MENS REA AND THE LIQUOR LAWS

INNES v. McKINLAY; INNES v. POULTER, [1954] N.Z.L.R. 1054.

Some recent decisions have once again indicated the difficulties encountered by the courts in endeavouring to interpret many of our liquor laws. Thus McGregor J.'s interpretation of the section making it an offence for a barman to serve liquor to a person apparently under twenty one years of age (1) in Innes v. McKinlay; Innes v. Poulter, [1954] N.Z.L.R. 1054 appears to be irreconcilable with Read J.'s interpretation of the same section in Jones v. McDonald, [1939] N.Z.L.R. 928. Then again a magistrate, in two recent unreported decisions, appears to have contradicted himself in endeavouring to interpret the section dealing with liquor in the vicinity of a dance hall (2). These cases will be fully discussed in the course of this article.

It is suggested now, however, that the cause of confusion was the same in all these cases. It is succinctly stated by Glanville Williams in his recent book Criminal Law (3):

> There is a conflict of authority whether the strict interpretation is to be applied under the Licensing Acts.

The reason for his statement is this. Many sections creating licensing offences do not contain such words as "knowingly" or "wilfully" with reference to doing the forbidden act. They are in the form:

> If A does a certain act he commits an offence.

Some members of the judiciary believe, that in certain cases, this form creates an offence of strict liability; that is, A commits the offence if he simply does the forbidden act, and whether he intended to do it or not is quite irrelevant. Thus it is an offence to serve a constable with liquor while he is on duty (4). According to the strict interpretation of this section, if a licensee serves a constable whom he

honestly believes is not on duty, but who in fact is on duty, the licensee is guilty of the offence, although he had no intention whatsoever of doing the forbidden act.

According to the other, and contrary, school of judicial opinion the licensee would not be guilty of the offence if he did not intend to perform the forbidden act of serving a constable on duty. Members of this school of thought hold that sections in terms of simple prohibition without reference to the mental element do not create offences of strict liability. That is, they hold that mens rea, or an intention to do the forbidden act, perhaps the most important basic concept in English criminal law, is not ousted from these offences simply because such terms as "knowingly" or "wilfully" are not used with reference to doing the forbidden act.

Mens rea in the discussion that follows will be used with the meaning given by Shearman J. in Allard v. Selfridge and Co. Ltd., [1925] 1 K.B. 129 at 137:

> The true translation of that phrase is criminal intention, or an intention to do the act which is made penal by statute or by the common law.

This clash of judicial opinion, as to the correct interpretation of these contentious sections, has produced in the past, and still is producing chaos in this branch of the law. Furthermore, as will be indicated presently, grave injustice is often a most unfortunate corollary of this confusion. This lamentable state of affairs has provoked the eminent American jurist Hall to exclaim (5):

> This branch of our law is so thoroughly disorganized, rests so largely on conjecture and unsound psychology and effects such gross injustice as to require major reform.

Hall in this statement is referring to this problem in interpretation, and its effects, not only in regard to liquor laws. This particular problem spreads far beyond the realm of these laws, which are made the basis of this article simply because they provide an excellent example of this widespread problem. For liquor laws are only one species of a

very much larger genus and this problem, possibly the greatest general problem in statutory interpretation today, is common to the whole class of offences to which liquor laws belong.

This is the great and growing class of offences regarded by many as not being "real" crimes and variously termed quasi-criminal offences, mala prohibita, or, by American writers, "social welfare" offences. Such offences relate to licensing, public revenue, public health, pure food, trade, gaming, municipal affairs, traffic, transport regulations, nuisance etc. These are contrasted with what are termed "real" crimes, or mala in se, such as murder, rape, arson etc. It is often asserted that this distinction is no longer of importance in criminal law. However true this assertion may be generally, it is submitted that it is still of vital significance in present day statutory interpretation and, as was suggested earlier, gives rise to what is perhaps the most vexing general problem facing the courts today in this field.

