

CHAPTER 8

PROPERTY OFFENCES

The Structure of property offences

8.1 Offences against property form a complex scheme because different offences deal with different ways that property interests can be violated. The focus of this chapter will be on:

- theft, punishable by up to 5 years' imprisonment in cases of 'simple larceny' and longer terms of imprisonment where certain aggravating features are present: Penal Codes SI 261-277, 279-281; Ki/Tu ss 254-270, 272-274;
- fraudulent conversion, punishable by up to 7 years' imprisonment: SI s 278; Ki/Tu s 271, and embezzlement by a clerk or servant, punishable by up to 14 years' imprisonment: SI s 273(a)(ii), (b)(ii); Ki/Tu s 266; (a)(ii), (b)(ii);
- robbery, ordinarily punishable by up to 14 years' imprisonment and in aggravated forms, where the offender carries an offensive weapon, the offence is committed by two or more persons, or violence is used or threatened, by up to life imprisonment: SI s 293; Ki/Tu s 286;
- burglary and other offences of breaking and entering, ordinarily punishable by up to 7 year's imprisonment and in aggravated forms by up to life imprisonment: SI ss 299-301; Ki/Tu 292-294;
- obtaining property or credit by a false pretence, punishable by up to 5 years' imprisonment: SI ss 308-309; Ki/Tu s 301-302;
- receiving, punishable by up to 14 years' imprisonment: SI s 313-314; Ki/Tu ss 306-307;
- arson and other forms of destroying or damaging property: with penal liability ranging from 2 years up to life imprisonment, depending on the nature of the property and the risks associated with the mode of destruction or damage: SI ss 319-327; Ki/Tu ss 312-320.

8.2 Historically, prosecutions could fail when the wrong property offence was charged. However, the Penal Codes provide for a person charged with one property offence to be convicted of one of the other offences, if that is what the evidence establishes: SI ss 170-175; Ki/Tu ss 168-173.

8.3 The principles relating to criminal responsibility for property offences differ in some respects from those for offences against the person. Although many offences against the person require proof of subjective fault elements, not all do: some can be committed inadvertently, for example through criminal negligence. In contrast, property offences typically include an express declaration that the offence must be

committed intentionally or with some other advertent state of mind. Liability for criminal negligence is not a feature of the law of property offences.

Elements of theft

8.4 The terms 'theft', 'stealing' and 'larceny' are synonyms. All three are used in the Penal Codes. The basic offence is titled both 'theft' and 'simple larceny': SI s 261; Ki/Tu s 254. However, the special offences for stealing particular things or in particular circumstances are generally called forms of 'larceny'. The active verb in most of the provisions is 'steals'.

8.5 The Penal Codes contain an elaborate and overly complicated range of offences of theft, with maximum penalties varying with what is stolen and in what circumstances.

- 'Simple larceny', with liability to 5 years: SI s 261; Ki/Tu s 254.
- Larceny of a will, with liability to life imprisonment: SI s 262; Ki/Tu s 255.
- Larceny of legal documents, with liability to 5 years: SI s 263; Ki/Tu s 256.
- Larceny of electricity, with liability to 5 years: SI s 264; Ki/Tu s 257.
- Larceny of minerals, with liability to 5 years: SI s 265; Ki/Tu s 258.
- Larceny of postal packet, with liability to 10 years: SI s 266; Ki/Tu s 259.
- Larceny in dwelling-house, with liability to 14 years: SI s 269; Ki/Tu s 262.
- Larceny from the person, with liability to 14 years: SI s 270; Ki/Tu s 263.
- Larceny from ship, dock, etc., with liability to 14 years: SI s 271; Ki/Tu s 264.
- Larceny by of chattel or fixture by tenant or lodger, with liability to 7 years, depending on the value of what is stolen: SI s 272; Ki/Tu s 265.
- Larceny by clerk or servant, with liability to 14 years: SI s 273; Ki/Tu s 266.
- Larceny of cattle, with liability to 5 years: SI s 274; Ki/Tu s 267.
- Larceny of dog, with liability to 6 months or a fine: SI s 275; Ki/Tu s 268.
- Larceny of birds or animals kept confined or for domestic purposes, with liability to 6 months or a fine: SI s 276; Ki/Tu s 269.
- Larceny of fish, with liability to a fine: SI s 277; Ki/Tu s 270.

8.6 The Codes provide this definition of theft in SI s 258(1); Ki/Tu s 251(1):

A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof:

Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part

owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner.

