CASE COMMENT

REGULATORY OFFENCES

Branding Sheep — Interpretation of the Brands Act 1933-1963 (S.A.) s. 70 (d)

Samuels v. *Centofanti*[1], a recent decision of the South Australian Court of Criminal Appeal, is yet another case upon the interpretation of regulatory offences[2]. The case is of interest in three respects: first, the interpretation of the words "cause" and "authorise", words which commonly appear in regulatory offences, secondly, the doctrine of vicarious liability[3], and thirdly, the application of the defence of reasonable mistaken belief (as propounded by Dixon J. in *Proudman* v. *Dayman*[4])[5].

The respondent D, a farmer, was convicted by a Magistrate on a charge under section 70(d) of the Brands Act 1933-1963 (S.A.) of causing authorising or suffering several sheep which did not belong to him to be branded with his registered brand[6]. D's wife X, who was his business partner, had applied D's brand to some sheep which belonged to a third person and which had strayed onto D's land. In preparation for selling some sheep at the market, D had authorised X to brand all sheep on his property which were not ewes, sucker lambs, sheep fit for sale, or sheep which did not belong to the partnership. D was absent at the time of branding and was unaware that X had branded sheep belonging to a third person. The evidence suggested that D was not negligent in being unaware of this fact[7].

The respondent's conviction was quashed on appeal by Bright J. of the Supreme Court of South Australia on the grounds first, that D had not caused authorised or suffered any sheep not belonging to the partnership to be branded with his registered brand since he had not adverted to X branding sheep which did not belong to the partnership nor (in respect of the question of "suffering")

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1. As yet unreported. References here given are from the original judgments.
2. For a recent discussion see especially Howard: *Strict Responsibility* (1963).
3. See *e.g.*, *R.* v. *Australasian Films Ltd.* (1921) 29 C.L.R. 195; *Vane* v. *Yiannopoullos* [1965] A.C. 486; *Gifford* v. *Police* [1965] N.Z.L.R. 484.
4. (1941) 67 C.L.R. 536.
5. For a detailed discussion of this defence see Howard: *Strict Responsibility* (1963) Chap. 5, and Howard: *Australian Criminal Law*, (1965) 323-338.
6. S. 70 (d) provides:
   "Any person who . . . brands or marks, or assists in branding or marking any horse, cattle, or sheep, or causes, authorises, or suffers any horse, cattle or sheep to be branded or marked, with a registered brand or mark which is not registered in the name of the owner of such horse, cattle, or sheep . . . shall be guilty of an offence, and liable to a penalty, which . . . shall not be more than twenty-five pounds, or shall be liable to be imprisoned for any term not exceeding three months."
7. However, in dissent, Chamberlain J. appeared to take a different view of the facts.

was his inadvertence negligent; secondly, that even if there was a causing authorising or suffering of the branding of the relevant sheep, D was exculpated under the defence of reasonable mistaken belief (as propounded by Dixon J. in *Proudman* v. *Dayman*[8]) since he believed, quite reasonably, that all the sheep which X had branded did in fact belong to the partnership.

The appeal to the Court of Criminal Appeal (Bray C.J., Mitchell and Chamberlain JJ.) against the decision of Bright J. was disallowed by both Bray C.J. and Mitchell J., Chamberlain J. dissenting. Bray C.J. held that in view of the words "cause" and "authorise" used in section 70(d) of the Brands Act, D was required to have adverted to the branding by his wife of the sheep which in fact belonged to a third person[9], or, in view of the use of the word "suffer", to have been at least negligent in failing to have adverted to this branding[10]. In his Honour's opinion the evidence did not establish such advertence or negligence. In addition Bray C.J. held that D was not vicariously liable under section 70 (d) for the conduct of his wife on the following grounds. First, that a partner could not be held vicariously liable for the conduct of another party except where the relevant offence could be classified as being criminal or "quasi-criminal". In his Honour's opinion *Davies* v. *Harvey*[11], a decision of the English Divisional Court where a partner was held vicariously liable for the conduct of another partner, could be distinguished on the basis that the provision there construed, unlike section 70(d) of the Brands Act, did not enact a criminal or quasi-criminal offence. This view (which is inconsistent with *Davies* v. *Harvey*[11] since a criminal offence was there involved[12]) was justified on the ground that "a partner possesses no right or power to control the acts of his partners comparable to the right and power"[13] which a master exercises over a servant. Secondly, that the words "cause" and (by implication from the judgment) "authorise" would not admit of the imposition of vicarious liability even if a master-servant relationship were present. Although the use of the word "suffer" had not excluded vicarious liability in several English Divisional Court

