THE REASONABLENESS OF MISTAKE IN THE CRIMINAL LAW[1]

Common Law Jurisdictions.

The effect of mistake of fact in the criminal law is not uniform. In particular, it is sometimes, but not always, true to say that to constitute a sufficient answer to a criminal charge a mistake of fact must be reasonable. Thus Dr. Glanville Williams says that the "idea that a mistake, to be a defence,[2] must be reasonable, though lurking in some of the cases, is certainly not true as a general proposition," except, of course, where some statute expressly confines the defence to reasonable mistake.[3] With this may be contrasted the rather different formulation by Professor Perkins: "If no specific intent or other special mental element is required for guilt of the offense charged, a mistake of fact will not be recognized as an excuse unless it was based upon reasonable grounds."[4]

The case against reasonableness of mistake in the criminal law was put in 1908 in the following words: "Must the mistake be reasonable? An act is reasonable in law when it is such as a man of ordinary care, skill, and prudence would do under similar circumstances. To require that the mistake be reasonable means that if the defendant is to have a defence, he would have acted up to the standard of an average man, whether the defendant is himself such a man or not. This is the application of an outer standard to the individual. If the defendant, being mistaken as to material facts, is to be punished because his mistake is one which an average man would not make, punishment will sometimes be inflicted when the criminal mind does not exist. Such a result is contrary to fundamental principles, and is plainly unjust, for a man should not be held criminal because of lack of intelligence. If the mistake, whether reasonable or unreasonable, as judged by an external standard, does negative the criminal mind, there should be no conviction."[5]

Yet it is undoubtedly true that in many judicial references to mistake of fact the word "reasonable" or some synonym appears. Perhaps the best known is the sweeping declaration of the Privy

1. This article is a revised version of a paper delivered to the Australian Universities Law Schools Association upon the occasion of the 15th annual conference at Perth, W.A., in August 1960. I am most grateful to those members who took part in the ensuing discussion for their penetrating criticisms of the original draft.
2. The word "defence" is used here, as elsewhere in this article, as a matter of convenience. It is not intended to imply that any burden of proof rests upon the defendant.
3. Glanville Williams, *Criminal Law: The General Part*, pp. 163 and 167.
4. Perkins, *Criminal Law*, p. 827.
5. (1908) 22 Harv. Law Rev., 75, 84.

Council in *Bank of New South Wales v. Piper*[6] that "the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts, which, if true, would make the act charged against him innocent," but many other examples could be cited.[7]

Nevertheless, there are also dicta of high authority which do not limit the defence of mistake of fact to reasonable mistake. Thus Lord Atkin in *Thorne v. Motor Trade Association*, commenting on a passage in Darling J.'s judgment in *Dymond*,[8] remarked that "language was used in the judgment which seemed to indicate that even if the mistake were as to a fact which would have constituted a reasonable cause such a mistake would be irrelevant; in other words, there must be in fact a cause not merely a genuine belief in a cause. This seems to be incautiously expressed: and I do not think that doubt should exist upon a well established proposition in criminal law that normally a genuine belief in the existence of facts as apart from law, which if they existed would constitute a defence, is itself a sufficient defence."[9]

The difficulty is usually resolved by explaining that the word "reasonable" in this context means only that unless the mistake is reasonable it is not likely to be believed, not that reasonableness is required as a matter of law. Thus in *Gurney* Cockburn C.J. said that "the reasonableness of belief, though it may be one element of judging of its honesty, is not conclusive,"[10] and Lord Bramwell in *Derry v. Peek* referred to "a confusion of unreasonableness of belief as evidence of dishonesty, and unreasonableness of belief as of itself a ground of action."[11]

Now, this explanation, although it reconciles many of the dicta satisfactorily, is not adequate in all cases. For instance, it is difficult to say that the court is referring only to an evidentiary caution when it deliberately requires that the mistake be such "as does not arise from a want of proper care",[12] or "not superinduced by fault

