

## CONSPIRACIES, CODES AND THE COMMON LAW: *ANSARI V THE QUEEN AND R V LK*

Criminal proceedings before higher appellate courts tend to involve either matters of procedure, or the technical interpretation of specific, offence-creating statutes. In this context, tracing a discernible approach to statutory interpretation can enhance understanding of how an appellate court may deal with future criminal cases. Of course, where the jurisdiction out of which the proceedings arise has a criminal code, the importance of approaches to statutory interpretation is higher still. This paper will examine the High Court's recent approach to construing offence-creating legislation, by means of two cases involving charges of conspiracy laid under the *Criminal Code Act 1995* (Cth) sch 1 ('*Commonwealth Code*'): *R v LK*<sup>1</sup> and *Ansari v The Queen*.<sup>2</sup> These cases indicate a possible, and perhaps controversial, tendency to read criminal legislation and particularly criminal codes in such a way as to reflect common law criminal offences.

Both *Ansari* and *LK* arose out of the Sydney underworld of organised crime. The defendants in both sets of cases were brothers allegedly involved in international money laundering rings. The Ansari brothers were accused of dealing with AUD2 million, thought to be the proceeds of criminal activity, for a Romanian associate. The brothers RK and LK were charged with respect to the movement of CHF25 million through various offshore accounts, and into the archetypal Swiss bank account.

Both sets of brothers were charged with conspiracy to commit money laundering offences under the *Commonwealth Code*. The common question that governed their fates was whether it is possible to conspire to commit an offence based on recklessness rather than intention; whether it is possible to conspire with another person to be reckless.

Conspiracy is criminalised by s 11.5(1) of the *Commonwealth Code*. The elements of the offence are that:

- the defendant entered into an agreement with other persons;<sup>3</sup>

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<sup>1</sup> (2010) 241 CLR 177 ('*LK*').

<sup>2</sup> (2010) 241 CLR 299 ('*Ansari*').

<sup>3</sup> *Commonwealth Code* s 11.5(2)(a).

- the defendant and one of the other parties to the agreement intended that an offence would be committed pursuant to the agreement;<sup>4</sup> and
- the defendant or one of the other parties to the agreement committed an overt act pursuant to the agreement.<sup>5</sup>

So, the requisite fault element for conspiracy is the intention to commit some other offence, or that another party to the agreement commits some other offence. This is one of the unusual characteristics of conspiracy — it relies upon the commission or intention to commit some other, separate offence.

In *Ansari* and *LK*, that other offence was money laundering, criminalised by s 400.3(2) of the *Commonwealth Code*. Money laundering involves a physical element of dealing with money in particular ways. Unusually, the offence in s 400.3(2) also has two fault elements, both of which must be made out for a finding of guilt:

- the defendant must intentionally deal with the money; and
- the defendant must also be reckless as to the money being the proceeds of crime, or reckless as to the fact that the money may in future be used as an instrument of crime.

RK and LK were alleged to have intentionally dealt with money and to have been reckless as to it being the proceeds of crime. The *Ansari* brothers were alleged to have intentionally dealt with money and to have been reckless as to the possibility of it being used as an instrument of crime in the future.

In proving a criminal conspiracy to commit money laundering, the first fault element of money laundering — intentionally dealing with money — poses no great conceptual difficulty. The second fault element — recklessness as to the status or future uses of the money — raises logical and legal difficulties. Conspiracy requires two people to agree (and to intend) that they will in future commit an offence. Yet if that offence involves being reckless, then the question inevitably arises: is it possible for a person to agree and intend to be reckless in future conduct? The High Court said that it was not possible. Upon this basis, the Court construed conspiracy's fault element of intention as governing, and effectively replacing, the fault elements of the substantive offences upon which the conspiracy relies.

The joint judgment in *LK* was written by Gummow, Hayne, Crennan, Kiefel and Bell JJ.<sup>6</sup> In *Ansari*, their Honours were joined by Heydon J, and largely adopted the reasoning outlined by the joint judgment in *LK*. The joint judgments paid close attention to conspiracy as established at common law, for which the prosecution must demonstrate not merely an intention to commit the conduct that is the separate

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<sup>4</sup> Ibid s 11.5(2)(b).

