ATTEMPTING TO HAVE IN POSSESSION

I INTRODUCTION

It has been said of some criminal offences that they are not subject to the law of attempt. Stephen, perhaps the most ambitious proponent of this view, listed perjury, riot and criminal libel as examples,[1] though it would seem that an inventive imagination could conceive possible, if unlikely, attempts in such cases.[2]

So-called "status" or "situation" offences present another problematic category. In particular, it has sometimes been claimed that the purposive notion of attempt has no intelligible application to offences of "having in possession". Such an offence, so the argument runs, is expressed exclusively as an objective and continuing state of affairs and, in the nature of things, there is no room for an intermediate stage of attempt. One either has something in possession or one does not. Of course, it is acknowledged that while a prior act of acquisition is not a constituent element of an offence "having in possession", there is no difficulty in giving meaning to an "attempt to acquire possession". So long as the legislature uses such words as "procure or obtain possession of" the law of attempt can be applied quite coherently to any offence so constituted.

In New Zealand two reported decisions have reached different conclusions on the concept of attempting to have in possession. Both concerned the application of attempt to having possession of a narcotic or controlled drug for the purpose of supply. In *R* v *Grant*[3] the accused was apprehended by the police after he had picked up a bag which he thought contained cannabis. In fact the police had earlier replaced the cannabis with paper. Because the accused had not taken possession of cannabis, Mahon J directed that no indictment be presented on an information alleging possession of a narcotic for a purpose prohibited by section 5(1)(e) of the Narcotics Act 1965. Further, his Honour held that no indictment could lie for an attempt to have a narcotic in possession for the purpose of supply since such an "offence" was unknown to New Zealand law.

More recently, Speight J in *R* v *Willoughby*[4] has taken a different view. In that case the two accused had made arrangements to obtain one ounce of heroin. They paid the purchase price and a packet claimed to contain heroin was handed to them. However they complained that they had been given short measure and returned the packet which was never recovered. Although the Crown had no evidence that the substance allegedly passed to the accused was indeed heroin, the question of factual impossibility would have been immaterial on a charge of attempt.[5] But the decision in *Grant* apparently deterred the Crown from charging an attempt and the accused were arraigned on an indictment which included a count that they had conspired with others to have heroin in their possession for the purpose of supply.[6]

1 *A History of the Criminal Law of England* (1883) Vol 2, 227.
2 See Smith and Hogan, *Criminal Law* (4th ed 1978) 262.
3 [1975] 2 NZLR 165.
4 [1980] 1 NZLR 66.
5 *R* v *Donnelly* [1970] NZLR 980 (CA); *Police* v *Jay* [1974] 2 NZLR 204.
6 Misuse of Drugs Act 1975, s 6(1)(f), (2A).

In the course of trial Speight J declined to follow *Grant* and ruled that there can be an attempt to commit the offence of having in possession for a purpose prohibited by section 6(1) of the Misuse of Drugs Act 1975. After expressing reservations about the propriety of conspiracy charges where the evidence is all or nothing on the completed offence or an attempt, he amended the indictment by substituting a charge of possession for the conspiracy count. Under this amendment either or both accused could be convicted on the substantive offence of having a controlled drug in possession for a prohibited purpose or on an attempt to commit this offence. Another count of conspiring to deal in heroin was struck from the indictment on the ground that the mere fact of purchase does not justify a charge of dealing. Speight J reasoned that if it were otherwise section 7(1)(a) of the Misuse of Drugs Act 1975 would be rendered otiose since that provision specifically creates the offence of "procuring".

This note will consider both *Grant* and *Willoughby* with particular reference to the analysis in the former decision. It will be argued that attempting to have in possession is an intelligible concept; and further, that it should be applied to the Misuse of Drugs Act 1975.

II The Concept in the Abstract

The Analysis in Grant

Section 72(1) of the Crimes Act 1961 provides:

> Everyone who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.