6. [1897] A.C. 383, 389-390.
7. For a selection see *Prince* (1875) 2 C.C.R. 154, 170, *per* Brett J.; *Tolson* (1889) 23 Q.B.D. 168, 181, *per* Cave J., 188, *per* Stephen J.; *Hardgrave v. The King* (1906) 4 C.L.R. 232, 237, *per* Griffith C.J.; *Maher v. Musson* (1934) 52 C.L.R. 100, 104, *per* Dixon J. (as he then was); *Proudman v. Dayman* (1941) 67 C.L.R. 536, 540, *per* Dixon J. For American examples see Perkins *op. cit.* pp. 826-827 nn. 71-77; *U.S. v. Ah Chong* (1910) 15 Philippine 488; *Adams v. State* (1928) 110 Tex. Cr. 20, 7 S.W. 2d 528.
8. [1920] 2 K.B. 260.
9. [1937] A.C. 797, 809. Cp. *Thomas v. The King* (1937) 59 C.L.R. 279, 299-300, *per* Dixon J. And see Perkins *op. cit.* p. 828 n. 82; *Marshall* (1830) 1 Lew. 76.
10. (1869) 11 Cox 414, 467.
11. (1889) 14 App. Cas. 337, 352. See also *Wilson v. Inyang* [1951] 2 K.B. 799, and the note thereon by Glanville Williams at 14 *Mod. Law Rev.* 485; *Bonnor* [1951] V.R. 227, 253-254, *per* Barry J.
12. *Hamilton v. State* (1930) 115 Tex. Cr. 96, 97; 29 S.W. 2d 777, 778.

or negligence",[13] or even more explicitly lays down that if the defendant pleads mistake he "is bound to exercise reasonable diligence to ascertain the facts".[14] And there is a further difficulty over offences of negligence.[15] It is a contradiction to say that an offence can be committed on proof of negligence and yet allow a negligent mistake as a defence merely because it happened to be genuine. It is clear that for a mistake of fact to afford a defence to a charge based on negligence, it must also be reasonable, *i.e.*, such a mistake as a reasonable man would have made in the circumstances.

It is submitted that these difficulties have their origin in the custom of treating mistake of fact in the criminal law as one single defence. The truth of the matter is that there are two such defences, one applicable to crimes of *mens rea*,[16] and one applicable to crimes of negligence. To crimes of *mens rea*, or elements of a crime which require *mens rea*, mistake of fact *simpliciter* is a defence; to crimes of negligence, or elements of an offence which require only negligence, mistake of fact is a defence only if the mistake was in all the circumstances a reasonable one to make. If this analysis is accepted, judicial dicta on the subject need not be taken too literally, but can be read in relation to the offence before the court and interpreted accordingly.

There is, however, one disadvantage to stating the law in this way, and that is that to discover whether a mistake must be reasonable, one must first inquire whether the offence charged is one of negligence. A possible source of difficulty where statutory offences are concerned is that an offence which may have been intended to depend upon *mens rea* can be converted into an offence of negligence by the express inclusion in the statute of a reference to reasonable mistake. Thus by the Crimes Act, 1900 (N.S.W.), s. 77 (c) (ii) it is a defence to a charge of indecently assaulting a female under the age of sixteen years for the accused reasonably to have believed that the female in question was over that age. The result is that in New South Wales this offence, so far as the requirement of age is concerned, is one of negligence.[17] In that particular case this result may have been intended and is by no means remarkable, for it is not unjust to expect a man who desires

13. *Dotson v. State* (1878) 62 Ala. 141, 144.
14. *Gordon v. State* (1875) 52 Ala. 308, 315.
15. The term "negligence" is used here as meaning "a non-intentional failure to conform to the conduct of the reasonable man in respect of the consequence in question" (Williams *op. cit.* p. 86). The antithesis sometimes drawn between negligence as conduct and negligence as a state of mind is thought to serve no useful purpose (see *ibid.*, pp. 85-86).
16. The term "*mens rea*" is used here to indicate some degree of advertence in contradistinction to inadvertent negligence, and comprises such states of mind as intention, knowledge, wilfulness, and recklessness.
17. Cp. Criminal Law Consolidation Act, 1935-1952 (S.A.), ss. 55 (2) (b) and 57 (3) (b).

sexual excitement with a young woman to take reasonable care to ascertain her age first. But parliamentary draftsmanship is not always conspicuous for its precision, and the consequences of inattention may not always be so satisfactory.

Code Jurisdictions.

Admittedly, the danger of legislative oversight in the common law jurisdictions is not unduly menacing, for the major offences requiring *mens rea* remain the products of case-law and are not subject to a statutory defence of reasonable mistake of fact. The case is different, however, when a comprehensive code of criminal law is enacted, for the inclusion of the word "reasonable" in the formulation of a single general defence of mistake in a code may lead to serious difficulty. The point may be illustrated by reference to the Queensland Criminal Code.

