OFFENCES AGAINST PROPERTY IN NIGERIAN LAW WITH PARTICULAR REFERENCE TO THE NORTHERN STATES

By

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D E D I C A T I O N

This thesis is dedicated to my late guardian Iya Hajara.

DECLARATION

I hereby declare that this thesis entitled Offences Against Property in Nigerian Law with Particular Reference to the Northern States has been written by me and that it is a record of my own research work. It has not been presented in any previous application for a higher degree. All quotations and references are indicated with specific acknowledgements.

Hussein Mukhtar

C E R T I F I C A T I O N

The thesis entitled "Offences Against Property in Nigerian Law with Particular Reference to the Northern States" by Hussein Mukhtar meets the regulations governing the award of the degree of LL.M. of Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.

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ABSTRACT

This thesis covers an analytical study of offences against property in Nigeria under the Penal Code which applies to the eleven Northern States and the Criminal Code applicable to the ten Southern States. More attention Is, however, focused on the law applicable to the Northern States* Reference has been made to pre-statute period when the only applicable laws were the Customary laws of crime which varied from one community to another except the Muslim community in the North which were governed by the Islami law of crime long before the advent of the British. When the British came, they established some British Courts and gradually substituted the Customary laws of crime (including Islamic law of crime) with the Common law. The British colonialists later introduced a Criminal Code which initially applied only to the then Northern Region and was later extended to the Southern Region as well. On the eve of independence the Penal Code was drafted and applied, from the date of independence, to the Northern Region while the Southern Region has continued to apply Criminal Code.

Theft and stealing are two terms used in the Penal Code and the Criminal Code respectively for offences which albeit similar, are different in scope. The Criminal Code concept of stealing is wide enough to cover acts that may amount to theft, criminal misappropriation and criminal breach of trust under the Penal Code which are treated as three distinct offences.

Criminal misappropriation and criminal breach of trust exist as distinct offences only under the Penal Code. The difference between these two offences is very marginal. Criminal breach of trust is simply criminal misappropriation committed by a person entrusted with the property against which the offence is committed. The element of trust is therefore the distinguishing feature of criminal breach of trust. These two offences differ from theft only because the offender is in possession of the property at the time of the commission of the offence. In theft the property must have been possessed by a person other than the offender. All these three offences will, however, amount to stealing under the Criminal Code.

Simple and armed robbery are now regulated by the Robbery and Firearms (Special Provisions) Decree 1984. The definition of robbery under the Decree is identical with the Criminal Code definition[1] and is wide enough in scope to cover extortion, robbery and brigandage under the Penal Code. These offences can, therefore, now be tried only under the Decree as either robbery or armed robbery depending upon whether, at the time of committing the offence or immediately before or after, the offender uses or threatens to use actual violence to constitute the former, or the offender is armed with any offensive weapon to constitute the latter. Anything that may be used for causing injury to person will suffice as an offensive weapon. Thus, articles like knife, sticks, etc. have been held to be offensive weapons[2]. Possession of firearms whether real or imitation in a public place in such circumstances indicating an intention to commit armed robbery whether by the person in possession or another and whether immediate or eventual, is an offence punishable under Section 2(3) of the Decree with a prison term ranging from a minimum of fourteen years to a maximum of twenty years.

Property obtained by the commission of any of the above offences is stolen property and receiving or retaining such property dishonesty is an offence under Section 317 of the Penal Code. Stolen property is more broadly conceived by the

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1. Cf. SS. 401 and 13 of the Criminal Code and the Robbery and Firearms (Special Provisions) Decree, 1984 respectively.
2. State v. Sama'ila Saidu RESPT/B./1/84; State v. Muhammadu Ibrahin and one other RESPT/B./2/84 (both unreported cases tried by the Bauchi State Robbery and Firearms Tribunal).

Criminal Code, which embraces property obtained by the commission of any offence whether in Nigeria or else where if such act would have constituted a crime if committed in Nigeria[3]. Section 148(a) of the Evidence Act provides for a presumption that a person found in possession of stolen goods soon after the theft is either the thief himself or the receiver of such goods with knowledge that they are stolen unless he can account for his possession thereof.

Cheating requires either fraudulent or dishonest intention in deceiving another to part with property or to consent to the retention of property by another in consequence of the deceit. It will also suffice if the offender by deceiving his victim intentionally causes such person to do or omit to do anything which he would not do or omit to do if he were not so deceived. Any property moveable or otherwise is subject of the offence of cheating under the Penal Code. However, under the Criminal Code only property which is capable of being stolen may be the subject of cheating or obtaining by false pretences.

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3. See Section 427 of the Criminal Code.

The offence of mischief is committed, under the Penal Code, by the offender destroying any property or a change in any property or in its situation and thereby extinguishing or diminishing its value or utility or affecting it injuriously intending to cause or knowing that he is likely to thereby cause wrongful loss or damage to the public or to any person. The Criminal Code deals with various kinds of mischief separately such as arson under Section 443 of the Criminal Code, casting away ships under Section 447 of the Criminal Code, obstructing and injuring railways under Section 449 of the same Code, injury to animals under Section 450, etc.

Forgery under both Codes is a documentary deceit similar to cheating which involves an oral or some form of deceit otherwise than by document. Forgery under Section 363 of the Penal Code involves the making of a false document or part thereof intending thereby to support any claim or title or to cause damage or injury to the public or to induce any person to part with property or to enter into any agreement or with intent to commit fraud.

Forgery committed by a clerk, officer, or servant or by a person acting as such in relation to any book, paper, writing, document of title or account belonging to his employer or is in the employer's possession whether physically or constructively, amounts to falsification of accounts under Section 371 of the Penal Code. Supprisingly, however this offence, which itself is a special form of forgery, carries lesser sentence than forgery. The offence of fraudulent false accounting under the Criminal Code is very similar to the Penal Code provision.[4]

PREFACE

This piece of work deals with offences against property as conceived by the Penal and Criminal Codes. It is divided into seven chapters, and each chapter gives a detailed account of the law and the principal decided cases on the topic. The work also provides the legal views of some learned writers on Nigerian Criminal Law.

Offences against property are particularly important in Criminal law as most criminal cases tried in our courts, especially the lower courts, relate to this area of the law. The law under both the Penal Code and the Criminal Code have been carefully analysed and a number of constructive criticisms and suggestions have been made where necessary. A number of short-comings have also been pointed in our laws especially the Criminal Code which has been applied in Nigeria for almost a century without necessary review. More attention is, however, focused on the Penal Code which applies to the Northern States. The Criminal Code provisions on offence against property are mostly discussed in drawing comparisons and differences between the two Codes. The idea behind making specific reference to the Northern States is for the fact that there are currently very few materials on Criminal law applicable to this part of the country.

The responsibility of personal opinions expressed, possible inaccuracies and shortcomings in this work solely remain mine.

Zaria, October 1988. HUSSEIN MUKHTAR.

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ABBREVIATIONS

Law Reports of Nigeria

All N.L.R.	...	All Nigeria Law Reports.
E.R.L.R.	...	Eastern Region Law Reports.
F.S.C.	...	Selected Judgements of the Federal Supreme Court.
N.L.R.	...	Nigeria Law Reports.
N.N.C.N.	...	Northern Nigeria Case Notes.
N.N.L.R.	...	Northern Nigeria Law Reports.
N.R.N.L.R.	...	Northern Region of Nigeria Law Reports.
W.A.C.A.	...	Selected Judgements of the West African Court of Appeal.
W.N.L.R.	...	Western Nigeria Law Reports.
W.R.N.L.R.	...	Western Region of Nigeria Law Reports.

Law Reports of the United Kingdom

A.C.	...	Appeal Cases.
All E.R.	...	All England Reports.
B. & P.	...	Bosanquet and Puller's Reports.
C. & K.	...	Carrington and Kirwan's Reports.
Ch. D.	...	Law Reports, Chancery Division.
Cox C.C.	...	Cox Criminal Cases.
Cr. App. R.	...	Criminal Appeal Reports.
F. & F.	...	Foster and Finlason's Reports.
K.B.		Law Reports. King's Bench.
L.J.K.B.	...	Law Journal, King's Bench.
L.R.C.C.R.	...	Law Reports, Crown Cases Reserved.
L.T.	...	Law Times Reports.
Q.B.	...	Queens Bench.
R. & R.	...	Russel and Ryan's Crown Cases Reserved.
Stra.	...	Strange's King's Bench Reports.

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W.L.R. ... Weekly Law Reports.

Law Reports of India and Pakistan

A.I.R. ... All India Reporter.

All.	Allahabad.
Assam	Assam.
Bom.	Bombay.
Cal.	Calcutta.
Lah.	Lahore.
Mad.	Madras.
Oudh.	Oudh.
Punj.	Punjab
S.C.	Supreme Court.
Sind	Sind.

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CHAPTER ONE

1. INTRODUCTION

1.1. BRIEF HISTORY OF THE CRIMINAL AND PENAL CODES

Before the advent of the British, there existed only various customary laws applicable to families, villages, and communities especially in the Southern part of Nigeria, while in the North there existed a highly systematised Islamic law governing every aspect of human life, and which had been used in determination of both civil and criminal offences within the Muslim community. Allah Almighty has said:

> "Verily, this is My Way,
> leading straight: Follow it:
> Follow not (other) paths:
> They will scatter you about
> From His (great) paths:
> Thus doth He command you,
> That ye may be righteous."[1]

The dominant school of jurisprudence in the North was the Maliki School. There were also some pagan communities who followed their various customary criminal laws and some of those who lived among the Muslims, adopted some of the Islamic principles in both civil and criminal law. The Islamic law unlike customary law is codified and easily ascertainable.

In 1861 the British set up a colony in Lagos. Initially they did not temper with the pre-existing customary criminal law. Later, however, as the British established more institutions in the colony, they started importing the common law into the colony. In 1863, the British replaced the various customary criminal laws with English law of crime. The British continued to extend their influence and the application of the their law to the immediate hinterland while

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1. Holy Qur'an Surah 6 Verse 153.

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Islamic law was applied further inland. The application of English common law of crime, the customary law of crime and the Islamic law of crime continued up to the year 1903. The British hesitated abrogating the long-standing Islamic law and other customary laws of crime for fear of unfavourable response from the people practicing such laws. A gradual process was therefore adopted by establishing British courts which applied common law of crime which itself was applied with hardships and inconveniences as it was very difficult to ascertain having not been embodied in a comprehensive Code.

The Lugard administration made a proclamation in 1904 which introduced, for the first time, a Criminal Code in Northern Nigeria, the application of which was initially limited only to British courts by Section 4 of the Proclamation which exempted the native courts from applying the provisions of the Criminal Code. The British thought of extending the application of the Criminal Code to Southern Nigeria after the amalgamation of the two regions in 1914, and accordingly in 1916, the application of the Criminal Code was so extended to Southern Nigeria with the exemption of its application in native courts and/or tribunals preserved. Thus, even in 1916 the bulk of criminal cases in both North and South were tried not in accordance with the provisions of the Criminal Code but by the application of customary criminal laws and the Islamic law of crime which was regarded by the colonialists as native law and custom. It is partinent to note, however, that Islamic law cannot by any stretch of imagination be termed as a customar

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2. The Future of Law in Africa, Cap. 2 (Edited by Allot.)

law, be it from its source, nature or characteristic. Even in the Holy lands where Islam originated, its status is not that of a customary law. It is instead a divine civilised written law which replaces the customary practices of the Muslim community. The situation in Nigeria, as the colonialist found it, was no different. Islamic law is not indigenous to any part of Nigeria, not even any part of the world but a civilisation which long preceded the British "civilisation."

The Criminal Code was based on a bill drafted by one of th most eminent British lawyers, Fitzjames Stephen in 1878 but which the British Parliament declined to enact as law for Britain. The Criminal Code was then applied side by side with the various customary criminal laws and the Islamic law of crime which was applied solely to Muslims. The British however, began to frown at the various customary laws and Islamic law that were applied simultaneously with the Code especially where such laws are grossly inconsistent with the Code or the British legal system, for example, while provocation is a partial defence under the Code, Islamic law does not recognise such a defence as it teaches against being angry. A man once came to the Messenger of Allah, may Allah bless him and grant him peace, and said, "Messenger of Allah teach me some words which I can live by. Do not make them too much for me, lest I forget." The Messenger of Allah bless him and grant him peace said, "Do not be angry."[3] The Messenger of Allah (S.A.W.) also said, "A strong person is not a person who throws his adversaries to the ground. A strong person is the person who contains himself when he is angry."[4] Thus

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3. See Imam Maliki, Al-muwatta 47.3.
4. Ibid.

an accused person who kills on "grave and sudden provocation" would, if tried in a British court be sentenced to a maximum of life imprisonment while the same accused on the same facts could have been convicted of murder in an Islamic court unless the heirs of the deceased have chosen to accept blood-money as compensation[5]. It was therefore a matter of chance whether a man was tried in a Muslim court or in a British court[6]. The British tried to evolve a solution to that situation by affecting an amendment in the Criminal Code Ordinance which would, at least, restrict trials and punishments for criminal offences to the provisions of the Code. Section 4 of the ordinance which hitherto provided that trials and punishments for offences must be strictly in accordance with the provisions of the Code or some other imperial legislation, other than those "in a native tribunal" was amended in 1933 by repealing the words "other than a native tribunal." Section 10 of the ordinance however permitted customary or native courts to continue to apply native law and custom subject to the "humanity" of the punishment imposed. According to the reports of the Native Courts Commission of enquiry led by Commissioner Brooke from 1949-52, the effect of the amendment of Section 4 of the Criminal Code Ordinance was to prohibit punishments under native or customary criminal law which was considered as harsh and inhuman. This, however, covered only crimes which were offences both under customary criminal law as well as under the Code in which case the native courts were to impose only punishments under the Code even if the offences are tried under the native criminal law.[7]

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5. See Holy Qur'an, Cap. 4 Verse 92.
6. (1957) J.A.L. at p. 87.
7. Native Court's Commission of Enquiry (Conclusions) p. 12.

There were also some judicial interpretations on the 1933 amendment of the Criminal Code. The first of such interpretations was given by the West African Court of Appeal in the case of Tsofo Gubba v. Gwandu N.A.[8] where the appellant was convicted of murder and sentenced to death by a Grade "A" native court. The Supreme Court upheld the conviction even though it was satisfied that the evidence proved no more than manslaughter under the Criminal Code, considering itself bound by a previous West African Court of Appeal decision.[9] On appeal to the West African Court of Appeal it was held, inter alia that no person is liable to be tried or punished in a native court for an offence against the Criminal Code or other Ordinance except under the provisions of that Code or other Ordinance. The native courts were also empowered to try offences under native law and custom and inflict the appropriate punishments provided thereby, subject to the restrictions imposed by Section 10 of the Native Court's Ordinance, provided that such act does not also constitute an offence under the Criminal Code or any other Ordinance in Nigeria. The court further held that where a native court exercises jurisdiction in relation to an act which constitutes an offence both against the Criminal Code or other Ordinance, and against the native law and custom, the native court must exercise that jurisdiction in accordance with the provisions of the Criminal Code or other Ordinance. The native court in this case therefore erred in applying the principles of "Mohammedan" law in coming to their verdict, the charge being one of murder, came to a wrong conclusion in law, and imposed a penalty unauthorised by the Criminal

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8. (1947) 12 W.A.C.A. 141.
9. Borno N.A. v. Magudama Abacha, W.A.C.A. 2326, 11th January, 1946 (unreported).

Code. Seven years later, however, the Federal Supreme Court in Dalo Maryam v. Bauchi Native Authority[10], held that High Court has no power to order a retrial under the Criminal Code in homicide cases if the conviction and sentence are correct according to "Maliki" Law. The question whether the offence is manslaughter in "English Law" cannot be enquired into; the only questions that can be raised are whether the decision in the court below is correct by native law and custom and whether it is contrary to natural justice, morality, equity and good conscience or incompatible with the provisions of any written law. The view in Gabbai's case is however supported by more authority on this point. In Usman Acida v. R.[11], it was held that a trial is unsatisfactory where the penalty imposed widely diverges from that prescribed by the Criminal Code. The position therefore was that while native courts were allowed to try offences under customary law, they were restricted to imposing punishments only in strict conformity with the provisions of the Criminal Code.

In Bana v. Borno Native Authority[12], it was held that the provision of Section 19A of the Native Court's Ordinance merely prohibits a native court from imposing a higher sentence than that allowed by the Criminal Code for the offence. Thus, the punishments under the Criminal Code in effect supplemented the customary criminal law. The trial of offences under one law and punishing under another caused untold hardships on the native courts which had to

10. (1957) N.R.N.L.R. 73; Contrast Fagoji v. Kano Native Authority, Supra at p. 57.

11. (1950) 13 W.A.C.A. 48.

12. (1954) 14 W.A.C.A. 587.

look left to find the applicable law for the purpose of trial and then right to ascertain the sentence to be imposed under the Criminal Code.

Similarly, Maizabo v. Sokoto Native Authority[13], the Federal Supreme Court held that the provision of Section 10A of the Native Courts Ordinance requires Native courts to ascertain which offence under the Criminal Code the act or omission constitutes, and not to impose punishment greater than that provided by the Criminal Code for such offence. Thus, in trying a case of homicide under Native law and custom, they are required to consider if the offence would be manslaughter under the Criminal Code; and if so they are not to impose a greater punishment than that provided for manslaughter in the Criminal Code.

In 1958 during the Constitutional Conference in London, the Nigerian delegates discussed the need to abolish the application of Customary Criminal law in Nigeria because the application of the Criminal Code side by side with Customary Criminal law had given rise to many difficulties and conflicting judicial

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13. (1957) N.R.N.L.R. 133.

judicial pronouncements[14]. In the same year, the Government of Northern Nigeria set up a Panel of Jurists to consider the problem and suggest a solution. The Panel suggested the codification of Criminal Law and restricting the application of Islamic law to personal transactions amongst the Muslims. There was, however, an objection by some elites in the North backed by the powerful traditional rulers on the adoption of the Criminal Code on the ground that the Code, by its nature was not suitable for Muslim community, having not taken care of some offences under Islamic law such as adultery and drinking of alcohol. It was thus felt necessary to have a separate Code for the North which will suit the Northern community. There was, however, a considerable controversy between some British orientated modernists who wanted a British modelled Code on the one hand and the traditionalists on the other who wanted the application of Maliki law in its entirety[16].

The then Northern Government then set up a Panel of Jurists with the Chief Justice of Sudan, Sayyed Muhammed Abu Rannat as the Chairman. The membership of the Panel included Mr. Justice Muhammad Sharif, a retired Jude of the Supreme Court of Pakistan, Professor J.N.D. Anderson a Professor of Oriental laws in the University of London, The Waziri of Borno Shettima Kashim, Mr. Peter Achimugu and M. Musa Othman the Chief Alkali of Bida. The Panel

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14. Chukkol K.S., Defences to Criminal Liability in Nigerian Law, 1st Ed. Ahmadu Bello University Press, Zaria at p. 4.

15. Anderson, (1959) 8 I.C.L.Q. 442.

16. Amankwah, O., Introduction to the Criminal Law of Northern States of Nigeria (Cases and Materials) p. 38.

recommended the establishment of a Code which will gain international acceptance on the one hand and also be acceptable to people living in the Northern Region on the other. The draft Penal Code was further scrutinised by some learned Muslim jurists headed by M. Junaidu the Waziri of Sokoto to confirm that the provision of the Code were not in conflict with the injunctions of the Qur'an and Sunnah since the majority of the population in the North are Muslims. The Panel recommended the introduction of two Codes i.e. the Penal Code and the Criminal Procedure Code which were based on equivalent Codes applied in Sudan, a country considered in many respects to be similar to Northern Nigeria. The Sudan Codes were also based on Indian Codes with minor modifications. The two draft Codes were also modified slightly to suit the requirements of their application in Northern Nigeria, and the Penal Code is supplemented by Federal legislation on matters outside the legislative competence of the Regional legislature such as offences relating to posts and telegraphs, currency, treason, sedition, railways, aircrafts, etc.

The decision taken to abolish customary criminal law at the 1958 Constitutional Conference was enshrined in the 1963 Constitution. Section 22(10) of that Constitution provided as follows:

> "No person shall be convicted of a criminal offences unless that offence is defined and the penalty therefore is prescribed in a written law."

It is submitted that this provision which is expressed by the maxim nullum crimen sine lege does not seem to oust Islami law which is a written law, but for the fact that the latter was never enacted by the Regional legislature.

The Penal Code was then enacted by the Penal Code Law 1959 as schedule thereto, and it came into operation on 30th September, 1960. The dual system of customary and statute criminal law is, since Independence, replaced by a dual Code system.[17] It is, thus, considered important to examine the relationship between the two Codes with regards to offences against property.

1.2. COMPARATIVE ANALYSIS ON THE PENAL CODE AND CRIMINAL CODE PROVISIONS RELATING TO OFFENCES AGAINST PROPERTY

Most offences against property are similar in one way or another under both Codes and the mens rea required is normally fraudulent or dishonest intention. Section 383(2) of the Criminal Code defines "fraudulently" as the state of mind of an accused person taking or converting anything capable of being stolen with any of the following intents:

(a) an intent permanently to deprive the owner of the thing of it.