In the case of "real" crimes (with very few and well defined exceptions) mens rea is <u>always</u> regarded as an essential constituent of the offence whether it be expressly required or not. But this basic concept of English criminal law is regarded by many of the judiciary as having no general application to quasi-criminal offences. So Kennedy L.J. in <u>Hobbs</u> v. <u>Winchester Corporation</u>, [1910] 2 K.B. 471 stated (at 483):

> I think there is a clear balance of authority that in construing a modern statute this presumption as to mens rea does not exist.

This viewpoint has been strongly challenged by other judges. Thus Devlin J. in <u>Reynolds</u> v. <u>G.H. Austin and Sons Ltd.</u>, [1951] 2 K.B. 135, at 148, after repeating this statement of Kennedy L.J., repudiated it in these words:

> I need refer only to the dictum of Lord Goddard C.J., in <u>Harding</u> v. <u>Price</u>,[[1948] 1 K.B. 695, 700]: "The general rule applicable to criminal cases is actus non facit reum nisi mens sit rea . . . . In these days when

> offences are multiplied by various regulations and orders to an extent which makes it difficult for the most law-abiding subjects in some way or at some time to avoid offending against the law, it is more important than ever to adhere to this principle.

By reference to the liquor laws as illustrative of the general problem, the following submissions will be made. Firstly that offences of strict liability do cause grave injustice. Secondly that at present such offences may be created, and are in fact created, by individual members of the judiciary according to their own personal views on the exclusion or retention of mens rea - or in Allen's words (6) by "impalpable and indefinable elements of judicial spirit or attitude". Thirdly it will be submitted that this should certainly not be possible and that if these offences of strict liability must be created they should be created in absolutely unequivocal terms so that the public and the courts would know exactly where they stand. Finally it will be submitted that remedial measures, which will be respectfully suggested, would do much to bring order into the present confused state of this branch of the law.

Apologists of strict liability will no doubt deny that injustice flows from such offences. For, they will assert, it matters not whether an offence be classified as one of strict liability or not because in the absence of mens rea the penalty is always monetary and small. Furthermore, they will claim, the creation of these offences is fully justified because "they put pressure on the thoughtless and inefficient" (7).

With due respect to those who hold such views it is submitted that both justifications represent a superficial viewpoint which cannot be too strongly repudiated. If these offences are aimed at the careless, and it is not disputed that they are, it is surely remarkable that proof of the utmost care is no defence to a charge laid under them. Further it is submitted that to excuse them by claiming that in the absence of mens rea their only penalty is monetary and small is a gross misstatement of their true effect.

As proof of this it is instructive to observe the impact of such an offence on the accused in Police v. Burns (Unrep. d. Gore Magistrate's Court, October 27, 1953). The accused had recently sold his car and was awaiting delivery of a new one. Wishing to attend a ball he borrowed a car from a friend. He parked this car beside the entrance to the hall. Unknown to him the owner had left a bottle of beer in the back. The beer was discovered by patrolling police. The unfortunate driver was forced into the unwelcome glare of court proceedings to face a charge of having liquor in the vicinity of a dance hall while he was attending the dance. The magistrate decided that this was an offence of strict liability; hence, although he accepted as a fact that the accused did not know of the beer, he felt bound to convict him. So the accused suffered the odium of conviction - without penalty - a belated gesture of mercy which must have astonished him. It should be noted that there is no indication beside the record of the conviction that the accused was both morally innocent and in no conceivable way negligent. Further he lost much valuable time, had legal costs to pay and no doubt lost a certain amount of public respect.

His feelings however may be imagined when he learned that the same magistrate, some twelve months later, in circumstances identical in all material respects, held that if the accused did not know of the presence of liquor in the car he was not guilty of the offence: Police v. Winsloe (Unrep. d. Gore Magistrate's Court, November 23, 1954). It appears that counsel cited Innes v. McKinlay (supra), in this case and McGregor J.'s view that mens rea was a necessary constituent of another licensing offence may have been responsible for the volte-face of the learned magistrate.

