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Forgery

Forgery and counterfeiting are regulated by the Forgery and Counterfeiting Act 1981.¹ This Act, which is based largely on the recommendations of the Law Commission,² replaced earlier legislation,³ and abolished forgery at common law. Decisions under the pre-1981 law are therefore no longer binding, though they may retain some persuasive authority and provide examples for discussion.⁴

The forging of documents as an activity rarely brings any advantage to the forger without more. The act of forging is usually a preparatory step to the commission of some other crime, often involving fraud, which will result in some material advantage (most obviously property or other value transferring) to the forger. Since preparatory acts falling short of attempts are not generally criminalized, it has been cogently

¹ Smith, *Property Offences*, Ch 23, *Arlidge and Parry on Fraud* (5th edn, 2016) Ch 11.

² LC 55, *Report on Forgery and Counterfeit Currency* (1973). See also Law Com Working Paper No 26, *Forgery* (1970). The history is considered by JWC Turner, 'Documents in the Law of Forgery' [1946] 32 Virg LR 939.

³ In particular the Forgery Act 1913 and the Coinage Offences Act 1936.

⁴ Counterfeiting is discussed in the sixth edition of this book, at p 669–676 but is omitted from later editions.

argued⁵ that, with the exception of special cases such as banknotes and coins, there is no need for a separate offence of forgery. The Law Commission did not accept this view, observing that:

In the many and varied activities of modern society it is necessary to rely to a large extent on the authenticity of documents as authority for the truth of the statements which they contain.⁶

While the Commission recognized that it was unnecessary to rely on a specific offence of forgery where property was obtained by the use of forged documents, the necessity for a forgery offence was strikingly illustrated by the kind of person who has in his possession a number of forged documents (such as passports,⁷ credit cards, railway season tickets, even Cup Final tickets) where it would not be possible to

⁵ By EJ Griew, 'The Law Commission's Working Paper on Forgery: A General Comment' [1970] Crim LR 548 and P Glazebrook, 'The Law Commission's Working Paper on Forgery: Some Further Comments' [1970] Crim LR 554. Yet many statutes create offences of possessing even apparently innocuous articles with intent to commit crimes.

⁶ LC 55, para 14. When introducing the Bill to the House of Lords (HL, vol 416, col 605) Viscount Colville declined to enter 'the philosophical . . . or jurisprudential discussions' about the need to have an offence of forgery. To him, it was right that forgers 'who, after all, are a special form of criminal that we tend to recognize as such' should have legislation directed against them. The circularity of this reasoning was apparently lost on their lordships. Lord Elwyn-Jones favoured the retention of forgery because it was a fact that 'forgeries do run into thousands each year as crimes'.

⁷ This increasingly common offence gives rise to concern: see eg *Kolawole* [2004] EWCA Crim 3047 and *Juman* [2008] 1 Cr App R (S) 23.

secure convictions for a charge of attempting to commit any offence. Such conduct would now be caught by ss 6 and 7 of the Fraud Act 2006: possessing and offering, etc to supply articles for use in fraud. Despite these new offences, there is perhaps good reason for retaining forgery as a separate offence: it has long been regarded as a serious offence, and the conduct can be regarded as qualitatively distinctive enough to warrant a particular label.⁸

The offences of forgery may be paraphrased as follows:

- (1) making a false instrument (s 1);
- (2) copying a false instrument (s 2);
- (3) using a false instrument (s 3);
- (4) using a copy of a false instrument (s 4);
- (5) having custody or control of specified kinds of false instrument (s 5(1)); and
- (6) making or having custody or control of machines, paper, etc for making false instruments of that kind (s 5(3)).

All of the forgery offences require proof that D intended to induce somebody⁹ to accept a false instrument as genuine, which as a result causes the other person to do or not to do some act to his own or to any other person's prejudice. Numerous elements of the offences require further elaboration beginning with what articles may form the subject matter of a forgery.

⁸ See also P Alldridge, *Relocating Criminal Law* (2000) 168, commenting on the historical significance of the offence in securing the integrity of the marketplace, and suggesting that money laundering offences supersede it in significance.

⁹ Who need not be identified: *Johnson* [1997] 8 Arch News 1.

29.1 The subject matter of forgery

A person is guilty of forgery if he makes a false instrument and for this purpose

‘instrument’ is defined by s 8:

- (1) Subject to subsection (2) below, in this Part of this Act ‘instrument’ means—
 - (a) any document, whether of a formal or informal character;
 - (b) any stamp issued or sold by a postal operator;
 - (c) any Inland Revenue stamp; and
 - (d) any disc, tape, sound track or other device on or in which information is recorded or stored by mechanical, electronic or other means.
- (2) A currency note within the meaning of Part II of this Act is not an instrument for the purposes of this Part of this Act.
- (3) A mark denoting payment of postage which a postal operator authorises to be used instead of an adhesive stamp is to be treated for the purposes of this Part of this Act as if it were a stamp issued by the postal operator concerned.¹⁰

The terms ‘writing’, ‘document’ and ‘instrument’ have been traditionally used in the criminal law to denote the subject matter to be protected against forgery. At common law the preference was for ‘writing’, under the Forgery Act 1913 it was for ‘document’, under the 1981 Act ‘instrument’ is given pride of place but this is immediately defined to mean, *inter alia*, ‘any document, whether of a formal or informal character’. A fundamental question in interpreting the Act is therefore what ‘document’ means.¹¹

¹⁰ Subs (3A) provides definitions of ‘postal operator’ and subs (4) defines ‘Inland Revenue stamp’.

¹¹ Arlidge and Parry submit that ‘any document’ may be the subject matter of forgery: para 11-006. Cf the extensive definition in the context of hearsay evidence in the Civil

29.1.1 Document

A document will normally be written on paper but may be written on any material and the writing may consist of letters, figures or any other symbols used for conveying information. ‘Instrument’ might convey the notion that the document must be of a formal nature (wills, deeds, etc) but since s 8(1)(a) extends to documents of an ‘informal’ character this notion is clearly too restrictive. It was held under earlier legislation that a forged letter purporting to come from an employee and requesting money from the employer,¹² a telegram which had been antedated in order to defraud a bookmaker,¹³ a certificate of competency to drive,¹⁴ and a football pools coupon¹⁵ were all documents and there is no reason to suppose that they would not be considered instruments within s 8(1)(a). It may often be relevant to ask, though it is not suggested as an exclusive test, whether the document is of such a kind that the recipient is expected to act on it in some way.¹⁶

‘Document’ cannot include all articles which might be called forgeries by the non-lawyer. In common parlance, a replica of a Stradivarius may be said to be a forgery,

Evidence Act 1995, Sch 1, para 12: ‘document’ means anything in which information of any description is recorded.

¹² *Cade* [1914] 2 KB 209, CCA.

¹³ *Riley* [1896] 1 QB 309, CCR.

¹⁴ *Potter* [1958] 2 All ER 51, [1958] 1 WLR 638 (Paull J).

¹⁵ *Butler* (1954) 38 Cr App R 57, CCA.

¹⁶ Compare the tests for determining whether documents are accounts for the purposes of false accounting, as discussed earlier.

but a violin cannot be regarded as a document. Nor is a painting, as such, a document. On the other hand, an authentication certificate, purporting to come from an acknowledged expert and which ascribes a specific painting to a particular artist, is a document which may be forged.¹⁷ It is no less of a document because it is pasted to the back of, or even directly written on the back of, the canvas. What, then, if D produces a facsimile Constable or Turner and further signs the painting in the style of the artist? In *Closs*,¹⁸ it was argued that such a signature was, in effect, a certificate authenticating the work and as such it would constitute a forgery. The argument was rejected. Cockburn CJ asked, ‘If you go beyond writing where are you to stop? Can sculpture be the subject of forgery?’¹⁹

The court went on to regard the signature on the painting as no more than a mark put there by the artist with a view to identifying it. *Closs* was decided at common law. Under the 1913 Act, on essentially similar facts, a ruling was given in *Douce*²⁰ that the signature constituted a document within the 1913 Act because it purported to convey information about the picture. The Law Commission proposed to settle this argument in favour of *Closs* by defining ‘instrument’ as ‘an instrument in *writing*’²¹ but the Commission’s recommended wording is not that which appeared in the Bill

¹⁷ *Pryse-Hughes* (1958) *The Times*, 14 May.

¹⁸ (1857) *Dears & B* 460, CCR. The decision was reversed by the Fine Arts (Copyright) Act 1862, s 7. See the discussion by C Fry, ‘Forgeries and Signatures on Paintings’ (1993) 143 *NLJ* 1233.

¹⁹ (1857) *Dears & B* 460 at 466.

²⁰ [1972] *Crim LR* 105, QS.

²¹ *LC* 55, para 23 (emphasis added).

that was enacted by Parliament.²² If an artist was in the habit of writing on the back of his paintings the date and place of origin of his paintings and then adding his signature, it would seem clear enough that this writing constitutes a document; if so, there can only be the finest of lines between this and a signature on the face of the painting.

Glanville Williams suggests a useful test to resolve the difficult cases: if the thing is intended to have utility apart from the fact that it conveys information or records a promise, it is not a document.²³ The stamping of the manufacturer's name on a gun, a car, or a package conveys information but does not convert the gun or car or package into a document. Nor does the writing 'Made in Sheffield' on a pair of scissors actually made elsewhere render the scissors a document. All of these articles have a primary purpose other than the conveying of information or a promise.

The meaning of 'document' for the purposes of forgery cannot be considered in isolation from the rule that it must 'tell a lie about itself'.²⁴ If an applicant for a job falsely states his qualifications in his letter of application, the letter is not a forgery; but if he writes a reference which purports to come from his employer and mentions those qualifications, the reference is a forgery. The document in the second example not only contains the false statement about D's qualification, but it lies about the circumstances of its own making—it purports to be from the employer.

²² D Crystal-Kirk, 'Forgery Reforged: Art Faking and Commercial Passing Off since 1981' (1986) 49 MLR 608 argues that the painting in *Closs* falls within the 1981 Act.

²³ 'What is a Document' (1948) 11 MLR 150 at 160.

²⁴ See 29.1.3.1.

The registration plate of a car may be thought to have a purpose of conveying information because it tells us the date of first registration of the car (and, indirectly, the name of the registered owner). Considered simply as a plate, it may be a document; but it does not tell a lie about anything until it is affixed to a car of different (invariably earlier) registration. Then, however, it is *the car* which tells a lie about itself ('I am a 17-reg car') and the car is not a document.²⁵ If the number on the vehicle excise licence ('logbook') is altered to correspond, that is forgery of a document because that licence purports to have been issued in respect of a vehicle with a particular number and the sole purpose of the licence is to supply information.

