

The Law Commission

(LAW COM. No. 102)

CRIMINAL LAW

ATTEMPT, AND IMPOSSIBILITY IN RELATION TO ATTEMPT, CONSPIRACY AND INCITEMENT

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

*Ordered by The House of Commons to be printed
25th June 1980*

LONDON
HER MAJESTY'S STATIONERY OFFICE
£3.75 net

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—

The Honourable Mr. Justice Kerr, *Chairman*.

Mr. Stephen M. Cretney.

Mr. Stephen Edell.

Mr. W. A. B. Forbes, Q.C.

Dr. Peter M. North.

The Secretary of the Law Commission is Mr. J. C. R. Fieldsend and its offices are at Conquest House, 37–38 John Street, Theobalds Road, London, WC1N 2BQ.

ATTEMPT, AND IMPOSSIBILITY IN RELATION TO ATTEMPT, INCITEMENT AND CONSPIRACY

CONTENTS

	<i>Paragraph</i>	<i>Page</i>
PART I INTRODUCTION	1.1-1.9	1
PART II ATTEMPT	2.1-2.143	3
A. INTRODUCTION	2.1-2.2	3
B. PRELIMINARY ISSUES RELATING TO ATTEMPT	2.3-2.9	4
1. Retention of separate inchoate offences	2.4-2.5	4
2. The need for a general law of attempt	2.6	5
3. Retention of the concept of attempt	2.7-2.9	6
C. THE MENTAL ELEMENT IN ATTEMPT	2.10-2.18	8
1. The Working Party's formulation and the present law	2.11-2.13	8
2. Conclusions and recommendations	2.14-2.18	10
D. THE ACTUS REUS IN ATTEMPT	2.19-2.52	13
1. The attempt theories	2.22-2.37	14
(a) The "first stage" theory	2.22-2.23	14
(b) The "final stage" theory	2.24-2.25	15
(c) The "unequivocal act" theory	2.26	16
(d) The "proximity" test	2.27-2.29	17
(e) The "substantial step" test	2.30-2.37	18
(i) The Working Party's proposals	2.30-2.31	18
(ii) Consideration of the "substantial step" test	2.32-2.37	19
2. The present law reconsidered	2.38-2.44	22
3. Recommendations as to the actus reus	2.45-2.52	25
(a) Content of the actus reus	2.46-2.49	26
(b) Issues of law and fact	2.50-2.52	27
E. ATTEMPTING THE IMPOSSIBLE	2.53-2.100	29
1. The present law	2.53-2.65	29
(a) <i>Haughton v. Smith</i>	2.53-2.60	29
(b) Subsequent cases	2.61-2.65	33

	<i>Paragraph</i>	<i>Page</i>
2. Impossibility in other systems of law	2.66-2.84	36
(a) Scotland	2.67	37
(b) The draft Criminal Code of 1879	2.68	37
(c) Canada	2.69	38
(d) Australia	2.70-2.75	38
(e) New Zealand	2.76-2.77	40
(f) South Africa	2.78	42
(g) United States of America	2.79-2.81	42
(h) France	2.82	44
(i) Germany	2.83	45
(j) Conclusion	2.84	45
3. Consideration of the present law.	2.85-2.98	45
4. Conclusions and recommendations	2.99-2.100	53
F. PROCEDURAL ISSUES RELATING TO ATTEMPT	2.101-2.119	54
1. Attempts and summary offences	2.102-2.105	54
2. Mode of trial and penalties	2.106-2.110	56
(a) Mode of trial	2.106	56
(b) Penalties.	2.107-2.110	57
3. Conviction of alternative offences	2.111-2.115	59
(a) The doctrine of merger.	2.111-2.113	59
(b) Conviction of alternative offence of attempt on summary trial.	2.114-2.115	60
4. Restrictions on prosecution	2.116	61
5. Powers of arrest, search and forfeiture.	2.117	61
6. Offences by bodies corporate	2.118	62
7. Corroboration	2.119	62
G. ATTEMPT AND OTHER OFFENCES	2.120-2.130	63
1. Attempt and other inchoate offences	2.121-2.122	63
(a) Attempt to incite.	2.121	63
(b) Attempt to conspire.	2.122	63
2. Attempts to aid and abet	2.123	64
3. Attempts to commit offences under sections 4(1) and 5(1) of the Criminal Law Act 1967	2.124-2.126	64
4. Offences of attempt in existing legislation.	2.127-2.130	66
H. POSSIBLE DEFENCE OF WITHDRAWAL	2.131-2.133	68
I. THE EXTRATERRITORIAL OPERATION OF ATTEMPT	2.134-2.141	69
1. Statement of the problems	2.134-2.139	69
2. Conclusions and recommendations	2.140-2.141	72
J. ABOLITION AND REPEALS	2.142-2.143	73
1. Abolition	2.142	73
2. Repeals	2.143	74

	<i>Paragraph</i>	<i>Page</i>
PART III CONSPIRACY AND IMPOSSIBILITY.	3.1–3.8	74
A. INTRODUCTION	3.1	74
B. THE EXISTING LAW	3.2–3.5	75
C. CONCLUSIONS AND RECOMMENDATIONS .	3.6–3.8	77
PART IV INCITING THE IMPOSSIBLE	4.1–4.4	79
PART V SUMMARY OF RECOMMENDATIONS .	5.1–5.2	81
APPENDIX A Draft Criminal Attempts Bill and Explanatory Notes		85
APPENDIX B Membership of the Law Commission's Working Party upon the General Principles of the Criminal Law		102
APPENDIX C Organisations and individuals who commented on the Law Commission's Working Paper No. 50, "Inchoate Offences"		103
APPENDIX D Participants in a seminar held at All Souls' College, Oxford on 5–6 April 1974, to discuss the Law Commission's Working Paper No. 50, "Inchoate Offences"		104
APPENDIX E "Conditional Intent" and <i>R. v. Husseyn.</i>		105

THE LAW COMMISSION

Item XVIII of the Second Programme

CRIMINAL LAW ATTEMPT, AND IMPOSSIBILITY IN RELATION TO ATTEMPT, CONSPIRACY AND INCITEMENT

*To the Right Honourable the Lord Hailsham of St. Marylebone, C.H.,
Lord High Chancellor of Great Britain*

PART I INTRODUCTION

1.1 In our *Second Programme of Law Reform*¹ we recommended a comprehensive examination of the criminal law with a view to its codification. We recommended that we should examine the general principles of the criminal law with the assistance of a Working Party. The constitution of this Working Party is given in Appendix B.

1.2 As part of the examination of the general principles the Working Party made provisional proposals in regard to the three common law offences of attempt, incitement and conspiracy which we published as a Working Paper on *Inchoate Offences*.² These are known as inchoate offences since they may be committed notwithstanding that the substantive offence to which they relate is not committed.

1.3 During our consultations on this Working Paper the application of the law of conspiracy in certain areas³ made it necessary for us to give first priority to consideration of particular aspects of criminal conspiracy. This we did in three separate Working Papers.⁴ Ultimately at the request of your predecessor we prepared as a matter of urgency our recommendations on the inchoate offence of conspiracy and on the matters considered in the three Working Papers. This was published as our *Report on Conspiracy and Criminal Law Reform*,⁵ and many of our recommendations, including those relating

¹ (1968) Law Com. No. 14, Item XVIII.

² (1973) Working Paper No. 50, *Inchoate Offences: Conspiracy, Attempt and Incitement*.

³ E.g. corrupting public morals, *Knuller v. D.P.P.* [1973] A.C. 435; conspiracy to trespass, *Kamara v. D.P.P.* [1974] A.C. 104; conspiracy to effect a public mischief, *Withers v. D.P.P.* [1975] A.C. 842; conspiracy in regard to flying pickets, *R. v. Jones* (1974) 59 Cr. App. R. 120.

⁴ (1974) Working Paper No. 54, *Offences of Entering and Remaining on Property*; (1974) Working Paper No. 57, *Conspiracies relating to Morals and Decency*; (1975) Working Paper No. 63, *Conspiracies to Effect a Public Mischief and to Commit a Civil Wrong*. We also issued in 1974 Working Paper No. 56, *Conspiracy to Defraud* and in 1975 Working Paper No. 62, *Offences relating to the Administration of Justice* (which examined conspiracy to pervert the course of justice).

⁵ (1976) Law Com. No. 76; the recommendations in relation to the subject matter of Working Paper No. 57 (see n. 4, above) were not implemented by the Criminal Law Act 1977. The Government instead decided that a more wide-ranging review of the laws relating to obscenity and indecency was needed than our terms of reference permitted. This led to the setting up of the Williams Committee on Obscenity and Film Censorship, whose Report was published in November 1979 (Cmnd. 7772).

to the inchoate offence of conspiracy, were implemented by the Criminal Law Act 1977.

1.4 Following the Report on Conspiracy it was our intention to deal with the remaining inchoate offences of attempt and incitement in a single further report. Examination of aspects of incitement, however, led us to conclude that there were problems which could not be resolved satisfactorily without a parallel examination of related problems in the law of complicity in crime, a topic upon which we have published a Working Paper prepared by the Working Party.⁶

1.5 If in regard to complicity in crime we were to recommend that there should be an offence of aiding, abetting, counselling or procuring crime which is not dependent on proof that a substantive offence had been committed, there would be no need for a separate inchoate offence of incitement. There has been strong and cogently argued academic support for this approach.⁷ But even if it were decided that incitement should continue to be a separate inchoate offence there remain many issues which it would be difficult to discuss without reference to the law of aiding and abetting. These include such questions as—

- (a) should the actus reus of the inchoate offence of incitement be the same as the actus reus of the present offence of counselling or procuring?
- (b) should the rules as to the liability of the incitor of a person, who by reason of age or lack of capacity cannot commit the offence, be the same as those applicable to an accomplice of one who is not liable for the principal offence?
- (c) should a spouse continue to be liable for inciting his or her spouse to commit an offence, as a spouse is liable as an accessory for counselling or procuring, or should the rule adopted in relation to conspiracy⁸ be followed?

1.6 Having regard to the urgency which in our view attaches to resolution of the important issues which recent cases have raised in relation to the law of attempt, we do not think we should delay reporting on attempts until we come to deal with complicity in crime. An additional advantage of not considering complicity at this stage is that we shall be able to take a fresh look at and consult upon “entrapment”, in relation to which we recommended⁹ that it should not be a defence that one was entrapped, but that consideration should be given to making it an offence in certain circumstances to entrap another. For these reasons the present Report does not deal with

⁶ (1972) Working Paper No. 43, *Parties, Complicity and Liability for the Acts of Another*.

⁷ Buxton, “*Complicity in the Criminal Code*” (1969) 85 L.Q.R. 252, “*Complicity and the Law Commission*” [1973] Crim. L.R. 223, and “*Inchoate Offences: Incitement and Attempt*” [1973] Crim. L.R. 656.

⁸ By s. 2 (2) (a) of the Criminal Law Act 1977 a spouse is not liable for conspiring with his or her spouse.

⁹ (1977) Law Com. No. 83, *Report on Defences of General Application*, paras. 5.34–5.40 and 5.48–5.52. The House of Lords has now made it clear that there is no defence of entrapment: *R. v. Sang* [1979] 3 WLR 263.

the need for reform of the law of incitement. This will be considered when we deal with complicity in crime.

1.7 One of the most important aspects of the law of attempt with which we have to deal is the extent to which a person can be liable for an attempt to commit an offence which, unknown to him, it is impossible in the circumstances to commit. This was the issue considered by the House of Lords in *Haughton v. Smith*.¹⁰ The same question has recently also been the subject of consideration by the House of Lords in the context of conspiracy,¹¹ in the course of which the House adverted to the position in the law of incitement.¹² We have therefore thought it necessary to consider the issue of impossibility in relation to all three inchoate offences,¹³ and the draft Bill annexed to this Report¹⁴ contains clauses which, in addition to those which would implement our recommendations relating to attempt, cover impossibility in relation to conspiracy.¹⁵ Nevertheless, since the development of the law in this respect has centred principally on the law of attempt, and since the extensive literature relating to the issue has focused on impossibility primarily in relation to attempt, our principal discussion of it is in that context.

PART II ATTEMPT

A. INTRODUCTION

2.1 Provisional proposals for reforming the law of attempt were made in Working Paper No. 50¹ by the Law Commission's Working Party on the General Principles of the Criminal Law. This elicited a wide range of helpful comment on consultation.² The Working Paper was also the subject of a seminar held at All Souls' College Oxford,³ at which problems in the law of attempt were discussed. In addition, there have been developments in both case-law and legislation which have had a bearing on our work. The decisions of the House of Lords in *Haughton v. Smith*⁴ and *D.P.P. v. Stonehouse*⁵

¹⁰ [1975] A.C. 476. Working Paper No. 50 made provisional proposals in relation to this: see para. 2.53, n. 149, below.

¹¹ *Director of Public Prosecutions v. Nock and Alsford* [1978] A.C. 979.

¹² *Ibid.*, at p.999 per Lord Scarman.

¹³ By virtue of our recommendations, incitement will continue to be an offence at common law until we have considered it in the context of complicity.

¹⁴ Appendix A.

¹⁵ For reasons given in Part IV of the Report, the draft Bill makes no corresponding provision in relation to incitement.

¹ (1973) *Inchoate Offences: Conspiracy, Attempt and Incitement*.

² Those commenting on Working Paper No. 50 are listed in Appendix C.

³ The seminar took place on 5-6 April 1974; its participants are listed in Appendix D.

⁴ [1975] A.C. 476.

⁵ [1978] A.C. 55.

have required detailed consideration. The greater part of our Report on the inchoate offence of conspiracy⁶ has been implemented in the Criminal Law Act 1977; and in those areas where conspiracy and attempt present similar problems, it has been necessary to pay close regard to the solutions provided in that Act in relation to conspiracy.

2.2 Certain aspects of the law of attempt require detailed examination; among these are the problems of what constitutes an attempt, and whether and to what extent the law should penalise what has been loosely termed "attempting the impossible". A brief conspectus of what constitutes the present law on these matters would, we think, be inadequate and even misleading. In this Part of the Report we therefore examine in turn the more important questions relating to the law of attempt, stating in relation to each, public response to the Working Party's provisional proposals and any subsequent developments in the law, and setting out the reasoning which leads to our present recommendations. We have also had to give detailed consideration to the application of the law of attempt to certain offences, namely theft and burglary, because of recent problems in this context which culminated in references by the Attorney General under section 36 of the Criminal Justice Act 1972.⁷ The results of our work on these references, which involved submission of a written brief for the assistance of the Court of Appeal and counsel, is outlined in Appendix E to this Report.

B. PRELIMINARY ISSUES RELATING TO ATTEMPT

2.3 Several preliminary issues require brief examination before we consider the elements of the law of attempt. All of these relate to the initial question whether the concept of attempt should be retained. As is the case with all inchoate offences, retention is justified by the necessity to permit the criminal law to impose sanctions at a stage before the substantive offence has been committed. In relation to attempt, the acceptance of this principle has led to debate as to how much activity in pursuance of the intention to commit the substantive offence is sufficient for there to be an attempt; in other words, what is its *actus reus*? This is indeed one of the principal concerns of the present Report. There are however several questions which require brief consideration before this important topic is examined in detail.

1. Retention of separate inchoate offences

2.4 The first preliminary issue is whether it is right to retain the separate inchoate offences of attempt, conspiracy and incitement. In our Report on Conspiracy we recommended that conspiracy be retained as a separate offence and that recommendation was implemented by section 1 of the Criminal Law Act 1977. We have mentioned that for the most part we do not propose to consider the law of incitement in this Report. But the Working Party in 1973 considered this preliminary issue in relation to all three inchoate offences, in the following terms—

⁶ (1976) Law Com. No. 76, *Report on Conspiracy and Criminal Law Reform*.

⁷ *Attorney General's References (Nos. 1 and 2 of 1979)* [1979] 3 WLR 577.

“Theoretically it would be possible to subsume all of them under an extended concept of committing preparatory acts. All of them at present require some activity to have taken place. Conspiracy, for example, at present requires as a minimum the agreement between two individuals to commit a crime or some other unlawful act.⁹ It is a possible view that any overt act directed to the commission of an offence with an intent to commit a crime should constitute an attempt; and, on this basis, conspiracy itself would be no more than a particular kind of attempt. We have come to the conclusion, however, that this apparent simplification of the law would itself raise difficulties which would render it impracticable. Such a scheme, it seems to us, would cause considerable difficulty in the definition of the concept of “overt act”—even if given an alternative label—and for this very reason, in fields other than conspiracy, might go perilously close to penalising the mere intention to commit an offence Here it is sufficient to state that we have come to the provisional conclusion that the traditional distinctions between conspiracy, attempt and incitement, even if the boundaries of these offences require some amendment, serve to characterise the nature of conduct required to be penalised, and to avoid the danger of penalising intention alone”.¹⁰

2.5 None of our commentators disagreed with the Working Party’s conclusion, and such comment as it did receive stressed that merger of the three inchoate offences into a single offence of, for example, doing an act preparatory to a crime, would produce an offence so generalised as to be dangerously oppressive.¹¹ We think it right to retain the distinction between attempt and other inchoate offences for the reasons given by the Working Party.

2. The need for a general law of attempt

2.6 The second preliminary issue, given that the distinction between attempt and other inchoate offences should be retained, is whether there is a need for a general law of attempt; that is, whether attempt should be a general offence in a criminal code as distinct from an offence preliminary to certain substantive offences only, or even, as has been argued,¹² part and parcel of the definition of the substantive offence. While we concede the theoretical attraction of the latter alternatives, there are countervailing practical difficulties with which the Working Party dealt in the following terms¹³—

“The alternative to a general law of attempt necessarily involves the tailoring of every offence (or many offences) to include within it an appropriate width of penalised conduct which will exclude the necessity for an inchoate offence of attempt in respect of it. For example, robbery would include, not only stealing with the use of force but the attempt to do

⁹ The Criminal Law Act 1977, ss.1 and 5 now restricts conspiracy to agreements to commit specific crimes, save in regard to conspiracy to defraud and conspiracy to outrage public morals and decency.

¹⁰ (1973) Working Paper No. 50, para. 3.

¹¹ See Buxton, “Inchoate Offences: Incitement and Attempt” [1973] Crim. L.R. 656.

¹² See P. R. Glazebrook, “Should we have a law of attempted crime?” (1969) 85 L.Q.R. 28.

¹³ (1973) Working Paper No. 50, para. 64.

so where there is no actual appropriation,¹⁴ theft would need to be re-drafted to include not only the dishonest appropriation of property belonging to another with the intention of permanent deprivation, but the attempt to do so where there is no property capable of appropriation. It is true that recent Acts which have in some degree had the effect of codifying certain branches of the criminal law, such as the Theft Act 1968 and the Criminal Damage Act 1971, have widened the scope of certain offences in comparison with the pre-existing law; but this has not been done with the object of making redundant the application of the present law of attempts to acts which fall short of the completed offence. Each of these Acts does have provisions penalising certain conduct, such as being equipped, when not at one's place of abode, with any article for use in the course of any "burglary, theft or cheat", or having custody or control of anything intending without lawful excuse to use it to destroy or damage property; but they are not intended to deal exhaustively with all conduct which might amount to an attempt. In our view, it would unduly complicate the offence-creating provisions of the Acts to seek to amend them with the particularity which would be required to define precisely the nature of all the preparatory conduct to be penalised, even assuming that this was possible. The Acts were drafted against the background of a continuing law of attempts and the current review of other aspects of the criminal law also assumes its continuance in some form; and we are aware of no foreign criminal code which dispenses with this requirement."

The views of the Working Party met with no disagreement on consultation, and several positive expressions of support. We see no reason to dissent from the foregoing reasoning and the Working Party's conclusion that a general law of attempt is needed as part of the criminal code. It need only be added that recent examination of important substantive offences by the Criminal Law Revision Committee and ourselves explicitly assumes the continued existence of a general law of attempt.¹⁵

3. Retention of the concept of attempt

2.7 The final preliminary question is, assuming that an inchoate offence is needed in the field presently covered by the law of attempt, whether that concept should be retained or whether some other concept should be substituted for it. We have already pointed out that the main justification for the retention of inchoate offences is the need to permit the law to impose criminal sanctions in certain cases where a crime has been contemplated but not in fact committed. It is, however, a fundamental principle of our law that it should not seek to penalise the mere intention to commit a crime. As the Working Party said¹⁶—

¹⁴ Most attempts to rob are now dealt with by s.8 (2) of the Theft Act 1968, which penalises an assault with intent to rob with the same maximum as robbery.

¹⁵ See CLRC 14th Report, *Offences against the Person*, (1980) Cmnd. 7844, para. 303, and (1979) Law Com. No. 96, *Offences relating to Interference with the Course of Justice*, para. 3.129.

¹⁶ (1973) Working Paper No. 50, para. 65.

“The mere intention in a serious case constitutes a social danger, but provided that it remains no more than an intention, no intervention is justifiable. It is only when some act is done which sufficiently manifests the existence of the social danger present in the intent that authority should intervene. It is necessary to strike a balance in this context between individual freedom and the countervailing interests of the community.”

In some cases, as the Working Party pointed out, the problem of balancing social and individual interests—

“has been met by the adoption of a technique other than the law of attempt, for example, by the creation of offences of procurement, possession, threats and going equipped. Provisions of this kind, however, relate only to specific crimes and particular types of attempt in relation to these crimes. They do not purport to offer more than a partial remedy. There are in a few instances specific attempts in statutes creating the substantive offence, relating for the most part to sexual offences, but this is not the practice in more recent codifying Acts. Within a limited sphere (for example, official secrets) another solution has been found by going back a stage further than the earliest stage at which the present law of attempt seeks to operate and providing that acts ‘preparatory to’ the commission of substantive offences shall in themselves constitute offences. Generally, however, English law has hitherto not travelled back this far in the chain of causation¹⁷ unless the preparatory act itself constitutes a substantive offence, as where forgery is committed as a preliminary step in an ultimate intended offence of deception”.¹⁸

2.8 Another relevant consideration is that, if it is accepted that some kind of inchoate offence is needed to penalise conduct at present dealt with by the law of attempt, it is worth retaining that name for the offence. Not only is the word “attempt” one which is in everyday use, but it may cogently be argued that the conduct which the law should aim to penalise is, broadly speaking, that which the layman would regard as “attempting” to commit an offence. This desirable coincidence of social policy and ordinary language could not survive a drastic expansion of the meaning of “attempt” to encompass all preparatory acts.

2.9 While the Working Party itself put forward a definition of attempt wider than that now used,¹⁹ it nevertheless concluded that use of a concept altogether different from and wider than that of attempt, for example, any overt act evidencing a criminal intention, would not be satisfactory. It would fail to balance the interests of society and the individual, and would represent a departure from the accepted general practice of English law without any evidence of a pressing need for change. On consultation, no evidence was produced which would indicate a need for change in this respect, and indeed

¹⁷ An exception was *R. v. Gurmit Singh* [1966] 2 Q.B. 53, where McNair J., in upholding the conviction for acts preparatory to forgery, relied on early authorities inconsistent with later developments in the law of attempt.

¹⁸ (1973) Working Paper No. 50, para. 66.

¹⁹ See para. 2.30 below, and in particular paras. 2.33–2.37 as to the inherent difficulties in this approach.

the Working Party's conclusion evoked no dissent. In regard to this final preliminary question we therefore conclude that the Working Party were correct in their view that the concept of attempt should be retained in preference to any possible alternative.

C. THE MENTAL ELEMENT IN ATTEMPT

2.10 In some of the most widely quoted definitions of attempt,²⁰ the question of what constitutes an attempt is interconnected, and some would say, confused, with the mental element required for the offence. To minimise this confusion, and also to dispose first of one of the less controversial aspects of the law of attempt, we deal now with the required mental element.

1. The Working Party's formulation and the present law

2.11 As a matter of analysis the Working Party thought it useful to consider separately the defendant's mental state as to the *consequences* of his acts and, where circumstances are elements of an offence, as to the *circumstances* in which he carried them out. The Working Party's discussion carried through this distinction into the formulation of the mental element.²¹ Thus, to take some simple examples, attempted murder would, on the Working Party's test, require the intention to bring about the consequence specified by the offence of murder, that is, the death of another; an intent to cause grievous bodily harm would not be enough on this test, even though the offence of murder is committed if the defendant kills another with intent only to cause grievous bodily harm. On the other hand attempted theft would not necessarily require knowledge that the property which the defendant intended to appropriate belonged to another; mere recklessness would be enough, since recklessness as to this element of the offence is sufficient for theft.²²

2.12 The Working Party's formulation of the mental element for attempt was criticised as being unduly complex.²³ We agree with this criticism. The separation of elements of an offence into circumstances and consequences may in some instances be a useful means of analysing them. But to ask in the case of every offence what is a circumstance and what is a consequence is in our view a difficult and artificial process which may sometimes lead

²⁰ See para. 2.22 and notes 52–53, below.

²¹ (1973) Working Paper No. 50, para. 89, where the mental element for attempt was formulated as follows: "(a) *As to consequences*. Where a particular consequence must be brought about before the offence in question is committed, an attempt to commit that offence is committed only when the actor intends that consequence.

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

²² See Glanville Williams, *Textbook of Criminal Law* (1978) p.661.

²³ See Buxton, "Inchoate Offences: Incitement and Attempt" [1973] *Crim. L.R.* 656 at pp. 661 *et seq.*

to confusion.²⁴ Since a new statutory offence of attempt in place of the common law will (subject to express exceptions)²⁵ apply to all existing offences, it seems to us that the terminology of “circumstances” and “consequences” will not be appropriate. Save as an aid to analysis, we therefore do not use this terminology in our discussion of the mental element.

2.13 Since the issue of the Working Paper, the mental element in attempt has been considered by the Court of Appeal in *R. v. Mohan*.²⁶ The defendant was alleged to have driven a car at a policeman intending to injure him. He was charged with attempting to cause grievous bodily harm with intent and upon that charge he was acquitted. He was also charged with attempting by wanton driving to cause bodily harm to the policeman. The jury was directed that it was sufficient for the prosecution to prove that the defendant was reckless as to whether bodily harm would be caused by wanton driving, and found him guilty. The conviction was quashed by the Court of Appeal (Criminal Division). The Court in its judgment stated that—

“The attraction of this [approach] is that it presents a situation in relation to attempts to commit a crime which is simple and logical, for it requires in proof of the attempt no greater burden in respect of mens rea than is required in proof of the completed offence. The argument in its extreme form is that an attempt to commit a crime of strict liability is in itself a strict liability offence. It is argued that the contrary view involves the proposition that the offence of attempt includes mens rea when the offence which is attempted does not and in that respect the attempt takes on a graver aspect than, and requires an additional burden of proof beyond that which relates to, the completed offence.”²⁷

The Court’s answer to this argument is contained in the following passage—

“An attempt to commit a crime is itself an offence. Often it is a grave offence. Often it is as morally culpable as the completed offence which is attempted but not in fact committed. Nevertheless it falls within the class of conduct which is preparatory to the commission of a crime and is one step removed from the offence which is attempted. The court must not strain to bring within the offence of attempt conduct which does not fall within the well established bounds of the offence. On the

²⁴ Buxton, *ibid.*, at pp. 662–663 takes as an example one cited by Smith and Hogan, *Criminal Law* (4th ed., 1978) p. 37: s. 20 of the Sexual Offences Act 1956, which makes it an offence “for a person acting without lawful authority or excuse to take an unmarried girl under the age of sixteen out of the possession of her parent or guardian against his will”. Here, according to Smith and Hogan, the “consequence” is removal of the girl from her parent’s possession, and the “circumstances” are the absence of lawful authority or excuse, and the fact that the girl is under sixteen and is unmarried, and was in the possession of the parent; but, as Buxton points out, this last-mentioned element is also part of the consequence—the removal of a girl from her parent’s possession. Thus, applying the Working Party’s test, it seems that, if removal from the parent’s possession is treated as a consequence, a defendant would be not guilty of attempt if he did not advert to the possibility of the girl being in her parent’s possession because of his absence of intent, but, if it is treated as a circumstance, he would be guilty of attempt because of his recklessness as to that circumstance.

²⁵ See paras. 2.121 *et seq.*, below.

²⁶ [1976] Q.B. 1. As to the special problem of the mental element in attempted theft, see Appendix E, below.

²⁷ *Ibid.*, p. 6.

contrary, the court must safeguard against extension of those bounds save by the authority of Parliament. The bounds are presently set by requiring proof of specific intent, a decision to bring about, in so far as it lies within the accused's power, the commission of the offence which it is alleged the accused attempted to commit, no matter whether the accused desired that consequence of his act or not."²⁸

In establishing whether in any particular case such intent is present, the Court pointed to the requirements of section 8 of the Criminal Law Act 1967,²⁹ and commented—³⁰

“Upon the question whether or not the accused had the necessary intent in relation to a charge of attempt, evidence tending to establish directly, or by inference, that the accused knew or foresaw that the likely consequence, and, even more so, the highly probable consequence, of his act—unless interrupted—would be the commission of the completed offence, is relevant material for the consideration of the jury. In our judgment, evidence of knowledge of likely consequences, or from which knowledge of likely consequences can be inferred, is evidence by which intent may be established but it is not, in relation to the offence of attempt, to be equated with intent. If the jury find such knowledge established they may and, using common sense, they probably will find intent proved, but it is not the case that they must do so.”

This case appears to us to have removed some of the difficulties raised by earlier cases,³¹ and the extracts from the Court's judgment quoted above have been of value in our consideration of how to formulate the law for the future.

2. Conclusions and recommendations

2.14 In our view, an indication of the most appropriate way in which to express for the future the mental element of a new statutory offence of attempt is to be found in the Court of Appeal's dictum in *R. v. Mohan* that the bounds of the mental element require “proof of specific intent, a decision to bring about, in so far as it lies within the accused's power, the commission of the offence which it is alleged the accused attempted to commit”.³² At the time of the attempt, the completed offence has of course not yet taken place: it is a future occurrence, even though in some instances the temporal difference may be small. It therefore seems to us that it is not only in accord with the decision in *R. v. Mohan* but right in principle that the concept of the mental element in attempt should be expressed as an intent to bring about

²⁸ *Ibid.*, p. 11.

²⁹ “A court or jury, in determining whether a person has committed an offence, (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances”.

³⁰ [1976] Q.B. 1, at pp.10–11.

³¹ See (1973) Working Paper No. 50, para. 88, and *Gardener v. Akeroyd* [1952] 2 Q.B. 743 at pp. 747 and 751, and *R. v. Collier* [1960] Crim. L.R. 204; but see Smith and Hogan, *Criminal Law* (4th ed., 1978), p. 250.

³² [1976] Q.B. 1, 11; see para. 2.13, above.

each of the constituent elements of the offence attempted. Put more simply, this may be stated as an intent to commit the offence attempted.

2.15 Some illustrations may indicate how this concept might be expected to work in practice. If a defendant who is interrupted while forcing the window of a house is accused of attempted burglary,³³ it will be necessary to show that at the time of the attempted entry he intended to enter a building as a trespasser with the further intent required by the offence of theft of appropriating property of another.³⁴ If a defendant is accused of an attempt to commit the offence under section 35 of the Offences against the Person Act 1861 of causing bodily harm by wanton driving in charge of a vehicle, it will be necessary to establish that he intended by that means to cause such harm.³⁵ And to take an instance where the completed offence is one of strict liability, where a defendant is charged with an attempt to have intercourse with a girl under the age of thirteen, it will be necessary to show that he intended to have intercourse with a girl under that age.³⁶ The mental elements for the completed offences in these examples require varying degrees of knowledge of circumstances and intent to do the proscribed acts, stretching from strict liability to full knowledge and intent; but the mental element for the attempt to commit them may in each case be described as an intent that the offence shall be brought about. This intention will in practice be established by proof of the defendant's intention to bring about the consequences, and of his knowledge of the factual circumstances, expressly or implicitly required by the definition of the substantive offence.

2.16 It should be noted that a requirement of proof of intent to commit the offence attempted is in no way intended to derogate from the general principle that ignorance of the law is no defence to a charge of an attempted (or indeed any) crime. In the example cited above, it does not follow from the requirement that there should be an intent to have intercourse with a girl under thirteen that the defendant must also be aware that such conduct is an offence. This distinction between the intention to do something which, if done, is an offence and the knowledge that, if done, an offence is committed is of particular importance in the sphere of "regulatory" legislation, where the offences are frequently of strict liability and triable only summarily.³⁷ On any charge of attempt to commit such offences it will be necessary to

³³ Under s. 9(1)(a) of the Theft Act 1968, burglary is defined as entering a building as a trespasser with intent to commit specified offences i.e. theft of anything in the building, inflicting grievous bodily harm on anyone in it, or raping a woman in it, or doing unlawful damage to it or anything in it. For the purpose of our illustration we have chosen the example of theft.

³⁴ For the purpose of this example we exclude consideration of whether there is in fact property there; as to "conditional intent" in this context, see generally Appendix E.

³⁵ The fact situation in *R. v. Mohan* [1976] Q.B. 1, para. 2.13, above.

³⁶ Compare *R. v. Collier* [1960] Crim. L.R. 204, from which it has been argued that, like the completed offence under s. 6 of the Sexual Offences Act 1956 of unlawful intercourse with a girl under sixteen, an attempt to commit that offence is also of strict liability. See Smith and Hogan, *Criminal Law* (4th ed., 1978) p. 250 and Glanville Williams, *Textbook of Criminal Law* (1978) p. 374.