It is because such injustice as this may flow from offences of strict liability that it is submitted that if the Legislature feels that it must create them they should be created in absolutely unequivocal terms.

Before proceeding to substantiate the second submission that nevertheless at present these offences may be, and in fact are, created by judicial spirit or attitude alone, an important preliminary point must be interpolated.

In New Zealand statutory offences are traditionally classified on the basis of whether mens rea is a constituent or not by reference to the locus classicus on the subject here, the classification of Edwards J. in R. v. Ewart (1905), 25 N.Z.L.R. 709 at 731. Edwards J. divided statutory offences into three classes. This article is concerned only with the second and third. Both these classes are concerned with the classification of offences created by the type of section under discussion, namely those which do not contain such terms as "knowingly" or "wilfully" with reference to doing the forbidden act. Class two of the classification in R. v. Ewart (supra) contains sections of this type which are regarded as creating offences of strict liability. Class three consists of sections similarly worded which are regarded as creating offences which still retain mens rea as an essential ingredient. According to Edwards J. in offences which fall into the third class the onus was not on the prosecution to prove mens rea; the onus was on the accused to prove absence of mens rea if he wished to establish his innocence.

Referring to this in Innes v. McKinlay (supra, at 1057) McGregor J. said:

> I am of opinion . . . the third class of cases in R. v. Ewart . . . now requires qualification in view of the decision of the House of Lords in Woolmington v. Director of Public Prosecutions, [1935] A.C. 462. In accordance with the judgment in Woolmington's case, there is no burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt (8).

The second submission, that at present offences of strict liability may be, and are, created by judicial spirit or attitude alone, may now be restated in terms of the classification in R. v. Ewart (supra). At present the courts may, and do, allocate offences created by this type of section to either class two (strict liability) or class three (mens rea an ingredient) of R. v. Ewart (supra). This is done although the Legislature has used similar wording in all cases and does not appear to have given any indication whatsoever that mens rea was to be excluded in some cases

and retained in others. No section appears to exist which expressly states that the offence which it creates is to be regarded as one of strict liability; nor has Glanville Williams been able to discover any in English law (9).

On what grounds then do the courts decide that a certain offence is one of strict liability? It might well be thought that the answer would be simply this. If a judge or magistrate believed that mens rea was not a necessary constituent of quasi-criminal offences he would always regard simple words of prohibition, without reference to the mental elements, as creating an offence of strict liability. This, strangely enough, is not the case. As if reluctant to completely reject the mens rea doctrine, they claim that in some cases only do such simple words of prohibition spell out strict liability. What further test then do they apply to these words which enables them to diagnose a case of strict liability?

A detailed analysis of cases where strict liability has been thus diagnosed shows that by far the commonest test used and the one mainly responsible for ousting mens rea has been this. The judge or magistrate in considering a section of the type under discussion asks: "Is it a necessary implication [the hallowed phrase] that the Legislature intended mens rea to be excluded from this section?" The answer to this question has often been in the affirmative, although there is nothing to suggest that the Legislature ever thought about it at all . . . ." (per Jordan C.J. in R. v. Turnbull (1943), 44 S.R. (N.S.W.) 108 at 110).

On what grounds then does a judge or magistrate decide that the Legislature must have intended to dispense with mens rea? Glanville Williams suggests two principal ones; the social policy of the section and the heinousness of the crime (10). Other reasons he suggested are these. Some trace the history of the section into legislation now repealed; others regard an express reference to mens rea in one section of the statute as dispensing with it in another where it is not specifically expressed. Then some rely on technical rules of construction; but he states, "it is hard to resist the impression that many decisions depend

simply upon idiosyncrasy"(11) - or in Allen's words (p. 61, ante) on "impalpable and indefinable elements of judicial spirit or attitude".

Hence at present the deplorable offences of strict liability appear to be capable of creation in a most fortuitous, uncontrolled and wholly inexplicable manner. It is impossible to predicate their birth. As Jordan C.J. stated in R. v. Turnbull (supra, at 110):

> . . . no one can now be reasonably sure of the effect of a penal statute [sc. whether it will create an offence of strict liability or not] until it has been tested by prosecutions.