This definition contains two alternative types of conduct elements for the offence:

- In *theft by taking* (first para), the offence is committed when possession of the property is gained.
- In *theft by converting* (second para), possession of the property is gained lawfully but the property is stolen later, through the person doing an act inconsistent with the rights of the owner, such as selling the property.

8.7 Despite the references to 'owner' in SI s 258(1); Ki/Tu s 251(1), stealing is essentially an offence against possession rather than ownership as such. There is an extended definition of 'owner' in SI s 258(2)(c); Ki/Tu s 251(2)(c).

The expression "owner" includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen.

Under this definition, the parties to jointly owned property can steal from each other. It would also be possible for a person to steal from anyone who has actual possession of the thing, including a person whose possession is unlawful. It is even possible for an owner of a thing, or any person with a legal interest in it, to steal the thing from a person who is entitled to possession of it.

Things capable of being stolen

8.8 Things 'capable of being stolen' are defined in SI s 257; Ki/Tu s 250. The main part of the definition, in SI s 257(1); Ki/Tu s 250(1) provides:

Every inanimate thing which has value and is the property of any person, and if adhering to the realty then after severance therefrom, is capable of being stolen.

Provided that...anything attached to or forming part of the realty is not capable of being stolen by the person who severs the same from the realty, unless after severance he has abandoned possession thereof.

This general definition excludes:

- real property including items such as fixtures, although they can be stolen by conversion after having been severed;
- intangibles such as power, although there is a special offence of larceny of electricity under SI s 264; Ki/Tu s 257;
- animals, although there are special offences relating to larceny of some creatures under SI ss 274-277; Ki/Tu ss 267-270. In addition, creatures wild

by nature can be stolen in certain circumstances, including where they have been tamed or are usually confined: SI s 257(2)-(7); Ki/Tu s 250(2)-(7);

- people, although there are special offences of child stealing under SI s 253; Ki/Tu s s 246.

8.9 Material on which information is recorded, such as paper, can be stolen. However, information itself, however confidential, is not capable of being stolen: see *Oxford v Moss* (1979) 68 Cr App R 183 (CA); *Stewart* (1988) 59 DLR 1 (SCC). To compensate for this limitation, some jurisdictions have created separate offences relating to the unauthorised use of computers and to dishonestly obtaining or using personal financial information. 'Identity theft', in which one person personates another, is also covered by separate offences, if at all, rather than by the offence of theft.

Theft by taking

8.10 Theft by taking requires that the offender 'takes and carries away' the item. This signifies that the offender must move the thing or cause it to be moved. This is sometimes called the requirement for 'asportation'. SI s 258(2)(b); Ki/Tu s 251(2)(b) provides:

The expression "carries away" includes any removal of anything from the place which it occupies, but in the case of a thing attached, only if it has been completely detached.

8.11 Theft by taking generally cannot be committed when property has been given by the owner to the recipient. However, the distinction between taking and being given may sometimes be a fine one. Making an unauthorised withdrawal from an automatic teller machine has been held to be a taking, although the issue has been the subject of debate: see *Mujunen v R* [1994] 2 Qd R 647.

8.12 Under SI s 258(2)(a); Ki/Tu s 251(2)(a), the concept of 'taking' is extended to include some instances of being given the property:

The expression "takes" includes obtaining the possession —

- (i) by any trick;
- (ii) by intimidation;
- (iii) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained...

Nevertheless, these provisions are confined to obtaining possession alone; they do not extend to obtaining ownership. Suppose, for example that someone seeks to trick

an owner into giving up some property. If the transfer is expressed to be for a particular temporary purpose such as obtaining a valuation, possession alone has been transferred and the property has been 'taken'. If, however, the owner gives up the property unreservedly in return for a promise of future payment, ownership has been transferred and the property has not been 'taken'.

8.13 The concept of 'taking' has also been extended by SI s 258(2)(a); Ki/Tu s 251(2)(a) to include some instances of finding property and keeping it:

The expression "takes" includes obtaining the possession —...

(iv) by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps.

This cumbersome phraseology means that a person who finds property and retains possession, failing to take reasonable steps to discover the owner, 'takes' the property and can therefore steal it.

Theft by converting

8.14 The term 'converts' is not defined in the Penal Codes. At common law, conversion involves 'a dealing with the thing said to be converted in a manner inconsistent with the owner's right in the thing': *Ilich v R* [1987] HCA 1; (1987) 162 CLR 110, at 115-6, 124. In this context, the phrase 'the owner's right in the thing' seems to mean the owner's right to dispose of property by, for example, transferring legal claims to it or destroying it. Mere failure to return property does not amount to conversion at common law even if the failure was deliberate. Conversion requires some sort of physical dealing with the goods: see *R v Angus* [2000] QCA 29, [15].

