STRICT RESPONSIBILITY: A COMMENT.

The writing of this article was prompted by Mr. Howard's article on "Strict Responsibility in Western Australia."[1] I subscribe wholeheartedly to what I believe is his basic contention—that the sections of the Criminal Code relating to criminal responsibility are of general application to all offences committed in this State. And indeed this is undeniable. It would seem too, from the reported decisions in any event, that this has not always been fully appreciated in the past.[2] I do not, however, agree with Mr. Howard's "general theoretical analysis"[3] of sections 23 and 24 of the Code, nor with his assessment of some of the cases he has selected to illustrate his points.

My main objection to his theoretical analysis stems from his premise that the word "act" in section 23 means "an act for which the actor is prima facie criminally responsible"; so that on a charge of selling sub-standard milk the act includes knowledge that the milk was sub-standard. In other words, "act" is to include the whole of the *actus reus* in its widest sense.[4] As a result, difficulties arise in reconciling the two sections, both of which, he asserts, "cover mistake of fact." The solution to this dilemma he finds in the opening words of section 23, arguing that as section 24 requires that there be a "*reasonable* but mistaken belief in the existence of any state of things"[5] in order to afford excuse, this is one of the "express provisions of the code relating to negligent acts and omissions" to which section 23 is subject, and therefore "in the absence of any contrary indication" [in the statute concerned, presumably] "a plea of mistake must be both honest and reasonable; but the closing words of section 24 make it clear that where there is such a contrary indication the mistake need only be honest." In other words, the purpose of section 24 is to restrict the scope of section 23 and its exclusion has the effect of removing this restriction.

1 *Supra*, 229.

2 Sec. 24 of the Code has received express mention in only one case reported in the Western Australian Law Reports—Sharp v. Caratti, (1922) 25 West. Aust. L.R. 133.

3 All quotations in this article except where otherwise indicated are from *Strict Responsibility in Western Australia, supra.*

4 See GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART, 15 *et seq.*; RUSSELL on CRIME, 11th ed., 27-30; and CROSS AND JONES, AN INTRODUCTION TO CRIMINAL LAW, 4th ed., 31-39. See also PERKINS on CRIMINAL LAW, 471-473.

5 See sec. 24 (emphasis added).

The first question that arises is this: Assuming that the requirement that the belief be reasonable deprives an accused of the defence if he has been negligent, is section 24 an express provision of the Code relating to negligent acts? And the answer, it is submitted, is that it is not; no more so than section 23 itself. It offers excuse limited by the reasonableness of the accused's belief: At best, it too excludes negligent acts from its excusatory provisions. The sections in the Code imposing liability for failure to use reasonable care and take reasonable precautions when under an express duty to do so (see sections 262-267 and section 291A) which are clearly within the exception to section 23 and have been judicially recognised as so being,[6] are of a very different nature. The requirement in section 24 of reasonableness is of course significant. It is not enough that the accused believed, the belief must have been reasonable. This seems to import an objective test, but it is doubtful whether a restatement of the requirement in terms of negligence is helpful. Glanville Williams regarding such a requirement says[7]: "The result, whether intended or not, is that [the offence] can be committed by negligence." It would be more correct to say that the accused will be denied the defence if he has been negligent. According to J. W. C. Turner,[8] however, since the defence raises an essentially subjective point the requirement of reasonableness is "simply a matter of evidence", though he too states: "If the facts upon which he [the prisoner] relies are such that, in the opinion of the jury, they would not have misled an ordinary 'reasonable' man to think what the prisoner alleges they misled him to think, then the jury may well refuse to believe that he was misled . . ."[9] And in fact it is unlikely that a judge when summing up to a jury will direct in terms of negligence or that such a direction will be of much assistance to them. If he should choose to sum up in such terms presumably he will have to distinguish between civil and criminal standards of negligence and direct that only criminal negligence will deprive the accused of the defence—though this has not as yet been judicially determined in this context.