<sup>5</sup> Ibid s 11.5(2)(c).

<sup>6</sup> Heydon J concurred with the reasoning and orders of the joint judgment.

offence, but must also demonstrate knowledge of each of the essential facts upon which the conduct operates to constitute this separate offence.<sup>7</sup> For the purposes of money laundering, at common law the conspirators must have entered into an agreement intending not only to engage in money laundering generally, but with knowledge of each of the facts that made dealing with *this* money in *this way* money laundering.<sup>8</sup> As a consequence, if the fault element for a substantive offence is recklessness, for the purposes of conspiracy to commit that substantive offence the fault element for the substantive offence will be treated as though it were intention. This interaction between conspiracy and other offences at common law was considered reasonably well established.<sup>9</sup>

Having determined the common law position, the joint judgment then integrated it into the *Commonwealth Code's* conception of conspiracy. The *LK* joint judgment reasoned that the terms 'conspire' and 'conspiracy' had acquired established common law meanings at the time the Code was enacted. The Code's use of these terms imported their common law meanings into the legislative framework.<sup>10</sup> Moreover, the joint judgment argued, the terms in which the Code offences had been drafted would anyway have produced the same result as the common law. In *LK*, their Honours said that:

As a matter of ordinary English it may be thought that a person does not agree to commit an offence without knowledge of, or belief in, the existence of the facts that make the conduct that is the subject of the agreement an offence. This is consistent with authority with respect to liability for the offence of conspiracy under the common law.<sup>11</sup>

Chief Justice French wrote separate judgments in *Ansari* and in *LK*. He reached the same conclusion as the joint judgments in both cases, namely that conspiracy under the *Commonwealth Code* required that there be an intention to commit all elements of the substantive offence, even if one of the elements of the substantive offence itself required only a recklessness fault element.<sup>12</sup> Like the joint judgment, French CJ reached this conclusion through an examination of the workings of conspiracy at common law,<sup>13</sup> as well as a relatively brief consideration of the Code's terms. Moreover, French CJ referred extensively to statements made by drafters of the *Commonwealth Code* to support his conclusions.<sup>14</sup>

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<sup>7</sup> *LK* (2010) 241 CLR 177, 224 [107], 218–19 [94], 227 [114], 228 [117]; *Ansari* (2010) 241 CLR 299, 318 [59].

<sup>8</sup> *LK* (2010) 241 CLR 177, 228 [117].

<sup>9</sup> *Ibid* 218–19 [94], 225 [110], 225–6 [112].

<sup>10</sup> *Ibid* 224 [107].

<sup>11</sup> *Ibid* 228 [117].

<sup>12</sup> *Ibid* 212 [75].

<sup>13</sup> *Ibid* 206–9 [59]–[67]. In *Ansari* (2010) 241 CLR 299, French CJ simply referred back to his discussion of the common law in *LK*: at 308 [21].

<sup>14</sup> *LK* (2010) 241 CLR 177, 203–6 [51]–[57].

In *LK*, French CJ's judgment reflected largely the same reasoning process as that used by the joint judgment. Yet in the later-decided *Ansari*, French CJ made some additional, interesting observations. The Chief Justice reiterated his conclusion from *LK* that s 11.5(1) of the *Commonwealth Code*, when read in light of common law conspiracy principles, required that the defendant had an *intention* to commit all elements of the future substantive offence.<sup>15</sup> However, his Honour disagreed with the *LK* joint judgment's reasoning<sup>16</sup> that it was conceptually impossible for a person to intend in the present to act recklessly in future. For instance, French CJ said, a conspirator could intend in future to deal with money, while knowing that there was a risk that it will become an instrument of crime, or the conspirator may intend in future to deal with money while also intending that there be a risk that the money will become an instrument of crime.<sup>17</sup> Both of these situations would constitute a person intending to be reckless in future. However, despite this reading being conceptually possible, French CJ reaffirmed his view that the *Commonwealth Code*'s intention requirements should be read in line with the common law position.<sup>18</sup>

It is interesting to note that the judges in both cases narrowed the scope of the Code offence of conspiracy, in a way that I argue was not necessarily required by the statute. Two possible reasons were given by the High Court for doing so: simple logic, and the influence of the common law. I will assess each in turn.

