Theft (Amendment) Bill
Proposed offence of "Fraud"

Introduction

During the last meeting held with the Bills Committee, the Administration explained and the Bills Committee accepted that the common law offence of conspiracy to defraud should be retained.

2. The Bills Committee further requested the Administration to revert on the following matters:

(a) to consider whether the words "except in section 16A" are still required to be added before "to be construed" in section 8(2) of the Theft Ordinance, Cap.210, in view of the Committee Stage Amendments to be proposed to the definitions of "benefit" and "prejudice" in the new section 16A of the Ordinance;

(b) to explain why references to "relating to the past, the present or the future" and "opinions" are necessary in the definition of "deceit" under the new section 16A (clauses 3 of the Bill); and

(c) to explain the effect of the amendments in clauses 8 to 11.

Does section 8(2) of the Theft Ordinance require amendment?

3. After careful consideration of this matter, the Administration is of the view that it is necessary to exclude the application of the definitions of "gain" and "loss" in section 8(2) to the new offence of fraud, by inserting

the words “except in section 16A” before the words “to be construed” in the existing subsection, in order to give full effect to the Law Reform Commission’s recommendation as to the new offence set out in [the proposed] section 16A(1). This is because an essential element of the new offence is that it must result in either a “benefit” or “prejudice or a substantial risk of prejudice.” “Benefit” is defined as “any financial or proprietary gain, whether temporary or permanent,” and “prejudice” is defined as “any financial or proprietary loss, whether temporary or permanent.” Whilst it is intended that “gain” in the definition of “benefit” and “loss” in the definition of “prejudice” are to have the same meanings respectively, as “gain” in section 8(2)(a) and “loss” in section 8(2)(b), the introductory words in section 8(2) i.e “gain or loss in money or other property,” are different to the words used in the definitions of “benefit” and “prejudice” i.e. “financial or proprietary gain/loss,” although of similar meaning.

4. It is considered if the terms “benefit” and “prejudice” are to remain essential parts of the offence of fraud, it would cause confusion and problems in interpretation by the courts, if the meaning of the terms “gain” and “loss” where they appear in the definitions of “benefit” and “prejudice,” was to be ascertained by reference to section 8(2) of the Theft Ordinance. For the sake of clarity the Administration feels that the definitions of “benefit” and “prejudice” and “gain” and “loss” should be included in section 16A, signifying that these definitions are relevant to the proposed new offence.

<u>The definition of “deceit”</u>

5. Members of the Committee are aware that the proposed definition of "deceit" is similar to the definition of "deception" in section 17 of the Theft Ordinance.

(a) "...the past, the present or the future"

6. Our research has revealed that the definition of "deception" in the English Theft Act, 1968, differs from the Hong Kong definition. Under the English definition

> '"*deception*" *means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.'*

7. It will be noted that there is no reference in this definition to the "*past*" or the *future.*" Professer Edward Griew in his distinguished work entitled The Theft Acts 1968 and 1978[1] considers that the words

> '"*a deception...by words...as to fact*" *involves the making of an untrue statement as to some past or present fact....'*

8. Professor Griew does not support his opinion by reference to any decided case, and our research has failed to find any such case to support this contention, but if the Professor is correct, then representations as to future events such as "I will inherit $5m from my father's estate when he dies, and I will pay you for the new car, including interest, when I receive that money" in circumstances where the person making the

[1] Sweet and Maxwell, London 1990 @ p142, para. 7-14.

representation knows that the $5m has been left in his father's will to his brother (his father being extremely ill and expected to pass on shortly), and where, because of this representation, the person making the representation is permitted to take possession of a new car, would not be covered by this definition.

9. An examination of some old departmental files relating to the 1970 Theft Bill and of Hansard reveals that the legislature intended that the definition should incorporate the best of the English definition whilst at the same time retaining provisions derived from the definition of "false pretence" in the Larceny Ordinance (the predecessor to the Theft Ordinance); "false pretence" is defined as including :-

> *"..a false pretence or false representation relating to the past, the present or the future and a false statement or false representation of intention or opinion.."*

10. So far as this particular part of the proposed definition of "deceit" is concerned, the Administration is of the view, in order that the law in this regard is abundantly clear, to the extent that false representations as to future events are covered, that the definition as proposed should go forward.

(b) "opinion"

11. The term "opinion" was included in the definition of "deception" for the same reason as representations as to past, present and

future events were included, i.e. an intention on the part of the legislators to incorporate the best of the English definition whilst retaining provisions from the old legislation.

12. However, as Professor Griew[2] states,

> *"....Usually it is easy enough to identify a fact falsely asserted by words used. But difficulties can occur where the defence is in a position to argue that the statement made was one of opinion rather than fact;*

Another eminent academic, Professor Sir John Smith also opines[3] that

> *"The Theft Act gives no guidance as to whether a misrepresentation of opinion is capable of being a deception..."*

13. The leading case on this type of conduct is a case called ***Bryan*** [a copy of which is attached]. Both Professor Smith and Professor Griew express the view that facts similar to those in the ***Bryan*** case, would support a prosecution, although to date the concept does not appear to have been tested in Court.

14. The Administration is of the view that this part of the proposed definition of "deceit" should also be left intact, so that persons such as retailers of electrical and luxury items, are left in no doubt that if they falsely or recklessly express an opinion as to the value or quality of their

[2] supra para. 7-14
[3] The Law of Theft, 8th edn. para. 4-31.

merchandise, that such conduct will not be tolerated; this aspect is particularly important to the tourist industry, where we regularly hear of cases in which tourists have been deceived into purchasing poor-quality goods of low value, at an inflated price, as a conequence of dishonest retailers misrepresenting the true quality and value of the goods.

Consequential Amendments

15. Clause 8 of the Bill adds the new offence of fraud in section 128(3) of the Merchant Shipping (Seafarers) Ordinance, Cap.478 so that the power to cancel or suspend a certificate of competency may be exercised against a certificate holder who has been convicted of the new offence of fraud in relation to a certificate of competence or of a conspiracy to commit any such offence.

16. Clause 9 of the Bill adds the new offence of fraud in section 17(3) of the Merchant Shipping (Seafarers) (Certification of Officers) Regulation (Cap.478 sub.leg.) so that the power to cancel or suspend a certificate of competence or a certificate of service may be exercised against a certificate holder who has been convicted of the new offence of fraud in relation to a certificate of competence or a certificate of service or of a conspiracy to commit any such offence.

17. Clause 10 of the Bill adds the new offence of fraud in section 7(2) of the Merchant Shipping (Seafarers) (Engine Room Watch Ratings) Regulation (Cap.478 sub. leg.) so that the power to cancel or suspend an Engine Room Watch Rating Certificate may be exercised against a Certificate holder who has been convicted of the new offence of fraud in

relation to such Certificate or of a conspiracy to commit any such offence..

18. Clause 11 of the Bill adds the new offence of fraud in section 7(2) of the Merchant Shipping (Seafarers) (Navigational Watch Ratings) Regulation (Cap.478 sub.leg.) so that the power to cancel or suspend a Navigational Watch Rating Certificate may be exercised against a Certificate holder who has been convicted of the new offence of fraud in relation to such Certificate or of a conspiracy to commit any such offence..

19. Under the above provisions in the Merchant Shipping (Seafarers) Ordinance and its subsidiary legislation, the power to cancel or suspend the relevant documents may be exercised against a document holder who has been convicted of offences relating to false representation, fraudulent using or conspiracy to defraud in relation to a document referred to the relevant provisions. It is considered that the power to cancel or suspend the relevant documents under these provisions should similarly be extended to the new offence of fraud in relation to the relevant documents.

Department of Justice
May 1999

Threatening to publish, with intent to extort. 6 & 7 Geo. 5. c. 50. <???>. 31.

49. Any person who with intent--

(*a*) to extort any valuable thing from any person, or

(*b*) to induce any person to confer or procure for any person any appointment or office of profit or trust,

(i) publishes or threatens to publish any libel upon any other person (whether living or dead); or

(ii) directly or indirectly threatens to print or publish or directly or indirectly proposes to abstain from or offers to prevent the printing or publishing of any matter or thing touching any other person (whether living or dead),

shall be guilty of a misdemeanor triable summarily and on con- viction thereof liable to imprisonment for two years.

(Amended, 22 of 1950, s. 3)

FALSE PRETENCES.

False pretences and fraud.

50. (1) Any person who by any false pretence or by means of any other fraud whether or not such false pretence or other fraud was the sole or main inducement--

(*a*) with intent to defraud, obtains from any other person credit or any chattel, money or valuable security or causes or procures credit to be given, money to be paid or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person; or

(*b*) with intent to defraud or injure any other person, causes or induces any other person--

(i) to execute, make, accept, endorse, or destroy the whole or any part of any valuable security; or

(ii) to write, impress, or affix his name or the name of any other person, or the seal of any body corporate or society upon any paper or parchment in order that the same may be afterwards made or converted into, or used or dealt with as, a valuable security.

shall be guilty of felony and on conviction thereof liable to imprisonment for ten years.

(2) In this section, “false pretence” includes a false pretence or false representation relating to the past, the present or the future and a false statement or false representation of intention or opinion.

(3) In this section, “obtaining credit” includes incurring a liability or an obligation to pay money, supply goods, render services or do any other thing and causing or procuring credit to be given shall be construed similarly.

acquiescing in the opinion that the existence of a contract of sale between the parties will prevent the obtaining money under false pretences, though in conformity with the contract, from being within the statute. I know the [264] opinion of the late Chief Justice of the Common Pleas was to the contrary; and, as at present advised, though I express no final opinion, I think the existence of a contract obtained by fraud ought not to make a difference in favour of the fraudulent person.

Bramwell B.—I express no opinion on the last point put by my Brother Willes, but I think this conviction ought to be affirmed. If the prisoner had not known it was short weight, but had innocently stated it was what it appeared to be, and had sold the coals, he would have been guilty of this offence if he afterwards found out the mistake and yet persisted in the assertion that so many hundredweights had been delivered, and thus got the money.

Watson B.—I think it is not open to us to reconsider the authorities. There are a great many difficulties, notwithstanding those decisions, but I cannot say the conviction in this case is wrong.

Channell B.—I also am of opinion the conviction should be affirmed. It seems to me clear that the prisoner obtained the money which he got for the coals by pretences which he knew to be false, and that he did that with intent to defraud. Those circumstances, taken together, *prima facie* bring the case within the statute. I think that the fact, that those circumstances occurred after the antecedent contract of sale, does not prevent the application of the statute, and that the conviction was right.

Conviction affirmed.

[265] 1857.

REGINA v. JOHN BRYAN.

(The prisoner was convicted on an indictment for obtaining money by false pretences, the pretences charged being that certain spoons were of the best quality; that they were equal to Elkington's A (meaning spoons made by Messrs. Elkington and stamped by them with the letter A); that the foundation was of the best material, and that they had as much silver upon them as Elkington's A. The misrepresentations were made to certain pawnbrokers for the purpose of obtaining, and the prisoner did thereby obtain, advances of money on the spoons, which were in fact of inferior quality and not worth the sums advanced. The pawnbrokers stated that they were induced by the prisoner's misrepresentation, and by nothing else, to advance the money; and that if they had known the real quality of the spoons they would not have advanced money upon them. The jury found the prisoner guilty of fraudulently representing that the goods had as much silver on them as Elkington's A, and that the foundations were of the best material, knowing that to be untrue, and that he thereby obtained the money. Held, by Lord Campbell C. J., Cockburn C. J., Pollock C. B., Coleridge J., Cresswell J., Erle J., Crompton J., Crowder J., Watson B. and Channell B. (Willes J. *dissentiente* and Bramwell B. *dubitante*), that the conviction was wrong.)

[S. C. 26 L. J. M. C. 84; 21 J. P. 372; 3 Jur. N. S. 620; 5 W. R. 598; 7 Cox C. C. 312. Considered, *R.* v. *Ragg*, *R.* v. *Goss*, 1860, Bell, C. C. 208, 214; *R.* v. *Lewis*, 1869, 11 Cox C. C. 404. Distinguished, *R.* v. *Ardley*, 1871, L. R. 1 C. C. R. 301. Referred to, *Re Lawrence, Mortimore & Schrader*, 1861, 4 L. T. 184; *R.* v. *Levine & Wood*, 1867, 31 J. P. 248; *R.* v. *Shuter & Coulson*, 1867, 10 Cox C. C. 577; *R.* v. *Foster*, 1877, 46 L. J. M. C. 128.]

The following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by the Recorder of London.

At a Session of Gaol Delivery, holden for the jurisdiction of the Central Criminal Court, on the 2nd day of February, A.D. 1857, John Bryan was tried before me for obtaining money by false pretences.

There were several false pretences charged in the different counts of the indictment, to which, as he was not found guilty of them by the jury, it is not necessary to refer. But the following pretences were among others charged. That certain spoons produced by the prisoner were of the best quality, that they were equal to Elkington's A (meaning spoons and forks made by Messrs. Elkington, and stamped by them with the letter A), that the foundation was of the best material, and that they had as much silver upon them as Elkington's A. The prosecutors were pawnbrokers, and the false pretences were made use of by the prisoner for the purpose

of procuring advances of [266] money on the spoons in question, offered by the prisoner by way of pledge, and he thereby obtained the moneys mentioned in the indictment by way of such advances. The goods were of inferior quality to that represented by the prisoner, and the prosecutors said that, had they known the real quality, they would not have advanced money upon the goods at any price. They moreover admitted that it was the declaration of the prisoner as to the quality of the goods, and nothing else, which induced them to make the said advances. The moneys advanced exceeded the value of the spoons. The jury found the prisoner guilty of fraudulently representing that the goods had as much silver on them as Elkington's A, and that the foundations were of the best material, knowing that to be untrue; and that in consequence of that he obtained the moneys mentioned in the indictment. The prisoner's counsel claimed to have the verdict entered as a verdict of Not Guilty, which was resisted by the counsel for the prosecution; and, entertaining doubts upon the question, I directed a verdict of Guilty to be entered, in order that the judgment of the Court for the Consideration of Crown Cases might be taken in the matter; and the foregoing is the case on which that judgment is requested.

RUSSELL GURNEY.

This case was argued on 2nd May, 1857, before Cockburn C. J., Coleridge J., Crowder J., Willes J. and Bramwell B.

Hardinge Giffard appeared for the Crown, and B. C. Robinson (F. H. Lewis with him) for the prisoner.

B. C. Robinson for the prisoner. This is a mere misrepresentation as to quality. If a man fraudulently [267] represents a thing to be in specie what it is not, it is a false pretence; but if the representation is merely of the quality of the article, it is not.

The Court here intimated that the case had better be argued before the fifteen Judges at the same time as *Regina* v. *Sherwood* (*ante*, p. 251).

The case was accordingly argued on the 11th May, 1857, before Lord Campbell C. J., Cockburn C. J., Pollock C. B., Coleridge J., Cresswell J., Erle J., Crompton J., Crowder J., Willes J., Bramwell B., Watson B. and Channell B.

The case was argued immediately after *Regina* v. *Sherwood* (*ante*, p. 251).

G. Francis (with him Metcalfe) appeared for the Crown; and B. C. Robinson (with him F. H. Lewis) for the prisoner.

B. C. Robinson for the prisoner. This is simply a misrepresentation of quality, and is not within the statute. A representation that a thing is in specie, that which it is not, has been held to be within the statute, but there is no authority to shew that a mere misrepresentation of the quality of an article is.

Lord Campbell C. J.—With regard to quality it has been said that it is lawful to lie. The seller exaggerates, and the buyer depreciates, the quality. The only specific fact here is that the spoons were equal to Elkington's A.

B. C. Robinson. All the representations are mere vaunting or puffing of goods. I cannot contend that the prisoner did not tell a wilful lie; no doubt he did; but the articles he proposed to pledge were plated spoons; and they were plated spoons, although of an inferior quality to that which he represented them to be. In *Regina* v. *Roebuck* (*ante*, p. 24), the chain was repre-[268]-sented to be silver, when it was not silver but base metal. In *Regina* v. *Abbott* (1 Den. C. C. 273), the cheese was not of the kind it was represented to be; the bulk of the cheese was said to be the same as the taster, when it was not. To make this case analogous to those, the representation must have been that the spoons were actually Elkington's A, and not equal to Elkington's A.

Pollock C. B.—Would it be indictable to say that a cheese came from a particular dairy when it did not?

B. C. Robinson. That would be a much stronger case than this, and would resemble *Regina* v. *Abbott*; but if this conviction is good, a man selling beer as treble X, when it was double X, would be indictable, and who is to decide between buyer and seller in such cases?

Coleridge J.—If mere puffing by the seller would be indictable, depreciation by the buyer would be equally so. "It is nought, it is nought, saith the buyer, but when he goeth his way he boasteth."

B. C. Robinson. If the representation had been that the spoons were in fact Elkington's A, this case would have resembled *Regina* v. *Dundas* (6 Cox C. C. 380),

where a spurious blacking was sold as blacking of Everett's manufacture, and *Regina* v. *Ball* (Car. & M. 249), in which articles were represented to be silver which were not silver. In both those cases the misrepresentation was as to the species, not as to the mere quality of the article. If such representations were to be held to be within the statute, trade could not be carried on with safety. The jury would in each case be made the judges of the offence; quality being in most cases a matter of opinion only.

[269] G. Francis for the Crown. This is in fact a misrepresentation of quantity, and substantially the same as *Regina* v. *Sherwood*.

Lord Campbell C. J.—Of the quantity of the silver?

G. Francis. Yes. Elkington's A is an article of ascertained manufacture, and by representing the spoons to be equal to Elkington's A, the prisoner represented that they were covered with the same quantity of silver as Elkington's spoons would be covered with. The money was therefore obtained by a false representation that there was a greater weight of silver than there really was, and therefore there was a false pretence of an existing fact within the statute. Secondly, if the representation was of quality merely, it is within the statute; the money was obtained by the representation, and the jury have found the representation was made with intent to defraud.

B. C. Robinson in reply. The articles were of the species represented.

Pollock C. B.—Suppose a publican represents that his beer is not really Guinness's beer, but equal to Guinness's?

Lord Campbell C. J.—The goods were the goods bargained for, but of inferior quality.

Bramwell B.—What would you say to the sale of a paste pin for a diamond pin?

B. C. Robinson. There the species would not be the same; but it would not do if the representation was that the diamond was "of the first water" when it was not.

Lord Campbell C. J.—I am of opinion that this conviction cannot be supported. It seems to me to proceed upon a mere misrepresentation, during the bargaining for the purchase of a commodity, of the **[270]** quality of that commodity. In the last case which we disposed of (*Regina* v. *Sherwood*, *ante*, p. 251), after the purchase had been completed, there was a distinct averment, which was known to be false, respecting the quantity of the goods delivered, and in respect of that misrepresentation a larger sum of money (the amount of which could be easily calculated) was received by the person who sold them than he was entitled to ask, and therefore I thought, and I think now, that that was clearly a case within the Act of Parliament; but here, if you look at what is stated upon the face of the case, it resolves itself into a mere misrepresentation of the quality of the article; and, bearing in mind that the article was of the species that it was represented to be to the purchaser, because these were spoons with silver upon them although not of the same quality as was represented, the pawnbroker received these spoons, and they were valuable, although the quality was not equal to what had been represented. Now it seems to me it never could have been the intention of the Legislature to make it an indictable offence for the seller to exaggerate the quality of that which he was selling any more than it would be an indictable offence for the purchaser, during the bargain, to depreciate the quality of the goods, and to say that they were not equal to that which they really were. Such an extension of the criminal law is most alarming, for not only would sellers be liable to be indicted for exaggerating the good qualities of the goods, but purchasers would be liable to be indicted if they depreciated the quality of the goods, and induced the sellers, by that depreciation, to sell the goods at a lower price than would have been paid for them had it not been for that representation. As yet I find no case in which a mere misrepresentation at the time of **[271]** sale of the quality of the goods has been held to be an indictable offence. In *Regina* v. *Roebuck* (*ante*, p. 24) the article delivered was not of the species bargained for; there the bargain was for a silver chain, and the chain was not of silver, but was of some base metal, and was of no value. But here the spoons were spoons of the species that was bargained for, although the quality was inferior. It seems to me therefore that this is not a case within the Act of Parliament, and that the conviction cannot be supported.

Cockburn C. J.—I am of the same opinion, and for the same reasons as those

which have been just pronounced by my Lord. It seems to me to make all the difference whether the man who is selling merely represents, as in this instance it appears he did, the articles to be better in point of quality than they really are, or whether, as in the case of *Regina* v. *Roebuck*, he represents them to be entirely different from what they really are. There the representation was that the things were silver, when in point of fact they were of base metal and entirely different from what they were represented to be. Here, if the person had represented these articles as being of Elkington's manufacture, when in point of fact they were not, and he knew it, that would be an entirely different thing; but the representation here made was only a vaunting and exaggerating of the value of the article in which he was dealing, by representing it to be in quality equal to a particular manufacture. I think that makes an essential difference between this case and the cases referred to, and I concur with my Lord in opinion that the conviction cannot be supported.

Pollock C. B.—There may be considerable difficulty in laying down any general rule which shall be **[272]** applicable to each particular case; but I continue to think that the statute was not meant to apply to the ordinary commercial dealings between buyer and seller; still I am not prepared to lay down the doctrine in an abstract form, because I am clearly of opinion that there might be many cases of buying and selling to which the statute would apply—cases which are not substantially the ordinary commercial dealings between man and man. I think if a tradesman or a merchant were to concoct an article of merchandize expressly for the purpose of deceit, and were to sell it as and for something very different even in quality from what it was, the statute would apply. So, if a mart were opened, or a shop, in a public street, with a view of defrauding the public, and puffing away articles calculated to catch the eye, but which really possessed no value, there, I think, the statute would apply; but I think the statute does not apply to the ordinary commercial transactions between man and man, and certainly, as has been observed by the Lord Chief Justice, if it applies to the seller it equally applies to the purchaser, although it is not very likely that cases of that sort would arise. It would be very inconvenient to lay down a principle that would prevent a man from endeavouring to get the article cheap which he was bargaining for, and that if he was endeavouring to get it under the value he might be indicted for obtaining it for less than its value; and there is this to be observed, that if the successfully obtaining your object, either in getting goods or money, is an indictable offence, any attempt or step towards it is an indictable offence as a misdemeanor, because any attempt or any progress towards the completion of the offence would be the subject of an indictment, and then it would follow from that, that a man could not go into a broker's shop and **[273]** cheapen an article but he would subject himself to an indictment for misdemeanor in endeavouring to get the article under false pretences. For these reasons I think it may be fairly laid down that any exaggeration or depreciation in the ordinary course of dealings between buyer and seller during the progress of a bargain is not the subject of a criminal prosecution. I think this case falls within that proposition, and I therefore think this conviction cannot be supported.

Coleridge J.—I am of the same opinion; and, as far as disposing of this particular case, I should like to do it very much upon the grounds stated by Lord Campbell and the Lord Chief Justice. I am glad, however, to have the opportunity of saying also that I agree with the proposition laid down by my Lord Chief Baron in the latter part of his observations, as it seems to me that it would be a dangerous thing to say that there could be no fraudulent misrepresentation within the statute in the course of an ordinary transaction of buying and selling. I think it may as often occur in the course of a real transaction of buying and selling as in any other way; but in order to determine whether a fraudulent misrepresentation is or is not within the statute, I think you must look, among other things, to the extent to which it goes and the subject-matter to which it is applied. It seems to me to be a safe rule to say,—where it applies simply to the quality, and is only in the nature of an exaggeration on the one hand or a depreciation on the other, which too frequently takes place even in tolerably honest transactions between parties, this is not the subject of a criminal proceeding. If you were to make such a representation the subject of a criminal prosecution under the statute or at common law, you would be not only multiplying prosecutions to a most inconvenient extent, but in a number of **[274]** instances do

great injustice, and would be making a party answer criminally where in truth he had no criminal intent in his mind.

Cresswell J.—I agree that this conviction is not to be sustained. I am afraid that the law upon this subject of false pretences is in a state which is well calculated to embarrass those who have to administer it. This case is distinguishable from *Regina* v. *Abbott* (1 Den. C. C. 273) and *Regina* v. *Roebuck* (*ante*, p. 24); but, if I may refer to what I said on a former occasion, I then said I feel bound by authority and I act upon it. I therefore think those cases ought to be binding, unless a time should arrive when they are overruled by an unanimous decision of the whole of the Judges. In this instance the case is distinguishable, and we are not bound by them, and I think this conviction cannot be supported.

Erle J.—I am also of opinion that this conviction cannot be sustained, not on the ground that the falsehood took place in the course of a contract of sale or pawning, but on the ground that the falsehood is not of that description which was intended by the Legislature. It is a misrepresentation of what is more a matter of opinion than a definite matter of fact. Whether these spoons in their manufacture, and in the electrotype, were equal to Elkington's A or not, cannot be, as far as I know, decidedly affirmed or denied in the same way as a past fact can be affirmed or denied, but it is in the nature of a matter of opinion. I fully concur in what has been said, that the statute never intended, in the course of commercial transactions, to allow a party who is dissatisfied with his bargain to resort to a complaint of any exaggerated praise of the article which has been purchased, and call the seller before a jury to be indicted for that; [275] and on this ground I am of opinion that the present case is not within the statute; but, as to the other ground, it seems to me not only are contracts for sale not intended to be excluded by the statute, but on the contrary, the statute was precisely intended to make falsehoods in respect of contracts of sale indictable. The statute recites that there had been a failure of justice by reason of cheats not amounting to larceny, and it therefore makes the obtaining of goods by false pretences an indictable misdemeanor. Now what were the cheats which were not amounting to larceny in respect of the prosecution of which there had been a failure of justice? I think that those cheats were the cases either where a person, intending to defraud another of his goods by a false pretence in purchase, obtained from him a transfer of the property in the goods, he intending not to give the value of them, or where, by a false pretence in sale, a man put off upon another a counterfeit article which he knew was not truly the article intended, and so got money paid for the specific thing shewn, that being apparently what the buyer intended, but being in reality a totally different thing; the property was under those circumstances held to have passed, and the matter was held to have amounted to a cheat; at the same time, where a party intended to part with the possession only, and a fraudulent person obtained the article *animo furandi*, and took it off, although the possession was so passed to him, still it was held to be no transfer of the property in law, but the property remained in the owner notwithstanding, as in the ordinary case of a man coming up to the seller of a horse at a fair and saying, "Allow me to try that horse": if he rode it away and sold it, and the jury was of the opinion that he got this possession *animo furandi*, it was a larceny; but if he professed to the seller of the horse, "I buy your [276] horse," and paid by a false cheque, or deceived by a false pretence of future payment, and the seller said, "I agree to that," although the jury found that he did this *animo furandi*, he was held to be not guilty of larceny before the statute, which seems to make persons responsible criminally when there was a contract of sale falling within the same category of criminal intention as the cases I have adverted to, where the possession only had been obtained *animo furandi*. Now, looking at all the cases that have been decided upon the statute, those that have been the subject of the greatest comment appear to me to fall within the principle relating to putting off counterfeit articles in sales where the substance of the contract is falsely represented, and by reason thereof the money is obtained. In *Regina* v. *Roebuck* (*ante*, p. 24) the thing sold was not the thing which it was sold for—a silver chain. Here silver, though in form an adjective, is in reality the substance of the contract. The silversmith had no intention of buying a chain, but he intended to buy silver, and what was represented to him to be silver was not silver, though it was a chain; the property in the chain passed, and the money was paid, still clearly there was a false pretence as to the silver; and so in the case of *Regina* v. *Ball* (Car. & Marsh. 249); so also in the case of *Regina* v. *Abbott* (1 Den. C. C. 273), the substance of the contract was not a mere cheese, a thing in the shape of a cheese, of any quality, but the substance of the purchase was a Cheddar cheese (or some other species of cheese), and the taster which a fraudulent person had inserted in the cheese sold was of that species, and it was sold with a false affirmation that the article was Cheddar cheese, which would be a totally different article from the Gloucester cheese, or [277] whatever the substance was said to be of the cheese that was sold. In the case of Everett's blacking (*Regina* v. *Dundas*, 6 Cox, C. C. 380) it is the same thing. We have it in evidence, in that case, that a new blacking, saleable in the neighbourhood under the name of Everett's blacking, was a vendible article; the prosecutor purchased it for the purpose of retailing it, and unless it had been Everett's blacking he would have had no demand for it; the question whether it was Everett's blacking was as to the substance of the article; it was not a blacking he wanted, it was Everett's; and though it is in form an adjective it is in reality the substance of the bargain. These are cases of putting off counterfeit articles. As to the case of *Regina* v. *Kenrick* (5 Q. B. 49): although in the case of *Rex* v. *Pywell* (1 Stark. R. 402) it had been held not indictable to praise the quality of a horse, knowing him not to be worthy of the praise put upon him, yet in *Regina* v. *Kenrick*, as far as I understand it, and I was counsel for the man, the fact which brought the case within the definition of the crime was the fact that Kenrick averred that the horses had been the property of a lady deceased, were now the property of her sister, had never been the property of a horse dealer, and were quiet and proper for a lady to drive. The purchaser wanted those horses for a woman of his family. The substance of the contract, in his mind, was that they were the property of a lady who had driven the horses, and it was a false assertion of a definite existing fact to say "They are the property of her sister now," when they were in fact the property of a horse dealer, and had run away and produced a fatal accident. The case of *Regina* v. *Kenrick* was [278] not the warranting a horse sound, as in the case of *Rex* v. *Pywell*, but it was the affirming a false fact which the party knew to be false, and on that ground the conviction proceeded. It seems to me that these cases, which have given rise to a great deal of observation, fail to bear out the principle contended for by the prosecution. No doubt it is difficult to draw the line between the substance of the contract and the praise of an article in respect of a matter of opinion; still it must be done, and the present case appears to me not to support a conviction, upon the ground that there is no affirmation of a definite triable fact in saying the goods were equal to Elkington's A, but the affirmation is of what is mere matter of opinion, and falls within the category of untrue praise in the course of a contract of sale, where the vendee has in substance the article contracted for, namely, plated spoons.