Chapter V of that Code sets out the general principles of criminal responsibility which "apply to all persons charged with any offence against the Statute Law of Queensland."[18] Chapter V includes s. 24, which runs as follows.

> *Section* 24:—A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.
>
> The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.[19]

It will be seen that this section, which is the only one concerned in general terms with mistake of fact,[20] includes an express requirement that the mistake be reasonable. Therefore in its full form the first paragraph of s. 24 applies only to offences, or to particular elements of offences, which can be committed negligently. Since this is the only section on mistake of fact in the Code, and since it is of general application, the question arises, how is s. 24 to be reconciled with those offences which require proof by P of some form of advertence[21] on D's part? Or, to put the question

18. s. 36.
19. ss. 24 and 36 of the W.A. Code are identical. Cp. s. 14 of the Tasmanian Code.
20. Claim of right is dealt with in s. 22. Some rules excluding the defence of mistake of fact in relation to the age of the victim in certain sexual offences are to be found in ss. 229 and 352. (W.A. Code ss. 22, 205, and 330).
21. The expression "offences . . . of advertence" is used in the text instead of "offences requiring *mens rea*" because the term "*mens rea*" is not used in either the Queensland or the W.A. Codes and is not applicable to offences under them: See *Widgee Shire Council v. Bonney* (1907) 4 C.L.R. 977, 981, *per* Griffith C.J. Similarly, the generic word under these Codes is "offence" and not "crime", which is used to designate the more serious offences.

from the opposite point of view, if the negligence defence of mistake is to be found in s. 24, where is what a common lawyer might call the *mens rea* defence of mistake to be found? It is proposed to furnish the answers to these questions by inquiring into the application of s. 24 to wilful murder, house-breaking, burglary, and rape.

(i) *Wilful Murder.*

Students at the Law School of the University of Queensland were recently asked to consider the following problem. D[22] is driving some sheep along a country road at dusk. He sees a small shape move towards the flock some way ahead. Thinking it is a dingo about to attack the sheep, he shoots and kills the intruder. When he reaches the body he discovers he has killed, not a dingo, but a child. He is charged under s. 301 of the Code with wilful murder. The jury find that D honestly believed he was shooting at a dingo, but that the mistake was not a reasonable one in the circumstances. Should D be convicted?

To these facts must be added the definition of wilful murder.

> *Section* 301:—Except as hereinafter set forth, a person who unlawfully kills another, intending to cause his death or that of some other person, is guilty of wilful murder.[23]

By s. 291 an unlawful killing is one which is not authorised, justified, or excused by law.[24]

The opposing arguments may be shortly stated. D relies on the fact that an essential element in the crime of wilful murder is proof by P of an intention on D's part to kill a human being. Since, owing to D's mistake, P cannot prove this element, D cannot be convicted of wilful murder. P's reply, however, is formidable, although the absurdity of the result leaves us in no doubt that it cannot be the law. According to P, D cannot be heard to say that the element of intention to kill a human being has not been proved, for the only way in which D can demonstrate this is by pointing to his own mistake. The Code, which by the Criminal Code Act, 1899, s. 2, "shall be the law of Queensland with respect to the several matters therein dealt with", and which is therefore the only source of law on any subject with which it deals, legislates for the defence of mistake in s. 24. This section clearly restricts the defence to reasonable mistake, and the jury have found that D's mistake was not reasonable. Therefore D cannot rely on his mistake as an answer to any element in the offence charged. Therefore D must be convicted of wilful murder.

Obviously P's argument cannot be correct, for it is unthinkable that if the jury's findings had been made as a preliminary to a

22. D stands for the defendant to a criminal charge and P for the prosecutor.
23. W.A. Code s. 278. 24. W.A. Code s. 268.

request for a direction on the law to assist them in arriving at their general verdict, the trial judge would have been obliged to tell them that it was their duty to convict of wilful murder. Equally obviously, the difficulty arises from the inclusion in s. 24 of the word "reasonable". Since it cannot be assumed that the requirement of reasonableness is merely to be overlooked or explained away, the problem is to retain it but to fit s. 24 into a scheme of the Code which does not lend itself to anomalies of this kind.