8.15 Conversion is addressed in two ways under the Penal Codes.

- It is made a form of theft by SI s 258(1); Ki/Tu s 251(1):

Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner

- It is also a separate offence under SI s 278; Ki/Tu s 271. This offence will here be called 'fraudulent conversion', to distinguish it from theft by conversion. It includes various forms, the broadest of which is found in SI s 278(1)(c); Ki/Tu s 271(1)(c):

Any person who – ...

(c) (i) being entrusted either solely or jointly with any other person with any property in order that he may retain in safe custody or apply, pay or deliver, for any purpose or to any person, the property or any part thereof, fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof; or (ii) having either solely or jointly with any other person received any property for or on account of any other person, fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof.

8.16 Most instances of theft by conversion will also amount to fraudulent conversion under SI s 278; Ki/Tu s 271. Fraudulent conversion is, however, a broader offence because it requires neither a physical dealing with the item nor an intent permanently to deprive the owner. The relationship between fraudulent conversion and theft by conversion is examined further below, **8.33**.

Fault elements of theft

8.17 There are two components to the fault elements of theft:

- *'fraudulently and without claim of right made in good faith'*. This echoes the defence of claim of right in SI/Ki/Tu s 8:

A person is not criminally responsible in respect of an offence relating to property, if the act done or omitted to be done with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.

In the context of theft, 'fraudulently' appears to mean something like 'dishonestly', or acting in disregard of the interests of other persons. A claim of right is a claim, albeit mistaken, of legal entitlement to take or deal with property. The claim must be a legal claim to the property and not just a moral claim. The defence constitutes an exception to the general principle that ignorance of the law is no excuse: SI/Ki/Tu s 7.

- *'with intent permanently to deprive the owner'* of the property. A mistake of fact may be inconsistent with an intention to deprive. For example, a person who mistakes a mobile phone belonging to someone else for her or his own mobile phone does not intend to deprive the owner when taking it.

8.18 Deprivation means the experience of loss. An intent permanently to deprive is an ulterior intent, meaning that it is an intention with respect to something lying beyond the appropriation of the property. Actual deprivation might not occur; it is the intention to deprive that founds criminal liability. There is no deprivation if, for

example, the property is recovered by the police before its loss is experienced. Yet the offence may still be committed.

8.19 Unauthorised borrowing or use of another person's property is not generally stealing because there is no intent *permanently* to deprive. Nevertheless, there can be an intent permanently to deprive despite an intent to restore the property if the intent to restore is unrealistic. As it was put by Connolly J in *Toritelia v R* [1987] SBCA 2:

Intention to restore coupled with an ability to do so is inconsistent with the intention permanently to deprive. On the other hand, an alleged intention to restore with no reasonable prospect of doing so is, in practical terms, an intention permanently to deprive the owner unless a pious hope be fulfilled.

Moreover, there is a separate offence relating to the unlawful use of the certain property of another person: SI s 292; Ki/Tu s 285:

Any person who unlawfully and without claim of right but not so as to be guilty of stealing, takes or converts to his own use or to the use of any other person, [SI– any draught or riding animal, or any vessel] [Ki/Tu – any vehicle or cycle, however propelled, or any vessel]...

Such offences are found in most jurisdictions.

8.20 On the different meanings of 'intention', see **4.50-4.55**. In the context of theft, intention will usually take the form of knowledge rather than purpose. It is rare for one person to steal the property of another in order to deprive the other person of it. A person who steals the property of another will usually do so simply in order to gain the benefit of the property, but with the incidental knowledge that the other person will thereby be deprived of it.

8.21 Intention to deprive can be proved by inference as well as directly. Moreover, it is not necessary that there be direct evidence tying the accused to the taking or conversion. Possession of recently stolen property can be a sufficient basis to infer that the possessor appropriated the property with the intent to permanently deprive the owner: see *Bruce v R* (1987) 74 ALR 219; [1987] HCA 40 at [1]. This is sometimes called the doctrine or presumption of 'recent possession'.

Theft and property transactions

8.22 Theft can only be committed when a taking or conversion occurs 'without the

consent of the owner': SI s 258(1); Ki/Tu s 251(1). In cases where property was given by one person to another, rather than taken by the recipient, it may be necessary to determine whether what was given was either ownership of the property, including the right to dispose of it, or mere possession.