It is now proposed to illustrate and substantiate these submissions by reference to cases involving interpretation of liquor laws.

The problem was first indicated in 1884 and 1895 by two apparently conflicting decisions in England. These were Cundy v. Le Cocq (1884), 13 Q.B.D. 207 and Sherras v. De Rutzen, [1895] 1 Q.B. 918. Prosecutions in these cases were laid under two different sections of the Licensing Act, 1872 (U.K.). Both these sections were of the pattern under discussion here: If A does a certain act he commits an offence. Both, that is, appeared to create the same type of liability. Yet as will be seen the first section was held to create an offence of strict liability while the second was not.

In Cundy v. Le Cocq (supra) the accused was charged under s. 13 of the Licensing Act, 1872 (U.K.) which states:

> If any licensed person . . . sells any intoxicating liquor to any drunken person, he shall be liable to a penalty . . . .

Stephen J., who delivered the judgment of the court held that this section created an offence of strict liability and the fact that the purchaser had given no indication of intoxication and the publican did not know that he was intoxicated was irrelevant.

The court in Sherras v. De Rutzen (supra) in effect refused to follow this decision by refusing to oust mens rea from the similarly worded s. 16 (2) of the Licensing Act, 1872 (U.K.) which states:

> If any licensed person . . . (2) Supplies any liquor . . . to any constable on duty . . . he shall be liable to a penalty . . . .

In this case the publican was acquitted on the ground that he honestly believed that the constable was not on duty.

Stephens J. in Cundy v. Le Cocq (supra) repudiated mens rea on three grounds. He regarded the general scope of the Act - but the same Act was under consideration in Sherras v. De Rutzen (supra). He compared this section with others in the Act where mens rea is expressly required - but the section in the second case was of the same pattern as the one he was considering. He regarded the social policy of the section - but it would not appear to be any less in the interests of society that policemen should not be served liquor while on duty than that persons already intoxicated should be served. Hence it is submitted that these two cases illustrate in a nutshell the unpredictable way offences of strict liability may be created according to judicial spirit or attitude.

There are almost identical sections in the Licensing Act 1908 creating offences identical with those considered in these two cases (12). Cundy v. Le Cocq (supra) was followed here in McVeigh v. Eccles (1899), 18 N.Z.L.R. 44 and Harvey v. Whitehead (1911), 30 N.Z.L.R. 795.

It was not followed in a case this year. Drummond S.M. in Police v. Watson (Unrep. d. Lower Hutt Magistrate's Court, June, 1955) rejected the strict interpretation of the section and held that serving a person already intoxicated was not an offence of strict liability. He said:

> . . . the evidence did not prove beyond reasonable doubt that the barman knew he [sc. the accused] was intoxicated when serving him.

The problem of classifying offences created in this manner arose early in New Zealand also. In Dunn v. Manson (1911), 30 N.Z.L.R. 399, at 403 Edwards J. attempted to classify, according to the scheme in R. v. Ewart (supra), the offences created by s. 205 of the Licensing Act 1908. These are offences which may be committed by a barman. In the course of this judgment Edwards J. suggested obiter that "offence (e) certainly falls within the second class of cases [sc. of R. v. Ewart (supra)]". That is it creates an offence of strict liability. This is the offence which the barman commits if he supplies liquor to

> . . . Any person at a time at which such person is not entitled lawfully to be supplied with liquor . . . .

But under an almost identical Australian section it has been held that this is not an offence of strict liability; Anstree v. Jennings, [1935] V.L.R. 144. In this case it was held that it was a sufficient defence to such a charge that the defendant honestly believed that the person supplied was a bona fide traveller, lodger or boarder.

Differing judicial attitude would in this instance again seem to be the sole criterion for the creation or non-creation of an offence of strict liability.

