CRIMINAL RESPONSIBILITY AND THE MISUSE OF DRUGS ACT 1971

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PART ONE: TABLES

(a) Summary

One of the prominent features of the legislation concerned with the use or misuse of dangerous or otherwise harmful drugs, also known as controlled drugs, is the close connection between international agreements entered into by the British government and subsequent domestic regulations. This was undoubtedly the case with the Misuse of Drugs Act 1971, a statute which is a consolidating Act and which sought to legislate for modern conditions most noted for their rapid change in the demand for and supply of particular drugs and in the habits of addiction. The 1971 Act is related to the international obligations as the successor in a line of domestic statutes, beginning with the Pharmacy Act 1868. The 1971 Act contains some twenty crimes and offences in relation to controlled drugs and in this respect the Act is noted for the increasingly complex and detailed offences when compared with earlier Acts. This work is concerned only with the criminal aspects of the law relating to the misuse of drugs. There has been in recent years a great increase in the literature concerning the sociological, psychological and medical aspects of drugs and the conditions of and encouraging their misuse. This work is concerned with criminal responsibility and the misuse of drugs. In the light of the general principles of criminal law this work attempts to analyse the criminal offences in terms of the statutory provisions and the subsequent case law. Each offence in the Act is considered separately and its development since the passing of the 1971 Act is seen

through the particular reported cases and in relation to the general changes in the criminal law. The actus reus and the mens rea of the offences are considered, as are the defences contained in the Act. In particular the fundamental principles such as the burden of proof are discussed and the recent changes in the law in relation to the burden of proof on the accused is seen to be set to follow Australian precedents although such changes in United Kingdom jurisdictions are seen also to be gradual, hesitant and without any great display of enthusiasm on the part of the judiciary. The nature of mens rea is analysed and the recommendation in the recent reports by the Law Commission is compared to the law relating to the misuse of drugs. This work concludes that the increasing importance of statutory offences, as reflected in some of the very heavy sentences possible in terms of the 1971 Act, requires that the law in relation to mens rea should be more settled and that although legislation is unlikely in the near future, commentators should seek to find answers to the complex questions in order to give suitable advice to Parliament when called upon to do so. The law is stated as at 26th August 1981.

(b) Tables of Reference

REFERENCES AND ABBREVIATIONS

AJIL - American Journal of International Law

Bassiouni and Nanda - M. Cherif Bassiouni and Ved P. Nanda A Treatise on International Law: Vol 1 Crimes and Punishment (1973)

CLB - Commonwealth Law Bulletin

Crim LR - Criminal Law Review

Crim LJ - Criminal Law Journal (Australia)

Cross and Jones - Introduction to Criminal Law (8th edition 1976)

Cross - Sir Rupert Cross Statutory Interpretation (1976)

Edwards - J L Edwards Mens Rea in Statutory Offences (1956)

Faulkner and Field - R J Faulkner and R A Field: Vanquishing the Dragon: The Law of Drugs in Hong Kong (1975) originally published as separate articles: see (1975) HKLJ 134-177; 277-335

Gloag and Henderson - Introduction to the Law of Scotland (8th edition 1980)

Gordon - Gerald Gordon Criminal Law of Scotland (2nd edition 1979)

Howard - Colin Howard Strict Responsibility (1963)

JLS - Journal of the Law Society of Scotland

Jacobs - Francis G. Jacobs Criminal Responsibility (1971)

JPN - Justice of the Peace Notes

LLR - Lesotho Law Review

LQR - Law Quarterly Review

Lydiate - P W Lydiate The Law Relating to Misuse of Drugs (1977)

Macfarlane - Bruce Macfarlane Drug Offences in Canada (1979)

Med, Sci & Law - Journal of Medicine, Science and Law

Morris and Howard - N. Morris and C. Howard Studies in Criminal Law (1964)

NILQ - Northern Ireland Law Quarterly

New LJ - New Law Journal

Smith & Hogan - J C Smith and B. Hogan Introduction to Criminal Law (4th edition 1978)

Teff - Harvey Teff Drugs, Society and the Law (1975)

WWR - Western Weekly Reports (Canadian)

1964 Act - Drugs (Prevention of Misuse) Act 1964 (c64)

1965 Act - Dangerous Drugs Act 1965 (c15)

1967 Act - Dangerous Drugs Act 1967 (c82)

1971 Act - Misuse of Drugs Act 1971 (c38)

1975 Act - Criminal Procedure (Scotland) Act 1975 (c21)

1977 Act - Criminal Law Act 1977 (c45)

1979 Act - Customs and Excise Management Act 1979 (c2)

Note: COCN refers to the Crown Office Circulars, a series of reports issued by the Crown Office in Edinburgh to Procurators Fiscal throughout Scotland informing them of current case law. Many of the cases so reported are not to be found in any public journals.

PART TWO: BACKGROUND

Chapter 1 LEGAL HISTORY

1.01 The antecedents of the statutory provisions relating to controlled drugs are considered in this section. It has to be said immediately, by way of exclusion, that the reasons for or causes of the use or misuse of stimulants or depressants are not a matter for our present concern (1): the fact is that these substances are used and that their precise use has varied in accordance with, or because of, changing social mores. Nor are we concerned with whether the law in relation to any particular drug should be changed (2) nor the effects of drugs (3). Nor either are we here concerned with a study of what has come to be known as "the British system", the general approach to the matter of drugs as a medical problem rather than simply a matter for the criminal courts to deal with (4). What is a matter for our concern now is the Misuse of Drugs Act 1971 in its relationship to earlier statutes and also, and this is a peculiarity of drug control, to international obligations. This work is essentially a study of criminal liability and drug control in the United Kingdom.

(1) see for example Brian Wells Psychedelic Drugs: Psychological, Medical and Social Issues (1973) and Peter Laurie Drugs: Medical, Psychological and Social Facts (1974) for further discussion.

(2) a recent viewpoint is Frank Logan. Should the law on cannabis be changed? Political Quarterly 1980: 51 (3) p331-340.

(3) for an extremely helpful article see D J Power Illicit drug taking 14 Med, Sci & Law 258

(4) see Teff p16 et seq

1.02 The domestic legislation of Great Britain is now considered under a variety of headings and these follow the general chronological theme for in the progress of Acts certain specific events mark different periods in the development.

1.03 (a) Early domestic. The Pharmacy Act 1868 provided for a moderate measure of control over opium and its preparations and this Act contained in Schedule A part III "opium or any preparation of opium or of poppies". The Act prohibited any person from selling or offering to sell, dispense or compound poisons unless that person was a chemist or "druggist" or from selling any poison unless the container was distinctly labelled. This is the earliest indication of a policy of restriction and owed its origins to the international and Far Eastern ramifications of opium use and to the domestic opium movement known as the Society for the Suppression of the Opium Trade founded in 1874. There was also concern about the domestic use of opium and recent research has suggested that many working people used opiates and were unconsciously addicted until supplies failed. (5) This Act was amended by the Pharmacy and Poisons Act 1908 and there the new Schedule included "Opium and all preparations or admixtures containing 1% or more of morphine". The Act also restricted for the first time sales of cocaine by the inclusion of "coca, any preparations or admixtures of, containing 1% or more of coca alkaloids".

(5) Virginia Benidge "Working-class Opium Eating in the Nineteenth Century: Establishing the Facts "British Jor. of Addiction (1978) 73 p363-374

1.04 (b) Drug control before the League of Nations. The use of drugs and the trade in them continued to increase throughout the Nineteenth century and the early part of the Twentieth and the matter came increasingly to the attention of government. In 1893 British concern about drug-taking in India was reflected in the appointment by the Indian government of a Royal Commission to review the position of opium and cannabis smoking on the sub-continent. The House of Commons passed a resolution in 1906 without division reaffirming its belief that "the opium trade between India and China is morally indefensible". (6) Externally it was American pressure on the international scene that pushed Britain, albeit unwillingly, into a system of control that began with the Shanghai Conference of 1909. Although delegates had no power to sign a diplomatic Act the resolution adopted succeeded in arousing strong international opinion and thereby led to the Hague Convention of 1912 which did result in an international treaty. The Convention dealt with generally, raw opium, prepared opium, manufactured drugs and China, and with respect to the first, production and distribution were regulated. The manufacture and use of morphine, cocaine and their respective salts was to be limited to legitimate medicinal purposes. China and its long tradition of opium use meant that efforts to control drug abuse could only be directed to the long term although vested trade interests ensured that opium-smoking was allowed or at least unhindered in the Far-East territories. Article 20 of the Hague Convention required:

(6) Resolution 30th May 1906: 158 Parl. Dels. HC (4th ser.) 494, 516

"the contracting powers to examine the possibility of enacting laws or regulations making it a penal offence to be in illegal possession of raw opium, prepared opium, morphine, cocaine and their respective salts."

This formed the basis of Britain's first domestic statute of a penal nature but the advent of the First World War meant that implementation of our obligation was postponed.

1.05 (c) Drug control after the League of Nations. The Dangerous Drugs Act 1920 came into operation on 1st September 1920 (7) and it sought to establish a system of control in accordance with our international obligations. The Act was divided into four categories: Part I contained certain restrictions in relation to the importation and exportation of raw opium and also made provision for regulations for the production of and dealing in raw opium: Part II contained certain restrictions in relation to the importation and exportation of prepared opium and made provision for offences concerning importation and exportation of cocaine, morphine, ecgomine and diamorphine (commonly known as heroin) and their respective salts and medicinal opium and made provision for regulations to control the manufacture and sale of these drugs and also for the granting and the withdrawal of authority to manufacture, retail, dispense or compound any such drug. Part IV contained inter alia powers of inspection by constables or other authorised persons and the granting of licences. More particularly the offences in the Act were punishable (8) on summary conviction by a fine not exceeding £200 or by imprisonment with or without hard labour for a

(7) by Section 17(2)

(8) by Section 13(2)

term not exceeding six months or by both; and for second or subsequent convictions to a fine not exceeding £500 or to imprisonment with or without hard labour for a term not exceeding two years or to both; and, in addition, the court could order forfeiture of goods in respect of which the offence was committed to be forfeited.

1.06 The 1920 Act may appear to be the foundation of British drug legislation and the first Act of domestic and social legislation to be passed as a result of international agreement. But it is now seen to be the extension of certain domestic legislation which filled the apparently fallow years of 1912-1920. The Defence of the Realm Act 1916 provided by Regulation 40B that the sale or supply of cocaine and other drugs to any member of the armed forces was forbidden unless ordered by a doctor on a written prescription, dated and signed by him and marked "not to be repeated". The perceived needs of the war effort allowed the passage of this measure of formal restriction virtually without opposition. It has been said recently (9)

"As in other areas of national life - licensing, rent and price-control and direction of labour - war conditions encouraged the establishment of significant incursions into the liberty of the individual."

1.07 Be that as it may, the Regulation represents the link between pre- and post-war legislation. The League of Nations Covenant provided by Article 23 that the League should have general supervision over agreements with regard to the traffic in opium and other dangerous drugs. Before this role could

(9) Virginia Benidge War Conditions and Narcotic Control Jol. Soc. Pol. 7 3, p285-364 at p286

be demonstrated a further outbreak of the misuse of cocaine in Britain led to the Dangerous Drugs and Poisons Amendment Act 1923 which amended the 1920 Act in providing in certain circumstances for search warrants and in extending the range of offenders to include false declarations to obtain licences to distribute drugs. It was also made an offence to "aid, abet, counsel or procure the commission of an offence" and, generally, penalties were increased. The League of Nations did have the opportunity to demonstrate its role with the General Convention of 1925. This required governments to submit to the newly-created Permanent Control Opium Board annual statistics concerned the production of opium and coca leaves; the manufacture, consumption and stocks of narcotic drugs and quarterly reports on import certificates and export authorisation requiring government approval of each import and export. The link between international obligations and British domestic legislation was illustrated most clearly by the resulting Dangerous Drugs Act 1925, the long title of which is:

"An Act to amend the Dangerous Drugs Acts 1920 and 1923, so far as is necessary to enable effect to be given to a Convention signed at Geneva on behalf of His Majesty on the Nineteenth day of February, Nineteen hundred and Twenty five".

1.08 Section 1 of the 1925 Act increased the number of substances subject to control by extending Part I of the 1920 Act to include coca leaves Indian hemp and resin obtained from Indian hemp and all preparations of which such resins form the base, as it applies to raw opium. Section 3 of the 1925

Act likewise extended Part III of the 1920 Act to include morphine, cocaine, heroin and their respective salts, medicinal opium and any extract or tincture of Indian hemp. Although the 1925 Act proceeded through Parliament extremely fast, the Treaty of 1925 was not ratified generally until 1928 and in some cases 1930. (10)

1.09 International concern about drug traffic, licit or otherwise, continued and the convention for limiting the manufacture and regulation of the distribution of drugs took place in 1931. This, the largest of all the conferences, was attended by 54 states while several others sent observers. The aim of the convention was agreed and signed on 13th July 1931. The main resolution was that under Article 2, by which each contracting party was to provide estimates of the amount of manufactured drugs needed for any one year. The signatories bound themselves not to exceed in their manufacture and imports certain maximum levels computed on the basis of estimates of their particular requirements. To examine and endorse these figures a Drugs Supervisory Board was created which would publish the parties annual estimates. The 1931 Convention (known as the Limitation Convention) sought to close the channels through which drugs escaped into the illicit traffic and to this end the estimates established were to be binding. Following on from this convention, the United Kingdom introduced the Dangerous Drugs Act 1932 which, like the earlier Acts, increased the number of substances to be controlled by the legislation but also, in the first section, introduced more complex chemical descriptions of these substances, otherwise the Act was very short. The

(10) see Bean p40

final pre-1939 war treaty was the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs which was signed at Geneva on 26th June 1936 and came into force in October 1939 (11). This was essentially another attempt to suppress the illicit traffic in dangerous drugs and the signatories undertook to enact measures to prevent offenders from escaping prosecution for technical reasons and to facilitate extradition for drug offences. The United Kingdom did not ratify the Treaty on the ground that it interfered with our right to decide our own penalties.

1.10 (d) Drug control under the United Nations. The degree to which drugs became the subject of control was well illustrated recently when one writer said (12)

> "By the time the war ended in 1945, only 21 drugs were controlled; by 1970 this number had increased to well over 100. The control system which had begun so quietly at the Shanghai Conference, has developed under the League of Nations to become a sophisticated system which had already been responsible for 3 out of the 4 Dangerous Drugs Acts in Britain. After 1945 this control system continued to develop .. "

The initiative taken by the League of Nations in the matter of controlling drugs was continued by the United Nations and indeed, the Geneva Protocol of 1946 signed on the 11th December 1946 transferred the League's functions to the United Nations. The Paris Protocol of 1948 was the immediate result of the United Nations' work and this Protocol was signed on

(11) see J G Starke The Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs 31 AJIL 31 (1937)

(12) Bean p44

19th November 1948 to come into force on 1st December 1949. This was concerned with bringing new synthetic drugs into the control system. It authorised the World Health Organisation to place under full international control any new drug which could not be placed under such control by application of the relevant provisions of the 1931 Convention and which it found either to be addict-producing or convertible into an addiction-producing drug. This protocol was one of three changes in international control which impinged upon British post-war legislation. The result of The Paris Protocol of 1948 was the Dangerous Drug (Amendment) Act 1951 which reflected the change from the League to the United Nations as well as clearing certain anomolies in the law of dangerous drugs in relation to Northern Ireland. Another change was the protocol for limiting and regulating the cultivation of the poppy plant and the production of, and international and wholesale trade in, and use of, Opium of 1953. This sought to establish an international opium monopoly governed by the Permanent Central Opium Board in order to limit the use of opium. A monopoly of the use was to be established by means of various quotas allocated to the various opium-producing countries, limited to seven in number, along with a system of international inspection. This, however, coincided with the beginning of the cold war and the entire matter was riddled with political considerations and consequently ten years was to elapse before the protocol came into force. The protocol required three of the seven producing countries to ratify it before it could be brought into force and that was not achieved until 8th March 1963.

1.11 Undoubtedly a major international agreement came into force on 13th December 1964. This was the Single Convention on Narcotic Drugs of 1961 and it, along with the 1953 protocol to a lesser extent, has been responsible for recent legislation in the United Kingdom to control drugs. The convention has been described as a "milestone" in the history of international drug control (13). Further, the agreement was described in this manner by a contemporary commentator (14):

> "Although the Single Convention on Narcotic Drugs is the product of compromise and is not as ambitious a document as it was in its draft form when the UN conference began, it is nevertheless a substantial new document and a prospectively important contribution to the field of international relations."

The new treaty simplified the international control machinery and changed the Permanent Central Opium Board and the Drug Supervisory Body into a single unit, the International Narcotics Control Board. The central feature of the Single Convention was the system of estimates developed in the earlier treaties and this matter was given to the INCB to administer. A total of 71 governments signed the protocol (15): the United Kingdom signed on 30th March 1961. The general theme of this section of this work is the extraordinary connection between the United Kingdom's international obligations relating to drugs and subsequent

(13) Bassiouni and Nanda p541

(14) R W Gregg The Single Convention for Narcotic Drugs 16 Food, Drug and Cosm. LJ 187 (1961) at p188

(15) for a complete list see Lydiate: Appendix 2: p137

domestic legislation. This is continued with the Drugs (Prevention of Misuse) Act 1964 and the Dangerous Drugs Act 1965. The 1964 Act developed the offence of possession of dangerous drugs and sought to tighten the regulations concerning the unauthorised or unlicensed importation of various substances, including amphetamines. It has to be conceded, however, that the Act was also passed as a response to the then increasing attractions of "pep" pills for teenagers, especially Drinamyl, but it was also aimed at curbing the irresponsible use of substances such as Dexedrine, which had been much used as an appetite suppresant. The 1965 Act consolidated earlier domestic legislation and introduced greater subtleties into the law with an increased number of dangerous drugs, including opiates and synthetic drugs and an increasing number of offences concerned with restrictions on importation and exportation. The rapidly changing social conditions in the United Kingdom and the changing nature of use of dangerous drugs indicated that even the existing and very modern legislation was insufficient and Parliament responded with the Dangerous Drugs Act 1967. This Act introduced powers for the Secretary of State allowing him to make Regulations concerned with the safe custody of dangerous drugs and the control of addicts and certain powers in relation to arrest and search. There were two further important developments in 1971: internationally, a United Nations Conference in Vienna adopted an agreement known as the Convention of Psychotropic Substances of 1971. This introduced strict international controls of LSD, mescaline and related substances, indeed a total of thirty two

substances having hallucinogenic effects on the human organism. Domestically, Parliament passed the Misuse of Drugs Act 1971 which was required as the then law was unsatisfactory, fragmentary and divided throughout many Acts and it was felt that they should be brought into one Statute. The law was thought to be inadequate for the problems arising out of drug abuse. The law was also inflexible because it did not permit the Home Secretary to move as quickly as he would want to in order to deal with the rapidly changing picture both of drug availability and habits of addiction (16). And, finally, the international aspect of drug control was expanded with the 1972 General Protocol, amending the 1961 Single Convention on Narcotic Drugs, which attempted to increase governmental co-operation.

1.12 The general trend of the development of the law in the United Kingdom shows a very close connection between international agreements entered into by the British government and subsequent domestic regulation. This was undoubtedly the case with the Single Convention of 1961 and the 1964 Act. However, the escalation of the misuse of drugs and the resulting complexities revealed legislation that was increasingly unsuited; accordingly, the consolidating Act of 1971 resulted (17).

(16) see the speech of the Home Secretary at the Second Reading HC vol 803 col 1749 (16th July 1970)

(17) further on this point see Teff at p21

PART THREE: THE OFFENCES AND DEFENCES

Chapter 2 THE OFFENCES AND DEFENCES

Section 3: Restriction of importation and exportation of controlled drugs.

2.01 The 1971 Act provides by Section 3 -

(1) Subject to Sub-section (2) below -

(a) the importation of a controlled drug; and

(b) the exportation of a controlled drug;

are hereby prohibited.

(2) Sub-section (1) above does not apply -

(a) to the importation or exportation of a controlled drug which is for the time being excepted from paragraph (a) or, as the case may be, paragraph (b) of Sub-section (1) above by regulations under Section 7 of this Act; or

(b) to the importation or exportation of a controlled drug under and in accordance with the terms of a licence issued by the Secretary of State and in compliance with any conditions attached thereto.

It is curious that although the 1971 Act creates the prohibition nowhere does it provide any sanction for the contravention thereof. The sanction is now contained in various provisions of the Customs and Excise Management Act 1979. (1) Section 3 of the 1971 Act provides that the importation and exportation of a controlled drug is prohibited unless it falls within the excepting provisions of Sub-section 2. The prohibitions contained in the 1979 Act are Section 50 (penalty for improper importation of goods), Section 68 (offences in relation to

(1) replacing the Customs and Excise Act 1952

exportation of prohibited or restricted goods) and Section 170 (penalty for fraudulent evasion of duty etc.) It is proposed to consider each of these offences in turn although it will be seen that the analysis of certain offences overlaps with others.

2.02 Section 50: 1979 Act

"(2) If any person with intent to defraud Her Majesty of any such drug or to evade any such prohibition or restriction as mentioned in Sub-section (1) above -

(a) unships or lands in any port or unloads from any aircraft in the United Kingdom or from any vehicle in Northern Ireland any goods to which this Sub-section applies, or assists or is otherwise concerned in such unshipping landing or unloading; or

(b) removes from their place of importation or from any approved wharf, examination station, transit shed or customs and excise post any goods to which this Sub-section applies or assists or is otherwise concerned in such removal

he shall be guilty of an offence under this Sub-section and may be detained."

"(3) If any person imports or is concerned in importing any goods contrary to any prohibition or restriction for the time being in force under or by virtue of any enactment with respect to those goods, whether or not the goods are unloaded, and does so with intent to evade the prohibition or restriction, he shall be guilty of an offence under this Sub-section and may be detained."

In Section 50(5) the penalties contained in Schedule 1 of the same Act are applied specifically to those offences.

2.03 The 1979 Act also provides by Section 5 -

"(2) - the time of importation of any goods shall be deemed to be -

(a) where the goods are brought by sea, the time when the ships carrying them comes within the limits of a port;

(b) where the goods are brought by air, the time when the aircraft carrying them lands in the United Kingdom or the time when the goods are unloaded in the United Kingdom whichever is the earlier;

(c) where the goods are brought by land, the time when the goods are brought across the boundary into Northern Ireland."

This Sub-section then sets out the time at which importation occurs and it is submitted that the inference from this Sub-section is that the meaning of "importation" is simply "brings in" and that this meaning extends to the use of the word in both Sub-sections.

2.04 The actus reus of each of the two offences is undoubtedly different in that the first is or appears to be concerned with the mechanics of importation and the second is more concerned with the overall plan or scheme. The mens rea of each offence is also different in that the first offence is wider and concerns intentions to defraud Her Majesty of each such duty or to evade a prohibition or restriction whereas the second is concerned with importing goods contrary to any prohibition or

restriction. Both Section 50 and Section 170 provide penalties for the importation of controlled drugs but it is understood that Customs practice is to charge offences generally in terms of Section 170. (2)

2.05 Section 68: 1979 Act

"(1) If any goods are -

(a) exported or shipped as stores; or

(b) brought to any place in the United Kingdom for the purpose of being exported or shipped as stores

and the exportation or shipment is or would be contrary to any prohibition or restriction for the time being in force with respect to those goods under or by virtue of any enactment, the goods shall be liable to forfeiture and the exporter or intending exporter of the goods and any agent of his concerned with the exportation or shipment or intended exportation or shipment shall each be liable on summary conviction to a penalty of three times the value of the goods or £100 whichever is the greater.

(2) Any person knowingly concerned in the exportation or shipment as stores, or in the attempted exportation or shipment as stores, of any goods with intent to evade any such prohibition or restriction as is mentioned in Sub-section (1) above shall be guilty of an offence under this Sub-section and may be detained".

In Section 68(4) the penalties contained in Schedule 1 of the same Act are applied specifically to these offences.

(2) private information

2.06 The 1979 Act provides by Section 5 -

"(4) - the time of exportation of any goods from the United Kingdom shall be deemed to be -

(a) where the goods are exported by sea or air, the time when the goods are shipped for exportation;

(b) where the goods are exported by land, the time when they are cleared by the proper officer at the last customs and excise station on their way to the boundary.

(5) In the case of goods of a class or description with respect to the exportation of which any prohibition or restriction is for the time being in force under or by virtue of any enactment which are exported by sea or air the time of exportation shall be deemed to be the time when the exporting ship or aircraft departs from the last port or customs and excise airport at which it is cleared before departing for a destination outside the United Kingdom."

2.07 In considering the constituent elements of these offences some help is gained from Garrett v Arthur Churchill (Glass) Ltd. (3) where A, a company director, handed over an antique goblet to B knowing that B intended to export it without obtaining the requisite export licence. Both A and his company where charged with being knowingly concerned in the exportation of the goblet with intent to evade the prohibition on exportation, contrary to Section 56(2) of the Customs and Excise Act 1952 (4). The Justices considered that in the whole

(3) [1970] 1QB92

(4) now Section 68(2) of the 1979 Act

circumstances it was A's legal duty to hand over the goblet, even though he knew that doing so might result in an illegal exportation and that once the goblet had been handed over he had lost all control over it and was not concerned in its exportation thereafter, and accordingly they dismissed the charge. But, on appeal by the prosecution to the Divisional Court, the Lord Chief Justice said (5)

> "In confirming the activities which can amount to being concerned in exportation to that limited time when the aircraft leaves, the Justices were wrong. A man can be concerned with the exportation of goods by doing things in advance of the time when the aircraft leaves, and certainly handing over goods for export the night before the aircraft leaves seems to me quite clearly to amount to "being concerned with the export of goods". "

The prosecution is required therefore to prove that the accused were "knowingly concerned in the exportation with intent to evade the prohibition."

2.08 In Rose v. Hemming (6) there is authority that in this context "place" need not be port or airport. The question there was whether coffee had been brought to "any quay or other place" for the purposes of being exported (7) and it was held that the delivery of the coffee to an island staging post from where it was sold to persons who subsequently exported it was to bring it to a "place" for the purposes of exportation.

(5) ibidat p94

(6) [1951] IKB676; [1951] IAIIER 389

(7) in terms of Section 31(1) of the Import, Export and Customs Powers (Defence) Act 1939

2.09 It is submitted then that the mens rea of the offence in Section 68(2) is the intention to do the forbidden act or knowledge that the forbidden act is being done. Although the offences may concern actual knowledge it is submitted further that wilful blindness would nevertheless be sufficient in certain circumstances.

2.10 Section 170: 1979 Act

"(1) - if any person -

(a) knowingly acquires possession of any of the following goods, that is to say -

(i) goods which have been unlawfully removed from a warehouse or Queen's warehouse,

(ii) goods with respect to the importation or exportation of which any prohibition or restriction is for the time being in force under or by virtue of any enactment; or

(b) he is in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with such goods,

and does so with intent to defraud Her Majesty of any duty payable on the goods or to evade any such prohibition or restriction with respect to the goods he shall be guilty of an offence under this Section and may be detained.

(2) - if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion -

(a) of any duty chargeable on the goods;

(b) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment; or

(c) of any provision of the Customs and Excise Management Act 1979 applicable to the goods;

he shall be guilty of an offence under this Section and may be detained".

2.11 The question of the time and meaning of the term importation has been discussed. The question of duration of importation was considered in R v Green (8) where Green was convicted of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of cannabis contrary to Section 304(b) of the Customs and Excise Act 1952 (9). On 6th August a crate arrived at Southampton by ship. Green completed customs forms to obtain its clearance. On 20th August the customs officers opened the crate and found it contained cannabis and replaced the cannabis with peat. Thereafter Green rented a garage and in September the crate was delivered to it by a haulage contractor. Green had supplied the contractor's name and address to others involved and was also alleged to have admitted assisting to unload the crate at the garage. The defence submitted (10) that the prosecution must establish that Green had become involved prior to 20th August. The judge adopted the prosecution submission that the offences were continuing and involvement after 20th August sufficient.

(8) [1975] 3AIIER 1101 CA; [1976] Crim LR 47; [1976] 2 WLR57

(9) now Section 170: 1979 Act

(10) relying on Haughton v Smith (1974) 58 Cr App R198

And, on appeal by the accused, it was held, dismissing the appeal, that the actus reus of the offence under Section 304(b) was being concerned in the evasion or attempted evasion of the prohibition, not the successful evasion. Evasion was a continuing offence and did not cease when the goods were seized. Once imported the evasion continued until the goods ceased to be prohibited or, possibly, were re-exported. And, it is submitted, that the mens rea is to be "knowingly" concerned.

2.12 The case law also shows the development of the question of proof of knowledge in relation to the requirement of being "knowingly" concerned in a contravention of Section 170. In R v Hussain (11) the accused was on a ship that came into Liverpool and a search by a customs officer of the cabin occupied by the accused and two others revealed ten packages containing about 20 lbs of cannabis resin in the bulkhead of the cabin. The accused said it had nothing to do with him, but that he would take the blame, as the packages had been placed there by a ship's officer and another member of the crew and that he had been threatened by them to remain silent, though he would be rewarded if he did so. The accused was convicted and appealed and there Lord Widgery said (12):

> "It seems perfectly clear that the word "knowingly" in Section 304 is concerned with knowing that a fraudulent evasion of a prohibition in respect of goods is taking place. If, therefore, the accused knows that

(11) [1969] ZA11ER 1117; [1969] 3WLR 134; [1969] 53 Cr App R 254; [1969] 2QB567 and considered in R v Kelly (1975) 12 SASR 389 (Australian Supreme Court)

(12) ibid at p1119

> what is on foot is the evasion of a prohibition against importation and he knowingly takes part in that operation, it is sufficient to justify his conviction, even if he does not know precisely what kind of goods are being imported. It is, of course, essential that he should know that the goods which are being imported are goods subject to prohibition. It is essential he should know that the operation with which he is concerning himself is an operation designed to evade that prohibition and evade it fraudulently. But it is not necessary that he should know the precise category of the goods the importation of which has been prohibited."

The last point raised by his Lordship had been considered in R v Fernandez (13) where Fernandez was convicted of possessing cannabis. He was a merchant seaman and was given a package to take to England where he was to hand it to a man who would pay him for his trouble. He was told that the package contained sticks for smoking and he had an idea that this referred to marijuana cigarettes. He saw the contents because the package broke open when he had it and he appreciated that if the package was discovered he might get into trouble with the customs authorities. However, he claimed that he did not know the package contained drugs and that there was nothing that aroused his suspicion. The judge directed the jury that, in effect, where a person receives a package under circumstances where an individual of ordinary

(13) [1976] Crim LR 277: this case is discussed exhaustively in relation to the concept of possession: see Section 5(1)

common sense ought to know that it may contain drugs then even if it could not be shown that the accused knew the exact contents would not prevent him from being guilty. Fernandez was convicted and appealed but there it was held that the case against him was overwhelming and on the facts the direction was adequate and appeal dismissed. (14) In 1965 the question of being knowingly concerned in the carrying of drugs with intent to evade restrictions against importation was considered in R v Irala-Prevost (15) where the accused was convicted of unauthorised possession and being knowingly concerned as stated. The accused was a passenger in a motor car in which there was concealed a large quantity of drugs on a journey from North Africa to England. His defence was that he was unaware of the presence of the drugs and the judge concentrated on the issue of knowledge saying:

> "if two people start off a journey together, one actually is the owner and driver of the car, and something is in the back of the car and they are both intending that it should be taken along in the car and the passenger who is there knows about it, then he would be in joint possession along with the person who is driving the car and whose car it is."

The accused appealed on the ground of non-direction as to possession and it was held that the directions were sufficient so far as the counts of carrying drugs were concerned and the appeals on those counts would be dismissed. So far as the

(14) as to the question of a person lying about goods in his possession: see Dixon v McAllister [1945] NIR 48

(15) [1965] Crim LR 606

counts of possessing drugs were concerned it was incumbent on the judge to say something to the jury to make them realise that some degree of control must be established: considering R v Rutter and White (16). The convictions on the count of possession would be quashed. And importation was considered in relation to knowledge in R v Williams (17) where Williams pleaded guilty to being knowingly concerned in a fraudulent evasion of the restriction on the importation of cannabis contrary to Section 304(b) of the Customs and Excise Act 1952. Williams had agreed with another man to sell cannabis which that man would send from India. Subsequently, that man sent cannabis to Williams by post from India. He appealed inter alia on the grounds that on the facts the offence had not been made out but it was held in dismissing the appeal that it might well be that there was a joint enterprise to import, but even if it was looked upon as an agreement on one side to import and on the other to sell, what Williams did was sufficient to make him knowingly concerned in the importation.

2.13 In R v Borrodale and Abdullah (18) the term "fraudulent evasion" was considered in the Court of Appeal where it was held that a trial judge had correctly directed the jury that "fraudulently" involved acting or telling lies with intent to cause customs officers to act contrary to what would otherwise be their duty. The conduct of Borrodate and Abdullah in pretending that the particular suitcases and contents involved were other passengers' baggage was fraudulent within the Act.