- When possession alone has been transferred, the recipient can commit a subsequent offence of stealing by conversion.
- Transfer of ownership, however, generally excludes the operation of the law of theft. The law of theft has no application where a dishonest disposal of property occurred after ownership was transferred. It is well established as a matter of common law that there cannot be a conversion by a person who owns the property: *Ilich v R* [1987] HCA 1; (1987) 162 CLR 110, at 115-6, 124. Moreover, this is so even though ownership was obtained dishonestly, for example by a false pretence. Where ownership has been obtained dishonestly, the relevant offence is not theft but obtaining property by a false pretence: SI ss 308; Ki/Tu s 301.

8.23 Ownership of property is generally a matter of civil law. The general test of what is transferred is the intention of the person who makes the transfer. Ownership passes if that was what is intended. If the owner of something gives it to another person for a particular purpose such as temporarily using it, the intent is to transfer possession alone: the owner expects to get the thing back. If, however, the owner gives the property to another person, not expecting to get it back, in return for a promise of future payment for it, the intent is to transfer ownership.

8.24 There is, however, an exception for money because of its peculiar nature as a medium of exchange. It has been said: 'Money in most circumstances cannot be followed, which is to say that property, or ownership, generally passes with possession': *Ilich* [1987] HCA 1; (1987) 162 CLR 110 at 128. This is why someone who borrows cash need not return the same notes or coins.

8.25 In most criminal cases, principles of civil law will determine whether ownership has passed in a transaction. However, special provision has been made in many criminal statutes for two types of cases that have been problematic, especially where money is involved: transfers of property with a direction as to what is to be done with it; and transfers of property to one person with intent that it be passed on to someone else. It has commonly been thought that these cases justify exceptions to the general principle that a person given possession of money is also given ownership. However, the problem has been tackled in different ways in different jurisdictions. Some jurisdictions have dealt with these cases by bringing them within the scope of the offence of theft: they either specifically provide that ownership does not pass to the person receiving the property (see eg the Fiji Crimes Act 2009 s 296) or they expressly

extend the scope of the offence to cover the two types of cases, so that there is no need to determine what was given (see eg the Samoa Crimes Act 2013 s 162). However, a third approach has been taken in Solomon Islands, Kiribati and Tuvalu: in these jurisdictions, the problematic cases are covered by the offences of fraudulent conversion (SI s 278; Ki/Yu s 271) or embezzlement by a clerk or servant: SI s 273(a)(ii), (b)(ii); Ki/Tu s 266; (a)(ii), (b)(ii). On these offences, see below, **8.28-8.33**.

8.26 There can sometimes be an intention to transfer ownership even if the transfer was made under a mistake. This depends on the category of mistake. In Solomon Islands, Kiribati and Tuvalu, the matter is governed by common law.

- A mistake of a 'fundamental' kind negatives an apparent agreement to transfer ownership, so that possession alone is transferred and there can be a subsequent act of conversion. In *Ilich v R* [1987] HCA 1; (1987) 162 CLR 110 at 126, it was said that only three kinds of mistake can be regarded as fundamental: mistakes 'as to the identity of the transferee or as to the identity of the thing delivered or as to the quantity of the thing delivered'.
- Mistakes that are not 'fundamental' do not prevent a transfer of ownership: *Ilich v R* [1987] HCA 1; (1987) 162 CLR 110 at 127. An example of a non-fundamental mistake would be a mistaken belief that a payment has been made and that there is therefore an obligation to transfer the property. In such cases, theft is not committed even if the recipient is or becomes aware of the mistake. There may be a civil action for recovery of the property but that is a different matter that does not involve criminal responsibility.

8.27 Money is an exceptional category of property subject to special rules. A common law principle has developed to the effect that when money 'passes into currency', through a bona fide transaction, ownership of the money generally passes with its possession: *Ilich v R* [1987] HCA 1; (1987) 162 CLR 110 at 128, 143. This principle applies even when there has been an overpayment that would otherwise constitute a 'fundamental' mistake. The reasoning in *Ilich*, including the doubts expressed about some old English precedents, should mean that the same principle applies to all types of mistake about matters of money. The result is to limit the scope for commission of an offence of theft by subsequent conversion. However, an offence of fraudulent conversion or embezzlement may still be committed.