Next, in the terms of section 24 it is the operation of the *rule* in the section that may be excluded. It would require some very astute drafting to extend the excusatory provisions in section 23 by excluding the rule in section 24. This has not as yet been achieved by express

6 See, for example, R. v. Callaghan, (1952) 87 Commonwealth L.R. 115, at 119.
7 *Op. cit. supra,* at 119, 166.
8 RUSSELL on CRIME, 11th ed., 80, and KENNY, OUTLINES OF CRIMINAL LAW, 17th ed., 54.
9 RUSSELL on CRIME, 80.

enactment. For the implied exclusion of the rule Mr. Howard refers to offences "of 'knowingly' or 'wilfully' doing something", the effect of which he says "is impliedly to exclude liability for negligence and . . . leave . . . responsibility to be determined by the rule as to volition in section 23." While I readily concede that the use of either of these expressions does with very few exceptions[10] have the effect of excusing an accused notwithstanding his negligence, it seems unnecessarily devious to read into them an implied exclusion of a provision in the Code affording only reasonable mistake as a defence in order to extend the operation of another provision to which it is said to be subject. The short, simple, and practical answer is that for the proof of knowledge or wilfulness as an element of an offence the terms of section 23 and section 24 are really not directly relevant, and need not be called in aid.

Moreover, the question of how mistake of fact as a defence could be totally excluded would also offer considerable difficulty. If Mr. Howard's contention is correct then it would be necessary not only to exclude the rule in section 24 but make provision for the exclusion of mistake as a defence under section 23. Here again there has been no instance of this having been done expressly, or for that matter, impliedly. Such exclusion would need somehow to preserve the defence of involuntary act other than under mistake. It seems to have been generally accepted[11]—and quite rightly it is submitted—that the exclusion of the rule in section 24 has the effect of depriving the accused completely of his defence of mistake of fact.

Up to this stage Mr. Howard's analysis has rested squarely on a basis of statutory interpretation and may be put thus: The sections are mutually exclusive; unless it is excluded section 24 applies; if it is excluded, then section 23 comes into operation. But he follows this with an assertion that a distinction must be drawn between "mere absence of knowledge or simple ignorance, and a positive wrong belief or mistake. Where the defendant pleads simple ignorance he is relying on section 23 . . . Where he pleads mistake of fact he is relying on section 24 for he is precluded from relying on section 23 . . . because the opening words of section 23 have the effect of referring a plea of mistake of fact, as opposed to simple ignorance, for consideration under section 24; for section 24 says that a negligent mistake is no defence." This is difficult to follow. Whatever the defendant's plea

10 See GLANVILLE WILLIAMS, *op. cit.*, 125-126.

11 In Queensland certainly; see Brimblecombe v. Duncan, [1958] Queensland R. 8, and the earlier cases mentioned therein.

might be, if section 24 is excluded by the law relating to the subject, then under Mr. Howard's previous contention section 23 would apply to both simple ignorance and mistake of fact. And if section 24 is not excluded, this assertion arising from the distinction between simple ignorance and positive wrong belief would seem to depend on the proposition that a plea of "positive wrong belief or mistake" always raises a question of negligence and that a plea of "simple ignorance" never does. But this is surely not necessarily so. It is doubtful too whether the distinction is of any real assistance in determining whether or not there was "an honest and reasonable but mistaken belief in the existence of [a] state of things", which is the essential matter of enquiry under section 24. It may well be that to succeed with a defence under section 24 it would have to be shown that the accused adverted to the circumstances and came to an affirmative though mistaken belief, but this does not alter the fact that the application or otherwise of the section is a question of statutory interpretation.

These difficulties are readily resolved if the word "act" in the context of section 23 is confined to its primary meaning of muscular contraction or bodily movement.[12] The three possible elements of the *actus reus*—the act, the circumstances, the consequences—then fall neatly into the pattern of the two sections.[13] The first paragraph of section 23 requires that the act be volitional. Criminal responsibility does not attach to involuntary actions—convulsive or reflex, nor to acts done under physical force, and probably not to action in conditions of sleep-walking, hypnosis, or automatism. But it is only the primary act, the bodily movement, which must be shown to have come about

12 This incidentally is the meaning expressly adopted for the word in the Model Penal Code of the American Law Institute. In Tentative Draft No. 1, Article 2, sec. 2.01—Definitions—"Unless the context otherwise requires, 'act' or 'action' means a bodily movement, whether voluntary or involuntary." A note explains: "The description of an action may, and usually does, refer not only to the bodily movement proper but also to those attendant external circumstances, e.g., pulling the trigger or driving the car . . . It seems unnccessary and inconvenient to insist . . . that pulling the trigger or driving the car must be viewed not as acts but as results of acts, i.e., of moving a finger or a foot."