At this point, it may be useful to diverge briefly into a discussion of the nature of intention and recklessness as fault elements. Most offences involve some form of mental or fault element; indeed, at common law, a mental element is automatically presumed.<sup>19</sup> Intention and recklessness are two common forms of fault element. The common law meaning of intention is that the defendant has an aim or purpose of bringing about the constituent elements of the offence in question.<sup>20</sup> Generally, a person is reckless in the common law sense if the person acts with knowledge that a consequence is a probable or possible result of his or her actions, and that consequence constitutes an offence.<sup>21</sup>

However, some recent Commonwealth offences adopt a less typical form of recklessness: offences like money laundering and supporting terrorism use recklessness as to *present knowledge* rather than recklessness as to a *future*

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<sup>15</sup> *Ansari* (2010) 241 CLR 299, 308 [21].

<sup>16</sup> *LK* (2010) 241 CLR 177, 228 [117] (joint judgment). This passage is quoted in the text accompanying n 11.

<sup>17</sup> *Ansari* (2010) 241 CLR 299, 310 [26].

<sup>18</sup> *Ibid* 308 [21].

<sup>19</sup> *Allchurch v Cooper* [1923] SASR 370, 373–4 (Gordon J).

<sup>20</sup> See generally *La Fontaine v The Queen* (1976) 136 CLR 62; *R v Crabbe* (1985) 156 CLR 464; *Bouhey v The Queen* (1986) 161 CLR 10.

<sup>21</sup> *Pemble v The Queen* (1971) 124 CLR 107; *La Fontaine v The Queen* (1976) 136 CLR 62.

*consequence*.<sup>22</sup> So, for instance, the money laundering provisions in *LK* and *Ansari* criminalise dealing with money while reckless as to whether it is proceeds of crime; by contrast, the classic recklessness offence of manslaughter uses recklessness as to the consequences of one's actions. The *Commonwealth Code* uses recklessness rather than intention as the fault element for these offences for interrelated evidentiary and normative reasons. As an evidentiary matter it can be very hard, or impossible, to show that a person actually knew what they were taking part in; but as a normative matter, the unusual nature of the activity (such as moving CHF25 million into an offshore account in small instalments) should have caused them to take some care about what they were taking part in.<sup>23</sup> So, the question is how the law of inchoate offences should be adapted to this type of crime. *LK* and *Ansari* grappled with the *Commonwealth Code*'s attempt at adaptation, but ultimately, I argue, reverted to the common law position and its orthodox conception of recklessness as relating to consequences rather than knowledge. The result is that an intended new formulation for recklessness has been left by the wayside.

I turn now to the logic of conspiracy's interaction with other *Commonwealth Code* offences, as expounded by the joint judgments in *LK* and *Ansari*. The starting point is clear: under the *Commonwealth Code*, the physical element for conspiracy is entering into an agreement, and the fault element is intention. More particularly, conspiracy requires an intention that an offence would in future be committed pursuant to the agreement entered into by the conspirator.<sup>24</sup> Yet this deceptively simple statement fails to specify exactly what about the future offence must be intended; must the defendant merely intend to pursue some general course of action, made up of his intended acts and also of circumstances beyond his knowledge and control? Or must the defendant intend both to commit all the necessary acts, and intend to do so in the particular circumstances that make these acts criminal, in order for the defendant to be guilty of criminal conspiracy? To illustrate, does the defendant intend to commit the reckless money laundering offence criminalised under s 440.3 of the Code if he intends to deal with money knowing only that there is a *risk* that the money will be the proceeds of crime? Or in order to intend to commit the s 440.3 offence, must the defendant intend to deal with the money, and also know and intend that the money is the proceeds of crime?

The High Court said that the *Commonwealth Code* requires the latter. I will make a few points about this conclusion.