To be the subject of forgery, the document, in the view of the Law Commission, must usually contain messages of two distinct kinds:

The essence of forgery, in our view, is the making of a false document intending that it be used to induce a person to accept and act upon the message contained in it, as if it were contained in a genuine document. In the straightforward case a document usually contains messages of two distinct kinds—first a message about the document itself (such as the message that the document is a cheque or a will) and secondly a message to be found in the words of the document that is to be accepted and acted upon (such as the message that a banker is to pay a specified sum or that property is to be distributed in a particular way). In our view it is only documents which convey not only the first type of message but also the second type that need to be protected by the law of forgery.²⁶

On this view, it would *not* be forgery to make a false copy of a celebrity's autograph since the autograph conveys only one message (*viz* about the genuineness of the signature) and there is no second message about the genuineness of the piece of paper

²⁵ See, however, *Clifford v Bloom* [1977] RTR 351, [1977] Crim LR 485, DC; *Clayton* (1981) 72 Cr App R 135, [1981] Crim LR 186, CA.

²⁶ LC 55, para 22.

on which the autograph is written. But where a cheque is forged by the insertion of a false signature, two messages are conveyed: one that the signature is genuine and the other that the signature validates the order for the payment of money.

In *Smith*,²⁷ D sold baking powder in wrappers substantially resembling the wrappers of one George Borwick, a well-known manufacturer of baking powder. It was held that the wrappers were not forgeries since they were not documents. The same result would appear to follow on the Law Commission view. The wrappers conveyed only one message, that they were George Borwick wrappers, and conveyed no further messages concerning the genuineness of the document. They may have conveyed a second message about the origin of the baking powder but there was no second message conveying the notion that the *wrapper* was to be accepted and acted upon.

29.1.2 Instrument

The Law Commission recommended, and provided in its draft Bill, to exclude from the definition of 'instrument' documents that are of historical interest only or which are collector's items. That recommendation was not taken forward into the 1981 Act. Suppose, then, that D makes a false copy of Shakespeare's will with a view to selling it as genuine. It is, of course, clear that if D makes a false copy of his father's will with a view to securing the inheritance for himself, this is a forgery. Both wills are made false with a view to a dishonest gain but Shakespeare's will differs in one important respect. It is not produced with a view to affecting the devolution of

²⁷ (1858) Dears & B 566, CCR.

Shakespeare's property, and if V buys it believing it to be genuine, he will do so not because the will, as a will, is going to affect his or anyone else's interests, but merely for the intrinsic value of that piece of paper.

The essence of 'instrument' or 'document' is peculiarly difficult to define. To constitute an instrument for the purposes of forgery, the document must do more than merely convey information; it is submitted that it must be of such a nature that the information contained in it²⁸ as a document is intended to be acted on in some way, usually, though not necessarily exclusively, by purporting to affect the rights or interests of some person or persons.

By s 8(1)(d), the definition of 'instrument' embraces 'any disc, tape, sound track or other device on or in which information is recorded or stored^[29] by mechanical, electronic or other means'. This extension, if it is in fact an extension,³⁰ must be regarded as entirely right in an age when so much documentation is processed digitally. Under this definition, magnetic strips on credit and debit cards are protected.³¹ The extension will, of course, be subject to the same qualifications as other instruments. If D produces a recording of what purports to be Prime Minister Gladstone's voice, he is not guilty of forgery though he intends to defraud purchasers by making a false representation about whose voice is recorded; the recording is no

²⁸ A document may be comprised of more than one part, eg a letter may be taken together with its envelope.

²⁹ cf *Gold and Schifreen* [1988] AC 1063, [1988] 2 All ER 186, HL, see 29.1.4.4.

³⁰ It has never been of any account in the law of forgery on what material, or in what symbols or code, the information is recorded.

³¹ *Arlidge and Parry on Fraud*, para 11.007.

more a document for the purposes of the Act than the false Shakespeare will. Nor is D, a bank clerk, guilty of forgery merely by causing false entries to be made in the bank's computer any more than he would be guilty of forgery in making false entries in the bank's paper ledgers.³² Nor is E guilty of forgery if he obtains access to information stored in a computer by sending electronic signals which cause the computer to accept him as an authorized user.³³ If, however, D and E cause entries to be made which purport to be made or authorized by one who did not make them, they may be guilty of forgery.

29.1.3 The forgery

By s 9 of the Act:

- (1) An instrument is false for the purposes of this Part of this Act—
 - (a) if it purports to have been made in the form in which it is made by a person who did not in fact make it in that form; or
 - (b) if it purports to have been made in the form in which it is made on the authority of a person who did not in fact authorize its making in that form; or
 - (c) if it purports to have been made in the terms in which it is made by a person who did not in fact make it in those terms; or
 - (d) if it purports to have been made in the terms in which it is made on the authority of a person who did not in fact authorize its making in those terms; or

³² cf *Re Windsor* (1865) 6 B & S 522.

³³ *Gold and Schifreen* [1987] QB 1116, [1987] 3 All ER 618. See 29.1.4.4. But in these last two cases D will probably commit an offence under the Computer Misuse Act 1990, see Ch 28.

- (e) if it purports to have been altered in any respect by a person who did not in fact alter it in that respect; or
 - (f) if it purports to have been altered in any respect on the authority of a person who did not in fact authorize the alteration in that respect; or
 - (g) if it purports to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered; or
 - (h) if it purports to have been made or altered by an existing person but he did not in fact exist.
- (2) A person is to be treated for the purposes of this Part of this Act as making a false instrument if he alters an instrument so as to make it false in any respect (whether or not it is false in some other respect apart from that alteration).

29.1.3.1 Falsity in general

The definition given by s 9 of ‘falsity’ is exhaustive. The governing notion is that the document must not only tell a lie, it must also tell a lie about itself.³⁴ Telling a lie does not become a forgery simply because the lie is in writing. For there to be a forgery, the ‘document’ must be false; it is not enough that the information in it is false.

In its ordinary application the distinction is easy enough to grasp, as demonstrated by the previous example of a job application. If D falsely states his qualifications in his job application, that is not a forgery; but if he writes a reference which purports to come from his employer, the reference is a forgery. The reference is false within s 9(1)(a) because it purports to have been made in the form in which it is made by a person (the employer) who did not make it in that form. A cheque is similarly false if

³⁴ The aphorism appears to have been coined by Kenny, *Outlines*, 375. Professor Edward Griew used to refer to the concept as one of ‘automendacity’.

D signs it in the name of V.³⁵ Section 9(1)(a) should be straightforward and no serious difficulties are likely to be encountered in its application.

Section 9(1)(b) is equally uncontroversial. It deals with the case where D makes a document which purports to be made on V's authority (even though it does not purport to be made by V himself) when V's authority has not been given. It can make no difference, incidentally, if D has the same name as V provided that D intends his signature, or his authorization, to be taken for the signature or authorization, of V.

Paragraphs (c) and (d) in effect parallel (a) and (b) in relation to cases where V has in fact made or authorized the instrument in certain terms but D alters those terms.

Section 9(1)(c) deals with the case where V writes a cheque for £10 and D makes the amount appear as £100.

Section 9(1)(d) deals with the case where V, having authorized D to make out the cheque for £10, D in fact enters £100.

Paragraphs (e) and (f) contain further parallel provisions in relation to alterations. Usually the maker of an instrument, V, is free to alter it (he may, for instance, alter the name of the payee or the amount to be paid on a cheque); but where another person D, alters it and his alteration purports to be made or authorized by the maker, D makes a false instrument. In this connection, the facts of *Hopkins and Collins*³⁶ provide a convenient illustration. D and E, the secretary and treasurer of a football

³⁵ See also the discussion in Smith, *Property Offences*, para 23.19, of cases where D signs a credit card issued to X with D's own name in the hope that the difference will not be detected.

³⁶ (1957) 41 Cr App R 231, CCA.

supporters' club, received monies raised by members and made payments on behalf of the club. Over a period of time they (a) entered in the books amounts less than were paid in; (b) entered amounts in excess of what was paid out; and (c) altered certain of the entries. It is clear that their accounts were inaccurate but, while the making of inaccurate accounts may be the offence of false accounting,³⁷ it is not a forgery. The accounts tell a lie but to be false within s 9(1)(e) or (f) they must tell a lie about themselves. So far as D and E's acts (a) and (b) are concerned, the accounts merely told a lie; they purported to be the accurate accounts of D and E when they were in fact the inaccurate accounts of D and E. But what of (c): the alterations?

Paragraphs (e) and (f) do not render a document false merely because it has been altered. The alteration is a forgery only if it purports to be made or authorized by one who did not make or authorize it. Thus, so long as the alterations were made or authorized by D and E they were not forgeries. Suppose, however, that only D, the secretary, had been acting dishonestly, and suppose further that only E, the treasurer, was authorized to keep the accounts. If D, without E's authority, altered entries so that the alterations appeared to have been made or authorized by E, the accounts would be forged.³⁸

A document is accordingly not forged merely because it contains false information and has been prepared by D to perpetrate a fraud. If D, with a view to defrauding V, persuades E to execute documents which are to be used to convince V that D is wealthy or of good character, the documents, so long as they purport to be

³⁷ See Ch 23.

³⁸ To constitute a forgery, the hand of Jacob must purport to be the hand of Esau. Cf the comments of Dyson LJ in *Atunwa* [2006] EWCA Crim 673 at [7]–[8].

executed by E, are not forged even though the transactions or facts to which they purport to relate are a complete sham.³⁹

But a case which seems to be at odds with this analysis is *Donnelly*.⁴⁰ D, a jeweller, at E's request, gave E a written valuation of certain items of jewellery, stating that D had examined the jewellery. In fact, there was no jewellery to be valued; the valuation was a sham and part of a plan to defraud insurers. Upholding D's conviction for forgery, the Court of Appeal said that it was only concerned with determining whether the valuation certificate was a false instrument by virtue of s 9. The court held that it was, because it fell foul of s 9(1)(g) in that it had been made 'otherwise in circumstances' in which it was not in fact made. 'In our judgment,' said the court:⁴¹

the words coming at the end of paragraph (g) 'otherwise in circumstances . . .'
expand its ambit beyond dates and places to any case in which an instrument purports
to be made when it was not in fact made. This valuation purported to be made after
[D] had examined the items of jewellery . . . He did not make it after examining these
items because they did not exist. That which purported to be a valuation after
examination of items was nothing of the kind: it was a worthless piece of paper.