³⁷ We discuss below at paras. 2.105 and 2.108 our recommendation that an attempt to commit a summary offence should be an offence, triable only summarily, and we point out in para. 2.105 that there will be some kinds of offences, such as those of omission, where a charge of attempt will be inappropriate.

prove that the defendant intended to carry out the forbidden act, whether or not he knew that the act would amount to an offence. In some common offences, such as certain of the offences under the Road Traffic Act 1972, this might well restrict the occasions upon which it would be possible to charge an attempt. For example, if the defendant was stopped when on the point of driving off in his motor car which had defective brakes, he could not be convicted of attempting to use a car which "does not comply with regulations" unless there was proof of his intention to drive with defective brakes, although the completed offence does not require knowledge that the brakes are defective.³⁸ In our view this is the right result: while there are many instances in which legislation has imposed strict liability where the proscribed conduct is completed, there is less justification for imposing such liability if the defendant neither intended to do nor succeeded in completing the forbidden act.³⁹ As the Court of Appeal pointed out in *R. v. Mohan*,⁴⁰ an attempt "is one step removed from the offence which is attempted", and care has therefore to be taken to avoid bringing "within the offence of attempt conduct which does not fall within the well-established bounds of the offence".⁴¹

2.17 In our *Report on the Mental Element in Crime*⁴² we recommended that whenever a person's conduct was in issue, the test of whether he "intended" a result of his conduct should be whether he *intended* to produce the result or *whether he had no substantial doubt* that his conduct would produce it.⁴³ But we pointed out in that Report that our recommendations would not preclude the use in future legislation of the term intention in a different sense.⁴⁴ There are in our view two reasons for departing from that test in the context of attempt. In the case of attempt, what is intended is not a "result" of "conduct" but commission of the complete offence. The formulation used in our *Report on the Mental Element* is therefore not appropriate to the mental element which we propose for attempt and cannot easily be adapted to it in legislative terms. More fundamentally, implicit in attempt is the "decision to bring about, in so far as it lies within the accused's power, the commission of the offence".⁴⁵ This confirms that what is required is an actual intent to commit the offence attempted. There is no room for the broader concept of intent which in our *Report on the Mental Element in Crime* we describe as having no substantial doubt as to the results of conduct. We therefore do not recommend adoption of the terminology used in that Report, and see no need for any special definition of intent in the present context.

³⁸ The completed offence is using on a road a vehicle which does not comply with regulations, contrary to the Road Traffic Act 1972, s. 40(5)(b), and is penalised with a fine on summary trial of £100; the relevant regulation is in the Motor Vehicle (Construction and Use) Regulations 1978, S.I. 1978 No. 1017 (as amended) reg. 64.

³⁹ See Buxton, [1973] Crim. L.R. at pp. 663-664.

⁴⁰ [1976] Q.B. 1.

⁴¹ *Ibid.*, at p. 11.

⁴² (1978) Law Com. No. 89.

⁴³ *Ibid.*, para. 44 and Appendix A, clauses 1 and 2. This terminology is expressly adopted for the offences recommended in our *Report on Offences relating to Interference with the Course of Justice*: see (1979) Law Com. No. 96, Appendix A, cl. 33.

⁴⁴ (1978) Law Com. No. 89, para. 71.

⁴⁵ *R. v. Mohan* [1976] Q.B. 1, 11; see para. 2.13, above.

2.18 For the reasons given in the foregoing paragraphs, we *recommend* that the mental element for the offence of attempt should be defined as an intent to commit the offence attempted.⁴⁶

D. THE ACTUS REUS IN ATTEMPT

2.19 We have referred to the general objective of the law of attempt as being to enable the criminal law to impose criminal sanctions in certain cases where a crime has been contemplated but not in fact committed. We have also stated why we think it desirable to retain the concept of attempt rather than some alternative and probably wider concept.⁴⁷ As we have suggested, although retention of that concept may in itself go some way towards determining the range of conduct capable of being penalised by attempt, there are clear reasons why some further definition of this conduct is required. The nature of the offence is such that complete consistency of verdicts cannot be expected, and different juries may reach different conclusions upon what seem to be similar facts.⁴⁸ But in the absence of any definition of the conduct required for an attempt, there would be little assistance which a judge could give in directing the jury, and this could lead to unacceptable discrepancies and very marked inconsistencies in jury verdicts in similar cases. Of still greater significance is the possibility that, even though the very term "attempt" suggests some limitation upon the range of conduct penalised by virtue of its meaning in ordinary usage, the absence of further definition would leave open the possibility of penalising conduct so distant from the ultimate objective that there would be a failure to maintain that balance between the needs of society and the individual to which we have referred. These considerations make us disinclined to follow recent proposals which seek to sidestep the problem of defining what conduct should be covered by the term attempt,⁴⁹ and lead us to discuss in the following paragraphs the various possibilities as to what its actus reus should be. We deal separately with the question of the circumstances (if any) in which a person should be guilty of attempt when his objective cannot in fact be achieved or when, although it is carried through, his conduct would not amount to a crime.⁵⁰

2.20 The nature of the actus reus required for an attempt has been the subject of some important dicta in the authorities, much discussion by academic writers and the reassertion in the most recent cases that elaborate analysis is out of place in trying to define a concept which is commonly understood. We agree with this view. This does not mean that we think that the discussion of problems in the present law is of no value. But novel solutions to them may raise their own difficulties, and their adoption could only be justified if the existing law were widely thought to be unjust.

⁴⁶ See Appendix A, cl. 1(1).

⁴⁷ See paras. 2.7–2.9, above.

⁴⁸ We discuss this further at paras. 2.50 *et seq.*, below.

⁴⁹ See e.g. recommendations of the Criminal Law and Penal Methods Reform Committee of South Australia in their Fourth Report, *The Substantive Criminal Law* (1977) p. 288, where the Committee suggests that "attempt be defined only as behaviour intended by the defendant to further his purpose of committing a crime, without any requirement of proximity as a matter of law".

⁵⁰ See paras. 2.53 *et seq.*, below.

2.21 In the Working Paper on *Inchoate Offences*, the Working Party put forward its provisional proposal which was based on the concept of a "substantial step" accompanied by illustrative examples. This solution to the problem would, in form at least, have meant a complete change in the present law. The reception accorded to this proposal was such that we think it desirable to examine it afresh together with the various solutions put forward in the past, and to consider again the operation of the existing law. We review first, as did the Working Party, the various theories aimed at defining an attempt.

1. The attempt theories

(a) The "first stage" theory

2.22 The "first stage" test in its pure form seizes on the first overt act done towards the commission of the offence as the criterion. It appears to be adopted by some Continental Codes, which refer to "acts exhibiting the commencement of the execution" of crimes, although this form of words might be regarded as equally consistent with an "unequivocality" test.⁵¹ It also met with a measure of approval in the English draft code of 1879,⁵² Stephen's *Digest of the Criminal Law* Article 29,⁵³ and the Indian Penal Code.⁵⁴ In these latter cases, however, it seems to have been qualified by the additional test of proximity. In its pure form the "first stage" test appears to lay undue stress upon the intention of the defendant in that, given proof of intention to commit an offence, many quite innocent acts can be regarded as overt acts done towards the commission of the offence. For example the buying of a particular nib or pen with which to forge a signature may be an overt act towards committing the forgery, if the intention to forge is established. It was for this reason that the Working Party considered that this test would not be acceptable. We have seen that generally English law rejects a test which is based on an act of mere preparation⁵⁵ and that, save in isolated examples,⁵⁶

⁵¹ E.g. Article 2 of the French Penal Code states that "Every attempt to commit a felony [i.e. an offence punished under Articles 1, 7 and 8 with the heaviest penalties] manifested by commencement of execution is considered like the completed felony, if the attempt has been terminated, or it has fallen short of success only because of circumstances independent of the perpetrator's will."

⁵² The first para. of s. 74 states that "An attempt to commit an offence is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted, either by the voluntary determination of the offender not to complete the offence or by some other cause." (Draft Code, Appendix to the *Report of the Criminal Code Bill Commission*, (1879) C. 2345).

⁵³ Art. 29 states in part that "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts, which would constitute its actual commission, if it were not interrupted. The point at which such a series of acts begins cannot be defined; but depends upon the circumstances of each particular case." See citations in *R. v. Lineker* [1906] 2 K.B. 99, 102; *Hope v. Brown* [1954] 1 W.L.R. 250, 253. And see *D.P.P. v. Stonehouse* [1978] A.C. 55, 85 *per* Lord Edmund-Davies.

⁵⁴ The "General Principle" applying under section 511 of that code is that "Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment" of a specified duration.

⁵⁵ See para. 2.7., above.

⁵⁶ E.g. *R. v. Gurmit Singh* [1966] 2 Q.B. 53, n.17, above.

this line of development has not been followed. A concept of attempt based on the "first stage" theory would appear to follow that line too closely, and we agree with the Working Party's rejection of it.

2.23 In this context we have noted the recent suggestion⁵⁷ of a test of "commitment", which would involve consideration "of a number of factors including proximity, the degree of planning, the expenditure of effort and the attitude of the accused" in determining whether there is a sufficient *actus reus*. Although we have given serious thought to this proposal, we are not persuaded that it should be introduced into the law. If it were adopted, we think that it would be possible to obtain a conviction if it could be shown that the defendant was seriously committed to the attempt, even though none of his acts was other than merely preparatory. A person who had done no more than plan a crime could be guilty of an attempt if his planning were sufficiently detailed, involved major expenditure, and so on. For reasons we have given above,⁵⁸ we have as a matter of policy decided against the possibility of penalising criminal intent accompanied by merely preparatory acts; it follows that we do not think that this suggestion should be pursued.

(b) *The "final stage" theory*

2.24 The "final stage" theory admits of no attempt unless and until the intending offender has done all that is necessary for him to do in order to bring his crime to completion. At one time it met with approval in English law and was certainly adopted by Parke B. as decisive in *R. v. Eagleton* where he stated⁵⁹ that—

"The mere intention to commit a misdemeanour is not criminal. Some act is required and we do not think all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are; *and if, in this case . . . any further step on the part of the defendant had been necessary to obtain payment, . . . we should have thought that the obtaining credit . . . would not have been sufficiently proximate to the obtaining of the money. But, on the statement in this case, no other act on the part of the defendant would have been required. It was the last act, depending on himself, towards the payment of money, and therefore, it ought to be considered as an attempt.*"

This passage, in whole or in part, has been much quoted. In the present context, it is the part which we have italicised that is material. This part was apparently crucial to the decision of the Court of Criminal Appeal in *R. v. Robinson*, although the court did not in fact cite it in its judgment.⁶⁰ The approach also found some favour in Scotland, although discussed in two different forms; on the one hand, the stage of attempt was reached once

⁵⁷ Andrews, "Uses and Misuses of the Jury" in Glazebrook (ed.), *Reshaping the Criminal Law* (1978) pp. 55–56. The writer emphasised that his suggestion was not fully developed, since this was inappropriate in the context of an essay upon a different subject.

⁵⁸ See paras. 2.7–2.9, above.

⁵⁹ (1855) 6 Cox C.C. 559, 571.

⁶⁰ [1915] 2 K.B. 342. The facts of this much-criticised case are given in para. 2.29, n. 72, below. The whole of the quoted passage from *R. v. Eagleton* was cited in the argument for the appellant, but the court cited in its judgment only the unitalicised part: *ibid.*, p. 348.

the defendant had done all that it was necessary for him to do in order to bring the offence to completion; and on the other, the stage of attempt had not been reached as long as it was possible for the accused to repent and to prevent the completion of the crime. But there is some doubt as to whether the theory, in either form, represents Scots law today.⁶¹

2.25 The Working Party summarised objections to basing the law of attempt on this approach in the following terms⁶²—

“In the first place, it is difficult, from a practical point of view, to see how it could be applied to certain serious crimes. On a strict application of the test, attempted rape, for example, would not be possible and it is this approach which may well have been responsible for the conclusion that there could not be a verdict of attempting to demand money with menaces because “either there is a demand or there is not”. More importantly, however, it seems to us that the theory allows too many persons who might be thought deserving of punishment (as in *Robinson’s* case) to escape it; and, futhermore, allows intending offenders to advance far in their conduct before effective intervention can take place.”

The approach has been criticised elsewhere⁶³ and we think the Working Party rightly rejected it.

(c) *The “unequivocal act” theory*

2.26 This theory in its pure form requires that the act itself, without regard to any statement of intention, either contemporaneous or subsequent, must unequivocally demonstrate the intention to commit the relevant offence. It was propounded by Salmond and was enacted in the New Zealand Crimes Act 1908, but was found not to work satisfactorily in practice. In some instances, the act demonstrated unequivocally the intent to commit an offence, but was so distant from the execution of it that on a common-sense view it was impossible to regard it as an attempt. In others, the conduct was clearly carried out in execution of the offence but could not be regarded as unequivocally pointing to the intention. The test was therefore discarded by the New Zealand Crimes Act 1961, section 72 (3),⁶⁴ and we do not ourselves favour it. Nevertheless, elements of the test have found their way into English cases,⁶⁵ to which we refer again below.

⁶¹ Gordon, *Criminal Law* (2nd ed., 1978) p. 189, who concludes that Scottish law may now be best reflected in the decision of *H.M. Advocate v. Camerons* (1911) 6 Adam 456, in which Lord Dunedin said in his summing up that “the root of the whole matter” was “to discover where preparation ends and where perpetration begins. In other words, it is a question of degree, and when it is a question of degree it is a jury question” (p. 485). See also Lord Reid in *Haughton v. Smith* [1975] A.C. 476, at p. 499 quoted in para. 2.40, below.

⁶² (1973) Working Paper No. 50, para. 71.

⁶³ See *D.P.P. v. Stonehouse* [1978] A.C. 55, 85 *per* Lord Edmund-Davies; *Archbold* (40th ed., 1979) para. 4105.

⁶⁴ This states that “An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence whether or not there was any act unequivocally showing the intent to commit the offence”.

⁶⁵ *Davey v. Lee* [1968] 1 Q.B. 366; *Jones v. Brooks* (1968) 52 Cr. App. R. 614. See further para. 2.39, below. And see also *Russell on Crime* (12th ed., 1964) pp. 179 *et seq.*

(d) The "proximity" test

2.27 In so far as English law subscribes to any one theory or approach (a matter which we examine further below), that of "proximity" may be regarded as dominant, although the case law discloses elements of all the approaches so far considered. But the requirement of the proximity of the conduct to the completed offence, and the distinction between this and acts of preparation, is a common thread throughout most reported cases, whether or not in conjunction with other requirements. This is often expressed by reference to the decision of Parke B. in *R. v. Eagleton*.⁶⁶ Frequently the citation is limited to the statement that "acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are."⁶⁷ On this basis the courts have sometimes held that, as the defendant had done all that it was necessary for him to have done, his act was sufficiently proximate to the offence attempted; in others, the courts have concluded that, since there was still an opportunity for the defendant to change his mind, the stage of mere preparation had not been passed.

2.28 Variants on the proximity test have been advanced in certain other common law jurisdictions. In the United States, for example, Holmes J. enunciated in *Commonwealth v. Kennedy* the well-known test: "As the aim of the law is not to punish sins but is to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it."⁶⁸ Elsewhere⁶⁹ he suggested that his notion of "dangerous proximity to success" required consideration in each case of public policy, for example "the nearness of the danger, the greatness of the harm, and the degree of apprehension felt." In so far as this embodies the idea that the defendant must have done nearly everything that he could towards his aim, it differs little from the proximity test as it is presently understood; but the objective elements in the test, relating to surrounding circumstances rather than the defendant's own acts, are in our view not helpful in defining the critical stage of his conduct.⁷⁰

2.29 It is true to say, as our Working Party did,⁷¹ that no precise test has been evolved for determining whether an act is sufficiently proximate to the offence to constitute the actus reus of an attempt. Because of the imprecision of these words and because their application in practice resulted in the

⁶⁶ (1855) 6 Cox C.C. 559; see para. 2.24, above.

⁶⁷ *D.P.P. v. Stonehouse* [1978] A.C. 55 at pp. 68, 71, 76, 85 (see n. 106, below); *R. v. Robinson* [1915] 2 K.B. 342; *Hope v. Brown* [1954] 1 W.L.R. 250; *R. v. Bloxham* (1944) 29 Cr. App. R. 37. See also *R. v. Taylor* (1859) 1 F. & F 511; *R. v. Punch* (1928) 20 Cr. App. R. 18; *Jones v. Brooks* (1968) 52 Cr. App. R. 614.

⁶⁸ 48 N.E. 770 (Mass. 1897); see also Buxton, "Inchoate Offences: Incitement and Attempt" [1973] Crim. L.R. 656 at p. 666; and for a general review of the variants on the proximity test under discussion see further, Stuart, "The Actus Reus in Attempts" [1970] Crim. L.R. 505.

⁶⁹ *Hyde v. U.S.* 225 U.S. 347, 388 (1911) (Holmes J. diss.); Holmes, *The Common Law* (1882) p. 68.

⁷⁰ See also the recommendation of the South Australia Criminal Law and Penal Methods Reform Committee in their Fourth Report, *The Substantive Criminal Law* (1977) p. 288, noted at n. 49, above. And see the New Zealand Crimes Act, 1961, s. 72(3), n. 64, above.

⁷¹ See (1973) Working Paper No. 50, para. 73.

conduct in such cases as *R. v. Robinson*,⁷² *R. v. Komaroni*⁷³ and *Comer v. Bloomfield*⁷⁴ being held not to constitute an attempt, the majority of the Working Party felt that a new formulation of the actus reus was required. The Working Paper therefore provisionally proposed as a solution the "substantial step" approach, which we now consider in detail.

(e) *The "substantial step" test*

(i) The Working Party's proposals

2.30 The Working Party's proposal⁷⁵ was that the actus reus of an attempt should be defined as conduct which is a substantial step towards the commission of the ultimate offence. It should be for the judge to direct the jury as a question of law as to whether particular conduct did or did not constitute a substantial step. Conduct constituting preparation for the commission of an offence might, according to circumstances, amount to a substantial step on these proposals. Recognising the degree of imprecision that this wording might import, and also being aware that it might be regarded as penalising conduct too far removed from the contemplated offence, the Working Party proposed that legislation should include a list of illustrations which, while not exhaustive, would in law constitute substantial steps.⁷⁶ On the other hand they would not give any indication of what was too remote from the offence attempted to be regarded as a substantial step.

2.31 Although there is little authority in English law for the approach favoured by the Working Party,⁷⁷ there are several codes which use the concept of the substantial step. Thus the Draft Code for the Australian Territories provides as the sole test of attempt "conduct which is or which [the defendant]

⁷² [1915] 2 K.B. 342: here a jeweller insured his stock for £1200 against theft, concealed stock on the premises, tied himself up with string and called for help. He told the police who broke in that he had been knocked down and his safe robbed. He confessed when the property was found later, but his conviction for attempting to obtain money by false pretences was quashed. Had he prepared a claim form or communicated the facts on which a claim was to be based to the insurance company it seems clear that he would have been convicted; *ibid.* at p. 348. Proceedings on similar facts could today be brought under the Criminal Law Act 1967, s. 5 (2) (false reports wasteful of police employment). The case is criticised by Lord Edmund-Davies in *D.P.P. v. Stonehouse* [1978] A.C. 55, 85; see para. 2.41, below.

⁷³ (1953) Law Journal, vol. 103 p. 97: the defendants trailed a lorry for some 130 miles, even giving assistance to it when it broke down, waiting for a chance to steal it and its load; held, no attempt, only a continuous act of preparation.

⁷⁴ (1970) 55 Cr. App. R. 305; the defendant drove his vehicle into a wood to hide it, and enquired of the insurers whether a claim would lie for its loss; held, no attempt to obtain money by deception. See further, as to this and the preceding cases, para. 2.39, below.

⁷⁵ See (1973) Working Paper No. 50, paras. 74 *et seq.*

⁷⁶ The illustrations were as follows: (a) committing an assault for the purpose of the intended offence; (b) lying in wait for, searching out or following the contemplated victim or object of the intended offence; (c) enticing or seeking to entice the contemplated victim of the intended offence to go to the place contemplated for its commission; (d) reconnoitring the place contemplated for the commission of the intended offence; (e) unlawful entry upon a structure, vehicle or enclosure, or remaining thereon unlawfully for the purpose of committing or preparing to commit the intended offence; (f) acquiring, preparing or equipping oneself with materials to be employed in the commission of the offence, which are specially designed for such unlawful use or which serve no lawful purpose in the circumstances; (g) preparing or acting a falsehood for the purpose of an offence of fraud or deception; (h) soliciting any person, whether innocent or not to engage in conduct constituting an external element of the offence.

⁷⁷ The decision of Rowlatt J. in *R. v. Osborn* (1919) 84 J.P. 83 lends some support to it.

believes to be a substantial step towards the commission of the offence.”⁷⁸ A number of examples similar to but not identical with those proposed by the Working Party are set out as indicating, without being exhaustive, circumstances which are in law sufficient to constitute a substantial step. A somewhat similar formulation is found in the New York Revised Penal Law, Article 110, namely “with intent to commit a crime, [engaging] in conduct which tends to effect the commission of a crime”.

(ii) Consideration of the “substantial step” test

2.32 In our Introduction to Working Paper No. 50 we expressed some reservations as to the Working Party’s preference for the “substantial step” test.⁷⁹ We suggested that the fact that this test would allow conviction in particular cases which the Working Party disliked⁸⁰ did not demonstrate that the test was in itself satisfactory, and we queried whether the definition of attempt might not be better formulated in terms of adequate proximity determined as a question of fact by a properly instructed jury. Those commenting on the paper were, by a considerable majority, strongly against the concept of a substantial step and some specifically went further and agreed with the comments in our Introduction. Nor did the test find much favour with the participants in the seminar which we held at All Souls’ College, Oxford.⁸¹ Among those opposed to the substantial step test were the Society of Public Teachers of Law and the Prosecuting Solicitors’ Society of England and Wales. The sub-committee of the Bar Council’s Law Reform Committee opposed the provision of examples, while not feeling strongly about the test itself. On the other hand, The Law Society thought that the danger of the substantial step approach was that “its imprecision may increase the ambit of the criminal law so far back from what has hitherto been understood to be punishable as an attempt, as to involve serious danger to the liberty of the subject and the possibility of abuse by the authorities”. The late Lord Reid, in his comments to us, was “wholly against the ‘substantial step’. It is far too vague and goes much too far in making guilty intention overshadow guilty conduct.” There was also some powerfully argued support for the approach⁸² and a limited endorsement by a few of those who commented on the Working Paper.

2.33 It seems to us that the introduction of the concept of a “substantial step” together with illustrative examples in new legislation could only be justified if there were fundamental defects in the existing law, or if it could be

⁷⁸ 1969, Parliamentary Paper No. 44 of the Australian Commonwealth. This provision is modelled on the Model Penal Code of the American Law Institute (1962), Article 5.01 (1) (c) of which provides that a person is guilty of an attempt, if, acting with the kind of culpability otherwise required for commission of the crime, he “purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.” Article 5.01 (2) provides a list of illustrations with which those in the Australian Territories Draft Code are identical. It is noteworthy that the Final Report of the United States National Commission on Reform of Federal Criminal Laws upon *A Proposed New Federal Criminal Code*, (1971) while embodying a provision as to the substantial step similar to that in the Model Penal Code, omits all illustrative examples, commenting only that such examples “could be added”.

⁷⁹ (1973) Working Paper No. 50, *Inchoate Offences*, Law Commission’s Introduction, pp. vii-viii.

⁸⁰ See para. 2.29, above.

⁸¹ See para. 2.1, above, and Appendix D.

⁸² See Buxton, “Inchoate Offences: Incitement and Attempt” [1973] Crim. L.R. 656 at p. 665.

demonstrated that the courts had in a substantial number of cases reached decisions at variance with the social purposes of the law of attempt outlined at the beginning of this section of the Report. At the time when the Working Party was considering the law of attempt, the unsatisfactory way in which the test of proximity appeared to be working accounted for the desire of the Working Party to introduce a fresh concept, but as we indicate below, the position has changed to some extent in the intervening period.⁸³ Considered on its own merits, it seems to us that the definition of what constitutes a "substantial step" is incapable of further description or elucidation. The Working Party tried to surmount this difficulty in two ways. In the first place, it suggested that it should be for the judge to direct the jury as a matter of law whether the particular conduct did or did not constitute a substantial step. We deal in more detail below⁸⁴ with the functions of the judge and jury in the law of attempt. It suffices to state here that in our view the question whether the defendant's conduct amounts to an attempt is a question of fact which should be for the jury to decide. Secondly, the Working Party suggested the provision of examples which would be illustrative, but not exhaustive, of what constitutes a substantial step. If, as we believe, provision of such examples is necessary because it is inherently impossible to define further what is meant by a "substantial step", the test in our view stands self-condemned: either the examples are superfluous because they fall within the natural meaning of "substantial", or they amount to a highly artificial concept of what is "substantial" because the conduct which they illustrate would not ordinarily be regarded as a substantial step towards the commission of an offence. Furthermore, even if the examples were allowed to remain as part of the test, some of those proposed by the Working Party are probably unsatisfactory as they stand⁸⁵ and in our view would inevitably be subject to interpretation and accretion through reported cases. At the same time, examples (*d*), reconnoitring, and (*f*), acquiring and preparing materials for use in committing an offence, lie far outside the law of attempt as at present understood, and amount only to preparation. The courts have little or no experience of the use of legislative illustrations in the criminal law and it seems to us that there would be a considerable degree of uncertainty as to how they could be used in practice.⁸⁶ For example, in situations which both fell outside the presently accepted bounds of attempt and were not analogous to the illustrations, could the judge in his direction nonetheless quote any of them he chose as an aid to the jury? The test provides no clue to the answer. This uncertainty, together with the drawbacks of the examples which we have mentioned, suggests that there would be serious dangers of the development of

⁸³ See paras. 2.39-2.44, below.

⁸⁴ See paras. 2.50-2.52, below.

⁸⁵ One of those commenting on them pointed out that illustration (*a*) (see para. 2.30, n. 76, above), which was intended to cover such cases as where a mother is assaulted in order to kidnap her child, fails to make clear either the spatial or temporal relationship between the assault and the ultimate offence; in some cases the assault on the mother may be too far away in time or place to amount to more than a preparatory act. At the same time, many assaults for the purposes of committing offences already constitute attempts.

⁸⁶ Where illustrations are used in legislation upon civil law matters (e.g. in the Torts (Interference with Goods) Act 1977, ss, 3(6), 6(2) and 7(4)) their purpose is usually to clarify and exemplify provisions which might otherwise be difficult to understand. This contrasts with the illustrations of what constitutes a substantial step which, as we have noted, seem to be designed to provide substance to an inherently vague concept which cannot be elucidated by other means.

a body of case-law widening the ambit of the law of attempt to an unacceptable extent. Irrespective of this possibility, we regard the provision of a vague test together with illustrations as an unsatisfactory way of reforming the law.

2.34 Reference to example (f) in the previous paragraph leads us to mention a further consideration which militates against the “substantial step” approach. Inclusion by means of examples of what are at present regarded as acts of preparation within the concept of substantial step would have the effect of stretching the legal meaning of attempt far beyond what is ordinarily understood by that term. It might be maintained that this objection could be met by substituting for “attempt” some other concept such as “furtherance of a crime”. We have already indicated our reasons for rejecting this approach, which is of greater moment than an issue of nomenclature.⁸⁷ It suffices to add here that, if the word “attempt” were dropped altogether in favour of an alternative concept, the limitation implicit in the ordinary meaning of attempt would be lost and there would be no clear limit on the extent to which criminal liability could be pushed back to cover even the remotest acts of preparation, other than the undefined concept of substantiality. On the other hand, if the word “attempt” were retained, there would be an unresolved clash between that term and that of the “substantial step”.

2.35 In considering examples of the substantial step which would at present be regarded only as preparatory acts, it is also necessary to bear in mind the existing law, particularly in relation to possession offences. There are provisions penalising the possession of an offensive weapon in a public place which have recently been extended to possession of a weapon of offence while trespassing on private property.⁸⁸ The Forgery Act 1913, the Theft Act 1968 and the Criminal Damage Act 1971 also contain possession offences. In these areas, at any rate, the law penalises by means of specific offences some of the conduct with which it would otherwise be possible to deal, under the substantial step test, by means of specific examples stretching the meaning of “attempt” far beyond its accepted usage. Provision of such specific offences seems to us to be the preferable approach; and provision of a general offence based on the “substantial step” concept would entail an unnecessary overlap with those offences.

2.36 The proposition that some of the examples of a substantial step suggested by the Working Party extend far beyond the law of attempt as at present understood and amount only to preparation is particularly true of example (d), “reconnoitring the place contemplated for the commission of the intended offence”. There is an added danger in adopting an example such as this that the law of attempt would be capable of being used in situations which, if they should be penalised at all, should be the subject of a specific offence. For example, some of the ground covered by (d) is dealt

⁸⁷ See paras. 2.7-2.9, above.

⁸⁸ The Prevention of Crime Act 1953, s. 1(1) penalises anyone who without lawful authority or excuse “has with him in any public place any offensive weapon”. The Criminal Law Act 1977, s. 8 based on clause 9 of the draft Bill annexed to (1976) Law Com. No. 76 *Report on Conspiracy and Criminal Law Reform*, penalises anyone on any premises as a trespasser, after having entered as such, if, without lawful authority or reasonable excuse, he “has with him on the premises any weapon of offence”.

with at present by that part of section 4 of the Vagrancy Act 1824 which penalises "every suspected person or reputed thief, frequenting any . . . street or any highway or any place adjacent to a street or highway with intent to commit an arrestable offence." Whatever the criticisms which may be made of the "suspected person" offence, we do not think that it would be legitimate simply to replace it by an artificial extension of the law of attempt. Cosmetic changes of this sort conceal rather than clarify the true state of the law. If there is a need for the law to be extended beyond the accepted bounds of the law of attempt, in our view this is a matter which requires separate consideration in relation to the specific types of conduct which it is sought to penalise. As we have noted, this is the approach which has already been adopted in several instances.⁸⁹

2.37 The substantial step approach was put forward because of the advantage it would have in penalising certain conduct held in the past not to amount to an attempt. As we have noted, this would be achieved by very substantially widening the present law and by materially altering the functions of the judge and jury in the law of attempt in a way which we consider unacceptable. Without this alteration we believe the concept would render the law more uncertain than it is at present. With it, it would confine questions of fact and degree in particular cases in the straitjacket of precedent. In our view the disadvantages of the approach discussed in the preceding paragraphs greatly outweigh any advantage to be gained from it, and we do not recommend its adoption.

2. The present law reconsidered

2.38 The cases mentioned in our preceding survey have all been cited as decisions on the issue of the *actus reus* in the English law of attempt and, as we have seen, they draw upon more than one of the theories referred to above. We think it necessary to examine recent decisions with a view to determining the currently accepted view of the issue. As will be seen, this has undergone some change.

2.39 In 1973, when Working Paper No. 50 was published, the law was taken to be settled by a trio of Divisional Court cases. In the first of these, *Davey and Others v. Lee*,⁹⁰ Lord Parker C.J. adopted the definition in Stephen's *Digest*⁹¹ but accepted also as a helpful definition the following passage from *Archbold*⁹²—

⁸⁹ See para. 2.35, above. As to possible reform of the Vagrancy Act, see *Report of the Home Office Working Party on Vagrancy and Street offences* (1976), para. 66, in which a new summary offence is recommended to penalise a person whose antecedent conduct in a public place suggests an intention to commit an arrestable offence, "antecedent conduct" including at least one suspicious act before and distinct from the act which caused him to be charged with the offence. This is in substance a reformulation of the relevant part of s. 4 of the Vagrancy Act 1824 in modern terms.

⁹⁰ [1968] 1 Q.B. 366; see also [1967] Crim. L.R. 357.

⁹¹ See para. 2.22, n. 53, above.

⁹² (36th ed., 1966) para. 4104.

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

This formulation combines part of Parke B’s much-quoted dictum in *R. v. Eagleton*⁹³ with the “unequivocality” test which, as we have noted,⁹⁴ had by the time of *Davey v. Lee* already been dropped from the New Zealand Crimes Act because it was found to be unworkable. In the second case, *Jones v. Brooks and Brooks*,⁹⁵ Lord Parker C.J., while again referring to the passage from *Archbold*, limited his quotation to that part of it taken from the dictum in *R. v. Eagleton*, and expressed the view that, where the act concerned is equivocal, the expressed intention of the defendant, both at the time and after the actus reus, is relevant “in order to see towards what the act is directed. Once that is decided, then it still remains for the prosecution to show that the act itself is sufficiently proximate to amount to an attempt to commit the crime which it was the intention of the respondents to commit.”⁹⁶ Elements of an emasculated “unequivocal act” test were therefore combined with an unelucidated “proximity” test. It followed that whether conduct amounted to an actus reus of an attempt would in some cases depend on the evidence as to the defendant’s intention. In the third case, *Comer v. Bloomfield*,⁹⁷ Shaw J. quoted, without expressly approving, the definition from *Archbold*, and said in effect that the decision of the magistrates was not so wrong as to be perverse. The defendant in that case had gone further than the defendant in the much-criticised decision of *R. v. Robinson* in so far as he had reached the stage of enquiring of his insurers whether a claim would lie for loss of his vehicle. It is evident from this outline of the cases that the proximity test was not working well. Its application was confused by the introduction of elements of other incompatible approaches and by the lack of any agreed principle upon which to decide what was sufficiently proximate. This in turn resulted in a random appeal to authorities, including such unsatisfactory cases as *R. v. Robinson*,⁹⁸ where the result reached would, to the man in the street, appear to be contrary to common sense.