(16) [1959] Crim LR 288

(17) [1971] Crim LR 356

(18) [1973] Crim LR 513

2.14 But a fraudulent evasion is not necessarily restricted to the port of entry. In Beck v Binks (19) the accused was charged with knowingly carrying uncustomed goods, namely 208 watches, with intent to defraud His Majesty of the duties of them and one of two points at issue was whether there could be an intention to defraud or evade customs duty when, as here, the goods were away from the port of entry. The Lord Chief Justice said (20):

> "If a person is knowingly carrying uncustomed goods he is assisting in the smuggling of the goods .... as much as anyone else. The intent is there; it is all part of one operation. When, as here, it is found that a man is dealing with 208 watches which are uncustomed, I myself think, it is beyond question that he was carrying goods with intent to defraud His Majesty of the custom. Otherwise a most extraordinary lacuna is left in the Act because it can be said that once a man has got away from the place where the goods were actually landed no one ever dealing with the smuggled goods could ever be guilty of an offence. I do not think that has ever yet been held to be the law, and I am certainly not prepared to hold it now. I think it is clear that the appellant was carrying uncustomed goods with intent to defraud His Majesty of the duties thereon."

(19) [1949] 1KB 250

(20) ibid at p252

2.15 And, in R v Cohen (21) where the accused was found guilty of knowingly harbouring certain uncustomed goods, namely 352 Swiss watches and certain other goods and convicted, he appealled against conviction and sentence of 12 months imprisonment. In dismissing the appeal on both points the Lord Chief Justice said (22):

> "A simple way of proving lack of knowledge is to prove that the goods were bought in the ordinary course of trade. "If a man buys from a trader in the ordinary way (it does not matter whether it is wholesale or retail) would presume that he had bought it honestly and that the duty upon it has been paid." "

2.16 And, later (23)

> "This class of case is closely analogous to those of receiving stolen goods when the evidence relied on for the prosecution is merely possession of goods recently stolen. That has always been held to be prima facie evidence of guilty knowledge, or, in other words, to raise the presumption of guilt so that, it no explanation is given by the receiver, the jury are entitled, but not compelled, to convict .... So in the present class of case, once it is proved that the accused was knowingly in possession of dutiable goods which he had not proved had paid duty, if he gives no explanation he may be convicted of harbouring. .... Another ingredient

(21) [1951] 1KB 505

(22) ibid at p508 quoting R v Fitzpatrick [1948] 2KB 203 at p 211

(23) ibid at p508

of the offence is the intent to defraud - but, as in any case where an intent to defraud is a necessary ingredient, the intent must usually be inferred from the surrounding circumstances. If a jury is satisfied that the man knew - which of course would include a case in which he had wilfully shut his eyes to the obvious - that the goods were uncustomed and he had them in his possession for use or sale, it would follow, in the absence of any other circumstances, that he had intended to defraud the Revenue. Certainly that applies in such a case as the present where the appellant not only had the goods in his possession for the purpose of selling but told lies to the officers when challenged on the matter".

2.17 What constitutes importation arose in R v Watt and Stack (24) where the accused were charged with evading the prohibition against importation with intent, the drug concerned being cocaine. At their trial there was evidence to show that they had been dealing in cocaine but no evidence to show that they or anyone else had imported it. The jury were directed that there was no need for the prosecution to adduce evidence of actual importation. The accused were convicted and appealed on the ground of misdirection and it was held, allowing the appeal, that firstly, the Crown must prove an importation and, secondly, that the onus on the Crown is to prove that the

(24) (1979) 70 Cr App R 187 CA

intent must involve establishing a link or nexus between the actus reus of the offence and some prohibited importation. As Lord Justice Bridge said (25)

> "Merely to establish that there has been a dealing with the prohibited goods, and that by virtue of the presumptions they are presumed at some time in the indefinite past to have been unlawfully imported, would not, in our judgment, ever justify, without anything further, inviting a jury to conclude that the evidence established an intent to evade the prohibition on importation."

Section 4: Restriction of production and supply of controlled drugs

2.18 The 1971 Act provides by Section 4 that -

"(1) Subject to any regulation under Section 7 of this Act for the time being in force, it shall not be lawful for a person -

(a) to produce a controlled drug; or

(b) to supply or offer to supply a controlled drug to another.

(2) Subject to Section 28 of this Act, it is an offence for a person -

(a) to produce a controlled drug in contravention of Sub-section (1) above, or

(b) to be concerned in the production of such a drug in contravention of that Sub-section by another.

(25) ibid at p192

(3) Subject to Section 28 of this Act, it is an offence for a person -

(a) to supply or offer to supply a controlled drug to another in contravention of Sub-section (1) above; or

(b) to be concerned in the supplying of such a drug to another in contravention of that Sub-section; or

(c) to be concerned in the making to another in contravention of that Sub-section of an offer to supply such a drug.

Similar provisions were contained in earlier legislation (1) but the effect of this section is that the production and supply of controlled drugs is rendered unlawful unless it is authorised by regulations made under Section 7 of the same Act. The statutory defence of proof of lack of knowledge etc. contained in Section 28 applies to offences in this section. In considering these offences it has to be said that the Act in this section follows its peculiar pattern of making it unlawful to do a certain action by one Sub-section and then making it an offence to do that action in the following Sub-section: the result is that in this section there are two main unlawful activities and arising from these are five offences.

2.19 (a) <u>"PRODUCE": Sections 4(1)(a) and 4(2).</u> In terms of Section 37(1) of the 1971 Act there is a statutory definition of produce; "produce" where the reference is to producing

(1) Sections 4, 8 and 11 of the 1965 Act

a controlled drug means producing it by manufacture, cultivation or any other method and "production" has a corresponding meaning. This has resulted in some ambiguity as cultivation forms the basis of a separate offence in Section 6. It may well be that the term "or any other method" may include "compound" (2). Section 37(1) also provides that "contravention" includes a failure to comply with any requirement under the relevant regulation. The two offences concerned with producing are those in Section 4(2)(a) which makes it an offence to produce a controlled drug and Section 4(2)(b) which makes it an offence to be concerned in the production of a controlled drug. It has to be said that the phrase to be "concerned in" is wider in meaning than "assistance" and that provided a person has some interest in the prohibited activity he will be concerned in it (3). The words "anywise concerned in the sale or letting of steerage passengers" in Section 314 of the Merchant Shipping Act 1894 were considered by the Divisional Court in Morris v Howden (4) and Bruce J. in giving the reserved judgment of the court said (5):

> "To be concerned in a sale or letting means, I think, to have a part or share in the sale or letting - to have something to do with the sale or letting - to have some interest in the transaction, or in some way to deprive some profit or advantage from it."

(2) See Section 7(3)

(3) See Attorney-General v Robson (1850) 5 Ex 790

(4) [1897] 1QB 378

(5) ibid p 380

Accordingly, it is submitted, an individual could contravene Section 4(2)(b) even though he does not participate in any way in the production of a controlled drug provided it could be shown that he has an interest in its production. It may be, therefore, that the financial backers of an illegal scheme would be "concerned in" the production, or supply, of a controlled drug even though they only provided money for the scheme to be put into effect. The issue of production has arisen in two cases: Firstly R v Nock (6) where the accused were tried on an indictment charging them with conspiracy to contravene Section 4 of the 1971 Act by entering an agreement to produce cocaine. The evidence established that they had agreed to separate elements of a powder that they had obtained on the assumption that one of the elements would be cocaine. In fact they had the wrong powder which contained no cocaine. The accused were convicted and the Court of Appeal upheld their conviction and they appealed to the House of Lords. There, it was held that (7) the limited agreement entered into by the accused could not in any circumstances have involved the commission of the offence created by the Act of 1971 and appeal allowed. In R v Harris (8) the accused was similarly tried and convicted on an indictment charging them with conspiracy to contravene Section 4 of the 1971 Act by entering an agreement to produce amphetamines. In the Court of Appeal the accused

(6) [1978] Crim LR 483

(7) on the authority of Haughton v Smith [1975] AC 476; [1974] 2WLR1 on appeal from R v Smith (Roger) [1973] 2 WLR 942 and [1974] Crim LR 305

(8) (1979) 69 Cr App R 122 CA

was held to have been rightly convicted as he and his fellow conspirators had acquainted themselves with the proper process and had entered into an agreement to produce the class B drug. The accused and the others had lacked the requisite knowledge to produce the controlled drug but their process was inherently possible of fulfilment and for that reason the instant case is distinguished from R v Nock supra. It has to be said that both these cases are more properly the concern of the law of conspiracy, especially the statutory conspiracy (9) of agreeing to produce a controlled drug. Nevertheless, in their way they begin to set limits to productions.

2.20 (b) "SUPPLY": Sections 4(1)(b) and 4(3). The 1971 Act contains certain statutory definitions of this term: "supplying" includes "distributing" by Section 37(1) and, applying the ejusdem generis role (10), by Section 7(3) "supply" includes "administer" and "prescribed". "Supply" denotes also the parting of possession of one person to another (11) and this meaning was considered in R v Harris (12) where the Court of Appeal (Criminal Division) had to consider the conviction of supplying (13) where the accused had administered another person's own heroin to him by assisting in the process of injecting the drug and the court held that these circumstances did not amount to supplying and the conviction was quashed. It is to be noted that the phrase "to another" is used throughout the section thus

(9) see Section 1: Criminal Law Act 1977

(10) see Cross p114

(11) R v Mills [1963] 1AIIER 202; [1963] 1QB522

(12) [1968] 2AIIER50; [1968] 1WLR769

(13) contrary to reg. 8 of Dangerous Drugs (No. 2) Regs. 1964

clearly excluding the argument that for a person to administer heroin or similar controlled drug to himself amounts to supplying. In Mieras v Rees (14) the accused was charged with unlawfully supplying a substance believing it to be a controlled drug contrary to Sections 19 and 4(3) of the 1971 Act. The accused admitted that on three occasions he supplied a substance in the belief that it was STP or a derivative, but he said that he had subsequently learned that the substance was neither. The prosecution were unable to prove that the substance was the proscribed drug but, relying on the accused's belief at the relevant times, the justices convicted him. The accused appealed by case stated to the Queen's Bench Divisional Court and there it was held, allowing the appeal, that the prosecutor had failed to discharge the burden of showing that the substance supplied was a controlled drug and that in the circumstances there was no actus reus and therefore, notwithstanding the presence of mens rea, it was impossible to establish attempt. Thus, the accused's objective of supplying or distributing the substance was achieved though in the event the act was not criminal by reason of a mistake of fact. In R v Willis (15) the accused supplied controlled drugs to an individual after the latter persistently requested them and it so happened that the instigator of the deal was a policeman. It was held on appeal after conviction that evidence of supply was correctly admitted and the court

(14) [1978] Crim.LR224

(15) [1976] Crim.LR127

founded on earlier authorities that the defence of entrapment does not exist in English law. In Holmes v Chief Constable of Merseyside Police (16) the High Court had to consider an appeal against conviction of a contravention of Section 5(3) of possessing a controlled drug with intent to supply it unlawfully to another. The accused had been asked at the end of the prosecution as to the proposition of law to be relied on for the defence and it was stated that it would be this: where a person had drugs on behalf of himself and others and the whole group were in joint possession of the drugs then a division of the drugs within the group could not be a supply of drugs within the section. The judge ruled this defence invalid and the defence led no evidence and the accused was convicted. On appeal, it was held, that the court must give the word "supply" its ordinary everyday meaning, so that a person who purchased drugs for himself and others could supply the drugs to the others. But the court allowed the appeal in that the judges ruling had prevented the defence from leading evidence and the case was remitted to another judge for a rehearing. It is conceded that this concerned an offence in Section 5(3) and we are presently concerned with Section 4(1)(b) and 4(3) but the dicta that "supply" must be given its ordinary everyday meaning is of some importance in settling the limits of meaning. Parliament doubtless intended different objectives by Section 5 and Section 4 of the 1971 Act but in the

(16) [1976] Crim.LR125

circumstances the meaning of "supply" must remain constant in the interests of justice, including fairness to the accused. Further, the Act itself fails to indicate an intention on the part of Parliament to distinguish between the word "supply" in each of the sections and also the penalties in Schedule 2, the maximum of which remain the same for each offence. The decision in Holmes supra was applied in R v King (17) where the accused gave evidence to the effect that in a social setting he might make a "reefer" cigarette from his own supply of cannabis, smoke it and pass it to his friends who would take a puff and pass it back and this process would be repeated. It was held inter alia that "supply" in Section 5(3) must be given its ordinary everyday meaning following Holmes supra and that it appears to mean the passing of possession from one person to another following R v Mills supra. Where, as here, a person passes round a cigarette among several people in circumstances where some or all of them contemplate only taking a puff and passing it on, that does not constitute supplying the material in the cigarette as it exists. This case suggests that it is only a "supply" if at the beginning the accused has the material in his possession and at the end it has come into the possession of another in the sense that the other can do with it as he wishes. The control over a cigarette exercised by an individual within a circle of smokers as described is not such a degree of control as to make it a "supply" by the

(17) [1978] Crim.LR228

accused, or so it would seem from King's acquittal. But in R v Moore (18) the accused was charged with possession of a quantity of cannabis resin with intent to supply unlawfully to another contrary to Section 5(3) and in the alternative with offering to supply the same drug to another contrary to Section 4(3)(a), indicating, it is submitted, the closeness of the offences and the terminology. The essential facts were that Moore had persuaded two girls who had never smoked cannabis before to leave a public house with him and "go for a smoke". Moore was arrested as he was rolling a reefer which by his own admission he intended sharing with the two girls. At the close of the prosecution case the defence contended that in view of R v King supra Moore could not be convicted on either count. It was further contended that there was here nothing more than an offer to supply "smoke" rather than the material in the cigarette; in short that the control of the cigarette that Moore intended to pass to the girls was not sufficient to make it a "supply" within the meaning of the Acts. It was held, declining to follow R v King supra that "supply" should not be given too narrow a definition and that here there was an offer of consumption and therefore an offer to supply. There is nothing in the report of the case in the Criminal Law Review to suggest that the two girls de facto took hold of the cigarette and smoked or puffed at it or, presumably, the charge would be one of supplying. Indeed it may be that the learned judge in R v Moore supra failed so to distinguish the earlier case on that basis. No one,

(18) [1979] Crim.LR789

either seems to have argued that in this context "supplying" included "distributing" in terms of Section 37(1) and the point was not brought out in R v King supra. The suggestion in the dicta that it is only a supply if at the beginning the accused has the material in his possession and at the end it has come into the possession of another in the sense that he can do with it as he wishes is, it is submitted, too narrow a construction to be the true intention of Parliament. In seeking to find this intention we are not as restricted as the Courts (19) and it is therefore interesting to note what a Member of Parliament said when the Bill was being considered (20)

> "The main object of this Bill is to restrict the circulation of drugs for misuse".

It is submitted, then, that the correct meaning of "supply" as including distribution in terms of Section 37(1) is a means of reconciling two otherwise inconsistent cases. The commoner aspect of drug use, implied in the preceding cases, was emphasised in R v Buckley (21) as was this element of distribution. Buckley posted his money with another person and purchased cannabis resin in bulk and returned to split the bulk, keeping his own share and giving a share to the other person. On appeal against a conviction for a contravention of Section 4(3)(a) by supplying a controlled drug the accused argued that at the time he gave the cannabis resin to the other man the latter

(19) Cross at p134: "Generally it has been assumed that Parliamentary materials are inadmissable on interpretation for any purposes whatsoever".

(20) Mr. Deedes: Standing Committee A: 10th November 1970

(21) [1979] Crim.LR664

had already notional possession so that there could be no supplying. The appeal was dismissed, the short answer being to "the somewhat recondite submission" that by Section 37(1) "supplying" included distribution, and whatever else the accused might have been doing when he divided the cannabis resin, he was without doubt distributing it.

2.21 (c) "Offer to supply": Section 4(1)(b) and 4(3). It has been submitted that the distinction between a supply and an offer to supply has at times become blurred but the latter has been considered by itself in Haggard v Mason (22) the accused purchased a quantity of what he then believed to be a controlled drug for the purpose of reselling and he was introduced to a third party to whom he offered to sell the substance. The offer was accepted, the buyer also believing the substance to be a controlled drug. It subsequently transpired that the substance was not in fact a controlled drug but the justices nevertheless convicted the accused of offering to supply a controlled drug to another contrary to Section 4(3)(a). On appeal to the Queens Bench Divisional Court, it was held inter alia that the appeal would be dismissed on this point as the offence was complete at the moment when the accused met the third party and offered to supply him with the substance. It was immaterial that what was in fact supplied was not a controlled drug. In the course of the judgment the very important distinction between supplying and offering to supply was made out by Lawson J (as he then was) (23):

(22) [1976] 1AIIER337; [1976] Crim.LR51

(23) ibid at p340

> "It matters not in relation to the offence of offering to supply that what is in fact supplied pursuant to that offer, the offer having been accepted, is not in fact a controlled drug. Of course, if the charge had been supplying a controlled drug, it is clear that the fact that a controlled drug was not in fact supplied would mean that that offence could not have been established".

Certainly the last point was raised in Mieras v Rees supra and affirmed but Haggard v Mason supra is authority it is submitted for the proposition that the actus reus of supplying differs from that of offering to supply: in the former the accused must supply to another a substance that is in fact a controlled drug but in the latter an offer must be made and accepted and any substance supplied on the strength of that offer need not necessarily be such a controlled drug. There is nothing inherently unfair or unjust in having such an actus reus for the latter offence as the trading in drugs of that nature is notoriously lacking in trust and goodwill and the circulation of adulterated drugs abounds. It would be invidious not to say unjust to have accused persons entitled to an acquittal simply because a chemical impurity renders the substance offered for supply not a controlled drug. On the question of impossibility of performance in offering to supply such a drug see R v Bennett, Wilfred and West (24) where the fact that controlled drugs were involved appears to have been a side-issue.

(24) (1979) 68 Cr App R168CA

2.22 The offences in Section 4 include particular offences of "being concerned in" and in R v Blake and Connor (25) police officers saw O'Connor approach a group of young people in Piccadilly Circus in London and heard him ask them if they liked cannabis. When asked where they could get some of the drug, he replied that he had a friend who lived in a flat nearby who could "fix them". When they arrived at Blake's flat, Blake pretended not to know O'Connor and left the premises. Both Black and O'Connor were charged with being concerned in the making of an offer to supply a controlled drug. Neither Blake nor O'Connor gave evidence at their trial and the jury were directed that before Blake could be guilty there would have to be some previous arrangement between him and O'Connor. Both were convicted and on appeal on the basis that as there was no evidence that Blake knew of the offer made by O'Connor at Picadilly Circus, he could not be guilty of the offence charged, it was held that Section 4(3)(c) of the 1971 Act had been particularly widely drawn so as to involve persons who might be at some distance from the making of the offer to supply a controlled drug, and in the present case on the evidence before the jury, the latter were perfectly justified in coming to the verdict they did, especially as no other explanation was given for the conduct of Blake and O'Connor at the relevant time: appeals dismissed.

2.23 The punishment for a conviction of an offence under Section 4 is:

(25) (1979) 68 CR.AppR1.CA

Section 4(2): production or being concerned in production of a controlled drug.

	Class A	Class B	Class C
(a) Summary	12 months or £400 or both	12 months or £400 or both	3 months or £500 or both (26)
(b) Indictment	14 years or a fine or both	14 years or a fine or both	5 years or a fine or both

Section 4(3): supplying or offering to supply a controlled drug or being concerned in the doing of either activity by another.

	Class A	Class B	Class C
(a) Summary	12 months or £400 or both	12 months or £400 or both	3 months or £500 or both (27)
(b) Indictment	14 years or a fine or both	14 years or a fine or both	5 years or a fine or both

(26) 1977 Act Schd. 5 para1(1)(6) and 1979 Act Schd.7B para.1(1)(6)

(27) ibid

Section 5: Restriction of possession of controlled drug.

2.24 Section 5 of the 1971 Act contains two offences of possessing controlled drugs; namely unlawful possession and possession with intent to supply unlawfully. The section also contains specific defences in relating to the former of these offences. This part of the work is a long one because of certain technical difficulties arising out of the concept of possession but also as the offence of possession is the commonest of all offences in the Act that are prosecuted in the Courts (1). Section 5 is based on the provisions in Section 1 of the 1964 Act and Sections 4, 8 and 11 of the 1965 Act and various regulations made under these sections. In general terms Section 5 provides by Sub-section (1) that it shall not be lawful for a person to have a controlled drug in his possession, although this is subject to any regulations made under Section 7 of the same Act. Sub-section (2) provides that it is an offence for a person to have a controlled drug in his possession and Sub-section (3) provides that possession with intent to supply unlawfully to another is an offence. Both the offences in this section are subject to the specific defences provided for in Section 28 of the 1971 Act and Section 5 contains two specific defences which are also discussed.

(1) For example, in 1978 the number of persons found guilty of drug offences in the UK amounted to 13,394 of which 11,579 were convicted for unlawful possession and 495 were for possession with intent to supply unlawfully to another: UK Official Statistics Relating to Drug Abuse: Supplement to Druglink No. 13 (Spring 1980). "Druglink" is a publication of the Institute for the Study of Drug Dependance, London.

Part One: The Offences.

2.25 (a) Section 5(1)

> "Subject to any regulation under Section 7 of this Act for the time being in force, it shall not be lawful for a person to have a controlled drug in his possession."

It is certain that the concept of possession in relation to this sub-section is one of the most difficult aspects of the 1971 Act. More generally it is a concept that has a variety of uses and a variety of meanings and much is ascribed to the term "possession" in accordance with context and use. It is almost certain that a detailed search for a "proper" meaning is most likely to be a fruitless one. As Lord Parker CJ said (2)

> "The term "possession" is always giving rise to trouble. The meaning of possession depends on the context in which it is being used."

One reason advanced as to why such a notion as possession is surrounded with complexity is that there is an inevitable and continuing conflict between the logic of the law and the demands of convenience in particular cases (3). But it is also asserted (4) that in one sense possession began as a fact - the fact of physical control and it is not doubted by the same learned commentator that most legal systems have built upon the notion of physical control in developing rules which

(2) Towers & Co.Ltd. v Gray [1961] 2WLR553 at p557-8

(3) G W Paton Jurisprudence (1972) Chapter 22 at p557

(4) ibid at p558

have the term "possession" as a necessary part of their expression. The concept of possession is one in which Roman law has had considerable influence. Indeed according to Lord Stair, possession is the holding or detaining of anything by ourselves or others for our use. And further (5)

> "To possession there must be an act of the body which is detention and holding: and an act of the mind which is the inclination or affection to make use of the thing detained."

This shows clearly the necessity in possession of the requirement of a mental element, an act of the mind, which is the intention to hold the thing for one's own benefit. This is presumed from the fact of detention unless the holding of the thing as his own would infer a crime on the part of the holder (6). The intention to so hold the thing for one's own benefit is the animus possidendi and the absence of this is the distinction between possession and custody.

2.26 It is submitted then that the limits of the concept of possession are essentially a matter of jurisprudential inquiry but the all too brief discussion above does indicate the broad lines of inquiry to be taken in seeking to make out the limits and it will be shown that the courts, in considering offences of possession, concern themselves with evidence of knowledge and control.

(5) Stair II, 1, 17 quoted in Gloag and Henderson p564

(6) Erskine Inst. II, 1, 20 quoted ibid

Some assistance in this matter is given by the legislature: Section 37(3) of the 1971 Act provides (7)

> "For the purposes of this Act the things which a person has in his possession shall be taken to include any thing subject to his control which is in the custody of another."

It is submitted that this part-definition suggests clearly that control is indeed an essential element in possession. It will be shown from the case law that control is an important element but the problem of the nature and degree of knowledge required by the accused has probably raised far more problems and necessitated greater attention by the courts.

2.27 (a) case law prior to the 1971 Act. In considering the case law the principle established in Barras v Aberdeen Steam Trawling and Fishing Co. (8) has been applied:

> "Where the language of a statute has received judicial interpretation, and Parliament again employs the same language in a subsequent statute dealing with the same matter, there is a presumption that Parliament intended that the language so used by it in the subsequent statute should be given the meaning which meantime has been judicially attributed to it."

(7) this is based on a wider definition provided for by regulation 20: Dangerous Drugs (No. 2) Regulations 1964 (SI1964No.1811): and see R v Smith The Times Law Report 16th August 1966

(8) 1933 SC(HL)21; 1933 SLT 338 per Lord Macmillan at p50 but see Farrell v Alexander [1977] AC59 per Lord Wilberforce at p74

Thus, although the cases in this section involve offences in terms of the 1964 and 1965 Acts the context is the same and the case law is equally applicable to the offences in terms of the 1971 Act. In R v Irala - Prevost (9) the accused was charged inter alia with unauthorised possession of dangerous drugs where he had been a passenger in a car in which was concealed a large quantity of drugs on a journey from North Africa to England. His defence was that he was unaware of the presence of the drugs and in charging the jury the judge concentrated on the issue of knowledge. Following conviction, the accused appealed on the ground of non-direction as to possession and the Court of Criminal Appeal held that it was incumbent on the judge to say something to the jury to make them realise that some degree of control must be established and as that had not been done in the present case the conviction would be quashed. It is submitted then that this decision is the authority for the proposition that mere proximity to a dangerous or controlled drug is not enough: for conviction there must be evidence that the accused had control over those drugs, a requirement of the common law which is now, partially at least, acknowledged by the legislature in the definition in Section 37(3) of the 1971 Act.

(9) [1965] Crim.LR606: in America drugs and cars is virtually a specialist subject! see E F Short Illicit drugs - possession by car occupant: 57ALR3d.1319

2.28 In the mid 1960's there was a series of decisions that gave rise to considerable discussion firstly for their importance in relation to drug legislation and secondly for their influence in a more general respect in relation to central questions of criminal responsibility. In Lockyer v Gibb (10) the accused was charged with having in her possession 83 tablets of morphine sulphate without authority. When she was stopped by the police she had in her possession a hold-all and in it were many items, including a paper bag which contained a brown- glass bottle in which were visible some small white tablets. The accused was aware that she was in possession of the bottle, and that it contained tablets, but there was a possibility that she did not know that the tablets contained morphine sulphate. The accused was convicted and she appealed on the ground that the prosecution had failed to establish that the accused knew that she was in possession of some drug. In dismissing the appeal and applying Yeander v Fisher (11) the Divisional Court held that in order for the offence to be established, while it was necessary for the prosecution to prove that the accused knew that she had in her possession the articles which transpired to be drugs, it was not essential that she should know that they were drugs, or indeed drugs of a particular character. Lord Parker CJ, in giving judgment, looked at the mischief aimed at by this legislation and concluded

(10) [1966] 2AIIER 653; [1967] 2QB243

(11) [1965] 3AIIER 158 discussed infra in relation to Section 8 of the 1971 Act. Lord Parker CJ gave judgment in both cases.

that, as drugs were then a matter of grave concern, it was the intention of Parliament, as evinced by the legislation, in this case Section 13 of the 1965 Act, to tighten up more and more the control of drugs and that this alone would justify a provision imposing absolute liability. But in looking at the language of the provision itself his Lordship could not avoid consideration the fact that the word "knowingly" does not appear before "possession" although this in itself, he conceded, was not conclusive. It was for these reasons that his Lordship held that (12)

> "While it is necessary to show that the defendant knew that she had the articles which turned out to be a drug, it is not necessary that she should know that in fact it was a drug or a drug of a particular character."

Thus knowledge as an element of possession was required, knowledge as to the nature of the articles was not; a requirement that certainly made prosecutions easier. The matter of absolute offences arose again in Warner v Metropolitan Police Commission (13) when the accused was charged with having drugs in his possession without being duly authorised, the evidence being that a police officer had stopped the accused who was driving a van in the back of which were found two cases, one containing scent bottles and another containing 20,000 amphetamine sulphate tablets. The accused said that he

(12) ibid at p249

(13) [1968] 2WLR1303

had been to a cafe where he had been accustomed to collect scent from another and was told by the proprietor that a parcel from that other person had been left under a counter and when the accused had looked there he had seen two parcels, namely the one containing scent and the other which was found to contain the drugs. He said that he had assumed that both contained scent. As to the question of possession, the chairman directed the jury that if he had control of the box which turned out to be full of amphetamine sulphate tablets, the offence was committed and it was only mitigation that he did not know the contents. On appeal against conviction on the grounds that the chairman misdirected the jury as to "possession" the House of Lords reaffirmed on a majority that the offence in Section 1(1) of the 1964 Act came within a class of Acts in which the offence proscribed was absolute and therefore the Act forbad possession of certain scheduled drugs, and whether an accused possessed them with an innocent or guilty mind or for a laudable or improper purpose was immaterial since he was not allowed to possess them and if he did possess them without lawful authority he was guilty of an offence under the Act. But that while, therefore, there was a very strong prima facie inference of fact that the accused was in possession of the drugs when, as here, the prohibited drugs were contained in a parcel the prosecution had to prove not only that the accused possessed the parcel but

also that he possessed its contents, for a person did not (within the meaning of the Act) possess things of whose existence he was unaware.

2.29 But Warner v Metropolitan Police Commissioner supra is a complex case, of which a close reading reveals wide variance in judicial reasoning. Lord Reid was in a minority of one in holding that this statutory offence was not an absolute one. Although, as he said, no one doubted that Parliament had the power to create absolute offences, no common law offence had ever been held to be absolute, and until recently absolute statutory offences were only of a quasi-criminal nature. They did not therefore offend the ordinary man's sense of justice based on the view that moral guilt is the essence of an offence (14). Lord Reid agreed with Devlin J's conclusions in Reynolds v Arshin (GH) and Sons Ltd. (15) that it would be useless and unjust to inflict a penalty on aperson who could not reasonably know what the relevant circumstances were. Such a penalty could have no effect on other persons in the future, which is one of the main purposes of the criminal law, because if they did not know what the facts were when they acted, then there could be no mens rea on their part. A person who has not in the past been thoughtless and inefficient cannot be forced in the future to take greater care than he has already. As to the words "have in his possession", Lord Reid

(14) ibid at p1308

(15) [1951] 2KB135 at p144

thought, as did the other Law Lords at this point, that these words meant more than mere physical control so that some mental element was required (16).

2.30 The majority decisions themselves display this variance: Lord Morris of Borth-y-Gest agreed with Lord Reid that there should be no conviction if there is no mens rea but he found this in the words of the section concerned because the notion of having something in one's possession in itself involes a mental element (17). Lord Morris thought therefore that before the prosecution could succeed they must prove that a person knowingly had in his possession something which in fact was a prohibited substance although it need not prove that the accused knew the nature and substance of the thing he possessed. Lord Guest adopted the view that wording of the section "it shall not be lawful for a person to have in his possession" made it clear that the offence was absolute. He held that if the prosecution was required to prove that the accused knew of the nature of the substance there would be wide-scale evasion of the Act. He concluded (18)

> "I would go further and say that to require mens reawould very largely defeat the purpose and object of the Act."

But his Lordship was less clear on the meaning of the word "possession" but, after reviewing case law, he

(16) [1968] 2WLR at p1319

(17) ibid at p1334

(18) ibid at p1340

did say that there is no possession by a man until he knows what he has got although this left the question of what was meant by "what". Lord Pearce thought that an accused should have an opportunity to show that there was no moral guilt attached to his control of unauthorised drugs when he said (19)

> "It would, I think, be an improvement of a difficult position if Parliament were to enact that when a person has ownership or physical possession of drugs he shall be guilty unless he proves on a balance of probabilities that he was unaware of their nature or had reasonable excuse for their possession."

He continued later (20) to interpret the words "have in his possession"

> "If a man has physical control or possession of a thing that is sufficient possession under the Act provided that he knows that he has the thing. But you do not (within the meaning of the Act) possess things of whose existence you are unaware".

Lord Wilberforce said (21):

> "I can say at once that I am strongly disinclined, unless compelled to do so, to place a meaning upon this Act which would involve the conviction of a person consequent upon mere physical control, without consideration, or the opportunity for

(19) ibid at p1345

(20) ibid at p1347

(21) ibid at p1349

consideration, of any mental element."

Thus it was that the House of Lords held that the Court of Appeal in hearing Warner's first appeal from the magistrates had erred in equating control with possession. It has to be said, however, that the view of the Court of Appeal did commend itself to some commentators for Dr. Goodhart has agreed (22) that the law would be both simpler and more certain if we talked of control rather than possession. He argued that as de facto control was the basis on which the English law of possession was founded then knowledge on the part of the possessor was immaterial. He did not think that it would be difficult in a statute to distinguish between intentional control and uninten: :tional control and that such a test would be an objective rather than a subjective one. Dr. Goodhart also proposed altering the strict rules of evidence where an act, such as tempting young persons to buy drugs, is "peculiarly" harmful, and where it may be difficult to prove the existence of mens rea, although "it is almost certain that it does exist" (23). By this means he hoped that all the technical distinctions between the various cases which now "clutter the books" will be swept away by the simple provision that a person who has control of a thing is deemed to have possession of it. In reply, Mr. Miers said that (24)

(22) A L Goodhart Possession of Drugs and absolute liability [1968] 84LQR382

(23) ibid at p385

(24) D R Miers The Mental Element in Drug Offences (1969) NILQ 370 at p376

Dr. Goodhart's proposition was "surely a travesty of the criminal process" but describes the idea as being a variation of the necessity argument. Warner supra therefore raised some very profound questions of criminal responsibility which neither the judges nor the commentators found themselves united in answering. But the result in law of the case was that in relation to the concept of "possession" of a dangerous drug in a container, mere proof by the prosecution of physical control or custody of that container was not enough and that proof that an accused had knowledge of the contents of what was alleged to have been in his possession was equally necessary to secure a conviction. In short, no mental element beyond that required to constitute possession need be proved: there was no requirement that the accused knew that the "thing" was a drug or a dangerous drug only that there was something in the container.

