The Law Commission

Working Paper No 62

Criminal Law

Offences relating to the Administration of Justice

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CONTENTS

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ADMINISTRATION OF JUSTICE

I. INTRODUCTION

1. In its working paper on Inchoate Offences the Working Party assisting the Law Commission in the examination of the general principles of the criminal law has provisionally proposed that the crime of conspiracy should be limited to conspiracy to commit a substantive offence[1]. It was recognised that the implementation of this proposal would in some respects reduce the extent of the present law of criminal conspiracy, and that there would have to be an examination of those areas of the law where gaps might be left. If such an examination showed that there was conduct which it was felt should continue to be criminal, whether committed by a number of persons or by only one, then it was envisaged that additional substantive offences would have to be proposed.

2. In Working Paper No. 54[2] we have dealt with the offence of conspiracy to trespass, as found to exist in Kamara and Others v. Director of Public Prosecutions[3], and made the provisional proposal that it should cease to be an offence. In Working Paper No. 56[4] we have examined in the field of fraud those offences which have been prosecuted as conspiracies to defraud and have made provisional proposals for the filling of those gaps that may be left by the proposed restriction of conspiracy which we thought needed to be filled. In Working Paper No.57[5]

1. Working Paper No. 50 (1973), para. 32.
2. Offences of Entering and Remaining on Property (1974).
3. [1974] A.C. 104.
4. Conspiracy to Defraud (1974).
5. Conspiracies relating to Morals and Decency (1974).

we have made a like study of offences which have been prosecuted as conspiracies to corrupt public morals and to outrage public decency. In this last-mentioned paper we have gone somewhat further than in the two earlier papers: apart from considering what gaps need to be filled if conspiracy is limited to conspiracy to commit an offence we have made provisional proposals for the rationalisation of the common law offences of corrupting public morals and outraging public decency. In this we have had in mind the overall objective of codifying the criminal law[6].

3. A working paper to examine the effect of the proposed restriction of conspiracy in the area of offences of perverting or obstructing the course of justice was in the minds of the Working Party who prepared the paper on Inchoate Offences[7] and they appreciated the connection between these offences and contempt of court. Since then the Committee on Contempt of Court under the Chairmanship of the late Lord Justice Phillimore has reported[8] with recommendations which, if implemented, will have an effect upon our work in this area.

4. The Report of the Phillimore Committee does not recommend a complete codification of the law of contempt, but it does recommend some clarification of certain aspects of the law, limitation of the power of the courts to deal summarily with conduct which amounts to a contempt, and the creation of two new criminal offences, which they suggest the Law Commission should consider in the context of offences against the administration of justice. Their recommendations which particularly affect the present paper may be summarised as follows -

(i) Contempt jurisdiction should be invoked only where -

(a) the offending act does not fall within the definition of any other offence; or

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6. (1968) Law Com. No. 14, Second Programme of Law Reform, Item XVIII.

7. Working Paper No. 50, paras. 18-19 and 32.

8. Report of the Committee on Contempt of Court, (1974) Cmnd. 579

(b) urgency or practical necessity requires that the matter be dealt with summarily[9];

(ii) Conduct which is intended to pervert or obstruct the course of justice should only be capable of being dealt with as a contempt of court, by the summary procedures applicable to contempt of court, if the proceedings to which the conduct relates have started and have not been completed[10];

(iii) Conduct directed against a litigant in connection with legal proceedings in which he is concerned, which amounts to intimidation or unlawful threats to the person, or to property or reputation should (subject to (ii) above) be capable of being treated as contempt of court; but conduct falling short of that should not be a contempt[11];

(iv) New substantive offences should be created to cover -

(a) taking or threatening reprisals against a witness after proceedings are concluded[12] and

(b) scandalising the court[13].

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9. Ibid., para. 21.

10. Ibid., para. 72. The Report makes it clear that there are two procedures - both of which are of a summary nature - by which contempts are dealt with. The one is where the contempt is before the court trying a case when the judge deals immediately with the conduct. The other procedure is where proceedings are instituted before the Divisional Court on notice and tried by that court on affidavits, supplemented, if necessary, by viva voce evidence.

11. Ibid., para. 62.

12. Ibid., para. 157.

13. Ibid., para. 164

5. Although not specifically recommended by the Committee, it is clear from their treatment of the present law of offences against the administration of justice in Appendix II that some clarification of the common law is required[14]. In addition, an examination of "Common Law Misdemeanours" was planned in our First Programme of Law Reform[15], and they include the common law offence of perverting or obstructing the course of justice. We have had the advantage of some work done in connection with this offence by a sub-committee of the Criminal Law Revision Committee, who gave preliminary consideration to replacing the wide general offence with a number of specific offences.

6. The way in which this matter has developed, and in particular the treatment of the subject in the Report of the Phillimore Committee, leads us to think that the most useful course is for us now to undertake an overall study of offences concerned with the administration of justice. A paper restricted to the question of what offences, if any, might need to be created if the crime of conspiracy was restricted to conspiracy to commit an offence would serve only a very limited purpose[16]. Accordingly this paper considers generally, though subject to some limitations offences concerned with the administration of justice and makes provisional proposals for their clarification and orderly exposition.

7. In the main we are concerned with those offences which are related to specific judicial proceedings, whether in progress or contemplated, but we do not deal in detail with all conduct by which judicial proceedings may be obstructed. The physical obstruction of court proceedings is dealt with now as contempt of court and we do not propose any change[17]. The misconduct of court

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14. Ibid., App. II, paras. 5-11.

15. (1965) Law Com. No.1, Item XIV.

16. Particularly because there is a wide substantive offence of perverting the course of justice irrespective of conspiracy; see para. 10 below.

17. See para. 14 below.

officials in office we propose should be dealt with in the context of misconduct by public officers[18]. Escape from custody, other than escape to avoid trial, we propose should be dealt with separately from offences relating to the administration of justice[19]. We deal with misleading the police to obstruct them in their duty to decide upon the institution of criminal proceedings[20], but not with other more general obstruction of the police[21].

II. PRESENT LAW

Common Law

Perverting the course of justice.

8. Offences against the administration of justice have been punishable at common law for many centuries, and it was originally only in connection with interfering with the machinery of justice that forgery, perjury, deceit and even conspiracy were treated as criminal offences[22]. At least since the reign of Edward I the law has recognised the offence of conspiracy, but it seems that in that early period the only conspiracy which it punished was a conspiracy to take civil or criminal proceedings maliciously. Holdsworth[23] takes as the starting point of his discussion of conspiracy as an offence certain statutes of Edward I which are almost entirely concerned with conspiracy in relation to court proceedings.

9. It is no doubt due to this early connection between conspiracy and interfering with the administration of justice that in later years it became the general practice to prosecute as a conspiracy most conduct that was concerned with obstruction of the course of justice. The practice is also reflected in the treatment

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18. See para. 90 below.
19. See para. 102 below.
20. See paras. 98-100 below.
21. See para. 24 below.
22. Holdsworth, A History of English Law, Vol. III, p.400.
23. Ibid., pp.402-403.

of the subject in the context of conspiracy by such standard works as Halsbury[24], Russell[25], and Archbold[26]. This practice is still followed in many cases[27].

10. Nevertheless it seems to be clear that at common law wrongful obstruction of the course of justice is now an offence without any element of conspiracy. This offence, and the subject matter of the conspiracy offences, is referred to in a number of ways. It may be called interfering with the administration of justice, or obstructing the administration of, or the course of, justice. It may be called defeating the due course of justice, perverting the course of justice, or defeating the ends of justice, or even effecting a public mischief. It seems to us that the most convenient, precise and all-embracing phrase to use to describe the conduct under discussion is that which heads this section, namely "perverting the course of justice". It was decided in R. v. Vreones[28] that attempting, by the manufacture of false evidence, to mislead a judicial tribunal which might come into existence was an indictable misdemeanour at common law. In that case the defendant tampered with samples of wheat, taken for submission to arbitrators to be appointed in the event of any dispute as to the quality of the consignment of wheat. Lord Coleridge held that to manufacture false evidence for the purpose of misleading a judicial tribunal was a misdemeanour. In R. v. Grimes[29] it was held in the Crown Court, Liverpool, by Judge Kilner Brown that "an attempt to defeat the due course of justice" was an offence known to the law, even where there was no

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24. Halsbury's Laws of England (3rd ed.), vol. 10, p.631.

25. Russell on Crime (12th ed., 1964), Vol. 2, p.1481.

26. Archbold, Criminal Pleading, Evidence & Practice (38th ed., 1973), para. 4066.

27. R. v. Sharpe (1937) 26 Cr. App. R.122; R. v. Panayiotou [1973] 1 W.L.R. 1032.

28. [1891] Q.B. 360.

29. [1968] 3 All E.R. 179.

element of conspiracy. This was approved by the Court of Appeal in R. v. Panayiotou[30]. In R. v. Andrews[31], the Court of Appeal held that to produce false evidence in order to mislead a court and to "pervert the course of public justice" was a substantive offence, and that incitement so to act could properly be charged in appropriate circumstances. The effect of these recent cases is to establish at common law a general offence of perverting the course of justice, so making it unnecessary to charge either a conspiracy or a more particular offence, such as tampering with evidence.

11. Broadly speaking, the offence penalises any conduct which wrongly interferes, directly or indirectly, with the initiation, progress or outcome of any criminal or civil proceedings, including arbitration proceedings. It does not matter that specific proceedings have not yet been started, if the intention is to prevent them being initiated[32], or even that proceedings have been completed, if the intention is to avoid their result[33]. It is difficult, too, to draw any line between the broad offence of perverting the course of justice and the specific common law offences which have been held to exist. In some instances the courts have considered the matter from the viewpoint of whether the conduct comes within the broad offence[34], in others they have considered whether the conduct amounts to a specific offence, such as embracery (attempting to corrupt or influence a juror[35]), or interfering with a witness by threats or persuasion[36]. In addition, there has been a wide range of conduct penalised as a conspiracy to do

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30. [1973] 1 W.L.R. 1032, although this was a case which involved a conspiracy.

31. [1973] Q.B. 422.

32. R. v. Panayiotou [1973] 1. W.L.R. 1032, where the police were investigating a complaint of rape; R. v. Sharpe (1937) 26 Cr. App. R. 122.

33. R. v. Davis (1910) 4 Cr. App. R.21 where an appeal against conviction had been dismissed, but the accused was attempting to prove his innocence by means of a forged document.

34. R. v. Andrews [1973] Q.B. 422.

35. Archbold (38th ed., 1973), para. 3447.

36. Russell on Crime (12th ed., 1964), Vol. 1, p.312.

certain things which directly or indirectly interfere with the administration of justice, the charges sometimes being based on conspiracy to pervert the course of justice, and sometimes on conspiracy to effect a public mischief.

Examples of conspiracy charges.

12. Since one of the primary purposes of this study is to ascertain whether the present law of conspiracy covers conduct which would not be covered if conspiracy were limited to conspiracy to commit an offence, it is necessary to examine the area in a little more detail:-

(i) Russell[37], in dealing with conspiracies to interfere with the fair trial of proceedings, lists (citing mainly early cases) the following conspiracies that have been held to be criminal -

(a) to dissuade or prevent witnesses from giving evidence,

(b) to prevent a witness from attending the trial,

(c) to prepare witnessess to suppress the truth,

(d) to bribe or tamper with jurors or to corrupt judges,

(e) to pervert the minds of magistrates or jurors by the publishing, pending criminal proceedings, of matter likely to prejudice a fair trial.

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37. Russell on Crime (12th ed., 1964), Vol. 2, p. 1484.

(ii) In R. v. Robinson[38] the survivors of an accident, in which a car overturned killing one of the passengers, by agreement told the police, when questioned, that the deceased had been the driver. They were convicted of conspiracy to effect a public mischief.

(iii) In R. v. Rose[39] the driver of a car, when stopped for a motoring offence, pretended with the help of his passenger to be someone else who, as a result, was actually charged with the offence. They were convicted of conspiracy to effect a public mischief.