It is submitted that the clue is to be found in the last sentence of s. 24: "The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject". At first sight the sentence seems to be superfluous, for any statutory provision may be expressly or impliedly excluded by any later statute, and the Code is not peculiar in this respect. Further reflection, however, may lead to the different conclusion that the first paragraph of s. 24 does not necessarily stand or fall as a whole, but applies only so far as its terms accord with the elements of the particular offence under consideration. On this view the function of the sentence quoted is to make it clear that the first paragraph of s. 24 does not apply in its entirety to offences with the definitions of which any part of it would be inconsistent.

So far as the requirement of reasonableness is concerned, such offences fall into two groups, those needing proof by P of what Professor Perkins calls a "specific intent or other special mental element", and offences of strict responsibility. There is an inconsistency between s. 24 and offences requiring a specific intent, such as the intent to kill a human being in wilful murder, because it is a contradiction to say that P must prove a certain mental state on D's part, and yet allow D to be convicted if a reasonable man would not have held the belief which D actually had. There is an inconsistency between s. 24 and offences of strict responsibility because if D is strictly responsible on proof by P of the criminal act alone, D's beliefs are irrelevant whether reasonable or not. Offences of strict responsibility will not be further considered here.[25]

In the problem D's answer to P's argument is that the requirement of reasonableness in s. 24 is irrelevant because wilful murder is not an offence of negligence. Another way of putting the point is to say that since there is an inconsistency between the general section 24 and the particular section 301, the particular, in accordance with the usual rule of interpretation, prevails over the general to the extent of the inconsistency. Therefore the definition of wilful murder in s. 301 is not to be cut down by the word "reasonable" in

25. The law relating to strict responsibility in Queensland is examined by the present writer in a forthcoming article in the Modern Law Review.

s. 24. Therefore D's mistake operates to prevent his conviction for wilful murder.

Whether D should be acquitted altogether or convicted of manslaughter instead[26] is not clear on the facts of the problem. The jury have established that D was negligent, but to support a conviction for manslaughter there would have to be a finding, not merely of negligence, but of criminal negligence, for under the Codes, as at common law, a higher degree of negligence is required for criminal than for civil liability.[27]

In *Anderson v. Nystrom*[28] Philp J. rejected an argument by counsel, to the effect that s. 24 had no application to offences under the Code which contained the word "knowingly", as "unthinkable", on the ground that it would then have an application to homicide and stealing, and that to exclude the defence of mistake from these offences would be absurd. His Honour's comment suggests that there may have been some misunderstanding between himself and counsel. It is quite clear that the first paragraph of s. 24 cannot apply in its entirety to offences which can be committed only "knowingly", any more than it can apply in its entirety to offences requiring a specific intent. But equally, the first paragraph of s. 24 applies to any offence so far as it is not inconsistent with the definition of that offence, and therefore applies to a limited extent to offences which can be committed only "knowingly".

(ii) *Housebreaking and Burglary.*

The relationship between s. 24 and the definition of the particular offence is seen readily enough in wilful murder, to which the intention to kill a human being is central. It may be instructive, however, to examine the operation of mistake in an offence in which the specific intention is found alongside some other requirement which can be fulfilled through negligence. An example in housebreaking under s. 419 (1):—

> Any person who breaks and enters the dwelling-house of another with intent to commit a crime therein is guilty of a crime.[29]

26. Under the power in s. 576 (W.A. Code s. 595).
27. *Callaghan v. R.* (1952) 87 C.L.R., 115. But see the convincing criticism of this case by Peter Brett, *Manslaughter and the Motorist* (1953), 27 Aust. Law Jour. 6 and 89.
28. [1941] St. R. Qd. 56, 72. *Waterside Workers' Federation v. Birt* [1918] St. R. Qd. 10, where mistake of fact was considered in relation to a statutory offence of "wilfully" failing to comply with an arbitration award, is irrelevant here because the statute was a Commonwealth one. Common law principles apply to Commonwealth offences. In *Foreman v. Bowser* (1918) 12 Q.J.P.R. 108, where s. 24 was applied to an offence of "intentional or deliberate" infliction of unnecessary pain on an animal, no difficulty was encountered because the mistake seems to have been regarded as reasonable.
29. W.A. Code s. 401 (1).

