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CRIMINAL AND CIVIL ASPECTS

OF BRIBERY

BY

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ABSTRACT

The purpose of this work is to identify legal action which may be taken against parties to bribery in the fields of criminal and civil law. In particular, the element of mens rea is investigated with regard to criminal corruption. On the civil side, the principal, who has been the victim of bribery, has various remedies against the parties to the bribe. These remedies are analysed with special reference to the influence of English law on the South African law in this field. The options open to the principal, where his agent has made a secret profit which does not amount to bribery, are also considered.

SUMMARY

This work is divided into two main parts, namely, bribery in the criminal and civil law.

The element of mens rea is investigated in the section on criminal law which deals with common law bribery and statutory corruption in terms of the Prevention of Corruption Act 6 of 1958. Some comparisons are drawn between this legislation and the common law. A case is made out for the retention of the requirement that under the common law the briber must intend to secure a benefit for himself when offering or giving the bribe. This intention to benefit, however, forms no part of the briber's mens rea in statutory corruption.

The investigation of the mens rea requirement is continued in an analysis of the meaning of the word "corruptly" in the Prevention of Corruption Act. It is submitted that "corruptly" must be seen in the context of mens rea rather than unlawfulness. If this is correct, "corruptly" does not simply convey the requirement of intention. A special intent is envisaged. Both parties to the bribe must intend to breach the relationship of trust which exists between the principal and the agent. A comparative study of American law on corruption is used to support this contention.

Finally, the relevance of the briber's mens rea is considered when dealing with the liability of the bribee under the common and statute law. It is submitted that, before there can be a conviction of the bribee, it is unnecessary to prove that the briber intended the bribe to operate as an inducement and that the bribee was aware of such an intention when he accepted the gift. Nor is it necessary to prove that the bribee believed that the briber intended that the bribe should operate as an inducement. It is submitted that the State need simply prove that the bribee acted with the requisite corrupt intent.

Turning to the civil law, the legal relationship between the principal, agent and third party is considered where the agent has accepted a bribe or secret profit from the third party. The terms "principal" and "agent" are used in a broad context. Where a fiduciary relationship exists between two parties, the possibility of bribery may arise. A distinction between a secret profit made by an agent which does not amount to bribery and a straight bribe is drawn. It is submitted that the key to such a distinction lies in the fact that in the case of bribery, when giving the bribe, the third party must intend to induce the agent to act in his favour in a transaction between himself and the principal, whereas no such intention to induce is

present where the agent makes a secret profit which does not amount to bribery. Once a fiduciary relationship is proved between the principal and the agent then any secret profit or bribe received by the agent may be claimed by the principal.

Where an agent has accepted a bribe from a third party, any contract which the agent has entered into on behalf of his principal with the third party is voidable at the instance of the principal. Unlike English law where the principal may rely on fraud as a cause of action when he elects to resile from his contract with the third party, in South Africa the fact that the agreement was secured by wrongful conduct, namely, bribery, entitles the principal to rescind his contract with the briber. Certain irrebutable presumptions in English law, which assist the principal in proving bribery, do not form part of South African law. Since bribery is a delict, the briber and bribee are jointly and severally liable to the principal for damages he has suffered as a result of the bribe. In South African law the principal's claim for damages is not mitigated by the recovery of the bribe. However, in English law, the principal's claims for the bribe and damages lie in the alternative only. It is submitted that the English approach is to be preferred.

In both English and South African law the principal may cancel his contract with an agent who has accepted a bribe or secret profit. In addition, an agent under South African law will forfeit his commission. It is submitted that this forfeiture is too harsh where an agent has made a secret profit which is not a bribe. In this regard the English law is to be preferred where there is authority for the view that an agent, who has innocently received a secret profit, is entitled to his remuneration. It is submitted that all expenses properly incurred by the agent in the scope of his agency may be deducted from the secret profit or bribe which the principal seeks to recover.

In conclusion, it is submitted that despite the uncertainty which surrounds some of the civil remedies available to a principal, whose agent has been bribed or has made a secret profit, this branch of the law should be permitted to develop through the common law without resorting to legislation.

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CHAPTER 1

THE ELEMENT OF MENS REA IN THE COMMON LAW DEFINITION OF BRIBERY.

A. SOURCES OF COMMON LAW BRIBERY.

The modern South African law of bribery is the focal point of this work. In particular the mens rea of both parties to a bribe will be concentrated upon. Such a study would be incomplete without a reference to the early Roman law and Roman-Dutch law sources which have influenced the law of bribery as it exists in South Africa today. It is unfortunate that bribery enjoyed little attention from our old writers, it being observed by Rabie JA in reference to such authors¹

"by wie daar oor die geheel eintlik teleurstellend min te vind is oor die misdaad wat ons onkoperij noem"

(a) Roman law

The XII Tables made provision for the death penalty where a judge or arbitrator received money in the determination of a case.² The Lex Sempronia of 123 BC, the Lex Iudicialia of 70 BC and the Lex Julia Repetundarum of 55 BC were introduced in an attempt to stem the tide of corruption

1. S v Gouws 1975 (1) SA 1 (A) at 10G.
 2. Van Leeuwen 263.

which was apparently rife in Republican times.¹

The thrust of the leges was aimed at judicial officers who accepted bribes. The Lex Julia contemplated corruption in both civil and criminal proceedings.² Other features which emerge from the Roman law on bribery are that gifts of modest value to officials were lawful (hence the bribee must have acted unlawfully); gifts could be in the form of money or property; the action in return for the bribe need not fall within an official's defined duties as all that was necessary was action or inaction in an official capacity.³

There is little to be found on the requirement of mens rea. Intention is touched on in the context of an attempt in the following passage:⁴

"No person shall think that there is a difference between an attempted and an effectuated act of corrupt solicitation since the laws punish by the same penalty both the crime and the intention to commit the crime".

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1. Kelly 34-37. According to Kelly, the Lex Sempronia punished those who procured the condemnation of a defendant. See also TW Bennett and KM Coleman "Tanta Licentia, Tanta Legum Contemptio" (1980) 97 SALJ 412 at 417.
 2. Kelly 37 who cites the Lex Julia quoting from D 48 11 3 and D 48 11 7. This lex eg prohibits a judge from receiving anything in return for assessing damages in a lawsuit (litem aestimandam) and handing down a judgement sounding in money (iudicium pecuniae).
 3. These principles are extracted from the following texts: D 1 16 6 3; D 48 11 8 1. For examples of acti rei under the Lex Julia see Hunt 215.
 4. The Theodosian Code 9 26 1 translated by C Pharr. This was enacted in 397.

It emerges that an attempt to secure a bribe would be penalised even although no gift exchanged hands. For the offence to be complete all that is necessary is solicitation, accompanied by the requisite mens rea.

(b) Roman-Dutch Law

It has been held¹ that the Placaaten of the States-General of the United Netherlands of 1 July 1651² and 10 December 1715³

"are generally regarded as laying down what constitutes bribing in Roman-Dutch law".

The Placaat of 1651⁴ is aimed exclusively at the briber in that it forbids⁵

"any person ... to ... give or promise ... any gifts ... to any person ... (the Placaat sets out classes of officials here) in order to obtain, or for having obtained, for themselves ... any posts, offices, benefices or dispositions in regard to any kind of matter"

The Placaat of 1715⁶ penalised both the briber and bribee.⁷

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1. Per Schreiner J in R v Chorle 1945 AD 487 at 492.
 2. GPB I 401.
 3. GPB V 686.
 4. GPB I 401.
 5. This is a summary of the 1651 Placaat as translated in S v Benson Aaron (1893) Hertzog 125 at 130-131.
 6. GPB V 686.
 7. S v Gouws 1975 (1) SA 1 (A) 11D-E.

Officials were admonished to discharge their functions with honour and duty without allowing themselves to be corrupted by gifts.¹ Further, all persons were prohibited from giving officials gifts in order to obtain for themselves or others certain advantages.²

An additional method in countering bribery was the obligation placed on certain officials to declare upon oath that they have not and will not allow themselves to be corrupted by gifts.³ If this oath of purgation was transgressed then the offender would be guilty of perjury.⁴

A survey of Roman-Dutch law on bribery reveals that its ambit was very wide.⁵ A wide category of officials could be penalised.⁶ The bribe could take various forms. The selling of offices was regarded as a species of bribery.⁷ The timing of the favour was irrelevant as long as it could be related to the bribe received or promised.⁸

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1. R v Sacks 1943 AD 413 at 420.
 2. R v Sacks (*supra*) at 421.
 3. Van Leeuwen 263.
 4. Van der Linden 236-237.
 5. Hunt 216.
 6. R v Sacks 1943 AD 413 at 420.
 7. Huber 7 6 17 9; 6 17 11.
 8. R v Chorle 1945 AD 487 at 492.

The type of service in return for the bribe need not fall within the scope of the official's duties,¹ nor need it be in conflict with such duties.²

(c) The reception of Roman-Dutch law in the South African common law of bribery

The starting point is to establish the standing in South African law of the two Placaaten of the States General of the United Netherlands of 1 July 1651³ of 10 December 1715.⁴

As far as the Placaat of 1651 is concerned, it is settled that it forms part of the South African common law.⁵ General statutes of Holland prior to 1652, the year of Dutch settlement in the Cape, were received in South Africa as part of the Roman-Dutch law.⁶

Different considerations apply to the Placaat of 1715. Without positively deciding the matter, the Appellate Division in R v Sacks⁷ intimated that this Placaat was also part of South African law. The court accepted the

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1. R v Chorle (*supra*) at 496.
 2. Hunt 217 submits that the 1651 and 1715 Placaaten are wide enough to cover cases where an official has been bribed to do his duty.
 3. GPB I 401.
 4. GPB V 680.
 5. R v Sacks 1943 AD 413 at 422.
 6. Hahlo and Kahn 14-15 who cite R v Harrison and Dryburgh 1922 AD 320 at 336.
 7. 1943 AD 413 at 422.

proposition that all ordinances passed by the States General, which were not of purely local application, applied to the Cape as well. Tindall J went on to hold that:¹

"The Placaat of 1715 was passed by the States-General and it is obviously one of general and not merely local application."

In the later case of R v Chorle,² Schreiner J affirmed³

"that whatever acts the Placaats penalised are, in the absence of abrogation by disuse or modification by subsequent legislation, crimes today"

Much later, the Appellate Division decided the case of S v Gouws⁴ on the assumption that both Placaaten were part of our law. It is submitted, therefore, that the Placaat of 1715 is part of South African law today.⁵

It has been suggested that the Placaaten are regarded as having the status of common law rules in South Africa today, rather than that of statutes. Thus it has been contended by Hosten that⁶

"placaaten, although they are a type of legislation, may not be classified as statute and thus regarded as a formal source of our law. This is so because these Dutch placaaten were assimilated into South African legal practice through the agency of the common law and not as a statutory medium stricto sensu"

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1. R v Sacks (*supra*) at 423.
 2. 1945 AD 487.
 3. At 492.
 4. 1975 (1) SA 1 (A) at 11-12.
 5. This is a view shared by Hunt 217 and Snyman 314.
 6. At 264.

A practical consequence of this is that Placaaten, like common law rules, may, unlike statutory provisions, be abrogated by disuse.¹

It is submitted, however, that the better view is that the Placaaten, having been enacted by a legislative body, retain their statutory characteristics. The one exception is that Dutch, Batavian and Cape Placaaten, may be abrogated by disuse.² Save for this, it is more accurate to classify the Placaaten as statutes rather than common law rules.³ Thus the Placaaten, unless abrogated, should be regarded as statutes and interpreted as such. This conclusion has important consequences when attempting to define common law bribery.⁴

It is conceded that the two Placaaten dealing with bribery could have been more elegantly drafted. To some extent they are characterised by a want of precision which is a feature of Roman-Dutch criminal law. They are discursive in the sense that they concentrate more on penalising particular forms of conduct rather than isolating general principles which could be invoked in deciding what conduct should be punished.

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1. R v Detody 1926 AD 198.
 2. See R v Detody (supra).
 3. Hahlo and Kahn 38-41.
 4. See 10 below where the intention to benefit on the part of the briber is discussed.

It is this failing which has caused our courts, on occasions, to look to other legal systems for assistance when tackling the definition of bribery.¹ To this extent it may be said that the present common law of bribery is not purely Roman-Dutch in origin.²

It is submitted that despite the inelegant draftmanship, the Placaaten on bribery are sufficiently comprehensive to provide our courts today with a reliable formula for identifying conduct amounting to bribery. They are entrenched in our common law. The courts should avoid relying on foreign legal principles or definitions which are inconsistent with the plain meaning of the Placaaten. Difficulties have arisen where the Placaaten have been departed from.³ It is submitted that the primary obligations of the courts is to ascertain the scope of our common law bribery from the language used in the Placaaten.

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1. See eg S v Benson Aaron (1893) Hertzog 125. For the English and American definitions of bribery see 13n1 below. Hunt 217 submits that the English law definition "does not differ materially from that enunciated by Gardiner and Lansdown (1 ed 735) in 1919 and later espoused in most respects by the Appellate Division." See in this regard R v Patel 1944 AD 511 at 526 read with R v Chorle 1945 AD 487 at 492-3. With regard to the influence on South African law by the American definition, Hunt 217 suggests that "At most it has been an agent in the crystallization out of the discursive Placaaten of a fairly concise South African definition." Cf Snyman 314 who states that "English law has had no noticeable influence on the crime of bribery." It will be submitted that the influence of foreign definitions of bribery may have led to the demise of requiring the briber to have an intention to benefit from the crime. See 12 below.
 2. See Hunt 216-217.
 3. See generally the difficulties which have faced our courts in determining the scope of common law bribery which are dealt with at 11-18 below.

B. MENS REA IN COMMON LAW BRIBERY

(a) Introduction

In formulating definitions of bribery, the modern approach has been to distinguish between the briber and bribee.¹

The offence of the briber has been defined by Hunt as²

"unlawfully and intentionally offering to or agreeing to or agreeing with a State official to give any consideration in return for action or inaction by him in an official capacity."

Bribery, from the point of view of the bribee, is³

"committed by a State official who unlawfully and intentionally agrees to take any consideration in return for action or inaction by him in an official capacity."

These attempts to define bribery are, with some modifications,⁴ based upon the following composite definition of Gardiner and Lansdown⁵ which has received judicial support:⁶

"It is a crime at common law for any person to offer or to give to an official of the State, or for such official to receive from any person, any unauthorised consideration in respect of such official doing, or abstaining from or having done or abstained from, any act in his official capacity."

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1. Hunt 219 and 227; De Wet and Swanepoel 598. This approach has also been followed in s 2 of the Prevention of Corruption Act 6 of 1958.
 2. At 219.
 3. Hunt 227.
 4. The modifications relate to a reference to intention, unlawfulness, the agreeing to give, the change in word order to show that the consideration need not be given to the official himself and instead of "his official capacity" the words "an official capacity" are used. See Hunt 219n63
 5. At 1150.
 6. The definition is similar to that cited in earlier editions of Gardiner and Lansdown 1 ed (1919) 735 which was approved by Feetham JA in R v Patel 1944 AD 511 at 521 "as a sufficient working definition of the offence in question...." See Hunt 219n63 for references to other cases which endorsed this definition. Contrast, however, the qualified support in R v Chorle 1945 AD 487 at 492-493. See also S v Gouws 1975 (1) SA 1 (A) at 11B.

- (b) The mens rea of the briber with special reference to the intention to benefit from the bribe.

Controversy has followed various efforts to define bribery. It is appropriate to consider one dispute in particular as it directly concerns the requirement of mens rea. It has been suggested by De Wet and Swanepoel¹ that the briber must intend to secure a benefit either for himself or for someone else when offering or giving the bribe. In support of this proposition the Placaat of 1 July 1651² and two cases are cited, namely, S v Benson Aaron³ and R v Chorle.⁴ This approach has been criticised.⁵

Any attempt to resolve this dispute must start with an analysis of the relevant portion of the Placaat of 1651⁶ which prohibits the giving of a bribe⁷

"in order to obtain, or for having obtained, for themselves or for anyone else, directly or indirectly, any posts, offices, benefices or dispositions in regard to any kind of matter, or for the despatch thereof under any pretext whatsoever."

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1. At 598 where De Wet and Swanepoel define the crime of the briber as "die belofte tot aanbieding of gee van 'n voordeel deur iemand aan 'n amptenaar met die oogmerk die bereiking van 'n eie voordeel of voordeel vir iemand anders deur 'n pligstrydige te verrigte ... ampshandeling." (My emphasis) The underlined requirement is dealt with at 600. Note that the topic of bribery is omitted from the 3 ed of the authors' work.
 2. GPB 1 401
 3. (1893) Hertzog at 125.
 4. 1945 AD 487 at 492.
 5. Hunt 219n63 and 221; Snyman 6 LAWSA para 221.
 6. GPB 1 401.
 7. This translation appears in S v Benson Aaron (1893) Hertzog 125 at 130-131.

This should be read with the Placaat of 1715¹ which also prohibits the giving of a bribe²

" [t]o obtain or for having obtained for themselves (i.e. the donors) or for someone else, directly or indirectly, any posts, offices, advantages, concessions, remissions, judgments, resolutions, salaries or other dispositions (bestowals, dispensations?) in regard to matters of any kind, or for the expediting of these things or to obtain knowledge of any secrets."

1. The erosion of the intention to benefit element

Hunt suggests³ that it is not necessary to show that the briber intended to benefit either himself or a third party. Hence it appears from his definition that the bribe is simply given "in return for action or inaction by him in an official capacity."⁴ The intention to benefit is lost. How did this happen? Since it is accepted that the Placaaten form part of our common law,⁵ they have been the subject of judicial interpretation on occasions by our courts.⁶

In the Benson Aaron case, Morice J refused to hold that bribery under the Placaaten could only be committed when done with the object to secure an appointment. The purpose of the bribe, according to the 1651 Placaat, could be "to obtain offices or favours."⁷ The word "favours" was not restricted to appointments. Further the words "dispositions in regard to matters of any kind", which appear in the Placaat of 1715, assisted Morice J in coming to his conclusion.

1. GPB V 686.
 2. This translation appears in R v Sacks 1943 AD 413 at 421.
 3. At 221.
 4. At 219.
 5. See 6 above.
 6. See eg S v Benson Aaron (1893) Hertzog 125; R v Sacks (*supra*) at 421; S v Gouws 1975 (1) SA (A) at 11.
 7. At 131.

Roman-Dutch law of bribery was equated with the English and American law where Morice J found that the crime of bribery is not confined to the briber seeking to obtain an office in the services of the State. He held that¹

"[i]n this respect the Roman-Dutch law agrees with the law of England, for in Wharton's Law Lexicon, bribery is defined as being 'the taking by or giving to a person in a judicial or public office of any fee ... to influence his behaviour in his office, or ... to appoint another in a public position.'"

When considering the American law, Morice J continued that²

"Wharton ... says in his Treatise on Criminal Law, 9th edit., sect. 1857: 'Bribery is corruptly tendering or receiving a price for official action.'"

Regard was also had to the purpose behind the Placaaten, namely, that officials must act according to their instructions, honour, oath and duty.

It emerges that Morice J gave a wide meaning to words in the Placaaten which purport to qualify the mens rea of the briber. In particular he may have gone too far in equating the Placaaten with the American definition which does not require the briber to intend to benefit from the bribery. To this extent it may be said that the American definition of bribery is not consistent with the requirements for bribery as set out in the Placaaten. It is probably through this injudicious approval of the American

1. At 131-132. The extract of the English Law definition of bribery was taken from Wharton's Law Lexicon 9 ed by JM Lelly.
2. At 132.

definition which started the confusion surrounding the mens rea requirement of an intention to benefit.¹

In the Appellate Division case of R v Sacks,² Tindall JA confirmed that the intention of the briber was not confined to securing an appointment. Without specifically settling the scope of the briber's intention under the Placaaten, he took the view that the words "other dispositions in regard to matters of any kind, or for the expediting of these things"³ are very wide.⁴ Without defining the full scope of bribery Tindall JA came to the conclusion that the crime⁵

"includes the making of a gift to an official in order to influence him to do something in conflict with his duty."

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1. The same criticism is true if regard is had to some of the definitions of bribery in English law. Kenny 364 eg says it is an offence "to bribe or offer to bribe ... any public officer to omit to do his duty or act contrary to his duty." No intention to benefit is mentioned here. See Hunt 216 for further consideration of the English Law. However, it is interesting to note that such an intention is present in the following definition of bribery which appears in Wharton's Law Lexicon ed by J M Lilly 10 ed (1902): "A corrupt gift to any person in office or holding a position of trust, with the object of inducing him to disregard his official duty or betray his trust for the benefit of the giver." (My emphasis).
 2. 1943 AD 413 at 422.
 3. This is an extract from the Placaat of 1715 quoted at 11 above.
 4. At 421.
 5. At 423.

It is submitted that this statement does not correctly reflect the spirit of the Placaaten in that it omits a reference to the intention of the briber to benefit. Further the official does not necessarily have to act in conflict with his duty.¹

The quoted excerpt from Sack's case was criticised in R v Patel² where Feetham JA emphasised that the statement did not purport to be a comprehensive definition of the crime of bribery. The criticism, however, was directed at the requirement that the official should act in conflict with his duty. Nothing was said about an intention to benefit. Feetham JA rejected³ the proposition that the official had to act in conflict with his duty, it being sufficient to show that the gift be tendered to persuade an official to act in his official capacity.

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1. R v Patel 1944 AD 511 at 521.
 2. 1944 AD 511. In the case of Patel the accused (the briber) offered a policeman £100 if he could persuade the public prosecutor to withdraw a charge against a third party. The court held that the policeman would be acting in his official capacity in using his official status to discuss the case with the prosecutor even although the policeman was not discharging any duty officially imposed on him by law.
 3. At 521.

It was in Patel's case that reference was made for the first time in the Appellate Division to the Gardiner and Lansdown common law definition of bribery.¹ After referring to previous cases² which had accepted this definition, Feetham JA gave his qualified support by holding that it was a "sufficient working definition".³ A notable feature of this definition is the absence of an intention to benefit. To this extent it contradicts the Placaaten. This is an aspect which the courts have yet to resolve.

When the Appellate Division had to consider this common law definition again in R v Chorle,⁴ Schreiner JA had the following to say⁵:

"[T]he statement in Gardiner and Lansdown is not couched precisely in the form of a definition.... It may be said that it was intended in this summary of the scope of bribery to give effect to the view that since the crime derived from several old enactments the statement might not be exhaustive and that while persons who do the acts mentioned in the summary are guilty of the crime of bribery others may also be guilty of the crime although their acts do not fall within its terms."

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1. The definition is to be found in Gardiner and Lansdown 985 which is quoted at 9 above.
 2. R v Muller 1934 NPD 140; R v Visser 1935 TPD 296.
 3. At 521.
 4. 1945 AD 487. In the case of Chorle the accused (briber) endeavoured to bribe a building contractor to expedite the issue of a building permit. An official, other than the building contractor, approached by the accused, was in fact responsible for the issue of the permits. The court held that a conviction of the accused was in order even although the favour sought did not relate to an aspect within the contractor's legal sphere of duties.
 5. At 492-493.

Schreiner JA went on to hold¹ that the language used in the common law definition was unduly restrictive in that it was unnecessary for the State to prove that the official had acted in a matter covered by his official functions. Again the absence of an intention to benefit was not in issue. If this aspect had been raised it is doubtful whether the court would have remarked that all persons whose conduct falls within this statement on the common law are guilty of bribery. In any event the criticism reduces the attempt of Gardiner and Lansdown from a "working definition" to a "summary of the scope of bribery".²

Despite the caveat issued by Schreiner JA in Chorle's case, the Gardiner and Lansdown "summary" has been approved in a number of other cases in varying degrees.³

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1. At 496.
 2. It is suggested by Hunt 219n63 that, in response to the criticism in R v Chorle 1945 AD 487 at 492, later editions of Gardiner and Lansdown (see 6 ed (1957) 1150) substituted for the words "in the exercise of his official functions" the words "in his official capacity".
 3. Hunt 219n63 cites some of these cases, namely, R v Libala 1958 (2) PH H265 (E) at 537; S v Jack 1963 (1) PH H86 (E) at 211. See also S v Makhunga 1964 (3) SA 513 (C) at 514D, where Steyn J held that the definition appears to accord with Roman-Dutch authority. To this list may be added R v G 1959 (4) SA 39(T) at 42 where it was held that the definition was not exhaustive.

It is this approval by our courts, albeit qualified, which perhaps lends the greatest credibility to the theory that the briber need not intend to extract an advantage from his unlawful conduct. All that is necessary is for the briber to secure some action or inaction from the official if the common law definition is accepted in its present form.

It must be remembered, however, that none of these cases directly decided the issue as to whether the briber should intend to benefit from his unlawful transaction. They are instructive in the sense that they shed some light on the interpretation of certain key portions of the Placaaten when seeking to formulate a common law definition of bribery.

Nathan, one of our early writers, seems to suggest that an intention to benefit is unnecessary.¹ Apart from Hunt,² who clearly supports the notion that an intention to benefit is irrelevant, Snyman³ also feels the bribe need simply be given in return for some "action or inaction" by a State official. No reference is made of an intention to

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1. Nathan 2464 states that: "All persons who give or promise anything ... to officers ... with the intent to induce such officers ... to perform any act ... or otherwise to influence them in their official ... capacity, or with the intent to obtain any office, whether for the benefit of any person giving or promising the same or for other reasons are guilty of the crime of bribery." (My emphasis). The underlined words are wide enough to exclude an intention to benefit.
 2. At 219n63 and 221.
 3. At 314 and 316.

benefit. Further, Parliament, in enacting the Prevention of Corruption Act,¹ does not require an intention to benefit on the part of the briber.² This is consistent with the approach in other foreign legal systems.³

2. The application of interpretation rules to the Placaaten

The question to be answered is whether the State must prove that the briber intended to benefit when tendering the bribe before he can be convicted of bribery. It is hardly surprising that this issue has not come before our courts as it is apparent in most cases that the briber will have some personal advantage in mind. However, an intention to gain a personal benefit may be absent. Hunt⁴ gives the example where the briber "impelled by a purely malicious motive to foul up a section of the administration, offers officials bribes to neglect their duty." Does this amount to bribery?

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1. 6 of 1958.
 2. s 2(b).
 3. See egs 1(1) of the Prevention of Corruption Act 1906 in England which penalises any person who corruptly gives a gift to an agent as an inducement for doing an act in relation to his principal's affairs.
 4. At 221.

If the Placaaten were to be interpreted in the same fashion as a modern penal enactment, it is submitted that intended personal gain by the briber must be proved. A study of the 1715 Placaaten,¹ for example, shows that some advantage must be contemplated by the briber. In return for the bribe he must anticipate, inter alia, a post, advantage, concession or salary in his favour. These words have been described as "a number of listed advantages."² That much is clear. Towards the end of the list appears "or other dispositions in regard to matters of any kind". Although it is accepted that these words "of andere dispositien op eenigerhande saaken" are "very wide",³ the word "disposition" has been said to convey a bestowal or dispensation in a translation of the Benson Aaron⁴ judgement. Again this conveys an impression of an anticipated quid pro quo. This view is supported by the fact that "disposition" ordinarily means "the act of disposing of"⁵ or "any transfer or abandonment of rights to property".⁶

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1. The translation of this Placaat is set out at 11 above.
 2. R v Chorle 1945 AD 487 at 492.
 3. R v Sacks 1943 AD 413 at 421.
 4. (1893) Hertzog 125 at 131.
 5. The Shorter Oxford English Dictionary 3 ed.
 6. Bell's South African Legal Dictionary 3 ed (1951) by A Milne.
A disposition is defined in s 2 of the Insolvency Act 24 of 1936 as meaning: "Any transfer or abandonment of rights to property (including) a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but (not including) a disposition in compliance with an order of the court."

Even if the phrase "dispositions in regard to matters of any kind" could carry a wider meaning, which is doubted, it is submitted that such interpretation would be necessarily restricted by the eiusdem generis rule.¹ The list of words preceding this general phrase constitute a "genus" conveying the idea of a benefit. It would be proper, therefore, to confine this phrase to a meaning denoting a benefit of some kind.

Hunt, takes the contrary view, suggesting:²

"Though the Placaats specifically penalise persons whose object is their own or someone else's advantage, it is submitted that the mischief aimed at cannot be thus limited, and that the mention of animus lucrandi must not be regarded as definitive".

This line of reasoning flies in the face of basic canons of interpretation. According to the plain meaning of the language used in the Placaaten it is clear from the list of advantages cited that the briber must have intended some benefit. It is from this language that the intention of the legislation is readily ascertainable.³ It is conceded that the courts may have regard to the object and policy of

1. Cockram 220.

2. At 221n85.

3. The intention of the legislature must be deduced from the words which it has used. See Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530.

the legislature to assist in the interpretation of legislation.¹ In this case the mischief aimed at is the tempting of officials through gifts to use their opportunities to further private interests in State affairs.² It can hardly be suggested that the literal meaning of the words used in the Placaaten defeats the intention of the legislature.³

3. The penal nature of the Placaaten.

Sight must not be lost of the penal nature of the Placaaten.⁴ The action of an accused must fall directly within the ambit of the enactment as, to hold otherwise, leads to the misunderstanding that it is sufficient to bring his actions substantially within the mischief aimed at by the legislature. In this regard Lord Tomlin stated in IRC v Duke of Westminster:⁵

"The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting 'the incertain and crooked cord of discretion' for 'the golden and streight metwand of the law'."

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1. This is so, particularly where vague words are used. See S v Ziggolo 1980 (1) SA 49 (A) at 58A.
 2. R v Chorle 1945 AD 487 at 495.
 3. If it were otherwise then the literal meaning of the words may be departed from once the true intention of the legislature is established, having regard to the mischief which it seeks to curtail. See Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530.
 4. See 10-11 above.
 5. [1936] AC 1 at 19. See generally Milton and Fuller 10-13.

This approach is entirely consistent with the principle that a provision¹

"creating a criminal offence should not lightly have its penal scope extended beyond the plain meaning of its language".

It will be remembered that the above propositions rest on the assumption that the Placaaten are to be treated on the same level as penal enactments for purposes of interpretation. Again, Hunt takes the contrary view, stating²

"although the Placaats thus form the basis of common-law bribery in our law, they should on the one hand not be restrictively construed in the fashion of a modern penal statute, nor, on the other, regarded as a complete statement on the subject of common-law bribery."

For support he turns to Schreiner JA in R v Chorle.³ An analysis of the portion of the judgement, to which Hunt⁴ refers, suggests that the author has misdirected himself. Schreiner JA stated that the law in its original form (the Placaaten) is wide enough to secure protection against the mischief at which it is aimed.⁵

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1. Per De Villiers JP in R v Ackerman 1931 OPD 65 at 69.
 2. At 217.
 3. 1945 AD 487 at 496-497.
 4. At 217n44 and 217n45.
 5. R v Chorle (*supra*) 496 where Schreiner JA held that "there is no reason why the law, (the Placaaten) which in its original form was wide enough to secure that protection, should, by restrictive interpretation, be cut down to something less than is necessary to achieve its object" (My emphasis).

He criticised the common law definition of Gardiner and Lansdown which he found placed an unduly restrictive interpretation on the Placaaten. At no stage was it suggested that the Placaaten should not be interpreted along lines similar to penal enactments. The common law definition of Gardiner and Lansdown was found to be defective.

Chorle's case does, however, contain a dictum to which Hunt does not refer, which lends some colour to his statement as to how the Placaaten should be interpreted. Thus Schreiner JA held obiter that¹:

"It may not be possible to affirm that no conduct that cannot be brought within² the language of the Placaats amounts to bribery"

Regarding this somewhat tentative dictum, Schreiner JA appears to have adopted a different approach some ten years later when he had the following to say on the topic of common law crimes in Roman-Dutch law³:

"There should if possible be a high degree of rigidity in the definition of crimes; the more precise the definition the better Without wishing in the least to detract from the importance of elasticity or capacity for growth in wide areas of our legal field, I do not think that the definition of a crime is such an area. If there are acts similar to theft which should be punished the Legislature must intervene [I]t is not for the Courts to create new crimes; nor is it for the Courts to give an extended definition to a crime in order to provide a new protection for property, even if modern conditions indicate that in some instances such protection might be desirable."

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1. At 492.
 2. Schreiner JA went on to affirm that, subject to certain qualifications, any acts penalised by the Placaaten are punishable as bribery today.
 3. R v Sibiya 1955 (4) SA 247 (A) at 256-257. Note also the views of Snyman 33-34.

It is submitted that this approach of the Appellate Division must be preferred to that adopted by some divisions of the Supreme Court where criminal conduct has been defined by relying on broad principles rather than the precise language used in enactments.¹ This submission is supported in S v Von Molendorff² where Ackermann J held that:³

"While it is true that during the nineteenth and early twentieth centuries the South African Courts exercised what was tantamount to a legislative function in criminal matters, it is now generally accepted that our Courts should not actually create new offences [T]he definitions of the common law and statutory crimes should be reasonably precise and settled [I]f there is a doubt as to whether particular acts are covered by the definition of a common law crime, the accused ought to be given the benefit of the doubt."

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1. See eg S v Burger 1975 (2) SA 601 (C) at 616G where Baker J held that: "Die beginsels soos in die gewysdes uiteengesit, is wat belangrik is, nie die spesifieke voorbeelde van die misdad regsverdeling wat ek genoem het nie. Die gereg groei en ontwikkel met die verloop van tyd; hy staan nie stil nie. Sedert die tyd van die Romeins-Hollandse skrywers het daar groot ontwikkelinge plaasgevind op die gebied van die strafreg." See also S v J 1980 (4) SA 113 (E) at 116 where Smalberger J stated that: "When the mischief which it is sought to punish is present the natural development of the law should not be stifled, but should be extended to embrace such mischief where this can be done without any unnecessary stretching of the limits of the offence, and without departing from well defined and clearly recognised principles of Roman-Dutch law."
 2. 1987 (1) SA 135 (T).
 3. At 169-170. The minority judgements of Burger J in S v Burger (supra) at 621A and Howie J in S v J (supra) at 118H are consistent with the approach adopted by Schreiner JA in R v Sibiya 1955 (4) SA 247 (A).

It is submitted that the clear language of the Placaaten stipulates that the briber must give the bribe with the intention of securing a benefit. The Placaaten should be treated as penal enactments for purposes of interpretation. Any attempt to construe the Placaaten in order to neutralise the element of intention to benefit is improper. The following caveat issued by Tindall AJP should be observed¹

"The Court must be careful not to extend this crime beyond its limits according to the Roman-Dutch law."

4. The scope of the briber's intended advantage.

If it is accepted that the Placaaten require an intention to benefit from the bribe, the next enquiry is to establish the scope of the intended advantage. Should it be limited to a pecuniary or proprietary benefit, or may it be given a wider meaning so as to embrace other advantages? Some of the words in the Placaat of 1715² do have a distinct proprietary connotation, for example, "posts", "salaries" and "dispositions". On the other hand, words like "concessions", "remissions", "judgements" need not necessarily embrace monetary gain. They could relate to matters of status, freedom, or administrative action where the advantage sought is unrelated to financial or proprietary gain. The words "any advantages" per se

1. R v Sharp 1935 TPD 418 at 421.

2. The relevant portion of this Placaat is quoted at 11 above.

are wide enough to include benefits which need not necessarily be of a temporal kind.¹

It follows that the test for determining the existence of an advantage is subjective and not objective. The briber must have intended that a benefit would accrue to him when bribing the official. It matters not if the anticipated advantage is illusory. The objective value of the advantage is irrelevant. The advantage anticipated may be of sentimental value to the briber yet worthless to others. Further, the value anticipated through the intended advantage may be actual or potential.

The majority judgements in S v Munyani² and S v J³ lend some support for this approach. Both cases dealt with the common law crime of extortion. The issue canvassed was whether the advantage extorted was wide enough to embrace non-patrimonial benefits. After considering the definition of "advantage" as amounting to "money, property or some valuable thing," it was decided that these words were sufficiently wide to embrace non-patrimonial benefits.

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1. Hunt 227 lists some of "corrupt services" sought. The following anticipated advantages taken from this list prima facie illustrate that the advantage sought need not be patrimonial: (i) the non-initiation of criminal proceedings (R v Charteris (1904) 21 SC 440 and R v Christopher 1945 (2) PH H258 (N)); (ii) the withdrawal by the public prosecutor of a criminal charge (R v Patel 1944 AD 511); (iii) the advance disclosure of the contents of examination papers (R v Visser 1935 TPD 296); (iv) the release of a prisoner from gaol (R v Mapele 1928 OPD 185).
 2. 1972 (1) SA 411 (RAD).
 3. 1980 (4) SA 113 (E).

This approach has been disapproved of by Ackermann J in the recent case of S v Von Molendorff¹ where the appellant, who was a policeman, threatened the complainants with detention in order to induce them not to lay a charge of assault against the appellant. Since the advantage which the appellant attempted to extort was not a proprietary or pecuniary one, the crisp question which Ackermann J had to consider was whether the advantage extorted is limited to a proprietary benefit²

"or whether its ambit is wider and includes the extortion of non-patrimonial benefits."

After a careful review of the old authorities on the subject, Ackermann J concluded that the benefit required for extortion was limited to a patrimonial one.³ He found that legal principle did not permit a wider interpretation of advantage.⁴ It was wrong to emphasise the element of intimidation as there is a "danger of whittling down the other element of advantage to the extorter almost to vanishing point."⁵ If "advantage" were to be given an

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1. 1987 (1) SA 135 (T).
 2. At 161E.
 3. At 166I.
 4. At 170E.
 5. At 168E where Ackermann J relies on an example from the dissenting judgement of Lewis JA in S v Munyani 1972 (1) SA 411 (RAD) at 424F.

extended meaning, difficulties arise when limiting its ambit.¹ It is improper to interpret a penal provision by giving words an extended meaning in order to "cover crimes ... of a kindred nature."²

Whereas these dicta may carry some weight when dealing with extortion, they are not necessarily relevant to the field of bribery. It is apparent that the advantage perceived by the extorter is based on a definition which is substantially narrower than the sister Placaaten dealing with bribery.³ No undue emphasis is placed on any element of bribery when arguing to give "advantage" a wide meaning. It is, however, conceded that once "advantage" is construed in a wide sense, then difficulties may arise in deciding its ambit.⁴

5. Why the intention to benefit element should be retained.

It must be remembered that the Appellate Division approval of the common law definition is guarded.⁵ The court has shown that it is prepared to depart from the definition where it is inconsistent with the Placaaten. It has never been regarded as an authoritative definition. It has been described as a summary of the scope of bribery which "might

1. At 168-169. This aspect is considered at 30 below.
 2. At 169-170.
 3. Compare the wording of the Placaaten at 11 above with the words describing advantage in extortion at 26 above.
 4. See 32 below.
 5. See 16 above.

not be exhaustive."¹ Even in more recent times, this summary has not been elevated higher than the level of a "working definition."² Nor must it be forgotten that the requirement that the briber must intend to benefit has never been raised in our courts. To this extent, it may be argued that the part of the working definition which neutralises this intention to benefit requirement has been approved of obiter only. It may well be that once the court has heard full argument on this question it will again jettison the Gardiner and Lansdown definition in favour of the clear language of the Placaaten.

Our courts have not held specifically that the intention to benefit is not part and parcel of the Placaaten. Rules of interpretation are invoked to neutralise the intended benefit requirement. Rules, it has been submitted,³ which cannot be relied upon in that the language of the Placaaten is perfectly clear.

Those against the requirement of an intention to benefit argue that the object of the legislature would be unnecessarily restricted by insisting on an intention to benefit.⁴ But is this so?

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1. R v Chorle 1945 AD 487 at 492-493.
 2. S v Gouws 1975 (1) SA 1 (A).
 3. See generally 18-21 above.
 4. See eg Hunt 221n83.

Firstly, it is apparent that circumstances which permit a briber to argue that he lacked the necessary intention to benefit from his corrupt transaction will be very rare indeed. Little wonder that this issue has yet to be raised in our courts.

Secondly, it has been noted that the intention to benefit is extremely wide.¹ The objective value of the advantage is immaterial. Couple the subjective test for such intention with the view that the briber will invariably intend some advantage to accrue, one is left with an element of the offence which has considerable scope.

There may be difficulty in deciding how far the intention to benefit extends. This aspect was referred to in S v Von Molendorff² by Ackermann J as follows:³

"A difficulty I have with giving an extended meaning to the requirement of benefit is that there does not appear to me to be any way of sensibly limiting its ambit.... Whereas it is possible to apply the de minimis rule to patrimonial offences and to determine whether, for example, an article stolen (is) of 'trivial or no value'... I cannot see how it can possibly be applied to a non-patrimonial benefit in the crime of extortion, where, by definition, such benefit is incapable of being valued in any pecuniary manner or judged by any objective standard."

It is accepted that by giving the concept of advantage too wide a construction could lead to some absurd results. For example, it has been argued with reference to extortion that⁴

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1. See 25-26 above.
 2. 1987 (1) SA 135 (T).
 3. At 168-169.
 4. C Rees "'Some Advantage' in Definition of Crime of Extortion" (1960) 77 SALJ 119 at 122-123.

"one obtains an advantage from another by virtue of that other person either doing something or refraining from doing something in accordance with one's wishes ... 'some advantage' ... must be taken to mean the advantage gained by the accused when his victim either does something or refrains from doing something in compliance with the accused's instructions, or, to put it differently, the advantage envisaged is the advantage gained by the accused when the victim complies with his demands."

If this argument is accepted then it would render the intention to benefit requirement colourless. Where the briber, acting out of malice or spite, bribes an official to neglect his duty, there the intention to benefit would be satisfied in that it is advantageous to the briber to persuade the bribee to follow his request. It is submitted, however, that to widen the meaning of advantage to this extent is unrealistic. Thus, again with reference to extortion, it has been held¹ that mere intimidation is insufficient to constitute this offence. The intimidation must be directed to the purpose of extorting some advantage. In this regard it has been said²:

"Intimidation resorted to simply to satisfy some sadistic whim is, therefore, not extortion. The extorter must intend to obtain some advantage or benefit from the intimidation."

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1. S v Munyani 1972 (1) SA 411 (RAD).
 2. Per Beadle CJ S v Munyani (*supra*) at 419R-C In coming to this conclusion, the judge relied on Voet 47 13 1 who wrote: "If fear has been instilled of ... future danger which threatens from private persons and is to be inflicted ... by private persons, for instance the fear of death ... the action based on fear is indeed available on that account, though there is no judicial proceeding based on extortion."

There can be little doubt that the concept of a patrimonial advantage is more practicable than the idea of a non-patrimonial benefit. Yet it would be unwise to over-stress this difficulty. The wording of the Placaaten is sufficiently clear to convey the intention that the advantage need not be confined to value in a pecuniary sense.¹ Once this is accepted, then the intention so conveyed should be supported, despite the fact that difficulties may be encountered in assessing the precise scope of the benefit sought by the briber. To ignore such an intention or to completely discount the words in the Placaaten, which encompass the advantage requirement, would amount to an unacceptable breach of interpretation rules.