(iv) In R. v. Sharpe[40] the defendants agreed to conceal and destroy evidence of the collision between a car driven by one of them and a cyclist, to persuade another to make a false statement, and to mislead the police investigating the collision by making false statements. They were convicted of conspiracy "to defeat the ends of public justice".

13. There seem to be no real differences in principle between any of the cases in paragraph 12 above. The object of

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38. (1937) 2 Jo. Crim. Law 62.
39. (1937) 1 Jo. Crim. Law 171.
40. (1937) 26 Cr. App. R. 122.

the conspiracy in each of the instances (a) to (e) in sub-paragrap (i) would be to pervert the course of justice, which is a substantive offence in itself. The ratio decidendi in R. v. Sharpe was that public justice required not only that people should not take steps to conceal a crime or destroy evidence once a summons had been served, but also that every crime should be suitably deal with; consequently, a person who endeavoured to avoid the consequences of his wrongdoing by conspiracy with others before any proceedings were initiated, was just as much guilty of an offence as if he waited until proceedings were actually pending. On this basis both Robinson and Rose could have been charged with conspiracy to pervert the course of justice, and need not have been charg with conspiracy to effect a public mischief[41]. There are also certain statutory offences which may be applicable[42].

Contempt of Court

14. Many substantive offences against the administration of justice and many conspiracies to pervert the course of justice may be punishable also as contempt of court. For example, the law of contempt deals with the physical obstruction of court proceedings, many instances of which will also constitute some other offence, such as assault or criminal damage. The Phillimore Report does not propose a definition of what amounts to contempt in the face of the court, and it is our provisional view that there should not be any such definition, at least at this stage.

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41. Such a charge would probably not, since the decision in Withers v. D.P.P. [1974] 3 W.L.R. 751, now be preferred in tho terms. That case decides that there is no separate and distinct class of criminal conspiracy called conspiracy to effect a public mischief. Where, however, the object or mean of a conspiracy are in substance of such a quality or kind as has already been recognised by the law as criminal, a charge of conspiracy to effect a public mischief which discloses suc facts may still be a good charge.

42. These are dealt with in paras. 18-24 below.

15. The law of contempt also covers many acts which interfere with the course of justice[43], in particular interference with witnesses, with parties and with officers of the court. This overlap will not be so wide if there is implementation of the Phillimore Committee's recommendations that contempt proceedings should be restricted to conduct in relation to proceedings which have started and have not been completed[44], and that contempt procedure should be invoked only where urgency or practical necessity requires that the matter be dealt with summarily[45].

Escape and avoiding trial

16. There is another type of conduct usually considered under the general heading of offences relating to the administration of justice, namely that concerned with avoiding justice altogether. At common law it is an offence to allow (whether voluntarily or negligently) a person in custody on a criminal charge to escape from lawful custody. It is also an offence for a person in custody on a criminal charge to escape, or, when in civil or criminal custody, to break out of prison, or for a person forcibly to liberate another from lawful custody on a criminal charge. A charge of conspiracy to effect a public mischief has been used successfully to prosecute a conspiracy to obtain compassionate leave from prison by falsely representing that circumstances warranting the grant of such leave existed[46].

Agreeing to indemnify bail

17. It has also been held to be an indictable conspiracy for persons to agree with a surety for bail that the surety will be indemnified in the event of a breach of the conditions of bail which results in him being obliged to meet his monetary obligations[47]. The basis of these cases is that it is "difficult to

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43. Borrie and Lowe, The Law of Contempt (1973), Chap. 8.
44. Phillimore Report, para. 72.
45. Ibid., para. 21.
46. R. v. Henman & Donovan C.C.C., 1 May 1969 (unreported).
47. R. v. Porter [1910] 1 K.B. 369; R. v. Foy [1972] Crim. L.R.504.

conceive any act more likely to tend to produce a public mischief than what was done" as it tends to lessen the responsibility of the surety and so to make it easier for those admitted to bail to abscond. It is clear from the two cases that liability does not depend upon proof of intent to defeat the course of justice or intent that the person bailed should abscond. The decision of the House of Lords in Withers v. D.P.P.[48] may have raised some doubt as to whether an agreement to indemnify bail is an indictable conspiracy where there is no intention to defeat the course of justice. If there is such an intention the object of the agreement would be a criminal offence and clearly a conspiracy charge would lie. If there is no such intent it may be difficult to base liability on the natural and probable consequence of the agreement if it is not actually foreseen[49].

Statute Law

18. In addition to the common law offences there are a number of statutory offences which deal with specific aspects of conduct concerned with perverting justice. Some of these, such as the offences under the Perjury Act 1911, are concerned specifically with the giving of false evidence in judicial proceedings, others, such as offences under sections 4 and 5 (1) of the Criminal Law Act 1967, are concerned with impeding the apprehension or prosecution of a person who has committed an arrestable offence, or with accepting a consideration for not disclosing information which might be of material assistance in securing the prosecution or conviction of such a person.

Perjury

19. The Perjury Act 1911 deals comprehensively with perjury in judicial proceedings, and with aiding, abetting, counselling, procuring or suborning another to commit perjury. We considered the Perjury Act in our Working Paper on Perjury and Kindred Offences[50] and made provisional proposals for

48. [1974] 3 W.L.R. 751.

49. Criminal Justice Act 1967, s.8.

50. Working Paper No.33 (1970).

the offence of perjury proper and for the other offences of making false statements that are included in that Act. We had a very helpful response from those we consulted and although we have not proceeded to a report on the subject, we have now reached conclusions in regard to recommendations in respect of perjury in judicial proceedings. These we deal with in paragraphs 42-60 below.

20. The offence of perjury contained in section 1 of the Act, and that of aiding and abetting, procuring or suborning contained in section 7, sufficiently cover falsely giving evidence in judicial proceedings. The availability of a conspiracy charge covers the situation where proceedings may not have yet been instituted but there is a plan to give false evidence, if and when the need arises.

Other statutory offences

21. The Criminal Law Act 1967, which gave effect to the recommendations of the Criminal Law Revision Committee's Seventh Report on Felonies and Misdemeanours[51], abolished the distinction between felonies and misdemeanours. This resulted in the disappearance of the three common law offences of misprision of felony (concealing a felony known to have been committed), being an accessory after the fact to a felony (helping a person known to have committed a felony to escape apprehension or prosecution) and compounding a felony (agreeing for a consideration not to prosecute or to impede the prosecution of a felony).

22. The Committee recommended[52] that misprision of felony should not continue to be an offence. The other two offences were put into statutory form in the Criminal Law Act 1967 as follows:-

s.4(1) "Where a person has committed an arrestable offence, any other person who, knowing or believing him to be guilty of the offence or

51. (1965) Cmnd. 2659.

52. Ibid., paras. 39-41.

of some other arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence."

s.5(1) "Where a person has committed an arrestable offence, any other person who, knowing or believing that the offence or some other arrestable offence has been committed, and that he has information which might be of material assistance in securing the prosecution or conviction of an offender for it, accepts or agrees to accept for not disclosing that information any consideration other than the making good of loss or injury caused by the offence, or the making of reasonable compensation for that loss or injury, shall be liable on conviction on indictment to imprisonment for not more than two years."

23. Accordingly, where false information is given to the police by a person with intent to impede the apprehension or prosecution of another whom he believes to have committed an arrestable offence, there will be an offence under section 4 (1) of the Criminal Law Act 1967. If the person who has committed the arrestable offence encourages the giving of such false information he will be guilty of inciting the commission of an offence against section 4(1).

24. The offence under section 51(3) of the Police Act 1964 of resisting or wilfully obstructing a constable in the execution of his duty can also be used in this context, because the section and its predecessors have been interpreted in England as covering any conduct which hinders the performance of a constable's duty and not as being confined to obstruction having a physical aspect Giving false information to the police could, therefore, be obstruction of a constable in the execution of his duty, even, it seems, if given by the offender himself[54] . In addition there is

53. Betts v. Stevens [1910] 1 K.B.1. For the position in Scotla see Curlett v. McKechnie 1938 S.C. (J.) 176, and see J.A. Coutts, "Obstructing the Police", (1956) 19 M.L.R. 411.

54. Rice v. Connolly [1966] 2 Q.B. 414.

an offence under section 5(2) of the Criminal Law Act 1967 of causing wasteful employment of the police by knowingly making certain false reports. These provisions cover, in regard to all offences, the ground covered in relation to arrestable offences by sections 4(1) and 5(1) of the Criminal Law Act 1967, but they extend even wider in that they are not limited to impeding the apprehension or prosecution of an offender or to information material to securing his prosecution or conviction. We shall confine ourselves in this paper to the offences more specifically related to judicial proceedings and their institution.

Summary

25. A study of the reported cases shows that conduct may be punishable -

(a) because it is recognised as a specific offence by the common law, such as embracery or interfering with a witness by threats or persuasion,

(b) because it amounts to a statutory offence, such as perjury, or impeding the prosecution of a person who has committed an arrestable offence, contrary to section 4(1) of the Criminal Law Act 1967,

(c) because it comes within the broad common law offence of perverting the course of justice,

(d) because it amounts to attempting or inciting the commission of any of the above offences,

(e) because it amounts to a conspiracy to commit any of the above offences,

(f) because it constitutes contempt of court,

(g) possibly because it amounts to a conspiracy to effect a public mischief which is recognised by the law as criminal, although the only conduct covered by the reported cases which falls within this category alone is an agreement to indemnify bail.

It is apparent, therefore, that the restriction of conspiracy to conspiracy to commit an offence would not leave any gaps in the law of offences relating to the administration of justice. In fact, the broad common law offence of perverting the course of justice is very wide, and embraces many of the specific offences in this field.

III. PROPOSALS FOR REFORM

General

26. One of the problems in proposing a comprehensive but simplified series of offences to cover conduct which amounts to perverting the course of justice is to settle how wide or how narrow the field should be, having regard, particularly, to other offences which might serve to penalise the conduct. It is clear from the preceding paragraph that under the present law there is a very extensive overlapping of offences available to deal with the same conduct. We accept that some overlapping is unavoidable and indeed is not necessarily undesirable, but our main objective to provide a series of specific and relatively tightly defined offences, rather than a general offence which is open to extension by judicial interpretation, with the uncertainty that this entail

Relationship with contempt of court

27. As we have said[55], conduct which can be punished as contempt of court is also in many cases punishable either as one of certain common law offences or under statute. The Phillimore Report, however, recommends that conduct intended to pervert or obstruct the course of justice should only be capable of being dealt with as a contempt of court if the proceedings to which the conduct relates have started and have not been completed[56]. Implementation of this recommendation would restrict the overlap that presently exists. It recommends, too, that, even where the conduct can be dealt with as contempt, the contempt procedure should not be invoked unless urgency requires that the matter be dealt with summarily, or the conduct does not fall within the definition of any other offence[57].

28. The Report recommends that to take or threaten reprisals against a witness or a juror after the proceedings are concluded should be made an indictable offence and should no longer be a contempt of court[58]. It also recommends that the publication of matter imputing improper or corrupt judicial conduct with the intention of impairing confidence in the administration of justice should be made a specific criminal offence, and that the publication of such matter should not constitute contempt of court unless it occurs in the face of the court, or relates to particular proceedings which are in progress[59].

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55. Para. 15 above.
56. Phillimore Report, para. 72.
57. Phillimore Report, para. 21.
58. Ibid., paras. 157 and 158.
59. Ibid., paras. 163 and 164.

29. The Committee, although they have recommended that the scope of the common law of contempt be limited, have not recommended that contempt within those limits should cease to be a common law offence and be codified. It will be necessary in the course of the preparation of the criminal code to consider whether the law of contempt ought to be codified. It seems to us, however, that now would not be an appropriate time to undertake this, in view of the recent consideration of the subject.