In *Grant* Mahon J observed that a juxtaposition of section 72(1) with section 5(1)(e) of the Narcotics Act 1965 made it theoretically possible to construct the offence of attempting to have a narcotic in possession for a prohibited purpose. Thus if an accused has the intent to have a prohibited substance unlawfully in his possession and performs proximate acts to that end, it can literally be said that he attempted to have that substance in his possession. However, because an offence of having in possession negatives the commission of an act as a necessary part of the actus reus, the matter was not as simple as that:[7]

> [Such an] offence is of a kind which is neither an act nor an omission. It falls within that intermediate category in which liability consists in the involvement of the accused with specified facts or circumstances. . . . It represents not an act but the passive consequences of a prior act, namely, the act of acquisition of possession.

Consequently an offence of this type is difficult to accommodate within the rather brittle rubric "act or omission" which is found in the definition of "offence" in section 2 of the Crimes Act 1961. Nevertheless, despite the semantic difficulties, Mahon J concluded that the word "act" in that definition necessarily comprehends conduct amounting to unlawful possession in the various circumstances specified by the criminal law.[8]

7 Supra n 3 at 168-169.
8 Ibid at 169.

Turning next to the definition of attempt in section 72, Mahon J interpreted the word "act" in subsection (1) to require the commission of an act as opposed to the acquisition, by design or otherwise, of a criminal status such as unlawfully having in possession. Moreover, by implicit definition, the requisite act must be antecedent to the completed offence. But in the case of criminal possession the only antecedent act capable in the abstract of description as an attempt is "the act of acquiring or procuring possession, which is the very act by which the crime is consummated. . . ."[9]

An Alternative Approach

With respect, it is not at all self-evident that the only act that can qualify for abstract description as an attempt is the act which coincidentally constitutes the prohibited possessory status. By seizing on the very act by which the offence is completed Mahon J in *Grant* seems to have adopted the "final stage" theory whereby there is no attempt unless and until the alleged offender has done everything he can to bring his offence to completion. Similar reasoning may well account for the doubtful proposition, advanced in *R* v *Moran,* that the common law knows no offence of attempting to demand money with menaces because "there is either a demand or there is not".[10] Indeed a strict application of the "final stage" test sometimes subverts the essential purpose of the law of attempt in allowing legal intervention without waiting for an intending offender to complete his criminal object.[11]

The preferable approach is to regard other positive acts to acquire the status of having in possession as attempts, so long as they are not too remote from the intended offence.[12] On this view, antecedent steps taken toward obtaining possession comprise a purposive course of conduct which, like any other series of acts, is subject to the law of attempt and the attendant distinction between mere preparation and proximate conduct. So if a person, prior to actually acquiring possession, takes a "real and practical step"[13] toward accomplishing his object there is no compelling reason—at least in the abstract—for denying that he has attempted to have in possession. The issue reduces to identification of the requisite intent and proximate conduct.

This approach to the question is not without authority. Two American appellate courts have recognised the concept of attempting to have in possession. In *People* v *Foster*[14] the appellant challenged the validity of his conviction for attempting to possess instruments of burglary in circumstances evincing an intention to use them in the commission of a

9 Idem.

10 (1952) 36 Cr App R 10, 12 per Lord Goddard CJ. Cf *Treacy* v *Director of Public Prosecutions* [1971] AC 537, 551 per Lord Reid (HL(E)). See further *Russell on Crime* (12th ed Turner, 1964) Vol 2, 877-878; Smith, "Success and Failure in Criminal Attempts" [1961] Crim LR 436, 445; note (1952) 15 MLR 345.

11 See Law Commission (UK), *Inchoate Offences: Conspiracy, Attempt and Incitement* (1973) Working Paper No 50: para 71; *Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (1980) Law Com No 102: para 2.25.

12 See contributor's note (1975) 1 NZ Recent Law (NS) 187, 188.

13 *Police* v *Wylie* [1976] 2 NZLR 167, 170 per Woodhouse J (CA).