2.31 In R v. Fernandez (25) the accused was convicted of possessing cannabis. He was a merchant seaman and had been given a package to take to England where he was to hand it to a man who would pay him for his trouble. He was told the package contained sticks for smoking and had an idea this referred to marijuana cigarettes and he saw the contents because the package broke open while he had it. He understood that if the package was discovered he might get into trouble with

(25) [1976] Crim.LR277

the customs authorities. However, he claimed he did not know the package contained drugs and that nothing aroused his suspicions. The judge directed on the issue of possession or control: "if the person were to receive the package under circumstances whereby it would be clear to any person of ordinary common sense that it might well contain either drugs or some other article which ought not to be in distribution the mere fact that it could not be shown that the carrier knew the exact contents would not prevent him from being guilty ... the mere fact that the prosecution cannot show that he knew the exact nature of the drug would not matter if he did know the package might well contain some prohibited article and if in fact it did contain a prohibited drug." Following conviction, the accused appealed on the ground that the direction was wrong, relying on Warner supra and Sweet v Parsley (26). The Court of Appeal held that it could find in Sweet v Parsley supra no indication of a change in the views expressed in Warner supra, and it was in Warner that the answer to the appeal was to be found. The majority view in Warner was that one could not safely regard the offence as absolute: some mental element, or subjective test, might have to be applied. In "package" cases the position could be summarised as follows: prima facie the prosecution satisfy the onus on them by proving that the accused was in physical control of articles

(26) [1969] 2 WLR 470 and discussed infra in relation to Section 8.

which were dangerous drugs. But, if the suggestion is made that the accused was mistaken as to the nature of the goods then it may be necessary to counsider what his mental state was. For example, if it is clear that he did not know precisely what the contents of the package were but nevertheless his conduct indicated that he was prepared to take it into his possession whatever it was then no difficulty arose in regard to proving that he was in possession of the contents for all purposes. Similarly, if the accused took the package into his possession in a situation in which he should certainly have been put on inquiry as to the nature of what he was carrying and yet he deliberately failed to pursue an inquiry and accepted the goods in circumstances which must have pointed the finger of suspicion at their nature and at the propriety of his carrying them, then it was a proper inference that he accepted them whatever they were and it was not open to him to say that he was not in possession of the goods because he did not know what they were. The case against the accused in this case was overwhelming and on the facts the direction was adequate and the appeal was dismissed. Thus it would appear to be the ratio decidendi of R v Fernandez supra that in the prosecution of offences of possessing dangerous drugs an intent on the part of the accused to possess a package irrespective of what that might contain is enough to

convict him. That intent may be inferred in circumstances where the accused ought to have made inquiry as to the nature of the contents because of suspicions surrounding the contents. But such a rule does not apply in English law of aiding and abetting for there it is well-established that it must be proved that the accused knew the essential facts which constitute the offence, and this is so even where the offence is one of strict liability: in R v Patel (27) the accused knew he was assisting others but he did not know that a particular bag carried by one of the others contained cannabis and an appeal was allowed on this ground. It was held that in these circumstances the prosecution had to prove that Patel knew the bag carried by the other man contained a dangerous drug.

2.32 In Lustman v Stewart (28) the accused and two others were charged inter alia with possession of cannabis resin and were convicted. They appealed to the High Court of Justiciary by way of stated case and the findings-in-fact set forth that the accused were attempting to set up a self-sufficient community and were at the relevant time living in an experiment of communal living. The police on information received obtained a search warrant and went to the accused's farm which was described as "dirty, untidy, sparsely furnished and decorated in parts in a psychedelic fashion". The police officers noted that

(27) [1970] Crim.LR274

(28) 1971 SLT (Notes) 58

all the rooms had a peculiar odour which they took to be incense. In a room were several ashtrays with handrolled cigarettes and in certain of these were found small fragments of cannabis. The accused were cautioned and Lustman replied "There are things which happen here which I can't control." The remaining accused made non-incriminating replies. The court held that the findings-in-fact fell just short of what was sufficient for conviction and, without issuing opinions, quashed convictions. Without opinion it is difficult to assess the view of the Court but counsel had argued for the accused that there was no finding-in-fact that the drug was actually in the custody of anyone of the inhabitants and accused, nor evidence allowing this inference to be drawn. Mere presence was insufficient. Certainly, given that this was a commune if one had been found to be in the custody of one then the others might well have been correctly convicted for the offence was Section 4(1) of the Dangerous Drugs Act 1965 and therefore subject to the statutory definition of possession in regulation 20 of the Dangerous Drugs (No. 2) Regulations 1964. But if knowledge and control are both considered to be essential pre-requisites for proof of possession there have been circumstances in reported cases in which both have been held to have been proved but nevertheless the court has quashed a conviction. In Mackay v Hogg (29) the Sheriff in a stated case found

(29) unreported 18th February 1975 but see COCN: A12/75

the following facts admitted or proved: police officers searched with a warrant a house occupied by a woman and there searched her bedroom in her presence. Two other officers entered the living room and found the accused Mackay asleep on a couch there. He was naked and his clothes were on a chair by the couch. He awoke and his clothes and the chair were searched. He cushion of the chair was removed in the course of the search and left on end to indicate that the chair had been searched. Shortly after that the accused got up and dressed and then another police officer entered the living room and searched the chair and sixteen tablets were found lying on the seat cover of the chair. Later analysis revealed the tablets to be LSD. It was found-in-fact that no one had anything to do with the chair except the accused between the two searches. The accused was convicted of possession and appealed and the opinion of the High Court was that on the findings-in-fact it was a legitimate inference that the accused had placed the tablets there and that it could be reasonably inferred also that the accused must have moved the tablets by hand from some unknown part of the woman's living room to the seat cover of the chair. He must therefore have had the tablets in his hands for "at most a second or two". In the opinion of the Court this proved fleeting contact between the accused and the tablets and in the context of the other findings-in-fact it was not

enough to justify a finding that he had them in his possession within the meaning of the Sub-section. Accordingly, in the "quite unusual and exceptional circumstances" conviction was quashed. It is clear then that control was proved and knowledge of the tablets inferred in the circumstances but, presumably, in the absence of evidence as to where the accused had obtained the tablets from, it was "possession" in a highly technical sense and indeed it is to be noted that in the report of the Court's Opinion the mention is of "fleeting contact" rather than possession.

2.33 (b) case law subsequent to the 1971 Act. In Calder v Milne (30) the accused appealed against conviction of possession of cannabis. The accused was found-in-fact to share a flat with three others and although he had exclusive use of a room as a bedroom other occupants were permitted to use the room as a sitting-room if they wished. Occasionally the accused's girl friend used the room although she was not present on the relevant date nor the previous night. Police officers with a warrant searched the accused's room and found two cigarette ends in a waste paper bucket which also contained cannabis although the quantity was not specified by the analysts as they had not been asked to! At the trial the accused gave evidence on his own

(30) unreported, High Court of Justiciary, 18th February 1975. COCN: A12/75

behalf saying that he had smoked cannabis earlier than the date in question but in another part of the house and had flushed the reefer ends away. The ends found were not his. Others in the flat had smoked cannabis. The Sheriff disbelieved the accused's statement that the reefer ends were not his and convicted him. The Court stated in its Opinion that "there is no finding-in-fact as to when the accused was last in his bedroom before the search and there is nothing to show when he last slept in the room or in the house. In all the circumstances, it is quite impossible to hold that the possession of the cannabis in question had been brought home to the accused." Conviction was quashed. Clearly, the Court felt that the prosecution had failed to eliminate an important alternative explanation: namely, that the other occupants in using the bedroom as a sitting room had used the cannabis. If control was possible, though mere proximity is insufficient on the authority of R v Irala-Prevost supra, then there was no evidence of knowledge, of the substance found, on the part of the accused and he gave evidence to deny that it was his.

2.34 "Fleeting possession" arose again in R v Wright (31) where the accused was convicted of possessing cannabis. He had been in a car with others and a

(31) [1976] Crim.LR248

police officer in a car following them saw the accused throw something from the car. This turned out to be a small tin containing cannabis. In evidence at his trial the accused said that he had no cannabis and was not aware that his companions in the car had any. He did not know the car behind was a police car. Another person in the car gave him the tin. He did not know what it was. He had been told to throw the tin out of the window and had done so. He knew this other person used cannabis and on being told to throw the tin away it occurred to him that it might contain drugs. The judge left the issue of possession to the jury mainly on the basis of custody and control. The accused appealed on the ground that the judge gave the jury no assistance about the necessary mental element. The Court of Appeal allowed the appeal on the ground that it was clear from Warner supra that for the purposes of the 1964 Act a distinction was to be made between mere physical custody and possession, which connoted a mental element. If a person was handed a container and at the moment he received it did not know or suspect, and had no reason to suspect, that it contained drugs and if, before he had time to examine the contents, he was told to throw it away and immediately did so, he could not be said to have been in possession of the drugs so as to be guilty of an offence contrary to Section 5 of the 1971 Act. The judge ought to have directed

the jury to this effect and his failure to do so was a fatal defect and conviction quashed. In Coffey v Douglas (32) the Court held that in the particular circumstances of the case there was no evidence of "fleeting possession". The accused was found to have been seen by police officers at a window, disappear then appear at a front door and let them in. In the interval in which the accused was out of sight there was scuffing and a toilet in the house was heard to be flushed and when police officers looked in the toilet they saw cigarette ends, floating in the water, which later analysis revealed cannabis resin. There was held to be, on appeal against conviction, insufficient evidence to infer possession, even "fleeting possession". The meaning of the term was also considered in R v Pragliola (33) where the accused had had a distinctive pipe removed from his flat by the police but returned to him when no charges were made. A subsequent examination of the same pipe at a later date showed traces of cannabis resin which had not been there on the earlier examination. The time between the return of the pipe and its removal by the police for a second time amounted to 1 year 8 months. The accused was charged with possession of cannabis resin and submissions by defence counsel at the close of the prosecution case questioned whether

(32) unreported. High Court of Justiciary 26th May 1976 COCN A47/76

(33) [1977] Crim.LR612

as a matter of policy the charge could be put in this way, considering the period of time involved. The learned judge held that there was no case to answer because any extension backwards in time in cases of possession is oppressive in truth and in fact the possession of cannabis in this extension back relates to the moment when the police took possession and is of restricted duration and the offence charged is in effect of recent possession of a drug. The learned judge clearly indicated that he regarded recent possession as being a "last few minutes and last few hours". The jury were directed to return verdicts of not guilty. It appears that here, as in Calder v Milne supra, the prosecution did not exclude various alternatives and these arose out of the central weakness of the prosecution case namely the length of time involved; for example, someone else may have borrowed the pipe during the period. There was no evidence of knowledge of the presence of the traces of cannabis resin by the accused, all there was evidence of was "fleeting contact".

2.35 In McKenzie v Skeen (34) the police with a warrant searched a flat in which the accused occupied a room and there found, on a mantlepiece, a wooden board and three utensils suitable for smoking cannabis. Analysis revealed traces of cannabis indicating that

(34) unreported. High Court of Justiciary: 2nd August 1977 COCN: A21/77

cannabis had been in the utensils. In a suitcase the officers found a small opaque glass jar with a lid which was in position. This jar contained cannabis seeds which did not come within the definition of cannabis in the Act and also 10 milligrammes of cannabis in the form of small flakes. This cannabis was amongst the seeds and might not be seen through the glass of the jar. The seeds were clearly visible. The officers also found in a cupboard in this room another smoking utensil and analysts subsequently revealed traces of cannabis indicating that cannabis had been in it. After caution the accused said that the smoking utensils had been in the room when she moved in and she had obtained the jar and seeds in Morroco. Only one police officer gave evidence of seeing the cannabis in the jar and a forensic scientist said that the vegetable material was extremely small and could not be seen within the jar without holding it up to the light. He himself had only detected the fragments of vegetable material upon tipping the contents out and carefully segregating the seeds. The trial judge convicted the accused of being knowingly in possession of the cannabis in the jar. In quashing the conviction the court held that there was no evidence which showed or from which an inference could be drawn that the accused knew of the presence of the vegetable material in the jar. The Lord Justice

Clerk (Lord Wheatley) said (35)

> "In most cases possession of a container will support the inference of possession of its actual contents but it must always be a question to be decided in the particular circumstances of the particular case."

In R v. Peaston (36) the accused occupied a bed-sitting room in a house comprising entirely of such accommodation. He received through the post in an envelope a film capsule containing 7.7 grammes of amphetamine hydrochloride. This envelope had been pushed through the letter-box by the postman with other letters and placed with them on the hallway table. The accused was unaware of the envelope's arrival. A police officer with a warrant to search the accused's room took the envelope to the room and handed it to the accused who opened it and gave the contents to the policeman. The accused was charged inter alia with being in possession of a controlled drug and at trial his submission of no case to answer was overruled. He then changed his plea to one of guilty. He then appealed on the ground that on the admitted facts he could not be said to be "in possession" of the drug in question. In dismissing the appeal the Court held that since the accused had ordered the supplier to send the drug through the post to his address, he was properly to be regarded as in possession of the envelope

(35) ibid

(36) (1979) 69 Cr.App.R203CA

containing it when it arrived through the letter-box of the house in which he was living. At the appeal the Lord Chief Justice (Lord Widgery) distinguished the instant case from that of Warner supra on the basis that the present case concerned a person who had given instructions to receive the controlled drug, which Warner had not done.

2.36 Up to this point the case law has concerned the concept of possession in relation to individuals but the courts have been concerned with joint possession: in R v Searle (37) the accused and others were convicted of possession a quantity of dangerous drugs of various kinds. The drugs were found in a vehicle which all the accused were using for a touring holiday. It was not possible to attribute the possession of any particular drug to any particular accused and the prosecution put the case on the basis of joint possession of all the drugs. The accused led no evidence. The judge told the jury in effect that if they believed that each accused knew of the presence of the drugs, even in the possession of others in the van, then they too were guilty of possession. In allowing the appeals the court held that the effect of the summing up was to equate knowledge with possession. However, mere knowledge of the presence of a forbidden article in the hands of a confederate was not enough,

(37) [1971] Crim.LR592

joint possession had to be established. The sort of direction which ought to have been given was to ask the jury to consider whether the drugs formed a common pool from which all had the right to draw at will, and whether there was a joint enterprise to consume drugs together because then the possession of drugs by one of them in pursuance of that common intention might well be possession on the part of all of them. The summing up was inadequate and possibly misleading. Although there was ample evidence to justify a conviction it was impossible to say with certainty that all the accused were guilty and so it was not a case in which the statutory proviso could be applied. This is to be contrasted with, for example, the Canadian case of R v Bourne (38) where it was held that to prove joint possession it is only necessary to prove that an accused knows that a companion has a forbidden drug in his custody and that it was with the accused's consent, although something more than mere indifference or negative conduct is required. In Allan v Milne (39) four accused were convicted of possessing cannabis. The material facts were that a search by warrant uncovered a quantity of cannabis and a pipe as well as a set of scales for measuring small weights. The cannabis and the pipe had been found under a kitchen sink and all the accused were aware that it was there and each had access to it. Three of the accused had

(38) (1970) 71WWR385 (British Columbia Court of Appeal)

(39) 1974 SLT (Notes) 76

lived in the flat for over a year and the fourth had been there for at least a period of weeks. The accused were or had recently been students and were on close terms. The kitchen and living room were used communally. The scales were found on the kitchen table and were not a domestic type. In the absence of evidence to the contrary the only reasonable inference from these circumstances was that all the accused had knowledge of the presence of the cannabis in the flat and of its whereabouts. The trial judge was also satisfied that all the accused had access to the cannabis and could use it as he or she chose. The accused appealed to the High Court which held, without issuing opinions, that the findings-in-fact were sufficient for conviction.

2.37 It is submitted then that this analysis of the term "possession" in terms of Section 5(1) necessarily impinges on the remainder of the section for the term is used there repeatedly but it is a reasonable presumption that Parliament intended the term to be used in the same way in each part of that section. It appears from the case law, and in the light of jurisprudential inquiries, impossible to lay down a precise meaning for the term of possession although it does seem clear that there must be evidence of custody and knowledge or custody in such circumstances that the requisite knowledge can be inferred. It is submitted

however, that this knowledge is knowledge that the thing is in such control. It is not necessary that a person should know the character of the thing; that it is a drug which is in law a controlled drug, in order to constitute possession. But this review of the case law reveals, it is submitted, the wisdom of Lord Wilberforce's remark that (40)

> "In relation to (possession) we find English law, as so often, working by description rather than by definition".

2.38 (b) Section 5(2): the unusual wording of the 1971 Act is illustrated in this section where in Sub-section(1) it is provided that it shall not be lawful for a person to have a controlled drug in his possession and in Sub-section (2) it is an offence for a person to have a controlled drug in his possession in contravention of Sub-section (1). The meaning of "possession" has been canvassed above but it should be noted that in relation to possession the offences in this section do not specify a minimum quantity of controlled drug that has to be found in an accused's possession before he can be convicted. An extensive case law in relation to this topic is considered under a separate heading infra (41).

2.39 (c) Section 5(3): one of the developments in drug law is the offence contained within Sub-section (3):

(40) Warner (1969) AC.256 at p309

(41) One recent writer has suggested as "the obvious amount" a minimum quantity of 100 milligrammes but gives no reasons for deciding on this

> "subject to Section 28 of this Act, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of Section 4(1) of this Act".

This is the offence of possession of a controlled drug with intent to supply it unlawfully to another. The offence therefore is not concerned with whether the possession is lawful or unlawful but only with the intention to supply it unlawfully. The major concern, it is submitted, of this offence is the meaning of the phrase "with intent to supply" which is the essence of the offence and the aggravating factor for the purposes of punishment. In R v Harris (42) the Court of Appeal held that a woman did not supply heroin to a man when she injected him with his own heroin but Lord Parker did say (43) obiter that it would be a supply within the meaning of the 1965 Act if she injected him with her heroin but the circumstances of the case were plainly unusual. In R v King (44) the accused gave evidence in a trial on an offence of contravening this section to the effect that it was his habit, if he was visited by friends who also smoked cannabis, to make a "reefer cigarette from his own supply, to smoke some of it and then pass it

(42) [1968] 2AIIER49

(43) ibid at p51

(44) [1978] Crim.LR228; discussed infra at para 3.20

on to his friends. The latter would have a puff of it and then return the cigarette to the accused and the process would be repeated. Expert evidence was given to the effect that this practice was routine when two or more persons smoked cannabis together. Counsel was invited to address the court as to whether the passing round of such a cigarette could be supply within the meaning of the Act. During the course of the argument the question arose as to whether an intent to supply was a real or constructive intent: The presiding judge held firstly that Section 5(3) required a real intent to supply, a willingness to do what is referred to, and that there must be a real likelihood that this will be done; at least in the application of the provision in England and Wales, and secondly, that "supply" in Section 5(3) must be given its ordinary everyday meaning following Holmes v Chief Constable of Merseyside Police (45) and that it appears to mean the passing of possession from one person to another, following the dicta of Lord Parker CJ in R v Mills (46). Where, as here, a person passes round a cigarette among several people in circumstances where some or all of them contemplate only taking a puff and passing it on, that does not constitute supplying the material in the cigarette as it exists. It is only a supply if at the beginning the accused has the material in his possession and at the end it has

(45) [1976] Crim.LR125; discussed infra at para 3.20

(46) [1968] IQB522

come into the possession of another in the sense that the other can do with it as he wishes. The control over a cigarette exercised by an individual within a circle of smokers as described is not such a degree of control as to make it a "supply" by the accused within the meaning of Section 5(3). It is submitted then that the parting of possession is the core of supplying drugs to another. The mischief that Parliament is aiming atwith this provision is the circulation of drugs. It may well be that financial gain is a compelling factor in the supplying of drugs but that is not a requirement of this section; although evidence of such transactions accompanying the apparent passing of possession may give rise to an inference in the absence of any explanation. In an Australian case Falconer v Redersen (47) Anderson J. said in a trial for trafficking in Indian hemp:

> "I do not think it relevant in order to constitute trafficking in a drug that a person so accused acted without reward."

But in R v Moore (48) the accused was charged with possession of cannabis resin with intent to supply or, alternatively, with offering to supply, in terms of Section 4(3)(a), in circumstances where he had persuaded two girls who had never smoked cannabis before to leave a public house with him and "go for a smoke". The accused was arrested outside

(47) [1974] VR 185 at p188

(48) [1979] Crim.LR789

the public house as he was rolling a reefer which he admitted he intended smoking with two girls. The resin amounted to 12.95 grammes. At the close of the prosecution case the defence submitted that on the authority of R v King supra the accused could not be convicted and that the case cited was for the proposition that there was here nothing more than an offer to supply "smoke" rather than the material in the cigarette. In short that the control of the cigarette that Moore intended to pass to the girls was not sufficient to make it "supply" within the meaning of the Act. The trial judge held that firstly "supply" should not be given too narrow a definition and in this case there was an offer to supply and secondly, declining to follow the decision in R v King supra, there was a case to answer on both counts. This resulted in Moore changing his plea to guilty to offering a controlled drug with intent to supply. Clearly, these decisions are contradictory and as both are Crown Court cases the matter requires settlement elsewhere. If the mischief aimed at is the circulation of drugs then, it is submitted, that passing of a cigarette to another, irrespective of purpose, is "supply" within the meaning of the Act. The fact that a person receiving a cigarette, as here, only retains it for a few seconds while taking a puff amounts only to a difference in degree rather than in principle. It is ventured then when the conflict

comes to be resolved the decision in R v Moore supra will be preferred.

2.40 It appears on the authorities cited that the passing of possession is a strong determining factor in assessing whether there has been an intention to supply, although whether this is conclusive is not decided. It seems equally uncertain as to whether the fact that such passing of possession is temporary is also material. The fact that the United Kingdom legislation has left the offence of supplying generally undefined has been described as (49)

> "allowing the courts some room to manoevre in seeking to find and apply just and humane solutions to difficult individual cases."

In other jurisdictions the solution has been to create an offence of "trafficking in" a drug and that such offence is to be presumed where the quantity of drug found in the possession of the accused exceeds amounts determined by the legislature in the relevant statutes; such an offence is regarded as being of greater severity than possession only (50).

(49) R Brown "Supplying" Drugs in England and Australia 4 Crim.LR 131

(50) For example, in Ong An Chuan v Public Prosecutor [1981] AC648, a Singapore appeal to the Privy Council, convictions for trafficking were upheld and the accused hanged. For Hong Kong: see Faulkner and Field at p51

2.41 (d) Section 5(4): this Sub-section provides a defence in relation to the offence of possession.

> "In any proceedings for an offence under Sub-section (2) above in which it is proved that the accused had a controlled drug in his possession, it shall be a defence for him to prove -
>
> (a) that, knowing or suspecting it to be a controlled drug he took possession of it for the purpose of preventing another from committing or continuing to commit an offence in connection with that drug and that as soon as possible after taking possession of it he took all such steps as were reasonably open to him to destroy the drug or to deliver it into the custody of a person lawfully entitled to take custody of it; or
>
> (b) that, knowing or suspecting it to be a controlled drug he took possession of it for the purpose of delivering it into the custody of a person lawfully entitled to take custody of it and that as soon as possible after taking possession of it he took all such steps as were reasonably open to him to deliver it into custody of such a person."

These defences are additional to the defences in Section 28. The onus of proving one of these defences is placed on the accused and in order to succeed he must prove the matter on balance of probabilities: R v Carr-Briant (51). The section provides that once the prosecution have proved that the accused "had a controlled drug in his possession" the defences operate. As the defences relate exclusively to unlawful possession in Section 5(2) it is submitted that the prosecution must prove such unlawful possession. A close reading of the sub-sections make the defences self-explanatory but it should be noted that there are limits, in particular that any such action is "for the purpose of delivering it" and "as soon as possible" after taking possession. In Meider v Rattee (52) the accused took possession of an ampoule of methadene from a registered addict who was then lawfully in possession of the drug. This was done on a Friday. The accused's purpose was to help the addict to cut his intake and to return the ampoule to him on Monday if it was required. The accused still had the ampoule when seen by police officers on the Monday morning. She was charged with unlawful possession of a controlled drug and at her trial it was argued that she came within the terms of Section 5(4)(6) as it was not

(51) [1943] KB607

(52) [1980] CLY 530

"reasonably open to her" to deliver the ampoule to anyone other than the addict. She was convicted but conditionally discharged. On appeal by case stated it was held that assuming, though this was doubted, that the accused's "purpose" within the Sub-section was to "deliver" it to the addict rather than keep it for him, it could not possibly be said that delivery to an authorised person was not reasonably open to the accused between Friday and Monday. The words "such a person" in the Sub-section meant delivering to any authorised person not the addict only.

2.42 (e) Section 5(5): this Sub-section provides that the defence in Sub-section (4) applies with modification to an attempt, in terms of Section 19 of the 1971 Act, to possess unlawfully a controlled drug. This defence is similar to that in terms of Section 5(4) and on the same authority on balance of probabilities. The defence is that if the accused is proved to have attempted to get unlawful possession of a controlled drug he has a defence if he proves that (a) knowing or suspecting it to be a controlled drug, he attempted to take possession of it for the purpose of preventing another from committing or continuing to commit an offence in connection with that drug; or (b) knowing or suspecting it to be a controlled drug, he attempted to take possession of it for the purposes of delivering it into the custody of a person lawfully entitled to it.

2.43 (f) Section 5(6): this Sub-section preserves the accused's right to rely on a defence in terms of Section 28 or a general defence in law, such as insanity or duress.

2.44 The punishment for an offence under Section 5 is set out below: (53)

	Class A	Class B	Class C
Section 5(2)			
a. Summary	12 months or £400 or both	3 months or £500 or both (54)	3 months or £200 or both (55)
b. Indict:ment	7 years or a fine or both	5 years or a fine or both	2 years or a fine or both.
Section 5(3)			
a. Summary	12 months or £400 or both	12 months or £400 or both	3 months or £500 or both (56)
b. Indict:ment	14 years or a fine or both	14 years or a fine or both	5 years or a fine or both.

(53) in terms of Section 25 and Schedule 4 of the 1971 Act as amended.

(54) words substituted by 1977 Act Schd. 5 para 1(1)(c)(i) and 1975 Act Schd. 7B para 1(1)(c)(i)

(55) words substituted by 1977 Act Schd. 5 para 1(1)(c)(ii) and 1975 Act Schd. 7B para 1(1)(c)(ii)

(56) words substituted by 1977 Act Schd. 5 para 1(1)(b) and 1975 Act Schd. 7B para 1(1)(b)

Part Two: Evidential Problems

2.45 It is essential in any prosecution for unlawful possession of a controlled drug for the Crown to prove beyond reasonable doubt that the substance found in the possession of the accused is a controlled drug in terms of the Act. Generally, the prosecution send the substance to forensic scientists for analysis and thereafter call them as witnesses to speak to the facts. But in the context of possession certain difficulties have arisen concerning proof of the nature of the substance.

2.46 In Bird v Adams (1) the accused was arrested for having in his possession LSD and at the police station he was cautioned and he admitted the possession, and also supplying to others. He was charged with unlawful possession and thereafter went to trial. The prosecution evidence included that of the police officer to whom the admission was made and at the close of the prosecution case the defence submitted that there was no case to answer on the ground that there was no proof that the accused had been in possession of a prohibited drug for there had been no analysis and the accused was incompetent to say what the substance was that he possessed. The justices ruled that the prosecution

(1) [1972] Crim.LR 174

had proved the nature of the substance and, the accused not giving evidence, convicted him. He appealed by case stated to the Divisional Court on the question whether the evidence offered on behalf of the prosecution was sufficient to prove that the substance in the accused's possession was in fact a substance in the Act. In dismissing the appeal, the court held that there were many instances where an admission made by an accused on a matter of law in respect of which he was not an expert was really no admission at all and there were cases where an admission of a fact was valueless because the circumstances were such that an accused could not possibly have the necessary knowledge, but here the accused admitted that he had in his possession a dangerous drug and had been peddling it. The accused had certainly sufficient knowledge of the circumstances of his conduct to make his admissions at least prima facie evidence of its truth which was all that was required at the stage in the proceedings when the submission of no case was made and, accordingly, the justices had correctly ruled that there was a case to answer. On a close reading of the report of the case there appears to be no reasoning as to why an admission such as Bird made should be sufficient: no principles were laid down that established why it was that a person charged with a contravention of drug legislation should have

"sufficient knowledge of the circumstances of his conduct" to render the likelihood of the truth being greater in what he said. In the notes to this report in the Criminal Law Review the learned commentator said (2)

> "The only circumstance referred to, however, appears to be the fact that the accused had been peddling the drug. It does not appear in what respect, if any, the act of peddling added to his personal knowledge of that with which he was dealing. In disposing of it to others as LSD he may have been, and probably was, relying entirely on what he had been told by his own supplier."

The activity of dealing in drugs for gain is notoriously lacking in trust and a spirit of goodwill and in many transactions, it is submitted, adulterated goods are frequently passed off as more pure or of a higher quality. In the court's enthusiasm to refuse the appeal, no doubt for policy reasons, an authority was established that, to say the least, was unsatisfactory. In Mieras v Rees (3) the accused was charged with offences of unlawfully supplying a substance believing it to be a controlled drug, namely STP, contrary to Section 19 and 4(3) of the 1971 Act. The accused admitted that on all three occasions he supplied the substance

(2) ibid at p175, and see the same notes for the case law for the civil aspects of similar admissions

(3) [1975] Crim.LR224

in the belief that it was STP or a derivative, but said that he had subsequently learned that the substance had no connection with STP. The prosecution were unable, for reasons not disclosed in the report, to prove that the substance was the prescribed drug but, relying on the accused's belief at the relevant times, the justices convicted him. The accused appealed by way of case stated to the Divisional Court. In allowing the appeal the court held that the prosecutor had failed to discharge the burden of showing that the substance supplied was a prescribed (sic) drug; that, in the circumstances, there was no actus reus and, therefore, notwithstanding the presence of mens rea it was impossible to establish attempt (4). There appeared at this point to be two contradictory decisions: in Bird v Adams supra the Divisional Court held that the accused's admission that a substance was a controlled drug amounted to at least prima facie evidence because he had "sufficient knowledge of the circumstances of his conduct" whereas in Mieras v Rees supra the same court held that the prosecution had failed to establish that the substance supplied was a controlled drug and the accused's belief that the substance was a particular controlled drug was not regarded as sufficient evidence. In R v Wells (5) the police

(4) the authority cited was Haughton v Smith [1974] 2WLR1

(5) [1976] Crim.LR518

made inquiries into drug offences and the accused told an officer that she had consumed cannabis and amphetamine sulphate and she was indicted for, and pleaded guilty to, possessing those drugs. She then sought to withdraw her plea, relying on Mieras v Rees supra, but the judge refused leave. In the Court of Appeal the court held, in dismissing the appeal, that the submission that the prosecution must identify the drugs by scientific evidence before a court could accept a plea of guilty was wrong. In the last analysis all evidence as to the nature of the substance was an expression of opinion, though scientists might be able to express more reliable opinions than others. There was no suggestion and no evidence to suggest that the accused's belief as to the nature of the substance was mistaken. Mieras v Rees was a plea of not guilty and the circumstances required proof of the nature of the substance. Here, the Criminal Division appeared to be following Bird v Adams supra as the relevant authority. To distinguish Mieras v Rees on the ground that there was a plea of not guilty meant that where an accused went to trial in England the unsupported admission was insufficient and further evidence as to the nature of the substance was required and yet with a plea of guilty the court was prepared to accept such unsupported

admissions (6). In Lang v Evans (7) the accused admitted supplying cannabis and cannabis leaves to another and in the circumstances the Crown Court held obiter that, considering the cases cited supra, they were entitled to conclude that a person who was supplying such a plant would know its true identity. However, in view of the then technical problems concerning the definition of cannabis leaves the court was not prepared to allow the prosecution to found on the unsupported admissions. In R v Chatwood (8) the accused and three others who had previously been involved in the abuse of drugs made oral and written admissions to the police that they had injected themselves with various class A controlled drugs including heroin. Each was charged with Section 5 offences to which they tendered pleas of not guilty. The prosecution evidence from a forensic scientist was that he could not tell whether a substance was heroin without analysing it and from a police officer was that, while he might have a good suspicion about a substance being heroin he could not be certain. At the close of the prosecution case the defence submitted that there was no case to answer citing

(6) following the report of R v Wells, a letter was published in the same journal confirming that the Courts-Martial Appeal Court had refused leave to appeal in a case involving unsupported admissions: [1977] Crim.LR62 but see footnote 9 infra

(7) [1977] Crim.LR286

(8) [1980] Crim.LR46

as authority Haughton v Smith supra; Mieras v Rees supra and Wells supra. The submission was rejected and only one accused gave evidence, to the effect that the substance with which he had injected himself was flour. The accused were convicted and appealed. In dismissing the appeals the court held that Haughton v Smith supra was not binding as it was essentially concerned with the law of attempts and Mieras v Rees supra was similarly concerned with attempts (9). Bird v Adams

(9) The report for R v Chatwood points out that the Criminal Law Review report for Mieras v Rees was inaccurate. The report said that the accused had been charged with unlawfully supplying a substance believing it to be a controlled drug when in fact the accused had been charged with attempting in terms of Section 19 of the 1971 Act to commit an offence under Section 4(3) by unlawfully supplying a substance believing it to be STP. In effect, therefore, the correct distinction between Mieras v Rees and R v Wells is not that in the former there was a plea of not guilty and in the latter there was a plea of guilty but rather in the former the offence was an attempt and in the latter the offence was a completed one.

supra was concerned with the question whether an admission of possessing a controlled drug was prima facie evidence that the substance was in fact such a drug, and that case correctly stated the law. R v Wells supra proceeded entirely on the same reasoning as Bird v Adams supra. The accused's statements were sufficient to provide prima facie evidence of the substance which had been in their possession and the jury clearly disbelieved the evidence of the accused who did give evidence.