The fact remains that, wherever the line is drawn, the element involving an intention to benefit is wide. It cannot seriously be contended that to insist on such an intention would threaten the object which the legislature had in mind when the Placaaten were enacted. In any event if such threat does eventuate, which seems remote, then Parliament, not the courts, should ensure that the mischief aimed at is properly contained.² It is submitted, therefore, that any attempt to define common law bribery must include a reference to the intention of the briber to benefit. Thus the approach of De Wet and Swanepoel³ is to be preferred.

1. See 25-26 above.
2. Snyman 33
3. At 598 and 600.

Having regard to the contents of the Placaaten, it is submitted that bribery is committed where the briber intentionally and unlawfully solicits the services of a state official in an official capacity by giving or agreeing to give or offering any consideration to the said official in order to secure or for having secured an advantage either for himself or someone else.

Thus the elements of the briber's mens rea may be summarised as follows

- (i) he must be aware that he is acting unlawfully;¹
- (ii) he must know that the bribee is a state official;²
- (iii) when offering or making the payment, he must intend to persuade the bribee to take action in an official capacity;³ and
- (iv) he must intend to secure some advantage either for himself or someone else.

(c) The bribee.

A review of the mens rea of the bribee discloses the following salient features

- (i) he must be aware that he is acting unlawfully;⁴
- (ii) he must know that he is a state official;
- (iii) he must intend to agree to take the bribe. Mens rea is lacking where the bribee is unaware that a bribe has been given to him;⁵ and
- (iv) he must see the bribe as a consideration in return for performance or non-performance by him in an official capacity. There must be a causal link in the mind of the bribee between the bribe and his action.⁶ For

1. S v De Blom 1977 (3) SA 513 (A) at 529-530.

2. R v Sacks 1943 AD 413.

3. S v Deal Enterprises (Pty) Ltd 1978 (3) SA 302 (W) at 308A.
See also Hunt 221; Snyman 317.

4. S v De Blom 1977 (3) SA 513 (A) at 529-530

5. R v Capita 1960 (3) SA 97 (O).

6. S v Gouws 1975 (1) SA 1 (A) 13-15.

example, if the official thinks that the briber is repaying a loan, there is no mens rea.¹

(d) Conclusion

Two primary sources of laws governing bribery and corruption exist side by side. The one is common law bribery, while the other is to be found in the Prevention of Corruption Act.² The Act has not supplanted the common law.³ Given the correct circumstances, it is possible for the State to elect whether it is to prosecute an offender under either the common law or Act.⁴

It has been stated that substantial similarities exist between common law and statutory bribery.⁵ Differences, however, do exist. Whereas the common law deals exclusively with the bribery of State officials, the Act makes provision for a far wider class of offenders. Not only may State officials be prosecuted under the Act, but agents representing principals in the private sector also fall under its provisions.⁶

Turning to the element of mens rea, the Act does not require that the briber should intend to benefit from

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1. Hunt 228.
 2. 6 of 1958. Hereinafter referred to as "the Act". The relevant provisions of the Act are quoted below at 37-38.
 3. Joubert 424.
 4. Hunt 233.
 5. De Wet and Swanepoel 601.
 6. S v Young 1977 (1) SA 602 (A) at 609.

the bribery.¹ The position under the common law is at least doubtful. It is submitted, however, that the intention to benefit should form part of the briber's mens rea. It follows that should the prosecuting authorities be doubtful as to whether or not the briber intended to benefit from his misconduct then the alleged offender should be charged with statutory corruption, and, in the alternative, with common law bribery. By doing so, the controversy surrounding the advantage requirement will be side-stepped.

Two further differences between the common law and the Act exist in the context of mens rea. Firstly, whereas the conduct of the briber and bribee is qualified by the word "corruptly"² in the Act, no such qualification appears in any of the common law definitions of bribery. It is a moot point whether the insertion of "corruptly" would serve a useful purpose in common law definitions of bribery in the context of the requirement of mens rea. This is a question which shall be addressed in Chapter 2³ when the statutory use of "corruptly" is interpreted against a common law background.

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1. In terms of s 2(b) of the Act it is an offence for any person to corruptly give or offer, any gift to an agent as an inducement for doing any act in relation to his principal's affairs. Note, however, that the word "corruptly" has sometimes been interpreted as meaning acting with the intention to obtain some advantage. See R v Peters 1926 TPD 268; R v Steckel 1942 SWA 22.
 2. See s.2(a) and (b) of the Act.
 3. See 37 below.

Secondly, it will be submitted in Chapter 3¹ that the courts have distinguished between the common law and the Act in the relevance to be attached to the mens rea of the briber when considering the culpability of the bribee.

Taking these differences into account it is submitted that the common law and the Act in the context of corruption are not as similar as appears at first sight.

1. See 94 below.

CHAPTER 2THE INTERPRETATION OF THE WORD "CORRUPTLY"
IN THE PREVENTION OF CORRUPTION ACT 6 of 1958.A. A SUMMARY OF THE ENGLISH AND SOUTH AFRICAN
LEGISLATION.

The wording of the South African Prevention of Corruption Act¹ is almost identical to its English counterpart.² The Act penalises any person who

- "(a) being an agent, corruptly accepts or obtains or agrees to accept or attempts to obtain from any person, either for himself or for any other person, any gift or consideration as an inducement or reward for doing or omitting to do or for having done or omitted to do any act in relation to his principal's affairs or business, or for showing or refraining from showing favour or disfavour to any person in relation to his principal's affairs or business;³
- or
- (b) corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to his principal's affairs or business;⁴

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1. 6 of 1958, hereinafter referred to as "the Act". This legislation replaces the substantially similar Prevention of Corruption Act 4 of 1918.
 2. The Prevention of Corruption Act 1906 which has been usefully summarised by Glanville Williams 848 as follows: "(1) If any agent corruptly obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any gift or consideration, or (2) if any person corruptly gives or agrees to give or offers any gift to any agent - as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs" This legislation(s 1) also penalises any person who "knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge in intended to mislead the principal"
 3. S 2(a).
 4. S 2(b).

or

- (c) knowingly gives to any agent, or, being an agent, knowingly uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead his principal."¹

It will be noticed that the adverb "corruptly" is deliberately used in the first two sub-sections. It is omitted from the third sub-section, where the word "knowingly" appears.

Since the English and South African legislation is similar, it is appropriate to seek guidance from relevant English decisions where necessary.² This is an approach followed by our courts.³ Similarly, the legislation of both countries relating to elections where the word "corruptly" appears will also be considered through the case law.⁴ Finally, reference will also be made to the use of "corruptly" in various provincial ordinances.⁵

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1. S 2(c).
 2. Osaka Mercantile Steamship Co Ltd v South African Railways and Harbours 1938 AD 146 at 173-174.
 3. See eg R v Roets 1954 (3) SA 512 (A) at 515.
 4. See eg the Electoral Consolidated Act 46 of 1946 which deals with "corrupt" and "illegal practices" at elections which may be compared with the Representation of the People Act 1949 in England.
 5. Article 78 Ord 21 of 1942 (N) and article 545 Ord 17 of 1939 (T).

B. PRACTICAL DIFFICULTIES IN DISTINGUISHING BETWEEN
CORRUPT AND INNOCENT CONDUCT.

How are corrupt and innocent transactions to be distinguished? Gifts may be given out of gratitude or to mark special occasions such as a wedding or birthday. It is customary to give porters and waiters tips. It has become established business practice to entertain prospective clients.¹ This practice receives some recognition in the Income Tax Act.² Tax relief is available to those who can show that expenditure on entertainment was incurred in negotiating business³ or incurred for the purpose of protecting an existing income.⁴ Established business practice is characterised by prospective clients being encouraged to close business deals by way of dinners or free tickets to sports events. It is a feature difficult to control. Competitors must not lag behind in the entertaining of clients for fear of losing business. Nothing prevents two principals, who do business with each other, from reciprocating in this manner.⁵ The difficulty arises where the recipient of the generosity is an agent of a principal who remains unaware of these overtures. In this context the ground for corruption is fertile.

1. S v Deal Enterprises (Pty) Ltd 1978 (3) SA 302 (W) at 310G.

2. 58 of 1962.

3. S 11(a).

4. S 11(u). See eg ITC 422 (1938) 10 SATC 331 which illustrates the type of entertainment expenditure claimed, although tax relief was refused in this particular case.

5. If a prospective purchaser of a new car gives the motor dealer R100 to be placed higher on the waiting list, he is not committing an offence. A secret payment to the dealer's manager, however, could amount to bribery. See Glanville Williams 848.

Corruption under the guise of entertainment is perhaps more insidious than the more direct form of bribery where money is paid to an agent in exchange for a favour. The public are more complacent. People are more amenable to this form of corruption as it does not appear to be particularly immoral.¹ When confronted, the parties to the bribe plead innocence, alleging that they were not aware that what they were doing was wrong. In any event they argue that it is accepted business practice with which they have to conform if they are to remain competitive.

Consider some of the following examples²

- (i) a project engineer awards a sizeable tender to a company. A week later the company invites him on an all-expenses paid shooting trip to a private game reserve. He accepts the offer;
- (ii) members of a company negotiating team accept a potential supplier's invitation to lunch;
- (iii) a company official accepts a bottle of whisky from a supplier as a Christmas gift;

1. See anonymous note "Control of Non-governmental Corruption by Criminal Legislation" (1960) 108 Univ of Pennsylvania LR 848 at 867.

2. These illustrations are extracted from L Pitt "Managerial attitudes towards corruption" being a paper delivered on 2 August 1983 at a seminar on corruption held by School of Business Leadership at UNISA, Pretoria.

- (iv) shortly after awarding a major contract, a company official and his son are invited to join the suppliers at their private box for a major rugby match. They accept the offer;
- (v) a branch manager receives a voucher for a week-end's stay at a holiday resort from a supplier as a birthday gift.

To complicate matters it does not automatically follow that every time an agent receives a secret profit he is guilty of corruption. Where such a profit is untainted by criminal corruption, civil, rather than criminal, consequences follow. This occurs, for example, where an agent in good faith mistakenly accepts a secret profit.¹

It is against this complex factual background that decisions have to be taken as to whether a particular act infringes the law on corruption. This task is not only confined to prosecutors and judicial officers. The Advocate-General has to investigate and report on complaints concerning the improper enrichment of persons at the expense of the State.² Further, auditors are obliged to report material irregularities, which include evidence of bribery, to the appropriate authorities.³

1. Hippisley v Knee Bros [1905] 1 KB 1.
2. S 5 of the Advocate-General Act 118 of 1979.
3. S 26(3) of the Public Accountants' and Auditors' Act 51 of 1951.

C. VARIOUS APPROACHES TO THE INTERPRETATION OF THE WORD "CORRUPTLY".

It is unfortunate that the practical difficulties in identifying corrupt conduct have been compounded by divergent views on how the Act is to be interpreted. The key concept in the Act is to be found in the word "corruptly". If this concept could be adequately defined, then the distinction between corrupt and innocent behaviour would become clearer.¹

There are three schools of thought as to how "corruptly" should be interpreted.

- (i) Under a colourless approach, no special intention is necessary. The intention is colourless.²
- (ii) A second school defines what "corruptly" should mean. Although the definitions vary, some colour is given to the adverb "corruptly". The definition so assigned then plays a significant role in deciding whether the Act has been infringed. The intention is no longer colourless. A special intent is required.³ Sometimes "corruptly" is used to colour unlawfulness.⁴

1. See the anonymous note "Campaign Contributions and Federal Bribery Law" (1978) 92 Harvard LR 451 at 453 where the distinction between legitimate and illegitimate campaign contributions is considered. It is suggested that everything hinges on the interpretation of "corruptly" and that "this ... alone may determine the line between guilt and innocence in many campaign contribution situations".

2. See eg R v Roets 1954 (3) SA 512 (A).

3. See eg R v Lotzoff 1937 AD 196.

4. See 73 below.

(iii) "Corruptly" has been used in conjunction with the words "as an inducement" to promote the view that the briber must intend the gift to operate as a bribe and that the bribee must appreciate that this was the intention of the briber before the bribee can be convicted.¹ Thus the recipient of a gift acts corruptly if he accepts knowing that the giver meant to induce him to act in relation to the affairs of the principal.²

This approach will be considered in detail in Chapter 3, where it will be submitted that it is not always necessary to prove that the bribee must be aware of the intention of the briber before the bribee can be convicted.³ If this submission is correct, it would be improper to give "corruptly" a special meaning in the context of the mens rea of the bribee. Even if this submission is wrong, there is a more fundamental criticism. "Corruptly" qualifies the giving and receiving of a bribe. Only the guilt of the bribee is considered.

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1. In R v Ndobe 1952 (3) SA 562 (T) at 563 the importance of the words "corruptly" and "as an inducement" were emphasised. The recipient of the gift is penalised if he knows that the giver has given the gift with the intention of inducing him to act.
 2. See R v Geel 1953 (2) SA 398 (A) at 402G where Hoexter JA held that "an agent can only receive something as an inducement to act ... if he believes that it is in the mind of the giver to induce him to act"
 3. Cf S v Gouws 1975 (1) SA 1 (A).

"Corruptly" is not considered in relation to the guilt of the briber. The first two approaches will now be considered in some detail. The third approach will be considered separately as it merits special treatment.

D. THE APPROACH WHICH RENDERS "CORRUPTLY" COLOURLESS.

A founding judgement which rendered "corruptly" colourless was delivered by Willes J in the House of Lords in the often quoted case of Cooper v Slade.¹ Willes J, who gave the majority judgement, held that²

"the word 'corruptly' in this statute means not 'dishonestly', but in purposely doing an act which the law forbids as tending to corrupt voters, whether it be to give a pecuniary inducement to vote, or a reward for having voted in a particular manner. Both the giver and receiver ... may be said to act 'corruptly'. The word 'corruptly' seems to be used as a designation of the act of rewarding a man for having voted in a particular way as being corrupt, rather than as part of the definition of the offence."

This approach was followed in Bewdley Election Petition³ where Blackburn J commented:⁴

"Those who framed the Act ... have governed it all by the word 'corruptly'. The interpretation of this word ... is not 'wickedly', 'immorally', or anything of the sort, but embraces such conduct as it was evidently the intention of the Legislature to discountenance."

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1. (1858) 6 HLC 746; 108 RR 292 at 301. This case dealt with election petitions under s 2 of the Corrupt Practices Prevention Act 1854 (now replaced by the Representation of the People Act 1949) which makes a person guilty of bribery if he corruptly gives money to a voter for voting or refraining from voting. The court considered the meaning of "corruptly".
 2. At 301. (My emphasis).
 3. (1869) 19 LTR 676.
 4. At 678.

In more recent times in English law, despite the presence of decisions which lend some meaning to "corruptly",¹ the Court of Criminal Appeal has followed the colourless approach on two occasions.² No special meaning is attached to "corruptly". Once it is proved that the accused intentionally executed the prohibited conduct, his behaviour is automatically labelled as corrupt. "Corruptly" is therefore rendered colourless.

The influence of these English decisions is reflected to some extent in the South African case law. In R v Sesing,³ De Beer J questioned whether it was necessary for the State to prove that the briber must have the intention to induce the agent to act in conflict with his duty towards his principal before he can be said to have acted "corruptly". The conflict of duty requirement had been laid down in an earlier Appellate Division decision of R v Lotzoff.⁴

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1. See eg R v Lindley [1957] Crim LR 321; R v Calland [1967] Crim LR 236.
 2. R v Smith [1960] 1 All ER 256. In R v Wellburn (1979) 69 CAR 254 CA at 264, Lawton LJ approved the recorder's direction to the jury in the following terms: "Corruptly ... does not mean dishonestly. It is a different word. It means purposefully doing an act which the law forbids as tending to corrupt."
 3. 1940 OPD 78.
 4. 1937 AD 196. In Lotzoff's case the appellant was convicted of contravening s 2(b) of the Prevention of Corruption Act 4 of 1918 in that he had corruptly offered £3 to an insurance assessor who had been sent to assess hail damage to crops belonging to the appellant's father. The conviction was confirmed on appeal as the court found that the money had been offered to the assessor for the purpose of persuading him to do something in conflict with his assessing duties.

The case of Lotzoff came in for further criticism in R v Pamensky¹ where the approach in Sesing's case was preferred, it being held by Gutsche J that:²

"If the payment was forbidden, it was made corruptly
[T]he payment ... to the agent is prohibited if it is ... an inducement for doing an act in relation to the principal's affairs."

"Corruptly" is reduced to mean acting with the intention of doing an act prohibited by the legislature. No special intention is required.

After stating that the definition of "corruptly" in Lotzoff's case was not intended to be exhaustive,³ Schreiner JA in R v Roets⁴ concluded that the definition could no longer be sustained having regard to the wide language of the Act. Following the Bewdley Election Petition case, the court held that the Act "really stigmatizes as corrupt the conduct it penalises".⁵ Whenever an agent accepts a gift for doing something in relation to the affairs of his principal, the conduct is corrupt.

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1. 1946 EDL 68.
 2. At 72-73.
 3. R v Kemp 1942 AD 147 at 155.
 4. 1954 (3) SA 512 (A).
 5. At 515G-H.

Roets' case is the leading authority in South Africa for the colourless approach. As such it has influenced subsequent decisions. Thus Coleman J held in S v Van Zyl¹ that the Court was bound by the case of Roets. Any notion of assigning a special meaning to "corruptly" was rejected. Considering mens rea, all that is required is²

"a knowledge of the facts necessary to bring the the transaction within the words of the statutory provision."

Similarly, Roets' case was followed in S v Petro Louise Enterprises (Pty) Ltd³ where the reasoning of a magistrate was approved by Botha J in the following terms,⁴ namely,

"the magistrate ... used the word 'corruptly', not as introducing a notion in addition to, but simply as a compendious expression of, the effect of the words of the Act"

E. THE APPROACH WHICH ASSIGNS SOME MEANING TO "CORRUPTLY".

Although there is a general reluctance to define "corruptly" accurately, some weight has been attached to the word in the English Courts. In a minority judgement in Cooper v Slade⁵ Coleridge J held:⁶

"The word 'corruptly' was certainly not inserted in the statute without a purpose.... [I]t is material to bring an act within this part of the section...."

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1. 1965 (2) PH K61 (T).
 2. Per Coleman J at 233.
 3. 1978 (1) SA 271 (T).
 4. At 278.
 5. (1858) 6 HLC 746; 108 RR 292.
 6. At 304.

In considering the meaning of "corruptly", Coleridge J continued

"here the statute expressly makes the operating motive in the mind of the party material, and it adds that that motive must be corrupt; which is as much to say, that it may operate honestly and without intent to interfere with the purity of the election."

Basically "corruptly" was linked to dishonesty, which is an approach followed by a number of other English decisions.¹

Turning to the South African case law, there is clear evidence of some weight being attached to "corruptly". The approach in the case of Cooper has been criticised.² "Corruptly" has been linked to a conflict of duty in R v Lotzof³ in the following context⁴

"the offer must have been made with the intention of inducing the person to whom the offer is made to do something in conflict with his duty, and to favour the person who makes the offer as against his principal or employer".

More succinctly, "corruptly" has been described by De Villiers JA in R v Lotzoff⁵ as acting⁶

"with intent to induce the agent to do an act in conflict with his duty towards his principal".

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1. Tower Hamlets Stepney Division Case; Blitz's case (1886) 54 LT 684; R v Lindley [1957] Crim LR 321; R v Calland [1967] Crim LR 236.
 2. Krige v De Waal (1894) 11 SC 163 at 174.
 3. 1936 OPD 216.
 4. Per Krause JP at 218.
 5. 1937 AD 196.
 6. At 199.

This approach has been broadened to label conduct as corrupt if the relationship of good faith between principal and agent is breached by the acceptance or the giving of a bribe.¹

"Corruptly" is also used in the context of a corrupt intention, which, on occasions, has been equated with dishonesty. The honesty of the intention of the alleged offender is considered.² "Corruptly" imparts some element of impropriety.³ An element of corruption must be present.⁴ The requisite intention has been described in terms of a corrupt motive.⁵ "Corruptly" means dishonestly in the sense that the offender knew his action was in breach of good faith towards the principal.⁶

F. AN EVALUATION OF THE DIFFERENT APPROACHES TO THE INTERPRETATION OF "CORRUPTLY".

Judges, who support the colourless approach to "corruptly", have rarely attempted to justify their line of thought. It would appear that they wish to afford the object of legislation the widest possible protection, an attitude which is reflected by Lawton J in the following passage:⁷

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1. R v Sesing 1940 OPD 78 at 93-94; R v Roets 1954 (3) SA 512 (A).
 2. Krige v De Waal (1894) 11 SC 163 at 174.
 3. Maharaj v James 1927 NPD 215 at 218.
 4. R v Govey 1929 CPD 58 at 62.
 5. R v Mithi 1959 (4) SA 287 (T); S v Du Preez 1968 (2) SA 731 (T)
 6. S v Ernst 1963 (3) SA 666 (T) at 667F.
 7. R v Wellburn (1979) 69 CAR 254 CA at 265. The court was considering the word "corruptly" in s 1(1) of the Prevention of Corruption Act 1906.

"Nothing is to be gained by using variations for statutory words in ordinary usage unless the context so requires and it does not so in the 1906 Act The mischief aimed at by the modern statutes dealing with corruption is to prevent agents and public servants being put in positions of temptation."

It is accepted that bribery is extremely difficult to detect.¹ There appears to be a real fear that if "corruptly" were to be interpreted as requiring a special intention, the burden on the prosecution would become intolerable, leading to a decline in the number of successful prosecutions in corruption cases. Although this view is not stated explicitly, the difficulties of proving a corrupt intent have been hinted at in cases which have compared "corruptly" with "knowingly".² It has been suggested that "corruptly" has been replaced by "knowingly" in the third leg of the legislation in order to avoid the real problem of proving that the agent had been corrupted.³ An obvious way to avoid this difficulty would be to neutralise "corruptly" by rendering it otiose.

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1. In R v Braithwaite [1983] 2 All ER 87 at 91e-f corruption in the public service was described as a grave social evil which was difficult to detect for those who take part in it will be at pains to cover their tracks.
 2. Sage v Eicholz [1918-19] 1 All ER 424. See s 1 of the Prevention of Corruption Act 1906 in England. Contrast subsecs (a) and (b) with subsec (c) of s 2 of the South African Prevention of Corruption Act 6 of 1958.
 3. R v Tweedie [1984] 2 All ER 136.

While it is accepted that the courts will be slow to interpret an Act in such a way which could frustrate the aim of the legislature, it would be unwise to use the object of the legislation as a panacea for ignoring "corruptly".¹ In any event, the legislature is free to cure any defects in its legislation.

In England, Parliament has taken active steps to meet the problem of proving corruption, by introducing the following presumption:²

"Where ... it is proved that any money, gift or other consideration has been paid or given to or received by a person in the employment of His Majesty ... by or from a person, or agent of a person, holding or seeking to obtain a contract from His Majesty ... the ... consideration shall be deemed to have been paid or given or received corruptly ... unless the contrary is proved."

The onus of proof that a payment was in fact not a corrupt payment rests with the accused which may be discharged by establishing his case on a balance of probability.³ It is interesting to note that Parliament does not share the view that "corruptly" is meaningless. The presumption is directed at this very word. It must mean something.

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1. Edwards 246. The interpretation of the Act will be considered at 56 below.
 2. S 2 of the Prevention of Corruption Act 1916. See Glanville Williams 115.
 3. R v Carr-Briant [1943] KB 607. See Archbold 1664.

A rare instance where the courts have attempted to justify the colourless approach is to be found in R v Smith.¹ In deciding that "corruptly" added nothing to the wording of the Act² in the context of the facts it was considering, namely, a consideration which had been given in anticipation of some action, Lord Parker held that³:

"[T]here is certainly force in the view that the word 'corruptly' may be necessary in dealing with the case of a reward for services rendered. Accordingly, it is wrong to say that the word 'corruptly' cannot be given some meaning additional to what is provided by the words of the section without it."

This reasoning is difficult to follow. If the gift is made before the service is rendered, "corruptly" has no special meaning. If the gift is handed over after service is performed, the word "corruptly" "may be necessary". There is no suggestion in what sense "corruptly" may be necessary, nor does Lord Parker explain why the timing of the gift is material to the interpretation of "corruptly".

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1. [1960] 1 All ER 256.
 2. The court was considering s 1(2) of the Public Bodies Corrupt Practices Act 1889 which penalises any person who corruptly gives a gift as an inducement to an official of a public body for doing anything in respect of any matter in which the public body is concerned.
 3. At 259E.

In the absence of proper reasons,¹ it is difficult to support this approach. The legislature does not make the timing of the gift critical. It may be given before or after the services sought. "Corruptly" qualifies either eventuality. Obviously there must be a causal connection between the gift and service. This element is established without reference to "corruptly".² In the end result it is ironic to justify the colourless approach by lending colour to "corruptly" under certain controlled conditions.

It will be remembered³ that when the three sub-sections of the Act⁴ are compared "corruptly" is used in the first two whilst "knowingly" is used in the third. Reference has already been made to this feature⁵ in explaining that the use of "knowingly" relieves the prosecution of proving corruption. "Corruptly" means something more than "knowingly". The change of the adverbs is intentional. By using "knowingly" in the third sub-section, Parliament

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1. Lord Parker seems to have based his reasoning on s 2 of the Corrupt Practices Prevention Act 1854 where, in regard to the offer to vote in a particular way, the word "corruptly" is not used, but in so far as the Act deals with the past, the reward for voting in a particular way, the word "corruptly" does appear. It is submitted with respect that this reasoning cannot be supported. The fact remains that "corruptly" qualifies the legislation with which Lord Parker was dealing. Simply because "corruptly" was omitted from a different statute is no reason for ignoring it in the Act under consideration. See also the criticisms of Gordon 947-948.
 2. In R v Pamensky 1946 EDL 68 at 74 Gutsche J held: "In every case the Crown must prove that there was a causal connection between the act or omission and the gift or consideration."
 3. See 38 above.
 4. In South African law compare subsecs (a) and (b) with subsec (c) of s 2 of the Act 6 of 1958. A similar split is to be found in England in s 1 of the Prevention of Corruption Act 1906.
 5. See 50 above.

intended to create an offence without requiring the element of corruption. If "corruptly" is neutralised how are the three sub-sections to be distinguished when considering the element of corruption?¹

These views may be linked to procedural requirements when drafting charge sheets. Centlivres CJ in R v Preller² has held that "corruptly" is an essential ingredient of the charge. An analogy was drawn with R v Myburgh³ where "knowingly" had been omitted from the charge sheet. The charge was considered to be fatally defective. Should "corruptly" be omitted the same consequences would follow. "Corruptly", therefore, plays a key role in any indictment.

Further, the element of corruption has been used to distinguish between the securing of secret profits by an agent which may simply have civil consequences as opposed to bribery which attracts a criminal sanction. Whereas proof of corruption is necessary in criminal law, such proof is not required under civil law.⁴

This lends additional credence to the view that some special meaning must be attributed to "corruptly".

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1. Sage v Eicholz [1918-19] 1 All ER 424; R v Tweedie [1984] 2 All ER 136; Maharaj v James 1927 NPD 215 at 218.
 2. 1952 (4) SA 452 (A) at 463A-C.
 3. 1922 AD 249.
 4. After discussing the requirement necessary to prove bribery for civil purposes, Slade J said in Industries and General Mortgage Co Ltd v Lewis [1949] 2 All ER 573 at 575F-H: "I emphasise for 'civil purposes' because the Prevention of Corruption Act, 1906, s.1 (1), introduces the adverb 'corruptly' and, except in cases provided for in s.(2) of the amending Act of 1916, the onus is put on the prosecution of showing that the payment has been made corruptly. I hold that proof of corruptness or corrupt motive is unnecessary in a civil action
...."

It will be observed that "corruptly" is relevant in three situations

- (i) the distinction between corrupt and innocent conduct;
- (ii) the distinction between offences in the Act governed by the word "corruptly" on the one hand and "knowingly" on the other;
- (iii) the distinction between corrupt conduct which attracts criminal liability as opposed to corrupt behaviour which has exclusively civil consequences.

It is submitted that the legislature deliberately inserted "corruptly" to assist the courts in drawing these distinctions. Unfortunately, it did not define "corruptly". To complicate matters, the courts have been hesitant to assign a specific meaning to "corruptly".¹ It is this lack of clear definition which has made "corruptly" a dubious concept. If the scope of "corruptly" could be accurately stated, it would become a useful yardstick in classifying various types of behaviour.²

1. See 67 below.
2. Anonymous note "Campaign Contributions and Federal Bribery Law" (1978) 92 Harvard LR 451 at 453.

Given the complex factual background to the problem,¹ it is vital to formulate clear principles to assist in identifying corrupt conduct. This can only be done by accurately defining "corruptly". To render it colourless simply exacerbates the problem.

G. THE MEANING WHICH SHOULD BE ASSIGNED TO "CORRUPTLY".

For the purposes of assigning some meaning to "corruptly" two assumptions will be made. Firstly, the colourless approach is rejected as being wrong.² Secondly, "corruptly" qualifies the mens rea element of the offence rather than the concept of unlawfulness.³

(a) Some misconceptions.

Several misconceptions about the meaning of "corruptly" must be laid to rest before a definition can be attempted.

"Corruptly" has from time to time been linked to motive. For example, it has been held that by the use of "corruptly" the legislature has expressly made "the operating motive in the mind of the party material".⁴ A number of cases refer to "a corrupt motive".⁵

1. See 40-41 above.

2. See 55 above.

3. See 73 below.

4. Per Coleridge J in Cooper v Slade (1858) 6 HLC 746; 108 RR 292 at 304.

5. R v Mithi 1959 (4) SA 287(T); S v Nkadineng 1962 (4) SA 564 (T) at 566H; S v Du Preez 1968 (2) SA 731 (T); S v Joubert 1979 (1) SA 97 (T).

It is submitted that this approach is incorrect as motive is irrelevant.¹ In keeping with the general principles of criminal law, motive is not an essential for criminal liability as it forms no part of the intention required for mens rea.² It is possible therefore to have a perfectly altruistic motive which may be laudable.³ This will not be considered as a defence to a charge of corruption.

Further some weight must be accorded to the dicta that corruption is difficult to prove.⁴ To over emphasise the repugnant features associated with "corruptly" would place an intolerable burden on the prosecution. Parliament could never have intended this.⁵ Accordingly, despite

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1. Snyman 319 takes the view that "corruptly" ought not to be taken as referring to the motives of the giver or receiver of the bribe. He suggests that on closer scrutiny of cases referring to motive, all that is in fact required is intention. See also Hunt 221 where he discusses motive in relation to common law bribery.
 2. See Burchell and Hunt 187-188 on the irrelevance of motive.
 3. In R v Smith [1960] 1 All ER 256 at 257I, Lord Parker quoted with approval, the following instructions of the trial judge to the jury: "Motive does not matter: ... it may be that I am anxious to help a widow, who, perhaps, is starving and whom I think I can help by getting a public official ... to ... help her It does not matter."
 4. See 50 above.
 5. After equating "corruptly" with "dishonestly", Glanville Williams 849-850 sounds a warning of using "corruptly" in ways which could present peculiar difficulties to the prosecution. He criticises the decision in R v Lindley [1957] Crim LR 321 where it was held that the prosecution had to prove that the accused dishonestly intended to weaken the loyalty of the servants (bribees) to their master and to transfer that loyalty from the master to himself. It was submitted that by requiring this type of prejudice, the corruption laws would be "greatly weakened". The author also criticises R v Calland [1967] Crim LR 236 where the judge directed the jury that it was insufficient for a conviction to find that what the accused did was "sharp practice". Dishonesty had to be proved. Glanville Williams has some difficulty with the distinction between "sharp practice" and "dishonesty".

some of the emotive dictionary meanings of "corruptly",¹ some support must be given to the view that it does not mean "wicked", "immoral" or "anything of the sort".²

(b) The common law.

How is "corruptly" to be interpreted? A basic canon of interpretation is that a statute derogates as little from the common law as possible.³ The common law offence of bribery has not been replaced by the Act.⁴ To this extent common law definitions of bribery are potentially useful when considering the scope of the Act. Unfortunately, definitions of common law bribery do not contain references to "corruptly" with the exception of one instance where bribery was defined by Morice J as⁵

"corruptly tendering or receiving a price for official action".

The insertion of "corruptly" in this definition has been criticised by Hunt in the following terms:⁶

"[T]he word 'corruptly' though in popular use, has misleading overtones of motive ... [T]he phrase 'unlawfully and intentionally' is both more accurate and more in accordance with the general principles of our criminal law"

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1. See the Concise Oxford Dictionary 5 ed (1970) by HW Fowler where "corrupt" has been equated with "rotten", "depraved" and "wicked" or "to infect" and "to taint". See also The Oxford Companion to Law (1980) by DM Waler where corruption is defined as "the perversion of anything from its original pure state."
 2. Bewdley Election Petition (1869) 19 LT 676 at 678.
 3. Van Heerden v Muir 1955 (2) SA 376 (A) at 379.
 4. Hunt 233.
 5. In S v Benson Aaron (1893) Hertzog 125 at 132. It should be noted, however, that the use of "corruptly" has not found favour in later common law definitions. See 35 above.
 6. At 219.

It is illuminating to observe that Hunt promptly proceeds to include the words "unlawfully , intentionally, and corruptly" in his specimen indictments for common law bribery.¹ As far as can be ascertained, it is in fact practice to include a reference to "corruptly" in charge sheets alleging common law bribery.²

It may be that since the more popular definitions of bribery³ contain no reference to "corruptly", the courts in dealing with the common law offence have paid scant regard to this word, despite its presence in the indictments. However, some mention was made of "a corrupt intent" with reference to common law bribery when Nicholas J held that:⁴

"The mental element in the crime ... has been described as 'a corrupt purpose' ... or 'a corrupt intent'.... These convenient shorthand expressions mean no more than that the giver of a bribe must intend to seduce the recipient into taking a price for action in an official capacity...."

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1. Hunt 231-232.
 2. See eg S v Deal Enterprises (Pty) Ltd 1978 (3) SA 302 (W) at 308A.
 3. For a review of definitions see chap 1 above.
 4. S v Deal Enterprises (Pty) Ltd 1978 (3) SA 302 (W) at 308A.

This smacks of a colourless approach. It may be debated whether Nicholas J was correct in his analysis of the authorities.¹ Little purpose can be achieved in extending this debate as it is apparent that reference to the common law is of little assistance in interpreting "corruptly" in the Act for the following reasons:

- (i) "corruptly" is not consistently required as part of the definition of common law bribery;
- (ii) despite this inconsistency, "corruptly" is a regular feature of bribery charge sheets;
- (iii) the courts have paid little regard to "corruptly" and, where they have considered the concept, their interpretations have varied.

It therefore seems that no concrete meaning can be given to "corruptly" in common law bribery. As such a reference to the common law is unrewarding.

1. Nicholas J referred to R v Govey 1929 CPD 58 at 62; R v Ingham 1958 (2) SA 37 (C) at 43 and R v Chorle 1945 AD 487 at 496. In Govey's case Gardiner JP held at 62: "It is sufficient if the bribe is given for something which has been done, if it is given corruptly, but of course there must be the element of corruption I say "corruptly" because if a person in gratitude were to give something ... it would not be bribery." It is submitted that this dictum is equally consistent with the view that "corruptly" requires a special intention to be proved. Likewise in Ingham's case where the use of the words "corruptly", "corrupt intent", "corruptive effect" and "corrupt purpose" may be construed to mean a special intention.

(c) The protection of a fiduciary relationship.

The Act concerns itself with the protection of a relationship between principal and agent.¹ A basic tenet of such a relationship is that the agent must show the utmost good faith in his dealings with and on behalf of his principal.² However, when regard is had to the definitions of principal and agent in the Act, it is immediately apparent that the legislature was not confining its protection to the relationship between principal and agent simpliciter, but it extends its concern to other parties who, although they stand in a relationship of trust to each other, are not considered principals and agents in a strict legal sense.³

It follows that the mischief aimed at is conduct which breaches the relationship of confidence which exists between "principal" and "agent".⁴ This is reflected in our case law where Baker J held that⁵

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1. R v Sesing 1940 OPD 78 at 87.
 2. See De Villiers and Macintosh 337-338 and the authorities there cited.
 3. Some of the following persons are considered as "agents" for purposes of the Act: any person employed by or acting for another, any trustee of an insolvent estate, any executor of a person under a disability and any person in the service of the State, a provincial administration, municipality or company. "Principal" has been defined in wide terms to accord with the extensive definition of agent. See s 2 of the Act.
 4. See Joubert 425; Hunt 233.
 5. S v Van der Westhuizen 1974 (4) SA 61 (C) at 64A. Baker J also referred to Morgan v City Council of Cape Town 1932 CPD 109 on the relationship of employer and employee.

"it is bad faith of a most serious kind for a public official to put himself in a position where he disables himself from giving his employer the benefit, to which his employer is entitled, of unbiased advice and guidance, because the employee has secretly and corruptly made himself a paid tool of some third party."

(d) An attempt to define "corruptly".

It is against this background¹ that a definition of "corruptly" may be attempted. In the ordinary grammatical sense, "corruption" has been linked to "dishonesty", "improbity"² and "breach of trust or faith"³ This equation is consistent with the view adopted by some decided cases,⁴ where it has been held, for example, that "corruptly" means⁵

"dishonestly, i.e. knowing that it was in breach of his duty of good faith towards the council."

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1. A similar background applies to s 3(d) of the Prevention of Corruption Act Chap 70 in Zimbabwe which makes it an offence for an agent, by collusive agreement with the seller of goods to secretly obtain any consideration. In S v "A" 1979 (4) SA 51 (R) at 60E Gubbay J held that: "s 3 (d) was framed against the backdrop of the law of agency and is directed at ensuring ... that an agent does not breach the trust ... reposed in him - his duty to show the utmost good faith [T]he lawmaker intended to hit at arrangements entered into between the agent and third party without the knowledge of the principal and in breach of the duty owed him."
 2. Fowler Concise Oxford Dictionary.
 3. WC Burton Legal Thesaurus.
 4. See eg Manaraj v James 1927 NPD 215 at 218; R v Ottens 1957 (1) SA 692 (N) at 695 where Holmes J assumed, without deciding, that the Crown had to prove that the appellant did not honestly believe that what he did was outside his principal's affairs in the sense that his action "did not offend against the implication of confidence".
 5. Per Galgut J in S v Ernst 1963 (3) SA 666 (T) at 667F.

If it can be correctly assumed that "corruptly" qualifies the mens rea requirement,¹ then it is submitted that it colours intention to the extent that the accused must intend to breach the relationship of trust which exists between principal and agent.² The onus will be on the prosecution to prove this special intention beyond reasonable doubt.³

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1. See 71 below.
 2. Cases which link "corruptly" to breach of a duty owed by the agent to his principal are R v Lotzof 1936 OPD 216 at 218; R v Lotzoff 1937 AD 196 at 199; R v Sesing 1940 OPD 78 at 87; S v Ernst 1963 (3) SA 666 (T) at 667F. Cf R v Ottens 1957 (1) SA 692 (N) where the link between "corruptly" and breach of duty was assumed without being decided. Note also the following excerpt from Tiatie v Rex 1938 Justice Summary 224 when Schreiner J was quoted with approval by Hoexter JA in R v Geel 1953 (2) SA 398 (A) at 401: "So long as the agent accepts with the idea present to his mind that he may be influenced by the reward and not solely by his ... duty to his employer, he acts corruptly". Contrast R v Roets 1954 (3) SA 512 (A) at 515 where corruption and breach of duty automatically follow once it is proved that the accused has contravened the Act without giving any special meaning or any meaning at all to "corruptly". In defining the nature of a corrupt act AJ Middleton "A legal view of corruption" in a paper delivered on 2 August 1983 at Seminar on corruption held by the School of Business Leadership at UNISA, Pretoria said "the essence of corruption (lies) in the violation of trust It appears to me, that whenever we encounter a breach of trust we are dealing with some form of corruption." See also Middleton 6 LAWSA para 419; Hunt 234-235.
 3. After equating "corruptly" with an intent to breach a relationship of good faith when considering article 45 (1) Ord 17 of 1937 (T), Galgut J said in S v Ernst 1963 (3) SA 666 (T) at 669 when acquitting the accused "it has not been proved that the accused had the necessary and particular mens rea required by the section."

There are generally three elements of a crime, namely, the mens rea, actus reus and unlawfulness. However, it is more usual to group unlawfulness with actus reus.¹ The mens rea comprises an awareness by the accused of each objective component of the actus reus² and any special intention required by the legislation.³

Relating these principles to the Act,⁴ the mens rea of the briber may be formulated as follows:

- (1) he must be aware of all the elements of the actus reus, including the fact that his action is unlawful, namely:
 - (i) the giving or offering of any consideration,
 - (ii) to an agent,
 - (iii) for doing any act in relation to the affairs of the principal;
- (2) he must intend the consideration to act as inducement for action from the agent;
- (3) he must be aware of the special relationship of trust that exists between the principal and his agent; and
- (4) he must intend to breach the said relationship.

1. Burchell and Hunt 108.
2. Burchell and Hunt 130-131.
3. Hunt 217-218.
4. S 2(b).

In terms of the Act,¹ the mens rea of the bribee will be:

- (1) he must be aware of all the elements of the actus reus, including the fact that his action is unlawful, namely:
 - (i) the accepting or agreeing to accept any consideration,
 - (ii) for doing an act in relation to the affairs of his principal;
- (2) he must see the consideration as an inducement to act;
- (3) he must be aware of the special relationship of trust which he has with his principal; and
- (4) he must intend to breach the said relationship.

It is submitted that this is the clear meaning which the legislature wished to convey by "corruptly".

(e) An assumption that "corruptly" is ambiguous.

Alternatively, if the proposition is incorrect that the meaning of "corruptly" is clear, then resort must be had to the canons of interpretation which apply where an enactment is ambiguous. The two reasonably acceptable interpretations of "corruptly" are:

1. S 2(a).

- (i) it assumes no special meaning, but simply connotes an intention to do the prohibited act; or
- (ii) a special intention is required in that the offender must intend to breach the relationship of trust which binds a principal and agent.

Where an ambiguity exists then the approach of our courts has been set out as follows by Schreiner JA:¹

"The right approach to the problem must be reached by the balancing of two principles. In the first place ... in penal matters the more lenient interpretation of two reasonably acceptable ones should be favoured And secondly ... even in penal matters the Courts must try to give effect to the true intention of the Legislature where that is sufficiently clearly manifested."