(b) an intent permanently to deprive any person who has any special property in the thing of such property.

(c) an intent to use the thing as a pledge or security.

(d) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform.

(e) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion.

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17. Okonkwo C.O. and Naish M.E. Criminal Law in Nigeria, 1st Ed., Sweet and Maxwell, at p. 12.

(f) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.

The above provision is not only too lengthy but also so wide as to cover an area that ought not have been contemplated by the enacting legislature. For example paragraph (e) above suggests that taking of a thing capable of being stolen is fraudulent if it is accompanied by an intention to deal with the property in such a manner that it can not be returned in the condition in which it was at the time of the taking. A person therefore who takes a thing and improves it to the benefit of its owner seems to be covered by the definition above and therefore by that of stealing as well. On the other hand, however, dishonest intention which is required as mens rea for theft under Section 286 Penal Code, cannot cover such an absurd situation. Section 16 of the Penal Code defines dishonest intention thus:

> "A person is said to do a thing dishonestly who does that thing with the intention of causing a wrongful gain to himself or another or of causing wrongful loss to any other person."

Wrongful gain is gain by unlawful means of property to which the gainer is not entitled and wrongful loss is loss by unlawful means of property to which the looser is entitled.[18] Even the word "fraudulently" has been more precisely defined under the Penal Code, thus:

> "A person is said to do a thing 'fraudulently' or 'with intent to defraud' who does that thing with

18. See SS. 13-15 Penal Code.

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> intent to deceive and by means of such deceit to obtain some advantage for himself or another or to cause loss to any other person."[19]

However, fraudulent intent as defined above differs from the Criminal Code definition which does not require the element of deceit. Even under the Penal Code fraudulent intent is only required for offences which involve deceit such as forgery and cheating. It is submitted, however that dishonest intention as defined under the Penal Code is wide enough in scope to cover the lengthy definition of "fraudulently" under the Criminal Code.

Another remarkable point is that the requirement of absence of consent of the person in possession of the property stolen which is necessary to prove theft under the Penal Code, has not been incorporated in to the Criminal Code definition of stealing. Thus, while the Penal Code requires only moving as actus reus for theft, the Criminal Code on the other hand requires either taking or conversion. A person will not, however, be deemed to take a thing unless he moves it or causes it to move.[20] The requirement of simple moving is, thus, common to both Codes.[21] It is submitted that the requirement of both Codes that the property should be moveable is superflous since nothing can be moved unless it is, of-course, moveable or made to be moveable. The earth and anything attached to the earth, not being moveable cannot be stolen by the provisions of either Code, unless it is severed from the earth. The penal Code defines "moveable property" as

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19. Section 17 Penal Code.
20. Section 383(6) Criminal Code.
21. Compare Section 383(6) Supra with Section 286 of the Penal Code.

including "corporal property of every description except land and things attached to the earth or permanently fastened to anything which is attached to the earth."[22] The Criminal Code, on the other hand does not define the term "moveable property" leaving it to the ordinary and plain meaning of the words that it ought to be property which can be moved.

The Criminal Code definition of stealing requires in some cases that the accused should intend to permanently deprive the owner of the thing of it, or any person who has any special property such as charge or lien in the thing of such property. However, paragraphs (c), (d) and (e) of Section 383(2) of the Criminal Code do not require any intention of permanent deprivation but only indicate an intention by the person taking the property to deprive the owner of the property of it temporarily. The Criminal Code therefore requires an intention of either permanent or temporary deprivation of property in order to constitute stealing, depending upon the particular "fraudulent" intention with which the property was taken or moved. The Penal Code on the other hand does not require permanent deprivation. A temporary deprivation of property will, thus, suffice to constitute theft under the Penal Code, subject, however, to the presence of the other ingredients of theft.

The defintion of stealing under the Criminal Code is wide enough in scope to cover the defintions of theft and criminal misappropriation under the Penal Code. Section 383(1) of the Criminal Code provides:

> "A person who fraudulently takes anything capable of being stolen,

22. Section 12 Penal Code.

or fraudulently converts to his own use or to the use of any other person anything capable of being stolen, is said to steal that thing."

CHAPTER TWO

2. THEFT (STEALING)

2.1. THE CONCEPT OF THE OFFENCE

It is intended here to concentrate discussion on theft under the Penal Code leaving detailed discussion under the Criminal Code to the second part of the chapter.

Theft is defined under the Penal Code as follows:-

(1) "Whoever intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to take it is said to commit theft."

(2) "Whoever dishonestly abstracts, diverts, consumes or uses any electricity or electric current is said to commit theft."

There are six basic ingredients of the offence:-

(i) dishonest intention.

(ii) the property must be moveable.

(iii) the property must be in possession of a person.

(iv) the property must have been moved whilst in the possession of that person, and

(v) without his consent.

(vi) the moving of the property must be with view to taking the property out of the possession of that person.

2.1.1. Dishones Intention

This is the mens rea in theft, and it must exist in the mind of the accused person at the time when the property was

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1. Section 286 of the Penal Code.

moved. Moving of property can be said to be made dishonestly if it is so done by an accused person with the intention of causing a wrongful gain to himself or another or of causing wrongful loss to any other person[2]. Wrongful gain is gain by unlawful means of property to which the person gaining is not legally entitled[3]. Wrongful loss is the loss by unlawful means of property to which the person loosing it is legally entitled[4]. In the case of Mehra v. The State[5], the accused person went to an aerodrome and took and flew a government aircraft without permission, until he was forced to land due to lack of fuel. It was held that the accused had committed theft of the aircraft because he had deprived the government of its legitimate use. So also in yet another Indian case of Emperor v. Naushe Ali Khan[6], where the accused siezed books from a boy returning from school and told the boy that he would return it only when the boy goes to his (accused's) house. It was held that the accused was guilty of theft.

Dishonest intention is normally inferrod from the circumstances of each particular case. It can therefore be rebutted by evidence showing good faith on the part of the accused at the time of moving or taking the property. Thus, in the case of Sitabai v. Emperor[7], the accused, a woman, agreed to sell a barge and actually received part

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2. Section 16 of the Penal Code.
3. Section 13 of the Penal Code.
4. Section 14 of the Penal Code.
5. A.I.R. (1957) S.C. 369.
6. (1912) I.L.R. 34 All 89.
7. A.I.R. (1930) BOM. 488.

of the price and that the balance was to be paid on delivery. When the barge was delivered the buyer could not pay and the accused, therefore, took the barge away, and was prosecuted for theft of the barge because under the law relating to sale of goods, the buyer became the owner on delivery. It was held that as this rule is not generally known to people like the parties, the accused could not be said to have acted dishonestly and is not, therefore, guilty of theft.

Evidence of good faith may, however, be nagatived by an accused person doing something which he knows or ought to have known that he has no right to do. In Ransom v. Triloki,[8] the accused supplied a lorry under a hire-purchase agreement giving him a right to recover the lorry in default of payment of any instalment. On default being made, the accused obtained possession of the lorry by force. It was held that the accused was guilty of theft because his only remedy was a suit for possession. Thus if a creditor takes his debtor's goods in order to compel payment of the debt, he will be guilty of theft thereof.[9]

A bona fide claim of right is, however, a good defence to a charge of theft and other offences against property as it will rebut the presumption of dishonest intention on the part of the accused. For instance, in R. v. Vega,[10] The West African Court of appeal held that the accused person, who took some old corrugated sheets which have been lying idle for a very long time and which the accused believed to have been abandoned, was not guilty of theft.

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8. (1942) I.L.R. 17 Luck 663.
9. Q.E. v. Aga Muhammad (1896) I.L.R. 18 All 88.
10. (1938) 4 W.A.C.A. 8.

It is immaterial that a bona fide claim of right does not conform with factual or legal reality - just like mistake as a defence. In the English case of R. v. Bernhard[11], it was held that a person has a claim of right if he is honestly asserting what he believes to be a lawful claim, even though it may be unfounded in law or in fact.

A claim of right must therefore be honest. As a matter of law, therefore, it need not be reasonable, although as a matter of evidence, if it is shown to be unreasonable, there is quite a strong inference that it is also dishonest.[12] In the Queensland case of R. v. Pollard,[13] the trial court stressed that an accused person must believe that he was entitled to take the thing in question and not only that he would have been entitled. In that case the accused used a car without the owner's consent in the belief that the owner would have consented if asked. With respect, the learned trial Judge misdirected himself because the consideration should have been whether the accused honestly believed that he had a right to take the car. In other words the trial court would have considered whether there was an implied consent on the part of the owner or person in possession thereof.[14]

The defence of honest claim of right will avail even though the mode of pursuing such claim is unlawful.[15] There is, however, a tendency, by our courts, to deny such a defence

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11. (1938)2 K.B. 264.
12. Okonkwo and Naish:Criminal Law in Nigeria, Sweet and Maxwell, 1964 Edition at p. 114.
13. (1962) Q.W.N. 13.
14. See Ill. (K), S. 28(6 Penal Code.
15. See Okonkwo, "Bona Fide Claim of Right in Nigeria," (1973) 17 J.A.L. 271.

because of illegality in the conduct of the accused person. In Ejuron v. C.C.P.[16] the accused person illegally set up his own court to hear a claim for return of dowry. He allowed only the complainant to present his case and without giving the defendant a similar opportunity, he ordered his messengers to beat the defendant and lock him up in a room as a result of which the defendant's relative paid the money to the complainant. The Supreme Court held that the accused's conduct amounted to stealing and that the illegality in the procedure vitiated the defence of bona fide claim. It is submitted, however, that these decisions are wrong because Section 23 of the Criminal Code does not require that the conduct of the claimant should be lawful.[17]

In Abdul v. Emal[18], where the accused by asserting a claim of title to a land in possession of Z, removed crops grown by Z on such land, it was held that the accused was guilty of theft. However, a share cropper who removed crops without separating the share of his landlord was held not guilty of theft.[19] It was suggested that the accused might have been guilty of dishonest removal of the crop to prevent it being available for payment of his debt under Section 174 of the Penal Code.[20] This view is, however, subject to other circumstantial evidence being proved like the fact that the tenant was in arrears of rent and that it was not paid to the landlord soon before or after the removal of the crop.

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16. (1964) 1 All N.L.R. 386.
17. Okonkwo and Naish, Criminal Law in Nigeria, 2nd Ed., Sweet & Maxwell at p. 111.
18. A.I.R. (1929) Pat 86.
19. Manzur Hassan v. Crown, A.I.R. (1950) Lah. 42.
20. Gledhill, Op. Cit. at p. 547.

2.1.2. Moveable Property

Section 12 of the Penal Code defines moveable property thus:

> "The words 'moveable property' include corporeal property of every description except land and things attached to the earth."

Corporeal property is that which may be perceived by the senses; the defintion, therefore, excluded all choses in action and obligations of all kinds, which are not so capable of being perceived.[21]

The essential factor is that the thing, in whatever form, must be capable of being moved. A thing so long as it is attached to the earth, not being moveable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.[22] It is submitted that to severe a thi from the earth with dishonest intention does not only amount to making that thing capable of being stolen but completes the actus reus of theft since there can be no severance without moving the particular thing so severed, and a moving effected by the same act which effects the severance may be theft.[23] So that if A cuts down a tree on Z's ground with the intention of dishonestly taking the tree out of Z's possession without Z's consent, he commits theft as soon as he severed the tree in order to take it.[24]

Land and things permanently attached thereto such as buildings, trees, roads, mountains, etc. are not moveable

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21. Richardson S.S., Notes on the Penal Code Law, 3rd Ed., Gaskiya Corporation, Zaria, at p. 16.
22. Exp. 1 to Section 286 of the Penal Code.
23. Ibid Exp. 2.
24. Ibid. Ill. (a).

and, therefore, not capable of being stolen.[25]

Section 286 of the Penal Code does not require that the property stolen should be of some value monetary or otherwise. It will suffice once the property is not abandoned[26] and is not subject to the de minimis[27] rule. A person, for example, will not be convicted for theft for dipping his pen into another man's ink. It has been held that an admission ticket into an examination hall is valueable to the person entitled to its possession and therefore capable of being stolen.[28]

2.1.3. **Possession.**

One essential ingredient of theft is that the property must be possessed, by a person other than the accused, at the time of the commission of the offence. Unlike the position under the Criminal Code, the general rule is that a person cannot commit theft in respect of property in his possession.[29] Thus, if Z entrusts jewellery to A which A carries to the market and sells, A can not be convicted of theft because the jewellery was already in his possession and he could, therefore, have not taken it out of Z's possession, though A may be convicted criminal breach of trust.[30]

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25. Cf. Ojiko v. I.G.P., infra, at p. 40.
26. Cf. R. v. Vega at p. 17 (Supra).
27. See Section 58 of the Penal Code.
28. Amanat Ali v. State, P.L.D. (1957) Lah. 207.
29. Gledhill at p. 543.
30. III (d) Section 286 of the Penal Code.

The word "possession" has not been defined under the Penal Code. Attempts were made by various famous writers to define the word. Maine defines possession as "physical possession coupled with the intention to hold the thing detained as one's own" while Salmond defines it as "the continuing exercise of a claim to the exclusive use of a material object."[31] However, John Burke makes a distinction between actual and constructive possession, using the terms "Immediate" and "mediate" possession. He defines the former as possession retained personally and the later as possession retained for or on account of another.[32] Gledhill defines possession as custody or control.[33] The Penal Code simply indicates the scope of the definition by mentioning constructive possession. Property in possession of a person's wife, clerk or servant on his account is deemed to be in that person's possession.[34] In this case the same property is in the possession of both the owner and the person who holds such property on his account, provided that the person in whose custody the property is, is the wife, clerk or servant of the owner. The Penal Code, therefore, unlike English law, does not make distinction between "custody" and "possession" in this area. But the distinction will still apply in situations where the property is e.g. in the custody of the owner's friend even though held on the owner's behalf. In this case the property may only be said to be in the friend's possession and, therefore, can not be stolen by such friend. But if he misappropriates the

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31. Osborn's Concise Law Dictionary 6th Ed. p. 257.

32. Ibid.

33. Gledhill A., Penal Codes of Northern Nigeria and the Sudan, 1963 Ed., Sweet & Maxwell, p. 543.

34. See Section 20 of the Penal Code.

the appellant had been wrongly convicted on the evidence before the trial court because no evidence had been given to indicate that the four tyres which had admittedly been in the possession of Mamman had been stolen from Jos Native Authority. There was nothing to suggest that these tyres belonged to Jos Native Authority and that it was for the prosecution to establish this as an essential part of the offence. The court pointed out that it was not enough to rely on the fact that there had been no denial by the appellant that the tyres were infact the property of Jos Native Authority. The duty to prove this element of the offence lay on the prosecution to establish this and this duty had not been fulfilled. The appeal was therefore, allowed.

With respect, it is submitted that there was a misdirection in the judgment above. Since it was established by evidence that the tyres were removed from Jos Native Authority Garage, it is sufficient, prima facie, evidence showing that the tyres were in the possession of Jos Native Authority at the time of the theft as property in the Native Authority Garage ought to be deemed to be in the possession of the Native Authority. It would have been different if the tyres were stolen before they arrived at the Native Authority Garage. Thus, in another case decided a year later by the same court, Obey Chukwundindi and Anor. v. Commissioner of Police[38], the appellant was convicted of stealing by taking certain goods from the possession of the Nigerian Railway Corporation. The prosecution case was that when waggon

38. Appeal No. Z/3CA/1963.

later A takes the jewel out of Z's possession with the intention of depriving Z of the property as security for his debt, A commits theft.[40] There are, therefore, two essential elements before a person can be said to commit theft in respect of his own property. The property of a person possessed by another must be legally possessed by such other, and secondly there must also be dishonest intention on the part of the owner. There is, of course, a clear distinction between Nawab's case and that of Judah v. Emperor,[41] where the owner of an electric kettle who gave it to a repairer to be mended within a stipulated time and it was not so mended within such stipulated period or within a reasonable time thereafter. The owner who later forcibly removed the kettle and refused to pay, was held not guilty of theft. Similarly, in R. v. Turner,[42] the appellant had left his car with a repairer, promising to pay for the repairs when he returned to collect the car the following day. The appellant, however, returned after the repairs, and surreptitiously took back his car. Although the appellant claimed that he was entitled to do as he did, it was clear from the circumstances that he was acting dishonestly, and his conviction for stealing the car from the repairer was affirmed.

2.1.4. Moving

An accused person does not have to reduce property into his possession before he can be said to commit theft. It is only necessary that every part of the object should be moved. Property attached to the earth is deemed to be moved by mere severance.[43]

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40. Ill. (i). S. 286 of the Penal Code.
41. (1926) I.L.R. 53 Cal. 174.
42. (1971)2 All E.R. 441; Cf. R. v. Meredith, (1973) Crim. L.R. 253.
43. Exp. 1 and 2 to S. 286 of the Penal Code.

A person who moves an animal is said to move not only the animal but also property, if any, which moves along with it. Thus if A drives a camel carrying a treasure in a certain direction in order that he may dishonestly take the treasure, A will be guilty of theft of the treasure as soon as the camel begins to move.[44] To cause an animal to move by any means is, legally, not only moving the animal but also moving everything which in consequence of the motion so caused is moved by that animal.[45] A person is also said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing as well as by actually moving it.[46] It does not, therefore, make any difference whether property was moved by the immediate or remote act of an accused person or by his conduct. In Akiga v. Tiv Native Authority,[47] it has been held that taking money (or property) by sleight of hand without either the knowledge or consent of person in possession constitutes theft.

2.1.5. Consent

Consent means agreement or acquiescence.[48] Consent may be expressed or implied and may be given either by the person in possession or by any person having for that purpose authority either express or implied. Although the Penal Code does not define consent, it, however, describes what is not consent.[49] Consent will be invalid if it is given

44. Ill. (c) S. 286 of the Penal Code.
45. Exp. 4 S. 286 of the Penal Code.
46. Ibid. Exp. 3.
47. (1965) N.M.L.R. 401, Infra, at p. 99.
48. Osborn's Concise Law Dictionary 6th Ed. p. 88.
49. See S. 39 of the Penal Code.

under any of the following circumstances:-

(a) "by a person under fear of injury, or under a misconception and if the person doing the act knows or has reason to believe, that the consent was in consequence of such fear or misconception; or

(b) by a person who, from unsoundness of mind or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

(c) by a person who is under fourteen years of age."[50]

From the foregoing, therefore, consent must be obtained freely from a person legally capable of so consenting, without any kind of threat or undue influence.

Consent is only limited to that act or omission which is freely consented. Thus, a person who consents to taking of property does not thereby consent to its being appropriated.[51]

2.1.6. Property Moved With a View to Taking it out of Possession

The last requirement to complete the ingredients of theft is that an accused person must have moved the property with a view to taking it out of the possession of either the owner or the lawful possessor thereof. It is submitted that it will be rather superfluous to discuss this as a sub-topic since it ought to be covered by dishonest intention. Moving coupled with dishonest intention is therefore sufficient to satisfy this requirement.

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50. Ibid.

51. Halsbury's Laws of England 4th Ed. Vol.II p. 24.

2.2. SIMILARITIES AND DIFFERENCES UNDER THE PENAL CODE AND CRIMINAL CODE

2.2.1. Things Capable of Being Stolen

Section 382 of the Criminal Code defines things capable of being stolen as follows:-

Every inanimate thing whatever which is the property of any person, and which is moveable is capable of being stolen.

The section then goes ahead to list animals and birds which can be stolen. Looking at the first paragraph of Section 382, cited above, one finds that it is in conformity with the Penal Code Provision. The requirement under the Criminal Code is as follows:-

(a) that the property should either be inanimate or some of the tamed or wild animals and/or birds mentioned in Section 382 of the Criminal Code.

(b) that the thing must be owned by some other person(s).

(c) that the property must be moveable or property which has been made moveable by moving it.

While inanimate objects are common to both Codes, the Penal Code Provision is not restrictive on the kind of animals or birds which are capable of being stolen. The Penal Code is concerned, mainly with possession. The Penal Code simply covers "any moveable property" inrespective of whether it has life or/is inanimate. The division, in the Criminal Code, between inanimate and live properties is, therefore, not only superflous but it also makes the provision unduly restrictive. For example,

an ostrich is not capable of being stolen under the Criminal Code unless it is on an enclosed ostrich farm whereas under the Penal Code it can be stolen wherever it may be provided it is possessed by any person other than the thief.

2.2.2. "Taking" and "Moving"

Although the Criminal Code and Penal Code use "taking" and "moving" respectively in their various provisions[52], it is submitted that those words are synonymous. The Criminal Code provides that a person shall not be deemed to take a thing unless he moves it or causes it to move[53]. It is rather suprising why the draftsman chose to use "taking" instead of simply using the word "moving" which would have saved the necessity of defining "taking" to mean "moving". There is always moving where there is taking but there may not be taking in the literal sense whenever there is moving. Even though English law is quite similar to the Criminal Code provision, yet English decisions also seem to suggest that moving amounts to taking. In R. v. Taylor[54], where A intending to steal a book from B's briefcase begins to move out the book whereupon B suddenly shouts at him and he drops it back into the briefcase. It was held that A was guilty of stealing and not merely an attempt to steal.

