Status Offences

A. P. RANDERSON

It is a long established principle of the criminal law that "a person cannot be convicted of any crime unless he has committed an overt act prohibited by the law, or has made default in doing some act which there is a legal obligation upon him to do."[1] Woodhouse J. in *Kilbride* v. *Lake*[2] formulated the principle thus: "A person cannot be made criminally responsible for an act or omission unless it was done or omitted in circumstances where there was some other course open to him. If this condition is absent, any act or omission must be involuntary or unconscious or unrelated to the forbidden event in any causal sense regarded by the law as involving responsibility."[2a]

It is, of course, open to the legislature to provide differently and this is just what has been done in some recent (and some not so recent) legislation. Two New Zealand decisions[3] of late have shown that legislation may be so framed as to make proof of any act on the part of the accused unnecessary to the prosecution's case, and the decisions have raised doubts as to the efficacy of, and the justification for, such offences. Questions have been raised also as to possible defences to such offences.

[1] 10 *Halsbury's Laws of England*, 3rd ed. 272.
[2] [1962] N.Z.L.R. 590.
[2a] P. 593.
[3] *Police* v. *Taylor* [1965] N.Z.L.R. 1095; and *Helleman* v. *Collector of Customs* [1966] N.Z.L.R. 705.

Status offences have been referred to as imposing "absolute" rather than "strict" liability but this terminology may be confusing in some areas as the Australian cases[4] use the distinction to differentiate between offences of strict liability (as we know them) and offences which *prima facie* impose strict liability but from which the accused can exculpate himself by proof of absence of some form of *mens rea.*

Howard[5] defines a status offence as "one which attaches criminal responsibility to a person merely by reason of his status, capacity or physical situation, apparently dispensing with the need for either act or omission as a prerequisite for conviction."[5a] Clarke[6] goes further and says that status offences appear to dispense with questions of mental processes as well as the need for an act,[6a] but for the purpose of this paper Howard's definition will be adopted—that is, a status offence is one which imposes liability by reason of the "status" of the accused, dispensing with the need for act or omission on his part, but not necessarily dispensing with a mental element.

It is to be noted that "status" has a definition sufficiently wide to include not only offences in which a person is made liable through his position in relation to the subject-matter (e.g. "captain", "owner", or "occupier") but also through the concurrence of circumstances set out in the legislation as constituting the offence (e.g. "being in possession of certain objects" or "being in a certain place or condition").

For the purpose of this paper *actus reus* will be defined as the prohibited events which are set out in the legislation as constituting the offence (and excluding any mental element). When it is said, therefore, that a status offence dispenses with the need for any act or omission on the part of the accused, what is meant is that there is no need for the prosecution to prove any act or omission of the accused which caused or contributed to the *actus reus* of the offence.

Mens rea refers either to a mental element which must be positively proved by the prosecution or to a mental element which may be used by way of a defence in certain cases (*infra*). At the outset it is important to remember that whether a particular section discloses a status offence or not is a question of statutory construction in each case and as Napier C.J. said in *Norcock* v. *Bowey*[7] the way to approach the question is to give "such fair large and liberal construction as will best ensure the attainment of its object according to the true intent, meaning and spirit of the enactment." This is a reference to section 22 of the Acts

[4] See for example *Proudman* v. *Dayman* [1943] C.L.R. 536.
[5] *Strict Responsibility* (1963).
[5a] P. 46.
[6] *Defences to Offences of Strict Liability* 1967 (Unpublished) thesis; Victoria Law School.
[6a] P. 13.
[7] [1966] S.A.S.R. 250, 265.

Interpretation Act (1913–1957) which is the Australian equivalent of our section 5 (j). Howard (*supra*) states that "there is no ground at all for presupposing in the approach to status offences that the legislature intended to be unreasonable when creating them. It is easily demonstrable that the statement of the elements to an offence in a statute normally constitutes a minimum, not a maximum, of what has to be proved. . . . The inference follows that merely because there is no express mention in the definition of an offence of such a basic requisite for criminal responsibility as (an act or omission on the part of the accused) such a requirement is not necessarily excluded from that offence."[7a]

I. Categories of Status Offences

A. *Those which Require No Act or Mental State on the Part of the Accused and which Contain No Verb to which the Accused is Related as Subject:*