"'Voluntary' means responding to an inward effort of the actor, whether conscious or habitual."

13 Sir Samuel Griffith, in his letter of 29th October 1897 forwarding the Draft Code to the Attorney-General of Queensland, with reference to Chapter V, Criminal Responsibility, wrote: "No part of the Draft Code has occasioned me more anxiety, but I may add that I regard no part of the work with more satisfaction." It is submitted, with but slight reservations, that Sir Samuel was justified in his satisfaction. (Extracts from the letter are included as an introduction with the bound volumes of the 1902 Criminal Code of Western Australia).

from the exercise of the will. Section 24 then brings in the knowledge of the circumstances in which the act is done, and excuses a volitional act done "under an honest and reasonable, but mistaken, belief in the existence of [a] state of things."[14] And then in those cases in which the consequences which result from the act form part of the *actus reus,* the second paragraph of section 23 makes the intention[15] as to those consequences immaterial "unless the intention to cause a specific result is expressly declared to be an element of the offence."

On the charge of selling sub-standard milk then the accused could hardly contend that he *acted* independently of the exercise of his will. But his act having been volitional, the circumstances in which he acted are nonetheless relevant. It is still open to him (subject to the possible exclusion of the rule in section 24 as a matter of statutory interpretation) to assert that he was mistaken as to the state of things; that he reasonably believed that the milk was up to standard, or was not sub-standard. As the accused's intention to cause a particular result would not be an element of the offence, the question of the result or consequence of his act is not material.

14 Hence a wrongful belief, however honest and reasonable, in the *effect,* i.e., in the consequences that will result from a particular act in particular circumstances, will not excuse unless it comes within the terms of the second paragraph of sec. 23. It is not a "belief in the existence of [a] state of things" so as to amount to a mistake of fact in the terms of sec. 24: See R. v. Gould and Barnes, [1960] Queensland R. 283.

Nor is it necessary for the accused to prove the mistaken belief. He needs but to produce some evidence to shift the burden of proof to the prosecution: See Loveday v. Ayre, [1955] State R. (Queensland) 264, and Brimblecombe v. Duncan, [1958] Queensland R. 8; and in Western Australia, in Gibson v. Salter, [1960] West. Aust. R. 35, Wolff S.P.J., though he found it unnecessary to consider whether sec. 24 applied on a charge under the Health Act of selling sub-standard milk, indicated that he was of similar opinion regarding the burden of proof. On the other hand, Dean J. of the Supreme Court of Victoria considered that the onus was on the defendant to establish the common law defence of "honest and reasonable belief, . . . in a state of facts which if true would exculpate:" See Gherashe v. Boase, [1959] Argus L.R. 218, at 219. See also Bonner, [1957] Victorian R. 227, in which the majority of the Supreme Court of Victoria (Herring C.J., Gavan Duffy and O'Brien JJ., with Barry and Sholl JJ. dissenting) held that on a charge of bigamy the burden was on the accused to prove that he believed on reasonable grounds that his former marriage had been dissolved.

15 Mr. Howard's suggestion that intention imports a consequence that is positively desired is surely untenable. See Lang v. Lang, [1955] A.C. 402, at 428-9; R. v. Smith, [1960] 3 Weekly L.R. 92, [1960] 2 All E.R. 450, at 455. The reversal of the judgment of the Court of Criminal Appeal by the House of Lords ([1960] 3 Weekly L.R. 546, [1960] 3 All E.R. 161) in the latter case does not in any way affect the position though Viscount Kilmuir L.C. seems less precise in his use of the words "intent" and "desire" (see [1960] 3 Weekly L.R. 546, at 558).