Criminal and civil proceedings

30. Whilst it is clear that both criminal and civil proceedings should be protected by an offence of perverting the course of justice, there is in our view one important distinguishing feature between them. In the generality of criminal matters there is a duty upon some authority to consider whether or not proceedings should be brought and pursued to finality. This is a duty which directly affects the public interest and which has to be exercised in accordance with the public interest. In civil proceedings, on the other hand, there is no such duty to be exercised in the public interest. The decision whether or not to proceed to judgment is in the normal case one to be taken by the individual having regard to his own interests. This distinction leads us to think that, in relation to perverting the course of justice in the generality of criminal matters, it is necessary to provide offences to deal not only with perverting judicial proceedings, but also with misleading officials whose duty it is to consider whether or not proceedings should be taken. The conduct of the defendants in R. v. Sharpe[60], R. v. Robinson[61] and R. v. Panayiotou[62] was in each case related to misleading the police before the institution of any judicial proceedings.

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60. (1937) 26 Cr. App. R. 122.

61. (1937) 2 Jo. Crim. Law 62.

62. [1973] 1 W.L.R. 1032.

31. In relation to perverting the course of justice in civil matters, it is our provisional view that it is, in general, necessary to provide offences to deal only with perverting the course of justice in relation to the proceedings themselves. However reprehensible it may be to deceive another with whom one has a purely civil dispute into thinking that he has no ground for a successful suit, it does not seem to us to be a matter for criminal sanctions in itself. It may, of course, in certain circumstances amount to a deception offence.

32. Prosecutions brought by citizens in their private capacities have characteristics of their own. In their nature they are criminal proceedings resulting, if successful, in criminal penalties. But in one important respect they have an affinity to civil proceedings, in that there is no duty upon any citizen to be exercised in the public interest to decide whether or not to bring proceedings. The decision is a matter for the individual concerned and may be exercised either in the public interest, or in the private interest of the prosecutor. In the final event the public interest can be protected in an appropriate case by the Attorney General or the Director of Public Prosecutions exercising the right to take over any private prosecution[63], although this is a right which is exercised only in exceptional cases. It is our view that there is no necessity to provide offences to deal with misleading a private prosecutor in the exercise of his choice as to whether to bring or proceed with a private prosecution.

33. Despite what is said above, it will be necessary to consider whether an offence is required to penalise the intimidation of any litigant or prospective litigant with the intention of dissuading him from instituting, defending or continuing proceedings[64], and whether this should apply to both criminal and

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63. The Attorney General's right is to be found in the common law, Archbold (38th ed.) para.266; and the Director's right is given by s.2(3) of the Prosecution of Offences Act 1908.

64. See paras. 68-84 below.

civil proceedings. This appears to be dealt with at present as contempt of court[65]. The Phillimore Committee has recommended that no conduct occurring before the institution of proceedings should be a contempt of court, and if this recommendation is implemented there will be a gap in the law in respect of intimidation before the institution of proceedings.

Outline of proposed offences

34. Our aim is to abolish the present common law offence of perverting the course of justice as well as any specific common law offences in the same area, and to replace these with a simplified series of offences as precisely defined as possible. These simplified offences can, we suggest, be divided into two main categories -

(1) Those concerned with all proceedings, civil and criminal, including proceedings before tribunals with a duty of adjudication under any Act of Parliament, and

(2) Those concerned only with criminal proceedings.

35. Under the first category we shall consider -

(i) Perjury.

(ii) Tampering with or fabricating evidence.

(iii) Preventing witnesses or potential witnesses from attending proceedings, or inducing them to absent themselves so as to be unavailable as witnesses.

65. Archbold (38th ed., 1973), para. 3463 and Borrie and Lowe, The Law of Contempt, pp. 223-229.

(iv) Intimidating any litigant or prospective litigant.

(v) Improperly influencing a court.

(vi) Impersonating a juror.

36. Under the second category we shall consider -

(i) Impeding the investigation of crime.
(ii) Escaping to avoid trial.
(iii) Agreeing to indemnify bail.

37. The Phillimore Report recommends the creation of two new criminal offences. The one relates to taking or threatening reprisals against a witness or a juror after the proceedings have been concluded in respect of anything done in his capacity as witness or juror. The other relates to publishing matter imputing improper or corrupt judicial conduct to any judicial officer with the intention of impairing confidence in the administration of justice. The Report suggests that it may be convenient for the Law Commission to consider these offences in the context of our examination of offences against the administration of justice. We have consulted with the Lord Chancellor and the Home Secretary and they have agreed that we should consider these questions in this paper.

1. Offences relating to all proceedings

(i) Perjury

Introductory

38. It is an offence under section 1 of the Perjury Act 1911 wilfully to make on oath in judicial proceedings a material statement known to be false or not believed to be true. Where such conduct is prosecuted it is the almost invariable practice to charge perjury. On some occasions, however, where there has been

a conspiracy to commit perjury, a charge of conspiring to obstruct or pervert the course of justice has been brought[66], instead of charging one of the offences provided by section 7 of the Act; these are counselling, procuring or suborning, and inciting or attempting to procure or suborn the giving of false evidence.

39. The Perjury Act 1911 deals not only with perjury in judicial proceedings but also with statements on oath otherwise than in judicial proceedings (section 2), false oaths or statements with reference to marriage (section 3), false declarations or statements in relation to births and deaths (section 4), false statutory declarations and other oral declarations required under an Act of Parliament (section 5), and false declarations to obtain registration for carrying on a vocation (section 6).

40. In a working paper[67] issued in October 1970 we considered perjury in some detail and made provisional proposals for a revision of the Perjury Act 1911. We have had the benefit of views from many sources on these proposals and are now in a position to express a concluded opinion at least in regard to perjury in judicial proceedings.

41. We proposed that the present offences in the Act should be replaced by three offences, namely -

(i) Perjury in judicial proceedings,

(ii) Making false statements or representations in relation to births, marriages and deaths,

66. R. v. Demaine [1971] Crim. L.R. 110.
67. Working Paper No.33, Perjury and Kindred Offences.

to replace the offences in sections 3 and 4 of the 1911 Act.

(iii) Making false statements (a) on oath other than in judicial proceedings, (b) in a statutory declaration or (c) in any oral or written statement required or authorised by, under or in pursuance of an Act of Parliament. This would replace the offences in sections 2, 5 and 6 of the 1911 Act.

We also proposed the repeal of a large number of offences of making false statements found in a variety of statutes.

Consultation on the working paper showed general approval for these proposals, subject to reservations in some instances as to the breadth of the last of the proposed offences.

42. Since then we have had allocated to us the study of inchoate offences, including conspiracy, which has led to an examination of (among other matters) conspiracy to defraud and to this paper on offences relating to the administration of justice. Our working paper on Conspiracy to Defraud[68] refers to the offences of making false statements in relation to births, marriages and deaths, and of making false statements unconnected with judicial proceedings: we have there expressed the view that the proper place for these offences in a criminal code is not in a section concerned with the administration of justice. Our view now is that perjury in judicial proceedings ought to be separated from the other offences involving the making of false statements, and that it more properly falls among offences of perverting the course of justice.

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68. Working Paper No. 56, paras. 24-25 and 68.

43. Our detailed proposals in regard to the offence of perjury itself were that it should be defined as -

(i) the making of a false statement,

(ii) that was material,

(iii) on oath (or its equivalent),

(iv) in, or for the purposes of, judicial proceedings, that is, proceedings before any court, tribunal or person having power by law to hear, receive and examine evidence on oath,

(v) with the intention that the statement be taken as true,

(vi) with the knowledge that it was false, or not believing it was true.

44. In addition we proposed that -

(i) corroboration of the falsity of a statement made under oath should continue to be required before there could be a conviction for perjury, and

(ii) there should be no offence of making self-contradictory statements on oath.

45. Whilst not all comments on these detailed matters were in favour of each of our proposals, there was broad agreement with them. This leads us to think that we should not trouble our commentators by again putting forward only provisional proposals in regard to the offence of perjury, and seeking their views on them.

Should perjury be confined to false statements?

46. We expressed the provisional view that perjury should be confined to the making of a false statement, whereas the present law would seem to penalise, as did the common law, the making of a true statement which the accused did not believe to be true. We argued[69] that perjury was essentially an offence designed to pun-

69. Working Paper No. 33, para. 27.

ish the telling of lies which might mislead a court and so pervert the course of justice, and we doubted whether any social purpose was served by rendering liable to punishment a person who made a true statement which he believed to be false or did not believe to be true. The proposed change in the law was not included in the list of matters upon which we particularly requested views, and perhaps for that reason was specifically mentioned by only a few of our commentators. There were, however, some who did not agree with our provisional view. It was suggested that it would be an additional burden for a prosecutor to have to prove not only that the defendant did not belive his evidence to be true but also that it was not true. This argument seems to disregard the common law rule, embodied in section 13 of the Perjury Act 1911, that there must be corroboration of the falsity of any statement alleged to be false before there can be a conviction for perjury. The question of perjury by true statement has not arisen in the courts since the early seventeenth century and we doubt whether there is likely to be any occasion to-day where there would be a prosecution for making a statement on oath that was in fact true. We feel that perjury should be so defined as to make punishable only the making of a false statement on oath.

Oral evidence not on oath

47. There was no dissent from our provisional conclusion that perjury should be confined to the giving of false evidence on oath (or its equivalent)[70] in judicial proceedings. But the

70. Under s.1 of the Oaths Act 1888 a person who objects to being sworn on the ground that he has no religious belief or that the taking of an oath is contrary to his religious belief may instead make a solemn affirmation. Under s.1 of the Oaths Act 1961 a person to whom it is not reasonably practical to administer an oath in the manner appropriate to his religious belief may be permitted to make a solemn affirmation. See too the Quakers and Moravians Acts 1833 and 1838. Sect.28 of the Children and Young Persons Act 1963 allows for a "promise before Almighty God" in a juvenille court or where an oath is to be taken by any child or young person in any court. When we talk of evidence 'on oath' we include these alternatives. Replacement of the oath by a different form of undertaking to tell the truth would not affect our proposals.

Home Office and the Association of Chief Police Officers suggested that where, in proceedings before any tribunal or person having power to hear, receive and examine evidence on oath, the power to administer the oath is dispensed with, the giving of false evidence without the oath should constitute an offence, though not the offence of perjury.

48. The general rule, in criminal and civil proceedings alike, is that all oral evidence must be given on oath: the law places no reliance on testimony not given on oath or affirmation. No person can give testimony in any trial, civil or criminal, until he has given an outward pledge that he considers himself responsible for the truth of what he is about to say and has rendered himself liable to the temporal penalties of perjury in the event of his wilfully giving false testimony. The sole criterion of competence to give evidence is the person's understanding of the nature of the oath[71].

49. In criminal proceedings there is specific provision[72] for a defendant to make an unsworn statement from the dock, which, although not evidence in the sense of sworn evidence, is evidence in the sense that the jury can give it such weight as they think fit in considering only the case against the defendant making the statement[73]. No penalty attaches to the telling of lies in such an unsworn statement. A second exception in criminal proceedings to the rule that all oral evidence must be given on oath is to be found in section 38 of the Children and Young Persons Act 1933. Under this section a court may receive, in any proceedings against a person for any offence, the evidence of a child of tender years, though not given on oath

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71. Phipson on Evidence (11th ed., 1970), paras. 1486 and 1477, Taylor on Evidence (12th ed., 1931), para. 1378; Cross, Evid (4th ed., 1974), p.149.

72. Criminal Evidence Act 1898, s.1(h).

73. R. v. Frost and Hale (1964) 48 Cr. App. R.284. This is not evidence in the full sense as it is not to be taken into account against a co-defendant, by analogy from R. v. Gunewardene (1951) 35 Cr. App. R. 80,91.

if in the opinion of the court the child understands the duty to speak the truth. The section makes a child who wilfully gives false evidence liable on summary conviction to be dealt with as if he had been convicted of an indictable offence punishable in the case of an adult with imprisonment. The provision is now probably of limited application by reason of the effect of section 50 of the Children and Young Persons Act 1933, as amended by section 16 of the Children and Young Persons Act 1963, which provides a conclusive presumption that no child under the age of ten years can be guilty of any offence.