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<sup>22</sup> This use of recklessness is not entirely unknown to the common law, but is more rare: see, eg, *R v Wozniak* (1977) 16 SASR 67; *R v Hemsley* (1988) 36 A Crim R 334; *R v Kitchener* (1993) 29 NSWLR 696.

<sup>23</sup> Explanatory Memorandum, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002 (Cth). I note that if the fault element of intention to launder money can be made out, then the defendant may be charged with a different offence that carries a higher penalty: *Commonwealth Code* s 400.3(1).

<sup>24</sup> *Commonwealth Code* s 11.5(2)(b).

First, the *Commonwealth Code* expressly establishes a comprehensive fault element regime. In particular, it establishes that as a general rule, for a physical element of conduct the fault element is intention, but for a physical element consisting of a circumstance, the fault element is recklessness.<sup>25</sup> This mapping of fault elements is reflected in the money laundering offence with which the defendants in the present cases were charged: there must be intention to deal with money (that is, intention as to conduct), but only recklessness as to the circumstance of the money dealt with being the proceeds of crime or becoming an instrument of crime (that is, recklessness as to the circumstances in which the conduct takes place). The use of recklessness for knowledge as to circumstances as well as results or consequences is unusual at common law, as I discussed previously, but is adopted as the norm for the *Commonwealth Code*.<sup>26</sup> Yet this general norm for organising different levels of fault element to conduct and circumstances was rejected by the High Court for use in conspiracy offences: according to *LK* and *Ansari*, the fault element for both types of physical element is to be intention.

What is it about the offence of conspiracy that alters the organisation of fault elements used as the Code's general scheme? The High Court answered that conspiracy's requirement of an intention fault element alters the allocation of fault elements within the substantive offence; essentially, conspiracy's fault element is substituted for all of the fault elements of the substantive offence.<sup>27</sup> The joint judgment said that this is because it is not logically possible to intentionally agree to be reckless; that is, that it is not possible for two people to jointly intend to do a thing, and intend to be reckless as to the circumstances in which that thing is done.<sup>28</sup>

There need not be conceptual or logical difficulty in agreeing and intending to be reckless in the sense of the new offences: a person can intend to deal with money in a week's time, while not know today whether that money is the proceeds of crime; and two people can similarly agree to deal with money in a week's time, while not knowing today whether that money is the proceeds of crime. However, the person knows today that there is a strong possibility that the money to be dealt with in a week is the proceeds of crime, and the person still has an intention today to deal with that money next week even if the person does not come across new information demonstrating that the money is not the proceeds of crime. In this way, the person (or the two conspirators) intends to commit the offence of dealing with money, and is reckless as to whether it is the proceeds of crime.

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<sup>25</sup> *Ibid* s 5.6.

<sup>26</sup> The *Commonwealth Code's* adoption of this as the norm is expressly recognised by the High Court in *LK* (2010) 241 CLR 177, 230 [127] (joint judgment).

<sup>27</sup> *LK* (2010) 241 CLR 177, 228 [117], 234–5 [141] (joint judgment); *Ansari* (2010) 241 CLR 299, 318 [59]–[61] (joint judgment).

<sup>28</sup> *LK* (2010) 241 CLR 177, 228 [117].

Yes, it is a little contorted, and instructing a jury would not be easy.<sup>29</sup> But conceptually and logically, it does seem to be possible to intentionally agree to a reckless offence. Perhaps the most simple way of considering the matter is not that two people are intentionally agreeing to be reckless in the future, but that they are intentionally agreeing to do something that is reckless, knowing that it is reckless.

So, if there is no conceptual impossibility in intending and agreeing to be reckless, then there can be an intentional conspiracy to commit a recklessness offence. The terms of the Code direct that guilty conspirators must intend to commit a further substantive offence, and the substantive offence in question in *LK* and in *Ansari* required that the conspirators intend to engage in conduct and be reckless as to knowledge. So, the terms of the Code do not themselves indicate that conspiracy's fault element of intention should apply separately to all of the physical elements (including factual circumstances) of the offence, rather than to the offence overall. Why depart from that *prima facie* meaning, if logic does not require it? An alternative reason offered by the High Court is that the common law offence of conspiracy requires intention to commit all elements of the substantive offence, and that this common law rule has been woven into the terms of the Code offence.