14 300 NY 431, 91 NE (2d) 875 (1950).

crime. Conceding the possibility of his having attempted to have possession of the instruments, he nevertheless argued that he could not have attempted to intend to make criminal use of them. The Court of Appeals of New York rejected this plea as specious and suggested that "[s]urely it is possible to try to get possession of burglar's instruments for the purpose of subsequently committing an additional and independent criminal offence. . . ."[15] Again, in *People* v *Siu*[16] a California District Court of Appeal upheld a conviction for attempting to commit a possessional offence under narcotics legislation. On facts similar to those in *Grant* the appellant had taken possession of a package which he thought contained heroin but which in fact contained talcum powder. The Court concluded that delivery to the appellant of what he thought was heroin constituted a "direct . . . act toward commission of the crime of possession".[17] In *Grant,* however, Mahon J was not inclined to regard either decision as authoritative:[18]

> [I]n both cases it appears that the true ground of liability as determined against the prisoner was that he took possession, or received possession, of the prohibited articles. The Court in each case, therefore, included in the definition of possession the prior act of the accused by which his status as a possessor was attained. I respectfully disagree with that analysis of liability. The prisoners in the American cases were convicted, or so it appears, for commission of the antecedent act from which the fact of possession resulted, whereas they were charged under a statute which prohibited not the antecedent act but the possessory consequences flowing from the act.

The question has also been considered recently by both the Court of Appeal of New South Wales and the High Court of Australia in *Beckwith* v *R.*[19] In that case, which concerned the application of a general attempt provision to a possessional offence under the Customs Act 1901-1975 (Cth), Street CJ in the Court of Appeal was untroubled in postulating a hypothetical case of attempting to have in possession:[20]

> Notwithstanding what was said in *R* v *Grant,* I find no difficulty in contemplating a man attempting to have a prohibited import in his possession by say, attending at a post office to collect a parcel containing a prohibited import, completing all the documentary formalities and being about to pick it up from the counter when intercepted by the police.[21]

Similarly, though the High Court reversed the Court of Appeal's decision on the construction of the relevant statutory provisions, Gibbs J accepted that there could be an attempt to have in possession. He re-

15 91 NE (2d) 875, 876 (1950).
16 126 Cal App (2d) 41, 271 P (2d) 575 (1954).
17 271 P (2d) 575, 577 (1954).
18 Supra n 3 at 170.
19 [1976] 1 NSWLR 511 (CA NSW); (1976) 12 ALR 333 (HC Aust).
20 Ibid at 517.
21 Arguably, this type of situation can also be analysed under the concept of constructive possession in s 2(2) of the Misuse of Drugs Act 1975. Though the offender does not have actual possession of the parcel, which remains in the innocent custody of the post office, completion of the documentary formalities may render it "subject to his control". For a rather strained application of the equivalent provision under the Health Act 1937-1976 (Qld) see *R* v *Warneminde* [1978] Qd R 371 (CCA).

jected the general proposition implicit in *Grant* that in cases of criminal possession there is no point in time at which it is possible to identify an attempt short of the full offence itself:[22]

> [I]f a legislature provided in terms that it should be an offence to attempt to have possession of a narcotic there would in my opinion be no difficulty in giving effect to the intention so expressed. An act which would constitute an attempt to get possession of a narcotic would in those circumstances also be regarded as constituting an attempt to have possession of the narcotic. I am unable to agree that the only act which would be capable of being described as an attempt to have possession would be the act of getting possession.

Admittedly, some cases will lend themselves more readily than others to a step-by-step analysis. In *Willoughby,* for example, the two accused engaged in a series of acts before receiving and inspecting the packet alleged to contain heroin: they met a person who agreed to procure the drug for them, settled and paid the purchase price, travelled to an intermediary's house and continued to the point of supply. By contrast, the accused in *Grant* simply walked toward the bag, which he believed to contain cannabis, and picked it up. Nevertheless, can it not be said that in reaching toward the bag—if not in approaching it—he crossed the threshold of proximity and committed a criminal attempt? If the police had not removed the cannabis from the bag in *Grant,* one must conclude from Mahon J's analysis that until the accused picked up the bag there was no attempt, but that when he did so he completed the offence of having in possession.