50. There are no statutory exceptions applicable to civil proceedings for the reception of oral evidence otherwise than on oath. The sole criterion of the competence of a person to give evidence must, therefore, be whether he understands the nature of the oath. It must follow that unsworn evidence from a child who does not understand the nature of the oath cannot be received. As we understand the position, the admissibility of unsworn evidence of children, where it is given, depends upon the agreement of the parties to waive the taking of the oath.

51. In the case of many other tribunals, however, it is not uncommon for an informal procedure to be adopted under which evidence is received without the requirement that it be given under oath, even where the tribunal has the power to take sworn evidence. The commonest examples of tribunals not requiring evidence to be given on oath, though they have the power to do so, are arbitration tribunals under the Arbitration Act 1950 and tribunals conducting local inquiries under the Town and Country Planning Act 1971. In the cases where tribunals have a discretion as to whether to require evidence to be given on oath or to receive unsworn evidence there is no sanction provided for the making of false statements in unsworn evidence. The furthest that any legislation seems to go is to make it an offence deliberately to alter, suppress, conceal or destroy any book or other document which is required in any inquiry under

the Local Government Act 1972[74].

52. The oath is normally dispensed with when it is felt that the proceedings will be more satisfactorily conducted in an informal atmosphere. It is relevant to note that the Report of the Franks Committee on Administrative Tribunals and Enquiries[75] attached "importance to the preservation of informality of atmosphere before many tribunals". They thought that this would be destroyed if the oath were made obligatory, and they favoured the retention of the discretionary power. We agree with this approach. Nor do we think it would be satisfactory to create a separate offence of giving false evidence where the oath is not administered. If there were such an offence it would be necessary to warn the witness of the consequence of his giving false evidence, and that, of itself, would destroy the informality of the occasion. A number of those we consulted stressed how the decisions of many tribunals can seriously affect the lives and property of those who appear before them; they suggested for that reason that there was a case for providing a criminal sanction against the giving of false evidence before tribunals even where the oath was not required. We do not agree. The tribunal which has decided to accept unsworn evidence will have done so because it feels that that procedure will facilitate its work. To provide a penalty, of which the witnesses will have to be warned, will nullify that decision. In a proper case, a tribunal which has that power can always require the evidence of a particular witness to be given on oath if it considers this necessary to arrive at a proper decision.

53. We do not recommend that there should be any offence created to penalise the giving of false evidence before a tribunal where the tribunal has not required the evidence to be given under oath or its equivalent.

Extra-curial unsworn statements admissible as evidence

54. In criminal proceedings there are some instances where the court can dispense with evidence on oath, accepting instead a

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74. Sect. 250(3). The maximum penalty on summary conviction is a fine of £100, or six months imprisonment, or both.

75. (1957) Cmnd. 218, para. 91.

statutory declaration or certificate. For example -

(i) Under section 27 of the Theft Act 1968 a statutory declaration that a person despatched, received or failed to receive any goods or postal packet is admissible in evidence in any proceedings for the theft of anything in the course of transmission.

(ii) Under section 41 of the Criminal Justice Act 1948 a certificate certifying the correctness of a plan is admissible under certain conditions as evidence of the relative position of things shown on the plan.

(iii) Under section 181 of the Road Traffic Act 1972 a certificate by a constable as to who was driving a vehicle on a particular occasion is admissible in certain proceedings.

It is an offence under section 5 of the Perjury Act 1911, knowingly and wilfully to make a statement false in a material particular in either a statutory declaration or in such a certificate, whether or not the declaration or certificate is used or tendered in any proceedings.

55. Under sections 2 and 9 of the Criminal Justice Act 1967 a statement is admissible under certain conditions in, respectively, committal proceedings and other criminal proceedings. Section 89 of that Act penalises the making of a false statement in a written statement tendered in evidence

under either of these sections. It is important to note in this case that there is an offence only if the written statement is tendered in evidence. This qualification makes it possible for a person to retract or amend his statement before it is tendered in evidence without fear of prosecution.

56. Section 27 of the Children and Young Persons Act 1963 provides that (with certain exceptions), in any proceedings before a magistrates' court inquiring into a sexual offence as examining justices, a child shall not be called as a witness for the prosecution, but that any statement in writing made by or taken from the child shall be admissible. No penalty is there provided for making a false statement.

57. It would seem that, apart from the fact that false statements in statutory declarations and certificates can form the basis of a charge under section 5 of the Perjury Act 1911, there could, in the cases referred to in paragraph 54 above, also be a prosecution for perverting or attempting to pervert the course of justice at common law. It may be that the common law could also be invoked to deal with false statements included in statements made in terms of sections 2 and 9 of the Criminal Justice Act 1967, and even to deal with false statements made in statements and unsworn evidence admissible under the legislation relating to evidence by children.

58. The existence of statutory provisions for the admission judicial proceedings of extra-curial statements not made on oath leads us to think that there should be an offence additional to perjury (as we think it should be defined), to cover the making o certain of those statements.

59. In the first place, we think that there should be an offence of making, in any statutory declaration or certificate, required or authorised by any Act of Parliament, and admissible

in any judicial proceedings, a material statement which is false and which the person making it knows to be false or does not believe to be true, with the intention of perverting the course of justice. Such an offence would not apply to statements tendered in evidence under sections 2 or 9 of the Criminal Justice Act 1967, for they are not statutory declarations under the Statutory Declarations Act 1835. In view of the special considerations attaching to these statements we think that there should be retained an offence in the terms of section 89 of the Criminal Justice Act 1967 to deal with them. A child's statement tendered under section 27 of the Children and Young Persons Act 1963 is not at present subject to criminal sanction and in our view this should continue to be the position. In this latter case the statement is admissible only in the committal proceedings, and even then is not admissible if the defence objects, which it will almost certainly do if the evidence is in any way controversial.

Summary of recommendations as to perjury

60. Accordingly we propose that in the forefront of offences against the administration of justice there should be an offence of perjury. The essentials of such an offence should be -

(i) making a false statement that is material with the intention that it be taken as true,

(ii) on oath, in judicial proceedings,

(iii) with the knowledge that it is false, or not believing it to be true.

There should be an additional offence to penalise making false

statements in statutory declarations or certificates that are admissible in judicial proceedings; and the offences under section 89 of the Criminal Justice Act 1967 and section 38(2) of the Children and Young Persons Act 1933 should be retained.

(ii) Tampering with or fabricating evidence

61. Under the present law to tamper with or fabricate evidence with the intention of perverting the course of justice is an offence. It was held in R. v. Vreones[76] that to manufacture false evidence for the purpose of misleading a judicial tribunal was a misdemeanour. In R. v. Andrews[77] it was held that to pervert the course of public justice was a substantive offence, which embraced producing false evidence in order to mislead a court.

62. It is our provisional view that such conduct should continue to be an offence and that it should be specifically defined. This offence is closely related to perjury and we think that it should be confined to conduct intended to pervert the course of justice in judicial proceedings as defined in relation to perjury[78]. Without such limitation there would be some vagueness as to what was meant by the course of justice, and the offence would have an ambit far beyond the sphere of administration of justice. We do not favour its extension to those types of administrative enquiries set up to investigate a subject without the power to receive and examine evidence on oath.

63. In the first place, therefore, it should be an offence to fabricate or tamper with evidence with the intention of influencing the outcome of judicial proceedings. This would cover not only making false evidence but also destroying

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76. [1891] Q.B. 360; para. 10 above.

77. [1973] Q.B. 422.

78. I.e. proceedings before any court, tribunal or person having power by law to hear, receive and examine evidence on oath.

evidence which would be relevant to the decision in the proceedings. In the second place the offence should be capable of being committed even if the proceedings have not yet been instituted, provided the intention is to pervert the course of justice in judicial proceedings if they are instituted. This was the position in R. v. Vreones[79], where no proceedings had been launched at the time the evidence was tampered with.

64. There is a third situation which can arise where a person seeks to avoid any proceedings being taken by destroying or altering evidence which would influence the decision of another in deciding whether or not to initiate proceedings. It was held, for example, in R. v. Sharpe[80] that conspiring to destroy evidence of a crime in order to avoid detection and prosecution was an offence against the administration of justice, although no proceedings had then been started. We discuss in a later section of the paper[81] certain offences of misleading the police, but our provisional view in regard to tampering with evidence is that in criminal matters it should be an offence not only when there is an intention to pervert the course of justice in judicial proceedings, whether instituted or only contemplated, but also when there is an intention to affect the decision of any authority with a duty to consider whether to institute such proceedings. The distinction we have drawn in paragraphs 30-31 above between civil and criminal proceedings is of relevance in this context. In civil proceedings there is no authority with a duty to consider whether to bring proceedings, and it is our provisional view that it would be giving too wide a scope to this proposed offence if it were to penalise tampering with evidence to deceive a prospective

79. [1891] Q.B. 360.

80. (1937) 26 Cr. App. R. 122.

81. See paras. 93-101 below.

civil litigant into thinking that he should not bring proceedings. In many cases as for example in R. v. Vreones, it will be possible to prove that there was an intention to pervert the course of justice in proceedings if there are instituted. But we do not propose that, in the absence of such intention, it should be an offence to tamper with evidence to deceive a prospective civil litigant.

65. We provisionally propose an offence of tampering with, or fabricating, evidence with the intention of perverting the course of justice in any judicial proceedings (whether instituted or not at the time), or with the intention of affecting the decision of any authority with a duty to consider whether to institute criminal proceedings.

(iii) Preventing the attendance of witnesses

66. There are cases where persons have been prosecuted at common law for preventing a witness from giving evidence[82], and even for dissuading a witness from giving evidence[83]. Such conduct can also amount to contempt of court[84].

67. We provisionally propose that there should be an offence of preventing witnesses, or those who might be witnesses, in judicial proceedings from giving evidence in the proceedings, or inducing them not to give evidence in such proceedings, or to absent themselves so as to be unavailable at proceedings, in each case with the intention of perverting the course of justice in judicial proceedings (whether instituted or not at the time).

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82. R. v. Lawley (1731) 2 Str. 904; R. v. Steventon (1802) 2 East 362.

83. R. v. Gray (1903) 22 N.Z.L.R. 52; R. v. Kellett [1974] Crim L.R. 522.

84. Borrie and Lowe, Contempt of Court (1973), p. 98.

(iv) Intimidation of a party

68. The question of intimidation can arise in both civil and criminal proceedings. In criminal matters it would not be strictly appropriate to refer to the prosecutor and the defendant as "parties" but we use this word for convenience in the discussion which follows, to cover the protagonists in both criminal and civil proceedings, more particularly because all the authority we have found concerns civil proceedings.

69. Deterring or preventing a party from bringing an action (or attempting to do so) or inducing a party to suppress certain evidence or to give false evidence is said to be an interference with the due administration of justice and to amount to a contempt[85]. Where the conduct involves an inducement to give false evidence it is clear that, even apart from constituting a contempt, it may amount to subornation of perjury (if the false evidence is given), or incitement to perjury (if it is not). It could also be prosecuted as perverting, or attempting to pervert, the course of justice. It is irrelevant in those circumstances that the witness incited happens also to be a party to the action.

70. We are concerned at this point with the narrower question of when it is an offence to deter or prevent a person from bringing proceedings, or from continuing with the prosecution or defence of an action. The main authorities which establish that such conduct amounts to a contempt are Smith v. Lakeman[86], and Re Mulock[87]. Neither of these cases, nor any other reported case, deals with whether the conduct also

85. Borrie and Lowe, Contempt of Court (1973), p. 223, under the sub-heading "Interference with parties to an action".

86. (1856) 26 L.J. Ch. 305.

87. (1864) 33 L.J. P.M. & A. 205.

amounts to a substantive offence apart from contempt. Indeed, Archbold[88] deals with the conduct only as contempt.