Crompton J.—I also think that this conviction cannot be supported. I think that the statute of false pretences ought not to be construed to extend to transactions where, in the course of a bargain for a specific chattel, the supposed misrepresentation consists in mere praise or exaggeration or puffing of a specific article to be sold, where the purchaser gets some value for his money; where the thing sold is of an entirely different description from what it is represented to be and of no value whatever, as where a man passes off a chain of base metal for gold or silver, and the buyer really gets nothing for his money, the case is different. This was the ground of the opinion of some of the Judges in *The Queen* v. *Roebuck*. So where money is obtained for notes of the Bank of Elegance by the pretence that they are notes of the Bank of England, the cases shew that there is a false pretence.

[279] I do not however think that the statute was intended to apply to every case of a warranty where there is a real sale and where, in the course of bargaining for a specific chattel, one party praises and exaggerates, or the other party depreciates, the description and quality of the thing to be sold, and where something is got by the bargain; in such cases the party gets a worse bargain for his money, and what he really loses is the difference between the good and the bad thing. No specific money or chattel is obtained by the false pretence or lost by the buyer, but the real loss is for damage by having a worse bargain, and from the difference in value between the thing sold and what it would have been worth if the representation were true, which sounds only in damages.

I think that it would be dangerous to construe the statute as extending to every case of a false warranty, and I think that this conviction should be quashed.

Crowder J.—I am of opinion that the conviction is bad. I think this case goes

further than any of the cases that have yet been decided, and I am clearly of opinion that they have gone quite far enough and ought not to be extended. I think the distinction that has been taken in this case ought to exclude it from the category of those decisions: the distinction being that the false statement is with respect to the quality only of a known specific article, viz. plated spoons. It was true that they were plated spoons, but it was false that the plating was of a quality equal to that which was then known as Elkington's A. Now the cases that have already been decided in respect to contracts of sale and other dealings between parties have not gone beyond this, that where the subject-matter about which the parties have been dealing is of a specific denomination, and that denomination is [280] falsely given, it has been held to be a false pretence; but the present case is a step beyond that; and, as I am very doubtful whether the statute was ever intended to go the length to which the decisions have carried it, I am of opinion it ought not to be extended further, and that it could not be so extended without confounding the distinction between civil and criminal cases. I have therefore come to the conclusion that this conviction cannot be supported.

Willes J.—My opinion is of little value after those which have been expressed; but such as my opinion is, I am bound to pronounce it, and I do so with the less diffidence because it was the considered opinion of the late Chief Justice Jervis, than whom no man who ever lived was more competent to form an opinion upon the subject. I am of opinion that the conviction was right, and that it ought to be affirmed. It appears to me that a great number of observations have been brought to bear upon the construction of the statute which would not have been attended to if the words of the statute had been looked at, and I cannot help thinking that in many of the cases to which reference might be made, and they are very numerous, upon this subject, the judgments would have commanded more attention in after times if the words of the statute had been attended to, and those who delivered those judgments had not permitted themselves to consider, instead, whether a particular view would or would not be convenient to trade, either in its present state or in the state to which it might be reduced by a proper administration of the law. I think that the words of the statute should be implicitly followed, and the Legislature obeyed according to the terms in which it has expressed its will in the 53rd section of the 7 & 8 Geo. IV. c. 29. I am looking to the words of that section, and I am unable to bring myself to think [281] that the Legislature was at all dealing with anything in the nature of a distinction between the case of property fraudulently obtained by a fraudulently obtained contract and goods obtained without any contract, but fraudulently obtained. I cannot help thinking that if the attention of the framers of the statute had been directed to any such possible operation of it, they would, in the spirit in which the section is framed, have enacted, in terms even more clear than those of the 53rd section, that that which is obtained by fraud shall not benefit the fraudulent person, and that the interposition of a contract also obtained by fraud ought not to make any difference in favour of the cheat. The section commences with the recital that "a failure of justice frequently arises from the subtle distinction between larceny and fraud." That is the recital, and I had on my mind an impression that the recital of a statute may have the effect of enlarging, but not of restraining, the operation of the subsequent enactment. The enacting part of the section is, "If any person shall by any false pretence obtain from any other person any chattel, money, or valuable security with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor." And it appears to me that the only proper test to apply to any case is, whether it was a false pretence by which the property was obtained, and whether it was obtained with the intention to cheat and defraud the person from whom it was obtained.

Now in this case it should seem that there was a false pretence; there was a pretence that the goods had as much silver upon them as Elkington's A, and there was also the pretence that the foundations were of the best material. If I could bring myself to take the view which my Brother Erle has taken, that this was mere matter of opinion, and not matter of fact, which [282] could be ascertained by inspection or calculation, possibly I might take the same view of the case; but it appears to me that, on the face of the case, it should seem that Elkington's A must have been, for practical purposes, a fixed quantity; the quantity of silver on it must have been fixed, and the proper material, the best material for the foundation of such plated

articles, must have been a well known quality in the trade, because it appears that the prisoner made a statement with respect to the quantity of silver, and the quality of the foundation, with the intent to defraud. It appears that the persons who made the advances were thereby defrauded, and thereby induced to make the advances, and the jury have found that the statements were known by the prisoner to be untrue, and that in consequence of those statements he obtained the money mentioned in the indictment. It appears to me that for all practical purposes that ought to be taken to be a sufficient fact, coming within the region of assertion and calculation, and not mere opinion, and that it should be considered as a false pretence. Well, then the statute says—"obtain from any other person any chattel, money, or valuable security." It is found in this case that the money was obtained. If the matter was a simple commendation of the goods, without any specific falsehood as to what they were; if it was entirely a case of one person dealing with another in the way of business, who might expect to pay the price of the articles which were offered for the purpose of pledge or sale, and knew what they were, I apprehend it would have been easily disposed of by the jury, who were to pass an opinion upon the subject, acting as persons of common sense and knowledge of the world, and abstaining from coming to any such conclusion as that praise of that kind should have the effect of making the party resorting to it guilty of [283] obtaining money on a false pretence. I say nothing on the effect of a simple exaggeration, except that it appears to me it would be a question for the jury in each case whether the matter was such ordinary praise of the goods (*dolus bonus*) as that a person ought not to be taken in by it, or whether it was a misrepresentation of a specific fact material to the contract and intended to defraud, and did defraud, and by which the money in question was obtained. Well, then there is the latter part of the section—"with intention to cheat and defraud any person of the same." It must be with the intent to cheat and defraud the person of the same. I am unable to bring my mind to any anxiety to protect persons who make false pretences "with intent to cheat and defraud." It was stated in the evidence by the prosecutor, "I would have advanced nothing but for the misrepresentation," and it was found by the jury that the money was obtained by the misrepresentation. But it is said that the effect of establishing such a rule as that for which I contend would be to interfere with trade; no doubt it would, and I think ought to, prevent trade being carried on in the way in which it is said to be carried on. I cannot help expressing my regret if trade is carried on, and I do not believe it is generally carried on, by persons making false pretences with the intention to cheat or defraud persons of their money. I am far from wishing to interfere with the rule as to simple commendation or praise of the articles which are sold, on the one hand, or to fair cheapening on the other; those are things persons may expect to meet with in the ordinary and usual course of trade; but I cannot help thinking that people ought to be protected from any such acts as those I have referred to being resorted to for the purpose and with intent to cheat or defraud purchasers of their money or [284] tradesmen of their goods. If the result of it would be to multiply prosecutions, that must be because we live in an age in which fraud is multiplied to a great extent, and, amongst others, in this form. I agree in what the late Chief Justice Jervis said as peculiarly applicable to such a supposed state, though I hope not to ordinary trade, that if there be such a commerce as requires to be protected by the statute being limited in the mode suggested, it ought to be made honest and conform to the law, and not the law bent for the purpose of allowing fraudulent commerce to go on. I cannot help thinking, therefore, upon the plain construction of the 53rd section of the 7 & 8 Geo. IV. c. 29, that the prisoner in this case, having fraudulently represented that there was a greater amount of silver in the articles pledged and that there was a superior foundation of metal, that being untrue to his knowledge, for the purpose of defrauding the prosecutors of their money, which he accordingly obtained, he was therefore indictable, and that the conviction ought to be affirmed.

Bramwell B.—I regret being called on to give judgment in this case without an opportunity of further considering it; but the inclination of my opinion is, that this conviction ought to be sustained. I can understand the statute in two ways, one that it only applies to those cases where there is no contract, and the chattel or money is got by false pretences, either without or independently of any contract, as in the last case (*Regina* v. *Sherwood*, *ante*, p. 251), where, though, had there been no fraud in the making of the contract, there was in the assertion that the things delivered

were of a certain amount; the other, that the statute was intended never to apply to cases where the fraud was not the immediate cause, or sole cause, of obtaining the [285] money; but the contract was obtained by fraud, and the money or the article handed over to the person in pursuance of that, or of that and something given by the fraudulent person. The first case is clearly within the statute, and the inclination of my opinion is, the statute does extend to cases such as last mentioned; but with great doubt; for it may well be that the statute does not apply except when the money or chattel is obtained immediately by the fraud, and does not apply where the chattel or money is obtained by a contract, which contract is obtained by fraud; so also it may be that the statute does not apply to cases where the fraud is not the sole cause of the delivery or giving of the chattel or money, or where something is delivered or given, as well as fraud used, by the fraudulent person, as it may be said that the money or chattel is not obtained by fraud, which means fraud alone, since, but for the delivery or giving of something by the fraudulent person, he would have obtained nothing. I can understand the statute being limited to the first class of cases or extended to both; but I declare I cannot understand the medium course suggested to-day, namely, that the statute does apply to some of the cases in the second class, but does not apply when the person defrauded gets in specie the thing contracted for, though with a difference in the quality.

Take this present case. I do not know that I am influenced by the fact, but we were told last time that in truth there was no silver on these things, and that as compared with Elkington's they were valueless. Now it seems to be supposed that the misrepresentations were no more than a kind of praise, exaggeration, or puffing. I confess I cannot comprehend that, and as well as I can understand the opinions that have been expressed, this result would follow, that, [286] suppose Elkington's plated articles had got half an ounce of silver on them and the prisoner's articles had got none, he would have been indictable; but, if Elkington's had got one ounce of silver and the prisoner's only a quarter of an ounce, he would not, because it would have been only the superior quality that was exaggerated. I own I cannot understand that. I cannot help looking at the statute and I find nothing about exaggeration of quality. I find the statute express,—"if any person shall by any false pretence obtain from any other person any chattel or valuable security,"—that means, to my mind, whether he obtains it by fraud directly or indirectly and wholly by fraud, or by that and something else. Therefore it seems to me the only true exposition of the statute is, to hold it either to apply or not apply to all contracts and cases where the fraudulent person gives something in return,—either to say that whenever there is a contract or something is so given it is not within the statute, or to say it is, though there is a contract, if that contract was brought about by fraud, though something may have been delivered to the person defrauded, if, but for the fraud, the contract would not have been entered into. As at present advised I incline to think the true meaning of the statute is, that it shall extend to people who make these bargains by fraud, and so by the fraud get possession of the chattels or property of others; and I incline to hold the conviction right.

Watson B.—I am of opinion that the conviction is wrong. I think that the cases which have been decided upon this subject have gone quite far enough, and I believe much further than the framers of the statute ever intended it should go. I agree with my Brother Crowder in this point, that this case does not fall within any of those decisions that have been [287] referred to that are now to be considered authorities. In my opinion the conviction is wrong. The question is this, whether this representation, false as it may be, merely of the quality of the article which is pawned, as it would be upon a sale, is a false pretence within the meaning of the statute. In my opinion it is not. All that is represented here is, that it was of the first quality, equal to Elkington's A, and the foundation of the best material, and had as much silver as Elkington's,—in ordinary language merely puffing the article, which may be untrue. In an ordinary case, if a party wishes to protect himself, he ought to take a warranty of the quality of the article offered for pawn or sale. The result of holding this conviction right would be, that on every sale, where any exaggeration has taken place, the tradesman might be convicted for obtaining money on false pretences. For these reasons I think it is not a false pretence within the statute, and therefore the conviction was wrong.

Channell B.—I am of opinion that the conviction cannot be sustained. But for

the doubt expressed by my Brother Bramwell, and the more decided opinion expressed by my Brother Willes, I should have contented myself with saying that I concurred in the judgment of the other members of the Court; but I think it right, under the circumstances, to state the grounds of my opinion. A certain number of spoons were produced to the prosecutor; those spoons were represented, not as silver spoons, but as having silver upon them; there was then the further representation that they had as much silver as Elkington's A, and further that the foundations were of the best material. I consider the spoons were the same in species as they were represented to be. It is not as if the purchaser had been induced, by the representations [288] made, to buy them for silver, and then had found that the spoons had no silver upon them. The representation is that the quantity of silver on them was equal to the quantity on Elkington's. I consider that is, in substance, the same as if he had said the quality of the silver upon them is the same as on Elkington's, and that the statute does not apply to such a representation, made in language which the prosecutor must be taken to know is mere matter of opinion. On that point the case is distinguishable from *Reg.* v. *Roebuck*, the ground of that decision being that the representation was that a certain chain was a silver chain when in fact it was not, and therefore did not resemble at all the article intended. In this case the spoons did correspond to that extent with the representation, and they were spoons of some value, supposing value to be an element to be taken into consideration. The other case of *Reg.* v. *Abbott* is plainly distinguishable, upon the ground put by Mr. Robinson. On these grounds I am clearly of opinion that the conviction cannot be supported.

Conviction quashed.

1857.

REGINA v. WILLIAM GAYLOR.

(The prisoner was convicted of manslaughter. It appeared that the prisoner procured sulphate of potash and gave it to his wife intending her to take it for the purpose of procuring abortion; and that she, believing herself to be pregnant, although in reality she was not, took the sulphate of potash in the absence of the prisoner, and died from its effects. Held, that the conviction was right.)

[S. C. 21 J. P. 119; 7 Cox C. C. 253.]

The following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by Erle J.

The prisoner Gaylor was indicted before me at the last November Session of the Central Criminal Court [289] for manslaughter. The facts were, that his wife's death was caused by swallowing sulphate of potash for the purpose of procuring abortion, she believing herself to be pregnant, although in reality she was not. The prisoner purchased this sulphate of potash, and gave it to his wife in order that she might swallow it for the above mentioned purpose, but he was absent at the time when she so swallowed it. For the prosecution it was contended that the wife committed a felony in so swallowing the sulphate of potash, and, as death ensued therefrom, she also committed murder (*Rex* v. *Russell*, 1 Moo. C. C. 356); that the prisoner was an accessory before the fact to this felony and to the consequent murder, and might be tried as if the principal had been convicted under 11 & 12 Vict. c. 46, s. 1; and that, although the evidence showed his offence was murder, yet that would support an indictment for manslaughter. Under my direction the jury convicted. The prisoner was discharged on recognizance, and I reserved for the opinion of the Court the following questions:—

1st. Was the deceased guilty of felony in administering sulphate of potash to herself for the purpose of procuring abortion, she not being pregnant?

2nd. Was the husband by his act guilty of felony, or an accessory thereto, he having been absent when she swallowed the drug?

3rd. If the husband was an accessory to the felony, was an indictment for manslaughter supported, it being laid down that there cannot be an accessory to manslaughter? (2 Hale, P. C. 246).

4th. Can the indictment be supported under 11 & 12 Vict. c. 46, s. 1? (*a*)

(*a*) That section enacts,—"That from and after the passing of this Act, if any person shall become an accessory before the fact to any felony, whether the same be

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THE THEFT ACTS 1968 AND 1978

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Chapter 7

OBTAINING PROPERTY BY DECEPTION

1. THE OFFENCE

7-01 THE dishonest obtaining by deception of property belonging to another with the intention of permanently depriving the other of it is an offence punishable on conviction on indictment with up to 10 years' imprisonment (s.15(1)).

"For the purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it . . ." (s.15(2)). "Property" and "belonging to another" have much the same large meanings as they have in the law of theft (s.34(1)). "Deception" is defined (s.15(4)) so as to include any deliberate or reckless deception as to a matter of fact or law, however effected. These definitions combine to produce a very wide offence. [1]

7-02 *Some irrelevant matters.* All the conditions of liability are stated in section 15(1). In a case of obtaining a social security benefit by deception it was argued that no offence could be proved in the absence of an adjudicator's decision that the defendant was not entitled to benefit. This remarkable argument, effectively making an administrative adjudication an ingredient of the offence, inevitably failed. [2] Nor, probably, is a person using deception to obtain a benefit saved by the fact that the truth he fails to declare would actually entitle him to benefit (though his knowledge or belief that he is legally so entitled may be relevant to whether he obtains the benefit dishonestly).[3]

Another matter that the Court of Appeal has had occasion to declare irrelevant is the tendency of the victim's trading policy, sought to be circum- vented by the deception charged, to contravene European community law. The use of the criminal law is concerned with the dishonest deception charged, not with support for the victim's policy.[4]

1 But the fact that the property obtained must have belonged to another seems strictly to have one serious limiting effect on the offence; see below, _ 7-06. The offence is distinctly wider than that of obtaining by false pretences which it repiaced: Larceny Act 1916, s.32(1). The main limitations of that offence were: that it applied only to the obtaining of any chattel, money or valuable security; that it applied only when ownership and not merely possession of property was obtained; and that the pretence had to be as to some present or past fact, not including the alleged offender's intentions as to the future.

2 *Lally* [1989] Crim.L.R. 648.

3 See below, _ 7-66.

4 *Dearlove and Drucker* (1988) 88 Cr.App.R. 279.

2. "OBTAINS PROPERTY BELONGING TO ANOTHER"

Property belonging to another

"Property"

7-04 The definition of "property" in section 4(1) is made to apply generally for purposes of the Act by section 34(1), so that the offence under section 15 can be committed in respect of any kind of property. There are no provisions, as there are in the case of theft, limiting the circumstances in which land can be the subject of the offence. Whatever can be transferred by one person to another as property is in practice within section 15, for deception can induce its transfer. So, for instance, a beneficial interest in property under a trust is, it is submitted, itself property within the phrase "things in action and other intangible property," and to induce the assignment of such an interest is therefore to obtain property.

If D, by deception, induces P to pay him more money than he would have paid but for the deception, there is an obtaining of property within the section and D may be convicted even though the precise amount of the excess cannot be specified. [5]

"Belonging to another"

The property obtained must be property "belonging to another."[6] The wide definition of this phrase in section 5(1) is also made to apply here by section 34(1). It is desirable to notice the force of this in conjunction with the provision that "a person is to be treated as obtaining property if he obtains ownership, possession or control of it" (s.15(2)). The result is that there is an obtaining within section 15 if the effect of D's fraud is that he obtains ownership, possession or control of any property which P owns, possesses or controls or in which P has any proprietary right or interest.[7]

Of course, the normal case will be that in which D induces P to part with property of which P is the owner. It will be enough if D obtains ownership only or possession only. For instance, if D by deception induces P to agree to sell him specific goods in a deliverable state so that, as prima facie occurs in such a case,[8] the property in the goods passes to D on the making of the contract, D is guilty even if he never acquires possession. [9] Conversely, D

5 *Levene* v. *Pearcey* [1976] Crim.L.R. 63 (taxi driver telling passenger that normal route is blocked, using longer route and obtaining larger fare).

6 A mistake in the information or indictment as to the person to whom the property belonged will be immaterial if the defendant nevertheless has enough information to know the nature of the charge; if the victim's identity is material, an error on the point can be cured by amendment: *Etim* v. *Hatfield* [1975] Crim.L.R. 234.

7 With one immaterial exception: see s.5(1).

8 Sale of Goods Act 1979, s.18, r. 1.

9 By obtaining ownership, D puts himself in a position to pass ownership to a third person, who may buy in good faith and obtain a valid title as against P: Sale of Goods Act 1979, s.23; *Eighth Report*, para. 90.

may deceive P into lending or hiring goods to him, D's intention being to deprive P permanently of them, and here D is guilty although he does not acquire ownership.

7-05 Alternatively, D may himself be the owner and still commit the offence. Two obvious examples are the following:

(i) P contracts to sell goods to D, D using no deception to induce the contract. The circumstances are such that the property in the goods passes before delivery. P retains possession and is entitled to do so until D pays or tenders the price. D by deception induces P to part with possession (*e.g.* he gives P a cheque that he knows to be worthless).

(ii) D pledges goods with P. By deception he induces P to redeliver the goods to him.

Again, neither D nor the person deceived need be the owner. P may have possession or control of Q's goods. If D induces P to part with the goods, intending to deprive both P and Q of them, either P or Q can be named in the indictment as the person to whom the goods belong. It will no doubt be convenient to name P.

Newly created thing in action

7-06 The limitation of the offence to the obtaining of property belonging to the victim might be thought embarrassing in some cases. One such case is that in which, by deception and at the expense of P, D causes his bank account to be credited with a sum. D thus obtains a thing in action--he has a right enforceable against his bank.[10] But that right, which is the only "property" that he obtains, is plainly not something that has ever belonged to P. The point seems not to have been taken in Court of Appeal cases[11] in which D has presented for payment a cheque drawn by P that he has stolen from the payee, [12]or in which he has by fraud induced P bank to transfer funds to Q bank for the credit of his account with the latter. [3] In the former a conviction of theft of the cheque (or, on suitable facts, obtaining the cheque from the payee by deception) might suffice. In the latter the argument presented here, if correct, might mean that the rogue has committed no offence. This would be regrettable. But a rejection of the argument would seem to involve treating "obtains property belonging to another" as meaning, in cases like these, "obtains a thing in action equivalent in value to other property (not necessarily describable) belonging to P before the transaction induced by the deception." An obtaining so described ought no doubt to be within section 15; but it seems not to be within the section as drafted. Nor is an

10 See _ 2-141, above. Even if the credit merely goes to reduce D's overdraft, there is presumably for a fraction of time property that can be said to have been obtained by D.

11 But it is understood to have been taken successfully before some trial judges.

12 *Davies* (1981) 74 Cr.App.R. 94: cheque for *10,000, drawn by P1 in favour of P2, stolen from\ P2 and paid into D's bank; held, D obtained "the sum of *10,000" (but see above, _ 2-11 at n. 33) "belonging to P1."

13 *Thompson* (1984) 79 Cr.App.R. 191: D's account at P bank abroad inflated by D's fraud; credit transfer requested to D's account with E bank in England; charge, obtaining "涡 the property of P bank"; conviction upheld.

obtaining by deception (*e.g.* by disguised multiple applications) of shares issued on flotation direct to the public. Such shares[14] are "things in action [or] other intangible property" existing for the first time as the property of the person to whom they are allotted.[15]

"Obtains"

For purposes of section 15: 7-07

(a) "a person is to be treated as obtaining property if he obtains owner- ship, possession or control of it." The flexibility that this gives to the offence has been illustrated above.

(b) "'obtain' includes obtaining for another or enabling another to obtain or to retain." The following are examples:

(i) *Obtaining for another.* P has a lien on E's goods and D on E's behalf persuades P to give up possession to him (D) by promising to discharge E's debt. (Note that, as P is the only person whom D intends to deprive, he alone can be named as the person to whom the property belongs.)

(ii) *Enabling another to obtain.* In a similar situation, D prevails on P to deliver the property direct to E. In *Duru*,[16] D deceived P into making a loan to F, which P did by sending a cheque to F's solicitor, E. D had "enabled [E] to obtain" possession or control of the cheque; and it was irrelevant that E was not himself a party to the deception.

(iii) *Enabling another to retain.* E is in possession of P's goods. D deceives P into leaving them with E rather than claiming their return.

It is odd that enabling another to retain is obtaining within the section but that enabling oneself to retain is not. True, in most cases where D, by deception, and with the necessary intention, induces P to let him retain P's property, D will commit theft. But theft may not catch some cases--for instance, if D, P's bailee, induces P by deception to sell him the goods bailed and thus to leave them in his possession, it is possible that he will commit no appropriation until after the goods have ceased to belong to P.[17]

3. DECEPTION

Statutory definition

Section 15(4) provides a partial explanation of the term "deception": 7-08

"For purposes of this section 'deception' means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person."

The purpose of this provision is not to provide a definition in the full

14 As opposed to relevant pieces of paper (letters of allotment, share certificates) transferred by the company.

15 See also below, _ 7-62, n. 31.

16 (1973) 58 Cr.App.R. 151.

17 See, however, above, _ 2-91. See further, Smith, *Theft*, para. 201.

sense, but rather to make clear that the term "deception" used in this Act does not share some of the limitations of the term "false pretence" in the Larceny Act offence replaced by section 15.[18] In particular, it was not formerly an offence to obtain property by making a promise that the maker had no intention of keeping or by otherwise deliberately misrepresenting an intention. It was therefore thought desirable to single out fraudulent state- ments of intention for express reference. Section 15(4) is one of those provisions designed as important messages for the pre-Theft Act practi- tioner in particular.[19]

The parenthesis "whether deliberate or reckless" may conveniently be reserved to a discussion of the whole of the fault element of the offence.[20] The rest of the subsection requires extensive consideration at this point.

Deception requires a deceiver and a deceived

7-09 Towards the end of section 15(4) occurs the phrase "the person using the deception." This might suggest that deception is something employed (a lie or other tricking device) rather than something practised (a lie or trick having an effect upon a victim). But the Committee, in the course of justifying the choice of the word "deception" in place of the old phrase "false pretence," said that the new expression has:

> "the advantage of directing attention to the effect that the offender deliberately produced on the mind of the person deceived, whereas 'false pretence' makes one think of what exactly the offender did in order to deceive"[21];

and it is certainly true that there can be no deception without a deceived party. This part of the chapter--like section 15(4)--will be concerned only with the deceptive practice used by D; but it must not be forgotten that one element of a deception is P's being in some sense misled by that practice. In what sense he must be misled will be considered hereafter.

"Deceiving" a machine

7-10 It appears now[22] to be universally accepted that a deception offence cannot be committed by obtaining an advantage through misuse of a machine (whether a computer or a mechanical device) without the interven- tion of a deceived human being.[23] The terms of two of the deception offences seem to confirm this view. Sections 1 and 2 of the Theft Act 1978 (obtaining

18 Obtaining any chattel, money or valuable security by any false pretence; Larceny Act 1916, s.32.
19 Others are ss.3(1) and 4(1).
20 See __ 7-55, 7-56.
21 *Eighth Report*, para. 87.
22 The point was left open in *Davies v. Flackett* [1973] R.T.R. 8.
23 There has been at least one ruling to this effect in the context of false V.A.T. returns (*Moritz*, 1961, unreported), with consequent amending legislation: Value Added Tax Act 1983, s.39(2C) (added by Finance Act 1985, s.12(5)).

services by deception; evasion of liability by deception) are both worded in a way which assumes the existence of a person who is not merely the victim of the offence but is also personally affected by the deception.[24] It would be odd if the offence of obtaining property, but not that of obtaining services, could be committed by feeding a false coin into a machine. The oddity would be compounded by the fact that where property is obtained, as from a vending machine, the transaction can perfectly aptly be prosecuted as theft.

7-11 The Law Commission has several times considered whether the need for a human object of deception leaves a gap in the law of fraud that ought to be filled.[25] The tendency of its discussions so far seems to be that, although there is a case for law reform, the gap is only a small one, because the disbonest manipulation of machines almost always involves the commission of some other offence, often theft. But the gravamen of many transactions will be the actual dishonest obtaining of an advantage (otherwise than by theft) that a conviction of an offence such as forgery[26] or false accounting will only imperfectly reflect. Some reform of the law should certainly figure in any revision either of the Theft Acts or of the general law of fraud.