The first one of the recent New Zealand cases disclosed a status offence which falls into this first category. The case was *Helleman* v. *Collector of Customs* (*supra*) in which the accused was the captain of a vessel which came within the territorial waters of New Zealand having devices adapted for the purpose of smuggling *viz* two lubricating oil tanks into which platforms had been built. He was charged under section 216 of the Customs Act 1913—"If any ship *is found* (italics mine) within one league of the coast of New Zealand or within the territorial waters of New Zealand, having false bulkheads, bows, sides or bottoms, or any secret or disguised place adapted for the purpose of concealing goods . . . the master and owner of the vessel shall be severally liable to a penalty of £500." Captain Helleman knew nothing of the platforms nor of the goods found. There were 300 potential hiding places and only a 24 hours a day vigil could have prevented the occurrence of the offence. Hardie Boys J. said that the appeal in *Kilbride* v. *Lake* (*supra*) succeeded "for the reason that no act or omission of the appellant's produces the prohibited event" but that here "the ship came within the territorial waters of New Zealand having in its oil tanks these prohibited devices; for the control of that situation the master as well as the owner is made responsible; the ship he controlled produced the prohibited event by reason of the device it contained."[7b] It is submitted that the case was correctly decided but for the wrong reason. Hardie Boys J. attempted to rationalise the decision on the basis of *Kilbride* v. *Lake*, but the latter concerned an ordinary case of strict

[7a] P. 50.
[7b] P. 707–8.

liability in which under the terms of the particular legislation the prosecution was required to prove that the act or omission of the accused had produced the prohibited event (*actus reus*). In the present case there was no need for such proof to be given. The appellant was liable purely through his status as master of the vessel and the prosecution did not need to prove any act or omission on his part. It was, therefore, plainly a status offence.

The second recent New Zealand case is *Police* v. *Taylor* (*supra*). There, the accused was convicted under section 33 (1) of the Impounding Act 1955—"Where at any time of the day or night any stock *is found* (italics mine) straying or wandering on any road in such a manner as to obstruct or be reasonably likely to obstruct the road, any person may seize the stock, and may either impound it or... return it to the owner and . . . the owner of such stock . . . is liable to a fine not exceeding £10 per head. . . ." The accused had taken all reasonable precautions to prevent the stock wandering, but some had nevertheless escaped independently of the owner's knowledge or volition.

Turner J. in holding the accused guilty of the offence, said that this was a case in which *mens rea* was irrelevant and in which no amount of care could exculpate the accused. He rightly said that *Kilbride* v. *Lake* was irrelevant, but the reason he gave (that in *Kilbride* v. *Lake* Woodhouse J. felt able to pose the question whether or not the regulation contemplated *mens rea*) was incorrect. This was certainly a strange view to take of *Kilbride* v. *Lake*, which turned on the question of *actus reus*.

A similar provision to that in *Police* v. *Taylor* was under examination in the South Australian case of *Snell* v. *Ryan*[8] Section 146 of the Impounding Act 1920–1947 states—"If any cattle are found straying . . . in any street or public place, the owner thereof shall be liable to a penalty not exceeding £5." The owner of a cow had left it, along with other cattle in a paddock which was securely fenced and enclosed. Without the owner's knowledge, a gate leading into the paddock was opened and left open by a person or persons unknown. The cow escaped from the paddock, and was subsequently found straying on a public road. In holding the accused owner not guilty Napier C.J. said: "I have too much respect for the legislature to suppose that it could have intended to penalize the owner of cattle which are found straying through no default or neglect upon the part of anyone for whom the owner is responsible, but as the result of the wrongful and possibly criminal act of a stranger."[8a] Napier C.J. went on to say that "If the terms of the statute leave any escape from that predicament we are entitled to put an interpretation upon the Act which avoids what

[8] [1951] S.A.S.R. 59.
[8a] P. 60.

I should describe as tyranny and injustice, and, speaking generally, this avenue of escape is opened by the presumption that a person is not criminally responsible for an act which is done independently of the exercise of his will or by accident (see *Hardgrave* v. *King*[9] which I cited in *Dayman* v. *Proudman*[10])." The first of these cases involved an ordinary offence of strict liability and the second involved the word "permitting". Thus neither disclosed a status offence but nevertheless validly set out the presumption referred to by Napier C.J. The effect of Napier C.J.'s decision is therefore that on his construction of the section involved, the presumption was not rebutted and the act of a stranger was thus a defence as this meant that the cow had escaped independently of the will of the owner.

Although a contrary decision would clearly have been unjust, it is nevertheless submitted that the presumption which Napier C.J. referred to, is inapplicable to status offences and that Napier C.J. construed the section incorrectly. It is submitted that on the construction of the section, the prosecution is not required to prove any act on the part of the owner and that as a result a defence based upon an involuntary act is irrelevent. This result would appear to be intended by the legislature on the plain language of the section.

Clarke (*supra*) says that the different result reached in *Snell* v. *Ryan* from that reached in *Police* v. *Taylor* may be due to the fact that the New Zealand section contains an impounding provision whereas the Australian section does not, but the writer cannot see that this makes any material difference.[8b] In *Mt. Roskill Borough Council* v. *McKassack*[11] liability was imposed under a similar section in an earlier Act although the Magistrate was satisfied "that the cattle were let out by some ill-intentioned stranger." To a similar effect was *Commonwealth* v. *New York Central Railway*[12] where trains remained at a crossing more than five minutes because air-brake valves had been deliberately opened by an unknown person and the additional time over the statutory limit was needed to close them. It was held that the defendant was liable at its peril.