Further striking evidence in support of the submission that at present offences of strict liability may be, and are, created by judicial attitude alone is found in the varying interpretations of the section making it an offence to supply liquor to a person apparently under the age of twenty one. Some magistrates and judges hold that if the youth who was served appears to them to be under twenty one that is the end of the matter and it matters not that the licensee or barman honestly believed that he was over twenty one. This difference in opinion may easily arise as McGregor J. pointed out in Innes v. McKinlay (supra, at 1056) for:

> . . . what is apparent to the tribunal dealing with the matter from the appearance in the Court of the person supplied may not be apparent to the person supplying in view of entirely different surrounding circumstances, conditions of dress, light, companionship, etc.

Other magistrates and judges do not adopt the strict interpretation of the section and do ask "did the licensee (or barman) intend to serve a person who appeared to be under twenty one years of age?" Harley S.M. recently pointed out in Police v. Nairn; Police v. Hagen (Unrep. d. New Plymouth Magistrate's Court, July, 1955) that this is a matter of no little consequence to the licensee who may lose his licence through being trapped into serving youths under twenty one although he himself has acted with complete honesty.

The present section creating this offence as far as the licensee is concerned is s. 6 (1) of the Licensing Amendment Act 1952 which repeals and replaces s. 202 of the principal Act and provides:

> Every person commits an offence against the Act . . . who, being the holder of a licence . . . under the Act . . . supplies any intoxicating liquor, or allows it to be supplied, whether by sale or otherwise, to any person who is apparently under the age of twenty-one years . . . .

Section 205 (b) of the Licensing Act 1908 creates the same offence where some person other than the licensee supplies the person apparently under twenty one.

McGregor J. in Innes v. McKinlay (supra) in deciding whether or not this is an offence of strict liability made no distinction between supply by the licensee and supply by the barman. This viewpoint is respectfully adopted in the following submissions.

Edwards J. in Dunn v. Manson (supra, at 403) stated obiter that this offence (and another):

> . . . certainly came within the third class of cases defined in The King v. Ewart.

Denniston J. without having to decide the question, came to the opposite conclusion in Eccles v. Richardson, [1916] N.Z.L.R. 1090 at 1094:

> . . . the act - supplying liquor to a person "apparently" under the age of twenty-one is within class (ii) of Rex v. Ewart, and absolutely prohibited without any reference to the state of mind of the accused.

A differing judicial attitude again predicates the birth of an offence of strict liability.

McGregor J. in Innes v. McKinlay (supra) adopted the contrary attitude and held that this was not an offence of strict liability. He did not however refer in his judgment to a relevant decision which followed Denniston J.'s interpretation of the section; that of Reed J. in Jones v. McDonald, [1939] N.Z.L.R. 928. In this decision the learned judge reaffirmed Denniston J.'s view that the offence was undoubtedly one of strict liability.

This case is very instructive as it shows the utter confusion which this type of section generates. The facts were briefly these. The youths secured the liquor from the barman by lying about their true ages. The magistrate in the court below accepted as a fact that the barman honestly believed the ages given, but found as a further fact that to him the youths did appear to be under twenty one. He felt bound by authority to regard this as an offence of strict liability; but felt further that in the absence of mens rea a penalty was morally unjustifiable. He resolved this conflict by dismissing the information under s. 92 (1) of the Justices of the Peace Act 1927 on the ground that the offence was of so trifling a nature that it was inexpedient to inflict any punishment.

On appeal Reed J. emphatically rejected the magistrate's endeavour to avoid the strict liability of the section. He stated at 930:

> As the law stands that [sc. the bona fides of the supplier] is not in issue . . . the supplying is prohibited absolutely, proof of breach of which necessitates a conviction.

In the most recent case however on this subject Police v. Nairn; Police v. Hagen (supra) Harley S.M. in similar

circumstances no less emphatically rejected this view of the section. He said:

> I have had a number of cases - as I think this is one - where the youths deliberately design to trap the barman and licensee. All that can happen to the youth is a £2 fine, but if it goes on the licensee can lose his licence. The scales of justice don't seem to be fairly weighed. It is unfair all the time to blame the barman and the licensee.