Deception by words or conduct

Section 15(4) explains that "deception" embraces "any deception . . . by words or conduct." A conventional way of saying much the same thing is to say that one person may deceive another by either an express or an implied representation which is false; he represents something to be the case which is not. But it has been observed that some kinds of deception cannot properly, or at least without artificiality, be analysed as involving the making of representations.[27] Although this may be true, the conventional language remains useful. In every case of deception the victim will in some sense[28] be led to suppose that which is not; and in this chapter "that which is not" will be referred to as that which is "falsely represented" to be the case. 7-12

Adherence to this conventional usage in a general discussion does not imply that similar language is obligatory or even appropriate in the drafting of particular charges. What matters in charging is that the substance of the allegations should be clear to the defendant and to the court. It may or may not, depending on the type of case, be accurate and informative to assert that the defendant implied a particular false proposition (or "represented" something) by his conduct.

Deception as to fact or law

Law

7-13 The reference in section 15(4) to a deception "as to law" is included for the

24 s.1(2): ". . . the other is induced to confer a benefit"; s.2(1)(*b*): ". . . induces the creditor . . . to wait for payment."
25 Working Paper No. 56, *Conspiracy to Defraud* (1974), paras. 61-63; Working Paper No. 104, *Conspiracy to Defraud* (1987), paras. 4.9-4.14; *Computer Misuse* (Law Com. No. 186; Cm. 819; 1989), paras. 2.4-2.7.
26 See Forgery and Counterfeiting Act 1981, ss.8(1)(*d*), 10(3)).
27 Arlidge and Party, *Fraud*, paras. 2.06 *et seq.*; Williams, *Textbook*, pp. 780-782.

28 See below, __ 7-41 to 7-45..

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avoidance of doubt.[29] It was not settled whether a false statement as to a matter of law was a false pretence under the old law. There was no need for similar uncertainty under the present Act.

Fact and opinion; implied fact

7-14 A "deception . . . by words . . . as to fact" involves the making of an untrue statement as to some past or present fact; that the car being sold was first registered in a particular year; that the fire giving rise to an insurance claim destroyed the mink coat; and so on. Usually it is easy enough to identify a fact faisely asserted by the words used. But difficulties can occur where the defence is in a position to argue that the statement made was one of opinion rather than of fact; or where the prosecution need to argue that what was false was something implied by a true statement of fact or an apparent expression of opinion.

7-15 (i) *Fact and opinion.* In criminal law, as in civil law, liability does not normally derive from the giving of an unjustified or exaggerated opinion. A statement of opinion is not a statement of fact. A person seeking to make a sale is not penalised for over-praising his goods so long as he confines himself to statements as to value and quality. But he cannot with impunity assert that the goods have some attribute that is no mere matter of opinion and which it can be demonstrated that they do not have. The difference has been happily expressed as that "between saying that something is gold and saying that something is as good as gold."[30]

7-16 (ii) *Implied fact.* There may be deception "by words . . . as to fact" although no untrue fact is expressly stated. The assertion of one fact, for example, may be such as to imply the non-existence of some other fact which the maker of the assertion knows to exist and which might affect the mind of the person to whom the statement is made. For instance, a statement about the past fortunes of a business for sale may assert that the average turnover of the business during the past 10 years has been of a certain satisfactory order. This assertion may be literally true; but if the turnover has consis-tently decreased over the 10 years, so that the volume of business now being done is disastrously small, the concealment of this material fact should certainly involve potential liability for "deception . . . as to fact."[31] A neat example of an implied fact is provided by a case in which a car dealer turned back the odometer of a car and displayed a notice saying that the mileage

29 *Eighth Report*, para. 101(ii).
30 Smith and Hogan, *Criminal Law* (1st ed.). p. 410, comparing (*inter alia*) *Rryan* (1857) Dears. & B. 265 (opinion; but an unsatisfactory case) and *Ardley* (1871) L.R. 1 C.C.R. 301 (fact).
31 Compare *Kylsant* [1932] 1 K.B. 442, decided on the wording of the Larceny Act 1861, s.84 ("statement . . . false in any material particular").

reading "may not be correct." He thereby falsely represented, as the indict-ment alleged, "that he had no reason to disbelieve" the reading.[32]

7-17 (iii) *Expression of opinion implying fact.* A statement that is, in form, one of opinion may likewise imply some fact that can be shown to be untrue. To say that Mr. Smith is "a most desirable tenant" is to seem to assert at least that there are no facts known to the speaker that would justify the view that Mr. Smith does not deserve this description.[33] Similarly, the statement that the shares of a company would be a worthwhile investment is in form a value judgment; but it would surely be falsified by proof that the company was unable to pay its creditors and had no apparent means of achieving solvency. Another way of discovering a statement of fact in such cases is to say that D is asserting that he holds the opinion he expresses when in fact he does not hold that opinion at all. An indictment would accurately charge that D falsely represented that he "was of the opinion" or "believed" that such-and-such was the case.

Deception as to Intention

7-18 The reference in section 15(4) to "a deception as to . . . present intentions" makes clear that the doctrine of *Edgington* v. *Fitzmaurice*[34] operates in the criminal law as well as in the civil. D's statement that, for example, he intends to use for a particular purpose money that P is thereby induced to invest in D's enterprise is a deception if D does not then have that intention. The definition refers, of course, to "the present intentions of [D] *or any other person.*" So D's statement that E, or the limited company that D represents, intends to do something in the future is also within the defini-tion, if E or the company has not that intention and D either knows this fact or does not believe his statement to be true.

Promises

7-19 The statement "I promise to do such-and-such" is in effect a statement of intention; for after all a person may be taken to imply an intention to keep his promise. So with the enactment of the Theft Act 1968 it became an offence to obtain property by a false promise--that is, a promise which, at the time he makes it, the maker does not intend to keep.[35] Under the former

32 *King* [1979] Crim.L.R. 122. *Banaster* (1978) 68 Cr.App.R. 272, illustrates the sometimes subtle distinction between what words mean and what they imply. A minicab driver told a passenger at London Airport that he was "an airport taxi." The jury, it was said, were rightly allowed to find that his words "implied" that it was "all official." The words no doubt *meant* that he had some official status. His conviction, which was upheld, was of obtaining the fare paid by the deception that it was "the correct fare" (meaning "authorised"?). The words he used seem not to have *meant* this; it is not even very plain that they *implied* it.
33 Compare *Smith* v. *Land and House Property Corporation* (1884) 2B Ch.D. 7.
34 (1885) 29 Ch.D. 459.
35 For important observations as to statements of present intention, expectation or belief implied by the making of promises or forecasts, see cases decided under the Trade Descrip-tions Act 1968: *Sunair Holidays Ltd.* (1973) 57 Cr.App.R. 782; *British Airways Board* v. *Taylor* (1975) 62 Cr.App.R. 174.

law of obtaining by false pretences there were situations in which, although the essential wrongdoing was the making of a false promise, a conviction had to rest on the discovery of some pretence as to a fact other than intention. Thus, if D obtained money from P by promising to marry her, he could formerly be convicted of obtaining the money by false pretences only if he was not free to marry her and then only upon the ground that he had asserted that he was. He may now be convicted if, and because, he did not intend to marry P. But it is vital to stress that the criminal law has not become a vehicle for the enforcement of promises. What must be proved is that at the time of the obtaining D did not have the intention that his words or conduct could be taken to assert. It is neither necessary nor sufficient to prove that he later decided not to keep his promise (though the fact that he did not keep it may be evidence in favour of the conclusion that he never intended to do so).

Deception by conduct

Introduction

7-20 The scope of deception offences depends in part upon the readiness of courts to read into the behaviour of defendants the making of relevant representations. It also depends in part upon their readiness to conclude that the alleged victims of deception relied upon the representations in acting as they did. The present discussion concerns the former point: what statement of fact (if any) does D's conduct imply? The answer to this question is, of course, dependent to an extent upon the question whether P can be said to have relied upon such a statement; for a court will not think to read into D's conduct any statement upon which P cannot in some sense be said to have relied.[36] From the wealth of possible implications of D's conduct, therefore, the law selects certain implications only. But the discovery of *any* implica-tion is an act of interpretation the validity of which cannot be demonstrated. In making such a discovery the court is in truth engaged upon an artificial exercise designed to ensure that the law of deception is given appropriate content. That law cannot be limited only to "deception by words." The question how much further it is to stretch is obviously one of policy. It is also one of plausibility. Any statement that a person is to be regarded as impli-edly making in a given situation ought to be one that an honest person in that situation might be expected to confirm without question. And it ought to be one the truth of which may be supposed to be of significance to a person to whom it is treated as being addressed in the context of a transaction of the kind in question. It is thought that, so long as this requirement of plausibility is respected, it is proper for the law to use deception offences energetically in the control of dishonest activity.

Standard examples

7-21 The following are some standard examples of different kinds of fraud depending upon deception by conduct.

36 As to reliance, see below, __ 7-41 to 7-45.

(i) A person who sells property is normally taken to imply by his conduct that he has a right to do so. If he has not (and knows that he has not or does not believe that he has), he employs a deception which is likely to influence his buyer; for the buyer would be unlikely to buy if he knew that the seller had no title. If the buyer is so influenced, what he pays for the property is obtained by deception by conduct.[37]

(ii) The fraud perpetrated by one who wears a uniform to which he is not entitled has long been a classic of the textbooks because of the direction of Bolland B. in *Barnard* in 1837[38]:

> "If nothing had passed in words, I should have laid down that the fact of the prisoner's appearing in the cap and gown would have been pregnant evidence from which a jury should infer that he pretended he was a member of the university. . . ."

There is no reason why this popular illustration of an implied pretence should not survive as a simple example of deception by conduct.

(iii) A similar example is that of the fraud committed by establishing the outward appearance of a 7-22
genuine business or enterprise and thereby induc-ing people to supply goods that will not be paid for, or to pay for non-existent goods, or to invest money in a worthless undertaking. Frauds of this kind are often large-scale operations in which several people are involved. They are commonly prosecuted as conspiracies--either to commit offences (as obtaining property by deception) or to defraud.[39]

(iv) A person who enters a restaurant and orders a meal impliedly repre-sents that he intends to pay for the meal (and, in the ordinary case, that he intends to pay before leaving the restaurant).[40]

Cheques, cheque cards and credit cards

The representations involved in the use of cheques, cheque cards and credit cards have been considered by the House of Lords in two cases. 7-23

37 Compare *Edwards* [1978] Crim.L.R. 49 (squatter "letting" a room).

38 (1837) 7 C. & P. 784.

39 Conspiracy to defraud was preserved as an offence at common law by the Criminal Law Act 1977, s.5(2) (and is now punishable with a maximum of 10 years<???> imprisonment: Criminal Justice Act 1987, s.12(3)). Under s.5(2) in its original form, an agreement on a course of conduct amounting to or involving the commission of a substantive offence, even of fraud (such as obtaining property by deception), could be charged only under s.1 of the Criminal Law Act 1977 as a conspiracy to commit that offence, and not as a conspiracy to defraud (though if the agreement involved additional fraudulent conduct, not amounting to a sub-stantive offence, this aspect of the agreement could be charged as a conspiracy to defraud): *Ayres* [1984] A.C. 447 (as explained in *Cooke* [1986] A.C. 909). This inhibition continues to apply to agreements made before, and not subsisting on, July 20, 1987. But on that date s.12 of the Criminal Justice Act 1987 came into force, removing the inhibition (subs.(1)) and appropriately amending s.5(2) of the 1977 Act (subs. (2)). As to the choice of charge, see paras. 15-17 of the Code of Practice for Prosecutors made by the Director of Public Prosecutions under the Prosecution of Offences Act 1985, s.10.

40 See *D.P.P.* v. *Ray* [1974] A.C. 370 (_ 7-33, below)--where there was no offence under s.15. because the intention not to pay was formed after the food had been consumed.

(i) *Cheques*. Professor Kenny long ago identified a number of representations as implied by "the familiar act of drawing a cheque."[41] (a) The first implied statement was "that the drawer has an account with [the] bank" upon which the cheque is drawn. There is no doubt that this statement is implied; and it is a convenient representation to allege where the drawer has no such account. (b) The second implied statement was "that [the drawer] has authority to draw on [the account] for [the] amount" for which the cheque is drawn. This implication, it has now been suggested, is incorrect. "A customer needs no authority from his banker to draw a cheque on him; it is the banker who needs authority from the customer to pay it on presentment."[42] It is in any case redundant, being, like the first statement, embraced by the third.[43] (c) In *Metropolitan Police Commissioner* v. *Charles*[44] the majority of their Lordships[45] accepted Kenny's third representation, namely:

> "... that the present state of affairs is such that, in the ordinary course of events, the cheque will on its future presentment be duly honoured."[46]

Kenny went on to point out that the drawing of the cheque:

> "does not imply any representation that the drawer now has money in this bank to the amount drawn for, inasmuch as he may well have authority to overdraw, or may intend to pay in (before the cheque can be presented) sufficient money to meet it"

—or, it may be added, may expect the account to be sufficiently fed by some other person. Indeed, the cheque may be considerably postdated; yet the same representation will be implied.[47] This does not mean that the drawer's act simply implies a representation as to the future, a prediction; this would not satisfy the requirement of a "deception ... as to fact."[48] Rather it implies a statement as to the existence of a "state of affairs" (to repeat Kenny's words) which includes the drawer's present intention or expectation. Nevertheless, it is certainly less pedantic to express it in Viscount Dilhorne's pithy terms: "a man who gives a cheque represents that it will be met on presentment."[49]

[41] *Outlines of Criminal Law*—see now 19th ed. (1966), p. 359. Kenny cited *Hazelton* (1874) L.R. 2 C.C.R. 134, and his analysis was adopted by the Court of Appeal in *Page* [1971] 2 Q.B. 330n.
[42] *Per* Lord Diplock in *Metropolitan Police Commissioner* v. *Charles* [1977] A.C. 177 at 182; see also *per* Viscount Dilhorne at 185.
[43] *Ibid.* at 190–191 (Lord Edmund-Davies).
[44] [1977] A.C. 177.
[45] Lord Diplock (at 182) restated the drawer's representation to be that "the cheque is one which the bank on which it is drawn is bound, by an existing contract with the drawer, to pay on presentment or, if not strictly bound to do so, could reasonably be expected to pay in the normal course of dealing."
[46] This was in fact Kenny's explanation of another statement by which he no doubt sought to express the same notion: "that the cheque, as drawn, is a valid order for the payment of that amount." But this can be read as referring to the future; so that the version quoted in the text, which is a representation as to existing fact, is now preferred: see *per* Robert Goff L.J. in *Gilmartin* [1983] Q.B. 953 at 960–961.
[47] *Gilmartin*, above.
[48] See *per* Robert Goff L.J. in *Gilmartin*, above, at 960.
[49] *Charles* [1977] A.C. 177 at 186. Compare *per* Lord Reid in *D.P.P.* v. *Turner* [1974] A.C. 357 at 367.

The transaction contemplated by Kenny is that where D uses a cheque to obtain property from the payee. When he demands cash from his own bank against his account he thereby represents that he believes the state of his account (no doubt including uncleared effects[50] and overdraft facilities) to be such that he is entitled to draw that amount. 7–24

(ii) *Cheque cards and credit cards*. In *Charles* D obtained gambling chips at a club by giving 25 cheques for £30 each, supported by a cheque card. The use of the card in accordance with specified conditions created an undertaking by D's bank to honour the cheques. So the representation involved in giving the cheques was true; the cheques would undoubtedly be met, whatever the state of D's account. The House of Lords held, however, that when the drawer of a cheque presents a cheque card by way of guarantee, he represents to the payee that he has the bank's authority to use the card in relation to that cheque so as to create a contractual relationship between bank and payee. If the cheque is one which would not be met but for the use of the cheque card, he will lack that authority. The use of the card will then involve a misrepresentation. 7–25

In *Lambie*[51] D selected goods in a shop and proposed to pay by Barclaycard. That is to say, she was using the card as a credit card. The shop had the usual agreement with D's bank that the bank would honour a voucher signed by the holder of a current card for a transaction within an agreed limit. D's transaction was within that limit. The shop manageress accepted this form of payment. The House of Lords held, applying its decision in *Charles*, that D had represented (falsely, on the facts) that she had authority to contract with the shop on the bank's behalf that the bank would honour the voucher signed by D.

A person dishonestly using a cheque card or credit card is guilty of an offence involving deception only if the payee is deceived by the cardholder's misrepresentation into accepting the cheque or voucher concerned. This aspect of deception is considered below.[52] The discussion may be anticipated by saying that convictions were confirmed in both *Charles*[53] and *Lambie*.[54]

The representations found in *Charles* and *Lambie* have attracted much criticism.[55] The gist of the criticism is that resort to the notion of the cheque card or credit card holder as agent of the issuer of the card is not necessary to explain the existence of a contract between the issuer and the payee or 7–26

[50] In *Christou* [1971] Crim.L.R. 653, D paid in for the credit of his account cheques which were worthless, as he knew they were or might be. He then drew on the account before those cheques were presented. This was one indivisible deceptive practice.
[51] [1982] A.C. 449.
[52] §§ 7–41 *et seq.*
[53] What was obtained in *Charles* was a pecuniary advantage in the form of D's being "allowed to borrow by way of overdraft" (see below, §§ 7–53 and 10–12) and D was convicted accordingly under s.16(2)(*b*). He probably had not the intention of permanently depriving the club of the gambling chips, within the meaning of s.15 (though for an argument to the contrary, see J. C. Smith [1976] Crim.L.R. 330).
[54] The conviction in *Lambie* was under s.16(2)(*a*), since repealed. It might have been under s.15—and should have been: [1982] A.C. 449 at 456.
[55] Williams, *Textbook*, pp. 778–780; Bennion (1981) 131 New L.J. 1041 (on *Lambie*); Paulden (1981) 145 J.P.N. 708.

supplier; card-holders do not, on a true analysis, act as agents and a dis-honest card-holder cannot properly be interpreted as asserting an authority which no card-holder has. Moreover, it is said, the payee or supplier with whom the card-holder deals is not interested in whether the latter has the bank's authority. He is interested only in whether the conditions that will entitle him to payment (by guarantee of a cheque or by payment against a voucher) are satisfied. This criticism asserts, in effect, that it is inept to identify a representation on which the representee cannot truly be said to rely.[56]

A strong case has undoubtedly been made that the language of agency in *Charles* and *Lambie* is inappropriate. The House of Lords might rather have said quite simply that the user of a cheque card or credit card impliedly represents that he is entitled as between himself and the bank to use the card for the transaction in question. This way of expressing the matter would, of course, still be open to the objection that such a representation is of no interest to the third party--a point that will be referred to again below.

Overcharging

7-27 A common mischief which may involve an offence under section 15 is that of serious overcharging for work done--as, for instance, domestic building repairs. An example was before the Court of Appeal in *Silverman.*[57] D was known to two elderly sisters because of work that he or his employers had done for their family over a long period. He charged them grossly excessive sums for work done on their property. He was held to have been rightly charged under section 15 with obtaining the sums by impliedly representing them to be "a fair and proper charge." The court interpreted the situation as being one of "mutual trust"--thus, it seems, referring to the trust likely to have been reposed in D by the sisters. The question was whether he had taken advantage of them "by representing as a fair charge that which he, but not [they], [knew] to be dishonestly excessive." He had; "his silence on any matter other than the sums to be charged was as eloquent as if he had said that he was going to make no more than a modest profit." Although liability on such facts may be supportable, its proper basis needs careful consider-ation if section 15 is not to be misused in cases of this kind. There is a world of difference between fraud (with which the section is concerned) and exploita-tion (with which it is not).

7-28 *What kind of representation?* The first question is: what is the substance of the deception? The suggested implied statement, "My charge is fair and proper" (or "My profit is only modest") looks like a statement of opinion rather than of fact, unless "fair and proper" can be understood as referring to an objective yardstick. The only yardstick available, it is submitted, is "the going rate for the job." To convert the alleged deception into a

56 Compare above, _ 7-20.

57 (1987) 86 C<???>.App.R. 213. The convictions in this case were quashed on a separate ground.

"deception ... as to fact," conduct such as Silverman's must be interpreted as carrying some such implication as, "The price I am quoting or charging is within the range of prices likely to be quoted for the same services by other tradesmen (with similar overheads)."[58] This is a clumsy kind of implication to spell out in an information or indictment; but it is submitted that the defendant (and the tribunal of fact) should know that what is in substance alleged is that such an assertion was implied in the circumstances and that the victim paid the price in reliance upon it. It would be helpful, at any rate, if in a future case the phrase "fair and proper" could be explained, whether or not along the lines suggested here.

7-29 *When is such a representation to be implied?* Clearly such a representation cannot be implied whenever a quotation for work is given or payment for work is demanded. The judgment in *Silverman*, which was concerned with rather special facts, does not go far to identify the circumstances that will justify the implication. It is submitted that it is helpful to refer in this context to the fact that deception, as explained in section 15(4), must be "deliberate or reckless." So D cannot be guilty of obtaining his price by deception unless he realises[59] that P may understand him to be implying the propriety (as above explained) of his price and may employ him, or pay him, on the strength of that understanding. But if D does so realise, it must become relatively easy to find a false representation (once granted that overcharging can ever found a conviction under section 15). D's knowledge of P's inno-cence and inexperience in relevant respects may be relevant; or his know-ledge that P is likely to trust him on the strength of prior transactions or social connections (as in *Silverman* itself). Such knowledge may combine tellingly with the fact (no doubt a feature of most cases attracting the concern of prosecutors) that D has spontaneously approached P to propose the transaction and is not tendering in a competitive situation initiated by P.

7-30 *Deception or extortion?* The grosser the overcharging, the greater the temptation may be to allege that a deception has occurred. But the more grossly excessive D's price is, the more hopelessly innocent and trusting P must be (and be thought to be) if he is to suppose D to be asserting the propriety of the price (and if D is to anticipate his reliance on such an assertion). Some people, indeed--as, apparently, the victims in *Sullivan*-- are astonishingly gullible and a claim to have supposed that even an absurdly exorbitant price was a normal price may compel belief. But, paradoxically, the greater the price, the more critically considered must be the suggestion

58 The alternative, "*I hold the opinion that* my price is reasonable" or "fair and proper" (which, like any statement about one's state of mind, is a statement of fact) means little until translated into a claim to hold an opinion about the price relative to the market: and once that translation is made, the simpler interpretation. "*It is the case that* ..." seems permissible and preferable. (Silverman's victims thought that they were paying a "normal" or "standard" charge (86 Cr.App.R. at 215), not that Silverman was of that opinion.) A related interpreta-tion, "Other tradesmen would think my price reasonable," recalls the likely meaning of "proper" in s.21(1)(*b*) (blackmail): see below, _ 13-31.

59 See below, __ 7-55, 7-56.

that P was *deceived* into paying it. If deception is not the explanation, however, there must be some other. One possibility, where D announces the price of work already done, is that P feels under pressure to pay what D demands because the very demand for so excessive a sum carries a quality of menace. In a sufficiently clear case (and certainly where menaces are expressly used) the right charge may be blackmail rather than obtaining by deception.

Conduct to conceal facts

7–31 An interesting situation is presented by conduct of D which is intended to work a deception but of which, if the deception is to succeed, P must remain in ignorance. For instance, D may intercept a letter warning P of a fact that would be likely, if known to P, to make him refuse a proposed transaction, or D may hide physical evidence of the fact that P would otherwise see. It would appear to be open to a court to say that such conduct amounts to deception within section 15. A clearer case would be that where D conceals (as by filling in and painting over) a serious defect in goods, the goods then being examined by P. In this case the result of the work of concealment would be visible to P.[60]

Silence as conduct

7–32 In some situations D may be thought to have a moral duty (and may for other purposes have a legal duty) to reveal to P some fact which might affect P's mind in relation to a proposed transaction. Suppose that, after forming his intention that P shall be misled by his own ignorance, D does nothing active but pursues his dishonest purpose by maintaining silence. If a transaction then ensues in which D obtains property from P, the question may arise whether he has obtained that property by deception.[61]

Before considering particular examples of situations of this kind, the following general observations may be offered. First, the question for present purposes is not whether D had a duty to reveal facts but only whether he appeared to assert or deny them. But if D is not, according to the law of contract or of tort, under a duty to reveal a fact known to him, it is the more difficult to interpret his silence as a denial of that fact; and this consideration contributes to ensuring that the criminal law is not in practice more demanding than the civil. Secondly, there may in fact be no situation in which mere silence, mere inaction, alone can work a deception within the meaning of the Act. It may be necessary at least to find some other conduct of D in association with which his silence may be interpreted as making a representation.

[60] Compare under the Trade Descriptions Act 1968, *Cottee* v. *Douglas Seaton (Used Cars) Ltd.* [1972] 1 W.L.R. 1408 at 1417; [1972] 3 All E.R. 750 at 758, *per* Milmo J.
[61] See *Eighth Report*, para. 101(iv); Smith, *Theft* (4th ed.), paras. 170–172; Arlidge and Parry, *Fraud*, paras. 2.44 *et seq.*; A. T. H. Smith [1982] Crim.L.R. 721 at 729–731.

The main relevant authority under the Act is *D.P.P.* v. *Ray*.[62] D entered a restaurant intending to pay for the meal he was to eat. The representation implied by his conduct (that he intended to pay) was therefore true. After he had eaten his meal he decided not to pay and sat at his table until the waiter was out of the room. He then made his escape without paying. The House of Lords held by a majority that he had obtained by deception the evasion of his obligation to pay,[63] either because the initial representation made on entering and ordering the meal was "a continuing representation which remained alive and operative" and had become false,[64] or because by remaining at the table after forming his dishonest intention he continued to make from moment to moment, but now falsely, the representation that he intended to pay.[65] A corresponding case under section 15 would be provided by the diner who forms his decision not to pay for his food between the time of ordering it and the time of its being served. 7–33

D.P.P. v. *Ray* illustrates the situation where D makes an assertion to P which is true when made but which becomes untrue before the relevant obtaining. Three other situations may be briefly considered. The first is that where D makes an assertion which he believes to be true but which is not. Before he obtains any property from P, D learns that his assertion was false. He does not correct it. He may probably be interpreted as now falsely representing that he believes his original assertion to be true, or as continuing to make (but now falsely) that same assertion. The second situation is that where P makes clear to D that he assumes some fact to be true which is material to a negotiation between them. D knows the assumption is false but, though he does not actively confirm it, he does nothing to disabuse P. It is unlikely that a court would hold D's silence to be "conduct" within the meaning of section 15(4). The third situation is even clearer. D simply refrains from mentioning to P a fact, known to D, that might affect P's mind in the transaction proposed between them. The fact that it will usually be impossible to identify a clear statement to be inferred from D's silence should suffice to exclude liability, quite apart from all other considerations, including the consideration that no civil liability normally arises from simple non-disclosure. 7–34

The falsity of the representation

The representation that D makes by words or conduct must be false if 7–35

[62] [1974] A.C. 370. See also *Nordeng* (1975) 62 Cr.App.R. 123, and commentary by J. C. Smith [1976] Crim.L.R. 196.
[63] Contrary to s.16(2)(*a*), since repealed. The diner who makes off without payment will now be prosecuted under the Theft Act 1978, s.3: see Chap. 12.
[64] *Per* Lord MacDermott (at 382).
[65] See *per* Lord Pearson at 391; and compare *per* Lord Morris of Borth-y-Gest at 385–386. (The latter explanation may be necessary if the decision is to apply where the waiter allegedly deceived is one who was not present until after the meal was served: see White (1986) 37 N.I.L.Q. 255 at 258.) Lords Reid and Hodson dissented. Lord Reid (at 379): "Deception, to my mind, implies something positive. It is quite true that a man intending to deceive can build up a situation in which his silence is as eloquent as an express statement. But what did the accused do here to create such a situation? He merely sat still." Lord Hodson (at 389): "Nothing he did after his change of mind can be characterised as conduct which would indicate that he was then practising a deception."

there is to be a deception. It is not enough that he thinks he is telling a lie. If "quite accidentally and, strange as it may sound, dishonestly,"[66] he tells the truth, he cannot be convicted of an offence requiring deception. (He may, however, be convicted of an attempt, even if he obtains what he sets out to obtain.[67]

Falsity of representation as to law

7-36 When D is charged with an obtaining effected by a "deception as to law," it must be up to the judge to direct the jury as to the truth or falsity of the representation said to have been made. The representation may be an implied one, as where D is alleged to have obtained the price of property he had no right to sell. Whether he had such a right will usually turn on matters of pure fact. Exceptionally, however, where it depends upon the legal consequences of background events, those consequences are for the judge to declare.[68]

Multiple representations

7-37 It may be alleged that D induced P to act as he did by making a number of false statements. In such a case there may be a conviction only if the jury agree that D was so induced by at least one particular statement as to which they (or a sufficient majority[69]) are all satisfied. This is an application of the general proposition that:

> "where a number of matters are specified in [a] charge as together consti-tuting one ingredient in the offence, and any one of them is capable of doing so, then it is enough to establish the ingredient that any one of them is proved; but . . . any such matter must be proved to the satisfaction of the whole jury."