2.47 Consequently, it would appear to be the law in England and Wales that the opinion of the accused that the substance which he or she had in his or her possession is a controlled drug, is evidence of that fact: Bird v Adams supra and R v Wells supra being the authorities. The reasoning behind this principle would appear to be that as the possessor of the controlled drugs has special knowledge as to the propensities of the drug and, indeed, possession of the drugs is obtained particularly for those effects, then that ipso facto increases the weight to be given to that evidence contained in the admission. This certainly appears to be borne out in R v Chatwood supra where an essential fact appears to be that the accused had previously been involved in the abuse of drugs and were therefore expressing an opinion, an informed opinion, as to the nature of the drugs which they admitted to having in their possession.

2.48 Further, it is submitted that none of the cases cited above is binding in Scotland. Each case is concerned essentially with an unsupported admission by an accused person that he had a controlled drug in his possession at a certain time. While in Scots law the making of a confession need not itself be corroborated (10) a confession alone is insufficient. The amount of evidence needed to corroborate a confession depends on the circumstances of the case and especially on the circumstances and reliability of the confession (11). It is submitted that the courts in Scotland would require considerably more corroboration to such a confession than the quasi-expert status given to the accused in England.

2.49 It would appear to be that in England and Wales in order to secure a conviction for possession of a controlled drug it is not necessary that the actual substance should be produced, nor that it should be subjected to analysis and found to be the substance it is alleged to be. It would appear from the authorities cited that there is sufficient evidence for a conviction where the Court feels it can safely rely on an admission that the substance in question

(10) Mills v H M Advocate 1935JC77; Innes v H M Advocate 1955 SLT (Notes) 69

(11) Sinclair v Clark 1962 JC57

is the controlled drug narrated in the summons (12). It would also appear that in Scotland identical unsupported admissions would be insufficient and that corroboration would be required: corroboration which essentially varies according to the facts and circumstances of each case. The law relating to the misuse of drugs may therefore be the same for each jurisdiction but, it is submitted, its application varies in accordance with the varying requirements in the law of evidence.

(12) The problem of identification has been considered in other jurisdictions: for example in R v Moshesha (1974-75) LLR428 the High Court of Lesotho held that, as dagga (cannabis) is a "notorious plant" in that country, the unchallenged evidence of a police officer that the substance in question was dagga was sufficient to establish prima facie proof of the identity of that substance.

Part Three: Traces or Minute Quantities.

2.50 As the general law of possession of controlled drugs has developed through the reported cases since the passing of the 1971 Act so certain themes of a subsidiary but nevertheless important nature have taken root and grown. One such theme has sometimes been that of de minimis non curat lex (1) which appears to have had an earlier planting in certain Commonwealth jurisdictions than those in the United Kingdom (2). The original lacuna in the statutes that has given rise to this matter is that while sections provide that possession of controlled drugs is to be an offence, no indication is given in the statutes of the minimum quantity of a controlled drug that it is an offence to possess. Ordinarily, this is of little or no concern but in certain cases an accused is proved to be in possession of minute quantities and this has raised complex issues. The case law has, in its development, produced certain tests to be applied in common circumstances but also results have been obtained by the judges applying the widely used rules of statutory interpretation. These results it must be

(1) "the law does not concern itself with trifles" Brown's Legal Maxim 10th ed. p88: some cases refer to "traces" rather than de minimis.

(2) generally see Macfarlane chp.21 and by the same author Narcotics Prosecution and the Defence of De Minimis Non Curat Lex (1974-75) 17 Crim.LQ98 and Faulkner and Field at p172

said vary with the circumstances of the particular cases and, now, with the jurisdiction for differences have appeared in the law as applied in Scotland and England and Wales. Some cases are concerned with the earlier legislation and some with the 1971 Act but it will be of some assistance to have the terms of the amount offence rehearsed; Section 5(1) and (2) of the 1971 Act provide that it shall not be lawful for a person to have a controlled drug in his possession and Section 2 and Schedule 2 of the Act define controlled drugs for the purposes of the Act. Cannabis and cannabis resin are included in Part II of the 2nd Schedule.

2.51 (a) cases prior to the 1971 Act. In Hambleton v Callinan (3) the accused were arrested by the police on suspicion of being in unlawful possession of drugs. They were asked for and gave to the police some samples of urine which were placed in bottles and sealed and labelled. Subsequent analysis revealed traces of amphetamine powder in Callinan's urine and he was charged with possession of amphetamine powder having been found in his urine sample: contrary to Section 1(1) of the 1964 Act. After that the justices found that the accused was not in possession of amphetamine. The prosecutor appealed and argued that a man could be in possession of a prohibited substance within the meaning of the offence charged if he had traces of

(3) [1968] 2AIIER943

it in his urine, in his intestines or any other part of his body in which it can be found. Lord Parker CJ agreed with the justices and held that where, as here, something is literally consumed and changed in character, it was impossible to say that a man was in possession of it within the meaning of the Act. This, it is submitted, is the ratio decidendi of the case but his Lordship continued and said, obiter, that he could see (4)

> "no reason why in another case the time when the possession is said to have taken place should not be a time prior to the consumption because as it seems to me the traces of, in this case, amphetamine powder in the urine is at any rate prima facie evidence - which is all the prosecution need - that the man concerned must have had it in his possession, if only in his hand prior to raising his hand to his mouth and consuming it. Accordingly, it seems to me that the possible difficulty that the decision in this case raises for the police does not arise in practice because the date of his possession can always be laid prior to consumption."

The problem of how minute a quantity of controlled drug may be and yet still establish possession of a controlled or dangerous drug first seems to have arisen in R v Worsell (5) where police officers

(4) ibid at p945

(5) [1969] 2AIER1183; [1976] 1WLR111; [1969] Crim.LR140

stopped a motor car in which the accused and two others were travelling, one of them owning the car. A search revealed a hypodermic syringe and a small tube under the dash-board of the motor car. There is no doubt that the tube may have contained at one time some heroin but the accused was convicted of possession of a controlled drug although the quantity consisted only of a few small droplets which were only discernible microscopically and were impossible to measure or pour out. The tube appeared empty and there was nothing in it that was visible to the human eye. The accused appealed and the Court of Appeal allowed the appeal. In giving the judgment of the court Salmon LJ (as he then was) indicated that the case had been argued on the basis that the accused was in possession of the controlled drug in the tube at the moment of his arrest. That being so, his Lordship held that (6)

> "before the offence can be committed it is necessary to show that the accused is in truth in possession of a drug. This court has come to the clear conclusion that inasmuch as this tube was in reality empty (that is, the droplets which were in it were invisible to the human eye and could only be discerned under a microscope and could not be measured or poured out) it is impossible to hold that there was any evidence

(6) ibid at p1184

> that this tube contained a drug. Whatever it contained, obviously it could not be used and could not be sold. There was nothing in reality in the tube."

The penultimate sentence proved to be of considerable importance in subsequent development. His Lordship did say that if the indictment had libelled an earlier date then there would have been in the circumstances of this particular case grounds for a conviction. The importance of the case is that it appears to be the authority for the general proposition that there could be no offence unless the quantity of the drug was such that it could be used in some way or sold. In R v Graham (7) the accused was convicted of possessing cannabis resin found in scrapings from the pockets of his clothes. The quantity of the drug was very small but capable of being weighed and measured. His defence was that he did not know that the cannabis resin was in his pockets and was not truly in possession of it. He said that he had been convicted of possessing cannabis in 1967 and the resin might have been left over from then or left by friends who had used his clothes in the meantime. He appealed on the grounds that the quantities were so small as to amount to nothing (8). The Court of Appeal dismissed the accused's appeal holding that as the quantities could be weighed and measured it could not be said

(7) [1969] 2AIIER1181; [1969] Crim.LR193; 113 Sol. J.87

(8) relying on R v Worsell supra

that there was no cannabis resin in his possession. As Fenton Atkinson LJ said (9):

> "on the evidence of the scientific officers that what was found - could in fact be measurable and weighed in milligrammes, we do not think that as a matter of law it could be said that there was in truth no cannabis in the appellant's possession."

It could be seen therefore that the Court of Appeal was laying down limits for prosecution for possession of minute quantities of dangerous drugs but as there was no explicit numerical indicators it was all essentially a question of degree. The matter was considered again in R v Frederick (10) when the accused appealed against conviction of having in his possession approximately 307 grains of cannabis resin. The evidence was that the 307 grains were found in one place in the accused's flat and elsewhere two pipes and a tobacco pipe were found and discovered to have traces of cannabis resin. There was no evidence that these traces were so small as to amount to virtually nothing. The prosecution based their case on possession by the accused of the cannabis resin found and totalling 307 grains, on possession of the traces of cannabis resin found in the pipes and pouch, and on inferences which could be drawn from those facts that the accused

(9) R v Graham ibid at p1182

(10) [1969] 3AIER804; (1969) 53Cr.App.R455

had been in possession of other cannabis resin. The jury returned a general verdict of guilty. The accused appealed and it was then held that he had been correctly convicted and the matter dismissed. Edmund Davies LJ said in judgment (11) that the Crown had had an extremely strong case in relation to the 307 grains and could rely on the presence of the traces in the pipes and the pouch to support that case. The prosecution, he continued, had no need to seek to establish as an entirely separate ground on which a conviction could be based the actual presence of the drug in the pipe and pouch at the time when the police took possession of those articles. However, the charge in the indictment was, he held, wide enough to cover the case which the Crown sought to establish. Counsel for the accused had submitted that as only traces of cannabis and cannabis resin had been found in the pipe and the pouch possession of such a quantity could not in itself constitute the offence charged and he relied on R v Worsell supra. This case was distinguished by his Lordship on the grounds that it turned on "very special facts", the amended charge there being that the accused was in possession of "a few droplets of diamorphine" and the dicta that there was nothing in reality in the tube was cited (12). But R v Graham supra was contrasted by his Lordship with

(11) ibid at p807

(12) R v Worsell supra per Salmon LJ at p1184

R v Worsell supra and he pointed out (13) that in the former the scientific officer had been able to measure and weigh the drugs in question so that it could not be said as a matter of law that there was in truth no cannabis in Graham's possession. In the instant case his Lordship noted that there was no investigation of the scientific evidence with a view to establishing that what were described as "traces" of cannabis and cannabis resin found in the pouch and two pipes in reality amounted to nothing. R v Frederick supra then is an authority in the development of the test of measurability of drugs in a prosecution. The question of minuteness arose again in R v Marriott (14) where the accused was found to have in his bedroom a penknife which on forensic analysis was found to have a minute quantity of cannabis resin attached to the tip of its blade and he was charged with being in possession of a quantity of cannabis resin contrary to the 1965 Act. It was contended on his behalf that to be in possession of cannabis resin for the purposes of the 1965 Act the accused had to have knowledge of the cannabis resin on the penknife at the time he was in possession of the knife. The assistant recorder rejected the contention and directed the jury that the prosecution did not have to establish any knowledge on the part of the accused but only that

(13) R v Graham supra at p806

(14) [1971] 1WLR189; 1971 1AIIER595

he was in possession of cannabis resin without any licence or authority. The accused was convicted. On appeal against this, on the ground that the trial judge had misdirected the jury, it was held, allowing the appeal that the prosecution had to prove not only that the accused had unauthorised possession of cannabis resin but also that he had reason to know at least that there was some foreign substance on the penknife blade. In Bocking v Roberts (15) the accused had been found in possession of a hookah pipe which had at some time been used for the smoking of cannabis or cannabis resin and chemical tests performed on the bowl of the pipe showed that traces of cannabis resin were present in the bowl on the date in question. The amount of cannabis resin in the bowl could not be weighed but was known to be at least 20 microgrammes, this being the minimum amount of cannabis resin that could be chemically detected. The pipe contained traces of a burnt substance which presumably could be smoked again. The accused had used the pipe for smoking cannabis resin some time before his arrest. The accused was convicted as the justices were of the opinion that there was sufficient cannabis resin in the pipe to be measured as 20 microgrammes. On appeal the question for the opinion of the court was whether the possession of an amount of cannabis resin which could not be

(15) [1973] 3WLR465; [1973] 3AIIER962

weighed but could be chemically detected and measured as 20 microgrammes at the very least could amount to possession contrary to the 1965 Act. In giving judgment Lord Widgery CJ said (16)

> "it is quite clear that when dealing with a charge of possessing a dangerous drug without authority, the ordinary maxim of de minimis is not to be applied, in other words if it is clearly established that the accused had a dangerous drug in his possession without authority, it is no answer for him to say: "Oh, but the quantity of the drug which I possessed was so small that the law should take no account of it." The doctrine of de minimis as such in my judgment does not apply but on the other hand, since the offence is possessing a dangerous drug, it is quite clear that the prosecution have to prove that there was some of the drug in the possession of the accused to justify the charge, and the distinction which I think has to be drawn in cases of this kind is whether the quantity of the drug was enough to justify the conclusion that he was possessed of a quantity of the drug or whether on the other hand the traces were so slight that they really indicated no more than at some previous time he had been in possession of the drug. It seems to me that

(16) ibid at p964

> that is the distinction that has to be drawn: although its application to individual cases is by no means easy."

His Lordship then proceeded to consider the reported cases and he concluded that the distinction between R v Worsell supra and R v Graham supra was that in the former the quantity was insufficient to be measured at all whereas in the latter the quantity of cannabis found was capable of measurement, although it consisted of no more than traces of cannabis in the scrapings from three of the accused's pockets (17). His Lordship concluded that:

> "It is, I think, quite clear, as I said earlier in this judgment, that in these cases the tribunal of fact has to decide whether the quantity or traces spoken to by the expert witness is enough to justify the conclusion that the accused was in possession of a quantity of the drug, rather than it should amount to no more than an indication that he had on some other occasion had the drug in his pocket. I do not profess to suppose that it is always or offers an easy distinction to draw, and I do not think that courts trying these cases in future will be assisted by any attempt on our part to lay down any sort of mathematical formula to

(17) ibid at p965

> determine what is or what is not enough in terms of quantity to justify a conviction. I think that the distinction to which I have referred must be in the mind of the tribunal of fact, that they should approach such questions not leaving their common sense at home and bearing in mind that there is a heavy onus on the prosecution in all criminal cases to prove beyond all reasonable doubt that the offence has been committed. I think that if tribunals of fact approach this question in that way, we shall get as near to a satisfactory and consistent series of answers as by any other method."

Applying these principles his Lordship held that as the quantity of cannabis could not be measured in the sense that no precise figures could be given for its weight and size, yet it was measur: :able in the sense that it must have been at least 20 microgrammes and in the circumstances the appeal would be dismissed. The case is also noted for the dissenting judgment of MacKenna J. which, it is submitted, reveals a preference for a far more physical or literal test of measurability than that suggested by Lord Widgery. The dissenting judgment holds that the "traces" are proof that the accused had once been in possession of a drug but there was not enough to prove that he was still

in possession. It continued (18):

> "If I were asked where the line should be drawn, I would be tempted to answer that it must be drawn substantially above 20 microgrammes."

And later:

> "The figure .. was ascertained by a chemical test: if there had not been at least 20 microgrammes present the result of the test would have been different. There was no putting of the cannabis on a weighing scale or measuring it by any instrument."

MacKenna J. was for acquittal: he believed the legislature had not intended that a man be convicted for possessing a forbidden drug simply if a chemical test gave a positive reaction. Bean J. agreed with the Lord Chief Justice and, accordingly, the appeal was dismissed. The importance of Bocking v Roberts, it is submitted, lies in the dicta of Lord Widgery and his clear rejection of the de minimis rule: the inference being that dangerous drugs are so dangerous or at least so important that the courts must consider every case involving them. But, to avoid over zealous prosecutions for minute amounts the test was to be one of measurability, even if only that an approximation was made. In deciding the case

(18) ibid at p966

in this way Lord Widgery was clearly applying the test of a weighable and measurable quantity to be found in the authority of R v Graham supra. Further, it has to be said that an alternative test of usability expounded by Salmon LJ in R v Worsell supra appears to be in direct conflict; or, at least, in 1973 the courts were faced with the problem of having authorities for two different tests of possession of minute quantities of drugs (19)

2.52 The interim conclusion for the cases on the legislation prior to the 1971 Act is that they had produced two different tests of possession of minute quantities of drugs. Although the preponderence of cases was for the test of measurability nevertheless the authority was strong for the test of usability. Whatever Parliament's intention had in fact been prior to 1971, when the 1971 Act came into force the new legislation contained no provisions which appeared to take cognisance of the problems that had developed.

(19) further on this point see D M Davies Possession of Drugs in Minute Quantities 138JPN58 where the author discusses the difficulties in reconciling R v Worsell and Bocking v Roberts and see also A R L Ansell "Traces" Revisited [1971] 123NLJ884

2.53 (b) cases subsequent to the 1971 Act. In R v Colyer (20) the accused was in possession of a pipe which, although it had no bowl, could be used either to smoke cannabis within it or to hold a reefer cigarette. No drug was visible to a forensic scientist but he carried out certain tests which indicated the presence of at least 2 microgrammes of cannabis at the time of the accused's arrest. One microgramme is a millionth of a gramme and 20 microgrammes is roughly equivalent to a millionth of an ounce. It was held that Bocking v Roberts supra was not binding on the court (21) and on the evidence heard in this case the reasoning in the dissenting judgment of MacKenna J. was to be preferred. To say that the amount of cannabis found in this case by the chemical test was measurable was stretching the meaning of the word unduly. Further, considering the minute amount of cannabis found in this case by the chemical test and the elaborate method used by the scientists to establish its presence, it could not be said that the prosecution had produced a prima facie case that the accused knew he had control of the drug. Accordingly, there was no case

(20) (1974) Crim.LR243

(21) on the grounds that the Crown Court is a branch of the Supreme Court having equal status with the High Court, Accordingly, a decision of the Divisional Court of the Queen's Bench Division is not binding upon the Crown Court, but is only of persuasive authority.

to answer. It is submitted then that if an accused claims that he was quite unaware of the drug forming the basis of the prosecution then he is denying that he had the necessary mens rea for the particular offence of possession and the onus of proof is on the prosecution to show beyond reasonable doubt that the accused did know of its presence: R v Marriott supra. It would seem then, following R v Colyer supra, that a highly complicated chemical test revealing only traces or evidence of past presence of a drug is only very inadequate evidence and raises no inference of knowledge. The theme of minute quantity arose again in R v Hierowski (22) where the accused had his van searched by police officers and they found three reefer ends which he admitted were his. They were lying on the floor and two of them contained not less than 20 microgrammes of resin and one of them 1 milligramme of resin. Evidence was led by the prosecution that the 20 microgrammes of cannabis resin was invisible and only showed up on chemical analysis and also that any part of the cannabis plant (including the leaves) when burnt would, by a process of distillation, leave invisible traces of resin. It was held that the Crown had only raised the reasonable suspicion that on a previous occasion the accused had been smoking cannabis in his van although this was not the offence charged.

(22) [1978] Crim.LR563

Further, the Crown had not excluded the possibility that the accused had smoked a cannabis leaf and this was not then illegal. In addition, the prosecution had relied on the traces of cannabis resin in the cigarette as allowing knowledge to be inferred. The Crown argued that in the circumstances the accused must have known of the presence of cannabis resin. His Honour held that it was customary for users of reefers to retain them if they thought they still contained cannabis and it followed that the accused would not have left them in the back of the van if he had thought that there was still cannabis in them. Finally, applying the earlier authorities to convict the accused in the circumstances would be too artificial altogether and, therefore, there was no case to answer. Thus, in both R v Colyer supra and R v Hierowski supra the trial judge had refused to be bound by the authority of Bocking v Roberts supra which created some difficulties because as was said later in 1978 (23):

> "judges and indeed prosecuting authorities have relied on Bocking v Roberts as authority for the proposition that a quantity as minute as 20 microgrammes is sufficient to sustain a charge of being in unlawful possession of a controlled drug."

(23) R v Carver [1978] 3AIIER60 per Michael Davies J. at p62

Nevertheless, the saga continued with R v Bayliss and Oliver (24) in which the accused were indicted on a number of counts relating to possession and supplying cannabis resin. At the close of the prosecution case the defence submitted that the counts of possession of 0.094 grammes of cannabis resin should be withdrawn from the jury. The evidence was that two pieces of resin amounting each to 0.011 and 0.083 grammes had been found separately in the communal living room of the house where the two accused and one other lived. The resin was not of the same type nor packaged in the same way. The court held, applying R v Worsell supra and upholding the defence submission, that there was no evidence that the amounts were usable nor that they amounted to a usable quantity. Further, the indictment was bad for duplicity as it was not permissable to add quantities together as in the present circumstances. The increasingly complicated and conflicting authorities were considered further in R v Carver supra where the accused was found to have possession of a roach end and a wooden box containing traces of vegetable matter. A forensic scientist gave evidence for the prosecution and said that a test produced a reaction indicating the presence of not less than 20 microgrammes of cannabis resin in each roach end and from the hinges and

(24) [1978] Crim.LR361

cracks in the lid of the wooden box he recovered 2 milligrammes of cannabis resin by means of scraping with a scalpel. Neither amounts could be used in any way which the drug legislation intended to prohibit. The jury convicted the accused who appealed to the Court of Appeal against conviction on three grounds: first, the quantities of drug were so minute that common sense would equate them with nothing. The Court allowed the appeal on this ground in respect of the 20 microgrammes in the roach end. As Michael Davies J. said (25):

> "applying the common sense test, probably the 20 microgrammes ought to be regarded as amounting to nothing. Bocking v Roberts ought no longer to be relied on in support of a contrary view."

The appeal was not allowed in relation to the amount of 2 milligrammes as the forensic scientist's evidence was that this was about the size of 2 pinheads which the common sense test could not equate with nothing. Secondly, since the mischief which the statute is intended to strike at is the use of dangerous drugs, possession of a quantity too small to be used ought to be ignored. This ground of appeal in the submission was accepted by the court (26):

(25) R v Carver ibid at p62

(26) ibid at p63

> "So far as the 2 milligrammes are concerned, and a fortiori the 20 microgrammes, on the evidence (of the forensic scientist) these quantities were too small to be usable for any purpose which the statute was intended to prohibit."

The effect ot this, it is submitted, is to tip the judicial balance in favour of the "usable" test at the expense of the test of "measurability". To obtain a conviction the prosecution must prove that the accused had possession of a controlled drug that is usable in some way which the 1971 Act sought to prohibit. The fact that the relevant controlled drug can be measured is, legally, irrelevant; the test, on the authority of this case, is whether the quantity of controlled drug can be used. The third ground of appeal was that an accused ought not in law to be held to be in possession of a drug unless he has knowledge of the material alleged to be possessed and an intention to exercise control over it. Their Lordships, having allowed the appeal on the earlier points, found it unnecessary to deal with this submission and the "difficult problems" which may arise in connection with the meaning of "possession" and its application to the facts of a particular case. This whole decision was welcomed by at least one commentator (27):

(27) C. Manchester "Dangerous Drugs and De Minimis" (1979) 95LQR31 at p33 and A N Khan described the decision in R v Carver as "logical and reasonable" see Cannabis De Minimis 134JPN102

> "Deciding whether a quantity is "measurable" is a difficult task as the divergence of judicial opinion shows, and it is hardly satisfactory to try to distinguish cases like Worsell and Graham on this ground, for is not any (author's emphasis) quantity, however small, measurable by scientific means? The correct test should be whether the quantity is usable, for after all it is the use (or rather, misuse) of drugs which is the mischief aimed at by the statute."

In R v Webb (28) the accused appeared on two charges each for being in unlawful possession of cannabis resin. The first charge related to cannabis resin amounting to 26.4 milligrammes found in various articles in the accused's room on a certain date. The articles were a plastic container (0.4 mg), a polythene bag (8 mg) and two cigarette ends (16 mg. and 2 mg). The second charge included a total of 0.6 mg of cannabis resin found in a cigarette packet in the accused's room on a later date. The prosecution called evidence that showed that if cannabis resin was used in a cigarette, fragments of cannabis resin were sprinkled over the tobacco before it was rolled. The prosecution also called evidence indicating that all these quantities of cannabis resin were visible to the naked eye and could be dislodged and removed with ordinary

(28) [1979] Crim.LR463

implements such as a penknife or tweezers and placed in a new cigarette; and that the cannabis resin in the cigarette ends could alternatively be placed in a new cigarette if the surrounding tobacco was re-used, and that although the average quantity of cannabis resin in a cigarette was 50-100 milligrammes, a whole cigarette with as little as 10 milligrammes had been found. The quantities of 0.4 milligrammes and 0.6 milligrammes were only above the size of a pin head and were at least easy to notice and handle. On a submission at the end of the prosecution case, the learned Recorder made two rulings: firstly, quite apart from the issue of possession, there was no evidence that the quantities of 0.4 milligrammes in the first charge and 0.6 milligrammes in the second charge were, in practical reality, usable in any manner which the 1971 Act was intended to prohibit and that there was no case to answer in respect of the cannabis resin of those quantities. There was, however, evidence on which the jury could decide that the larger quantities were so usable and the prosecution in order to prove that any quantity in question can in practice be used to contribute at least a part of the cannabis resin needed to make up a whole cigarette even if further cannabis resin has to be added. It is submitted that the Recorder here was applying the test of common sense based on

R v Carver supra in holding that the small amounts are in practical reality not usable. The second ruling was that the first charge did not need to be severed into one count for each quantity either on the grounds of duplicity on the face of the count or on the ground that, on the evidence more than one offence had been disclosed. In short, the circumstances of this case revealed a sufficient similarity between the quantities of the drug for them to be combined for the purpose of prosecution; something that was disapproved of in R v Bayliss and Oliver supra.

2.54 The 1971 Act is a United Kingdom statute applying equally to each jurisdiction of England and Wales, Scotland and Northern Ireland. For this reason Parliament is presumed to have intended that the law should apply equally but this has not been so. In Keane v Gallacher (29) police officers with a search warrant entered and searched the room occupied by the accused and he admitted to them that the contents of the room belonged to him. The police officers discovered on top of the sideboard a tin which contained nothing but a small quantity of resinous material. One of the police officers then gave a common law caution stating that she suspected that the resinous material was a controlled drug to which the accused replied "So what?". In a pocket of a pair of jeans lying beside the bed the police officers found a small

(29) 1980 SLT144: another appeal by the Crown was heard on the same day with a similar result;

plastic bag which contained nothing but a small quantity of a resinous substance like cannabis resin. In answer to a further caution regarding the contents of the plastic bag the accused made no reply. Analysis discovered that the resinous material found in the tin was cannabis resin and weighed 10 milligrammes and that the resinous material found in the plastic bag was cannabis resin and weighed not less than 1 milligramme. In each case the resinous material was examined both chemically and microscopically. In submission the defence solicitor argued inter alia that the Crown had failed to prove that the quantity of cannabis resin found in possession of the accused was "usable" and this was on the authority of R v Carver supra. The learned Sheriff acknowledged that while that decision was highly persuasive it was not binding but in the circumstances it would be followed. The accused was acquitted and the Crown took an appeal by way of stated case and in the High Court the Advocate Depute argued that while accepting that these must be an "amount" of the controlled drug found in the possession of the accused, that requirement had been satisfied in the instant case, since the material found was visible, measurable and weighable and had been identified as a controlled drug - cannabis resin. Accordingly, the usability test should not be applied. Counsel

for the Respondent relied on the usability test in R v Carver supra and argued that the decision should be adopted and applied in Scotland for the reasons persuading the English bench. In considering this matter, the court took the view that the answer to the problem should be found in the terms of the Act itself and it followed then that if it is established that an accused person was, without legal authority, in possession of material and that material was a controlled drug then a conviction for a contravention of Section 5(1) of the Act should follow. In the instant case the charge echoed the relevant section of the Act and no plea was taken to the relevancy of the charge. The opinion of the court was that (30):

> "The decision in R v Carver seems to entail the importation into Section 5(1) of a qualification to the term "controlled drug", namely "which is capable of being used". If that be the case, it would add an additional onus on the prosecution to prove that fact. If Parliament had intended that such a qualification should be added it would have been simpler to give express effect to it."

(30) ibid at p147

And later (31):

> "The plain wording of (Sub-section 5(1).) makes "identification in an acceptable manner" and not "capable of being used" the test, and there does not appear to us to be any absurdity in that."

The usability test appeared to the court to replace "identification" with "usable" unjustifiably and in considering the matter the existing authorities were reviewed. The opinion of the High Court was that the ratio decidendi in R v Worsell supra was that in reality there was nothing in the tube in question, and the question of use never arose. In R v Graham supra the question of use did not appear to have been raised. In Bocking v Roberts supra a conviction was sustained on certain principles laid down by Lord Widgery CJ and there the test of "usability" never arose. In the circumstances the "innovation" of the test of usability was held by the court not to be justified and, in the words of the opinion: (32)

> "The fact that the Crown failed to prove that the quantity of cannabis resin found in the Respondent's possession could be used for a purpose struck at by the Act is an irrelevant consideration."

(31) ibid at p147

(32) ibid at p147

It appears then that in Scotland, but not in the rest of the United Kingdom, the usability test has been rejected firmly and the ratio decidendi would appear to make the test one of identification in an acceptable manner. Indeed, counsel for the Respondent raised an additional point in arguing that what had been found in the possession of his client was consistent with him having previously been in the possession of a controlled drug and did not establish that he was then presently in possession of a controlled drug. The opinion of the court was that where identification of the matter found as being a controlled drug is satisfactorily established, then this point does not arise, since at the point of time of the discovery of the material the person was in possession of a controlled drug. The opinion of the High Court of Justiciary was delivered on 11th January 1980 and on 11th June 1980 the matter was raised in the House of Commons when Mr. David Steel MP asked the Solicitor General for Scotland if he was satisfied that relevant judgments by the High Court of Justiciary in Scotland and the Court of Appeal in England are compatible with the uniform application of the Misuse of Drugs Act 1971. The Solicitor General for Scotland (Mr Nicholas Fairbairn QC MP) replied saying that the recent decisions of the High Court of Justiciary

in Keane v Gallacher supra and Miln v McLeod supra expressly disproved of the test of "usable quantity" which appeared in the English case of R v Carver supra. The decisions were based on the fact that Section 5 of the Misuse of Drugs Act 1971, under which all these cases were prosecuted, contains no reference to such a test and the concept of a "usable quantity" where small quantities of controlled drugs were concerned necessitated an unjustified extension to the words of Section 5: He continued; the High Court of Justiciary took the view that the proper test to be applied was not whether a "usable quantity" existed, but whether the substance identified as a controlled drug was in the possession of the accused. In the view of the Solicitor General this is the correct test to be applied and there is no anomaly in the law, only in the application of it at present. It may be that on some future occasion the decision in R v Carver will be reconsidered in the light of the argument that prevailed in Keane v Gallacher and Miln v McLeod (33). To date (34) the matter has not been reconsidered in such a way.

2.55 In Tarpy v Rickard (35) the facts were that a police raid on the accused's flat uncovered

(33) (Parliamentary News) 1980 SLT156

(34) November 1981

(35) 1980 Crim.LR375. This report uses "cannabis" and "cannabis resin" interchangeably although they are in law separate controlled drugs; see Section 37(1) of 1971 Act

visible fragments of cannabis on various articles from which it was concluded that there was at least 12 milligrammes altogether. The accused was convicted inter alia of possession of cannabis resin by magistrates and he appealed to the Crown court where conviction was upheld. An expert called by the defence gave evidence that 100 milligrammes of cannabis resin with the average tetrahydro cannabis content would be needed to affect an average man, but that a child of two years of age would be affected by 12 milligrammes. The Crown Court held that the 1971 Act was intended to prohibit possession of a quantity of cannabis resin sufficient to affect a child. A case was stated for the opinion of the Court, where it was submitted that because the 12 milligrammes on its own would have no effect it was not a "usable" amount, and that the charge was bad for duplicity, it not being permissible for the prosecution to aggregate the four separate amounts found, to produce a total of 12 milligrammes. It was held dismissing the appeal that there was no reason why a quantity of drug should be looked at on its own to see whether it was usable. The High Court applied the dicta in Bocking v Roberts supra per Lord Widgery CJ when he said that it was for the tribunal of fact to say whether the evidence showed actual possession of a quantity of

drug rather than a mere indication of earlier possession. In R v Webb supra the presiding judge had left to the jury whether 26 milligrammes could form a usable part of an amount that would affect the user. In the instant case Ackner LJ said that with the addition of the word "significant" to "part" he would not disagree with the direction in R v Webb supra. Further, as for the point about duplicity, the court held, applying R v Bayliss and Oliver supra, that the appeal would be dismissed on that point. In R v Boyesen (36) the accused was charged with possessing 5 milligrammes of cannabis resin, that being the quantity of the drug which was found in a plastic bag. The only evidence of usability appeared from a ruling of the trial judge when he referred to a prosecution expert who had averred that even one milligramme of cannabis was a usable quantity because it could be seen, picked up, put in a pipe or cigarette, touched or manipulated. Accordingly, he overruled a submission by defence counsel that the quantity in the present case was not usable. The accused was convicted and appealed. It was held that common sense should prevail in deciding whether the quantity of cannabis resin charged was usable for the purpose of charging a contravention of Section 5, and in the instant case

(36) (1981) 72 Cr.AppR43CA

five milligrammes of cannabis resin was not such a usable quantity and, accordingly, the appeal would be allowed and the conviction quashed. In giving judgment Wien J. said: (37)

> "It seems to this Court to be offensive that the whole machinery of the law should be brought into operation to prosecute a man for allegedly possessing five milligrammes of cannabis resin. We are not concerned with any other drug. It may be that to possess a minute quantity of morphine, heroin or cocaine would be regarded differently. But this is a Class B drug viz. cannabis resin. One wonders how in common sense 5 milligrammes could be regarded as usable. Theoretically, it may be possible to add that quantity of cannabis resin to more and more again, to make what is called a "reefer"; but it is difficult to see how in common sense such a minute quantity could be regarded as usable. We do not regard it as capable of being used. Alternatively, it amounts to "nothing". We can adopt either of the alternatives mentioned in Carver's case."