8. See nn. 4 and 5.

9. In respect of "cause" reliance was placed upon *Miller* v. *Hilton* (1937) 57 C.L.R. 400 and *O'Sullivan* v. *Truth and Sportsman Ltd.* (1957) 96 C.L.R. 200. In respect of "authorise" reliance was placed upon *Evans* v. *Hilton & Co.* (1924) 131 L.T. 534; *Performing Rights Society Limited* v. *Ciryl Theatrical Syndicate Limited* [1924] 1 K.B. 1; *Falcon* v. *Famous Players Film Co.* [1926] 2 K.B. 474; *Winstone* v. *Wurlitzer Automatic Phonograph Co. of Australia Pty. Ltd.* [1946] A.L.R. 422 at 426 per Herring C.J.; *Australian Performing Rights Association Ltd.* v. *Canterbury-Bankstown Glee Club Ltd.* [1964-5] N.S.W.R. 138.

10. In respect of "suffer" reliance was placed upon *(inter alia) Somerset* v. *Hart* (1884) 12 Q.B.D. 360, 362 per Lord Coleridge C.J.; *James & Son Limited* v. *Smee* [1954] 3 All E.R. 273.

11. (1874) 9 Q.B. 439.

12. The distinction between civil or quasi-criminal offences and criminal regulatory offences is unsound. The paramount object of regulatory offences is to deter, not to compensate. Although the distinction has often been drawn the cases indicate that this approach is but a facile method of enabling judicial manipulation. See *e.g. A.-G.* v. *Siddon* (1830) 1 C. & J. 220, 148 E.R. 1400; *Newman* v. *Jones* (1886) 17 Q.B.D. 132; *Commonwealth* v. *Koczwara* 155 A. 2d. 825 (1959); *Vane* v. *Yiannopoullos* [1965] A.C. 486, 502 per Lord Evershed.

13. (1967) 11th July, at p.9. Not yet reported. References given are from the original typewritten judgment.

decisions, including *Bond* v. *Evans*[14] and *Somerset* v. *Hart*[15] (which concerned offences such as being a licensee and suffering gaming on the relevant premises), Bray C.J. regarded such decisions as turning upon the presence of a master-servant relationship and perhaps also upon "the peculiar duties cast on licensees"[16]. In respect of the latter point his Honour contrasted the licensee cases with *Newman* v. *Jones*[17], a decision of the English Divisional Court where the trustees of a club were held not to be vicariously liable for the conduct of a servant, on the ground stated by Stephen J. in *Bond* v. *Evans*[14] that "the trustees of a club are on a different footing from a licensed victualler, who is the proprietor of a house, and the holder of a licence"[18].

Mitchell J. did not discuss the possibility of D being held vicariously liable, but, in respect of the issue of primary liability, was in substantial agreement with the view of Bray C.J. that D had not authorised or caused X to brand the sheep which did not belong to the partnership. Her Honour stated that since the evidence did not establish advertence by D to the branding in question, he was as immune from conviction as the absentee owner whose resident employee brands straying sheep which belong to a third person when his authority to brand extends only to the owner's sheep.

In dissent Chamberlain J. held that D had caused authorised or suffered the particular sheep to be branded by X, and further that it was immaterial whether or not D believed (even reasonably) that these sheep belonged to the partnership. The grounds were as follows. In respect of whether D had caused authorised or suffered the relevant branding his Honour stated:

> ". . . . I think it is clear that [D] had given his wife and son a general instruction that all sheep were to be branded with [his brand] before before being taken to market. His evidence is that he gave them instructions on July 27th to get sheep ready for the market and indicated the types which were to be taken. In pursuance of these instructions the wife and son yarded the sheep, the son finding some which did not bear the respondent's brand, told his mother to brand them, and she did so. In these circumstances I do not see how it can be doubted that the respondent intentionally brought about the branding in question, or at the least authorised it. It is true that he did not apply his mind to the particular sheep, but it cannot be doubted that, for instance, a shopkeeper who instructs his assistant or indeed his junior partner to sell any goods on the shelves that are asked for, both causes and authorises a sale in the ordinary course of business, although he may have no knowledge of the individual transaction. If A provides B with implements of housebreaking and directs or encourages him to break into any house that he finds convenient, A becomes liable for the breaking and entering of whatever house B happens to choose. I am not impressed by the argument that this reasoning would expose the

14. (1888) 21 Q.B.D. 249.
15. (1884) 12 Q.B.D. 360.
16. (1967) 11th July, at p.12.
17. (1886) 17 Q.B.D. 132.
18. (1888) 21 Q.B.D. 249.