The general proposition and its particular application were laid down in *Brown.*[70] a case of fraudulently inducing an investment under the Prevention of Fraud (Investments) Act 1958, s.13(1).

7-38 The Court of Appeal in *Brown* sought to explain the earlier decision of *Agbim*,[71] which had been interpreted as requiring agreement only that P had

66 *Deller* (1952) 36 Cr.App.R. 184, *per* H<???>bery J. at 191.
67 Criminal Attempts Act 1981, s.1(2)(3); *Shivpuri* [1987] A.C. 1.
68 See, *e.g. Walker* (1983) 80 L.S.Gaz. 3238; [1984] Crim.L.R. 112 (above, _ 1-25).
69 Juries Act 1974, s.17. The same majority, of course, would need to be satisfied as to all other elements of the offence.
70 (1983) 79 Cr.App.R. 115 at 119. As to the circumstances (controversially said to be "comparatively tare") in which a direction based on the *Brown* principle needs to be given, see *More* (1987) 86 Cr.App.R. 234 at 244 (the House of Lords, *Ibid.* at 252, found it unnecessary to express an opinion on this point or on the correctness of *Brown*). For general consideration of the problem of "satisfying the jury." see J. C. Smith [1988] Crim.L.R. 335.
71 [1979] Crim.L.R. 171--but more detail emerges in the judgment in *Brown.*

been induced by some false representation and not agreement that any particular representation had effected the inducement. *Agbim* was now said to be authority only for the proposition that the jury "need not be agreed as to the parts of the evidence which lead them to agree that the ingredients of the offence have been made out." One at least of the convictions in *Agbim* was on a count alleging the obtaining of a cheque[72] by the deception that a statement of expenses was correct. The several false items said to make that statement incorrect (fictitious heads of expenditure, exaggerated rates of expenditure, and so on) were not--in the language of *Brown*--"matters ... specified in the charge." Agbim's conviction was upheld although the jury had not been directed that they must agree upon a particular clement of falsity; and the outcome appears to have been approved in *Brown.*[73] But it is submitted that it is unsatisfactory to describe different statements relied upon in a case like *Agbim* as "parts of the evidence" (about which jurors can take different views) merely because of the form of the charge. If D puts in one claim with 12 items, he is alleged to have obtained his payment by a single incorrect total claim; if he puts in 12 separate claims, the same payment might be described as induced by 12 false representations. Nothing should turn on the chance circumstance that the jury may be able to say in the former case, but not in the latter, that they are all agreed upon a "matter specified in the charge." Unless great care is taken they might (in an extreme case) convict, although every one of the impugned items of expenditure is accepted as correct by 11 of their number.

Proving a negative

7-39 Where the burden of proving the falsity of the representation involves proving a negative, there is in common sense a limit to the quantity of evidence that the prosecution can be expected to adduce on the issue. If D has asserted that such-and-such is the case (*e.g.* the goods he sells cost eight times as much in the big shops), it is enough for the prosecution to speak of limited unsuccessful efforts to verify his assertion (seeking the goods at higher prices in a few shops). Reasonable efforts of that kind having been reported, it is not wrong for the judge to observe to the jury that the defence might be expected to give positive evidence, if it can be given, tending to support the representation.[74]

4. RELATION BETWEEN THE FALSE REPRESENTATION AND THE OBTAINING

The deception must precede the obtaining

7-40 This proposition should be too obvious to need stating. But it was the sole

72 Procuring the execution of a valuable security (s.20(2)).
73 (1983) 79 Cr.App.R. at 118-119.
74 *Mandry and Wooster* (1972) 58 Cr.App.R. 27, from which the illustrative facts in the text are taken.

reason required for the quashing of the conviction in *Collis-Smith*.[75] D had petrol put in the tank of his car at a petrol station. He then falsely stated that he was using the car for business purposes and that his firm would pay for the petrol. This was the substance of the deception charged and his appeal against conviction was rightly allowed; the petrol was not obtained by this deception.

The prosecution argued in *Collis-Smith* that after *possession* of property had been obtained D might by a deception then made obtain *ownership*, and that such a transaction would satisfy the section. This argument, it is submitted, was clearly correct in principle (though the court, seemingly anxious to protect criminal practitioners from "difficult points under the Sale of Goods Act," was not prepared to acknowledge this); but it was equally clearly inapplicable in the instant case, in which the property in the petrol must have passed on its being put into the tank.[76]

The effect of the representation on P[77]

Need P believe the representation?

7–41 "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false." This well-known statement by Buckley J. in *Re London and Globe Finance Corporation*[78] was cited with approval in *D.P.P.* v. *Ray*.[79] It appears at first sight to state the obvious and to require no elaboration. Yet there is, on reflection, a good deal of uncertainty attaching to the notion of "believing that a thing is true"; and there has been no judicial consideration of what amounts to "believing" for this purpose.[80] It is submitted that, if indeed "believing" is an appropriate word in this context, it should not be understood only in the sense of firmly accepting the truth of the statement in question. The deception offences can hardly be limited to cases in which P is induced to hold a strong positive belief. P may be well aware that he does not know D, that there are rogues and liars abroad and that D may be one of them. He may act "on the strength" of D's assertion and in reliance upon it, but without in any positive sense either believing or disbelieving it. If D is lying, P is surely "deceived" for the purposes of section 15. It may in fact be

[75] [1971] Crim.L.R. 716.
[76] See above, § 2–47.
[77] For criticism of modern developments, see A. T. H. Smith [1982] Crim.L.R. 721.
[78] [1903] 1 Ch. 728 at 732.
[79] [1974] A.C. 370.
[80] The authorities on obtaining by false pretences largely avoided reference to any particular state of mind that the pretence must bring about. It was variously said that it must be proved that by his statement D "did so act on the mind of the prosecutor as that he did thereby obtain money, etc. . . . [and] if in fact the prosecutor was not . . . persuaded [by D's statement] . . . the charge is not supported" (*Aspinall* (1876) 2 Q.B.D. 48 at 57, *per* Brett J.A.); that the offence was committed if "the property was parted with on the faith of the false pretence" (*Jones* (1884) 50 L.T. 726); that it must be shown that P was "influenced by the false pretence and would not have transferred [the goods] but for his reliance on it" (*Russell on Crime* (12th ed.), p. 1184; compare *Seagrave* (1910) 4 Cr.App.R. 156, as to reliance); that P must have been "induced by" the false statement to part with the property (*Smith* (1915) 11 Cr.App.R. 81). References to P's "believing" D's statement were rare; but see *Grail* (1944) 30 Cr.App.R. 81; *Sullivan* (1945) *ibid.* 132.

better to abandon the word "believe" and to say that to deceive is to induce a person to act in reliance upon a false representation.[81]

The test of whether P has been so induced is whether he would have acted 7–42
as he did if he had known that the representation made by D was false. This question (and not whether P believed D, or why P acted as he did) is therefore the question to which evidence should be directed. This appears from the decisions of the House of Lords in *Metropolitan Police Commissioner* v. *Charles*[82] and *Lambie*,[83] which have already been mentioned for another purpose.[84]

In *Charles* P accepted D's cheques because they were backed by a cheque card. He would not have done so if he had known that D had no authority to use the card. D's conviction under section 16 of obtaining a pecuniary advantage by deception[85] was upheld. It is quite clear from the evidence that P was at best agnostic on the question of D's right to use the cheque card. Their Lordships, in asserting that P "believed" that D was authorised to use it[86] must, on the facts, have been using "belief" to stand for ignorance of the truth plus reliance on the representation of authority; firm acceptance of the truth of that representation was not in question.[87] In *Lambie* the manageress was not asked in evidence whether she would have completed the transaction had she known that the customer was acting dishonestly *vis-à-vis* the bank, having no authority to use the credit card. But the House of Lords held that the manageress's answer "No" to that question could be assumed.[88] On that basis *Charles* was regarded as indistinguishable and the customer's conviction of a deception offence was confirmed.[89]

"Acting in reliance": need P be aware of the representation?

It is natural enough to describe a deceived person as "believing" the truth 7–43

[81] This paragraph was approved by the Court of Appeal in *Lambie* (1980) 71 Cr.App.R. 350 (reversed on another ground, [1982] A.C. 449).
[82] [1977] A.C. 177.
[83] [1982] A.C. 449.
[84] Above, § 7–25. See also below, § 7–44.
[85] For the pecuniary advantage, see below, §§ 7–53, 10–12.
[86] [1977] A.C. 177 at 183, 193.
[87] For analysis of the facts, see J. C. Smith at [1977] Crim.L.R. at 618–619.
[88] [1982] A.C. 449 at 460. It is assumed, that is to say, that she would not have been prepared to testify that, had she known the truth, she might have been willing to participate in a fraud on the credit card company. (But the reason cannot be—*pace* Lord Roskill—that an affirmative answer to the hypothetical question would have made her a party to the fraud.) See further, § 7–48, below.
[89] For elaborate criticism of *Charles* and *Lambie*, see J. C. Smith at [1977] Crim.L.R. 617–621 and at [1981] Crim.L.R. 713–717. The essential argument may perhaps be summarised thus: that the payee in a cheque card or credit card case (as witness the evidence in *Charles* and *Lambie*) has no interest in the state of the card-holder's account with his bank, for the very point of the card is to guarantee payment whatever the state of that account; that this is as much as to say that the payee has no interest in whether the user has authority to use the card; that a representation cannot be said to deceive one who is indifferent as to its truth; that the question whether the payee would have accepted payment by means of the card had he actually known of the lack of authority is improperly hypothetical; and that dishonest misuse of a cheque card or credit card in a transaction with a third party should not be held to be an offence of deception. See also A. T. H. Smith [1978] J.B.L. 129, especially at 135–136.

of what he is told; that is no doubt the standard effect of a successful lie. But positive belief is not required; so the typical victim may instead be described (as for convenience he is in this chapter) as acting, even agnostically, "in reliance on" what he is told. Yet even this language—or any expression suggesting that D's representation must have some effect on P's mind—is not perfectly appropriate for many cases. Although the victim of a deception by words will be exactly aware of the representation made by D, this is not necessarily the case with deception by conduct. There must be many cases in which the relevant implication of D's conduct (that which a court will recognise[90] and a well-drawn indictment will allege) is not present to P's mind at all.

7–44 For example, presumably it rarely occurs to a British Rail passenger that the steward serving him in the buffet car may be engaged on a fraud on his employers, selling his own food rather than theirs, intending to keep the purchase price and defraud his employers of the profit they should make. But cases on this kind of fraud make clear that if, knowing the truth, the customer would not buy the steward's food, the price he pays in ignorance of the truth is obtained from him by deception.[91] Such a victim is deceived although, almost inevitably, the relevant implication of the deceiver's conduct ("This is British Rail's food") never crosses his mind. This seems to confirm that, so far as concerns the relationship between D's conduct and P's act, the sufficient questions are: Did D's conduct imply a particular statement? And did P act in response to D's conduct in a way in which he would not have acted if he had known the contrary of the statement? References in this chapter to P's "relying" on what is implied by D's conduct must be understood in this sense.

7–45 Take by way of another example the case of a competition in which only one entry is permitted from each competitor. D puts in two entries in different names. The judge considers one of D's entries and awards it a prize. It seems plain that D has obtained consideration of the entry, and perhaps[92] a prize, by deception even though it did not occur to the judge that the entry might be one of two or more entries submitted by the competitor, still less that its submission implied that it was a unique entry. This example is stimulated by the surprising reason reported for the failure of a prosecution for the obtaining by deception of an allotment of shares by disguised multiple applications: "the prosecution could not prove that the shares were issued in the belief that this was the only application."[93] It is submitted that the prosecution were expected to prove too much.

[90] See above, § 7–20.
[91] Especially *Doukas* (1977) 66 Cr.App.R. 228; *Cooke* [1986] A.C. 909. The cases concern the offence of going equipped to cheat (s.25) and are discussed below, § 15–10.
[92] Acknowledging a possible argument about causation.
[93] *Best, The Times*, October 6, 1987. The obtaining charge having failed, there was a conviction of attempt. *Sed quaere?* Was the defendant proved to have intended to induce the "belief" that he failed to induce?

P's knowledge of falsity or indifference to truth

If D makes a false statement of fact to P, intending thereby to induce P to lend him money or sell him property, and P knows that the statement is false but nevertheless lends the money or sells the property, D is not, despite himself, guilty of obtaining by deception. He may, however, be convicted of an attempt.[94] 7–46

Another possibility is that P is misled by D's statement but is indifferent to the matter about which the statement is made and therefore transfers property without reliance on it; he would act in the same way even if he knew the truth. Here again, though D may have committed an attempt, he has not committed an offence under section 15.

On the other hand, if D's representation is a factor operating on P's mind as an inducement to part with his property, the offence is complete. It is irrelevant that other factors also operated on his mind.[95]

Evidence of effective representation

To prove that P was induced to part with his property by the particular false representation charged, the prosecution are normally obliged to adduce P's evidence to this effect. There are two points here. 7–47

(a) First, it is *necessary to charge and prove the representation that operated on P* as the relative inducement. This was not done in *Laverty*.[96] D, having acquired a stolen car, registration number JPA 945C, put different number plates on it—DUV 111C. He sold the car to P. He was charged with obtaining the price from P by the false representation that the car "was the original motor car DUV 111C." There was no evidence that P bought the car in reliance upon the representation that it was the car for which that registration number was originally issued. Nor could it safely be inferred that he would not have bought the car if he had known that its number had been changed. His evidence was that he bought it because he thought that P was its owner. The representation charged should have been that D was entitled to sell. D's conviction was quashed.

(b) Secondly, it is *normally necessary for P to give evidence of the inducement*.[97] The obtaining by the deception charged must, after all, be proved beyond reasonable doubt. P's reliance on the particular representation may, however, be a matter of irresistible inference from other proved facts; and if that is so and P's evidence on the point "is not and cannot reasonably be expected to be available," that reliance may be found as a fact.[98] P should nevertheless be produced as a witness unless his absence can be explained.[99] 7–48

[94] Compare *Hensler* (1870) Cox C.C. 570; *Edwards* [1978] Crim.L.R. 49.
[95] Compare, *e.g. Lince* (1873) 12 Cox C.C. 451.
[96] (1970) 54 Cr.App.R. 495.
[97] *Laverty* (1970) 54 Cr.App.R. 495.
[98] *Lamble* [1982] A.C. 449 at 460–461; applying *Sullivan* (1945) 30 Cr.App.R. 132; and see *Tirado* (1974) 59 Cr.App.R. 80; *Etim* v. *Hatfield* [1975] Crim.L.R. 234. For criticism of *D.P.P.* v. *Ray* [1974] A.C. 370 (above, § 7–33) on this point, see J. C. Smith, *Theft*, para. 163.
[99] *Tirado*, above (P not able to be brought to this country). In *Etim* v. *Hatfield*, above, post office counter clerks were understandably not called to give evidence about particular giro cheque transactions, which presumably they would not recollect.

The conviction in *Lambie* depended, as has been seen,[1] on the confidence of the House of Lords that the manageress, had she been asked, would have said that she would not have accepted Ms Lambie's credit card voucher if she had known that Ms Lambie lacked authority to use the card. But the case can hardly establish an irrebuttable presumption that one who is aware that his customer no longer has a right to use his credit card or cheque card will refuse to accept payment involving its use.[2] The point arises, of course, in a hypothetical way. In practice P will not have known the truth; he will justifiably have regarded the card as guaranteeing payment whatever the position as between D and his bank.[3] But it may not be impossible to persuade P to admit that, *had* he known the truth, he *might* have been unscrupulous and still accepted that mode of payment. He ought therefore to be available for cross-examination.

The effect of intervening events and transactions

7–49 A common purpose of deception is to induce the victim to enter into a contract under which (perhaps after a considerable lapse of time) he will transfer property or pay money to the deceiver or a third person. If the property or money is obtained *by* the deception, it is immaterial that a contract has intervened between the deception and the transfer or payment. A striking instance occurred in the old case of *Martin*.[4] D by false pretences induced P to contract to build him a vehicle. P built the vehicle and delivered it to D although in the meantime D had countermanded the order. A conviction of obtaining the vehicle by false pretences was upheld, the jury having been entitled to find that the pretence was a continuing one.

7–50 It was said in the modern case of *King and Stockwell*[5] that "the question in each case is: was the deception an operative cause of the obtaining of the property?"; and that this question is "to be answered as a question of fact by the jury applying their common sense."[6] In that case the defendants posed as representatives of a known firm of tree surgeons and persuaded the victim that trees in her garden urgently needed removing, work which they would do for £470. She agreed. The fraud was uncovered before any money was paid. It was held that there was ample evidence to justify convictions of attempting to obtain money by deception—that is, money that would have been paid over "as a result of the lies."[7] The upholding of these convictions was plainly correct. But language such as that in which the court framed the crucial question of fact appears to be unsuitable for the lay tribunal; and it can surely be avoided.

7–51 It is true that such language runs through the cases. In *Clucas*,[8] for example, the Court of Criminal Appeal held that one who induces a bookmaker to accept a large bet on a horse by falsely pretending that he is a

[1] Above, § 7–42.
[2] Compare *Cooke* [1986] A.C. 909 at 921: would British Rail passengers necessarily refuse to buy from staff engaged in a restaurant car fiddle?
[3] See n. 89, above.
[4] (1867) L.R. 1 C.C.R. 56.
[5] [1987] Q.B. 547.
[6] *Ibid.* at 533.
[7] *Ibid.* at 534.
[8] [1949] 2 K.B. 226.

commission agent acting on behalf of a number of persons does not by the pretence obtain the sums paid when the horse wins; it is the backing of the winning horse which is "the effective cause" of the payment.[9] In *Button*,[10] by contrast, D, an able runner, obtained a big handicap in a race by pretending to be E, a runner with a poor record. D won the race and claimed the prize. He was guilty of attempting to obtain the prize by false pretences. Matthew J. described the original pretence as "not too remote."[11]

7–52 It is thought that the appropriate result can be achieved without asking the jury to classify the deception as an "operative" cause, or as a "remote" cause, of the obtaining, or the deception or any other antecedent as its "effective" cause. It is submitted that the only question of fact is whether P, *at the time when he made the payment or transferred the property*, was induced (that is, influenced in part at least) by D's earlier false statement to do so.[12] If that is right, the abstract language of causation can be avoided. Cases like *Clucas* suggest that a deception can be too remote a cause as a matter of law. But this may mean no more than that the judge should direct an acquittal if no reasonable jury could answer the question of fact in the affirmative.

Deception of P, obtaining from Q

7–53 D may deceive P and thereby obtain property from Q or a pecuniary advantage at Q's expense. If there is "a causal connection"[13] between the deception and the obtaining D may be convicted under section 15 or section 16 as may be appropriate. The phrase "causal connection" is rather vague and the scope of the principle may at some time need to be more closely determined. The following are examples of the operation of the principle:

(a) *Property obtained.* An insurance agent by deception induces P to insure with Q company and may be convicted of thereby obtaining commission from the company in respect of the policy.[14]

(b) *Pecuniary advantage.* D wrongfully uses a cheque card to induce P to accept his cheque. D's bank is thereby obliged to honour the cheque so that his bank account is to that extent overdrawn. D may be convicted of obtaining by deception the pecuniary advantage of being "allowed to borrow by way of overdraft" (s.16(1) and (2)(*b*)).[15]

[9] See also *Lewis* (1922), unreported, referred to in *Russell on Crime* (12th ed.), p. 1186n. A schoolteacher obtained an appointment by misrepresenting her qualifications. She was acquitted of obtaining her salary by this pretence, "on the ground that she was paid because of services she rendered, and not because of the falsehood." *Lewis* and *Clucas* combine to explain the provision of s.16(2)(c), below, § 10–14. In *King and Stockwell* (see text above) the court plainly entertained some doubt about the correctness of *Lewis*.
[10] [1900] 2 Q.B. 597.
[11] *Ibid.* at 600.
[12] It was suggested in earlier editions of this book that there is another question: whether D was still making his deceptive statement, expressly or impliedly, at the time of the obtaining. But it is now thought that there is no such positive additional requirement as, in effect, a "continuing" deception (compare *Martin* (1867) L.R. 1 C.C.R. 56 at 60: "there must be a continuing pretence"), which is in this context an unnecessary fiction.
[13] *Kovacs* (1973) 58 Cr.App.R. 412 at 416; approved in *Metropolitan Police Commissioner* v. *Charles* [1977] A.C. 177; *Clarkson* [1987] V.R. 962 at 980 (Supreme Court of Victoria).
[14] *Clegg* [1977] C.L.Y. 619 (Judge Beaumont).
[15] Cases cited at n. 13, above. Also *Smith* v. *Koumourou* [1979] R.T.R. 355. And see *Beck* (1984) 80 Cr.App.R. 355 (procuring execution of valuable security); below, § 11–16.

5. THE MENTAL ELEMENT

7-54 There are three strands in the mental element of the offence under section 15. D cannot be convicted of the offence unless it is proved:

(i) that his deception was "deliberate or reckless";
(ii) that he obtained the property "with the intention of permanently depriving [P] of it"; and
(iii) that he obtained the property "dishonestly."

"**Deliberate or reckless" deception**[16]

7-55 "Deception" means "any deception (whether deliberate or reckless) ..." (s.15(4)). "Deception" is, as it were, a two-sided word; it involves both the making of a deceptive statement and the effect of that statement upon the person to whom it is made. Conformably with the nature of the word they qualify, the words "deliberate" and "reckless" also do double duty. There are two senses, that is to say, in which D may deliberately or recklessly deceive P. He may know or be reckless as to the falsity of the statement; and he may make the statement intending to deceive P or reckless whether P is deceived. There is no doubt that both of these senses of the compressed expression "deception (whether deliberate or reckless)" must be satisfied. On the other hand it would seem that recklessness in both of the relevant respects will suffice. So D is guilty of deception if (a) by words or conduct he makes to P a statement which is false, and (b) he is at least reckless as to its falsity, and (c) he is at least reckless as to its misleading P and (d) it does mislead P. But he is not guilty of deception if, though he makes a false statement, he genuinely believes that P will not be misled by it--if, for instance, he believes that P knows it to be untrue.

7-56 A question arises as to the meaning of "reckless." The House of Lords has held that in some other modern criminal statutes the word includes failing to advert to a risk that ought to be obvious--in effect a case of gross negli-gence.[17] It can be argued that the word has the same meaning in section 15 and that the present offence is committed by one who makes a statement that he crassly fails to recognise may be false and who dishonestly obtains property as a result. This is in fact an unlikely case. One who dishonestly *obtains* by deception (as section 15 requires) is almost bound to have *deceived* dishonestly; he will have realised that his statement might be false and might mislead<???> The House of Lords decisions mentioned above did not specifically refer to offences of dishonesty or to existing authority requiring more than mere negligence for reckless deception.[18] It is submitted that

16 See *Eighth Report.* para. <???>(i).
17 *Caldwell* [1982] A.C. 341 (Criminal Damage Act 1971, s.1); *Lawrence* [1982] A.C. 510 (reckless driving: Road Traffic Act 1972, s.2; now R.T.A. 1988, s.2).
18 *Staines* (1974) 60 Cr.App.R. 160; *Rayle* (1971) 56 Cr.App.R. 131; and see *Waterfall* [1970] 1 Q.B. 148, where the point is expressed to relate to the requirement of dishonesty rather than to that of deception.

deception requires at least indifference to the truth of the representation.[19] This would keep the criminal offence in line with House of Lords authority on the tort of deceit.[20]

"With the intention of permanently depriving the other of it"

7-57 The effect of this phrase is that, as in the case of theft, there will be no offence if D intends by his deception to obtain the property from P only temporarily. D may deceive P into lending him a chattel or letting it to him on hire. If he intends to return it when the period of the loan or hiring is over, he commits no offence under section 15. It is necessary, however, to dis-tinguish carefully between a loan of money and a loan of other property. When D, pretending to be down on his luck, persuades P to lend him £10 in cash, he intends to deprive P permanently of the particular notes and coins handed to him; and, so far as this aspect of the mental element of the offence is concerned, his conduct is within the section although he may intend to repay his debt.[21] And where by deception D obtains a loan from P by cheque, he intends to deprive P permanently of the cheque, for once it is paid it ceases to be in its substance the thing that it was before.[22]

7-58 D has the necessary intention for the purpose of section 15 if he intends to deprive P entirely of whatever interest P has in the property. As has been seen,[23] P need only have possession or control of the property or any proprietary right or interest in it, in order to be the victim of this offence. So, for example, if P has a lien on D's goods, and D by deception induces P to deliver the goods to him, intending to defeat the lien, the offence is commit-ted. Similarly, D may trick P into parting with possession of property which P is entitled to possess for a short while only, and this will be an offence under section 15 even if D intends to return the property to its owner (for whom, indeed, he may have practised the fraud).

Application of section 6 for section 15 purposes

7-59 It will be remembered that the expression "with the intention of perma-nently depriving the other of it" is partially defined for the purpose of theft by section 6.[24] By section 15(3) that section is made to apply also for purposes of section 15 "with the necessary adaptation of the reference to

19 Compare *Large* v. *Mainprize* [1989] Crim.L.R. 213 (on "recklessly furnishing false information").
20 *Derry* v. *Peek* (1889) 14 App.Cas 337. Common law fraud is committed by one who makes a false statement "(1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false": *per* Lord Herschell at 374. Lord Herschell observed that "(3)" is really only an instance of "(2)".
21 The point is illustrated in *Halstead* v. *Patel* (1972) 56 Cr.App.R. 334. For comment on this distinction between fungibles and non-fungibles, see Williams and Weinberg, *Property Offences* (2nd ed.), p. 166. In England and Wales, unlike Victoria, its effect is mitigated by the existence of the offence of obtaining services (*e.g.* the hiring of a chattel) by deception.
22 *Duru* (1973) 58 Cr.App.R. 151.
23 Above, __ 7-04, 7-05.
24 See above, __ 2-103 *et seq.*

appropriating." Section 6 is therefore to be read for purposes of section 15 as though for the word "appropriating" in section 6(1) there were substituted the words "obtaining by deception." There are obviously some difficulties involved in applying a section that is sufficiently obscure in its primary context to another offence for which it is, in a number of places, even less happily worded.

7–60 (a) Cases in which D obtains *ownership* of P's property by deception "without meaning [P] permanently to lose the thing itself," yet intending "to treat the thing as his own to dispose of regardless of [P's] rights," must be rare indeed.[25] We may construct one, admittedly unlikely, case by way of example. D is hard up. By deception he induces P to sell him a valuable article at a very low price. He merely wants to raise money on the article. He pawns it for a large sum and sends the pawn ticket to P with an apologetic letter.[26]

(b) It is easier to imagine cases in which section 6 might be relevant where D by deception obtains *possession* but not ownership of the property in question. Suppose that D dishonestly deceives P into giving him possession (not by way of loan) of some property other than land.[27] The effect of section 6 is that if, though he does not mean P permanently to lose the thing itself, D intends to treat it as his own to dispose of[28] regardless of P's rights, the mental element of the present offence, as of theft, is satisfied. The reader is invited to consider the three situations suggested in § 2–104 and to suppose that possession in each situation is obtained by deception. In each case D will on the altered facts have committed an offence under section 15.

7–61 (c) D may induce P by deception to lend him property. If he intends to return it, but only when it is "in such a changed state that all its goodness or virtue has gone,"[29] his borrowing is "equivalent to an outright taking" and he may be said to be treating it as his own to dispose of regardless of P's rights. His intention so to treat it is regarded as an intention of permanently depriving P of it.

(d) If D obtains property by deception, intending to lend it to E for a period and in circumstances making the lending equivalent to an outright disposal, he will be regarded as intending to deprive P permanently (s.6(1)). So also if he obtains the property intending for his own purposes to part with it under a condition as to its return which he may not be able to perform (s.6(2)). It must be doubtful whether such cases, though provided for by the terms of section 6 as applied to section 15, ever actually arise.