2.2.3. Conversion

Under the Criminal Code and English law alike we have stealing by Conversion, an offence which will under the Penal

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52. See SS. 383 C.C. and 286 of the Penal Code.
53. S. 383(6) C.C.
54. (1911) 1 K.B. 674.

Code amount to criminal misappropriation. Conversion under Section 383 of the Criminal Code is suggested to have the same meaning as at common law.[55] Conversion of property seems to be a denial or assertion of a right which is inconsistent with that of the owner with intention so to do. Thus, Lord Atkin said in Lancashire and Yorkshire Railway Co. v. Nicol:[56]

> "Dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owners right or to assert a right which is inconsistent with the owner's right."

Conversion is not, however, a criminal offence per se. Conversion of property may only amount to stealing if it is done with fraudulent intention as defined in Section 383 of the Criminal Code. Subsection (1) of the said Section 383 provides inter alia:

> "A person who .... fraudulently converts to his own use or to the use of any other person anything capable of being stolen, is said to steal that thing".

The word "or to the use of any other person" mean to the use of any person other than the owner thereof. Thus, in stealing by conversion, an accused person must be shown to have converted the property to his own use or to the use of any person other than the true owner. It means, therefore, that conversion of property to the use of its owner can not in law amount to stealing of such property.

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55. Okonkwo & Naish 1964 Ed. Supra at p. 282.
56. (1919) 88 L.J. K.B. 601 at 605.

In R. v. Tom Anyadiegwu[57], the accused was employed as a Treasurer in a Native Administration. In the course of his duty he kept a cash book, and in it he entered as paid three sums of money totalling £6.10.0d which infact were in accordance with the approved accounting practice of the Native Administration. The accused kept the moneys in his employers two safes, and he transfered the sum of £6.10.0d from one of the safes to another. Thereafter the money in the second safe was checked in the presence of the accused person, and a shortage was discovered. The accused concealed the fact that he had transferred £6.10s.0d to that safe. If the accused had mentioned it, the shortage would have been increased by £6.10s.0d. He was suspended from duty the next day. The three sums amounting to £6.10s.0d which he had entered in the cash book as paid, still remained unpaid. He was charged and convicted of stealing those three sums, the trial judge holding that there had been a conversion of those sums by the accused person to his own use. The West African Court of Appeal held, quashing the conviction and sentence, that the moving of the three sums by the appellant from one safe belonging to his employers to another safe belonging to his employers did not in law amount to a converaion of them to his own use.

It is submitted, however, that the accused person in the above case, may be properly convicted under Section 438 of the Criminal Code for fraudulent false accounting.

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57. (1943) 9 W.A.C.A. 67.

The question whether there is conversion or not will depend on two main factors:-

(1) Firstly whether the property was converted to the use of the person converting it or to the use of any person other than the owner.

(2) Secondly whether the property was owned or received on behalf of the person alleged to be the owner thereof.

The first point has been discussed above. On the second point, it will seem that a servant who receives money for his master is guilty of stealing while a servant, acting outside the scope of his employment, who uses his master's tools to obtain money for himself, may not be guilty of stealing the sums received. Thus in the English case of R. v. Cullum,[58] the captain of a barge dishonestly, and in disobeyance of the owner's orders, carried cargo on the barge and appropriated the money which he received for the freight. He was prosecuted for embezzlement under Section 68 of the 1861 Act (the definition of which was similar to that of the Larceny Act 1916, Section 17(1)(b)); but it was held that he was not guilty because he had not received the money "for or in the name or on the account of his master or employer."

Also in Oshinye v. C.O.P.,[59] where the accused person obtained goods from someone by falsely telling him that the

58. (1873) 12 Cox. 469; L.R. 2 C.C.R. 28.

59. (1960) 5 F.S.C. 105.

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owner had authorised him to receive them but without any fraudulent intent on the part of the accused. The accused later decided to and actually misappropriated the goods to his own use. The Federal Supreme Court held that the accused was guilty of stealing by conversion. Similarly, in R. v. Ekpenyong[59(a)], the accused who sold a cycle he hired from the prosecutor was held guilty of stealing by conversion.

It is submitted that if the three cases above were tried under the Penal Code the accused persons would have been convicted for criminal misappropriation.

2.2.4. Fraudulent Intent

The mens rea of theft under the Penal Code and English law alike is " dishonest intention" while the Criminal Codes uses "fraudulently" i.e. an intent to defraud. The word "consent" has not been used in the Criminal Code as in the Penal Code but it has been held that absence of consent is necessarily implicit even under the Criminal Code.[60]

Under the Penal Code a person will be said to do a thing "fraudulently" or "with intent to defraud" who does that thing with intent to deceive and by means of such deceit to obtain some advantage for himself or another or to cause loss to any other person.[61] The Criminal Code, however, gives a very lengthy definition of the word "fraudulently" which, it is submitted, is not in any way wider than the concise definition of the same word under the Penal Code. A person who takes or converts anything capable of being stolen is deemed to do so fraudulently under

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59(a). (1942) 8 W.A.C.A. 140.

60. Wada v. I.G.P. (1957) N.R.N.L.R. 1; Cf. Ejuren v. C.O.P. (1961) 1 All N.L.R. 478 (FSC).

61. Section 17 of the Penal Code.

Section 383(2) of the Criminal Code.[61(a)] A comparative analysis of the mental element under the two Codes reveals the difference between them.

2.2.5. An Intent Permanently to Deprive the Owner of the Thing of it

Under the Criminal Code, an intent to deprive the owner of some property of it must be to deprive him permanently of it and not merely temporary deprivation.

The position under the Criminal Code is the same as under English law. In an old English case of R. v. Holloway,[62] where a skin dresser who had not been paid by his employers took some already dressed skins from his employer's warehouse and claimed payment for dressing them. It was held that he could not be guilty of stealing them because he does not intend his employers to be permanently deprived of them nor does he treat them as belonging to him.

The criteria for determining whether there is an intention, by the taker, to permanently deprive the owner of the thing

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61(a). See page 10 infra.

62. (1849) 2 C. & K. 942.

of it is a matter of controversy, especially in cases of borrowing and lending. The question is when can a person borrowing property be said to have intended to permanently deprive its owner. The answer to this is readily provided by Section 6(1) of the Theft Act 1968 which provides that borrowing or lending may presuppose such an intention "if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal". An outright taking is an intention by the taker to treat the thing as his own to dispose of regardless of others rights.[63] In R. v. Hall,[64] the accused person who was a servant took fat, belonging to his master, from the later's store and requested the master to buy the fat as a fat brought by a butcher. He was convicted of larceny of the fat.

The taking of the fat here amounts to an outright taking as the servant denied the fact that the master owns the fat.

2.2.6. An Intent Permanently to Deprive Any Person Who Has Any Special Property in the Thing of Such Property

This means that not only tangible or corporeal property may be subject of theft but also special property in the property such as lien or charge. In Rose v. Matt,[65] Lord Goddard, C.J., spoke of a pledgee as having a "special property" in the pledge, but the special property is possession. Under the Penal Code the position would be the same because all that is required is possession of the property rather than ownership. Thus, a finder of lost article has a special property in it.[66]

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63. Smith and Hogan, Criminal Law, 3rd Ed., Butterworths, at p. 430.
64. (1849) 2 C. & K. 947.
65. (1951) 1 K.B. 810; (1951) 1 All E.R. 361.
66. See Armory v. Delamirie (1722) 1 Stra. 505.

A person may be guilty of stealing a thing which he is the owner thereof or in which he has also a special property or interest.[67]

2.2.7. An Intent to Use the Thing as a Pledge or Security

The law seeks to punish a person who takes another's property with intent to use it as a pledge or security. In an example given where A lends B a book to read and B takes the book to refectory after lectures, order food and suddenly realises that he left his wallet in the classroom. He then leaves the books as security for the price of the food, with the cashier, intending after his meal to fetch his wallet from the classroom and pay for the food. Okonkwo and Naish submitted that it would be monstrous to convict B of stealing the book because he had an honest intention in what he did.[68] With respect, this situation is not covered by the provision of Section 383 of the Criminal Code because B did not initially take the book from A with intent to use it as a pledge or security, nor can it be said that the temporary use of the book by B in those circumstances amounts to conversion of the book. There was therefore no fraudulent intent on B's part in dealing with the book.

2.2.8. An Intent to Part with it on a Condition as to its Return Which the Person Taking or Converting it May be Unable to Perform

The present subheading and the previous one may be similar in some respects but they do not necessarily overlap. Under the present subheading it is considered "fraudulent" if a

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67. See Section 388 of the Criminal Code; Cf. Nawab v. The State Supra at p. 25; R. v. Turner, Supra at p. 26.

68. Op. Cit. at p. 286.

person takes or converts another's property and subsequently gives it to another only to be returned to him on condition which he may not likely perform. Thus, if A bets with B to drive a car from Onitsha to Warri in twenty minutes, on which B stakes one hundred Naira and A takes C's bicycle and stakes it, A will be guilty of stealing the bicycle, because the condition on which A intends to return C's bicycle is such that he may be unable to perform.

2.2.9. An Intent to Deal with it in Such a Manner that it can not be Returned in the Condition in which it was at the Time of Taking or Conversion

This provision seeks to protect the interest of property used by other persons, so that a person taking or converting another's property must be able to return it in substantially the same condition in which he takes it, otherwise he may be guilty of stealing the property. It is necessary, for taking or conversion to amount to stealing, that the change in the condition of the property involved should be substantial. In R. v. Bailey,[69] the accused took his master's car without the knowledge or consent of the master and used it for three days. It was held that the use of the car for three days does not amount to a substantial change in the condition of the car and therefore the accused was not guilty of stealing the car. The court further held, however, that he could properly be convicted of stealing the petrol he used in driving the car. This decision, it is submitted, is unsatisfactory since the accused only used the petrol as he used the car, and the fact that the petrol, unlike the car, is capable of a speedy reduction or finishing, does not make such usage amount to

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69. (1924) Q.W.N. 38.

taking or converting the petrol in the car.

The accused could properly be convicted of theft if he had been tried under the Penal Code, since temporary deprivation coupled with dishonest intention will suffice to constitute theft under Section 28[illegible] of the Penal Code.

2.2.10. In Case of Money, an Intent to Use it at the Will of the Person who Takes or Converts it, Although he May Intent Afterwards to Repay the Amount to the Owner

This, it is submitted, is analagous to temporary deprivation of property under the Penal Code. Thus, even under the Criminal Code money may exceptionally be stolen by mere temporary deprivation. The only point of difference is that under the Penal Code the initial taking must be without the consent of the owner or person in possession while under the Criminal Code, it does not matter even if the initial taking is done with the full consent of the owner. Thus in R. v. Orizu,[70] the accused person was convicted of stealing when he collected money from some people with a promise to send them to America on scholarship which he did not do. The accused also failed to return the money on demand or at a reasonable time thereafter.

The important point here is whether an accused person is able to return the money on demand or within a reasonable time thereafter. This presupposes that there has to be a demand for the return of the money. It is submitted that this requirement is necessarily implicit in the above provision of the Criminal Code.

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70. (1954) 14 W.A.C.A. 455.

CHAPTER THREE

3.1. CRIMINAL MISAPPROPRIATION AND BREACH OF TRUST

The offence of criminal misappropriation involves dishonest conversion of property which is in the possession of the person converting it or under his control. The provision of the Penal Code reads:

> "Whoever dishonestly misappropriates or converts to his own use any moveable property, commits criminal misappropriation."[1]

The initial possession of the property is normally innocent but subsequently changes to illegal by the fact that the person in possession forms a dishonest intention to misappropriate or convert the property to his own use. Thus, where A takes property belonging to Z out of Z's possession in good faith believing that such property belongs to him, A is not guilty of theft because he had no dishonest intention when he took the property. But if A, after discovering his mistake, misappropriates the property to his own use dishonestly, he will be guilty of criminal misappropriation.

There are, therefore, two main differences between theft and criminal misappropriation under the Penal Code:

(a) The point in time at which the dishonest intention is formed. While in theft there must be a dishonest intention at the time of taking or moving the property, in criminal misappropriation it is formed subsequently i.e. when the converter of the property is already in possession of the property or has it under his dominion.

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1. Section 308 of the Penal Code.

(b) In theft the property must be possessed by a person other than the thief while in criminal misappropriation the offender usually is in possession of the property.

So if A having borrowed Z's property, pledges it as a security for loan intending to restore it to Z on a future date, A has committed criminal misappropriation.[2]

A person who finds property not in the possession of any other person and takes such property for the purpose of protecting it for its owner or restoring it to the owner has no dishonest intention and is not guilty of an offence but he is guilty of criminal misappropriation if he appropriates it to his own use, when he knows or has the means of discovering the owner or before he used reasonable means to discover and give notice to the owner.[3]

The misappropriation need not be permanent. A dishonest misappropriation for a time only is covered by Section 309 of the Penal Code.[4]

Criminal misappropriation does not exist as a distinct offence under the Criminal Code and English law alike. It is covered by the definition of stealing.[5] In an old English case,[6] A asked his friend Z, in the dark, to lend him a shilling and Z, by mistake, gave him a sovereign. A, on discovering the fact converted it to his own use and he was convicted for stealing by conversion at his trial. In the

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2. Ill. to Section 308 of the Penal Code.
3. Exp. 2 to Section 308.
4. See Exp. 1 to Section 308.
5. See Section 383 of the Criminal Code.
6. R. v. Ashwell (1885) 16 Q.B.D. 190.

court of Crown Cases Reserved, seven Judges were for sustaining the conviction and an equal number for setting it aside. All the Judges were of the view that if the original taking was innocent, the subsequent conversion was not an offence but those who were for upholding the conviction held the view that there was no taking till A discovered the mistake and this view seems to conform with an older English decision in the case of R. v. Middleton,[7] where the appellant presented an authority to draw ten shillings from a post office savings Bank at the Post Office. The clerk by mistake looked at another authority presented by someone else and gave the appellant a larger sum. The appellant was convicted of stealing the excess and in upholding the conviction by seven Judges to four, it was held that the clerk's authority to transfer the ownership of the money was negatived either by his mistake or the appellant's intention to steal. Thus, "taking" includes obtaining possession by mistake of the owner (or giver) known to the taker.

3.2. CRIMINAL MISAPPROPRIATION COMPARED AND CONTRASTED WITH CRIMINAL BREACH OF TRUST UNDER THE PENAL CODE PROVISIONS

The main difference between criminal misappropriation and breach of trust relates to the manner in which the property misappropriated came to the possession of the offender. In the former offence, he may have obtained possession innocently or accidentally, but in criminal breach of trust he must be in possession in a fiduciary capacity.[8] There must be some kind of trust or confidence placed in the offender as to the custody or management of the property misappropriated, while

7. (1873) 2 C.C.R. 38.
8. Gledhill A., Notes on the Penal Code of the Sudan, 1963.

this form of requirement is not necessary in criminal misappropriation. The Hausa phrase Zamba chikin aminchi illustrates the position very aptly. The Penal Code provision is explicit on the requirement of trust as a necessary ingredient for the offence of criminal breach of trust, as the very name of the offence itself also indicates. Thus, to commit criminal breach of trust is simply to commit criminal misappropriation when the offender is in anyway entrusted with the subject of the offence or any dominion over such property. Thus, Section 311 of the Penal Code is a development of the offence of criminal misappropriation. The extra essential ingredient is that it must be shown that the misappropriation was done by a person in whom trust or some kind of confidence had been placed to the custody or management of the property misappropriated. Proof of trust of some kind is always necessary, otherwise criminal misappropriation may only be punished under Section 309 of the Penal Code.[10]

3.2.1. Property

The definition of criminal misappropriation "specifically refers to "moveable property."[11] Thus, the offence of criminal misappropriation can not be committed in respect of immoveables such as land and things permanently attached thereto. The definition of criminal breach of trust,[12] on the other hand, does not impose any restriction to moveables. The offence under Section 311 of the Penal Code can, therefore, be committed in respect of any kind of property, be it moveable

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9. Section 311 of the Penal Code.
10. See Richardson S.S., Notes on the Penal Code Law, 4th Ed., at p. 205.
11. Section 308 of the Penal Code.
12. Section 311 of the Penal Code.

or otherwise. "Property", therefore, has a wider meaning in criminal breach of trust than in criminal misappropriation. Surprisingly, in an old Indian case[13] an employee of a factory who was placed in charge of certain lands belonging to the factory and who arranged for their cultivation for his personal benefit, in breach of his instructions, was held not guilty of criminal breach of trust because the offence could not be committed in respect of immoveables. It is submitted, with respect that this decision was erroneous in law as the plain and ordinary meaning of the words used in Section 311 of the Penal Code do not by any stretch of imagination exclude immoveable property. Even the English law which provides that theft can not be committed in respect of immoveables, makes an exceptional provision similar to the offence of criminal breach of trust under the Penal Code. The English law[14] inter alia provides:

> "A person can not steal land, or things forming part of land and severed from it by him or by his directions, except in the following cases, that is to say:-
>
> (a) when he is a trustee or personal representative, or is authorised by power of attorney, or as liquidator of a company, or otherwise, to sell or dispose of land belonging to another, and he appropriates the land or anything forming part of it by dealing with it in breach of the confidence reposed in him....."

3.2.2. Dominion

The word "dominion" as used in Section 311 of the Penal Code means "control."[15] In the case of Emperor v. Bimala Charan Roy,[16] a municipal waterworks supervisor responsible for the distribution of water, allowed tenants of a house belonging to him

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13. Jugdown Sinha v. Q.E. (1897) I.L.R. 23 Cal. 372.
14. Section 4(2) of the Theft Act 1968.
15. See Gledhill, Penal Codes of N. Nigeria and the South 1963 ed. at p. 572.
16. (1913) I.L.R. ...

to use water from the municipal supply without paying the necessary tax. It was held that he was guilty of criminal breach of trust.

Similarly, a sanitary inspector incharge of a night soil in a municipality, induced sweepers to deposit the soil in a place other that prescribed by the municipality and sold it for his own benefit. It was held that the sanitary inspector was guilty of criminal breach of trust because the property in the night soil was vested in the municipality and he had dominion over it.[17] It has been held that dominion is wide enough to cover control of money paid in to bank.[18]

3.2.3. Entrustment

The main feature which distinguishes criminal misappropriation from criminal breach of trust is the "trust". The property must have been entrusted to the person accused. Thus, an executor to Will of a deceased person, will be guilty of criminal breach of trust, if he dishonestly neglects to divide the effects according to the Will and appropriates the property to his own use. Similarly, where a warehouse keeper is given furniture for safe keeping under a contract to be paid a stipulated amount for a fixed period and the warehouse keeper dishonestly sells the goods, he will be liable for criminal breach of trust. Also were A residing in Kaduna is an agent for Z residing in Zaria and there is an agreement between them that all sums remitted by Z to A shall be invested by A according to Z's direction. Z remits a sum of money to A with directions to A to invest the same in Government Securities.

17. Emp. v. Hori Lal, (1923) I.L.R. 45 All 281.
18. Sudan Govt. v. Fayez Ghali Girgis, (1957) S.L.J.R. 74.

If A dishonestly disobeys the direction and employs the money in his own business, he will be guilty of criminal breach of trust, but if, in good faith believing that it will be more for Z's advantage to hold bank shares, he disobeys Z's direction and buys bank shares for Z instead of buying Government Securities, A will not be guilty of criminal breach of trust even if Z eventually suffers loss since A did not act dishonestly, though he may incur liability under civil law.[19] There is therefore, trust relationship between a master and servant on the masters property held by the servant on his account, the pledgee is also entrusted with the property of the principal.[20]

The trustee is also expected to deal with the trust property strictly in accordance with any direction of law prescribing the mode in which such trust is to be discharged or any legal contract which he has made touching the discharge of such trust, be it express or implied,[21] while criminal misappropriation has nothing to do with either informal trust or any legal contract. The offence of criminal breach of trust is, therefore, a mere extention of the offence of criminal misappropriation by incorporating the requirement of trust of some kind as a necessary ingredient in addition to the other ingredients required to prove an offence of criminal misappropriation. In both offences it is necessary to prove that the property was misappropriated with a dishonest intention.[22]

Another distinguishing feature of the offence of criminal breach of trust is that an abetment may constitute an actus reus

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19. See ILLS (a) to (d) under Section 311 of the Penal Code.
20. Ibid.
21. See Section 311 of the Penal Code.
22. See Section 16 of the Penal Code.

he shall also be liable to fine.[25] The punishment is still increased where the offence of criminal breach of trust is committed by a public servant, banker, factor, broker, legal practitioner or agent entrusted with the property in-such capacity, to imprisonment which may extend to fourteen years and he shall also be liable to fine.

3.3. THE POSITION UNDER THE CRIMINAL CODE

The offences of criminal misappropriation and criminal breach of trust exist under the Criminal Code mostly as stealing. Other forms of criminal breach of trust which constitute other distinct offences under the Criminal Code will be considered later.

Section 383 of the Criminal Code provides inter alia that:

> "A person who ... fraudulently converts to his own use or to the use of any other person anything capable of being stolen, is said to steal that thing."