The Nature of the Possessional Offence

In *Grant* Mahon J regarded the possessional offence as an attempt-like prohibition attributable to the "practical necessity of punishing in certain circumstances a person against whom nothing can be proved except possession".[23] Unlike many substantive offences which are stated in terms of ultimate harms produced to person or property, the possessional offence in most cases merely evidences a preparatory status which, on grounds of policy, the law decides to designate as a substantive offence. For this reason Mahon J concluded:[24]

> It seems contrary to any policy requirement of the criminal law that in declaring possession to be unlawful, as constituting an inchoate attempt not otherwise punishable, the Legislature should further create the offence of attempting to be in possession.

Certainly many of the possessional offences can be viewed in this way. In the case of possession of a controlled drug for the purpose of supply, the criminal law prohibits a form of inchoate criminality by penalising a condition preliminary to supply. Here supply is, as it were, the "offence-in-chief".[25] Moreover, a juxtaposition of this particular offence with

22 Supra n 19 at 338. Though Murphy J, at 346, thought it debatable whether an attempt to have possession is an understandable concept, Mason J, at 343, was prepared to assume that a general attempt provision may be applied to an offence of having in possession.

23 Supra n 3 at 170.

24 Ibid.

25 The term is borrowed from Fletcher, *Rethinking the Criminal Law* (1978) 132.

section 72 of the Crimes Act illustrates the doubly inchoate or relational nature of liability for attempt: a person commits an offence when he does an act "for the purpose of" acquiring the status of possession which is itself predicated on the further purpose of supply. So also, the possessional offences in section 13(1) of the Misuse of Drugs Act are relational in the sense that the law prohibits possession as a lesser and anterior "harm" to prevent a greater and ulterior mischief—possessing a needle, pipe or syringe for the purpose of a drug offence or the seed or fruit of a prohibited plant prior to cultivation. To this extent, therefore, "[i]t may be said that any offence which includes in its definition the purpose of committing another offence is merely an attempt in different words."[26] From this perspective an attempt to commit an offence of "having in possession for the purpose of" is tantamount to an attempt to commit an attempt—a form of culpability unknown to the law.[27]

There are, nevertheless, some countervailing arguments. In the first place, the relational nature of unlawful possession cannot disguise the fact that it is classified as a species of substantive offending. In effect, the law singles out possession as a discrete offence because there is a probability of further offending contingent on this status. As Jerome Hall explains:[28]

> If we know the harm which it is sought to effect, we recognise the inchoate crime as representing the necessary, preliminary pattern of behaviour; hence we segregate . . . specific fact-clusters and penalise the doer. Such an anti-social situation regardless of how it may be distinguished sociologically from "ultimate" harmful consequences is, of course, independently criminal, legally.

Secondly, it is difficult to accept the generality of Mahon J's conclusion on the question of policy. Possession of controlled drugs aside, the criminal law also prohibits the possession of instruments for conversion or burglary,[29] paper or implements for forgery,[30] instruments for counterfeiting stamps and coin and counterfeit coin itself,[31] and the possession of offensive weapons or disabling substances.[32] In common with the prohibition against possession of controlled drugs for the purpose of supply, the provisions creating these offences are directed at inchoate or incipient criminality. Some adopt the relational terminology "with intent to" while others refer to articles designed, adapted, or capable of being used for some further offence. Does policy so obviously exclude attempts to commit some of these offences? Why is it, for instance, that one cannot attempt to have possession of instruments for burglary or forgery or that one cannot try to obtain possession of counterfeit coin with the further intention of uttering it? In the writer's opinion, the application of attempt to such a relational offence may well be entirely consistent with the policy imperatives relevant to particular sanctions, though the effect is to push the point of liability still further back to a stage twice removed, so to speak, from the ultimate offence intended.

26 Howard, *Criminal Law* (3rd ed 1977) 324.
27 *R* v *Thompson* (1911) 30 NZLR 690 (CA).
28 "Criminal Attempt—A Study of Foundations of Criminal Liability" (1940) 49 Yale LJ 789, 816.
29 Crimes Act 1961, ss 229(1), 244(1)(a),(b). See also Summary Offences Act 1981, s 14.
30 Crimes Act 1961, s 274(a),(b),(d),(e).
31 Crimes Act 1961, ss 275(c),(h), 283(1),(2), 289.
32 Crimes Act 1961, s 202A(4)(b).