> Public Trustee or a trustee company controlling a large number of grazing properties, to liability every time a sheep was mistakenly branded by the person in charge of the particular property. The civil rights and obligations of trustees . . . involve different considerations from those which arise in the application of a penal statute . . ."[19]

In respect of the relevance of D's belief that all the sheep branded by X belonged to the partnership Chamberlain J. held that the defence of reasonable mistaken belief was not available because D "never applied his mind to *these* sheep at all"; even if on the evidence D had reasonably (but mistakenly) believed that all the sheep to be yarded for market did not belong to a third person, in his Honour's opinion this would have been immaterial[20]. Further, Chamberlain J. held that in any event the defence of reasonable mistaken belief was not available under section 70 (d) on the ground that both the object and the wording of the relevant provisions indicated a legislative intention to impose strict liability. Relying upon the observations of the Privy Council in *Lim Chin Aik* v. *The Queen*[21] Chamberlain J. stated that the object of the legislature was not likely to be the imposition of strict liability "unless there is something that the party concerned can do 'directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control which will promote the observance of the regulations' "[22]. In his Honour's opinion D was in substantial control of the farm[23] and could have been expected to avoid the mistake made by X in branding sheep belonging to a third person; for example, D could have taken steps to brand all sheep placed on the farm prior to putting them out in the paddocks. Consequently "the putting of the defendant under strict liability"[24] would promote the observance of section 70(d). As for the wording of section 70(d) Chamberlain J. relied principally upon the absence of any express reference to the defence of reasonable mistaken belief in this provision, an absence which, in his Honour's opinion, was especially significant in virtue of the enactment of specific statutory defences to other offences created by the same portion of the Brands Act. Reference was made to sections 69, 71 and 72[25] [26].

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19. (1967) 11th July, at p. 4.
20. His Honour also stated: "The respondent does not claim to have made a mistake. He claims in fact that there was no mistake and that the sheep in question were his property." With respect, however, this reasoning fortifies D's case once it is conceded that the sheep did not belong to D or to the partnership.
21. [1963] A.C. 160. For a discussion of these observations and their unworkable nature see note upon *August* v. *Fingleton* [1964] S.A.S.R. 22 in (1966) Adelaide Law Review 402-403.
22. (1967) 11th July, at p. 6.
23. Contrast the view taken of the facts by Bray C.J.
24. (1967) 11th July, at p. 6.
25. In addition Chamberlain J. stressed the presence of the offence of *wilfully* causing authorising or suffering etc. in s.73 (1). However this does not exclude the relevance of the defence of reasonable mistaken belief under s.70 (d) since this defence is pleaded to show an absence of negligent inadvertence not an absence of wilfulness or advertence. This point was expressly made by Bright J.
26. Further, Chamberlain J. doubted whether the limitation upon strict liability formulated by the Court of Criminal Appeal in *Norcock* v. *Bowey* [1966] S.A.S.R. 250 (viz. that D should not be held strictly liable where the proscribed event or state of affairs has resulted from an act of a stranger or an act of God) was applicable

Interpretation of "Cause" and "Authorise"

All members of the Court of Criminal Appeal regarded the words "cause" and "authorise" as requiring advertence by D not to every external aspect of the offence but only to the fact that the particular sheep which, as it happened, did not belong to D were branded with his brand. While this interpretation is perhaps inconsistent with the interpretation of "cause" adopted by the High Court in *O'Sullivan* v. *Truth & Sportsman Ltd.*[27], it follows closely the approach adopted by the High Court in *Proudman* v. *Dayman*[28] where the relevant word was "permit". In that case D was charged with permitting an unlicensed driver to drive a motor vehicle. It was held that this offence did not require advertence to the fact that the relevant driver was unlicensed but merely advertence to the fact that he was driving the particular motor vehicle.

The application of the above interpretation of the words "cause" and "authorise" to the facts of the case by Chamberlain J. is difficult to follow. It is not clear from the relevant passage in his judgment (which is set out above) whether his Honour's view of the facts was that D had authorised his wife X to brand all sheep on the farm, even if they did not belong to the partnership. That it was is perhaps suggested by the statement: " . . . I think it is clear that he had given his wife and son a general instruction that all sheep were to be branded with [his brand] before being taken to market." This construction is also suggested by the complicity-in-the-housebreaking example given by his Honour: this example would be quite irrelevant unless D had authorised his wife to brand sheep which did not belong to the partnership since the accomplice in the example *did at least agree to the commission of the offence of housebreaking*. However, two aspects of the judgment suggest that his Honour considered that D had authorised his wife to brand only those sheep which did belong to the partnership. First, no reference appears in the judgment to the body of evidence which supported this view of the facts. It is difficult to assume that his Honour would have taken a view of the facts contrary to this evidence without giving some explanation, especially in view of the considerable weight placed upon it by Bray C.J.[29] Secondly, the discussion of the position of the Public Trustee or a trustee company controlling a large number of grazing properties in the context of the present issue

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under s.70 (d). His Honour considered that this limitation was inconsistent with *Lim Chin Aik* v. *The Queen:*

> "I do not understand [the Privy Council] as repudiating the idea that where strict liability is in fact imposed justice cannot be met by the imposition of a nominal penalty, or no penalty at all, in what must be the exceptional case where a defendant who is in no ordinary sense to blame is convicted."