2.40 Since 1973 the law has been considered in two cases in the House of Lords, in both of which reference was made to the issue of the actus reus in attempt. In *Haughton v. Smith*,⁹⁹ Lord Hailsham, after quoting in full from *R. v. Eagleton*,¹⁰⁰ and also the various tests set out in *Davey v. Lee*,¹⁰¹ said¹⁰²—

⁹³ (1855) 6 Cox C.C. 559, 571; see para. 2.24, above.

⁹⁴ See para. 2.26, above.

⁹⁵ (1968) 52 Cr. App. R. 614.

⁹⁶ *Ibid.*, at p. 617.

⁹⁷ (1970) 55 Cr. App. R. 305; the facts are given in para. 2.29, n. 74, above.

⁹⁸ See [1915] 2 K.B. 342 and n. 72, above.

⁹⁹ [1975] A.C. 476; the facts are given in para. 2.54, below.

¹⁰⁰ (1855) 6 Cox C.C. 559; see para. 2.24, above.

¹⁰¹ [1968] 1 Q.B. 366; see para. 2.39, above.

¹⁰² [1975] A.C. 476, 492.

“The act relied on as constituting the attempt must not be an act merely preparatory to commit the completed offence, but must bear a relationship to the completion of the offence referred to in *R. v. Eagleton* . . . as being ‘proximate’ to the completion of the offence and in *Davey v. Lee* . . . as being ‘immediately and not merely remotely connected’ with the completed offence”.

Lord Reid said¹⁰³—

“It is well settled that mere preparation is not criminal It can be said that the accused must have begun to perpetrate the crime. But no words, unless so general as to be virtually useless, can be devised which will fit the immense variety of possible cases. Any attempted definition would, I am sure, do more harm than good. It must be left to common sense to determine in each case whether the accused has gone beyond mere preparation.”

2.41 In *D.P.P. v. Stonehouse*,¹⁰⁴ one of the questions at issue was whether the defendant’s conduct was such as could constitute an attempt. In that case the defendant, having insured his life in England for the benefit of his wife, faked his death and disappeared. If he had not been discovered before his wife was paid by the insurers, “the full offence would have been that he dishonestly and by deception enabled his wife to obtain insurance money by the false pretence that he had drowned,”¹⁰⁵ contrary to section 15 of the Theft Act 1968. In holding that the defendant’s acts did suffice for an attempt, four of the speeches¹⁰⁶ referred to the first and the most quoted part of Parke B’s dictum in *R. v. Eagleton*,¹⁰⁷ three of them with a measure of approval, Lord Diplock adding that “the offender must have crossed the Rubicon and burnt his boats”,¹⁰⁸ and Lord Salmon defining an attempt also on the lines of Article 29 of Stephen’s *Digest*.¹⁰⁹ Lord Edmund-Davies,¹¹⁰ however, criticised both the *Eagleton* dictum and the *Digest* formulation, doubting whether the former had been properly applied in *R. v. Robinson*.¹¹¹ He thought that the court had been wrong in that case to treat all the preceding acts of the defendant as mere preparation, and that the ruling that there could be no conviction for an attempt to obtain by deception unless the deception had come to the knowledge of the intended victim should not be followed. He also disapproved of the view¹¹² that a defendant must necessarily be guilty of an attempt if he has done the last act which he expects to do and which it is necessary for him to do to achieve the consequence aimed at,¹¹³ since

¹⁰³ *Ibid.*, at p. 499.

¹⁰⁴ [1978] A.C. 55.

¹⁰⁵ *Ibid.*, at p. 87 per Lord Edmund-Davies.

¹⁰⁶ *Ibid.*, at p. 68 per Lord Diplock, p. 71 per Viscount Dilhorne, p. 76 per Lord Salmon, p. 85 per Lord Edmund-Davies.

¹⁰⁷ (1855) 6 Cox C.C. 559; this is referred to in para. 2.24, above.

¹⁰⁸ *D.P.P. v. Stonehouse* [1978] A.C. 55, 68.

¹⁰⁹ *Ibid.*, at p. 76; as to Art. 29 of Stephen’s *Digest* See para. 2.22, n. 53, above.

¹¹⁰ *Ibid.*, at pp. 85-86.

¹¹¹ [1915] 2 K.B. 342.

¹¹² See Glanville Williams, *Criminal Law, The General Part* (2nd ed., 1961) p. 622 and *Textbook of Criminal Law* (1978) p. 376; Smith and Hogan, *Criminal Law* (4th ed., 1978) p. 256.

¹¹³ Compare the last sentence of Parke B’s dictum in *R. v. Eagleton* (1855) 6 Cox C.C. 559, 571, quoted in para. 2.24, above.

he may nonetheless have engaged only in preparation. Lord Edmund-Davies considered that Stonehouse's conduct was sufficiently proximate to constitute the attempt because the faking of his death, in relation to the offence charged, was intended to produce the result, was the final act which he could perform, and went a substantial distance towards the attainment of his goal.¹¹⁴

2.42 We draw three conclusions from this brief review of recent cases. In the first place, the "unequivocal act" approach is no longer to be applied even though it only recently made an appearance as an element of the test of what constitutes the actus reus; secondly, the correct test is that of proximity, although there is no agreement on how this should be formulated; and thirdly, there must now be some doubt as to whether *R. v. Robinson*,¹¹⁵ and, *a fortiori*, *Comer v. Bloomfield*,¹¹⁶ were correctly decided.

2.43 *Stonehouse* does clarify certain other matters which, although not bearing on the immediate issue, have the effect of further developing the law of attempt. In the first place, it seems clear on the facts of the case that an act may be proximate enough to render the person doing it liable for an attempt even if there is a further act to be done to effect the crime, which is to be done by an innocent agent. Secondly, the facts of the case lend support to the view¹¹⁷ that, provided the defendant acts as principal, the last act which it is in his power to do towards the commission of an offence will always be sufficiently proximate to it to constitute an attempt.¹¹⁸

2.44 Finally, the House of Lords also settled the respective roles of judge and jury in trials for attempts. In *R. v. Cook* Lord Parker C.J. stated¹¹⁹ that "while in every case it is for the judge to rule whether there is any evidence capable of constituting an attempt, it is always for the jury to say whether they accept it as amounting to an attempt." This approach was endorsed by a majority of the House of Lords in *D.P.P. v. Stonehouse*:¹²⁰ "in every case where a jury may be entitled to convict, the application of the law to the facts is a matter for the jury and not for the judge."¹²¹

3. Recommendations as to the actus reus

2.45 In the light of the case law, the opinions of writers and the various approaches to the actus reus already described, we must make it clear that in our view there is no magic formula which can now be produced to define precisely what constitutes an attempt. In common with most commentators

¹¹⁴ *D.P.P. v. Stonehouse* [1978] A.C. 55, 87.

¹¹⁵ [1915] 2 K.B. 342.

¹¹⁶ (1970) 55 Cr. App. R. 305.

¹¹⁷ Not shared by Lord Edmund-Davies: see para. 2.41, above.

¹¹⁸ See [1977] Crim. L.R. p. 547 and Smith and Hogan, *Criminal Law* (4th ed., 1978) p. 256.

¹¹⁹ (1963) 48 Cr. App. R. 98, 102.

¹²⁰ See [1978] A.C. 55, at p. 80 *per* Lord Salmon, pp. 87-88 *per* Lord Edmund-Davies, p. 94 *per* Lord Keith of Kinkel; compare Lord Diplock at pp. 70-71 and Viscount Dilhorne at pp. 73-74, who considered that a judge is not forbidden to tell the jury that particular acts of the defendant, if established, are so closely connected with the offence that they amount in law to an attempt to commit it, if the application of the law to the facts is so clear that a verdict to the contrary would be perverse; and see further para. 2.50, below.

¹²¹ *Ibid.*, at p. 94 *per* Lord Keith of Kinkel.

and also with some of the most recent authority, we think that there is always bound to be some degree of uncertainty in answering this question.¹²² We have seen that many of the approaches considered above, if strictly applied to every case, have the defects of being either unworkable in practice or of leading to manifestly undesirable results. Furthermore, we have noted that the Working Party's proposed solution would also possess the disadvantage of being unacceptably wide as to the range of conduct which would constitute the *actus reus* of attempt. Of the various approaches, only the "proximity" test has produced results which may be thought broadly acceptable. Its disadvantages are that hitherto it has not worked well in some cases,¹²³ and that it is imprecise. It shares the latter disadvantage with all other approaches; but its flexibility does enable difficult cases to be reconsidered and their authority questioned. Further, where cases are so dependent on what are sometimes fine differences of degree, we think it is eminently appropriate for the question whether the conduct in a particular case amounts to an attempt to be left to the jury. This suggests that a relatively simple definition based on the "proximity" approach is the best which can be hoped for.

(a) *Content of the actus reus*

2.46 The first element in a statutory test of proximity should be the drawing of the distinction between acts of preparation and acts which are sufficiently proximate to the offence. This is a truism repeated in many cases including the most recent.¹²⁴ It is nonetheless useful because it recognises that certain forms of conduct, in almost all circumstances which can be envisaged, do not amount to an attempt. Possession of implements for the purpose of committing an offence is an obvious example which, as we have noted,¹²⁵ is at present dealt with by other means. Reconnoitring the place contemplated for the commission of the intended offence¹²⁶ is another example of conduct which it is difficult to regard as more than an act of preparation: it would not ordinarily be called an attempt.

2.47 The definition of sufficient proximity must be wide enough to cover two varieties of cases; first, those in which a person has taken all the steps towards the commission of a crime which he believes to be necessary as far as he is concerned for that crime to result,¹²⁷ such as firing a gun at another and missing. Normally such cases cause no difficulty. Secondly, however, the definition must cover those instances where a person has to take some further step to complete the crime, assuming that there is evidence of the necessary mental element on his part to commit it; for example, when the defendant has raised the gun to take aim at another but has not yet squeezed the trigger.

¹²² See Smith and Hogan, *Criminal Law* (4th ed., 1978) p. 255; *Haughton v. Smith* [1975] A.C. 476, 499 *per* Lord Reid, quoted in para. 2.40, above. See also Stephen's *Digest of the Criminal Law* (9th ed.) Art. 29 and para. 2.22, n. 53, above.

¹²³ See para. 2.39, above.

¹²⁴ See para. 2.40, above.

¹²⁵ See para. 2.35, above.

¹²⁶ Compare illustration (d) of the Working Party's proposal for the "substantial step" test, para. 2.30, n. 76, above.

¹²⁷ This is on the assumption that he is the actual perpetrator; if his part in the commission is a minor one, none of his acts may get beyond the stage of preparation: see *D.P.P. v. Stonehouse* [1978] A.C. 55, 86 *per* Lord Edmund-Davies, and para. 2.41, above.

We have reached the conclusion that, in regard to these cases, it is undesirable to recommend anything more complex than a rationalisation of the present law.

2.48 In choosing the words to be used to describe this rationalisation of the present law, we have had to bear in mind that they will be the subject of consideration and interpretation by the courts. For this reason we have rejected a number of terms which have already been used with some frequency in reported cases, such as acts which are “proximate to”, or “closely connected” or “immediately connected” with the offence attempted. The literal meaning of “proximate” is “nearest, next before or after (in place, order, time, connection of thought, causation etc.)”.¹²⁸ Thus, were this term part of a statutory description of the actus reus of attempt, it would clearly be capable of being interpreted to exclude all but the “final act”; this would not be in accordance with the policy outlined above.¹²⁹ The term “immediately connected” is in our view inappropriate for the same reason.¹³⁰ And acts which may be “closely connected” in the sense that they have advanced a considerable way towards the completed offence may nonetheless bear no qualitative resemblance to the acts required for completion. For example, it is arguable that what the appellant in *R. v. Robinson*¹³¹ had done had no close qualitative connection with what remained to be done—making a claim on the insurance company—even though in terms of quantity his conduct as a whole had advanced far towards his objective. This potential ambiguity therefore precludes use of that term.

2.49 The foregoing considerations lead us to recommend as the most appropriate form of words to define the actus reus of attempt *any act which goes so far towards the commission of the offence attempted as to be more than an act of mere preparation*.¹³²

(b) *Issues of law and fact*

2.50 The final element of the offence of attempt which requires consideration in the present context is the respective functions of the judge and jury. We have noted that the “substantial step” approach would require the judge to direct the jury as a matter of law as to whether particular conduct, if proved, constitutes a substantial step.¹³³ On the other hand most commentators on the Working Paper and participants at the seminar¹³⁴ thought that whether on the evidence in the particular case conduct in fact amounted to

¹²⁸ Concise Oxford Dictionary (6th ed., 1976).

¹²⁹ See para. 2.47, above. The “final stage” theory is examined and rejected in paras. 2.24-2.25, above.

¹³⁰ We have noted that both terms are used in the New Zealand Crimes Act: see para. 2.26 and n. 64, above.

¹³¹ [1915] 2 K.B. 315; see n. 72, above.

¹³² See Appendix A, cl. 1(1) (a).

¹³³ See paras. 2.30 and 2.33, above. It is noteworthy that this view of the respective functions of judge and jury is also taken by *Russell on Crime* (12th ed., 1964) p. 178, earlier editions of *Archbold* (up to the 35th ed., which was disapproved in *R. v. Cook* (1963) 48 Cr. App. R. 98) and the draft Code of 1879. Codes based on that draft Code also have provisions to this effect; see e.g. the Canadian Criminal Code, s. 24 and the New Zealand Crimes Act 1961, s. 72.

¹³⁴ See para. 2.1, above and Appendix D.

an attempt was a matter to be left to the jury. Since then, the majority in *D.P.P. v. Stonehouse* has, as we have noted,¹³⁵ approved the decision in *R. v. Cook* in which Lord Parker C.J. stated that, "while in every case it is for the judge to rule whether there is any evidence capable of constituting an attempt, it is always for the jury to say whether they accept it as amounting to an attempt. That involves . . . a careful direction in every case on the general principle with regard to what acts constitute attempts".¹³⁶ We agree with this view: as factual situations may be infinitely varied and the issue of whether an accused's conduct has passed beyond mere preparation to commit an offence may depend upon all the surrounding circumstances, it is appropriate to leave the final issue to be decided as a question of fact, although "the judge may sum up in such a way as to make it plain that he considers that the accused is guilty and should be convicted".¹³⁷ Furthermore, this division of function between judge and jury is in accord with the principle that it is for the judge to tell the jury what the law is, but for the jury to say whether on the facts the accused has been brought within the provisions of the offence with which he has been charged. If the conduct is such that in law it cannot constitute more than an act of preparation the judge must direct the jury to acquit. It is of course necessary for the judge also to direct the jury as to the mental element of intent required for attempt, and for the jury to decide whether he had that intent; but this accords with the accepted principles governing the functions of judge and jury, and has never given rise to the difficulties which directions as to the conduct required for an attempt have raised in the past.

2.51 There has been criticism of the present tendency to leave the application of words in statutes to the jury as a question of fact,¹³⁸ on the ground that this opens the way to perverse verdicts of acquittal.¹³⁹ We think that this argument ignores the accepted function of the jury when the question is whether the accused's conduct falls within non-technical words used to characterise the elements of an offence.¹⁴⁰ The criticism would have more substance if it could be said that the facts of one case were in all respects identical to another, but "a lawyer may think that the result of applying the law correctly to a certain factual situation is perfectly clear, but nevertheless the evidence may give rise to nuances which he has not observed, but which are apparent to the collective mind of a lay jury."¹⁴¹ Although the risk of perverse verdicts cannot altogether be eliminated, "the risk that directions to convict may lead to quashings can be obviated by clarity in identifying the contested issue, by commenting on the evidence (maybe even in strong terms, provided that they fall short of a direction, as Lord Devlin stressed in *Chandler v. Director of Public Prosecutions*),¹⁴² and by then trusting the

¹³⁵ See para. 2.44, above.

¹³⁶ (1963) 48 Cr. App. R. 98, 102.

¹³⁷ *D.P.P. v. Stonehouse* [1978] A.C. 55, 80 per Lord Salmon.

¹³⁸ See [1977] Crim. L.R. 549-550.

¹³⁹ *Ibid.*, and Glanville Williams, *Textbook of Criminal Law* (1978) pp. 376 and 383.

¹⁴⁰ See *D.P.P. v. Stonehouse* [1978] A.C. 55, 88 per Lord Edmund-Davies.

¹⁴¹ *Ibid.*, at p. 94 per Lord Keith of Kinkel.

¹⁴² [1964] A.C. 763, 806.

jury to play their constitutional part in the criminal process".¹⁴³ Thus the risk is one which is more apparent than real.

2.52 The difficulties which have occurred in the past in defining the respective functions of judge and jury in relation to the actus reus of attempt lead us to the view that, although the issue may be regarded as settled at common law by a majority decision of the House of Lords,¹⁴⁴ legislation which creates a new statutory offence of attempt ought to deal with it in specific terms. Accordingly we *recommend* a provision to the effect that the question whether an act done by the defendant is capable of being an attempt should be a question of law; the question whether that act (accompanied by the required mental element) amounts in all the circumstances to an attempt should be a question of fact.¹⁴⁵

E. ATTEMPTING THE IMPOSSIBLE

1. The present law

(a) *Haughton v. Smith*

2.53 The problem for discussion in this section of the Report concerns the circumstances in which a defendant may be found guilty of attempt when he attempts to commit an offence known to the law believing that the circumstances are such that the offence will be committed, but when, unknown to him,¹⁴⁶ they are in fact such that the means adopted or proposed are inadequate or the object is unattainable. The same problem arises where one person incites another to commit an offence which is in fact impossible to carry out or conspires with another to commit such an offence; but since most of the authorities and literature treat the problem in the context of attempt, we reserve for separate consideration whether the principles which we recommend in relation to attempt should also apply to these offences.¹⁴⁷ In the context of attempt, the problem has been widely discussed by legal writers and judges, not only in England but also in Commonwealth countries, in the U.S.A.¹⁴⁸ and in Civil Law jurisdictions. Any consideration, however, of the question of impossibility in attempts as far as English law is concerned must now begin with a reference to the decision of the House of Lords in *Haughton v. Smith*.¹⁴⁹ In that case a number of earlier authorities were

¹⁴³ *D.P.P. v. Stonehouse* [1978] A.C. 55, 88 *per* Lord Edmund-Davies.

¹⁴⁴ *Ibid.*; see para. 2.44, above.

¹⁴⁵ See Appendix A, cl. 3(3).

¹⁴⁶ If the impossibility is known to the defendant, that fact is inconsistent with the finding that he has the mental element of intention to commit a crime, which, as we have emphasised, is an essential element in the crime of attempt.

¹⁴⁷ See Parts III and IV, below.

¹⁴⁸ The literature on this subject in the United States is particularly voluminous. "Judging from the volume of literature in this area, scholars in the field of substantive criminal law appear to be more fascinated with the subject of impossibility in attempts than with any other subject" (La Fave and Scott, *Handbook on Criminal Law* (1972) p. 438).

¹⁴⁹ [1975] A.C. 476. The issue of impossibility was discussed in (1973) Working Paper No. 50, paras. 126-136 and provisional proposals were then made by the Working Party which would in most instances have resulted in there being liability in cases of impossibility. The Working Paper was however published before the recent decisions of the House of Lords and the subject demands fundamental reconsideration in the light of those decisions. Accordingly we make no further reference in this Report to these provisional proposals.

reviewed and in some instances apparently overruled, and general views (not limited to the particular facts before the House) were put forward as to the correct approach to the problem of impossibility in attempts.

2.54 In *Haughton v. Smith* police officers stopped an overloaded van and, finding that it contained stolen goods, took the driver to the police station. The taking of the goods into police possession meant that they reverted to lawful custody¹⁵⁰ and so ceased to be stolen goods, but the police officers decided to permit the van and goods to continue to a service area on a motorway, accompanied and followed by police officers. There the defendant took a leading part in arranging for future disposal of the goods. He was convicted of attempting to handle stolen goods. The Crown had conceded that he could not be charged with the full offence of handling stolen goods, as at the time of the alleged offence the goods by virtue of section 24(3)¹⁵¹ of the Theft Act 1968 had ceased to be stolen goods. For the reasons given in paragraph 2.55, below, the Court of Appeal quashed the defendant's conviction but certified as a point of law for decision by the House of Lords the following: "If stolen goods are returned to lawful custody and thus cease to be stolen by virtue of section 24 of the Theft Act 1968, can a person who subsequently dishonestly handles goods believing them to be stolen be guilty of the offence of attempting to handle stolen goods?" The Crown's appeal to the House of Lords was unanimously dismissed for the reasons discussed in paragraphs 2.56 — 2.61, below.

2.55 The Court of Appeal had distinguished between two categories of cases—

"The first class is the type of case where the accused has embarked on a course of conduct which, if completed, will result in an offence but for some reason breaks off that course of conduct and never completes the action required to amount to the offence The second class . . . is where the accused has meticulously and in detail followed every step of his intended course believing throughout that he was committing a criminal offence and when in the end it is found that he has not committed a criminal offence because in law that which he planned and carried out does not amount to a criminal offence at all."¹⁵²

In the first class, where the accused's conduct if completed would have amounted to a crime, the Court of Appeal placed by way of example the picking of an empty pocket; the efforts of a would-be burglar, disturbed by the police, who has been trying to break open a window; and those of a would-be safecracker who finds the safe too difficult to open. In such cases the court considered that a charge of attempt could properly be laid. But in the second class, where the accused's intended course of conduct was completed and did not amount to a substantive crime, it considered that no charge of attempt would lie. The court took the view that the case before them belonged to the second class. In reaching this conclusion the court found

¹⁵⁰ Theft Act 1968, s. 24 (3).

¹⁵¹ Under this subsection "no goods shall be regarded as having continued to be stolen goods after they have been restored to the person from whom they were stolen or to other lawful possession or custody. . . ."

¹⁵² [1975] A.C. 476, 481, *per* Lord Widgery C.J. (C.A.).

of particular value a dictum of Birkett J. giving the judgment of the Court of Criminal Appeal in *R. v. Percy Dalton (London) Ltd.*¹⁵³—

“Steps on the way to the commission of what would be a crime, if the acts were completed, may amount to attempts to commit that crime, to which, unless interrupted, they would have led; but steps on the way to the doing of something, which is thereafter done and which is no crime, cannot be regarded as attempts to commit a crime.”

2.56 The House of Lords, while reaching the same conclusion on the facts of the case as the Court of Appeal, enunciated principles governing the question of impossibility in attempts which have wider implications. Thus, the Court of Appeal confined itself to the narrow question whether a person can be guilty of an attempt to handle stolen property if, having regard to section 24(3) of the Theft Act 1968,¹⁵⁴ the property in question is no longer stolen at the time of the alleged attempt. The wider reach of the speeches in the House of Lords is illustrated by the differing view taken in that House and in the Court of Appeal of *R. v. Curbishley*¹⁵⁵. In the latter case a conviction of attempting to assist in the removal of stolen goods was upheld where the appellants had taken a car to a certain place to pick up goods which they expected to be stolen goods, but found that when they arrived at that place there were no goods for them to collect. Lord Widgery, C.J. in *Haughton v. Smith*¹⁵⁶ thought that *R. v. Curbishley* was rightly decided because it was merely an illustration of his first class of case¹⁵⁷ where a man sets out to commit a criminal offence but is unable to commit the full course of action involved by reason of some intervention on the part of others. Only if it could have been shown that the goods had been returned to lawful custody would he have regarded the case as one on all fours with *Haughton v. Smith*. On the other hand in the House of Lords Lord Hailsham of St. Marylebone L.C.¹⁵⁸ said that even if on the facts *R. v. Curbishley* were not a case where once stolen goods had ceased to be stolen at the time of the alleged attempt, it fell into a class of cases which “in general” were not indictable in English law.¹⁵⁹

¹⁵³ (1949) 33 Cr. App. R. 102, 110. The facts of the case were that the defendants sold a certain weight of pears at a price below the permitted maximum. But they thought the weight was less than it in fact was and that they were selling at a price above that maximum. The court held that in these circumstances it was not possible to charge the defendants with attempting to sell at a price in excess of the permitted maximum.

¹⁵⁴ See n. 151, above.

¹⁵⁵ (1970) 55 Cr. App. R. 310.

¹⁵⁶ [1975] A.C. 476, 483-4 (C.A.), (sub nom. *R. v. Smith (Roger)*).

¹⁵⁷ See para. 2.55, above.

¹⁵⁸ [1975] A.C. 476, 497. Lord Salmon (p. 506) and Lord Morris of Borth-y-Gest (p. 502) dismissed the appeal for the reasons given by Lord Hailsham. Both Lord Morris and Viscount Dilhorne (see para. 2.60, below) thought that *R. v. Curbishley* was wrongly decided.

¹⁵⁹ *Ibid.*, at pp. 493 and 497. Lord Hailsham there said that *R. v. Curbishley* was indistinguishable on the facts from *Haughton v. Smith* and that both therefore fell within the category of cases where the defendant “without interruption efficiently [does] every act which he set out to do, but may be saved from criminal liability by the fact that what he has done, contrary to his own belief at the time, does not after all amount in law to a crime”. This category is the sixth noted by Turner J. in *R. v. Donnelly* [1970] N.Z.L.R. 980, 990: see paras. 2.57 and 2.76, below.

2.57 The class of case of which Lord Hailsham was referring was one of a number set out by Turner J. in the New Zealand case of *The Queen v. Donnelly*.¹⁶⁰ The class in question was described by Turner J. as covering a person who sets out to commit a crime but who finds—

“that what he is proposing to do is after all impossible—not because of insufficiency of means [another of Turner J.’s classes] but because it is for some reason physically not possible whatever means be adopted. He who walks into a room intending to steal, say a specific ring, and finds that the ring is no longer there, but has been removed by the owner to the bank, is thus prevented from committing the crime which he intended, and which, but for the supervening physical impossibility imposed by events he would have committed.”

2.58 Before the decision of the House of Lords in *Haughton v. Smith* it was widely thought that if a person has as his objective the commission of a crime which in the circumstances is physically incapable of being committed, he may nevertheless be liable for an attempt to commit that crime. Thus in *R. v. Ring, Atkins and Jackson*¹⁶¹ it had been held, contrary to earlier decisions,¹⁶² that a man could be guilty of an attempt to steal from a pocket which was in fact empty. Lord Hailsham, however, with whose speech Lords Morris and Salmon were in agreement, while saying that he was expressing “no concluded opinion”, regarded the reasoning in the decisions before *Ring* as sound, which led him to the conclusion, referred to above, that “in general” there could be no attempt to do what in fact was impossible of achievement.¹⁶³ He went on to discuss whether a charge of attempted murder would lie where a man stabs a corpse or a bolster in a bed, believing it is occupied by his living enemy, or if a man fires into an empty room thinking his intended victim is present in it. He concluded, again with the qualification “in general”, that no charge of attempt would lie in such cases. He accepted that where a man used inadequate means to achieve his objective he would be guilty of an attempt and appears to have left open the question where inadequacy of means (to use his example, a non-fatal dose of cyanide)¹⁶⁴ becomes impossibility of achieving an objective (as when water is administered in mistake for cyanide).

2.59 Lord Reid in *Haughton v. Smith* was more emphatic than Lord Hailsham in rejecting the possibility of bringing a charge of attempt where the crime attempted could not be committed. If a crime is impossible in the circumstances, then in his view no acts could be proximate to it and hence there would be no attempt. To hold otherwise would be to punish people for their guilty intentions. Discussing one of the hypothetical cases raised by Lord Hailsham he went so far as to say that the law “cannot be so asinine” as to make a man liable for attempted murder if he stabs a corpse thinking

¹⁶⁰ [1970] N.Z.L.R. 980; see paras. 2.76-2.77, below.

¹⁶¹ (1892) 61 L.J.M.C. 116; (1892) 17 Cox C.C. 491.

¹⁶² *R. v. McPherson* (1857) Dears and B. 197, 169 E.R. 975; *R. v. Collins* (1864) 9 Cox C.C. 497.

¹⁶³ [1975] A.C. 476, 495.

¹⁶⁴ In *R. v. White* [1910] 2 K.B. 124, a man who administered such a dose was held guilty of attempted murder.

it is a living person. Nevertheless Lord Reid conceded that there will be “borderline cases” where inadequate means to achieve an objective are used or where a person shoots at a place recently occupied by his intended victim.¹⁶⁵

2.60 Viscount Dilhorne also gave a very wide scope to impossibility in ruling out a charge of attempt. There could be no charge of attempt if the crime could not be committed either as a result of physical impossibility or by reason of legal impossibility. In either case the defendant would not be convicted of an attempt if, had he succeeded in doing all that he attempted to do, he would not have been liable for the full offence. “Conduct which is not criminal is not converted into criminal conduct by the accused believing that a state of affairs exists which does not exist.” Applying these principles, Viscount Dilhorne took the view that a person could not be liable for attempting to handle stolen goods which were not in fact stolen (the issue in the instant case), for attempting to steal when taking his own umbrella thinking it belongs to someone else, or (in so far as he declined to treat *R. v. Ring* as authoritative)¹⁶⁶ for attempting to steal from a pocket which was in fact empty.¹⁶⁷

(b) *Subsequent cases*

2.61 The law regarding impossibility in attempts appeared therefore to be left by the decision in *Haughton v. Smith* as follows: (1) no charge of attempt to handle stolen goods will lie where the goods in question are not in fact stolen; (2) subject to some possible qualifications of indefinite extent,¹⁶⁸ no charge of attempt will lie where what is attempted is in fact impossible of achievement. Subsequent cases at first tended to emphasise the wide impact of *Haughton v. Smith* rather than to limit its significance. In *Partington v. Williams*¹⁶⁹ the defendant took a wallet from a drawer in the office of her employers and looked in it with the intention of stealing any money it might contain. In fact it contained none. She was convicted of attempting to steal, but the conviction was quashed on appeal. The commission of the substantive offence was in the circumstances impossible. The Divisional Court considered¹⁷⁰ that the wide principles enunciated by the House of Lords in *Haughton v. Smith* were not obiter, and in particular that the earlier cases¹⁷¹ on all fours with the instant case were to be regarded as overruled. In this respect, however, the House of Lords in *D.P.P. v. Nock and Alsford*¹⁷² took the view

¹⁶⁵ The preceding four sentences are paraphrased from Lord Reid’s speech at [1975] A.C. 476, 500; see paras. 2.90 and 2.95, below.

¹⁶⁶ See [1975] A.C. 476, 505.

¹⁶⁷ The preceding statements in this paragraph are taken or paraphrased from [1975] A.C. 476, 506.

¹⁶⁸ See the reference in para. 2.58, above to the qualification “in general” to the propositions put forward by Lord Hailsham and to his recognition that there is an indeterminate line between inadequacy of means (where attempt will lie) and impossibility of objective sought (where it will not). See also Lord Reid’s reference to “borderline cases” mentioned also in para. 2.59, above.

¹⁶⁹ (1975) 62 Cr. App. R. 220.

¹⁷⁰ *Ibid.*, at p. 224 per May J.

¹⁷¹ *R. v. Brown* (1889) 24 Q.B.D. 357; *R. v. Ring* (1892) 17 Cox C.C. 491.

¹⁷² [1978] A.C. 979; see para. 2.65, below.

that, for reasons which we set out below, the Divisional Court had misinterpreted *Haughton v. Smith*.¹⁷³

2.62 We also have details (for which we are indebted to the Director of Public Prosecutions) of two unreported cases decided in 1976 in which the impact of *Haughton v. Smith* is evident. In one, a luggage loader at an airport engaged in removing passengers' luggage from a conveyor belt was observed to place certain cases behind a pillar which he opened with keys and rummaged through before relocking and replacing them; he was not seen to remove anything permanently from the cases, and there was no evidence as to their contents. Although convicted of going equipped to steal, the judge directed an acquittal on the charge of attempted theft of unspecified goods, since in his view it came within the ratio of *Partington v. Williams*.¹⁷⁴ In another case the defendant, falsely pretending that he was interested in buying a business for sale, invited the vendor to a hotel with his books of account and day's takings for checking by the defendant's accountant. The police advised the vendor to take a brief case containing only the books. It was left in a hotel bedroom at the defendant's suggestion, and in the course of the meeting he excused himself, went to the bedroom, and was arrested while searching the case. He admitted that he intended to steal the money and leave, but, in view of the present law, it was thought impossible to charge attempted theft of the money.

2.63 Another area in which the decision in *Haughton v. Smith* has a practical effect was mentioned in a representation made to us by His Honour Judge Bingham and ten other circuit judges sitting on Merseyside. They were particularly concerned with the difficulties which can arise where a person is found seeking to obtain entry to a car boot; although there may be clear evidence that he intended to steal whatever he found in the car or boot, it will not be possible to charge him with an attempt to steal the contents of the car or boot, if there is nothing there for him to steal.