71. In Smith v. Lakeman the plaintiff was held to have been in contempt for writing a letter to the defendant threatening that if the latter proceeded with his defence in pending litigation he would at once "be indicted for swindling, perjury and forgery" thus bringing disgrace on his family and ruining for ever the prospects of his gallant son. The letter, written anonymously in a disguised hand, purported to come from "a sincere friend" of the defendant, but it was not denied it had come from the plaintiff. It was held that the letter had clearly been written to intimidate the defendant as a suitor and so to divert the course of justice. For these reasons the court held that there had been a contempt of court.

72. In Re Mulock a person who was not a party to an action wrote to the petitioner in a pending divorce suit, threatening that if she did not withdraw her petition he would publish the full truth of the case founded upon his own various communications with the petitioner's own friends, and accompanied by a statement of facts concerning the petitioner before her marriage, borne out by irrefragable documents. It was held that the petitioner had the right to approach the court free from all restraint or intimidation, and that the attempt to prevent the suit being brought before the court by threats of bringing her into disgrace and disrepute amounted to a contempt.

73. These cases seem to be examples of what can probably, without difficulty be characterised as improper pressure. But we doubt whether they justify a general proposition that it is

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88. (38th ed., 1973), para. 3463.

a contempt of court to make any kind of threat to a party for the purpose of deterring or influencing him in respect of an action in which he is involved[89]. An offer of money by one party in a case to the other, on condition that the latter withdraws his proceedings, is part of the normal procedure by which innumerable civil actions are settled. Where a dispute, though ostensibly between only two parties, may affect others in its result, it is not uncommon for a third party to offer some consideration to one or other of the parties to put an end to the litigation. Influence or inducement of this nature is certainly not within the law of contempt. In the same way it is very common practice in commercial litigation to use as a bargaining factor to induce one party to settle or withdraw a claim, a separate obligation upon which a legitimate claim can be based. The inducement to settle is the offer not to proceed with the separate claim or, put in another way, the threat, express or implied, that if the case is not settled the other claim will be pressed.

74. There is some authority[90] that, if the threat directed against the litigant is a threat to exercise a legal right, there may be no contempt. However, the facts in Webster v. Bakewell R.D.C. were perhaps rather special and this may have influenced the judgement. In that case the landlord genuinely thought it was in her interest to put a stop to the litigation which affected the property occupied by her tenant as well as other nearby property which she owned. To achieve this she threatened the tenant, who was suing the Rural District Council in respect of trespass to the property, that she would terminate his tenancy in order to deprive him of locus standi if he did not withdraw his action. The threat was interpreted as a threat to exercise a legal right to terminate the tenancy of the plaintiff.

89. Cf. Borrie and Lowe, Contempt of Court (1973), pp. 223-224.
90. Webster v. Bakewell R.D.C. [1916] 1 Ch. 300.

The court held that, in the circumstances, it was no contempt for the landlord to threaten to assert her legal rights to prevent the continuation of an action which to her mind was detrimental to her interest in the property.

75. This decision has been criticised[91] on the ground that there is no valid basis for drawing a distinction between intimidating a witness and intimidating a litigant and that as the one clearly constitutes contempt so should the other. We doubt whether this criticism is valid. There is, in our view, a vital distinction between the position of a litigant and that of a witness, more particularly in that a witness can be compelled to give evidence whereas the decision to bring or defend proceedings is a matter within the free choice of a litigant.

76. The real issue is whether a person must expect to be subject to the same pressures in exercising his choice in regard to litigation as he may be subject to in making any other choice relating to his business or personal affairs, and, if not, what greater protection he can expect to have.

77. A person's right to seek relief from the court is an important one. It is in the public interest that he should not be deterred from bringing claims before the court, for there is always the danger that there might be recourse to self-help, with the evils that may flow from that, if he can be denied access to the courts by threats and pressure. There is, therefore, some justification for giving protection against intimidation and pressure aimed to restrict a person's free access to the courts.

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91. Borrie and Lowe, Contempt of Court (1973), p. 229.

78. This protection should, however, not be so far-reaching as to interfere with normal pressures to which people may legitimately be made subject in their ordinary relationships with each other. In seeking the dividing line between legitimate and illegitimate pressure in this context, we considered various categories into which threats could fall. These categories included -

(a) threats to commit a criminal offence,

(b) threats to commit a tort, such as defamation,

(c) threats to expose any secret tending to subject any person to hatred, contempt or ridicule or to impair his credit or business repute[92],

(d) threats to commit a breach of contract, such as a threat of summary dismissal of an employee,

(e) threats to cause harm by doing what one was entitled to do, such as a threat to give lawful notice to a tenant or to an employee.

79. It seems to us that no distinction can be drawn to differentiate between legitimate and illegitimate pressure by reference to the nature of the threat alone. In particular,

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92. American Law Institute's Draft Model Penal Code (1962), s.223(4)(c).

it seems to us that there are some situations where to threaten to do what one is entitled to do in order to induce another to refrain from bringing proceedings would be justified, whereas there are other situations where it would not be justified. Webster's case[93] is an example of what may, in the circumstances of that case, be regarded as legitimate pressure. On the other hand pressure may well be illegitimate, thought not constituting a threat of either a criminal or tortious act, where, for example, one person threatens to tell some unpleasant truth about another which would hold him up to hatred, ridicule or contempt.

80. The Criminal Law Revision Committee had the same problem to consider in defining the elements of the offence of blackmail which they recommended[94]. Their proposal, which was implemented by the Theft Act 1968[95], was to penalise the making of an unwarranted demand with menaces, made with a view to gain or with intent to cause loss. "Menaces" is left undefined, and so bears the wide meaning given to the word in Thorne v. Motor Trade Association[96], of a threat of action detrimental to or unpleasant to the person addressed. A demand with menaces is said to be unwarranted unless the person making it does so in the belief (a) that he has reasonable grounds for making the demand and (b) that the use of the menaces is a proper means of reinforcing the demand. The Committee were, of course, concerned with theft and related offences, and for that reason confined their proposal to the making of an unwarranted demand with a view to gain or with intent to cause loss. In this form section 21 of the Theft Act would cover many instances of making an

93. [1916] 1 Ch. 300.

94. (1966) Cmnd. 2977, Eighth Report on Theft and Related Offence paras. 108-125.

95. Sect. 21.

96. [1937] A.C. 797, 817.

unwarranted demand with menaces that a litigant should either not proceed with, or cease to defend, a civil case. There may, however, be cases where no monetary relief is sought, such as those concerned with status, where the Theft Act would have no application. And, in any event, it seems to us that there would be some advantage in providing separately for the very special situation of bringing wrongful pressure to bear on litigants.

81. The Criminal Law Revision Committee recognised that there was much room for disagreement as to what kinds of demand should or should not be treated as justified, and even more room for disagreement as to when it was permissible to employ threats in support of a demand. In respect of each of these questions the Committee thought that it was right to provide a subjective test, with the qualification that the belief must be, in the case of the demand, that there are reasonable grounds for making the demand, and, in the case of the use of the menaces, that it is a proper means of reinforcing the demand. This solution has been the subject of some criticism[97], but it is now a part of the law and it seems to us that unless there are compelling reasons for providing a different basis for penalising the bringing of pressure upon litigants, the same criteria should be adopted.

82. There is as yet very little authority on section 21 of the Theft Act. We would suggest, however, that although the test is a subjective one in regard to each aspect of the defendant's belief, a person who knows that his demand has no foundation, whether in law or in fact, cannot believe that his demand is reasonable, nor can a person who knows that the use

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97. "Blackmail: a Criticism" by Sir Bernard MacKenna, [1966] Crim. L.R. 467: compare "Blackmail: Another View" by Brian Hogan, [1966] Crim. L.R. 474.

of the menaces would be generally condemned, believe that such use is a proper means of reinforcing his demand[98]. If section 21 is applied in this way it is our provisional view that it provides the correct criteria upon which to base an offence of intimidation of parties to any proceedings.

83. We provisionally propose that it should be an offence to make an unwarranted demand with menaces that a person should not institute any judicial proceedings, or that he should withdraw or agree to settle any such proceedings. A demand with menaces should be unwarranted unless the person making it does so in the belief that he has reasonable grounds for making it, and that the use of the menaces is a proper means of reinforcing the demand.

84. We think that this offence should apply where unwarranted demands in regard to the institution or discontinuance of criminal proceedings are made upon a prosecutor[99]. The defendant in criminal proceedings is in a somewhat different position as he cannot by his conduct put an end to proceedings. Nevertheless the way in which he pleads may clearly affect both the conduct and the outcome of the proceedings, and the administration of justice may be perverted if he is compelled to plead in a way contrary to his wishes. It is true that in some cases where there is pressure of this sort brought to bear upon a defendant there will also be pressure upon him to mislead the court or police by evidence or statements. In that case those bringing the pressure to bear will be guilty of incitement to another offence, but such a charge may not always be available. It is our provisional view that a defendant in a criminal matter, should not be subject to pressure as to the way he pleads in answer to a charge, and that it should be an offence to demand with menaces that he plead in a particular way.

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98. [1972] Crim. L.R. 424, commenting on R. v. Lambert there reported.

99. Turner in Kenny's Criminal Law (19th ed), p. 429 says, without quoting authority, that an agreement to persuade a prosecutor not to appear at the trial is an instance of an unlawful agreement which may be the subject of a conspiracy charge.

(v) Improperly influencing a court

85. It is an offence to threaten or bribe a juryman (or any officer or member of a court) or to seek to influence his decision by flattery or any persuasion improperly brought to bear, regardless of whether the decision sought is a true decision. It has been held that a conspiracy to influence the minds of magistrates or jurors, by publishing, pending criminal proceedings, matter likely to prejudice a fair trial is a criminal offence[100], and indeed that such publication even without conspiracy is an offence. The essence of the matter is inducing those who have to try a case to approach the question to be tried with minds into which predjudice has been instilled by the published assertions[101].

86. In regard to offences relating to the administration of justice it is our provisional view that only conduct which is intended to pervert the course of justice should be made criminal. Conduct which, though it is likely to influence a decision by prejudicing the minds of the court or jury, but which is not intended to do so, can safely be left to the law of contempt of court. The Phillimore Report recommends that the publication of any material which creates a risk that the course of justice will be seriously impeded or obstructed should be contempt without proof of intent to impede or obstruct, provided that it occurs within the time limits prescribed[102]. We agree with this recommendation but we think that it should also be a separate criminal offence to publish, whether before or after the institution of proceedings, any material which creates a risk that the course of justice in any judicial proceedings will be seriously obstructed or prejudiced, provided this is done with intent to pervert the course of justice.

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100. R. v. Tibbits [1902] 1 K.B. 77.

101. Ibid., at 89.

102. Phillimore Report, paras. 113 and 72.

87. We propose the following offences-

(1) seeking to influence the decision in a judicial proceeding -

(a) by threatening or bribing a juryman, or any officer or member of the court or tribunal, or

(b) by persuasion improperly brought to bear on such persons, and

(2) publishing, with intent to pervert the course of justice, any material which creates a risk that the course of justice in any judicial proceedings will be seriously obstructed or prejudiced.

88. In addition it should remain an offence to impersonate a juror, even though there is no corrupt motive or specific intention to deceive other than that which is involved in entering the jury box and taking the oath in the name of another[1(

89. The other aspect of seeking to influence an officer or member of a court in the decision in any judicial proceeding is the misconduct in office of any such person. A public officer who is guilty of misbehaviour in office by neglecting a duty imposed upon him either at common law or by statute, commits an offence at common law and is liable to indictment unless another remedy is substituted by statute[104]. This applies to all public officers including judicial officers as do the common law offences of asking for or accepting a bribe[105].

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103. R. v. Clark (1918) 82 J.P. 295.