Fraudulent conversion and embezzlement

8.28 The offence of 'conversion' is established by SI s 278; Ki/Tu s 271. The offence must be committed 'fraudulently'. It will therefore be called 'fraudulent conversion' here, to distinguish it from theft by conversion: see above, **8.14-8.16**. In this context,

the term 'fraudulently' might be interpreted to mean something like 'dishonestly' or acting in disregard of the interests of the other person. In *Toritelia v R* [1987] SBCA 2, White P concluded that the question is whether the person 'acted deliberately in breach of his obligations in a manner prejudicing another's right knowing that he had no right to do so'. In *Peters v R* (1998) 192 CLR 493; 151 ALR 51, Kirby J said, 'I believe that the nouns "fraud" and "dishonesty", and the corresponding adverbs "fraudulently" and "dishonestly", may be used interchangeably': 151 ALR 51 at 86.

8.29 The offence of fraudulent conversion takes several forms. The broadest form is found in SI s 278(1)(c); Ki/Tu s 271(1)(c). The wording of this provision differs between jurisdictions in some respects which are not material. The Solomon Islands version reads:

Any person who - -

...

- (i) being entrusted either solely or jointly with any other person with any property in order that he may retain in safe custody or apply, pay or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof fraudulently converts to his own use or benefit or the use or benefit of any other person, the property or any part thereof or any proceeds thereof; or
- (ii) having either solely or jointly with any other person received any property for or on account of any other person, fraudulently converts to his own use or benefit or the use or benefit of any other person, the property or any part thereof or any proceeds thereof,

... shall be liable to imprisonment for seven years.

Other parts of the section deal with conversion in specific settings: sub.s (1)(a) applies to anyone holding a power of attorney for the sale or transfer of land; sub.s (1)(b) applies to directors, members or officers of body corporates in their dealings with corporate property.

8.30 Closely related to fraudulent conversion is the offence of embezzlement by a clerk or servant under SI s 273(a)(ii), (b)(ii); Ki/Tu s 266; (a)(ii), (b)(ii). 'Embezzlement' is not defined. However, the offence in SI s 273; Ki/Tu s 266 can be committed in either of two ways: by stealing; alternatively, by 'embezzling'.

Any person who - -

...(ii) fraudulently embezzles the whole or any part of any chattel, money or valuable security delivered to or received or taken into possession by him for

or in the name or on the account of his master or employer...
...shall be liable to imprisonment for fourteen years.

In this context, 'embezzles' appears to mean the same as 'converts'.

8.31 The provisions of SI s 278(1)(c); Ki/Tu s 271(1)(c) apply to two types of cases which have been problematic for the law of theft because of the principle that ownership of money passes with its possession: see above, **8.25**.

- Paragraph (c)(i) covers cases where property is given with a direction as to what is to be done with it. For example, one person may give money to another to make a particular purchase on his or her behalf.
- Paragraph (c)(ii) covers cases where property is given to one person with intent that it be passed on to someone else. For example, the purchaser of goods in a shop typically intends the money to go to the owner of the business, even when the money is initially paid to a shop assistant.

8.32 At common law, 'conversion' involves 'a dealing with the thing said to be converted in a manner inconsistent with the owner's right in the thing': *Ilich v R* [1987] HCA 1; (1987) 162 CLR 110 at 115-5, 124. It cannot therefore be committed by a person to whom ownership has passed. However, SI s 278(1)(c); Ki/Tu s 271(1)(c) appear designed to bypass the effect of this principle by deeming that the scenarios constitute conversion.

8.33 Many cases of fraudulent conversion or embezzlement will also be cases of theft by conversion. However, the scope of the offences of fraudulent conversion and embezzlement is broader for several reasons.

- First, the offences appear designed to bypass the question of whether ownership may have passed to the recipient of the property, in the same way that some jurisdictions have extended the offence of theft to cover these types of cases: see above, **8.25**.
- Secondly, the offences do not require any physical dealing with the property. See, for example, *R v Davenport* (1954) 38 Cr App R 37, at 41-42. In that case, a company secretary received blank cheques from the company, with the understanding that he would fill in the name of a proper payee. Instead, he inserted the name of a creditor of his own. The creditor presented the cheques at his own bank, the payment was made and the company's bank account was debited. The company secretary was initially convicted of larceny of the company's money. That conviction was quashed on the ground that and there was no dealing with the company's money: the money paid to the creditor was the bank's money. However, it was suggested that the loss to the company because of the debit involved fraudulent conversion.