7–62 (e) In some of the situations dealt with above, D may be guilty both of obtaining property by deception and of theft. But this is not possible if the property is land: you cannot by the same transaction obtain land by deception and also steal it.[30] It is clear, however, that an offence under section 15 can be committed by a deception which obtains an existing interest in land (by the assignment of a lease, for example). But suppose that D by deception induces P to grant him a lease. In this case what D "obtains" must be the land, by obtaining possession of it (s.15(2)); it is the land which is "property belonging to [P]."[31] The question that might arise is whether a fraudulent lessee can ever be described as intending to deprive a lessor permanently of the land the subject of the demise. What, in particular, if D obtains a very long lease? Leaving aside section 6 for the moment, is there any point short of the assignment of P's whole interest at which the quality of temporariness ceases and that of permanence takes over? If D obtains a lease for 99 years or more it is certainly tempting to say that he intends to deprive P permanently of the land. It cannot be confidently predicted that the courts would yield to this temptation without the aid of section 6: it is sufficient here to hint at the possibility of their doing so. But suppose that P's age and the length of the lease permit D a plausible claim that he did not intend to permanently deprive P personally (let alone his successors in title) of the land. Does D nevertheless intend, within the meaning of section 6(1), to treat the land as his own to dispose of regardless of P's rights? It would not seem so, unless the taking of the lease can be treated as "a borrowing . . . for a period and in circumstances making [the borrowing] equivalent to an outright taking." In *Chan Wai Lam* v. *The Queen*,[32] where deception induced a government grant of a sub-lease expiring (in 1997) three days before expiry of the head lease, the Court of Appeal of Hong Kong considered questions raised in this paragraph and concluded, no doubt correctly, that an offence under the local equivalent of section 15 could be committed only where D intends to deprive P of the whole of his interest.

Nor does the Act cater in clear terms for the case—surely not a fanciful one—of the person who by deception obtains a tenancy or short lease, intending, when his contractual right is determined by notice or effluxion of time, to claim security of tenure under relevant legislation.

[25] In *Duru*, above, the Court of Appeal would if necessary have held s.6(1) to be relevant.
[26] Compare situation (iii) in § 2–104.
[27] As to land, see (e), below.
[28] But not simply to use, however dishonestly and to P's disadvantage: *pace* Judge Fricker Q.C. in *Harkinder Atwal* [1989] Crim.L.R. 293 (obtaining credit and charge cards); compare comment at 294.
[29] *Lloyd* [1985] Q.B. 829 at 836; above, § 2–108.

"Dishonestly"

Dishonesty and recklessness

7–63 The word "dishonestly" in section 15(1) contributes, it is thought, to limiting "reckless" deception to cases in which D is indifferent to the truth of his representation and not merely negligent in making it. This has been discussed above.[33]

[30] See s.4(2), which limits the circumstances in which land can be stolen, but which does not apply to s.15 (s.1(3)).
[31] The leasehold interest carved out of P's estate in the land does not exist before it is created by the lease and it never belongs to P. It cannot itself, therefore, be said to be the subject-matter of an offence. Compare *Chan Wai Lam* [1981] Crim.L.R. 497.
[32] Above.
[33] § 7–56. Dishonesty and deception are, in fact, separate issues; but they are quite commonly confused or telescoped in the cases. Examples may be found in *Waterfall* [1970] 1 Q.B. 148 (see (1970) 33 M.L.R. 217); *Potger* (1970) 55 Cr.App.R. 42; *Halstead* v. *Patel* (1972) 56 Cr.App.R. 334; *Green and Greenstein* (1975) 61 Cr.App.R. 296; *Lewis* (1975) 62 Cr.App.R. 206; *Ravenshad* [1990] Crim.L.R. 398.

Questions for the jury

7–64 The word "dishonestly" qualifies the phrase "obtains property"; it is the obtaining that must be dishonest. Guilt depends upon affirmative answers to the two *Ghosh*[34] questions:

(i) was what D did dishonest according to the ordinary standards of reasonable and honest people? and
(ii) must D have realised that it was dishonest according to those standards?

These are matters for decision by the jury; but they need not be troubled with question (ii) unless there is some evidence to suggest that D believed that what he did was honest by ordinary people's standards.[35]

7–65 This double test for dishonesty has been fully discussed in the chapter on theft.[36] General explanation and comment need not be repeated here; but it is of interest to note that in relation to deception offences the *Ghosh* test contradicts earlier Court of Appeal and Divisional Court authorities without explicitly overruling them. For it had been held that as a matter of law it could be no defence that one had intended to repay a loan obtained by deception[37] or a sum of money obtained across a post office counter by a cheque drawn on an empty giro account.[38] These authorities were silently overturned when the leading theft case of *Feely*[39] was applied[40] to deception offences.[41] That application was not perhaps quite inevitable, for, except in cases where D believes he has a legal right to the thing obtained, it might have been possible to hold that D's deception itself supplies a sufficient

[34] [1982] Q.B. 1053. (The case concerned offences under ss.15 and 20(2).)
[35] See above, § 2–128.
[36] Above, §§ 2–127 *et seq.*
[37] *McCall* (1970) 55 Cr.App.R. 175.
[38] *Halstead* v. *Patel* (1972) 56 Cr.App.R. 334. In *Potger* (1970) 55 Cr.App.R. 42, the Court of Appeal had said that the word "dishonestly" had a "wider ambit" than the phrase "intent to defraud" used in the old law of false pretences. This suggested that a number of situations which under that law were cases of intent to defraud were now as a matter of law to be classified as cases of dishonesty: see especially *Naylor* (1865) L.R. 1 C.C.R. 41; *Carpenter* (1911) 22 Cox C.C. 618; and, as to conspiracy to defraud, *Allsop* (1976) 64 Cr.App.R. 29.
[39] [1973] Q.B. 530 (the source of question (i) in the text above).
[40] By *Green and Greenstein* (1975) 61 Cr.App.R. 296; and then, with the gloss of question (ii), by *Ghosh* itself. In the former case D applied for shares being issued to the public. He knew that the issue would be oversubscribed and that shares would be allotted to applicants in proportion to the size of their applications. Cheques had to be sent with applications; an applicant allotted less shares than he applied for would be sent a "return" cheque for the change with the letter of allotment. D applied for very large amounts of shares, sending cheques which could not possibly be met on first presentation without the help of the proceeds of the issuing houses' own return cheques (which he knew could be speedily cleared). Granted that D obtained the letters of allotment by deception, the question was whether this method of conducting a "stagging" operation (applying for an allotment of shares or stock in order to sell immediately at a profit—an operation not in itself illegal) was "dishonest." This was the first prosecution to test the question. The question was held to be for the jury to decide, a remarkable allocation of law-making power to the jury. Speculation is justified as to the kind of precedent the jury's decision constituted: D. W. Elliott [1976] Crim.L.R. 707 at 715. The jury convicted.
[41] The point was confirmed, specifically in respect of *McCall* (above, n. 37), in *Melwani* [1989] Crim.L.R. 565.

element of dishonesty.[42] But it is hardly surprising that the principle that the jury should apply their own understanding of the meaning of the word "dishonestly" was regarded as valid in all contexts if valid in one.

Belief in legal entitlement

7–66 There is no provision (corresponding to s.2(1)(*a*) in relation to theft) declaring that a person does not obtain property dishonestly if he believes that he is entitled in law to obtain it. Nor are the jury to be directed to that effect. The expectation appears to be that, with the benefit of an ordinary *Ghosh* direction, the jury will achieve the right result.[43] If the right result is inevitably an acquittal, it is surely preferable that the jury be told so; their function should merely be to say whether he may have believed as he claims. If the right result is not inevitably an acquittal, there is a strange inconsistency between theft and other offences: although (by virtue of s.2(1)(*a*)) I am innocent of theft if by no matter what unlawful force I induce P to give me what I wrongly think I have a claim to,[44] I may (depending on the view of the jury) be guilty under section 15 if by lying I induce him to do the same.[45] It is submitted that there should be no question of a conviction if D by deception obtains property in any of the following cases:

(a) D believes that the property belongs to him and that P is not entitled to retain it.
(b) D believes that the property belongs to E, for whom he is obtaining it, and that P is not entitled to detain it from E.
(c) D believes, or it is the case, that P owes D or E money; and he believes that the obtaining of the property in question from P is a proper way of enforcing his or E's claim against the defaulting debtor.[46]

6. JURISDICTION

The place of the obtaining

7–67 A court in England and Wales will be competent to try an offence under section 15 only if it was committed within the jurisdiction; and that depends on the property's having been obtained here.[47] This principle has been

[42] Compare, at least as to "deliberate" deception, *Potger* (1970) 55 Cr.App.R. 42; *Ghosh* [1982] Q.B. 1053 at 1060, where Lord Lane C.J. is tempted by the point but does not pursue it; *Cooke* [1986] A.C. 909, *per* Lord Mackay at 934.
[43] *Woolven* (1983) 77 Cr.App.R. 231.
[44] See above, § 2–123.
[45] This unbecoming distinction does not exist in Victoria: *Salvo* [1989] V.R. 401.
[46] Compare *Williams* (1836) 7 C. & P. 354; Williams, *Criminal Law - The General Part* (2nd ed.), pp. 330–331.
[47] *Harden* [1963] 1 Q.B. 8; *Tirado* (1974) 59 Cr.App.R. 80 (notwithstanding doubts expressed by Lord Diplock in *Treacy* v. *D.P.P.* [1971] A.C. 537 at 563); *D.P.P.* v. *Stonehouse* [1978] A.C. 55, *per* Viscount Dilhorne at 74; compare *Ellis* [1899] 1 Q.B. 230; *Governor of Pentonville Prison, ex p. Khubchandani* (1980) 71 Cr.App.R. 241; *Thompson* (1984) 79 Cr.App.R. 191.

The Law of Theft

EIGHTH EDITION

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D. PORCE OR THREAT AGAINST A THIRD PERSON

3-11 It is clear that, under the Theft Act, force used against any person will constitute robbery when it is used in order to commit theft. Similarly a threat to use force against any person aimed at putting that person in fear of being then and there subjected to force is enough. So if D, being about to commit theft from P, is interrupted by a passer-by, Q, and repels Q's attempt to interfere, either by actual force or the threat to use force, he is guilty of robbery if he completes the theft. It is immaterial that no force or threat is used against P from whom the theft is committed. It would seem that in such a case the indictment would properly allege robbery from P, for clearly there was no robbery from Q.

3-12 The case put above may be an extension of the common law of robbery; but there is another respect in which the Act may have narrowed the law. Suppose that D threatens P that, if P will not hand over certain property to D, D will use force on Q. This was probably robbery at common law[1] It is difficult if not impossible, however, to bring such a case within the words of the Act since D does not seek to put any person in fear of being then and there subjected to force in order to commit theft. He does not put P in such fear because the threat is to use force on Q. He does not put Q in fear because the threat is not addressed to him. Such cases should again be treated as blackmail contrary to s. 21.

1 *Reane* (1794) 2 East PC 734 at 735-736, per Eyre CB, *obiter.*

3-13 It might be different in the example put in the previous paragraph if the threat were addressed to Q as well as to P or overheard by Q. If it were D's object to cause Q to intercede with P to hand over the property, so as to save himself from D's threatened force, this would be robbery.

3-14 At common law, the theft had to be from the person or in the presence of the victim. In *Smith v Desmond*[1] the House of Lords, reversing the Court of Criminal Appeal,[2] put a wide interpretation upon this rule, holding that it was satisfied if the force or threat of force was used on a person who had the property to be stolen in his immediate personal care and protection. D was therefore guilty of robbery when he overpowered a nightwatchman and a maintenance engineer in a bakery and then broke into a cash office some distance away and stole from a safe. Though the victims did not have the key to the office or the safe they were in the building to guard its contents which were, therefore, in their immediate personal care and protection.

1 [1965] AC 960. [1965]1 All ER<???>976
2 [1964] 3 All ER 587.

3-15 Such a case is obviously within the terms of the Theft Act. Indeed, it follows from what has been said above that there is no longer any necessity to prove that the property was in the care and protection of the victim of the force or threat. It is enough that the force or threat was directed against any person so that, if in *Smith v Desmond* the persons overpowered had been mere passers-by who happened to have interfered with D's plans, this would be enough under the Theft Act, though not at common law.

CHAPTER 4

Criminal Deception

4-01 The Theft Acts create eight offences of dishonestly getting something by deception. They are:

1. Obtaining property: 1968, s. 15.
2. Obtaining a money transfer: 1968, s. 15A.
3. Obtaining a pecuniary advantage: 1968, s. 16.
4. Procuring the execution of a valuable security: 1968, s. 20 (2).
5. Obtaining services: 1978, s. 1.
6. Securing the remission of a liability: 1978, s. 2 (1) (a).
7. Inducing a creditor to wait for or to forgo payment: 1978, s. 2 (1) (b).
8. Obtaining an exemption from or abatement of liability: 1978, s. 2 (1) (c).

Though the Acts use four verbs, "obtain", "procure", "secure" and "induce", the offences all contain a common element in that D must achieve the proscribed result by deception. It is convenient to consider this and the other elements common to all these offences together. The word "obtain" is used for this purpose, to include the other three verbs. The common elements are:

1. The meaning of "obtaining by deception".
2. The meaning of "any deception".
3. The meaning of "dishonestly".

A. THE COMMON ELEMENTS IN OBTAINING OFFENCES

(a) Obtaining by deception

4-02 The obtaining must be *by deception.*[1] It must be proved that D's conduct actually deceived P and caused him to do whatever act is appropriate to the offence charged. It follows that the deception must precede the relevant act. If, after D, a motorist, has had his tank filled by an attendant, P, and the entire proprietary interest in the petrol has passed to him, he falsely convinces P that it will be paid for by his firm, he does not obtain the petrol by that deception.[2] It would be otherwise if the seller, P retained a lien on the petrol[3] - as he possibly would if the petrol were in a can in D's car. If P was still in possession of the petrol it continued to "belong to" him, and would be obtained from him when he was induced to surrender his lien by allowing D to take the petrol away. If D was dishonest from the start, he might be convicted of obtaining the petrol by the implied representation that he had a present intention to pay. This course will not be open where self-service is invited and D dishonestly helps himself, unless it can be proved that P pressed the button releasing the petrol to the pump in reliance on a representation by D that he intended to pay, implicit in his driving on to the forecourt.[4]

If then P knows that D's statement is false,[5] or if he would have acted in the same way even if he had known it,[6] or if he does not rely on the false statement but arrives at the same erroneous conclusion from his own observation or some other source,[7] or, of course, if he does not read or hear the false statement, D is not guilty of obtaining. In each of these cases, however, D may be convicted of an attempt to obtain by deception.[8] The onus is on the prosecution to prove

that the representation was effective. Probably it is unnecessary to go so far as to prove that P believed the statement to be true; it is enough that, though he had his doubts about it, he acted in reliance on it - he would not have so acted if it had not been made.

The principle that deception must be the cause of the obtaining seems to have been stretched in *Miller.*[9] D induced P to ride in his car by falsely representing that it was a taxi. P probably knew that he had been deceived by the time a grossly excessive fare was demanded but paid because he was afraid. An argument that it must be proved that P paid because he believed the lie to be true was rejected. It was sufficient that the lie was a cause of the payment; and, but for the lie, P would never have entered the car. It may be that where D, by deception, causes P to incur a legal obligation, the act of performing that obligation is obtained by deception, even though, when P performs it, he knows that it is false.[10] But that was not so in *Miller*; P was not, and it is unlikely that he supposed he was, under an obligation to pay the excessive sum to the bogus taxi-driver. Since *Gomez*, a better charge would be theft.[11]

The normal way of proving that a deception was relied on is to call P to say that he relied on it.[12] Like any other allegation, however, this may be proved by inference from other facts without direct evidence.[13] Where more than one false representation is alleged, it is sufficient to prove that one of them was operative; but the jury must, subject to the majority verdict provisions, be agreed on the one. It is not sufficient that some are satisfied only as to one representation and the remainder only as to another.[14] Whether a representation was made is a question of fact for the jury. Whether it was false usually depends on the meaning intended or understood by the parties and that too is a question for the jury, even where the statement is made in a document. Where - in this context, exceptionally - the issue is as to the legal effect of a document, it is for the judge to decide.[15]

1 See, generally, A.T.H. Smith "The Idea of Criminal Deception" [1982] Crim LR 721.
2 *Collis-Smith* [1971] Crim LR 716, CA. But he may be guilty of making off without payment, below, Chapter 5.
3 He almost certainly does not because he has parted with possession as well as ownership of the petrol. *Cf Edwards v Ddin* [1976] 3 All ER 705, 1 WLR 942.
4 *Coady* [1996] Crim LR 518, CA. D may, however be guilty of theft of the petrol, above, para 2-07, and of evading his liability to pay the price by deception, contrary to s. 2 (1) (b) of the Theft Act 1978, below, para 4-87.
5 *Ady* (1835) 7 C & P 140; *Mills* (1857) Dears & B 205; *Hensler* (1870) 11 Cox CC 570; *Light* (1915) 11 Cr App Rep 111.
6 *Edwards* [1978] Crim LR 49, CA. See commentary at 50.
7 *Roebuck* (1856) Dears & B 24. Cf the similar principle which applies to misrepresentation in relation to the law of contract: *Attwood v Small* (1838) 6 Cl & Fin 232; *Smith v Chadwick* (1884) 9 App Cas 187, HL.
8 *Hensler* (1870) 11 Cox CC 570.
9 (1992) 95 Cr App R 421, [1992] Crim LR 744, discussed by Griew, *Theft*, 8-55 to 8-57, A.T.H. Smith *Property*, 17-125.
10 Below, para 4-05.
11 See above, para 2-41.
12 *Laverty* [1970] 3 All ER 432, CA; *Tirado* (1974) 59 Cr App Rep 80 at 87, CA.
13 *Tirado* (above) at 87.
14 *Brown* (1983) 79 Cr App Rep 115, CA. *Price* [1991] Crim LR 465. See LC. Smith "Satisfying the Jury" [1988] Crim LR 335.
15 *Adams* [1994] RTR 220, [1993] Crim LR 525 and commentary, (Commentary approved in *Page* [1996] Crim LR 821). Cf. *Deller*, above, para 2-24.

4-03 A case that is difficult to reconcile with these principles is *Sullivan.*[1] D represented that he was the "actual maker" of dartboards. The representation was untrue and it was held that he was guilty of obtaining by false pretences

from customers who sent him the price of a board although they said in evidence that they parted with their money "because I wanted a dartboard". No one said that he paid because he thought D was the "actual maker". The court apparently thought that there could be no other conceivable reason for their doing so. This seems doubtful. As Sullivan was unknown to them, it probably mattered not at all whether he was the actual maker, so long as he supplied a satisfactory dartboard.

In *Laverty*,[2] a case under s. 15, D changed the registration number-plates and chassis number-plate of a car and sold it to P. It was held that this constituted a representation by conduct that the car was the original car to which these numbers had been assigned; but D's conviction for obtaining the price of the car by deception from P was quashed on the ground that it was not proved that the deception operated on P's mind. There was no direct evidence to that effect - P said he bought the car because he thought D was the owner - and it was not a necessary inference.[3]

1 (1945) 30 Cr App Rep 132.
2 [1970] 3 All ER 432. Cf *Talbot* [1995] Crim LR 396.
3 If the only flaw in the prosecution's case was that the representation did not influence P, the court had power to substitute a conviction for an attempt. They did not do so, possibly because there was also insufficient evidence that D intended to deceive P into buying the car by this representation. The purpose of changing the plates may well have been not to deceive the buyer, but to deceive the police, the true owner and anyone else who might identify the vehicle. It would seem that the prosecution would have been on stronger ground had they alleged that D had made a representation by conduct that he had a right to sell the car.

4-04 In *Etim v Hatfield*,[1] where D produced to a post office clerk a false declaration that he was entitled to supplementary benefit and was granted £10.60, but no post office employee gave evidence, it was held that D was rightly convicted because there was no conceivable reason for the payment other than the false statement. In *Laverty*, the court stated that the principle in *Sullivan* should not be extended; but *Sullivan* was followed and *Laverty* distinguished in *Etim v Hatfield. Etim*'s case is defensible as one where it was a necessary inference that P acted on the representation; but such a conclusion is hard to justify in the case of *Sullivan.*

Equally difficult to reconcile with principle and more significant is *DPP v Ray.*[2] D, having consumed a meal in a restaurant, dishonestly decided to leave without paying, waited until the waiter went out of the room and then ran off. The House of Lords, Lords Reid and Hodson dissenting, held that the waiter was induced to leave the room by D's implied and continuing representation that he was an honest customer intending to pay his bill. It does not appear that the waiter was ever called in evidence; and it would seem, on the facts, very far indeed from being a necessary inference that the waiter acted on the alleged representation. A doubtful application of a fundamental principle, even by the House of Lords, does not, however, impair the validity of the principle itself; and it remains necessary in every case to prove beyond reasonable doubt that P was deceived by, and acted upon, the representation.

1 [1975] Crim LR 234.
2 [1974] AC 370, [1973] 3 All ER 131, [1974] Crim LR 181 (see commentary). The prosecution was brought under 1968, s. 16 (2) (a) which has now been repealed, but the case remains an authority on this point.

4-05 So far we have used the traditional term, "representation," to mean what D did. It has been argued that, under the Theft Acts, this is no longer appropriate. The CLRC preferred the term, "deception" to "false pretence"

because (i) "deception" includes the effect on the mind of P, whereas "false pretence" does not; and (ii) deception "seems more apt in relation to deception by conduct".[1] Point (i) is obviously correct, but when we compare the phrases, "obtains by deception" and "obtains by a false pretence", the difference disappears because the latter necessarily implies that the false pretence has deceived. Point (ii) suggest no more than a better description of the same thing. It is argued,[2] however, that the effect may have been to make a change of substance and an extension of the law, because it is no longer necessary to prove a "representation". But the authors are unable to find any case in which it is not "at least arguable, and usually clear, that [D's] conduct did amount to a misrepresentation".[3] And their conclusion that the law requires proof that D's words or conduct caused P to believe in, and act on a "proposition" which he knew to be false[4] does not seem to be materially different from the traditional view. Words or conduct intended to induce belief in a proposition is a representation, express or implied. It seems that we may safely continue to adhere to the traditional terminology.

1 *Eighth Report*, Cmnd 2977, para 101 (iv).
2 Arlidge and Parry, 4-003 to 4-025.
3 Para 4-012.
4 This necessarily brief summary of the authors' conclusion does not, of course, do full justice to it.

(i) Obtaining by deceiving a third party

4-06 In *Kovacs*[1] it was held that s. 16 (1) of the 1968 Act does not require that the person deceived should suffer any loss arising from the deception. The deception might be practised on one person with the result that the pecuniary advantage was obtained from another. All that was necessary was that there should be a causal connection between the deception and the obtaining. If this is true for s. 16, it must be true for the other obtaining offences. *Kovacs* was applied by the House of Lords in *Charles* and *Lambie*, considered in the next paragraph.

The principle seems to be that where D deceives O into doing an act which imposes a legal liability upon P to do something else, D may be held to have obtained by deception the act which P does, not because he is deceived, but because he is bound to do it.[2] If P has "held out" D to O as having authority to contract on P's behalf - e.g. P has led O to believe that D has authority to buy goods for him - and D makes a contract with O in P's name, within the scope of this ostensible authority, P is bound by the contract even though D had not, and knew he had not, P's actual[3] authority to make it. If D has bought the goods within the scope of the ostensible authority, P is bound to pay O and, though P has never been deceived, the price has been obtained from him by D's false representation that he had authority to make it. *Kovacs*, *Charles* and *Lambie* are all suspect decisions on other grounds, but that suspicion does not necessarily extend to this principle.

1 [1974] 1 All ER 1236, 58 Cr App Rep 412, CA.
2 *Beck*, below para 6-18, is a doubtful decision because there was only a commercial, not a legal, obligation.

(ii) Obtaining by using a cheque card or credit card

4-07 The principle that the representation must cause the obtaining has created problems where something is obtained by one who uses a cheque backed

by a cheque card, or a credit card. The cheque card in issue in these cases contained an undertaking by the bank that, if the conditions on the card were satisfied, the cheque would be be honoured. The position with credit cards was similar. The bank issuing the card entered into contracts with tradesmen, agreeing to pay the tradesman the sum shown on a voucher signed by the customer when making a purchase, provided that the conditions were satisfied. In the case of credit cards, the contract between the bank and the tradesman preceded the purchase by the customer, whereas in the case of the cheque card that contract was made when the tradesman accepted the customer's cheque, relying on the card which was produced.[1] This distinction is not material for present purposes.

The conditions on both types of card may be satisfied although the holder is exceeding his authority - i.e. the cheque card-holder's bank account is overdrawn or even closed, and the credit card-holder is exceeding the credit limit which the bank has allowed him. The tradesman accepting either type of card will usually do so simply because the conditions on the card are satisfied. He will neither know nor care whether the customer is exceeding his authority and using the card in breach of contract with the bank. He will get his money in any event - and that is all he will be concerned with. This is neither immoral nor unreasonable. The whole object of these cards is to dispense the tradesman from concerning himself in any way with the relationship between the cardholder and his bank. The tradesman is perfectly entitled to take advantage of the facility which the banks offer him.

1 *First Sport Ltd v Barclays Bank plc* [1993] 3 All ER 789, [1993] 1 WLR 1229, CA (Civ Div), holding, Kennedy LJ dissenting, that the bank was bound even though the cheque was a forgery. Lord Roskill's opinion in *Lambie* (all their Lordships concurring) that the customer was making a contract as agent for the credit card company is powerfully criticised by Bennion, 131, NLJ 431. See also Williams *TBCL* 779 discussing *Charles* and cheque cards: "The card-holder is the bearer of the offer, but need no more be regarded as the bank's agent to contract than was the newspaper that carried the celebrated advertisement by the [Carbolic Smoke Ball Col. or the newsagent who sold the copy of the newspaper to [Mrs Carlill], an agent for [the smoke ball company]." (*Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, CA, is obviously the case to which Professor Williams intended to refer.) The courts continue to treat the person producing the card as an agent with the ostensible authority of the bank but, on this issue, it is submitted that the dissenting judgment of Kennedy LJ in *First Sport Ltd v Barclays Bank plc* [1993] 3 All ER 789 at 797, d-f, above, is to be preferred.

4-08 In *Charles*,[1] D obtained gaming chips at a gaming club by the use of cheques and a cheque card, knowing that his account was overdrawn and that he had no authority to overdraw. The conditions on the card were satisfied so that the representation usually implied on the drawing of a cheque,[2] i.e. that the facts are such that the cheque will be met, was true. The representation alleged was that he was entitled and authorised to use the cheque card. If such a representation was made, it was untrue and he knew it was untrue. He was convicted of obtaining a pecuniary advantage, namely increased borrowing by way of overdraft, by the deception that he was entitled and authorised to use the card. The manager, Mr Cersell, said, "If there is a cheque card we make no inquiries as to [D's] credit-worthiness, or as to the state of his account with the bank. All this is irrelevant unless the club has knowledge that he has no funds, or the club has knowledge that he has no authority to overdraw."[3] Notwithstanding this forthright statement (and others) the House of Lords held that there was evidence that Mr Cersell had been induced to give the gaming chips by D's implied representation that he was entitled and authorised to use the cheque card.[4]

1 *Metropolitan Police Comr v Charles* [1977] AC 177, [1976] 3 All ER 112.
2 Below, para 4-20.
3 See [1976] 1 All ER 659 at 663-664.
4 The holding that there is an implied representation of authority to use the card is suspect. If the relationship between D and his bank is irrelevant, as it surely is, why should D be taken to be saying anything about his authority? If Q actually asks him, D can answer, "It is none of your business - you are only concerned with the conditions on the card." Representations, like terms in contracts, should only be implied under the compulsion of necessity.

4-09 In the light of the evidence quoted, this finding seems, with respect, to be almost perverse; but *Charles* was followed in *Lambie*.[1] D was the holder of a Barclaycard. She had exceeded her credit limit and been asked to return the card but had not done so. She bought goods in a shop and tendered the card. The assistant, Miss Rounding, having checked that the conditions were satisfied, allowed her to take the goods. D was convicted of obtaining a pecuniary advantage from the bank by the false representation that she was entitled to use the card. Her conviction was quashed by the Court of Appeal which thought, wrongly, that there was a material distinction between cheque cards and credit cards. The House of Lords restored the conviction. Miss Rounding was as emphatic as Mr Cersell that she was totally uninterested in the state of account between the customer and her bank. "From my experience I or my shop is not any more worried about accepting a Barclaycard as accepting the same number of pound notes . . . We will honour the card if the conditions are satisfied whether the bearer has authority to use it or not." It seems to have been recognised on all hands that the state of the card-holder's account with his bank is a matter of complete indifference to the representee. Since the authority to use the card depends on the state of the account, it is difficult to see how one can be indifferent to the one without being equally indifferent to the other. Apparently in the teeth of her own testimony, the House of Lords held that there was evidence that Miss Rounding had been induced to accept the card by the alleged false representation by D that she was entitled to use it.

1 [1981] 1 All ER 332, CA; revsd [1982] AC 449; [1981] 2 All ER 776, [1981] Crim LR 712, HL, and commentary. Since the repeal of s. 16 (2) (a) of the 1968 Act, Lambie's conduct could not constitute obtaining a pecuniary advantage; but it is probably obtaining services, contrary to 1978, s. 1, below, para 4-75.