Obviously, the valuation certificate told a lie, but did it tell a lie about the *circumstances* in which it was made? If it did, then a begging letter in which the beggar, or someone on his behalf, falsely states that he is homeless or unemployed, is

³⁹ cf *Dodge and Harris* [1972] 1 QB 416, [1971] 2 All ER 1523, CA.

⁴⁰ (1984) 79 Cr App R 76. See also the commentary by Smith, *Property Offences*, paras 23.16–23.18; *Arlidge and Parry on Fraud*, paras 11.021–11.022.

⁴¹ (1984) 79 Cr App R 76, CA.

equally a forgery because the circumstances to which the writer alludes do not exist. This would be a remarkable extension of the law of forgery as previously understood but if this is the conclusion to which s 9(1)(g) inexorably leads then it would have to be accepted.⁴²

It is submitted, however, that it cannot stand with the decision of the House of Lords in *More*⁴³ (in which *Donnelly* was not mentioned). In *More*, Lord Ackner, in a speech with which all their lordships agreed, firmly stated that s 9(1) requires the document to tell a lie *about the circumstances of its making* (as distinct from the circumstances which it purports to report). ‘It is common ground,’ he said:⁴⁴

that the consistent use of the word ‘purports’ in each of the paragraphs (a) to (h) inclusive of s 9(1) of the Act imports a requirement that for an instrument to be false it must tell a lie about itself, in the sense that it purports to be made by a person who did not make it (or altered by a person who did not alter it) or otherwise purports to be made or altered in circumstances in which it was not made or altered.

Donnelly was followed as a decision binding on the court, and *More* was unconvincingly distinguished, in *Jeraj*,⁴⁵ where D, a bank manager, signed a document stating that he had received a letter of credit and that he, on behalf of the

⁴² Counsel for the Crown in *Donnelly* conceded that the valuation certificate would not have been a forgery either at common law or under the Forgery Act 1913 but argued that it was now a forgery by virtue of s 9(1)(g).

⁴³ [1987] 3 All ER 825 at 830, [1987] 1 WLR 1578, discussed at 29.1.3.2.

⁴⁴ *ibid* at 830.

⁴⁵ [1994] Crim LR 595. cf R Leng, ‘Falsity in Forgery’ [1989] Crim LR 687, arguing that the document was not merely a false valuation, but purported to be something it was not—a valuation based on an inspection of jewellery.

bank, endorsed it. The letter of credit did not exist. It seems to be a simple case of writing a falsehood. Then in *Warneford and Gibbs*,⁴⁶ the court, unaware of *Jeraj*, held that *Donnelly* could not stand with *More*.

In *Atunwa*,⁴⁷ the preceding analysis was cited with approval by the Court of Appeal, although the court then went on to apply the provisions in a manner which, it is submitted, extends the law. On its facts, the decision was straightforward: D was in possession of cheques signed on behalf of registered companies with signatures from unknown, possibly non-existent, people. His conviction for possessing them was upheld, but the Court of Appeal held that forgery could be committed if a person, D, purported to sign a cheque on behalf of a company, X Co, in his own name where he was not an authorized signatory on that account. The court suggested that D purported to make an instrument in the terms in which it was made on the authority of a person, X Co, who did not in fact authorize its making in those terms. On that basis, the court concluded that the cheque ‘told a lie about itself’: that it was a cheque duly signed by a person authorized to sign it on behalf of the company.

It is respectfully submitted that the court may have gone too far. If D signs as X, that is forgery. The cheque will tell a lie about itself. If D signs, in his own name, a cheque drawn on a named account (eg cheques personalized in a trading name), how

⁴⁶ [1994] Crim LR 753.

⁴⁷ [2006] EWCA Crim 673.

is that instrument telling a lie about itself?⁴⁸ The form and terms in which the *instrument is made* (ie its description or purported description about itself) is what is material, and there seems to be no lie being told about that. It was held under the pre-1981 Act law that it is not forgery for D to sign his name in a manner different from his normal signature with a view to denying it was his. The cheque did not in that case purport to be signed by anyone else.⁴⁹ The application of the law in *Atunwa*⁵⁰ above is also difficult to reconcile with *More*: in what sense is a cheque signed by D in his own name on a cheque for a company account to which he is not a signatory ‘purporting to be made by a person who did not make it’ or ‘purporting to be made in circumstances in which it was not made’?

The situation is rendered yet more confusing by *A-G’s Reference (No 1 of 2000)*.⁵¹ D, a coach driver, tampered with the tachograph in his vehicle so that it falsely recorded that he had taken a break from driving as required by law and that the vehicle had been driven by another driver. The court concluded that *Donnelly* was binding on them; *Warneford* was wrong, but *Donnelly* and *Jeraj* should be restricted ‘so that they apply only where *circumstances* need to exist before the document can properly be made or altered’.⁵² What distinguishes that case from a simple lie is not

⁴⁸ The appellant had argued that to be caught by the Act the cheques had to purport to be authorized by being signed in the name of someone who was an authorized signatory.

⁴⁹ *Macer* [1979] Crim LR 659.

⁵⁰ [2006] EWCA Crim 673.

⁵¹ [2001] 1 Cr App R 218, [2001] Crim LR 127 and commentary.

⁵² At [24] (emphasis in original).

explained. If D writes a letter stating that he has a first-class honours degree from the University of Cambridge when he has never been near that place, he is asserting the existence of non-existent examination scripts which have been evaluated and rated first class—circumstances which must exist before he could properly write such a letter. If that is a forgery, then so is any other written lie. Equally baffling is the court's opinion that, while the tachograph record was a forgery, a handwritten statement of the same lie would not have been.

Paragraph (g) of s 9(1) deals with the case where the document purports to be made or altered on a date or at a place or otherwise in circumstances where it was not in fact made or altered. This would deal, for example, with the case where D alters the date on a will or deed to make it appear to antedate another will or deed.⁵³ Nor is the will or deed any less false because it is D's own will or deed; a will or deed which purports to be executed on the 1st of the month tells a lie about itself if it was in fact executed on the 10th and D, provided he acts with mens rea, is guilty of forgery.⁵⁴

⁵³ cf *Wells* [1939] 2 All ER 169, 27 Cr App R 72, CCA; D was convicted of forgery where he altered the date on a settlement so as to antedate the provisions of an Act of Parliament in order to avoid the payment of tax on the settlement.

⁵⁴ Under the 1913 Act, there was a requirement that a document must be forged in a material particular. Arguably, on facts such as those in *Wells* (earlier) D would not have been guilty of forgery in antedating the settlement if he had failed to antedate it sufficiently to avoid tax. There is now no requirement for materiality and D on facts such as *Wells* may be guilty of forgery even though the alteration does not achieve its

29.1.3.2 Falsity and non-existing persons

The most difficult provision in s 9(1) is para (h). Most frequently, false documents purport to be made or authorized by some existing person known to the person who is intended to be affected by the contents of the document. Sometimes, however, D may find it equally, or better, suits his purpose to invent the name of a person by whom the document purports to be made. Suppose, for instance, that D and E apply for a job and in order to bolster their prospects D falsely makes a reference purporting to come from Sir George X while E falsely makes a reference purporting to come from Sir Peter Y. In fact, there is no Sir George X, who is merely D's invention, but there is a Sir Peter Y who was formerly E's employer. E's reference is clearly a forgery and, on the face of it, there is no reason why D's case should be treated any differently; certainly D's case falls within s 9(1)(h).

But consider the facts of *Hassard and Devereux*.⁵⁵ D, a company bookkeeper, made out cheques to a company creditor, BSA, and after the cheques had been signed by directors, he altered the cheques to BS Andrews and handed them to his accessory, E. Obviously these cheques were forgeries (s 9(1)(b)) and we are not concerned with them. D and E now needed to cash these cheques so they gave them to F. F representing herself as Andrews and giving her correct address, opened an account in the name of BS Andrews. F then drew a cheque on this account. While F's conviction for forgery under the 1913 Act was upheld and was a questionable decision under that Act, the question which now arises is whether this cheque is a forgery by virtue of s

intended effect. D may also be guilty of forgery if he alters it to make it false in any respect whether or not it is false in some other respect: s 9(2).

⁵⁵ [1970] 2 All ER 647, [1970] 1 WLR 1109, CA.

9(1)(h). It might be said that the case falls literally within the paragraph; the cheque purports to be made by an existing person (BS Andrews) who did not in fact exist.⁵⁶

This is problematic because any person may assume an alias. Authors frequently do. If, for example, an author called X chooses to write under the name of Y and has his royalties paid to Y in which style he opens a bank account, is he guilty of forgery if he draws cheques on that account in the name of Y?⁵⁷ The answer must be an obvious 'no'. Y is not someone who does not exist; he is someone who does exist, Y being a mere alias for X. Clearly, if the bank knows that X and Y are one and the same person, there can be no question of forgery. It can hardly become forgery because the bank is unaware of the true name of X, knowing him only in the style of Y. Nor can the cheques be regarded as forgeries because X has opened a bank account in the name of Y for a dishonest purpose, such as evading paying tax on his royalties.

It is suggested, therefore, that if D assumes an alias, and V knows him by that alias, his conduct falls outside s 9(1)(h), and documents presented by D to V in the style of his alias are not documents which are made by a person who did not in fact exist.

In *Hassard* and *Devereux*, the bank, had it been aware that BS Andrews was not F's real name, would not have honoured the cheque or, at least, would have required a convincing reason why it should. But the bank was not misled by anything which appeared on the face of the cheque; it was honouring a cheque to the person presenting it for payment. The person in question simply called herself F or BS

⁵⁶ A similar problem is presented by the facts of *Martin* (1879) 6 QBD 34, CCR.

⁵⁷ cf *Atunwa* discussed earlier.

Andrews. The cheque does not purport to be made by an existing person who does not exist; it purports to be made by an existing person who chooses to assume one name rather than another.