104. Russell on Crime (12th ed., 1964), vol. 1, p. 361.

105. Ibid., p. 381.

90. How far misbehaviour of a public officer in his office should be penalised is in our provisional view a matter which should be dealt with in the context of misconduct of any public officer, rather than in the context of offences relating to the administration of justice. Misconduct by jurors, however, would seem not to fall conveniently within the same subject matter, and should we think, be made an offence within the scheme of offences against the administration of justice.

91. We provisionally propose that it should be an offence for any juror in civil or criminal proceedings to give a verdict otherwise than in accordance with his oath, or to agree or offer to do so.

2. Offences relating only to criminal matters

92. The second category we consider is concerned with those offences which relate only to criminal proceedings. For reasons discussed in paragraph 31 above, our provisional view is that it is necessary to provide, in this category, offences to deal not only with perverting the course of justice in judicial proceedings, but also with impeding officials whose duty it is to consider whether or not proceedings should be taken. The questions of escape, offences in relation to bail, compounding offences and impeding the arrest and prosecution of offenders also arise.

(i) Impeding the investigation of crime

93. We have already dealt with the fabrication of evidence with the intention of affecting the decision of any authority with a duty to consider whether to institute criminal proceedings and provisionally proposed that this should be a specific offence[106]. In this section we are concerned with the wider class of conduct of giving false information to the authorities who are involved with the investigation of crime.

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106. See paras. 64 and 65 above.

94. The question of false accusations of crime and of malicious prosecution do not cause much difficulty. There is no offence of malicious prosecution, but any person who gives false evidence for the prosecution in a criminal trial, or persuades others to do so, will be guilty of perjury or incitement to perjury. In addition section 5(2) of the Criminal Law Act 1967 penalises a person who causes any wasteful employment of the police knowingly by making a false report to any person tending to show that an offence has been committed or tending to show that he has information material to any police enquiry. The penalty on summary conviction is imprisonment for up to six months. These offences we think are adequate to deal with that aspect of perverting the course of justice which involves the making of false accusations.

95. Interfering with the police investigation of crime can at present be dealt with in a number of ways -

(i) Section 51(3) of the Police Act 1964 provides -

> "Any person who resists or wilfully obstructs a constable in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding one month or to a fine not exceeding £20 or to both."

This section has been interpreted in England as covering any conduct which makes it more difficult for the police to carry out their duties[107]. It seems possible that it is an offence under this section even for a suspect questioned by the police to tell a false story to exculpate himself[108], though it would not be an offence for him to refuse to answer questions.

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107. Hinchcliffe v. Sheldon [1955] 1 W.L.R. 1207.

108. Rice v. Connolly [1966] 2 Q.B. 414, per Lord Parker C.J. at p. 420.

(ii) Section 4(1) of the Criminal Law Act 1967 provides -

> "Where a person has committed an arrestable offence, any other person who, knowing or believing him to be guilty of the offence or of some other arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence."[109]

(iii) Section 5(1) of the Criminal Law Act 1967 provides -

> "Where a person has commited an arrestable offence, any other person who, knowing or believing that the offence or some other arrestable offence has been committed, and that he has information which might be of material assistance in securing the prosecution or conviction of an offender for it, accepts or agrees to accept for not disclosing that information any consideration other than the making good of loss or injury caused by the offence, or the making of reasonable compensation for that loss or injury, shall be liable on conviction on indictment to imprisonment for not more than two years."

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109. The maximum penalty varies according to the gravity of the other person's offence from 10 years' imprisonment where the sentence for that offence is fixed by law (viz. murder and treason) to 3 years' imprisonment where the maximum term of imprisonment for that offence is less than 10 years.

(iv) At common law it is an offence of perverting the course of justice to give false information to the police in order to avoid proceedings being taken against one who has committed any offence, whether arrestable or not[110].

96. Each of the three statutory offences mentioned in the last paragraph covers conduct which may directly affect the course of justice, in that it may be aimed to prevent judicial proceedings being brought when they should be brought, or to achieve an acquittal when there should be a conviction. But section 51(3) of the Police Act 1964 covers in addition a very much wider field of conduct and section 4(1) of the Criminal Law Act 1967 can be contravened when there is only an intent to impede the apprehension of the offender. Whilst the section of the Police Act can be contravened by an offender himself, both sections of the Criminal Law Act apply only to persons other than the offender.

97. We would not favour making it an offence of general application merely to fail to give information to the police, even though the intention was to prevent proceedings being brought against an offender. It has never been an offence to fail to give information as to a misdemeanour, and the old offence of misprision of felony[111] disappeared with the passing of the Criminal Law Act 1967. Compounding too has ceased to be an offence save in so far as it is retained by section 5(1) of that Act, and in regard to treason.

98. On the other hand, it can be a serious matter for a person to prevent another from giving information to the

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110. See para. 12 above.

111. Namely concealing or procuring the concealment of a felony known to have been committed. Russell on Crime (12th ed., 1964), Vol. 2, p.168.

police with the intention of obstructing them in their duty to decide upon the institution or conduct of judicial proceedings. It is our provisional view that it should be an offence -

(i) to prevent a person who might be a witness in any criminal proceedings from giving information as to any offence that has been committed,

(ii) to induce such person to absent himself so as to be unavailable to give information as to any offence that has been committed, and

(iii) to persuade any such person by means of any threat or intimidation not to give information as to any offence that has been committed,

in each case with the intention of obstructing the police or any public authority in their duty to decide upon the institution or conduct of criminal proceedings. This offence should be capable of being committed as much by the person who has committed the offence to be concealed as by any other person.

99. The police may also be hampered in their duty to decide upon criminal proceedings by false information given to them. To give such false information is an offence at present, both under the common law[112], and probably also under section 51(3) of the Police Act 1964[113]. There is no case directly in point as to whether an offender who lies to the police when questioned about an offence he has commited can be convicted of perverting the course of justice, but it seems probable that in law he could

112. See paras. 12 and 13 above.

113. See para. 95(i) above.

be so convicted. This was the situation in R. v. Rose[114] although in that case there was an agreement by the defendant and another falsely to implicate another and the judgement is based upon a conspiracy to effect a public mischief. It may be thought to be oppressive to penalise a suspect who lies to the police to avoid being brought to justice. He does not commit an offence if he runs away before arrest, nor, probably, if he wipes away his fingerprints before leaving the scene of his crime. On the other hand his lies may directly or indirectly point to the guilt of another person, and cause considerable waste of police time. In practice a defendant who lied to the police during their investigation and was subsequently convicted would not be charged with an offence of obstructing the course of justice any more than he is charged with perjury if he falsely denies his guilt on oath at his trial. Nevertheless, as is the position on rare occasions in regard to false evidence by a defendant, there may be circumstances where it would be desirable to prosecute a defendant for giving false information in an exculpatory statement made to the police, as, for instance, when he falsely throws suspicion on another.

100. It is our provisional view that it should be an offence to give false information to the police or to any public authority with the intention of obstructing them in their duty to decide upon the institution or conduct of criminal proceedings. We seek views, in particular, as to whether this offence should apply to a suspect seeking to exculpate himself.

101. The offences proposed in paragraphs 98 and 100 above should be additional to the present offences under sections 4(1) and 5(1) of the Criminal Law Act 1967.

(ii) Avoiding trial

102. It seems to us that we should deal with escaping and with failing to answer bail in order to avoid trial in the

114. (1937) 1 Jo. Crim. Law 171.

context of offences against the administration of justice. Other instances of escape from prison fall more properly either under legislation relating to prisons or under the law relating to the preservation of public order. But we provisionally propose a specific offence of escaping from lawful custody with the intention of avoiding trial.

103. In regard to failing to answer bail, we have the advantage of having available the Report of a Home Office working party on Bail Procedures in Magistrates' Courts[115]. The Working Party gives some attention to the practice, which has become very widespread, of granting release from custody on bail without sureties, but on the defendant's own recognisance, which is no more than acknowledgement of liability in the sum fixed. In the case of a person failing to answer his bail the court cannot commit the defaulter to prison forthwith. It can declare forfeiture of the recognisance, but even then cannot commit the defaulter to prison without holding an enquiry as to his means and without considering or trying all other methods of enforcement. It is apparently unusual in cases where a defendant has absconded while on bail and has subsequently been arrested, for his recognisance to be forfeited. The working party consider that the system of personal recognisance is for all practical purposes largely ineffective.

104. The working party suggest that the surety system should be retained but that sureties should not be required as a matter of course, and that, where required, they should be supplementary to a written undertaking by the defendant to appear at the time and place required. Absconding in breach of this undertaking, they recommend, should be an offence triable before the court which tries the substantive offence and punishable by three months' imprisonment and a £400 fine in a magistrates' court, and by 12 months' imprisonment and a fine in the Crown Court.

115. Report (H.M.S.O., 1974).

105. This way of dealing with a person absconding when on bail seems to us to be an acceptable way of dealing with the problem, and we provisionally propose that the essentials of the offence should be failing to answer bail, with the intention of avoiding trial.

(iii) Agreeing to indemnify bail.

106. It has been held to be an offence at common law to agree to indemnify bail on the basis that this is a conspiracy to effect a public mischief. In R. v. Porter[116] the defendant and another each entered into a recognisance in £50 conditioned for the appearance of C at quarter sessions to which he was commited for trial on a charge of felony. The two sureties agreed with C, whilst the charge was still pending that C would indemnify them against their liability on their recognisance. It was held that the agreement was an illegal contract, not only in the sense of being unenforceable, but also as being one which clearly tended to produce a public mischief, and that it amounted to a criminal conspiracy without any necessity for a finding that there was an intent to pervert or obstruct the course of justice. In the course of his judgement Lord Alverstone said -

> "It is, in our opinion, difficult to conceive any act more likely to tend to produce a public mischief than that which was done in this case. It is to the interest of the public that criminals should be brought to justice, and, therefore, that it should be made as difficult as possible for a criminal to abscond; and for many years it has been held that not only are bail responsible on their recognizance for the due appearance of the person charged, but that, if it comes to their knowledge that he is about to abscond, they should at once inform the police of the fact. It has been suggested to us that the more modern view of bail is that it is a mere contract of suretyship, and that an agreement to indemnify bail, therefore, does not involve any illegality. If that were so, as soon as the bail had got his indemnity, he would have no interest whatever in seeing that the accused person was forthcoming to take his

116. [1910] 1 K.B. 369.

> trial, and it is obvious that criminals, particularly if possessed of means, would very frequently abscond from justice."

The court disapproved of a contrary dictum in R. v. Broome[117] which has been acted upon in R. v. Stockwell[118]. There is also the more recent case of R. v. Foy[119] which followed Porter. The decision in Withers v. D.P.P.[120] may have raised some doubt as to whether such an agreement is an indictable offence where there is no intention to defeat the course of justice[121].

107. The surety system was examined in some detail by the Home Office Working Party on Bail Procedures in Magistrates' Courts[122]. The theory underlying the system is that an accused person is released from the custody of the law to the custody of the sureties who are bound to produce him to answer on his trial, and that they make themselves liable for the appearance of the accused. The working party recognised that the concept of the accused being in the physical custody of the sureties was no longer appropriate in present day conditions, but nevertheless considered that the system should be retained for two main reasons, namely -

> "First, the very fact that a person of some substance is prepared to stand surety and stake his own money on the likelihood of the defendant's appearance provides some independent corroboration of the defendant's reliability. Secondly, even though the surety can no longer be expected to exercise physical control over the principal, he may still exercise some influence over him, in view of the obligation which the principal

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117. (1851) 18 L.T. (O.S.) 19.

118. (1902) 66 J.P. 376.

119. [1972] Crim. L.R. 504.

120. [1974] 3 W.L.R. 751.

121. See para. 17 above.

122. Report (1974), paras. 106-124.

> may feel towards the surety and his knowledge that if he absconds the surety stands to forfeit his recognisance."[123]

108. In addition, at common law sureties who believe an accused is about to flee may bring him before a justice and so discharge themselves from their obligation[124], although this procedure has been largely superseded by section 23(1)(b) of the Criminal Justice Act 1967 which enables a constable to arrest without warrant a person who has been admitted to bail,

> "on being notified in writing by any surety for that person that the surety believes that that person is likely to break [the condition that he will appear at the time and place required] and for that reason the surety wishes to be relieved of his obligations as a surety."