And later (38) discussing the quantity of 5 milligrammes:

> "It would require exceptional circumstances to justify a prosecution in respect of such a minute quantity."

(37) ibid at p45

(38) ibid at p46

2.56 Conclusion. It appears then that certain differences have arisen in relation to prosecutions for contraventions of Section 5 of the 1971 Act for possession of controlled drugs. These differences relate to the views taken by the High Court of Justiciary in Scotland and the Court of Appeal in England in the construction of the same section of the same Act and the result is, as the Solicitor General for Scotland had conceded, an anomaly in the application of the law. These differences arise from the minimum quantity of a controlled drug which the courgs regard as necessary before they will consider the case. In Scotland the test is that the controlled drug must be identifiable in an acceptable manner, on the authority of Keane v Gallacher supra, and in England and Wales, and probably Northern Ireland, the test is that the controlled drug must be of a usable quantity and that what constitutes such a quantity is a matter for the tribunal of fact, on the authority of R v Carver supra. While the latter decision was welcomed in England (39), in Scotland it has been described by one writer (40) as unsatisfactory as it is revisionist, arbitrary and, further,

> "it cannot fail to keep defence lawyers pushing against the open door till all the milligrammes from one to 1000 are notched off one by one."

(39) C Manchester "Dangerous Drugs and De Minimis" supra

(40) The author's name is not given (1979) 24JLS513 at p514

The last point was clearly illustrated in R v Boyesan supra. Whatever the correct view, it appears safe to say that the courts have treated the issue of possession of a minute quantity of a controlled drug as an issue concerning the meaning of the term "possession" soluble only by the application of the appropriate rule of statutory construction. Indeed, this was the basis of an article by Mr. Barlow (41) in which he analysed the case law as it then was and he discovered four approaches adopted by the courts. These approaches come into the categories of substantive and adjectival, with two in each. Substantive (1) the literal approach which Barlow defined as represented in England by the decisions of revisionist judges who had introduced the test of measurability, as in R v Graham supra, for which there was no statutory warrant. This approach in turn is subdivided between the fundamentalists, who believed that as there is no express stipulation in the governing statute of the amount necessary to warrant conviction any amount will do, and the revisionists who suggested that the quantity ought at least to be scientifically measurable. (2) the mischief rule, and this approach, Barlow claims, allows the courts the right to determine the objects of the statute and hence the relevance of minute quantities to the

(41) N L A Barlow Possession of Minute Quantities of a Drug. [1977] Crim.LR26

terms of the section. This social policy approach considers whether the objectives of the drug control statute are threatened by the possession of a quantity of drugs, spent at pharmacological power and thus unusable for any of the purposes for which they are prohibited. If there is no such threat then a prosecution and conviction and all that follows is pointless. Adjectival (3) The past-possession approach, argues Barlow, assumes the validity of the literal approach for the purpose of conviction but sentences on the basis that a larger quantity was in fact "possessed": the first authority on this point being Canadian: R v McLeod (42). Barlow criticises this approach as an (43):

> "impermissible instance of judicial speculation that may have been entirely without factual foundation."

(4) The relevance of minute quantities to the issue of knowledge. If the quantity is so small that it takes sophisticated chemical tests to reveal their presence it may well be that the accused was ignorant of the control exerted by him or her over that controlled drug. Barlow argues that whereas before, the courts inferred knowledge by the mere presence of the controlled drug irrespective of quantity now the courts will

(42) (1955) IIICCC137 (BCCA) and discussed by Macfarlane at p451

(43) Barlow ibid at p29

consider the surrounding facts and circumstances from which to infer knowledge. In concluding, Barlow argues that where the prosecution insists on proceeding on the basis of possession of minute quantities of a controlled drug then it should be a common sense presumption that the accused was unlikely or unable to be aware of minute drug traces found in his or her custody. He argues further that if the prosecution overcome that presumption, perhaps by leading evidence of incriminating admissions, then, nevertheless the "usable quantity" test should be applied in addition (44). It has to be conceded that Barlow's suggestions concerning presumptions would be valuable safeguards so far as an accused person is concerned and these may well dissuade prosecutors from bringing cases in which such small amounts are involved. But, our main concern must be the anomaly in the application of the law in Scotland and the rest of the United Kingdom, a result, surely, not intended by Parliament. The view that one takes of the matter depends largely on what criteria chooses to consider in the first place and which rules of construction one prefers. For that reason it is difficult, it is submitted, to argue

(44) The author goes further and suggests as an alternative a "use potential" test: see Police v Emeraldi (1976) NZLR476CA

which of the two tests that are now applied is the correct one. If two judges in different jurisdictions come to different conclusions in relation to the same problem it is a complicated matter to resolve or reconcile these differences. In the present problem it is submitted that the English test of usable quantity does indeed place an additional burden on the prosecution and that this is not a burden specifically placed there by Parliament. Scrutiny of the relevant section shows no intention explicitly to make the controlled drug in question only proscribed if it is of a "usable" amount and, further, no indication is given as to the limits which have in fact been established by judicial dicta only. Indeed, it is submitted that the matter has been placed in an even more unsettled state by the most recent decision (45) which seems to suggest that such numerical limits that have been settled apply or may apply only to cannabis resin and that other controlled drugs, or at least those in other classes in the Act, may be subject to different limits. In short, the law is uncertain. The Scots test of "identification in an acceptable manner" avoids the inherent difficulties of the test of usability. The Crown in Scotland must prove beyond reasonable doubt that the accused had a

(45) R v Boyesen supra per Wein J at p45

controlled drug in his possession and if that is done then they have discharged the burden on them. The Crown in Scotland need not show that the quantity of controlled drug concerned is a usable quantity. The Scots test would appear to apply to all controlled drugs in terms of the 1971 Act. The inherent fault of the Scots test, however, is that there is presently no indication of the true meaning of identification in an acceptable manner. It is possible that in seeking to avoid certain of the English complications the Scots judges have posed themselves a question of comparable complexity but perhaps that remains to be seen. The dicta in Keane v Gallacher supra gives no indication of any lower limit and to that extent the law is uncertain for the problem that arises is the difficulty of distinguishing between possession of a controlled drug and evidence of past possession where the evidence is minute in the extreme. Therefore, the conclusion must be that this aspect of the law of possession is uncertain, unsatisfactory and in need of further examination either by the courts or, preferably, by Parliament itself.

Part Four: Meaning of Terms, Definitions and Doubts.

2.57 Repeatedly in the case law reference is made to cannabis and to cannabis resin in relation to the same substance when, in terms of Section 37(1) of the 1971 Act, they are separate controlled drugs. Indeed, the whole aspect of identification of cannabis and its constituent parts and cannabis resin proved to be a major diversion in the development of the law. In this section of the work it is proposed to consider two problems that developed; firstly the judicial uncertainties expressed as to definitions and identification of particular parts of the plant of the genus Cannabis and, secondly, the difficulties that arose where the prosecution proved that an accused person had possession of a substance but failed, for various reasons, to prove which controlled drug that substance was.

2.58 A. In terms of Section 37(1) of the 1971 Act the definitions are (before any amendment):

"(a) Cannabis: (except in the expression "cannabis resin") means the flowering and fruiting tops of any plant of the genus Cannabis from which the resin has not been extracted, by whatever name they may be designated;

(b) Cannabis Resin means the separated resin, whether cures or purified, obtained from any plant of the genus Cannabis."

Both of these controlled drugs are to be found in

Class B of Part II to Schedule 2 of the 1971 Act. But in addition to the definitions in Section 37(1) the 1971 Act also contains in Part IV a list of certain expressions and their meanings as they are used in Schedule 2 of the Act and this list includes -

(c) Cannabinol Deritatives means the following substances, except where contained in cannabis or cannabis resin, namely, tetrahydro derivatives of cannabinol and 3 - alkyl homogues of cannabinol or of its tetrahydro derivatives.

As the case law has developed so certain difficulties became apparent and these arose generally out of the statutory definitions (1). In Harding v Hayes (2) an appeal was taken by the prosecution to the Divisional Court on the ground that the justices had not permitted scientific evidence to be led which would have established that cannabis leaves, found in the possession of the accused, were part of the "flowering or fruiting tops" of the cannabis plant in terms of Section 37(1) of the 1971 Act. At trial the accused had asserted that leaves were not part of the plant within the meaning of the Act and this was upheld by the justices who then

(1) A similar problem emerged with the 1965 Act but presently only the 1971 Act is examined: see N Bragge The Definition of Cannabis in the Divisional Court [1971] 123NLJ964: for a scientific discussion see E G C Clarke and A E Robinson When is Cannabis Resin? 10 Med,Sci & Law 139

(2) [1974] Crim.LR713

dismissed the charge of possession. On appeal it was held that the case would be remitted to the justices with a direction to continue the hearing and allow the scientific expert to give evidence. In so directing their Lordships followed Constable v Broadley (3) in which a finding by justices that cannabis did include the leaves was upheld. This was done on the evidence of a scientific expert who stated that there was no part of the cannabis plant other than the root which was not part of the "flowering or fruiting tops". Both of these cases were cited in R v Berridale Johnston (4) where the accused was indicted on one count of possession of cannabis containing cannabis resin (sic). The defence moved to quash the Indictment on the grounds that this was an offence not known to the law. The judge invited the prosecution to delete the words "containing cannabis resin" and add an alternative count of possessing cannabis resin. This was done and the prosecution evidence included a scientist who stated firstly that cannabis leaves were part of the "flowering and fruiting tops" of the plant and thus within the legal definition of cannabis, although this was conceded not to be the case in cross-examination. Secondly, that once the leaf was removed from the plant it was "separated" and

(3) unreported: 10th July 1973

(4) [1976] Crim.LR306

thus converted into cannabis resin. The defence submission was that there could be no case to answer on the basis of the first Crown point and that the second was so confusing that it should not go to the jury. The prosecution argued that the court was bound by Harding v Hayes supra following Constable v Broadley supra that cannabis leaves were part of the fruiting and flowering tops but the defence argued that it was a question of fact for the jury and that neither of these cases laid down that principle or were relevant. In the event the judge dismissed the first point and left the second to the jury who found the accused not guilty. In so dismissing the first point the judge appeared to hold that the leaves were not part of the flowering or fruiting tops and therefore not cannabis within the meaning of Section 37(1). And in finding the accused not guilty the jury appeared to hold that they did not believe that a separated leaf is the separated resin contemplated by the section. The great uncertainty that arose was that if the question as to whether cannabis leaves were part of the flowering and fruiting tops was a question of fact in every case, as the defence had suggested, then precedents became irrelevant and expert scientific evidence was required in every case and so the possible inconsistencies increased for although

the technical meanings of the words could be given to the court it would continue to be a matter of debate as to whether any given part of the plant in question fell within that definition.

2.59 The complications continued with R v Goodchild (5) where the essential question was; what constitutes cannabis? At trial the accused had admitted possession of "cannabis leaves". The Crown expert evidence in substance was that the material consisted of dried cannabis leaves plus a small amount of stalk to which the leaves were attached and that there was no evidence that this material contained any of the fruiting or flowering parts of the plant. But, the material did contain the active chemical constituents of cannabis resin and tetrahydro cannabinol, a cannabinol derivative. The defence evidence was that generally greater amounts of cannabis resin were to be found in the flowering tops than in the lower aerial parts of the plant, that cannabinol derivatives were to be found in the resin of all parts of the plant and that the vegetable part of the plant had leaves but no flowering parts and that these particular leaves were not part of the flowering or fruiting parts of the plant. The submissions at trial were; from the Crown, that so far as the charges involving cannabis were concerned the statutory

(5) [1977] 2AIIER163; [1977] Crim.LR287

definition of cannabis included the whole of the aerial plant; from the defence that the cannabis leaves without more specification were not within the statutory definition. The trial judge held as a matter of law that "the flowering or fruiting tops of any plant of the genus Cannabis" applied to the whole plant above the ground but he certified that the case was fit for appeal on the question whether possession of some leaves and stalk only from an unidentified part of a plant of the genus Cannabis (a) disclosed an offence of being in possession of a controlled drug in terms of Section 5(1) and (2) or (3) of the 1971 Act, and (b) if so, possession of which controlled drug or drugs? The Court of Appeal in giving judgment held that for material to come within the definition of "Cannabis" in Section 37(1) of the 1971 Act it must be shown that it is part of the "flowering or fruiting tops" of the cannabis plant; that is, the floral structure at the tip of the stems; it is not sufficient merely to show that the material is some part of the plant from above the ground from which cannabis resin can be extracted. Accordingly, possession of material consisting only of cannabis leaves from the vegetable part of the plant, and the stalk to which they are attached, although cannabis resin can be extracted from the leaves, is not unlawful possession of a controlled

drug, that is, "cannabis" for the purposes of Section 5(2) of the 1971 Act. The appeal was allowed. It has to be said that although there may be valid historical reasons why Parliament had adopted such a restricted definition in the 1971 Act (6) this decision meant that in certain known circumstances a person could be in legitimate possession of a certain part of a plant from which cannabis resin could be extracted! On the same day and in the same court R v McMillan (7) was heard on appeal. The ground was that it had not been established at trial that the cannabis leaves found in the accused's possession were cannabis within the meaning of Section 37(1) of the 1971 Act. At trial the jury had been directed that cannabis leaves could be part of the "flowering or fruiting tops" of the cannabis plant following expert evidence to that effect. It was held on appeal that as the distinction between the mere leaf and the flowering or fruiting top of the cannabis plant which could include the leaf had not been pointed out to the jury, their verdict could not be said to be safe or satisfactory and, accordingly, conviction would be set aside. The same court again had occasion to hear R v Mitchell (8) where the accused had been convicted of possessing cannabis with intent to supply unlawfully. R v Goodchild supra had been

(6) further on this point see ibid dicta per Slynn J at p167

(7) [1977] Crim.LR680

(8) [1977] 2AIIER168

heard after trial but before Mitchell's appeal was heard but there the court considered evidence from an analyst who had seen the material consisting of herbal material and seeds taken from the accused. She was able to say inter alia that the clean seeds (that is, seeds apart from the husks) found in the accused's possession contained no active constituent, that they contained no cannabis resin and that they were on sale continuously as bird seed. She also said that the herbal material consisted of clean seeds of cannabis, of stalk and of leaf and beyond that she was not able to go. The court held, applying R v Goodchild supra that it was insufficient to show that the material consisted of leaves and stalk for it had to be shown that the material was part of the "flowering or fruiting tops". Further, as the analyst had said that the clean seeds without their husks did not contain cannabis resin, the court held further, that these seeds did not constitute cannabis within the meaning of Section 37(1) and conviction quashed. In Lang v Evans (9) the accused was arrested by police for possessing cannabis, an offence which he denied at first although later he made a written statement in which he admitted "giving Billy cannabis and cannabis leaves". He was convicted but appealed to the Crown Court and it was held that although the appeal was

(9) [1977] Crim.LR286

devoid of all merit it would have to be allowed. The court held on the authorities (10) that they were entitled to conclude that a person who was supplying such a plant would know its true identity. But in view of the statutory definition given to cannabis, namely the fruiting and flowering tops, the court was not prepared to hold that a person, unless he was a pharmacologist, would be able to distinguish between the fruiting or flowering top from the rest of the plant. It was held per curiam that thereafter it would only be possible to secure a conviction for possessing cannabis by producing an analysts report and that the magistrates were right to convict as since that date the law had been altered by R v Goodchild supra and R v Macmillan supra. The Court of Appeal heard another case before this complex problem was resolved: R v Goodchild (No. 2) (11). The accused was found in possession of some leaves and stalks from a cannabis plant which had been separated from the plant. He was charged inter alia with unlawful possession of cannabis resin, a class B drug, but the trial judge directed the jury to acquit him on the ground that the separation of the leaves and stalk from the

(10) see ibid at p287

(11) under the heading of R v Goodchild (No. 2) Attorney-General's Reference (No. 1 of 1977) [1978] 1AIIER649: one of the charges on this Indictment resulted in the first Goodchild case: [1977] 2AIIER163

plant did not constitute separation of the resin in order to bring the leaves and stalk within the statutory definition. The Attorney-General referred the acquittal to the Court of Appeal and it was held that to constitute the "separated resin" of a cannabis plant, and therefore to constitute cannabis resin within Section 37(1) there had to be deliberate removal by some process of the resin of the plant, and the mere possession of leaves and stalk which had been separated from the plant and which contained resin did not amount to unlawful possession of cannabis resin, contrary to Section 5(2). Accordingly, the trial judge had been right to direct the acquittal of the accused. But, the accused had also been charged on the same Indictment with unlawful possession of a cannabinol derivative, a class A drug, and at the trial the Crown adopted the procedure of handing in as admissions statements by several experts as to the nature of cannabis and a cannabinol derivative. In one of these it was stated by an expert that the leaves and stalk in the accused's possession contained matter which came within the definition of cannabinol derivatives in Part 4 of Schedule 2 to the 1971 Act, namely a tetrahydro derivative of cannabinol. On that evidence, the trial judge ruled that the accused was in possession of a

cannabinol derivative within Section 5(2) and, thereupon, the accused changed his plea to that charge to plead guilty and a conviction was entered. The accused then appealed against that conviction on the ground that possession of the separated leaves and stalk could not constitute unlawful possession of a cannabinol derivative within Section 5(2) of the 1971 Act merely because a cannabinol derivative was present naturally in them. The Court of Appeal held on this point that the trial judge had not erred in law in accepting the expert's statement that there was present in the leaves and stalk in the accused's possession a cannabinol derivative within the definition in Part 4, or in ruling that the mere presence naturally in the leaves and stalk of a cannabinol derivative was sufficient for the purposes of Section 5(2). Accordingly, the appeal against conviction on this point would be dismissed, although in doing so the court disapproved of the Crown practice in this case of submitting a large number of written statements preferring instead a few witnesses who, being present, could be cross-examined.

2.60 Thus, while Constable v Broadley supra and Harding v Hayes supra appeared to have been overruled by R v Goodchild the cases subsequent to that case left the law in an unsatisfactory state. Although the correctness of the court's

decisions were not in doubt it had become the law that possession for whatever reason of the leaves of the cannabis plant was not of itself illegal even although they were known to be used by smokers for their psycho-active ingredients. Further, a second point was that while the Court of Appeal held Goodchild to have been correctly convicted in R v Goodchild (No. 2) supra there was no potential oppression in that a person in possession of material from the cannabis plant (other than from the flowering or fruiting tops) could be convicted of possessing a Class A drug (a cannabinol derivative) but not of the less serious offence of possessing a Class B drug (cannabis). This whole matter fell within the remit of the Advisory Council on the Misuse of Drugs (12) and they advised the Home Secretary accordingly (13). As a result the Criminal Law Act 1977 provided by Section 52 for an amendment to Section 37(1) in that there was substituted a new definition -

> ""cannabis" (except in the expression "cannabis resin") means any plant of the genus Cannabis or any part of any such plant (by whatever name designated) except that it does not include cannabis resin or any of the following products after separation from the rest of the plant, namely:-

(12) see Section 1(2) of the 1971 Act

(13) the advice was given "urgently": see letter printed at HC Vol 933 col 597

(a) mature stalk of any such plant

(b) fibre produced from mature stalk of any such plant, and

(c) seed of any such plant."

This section came into force on 8th September 1977.(14)

2.61 B. The second question to be discussed here was the problem where possession of something had been proved, but doubts existed as to what that something was and indeed whether the substance was a controlled drug. In Henson v Meiklejohn (15) the accused was found to have been in possession of certain items containing materials which subsequent analysis showed to be cannabis resin. The accused was aquitted on a charge of possessing cannabis resin contrary to Section 5(2) on the basis that there was no evidence adduced by the Crown from the two analysts that the material found in possession of the accused could be obtained only from a plant of the genus Cannabis. This qualification was required in terms of the definition of cannabis resin in Section 37(1) of the 1971 Act and the trial judge found that the Crown had not excluded the possibility of synthetic production. The appeal by the prosecutor was heard by the High Court of Justiciary but remitted back to the trial judge with a question as to whether evidence had been led to the synthetic production of cannabis resin and for

(14) SI 1977 No.1365

(15) unreported: 25th May 1977: see COCN: A9/77

whom and to what effect. In his note to the High Court of Justiciary the trial judge replied that the prosecutor had led evidence from two forensic scientists and they had conceded inter alia that the three active principles could be synthesised but that in this case there had been no evidence to exclude synthetic production of the material analysed and the Crown appeal was refused. Again in Muir v Smith (16) where pieces of brass which together formed a pipe and contained at least 20 microgrammes of cannabis as debris were found in the accused's flat. On the accused's appeal to the Crown Court against conviction of possessing cannabis resin, it was found that 20 microgrammes were the debris of a larger amount of cannabis resin or herbal cannabis. The accused appealed by case stated to the Divisional Court and there it was held that as the Crown Court could not decide whether the accused had possessed cannabis resin or herbal cannabis, it could not be said that the case against the accused had been proved. The appeal was allowed and the conviction quashed. It seems, therefore, to have been proved that the accused had a controlled drug in his possession but the prosecution could not prove which of two possible controlled drugs the substance was, that is to say, cannabis resin or herbal cannabis. As

(16) [1978] Crim.LR293

neither could be eliminated it would not be said that the other had been proved. In passing it has to be said that the report on this case refers to "herbal cannabis" but this, with respect, is not a term for any controlled drug within the meaning of the 1971 Act. Similarly, in R v Best (17) where the accused and four others were each indicted on a separate count of unlawful possession of cannabis resin. Because a prosecution witness was unavailable and an expert was of opinion that the substance possessed was either cannabis or cannabis resin, leave was sought to amend each count to charge unlawful "possession of a controlled drug, being either cannabis resin or cannabis." Defence objections were rejected and the accused were convicted. They appealed against conviction and the sole ground that each count as amended was bad for duplicity. It was held in the Court of Appeal that the appeal failed. Cannabis and cannabis resin were linked in the list of Class B drugs set out in Part II of Schedule 2 of the 1971 Act. Seen together in that context they could be charged as they had been in the instant case without offending against the rules of duplicity. The clear allegation was of a single act of possession of an identified substance, which the evidence disclosed as cannabis or cannabis resin and no other substance. Since

(17) [1979] Crim.LR787; [1979] 70 Cr.App.R.21

cannabis and cannabis resin came from the same part of the Schedule and were linked in it, there could be no complaint at common law, let alone under the Indictment Rules 1971 about the combination, as here, of cannabis or cannabis resin.

2.62 It has to be said that at first sight Muir v Smith supra and R v Best supra are irreconcilable as being contradictory. The distinction is perhaps more a matter of criminal procedure than substantive law. In the former the accused was convicted of possessing cannabis resin and on appeal to the Crown Court it was held that in truth the substance was either cannabis resin or herbal cannabis leaving the Divisional Court with a summons narrating one substance and the evidence suggesting either that or alternative, albeit a close alternative. In the latter case the Indictment, following leave to amend being granted, narrated two close alternative substances and this was substantiated by the evidence. If this is correct then the distinction is indeed a narrow one: in short, in the latter the Indictment equated the evidence. It would also suggest that in future where the prosecutor proceeds on the possession of a small quantity then the alternative might be included from the outset but if this is the case then one questions, surely, the fairness to the accused and the return on the efforts where the quantity is minute.

2.63 In Arnott v Macfarlane (18) the accused allowed policemen into his house and admitted that he was the occupier. The police had a warrant and searched the house and found in the bottom of a paper refuse sack in the kitchen four cigarette ends. These cigarette ends were roaches and analysis subsequently revealed 0.02 grammes of cannabis resin. The accused was cautioned and charged and replied "I accept full responsibility for the stuff you found. No-one else was involved". The accused was served with a complaint with a charge of unlawful possession of cannabis and after trial was convicted of unlawful possession of cannabis [resin] and fined £20. He appealed to the High Court of Justiciary and the appeal was allowed, the court holding that there was no evidence to substantiate the trial judge's finding-in-fact that cannabis resin is the residue of smoked cannabis. The ratio decidendi of the case would seem to be that one cannot infer the presence of cannabis resin from the actual presence of cannabis or vice versa. It is submitted that in this case the prosecution served a complaint that narrated the wrong controlled drug as the copy of the analyst's report used as a production plainly stated the relevant substance to be cannabis resin. There appears, further, to be no suggestion in the report of the appeal that at the end of the Crown

(18) unreported 25th February 1976 COCN A23/76

case the prosecutor moved to amend the complaint in accordance with the evidence!

Section 6: Restriction of cultivation of cannabis plant.

2.64 The 1971 Act provides by Section 6:

> "(1) subject to any regulations under Section 7 of this Act for the time being in force, it shall not be lawful for a person to cultivate any plant of the genus Cannabis.
>
> (2) subject to Section 28 of this Act, it is an offence to cultivate any such plant in contravention of sub-section (1) above".

This provision is derived from Section 6 of the 1965 Act which provided for the penalization of the intentional cultivation of the cannabis plant. It is striking that the section in the 1965 Act makes it an offence to "Knowingly" cultivate whereas the offence in the 1971 Act is simply to cultivate. The specific requirement of mens rea in the earlier section is reinforced in the side-note to the section which describes the offence as being the "penalization of intentional cultivation". The omission in the 1971 Act has not otherwise gone unnoticed for at the Second Reading of the Bill (1) one member said that the absence of the word "knowingly" was obvious from clauses 4, 5, 6 and 9 especially as it had been included in clause 8

(1) Mr. Clinton Davies:16th July 1970: HC Vol 803 col.1823

but the matter was not taken further.

2.65 It has been shown how the statutory definition of cannabis in terms of Section 37(1) of the 1971 was subsequently amended as a result of developments in the case law and that the effect of this amendment is to designate the whole of the cannabis plant, at any stage of its development, a controlled drug (2). In seeking to establish the mens rea in the offence of cultivation of the plant of the genus Cannabis, as it is now defined, some assistance is rendered by the Oxford English Dictionary which defines "cultivate" as:

> "1. to bestow labout and attention upon land in order to raise crops; to till. 2. to produce or raise by tillage."

It is submitted then that to "cultivate" one is required to undertake some positive act and also to direct one's mind both to the act and to the intended result of the act. The case law on the offence is minimal but in the one reported case the definitions in the OED were reflected in the dicta. Tudhope v Robertson (3) was an appeal to the High Court of Justiciary by stated case from a trial where an accused husband and wife were found not proven of contravening Section 6. The learned Sheriff held that his findings-in-fact

(2) see paras 3.57 to 3.60

(3) 1980 SLT 60

disclosed no evidence of the necessary bestowing of labour and care required in cultivation nor any evidence from which that could be inferred. The findings-in-fact were that police officers saw the tops of plants in a window and believing them to be plants of the genus Cannabis obtained a warrant to search the house. There, they found in the same room, on a table at the window, fifteen plants in one pot, the plants appeared to be fresh and healthy with leaves fully out. A caution at common law was given and the husband replied "I thought its legal until its hash producing" and his wife replied "I thought they had to be a certain height before its illegal." The search also produced a dish containing a small paper bag containing cannabis seeds. The Sheriff also found-in-fact that the search did not produce any watering can, spray, tools or other implements with which to tend the cannabis plants. Accordingly, he held that there was no evidence of cultivation. But on appeal the Court held that the Sheriff was plainly wrong and that there was ample evidence to demonstrate sufficient cultivation to lead to a conviction of the offence libelled. That evidence, the court held (4), lay in the positioning of the plants to secure the light necessary to growth, the condition of the plants, the presence of the seeds, and the objective which the accused had in mind in

(4) ibid at p62

having the plants in their house at all. The finding of not proven was therefore quashed and the case remitted to the Sheriff with a direction to convict both accused. The Court added that the replies made by both accused to caution was sufficient indication of joint responsibility. It appears that in essence the Court had accepted the submission by Crown Council that the learned Sheriff had misdirected himself by taking too narrow and restricted a view of the verb "to cultivate" in relation to these specific plants. In the instant case the evidence of the discovery of seeds indicated the element of planting and the positioning of the plants at the window and their fresh condition indicated cultivation.

2.66 It is submitted therefore that Parliament has not specified a particular mental element or state of mind for the offence in Section 6 of the 1971 Act despite doing so for the earlier offence. However, in interpreting the statute to discover the actus reus of the offence a mental element arises with respect to the inclusion of the word "cultivate". The acts which must be done to constitute cultivation require knowledge or intention, that is to say, desire of consequences, and to that extent the mental element is certain.

2.67 The paucity of case law in relation to this offence would appear to be a fairly common occurrence generally. Recent researches have failed to produce any cases in Hong Kong on a similar provision (5). In Canada there have been several reported decisions and it is of some interest to note that in that jurisdiction the same meaning in the OED has been accepted (6). Both the Hong Kong and Canadian offences of cultivation are concerned with marijuana (cannabis) or opium poppy whereas the UK provision relates only to the former. This was raised when the Bill was being considered by the Committee of the Whole House (the Lords) when Lord Kilbracken said (7) that he could not see why this clause was restricted only to the cannabis plant and, indeed, he instanced the opium poppy as another suitable item to be so restricted. His Lordship's inquiry was not taken further.

2.68 Further analysis to discover the exact mens rea and comparisons with developments in other jurisdictions are now largely futile. The meaning of cannabis in the 1971 Act as amended by the 1977 Act results in the whole of the cannabis plant, at any stage of its development, a controlled drug for the purposes of the 1971 Act. This means that the unlawful supply, production (8) and possession of the controlled drug

(5) Faulkner and Field at p64

(6) see McFarlane at p247 for Canadian authorities

(7) 9th February 1971: HL Vol 315 col.68

(8) production includes cultivation; see Section 37(1)

cannabis are governed by Sections 4 and 5 of the 1971 Act and, accordingly, Section 6 has become redundant. This was the conclusion of the Advisory Council on the Misuse of Drugs (9) and the Council recommended to the Home Secretary that Section 6 of the 1971 Act should be repealed (10). The Legalise Cannabis Campaign criticise this (11) apparently on two grounds: Firstly that the recommendation fails to consider reducing the penalties for cultivation which in their view is a less immoral offence as it is usually an activity done for the individual for his or her own use: Secondly, replacing the term "cultivation" by "production, supply or possession" in accordance with the recommendation may well result in heavier sentencing by the courts because the implications are more serious. The first point certainly is more concerned with the short term and may or may not be disposed of once the Home Secretary's view of the Council's recommendation is known. The second point appears to place the offence of cultivation in a less serious category as compared to the other offences in the 1971 Act but, following R v Leonard (12), this need not be so for there certain circumstances were held sufficient to allow the court, for the purposes of sentencing

(9) Report and Review of the Classification of Controlled Drugs and Penalties etc. (Home Office 1979) page 19

(10) Ibid at p21

(11) in a booklet they published entitled "Trash Rehashed" (London 1979) page 32

(12) [1981] Crim L R 631

sentencing at least, to infer cultivation with intent to supply, an aggravation not explicitly in the 1971 Act.

2.69 The punishment on conviction of an offence in terms of Section 6 has not been amended since the passing of the 1971 Act:

(a) Summary 12 months or £400, or both

(b) Indictment 14 years or a fine, or both. (13)

Section 8: Occupiers etc. of premises to be punishable for permitting certain activities to take place there.

2.70 The 1971 Act provides by Section 8:

"A person commits an offence if, being the occupier or concerned in the management of any premises, he knowingly permits or suffers any of the following activies to take place on those premises, that is to say -

(a) producing or attempting to produce a controlled drug in contravention of Section 4(1) of this Act;

(b) supplying or attempting to supply a controlled drug to another in contravention of Section 4(1) of this Act, or offering to supply a controlled drug to another in contravention of Section 4(1);

(13) Section 25 and Schedule 4: 1971 Act

(c) preparing opium for smoking,

(d) smoking cannabis, cannabis resin or prepared opium."