This conclusion seems clearly to follow from *More*.⁵⁸ D came into possession of a cheque made out to MR Jessell with which he opened an account at a building society in the name of Mark Richard Jessell and later drew on that account by completing a withdrawal form in the name of Mark Richard Jessell. Affirming D's conviction for forgery, the Court of Appeal held that the withdrawal form came within s 9(1)(h) since it purported to have been made by an existing person who did not in fact exist. The House of Lords disagreed and quashed the conviction. As Lord Ackner pointed out:⁵⁹

[D] was a real person . . . The withdrawal form clearly purported to be signed by the person who originally opened the account and in this respect it was wholly accurate.

Thus, in my judgment, it cannot be validly contended that the document told a lie about itself . . .

This, with respect, is entirely right. It follows that, while there is no mention in *More of Hassard and Devereux* (presumably because the latter is a decision under the repealed 1913 Act), if the facts of *Hassard* were to recur, a conviction for forgery under the 1981 Act could not be sustained.

This does not mean that s 9(1)(h) is devoid of effect, though the scope for its application is probably not extensive. For example, where D makes a document purporting to emanate from E (E being purely a fiction in the sense that neither D nor any accomplice of D's is going to assume the alias of E and represent himself as such

⁵⁸ *[1987] 3 All ER 825*, *[1987] 1 WLR 1578*, HL.

⁵⁹ *ibid* at 830.

to V) the case must fall within s 9(1)(h) and D will be guilty of forgery.⁶⁰ Thus, the example given at the beginning of this section, where D presents to V a reference purporting to emanate from Sir George X, there being no Sir George X, would be one of forgery.

All in all it would seem that para (h) can apply only in restricted circumstances and it may be that Williams was right in suggesting⁶¹ that the section is unnecessary. We ought to be spared the complexity which arises from the application of the law of forgery to documents in the name of fictitious persons.

29.1.3.3 Falsity by omission

At first sight, it may seem odd to suggest that forgery may be committed by omission, since if anything requires positive and painstaking effort it might be said that this is so of the craft⁶² of the forger. But appearances can be deceptive. Though such cases may be of rare occurrence, it is possible to imagine cases of forgery by omission. If, for

⁶⁰ cf *Gambling* [1975] QB 207, [1974] 3 All ER 479, CA.

⁶¹ 'Forgery and Falsity' [1974] Crim LR at 71 and 80. Cf Williams, TBCL, 898. See also RN Goodman, 'When is a Document False in the Law of Forgery' (1952) 15 MLR 11.

⁶² Regrettably the photocopier, scanner, digital camera, computer and even kitchen cleaners (which can be used to remove signatures from credit and cheque cards) have brought forgery within the reach of the artisan as well as the artist. Many instances of forgery can be charged under ss 6 and 7 of the Fraud Act 2006 without much difficulty.

example, V, a blind man, dictates his will to D and D, with a view to gain for himself or another and with intent to cause loss to another, omits certain provisions, the will appears to be a forgery. The will purports to be made or authorized in the terms in which it is made by a person (V) who did not in fact make or authorize its making in those terms and thus falls within s 9(1)(c) or (d). In order for an omission to constitute forgery, its effect must be to render the document false within s 9(1), that is, it must result in the document telling a lie about itself. If, in *Hopkins and Collins*⁶³ (the club bookkeepers case earlier), D and E had simply failed to enter in the club's books monies which were paid in by members, the accounts would not be forged. Their accounts would be inaccurate but they would not be false within any of the definitions in s 9(1); they would remain what they purported to be: a statement of accounts prepared by D and E.

29.1.4 Mens rea: intent to prejudice

29.1.4.1 Double requirement of intention

Sections 1 to 5 of the Act create various offences involving forgery. For convenience we can describe the mens rea of the various offences as having two aspects. First, there is the mental element required in relation to making, using, or possessing the false instrument and this aspect is considered in relation to the specific offences in the next section. The second aspect, which governs the offences under ss 1 to 4 and certain aspects of the offences under s 5, is the requirement that D should intend that V be induced, by reason of accepting the false instrument as genuine, to do or not to

⁶³ (1957) 41 Cr App R 231, CCA, see 29.1.3.1.

do some act to his own or another's prejudice. It is this aspect which is discussed here.

As the Court of Appeal in *A-G's Reference (No 1 of 2001)*⁶⁴ confirmed, it is necessary for the prosecution to show that D had a double intention: (a) an intention to induce somebody to accept the false document as genuine and (b) an intention that his victim, by reason of accepting the document, would do or not do some act to his own or any other person's prejudice. In *Tobierre*,⁶⁵ it was accordingly held that D's conviction was to be quashed where the trial judge appeared to have directed the jury that it was enough that D intended a false instrument to be accepted as genuine and did not, or did not adequately, explain that it must be proven *also* that D intended thereby to induce another to act to his prejudice.

29.1.4.2 Induce and prejudice

By s 10 of the Act which exhaustively defines 'induce' and 'prejudice':

- (1) Subject to subsections (2) and (4) below, for the purposes of this Part of this Act, an act or omission intended to be induced is to a person's prejudice if, and only if, it is one which, if it occurs—
 - (a) will result—
 - (i) in his temporary or permanent loss of property; or
 - (ii) in his being deprived of an opportunity to earn remuneration or greater remuneration; or

⁶⁴ [2002] EWCA Crim 1768, [2002] Crim LR 845, CA.

⁶⁵ [1986] 1 All ER 346, [1986] 1 WLR 125, [1986] Crim LR 243, CA; *García* (1987) 87 Cr App R 175, [1988] Crim LR 115, CA.

- (iii) in his being deprived of an opportunity to gain a financial advantage otherwise than by way of remuneration; or
 - (b) will result in somebody being given an opportunity—
 - (i) to earn remuneration or greater remuneration from him; or
 - (ii) to gain a financial advantage from him otherwise than by way of remuneration; or
 - (c) will be the result of his having accepted a false instrument as genuine, or a copy of a false instrument as a copy of a genuine one, in connection with his performance of any duty.
- (2) An act which a person has an enforceable duty to do and an omission to do an act which a person is not entitled to do shall be disregarded for the purposes of this Part of this Act.
- (3) In this Part of this Act references to inducing somebody to accept a false instrument as genuine, or a copy of a false instrument as a copy of a genuine one, include references to inducing a machine to respond to the instrument or copy as if it were a genuine instrument or, as the case may be, a copy of the genuine one.
- (4) Where subsection (3) above applies, the act or omission intended to be induced by the machine responding to the instrument or copy shall be treated as an act or omission to a person's prejudice.
- (5) In this section 'loss' includes not getting what one might get as well as parting with what one has.

Essentially 'prejudice' may be of two kinds, *viz* the causing of economic loss or the causing of conduct in contravention of a duty.

Economic loss

Usually, an instrument is forged with a view to the economic benefit (in terms of money or other property) of the forger and consequential economic loss to the victim.

Gain and loss are usually two sides of the same coin but the section treats the loss caused and advantage gained separately.⁶⁶

Most obviously, D intends to induce V to act, or omit to act, to his prejudice if as a result V will be deprived, permanently or temporarily, of property (s 10(1)(a)(i)). This is most commonly the forger's intention and is typically instanced by the forgery of cheques, credit cards and other instruments in order to induce another to act to his prejudice. So, if D falsifies a credit card to induce V to part with goods, he may be convicted of forgery. The fact that V may, as is often the case with credit cards, claim reimbursement from X (a bank or credit card company) cannot mean that V has not been induced to act to his prejudice; V has lost, and D intended to induce the loss of, the goods.

In practice, most cases will be covered by s 10(1)(a)(i) but the section goes on to deal with other cases of less frequent occurrence. Section 10(1)(a)(ii) deals with the sort of case where V is seeking, say, employment or promotion in employment, and D writes a letter to the employer purporting to come from someone whose opinion is respected by the employer and which is intended to ensure that V does not get the post or the promotion. Such cases may be of limited occurrence but when they occur a false instrument has been made with a view to V's prejudice and there is no reason why they should not fall within the ambit of forgery.

Section 10(1)(a)(iii) may have been included from an abundance of caution. It is possible to imagine a case where D and E are bidding for a contract to supply vehicle components to V. D might forge a letter purporting to come from someone who has

⁶⁶ cf Fraud Act, s 5, see Ch 22.

done business with E which asserts that E cannot be relied on to keep delivery dates. If E does not get the contract, he has not been deprived of property within s 10(1)(a)(i). Nor might the case fall within s 10(1)(a)(ii) since ‘remuneration’ ordinarily connotes a payment for services rendered and may not be apt to cover the case where the loss suffered is profit margins under a contract for the supply of goods. Accordingly, sub-para (iii) was included to make it clear that such a case falls within the Act.

Section 10(1)(b) is concerned with financial advantage and there is no need to prove loss to any particular victim. The offence is therefore complete and can be charged at a very early stage in the wrongdoing. Usually the financial advantage will accrue to the forger or an accomplice, but an offence may be committed even though the beneficiary is unaware of the fraud. If D forges a testimonial with a view to securing the employment, or promotion, of someone in V’s firm, it does not matter whether that someone is D himself, someone who has procured the forged testimonial, or someone who is wholly ignorant of D’s action. The case falls within s 10(1)(b)(i) since ‘somebody’ is given an opportunity to earn remuneration or greater remuneration. Nor does it matter that the ‘someone’ who gets the job or the promotion, fully justifies the remuneration, or greater remuneration, or, indeed, brings financial gain to V.

Section 10(1)(b)(ii) deals with the case where what is sought is a financial advantage otherwise than by way of remuneration. So if in the bidding for a contract D forges a letter extolling the virtues of his own (or another bidder’s) products, an offence may be committed. Again, it cannot matter that D’s (or the other’s) products are in fact the best and the cheapest. The section makes it clear that an act or omission intended to be induced ‘is’ to another’s prejudice if the case falls within the section.

Typically, D might seek to falsify an instrument with a view to giving himself (or another) an advantage over other competitors, or seek to disadvantage another competitor, but a case may fall within s 10 though D is the sole applicant for a job or a sole bidder for a contract.

Performance of duty

The question of how far the mens rea of forgery extends beyond an intention to cause economic loss is settled by s 10(1)(c)—a victim is prejudiced if it is intended that he should accept a false instrument as genuine ‘in connection with his performance of any duty’. In formulating this provision, the Law Commission sought,⁶⁷ on the one hand, to include such cases as forging a security pass to gain access to premises, forging a certificate of competency to drive and forging documents in such circumstances as *Welham v DPP*⁶⁸ where documents were forged not with the intention of causing financial loss, but with the intention of avoiding statutory restrictions on borrowing. On the other hand, the Commission wished to exclude cases where the prejudice was trivial or inconsequential.