Some difficulty could arise where the offence is not framed in terms of an act (or omission)—the "unlawful possession" cases being typical. This difficulty has in general been overcome in the criminal law by importing into the expression "possession" a requirement of "knowledge of the existence and whereabouts of the thing" possessed.[16] The knowledge in this context does not go to the "circumstances" element of the *actus reus* but rather to the voluntary assumption, the conscious retention, or the failure to divest oneself of the possession[17] and thus is drawn into the "voluntary act" element of the offence.[18] Mr. Howard himself refers to the "unlawful possession" type cases—presumably in support of his contention that "both section 23 and section 24 cover mistake of fact." He says that if the accused denies knowledge of the possession, "he is setting up section 23, but if he admits knowledge of the presence of the article but denies knowledge of its quality he is setting up section 24." I agree, to the extent indicated above, that the denial of knowledge of possession could be a reliance on section 23. It matters little if at all from a practical point of view under the Code whether "possession" be regarded as a word "which [had] previously acquired a technical meaning" under the rule for the interpretation of Codes laid down in *Bank of England v. Vagliano Bros.*,[19] or whether reference be made to section 23 to ascertain whether there had been an "act" of acquisition, or an "omission" to divest. But the denial of knowledge of possession (as opposed to knowledge of the quality of the article possessed) cannot amount to a defence of mistake of fact as Mr. Howard contends. It forces him into the impossible position of having to read from the statutory provision creating the "unlawful possession" offence both an exclusion of the rule in section 24, to enable a reliance on section 23 (when there is a denial of knowledge of possession), and at the same time a non-exclusion of the rule to enable a reliance on section 24 (when

16 See GLANVILLE WILLIAMS, *op. cit.*, 8.

17 *Ibid.*, at 7.

18 In Lawrence v. Lake, [1921] Queensland W.N. 40, the appellant having been convicted of "unlawfully" having opium in his possession, Shand J., though he dismissed the appeal, stated: ". . . a man who was ignorant that a parcel in his possession contained opium would be protected by the provisions of s. 23." The judgment appears to have been delivered *ex tempore* though the case was argued, and it is submitted with respect, though in the circumstances it was of no practical importance, that his Honour was wrong. The possession of the parcel being voluntary, the mistake as to the nature of the article possessed should have been considered in the terms of sec. 24. It would have been otherwise had the accused not known that the parcel was among his belongings.

19 [1891] A.C. 107, at 145.

there is a denial of knowledge of the quality of the article possessed). Nor would he be able to find a way out in the opening words of section 23 unless he contends that denial of knowledge of quality raises an issue of negligence and denial of knowledge of possession does not.

To turn next to the cases selected to illustrate this point. First, it is not correct to say that "the only case in which the relevance of any of the general sections of the Code to an offence charged under another statute has been observed in *Sharp v. Caratti.*"[20] The Supreme Court in 1944 in *Snow v. Cooper*[21] and in 1955 in *Wilson v. Dobra*[22] expressed itself quite clearly on the applicability not only of Chapter V which deals with Criminal Responsibility—and which is expressly made applicable by section 36 of the Code—but of section 7, Parties to the offence, and indeed of all the general provisions of the Code, to all offences (subject of course to statutory exclusion) committed in Western Australia. Mr. Howard repeatedly refers to the failure of the Court to appreciate the relevance of section 36 and it is true that section 36 does statutorily apply the provisions of Chapter V, Criminal Responsibility, to all offences against the statute law of Western Australia; but it would seem well established that even without section 36 the provisions of the chapter would, with all the other general provisions of the Code, so apply.[23]

Of the cases in which Mr. Howard considers "the actual decisions arrived at are not contrary to what one would expect", despite the failure of the Court to see "the relevance of section 36",[24] it is not altogether surprising that the Courts did not refer to the criminal responsibility provisions of the Code. *Coleman v. Richards*[25] and

20 (1922) 25 West. Aust. L.R. 133.

21 (1955) 57 West. Aust. L.R. 92. The reporting of this decision was apparently prompted by the judgment in Wilson v. Dobra, note 22 *infra,* in which it was followed.

22 (1955) 57 West. Aust. L.R. 95.

23 The Supreme Court of Queensland seems to be of the same opinion; see, for example, Kennedy v. Bates, [1959] Queensland R. 84; and in Connolly v. Meagher, (1906) 3 Commonwealth L.R. 682, Griffith C.J. (who had drafted the Code) in delivering the judgment of the High Court had no hesitation in holding that sec. 16 of the Queensland Code applied to a charge under the Licensing Act 1885.

24 Mr. Howard could also perhaps have included Isherwood v. O'Brien, (1920) 23 West. Aust. L.R. 10, with these cases. The accused claimed that he honestly believed that he could foretell the future and was therefore not guilty of *pretending* to tell fortunes. On the facts as found however he was clearly guilty.

25 (1941) 43 West. Aust. L.R. 21.