One final point may be noted. Arguably, the same logic which holds that attempt does not apply to possessional offences because they punish inchoate criminality may also render it inapplicable to a wider range of attempt-like conduct.[33] Quite apart from the many provisions which prohibit acts done "with intent to" or "for the purpose of" accomplishing an ulterior offence, the criminal law uses a number of techniques, other than the law of attempt, to reach preparatory conduct. The more common form of burglary provides a good example.[34] As the Court of Appeal has observed in another context,[35] this offence is structurally similar to the offence of having possession of controlled drugs for a prohibited purpose. The physical act of breaking and entering premises is the statutory equivalent of the status of having possession of controlled drugs; and in each case the external circumstances of the offence must be accompanied by a relational state of mind—the intention to commit a crime within the premises entered or to use the drugs for a prohibited purpose. In fact it would seem that burglary and a number of other attempt-like offences may be attempted.[36]

In terms of policy, therefore, one is faced with the problem of distinguishing the relative inchoate or relational aspects of a variety of substantive offences cast in different statutory forms. While it may be that in a particular statutory context the concept of attempt should not be applied to a specific possessional or other relational offence, it is by no means inevitable that this must be so.

III The Concept in Statutory Context

If it is accepted that the concept of attempting to have in possession is intelligible as an abstraction, the further question is whether the concept applies to the Misuse of Drugs Act 1975.

Attempting to "Procure": section 7(1)(a)

The first consideration relevant to this inquiry arises from a difference in language creating the several possessional offences under the Misuse of Drugs Act 1975. Section 7(1)(a), which deals with possession for personal consumption, provides that no person shall "[p]rocure or have in his possession" any controlled drug. Clearly the distinction drawn in this provision—between an antecedent act of acquisition and the possessory consequences arising from it—causes no problems for the law of attempt

33 The writer acknowledges, however, that the force of Mahon J's observations in *Grant* derives from his view that the possessional offence "represents a departure from the original common law definition of an offence as comprising an *overt act* accompanied by the relevant intent" (supra n 3 at 169; emphasis added). Where offences punish attempt-like *acts* the same considerations may not weigh.

34 Crimes Act 1961, s 241(a). The relationship between burglary and attempt is discussed in comments on the American Law Institute's Model Penal Code, Tentative Draft No 11 (1960), reproduced in Kadish and Paulsen, *Criminal Law and Its Processes* (3rd ed 1975) 337-338, and in La Fave, *Principles of Criminal Law* (1978) 425-427.

35 *R* v *Tracy* [1978] 2 NZLR 91, 95.

36 See Adams, *Criminal Law and Practice in New Zealand* (2nd ed 1971) para 698; Glanville Williams, *Criminal Law: The General Part* (2nd ed 1961) 615; *Textbook of Criminal Law* (1978) 389; Howard, supra n 26 at 324.

since an "attempt to procure" is easily understood.[37] For this reason Mahon J in *Grant* expressed the view that the accused could be charged with the offence of attempting to "receive" a narcotic under the equivalent provision of the Narcotics Act 1965.[38]

However, section 6(1)(f) of the Misuse of Drugs Act (like section 5(1)(e) in the earlier Narcotics Act) is directed at the possessory status alone. It provides that no person shall "[h]ave any controlled drug in his possession" without including any express reference to "procuring" possession. Similarly, the offences created by section 13(1) are limited to the status of "having in possession". Quite plainly, therefore, the text of these provisions discloses a lacuna in the Misuse of Drugs Act: unlike the simple possessional offence in section 7(1)(a), the relational offences do not in terms prohibit the antecedent act of "procuring" to which the concept of attempt can be applied without difficulty. Moreover, if a charge of attempting to have in possession will not lie under section 6(1)(f) the prosecution's only recourse in a case like *Grant* is to the lesser charge of attempting to procure under section 7(1)(a). Where a Class A controlled drug is involved the difference in penalty is material: a charge of attempting to have heroin in possession for a prohibited purpose would attract a maximum term of imprisonment for ten years on conviction on indictment[39] whereas the maximum liability on conviction for attempting to procure possession of the same drug is three months' imprisonment and/or a fine not exceeding $500.[40] Suppose, for example, that someone is intercepted by the police after he has paid the purchase price for a large quantity of heroin but just before he actually takes possession of the drug. He admits that he wanted to acquire the drug for the purpose of supply. Surely the policy of the legislation is better served by charging him with an attempt to commit a dealing offence under section 6(1)(f) rather than by proceeding under the procuring provision of section 7(1)(a).