The Act seeks to achieve this balance by the employment of the concept of ‘duty’. ‘Duty’ here must refer to a legal duty and cannot extend to what might be regarded as a social or moral duty. It will extend, however, to a duty arising under contract as well as a duty imposed by law independently of contract. Thus, cases falling within s

⁶⁷ LC 55, paras 28–37.

⁶⁸ [1961] AC 103, [1960] 1 All ER 805, HL.

10(1)(c) would include cases such as: *Harris*⁶⁹ (where papers were forged to secure the release of a prisoner from jail); *Toshack*⁷⁰ (where a seaman forged a certificate of good conduct so that the Trinity House examiners would let him take an examination); *Moah*⁷¹ (where a testimonial was forged to gain admission to the police force); and *Bassey*⁷² (where a student forged papers to gain admission to the Inner Temple).

But where it is not intended to induce anyone to act in connection with a duty, no offence is committed under the Act. The Law Commission gave as an example the case of the bogus invitation to a party with a view to raising a laugh. It is understandable that the heavy hammer of forgery should not be used on so small a nut,⁷³ even though real inconvenience may be caused.⁷⁴

It is not enough that an instrument is falsified with a view to deceiving V unless there is an intention to induce an act or omission which constitutes 'prejudice' as defined. It would not constitute forgery, for example, to falsify a birth certificate if

⁶⁹ (1833) 1 Mood CC 393, CCR.

⁷⁰ (1849) 1 Den 492.

⁷¹ (1858) Dears & B 550, CCR.

⁷² (1931) 22 Cr App R 160, CCA.

⁷³ Yet the heavy hammer would be applicable if the invitation was intended to induce a doorman or butler to admit the bearer to the party.

⁷⁴ What if the bogus invitation was sent as a means of getting V out of the way while D burgles his premises? Has D, by reason of getting V to accept the invitation as genuine, induced an act which, if it occurs, will result in V's loss of property within s 10(1)(a)(i)?

D's *only* object is to make his friends believe that he is a little younger than he looks. To constitute forgery, D must intend by the false document to prejudice the victim or some other party; it is not enough that acceptance of the false document will result in someone doing, or not doing, something to D's prejudice. Literally, 'a person's prejudice' in s 10 might be read as including D himself but in *Utting*⁷⁵ the Court of Appeal rightly regarded such a submission as absurd.

29.1.4.3 Claim of right

It will be recalled that s 10(2) states that 'an act which a person has an enforceable duty to do and an omission to do an act which a person is not entitled to do shall be disregarded for the purposes of this Part of this Act'. What then of the case where although D acts with the necessary intent, he seeks merely to cause V to do what he has an enforceable duty to do?

Actual claim of right

This issue may be conveniently illustrated by reference to the facts of *Parker*,⁷⁶ a decision under the pre-1981 Act law. D, who had made a loan of £3 to V and was unable to get payment from V, wrote him a letter purporting to come from the War Office, which asked V to give D's demand his best attention without delay. On these facts, D has obviously made a false instrument within s 9 but he is not guilty of

⁷⁵ (1988) 86 Cr App R 164, [1987] Crim LR 636.

⁷⁶ (1910) 74 JP 208, CCC. Cf *Winston* [1999] Crim LR 81 and *Knock* [2014] EWCA Crim 1986, in which the Vs were under no duty to pay until certain formalities had been completed.

forgery by reason of what is now s 10(2). Arguably, V suffers no ‘prejudice’ within s 10(1) if he is merely made to pay that which he already owes⁷⁷ but s 10(2) puts the matter beyond doubt. In a case where D does have a legal entitlement to the money or other property in question, the effect of s 10(2) is that an act is not to ‘a person’s prejudice’ if that person has an enforceable duty to do that act. The ‘enforceable duty’ must of course be one which is imposed by law or arises under contract.

Some confusion is created by the application of the principle in the case of *A-G’s Reference (No 1 of 2001)*.⁷⁸ DD were the parents of L who was charged with a serious offence abroad. Her conduct attracted media attention and an appeal was launched to meet DD’s travelling and other expenses in attending L’s trial. Some £250,000 was raised and paid into a trust account. Unbeknown to DD and without their consent, mail addressed to them was delivered by the Post Office to the fund organizers and opened by volunteers who placed all monies received, without consideration being given to the expressed intention of the donors, into the fund’s bank account. It was alleged that DD provided the trustees with false invoices relating to accommodation expenses incurred. DD were acquitted on the direction of the trial judge on an indictment alleging, *inter alia*, use of a false instrument, contrary to s 3, following a submission that the money was ‘theirs to start with in law and becomes theirs as a result of any act done by the trustees then they have not gained because it was always theirs and there was no advantage’. The Court of Appeal held that this submission ought not to have succeeded. The referred question for the Court of Appeal was whether, on a charge under s 3:

⁷⁷ cf the discussion in connection with blackmail, Ch 24.

⁷⁸ [2002] EWCA Crim 1768, [2002] Crim LR 844, CA and commentary.

where the accused has used a false instrument or furnished false information with a view to obtaining money or other property it is necessary for the prosecution to prove that the accused had no legal entitlement to the money or other property in question?⁷⁹

The court accepted that the existence of a claim of right at the time when the false document was used might negative an intention to cause another to act to his prejudice in some cases. If the effect of D's legal entitlement to the property would create in the alleged victim of forgery a duty to deliver the property as requested, then the prosecution must prove that D had no legal entitlement to it. Otherwise the prosecution need not disprove a legal entitlement. But, even if D has no legal entitlement (in the sense of a proprietary interest) to the property, the prosecution must disprove any claim of which he offers evidence that the property is due as a debt. On the facts, it was held that the prosecution had demonstrated both elements of intention: an intention to induce the trustees to accept the false invoice as genuine, and an intention to cause them by so accepting it to authorize payment, which it was their duty not to do, and it was irrelevant that DD might have intended to deprive the trust only of that sum which they could have obtained if they had pursued their claim in another way.

There are a number of difficulties with the decision and the approach to the trustees' duties. The court placed significant reliance on the fact that DD had no proprietary interest in the money, but, even though DD retained no proprietary

⁷⁹ If all money had belonged to DD it would have continued to belong to them under the principle in *Taylor v Plumer* (1815) 3 M & S 562 (agent converting principal's property into another form, property in changed form belongs to principal).

interest, they were surely creditors of the trust fund, and the trustees had a duty to pay the debt, a duty which existed from the moment the money passed into their legal ownership. Moreover, the court took a restricted approach to s 10(2). It was acknowledged that s 10(2) was intended to reverse the decision in *Parker*. Under s 10(2), there is no doubt that conduct such as that in *Parker* is intended to be caught under s 10(2). The court relied on statements in *Campbell*⁸⁰ which might be read as conflicting with the generally accepted approach that s 10(2) assumes that V's duty, if there is one, continues to exist notwithstanding his being deceived by D's forged instrument.⁸¹

Belief in claim of right

In *Parker*, D had a claim of right since V was in debt to him. It is submitted that D's honest belief⁸² that V has an enforceable duty to do the act in question suffices to bring the case under the ambit of s 10(2), even if the belief is unreasonable. But it is not enough that D genuinely believes that his action is morally justified.⁸³ D may feel that he has been unfairly overlooked for promotion on previous occasions but if on

⁸⁰ (1985) 80 Cr App R 47 at 49 (presentation of forged cheque).

⁸¹ If the duty existed before the false instrument was made or used, s 10(2) should apply.

⁸² The Law Commission, LC 55, para 35, considered adding 'dishonestly' to the mental element but did not think that it was 'either necessary or helpful'.

⁸³ cf *Hagan* [1985] Crim LR 598, CA, holding it irrelevant that D may have made no personal gain from the property obtained and may have applied it to an entirely worthy cause. The case was decided under the 1913 Act but the same result would follow under the 1981 Act.

the next occasion he falsifies a testimonial intending to induce his employer, V, to promote him, all the requirements of forgery are satisfied. The Law Commission explained the problem in the following terms:

If a person makes a false instrument intending that it be used as genuine to prejudice another by inducing him to act contrary to his duty it is irrelevant that that person may genuinely believe that he is entitled to what he is trying to obtain. However firmly he may believe, for example, that he is entitled to a driving licence, he intends another to act contrary to his duty if he intends to induce him to issue such a licence against a false certificate of competency to drive, as it is the issuing officer's duty to issue a licence only against the presentation of a valid certificate of competence.⁸⁴

Suppose that D forges the acceptance to a bill of exchange in the name of E and claims that when he did so he intended all along to meet the bill and has now paid the bankers who honoured the bill so that no actual loss has been sustained by anyone.⁸⁵

The case appears to be an offence under the Act. By the forged signature, D has induced the bankers to honour the bill and as a result D gains a financial advantage.⁸⁶

D cannot be relieved of liability by s 10(2) because it cannot be asserted that the bankers have any enforceable duty to honour a forged bill; had the bankers known that they were in the position of accepting a bill without the usual security of an acceptor they would have been duty-bound to reject it.

Irrelevance of dishonesty

⁸⁴ Para 35.

⁸⁵ These are the facts of *Geach* (1840) 9 C & P 499.

⁸⁶ In effect D obtains credit or time to pay.

It follows that while a claim of legal right may negative D's intention to cause another to act to his prejudice, it is not ordinarily relevant to consider whether D was acting dishonestly. It is necessary for the court to ascertain what acts D intended to induce, and that is a subjective question. However, whether the act D intended to be induced is to the actor's prejudice appears to be an objective question, and once the facts are ascertained, it is a question of law, for only the judge can decide whether there is an enforceable duty to do a particular act. If there is such a duty, then the offence is not committed, even though D was unaware of the existence of the duty.

Some might say that the forger who all along intends to repay the sum he is inducing V to make available is not acting dishonestly, but this would not affect his liability for forgery since he has intentionally made a false instrument with intent thereby to induce another to do that which it is his duty not to do. This is confirmed by *Campbell*.⁸⁷ E, a plausible rogue, told D that she had returned a car to a seller and the only way the seller could repay the purchase price was for E to make out a cheque in a fictitious name. D then did as E requested by endorsing the cheque in the fictitious name to herself and paying it into her account, later drawing out the money which she paid to E. It was never doubted that D had been duped and that she thought she was acting honestly in that no one would be the loser. Affirming her conviction for forgery, the Court of Appeal said that the trial judge was right to rule that dishonesty was not a necessary element for forgery.⁸⁸ Both elements of the mens rea

⁸⁷ (1985) 80 Cr App R 47, CA.