In *Snell* v. *Ryan* Napier C.J. also said that if an appellant "had done everything that any reasonable man could be expected to do in the way of securing his cattle, and ensuring that they would be kept off the road, it is plain that he ought not to be convicted under this section."[12a] This was on obiter remark however, and it is submitted that

[8b] P. 30.
[9] [1906] 4 C.L.R. 232, 237.
[10] [1941] S.A.S.R. 87, 97.
[11] [1951] 47 M.C.R. 76, 78.
[12] (1909) 202 Mass. 394.
[12a] P. 60.

it should be read in the context of the case—that is, in addition to his taking all reasonable care, the escape of a cow was caused by the act of a stranger. That Napier C.J. did not regard the taking of all reasonable care as being sufficient defence in itself appears from his judgment in *Norcock* v. *Bowey* (*supra*)—"It is no answer to a charge under the section to prove that the owner took reasonable care to ensure that the animal was not on the road. But I desire to add that, in my opinion, it would have been a good answer to the charge if the owner had been able to prove how the animal came to be on the road, and had shown that it was due to circumstances beyond his control, i.e. to an Act of God or to some wrongful act of a stranger whom the owner had no means of controlling or influencing."[12b] (Other matters touched upon in *Norcock* v. *Bowey* will be referred to later.)

Further examples of status offences in this first category are *Trenchard* v. *Ryan*[13] in which the owner of a horse ridden or driven in a public street when unfit for the purpose was held liable and *Lewis* v. *Brown*[14] in which the owner of stock found upon a reserve for travelling stock was held liable. Another status offence was disclosed in *Hinchley* v. *Rankin*[15] where the parent of a child who failed to attend school regularly was made the subject of a penalty. A further New Zealand example is under Section 24 of the Dogs Registration Act 1955 in which the owner of a dog which attacks any person or stock on any highway or public place is liable to a penalty.

R. v. *Larsonneur*[16] was a case which has been much debated and through an error as to the actual language of the provision in question, has been regarded by some as a status offence, but is in fact an offence merely of strict liability—"If any alien having landed in the United Kingdom in contravention of Article 1 of this order is at any time found within the U.K. he shall be guilty of an offence against this order." (The defence of compulsion will be considered later.) Note though, the case of *Chia Gee* v. *Martin*[17] where prohibited immigrants were discovered as stowaways, arrested on board ship at Fremantle, and brought ashore in custody. It was no defence to a subsequent prosecution for being prohibited immigrants found within the Commonwealth in contravention of the Immigration Restriction Act 1901 that they were brought ashore in the custody of the law. This would appear to be a status offence, and the defence of compulsion by lawful authority did not apply.

[12b] P. 266.
[13] (1910) 10 S.R. (N.S.W.) 618.
[14] (1931) 48 W.N. (N.S.W.) 196.
[15] [1961] 1 W.L.R. 421.
[16] (1933) 24 Cr. App. R. 74.
[17] (1906) 3 C.L.R. 649.

B. *Those Requiring No Act or Mental State on the Part of the Accused and which Contain a "Passive" Verb to which the Accused is Related as Subject*

In this category of status offence there is no positive act as such required, and the verb to which the accused is related as its subject merely requires some state of "being" or "having" on the part of the accused, such as "being drunk" or "having in his possession certain prohibited drugs".

Included in this category are crimes which Lacey[18] refers to as "crimes of personal condition". The essential element of these offences consists not in action or inaction but in the accused having a certain personal condition or being a person of a specified character, for example, vagrancy; being a common drunkard, common prostitute, common thief, tramp or disorderly person. Lacey continues: "While it may be argued that evidence of past conduct is necessary to prove one a common thief (for example), the conduct proved is not the offence but only a ground for inferring that the accused has the personal condition for which he is to be punished."[18a]

Not all of the examples cited by Lacey are status offences in New Zealand, but some are set out as such in our Police Offences Act 1927.[19] Section 43, which states that "Every person who is drunk while in charge in any public place of any carriage horse, cattle, or steam-engine," sets out a status offence, but Section 46 requires that in order to be convicted as a common prostitute, acts of loitering, importuning or behaving in a riotous or indecent manner are required. Section 49 disclosed another status offence—"Every person shall be deemed an idle and disorderly person and may be liable to imprisonment: (a) Who is the occupier of any house frequented by reputed thieves or person who have no visible lawful means of support; or (b) Who is found in any such house. . . ." Similarly in Section 52—"Every person shall be deemed a rogue and vagabond who is found without lawful excuse . . . in any building. . . ."