The Interpretation in Willoughby

In a brief ruling on this question in *Willoughby* Speight J declined to follow *Grant* on two grounds. First, he was unable to accept the view that there could not be an attempt to have in possession because the full offence was constituted by a state of affairs and not by an act or omission. In his opinion, having or being in possession can be active or passive, and "though it is possibly an argument based in semantics, an act or omission demonstrating control must always be proved in a case of possession."[41]

37 Eg *Police* v *Wylie* supra n 13. Occasionally the legislature makes specific provision for "attempting to procure"— an example is found in s 3(6) of the Contraception, Sterilisation and Abortion Act 1977. See also Arms Act 1958, ss 7(4), 8(5), 17.

38 See also *Police* v *Jay* supra n 5. Section 6(1) of the Narcotics Act 1965 referred to "procure, receive, store, or have in . . . possession"; s 7(1)(a), the corresponding provision in the Misuse of Drugs Act 1975, omits reference to "receive" and "store".

39 Misuse of Drugs Act 1975, s 6(2)(a); Crimes Act 1961, s 311(1).

40 Misuse of Drugs Act 1975, s 7(2)(a); Crimes Act 1961, s 311(1).

41 Supra n 4 at 68. According to Speight J, having in possession can be characterised as active, where the possessor exercises positive control over something within his manual custody, or omissive, where he recognises that something is within his power of control and permits it to remain so by doing nothing to disown or remove it.

While this point does not seriously disturb the analysis in *Grant,* his Honour offered a second and more important reason for departing from Mahon J's decision. Adopting the interpretation initially conceded as literally possible in *Grant,* Speight J found no difficulty in juxtaposing the general provision of section 72 of the Crimes Act with the possessional offence in section 6(1)(f) of the Misuse of Drugs Act.[42] Thus, if a person forms an intention to have a controlled drug in his possession for the purpose of supply and does an act such as purchasing or attempting to purchase to that end "he comes within the plain wording of [section] 72 read in the context of the Misuse of Drugs Act."[43] In the terms of section 72, his "intent to commit an offence" is accompanied by an "act for the purpose of accomplishing his object".

Though it may be argued that this straightforward construction merely begs the question considered in *Grant,* in the writer's view it represents the correct approach to the issue. As suggested earlier, purposive conduct prior to the act of actually acquiring or procuring possession can indeed be characterised as an attempt, provided it is sufficiently connected with the full offence itself. Moreover, in the particular context of the Misuse of Drugs Act, Speight J's interpretation does not limit the prosecution to the lesser procuring charge under section 7(1)(a), or to the undesirable use of the conspiracy provision of section 6(2A)[44] in cases like *Willoughby.* It would also seem to advance the primary legislative purpose of preventing drug misuse by rigorously prohibiting dealing and related preparatory activities.

Miscellaneous Possessional Offences: section 13(1)

In addition, the argument that a charge of attempting to procure provides an alternative to a charge of attempting to have in possession is considerably weakened in the context of section 13(1) of the Misuse of Drugs Act. As previously noted, that provision prohibits two offences: (i) having possession of a needle, syringe, pipe or other utensil for the purpose of an offence against the Act; and (ii) having possession of the seed or fruit (not in either case being a controlled drug) of a prohibited plant which the possessor is not authorised to cultivate. If the approach in *Grant* is correct, there can be no attempt to have possession of either drug paraphernalia or the seed or fruit of a prohibited plant. Further, since a charge of attempting to procure under section 7(1)(a) relates only to a "controlled drug", it cannot apply to an attempt to obtain possession of a pipe, syringe, or similar drug accessory. And, so far as the seed or fruit of a prohibited plant is concerned, such a charge has a limited operation: it is available in respect of a controlled drug such as cannabis seed[45] but not otherwise—for example, where the seed or fruit of prohibited plants producing mescaline or psilocybine[46] is concerned.