⁸⁸ *Suska-Lipka v Poland* [2013] EWHC 2639 (Admin) could be taken to suggest that the offence of forgery requires proof of dishonesty. This would be incorrect. The judgment is perhaps best explained on the basis that Ouseley J was simply using

were present here; she intended the bank to accept the false signature on the cheque as genuine and by reason thereof to cause the bank to do that which it was its duty not to do. It was thus irrelevant that she intended no permanent or temporary loss to the bank.

29.1.4.4 Forgery and machines

D may, with dishonest intent, make a device with a view to causing a machine to operate to his advantage. It might be merely a metal disc the size of a coin or it might be a card storing information to which the machine will respond. The former cannot be an ‘instrument’ and so cannot be a forgery but the latter now may be. ‘The increasing use of more sophisticated machines,’ said the Law Commission:⁸⁹

has led us to include within ‘instruments’ capable of being forged the discs, tapes and other devices mentioned in paragraph 25, which may cause machines into which they are fed to respond to the information or instructions upon them, and, of course, there are machines which are designed to respond to an instrument in writing. It is necessary, therefore, to make provision to cover in such cases the intention to cause a machine to respond to a false instrument as if it were a genuine instrument. There also has to be provision for treating the act or omission intended to flow from the machine responding to the instrument as an act or omission to a person’s prejudice.

Section 10(3) and (4) are intended to implement the Commission’s recommendation.

References to inducing *somebody to accept* a false instrument as genuine include references to inducing *a machine to respond* to the instrument as if it were genuine.

‘dishonesty’ as shorthand for the requirements of intention to cause V to accept the document as genuine and act on it to his prejudice.

⁸⁹ Law Com Working Paper No 55, para 36.

These provisions were intended by the Law Commission (and presumably Parliament) to apply to a person who makes his own cash card with a view to obtaining money from an ATM, a practice which has been made much easier in a digital world with software packages which create such cards.⁹⁰ If he carries out his intention he will be guilty of theft of the money,⁹¹ but the preparation of the card is merely a preparatory act, and not therefore amounting to attempted theft.⁹² There are two difficulties in construing the Act to apply to this case.

(1) The card is certainly an ‘instrument’ within s 8(1)(d);⁹³ but it must also be a ‘false’ instrument within s 9 and it is hard to see that it ‘purports’ to be anything

⁹⁰ In the Explanatory Notes to the Draft Bill (LC 55) the Commission said of its provision (which is not reproduced in identical terms in the Act) that it ‘is required to deal with those cases where the false instrument, whether it be an instrument in writing or a disc, tape, sound track or other device, is made or used to cause a machine to respond to it as if it were a genuine instrument. The use of a false card to cause a bank’s cash dispensing machine to pay out money would not be within [section] 3 standing alone as there would be no intention of inducing somebody to accept it as genuine and to act upon it.’ And see now the Computer Misuse Act 1990 which in the instances discussed above will usually offer an alternative route to conviction.

⁹¹ cf *Hands* (1887) 56 LT 370, DC.

⁹² This will be a sufficient act for a prosecution under s 6 or possibly s 7 of the Fraud Act 2006, see Ch 22.

⁹³ See 29.1.

other than what it is, any more than a copy of a key⁹⁴ made by an intending thief purports to be the original key.

- (2) Section 10(3) and (4)⁹⁵ appear to contemplate two successive ‘inducements’: (a) the machine is induced to respond to the false instrument; and (b) the response of the machine induces an act or omission. Section 10(3) extends the meaning of accepting a false instrument as genuine but it does not extend the meaning of ‘do or not do some act’; and s 10(4) appears to confirm that an act or omission is still required. Everywhere else in the Act this undoubtedly means the action or omission of a person, and that is its natural meaning in s 10(4).⁹⁶

If that is right, ‘prejudice’ will result in the bank dispenser case only if and when a bank official acts in some way in consequence of the operation of the machine,

⁹⁴ The key, of course, could not be a document, at least where the key is of the traditional variety and not a card key of the kind nowadays favoured in hotels.

⁹⁵ See 29.1.4.2.

⁹⁶ The incorporation of the extended meaning of ‘inducing to accept’ into the definition of forgery in s 1 cannot avoid a reference to a person at some stage. There are two alternatives. The first assumes that a machine can act or omit. The second, preferable, alternative avoids that solecism: (a) ‘A person is guilty of forgery if he makes a false instrument with the intention that he or another shall use it to induce a machine to respond to the instrument as if it were a genuine instrument and by reason of so responding to it to [do or not to do some act to a person’s prejudice]’; (b) for the bracketed words, substitute: [cause another person to do or not to do some act to his own or any other person’s prejudice].

perhaps by debiting the genuine customer's account or sending him an inaccurate statement of account. Whether or when that will happen depends on the degree of mechanization of the bank's operations. It might be argued that 'act or omission' is here loosely used to mean the functioning of the machine, but that is not what s 10(4) says; and, while we might swallow the notion that a machine can act or omit, the idea that it can perform a duty is surely unacceptable. If D makes his own swipe card with a view to gaining unauthorized access to premises, this can be a forgery only if D intends it to result in the acceptance of the card by someone 'in connection with the performance of any duty'. The same question applies as to whether the card purports to be something which it is not, any more than does a password written on a piece of paper and shown to the gatekeeper, but there is also the more formidable difficulty—indeed, it is submitted, impossibility—of treating the electronic device as having a duty to admit only authorized persons.

It is important not to lose sight of the fact that we are talking about the intention of the accused. If prejudice requires a human act or omission, the question is not whether a person would actually act or omit in consequence of the use of the alleged forgery, but whether D intended that they would. The difficulty of proving such an intention might persuade a court against the view that prejudice requires a human act where a machine has been 'induced to respond'.

Other difficulties are illustrated by *Gold and Schifreen*.⁹⁷ Here D and E, two skilled 'hackers', obtained unauthorized access to V's computer on which information

⁹⁷ [1988] 2 All ER 186, HL. See the comments by I Lloyd, 'Computer Abuse and the Law' (1988) 104 LQR 202 and Y Cole-Wilson, 'Old Bailey Hacks: Some Reflections on *Gold and Schifreen*' (1987) 137 NLJ 1118 (on the CA decision).

was stored by causing the computer to accept them as authorized users. The House of Lords agreed with the Court of Appeal that their convictions for forgery should be quashed on the ground that the signals which caused the computer to treat them as authorized users were never 'recorded or stored' within s 8(1)(d) of the Act;⁹⁸ they appeared only momentarily on a screen and were then immediately expunged. The House did not find it necessary to decide on the further argument, relied on in the Court of Appeal, that the extension of forgery to discs, tapes, etc did not alter the need for the requirement that the document must tell a lie about itself. Here, it seems, D and E simply caused the computer to accept them as authorized users. In effect they simply told a lie (*viz.*, we are authorized users) and the case might be likened to D writing a password on a piece of paper which tricks the guard into admitting him to the premises he protects.

The courts in *Gold* were evidently unhappy about what they regarded as a Procrustean attempt to use the Act for situations for which it was not designed.⁹⁹

⁹⁸ See 29.1. This view does not sit easily with the approach in relation to the offences in the Protection of Children Act 1978 of making an indecent image of a child; it seems that such images are 'made' by the internet cache on a machine even though not knowingly stored by D who views them: *Bowden* [2001] 1 QB 88 and cf *Harrison* [2007] EWCA Crim 2976.

⁹⁹ See the Computer Misuse Act 1990, in Ch 28, which deals with the problem. The decision of the House of Lords prompted the editorial comment in the *Journal of International Business Law* ((1987) at 107) that the 'theory and practice of the

29.1.4.5 Causation

Forgery extends not only to the case where by reason of accepting the false instrument as genuine V is intended to be induced to act, or fail to act, to his prejudice, but also to the case where V is intended to be caused to act, or not to act, to the prejudice of any other person. As has been shown,¹⁰⁰ a false testimonial may be sent by D to V in order to induce V to appoint D or to appoint E or not to appoint F, and all three situations fall within the ambit of forgery. But it is not enough that the false instrument results in prejudice to someone; the prejudice must result from a person (or persons) having accepted the false instrument as genuine and being induced thereby to do, or refrain from doing, something. Prejudice clearly results to F if, as a result of the false reference, F is not considered for the job and is denied the opportunity to earn remuneration, but the offence lies not in F being prejudiced but in V being induced to act to F's prejudice.

Suppose that D wishes to acquire a vehicle from V, a dealer, and because D does not have the ready money, he is referred by V to X Co, a finance company, to arrange a hire-purchase of the vehicle. D signs the hire-purchase proposal in the name of Z, a creditworthy individual, which D is not. Having satisfied himself that Z is creditworthy, X Co confirms the proposal with V and V delivers the vehicle.¹⁰¹

criminal law are shown to be light years behind technological developments in the commercial sector'.

¹⁰⁰ See 29.1.

¹⁰¹ These are the facts of *Hurford* [1963] 2 QB 398, [1963] 2 All ER 254, CCA.

Supposing that V is prejudiced by delivering the vehicle to D,¹⁰² it would not be apt to allege in an indictment that D has made a false instrument intending to induce V to act to his prejudice. The victim must be a person who, by reason of being induced to treat the false instrument as genuine, does something (or fails to do something) to his own or another's prejudice. The case presents no problems if D is charged with inducing X Co to act to its own or another's prejudice in that D gains from X Co a financial advantage otherwise than by way of remuneration (s 10(1)(b)(ii)).¹⁰³

29.2 The offences

29.2.1 Forgery

By s 1 of the Act:

A person is guilty of forgery if he makes a false instrument, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

By s 6, the offence is triable either way; on summary conviction it is punishable by six months' imprisonment and/or a fine not exceeding the statutory maximum and on trial on indictment by ten years' imprisonment. It is a Group A offence under the Criminal Justice Act 1993.

¹⁰² It may be that V is not prejudiced since he may be able to claim the whole of the price of the vehicle from X Co.

¹⁰³ Hence the Law Commission (LC 55, para 47) saw no need to reproduce the offence under s 7 of the 1913 Act of demanding property under or by virtue of forged instruments.