- Thirdly, these offences do not require intention to permanently deprive the owner of the property, which is the distinctive fault element of theft by conversion: see above, **8.17-8.21**. Suppose that someone is entrusted to look after property such as a building or a vehicle for a period of time, and rents out that property for his or her own benefit without the consent of the owner. Renting out might be regarded as a form of conversion similar to selling the property: both involve assuming the rights of an owner. Theft of the property by conversion would not be committed because there would be no intention to permanently deprive the owner. Fraudulent conversion of the property, however, would be committed. In such a case, there might also be theft or fraudulent conversion of the rental income. However, that would depend on the offender not having been given its ownership: see above, **8.22-8.27**.

Robbery

8.34 The offence of robbery is not defined in the Penal Codes. It is usually understood to involve theft coupled with the use or threat of violence against a person, immediately beforehand or afterwards, with intent to commit the theft or to escape from the scene. It is therefore a compound offence, involving theft coupled with an assault. The violence will usually be against the victim of the theft but it can be directed to any person including, for example, a third party who attempts to prevent the robber escaping.

8.35 The Penal Codes establish two grades of robbery, related to the seriousness of the violence.

- Robbery is punishable by up to life imprisonment under SI s 293(1); Ki/Tu s 286(1) when a person:

being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob, any person; or
 robs any person and, at the time of or immediately before or immediately after such robbery, uses or threatens to use any personal violence to any person

- A case of simple robbery, without any of the specified aggravating features of sub-s (1), is punishable by up to 14 years' imprisonment: SI s 293(2); Ki/Tu s 286(2).

8.36 In the first category of robbery, cases where theft is intended but not

accomplished are covered by the inclusion of 'assault with intent to rob'. Cases where the violence is less serious are addressed by the separate offence of assault with intent to rob, which is punishable by up to five years' imprisonment: SI s 293(3); Ki/Tu s 286(3). There are also offences relating to demanding things with menaces, which could apply if threats are made but an assault is not committed: SI ss 294-295; Ki/Tu ss 287-288.

8.37 Each physical part of a robbery has a fault element in the form of intention. Theft requires an intention to permanently deprive the owner of property. Moreover, the violence must be intentional or at least reckless in order to constitute an assault: see **6.18-6.21**.

Breaking and entering

8.38 There are several offences in the Penal Codes relating to the commission or intended commission of offences classified as 'felonies' in buildings. 'Felonies' are offences declared to be such: SI/Ki/Tu s 4. They include theft, which is the most commonly committed offence in cases of breaking and entering. However, the scheme covers serious offences against the person, such as rape and causing grievous harm, as well as offences against property.

8.39 'Breaking and entering' is a key concept for these offences. 'Breaking and entering' is defined in complex terms in SI s 297; Ki/Tu s 290.

A person who breaks any part, whether external or internal, of a building, or opens by unlocking, pulling, pushing, lifting or any other means whatever, any door, window, shutter, cellar flap or other thing intended to close or cover any opening in a building, or an opening giving passage from one part of a building to another, is deemed to break the building.

A person is deemed to enter a building as soon as any part of his body or any part of any instrument used by him is within the building.

A person who obtains entrance into a building by means of any threat or artifice used for that purpose, or by collusion with any person in the building, or who enters any chimney or other aperture of the building permanently left open for any necessary purpose, but not intended to be ordinarily used as a means of entrance, is deemed to have broken and entered the building.

Under this definition, it is not always necessary that there be an actual 'breaking'. A person can 'break' a building by entering in some way other than by simply passing

through an intended means of entrance. Thus, it is a 'breaking' to enter by opening a door or window but not by simply walking through an already open door.

8.40 The offences cover different types of connection between breaking and entering and the commission of an offence, and different circumstances.

- SI s 299; Ki/Tu s 292 creates an offence called 'burglary' which is concerned with breaking and entering dwelling-houses by night. It is burglary to break and enter with intent to commit an offence, to break out after having entered with intent to commit an offence, and to break out after having committed an offence.
- SI 300; Ki/Tu s 293 makes it an offence to break and enter a range of buildings, including a dwelling-house, shop, warehouse or office, and commit an offence therein, or to break out having committed an offence therein.
- SI s 301; Ki/Tu s 294 makes it an offence to break and enter a range of buildings, including a dwelling-house, shop, warehouse or office, with intent to commit an offence therein. It also makes it an offence to enter a dwelling-house by night with intent to commit an offence therein, even if there is no breaking.
- SI s 302; Ki/Tu s 295 creates an offence of being found by night in possession of housebreaking instruments, being masked or disguised with intent to commit an offence, or being in any building with intent to commit an offence.