2.64 Another consequence of *Haughton v. Smith* is the very fine distinctions which the courts now have to draw, sometimes in relation to matters of fact and sometimes in relation to the offence charged. In *R. v. Farrance*¹⁷⁵ the defendant had been convicted of attempting to drive when he had a blood alcohol concentration above the prescribed limit contrary to section 6(1) of the Road Traffic Act 1972. The facts were that the clutch of his car had burnt out, so that although the defendant could operate the engine he could not drive the car. The Court of Appeal upheld the conviction on the grounds that a burnt out clutch was only an impediment to the commission of a crime, similar to the inadequate burglar's tool or the would-be poisoner's insufficient

¹⁷³ *Ibid.*, at p. 992 *per* Lord Diplock and p. 1000 *per* Lord Scarman; see para. 2.65, below. Apart from Lord Scarman's comments on *Partington v. Williams* in *Nock*, its result cannot stand with the Court of Appeal's judgment in *R. v. Walkington* [1979] 1 WLR 1169: see Appendix E, below.

¹⁷⁴ (1975) 62 Cr. App. R. 220; see para. 2.61, above.

¹⁷⁵ (1977) 67 Cr. App. R. 136. See also *R. v. Cooper and Miles* [1979] Crim. L.R. 42.

dose.¹⁷⁶ It is not clear what the court's answer would have been if the car had had no petrol or if its transmission had completely seized up. The second category is illustrated by the contrast between *Mieras v. Rees*¹⁷⁷ and *Haggard v. Mason*¹⁷⁸. In the first of these cases, the defendant was held on appeal to the Divisional Court not guilty of *attempting to supply* a certain controlled drug contrary to the Misuse of Drugs Act 1971 when he had supplied a different substance in the belief that it was that controlled drug. In the second case, the Divisional Court held that the defendant was rightly convicted of *offering to supply* a certain controlled drug, when he had offered to supply a different substance in the belief that it was that controlled drug. The facts of the two cases are indistinguishable: in both cases the defendant sold a substance which both he and his purchaser believed to be a particular controlled drug and in neither case was the drug either that particular drug or any controlled drug. The distinction therefore lay solely in the different nature of the offences charged.¹⁷⁹ Whatever his intention, neither defendant could be charged with *supplying* a controlled drug because he had not done so, either in fact or in law. *Haughton v. Smith* prevented a conviction for *attempting to supply* a controlled drug; both defendants had the requisite mental element of intending to supply such a drug, but their conduct in relation to a substance which was not in fact a controlled drug could not amount to the actus reus of attempting to supply a controlled drug. But both defendants could be convicted of *offering to supply* a controlled drug, since the actus reus of that offence is simply making the offer and the mens rea is no more than intending to make it. It is thus irrelevant to such a charge whether what the defendant had with him was or was not a controlled drug or indeed whether he had anything with him at all. These distinctions, even if acceptable to lawyers, seem contrary to common sense and to the ordinary use of language. The layman would probably agree that the defendant's mistake should prevent him being convicted of supplying a controlled drug, but he would certainly regard his conduct as including both an offer to supply and an attempt to supply. Under the present law, however, successful prosecution seems to depend on the selection of the appropriate charge and on its wording. Moreover, whether any charge can be brought will often depend on the legislature having created as a substantive and separate offence what is in truth only one way of attempting to commit the substantive offence; thus in section 4(3) of the Misuse of Drugs Act 1971 provision is made for "offering to supply" as an offence separate from "supplying", while statutory provision for "attempting" to commit any offence under that Act is made in section 19.

¹⁷⁶ The Road Traffic Act 1972, s. 6(1) provides that "if a person drives or attempts to drive a motor vehicle on a road . . . , having consumed" an excess of alcohol which brings its concentration in the blood above a prescribed limit, he commits an offence. The "attempt" here is not in the nature of a common law attempt to commit an offence, with the required mental element of an intent to commit the offence attempted. Thus the Court of Appeal's consideration of the defendant's conduct in *R. v. Farrance* upon the basis of the law of attempt may have been misplaced.

¹⁷⁷ [1975] Crim. L.R. 224; see also *R. v. Chatwood* [1980] 1 All E.R. 467.

¹⁷⁸ [1976] 1 W.L.R. 187.

¹⁷⁹ *Mieras v. Rees* was not cited in *Haggard v. Mason*; in any event, it was incorrectly reported until *R. v. Chatwood*, n. 177, above.

2.65 In *D.P.P. v. Nock and Alsford*¹⁸⁰ the House of Lords held, contrary to what had been said by the Court of Appeal in *R. v. Green*,¹⁸¹ that the principles underlying *Haughton v. Smith* were as applicable to the inchoate crime of conspiracy as they were to the inchoate crime of attempt.¹⁸² However, the House of Lords in *D.P.P. v. Nock and Alsford* (where the appellants agreed to obtain cocaine, a controlled drug the production of which was an offence, by separating it out from a powder which in fact contained no cocaine) explained the principles underlying *Haughton v. Smith* in a more restrictive way than had hitherto generally been thought possible. The appellants were held not guilty of conspiracy only because the agreement was to pursue a *specific course of conduct* which when carried out could not produce cocaine and so could not constitute a crime; they would have been guilty if they had simply agreed to go into business as cocaine producers even if in pursuance of that agreement they attempted to produce cocaine from a substance which could not yield it.¹⁸³ This reasoning was also applicable to attempts. According to Lord Scarman in *Nock and Alsford*, the House of Lords did not commit themselves in *Haughton v. Smith* to the "sweeping . . . proposition . . . that he who, with intent to steal, picks a pocket but finds nothing to steal, must be acquitted of attempted theft".¹⁸⁴ The true position, according to Lord Diplock, was that in that case they did not say that the actual decision in *R. v. Ring*¹⁸⁵ was wrong, only that Lord Coleridge C.J. was in error in repudiating the authority of *R. v. McPherson* and *R. v. Collins*.¹⁸⁶ The first of these two cases was concerned with an attempt to steal goods specified in the indictment which had in fact been removed before the defendant broke into the house. In the second, "the offence charged was restricted to an attempt to steal from the person of a woman unknown property located in the very pocket in which one of the accused had put his hand", when there was no affirmative proof that there was anything in the pocket. On the other hand in *R. v. Ring* the charge was of attempting to steal from a person of a person unknown, which was "an attempt to steal from the person generally".¹⁸⁷ Lord Diplock concluded that "under an indictment drafted in suitably broad terms I see no reason why even the solitary pickpocket should not be convicted of attempted theft without the prosecution needing to prove that the particular pockets or handbags in which he was seen to put his hand in fact contained something which he would have stolen if he could".¹⁸⁸

2. Impossibility in other systems of law

2.66 The law elsewhere has developed along a different course from that followed in England and Wales, and we think it would be helpful to examine

¹⁸⁰ [1978] A.C. 979. The facts of this and subsequent cases dealing with conspiracy and impossibility are fully set out in Part III of this Report, below.

¹⁸¹ [1976] Q.B. 985, in which it was held no defence to a charge of conspiracy that the purpose of the conspiracy could not at the time of the agreement be achieved.

¹⁸² See Lord Scarman (with whose speech the other Law Lords agreed) at pp. 994 and 998.

¹⁸³ *Ibid.*, at p. 996.

¹⁸⁴ *Ibid.*, at p. 1000.

¹⁸⁵ See n. 161, above.

¹⁸⁶ See n. 162, above.

¹⁸⁷ *D.P.P. v. Nock and Alsford* [1978] A.C. 979, 991 per Lord Diplock.

¹⁸⁸ Per Lord Diplock in *D.P.P. v. Nock and Alsford* [1978] A.C. 979, 993. Lord Diplock explains *R. v. Easom* [1971] 2 Q.B. 315 (when the defendant, having removed a handbag in a darkened cinema and, on inspection of its contents, took nothing, leaving it within reach of the owner,

how the problem is treated in a number of common law and civil law jurisdictions.

(a) *Scotland*

2.67 In Scotland it has in effect been held that an accused who has placed his hand in an empty pocket with intent to steal commits attempted theft.¹⁸⁹ As Professor Gordon has pointed out¹⁹⁰ this proposition is difficult to reconcile with an earlier case¹⁹¹ in which it was held not to be attempted abortion to administer abortifacients to a non-pregnant woman. On the other hand it was held¹⁹² after the two cases already mentioned that it was attempted abortion to administer harmless drugs believed to be abortifacients to a pregnant woman. Although Professor Gordon considers that impossibility of any kind ought not to be a defence, he concedes that the present position under Scottish law may be that there is no general rule as to the effect of impossibility in attempt. "Whatever the complete definition of the full crime, there is in that definition some basic constituent element or elements which must be involved for there to be a successful charge of attempt. . . . What this is must be determined for each crime by reference to the authorities on that particular offence".¹⁹³

(b) *The draft Criminal Code of 1879*

2.68 The law in the Commonwealth and in the United States has been influenced by the Report of the English Criminal Code Commissioners of 1879¹⁹⁴ who formulated their treatment of impossibility in the law of attempt as follows—

"Everyone who, *believing that a certain state of facts exists, does or omits an act the doing or omitting of which would if that state of facts existed be an attempt to commit an offence*, attempts to commit that offence, although its commission in the manner proposed was by reason of the non-existence of that state of facts at the time of the act or omission *impossible*"¹⁹⁵ (emphasis added).

was considered *obiter* by the Court of Appeal to be not guilty of attempted theft) as a case where on the particular indictment for theft any attempt of which the defendant could have been found guilty would have had to be an attempt to steal the particular articles specified in the indictment. And on the facts there was no unequivocal intention permanently to deprive the owner of the bag of it or its particular contents. *Attorney General's References (Nos. 1 and 2 of 1979)* [1979] 3 WLR 577 makes it clear that, if Easom had been indicted for attempting to steal some or all of the contents of the handbag, he could have been convicted accordingly: see pp. 584-585 and 590, and Appendix E, below.

¹⁸⁹ *Lamont v. Strathern* 1933 J.C. 33.

¹⁹⁰ *Criminal Law*, (2nd ed., 1978) p. 197.

¹⁹¹ *H.M. Adv. v. Anderson* 1928 J.C. 1.

¹⁹² In *H.M. Adv. v. Semple* 1937 J.C. 41.

¹⁹³ Gordon, *op. cit.*, quoting J.A.C. Thomas, 1962, *Jur. Rev.* 127, 139.

¹⁹⁴ C. 2345.

¹⁹⁵ Sect. 74. A side note states that this declares the law differently from *R. v. Collins* (see para. 2.58 and n. 162, above).

(c) *Canada*

2.69 Section 24 (1) of the Criminal Code of Canada is as follows—

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

In *Regina v. Scott*¹⁹⁶ the charge against the defendant was that he “did unlawfully attempt to commit an indictable offence, to wit: did unlawfully attempt to steal cash valued at less than £50 . . . contrary to Section 406(c) of the Criminal Code”. It appeared that, although the pocket into which the defendant thrust his hand contained a wallet and various valuable papers, there was no money in the wallet. Nevertheless the majority of the Court held that “the proper and reasonable inference to be made under the circumstances that existed was that the appellant had the intent to steal money from the pocket” and that “the evidence established that the appellant did an act towards the accomplishment of that objective”, and was therefore guilty of a criminal attempt. It is also settled that to sustain a charge of attempted theft, the Crown is not required to prove what the defendant intended to steal or that it would have been possible to complete the theft.¹⁹⁷

(d) *Australia*

2.70 Section 4 of the Criminal Code of Queensland and section 4 of the Criminal Code of Western Australia provide as follows—

“When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt to commit the offence *It is immaterial that by reason of circumstances not known to the offender it is impossible to commit the offence*” (emphasis added).

It might at first be thought that the effect of the conclusion of the section is much limited by the words in its earlier part which require that the means used in an attempt should be adapted to the fulfilment of the complete offence. Thus it could be argued that what a person has in fact done (rather than what he thinks he is doing) must be adapted to the end (that is to say, the criminal offence) which he is seeking to achieve. However, it has been pointed out by an Australian commentator¹⁹⁸ that this limitation is only superficial and depends in each case on the particularity with which a court defines the means adopted. Thus, it is possible to say that a man can be guilty or not guilty of an attempt to kill when, intending to kill, he pulls the trigger of an unloaded gun, according to whether the means is regarded simply as a gun or as an unloaded gun.

2.71 Section 2 of the Criminal Code of Tasmania lays down that—

“(1) An attempt to commit a crime is an act or omission done or made with intent to commit that crime, and forming part of a series of events

¹⁹⁶ (1964) 2 C.C.C. 257 (Alberta Court of Appeal).

¹⁹⁷ *R. v. Gagnon* (1975), 24 C.C.C. (2d) 339 (Quebec Court of Appeal).

¹⁹⁸ Howard, *Australian Criminal Law*, (2nd ed., 1970) pp. 304-5

which if it were not interrupted would constitute the actual commission of that crime. (2) *The offence of attempting to commit a crime may be committed . . . whether under the circumstances it was possible to commit such crime or not*" (emphasis added).

2.72 Another Australian writer¹⁹⁹ has described this provision as "a pretty attempt to have the best of both worlds" and it certainly seems doubtful whether the reference to "an act or omission . . . forming part of a series of events which if it were not interrupted would constitute the actual commission of that crime" is to be taken literally. For example, it would seem likely that notwithstanding subsection (1) a person would be liable for an attempt to steal if, having thrust his hand into a pocket which is in fact empty, he were seized by a policeman. And in fact in *Haas v. The Queen*²⁰⁰ it was held that a physical attack intended to kill can be attempted murder notwithstanding that the blows struck could not cause death.

2.73 In the non-code States of Australia which have had to decide the question of impossibility on the basis of the common law there has been little tendency to treat impossibility as a bar to liability for attempt. Thus in *R. v. Linder*,²⁰¹ which concerned the supplying of pills with intent to procure a miscarriage, the pills in fact not being noxious, the Court of Criminal Appeal of South Australia only declined to substitute a verdict of attempt because of the absence of a finding that the defendant believed the pills to be noxious. This suggests that, given such belief, there would have been liability for an attempt, even though the pills were not noxious. In *McMillan v. Reeves*²⁰² it was held that an accused can be convicted of attempting to put a vehicle in motion under the influence of liquor even though for a mechanical reason it is impossible to start the car. And in *O'Sullivan v. Peters*²⁰³ it was held that the placing of a wager on a horse which unknown to the defendant had already been scratched from the race is an attempt to bet. It has been suggested²⁰⁴ that some difficulty arises with regard to the decision in *Stephens v. Abrahams*,²⁰⁵ where it was held that no charge of attempt to defraud the revenue would lie where a false invoice was submitted to customs officials in order to secure the release of goods which in fact were not subject to duty at all. However, as we shall argue in our conclusion, this is a case of a pure mistake of law as a result of which a person thought he was committing an offence when in fact he was not; in such circumstances he is not liable for committing a substantive offence because there is *ex hypothesi* no substantive offence for him to commit and he cannot be liable for an attempt because he is not intending to commit what in law is a crime.²⁰⁶

¹⁹⁹ Brett, *An Inquiry into Criminal Guilt* (1963) p. 127.

²⁰⁰ [1964] Tas. S.R. 1.

²⁰¹ [1928] S.A.S.R. 412.

²⁰² (1945) 62 W.N. (N.S.W.) 126. Compare *R. v. Farrance*, para. 2.64 and n. 175, above.

²⁰³ [1951] S.A.S.R. 54.

²⁰⁴ By Howard, *Australian Criminal Law* (2nd ed., 1970), pp. 301 *et seq.*

²⁰⁵ (1902) 27 V.L.R. 753; see paras. 2.88 and 2.98, below.

²⁰⁶ This is also the conclusion of the Criminal Law and Penal Methods Reform Committee of South Australia in their Fourth Report, *The Substantive Criminal Law*, (1977) at pp. 292-293.

2.74 Since the decision of the House of Lords in *Haughton v. Smith*²⁰⁷ the Criminal Law and Penal Methods Reform Committee of South Australia in their recent report²⁰⁸ have discussed the general question of impossibility in attempts. They refer to an unreported judgment²⁰⁹ of the Court of Criminal Appeal of South Australia in which *Haughton v. Smith* was followed. Bray C. J., however, said that he could see little ethical difference between a man who, intending to kill, puts an inadequate dose of arsenic into his wife's coffee, puts in a harmless substance thinking it is arsenic and puts in a harmless substance which he erroneously thinks has lethal qualities; yet according to Bray C. J.'s understanding of *Haughton v. Smith*, only in the first case would there be liability for attempted murder. The recommendation of the Committee was that there should be—

“a statutory statement of the law reaffirming the rule that factual impossibility is no defence to a charge of attempted crime and including some other expression of statutory intention that the rule should be applied strictly and without limitation based on different kinds of factual impossibility”.²¹⁰

2.75 It should finally be mentioned that section 52 of the Draft Criminal Code for the Australian Territories²¹¹ would define an attempt as follows—

“when a person intending to commit an offence engages in conduct which is or which he believes to be, a substantial step²¹² towards the commission of the offence, he is said to commit that offence” (emphasis added).

(e) *New Zealand.*

2.76 Turning to the law of New Zealand, we find that section 72(1) of the Crimes Act 1961 appears at first sight to eliminate any question of impossibility as a defence to a charge of attempt. Section 72(1) is as follows—

“Everyone who, having an intent to commit an offence, does or omits any act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended *whether in the circumstances it was possible to commit the offence or not*” (emphasis added).

In spite of this section, however, in *R. v. Donnelly*²¹³ (where the defendant was charged with attempting to receive stolen records after calling at a left luggage depot for goods which in fact had already been traced and collected by the police on behalf of the owner)²¹⁴ the New Zealand Court of Appeal by a majority (North P. and Turner J.) held that the concluding words of the section only relate to cases of pure factual impossibility, and were not

²⁰⁷ [1975] A.C. 476.

²⁰⁸ See n. 206, above, pp. 288-294.

²⁰⁹ *R. v. Collingridge*, judgment delivered 10th December 1976.

²¹⁰ See n. 206, above p. 294.

²¹¹ 1969, Parliament of the Australian Commonwealth, Parliamentary Paper No. 44.

²¹² The Draft Code adopts the “substantial step” test of the *actus reus*—see paras. 2.30 *et seq.*, above.

²¹³ [1970] N.Z.L.R. 980. We think it desirable to examine this case in some detail as it was extensively quoted with approval by Lord Hailsham of St. Marylebone L.C. in *Haughton v. Smith* [1975] A.C. 476 at p. 493: see para. 2.57, above.

²¹⁴ By s. 261 of the Crimes Act 1961 a subsequent receiving of goods, although once stolen, which have been restored to the owner, cannot amount to the substantive offence of receiving stolen goods.

applicable to legal impossibility even though the latter arose by reason of a fact unknown to the defendant. Thus, "he who walks into a room intending to steal, say, a specific diamond ring, and finds that the ring is no longer there, but has been removed by the owner to the bank, is thus prevented from committing the crime which he intended and which, but for the supervening physical impossibility imposed by events, he would have committed".²¹⁵ Nevertheless "the would-be criminal is guilty of attempting to steal the diamond ring, though the theft was as a matter of fact physically impossible".²¹⁶ On the other hand, the majority considered that the defendant in the case before them "intended, no doubt, to do acts which he thought amounted to an offence; but these acts do not in law amount to an offence. . . . What the appellant intended to do, therefore, was *to do something which was not an offence*" (emphasis in original). There was no reason why the defendant's "mistaken belief that what he was doing was a crime should convict him, if in fact all the acts which he did or attempted to do would not in law amount to a criminal offence".²¹⁷

2.77 In his dissenting judgment in *R. v. Donnelly* Haslam J. stated that "the particular form of mens rea prescribed in [section 72(1)] entails the accused having in mind a purpose which, on the facts as he believes them to be, would constitute a crime. In my opinion the concluding phrase in S.72(1) makes irrelevant what may be described as an objective impossibility in the circumstances to commit the offence intended. These considerations must apply in every instance, whether or not legal consequences also arise from the factual impossibility. In the present instance, there was ample evidence that Donnelly intended to commit the crime of receiving and presented the ticket for the purpose of accomplishing that object". Furthermore, in commenting on this case, it has been pointed out, in our view persuasively, that irrespective of the point of interpretation arising on section 72(1), "the essence of attempt is surely the intention of the accused together with sufficiently proximate acts and so long as the actus reus is present it would seem to be illogical to distinguish between legal and factual impossibility since in both cases the intention is identical".²¹⁹ And in its report of January 1973 on "The Law relating to the Frustration of Attempts by Impossibility" the New Zealand Criminal Law Reform Committee drew attention to the practical difficulties in regard to detecting the receiving of stolen goods which are created by the decision in *R. v. Donnelly*. While coming to no definite conclusion as to whether the majority view or that of Haslam J. on the general effect of impossibility in attempts was to be preferred, they recommended that the existing law of receiving should be amended to make it an offence to receive property "which the accused believed to have been stolen, unless he believes when he receives it that it has already been restored to the owner".

²¹⁵ [1970] N.Z.L.R. 980 at p. 991, *per* Turner J.

²¹⁶ *Ibid.*,

²¹⁷ *Ibid.*, at p. 992.

²¹⁸ [1970] N.Z.L.R. 980, 994.

²¹⁹ [1971] Crim L.R. 702, 705. The distinction in this context between factual and legal impossibility is discussed in paras. 2.88-2.89, below. It is noteworthy that while Lord Hailsham of St. Marylebone L.C. quoted extensively from the majority judgment of Turner J. in his speech in *Haughton v. Smith*, no reference was made to the cogent views of Haslam J's dissenting judgment: see n. 213, above.

(f) *South Africa*

2.78 The question of impossibility in the law of attempt has also been raised in the law of South Africa²²⁰ and is now generally regarded as settled since the decision of the Appellate Division in *R. v. Davies*.²²¹ In that case the accused was found guilty of attempted abortion although the foetus was already dead when the attempt was made; “the fact that an accused’s criminal purpose cannot be achieved, whether because the means are, in the existing or in all conceivable circumstances, inadequate or because the object is, in the existing or in all conceivable circumstances, unattainable, does not prevent his endeavour from amounting to an attempt”.²²²

(g) *United States of America*

2.79 In the United States section 5.01(1) of the American Law Institute’s Model Penal Code provides as follows—

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

- (a) purposely engages in conduct *which would constitute the crime if the attendant circumstances were as he believes them to be*; or
- (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing, *or with the belief that it will cause such result* without further conduct on his part, or
- (c) purposely does or omits to do anything which, *under the circumstances as he believes them to be*, is an act or omission constituting a substantial step²²³ in the course of conduct planned to culminate in his commission of the crime” (emphasis added).

The purpose of section 5.01(1) is stated in the Commentary²²⁴ to be “to extend the criminality of attempts by sweeping aside the defence of impossibility (including the distinction between so-called factual and legal impossibility) [and by drawing the line between attempt and non-criminal preparation further away from the final act],²²⁵ the crime becomes essentially one of criminal purpose implemented by an overt act strongly corroborative of such purpose”.

2.80 Generally speaking the United States cases on impossibility in attempts are, at least as far as “physical” or “factual” impossibility is

²²⁰ See Burchall and Hunt, *South African Criminal Law and Procedure*, (6th ed., 1957) Vol. 1, p. 139.

²²¹ 1956 (3) S.A. 52 (A.D.).

²²² *Ibid.*, at p. 64.

²²³ The Model Penal Code makes use of the concept of a “substantial step” in defining the actus reus of attempt, as to which see paras. 2.30, *et seq.*, above.

²²⁴ See Tentative Draft No. 10 of the Model Penal Code, p. 25.

²²⁵ The words here within square brackets are concerned with the “substantial step” test of a proximate act in attempt, as to which see n. 223, above.

concerned,²²⁶ in line with the principles formulated in the Model Penal Code.²²⁷ But as is hinted at in the Commentary to the Code there have been conflicting decisions on “legal” impossibility and indeed some uncertainty as to what “legal” impossibility for this purpose signifies. In some cases where it has been held that a man cannot be held liable for an attempt, “legal” impossibility of the aimed-at offence, which precludes a charge of attempt, means no more than this: that where the accused, being under no mistake as to the facts of a situation, seeks to do something which is not criminal, “the principle of legality implies that . . . an attempt to cause [it] is not criminal”.²²⁸ However in *People v. Jaffé*²²⁹ legal impossibility as a bar to a charge of attempt was given a wider scope. The accused in that case was charged with attempting to receive stolen goods which at the time they were offered to him were in the custody and control of the true owners. In denying that he could be guilty of an attempt the New York Court of Appeals laid down generally that “if all which an accused person intends to do would if done constitute no crime, it cannot be a crime to attempt to do with the same purpose a part of the thing intended”.²³⁰ They did not consider how far this seemingly unanswerable proposition would be affected by cases in which “what the accused intended to do” was vitiated by a mistake of fact rather than a mistake as to the legal consequences of what he did.²³¹

2.81 *People v. Jaffé* was cited with approval by Lord Hailsham of St. Marylebone L.C. in *Haughton v. Smith*²³² and preferred to the later and conflicting decision of a Californian court in *People v. Rojas*.²³³ But no doubt because it was not cited in argument, he made no reference to the more recent

²²⁶ For example: *Commonwealth v. Kennedy* (1897) 170 Mass 18; 48 N.E. 770 (conviction of attempted murder upheld by Holmes J. even though no allegation that poison put in intended victim's moustache cup was strong enough to kill. Holmes pointed out that even in less serious crimes impossibility of achievement is not necessarily a defence, citing as examples picking an empty pocket and seeking to procure the abortion of a non-pregnant woman); *State v. Mitchell* (1902) 170 Mo 639; 71 SW 175 (charge of attempted killing upheld when accused shoots into window at intended victim who was however in another room at the time); *People v. Gill* (1954) 126 Cal 2d 291; PL 575 (charge of attempted possession of drugs upheld where accused was handed dummy drug packet by colleague acting on superior orders. Californian law stated to be: “if a person formulates the intent and then proceeds to do something more which in the usual course of natural events will result in the commission of a crime, the attempt to commit that crime is complete. And even though the intended crime could not have been completed due to some extrinsic fact unknown to the person who intended it, still he is guilty of an attempt”); *US v. Thomas and McCallam* (1962) 13 US C.M.A. 278; 32 CMR 278 (attempted rape upheld where woman already dead unknown to would-be rapists).

²²⁷ See Inbau, Thompson and Zagel, *Criminal Law and its Administration*, (2nd ed., 1974) p. 409.

²²⁸ Hall, *General Principles of Criminal Law*, (2nd ed., 1960) P. 595. Among other examples Hall cites the case of a boy, legally incompetent because of his age to commit rape, not being guilty of attempted rape (*State v. Fisk* (1906), 15 N.D. 589; 108 N.W. 485). Compare *R. v. Williams* [1893] 1 Q.B. 320, in which Lord Coleridge C.J. said *obiter* at p. 321 that, as a boy under fourteen could not be convicted of rape, he could not “be convicted of attempting to do that which the law says he was physically incapable of doing”. Hawkins J. did not assent to this proposition and Cave J. reserved his opinion on it.

²²⁹ (1906) 185 N.Y. 497; 78 N.E. 169, N.Y. Ct. of Appeals.

²³⁰ The similarity to the much cited dictum of Birkett J. in *R. v. Percy Dalton (London) Ltd.* (see para. 2.55 and n. 153, above) will be noted.

²³¹ See further, para. 2.89, below.

²³² [1975] A.C. 476, 497.

²³³ (1961) 55 Cal. 2d 252; 358 P. 2d 921.

New York case of *People v. Rollins*,²³⁴ where the issue was whether a charge of attempt to steal would lie where goods were handed over to the would-be thief with the consent (unknown to the thief) of the owner and where Shapiro J. gave a very full review of the cases and the literature.²³⁵ Although Shapiro J. felt bound to follow *People v. Jaffé* he regretted that the law in New York was not as in California.²³⁶ In fact the law of New York was changed in 1967 and now provides—

“If the conduct in which a person engages otherwise constitutes an attempt to commit a crime pursuant to s. 110, it is no defence to a prosecution for such attempt that the crime charged to have been attempted was under the attendant circumstances factually or legally impossible of commission if such crime would have been committed had the attendant circumstances been as such person believed them to be.”²³⁷

(h) *France*

2.82 Before putting forward our own conclusions and recommendations we turn finally to the civil law which, at all events as far as the development of the law in France and Germany is concerned, appears to have been faced with similar problems in regard to the law of attempts and, at least in the past, to have given rise to similar conflicts of opinion. Article 2 of the French Criminal Code of 1810 dealt with the crime of attempt as follows—

“Every attempt to commit a felony manifested by commencement of execution is treated like the completed felony, if it has been discontinued or if it has not succeeded only because of circumstances independent of the perpetrator’s will.”

In the 19th century the provision was interpreted to mean that a person could be criminally liable for seeking to commit a felony if the contemplated felony was relatively impossible as distinguished from absolutely impossible. It was held, for example, that a person could be liable for attempted murder if he fired into a room erroneously thinking his intended victim was sleeping there.²³⁸ This was regarded as only relative impossibility, whereas it was held that there could be no attempt to procure the abortion of a woman who was not in fact pregnant,²³⁹ this being a case of absolute impossibility. The distinction, however, was later criticised on the ground that there are no degrees of impossibility; it is as impossible to shoot someone by firing into an empty room as it is to procure the abortion of a woman who is not pregnant. The more modern view of the courts has been that liability for attempt is “subjective” in the sense that it depends on the accused’s intention to commit a crime and on the accused’s commencement of action intended to achieve that end. Thus in 1928 the Cour de Cassation held²⁴⁰ a husband

²³⁴ (1962) 37 Misc. 2d 14; 233 N.Y.S. 2d 580. Sup. Ct. N.Y.

²³⁵ In particular J.C. Smith, (1957) 70 Harv. L.R. 422 and Hall, *op. cit.*

²³⁶ See n. 226, above.

²³⁷ Revised New York Penal Law, s. 110(10); see further para. 2.31, above.

²³⁸ Crim. 2 April 1877. S. 1877 I 329.

²³⁹ Crim. 8 Jan. 1859. S. 1859 I 362.

²⁴⁰ Crim. 9 Nov. 1928. D 1929. I 97. This key decision has been followed in a number of other decisions concerning abortion since 1929. See Bouzat and Pinatel, *Traité de Droit Pénal et de Criminologie*, Tom I (2nd ed., 1970) p. 300, n. (5). There has however been some conflict of decisions as to whether an attempt lies in respect of a crime directed against someone who is already dead. See Bouzat and Pinatel, *op. cit.* n. (7).

and wife guilty of an attempt to commit an abortion after they had administered a substance to their servant which of its nature could not be an abortifacient. The draft Revision of the Criminal Code of 1934²⁴¹ gave expression to this subjective view in providing—

“Attempt is punishable even though the end sought could not be attained because of a fact unknown to the actor”²⁴² (emphasis added).

(i) *Germany*

2.83 Article 22 of the General Part of the German Criminal Code in the revised version of 1969 makes explicit what was left unsaid in the old article 43(1)²⁴³ of the German Criminal Code. Article 22 is as follows—

“An attempt to commit a crime takes place if anyone *in the light of his understanding of the facts* sets out directly to bring into operation the prescribed elements of a crime” (emphasis added).

Even before Article 22 came into force the courts had held that there could be liability for an attempt irrespective of whether the means adopted were inadequate or the object aimed at was impossible or indeed whether the attempt was impossible for both reasons; thus the Reichsgericht had held that a charge of attempt to procure abortion lay where the means adopted were incapable of producing an abortion and the woman on whom the attempt was made was not pregnant.²⁴⁴

(j) *Conclusion*

2.84 It is evident from this survey of the ways in which attempting the impossible is treated in foreign systems of law that the vast majority differ from the approach now adopted in England and Wales following the decision in *Haughton v. Smith*. Of those which we have examined, only New Zealand and, with apparent reluctance, South Australia clearly limit the situations in which it is an offence to attempt to commit a crime which in the circumstances it is impossible to commit. In all other instances, both in common law and civil law systems, factual impossibility is apparently no bar to a charge of attempt. Against this background, we now examine the policy and practical implications of the law of England and Wales.

3. Consideration of the present law

2.85 In paragraphs 2.61–2.64 we referred to the fine distinctions and practical difficulties which have arisen following the decision of the House of Lords in *Haughton v. Smith*.²⁴⁵ In *D.P.P. v. Nock and Alsford*,²⁴⁶ however, the House of Lords suggested, as summarised in paragraph 2.65, that the effect of the earlier decision was less wide than had generally been thought. The

²⁴¹ This is not in force.

²⁴² Article 108.

²⁴³ Article 43(1) provided: “Anyone who manifests a decision to commit a felony or gross misdemeanour by acts constituting the commencement of the execution of such felony or gross misdemeanour, shall be punished for attempt if the intended felony or gross misdemeanour has not been completed.”

²⁴⁴ R.G. St. 34.218.

²⁴⁵ [1975] A.C. 476.

²⁴⁶ [1978] A.C. 979.

suggestion was that if an attempt to commit a crime were charged in “sufficiently broad terms”²⁴⁷ the actual impossibility of completing the crime aimed at in the particular manner adopted would not preclude a conviction for an attempt to commit that crime. As Lord Diplock said²⁴⁸—

“The crime which the pickpocket sets out to commit is not confined to stealing from a particular person or *a fortiori* from a particular pocket in a particular person’s clothes or from a particular article carried by a particular person. When he converts intention into attempt by the proximate act of extending his hand to a particular pocket or article, failure at this point to effect his intention of stealing, because where he first puts his hand there is nothing to steal, does not mean that the course of conduct that he intended to pursue would have ended with this initial failure and would not have continued until he had found something to steal in some similar place and stolen it.”