Applying the first principle it is apparent that interpretation (ii) would favour the accused in that the onus will be on the State to prove a special as opposed to colourless intention. Regarding the second principle, the question must be asked whether, by the adoption of interpretation (ii) the intention of the legislature would be frustrated. It is submitted that the answer to this question must be no. The object behind the legislation is mirrored in the special intention which focusses as a breach of trust situation. The emotive use of "corruptly" is avoided. It cannot be suggested that the onus on the State is so intolerable that the object of the legislature would be defeated by

1. R v Moosa 1960 (3) SA 517 (A) at 528.

making convictions under the Act difficult to secure. With or without "corruptly" the State still has to prove an awareness of the principal and agent nexus. Is it such a difficult step to prove a knowledge of a relationship of trust with an intention to breach such a relationship? In many cases the clandestine operations of the briber or bribee will lead to a strong inference of such knowledge.

Far from being a troublesome epithet, it is in fact useful. When properly defined, it is a helpful guide for distinguishing between corrupt and innocent conduct. To this extent, by requiring a special intention, the aims of the legislature may be promoted, rather than frustrated.¹

(f) The interpretation of "corruption" by the South African courts.

It must be remembered that this suggested definition of "corruptly" is simply a submission as to what the adverb ought to be. To place this submission in proper perspective, it is necessary to consider the views of the Appel-

1. On the construction of penal statutes see generally Milton and Fuller 10-13. In R v Lotzoff 1937 AD 196 at 199 De Villiers JA, referred to R v Smith 1912 AD 386 at 389 where "corruptly" was analysed as follows: "But the deliberate intention of inducing a jurymen to disregard his oath and to decide a case not upon the evidence but upon some ulterior consideration is a dishonest intention. And any influence exerted with that object is corruptly exerted within the meaning of the section. Indeed, it was the very mischief against which that portion of the statute was intended to guard."

late Division in some detail where "corruptly" in the context of breach of a duty of good faith has received some attention.

In the Appellate Division case of R v Lotzoff¹, De Villiers JA stipulated that "corruptly" envisaged an intention by the briber to induce the agent to act in conflict with his duty towards the principal. It is not necessary to prove that the principal suffered prejudice.

The "conflict of duty" premise has been criticised in R v Sesing.² Van den Heever J suggested³ that to define "corruptly" in terms of an intention to induce an agent to do an act in conflict with his duty results in tautology, as the same idea is conveyed by the words "as an inducement". It is submitted that this criticism is not

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1. 1937 AD 196 at 200. For the facts of Lotzoff's case see 45n4 above.
 2. 1940 OPD 78. In Sesing's case the appellant was employed by a municipality to allocate houses. He corruptly accepted gifts as an inducement to show favour to the givers of the considerations in their application for allotment to them of municipal houses. The appellant was accordingly convicted of contravening s 2(a) of Act 4 of 1918. In confirming the conviction on appeal, the court found that there was no merit in the argument of the appellant's counsel that the charge sheet should allege and stand by a specific duty owed by the appellant to the municipality. The court (Fischer JP Van den Heever J and De Beer J) found that it was wrong to confine the prohibition in the Act to affairs within the scope of the agent's authority ex facie an express mandate.
 3. At 88.

well founded. The notion of "conflict" does not necessarily arise from "as an inducement". As such the reference to conflict of duty does colour "corruptly". Nevertheless, Van den Heever J went on to define "corruptly" in terms of the giving or taking of a consideration "which is contrary to the implications of the position of confidence."¹

In the same case De Beer J delivered a separate judgement in which he too expressed reservations about the accuracy of the definition of "corruptly" in Lotzoff's case as follows:²

"But can it be said that under sec 2 (a) the 'corrupt' acceptance implies that there must be the intention to induce the agent to do something in conflict with the defined duty entrusted to him? I think not. In any case the duty spoken of by De Villiers, J.A. in Lotzof, ... does not refer to the specific duty entrusted to an agent but, on the contrary, it can only have been intended to refer to the general concept of duty which any agent owes his principal, namely, that of exercising the utmost good faith on all occasions

[A]n agent is acting in conflict with his duty towards his principal by accepting any bribe, although the act desired from him may not be in conflict with the interests of his principal and although the performance of such an act may not have been specially entrusted to him."

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1. At 88.
 2. At 93-94.

This gloss given to the Appellate Division's definition of "corruptly" in Lotzoff's case has some merit. Having regard to the wide language of the Act,¹ it is not incumbent on the State to show that the performance sought by the briber conflicted with "a defined duty entrusted to him."² In any event it is doubted that this was the sort of duty which De Villiers JA had in mind, having held, as he did, that it was not necessary to prove that the principal had suffered prejudice.

It emerges ex facie the quoted passage from the case of Sesing that the phrase "conflict of duty" is given a wide meaning in the sense that it visualises a breach of a general duty of good faith which any agent owes to his principal. This is acceptable. The interpretation could even be widened to include any breach in the relationship of trust between those who fall under the very broad definition of "principal" and "agent" in the Act.³ It follows

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1. The action in return for the bribe under s 2(a) of Act 4 of 1918 need only be "in relation to his principal's affairs or business." Nor is it necessary to prove that the bribee carried out any action in return for the bribe as pointed out by Coleman J in S v Van Zyl 1965 (2) PH K61 (T) at 231: "Even if I assume that the appellant was not proposing to extend the slightest indulgence towards the contractor, in relation to the ... contract ... which he would not have shown had the money not been promised or paid to him, the payment was one which might well have influenced another person in his position to act adversely to the interests of the State."
 2. At 200.
 3. Trollip JA held in S v Young 1977 (1) SA 602 (A) at 609B: "Both in the public and private sectors an agent or employee holds a position of trust and confidence in relation to the business or affairs of his principal or employer. In the performance of his duties as such he must act with the utmost good faith."

that the definition of "corruptly" in the case of Lotzoff, as interpreted by De Beer J in Sesing's case, is consistent with the meaning which, it is submitted, that "corruptly" should bear. Unfortunately, this situation no longer prevails because the Appellate Division in R v Roets¹ watered down the meaning of "corruptly" to the extent that it was made colourless, as this extract from the judgement of Schreiner JA reveals:²

"If the word 'duty' is to be used at all in explaining the meaning of 'corruptly' it must clearly be given a wide sense. The gift or consideration need not actually influence the agent's conduct.... The provision really stigmatises as corrupt the conduct it penalises. It says, in effect, that whenever an agent accepts or obtains or agrees to accept or attempts to obtain a gift or consideration for doing or forbearing from doing something which has to do with the affairs or business of his principal, the conduct is corrupt and in breach of his duty to his principal; for even if he is not himself prepared to allow his conduct... to be influenced, there is corruption and breach of duty in accepting ... what might well influence an agent in his position to act to his principal's detriment."

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1. 1954 (3) SA 512 (A). In the case of Roets the first appellant was convicted of contravening s 2(a) of Act 4 of 1918 in that he had corruptly obtained money from a butcher as inducement not to report alleged contraventions of local Meat Control Regulations. It was the duty of the appellant to report such contraventions arising from his employment by the Meat Control Board. Since no contraventions were in fact proved, counsel for the appellant argued that there was no duty on the appellant to make a report to his employers. Accordingly it had not been proved that the money received from the butcher had been accepted to refrain from doing something which was the appellant's duty to do. In rejecting this contention, Schreiner JA (Centlivres CJ, Greenburg JA, Van den Heever JA and Hoexter JA concurring) held that the wide language of s 2(a) was not to be confined to proving that the appellant had breached some rule or instruction governing his obligations to his employer. The appeal was accordingly dismissed.
 2. At 515-516.

The explanation of "corruptly" with reference to a conflict of duty in the case of Roets goes a long way in stripping "corruptly" of any meaning. There is a doubt that "duty" may be used in explaining "corruptly". Without any reference to "corruptly", the offence is committed where the remaining requirements of the Act are satisfied. Schreiner JA referred to an earlier Appellate Division decision of R v Kemp¹ where the view was expressed that the definition of "corruptly" was not intended to be exhaustive. He also referred to English authority² with apparent approval, which renders "corruptly" neutral. The breach of duty concept is relegated to a consequence of corruption rather than a material element of the offence. It is impossible to reconcile this approach with the view that "corruptly" should retain some meaning. That being so, despite the presence of cases³ decided subsequently to that of Roets, where "corruptly" was given some weight, it must be accepted that the Appellate Division decision in Roets's case is powerful authority in support of the colourless approach.⁴

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1. 1942 AD 147 at 155.
 2. Bewdley Election Petition (1869) 19 LTR 676.
 3. R v Mithi 1959 (4) SA (T) 287; S v Nkadimeng 1962 (4) SA 564 (T) at 566H; S v Ernst 1963 (3) SA 666(T) at 667F; S v Du Preez 1968 (2) SA 731 (T).
 4. S v van Zyl 1965 (2) PH K61 (T); S v Petro Louise Enterprises (Pty) Ltd 1978 (1) SA 271 (T) at 278.

This recantation by the Appellate Division in its treatment of "corruptly" is a regrettable development in South African law when regard is had to the important role which this epithet should play in isolating corrupt conduct.¹

It is submitted that, in view of cases which contrive to give some meaning to "corruptly",² the Appellate Division should mitigate the uncompromising support for the colourless approach at the earliest opportunity.

H. Should "corruptly" qualify mens rea or unlawfulness?

Snyman argues:³

"The meaning of the word 'corruptly' is not quite clear. Sometimes it has been assumed that the word refers to ... intention, but this view is unacceptable, for this requirement appears from the words 'as an inducement or reward.' The view in Hunt, which is based on a dictum by Van den Heever J in Sesing, is that the word 'corruptly' refers to the requirement of unlawfulness. It is submitted that this is the better view."

The relevant passage from Hunt, who quotes from R v Sesing⁴ when discussing the various meanings of "corruptly", appears as follows:⁵

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1. See 54-55 above.
 2. See 72n3 above.
 3. At 319 (My emphasis).
 4. 1940 OPD 78 at 87.
 5. Hunt 234-235.

"Secondly, as a reference to the element of 'unlawfulness.' This was the view of Van den Heever J (as he then was) in R v Sesing:

'Now it is obvious that an agent, as defined, must often be in a position where he may legitimately accept a consideration either for himself or someone else as an inducement to do or refrain from doing something in relation to his principal's affairs or business. I would have thought, therefore, that the Legislature inserted the word 'corruptly' in order to exempt such innocent transactions and direct its prohibition to a giving or taking which is contrary to the implications of the position of confidence. It seems to me fair to assume that the word is encrusted with Latin associations such as are aroused when one thinks of such expressions as 'de servo corrupto'; 'mulierem corrumpere'; or, as Cicero says, 'corruptus largitionibus animus'.

"It is submitted ... that 'unlawfulness' must be an element of the offence This conclusion can be supported either by equating the word 'corruptly' with 'unlawfulness', which is more or less what Van den Heever J had in mind, or else, if the colourless interpretation of 'corruptly' preferred by the Appellate Division is applied by implying - in accordance with general principles - an element of 'unlawfulness' in the section."

It is submitted that the equating of "corruptly" with unlawfulness cannot be sustained. The South African cases have consistently linked "corruptly" with intention. Where the colourless school of thought is followed, "corruptly" does not imply a dishonest intent but simply an intention to do the prohibited act.¹ Where some meaning is given to "corruptly", it is described in terms of a special intent. It has been linked with "dishonesty",² "an intention to

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1. R v Sesing 1940 OPD 78 at 92; R v Pamensky 1946 EDL 68 at 72; S v van Zyl 1965 (2) PH K61 (T).
 2. Krige v de Waal (1894) 11 SC 163 at 174; R v Smith 1912 AD 386 at 389; Maharaj v James 1927 NPD 215 at 218; R v Ottens 1957 (1) SA 692 (N); S v Ernst 1963 (3) SA 666 (T) at 667F.

induce the agent to act in conflict with his duty",¹ "an intention to personally benefit",² "knowing that it was in breach of good faith"³ and "having a corrupt motive".⁴ The same situation is to be found in English law where "corruptly" has been associated frequently with intention.⁵ Not unexpectedly, in the light of this overwhelming authority,⁶ several academic writers consider "corruptly" in the context of mens rea. The word

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1. R v Lotzof 1936 OPD 216 at 218; R v Lotzoff 1937 AD 196 at 199; R v Sesing 1940 OPD 78 at 93.
 2. R v Peters 1926 TPD 268 where Tindall J dealt with a contravention of s 9 of Act 16 of 1914 in the context of a "corruptly" made affidavit. He held that it was insufficient to show that the statement was false and that the person making it knew that it was false. The judge continued: "There must be something more than that; there must be an intention to obtain some advantage, either for the benefit of the person making the statement or for the benefit of some other person." (At 269) See also R v Steckel 1942 SWA 22.
 3. S v Ernst 1963 (3) SA 666 (T) at 667.
 4. S v Nkadimeng 1962 (4) SA 564 (T) at 566H; S v Du Preez 1968 (2) SA 731 (T).
 5. R v Smith [1960] 1 All ER 256 at 258F where Lord Parker CJ held "the word 'corruptly' ... denotes that the person making the offer does so deliberately and with the intention that the person to whom it is addressed should enter into a corrupt bargain." In R v Lindley [1957] Crim LR 321 and R v Calland [1967] Crim LR 236 "corruptly" was held to mean "dishonestly". See especially legislation directed at corrupt practices at elections where "corruptly" has been linked with intention. See the Hereford Case (1869) 21 LT 117; Tower Hamlets Stepney Division Case; Blitz's Case (1886) 54 LT 684.
 6. It will be remembered at 41 above that "corruptly" has also been used in the sense that the briber must intend the gift to operate as a bribe and the bribee must appreciate that this is his intention. This requirement relates to mens rea exclusively. See eg R v Ndohe 1952 (3) SA 562 (T) at 563; R v Geel 1953 (2) SA 398 (A). Cf common law bribery where phrases such as "corrupt purpose" and "corrupt intent" are used when considering mens rea. See R v Chorle 1945 AD 487 at 496; R v Ingham 1958 (2) SA 37 (C) at 43B; S v Deal Enterprises (Pty) Ltd 1978 (3) SA 302 (W) at 308A.

"corruptly" in its ordinary sense clearly implies a state of mind.¹ It has been suggested that when the legislature wishes mens rea to be an element of a statutory offence it uses the proper words. "Corruptly" is then listed alongside such words as "maliciously", "knowingly" and "wilfully" as the sort of words which our courts have held to indicate that mens rea in the form of intention is required.² "Corruptly" is sometimes interpreted to impart a dishonest or improper intention. It is also considered in the context of requiring the necessary averments of intention to be set out on charge sheets.³ "Corruptly" has also been cited as an example of the legislature seeking to underline the emphasis on mens rea.⁴ Writers in relation to corrupt practices at elections, when analysing "corruptly", speak of "proof of corrupt intention".⁵ Even Hunt, who links "corruptly" with unlawfulness, concedes tentatively that perhaps the epithet has a role to play when considering mens rea.⁶

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1. Milton and Fuller 33.
 2. Burchell and Hunt 218.
 3. See Lansdown and Campbell 207 who write: "Where it is an essential feature of the offence that it should be committed in circumstances showing a particular mental attitude on the part of the offender, as, for example, that it should be done wilfully, knowingly, corruptly or negligently, the failure of the charge to aver that the act was thus done has in the past been held to be a fatal defect" (My emphasis). See *R v Preller* 1952 (4) SA 452 (A) at 463A-C. Although this position has been altered by s 88 of the Criminal Procedure Act 51 of 1977. Evidence at a trial to prove the presence of the essential mental element will automatically cure the defect in the charge in certain circumstances. The fact remains that "corruptly" has been envisaged as an averment of intention or mental state.
 4. Edwards 54.
 5. Archbold 1651-1655; Gardiner and Lansdown 1004-1005; Middleton 6 LAWSA para 420. "Corruptly" is used in a mens rea context where the word appears in the Electoral Consolidation Act 46 of 1946 when dealing with corrupt election practices.
 6. Hunt 235.

Against this array of authority, stands the separate judgement of Van den Heever J in R v Sesing.¹ Even this single judgement is far from conclusive proof that the judge did in fact have unlawfulness in mind. Although, at first blush, it appears that Van den Heever J was considering a distinction between lawful and unlawful conduct, he does not expressly say this. For example, "an innocent transaction" could be interpreted to mean a transaction done with an innocent intent.² Probably alert to this possibility, Hunt,³ showing some uncertainty, states that the equating of "corruptly" with "unlawfulness" "is more or less what Van den Heever J had in mind."

Not only is the weight of authority against interpreting "corruptly" in terms of unlawfulness, but such an equation is juristically unsound. Snyman⁴ suggests that the reason why "corruptly" cannot refer to the requirement of intention is that this requirement appears from the words in the Act "as an inducement of reward." No doubt the parties must intend to give or receive the gift as an

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1. 1940 OPD 78 at 88. The material portion of the judgement of Van den Heever J is quoted at 74 above. Each of the three judges in the case of Sesing delivered separate judgements.
 2. At 88 Van den Heever J associates "corruptly" with "corruptus largitionibus animus."
 3. At 234-235.
 4. At 319. See 73 above.

inducement for certain action. Can it be suggested that because this intention to induce is a feature of the offence, it necessarily excludes "corruptly" from featuring in the requirement of mens rea? It is submitted that the two concepts are not necessarily mutually exclusive. The intention to induce or be induced may be coloured by a corrupt intention as opposed to an innocent one.

If Hunt¹ is correct in his submission that, where "corruptly" is given a colourless interpretation, the word is used to imply an element of unlawfulness, the use of "corruptly" in this context is sui generis. Traditionally unlawfulness is an element of every crime.² Since this is automatically so, the legislature generally finds it unnecessary to use words in statutory offences indicating that unlawfulness is required. To suggest that "corruptly" secures the unlawful requirement renders the epithet superfluous as the unlawfulness would be an element of the offence with or without "corruptly".³

Alternatively, if Hunt is correct when he suggests that "corruptly" is used to colour the element of unlawfulness in the sense that only transactions "contrary to the implications of the position of confidence" are hit by the Act,

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1. At 235. See 74 above.
 2. See Hosten 711 where it is submitted that: "Unlawfulness is an element in every crime just as unlawfulness is an element in delict; an act must thus be unlawful before it can be punishable". See also Snyman 74.
 3. Burchell and Hunt 114-115.

then this is an equally unusual way for the legislature to go about its business.¹ The criterion applied in determining unlawfulness is described as "objective reasonableness" which is ascertained by what the community considers as wrong.² There is no numerus clausus for grounds which exclude unlawfulness.³ It is submitted that it would be unwise for the legislature to attempt a definition or qualification of unlawfulness using "corruptly". The prevailing boni mores determines the concept of unlawfulness.

A further aspect is that when the available defences excluding unlawfulness are considered,⁴ it becomes apparent that if "corruptly", coloured by the meaning suggested by Hunt, does qualify unlawfulness, then it adds little, if anything, to the nature of the offence. The defences which Hunt⁵ cites, namely trapping, custom and consent would in any event all be available to the accused under the unlawfulness requirement with or without recourse to any special

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1. It is unusual for the legislature to make express reference to the element of unlawfulness in legislation, save by saying that if a certain act is done, the actor "shall be guilty of an offence." See Milton and Fuller 6.
 2. Hosten 711 who cites S v A 1971 (2) SA 293 (T) at 299 where Botha AJ (with Cillie JP concurring) held that in determining the unlawfulness of an accused's conduct, the court will ascertain "the prevailing boni mores in accordance with public opinion."
 3. Snyman 74.
 4. The defences listed by Burchell and Hunt 322 are: private defence, necessity, impossibility, obedience to orders, authority and consent.
 5. See Hunt 234-235.

qualification of this element by "corruptly". Given the flexible nature of unlawfulness, it is difficult to conceive of a situation where "corruptly" could usefully add to this requirement.

Herein lies a safety mechanism for the colourless approach towards "corruptly". It has been argued that where "corruptly" has been discounted, a useful key to distinguishing between corrupt and innocent conduct is lost.¹ The colourless approach survives because of the unlawfulness requirement. It is this element which assists the courts when deciding whether the conduct is corrupt.

The question remains whether there is any practical difference between relating "corruptly" to unlawfulness in either of the two senses understood by Hunt², on the one hand, and linking "corruptly" to mens rea in formulating a special intention on the other. The difference is clearly distinguishable in law. The unlawfulness of the act is normally judged objectively without any reference to the state of mind of the accused.³ The test for mens rea, where dolus directus or eventualis is required, is subjective.⁴

1. See 55 above.

2. See 79n5 above.

3. S v Goliath 1972 (3) SA 1 (A) at 11E-G and 25B-C; S v Motleleni 1976 (1) SA 403 (C) at 406C. See generally Burchell and Hunt 114-115.

4. See generally Burchell and Hunt 141-143 and the authorities which they cite at 142n144. They state that, since R v Nsele 1955 (2) SA 145 (A), the subjective test for criminal intention has been consistently applied by the South African courts.

Different practical consequences follow. If "corruptly" qualifies mens rea by requiring a special intention, the State will not only have to prove that the accused was subjectively aware of all the elements constituting the actus reus.¹ In addition, the State will have to show that the accused, being aware of the special relationship of trust between the principal and agent, intended to breach such a relationship.² The focal point of the enquiry is the mind of the accused. By way of contrast, if "corruptly" qualifies unlawfulness the test whether the transaction is innocent or corrupt is objective. The mind of the accused plays no part. Flowing from this distinction, the defences which exclude mens rea when compared to those which neutralise unlawfulness are entirely different.³

An important recent development in our law could narrow any difference which may result from equating "corruptly" with either mens rea or unlawfulness. It has now been established in S v De Blom⁴ that the accused must be aware of the unlawfulness of his conduct. This is a feature of mens rea in the form of intention.⁵ Is a special intention relevant when an awareness of the unlawfulness of the

1. Burchell and Hunt 130-131; 223-227.

2. See 64-65 above.

3. Burchell and Hunt 236-238; 321-322.

4. 1977 (3) SA 513 (A).

5. S v Speedy 1985 (2) SA 782 (A) where Hefer JA held at 788B-C that "die skuldigbevinding nie geregverdig kan word nie indien 'n redelike moontlikheid bestaan dat die appellant geglo het dat sy optrede regmatig was."

alleged misconduct is in any event necessary?

It is submitted that this question must be answered affirmatively. It cannot be suggested seriously that simply because an awareness of unlawfulness is a requirement of mens rea that statutory words such as "maliciously", "wilfully", "corruptly", and "fraudulently", which have all been held to colour the mens rea requirement in varying degrees, become irrelevant.¹

Apart from the conceptual differences between mens rea and actus reus, which have already been discussed,² "corruptly" has been construed to qualify mens rea in a special way. A subjective intention to breach a relationship of trust must be proved. This is not the same as requiring an awareness of unlawfulness. The latter is a more general requirement. All that is necessary to prove

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1. Where eg "wilfully" and "maliciously" are used in conjunction they are taken to mean "with a deliberate intention without any regard to the consequences" (R v Sprinkaan 1918 TPD 270 at 271). "Fraudulently" means "with intent to defraud" (R v Olifant 1950 (2) SA 514 (O)), Milton and Fuller 30n53 suggest: "By reason of the fact that the plain meaning of the words is to indicate that the legislature in some way contemplated the state of mind of the person accused with a statutory offence. The words are thus those evocative of a particular state of mind ('maliciously', 'wantonly', 'cruelly', 'corruptly', etc) or those indicative merely of a state of mind as opposed to mere inadvertence ('intentionally', 'knowingly', 'wilfully'). There would appear to be no closed list of such words; they are as infinite as the semantic ingenuity of the lawmaker."
 2. See 80 above.

is that the accused knew in broad terms that what he was doing was contrary to law. This is different to requiring a special intention.¹

It is therefore submitted that "corruptly" qualifies intention rather than unlawfulness.

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1. S v De Blom 1977 (3) SA 513 (A) at 531B-C. In S v Nkadimeng 1962 (4) SA 564 (T) at 567A and S v Ernst 1963 (3) SA 666 (T) at 667 Galgut J emphasised that the accused must be aware of the wrongfulness of the giving or receipt of the consideration. In the case of Ernst at 667F acting corruptly was equated with dishonesty which involved a breach of good faith towards the principal. Colman J in S v Van Zyl 1965 (2) PH K61 (T) at 233 interpreted these observations to mean: "I do not think, however, that the learned judge, in either of those passages, was using the words 'wrongly' and 'dishonestly' to mean either 'with consciousness of moral turpitude' or 'with knowledge and understanding of the law'. In my view he meant ... to refer to nothing more than a knowledge of the facts necessary to bring the transaction within the words of the statutory provision." It is submitted that the construction placed on the dicta of Galgut J by Colman J is incorrect. Colman J has confused *mens rea* coloured by "corruptly", which is what Galgut J had in mind, with unlawfulness. It was never suggested by Galgut J that there should be a "consciousness of moral turpitude", and a "knowledge and understanding of the law." It is clear, particularly from his remarks in Ernst's case, that Galgut J simply required a special intention to lend some meaning to "corruptly". This is not to be confused with over-emphasising a knowledge of unlawfulness to the extent of requiring that the accused knew the detailed requirements of the offence and the exact language used in the relevant section of the legislation. See Burchell and Hunt 168.

I. AMERICAN AND SOUTH AFRICAN CORRUPTION LAW COMPARED.

(a) American legislation .

A federal official commits bribery when he corruptly agrees to receive anything of value from any other person for being influenced in the performance of any official act.¹ Similarly, it is an offence for any person to corruptly give anything of value to a federal official in order to influence him in the performance of any official act.²

Apart from these bribery provisions, an anti-gratuity section³ provides that a federal official shall be guilty of a gratuity offence if he receives otherwise as provided by law for the proper discharge of official duty anything of value for himself for any official act performed by him.

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1. Section 201(c)(1) of the United States Code is cited in 18 United States Code Services (USCS) which penalises any public official who "corruptly asks ... receives or agrees to receive anything of value ... in return for: (1) being influenced in his performance of any official act; or (2) being influenced to commit ... any fraud ... on the United States; or (3) being induced to do ... any act in violation of his official duty"
 2. 18 USCS s 201(b) penalises any person who "corruptly gives, offers or promises anything of value to any public official ... with intent - (1) to influence any official act; or (2) to influence such public official ... to commit ... any fraud ... on the United States; or (3) to induce such public official to do ... any act in violation of his lawful duty"
 3. 18 USCS s 201(g) penalises any public official who "otherwise than as provided by law for the proper discharge of official duty ... asks ..., receives, or agrees to receive anything of value for himself ... because of any official act performed or to be performed by him"

The object of the legislation is that society is entitled to the benefit of unbiased judgement of public officials. Where the will of an interested party is substituted for the judgement of a public official as the controlling factor in the official decision, it is in the interests of society to deal sternly with such action.¹

(b) Bribery and gratuity provisions compared.

It will be noticed that whereas "corruptly" appears in the bribery offences, it is omitted in the gratuity section which is controlled by the phrase "otherwise as provided by law." The reason why the gratuity section was introduced was to avoid the difficulties presented by the word "corruptly".²

The American courts immediately drew a distinction between the bribery and gratuity provisions focussing their attention on "corruptly".³ This distinction was expressed in the following terms:⁴

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1. United States v Jacobs 431 F2d 754 at 759 (1970).
 2. The gratuity law, which does not contain a reference to "corruptly" was introduced because of the evidentiary difficulty of proving bribery and the conceptual difficulty of distinguishing bribes from campaign contributions. See TJ Noonon Jnr "Bribery" (1983) Encyclopaedia of Crime and Justice 119 at 121.
 3. United States v Strand 574 F2d 993 (1978). In United States v Fenster 449 FSupp 435 (1978) it was held that the bribery section requires a higher degree of criminal knowledge and purpose, as evidenced by the use of the word "corruptly" than the gratuity section. See also United States v Irwin 354 F2d 192 (1965) where the court, in dealing with a gratuity provision, held that the awarding of gifts related to an employee's official acts is an evil itself even although the donor does not corruptly intend to influence the employee's official acts.
 4. Per Wilkey J in United States v Brewster 506 F2d 62 at 71 (1974). (My emphasis).

"On the face of the statute the two comparative clauses are not equivalent. Congress did not use the same language in defining criminal intent for the two offenses. 'Corruptly' bespeaks a higher degree of criminal knowledge and purpose than does 'otherwise than as provided by law for the proper discharge of official duty'."

Thus "corruptly" is given a special meaning which promotes the distinction between bribery and gratuity. Perhaps our courts should follow this line of thought when distinguishing between the words "corruptly" and "knowingly" in the South African legislation.¹ The American approach lends support to the view that some meaning should be given to "corruptly" for purposes of distinction.

(c) What does "corruptly" mean?

Since "corruptly" is used in distinguishing between bribery and gratuity legislation, some meaning must be given to the word. Its interpretation must be sufficiently meaningful to make this distinction clear. At the same time, the meaning given to "corruptly" should not be formulated in a way which will make it difficult for the prosecution to prove corruption.²

A corrupt intent is required.³ In defining such intent, emphasis is placed on the concept that the bribe is the

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1. Compare subsecs (a) and (b) with subsec (c) of s 2 of the Act. See 37-38 above.
 2. People v Johnston 20 ALR 2d 1001 (1950).
 3. See United States v Anderson 509 F2d 312 (1974) where it was held that the existence of a corrupt intent to influence, or be influenced in, the discharge of official duties is a necessary element of the crime of bribery.

prime mover or producer of official action.¹ More specifically, "corruptly" has been defined as²

"the requisite corrupt intent consisted of the defendant's knowing acceptance of money for financial gain, in return for violation of his official duty, with the specific intent to violate the law".

If the concept of violation of official duty is seen in the context of the impairment of the integrity of public life, then this matches the intended breach of faith concept argued for earlier.³

(d) "Corruptly" relates to intention.

It will be observed from the American law on corruption, which has been canvassed, that "corruptly" is considered in the context of intention. It has been suggested that a criminal intent cannot be inferred from proof of payment only. Corrupt intent for bribery is an intent to influence an official act, or an intention to influence an official to commit fraud on the United States government or an intent to induce a public official to act in violation of his duty.⁴

1. See eg United States v Strand 574 F2d 993 (1978).

2. Per Choy J in United States v Strand (supra) at 996.

3. See 64-65 above.

4. See RB Fiske Jnr "White collar crime - a survey of law" (1980-81) 18 American Crim LR 165 at 240-241. The author proceeds to compare bribery with a gratuity offence which simply requires proof that the official to whom payment was made was in a position of authority and that payments were made because of that authority.

It is submitted that this is further authority that "corruptly" should qualify mens rea. As such it should be determined subjectively.¹

(e) Election law.

A problem which has bedevilled American election law is the fine distinction which lies between lawful and corrupt campaign contributions. Whereas a non-elected official should be confined to his salary, an elected official depends on outside contributions to run for re-election.² Where does a lawful contribution end and bribery begin? If it can be shown that the contribution was paid in order to secure the vote of an official on some future issue then bribery has been proved. Much will turn on "corruptly". This may be the sole standard which may determine the line between guilt and innocence.

A similar problem is yet to face the South African courts.³ The American situation is, however, topical in that it emphasises the importance of "corruptly". It has been suggested⁴ that, in an electoral sense, "corruptly" has been found wanting. It is not defined by the legislature. It is vague. The root of the difficulty is the

1. See 80 above.

2. An "elected" official is one who has been voted into office, whereas a person appointed under a contract of service by an administration may be described as "non-elected".

3. Although note s 115(2) of the Electoral Consolidation Act 46 of 1946 where the provisions relating to bribery shall not apply to any electoral expenditure bona fide and lawfully occurred.

4. Anonymous note "Campaign Contributions and Federal Bribery Law" (1978) 92 Harvard LR 451 at 453-460.

impossibility of determining in a principled fashion the difference between corrupt and proper conduct on the basis of criminal intent. Flowing from these difficulties there has been a concerted American effort to introduce legislation which avoids the use of "corruptly" while attempting more definitive descriptions of particular offences.¹ The attempts to exclude a reference to "corruptly" have met with varying degrees of success. Nevertheless "corruptly" still remains firmly entrenched as part of the definition of bribery.

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1. In the work cited at 88 n4 above the following piece of proposed legislation on bribery which avoids the use of the word "corruptly" failed to obtain the necessary approval because of the difficulty of drawing a proper line between exempt and criminal activities: "A person is guilty of an offense if: (1) he offers, gives ... to a public servant; or (2) as a public servant, he solicits, demands, accepts ... from another person; anything of value in return for an agreement or understanding that the recipient's official action as a public servant will be influenced thereby, or that the recipient will violate a legal duty as a public servant." (At 466). Note, however, the successful introduction of anti-gratuity legislation which supplements rather than replaces bribery. See 18 USCS s 201(g).

J. CONCLUSION .

Since the inquiry into "corruptly" was introduced against a factual background, it is appropriate to conclude with a reference to the practical inquiry upon which the courts embark in order to ascertain whether the Act has been infringed. Seldom is there direct evidence of mens rea.¹ This is particularly true of corruption cases where it is in the interests of both parties to the bribe to act secretly. The court is usually forced to draw inferences from the surrounding circumstances to ascertain mens rea. In deciding whether a corrupt intention is present the court will consider:²

- (i) when and where the gift was given;
- (ii) the social standing and employment held by the giver and recipient;
- (iii) whether the gift is of a moderate or immoderate amount;
- (iv) whether it is given openly or secretly, underhandedly or clandestinely.

1. R v Swemmer 1917 TPD 455 at 459.

2. These guidelines were laid down by Nicholson J in S v Deal Enterprises (Pty) Ltd 1978 (3) SA 302 (W) at 308C when he was considering whether "a corrupt intention" had been proved. Although the case deals with common law bribery, the guide given by the judge would be equally appropriate in ascertaining mens rea under the Act.

In this regard Willes J said that:¹

[T]he law deals with substance and not with shadows The Judge must satisfy his mind whether that which was done was really done in so unusual and suspicious a way that he ought to impute to the person who has done it a criminal intention in doing it"

Assuming that some meaning² should be attached to "corruptly", the question remains whether there should be legislative intervention to ensure that the prosecution of offences under the Act are not unduly hampered when attempting to prove corruption. Various avenues are open to the legislature:

- (a) Parliament may place the onus on the accused to show on a balance of probabilities that the consideration was not given or received "corruptly";³
- (b) Parliament may enact legislation which specifies corrupt offences without referring to "corruptly".⁴

1. Per Willes J in *Bodmin* (1869) 1 O'M and H 117 at 125-126. This extract was quoted with approval in S v Deal Enterprises (Pty) Ltd 1978 (3) SA 302 (W) at 310-311.

2. See 73 above.

3. See eg s 2 of the Prevention of Corruption Act 1916 in England. To protect honest donors, prosecutions under the Act require the consent of the Attorney-General or Solicitor-General.

4. See s 3(d) of the Prevention of Corruption Act Chap 70 in Zimbabwe where an agent shall be guilty of corruption if, by collusive agreement with the seller of goods, he secretly obtains any consideration. See also antigratuity legislation in America eg 18 USCS s 201(g).

As to solution (a), the legislature should be slow in departing from the well established principle that the onus lies on the State to prove its case beyond reasonable doubt. The Act has been amended recently to render an accused liable to the same penalties which may by law be imposed for the crime of bribery.¹ Therefore, a person who has been convicted under the Act in the Supreme Court faces the full weight of the court's common law jurisdiction. The legislature obviously regards the offence as an extremely serious one.² It is doubtful whether justice demands that an accused should be asked to share an onus in cases of this nature.

The alternative solution (b) has difficulties of its own. In America, for example, despite efforts to excise "corruptly" from its legislation, the adverb still features and plays a key role in bribery legislation. The corruption laws which omit a reference to "corruptly" supplement rather than replace the main offence of bribery where "corruptly" is firmly entrenched. The reason given for the retention of "corruptly" is that to omit it would cause difficulties in distinguishing between innocent and corrupt conduct.³

1. S 2 of the Prevention of Corruption Act.
2. *S v Young* 1977 (1) SA 602 (A) at 609C.
3. See ⁸⁹ⁿ¹ above.

It is submitted that in the absence of evidence to the contrary,¹ there are insufficient reasons for the legislature to interfere with "corruptly" at this stage. This leads to the question whether "corruptly" is as troublesome as has been suggested. It has been argued that it has a positive role to play.² A failure to appreciate this by rendering "corruptly" superfluous has led to some strange decisions.³

The necessity for anti-bribery legislation stems from a moral issue in that corruption amounts to a breach of trust and the sale of something which should never be sold.⁴ By relating "corruptly" to a breach of trust, the essence of the crime is pin-pointed. The distinction between innocent and punishable reciprocities in business life is sharpened thereby minimising the danger of convicting innocent givers or recipients of gifts.⁵

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1. See TJ Noonon Jnr "Bribery" (1983) I Encyclopaedia of Crime and Justice 119 at 123 where it is submitted that since bribery is not normally boasted of by the briber or bribee, it remains an unquantified phenomenon. As such it is impossible to say whether the multiplication of laws and prosecutions is reducing it, keeping even with it, or falling behind.
 2. See 67 above.
 3. In R v Smith [1960] 1 All ER 256 the appellant gave an IOU to a mayor with a view to trapping him into accepting a bribe. The appellant intended to act as a trap. He never intended to follow the matter through in order to obtain a favour from the Council. Favoursing a colourless approach to "corruptly", Lord Parker CJ supported the conviction of the appellant. This decision has been criticised by Gordon 947-948. Contrast Smith's case with S v Ganie 1967 (4) SA 203 (N) at 211-212 where the absence of mens rea exempted a trap from becoming an accomplice. Note, however, that Burchell and Hunt 429-430 take the view that a more appropriate reason for exempting a trap from criminal liability is that his conduct is justified on the ground of State authority.
 4. TJ Noonon Jnr "Bribery" (1983) I Encyclopaedia of Crime and Justice 119 at 124.
 5. Edwards 247.

CHAPTER 3THE ROLE OF THE GIVER OF A BRIBE AT THE TRIAL OF
THE RECIPIENTA. INTRODUCTION

Controversy has existed for some time as to the relevance of the state of mind of the giver of a bribe when the guilt of the recipient is under consideration. In a long series of cases three schools of thought have emerged

- (a) the State must prove that the giver must actually have intended the gift to operate as an inducement or reward and the recipient must be aware of such an intention when he accepts the gift;
- (b) it is sufficient to show that the recipient of the gift believed (rightly or wrongly) that the giver intended that the gift should operate as an inducement or reward;
- (c) the State need prove neither (a) nor (b), but may simply rely on the fact that the recipient of the gift acted with the requisite corrupt intent.

For the purpose of analysing this controversy, the salient features of the common law definition of bribery are¹

- (i) a briber must offer to or agree with a State official to give a consideration in return for action or inaction by him in an official capacity;
- (ii) a bribee must agree to take a consideration in return for action or inaction by him in an official capacity.

Similarly, the Prevention of Corruption Act² distinguishes between the briber and bribee as follows

- (i) the briber must corruptly give or agree to give or offer a consideration to an agent as an inducement for doing or forbearing to do an act in relation to his principal's affairs;
- (ii) the bribee must corruptly accept or obtain or agree to accept or attempt to obtain from any person a consideration as an inducement for doing or omitting from doing any act in relation to his principal's affairs.

1. The common law definition of bribery is considered in Chap 1 above.
2. S 2(a) and (b).

It will be noted that although the offences of the briber and bribee are severable,¹ a measure of reciprocity is envisaged. There must always be two parties. A causal link should exist between the consideration and the action.² It must be decided whether a conviction of the recipient of a gift is dependant on the guilt of the giver. Put differently, is it possible to secure a conviction of bribery against the bribee where the other party has acted entirely innocently?

B. A REVIEW OF THE THREE SCHOOLS OF THOUGHT.

(a) Proof of corrupt intent on the part of the giver.

The view that there can be no conviction of the recipient of the gift unless the State proves that the giver actually intended the gift to operate as an inducement or reward was pioneered in R v Naidoo.³

In R v Sesing,⁴ Van den Heever J sought to draw a distinction between the meaning to be given to "corruptly" when considering the behaviour of the briber as opposed to the interpretation that "corruptly" should bear when looked at in the context of the conduct of the bribee. In this regard, Van den Heever J remarked⁵

1. Snyman 6 LAWSA para 221.
 2. S v Van Zyl 1965 (2) PH K61 (T).
 3. (1927) 44 SALJ 585 (N).
 4. 1940 OPD 78. For the facts of Sesing's case see 68n2 above.
 5. At 88. (My emphasis).

"it is clear that the word 'corruptly' cannot have the same meaning in para. (a) as in para. (b) of sec. 2, for in one case it stigmatises the conduct of the active agent of seduction and, in the other, that of the passive party. A recipient cannot induce himself to do or refrain from doing (something in relation to his principal's affairs or business). It seems to me, therefore, that the Legislature could have meant nothing more than this: If you accept, knowing that the giver meant to seduce. For otherwise the agent would always have a complete answer by saying 'I accepted, knowing what object the giver had in mind, but I accepted intending not to be influenced.' "

In R v Ndobe¹ Ramsbottom J considered the liability of the bribee. He sought to distinguish between the corrupt receipt of a gift by a bribee as opposed to the situation where the "gift is corruptly" solicited but not received." Following the approach in Sesing's case, Ramsbottom J discussed how a corrupt receipt by the bribee should be proved:²

If a fee or reward is received, it must be received 'as an inducement' to the recipient to do or refrain from doing something That imports the idea of a mental state in the giver. A man can only receive something as an inducement to act or to refrain from acting if it was in the mind of the giver to induce him to act or to refrain from acting, and he can only receive something in 'in consideration of' his acting or forbearing to act if the giver intended the fee or reward to be in consideration of an act or forbearance A servant of the Council receives a fee ... 'corruptly' ... if he receives it knowing that the giver has given it with the intention of inducing him to act"

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1. 1952 (3) SA 562 (T).
 2. At 563-564. (My emphasis).

In R v Durga¹ Holmes J held that²

"if the giver is innocent of any motive to induce or reward the agent, it cannot be said that the latter has accepted or obtained a gift or consideration as an inducement or reward."

This case was followed in R v Mithi³ where Dowling J held that in order to convict the recipient of the consideration "the Crown must prove that the giver had a corrupt motive."

Note also S v Pillay⁴ where, in acquitting the appellant, Caney AJP stated⁵

"in the case of bribery both parties, the giver and receiver, are dishonest whereas in a case such as the present ... the givers were innocent parties with no motive to bribe or perform any corrupt act. ... [I]t was the appellant from beginning to end who was the person with the guilty mind."

A similar approach is to be found in S v Mbokatwane⁶ where the appellant was likewise acquitted on the basis, inter alia, that the State had not proved that the complainant gave the money as an inducement. One is left with the situation that only after the State has established a corrupt intention on the part of the giver, will the court continue its inquiry to establish whether or not the conduct of the recipient falls within the ambit of s 2(a).

1. 1952 (4) SA 619 (N).
 2. At 620A.
 3. 1959 (4) SA 287 (T) at 290A.
 4. 1964 (2) SA 385 (N).
 5. At 388D-E.
 6. 1970 (3) SA 64 (E) at 66C.

- (b) Proof that the recipient believed that the giver has a corrupt intention.