This view of *Lim Chin Aik* v. *The Queen* seems quite accurate (see note upon *Norcock* v. *Bowey* in (1967) 3 Adelaide Law Review 111); however cf. *Samuels* v. *Centofanti* per Bright J. and the view taken of *Lim Chin Aik* v. *The Queen* by Chamberlain J. earlier in his judgment (see extract quoted *supra* p. 239).

27. (1957) 96 C.L.R. 220. The judgment suggests that the High Court required advertence to *every* external aspect of an offence of "causing". Cf. however Hart & Honore: *Causation in the Law* (1959) 332.

28. (1941) 67 C.L.R. 526. For a fuller discussion of the point canvassed here see Howard: *Strict Responsibility* (1936) 58-61.

29. (1967) 11th July, at pp. 4-8.

refers to the case where a sheep is "mistakenly branded by the person in charge of the particular property". This indicates that his Honour had in contemplation the situation where the trustee company or Public Trustee had authorised the person in charge to brand only those sheep which belonged to the company or the Public Trustee: if the authority extended to all sheep on the property there would be nothing relevant here about which the employee could be mistaken. A possible explanation of this part of the judgment is that Chamberlain J. was not discussing D's primary liability but whether D could be held vicariously liable for the conduct of his wife. This possibility is suggested by his Honour's statement that his reasoning would not result in the imposition of liability upon the Public Trustee or a trustee company controlling a large number of grazing properties. As will be seen below there is difficulty in imposing vicarious liability upon a trustee[30] and his Honour may well have had this difficulty in mind. Certainly there seems no other obvious explanation for the reference to the position of the Public Trustee or a trustee company; for example this reference has no connection whatsoever with the complicity-in-housebreaking example given (surely his Honour would not regard the Public Trustee or a trustee company as immune from conviction for complicity in housebreaking if he or it were A in this example). Perplexingly, however, the possibility that his Honour was considering vicarious liability would be inconsistent with that part of the same extract from his Honour's judgment devoted to demonstrating that D had in fact intentionally brought about his wife's branding of non-partnership sheep.

This ambiguity in the judgment of Chamberlain J. leads one to the important question whether the negligence rather than advertence should be regarded as sufficient where the words "cause" or "authorise" appear (this could well be the present position where the relevant word is "suffer"[31]). It will be recalled that Chamberlain J. considered that in the present case D could have taken more steps to avoid the incorrect branding of sheep than he had and for this reason there would be some point in holding him strictly liable. This comes close to saying that D should be held strictly liable *because he was negligent*. If the majority's interpretation of "cause" and "authorise" is adopted the person who negligently fails to realise that sheep which in fact do not belong to him are being branded with his brand will escape liability. Consequently the majority's interpretation could frustrate the effective enforcement of section 70(d). That Chamberlain J., unlike Bray C.J., regarded D as having been negligent in failing to realize that his wife was branding sheep which belonged to a third person perhaps suggests that his Honour was seeking to avoid the difficulty (imposed by authority[32]) of construing "cause" or "authorise" as requiring only negligence rather than advertence. However it should be mentioned that had Chamberlain J. wished to avoid requiring advertence reliance could have been placed on the offence of "suffering" enacted by section 70(d) since the word "suffer" more readily admits of this construction than the words "cause" and "authorise".

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30. P. 242.

31. See the views of both Bray C.J. and Bright J. in the present case and Howard: *Strict Responsibility* (1963) 55-62.

32. See n.9.

Vicarious Liability

Consider first Bray C.J.'s refusal to impose vicarious liability upon one partner in respect of the conduct of another. His Honour's emphasis upon the lesser degree of control possessed by a partner than by an employer raises the presumption that his Honour would also disapprove of the imposition of vicarious liability in respect of the conduct of say an independent contractor or fellow employee, and therefore would disagree with the decisions in such cases as *U.S.* v. *Parfait Powder Puff Co. Inc.*[33] and *Linnett* v. *Commissioner of Metropolitan Police*[34].