8.41 These offences fall into two main groups.

- One group of offences focuses on breaking and entering buildings with intent to commit an indictable offence: SI ss 299(a), (b)(i), 301; Ki/Tu ss 292(a), (b)(i), 294. Like stealing, these are offences of ulterior intent, meaning that the commission of an offence inside lies beyond what has to be proved and need not actually have occurred.
- Another group of offences focuses directly on the commission of offences in buildings after having broken and entered them or before breaking out of them: SI ss 299(b)(ii), 300; Ki/Tu ss 292(b)(ii), 294. These are not offences of ulterior intent. The commission of an offence must be proved to have occurred. On the other hand, the entry need not have been made with any particular intent.

Obtaining by false pretences

8.42 It is an offence to use a false pretence to obtain property with intent to defraud the other person: SI s 308(a); Ki/Tu s 301(a). The offence extends to obtaining for oneself or for another person.

Any person who by any false pretence — (a) with intent to defraud, obtains from any other person any chattel, money or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person... shall be liable to imprisonment for 5 years.

It is also an offence to use a false pretence or any other fraud to obtain credit, with liability to two years' imprisonment: SI s 309(a); Ki/Tu s 302. This would include obtaining access to a facility or service without paying or on favourable terms.

8.43 'False pretence' is defined in SI s 307; Ki/Tu s 30:

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

The representation must be of a matter of existing fact. It must not only be false but must also be known by the person to be false or not believed to be true.

- A representation known to be false is intentionally made.
- A representation not believed to be true is made with foresight of the risk that it may be untrue and is therefore made recklessly.

The fault element of the offence is therefore either intention or recklessness.

8.44 The false pretence must be made 'with intent to defraud'. It is sometimes said that to defraud ordinarily means to deprive a person dishonestly: see, for example, *Peters v R* (1998) 192 CLR 493; 151 ALR 51. *Peters* involved a charge of conspiracy to defraud under Australian Commonwealth law. In *Peters*, Kirby J went so far as to say, 'I believe that the nouns "fraud" and "dishonesty", and the corresponding adverbs "fraudulently" and "dishonestly", may be used interchangeably: 151 ALR 51 at 86

8.45 The offence of obtaining property by false pretences covers transfers of either possession or ownership, although its main relevance under the Penal Codes is in cases where ownership has been obtained. The offence has played an important role in overcoming some of the historical limitations on the offence of theft. The use of deception to induce the transfer of property, either of its possession or its ownership, did not traditionally amount to theft, even though subsequent disposition of the property might have amounted to theft by conversion if all that was transferred was possession. In most jurisdictions, the only relevant offence for the deception was an offence like obtaining by false pretences. In Solomon Islands, Kiribati and Tuvalu, however, obtaining possession by a trick is also theft under SI s 258(2)(a)(i); Ki/Tu s

258(1)(a)(i). The main role of the offence of obtaining by false pretences is therefore in cases where ownership has passed.

Receiving

8.46 When stolen property is passed on to another person, that person may commit the offence of receiving: SI s 313(1); Ki/Tu s 306(1).

Any person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour, is guilty of an offence of the like degree (whether felony or misdemeanour) and shall be liable —

- (a) in the case of felony, to imprisonment for 14 years; and
- (b) in the case of misdemeanour, to imprisonment for 7 years.

SI s 314; Ki/Tu s 307 creates a similar offence for property stolen or otherwise unlawfully obtained outside the jurisdiction.

8.47 The offence of receiving may be committed with respect to property obtained by ‘misdemeanours’ such as fraudulent conversion or obtaining by false pretences as well as property obtained by theft, which is a ‘felony’ in most of its forms but a misdemeanour in others. The historical terms ‘felony’ and ‘misdemeanour’ have no contemporary significance except where the distinction is incorporated in a specific provision. Their retention in SI s 313(1); Ki/Tu s 306(1) introduces unnecessary complexity.

8.48 A receiver must have acted ‘knowing’ the property to be stolen. The offence cannot be committed inadvertently, even with negligence. It also cannot be committed recklessly, in the sense of with awareness of a risk that property is stolen. ‘Knowing or believing’ requires greater confidence. Provision is made in SI s 317; K/T s 310 for knowledge to be proved in certain special ways: by proof that other stolen property had been in the possession of the defendant in the 12 months preceding the offence charged or by proof that the defendant had been convicted of an offence involving fraud or dishonesty in the five years preceding the offence charged.