Gee v. Wills[26] relate to charges under Commonwealth legislation; the former under the National Security (Subversive Associations) Regulations, and the latter under the National Security (Rationing) Regulations. As the National Security Act 1939 contains no provisions relating to criminal responsibility, section 80 of the Judiciary Act 1903 would make " the common law of England as modified by the . . . statute law in force in the State . . ." applicable. This raises a nice question of whether the Criminal Code, "a code intended to *replace* the common law",[27] comes within this definition? A question which does not appear as yet to have been judicially considered.[28] *Wrightman v. Copperwaite*[29] was an "unlawful possession" case and the issue turned on the question of whether or not the accused was in "possession" of the stolen property. In *Savage v. Hungerford*[30] the charge revealed no offence under the statute, so the question of criminal responsibility under the Code did not arise. Similarly in *Mouritzen v. White,*[31] while the expression "knowingly allow" certainly required proof of knowledge in the barman, the magistrate having found that the barman must have known that the intoxicated men were on the premises, the licensee was clearly guilty in the terms of section 45 of the Wines, Beer and Spirit Act 1880 which made him liable for the barman's default, and a discussion of sections 23 and 24 would have served no purpose. *Stephens v. Taufik Raad*[32] too is hardly a good example, no

26 (1945) 47 West. Aust. L.R. 24.

27 *Per* Dixon and Evatt JJ. (as they then were) in Brennan v. The King, (1936) 55 Commonwealth L.R. 253, at 263 (with emphasis added).

28 In Hardgrave v. The King, (1906) 4 Commonwealth L.R. 232, the accused having been convicted on a charge under the Commonwealth Audit Act 1901, a Queensland Court of Sessions stated a case for the High Court on a point of the admissibility of evidence. During the course of counsel's argument, Griffith C.J. referred to the definition of criminal intention in the Queensland Criminal Code 1899, secs. 23 and 24; but no mention at all of the Code is made elsewhere in the report. In Waterside Workers' Federation of Australia v. Birt & Co. Ltd., [1918] State R. (Queensland) 10, Cooper C.J. took it for granted that the section applied in the case of a charge against the defendant company, under sec. 49 of the Commonwealth Conciliation and Arbitration Act 1904-1911, of wilful default in compliance with an award. "An essential part of the complaint", said his Honour (at 19), "is the allegation of wilfulness, and it is important to consider that element in reference to a principle of law embodied in s. 24 of the Criminal Code." Why the allegation of wilfulness should make reference to sec. 24 specially important is not clear—other than possibly as an assurance that the rule has not been excluded. But the initial issue of whether or not the provisions of the Code applied to offences committed under a Commonwealth statute was not considered at all.

29 (1930) 32 West. Aust. L.R. 101.

30 (1902) 4 West. Aust. L.R. 135.

31 (1910) 12 West. Aust. L.R. 158.

32 (1906) 8 West. Aust. L.R. 183.

question of mistake or the intention of the accused being involved, the issue being whether the accused had in fact advertised representing himself as qualified to practise medicine.

In his second group of cases, "those . . . in which the court has imposed strict responsibility", Mr. Howard includes four cases. In three of these cases I would agree that the Court should have considered the criminal responsibility sections of the Code but did not, and the decisions in two of the three might well have been wrong as a result.

Durham v. Ramson[33] does appear to have been a bad decision. On the facts as found, section 24 of the Code would clearly have afforded an answer to the charge unless its operation was excluded, but the section is not mentioned at all in the judgment nor does it appear to have been cited to the Court in argument. The case was decided on section 7 of the Sale of Liquors Amendment Act 1897, the material part of which reads: "Any licensed person who, by himself, his agent or servant, . . . shall leave upon his licensed house or premises any liquor which is adulterated . . . shall, on conviction . . . be liable . . ." A proviso gives a defence in the case of spirits adulterated to a limited extent with water. The Court interpreted the section as imposing strict liability and excluding *mens rea*. It may be that it would also have excluded the operation of section 24 but the fact remains that the Court did not address itself squarely to this—which should have been the issue before it. And in *Brown v. Shennick*,[34] on an appeal from a conviction under the Wines, Beer and Spirit Sale Act 1880, Burnside J. in a short judgment with which Rooth J. the only other judge on the bench concurred, at page 108 stated: "The Statute does not say anything about a person 'honestly believing'." But section 24 of the Code does, and the real issue of whether or not the section was excluded was not faced. In *Robinson v. Torrisi*[35] too, no reference was made to the Criminal Code sections, though, and in this I seem to disagree with Mr. Howard, I think that from the wording of section 51 of the State Transport Co-ordination Act 1951 (which makes both "the driver and the owner of the public vehicle which (a) operates on any road. and (b) is not licensed . . . guilty of an offence . . ." and also provides a good defence to the driver if "he believed on reasonable grounds that such public vehicle was licensed . . .") the Court would have as readily excluded both sections 23 and

33 (1907) 9 West. Aust. L.R. 76.
34 (1908) 10 West. Aust. L.R. 107.
35 (1938) 40 West. Aust. L.R. 62.