4-10 It is clear that if Mr Cersell or Miss Rounding had been aware that the bearer of the card had no authority to use it, neither would have entered into the transaction. They would then have been parties to a fraud on the bank. They did not care whether D had authority or not but they would have cared if they had known he had no authority. In both cases the House attached great importance to this fact but it seems irrelevant. However dubious the reasoning, these decisions establish, for all practical purposes, that one who dishonestly uses a cheque or credit card in excess of his authority is guilty of obtaining a pecuniary advantage, or services, from the bank.

Yet, notwithstanding *Charles* and *Lambie*, it appears that prosecutors have had difficulties in obtaining convictions in similar cases where the tradesman has admitted that the deception did not operate on his mind. It seems that this was the reason why the prosecution resorted unsuccessfully in *Navvabi*[1] to a charge of theft, though the facts were remarkably close to those of *Charles*; and in *Kassim*,[2] it was said to be the reason for the proliferation of charges of procuring the execution of a valuable security, contrary to 1968, s. 20 (2). It is not at all surprising that the honest tradesman should say, "I didn't care whether D had authority to use the card or not" but it is surprising that he

would also say, "And I would still have accepted the card even if I had known he had no authority to use it." Unless he is prepared to go so far,[3] *Charles* and *Lambie* assert that he has been deceived; but the indictment alleges that he was induced to accept the card by D's false statement that he had authority to use it and the truth is that it did not matter to him whether D had authority or not.[4] It may be that juries prefer the truth to legal fiction, even fiction written by the House of Lords.

Since it is the tradesman who is deemed to have been deceived, it follows that the goods or services are obtained from him by the same "deceptions". In *Lambie*, the House criticised the justices for dismissing a charge of obtaining goods from the shop, contrary to s. 15 of the 1968 Act. It may be, however, that the justices observed that D caused no loss to the seller, who got his money from the bank, and it may be that D neither intended nor foresaw any loss to the seller. They may, therefore, have held that so far as the seller of the goods was concerned, as opposed to the bank, there was no evidence of dishonesty.

1 Above, para 2-52.
2 (1988) 152 JP 405 at 417, [1988] Crim LR 372, CA; revsd, [1992] 1 AC 9, [1991] 3 All ER 713. See Lord Ackner at p 721.
3 According to the Law Commission, shop assistants and others "will often give evidence that they had no interest in [D's] relationship with his bank and would still have accepted the payment in question had they known the truth". Law Com No 228 (Conspiracy to Defraud), 1944, para 438.
4 See the model cross-examination suggested at [1981] Crim LR 716.

(iii) Obtaining for a corporation

4-11 Where D is charged with obtaining a cheque from a limited company, it was held in *Rozeik*[1] that it must be proved that a person whose state of mind was that of the company was deceived. The managers who signed the cheques were the proper persons to do so but they were not deceived because they knew that the representations were false - though, on the unusual facts of the case, they were not parties to the fraud. Only the managers could undertake the legal obligation involved in drawing a cheque; the managers *were* the company for the purpose of issuing cheques, so the company was not deceived. The decision was based on the then prevailing view that D was obtaining a thing in action belonging to the company. That view has since been exploded.[2] It is only as a tangible thing, a "valuable security", that the cheque can be obtained from its drawer. It is sufficient that D obtains possession or control of such a thing, so, if he deceives a secretary, or a messenger employed by the company to hand over the cheque he has obtained it by deception. It is just as if he had deceived the janitor employed by the company into handing over the keys of the safe by the representation that he was the managing director.

1 [1996] 1 Cr App Rep 260, [1996] Crim LR 271, CA.
2 *Preddy*, below, para 4-60.

(iv) Obtaining and machines

4-12 The prevailing opinion is that it is not possible in law to deceive a machine.[1] It would be unreal to treat an automatic chocolate machine as deceived when it is activated by a foreign coin or washer. "To deceive is . . . to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false."[2] Deceit can be practised only on a human mind.[3] Where D obtains property or a pecuniary advantage as the

result

of some dishonest practice on a machine, without the intervention of a human mind, he cannot be guilty of an obtaining offence. It was held to be larceny (and, implicitly, not obtaining) to get cigarettes from a machine by using a brass disc instead of a coin.[4] The owner of the machine intends to pass ownership and possession of the goods to anyone who inserts the proper coin.[5] There is no difference, so far as the law of theft is concerned, between operating the machine by the use of a foreign coin and causing it to disgorge its contents by the use of a screwdriver. If a tradesman makes a dishonest claim on the appropriate form for the repayment of VAT input tax and the claim, without being read by anyone, is fed into a computer which automatically produces a cheque for the sum claimed, this may be regarded as indistinguishable from obtaining the cigarettes by the foreign coin.[5] The clerks who feed the document into the machine and put the cheque in the envelope are innocent agents - like an eight-year-old child, told to put the foreign coin in the machine and bring home the cigarettes. It has been held[7] that since VAT returns are processed by computer, a person making a false return does not have an intent to deceive for the purposes of s. 39 (2) (a) of the Value Added Tax Act 1983; but this assumes that D knows that no person is going to act on the false statement. If he believes that a person will be deceived, he is attempting to commit the offence.

There is a similar problem where the machine does not produce goods but provides a service[8] If the service is dishonestly obtained without deceiving a human being, there can be no obtaining offence.[9] If D, by using a foreign coin, operates the washing machine in P's launderette, he is not guilty of obtaining the service by deception but may be convicted of the offence of abstracting electricity, perhaps of stealing the hot water, and possibly of making off without payment contrary to 1978, s. 3 (1)[10]

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1 Griew, *Theft*, 8-12, thinks this "appears now to be universally accepted." See also Williams, *TBCL* 794 and A.T.H. Smith, *Property Offences*, 11-02. Arlidge and Parry, 4-054, however are more doubtful. Some devices used to operate machines are now "instruments" for the purposes of the law of forgery. Difficulties to which this may give rise are discussed in Smith & Hogan, 683-686, Arlidge and Parry, 5-012.

2 *Re London and Globe Finance Corpn Ltd* [1903] 1 Ch 728 at 732.

3 See (1972) Law Soc Gaz 576 and Law Commission Working Paper No 56, p 51.

4 *Hands* (1887) 16 Cox CC 188. Cf *Cooper and Miles* [1979] Crim LR 42 (Judge Woods), *Goodwin* [1996] Crim LR 262, CA.

5 Just as a newsvendor who leaves papers in the street for customers to pay for and take.

6 This may, however, amount to forgery. See Forgery and Counterfeiting Act 1981, s. 10 (3), discussed, Smith & Hogan, 674-676.

7 According to Arlidge and Parry, 4-054, by the trial judge in *Mor<???>* (17-19 June 1981) unreported. The problem regarding VAT is dealt with by the Finance Act 1985, s. 12 (5), which provides, as an allernative *mens, rea* to "intent to deceive", "intent to secure that a machine will respond to the document as if it were a true document".

8 Below, para 4-75.

9 Below, para 4-76.

10 Below, para 5-91.

(v) Obtaining too remote from deception

4-13 Under the old law of false pretences it was held in *Clucas*[1] that, if D induces P by deception to accept bets on credit and D backs a winning horse, the money paid by P to D is not obtained by deception; the effective cause of the obtaining is not the deception but the fact that D backed a winner. Similarly it was held in *Lewis*[2] that D who obtained employment as a teacher by deception did not obtain the salary paid at the end of the month by deception; the salary was paid for the work done, not in consequence of the deception. Both of these

cases are now expressly provided for in 1968, s. 16 (2) (c) and constitute an offence of obtaining a pecuniary advantage by deception.[3] In *King and Stockwell*,[4] convictions for attempting to obtain property by deception were upheld where DD persuaded P to employ them to cut down P's trees by falsely stating that the trees were dangerous. The court rejected the argument that, if the money had been paid, it would have been paid because the work had been done, not because of the deception. The question whether the deception would have been an operative cause of the obtaining of the money was one of fact for the jury. This casts some doubt on *Clucas*[5] and still more on *Lewis*. In the case of many contracts of service, however, it is obvious that there does come a point when the salary or wage is paid solely because the work has been done and any deception by which the employment was obtained has become inoperative. It would be absurd to suggest that D, who obtained his job by deception 30 years ago, obtained last month's salary by that deception. Even in that case, however, D might be convicted under s. 15 where he is paid a higher salary if his employer still believes the false representation he made on appointment that he holds a particular qualification which entitles him to be on a higher salary scale. The deception then appears to be the direct and continuing cause of his obtaining the additional money.[6]

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1 [1949] 2 KB 226, [1949] 2 All ER 40, CCA, distinguished in *Miller*, above, para 4-02.

2 (1922) Somerset Assizes, per Rowlatt J: Russell, *Crime* 1186n.

3 Below, para 4-65.

4 [1987] QB 547, [1987] 1 All ER 547, [1987] Crim LR 398, CA and commentary.

5 It may be noted that in *Clucas* the two defendants were convicted of conspiracy to defraud. This may seem inconsistent because if P paid out only because the punter had backed a winning horse he was not defrauded; but perhaps a bookmaker is "defrauded" when he is induced to take the bet.

6 Cf *Levene v Pearcey* [1976] Crim LR 63 and commentary (taxi-driver obtaining excessive fare by telling passenger normal route blocked).

(b) Any deception

4-14 By s. 15 (4):

"For purposes of this section 'deception' means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person."

The definition in 1968, s. 15 (4) applies to 1968, ss. 15, 15A, 16 and 20 (2) and to 1978, ss. 1 and 2.

(i) Proof of falsity

4-15 It must be proved that D made a false statement.[1] If his statement was true he cannot be guilty of the offence (though he may now be guilty of an attempt),[2] even though he believed it to be false and was completely dishonest. Where this rule requires the prosecution to prove a negative and the affirmative fact which, if it exists, will establish the truth of the statement, is within the knowledge of the accused, there may be an onus on him, not to prove anything, but at least to introduce some evidence of the affirmative fact. In *Mandry and Wooster*,[3] street traders selling scent for 25p said, "You can go down the road and buy it for 2 guineas in the big stores." The police checked on certain stores but it was admitted in cross-examination that they had not been to Selfridges. It was held that it was not improper for the judge to point out that it was

impossible for the police to go to every shop in London and that "if the defence knew of their own knowledge of anywhere it could be bought at that price . . . they were perfectly entitled to call evidence". Since no evidence was called to show that the perfume was on sale at Selfridges or anywhere else, the convictions were upheld.

[1] Cf *Banaster* [1979] RTR 113.
[2] Criminal Attempts Act 1981.
[3] [1973] 3 All ER 996; cf *Silverman* (1987) 86 Cr App Rep 213.

(ii) Deliberate or reckless

4-16 A deception is deliberate if D knows his statement is false and will or may be accepted as true by P. A deception is reckless if he is aware that it may be false and may be accepted as true by P; or if he is aware that it is ambiguous and may be understood by P in the false sense.[1] Carelessness or negligence is not enough.[2] If D believes his statement to be true, he is not reckless, however unreasonable his belief may be; but the more unreasonable D's alleged belief, the more likely is it that the court or jury will be satisfied that the belief was not really held. The *Caldwell*[3] test of recklessness, though it was at one time stated to be of general application,[4] is inappropriate and has not been followed[5] in the context of reckless statements.

If then D says to P, "This watch chain is solid gold", not knowing whether it is solid gold or not and, either not caring a jot whether the statement is true or false or hoping that the statement will turn out to be true, he is guilty of an offence under s. 15 (1) if the statement turns out to be untrue and, in consequence, P is induced to pay money for the chain.

[1] *Dip Kaur v Chief Constable for Hampshire* [1981] 2 All ER 430, above, para 2-17.
[2] *Staines* (1974) 60 Cr App Rep 160, CA. This is the rule in the tort of deceit - *Derry v Peek* (1889) 14 App Cas 337 - and it would be remarkable if deception in the criminal law were held to be wider than deceit in the civil.
[3] [1982] AC 341, [1981] 1 All ER 961, [1981] Crim LR 392, HL and commentary; Smith & Hogan 64-70.
[4] *Seymour* [1983] 2 All ER 1058, HL. See now *Reid* [1992] 3 All ER 673, HL.
[5] *Large v Mainprize* [1989] Crim LR 213, DC.

(iii) By words or conduct

4-17 By s. 15 (4) of the 1968 Act (which is applicable as well to ss. 15A, 16 and 20 (2) and to deception offences under the 1978 Act), deception means any deception by words or conduct. In *Barnard*,[1] D went into an Oxford shop wearing a fellow-commoner's cap and gown. He induced the shop-keeper to sell him goods on credit by an express representation that he was a fellow- commoner; but Bolland B said, *obiter*, that he would have been guilty even if he had said nothing. In an Australian case,[2] the wearing of a badge was held to be a false pretence when it indicated that the wearer was entitled to take bets on a racecourse. Offering a car for sale, knowing that the odometer has been set back by a previous owner is a false representation. Similarly where a buyer tenders an article in a supermarket, knowing that the proper price has been altered by a mischievous label switcher or misapplied by a careless assistant.[3] The cashier is no less deceived as to the price at which the goods are for sale than where the label is switched by D himself.

Where D knows that P is or may be under a misapprehension, anything whatever done by D to confirm P in his error is capable of amounting to a

deception. Positive steps taken by a seller to conceal from a buyer defects in the goods may amount to fraud in the civil law and would seem to be capable of being deception under the Theft Acts. If P inspected the goods and, because of the concealment, failed to detect the fault, the offence would be complete. If P omitted to inspect the goods and so was not deceived,[4] D would be guilty of an attempt. To display a picture with a collection belonging to a particular seller may amount to fraud and seems to be capable of being a deception, if it is known that the price will be enhanced by the fact that the picture appears to belong to that collection.[5]

It has been held to be fraud in the civil law for the seller of a ship to remove her from the ways where she lay dry and where it might be seen that the bottom was eaten and her keel broken, and to keep her afloat so that these defects were concealed by the water.[6] This would seem to amount to deception. Suppose, however, that the ship was already in the water before any sale was in prospect. Would it be an offence for the seller to leave her there when viewed by the buyer and say nothing about the defects? It would seem not; there are no "words or conduct" here and presumably the seller might not even be civilly liable in such a case.

[1] (1837) 7 C & P 784.
[2] *Robinson* (1884) 10 VLR 131.
[3] Contra, A.T.H. Smith, *Property Offences*, 17-26. Cf *Dip Kaur v Chief Constable for Hampshire* [1981] 2 All ER 430, DC, [1981] Crim LR 259 and commentary, above, para 2-14.
[4] Cf *Horsfall v Thomas* (1862) 1 H & C 90.
[5] Cf *Hill v Gray* (1816) 1 Stark 434, a doubtful decision, since it is not clear that the seller induced the buyer's mistake.
[6] *Schneider v Heath* (1813) 3 Camp 506, approved by the Court of Appeal in *Ward v Hobbs* (1877) 3 QBD 150 at 162, CA.

4-18 *Conduct and omissions.* In commercial transactions D, though under a duty to do nothing to confirm any misunderstanding by P, has no duty to correct it even though he is fully aware of it. "The passive acquiescence of the seller in the self-deception of the buyer does not entitle the buyer to avoid the contract."[1] *A fortiori*, it cannot amount to a criminal offence. It may be different, however, if D is under a duty to speak. In *Firth*,[2] a consultant was held to have deceived a hospital, contrary to 1978, s. 2 (1), by failing to inform the hospital that certain patients were private patients, knowing that the effect would be that they would be exempted from liability to make a payment. The court made no reference to the statutory definition, presumably regarding an omission in breach of duty as "conduct".

[1] *Smith v Hughes* (1871) LR 6 QB 597, above, para 2-23.
[2] (1989) 91 Cr App Rep 217, CA; [1990] Crim LR 326, CA and commentary, criticised in Archbold, 21-348, *Cf Shama* [1990] 2 All ER 602, 1 WLR 661, CA.

(iv) Deception by implied statement

4-19 The most difficult question is as to how far statements should be held to be implied in words or conduct. It is established that one who enters a restaurant and orders a meal impliedly represents that he intends to pay for the meal before leaving[1] and probably also represents, in the absence of an agreement for credit, that he has the money to pay.[2] A person who registers as a guest in a hotel represents that he intends to pay the bill at the end of his stay.[3] A wine waiter employed at a hotel impliedly represents that the wine he offers is his employer's, not his own.[4] A motor trader who states that the mileage shown on

the odometer of a second-hand car "may not be correct" represents that he does not know it to be incorrect.[5] A bookmaker, it is submitted, represents, when he takes a bet, that he intends to pay if the horse backed wins.[6] One who takes a taxi represents that he intends to pay, and has the means of paying, at the end of the ride.[7] A customer in a supermarket who tenders goods to the cashier represents that the price label on the goods is that which he believes to be authorised by the management,[8] so that there is a deception if he knows that the label has been "switched" by himself or another. These are all representations of present fact.

Where there has been an express representation, there will usually be ample evidence that the representee actually had the misrepresented fact in mind. In the case of implied representations, this may not be so. When a customer in a restaurant orders food, it is unlikely that the waiter actually thinks, "He is saying that he has the means to pay for this meal." The buyer of a car may not consciously reflect that the seller is asserting that he is the owner, or that he has the right to sell the car.[9] In each case, it is something that goes without saying. The waiter would not take the order if he knew that the customer had no means of paying for it. Moreover in each of the cases put it matters to the representee (unlike the representees in *Charles* and *Lambie*) that the representation is true. The waiter, for example, is not content to deal with the customer whether he has the means to pay or not - whereas the representees in *Charles* and *Lambie* were quite content to deal with their customers, whether they had authority to use their cards or not (so long as they did not know the customers had no authority). Unlike the waiter, they knew they would be paid anyway.

1 *DPP v Ray* [1974] AC 370 at 379, 382, 385, 388, 391, [1973] 3 All ER 131, HL.
2 Ibid, at 379, 382.
3 *Harris* (1975) 62 Cr App Rep 28, CA.
4 *Doukas* [1978] 1 All ER 1061, [1978] Crim LR 177, CA. The decision is to be preferred to *Rashid* [1977] 2 All ER 237, CA.
5 *King* [1979] Crim LR 122.
6 Cf *Buckmaster* (1887) 20 QBD 182.
7 Cf *Waterfall* [1970] 1 QB 148, [1969] 3 All ER 1048, CA.
8 Cf *Morris*, above, para 2-06.
9 Cf *Wheeler* (1990) 92 Cr App Rep 279, 282, CA (seller in market overt (now abolished) probably represents only that he transfers such title as he has).

(v) Representations implied on drawing cheques

4-20 From *Hazelton* (1874)[1] until *Metropolitan Police Comr v Charles* (1976)[2] it was thought to be settled law that a person tendering a cheque impliedly makes three representations: (i) that he has an account on which the cheque is drawn; (ii) that he has authority to draw on the bank for that amount; and (iii) that the cheque as drawn is a valid order for that amount. In *Charles*, the House of Lords cast doubt on the second of these representations,[3] saying that in substance there is only one representation - that the facts are such that, as far as can reasonably be foreseen, the cheque will be honoured on presentment. Lord Edmund-Davies quoted with approval the words of Pollock B in *Hazelton*[4] that the representation is that "the existing state of facts is such that in the ordinary course the cheque will be met". In *Gilmartin*, the Court of Appeal thought that "this terse but neat epitome of the representation . . . should properly be regarded as an authoritative statement of the law".[5] It is the same where the cheque is post-dated as where it is not. Such a representation is complete only if the facts include a certain intention and belief of the drawer.

As the court points out, whether the cheque is post-dated or not, it may be the drawer's intention to pay in sufficient funds to meet it before presentation. Alternatively, he may believe that a third party is going to pay in such funds - as where he draws a cheque, knowing that his account is overdrawn but confidently expecting that he will have an ample credit balance tomorrow when his monthly pay is paid into his account by his employer. There being no express representation, the drawer must be taken to be saying that either, (a) there are sufficient funds in the account to meet the cheque; or, (b) he intends to pay in sufficient funds; or, (c) he believes that a third party will do so. Each is a representation of fact, not a mere promise, and so is sufficient to amount to a deception.[6]

1 LR 2 CCR 134, the source of the proposition in Kenny *Outlines* 359, adopted in *Page* [1971] 2 QB 330 at 333.
2 [1977] AC 177, [1976] 3 All ER 112, HL.
3 But see [1977] Crim LR at 616.
4 (1874) LR 2 CCR 134 at 140.
5 (1983) 76 Cr App Rep 238 at 244.
6 In *Charles* [1976] 3 All ER 112 at 116, Viscount Dilhorne said, "Until the enactment of the Theft Act 1968 it was necessary in order to obtain a conviction for false pretences to establish that there had been a false pretence of an existing fact." This is misleading. It is still necessary to prove a representation of an existing fact or of law: *Beckett v Cohen* [1973] 1 All ER 120, [1972] 1 WLR 1593, DC; *British Airways Board v Taylor* [1976] 1 All ER 65, HL. All that the 1968 Act did was to make clear that certain statements of fact - i.e. present intentions - were for the future to be treated as such. The implication of Viscount Dilhorne's statement was not accepted by Lord Diplock (p 113) or Lord Edmund-Davies (p 121) or by the court in *Gllmartin.*

4-21 In *Greenstein*,[1] DD made a practice of applying for very large quantities of shares, sending a cheque for an amount far in excess of the money in their bank accounts. They had no authority to overdraw but they expected to be allotted a relatively small number of shares and to receive a "return cheque" for the difference between the prices of the shares applied for and the shares allotted. By paying the return cheques into their accounts they enabled the cheques drawn by them to be honoured, on most occasions on first presentation, on other occasions after, apparently, a very short interval, on second presentation. It was alleged that DD had obtained shares by "*Hazelton*" representations (the case being decided before *Charles*), that they had authority to draw the cheques and that they were good and valid orders. In some cases, where DD had given an undertaking required by the issuing houses that "the cheque sent herewith will be paid on first presentation", there was an allegation of a further representation to that effect. Since all the cheques were met on first or subsequent presentation, no one lost a penny but some applicants who might have got shares if DD had made more modest applications did not get them because, as DD anticipated, there were not enough to go round.

It was held that DD had no authority, either from banking practice or the particular facts proved, to draw the inflated cheques; and that they were not valid orders because they could be met only by paying in the return cheques. There was, therefore, a deception. The deception was effective because the issuing houses would not have entertained the application had they known that their own return cheques were going to be used to fund it. The jury's verdict implied that DD were reckless whether their cheques would be honoured on first presentation; and, on the facts, the jury "were entitled if not bound to infer that the deception was deliberately dishonest".

It would seem then that *Greenstein* was correctly decided in the light of *Charles.* DD did not have the belief which they impliedly represented they had. As in Viscount Dilhorne's speech in *Charles*,[2] there is a disturbing and, it

is submitted, unwarranted suggestion that a representation as to something other than present fact will do.

The court distinguished the dicta of Buckley J in *Re London and Globe Finance Corpn Ltd* [3] on the ground that Buckley J "did not have in mind a case where the thing in which a person is induced to believe is a future state of affairs which comes about by a lucky chance, or as here by the act of the very person who was induced by the deception to do it". With respect, the inducing of a belief "in a future state of things" is incapable of being a deception. The deception must be as to present facts, including D's present intention or belief; and, so long as it is understood that "believe" does not require complete conviction[4] and that P sufficiently believes if he relies on the truth of the representation though he is not completely convinced it is true,[5] there should be no qualification of Buckley J's proposition that there can be no deception unless a person is induced to believe that a thing is true which is false in fact.

[1] [1976] 1 All ER 1, 61 Cr App Rep 296, CA.
[2] See para 4–20, fn 6, above.
[3] [1903] 1 Ch 728 at 732, above, para 4–12.
[4] Cf Griew in Glazebrook *Essays* 69 et seq.
[5] See [1977] Crim LR at 621.

4–22 It is certainly not enough to establish an implied deception that there is an implied term for the purposes of the law of contract and that the party bound by the term knows that it is unfulfilled.[1] Suppose, for example, that the seller of goods, in circumstances in which the law implies an undertaking on his part that the goods are of "satisfactory quality", knows that the goods are not "satisfactory" but says nothing. It will be necessary to prove that the seller knew that he was being taken by the buyer to be making a particular assertion and that he knew the assertion to be false or that he did not believe it to be true. An obvious example of a sufficient deception is where the seller induces a sale of an inferior article by producing a sample of superior quality.[2] Though he does not say so in terms, the seller inevitably knows[3] that the buyer understands him to assert that the bulk corresponds with the sample in quality.

An apparently innocent act may constitute deception when considered in the light of a previous course of conduct. D laid before P a number of bars of metal of little value, saying "Eight ounces at four shillings an ounce". The fact that he had previously pledged ingots of silver, which were similar in appearance to the bars now produced, established fraud.[4]

[1] For a discussion of the controversial case of *Berg v Sadler and Moore* [1937] 2 KB 158 and of the implications for the criminal law of *Smith v Hughes* (1871) LR 6 QB 597, see fourth edition of this book, pp 86–89.
[2] *Goss* (1860) Bell CC 208.
[3] The question must still be left to the jury – "Did this seller know?": Criminal Justice Act 1967, s. 8.
[4] *Stevens* (1844) 1 Cox CC 83.

(vi) Can an omission to undeceive be a deception?

4–23 Where D's statement is true at the time it is made but later to his knowledge becomes false, he will be guilty of obtaining by deception if P acts on the false statement by tendering property or a pecuniary advantage which D dishonestly accepts. In *DPP v Ray*,[1] the statement was D's implied representation that he intended to pay for his meal. This statement was true when made and continued true until the end of the meal, but when D changed his mind it became

false. It was held that the waiter acted on the false statement by leaving the room, when he would not have done so had he known the truth, that D intended to leave without paying. If D had changed his mind during the meal, it is clear that any part of the meal served and any service performed by the waiter thereafter would have been obtained by deception. It is essential to prove that P acted on the false representation and that the result of P's so acting was that D obtained the property or the service as the case may be. It was accepted that, if D had decided not to pay and made off while the waiter was out of the room, he would not have committed the offence. On the particular facts, D's continued presence was essential to the prosecution's case. Whether continuing conduct is required as a matter of principle is a different matter. Lord Pearson said:

> "By 'continuing representation' I mean in this case not a continuing effect of an initial representation, but a representation which is being made by conduct at every moment throughout that course of conduct. .."

[1] [1974] AC 370, [1973] 3 All ER 131, HL; *Nordeng* (1975) 62 Cr App Rep 123 at 129, CA.

4–24 Is this a material distinction? Suppose that D sends a written order to D for a book, promising to pay the price within 10 days of delivery. If (i) D does not intend to pay, he will obtain the book by deception. Suppose (ii) that D does intend to pay when he posts the order, but changes his mind before P reads it. Again, it seems clear that D will obtain the book by deception. The representation is false when communicated. It is quite immaterial that D and P are not in each other's presence. Suppose (iii) that D's change of mind occurs just after P has read the order but before he acts on it by appropriating a book to the contract and sending it. Here we have only "the continuing effect of an initial representation". One view[1] is that this would be materially different; there has been no deception "by words or conduct", as required by s. 15(4), only a mere omission to undeceive. However, P *is* deceived from the moment of D's change of mind, no less than in *Ray*. It was not self-deception. What deceives him if it is not D's overall "conduct" – the representation and the omission to correct it? The distinction between cases (ii) and (iii) seems immaterial.

Whatever the true position in those cases, it seems that the same result must follow in the case where the statement is false when made but believed by D to be true, if D discovers that the statement is false and thereafter accepts property or a service from P who, as D knows, is acting on the false statement.

This is not to argue that criminal liability should be imposed in all cases where the civil law imposes a duty to speak. This is a highly technical matter and there are instances where it would not be obvious to the layman that to remain silent would be tantamount to deception. Such cases may be unsuitable for the imposition of criminal sanctions. The point is that criminal liability should not be imposed where the civil law imposes no duty to speak. Where it does impose such a duty then the act may reasonably be held criminal but only if the words of the Act may fairly be said to cover the case.

[1] Cf Arlidge and Parry, 4–015 to 4–018; Griew, *Theft*, 8–34, A.T.H. Smith, *Property Offences*, 17–92, Williams, *TBCL* 787, speaking of the "fiction of continuing representation". But why is it a fiction? P sends the book only because he continues to rely on P's representation that he intends to pay for it. This is decidedly less fictitious than that deduced from Ray's continuing to sit at the cafe table.

