> are looking for. For this purpose, I doubt that all the manifold theories of the professors really have improved at all upon the old words "proximate" and "remote", with the idea they convey of some reasonable connection between the original negligence and its consequences, between the harm threatened and the harm done. In other words, if there is a conclusion, it is that the courts may very possibly have been right all the time after all.[4]

Likewise, in his chapter on *Rylands* v. *Fletcher* the author enters upon a cogent vindication of the principle understood by reference to what he takes to be its true scope and application after a consideration of the interests it serves.[5] Here again, his formulation may not be precisely what our courts will ultimately accept, and in other branches of the law of torts, for instance in relation to contributory negligence,[6] the author does not pretend to be able to find a dominant tradition in the authorities which can be regarded as embodying a sound fundamental notion. But enough has been said to indicate that in these pages there is much to encourage those who hope that in a difficult period of readjustment techniques of re-examination of the authorities in terms of the interests they serve may not carry judges and lawyers along the path of disintegration of the common law of tort.

W. L. MORISON*

English Studies in Criminal Science: Mens Rea in Statutory Offences, by J. LL.J. Edwards. London, Macmillan & Co. Ltd., 1955. xiv and 297 pp. (£1.14.9 in Australia.)

Mens Rea in Statutory Offences is a welcome eighth volume to the series entitled *English Studies In Criminal Science*, edited by L. Radzinowicz, LL.D., and published under the auspices of the Department of Criminal Science of the Faculty of Law, University of Cambridge.

Actus non facit reum nisi sit mens rea, to extend fully the maxim contained in the author's title, is a principle of the criminal law which has been marked by many vicissitudes in its application to new offences created by statute.

As a principle of the common law it required that a crime to be such involved something more than a vicious act. It was necessary also that the act be accompanied by a vicious will.

The need to prove a guilty state of mind has not always, however, lent itself towards efficacy of enforcement. For some considerable period in the history of English statute law therefore *mens rea* as an ingredient of statutory offences has been a matter of some interest to legislators who have often weighed heavily on the scales in favour of the public interest to be served by remedying the evil attacked rather than in favour of the morally innocent individual subject. The judicial approach to the many statutory inroads on the principle can by no means be called a re-action. In many instances, now over many centuries, the orientation (except in the graver class of crimes) has often been in the direction of construing statutory offences as being of absolute liability.

In an attempt to formulate some guiding principle on the topic, Dr. Edwards has selected a wide variety of statutory provisions enacted over the

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[4] At 242.
[5] Ch. III.
[6] Ch. I.

* D.Phil.(Oxford), B.A., LL.B.(Sydney), Associate Professor of Common Law in the University of Sydney.

centuries and has critically examined an imposing number of interpretative glosses on them. In undertaking this formidable task he has grouped his treatment under headings drawn from the terms used both singly and conjointly (and sometimes indiscriminately) in the various statutes.

It is a method of convenience, which to some extent only, unfortunately, has the merit of grouping illustrations co-extensively with the degree to which the maxim may be assumed to have application. Thus one can distinguish the varying degrees of culpability embraced by the words "maliciously" and "fraudulently" from those incorporated in "suffers" "permits" and "allows". Comparison of the cases grouped under these headings of convenience—"malice," "wilfulness", "knowingly," "permitting," "suffering," "causing," "allowing" and "fraudulently"—does however suffer as both judicial approach and legislative intention cannot be divorced from the true nature of each particular offence and its context.

With this difficulty in mind the author's critical analysis of a wide collection of judicial decisions (many irreconcilably conflicting) does throw up clearly in relief not only the problem but also many of the sources of confusion and divergence as to the relevancy of the accused's state of mind which occur in profusion under each heading, sometimes in respect of the same offence.