109. It seems to us that the basis underlying the system of sureties would be defeated if it were possible for an accused to indemnify or to arrange an indemnity for a surety. It is true that at civil law a surety could not successfully sue on an agreement indemnifying him, but this would not be sufficient sanction to prevent the deposit of money with the surety in advance, as was done in Herman v. Jeuchner[125].

110. It is our provisional view that it should be made a specific criminal offence to make an agreement that the surety for bail would be indemnified for any liability incurred in the event of the non-appearance of an accused person to answer his bail, and that any common law offence which may exist should be abolished.

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123. Ibid., para. 108.

124. Archbold (38th ed., 1973), para. 290. It is apparently an offence to attempt to rescue an accused from his surety's custody though we know of no prosecution for this offence. The offence could, we think, safely be abolished.

125. (1885) 15 Q.B.D. 561.

3. Additional offences

111. The Phillimore Report considers in Chapter 6 the creation of a separate offence of taking or threatening reprisals after the conclusion of proceedings against witnesses or jurors in respect of anything done by them in those capacities, and recommends that there should be an offence punishable with a maximum of imprisonment for two years. We reproduce below paragraphs 155-158 of the Report which sets out the reasoning and the recommendation of the Committee -

CHAPTER 6

REPRISALS AGAINST WITNESSES

155. In two cases in the Court of Appeal in 1963[80] it was held to be a contempt to take reprisals against a witness who has given evidence in legal proceedings. In both cases it was the losing party who took reprisals against a witness for the other side. The precise point does not appear to have arisen in this country before 1963, but although, clearly, the proceedings themselves are no longer capable of being affected, there is not doubt that reprisals of this kind can interfere with the administration of justice, since:-

(a) a witness may be deterred from giving evidence for fear of reprisals even if he has not been threatened before the proceedings;

(b) other witnesses in future cases may be deterred.

It is also offensive to justice that a man should suffer in consequence of performing a public duty which may have been burdensome to him.

156. It is necessary to be clear as to what is covered by this head of contempt. In both cases in 1963 the action taken against the witnesses was prima facie lawful. In A.-G. v. Butterworth the witness was deprived of his office of treasurer and delegate of a branch of a trade union because his colleagues thought that in giving the evidence he did he had acted against the interests of the

80. A.-G. v. Butterworth [1963] 1 Q.B. 696; Chapman v. Honig [1963] 2 Q.B. 502.

union. In Chapman v. Honig a tenant who had given evidence against his landlord in another case was given notice to quit. In both cases it was the intention to punish or to take revenge which was the vital factor which turned the otherwise lawful action into an unlawful one. It will not always be easy to discover the intention behind otherwise lawful actions, but we are satisfied that this protection should be given especially where, as in Chapman's case, the witness realised the possibility of reprisals and only gave evidence when subpoenaed to do so.

157. In the Butterworth case Lord Justice Pearson pointed out[81] that in cases of this kind there is no pressing need for prompt disposal of the matter since the proceedings have been concluded. He considered that trial by jury would be more appropriate for determining the issue of the defendant's intention or purpose. We entirely agree, and this approach is in accordance with the principles set out in paragraph 21 above. It would be preferable in our view if conduct of this kind were made a separate criminal offence. We observe that there is a precedent for the creation of such an offence in the Witnesses (Public Inquiries) Protection Act 1892, which applies both to England and Scotland. Section 2 of that Act provides as follows:-

> "Every person who commits any of the following acts, that is to say, who threatens, or in any way punishes, damnifies, or injures, or attempts to punish, damnify, or injure, any person for having given evidence upon any enquiry, or on account of the evidence which he has given upon any such inquiry, shall, unless such evidence was given in bad faith, be guilty of a misdemeanor, and be liable on conviction thereof to a maximum penalty of one hundred pounds, or to a maximum imprisonment of three months."

The wording of the provision is, of course, in some respects out of date, and maximum penalties should in our view be in line with those for contempt in the superior courts[82] but we consider that this is the right approach. We recommend that to take or

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81. [1963] 1 Q.B. 696, at p. 728.
82. See Chapter 10 [in the Phillimore Report].

threaten reprisals against a witness after the proceedings are concluded should no longer be a contempt, but that it should instead be made an indictable offence.

158. In the Chapman case there was some argument as to whether the dispossessed tenant was entitled to damages. The Court of Appeal held by a majority that he was not, mainly on the ground that the law of "criminal" contempt is for the protection of the administration of justice and not of the aggrieved individual. Lord Denning, M.R., however, strongly dissented from this view and thought that damages could and should be awarded[83]. Compensation can in fact be awarded under the 1892 Act to witnesses at public inquiries who are victimised. Section 4 provides that:-

> "It shall be lawful for any court before which any person may be convicted of any offence under this Act, if it thinks fit, in addition to sentence or punishment by way of fine or imprisonment, ... upon the application of the complainant, and immediately after such conviction, to award to the complainant any sum of money which it may think reasonable, having regard to all the circumstances of the case, by way of satisfaction or compensation for any loss of situation, wages, status, or other damnification or injury suffered by the complainant, through or by means of the offence of which such person shall be so convicted; provided that where the case is tried before a jury, such jury shall determine what amount, if any, is to be paid by way of satisfaction or compensation."

We see no reason why the victim should not be entitled to compensation, and we recommend that it should be open to the court to award it, as it can do under section 4 of the 1892 Act. We would add that, although we are aware of no case of reprisals taken against a juror for anything done in that capacity, the same principles apply, and the new offence should cover jurors as well. We so recommend.

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83. [1963] 2 Q.B. 502, at pp. 512-4.

112. We agree with the recommendation and we propose an offence on the lines of section 2 of the Witnesses (Public Enquiries) Protection Act 1892 to cover taking or threatening reprisals against witnesses and an analogous offence to cover conduct aimed at jurors. We doubt whether specific provision for compensation will be necessary in the light of section 1 of the Criminal Justice Act 1972.

113. The Report also considers in Chapter 7 the creation of a substantive offence of imputing improper or corrupt judicial conduct with the intention of impairing confidence in the administration of justice. We reproduce below paragraphs 159-167 of the Report which set out the reasoning and the recommendation of the Committee -

CHAPTER 7

SCANDALISING THE COURT

159. The archaic title of this chapter refers to that part of the law of contempt which prohibits certain forms of verbal attack upon courts or judges. In Scotland the phrase used was "murmuring" judges and in addition to being a contempt it was until 1973 a statutory offence there as well[84]. The object of the law of contempt here, as elsewhere, is to protect the administration of justice, and the preservation of public confidence is an important part of this process. But the conduct of judges as judges and the decisions of the courts are matters of legitimate public concern, and there must clearly be freedom to comment or criticise within reasonable limits. In virtually every case of contempt of this kind the courts have stressed that bona fide criticism is permissible[85]. As Lord Atkin said in a celebrated opinion[86]:-

> "But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary

84. Judges Act 1540, now repealed by the Statute Law (Repeals) Act 1973; see generally Hume on Crimes, Vol. 1, p. 406.

85. For example, R. v. White (1808) 1 Camp. 359n; R. v. Metropolitan Police Commissioner, ex parte Blackburn (No.2) [1968] 2 Q.B. 150.

86. Ambard v. A.-G. for Trinidad and Tobago [1936] A.C. 322, at p. 335.

> right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

Broadly speaking what is prohibited is (a) scurrilous abuse of a judge as a judge or of a court and (b) attacks upon the integrity or impartiality of a judge or court.

160. Proceedings for contempts of this kind are in fact rare. The last successful application in this country appears to have been as long ago as 1930[87]. The view was indeed expressed by one Lord of Appeal at the end of the last century that this form of contempt was obsolete[88] but in the event a case arose in the following year[89]. There is not much evidence that the press is unduly inhibited by this aspect of the law. Criticism has become more forthright in recent years, especially since the creation of the National Industrial Relations Court. Things have been said and published about that Court and its President which could undoubtedly have been made the subject of proceedings for contempt. For example, in one publication it was stated as a fact that the judge had conferred in private with one party to proceedings with a view to advising them about the next step to take. Although this was untrue and a gross contempt no proceedings were instituted.

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87. R. v. Wilkinson (1930), The Times, 16th July.
88. Lord Morris in McLeod v. St. Aubyn [1899] A.C. 549, at p. 561.
89. R. v. Gray [1900] 2 Q.B. 36.

161. Most attacks of this kind are best ignored. They usually come from disappointed litigants or their friends. To take proceedings in respect of them would merely give them greater publicity, and a platform from which the person concerned could air his views further. Moreover, the climate of opinion nowadays is more free. Authority, including the courts, is questioned and scrutinised more than it used to be. The Lord Chief Justice said in his evidence to us: "Judges' backs have got to be a good deal broader than they were thought to be years ago." It is no doubt because of this, and in pursuance of the spirit of Lord Atkin's dictum that practice has reverted to what it was before the turn of the century when it was said that[90]:-

> "Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."

We feel that the time has come to bring the law into line with this practice.

162. At one stage we considered whether such conduct should be subject to penal sanctions at all. It was argued that any judge who was attacked would have the protection of the law of defamation, and that no further protection is necessary. We have concluded, however, that some restraints are still required, for two reasons. First, this branch of the law of contempt is concerned with the protection of the administration of justice, and especially the preservation of public confidence in its honesty and impartiality; it is only incidentally, if at all, concerned with the personal reputations of judges. Moreover, some damaging attacks, for example upon an unspecified group of judges, may not be capable of being made the subject of libel proceedings at all. Secondly, judges commonly feel constrained by their position not to take action in reply to criticism, and they have no proper forum in which to do so such as other public figures may have. These considerations lead us to the conclusion that there is need for an effective remedy, both in England and Wales, and in Scotland, against imputations of improper or corrupt judicial conduct.

163. We are, however, satisfied that the remedy should not be part of the law of contempt. It

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90. per Lord Morris in McLeod v. St. Aubyn [1899] A.C. 549, at p. 561.

does not normally require to be dealt with urgently and so be subject to the summary procedure, nor are there good reasons of convenience why it should be. Moreover, it can be argued with some force that by dealing with these cases under the summary contempt procedure, the judges are sitting as judges in their own cause, although of course the judge who was himself the subject of attack would not in practice sit to hear the case[91]. If on the other hand, the conduct occurs or the imputations are made in the face of the court, or relate to particular proceedings which are in progress, and give rise to a risk of serious prejudice, such conduct can and should be capable of being dealt with summarily as a contempt on that basis. Where the attack is made in court upon the presiding judge it should of course continue to be a contempt, and we have already concluded that reasons of convenience require that he should, as at present, be able to deal with it himself[92].

A new offence recommended

164. We therefore recommend that this branch of the law of contempt should be replaced by a new and strictly defined criminal offence[93]. The offence should be constituted by the publication, in whatever form, of matter imputing improper or corrupt judicial conduct with the intention of impairing confidence in the administration of justice. It would be triable only on indictment. Criticism, even if scurrilous, should only be punishable if it fulfilled these two requirements. As the offence would be one which struck generally at the administration of justice itself, prosecution should only be at the instance of the Attorney-General in England and Wales and of the Lord Advocate in Scotland.

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91. Skipworth's case [1873] L.R. 9 Q.B. 230, at pp. 238-9.
92. See paragraphs 30-31 [in the Phillimore Report].
93. The view has been expressed in Scotland (Gordon on Criminal Law, p. 1017) that Scots law has always recognised slander of judges as a common law offence, but if such conduct ceases to be justiciable as a contempt, and punishable by the court at its own instance, it may be doubted whether the authority cited by Gordon would support that conclusion.

Should truth be a defence?