(vii) As to fact or law

4-25 In the old law of false pretences the books unanimously stated that the misrepresentation must be as to a matter of fact.[1] They then went on to contrast representation of fact with representation of opinion or intention. No discussion is to be found of representations of law and no authority is cited to show that a misrepresentation of law would not have been a sufficient false pretence. Indeed there appears to be no authority to that effect. On the other hand there is no authority to show that a misrepresentation of law was enough. It is thus uncertain to what extent the express inclusion of deception as to a matter of law extends the law. Certainly it seems desirable that misrepresentations of law should be within the terms of the Act. Consider the following cases:

(i) D and P are reading a legal document and D deliberately misrepresents its legal effect. This would seem to be misrepresentation of law since the construction of documents is a question of law. If D does so with the object of leading P to believe that D has some right over P's land so as to induce P to pay money for the release of that right, this would seem to amount to obtaining by deception.

(ii) P and his wife, D, have entered into a separation agreement whereby P covenanted to pay D an annual sum "free of any deduction whatever". D, knowing that the true legal construction of the document is to the contrary,[2] represents to P that this prevents P from deducting income tax. This is a misrepresentation of law and it would seem that D is guilty of obtaining the money (or at least that portion of it which represents the tax which ought to have been deducted) by deception.

1 Archbold (36th edn) 1945; Russell 1171; Smith & Hogan (1st edn) 408; Kenny 358.

2 *Ord v Ord* [1923] 2 KB 432.

4-26 In the cases just considered, it has been assumed that the law is quite clear and definite and D knows what it is. Many legal disputes arise, of course, where the law is uncertain. In these instances it is most unlikely that an offence could be committed under the Act. It must often happen that counsel make submissions as to the law in court which do not accord with, or are in direct opposition to the proposition which the same counsel would formulate if he were writing a textbook on the matter. The nature of his submission where the law is uncertain is governed by the interests of his client. A solicitor making similar submissions so as to exact money by way of compromise could not be said to be committing an offence because it is impossible to prove that the statement is (or was at the time) false - the law, *ex hypothesi*, being uncertain.

4-27 The following proposition formulated by Street[1] for the law of the tort of deceit is probably equally true of deception under s. 15:

> "If the representations refer to legal principles as distinct from the facts on which those principles operate and the parties are on an equal footing, those representations are only expressions of belief and of the same effect as expressions of opinion between parties on an equal footing. In other cases where the defendant professes legal information beyond that of the plaintiff the ordinary rules of liability for deceit apply."

1 *Torts* (8th edn) 111-112.

(viii) Deception as to intention

4-28 Deception includes a deception as to the present intentions of the person using the deception or any other person. A representation as to present intention may be expressed or implied. Several examples of implied representations have been considered above.[1]

It must be proved in these cases that D had no intention of carrying out his promise at the time he made it or at the time it was acted on. If he intended to carry out his promise at those times but later changed his mind he is guilty of a breach of contract but of no criminal offence. It has long been recognised that a misrepresentation as to present state of mind will found a civil action for deceit and this is no more difficult to prove in the criminal than in the civil case - though the standard of proof is, of course, higher. Evidence as to the circumstances in which the promise was made, or as to a systematic course of conduct by D or, of course, as to a confession are examples of ways in which a jury might be convinced beyond reasonable doubt that D was deceiving P as to his present intentions.

1 Para 4-19.

4-29 Deceptions as to the present intentions of another person seem to be rare. Examples would be where an agent obtains property for his principal by representing that the principal intends to render services or supply goods, well knowing that the principal has no such intention, or where an estate agent says that a particular building society is willing to advance half the purchase price of a house, knowing that this is not so, and thus induces a purchaser to pay a deposit.

(ix) Statements of opinion

4-30 A statement of opinion was not a sufficient false pretence under s. 32 of the Larceny Act 1916. The leading case, *Bryan*,[1] carried this doctrine to extreme lengths. There D obtained money from P by representing that certain spoons were of the best quality, equal to Elkington's A, and having as much silver on them as Elkington's A. These statements were false to D's knowledge.[2] Nevertheless ten out of twelve judges[3] held that his conviction must be quashed on the ground that this was mere exaggerated praise by a seller of his goods to which the statute was not intended to apply. Erle J said, "Whether these spoons . . . were equal to Elkington's A or not, cannot be, as far as I know, decidedly affirmed or denied in the same way as a past fact can be affirmed or denied, but it is in the nature of a matter of opinion." This can hardly be true, however, of the statement that the spoons had as much silver on them as Elkington's A. This seems to be no less a misrepresentation of fact than that a six-carat gold chain is of fifteen-carat gold which has subsequently been held to be a sufficient false pretence.[4] It has been held[5] that it is a misrepresentation of fact for the accused to state "that they [had] effected necessary repairs to a roof [which repairs were specified] that they had done the work in a proper and workmanlike manner and that [a specified sum] was a fair and reasonable sum to charge for the work involved". The evidence showed that nothing needed to be done to the roof, what had been done served no useful purpose and it could have been done for £5, whereas £35 was charged. Even an excessive quotation for work to be done may be a sufficient deception where a situation of mutual trust has been built up between D and his customer so that D must be taken to be saying dishonestly that he is going to make no more than a modest profit,

when he knows that the profit, if the quotation is accepted, will be very large.[6]

1 (1857) Dears & B 265.
2 D's counsel said: "I cannot contend that the prisoner did not tell a wilful lie . . .".
3 Willes J *dissentiente* and Bramwell B *dubitante*.
4 *Ardley* (1871) LR 1 CCR 301.
5 *Jeff and Bassett* (1966) 51 Cr App Rep 28, CA. Cf *Hawkins v Smith* [1978] Crim LR 578 ("Showroom condition throughout" a false trade description of a car which has interior and mechanical defects).
6 *Silverman* (1987) 86 Cr App Rep 213, [1987] Crim LR 574, CA.

4-31 The Theft Act gives no guidance as to whether a misrepresentation of opinion is capable of being a deception. In principle there is no reason why it should not be, where the opinion is not honestly held. A vendor's description of his tenant as "a most desirable tenant" when the rent was in arrears and, in the past, had only been paid under pressure was held by the Court of Appeal to be a sufficient misrepresentation to found an action in deceit.[1]

> "In a case where the facts are equally well-known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. . . . But if the facts are not equally well-known to both sides, then a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."[2]

The way seems open to the courts, if they so wish, to hold that "deception" extends to this kind of case. The use of that term frees them from the fetters of false pretences. A view of commercial morality very different from that of the majority of the judges in *Bryan* now prevails and deliberate mis-statements of opinion would today be generally condemned as dishonest, no less dishonest, indeed, than mis-statements of other facts - for whether an opinion is held or not is a fact - and the law should follow the changed attitude. It may, moreover, be a significant fact that at the time *Bryan* was decided, it was not possible for the prisoner to give evidence in his own defence.[3]

Against this view, it might be argued that, since the Act has expressly removed one limitation on false pretences (representations as to intention) and has said nothing about this limitation, Parliament's intention is to allow it to continue. It is submitted that this would be a quite unjustifiable assumption. Parliament, in fact, has left it to the judges and, by the use of new terminology, given them a more or less free hand. The question now ought to be not "Is it a matter of opinion?" but, "If it is a matter of opinion, was it D's real opinion?" If the opinion is not honestly held there is, in truth, a misrepresentation of fact for the accused's state of mind is a question of fact. The Act indeed recognises this by holding false promises to be deception. If "I intend . . ." (not intending) is a deception, is not "I believe . . ." (not believing) equally a deception?

1 *Smith v Land and House Property Corpn* (1884) 28 Ch D 7.
2 Ibid, at 15, per Bowen LJ.
3 In *Ragg* (1860) Bell CC 208 at 219, Erle CJ, referring to *Bryan*, said ". . . if such statements are indictable a purchaser who wishes to get out of a bad bargain made by his own negligence, might have recourse to an indictment, on the trial of which the vendor's statement on oath would be excluded, instead of being obliged to bring an action where each party would be heard on equal terms".

4-32 *Deception inducing performance of a binding contract.* It seems that no offence is committed if D and P have entered into an enforceable contract and D deceives P into performing that contract. In *Wheeler*[1] D, a bona-fide

purchaser of a stolen medal, one morning sold the medal to P. Delivery was to be in the afternoon. D was not dishonest before or at the time of the sale. The medal belonged to its original owner until D sold it but, because the sale was in market overt,[2] the ownership immediately passed to P. Before delivery D was informed that the medal had been stolen. P inquired whether the medal was on a police list of stolen property. D dishonestly said that it was not. P then paid the price and took delivery of the medal. He would not have done so had he not been deceived. D's conviction for obtaining the price by falsely representing that he was the lawful owner and entitled to sell it was quashed on the ground that the particulars in the indictment were not made out. Since the medal already belonged to P, the court said that D could not and did not make that representation. This seems to assume that D understood the law of sale of goods including the doctrine of market overt. D may very well have supposed that the sale was not complete until delivery; and P may have supposed that he was entitled to refuse to accept and pay for the medal if it had been stolen. In the morning D believed he was the owner and entitled to sell. He would not have been entitled to sell in the afternoon because he knew the medal was stolen but it had already been sold. The court attached much importance to the fact that P had no right to rescind the contract of sale. He was bound to take delivery and pay the price. The fact seems to be that D induced P to pay the price by deception; and unless the case turns on the fact that the deception was wrongly described, it may be that it decides that it is not an offence by deception to induce the performance of an act which the other is bound to do.

1 (1990) 92 Cr App Rep 279, CA. Cf para 2-44 above and the discussion by Griew, *Theft*, 8-40 to 8-41. If D is entitled in law to recover the price of goods from P, can his obtaining it be an offence under s. 15 or theft contrary to s. 1? Cf *Talbott* [1995] Crim LR 396.
2 The doctrise of market overt was abolished by the Sale of Goods (Amendment) Act 1994.

(c) Dishonestly

(i) Where there is or may be a claim of right

4-33 The deception must also be done "dishonestly". Dishonesty is a subjective concept. The jury must assess D's actual beliefs, whether reasonable or not. The reasonableness or otherwise of the alleged belief is relevant only to the question whether it is actually held or not.[1] Section 32 of the Larceny Act 1916 required an "intent to defraud" and the Court of Criminal Appeal said repeatedly that this meant "dishonestly"[2] so the law would appear to be unchanged. The Court of Appeal has said,[3] however, that "dishonestly" has a wider ambit without indicating the respects in which it is wider. D may deceive deliberately or recklessly, yet not obtain dishonestly.[4] "Dishonestly" is a separate element in the *mens rea*. The jury should always be directed that they must be satisfied that the deception was done dishonestly; though the absence of direction on this point may not be fatal where dishonesty is, in the particular circumstances, an inevitable inference from a deliberate deception.[5] There is no definition of dishonesty for the purposes of this section and the partial definition in s. 2(1) applies only for the purposes of s. 1 of the Act. The judge must now direct the jury in accordance with *Ghosh*[6] and in *Woolven*[7] the Court of Appeal thought that this direction was wide enough to embrace the occasions on which there might be a claim of right. If this is true for obtaining, it is equally true for theft; and s. 2(1)(a) of the Act is in effect redundant. If every jury would inevitably find that a person with a claim of right is not dishonest

under the *Ghosh* test, there is no need for a claim of right direction. Where the charge is theft, the premise is probably well-founded; but where obtaining by deception is charged it is less clear. Dishonesty then comes into question only where D has made a deliberate or reckless deception. A jury might well think a person dishonest who had practised a deliberate deception even where he did so to get something to which he thought he was entitled.[8]

It is submitted that a claim of right is as inconsistent with dishonesty under s. 15 and other obtaining offences, as it is for theft. It is submitted that the statement of the Court of Apeal in *Lightfoot*[9] that "The defendant's knowledge of the law, whether the criminal law or the law of contract, is irrelevant", must be qualified at least to the extent that a mistake of civil law giving rise to a claim of right is a defence. Because theft and obtaining property by deception overlap - indeed, since *Gomez*, all obtaining, except of land, is theft - it would be inconvenient and unjust if it were otherwise. If D believes the property to be his own, whether through a mistake of fact or a mistake of law, he has a defence if the charge is brought under s. 1. It would be wrong that he should have no defence if the charge is brought under s. 15. If the judge has to direct the jury expressly on the theft charge that claim of right is a defence (and it is submitted that he should), then it is desirable that he should also have to do so on the obtaining charge, instead of leaving the jury to deduce this from the general *Ghosh* direction.[10]

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1 *Lewis* (1975) 62 Cr App Rep 206, [1976] Crim LR 383, CA.

2 *Wright* [1960] Crim LR 366.

3 *Potger* (1970) 55 Cr App Rep 42 at 46, CA.

4 See *Wright* (above), *Griffiths* [1966] 1 QB 589, [1965] 2 All ER 448 and *Talbott* [1995] Crim LR 396.

5 *Potger* (above), fn 3; but see also *McVey* [1988] Crim LR 127 and commentary.

6 Above, para 2-122. See *Melwani* [1989] Crim LR 565, CA.

7 (1983) 77 Cr App Rep 231, [1983] Crim LR 623, CA.

8 In *Falconer-Atlee* (1973) 58 Cr App Rep 348 at p 358, a case of theft, the judge's direction on dishonesty was held to be defective because he omitted to tell the jury that s. 2(1)(a) expressly provided that a person with a claim of right was not dishonest. Yet, since D's mistake, if any, was a mistake of fact, the direction does not seem to have been necessary or, indeed, appropriate. The court in *Woolven* distinguished that case, not because it was a case of theft but, apparently, on the ground that the direction in the instant case did, in effect, if not in so many words, tell the jury to acquit if they thought D might have a claim of right.

9 (1992) 97 Cr App Rep 24, [1993] Crim LR 137, CA. Cf. *Bernhard* [1938] 2 KB 264 and Theft Act 1968, s. 2(1)(a).

10 In *Parker* (1910) 74 JP 208 Ridley I held that a claim of right was no answer to a charge of demanding money upon a forged document with intent to defraud. In *Woolven*, the court thought that case was not a decisive authority against a claim of right defence under s. 15; and *Parker* has been overruled by the Forgery, and Counterfelting Act 1981, s. 10(2). Cf Smith & Hogan 682-683 and the fourth edition of this book, paras 181-183.

4-34 If this be correct, D would have a defence in the following case:

D's car has been obtained from him by X who gave a cheque drawn on a bank where he had no account and who never paid the price. X has sold the car to a bona-fide purchaser, P. P refuses to give up the car to D. D, believing that he is entitled to have the car back, recovers possession by pretending to be a mechanic from P's garage collecting the car for servicing.

Here D has no actual right to recover possession of the car; he is certainly guilty of a deliberate deception; but if he genuinely believes he is entitled to possession of the car, it is submitted that the jury should be told that he is not "dishonest" for the purposes of the section.

Probably the same result must follow where D's belief relates not to any specific property but to the repayment of debt:

D, a Hungarian woman, has been P's mistress. On the termination of the relationship, P promises to pay D 鴉 100. Later he declines to do so. D is advised by a Hungarian lawyer that she is entitled to the money. By a deliberate deception she causes P to pay her 鴉 100.[1] In such a case there was, and no doubt is, a sufficient claim of right to negative an "intent to steal"; and, if so, there should equally be a defence to obtaining by deception.

A more difficult case is that where D obtains something other than the thing to which he has a claim of right.

D's employer, E, cannot pay D's wages because he cannot obtain payment of a debt owed by P to E. D, by deception, obtains some of P's property and delivers it to E, hoping thereby to enable E to procure the payment of the debt - and the means to pay D's wages.

In such a case[2] Coleridge J thought that the facts negatived an intent to defraud; and in a subsequent case[3] Pollock CB put this on the ground that D must have thought he had some right to obtain the property which he did obtain. Of course, he had no right in law so to do, in which case the decision on these facts must depend on the state of D's mind in the particular case. Did he, or did he not, believe he had, or that E had, a legal right to act in this way? Looked at in this way, it would seem rather unlikely that a claim of right could often be made out. D had a claim of right to his wages; E had a claim of right to payment by P of the debt (both being actual rights) but the question is whether D had a claim of right to the particular property he obtained by the deception. Few people would suppose today that they have a right to take the property of a debtor to compel him to pay his creditor.

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1 Cf *Bernhard* [1938] 2 KB 264, below, para 10-31.

2 *Williams* (1836) 7 C & P 354. Cf *Close* [1977] Crim LR 107, CA.

3 *Hamilton* (1845) 1 Cox CC 244.

(ii) Where there is no claim of right

4-35 Prior to *Feely*[1] the courts were inclined to decide as a matter of law that certain common types of conduct were dishonest. In *McCall*,[2] the Court of Appeal decided that to obtain a loan by deception was dishonest even though D intended to repay. D's submission that such conduct "is not necessarily tainted with dishonesty" was rejected. There was "an unanswerable case" against him. In *Halstead v Patel*,[3] D knowingly overdrew on a Giro account, intending to repay at some future date when a strike was over. It was held, relying on decisions which were not followed in *Feely*, that the "pious hope" of repaying at some future date was no defence; the justices were bound to convict. In *Potger*,[4] where D induced P to subscribe for magazines by the false representation that he was a student taking part in a points competition, it was no answer that magazines worth the money would have been delivered in due course. The Court of Appeal came close to giving a definition of dishonesty in obtaining cases:

> ". . . once the jury had come to the conclusion that these were deliberate lies intended to induce the various persons to do acts which would benefit[5] the appellant and that they were or would have been induced so to act by those lies, it was inevitable that the jury should reach the conclusion at which they did arrive."

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1 Above, para 2-121.

2 (1970) 55 Cr App Rep 175. In *Melwant* [1989] Crim LR 565. CA, it was said that *McCall* "cannot really survive the decisions in *Feely* and *Ghosh*"; and this may be true of the other cases cited in this paragraph.

3 [1972] 2 All ER 147, 1 WLR 661. The judgment is clearly wrong in so far as it refers to a "belief based on reasonable grounds". See [1972] Crim LR 236; *Lewis* [1976] Crim LR 383. CA.

[4] (1970) 55 Cr App Rep 42.
[5] But should not the emphasis have been on prejudice to P rather than benefit to D? Cf *Welham v DPP* [1961] AC 103, [1960] 1 All ER 805, HL.

4-36 *Feely*, as modified in *Ghosh*,[1] applies in an obtaining offence as in theft. In *Feely*, Lawton LJ contrasted the case of the man who takes money from a till intending to repay (presumably before it is missed); and the man who obtains cash by passing a cheque on an account with no funds, intending to pay funds in to meet the cheque when it is presented. According to *Cockburn*[2] (overruled in *Feely*) the first man was dishonest in law whereas:

> "the man who passes the cheque is deemed in law not to act dishonestly if he genuinely believes on reasonable grounds that when it is presented to the paying bank there will be funds to meet it."

Lawton LJ commented:

> "Lawyers may be able to appreciate why one man should be adjudged to be a criminal and the other not; but we doubt whether anyone else would."

The man passing the cheque would be acquitted of an obtaining offence on the ground that he does not intend to deceive,[3] so the question of dishonesty would be unlikely to arise. If it did, it would now be a matter for the judgment of the jury in accordance with *Ghosh*. But the cases are not indistinguishable for the raider of the till intends to commit a legal wrong - a trespass against, or a breach of contract with, the owner - whereas the passer of the cheque has no such intention.

Feely was followed in an obtaining case, *Greenstein*,[4] the first prosecution brought in respect of a particular method of "stagging". The judge told the jury:

> "... this is the first prosecution. It has not yet been decided if what they did did amount to a dishonest criminal deception and it will be you who will decide the answer to that question."

But the answer given by the jury is of no authority in any future case, even on exactly similar material facts. Surely the law should supply the answer to the question whether this practice is lawful or not - just as the law should say whether it is or is not lawful to obtain a loan by deception with intent to repay in due course. It is not the function of the jury to make law.

[1] Above, para 2-122.
[2] [1968] 1 All ER 466, [1968] 1 WLR 281, CA.
[3] Above, para 4-20.
[4] [1976] 1 All ER 1, [1975] 1 WLR 1353, CA above, para 4-21.

4-37 Though, since *Ghosh*, the question for the jury would be formulated differently, *Greenstein* remains the authority that it is not necessarily a defence to a charge of dishonesty that D did not intend anyone to suffer financial loss. Where D, who has no money in his bank account and no authority to overdraw, obtains goods by using a cheque card, he knows that the person from whom the goods are obtained will suffer no financial loss - the loss will fall on the bank. For this reason, it may be that a charge of obtaining services from the bank will be preferred to one of obtaining goods from the seller; but it appears that there is evidence of dishonesty towards the seller as well, if he was induced by the deception to part with his property.[1]

[1] See the discussion of cheque card frauds, above, para 4-07.

4-38 Suppose that D, by making false statements as to his assets, persuades his bank manager to allow him to borrow by way of overdraft. Section 16(2) (b) of the 1968 Act says that he is to be regarded as having obtained a pecuniary advantage. It is now for the jury to decide whether it is a defence that D intended (and was able) to repay the loan with interest in the agreed time. In a sense he has not obtained a "pecuniary advantage" at all, since he is going to give a full economic return for what he gets, but that is not necessarily an answer.[1] If D, aged 48, applies for an appointment for which the maximum age is 45, stating that he is 44, he commits the *actus reus* of the offence if he is appointed (and of an attempt if he is not). It is for the jury to decide whether he is dishonest if he can say truthfully, "I was the best qualified candidate and would have earned every penny of my salary if appointed." It is true that s. 16(2)(c) defines only "pecuniary advantage" and the advantage must be obtained "dishonestly"; but it is thought that it would defeat the intention behind s. 16(2) if the meaning given to "dishonestly" excluded these cases.

[1] Below, para 4-67.

B. OBTAINING PROPERTY BY DECEPTION

4-39 By s. 15 of the 1968 Act:

> "(1) A person who by any deception dishonestly obtains <???>perty belonging to another, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable to imprisonment for a term <???> exceeding ten years.
> (2) For purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and 'obtain' includes obtaining for another or enabling another to obtain or to retain."

(a) The obtaining

(i) For one's self

4-40 It must be proved that property was in fact obtained. Evidence that, following the representation, the property would have been transferred to D in the normal course, is not enough. It is not sufficient to prove that D made dishonest applications to the Department of Employment for unemployment benefit, that the Department's system was that, in response to applications, Girocheques produced by computer were sent to the applicants, and that D had never complained of not receiving a Girocheque: *Bogdal v Hall*,[1] where the court thought it would be unsafe to draw an inference that D had received any of the cheques - but there was prima facie evidence of an attempt to obtain. There is a sufficient obtaining if D obtains ownership, possession or control.[2] If D is lawfully in possession of P's goods, for example, as a bailee, and he dishonestly by deception induces P to sell him the goods, the offence is complete when the ownership passes to D. Conversely if D by deception induces P to enter into an unconditional contract to sell to D specific goods which are in a deliverable state, the offence is complete although the goods never leave P's possession. The ownership in the goods passes as soon as the contract is made and it is immaterial that the time of payment and of delivery is postponed.[3] Similarly if D, by deception, induces P to transfer to him a bill of lading in respect of goods which are at sea, he will be guilty of obtaining not merely the bill of lading but also the goods which it represents, for title to them passes on

indorsement and delivery of the bill. It may be that, in these cases, P will suffer no loss; but it is right that such conduct should be criminal since it puts P's property at risk. D has probably obtained a voidable title to it and, if he can resell to a bona-fide purchaser before P succeeds in avoiding the contract, the bona-fide purchaser will get an unimpeachable title to the property and P will be permanently deprived of it.

1 [1987] Crim LR 500, DC.
2 It is unnecessary to prove that D obtained the whole of the property mentioned in the information or indictment, but the sentence should relate only to property proved to have been obtained: *Levene v Pearcey* [1976] Crim LR 63, above, para 4-13, fn 6.
3 Sale of Goods Act 1979, s. 18, r. 1.

4-41 It follows that if D, being in a foreign country, say France, sends a letter to England deceiving P into selling him goods which are in England, D is guilty of obtaining by deception in England as soon as the property passes to him. It is immaterial that he never sets foot within the jurisdiction. If the letter arrives within the jurisdiction but does not deceive P, D is liable to conviction in England for an attempt. This is so even if the letter is lost before it reaches these shores. Though nothing whatever has happened in England, D intended consequences to occur here and it is to the consequences intended that we have regard when dealing with attempts (and conspiracy or incitement). The Criminal Justice Act 1993 will codify this rule when it is brought into force.[1]

1 Section 3(3) and para 1-19 above. For earlier authorities see *Baxter* [1971] 2 All ER 359 at 362, CA, per Sachs LJ. *DPP v Stonehouse* [1978] AC 55, [1977] 2 All ER 909, [1977] Crim LR 544, HL and commentary.

4-42 The converse case is where D, in England, sends a letter to P in France, deceiving P into transferring property in goods to D in France. It was held in *Harden*,[1] a prosecution for obtaining by false pretences under the Larceny Act 1916, that the English courts had no jurisdiction: the prohibited result did not occur in England. *Harden* was doubted by Lord Diplock in *Treacy v DPP*.[2] Lord Diplock thought that the question would call for re-examination when it arose under s. 15 of the 1968 Act: subject to any contrary intention of Parliament, the only limitations on the jurisdiction of the courts of the United Kingdom were those imposed by international comity. The question did arise, apparently for the first time, in *Smith*.[3] It was held that, even if the obtaining (the transfer of funds from one bank account in New York to another[4]) occurred only in New York, the court had jurisdiction on the ground that all the relevant acts were done in London - the representor and the representee were both here, the representation was made and the representee was deceived here. Though it was not necessary to decide the point, the court favoured the opinion that, while possession of the property may have been obtained only in New York, ownership and control were obtained in England where the transferee was. Proximity may be necessary for control of a physical object but not of intangible property like a bank account. Possession has a physical element but ownership is intangible, a bundle of rights which may be held to go wherever the owner goes. These problems will disappear if and when Part I of the Criminal Justice Act 1993 is brought into force.

1 [1963] 1 QB 8, [1962] 1 All ER 286.
2 [1971] AC 537, [1971] 1 All ER 110.
3 [1996] 2 Cr App Rep 1, 16-21. [1996] Crim LR 329, CA.
4 In the light of *Preddy*, below, para 4-60, the case is probably wrongly decided but this does not affect its authority on the jurisdiction point.

4-43 It may happen that ownership in goods passes from seller to buyer when the goods are "appropriated to the contract" but the buyer does not get possession until the goods are delivered. The transfer of both ownership and delivery may be induced by the same deception. It was argued in the sixth and earlier editions of this book that even if, because of *Harden*, the transfer in France of ownership was not an offence triable in England, the subsequent delivery of possession in England was. Whatever the merits of that argument at the time, it seems unlikely that the delivery of possession, albeit obtained by deception, can now be regarded as a separate offence. Obtaining the ownership is theft of the goods and *Atakpu*[1] shows that they cannot be stolen twice. There is no second theft when possession is obtained. Equally, it is thought, the goods cannot be obtained twice. Though the offence may be committed by obtaining ownership or control, it is an offence of obtaining *the property*; and, once obtained, it cannot be obtained again. It is desirable that there should be consistency between the offences of theft and obtaining property.

1 [1994] QB 69, [1993] 4 All ER 215, CA, above, para 2-46.

4-44 It is enough that D obtains control. So if D, an employee, by deception induces his employer, P, to entrust goods to D for use in the course of D's employment, D may be guilty of the offence though he has obtained not possession of the goods but control or "custody" as this particular relation to goods is sometimes called.

(ii) For another

4-45 "'Obtain' includes obtaining for another or enabling another to obtain or retain."[1] So if D, by deception, induces P to make a gift of goods to E, D is guilty. That would be a case where D obtained for another. An instance of D's enabling another to obtain would be where E is negotiating with P for the sale of goods by E to P and D deceives P as to the quality of the goods so as to induce him to enter into the contract with and pay the price to E. Of course E, in these examples, would also be guilty if he was a party to D's fraud.

1 Section 15(1). *DPP v Stonehouse* [1978] AC 55, [1977] 2 All ER 909, [1977] Crim LR 544, HL.

4-46 The meaning of "enabling another . . . to retain" presents more difficulties. If E is in possession of P's goods and D, by deception, induces P to agree to transfer the ownership in the goods to E, this would be "obtaining for another" and not "enabling another to retain". The latter provision must be intended to apply to the situation where D induces P to allow E to retain some interest which E already has, for, if P is induced to transfer any new interest, this is obtaining for another. There seem to be three possible cases:

(i) E is P's bailee at will and D, by deception and with the appropriate intent, induces P not to terminate E's possession.
(ii) E is P's employee and has custody of P's goods. D, by deception, induces P not to terminate that custody, again with the appropriate intent.
(iii) E has obtained the ownership of property from P under the terms of a contract voidable by P. P is proposing to rescind that contract. D, by deception, induces him to refrain from doing so. It is clear that D has enabled E to retain ownership and therefore he is to be "treated as" obtaining property.