Also included in this second category are those offences which place liability on the accused through his status as "occupier" or "licensee" of premises used for unlawful purposes or in contravention of licensing laws. An example of the first type is the Australian case *Bond* v. *Foran*,[20] where the offence was as follows—"No person shall be the occupier of any such house, office, room or place kept or used for any (unlawful gaming)." In this case a bookmaker was operating in a crowded bar unknown to the occupier, and the accused was able to escape conviction

[18] (1953) 66 Harvard L.R. 1203.
[18a] P. 1204.
[19] Reprinted 1965, Vol. III, N.Z. Statutes.
[20] (1934) 52 C.L.R. 364.

as the High Court construed the section as requiring proof of *mens rea*.

Martin v. *Whittle*[21] is an example of the second type of offence where the accused was convicted of "being the licensee of premises on which liquor was disposed of otherwise than during the hours authorised by the licence." Absence of *mens rea* was held to be no defence.

There is also a small group of cases relating to "being drunk" and being "found drunk" some of which should be included in the first category of status offence but which for convenience will be grouped under the second category. First there are those offences relating to drunkenness set out in the Police Offences Act 1927, one of which has already been referred to above. See Section 41—"Every person found drunk in any public place is liable to a penalty" and section 43 (*supra*). An example of the former type of offence is *McKenzie* v. *Police*[22] in which the appellant had been charged with being "found drunk in a public place." A constable had been making an inquiry of the appellant at his residence and asked the appellant to accompany him out onto the street whereupon he arrested him. The appellant's appeal against conviction was allowed, not on the basis of lack of causation but on the interpretation of the word "found". *O'Sullivan* v. *Fisher* (*infra*) was not cited and from this the inference may be drawn that the court did not regard proof of an act on the part of the accused as a necessary requirement.

In *O'Sullivan* v. *Fisher*[23] the respondent was charged under a South Australian statute as "any person who *is drunk* (italics mine) in any road, street, thoroughfare or public place." The respondent had been removed from private premises onto a street by two constables and had then been arrested. It was held that this was an absolute prohibition and that physical compulsion by lawful authority was in general no defence to such a charge. It is to be noted here that no defence was available on the interpretation of the word "found" as in *McKenzie* v. *Police*, and the court should logically have concluded that no defence was available. Instead, it recognized a defence of compulsion by unlawful authority thereby recognizing also the necessity for proof of some volitional act on the part of the accused. Again this would appear to be a just result but, it is submitted, not one which is open on the construction of the section. (The defences available will be considered later also in connection with *R.* v. *Larsonneur*.)

Purdie v. *Maxwell*[24] was a case decided under section 40A[25] of our former Transport Act 1949—"Every person commits an offence against

[21] [1922] V.L.R. 207.
[22] [1956] N.Z.L.R. 1013.
[23] [1954] S.A.S.R. 33.
[24] [1960] N.Z.L.R. 599.
[25] Section 59 is the corresponding section of the 1962 Transport Act and does not disclose a status offence.

this Act who while under the influence of a drink or drug to such an extent as to be incapable of having proper control of a vehicle, is in charge of a motor-vehicle on any road. . . ."

Purdie's defence (which was rejected on the evidence) was that he had been involuntarily carried into his car, he being in a completely helpless state and having neither the intention nor the power to drive his car. F. B. Adams J. did not have to decide whether *mens rea* (in the sense of intention to be in physical possession and control) was a necessary ingredient of the offence as he found that Purdie did realize that he was in charge of the car and that once he was in charge of the car, supervening drunkenness could not negative any intention which might be necessary. He did make an obiter remark however that if intention was necessary, absence of such intention might be shown by conduct "of such a nature as to show that the appellant was rejecting or abandoning control of the car." Clarke (*supra*) has taken this to mean that "being in charge" is an act which must be proved by the prosecution in order to convict,[25a] but it is submitted that no act is required on the part of the appellant, only an intention to be in control. Thus if he is carried into the vehicle, but realizes that he is in control, then this is sufficient. "Being in charge" is thus another status offence with a defence of absence of *mens rea* available.[26]

Further examples of this second category of status offence are to be found in the N.Z. Narcotics Act 1965 (section 6—"No person shall have in his possession [certain drugs]") and section 3 of the Motorway Regulations 1950/230 ("Every person commits an offence against this regulation who is on a motorway in contravention of this regulation"). No person may be on the motorway unless he is in a vehicle and thus, a hitch-hiker dropped through no desire of his own at a point on the motorway could be liable under this regulation.