The underlying policy consideration would appear to be that person who has a general intent to commit a crime is a social danger and should be liable for attempt to commit it even if the particular attempt in the course of which he has been caught was in fact impossible, whereas there is no social danger in a man setting out to commit only one crime in a particular context if the commission of the crime in that context is in fact impossible. It is necessary to examine whether this elucidation of the principles of *Haughton v. Smith* is satisfactory, and in any event whether continued support for the policy of that case is the right course for the future. We examine first *Nock and Alford* in order to assess its implications from the point of view of policy and practice.

2.86 We have pointed out that in *Nock and Alford* the House of Lords supported the early decisions in *R. v. Ring* and *R. v. Collins*, in the sense that it considered that both could be regarded as rightly decided on the form of the indictments in those cases.²⁴⁹ But the rationale for the case of *Ring* suggested by the House of Lords does entail the substitution of a general intention to commit crimes of a particular class for a specific intention to commit one crime in particular circumstances. This surely undermines the doctrine that proximate acts are a necessary element in liability for attempt; for clearly the basis of the law of attempt is not mere guilty intention but guilty intention together with proximate acts, and the substitution of a general intention to commit crimes inevitably links the appropriate mens rea less directly to the acts relied on as the actus reus of the attempt. The extracts which we have quoted above from Lord Diplock’s speech²⁵⁰ seem to suggest that the act of putting the hand into a particular person’s empty pocket is evidence of the “proximity” of that act, not to the attempt to steal from that person, but to the stealing thereafter from the pocket of some other person in which the intending thief might actually succeed in finding money

²⁴⁷ [1978] A.C. 979, 993 *per* Lord Diplock; precisely which terms would be considered suitable is not clear, but we indicate in Appendix E below the terms in which, having regard to *Attorney General’s References (Nos. 1 and 2 of 1979)* [1979] 3 WLR 577, it now appears that indictments may be drafted in cases where it is not clear that the defendant intended to steal specific identifiable items of property.

²⁴⁸ *Ibid.*, at p. 993.

²⁴⁹ See para. 2.65, above, and [1978] A.C. 979, 991 *per* Lord Diplock.

²⁵⁰ See paras. 2.65 and 2.85, above; and see the comment in [1978] Crim. L.R. at p. 486.

or something worth stealing. This explanation is in our view difficult to reconcile with the concept of proximity as explained by the House of Lords in other recent cases.²⁵¹

2.87 If our comments correctly summarise the effect of *Nock and Alford* in this respect, the case raises major practical difficulties: the problem of charging a specific actus reus coupled with a general mens rea to commit crimes of the class into which the actus reus falls, and also the evidential problem of proving a general intent to commit a crime on any available occasion from evidence of an intent limited to the particular circumstances of the attempt in the course of which the defendant was caught. Framing an indictment in "suitably broad terms" may be appropriate in cases such as pick-pockets where it is legitimate to infer a general intent to commit a particular class of crime from proof of one attempt. But most cases will call for evidence of such a general intent over and above that relating to the specific "impossible" attempt with which the defendant is charged. It is difficult to see where that evidence is to come from other than a confession by the accused, and also, in those cases where it can be obtained from another source, how it is distinguishable from inadmissible evidence as to a general disposition to wrongdoing.²⁵² These difficulties of proof may well be among the reasons why in several instances Parliament has seen fit to create separate substantive offences, such as going equipped for stealing etc. under section 25 of the Theft Act, when the acts rendered criminal are really acts preparatory to the main substantive offences. We conclude that if there is any basis for the criticisms²⁵³ made of the decision of the House of Lords in *Haughton v. Smith*, they do not appear to be satisfactorily met by the explanation of that decision later made by the House in *D.P.P. v. Nock and Alford*. The basic question we have to consider is therefore whether the law as laid down in *Haughton v. Smith* is satisfactory.

2.88 We think it would have been helpful if in *Haughton v. Smith* a clearer distinction had been made between a case in which factual impossibility as a defence to a charge of attempt is in issue and a case where as an inevitable logical deduction from "the principle of legality"²⁵⁴ no question of a criminal attempt can arise. The latter type of case arises where a person solely by reason of an error as to the general criminal law believes that certain conduct constitutes a criminal offence. For example, the defendant is under the mistaken impression that it is a criminal offence to have sexual intercourse with a girl over 16 but under 18; neither such intercourse nor *a fortiori* attempting it is a criminal attempt. There has been general agreement among commentators

²⁵¹ See *Haughton v. Smith* [1975] A.C. 476 and *D.P.P. v. Stonehouse* [1978] A.C. 55, and paras. 2.40-2.43, above.

²⁵² See Cross, *Evidence* (5th ed., 1979) Ch. 14, pp. 354 *et seq.*

²⁵³ E.g. Glanville Williams, [1974] C.L.J. 31 and *Textbook of Criminal Law* (1978) pp. 392 *et seq.*; J.C. Smith, [1974] Crim. L.R. 305. A more favourable view of the House of Lords' decision is taken by Temkin, (1976) 39 M.L.R. 55, and Rowell, (1978) 128 New L.J. 716. As to *D.P.P. v. Nock and Alford*, see [1978] Crim. L.R. 483, Glanville Williams, "Compounding the Confusion in Inchoate Offences" (1978) 128 New L.J. 724, and Temkin, "When is a Conspiracy like an Attempt—and other Impossible Questions" (1978) 94 LQR 534.

²⁵⁴ See Jerome Hall, *General Principles of Criminal Liability*, 1960, p. 586: "unless the intended end is a legally proscribed harm, causing it is not criminal, hence any conduct falling short of that is not a criminal attempt."

on Working Paper No. 50²⁵⁵ as well as by courts²⁵⁶ and legal writers²⁵⁷ in this country and overseas that any charge of criminal attempt is inappropriate in such a case.

2.89 Some courts have however stated the “principle of legality” mentioned in the preceding paragraph in language which, although capable of covering that principle and for that reason attracting ready agreement, is in fact used for a somewhat different purpose. A much cited dictum²⁵⁸ in this connection is that of Birkett J. in *R. v. Percy Dalton* which we have quoted in paragraph 2.55, above. “Steps on the way to the doing of something, which is thereafter done, and which is no crime, cannot be regarded as attempts to commit a crime” clearly disposes of any charge of attempt in respect of a man who has sexual intercourse with a girl of that age. But if the “doing of something” refers solely to the physical action of the accused and does not include the results at which that action is aimed, then there will be a very much wider range of cases where no charge of attempt will be possible. Thus in *Haughton v. Smith*²⁵⁹ the intention to handle *stolen* property was disregarded; what was taken as excluding a charge of attempt was that the intended physical acts of the defendant in relation to the property did not amount to a criminal offence, not because he was mistaken as to the law about handling stolen property but because he had been ignorant of the history of the goods in question. Similarly, in *D.P.P. v. Nock and Alford*,²⁶⁰ where the issue related to conspiracy rather than attempt, the emphasis was put, not on the ultimate object which was to make cocaine (clearly an illegal act), but on the specifically limited agreement to work on a particular substance (which since it contained no cocaine was not illegal) even though the intended but actually unattainable objective was to obtain cocaine.

2.90 It seems that the interpretation put by the House of Lords on Birkett J.’s dictum in *R. v. Percy Dalton*, which greatly narrows the field in which a charge of attempt may be brought, was ultimately influenced by a consideration of policy which is emphatically stated by Lord Reid in *Haughton v. Smith*²⁶¹—

“The theory [that there can be an attempt to commit an offence, which in fact could not be committed, if the accused does not know the true facts but erroneously believes the facts to be such that his conduct would

²⁵⁵ See para. 126 where it was stated that there could be no liability for an inchoate offence where there was no substantive crime except in the mind of the defendant.

²⁵⁶ See n. 228 above, and Lord Hailsham of St. Marylebone L.C. in *Haughton v. Smith* [1975] A.C. 476, 496 where he agreed with Lord Coleridge C.J.’s *obiter dictum* in *R. v. Williams*, as cited in n. 228, above.

²⁵⁷ An exception is Brett in *An Inquiry into Criminal Guilt*, (1963) p. 129 who there argues that the person who is prepared to defy what he believes to be the law in order to pursue his selfish ends shows himself to be a dangerous man, standing in need of punishment, correction or treatment. See also Gordon, *Criminal Law* (2nd ed., 1978), p. 196.

²⁵⁸ It was for example cited with approval by Lord Widgery C.J. in the Court of Appeal in *Haughton v. Smith* [1975] A.C. 576, 482, and by Lord Hailsham of St. Marylebone L.C. (p. 487) and Lord Reid (p. 500).

²⁵⁹ [1975] A.C. 476.

²⁶⁰ [1978] A.C. 979.

²⁶¹ [1975] A.C. 476, at pp. 498 and 500.

be an offence if the facts had been as he believes them to be] is really an attempt to punish people for their guilty intentions. The man who stabs the corpse may be as deserving of punishment as a man who attempts to murder a living person. The accused in the present case may be as deserving of punishment as he would have been if the goods had still been stolen goods. But such a radical change in the principles of our law should not be introduced in this way even if it were desirable.”

We do not however think that to disregard impossibility in relation to attempts would necessarily be so revolutionary a departure from the basic principles of English law as Lord Reid suggested. It would not mean that a man would be liable for an attempt by reason of his intent alone. An attempt would still require a proximate act as well as an intent although the proximity of the act would have to be judged in the light of the facts as the defendant believed them to be. Thus suppose A intends to kill B by means of what he believes to be a bottle of poison. In any possible charge of attempted murder A's guilty intention would certainly loom large but it would by no means be the only ingredient. There would also have to be evidence of an *actus reus* sufficient to amount to an attempt, of which an extreme example would be his act of administering the contents of the bottle; that act would be judged in the light of what he believed it to contain.

2.91 It is true that the decision of principle of the House of Lords in *Houghton v. Smith* was subject to the important qualification that an attempt which fails by reason of the insufficiency of the means adopted may be criminal; but it seems to us that the qualification is not only of indeterminate extent but also difficult to rationalise from the point of view of policy. A number of examples may be given which indicate its drawbacks. Lord Hailsham of St. Marylebone L.C.²⁶² himself recognised that it may be difficult to distinguish between impossibility of means and impossibility of the objective sought, giving as one example a case where from one point of view it might be said that only the means were insufficient, because a gun has too short a range to reach the intended victim, or from another point of view that the objective could not be achieved because the victim was too far off. Lord Hailsham was confident that in this particular case an attempt would clearly be criminal, but Lord Reid²⁶³ seemed to think that the effect of impossibility on a charge of attempt, as far as the position of the intended victim was concerned, would be a matter of degree; on that basis it would follow that one could not attempt to kill another who was a mile off with a revolver, however much one intended the crime and however complete one's belief in the range of one's weapon. Again, Lord Hailsham gave Turner J.'s example²⁶⁴ of a man “who walks into a room intending to steal, say a specific diamond ring, and finds the ring is no longer there but has been removed by the owner to the bank”. He was of the opinion that in such a case no charge of attempted theft would lie.²⁶⁵ Yet it is only necessary slightly to elaborate the facts to see what arbitrary lines of policy are thus determined. If the owner of the ring, suspecting an attempt to steal it, changes the lock

²⁶² [1975] A.C. 476, 494.

²⁶³ *Ibid.*, p. 500.

²⁶⁴ In *R. v. Donnelly* [1970] N.Z.L.R. 980, quoted by Lord Hailsham at p. 493.

²⁶⁵ [1975] A.C. 476, 495.

on the door, the would-be thief who tries out his now useless key on the lock has only used inadequate means and can be guilty of an attempt to steal; but if the owner has removed the ring to the bank the would-be thief is not guilty. The facts of *D.P.P. v. Nock and Alsford* suggest similar inconsistencies: it is clear that the defendants were not convicted of attempting to produce cocaine because the powder they were attempting to separate contained no cocaine. Yet if that powder had in fact partly consisted of cocaine and their failure was due to an optimistic use of an inadequate and inappropriate reagent, it seems that they would have been guilty of an attempt.²⁶⁶ Finally, one may contrast the case of the intending murderer who doses his victim with too weak a solution of poison with that of another who administers an entirely innocent liquid.²⁶⁷ Both believe that what they are giving is lethal. The only possible explanation which can be given for holding the former guilty of attempted murder and the latter not guilty is that the actions of the former were in some sense more dangerous than those of the latter. The explanation itself poses the question of how weak the mixture has to be before it becomes innocent.

2.92 Results as capricious as these do not seem acceptable in the criminal law, yet it is common ground among the proponents of the principle in *Haughton v. Smith* that it is subject to the qualification that liability for attempt should attach where the only reason for failure to commit the full crime is the inadequacy of the means employed. This qualification seems to us so uncertain in its application as to throw doubt on the principle itself.

2.93 We are very conscious that the whole problem of impossibility in relation to attempts has been recently reviewed by the House of Lords in two cases in which, although there were a number of separate opinions, there was a wide measure of agreement and an absence of dissenting speeches. In these cases it was also evident that the views expressed did not purport to be merely an elucidation of the existing law but were also felt to be justified on grounds of policy and principle.²⁶⁸ Nevertheless our review of the present law as determined by the two cases in the House of Lords leads us to the conclusion that it is over-analytical in its approach, uncertain in its application and produces results which informed public opinion would regard as capricious. Furthermore, it is out of line with the approach of most other systems of law to which we have drawn attention above.²⁶⁹

2.94 It seems to us necessary therefore to argue the matter from first principles and try to reach a conclusion which is reasonably simple and certain and, so far as possible, in accordance with every day notions of justice.

2.95 The problem we are considering is not easy of solution, not least because both the proponents and opponents of the principle in *Haughton*

²⁶⁶ Compare *R. v. Harris*, (1979) 69 Cr. App. R. 122 and para. 3.5, below.

²⁶⁷ See para. 2.58, above.

²⁶⁸ See Lord Scarman in *D.P.P. v. Nock and Alsford* [1978] A.C. 979, 997 with whose speech the other Law Lords (Lords Diplock, Edmund-Davies, Russell of Killowen and Keith of Kinkel) agreed: "[*Haughton v. Smith*] is, in my respectful opinion correct in principle. I would not question the decision, though its proper limits may have to be considered."

²⁶⁹ See paras. 2.67-2.84, above.

v. *Smith* regard commonsense as their ally. There are borderline cases which ever approach is adopted. Lord Reid regarded the answers to the questions he posed in *Haughton v. Smith* in relation to the man who stabbed a corpse and the man who married a woman whose husband he believed to be alive as too clear for argument.²⁷⁰ We respectfully disagree. We agree with Lord Reid that the man who picks an empty pocket cannot be convicted of theft. We further agree that “the ordinary man would say without stopping to think—of course he was attempting to steal”;²⁷¹ but, in so far as Lord Reid implied that after stopping to think the ordinary man would reach a different conclusion, we again respectfully disagree. We think that he would still take the view that this was attempted theft and we consider that the law should reflect this belief.

2.96 We think it would be generally accepted that if a man possesses the appropriate mens rea and commits acts which are sufficiently proximate to the actus reus of a criminal offence, he is guilty of attempting to commit that offence. Where, with that intention, he commits acts which, if the facts were as he believed them to be, would have amounted to the actus reus of the full crime or would have been sufficiently proximate to amount to an attempt, we cannot see why his failure to appreciate the true facts should, in principle, relieve him of liability for the attempt. We stress that this solution to the problem does not punish people simply for their intentions. The necessity for proof of proximate acts remains. The fact that the impossibility of committing the full crime reduces the social danger is adequately reflected in the generally milder penalty which an attempt attracts instead of that for the full offence. And even if it is conceded that there may be some reduction in the social danger in cases of impossibility, it has to be borne in mind that a certain social danger undoubtedly remains. Defendants in cases such as *Haughton v. Smith* and *Nock and Alsford* are prepared to do all they can to break the criminal law even though in the circumstances their attempts are doomed to failure; and if they go unpunished, they may be encouraged to do better at the next opportunity. Finally, if the solution under consideration is accepted, it makes it possible to dispense with the doctrine of “inadequate means” and with strained efforts to catch those who might otherwise escape by resort to broadly drawn indictments and an “inferred general intention”.

2.97 If it is right in principle that an attempt should be chargeable even though the crime which it is sought to commit could not possibly be committed, we do not think that we should be deterred by the consideration that such a change in our law would also cover some extreme and exceptional cases in which a prosecution would be theoretically possible. An example would be where a person is offered goods at such a low price that he believes that they are stolen, when in fact they are not; if he actually purchases them, upon the principles which we have discussed he would be liable for an attempt to handle stolen goods. Another case which has been much debated²⁷² is

²⁷⁰ [1975] A.C. 476, 500.

²⁷¹ *Ibid.*, at p. 499.

²⁷² See e.g. Lord Morris of Borth-y-Gest in *Haughton v. Smith* [1975] A.C. 476, 502, and Viscount Dilhorne, *ibid.*, at p. 506. Both thought that taking one's own umbrella in mistake for another's could not be theft.

that raised in argument by Bramwell B. in *R. v. Collins*.²⁷³ If A takes his own umbrella, mistaking it for one belonging to B and intending to steal B's umbrella, is he guilty of attempted theft? Again, on the principles which we have discussed he would in theory be guilty, but in neither case would it be realistic to suppose that a complaint would be made or that a prosecution would ensue. On the other hand, if our recommendations were formulated so as to exclude such cases, then it might well be impossible to obtain convictions in cases such as *Haughton v. Smith*, where a defendant handles goods which were originally stolen, intending to handle stolen goods, but where, unknown to him, the goods had meanwhile been restored to lawful custody. Another example of possible difficulty which has been suggested is where a person in the erroneous belief that he can kill by witchcraft or magic takes action—such as sticking pins into a model of his enemy—intending thereby to bring about his enemy's death.²⁷⁴ Could that person be charged with attempted murder? It may be that such conduct could be more than an act of mere preparation on the facts as the defendant believes them to be; and in theory, therefore, it is possible that such a defendant could be found guilty.²⁷⁵ In the ordinary course, we think that discretion in bringing a prosecution will be sufficient answer to any problems raised by such unusual cases; but even if a prosecution ensued, it may be doubted whether a jury would regard the acts in question as sufficient to amount to an attempt.

2.98 A possible difficulty of another kind which we have considered is the distinction which it will be necessary to draw between impossibility arising from misapprehension as to the facts and impossibility arising from a misapprehension of the law in situations which at first sight appear to be similar. As we have seen, if the defendant believes, because of a mistake of law, that certain conduct constitutes an offence when it is not, he should not be liable for attempt if he acts in accordance with his intent.²⁷⁶ For example, the

²⁷³ (1864) 9 Cox C.C. 497.

²⁷⁴ See Glanville Williams, *Criminal Law, the General Part*, (2nd ed., 1961) p. 652, who thinks if a man administers salt to his enemy believing it to be poisonous, he should probably be guilty of an attempt, "for one who [does so] is somewhat dangerous; when he fails with salt he may hit on weedkiller". Hall, *General Principles of Criminal Law*, (2nd ed., 1960) would take the discussion out of the sphere of attempts altogether, at least as far as the law in the United States is concerned, in suggesting that "extreme mistakes regarding the external world would be symptomatic of severe mental disorder". Howard, *Australian Criminal Law*, (2nd ed., 1970) discussing the case of a man who tries to kill his enemy by sticking pins secretly into a model of him, says the man's intention is "too far removed from reality to be taken seriously", as far as circumstances in Australia are concerned. In German law, according to Schwarz-Dreher, *Strafgesetzbuch* (30th ed., 1968) p. 207, an intention to commit a crime by prayer, a pact with the Devil or sympathetic magic is not allowed to undermine the general inadmissibility of impossibility as a defence to attempt; the aim will be regarded as a hope or aspiration rather than a legal intention.

²⁷⁵ In the South African case of *R. v. Davies* 1956 (3) S.A. 52 (A.D.) (see para. 2.78, above), Schreiner J.A. said at p. 63 "an attempt to kill by incantations would in a civilised community be similarly explainable [as a mere intention to frighten the victim or as indicating that the defendant was not mentally responsible], but among primitive persons that might be a real danger to life. Fears of the effect of the incantation might itself cause death to the victim or, if an endeavour to kill by incantations failed, further efforts might be made along more orthodox lines". It should also be noted that in this type of case a defendant may in theory already be liable on the principles of *Haughton v. Smith* since it is arguable that he fails in his objective solely because of his use of inadequate means: see para. 2.91, above.

²⁷⁶ See para. 2.88, above.

defendant intends to smuggle certain goods through the customs in the belief that they are dutiable; under the relevant law those goods are in fact not dutiable. He has made no mistake as to the nature of the goods: his error is solely one of law, and if he imports them he should not be liable for an attempt improperly to import goods without paying duty, since he had no intent to commit an offence known to the law.²⁷⁷ The position is different if the defendant is asked while abroad to smuggle into the country goods which he is assured by the person making the request are goods which are actually dutiable, but which are not in fact dutiable because they are not what he believes them to be. Here the defendant's error arises solely from his misapprehension as to the nature of the goods; it is a pure error of fact. He has every intention of committing an offence on the facts as he believes them to be, and if he succeeds in importing the goods or in getting sufficiently close to his objective, he must be liable for an attempt upon the principles which we have been considering. Fine as the distinction appears to be in these cases, it is one which is in our view vital to make. Provided that any legislation giving effect to the principle of factual impossibility makes the distinction sufficiently clear, we think that careful consideration of the facts of each case will eliminate potential difficulties.

4. Conclusions and recommendations

2.99 Our conclusion is that the fact that it is impossible to commit the crime aimed at should not preclude a conviction for attempt. The experience of other countries and consideration of the conditions in this country do not suggest to us that such a principle will cause serious difficulty, whereas we are strongly of the view that a contrary principle, with its necessarily somewhat indeterminate exceptions and limitations, can and does cause difficulty, uncertainty and anomalies in the administration of the criminal law. Furthermore, we believe the law as it stands at present is out of line with what the majority of people would, if questioned, understand the law to be.

2.100 The policy which we *recommend* may be summed up as follows—

(1) the fact that an offence which is intended cannot in fact be committed should not preclude a conviction for attempt to commit that offence if the defendant

(a) intends to commit the offence; and

(b) takes action which, but for the existence of facts or circumstances making commission of the offence impossible, would either constitute the intended offence or an attempt to commit it;

but (2) pursuing a course of action which does not constitute an offence should not become an attempt to commit an offence because, by reason only of an error as the general law, the defendant believes that that course of action does constitute an offence; and action which falls short of that full course of action should not constitute an attempt to commit an offence because, by reason only of an error as to the

²⁷⁷ See Customs and Excise Management Act 1979, s. 49, under which it is an offence to import goods with intent to evade duty if they are "goods chargeable with a duty which has not been paid"; and see also *Stephens v. Abrahams* (1902) 27 V.L.R. 753, cited in para. 2.73, above.

general law, the defendant believes that the course of conduct if completed would constitute an offence.

In the draft Bill (Appendix A) we provide for proposition (1) above in clause 1(1)(b) and (2). Subsection (1)(b) penalises anyone who carries out what would amount to the actus reus of an attempt to commit an offence but for the existence of any facts or circumstances which render the commission of the intended offence impossible. This covers cases such as intended theft from an empty pocket where, if there had in fact been something there, it would have been possible to charge the defendant with attempted theft of the contents of the pocket. Subsection (2) is a special provision designed to reverse *Haughton v. Smith* in so far as the ratio of that case relied on the absence of the requisite mental element,²⁷⁸ and applies to cases where the defendant is mistaken as to, or is ignorant of, material facts from which legal consequences flow. In that case the defendant was unaware of the history of the particular goods which he handled, and therefore did not know that they had ceased to be stolen. In consequence, although he did everything which he intended to do in relation to the particular goods, what he did was, contrary to his own belief, not an offence.²⁷⁹ Subsection (2) therefore provides that a defendant is to be deemed to have the requisite intent for an attempt to commit an offence²⁸⁰ if, were the facts or circumstances of the particular case as he believed them to be, he would be regarded as having that intent. Proposition (2) above is met by the requirement that the defendant's acts must be carried out with the intent to commit a "relevant offence", that is, any offence which, if it were completed, would be triable in England and Wales. Thus if his aim is to carry out an offence which is not known to the law, for example to have intercourse with a girl aged sixteen with her consent, his erroneous belief that the general criminal law makes it an offence to have intercourse with girls of sixteen will not make him guilty of an attempt.

F. PROCEDURAL ISSUES RELATING TO ATTEMPT

2.101 Most of the issues concerning the law of attempt with which we now deal relate more to procedure than to substance, and it is therefore convenient to consider them in turn in one section of this Report.

1. Attempts and summary offences

2.102 Should an attempt to commit a purely summary offence itself be an offence? In the case of conspiracy we recommended that conspiracy to commit a summary offence should be an indictable offence, albeit with a requirement of consent by the Director of Public Prosecutions to institution

²⁷⁸ [1975] A.C. 476: see para. 2.54, above. This case was, as Lord Hailsham of St. Marylebone L.C. pointed out at p. 493, on all fours with *R. v. Donnelly* [1970] N.Z.L.R. 980 (see paras. 2.76-2.77, above), save that the latter related to the construction of s. 72(1) of the New Zealand Crimes Act 1961. In so far as they are concerned with attempting the impossible, there is no material difference between clause 1(1)(b) of our draft Bill and s. 72(1).

²⁷⁹ *Ibid.*, at pp. 493 and 497, per Lord Hailsham of St. Marylebone L.C., who there stated that he would place the case within the sixth category of cases described by Turner J. in *R. v. Donnelly* (*ibid.*, at p. 990; see para. 2.56, n. 159, above).

²⁸⁰ See para. 2.18 and Appendix A, cl. 1(1), where this intent is defined as an intent to commit a "relevant offence". The definition of "relevant offence" in clause 1(3) is subject to some exceptions which we discuss further in paras. 2.121-2.126, below.

of proceedings; and this recommendation was implemented by the Criminal Law Act 1977.²⁸¹ In the case of conspiracy, however, our position was consistent with the common law;²⁸² but in the case of attempts, it seems probable that at present, in the absence of specific provision, an attempt to commit a summary offence is not itself an offence.²⁸³

2.103 The Working Party²⁸⁴ set out the arguments for retaining the common law distinction, but tentatively concluded that all three inchoate offences should be treated similarly, so that an attempt to commit a summary offence would itself become an offence. On consultation, some commentators expressed reservations about this change in the law; in particular The Law Society did not favour this course which it thought would lead to a needless proliferation of offences. Others, however, accepted consistency as a virtue in this context, and it was pointed out that this is now the position with regard to attempts under the law of Northern Ireland.²⁸⁵

2.104 There are certainly solid reasons for maintaining the present law. The Working Party stated them in the following terms²⁸⁶—

“Justification for retaining the present position lies in acknowledging a distinction between conspiracy and incitement on the one hand and attempt on the other hand. The distinction lies in the fact that in conspiracy and incitement there is always more than one person involved. . . . In the case of an attempt, however, there is merely a failed offence, which does not necessarily involve any other person. It may also be argued in favour of the present position that to make it an offence to attempt summary offences generally will introduce unnecessary complexity in the administration of the law by the police and the lower courts The amount of time which may be spent in magistrates’ courts considering complicated questions of whether or not there has been an attempt to commit a minor offence may well be out of proportion to the advantage accruing from allowing the law to intervene at an early stage. Accordingly, where the legislature wishes to penalise an attempt to commit a summary offence it should do so expressly, either in general terms or by specifying the conduct short of a completed transaction which it wishes to penalise. It may further be urged that, where summary offences may be committed on a wide scale simultaneously by a large number of people, of whom in practical terms it is impossible to charge every one, the police have a particularly invidious task in selecting those among them who ought to be brought before the courts. The possibility of charging those who

²⁸¹ See (1976) Law Com. No 76, *Report on Conspiracy and Criminal Law Reform*, para. 1.85 and Criminal Law Act 1977, s. 4(1).

²⁸² See *R. v. Blamires Transport Services Ltd.* [1964] 1 Q.B. 278.

²⁸³ This was the view accepted by the Working Party (see Working Paper No. 50, para. 104) and has some support in (1978) 142 J.P. 367. Smith and Hogan, *Criminal Law* (4th ed., 1978) p. 246, citing an earlier article in (1922) 86 J.P. 550, suggest that there is “some slight authority” for the view that an attempt to commit a summary offence is indictable, but point out that the inference to be drawn from the Criminal Law Act 1977 is that the legislation “proceeds on the basis that there is no such offence” as an attempt to commit a summary offence.

²⁸⁴ (1973) Working Paper No. 50, paras. 105 *et seq.*

²⁸⁵ Magistrates’ Courts Act (Northern Ireland) 1964, s. 69.

²⁸⁶ Working Paper No. 50, para. 108.

conspired to commit or incited the commission of these summary offences provides a justifiable basis of policy for such a process of selection. This is a factor which is generally inapplicable in the case of attempts.”

2.105 While acknowledging that there is force in some of these arguments, we have concluded that consistency in this context would be preferable. An attempt may fall little short of the completed crime and, in such instances, the defendant's conduct may be almost as serious as if he had been successful; this consideration applies with equal force to summary and indictable offences. We do not think that there is a real danger of a needless proliferation of charges of attempt to commit summary offences. There will be some instances in which, not only will it be undesirable to prosecute an attempt to commit a summary offence, but in which it will in practice not be possible. For example, attempted “careless driving” or attempted “reckless driving” are concepts to which it is difficult to give any meaning. The same consideration applies to offences of omission, and offences which are complete where a particular set of circumstances exists, such as “being found” on enclosed premises under section 4 of the Vagrancy Act 1824. And we have already noted²⁸⁷ that the need to establish a mental element of intent to do the prohibited act would place another limitation upon the number of offences of strict liability in respect of which it would be possible to charge an attempt. On the other hand, there are other summary offences in which it seems desirable that a charge of attempt should be available;²⁸⁸ this is particularly true of some of the offences which, as a result of the Criminal Law Act 1977, have become triable only summarily.²⁸⁹ This change in mode of trial emphasises that the distinction between indictable and summary offences today does not necessarily reflect the distinction between serious and minor offences, still less a distinction between regulatory and other offences. Thus little distinction based on mode of trial can be made on penological grounds; and to this extent the justification for different treatment of attempts to commit summary offences disappears. Having regard to these considerations, we do not think there are compelling reasons for a conclusion differing from that which we adopted in regard to conspiracy, and therefore *recommend* that an attempt to commit a summary offence should itself be an offence.²⁹⁰

2. Mode of trial and penalties

(a) *Mode of trial*

2.106 Conspiracy has always been an offence triable only on indictment, and this restriction was preserved both in the recommendations in our Report on conspiracy and in the Criminal Law Act 1977,²⁹¹ even in regard to the

²⁸⁷ See para. 2.16, above.

²⁸⁸ E.g. the many summary offences relating to the protection of birds and animals. See also n. 352, below.

²⁸⁹ E.g. offensive conduct conducive to a breach of the peace under the Public Order Act 1936, s. 5, criminal diversion of mail under the Post Office Act 1953, s. 11, and taking or destroying game under the Night Poaching Act 1828, s. 1 (compare taking and destroying and attempted taking and destroying of fish from water on private property under Sch. 1 of the Theft Act 1968; see para. 2.127, below). Offences under the Criminal Damage Act 1971, s. 1 also become purely summary if the value of the property damaged is less than £200, but in this case Sch. 4 of the 1977 Act provides specifically for attempts to commit such offences.

²⁹⁰ Appendix A. cl. 1(2).

²⁹¹ See (1976) Law Com. No. 76, para. 1.87, Criminal Law Act 1977, s. 3(1).

trial of conspiracy to commit summary offences. Attempts to commit some indictable offences, however, have for long been triable summarily in certain circumstances, and by the Criminal Law Act 1977 these, together with attempts to commit further specified offences,²⁹² have become triable either way, that is, either on indictment or summarily in accordance with the procedure specified by that Act.²⁹³ In none of these matters is it necessary for us to suggest any changes of substance. The sole issue which remains to be decided is the mode of trial of attempts to commit summary offences. Conspiracy to commit a summary offence is triable only on indictment.²⁹⁴ This was the position at common law and we recommended that it should remain unchanged in our *Report on Conspiracy and Criminal Law Reform* because prosecutions for conspiracy to commit summary offences would be infrequent; their only justification lay in those instances where there was "the social danger involved in the deliberate planning of offences on a widespread scale".²⁹⁵ Clearly, that consideration is not present in the case of an attempt to commit a summary offence. Nor do we think that magistrates' courts will in any way be unable to cope with the law of attempt in general: they have dealt with attempts to commit indictable offences which are triable summarily for many years without obvious difficulty. This leads us to the view that, like incitement,²⁹⁶ attempts to commit offences which are triable only summarily should themselves always be dealt with by summary trial. For these reasons, we *recommend* that an attempt to commit a summary offence should itself be triable only summarily.²⁹⁷

(b) Penalties

2.107 There is statutory provision under section 18(2) of the Powers of Criminal Courts Act 1973 to the effect that a person convicted on indictment of an attempt to commit an offence for which a maximum term of imprisonment or a maximum fine is provided by any enactment shall not be sentenced to imprisonment for a term longer, nor to a fine larger, than that to which he could be sentenced for the completed offence. Furthermore, section 28(1)(c) of the Criminal Law Act 1977 now provides that, on summary conviction of attempting to commit an offence triable either way, a person shall not be liable to any greater penalty than he would be liable to on summary conviction of the completed offence.²⁹⁸ These provisions do not affect the position as to common law offences:²⁹⁹ their penalties are at large and so also is the penalty for an attempt to commit them. In addition, there are some attempts for which specific penalties are provided by statute, the maximum penalty sometimes being the same as for the completed offence,³⁰⁰ and sometimes a lesser penalty.³⁰¹

²⁹² See Criminal Law Act 1977, s. 16 and Schs. 2 and 3.