He dismissed the charges against the two accused.

It is submitted that these conflicting interpretations of the section indicate again that offences of strict liability may be created by judicial attitude alone.

Section 59 of the Statutes Amendment Act 1939 provides further proof of this submission. This section makes it an offence to have liquor at, or in the vicinity of, a dance hall while attending a public dance.

The subsection most relevant for the discussion states:

> (2) Every person who, while a dance is being held in any hall . . . has any liquor in his possession or control in the hall or in the vicinity of the hall . . . commits an offence.

In Police v. Jordan (1940), 1 M.C.D. 525 Lawry S.M. held that this was not an offence of strict liability. He stated (at 527):

> If an absolute liability is imposed, irrespective of guilty knowledge, hardship and injustice might be imposed.

He pointed out, a passenger or stranger might leave liquor in the defendant's car unknown to him; to find him guilty under such circumstances would be most unjust.

However Paterson S.M. in Police v. Chisholm (1944) 4 M.C.D. 24 decided this was an offence of strict liability on the

ground of the social purpose of the section. He stated (at 27):

> The mischief intended to be put an end to by the enactment under consideration was the use of intoxicating liquor at dances for the purpose of assisting in seducing and debauching young women and girls. The remedy provided is the complete prohibition of the possession of liquor in the vicinity of dance halls.

McCarthy S.M. in Police v. Hawthorne (1951), 7 M.C.D. 168 found he had to choose between these two conflicting precedents. He stated (at 169) "I respectfully agree with Lawry S.M. . . . ." and thus chose to regard the offence as being not one of strict liability.

As indicated earlier, in the two unreported cases, involving borrowed cars with beer left in the back unknown to the borrower, Police v. Barns (supra) and Police v. Winsloe (supra), the same magistrate chose first one classification for this offence then the other.

The consideration of these sections, it is submitted, indicates conclusively that at present these deplorable offences of strict liability may be and are created by judicial spirit or attitude alone.

How may this lamentable situation be remedied? With quasi-criminal offences steadily increasing in number and impinging on the lives of nearly everyone in one way or another it is imperative that an answer to this question be found.

It is first proposed to consider the question on the assumption that the Legislature may unfortunately decide to create in the future and retain from the past offences of strict liability which the courts have created.

On this assumption the following remedial measures are submitted.

First a strong plea is made that if these offences are to be created they should be created in absolutely unequivocal terms. Again if it is decided to retain such offences

already created by the courts these should be restated in the same way. This result may be easily achieved by adding the following words to any section which it is decided should create an offence of strict liability.

> It shall be no defence to a charge under this section that the defendant did not act wilfully.

A further plea is made that the basic principle of criminal law, that mens rea is an essential ingredient of all criminal offences unless specifically excluded be strongly reaffirmed. If this were done the Legislature would soon learn that if it decided to create offences of strict liability it would have to do so in unmistakable terms.

These submissions receive strong support from Jordan C.J. in R. v. Turnbull (supra, at 109, 110):

> . . . it was said by Cave J. in R. v. Tolson [(1899) 23 Q.B.D. 168 at 182] . . . that to eliminate this requirement [sc. of mens rea] in the case of a statutory offence "seems so revolting to the moral sense that we ought to require the clearest and most indisputable evidence that such is the meaning of the Act." If Courts had adhered to this principle, this branch of the law would be free from difficulty. If it had been steadily insisted upon, persons sponsoring a bill by which it was sought to penalise a man for doing something, notwithstanding that he did not and could not know that he was doing it, would very soon have learned that it was necessary to disclose this on the face of the bill either in express terms or by words conveying so necessary an implication of intention in that behalf as to leave no room for doubt about their purpose . . . . Unfortunately this course was not followed . . . . The result has been lamentable.

A strong submission is however made that offences of strict liability may be dispensed with altogether and this without casting any heavier burden on the Crown in adducing the requisite proof and without creating gaps in the law through which alleged offenders may more easily escape.