In considering an alleged contravention of section 2(a) of the 1918 Act,¹ Hoexter JA in R v Geel² had occasion to comment on the reasoning in the cases of Ndobe and Durga as follows:³

"I agree with the view expressed in the cases quoted to this extent that an agent can only receive something as an inducement to act or to refrain from acting if he believes that it is in the mind of the giver to induce him to act or to refrain from acting. Whether the actual state of mind of the giver is to be taken into account is not a question which is necessary to decide in the present case. It is possible to conceive of a case in which the giver had no intention of bribing and the agent nevertheless erroneously believed that he had such an intention. In such a case it may be that the agent would be guilty of contravening the section even if the giver had no intention of bribing. But what is clear at any rate is that the agent cannot be guilty if he knows or believes that the giver has no intention of bribing. The onus is on the Crown to prove, at least, that the agent believed, when he accepted or obtained the gift or consideration, that the giver intended such gift or consideration as an inducement for doing or forbearing to do... any act in relation to his principal's affairs or business."

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1. The Prevention of Corruption Act 4 of 1918 which preceded the present Act on corruption.
 2. 1953 (2) SA 398 (A). In Geel's case the appellant was employed by a municipality to issue site permits to black persons. The State alleged that he had corruptly obtained £20 from an applicant for a permit as an inducement to issue the permit. The applicant had paid the money in good faith. He had no intention to bribe the appellant. Hoexter JA (with Greenberg JA and Fagan JA concurring) set aside the appellant's conviction under s 2(a) of Act 4 of 1918 as the State had failed to prove that appellant believed that the applicant for the permit had paid the money to induce him to issue the permit.
 3. At 402G.

Without specifically rejecting the approach under

(a) above, Shaw J in R v Mbata¹ concentrated on the state of mind of the recipient:²

"Whereas, therefore, a fee or reward is corruptly received if the servant receives it with the knowledge or, applying Geel's case, belief that the giver has given it with the intention of inducing him to act or forbear from acting ... it is corruptly solicited if it is asked for with the intention that the giver should give it with that intention."

It is clear that the gift may be corruptly received without the giver having a corrupt motive. It could also be corruptly solicited without the giver ever forming a corrupt intention.

The approach suggested in Geel's case has found favour particularly in instances where the gift has been corruptly solicited by the bribee as opposed to the circumstance where the initiative comes from the briber who offers the gift to the bribee. This distinction received attention in R v Ndobe³ where Ramsbottom J held:⁴

"The position where a gift is corruptly solicited but not received is rather more difficult. Here, the mental element is somewhat different. The person solicited may never form the intention of making the gift, and in this case it is the state of mind of the person who solicits that must be regarded It is not enough for him to ask for a gift; he must ask that something be given him as an inducement to him to act"

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1. 1954 (1) SA 538 (N).
 2. At 541E. (My emphasis).
 3. 1952 (3) SA 562 (T).
 4. At 564D-E

The finding in R v Mithi¹ that the State must prove that the giver must have a corrupt motive before the recipient of a bribe can be convicted was criticised in S v Nkadimeng,² where Galgut J took the view that it was not necessary that the giver should always have a corrupt intention before the recipient can be convicted. The judge was dealing with a case where the giver acted as a trap. It was found that the State had proved that the appellant (the bribee) had believed that the giver had a corrupt intention in giving the money. Accordingly, the appellant's conviction was confirmed.

The approach concentrating on the belief of the recipient was also followed in S v Lebane³ and S v Panovka.⁴ In the latter case Burne J held that it must be proved that the recipient subjectively knew or believed that the giver was trying to bribe or induce him to do or omit doing any act in relation to the affairs or business of his principal.

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1. 1959 (4) SA 287 (T).
 2. 1962 (4) SA 564 (T).
 3. 1963 (2) PH K88 (C). In this case Watermeyer J was dealing with an alleged contravention of s 2(a) of the Act. The judge posed the following question: "[C]an it be inferred beyond reasonable doubt from the circumstances in which the money was handed over that the appellant (recipient) believed that the complainant and his aunt (giver) were intending to induce him to act [?]"
 4. 1970 (1) PH S30 (N) at 72. In this case the test proposed by Burne J was as follows: "The question involved is not whether a reasonable man, regarding the position objectively, would, or should, have known or believed that it was in the mind of the giver to bribe or induce him. The question is whether the accused subjectively did know or believe that the giver was trying to bribe or induce him."

In S v Du Preez¹ the requirement that the giver should have a corrupt motive was sharply rejected by Claassen J when dismissing an appeal by the recipient against his conviction under section 2(a)² in the following terms:

Volgens my mening kan daar miskien gevalle wees waar dit nodig mag wees dat daar korruptiewe motiewe gevind moet word aan die kant van die gewers, maar ek is met eerbied oortuig dat die nie in alle gevalle nodig is nie. Daar moet ... gevalle wees waar dit alleen nodig is om te bewys dat die agent die korruptiewe motiewe gehad het. Veral sal dit die geval wees waar die poging om die beloning te verkry op korrupte wyse van hom, die agent, uitgegaan het en die gewer daartoe ingewillig het [D]ie appellant het geweet dat sy eie motiewe korrupt was en het hy ook geglo dat die motiewe aan die kant van die betalers korrupt was Dit was nie nodig om te bewys dat die klaers korrupte bedoelings gehad het nie.

The trend of these cases³ clearly shows that, when applying section 2(a), the intention of the giver is being pushed into the background, with greater emphasis being placed on the state of mind of the recipient.

(c) Proof of a corrupt intention on the part of the recipient alone.

From the approach in (b) above, it remains essential for the State to prove a corrupt intention on the part of the giver in the sense that the recipient believed that the giver was acting corruptly. If the recipient knew or believed that the giver gave the gift with an entirely innocent motive, for example, where the giver acted in good faith on a misrepresentation of the recipient, then the recipient cannot be convicted under section 2(a).

1. 1968 (2) SA 731 (T).

2. At 733F and 734D.

3. See also S v Joubert 1979 (1) SA 97 (T) at 101-102.

In S v Ernst,¹ Galgut J emphasised that the essence of the offence is "the actual subjective intention and state of mind of the accused". He held that "the crucial and final consideration" is the state of mind of the accused, who, in the case of Ernst, was the recipient of money which he had solicited from the complainant. Galgut J accepted as a general proposition that where the offer of a gift originates from the giver, the state of mind of the recipient could usually be inferred from the nature of the communication between the two parties to the bribe. The consensus ad idem would usually be sufficient to establish that the intention of the bribee corresponded with that of the briber. Clearly such consensus need not always be present. The recipient may accept the gift innocently, despite the corrupt intention of the briber or vice versa. It is a question of drawing inferences from the facts with the focal point of the enquiry being the intention of the man on trial.

1. 1963 (3) SA 666 (T) at 667E-F. In Ernst's case the appellant was charged with contravening s 45(1) of Ordinance 17 of 1939 (T). The appellant, a municipal official, had corruptly solicited R2 from a fellow municipal employee, one Wiseman, as a consideration for agreeing to keep Wiseman in the service of the municipality. Galgut J accepted the appellant's version that after dismissing Wiseman, he agreed to re-employ him if he accepted a beating. Wiseman refused to submit to the beating, but agreed to pay a R2 fine to the appellant instead. The fine was paid to the appellant who then re-engaged Wiseman. In upholding the appeal, Galgut J (with Trollip J concurring) found that the State had failed to prove that the appellant had the necessary mens rea to found a conviction of corruption.

Further, where the bribee unsuccessfully solicits payment, regard must be had to his intention. The enquiry is directed at investigating his intention and state of mind when he solicited the gift.

It appears that the ratio in Ernst's case is that the state of mind of the giver is by no means decisive. It is simply an evidential factor which may be taken into account in assisting the court when determining the state of mind of the recipient. The essence of the offence, however, is the actual subjective intention and state of mind of the accused. Galgut J emphasised that¹

"the crucial and final consideration is the accused's ... state of mind"

The appellant was acquitted on the basis that, even if the giver acted corruptly, it was not proved that the recipient (appellant) was aware of any corrupt motive on the part of the giver. The appellant therefore lacked the necessary mens rea. Although this was the reason given for acquitting the appellant, it would seem that the comments of Galgut J on the law could permit the conviction of a bribee where his mens rea has been proved without reference to what he believed to be the intention of the briber.

1. At 669A.

The only case which deals with these principles under common law bribery is S v Gouws.¹ Counsel for the appellant (the recipient of the reward) contended that there was no material difference between the statutory provisions concerning bribery and the common law crime of bribery. This contention appears to be correct, if one confines the comparison to the principles under discussion.

After a review of the common law and most of the cases already referred to, Rabie JA in Gouw's case came to the conclusion that²

"in ons reg betreffende die gemeenregtelike misdaad omkoperij dit nie juis is om te sê dat die ontvanger van 'n geskenk alleen skuldig bevind kan word indien daar ook bewys van die skuld van die gewer van die geskenk is nie."

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1. 1975 (1) SA 1 (A). In Gouw's case the appellant was the manager of the Motor Vehicle Insurance Fund ("the Fund") He formed K Ltd with one Kriel as its director. Money of the Fund was invested through K Ltd with various institutions. A portion of the commission paid by the Fund to K Ltd in return for its investment services was given to the appellant by Kriel. The State alleged that this payment to the appellant constituted common law bribery. Since the evidence disclosed that Kriel lacked the intention to bribe the appellant, his counsel argued that the conviction of bribery could not be sustained. Rabie JA (with Rumpff CJ and Wessels JA concurring) rejected this submission as he found that it was unnecessary for the State to prove that Kriel himself was guilty of bribery. The court went on to hold, however, (Wessels JA dissenting) that the appellant was entitled to an acquittal on the basis that there was an insufficient nexus between the payment of the commission to the appellant and his work for the Fund.
 2. At 12-13.

Two aspects require comment. Firstly, the judge refrained from deciding on the correctness or otherwise of Ndobe's case and other related cases dealing with statutory bribery, thus confining the ambit of his finding to common law bribery.

Secondly, although Rabie JA specifically rejected the necessity of proving a corrupt intention on the part of the giver before a bribee can be convicted, it is submitted that it is implicit from his judgement that it is even unnecessary to show that the bribee believed that the giver gave the gift corruptly.

The reasons for this conclusion are

- (i) although the giver of the alleged bribes was a company, the court had regard to the conduct of its director, one Kriel, who was found to be a relatively simple and unsophisticated person. Kriel testified that when the company made payments to the appellant (the alleged bribee) he was unaware that they could be construed as bribes. Kriel was in fact completely controlled by the appellant.¹ It is unlikely that the appellant believed that Kriel was acting corruptly;

1. At 14A.

- (ii) although the appellant was acquitted on several counts of bribery by the majority of court, the basis of acquittal was not founded on the fact that the appellant believed in the innocence of Kriel, but rather on the grounds that there was no causal connection either in fact or in the mind of the appellant between the money paid to him and any official action he may have rendered;¹
- (iii) it is instructive to note that although Wessels JA sided with the majority of the court on the law, in a dissenting judgement he took the view that the appellant had been correctly convicted of bribery. He arrived at this conclusion accepting the innocence of Kriel. Further, his finding was not dependant on what the appellant believed to be the role played by Kriel. Wessels JA held that:²

"Kriel het getuig dat hy geen bedoeling gehad het om die appellant om te koop nie. Al sou hierdie getuienisaanvaar word sou dit ... nie die kwessie van appellant se skuld in die betrokke omstandighede affekteer nie. Hy het inderdaad voordele van Konsortium ontvang en die getuienis dui ont-eenseglik daarop dat, tot die appellant se kennis, daar 'n verband was tussen die ontvangs van dié voordele en die handeling wat deur hom in 'n amp-telike hoedanigheid verrig is."; and

1. At 15A.
2. At 17A.

(iv) in a review by Rabie JA of the common law and some comparative law, which is considered later,¹ there is no suggestion that the recipient is required to believe that the giver intended to act corruptly.²

It is submitted, therefore, that Gouw's case is strong authority for arguing that it is the mental attitude of the recipient that is decisive. The actual or putative corrupt motive of the giver is not an element of the offence.

This view is supported in S v Hartzenburg³ where Steyn J, having found that the givers were unaware that they were committing an offence, concentrated solely on the intention of the recipient using the following reasoning⁴

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1. See 109; 126 below.
 2. In his review of the Placaat of 1715, Rabie AJ at 11H held: "Daar word niks gesê omtrent die gemoedsgesteldheid van die gewer van die geskenk, of omtrent die ontvanger van die geskenk se kennis van die gemoedgesteldheid van die gewer van die geskenk nie. M.a.w., die verbod op die aanneem van 'n geskenk word nie afhanklik gemaak van die gemoedstoestand, of skuld, van die gewer van die geskenk nie."
 3. 1964 (2) PH H219 (T). In Hartzenburg's case the appellant's duty was to employ people to work for the provincial administration in a road camp. Prospective employees were told by the appellant that their applications for employment could succeed only if each person brought him a chicken. The employees gave the chickens to the appellant in good faith. They had no intention to bribe the appellant. Since this intention was absent, the appellant's counsel argued that his conviction under s 2(a) of the Act was improper. In confirming the conviction, Steyn J (with Trollip J concurring) emphasised that it was the intention of the appellant, not that of the employee, that was relevant.
 4. At 527.

"waar die aanbod van die agent kom ... aan 'n persoon, gepaard met 'n rede vir daardie aanbod wat dan oorgedra word aan die persoon wie daarna die gawe moet gee, kan 'n mens aflei van die vorm van daardie versoek wat die bedoeling was."

It was emphasised that it is the intention with which the recipient accepted the gift which is relevant, not the intention of the giver when he offers the gift.

C. AN EVALUATION OF THE THREE SCHOOLS OF THOUGHT.

(a) The common law.

In a careful review of common law bribery, Rabie JA in S v Gouws¹ searched in vain for authority which supported the proposition that the recipient of a gift can be convicted of bribery only if there is proof of a corrupt intent of the giver. It has been generally accepted by the Appellate Division² that the provisions of, inter alia, the Placaat of 10 December 1715 set out the Roman Dutch law of bribery, which Rabie JA construed in Gouw's case as follows:³

"Hier word bepaal ... dat 'n amptenaar nie 'n geskenk mag ontvang as hy weet dat daardie iemand iets met sy (die amptenaar se) werkgewer te doen het deurdat hy bv. die een of ander voordeel wil verkry, of omdat hy dit reeds verkry het nie."

1. 1975 (1) SA 1 (A).
 2. R v Chorle 1945 AD 487 at 492.
 3. At 11.

Rabie JA concluded from this passage that the behaviour of the recipient may still fall within the ambit of the Placaat without it being necessary to prove :

- (i) the attitude or guilt of the giver; or
- (ii) the receiver's knowledge of the attitude or guilt of the giver.

Rabie JA in Gouw's case continued:¹

"Wanneer 'n mens let op die ratio van die verbod op die gee en aaneem van geskenke, sou daar m.i. ook nie genoegsame rede wees om die skuld van die ontvanger van die geskenk noodwendig van die skuld van die gewer daarvan afhanklik te maak nie Waar dit dus die ampsintegriteit is wat beskerm moet word is dit moeilik om in te sien waarom die amptenaar wat 'n geskenk ontvang nie skuldig bevind sou kon word tensy die gewer van die geskenk bedoel het om hom om te koop en dus self ook aan die misdaad skuldig is nie."

This reasoning was illustrated by way of an example.²

In return for a favour a person gives a gift to an official. The giver is unaware that his benefactor is an official who was simply carrying out his official duties when extending the "favour". The giver is not guilty of bribery. Why should the official not be convicted of bribery when he knew that the gift was made in return for carrying out his official duties which the giver looked upon as a favour?

1. At 11-12.
2. At 12B.

In deciding that it is not correct to say that, before the receiver can be convicted of common law bribery, there must also be proof of the guilty intent of the giver, Rabie JA specifically refrained from extending his decision to statutory bribery.¹ It is submitted, however, that his judgement has some bearing on corruption under the Act. With several exceptions not relevant to the present enquiry, the common law and the Act are substantially similar. It has been suggested that the Act was designed to incorporate the elements of common law bribery which have been identified from time to time in previous decisions.²

Having regard to the similarity between the common law and statute law on bribery there is no reason why the decision in Gouw's case should not be extended by the Appellate Division to corruption under the Act in the near future. This view is reinforced by the basic canon of interpretation which stipulates that "a statute is to be construed in conformity with the common law rather than against it."³ It is paradoxical that a recipient of a gift on the same facts could be convicted under the common law of bribery but acquitted under the Act where the giver of the consideration acted innocently.

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1. At 13A
 2. De Wet and Swanepoel 601.
 3. Per Centlivres CJ in Van Heerden v Muir 1955 (2) SA 376 (A) at 379.

(b) Statutory corruption(1) Why the intention of the briber is considered relevant to the culpability of the bribee.

Under section 2(a) of the Act, an agent is guilty of corruption if he corruptly accepts or obtains any gift as an inducement for doing an act in relation to his principal's affairs. The underlined words lie at the centre of the dispute. They have been interpreted to mean that the gift can only be received as an inducement to act if the giver intended this result. The recipient cannot induce himself to act. Where the giver has no intention to induce action¹ or where the recipient believes that the giver is devoid of such intention,² the recipient of the gift cannot be convicted of taking the gift as an inducement to act.

(2) An alternative interpretation of the words "as an inducement ... to ... act."

It is true, that reciprocity lies at the heart of corruption. There must at least be two parties to a corrupt transaction. The gift must be regarded as a quid pro quo for some action.³ The question to be decided is whether the reference to "an inducement to act" precludes the conviction of the bribee, where the giver acts inno-

1. See cases cited under approach (a) at 96 above.
 2. See cases cited under approach (b) at 99 above.
 3. S v Van Zyl 1965 (2) PH K61 (T).

cently. Alternatively, is it really necessary to insist on the requirement that the recipient must believe that the giver acted corruptly?

One accepts without hesitation that there must be a causal link in the mind of the recipient connecting the gift with the action on his part. For example, if the recipient thinks that the giver is repaying a loan, then clearly no conviction can follow. To this extent it is perfectly correct to say that the recipient must realise that the gift was being offered as consideration for work done by him. This requirement, it is submitted, can still be fulfilled where the giver makes a payment in good faith and the recipient is aware that the giver has made the payment honestly. Such a circumstance does not preclude the recipient from acting corruptly provided the recipient relates the gift directly to an inducement or reward for some action on his part as is envisaged in section 2(a). In other words it is the guilty state of mind of the recipient that is decisive. Any corrupt intention (real or imaginary) of the giver should not be used as a conditio sine qua non for a conviction of the recipient.

It is submitted that, since section 2(a) concerns itself with penalising the recipient of the gift, it is his state of mind that is the decisive factor. The mental attitude of

the giver is not strictly material in deciding whether or not the requisite mens rea of the recipient is present. The mischief at which section 2(a) is aimed is any conduct on the part of the recipient which assails the integrity of office held by the recipient. It is this integrity which must be protected.¹ Further since the bribee need not be a State official, it may be added that the legislature wanted to ensure that an agent is encouraged to comply with his duty to act in the utmost good faith in conducting his principal's affairs in the latter's interests and not for his own benefit.² Having regard to the purpose behind section 2(a), it is difficult to follow why it is necessary to prove the corrupt intent of a giver before a conviction of the recipient can follow. The insistence of the requirement is neither expressly provided for nor can it be implicitly included in applying section 2(a).³

A separate offence has been created by section 2(b) to penalise the giver of the reward. There is no suggestion that the conviction of the giver is dependant upon the mens rea of the recipient, it being sufficient to prove the giver's corrupt intent.⁴ There is no reason why the

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1. S v Gouws 1975 (1) SA 1 (A) at 12A.
 2. S v "A" 1979 (4) SA 51 (R) at 60E.
 3. As was pointed out by Claassen J in S v Du Preez 1968 (2) SA 731 (T) at 733E "die klem val op die korrumperte ontvangs of verkryging van 'n geskenk of vergoeding deur die agent." See also S v Joubert 1979 (1) SA 97 (T) at 101H.
 4. Cf R v Ingham 1958 (2) SA 37 (C) at 48B where Rosenow AJ held that the crime of common law bribery is complete when the briber makes his offer to the bribee.

mental attitudes of giver and recipient should not be equally clearly isolated in the application of section 2(a).

It is submitted that the language used in section 2(a) is sufficiently clear to sanction a conviction of the bribee where the giver is innocent or where the bribee believes that the giver had no corrupt intention. Alternatively, if this submission is incorrect in that the language used in section 2(a) is ambiguous, thereby permitting two reasonably acceptable interpretations, then the approach which concentrates exclusively on the mens rea of the bribee is to be preferred. As long as there is a causal link in the mind of the bribee between the gift and the performance, that is sufficient. To hold otherwise would defeat the legislative object of the Act, even although this construction could operate against the bribee.¹

(3) The party who instigates the bribery.

Our courts² have on occasions distinguished between bribery initiated by the briber as opposed to the case where the bribee solicits a bribe when considering the guilt of the bribee. Where the briber offers a bribe, the bribee must know³ or believe⁴ that the briber tendered the gift as an inducement to act. The weakness of this approach is readily observed when an attempt is

1. Milton and Fuller 11

2. See eg R v Ndobe 1952 (3) SA 562 (T) at 563-564; R v Mbata 1954 (1) SA 538 (N) at 541E; S v Ernst 1963 (3) SA 666 (T) at 667-668.

3. See eg R v Mithi 1959 (4) SA 287 (T).

4. R v Geel 1953 (2) SA 398 (A).

made to apply it to the situation where the bribe is solicited by the bribee. The mens rea of the briber can no longer be material to the guilt of the bribee if the eventuality is to be catered for where the solicitation of the bribee is rejected or where, in response to the bribee's solicitation, the giver hands over the gift innocently. It is in these situations that the courts were forced to focus upon the mens rea of the bribee.¹

It is submitted that there is no merit in distinguishing between cases where the offer to bribe came from the giver and those where the gift is solicited by the bribee. In either eventuality the possibility exists that the giver of the gift acted innocently. This innocence should not be weighed in favour of the bribee where the State is able to prove that he had the necessary mens rea when receiving or soliciting the gift.

It is not suggested that the mens rea of the briber is irrelevant when assessing the guilt of the bribee. This is particularly so when the offer to bribe originates unsolicited from the briber. The intention of the briber which may be inferred from the nature of the offer will be important evidence against the bribee where the offer is accepted.² A consensus ad idem may be established. In this context it is correct to say that where a bribee

1. See eg the cases cited under approach (b) at 99 above.
2. S v Ernst 1963 (3) SA 666 (T) at 667G.

accepts the offer knowing or believing that it was the intention of the briber to induce him to act, a conviction of the bribee will generally follow. But this is a matter of evidence. To elevate this evidential material to the status of an element of the crime of corruption is wrong as it does not allow for the situation where the giver lacks mens rea yet the bribee acts corruptly.

D. THE "ATTEMPT" SOLUTION

Before the decision in S v Gouws,¹ Hunt² took the view that in common law the bribee who thought that the briber intended to bribe, could only be convicted of attempted bribery where the giver had in fact acted innocently. In a similar situation under the Act, Hunt submits that it would be proper to convict the bribee of contravening section 2(a) as it is an offence for the bribee "to attempt to obtain" a gift in return for action in relation to his principal's affairs. These propositions require closer scrutiny.

(a) Common law bribery.

The position of the briber may be contrasted with that of the bribee. The common law offence of the briber includes an offer or an agreement to give a bribe. On the other

1. 1975 (1) SA 1 (A).
 2. PMA Hunt "Bribery : Relevance to the Bribee's Guilt of Briber's Intention" (1968) 85 SALJ 399.

hand, the offence of the bribee is confined to agreeing to take or taking a consideration.¹ It follows that the offence of the briber is complete when he offers to bribe even although the offer is not accepted.² To convict the bribee at least an agreement must be proved.³ Therefore it is accepted that where a bribee unsuccessfully solicits a bribe, the proper verdict would be attempted bribery.⁴

Hunt extends the concept of attempt to the following situation:⁵

"Y is guilty only of an attempt if he receives from X a consideration which he thinks X intends as a bribe, but which X intends as an innocent payment of some kind: in this case Y has mens rea, but that element of the crime has not been satisfied which requires an agreement to take the consideration in return for action or inaction."

It is submitted that such an extension cannot be supported. There is no authority for this approach in common law.⁶ There must be agreement between the parties in that the consideration is handed over in return for official action or inaction. The difference is that the giver acts innocently, whereas the recipient acts unlawfully. On Hunt's theory, the bribee can only be convicted of an

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1. R v Chorle 1945 AD 487 at 492-493.
 2. Hunt 223.
 3. The common law definition of passive bribery stipulates an agreement between the briber and bribee. See Snyman 314.
 4. Section 256 of the Criminal Procedure Act 51 of 1977.
 5. PMA Hunt "Bribery: Relevance to the Bribee's Guilt of Briber's Intention" (1968) 85 SALJ 399 at 401.
 6. On the contrary, S v Gouws 1975 (1) SA 1 (A) now excludes Hunt's submission. Contrast Hunt 229-230.

attempt even although he has received the gift. This places too fine a distinction on the "agreement" requirement.¹ Whatever the position may be in the law of contract,² it is submitted that for the purposes of the common law the offence of bribery is complete, from the bribee's point of view, where the parties are ad idem on the gift and the action, providing that the bribee acts unlawfully with the requisite mens rea.

(b) Statutory bribery.

The Act is sufficiently wide to cover instances where the bribee "corruptly" accepts or obtains or agrees to accept or attempts to obtain a consideration.³ Hunt has the following to say concerning the controversy where the bribee may be acquitted if the giver of the consideration acts innocently:⁴

"It is submitted that in the context of section 2(a) this whole controversy is somewhat academic. Even if Y has not accepted or obtained a bribe ... he has clearly 'attempted to obtain' a bribe ... and as 'attempts to obtain' are within the express terms of the section, a conviction for contravening section 2(a) is in order"

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1. By adopting an over technical approach to defining agreement, the object of the legislature could be defeated. S v Gouws 1975 (1) SA 1 (A) at 12.
 2. Diedericks v Minister of Lands 1964 (1) SA 49 (N).
 3. S 2(a).
 4. PMA Hunt "Bribery: Relevance to the Bribee's Guilt of the Briber's Intention" (1968) 85 SALJ 399 at 400.

In support of this proposition Hunt relies on R v Kok¹ where Holmes J (as he then was) held:²

"If an agent corruptly asks a person for £5 as an inducement for omitting to do something in relation to his principal's affairs or business, that seems to me clearly to be an attempt to obtain money as an inducement, regardless of the state of mind of the person approached. And that attempt to obtain the money as an inducement is unaffected by the fact that the person concerned afterwards pays it without any motive to induce, but to assist a police trap."

Although the argument is an attractive one, it has several defects. As was conceded in the case of Kok,³ the main issue was side-stepped, namely, the relevance of the intention of the giver of the bribe. It is illogical to speak of an attempt to obtain a consideration when, according to the facts of Kok's case, the money had actually been received by the bribee. In these circumstances, is it notionally possible that this attempt could ever be converted into a completed offence? If it is accepted that no conviction of bribery can follow where the giver acts innocently, then the appellant should have been acquitted in Kok's case as to be convicted of bribery in these circumstances is a legal impossibility.⁴ It remains pertinent to settle the relevance of the giver's intentions when assessing the guilt of the recipient.

1. 1960 (4) SA 638 (N).

2. At 640-641.

3. At 640C.

4. In R v Davies 1956 (3) SA 52 (A) at 64B Schreiner JA held: "If what the accused was aiming to achieve was not a crime an endeavour to achieve it could not, because by a mistake of law he thought that his act was criminal, constitute an attempt to commit a crime."

The approach adopted in Kok's case has enjoyed little support. In the majority of cases¹ the accused have been acquitted without the consideration of a possible conviction of an attempt. Other cases have rejected this solution. In S v Lebane,² where the accused was acquitted, the possibility of conviction of an attempt was considered but not applied. Further in S v Pillay,³ Caney AJP in considering Kok's case and S v Nkadimeng,⁴ sought to distinguish them on the facts from the matter before him, concluding, when acquitting the appellant:⁵

"According to the evidence it was the appellant from beginning to end who was the person with a guilty mind. It was, if anything, an attempt at deceit on his part and if he was guilty of anything ... then it would be presumably falsitas or theft by false pretences."

It is of interest to consider why the legislature specifically included a reference to an attempt to obtain a reward when a conviction of attempted bribery could in any event be supported by applying general principles.⁶ Perhaps the legislature wished to emphasise that just as the briber could be convicted of corruption although

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1. See eg the cases cited at 96-98 above.
 2. 1963 (2) PH K88 (C).
 3. 1964 (2) SA 385 (N).
 4. 1962 (4) SA 564 (T).
 5. At 388E.
 6. S 15(1) of the Riotous Assemblies and Criminal Law Amendment Act 27 of 1914 which would have been applicable to the Prevention of Corruption Act 4 of 1918 which is substantially similar to the present Prevention of Corruption Act 6 of 1958. Cf s 191 of the Criminal Procedure Act 56 of 1955 and s 256 of the Criminal Procedure Act 51 of 1977.

his offer was refused, the bribee could expect to be penalised where his solicitation for a bribe fell on deaf ears. Nevertheless, it is accepted that the statutory reference to attempt may have a wider connotation. For example, it could cater for the situation where the bribee makes a written offer for a bribe. If the offer is intercepted in the post by the police, before reaching the briber, a conviction of attempting to obtain a bribe would be proper.¹

E. ACCOMPLICE EVIDENCE

A consequence of following the approach that it is necessary to prove mens rea on the part of the giver before a recipient of a gift may be convicted is that the giver must automatically be labelled as an accomplice. In all instances under this approach, therefore, the giver's evidence must be approached with the requisite caution. Thus in R v Otter² Tredgold J held that³

"the recipient of a bribe is an accomplice of the giver of the bribe."

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1. See Hunt 224.
 2. 1947 (4) SA 571 (SR).
 3. At 573.

In R v Ingham,¹ a case concerned with common law bribery, Rosenow AJ held that²

"both giver and receiver are equally guilty, in connection with the same transaction."

Rosenow AJ ruled that the recipient was an accomplice. In Ingham's case the giver was charged and the recipient was called as a witness. The judge, did, however, qualify his general remarks by saying that the offence of bribery may be complete when an offer to bribe was not accepted. In that instance there would obviously be no question of accomplice evidence.

Rosenow AJ in Ingham's case considered section 2(a) of the Act. After equating the common law with the statute law he concluded that³

"the Legislature endeavoured to indicate that both the giver and receiver were concerned in one offence The effect is in each case that the receiver is the guilty partner of the giver in one offence."

The evidential consequences which flow from adopting the view that the giver must have had a corrupt intention before the recipient can be convicted is clearly

1. 1958 (2) SA 37 (C).
 2. At 48.
 3. At 49H. See also R v Maqutu 1946 EDL 220.

illustrated in S v Gakool¹ where counsel for the appellant argued that²

"before it can be held that an agent has contravened sec.2(a), it must be proved that the giver of what may be called the bribe acted corruptly in giving it."

This submission was accepted by the court. Building on it, counsel further contended that the complainants (givers) should be treated as accomplices of the appellant (the recipient). This too the court accepted, holding that the cautionary rule applying to accomplice evidence must be followed in assessing the evidence of the complainants.³

In S v Du Preez,⁴ although the court found that it is not necessary in all cases for the State to prove a corrupt motive on the part of the giver before the recipient can

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1. 1965 (3) SA 461 (N).
 2. At 466.
 3. Note, however, that an exception to the general rule in corruption cases, that the one party to the transaction is an accomplice of the other arises where one acts as a trap. See S v Ganie 1967 (4) SA 203 (A) at 211E.
 4. 1968 (2) SA 731 (T).

be convicted, the court nevertheless regarded the complainants as accomplices because, on the facts of the case, it was generally felt that the complainants had in fact acted corruptly.

It is submitted that in all cases the test as to whether a giver of a gift is to be labelled as an accomplice of the recipient should not be linked arbitrarily to the approach which requires a corrupt intention on the part of the giver. If either the approach requiring the recipient to believe that the giver was acting corruptly, or the approach that only the mens rea of the recipient is relevant, is adopted, then the inquiry as to whether the giver is an accomplice will be decided on the facts of the particular case. It is possible to conceive of a number of situations where the giver of a gift could under no circumstances be considered an accomplice of the recipient.

F. COMPARATIVE LAW(a) The Dutch Criminal Code.

Section 363 of this code¹ deals with the liability of officials for accepting gifts in certain circumstances.

This section has been interpreted as follows:²

"Die strafbaarheid van de ambtenaar is ook hier niet gebonden aan de opvatting van hem die de gift doet omtrent het geoorloofde van hetgeen gedaan of nagelaten is. De ambtenaar neemt een gift of een belofte aan, hem gedaan naar aanleiding van een verrichting, die verrichting was in stryð met zyn plicht; en hy, de ambtenaar, weet dit; ziedaar de elementen van het misdryf."

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1. S 363 of the Dutch Criminal Code reads as follows: "Met gevangenisstraf van ten hoogste vier jaren wordt gestraft de ambtenaar: 1. die ene gift of belofte aanneemt, wetende dat zy hem gedaan wordt ten einde hem te bewegen om, in stryð met zyn plicht, in zyne bediening iets te doen of na te laten; 2. die eene gift aanneemt, wetende dat zy hem gedaan wordt ten gevolge van of naar aanleiding van hetgeen door hem, in stryð met zyn plicht, in zyne bediening is gedaan of nagelaten." ("An official may be imprisoned for a period not exceeding four years where he: (1) accepts a gift or promise knowing that it was offered with the intention to induce him to do or omit from doing an act which is in conflict with his duty; (2) accepts a gift knowing that it was given to him as a result of him having acted or refraining from acting in conflict with his duty.")
 2. See TJ Noyen Het Wetboek van Strafrecht 6 ed 11 520 as set out in S v Gouws 1975 (1) SA 1(A) at 12E-F. ("The culpability of an official is not dependant upon the intention of the person who gave the gift as a consideration for an act or omission. The official accepts the gift or promise in return for acting in conflict with his duty; and he, the official knows it, hence the elements of the offence.") MJ Scott MacNab assisted with the translations.

The guilt of the official is based on the fact that he knowingly accepted a gift because of certain conduct which is contrary to his duty. The knowledge of the giver of the gift concerning the lawfulness of the transaction is irrelevant in establishing the guilt of the official.

(b) English law.

Glanville Williams submits that "corruption can be one-sided".¹ There is no reason why the bribee should be acquitted simply because the giver of the consideration did so innocently.

In interpreting the English Act,² which is similar to the South African legislation on corruption, the crime of the bribee is clearly distinguishable from that of the briber. No guilt attaches to the receiver of a bribe if he takes it innocently.³ Nevertheless this feature will not prevent the conviction of the giver of the bribe where the prosecution is able to prove that he has contravened the Act. The conviction of one party to a bribe and the acquittal of the other at separate trials does not necessarily render the conviction unsafe on the grounds of inconsistency.⁴

1. At 848-849.

2. S 1 (1) of the Prevention of Corruption Act 1906. See 37 above.

3. R v Millray Window Cleaning Co [1962] Crim LR 99.

4. R v Andrews Weatherfoil Ltd [1972] 1 All ER 65 at 74a where Lord Eveleigh held that: "In cases of corruption it is possible to envisage a bribe being corruptly offered and innocently accepted and possible even the other way around."

(c) The United States

In discussing American common law bribery, Anderson states that:¹

"A corrupt intent need not be shown as to both parties to the transaction. It need only be established with respect to the party who is the defendant in the trial. Thus, the payment of money to a public official with intent thereby to influence his action in a matter pending before him in his official capacity is bribery. This is true even though the officer receives the money in ignorance of such intent, as, for example, when a magistrate receives money in ignorance of what it is given for and retains it solely for the purposes of justice. If an official accepts something of value with intent that it shall influence his official action, he is guilty, even though the giver had no intention of bribing him."

The corrupt intent need not exist in the mind of both parties to the transaction. It may exist in the mind of either party. Where a corrupt intent has been proved in respect of one party, it is not a defence to allege that the other party to the bribe acted innocently.² Thus it has been held³ that if a corrupt intent exists on the part of the person receiving the bribe, regardless of the intention on the part of the giver, it is sufficient to constitute the crime. Guilt is measured by the intention of the accused on trial. It is not dependant on the intention of someone else.

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1. At 774.
 2. See American Jurisprudence 2d X11 752 where the following citation appears: "Sims v State, 131 Ark 185, 198 SW 883 (bribe-giver or bribe-taker is indictable for his individual guilty participation in transaction regardless of corrupt intention of other party; People v Lyons, 4 I11 2d 396, 122 NE2d 809 ... (mutual intent on part of giver and acceptor is not necessary) ... ; Williams v State 178 Wis 78, NW 268, 269 (guilt of briber is measured by his own intent and not the intent of acceptor)."
 3. Robinson v United States F2d 505 (1928) at 509.

(d) Conclusion

The provisions controlling bribery in the countries discussed are similar to those governing South African bribery.¹ No authority has been found in this comparative law survey which suggests that the guilt of one party to the bribe is dependant on the mens rea of the other. The contrary is true. The mens rea is individualised. In determining whether mens rea may be ascribed to an individual, the intention, innocent or otherwise, of any one else is irrelevant.

G. CONCLUSION

As far as the common law of bribery is concerned, it is submitted that the Appellate Division in S v Gouws² has settled the matter in favour of the approach which concentrates exclusively on the mens rea of the bribee when considering his culpability. It is obvious that the giver of the gift need not have a corrupt intent to bribe the recipient before the latter can be found guilty of common law bribery. Nor, it is submitted, is it even necessary for the bribee to believe that the giver acted corruptly.

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1. See eg s 363 of the Dutch Criminal Code quoted at 126n1 above. Further the English legislation on corruption is almost identical to its South African counterpart. The American common law definition of bribery has been quoted with approval in S v Benson Aaron (1893) Hertzog 125 at 132. Note, however, the comments of Hunt 219n63.
 2. 1975 (1) SA 1 (A) at 12-13.

Statutory corruption does not enjoy the same clarity. It is unfortunate that the Appellate Division has failed to resolve the difficulty of the part played by the mental state of the giver when considering the guilt of the recipient charged under section 2(a), despite having two opportunities to do so.¹ It is submitted, however, that the pendulum is swinging towards the view which makes the mens rea of the recipient decisive. Building on the doubt raised in R v Geel² as to whether it was always necessary to take into account the actual state of mind of the giver at the trial of the recipient, a trend has developed which concentrates on the mens rea of the giver.³ The controversy, however, is still far from settled. When dealing with statutory corruption, the following unequivocal dictum of Hoexter JA in Geel's case still stands:⁴

"But what is clear at any rate is that the agent cannot be guilty if he knows or believes that the giver has no intention of bribing."

It follows that in statutory corruption the onus still remains on the State to prove that the bribee at least subjectively believed (erroneously or otherwise) that the briber intended to bribe him. This, it has been submitted, is not a requirement of the common law.⁵ Having

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1. R v Geel 1953 (2) SA 398 (A); S v Gouws 1975 (1) SA 1 (A).
 2. 1953 (2) SA 398 (A).
 3. See eg S v Ernst 1963 (3) SA 666 (T); S v Hartzenburg 1964 (2) PH H219 (T); S v Du Preez 1968 (2) SA 731 (T); S v Joubert 1979 (1) SA 97 (T).
 4. At 402H.
 5. S v Gouws 1975 (1) SA 1 (A).

regard to this dichotomy between the common law and statute law, prosecutors should charge bribees under the common law, where possible, if the facts indicate that the giver of the consideration did not intend the gift as a bribe. Alternatively, where a prosecution of the bribee under the Act cannot be avoided, prosecutors should consider taking the precaution of including, as alternative charges to an allegation of contravening section 2(a) of the Act, theft by false pretences or fraud.¹

In the meantime it is hoped that the Appellate Division will at the earliest opportunity bring statutory corruption in line with common law bribery. It is submitted that it is unnecessary to insist that the giver should have mens rea in all cases before the State can succeed in a prosecution against the recipient. Nor does it seem even necessary that the recipient should believe (whether such belief is justified or not) that the giver acted corruptly.

1. R v Ndobe 1952 (3) SA 562 (T) at 564F.

CHAPTER 4

RECOVERY OF THE BRIBE

A. INTRODUCTION

In any transaction involving bribery, the existence of at least three parties is contemplated. These may be referred to as the principal (P), the agent (A) and the third party (X). The active parties to the bribery are X, the briber, and A, the bribee. Since the essence of bribery is the secrecy of the transaction between A and X,¹ P will only come into the picture once he has discovered the bribe despite the efforts of A and X to keep it secret. It is really at this moment that the stage is set for an investigation into the civil consequences of bribery which reveals an interesting set of permutations that may arise from the legal relationship between P, A and X.

B. HISTORICAL BACKGROUND

Although Roman law recognized the principle of direct representation in the law of contract,² it remained hampered by the maxim "nemo alteri stipulari potest".³

1. De Villiers and Macintosh 419;552.

2. At first Roman law did not recognise the principle of direct representation, but later a procurator could be appointed by a paterfamilias to administer his economic affairs. Sanders 162.

3. According to D 17 1 4 a mandate was gratuitous and was based upon moral duty and friendship. Roman law emphasised the relationship between the principal and agent inter se rather than the relationship between the principal and the third party. Lee 310. See Kerr 7n6 who states that "[i]n Roman times a mandatory could not act for and on behalf of the mandator in the way a modern agent can" Hahlo and Kahn 694 conclude that the "idea of representation grew painfully in Roman law and remained to the end a stunted creature" See also Wessels paras 1745-1755.

The limited concept that one party could represent another in a contract was adopted by Roman-Dutch law where some of the subtleties of the Roman law were removed.¹ Nevertheless, some jurists are ad idem that there is a paucity of development in Roman-Dutch law as far as the law of agency is concerned.² As a result of this somewhat sterile background, the South African courts have been greatly influenced by the law of England.³ Thus after a review of the Roman law and Roman-Dutch law authorities, Innes CJ commented as follows:⁴

"The modern idea of an agent - that is, of a person who enters into contracts for his principal, on which, as a general rule, he cannot himself be sued - was not known to Roman law, though that law fully recognised the position of one who transacted business for another, and dealt in some detail with his rights and liabilities But the modern agent plays a far more important part in commercial matters than did the mandatory or the institor; and the courts of England and America have developed the doctrine of the civil law, and examined the duties which an agent owes to his principal far more thoroughly than was possible at an earlier time, when business operations were neither so numerous nor so complicated."

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1. JC de Wet "n Bydrae tot die Geskiedenis van die Ontwikkeling van Direkte Verteenwoordiging by die Sluiting van Ooreenkomste" (1942) 6 THRHR 99 at 210; De Wet and Yeats 85. See also Blower v Van Noorden 1909 TS 890 at 897.
 2. De Villiers and Macintosh 16; Hahlo and Kahn 695.
 3. See eg Transvaal Cold Storage Co Ltd v Palmer 1904 TS 4 at 19-20; Blower v Van Noorden 1909 TS 890 at 899 and 905; Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöperasie Bpk 1972 (1) SA 761 (A); Faure v Joubert 1979 (4) SA 939 (A) at 951.
 4. Transvaal Cold Storage Co Ltd v Palmer (*supra*) at 19-20.