²⁹³ See Criminal Law Act 1977, ss. 19-24.

²⁹⁴ Criminal Law Act 1977, s. 3(1).

²⁹⁵ (1976) Law Com. No. 76, para. 1.85.

²⁹⁶ See Criminal Law Act 1977, s. 15(1)(b).

²⁹⁷ Appendix A, cl. 3(1)(b).

²⁹⁸ Normally six months' imprisonment and a fine of £1000: Criminal Law Act 1977, s. 28(1) and (7).

²⁹⁹ Other than those specified in Schedules 2 and 3 of the Criminal Law Act 1977.

³⁰⁰ E.g. attempting to commit an offence under the Official Secrets Acts 1911 and 1920: Official Secrets Act 1920, s. 7.

³⁰¹ The offences under the Sexual Offences Act 1956 specified in Sch. 2 thereto.

2.108 In its Working Paper, the Working Party said³⁰²—

“The policy underlying section 7(2) of the Criminal Law Act 1967³⁰³ that, subject to the maximum provided for the completed offence, the penalty for an attempt should be at large is, in our view, the right one and should be of general application. Some Codes³⁰⁴ provide for lower penalties for attempts than the completed offences but it is suggested that this treatment fails to take into account the fact that attempts may range in scope from the offence which is frustrated at the last moment, either by change or the intervention of a third person, to the earliest and most remote acts of preparation which can properly be regarded as an attempt. It is for this reason that we propose as a general rule (which will, of course, be subject to specific provision by Parliament) that the penalty for an attempt to commit an offence should be in the discretion of the court subject only to the limitation that it does not exceed any maximum prescribed for the completed offence.”

We agree with the view there expressed and only add, by way of comment, that, with the abolition of offences at common law and their replacement by codified, statutory offences with maximum penalties, the penalty for attempt will itself increasingly be subject to a corresponding maximum. Subject to our comments in the following paragraphs, we therefore *recommend* no change in the principles applying to attempts to commit indictable offences and further *recommend* that the maximum penalty for an attempt to commit a summary offence should be the same as that provided for the offence itself. In the result, our recommendations provide that, subject to the exceptions discussed in the following paragraph, the mode of trial and maximum penalty for an attempt to commit an offence will correspond with those for the completed offence.³⁰⁵

2.109 We have noted that as an exception to the general rule the Sexual Offences Act 1956 provides specifically for lower maximum penalties for attempts to commit some, but not all, of the offences under that act.³⁰⁶ It is clear that the policy of the 1956 Act is, in the instances where there is a lower penalty for an attempt than for the completed offence, inconsistent with the policy introduced by the Criminal Law Act 1967.³⁰⁷ But there seems to have been no recent discussion or analysis of the policy underlying the distinction;³⁰⁸ and we note that in its Report on *Sentences of Imprisonment* the Advisory Council on the Penal System commented on the anomalous character of these provisions, and recommended in these cases maximum penalties the same as those for the completed offences,³⁰⁹ even though in

³⁰² Working Paper No. 50, para. 113.

³⁰³ Now Powers of Criminal Courts Act 1973, s. 18(2).

³⁰⁴ E.g. Indian Penal Code, s. 511; Canadian Criminal Code, s. 421.

³⁰⁵ Appendix A, cl. 3(1).

³⁰⁶ See para. 2.107 and n. 301, above; see Sexual Offences Act 1956, Sch. 2, as amended by the Indecency with Children Act 1960 and the Sexual Offences Act 1967.

³⁰⁷ See para. 2.108, above.

³⁰⁸ The distinction has existed in the case of some of these offences since the Criminal Law Amendment Act 1885. The most recent changes in the penalties for attempt in the Indecency with Children Act 1960 and the Sexual Offences Act 1967 were noted in debate upon the Bills but not further discussed; see Hansard (H.C.) Vols. 620, col. 558 and 738, col. 1076.

³⁰⁹ See Report (1978), para. 180 and Table 2, p. 150.

a few instances this entailed an increased penalty under their general scheme. On the other hand, we note that the Schedule of penalties to the 1956 Act was last amended at the same time as the general principle contained in the Criminal Law Act 1967 was enacted.³¹⁰ Furthermore, the whole subject of sexual offences is under review by the Criminal Law Revision Committee. We have therefore decided to retain in our draft Bill the exceptions provided by the Sexual Offences Act 1956 in respect of the penalty for attempt to commit certain offences under that Act. As and when our recommendations are implemented, this will give Parliament the opportunity to decide whether changes should be made to the 1956 Act to accord with the general principle which we recommend.³¹¹

2.110 The final point with which it is necessary to deal in relation to penalties concerns sections 27(1) and 32(1) of the Criminal Law Act 1977. Section 27(1) provides that a magistrates' court shall not have power to impose imprisonment for more than six months in respect of any one offence and section 27(2) states that this shall apply to any offence unless expressly excluded. Section 32(1) provides that, where a person would otherwise be liable on conviction on indictment to a fine not exceeding a maximum amount, he shall be liable to a fine of any amount. There may be instances in future where a magistrates' court is given power to impose a maximum sentence of imprisonment greater than six months, or where on indictment a maximum fine is specified. In such instances it should be possible upon the general principle which we have recommended for a similar maximum to be imposed for an attempt to commit any such offence. We have therefore provided specifically that these provisions of the Criminal Law Act 1977 shall not apply in such cases.³¹²

3. Conviction of alternative offences

(a) *The doctrine of merger*

2.111 At common law the doctrine of merger required that, where the defendant was charged with a misdemeanour, and the facts proved established not only a misdemeanour but the commission of a felony, the misdemeanour merged with the felony and the defendant had to be acquitted of the misdemeanour. Applied to attempt, which was a misdemeanour, this would have resulted in acquittal on a charge of attempt to commit a felony where it was shown that the felony itself was committed.

2.112 The abolition of felonies by the Criminal Law Act 1967 meant that the doctrine in the form described could no longer operate; and for the avoidance of doubt³¹³ section 6(4) provides that where a person is charged on indictment with attempting to commit an offence, but not with the complete offence, he may be convicted of attempt notwithstanding that he is shown to be guilty of the complete offence. There were, however, two qualifications

³¹⁰ The Sexual Offences Act 1967 and the Criminal Law Act 1967 received the Royal assent on the same day, 27 July, 1967.

³¹¹ Appendix A, cl. 3(4)(a).

³¹² Appendix A, cl. 3(4)(b).

³¹³ See Seventh Report of the Criminal Law Revision Committee, *Felonies and Misdemeanours* (1967) Cmnd. 2659, para. 51.

to be made to the position as it stood after 1967: first, section 6(4) did not apply to summary trials of indictable offences, and secondly, dicta in some cases³¹⁴ left open the possibility that there existed a separate doctrine of merger applying only to attempts, which would preclude conviction on a charge of attempt to commit an offence triable either way which was tried summarily where, though the defendant was charged with an attempt, the facts established commission of the full offence. This uncertainty led the Working Party to recommend³¹⁵ that section 6(4) should apply both to trials on indictment and to summary trials.

2.113 As a result of the decision in *Webley v. Buxton*,³¹⁶ it is now clear that the only doctrine of merger known to the common law was that relating to misdemeanours and felonies which was abolished by the 1967 Act; there is no separate doctrine of merger relating to attempt and the full offence. This means that, where a defendant is tried summarily on a charge of attempting to commit an indictable offence, the justices can nevertheless convict him of the offence charged if the facts establish the complete offence. Consequently, as regards offences triable on indictment or either way, we see no need for any new statutory provision to this effect. Similarly, we see no need for any provision in relation to purely summary offences. An attempt to commit a summary offence will, as a result of our recommendations, become an offence triable summarily; and there is nothing in the law as it stands which would preclude conviction of an attempt to commit a summary offence if, on a charge of attempt, the defendant is found to have committed the full offence.

(b) *Conviction of alternative offence of attempt on summary trial*

2.114 The combined effect of section 6(3) and (4) of the Criminal Law Act 1967 is that, if charged with but found not guilty of the substantive offence, a person may nonetheless be convicted of an attempt if the allegations in the indictment amount to or include an attempt to commit that offence. This only applies, however, to offences tried on indictment. Unless a defendant consents to two informations being tried together or unless legislation provides otherwise, a magistrates' court is limited to trying one offence at a time;³¹⁷ and if the defendant is acquitted of the substantive offence, a new information must therefore be laid in respect of the attempt.³¹⁸ Consequently the evidence of witnesses must be heard again.

³¹⁴ *R. v. Males* [1962] 2 Q.B. 500, 504 per Lord Parker C.J.; *Rogers v. Arnott* [1960] 2 Q.B. 244.

³¹⁵ Working Paper No. 50, para. 90.

³¹⁶ [1977] Q.B. 481.

³¹⁷ Magistrates' Courts Rules 1968, S.I. 1968 No. 1920; Rule 12(1) states that "subject to any Act passed after 2nd October 1848, a magistrates' court shall not proceed to the trial of an information that charges more than one offence". An example of such a legislative exception is s. 14(2) of the Children and Young Persons Act 1933 relating to trial of offences involving cruelty etc. to young children.

³¹⁸ *Pender v. Smith* [1959] 2 Q.B. 84, 88. This is a particular application of the general principle that a magistrates' court has no jurisdiction to convict of a lesser offence than that charged even if it forms an ingredient of the greater offence, because magistrates may at any one time try only one information alleging one offence: *Lawrence v. Same* [1968] 2 Q.B. 93.

2.115 Since we have recommended that an attempt to commit a summary offence should be an offence,³¹⁹ the question arises whether there should be new statutory provisions applying to attempts to commit a summary offence corresponding to those set out above. There would, however, be some difficulty in providing that a person charged with a summary offence, or an offence triable either way which is tried summarily, should in appropriate cases be convicted of an attempt to commit that offence. A person charged with a summary offence may not be prepared, without notice, to defend himself in relation to the special issues raised by a charge of attempt, such as the mental element or the question of proximity. Furthermore, the position differs from jury trials because the jury will have had the benefit of the judge's direction on the issue of attempt. These considerations seem to us to make inappropriate any provision corresponding to section 6(3) of the Criminal Law Act 1967 in the case of summary trials. Nevertheless it still seems to us desirable to avoid the present restrictions which require either the defendant's consent to the trial of two information together, or the rehearing of evidence on a fresh information. In our view the most satisfactory means of doing so is to provide that where there are separate informations charging a defendant with an offence (which may be a summary offence or an offence triable either way which is to be tried summarily) and an attempt to commit it, the court may try the informations together without the defendant's consent. The court would retain a discretion to try the informations separately, but trial of the informations together without consent would be an express exception to the normal practice applying in magistrates' courts.³²⁰ We recommend accordingly.³²¹

4. Restrictions on prosecution

2.116 Prosecution of certain offences is made subject to special requirements, such as the consent of the Director of Public Prosecutions to institution of proceedings, or institution of proceedings within specified time limits. Unless specific provision is made,³²² it seems that these restrictions do not apply to a charge of attempt to commit such offences. In our view there is no justification for permitting attempt to be prosecuted without consent where such consent is needed for charging the substantive offence, or for instituting proceedings outside the time limits specified for the substantive offence. The Criminal Law Act 1977³²³ provides for similar restrictions in relation to conspiracy, following recommendations to that effect in our *Report on Conspiracy and Criminal Law Reform*,³²⁴ and we recommend that provision be made for attempt similar to those in that section.³²⁵

5. Powers of arrest, search and forfeiture

2.117 Where legislation gives specific powers of arrest and search in respect of a particular offence, we consider it desirable that there should be

³¹⁹ See para. 2.105, above.

³²⁰ See n. 318, above.

³²¹ Appendix A, cl. 3(2).

³²² See e.g. Sexual Offences Act 1956, s.37 and Sch. 2, paras. 10(b), 14(b) and 15(b).

³²³ Sect. 4(3) and (4).

³²⁴ (1976) Law Com. No. 76, para. 1.75.

³²⁵ Appendix A, cl. 2(1) and (2)(a), (b), (c). Para. (b) covers instances such as the Rent Act 1977, s.150, empowering local authorities to institute proceedings for offences under the Act.

corresponding powers in respect of an attempt to commit such an offence. Similarly where a court has power to order a forfeiture for an offence, there should be a corresponding power in respect of an attempt. An example of an existing power is provided by section 6 of the Conservation of Seals Act 1970, under which there may be forfeiture of any seal or seal skin in respect of which an offence under the Act (which includes attempts) is committed,³²⁶ or of any seal, seal skin, firearm, ammunition or poisonous substance in the defendant's possession at the time of the offence. We accordingly *recommend* provisions concerning arrest, search and forfeiture to apply generally in relation to attempts in the same way as to completed offences.³²⁷

6. Offences by bodies corporate

2.118 There are many provisions in legislation imposing liability on the director, manager, secretary or other officer of a body corporate where an offence is committed with their consent or connivance or, in many instances, as a result of their neglect.³²⁸ In principle it seems desirable that such provisions should apply also when there is an attempt to commit any of the offences in question. But the mental element required for an attempt makes it inappropriate for this to extend to offences committed as a result of the "neglect" of company officers. We therefore *recommend* that provisions penalising company officers for offences should apply also to attempts to commit those offences, but only where liability depends upon the officers' "consent or connivance".³²⁹

7. Corroboration

2.119 In *R. v. Wilson*³³⁰ the Court of Appeal (Criminal Division) raised the question whether corroboration is required in a charge of attempt to commit an offence, where by statute a person may not be convicted of the completed offence without corroborative evidence. The court did not have to decide the issue in that case, but observed that it would seem "strange law" if in such an instance corroboration were not required on a charge of attempt.³³¹ In our view corroborative evidence should be required in cases of attempt where there is a specific statutory requirement of corroboration in relation to particular completed offences.³³² But the position differs in those cases where corroboration, or at least a warning as to the dangers of

³²⁶ The Act creates offences under ss. 2, 3 and 11; it also specifically provides by s. 8(1) that an attempt to commit an offence under the Act is an offence, but we recommend the repeal of this and similar provisions in other Acts: see para. 2.128, below.

³²⁷ Appendix A, cl. 2(1) and (2)(d), (f). See also the general power of forfeiture under the Powers of Criminal Courts Act 1973, s.43, which is operative in the limited circumstances defined by that section.

³²⁸ The corporate liability provision in s. 18(1) of the Theft Act 1968 is limited to "consent or connivance."

³²⁹ Appendix A, cl.2(1) and (2) (g).

³³⁰ (1973) 58 Cr. App. R. 304. The defendant was convicted of incest, but also charged with attempt to procure a woman to have unlawful sexual intercourse. The completed offence under s. 2 of the Sexual Offences Act 1956 requires corroborative evidence under s. 2(2).

³³¹ *Ibid.*, at pp. 306-307.

³³² *I.e.* under the Treason Act 1795, s. 1; Perjury Act 1911, s.13; Representation of the People Act 1949, s. 146(5); Sexual Offences Act 1956, ss. 2(2), 3(2), 4(2), 22(2), 23(2); Road Traffic Regulation Act 1967, s. 78A(2) (speeding offences), inserted by the Road Traffic Act 1972, s. 203(2).

convicting without it, is required as a rule of practice.³³³ In any such case, for example, where children have given evidence on oath in relation to an offence, the rule of practice is sufficient for the purpose, whether the case concerns a substantive or an inchoate offence. In these cases there is therefore no need for further provision in our draft Bill. Accordingly, we *recommend* that, where there is a statutory requirement of corroborative evidence in the case of a completed offence, there should be a corresponding requirement of such evidence for an attempt to commit such an offence.³³⁴

G. ATTEMPT AND OTHER OFFENCES

2.120 Under this general heading we deal among other matters with the relationship between attempt and other inchoate offences, attempt and aiding and abetting, and the position where existing legislation contains offences of attempt.

1. Attempt and other inchoate offences

(a) *Attempt to incite*

2.121 We consider it desirable to retain the possibility of a charge of attempt to commit the common law offence of incitement, since this is both appropriate and necessary where a communication amounting to an incitement is intercepted before it reaches the person to whom it is sent. In the draft Bill at Appendix A, we have provided that there may be an attempt to commit any offence, provided that it is a "relevant offence" as there defined.³³⁵ Certain offences are excluded from the definition of what constitutes a "relevant offence". Incitement, however, is not one of the offences so excluded, and it therefore remains a "relevant offence" for the purposes of the draft Bill. Thus our provisions preserve the possibility of charging an attempt to incite an offence.

(b) *Attempt to conspire*

2.122 Incitement and attempt to commit the statutory offence of conspiracy have under the Criminal Law Act 1977 ceased to be offences.³³⁶ So far as attempt to conspire is concerned, it is in our view desirable to extend the provision in the Criminal Law Act to cover all conspiracies, whether statutory or not. Accordingly we have provided³³⁷ that conspiracy, whether or not governed by the Criminal Law Act 1977, is not to be a "relevant offence", and is therefore not an offence which under our draft Bill there can be an attempt to commit.

³³³ *I.e.* in the case of the evidence of accomplices, complainants in sexual offences and children who have given evidence on oath.

³³⁴ Appendix A, cl. 2(2)(e).

³³⁵ See cl. 1(2).

³³⁶ Sect. 5(7). The Working Party proposed this in (1973) Working Paper No. 50, para. 44 on the grounds of remoteness from the substantive offence; it was not considered in our *Report on Conspiracy and Criminal Law Reform*, but s. 5(7) as added during the passage of the Bill.

³³⁷ Appendix A, cl. 1(3)(a).

2. Attempts to aid and abet

2.123 From reported cases it is clear that, when legislation penalises aiding and abetting particular conduct which is not itself an offence, charges of attempting to aid and abet that conduct may be brought.³³⁸ But save in these exceptional cases, the factual situations which can be envisaged seem to us too remote from the commission of the ultimate offence to warrant a charge of attempt to aid and abet.³³⁹ For example, the defendant attempts but fails to hire a getaway car for a robbery which takes place. Or the defendant sends a cheque through the post in answer to a call for funds to be used for distributing material contravening section 5A of the Public Order Act 1936 (incitement to racial hatred); the material is distributed but the defendant's cheque never arrives. In both instances the defendant would have been a secondary party if his activities had gone according to plan. But if on the above facts there is insufficient evidence to convict him of conspiracy or incitement, we do not think a charge of attempting to be a secondary party would be justified: the social danger of his activities seems too remote from the ultimate offence. Accordingly we *recommend* that an attempt to aid, abet, counsel or procure the commission of an offence should for the future not be an offence save in the exceptional cases referred to above.³⁴⁰

3. Attempts to commit offences under sections 4(1) and 5(1) of the Criminal Law Act 1967

2.124 Section 4 (1) of the Criminal Law Act 1967 penalises a person who, knowing or believing another to be guilty of an arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede the apprehension of prosecution of that person if he has committed an arrestable offence. Section 5(1) penalises a person who accepts or agrees to accept any consideration (other than compensation for the loss or injury caused by the offence) for not disclosing information he has which might assist in securing the prosecution or conviction of another who has committed an arrestable offence, when he knows that an arrestable offence has been committed. These offences became triable either way as a result of the Criminal Law Act 1977, but this did not apply to attempts to commit the offences.³⁴¹ If such charges are possible (as to which there is no authority) they would therefore be triable only on indictment.³⁴² In our *Report on Offences relating to Interference with the Course of Justice* we have recommended repeal of the two offences and

³³⁸ *R. v. McShane* (1977) 66 Cr. App. R. 97, where the defendant's conviction for attempting to counsel or procure the suicide of another was upheld by the Court of Appeal. Under the Suicide Act 1961, suicide is not an offence, but s. 2(1) penalised anyone who "aids, abets, counsels or procures the suicide of another or an attempt by another to commit suicide".

³³⁹ See [1977] Crim. L.R. 547 and 738 (commentaries on *Stonehouse* and *McShane*); Glanville Williams, *Textbook of Criminal Law* (1978) pp. 383-384.

³⁴⁰ Appendix A, cl. 1(3) (b), which excludes aiding and abetting etc. from the definition of a "relevant offence" which can be attempted. It is noteworthy that an attempt to aid and abet is excluded from those offences which by virtue of the Criminal Law Act 1977 became triable either way: see Sch. 2, para. 23 and Sch. 3, para. 34. Both these paragraphs are recommended for repeal in the draft Bill in Appendix A, cl. 6 (3) and Sch.

³⁴¹ See Sch. 2, paras. 19 and 23, and Sch. 3, paras. 26 and 34.

³⁴² See paras. 2.106 and 2.107, above.

their replacement as part of a code of offences relating to conduct perverting the course of justice.³⁴³

2.125 Section 4(1) penalises the doing of “any act” with the prescribed intent. If “any act” may with the prescribed intent constitute the offence itself, it seems to us that a charge of attempt to commit it is unnecessary: the charge will always in practice be that of the offence. We therefore *recommend* that there should be no offence of attempt to commit an offence under section 4(1).³⁴⁴

2.126 Section 5(1) presents more difficulties. Both this offence and the offence in section 4(1) were formulated by the Criminal Law Revision Committee in their Report recommending the abolition of the distinction between felonies and misdemeanours,³⁴⁵ which “made a serious effort to state restrictively the law regulating interference with justice”.³⁴⁶ It seems likely, therefore, that the limits of the conduct to be penalised were carefully fixed by section 5(1) and that it was not intended that they should be spread further by means of inchoate offences. Internal evidence suggests that this may be so, for it would be unrealistic to charge an “attempt to agree to accept consideration”. It is also difficult to accept that Parliament intended by the Criminal Law Act 1977 that, while an offence under section 5(1) should be triable either way, an attempt to commit such an offence should be triable only on indictment;³⁴⁷ it seems more likely that it was envisaged that charges of attempt would never be brought in such cases. On the other hand, in our *Report on Offences relating to Interference with the Course of Justice*³⁴⁸ we have recommended the repeal of section 5(1) and its replacement by a wider offence which would, for example, penalise not only accepting or agreeing to accept consideration, but also offering to accept and giving or agreeing to give consideration. The policy underlying this recommendation is inconsistent with the suggestion that there can be no attempt to commit the offence under section 5(1). But we believe that any inconsistency here is more apparent than real: any conduct of the kind referred to which falls outside section 5(1) may at present be caught by charges of perverting or attempting to pervert the course of justice, a broad common law offence the abolition of which we recommend in our Report on the subject.³⁴⁹ Pending the implementation of that Report, we believe it would be more satisfactory, and probably more in accord with the intention of Parliament as expressed by the Criminal Law Act 1977, to exclude any offence of attempt to commit an offence under section 5(1) of the Criminal Law Act 1967, and to leave any cases which might otherwise

³⁴³ (1979) Law Com. No. 96, paras. 3.96 and 3.104-3.108, and Appendix A, cl. 21 and 22.

³⁴⁴ Appendix A, cl. 1(3)(c).

³⁴⁵ Seventh Report, *Felonies and Misdemeanours* (1965) Cmnd. 2659.

³⁴⁶ Glanville Williams, [1975] Crim. L.R. at p. 430; see (1979) Law Com. No. 96, paras. 3.86 *et seq.*

³⁴⁷ See para. 2.124, above.

³⁴⁸ (1979) Law Com. No. 96, paras. 3.104-3.108 and Appendix A, cl. 22.

³⁴⁹ *Ibid.*, para. 3.132 and Appendix A, cl. 35.

be so charged to be dealt with by the common law offence of perverting the course of justice. We *recommend* accordingly.³⁵⁰

4. Offences of attempt in existing legislation

2.127 Where the term "attempt" is already used in legislation, it may serve one or other of several functions. In some instances it is merely a label used to describe a substantive offence. Thus although the sidenote to section 3 of the Explosive Substances Act 1883 refers to "Attempt to cause explosion", the offence under section 3(1) (a) to which this note refers is "unlawfully and maliciously doing any act with intent to cause serious injury to property"; this is a far wider concept than an attempt at common law. In other instances where the term "attempt" is used the act attempted may not be an offence although it may involve the commission of one. For example, section 21 of the Offences against the Person Act 1861 (of which the Criminal Law Revision Committee recommends the repeal in its recent Report) penalises an "attempt to choke, suffocate, or strangle" any person. Choking or suffocating would necessarily involve commission of other offences under the Act, but these offences are not described in such terms. Again, there are instances where a statute penalises an attempt to do an act which, if done, is itself also penalised, but where it is evident that the mental element required for the general law of attempt is excluded. For example, it is clear that the offence of "unlawfully taking or destroying or attempting to take or destroy" fish from water on private property in Schedule 1 to the Theft Act 1968 imports no requirement of mens rea other than an intent voluntarily to do the act which the law prohibits;³⁵¹ and there are other instances where the mental element is implicitly excluded by the terms in which the offences are drafted.³⁵² We think that nothing in our recommendations should affect the offences where the foregoing considerations apply.

2.128 On the other hand there are several instances where statutes penalise what in every other respect appear to be common law offences of attempt. Since all of those which we have found appear in statutes which create summary offences, the fact that there is in all probability no offence at common law of attempt to commit a summary offence³⁵³ may account for the specific provision of offences of attempt, although the desire to extend forfeiture provisions applicable only to certain substantive offences to attempt to commit

³⁵⁰ Appendix A, cl. 1(3)(c). The Criminal Law Act 1977, Sch. 2, para. 23 and Sch. 3, para. 34, are recommended for repeal: see cl. 6(3) and Sch. If our recommendations in (1979) Law Com. No. 96 (see n. 343, above) are implemented, the offences in clauses 21 and 22 of the draft Bill annexed to it will require exclusion from the definition of a "relevant offence" in Appendix A, cl. 1(2) below, in the same way as ss.4(1) and 5(1) of the Criminal Law Act 1967 are excluded by cl. 1(3)(c). This consideration, however, does not apply in the case of the other offences in that draft Bill: the law of attempt will apply to them in the usual way.

³⁵¹ *Wells v. Hardy* [1964] 2 Q.B. 447.

³⁵² E.g. Treason Act 1842, s. 2; Post Office Act 1953, s. 11(1); Road Traffic Act 1972, s.5(1) ("attempting to drive when unfit to drive through drink or drugs"); Customs and Excise Management Act 1979, s. 16(1). The offence of attempt in the Internationally Protected Persons Act 1978, s. 1(3)(b) has its own special mental element which differs from those of the common law offence of attempt and of the statutory offence of attempt in cl. 1(1) of our draft Bill; and see also the offence of "wilful" attempt to kill, injure or take a wild bird under the Protection of Birds Act 1954, s. 1(a).

³⁵³ See paras. 2.102, *et seq.*, above.

those offences may in some instances have afforded an additional reason.³⁵⁴ In any event, we think that in all these instances³⁵⁵ the provisions of the new statutory offence of attempt should apply. The simplest means of securing this is repeal of the references to attempt in these Acts; the substantive offences created by these Acts will be "relevant offences" for the purpose of the legislation we recommend.³⁵⁶ It is also necessary to ensure that, where special provision has been made in legislation which affects the common law of attempt, any such provision shall apply in the same way to the new statutory offence of attempt. This is of particular importance in relation to section 6(3) and (4) of the Criminal Law Act 1967.³⁵⁷ The draft Bill makes provision for all the matters to which we have referred in this paragraph.³⁵⁸

2.129 The references in existing legislation to the common law offence of attempt have in some instances caused difficulty. There is, we think, no need for the offence of attempt in section 19 of the Misuse of Drugs Act 1971,³⁵⁹ while for reasons which we now set out the references to attempt to commit offences under that section in section 5(5) of that Act are also unnecessary, and may not have been needed at all. This subsection provides for section 5(4) of the Act to apply, with certain modifications, to attempts to commit the offence under section 5(2) of having in possession a controlled drug. Subsection (4) provides in substance for defences of lawful excuse to this offence, such as possession with the purpose of returning the drug to lawful custody. As we have seen,³⁶⁰ attempt at common law requires an intent to commit the offence attempted, and we have adopted this as the mental element for the statutory offence of attempt.³⁶¹ In the case of an attempt to commit an offence under section 5(2), the burden would be on the prosecution to prove the intent, and that would include (where the issue was raised) proof that the defendant did not intend, for example, to hand the drugs over to the police. It follows that if a person attempts to possess a controlled drug with the sole intention of restoring it to lawful custody, he does not have the mental element for an offence of attempt. Thus it seems to us that section 5(5) is superfluous: cases of attempted possession where any of the lawful excuses under section 5(4) are applicable would not satisfy the mental element of attempt either at common law or under our recommendations. The subsection is therefore recommended for repeal in our draft Bill.³⁶²

³⁵⁴ See comment on *R. v. Todd* [1979] Crim. L.R. 665.

³⁵⁵ These include the Perjury Act 1911, s. 7(2) (attempting to procure or suborn); Official Secrets Act 1920, s. 7 (attempts to commit offences under the Official Secrets Acts 1911 and 1920); Deer Act 1963, s. 4(1) (the Act created only summary offences); Conservation of Seals Act 1970, s. 8(1) (again, only summary offences); Misuse of Drugs Act 1971, s. 19.

³⁵⁶ See Appendix A, cl. 1(3).

³⁵⁷ See paras. 2.112-2.114, above. And see the provisions as to attempt in the Internationally Protected Persons Act 1978, s. 1(2), and the Suppression of Terrorism Act 1978, s. 4(1).

³⁵⁸ See Appendix A, cl. 5(2), 6(3) and Sch. The references to attempt in the Sexual Offences Act 1956, Sch. 2 are preserved: see para. 2.109, above and cl. 3(4)(a).

³⁵⁹ See n. 355, above. All the substantive offences under the Act and offences of incitement under s. 19, are "relevant offences" for the purpose of cl. 1(1) of the draft Bill in Appendix A; see further para. 2.121, above.

³⁶⁰ See para. 2.13, above.

³⁶¹ See para. 2.18, above.

³⁶² See Appendix A, Sch. of repeals.

2.130 We believe that in the preceding paragraphs we have considered most of the references to the term "attempt" in current legislation. If there are others with which we have not dealt, any which amount to common law offences of attempt would become offences of attempt under the provisions of our draft Bill by virtue of clause 5(2); and any which do not amount to attempts at common law³⁶³ would remain unaffected by our recommendations.

H. POSSIBLE DEFENCE OF WITHDRAWAL

2.131 In Working Paper No. 50 the Working Party raised the question whether there should be a defence of withdrawal or "repentance" available in respect of an inchoate offence,³⁶⁴ so enabling a person charged, for example, with attempt to commit an offence to raise the defence that he had abandoned the attempt before the substantive offence was completed.

2.132 There is no authority to suggest that withdrawal from an attempt to commit an offence may at present be raised as a defence. Any interruption of the defendant's acts, whether or not due to his voluntary desistance, is not material to whether there has been an attempt,³⁶⁵ although it might show that there was not the mens rea necessary for liability. As the Working Party pointed out, an attempt is committed as soon as there are proximate acts accompanied by the necessary intent; thus even though withdrawal might result in the completed offence not being committed, it could not undo the fact that at some stage the defendant would have committed the inchoate offence. Despite the apparent logical difficulties, such a defence is provided by certain continental Codes and by the American Law Institute's Model Penal Code,³⁶⁶ and the Working Party went on to summarise, without giving preference to any particular view, what seemed to be the principal advantages and disadvantages of such a defence.³⁶⁷ In favour of the defence was the suggestion that it could operate as an inducement to one who had embarked upon criminal conduct to desist from the completion of the offence by enabling him to raise a complete defence to criminal charges. On the other hand, it was suggested that, since the principal justification for provision of inchoate offences lay in the opportunity they gave for intervention by the police at

³⁶³ *I.e.* because they fall within one or other of the categories described in para. 2.127, above.

³⁶⁴ (1973) Working Paper No. 50, paras. 138 *et seq.* The Working Party discussed this in the context of all three inchoate offences. The issue was raised in our *Report on Conspiracy and Criminal Law Reform* (1976) Law. Com. No. 96, paras. 1.76-1.79, where we said that withdrawal as a defence to inchoate offences should be considered in the context of the law of complicity. In the Working Paper on *Parties, Complicity and Liability for Acts of Another*, (1972) Working Paper No. 43, the Working Party made provisional proposals (Proposition 9) for a defence of withdrawal, but we have not yet reported on this subject.

³⁶⁵ See *Haughton v. Smith* [1975] A.C. 476, 493-4 *per* Lord Hailsham of St. Marylebone L.C.; *R. v. Taylor* (1859) 1 F. & F. 511, 175 E.R. 831; *R. v. Lankford* [1959] Crim. L.R. 209; Glanville Williams, *Criminal Law* (2nd ed., 1961), para. 199; Smith and Hogan, *Criminal Law* (4th ed., 1978) p. 256.

³⁶⁶ As to the French Penal Code, see para. 2.82, above. Sect. 5.01(4) of the Model Penal Code provides that a defendant is not liable for attempt if "he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose". Further provisions specify circumstances in which "renunciation" is not "voluntary" or "complete".