165. We considered whether there should be any defences to the new offence we have recommended, and in particular whether, in the event of a specific allegation being made (for example of partiality or corruption) it should be a sufficient defence merely to prove that the allegation was true. In view of the special constitutional position of courts and judges, we do not think that a criminal trial is the right way of testing this issue. A defence of truth may or may not be advanced in good faith; an allegation of bias, for example, may follow a long and responsible investigation or it may be generalised or malicious invective on the part of somebody who has lost his case. The latter is usually, no doubt, best ignored but if, in an extreme case, a prosecution were brought and such a defence put forward its effect would simply be to give the defendant a further and public platform for the wider publication of his assertions or allegations, which might be wholly without foundation. An allegation of bias in relation to a particular case might, if the defendant were permitted to plead justification, be used in effect as a means of getting a case reheard. Finally, a simple defence of truth would permit the malicious and irresponsible publication of some damaging episode from a judge's past, however distant, calculated to cast doubt upon his fitness to try a particular case or class of cases. We therefore do not consider that truth alone should be a defence.

Public benefit

166. We think, however, that if, in addition to proving the truth of his allegation, a defendant can also show that its publication was for the public benefit he should be entitled to an acquittal. We are very much alive to the juridical difficulties of such a defence, but the present context, in our view, justifies its creation and there is a precedent for it in the closely analogous law of criminal libel in England and Wales. We would, however, add an important proviso. In our view, the proper course for anyone to take who believes that he has evidence of judicial corruption or lack of impartiality is to submit it to the proper authority, namely, the Lord Chancellor or the Secretary of State for Scotland, as the case may be. It is they who have the power of removal of judicial officers below High Court level if they misbehave[94], and they are the appropriate

94. Courts Act 1971, section 17(4); Sheriff Court (Scotland) Act 1907, section 13.

> recipients for complaints as to the conduct of High Court Judges. It is hard to conceive how it could be held to be for the public benefit to publish allegations imputing improper motives to those taking part in the administration of justice if the defendant had taken no steps to report the matter to the proper authority, or to enable that authority to deal with it.
>
> Conclusion
>
> 167. Our recommendation is therefore that it should be a defence to show that the allegations were true and that the publication was for the public benefit. This defence would thus be the same as exists at present to a charge of criminal libel. We understand that the Committee on Defamation is likely to recommend that the law of criminal libel should be preserved to cover certain specific situations. The offence we recommend could conveniently be made, in England and Wales, a part of that law...

114. We agree with the recommendation and we propose the creation of an offence as recommended by the Committee. It should be a defence that the allegations were true provided that publication was for the public benefit. Such an offence will not prevent the conduct being dealt with as contempt of court, as at present, if it occurs during the proceedings.

4. Summary of Proposed Offences

115. The following is a brief summary of the offences we propose should be created or retained -

(1) In relation to all judicial proceedings -

(a) Perjury.

(b) Tampering with or fabricating evidence.

(c) Preventing witnesses from attending proceedings or inducing them to be unavailable.

(d) Intimidating litigants.

(e) Threatening or bribing a juryman or member of a court.

(f) Publishing material which creates a risk that the course of justice will be seriously obstructed or prejudiced, intending to pervert the course of justice.

(g) Impersonating a juror.

(h) Misconduct as a juror.

(2) In relation to criminal proceedings -

(a) Preventing potential witnesses from giving information to the police.

(b) Giving false information to the police.

(c) Escaping to avoid trial.

(d) Failing to answer bail to avoid trial.

(e) Agreeing to indemnify bail.

(f) Assisting a person believed to be guilty of an arrestable offence[126].

(g) Compounding an arrestable offence[127].

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126. This is an offence under s.4(1) of the Criminal Law Act 19(

127. This is an offence under s.5(1) of the Criminal Law Act 19(

(3) Not necessarily related to the outcome of particular proceedings -

(a) Taking or threatening reprisals against witnesses, jurors or officers of a court for anything done in that capacity.

(b) Imputing improper or corrupt judicial conduct.

116. The provision of the offences set out above would, we feel, be sufficient to allow the general common law offence of perverting the course of justice to be abolished. It would also allow a number of specific common law offence now rarely charged to be abolished. These include personating a juryman[128], embracery[129], obstructing a coroner[130], fabrication of false evidence[131], disposing of a corpse to obstruct a coroner[132], and indemnifying bail[133]. There may still be some acts which would be penalised only by the law of contempt of court - such as physical obstruction of court proceedings - but our provisional view is that, for those, contempt of court provides sufficient sanction.

5. Penalties

117. If there is to be a scheme of offences on the lines we propose it is necessary for there to be a rational system of penalties for offences. All the present common law offences are triable on indictment and the penalty is at large with no maximum period of imprisonment or fine laid down. Perjury in judicial proceedings is punishable under the Perjury Act 1911 with

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128. Archbold (38th ed., 1974), para. 1602.
129. Ibid., para. 3447.
130. Ibid., para. 3482.
131. Ibid., para. 3544.
132. Ibid., para. 3907.
133. Ibid., para. 3449.

a maximum penalty of seven years' imprisonment and a fine. In Working Paper No.33 we proposed that this maximum penalty should be retained and the views expressed to us on consultation have not caused us to alter that proposal. We recommend that the maximum penalty for perjury in judicial proceedings should be imprisonment for seven years and a fine. Perjury can properly be considered as the most serious of the statutory offences of perverting the course of justice and it is our provisional view that this should be taken as the maximum sentence for those offences in the scheme we have proposed and that the others should be related to that so far as is possible, having regard to all other relevant circumstances.

118. Our provisional proposals for maximum sentences for the offences set out in paragraph 115 are as follows -

(1) (a) Perjury
7 years' imprisonment, as recommended in paragraph 117 above.

(b) Tampering with or fabricating evidence
7 years' imprisonment. This is as serious and deliberate an offence as perjury and should we think carry the same maximum penalty.

(c) Preventing witnesses from attending proceedings
5 years' imprisonment. This is a serious offence which can gravely hamper the proper administration of justice.

(d) Intimidating litigants
5 years' imprisonment. The range of conduct that is covered by this offence is very wide, but at its worst the offence can be as serious as (c) above.

(e) Threatening or bribing a juryman or members of the court

5 years' imprisonment. This is a serious offence which involves corrupting others in the performance of a public duty.

(f) Publishing material intending to pervert justice

2 years' imprisonment. This is closely related to contempt of court, and the Phillimore Report recommends a maximum of 2 years' imprisonment for contempt[134].

(g) Impersonating a juror

2 years' imprisonment. This, though it may be a serious offence, does not necessarily involve perverting justice.

(h) Misconduct as a juror

5 years' imprisonment. This offence needs to carry the same penalty as that in (e) above.

(2) (a) Preventing witnesses giving information to the police

2 years' imprisonment. This conduct may be preliminary to preventing a witnesses from attending proceedings, but in itself should not, in our view, carry as high a maximum penalty as that offence.

(b) Giving false information to the police

2 years' imprisonment. This may amount to a more serious offence than that under

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134. Phillimore Report, para. 201.

s.5(2) of the Criminal Law Act 1967, which carries a penalty of only 6 months' imprisonment.

(c) Escaping

1 year's imprisonment. This is in line with the recommendation of the Working Party on Bail in (d) below.

(d) Failing to answer bail

1 year's imprisonment. The Working Party on Bail[135] recommended 1 year in cases dealt with by the Crown Court. Our provisional proposal is that as a maximum penalty this is reasonable.

(e) Indemnifying bail

1 year's imprisonment. This is in line with (c) and (d) above.

(f) Assisting an offender

Section 4(3) of the Criminal Law Act 1967 provides a scheme of scaled penalties related to principal offences. These vary from 10 years to 3 years. We do not propose any change. The conduct covered by section 4 is wider than obstructing the course of justice and the penalties, in our view, should remain as they are.

(g) Compounding

2 years' imprisonment. This is the penalty under s.5(1) of the Criminal Law Act 1967 which we think should be retained.

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135. Report, para. 102.

(3) (a) Taking reprisals

2 years' imprisonment. This is recommended by the Phillimore Committee, not following the 3 months' maximum of s.2 of the Witnesses (Public Inquiries) Protection Act 1892 .

(b) Imputing improper or corrupt judicial conduct

2 years' imprisonment. This is a form of contempt of court and should carry the same maximum penalty as is recommended in the Phillimore Report for contempt.

IV. COMPREHENSIVE SUMMARY OF PROPOSALS

119. We provisionally propose that the following common law offences should be abolished -

(i) Obstructing, perverting or defeating the course of justice, including -

(a) fabricating false evidence for the purpose of misleading a judicial tribunal,

(b) making a false statement with a view to perverting the course of, or preventing, judicial proceedings,

(c) dissuading or preventing a witness from appearing or giving evidence in judicial proceedings,

(d) embracery, i.e. attempting to influence a juror otherwise than by evidence and argument in court.

(ii) Personating a juryman.

(iii) Escaping from custody in order to avoid trial.

(iv) Agreeing to indemnify bail.

120. We provisionally propose that the following offences should be created (or retained where they already exist), with the maximum penalties (see paragraph 118) indicated in each case.

(i) Perjury - 7 years' imprisonment. (Paragraph 60.)

(ii) Tampering with or fabricating evidence with the intention of perverting the course of justice in any judicial proceedings, or with the intention of affecting the decision of any authority with a duty to consider whether to institute criminal proceedings - 7 years' imprisonment. (Paragraph 65.)

(iii) Preventing witnesses from giving evidence in judicial proceedings, inducing them not to give evidence or to absent themselves so as to be unavailable to give evidence, in each case with the intention of perverting the course of justice - 5 years' imprisonment. (Paragraph 67.)

(iv) Making an unwarranted demand with menaces that a person should not institute any judicial proceedings, or that he should withdraw or agree to settle any such proceedings, or that a defendant in criminal proceedings should plead in a particular way - 5 years' imprisonment. (Paragraphs 83-84.)

(v) Seeking to influence the decision in judicial proceedings by threatening or bribing or improperly persuading a juryman or member of the court - 5 years' imprisonment. (Paragraph 87(1).)

(vi) Publishing with intent to pervert the course of justice, any material which creates a risk that the course of justice in any judicial proceedings will be seriously obstructed or prejudiced - 2 years' imprisonment. (Paragraph 87(2).)

(vii) Impersonating a juror - 2 years' imprisonment. (Paragraph 88.)

(viii) Offering or agreeing as a juror to give a verdict otherwise than in accordance with one's oath or giving a verdict otherwise than in accordance with one's oath - 5 years' imprisonment. (Paragraph 91.)

(ix) Preventing those who might be witnesses in any criminal proceedings from giving information, inducing such persons to absent themselves so as to be unable to give information and persuading such persons by threat or intimidation not to give information, in each case with the intention of obstructing the police or any public authority in their duty to decide upon the institution or conduct of criminal proceedings - 2 years' imprisonment. (Paragraph 98.)

(x) Giving false information to the police or to any public authority with the

intention of obstructing them in their duty to decide upon the institution or conduct of criminal proceedings - 2 years' imprisonment. We seek views as to whether this offence should apply to a suspect seeking to exculpate himself. (Paragraph 100.)

(xi) Escaping from lawful custody with the intention of avoiding trial - 1 years' imprisonment. (Paragraph 102.)

(xii) Failing to answer bail with the intention of avoiding trial - 1 years' imprisonment. (Paragraph 105.)

(xiii) Agreeing to indemnify the surety for bail for any liability incurred in the event of the non-appearance of an accused to answer his bail - 1 year's imprisonment. (Paragraph 110.)

(xiv) The offence under section 4(1) of the Criminal Law Act 1967 of impeding the apprehension or prosecution of another known to be guilty of an arrestable offence - Imprisonment varying from 10 to 3 years depending upon the offence. (Paragraph 101.)

(xv) The offence under section 5(1) of the Criminal Law Act 1967 of agreeing to accept a consideration for not disclosing information which might be of material assistance in securing the prosecution or conviction of an offender for it - 2 years' imprisonment. (Paragraph 101.)

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