Pursuant to this dictum, which was handed down in 1904, our courts have increasingly referred to English law in particular when confronted with contemporary problems in the law of agency where reference to the Roman-Dutch law has proved unhelpful.¹

A similar approach will be adopted when considering the legal relationships between P, A and X in the context of modern day corruption. This approach is particularly apposite when dealing with bribery, since very little on this topic is to be found in the early sources of our common law.² Yet this approach must obviously be tempered by the underlying principle that Roman-Dutch law remains a primary source of South African law. Roman-Dutch law remains a first source of reference.³ Only in cases where such a source is found wanting will reference be made to English or American law. To this extent the Roman-Dutch law will be supplemented with laws from other sources in order to build a body of South African law which is equipped to meet the intricacies of modern commercial practice.⁴

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1. See the cases cited at 133n3 above.
 2. S v Gouws 1975 (1) SA 1 (A) at 10G.
 3. Trust Bank van Afrika Bpk v Eksteen 1964 (3) SA 402 (A) at 410-411.
 4. See generally De Villiers and Macintosh 12-13. Note that in Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk 1986 (1) SA 819 (A) at 846H and 848C Rabie JA corrected an over enthusiastic embrace of the English law in earlier South African decisions.

C. WHO IS AN AGENT?

An agent has been defined as a person who has authority to act on behalf of another in contracting legal relations with third persons.¹ This is a narrow definition of agency, the essence of which is that the agent

"is a person clothed with authority to create, vary or discharge contractual relations between his principal and a third party".²

Clearly such a relationship is exposed to the danger of bribery. An agent may be induced by a bribe to enter into a contract on behalf of his principal. To confine an agent to this restrictive definition in the context of bribery would be wrong. Bribery constitutes a threat to relationships which do not necessarily fit into this narrow definition of agency.

The term "agent" has been used in a wider sense in that the principal may be represented by the agent without the latter necessarily having the power to enter into, vary or discharge contractual relations on behalf of the principal.³

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1. De Villiers and Macintosh 38. Fridman 8 defines agency as "the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property." Powell 7 states that "an agent is a person who is authorised to act for a principal and has agreed so to act, and who has power to affect the legal relations of his principal with a third party."
 2. Kahn 316.
 3. Kerr 2-3.

In other words the key element, essential to the narrow definition of agency, becomes optional.¹ An agent in the strict sense is distinguished from a mandatory, such as a surgeon, attorney or banker, who undertakes to carry out a task entrusted to him.² Further examples of "agents" who do not necessarily have the power to conclude contracts on behalf of their principals are estate and insurance agents.³

It is apparent that bribery may threaten the relationship of principal and agent not only in the context where the "agent" is narrowly defined but also where the term "agent" is used in a wide sense. For example, where an agent does not have the power to conclude a contract on behalf of his principal, he may still be influenced to induce the principal to conclude a contract with the briber rather than with a competitor of the briber.

"Agent" is used in a wide sense in the context of bribery.⁴ This has been confirmed by the Appellate Division in Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk⁵ where Rabie JA,

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1. See generally De Villiers and Macintosh 10-11. At 11 the authors state: "The essence of the modern view of agency is that there must be a third party in contemplation and that the agent acts purely as a channel bringing the principal into legal relations of a contractual nature with the third party".
 2. Kahn 316.
 3. Kerr 2.
 4. This approach is consistent with the very wide definition of "agent" in s1 of the Prevention of Corruption Act 6 of 1958 which penalises corruption in criminal law.
 5. 1986 (1) SA 819 (A).

when dealing with the scope of the word "agent", held that:¹

"Die woord 'agent' in hierdie verband het 'n wye betekenis en is nie beperk tot iemand wat die bevoegdheid het om 'n ooreenkoms namens 'n ander aan te gaan nie. In Mangold Bros Ltd v Minnaar and Minnaar 1936 TPD 48, waarna reeds hierbo verwys is, is byvoorbeeld bevind dat die respondente, wat 'n trekker en dorsmasjien van die appellant gekoop het, geregtig was om die ooreenkoms te repudieer omdat daar omkoopgeld betaal is aan 'n persoon wat deur hulle gevra was om die trekker en dorsmasjien te ondersoek en hulle dan te adviseer oor die vraag of hulle dit moes koop. Kyk ook die Engelse saak Alexander v Webber [1922] 1 KB 642, waar die eiser 'n gebruikte motor op advies van sy chauffeur gekoop het en toegelaat is om die ooreenkoms te verwerp nadat dit aan die lig gekom het dat die verkoper heimlik vergoeing aan die chauffeur betaal het."

It can be concluded that the possibility of bribery may arise where "agency" exists in the narrow or wide sense of the expression. Bribery may be relevant where a person has authority to act for another to create contractual obligations between the principal and the third party. Bribery may also feature where the agent is required to perform non-juristic acts in the sense that such acts "do not have the effect of bringing his principal into legal relations with third parties."²

1. At 845C.
2. De Villiers and Macintosh 40.

A principle common to agency in the narrow and wide sense is that in all cases the agent is obliged to perform his duty in a spirit of good faith towards his principal. Whether one is concerned with conventional representation such as agents,¹ servants² and independent contractors or juristic representatives such as guardians, State officials, company directors³ and curators, this "large amorphous mass of representatives" is characterised by a fiduciary duty to the person whom they represent.⁴ Such a fiduciary relationship may be exposed to bribery. It is submitted that rather than considering narrow or wide definitions of agency, for the purposes of ascertaining whether bribery may be relevant to a particular relationship, the test should be whether one person stands in a position of confidence to another.

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1. Fisheries Development Corporation v AWJ Investments (Pty) Ltd 1980 (4) SA 156 (W).
 2. Gerry Bouwer Motors (Pty) Ltd v Preller 1940 TPD 130; Premier Medical and Industrial Equipment (Pty) Ltd v Winkler 1971 (3) SA 866 (W) at 867. S v Young 1977 (1) SA 602 (A).
 3. Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168.
 4. De Villiers and Macintosh 2-3. Reuschlin and Gregory 121.

D. THE DISTINCTION BETWEEN A SECRET PROFIT AND
A BRIBE

A further aspect which requires to be settled is the isolation of criteria which may be used in distinguishing bribes from secret profits. It is accepted that the expression "secret profit" is sufficiently wide to include a bribe.¹ However, it is important to draw a distinction between a bribe and a secret profit not involving bribery as the civil consequences of each transaction are in some respects different.² A civil law definition of bribery must be attempted.

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1. See Fridman 141; Powell 315-316.
 2. The principal similarities in the civil consequences which flow from accepting a bribe or secret profit may be summarised as follows: (i) P may recover the bribe or secret profit received by A (see 159 below); (ii) P may cancel his contract with A (see 240 below); (iii) P may withhold A's commission under South African law (see 243 below), but in English law there is support for the view that A is entitled to his commission where he has accepted a secret profit as opposed to a bribe (see 247 below). On the other hand, the salient differences in the civil consequences pursuant upon the acceptance of a bribe or secret profit are: (i) Whereas P may rescind his contract with X where A has been bribed, no such rescission lies where A has accepted a secret profit (see 187 below); (ii) P has an action for damages against A and X for loss which he has suffered as a result of the bribery, whereas no such action lies where A has received a secret profit (see 214 below).

(a) Definition of bribery in English law.

The English law definition of bribery has been authoritatively laid down by Slade J in Industries and General Mortgage Co v Lewis¹ as follows²:

"For the purposes of the civil law a bribe means the payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent".

Slade J went on to hold that proof of corruption is unnecessary. The fact that X has no dishonest intention to induce A to act in his favour is immaterial. Once the three requirements which Slade J stipulated have been met, then the following presumptions come into play:

- (i) X has acted corruptly;
- (ii) A has been influenced by the payment to the detriment of P; and
- (iii) the damage suffered by P is equivalent to at least the amount of the bribe.

1. [1949] 2 All ER 573.
2. At 575 F-H.

Thus it is conclusively presumed against X that he acted corruptly and against A and that he was influenced to the detriment of P by the payment. It is not open to either X or A to show that he acted innocently. Corruption and undue influence are irrebutably presumed once X makes a secret payment to A whom he knows to be the agent of P.¹

(b) A criticism of the English law definition of bribery.

It is submitted with respect that the approach of Slade J in the case of Lewis to the definition of civil law bribery should not be followed. It contradicts an earlier attempt to define bribery by Romer LJ in Hovenden and Sons v Millhoff² who had this to say³:

"Without attempting an exhaustive definition I may say that the following is one statement of what constitutes a bribe. If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and agent - that is to say, without the knowledge and consent of the principal - then the gift is a bribe in view of the law. If a bribe be once established to the Court's satisfaction, then certain rules apply First, the Court will not inquire into the donor's motive in giving the bribe, nor allow evidence to be gone into as to the motive. Secondly, the Court will presume, in favour of the principal and as against the briber and the agent bribed, that the agent was influenced by the bribe; and this presumption is irrebutable."

1. Chitty para 2058.
 2. (1900) 83 LT 41; 16 TLR 506.
 3. At 507. (My emphasis).

It is submitted that the underlined words in the above dicta constitute a key element in the definition of bribery. It is this element which is omitted from the definition handed down by Slade J in the Lewis case. Counsel drew the attention of Slade J during argument to the requirement that the gift must be made "with the view of inducing the agent to act in favour of the donor." Slade J dismissed this argument. Reading the "inducement" requirement together with the remarks of Romer LJ that the motive of X was irrelevant, Slade J interpreted the reference to inducement as follows¹:

"[O]nce the bribe is established, there is an irrebutable presumption that it was given with the intention to induce the agent to act favourably to the payer and, thereafter, unfavourably to the principal."

Slade J went on to hold, with reference to Romer LJ's dicta, that to require proof of inducement²

"would tear up the whole of the learned judge's observations because he says lower down that the courts will not receive evidence as to what is the motive of the person making payment. The motive will be conclusively inferred against him."

It is submitted that this construction of Romer LJ's judgment is untenable. The element that X must make a gift with an intention to induce A is set out in the clearest possible terms. There can be no doubt that it constitutes a substantive part of the definition of bribery as envisaged by Romer LJ. To wish this requirement away by link-

1. At 576H.
2. At 577C.

ing it to the remark that the motive of A is irrelevant is inappropriate. It is well established in law that intention is clearly distinguishable from motive.¹ What Romer LJ was saying is that once an intention to induce has been proved, the motive of X when bribing is irrelevant. X could act with an entirely laudable motive, it does not matter. Intention is severable from motive.

A further misconstruction of Romer LJ's judgement occurs where Slade J associated the dictum on motive with an irrebutable presumption. Slade J suggested that X's intention to induce is irrebutably presumed since a corrupt motive will be conclusively inferred against him.² This is incorrect. There is not the slightest suggestion in the judgement of Romer LJ that the motive of X will be irrebutably presumed. All that Romer LJ said is that X's motive is irrelevant. He only referred to one presumption, namely, that A has been influenced by the bribe.³

The case of Lewis has nevertheless received unreserved approval in England in Taylor v Walker.⁴ Counsel's plea for a return to the requirement in the Hovenden case that an intention to induce A to act in favour of X is required was firmly rejected. Accordingly it must be

1. Burchell and Hunt 64.
 2. At 578.
 3. See 141 above.
 4. [1958] 1 Lloyd's Rep 490 at 511-512.

accepted that proof of such intention is no longer part of English law.¹

(c) The influence of English law on the South African definition of bribery.

The reason why the cases of Hovenden and Lewis have been considered in some detail is because of the possible implications which both judgements hold for South African law. The influence of Hovenden's case has already been felt in South Africa.

After quoting several English cases,² including that of Hovenden, Watermeyer J in Davies v Donald³ concluded⁴ that these cases

"seem to lay down a broad general rule that any secret benefit given by one contracting party to the agent of another with the intention of influencing his mind in favour of the donor is a bribe, which entitles the other contracting party to certain remedies against the agent and the donor quite irrespective of the donor's motive or the effect of the gift on the mind of the agent."

This "broad general rule" was accepted as being correct for the purposes of the judgement.

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1. Note also that Slade J in Lewis' case at 577H drew on the support of Scrutton LJ in Re A Debtor [1927] 2 Ch 367 where it was held that: "A man who is the agent of A in a transaction between A and B, and who also acts secretly for B in the same transaction, is presumed to act corruptly."
 2. Shipway v Broadwood [1899] 1 QB 369; Panama Telegraph Co v India Rubber Telegraph Works Co (1875) LR 10 Ch App 515.
 3. 1923 CPD 295.
 4. At 299. (My emphasis).

Davies' case was approved of by De Wet J in Mangold Bros Ltd v Minnaar and Minnaar¹ in the following terms:²

"Now, the learned Judge there says that the benefit must be given with the intention of influencing the mind of the agent in favour of the donor, but he goes on to say in the very next sentence that the transaction is a bribe irrespective of the donor's motive, and that seems to be the law too."

De Wet J then proceeded to quote from Hovenden's case with apparent approval.³ He inferred from the facts of the case before him that although X had paid the secret gift to A after the transaction between P and X had been concluded, such payment was made in pursuance of a prior promise by X to A. The payment was found to be a bribe.

It is submitted that the result of the two South African cases of Davies and Mangold Bros Ltd was to settle the elements of the South African definition of bribery in the following terms:

- (i) X must make a gift to A;
- (ii) at the time the gift is made, X must be aware that A is an agent of P;
- (iii) in making the gift X must intend to induce A to act in favour of X in a transaction between P and X;
and
- (iv) the gift made by A to X must not be disclosed to P.

1. 1936 TPD 48.
2. At 55.
3. At 55.

Once the above aspects have been proved, then X's motive (as opposed to an intention to induce) in making the gift is irrelevant. Further, an irrebutable presumption comes into operation. It is conclusively presumed in favour of P and against X and A that A was influenced by the bribe.

It should be noted, however, that although it was held in Davies' case that bribery could be established irrespective of "the effect of the gift on the mind of the agent,"¹ it was unnecessary for the court to make this finding, as it found as a fact that A had been influenced by the bribe.² A similar situation prevailed in the Mangold Bros Ltd case.³ It follows that the dicta in both cases regarding the irrebutable presumption are obiter.

(d) The Appellate Division decision of Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk.

The uncertainty regarding the influence of English law on the definition of bribery as laid down in the South African cases of Davies and Mangold Bros Ltd lingered on for almost half a century until the recent leading Appellate Division judgement of Rabie JA in Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk.⁴

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1. At 300.
 2. At 300.
 3. At 55 and 59.
 4. 1986 (1) SA 819 (A).

From the point of view of determining the scope of civil bribery in South African law, the court considered two aspects:

- (1) whether it was part of South African law to require that P should bear the onus of proving that, in making the gift, X must intend to induce A to act in favour of X;
and
- (2) whether, assuming that the giving of a bribe has been proved, it is to be irrebutably presumed in favour of P and against X and A that A was influenced by the bribe.

Ad (1) : The "intention to induce" requirement

Proof by P that X must intend to induce A to favour X constitutes an element of a tentative definition of civil bribery as set out by Rabie JA in the following terms:¹

"Onkoperij in die siviele reg bestaan in die praktyk meesal daarin dat iemand 'n geskenk of vergoeding aan die agent van 'n ander persoon gee, of beloof, sonder dat daardie ander persoon (dit wil sê die agent se prinsipaal) daarvan weet, met die doel om die agent te beïnvloed om met betrekking tot die sake van sy prinsipaal 'n voordeel vir die skenker te verkry."

1. At 845B. (My emphasis).

Although Rabie JA prefaced his remarks by saying that in practice bribery mainly comprises the elements which he cited, it is clear from his later comment¹ "om terug te keer na die vraag wat omkoperij behels" that he was concerned with setting out the constituent elements of bribery.

Rabie JA then directed his attention to the definitions of bribery in the cases of Davies and Mangold Bros Ltd which incorporate the requirement in Hovenden's case that P must prove X's intention to induce A when giving the gift. After referring to the definition of bribery by Slade J in the case of Lewis, Rabie JA criticised this approach in the following terms:²

"Slade R het verder gesê dat 'proof of corruptness or corrupt motive is unnecessary in a civil action'. Hy het dit gesê op grond van die woorde van Romer LJ in Hovenden & Sons v Millhoff (supra) dat 'if a bribe be established to the Court's satisfaction ... the Court will not inquire into the donor's motive in giving the bribe, nor allow evidence to be gone into as to the motive'. Volgens Slade R het Romer LJ met hierdie woorde te kenne gegee dat 'once the bribe is established, there is an irrebutable presumption that it was given with an intention to induce the agent to act favourably to the payer' Dit is myns insiens egter 'n vraag of Romer LJ so iets te kenne wou gegee het. Hy het 'n 'bribe' omskryf as 'a gift ... made ... with the view of inducing the agent to act in favour of the donor ...', en gevolglik is dit nie duidelik dat hy bedoel het dat wanneer daar van 'n 'bribe' bewys gelewer is, daar vermoed word dat 'it was given with an intention to induce the agent to act favourably to the payer' Hierdie vraag kan egter daargelaat word, aangesien daar in die geval voor ons bewys gelewer is van omkoperij soos omskryf deur Romer LJ in die passasie in Hovenden & Sons v Millhoff wat hierbo aangehaal is."

1. At 845E
2. At 846A-D.

It emerges from this passage that the comments on "intention to induce" are clearly obiter. It is submitted that whilst the dicta of Rabie JA remain obiter on this issue, they provide strong persuasive authority that the "intention to induce" element should be retained in any definition of civil bribery in South African law. However, since the matter has yet to be settled, it is constructive to debate whether the requirement of an "intention to induce" should be part of our law.

The South African cases of Davies and Mangold Bros Ltd were decided before the English decisions of Lewis and Taylor. The question to be decided is whether the South African courts should follow these two later English decisions which effectively jettison the requirement that X must intend to induce A to act in his favour.

It is largely a matter of balancing interests. The commercial community looks to the courts to protect it against bribery.¹ Such protection is hampered by a fundamental feature of bribery that it is a secret transaction between A and X which is carefully shielded from P. Even upon discovery of the bribe, P will frequently encounter difficulties when attempting to ascertain the precise nature of the surreptitious dealings with A and X.² It is probably this reasoning which has caused the

1. Hovenden and Sons v Millhoff (1900) 83 LT 41; 16 TLR 506.
 2. Shipway v Broadwood [1899] 1 QB 369.

courts to simplify the requirements for proof of bribery by introducing certain presumptions.

On the other hand, care must be taken to ensure that innocent parties are not snared in an over-zealous approach to combat bribery. Sight must not be lost of the fact that the civil consequences for a party to a bribe are more onerous than those for a party to a secret profit not amounting to bribery.¹

In settling this matter reference must be made to how secret profits and bribes arise in practice. The situation where a secret profit of A is derived independently of any complicity with X is of no importance here.²

An example of this would be where A, employed to buy property, charges P more than the price paid for the property bought by him.³ We are concerned with examples which involve the passing of a commission between X and A.

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1. See 139 above.
 2. See eg Mallinson v Tanner 1947 (4) SA 681 (T) where A bought P's property at an amount lower than an offer which had already been made to A by X. A then sold the property to X at a profit. A was obliged to account to P for the difference between the price which he paid P and that which he received from A. See also Hargreaves v Anderson 1915 AD 519.
 3. Thompson v Meade (1891) 7 TLR 698. For further examples see Powell 316. See Cowling v Stableford and Co Ltd (1905) 22 SC 363.

The facts in Lewis' case clearly illustrate how X, who paid a secret commission to A, can be held to be a party to a bribe. X agreed to pay A one half of the commission which X would obtain on a loan which A had negotiated with X for P. The fact that X had no dishonest intention to induce A to persuade P to pay a higher interest to accommodate the commission was immaterial. The commission by X to A was held to be a bribe despite the fact that X had acted in good faith.

Take an example where, after the contract has been closed between X and P, X, in order to express his appreciation for the work done by A, pays A a gratuity which is not disclosed to P. Once the presumptions cited in the case of Lewis are applied, the gratuity becomes a bribe.¹

When applying the English law to these facts, it will be observed that the distinction between secret profits and bribes has largely disappeared. It is primarily for this reason that English authors find some difficulty in drawing the distinction between the two types of transaction. Consider the following attempt:²

"The term 'secret profit', in its more general sense, could cover a bribe. In a more restricted sense, however, a secret profit is a gain to the agent derived from the execution of his authority independently of any complicity or connivance on the part of the third party. A bribe, on the other hand, essentially involves an act of the third party."

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1. De Villiers and Macintosh 551-552 qualify the ruling in the Lewis case by saying: "But this manifestly applies only to a payment, or promise to pay, made before the agent has completed the execution of his mandate; for it could not be presumed that an agent had been affected in the execution of his mandate by something happening only after such execution is complete."
 2. Powell 315-316.

Secret profits are thus confined to independent ventures by A. In the light of the Lewis decision, it seems that "connivance" or "complicity" between A and X is unnecessary.

A further attempt to distinguish between a bribe and secret profit has been expressed as follows:¹

"It was said ... that bribes come within the meaning of the expression 'secret profit'. But in respect of bribes it is necessary for the profit to come to the agent through the activity of some third party, who intentionally, and secretly, offers a commission to the agent for doing something."

Again this simply serves to isolate the case where A makes a profit on a frolic of his own. No distinction between a secret profit and bribe is made where X is involved in the giving of a secret commission to A.

Perhaps the most telling comment of all is the following:²

"A bribe will invariably involve dishonesty; but a secret profit need involve no fraud."

Assuming for the moment that the word "dishonesty" is used in the sense that X intended and did in fact induce A to act in his favour by bribery, then although this

1. Fridman 144.
2. Ball 23. (My emphasis).

feature is "invariably" present, it is not an element of the definition of bribery. It follows that English law has reached the point where an "honest" bribe is conceivable. A and X, although acting "honestly", may be branded as a bribee and briber respectively. More significantly, despite their "honesty" they attract the severe civil consequences which follow bribery.

Turning to the South African writers, (who, in fairness, have not had an opportunity to comment on the recent Appellate Division decision of Chemfos), De Villiers and Macintosh seem to assume that the English cases of Lewis and Taylor already form part of our law. For example, they write:¹

"As used in the law of agency 'bribe' merely means a secret commission or profit, and hence proof of a corrupt motive on the part of the payer is unnecessary."

Kerr,² however, takes a different view. When dealing with bribery, he quotes the Mangold Bros Ltd approach which endorses the requirement that X must make the gift with the view of inducing A to act in his favour. Note also the definition by Joubert:³

"Onkoperij vind plaas wanneer die verteenwoordiger iets deur 'n ander persoon gegee of belowe word om strydig met sy verpligtings teenoor die prinsipaal op te tree".

1. At 350.
2. At 141.
3. At 219.

It is submitted that the "intention to induce" is a vital element in distinguishing a bribe from other kinds of secret profits. Once this element is withdrawn then there is little left to distinguish between bribes and secret profits after the English law presumptions come into play. The result is that innocent parties could become liable for the civil law consequences of bribery. X is placed in a particularly vulnerable position since the onus is on him to disclose the commission to P. It is no defence for X to plead that he thought A would make the disclosure to P.¹

It is submitted that the South African law as reflected in the Davies and Mangold Bros Ltd cases is to be preferred to the English law. In South Africa, a secret profit, not amounting to bribery, may arise, for instance, where X makes a gift to A without the gift being disclosed to P. Bribery is distinguishable in that, although it contains the same elements as those cited for a secret profit, it contains the additional requirement, namely, in making the gift, X must intend to induce A to act in favour of X in a transaction between P and X. Thus the distinction between honest and dishonest behaviour is more easily distinguishable.²

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1. Grant v The Gold Exploration and Development Syndicate Ltd [1900] 1 QB 233 at 248. This case was quoted with apparent approval by Rabie JA in Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk 1986 (1) SA 819 (A) at 840A-D.
 2. The word "dishonest" is used in a selective sense, namely, acting with an intention to induce A to secure an advantage or favour for X.

This view does not make bribery impossible to prove. Invariably the intention to induce may be inferred from all the circumstances surrounding the clandestine transaction between X and A. One will consider the size of the gift, the social standing of X and A and the conditions under which the gift was made.¹ The interests of justice are better served in requiring such an intention to be proved on a balance of probabilities rather than run the real risk under the present English law approach where honest parties may face the heavy civil consequences attendant upon bribery. It is to be hoped, therefore, that the obiter dicta in the Chemfos case will prevail with our courts continuing to require the intention to induce element for civil bribery.

Ad (2) : The irrebutable presumption

It will be recalled that the cases of Davies and Mangold Bros Ltd referred to the feature that, once it has been proved that a bribe has been given by X to A, it is to be irrebutably presumed in favour of P and against X and A that A was influenced by the bribe.

It was held in the Chemfos case that South African law knew no such presumption. However, Rabie JA suggested obiter that once the giving of the bribe has been proved, X should bear the onus of proving that his bribery did

1. These guide lines were taken from S v Deal Enterprises (Pty) Ltd 1978 (3) SA 302 (W) at 308C. Although the court was dealing with the proof of a corrupt intent in criminal law, it is submitted that some of the factors which it considered in inferring a corrupt intent could also be usefully employed in civil cases in deciding whether an intention to induce was present.

not influence A and P. This finding was expressed by Rabie JA in the following terms:¹

"Soos reeds ... aangedui is, is die posisie in die Engelse reg dat, wanneer daar bewys word dat die een party by 'n ooreenkoms 'n omkoopgeskenk aan die agent van die ander party gegee het, daar ten gunste van die agent se prinsipaal, en teen die omkoper en die agent, omweerlegbaar vermoed word dat die agent deur die geskenk beïnvloed is. Hierdie vermoede berus, volgens wat in sekere beslissings gesê word, op praktiese oorwegings rakende bewyslewering en op oorwegings van openbare belang. 'A contrary doctrine,' het Chitty LJ in Shipway v Broadwood [1899] 1 QB 369 (CA) gesê, 'would be most dangerous, for it would be almost impossible to ascertain what had been the effect of the bribe,' en in Hovenden and Sons v Millhoff (*supra*) het Romer LJ gesê die vermoede word 'in the interests of morality with the view of discouraging the practice of bribery' deur die Howe aanvaar. Ons reg ken nie 'n vermoede soos die bogemelde nie, maar oorwegings van dié aard wat tot die aanvaarding daarvan in die Engelse reg gelei het, sou myns insiens moontlik in ons reg regverdiging kon bied vir die beskouing dat, waar dit blyk dat een party by 'n ooreenkoms 'n omkoopgeskenk aan die agent van die ander party gegee het, hy die las behoort te dra om te bewys dat sy omkoperie nie die beoogde beïnvloeding van die agent en sy prinsipaal bewerkstellig het nie. Dit is egter nie nodig om in hierdie saak 'n beslissing oor hierdie vraag te gee nie."

The reason for suggesting the switch in onus was in deference to the practical difficulties which P may encounter in proving the influence of the bribe on A, having regard to the secret nature of the transaction between A and X. Rabie JA found it unnecessary to express a firm conclusion on this proposed change in onus as he found that it had, in any event, been proved by P that A had been influenced by the bribe and that this influence had a material bearing on the conclusion of the contract between P and X.²

1. At 844F-I.
2. At 841I and 846G.

With reference to the English law irrebutable presumption mentioned in the South African cases of Davies and Mangold Bros Ltd, Rabie JA said:¹

"In sowel Davies v Donald as Mangold Bros Ltd v Minnaar and Minnaar, hierbo genoem, wil ek hier kortliks sê, het die Hof verwys na die Engelsregtelike reël dat waar 'n omkoopgeskenk aan 'n party se agent gegee is, die party die ooreenkoms op grond daarvan kan verwerp en dat dit nie saak maak of die agent deur die geskenk beïnvloed is nie. Dit blyk egter dat in albei hierdie sake die agent aan wie die geskenk gegee is daardeur beïnvloed is en, verder, dat die prinsipaal deur die agent beïnvloed is. In hierdie omstandighede sou ek hierdie sake nie beskou as 'n erkenning van die bestaan in ons reg van 'n reël soos die pas gemelde reël wat in die Engelse reg geld nie."

It will be observed that in English law, the irrebutable presumption operates against A and X. When dealing with the switch in onus, Rabie JA simply refers to the burden being placed on X to show that the bribe did not influence A. It is submitted that only X was referred to as Rabie JA was dealing with a case between P and X. It was unnecessary for him to refer to any onus which may be on A. There appears to be no reason why a shift in onus should apply to X only. The practical difficulties of proof which P faces will remain constant whether he is suing either X or A. It is submitted, therefore, that the rebuttable presumption envisaged by Rabie JA ought to operate in favour of P and against both X and A.

1. At 846G-H.

(e) Conclusion

Assuming for the moment that the obiter dicta of Rabie JA in the Chemfos case are to be followed, the elements of South African civil law bribery may be set out as follows:

- (i) X must give, or promise to give, a gift to A;
- (ii) X must be aware that A is an agent of P;
- (iii) in making, or promising, the gift, X must intend to induce A to act in favour of X in a transaction between P and X; and
- (iv) the gift made or promised to A by X must not be disclosed to P.

Where elements (i)-(iv) above have been proved, then there is a rebuttable presumption in favour of P against X and A that A was influenced by the bribe. A further evidential feature is that any evidence relating to X's motive (as opposed to his intention to induce) in making the gift is inadmissible or merely irrelevant.

On the other hand a secret profit, not amounting to bribery, simply arises where, unknown to P, X makes a gift to A. No intention to induce A when X makes the gift is present. There must, however, be some causal connection between the agency and the gift as pointed out by Gubbay J:¹

1. S v "A" 1979 (4) SA 51 (R) at 59-50.

"Of course, where a profit is made by the agent on a transaction completely outside the agency relationship, then the agent is not accountable to his principal.... The criterion is whether the profit was directly or indirectly connected with the agency. It is immaterial that the profit did not arise out of the transaction directly within the mandate of the agent, provided it was acquired by means of the agency."

E. IS P ENTITLED TO RECOVER THE BRIBE FROM A?

Assuming that X has paid a bribe to A, can P recover the bribe from A once he discovers the secret transaction between X and A? Before answering this question, it is important to note that the problem of deciding the difference between a bribe and a secret profit has no application here. The authorities are ad idem that P may recover any secret profit retained by A, whether amounting to bribery or not, which A acquires by virtue of his position as agent without the consent of P.¹ For the purposes of discussing this question the expression "secret profit" is used in its wide sense so as to incorporate a bribe.

1. Transvaal Cold Storage Co Ltd v Palmer 1904 TS 4; Davies v Donald 1923 CPD 295; Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 169; De Jager v Olifants Tin "B" Syndicate 1912 AD 505; Armstrong v Magid 1937 AD 260; Boardman v Phipps 1967 2 AC 46; Regal (Hastings) Ltd v Gulliver [1942] 1 All ER 378. On liability of company officers for secret profits see Bellairs v Hodnett 1978 (1) SA 1109 (A); S v Bloxam 1971 (2) SA 488 (W); Stewart Wrightson (Pty) Ltd v Minnitt 1979 (3) SA 399 (C). See generally De Villiers and Macintosh 341-343; Kerr 140-143; Fridman 140-144; Powell 315-319.

(a) Cause of action

It is important to isolate the exact cause of action upon which relief may be founded to recover a secret profit. The tripartite relationship between P, A and X is a complex one when consideration is given to the various remedies which each party may have where A has made a secret profit. Some of these remedies lie as an alternative to other relief. Some are cumulative with others. As a result of this complex interaction of a plethora of remedies, it becomes important to carefully identify the basis of any action. In a number of cases¹ counsel have fallen into the trap of paying insufficient attention to this problem.

Bearing in mind that the relationship between P and A is not necessarily contractual,² there are certain rights and duties between P and A which the law recognises. A is enjoined not to make any secret profit out of the execution of his authority.³ This duty is deduced from A's overriding duty of good faith.⁴ Where a fiduciary relationship between P and A is alleged and proved, then P will be entitled to recover any secret profit which A has made in the course of or by means of his agency.⁵

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1. See eg Peacock v Marley 1934 AD 1 at 6; Nathan v Blake's Executors 1904 TS 626 at 630 and 632.
 2. Powell 302.
 3. De Villiers and Macintosh 341.
 4. Powell 315.
 5. Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168.

Although agency in Roman law¹ was not as developed as it is today, it was clearly established that, when one person represented another in a transaction with a third party, good faith should be strictly observed. This principle was adopted by the Roman-Dutch writers.² A similar principle was developed in the law of England and America.³ The concept of good faith is entrenched in South African law today. Thus in the leading Appellate Division case of Robinson v Randfontein Estates Gold Mining Co Ltd⁴ the following statement was held to be a correct reflection of South African law:⁵

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1. D 471 8 9; Code 4 35; Gaius 3 155.
 2. Transvaal Cold Storage Co Ltd v Palmer 1904 TS 4 at 19-20 where Innes CJ cites Voet ad Pandectas 3 3 7 17; 14 3 8; 17 1 9. See also Robinson v Randfontein Estates Gold Mining Co Ltd (supra) at 178
 3. The fiduciaries duties, which are equitable in character, are based in equity. See Fawcett v Whitehouse (1829) 1 Russ and M 132. See also Fridman 11 and 138. There is also a suggestion by Bowen LJ in Boston Deep Sea Fishing and Ice Co v Ansell (1888) 39 ChD 339 that the fiduciary principle is based in common law as well. See Reuschlen and Gregory 10-11 for the position in American law.
 4. 1921 AD 168.
 5. Per Solomon JA at 229 who quoted this excerpt from Jacobus Marler Estates v Marler 114 LT 640 in which Lord Parker gave judgement. After citing this passage, Solomon JA remarked: "That this is a correct statement of our own law also does not, I think, admit of doubt."

"It is no doubt well settled in equity an agent cannot, without the consent of his principal given the full knowledge of the material facts and under circumstances which rebut any presumption of undue influence, retain any profit acquired by him in transactions within the scope of his agency. The principal can always in such a case treat the profit as acquired on his own behalf and insist on it being accounted for to him."

What requires to be emphasised is that the plaintiff need not plead that a strict relationship of agency was in existence at the time the secret profit was acquired. All that he need show is that a fiduciary relationship prevailed at the material time. This was repeatedly stated in the case of Robinson, as is reflected in the following excerpts from the judgement of Innes CJ:

"Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position."¹

"The test is expressed, for the most part, in terms peculiar to the English law; but the principle which underlies it is not foreign to our own. For it rests upon the broad doctrine that a man, who stands in a position of trust towards another, cannot, in matters affected by that position, advance his own interests, (e.g., by making a profit) at that other's expense."²

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1. At 177-178.
 2. At 179.

" [I]t is nowhere laid down that in these transactions there can be no fiduciary relationship to let in the remedy without agency. And it seems hardly possible on principle to confine the relationship to agency cases."¹

Thus the cause of action to recover a secret profit rests on a fiduciary relationship between P and A from which flows a duty on A to account for any secret profit to P obtained in the course of such a relationship.

(b) An extension of the cause of action in English law

In England, under both equity² and common law,³ P has a restitutionary right to recover the amount of a bribe paid to A. It has been suggested that a number of mythical foundations have been relied upon to substantiate this right.⁴ The right has been linked to the waiver of tort concept whereby P elects to proceed by way of quasi-contract against A for the amount by which A has been enriched, rather than to sue for damages in tort.⁵ It is argued that it is wrong to connect this right to tort, as there may be instances where the restitutionary right will lie where no tort has been

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1. At 180. See also Transvaal Cold Storage Co Ltd v Palmer 1904 TS at 20.
 2. Fawcett v Whitehouse (1829) 1 Russ and M 132.
 3. Boston Deep Fishing and Ice Co v Ansell (1888) 39 ChD 339.
 4. CA Needham "Recovering the Profits of Bribery" (1979) 95 LQR 536 at 545-548.
 5. United Australia Ltd v Barclays Bank [1941] AC 1.

committed. A, for example, may acquire a secret profit from wrongful conduct not considered tortious.¹ It is also incorrect to enforce the right on a quasi-contract basis. A does not promise to repay P his unjust gain.²

Although there is strong authority for suggesting that in English law the cause of action is based on the fiduciary nature of the relationship between P and A, there is authority for the view that this is not an exclusive ground.³ This suggestion stems largely from the dicta of several judges in Reading v A G⁴ where a sergeant in the armed forces was paid a sum of money by an outsider to transport illicit liquor and drugs in a civilian truck whilst wearing his uniform thereby diverting the suspicions of the police. The court held that the Crown was entitled to the money which had been secretly paid to the sergeant. In coming to this conclusion, Denning J said that the sergeant was not acting in the course of his employment and there was no fiduciary relationship.⁵

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1. For an illustration of a secret profit not acquired tortiously see 173 below where the facts of Boardman v Phipps [1967] 2 AC 46 are set out. See also Grant v Gold Exploration and Development Syndicate Ltd [1900] 1 QB 233.
 2. United Australia Ltd v Barclays Bank [1941] AC 1.
 3. Fridman 142-143; Powell 318-319.
 4. [1948] 2 KB 268; [1949] 2 KB 232; [1951] AC 507.
 5. [1948] 2 KB 268.

In an appeal¹ against the judgement of Denning J, the appeal court found that the use of the uniform by the sergeant constituted a breach of duty owed to the Crown. Further a fiduciary relationship was held to exist between the Crown and the sergeant. Asquith LJ said:²

"In most cases it has been assumed that the plaintiff, in order to succeed, must prove that a 'fiduciary relation' existed between himself and the defendant and that the defendant acted in breach of this relation. But the term 'fiduciary relation' ... is used in a very loose, or at all events very comprehensive, sense."

Asquith LJ added this caution:³

"But we do not wish to be taken as holding that if the fiduciary relation were absent the appeal would necessarily succeed."

It would appear that when the case of Reading went on further appeal to the House of Lords,⁴ a fiduciary relationship was found to exist between the Crown and the sergeant. However, Lord Porter made the following comment:⁵

"As to the assertion that there must be a fiduciary relationship, the existence of such a connexion is, in my opinion, not an additional necessity in order to substantiate the claim; but another ground for succeeding where a claim for money had and received would fail."

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1. [1949] 2 KB 232.
 2. At 236.
 3. At 238.
 4. [1951] AC 507.
 5. At 516.

It may be argued, therefore, that the basis of the English cause of action is money had and received with a possible action based on a fiduciary relationship where an action for money had and received cannot be brought.¹

Note, however, that the sergeant in Reading's case was found to be in breach of a fiduciary duty. It follows that all the comments regarding the necessity or otherwise of a fiduciary relationship to found a cause of action are obiter dicta. As far as can be ascertained a case has yet to come before the courts either in England or South Africa where a claim for secret profits has succeeded where no fiduciary relationship, in the broad sense, was in existence between the plaintiff and the recipient of the gift.

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1. The question may be posed why it was necessary for the court in Reading's case to cast a doubt over the requirement of a fiduciary relationship. The reason may be linked to the difficulties in finding an appropriate cause of action for the recovery of the bribe by P from X. See CA Needham "Recovering the Profits of Bribery" (1979) 95 LQR 536 at 547n69 where the author states: "In actions against the briber, it has never been necessary (and will usually be impossible) to establish a fiduciary relationship between the briber and the principal.... Nor should it be necessary (although it is sometimes assumed otherwise) that the bribee stand in a fiduciary position to the principal All that should be required is that the recipient of the bribe be acting for the principal in the transaction to which the bribe relates, or have some influence over the principal: if so, the acceptance of a bribe or commission is wrongdoing which will found an action for money had and received."

This development should not influence South African law which does not have a cause of action for money had and received. It is submitted that future South African judgements should remain anchored to the firm foundations laid by our Appellate Division in the Robinson case.¹ Before P is entitled to claim a secret profit from A, he should prove that a fiduciary relationship between himself and A has been breached.²

(c) A sui generis cause of action

If the cause of action used in South African law by P to recover a secret profit from A rests exclusively on the fiduciary relationship between the two parties, then it is unique in the sense that it is not founded on either contract, delict or unjust enrichment. It will be readily appreciated that the defences which A may raise against P for the return of the secret profit are extremely limited. It is important to isolate this

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1. At 216. See also Peacock v Marley 1934 AD 1 at 5 where Jones v East Rand Extension Co Ltd 1903 TH 325 at 335 was cited.
 2. In the recent case of Montres Rolex SA v Kleynhans 1985 (1) SA 55 (C) Seligson AJ held that there was no general remedy of an account of profits in trade mark infringement proceedings. To allow such wide relief would represent a radical departure from an established principle in our law. A claim for account will not lie in the absence of a fiduciary relationship or a contractual or statutory duty to account.

cause of action from others in order to assess its relationship with other remedies open to P who has been the victim of corruption. The following comparisons should be considered.

(1) Condictio indebiti

This action entitles a person to recover money paid or property delivered by mistake from the person to whom the payment was mistakenly made.¹ It was argued in the Robinson case² where a director (A) bought property which he ought to have acquired for his company (P) and then sold such property to P at a profit, that the payment of such profit by P to A ought to be recovered by the condictio indebiti.

In rejecting this contention, Innes CJ held that³

"it (P) became entitled to claim an account of profits and payment over. The amount recovered would depend on the result of the account. Such a form of action, whatever else it may be, is not a condictio. Had the defendant (A) re-sold the property to a third party at a profit, he would also have had to account. That would have been the same relief asked for in the same form. But the money received would not have been a refund at all."

In the same case Solomon JA, concurring with Innes CJ, said:⁴

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1. Davies v Diesel 1939 EDL 169.
 2. 1921 AD 168.
 3. At 199. (The reference to P and A in brackets is mine).
 4. At 241. See also the dictum of Juta JA at 262.

"The action is not one to recover money which was not owing when it was paid, but it was brought to recover the profits which the defendant (A) made out of a breach of his duty."

It would seem that the same principles are applicable a fortiori in the case where X gives a bribe to A. The recovery of the bribe from A by P could not be justified on the basis that there was a mistaken payment by X to A which entitles P to recover A's profit.

Thus the condictio indebiti cannot prevail in an action by P to recover a secret profit from A.

(2) Contract

The action for the recovery of a secret profit from A by P is not based in contract. The judges in the Robinson case held¹ that although the fiduciary relationship on which it depends may rest upon an implied mandate, the action was not based on a contract of agency. It does not ask for contractual performance.

(3) Damages

As the action is not based on contract, damages in delict must be considered. It is submitted that to permit P to recover a secret profit from A in the form of damages based on a delictual action would be wrong for two reasons:

1. At 199; 242; 262. See also United Australia Ltd v Barclays Bank [1941] AC 1.

- (i) The act of accepting a secret profit need not necessarily constitute a delict in that the acceptance is wrongful or due to the fault of A.¹ No matter how innocent the circumstances may be under which the secret profit was acquired, A is still under an obligation to account for such a profit to P.²
- (ii) Further to be successful in a delictual action, P must show that he has suffered actual loss, capable of pecuniary assessment.³ It has been held that this is not a conditio sine qua non for the recovery of a secret profit.⁴ In expanding upon this rule, it has been said that:⁵

"The rule ... is not based upon the existence of harm to the principal in the particular case. It exists to prevent a conflict of opposing interests in the minds of agents whose duty it is to act solely for the benefit of their principals. The rule applies, therefore, although the transaction between principal and agent is beneficial to the principal."