In case (iii), however, D is probably not guilty of an offence because he did not enable E to retain property "belonging to another". P has neither ownership, possession nor control. The question is whether property can be said to "belong

to" a person for the purpose of the section where he has nothing more than the right, by rescinding a contract, to resume ownership of it. The answer to this question seems to be in the negative: P has no proprietary right or interest in the property.[1] It is true that s. 15 (2) gives an extended meaning to the words "obtains property" - D is, in the specified circumstances, to be "treated as obtaining property", whether he does so or not - but it does not, in terms, extend the meaning of the equally important phrase, "belonging to another".[2] A right to rescind, it is submitted, is not a proprietary interest.

1 Cf s. 5 (1), above, para 2-55.
2 The meaning given to this phrase by s. 5 (1) (and 4 (1)) applies for the purposes of the Act generally: s. 34 (1)

4-47 It will be noticed that the Act makes no provision for the case where D by deception retains goods for himself. In most cases this will clearly fall under theft contrary to s. 1 so there will be no problem. In examples (i) and (ii), above, E, if he has *mens rea*, will be guilty of theft by "keeping [the property] as owner",[1] and D of aiding and abetting him: whereas if E has no *mens rea*, D will be guilty of theft through an innocent agent. But it is improbable that D or E is guilty of theft in example (iii).

If D is in possession or custody of P's property and, by deception, he induces P to allow him to retain that possession or custody as the case may be, with the intention of permanently depriving P of the property, D will be guilty of theft. If, however, D has acquired ownership and possession of the property from P before deception, it is difficult to see how he can be said to have appropriated the property of another. Suppose that D has acquired ownership and possession of P's property under a contract voidable by P for an innocent misrepresentation committed by D. P is about to rescind the contract and thus regain his ownership in the goods. D by deception induces him to refrain from doing so, intending to keep the goods permanently for himself. D can hardly be said to have appropriated the property of another since P has no interest, legal or equitable, in the property at this time; nor is this obtaining under s. 15 (1).

1 Section 3 (1), above, para 2-03.

(iii) Necessity for specific property

4-48 D cannot be guilty of enabling E to retain, unless there is some specific property which is the subject of the retention. So if D, E's accountant, deceives the Inland Revenue Inspector whereby E's liability to tax is reduced by 鴎 50, no offence is committed under this section. In a sense, of course, D has, by deception, enabled E to retain property; but it is not the property of another. It is submitted that the provision cannot have been intended to apply to the mere non-payment of a debt which is all that this is. D would, however, be guilty of an offence under 1978, s. 2 (1) (b).[1]

1 Below, para 4-95.

(b) Property

4-49 By s. 34 (1) the broad definition in s. 4 (1) applies, and the limitations for the purposes of theft by s.4 (2)-(4) are inapplicable, to deception. It seems clear, then, that s. 15 extends far beyond the "chattel, money or valuable security" which could be the subject of obtaining by false pretences under the

Larceny Act 1916, s. 32. Non-larcenable chattels which were not the subject of false pretences[1] may be obtained by deception. Other cases require more detailed consideration.

1 *Robinson* (1859) Bell CC 34.

(i) Land

4-50 Land presents peculiarly difficult problems because of the nature of interests in land and the fact that the terminology of the Theft Act is geared to the traditional subject matter of obtaining by false pretences, namely goods. Under English law, ownership subsists not in the land itself but in an abstract entity called "an estate". The freeholder owns not the land but the fee simple estate in the land, and the leaseholder has a leasehold estate. The land itself may, however, be possessed. The offence may be committed therefore by obtaining the ownership of an estate in the land or by obtaining possession or control of the land, provided that there is an intention to deprive the victim permanently of his interest, whatever it is.

4-51 *Where P parts with his estate.* There is little difficulty where the owner is induced to convey his whole estate to the rogue. For example, P, the owner of the freehold, is induced to convey the fee simple to D; or a lessee is induced to assign his whole leasehold interest to D. An obvious case is where an imposter procures the transference to himself of trust property or a deceased person's estate. But there are other cases. Suppose D induces P to sell him land for use as a coach-station, by agreeing that he will purchase all the petrol he needs for his coach-business from P. D never has any intention of honouring his promise. If the legal estate in the land is conveyed to D, or if D is given possession before conveyance, it seems clear that the offence is complete. It may be thought, however, that the offence is complete, at an earlier stage. The general rule is that when A contracts to sell land to B, an equitable interest in the land passes at once to B. This arises from the fact that a decree of specific performance will normally be granted for a contract for the sale of land and "equity looks on as done that which ought to be done". If the contract is not specifically enforceable, no interest passes.[1] When there has been deception, it seems inevitably to follow that the contract is voidable for fraud by the vendor and thus not specifically enforceable against him.[2] If the transaction has got no further than the contract, it seems, then, that D could not be convicted of the full offence, though he might be convicted of an attempt.

1 Megarry and Wade *Law of Real Property* (4th edn) 582.
2 Ibid 585.

4-52 *Where P creates a smaller estate.* The main difficulty arises out of the necessity for an intention permanently to deprive the owner of the property. Such an intent may be difficult or impossible to discover where the owner is induced not to part with his whole estate, but to carve some smaller estate out of it. Suppose that D, by deception, induces P, the owner of the freehold, to grant him a lease of the land for two years. Clearly D does not intend to deprive P permanently, or indeed at all, of the property which belongs to him - i.e. his freehold interest. Nor, if he intends to vacate the property after two years, does he intend to deprive P permanently of possession of the land. The position would be the same if P were himself a lessee whose lease had three years to run and he granted D a sub-lease for two years. These cases look much the same as

that of the owner of a ship who charters it for two years. If the charterer has induced the charter by deception but intends to comply with its terms, he does not commit an offence, because of his lack of intention permanently to deprive. There is a possible answer to this analogy. A lease of land differs from the letting of a chattel in that an estate in land is created by the granting of the lease. That estate is regarded in law as a separate piece of property; and D intends that P shall never have that particular piece of property. The snag about this is that it is impossible to say that the leasehold estate ever "belonged to", or could belong to P, the owner of the freehold.[1] If it were surrendered to P it would cease to exist as a separate piece of property and merge in P's larger interest. The leasehold interest does not exist until the lease is granted - and then it belongs to D. This case may, however, now be dealt with as an obtaining of services contrary to 1978, s. 1.[2]

1 *Chan Wai Lam* [1981] Crim LR 497 (Court of Appeal of Hong Kong) and commentary; of *Preddy*, below, para 4-60.

2 Below, para 4-75.

4-53 *Where P retains his estate but D obtains possession.* What is the effect of obtaining possession of land by deception? If P's only interest in the land is his possession of it, then, clearly the offence may be committed. For example, P is a squatter on the land with no title to it other than his actual possession. Even where P has a good title to the land which he does not lose through the deception, it is thought that the offence will be committed if he is to be deprived of possession for a period coincident with this interest. For example, D deceives P, who is a lessee of land for two years, to allow him into possession as a licensee for those two years. P's leasehold estate continues unimpaired. What then of the case where D obtains from P, the freeholder, a lease of the land for 99 - or 999 - years? P has not been deprived of his freehold interest but, fairly clearly, D has an intention to deprive him of possession of the land for the rest of his natural life.[1] Is it an answer that the land will some day revert to some remote successor in title? It is submitted that when the Act speaks of permanently depriving "another", it means the living person whose property is taken or obtained; so that if he is never to have it back in his lifetime, this element of the offence is made out. (So it would be theft if D were to take P's property, intending to restore it to P's executor after his death.) Even if this argument is correct, it provides no answer to the case of the man who obtains a short lease by deception and there is an awkward question as to where the line is to be drawn; but this too may be treated as a case of obtaining services contrary to 1978, s. 1.[2]

1 In *Chan Wai Lam* [1981] Crim LR 497 (Court of Appeal of Hong Kong) D was held to have no intent permanently to deprive where he obtained from the Hong Kong government a lease which would have expired three days before the end of the lease of the New Territories held by the government. Had the lease obtained been three days longer, it is submitted that there would have been evidence that D would have obtained possession with intent permanently to deprive. Otherwise he might have been held liable on the *de minimis* principle - but the courts are properly reluctant to invoke that principle in criminal cases.

2 Below, para 4-75.

4-54 *Where P parts with a portion of his estate.* The position is thought to be different where P is induced to transfer to D parts of his fee simple or other interest. For example, to convey to D the fee simple in the shooting-rights, or the minerals or to grant D an easement or profit a prendre. Here there is evidence that D does intend to deprive P permanently of a portion of his freehold interest.

If D is granted only a lease of the mineral rights, then there is the same difficulty as with grants of other leasehold interests; but may he be convicted of obtaining the actual minerals which he removes from the land? He certainly intends to deprive P permanently of these. The difficulty here might be that he is entitled by virtue of the estate which he holds, albeit an estate voidable for fraud, to take the minerals. The problem is essentially one of remoteness, and some authorities[1] suggest that the obtaining of the minerals may be too remote from the deception. It might well be otherwise, however, in a case where D by deception obtains not a lease but a mere contractual licence to take the minerals. This would not differ in principle from the common case of obtaining by deception, where D obtains the property in pursuance of a contract voidable for fraud.

1 See above, para 4-13.

4-55 *Where the freeholder obtains from the lessee.* It has been seen that the offence is committed if a lessee is induced to assign his lease. What if he is induced to surrender it to his landlord? P is permanently deprived of his interest, so there is no difficulty on that score. But is it possible to say that D has obtained property, when P's estate has simply ceased to exist? It certainly looks very odd, however, that D, the landlord, should commit no offence when anyone else in the world who persuaded P to transfer his estate would be so guilty. Perhaps the answer is that D has obtained possession of the land with intent and P shall have it no more and that is enough. It would be theft, if s. 4 did not exclude theft of land.

(ii) Things in action

4-56 Things in action and other intangible property (e.g. patents) are clearly property so that D commits an offence under s. 15 (1) if, by deception, he causes P to transfer his book debts, his copyright or patent to him.

An equitable assignment of a thing in action requires no formality.

> "Where there is a contract between the owner of a chose in action and another person which shows a clear intention that such a person is to have the benefit of the chose, there is without more a sufficient assignment in the eye of equity."[1]

Although, as with land, this result is said to follow from the principle that equity looks on as done that which ought to be done,[2] it does not depend on the availability of specific performance, for it is immaterial that no consideration is given by the assignee.[3] The assignment will be complete and the thing obtained be deception, notwithstanding the fraud. A purported assignment of a future thing in action can operate only as a contract to assign. One who, by deception, induces such an "assignment" will be guilty of an attempt to obtain by deception. If he gave consideration then, on the thing coming into existence, the full offence will be complete.

1 Cheshire, Fifoot and Furmston *Law of Contract* (12th edn) 507. "Chose" is a synonym for "thing".

2 Ibid 506.

3 Ibid 511-514.

4-57 *Cheques.*[1] If Q draws a negotiable cheque in favour of P for consideration supplied by P, P owns the thing in action represented by the cheque. If D then deceives P into negotiating it to him, D has obtained the thing in action. The right to sue Q on the cheque has been transferred from P to D. If, on the other

hand, D deceives P into drawing a cheque in D's favour, he cannot be guilty of obtaining the thing in action.[2] It never belonged to P - he could not sue himself - it was a new item of property which, from the moment of its creation, belonged to D.[3]

The fact that D is not guilty of obtaining the thing in action does not, however, mean that he cannot be convicted of obtaining the cheque. The piece of paper on which the cheque is written will, as D presumably knows, be returned to P's bank when, as D intends, he presents it. But the cheque, the tangible thing, is more than a mere piece of paper. It is a valuable security, property which could be obtained by false pretences under the Larceny Act 1916 before there was any possibility of committing an offence by obtaining things in action or other intangible property. The cheque, whether it creates a thing in action or not,[4] is a valuable thing because it is, in effect, a key to the drawer's bank balance. When it is presented and cancelled, it ceases to be a valuable security. Even if D does not intend to deprive P permanently of the piece of paper, he *does* intend to deprive him permanently of the valuable security. The old case of *Danger*,[5] however, appears to decide that nothing has been obtained from P. D produced to P a bill of exchange, duly stamped, signed by himself as drawer and payable to himself and, by false pretences, induced P to accept the bill by writing his name across it. It was held that P had no property in the document as a security or even in the paper on which it was written, so D had not obtained property belonging to another. Later cases,[6] however, suggest, or are explicable only on the basis, that the crucial fact was that P had no property in, or probably even possession of, the piece of paper. All that Danger obtained was the act of signing the paper, and a signature could not be described as property. Where the bill paper or cheque form belongs to P - he owns it or is in possession of it - and is signed and delivered by P, D obtains a tangible thing belonging to P - a valuable security.

1 See J. C. Smith, "Obtaining Cheques by Deception or Theft," [1997] Crim LR 396, and para 2-140, above.

2 He is probably guilty of procuring the execution of a valuable security. Below, para 6-14.

3 *Preddy* [1996] AC 815, [1996] 3 All ER 481, HL, below, para 4-60. Issuing the cheque is not an assignment of part of the thing in action consisting in the debt owed by P's bank to P. because the holder of a cheque cannot sue the bank on the cheque; Bills of Exchange Act 1882, s. 53 and *Schroeder v Central Bank of London Ltd* (1876) 34 LT 735.

4 Cheques create things in action only if given for valuable consideration - i.e. any consideration sufficient to support a simple contract or an antecedent liability: Bills of Exchange Act 1882. s. 27 (1). A cheque given without consideration - a birthday present - does not create a thing in action but is, it is submitted, a valuable security - it gives access to the drawer's bank balance.

5 (1857) 7 Cox CC 303, discussed by J.C. Smith [1997] Crim LR 401.

6 *Governer of Brixton Prison, ex <???> Stallmann* [1912] 3 KB 424, DC; *Pople* [1951] 1 KB 53, sub nom *Smith* [1950] 2 All ER 679; *Rozeik* [1996] 1 Cr App Rep 260, CA; *Carezana* [1996] Crim LR 667, CA, to name but a few.

4-58 *Obtaining a cheque from a corporation.* It was held in *Rozeik*[1] that where it is alleged that D obtained a cheque from a limited company, it must be proved that a person whose state of mind was that of the company was deceived. This goes too far. The only question is whether the property was obtained in consequence of the deception of any person.[2] Possession may be obtained from any person who has possession, whether he is the owner or not. Ownership may be obtained from a person who has, or who has power to give, ownership. A thing in action can be obtained only from a person who has the power to transfer a thing in action. In *Rozeik* the managers who signed the the company's cheques were the proper persons, and the only persons with authority, to do so

and they were not deceived because they knew that the representations were false.[3] The case was decided before the decision of the House of Lords in *Preddy*, so the assumption (which we now know to be wrong) was that the thing in action which D obtained from the company was property "belonging to" the company. The only persons who could grant the thing in action were not deceived so it was not obtained by deception. It was irrelevant for this purpose that other employees might have been deceived into putting the cheques before the managers for signature or preparing inaccurate accounts.[4] After *Preddy*, the question now, it is submitted, is whether D obtained the valuable security - the instrument, a tangible thing - by deception. If it was handed to him by the managers, he did not. But if he deceived any other employee, for example, a receptionist or messenger, into handing over the cheques, he obtained them by deception, just as he would if he obtained any money or chattel belonging to the company in that way. It is immaterial that the person giving possession had no authority to do so.[5]

1 [1996] 1 Cr App Rep 260, [1996] Crim LR 271, CA, doubted by Blackstone's CP, B5.18.

2 Arlidge and Parry, 4-104 to 4-108.

3 Surprisingly, they were not, or had to be treated as if they were not, parties to the fraud.

4 Archbold. 21-198a takes a different view: "it was critical to the success of his scheme that all the employees in the chain thought that they were processing ordinary bona-fide applications, i.e., that they were deceived." Certainly, but no property was obtained until the managers signed the cheque - and they knew the truth. The obtaining was not the result of those deceptions. The intervention of the managers broke the chain of causation. It would be different if the manager was unaware of the falsity. Cf Arlidge and Parry, 4-106. It is unlike *Kovacs* (1974) 58 Cr App Rep 412, CA where, because O is deceived, an obligation to deliver is imposed on P. No obligation was imposed on the managers.

5 The statement in Smith & Hogan, 569-570, requires qualification.

(c) Belonging to another

4-59 Property "belongs to another" for the purposes of this section if the other has possession or control of it or any proprietary right or interest in it except an equitable interest arising only from an agreement to transfer or grant an interest.[1] Thus, the owner may be guilty of obtaining his own property by deception where, by deception, he dishonestly induces another to give up his lawful possession or control of that property. Suppose that D has pledged his clock with P as security for a loan and, by deception, he induces P to let him have the clock back again, intending neither to restore it nor to repay the loan.[2] The case where D, by deception, induces his servant, P, to surrender custody of D's goods is more doubtful. Even if D has a dishonest intention - for example, to charge P with having stolen the goods[3] - he may be guilty of no offence because he has a right to require P to return the goods at any time.

If D is entitled under the civil law to have his property back again, but P declines to deliver it, it is submitted that D commits no offence by recovering possession by deception. Suppose D has made P a bailee at will. He terminates the bailment by demanding the return of the property. On P's refusal to restore it, D obtains it by deception. In most cases, of course, D will have a claim of right which will negative dishonesty; but, even if he does not, it is submitted that it ought to be held that there is no *actus reus* in such a case. It would generally be incongruous that a man should be guilty of an offence under the criminal law in obtaining property which, by the civil law, he is entitled to have.[4] It is true that the manner of exercising such a right has been held to justify the intervention of the criminal law formerly, where a right of entry on to premises was exercised by violence or threats,[5] in blackmail,[6] and demanding

property on a forged instrument contrary to s. 7 of the Forgery Act 1913.[7] Though the attempt to recover property is an essential part of these offences, it is evidently the use of the force, of the menace and of the forged instrument which is the gist of the offence. It might be argued that deception should fall into the same category. Deception, however, is less socially dangerous than force and does not attract that revulsion which nowadays attaches to blackmail. Demanding on forged instruments is less easily distinguishable; but like blackmail, it is an offence the gist of which is the demand. In the present case, the gist of the offence is the obtaining of property belonging to another: and, as against D, it ought not to be said that property belongs to P merely because P is in possession of it, if D is entitled to recover possession from him.

If, in the example given above, D had not terminated the bailment, the answer might be different. If he were then to recover possession by deception and with a dishonest intent - for example, intending to charge P with having lost the property - he should be guilty.[8]

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1 The definition of "belonging to another" in s. 5(1) (above, para 2-55) applies to s. 15: see s. 34 (1), below, p. 273.
2 Cf *Rose v Mart* [1951] 1 KB 810, [1951] 1 All ER 361, above, para 2-57.
3 Cf *Anon* (*undated*) 2 East PC 558; *Smith* (1852) 2 Den 449.
4 Cf *Wheeler*, above, paras 2-44, 4-32.
5 Criminal Law Act 1977, Part II, Smith & Hogan 801 (6th edn) 812.
6 Below, para 10-15.
7 *Parker*, above, para 4-33, fn 10. See Smith & Hogan 682.
8 Cf the corresponding case in theft, and *Turner* (*No 2*), above, para 2-58.

(d) Something belonging to D must be transferred to P

4-60 The offence is not committed unless something which belongs to P before the deception is transferred to D in consequence of it. In *Preddy*,[1] the House of Lords, reversing the Court of Appeal, held that where D dishonestly and by deception procures a transaction whereby P's bank account is debited by £X and, consequently, D's bank account is credited by £X, D is not guilty of obtaining property "belonging to" P. The effect is exactly the same as if D had obtained £X belonging to P but, in law, nothing which formerly belonged to P now belongs to D. A thing in action[2] belonging to P (the indebtedness of P's bank to P) has been diminished (or perhaps extinguished) and a different thing in action (the indebtedness of D's bank to D) has been enlarged (or perhaps created). This is the effect when funds are transferred between bank accounts, as is now common, by telegraphic transfer or CHAPS order. The decision caused consternation because of the many frauds, particularly "mortgage frauds", which had been and were being prosecuted, it now appeared wrongly, under s. 15. The Law Commission speedily produced a Report and draft Bill[3] which rapidly became the Theft (Amendment) Act 1996, filling the lacuna exposed by *Preddy* with a new s. 15A of the 1968 Act creating an offence of obtaining a money transfer by deception.[4]

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1 [1996] AC 815, [1986] 3 All ER 481, HL.
2 Cf para 2-105, above.
3 *Offences of Dishonesty: Money Transfers*, Law Com No 243 (1996).
4 See below, para 4-64.

(e) The mens rea of obtaining property

4-61 The constituents of the *mens rea* are:

(i) Deliberation or recklessness in making the deception.[1]
(ii) Dishonesty.[2]
(iii) Intention permanently to deprive.[3]
(iv) An intention, with or without a view to gain, to obtain property.

Constituents (i) and (ii) have been sufficiently examined above. Of (iii), it need be added only that the s. 6 meaning of the term applies for the purposes of s. 15 with the necessary adaptation of the reference to appropriation.[4]

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1 Above, paras 4-15 to 4-16.
2 Above, paras 4-33 to 4-38.
3 Above, paras 2-125 to 2-144.
4 Section 15(3).

4-62 There is no provision corresponding to that for theft that "it is immaterial whether the appropriation is made with a view to gain . . .".[1] It can hardly be doubted, however, that no further element of this nature is required in addition to the elements of *mens rea* described above. The draftsman perhaps took the view that the intention to obtain property, which is implicit in the subsection, in itself constituted a view to gain so[2] that any further express requirement would be superfluous. The terms of the Act make it clear that if D appropriates P's diamond and throws it into a deep pond, intending to deprive both P and himself permanently of it, he is guilty of theft. It does not, in express terms, say that D is guilty of deception if he obtains the ownership in or possession of P's diamond by deception with the intention of throwing the diamond into the pond and depriving P and himself permanently of it. It is submitted, however, that the obtainer of the diamond would be guilty of obtaining by deception. It is desirable that the same principles should govern s. 15 as s. 1.

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1 Section 1(2), above, para 2-113.
2 See below, para 4-63.

4-63 It is submitted that an intention to obtain property for oneself or another is a constituent of the *mens rea*. The *actus reus* of the offence is not committed where D, dishonestly and by deception, causes P to be deprived of his property but neither D nor anyone else obtains it. An intention to deprive another of property is therefore not a sufficient *mens rea* for the offence.

If D dishonestly tells P that a work of art owned by P is obscene, that it is being looked for by the police and that the best thing he can do is to burn it, D is not guilty of an offence under the section if P complies.[1] Suppose then, that D's object is to cause loss to one person, but that this will, incidentally, bring profit to another. For example, D induces P to exclude E from his will by telling P false stories of E's misconduct. D does not know or care who will profit as a result of E's exclusion from the will. Someone almost certainly will. Suppose that P, having substituted S's name for E's, dies and the executors pay the legacy to S. There is no doubt that D has dishonestly obtained property by deception for S. The *actus reus* is complete. Is it a defence for D to say that he did not intend to obtain property for anyone, that his only intention was to ensure that E did not benefit and that he would have been perfectly content with the outcome if P had decided to spend all his money in his lifetime?

It is arguable that the essence of the offence is the obtaining of property; that, in this example, the obtaining of the advantage is merely incidental to the fulfilment of D's plan and that, accordingly, D should not be guilty. If he were to be convicted, the iniquity of his conduct (when he came to be sentenced) would be found to lie in his malicious deprivation of E; but that is not an

offence. This argument requires the adoption of the narrowest possible definition of "intention" – but there is precedent for it in other offences.[2]

[1] D might be guilty of criminal damage through an innocent agent.
[2] Smith & Hogan 57–63.

C. OBTAINING A MONEY TRANSFER BY DECEPTION

4–64 Section 15A of the 1968 Act provides:

"(1) A person is guilty of an offence if by any deception he dishonestly obtains a money transfer for himself or another.
(2) A money transfer occurs when—
(a) a debit is made to one account,
(b) a credit is made to another, and
(c) the credit results from the debit or the debit results from the credit.
(3) References to a credit and to a debit are to a credit of an amount of money and to a debit of an amount of money."

This very specific provision describes what Preddy did and enacts that it is an offence. The Law Commission rejected the apparently obvious course of amending s. 15, finding that this could be done only by an undesirable amount of "deeming". The new offence seems to fill the lacuna very effectively but it is not, of course, retrospective, so only money transfers obtained after 18 December 1996 may be prosecuted under s. 15A. Subsection (3) limits the offence to "money", meaning an obligation to pay money, notably the obligation of a banker to his customer. It would not therefore apply to transfers of other things in action, such as bonds and securities.[1] Subsection (4) (below, p 264) anticipates and excludes possible unmeritorious defences. This is not an exclusive list, as the words, "in particular", are intended to make clear. There are many matters which a court may properly hold to be immaterial, though they are not listed in the subsection.

Obtaining a money transfer by cheques. Preddy also settled[2] that where D induces V to draw and deliver a cheque in favour of D, D is not guilty under s. 15 of the 1968 Act of obtaining by deception the thing in action represented by the cheque. That thing in action was never "property belonging to" V. From the moment it came into existence, it belonged to D. When D presents the cheque and it is honoured a debit is made to V's account and a corresponding credit to D's, so a money transfer as defined in s.15A (1) occurs. Arguably, in such a case, the *transfer* has not been obtained by deception but by D's presentation of the cheque (as where a key is obtained by deception and used to open a safe and steal: the money taken from the safe has been stolen, not obtained by deception). Subsection (4) (b) appears to assume that the transfer has been obtained by deception and, for practical purposes, probably puts the matter beyond all doubt. Even so, the new offence will not be committed until the cheque is honoured. D will, however, clearly be guilty of an attempt to commit that offence when he presents, or attempts to present, the cheque. Until he does so, he has probably done no act which is more than merely preparatory to the commission of the s. 15A offence. Nor will D be guilty of obtaining a transfer of funds if he negotiates the cheque to E for cash. P's account has not yet been debited and no account has been credited. The offence will be committed only when E, or some subsequent holder of the cheque presents it, and it is honoured. It is therefore almost as important as it was before the Theft (Amendment) Act 1996 to know whether D has obtained the cheque, as a valuable security, contrary to s. 15.[3]

[1] This limitation was criticised by Lord Donaldson of Lymington, whose amendments designed to broaden the ambit of the offence were not accepted by the House of Lords: Hansard, HL, vol. 576, col. 796.
[2] Following *Danger* (1857) 7 Cox CC 303, CCR and overruling *Duru* [1973] 3 All ER 715, [1974] 1 WLR 2, sub nom *Asghar* [1973] Crim LR 701, CA.
[3] See above, para 4–57.

D. OBTAINING A PECUNIARY ADVANTAGE BY DECEPTION

4–65 The draft bill proposed by the CLRC's *Eighth Report* would have created two offences of (i) obtaining credit by deception and (ii) inducing an act by deception with a view to gain. Part of the proposal did not commend itself to Parliament. Instead, a new clause, which became s. 16, was introduced to create the offence of obtaining a pecuniary advantage by deception. Section 16 (2) (a) proved to be so obscure that it amounted to "a judicial nightmare"[1] and it was repealed by the 1978 Act. Section 16, as amended, provides:

"(1) A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction on indictment be liable to imprisonment for a term not exceeding five years.
(2) The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where—
(a) . . .
(b) he is allowed to borrow by way of overdraft, or to take out any policy of insurance or annuity contract, or obtains an improvement of the terms on which he is allowed to do so; or
(c) he is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting.
(3) For the purpose of this section 'deception' has the same meaning as in section 15 of this Act."

[1] *Royle* [1971] 3 All ER 1359 at 1363, CA, per Edmund Davies LJ.

4–66 Section 16 creates only one offence.[1] Subsection (2) merely describes the various types of pecuniary advantage the obtaining of which will amount to an offence, just as s. 4 describes the property which may be stolen under s. 1. It is, however, important that the particulars of the offence should specify precisely what is the pecuniary advantage which the accused is alleged to have obtained. "If you indict a man for stealing your watch, you cannot convict him of attempting to steal your umbrella";[2] and, equally, a man who is charged with obtaining a pecuniary advantage of one sort should not be convicted of obtaining a pecuniary advantage of a completely different sort. So a conviction was quashed where D was charged with obtaining a pecuniary advantage within the meaning of s. 16 (2) (a) (now repealed) and the court held that he had obtained a pecuniary advantage, not within that provision, but within s. 16 (2) (c).[3]

[1] *Bale v Rosier* [1977] 2 All ER 160, [1977] 1 WLR 263.
[2] *McPherson* (1857) Dears & B 197 at 200, per Cockburn CJ.
[3] *Aston and Hadley* [1970] 3 All ER 1045, [1970] 1 WLR 1584, CA.

(a) Pecuniary advantage

4–67 The meaning of this term is limited to the cases set out in the two remaining paragraphs of s. 16 (2). In these cases a pecuniary advantage is deemed to have been obtained. If the facts proved are within one of the paragraphs, it is no defence that D obtained no pecuniary advantage in fact.[1] Conversely, it is