24 of the Code as it excluded the doctrine of *mens rea*. But here too the fact remains—the case was not argued on, nor does the judgment refer to the sections of the Code, which should have been considered.

Finally, in this connexion, the case of *Sweeney v. Denness*[36] in which the accused had been charged with knowingly supplying liquor to "a person under the age of 21 years" and about which Mr. Howard says: "The enquiry should have been directed also to ascertaining whether the statute in question excluded sections 23 and 24 of the Code." But in fact this issue was not raised. The appeal was confined to the question of the admissibility of evidence of age. The accused admitted that he had not asked the youth his age but "from his appearance thought that he was 18 or 19 years old",[37] so no question of intention or mistake arose. There is an error in the report which refers to the appellant having made the admission when clearly the judge meant the accused respondent.

Next on the question of vicarious liability. A consideration of section 23 is of course almost always relevant in the master and servant type situation when the master is to be held liable for the servant's acts.[38] It is submitted, however, that the enquiry should not be directed to whether the accused was acting "through an agent", or "recklessly", but to whether or not he was a party to the offence in the terms of sections 7, 8, and 9 of the Code.[39] Mr. Howard not having directed himself to a discussion of these sections, nor shall I, except insofar as they might have been considered in the cases he refers to.

Of the four cases that he considers "fall on the right side of the line", *Gee v. Wills* does not call for further comment. In *Duce v. McGuffie*[40] I agree that the Court was right in answering the case in favour of the accused, though they based their decision on "the law as laid down in the cases",[41] on the basis that a master is not liable for the conduct of his servant acting outside the scope of his authority without any consideration of the relevant sections of the Code. In *Walsh v. Rosich*[42] also, no reference at all was made to the Code either in the argument which is reported, or in either of the two

36 (1954) 56 West. Aust. L.R. 52.

37 *Ibid.*, at 53.

38 There are of course statutory exceptions.

39 For a discussion of these sections in this context see R. v. Solomon, [1959] Queensland R. 123.

40 (1909) 11 West. Aust. L.R. 118.

41 *Ibid., per* McMillan J. at 121-122.

42 (1947) 49 West. Aust. L.R. 74.

judgments. Vicarious liability was not squarely in issue, but on the facts there might possibly have been some scope for arguing the relevance of the Code. In *Cooper v. Royal Antediluvian Order of Buffaloes*[43] too, there was little if any scope to call in aid the sections of the Code either on the return of the order *nisi* to review before Walker J. of the Supreme Court, or on the appeal to the High Court.[44]

Mr. Howard cites *Mold v. Hodges*[45] and *Lynch v. Brown*[46] as cases "on the other side" of the line, that is, as cases in which the decisions have been wrong because of the failure to take the relevant provisions of the Code into consideration. In *Mold v. Hodges* certainly "the judgment contains no discussion of vicarious responsibility", but Mr. Howard has overlooked the fact that under section 19 (2) of the Bread Act a "master or employer [is] liable for any act or omission of his servant or agent." *Lynch v. Brown,* on the other hand, was a bad decision. Both McMillan C.J. and Burnside J. who constituted the Court rested their judgments on the proposition that the "acts [of the servant] in the course of his employment are those of his master",[47] following cases like *Sherras v. De Rutzen,*[48] and *Attorney-General v. Carlton Bank Ltd.*[49] and without any reference to the Code. The argument of counsel for the appellant complainant had also been along these lines. The respondent defendant did not appear and was not represented on the appeal.

In conclusion I would repeat that I agree that certainly in the past there seems to have been some unawareness of the application of the general provisions of the Criminal Code to offences committed under other statutes. It is remarkable that there are so few cases in which any mention of the Code is made. That there was scope for argument in some of the cases that the provisions of the Code afforded excuse is undeniable. But this criticism does not apply with the same force to the more recent decisions. Since 1955 in any event there has been reported authority that the Code contains "a general enunciation of principles to apply to the whole of our criminal law",[50] prin-

43 (1948) 50 West. Aust. L.R. 72.