C. *Those Which Require No Act on the Part of the Accused but which Nevertheless Require Proof by the Prosecution of some Form of Mental State*

An example of such an offence would be that in question in *Bond* v. *Foran* (*supra*)—"No person shall be the occupier of any house, office, room or place kept or used for [unlawful gaming]." It was held on the construction of this section that the prosecution were required to prove knowledge of the unlawful gaming in order to convict the accused. Also in *Purdie* v. *Maxwell* (*supra*), although it was not expressly decided it was probable that the prosecution would have had to prove an intention on the part of the accused to be in charge of the vehicle in order to convict.

[25a] P. 138.

[26] See also *Stoop* v. *Police* [1961] N.Z.L.R. 320.

D. *Those which Require No act on the Part of the Accused, nor that the Prosecution Positively Prove some form of Mental State, but in which the Accused has a Defence if he can Prove a Particular Mental State.*

This defence has been raised largely in the Australian jurisdictions and represents an intermediate category of offence in which proof of *mens rea* is not a necessary part of the prosecution's case, but in which it is nevertheless open to the party charged to exculpate himself by proving that he believed on reasonable grounds in the existence of certain facts which, if true, would have made his act innocent.

There is some doubt in New Zealand as to whether such an intermediate category of offence is still open after *Lim Chin Aik* v. *R.*[27] This category was first recognized in New Zealand in *R.* v. *Ewart*[28] by Edwards J., and in *Innes* v. *McKinley*[29] it was held that the offence of supplying intoxicating liquor to a person apparently under the age of twenty-one years was an offence which fell within the category of offence outlined in *Ewart's* case. However after *Lim Chin Aik* v. *R.* was decided, doubts were raised in *Boyes* v. *Transport Dept.*[29a] as to whether this category still existed. "It may be that in the light of the judgment in *Lim Chin Aik* there is no such third class as that referred to by Edwards J. in *Ewart* and that all offences created by statute fall into one or other of the first two classes referred to by him. . . ."[29a]

On a logical basis, if this defence is no longer applicable in New Zealand to the ordinary type of offence, then it should not be extended as a defence to status offences, although if it was to be so extended, the fact that it has been referred to only in connection with offences involving an act or omission on the part of the accused should not be a bar to its being so extended, as it is a defence which goes to *mens rea* (see *R.* v. *Tolson*[30]) not to *actus reus*. The effect of this defence is to place an evidential burden of proof upon the defendant. The defendant must establish on the balance of probabilities only, that he believed on reasonable grounds in the existence of certain facts which if true, would have made the *actus reus* (e.g. the escape of his cattle) innocent. The defendant is entitled to acquittal if the matter remains in reasonable doubt.[31]

The first of the Australian cases is *Snell* v. *Ryan* (*supra*). In that case the defence of Act of a stranger was recognised, but this of course does not go to *mens rea*. Napier C.J. did however mention (although obiter)

[27] [1963] A.C. 160.
[28] [1905] N.Z.L.R. 709, 731.
[29] [1954] N.Z.L.R. 1054.
[29a] [1966] N.Z.L.R. 171, 172 Per Wilson, J.
[30] (1889) 23 Q.B.D. 168.
[31] *Norcock* v. *Bowey* [1966] S.A.S.R. 250, 257.

that absence of negligence might be a defence. In *Norcock* v. *Bowey* (*supra*) however, he said this could not be a defence. No mention was made in *Snell* v. *Ryan* as to the defence of reasonable mistake, but Napier C.J. referred to *Hardgrave* v. *King* (*supra*) and *Dayman* v. *Proudman* (*supra*) in the latter of which the defence of reasonable mistake was discussed. The charge was against the owner of a motor-vehicle for permitting an unlicensed person to drive it. Angus Parsons J. held that the prosecution were required to prove *mens rea* in the sense that the accused knew or ought to have known that the driver was unlicensed. Napier J. and Murray C.J. held that *mens rea* in the sense of knowledge that the driver was unlicensed was not necessary, but that if the accused had had an honest and reasonable belief that the driver was licensed, then that would have been a sufficient defence.

In the appeal against conviction[32] it was held that the view of Napier J. and Murray C.J. was the correct one, but on the facts the accused had not shown that he had such an honest and reasonable belief as would free him from blame. Dixon J. made it clear that whether this defence was available was a matter of construction of the enactment concerned and that it could be excluded by the words, context, subject-matter or general nature of the enactment. Although these statements were not made in the context of status offences, there seems to be no reason (in Australia in any case) why it could not be a defence to a status offence in a proper case.

And in *Tanner* v. *Smart*[33] the defence was held to be applicable to the same provision as that in *Snell* v. *Ryan*, but that on the evidence there was no sufficient proof of the existence of facts which could lead to an honest and reasonable belief in the mind of the defendant that his cattle were safe from straying. In fact there was evidence of one or more specific warnings to the defendant to the contrary. But it would seem to have been clearly accepted that reasonable mistake would have been an adequate defence had it been proved. It is submitted however that the section was wrongly construed, and such a construction would not be followed in New Zealand.