The purpose generally of this Section is to make it an offence for a person to knowingly permit or suffer certain activities to take place on premises but in order to commit those offences such a person must have a certain status and that is, that he is the occupier of these premises or is concerned in the management of them. Each status will be considered in turn:

(a) the occupier. This offence has its origins in the less extensive provisions of Section 5 and Section 8(c) and (d) of the 1965 Act and the meaning of "the occupier" in Section 5 was considered in R v Mogford (1) where two girls both over 15 but under 21 years of age were left in their parents home while the parents were on holiday and in that time the police raided the house and discovered that cannabis was being smoked there. The two girls were charged with, being the occupiers of the premises, permitting the premises to be used for the purposes of smoking cannabis. The presiding judge, Neill J, held that on the facts the two girls were not the occupiers of the premises because they were not in legal possession of them during the temporary absence of their parents, and, further, because his Lordship did not consider the two girls

(1) [1970] 1WLR988

had sufficient control of the premises to be the occupiers. Finally, the mere fact that the two girls could invite guests to, and exclude others from, the house did not amount to the nature and measure of control envisaged by the statute. In this judgment did not specify what he meant by his use of the term "legal possession or control" nor did he set the limits of either (2). But, if it appears that his Lordship had some technical meaning in mind for the term "the occupier" then this was not a line of thought that was accepted in Scotland. In Christiston v Hogg (3) the accused was convicted of permitting the house of which he was an occupier to be used for the purpose of smoking cannabis or cannabis resin. The facts of occupation were that although the accused possessed a rent book he had not paid rent for some eight months. The reason for this was that the building of which the accused's flat formed part had been condemned as unfit for human habitation. Despite that, the accused had continued to live in the flat and when the police were investigating this matter the accused had said that he was the occupier and the police knew that he lived there. The accused appealed on the ground that he was a squatter and that he lived in the premises but had no legal right or title. His counsel cited R v Mogford supra as

(2) generally on the term "the occupier" see

Bruce v McManus 1915 3KB1

(3) 1974 SLT (Notes) 33

authority. The opinion of the Court in dismissing the appeal was (4)

> "No violence is done to the wording of the Section if the words "the occupier" are construed as bearing their ordinary meaning and connotation. In our opinion "the occupier" within the meaning of the section is a person who has possession of the premises in question in a substantial sense involving some degree of permanency and who, as a matter of fact, exercises control of the premises and dictates their use. Every case will depend on its own facts. We see no reason to restrict the interpretation of the words "the occupier" to describe one who has a legal right or title to inhabit the premises. In distinction to the remarks of Niell J, looking to the mischief struck at by the section, it would appear to us that if it were meant so strictly to limit and circumscribe the meaning to be attached to those words that would have been made plain in the Act by definition or otherwise and that Parliament has not chosen to do."

2.71 In R v Tao (5) the offence in Section 8 of the 1971 Act was considered and the circumstances were that the accused was a student living in a hostel owned by his college in Cambridge. A furnished room had been allocated to him at the hostel and the accused

(4) ibid at p34, per the Lord Justice General (Emslie)

(5) [1976] 3AIIER65

paid the college for the use of the room and lived there from the time he first went to Cambridge. The police were called to the hostel because of a small fire in the accused's room although he was not present then. On entering the room the police smelt burning cannabis and found traces of cannabis resin in the room. The accused was convicted of a contravention of Section 8(d). He appealed arguing that although he was in occupation of the room he was not "the occupier" of the room in terms of Section 8. In dismissing the appeal the court used arguments that were strikingly similar to Christison v Hogg supra although the latter had not been cited in submissions nor referred to in the judgment. Lord Parker CJ said (6):

> "The fact that whereas in many Acts one finds the phrase "the occupier" defined, there is no comparable definitions in this Act, suggests to this court that it was the intention of Parliament, in framing Section 8 to leave it to the tribunal of fact to determine whether, on the facts of each particular case, a given person was "the occupier" of the premises in question."

And his Lordship said that in seeking to find the mischief against which this section was aimed, the answer suggested that (7)

(6) ibid at p67

(7) ibid at p67: the same point concerning the mischief of the section was raised in Wheat v E. Lacon & Co. [1966] AC522 per Lord Denning MR: quoted in [1976] Crim.LR at p517

"Parliament was intending not that a legalistic meaning should be given to the phrase "the occupier" but a common sense interpretation, that is to say "the occupier" was to be regarded as someone who, on the facts of the particular case, could fairly be said to be "in occupation" of the premises in question, so as to have the requisite degree of control over those premises to exclude from them those who might otherwise intend to carry on the forbidden activities."

His Lordship said that the Court of Appeal agreed with the decision of Neill J. in R v Mogford supra but did not agree with the reasoning by which he reached that decision (8). Nevertheless, the judgment continued and analysed the accused's right of occupation and concluded, on the facts, that it was (9)

"not merely a right to use (the room) but a sufficient exclusivity of possession, so that he can fairly be said to be "the occupier" of that room for the purpose of Section 8. He does not have to be a tenant or to have an estate in land before he can be "the occupier" within that section. It is in every case a question of fact and degree whether someone can fairly be said to be "the occupier" for the purpose of that section."

(8) ibid at p68

(9) ibid at p69

2.72 This matter has been followed in some detail because, it is submitted, the wording of the section limits the commission of the offences to a special category of people who might, but for the offences, provide facilities which would assist those using controlled drugs. Consequently, it is of great importance to know the limits set by Parliament and the courts to that special category.

(b) the section also includes the alternative category of those "being concerned in the management of premises." In Yeander v Fisher (10) the licensee of a public house and his wife were convicted of being concerned in the management of premises, the public house, which were used for the purposes of smoking cannabis and of dealing in cannabis contrary to Section 9(1)(b) of the 1964 Act. At all material times Mrs. Yeander was in charge of the bar in the public house but on none of the occasions when the offences were committed was Mr. Yeander seen to be there. On appeal against conviction, because Section 9(1)(b) of the 1964 Act, as distinct from Section 9(1)(a), created an absolute offence under which anyone on the spot and concerned with the management of the premises would be liable if the premises were used for

(10) [1965] 3AIIER158

smoking or dealing in cannabis. The attitude of the bench, therefore, can be encapsulated in the dicta of Lord Parker CJ (11):

> "this statute is dealing with the very important matter, particularly today, of dangerous drugs. I certainly take judicial notice of the fact that drugs are a great danger today: and legislation has been tightening up the control of drugs in all its aspects."

In deciding whether the offence was absolute or not the Lord Chief Justice said that the test depended on the words of the particular statute and the subject matter with which it is dealing. His Lordship's view of the subject matter has been indicated but he held in addition that the offence was also a regulation for the public welfare and therefore in a category of case in which the provisions are more readily held to be absolute. As to the wording of the statute, his Lordship pointed out that whereas the offence in para (a) of Section 9(1) made explicit references to knowledge by inclusion of the phrases "knowingly" or "which to his knowledge has been used", the offence in para (b) of Section 9(1) contained no such provisions. It was conceded that while it was true that where you get the word "knowingly" expressly or impliedly used

(11) ibid at p161

in provision and not in another the matter was not conclusive: nevertheless, his Lordship thought that the matter in para (b) was intended by the legislature to be an absolute offence. If this decision and the attitude of the bench appeared to be firm then it was to remain so until Sweet v Parsley (12) where the accused, the sub-tenant of a farmhouse, let out several rooms to tenants who shared the use of the kitchen. She herself retained and occupied a bedroom. Later she gave up living there, though she came occasionally to collect letters and rent. On a certain date, quantities of drugs including cannabis resin were found in the farmhouse and she was charged with being concerned in the management of premises used for the purpose of smoking cannabis resin contrary to Section 5(6) of the 1965 Act. She conceded that the premises had been so used and the prosecutor conceded that she did not know this and she was convicted of the offence. On appeal to the House of Lords it was held that the offence created by Section 5(6) was not an absolute offence and the conviction should be quashed. The words "used for the purpose" in Section 5(6) refer to the purpose of the management, and mens rea is an essential ingredient of the offence. This case had become a cause célèbre

(12) [1970] AC133; [1969] 2WLR470; for an excellent analysis see the article by D R Miers at (1969) 20 NILQ 161

between conviction and its being quashed because of the harshness of the law as perceived by the press. The matter was referred to by Lord Reid in his speech when he remarked that the British press were vigilant to expose injustices and the public outcry and sense of injustice provoked by this case appears to have influenced the bench for this decision contrasts markedly with Warner v Metropolitan Police Commissioner (13) where almost the same composition of the House adopted a completely different approach on a similar problem. Sweet v Parsley supra is also noted for the general though not universal willingness of their Lordships to consider the general principles involved in the interpretation of criminal statutes. The case marked a determined reassertion of the rule that there is a presumption in favour of mens rea and that this included negligence (14). Further, the "half-way house" of negligence as the criterion of liability in offences of strict liability was discussed but with differing results. The speeches of Lords Reid and Pearce suggest that the burden of rebutting negligence by proof of reasonable mistake should remain on the accused while Lord Diplock interpreted the authority (15) as leaving the accused with an evidential burden only; meaning that the

(13) [1968] 2All ER356

(14) [illegible] and Wales: see Section 8: [1968] 2All ER356
Criminal Justice Act 1967

(15) Proudman v Daymar (1941) 67 CLB 536

accused need only raise a doubt that he took reasonable care and that he need not prove anything on balance of probabilities. At any rate, the case received an enthusiastic reception from criminal lawyers and halted an ealier disturbing trend. The matter of "being concerned in the management" next received judicial examination subsequent to the passing of the 1971 Act. In R v Joseph and Christie (16) the accused ran a card school in the basement of a house owned but not occupied by the local council. They were squatters and were there without lawful authority as trespassers. In a raid the police found packets of cannabis, many in the possession of a man who had been with the accused. The accused were convicted of being concerned in the management of premises upon which they knowingly permitted the supplying of a controlled drug contrary to Section 8. It was held by the Court of Appeal that the question whether an accused is lawfully in possession of the premises in question is irrelevant. An accused needs no interest in premises in order to be concerned in their management. The dicta by the Lord Chief Justice appeared to suggest that control of the premises would satisfy the requirements of the law for this phrase or, alternatively, if the accused was owning them or organising or managing them. It should also be

(16) The Times LR: 26th February 1977

added here that the Act does not contain, nor does there appear to be, an authoritative decision on the meaning of "premises" (17) in this connection.

2.73 Section 8 makes it an offence for a person to knowingly suffer or permit certain activities to occur. These words contain the essence of the requirement for criminal liability for this offence and they must now be considered with the case law (18). Knowingly. In legislation of the present nature, the requirement of knowledge is generally interpreted as applying to all the elements of the offence. The term "knowingly" does not limit the mens rea to actual knowledge of the relevant circumstances but also embraces wilful blindness or connivance (19). But there is authority that constructive knowledge - the failure to make reasonable inquiry - generally has no place in criminal law (20). Permit. In legislation where it is an offence to "permit" something to be done many authorities

(17) but the matter has been considered in certain civil matters; see inter alia Andrew v Andrews & Mears [1908] 2KB567; Bracey v Read [1963] Ch.88

(18) This aspect of criminal law has a case law that is so extensive as to be excessive and no attempt is made here to review the whole field

(19) see R v Thomas [1976] Crim.LR517

(20) Roper v Taylor's Central Garages (Exeter) Ltd. [1951] 2TLR284 per Devlin J at p289

require that the accused should have known of the conduct in question, since a man cannot be said to permit what he does not know about (21). The fault element in offences of "permitting" is expressed in a variety of ways but negligence is rejected so that offences of "permitting" can be committed either knowingly or recklessly.

Suffers. The interpretation of "permit" applies to offences of "suffering" although there is clear statutory definition of "suffer" (22)

> "if a person is in a position to prevent a thing without committing a legal wrong and does not do so, then in the common use of language that person suffers that thing. Of course, one cannot be said to suffer a thing which one cannot prevent, or which by law one ought not to prevent. But these appellants are in a position in which both physically and legally they could prevent this .... and they have not done so, and, therefore, in my opinion, they may properly be said to have "suffered" it ...."

The requirement of knowingly permitting or suffering applies to each of the activities contained in the four sub-sections.

(21) see Williams p83 for English authorities and Gordon p316 for Scots

(22) Rochford RDC v Port of London Authority (1914) 83LJKB1066

2.74 The first case to be considered in relation to these matters is R v Ashdown (23) where four co-tenants of the same premises jointly entered into a tenancy agreement with the landlords. Subsequently, one co-tenant smoked cannabis or cannabis resin on the premises and this was done in the full knowledge of the other co-tenants, who, it appeared, did nothing to stop it and were subsequently convicted of permitting premises to be used for smoking cannabis contrary to Section 5 of the 1965 Act. In dismissing the appeals Roskill LJ speaking for the Court of Appeal (24) said that the essence of the offence is knowingly permitting the activity to be carried on and that there was no privilege or immunity attaching to the position of co-tenants which would prevent him being guilty of an offence in these circumstances.

2.75 (a) producing or attempting to produce a controlled drug. In terms of Section 37(1) of the 1971 Act "produce" means producing it by manufacture, cultivation or any other method and "production" has a corresponding meaning. Further, in terms of Section 19 of the 1971 Act it is in itself an offence to attempt to commit an offence under the provisions of the Act. To this extent therefore the offence in Section 8(a) is unnecessarily long

(23) (1974) 59 Cr.App.R193

(24) ibid at p194

in its description (25). The overlap in the offences in Sections 4, 6 and 8 has been considered by the Advisory Council on the Misuse of Drugs (26) and the only case concerning this offence raised this very point. In Taylor v Chief Constable of Kent (27) the accused was the occupier of certain premises and cannabis plants were found on the premises in a room not occupied by the accused although he knew they were there. Both sides admitted that the plants had been cultivated by another occupant of the premises who had been convicted of an offence under Section 6 of the 1971 Act. A charge was preferred against the accused of contravening Section 8 and he pleaded not guilty submitting inter alia that there was no production of a controlled drug; that the activity in question was cultivation of the plants of the genus Cannabis under Section 6 which was not an activity proscribed by Section 8; that the present charge in effect equated Section 6 with Section 4 as a result of the amendment to Section 37(1) by Section 52 of the Criminal Law Act 1977 and that the amendment was not intended to have that effect. The prosecution relied on the plain words of Section 37(1) which specifically referred to production by cultivation and that embraced

(25) and Section 8(6) also

(26) see supra under Section 6

(27) [1981] Crim.LR244

cultivation of cannabis plants. Following conviction the accused appealed by case stated to the Divisional Court. In dismissing the appeal the court held that, bearing in mind that production included production by cultivation, the effect of the amendment to the definition of "cannabis" to include not only the flowering or fruiting tops, but virtually the whole of the plant, was to render cultivation of cannabis plant synonymous with production of a controlled drug. It accordingly followed that the accused was guilty of the offence charged and had been properly convicted.

2.76 (b) supplying or attempting to supply a controlled drug; or offering to supply a controlled drug. In terms of Section 37(1) of the 1971 Act "supplying" includes distributing.

2.77 (c) preparing opium for smoking. This offence relates solely to opium and is thus contrasted with the other offences under sub-sections (a) and (b) which concern 'controlled drugs'.

2.78 (d) smoking cannabis, cannabis resin or prepared opium. This offence relates to opium and cannabis and is thus contrasted with the other offences under sub-section (a) and (b) which concern controlled drugs.

2.79 Clause 8 of the 1971 Bill was subjected to considerable attention at various stages and some interesting points were raised, if not answered. The Honourable Member for Cardigan thought that the clear statement that guilty knowledge was a "condition precedent" to conviction, and indicated by the term "knowingly" was a great safeguard against injustice, but at the same time (28) he suggested different tests for the occupiers of public and private premises in that the former would be subject to absolute offences with statutory defences and for the latter there would be "the ordinary standard of criminal proof" but he thought such a distinction would achieve a balance between a determination to protect the innocent and, on the other hand, a desire to punish the guilty. The matter was not taken any further but, it is submitted, there would have had to have been clear definitions of these terms by the legislature to avoid almost certain difficulties in the matter of public and private premises. Further, the Honourable Member for Ashford pointed out an inconsistency in the Bill where there was a different classification of drugs of plant origin in one part of the schedule and their pharmacologically active ingredients in another Sch. as Part I Class A "cannabinol" and "cannabinol derivatives"

(28) Mr. Elstyn Morgan HC.vol 803 col. 1837

and Part II Class B "cannabis" and "cannabis resin". The result being, he said, that one of the effects of the inconsistency is that the offence referred to in clause 8(2) involving the smoking of cannabis or cannabis resin does not include cannabinol or its derivatives. (29) Finally, in a speech in the House of Lords, two interesting points were brought out by Lord Kilbracken (30) when he moved an amendment by which he sought to delete the smoking of cannabis, cannabis resin or prepared opium as an offence in terms of clause 8(d) because, firstly, although the clause made it an offence to allow a person to smoke a certain substance on premises it was not an offence to smoke that substance and, secondly, the noble Lord did not see why of all the drugs in the three schedules only these ones specified should be the subject of an offence. Effectively, it was an offence to permit someone to smoke cannabis on one's premises but not such an offence to allow someone to inject heroin. In reply for the Government Lord Windlesham said that liability for smoking was traced to 1920, which Act enacted treaty obligations from The Hague Convention of 1912 and these were therefore drugs already subject to offences and, anyway, the main difference between smoking and taking an intravenous method was that

(29) Mr. William Deedes, Standing Committee A
19th Nov. 1970 col. 219

(30) HL vol. 315 col. 72

the former could in all probability be detected easier because of the distinctive smell (sic). Lord Foot said that the clause was concerned with moral guilt and the method involving intravenous use was "very much more serious" and that a person who knows about heroin being taken on his premises should be open to prosecution. Thus, it would appear that while the case law has given some indication of the mens rea of the offences the section itself has inherent difficulties.

2.80 In terms of Section 25 and Schedule 4 of the 1971 Act the punishment is:-

	Class A	Class B	Class C
a. Summary	12 months or £400 or both	12 months or £400 or both	3 months or £500 or both (31)
b. Indictment	14 years or a fine or both	14 years or a fine or both	5 years or a fine or both.

(31) words added by 1977 Act Schd. 5 para 1(1)(b) and 1975 Act Schd. 7B para 1(1)(b)

Section 9: Probition of certain activities etc. relating to opium.

2.81 Section 9 of the 1971 Act provides:

"subject to Section 28 of this Act, it is an offence for a person -

(a) to smoke or otherwise use prepared opium; or

(b) to frequent a place used for the purpose of opium smoking; or

(c) to have in his possession -

(i) any pipes or other utensils made or adapted for use in connection with the smoking of opium, being pipes or utensils which have been used by him or with his knowledge and permission in that connection or which he intends to use or permit others to use in that connection; or

(ii) any utensils which have been used by him or with his knowledge and permission in connection with the preparation of opium for smoking.

Section 9 therefore is concerned exclusively with opium which, of all the controlled drugs in the 1971 Act, has the longest involvement with the law. The Pharmacy Act 1868 was the first attempt by the British legislature to place a measure of control

over opium and its preparations. The 1869 Act prohibited any person from selling or offering to sell, dispense or compound poison unless he was a chemist or druggist, or from selling any poison unless the container was distinctly labelled. This was the only restriction on the sale of opium, although substances in Part I of Schedule A, such as arsenic and cyanide could only be sold to a person known to the seller. For historical reasons (1) the legal control of opium was slowly tightened and refined so that a multiplicity of actions associated with opium were proscribed. These legal controls, arising out of an increasing knowledge of opium and its use, became more subtle and precise. Section 8 of the 1965 Act was replaced by a modified Section 9 of the 1971 Act which is subject to the statutory defence in Section 28. It is interesting to note that opium appears to have been singled out by the legislature for the closest attention of all the controlled drugs: the activities in relation to this offence are not applicable to any other controlled drug: it is not an offence, for example, to smoke cannabis nor to frequent a place where cannabis is smoked. Opium is a Class A controlled drug in Schedule 2 of the 1971 Act and it therefore attracts the severest penalties. There is no power in terms of the 1971

(1) see Bean p20

Act to allow the Secretary of State to make regulations providing that these activities are lawful in certain circumstances. Finally, the possession of "pipes or other utensils" is not illegal in relation to other controlled drugs, only for opium (2). The reasons for this state of affairs is very properly a matter for legal historians although the matter has been raised elsewhere (3).

2.82 Sub-section (a). While it is not an offence in terms the 1971 Act to smoke any controlled drug other than opium, it has to be said that in smoking such a controlled drug a person will probably be in possession of that controlled drug and therefore committing an offence in Section 5 of the 1971 Act. Both sections 5 and 9 apply to opium and it is submitted that there is a considerable degree of overlap of these two offences. The essential difference however is to be found in

(2) in the Misuse of Drugs Act 1975 in New Zealand it is provided by Section 13 that the possession of "any needle, syringe, pipe or other utensil, for the purpose of the commission of an offence against the Act" is itself an offence, and this applies to any controlled drug.

(3) see HL vol. 315 col.80 (quaere only opium) and HC col. 803 col. 1823 (quaere apparatus)

Schedule A where more severe penalties apply to offences under Section 9. The offence of smoking or otherwise using opium is the only offence of consumption under the Act.

2.83 Sub-section (b). The offence in this sub-section is to frequent "a place used for the purpose of opium smoking". It is submitted that such a place is what is generally known as an opium den and with this offence the legislature sought to prohibit the attendance at such places by anyone, irrespective of whether or not they themselves smoked opium there. Any person who is the occupier of such a place or is concerned in the management would commit an offence in terms of Section 8(2). That such a place is so used in an essential part of a charge against an accused and his or her knowledge of that use must be proved by the prosecution. However, we must now consider the meaning of "frequent".

2.84 Scotland. Within the meaning of Section 57(1) of the Local Government (Scotland) Act 1889 and Section 79 of the Paisley Police and Public Health Act 1901 "frequenting" does not necessarily involve more than one visit to a place, without coming and going. However in Linton v Clark (4), a case under an Edinburgh Police Act dealing with known thieves, it was held that it was not frequenting to

(4) (1887) 1 White 522

walk once along Princes Street accosting four or five men on the way. Frequenting requires more than mere use for passage, but it is not clear how much more. Lord Young thought the "act" had to be done several times (5). But it has been held in cases under local betting legislation that one can frequent a street by walking up and down in it or even standing still for a period of 20 minutes (6). Sheriff Gordon distinguished the latter case from Linton v Clark supra on the ground that in the latter the accused walked along the street in one direction like any ordinary pedestrian (7).

2.85 England. In English law it appears that any judicial interpretation of frequenting has arisen in the context of other offences. As a result of the case law there appears to be two essentially different meanings. Firstly, frequenting can be seen to be mere physical presence at a point in time. In R v Cross (8) the Court of Exchequer seems to have taken the view that the mere fact that a person was in a particular street constituted a frequenting of that street for the purpose of an offence contrary to Section 4 of the Vagrancy Act 1824 which makes it an offence to be a suspected person and to frequent certain places with intent to

(5) ibid at p527

(6) Davies v Jeans (1904) 4 Adams 336; Lang v Walker (1902) 4 Adams 82

(7) Gordon p 547

(8) (1857) 1 H & N 651

commit an arrestable offence. However, this was doubted in Clarke v R (9) where the Divisional Court took the view that repeated visits to the same locality or, at the very least, to loiter or linger in a locality for a period of time was required. Secondly, frequenting can be seen to be the presence for some identifiable criminal purpose of a continuous nature. In Airton v Scott (10) the accused had been convicted under a bye-law of frequenting a public place for the purpose of betting, that place being an athletic ground. Lord Alverston said (11):

> "As to the word "frequent", it was plain that being long enough on the premises to effect the particular object aimed at was "frequenting".

2.86 The English authorities, and the Scots also, were considered in Nakhla v The Queen (12) which was an appeal to the Judicial Committee of the Privy Council from the Court of Appeal of New Zealand. The essential facts were that at the instigation of the police a man who had been involved in certain burglaries went to a particular street with his cohabitee in order to sell the accused stolen property. The police watched and recorded the whole proceedings. The accused was arrested with the stolen

(10) (1909) 100LT393; 25TLR250; and see Jones v Scott 73 JP 149

(11) 25TLR at p250

(12) [1975] 2AIIER138

property and was charged with being a rogue and vagabond under Section 52(i)(j) of the Police Offences Act (New Zealand) 1927, the indictment alleging that "being a suspected person he did frequent a public place, namely Onental Terrace with a felonious intent". The judge directed the jury that they could find the accused guilty of "frequenting" a public place if they found it proved that he had been there long enough to exhibit a felonious intent. The accused was convicted and he appealed to the Judicial Committee who held that the mere physical presence in a place of a suspected person or reputed thief who, while in the place, was proved to have had a felonious intent was not by itself sufficient to constitute "frequenting". In general, "frequenting" involved the notion of something which, to some degree at any rate, was continuous or repeated. The circumstances in which "frequenting" might arise included or involved enquiring as to the reason why a person went to or remained at a place, the time during which he was at or near the place, the nature of the place and its significance or relevance in regard to the purpose or object with which he went to the place, the events taking place while he was there and, in particular, the extent of his movements, the nature of his behaviour and his

continuing or recurrent activities. For those reasons the facts did not warrant a finding that the accused had "frequented" the particular street named and, accordingly, the appeal was allowed and conviction quashed.

2.87 These cases, it is submitted, leave matters unsettled in so far as Section 9(b) of the 1971 Act is concerned. The reasoning is that the Sub-section makes it an offence for a person to frequent a place used for the purpose of opium smoking. There is no requirement by that section, or indeed any other, that the accused should be a "suspected person" or that he should intend "to commit an arrestable offence" or that he should have "a felonious intent". And the Scots authorities are concerned with either known thieves or betting offences. It is submitted further that the principle that in English law frequenting requires an activity which in the nature of things involves more than mere physical presence at a point of time or presence for some identifiable criminal purpose of a continuous nature does not and cannot apply to offences in Section 9(b). The authorities cited appear to suggest that an individual who has certain characteristics in law can by his actions be "frequenting". It is submitted that the offence

in Section 9(b) is concerned with places that have certain characteristics: "a place used for the purpose of opium smoking". Accordingly, as the legislature appears to have emphasised matters in this way, it follows that the legislature did not intend more than simply punishing people being found on these types of premises. It is conceded that the matter is uncertain and will remain so until tested in the courts.

2.88 Sub-section (c). The essence of this sub-section is that it is an offence for a person to have in his possession either pipes or other utensils made or adapted for use in connection with the smoking of opium or any utensils which have been so used. In Section 9(c)(i) the utensils must have either been used by the accused or used with his knowledge and permission, or which he intends to use or permit others to use. In Section 9(c)(ii) the accused must have used the utensils or such use must have been with his knowledge and permission. It is of importance to note that this "paraphernalia" offence relates only to opium and not to any other controlled drug.

2.89 The punishment in terms of Section 25 and Schedule 4 of the 1971 Act for conviction of an offence under Section 9 is -

(a) Summary 12 months or £400 or both

(b) Indictment 14 years or a fine or both.

Section 11: Power to direct special precautions for safe custody of controlled drugs to be taken at certain premises.

2.90 The 1971 Act provides by Section 11:

"(1) Without prejudice to any requirement imposed by regulations made in pursuance of Section 10(2)(a) of this Act, the Secretary of State may by notice in writing served on the occupier of any premises on which controlled drugs are or are proposed to be kept give directions as to the precautions or further precautions for the safe custody of any controlled drugs of a description specified in the notice which are kept on those premises.

(2) It is an offence to contravene any directions given under Sub-section (1) above."

2.91 Section 10(2)(a) of the 1971 Act grants power to make regulations requiring precautions to be taken for the safe custody of controlled drugs and these regulations have been made: the Misuse of Drugs (Safe Custody) Regulations 1973 (1) require controlled drugs, other than those specified in Schedule 1, generally to be kept either in a locked safe or room or in a locked receptacle (2) and also

(1) SI 1973 No. 798

(2) Regulations 1, 2 and 5 and Schedule 1: operational from 1st July 1973

require that where such drugs are kept on premises occupied by a retail pharmacist or in a nursing home or similar institution and are not under the supervision of a pharmacist or the person in charge should be kept in a locked safe, cabinet or room which complies with the requirement of Schedule 2 or, alternatively, in the case of a registered pharmacy, which is certified by the local chief officer of police as providing an adequate degree of security. Provision is made, in the latter case, for the inspection of premises and the renewal and cancellation of certificates. (3)

2.92 The notice to be served on the occupier in terms of Section 11(1) must be done in accordance with Section 29 of the 1971 Act. This being done, the occupier must comply with any direction given. The offence is to contravene any direction. "Contravention" includes failure to comply and "contravene" has a corresponding meaning (4). It is submitted that the Crown will have made out a case when the actus reus is proved. The sub-section creating the offence does not provide explicitly for any mental element and the statutory defence does not apply to this offence (5). This offence may fairly be described as regulatory or a plain welfare offence in seeking to ensure that controlled drugs are kept in certain, protective conditions.

(3) Coming into effect from 1st October 1974

(4) Section 37(1)

(5) See Section 28(1)

2.93 The punishment in terms of Section 25 and Schedule 4 of the 1971 Act for a conviction of an offence under Section 11(2) remains as it was originally provided for:

(a) Summary 6 months or £400, or both

(b) Indictment 2 years or a fine, or both.

Section 12: Directions prohibiting prescribing, supply etc. of controlled drugs by practitioners etc. convicted of certain offences.

2.94 The 1971 Act provides by Section 12(1) that the Secretary of State is empowered to give a direction to a practitioner or a pharmacist who has been convicted of certain offences connected with drugs. Section 12(2) provides that:

"A direction under this sub-section in respect of a person shall -

(a) if that person is a practitioner, be a direction prohibiting him from having in his possession, prescribing, administering, manufacturing, compounding and supplying and from authorising the administration and supply of such controlled drugs as may be specified in the direction.

(b) if that person is a pharmacist, be a direction prohibiting him from having in his possession, manufacturing, compounding and supplying and

from supervising and controlling the manufacture, compounding and supply of such controlled drugs as may be specified in the direction."

2.95 The 1971 Act provides by Section 7 that certain activities which would otherwise be unlawful may be authorised by the Secretary of State. The activities prohibited by Section 12(2) are those for which authorisation is expressly required in terms of Section 7(3). Section 12 came into effect, along with the remainder of the 1971 Act, on 1st July 1973 (1) and on that date the transitional provisions contained in Schedule 5 paragraph 3 ceased to take effect.

2.96 Sub-section 6 provides that it is an offence to contravene a direction given under Sub-section 2. "Contravention" includes failure to comply and "contravene" has a corresponding meaning (2). There is no explicit requirement as to the mental element in this offence and it is submitted that to make out the actus reus is sufficient. The statutory defence in Section 28(1) does not apply to this offence.

2.97 In relation to Scotland, the Criminal Justice (Scotland) Act 1980 applies in relation to offences in terms of Section 12 of the 1971 Act and therefore

(1) SI 1973 No. 795

(2) Section 37(1)

proof of certain matters of a routine nature may be possible by service on the accused person of a copy report relating to those matters (3).

2.98 The punishment in terms of Section 25 of Schedule 4 for conviction of an offence under Section 12(6) varies in accordance with the name of the drug -

Class A

(a) Summary 12 months or £400, or both

(b) Indictment 14 years or a fine, or both

Class B

(a) Summary 12 months or £400, or both

(b) Indictment 14 years or a fine, or both

Class C

(a) Summary 3 months or £500, or both

(b) Indictment 5 years or a fine, or both (4).

Section 13: Directions prohibiting, prescribing, supply etc. of controlled drugs by practitioners in other cases.

2.99 The 1971 Act provides by Section 13(3) that it is an offence to contravene a direction prohibiting practitioners and doctors from possessing, supplying etc. controlled drugs. This section contains provisions similar in nature to those formerly contained in Section 1(2) and (4) of the 1967 Act. But, Section 13 of the 1971 Act must

(3) See Section 26 and Schedule 1

(4) Amended by substitution by the 1977 Act Schd. 5 para 1(1)(b) and by the 1975 Act Schd. 7B para 1(1)(b)

essentially be seen in conjunction with Sections 10 and 14 of the same Act. The former section gives the Secretary of State power to make regulations for preventing the misuse of controlled drugs and the latter allows the Secretary of State to make investigations where grounds for a direction under Section 13 are considered to exist. Indeed these three sections of the 1971 Act together represent the way in which the control of drugs in Britain in the last 50 years has centred round the doctor/addict-patient relationship. This concept was established as a result of the Rolleston Committee Report of 1926, a committee consisting of nine members, all holding medical qualifications. The result was that the development of the control of drugs leaned heavily towards certain medical aspects and Britain was able to cope with the continuity problem without recourse, until recent years, to the criminal law and heavy sanctions; a course of action which was not followed in the United States where the "marajuana scare" of the 1930's was dealt with by the criminal courts. In Britain then the problem of drugs was seen almost entirely as a medical one (1). The powers granted to the Secretary of State in terms of Section 13 essentially cover for where that relationship has broken down.

(1) Bean p59 et seq

2.100 Section 13(1). The Secretary of State is empowered by this sub-section to give a direction to a doctor. The meaning of "doctor" is given in the interpretation Section (2). The direction is made in relation to a contravention of regulations made with respect to the notification of drug addicts in terms of Section 10(2)(h) or the supply of controlled drugs to addicts in terms of Section 10(2)(i) or who has contravened the terms of a licence issued in terms of Section 10(2)(i).