Consider secondly Bray C.J.'s views that the offence of suffering a brand to be applied to another person's sheep could impose vicarious liability only where a master-servant relationship is present but might in fact not impose vicarious liability at all since section 70(d) did not concern duties such as "the peculiar duties cast on licensees". It is submitted that it is highly doubtful whether this offence was intended to impose vicarious liability in any situation, principally because it may readily be interpreted as imposing liability for negligence (as is evident from Bray C.J.'s judgment). If this is so what reason is there for supposing that the legislature intended to impose vicarious liability, especially since the word "suffer" seems clearly aimed at excluding this possibility[35]? Even if the particular offence involves say "the peculiar duties" of licensees and it seems desirable that licensees be influenced to exercise a very high degree of care why construe the offence as imposing vicarious (and thus strict) liability? Surely it would be preferable to construe the offence as imposing liability where D has failed to exercise a high degree of care[36]. That *Bond* v. *Evans*[14] and *Somerset* v. *Hart*[15] are inconsistent with the approach here advocated would seem quite immaterial since these cases contain no reasoning upon this point.

Consider finally the position where D is a trustee and someone employed by him to manage say a farm belonging to the trust commits the conduct proscribed by a regulatory offence. Assuming that the offence is one which would impose vicarious liability upon an ordinary master, may D be held vicariously liable? There is a hint in the judgments of both Chamberlain J. and Bray C.J. that their Honours would not hold D vicariously liable[37].

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33. 163 F. 2d. 1008 (1948). See also *e.g. Ex p. Falstein* (1948) 49 S.R. (N.S.W.) 142.

34. [1946] K.B. 290.

35. The following authorities support the imposition of vicarious liability despite the use of "suffer" in the definition of a regulatory offence: *Avards* v. *Dance* (1862) 26 J.P. 437; *Bosley* v. *Davies* (1875) L.R. 1 Q.B. 84; *Redgate* v. *Haynes* (1876) L.R. 1 Q.B. 89; *Crabtree* v. *Hole* (1879) 43 J.P. 799; *Somerset* v. *Hart* (1884) 12 Q.B.D. 360; *Bond* v. *Evans* (1888) 21 Q.B.D. 249; *Mowling* v. *Justices of Hawthorn* (1891) 17 V.L.R. 150; *Martin* v. *McGinnis* (1894) 20 V.L.R. 556; *Ex parte Little* (1902) 2 S.R. (N.S.W.) 444; *R.* v. *Hawinda Tavern Ltd.* (1955) 112 C.C.C. 361; *Earl* v. *Jakus* [1961] V.R. 143. However, these authorities are weakly reasoned since no adequate justification was advanced for ignoring the word "suffer" in order to impose vicarious liability.

36. This is a point which has frequently been missed. See *e.g.* Note. "Liability Insurance for Corporate Executives" (1967) 80 Harvard Law Review 648, at 662.

37. (1967) 11th July, per Bray C.J. at p. 12, per Chamberlain J. at p. 4.

It is submitted with respect that such a view is clearly sound. Although a trustee may be in a position to control the conduct of an agent or servant employed in the administration of a trust as much as a master who is not a trustee there is one substantial policy reason against imposing vicarious liability upon a trustee. A trustee who is held liable in tort or in contract in respect of trust matters is entitled to be indemnified either from the trust funds or, in some cases, from the funds of the beneficiary himself, provided that there has been no personal fault[38]. There seems little reason why an analogous rule should not exist if D were held vicariously liable in respect of a regulatory offence where there has been no personal fault on his part[39]. Since liability would be transferred to innocent beneficiaries as a result of applying such a rule there is a substantial objection to construing a regulatory offence as imposing vicarious liability upon a trustee, an objection hardly met by the possibility of also imposing vicarious liability upon those trustees who had been personally at fault. Consequently a trustee should be held liable only in respect of his own negligent or advertent conduct[40].

Defence of Reasonable Mistaken Belief

In the present case Bray C.J. and Mitchell J. found it unnecessary to consider whether the defence of reasonable mistaken belief was available under section 70(d) or whether D himself could have relied upon it successfully because of their conclusion that D had not caused authorised or suffered X to brand the particular sheep in issue[41]. However, cases may well occur where there is in fact a causing authorising or suffering and yet where D may believe that the particular sheep are his own. Consequently the views of Chamberlain J., who did consider that D had caused authorised or suffered the particular branding in the present case, are of significance.

Consider first Chamberlain J.'s view that D could not successfully employ the defence of reasonable mistaken belief since he had not "applied his mind" to the specific sheep which were erroneously branded by his wife[42]. It is submitted that such specificity of belief is not necessary for the defence of reasonable mistaken belief. Take, for example, a situation where mistaken belief, as opposed to *reasonable* mistaken belief, is in issue. Assume that D goes rabbit-shooting. Almost beyond the range of D's vision are several rabbits and V, a young child. These objects present but a blurred image to D. He cannot distinguish clearly between any particular rabbit and does not realize that a young child is present. He shoots, killing V. In this instance D's

38. See *Scott on Trusts* (2nd ed., 1956) III s.249; Ford, *Unincorporated Non-Profit Associations* (1959) 71, n.2, and Chap. V.