This provision, in effect, has the same scope with the provision of Section 308 of the Penal Code which provides:

> "Whoever dishonestly misappropriates or converts to his own use any moveable property, commits criminal misappropriation."

It is submitted that the word "misappropriates" in Section 308 of the Penal Code has the same effect with the words "or to the use of any other person" in Section 383 of the Criminal Code.

The facts of R. v. Ekpenyong[26] and Oshinye v. Commissioner of Police[27], for example, which have been held to constitute

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25. See Sections 313 and 314 of the Penal Code.
26. (1942) 8 W.A.C.A. 140 (Supra), at p. 34.
27. (1960) 5 F.S.C. 105 (Supra), at p. 33.

stealing by conversion, would have been held to amount to criminal misappropriation if the cases were tried under the Penal Code.

Section 384 of the Criminal Code provides for some special cases not amounting to stealing. It runs thus:

> (1) "When a factor or agent pledges or gives a lien on any goods or document of title to goods entrusted to him for the purpose of sale or otherwise for any sum of money not greater than the amount due to him from his principal at the time of pledging or giving the lien, together with the amount of any bill of exchange or promisory note accepted or made by him for or on account of his principal, such dealing with the goods or document of title is not deemed to be stealing."
>
> (2) "When a servant contrary to his master's orders, takes from his possession any food in order that it may be given to an animal belonging to or in the possession of his master, such taking is not deemed to be stealing."

In both situations enumerated in subsections (1) and (2) above there does not seem to be a dishonest intention or fraudulent intent on the part of the person dealing with the property. Subsection (1) deals with a situation where a factor or agent pledges property of his principal for such sum not greater than an amount already due to him from such principal, while subsection (2) deals with a situation where a servant in disobedience to his master's orders takes food in his possession in order to give to any animal belonging to or in the possession of his master.

In both situations under subsections (1) and (2) of Section 384 there does not seem to be the requisite mens-rea to make the conduct criminal. The same situations will therefore, not constitute criminal misappropriation or criminal breach of trust under the Penal Code. It is

submitted that even if the Provisions of Section 384 of the Criminal Code do not exist the situations provided therein cannot constitute stealing as there is no fraudulent intent which is a necessary ingredient in an offence of stealing.

An offence analogous to criminal breach of trust is created by the Provisions of Section 434 of the Criminal Code. The section provides that where a trustee of any property fraudulently destroys the property, or converts the property to any use not authorised by the trust, he shall be guilty of a felony and liable on conviction, to imprisonment for seven years. The section went on to define the term "trustee" thus:

> "(a) trustees upon express trusts created by a deed, will, or instrument in writing, whether for a public or private or charitable purpose;
>
> (b) trustees appointed by or under the authority of an ordinance, law or statute for any such purpose;
>
> (c) persons upon whom the duties of any such trust as aforesaid devolve;
>
> (d) executors and administrators."

The scope of Section 311 of the Penal Code seems to be wider than that of Section 434 of the Criminal Code. Criminal breach of trust may be committed by a person who is, in any manner entrusted with property or even with dominion over property. Thus, the facts of Emperor v. Bimala Charan Roy[28], which constitute criminal breach of trust under the Penal Code will not lead to conviction under Section 434 of the Criminal Code. It

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28. (1913) 1 L.R. 35 All 361 (Supra), at p. 45.

may only amount to stealing under Section 383(1) of the Criminal Code as the Municipal Water Works official who allowed tenants in his house to use water without paying the necessary tax, is not a trustee within the meaning of Section 434 of the Criminal Code.[29]

The phrase "in any manner" seems to be too wide as to cover even absurd situations. Its scope may, for example, cover a situation where one is entrusted with property illegally acquired such as stolen property. It is submitted, however, that "entrustment with property" or "dominion over property" in Section 311 of the Penal Code does not cover property illegally obtained as the law will certainly not protect illegality.

Criminal breach of trust carries varying degrees of punishment depending on whether it was committed by a person in close working relationship with the giver of the property like servant, clerk or agent, or by another person.[30] The Criminal Code, however, covers the above situations as stealing with varying degrees of punishment.[31]

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29. See also Emp. v. Hori Lal. (Supra), at p. 46.

30. See Sections 308-315 of the Penal Code.

31. Section 390 of the Criminal Code provides punishment for stealing but the Code contains a sub-topic thereunder "Punishment in Special Cases" following which are listed eleven paragraphs containing sentences for various cases of stealing. It is wondered whether those eleven paragraphs are subsections under Section 390 and if so then the sub-topic is uncalled for.

CHAPTER FOUR

4. EXTORTION, ROBBERY, AND BRIGANDAGE

4.1. AN ANALYTICAL STUDY OF THE THREE OFFENCES:

4.1.1. Extortion

The offence of extortion is created in Section 291 of the Penal Code which provides:

> "Whoever intentionally puts any person in fear of any injury to that person or to any other and thereby dishonestly induces the person so put in fear to deliver to any person any property or document of title or any thing signed or sealed which can be converted into a valuable security, commits extortion."

From the foregoing provision, it is clear that, in extortion, the property is delivered by the person suffering the wrongful loss of that property as a result of fear of injury injected into his mind by the offender. The apparent consent of the person who suffered the loss of the property is therefore not consent in law[1] as the offender knows or should have reason to believe that the consent was given by the person put under fear in consequence of such fear. In the case of Yusufu Tudun Wada and Another v. Inspector-General of Police,[2] the first appellant, a Police Constable, together with the second appellant, a civilian, demanded money from a witness lest they should search his house and take him to Police Station. The witness thereby paid £10 to the appellants in order to avoid the inconvenience of that course. The trial Magistrate at Jos, convicted both appellants upon this evidence. On appeal it was contended, inter alia, that there was "no intent to steal" as required by the section under which they were charged, for

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1. See Section 39 of the Penal Code.
2. (1957) N.R.N.L.R. 1.

the money was not obtained "without the consent of the owner." It was held, inter alia, that consent in such circumstances must be voluntary consent, free from any menace "of such a nature as to unsettle the mind of the person upon whom it operates; and to take away from his acts that element of voluntary action which constitutes consent." There was no such voluntary consent in this case.

Injury[3] refered to in Section 291 of the Penal Code is only injury to person and not to property[4] because the words used are "..... injury to that person or to any other ...." In the case of Muhammadu Danjani and Anor. v. Kano Native Authority[5], it was held that to convict under Section 293 of the Penal Code it must be proved that the accused person put the victim or attempted to put him in fear of an "injury" to him or to somebody else, and injury is defined in Section 31 of the Penal Code to denote harm illegally caused; and "illegal" is defined in Section 29 of the Penal Code to mean a thing which is either an offence or furnishes grounds for a civil action. Accordingly it must be proved, the court further held, that the threat by the appellants to cause the complainant to be prosecuted unless the complainant gave them money and in consequence of which the complainant gave £180 to the 2nd appellant, would either have been the tort of malicious prosecution, or it would have been an offence i.e. the appellants setting the criminal law in motion against the complainant knowing that there "was no just or lawful ground" for doing so

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3. See Section 31 of the Penal Code.
4. Richardson S.S., Notes on Penal Code Law at p. 193.
5. (1967) N.N.L.R. 3 at p. 4.

(contrary to Section 180 of the Penal Code). The Kano High Court went further to hold that there was insufficient evidence to show that the accused knew there was no just or lawful ground for the prosecution, and therefore there was insufficient evidence to show that the harm with which the complainant was threatened would have been caused to him illegally and so amount to "injury" within the meaning of Section 293. The Court also held that it is no offence under Section 293 of the Penal Code for a person who knows that another person has committed a crime, to put that other in fear of prosecution for the crime with a view to committing extortion.

The property subject of extortion is "any property," be it moveable or immoveable. The property must have been delivered as a result of the fear of injury due to the threats made by the offender. Thus, in the case of Salihu Hong v. The State, where the accused person, a court staff, threatened another person with conviction unless that persons gives some money to the accused person. The person threatened actually entertained fear initially but later he was given marked currency notes by the police in order to trap the accused person, and he gave the accused the marked notes. It was held that at the time the money was given to the accused, the fear in the mind of the giver had ceased and therefore there was no extortion, but, at best, only an attempt. Bairamian J. (as he then was) suggests that it would be useful if prosecuting counsel in extortion cases were to put the question to the complainant "Why did you deliver what you did to so and so?" in order

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6. (1966) 1 All N.L.R. 199.

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to have direct evidence of the motivation. Similarly in Omotosho v. Commissioner of Police[7] the appellant a police constable investigated an allegation against the complainant for commission of an offence. Although the appellant discovered that the complainant did not comit the alleged offence, he, however, demanded money from the complainant, threatening to charge the complainant with the alleged offence if he failed to comply with the demand. The complainant reported the matter to the police who gave him marked currency notes to give to the appellant. The appellant was arrested when he received the money and he was convicted of an offence under Section 406 of the Criminal Code. On appeal it was held that the conviction was wrong because the threats could not and did not in anyway operate on the complainant. It is submitted, however, that the material question is not whether the threat actually unsettled the mind of the appellant but whether it is capable of operating as such. It is not necessary to prove that the victim was actually frightened by the threats[8]. Any threat capable of unsettling the mind of the victim will therefore, suffice provided that property was obtained in consequence thereof. The mind of the accused is the determining factor and not that of the victim. Thus in C.O.P. v. Ededey[9], the accused a police officer threatened to arrest the complainant and charge him with unlawful possession of Indian hemp. Both the accused and the complainant knew that the complainant did not commit the offence. The Supreme Court held that an offence under

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7. (1961) All N.L.R. 693.
8. Okonkwo and Naish, Criminal Law in Nigeria, 2nd Ed., Sweet & Maxwell, p. 300.
9. (1964) 1 All N.L.R. 117; (1966) N.M.L.R. 383.

Section 406 of the Criminal Code was committed; the proper test being whether the threat could unsettle the mind of a reasonable man. An accused person was not entitled to an acquittal because he did not succeed in unsettling the victim's mind.

The fear of injury to the victim is such fear that causes reasonable apprehension to cause the victim or another any illegal harm in mind, body, reputation or property.[10] An accused person must therefore threaten do what he is legally obliged not to do or to omit to do what he ought to, legally, do. For a threat to cause reasonable fear in the mind of the victim, it must be a threat to do something actually possible. It was therefore, held that a threat of divine displeasure is not physically possible and therefore extortion could not have been committed in consequence thereof. Unless the harm threatened is illegal[12] there can be no extortion. In the case of Ajab Din v. Crown[13], where the accused person was appointed to read a nikah at a Muslim wedding ceremony refused to read the nikah not until he was paid five rupees. It was held that as there was no fixed fee he was free to charge what he wanted and there was no obligation on him to read the nikah, and that he was therefore not guilty of extortion. Similarly, in the case of Habibul Razzak v. Emp.[14], it was held that an accused person who threatened to use his influence with a person in authority

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10. See Section 31 of the Penal Code.
11. Anwar v. Emp. A.I.R. (1944) Sind 203.
12. See Section 29 of the Penal Code.
13. (1923) I.L.R. 4 Lah. 179.
14. A.I.R. (1924) All 197.

The property must have been delivered as a result of and subsequent to the threat so that if the accused has already obtained possession of the property, a subsequent threat which deters the person entitled from claiming it will not make the offence extortion.[16] However under Sections 406 and 407 of the Criminal Code which provide for the offences of demanding property with menaces with intent to steal and by written threats respectively, property need not be delivered in order to constitute the actus reus of those offences. The actus reus of extortion as expressed by Section 291 of the Penal Code is the delivery, by the person put in fear to any person, of any property or document of title which can be converted into valuable security. The word document of title is itself defined under the Penal Code as follows:-[17]

> "The words 'document of title' denote a document which is or purports to be a document whereby a legal right is created, extended, transfered, restricted, extinguished or released, or whereby the existence or the extinction of a legal right is acknowledged or established."

The words "purports to be" are incorporated into the above definition otherwise any forged document, if the forgery was admitted, or any document not property executed on which no order could be passed in a civil action could not be called a "document of title."[18] Thus, the possibility of the prosecution loosing its case on the ground of the legal force of the document or an accused person taking an undue advantage thereof is properly safeguarded. However the document must be an original document and not only a copy.[19]

Anything signed or sealed which may be converted into a valuable security is also covered by the definition of extortion. Thus, if A by putting Z in fear of grievous hurt

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16. Gledhill, A. Notes on Penal Code of Northern Nigeria and the Sudan, 1963 Ed. Sweet and Maxwell, p. 552.
17. Section 23 of the Penal Code.
18. See Richardson S.S., Notes on the Penal Code Law 4th Ed., Gaskiya Corporation, Zaria, p. 19.

dishonestly induces Z to sign or affix his seal to a blank paper and deliver it to A and Z signs and delivers the paper to A, A has committed extortion, as the paper so signed may be converted into a valuable security.[20]

A dishonest intention is a necessary requirement to make the conduct of the offender criminal. It, therefore, equally applies to extortion. Thus, a person who makes an honest claim of right will not be guilty of extortion for there will be no *mens rea*.[21]

Extortion simpliciter is punishable with up to five years imprisonment.[22] However, there are varying degrees of punishment for extortion depending upon the nature of the threat. Extortion by putting a person in fear of death or grievous hurt and extortion by threat of accusation of offence punishable with death are punishable with up to fourteen years imprisonment and a fine in addition.[23] While an attempt to commit extortion by putting or attempting to put a person in fear of any injury to that person or another is punishable with up to two years imprisonment or fine or both.[24] In this case property need not have passed. It is enough if there is a threat of injury and the person threatened actually entertained fear as a result of the threat.

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20. See Ill. (d) to Section 291 of the Penal Code.
21. Cf. R. v. Hemmings (1865) 4 F. & F. 50; People v. Gallegos 130 Colo. 232 (1954).
22. Section 292 of the Penal Code.
23. See SS. 294 and 295 of the Penal Code.
24. Section 293 of the Penal Code.

4.1.2. Robbery

It is intended here to discuss robbery as conceived in the Penal Code leaving an analysis on the Robbery and Fire Arms Decree to the last part of the chapter.

Robbery, under the Penal Code is a special and aggravated form of theft or extortion. The Penal Code defines robbery as follows:-

> "(1) In all robbery there is either theft or extortion.
>
> (2) Theft is robbery if, in order to commit the theft or in committing the theft or in carrying away or attempting to carry away property obtained by the theft, the offender for that end voluntarily causes or attempts to cause to any person death or hurt or wrongful restaint or fear of instant death or of instant hurt or of instant wrongful restraint.
>
> (3) Extortion is robbery, if the offender at the time of committing the extortion is in the presence of a person put in fear and commits the extortion by putting that person in fear of instant death, of instant hurt or of instant wrongful restraint to that person or to some other person and by so putting in fear induces the person so put in fear then and there to deliver up the thing extorted."[25]

Thus, in all cases of robbery proof of either theft or extortion is an essential requirement. In either case, it must be further proved that the offender had caused death, hurt or wrongful restraint or fear for causing same and thereby inducing the person so put in fear to deliver any property, instantaneously. This means that the offence of robbery by extortion must necessarily be committed in the presence of the person put in fear as required by subsection (3) of Section 296 of the Penal Code. The offender will be deemed to be present if he is sufficiently near to put the other

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25 Section 296 of the Penal Code

person in fear of instant death or instant hurt or instant wrongful restraint.[26] The causation or threat to cause instant death, hurt, or wrongful restraint must be done in order to commit theft or extortion. It is not only enough to show that those offences were committed in the course of the same transaction in order to establish a case of robbery under the Penal Code. In Thet v. Emperor[27] the accused person who stole property and was being persued, when he abandoned the property and threw stones at the person persuing him to facilitate his escape, was held not guilty of robbery because the threat to cause hurt in throwing the stones was not done for the purpose of committing theft. Similarly in the case of Nath v. Emperor[28] the accused person beat the complainant and subsequently went and stole the complainant's money. It was held that that did not amount to robbery as the theft was an afterthought having no relationship with the earlier assault. On the other hand where accused persons intercepted and detained a boat belonging to the complainant on the pretext that they were authorised so to do by a Magistrate, the accused persons later stole the property in the boat. They were held to be guilty of robbery because they caused the complainant a wrongful restraint for the purpose of stealing the goods.[29]

"Restraint" for the purpose of conviction for robbery differs from its meaning in the law of tort where locking up a person even when he is asleep may constitute false imprisonment[30]

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26. Ibid. Exp.
27. A.I.R. (1917) L.B.
28. A.I.R. (1941) Oudh. 476.
29. Duleelooden Sheik, (1866) 5 W.R. 19.
30. Per Atkin L.J. in Meering v. Grahame-White Aviation Co. (1919) 122 L.T. 44, but Duke L.J. dissented from this opinion.

i.e. wrongful restraint. For the purpose of robbery, an accused person must have curtailed the liberty of another against the others will. In the case of Fateh Mohammed v. Emperor[31], the accused persons locked up a sleeping watchman of a certain shop and looted the shop. The accused persons were convicted of robbery but on appeal it was held that "restraint" implies abridgement of a person's liberty against his will and a person while asleep can not be restrained. Conviction for theft was, therefore, substituted.

Death, hurt or wrongful restrain must have been caused conciously by the offender for the purpose of over coming resistence or securing the possession of the property. Thus, where an accused person snatched a nose-ring from a woman and thereby injured her nose, he was rightly convicted of robbery[32]. Also if A holds Z down and takes Z's money from Z's clothes without Z's consent, A will be guilty of robbery because in order to steal Z's money he caused Z a wrongful restraint[33]. "Wrongful restraint" means voluntarily obstracting a person so as to prevent him from proceeding in any direction in which he has a right to proceed[34]. While Section 240 of the Penal Code defines "hurt" to means bodily pain, disease or infirmity.

In extortion there is always a threat but if the victim is threatened with instant death, instant hurt or instant wrongful restraint then it becomes robbery. Thus, if A

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31. A.I.R. (1929) Lah. 445.
32. Teekai Bheer, (1865) 5 W.R. 95.
33. Ill. (a) to Section 296 of the Penal Code.
34. Section 254 of the Penal Code.

threatens to shoot Z with a pistol unless Z delivers his purse to A in consequence of which Z so delivers his purse to A, A will be convicted of robbery because, in extorting the purse from Z, A has threatened Z with instant hurt[35] or instant death. It will constitute the same offence if A, in the above example instead of threatening to shoot Z, had threatened to cause instant hurt or instant death to Z's child who is then present[36]. The offence of robbery under the Penal Code is punishable with varying degrees of punishment ranging from ten years to life imprisonment[37]. The punishment is even lowered to seven years under Section 303 of the Penal Code. The law on robbery and armed robbery is now regulated by the "Robbery and Firearms (Special Provisions) Decree No. 5 of 1984 which will be discussed later.

4.1.3. Brigandage

Brigandage is robbery conjointly committed by five or more persons. The offence may also be committed where the whole number of persons conjointly committing or attempting to commit robbery and persons present and aiding such commission or attempt amount to five or more persons[38]. In other words abettors who are present and aiding when the crime is committed are inclusive in the number. A crowd of more than five persons who attacked their victims and forcibly dispossessed them of their cattle were held to be guilty of brigandage[39].

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35. Ill. (b) Ibid.
36. See Ill. (c) Ibid.
37. See Sections 298, 299 and 300 of the Penal Code.
38. See Section 297 of the Penal Code.
39. Ram Baran, (1893) I.L.R. 15 All. 299.

It is suggested that in committing brigandage the persons acting "conjointly" do not have to have a common intention.[40] It is however pertinent to note that brigandage is itself committed by the commission of either theft or extortion in such a manner that makes it to amount to robbery by five or more persons. The mens rea in either theft or extortion being dishonest intention, it follows, therefore, that each of the brigands must have had such intention at the time of committing the offence. It further follows, therefore, that the brigands acting conjointly should have had a common intention. In the case of Danbarudhar v. State[41] a crowd of some cultivators who were agitating against payment of rents in kind, attacked a lawyer and his companion returning from where they went to collect such kind of rent and dispossessed the two victims of their bicycles. Other persons who later removed the bicycles were held not guilty of brigandage on the ground that they did not act conjointly with the others. Here while the intention of the attackers was to cause hurt, the intention of those who later removed the bicycles was to acquire wrongful gain of those bicycles. Common intention did not therefore exist between them. It is submitted that the creation of the offence of brigandage under the Penal Code only amounts to superfluity as an offence committed by several persons (not necessarily five or more) in furtherance of the common intention of all, makes each accomplice liable for the offence to the same as if it were committed by him alone.[42] While brigandage is punishable with imprisonment for up to

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40. Gledhill A., Notes on the Penal Code of N. Nigeria and the Sudan, Sweet and Maxwell, p. 561.
41. A.I.R. (1951) Assam 143.
42. See Section 79 of the Penal Code.

fourteen years[43] it attracts a death penalty where culpable homicide punishable with death is committed in the cause of committing such brigandage.[44] It is rather remarkable that such a provision should ever have been made in the Penal Code since the commission of culpable homicide punishable with death has no other penalty than death[45] whether it is committed in the course of committing brigandage or otherwise. Another irony in the punishments provided under the Penal Code is that while an offender who uses or attempts to use a deadly weapon in the commission of robbery or brigandage is punishable with only seven years imprisonment, an accused person who merely makes preparation to commit the offence is punishable on conviction with up to ten years imprisonment and shall also be liable to fine.[46] Brigandage and robbery are now both regulated by the Robbery and Firearms Decree of 1984 with makes no such distinction.