44 *Sub nom.* Cooper v. Bennett and Bawden, (1948) 50 West. Aust. L.R. 80; Bennett v. Cooper, (1948) 76 Commonwealth L.R. 570, [1948] 2 Argus L.R. 495.

45 (1948) 50 West. Aust. L.R. 47.

46 (1917) 19 West. Aust. L.R. 78.

47 *Ibid.,* at 80, *per* McMillan C.J.

48 [1895] 1 Q.B. 918.

49 [1899] 2 Q.B. 158.

50 Snow v. Cooper, (1955) 57 West. Aust. L.R. 92, at 94 *per* Wolff J.

ciples of "general application to all offences whether triable at petty sessions or elsewhere and . . . not confined to offences mentioned in the Criminal Code and to those constituted before the date of the enactment establishing [it]."[51]

In *Gibson v. Salter*,[52] Wolff S.P.J. (as he was then) saw fit to say:[53] "While it is true that the onus rests on the prosecution at all times to prove beyond reasonable doubt that a person knows all the facts essential to constitute an offence, there has been much argument as to its applicability to the multiplicity of petty offences created by statutes and regulations: *R. v. Dacey*,[54] *Dayman v. Proudman*,[55] *McLeod v. Buchanan*.[56] On the facts as found it is not necessary to consider how far the defence of honest and reasonable mistake could apply in such a case." This dictum is perhaps unfortunate as it raises some doubt as to the position. The true issue in Western Australia surely is whether or not the rule in section 24 of the Code has been excluded and it is submitted with respect that the cases cited can hardly be of direct assistance in the solution of this question. In *Proudman v. Dayman*,[57] Dixon J. (as he then was) stated the common law position with great clarity as follows: "As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence."

The strength of the presumption that the rule applies to a statutory offence newly created varies with the nature of the offence and the scope of the statute. If the purpose of the statute is to add a new crime to the general criminal law, it is natural to suppose that it is to be read subject to the general principles according to which that law is administered. But other considerations arise where in matters of police, of health, of safety or the like the legislature adopts penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be

51 Wilson v. Dobra, (1955) 57 West. Aust. L.R. 95, at 96 *per* Dwyer C.J. The Judge's statement was in fact made with reference to sec. 7 but is clearly of general application.

52 [1960] West. Aust. R. 35.

53 *Ibid.*, at 37-38.

54 [1939] 2 All E.R. 641.

55 [1941] South Aust. State R. 87. Special leave to appeal from the decision of the Supreme Court of South Australia was refused—see Proudman v. Dayman, (1941) 67 Commonwealth L.R. 536.

56 [1940] 2 All E.R. 179.

57 (1941) 67 Commonwealth L.R. 536, at 540.

prejudiced. In such cases there is less ground, either in reason or in actual probability, for presuming an intention that the general rule should apply making honest and reasonable mistake a ground of exoneration, and the presumption is but a weak one. But if the Criminal Code is of general application to all offences committed against the statute law of Western Australia the question here is not whether the general rule should apply but whether the rule in section 24 has been excluded, and the section itself contains the directions as to its exclusion: "The operation of [the] rule may be excluded by the express or implied provisions of the law relating to the subject." The Supreme Court of this State does not appear to have considered the interpretation of this provision. In any event there is as yet no reported decision of such consideration. But the Supreme Court of Queensland has; and it has concluded that the question of whether or not the rule is to be excluded, "must be answered with reference to the whole of the statute creating the offence [charged], with particular reference to the section that actually creates it",[58] and that "there is no justification for attempting to read the section as if the words 'of the law relating to the subject' were somehow intelligibly inverted to mean 'the subject to which the law relates'."[59]

ERIC J. EDWARDS.*

58 *Per* Stanley J. in Brimblecombe v. Duncan, [1958] Queensland R. 8, at 18.

59 *Ibid.* It is not as clear to me, as apparently it was to His Honour, that "the *law* relating to the subject" necessarily excludes a consideration of the subject matter of the statute in question. It is submitted that it is at least arguable that as a matter of statutory interpretation (when considering a statutory offence to ascertain whether or not the rule in sec. 24 is to be impliedly excluded) the subject matter of the statute in question could be of some assistance.

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