Forgery is committed at the moment when the instrument is made, or it is not committed at all.¹⁰⁴ To be a forgery, it must be made with the dual intention that somebody (a) shall be induced to accept it as genuine and (b) by reason of so accepting it, do some prejudicial act.¹⁰⁵ If it is made with that intention, it is immaterial that neither of these events takes place, though the fact that they did take place may be relevant evidence of what the maker intended.¹⁰⁶ It is not enough, therefore, that D makes a copy of an instrument if his intention is to represent it as a copy; were it otherwise, the photocopier would have made us a nation of forgers. Nor would it suffice, it is submitted, that, subsequently realizing that the copy is good enough to pass as the original, D decides to pass it as the original. The definition requires that D makes the false instrument with the requisite intent at that time of making.

In *Ondhia*,¹⁰⁷ the alleged forgery was of a ‘copy bill of lading’. D created the copy bill—he was not merely making a photocopy of an existing bill—so the copy bill was ‘false’ and a forgery if, but only if, it was made with appropriate intents. He did not,

¹⁰⁴ Creating a draft will for a vulnerable neighbour from whom DD had been receiving large financial ‘gifts’ and keeping the will in a drawer was not sufficient to establish an attempt to make a false instrument: *Bowles* [2004] EWCA Crim 1608.

¹⁰⁵ In *Demco Investment and Commercial SA v Interamerican Life Assurance (International) Ltd* [2012] EWHC 2053 (Comm), Christopher Clarke J stated that he did not think it was possible to insert ‘knowingly’ before ‘makes a false instrument’. At [114].

¹⁰⁶ *Ondhia* [1998] 2 Cr App R 150, [1998] Crim LR 339 and commentary.

¹⁰⁷ See n 106.

however, intend to use *that paper* to induce anybody to do anything. It does not appear that he intended to show it to anyone. No one was to be induced to do anything by looking at the alleged forgery. He intended to use it to make a facsimile. After that, he had no further use for it. He intended that V should act on the facsimile. So the question appears to be: was D's intention to use the facsimile an intention to induce someone to accept the original copy bill as genuine and, consequently, act to his prejudice? The court's answer is in the affirmative—the appeal was dismissed. If D were to make a false instrument, intending to hold it in front of a TV or webcam so that V could read it and act upon it, that would seem a clear case of forgery. The fax machine came close to that;¹⁰⁸ but in the webcam example, the false instrument must exist (and be intended to exist) when it is read; but D might have intended to destroy the copy bill the moment he had faxed it and before the fax was read. Its existence was not essential to induce the prejudicial act envisaged. These difficulties suggest that it would have been better if *Ondhia* had been charged under s 2, below.

29.2.2 Copying a false instrument

By s 2 of the Act:

It is an offence for a person to make a copy of an instrument which is, and which he knows or believes to be, a false instrument, with the intention that he or another shall use it to induce somebody to accept it as a copy of a genuine instrument, and by

¹⁰⁸ The court suggested that there is a distinction between faxes and photocopies. See *Ondhia*, commentary at [1998] Crim LR 339. What then of the case where D creates the document in entirely electronic form and emails it to V?

reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

The offence is triable and punishable in the same way as forgery under s 1.

The commission of this offence requires (a) that the instrument that is copied is in fact a false instrument;¹⁰⁹ and (b) that D 'knows or believes' it to be false. In addition (c) the copy must be made with the intention of inducing someone to accept it as a copy of a genuine instrument.

It is not an offence simply to copy an instrument known or believed to be false if the copy is made to pass as a copy of a false instrument. At a trial for forgery, copies of the allegedly false instrument may be photocopied for the convenience of judge and counsel and it can hardly be supposed that this conduct falls within s 2.

The operation of the section may be illustrated by reference to the facts of *Harris*.¹¹⁰ D, who owed money to V, had acquired a receipt to which V's signature had been forged. He told V that he had paid the debt and when V questioned this, D photocopied the forged receipt and sent the copy to V. Such conduct clearly falls within s 2. Strictly, it is arguable that a photocopy of a false instrument made with the intention of being passed *as a copy* of a false instrument does not tell a lie about itself and courts elsewhere¹¹¹ have been disposed to take this view. Only where the copy is

¹⁰⁹ Just as for handling, it must be proved that the goods are in fact stolen. If the instrument is not false but is believed by D to be false there may be an attempt.

Following the approach of the Court of Appeal in *Pace and Rogers* [2014] EWCA Crim 186, discussed in Ch 11, the requirement might be interpreted as knowledge rather than belief.

¹¹⁰ [1966] 1 QB 184, [1965] 3 All ER 206n, CA.

¹¹¹ *Tait* [1968] NZLR 126 (New Zealand Court of Appeal).

made to pass as the original false instrument would the copy tell a lie about itself. The point is, however, no longer of importance in view of s 2; the offence is committed if D *intends* to pass the photocopy as a copy of a genuine instrument. But if D intends to pass off his copy of the false instrument as the false instrument itself this is forgery under s 1 and does not fall within s 2.

29.2.3 Using false instruments and copies

By s 3:

It is an offence for a person to use an instrument which is, and which he knows or believes to be, false, with the intention of inducing somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

And by s 4:

It is an offence for a person to use a copy of an instrument which is, and which he knows or believes to be, a false instrument, with the intention of inducing somebody to accept it as a copy of a genuine instrument, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

Both offences are triable and punishable in the same way as forgery under s 1.

The offence under s 3 in substance replaces the former offence, under s 6 of the Forgery Act 1913, of 'uttering'. Under s 6, a person who 'uses, offers, publishes, delivers, disposes of, tenders in payment or exchange, exchanges, tenders in evidence or puts off' was guilty of uttering. This extravagance of language is now replaced by the single verb 'uses' but this does not import any restriction on the ambit of the offence. The Law Commission was aware¹¹² that 'uses' is the paramount verb, was so

¹¹² LC 55, para 49.

regarded by the courts,¹¹³ and would do duty for the remaining expressions in the earlier legislation.

Any use of the false instrument will suffice. While the actual making of the false instrument can hardly be regarded as a use of it, its communication to another is clearly a use of it.¹¹⁴ No doubt it would be enough that it is left in a position where V will see it and it may be enough that it is sent to another.¹¹⁵

The use is not restricted to the maker of the false instrument. It is equally an offence for someone who did not make the false instrument to use it with the appropriate intent, whether or not there is any collaboration with the maker.

Whether making a copy of a false instrument, without any further steps taken to communicate it to another, constitutes a use of a false instrument¹¹⁶ is no longer of importance in view of the fact that it would in any case be an offence under s 2. Strictly, though, the case seems to fall within s 3. While it can hardly be said that D in forging a document purporting to be made by V is ‘using’ the very document he forges, there is no reason why E, who comes across D’s forgery and photocopies it with the appropriate intent, should not be regarded as using D’s forged instrument. In

¹¹³ cf *Harris* [1966] 1 QB 184, [1965] 3 All ER 206n, CA.

¹¹⁴ See *Jamalov* [2010] EWCA Crim 309, a prosecution under the Identity Cards Act 2006, s 25, in which the Court of Appeal stated *per curiam* that the offence under s 3 would have been committed by D using a false driving licence made in his name.

¹¹⁵ cf *Harris*, n 110. There is clearly a use of a false witness statement when it is sent forward along with other documentation relating to the case. Cf *A-G’s Reference (No 2 of 1980)* [1981] 1 All ER 493, [1981] 1 WLR 148, CA.

¹¹⁶ A point canvassed but left open in *Harris*, n 110.

the ordinary use of language he has used the instrument which was forged by D.

There may thus be a use of a false instrument though it is not communicated to another.

The offence is often charged in relation to immigration documents.¹¹⁷ There is a specific defence provided by s 31 of the Immigration and Asylum Act 1999: '(1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom directly from a country where his life was threatened (within the meaning of the Refugee Convention), he—(a) presented himself to the authorities in the United Kingdom without delay; (b) showed good

¹¹⁷ The Identity Cards Act 2006 was repealed by the Identity Documents Act 2010 from 21 Jan 2011. The offences created by s 25 of the 2006 Act (possession of false identity documents or apparatus for making such documents, etc) are re-enacted in ss 4, 5 and 6 of the 2010 Act with some consequential amendments. The definitions provided by s 26 of the 2006 Act are replaced by definitions contained in ss 7–9 of the 2010 Act. By s 13(1) of the 2010 Act, 'The repeal and re-enactment of provisions by this Act does not affect the continuity of the law.' The offence in the 2006 Act was—and the re-enacted offence presumably is—compliant with Art 8 of the ECHR, though in given circumstances a decision to prosecute D may breach Art 8: *SXH v CPS* [2017] UKSC 30. See also the defence for slavery or trafficking victims who commit an offence contained in s 45 of the Modern Slavery Act 2015.

cause for his illegal entry or presence; and (c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.¹¹⁸

A defendant charged under s 3 bears only an evidential burden as to his refugee status where he relies on the s 31 defence.¹¹⁹ In relation to the matters other than the issue of refugee status which had to be established under s 31, the defendant bears a legal burden of proof. The infringement of Art 6(2) of the ECHR is justified since it represents a proportionate way of achieving the legitimate objective of maintaining proper immigration controls by restricting the use of forged passports.¹²⁰

Little needs to be said about s 4 which parallels s 3 in relation to the use of a copy of the false instrument. It is submitted that copying a false instrument does not constitute a use *of the copy* within s 4. As has just been indicated, this may constitute a use of the false instrument within s 3; at the stage of copying D may properly be said to have used the original forged instrument but he can hardly be said to be using the copy which he makes.

¹¹⁸ On the breadth of s 31 in application, see *R v Asfaw (United Nations High Commissioner for Refugees intervening)* [2008] UKHL 31. See also *Ordu* [2017] EWCA Crim 4, on cases in which convictions were secured before the change of law in *Asfaw*.

¹¹⁹ However, s 31(7) provides that if the Secretary of State has refused the defendant's application for asylum, the legal burden is on the defendant to prove that he is a refugee: *Sadighpour* [2012] EWCA Crim 2669.

¹²⁰ *Makuwa* [2006] EWCA Crim 175. The Court of Appeal reviewed the authorities and gave guidance on the defence in *Mateta* [2013] EWCA Crim 1372 and *AM* [2010] EWCA Crim 2400.