In interpreting the provisions of the *Commonwealth Code* relating to conspiracy, the entire Court in both *Ansari* and *LK* also analysed in detail the requirements of the corresponding common law offence.<sup>30</sup> In doing so, the joint judgment in *LK* referred to Pearce and Geddes' authoritative treatise on statutory interpretation.<sup>31</sup> Pearce and Geddes note that 'the theoretical idea of a code is that it replaces all existing law and becomes the sole source of the law on that particular topic',<sup>32</sup> except:

- where words of the code evidence ambiguity; or
- where words used have acquired a technical meaning at common law, which is not excluded or superseded by terms of the code.<sup>33</sup>

It was this second exception that was relied upon — their Honours said that 'conspiracy' had a technical common law meaning, which had been imported into the Code.<sup>34</sup>

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<sup>29</sup> As was disapprovingly noted in *Ansari* (2010) 241 CLR 299, 317 [57] (joint judgment).

<sup>30</sup> *LK* (2010) 241 CLR 177, 224–6 [108]–[112] (joint judgment), 206–7 [59]–[61] (French CJ); *Ansari* (2010) 241 CLR 299, 317–18 [58] (joint judgment), 308 [21] (French CJ).

<sup>31</sup> D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6<sup>th</sup> ed, 2006) 273–4, quoted in *LK* (2010) 241 CLR 177, 219–20 [96]–[97].

<sup>32</sup> Pearce and Geddes, above n 31, 273–4.

<sup>33</sup> *Ibid.*

<sup>34</sup> *LK* (2010) 241 CLR 177, 220 [97].

However, Pearce and Geddes also referenced significant controversy about when these exceptions will be engaged and allow reference to common law.<sup>35</sup> It is clear that when interpreting a code, as with any other exercise in statutory interpretation, the first loyalty is to the text.<sup>36</sup> Only if the text is ambiguous, for instance by using an undefined technical legal term, should one look to the pre-existing common law.<sup>37</sup>

This rule has been unequivocally affirmed by the High Court on multiple occasions. Clear instances include in *Mellifont v Attorney-General (Qld)*,<sup>38</sup> where five justices writing together said:

The primary difficulty with the applicant's argument is that it is not legitimate to look to the antecedent common law for the purpose of interpreting the Code unless it appears that the relevant provision in the Code is ambiguous. That ambiguity must appear from the provisions of the statute; in other words, it is not permissible to resort to the antecedent common law in order to create an ambiguity. Nor, for that matter, is it permissible to resort to extrinsic materials, such as the draft Code and Sir Samuel Griffith's explanation of the draft Code ... in order to create such an ambiguity.<sup>39</sup>

Moreover, in *Director of Public Prosecutions (NT) v WJI*,<sup>40</sup> Kirby J noted that:

Codification puts a brake on the modern technique of looking beyond the statutory language. It focuses the attention of the decision-maker on the text of the code. That, after all, is the object of replacing the vast mass of decisional law with codified provisions. The purpose of codification would be undermined if lawyers, in the guise of construction, reintroduced all of the common law authority which the NT Code was intended to replace.<sup>41</sup>

Yet in *LK*, both the joint judgment and French CJ did exactly this: their Honours examined explanations of the Code's drafters,<sup>42</sup> rather than referring to ambiguities in the text, to justify resort to the common law.

The word 'conspiracy' clearly has a technical legal meaning at common law. However, this meaning is not automatically imported into the Code — judges look

<sup>35</sup> Pearce and Geddes, above n 31, 274–6.

<sup>36</sup> Ibid 274; *Bank of England v Vagliano Bros* [1891] AC 107; *Brennan v The Queen* (1936) 55 CLR 253, 263 (Dixon and Evatt JJ).

<sup>37</sup> Pearce and Geddes, above n 31, 275; *Stuart v The Queen* (1974) 134 CLR 426, 437; *R v Barlow* (1997) 188 CLR 1, 18; *Mellifont v A-G (Qld)* (1991) 173 CLR 289, 309.

<sup>38</sup> (1991) 173 CLR 289.