The most recent case on the same section is *Norcock* v. *Bowey* (*supra*). There the owner of a flock of sheep instructed his employee to move the sheep to a paddock adjoining a road. The employee carried out his duty, and both he and the owner believed on reasonable grounds, that all the sheep were in the paddock and that the fences of the paddock, and the gate, which the employee had securely closed, were sheep proof. Subsequently one of the flock of sheep was found straying on the road. The view of Chamberlain J. in the Supreme Court was that the accused ought to be convicted, following the reasoning in

[32] *Proudman* v. *Dayman* (1943) 67 C.L.R. 536.
[33] (1965) S.A.S.R. 44.

Police v. *Taylor* (*supra*) and the fact that the owner had taken reasonable care to prevent the escape of the sheep and honestly and reasonably believed that the paddock was sheep proof was no defence. This view was that there was no third category of offence such as that envisaged in *R.* v. *Ewart* (*supra*) and that the defence of reasonable mistake applied only where *mens rea* was an element of the offence. When referring to the fact that the defence applied where *mens rea* was an element he said[34]: "But I do not think this is any warrant for reading such a proviso into a statute imposing strict liability as a matter of general construction, and more especially where the liability is imposed, without qualification on proof of a state of objective fact." He thought further that the defence of absence of negligence was irrelevant unless there was a duty to take care.

In the appeal against conviction however, Napier C.J. agreed with Chamberlain J.'s conclusion, but did not agree that *Snell* v. *Ryan* was wrongly decided. He said that there could be a third category of offence —that *mens rea* could be excluded to differing degrees. Napier C.J. went on to say that it was no defence to a charge under that section to prove that the owner took reasonable care to ensure that the animal was not on the road, but he added that it would have been a good answer if the owner had been able to prove how the animal came to be on the road, and had shown that it was due to circumstances beyond his control, that is, "to the Act of God or to some wrongful act of a stranger whom the owner had no means of controlling or influencing."[34a] Hogarth J. and Walters A.J. agreed with the Chief Justice and the appeal was dismissed.

E. Vicarious Liability

The test for whether a statute may be construed as imposing vicarious liability is set out in *Mousell Bros. Ltd.* v. *London and N.W. Railway*[35] by Atkin J.—". . . regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed."[35a] Once this was established, the next step was originally the scope of employment test. If the criminal act of a servant was committed within the course of his employment, then the master was held to be vicariously liable for those acts. The doctrine applied only to master-servant relationships but would seem to be clearly an example of a status offence. Through his status in relation to the servant, the master is

[34] Page 254.
[34a] P. 266.
[35] [1917] 2 K.B. 836.
[35a] P. 843.

held liable for criminal acts committed by his servant in the course of his employment. No act is required on the part of the employer, and in the case of strict liability, all that must be established is his status as master and that the prohibited act of the servant was within the course of his employment.

More recently the courts have adopted a wider test based on the delegation of statutory duties by the master to his servant. "If the person in whom the legislative duty reposes chooses to delegate its effective observance to another, whether an employee or not, he will be held liable for any resulting breach." As to the requirement of knowledge in cases of vicarious liability it would appear that where knowledge on the part of the delegator himself is required, that the proper test is actual or constructive knowledge on his part. In cases where knowledge is required to be proved on the part of the delegate, such knowledge is imputed directly to the delegator on proof of delegation.[36]

Can it be said under the delegation test that a status offence is disclosed? That is, does the person charged have to cause or contribute to the *actus reus* of the offence in order to be held liable, or is he liable without proof of any such act on his part? It can be argued that this is not a status offence in that the person charged must be shown to have made an effective delegation of his duties—the act of delegation. But the act of delegation is not the act for which the penalty lies; it is merely the act by which the delegator places himself in a position where he is liable for conviction (in the event of his delegate committing a breach of statutory duty). Thus, technically speaking, vicarious liability under the delegation test is a status offence, but may be placed in a special category of such offences for the reason that the act of delegation (although extrinsic to the *actus reus* of the offence) must be proved to have taken place. Howard[37] refers to vicarious liability as being a status offence in that the accused is convicted merely through two concurrent circumstances, *viz*, his employment of the delegate, and a breach of the law by the employee.

It is to be noted also that in *Gifford* v. *Police*[38] it was suggested that it may not be necessary even to establish a complete delegation—"the licensee may be liable even although [he] remains in general control of the premises in cases where the barman is entrusted with the responsibility of exercising a discretion."[38a] And in *Goodfellow* v. *Johnson*[39] it

[36] Burns, *Recent Developments in the Criminal Law* (1967) Auckland Law School, (Unpublished); *Linnet* v. *Metropolitan Police Commissioner* (1946) K.B. 290; *Vane* v. *Viannopoullos* [1964] 3 W.L.R. 1218.