It is true that the most common justification for offences of strict liability is frankly that of expedience, for in most offences which are construed as being of strict liability, it is argued, it is extremely difficult, if not impossible, to prove the mental element of mens rea. This is no doubt perfectly true. If a person is found to have a bottle of beer in the luggage boot of his car while attending a public dance it is well nigh impossible to prove that he knew it was there. Hence, it is insisted, it must be regarded as sufficient for the prosecution merely to prove the actus reus, for if mens rea too had to be proved it would be almost impossible to ever secure a conviction.

This difficulty, as will be presently indicated, may however be overcome without creating offences of strict liability. The remedial measure which would achieve this would also, it is submitted, do away with the outstanding anomaly inherent in such offences which is the prime cause of the injustice which flows from them. That is the fact, previously indicated, that although these offences are aimed at the careless, proof of the utmost care is no defence to a charge laid under the sections creating them.

The remedial measure respectfully suggested is this. All offences of strict liability should be restated in terms of negligence, with the onus of proving that he was not negligent thrown on the accused. If this were done the prosecution need still only prove the actus reus but the person who had not been negligent would be able to show this and so avoid unjust conviction.

There are some such sections now. Section 213 of the Licensing Act 1908 makes it an offence for a licensee to serve a person against whom a prohibition order has been issued. But the type of proviso suggested above is added.

> Provided . . . it shall be a sufficient defence if the defendant satisfies the Court that he . . . had no reasonable opportunity of knowing and did not know that the person to whom the liquor was served was a prohibited person.

Section 7 of the Food and Drugs Act 1947 provides another good example of this type of Legislation.

> In a prosecution for selling any food or drug contrary to the provisions of this Act . . . it shall be no defence that the defendant did not act wilfully, unless he also proves that he took all reasonable steps to ensure that the sale of the article would not constitute an offence against this Act . . . .

Again in the Civil Aviation Regulations 1953 another helpful illustration of this type of enactment is to be found.

Regulation 18 (2) states:

> The owner, the operator, the hirer and the pilot in command of an aircraft which flies in contravention of . . . these regulations . . . shall be guilty of an offence . . . .

But Regulation 18 (9) states:

> Where a prosecution is taken under subclause (2) hereof, it shall be a defence . . . for the owner [etc.] . . . to prove that the alleged contravention took place without his actual fault or privity.

This very fruitful field is largely untapped. It is strongly submitted that this mode of creating quasi-criminal offences be made the general and not the exceptional mode of creation. In such cases care is a defence and the prosecution need still only prove the actus reus. The onus of proof then lies on the accused to show that he was not negligent, but the civil standard would presumably apply as in the defence of insanity: R. v. Carr-Braint, [1943] 2 All E.R. 156. Of course if a prima facie case of care be made out the prosecution must then rebut this, but this is in no way comparable with their having to prove mens rea in these cases and does not appear to be in any way an unreasonable demand.

Referring to the highly unsatisfactory state of this branch of the law Jordan C.J. stated in R. v. Turnbull (supra, at 110) that ". . . it is too late . . . now to restore elementary and fundamental principles of justice in this field of law." But it is submitted that if this method of drafting quasi-criminal offences be adopted Jordan C.J.'s statement may yet prove unduly pessimistic.

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(1) Licensing Act 1908, s. 205 (b).

(2) Statutes Amendment Act 1939, s. 59.

(3) Glanville Williams, Criminal Law (1953), 245.

(4) Licensing Act 1908, s. 183 (b).

(5) Hall, Principles of Criminal Law (1947), 343.

(6) Allen, Law in the Making (5th ed. 1951), 503.

(7) Pound, The Spirit of the Common Law, 52.

(8) See also Campbell, "Criminal Law: Mens Rea" (1946), 22 N.Z.L.J. 161, 222.

(9) Glanville Williams, op.cit., 238.

(10) Idem 270, 271.

(11) Ibid.

(12) Licensing Act 1908, ss. 181, 183 (b).