4.2. COMPARATIVE STUDY OF THE THREE OFFECES UNDER THE PENAL AND CRIMINAL CODES

The definition of robbery under the Criminal Code is wide enough in scope to cover both robbery and extortion under the Penal Code. Robbery under the Criminal Code is said to be committed when a person steals anything, and, at the time of stealing it or immediately before or immediately after stealing it, such person uses or threatens to use actual violence to any person or property in order to obtain or retain

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43. See Section 301 of the Penal Code.
44. See Section 302 Ibid.
45. See Section 221 Ibid.
46. See Sections 303 and 304 Ibid.

the thing stolen or to prevent or overcome resistance to its being stolen or retained.[47] The number of persons that commit the offence does not make any difference, but where the offence is committed by more than one person, the offenders must be shown to have acted conjointly. Thus, where several persons stole property during which one of them, unknown to the others, used violence, it was held that unless the others were aware or consented to the use of the violence, they could only be guilty of theft and not robbery.[48] This is similar to the Penal Code requirement.

Robbery under the Criminal Code may only be committed in respect of property which is capable of being stolen. It is, thus, restricted to only moveable inanimate property.[49] Under the Penal Code it seems extortion, and therefore robbery, may be committed in respect of any property i.e. moveable or otherwise,[50] since extortion under the Penal Code amounts to robbery where the threat by the accused is to cause instant death, instant hurt or instant wrongful restraint.[51]

An honest claim of right is a defence to a charge of robbery. Thus, a creditor who beats up his debtor and compelled the debtor to pay him on the spot was held not guilty or robbery.[52] It is submitted that this decision will hold equally good under both Nigerian Codes since there is absence of dishonest or fraudulent intent which is the requisite mens rea under the Penal Code and the Criminal Code respectively.

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47. See Section 401 of the Criminal Code.
48. R. v. Fallon, The Times, May 7, 1963.
49. See Section 382 of the Criminal Code.
50. See Section 291 of the Penal Code.
51. See Section 296(3) of the Penal Code.
52. R. v. Hemnings (1865) 4 F & F 50.

Punishment for robbery under two Codes is similar in most respects. Simple robbery under the Penal Code is punishable with ten years imprisonment, but where it is committed between sunset and sunrise on the highway or from a person sleeping or having laid down to sleep in the open air the term of imprisonment on conviction may extend to fourteen years which is similar to the punishment for simple robbery under the Criminal Code also.[53] If the offender is armed with dangerous or offensive weapon the offence under both Codes is punishable with life imprisonment.[54] Both Codes also provide for seven years imprisonment for attempted robbery.[55] Robbery and armed robbery are now punishable only under the Robbery and Firearms (Special Provisions) Decree, 1984, which will be analysed hereunder.

4.3. THE LAW UNDER ROBBERY AND FIREARMS (SPECIAL PROVISIONS) DECREE, 1984

The definition of robbery under Section 13 of the Decree is a carbon copy of the Criminal Code definition.[56] It runs, thus:

> "'Robbery' means stealing anything and, at or immediately before or after the time of stealing it, using or threatening to use actual evidence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained."

A person, therefore, who obtains property by stealing it may be convicted of robbery if immediately after stealing such property he uses violence in order to prevent any resistance

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53. See Sections 298 of the Penal Code and 402 of the Criminal Code.

54. Ibid.

55. Sections 299 of the Penal Code and 403 of the Criminal Code.

56. See Section 401 of the Criminal Code.

to the retention of such property. The use of actual violence may be before or after the stealing but it must be immediate. In R. v. Obi Bekun and 3 Others[57], the four appellants attacked a guest an "Nde man" and his companions who kept a portmanteau containing money for the purpose of stealing same. The "Nde man" was shot dead and immediately thereafter the appellants stole the portmanteau. It was held that the appellants were properly convicted of robbery. Although this case was decided about fourty three years before the promulgation of the decree, yet the decision could not have been different under the Decree since the law on this point remains unaltered.

If death is caused in the commission of robbery, it will not be a defence for the accused to show that he was acquitted on the murder charge[58]. Robbery is an aggravated stealing. The word "steal" bears the same meaning as provided by Section 383 of the Criminal Code.[59]

Robbery under the Decree is punishable with twenty one years imprisonment[60], where there is only threat to use violence and the offender is not armed. This part of the Decree seems to cover most cases of extortion under the Penal Code. The word "injury" in extortion is however wider than the phrase "use of actual violence" under the Decree. For example while harm to the reputation or mind of a person is covered by the definition of injury under the Penal Code[61], it can certainly not constitute actual violence which implies use of physical violence.

The Decree further provides for a death sentance in respect of armed robbery if the offender is armed with any firearms or

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57. (1941) 7 W.A.C.A. 45.
58. Ibid at p. 49.
59. See Section 13 of the Robbery and Firearms (Special Provisions) Decree 1984.
60. Section 1(1) Ibid.
61. Section 31 of the Penal Code

any offensive weapon or is in company with any person so armed, or at or immediately before or immediately after the time of the robbery the said offender wounds or uses any personal violence to any person.[62] Although the Decree does not specifically provide that the requirement of the offender or any person in his company being armed should be at a point in time, it is submitted that it should, by necessary intendment, be at the time of the commission of the offence.

The Decree defines firearms to include any canon, gun, rifle, carbine, machine-gun, cap-gun, flint-lock gun, revolver, pistol, explosive or ammunition or other firearm, whether whole or detached pieces. The term offensive weapon means any article other than a firearm which is made or adopted for use for causing injury to the person or intended to be used as such by the person in possession thereof, and it includes an airgun, airpistol, bow and arrow, spear, cutlass, matchet, dagger, cudgel, or any piece of wood, metal, glass or stone capable of being used to injure a person.[63] The Decree has, however, failed to define the word "injury". It is submitted, however, that it should mean anything that causes bodily pain, as the definition of the same word under Section 31 of the Penal Code seems to be too broad in scope for the purpose of armed robbery. Any instrument which may be used to inflict injury to a person is an offensive weapon. Thus, to injure or threaten a person with any such weapon and steal his property will tantamount to commission of armed robbery. In the case of The State v. Sama'ila Saidu[64] the

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62. Section 1(2) of the Decree.
63. Section 13 Ibid.
64. Unreported R/SPT/BA/1/84 of Bauchi State Robbery and

accused asked a taxi driver to take him to an unnamed village and on the way the accused brought out a knife and tried to stab the taxi driver when the driver quickly held the accused's hand and a struggle then ensued between them, and the driver tried and stopped the vehicle. The accused, however, succeeded in giving his victim some knife cuts on the left hand, face and some other parts of the body. After wresting himself from the claws of the accused the victim ran away but he was still persued by the accused. The accused then returned and drove the taxi cab away, and was in a bush road trying to repair some faults when he was apprehended and arrested. The accused person was held to be guilty of robbery while armed with an offensive weapon under Section 1(2)(a) of the Decree and sentenced to death. It is submitted that the accused could have been convicted under Section 1(2)(b) of the Decree since he did not merely possess the offensive weapon at the time he committed the crime but used such weapon to injure and did infact injure his victim immediately before the accused stole the car. The punishment, however, would not have been different. Similarly, in the case of The State v. Muhammed Ibrahim and One Other[65], the victim who was returning to his village from Wudil market where he sold eight cows found the two accused persons on the way apparently trying to repair a motor-cycle. The victim, having recognised the two accused persons, stopped to find out if he could assist. Thereupon the accused persons pounced on the victim and started beating him. During the attack, the knife tied on the waist of the

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65. Unreported RESPT/BA/2/84 Ibid.

victim was removed by the accused persons who stabbed him with it but it could not penetrate. He was, however, beaten by the accused persons to a state of unconscieusness and the accused persons removed one thousand Naira from the victims pocket. The two accused persons were convicted under Section 1(2)(a) of the Decree and sentenced to death. It is submitted that the accused persons could have been convicted under Section 1(2)(b) because actual violence was used by the accused persons at the time of the robbery. The Bauchi State Tribunal for the trial of offences under the Robbery and Firearms (Special Provisions) Decree 1984 which decided the above two cases is yet of the view that accused persons who removed their victims properties by using on him weapons like matchet, cutlass knives and sticks could properly be convicted under Section 1(2)(b) of the Decree[66]. Similarly, in the case of The State v. Tambaya Audu,[67] where the accused person beat a Fulani girl rearing twenty three heads of cattle with a stick and stabbed her on the kneck with a knife thereby causing her death and took away the cattle, he was rightly convicted under Section 1(2)(b) of the Decree and sentenced to death by firing squad. It is, however, pertinent to note that Section 1(2)(b) of the Decree provides only for death sentence and the mode of executing such sentence is to be determined only by the Military Governor who has the descretion to decide whether the offender should suffer death by firing squad or by hanging by the neck till he be dead.[68]

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66. The State v. Dunbari Bello and 3 Ors, (Unreported) RESPT/BA/8/85 of Bauchi State Robbery and Firearms Tribunal.

67. (Unreported) RESPT/BA/7/85 Ibid.

68. See Section 1(3) of the Robbery and Firearms (Special Provision) Decree, 1984.

Stealing cannot amount to robbery without this added element of force or fear. It is sometimes not very easy to distinguish between stealing and robbery especially in boarderline cases. The snatching cases, for example, have given rise to some controversy. There is, however, greater weight of authority supporting the view that when the thief snatched property from the owners grasp so suddenly that the owner cannot offer any resistence to the taking, there is no sufficient force to constitute robbery. An accused person who grabbed a bag of silver from the owner's grasp and ran off was held not guilty of robbery.[78] Similarly, an accused person who grabbed a promisory note from the owner's hands was held not guilty of robbery.[79] On the other hand it is clear that when the owner of the property offers resistance to the taking and thereby resulting in a struggle between the thief and the owner of the property before the thief can get possession thereof, then there is enough force to make the taking robbery. In the old case of State v. Moore,[80] the accused person grabbed at owner's pocketbook lying on top of package she was carrying. The owner at the same moment caught hold of it and the accused then struck her and wrested it from her grasp. The accused was held to be guilty of robbery. In Lear v. State it was also held that while mere snatching is not a taking by force, "if there be a struggle to keep it, or any violence, or disruption, the

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78. Lear v. State, 39 Ariz. 313 (1931), noted at 23 J. Crim. L. & Crim. 113 (1932).

79. Ellis v. State, 38 Okl. Crim. 243, 260 P. 93 (1927); Constrast with Jones v. Commonwealth, 112 Ky. 689 1902 where an accused person who snatched a pocketbook from the hands of the owner so quickly that the owner had no chance to resist was held guilty of robbery.

80. 106 Mo. 480, 17 S.W. 658 (1891)

robbery i.e. armed robbery. This is where he is armed with any firearms or any offensive weapon or is in company with any other person so armed; or immediately before or after the time of the assault the said offender wounds or uses any other personal violence to any person. It is submitted that the requirement of use of personal violence under this subsection is repetative since it is the same requirement with that of Section 2(1). It will not also be correct to say that paragraphs (a) and (b) under Section 2(2) are interdependent since the "or" used inbetween the two paragraphs is disjunctive. A court convicting under Section 2(2)(b) will therefore be faced with the dilemma of whether it should pass a sentence under Section 2(1) or Section 2(2) of the Decree. The difference between the two types of attempts should have been in whether an accused person who attempted to commit robbery was armed with a firearm or any offensive weapon or that he was bare handed. In the case of The State v. Ndubisi Agwu and One Other,[82] the two accused persons attacked a night-guard at Ramadan Printing Press in Bauchi in the night and stabbed him with a knife in order to have access into the company's premises where they intended to steal. The shouts of the night guard raised an alarm which attracted nearby policemen on patrol who came to the scene and found the night guard already rendered unconscious. The two accused persons escaped but were later arrested at Maiduguri Motor Park in Bauchi. The Bauchi State Robbery and Firearms Tribunal found the two accused persons guilty under Section 2(2)(b) of the Decree and sentenced them to

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82. (Unreported) Case No. KFSPF/BA/3/84 of Bauchi State Robbery and Firearms Tribunal.

life imprisonment. The facts of this case necessarily imply that the Tribunal read paragraph (b) together with paragraph (a) of the Section 2(2).

Possession of a firearm whether real or imitation in a public place with intent to the immediate or eventual commission of an offence under Section 1 of the Decree is an offence punishable with a minimum of fourteen years and a maximum of twenty years imprisonment under Section 2(3) of the Decree. A person, however, who has a firearm in his possession or under his control in contravention of the Firearms Act or any order made thereunder shall on conviction be liable to pay a fine of ₦20,000 or not less than ten years imprisonment or to both. The main difference between this provision and Section 2(3) above is that the former deals with possession of firearms in a public place whether real or toy with intention to commit robbery. It is immaterial whether the person in such possession holds a licence for keeping firearms or not. The later provision on the other hand deals with possession whether actual or constructive of a firearm in contravention of the Firearms Act. The mere possession or control inconsistent with the provisions of Firearms Act is sufficient to constitute the crime; the offence being one of strict liability unlike an offence under Section 2(3) of the Decree which requires proof of intention to commit robbery. In State v. Francis Nwachukwu[84], the accused who was a tenant, while parking from

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83. Section 3(1) of the Robbery and Firearms (Special Provisions) Decree, 1984.

84. (Unreported) Case No. RFSPT/BA/5/1984 of Bauchi State Robbery and Firearms Tribunal.

the rented premises left a pistol in a leather bag on a drum in the compound which the landlord later threw in to a pit latrine. The accused came later to claim it stating that he bought it for ₦15,000 and that the Divisional Police Officer knew about it. The accused caused the bag to be dug out from the pit laterine and the pistol was found in the bag. The accused was prosecuted successfully for possessing the pistol without licence and convicted under Section 3(1) of the Decree.

The tribunal system as established by the Decree is generally unsatisfactory, for instance, the judgments of the tribunals do not constitute any precedent since it is not a court of record, thus contributing nothing to the development of the legal profession. Also since the majority of its members belong to the armed services[85], who in the present era are the law makers, its composition tends to violate the principle of separation of powers embodied in the 1979 Constitution[86] (even as modified). It is pertinent to note, further, that the non-provision of the right of appeal to a properly constituted court, and the powers of the Military Governor to have a final say[87], does tend to violate the principle of fair hearing[87A]. The process from enacting the Decree to final execution or acquittal is at all stages controlled effectively by the armed services.

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85. See Section 6(2) of the Robbery and Firearm (Special Provisions) Decree, 1984.

86. See Section 6 of the Constitution of the Federal Republic of Nigeria, 1979.

87. See Section 9 of the Decree, Supra.

87(a) See Section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979.

CHAPTER FIVE

5. RECEIVING STOLEN PROPERTY

5.1. WHAT IS A STOLEN PROPERTY?

The Penal Code has clearly defined[1] "stolen property" as follows:

> "Property the possession whereof has been transferred by theft or by extortion or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is stolen property, whether the transfer has been made or misappropriation or breach of trust has been committed within the Northern States or elsewhere but if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property."

The provision above has exhaustively defined a stolen property. In cases tried under Section 317 of the Penal Code the first duty on the prosecution is to prove that the property is a "stolen" one i.e. by showing that the possession of such property was obtained by theft, robbery or extortion or that it was criminally misappropriated or that in respect of which criminal breach of trust was committed.

The provision having not covered any offence involving fraud, it follows therefore that property obtained by deceit is not a stolen one. One wonders why it is singularly omitted. However, property obtained by brigandage or from a person belonging to or who has belonged to a gang of brigands is separately provided[2] under the Code for the purpose of providing a maximum imprisonment for life for the receiver thereof with knowledge of such facts.

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1. See Section 316 of the Penal Code.
2. Section 318 of the Penal Code.

It is immaterial where the preceding crime, qualifying the property as a stolen one was committed. The stolen property will not cease to be such until it comes back to the possession of the person legally entitled to its possession or his agent or handed over to the police. It means therefore, the status of a stolen property does not change by sale even to an innocent purchaser. Thus the proceeds of the sale having not been obtained by any of the preceding crimes which qualify property as stolen will not be regarded as stolen money.[3] However, an innocent purchaser will not be guilty of receiving for absence of dishonest intention. Stolen money will, however, continue to be such even if the denomination is changed because what matters is the amount stolen or any part thereof, and not the stolen denomination. In the case of Sugnomal v. Emperor[4], the accused person was entrusted by his master with a Rs. 1,000 note for depositing it in the master's bank account. The accused person changed it into notes of smaller denominations and gave some of them to A and B who knew the facts. It was held that A and B were guilty of receiving stolen property.

The appropriator of the goods should have committed any of the offences against property qualifying the property to be stolen under Section 316 of the Penal Code before such property can be regarded as being received as stolen property. The status of the goods as stolen property will not change

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3. Ram Narain v. Central Bank A.I.R. (1952) Punj. 178 contrast with the case of D'Andrea v. Woods (1953) 1 W.L.R. 1307 where money obtained by sale of stolen stamps was held to be stolen property.

4. A.I.R. (1944) Sind 237.

even if the appropriator is immune from prosecution e.g. by reason of diplomatic immunity.[5] The thief himself may be prosecuted if the immunity is waived, and even if it is not waived the receiver thereof may properly be prosecuted unless he is also entitled to immunity.

However, where the appropriator is a child under the age of seven years,[6] in constrast with the above example, the goods appropriated are not stolen and the subsequent receiver thereof can not be guilty of receiving stolen property. In the case of Walters v. Lunt,[7] the appellants were charged under the Larceny Act 1916, Section 33(1) with receiving from a child, aged seven years, a child's fairly cycle knowing it to have been stolen. The child had taken the cycle from another little boy, and brought it home. His parents (the appellant's) kept it and told lies about it when the Police made enquiries. It was held that the child was not legally capable of committing an offence and therefore the appellants were not guilty of receiving stolen property. It is submitted that the above facts will constitute stealing by conversion under Section 383(1) of the Criminal Code, and if the same facts arose in the Northern States, the appellants could be convicted of criminal misappropriation under Section 309 of the Penal Code. To the contrary, however, in the old case of R. v. Begarayi,[8] a child between the ages of seven and twelve took an ornament and sold it for only one eighth

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5. Cf. Dickinson v. Del Solar (1930) 1 K.B. 376.
6. See Section 50 of the Penal Code.
7. (1951) 2 All E.R. 645; See also R. v. Creamer (1919) 1 K.B. 564.
8. (1885) I.L.R. 6 Mad. 373.

of its value. The child was tried for theft and discharged on ground that he had not attained sufficient maturity to understand the nature and consequence of his act.[9] The receiver on a charge of theft pleaded that there had been no preceding offence to qualify the property as a stolen one but he was overruled and convicted for receiving stolen property.

It is submitted with respect that the finding in the above case amounts to a misdirection in law as the exemption of the child from liability is not for mere immunity but for the fact that no offence is committed at all.[10]

The fact that the person accused of committing the preceding crime has been discharged will not debar subsequent preceedings against a receiver of the property as a stolen one because the discharge may be on grounds offering defence to the former which are not open to the later, e.g. immunity on ground of either diplomacy or sovereignty. Similarly the fact that the thief or preceding offender has been convicted does not pre-suppose the guilt of the receiver since each case is tried on its merits. Lack of guilty mind, for example, may exonorate the receiver. Conviction of the thief is even an inadmissible evidence, in the trial of the receiver, that the goods were stolen[11] because the admission of such evidence will mean that the Court has relied on the proceedings and judgement in another trial. The preceding offence and the dishonest receiving by an accused person

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9. See Section 50 of the Penal Code.
10. Ibid.
11. Hollington v. Hewthorn (1943) K.B. 587.

must therefore be proved as will be discussed hereunder.

5.2. THE MENS REA OF THE OFFENCE

The mental elements of receiving stolen property, which is necessary to make the conduct of the receiver a crime, is two fold:-

(i) Dishonest intention coupled with knowledge or reason to believe that the property is a stolen one.

(ii) The doctrine of Recent possession.