2.101 Section 13(2). The Secretary of State is empowered by this sub-section to give a direction to any practitioner. The meaning of "practitioner" is given in the interpretation Section (3). This direction is made in circumstances where the Secretary of State considers that a practitioner is or has been prescribing, administering or supplying or authorising the administration or supply of any controlled drugs in an irresponsible manner. What exactly constitutes an "irresponsible manner" is not defined in the Act and must then be considered as being a matter of discretion for the executive. This section came into effect on 1st

(2) Section 37(1): "doctor" means a fully registered person within the meaning of The Medical Acts 1950 to 1969

(3) Section 37(1): "practitioner" (except in the expression "veterinary practitioner") means a doctor, dentist, veterinary practitioner or veterinary surgeon

July 1973 (4) and the power contained therein could only be exercised on or after that date. The section applies where a practitioner "is or has been" acting in a certain manner and this, it is submitted, precludes the Secretary of State from anticipating a practitioner so acting. However, this sub-section may be read in conjunction with Section 15 which provides for temporary directions in circumstances where such a direction is required to be given without delay. A temporary direction has a period of operation of six weeks beginning with the date on which the direction takes effect (5).

2.102 Section 13(3). This sub-section provides that it is an offence to contravene a direction under Sub-section (1) and (2). This sub-section contains no qualifying words concerning mens rea and it is submitted that in the circumstances the offence is made out with proof of actus reus only.

2.103 The 1971 Act, in terms of Section 25 and Schedule 4, provides the punishment for each offence and these have been amended to the extent of deleting "6 months or £200, or both" and inserting "3 months or £500, or both" in the punishment for Class C drugs (6).

(4) by SI 1973 No. 795

(5) Section 15(5), subject to sub-section (6)

(6) Amended by substitution by the 1977 Act Schd.5 para 1(1)(b) and by the 1975 Act Schd. 78 para 1(1)(b)

Section 17: Power to obtain information from doctors, pharmacists etc. in certain circumstances.

2.104 The 1971 Act empowers by Section 17 the Secretary of State to obtain information from doctors, pharmacists and certain other people in particular circumstances. This section reflects what the Home Secretary said at the Second Reading of the Bill (1) about the then existing state of the law:

> "it is inflexible because - the Home Secretary cannot move as quickly as he would want to do, and should do, to deal with the rapidly changing picture both of drug availability and habits of addiction."

The section then should allow the Secretary of State to obtain the information that he requires in order to deal with what appears to him to be a social problem caused by the extensive misuse of dangerous or otherwise harmful drugs. It is of some interest to note here that the long title of the Act refers to dangerous or otherwise harmful drugs whereas many of the criminal offences refer to controlled drugs. The latter phrase means any substance or product for the time being specified in Parts I, II or III of Schedule 2 of the 1971 Act (2) and the former phrase, it is submitted, is a far wider one but not defined in the Act. The

(1) Mr. Maudling HC Vol 803 co. 1750: 16th July 1970

(2) Section 2(1)(a)

Secretary of State is also empowered to (3):

> "conduct or assist in conducting research into any matter relating to the misuse of dangerous or otherwise harmful drugs."

and this power may well be exercised in relation to Section 17.

2.105 Sub-section (2) essentially regulates the manner and time by which the information required by the Secretary of State is to be provided. The sub-section indicates that this information is not to relate to the identity of any person for or to whom any such drug has been prescribed, administered or supplied, and thus maintaining the strict doctor/patient code of confidential communication.

2.106 Section 17 provides for two offences relating to this power to obtain information. These offences are not subject to the statutory defence contained in Section 28 of the 1971 Act. The first offence is contained in sub-section (3):

> "A person commits an offence if without reasonable excuse (proof of which shall lie on him) he fails to comply with any requirement to which he is subject by virtue of Sub-section (1) above."

In seeking a conviction under this sub-section the prosecution, it is submitted, must prove two

(3) Section 32

essential matters: firstly, that the accused person is subject to a requirement to provide information under the Section and, secondly, that the accused person failed to comply with such a requirement. This failure to comply may be regarded as a contravention of a requirement (4). It is submitted then that the offence is one of strict responsibility and that once the prosecution have made out the two elements mentioned then no enquiry need be made into, or evidence adduced allowing an inference to be drawn as to, the state of mind of the accused person at the relevant time. The sub-section, however, itself provides a statutory defence that the accused person may avail himself of: he may be able to show that he failed to comply with the requirement made because there was a reasonable excuse. The onus of proof of this reasonable excuse is explicitly placed on the accused and this onus may be displaced on a balance of probabilities (5).

2.107 The second offence is contained in Sub-section (4):

> "A person commits an offence if in purported compliance with a requirement imposed under this section he gives any information which he knows to be false in a material particular or recklessly gives any information which is so false."

(4) See Section 37(1)

(5) R v Carr - Briant [1943] KB607

It has to be said that the offence in this sub-section arises only if there is an obligation to give information imposed by this section. The essence, it is submitted, of this offence is that information given is "false in a material particular" and such information may be false not only on account of what it states but also on account of what it omits or implies (6). The falsity must be in a "material particular" and a particular may be material if it renders more credible something else (7). Unlike the other offences in this section, sub-section (4) would not sufficiently be made out by the prosecution simply by proving that the information given was false in a material particular. In addition to the actus reus there is clearly stated in the sub-section to be a mens rea: the accused person must have been shown to know of the falsity in a material particular and here "know" means actual knowledge. The sub-section also provides that it is an offence to give recklessly any information and this connotes that the information is given without caring whether it is true or false (8). A person may act recklessly without having a dishonest motive (9). It is certain, then, that

(6) R v Lord Kylsant [1932] 1KB422 and R v Bishirigian [1936] 1AIIER586

(7) R v Tyson (1967) LR CCR107

(8) Williams Brothers Direct Supply Stores v Cloote (1944) 60TLR270

(9) R v Bates [1952] 2AIIER 842 approved R v Russell [1953] 1WLR77

the information must be false, but the accused considering the recklessness, need not know in every case that it is false. If he suspects or believes or has reason to believe it is false, he will be guilty but nor need he intend to deceive (10).

2.108 The punishment in terms of Section 25 and Schedule 4 of the 1971 Act for each offence is:

Section 17(3)	Summary only	£200 (11)
Section 17(4)	Summary	6 months or £400, or both
	Indictment	2 years or a fine, or both.

Section 18: Miscellaneous offences.

2.109 The 1971 Act provides by Section 18 for several miscellaneous offences and these are derived in general terms from Section 13 of the 1965 Act. The Section consists of four separate offences in relation to regulations made under the 1971 Act and also in relation to licence conditions and false statements and information given for the purposes of the Act or regulations. The statutory defence contained in Section 28 of the 1971 Act does not extend to these offences.

(10) Derry v Peek (1889) 14 App Cas [1886-90] AIIERI and Shawinigan v Voskins & Co.Ltd. [1961] 3AIIER 396; [1961] 1WLR1206

(11) increased by 1977 Act Schedule 6 and 1975 Act Schedule 7C

2.110 The 1971 Act provides by Section 10 that:

> "(1) subject to the provisions of this Act, the Secretary of State may by regulations make such provisions as appears to him necessary or expedient for preventing the misuse of controlled drugs."

This wide enabling sub-section is followed but not restricted by particular circumstances in which regulations may be made: for example:

> "(2)(a) - for requiring precautions to be taken for the safe custody of controlled drugs".

This sub-section includes a total of nine examples of where the Secretary of State may make regulations.

2.111 The 1971 Act provides by Section 3 that the prohibition on the importation and exportation of a controlled drug in terms of Section 3(1)(a) and (b) does not apply:

> "(b) to the importation or exportation of a controlled drug under and in accordance with the terms of the licence issued by the Secretary of State and in compliance with any conditions attached thereto".

2.112 It is now proposed to deal with each of the offences in turn and separately. The reason is to seek the conditions of liability for each offence and to consider how, if at all, they differ.

2.113 Section 18(1). The regulations made by the Secretary of State in terms of Section 10 are The Misuse of Drugs Regulations 1973 (1) and The Misuse of Drugs (Safe Custody) Regulations 1973 (2) and The Misuse of Drugs (Notification of and Supply to Addicts) Regulations 1973 (3). This sub-section provides that:

> "It is an offence for a person to contravene any regulations made under this Act other than regulations made in pursuance of Section 10(2)(h) and (i)".

It is therefore an offence to contravene any of the regulations contained in The Misuse of Drugs Regulations 1973 or The Misuse of Drugs (Safe Custody) Regulations 1973 for they were made in pursuance of this section but are not excepted as provided for. It is not however an offence in terms of Section 18(1) to contravene The Misuse of Drugs (Notification of and Supply to Addicts) Regulations 1973 because that is specifically made in pursuance of Section 10(2)(h) and (i) and is therefore excepted (4).

(1) SI 1973 No. 797

(2) SI 1973 No. 798 (made in pursuance of Section 10(2)(a).)

(3) SI 1973 No. 799 (made in pursuance of Section 10(2)(h) and (i).)

(4) but see Section 13

2.114 The offence in this sub-section is made out by the Crown when it is shown that the accused has contravened a regulation: contravention in terms of Section 37(1) includes failure to comply with and, it is submitted, that the offence is one of strict responsibility.

2.115 Section 18(2). The offence in this sub-section is made out by the Crown when it is shown by them that the accused has contravened a condition or other term of a licence issued by the Secretary of State for the importation of controlled drugs or a licence or other authority issued under regulations made under this Act. The licence or other authority should not be made in pursuance of Section 10(2)(i). It is submitted that this offence is also one of strict responsibility.

2.116 Section 18(3).

> "A person commits an offence if, in purported compliance with any obligation to give information to which he is subject under or by virtue of regulations made under this Act, he gives any information which he knows to be false in any material particular or recklessly gives any information which is so false."

It has to be said that the offence in this sub-section arises only if there is an obligation to give information imposed by any regulation made under the 1971 Act. This refers inter alia to

obligations imposed on every person authorised by or under the Misuse of Drugs Regulations 1973 supra regs. 5 to 8 to supply any drug listed in Schedules 2 to 4 to the regulations, each of whom is required to keep a register of those drugs contained, supplied and possessed by him, in accordance with reg. 19. Every such person must furnish particulars of such drugs obtained, supplied and possessed by him, when required by the Secretary of State to do so, in accordance with reg. 20(f). The actus reus of the offence then appears to be to give any information which is false in any material particular. The information given may be "false in a material particular" not only on account of what it states but also on account of what it omits or implies (5). The falsity must be in a "material particular" and a particular may be material if it renders more credible something else (6).

2.117 Section 28 of the 1971 Act does not apply to the offences under Section 18. The mens rea of the offence in Section 18(3) is indicated clearly by the word "knows" which here means actual knowledge. Further, "recklessly" connotes that the information is given without caring whether it is true or false (7). A person may act recklessly without

(5) R v Lord Kylsant [1932] 1KB422; R v Bishirgian [1936] 1AIIER586

(6) R v Tyson (1967) Lr CCR 107

(7) Williams Bros. Direct Supply Stores v Cloote (1944) 60 TLR 270

having a dishonest motive (8). It is certain then that the information must be false, but the accused need not know it is false. If he suspects or believes or has reason to believe it is false then he will be guilty; nor need he intend to deceive (9).

2.118 Section 18(4)

"A person commits an offence if, for the purpose of obtaining, whether for himself or another, the issue or renewal of a licence or other authority under this Act or under any regulations made under this Act he -

(a) makes any statement or gives any information which he knows to be false in a material particular, or recklessly gives any information which is so false, or

(b) produces or otherwise makes use of any book, record or other document which to his knowledge contains any statement or information which he knows to be false in a material particular."

Various of the constituent phrases in this sub-section have been discussed in relation to the other sub-sections of Section 18 so that this portion is accordingly limited. But, it has to be said that both offences under this sub-section arise

(8) R v Bates [1952] 2AIIER 842 approved in R v Russell [1953] 1WLR 77

(9) Derry v Peek (1889) 14 App Cas. [1886-90] AIIER1 and Shawingian v Voskins & Co.Ltd. [1961] 3AIIER 396; [1961] 1WLR 1206

only if the false information is given to obtain the issue or renewal of a licence or other authority. The actus reus of the offence in Section 18(4)(a) is the making of a statement or the giving of information for such a purpose. The actus reus of the offence in Section 18(4)(b) is the producing or otherwise making use of any book, record or document for such a purpose.

2.119 The mens rea of the offence in Section 18(4)(a) is indicated clearly by the word "knows" which here means actual knowledge and was discussed above (10). The burden on the Crown is to prove beyond reasonable doubt that the accused knew of the falsity in a material particular or acted recklessly with regard to this fact. The mens rea of the offence in Section 18(4)(b) is indicated clearly by the words "to his knowledge". The burden on the Crown in this offence is to prove beyond reasonable doubt that the accused knew that the document is false in a material particular. It is submitted that the variation in wording - "know" in Section 18(4)(a) and "to his knowledge" in Section 18(4)(b) - requires the more restricted meaning of knowledge in the latter offence whereas knowledge or recklessness or wilfulness is acceptable in the former (11).

(10) see para 3.117 supra

(11) see Roper v Taylor's Central Garage etc. [1951] 2 TLR 284 at p288

2.120 The punishment in terms of Section 25 and Schedule 4 for all of the offences is

(a) Summary 6 months or £400, or both

(b) Indictment 2 years or a fine, or both.

Section 19: Attempts etc. to commit offences.

2.121 The 1971 Act provides by Section 19 that -

> "It is an offence for a person to attempt to commit an offence under any other provision of this Act or to incite or attempt to incite another to commit such an offence."

This follows the provision of Section 18 of the 1965 Act:

> "If a person attempts to commit an offence against this Act, or solicits or incites another person to commit such an offence, he shall, without prejudice to any other liability, be liable on summary conviction to the same punishment and forfeiture as if he had committed an offence against this Act."

It has to be said from the outset that the offence contained in Section 19 of the 1971 Act has no operation with regard to the misuse of controlled drugs. The commentary that follows is a summary of the law in Scotland and in England as it applies to the two offences in the section which are attempts to commit offences under the Act and incitement to commit those offences. The Act also

contains provisions relating to the prosecution and punishment of contraventions of Section 19 in Section 25.

> "(3) An offence under Section 19 of this Act shall be punishable on summary conviction, on Indictment or in either way according to whether under Schedule 4 to this Act, the substantive offence is punishable on summary conviction, on Indictment or either way; and the punishment which may be imposed on a person convicted of an offence under that section are the same as those which, under that Schedule may be imposed on a person convicted of the substantive offence. In this section "the substantive offence" means the offence under this Act to which the attempt or, as the case may be, the Incitement or attempted Incitement mentioned in Section 19 was directed."

The effect of this sub-section is essentially to make the punishment for an attempt at an offence in the Act the same as the actual offence attempted. In punishing an accused person for attempting such an offence the law is punishing that person for something they did not do. The justification of this is that a person who intends to do an illegal act and does not succeed is just as wicked as a person who does succeed. Also, as

one learned commentator has put it (1):

> "it is only common sense to lock the stable door once the horse has shown signs of intending to get out, and foolish to wait until it has gone."

2.122 Scots Law. Sections 63(1) and 312(o) of the Criminal Procedure (Scotland) Act 1975 provide that any attempt to commit an offence shall itself be an offence, and as these sections are general in their terms they should apply to statutory offences as well as common law. It would seem to follow from this that a statutory provision in an Act that does not make a specific reference to an attempt being an offence is nevertheless covered by the terms of the 1975 Act. Section 19 provided for attempts and incitements. Conspiracy is an inchoate crime in that it does not require the putting into effect of any criminal purpose, it is itself a substantive crime and consequent on this it is a crime to attempt to form a conspiracy. This attempt to form a conspiracy is known as incitement. As soon as an individual invites another to join in the commission of a crime the first person has incited another and if the second person accepts the invitation and an agreement to commit a crime has been reached then both people will be conspiring. The difference between attempted crimes

(1) Gordon p164

and completed crimes is that in the former the actus reus of the crime attempted is not in fact brought into being, although other crimes may be fully committed in the course of the attempt. This overt act is evidence of intention and is required to constitute the attempt. The actus reus of an incitement to commit an offence is an invitation, or rather evidence of such an invitation. Further, in Scots law, the mens rea for an attempted crime is the same as that for the completed crime. (2)

2.123 English Law. At common law it is itself an offence to attempt to commit a statutory offence or to conspire to commit or to incite the commission of that statutory offence. These inchoate offences at common law may also be twice removed from the ultimate statutory offence as in the case of an incitement to conspire or an attempt to conspire to commit the statutory offence. Indeed in R v Chelmsford Justices Exp. J J Amos (3) the accused applied for an order of certiorari to quash a conviction of "attempting to incite" another to supply him with a controlled drug contrary to Section 18 of the 1965 Act. It was held, dismissing the application, that an "attempt to incite" was not an offence under Section 18 of the 1965 Act but since an attempt to incite to supply cannabis was an offence at common law all that was wrong was that

(2) Cawthorne v H M Advocate 1968 JC 32 per the Lord Justice General at p36

(3) [1973] Crim.LR 437

the incorrect label, namely the words "contrary to Section 18 of the Dangerous Drugs Act 1965", had been attached to the charge, that the name of the offence had never been in doubt and that the accused had not been prejudiced by the incorrect label. If this charge had been brought within the offence in Section 19 of the 1971 Act the matter would then have been correctly charged rather than at common law.

2.124 The requisites of a criminal attempt in English law are an intention to commit an indictable offence and the attempt normally requires an intention to commit the crime in question. Also, the requisite is that there is an overt act that the accused thinks furthers the intent and that is sufficiently proximate to the crime intended. That essentially means that the act must not be mere "preparation" although it must be said that the dividing line between "preparation" and attempt is a difficult one to draw. The requirement of intention results in part from the ordinary meaning of the word "attempt", and it was held by the Court of Appeal in R v Mohan (4) that attempt requires intention in the true sense, and mere knowledge of the probability or high probability or likelihood of the consequences is not sufficient. In English law one can attempt an offence of strict liability if it is indictable but

(4) [1976] QB1

the attempt requires mens rea even though the offence attempted does not (5). The common law offence of incitement is committed when one person "counsels, procures or commands" another to commit a crime, whether or not the other actually commits it. The mental requirement of incitement is (6):

> "probably an intention to bring about the crime or (presumably) recklessness as to a circumstance included in the definition of the crime."

The authority for the mens rea of attempt is R v Whybron (7) where it was held that in every case of attempt there must be intention as regards all the material elements of the offence. Thus, it would seem to be accepted that a crime like murder which may be committed unintentionally cannot be committed unintentionally.

2.125 The 1971 Act does have no further peculiarity in relation to attempted crimes. In relation to the offence of attempted unlawful possession of a controlled drug the 1971 Act provides a specific defence in Section 5(4). The defence operates in this way: if the accused is proved to have attempted to get unlawful possession of a controlled drug he or she has a defence if he or she proves that either knowing or suspecting it to

(5) see Gardner v Akeroyd [1952] 2QB743

(6) Williams p385 although the author cites no authorities on the point

(7) (1951) 35 Cr.App.R 141

be a controlled drug, he or she attempted to take possession of it for the purpose of delivering it into the custody of a person lawfully entitled to it. This defence is without prejudice to any other defence which it is open to an accused to raise (8). The accused must prove the defence on a balance of probabilities (9).

Section 20: Assisting in or inducing commissions outside United Kingdom of offences punishable under a corresponding law.

2.126 The 1971 Act provides by Section 20:

> "A person commits an offence if in the United Kingdom he assists in or induces the commission in any place outside the United Kingdom of an offence punishable under the provisions of a corresponding law in force in that place."

This offence contains provisions similar to those formerly provided by the 1965 Act by Section 13(2) -

> "A person -
>
> (d) who in the United Kingdom aids, abets, counsels or procures the commission in a place outside the United Kingdom of an offence punishable under the provisions of a corresponding law in force in that place, or does an act preparatory to, or

(8) Section 5(6)

(9) R v Carr - Briant [1943] KB607

in furtherance of, an act which if committed in the United Kingdom would constitute an offence against this Act:

shall be guilty of an offence against this Act."

It has to be said that the 'United Kingdom' means Great Britain and Northern Ireland (1): the matter is of some importance for generally criminal law is administered in jurisdictions determined by geographical boundaries and more generally those boundaries coincide with individual States. This is the principle of the territoriality under international law. There would seem however to be a principle of international law which concedes in certain circumstances the extra-territorial exercise of criminal jurisdiction by States (2). In the case of The Lotus (3) the Permanent Court of International Justice (the predecessor of the present International Court of Justice) it was held that (4)

(1) Royal and Parliamentary Titles Act 1927 Section 2(2)

(2) see J K Bentil "Extra-Territorial Application of the Misuse of Drug Legislation" 142 JPN 130 and, generally, Law Comm. Report No.91 on territorial and extra territorial extent of criminal law in England and Wales

(3) (1927) PCIJ Ser.A. No.10

(4) ibid at p20

> "Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty."

Indeed it might be said that this provision is necessary for many criminal activities now involve certain aspects of an international nature: it is trite that the illicit traffic of drugs on a large scale implies inter-State movement with assistance in one form or another in different States. The essence then of the offence contained in Section 20 is assisting or inducing in the United Kingdom an offence outwith the United Kingdom. Section 20 includes the phrase "assists in or induces" whereas Section 13(d) includes the term "aids, abets, counsels or procures". The latter is essentially art and part guilt in Scotland (5) and accessories in England (6) and it is submitted that the former phrase has the same meaning. But Section 20 contains only one offence rather than

(5) see Gordon p135

(6) see Williams p287

two since "assists in or induces" describes one particular type of activity (aiding and abetting) which can occur in one of two ways (7). The difference between the two sections is noticeable in so far as the offence in the 1965 Act includes alternatives of doing "an act preparatory to, or in furtherance of" and those wider phrases, it is submitted, introduce an element of uncertainty. These matters, and others, were considered in R v Vickers (8) in which the accused in 1973 had agreed, while in England and elsewhere, with another man that the accused would acquire a truck, would collect a number of speaker cabinets in London and transport them to Italy knowing that thereafter cannabis from a source unknown to the accused would be filled into the cabinets and shipped by other persons to the United States in contravention of the United States Comprehensive Drug Abuse Prevention and Control Act 1970. Following conviction the accused appealed (9) on the ground that the Crown were required to prove assisting in illegal importation by showing acts directly concerned with the actual importation, e.g. preparing a bill of lading or loading the cannabis into a plane bound for New York. In short counsel

(7) Ware v Fox [1967] 1WLR379 and Mallon v Allan [1964] 1QB385

(8) [1975] 2AIIER945; [1975] Crim.LR337

(9) The appeal also concerned a procedural point in relation to conviction

for the accused sought to say that, borrowing from the vocabulary of the law relating to attempts, the act must be more proximate to the illegal importation than was the case on the facts. In dismissing the appeal, Scarman LJ (as he then was) said (10):

> "as a matter of everyday speech it could be said that what the appellant agreed to do was to assist in the commission of the offence under American law of illegally importing a prohibited drug into the United States of America."

and later (11):

> "In our view Parliament chose the plain English phrase "assists in the commission of" so as to leave the jury the opportunity of exercising a common sense judgment on the facts of a particular case."

Their Lordships applied Cozens v Brutus (12), the authority for the principle that the meaning of plain English words is a question of fact, not law, and rejected counsel's submissions for a meaning that would be far narrower.

2.127 But counsel had supported his submission with two further arguments. Firstly, that, on the true construction of the Act as a whole, the offence of

(10) ibid at p950

(11) ibid at p950

(12) [1972] 2AIIER 1297 per Lord Reid at p1299 and [1973] AC854 at p861

assisting in the commission of a foreign offence under a corresponding law is one of strict liability; the words creating the offence must, therefore, be construed narrowly. Their Lordships rejected this argument too, on the basis that they could find nothing in the provisions of the Act that compelled them to construe the offence under Section 20 of assisting as being one of strict liability (13):

> "In ordinary English one who assists knows what he is doing and the purpose with which it is done."

Secondly, that there is a significant difference between Section 20 of the 1971 Act under which the accused was charged and the earlier offence under Section 13(d) of the 1965 Act and this related to the omission in Section 20 of the phrase "an act preparatory to, or in furtherance of" to be found in Section 13(d). Counsel conceded that his client would have fallen, on the facts of the case, within the Section 13(d) offence but his client could not have been brought within the more limited class of offence in Section 20. Counsel cited as authority R v Johnston (14) in which Orr LJ giving judgment commented that the legislature in 1971 must be taken to have deliberately omitted the words of the 1965

(13) R v Vickers ibid at p951

(14) unreported 22nd March 1974. Court of Appeal (Criminal Division)

Act which created the offence that are not to be found in the 1971 Act. Their Lordships accepted this dictum (15):

> "We have no doubt that the omission was deliberate".

but they said that it did not follow that they were to place on the language of Section 20 a narrow construction which was, in their view, inconsistent with the meaning of the plain English words used by the Section (16). The second argument was rejected, as was the appeal.

2.128 The same court was given an opportunity to consider its views on Section 20 in R v Evans (17) when the accused appealed against conviction for assisting in the United Kingdom in the commission in Canada of an offence punishable under the provision of a corresponding law in Canada providing for the control and regulation in Canada of the import of drugs. The essential facts were that the accused had been approached in the United Kingdom and asked if he would be interested in carrying drugs from Europe to Canada and he agreed to do this. He was told to fly to Brussels which he did and was met there and given a suitcase and holdall in which he was shown where cannabis was hidden. He took the luggage to Montreal where he handed it to a man.

(15) R v Vickers ibid at p951

(16) see Cross at p43 and Unwin v Hansom [1891] 2QB115 per Lord Esher at p119

(17) (1976) 64 Cr.App.R 237 CA; [1977] Crim.LR223

Following conviction, the accused appealed inter alia on the ground that there was no evidence of actings by him in the United Kingdom that were capable of amounting to "assisting" in the commission of the offence. It was argued that his agreement to fly to Brussels to pick up the cannabis and his travelling to Heathrow Airport to do so were at the highest merely acts preparatory to assisting in the commission of the relevant foreign offence. Again, the court's attention was drawn to the distinction between the language of Section 20 of the 1971 Act and Section 13(2) of the 1965 Act. In dismissing the appeal the court held that there was sufficient evidence of "assistance" to go to the jury to show that what was done was to make arrangements to provide for a human carrier of the prohibited drugs in that, having made his agreement with another, the accused went to Heathrow Airport and there picked up the ticket provided for him and flew to Brussels knowing that the purpose of his journey was the transportation of cannabis from Brussels to Montreal. Further R v Vickers supra was authority that the question as to whether the facts of a particular case show that an accused person had assisted in the United Kingdom in the commission of an offence punishable under the corresponding

law in any place outside the United Kingdom is a question of fact for the jury and that in the instant case the jury had decided the matter using their common-sense judgment.

2.129 It is submitted then that the combined effect of those two decisions is that any agreement in the United Kingdom to do acts abroad will amount to a conspiracy to commit the offence since it appears that going abroad is an act of assistance. Further, the concept of "assistance" now is so flexible in its interpretation as to bring under its general scope, all kinds of activities which may tend to have the effect of helping or facilitating the illegal production or trafficking in drugs across national frontiers. And it follows from this that any direct or indirect way in which activities of that kind are rendered possible or more possible or easier would fall within the terms of Section 20 of the 1971 Act. Counsel in the two reported cases may have argued for a narrow interpretation of Section 20 but in fact the actus reus of the offence is now very wide.

2.130 Section 20 contains the term "corresponding law" and this is defined in Section 36 of the 1917 Act as meaning:

> "a law stated in a certificate purporting to be issued by or on behalf of the government of a country outside the United Kingdom to be

> a law provided for the control and regulation in that country of the production, supply, use, export and import of drugs and other substances in accordance with the provisions of the Single Convention on Narcotic Drugs signed at New York on 30th March 1961 or a law providing for the control and regulation in that country of the production, supply, use, export and import of dangerous or otherwise harmful drugs in pursuance of any treaty, convention or other agreement to which the government of that country and Her Majesty's Government in the United Kingdom are for the time being parties."

It would seem that a certificate containing such a statement of the law is conclusive proof that a law is a "corresponding law". This is a matter that concerned Lord Foot in the Third Reading in the Lords (18) as he believed that what the law was is essentially a matter for the judiciary and the accused would have great difficulty in refuting the contents of such a certificate. The Government had suggested that the accused would not be disadvantaged as the Crown still had to prove their case beyond reasonable doubt. Lord Foot suggested further that as a certificate would be prima facie evidence of its contents the prosecution would not need to call supporting witnesses, leaving the accused

(18) HL Vo 316 col. 1007: 25th March 1971

to disprove the contents and thereby shift the burden of proof. Lord Wilberforce thought that Lord Foot attributed more significance to the certificate than it would have in practive. Nevertheless, the noble Lord pressed his Amendment and on a Division the Not-Contents had it and, accordingly, the Amendment was disagreed.

2.131 In practice the certificate containing such a statement does so in relation to either the law of a foreign country which provides for control of the production and other activities in that country of drugs in accordance with the Single Convention of 1961 or the law of a foreign country which provide for control in that country of dangerous or otherwise harmful drugs in pursuance of any treaty to which the governments of both that country and of the United Kingdom are parties. In neither of the two reported cases is there any mention of objection having been taken to such certificates as were tendered there and the system would appear to work tolerably well.

2.132 The punishment in terms of Section 25 and Schedule 4 are -

(a) Summary 12 months or £400, or both

(b) Indictment 14 years or a fine, or both.

Section 23: Powers to search and obtain evidence.

2.133 The 1971 Act provides by Section 23 for powers to search and obtain evidence and, in particular, that:

> "(1) A constable or other person authorised in that behalf - shall, for the purposes of the execution of this Act, have power to enter the premises of a person carrying on business as a producer or supplier of any controlled drugs and to demand the production of any controlled drugs and to demand the production of, and to inspect, any books or documents relating to dealings in any such drugs and to inspect any stocks of any such drugs."

In terms of Sub-section (2) if a constable has reasonable grounds to suspect that any person is in possession of a controlled drug in contravention of the 1971 Act or of any regulation made under that Act the constable may exercise certain powers to search that person and detain that person for the purpose of searching him and there are further powers in relation to searching, seizing and detaining evidence and vehicles. In terms of Sub-section (3) certain warrants may be granted.

2.134 In terms of Subsection (4) -

> "A person commits an offence if he -
>
> (a) intentionally obstructs a person in the exercise of his powers under this Section; or

(b) conceals from a person acting in the exercise of his powers under Sub-section (1) above any such books, documents, stocks or drugs as are mentioned in that Sub-section; or

(c) without reasonable excuse (proof of which shall lie on him) fails to produce any such books or documents as are so mentioned where their production is demanded by a person in the exercise of his powers under that Sub-section."

2.135 Intentional obstruction. There are four powers which may be exercised and which may be intentionally obsctructed:

(a) without warrant, to search business premises for information and evidence: Section 23(1).

(b) without warrant, to search for suspected unlawful possession for controlled drugs: Section 23(2).

(c) with warrant, to search premises for drugs: Section 23(3)(a).

(d) with warrant, to search premises for documents: Section 23(3)(b).

This offence of obstructing is wider than other similar offences of obstructing police officers in the execution of their duty (1) in that it extends to "other persons authorised". Further, whereas the

(1) Police Act 1964 Section 51(3) and Police (Scotland) Act 1967 Section 44(1)(a)

offence in the Scots Act of 1967 applies to a constable acting in the execution of his duty, the offence of obstructing in the 1971 Act applies where a constable or an authorised person is acting under the Sub-sections. Thus, to be guilty of this offence the obstructor must be aware that the person obstructed is exercising one of the four powers outlined above. This was the point at issue in Farrow v Tincliffe (2) where the accused and a girl friend were stopped by two police constables on suspicion that the accused had been selling cannabis oil and that the girl was carrying cigarette papers for use in smoking cannabis. The police constable carried out a superficial search but, wishing to search them thoroughly, asked the accused and the girl friend to go in the police car to the police station. On the way the accused threw or pretended to throw something out of the car window and told the girl to get out and run. The accused was charged with two counts of intentionally obstructing a person in the exercise of his powers under Section 23(2)(a) of the 1971 Act contrary to Section 23(4)(a) of the same Act. The accused argued that the police constables were not acting in the exercise of their power under Section 23(2)(a) because the section did not give the police power to take a person to search him but this was rejected

(2) [1976] Crim.LR126

by the juries who convicted him. The accused appealed by case stated to the Divisional Court and it was held, dismissing the appeal, that Section 23(2)(a) of the 1971 Act which gave the police the right to search and detain a suspect for the purpose of searching him, was clearly intended to operate parallel to Section 24 which gave the police the right of arrest on suspicion of certain offences, so that the accused's submission that the police constables ought to have arrested him before taking him away, failed. Further, if a male police constable wished a female suspect to be searched it was obviously right that he could take the suspect to a police station to be searched by a female police constable. The police constables were acting within the scope of their powers under Section 23(2)(a) and the accused's convictions were upheld. But it has to be said that in Scotland obstruction means obstruction involving physical force and does not extend, for example, to giving false information to the police: Curlett v McKechnie (3) whereas in England and Wales obstruction includes doing anything which makes it more difficult to exercise police powers and this need not involve physical violence: Hinchcliffe v Sheldon (4).