42 Ibid.
43 Idem.
44 The fact that s 6(2A) applies the related ancillary offence of conspiracy to the offence of having a controlled drug in possession for a prohibited purpose further supports this interpretation. This provision—originally relied on in *Willoughby*—was introduced by the Misuse of Drugs Amendment Act 1978 to increase the maximum penalty under the general conspiracy provision of s 310 of the Crimes Act 1961 from seven to fourteen years' imprisonment.
45 Misuse of Drugs Act 1975, Third Schedule, Part I.
46 Misuse of Drugs Act 1975, s 2(1): definition of "prohibited plant".

IV Conclusion

Contrary to the analysis in *Grant*, it is possible to give meaning to the concept of attempting to have in possession without working violence to either the law of attempt or the possessional offence itself. It is therefore suggested that the ruling in *Willoughby* is to be preferred to the decision in *Grant* and that the application of section 72 of the Crimes Act to the possessional offence in section 6(1)(f) of the Misuse of Drugs Act does not unreasonably extend the reach of the law to the very penumbra of preparatory conduct.

This conclusion is consistent with the general position in other jurisdictions. Although the application of the general attempt provision of the Canadian Criminal Code[47] to unlawful possession under federal drug control legislation[48] appears unsettled,[49] the concept of attempting to have possession is recognised elsewhere. The United Kingdom legislation[50] contains an attempt provision expressed as generally applicable to all drug offences, including simple possession and possession "with intent to supply"; and, to like effect, the drug codes of several Australian states incorporate similar provisions which apply to both possession for personal use and relational possession.[51]

Finally, it is to be remembered that a charge of attempting to have a controlled drug in possession for a prohibited purpose will not be established lightly. The prosecution must still prove that an accused intended to use the drugs for a prohibited purpose. If the charge is made out, the penalty will appropriately reflect the preparatory nature of the offender's conduct.[52]

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47 Criminal Code RSC 1970 c C-34, s 24.

48 Narcotic Control Act RSC 1970 c F-27; Food and Drugs Act RSC 1970 c F-27.

49 In *R* v *Rothberg* (1976) 33 CCC (2d) 56 the Ontario Provincial Court (Criminal Division) declined to commit an accused on a charge of attempting to have possession of a narcotic for the purpose of trafficking, contrary to s 4(2) of the Narcotic Control Act. Because s 8 of the Narcotic Control Act sets out a unique procedure which casts a reverse onus on the accused to prove that he did not have the narcotic for the purpose of trafficking, Fay Prov Ct J concluded that it should be strictly construed. In his view, the Crown was required to adduce some evidence of possession, as opposed to a mere attempt, and the general attempt provision of s 24 of the Criminal Code did not apply to prosecutions under s 4(2) of the Narcotic Control Act "although [it] might well apply to a separate prosecution under s 3 [simple possession] . . ." (ibid at 59). Cf the comment on this decision by Frankel, "Review of the Law Relating to Drug Offences under the Narcotic Control and Food and Drugs Acts" (1979) 9 CR (3d) 1, 26: ". . . there is no reason why, on proper evidence, the Crown should not be able to succeed where the attempt relates to . . . possession for the purpose of trafficking."

50 Misuse of Drugs Act 1971, s 19 (UK). See eg *Kyprianou* v *Reynolds* [1969] Crim LR 656; *R* v *Foo* [1976] Crim LR 456. Since the Act does not expressly prohibit the "procuring" of controlled drugs, the charge of "attempting to procure" in the former decision presumably refers to an attempt to commit an offence of having a controlled drug in possession under s 5.

51 Narcotic and Psychotropic Drugs Act 1934-1974, s 14(3) (SA); Poisons Act 1962, s 34(5) (Vic); Poisons Act 1966, ss 26(4), 33(2) (NSW); Police Act 1892-1978, s 94E(3) (WA).

52 See *R* v *Spartalis* [1979] 2 NZLR 265, 266 per Richmond P (CA).

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