39. On this view D would be entitled to recoup not only the fine but also his litigation expenses.

40. Some support for this conclusion is to be found in *Newman* v. *Jones* (1886) 17 Q.B.D. 132 in view of the very narrow view of "scope of employment" there taken.

41. However, Bray C.J. did advert to several enquiries which would have to be made if and when this question arose. The discussion which follows is of relevance to the bulk of these enquiries.

42. (1967) 11th July, at p. 10.

mistaken belief that a human being was not endangered would relieve him of liability for murder despite the fact that he has not adverted specifically to the attributes of each of the objects. Consequently why should it matter in a case such as the present where the defence of reasonable mistaken belief is in issue that D's belief is not related specifically to say each sheep? Further, it is probable that the defence of reasonable mistaken belief is a judicial innovation designed to enable courts to impose liability for negligent inadvertence, the "half-way house"[43] between *mens rea* and strict responsibility[44]. If this is so emphasis should be placed on the question whether D was negligently inadvertent. If emphasis is placed upon the specificity of D's belief the rationale of the defence may be undermined since it is quite possible for situations to occur where D's mistaken belief is reasonable (i.e. not negligent) but not as specific as Chamberlain J. would seem to require.

Secondly, a situation such as that in the present case raises the following further questions as to the nature of the belief required under the defence of reasonable mistaken belief. Must the belief be conscious? If so when must it be formed? If not, will a subconscious belief or even a simple ignorance (where the mind is blank, without any subconscious impression[45]) be sufficient? On the facts of the present case simple ignorance was not in issue, but D's belief that the sheep being branded by his wife belonged to the partnership seems to have been subconscious at the time of the relevant branding. Further, at some much earlier stage he appeared to have thought consciously about the possibility of sheep belonging to others being branded. It is submitted that a mere subconscious belief is sufficient for the defence. Although some statements of the law are to the contrary[46], the bulk of the case-law clearly

43. Glanville Williams: *Criminal Law: The General Part* (2nd ed., 1961) 262.

44. The origins of the defence are unclear. Possibly it is directly related to the usual common law defence of mistake of fact. This is suggested by some of the statements in *e.g. Maher* v. *Musson* (1934) 52 C.L.R. 100. This possibility is denied however by the clear requirement that the mistake must be reasonable as a matter of law, which is not a requirement of the usual common law defence of mistake of fact applicable say in the context of murder. (For authority to the effect that the *Proudman* v. *Dayman* defence of reasonable mistaken belief requires the mistaken belief to reasonable as a matter of law see *e.g. Martin* [1963] Tas. S.R. 203; *Coysh* v. *Elliott* [1963] V.R. 114; *Madsen* v. *Western Interstate Pty. Ltd.* [1963] Q.R. 434, at 465 per Wanstall, J.; *Crichton* v. *Victorian Dairies Ltd.* [1965] V.R. 49; *Foster* v. *Aloni* [1951] V.L.R. 481; but cf. *e.g. August* v. *Fingleton* [1964] S.A.S.R. 22. For a discussion of the point that unreasonableness is irrelevant (except in an evidentiary sense) to a defence based on mistake of fact in the context of offences such as murder which require advertence see Glanville Williams: *Criminal Law: The General Part* (2nd ed., 1961) 201-205; Howard; "Reasonableness of Mistake in the Criminal Law" (1961) University of Queensland Law Journal 45.) The most plausible explanation of the defence's origin is that statements of the usual defence of mistake of fact which incorrectly impose the requirement of reasonableness were relied upon deliberately in order to introduce liability for negligent inadvertence into the sphere of regulatory offences.

45. See Glanville Williams: *op. cit. supra* n. 43, at 151-152.

45a. Suggested by evidence reviewed (1967) 11th July, per Bray C.J. at pp. 4-8.

46. Howard: *Strict Responsibility* (1963) 95; note upon *Norcock* v. *Bowey* [1966] S.A.S.R. 250, in (1967) 3 Adelaide Law Review 111, at 117.
Relevant here is Glanville Williams' observation:
"To have knowledge of an event is not the same as to be thinking about it. Probably the test is: was the defendant capable of recalling the fact at the moment in question, if he had addressed his mind to it?" *(Criminal Law: The General Part* (2nd ed., 1961), 170.).

excludes only the state of simple ignorance[47]. On this view obviously it becomes unnecessary to consider the difficult question[48]: when must a conscious belief be entertained? This suggested effect of the authorities seems sound; as has been stated above the probable purpose of the defence of reasonable mistaken belief is to enable liability for negligent inadvertence to be imposed rather than strict liability or liability for *mens rea,* and this purpose would be frustrated if the defence were held inapplicable in those situations where D's belief is subconscious (even at all times[49]) but where his conduct has not been negligent[50].