8.49 The significance of requirement for knowledge may be lessened if the law of receiving is taken to incorporate the doctrine of wilful blindness. This is a common law doctrine, under which a person who was suspicious of something, and chose not to make further inquiries in order to avoid learning an uncomfortable truth, is deemed to have knowledge of the matter. In the Canadian case of *R v Briscoe* [2010] 1 SCR 411,

2010 SCC 13 at [210], it was said:

The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries.

The doctrine has a long history in the law of receiving, although its current status is questionable. In *Pereira v DPP* (1988) 192 CLR 597; 82 ALR 217, the High Court of Australia broke with tradition and ruled that, although suspicious circumstances may provide a basis for inferring knowledge, wilful blindness cannot be substituted where knowledge is required but cannot be proved. *Pereira* was a case about drugs offences and the implications for the law of receiving were not discussed. Nevertheless, its reasoning has subsequently been applied to receiving: see, for example, *R v English* (1993) 10 WAR 355. It remains to be seen whether Pacific courts will follow this reasoning or will accept the traditional view that wilful blindness is equivalent to knowledge.

Arson, destruction and damage

8.50 ‘Wilful and unlawful’ destruction of or damage to property is subject to penalties ranging from 2 years’ to life imprisonment, depending upon the kind of property involved and the mode of destruction or damage. There are a variety of offences in the Penal Codes and only the main ones will be discussed here.

8.51 A basic offence of destroying or damaging property is created by SI s 326(1); Ki/Tu s 319(1):

Any person who willfully and unlawfully destroys or damages any property is guilty of an offence...

Kiribati has now inserted into s 319(1) the additional words, ‘whether belonging to himself or another intending to destroy or damage such property, or being reckless as to whether such property would be destroyed or damaged: Penal Code (Amendment) Act 1999’.

8.62 Under SI s 326(1); Ki/Tu s 319(1), there is ordinarily liability to imprisonment for two years. However, there are increased penalties for various categories of property: SI s 326(2)-(7); Ki/Tu s 319(2)-(7). Liability extends to life imprisonment if the property is a building or vessel, the injury is caused by an explosion, a person is inside, and the person’s life is endangered: SI s 326(2); Ki/Tu s 319(2).

8.53 Special provision is made for destruction or damage by fire, with severe penalties.

- SI s 319; Ki/Tu s 312 is entitled 'Arson' and covers setting fire to certain categories of property, including buildings and vessels. The maximum penalty is life imprisonment.
- SI s 320; Ki/Tu s 313 is entitled 'Attempts to commit arson'. It covers attempting to set fire to the specified types of property and also setting fire to anything where the fire is likely to spread to any of the specified types of property. The maximum penalty prescribed is 14 years' imprisonment.

8.54 Arson is not committed by a person who fails to put out a fire. The Penal Codes do not impose liability for failing to prevent destruction of or damage to property. The general duty-creating provisions in SI ss 210-214; Ki/Tu ss 203-207 are concerned with the protection of persons but not property. It therefore seems that offences relating to destruction of or damage to property cannot be committed by omission.

8.55 For each of the offences relating to destruction of or damage to property, the defendant must have acted 'unlawfully'. 'Unlawfulness' in relation to these offences is not defined. Presumably, it covers harm to the property interests of another person, unless the action is reasonably necessary to defend or protect either persons or property from injury. Thus, a lessee or a part owner can act unlawfully in destroying or damaging property. A person may even act unlawfully in relation to property which is exclusively their own if the act is done with intent to defraud. For example, a person setting fire to their own property in order to collect insurance money would act unlawfully.

8.56 Most of the offences also require the defendant to have acted 'wilfully'. This term is not defined but has been the subject of case-law: see **4.68**. In *R v Lockwood; Ex parte Attorney-General* [1981] Qd 4 209, the court concluded that 'wilfully' encompasses both intentionally and recklessly in the sense of there being foresight that injury to property is likely to result. Common law principles of criminal responsibility were invoked to justify this interpretation. It is a general principle of criminal responsibility at common law that the conduct must have been intentional or at least reckless: see *He Kaw Teh v R* (1985) 157 CLR 523; 60 ALR 449. It was said in *Lockwood* that 'wilfully' is an ambiguous word and therefore it is permissible to consider the common law on liability for recklessness in its interpretation. This interpretation has been expressly adopted in Kiribati, though the insertion into s 319(1) of the additional words, 'intending to destroy or damage such property, or being reckless as to whether such property would be destroyed or damaged': se **8.51**.