5.2.1. Dishonest Intention

(i) Dishonest intention as defined[12] earlier is the accused person's intention, by receiving or retaining the property stolen, to cause wrongful gain to himself or another or wrongful loss to any person other than himself. It is submitted that in dishonest receiving the intention to cause wrongful loss or gain must be contemporaneous with the receipt while in dishonest retention this intention supervenes after receipt and commences with the change in the mental element of possession.[13]

"Knowledge" and "Reason to believe" are subjective and objective tests respectively applied in determining mens rea. "Knowledge" is established by an evidence that the accused person actually knows that the property is a stolen one when he receives or continues to retain it. On the other hand "reason to believe" is established by evidence usually circumstancial, that a reasonable person in the accused's position in life ought to have known that the property is a

12. See Section 16 of the Penal Code.

13. See Gledhill A., Penal Codes of Northern Nigeria and the Sudan 1963 Ed., Sweet & Maxwell, at p. 584.

stolen one. It is, thus, more than mere suspicion and an accused person will not be liable to be convicted on ground of mere suspicion. "Reason to believe" can not be inferred from carelessness or failure of an accused person to make enquiry. But such inference may be drawn from purchase of goods at grossly inadequate price or receipt in a clandestine manner.[14] For example when an accused person tells lies in relation to the goods[15] or where the goods were sold surreptitiously by an unsuitable person[16] or that the goods were sold at very low prices.[17] In the case of R. v. Braima And Anor[18], the first accused was released from Kaduna Prison on 3rd May, where he has spent seven months and went to the second accused's house to stay. The second accused was a warder in the prison. On 5th and 7th May respectively thefts occured in the neighbourhood, and on 9th May the second accused sent some of the stolen property to his brother at Enugu with instructions to sell them at any price he thought good. The first accused was convicted of shopbreaking and stealing the goods, and the second accused was convicted of receiving them. The second accused appealed on the grounds that there was no evidence that he knew or ought to have known that the property had been stolen. In dismissing the appeal, the West African Court of Appeal held that the circumstances fully justified a finding of guilty knowledge.

An accused person, found in possession of stolen property, may for the purpose of proving guilty knowledge be shown by

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14. Ibid.
15. R. v. Herron, The Times of 25th May, 1963.
16. Lawani v. Police (1952) 20 N.L.R. 87.
17. Otto George Gfeller v. R. (1942) 9 W.A.C.A. 12 (P.C.).

evidence of scienter to have possessed other property stolen within a period of twelve months preceding the date of the offence charged, or that within the five years preceding the date of the offence charged he was convicted of any offence involving fraud or dishonesty. The latter may however, not be proved unless:-

(a) Seven days notice in writing has been given to the offender that proof of such previous conviction is intended to be given, and

(b) Evidence has been given that the property in respect of which the offender is being tried was found or had been in his possession.[19]

5.2.2. Doctrine of Recent Possession

This is a rebuttable presumption of law created by Section 148(a) of the Evidence Act 1945, which inter alia, provides that:

> "... that the Court may presume - (a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession."

It means, from the that it is reasonable for a court to presume guilty knowledge if an accused person fails to account for his possession of recently stolen-goods. It is suggested that the raising of a presumption of guilty possession of recently stolen goods does not mean that the burden of proof is shifted to the accused so that he must

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19. See Section 46 of the Evidence Act. 1945.

prove positively that he is an innocent purchaser.[20] With due respect this view is not satisfactory. It is obvious that the prosecution has at this stage shifted the burden on the accused person to prove his innocence on the possession of the stolen goods albeit he may do that by merely raising doubt in the mind of the court as to his guilt. That he can do by nothing less than a positive evidence of his innocence. In the case of Mohammed Koladele v. Commissioner of Police[21], the appellant was convicted for dishonestly possessing a stolen car under Section 317 of the Penal Code. He was found washing the car on the eighth day after its theft. There was also evidence that he was driving the car within two days of its theft and almost daily for six days it was argued that there was no evidence of dishonest receipt or retention by the appellant. It was held that evidence of recent possession of stolen property raises a presumption of dishonest receipt or retention and the burden of rebutting this presumption lies on the accused: Section 148(a) of the Evidence Law.

The burden, therefore, lies on the accused person to, at least, raise doubt as to his guilt[22], and that has to be by positive evidence indicating his innocence, and if he does that he should be acquitted in the absence of any other evidence against him.[23]

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20. Richardson S.S., Notes on the Penal Code Law 4th Ed., Gaskiya Corporation, Zaria, at p. 208.

21. (1971) N.N.L.R. 33.

22. See Bernard Omorere v. I.G.P. (1956) N.R.N.L.R. 58.

23. M. Ibrahim Bigidan v. Kano N.A. (1961) N.N.C.N. 11.

The question whether goods are recently stolen or not is a question of fact for the trial court to determine from the nature of the goods involved and the circumstances of each particular case.[24] In the case of R. v. Palmer Iyakwe, the appellant, who was found in possession of shoes stolen five months previously, was held to be guilty of receiving the shoes knowing them to have been stolen, and not of the theft itself. Similarly the doctrine of recent possession was applied in the case of Galtima Alibe v. Borno Native Authority,[25] where the appellant, who was found in possession of a gown towards the end of September, 1969 which was part of property stolen on 13th July, 1969, was held to be guilty of receiving the gown knowing it to have been stolen under Section 317 of the Penal Code. In R. v. Opara,[26] the accused who was found in possession of property, barely two or three hours after the such property was stolen, was held guilty of stealing the property.

The Criminal Code defines stolen property as property obtained by means of any act constituting a crime, whether felony or misdemeanour or by means of an offence committed outside Nigeria which would also have been an offence if committed in Nigeria.[27] The word "stolen" here is therefore a shorthand for all goods obtained by the commission of any crime. The Criminal Code provision is therefore wider in this regard than the Penal Code provision which, it is submitted, is unduly restrictive.[27(a)] Also the punishment under the Penal Code i.e. fourteen years maximum term of imprisonment

24. 10 W.A.C.A. 180.
25. (1970) N.N.L.R. 79.
26. (1961) W.N.L.R. 127.
27. See Section 427 of the Criminal Code.
27(a) Cf. Section 316 of the Penal Code.

is coextensive with that under the Criminal Code where the property is obtained by commission of a felony. The offence of receiving stolen property is punishable with up to imprisonment for life under the Penal Code where the preceding offence is brigandage[28] or where the property is received from a person belonging to a gang of brigands or who has belonged to such gang and the receiver knew of such fact. Similar punishment applies under the Criminal Code to an accused person who with guilty knowledge receives a postal matter or any chattel money or valuable security contained therein.[29] The Criminal Code also provides for only seven years maximum sentence for receiving property obtained by the Commission of a misdemeanour.[30]

While under the Penal Code a stolen property will not cease to be such unless it comes back to the possession of the owner thereof[31] under the Criminal Code property will cease to be stolen as soon as another person has acquired a lawful title to it, and the knowledge of the receiver of the fact that the goods were stolen is immaterial.[32] It is wondered how "lawful" title may be acquired on a stolen property prior to a change in the status of such property. Even an innocent purchaser should not be deemed to have acquired a legal title to stolen goods notwithstanding the fact that he will not be convicted of receiving for absence of mens rea.

5.3. THE ACTUS REUS OF THE OFFENCE

The actus reus of receiving stolen property consists of receiving the property with knowledge or reason to believe, at

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28. See Section 318 of the Penal Code.
29. See Section 427 of the Criminal Code.
30. Ibid.
31. See Section 316 of the Penal Code
32. See Section 429 of the Criminal Code.

that time, that the property is a stolen one, or retaining such property after acquiring the aforesaid knowledge. Where the property comes into the possession of the accused person whether actually or property in the possession of a person's wife, clerk or servant on account of that person will suffice to constitute possession by him.[33] In Olujomoye v. R,[34] it was held that property in the possession of the appellant's wife were in his possession. In so holding, the West African Court of Appeal stated that actual manual possession of goods by a defendant is not necessary to the completion of the offence of receiving; it is sufficient if they are in actual possession of a person over whom the defendant has a control, so that they would be forthcoming if ordered. Thus, an accused person does not have to possess the stolen property physically. It will suffice if the property is under his control or custody. Also in the Indian case of Shewdhar v. Emperor,[35] the consignee of a stolen property was held to have received same, when he presented a railway receipt to a station-master paid the freight and received formal delivery of the property thereby bringing it within his unrestricted control.

The original receiving may be innocent but if the accused person later became aware of the fact that the goods are stolen and retains such property with dishonest intention, he will be guilty of receiving under Section 317 of the Penal Code. It will, however be unsafe to convict an accused person for possession in respect of property in a compound occupied by more persons than the accused unless there is other evidence implicating the accused person in respect thereof. Possession,

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33. See Section 20 of the Penal Code; Cf. Section 430(3) of the Criminal Code.
34. 3 W.A.C.A. 71 at p. 72.

whether physical or constructive, must be conscious and voluntary. Two co-tenants were both convicted of receiving three bags of stolen grains found inside their room.[36]

Stolen property ceases to be such when it comes back to the possession of the owner thereof. The owners reposession of property after the commission of the preliminary crime, removes the "stolen" taint on such property and a subsequent receiver thereafter can not be guilty of an offence under Section 317 of the Penal Code.

The section gives jurisdiction to a court to try a person for the offence of receiving stolen property if he is found in possession of property he stole outside the jurisdiction of the trial court because he continues to retain the stolen goods.

5.4. POSSESSION OF THING REASONABLY SUSPECTED OF BEING STOLEN

Section 319A of the Penal Code provides:-

> "Whoever knowingly has in his possession or under his control anything which is reasonably suspected of having been stolen or unlawfully obtained and who does not give an account to the satisfaction of a court of justice as to how he came by the same shall be punished with imprisonment which may extent to two years or with fine or with both."

The above provision is similar to Section 430 of the Criminal Code. Subsection (1) thereof provides:

> "Every person who is charged before any court with having in his possession or under his control in any manner or in any place, or for that he at any time within

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36. Jumo, (1907) 1 Sind. L.R. 66.

> the three months immediately preceding the making of the complaint did have in his possession or under his control in any manner or in any place, anything which is reasonably suspected of having been stolen or unlawfully obtained and who does not give an account, to the satisfaction of the court, as to how he came by the same, is guilty of an offence and is liable, on conviction, to a fine of two hundred Naira or to imprisonment for six months."

The lengthy provision of the Criminal Code above is not wider in scope than the more concise provision of Section 319A of the Penal Code. While the Criminal Code provision imposes a time limit of three months from the date of possession or control of the property to the time of making the complaint, the Penal Code does not make such restriction. Both Codes, however, cover not only stolen property but also property obtained by any kind offence or even a civil wrong. The phrase "any thing reasonably suspected of being stolen or unlawfully obtained" is, it is submitted, intended to cover property obtained by any offence or civil wrong. The word "unlawful" is synonymous with "illegal" which is defined as[37] everything which is prohibited by law and which is an offence or which furnishes ground for a civil action."

The offence under Section 319A of the Penal Code is not only wider in scope than Section 317 of the same Code with regard to property to which the two provisions apply, but is also substantially different from it in some other respects. For conviction under the latter provision it must, at least, be proved that the accused had reason to believe that property found in his possession was stolen, by showing the existence of circumstances under which a

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37. Section 29 of the Penal Code.

and charged under Section 319A of the Penal Code. Acquitting the accused of the charge, the court held that finding a new bicycle in the accused's repair yard cannot reasonably ground a suspicion that it is a stolen property. In Yakubu Kwaya v. Commissioner of Police[40] the appellant was convicted by a Magistrate grade II of an offence against Section 319A of the Penal Code and sentenced to six months imprisonment. It was alleged that the appellant could not explain how he got a box found in his house containing various garments. The appellant explained that half of the clothes were his and that the other half belonged to a debtor whose clothes he was holding as a pledge for the sum owing to him. The then High Court of Northern States held, quashing the conviction, that the prosecution should allege and must prove that the articles found in the accused's possession are reasonably suspected of having been stolen or unlawfully obtained. It is not an offence per se for a person to be unable to explain how he obtained property of which he is in possession because when a person is in possession of property, the presumption is that he owns it or that it is otherwise lawfully in his possession. The appellant having given a perfectly satisfactory explanation, the onus was on the prosecution to disprove it and not on the appellant to prove its truth.

While conviction under Section 319A of the Penal Code attracts a sentence of two years imprisonment or fine or both, an accused person convicted for assisting in concealing

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40. (1968) N.M.L.R. 140.

or disposing or making away with property which the accused person knows or has reason to believe to be stolen is punishable with up to five years imprisonment or with fine or with both.[41]

The presumption of dishonesty under Section 148(a) of the Evidence Law does not apply to the offence of unlawful possession of goods reasonably suspected to have been stolen, under Section 430(1) of the Criminal Code but it does apply to the offence under Section 317 of the Penal Code.[42]

An accused person facing a charge under Section 319A is not required to prove how he came by the property. It is enough if he gives an explanation which the court thinks likely to be true.

Both Section 317 and 319A however require that possession of the property by an accused person must be conscious because they both provide that the accused must possess the stolen property "knowingly".

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41. See Section 319 of the Penal Code; Cf. Section 430(1) of the Criminal Code which provides only two hundred Naira fine or six months imprisonment.

42. See Mohammed Koladele v. Commissioner of Police (1971) N.N.L.R. 33.

CHAPTER SIX

6. CHEATING, MISCHIEF AND FORGERY

6.1. CHEATING

Cheating is statutorily given a two fold definition[1] as follows:-

> "Whoever by deceiving any person -
> (a) Fraudulently or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property; or
>
> (b) Intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to cheat."

The section above sets out two different types of a single named offence the ingredients of which are intended to be discussed separately. The distinctive feature of cheating is that the actus reus is always completed by an act or omission of the victim. The accused person, infact does nothing more than deceit and inducement. The ingredients of the first type of cheating are:-

(i) Deceiving a person;
(ii) Thereby fraudulently or dishonestly;
(iii) Inducing that person;
(iv) (a) To deliver property to any person or
(b) To "consent" to the retention of property by any person.

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1. See Section 320 of the Penal Code.

6.1.1. Deceiving

Deceiving is making a person to believe what the accused person knows or has reason to believe is not true. The property must have been delivered in consequence of the deceit. It presupposes, therefore, that the deception must precede the delivery or consent to the retention of property. It is immaterial that the victim was unduly credulous or that he could have learnt the truth by the exercise of a reasonable caution or enquiry.[2] It will suffice if the victim is infact deceived. Where, for example, A intentionally deceives Z into a belief that A has performed his (A's) part of a contract made with Z, which he has not performed and thereby dishonestly induces Z to pay money, A commits cheating.[3]

Deceit must be proved, by the prosecution, as an essential ingredient of cheating. In the case of Aliyu Sambe v. Police[4] the appellant was convicted of cheating a prospective purchaser of a car by dishonestly inducing him to deliver £250. The charge failed to specify the deceit whereby the purchaser was alleged to have been induced to deliver the money and there was no clear indication of it in the judgment. The appellant argued that the offence had not been proved as there was no evidence that right from the beginning he had no intention of selling the car. It was held that a charge of cheating

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2. Gledhill A., Notes on the Penal Codes of Northern Nigeria and the Sudan 1963 Ed., Sweet & Maxwell, p. 588.
3. Ill(h) to Section 320 of the Penal Code.
4. (1968) N.N.L.R. 27.

must specify the deceit alleged, and there must be evidence of that deceit;hence the appeal was allowed.

A dishonest concealment of facts is enough to constitute a deception[5]. Concealment of fact, simpliciter may not however be enough to satisfy the requirement of Section 320 of the Penal Code unless there is a legal duty on the accused person to disclose the concealled facts. Thus in the case of Gendan Lal v. Abdul Aziz[6], a vendor of a real property who omitted to mention a mortgage on the property sold, was held not guilty of cheating because there was no legal duty on him to disclose the mortgage.

It is cheating to sell petrol diluted with kerosine or boiled sugar mixed with bee's not as honey or milk diluted with water or even motor oil of SAE 40W grade in containers of SAE 50W grade.

Representations other than of existing facts, for example of future event, may also amount to deception. Thus, where A not intending to repay, intentionally deceives Z into belief that A means to repay money that Z may lend to him, and thereby dishonestly induces Z to lend him money, A is guilty of cheating[7]. Also if A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of cotton which A does not intend to deliver and thereby dishonestly induces Z to advance money upon the faith of such delivery, A cheats; but if A at the time of obtaining the money intends

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5. Exp. to Section 320 of the Penal Code.
6. (1904) I.L.R. 27 All 302.
7. Ill(f) Section 320 of the Penal Code.

to deliver the cotton and thereafter breaks his contract by refusing to deliver the same, A will not be guilty of cheating but is liable only to a civil action for breach of contract.[8]

Deception must, however, be proved in order to secure conviction for cheating.[9] It means, therefore, proof of positive operation of deceit is necessary to secure conviction for cheating. In the case of Roy Akiga v. Tiv Native Authority,[10] even though the accused person presented himself to the complainant as a money doubler and during the night removed all the money collected as tax by the complainant without either the knowledge or consent of the complainant, the finding was that the accused took the property by sleight-of-hand without either the knowledge or consent of the complainant. This is theft and not cheating.

The actus reus of cheating must be directly connected with false representation by the accused. Thus in D.O. Okenyi v. Idoma Native Authority,[11] the appellant who was the supervisor of N.A. Works employed by the Idoma Native Authority, took the Native Authority's labourers and masons from their work and got them to work in his private building with Native Authority tools. He intended to cheat the Native Authority by using the workmen to do work on his private building for which the Native Authority would pay. He was convicted of an attempt to cheat the Native Authority. In allowing the appeal it was held that the appellant's act in getting the workmen to work on his private building was not

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8. Ill(g) Section 320 of the Penal Code.
9. Habu Tudun Wada and Anor. v. Kano Native Authority (1962) N.N.C.N. 41.
10. (1965) N.M.L.R. 402.
11. (1964) N.N.L.R. 106.

sufficiently proximate to any act of deceiving the Native Authority to believing that the workmen had been employed on Native Authority work, so that the Native Authority should pay them. The appellant could be guilty of cheating only if he committed an act directly connected with such representation. It is submitted that he could have been convicted of an attempt.

However, failure of a promise cannot be said to constitute deception. Thus where an accused person undertakes to cure a complainant of a certain disease but the treatment failed, it was held that such a promise simpliciter is not sufficient proof of deception.

A promise to give what the person promising does not have or is not factually in a position to give will constitute deception. In the case of Banamali v. Emperor,[12] where A received money from Z on the promise of giving a girl in marriage to Z but without disclosing the fact that the girl was already married, it was held that A was guilty of cheating.

In order to establish a case of cheating, it is necessary to prove that the person induced to part with his property was infact deceived. In the case of Habu Tudun Wada And Another v. Kano Native Authority,[13] it was held that evidence of successful deception is necessary to prove a case of cheating.

Deception under the Criminal Code is termed as "false pretence". The definition of the word deception as dishonest concealment of fact under the Penal Code[14] seems to be wide

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12. A.I.R. (1943) Pat. 212.
13. (1962) N.N.C.N. 41, Supra, at p. 99.
14. Expl. to Section 32 of the Penal Code.

enough to cover the lengthy definition of false pretence under the Criminal Code which runs, thus:-

> "Any representation made by words, writing, or conduct, of a matter of fact, either past or present, which representation is false infact, and which the person making it knows to be false or does not believe to be true, is a false pretence."[15]

The requirement that the pretence must be false to the knowledge of the accused person is common to both Codes. If the accused genuinely believes the representation to be true but which later turns out to be false, there will be no false pretence. There must be evidence to show that the facts represented were infact false and the accused knows or has reason to believe same to be false. In the case of R. v. Aliyu Zaria[16], the accused person was arraigned on a charge of obtaining money from the complainants by falsely pretending that he would give the sums collected to some officials who would grant loans to the complainants. The accused was held not guilty of obtaining such money by false pretence because there was no evidence that the officials did not request for such payment. In R. v. Abuah,[17] the accused, a legal practitioner had represented the complainant in a matter which was concluded and payments were made into court in favour of the complainant. The court having ordered the money to be paid to the complainant, the accused falsely alleged that he had the authority of his client to collect the money which was paid to the accused. The accused in his trial argued that he only collected the money to give him better

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15. Section 418 of the Criminal Code.
16. (1959) N.R.N.L.R. 67.
17. (1961) All N.L.R. 635.

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bargaining power in settlement of his fees by the complainant which was later agreed upon and the accused paid the balance to the complainant. It was held that the accused was guilty of receiving the money by false pretence. Notwithstanding the fact that the balance was later paid to the complainant the accused indeed induced the payment of the money to him knowing that he was not entitled to be paid or to receive such sum and thereby resulting in negotiations between himself and the complainant to his (accused's) satisfaction.

The deception must be the cause of the obtaining or retention. It has been held that where an accused person secures an employment by deception, he can not be convicted by obtaining his salary by deception because the salary is paid in respect of the work done and not in respect of the appointment.[18]

The representation must be in respect of an existing fact past or present. In the case of Achonra v. Inspector General of Police,[19] the accused person, who obtained money from another person by falsely pretending that he would give that money to a Police Superintendant for the purpose of securing job to that person, was held not guilty of obtaining the said money by false pretence because the representation related to future matter.

With respect, the line of reasoning in the above case seems to be questionable because the accused is shown to have represented a fact he knew to be false at the time of making the representation. It is, therefore, wondered what fact could be more existing than that. However, in the case of Inneh v.

18. Cf. Lewis (1922) Somerset Assizes, Rowlatt. J.
19. (1953) 3 F.S.C. 30.

Commissioner of Police[20], it was held that an accused person who gives a post dated cheque can not be said to have made false pretences because it only relates to future representation. But if the drawer has no account with the bank on which he issued the cheque then there is representation of an existing fact.[21]

6.1.2. Delivery

The question here is at what point in time will delivery of the property be said to have been completed? Determination of delivery of the property is important because it completes the actus reus of cheating under Section 320(a) of the Penal Code. Delivery occurs when something in the ownership or possession of one person passes to the ownership or possession of another.[22] It has been held that delivery may be effected by handing to the buyer (or an accused)[23] the key of a warehouse or other place where the goods are stored, provided that a licence to enter and take the goods can be implied therefrom.[24] In the case of Mohanlal v. Emperor[25], the accused by deceiving another person induced that person to give him an authority to collect that other's goods in possession of a third party. It was held that the accused was guilty of cheating notwithstanding that he did not obtain possession or ownership of the goods directly from the owner thereof.