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1. Lee and Honoré 199; 201.
 2. In Transvaal Cold Storage Co Ltd v Palmer 1904 TS 4 at 33 Mason J held that the rule will be applied "no matter how honestly the agent may have acted...."
 3. Lee and Honoré 199. See also Nathan v Blake's Executors 1904 TS 626 at 630.
 4. See Transvaal Cold Storage Co Ltd v Palmer 1904 TS 4 at 37 where P was entitled to succeed in recovering a secret profit even although there was no proof that P had suffered any loss.
 5. Per Price J in Mallinson v Tanner 1947 (4) SA 681 (T) at 687 when quoting from the Restatement of the Law of Agency 874.

The no-profit rule, irrespective of damage to P, has been enunciated in England in the following stern terms:¹

"[T]hat rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my judgment to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that."

Thus the quantum of profit which must be disgorged by A must be carefully isolated from the loss, if any, sustained by P.² It is wrong to approach this calculation from the view point of P's loss. There may be cases where P has lost nothing at all, yet A will be compelled to surrender his profit.³ Once this is understood, the calculation simply revolves around the gain made by A. The fact that P is placed in a better position than he would have been, but for the bribe, is irrelevant. Compensation of P is not in issue.⁴ It is accepted that it is unwise that A should be entitled to retain any profit arising from the agency unless this has been agreed to by P, who should be fully precognised of

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1. Per James LJ in Parker v McKenna (1874) LR 10 Ch App 96 at 124-125.
 2. Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd [1978] 2 All ER 405 at 409A.
 3. Hovenden and Sons v Millhoff (1900) 83 LT 41; Boardman v Phipps [1967] 2 AC 46.
 4. Herzfelder v McArthur Atkins and Co Ltd 1908 TS 332 at 354.

all the circumstances. To this extent it may be argued that the forcing of the agent to release his unjust rewards is a penal sanction which may act as a deterrent to others similarly tempted to accept secret profits.¹

(d) Is the no secret profit rule too wide?

In both South Africa and England the bar on secret profits hits the honest and dishonest recipient equally. It is no defence to claim that P suffered no prejudice and that A acted innocently.

Some academic writers have suggested that, whilst stern action against dishonest agents is welcomed in the interests of curbing corruption, the application of the no secret profit rule to honest brokers is undesirable. Thus it has been said of the no secret profit rule that²

"its simple certainty is deceptive and its mechanical application can and has caused hardship to a fiduciary who has acted honestly and in the best interests of his principal."

Apart from causing hardship, it has been suggested that:³

"If an absolute interdict is placed on trustee profit-making, trustees will have no incentive to seek out these profit-making opportunities and to that extent trust will suffer It is clear that a disgorgement rule will lead to some productive inefficiency; that is, some perfectly innocent and lucrative opportunities will not be realised because of the rule."

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1. AM Tettenborn "Bribery, Corruption and Restitution - The Strange Case of Mr Mahesan" (1979) 95 LQR 68 at 73.
 2. G Jones "Unjust Enrichment and the Fiduciary's Loyalty" (1968) 84 LQR 472 at 478.
 3. W Bishop and DD Prentice "Some Legal and Economic Aspects of Fiduciary Remuneration" (1983) 46 Modern LR 289 at 295-296.

The facts in Boardman v Phipps¹ illustrate how the secret profit rule, which is designed to operate prophylactically, can cause hardship. A negotiated the reorganization of shares, which P held in a company. Using information which A had gained in acting as an agent of P, A acquired shares for himself in the same company. The shares subsequently yielded a substantial profit. Although A had not acted dishonestly, it was held that he had to account to P for the profits.

It is accepted that the penal no-secret profit rule, although well suited to discourage corruption, may cause hardship to innocent parties. Nevertheless, there has been a plea for its strict enforcement particularly in the field of company law.² Further, although the courts in England and South Africa have applied the rule strictly, two salient features should be borne in mind.

Firstly, where A wishes to make a profit for himself incidental to the agency, he should approach P for permission. Once the proposed profit is disclosed and consented to by P, A may retain the profit. The question of corruption falls away.³

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1. [1967] 2 AC 46.
 2. RC Beuthin "Corporate Opportunities and the No Profit Rule" (1978) 95 SALJ 458.
 3. Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk 1986 (1) SA 819 (A) at 840A-D.

Secondly, the rule does not cover all secret profits made by A whilst employed by P. Thus it has been held that the contention that a manager of a company was bound to devote his whole time to its service was unsound. He was not bound to devote every moment of his working time to the company's business unless that business required it.¹ Thus income derived from part-time employment over week-ends may generally be retained by an employee. The test is whether the profits were made "in the course or by means of an agency" or whether they were derived from "a subsidiary contract".² Profits acquired by A within the scope of his agency cannot be retained. Thus it has been held that:³

"Of course, where a profit is made by an agent on a transaction completely outside the agency relationship, then the agent is not accountable to his principal.... It is immaterial that the profit did not arise out of the transaction directly within the mandate of the agent, provided it was acquired by means of the agency."

Lord Denning identified three sources of possible abuse for which A will be held accountable, namely, misuse of P's property; misuse of his position of authority or misuse of information or knowledge acquired by A arising from his employment by P.⁴ It must be remembered that we

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1. Transvaal Cold Storage Co Ltd v Palmer 1904 TS 4 at 16.
 2. Transvaal Cold Storage Co Ltd v Palmer (supra) at 20-21; Robinson v Randfontein Estates Gold Mining Co 1921 AD 168 at 229.
 3. Per Gubbay J in S v "A" 1979 (4) SA 51 (R) at 59-60.
 4. Boardman v Phipps [1967] 2 AC 46.

are not only concerned with agency stricto sensu, but also with wide fiduciary relationships. In the context of a master - servant relationship, some limitation has been placed on the test whether the profits were made in the course of or by means of the contract of agency.¹ Is the tea-boy, for example, disentitled from competing in an activity which conflicts with the business interests of his master? It has been contended that the crucial inquiry is a consideration of the nature of the duty owed by a fiduciary to his employer as appears from the following passage:²

"While it may be that in many instances the liability of the fiduciary to disgorge his profits has been made to rest upon the basis that he had acquired his profits only in his capacity as fiduciary and in the execution of his office ... and while the no-profit rule is an extension of the rule which prevented a fiduciary who had undertaken to act for another in any matter from acting for himself in the same matter, it is submitted that this is no justification for thus limiting the application of the fundamental principle itself The crucial inquiry will ... be whether what he has done has placed himself in a position in which his self-interest is in conflict with ... (his) duty."

It is submitted that it is in the interests of commerce generally that the no-secret profit rule should continue to be strictly enforced by our South African courts. It is in the hands of agents who wish to retain profits over and above their commissions to make a full disclosure to their principals. The application of the principles of

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1. Uni-Erections v Continental Engineering Co Ltd 1981 (1) SA 240 (W) at 254.
 2. RC Beuthin "Corporate Opportunities and the No Profit Rule" (1978) 95 SALJ 458 at 468 where the case of Bellairs v Hodnett 1978 (1) SA 1109 (A) was discussed.

causation will prevent the rule operating too harshly.

(e) May P recover a promised bribe from A?

X offers to pay A a secret profit. A accepts. P discovers the clandestine agreement before X pays the profit to A. Is A liable to account to P for the unpaid secret profit? This question was raised in the case of Transvaal Cold Storage Co Ltd v Palmer¹ where P obtained an order against A whereby A had to account for and pay over to P profits accruing to A. It emerges from certain passages² in the judgement that at the time the order was made, A was not yet in possession of profits promised to him by X. It would seem, therefore, that P is entitled to relief from the time that the secret agreement is closed between X and A. Actual delivery of the profit to A is irrelevant.

It is accepted that this may cause A some hardship in that he may be unable to recover the secret profit promised to him by X. However, the courts have shown little sympathy for A in this situation. Thus where A promptly returned a secret profit to X after P had found out about it, A was still held liable to P for the profit. In this regard

1. 1904 TS 4 at 16.

2. At 13; 14; 23; 30; 37. Note also the query put to counsel by Innes CJ at 7.

Curlewis J held:¹

"If respondent (A) has to pay this sum (secret profit) twice he has only himself to blame for not having faithfully discharged his duty towards his principal."

The principle seems to rest on the following dictum of Benjamin J:²

"It seems to me that an agent would be guilty of improper and unfaithful conduct if he has stipulated for a secret commission even though he has not actually received it, as he would thereby be affected in the fidelity which he owes to his principal."

Thus it is submitted that A is liable to account for and pay over all secret profits which he has arranged to make³ or which accrue to him in course of his employment beyond his ordinary remuneration.⁴

D. IS P ENTITLED TO RECOVER THE BRIBE FROM X?

In dealing with this topic, it is once again useful to compare the English and South African law. It will be debated whether the developments in English law should be followed in South Africa.

(a) The English law.

Initially it was considered under English law that P's only cause of action against X was to claim damages for fraud.⁵ This changed when a minority judgement⁶ was

1. Levin v Levy 1917 TPD 702 at 708. (The reference to A in brackets is mine).
2. Duffet v Lurie Bros 1923 CPD 473 at 475.
3. Kerr 142.
4. Lee and Honoré 158.
5. Salford Corporation v Lever [1891] 1 QB 168.
6. Per Collins LJ in Grant v The Gold Exploration and Development Syndicate [1900] 1 QB 233. Contra AL Smith and Vaughan Williams LJJ.

subsequently supported in a later case¹ which gave P the right to sue X for the bribe. This right of action has been recently confirmed by Lord Diplock who stated that:²

"This extension to the briber of liability to account to the principal for the amount of the bribe as money had and received, whatever conceptual difficulties it may raise, is now and was by 1956 too well established in English law to be questioned."

It is probably with these "conceptual difficulties" in mind that the English courts have been constrained to distance themselves from the cause of action based on a fiduciary relationship between P and A when A is being sued for the bribe.³ If that action could be described as one for money had and received then the same cause of action could justify the recovery of the bribe from X. Clearly the fiduciary relationship between P and A would be lacking in any relationship between P and X. Thus a common fiduciary basis to sue either A or X for the bribe is lacking. Hence the movement to the money had and received action for both remedies.

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1. Hovenden and Sons v Millhoff (1900) 83 LT 41.
 2. Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd [1978] 2 All ER 405 at 411. Lord Diplock held at 411 that the introduction of this remedy has "the effect of making bribery a wrong committed by the principal (X) which is sui generis and defies classification." (The reference to X in brackets is mine).
 3. See 162n1 above.

Finally, it should be noted that the English law is apparently sufficiently wide to allow P to sue X for the bribe despite the fact that X has already paid it to A.¹

(b) The South African law

There appears to be no reported case in South Africa where P has successfully sued X for the bribe. A review of the case law reveals that A remains the defendant in an action for the recovery of the bribe even although the promised bribe has yet to be paid to him.² In the latter event, the court is prepared to make an order attaching the secret profit in possession of X pending the outcome of the action by P against A for its recovery.³ It has been suggested that where A is unable to satisfy the judgement against him, it may be possible to demand a cession from A to recover the secret profit from X.⁴

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1. See eg Hovenden and Sons v Millhoff (1900) 83 LT 41.
 2. See eg Transvaal Cold Storage Co Ltd v Palmer 1904 TS 4; Duffet v Lurie Bros 1923 CPD 473. Compare the attempt made by P to recover profits made by X as a result of the re-sale of property which X bought from P after P had discovered that X had bribed A in Nathan v Blake's Executors 1904 TS 626. The bribe had been recovered by P from A. In discussing P's claim, Innes CJ said it was difficult to see how such a claim could succeed, even on different facts, as it implied a fiduciary relationship between P and X.
 3. Transvaal Cold Storage Co Ltd v Palmer (supra) at 30.
 4. During argument in Transvaal Cold Storage Co Ltd v Palmer (supra) at 7-8 Innes CJ asked counsel for P: "Are you entitled to bring an action of this nature before the profits have been actually earned? Supposing the defendant (A) fails to get the money he is claiming (i.e. the secret profit) from the Imperial Company (X)?" To which counsel for P replied: "We could force him to cede his (A's) rights to us" (P). (The references to P, A and X in brackets are mine.)

It is also instructive to note that South African jurists are generally silent on any possible right which P may have against X to recover the secret profit.¹

Should such a remedy be made available to P? The only basis for the introduction of this relief against X is to be found in English law where P can sue X for the bribe.² It is submitted that there are no cogent reasons why our courts should follow the English law in this regard.

It has been candidly conceded by the English judiciary that the right which P has to recover the bribe from X has caused "conceptual difficulties", making it a claim which is "sui generis" and "defies classification".³ This is a morass which should be avoided. It has been

1. DJ Joubert "Onkoperij" (1978) 11 De Jure 274 at 278 states rather tentatively: "Ooreenkoms met die derde vernietigbaar is, kan daar moontlik geredeneer word dat die bedonge teenprestasie in werklikheid die teenprestasie is waarop daar kamma ooreengekom is plus die omkoopgeskenk, sodat die volmaggewer ook op die omkoopgeskenk geregtig is as hy besluit om die ooreenkoms te handhaaf." The author continues that since A was not authorised to receive the bribe, P is able to claim the bribe from X even if X has already paid it to A. The author cites no case law to support the view that P may sue X for the bribe. Nor does he repeat this proposition in his book. He qualifies his view, stating that it cannot stand if it is accepted that "die skade wat die benadeelde ly in die reël gelyk is aan die waarde van die omkoopgeskenk...."
2. See 178 above.
3. Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd [1978] 2 All ER 405.

submitted that the right which P has to recover the bribe from A in South Africa is firmly based on their fiduciary relationship.¹ The English law attempts to widen this into an action for money had and received have been deprecated.² It is the extension of this cause of action which now gives P the right to recover the bribe from X.

It is submitted that the right which P has to sue A for the bribe cannot be equated with any right which he may have to recover the bribe from X. The relationship which P has with A is entirely different to the one he has with X. In any event South African law does not know an action for money had and received.

Thus the search for a proper cause of action remains unresolved. It could be argued that P should be able to sue X for the bribe since it is against public policy that X should be entitled to retain the profits of his fraud. It should be noted, however, that where P has suffered loss as a result of the bribery, he is entitled to recover damages from X.³

1. See 162 above.
2. See 167 above.
3. See 214 below.

It is submitted, therefore, that in South Africa P can not look to X for the bribe or any other secret profit unless P takes a cession of action from A.

E. IS X ENTITLED TO RECOVER THE BRIBE FROM A?

This situation was considered in Limbade v Dwarka¹ when X paid money as a bribe to A who undertook to use his influence with P. A failed to honour his undertaking, converting the money he received from X for his own use by buying certain properties. X applied for an interdict seeking to restrain A from alienating the properties, pending the outcome of an action based on a condictio brought by X against A for the repayment of the bribe. In refusing the application it was held that²

"the overriding factor at this stage of the proceedings is that the relief which he (X) seeks is discretionary and, in view of this turpitude, the Court is not prepared to extend it to him."

What happened the the main action is not reported, but the judge did comment obiter:³

"All this may possibly not debar him from success at the trial, in view of the qualifications placed upon the in pari delicto rule in Jajbhay v Cassim 1939 AD 537 at p 544."

1. 1957 (3) SA 60 (N).
 2. Per Holmes J at 62F. (The reference to X in brackets is mine.)
 3. Per Holmes J at 62E.

A had in fact misrepresented to X that he could influence P. A, therefore, was not only guilty of accepting a bribe, but also of fraud. On the other hand, X's misconduct was confined to the giving of the bribe. The court may come to the assistance of X in these circumstances, as it could be argued that the parties are not in pari delicto. Accordingly, X would be entitled to relief because his misconduct was less blameworthy than that of A.¹

In the event that A and X are in pari delicto² the test whether X shall be entitled to recover the bribe will depend on whether the doing of justice between the parties demands the relaxation of the par delictum rule. The courts will not, however, come to the assistance of X where such relief is contrary to public policy. It is submitted that public policy demands in these circumstances that X should be disentitled to claim return of the bribe.³

F. MAY A SUE X FOR THE BRIBE?

A cannot sue X for money promised to him by way of a bribe whether he was induced by such a promise to depart from his duty or not. The reason is that the agreement

1. Minister van Justisie v Van Heerden 1961 (3) SA 25 (O).
 2. In pari delicto potior est conditio possidentis.
 3. Jajbhay v Cassim 1939 AD 537 at 544.

between A and X is obviously illegal which carries the consequence that it is unenforceable by either party.¹ The par delictum rule can have no application, as it is postulated that no money has been paid or property delivered pursuant to the illegal agreement.²

Where the secret profit is not tainted with deceit it would seem that A could sue X for its recovery.³ The full amount of the secret profit may be recovered.⁴ The general rule is that where A fails to pay money due to P, he is liable to P for interest on the capital amount owing from the date of demand.⁵ It would appear, however, that where A converts the money of P for his own use then interest runs from the date of conversion. Such conversion includes the taking of bribes and secret profits.⁶ Where the secret commission comprises property, A is liable to surrender the property to P or to account to P for its highest value whilst in A's possession.⁷

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1. Ex turpi causa non oritur actio. Bobrow v Meyerowitz 1947 (2) SA 885 (T).
 2. This distinction between the ex turpi causa and par delictum rules is clearly explained by Wille and Millin 37.
 3. There is no authority for this proposition, but on general principles of contract it would appear that A could look to X for the promised profit.
 4. Mallinson v Tanner 1947 (4) SA 681 (T).
 5. Hansa v Dinbro Trust (Pty) Ltd 1949 (2) SA 513 (T).
 6. De Villiers and Macintosh 351-352 who cite Halsbury para 786. See Powell 326 who refers to Nant-Y-Glo and Blaina Ironworks Co v Grave (1878) 12 ChD 738; Boston Deep Sea Fishing and Ice Co v Ansell (1888) 39 ChD 339.
 7. Alfred Morton v AM van Zuilecom (1907) 28 NCR 500 following Eden v Ridsdale's Railways Lamp and Lighting Co (1889) 23 QB 368 at 371.

CHAPTER 5THE CONTRACT BETWEEN P AND XSECTION A: CANCELLATIONA. THE RIGHT OF P TO CANCEL HIS CONTRACT WITH X.

It is well established in both English and South African law that P is entitled to resile from a contract entered into on his behalf by A with X where X has bribed A.¹ In isolating a cause of action on which to found rescission, some difficulties have been experienced in South African law. The confusion has arisen from the incorporation of English law concepts which sit uneasily in South African law. It is therefore important to analyse the precise impact of English law in South Africa in this regard. Again it is emphasised that the scope of the cause of action must be accurately ascertained in order to be able to plead rescission correctly.

B. THE ROLE OF FRAUD IN THE ENGLISH LAW OF BRIBERY.

In English law fraud is used as the cause of action when P wishes to cancel his contract with X which has been secured by bribing A. Thus it has been held, for example, that:²

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1. Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk 1986 (1) SA 819 (A).
 2. Per James LJ in Panama Telegraph Co v India Rubber Telegraph Works Co (1875) LR 10 Ch App 515 at 526.

"[A]ny surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal [I]f he defrauded principal ... is entitled, at his option, to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the Court may think right to give him."

Where A acts in a transaction between P and X and where A also acts secretly for X in the same transaction, fraud will be presumed.¹ In the event of P initially repudiating the contract with X on insufficient grounds, P may subsequently justify the repudiation on the basis of fraud when he later discovers that A was bribed by X during the negotiations of the contract, even though he was ignorant of the fraud at the time of the initial repudiation.²

Where fraud has been used as a basis to resile from the contract, both A and X are liable for any actual loss sustained by P as a result of the contract brought about as a result of their fraudulent conduct.³

It is accepted that A must account to P for any secret profit whether such profit amounts to bribery or not.⁴

Some doubt has been expressed as to whether P is entitled to resile from his contract with X where A has made a

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1. Re A Debtor [1927] 2 Ch 367 at 376.
 2. Alexander v Webber [1922] 1 KB 642.
 3. Salford Corporation v Lever [1891] QB 168. See also Clerk and Lindsell 835.
 4. See 159 above.

secret profit which does not amount to bribery.¹ It seems clear that the contract between P and X will be inviolate where A makes a secret profit which does not involve any complicity on the part of X.² Apart from this situation where A acts on his own, it would seem that the giving and acquisition of secret profits in good faith could entitle P to cancel his contract with X when regard is had to the wide definition of bribery in English law.³

The English law definition of bribery has become emaciated by the dropping of the requirement that X must have an intention to induce A to act in X's favour, it being irrebutably presumed that the gift was given with a corrupt intention by X and that it influenced A to the detriment of P.⁴ It has been submitted that the excision of

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1. See Ball 23 where the author suggests, without citing any authority, that A and X are jointly and severally liable for deceit and conspiracy to defraud if A accepts a bribe from X. However, where A "merely receives a secret profit, no such actions will lie." Although it is unclear which actions the author had in mind, he amplified his statement by saying at 23: "Where there is merely a secret profit which does not involve payment by the third party, the principal will have no right to rescind the contract with the third party." To support this proposition Ball 25n10 cites Shipway v Broadwood [1899] 1 QB 369. Powell 317 suggests that the right to repudiate probably does not apply against X where A has merely taken a secret profit without X's knowledge. This would seem correct. If X did not consciously give A a gift, there is obviously no bribery even under the very wide English law definition.
 2. Powell 316.
 3. See 140-141 above.
 4. Industries and General Mortgage Co Ltd v Lewis [1949] 2 All ER 573; Taylor v Walker [1958] 1 Lloyd's Rep 490 At 511-512. See also Re A Debtor [1927] 2 Ch 367 at 373 where Lord Hanworth rejected a submission that the conduct of X and A could only be considered fraudulent where it was proved that X paid the bribe with the object of inducing A to act in the interests of X only.

the requirement that X must intend to induce A to act in X's favour makes it virtually impossible to distinguish between honest and dishonest conduct when considering the gift by X to A.¹ In practice, the honesty of either X or A is irrelevant. P will be entitled to cancel his contract with X once the conduct of X and A can be brought within the very wide definition of bribery.

This is a paradoxical situation. Honesty is irrelevant, yet the cause of action to found rescission is fraud which implies a deceitful conspiracy. The paradox is probably best explained when regard is had to two features. Firstly, English law has reached the stage that, once P has proved the colourless elements of bribery with the assistance of irrebutable presumptions, constructive fraud on the part of X is deemed to exist as is apparent from the following dictum of Lord Diplock:²

"[T]he giving of the bribe was treated in equity as constructive fraud on the part of the giver and where it was given in connection with a contract between the principal and the briber the principal was entitled to rescission of the contract."

Secondly, unlike in South African law, the concept of fraud in English law is extremely elastic. The difficulty of defining this concept is highlighted by Kerr as follows:³

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1. See 151-153 above.
 2. Maheesan v Malaysia Government Officers' Co-operative Housing Society Ltd [1978] 2 All ER 405 at 409A. See also Re A Debtor (supra) at 376.
 3. Kerr On the law of Fraud and Mistake 7 ed 1. This extract was quoted with apparent approval by Rabie JA in Plaaslike Boerdienste (Edms) Bpk v Chemfos Bpk 1986 (1) 819 (A) at 847I-J

"It is not easy to give a definition of what constitutes fraud in the extensive signification in which that term is understood by Civil Courts of Justice Fraud, in the contemplation of a Civil Court of Justice, may be said to include properly all acts, omissions and concealments which involve a breach of legal or equitable 'duty', trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat anyone is considered as fraud."

After a review of the English decisions, Rabie JA in the Chemfos case concluded that fraud in English law, in the context of corruption, allowed P to repudiate the contract with X where A had been bribed on the ground that it would be unfair to bind P to his contract with X since the law views bribery as immoral and wrongful. Rabie JA expressed himself thus:¹

"'n Ontleding van die Engelse beslissings oor die onderhawige onderwerp toon myns insiens dat die werklike grondslag van die reg wat 'n party het om die ooreenkoms te repudieer indien daar aan sy agent 'n omkoopgeskenk deur die ander party gegee is, daarin bestaan dat die reg omkoperie as 'n immorele en ongeoorloofdehandeling beskou en derhalwe nie toelaat dat die omkoper die ooreenkoms kan afdwing, of dat die ander party daaraan gebonde gehou moet word nie."

The wide definition of bribery in English law allows P to rescind his contract with X although, when exchanging a secret profit, X and A act entirely innocently. It is submitted that to permit rescission in these circumstances may be unfairly prejudicial to X.

1. At 848A-B.

C. FRAUD INTRODUCED INTO THE SOUTH AFRICAN LAW
OF BRIBERY THROUGH ENGLISH LAW.

Under the influence of English law, a number of South African cases relied on fraud as a cause of action for the cancellation of a contract affected by bribery. It has been held that where X knowingly places A in a position of a conflict of interest vis á vis P, X commits fraud on P. This renders the contract between P and X voidable at the instance of P.¹ Thus payment of a bribe by X to A constitutes fraud on P.²

A secret profit made by A has been referred to as fraud.³ Akin to the English law, the concept of constructive fraud was considered in South Africa in the following context:⁴

"In the present case the ground of action must be in the nature of fraud, actual or constructive, and we must require evidence from which no other conclusion can reasonably be drawn before we can say that the respondent can be regarded as a party to any such thing."

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1. Davies v Donald 1923 CPD 295 at 299-300.
 2. Mangold Bros Ltd v Minnaar and Minnaar 1936 TPD 48 at 59.
 3. Clulee v McArthur Atkins and Co Ltd 1908 NPD 54 at 58.
 4. Per Dove Wilson JP in Laughton v Holmes 1915 NPD 419 at 423-424. Note that this case did not deal with cancellation. P had brought an action against the respondent, X, to recover a secret commission which X had paid to A.

Where the contract between P and X has been tainted by bribery, fraud has been mentioned as a cause of action when awarding damages to P. Thus it has been said:¹

"The Courts have always held that where an agent receives a secret commission, that constitutes a fraud on the principal. That fraud has various consequences, one of which is that the whole transaction can be set aside, if it has not reached such a stage that there cannot be a restitution. Another consequence is that the principal who is injured by such a transaction may recover damages. A third consequence is that the principal may also recover the value of the promised gift to his agent."

A review of these cases shows that there was little analysis as to what actually constituted fraud. Was fraud used in its English law context or as the term is understood in South African law? The conclusion has already been reached that fraud in English law is extremely wide in nature.² This is in contrast to fraud which is clearly defined in South African law.³ It is instructive to consider what the consequences in law would be if P had to prove fraud in the South African context before he could cancel his contract which was tainted by the bribery of A.

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1. Per Mason J in Ex parte The Master In re The Niagara Ltd 1912 TPD 896 at 901-902. See also Nathan v Blake's Executors 1904 TS 626 at 630 where it was held that if X fraudulently induces A to deceive P, X is liable for any damages which P may suffer.
 2. See 185 above.
 3. See 192 below.

D. FRAUD AS A CAUSE OF ACTION IN SOUTH AFRICAN LAW.

It has been argued that the elements of fraud must be satisfied where rescission of the contract between X and P is claimed by reason of the payment of a bribe by X to A.¹ This proposition is of particular significance when considering the causal nexus between the inducement used by X and the pursuant contract between P and X. Four essential requirements for contractual fraud have been listed:²

- (i) unlawful conduct in the sense of a misrepresentation or non-disclosure in circumstances where there is a duty to disclose;
- (ii) mala fides in the form of an intention to induce the other party to contract as a result of the misrepresentation or non-disclosure;
- (iii) materiality of the misrepresentation or the non-disclosure; and
- (iv) a causal connection between the fraud and the conclusion of the contract.

If the requirements of fraud were to be applied to bribery then it is suggested that the materiality of the bribe to the conclusion of the contract would have to be

1. This argument has been extracted from the submissions of counsel representing X in Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk 1986 (1) SA 819 (A) at 821-825.

2. Counsel for X in Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk (*supra*) at 823H cited Karoo and Eastern Board of Executors and Trust Co v Farr 1921 AD 413 at 415 and Novick v Comair Holdings Ltd 1979 (2) SA 116(W) at 149-150 in support of this proposition.

proved. In particular a causal connection must be established between the non-disclosure of the bribe and the conclusion of the contract.

Leaving aside the question of presumptions for the moment, this would mean that in order to establish bribery for the purpose of rescinding a contract and claiming damages, P would have to prove the following causal link:

- (i) X gave a gift to A with the intention of inducing A to act in favour of X in a transaction between P and X;
- (ii) A must in fact be so induced by X;
- (iii) pursuant to such inducement, A must make representations to P in favour of X; and
- (iv) P must rely on these representations when entering into a contract between himself and X.

Thus the onus on P would not be discharged where, for example, despite the bribe, A made no representations to P or, where A made such representations, P either ignored them or they did not induce the contract, in that the contract would have in any event been concluded with or without such representations.

The argument is an attractive one. The rescission of a contract is at stake. The ratio for such rescission is

based on the fact that consensus to an agreement has been improperly obtained.¹ It is therefore reasonable to require that the bribe to A be causally related to the contract between P and X which P seeks to have set aside. However, this view does not cater for the real practical difficulties facing P which the law has recognised when he attempts to discharge this onus.

E. BRIBERY PER SE AS A CAUSE OF ACTION IN SOUTH AFRICAN LAW.

After pointing out that the English law concept of fraud was different to fraud in South African law, Rabie JA in the Chemfos case went on to firmly reject fraud as a cause of action for the rescission of the contract between P and X. In this regard Rabie JA said:²

"Wat betref die partye wat die omkoopgeskenk aan die agent van die ander party gegee het, moet 'n mens myns insiens sê dat die reg hom nie toelaat om teen die wil van die ander party 'n ooreenkoms af te dwing wat hy deur middel van ongeoorloofde gedrag, naamlik omkoperij, verkry het nie."

Thus the adoption of fraud as a basis for rescission in the earlier South African cases has been discarded. Cancellation is based on bribery per se. P will be entitled to this

1. See Hosten 391.
2. At 848D.

relief once he has proved bribery. It is the wrongful act of bribery which prevents X from enforcing his agreement with P.

The elements of bribery are therefore decisive when P attempts to formulate his claim to rescind his contract with X. The definition of civil bribery has been considered elsewhere.¹ It is useful to compare the requirements under this definition with the essentials of fraud in South African law. The requirement of fraud that there must be unlawful conduct in the sense of a misrepresentation or a non-disclosure may be equated with the giving of a gift by X to A without disclosing it to P. The mala fides in fraud is equivalent to the requirement in bribery that by giving the gift to A, X must intend to induce A to act in his favour in a transaction between P and himself.

Of greater interest, are the two remaining requirements of fraud, namely, the materiality of the misrepresentation or non-disclosure and the causal connection between the fraud and the conclusion of the contract. In the English law of bribery it would appear that these requirements are largely irrelevant. In England the mere payment

1. See 145-146 above.

of the bribe gives rise to presumption in favour of P and against X and A that A was influenced by the bribe.¹ Further, it is immaterial whether, as a result of the bribe, A influenced P to enter into the contract.²

These principles are not part of South African law. It has already been observed that the irrebutable presumption that A was influenced by the bribe has been excised from South African law.³ Although the point still has to be settled, the Appellate Division in the Chemfos case has indicated that for practical purposes⁴ a rebuttable presumption may lie in favour of P and against X that A was influenced by X's gift to him.⁵ It is thus open to X to place in issue the question as to whether A was influenced by the gift.

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1. Industries and General Mortgage Co Ltd v Lewis [1949] 2 All ER 573; Shipway v Broadwood [1899] 1 QB 369.
 2. The irrebutable presumption deems that P has been prejudiced at least to the extent of the bribe. See Taylor v Walker [1958] 1 Lloyd's Rep 490 at 511-512.
 3. See 155 above.
 4. The practical difficulties were alluded to in Ex parte The Master In re The Niagara Ltd 1912 TPD 896 where Mason J held at 902: "It is impossible for the Court to determine the exact effect of that present or bribe. The Courts have always declined to go into the question whether it actually affected the judgement of the parties who received it, because that is an investigation which is almost impossible to conduct to any satisfactory result. The Court has always said this: If an agent accepts money from the man with whom he is dealing, without the knowledge of his principal, he puts himself in such a position that his interest conflicts with his duty."
 5. At 844.

Once the effect of the gift on A is in issue, then, to complete the causal chain, it is equally pertinent to consider whether the bribe by X to A caused A to influence P to enter into a contract with X. In this respect the obiter dictum in the Chemfos case indicates that a rebuttable presumption will also lie in favour of P and against X. This emerges from the following passage of the judgement of Rabie JA¹

"waar dit blyk dat een party by 'n ooreenkoms 'n omkoopgeskenk aan die agent van die ander party gegee het, hy die las behoort te dra om te bewys dat sy omkoperie nie die beoogde beïnvloeding van die agent en sy prinsipaal bewerkstellig het nie."

Since Rabie JA found on the facts of the case that the influence which X intended the bribe to have did permeate through to A and P, he considered it unnecessary to settle this important issue.² This is unfortunate. Working on the assumption that this obiter dictum may one day crystallise into accepted principle, P, when claiming rescission of the contract between himself and X will have to plead not only that A was influenced by the bribe, but also that A was instrumental in the conclusion of the contract between P and X or influenced P to enter into a contract with X. P will, however, be assisted by the rebuttable presumption proposed by Rabie JA in the Chemfos case.³ The onus will be on X to show that neither A nor P

1. At 844I. (My emphasis)

2. At 844I.

3. At 844I. See DJ Joubert Annual Survey (1986) 136 at 137-138.

was influenced by his attempted inducement of A.

F. A COMPARATIVE ANALYSIS OF THE GROUNDS FOR CANCELLATION IN THE ENGLISH AND SOUTH AFRICAN LAW OF BRIBERY.

(a) A criticism of the irrebutable presumptions in the English law of bribery.

It is probably as a result of the introduction of two irrebutable presumptions which has made the English law definition of bribery unfairly wide. X is presumed to have acted corruptly when given the gift. A is presumed to have been influenced by the gift to the detriment of P. The consequence of these evidential aids is that the cause of action relied upon for the cancellation of a contract between P and X, namely fraud, assumes a mythical nature. The full elasticity of the English law of fraud generally is not even tested. Fraud is in fact presumed once it is established that X has made a secret payment to A whom he knew to be an agent of P.¹

Although it is accepted that P should have some assistance when he attempts to prove a secret arrangement between X and A, these far-reaching presumptions may operate harshly against innocent parties, particularly in relation to P's remedies of cancellation and claim for damages.

1. Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd [1978] 2 All ER 405.

This unyielding approach fails to take into account the practicalities of the situation. Three factual possibilities may be mooted.

- (a) X may give a gift to A which is totally unconnected to A's position as an agent of P with whom X is dealing.
- (b) X may give a gift to A in order to induce A to use his fiduciary powers to influence P in X's favour. A accepts the gift, but does not influence P as a result of the gift. Despite this, a contract between P and X is closed.
- (c) X gives a gift to A. A, having been influenced by the gift, misuses his fiduciary powers by persuading P to contract with X.

Whatever remedies are open to P to recover the gift, it would seem unfair to allow P to rescind his contract with X under situations (a) and (b) above. Surely there must be some causal connection between the gift from X to A and the contract between P and X. Irrebuttable presumptions presuming such a connection and, therefore, fraud fail to taken into account all the exigencies of the situation.¹

1. In Hovenden and Sons v Millhoff (1900) 83 LT 41 at 43 Romer LJ stated that an irrebuttable presumption operates in favour of P against X and A, namely, that A was influenced by the bribe. Shepherd 260 states that he does not agree that the presumption is irrebuttable. At 265, Shepherd adds that although the presumption is, in his view rebuttable, A will have to go "a very long way towards demonstrating that there was no possible circumstance in which his powers were abused, an exceedingly difficult task."

- (b) The rejection of the English law irrebutable presumptions in the South African law of bribery.

It is submitted that the rejection of the irrebutable presumption of English law bribery by Rabie JA in the Chemfos case is a further positive step for the South African law of bribery. These evidential aids went too far in presuming fraud. The unrealistic nature of this English approach permeated some of the earlier South African decisions. For example, it has been held that:¹

"a party (X) dealing with the agents (A) for participation in the sale, knowing that they were agents, must be affected by their fraud in the making of the sale, which ... was fraud in law, though not necessarily a fraud in fact or morality as well."

This disturbing distinction between what the courts regard as fraud on the one hand and fraud in fact or morality on the other is best avoided. This may be done by rejecting constructive or presumed fraud. The Chemfos case went further. Not only were the presumptions, which effectively presumed fraud, jettisoned, but fraud as a cause of action was eschewed.

The danger of "honest" bribery in South African law no longer exists. The key to dishonesty is to be found in the requirement that X must intend to induce A by giving

1. Per Bell J in Forbes Still and Co v Sutherland (1856) 2 Searle 231 at 237. (The references to X and A in brackets are mine.) Note that this was a case where P brought an action against X to cancel the contract on the grounds that A who had been instructed to sell the goods on behalf of P, secretly bought the goods on a joint account with X. See also the reference to constructive fraud in Laughton v Homes 1915 NPD 419.

the gift to influence A in X's favour.¹ Once this is in issue, unlike in English law, then the extent of the influence on A and P becomes pertinent.

It is submitted that this chain of influence, starting from X to A to P, lies at the heart of P's cause of action which entitles him to rescind his contract with X. It is difficult to see why P should be entitled to cancel the contract where this causal chain is broken. If this contract remains untainted by the surreptitious dealings between A and X then little can justify its cancellation.

The causal chain in English law is linked together by irrebuttable presumptions. The Chemfos case, while possibly requiring such a chain,² left the question open as to who should bear the onus of forging it.³ The obiter dictum in this case suggests the forging is assisted by a rebuttable presumption where the onus is on X to show that A and P were not influenced by X's inducement. This is not a difficult task when one considers that, generally speaking, no one pays for nothing.

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1. Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk 1986 (1) SA 819 (A) at 845.
 2. Cf Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk (supra) 845B. The matter was not decided, however. See the remarks of Rabie JA at 841I, where he found it unnecessary to comment on the approach by McEwan J in the court a quo who held that it was not important what representations the agent made to the principal, whether honest or dishonest, or whether or not the principal acted on such representations. It will be presumed that the bribe caused injury to the principal, which entitles him to have the contract set aside. See "Digest of cases on appeal" Plaaslike Boeredienste (Edms) Bpk v Chemfos Ltd 1983 (3) SA 616 (W).
 3. At 844I.

By the retention in South African law of the requirement that X must intend to induce A to act in X's favour, a clear cut distinction may be drawn between the case where X innocently gives something to A and an instance of bribery where X acts dishonestly. By giving a bribe, X encourages A to act in conflict with his duty to P. It is this sort of conduct which should attract severe civil penalties, including the rescission of the contract between P and X by P, as opposed to milder remedies which accompany conduct which does not involve dishonesty.¹

(c) Fraud and bribery compared in South African law.

It is submitted that the rejection of fraud as a cause of action in the context of bribery in South African law is a positive step taken by the Appellate Division in the Chemfos case. The term "fraud", as used in some English cases in the context of bribery, has a very broad meaning.² This is in contrast to the strict requirements which must be satisfied to prove fraud in South Africa.³ The excision of the reference to fraud in connection with bribery avoids a potential misunderstanding as to what must be proved if P wishes to rescind his contract with X.⁴

1. See 135n2 above.

2. See 189 above.

3. See 192 above.

4. Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk (supra).

It is accepted that fraud as a cause of action for cancelling the contract between X and P where A has been bribed is no longer applicable to South African law. The strict requirements for fraud do not have to be proved. However, an interesting analogy may be drawn between bribery and fraudulent misrepresentation when considering the right of P to rescind his contract with X.¹

Where a juristic act is concluded between A and X, it is their consensus, not P's which is crucial.² Where A acts within the scope of his authority and the appropriate consensus is reached with X, an agreement between P and X materialises.³ A contract concluded as a result of misrepresentation is voidable at the instance of the innocent party.⁴ The right to rescind is not based on the absence of consensus, but arises out of the wrongful act of misrepresenting the true situation.⁵ Consensus is present, but has been improperly obtained. P is entitled to rescind, if he has been misled, providing that there is a causal connection between the misrepresentation and the conclusion of the contract.⁶

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1. See Christie 269 and 281 where bribery is considered under the heading of misrepresentation and fraud.
 2. De Wet 1 LAWSA para 110. This situation relates to agency in the narrow sense where A is empowered to conclude contracts on behalf of P as opposed to agency in the wide sense where A is not so empowered. See 135-138 above.
 3. Frost v Leslie 1923 AD 276.
 4. Hall-Thermotank Natal (Pty) Ltd v Hardman 1968 (4) SA 818 (D).
 5. De Wet 1 LAWSA para 110.
 6. Bowditch v Peel and Magill 1921 AD 561.

Similarly, in bribery, the existence of A's authority and the consensus reached between X and A on behalf of P in a representative capacity is not in dispute. As has been clearly held in the Chemfos case,¹ P's right to rescind the agreement is based on the wrongfulness of method, namely bribery. X may influence A to conclude a contract on behalf of P with X. Alternatively, X may influence A to induce P to conclude a contract with X. In this case, P's consensus, improperly obtained, would be of crucial importance.

The analogy may be taken further. If it is accepted that the misrepresentation must induce the contract, the statements made obiter in the Chemfos case² regarding the influence of the bribe on A and the consequent effect on P are significant. To justify cancellation of the contract between P and X some causal connection between the bribery and the ultimate contract between P and X should be required.

A criticism of drawing the analogy between fraudulent misrepresentation and bribery too closely is that, since fraud has been rejected as a cause of action for cancellation in the Chemfos case, it is illogical to apply the same rules of fraud to bribery. There may be some merit in this criticism. However, it overlooks the suggestion

1. At 848D.
2. At 844I.

of Rabie JA in the Chemfos case¹ that the influence of the bribe on A and the subsequent effect on P may be rebuttably presumed against X, leaving him with the onus to show that no such causal connection existed. There is no such presumption in relation to fraud. Hence the difference between fraud and bribery.

Alternatively, it has been held that the type of influence the bribe may have vis à vis the contract between P and X is simply that there must be "some relationship" between the bribe and the contract.² This relationship is different to a causal connection between the bribe and the contract of X and P. Difficulties arise when an attempt is made to define the "some relationship" concept between the bribe and the contract. It is submitted that these difficulties are best avoided by requiring a direct causal link between the bribe and the contract. Once this link has been established, consensus has been improperly obtained which entitles P to rescission.