³⁶⁷ (1973) Working Paper No. 50, paras. 141-142.

an early stage in criminal activity, there would be an inherent contradiction in providing a defence when that activity had already reached a stage sufficiently advanced to warrant such intervention. The social danger already manifested by the defendant's conduct made it appropriate that any effort he might make to nullify its effects should instead be reflected by mitigation of penalty.

2.133 The arguments put forward by the Working Party were fairly evenly balanced, and the relatively few comments received upon the issue did not raise any fresh considerations which could be said to tip the balance of advantage towards a particular viewpoint. We believe that provision of a defence could only be justified if there were decisive arguments in its favour; particularly in the context of attempt, the defence could raise difficulties for law enforcement authorities still greater than those which already exist in deciding where the law may impose criminal sanctions. Furthermore, it is noteworthy that the Working Party discussed the possibility of a defence in the context of a test of attempt substantially wider than that of proximity which we have adopted.³⁶⁸ Where, as in the case of the proximity test, the *actus reus* of the attempt is more closely related to the completed offence, the case for introducing a defence of withdrawal is to that extent still further weakened. For these reasons we do not recommend any defence of withdrawal in relation to attempt; and for substantially the same reasons, we consider that a defence of withdrawal also cannot be recommended for the offence of conspiracy.

I. THE EXTRATERRITORIAL OPERATION OF ATTEMPT

1. Statement of the problems

2.134 The final section of this Report dealing with the principles of attempt examines the problems relating to attempt where part or all of the *actus reus* takes place outside England and Wales. In our Working Paper No. 29³⁶⁹ we made proposals for legislative provisions to be adopted in situations where criminal conduct occurs partly in England and Wales and partly elsewhere. Such provisions were in our view necessary in order that the courts in England and Wales should be able to decide whether conduct which was the subject of proceedings before them amounted to an offence occurring in England and Wales, and hence justiciable by the courts here. The provisional proposals covered both substantive offences and inchoate offences.³⁷⁰

2.135 Our Report on the *Territorial and Extraterritorial Extent of the Criminal Law* was, for the reasons given in it,³⁷¹ not published until 1978, by which time the position appeared to us to be different. In that Report we did not make any recommendations on the lines of those proposed in our Working Paper. We gave our reasons as follows—

“6. We have given close consideration to whether it would be possible to provide general rules of construction which would assist in determining

³⁶⁸ See para. 2.30, above.

³⁶⁹ *Territorial and Extraterritorial Extent of the Criminal Law* (May 1970).

³⁷⁰ *Ibid.*, paras. 91, 96 (conspiracy) and 98 (attempt and incitement).

³⁷¹ (1978) Law Com. No. 91, para. 2.

whether an offence has been committed in cases where although some elements of the offence may have been carried out abroad, other elements, including in particular any harm proscribed by the offence, have taken place in England and Wales. We have however come to the conclusion that we cannot recommend any such general rules. Where conduct essential to the commission of an offence has taken place in England or Wales, although other necessary elements of the offence have taken place or relate to territory outside England and Wales, it will frequently be the case that an offence will have been committed under English law.⁸ But we do not think that this can be a universal rule: much must depend on the policy underlying the particular offence. For example, although it is an offence under section 30 of the Sexual Offences Act 1956 knowingly to live on the earnings of prostitution, it is not self-evident that an offence is committed by anyone who is living off such earnings which have accrued from prostitution in another country.

7. Again, in some cases it is sufficient for an offence to have been committed under English law when, although the conduct required for the offence has taken place abroad, its harmful effects or results are felt in this country. In this connection Lord Diplock has suggested⁹ that "the rules of international comity do not call for more than that each sovereign state should refrain from punishing persons for their conduct within the territory of another sovereign state where that conduct has had no harmful consequences within the territory of the state which imposes the punishment". But it is important to note that it is for each state to decide as a matter of its own penal policy what constitutes "harmful consequences", and those consequences which are considered harmful by one state may be very different from those so considered by another. Thus, before adopting any general rule of jurisdiction based on harmful consequences, it is necessary to consider what would be its implications as regards the jurisdiction which might be claimed by other states in respect of activities which they regard as criminal. We think a provision applicable to all offences, enabling them to be tried in England and Wales on the basis of what may loosely be called the harmful effects of proscribed conduct in this country, would invite similar claims by other countries in respect of offences against their criminal law where at least in some cases the jurisdiction so claimed would run counter to our conceptions of public policy."³⁷²

⁸ *E.g.* in *R. v. Treacy* [1971] A.C. 537: posting a letter in England containing demand with menaces to recipient in West Germany held an offence under Theft Act 1968, s. 21; *R. v. El-Hakkaoui* [1975] 1 W.L.R. 396: possession of firearm in England with intent by means thereof to endanger the life of persons outside the United Kingdom held an offence under Firearms Act 1968, s. 16. Specific statutory provision to the same effect is made by the Theft Act 1968, ss. 22 and 24: a person who handles stolen goods commits that offence even if the stealing took place abroad, provided that the stealing amounted to an offence in the place where it occurred.

⁹ *R. v. Treacy* [1971] A.C. 537, 564.

³⁷² (1978) Law Com. No. 91, paras. 6-7; and see also, Lew "The Extra-territorial Criminal Jurisdiction of English Courts", (1978) 27 I.C.L.Q. 168 at pp. 178-179.

We concluded that progress could be made on this aspect of the territorial extent of the criminal law only in the context of individual offences, where the policy considerations could be examined in their particular application.³⁷³

2.136 The issue which we now have to consider is whether rules of general application such as we rejected in respect of substantive offences in our Report on the *Territorial and Extraterritorial Extent of the Criminal Law* may nonetheless be devised to apply to attempt, or alternatively whether it would be preferable to apply any rules formulated in relation to particular substantive offences to attempts to commit those offences.

2.137 In favour of the first course, it is noteworthy that in recent years the courts have in a number of important decisions indicated solutions to the problem of deciding when criminal conduct occurring partly in England and Wales and partly elsewhere amounts to an attempt justiciable by the courts in this country. Thus in *R. v. Baxter*³⁷⁴ it was held that the courts here could try the defendant for an attempt to obtain property by deception when he despatched by post from Northern Ireland fraudulent football pool claims to firms in Liverpool. In *D.P.P. v. Stonehouse*³⁷⁵ the House of Lords held that the completed offence (obtaining property by deception) would have been triable here because the defendant's acts, wherever done, would have caused the obtaining of the property in England, and the same principle applied to an attempt to commit the offence; the defendant's acts aimed at an effect in England, namely, the communication through the media to his wife and the insurance companies of the false statement that he had died. In *Baxter* there was direct communication by the defendant with his intended recipient; in *Stonehouse* there was not, but "he must have known and indeed intended" that news of his death would be publicised by the media and hence reach his wife and the insurers. He thereby "made the media his innocent and unwilling agents" in achieving this result.³⁷⁶

2.138 In favour of the provision of general rules, it may also be pointed out that, following the recommendation in our Report on Conspiracy,³⁷⁷ section 1 (4) of the Criminal Law Act 1977 does provide a statutory answer to the question as to the circumstances in which there is an offence of conspiracy triable here where the agreement is to pursue a course of conduct outside England and Wales. The answer provided by the Act in effect restates the common law as laid down by the House of Lords in *Board of Trade v. Owen*:³⁷⁸ the offence which is the object of the conspiracy "means an offence

³⁷³ We have followed this policy in our *Report on Offences relating to Interference with the Course of Justice* (1979) Law Com. No. 96. The Criminal Law Revision Committee has also considered aspects of extraterritorial jurisdiction in Offences against the Person: see their 14th Report, *Offences against the Person* (1980) Cmnd. 7844, paras. 295-304.

³⁷⁴ [1972] 1 Q.B. 1.

³⁷⁵ [1978] A.C. 55; see further, para. 2.41, above.

³⁷⁶ See [1978] A.C. 55, 78 *per* Lord Salmon, and *ibid.*, at pp. 67 (*per* Lord Diplock), 75 (*per* Viscount Dilhorne), 84 (*per* Lord Edmund-Davies), 93 (*per* Lord Keith of Kinkel); but see Glanville Williams, [1977] CLJ 225.

³⁷⁷ *Report on Conspiracy and Criminal Law Reform*, (1976) Law Com. No. 76, Appendix I, draft clause 1(5) and (6).

³⁷⁸ [1957] A.C. 602, 634 *per* Lord Tucker.

triable in England and Wales". Thus a conspiracy here to steal abroad is not covered by the Act, since the theft abroad is not an offence triable in England and Wales.³⁷⁹

2.139 There are, however, countervailing arguments against the provision of general rules, at least in regard to such situations as arose in *R. v. Baxter* and *D.P.P. v. Stonehouse*,³⁸⁰ that is, where the conduct takes place abroad and is in some way "aimed" at this country. We do not question these decisions in the context of the particular offences which were attempted. But having regard to the considerations of public policy to which we drew attention in the context of substantive offences,³⁸¹ we doubt whether any general rules as to attempt would be acceptable in principle. If in any particular case it would be objectionable on grounds of public policy and considerations of reciprocity to claim jurisdiction to try an offence here because conduct abroad is alleged to have some harmful effect in this country, the objections would be still greater in the case of an attempt abroad to commit that offence here. In these cases, the conduct sought to be penalised by definition falls short of the substantive offence and must therefore be more remote from any harmful effects in this country. *Baxter* and *Stonehouse* suggest that an attempt to commit some substantive offences should require that something be done in this country before it can be said that the attempt constitutes an offence here. But in other cases some less stringent requirement may be sufficient, while there may also be cases in which considerations of public policy and reciprocity will require that no attempt to commit a particular substantive offence should be an offence here unless all elements of the attempt take place in England or Wales. If this is so, then no single formula can be devised which is appropriate to an attempt to commit all substantive offences where the necessary conduct takes place outside or partly outside England and Wales.

2. Conclusions and recommendations

2.140 Where conduct takes place abroad which, if it were to take place in England and Wales, would be triable as an attempt to commit an offence, we do not think that it is possible to provide a uniform rule applicable to attempts to commit all offences which will answer the question whether the conduct is an attempt justiciable here. We think that provision in relation to specific offences ought to be made in this respect; and, indeed, this is the course we have adopted in our *Report on Offences relating to Interference with the Course of Justice*.³⁸² Our conclusion means that, for the time being, there will be no specific statutory provision governing extraterritorial attempts to commit some offences here, but we do not think this is a grave disadvantage.

³⁷⁹ But where the offence which is the object of the conspiracy is murder, s. 1(4) provides that a conspiracy to murder either in England and Wales or elsewhere is an offence. This exception preserves the policy of s. 4 of the Offences against the Person Act 1861 penalising conspiracy to murder wherever the murder was to take place. The Criminal Law Act 1977 contains a consequential repeal of part of s. 4 of the 1861 Act; s. 65 and Sch. 13.

³⁸⁰ See para. 2.137, above.

³⁸¹ See (1978) Law Com. No. 91, *Territorial and Extraterritorial Extent of the Criminal Law*, para. 7, quoted at para. 2.135, above.

³⁸² (1979) Law Com. No. 96, para. 3.129. This is also the course adopted by the Criminal Law Revision Committee in their 14th Report, *Offences against the Person* (1980) Cmnd. 7844, para. 303.

The courts will continue to be in a position to apply the principles underlying such decisions as *R. v. Baxter*³⁸³ and *D.P.P. v. Stonehouse*³⁸⁴ in the context of attempts to commit other offences.

2.141 Provision can, however, be made for attempts here to commit offences outside England and Wales. There is little authority at common law on this aspect,³⁸⁵ but for the future it seems clear that attempt should be confined to an attempt to commit an offence which, if completed, would be triable in England and Wales. In the normal course we doubt if any provision would have been required to secure that result but we have noted³⁸⁶ that section 1(4) of the Criminal Law Act 1977 specifically provides that conspiracy under that Act means conspiracy to commit "an offence triable in England and Wales". In the circumstances it seems desirable to follow the precedent established by that Act. We therefore *recommend* that legislation should make it clear that an attempt to commit an offence means an attempt to commit an offence which, if completed, would be triable in England or Wales.³⁸⁷ Provision is also needed to ensure that, if at any time in the future an attempt to commit a summary offence outside England and Wales is made an offence justiciable by the courts here, the magistrates' courts will have jurisdiction to deal with the attempt. This is in our view most conveniently effected by providing that proceedings for a statutory offence of attempt committed outside England and Wales may be taken in any place in England and Wales. It must be stressed that, having regard to our definition of the statutory offence of attempt,³⁸⁸ such a provision relates only to where such an attempt may be tried and has no bearing on whether particular conduct amounts to an attempt which is triable here. We *recommend* accordingly.³⁸⁹

J. ABOLITION AND REPEALS

1. Abolition

2.142 Our recommendations for codifying the law of attempt are intended as a replacement of the common law. Attempt is at present a common law offence, and we therefore *recommend* its abolition.³⁹⁰

³⁸³ [1972] 1 Q.B. 1; see para. 2.137, above.

³⁸⁴ [1978] A.C. 55; see para. 2.137, above.

³⁸⁵ A person in England and Wales assisting in the commission of conduct abroad which, because it is committed there, is not triable in England and Wales, is not triable here since there is no offence to which he is accessory; but he may in appropriate cases be extradited for trial abroad: *R. v. Godfrey* [1923] 1 K.B. 24. The Criminal Law Revision Committee have proposed that an attempt, conspiracy or incitement here to commit acts abroad which, if committed here, would amount to murder, manslaughter, causing serious injury with intent so to do, causing an explosion likely to endanger life or property or kidnapping should be punishable here: 14th Report, *Offences against the Person* (1980) Cmnd. 7844, para.303.

³⁸⁶ See para. 2.138, above.

³⁸⁷ Appendix A, cl. 1(3).

³⁸⁸ Appendix A, cl. 1(1) and (3).

³⁸⁹ Appendix A, cl. 3(5).

³⁹⁰ Appendix A, cl. 5(1).

2. Repeals

2.143 A comprehensive restatement of the penalties for attempt as provided in the draft Bill³⁹¹ permits repeal of section 18(2) of the Powers of Criminal Courts Act 1973.³⁹² We have already noted other provisions which we consider should be repealed.³⁹³

PART III CONSPIRACY AND IMPOSSIBILITY

A. INTRODUCTION

3.1 This part of the Report discusses and recommends an answer to the question: "When two or more persons agree upon a course of conduct with the object of committing a criminal offence, but, unknown to them, it is not possible to achieve their object by the course of conduct agreed upon, do they commit the crime of conspiracy?"¹ This raises the issue of impossibility which is relevant to all three inchoate offences of attempt, conspiracy and incitement. It is desirable in principle to provide a similar solution for all three offences and for that reason it was not considered in the context of our examination of the law of conspiracy.² We have indicated earlier in this Report what in our view should be the principles to be applied in the context of attempt.³ Recent decisions on the principles to be applied at common law and the special problems raised by the terms of the Criminal Law Act 1977 as to statutory conspiracy make necessary this further consideration of the problem in the present context. We make it clear at the outset, however, that our recommendations are intended to apply in the context of statutory conspiracy only. Conspiracy at common law survives in the areas of conspiracy to defraud and perhaps also of conspiracy to corrupt public morals and outrage public decency.⁴ But no instances of conspiracy to do the impossible have hitherto arisen in these two areas, and we do not think it would be the right course to extend our recommendations to common law offences the boundaries of which are themselves by no means entirely certain. In any event, we assume that the two types of common law conspiracy concerned will in due course be codified.⁵ Codification will necessarily entail the creation

³⁹¹ See Appendix A, cl. 3(1).

³⁹² See para. 2.107, above and Appendix A, Sch.

³⁹³ See paras. 2.128-2.129, above.

¹ *D.P.P. v. Nock* [1978] A.C. 979, 994 per Lord Scarman.

² (1976) Law Com. No. 76 *Report on Conspiracy and Criminal Law Reform*, Part I; see also para. 1.7, above.

³ See para. 2.100, above.

⁴ See Criminal Law Act 1977, s. 5(2) and (3). Corrupting public morals and outraging public decency are probably substantive offences at common law independent of conspiracy: (1976) Law Com. No. 76, paras. 3.21-3.24.

⁵ The Law Commission is examining conspiracy to defraud; the *Report of the Committee on Obscenity and Film Censorship* (1979) Cmnd. 7772 examines the areas of the law covered by conspiracies to corrupt public morals and outrage decency, and if its recommendations are implemented, this would enable these offences to be abolished.

of substantive offences, and we expect that the general law relating to conspiracy to commit such offences would then apply in the usual way.

B. THE EXISTING LAW

3.2 We have already noted⁶ that in *D.P.P. v. Nock*⁷ the House of Lords held, contrary to what had been said by the Court of Appeal in *R. v. Green*,⁸ that the principles underlying *Haughton v. Smith*⁹ were as applicable to conspiracy as they were to attempt. In *Nock* the statement of particulars averred that the defendants “on divers days before September 23, 1975, conspired together with other persons unknown to produce a controlled drug of Class A, namely cocaine”, being a conspiracy to contravene section 4 of the Misuse of Drugs Act 1971.¹⁰ The evidence established that they agreed to obtain cocaine by separating it from other substances in a particular powder which they had obtained, believing it to be a mixture of cocaine and lignocaine from which they could produce cocaine. The substance in fact contained no cocaine, so that it was impossible to produce cocaine from it. They were convicted and the Court of Appeal upheld the conviction.¹¹ Their appeal was allowed by the House of Lords. They were not guilty of conspiracy because, as counsel for the crown conceded, the agreement was to pursue a specific “course of conduct” which when carried out could not produce cocaine; thus the performance of the agreement could not constitute a crime. It seems that they would have been guilty if they had agreed “to go into business as cocaine producers” even if in pursuance of that agreement they attempted “to produce cocaine from a raw material which could not possibly yield it”; but “performance of the limited agreement proved in this case could not in any circumstances have involved the commission of the offence created by the statute”.¹² This was “no more than the application of the principle that an actus reus as well as mens rea must be established. And in the present case there was no actus reus, because there was no agreement upon a course of conduct forbidden by the statute”.¹³

3.3 In so far as *Nock* purports to elucidate and limit the apparent width of the effects of *Haughton v. Smith*, we have concluded that the criticisms of the latter case do not appear to be satisfactorily met by the explanation of it in *Nock*.¹⁴ As regards the reasoning by which the conclusion in *Nock* was reached, there was, as we note in the context of incitement,¹⁵ an apparent inconsistency between that case and the authorities on the law of incitement, which were nonetheless approved¹⁶ by the House of Lords in *Nock*. Furthermore, it is in our view difficult to avoid the conclusion that the decision

⁶ See para. 2.65, above.

⁷ [1978] A.C. 979.

⁸ [1976] Q.B. 985.

⁹ [1975] A.C. 476; see paras. 2.53, *et seq.*, above.

¹⁰ Sect. 4 provides that (1) subject to regulations, it shall not be lawful to produce a controlled drug, and (2) it is an offence to produce a controlled drug in contravention of subs. (1).

¹¹ See [1978] A.C. 979 at pp. 981–984 (C.A.).

¹² [1978] A.C. 979, 996 *per* Lord Scarman.

¹³ *Ibid.*, at p. 998.

¹⁴ See para. 2.87, above.

¹⁵ See paras. 4.2–4.3., below.

¹⁶ [1978] A.C. 979, 999 *per* Lord Scarman.

in *Nock* was reached only by a somewhat contrived and narrow view of the facts: but for the concession made by counsel for the Crown, it would have been equally persuasive to argue that the facts showed that there was an agreement by the defendants to produce cocaine, an objective forbidden by statute, albeit by means which unknown to them were inadequate for that objective. If this had been the agreement, it would have been sufficient for the actus reus of the conspiracy alleged. Although they did not know that the means were inadequate, the defendants had provided ample evidence of overt acts in pursuance of an agreement to produce cocaine on the facts as they believed them to be.¹⁷

3.4 In the context of attempt we have referred to the fine distinctions which at present sometimes have to be made in order to uphold a conviction for an attempted crime following the decision in *Haughton v. Smith*.¹⁸ It is therefore not surprising that fine distinctions should also appear in the context of conspiracy after *Nock* which illustrate the potential difficulties for the courts in the application of that case in the sphere of "impossible" conspiracies. In *R. v. Bennett*, *R. v. Wilfred*, *R. v. West*,¹⁹ the defendants were charged with conspiracy to contravene the Misuse of Drugs Act 1971 by being in possession of a controlled drug, cannabis. The evidence showed that they agreed to meet A in order to buy cannabis, but it was contended that A intended to swindle the defendants by selling them articles containing no cannabis. The court distinguished *Nock*; even accepting the defendants' contention, it did not follow that A had not had or could not have obtained cannabis and that, at the time of making the agreement, it was impossible for it to be carried out in accordance with the defendants' intention. There was a fundamental distinction between an agreement which, when made, could never, if carried out, result in the commission of the offence, because that was physically or legally impossible (which was the case in *Nock*) and an agreement which would, if carried out in accordance with the parties' intention, result in the commission of the offence alleged, but which could not be carried out because some person not a party to the agreement was unwilling or unable to do something necessary for its performance, or because of the incompetence of the conspirators or the impregnable defences of the intended victim. In this case the prosecution indicated that prosecuting authorities and trial judges were worried about the possible effects of *Nock* on the duties of the prosecution as to the evidence which should be called in cases falling within its principles. The Court of Appeal responded by laying down the burden of proof which, at common law, had to be discharged in such cases.²⁰

¹⁷ Compare *Haughton v. Smith* [1975] A.C. 476 and para. 2.96, above; and see comment at [1978] Crim. L.R. 484. See also *R. v. Harris* (1979) 69 Cr. App. R.122, para. 3.5, below.

¹⁸ See para. 2.64, above.

¹⁹ (1978) 68 Cr. App. R. 168 (C.A.); as the events in question occurred in 1976, the conspiracy charge was at common law.

²⁰ This was as follows: (a) The burden of proof rested on the prosecution. (b) If the prosecution had in their possession evidence which might show that, at the time when the agreement was made, the carrying out of the agreement would have been impossible (as in *Nock* where the evidence came from the police forensic laboratory), it was the duty of the prosecution either to call the evidence or to make it available to the defence. (c) If the prosecution had no such evidence, it was not their duty in the first instance to call evidence that the carrying out of the agreement would have been possible; the evidential burden of proving impossibility then

3.5 *Nock* was also distinguished in *R. v. Harris*²¹ where at first sight the facts were similar. The defendant was charged with conspiracy to produce a controlled drug. He and others attempted but failed to make the drug amphetamine. They had the correct chemical formula but when they mixed the chemicals concerned in a pan on a stove, they failed to produce amphetamine because one ingredient was wrong and because they lacked knowledge of the proper process. The Court of Appeal, dismissing the defendant's appeal against conviction, stated that if he or his co-defendants "had succeeded in acquainting themselves with [the proper] process . . . then the agreement which they had made to produce amphetamine by this means would have succeeded." There was therefore "an agreement to do an unlawful act, which was inherently possible of consummation".²² Thus it was not within the boundaries of the decision of *D.P.P. v. Nock*. This seems to be an illustration of inadequacy of means used, to which the general principles of *Haughton v. Smith* do not apply.²³ We have pointed out in the context of attempt²⁴ that this exception, the boundaries of which are uncertain, has in our view little merit from the point of view of policy, and this case can only reinforce that view: the intention of the defendants to produce a controlled drug and the social danger arising from the activities in pursuit of that intention were precisely the same in both *Nock* and *Harris*.

C. CONCLUSIONS AND RECOMMENDATIONS

3.6 When dealing with attempt to commit the impossible we gave our reasons for recommending for the future the adoption of principles differing from those propounded by the House of Lords in *Haughton v. Smith* and *D.P.P. v. Nock*,²⁵ and in doing so we took fully into consideration the review and further elucidation of the law, as the House of Lords saw it, provided in the latter case. For the most part, our reasoning in that context is applicable to conspiracies to do what is in fact impossible; so also is the conclusion that the present law as determined by the House of Lords is over-analytical in its approach, uncertain in its application and produces results which informed public opinion would regard as capricious.²⁶ So far as conspiracy is concerned, that conclusion is reinforced by the further considerations outlined in the preceding paragraphs. We therefore think it unnecessary further to elaborate on the shortcomings, as we conceive them to be, of the present law. Our conclusion is that, in principle, our recommendations as to attempting the impossible should also apply to conspiring to do the impossible.

3.7 We have to bear in mind, however, that in implementing this conclusion account must be taken of the provisions concerning statutory conspiracy

shifted to the defence. (d) The probative burden remained on the prosecution, and if there was some evidence of impossibility the question had to be left to the jury with appropriate directions. (e) If there was no evidence of impossibility, the judge did not need to direct the jury about it. See (1978) 68 Cr. App. R. 168, 177.

²¹ (1978) 69 Cr. App. R. 122.

²² *Ibid.*, at p. 124.

²³ See [1975] A.C. 476, 494 *per* Lord Hailsham of St. Marylebone L.C.

²⁴ See para. 2.91, above.

²⁵ See paras. 2.85 *et seq.*, above.

²⁶ See para. 2.93, above.

recently enacted in the Criminal Law Act 1977. Part I of that Act implements, with some modifications, the recommendations in Part I of our *Report on Conspiracy and Criminal Law Reform*;²⁷ and section 1(1) provides the definition of statutory conspiracy—

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

In *D.P.P. v. Nock* we have seen that the term “course of conduct” was used in the context of a conspiracy at common law,²⁸ and that a particularly restricted view was taken as to what the actual agreement was in that case: an agreement to pursue a specific “course of conduct” which when carried out could not produce cocaine and could therefore not constitute a crime.²⁹ There is an obvious risk that the term “course of conduct” in section 1(1) of the Criminal Law Act 1977 would on the facts of a case similar to *Nock* be construed in the same way as it was in that case. Consequently it is doubtful whether the offence of statutory conspiracy under section 1(1) of the Criminal Law Act would be so interpreted as to reach the result which we consider right in cases of conspiracy to do the impossible.³⁰ Specific provision will therefore have to be made to amend the Act in order to implement our recommendations.

3.8 In substance, and in parallel with our recommendation as to attempt, we *recommend* as follows—

(1) the fact that an offence which a person has agreed with another to commit cannot in fact be committed should not preclude a conviction for conspiracy to commit that offence if each of the defendants—

(a) intended that the offence should be committed; and

(b) agreed upon conduct which would amount to or involve commission of the offence but for the existence of facts or circumstances which render its commission impossible:

but (2) agreeing to do that which does not constitute an offence should not become a conspiracy to commit an offence because, by reason only of an error as to the general law, each of the defendants believes that that which they had agreed to do would constitute an offence.

Thus under our recommendations the facts of *D.P.P. v. Nock* would fall within subparagraph (1); but if in that case the defendants had agreed to make a harmless substance believing that it was a criminal offence to produce that substance, they would by virtue of subparagraph (2) not be guilty of conspiracy to commit an offence. In giving effect to our recommendations,³¹

²⁷ (1976) Law Com. No. 76.

²⁸ [1978] A.C. 979, 994 *per* Lord Scarman; see para. 3.1, above. And see the comment at [1978] Crim. L.R. 487.

²⁹ See para. 3.2, above.

³⁰ Compare Glanville Williams, *Textbook of Criminal Law* (1978) p. 359, and [1978] Crim. L.R. 487.

³¹ Appendix A, cl. 4.

we assume that a mental element for conspiracy is to be inferred from section 1 of the Criminal Law Act 1977, and that that element is the same as that for the offence which is the object of the conspiracy (save in those instances to which section 1(2)³² applies). To give effect to the provision for "legal impossibility" in subparagraph (2), we rely on section 1(4) of the Criminal Law Act, which provides that, for the purposes of section 1, an "offence" means an "offence triable in England and Wales"; thus a conspiracy to produce a substance which it is not an offence to produce would not fall within section 1 of the Criminal Law Act 1977 as amended by our draft Bill.³³

PART IV INCITING THE IMPOSSIBLE

4.1 We stated in the Introduction to this Report¹ that, although we proposed to deal with the inchoate offence of incitement in the context of a future report on criminal complicity, we believe it both appropriate and necessary to examine inciting the impossible in this Report, in order that consistent principles may in this important respect be seen to apply to all three inchoate offences. But the offence of incitement will continue to be governed for the present by the common law save in those areas (such as penalties)² where statute has already intervened.

4.2 Our task here is made easier because, by contrast with both attempt³ and conspiracy,⁴ the House of Lords has already expressed the view that the offence of incitement can be committed where, unknown to the inciter, the offence incited is impossible of commission. In *R. v. McDonough*⁵ the defendant was convicted of inciting another to receive certain lamb carcasses, knowing them to be stolen, although in fact no such carcasses existed at the time. In *Nock's* case the House of Lords purported to distinguish this decision of the Court of Appeal from the principles laid down in *Haughton v. Smith*: "Neither of these cases⁶ infringes the principle of [*Haughton v. Smith*]: for in each . . . the offence was complete. In *McDonough* the actus reus was the making of the incitement . . .".⁷ It therefore appears that the

³² Sect. 1(2) states that "where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) . . . unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place."

³³ Compare para. 2.100, above and Appendix A, cl. 1(1) and (3).

¹ See paras. 1.6-1.7, above.

² See Criminal Law Act 1977, s. 15(1)(b), s.16 and Sch. 2, para. 24 and Sch. 3, para. 35, and ss. 28(1)(b) and 30(4).

³ *Haughton v. Smith* [1975] A.C. 476; see para. 2.54, above.

⁴ *D.P.P. v. Nock and Alsford* [1978] A.C. 979; see paras. 2.65 and 3.2, above.

⁵ (1962) 47 Cr. App. R. 37.

⁶ *I.e. R. v. McDonough* and *Haggard v. Mason* [1976] 1 WLR 187 (as to which, see para. 2.64, above).

⁷ *D.P.P. v. Nock and Alsford* [1978] A.C. 979, 999 *per* Lord Scarman.

House of Lords was prepared to distinguish the position in incitement from that in attempt. It is doubtless possible to take the view that *McDonough's* case is incompatible with, and therefore cannot stand with, the principles of *Nock's* case;⁸ or alternatively so to interpret the dicta in *Nock's* case as to suggest that the decision in *McDonough* is in fact reconcilable with the principles enunciated in *Nock's* case.⁹ But the first course leaves the position in regard to inciting the impossible in a state of some uncertainty, while the latter involves a special and highly sophisticated interpretation of the cases. Our own view is that, whatever illogicality it entails, the House of Lords in *Nock's* case intended to draw a distinction between attempt and incitement in this context, and that the dicta in that case should be taken at their face value. The law relating to inciting the impossible in our view therefore already accords with the position which we recommend in regard to attempt and conspiracy.

4.3 Whatever view is taken of the dicta to which we have referred, in supporting *McDonough* the House of Lords provided yet another example of the extremely fine distinctions in the law relating to inchoate offences and impossibility resulting from *Haughton v. Smith*, upon which we have commented in the context of attempt.¹⁰ Furthermore it has been pointed out¹¹ that in distinguishing *McDonough* from *Haughton v. Smith* in the terms quoted above, the House of Lords in *D.P.P. v. Nock* appeared in the process to undermine its finding as regards conspiracy in that case.

4.4 We have discussed in detail the issue of impossibility in relation to attempt and we do not consider it necessary to rehearse the arguments again in the context of incitement. But we do not think that at this stage it is necessary to recommend legislation in regard to incitement. If we are right in our comments upon *Nock* and *McDonough*, and Court of Appeal has decided the law in regard to inciting the impossible in terms consistent with those which we have now recommended in relation to the other inchoate offences; and that decision has been approved by the House of Lords. It may be open to the House of Lords to distinguish *McDonough* in a future case; but if our recommendations are implemented, we think it unlikely that the case would be distinguished in a manner incompatible with the principles which would then apply to attempt and conspiracy. Furthermore, recommendations at this stage would entail legislation in regard to incitement before the stage has been reached of defining by statute the elements of that offence; and while this would have to be done if the present law of inciting the impossible were unsatisfactory, it would undoubtedly present difficulties. But since the law on this point appears to be settled in a manner consistent with our other recommendations, these difficulties add weight to our view that we should not at this stage suggest legislative intervention. Accordingly, we make *no recommendation* in relation to inciting the impossible.

⁸ See comment at [1978] Crim. L.R. 485 and Temkin, "When is a Conspiracy like an Attempt— and other Impossible Questions" (1978) 94 L.Q.R. 534 at p. 555.

⁹ See Cohen, "Inciting the Impossible" [1979] Crim. L.R. 239.

¹⁰ See para. 2.64, above.

¹¹ See [1978] Crim. L.R. at pp. 484–485.