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20. (1959) W.R.N.L.R. 304, See also R. v. Lawal F.S.C. 442/1962.

21. R. v. Maytum-White (1958) 42 Cr. App. R. 165.

22. Gledhill A., Notes of Penal Codes of Northern Nigeria and the Sudan 1963 Ed., Sweet & Maxwell, p. 591.

23. Bracket is mine.

24. Ellis v. Hunt (1789) 3 T.R. 464, 468, Chaplin v. Rogers (1800) 1 East 192, 195, Elmore v. Stone (1809) 1 Taunt 358, 460.

25. A.I.R. (1937) Sind. 293.

The delivery of property under Section 320 of the Penal Code may be to either the accused person or to any person other than the person deceived. This differs from the Criminal Code provision of obtaining by false pretences, a charge which will fail if the false pretence was made with the object of delivering property to another person.[26] It is submitted that "delivery" under Section 419 of the Criminal Code means delivery of ownership and that mere delivery of possession of property may only amount to stealing.[27] It will, however, suffice to constitute an offence of cheating which is a separate offence under the Criminal Code[28] if property is delivered to a person other than the accused in consequence of fraudulent trick or devise, provided the property is capable of being stolen. In the case of R. v. Labahedi[29], the accused presented false invoices to the customs and induced the release of goods on payment of lower duty than the chargeable rate. It was held that he was guilty of cheating.

It is submitted that if this case had been tried under the Penal Code, the court would not have given a different verdict.

6.1.3. Fraudulently or Dishonestly

The mens rea for cheating is either fraudulent or dishonest intention. The words dishonestly and fraudulently have been

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26. R. v. Ayewo (1957) W.R.N.L.R. 146.

27. Okonkwo and Naish, Criminal Law in Nigeria (1964) Ed., Sweet & Maxwell p. 303.

28. See Section 421 of the Criminal Code.

29. (1959) 4 F.S.C. 48.

statutorily defined under Sections 16 and 17 of the Penal Code respectively. Section 16 states as follows:-

> "A person is said to do a thing 'dishonestly' who does that thing with the intention of causing a wrongful gain to himself or another or of causing wrongful loss to any other person."

The provision above is self explanatory. Intention, however, is normally deduced from the natural consequences of the act done by an accused person.

"Wrongful gain" and "wrongful loss" are also defined in Sections 13 and 14 of the Penal Code respectively as follows:-

> "'Wrongful gain' is gain by unlawful means of property to which the person gaining is not legally entitled."[30]
>
> While "'wrongful loss' is the loss by unlawful means of property to which the person loosing it is legally entitled."[31]

"Fraudulently" which is the commonest form of mens rea for cheating is defined thus:-

> "A person is said to do a thing 'fraudulently' or 'with intent to defraud' who does that thing with intent to deceive and by means of such deceit to obtain some advantage for himself or another or to cause loss to any other person."[32]

It is submitted that "gain" is not fundamentally different from "advantage". But although "gain" is specifically qualified as "unlawful" for the purpose of criminal liability, "advantage" on the other hand is not similarly qualified. It is further submitted, that "advantage" in the above provision is necessarily intended to mean "undue advantage." In the case of Baburam v. Emperor,[33] the accused person who was the manager of a Hindu joint family and thereby empowered by Hindu native law and custom to

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30. Section 13 of the Penal Code.
31. Section 14 of the Penal Code.
32. Section 17 of the Penal Code.
33. (1935) I.L.R. 32 Cal. 775.

give a discharge for money due to the family, asked the collector to allow him to withdraw money standing to the credit of the family in the Treasury. The collector, however, required the production of a power of Attorney by the accused or the personal appearance of the family members to admit his authority to sign a receipt, on their behalf. The adult members subsequently appeared with two strangers who personated two infant members of the family and all of these signed the receipt after which the collector passed an order for payment. It was held that, though the collector had been deceived in consequence of which he paid money to the accused, the accused had not acted dishonestly or fraudulently because he was legally entitled to the money so there was neither wrongful gain nor wrongful loss. The collector was only induced to do his duty and that was not calculated to cause him any harm or injury, so the accused's act was not infact fraudulent.

In the above case the accused had had some advantage of, at least, having been saved the trouble of securing the attendance of all the actual members of the family, but such advantage is not in anyway an undue advantage since he only secured payment of what ought to be properly paid to him. On the other hand, however, in the case of King Emperor v. Tha Byaw;[34] the accused person had an authority to purchase a certain quantity of opium from a Government opium shop. When the accused person came to purchase the opium he falsely gave the name and address of another consumer entitled to a larger quantity of the opium than himself and thereby induced the

34. (1907) 4 L.B.R. 315.

excise officer to let him have more opium than he would have done. It was held that the accused person had secured an advantage for himself by fraudulently inducing the excise officer to let him have more opium and was, therefore, guilty of cheating.

Under the Criminal Code, the mens rea for both cheating and obtaining property by false pretences is intent to defraud which has not been defined in the Code. It is however, submitted that "intent to defraud" under Criminal Code should bear the same meaning as "fraudulently" under the Penal Code. Buckley, J. observed the difference between defrauding and deceiving, obiter[35], as follows:-

> "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practicing the deceit knows or believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind: to defraud is by deceit to induce a course of action."[36]

Section 418 however, defines false pretence as follows:-

> "Any representation made by words, writing, or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence."

This definition does not cover representation as to future fact. An accused person who obtained money from another person by falsely pretending to give to a Police Officer to secure a job for the giver was held not guilty of obtaining by false

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35. Re London and Globe Finance Corporation Ltd. (1903) 1 Ch. 728.

36. Ibid. at p. 732.

pretences, because the representation was as to future fact.[37]

Both Codes require that the deceit must be the effective cause of the victim acting (or omitting to act) in the manner required by the laws. A victim who was influenced by other considerations divorced from the deceit cannot be said to have been cheated.[38]

6.1.4 Property

The property mentioned in Section 320(1) of the Penal Code is "any property." It, therefore, includes both moveables and immoveables. Thus a vendor who sold trees which he knows to have been previously sold was held to be guilty of cheating.[39] On the other hand, however, property the subject of cheating or obtaining by false pretences under the Criminal Code must be property which is capable of being stolen. The offence can not therefore be committed in relation to land. It is observed that in cheating and obtaining property by false pretences under both Codes, the emphasis is on deceit and the consequence thereof. It is therefore submitted that any type of property should be covered thereunder, just as is provided by the Penal Code.
(b) The other type of cheating under the Penal Code is defined thus:-

> "Whoever by deceiving any person
> (b) intentionally induces the person so deceived to do (omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind reputation or property, is said to cheat."[40]

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37. Achonra v. I.G.P. (1958) 3 F.S.C. 30.
38. Ashutosh Mallick v. Emp. (1906) I.L.R. 33 Cal. 50.
39. Dori Lal v. Emp. A.I.R. (1919) All 217.
40. Section 320(b) of the Penal Code.

The requirement of deception as a necessary form of mens rea is common to both types of cheating under the Penal Code.[41] The type of cheating under Section 320(b) above, however, does not require any transfer of property between the victim and the accused or any one else. The actus reus here is the action or omission induced by the deceit. The act or omission must also have caused or, at least, likely to cause damage or harm in body, mind, reputation or property. It is therefore, not necessary that the damage or harm should have been actually caused. It is enough if the act or omission caused by the inducement is likely to cause such harm or damage. The word likely is defined under Section 19 of the Penal Code as follows:-

> "An act is said to be 'likely' to have a certain consequence or to cause a certain effect if the occurence of that consequence or effect would cause no surprise to a reasonable man."

The test of likelyhood is, therefore, not subjective. It will, thus, suffice if, in consequence of the act or omission induced by the accused person, a reasonable man in the accused's standing in life will not be surprised if any such harm or damage as is specified in Section 320(b) of the Penal Code should occur. The question is whether damage or harm is likely to result from the act or omission of the victim of the deception. It has been held that damage or harm or their likelihood need not have been contemplated by the accused.[42] In the case of Ashwini Kumar Gupta v. Emperor,[43] the accused, a University Teacher put on a false beard and

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41. Ibid.paras. (a) and (b).
42. Legal Remembrancer v. Manumatha (1923) I.L.R. 51 Cal. 250.
43. (1937) I.L.R. 1 Cal. 71.

represented an examination candidate. The day being hot, the invigilator put the fans on at a high speed which blew off the false beard and the fraud was then discovered. The accused person was held to be guilty of cheating because the act of the invigilator in allowing the teacher (accused) to sit for the examination instead of the actual candidate is likely to cause harm to the reputation of both the invigilator and the University whose servant he was.

Cheating as defined under Section 320(b) of the Penal Code is an offence foreign to the Criminal Code except Section 420 of the latter law which has some slight, but not identical, similarity. The said provision makes it an offence where "any person who by false pretence, or with intent to defraud, induces any person to execute, make, accept, endorse, alter, or destroy, the whole or any part of any valuable security, or to write, impress, or affix, any name or seal upon or to any paper or parchment in order that it may be afterwards made or converted into or used or dealt with as a valuable security, is guilty of a felony ...."

The above provision seems to be similar to inducing a person to do an act by deception under Section 320(b) of the Penal Code but the act here is restricted to only those mentioned above and does not, in any case, cover an omission. Moreover there is no requirement of causing or likelihood of any harm or damage as is required under the Penal Code. It is submitted that the differences between the provisions under the two Codes are so distinct that it can be said that the Criminal Code has failed to cover cheating as is enshrined under Section 320(b) of the Penal Code. The scope of the

Penal Code provision has however covered the lengthy provision of the Criminal Code.

Although cheating is ordinarily punished with not more than three years imprisonment or fine or both,[44] the punishment may reach up to five years when the person cheated is a person whose interest the offender is bound to protect[45] or where the offender cheats by personation.[46] A person may be said to cheat any person whose interest he is bound to protect if in that transaction the offender is in a special position of trust in relation to the person cheated e.g. a guardian cheating his ward, a legal practitioner his client, a medical practitioner his patient, or a bank manager his customer. The cheating, however, must be in relation to the legal obligation between the offender and the person cheated otherwise it will be punished under Section 322 as a simple cheating.

A person will be said to cheat by personation "if he cheats by pretending to be some other person or by knowingly substituting one person for another or representing that he or any other person is a person other than that he or such other person really is."[47] The offence under the above provision is committed whether the individual personated is real or an imaginary person,[48] living or dead. So that if A cheats by pretending to be B a person who is deceased, A cheats by personation.[49]

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44. Section 322 of the Penal Code.
45. Section 323 of the Penal Code.
46. Section 324 of the Penal Code.
47. Section 321 of the Penal Code.
48. Exp. to Section 321 of the Penal Code.
49. Ill.(b) to Section 321 of the Penal Code.

It is further provided under Section 325 of the Penal Code as follows:-

> "Whoever cheats and thereby fraudulently or dishonestly induces the person deceived to deliver any property to any person .... shall be punished with imprisonment for a term which may extend to Seven Years and shall also be liable to fine ."

It is intended under the above provision to cover cases of cheating where property has already been delivered by the victim to either the offender or another person. It is submitted that this provision is rather superflous as the definition of cheating under Section 320 embraces both cases in which no transfer of property is caused as a result of the deception and also cases whereby property is transferred.

6.2. MISCHIEF

Mischief is defined under the Penal Code[50] as follows:-

> "Whoever, with intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or to any person causes the destruction of any property or any such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously, commits mischief."

It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause or knows that he is likely to cause wrongful loss or damage to any person by injuring any property whether it belongs to that person or not.[51] Mischief may also be committed by an act affecting property belonging

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50. Section 326 of the Penal Code.
51. Exp. 1 to Section 326 Ibid.

to the person who commits the act or to that person and other jointly.[52]

The main ingredients of the offence of mischief as enshrined under the above provision are as follows:-

(i) That the accused intended to cause or knew that he was likely to cause wrongful loss or damage to the public or to any person.

(ii) That the accused caused destruction of the property or such change therein or in the situation thereof as has destroyed or diminished its value or utility or affected it injuriously.

The former constitutes the mens rea while the later forms the actus reus.

6.2.1. Intention or knowledge of likelihood to cause wrongful loss or damage

Intention or knowledge are matters of fact which must be proved. Intention is normally presumed from the resultant effect as a person is presumed to intend the natural consequences of his act. This test is an objective one. On the other hand "Knowledge" of the likelihood to cause wrongful loss or damage is a subjective test as it refers to the knowledge of the accused. The distinguishing characteristic of this offence is, therefore, malice just like fraud in cheating. An accused cannot be said to commit mischief by negligence[53] or recklessness unless the accused is proved to have had knowledge of the likelihood

52. Exp. 2 to Section 326 Ibid.

53. Cf. Namata Bandan v. Gwandu Native Authority (1967) N.N.L.R. 68, Supra at p. 115.

of his conduct resulting in wrongful loss or damage to property. "Wrongful loss" has the following meaning:

> "'Wrongful loss' is loss by unlawful means of property to which the person losing it is legally entitled."[54]

The property therefore should have been lost through unlawful means by a person legally entitled to it. It is submitted that "unlawful" is synonymous with "illegal" which is defined under Section 29 of the Penal Code as follows:

> "Everything which is prohibited by law and which is an offence or which furnishes ground for civil action is said to be illegal'".

If A voluntarily throws a ring belonging to Z into a river with the intention of thereby causing wrongful loss to Z, A has committed mischief.[55] An accused person may be liable to be convicted for mischief for an act resulting in wrongful loss or damage to another person's property even if he does such act with "good" motive provided that he knew and had reason to believe that he was likely to thereby cause wrongful loss or damage to another person. Thus, were some caltivators found their farm lands flooded and made a tunnel through railway embankment which damaged the embankment, it was held that the caltivators knew they were thereby likely to damage the embankment and it was no excuse that their motive was to preserve their crops. The caltivators were guilty of mischief.[56] But if the accused does not intend nor knew

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54. Section 14 of the Penal Code.
55. Ill. (b) to Section 326 of the Penal Code.
56. Dy. Supt. & Remembrancer v. Chulhar Ahir (1908) 16 C.W.N. 263.

himself to be likely to cause any wrongful loss or damage; he cannot be convicted of mischief even if any such loss or damage is infact caused. The remoteness of the damage or loss may be evidence that negatives such intent or knowledge on the part of the accused. In the case of Punjaji Bapuji v. Emperor[57], the accused person installed oil machinery in his house the vibrations of which resulted in damage to the property of his neighbour. Although the accused may be liable for nuisance in a civil action, it was held that he was not guilty of mischief because, in those circumstances, the accused could not be said to have intended or knew himself to be likely to cause wrongful loss or damage.

6.2.2. Causing destruction of Property ... or diminishing its value or utility ....

An accused person cannot stand to be convicted for mischief unless he is proved, in addition to the necessary mens rea as discussed above, to have caused destruction of property or any change in the property itself or in its situation and thereby diminishing its value or utility or affecting it injuriously. Mere proof of destruction or change in the property or its situation will not, per see warrant a conviction without strictly proving the intent or knowledge of likelihood to cause such destruction or change. In the case of Namata Bandan v. Gwandu Native Authority[58], the appellant was convicted of mischief under Section 327 of the Penal Code. He had released his cattle which had strayed into the complainant's farm and caused

57. A.I.R. (1935) Bom. 164.
58. (1967) N.N.L.R. 68.

damage to his crops. They had done this on two previous occasions on one of which the complainant had complained to the appellant. It was held, quashing the conviction, that the offence of mischief as defined by Section 326 requires proof that the accused caused the destruction of any property knowing that he was likely to cause wrongful loss or damage to any person. It is not enough to prove negligence, even gross negligence. The court further held that in the present case the trial court could only convict if there was proof that the appellant knew that if his cattle were not properly secured they would stray and cause damage to crops, and that he intentionally omitted to secure them or deliberately neglected to do so. But the trial Alkali did not direct his mind to these issues and though there was evidence on which the first of these two requirements could have been proved, there was no evidence on which the second could have been.

"Change" has been defined to mean change in the composition of the property.[59] There must be a physical change in the property which affects the value or utility of the goods. In the old case of Dass v. Koylash[60], the accused person untied bullocks and turned goods loaded on a cart on to the road. The accused was convicted of mischief on the ground that he had unlawfully caused a change in the situation of the goods, resulting in diminution of their utility to the owner thereof.

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59. Gledhill A., Notes on the Penal Codes of Northern Nigeria and the Sudan, 1964 Ed., Sweet & Maxwell at p. 603.

60. (1885) I.L.R. 12 Cal. 55.

Where a person has a legal right to do an act which results in loss or diminution of value or utility of property, such loss cannot be said to be wrongful because it is neither an offence nor can it give rise to grounds for any civil action against the doer of the act or omission. In the case of Abdul Rahman v. Emperor[61], a landlord who omitted to switch on electricity to his tenants was held not guilty of mischief. Similarly a landlord's pump man who omitted to pump water into the tenant's compound was held not guilty of mischief.[62] In both the two cases above the acquittal of the accused persons is based on the ground that there had been no physical change in the property despite the fact that the utility of the flats had been diminished. It is submitted that non availability of water and electricity are capable of causing a physical change in the buildings. There is infact a physical difference, at least in the night between a house lighted with electricity and another left in the dark. The darkness is therefore capable of constituting a physical change.

Property the subject of mischief may be any tangible or corporeal property whether it is moveable or immoveable. Right or interest in property like Lien, or easement not being tangible are not subject of mischief. In Ramaraju v. Emperor[63], the accused owns landed property over which others

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61. A.I.R. (1928) Sind. 49.
62. Ramdas v. Nagendra, A.I.R. (1948) Cal. 197.
63. A.I.R. (1930) Mad. 973.

have right of easement. The accused causes the land to be strewn with laterite thereby making the passage very difficult or impossible. It was held that mischief cannot be committed on non corporeal property.

The Penal Code and Criminal Code both provide for varying degrees of punishment according to the type of property on which mischief is committed or the manner in which the offence is committed.[64] The requirements of both Codes is virtually the same despite all the lengthy provisions in the Criminal Code. The Criminal Code, however, provides that it is an offence to cast away ships or destroy them wilfully and unlawfully,[65] while under the Penal Code an intention to commit theft or criminal misappropriation in diverting the ship is required.[66] It is submitted that the Penal Code provision in this regard is unduly restrictive. Thus, while diverting a ship for the purpose of mere misleading such ship will constitute an offence under Section 447(1) of the Criminal Code, the same act simpliciter will fall short of constituting an offence as is provided by Section 340 of the Penal Code unless the ship is perhaps misled by destroying or moving a public land mark.[67]

Mischief by fire or explosive substance is punishable with imprisonment for life where an accused person commits such offence with intention or knowledge of likelihood to cause the destruction of any building which is used as:

(i) place of worship, or
(ii) human dwelling, or
(iii) place for custody of property.[68]

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64. See Sections 327, 329 through 341 of the Penal Code and Sections 443 through 461 of the Criminal Code.
65. Section 447(1) of the Criminal Code.
66. See Section 340 of the Penal Code.
67. See Section 335 of the Penal Code.
68. See Section 337 of the Penal Code.

The Criminal Code on the other hand, while it omits the requirement of use of explosives, is wider than the Penal Code provision as it covers any building or structure whatever whether completed or not.[69] Both Codes however provide for similar punishments in this regard. While the Criminal Code treats as a separate offence the act of setting fire to crops and growing plants with punishment extending up to fourteen years,[70] the Penal Code leaves such an act to be treated as a simple case of mischief punishable with a maximum of two years jail or with fine or both.[71]

It is submitted that the offence of breaking open dishonestly a receptacle containing property or breaking it in order to commit mischief under Section 358 of the Penal Code, amounts to commission of mischief or, at least, an attempt to commit mischief. By the definition of mischief under Section 326 of the Penal Code, to break open or unfasten a closed receptacle, which contains or is believed by the accused person to contain property, may amount to causing such change in the property or in its situation as to diminish its value or utility with intent or knowledge that the accused would thereby cause wrongful loss or damage to the owner thereof.[71(a)] It is submitted therefore that Section 358 of the Penal Code was infact unnecessary.

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69. See Section 443(a) of the Criminal Code.
70. See Section 445 of the Criminal Code.
71. See Section 327 of the Penal Code.

71(a) Cf. Sections 358 and 326 of the Penal Code.

6.3. FORGERY

Forgery is defined in Section 363 of the Penal Code as follows:

> "Whoever makes any false document or part of a document, with intent to cause damage or injury to the public or to any person or to support any claim or title or to cause any person to part with property or to enter into any express or implied contract or with intent to commit fraud or that fraud may be committed, commits forgery; and a false document made wholly or in part by forgery is called a forged document."[72]

This section begins with the actus reus of the offence and ends up with the mens rea. The following are the ingredients of the offence:

(1) Making a false document or part of document.