<sup>39</sup> Ibid 309 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

<sup>40</sup> (2004) 219 CLR 43.

<sup>41</sup> Ibid 66.

<sup>42</sup> *LK* (2010) 241 CLR 177, 220–4 [99]–[107] (joint judgment), 203–6 [51]–[58] (French CJ).



to the terms of the Code to determine whether these terms supersede the common law. Unlike in many State criminal codes,<sup>43</sup> ‘conspiracy’ is not an undefined term implanted into the *Commonwealth Code* without further explanation. Its elements are clearly established in s 11.5(2).

The joint judgment in *LK* argued that s 11.5(2) of the Code did not outline elements of the offence of conspiracy, but merely specified some aspects of the existing meaning of the term ‘conspiracy’.<sup>44</sup> This existing meaning, according to their Honours, had been imported from the common law. This reasoning process, and approach to interpretation of the Code, seems to evince a desire to read the Code as corresponding to the common law.

It bears remembering the purpose of a code. Burbury CJ in *Murray v The Queen*<sup>45</sup> said:

The court will then incline to hold the view that the intention of the legislature was to retain the pre-existing legal concept as part of the criminal law and will in spite of semantic difficulties which may arise from the literal interpretation of related provisions of the code give effect to that intention as a controlling interpretative factor.<sup>46</sup>

Pearce and Geddes remarked of this statement that:

It is statements of this kind that infuriate advocates of codification of the law. It illustrates the great difficulty that common law judges experience when confronted with a code and how readily they will abandon its terms and retreat to the familiar ground of the common law.<sup>47</sup>

So, the High Court interpreted the *Commonwealth Code* offence of conspiracy based on common law ideas, and what the justices thought was the only logical interpretation of the interaction between various fault elements in the Code. What I have sought to show is that the terms in which the Code offence of conspiracy is drafted do not logically require intention with respect to all elements of the substantive offence — although it requires some minor mental contortions, it is possible to see how one can currently intend to be reckless in the future as to the existence of some circumstance, as was explained by French CJ in *Ansari*, and therefore how two people can jointly currently intend to be reckless as to some

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<sup>43</sup> *Criminal Code Act 1899* (Qld) ss 541–3 (‘*Criminal Code* (Qld)’); *Criminal Code Act 1924* (Tas) s 297 (‘*Criminal Code* (Tas)’); *Criminal Code Act Compilation Act 1913* (WA) s 558 (‘*Criminal Code* (WA)’).

<sup>44</sup> *LK* (2010) 241 CLR 177, 224 [107].

<sup>45</sup> [1962] Tas SR 170.

<sup>46</sup> *Ibid* 172–3.

<sup>47</sup> Pearce and Geddes, above n 31, 276.

future circumstance.<sup>48</sup> We are left with the High Court reading into the Code the common law requirements of conspiracy, which is not without controversy.

The decisions in *LK* and *Ansari* will not directly bear upon criminal law in jurisdictions other than the Commonwealth and the Territories; the State criminal codes, unlike that of the Commonwealth, do not specify the elements of ‘conspiracy’,<sup>49</sup> meaning that the common law would naturally supply these elements. Therefore, the approach taken by the High Court in *LK* and *Ansari* would be utterly without controversy as applied to some codes.

Nevertheless, adopting a narrow view of the Commonwealth offence of conspiracy, as the High Court has done here, may yet have far-reaching effects. Conspiracy regularly applies to a broad range of substantive offences: money laundering, as we saw in these two cases, but also drug dealing and trafficking, smuggling of people and goods, and violence by organised crime. Participation in these types of crime, where each player does only a small but important component act, is increasingly criminalised within legislation and codes using fault elements of recklessness — now nullified when the charge is of conspiracy. *LK* and *Ansari* have likely narrowed the scope of the Commonwealth offence of conspiracy, making it harder to prosecute those who help in the planning and preparation of these substantive, and serious, offences.

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<sup>48</sup> *Ansari* (2010) 241 CLR 299, 310 [26].

<sup>49</sup> *Criminal Code* (Qld) ss 541–3; *Criminal Code* (Tas) s 297; *Criminal Code* (WA) s 558.