(3) 1938 JC 176; see Gordon p819

(4) [1955] 3AIIER406

2.136 Concealing etc. It is an offence to conceal books, documents, stocks or drugs from a person authorised to inspect such items under Section 23(1); Section 23(4)(b). This particular offence arises from a positive act on the part of an individual, namely deliberately hiding the required item. But, it may be sufficient for an offence to be made out by making false statements about the whereabouts of the relevant articles: Police v Boyd (5).

2.137 Failing to produce. It is an offence to fail to produce books or documents when their production is demanded by a person authorised to do so: Section 23(4)(c). This section confers a right on a person to demand production and a duty on another person to comply with that demand. This offence - unlike that under Section 23(4)(b) - relates solely to books or documents and makes no reference to stocks or drugs. The failure or omission to produce which forms the basis of this offence must be without reasonable excuse. It is a matter for the accused to show on balance of probabilities that he has a reasonable excuse for his failure: R v Carr - Briant (6).

(5) [1969] NZLR 522

(6) [1943] 1KB607; 1943 2AIIER156

2.138 The punishment in terms of Section 25 and Schedule 4 is -

(a) Summary 6 months or £400, or both

(b) Indictment 2 years or a fine, or both.

Chapter 3 THE DEFENCES

3.01 Statutory defences. The first defence that an accused person may put forward arises out of the nature of the offences. In general terms the 1971 Act provided that certain activities are unlawful, and it provides further that doing that activity is an offence. It is further provided, in general terms, in relation to certain of these offences that the Secretary of State is empowered to make regulations which would permit these activities to be done when they would otherwise be illegal and would constitute an offence. For example, the Act provides by Section 6:

> "(1) Subject to any regulations under Section 7 of this Act for the time being in force, it shall not be lawful for a person to cultivate any plant of the genus Cannabis."

It may be, therefore, that in certain circumstances a person is charged with an offence against the 1971 Act when in fact that person was at the relevant time duly authorised. If that is so then it would be a good defence in law and the accused would be entitled, if the defence is made out, to an acquittal. But, the question arises concerning the burden of proof on the prosecution: are they required to show beyond reasonable doubt that the accused person was not so authorised in his

activities? Must the prosecution negate the possibility of lawful authority? The answer, it is submitted, lies in R v Ewens (1) where the accused was charged with being in unauthorised possession of a scheduled substance contrary to Section 1(1) of the 1964 Act. In giving evidence the accused admitted possessing the particular tablets but said that as he had suffered from mental depression he had been given various tablets over a number of years and some of these he had kept. As for the tablets in the charge, he said that he had got them on prescription from a doctor but he could not remember whom or when. The accused was convicted but appealed, the question being whether the chairman correctly directed the jury on the burden of proof in relation to the charge. The chairman had told the jury that where the accused had adduced evidence on his own behalf, as he had done here, then if that evidence was accepted by the jury as true or reasonably near the truth then that created a doubt sufficient to acquit. The contention at appeal by the accused being that the chairman ought to have told the jury that they should not convict unless the Crown had satisfied them so that they felt sure that these drugs were not in possession of the accused in pursuance of the prescription of a qualified medical practitioner. In disposing of

(1) [1966] 2AIIER 470

the matter Melford Stevenson J said (2):

> "It is tolerably plain that there must be many statutory prohibitions which would become incapable of enforcement if the prosecution had to embark on inquiries necessary to exclude the possibility of a defendant falling within a class of persons excepted by the Section when the defendant himself knows perfectly well whether he falls within that class and has, or should have readily available to him, the means by which he could establish whether or not he is within the excepted class."

And in giving judgment his Lordship referred (3) to R v Scott (4) in which a similar question arose under an order, made by virtue of the 1920 Act, which provided that no person should supply any of the specified drugs unless he was licensed by the Secretary of State to supply the drug. The point was taken at the close of the case for the prosecution that there was no evidence that the accused was an unauthorised person. Swift J held that, if the accused were licensed, it was a fact which was peculiarly within his knowledge and there was no hardship on him to prove it. He said (5) that:

(2) ibid at p473

(3) ibid at p474

(4) (1921) 86 JP 69

(5) ibid at p70

"it might be very difficult or impossible for the prosecution satisfactorily to prove that he did not possess any one or other of the qualifications which might entitle him to deal with the drug, but the defendant could prove without the least difficulty that he had authority to do it."

This dictum was cited and accepted in R v Oliver (6), not a drugs case, and that case was in turn applied in R v Ewens supra. In these circumstances it is submitted that the principle is equally applicable to the terms of the 1971 Act with the accused proving his case on balance of probabilities (7).

3.02 The second defence arised from Section 28 of the 1971 Act which is a statutory defence and a type of defence increasingly used by the legislature to mitigate the harshness of statutory offences imposing strict liability (8). Although statutory defences vary in degrees of complication generally they impose on the accused the burden of proving that he has no mens rea and was not negligent. The effect is that once the prosecution have established a case the accused must show that he acted innocently. These provisions may have some advantage but many commentators see the defences as a deviation

(6) [1943] 2AIIER 800

(7) R v Carr - Briant [1943] 1KB607; [1943] 2AIIER 156

(8) further on this point see Smith & Hogan p98

from the fundamental principle that the prosecution must prove the whole of their case in that where the prosecution have proved that the accused has committed the actus reus of a particular offence then it is for the accused to prove that he committed that actus reus innocently (9).

3.03 Section 28 contains a defence of proof of lack of knowledge which applies to the offences in Section 4(2) and (3), Section 5(2) and (3), Section 6(2) and Section 9 of the 1971 Act. In fact the section contains two different defences and these will be considered separately even though the first will be seen to be subject to the second.

3.04 Section 28(2)

> "Subject to sub-section (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged."

In discussing this matter it is submitted that there are two headings under which the defence

(9) this defence followed on suggestions in Warner [1969] 2AG256 and Sweet v Parsley [1970] AC132

has to be considered, that of the burden of proof on the accused and that of the substance of the defence. Burden of proof. In R v Colyer (10) it was held that for a prosecution to succeed under Section 5(2) of the 1971 Act the prosecution had to prove not only that the accused had control of the substance charged but also that he knew he had it (11). The burden of these rested on the prosecution. Once these matters were proved it was then open to the accused to try to establish a defence under Section 28, for instance, that while he knew he had the substance he was mistaken as to its nature. Under that section the burden of proof is on the accused and the section does not reduce the matters the prosecution had to prove before the Act, and still have to prove, nor alter the burden of proof in respect of them. It merely provides fresh defences not hitherto available. This was confirmed in R v Ashton-Rickhardt (12) where the accused was convicted of being in possession of cannabis resin. He had been stopped in relation to a road traffic offence and a search of his car uncovered a hand-rolled cigarette in the pocket of the driver's door and

(10) [1974] Crim.LR 243

(11) Warner ibid

(12) [1977] Crim.LR 424: this report uses cannabis and cannabis resin interchangeably but they are different: Section 37(1): also (1977) 65 Cr.App.R67

subsequent analysis revealed there to be about 200 milligrammes of cannabis resin. His defence was that he had no knowledge that the drug was in his car and that it must have been placed there by someone else. The trial judge directed the jury that the prosecution had to satisfy them that the accused had a controlled drug in his possession. After that it was up to the accused to satisfy them, on a balance of probabilities, that he did not know the drug was under his control. The accused appealed on the ground that the judge had misdirected the jury as to the meaning of possession in Section 5(2) and, further, that Section 28(2) of the 1971 Act does not require an accused to prove that he neither knew nor suspected nor had reason to suspect that he had custody of a controlled drug. The Court of Appeal, in allowing the appeal, held that the judge had failed to direct the jury that knowledge was an essential ingredient of possession (13) and that the burden of proving it remained with the prosecution. The Crown had submitted that possession in the 1971 Act bore a different meaning from that in the 1964 Act. If the legislature had intended to alter the meaning of possession, so as to exclude a mental element, one would have expected to find that intention more clearly expressed. Whatever the precise scope

(13) following Warner supra

of Section 28, its effect was to afford a defence where no defence had existed previously. Nothing in this section altered the burden of proof in respect of any element of the offence that the prosecution had to prove. It was not necessary, the court held, on this occasion to examine the limits of Section 28. Thus, we are not concerned here with the meaning of "possession" which the Court of Appeal clearly thought remained the same in the new Act as in the earlier ones. Rather, R v Ashton-Rickhardt supra is authority for the proposition that the burden of proving the case beyond reasonable doubt rests on the Crown, as it always has, and nothing in Section 28 altered that burden. The Court of Appeal went further and said that the defence in Section 28 was one that had not existed prior to the 1971 Act. In practice this means that the Crown must prove knowing custody or control over a controlled drug beyond reasonable doubt in order to make out a prima facie case and when this is done the accused in order to secure acquittal must prove that some other requirements of the offence has not been met. The accused must prove this matter on balance of probabilities (14) and failure to do this means that the intention to have possession of the controlled drug will be imputed to the accused by

(14) R v Carr - Briant [1941] KB 1

the court. In the submissions to the court in R v Ashton-Rickhardt supra the Crown argued that (15):

> "Section 28 removed from the shoulders of the Crown on to those of the accused the "burden of disproof" of knowledge that he had the "thing" in his possession".

This was a point that was raised obiter but not decided in R v Wright (16). However, the court rejected the argument in the instant case on the basis that, as indicated above, when construing Section 28 the defence was one that had not existed before and therefore it would be "very odd indeed" if at the same time as providing a new defence Section 28 also removed from the shoulders of the Crown the burden of proof of one of the essential elements of the offence as stated by the House of Lords in Warner supra. Thus in a prosecution for possession of a controlled drug the Crown still required to prove knowledge by the accused that he had control of the "thing" in question (17).

3.05 Thus, it would appear to be that the words in Section 28(2) "it shall be a defence" could be read either as making provision for a new defence, or, as putting the onus of proof on balance of probabilities on the accused. In terms of Section

(15) (1977) 65 Cr.App.R67 at p71. The point was also argued in McKenzie v Skeen unreported 2nd August 1977 COCN A21/77

(16) (1976) 62 Cr.App.R169; [1976] Crim.LR248

(17) ibid at p72

28(1) the defence applies to six different offences in the 1971 Act but most comment has been focussed on offences of possession of controlled drugs. In R v Ashton-Rickhardt supra the Crown argued on appeal that the provision put the onus of proof on the accused but this was rejected by the court which preferred to say that the section made provision for a new defence. The matter has not come before the courts again for judicial considera: :tion but there has been academic interest: in a recent article Ribeiro and Perry (18) suggest that there are at least eight distinct modes or situations of possession and that in each instance the precise elements in the offence to be proved by the prosecution or constituting an evidential burden on the defence will differ. Of these eight modes or situations of possession, the authors reject three as not amounting to possession-in-law, as they see it, and consider the remaining five. Of these five, the first is "ideal" possession which, if it existed on the authors definitions, would raise no legal or analytical problems, and another concerns container cases which, under Warner supra, places an evidential burden only on the accused and not, as we are concerned with here, a legal burden:

(18) R Ribeiro and J Perry Possession and Section 28 of the Misuse of Drugs Act 1971 [1979] Crim.LR90

for these reasons the authors leave these two modes or situations of possession to one side also. The authors then show (19) that the ordinary requirements of law relating to what they define as strict possession, joint possession and possession by innocent agent require the prosecution to prove knowledge on the part of the accused. It follows then, they argue, that on the authority of R v Ashton-Rickhardt supra, "it shall be a defence" amounts to a new defence, Section 28(2) is incapable of application, a conclusion that is "unwelcomed and reluctantly reached". An interpretation was offered by Mathias (20): the author points out that Riberio and Perry's analysis of possession into eight modes or situations is correct in so far as each type is distinct in terms of circumstance, but he suggests that the fact that different circumstances may constitute possession does not require the conclusion that the nature of possession differs in each, though he concedes that the authors do not appear to go that far in their suggestions (21). Indeed, Mathias shows that the requirement of the offence of unlawful possession of a controlled drug is the same whether the circumstances are what the earlier authorities classify as "strict possession" or

(19) supra at p104-5

(20) D Mathias "The Application of Section 28 of the Misuse of Drugs Act 1971 to Possession." [1980] Crim.LR689

(21) supra at p692-3

"possession of a container's contents". But, Mathias also argues, and probably this is the more important submission, that it is no longer necessary for the prosecution to prove, in order to establish a prima facie case, that the accused knew that the thing was under his control. Here then, is the alternative argument that the words "it shall be a defence" puts the onus of proof on the accused. Mathias argues that to say other than this is to argue on an assumption as to the true construction of that particular provision for which the only support is the obscurity of the legislative intent. Mathias bases his argument on the "half-way house" authority of Lord Pearce in Warner supra. And there matters rest until either there is a policy decision at the highest level, the House of Lords, or Parliament expresses its intention more clearly in a statute.

3.06 The substance of defence. It is clear that what the accused has to prove is that:

> "he neither knew of nor suspected nor had reason to suspect"

(and it is submitted that he must prove all of these things, the first two of which are subjective and the third objective)

> "some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged."

The facts covered by the last requirement are essentially those that constitute the actus reus of the particular offence. In this connection to "know" has been held to include suspicion or wilful blindness. (22)

3.07 Section 28(3)

"Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused -

(a) shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but

(b) shall be acquitted thereof -

(i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; or

(22) see Glanville Williams The Criminal Law, The General Part p57 and the authorities cited there and Textbook p84-87

(ii) if he proves that he believed the substance or product in question to be a controlled drug, or a controlled drug of a description, such that, if it had in fact been that controlled drug or a controlled drug of that description, he would not at the material time have been committing any offence to which this section applies."

(i) Section 38(3)(a): the effect of this sub-section is that it denies an accused person the possible defence that, where possession of a controlled drug is proved, he himself believed he had a different controlled drug from the one he had in fact. This sub-section has priority over the others in the section so that once it operates the other provisions cannot apply.

(ii) Section 28(3)(b)(i): the effect of this sub-section is that when an accused person is prosecuted for possession and the Crown have established that the accused in fact had in his custody a controlled drug as alleged then the accused is allowed a defence concerning his belief as to the nature of the substance which turned out to be a controlled drug. The accused must be acquitted if he discharges the legal burden of proving that he neither believed, nor suspected, nor had reason to suspect it to be a controlled drug. It is submitted that this defence

was intended by the legislature to deal with cases of strict possession and to alleviate the harshness of the courts in ignoring an accused person's genuine misapprehension as to the nature of the substance in his control. Further, proof of this strict possession, that is custody by the accused of an article in his full knowledge but with imprecise knowledge as to the nature of the article, does not mean an automatic conviction but rather it means that the accused must then discharge the legal burden of proving his lack of knowledge, suspicion or reason to suspect the true nature of the substance in his custody. This allows a defence for a person who was in the position of the accused in Searle v Randolph (23) who was convicted of possessing cannabis contrary to Section 13 of the 1965 Act when he had thirty six cigarette ends in his custody although there was no evidence that the accused knew or had reason to believe that they contained any substance other than tobacco. The total cannabis amounted to three milligrammes! This case is to be contrasted with R v Marriott (24) were the accused was acquitted on appeal of possession of cannabis resin, this amounting to 0.03 grains, contrary to Section 13 of the 1965 Act. The accused had been found to be in possession of a

(23) [1972] Crim.LR 779

(24) [1971] 1WLR189; [1971] 1AIIER 595

knife which analysis showed to have the particle of cannabis resin adhering to the tip of the blade but he said that he did not know of its presence. However, the court thought that if he knew that there was foreign matter on the blade then that was sufficient mens rea but the court doubted at the same time whether the law went that far!

(iii) Section 28(3)(b)(ii): the effect of this sub-section is to allow the accused a defence where he is found to be in possession of a certain controlled drug when he believes himself to be in possession of a different but particular controlled drug for which he is duly authorised. The accused has a legal burden of proving this belief.

(iv) Section 28(4): the effect of this sub-section is to preserve for the accused the general defences in the criminal law, for example, infancy and duress.

3.08 An anomaly in the defences contained in Section 28 arises out of an application of the whole section to those offences detailed in sub-section one. Section 6(2) makes it an offence to cultivate a plant of the genus Cannabis without authority but such a plant is not a controlled drug within the meaning of that phrase in terms of Section 2(1)(a) of the 1971 Act. Further, in Sections 9(a) and (b) the offences are concerned with one particular controlled drug (prepared opium) and a

belief on the part of the accused that he was acting in relation to some other controlled drug gives rise to a material mistake if he is believed. In Section 9(c) the offence relates to opium and prepared opium and the principles of Section 28 would seem not to apply.

PART FOUR

Chapter 4 Conclusions

A. Criminal Responsibility

4.01 The cardinal principle of the common law in criminal matters is that no act is punishable unless it is performed with a criminal mind and that requires that the state of mind is such that his actings are made criminal. The criminal liability of an accused person depends on whether he has committed the actus reus (that is, the legally blameworthy conduct) of a particular offence with the necessary mens rea (that is, the legally blameworthy state of mind). Generally, the principle of contemporaneity requires the actus reus and the mens rea to occur at the same point in time for the commission of a crime (1). But, the foregoing is trite in comparison to the remainder of a most complex subject and this is not the place for a complete review of the limits and content of that subject. What is required now, however, is some consideration of the principles of strict responsibility or strict liability (2). Whatever the common law may be, in modern times a doctrine has grown up that in certain classes of statutory

(1) but see G Marston Contemporaneity of Act and Intention (1970) 86LQR208 and A R White The Identity and Time of the Actus Reus [1977] Crim.LR148

(2) until recently strict responsibility or strict liability was known as absolute liability: see Williams p905 echoing the Law Commission Working Paper Number 31 (page 2 footnote 2)

offences an accused person could be convicted on proof by the prosecution of the actus reus only. These classes of statutory offences have come to be known as "public welfare offences" or "regulatory offences". One learned commentator has advanced two propositions in relation to the growth of the doctrine of mens rea. The first is that the development of mens rea represented the growing inference in the criminal law of ethical considerations of morality, contrasting with the earlier law which was more concerned with the nature and degree of harm done. The second is that the law was thereby improved (3). Notwith: :standing, then, the cardinal principle of mens rea in criminal matters, Parliament has been prepared to use the sanction of the criminal law as a means of securing a well-ordered structure of social and economic conduct. And in an attempt to achieve this end the cardinal principle has been circumvented continuously. This, it is suggested, is a result of the condition of life arising from an industrialised society and of such momentous events as two world wars with their vast output of regulations creating new offences. But, the development of strict responsibility owes some of its origins to judicial decisions and, in England,

(3) Howard p4

to the general policy adopted by successive Lords Chief Justice (4). This policy was reflected in the construction of the relevant statutory provisions of an offence. An Act of Parliament could explicitly alter the requisite mens rea for an offence or it could exclude certain defences or it could transfer the burden of proof from the prosecution to the defence. But, in many statutes Parliament is found to be silent on these particular matters and it then becomes necessary for the courts to interpret the statute by reference solely to the general principles of law. However, in recent legislation it is increasingly obvious that many of the offences classified as being of strict responsibility and are no less serious in their social consequences than those common law crimes which require proof by the prosecution of both an actus reus and a mens rea and any argument to the contrary, it is submitted, can be refuted by reference to the schedule of punishments relating to the 1971 Act, for example. Further, the vast number of offences of strict responsibility and the differing terms of each section of Acts creating such offences means that it is necessary to consider the actual terms of each offence in order to determine the

(4) For example Edwards at pxii writing in 1955 said that the mood of the bench then was "manifestly suspicious of attempts to extend the field of strict responsibility in crime."

requirements of actus reus and mens rea. Consequently, it is virtually impossible to lay down any generally valid rules of interpretation (5). But, it may be said that the courts pay considerable attention to the wording of the section and also the gravity of the offence, the nature of the penalty and the object of the statute. By emphasising any one or combination of these criteria the court can hold that a particular offence does or does not require mens rea. The justification of the policy that the courts are pleased to adopt from time to time, and indeed the action of Parliament in circumventing the cardinal principle, are not matters than can properly be discussed in this work.

4.02 One point on which both supporters and opponents of strict responsibility appear to be agreed is that the present position of the doctrine is unsatisfactory owing to its erratic incidence. One reason for this has been the great distinction drawn between crimes requiring mens rea and those being of strict responsibility so that judges faced with the decision in relation to a particular offence have been required to

(5) In the past judicial interpretation was in relation only to particular offences then before the court: only recently have general principles in relation to statutory offences evolved: see Edwards p244

construe it as one or the other. What jurists have sought then is some new system which combines the merits claimed for strict responsibility and those of crimes requiring mens rea. The answer to the problem, it has been suggested, is the half-way house between mens rea and strict responsibility, and that is responsibility for negligence. This, it is argued, would operate to maintain the high standards of care which the regulatory offences seek to establish. Responsibility for negligence would be strengthened by a shift in the burden of proof. The operation of this doctrine has been described in the following terms (6)

> "If from the statutory words no requirement of mens rea could be gathered, the accused would be prima facie liable to conviction on proof by the prosecution of actus reus only. However, the accused should be allowed to exculpate himself by proving affirmatively that he was not negligent. The issue of negligence would be a question of fact to be decided according to the circumstances of each case."

The authors submit that such a doctrine could not possibly be less effective than strict responsibility as an instrument of law enforcement and might be more effective by eliminating injustice.

(6) Morris and Howard p201

But this is not a theoretical model that the High Court of Australia has adhered with consistency to the principle that there should be no liability without fault, however minor the offence. Thus, the rule is that where an offence does not require full mens rea, it is nevertheless normally a good defence for the accused to prove that he acted under a reasonable mistake of fact. The standard of proof to be attained by the accused in Australia is on the balance of probabilities only (7).

4.03 The Australian solution then is to allow the accused a defence that he acted under an honest and reasonable belief in a state of facts which, if they existed, would make his act innocent. Although this solution has not been implemented in the United Kingdom it has been the subject of favourable judicial comment (8). There is, however, an alternative. This solution is that even where the words used to describe the prohibited conduct would not in any other context connote the necessity of any particular mental element they are nevertheless to be read as subject to the implication that a necessary element in the offence is the absence of a belief, held honestly and on

(7) see Proudman v Dayman (1941) 67 CLB 536 particularly at p540 and Smith and Hogan p97 and C Howard Strict Responsibility in High Court of Australia (1960) 76 LQR 547

(8) Sweet v Parsley supra per Lord Reid at p150 and Lord Pearce at p158 but see Brett Strict Responsibility: Possible Solutions (1974)

reasonable grounds, in the existence of facts which, if true, would make the act innocent (9). An important difference would be that the accused did not have a burden of proving such a defence, only of adducing evidence in support of his contention. The Law Commission, in carrying out its responsibility for examining the general principles of the criminal law with a view to their eventual codification has examined this matter. A working paper on the mental element in crime was prepared (10) and this formed the basis for discussion until the Report (11). The first recommendation contained in the Report was that there should be statutory provisions as to the meaning of intention, knowledge and recklessness, which provisions should apply unless expressly excluded. The second recommendation was that there should be certain statutory presumptions operating in the absence of express indications to the contrary, as to the extent to which offences should be taken to require a mental state on the part of the accused. The latter recommendation was that wherever in creating an offence Parliament made no provision making liability strict or making liability depend on the presence or absence of any particular state of mind or compliance with an

(9) Sweet v Parsley supra per Lord Diplock at p163

(10) (1970) Working Paper No. 31

(11) (1978) Report on the Mental Element in Crime (No. 89)

objective standard of conduct then, to the extent that no such provision is made, the offence should involve on the part of the accused, intention or recklessness in relation to any circumstance (12). Further, in future offences, where liability is subject to a defence or exemption, the accused should not be liable if he believed that any circumstance existed which, had it in fact existed, would have provided him with that defence or exemption. The burden of proving the accused's belief that the exempting circumstances existed is the same as the burden of proving that the circumstance itself existed (13). This position, it is submitted, is one essentially similar to that suggested by Lord Diplock (14). The Law Commission Report met with some hostile reaction and Professor Brian Hogan said that (15)

> "There is nowhere in the Report a firm and clear statement of principle, nor is Parliament offered any guidance."

The basis of the learned professor's argument appears to be that the problem goes much further than the substitution of liability based on fault (including negligence) for strict liability though, at the very least, a man ought not to be

(12) (1978) Report ibid para 89

(13) (1978) Report supra para 91 and see clause 6 of the draft Bill in Report

(14) see footnote 8 supra

(15) [1978] Crim.LR588 at p596

accounted criminal if he has taken all reasonable care to conform to the law's demands. It is, he says, pertinent to ask whether and when the imposition of criminal liability for merely negligent behaviour is proper and profitable. And he finds the suggestion that the substitution of liability based on negligence for strict liability - the so-called half-way house - will solve the problem as "facile."

4.04 We have seen the division of the offences contained in the 1971 Act and development of the case law in relation to each such offence. The legislature has provided for these offences but no attempt has been made to place these into similar or related categories of criminal responsibility. The 1971 Act classifies the offences in Sections 3 to 7 inclusive under the heading "Restrictions relating to controlled drugs etc.", the offences in Sections 8 and 9 under the heading "Miscellaneous offences involving controlled drugs etc." and the offences in Sections 10 to 17 under "Powers of Secretary of State for preventing misuse of controlled drugs." The 1971 Act also covers the offences in Sections 18, 19 and 20 with "Miscellaneous offences and powers" and that in Section 27 with "Law enforcement and punishment of offences." Each offence therefore is

to be judged in the light of its own terms, its own case law and the prevailing judicial policy. It would appear from the earlier parts of this work that Parliament has been prepared to give some indication of the mental element required to be proved if certain offences in the 1971 Act are to reach the stage of conviction, but, it is submitted that overall the picture is fragmented and much is still uncertain. The assistance that has been given by Parliament has been minimal.

4.05 Where Parliament has made a major attempt to consider the mental element in statutory offences is in the introduction of Lord Pearce's suggestion in Warner (16) to apply the half-way house" solution to Section 28 of the 1971 Act. But even here the matter is confused for academic opinion and the judiciary have been shown to be divided on the desirability of this solution and even where it is considered to be desirable there is uncertainty as to whether the burden on the accused is to be an evidential or a legal one. The concept of the "half-way house" cannot, therefore, be said to be fully developed or to have been applied with any great enthusiasm. Indeed, we have seen that the courts have had suitable occasions on which to review and indeed implement the concept but for, presumably, policy

(16) [1969] 2AC 256; [1968] 2WLR1303 at p1345

reasons have chosen not to do so. It may well be, of course, that in the absence of a clear lead from elsewhere the courts have chosen not to apply the solution despite the Australian precedents: certainly there has been a fundamental change in the law but this has not been expressed as clearly or decisively as it might have been and the courts have been described by some commentators as wrong in rejecting submissions that this is what should be done, and done in a decisive manner (17).

4.06 Accordingly, it is submitted that the 1971 Act shows clearly signs that the Parliamentary draftsman has attempted to give some sort of lead as to the mental element in statutory crime arising out of what the court has provided as guidance on earlier occasions. It is conceded that the judges frequently are at odds but then the 1971 Act itself is fragmented. However, as the 1971 Act is a major criminal statute and in daily use a clear expression of the requirements is necessary. It is submitted that matters could well have been clarified and the status of the offences enhanced by drafting the Bill with the offences in the related groups with suitable headings, such as "strict responsibility" for the regulatory offences such as Sections 12 and 17, "strict responsibility with a degree of mens rea" for Section 23 and

(17) D M Mathias ibid at p693

"offences requiring mens rea" for Section 5. Essentially the 1971 Act can be said to be in need of synthesis. This is not and cannot be said to be an academic exercise in "tidying-up" the statute book. The acts of, and the actions concerned with, drug-taking are viewed by Parliament as being of extreme seriousness and this is doubtless meant to reflect the nature of the social problem with which the legislature has had to concern itself. Certainly, some offences in the 1971 Act can be described as regulatory or public welfare offences but, it has been argued (18), the severe penalties contained in the Act, such as 14 years in several offences, are such that they are anything but simply regulatory. It is submitted that in fairness to the accused where such penalties are in contemplation by the legislature, clear and unambiguous indications of the requirement of full mens rea are required. Further, if the failure to give such a clarity of meaning is accepted as a valid criticism then another point arises: in the vast increase of statutory offences in the last thirty years there has been a proliferation of statutory defences and if the legislature is to provide such defences, it is submitted that equally clear indications as to the nature of the burden imposed, if any, on the accused be given and, if this is to vary depending on the nature of certain circumstances then this too

(18) Cross and Jones at p332

should be indicated.

B. Misuse of Drugs.

4.07 On initial question that seems as yet unanswered is why the long title of the 1971 Act should concern itself with "dangerous or otherwise harmful" drugs and yet the Sections of the Act provide for controlled drugs. What is the difference, if any? Are they intended to mean the same? The matter is unresolved. In the development of the law through the cases that have been discussed certain problems have arisen. Firstly, we have seen that the argument of minimum quantity has developed. The English test of usability has developed and, although not accepted in Scotland, it appears to be there to stay, unless and until there is a policy decision or, more probably in the absence of Scots criminal appeals to an English court, legislation to the contrary. It has been suggested by one writer that provision should be made for a prosecution only when the quantity is 100 milligrammes or more though there appears, in logic at least, no reason why this particular quantity should be founded on. This aspect of the law, it is submitted, is uncertain and unsatisfactory and there is need for some form of reconciliation between English and Scots decisions.

Secondly, in the course of the progress of the Bill through Parliament one member has been quoted as saying that the purpose of the legislation is to prevent the circulation of drugs. If this is correct, and the member has maintained a learned interest in the subject matter, then it is submitted that greater emphasis should have been given to offenders in terms of Section 5(3); possession with intent to supply unlawfully. Doubtless Parliament sought here, as in other parts of the Act, to leave much to the courts who must be allowed discretion to ensure justice in accordance with the circumstances of widely varying cases before them. But, should not clearer meanings have been given in relation to the intention to supply? At the present the law on this point is uncertain following on the irreconcilable decisions of R v King (19) and R v Moore (20) and if a suitable occasion arises for principles to be established then it is a matter of considerable importance that this should be done. The law can only be properly implemented when the intention of Parliament is settled.

4.08 There would appear, furthermore, to be some inconsistency in the gradation of controlled drugs. There is no indication within the Act as to why certain drugs are placed in one classification in

(19) [1978] Crim.LR228

(20) [1979] Crim.LR789

preference to others but this is what Parliament has done. We have seen in the cases how confusion had developed in relation to "cannabinol" and "cannabinol derivatives" in class A and "cannabis and cannabis resin" in class B. No reasons are to be found in the Act as to why Parliament regards them differently and applies varying penalties. It may be that the drugs in class A are regarded as more "dangerous or otherwise harmful" than those in the other classes but there is no expression of this view. It is possible, however, that Parliament refrained from indicating why the controlled drugs are so divided in order to avoid interminable arguments as to the scientific basis of these assertions. It would also seem that so far as the offences are concerned, Parliament has devoted considerably more of its attention to some drugs rather than others. There may well be good historical reasons for this; opium has concerned Britain in various economic and social contexts since the late 18th century (21) whereas what is commonly known as LSD was first synthesised in 1938 but only noted for its psychic properties in 1943 (22). But it is submitted that the attention paid to opium in terms of Section 9 is excessive, or at least it was an error not to give

(21) see for example Jack Beeching The Chinese Opium Wars (1975)

(22) Peter Laurie Drugs, Medical, Psychological and Social Facts at p107

comparable treatment to all offences. It was also an error to fail or omit to make provisions in relation to drug paraphernalia for all drugs and not simply opium. If, for example, the possession of syringes for non-medical purposes is not illegal then that in itself assists in the circulation of drugs. It is also submitted that in failing to make greater provision for the offences of importing and exporting controlled drugs the 1971 Act is ill-balanced. The supply of many controlled drugs in the United Kingdom is only maintained by the importation of drugs from abroad because of the nature and origin of the drugs and consequently Parliament ought to have provided especially for those offences in the 1971 Act. The same can be said for the offence of exporting controlled drugs, especially as the highly complex chemical processes require expert knowledge and specialist equipment that only an advanced country such as Britain has in short compass (23).

C. Future developments.

4.09 Notwithstanding these criticisms, it is a tribute to the draftsman of the 1971 Act that no new legislation in relation to drugs in general appears to be demanded. Many of the criticisms relate to

(23) a point made in R Lee and C Pratt Operation Julie (1978)

points which have developed subsequent to the passing of the 1971 Act. However, the principal criticism relates not so much to controlled drugs but to the criminal law in general. It is submitted that what is required is legislation to establish more clearly the position of the mental element in statutory offences. The likelihood that such legislation will be forthcoming is reduced by the lack of Parliamentary time, the complicated nature of the subject matter, political expediency, a desire to leave "lawyer's law" to the courts and the great variety of offences that such general principles would apply to. Such legislation was considered, as we have seen, by the Law Commission and a draft Bill prepared which on becoming an Act would affect all future legislation in that strict responsibility could only be imposed by the conscious choice of Parliament and that the offence would be labelled as one carrying liability without fault. Be that as it may, it seems likely that some time in the future the legislature will be required to consider the mental element in statutory offences. The problem is complicated by the widely-varying opinions of eminent jurists but this much is certain: while statutes in the past have concerned themselves with providing for offences of a trivial nature,

increasingly crimes are being established that by common consensus have a foundation in an important moral wrong. It is important, therefore, that the entire matter of the mental element in crime is reviewed continuously by all lawyers so that when finally called on by Parliament, agreed advice can be given.