29.2.4 Possession offences

By s 5 of the Act:

- (1) It is an offence for a person to have in his custody or under his control an instrument to which this section applies which is, and which he knows or believes to be, false, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.
- (2) It is an offence for a person to have in his custody or under his control, without lawful authority or excuse, an instrument to which this section applies which is, and which he knows or believes to be, false.
- (3) It is an offence for a person to make or to have in his custody or under his control a machine or implement, or paper or any other material, which to his knowledge is or has been specially designed or adapted for the making of an instrument to which this section applies, with the intention that he or another shall make an instrument to which this section applies which is false and that he or another shall use the instrument to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.
- (4) It is an offence for a person to make or to have in his custody or under his control any such machine, implement, paper or material, without lawful authority or excuse.
- (5) The instruments to which this section applies are—
 - (a) money orders;
 - (b) postal orders;
 - (c) United Kingdom postage stamps;
 - (d) Inland Revenue stamps;
 - (e) share certificates;

...^[121]

- (g) cheques and other bills of exchange;
 - (h) travelers' cheques;
 - (ha) bankers' drafts;
 - (hb) promissory notes;
 - (j) cheque cards;
 - (ja) debit cards;
 - (k) credit cards;
 - (l) certified copies relating to an entry in a register of births, adoptions, marriages, civil partnerships, conversions or deaths and issued by the Registrar General, the Registrar General for Northern Ireland, a registration officer or a person lawfully authorized to register marriages; and
 - (m) certificates relating to entries in such registers.
- (6) In subsection (5)(e) above 'share certificate' means an instrument entitling or evidencing the title of a person to a share or interest—
- (a) in any public stock, annuity, fund or debt of any government or state, including a state which forms part of another state; or
 - (b) in any stock, fund or debt of a body (whether corporate or unincorporated) established in the United Kingdom or elsewhere.

The offences under s 5(1) and (3) are triable and punishable in the same way as forgery under s 1. The offences under s 5(2) and (4) are also triable either way and are punishable on summary conviction with the same maxima of six months⁷

¹²¹ Repealed by the Identity Cards Act 2006, Sch 2, para 1. On the debacle of implementation and the over-hasty repeal, see *R (on the application of the CPS) v Bow Street Magistrates' Court* [2006] EWHC 1763 (Admin). On the difficulties in construing the relevant provisions of the 2006 Act, see *Ali* [2007] EWCA Crim 257, [2007] Crim LR 806 and comment. See now the Identity Documents Act 2010.

imprisonment and/or a fine not exceeding the statutory maximum; on trial on indictment, however, these offences carry a maximum of two years' imprisonment.

Section 5 penalizes the possession of the instruments specified in s 5(5). The list is exhaustive so that it is not an offence under this section to possess a false instrument as such (say, a false testimonial or will) unless it is one of the instruments specified.

Where the items in D's possession relate to his identity, offences under the Identity Documents Act 2010 may apply. Section 4 provides:

- (1) It is an offence for a person ('P') with an improper intention to have in P's possession or under P's control—
 - (a) an identity document that is false and that P knows or believes to be false,
 - (b) an identity document that was improperly obtained and that P knows or believes to have been improperly obtained, or
 - (c) an identity document that relates to someone else.
- (2) Each of the following is an improper intention—
 - (a) the intention of using the document for establishing personal information about P;
 - (b) the intention of allowing or inducing another to use it for establishing, ascertaining or verifying personal information about P or anyone else.
- (3) In subsection (2)(b) the reference to P or anyone else does not include, in the case of a document within subsection (1)(c), the individual to whom it relates.

The maximum sentence on indictment is ten years' imprisonment. There is also the offence under s 6 (possession or control of documents which are false or improperly obtained, etc or of apparatus for use in marking false documents, without reasonable excuse).¹²²

¹²² See generally *Unah* [2011] EWCA Crim 1837.

29.2.4.1 Possession of device for making an instrument

Section 5(3) also penalizes the possession of any ‘machine or implement, or paper or any other material, which to [D’s] knowledge is or has been specially designed or adapted^[123] for the making of an instrument’ to which the section applies. It is accordingly not enough that D possesses implements with which he intends to make an instrument unless the implements are *specially* designed or adapted to make one of the specified instruments. It is therefore not an offence to possess a pen, though D’s intention is to use it to make one of the *specified* instruments;¹²⁴ nor is it an offence to possess a household cleanser in order to falsify one of the specified instruments¹²⁵ since neither the pen nor the cleanser are specially designed, nor need be adapted, for the making of a false instrument. It is, of course, not possible to provide an exhaustive list of the machines, implements, paper, or other materials which are specially designed or adapted for making instruments to which the section applies. It is for the prosecution to establish that the implement, etc is so designed or adapted and that D knew that. ‘Knowledge’ in this subsection is not coupled with ‘belief’ as it is elsewhere in the section and generally in offences under the Act.¹²⁶ Clearly

¹²³ As to which see the discussion at 29.2.4.

¹²⁴ It may be an offence under s 6 of the Fraud Act 2006.

¹²⁵ Certain household cleansers can be used to remove the holder’s signature from credit cards thus enabling D to sign the holder’s signature in his own hand which can be easily reproduced by D. This may be an offence under the Fraud Act, s 6.

¹²⁶ See *Dhindsa* [1992] COD 396.

‘knowledge’ is more restricted than ‘knowledge or belief’. Following the House of Lords’ decision in *Saik*,¹²⁷ it should mean true belief.

It is only necessary to show that the implement, etc has been specially designed or adapted to make an instrument to which the section applies, not that the machine, etc has been designed or adapted to make *false* instruments. No doubt it will often be D’s intention that he or another should so use it, but it suffices that the implement, etc is specially designed or adapted to produce any of the specified instruments. Very commonly, cheque books are stolen and may be found in the custody or control of D; if D has one of the relevant states of mind, he is guilty of an offence since the paper or other materials used are specially designed for the making of cheques and cheques are included in the specified instruments.

If the apparatus is adapted to creating false identity papers, the Identity Documents Act 2010 may apply. Section 5 provides:

- (1) It is an offence for a person (‘P’) with the prohibited intention to make or to have in P’s possession or under P’s control—
 - (a) any apparatus which, to P’s knowledge, is or has been specially designed or adapted for the making of false identity documents, or
 - (b) any article or material which, to P’s knowledge, is or has been specially designed or adapted to be used in the making of such documents.
- (2) The prohibited intention is the intention—
 - (a) that P or another will make a false identity document, and
 - (b) that the document will be used by somebody for establishing, ascertaining or verifying personal information about a person.

¹²⁷ [2006] UKHL 18.

This offence carries a maximum penalty of ten years' imprisonment.

29.2.4.2 Custody or control

For the offence under s 5 of the 1981 Act, D must be proved to have 'custody or control' of the false instrument or of the implement, etc which is specially designed or adapted for its making. The Law Commission, not entirely unreasonably, was reluctant to plump for 'possession' because of the technicalities which have come to be associated with that concept.¹²⁸ The Commission preferred 'custody or control' as it did with criminal damage and reference may be made to the discussion in that context.¹²⁹

While s 5 creates four offences, there are in essence two pairs of offences. All four offences have the common element of custody or control of instruments or implements. The offences under s 5(1) and (3) are more serious than those under s 5(2) and (4) in requiring proof that D has the instrument intending to induce another to accept it as genuine and thereby to do, or not to do, something to his own or another's prejudice, or has the implement with a view to its use to produce an instrument with like intent. This intent has already been discussed.¹³⁰ The offences under s 5(2) and (4) differ only, but markedly, in relation to the mental element that needs to be established. Under these provisions, it is enough that D has custody or

¹²⁸ See Ch 27.

¹²⁹ See Ch 27.

¹³⁰ See 29.1.3.2. It may be that s 5(2) is available as an alternative within s 6(3) of the Criminal Law Act 1967, see *Fitzgerald* [2003] Crim LR 631 and commentary, cf *Fari* [2006] EWCA Crim 1418.

control of a specified instrument which he knows to be false, or a proscribed implement, 'without lawful authority or excuse'. Section 5(1) does not provide any such defence, because its strict mens rea requirements render such unnecessary.¹³¹ Aside from undercover police officers possessing counterfeit documents, it is difficult to envisage circumstances in which there could coexist a lawful possession of documents known to be false coupled with an intention to prejudice.

29.2.4.3 Lawful authority or excuse

Lawful authority or excuse is not defined in the Act and its use in other contexts affords no grounds for thinking that, so far as D is concerned, it will be generously interpreted. No doubt a police officer who in the course of his duty seizes false documents has lawful authority to retain the items for his custody, as does a private citizen who gains such custody with a view to delivering them to the police or other proper authority.¹³² Lawful authority must extend not only to those authorized by law but also to those who plan to act in accordance with the law. 'Excuse' is more difficult to define. It must extend to cases other than those where D has available to

¹³¹ *Dickins v Gill* [1896] 2 QB 310 suggests that the absence of a lack of intention to defraud does not constitute a lawful excuse for the possession. That is a separate question from whether D's lawful excuse for possession can coexist with his intention to defraud.

¹³² cf *Wuyts* [1969] 2 QB 474, [1969] 2 All ER 799, CA. Cf *Sunman* [1995] Crim LR 569, CA (counterfeiting case where D undecided as to what to do with instrument discovered to be false).

him some general defence to crime (eg insanity, infancy or duress) for otherwise its inclusion would be meaningless. What is capable of being an excuse must be a matter of law for the judge, but there is little in the decided cases by way of guidance¹³³ and the issue must turn on what the court believes is reasonable. It is thought unlikely that a court would consider it a lawful excuse that a false instrument or an implement of forgery is kept as a curio.

Where D is charged under s 5 with having control of an implement, it would appear to be necessary to prove that D knows it to be specially designed or adapted. Knowledge of falsity is required for the offence under s 5(2) and knowledge that the implement is so designed or adapted is required for the offence under s 5(3); and by s 5(4) the custody of any *such* machine, etc is an offence.

The onus of proving lack of lawful authority or excuse lies on the prosecution. Once the prosecution have proved that D had custody of (a) an instrument he knew to be false, or (b) an implement specially designed or adapted, there would be an evidential burden on D to proffer an explanation. If D does adduce some evidence of lawful authority or excuse it will be for the prosecution in the ordinary way to satisfy the jury that D has no authority or excuse.

¹³³ cf *Dickins v Gill* [1896] 2 QB 310, DC, where it was held in a case under the Post Office (Protection) Act 1884, s 7, that the proprietor of a philatelist newspaper had no lawful authority or excuse for possessing a dye which he made in order to produce black-and-white illustrations of a postage stamp in his newspaper.