The confusion which has pervaded this branch of the law has not infrequently been the source of judicial comment (see Jordan, C.J., *R.* v. *Turnbull* (1943) 44 S.R. (N.S.W.) 108). The author's own apt description is, however, worth repeating from the introductory paragraph of the third chapter:—

> Travellers along the Queen's highway will probably agree that a plethora of sign posts can sometimes be as disconcerting and misleading as a complete absence of directions indicating what lies ahead. The same feeling of desperation may be experienced by examining the judicial interpretation during the past hundred and fifty years of statutory offences involving guilty knowledge. Bent on making knowledge on the part of the alleged offender an essential ingredient in a crime, the Legislature, when defining an offence, has resorted with varying degrees of extravagance to the use of such words as 'knowingly', 'permitting', 'suffering', 'allowing', 'causing' or double-barrelled expressions such as 'knowingly permitting', 'knowingly suffering', or 'knowingly and wilfully permitting'. Paying heed to these 'signposts' or 'danger signals' it would sometimes appear according to their personal predilections, different generations of judges have left cluttered up behind them a body of case law which is badly in need of disentanglement.

Whether he succeeds in disentangling the confusion which has increased seemingly in the last half-century is a matter for the reader to judge. If he makes the excursion to find out he will be rewarded by a much greater insight into many of the problems associated with this important aspect of criminal law. The development and classification of statutory malice—express, implied transferred and general and particular malice—is discussed. This is followed by a consideration of the significance, in relation to statutory offences depending on malice, of a *bona fide* claim of right. A claim of right as an ouster of jurisdiction is distinguished from claim of right as a defence in a manner which throws much light on the ensuing discussion as to the test on which the validity of the defence of claim of right depends—is it subjective or objective? The same problem is examined in relation to "wilfully" and "fraudulently" with particular emphasis in the latter case in relation to larceny, forgery and other serious offences.

The chapter under the heading "knowingly" and the treatment of "permitting" and "suffering", "causing" and "allowing" is supplemented by a later compact consideration in Chapter IX of "the criminal degrees of knowledge in statutory offences"—from a short range viewpoint the most valuable contribution made by the book. The kinship with equity is suggested in the

development of the concept of connivance or wilful blindness as alternative to actual knowledge and in the adoption of a lower standard of conduct as manifesting the requisite guilty knowledge. In this respect we find mere negligence being deemed as sufficient to fix liability in some statutory offences dependent on proof of knowledge of the forbidden act or default.

The terms discussed also required some treatment of vicarious liability. This aspect, in particular its historical development and modern application, is the subject of a further chapter.

To the practitioner of today who is continually confronted with statutory offences phrased in such words as "knowingly", "permitting", "suffering", "causing", "allowing", "fraudulently" and so on, an informed and critical treatment of this difficult subject is of considerable value. At the same time, one does not find here a clear cut answer. No attempt to categorise words into logical compartments can often succeed in doing more than pose the problem. No statute, one might assume, let alone the whole body of statutory regulation, is a purely theoretical exercise of intellect. It is a part of our system of control of society, directed in general at some given practical end which can be as diverse as human affairs—preventing entirely an unswerving application of a given import or meaning to particular words. Nor can we assume that every parliamentary draftsman has selected the precise word with the particularity which would be needed for any such logical division into word compartments.

This is not unrecognised by the author who can and does point to vagaries of interpretation in the one context. Nor does it invalidate his general criticisms of judicial pronouncements on the relevancy of *mens rea* when such words as discussed are used.

From a long-range viewpoint, these concluding criticisms merit comment. He does not cavil at the proposition that there are and will be offences where liability is incurred by the mere intentional doing of the forbidden act, the disadvantage of sparing the morally innocent defendant being outweighed by the social advantage of ease of enforcement. Any judicial bent to add to the ever increasing number of such offences is, however, not to be fostered. In particular he disagrees that it can any longer be supported by the comparative unimportance of the offence and that only a monetary penalty may be involved. The social stigma may yet be disastrous. On the other hand, if criminal liability is to be independent of any moral fault (and lesser social disapprobation) the consequences may lead to a weakened respect for the law.