(2) Such making shall be with the intention of:

(i) causing damage or injury to the public or to any person; or

(ii) supporting any claim or title; or

(iii) causing any person to part with property or enter into any express or implied contract; or

(iv) commiting fraud or that fraud may be committed.

6.3.1. Making a False Document or Part of a Document

Making a false document has also been statutorily defined[73] as follows:

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72. Cf. Section 465 of the Criminal Code.

73. See Section 362 of the Penal Code.

the document is dead or alive. The situation will be the same even if the document was initially executed by the person who so tampers with it. Where A has a letter of credit upon B for one hundred Naira (₦100) written by Z, and A in order to defraud B adds a cipher to the one hundred and makes the sum one thousand Naira (₦1,000), intending that it may be believed by B that Z so wrote the letter, A has committed forgery.[75]

A man's signature of his own name may amount to forgery.[76] So that if A signs his own name to a bill of exchange intending that it may be believed that the bill was drawn by another person of the same name, A has committed forgery.[77]

Signing a document without authority is not, per se, an evidence of a false document. If, for example, the person signing believes on reasonable ground that he has an ostensible authority to sing, he will not be liable for forgery as there is no dishonest or fraudulent intent on the part of the signatory. The making of a false document in the name of fictitious person intending it to be believed that the document was made by a real person or in the name of a deceased person intending it to be believed that the document was made by the person in his life time, may amount to forgery.[78] "Makes" has been interpreted in India ejusdem generis with signs, seals or executes.[79] The better view is that it means "bringing" into existence.[80]

Paragraph (c) of Section 362 of the Penal Code deals with a situation whereby another person is made to sing a document

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75. Ill. (a) Section 363 of the Penal Code.
76. Exp. 1 Ibid.
77. Ill. (a) Exp. 1 Ibid.
78. Exp. 2 Ibid.
79. Emp. v. Hasat Ali, (1881) I.L.R. 7 Cal. 352.
80. See Richardson S.S., Notes on the Penal Code Law 4th Ed.,

when the signatory is, at that moment, unable to understand the document by reason of deceit, unsoundness of mind or intoxication. The accused need not be the person who administered the intoxicant on the signatory i.e. a voluntary intoxication will suffice for the purpose of this provision. It is submitted that section 362(c) should have been wide enough to cover such class of persons who are legally incapable of giving a valid consent.[81]

Section 464 of the Criminal Code defines a false document as follows:

> "A document or writing is said to be false:-
>
> (a) in the case of a document which is a register or record kept by a lawful authority, or an entry in any such register, or which purports to be issued by lawful authority as testifying to the contents of any register or record kept by lawful authority, or as testifying to any fact or event, if any material particular stated in the document is untrue; or
>
> (b) if the whole or some material part of the document or writing purports to be made by or on behalf of some person who did not make it or authorise it to be made, or if, in the case where the time or place of making is material, although the document or writing is made by or by the authority of the person by whom it purports to be made, it is with a fraudulent intent falsely dated as to the time or place of making; or
>
> (c) if the whole or some material part of the document or writing purports to be made by or on behalf of some person who does not, infact, exist; or
>
> (d) if the document or writing is made in the name of an existing person either by that person himself or by his authority with the fraudulent intention that it should pass as being made by some person real or fictitious, other than the person who makes it or authorises it to be made."

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81. See Section 39 of the Penal Code.

This lengthy provision is, in fact, not wider in scope than the Penal Code provision. A document which falls under the definition of a false document under one of the Codes will remain so if tested under the other Code.

6.3.2. Intent to Cause Damage or Injury to the Public or to Anyone

Making a false document with intent to cause damage or injury to the public or to any person amounts to forgery under the Penal Code.[82] Injury means "... any harm whatever illegally caused to any person, in body, minds, reputation or property."[83] In the case of Kali Prasad v. Emperor,[84] three persons A, B and C committed an offence. A sent a telegram to B in the name of Z warning B falsely that C had been arrested. It was held that A was not guilty of forgery because his intention was not to cause injury to Z or anyone else but to conceal the fact that he was the sender of the telegram.

6.3.3. Intent to Support any Claim or Title

It is forgery to make any false document with a view to support any claim or title. In the case of Krishnarawo v. State,[85] the accused person wrote a rent note purported to have been signed by another person in a suit he filed against that person, intending that the note may be used to support his title to the land which was then in dispute. The accused later withdrew the note when it was disputed during the trial. The accused was, however, held to be guilty of forgery by making a false document intended to support his title to the land. Similarly, if A finds a cheque

82. See Section 363 of the Penal Code.
83. See Section 31 Ibid.
84. A.I.R. (1915) Cal. 786.
85. A.I.R. (1953) Nag. 165.

signed by B payable to bearer but without any sum having been inserted in the cheque, and fraudulently fills up the cheque by inseting the sum of one hundred Naira, A commits forgery[86] because his intention in so filling the cheque is to support a claim of one hundred Naira.

6.3.4. Intention to Cause any Person to Part with Property or to Enter into any Express or Implied Contract

This is an inducement by a false document which causes the victim of the deceit a wrongful loss of his property or inducing him to enter into any contract which he would not have done if he were not so deceived. Thus, if A writes a letter and signs it with B's name without B's authority certifying that A is a man of good character and in a distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain alms from Z, A has committed forgery because his intention was to induce Z to, unduly, part with property.[87] Also if A without Z's authority affixes Z's seal to a document purported to be a conveyance of a plot from Z to A, with the intention of selling the estate to B and thereby of obtaining the purchase money from B, A has committed forgery.[88]

6.3.5. Intent to Commit Fraud or that Fraud May be Committed

Whenever the word "fraud" or intent to defraud" occur in a definition of a crime, it is pointed out that, at least, two elements are essential, i.e. deceit or intention to deceive (in some cases mere secrecy or concealment of fact will suffice to constitute deceit), and secondly, actual

86. Ill. (c) Section 363 of the Penal Code.
87. Ill. (i) Ibid.
88. Ill. (b) Ibid.

injury or risk of possible injury by means of the deceit.[89] In Patrick Okpalo v. Commissioner of Police,[90] it was held that an accused person can be convicted for forgery of a document which he swallowed, although the document is not produced in evidence.

Forgery is punishable with varying punishments according to the manner in, and purpose for which it is comitted.[91] A person who dishonestly uses a forged document as genuine knowing or having reason to believe same to be forged will be guilty of an offence punishable as if he had forged the document.[92] The phrase "uses as genuine" has been interpreted in the case of Garba Zonkwa v. Police,[93] where it was held, inter alia, that the phrase "uses as genuine" within the meaning of Section 366 of the Penal Code means "the use for which the document is normally employed," so that an accused person who did not use a forged driving licence for the purpose of driving could not be said to have "used it".

6.4. FALSIFICATION OF ACCOUNTS

Falsification of accounts is an offence set out in Section 371 of the Penal Code as follows:

> "Whoever being a clerk, officer, or servant or employed or acting in the capacity of a clerk, officer or servant, wilfully and with intent to defraud, destroys, alters, mutilates or falsifies, any book, paper, writing, document of title, or account, which belongs to or is in the possession of his employer or has been received by him for or on behalf of his employer, or wilfully and with intent to defraud makes or abets the making of any false entry in or omits or alters or abets the omission or alteration of any material

89. Richardson S.S., Notes on the Penal Code Law 4th Ed. Gaskiya Corporation, Zaria, p. 17.
90. (1962) N.R.N.L.R. 14.
91. See Sections 364 through 370 of the Penal Code and Sections 467 through 479 of the Criminal Code.
92. See Section 366 of the Penal Code.

particular from or in any such book, paper, writing, document of title or account, shall be punished with imprisonment for a term which may extent to seven years or with fine or with both."[94]

The main ingredients that constitute the offence as defined above are as follows:-

(i) That the accused was a clerk, officer or servant or acted in such capacity.

(ii) That he destroyed, altered, mutilated or falsified a book, paper, writing, valuable security, or account in question.

(iii) That the book, paper, etc. belonged to or was in the possession of his employer, or had been received by him for or on behalf of his employer.

(iv) That the accused did as in (ii) above wilfully and with intent to defraud.

However, it will suffice if, instead of (ii) above it is proved that the accused made or abetted the making of any false entry in, or omitted or altered, or abetted the omission or alteration of any material particular from or in a book, paper, writing, document of title or account.

6.4.1 Clerk, Officer or Servant

The offence of falsification of accounts can only be committed by a Clerk, Officer or Servant or a person acting in such capacity. If the same act that would have constitute falsification of accounts were committed by any other person, it will only amount to forgery. But the irony here is while forgery is punishable with up to fourteen years imprisonment,[95]

94. Section 371 of the Penal Code.

95. Section 364 of the Penal Code.

falsification of account is only punishable with not more than seven years imprisonment.[96] It is submitted that clerk, officer or servant deserves a severer punishment than another person who is not so related with the victim.[97]

The offender need not be an actual clerk, officer or servant. It is enough if he undertakes to perform the duties of such class of persons whether he is under an obligation to perform such duties or not, and whether he receives any remuneration in respect thereof or not. The question is whether he undertakes to keep accounts and while so doing, does any of the acts described in the section wilfully and with intent to defraud.[98]

6.4.2) Destroys, Alters, Mutilates or Falsifies

Falsification of accounts will be committed if a clerk, officer, or servant wilfully and with fraudulent intent destroys or alters or mutilates or falsifies a book, paper, etc. To falsify a document is to render it a false document as defined above.[99] In the case of Ram Chandra v. Emperor,[1] two directors of a bank who ordered false entries to be made in the accounts and the statement of paid up capital entered in double the amount of the actual paid up capital, were held guilty of falsification of accounts. Similarly an accused person who falsely represented that a woman employed under him was paid by causing to be entered in his accounts a thumb print of his nephew as that of the

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96. Ibid Section 371.
97. Cf. Section 314 of the Penal Code which provides for a higher degree of punishment for criminal breach of trust committed by a clerk or servant.
98. Emp. v. Laloo Ghella, (1904) 6 B.L.R. 553.
99. See Section 362 of the Penal Code.
1. A.I.R. (1926) Lah. 385.

woman who was in fact not paid, was held to be guilty of falsification of accounts.[2]

6.4.3. Book, paper, writing, document of title or account belonging to or possessed by his employer or received for or on behalf of such employer

Book, paper, and writing are all forms of one kind of document or another. Document of title is defined as "a document which is or which purports to be a document whereby a legal right is created, extended, transferred, restricted, extinguished, or released or whereby the existence or the extinction of a legal right is acknowledged or established.[3] Book, paper, etc. used in Section 371 of the Penal Code should be interpreted *ejusdem generis* with the word account so that the destruction, alteration, mutilation or falsification in book, paper, etc. must be with regard to an account either in that particular document or another. Thus, a balance of person's account with a bank written on a piece of paper will be covered by the section. The section, however, does not intend to cover mere maintainance of incorrect accounts or even false accounts. It is only intended to punish a person for making or maintaining accounts which are not honest.[4]

The account falsified must be that maintained by the employer or one received on the employers behalf. If the account is maintained by the employee for himself, it will not be within the scope of Section 371 of the Penal Code. Thus, were an agent, who lives in Scotland, falsifies documents which were later inspected by his principal who lives in Rangoon, it was held that the situation

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2. *Keshavrao v. Emp.* (1935) Bom. 30.
3. See Section 22 of the Penal Code.
4. Richardson S.S., *Notes on the Penal Code Law*, 4th Ed., Gaskiya Corporation, Zaria, at p. 241.

was not covered by the section because the agent was keeping the said account for himself.[5] It is submitted that distance between the employer and employee is not the determining factor. If the employee acts on behalf of his employer and keeps such records for him which he falsifies with the intention of deceiving the employer and thereby obtaining some advantage or causing the employer a wrongful loss in consequence thereof, the employee will be liable for falsification of accounts. However, an employee who makes a false entry in his own document of matters relating to his master's business, he was rightly held not guilty of false accounting since the document was not provided by his master.[6]

6.4.4. Wilfully and with intent to defraud

Wilfully means conciously and freely or voluntarily. The voluntary or conscious conduct of the accused person must be coupled with intent to defraud. Intent to defraud is defined thus:- A person is said to do a thing fraudulently 'or with intent to defraud' who does that thing with intent to deceive and by means of such deceit to obtain some advantage for himself or another or to cause loss to any other person."[7]

The offence of false accounting under the Criminal Code[8] is quite similar to the Penal Code provision. The Criminal Code, however, provides for various punishments for false accounting depending on the person who commits the offence.[9]

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5. Morley v. Emp. A.I.R. (1936) Ran. 299.
6. R. v. Kanu (1949) 12 W.A.C.A., 488.
7. See Section 17 of the Penal Code.
8. See Section 438 of the Criminal Code.
9. See Sections 434 through 439 of the Criminal Code.

Once fraudulent false accounting is proved, it will not be a defence to show that the person who committed the offence did not benefit from it. In the case of R. v. Kalla Quan[10], the appellant, who was being tried on seven charges of fraudulent false accounting and seven charges of stealing, pleaded that he falsified the books on orders of his superior and did not steal the goods, the stealing of which was made possible by the false accounting. It was held, inter alia, that proof of fraudulent false accounting does not necessarily follow that the person who falsified the accounts is the thief. There was a possibility that his superior officer did reap the benefit of the fraud. Accused must be given the benefit of the doubt and the convictions quashed. The court, however, held further that it mattered not that the accused reaped no benefit from the fraudulent false accounting and that it merely made stealing possible by another. Nor that he did it under instructions if he knew that the intent was to defraud, although it is an inference which is generally properly drawn that the person who rendered the stealing possible by his false accounting was also guilty of the theft it is not always so. If the alternative explanation is put forward and supported by evidence and there is a possibility that the explanation is true the accused must be given the benefit of the doubt.

Intent to defraud is also a necessary mens rea under the Criminal Code. In R. v. Yakubu[11], it was held that conviction under Section 438(b) of the Criminal Code can not be sustained where intent to defraud had not been alleged.

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10 (1944) 10 W.A.C.A. 14.

CHAPTER SEVEN

C O N C L U S I O N

Some of the provisions of our Penal Laws are unduly lengthy and unnecessarily scattered. The provision of Section 382 of the Criminal Code, for example, divides property capable of being stolen into inanimate and live properties. It therefore listed some tamed and wild animals and birds which are capable of being stolen. It is submitted that the concise provision of Section 286 of the Penal Code is in a better drafting style. The term "any moveable property" is wider in scope than the lengthy provision of Section 382 of the Criminal Code. The actus reus of theft under the Penal Code is "moving" the property in question while Section 383 of the Criminal Code states "taking or conversion" and goes ahead to define "taking" to mean "moving" under subsection (6) of the same provision. This, it is submitted, amounts only to superfluity. On the other hand, however, the Penal Code provisions on criminal misappropriation and criminal breach of trust are unnecessarily separated. Those provisions should have been harmonised with that of theft to provide for a single offence like the Criminal Code provision, so that property can be stolen irrespective of whether it is possessed by the thief or any other person provided the necessary mens rea exists at the time of taking or converting the property. The circumstances under which the property was stolen is no more than what may be considered in sentencing the offender.

Some provisions of the Criminal Code are in an out-dated drafting style which is not unexpected since it was drafted in the 19th century and it is the oldest applicable Criminal Law

in Nigeria. The punishment for stealing as provided by Section 390 of the Criminal Code is for the offence committed in ordinary circumstances. There then follows a sub-topic "punishment in special cases" under which the draftsman enumerates eleven subsections providing for punishments for stealing committed under various circumstances. It is submitted that the separation of that provision of the law with a sub-topic is not only unnecessary but also out-dated in style.[1]

The Penal Code, though more concise than the Criminal Code, does not seem to provide adequate and logical punishment for some of the offences against property. For example, while greater punishments are provided for offences like theft and criminal breach of trust when they are committed by a clerk or servant, the offence of falsification of accounts is punishable with only half of the term provided for forgery.[2] It is submitted that falsification of accounts is forgery committed by a clerk or servant or person acting in such capacity and should therefore have carried a severer punishment than forgery, since in the later the offender is not in such a special relationship with the victim as in the former.

It is also pertinent to note that some of our Criminal Laws are infact obsolete. For example, the offences of robbery and armed robbery under both Codes have been superseded by the Robbery and Firearms (Special Provisions) Decree of 1984. It is therefore, unnecessary and undesireable to retain them in State Laws. It is submitted that extortion under the

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1. See also footnote 31 at p. 52 (infra).

2. Cf. Sections 364 and 371 of the Penal Code.

Penal Code will similarly be rendered nugatory, by the Decree, if the offender is, at the time of committing the offence, armed with any offensive weapon. Some other provisions have not become obsolete by subsequent legislation but by the fact that they overlap other existing provisions of the same law. The offence of breaking open a receptacle dishonestly or with intent to commit mischief is, it is submitted, covered by Section 326 of the Penal Code[3] or, at least, constitutes an attempt to commit mischief.

It is unnecessary and infact undesirable for Nigeria to operate two Codes of Criminal law. The operation of the Criminal Code is restricted only to Anambra, Akwa-Ibom, Bendel, Cross River, Imo, Lagos, Ogun, Ondo, Oyo and Rivers States which formed the former Southern Nigeria; while the Penal Code operates only within Bauchi, Benue, Borno, Gongola, Kaduna, Kano, Katsina, Kwara, Niger, Plateau, and Sokoto States which formed the former Northern Region. It is pertinent to note that the factors that led to the promulgation of the Penal Code included the need to have a Code which would suit a society consisting of Muslims and non Muslims. The Nigerian society today is no different from the then Northern community. There is, therefore, a need to have a single Code for the whole country which will take care of the cultural and religious values of every sector of the Nigerian community. The Criminal Code apart from its construction in an out-dated drafting style was essentially drafted by J.F. Stephen in 1878 to suit the British society and is therefore unsuitable to the Nigerian society which is in no way similar to that of Britain. The legality of punishing a section of the Nigerian society for

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3. Cf. Sections 326 and 356 of the Penal Code.

acts which would otherwise be lawful if committed in another part of Nigeria is questionable. Section 39(1)(a) of the Constitution of the Federal Republic of Nigeria 1979 (unsuspended) provides:

> "A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion, or political opinion shall not, by reason only that he is such a person be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origins, sex, religions or political opinions are not made subject."

Thus, to make certain acts offences in one or more parts of Nigeria which are not offences in other parts or in other communities of the country will, it is submitted, amount to violation of the right to freedom from discrimination quoted above, which will in turn render such law or laws void as being inconsistent with this provision of the Constitution.[4] Trials for criminal offences should therefore be under the same law and attract the same punishment wherever conducted in Nigeria not only for the purpose of uniformity but also for equal treatment of Nigerians wherever they are within the country.

Although there is no case law so far on the point, offences like drinking of alcohol by a Muslim and adultery, it is submitted, are inconsistent with Section 39(1) of the 1979 Constitution, because they subject citizens of Nigeria of a particular religion and place of origin or residence to certain punishments to which other Nigerian citizens are not made subject.[5]

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4. See Section 1(3) of the Constitution of the Federal Republic of Nigeria 1979.

5. Contrast Section 68(2) of the Penal Code with Section 39(1) of the 1979 Constitution.

The Criminal Code is so old in origin and western in style that some offences provided by it do not seem to conform with the social norms of the Nigerian society. The offence of bigamy, for example, under Section 370 of the Criminal Code should not have been incorporated in our penal laws considering the nature of our society where, in almost all communities in the country, the orientation to live a polygamous life is dated back to time immemorial. It is unfortunate that we only adopt the British laws blindly in utter disregard to our customs and usages. One learned writer[6] sounded the following advice:

> ".... obsolete offences must be eliminated, inconsistent penalties must be reconciled....technical obstacles to conviction must be suppressed. Severe penalties must be provided (or reserved) for offences which today pose[7] the greatest threat to society.

Some eminent writers including Dr. Aguda[8] questioned the whole idea of retaining the offence of bigamy in our penal law since on various occasions people who are monogamous according to the Marriage Act do not hesitate to take additional wives. At times they even invite very important dignitaries in the locality such as the Magistrate and the Divisional Police Officer to celebrate. The fact that the wedding couples are encouraged by law officers to

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6. Schwartz L.B., "Reform of the Federal Criminal Law: Issues, Tactics and Prospects 19[illegible] (No. 1) Duke L.J., [illegible].

7. Ibid. at p. [illegible].

8. Aguda T.A., "Select Law Lectures and Papers" Op. Cit.; See also Sagay I.E., "Multiple Marriages in Nigeria" 1974 12 Nigerian Bar Journal at p. 87.

break the law is a clear indication that the offence of bigamy need not be retained in our law.[9]

Nigeria's penal laws should reflect the social, economic, political and religious norms of our various communities and our aims for advancement. We must realise the fact that the norms of the British, American or Asian societies are far different from our own and every attempt to reconcile them may only end in an failure.[10] The Law Reform Committee set up to review our laws should leave no stone unturned to harmonize our laws with our social milieu.

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9. See Chukkol K.S., Defences to Criminal Liability in Nigerian Law, ABU Press at p. 129.

10. See the Law Reform Commission Act, 1979.

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