D breaks and enters his neighbour's house intending to take a packet of cigarettes he has seen lying on a table through the window. On his trial he asserts two mistakes. First, he maintains that he thought the house was his own, which is identical in structure and similarly furnished, and broke in because he found when he got to the front door that he had lost his key. Second, he thought the packet of cigarettes was his own. The jury find that both mistakes were genuine but that neither was reasonable. D cannot be convicted because his second mistake amounts to a claim of right with s. 22 of the Code. As at common law, the particular form of misapprehension called claim of right does not have to be reasonable. Since D's defence comes squarely within s. 22, there is no need to invoke s. 24 at all. Indeed, it seems probable that s. 24 cannot be invoked, for s. 22 should prevail over it as a special section over a general one in the same way as a section defining an offence. The relevant paragraph of s. 22 runs as follows.

> *Section* 22:—. . . a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud.

But suppose now that the jury had found that the first mistake was genuine but unreasonable, and that D did not make the second mistake at all, his real belief being that someone had left the cigarettes behind by accident whilst visiting D earlier that day. It is submitted that D should be convicted, for there is nothing in the wording of s. 419 (1) to exclude responsibility for negligence so far as the requirement that the dwelling-house be someone else's is concerned. If there is nothing expressly or impliedly excluding the first paragraph of s. 24 or any part of it, then that paragraph applies in its entirety where mistake is raised, for its concluding sentence makes clear that s. 24 applies unless excluded.

It is submitted that the same reasoning applies to any other element of an offence which does not in terms require advertence, such as the circumstance that a housebreaking at night is burglary: if D pleads on a charge of burglary that he thought it was daytime, his mistake must be reasonable to succeed.[30] Conversely, where there is included in the definition of an offence the word "knowingly" or "wilfully", or some synonym, it follows that, under the Code as at common law, a mistake need only be genuine and not also reasonable.

(iii) *A Suggestion for Reform.*

It will be seen that in the result the position under the Queensland Code is the same as the common law position as stated by

30. Cp. Smith, *The Guilty Mind in the Criminal Law* (1960) 76 L.Q.R. 78, 80 ff.

Professor Perkins:—"If no specific intent or other special mental element is required for guilt of the offense charged, a mistake of fact will not be recognized as an excuse unless it was based upon reasonable grounds." But it will also be seen that the route to this result is not obvious, or at least not as clear as it might be. An improvement in the drafting of s. 24 is desirable.

The present form of s. 24 has the advantage that there is normally no doubt whether any particular offence, or any particular element in an offence, can be committed negligently: since the first paragraph of s. 24 applies in its entirety unless expressly or impliedly excluded, an offence can be committed negligently unless its definition is inconsistent with a requirement of reasonableness. If, for example, there were a section stating merely that a mistake of fact must be reasonable where negligence is charged but not where some degree of advertence is required, this would not help to solve the problem of identifying those elements of an offence which can be committed negligently.[31] It is submitted that s. 24 would be improved if mistake of fact were defined in some such terms as are used in the first paragraph now, but omitting the word "reasonable", and then adding on a proviso to the same effect as Professor Perkins's formulation. The result would be along the following lines.

> A person who does or omits to do an act under a mistaken belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.
>
> Provided that unless an intention to cause a particular result is an element of the offence constituted, in whole or part, by an act or omission,[32] a mistake of fact shall not excuse from criminal responsibility unless it was based upon reasonable grounds.

The word "honest" is omitted from the first paragraph of this draft because it is not thought to add anything of substance. To speak of a belief as dishonest is to imply that it is not held at all. In the normal usage of words the phrase "dishonest belief" is a contradiction in terms, for the kind of dishonesty meant is

31. The formula adopted in the Tasmanian Criminal Code s. 14 is defective from this point of view:—"Whether criminal responsibility is entailed by an act or omission done or made under an honest and reasonable, but mistaken, belief in the existence of any stage of facts the existence of which would excuse such act or omission, is a question of law, to be determined on the construction of the statute constituting the offence."
32. Cp. the second paragraph of s. 23:—"Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial."

incompatible with belief. It is therefore unnecessary to require that a mistaken belief be honest.[33]

It is submitted that, quite apart from any new codes which may come into being elsewhere in the common law world, the Queensland Code would be improved if the present s. 24 were replaced by the draft section proposed above. The effect would be to remove obscurities without changing the law.