Consider thirdly Chamberlain J.'s interpretation of section 70(d) as excluding the application of the defence of reasonable mistaken belief. An initial criticism is that his Honour's view of *Lim Chin Aik* v. *The Queen*[51] is, with respect, mistaken. In that case the Privy Council did not state that strict liability was intended by the legislature only where the particular accused would be thereby influenced to take greater care, but stated that the test was whether people generally would be thereby influenced to take greater care[52]. A quick demonstration of this point is afforded by the Privy Council's expectation that hard cases would still occur under its approach[53], an expectation which would not have been entertained had the court meant that strict liability was intended by the legislature only where the particular accused would be influenced to take greater care. Indeed, Chamberlain J.'s interpretation of *Lim Chin Aik* v. *The Queen*[21] is such that strict liability seems to be equated with liability for negligence[54]. This aspect of his Honour's approach attracts a further criticism. Later in Chamberlain J.'s judgment the

47. *Proudman* v. *Dayman* (1941) 67 C.L.R. 536; *Pelham* v. *Harris* [1944] S.A.S.R. 224; *Bergin* v. *Stack* (1953) 88 C.L.R. 248, at 254 per Webb J.; *Green* v. *Sergeant* [1951] V.L.R. 500; *Tanner* v. *Smart* [1965] S.A.S.R. 44. Cf. possibly *Gherashe* v. *Boase* [1959] V.R. 1. The requirement stipulated in *e.g. Proudman* v. *Dayman, Pelham* v. *Harris,* and *Gherashe* v. *Boase* that D must apply or address his mind to the relevant question does not necessarily indicate that the application or addressing must be a conscious process. *Foster* v. *Aloni* [1951] V.L.R. 481 is not inconsistent with the view taken here since it is not clear what type of belief the court would have required had it determined D's criminal responsibility as at the time when D went to sleep, which would have been the correct approach. (See Howard: *Strict Responsibility* (1963) 92-94.).

48. Not so difficult in the type of situation which arose in *Foster* v. *Aloni* [1951] V.L.R. 481. Very difficult where the offence is a "status offence" of the type involved in *Tanner* v. *Smart* [1965] S.A.S.R. 44.

49. *I.e.* where at no stage has D entertained a conscious mistaken belief.

50. The same argument applies in respect of the issue whether reasonable simple ignorance should come within the scope of the defence of reasonable mistaken belief. Note however the relevance in this context of the rule that ignorance of the law is no excuse. See *e.g. Bergin* v. *Stack* (1953) 88 C.L.R. 248, at 254 per Webb J.; *Harrison* [1938] 3 All E.R. 134 and see the discussion of this case by Glanville Williams in *Criminal Law: The General Part* (2nd ed., 1961) 155-156; and consider *Green* v. *Sergeant* [1951] V.L.R. 500.

51. [1963] A.C. 160. This case has frequently been misinterpreted by the Australian courts. See *e.g. August* v. *Fingleton* [1964] S.A.S.R. 22; *Hancock* v. *Cooley* [1964] V.R. 639; *Norcock* v. *Bowey* [1966] S.A.S.R. 250; and consider Note, (1966) 2 Adelaide Law Review 397 and Note, (1967) 3 Adelaide Law Review 111, upon this point.

52. *Id.,* at 174-175.

53. *Ibid.*

54. Chamberlain J. seemed to advert to this possible view being taken of his judgment but expressed no reason why this possibility should be rejected.

term "strict liability" is used in such a way that clearly "strict liability" is not equated with liability for negligence but means liability which is strict in the sense that it embraces those whose conduct has not been blameworthy[55]. This writer for one cannot see how hard cases produced by strict liability can result if one takes the view of *Lim Chin Aik* espoused by Chamberlain J. that strict liability is not intended by the legislature where to impose strict liability upon the particular defendant would not influence him to take greater care. If the imposition of "strict" liability upon D would achieve no purpose then, under Chamberlain J.'s approach, the offence would not be construed as imposing such liability.