Whilst also the author does not quarrel with the view that regard is to be had to the social purpose or objects of the statute, he convincingly deprecates the lop-sided emphasis which is frequently given to this tenet of interpretation. In particular he finds difficulty in seeing that the objects can form the basis for not giving full meaning to the use of the terms discussed in the text which in many contexts must be deemed to have been discriminately chosen. Gradually (he concludes) in the last fifty years the presumption in statutory, as with common law crimes, in favour of the requirement of a guilty mind has become re-established and a clear expression of legislative intention must appear for it to be excluded.

There is room, as he points out, for the draftsman to omit words such as "wilfully" where the offence is intended to be one of absolute prohibition. Also one might add, there would be infinitely less confusion and divergence if judicial interpretation gave consistent weight to such terms when they are employed in creating offences and adhered to the foregoing principle.

A strong claim is also made for much improved clarity of thought in the author's condemnation of the practice of paying lip service to the doctrine of *mens rea* in cases of absolute liability when the mere intentional doing of the act is treated by some judges as being sufficient to constitute *mens rea*—a spurious application of the doctrine causing confusion of thought in other cases

and accounting for a number of the irreconcilably divergent decisions.

In his general definition, *mens rea* in the form of a guilty mind, when it constitutes the basis of liability in a statutory offence, is established where a person intentionally does the forbidden act with knowledge of all the wrongful circumstances which the statute seeks to prohibit. A mere intention as opposed to accidental or inadvertent doing of the forbidden act can be a test which would reduce all statutory offences to terms of absolute liability.

"For too long", he concludes, "the spirit has prevailed in which the general public interest is regarded as overriding any considerations designed to protect the accused. The time has come to redress the balance."

The reader may well be disappointed if he still should find himself enmeshed on the borders of constructive knowledge, blameworthy inadvertence and purest moral innocence. If more entanglement yet lies ahead, some snares at least are now more visible.

VERNON WATSON*

LETTERS TO THE EDITOR

2nd August, 1956.

The Editor,
Sydney Law Review.

Dear Sir,

In "The Occupation of Sedentary Fisheries Off the Australian Coasts"[1] I submitted (*inter alia*) the legislative authority of the Federal Council of Australasia with respect to fisheries in Australasian waters beyond territorial limits[2] was not intended to be restricted by s.20 of the Federal Council of Australasia Act, 1885 (Eng.), but was plenary. I suggested that it could be extended to the possible need of controlling foreign vessels. With respect to the Queensland Pearl Shell and Bêche-de-mer (Extra-territorial) Act, 1888 and the Western Australian Pearl Shell and Bêche-de-mer (Extra-territorial) Act, 1889, I wrote:

> The 1886 and 1889 Acts may be characterised, therefore, as being with respect to the pearl shell and bêche-de-mer fisheries in the submarine areas defined in their Schedules. The limitation of the operation of these Acts to "British ships and boats attached to British ships" was not required by limitations on the powers of the Council imposed by either the constitutional instrument, or by international law. It was required only by Imperial policy.

This view has been usefully reinforced by my subsequent finding, in the Tasmanian Archives, a circular letter by Lord Derby (then Secretary of State for Colonies) to the "Governors of the Australasian Colonies", in which he set out the draftmen's views on the interpretation of the Federal Council of Australasia Act, 1885. The relevant portion of that letter is as follows:

> It has been questioned whether it would be constitutional and expedient for the Crown to delegate to the Council an unlimited power of dealing with the matters specified in sub-sections (a), (b) and (c) of this fifteenth clause, amongst other reasons because they are matters affecting,

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* LL.B.(Sydney). Member of the N.S.W. Bar.

[1] (1953-55) 1 *Sydney Law Review* 84.

[2] By Federal Council of Australasia Act, 1885 (48 and 49 Vict., c.60, s.15(c)).