G. UNLAWFUL INTERFERENCE BY X IN THE RELATIONSHIP BETWEEN P AND A.

Although fraud in English law is entrenched as the cause of action for rescinding the contract between P and X,

1. At 844I.
2. See the unreported judgement of McEwan J in the Court a quo summarised in "Digest of cases on appeal" in Plaaslike Boeredienste (Edms) Bpk v Chemfos Ltd 1983 (3) SA 616 (W).

some jurists¹ have suggested that rescission could be more appropriately based on the tort referred to as civil conspiracy. It is a tortious conspiracy for two or more persons, acting in concert, to induce another to breach a contract to which he is a party.² Thus where X and A arrange to act secretly against the interests of P who employs A, such unlawful interference could justify P's right to cancel his contract with X. It has been submitted that:³

"While it may often be possible to pinpoint a false representation made by the agent to his principal and in respect of which the briber is jointly liable as the instigator of the tort this does not appear to be essential to the plaintiff's case. It may be suggested that the action against the bribed agent and the briber may on occasion lie more properly in conspiracy, or for inducing a breach of contract between the agent and his principal."

A similar action is to be found in South African law. A person is liable for damages where he intentionally and wrongfully induces one party to a contract to breach that contract as a result of which loss is caused to the other contracting party. Where such interference can be classified as unlawful then the interfering party may be liable under the lex Aquila.⁴

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1. See eg AM Tettenborn "Bribery, Corruption and Restitution - The strange case of Mr. Mahesan" (1979) 95 LQR 68 at 69-70.
 2. Quinn v Leatham [1901] AC 495; Crofter Hand-Woven Harris Tweed Co Ltd v Veitch [1942] AC 435.
 3. Clerk and Lindsell 835.
 4. Atlas Organic Fertilizers (Pty) Ltd v Pikkewyen Ghwano (Pty) Ltd 1981 (2) SA 173 (T); Godongwana v Mpisana 1982 (4) SA 814 (TKSC); Schultz v Butt 1986 (3) SA 667 (A).

There appears to be no authority to show that a cause of action based on unlawful interference may be used to cancel the contract between P and X.¹ It has been suggested that this action can be used by P to recover damages from X.² In fact it seems to be confined to a remedy in the form of damages or an interdict. Cancellation is not considered.

In the absence of any direct authority on this point, it is probably safer to look elsewhere for a cause of action justifying cancellation.

H. IS THE CONTRACT BETWEEN P AND X VOID OR VOIDABLE?

In English law a contract between P and X which is tainted by the bribery of A is considered to be voidable at the instance of P.³ He may repudiate the contract and apply for rescission or he may affirm it.⁴ In either event he will be entitled to such damages as he may be

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1. This point was argued by counsel for X in Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk 1986 (1) SA 819 (A) at 821I and 822I but does not seem to have found favour with the Court.
 2. See eg DJ Joubert "Onkoperij" (1978) 11 De Jure 274 at 275 where the author states: "Teenoor die geskenkgewer (X) ... is sy (P) regsmiddels gebasseer op die beginsels van die reg insake die onregmatige daad en in die besonder op die reëls met betrekking tot die beskerming van vorderingsregte teen aantasting deur derdes." (The references to X and P in brackets are mine). The same author in his book says at 220: "Die oorreding van die verteenwoordiger om sy plig te versaak, is 'n onregmatige optrede teen die prinsipaal. Basies is dit 'n inmenging met die kontraktuele verhouding tussen die prinsipaal en die verteenwoordiger wat tot 'n aksie van onregmatige daad aanleiding gee."
 3. Panama Telegraph Co v India Rubber Telegraph Works Co (1875) LR Ch App 515; Shipway v Broadwood [1899] 1 QB 369; Alexander v Webber [1922] 1 KB 642.
 4. Powell 317.

able to prove. This approach is consistent with the English view that P is presumed to be the victim of fraud arising from the bribery by X of A.¹

In Re A Debtor,² Scrutton LJ was asked to decide whether the contract between P and X was void or voidable. He commented as follows³

"it is said that a contract obtained by a bribe is necessarily void as against both parties, but I cannot agree with that contention. If the contract is voidable only it gives the innocent party a right to rescind. There is no authority that a contract obtained by a bribe is void against both parties."

Scrutton LJ went on to hold that the contract was voidable at the instance of P.⁴

Under the influence of English law, several South African cases have followed the view that the contract between P and X is voidable at the instance of P.⁵ Since these early cases adopted fraud as a basis for their conclusion that the contract was voidable, this question needs to be re-examined in the light of the Chemfos case which rejected fraud as a basis for rescission.

1. See 188 above.
2. [1927] 2 Ch 367.
3. At 377.
4. See also Taylor v Walker [1958] 1 Lloyd's Rep 490. In North and South Trust Co v Berkeley [1971] 1 WLR 470 at 484-485, Donaldson J held that "an agent cannot lawfully place himself in a position in which he owes a duty to another which is inconsistent with his duty to his principal, but if nevertheless he does so, his action is not a nullity."
5. See eg Davies v Donald 1923 CPD 295 at 299-301; Mangold Bros Ltd v Minnaar and Minnaar 1936 TPD 48 at 59. See also De Villiers and Macintosh 553.

The bland acceptance of the English law in South Africa has been criticised by Joubert.¹ In cases of fraud, the misrepresentation must lead to the formation of the contract before it can be said that its validity is tainted with fraud which in turn will render it voidable at the instance of the innocent party. In this regard Joubert reasons that:²

"Aangesien die volmaggewer nie self by die kontraksluiting betrokke was nie, kan daarbeswaarlik gesê word dat die wanvoorstelling hom tot die kontraksluiting beweeg het.... Op grond hiervan wil dit derhalwe voorkom asof die wanvoorstelling nie een is wat ingevolge die gewone regsbeginself tot die vernietiging van die ooreenkoms aanleiding sal gee nie."

Joubert seems to prefer the approach that, because A was in breach of his duty of good faith to P by accepting the bribe from X, A's dealings with X when he purported to carry out P's mandate were unauthorised. As such, P will not be bound in a contract with X which has been entered into on P's behalf by A, unless P ratifies the contract. Joubert concludes:³

"Verwerp mens die opvatting dat die ooreenkoms op grond van wanvoorstelling vernietigbaar is, sodat daar geen grond vir die beskouing dat die ooreenkoms vernietigbaar is, bestaan nie, is die enigste ander moontlikheid dat die ooreenkoms ongeldig is vanweë volmagskending, sodat dit slegs die volmaggewer bind as hy dit bekragtig. Daar is dan geen bindende ooreenkoms nie, maar bekragtiging sal dit bindend maak."

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1. DJ Joubert "Onkoperij" (1978) 11 De Jure 274 at 277-278.
 2. At 277.
 3. At 277. Joubert repeats this submission in his book at 220 when dealing with reasons why the contract between P and X "kan deur die prinsipaal angeveg word. 'n Aanvaarbare ratio daarvoor sou wees dat die optrede van die verteenwoordiger nie in die belang van die prinsipaal is nie en dat dit derhalwe ongematig is. Die derde wat daarvan weet, sou hom nie op 'n oënskylike volmag kon beroep nie."

In fairness to Joubert, it must be remembered that his remarks were made before the Chemfos case. However, they merit consideration.

Dealing with the terminology,¹ it should be noted that we are not concerned with acts which are void in the absolute sense. Such acts cannot be ratified. Two situations are salient:

- (i) The contract between P and X may be unilaterally voidable. Both P and X are bound by the contract, but P has the power to set the contract aside.
- (ii) A void act may be retroactively ratified. P may ratify A's unauthorised action. This amounts to ratification of an inchoate transaction, thereby giving a legal basis to something which hitherto had no legal foundation at all.

The question is whether Joubert is correct in opting for situation (ii) above.

Joubert cites no case law for preferring the void but ratifiable option. Indeed such authority is hard to come by. It has been held that the taint attaching to any transaction between P and X, based upon A's breach of trust to P,

1. See generally CC Turpin "Void and Voidable Acts" (1955) 72 SALJ 58; AM Honoré "Degrees of Invalidity" (1958) 75 SALJ 32.

may be removed by P's ratification. In this regard Whitaker J said;¹

"If the transaction between the principal and agent can be validated by the principal on a full disclosure of the facts, it appears to me, *a fortiori*, that the taint attaching to any transaction between the agent and another, based on the agent's breach of trust to his principal, may also be removed by the principal's ratification."

The ratification by the principal of an agent's action is confined to situations where one person purports to act on behalf of another, but without authority.² The key element is the absence of authority. Breach of trust is not in issue as there is no principal and agent relationship stricto sensu when the putative representation took place. Assuming that P authorised A to act on his behalf when dealing with X, providing that A acts within the scope of such authority, P will be bound in a contract with X. P cannot later attack his contract with X on the grounds that A lacked authority.

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1. Flood v Taylor 1978 (1) PH A30 (R). Compare Forbes Still and Co v Sutherland (1856) 2 Searle 231 at 238 where Bell J, in permitting P to cancel a contract with X, entered into on his behalf by A after A had purchased goods on a joint account with X which he had been instructed by P to sell, described the sale as null and void. He held that P may adopt it or repudiate it. Note that this case was primarily concerned with the principle of A buying the property which P instructed him to sell. This is not the same as bribery. See Hargreaves v Anderson 1915 AD 519 at 522; Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 at 178.
 2. See generally De Villiers and Macintosh 282.

The contract may be repudiated on other grounds, for example, bribery. To suggest that, because A has acted in breach of a fiduciary duty which he owes to P, A's dealings with X are unauthorised, is a non sequitor. By taking the bribe, A has breached his duty of good faith which he owed to P. It is the method of executing the authority which entitles P to relief. The authority itself stands. The concepts of authority and breach of trust should not be confused. Accordingly, it is submitted that the suggestion that the contract between P and X is void on the grounds of a breach of trust by A and that therefore A's action was unauthorised cannot be supported.

Turning to Joubert's criticism¹ that the contract between P and X cannot be considered voidable because the connection between surreptitious dealings of X and A on the one hand and the eventual contract between P and X on the other is too tenuous, cognisance must be taken of the recent developments in law of bribery as expounded in the Chemfos case. Although the question of whether the bribe must influence A or P was left open,² an obiter dictum of Rabie JA in the Chemfos case³ suggests that there may be some connection between the bribe and P's contract with X. A and X have acted secretly. This is a material non-disclosure which could influence P's mind as to whether he wished to contract with X. The situation is akin to fraud

1. Joubert's criticism is quoted at 209 above.
2. 846F.
3. 844G.

by X and A on P. Fraud renders a contract voidable. Bribery should do the same. Although there is no specific finding in the Chemfos case as to whether the contract between P and X is either void or voidable, the following remarks of Rabie JA support a voidable construction:¹

"Die reg kan, na my mening, weens oorwegings van openbare belang, appellant (X) ... nie toelaat om 'n ooreenkoms wat op so 'n wyse tot stand gekom het, teenoor respondent (P) af te dwing indien hy besluit om dit te verwerp nie."

It is consistent with the equities of the situation that, as in cases such as fraud, P should have the right to elect whether he wishes to remain bound by the contract with X. A voidable contract which results in both P and X being bound, subject to P's right to rescind places P in a strong position. It occurs on occasions that, despite the bribery, his contract with X is to the advantage of P. The position of P is not so strong where the contract is considered void but ratifiable. It has been suggested that a void "contract" has no legal effect until ratified.² It amounts to an unaccepted offer by P which may be withdrawn at any time before ratification. This could have the strange result that X may resile from an unratified arrangement with P even although he had attempted to secure a contract with P through bribing A. A

1. At 849A (The references to X and P in brackets are mine). See also DJ Joubert Annual Survey (1986) 136 at 138.
2. De Wet 1 LAWSA para 131.

voidable contract gives the innocent party, P, greater protection.

It is therefore submitted that a contract between P and X which has been secured by the bribing of A by X should be voidable at the instance of P.

SECTION B : DAMAGES

A. MAY P SUE A AND X FOR DAMAGES?

In English law bribery is a tort.¹ Where P has suffered loss as a result of A's receipt of the bribe, A and X are liable jointly and severally for his loss.² The basis of the action is either a conspiracy to defraud or deceit.³

Similarly in South African law, bribery is a delict.⁴ It has been held, for example, that:⁵

"Clearly it is the law in England, and I think it is also the law in this country, that if a third person fraudulently induces an agent to deceive his principal, to the detriment of the latter and to his own benefit, then he is liable for any damages which the principal may suffer."

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1. CA Needham "Recovering the Profits of Bribery" (1979) 95 LQR 536 at 537.
 2. Chitty 33; Fridman 144; Powell 318.
 3. Salford Corporation v Lever [1891] 1 QB 168; Hovenden and Sons v Millhoff (1900) 83 LT 41; Mahesan v Malaysia Government Officers' Co-operative Housing Society [1978] 2 All ER 405.
 4. De Villiers and Macintosh 552.
 5. Per Innes CJ in Nathan v Blake's Executors 1904 TS 626 at 630.

Both A and X are jointly and severally liable to P for damages as a result of loss which he has sustained arising from the bribery.¹ Although these early South African cases rely on fraud to give bribery its delictual nature, it has now been ascertained that such a foundation is no longer accurate. Bribery per se is a wrong which gives rise to an action for damages in delict.²

P's actual loss is central to his claim for damages. For example, where P was induced by A to sell property to X the law has been stated as follows:³

"Unless they (P) can prove some damage they cannot succeed.... Those damages in my opinion would be the difference between the price at which the plaintiffs (P) were induced to part with their claims and the price which they could have obtained elsewhere on that day."

As far as quantum is concerned, there is an irrebuttable presumption in English law that P suffers loss at least to the extent of the amount of the bribe. If P can prove loss over and above the amount of the bribe, he is entitled to recover this as well.⁴ It is submitted that there

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1. Lee and Honoré 159. Ex parte The Master In Re The Niagara Ltd 1912 TPD 896 at 902.
 2. Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk 1986 (1) SA 819 (A) at 849E.
 3. Per Innes CJ in Nathan v Blake's Executors 1904 TS 626 at 630-631. (The reference to P in brackets is mine). In citing Davies v Donald 1923 CPD 295 at 301, De Villiers and Macintosh 553 state: "It is usually stated that the principal may elect whether to abide by the contract and claim damages, or to rescind it. It is submitted, however, that the principal can both rescind the contract and claim any restitutional damages suffered as a result of the corruption of the agent." This submission has been borne out in Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk 1986 (1) SA 819 (A) at 850-853 where damages were awarded to P where the contract between himself and X had been rescinded.
 4. Hovenden and Sons v Millhoff (1900) 83 LT 41 at 43.

are cogent reasons why such a presumption should not form part of the law in this country.

Firstly, from a practical point of view there are too many examples where the bribe bears no relation to the loss suffered by P. In a number of instances, particularly in the field of the bribery of administrative officers, P will have suffered no loss at all. In some situations P may even benefit from the contract entered into with X despite the bribery of A.¹

Secondly, such a presumption flies in the face of the well established principle in South African law that loss must be proved before a claim for damages can succeed. Generally, our law is against the award of nominal damages.²

Thirdly, there is a reason peculiar to English law as to why such a presumption exists. It is apposite to recall the following dictum of Slade J:³

" [S]ince it is established that one of the parties to a contract makes a secret payment to the person whom he knows to be the agent of the other, the law will presume against him that he has acted corruptly, that the agent has been influenced by the payment to the detriment of his principal, and that the principal ... has suffered damage to at least the amount of the bribe."

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1. Where eg a radio presenter is bribed to play a particular record over the air. The radio station may well benefit from such an action. See Shepherd 267-268.
 2. Monumental Art Co v Kenston Pharmacy (Pty) Ltd 1976 (2) SA 111 (C) at 118.
 3. Industries and General Mortgage Co Ltd v Lewis [1949] 2 All ER 573 at 578.

Each of the three irrebutable presumptions referred to by Slade J is dependent on the other to link the causal chain between the bribe and loss suffered.

Criticism has already been levelled at the manner in which the introduction of these presumptions has blurred the distinction between secret profits acquired in good faith and bribery.¹ More importantly, however, the South African Appellate Division has recently ruled in the Chemfos case² that there is no irrebutable presumption in South African law in favour of P and against A and X that A has been influenced by the bribe. If the causal chain is broken at this level, the need for an irrebutable presumption regarding P's loss falls away. Although this presumption has not been specifically rejected, there is no reason to believe that it will be retained while the other presumptions are cast aside.

For practical considerations, however, an obiter dictum in the Chemfos case suggests that X may bear the onus of proving that his bribery did not influence A and P. There is thus scope for the view that it will be rebutably presumed against A and X that P's loss is at least equivalent to the amount of the bribe.

1. See 200 above.
2. At 844H.

B. IS P ENTITLED TO DOUBLE RECOVERY IN THE FORM OF CLAIMS FOR THE BRIBE AND DAMAGES?

(a) The English law before Mahesan's case.

In Salford Corporation v Lever¹ Lord Escher MR took the view that P was not only entitled to recover the bribe paid to A, but he could also proceed against A and X, jointly and severally, for any damages he had sustained arising from the bribery. He emphasised that the liability for such damages existed cumulatively with A's liability to account for the bribe.² Thus when awarding damages in P's favour against A and X, the fact that P has already recovered the bribe is irrelevant.³ The damages will be computed without taking the recovery of the bribe into account. It was held that⁴

"the principal has two distinct and cumulative remedies: he may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, jointly and severally, damages for any loss which he has sustained by reason of entering into the contract without allowing any deduction in respect of what he has recovered from the agent under the former head, and it is immaterial whether the principal sues the agent or third person first."

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1. [1891] 1 QB 168.
 2. At 176.
 3. At 177 Lord Escher MR said: "The third person (X) was bound to pay back the extra price which he had received, and he could not absolve himself or diminish the damages by reason of the principal having recovered from the agent the bribe which he had received." (The reference to X in brackets is mine).
 4. This is an extract from the head note of Salford Corporation v Lever [1891] 1 QB 168 which was quoted with approval in Grant v The Gold Exploration Syndicate [1900] 1 QB 233 at 244. (My emphasis).

It was emphasised in the Salford case that P had a separate cause of action against A and X individually and not one cause of action against both or either of them. Two "frauds" are committed by A. One as agent, the other by conspiracy with X against P. The recovery of the bribe is based on money had and received. The recovery of damages is based on the tort of deceit.¹

The law so stated has an inequitable consequence. P may recover more loss than he has suffered. By allowing this double recovery, it could be argued that P is being unjustly enriched at the expense of A and X.

(b) Maheasan's case

Appreciating the inherent inequities in law as laid down in Salford's case, Lord Diplock in Maheasan v Malaysia Government Officers' Co-operative Society Housing Society² redressed the situation. Dicta permitting double recovery in Salford's case were obiter. To allow such recovery was inconsistent with the approach adopted in United Australia Ltd v Barclays Bank Ltd³ which emphasised that the plaintiff must elect between remedies. In rejecting the double recovery approach in the Salford case, Lord Diplock emphasised that the basis of liability to sue X was the loss

1. Hovenden and Sons v Millhoff (1900) 83 LT 41.
 2. [1978] 2 All ER 405.
 3. [1941] AC 1.

sustained by P in consequence of entering into a contract in respect of which a bribe was given. The cause of action was fraud. As A and X are joint wrongdoers either or both could be sued. Lord Diplock went on to hold:¹

"But fraud is a tort for which the damages are limited to the actual loss sustained; and if the principal has recovered the bribe from the bribed agent the actual loss he has sustained in consequence of entering into the contract is reduced by that amount."

The present state of English law may be summarised as follows:

- (i) P may recover the bribe from either A or X on the basis of money had and received;
alternatively
- (ii) P may sue A and X, jointly and severally, for the actual loss which he has sustained in consequence of his entering into the transaction in respect of which the bribe was given.

Where there is a difference in quantum between the two alternative claims, P may ask for judgement in the higher amount.²

1. At 410b.
2. In Mahesan v Malaysia Government Officers' Housing Co-operative Society [1978] 2 All ER 405 P was given judgement in respect of the higher of his two claims, namely the loss which he suffered as opposed to the amount of the bribe. See also Hovenden v Millhoff (1900) 83 LT 41 at 43.

(c) South African law.

The English law, as it stood prior to the Maheson case, has left its mark on South African law. In particular this is evidenced by two judgements of Mason J, namely Balmoral Diamond Syndicate Ltd v Liddle¹ and Ex parte The Master : In re The Niagara Ltd.² Both these cases dealt with the secret acceptance by directors (A) of companies (P) of their qualification shares from promoters (X) in circumstances where the promoters conducted subsequent business with the companies. Mason J held that the payment of such qualification shares to directors amounted to bribery.

In the Balmoral case, Mason J was asked to consider two claims brought by P against A. The first was for the value of the qualification shares paid by X to A. This claim may be equated with the recovery of the bribe. The

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1. 1907 TH 89. In this case the directors (A) were promised certain qualification shares by the promoters (X) if the directors induced the company (P) to buy certain mining claims in which the promoters had an interest.
 2. 1912 TPD 896. In this case the directors (A) were to receive their qualification shares from the promoters (X) in the event of the cession of a certain option from the promoters to the company (P). The company was represented by the directors when the cession went through. Mason J held at 903 that the directors were not entitled to accept their qualification shares from persons who are to have dealings with the company.

second claim was for damages which P had sustained as a result of entering into a contract with X which had been induced by A. In addition to allowing recovery of the bribe, Mason J held that¹

"if an agent is bribed, as was the case with the directors of the Balmoral Co., to induce his principal to give a higher price than would be otherwise asked, the principal can recover the excess price as damages from both the agent and the person bribing him...."

The court ordered that the amount of the bribe and damages be paid by the directors to the company.

This approach was reiterated by Mason J in the Niagara case, where he stated that:²

"The courts have always held that where an agent receives a secret commission, that constitutes fraud on the principal. That fraud has various consequences, one of which is that the whole transaction can be set aside Another consequence is that the principal who is injured by such a transaction may recover damages. A third consequence is that the principal may also recover the value of the promised gift to his agent You may call it qualification shares, or what you like; it is in substance a bribe."

In Nathan v Blake's Executors,³ P claimed damages from X arising from a contract entered into between P and X pursuant to the bribery of A. It emerged from the judgment that P had already recovered the bribe from A in an earlier action which was settled before the matter went to trial.⁴ Regarding the claim for damages vis à vis

1. At 117 following Salford Corporation v Lever [1891] 1 QB 168.
2. At 901-902.
3. 1904 TS 626.
4. At 629.

the bribe already recovered, Innes CJ remarked:¹

"But x was not paid to the syndicate (P) as part of the purchase price; it was a bribe given to one of the partners, (A) and that bribe has been recovered by the syndicate from the partner who received it. I fail to see that that in any way affects the measure of damages which the plaintiffs (P) can recover in this action [T]he remedies are entirely distinct against the agent and the briber. That is perfectly true; but the remedy against the briber in an action of this kind is subject to the operation of the ordinary rules on which damages are assessed."

The Court dismissed the claim for damages. The reason for the dismissal is that P had failed to prove his loss.² Had such proof been forthcoming, the claim for damages would no doubt have succeeded, despite the fact that P had already recovered the bribe from A. This case therefore stands as authority for the view that damages may be notionally recovered without taking into account the fact that P has already successfully sued A for the bribe.

(d) Should South African law follow the new approach adopted in the Mahesan case?

1. The scope of the Mahesan case.

In Salford's case the court allowed P to recover damages from X and although P had recovered the bribe from A it would appear that the dicta of this case are sufficiently wide to allow P to recover both the bribe and damages from

1. At 632.

2. At 631.

from a single defendant, namely A.¹ Having regard to the facts of the Salford case, it is conceded that the latter proposition is obiter.

This interpretation of the obiter dicta in the Salford case has been disputed. It has been held in a Canadian case² that where P sued X for damages and the bribe, such claims lie in the alternative only. Nevertheless the court found that there is nothing to prevent P from recovering the bribe from A and then suing X for damages.

The Mahesan case was also concerned with two claims by P against A, namely, recovery of the bribe and damages. The claims were allowed in the alternative only. Can a wedge be driven into this case, by arguing that it has not excluded P from suing A for the bribe and then claiming damages from X without taking into account the recovery of the bribe?

It is submitted that such a distinction cannot be drawn. In any event if the actions to recover the bribe and damages are truly independent, then it surely cannot make any difference whether one or two persons are sued. The court in Mahesan's case turned its face firmly against the principle of double recovery generally, either in the

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1. It clearly emerges from this case that A and X are jointly and severally liable to compensate P for any loss resulting from the bribery and such liability exists cumulatively with A's liability to account for the bribe.
 2. Attorney-General for Nova Scotia v Christian (1975) 49 DLR (3d) 742.

context of a recovery against a single defendant or actions involving more than one defendant.¹ It is on this basis that the Mahesan case will be discussed when considering its possible introduction into South African law.

2. Some absurdities in the double recovery approach.

Assuming that P may recover damages and the bribe, some strange consequences follow. Take the facts in the Salford case. Tenders were invited by P for the supply of coal. X agreed to pay A one shilling a ton if X's tender was accepted. To cover the bribe, X increased his price to P by one shilling a ton. P contracted with X to supply the coal. The amount of the bribe was identical to P's loss.

If P sues A on the double recovery formula, he may claim the bribe and his loss. P not only recovers his loss, but also receives an unexpected windfall. A, on the other hand not only has to pay the amount of the bribe, but also P's loss. It can be fairly said that P has been unjustly enriched at the expense of A.

Using the same facts, consider another option open to P under the double recovery theory. A question has been

1. It is submitted that this is clear from the following conclusion of Lord Diplock in Mahesan's case at 411g: "So both as against the briber and the agent bribed the principal has these alternative remedies: (1) for money had and received, under which he can recover the amount of the bribe as money had and received, or (2) for damages for fraud, under which he can recover the amount of the actual loss sustained in consequence of his entering into the transaction in respect of which the bribe was given, but he cannot recover both." See also CA Needham "Recovering the Profits of Bribery" (1979) 95 LQR 536 at 539.

framed as follows:¹

"When (A) by paying over to (P) the whole of the commission received from (X) has put (P) in as good a position as if the fraud had never been committed, can (P) still recover from (X), as loss caused by (X's) fraud, a sum which (P) has not in fact lost?"

It is apparent from these illustrations that to allow P to recover the bribe and damages would lead to an absurdity. Surely the law should not permit this. Yet, in justifying this strange result, it has been argued:²

"If the result of this is to reduce the amount of bribery, so much the better. It is not surprising to read in Sir Frederick Pollock's comment on the case (Salford) -
The morality of the law is, much to the benefit of the world, decidedly above the morality of ordinary mercantile life as regards the duties of agents."

One is tempted to rejoin that where "the morality of law" becomes too remotely distanced from "the morality of ordinary mercantile life," then the law could fall into disrepute, particularly where its application leads to patently absurd results.³

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1. This is an extract from a note on Salford's case in (1891) 7 LQR 99 at 100. (The references to X, A and P in brackets are mine).
 2. Powell 318. The quotation of Sir Frederick Pollock is to be found in the reference in note 1 above. (The reference to Salford in brackets is mine.)
 3. Hosten 17-19. It is possible that A could be called upon to pay the amount of the bribe three times. In a criminal prosecution, either under the common law or the Prevention of Corruption Act 6 of 1959, A could be asked to pay a fine approximating the value of the bribe. In a subsequent civil action, P could recover the bribe from A. In addition, where P has suffered loss which could correspond to the amount of the bribe, such loss may also be recovered by P from A.

3. The separate cause of action argument.

A strong argument used by those who support the view that the remedies for the recovery of the bribe and damages are cumulative is that there is a separate cause of action for each remedy.¹ This is indeed so. The cause of action relied upon by P to recover a bribe or any secret profit from A is based on the feature that A is in breach of his fiduciary duty owed to P.² The recovery of damages, on the other hand, is delictual in nature. This relief is based on a wrongful act, namely, bribery which fixes both A and X, jointly and severally, with liability. No action for damages will lie if A has made a secret profit not amounting to bribery.³

Building on this distinction, it can also be argued that the computation of the quantum to be recovered by P is different in each case. When claiming the return of the secret profit or bribe, P is entitled to the entire amount paid by X to A, irrespective of whether P sustained any loss or not.⁴ In a delictual action for damages, however, P must prove his loss before he can succeed.⁵ It can be broadly concluded that the delictual action is compensatory, whereas the action to recover a secret profit is essentially deterrent by nature.

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1. See eg AM Tettenborn "Bribery, Corruption and Restitution - the Strange Case of Mr. Mahesan" (1979) 95 LQR 68.
 2. See 160 above.
 3. See 214 above.
 4. Transvaal Cold Storage Co Ltd v Palmer 1904 TS 4.
 5. Nathan v Blake's Executors 1904 TS 626.

Although these theoretical arguments are no direct answer to the practical absurdities of the double recovery situation which could see A unduly prejudiced and P receiving an undeserved windfall, it has been suggested that:¹

"The law takes the attitude, for better or worse, that it is better in such situations that the principal should have the money paid over as a bribe than that the fiduciary or agent should. The interests in discouraging secret profits override the interests in preventing people from getting undeserved windfalls."

To sum up, the recovery of the bribe, as opposed to the claim for damages, is clearly distinguishable when regard is had to the cause of action, calculation of quantum and the purpose of the type of relief claimed. In addition, as a matter of policy, it is better to over-protect the interests of P than to over-emphasise possible prejudice to A by allowing double recovery.

4. The argument against double recovery.

It is conceded that the argument in favour of double recovery has some merit. Further, as far as the South African law stands at present, the weight of authority is balanced in favour of permitting double recovery by P.²

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1. AM Tettenborn "Bribery, Corruption and Restitution - the Strange Case of Mr. Mahesan" (1979) 95 LQR 68 at 73. In arriving at this conclusion, the author relies on Hovenden and Sons v Millhoff (1900) 83 LT 41 and Boardman v Phipps [1967] 2 AC 46.
 2. See 221-223 above.

The majority of South African writers are inclined to the same view.¹ However, since the South African standpoint is based on an uncritical acceptance of the English law² prior to the decision in the Mahesan case, the time is perhaps ripe to re-appraise the South African stance on the question of double recovery. Should our South African judges recant as their lordships did in the Mahesan case?

Although it is accepted that the remedy which P has against A to recover a bribe rests on a fiduciary rather than contractual duty which A owes to P,³ it is instructive to

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1. De Villiers and Macintosh 552-553; Lee and Honoré 159. See also Van Jaarsveld 356: "Indien hy (P) egter besluit om nie die volmag te beëindig nie, is hy afgesien van skadevergoeding, ook geregtig om die geheime wins van die verteenwoordiger te verhaal." (The reference to P in brackets is mine.) Contrast, however, Joubert 220-221. It should be noted that the approach of Kerr leaves the question open. At 142 the author lists a number of remedies available to P where A has made a secret profit. Kerr 142 states that in these circumstances P "may claim the profit which the agent made, if any, and damages for any loss which he can prove his business has suffered." It is perhaps open to argument that, in calculating the damages for any loss, the profit which has been recovered from A must be taken into account. This argument is strengthened when it is noted that Kerr 142n3 cites Transvaal Cold Storage Co Ltd v Palmer 1904 TS 4 at 16 to support his view. In this case Innes CJ was dealing with a claim by P to recover a secret profit made by A. Innes CJ commented obiter at 16 that if P could prove any loss to its business, an action for damages would have been maintainable. However, caution should be exercised in relying on this dictum for authority that the two remedies are cumulative. The judge does not say this. The claim for the damages may lie in the alternative to the claim for the bribe.
 2. DJ Joubert "Omkopery" (1978) 11 De Jure 274 at 277.
 3. Transvaal Cold Storage Co Ltd v Palmer (supra); Peacock v Marley 1934 AD 1 where Jones v East Rand Extension Co Ltd 1903 TH 325 at 335 was relied upon.

compare P's claim with contractual remedies where they overlap with delictual claims. It is established that P's remedy to claim damages from A and X arising from the bribery is delictual in nature.¹

As a starting point, it may be stated as a general proposition that a single act may give rise to both delictual and contractual liability.² The plaintiff has an option to proceed against the defendant either in delict or contract where the same set of facts gives rise to the alternative causes of action. In this regard it has been held:³

"The mere fact that the respondent might have framed his action in contract therefore does not per se debar him from claiming in delict. All that he need show is that the facts pleaded establish a cause of action in delict"

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1. De Villiers and Macintosh 552.
 2. Lillicrap Wassenaar & Partners v Pilkington Bros (SA) (Pty) Ltd 1985 (1) SA 475 (A). See also Boburg vol 1 1.
 3. Per Grosskopf AJA in Lillicrap Wassenaar & Partners v Pilkington Bros (SA) (Pty) Ltd (*supra*) at 496. This requires some qualification. Grosskopf AJA at 499, in reference to the law of delict, distinguished between an infringement of person or property rights which is prima facie unlawful and an infringement of a pure economic interest which may be unlawful, but is not prima facie unlawful, since considerations of policy may inhibit such a finding. See JM Burchell and M Dendy Annual Survey (1985) 181. In developing the distinction between damage to physical and personal interests on the one hand and financial interests on the other, Grosskopf AJA suggested that whereas the former interests may lead to a concurrence of delictual and contractual liability, no such concurrence is applicable to interests purely financial in character (at 500). See PQR Boburg "Back to Winterbottom v Wright? - Not Quite!" (1985) 102 SALJ 213; A Beck "Delictual Liability for Breach of Contract" (1985) 102 SALJ 222; P van Warmolo "Liability in Contract and Delict" (1985) 102 SALJ 227; D Hutchison and DP Visser "Lillicrap Revisited: Further Thoughts on Pure Economic Loss and Concurrence of Actions" (1985) 102 SALJ 587.

It does not follow from this, however, that where there is a concurrence of actions for damages under contract and delict that the plaintiff is entitled to a double recovery.¹ He can rely on either breach of contract or delict.² If he establishes both claims, damages will be awarded using the most advantageous claim as the measure. Alternatively, if he relies on both contract and delict, the plaintiff will be unable to recover more than the actual loss which he suffered.³ As a matter of principle the law is against the concept of double recovery.⁴

What must be emphasised is that P's separate claims for the bribe and damages essentially flow from one act, namely, the bribing of A by X. Although separate consequences flow from this single action, sight must not be lost of the fact that they arise from one transaction. To allow cumulative rather than alternative claims in these circumstances could lead to the awarding of relief which is incompatible with the single act upon which the claims are founded.

It is probably these general principles which are applicable to both English and South African law which prompted

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1. Van der Walt 8 LAWSA para 5.
 2. Van Wyk v Lewis 1924 AD 438; Wellworths Bazaars Ltd v Chandlers Ltd 1948 (3) SA 348 (W); Pockets Holdings (Pvt) Ltd v Lobel's Holdings (Pvt) Ltd 1966 (4) SA 238 (R). Note the qualification at 230n3 above.
 3. Van der Walt 8 LAWSA para 5.
 4. See Wille and Millin 141-142 where the authors state that where a party cancels a contract for breach he may claim in the alternative substitutionary or restitutionary damages. The court will never award the same damages twice over, "regardless of the ingenuity with which the claims may be framed."

Lord Diplock to remark in the Maheesan case:¹

"It was accurate to say that the principal had two distinct remedies against the agent, one for money had and received and the other for the tort of fraud; but it is flying in the face of a long line of authority to say that these two remedies were not alternative but cumulative."

In particular Lord Diplock relied heavily on the dictum in United Australia Ltd v Barclays Bank Ltd² which he summarised as follows:³

"[T]he House of Lords confirmed the principle that where the same facts gave rise in law to two causes of action against a single defendant, one (formerly lying in assumpsit) for money had and received and the other for damages for tort, the plaintiff must elect between the remedies The House of Lords also held that where the same facts gave rise in law to a cause of action against one defendant for money had and received and to a separate cause of action for damages in tort against another defendant, judgment recovered against the first defendant did not prevent the plaintiff from suing the other defendant in a separate action: but that to the extent that the judgment was actually satisfied this constituted satisfaction pro tanto of the claim for damages in the cause of action against the second defendant."

The independence in law of the two causes of action is indisputable, the one lying in the fiduciary relationship between P and A and the other in delict. Surely it is upholding this independence too far when cumulative relief is allowed to flow from one unlawful transaction, namely, bribery.

Turning to the question of quantum, it has been argued that it is in this field where the real issue lies. It has been stated:⁴

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1. Maheesan v Malaysia Government Officers' Co-operative Housing Society [1978] 2 All ER 405 at 410d.
 2. 1941 AC 1.
 3. At 410d-f.
 4. Shepherd 269-270.

"The theory behind it is that there are two distinct wrongs involved here: the fiduciary's wrong and the briber's wrong [B]ut the issue here is not liability per se, it is quantum"

Thus the question is not as to the existence of a separate right of action against A and X but as to the damages recoverable.¹ This aspect was concentrated on in the Mahesan case. In his claim for damages in delict, P would have to prove his loss. The recovery of the bribe by P would mitigate such loss.²

Although in South African law, bribery is no longer considered to be fraud, it remains a delict.³ The principle behind awarding damages in tort or delict remains the same. The plaintiff is compensated for his loss.⁴ It is axiomatic that loss must be proved. The recovery of the bribe mitigates such loss.

It is submitted that at the end of the day, P's interests would be adequately protected if he were allowed to recover the bribe and damages in the alternative. Consider the following permutations:

- (i) Where X has absconded, P may sue A for the bribe, alternatively, damages, whichever is the higher of the two amounts.
- (ii) Where A has absconded, P may sue X for damages.⁵

1. See case note on Salford Corp v Lever [1891] 1 QB 168 in (1891) 7 LQR 39.
 2. Mahesan's case (supra) at 410b.
 3. Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk 1986 (1) SA 819 (A).
 4. McGregor 7.
 5. In English law P may sue X for the bribe, alternatively, damages (Hovenden and Sons v Millhoff (1900) 83 LT 41) but it is doubted whether the bribe may be recovered by P from X in South African law. See 179 above.

(iii) Where both A and X may be brought before the court, P may sue A for the bribe, alternatively, A and X, jointly and severally, for damages, whichever is the higher of the two amounts.

Surely these remedies provide P with adequate protection without causing undue prejudice to either A or X.

It has been submitted¹ that in English law the recovery of a bribe by P should be regarded as a "collateral" payment which in law cannot be deducted from a claim for damages. In Parry v Cleaver,² Lord Reid stated that the question whether a payment was collateral is one of "justice, reasonableness and public policy."

The phenomenon of compensation from a collateral source is also known in South African law.³ The problem of deciding whether a payment is collateral arose in Dippenaar v Shield Insurance Co Ltd⁴ where Rumpff CJ had the following to say:⁵

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1. AM Tettenborn "Bribery, Corruption and Restitution - the Strange Case of Mr. Mahesan" (1979) 95 IQR 68 at 74.
 2. [1970] AC 1 at 13.
 3. See eg Santam Versekeringsmaatskappy Bpk v Byleveldt 1973 (2) SA 146 (A) where it was held that a salary paid gratuitously and out of proportion to the role of the plaintiff's services to his employer should be ignored for the purpose of computing the value of his lost earning capacity. This is consistent with the approach of McKerron 124. See also Lee and Honoré 254-256. At 254 the authors state that: "Where the plaintiff has been compensated by some third party for the damage suffered, whether gratuitously or in pursuance of a contract, such compensation is res inter alios acta and is not to be taken into account when assessing damages payable by the defendant." See further H Luntz "Damages for Loss of Wages" (1964) 81 SALJ 288.
 4. 1979 (2) SA 904 (A).
 5. At 915B-C.

"On the one hand a plaintiff who has suffered damage through a delict should, in law, be fully compensated for his loss. On the other hand the law does not require the person who committed the delict to compensate the plaintiff for more than his loss. In practice the apparently simple rules have caused problems in cases where, as a result of a delict, the plaintiff acquired benefits from other sources than the person who committed the delict and it had to be decided whether or not such benefits should be taken into account when an award of damages was made against the person who committed the delict"

Prior to the case of Dippenaar, it would appear that our courts were generally in favour of regarding as res inter alios acta compensation of the plaintiff by a third party for the damages suffered.¹ It followed that such compensation was not to be considered when assessing the plaintiff's loss. In support of the collateral payment rule it has been suggested that it supplements the criminal law as a deterrent.² Further, payments ex contractu flow from bargaining for which the plaintiff has paid.³ In any event, the lex Aquila requires the wrongdoer, not the third party, to compensate the plaintiff.⁴

Subsequent to the Dippenaar case, however, there has been a discernable shift towards restricting the collateral payment rule.⁵ In Dippenaar's case, Rumpff CJ refused to

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1. See eg Du Randt v Eriksen Motors (Welkom) Ltd 1953 (3) 570 (O); May v Parity Insurance Co Ltd 1967 (1) SA 644 (D); Oberholzer v Santam Ins Co Ltd 1970 (1) SA 337 (N); Santam Versekeringsmaatskappy Bpk v Byleveldt 1973 (2) SA 146 (A).
 2. Bosch v Parity Insurance Co Ltd 1964 (2) SA 449 (W) at 453.
 3. May v Parity Insurance Co Ltd 1967 (1) SA 644 (D) at 647.
 4. Santam Versekeringsmaatskappy Bpk v Byleveldt 1973 (2) SA 146 (A) at 152. See Lee and Honoré 255.
 5. Serumela v S A Eagle Ins Co Ltd 1981 (1) SA 391 (T); Krugell v Shield Versekeringsmaatskappy Bpk 1982 (4) SA 95 (T); Gehring v Unie Nasionaal Suid-Britse Versekeringsmaatskappy 1983 (2) SA 266 (K); Montres Rolex SA v Kleynhans 1985 (1) SA 55 (C).

follow the English case of Parry v Cleaver¹ in which the majority of judges found that a pension, like compensation by an insurance company, constituted a collateral source payment. Rumpff CJ came to the conclusion that a pension was not to be regarded as a form of insurance. In supporting the approach of Solomon AJ in the court a quo, Rumpff CJ held² that the pension is an integral part of the plaintiff's contract of employment. In an action for damages regarding injuries sustained by the plaintiff in a motor accident, caused by the negligence of the defendant, the court found that the amount of damages fell to be reduced by the plaintiff's pension benefits.³

The approach in Dippenaar's case has influenced a number of recent cases in South Africa. Thus, in a claim for damages arising from personal injury, any sick pay received by the plaintiff was held to have mitigated his claim for past loss of earnings.⁴ Similarly, the payment of medical expenses by the plaintiff's employer bars a claim for such expenses against a statutory insurer.⁵

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1. [1970] AC 1 at 13.
 2. At 920H.
 3. At 917B.
 4. Serumela v S A Eagle Ins Co Ltd 1981 (1) SA 391 (T).
 5. Krugell v Shield Versekeringsmaatskappy Bpk 1982 (4) SA 95 (T); Gehring v Unie Nasionaal Suid-Britse Versekeringsmaatskappy 1983 (2) SA 266 (K).

It is submitted that the courts have shown a tendency of late to apply the collateral payment rule with a measure of circumspection.¹ It is conceded that no cases have been found which consider the question of recovering the bribe and damages in the context of collateral payments. If, however, the trend against allowing such payments continues, then it may be argued that the courts will take into account the bribe which P has recovered when assessing his action for damages.