(iv) *Intention to Cause a Particular Result.*

Next the inquiry must be made, what is a "specific intent or other special mental element", or, in the words used above, "an intention to cause a particular result". The question involves identifying offences of intention. It has already been seen that such offences fall into two classes, those which stand or fall in their entirety on the question of intention, such as wilful murder under the Code and most forms of murder at common law, and those which consist partly of elements of intention and partly of elements of negligence, such as housebreaking under the Code and at common law. All offences of intention are defined in one of two ways: either the requirement of intention is expressed in the definition, or it is implied in the nature of the offence. Examples of the former are legion. It is necessary to remember only that a requirement that something be done "knowingly" or "wilfully" is just as much an express requirement of intention as the term "with intent to" do something. An example of implied intention arising from the nature of the offence is rape. Rape is defined in the Code as follows.

> *Section* 347:—Any person who has carnal knowledge of a woman, or girl, not his wife, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape.[34]

Nowhere in this definition is there any requirement of intention to bring about a specific result. It is submitted as self-evident that a clear intention at least to have carnal knowledge is implied in the offence, for one can scarcely have intercourse through mere negligence. What is perhaps less clear is whether the element of non-consent on the part of the woman is a matter of intention or

33. Or *bona fide:* cp. Queensland Code s. 22, where *bona fide* claim of right is referred to in the heading and honest claim of right in the text. Glanville Williams (*op. cit.* p. 167) suggests that these expressions may be intended to emphasise that wilful self-deception is not good enough.

34. W.A. Code s. 325.

negligence. The problem may be illustrated by an example.

D is charged with rape. Suppose first that P fails to prove that D had the intention to have intercourse, being mistaken as to the nature of the act. D must be acquitted. But suppose now that P proves the fact of intercourse, D's intention to have intercourse, and absence of consent by the woman, but the jury find that D mistakenly believed he had that consent. D must be acquitted if the specific intent in rape is not merely to have intercourse, but to have it with a non-consenting woman, or at least regardless whether she consented or not (recklessness). But if the specific intent in rape is limited to intercourse, then it is possible to argue that D should be acquitted only if his mistake was reasonable. In other words, whilst it is certain from a consideration of the very nature of rape that the first paragraph of s. 24 cannot apply in its entirety to the element of carnal knowledge, it is not certain whether the same is true of mistake as to consent.

One's feeling is that mistake as to consent should not be limited to reasonable mistake, for the scales are sufficiently loaded against a man charged with rape in any event,[35] but the views already expressed as to the scope of s. 24 tend to the opposite conclusion. If the express words of the section indicate that it must be applied in its entirety unless there is a conflict between its terms and the definition of the offence charged, there is at first sight nothing in the definition of rape to prevent the requirement of reasonableness being applied to belief in consent to intercourse. However, it is possible on a careful inspection of s. 347 to argue that the drafting of the section indicates an implied exclusion of the requirement of reasonableness in s. 24.

It is clear that none of the other elements of the offence is reasonably capable of being committed negligently. It would be unrealistic to envisage a negligent mistake by D as to whether the woman with whom he had intercourse was his wife, and it is not easy to see how one can overbear by threats or mislead by false and fraudulent misrepresentations through mere carelessness. It is submitted that on these issues, as with carnal knowledge, in the very nature of things the burden rests upon P of proving intention by D, or at least recklessness on D's part as to the effect of his actions or statements. This being so, there is a strong inference that every element in rape was intended by the draftsman to require actual knowledge on D's part and that the wording of s. 347 has this effect. Moreover, it is desirable to keep the criminal law under the Codes in line with the common law where this can be done without violence to the wording of the statute, and it seems that

35. Hence the rule of practice which requires corroboration on a charge of rape, and the importance attached to an early complaint by the victim.

the interpretation of the offence of rape put forward here represents the position at common law.[36]

Conclusion.

It is submitted in conclusion that hitherto, both at common law and under the Codes, too little attention has been paid to stating the effects of mistake of fact upon criminal responsibility with precision. This has led at common law, not only to recurrent uncertainty as to what those effects are, but in some instances to important, and not necessarily desirable, inroads on the principle of *mens rea* itself.[37] Under statute there has emerged the possibility that offences of negligence may be created through simple inadvertence to the importance of the word "reasonable". Under the Codes a process of careful analysis is necessary if absurdly unjust results are to be avoided. One can only hope that the future will tell a different tale.

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36. See the discussion by Morris and Turner in (1954) 2 Univ. Qld. L.J., 247.
37. Conspicuously in bigamy. Ever since *Tolson* (1889) 23 Q.B.D. 168, mistake, to be a defence to bigamy, has had to be reasonable. There is no obvious virtue in this rule.

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