[37] *Strict Responsibility*, pp. 49, 50.

[38] [1965] N.Z.L.R. 484.

[38a] P. 492.

[39] [1966] 1 Q.B. 83.

was held that the defendant licensee was vicariously liable for the act of a barmaid on his premises in contravention of the licensing laws even though she was employed not by the defendant but by a brewery company which owned the premises, as she did the act "on behalf of" the licensee. "Delegation" was not referred to, and this case would appear to show that the "act" of delegation need not be a specific act, but may be a mere arrangement implied from the circumstances. This strengthens the view taken of vicarious liability as a status offence.

The Food and Drugs Act 1947[40] expressly renders principals or employers vicariously liable for the actions of their agents or servants in contravention of the act, although there is a defence if they prove that the agent or servant did not act wilfully and that they took all reasonable steps to prevent the offence occurring.

F. *Corporate Liability*

A corporation may be held responsible for the criminal acts of its servants either vicariously (in which case the ordinary rules for vicarious liability apply) or by the doctrine of corporate liability itself. This section of the paper will be concerned with the latter form of liability and with the question whether such liability amounts to a status offence.

What is the nature of corporate liability? In every corporation there are persons of a managerial or executive character whose acts, when on company business, are deemed to be those of the company. Similarly, the relevant states of mind of executive servants are imputed to the company. Effectively, the acts and states of mind of such servants are the company's itself. Thus for the purpose of criminal prosecution such a servant and the company are deemed in law to be the same entity.[41]

As long as this concept is kept in mind, there can be no doubt that corporate liability is not a form of status offence. It is the company which is held liable for the offence, and it is the company (in the form of its executive officers) which performs the criminal acts.

II. Parties and Attempts

Can there be parties to a status offence? In principle there would seem to be no reason why there could not be parties to a status offence but as a matter of construction and from the nature of status offences, there is little possibility of there being a party to such an offence. See, for example *McAteer* v. *Lester*[42] in which the prosecution claimed that

[40] Section 11 (2).
[41] See *R.* v. *I.C.R. Haulage Ltd.* [1944] K.B. 551; *D.P.P.* v. *Kent Sussex Contractors* [1944] K.B. 146.
[42] [1962] N.Z.L.R. 485.

the appellant was a party to offences under the New Zealand Licensing Act 1908 ("Every person found on licensed premises at any time when such premises are required . . . to be closed is liable to a fine . . .") in that he had aided and abetted the offences of three other persons. Henry J. held that the language of the section was such as to exclude the possibility of there being parties to the offence.

In the same way, attempts would usually be excluded by the nature of status offences and the language of the legislation under consideration. But even if the language of the section did allow there to be a party to the offence, then the person charged as a party would not be liable for the status offence, but as a party to the status offence, and this of course requires some act on his part—mere presence is generally not enough to constitute a status offence. Similarly with attempts, the very word "attempts" implies that some act or other is required. This immediately places it outside the category of status offences.

III. Defences to Status Offences

It is important to note at the outset that there is no fixed rule as to which (if any) defences will be open to the accused in status offences. Rather, it is a matter of construction in each case.

From the nature of status offences as requiring no act on the part of the accused, it is submitted that any defences which relate to such acts should in principle be inapplicable to status offences. This was the view impliedly adopted in *Police* v. *Taylor* (*supra*) where the accused was held to have no defence. However, it has not been the view adopted by the South Australian cases—see *Snell* v. *Ryan* (*supra*) and *Norcock* v. *Bowey* (*supra*) in which it was held that the Act of God or of an ill-intentioned stranger was a sufficient defence to a charge under a Section virtually *in pari materia* with that in *Police* v. *Taylor*.

Then there is the defence which Clarke[43] refers to as "overmastering physical force." He explains that this refers not to the case where through compulsion of the will a person does an act though not of free volition; but to physical compulsion in which the unavoidable movement is no act at all. Clarke could find no cases in which it had been applied, but he submitted that from its very nature it goes to an act of the accused, and that there seemed to be no practical scope for applying the defence of status offences where the defendant was responsible for the activities of his animals or children.

The context in which the defence is most likely to be of practical application is in relation to the type of status offence which involves "being" or "being found" in a particular situation. In *R.* v. *Larsonneur*

[43] Chapter 5, Part II.