It is submitted that the recovery of the bribe by P is not a collateral payment. There are no cases either in England or South Africa which suggest a bribe is a collateral payment. Such payments are usually made by outsiders who are not directly involved in the cause of action for damages between the parties. For example, the payment of compensation by insurance companies is considered collateral.² A is not an outsider. He may

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1. It should be noted, however, that the precise scope of the collateral payment doctrine has still to be settled as is apparent from the following gloss on Dippenaar's case (*supra*) by De Kock J in the case of Gehring (*supra*) at 269-270: "Hierdie gebied van ons reg het nóg nie finaal gekristalliseer nie Dit blyk dus dat die vraagstuk van "collateral benefits" en die toets wat uiteindelik toegepas moet word om te bepaal of hulle afgetrek moet word van die bedrag wat die eiser kan verhaal, geen eenvoudige antwoord bied nie." This view has been supported by Kock 121 who writes that the present state of our law regarding *res inter alios acta* is by no means settled. See Kock 117-130 on collateral payments.
 2. See Lee and Honoré 255.

be joined with X in an action for damages brought by P as a joint wrongdoer. In these circumstances the payment of the bribe by A to P cannot be considered collateral. Finally, as was emphasised in Dippenaar's case,¹ a delictual claim for damages is wholly compensatory and non-punitive in nature.² The defendant in a delictual action is not required to compensate the plaintiff for more than his loss. To regard the bribe as a collateral payment may violate the compensatory nature of delictual damages.

1. At 915B.

2. This principle in Dippenaar's case (supra) was emphasised in Montres Rolex SA v Kleynhans 1985 (1) SA 55 (C) by Seligson AJ at 66D.

It is consequently hoped that when the South African courts are again seized with the problem of double recovery, they will follow the law as propounded in Maheson's case by allowing the claim for the bribe and damages in the alternative only.¹

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1. Some support for this view is to be found in DJ Joubert 'Omkoopery' (1978) 11 De Jure 274 at 282 where the author suggests as one possible solution to the problem of double recovery that, if it is accepted that P has a separate action against A for the recovery of the bribe, it should be seen against an integrated background of other duties owed by A to P. As such P should not be able to claim both the bribe and damages equivalent to the amount of the bribe from A. The author has, however, expressed doubts as to whether the recovery of the bribe and damages are separate actions. With reference to the English law presumption that P's loss will at least be equivalent to the amount of the bribe (Mahesan v Malaysia Government Officer's Co-operative Housing Society Ltd [1978] 2 All ER 405 at 411) he comments in his book at 221: "Dit gee aanleiding tot die gedagte dat die omkoopgeld sonder meer verhaal kan word en dat dit dan as 'n geheime wins gevorder kan word. Maar as die prinsipaal meer skade as die omkoopgeld ly, kan hy die verskil ook vorder. Hieruit blyk dat dit in werklikheid gaan oor 'n eis vir skadevergoeding met 'n vermoede dat dit minstens gelyk is aan die bedrag van die omkoopgeld en nie oor 'n selfstandige eis vir die omkoopgeld nie." Two criticisms may be expressed about this approach. Firstly, it is doubted whether the irrefutable presumption that P's loss is at least equivalent to the amount of the bribe should form part of South African law. Secondly, the evidence is overwhelming that the claims for the recovery of the bribe and damages each rest on a separate cause of action.

CHAPTER 6THE CONTRACT BETWEEN P AND A.A. MAY P CANCEL HIS CONTRACT WITH A WHERE A HAS
ACCEPTED A BRIBE OR SECRET PROFIT?¹

Under English law it is clear that, irrespective of the terms of the agency, P may summarily dismiss A where A has accepted a bribe. In the leading case of Boston Deep-Sea Fishing and Ice Co v Ansell,² A had received a secret profit from X, a ship builder, who was engaged by P to construct certain boats. In taking the secret commission, A was found to have acted fraudulently.³ It would appear that the secret commission amounted to a bribe.

Cotton LJ criticised A's transaction in the following terms:⁴

"In my opinion if people have got an idea that such transactions can be properly entered into by an agent, the sooner they are disabused of that idea the better. If a servant ... is acting, for another in the matter of any contract, receives, as regards the contract, any sum ... from the person with whom he is dealing on behalf of his principal, he is committing a breach of duty. It is not an honest act, and ... it is a sufficient act to shew that he cannot be trusted to perform the duties which he has undertaken as a servant or agent. He puts himself in such a position that he has a temptation not faithfully to perform his duty to his employer."

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1. For the purposes of this section it will be assumed that there is a contract between P and A as opposed to other types of fiduciary relationships not founded on contract.
 2. (1888) 39 ChD 339.
 3. At 369; 370.
 4. At 357.

For fear of creating the impression that he was confining his remarks to conduct patently dishonest, he added this gloss which would seem to extend his strictures to cases where A had innocently received a secret profit by adding:¹

"I do not, however, rely on that, but what I say is this, that where an agent entering into a contract on behalf of his principal, and without the knowledge or assent of that principal, receives money from the person with whom he is dealing, he is doing a wrongful act, he is misconducting himself as regards his agency, and ... that gives his employer ... authority to dismiss him from his employment as a person who by that act is shewn to be incompetent of faithfully discharging his duty to his principal."

It emerges from this case that the innocent recipient of a secret profit suffers the same fate as the bribee, namely, dismissal. The purpose for which the secret gift was given is irrelevant.² The confidential relationship between P and A is breached irrevocably.³

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1. At 357.
 2. At 363-364.
 3. See generally Chitty 49; Powell 326; Fridman 155.

A similar view prevails in South African law.¹ Not only will bribery be a ground for dismissal, but even where A had acted bona fide when accepting a secret profit, the same result will follow.² Nor is prejudice to P relevant. Grindley-Ferris J in Gerry Bouwer Motors (Pty) Ltd v Preller³ stated that:⁴

"It would appear therefore that it is unnecessary to determine whether the defendant company was prejudiced because the fact that the plaintiff accepted gifts and did not disclose such acceptance to his employer amounted to unfaithfulness and dishonesty towards the latter."

Grindley-Ferris J concluded:⁵

"I do not think that it can be contended that where a servant is guilty of conduct inconsistent with good faith and fidelity and which amounts to unfaithfulness and dishonesty towards his employer the latter is not entitled to dismiss him."

It is important to note that, on the facts, A was found to have acted bona fide, but the "mere fact" that A had taken a secret profit was enough to damnify him. Thus

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1. See Kerr 142; De Villiers and Macintosh 343.
 2. In Transvaal Cold Storage Co Ltd v Palmer 1904 TS 4 where A had taken a secret profit, Innes CJ at 23-24 held "no doubt that he (A) thought he was justified in acting as he did; but it is well that those who occupy fiduciary positions should realise that they are bound not only to refrain from acting dishonestly, but to exhibit to those whose interests they represent the fullest good faith and render them the fullest information in all matters directly or indirectly connected with their business." At 16 Innes CJ entertained "no doubt whatever that the plaintiff company (P) would have been justified in terminating his (A's) employment as manager as soon as it became aware of the arrangements (to acquire a secret profit) which he had made." (The references in brackets are mine).
 3. 1940 TPD 130.
 4. At 133.
 5. At 133.

the sanction of dismissal applies equally to the bribee and the bona fide secret profit taker.

B. CIRCUMSTANCES UNDER WHICH P MAY WITHHOLD A'S COMMISSION

P may cancel A's contract, but what of A's remuneration earned prior to such cancellation?

(a) South African law

It is clearly established that where A accepts a bribe from X, A will forfeit any commission owing to him by P.¹ The question to be considered is whether this forfeiture is equally applicable where A has accepted a bona fide secret profit as opposed to a bribe. A's commission has been described as²

"one way of rewarding an agent for services rendered for the principal, and where it is shown that those services have not been duly and faithfully rendered, the agent will be held to have forfeited his claim for payment."

A leading case of forfeiture of A's commission is Levin v Levy³ where Curlewis J held that⁴

"It is well established that where an agent has acted improperly and unfaithfully in the performance of his duty towards his principal, he will forfeit any remuneration or commission to which he would otherwise have been entitled if his improper and unfaithful conduct is connected with the duty he had to perform."

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1. See generally De Villiers and Macintosh 419 and the authorities cited there.
 2. Per Smith J in Herzfelder v McArthur Atkins and Co Ltd 1908 TS 332 at 357.
 3. 1917 TPD 702.
 4. At 705.

In considering what constituted "improper or unfaithful conduct" for the purposes of withholding commission, Curlewis J continued:¹

"But dishonesty on the part of an agent towards his principal to disentitle him to remuneration need not imply any criminal liability. The mere fact of an agent receiving and retaining a secret profit or commission arising out of and in connection with the performance of his duty, constitutes unfaithfulness and dishonesty towards his principal."

The views expressed in the case of Levin were extended in Duffet v Lurie Bros² where Benjamin J held that A would be guilty of improper and unfaithful conduct where³

"he has stipulated for a secret commission even though he has not actually received it, as he would thereby be affected in the fidelity which he owes to his principal."

Levin's case has received consistent support.⁴ Although there has been a tentative suggestion that A's conduct must have deceived P or damaged his interests,⁵ it would seem that the taking of a secret profit in good faith is

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1. At 705.
 2. 1923 CPD 473.
 3. At 475.
 4. Stanton v Humphrey 1923 EDL 419 at 424; Durand v Louw 1935 TPD 47. For cases decided along similar lines prior to Levin's case, see Alfred Morten v AM van Zuilecon 1907 28 NCR 500 at 513; Lazarus v Atkins 1910 WLD 203.
 5. Le Grange v Faure 1921 CPD 764 where Searle J held at 766 "when an agent accepts a sum of money from a third party and does not make a full disclosure to his principal ... he should not be entitled to recover commission from his principal ... if by the agent's conduct the principal may have been deceived ... or ... there may be some damage done to the principal's interests."

sufficient to warrant a forfeiture of commission. For example, Grindley-Ferris J held in Gerry Bouwer Motors (Pty) Ltd v Preller that¹

"although the plaintiff may have acted openly and bona fide, his conduct prejudiced the company which employed him It is unnecessary to determine whether the defendant company was prejudiced because the mere fact that the plaintiff accepted the gifts and did not disclose such acceptance to his employer amounted to unfaithfulness and dishonesty towards the latter."

The ratio of these dicta appears to be as follows:²

- (i) A is under a duty to show the utmost good faith in his dealings on behalf of P;
- (ii) this duty is breached by A where he acquires a secret profit connected with the agency;
- (iii) A automatically forfeits his commission where such a breach has been proved; and
- (iv) it is of no moment whether A accepted a secret profit in good faith or whether he took a bribe.

It follows from these cases that it is irrelevant whether A acted in good or bad faith when accepting his secret profit. Forfeiture follows automatically on breach of the fiduciary duty relating to the receipt of secret profits or bribes. This blanket forfeiture can operate

1. 1940 TPD 130 at 133.

2. See generally De Wet and Yeats 341-342.

harshly against agents who take a secret profit innocently. To some extent the severity of this rule is mitigated by insisting on a causal connection between the earning of the secret profit and the agency.

Thus where A charged for services which formed part of an entirely separate and distinct transaction to the one which he had with P, A was held to have acted honestly. He was entitled to his commission.¹ Further, where P engages A to undertake severable transactions, A is not entitled to commission on those transactions tainted by a breach of his fiduciary duty, but P will be liable to pay A's commission in respect of those transactions where A acted properly.²

(b) The English law on forfeiture of commission.

One of the earliest cases on forfeiture of commission is Andrews v Ramsay³ where P directed A to sell property for

1. Stanton v Humphrey 1923 EDL 419.
2. Herzfelder v McArthur Atkins and Co Ltd 1908 TS 332 where Smith J held at 359: "It seems to me that it would be going very far to hold that because an agent committed a breach of trust or even was guilty of fraud in one of a long series of transactions, and was thereafter faithful in the discharge of his duties, he had disentitled himself to remuneration in respect of them all." Note, however, that the courts apply this exception narrowly. This was stressed in National Screenprint (Pty) Ltd v The Campbell-Scott Co (Pty) Ltd 1979 (4) SA 393 (C) where A claimed commission for certain orders secured in favour of P. During the same period, in breach of his duty of good faith, A also secured orders in favour of P's competitor. It was held that P had bargained for the total loyalty of A. Since A had not met this bargain, P could meet his claim for commission with the exceptio non adimpleti contractus. See also Nitedals Taendstikfabrik v Bruster [1906] 2 Ch 671.
3. [1903] 2 KB 635.

a £50 commission. Having sold the property to X, A retained, as his commission, £50 out of a £100 deposit paid to him by X. The balance of £50 was paid by A to P. P, having learnt that A had also secretly received £20 as commission from X, successfully sued A for the £20 and £50 paid to A. After finding that A had acted improperly, Lord Alverstone set out the law as follows:¹

"A principal is entitled to have an honest agent, and it is only an honest agent who is entitled to any commission [I]f an agent directly or indirectly colludes with the other side, and so acts in opposition to the interest of his principal, he is not entitled to any commission."

In Hippisley v Knee Bros² A, an auctioneer, was instructed by P to sell some pictures by auction. A was paid a commission plus all out of pocket expenses, including advertising and printing expenses by P. On the sale of the pictures, A charged P the gross amount for advertising and printing without disclosing that he had in fact received a discount on these items from the printers. A had to account for the secret profit, but was allowed to retain his commission. In arriving at this conclusion Lord Alverstone distinguished the present case from the case of Andrews. The latter decision concerned an agent who had acted with downright dishonesty, as opposed to

1. At 638.
2. [1905] 1 KB 1.

the present case where A was under a mistaken notion as to what he was entitled under the contract of agency.

Lord Alverstone was not prepared to hold¹ that, where A retains a secret commission because of a bona fide mistake, he should be forced to forfeit his remuneration.² Touching on causation, he went on to hold that,³ in any event, the earning of the secret profit was not sufficiently connected to A's mandate to sell. That profit had been received from the printers who were not privy to the sale of the pictures at the auction.

In Keppel v Wheeler,⁴ although the court found that A may have to pay damages for a bona fide mistake which amounts to a breach of duty, since he acted in good faith, A was entitled to retain his commission. Although the comment was made that in practically every case where an agent in the course of his employment breached a fiduciary duty, he will forfeit any right to remuneration, the court was not prepared to hold that this would be an immutable consequence.

1. At 8.

2. Contrast, however, the remarks of Kennedy J in the same case, where, after conceding that it was difficult to lay down a definite rule, he said at 9 "that where an agent's remuneration is to be paid for the performance of several inseparable duties, if the agent is unfaithful in the performance of any one of these duties by reason of his receiving a secret profit in connection with it - and I here use that word 'unfaithful' as including a breach of obligation without moral turpitude - it may be that he will forfeit his remuneration"

3. At 8.

4. [1927] I KB 577.

Thus in Rosart Real Estate Ltd v Horvath and Horvath,¹ McGillvray JA held that A's commission would be forfeited where fraud or an element close to fraud is present. In this regard he said:²

"Where, on the other hand, this element of fraud is missing different considerations apply. In such circumstances the agent who acts in good faith, even though in breach of duty, may recover his commission so long as the breach is not material to the matter in issue."

Finally, in Boardman v Phipps,³ A acted as an agent for a trust. By using information which he had gained as an agent, he acquired a secret profit in good faith. Although A had to account to the trust for the secret profit, since he had not acted dishonestly, he was entitled to remuneration on "a liberal scale."

(c) The South African and English law approaches to forfeiture of commission compared.

A review of the English law suggests that the forfeiture of A's commission will depend largely upon whether he acted in good or bad faith when acquiring the secret profit.⁴

1. (1961) 29 DLR 2d 205.

2. At 208.

3. [1967] 2 AC 46. It should be noted, however, that although the House of Lords allowed the compensation of A as he had not acted fraudulently, the precise ratio for this finding is unclear. See Fridman 144. In the Court of Appeal [1965] 1 All ER 849 at 857; 864; 865 a difference of opinion developed between Lord Denning MR, who found that an honest agent is entitled to compensation and Pearson and Russell LJ, who were less inclined to approve of the policy suggested by Lord Denning MR. See Powell 327.

4. See 246-249 above.

By way of contrast in South African law, A will forfeit his commission where he has retained a secret profit arising from the agency. Good or bad faith on his part is irrelevant.¹

It would appear that the South African approach is unduly harsh on an agent who has innocently accepted a secret profit, particularly in circumstances where P adheres to to contract with X and recovers the secret profit and possible damages. It is accepted that in the interest of encouraging fidelity between P and A, A should disgorge his secret profit to P irrespective of any prejudice to P or good faith on the part of A.² Surely this goes far enough in protecting commercial morality. Is it not using a sledgehammer to enforce such protection by applying a similar rule to A's remuneration?

It is submitted that the English law from the point of view of equity is to be preferred. Under this system, A will invariably have to sacrifice his secret profit to P, but he will be entitled to retain his commission if he acquired the secret profit innocently.³ Such a dichotomy is almost impossible to achieve in South African law.⁴

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1. See 245 above.
 2. Transvaal Cold Storage Co Ltd v Palmer 1904 TS 4.
 3. See eg Boardman v Phipps [1967] 2 AC 46.
 4. Compare S v A 1979 (4) SA 51 (R) at 59G-H with Stanton v Humphrey 1923 EDL 419.

The only defence open to a South African agent is that there is an insufficient nexus between the acquisition of the secret profit and the agency. Where this can be shown, A is in really no danger at all. If the secret profit is made outside the relationship of agency, he will not have to account for such profit nor will he forfeit his commission.¹

The South African approach has eroded the distinction to some degree between an innocent secret profit and a bribe. The bribee deserves little sympathy when he loses his commission.² His position should be clearly distinguished from an agent who innocently accepts a secret profit.

Support for this submission is to be found where gross or wilful misconduct has been held to be necessary before A can be said to have forfeited his commission.³

Surely an innocent breach of duty cannot be equated with serious misconduct?

The Appellate Division has yet to be seized with this problem. It is hoped that it will restore the distinction between an innocent secret profit and a bribe when

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1. Uni-Erections v Continental Engineering Co Ltd 1981 (1) SA 240 (W).
 2. Contrast Joubert 221.
 3. See United Agency and Trust Co v Amm Bros 1917 TPD 439; Ese Financial Services (Pty) Ltd v Cramer 1973 (2) SA 805 (C) at 812-813; Fox and Caney (Pvt) Ltd v Dilworth 1974 (2) SA 631 (R) where Keppel v Wheeler [1972] 1KB 577 was followed.

considering forfeiture of commissions.¹ Until this happens, it must be accepted that our law treats the honest and dishonest agent similarly.²

(d) The relevance of Spencer v Gostelow

Although our writers have generally not considered the question of good or bad faith when dealing with forfeiture of commission, some³ have raised doubts as to whether such forfeiture is appropriate in the light of the principles laid down by the Appellate Division in Spencer v Gostelow.⁴ In this case, Innes CJ held that a master was bound to remunerate a dismissed servant in so far as he has benefited by the servant's work up to the date of dismissal. The degree of misconduct justi-

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1. It may be argued that the wide dicta in Levin v Levy 1917 TPD 702 were obiter when it comes to innocent acquisitions of secret profit in that Curlewis J was probably dealing with an agent who had acted in bad faith.
 2. Consistent with the approach of our courts in this matter, some of our writers take the view that A has no contractual claim against P for his remuneration where he has received a secret profit. See eg Kerr 142; Lee and Honoré 160; Wille and Millin 497-498. Note, however, the comment of De Villiers and Macintosh 419, relying on Hippisley v Knee Bros [1905] 1 KB 1, that "an agent who in good faith but mistakenly accepts a secret profit (e g a commission from the buyer) does not lose his right to remuneration, though he must account for the secret profit."
 3. See eg Kerr 142-143; Wille and Millin 497-498; Joubert 221.
 4. 1920 AD 617.

fying the dismissal is irrelevant. The ratio of the decision is based on unjust enrichment, as is apparent from the following dictum of Innes CJ:¹

"The benefit of the service accrued to the employer from day to day, and to permit him in terminating the contract to retain such accrued payments without payment would be to allow him unjustifiably to enrich himself at the expense of the servant."

Assume that A completed his mandate. On discovering that he has accepted a secret commission, P recovers the secret profit and damages from A. The contract between P and X which is voidable at the instance of P is enforced by P. If P is allowed to take the benefit of A's work and pay no commission can it not be fairly said that P has been unjustly enriched along the lines mooted by Innes CJ in the Spencer case?

Joubert has this to say on the subject:²

"In navolging van die Engelse reg word daar geleer dat die verteenwoordiger wat omkoopgeld geneem het, sy eie aanspraak op sy vergoeding verloor. Dit is voor-die-hand-liggend waar die kontrak met die derde ongedaan gemaak word omdat die opdrag dan as onuitgevoer geld. Waar die prinsipaal die kontrak in stand hou, is dit in stryd met die algemene beginsels van ons reg en met die billikheid omdat dit daarop neerkom dat die verteenwoordiger wat die prinsipaal se skade moet vergoed bowendien, as 'n soort van privaatstraf, sy vergoeding verbeur."

1. At 627.
2. At 221.

De Wet and Yeats argue that by allowing a forfeiture of commission in these circumstances, the courts have gone a little too far.¹ Kerr, however, raises the question whether a party to a contract who acts in bad faith can claim under unjust enrichment.² After a review of the authorities,³ he concludes that the court has a discretion in these circumstances whether to allow the commission.

An analogy may be drawn between the services rendered by A to P in course of which A has made a secret profit and the incomplete performance by a contractor who, despite the defective performance, sues his employer for payment. The general principle of reciprocity as applied by means of the exceptio non adimpleti contractus is that the employer has a right of withholding his own performance until the employee has fully performed his obligations as required by the contract.⁴

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1. At 342 the authors state: "Ons howe neem verder die houding in dat die lashebber wat troubreuk pleeg, ook sy aanspraak op beloning vir gelewerde dienste verbeur. Hiermee gaan hulle, na dit my voorkom, 'n bietjie te ver. Dit is wel waar dat die lashebber wat troubreuk pleeg, nie sy verpligtings onder die ooreenkoms behoorlik nakom nie, en dus met die exceptio non adimpleti contractus afgeweer kan word as hy sy beloning vorder, maar waar hy wel verplig word om rekenskap te gee van voordele wat hy so verkry het, word hy gedwing om sy verpligtings ten volle na te kom, en behoort hy ook aanspraak te hê op die teenprestasie."
 2. 142-143.
 3. Spencer v Gostelow 1920 AD 617 at 632; 635-7; Wegerle v Pretoria Machinery Sales 1946 TPD 319 at 323; Hauman v Nortje 1914 AD 293 at 305.
 4. Hauman v Nortje 1914 AD 293 at 300.

In BK Tooling v Scope Precision Engineering¹ Jansen JA considered circumstances under which departure from the strict principle of reciprocity could be justified. He held² that the courts had a discretion, based on consideration of fairness, to permit a relaxation of reciprocity principle. A contractor, whose performance is incomplete, may in these circumstances ask his employer to perform. The degree of the contractor's shortcoming in his performance is not decisive.³ A crucial consideration is the utilisation by the employer of the partial performance.⁴

Although it must be kept in mind that the BK Tooling case dealt with the incomplete performance of a contractor, some of the principles discussed by Jansen JA may be applicable to the contract between P and A. Assume, arising from the execution of A's mandate, that a contract between P and X is concluded. On discovering a secret profit made by A, P recovers the profit and elects to enforce his contract with X. In this sense, the performance of A is utilised by P in that he elects to stand by his contract with X. This is a decisive feature. A's performance, tainted as it is by his acceptance of a secret

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1. 1979 (1) SA 391 (A). See L Tager Annual Survey (1979) 117-121; L Hawthorne "BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A)" (1979) 42 THRHR 337.
 2. At 427A.
 3. At 434A-D. See also Boshoff t/a Etosha Meubelvervoerders v M Pupkewitz and Sons (Pty) Ltd 1984 (2) SA 24 (SWA).
 4. At 431G.

profit, is not material to the issue of whether the principle of reciprocity should be relaxed. The all important consideration is fairness. Would it be equitable for the court to permit A to recover his commission from P?

When answering this question one must remember that there is a long line of cases¹ in which A has been forced to forfeit his commission. If there is to be any change in this approach, it is submitted that the new attitude should be directed towards an agent who has innocently breached the fiduciary duty which he owes to his principal in relation to the no secret profit rule. It is in this context that the equities favour A in his attempt to recover his commission.

Some dicta of Jansen JA in the BK Tooling case may be used to accord similar relief to a bribee. A contractual, rather than an enrichment basis, was suggested² by Jansen JA to grant relief under the relaxation of reciprocity principle. In the field of unjust enrichment there is a reluctance to come to the assistance of a party who has

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1. See 239-241 above.
 2. At 422-423 where Jansen JA said: "Dit sou wenslik wees om in die toekoms in hierdie verband eenvoudig van 'n (kontraktuele) eis om 'n verminderde kontrakprys te praat, en benamings soos quantum meruit en die taal van verrykingsaamspreeklikheid te vermy. Dit sou tot minder verwarring en groter helderheid lei."

acted in bad faith.¹ This problem is sidestepped by relying on a contractual cause of action.²

Further Jansen JA was not in favour of making good faith a prerequisite for the relaxation of the reciprocal principle rule. In this regard he preferred the approach of Innes JA in Hauman v Nortje³ who emphasised that the court had a discretion, as opposed to the view of Lord De Villiers who made good faith a requirement. Jansen JA said:⁴

"Die hele grondslag vir die verslapping van die wederkerigheidsbeginsel en die erkenning van die moontlikheid om 'n eis om 'n verminderde kontrakprys in te stel, berus op billikheidsoorwegings. En hierde oorwegings kan klaarblyklik in bepaalde omstandighede voorskryf dat die aannemer tog vergoed moet word, selfs al weet hy dat hy sy verpligtinge nie ten volle nagekom het nie. As billikheidsoplossing is die standpunt van Lord De Villiers te eng en bied die standpunt van Regter Innes 'n veel soepeler en meer bevredigende oplossing. As sodanig moet lg voortaan aanvaar en toegepas word."

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1. See eg the approach of Lord De Villiers LJ in Hauman v Nortje 1914 AD 293 at 297 who appears to insist on good faith before he would allow a relaxation of the reciprocity principle. In the same case at 305, Innes CJ, however, while expressing a doubt that the court would probably not assist a fraudulent contractor, preferred not to discuss "the extent, if any, to which the mental attitude of the contractor would affect his claim to equitable relief" ... and desired "to leave that matter open".
 2. See 256n2 above.
 3. 1914 AD 293. See n1 above.
 4. At 427A.

The BK Tooling case dealt with the incomplete performance of a contractor. Whatever the opportunities may be for such contractors acting in bad faith, it is clear that the bad faith of an agent in accepting a bribe is reprehensible. Although good faith has been excised as a requirement for a departure from the reciprocity principle, its presence or absence is a factor which the court may take into account when considering the equities of a case.¹ There is little to be said in favour of a bribee. The courts have consistently emphasised the importance of protecting the fiduciary relationship between P and A.² Even where P utilises the services of A in the sense of enforcing his contract with X, it is submitted that the dishonesty of A ought to discourage the courts from finding circumstances which make it equitable for A to recover his commission from P.

C. P'S REIMBURSEMENT OF EXPENSES INCURRED BY A.

It is an implied term in a contract of agency that P will indemnify A against all expenses and liabilities incurred by A in the execution of his mandate.³ Since it is clear that A may forfeit his remuneration by accepting a secret profit or bribe in South African law, does it follow that

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1. BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A) at 426H.
 2. Transvaal Cold Storage Co Ltd v Palmer 1904 TS 4; Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168.
 3. See De Villiers and Macintosh 353.

his right to indemnity in lost under these circumstances as well?

There is very little authority on the topic.¹ Most of the cases which touch on this question in English and South African law are confined to situations where secret commissions have been made by promoters of companies.

In Bagnall v Carlton², A agreed to form a company (P) which would purchase property from X in exchange for which X agreed to pay A a commission which was not disclosed to P. In holding that the secret profit had to be paid by A to P, Cotton LJ said the following with regard to the charges and expenses incurred by A when forming the company:³

"The principle upon which I decide this case is, that the trustee (A) cannot make for himself a secret profit; and the profit is the net balance ... after deducting any charges and expenses properly incurred in the formation of the company."

In Emma Silver Mining Co v Grant,⁴ A agreed to form a company (P) to purchase X's mine at a specific price, for

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1. When this question arose in Duffet v Lurie Bros 1923 CPD 473 at 475, Benjamin J, who refused to answer it because of the paltry amount of the expenditure involved, stated: "As to the question whether an agent would be entitled to recover disbursements from his principal where he had stipulated for a secret commission the matter is obscure; no authority was quoted on appeal to show whether he could or could not recover in respect of such a claim; it is possible that he might be entitled to recover all disbursements or perhaps only certain disbursements"
 2. (1877) 6 ChD 371.
 3. At 408. (The reference to A in brackets is mine).
 4. (1879) 11 ChD 918.

a commission which was undisclosed to P of 20% of the purchase price. In considering whether the expenditure incurred by A in the formation of the company should be deducted from the secret profit which A had to forfeit to P, Jessel MR said:¹

"You (P) have a right to take from him (A) that which he improperly acquired by means of his being concerned in this illegal transaction; and it is no answer to say that one part of his receipts were illegally obtained, and the other part of his expenses were illegally and improperly made in ascertaining what that profit was. There are expenses connected with and forming part of the entire transaction; and it seems to me that in estimating his (A's) profit ... I ought to find out his real profit, that is, the net result of the transaction which was left to him"

It is apparent from these two English decisions that, irrespective of the propriety or otherwise of securing a secret profit, expenditure incurred by A in performing his mandate will be recoverable by him.²

There is authority for the view that a similar situation pertains to South Africa. In Balmoral Diamond Syndicate v Liddle,³ the directors (A) of a company (P) had received a secret commission arising from their purchase on behalf of P of a mining proposition from X. A had incurred certain expenditure in promoting the company (P) to facilitate this scheme. After finding that A had to account to P for the secret commission, Mason J, relying

1. At 940. (The references to P and A in brackets are mine.)
 2. See also Lydney and Wigpool Iron Ore Co v Bird (1886) 33 ChD 85.
 3. 1907 TH 89.

on English authority, stated that¹

"the authorities show that they (A) would be entitled to deduct all the legitimate and ordinary expenses of promotion"

It is of importance to note that in the Balmoral case,² Mason J was of the view that bribery had been proved. It follows that where such deductions are allowed in the case of bribery, they should also be allowable a fortiori in cases where a bona fide secret profit not amounting to bribery was made.

It is difficult to reconcile these cases with the view of certain English authors that the taking of a bribe will "negative any right to indemnity."³ It would seem that this approach is based on a general rule postulated by such authors that a breach of duty by A will result in a loss of his indemnity.⁴ The cases which the authors cite in support of this general rule do not deal with either bribery or the acquisition of secret profits.⁵

It appears that South African authors do not directly suggest that the acceptance by A of a bribe or secret profit will bar a claim for expenses.⁶ The grounds cited for

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1. At 114. (The reference to A in brackets is mine.)
 2. At 104; 106; 107; 117.
 3. See eg Chitty 49.
 4. See Powell 327; 153-155. Contra CA Needham "Recovering the Profits of Bribery" (1979) 95 LQR 536 at 552-555.
 5. The authorities cited by Chitty 67n95 deal with forfeiture of commission, not indemnities. The same applies to Fridman 155n1; 2.
 6. See De Villiers and Macintosh 350; 353-356; Kerr 142; 170-173; Wille and Millin 497-498; De Wet and Yeats 342.

the exclusion of indemnities do not necessarily cover the taking of bribes or secret profits.¹ It is interesting to note that Joubert raises the question of good faith by stating:²

"Die verteenwoordiger is geregtig op vergoeding van alle uitgawes en skulde aangegaan indien hulle te goeder trou en noodsaaklikerwys aangegaan is Die onkonste moet te goeder trou aangegaan word, naamlik vir die uitvoering van die opdrag en in die belang van die prinsipaal."

An analysis of this statement reveals that the requirement of good faith is confined to the manner in which the expenditure was incurred.³ The bad faith which attached to the bribery does not necessarily taint the incurring of expenditure. This distinction is explained by Jessel MR as follows:⁴

"[W]hether I approve or disapprove of the mode in which he carried out the transactions, or the items of expenditure which he made, the result in ascertaining the net profit cannot be affected by the moral nature or propriety of that expenditure."

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1. The grounds cited by De Villiers and Macintosh 353 are where the expense: (a) was not directly caused by the mandate; (b) has been improperly incurred; (c) was incurred in respect of a transaction outside the limits of A's instructions, unless ratified; (d) was incurred in respect of an illegal or immoral transaction, save in exceptional circumstances; (e) has been excluded by the terms of the contract.
 2. At 188.
 3. This view is reinforced by the authority to which Joubert 188n39 refers, namely, "Donellus Opera Omnia bd 3 p880 sê bona fide beteken 'cum quantum minimum in rem mandatum impedire procurator tantum impendit non aplus.' "
 4. Emma Silver Mining Co v Grant (1879) 11 ChD 918 at 940.

It is submitted that the secret profit or bribe which A is required to surrender to P is the net profit after deducting all expenses properly incurred by A. In order for such expenditure to be classified as "proper", it must be necessarily¹ or reasonably² incurred by A in the execution of his mandate.³ There is nothing to suggest that this general rule should be departed from when considering allowable expenditure in secret profit or bribery cases.⁴

D. P'S CLAIM FOR DAMAGES

The relationship between P, A and X primarily involves two contracts; one between P and A and the other between P and X. Breach of either contract may result in an action for damages. The claim for damages which P may have arising from his contract with X has already been discussed.⁵

Damages arising from breach of the contract between P and A will now be considered.

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1. Mosenthal and Co v Gruskin 1922 EDL 40 at 47.
 2. Alderson v Phillips and Evenary Ltd 1949 (1) SA 663 (SR) at 666. Kerr 171n7 observes that expenses are not reasonably incurred if they occur by reason of A's fault.
 3. Kerr 171.
 4. Note, however, that CA Needham "Recovering the profits of bribery" (1979) 95 LQR 536-555 submits that the expenditure must be "beneficial" to P. In Bagnall v Carlton (1877) 6 ChD 371 at 400 James LJ said: "Now the costs, charges, and expenses, I think they had a right ... to deduct, because what they were liable to pay the company was the profits which they made in a fiduciary character, that is to say, the net profits which they had made"
 5. See 214 above.

(a) P vis á vis A.

It has already been noted that P may cancel his contract with A upon A's receipt of a bribe or secret profit.¹

Where such cancellation results in loss to P, he will have an action for damages against A. This is based on the general rule that A is liable to P for all damage which is the proximate result of his failure to discharge his obligations in good faith.² The measure of damages for breach of duty by A will be the loss sustained by P which was within the contemplation of the parties at the time when the contract was made.

(b) P vis á vis X.

As an alternative to a contractual action against A, as is envisaged in (a) above, P may be able to sue X in delict for inducing A to breach his contract with P.

Where P cancels his contract with A because X has bribed A, P may sue X for delictual damages suffered as a result of X's interference with the contractual relationship between P and A.³

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1. See 185 above. Such cancellation may take place according to Kerr 197 even where the mandate to A is considered "irrevocable."
 2. See De Villiers and Macintosh 348. At 349 the authors suggest that the action by P could be either contractual or delictual. See also Powell 322; Fridman 155.
 3. See generally Lee and Honoré 306-307.

It would appear, however, that this remedy would only be available where A had been bribed as opposed to the acceptance of a secret profit in good faith. The elements of an action for the inducement of a breach of contract, namely, the intentional¹ and wrongful inducement of A by X to breach the contract between P and A are inconsistent with X giving a secret profit to A where both A and X act in good faith.²

GENERAL CONCLUSIONS

Having regard to corruption in the criminal law, it has been observed that the common law of bribery and the provisions of the Prevention of Corruption Act³ are essentially similar.⁴ However, a closer examination of the mens rea element reveals that differences between the two sources of corruption in criminal law do exist. Where the State has an election as to whether it wishes to proceed under either the common law or the Act, prosecutors should have regard to the different requirements of the common and statute law.

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1. Alliance Building Society v Deretitich 1941 WLD 204.
 2. Cf Powell 327n8.
 3. 6 of 1958, hereinafter referred to as "the Act".
 4. See 34 above.

If, for example, it is unclear that the bribee intended to benefit from the giving of a bribe, the difficulties under the common law in this regard may be avoided by prosecuting under the Act where no intention to benefit is required.¹ If the word "corruptly" in the Act is construed as requiring a special intent, then the State may proceed under the common law where "corruptly" does not feature in the definition of common law bribery.² Finally, it is unnecessary for the State to prove mens rea on the part of the giver of a bribe when seeking to show that the bribee should be convicted of common law bribery.³ This question still has to be settled when dealing with statutory corruption.⁴

Turning to the civil law, it has been observed that the English law has influenced the South African law of corruption.⁵ However, a comparative study of the two legal systems reveals that differences are evident. In drafting particulars of claim on behalf of P, his counsel should avoid an uncritical reliance upon English law. For example, in seeking to recover the bribe from A, a fiduciary relationship between P and A should be alleged.⁶ The distinction between a secret profit and bribe is more pronounced in South African law than it is in English law.⁷

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1. See 34-35 above.
 2. See 58-60 above.
 3. See 109-111 above.
 4. See 130-131 above.
 5. See 133 above.
 6. See 167 above.
 7. See 158-159 above.

Since civil remedies differ, depending on whether a bribe or secret profit is in issue, counsel for P should be alive to this distinction when drafting pleadings. Bribery per se, not fraud, entitles P to cancel his contract with X.¹

It is of interest to compare the criminal and civil definitions of bribery. For bribery to constitute a crime in common law, a consideration must be offered or given to a State official unlawfully and intentionally in return for action in an official capacity.²

The main elements of statutory corruption are satisfied where a consideration is corruptly offered or given as an inducement for doing any act in relation to the principal's affairs.³ The principal features of bribery in the civil law comprise the offering to give or the giving of a consideration to an agent with the intention of influencing him to secure some advantage for the briber in relation to the affairs of the principal.⁴

It will be observed that the requirements for statutory corruption and civil bribery are similar, as both require an intention to induce an agent to do something in relation to his principal's affairs. The only ostensible difference in the use of the word "corruptly" in the statute

1. See 194-198 above.
2. See 9 above.
3. See 37-38 above.
4. See 158 above.

governing criminal corruption. If no special meaning is to be given to this word,¹ then the difference between civil and criminal corruption narrows. It has been submitted, however, that "corruptly" has been inserted for the purpose of requiring a special intent which must be proved by the State.² If this submission is correct, then this special requirement relating to mens rea serves to distinguish between criminal and civil bribery.

Apart from the heavier onus which the State has to discharge in a criminal trial as opposed to the onus of the plaintiff in a civil case, a further evidentiary distinction is to be found in certain presumptions which assist the principal in his task to prove bribery in a civil trial. Although a rebuttable presumption has been introduced in criminal law on corruption in England to lighten the prosecution's burden of proof,³ no such assistance is available to the State in South Africa. It is submitted that the introduction of presumptions in the civil law of bribery have been introduced largely to facilitate certain contractual relief to which a principal may be entitled.⁴ This is not a consideration in criminal law. The traditional onus which rests on the State in criminal trials should remain with the prosecution. For these reasons it is contended that no presumptions should be intro-

1. See 71 above.
2. See 64-65 above.
3. See 51 above.
4. See 140 141; 155-157 above.

duced in favour of the State in the context of criminal corruption.¹

A final question to be considered is that since corruption in criminal law has been codified, should bribery in civil law share a similar fate? At the outset it should be noted that when regard is had to the interpretation of the word "corruptly" in the Act, it can hardly be suggested that the legislation on corruption has been an unqualified success.² The English civil law of corruption, which has exerted a substantial influence on its South African counterpart, remains uncodified.

Although an attempt has been made to accurately identify the various actions which are available to a principal who has been the victim of bribery, an analysis of both the English and South African law reflects some uncertainty.³ Some doubt has been cast on the extent to which English law should influence the South African law of bribery.⁴ A number of submissions have been made which call for a change in approach by the South African courts to certain aspects of civil corruption.⁵ Codification would go some way towards introducing some certainty. It could be argued that perhaps the problems are too complex to allow ad hoc development in the common law.

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1. See 92 above.
 2. See chap 2 above.
 3. See eg 167-180; 256 above.
 4. See 194; 207 above.
 5. See eg 239; 246 above.

It is submitted that any attempt to introduce legislation for corruption in civil law is best avoided at this stage. Bribery has been studied in the context of a fiduciary relationship between the recipient of the gift and the person to whom he owes a duty of good faith. It is this relationship of trust that must be protected against corruption. In the preface to his work on fiduciaries, Shepherd has the following to say:¹

"The law of fiduciaries is the legal system's attempt to recognise the more blatant abuses of the trust we place in each other. It is undoubtedly the most human area of the legal system, and as such the most undefinable. The areas of contract, tort, wills etc., are examples of the legal system creating and then working within a basically artificial rule superstructure. By contrast, the law of fiduciaries strikes at the essence of human activity, and we would be fools to think that, either as philosophers or as legal theorists, we are capable of neatly tagging and labelling the various facets of that trust In the law of fiduciaries, we are attempting to deal with something that is too human to be completely rational."

It is conceded that Shepherd was referring to the law of fiduciaries as a whole rather than the field of corruption on its own. However, it is submitted that his remarks are particularly salient to the development of remedies for those who are victims of corruption. The uncertainty in this field stems from the fact that the South African law, in particular, is going through a stage of development to meet modern commercial practice. The precise scope of relief to which a principal may be entitled has yet to be

1. At v-vi

settled.

The difficulty of proving corruption in both civil and criminal law, because of the secrecy which characterises bribery, has caused the courts in England to invoke evidential aids.¹ The extent to which such assistance is available in the South African law on civil corruption has yet to be finalised.²

It follows that flexibility is important in order to accommodate this developing branch of the law. The common law is the appropriate source which may permit such growth. Legislation could stunt development. There may be areas of the law where some legislation is necessary to deal with special problems. For example, in the field of company law, the fiduciary duties of directors have been codified to some extent.³ This is an option open to Parliament which should be exercised sparingly. If the fiduciary has any doubt as to whether certain action is permissible, it is generally a simple matter for him to resolve the problem. He need simply approach his principal for the necessary consent. This solution is particularly apposite in the field of corruption where a key concept is the secret activity of the briber and bribee. Where, upon full disclosure to the principal, the agent obtains consent to keep a consideration then there is no breach of the fiduciary relationship.

1. See 140-141 above.

2. See 155-156 above.

3. See eg ss 233; 234; 237 and 266 of the Companies Act 61 of 1973.

For these reasons it is submitted that the civil law governing corruption should be allowed to develop through the common law without interference from the legislature.¹

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1. The approach of Shepherd 371-373 has been adopted when formulating the submissions for this conclusion.