In respect of Chamberlain J.'s view that the defence of reasonable mistaken belief was excluded by the absence of any express or implied statutory reference thereto, and also by the existence in neighbouring provisions of the Brands Act of "codes of defences", three points may be made. First, the absence of express reference to the defence would seem immaterial. If the defence is related to the common law defence of mistake of fact[56] and is therefore merely a reflection of the broad principle that criminal liability be founded upon blameworthy conduct, one would not expect any statutory reference to it any more than one would expect a statutory reference to the defences of insanity and infancy[57]. Alternatively, if the defence of reasonable mistaken belief represents a judicial innovation to enable regulatory offences to be adequately enforced, as is the probable position[58], again one would not expect any statutory reference. It should be noted that it can scarcely be argued that if the defence is purely a judicial innovation it may therefore be disregarded on the ground that it requires judicial legislation. Such an approach ignores the realities of statutory interpretation: numerous examples demonstrate that, in much of this area at least, legislative intention is a myth[59]. In any event Chamberlain J.'s approach could not be defended upon this basis since his Honour's view of *Lim Chin Aik* v. *The Queen*[21] requires reading into the wording of a provision a substantial qualification.

Secondly, in the present case Chamberlain J.'s reliance upon the fact that "codes of defences" are enacted in the provisions neighbouring section 70(d) of the Brands Act is unconvincing. The proviso of section 69 would seem irrelevant. In respect of the offences enacted by section 69(b) this proviso relates only to a difficulty concerning the external aspects and not the *mental element*. In respect of the offence enacted by section 69(e) this proviso enacts a defence of absence of knowledge or authority, and consequently does not impliedly exclude the application of the defence of reasonable mistaken belief to other offences enacted in neighbouring offences (since the defence of

55. (1967) 11th July, at p. 9.

56. See n. 44 *supra.*

57. See Glanville Williams: *op. cit. supra* n. 43, at 259-260.

58. See n. 44 *supra.*

59. See *e.g. G. Newton Ltd.* v. *Smith* [1962] 2 Q.B. 278; *Lim Chin Aik* v. *Queen* [1963] A.C. 160; *Samuels* v. *Centofanti* per Bright J.; liability affords numerous striking examples of judicial legislation of the most obvious nature . See *e.g. R.* v. *Australasian Films Ltd.* (1921) 29 C.L.R. 195; *Fraser* v. *Dryden's Carrying Co.* [1941] V.L.R. 103; *Commonwealth* v. *Koczwara* 155 A. 2d. 825 (1959); *Gifford* v. *Police* [1965] N.Z.L.R. 484; *Vane* v. *Yiannopoullos* [1965] A.C. 486.

reasonable mistaken belief is pleaded to show an absence of negligence, not merely an absence of knowledge or advertence)[60]. In respect of the offences enacted under section 70 the qualification made in section 71 would appear to be irrelevant since this qualification concerns the definition of the external aspects and not the *mental element* of these offences. In respect of the offences enacted in section 72 (a) and (b), the defences enacted in the proviso to section 72 are of doubtful relevance also. Defences II and III relate merely to the external aspects of the offences. Defence I, which exculpates a person who shows that an unauthorised brand or mark on his sheep was "caused by any accidental cause", is of greater significance. However, the enactment of this defence to the offences enacted by section 72(a) and (b), which are similar in subject matter and severity to those offences enacted in section 69 and section 70, could be taken as indicating that the legislature contemplated imposing liability for fault in the case of offences enacted by section 70 including that enacted in section 70(d).

Thirdly, it may be observed that the bulk of the difficulty produced by the defence of reasonable mistaken belief stems from judicial uncertainty as to whether strict liability should be preferred to liability for negligence in order to implement a regulatory offence effectively. Few judges seem prepared to tackle this latter explicitly[61]. In the present case Chamberlain J. did not explain why he preferred strict liability to liability for negligence but stated: "[i]n some instances the public interest requires the net of the law to be cast widely. If it happens to catch unwanted fish, the remedy would appear to be to throw them back, and not to cut a hole in the net which will allow both them and the wanted catch to escape." This metaphor does not answer the vital question why the public interest does require the net of the law to be cast widely, and furthermore overlooks the fact that "unwanted fish" are not always "thrown back"[62], and even if they are, some costs (whether personal or financial) are involved.

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60. See also n. 25 *supra*.

61. For example it was awarded by the Privy Council in *Lim Chin Aik* v. *The Queen* [1963] A.C. 160. In terms of the notion of *stare decisis* this would seem immaterial See (1967) 3 Adelaide Law Review 111, 115 n. 29; and *Samuels* v. *Centofanti* per Bright J.
Consider also *Norcock* v. *Bowey* [1966] S.A.S.R. 250 where the S.A. Court of Criminal Appeal adopted a compromise between strict liability and liability for negligence without advancing any cogent reason for the necessity of such a compromise.
Pertinent here is the following observation of Holmes: ". . . I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and formulation of judgments inarticulate, and often unconscious . . ."—"The Path of the Law" (1897) 10 Harvard Law Review 457 at 467.

62. Howard, *Strict Responsibility* (1963) 20-22; *Norcock* v. *Bowey* [1966] S.A.S.R. 250.

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