(*supra*) the fact that the defendant had been brought to England in the custody of the police was no defence to the charge of being "found in the United Kingdom". The defence of compulsion was not mentioned although if the section had been construed correctly as an offence merely of strict liability, the defence, it is submitted, ought to have been mentioned. Note though, that in *Chia Gee* v. *Martin* (*supra*) it was held that a charge under a similar section (although this time actually disclosing a status offence) was successful against the defendants even though they had been brought ashore in lawful custody. It is submitted that in principle such a defence is not available in the case of status offences but that the courts are open to interpret the word "found" (as was done in *McKenzie* v. *Police*) as a defence in these circumstances.

In *O'Sullivan* v. *Fisher (supra)* the respondent was charged under a South Australian statute as "Any person who is drunk... in any... public place." The distinction was made between lawful and unlawful compulsion; the former was no defence, but the latter was. This reasoning presupposes that an act is an element even of the "being" type of offence. It is not possible to deduce this from the dictionary meaning of the verb "to be" and the presupposition must rely therefore on some general principle of law that an act is an element of every offence, unless the legislature unequivocally declares otherwise. It is submitted that the language of the section in *O'Sullivan* v. *Fisher* was unequivocal and thus any defence of unlawful compulsion ought not to have been available.

As for defences going to *mens rea*, there is nothing to prevent their being open on the construction of the section, either expressly[44] or impliedly[45]—in the sense of absence of *mens rea* which is required to be proved. Then of course there is the defence of honest and reasonable mistake discussed above in respect of a number of South Australian cases, but which may not apply in New Zealand since *Lim Chin Aik* v. *R.*[46] [47] In the case of vicarious liability, the delegator may have a defence if actual knowledge on his part is required to be shown. Finally, there may be some other specific statutory defence available to the accused, not being one which goes to *mens rea.*[48]

IV. Justification for Status Offences

What justification can there be for the imposition of absolute liability and what rationalizations have been offered by the courts to defend its use?

[44] *Fraser* v. *Dryden's Carrying Co.* [1941] V.L.R. 103; *Myers* v. *Crabtree* [1956] V.L.R. 431.
[45] *Bond* v. *Foran* (1934) 52 C.L.R. 364; *Stoop* v. *Police* [1961] N.Z.L.R. 320.
[46] [1963] A.C. 160.
[47] See *Boyes* v. *Transport Dept.* [1966] N.Z.L.R. 171, 172.
[48] *Bear* v. *Lynch* (1909) 8 C.L.R. 592.

In *Kilbride* v. *Lake* (*supra*) Woodhouse J. said that the justification for the imposition of strict liability was that it was in the "general public interest" and that any consequential injustice had to be accepted. It may be that this is the principle which must be used to justify the imposition of absolute liability. And in *Police* v. *Taylor* (*supra*) Turner J. said that the escape of stock onto the road was a "public nuisance" and therefore justified the imposition of absolute liability. In *Helleman* v. *Collector of Customs* (*supra*) Hardie Boys J. said that the section was drawn as it was for the "purpose of curing known mischief" and that "the captain was responsible for the state of affairs under his control."

And it would seem that minor injustices in cases which fall within this first category may be balanced in most cases by the public interest and the responsibility which the person charged takes on as a "captain", "owner", "parent", etc. This view was supported by Napier J. in *Dayman* v. *Proudman* (*supra*) when he said: "The risk of some hardship or injustice to individuals may be insignificant where the safety of the realm or of the public is involved, but I think we may assume that Parliament does not intend hardship or injustice to the individual unless there is some clear purpose to be served by excluding the ordinary rule of interpretation."[48a] And as Chief Justice Napier in *Norcock* v. *Bowey* (*supra*) he took a statement of Devlin J.S.[48b] *as* justification for allowing the defence of Act of God or of a stranger. ". . . a man may be made responsible for the act of his servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions, citizens are induced to keep themselves and their organizations up to the mark. Although in one sense, the citizen is being punished for the sins of others, it can be said that if he had been more alert to see that the law was observed, the sin might not have been committed. But if a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged not in punishing throughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing on the most convenient victim." There is no doubt that these comments are valid, but they must still be balanced against the responsibility taken on by the owner of stock, for example.

In the offences of personal condition (such as vagrancy, being a common prostitute, etc.) the past conduct of the accused is probably sufficient justification for the imposition of absolute liability and for the offence of "being found drunk" in a public place, it would seem that the person who gets drunk and knows the consequences takes those consequences on himself. Finally, it must be remembered that

[48a] P. 97.
[48b] *Reynolds* v. *G. H. Austin & Sons Ltd.* [1951] 2 K.B. 135, 149.

in some cases, there will be available the defences mentioned above such as lack of *mens rea.*

On balance then, it would seem that New Zealand courts have taken a fairly strict attitude towards status offences but that no final principles have yet been discussed or laid down. Further it would appear that whether or not a particular section discloses a status offence, and if so, which defences (if any) will be available, are both questions of statutory interpretation in each individual case.