PART V
SUMMARY OF RECOMMENDATIONS

5.1 In relation to the law of attempt we *recommend* as follows—

- (1) There should continue to be an inchoate offence of attempt, distinct from the other inchoate offences of incitement and conspiracy, which would make it an offence to attempt to commit an offence under the law of England and Wales (paragraphs 2.3-2.9 and 2.141 and Appendix A clause 1).
- (2) In order to be guilty of an attempt to commit an offence, a person must do an act with intent to commit an offence which goes so far towards the commission of that offence as to be more than an act of mere preparation (paragraphs 2.46-2.49 and clause 1(1)).
- (3) The question whether an act done is capable of being an attempt should be a question of law; the question whether that act (accompanied by the required mental element) amounts in all the circumstances to an attempt should be a question of fact (paragraphs 2.50-2.52 and clause 3(3)).
- (4) The mental element should be defined as an intent to commit the offence attempted (paragraphs 2.10-2.18 and clause 1(1)).
- (5) The effect of existing provisions enabling attempts to commit some indictable offences to be tried summarily should not be changed, but it should be provided in addition that an attempt to commit a summary offence should be an offence, capable of being tried only summarily (paragraphs 2.102-2.106 and clause 3(1)).
- (6) Subject to the express provisions to the contrary in the Sexual Offences Act 1956, the maximum penalty for an attempt should be the same as that for the completed offence. Thus, the effect of existing legislation which so provides should be preserved, and it should be provided in addition that the maximum penalty for an attempt to commit a summary offence should be the maximum for that offence (paragraphs 2.107-2.110 and clauses 3(1) and (4)).
- (7) Provision should be made to the effect that where there are separate informations charging a defendant with an offence (whether summary or triable either way) and an attempt to commit it, the magistrates' court may try the informations together without the defendant's consent (paragraphs 2.114-2.115 and clause 3(2)).
- (8) Unless otherwise expressly provided—
 - (a) Where an offence may not be prosecuted after expiration of a time limit an attempt to commit it should also not be prosecuted after expiration of that time limit (paragraph 2.116 and clause 2(1), (2) (c)).
 - (b) Where prosecution of an offence requires the consent of any person, the same consent should be required for the prosecution of an attempt to commit that offence (paragraph 2.116 and clause 2(1), (2) (a) and (b)).

- (c) Where express powers of arrest, search and forfeiture are provided in relation to offences, these should apply also to attempts to commit those offences (paragraph 2.117 and clause 2(1), (2) (d) and (f)).
- (d) Where there is a statutory requirement of corroborative evidence in the case of a completed offence, there should be a corresponding requirement of such evidence for an attempt to commit such an offence (paragraph 2.119 and clause 2(1) (2) (e)).
- (e) Where officers of bodies corporate are made liable for offences committed by the company carried out with their connivance or consent, they should be similarly liable for attempts to commit such offences (paragraph 2.118 and clause 2(1), (2) (g)).
- (f) Where statutes make express provision in regard to matters affecting common law attempt, they should apply in the same way to the statutory offence of attempt (paragraph 2.128 and clause 5(2)).
- (9) An attempt to incite an offence should continue to be an offence, but it should not be an offence to attempt to conspire, to aid and abet, or to commit the offences under sections 4(1) (assisting offenders) or 5(1) (concealing offences) of the Criminal Law Act 1967 (paragraphs 2.121-2.126 and clause 1(3)).
- (10) The common law offence of attempt should be abolished and where legislation creates offences which are in substance common law attempts, they should be repealed (paragraphs 2.127-2.130 and 2.142 and clauses 5(1), 6(3) and Schedule).

5.2 In relation to the commission of a substantive offence which, unknown to the defendant, it is in the circumstances impossible to commit, we recommend that—

- (1) (a) The fact that an offence which is intended cannot in fact be committed should not preclude a conviction for *attempt* to commit that offence if the defendant—
 - (i) intends to commit the offence; and
 - (ii) takes action which, but for the existence of facts or circumstances making commission of the offence impossible, would either constitute the intended offence or an attempt to commit it;
- (b) pursuing a course of action which does not constitute an offence should not become an attempt to commit an offence because, by reason only of an error as to the general law, the defendant believes that that course of action does constitute an offence; and action which falls short of that full course of action should not constitute an attempt to commit an offence because, by reason only of an error as to the general law, the defendant believes that the course of conduct if completed would constitute an offence (paragraphs 2.85-2.100 and clause 1(1) (b) and (2)).
- (2) (a) The fact that an offence which a person has agreed with another to commit cannot in fact be committed should not preclude a conviction for *conspiracy* to commit that offence if each of the defendants—

- (i) intended that the offence should be committed; and
 - (ii) agreed upon conduct which would amount to or involve commission of the offence but for the existence of circumstances which render its commission impossible;
- (b) agreeing to do that which does not constitute an offence should not become a conspiracy to commit an offence because, by reason only of an error as to the general law, each of the defendants believes that that which they had agreed to do would constitute an offence (paragraphs 3.6-3.8 and clause 4).
- (3) In regard to *incitement*, no provision should at present be made, since in our view the common law is already consistent with our recommendations as to attempts and conspiracy (paragraph 4.4).

(Signed) MICHAEL KERR, *Chairman*.
STEPHEN M. CRETNEY.
STEPHEN EDELL.
W. A. B. FORBES.
PETER M. NORTH.

J. C. R. FIELDSEND, *Secretary*

2nd April, 1980

APPENDIX A

**Draft
Criminal Attempts Bill**

ARRANGEMENT OF CLAUSES

Attempt

1. Attempting to commit an offence.
2. Application of procedural and other provisions.
3. Trial and penalties.

Conspiracy

4. Extension of definition of the offence of conspiracy.

Supplementary

5. Effect on existing law.
6. Amendments and repeals.
7. Short title, commencement and extent.

SCHEDULE: Repeals.

Criminal Attempts Bill

DRAFT

OF A

B I L L

TO

A.D. 1980

Amend the law of England and Wales as to attempts to commit offences and as to cases of conspiring to commit offences which, in the circumstances, cannot be committed.

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

Attempt

Attempting
to commit
an offence.

1.—(1) If, with intent to commit a relevant offence, a person does an act—

(a) which goes so far towards the commission of that offence as to be more than a merely preparatory act, or

(b) which would fall within paragraph (a) above but for the existence of any facts or circumstances which render the commission of that offence impossible,

he is guilty of attempting to commit that offence.

(2) For the purposes of subsection (1) above, an intent to commit a relevant offence includes an intention to do something which, if the facts or circumstances of the particular case were as the accused believes them to be, would amount to an intent to commit a relevant offence.

(3) In subsection (1) above, "relevant offence" means an offence (including a summary offence) which, if it were completed, would be triable in England and Wales other than—

1977 c.45.

(a) conspiracy (whether it is an offence at common law, or under section 1 of the Criminal Law Act 1977 or any other enactment);

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

1967 c.58.

(c) offences under section 4(1) (assisting offenders) or section 5(1) (concealing arrestable offences) of the Criminal Law Act 1967.

EXPLANATORY NOTES

Clause 1

1. This clause defines the constituent elements of the statutory offence of attempt, and also makes provision for attempts to commit offences which, in the circumstances, cannot be committed.

2. In accordance with the recommendation in paragraph 2.18 of the Report, the mental element required for an attempt is defined in *subsection (1)* as an intent to commit a relevant offence. "Relevant offence" is defined in *subsection (3)*. In substance, this codifies the law as laid down in *R. v. Mohan* [1976] Q.B. 1.

3. The conduct required for an attempt is defined in *subsection (1)(a)*. In substance this provides a statutory test for what amounts to a "proximate act", which is usually regarded as the test to be applied at common law. This gives effect to the recommendation in paragraph 2.49 of the Report.

4. The clause provides in *subsection (1) (b)* and *subsection (2)* for cases of attempting to commit a crime which it is impossible in the circumstances to commit. Together these provisions are intended to reverse the effect of *Haughton v. Smith* [1975] A.C. 476, where the defendant was held not guilty of attempting to handle stolen goods in circumstances where, unknown to him, the goods had at the time when he handled them reverted to lawful custody. *Subsection (1) (b)* penalises anyone who carries out what would amount to the conduct required for an attempt to commit an offence but for the existence of any facts or circumstances which render the commission of the intended offence impossible. Thus a would-be thief who puts his hand in an empty pocket with the intention of stealing will be guilty of attempting to steal all or any of its contents. *Subsection (2)* provides that a defendant is to be deemed to have the requisite intent for an attempt to commit an offence if, on the facts or circumstances of the particular case as he believed them to be, he would be regarded as having that intent. This has the effect of reversing *Haughton v. Smith*, in so far as that case held that a person could not be guilty of an attempt if he had done everything he had intended to do, and, contrary to his own belief, what he had done was not an offence. *Subsection (1)* excludes liability, however, where the defendant makes an error as to the general law: there will be no attempt unless the defendant does the act in question with the intent to commit a relevant offence as defined by *subsection (3)*. Thus a person who has or attempts to have sexual intercourse with a female aged sixteen with her consent (which under the law of England and Wales is not an offence) on the mistaken assumption that it is an offence to do so, will not be guilty of an attempt. These provisions give effect to the recommendations in paragraphs 2.99-2.100 of the Report.

5. A "relevant offence" is defined in *subsection (3)* as any offence, including a summary offence, which if completed would be triable in England and Wales. This gives effect to the recommendations in paragraphs 2.49, 2.105 and 2.141 of the Report. *Subsection (3)* also lists in paragraphs (a) to (c) certain offences which, because they are not relevant offences, there can be no attempt to commit. This gives effect to recommendations in paragraphs 2.121-2.126.

Criminal Attempts Bill

Application
of procedural
and other
provisions.

2.—(1) Any provision to which this section applies shall have effect with respect to an offence under section 1 above of attempting to commit an offence as it has effect with respect to the offence attempted.

(2) This section applies to any provision of any of the following descriptions made by or under any enactment (whenever passed)—

- (a) provision whereby proceedings may not be instituted or carried on otherwise than by, or on behalf or with the consent of, any person (including a provision which also makes other exceptions to the prohibition);
- (b) provision conferring power to institute proceedings;
- (c) provision whereby proceedings may not be instituted after the expiration of a time limit;
- (d) provision conferring a power of arrest or search;
- (e) provision whereby a person may not be convicted or committed for trial on the uncorroborated evidence of one witness (including any provision requiring the evidence of not less than two credible witnesses);
- (f) provision conferring a power of forfeiture, including any power to deal with anything liable to be forfeited;
- (g) provision whereby, if an offence committed by a body corporate is proved to have been committed with the consent or connivance of another person, that person also is guilty of the offence.

EXPLANATORY NOTES

Clause 2

1. *Subsection (1)* of this clause provides that where provisions in legislation of the kind specified in subsection (2) apply to completed offences, they shall apply in the same way to attempts to commit those offences. This gives effect to recommendations made in the paragraphs of the Report referred to below.

2. *Subsection (2)* specifies the provisions in legislation (existing or future) to which the provision in subsection (1) applies. These provisions relate to—

- (i) Consent to institution of proceedings or power to institute proceedings (paragraph 2.116).
- (ii) Time limits for institution of proceedings (paragraph 2.116).
- (iii) Any statutory requirement of corroborative evidence (paragraph 2.119).
- (iv) Powers of arrest, search and forfeiture (paragraph 2.117).
- (v) Offences by bodies corporate and their officials (paragraph 2.118).

Criminal Attempts Bill

Trial and penalties.

3.—(1) A person guilty by virtue of section 1 above of attempting to commit an offence shall—

(a) if the offence attempted is indictable, be liable on conviction on indictment to any penalty to which he would have been liable on conviction on indictment of that offence; and

(b) if the offence attempted is summary or triable either way, be liable on summary conviction to any penalty to which he would have been liable on summary conviction of that offence.

(2) In any case in which a court may proceed to summary trial of an information charging a person with an offence and an information charging him with an offence under section 1 above of attempting to commit it, the court may, without his consent, try the informations together.

(3) Where, in proceedings against a person for an offence under section 1 above, there is evidence sufficient in law to support a finding that he did an act falling within subsection (1) of that section, the question whether or not his act fell within that subsection is a question of fact.

(4) Subsection (1) above shall have effect—

1956 c. 69.

(a) subject to section 37 of and Schedule 2 to the Sexual Offences Act 1956 (mode of trial of and penalties for attempts to commit certain offences under that Act); and

1977 c. 45.

(b) notwithstanding anything in subsections (1) and (2) of section 27 (maximum of six months imprisonment on summary conviction unless express provision made to the contrary) or section 32(1) (no limit to fine on conviction on indictment) of the Criminal Law Act 1977.

(5) Proceedings for an offence under section 1 above committed outside England and Wales may be taken in any place in England and Wales.

EXPLANATORY NOTES

Clause 3

1. *Subsection (1)* of this clause provides that—

- (i) if an offence is triable only on indictment, an attempt to commit it shall also be only so triable, with a maximum penalty the same as that of the offence (paragraph (a));
- (ii) if an offence is triable either way, an attempt to commit it shall also be triable either way, with a maximum penalty the same as that of the offence as so tried (paragraphs (a) and (b));
- (iii) if an offence is a summary offence, an attempt to commit it shall also be a summary offence, with a maximum penalty the same as that of the offence (paragraph (b)).

The subsection gives effect to the recommendations in paragraphs 2.106—2.108 of the Report.

2. *Subsection (2)* provides that where there are separate informations charging a defendant with an offence (whether a summary offence or an offence triable either way which is to be tried summarily) and an attempt to commit it, the magistrates' court may try the informations together without the defendant's consent. This provision gives effect to the recommendation in paragraph 2.115 of the Report, and forms an exception to the rule that, without such consent, a magistrates' court may at any one time only try one information alleging one offence.

3. *Subsection (3)* makes provision for the recommendation in paragraph 2.52 of the Report that the question whether an act done by the defendant is capable of being an attempt should be a question of law, but the question whether that act amounts in all the circumstances to an attempt should be a question of fact.

4. *Subsection (4)(a)* provides that the scheme of penalties in subsection (1) shall not apply to those offences in Schedule 2 to the Sexual Offences Act 1956 which specify a maximum penalty for an attempt lower than the maximum penalty for the offences themselves. This gives effect to the recommendation in paragraph 2.109 of the Report.

5. Section 27(1) of the Criminal Law Act 1977 provides that a magistrates' court shall not have power to impose imprisonment for more than six months in respect of any one offence. Section 27(2) states that this shall apply to any offence unless expressly excluded. Section 32(1) of that Act provides that, where a person would otherwise be liable on conviction on indictment to a fine not exceeding a maximum amount, he shall be liable to a fine of any amount. Where a magistrates' court may in respect of any offence created after the 1977 Act imprison a defendant for a maximum period of over six months, or where in the case of an indictable offence created after that Act the court on indictment may not impose a maximum fine exceeding a specified amount, *subsection (4)(b)* provides for the same maximum penalties in the case of an attempt to commit such an offence. This gives effect to the recommendation in paragraph 2.110 of the Report.

6. *Subsection (5)* enables proceedings for an offence of attempt which takes place outside England and Wales to be commenced in a magistrates' court anywhere in England and Wales. The provision is essentially concerned with venue: it does not have the effect of making an attempt committed outside England and Wales justiciable in England and Wales where it would not otherwise be, since the offence-creating provision in clause 1 in relation to which it operates makes no provision in this respect. The subsection gives effect to paragraph 2.141 of the Report.

Criminal Attempts Bill

Extension of
definition
of the offence
of conspiracy.
1977 c. 45.

4. For subsection (1) of section 1 of the Criminal Law Act 1977 (definition of the offence of conspiracy) there shall be substituted the following subsection:—

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

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

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

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

EXPLANATORY NOTES

Clause 4

1. This clause substitutes a new subsection for section 1(1) of the Criminal Law Act 1977, which defines the statutory offence of conspiracy. The purpose of the substitution, as recommended in paragraphs 3.6–3.8 of the Report, is to impose liability for conspiring to commit an offence which it is in the circumstances impossible to commit, so reversing the effect of the decision in *D.P.P. v. Nock* [1978] A.C. 979. The subsection, to the end of *paragraph (a)*, reproduces in substance the existing section 1(1), while *paragraph (b)* provides for cases of factual impossibility. For example, it will be an offence under section 1(1) of the Criminal Law Act 1977, as substituted by this subsection, to conspire to produce a controlled drug if the agreement is to produce cocaine from substances incapable of doing so. Section 1(4) of the Criminal Law Act 1977 already provides that an offence, for the purposes of section 1(1), means an offence triable in England and Wales. Thus where the defendants make what is purely an error of law, they will not be liable for conspiracy under section 1(1); for example, it will not be an offence to conspire to produce a particular substance in the belief that it is a controlled drug when it is a drug which the law does not control.

Criminal Attempts Bill

Supplementary

Effect on
existing law.

5.—(1) The offence of attempt at common law is hereby abolished for all purposes not relating to offences committed before the commencement of this Act.

(2) Except as regards offences committed before the commencement of this Act and unless the context otherwise requires, references in any enactment passed before this Act to the offence of attempt at common law shall be construed as references to the offence under section 1 above.

EXPLANATORY NOTES

Clause 5

1. *Subsection (1)* of this clause abolishes the offence of attempt at common law (paragraph 2.142 of the Report).

2. *Subsection (2)* preserves the effect of provisions in existing legislation dealing with attempt at common law, for example, section 6(4) of the Criminal Law Act 1967 (trial on indictment of attempt and completed offences). This gives effect to the recommendations in paragraph 2.128 of the Report.

Criminal Attempts Bill

Amendments
and repeals.
1920 c. 75.
1911 c. 28.

6.—(1) Any reference—

- (a) in section 2(1) or 6(1) of the Official Secrets Act 1920 to an offence under section 1 of the Official Secrets Act 1911, or
- (b) in section 8(4) or (5) of the Official Secrets Act 1920 to an offence under either of those Acts,

includes a reference to an offence under section 1 above of attempting to commit it.

1968 c. 27.
1977 c. 45.

(2) In paragraph 3(1) of Part II of Schedule 6 to the Firearms Act 1968, the reference to an offence triable either way listed in Schedule 3 to the Criminal Law Act 1977 includes a reference to an offence under section 1 above of attempting to commit an offence so listed.

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

EXPLANATORY NOTES

Clause 6

1. This clause makes provision for amendments and repeals to legislation consequential on the creation of the statutory offence of attempt in accordance with the recommendations in paragraphs 2.128-2.129 of the Report.

2. *Subsection 1 (a)* provides that references in sections 2(1) and 6(1) of the Official Secrets Act 1920 to an offence under section 1 of the Official Secrets Act 1911 (penalties for spying) shall include a reference to an attempt to commit such an offence. Section 2(1) relates to evidence of certain activities in the course of commission of offences under section 1, and section 6(1) is a procedural provision in relation to the investigation of an offence under section 1.

3. *Subsection 1(b)* is consequential upon the repeal by clause 6(3) and the Schedule of the reference in section 7 of the Official Secrets Act 1920 to attempts to commit offences under the Official Secrets Acts (paragraph 2.128 of the Report). It preserves in relation to attempts to commit offences under the Acts the power under section 8(4) of the 1920 Act to exclude the public from the trial of offences, and the special provision as to corporate liability in section 8(5).

4. *Subsection (2)* effects a minor change to paragraph 3 of Part II of Schedule 6 to the Firearms Act 1968 (as substituted by the Criminal Law Act 1977, Schedule 12). This change is required because of the creation of the statutory offence of attempt and the consequential repeal of paragraph 34 of Schedule 3 to the Criminal Law Act 1977 (attempting to commit an offence triable either way).

5. *Subsection (3)* gives effect to the Schedule of repeals.

Criminal Attempts Bill

Short title,
commence-
ment and
extent.

- 7.—(1) This Act may be cited as the Criminal Attempts Act 1980.
- (2) This Act shall come into force at the expiry of the period of one month beginning with the day on which it is passed.
- (3) This Act does not extend to Scotland or Northern Ireland.

EXPLANATORY NOTES

Clause 7

This clause provides for the short title, commencement and extent of application of the Bill.

Criminal Attempts Bill

Section 6(3)

SCHEDULE

REPEALS

Chapter	Short Title	Extent of Repeal
1911 c. 6.	Perjury Act 1911.	In section 7(2) the words "or attempts to procure or suborn".
1920 c. 75.	Official Secrets Act 1920.	In section 12(2) the words "or with attempting to suborn or procure any other person".
1956 c. 69.	Sexual Offences Act 1956.	In section 7 the words from "attempts" to "this Act, or".
1963 c. 36.	Deer Act 1963.	In section 40 the words "or of attempting to commit".
1967 c. 60.	Sexual Offences Act 1967.	Section 4(1).
1970 c. 30.	Conservation of Seals Act 1970.	In section 8 the words "or attempting to commit either offence".
1971 c. 38.	Misuse of Drugs Act 1971.	Section 8(1) and, in section 9(1), in paragraph (a) the words "or attempted taking" and "or to be taken" and, in paragraph (c), the words "or attempted killing" and "or attempted to kill".
1973 c. 62.	Powers of Criminal Courts Act 1973.	In section 5, subsection (5) and, in subsection (6), the words "or (5)".
1977 c. 45.	Criminal Law Act 1977.	In section 19 the words from "to attempt" to "attempt". In section 25(3) the words from "the attempt" to "may be" and the words "or attempted incitement". Section 18(2).
		In section 5(7) the words "and attempt" and "or attempted". Section 28(1)(c). In Schedule 2, paragraph 23. In Schedule 3, paragraph 34. In Schedule 4, in paragraph 2, sub-paragraph (b) and the words "or attempted".

EXPLANATORY NOTES

Schedule

1. The Schedule sets out the extent of the repeals effected by clause 6(3). The repeals are all consequential upon the provisions in the clauses.

APPENDIX B

Membership of the Law Commission's Working Party on the General Principles of the Criminal Law¹

Joint Chairmen:	Mr Derek Hodgson, Q.C. ² Mr Norman Marsh, C.B.E., Q.C.
Law Commission member:	The Hon. Mr Justice Cooke
Members, other than representatives of the Law Commission:	*The Rt. Hon. Lord Edmund-Davies Mr T. R. Fitzwalter Butler Mr J. H. Buzzard ³ Mr A. E. Cox ⁴ Mr R. du Cann Mr J. N. Martin, O.B.E. *Professor Glanville L. Williams, Q.C., LL.D., F.B.A.
Alternate	{ Mr F. L. T. Graham-Harrison, C.B. (Home Office) Mr J. H. Walker (Home Office)
Alternate	{ *Sir Kenneth Jones, C.B.E. (Home Office) † Mr J. Nursaw (Home Office)
Secretary:	Mr J. C. R. Fieldsend (Law Commission)
Assistant Secretary:	Mr C. W. Dymont (Law Commission)

¹ The membership is given as at the time of the issue of Working Paper No. 50 (1973) on *Inchoate Offences*. The Working Party ceased to function in 1974.

² Appointed a judge of the High Court in October 1977.

³ Now his Honour Judge Buzzard.

⁴ Now his Honour Judge Cox.

* Also members of the Criminal Law Revision Committee.

† Secretary of the Criminal Law Revision Committee.

APPENDIX C

Organisations and individuals who commented on the Law Commission's Working Paper No. 50, Inchoate Offences

Mr. M. Butcher
Mr. R. J. Buxton
Mr. R. Card
The Cobden Trust
Freedom under Law International
General Council of the Bar
Mr. M. House
Inland Revenue
Justices' Clerks' Society
The Law Society
Mr. W. A. Leitch, C.B.
The Magistrates' Association
Mr. G. Orchard
Prosecuting Solicitors' Society of England and Wales
The Right Honourable Lord Reid
Mr. C. H. Rolph
Mr. A. H. Sherr
Society of Conservative Lawyers
Society of Public Teachers of Law
Society of Registration Officers
Mr. J. A. Clarence Smith
Mr. K. J. M. Smith
Mr. P. Smith
W. H. Thompson, Solicitors
Trades Union Congress
Professor K. W. Wedderburn

APPENDIX D

Participants in a seminar held at All Souls' College, Oxford on 5-6 April 1974, to discuss the Law Commission's Working Paper No. 50, Inchoate Offences

The Honourable Mr. Justice Cooke (Law Commission) (in the chair)
The Lord Chancellor, The Right Honourable Lord Elwyn-Jones
The Right Honourable Lord Edmund-Davies
The Right Honourable Lord Justice Shaw
Mr. Peter Archer, Q.C. (The Solicitor General)
Mr. Claud Bicknell, O.B.E.
Mr. R. J. Buxton
Professor Sir Rupert Cross
Mr. Aubrey L. Diamond
Mr. R. du Cann, Q.C.
Mr. C. W. Dymont
Mr. J. C. R. Fieldsend
Mr. F. L. T. Graham-Harrison, C.B.
Mr. Derek Hodgson, Q.C.*
Mr. Roger Hood
Sir Kenneth Jones, C.B.E.
Sir Stanley Krusin, C.B.
Mr. Philip Lewis
Mr. Richard Lowry, Q.C.
Mr. Alexander Lyon, M.P. (Minister of State, The Home Office)
Mr. Norman S. Marsh, C.B.E., Q.C.
Mr. Patrick Neill, Q.C.
Mr. J. M. Cartwright Sharp
M. Manfred Simon
Sir Norman Skelhorn, K.B.E., Q.C. (Director of Public Prosecutions)
Professor J. C. Smith
Mr. Ewan Stewart, M.C., Q.C. (Scottish Law Commission)**
Professor K. W. Wedderburn

* Appointed a judge of the High Court in October 1977.

** Appointed in January 1975 as a Senator of the College of Justice with the judicial title of Lord Stewart.

APPENDIX E

"Conditional Intent" and R. v. Husseyn

1. In the course of preparation of this Report, the Law Commission played an active part in the resolution of the problems thrown up by *R. v. Husseyn*¹ and the cases which purported to follow it. A short account of what happened may be of interest as showing both the speed with which misunderstandings of basic principles of the criminal law can take root and spread, and the value of the Attorney General's Reference procedure under section 36 of the Criminal Justice Act 1972 in correcting errors.

2. Theft-related offences, such as attempted theft, burglary, attempted burglary, assault with intent to rob, going equipped for burglary or theft, (all under the Theft Act 1968) and suspected persons loitering with intent to steal (under section 4 of the Vagrancy Act 1824 and usually referred to as "sus") form a large part of the cases being tried every day in the magistrates' courts and Crown Court.

3. They all have two features in common—

- (i) each requires proof that the accused "intended to steal"² at the time when he committed the actus reus of the offence;
- (ii) none requires proof that anything has in fact been stolen.

4. In delivering the judgment of the Court of Appeal in the attempted theft case of *R. v. Husseyn*, Lord Scarman stated³ "it cannot be said that one who has it in mind to steal only if what he finds is worth stealing has a present intention to steal".

5. This simple statement, taken by itself and out of context, was the origin of the difficulties. It gave rise to the doctrine that "conditional intent" in the sense of "intending to steal whatever one might find of value or worth stealing" was not a sufficient mental element in these theft-related offences; the prosecution must aver and prove that at the time of attempting, entering as a trespasser etc., the accused had a settled intention to steal some particular and specified object existing or believed by him to exist in his target area.

6. In such a form, the doctrine was obviously capable of mischievous results. In particular, it excluded from criminal liability the large majority of sneak thieves and burglars who conduct their operations "on spec". Without knowing what a handbag, a package left in a car, or a house contains, they nevertheless proceed in the hope or expectation that they will find something of value or worth stealing there, and intend, in that event, to steal it. As Geoffrey Lane L.J. pungently remarked⁴ after setting out the reasoning that led to the acquittal of one burglar, "a reading of that would make the

¹ (1978) 67 Cr. App. R. 131.

² Burglary may of course also be committed with intent to commit one or other of any of the offences specified in the Theft Act 1968, s. 9; see para. 2.15, n. 33, above.

³ (1978) 67 Cr. App. R. 131, at p. 132.

⁴ In *R. v. Walkington* [1979] 1 W.L.R. 1169, 1179.

layman wonder if the law had taken leave of its senses Nearly every prospective burglar could no doubt truthfully say that he only intended to steal if he found something in the building worth stealing.”

7. Unfortunately, several factors obscured the clarity of the issue. As reported, *R. v. Husseyn* gave no indication that the charge of attempted theft in that case had related to specific identifiable objects, and although Lawton L.J. did stress that the indictment in the subsequent case of *R. v. Hector*⁵ also charged attempted theft of particular objects, the report was headed “Whether conditional intention enough”, a phrase not used in the judgment. So it was not realised that Lord Scarman’s statement related only to the facts of the case before him⁶ or that the decision in both cases rested on the basic rule of criminal pleading that an allegation that the accused attempted to steal a particular item involves proof that that item was what he intended to steal; in such a case it is not enough to show that he intended to steal whatever he found worth stealing. Similarly, it was mistakenly, if understandably, believed that the supposed doctrine, in *R. v. Husseyn*, and not merely the actual decision therein, had the undoubted authority of the Court of Appeal in *R. v. Easom*⁷ behind it. Finally, many commentators, including some most critical of the doctrine, took the view that it was a consequence of and inseparable from the rule as to attempting the impossible laid down by the House of Lords in *Haughton v. Smith*⁸ even as later explained in *D.P.P. v. Nock and Alford*⁹.

8. Whatever the reasons, within a few months of the decision in *R. v. Husseyn*, submissions that “conditional intent is not enough” were being accepted by magistrates and Crown Court judges in all these theft-related offences, causing frustration and perplexity to prosecuting authorities and bringing the criminal law into disrepute.

9. Study of the relevant indictments and transcripts convinced us that, once the complications mentioned in paragraph 7 had been cleared out of the way, the matter could be put right without recourse to legislation and that the appropriate way to proceed was by way of Attorney General’s References to the Court of Appeal under section 36 of the Criminal Justice Act 1972. The Director of Public Prosecutions already had the matter under consideration and accordingly two References, one on burglary and one on attempted burglary, were filed with the Registrar of Criminal Appeals. For the assistance of counsel and the Court, the Commission submitted a lengthy memorandum together with a schedule of cases.¹⁰

⁵ (1978) 67 Cr. App. R. 224; see also *The Times*, 19 January 1978.

⁶ Read in context, Lord Scarman’s statement becomes “it cannot be said that one who has it in mind to steal only if what he finds is worth stealing has a present intention to steal the specific item charged” and is of course completely accurate.

⁷ [1971] 2 Q.B. 313.

⁸ [1975] A.C. 476. This is dealt with in Part II of the Report, paras. 2.53–2.100.

⁹ [1978] A.C. 979; see Part II, paras. 2.65 and 2.85–2.87 and Part III, *passim*.

¹⁰ The decision of the Court of Appeal in *R. v. Walkington* [1979] 1 W.L.R. 1169 on 22 February 1979 gave authority to the submissions in our memorandum as to the limited ambit of Lord Scarman’s statement in *R. v. Husseyn* (see para. 7 above) and destroyed the argument that “conditional intent is not enough” so far as it related to burglary.

10. The two References were decided by the Court of Appeal as *Attorney General's References (Nos. 1 and 2 of 1979)*¹¹ on 18 June 1979 and together with the ancillary judgments of the same judges sitting as a Divisional Court in *Scudder v. Barrett* and *Miles v. Clovis*,¹² restore clarity and common sense to the law. Where the accused's state of mind is that of intending to steal whatever he may find worth stealing in his target area, there is no need to charge him with attempting to steal specific objects. In appropriate cases of attempted theft a charge of attempting to steal some or all of the contents of (for example) a car or a handbag will suffice. In cases where the substantive offence does not require anything to be stolen, it is not necessary to allege more than "with intent to steal". "The important point is that the indictment should correctly reflect that which it is alleged the accused did and that the accused should know with adequate detail what he is alleged to have done."¹³ The result, in the Commission's view, is that it is now possible to state with confidence that in cases where an intention to steal anything of value or worth stealing accurately reflects the accused's state of mind at the time of the *actus reus*, this is sufficient to constitute "an intention to steal" and applies equally to all the theft-related offences.¹⁴

11. These References mark the first occasion on which the Law Commission has played an active part in the institution or resolution of legal proceedings. Although participation involved some slight delay in the final preparation of this Report, the Commission took the view that the problem was of urgent practical importance and that it would be proper, having regard to our statutory duty "to take and keep under review all the law with which [we] are concerned . . . with a view to the elimination of anomalies", to extend the work already being done on this subject in order to prevent wasteful duplication of effort. Nevertheless, as we pointed out in paragraph 2.13 of our *Fourteenth Annual Report*,¹⁵ the occasions on which it would be appropriate for the Commission to intervene in this manner must necessarily be rare and dependent on special circumstances.

¹¹ [1979] 3 W.L.R. 577.

¹² [1979] 3 W.L.R. 591 (note): *Scudder v. Barrett* held that justices were incorrect in dismissing an information charging a defendant with an *attempt to steal property unknown*, where the defendant had removed and replaced articles from another person's coat pocket. *Miles v. Clovis* held that justices were incorrect in dismissing an information charging the defendants with being *suspected persons loitering with intent to steal*, where they had made efforts to steal from women's bags; there was not evidence of their contents or that the defendants knew what was in them.

¹³ [1979] 3 W.L.R. 577, 590, *per* Roskill L.J.

¹⁴ In *R. v. Ellames* [1974] 1 W.L.R. 1391, the Court of Appeal expressed the view that "going equipped for burglary or theft" under s. 25(1) of the Theft Act 1968 covered possession of the articles for use in any future burglary or theft which the accused might undertake or indeed for such use by anyone else.

¹⁵ (1979) Law Com. No. 97, p. 11.

HER MAJESTY'S STATIONERY OFFICE

Government Bookshops

49 High Holborn, London WC1V 6HB
13a Castle Street, Edinburgh EH2 3AR
41 The Hayes, Cardiff CF1 1JW
Brazenose Street, Manchester M60 8AS
Southey House, Wine Street, Bristol BS1 2BQ
258 Broad Street, Birmingham B1 2HE
80 Chichester Street, Belfast BT1 4JY

*Government publications are also available
through booksellers*