Honest Claim of Right and Criminal Responsibility under the Queensland Code

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The Queensland Criminal Code, like the English criminal law, recognises a defence of honest claim of right where the offence charged is one relating to property. As Philp J. has remarked in an article in this journal[1] "there seems to be little difference on this topic between the two systems".[2] However, the location of the relevant Code provision not among the property offences but in Chapter V which deals with the general principles of criminal responsibility,[3] and the case law which the provision has generated make honest claim of right a defence of special interest.

Ignorance of the Law and Claim of Right

The defence is set out in s. 22 which provides as follows:

> "Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence.
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> But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honset claim of right and without intention to defraud".

The defence is drafted as an exception to the general rule contained in the first paragraph that ignorance of the law is no excuse. However it is really only an exception in an indirect sense. Hanger J. made this clear in *Olsen* v. *The Grain Sorghum Marketing Board, Ex parte Olsen*[4] when he said:

> "Section 22, after stating that ignorance of the law is no excuse, does not proceed to say that ignorance of the law is an excuse in the case of an offence relating to property for an act done with respect to property. It refers to an act done in the exercise of an honest claim of right and without intention to defraud.
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> In *Cooper* v. *Phibbs*[5] Lord Westbury has some remarks which I think are relevant:
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> 'It is said *Ignorantia juris non excusat*, but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application.'[6]
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> It is this distinction that must be kept in mind when construing and applying s. 22 of the Code".[7]

Thus ignorance or mistake of law is only an excuse when in the circumstances specified in s. 22 it provides the foundation for the exercise of an honest

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1. "Criminal Responsibility at Common Law and under the Criminal Code—Some Comparisons" (1950) 1 U.Q.L.J. (No. 2) 1.
2. *Ibid.*, at p. 3.
3. *Cf.* the English provisions i.e. Larceny Act s. 1 and its successor the Theft Act 1968 s. 2.
4. [1962] Qd.R. 580.
5. [1867] L.R. 2 H.L. 149.
6. *Ibid.*, at p. 170.
7. [1962] Qd. R. 580, at p. 589.

claim of right.[8] Of course, if the relevant mistake is one of fact not of law the accused may have a defence under s. 24 of the Code, provided the mistake is reasonable.

Offence Relating to Property

The defence is available only when the offence is one "relating to property". It was argued in *Olsen's* case[9] that these words were restricted to the offences set out in Part VI of the Code which is headed "Offences Relating to Property And Contracts". The Full Court, for reasons which will be indicated later, found it unnecessary to express an opinion on the matter but a similar argument found favour with Virtue J. in the West Australian case of *Pearce* v. *Paskov*.[10] The accused was charged with being in possession of undersized crayfish and underweight crayfish tails contrary to certain provisions of the fisheries legislation and it was argued, *inter alia*, on his behalf that he could rely on a defence of honest claim of right. Virtue J. disposed of the argument as follows:

> "Part VI of the Criminal Code is headed 'Offences Relating To Property And Contracts', and I have no doubt that the phrase 'offences relating to property' in s. 22 should be construed as applying exclusively to offences of the character of those defined in that Part of the Code. These offences can be classified under the headings of wrongful or fraudulent interference with the property of others which involve deprivation of or interference with the proprietary or possessory rights of the true owner or person in possession, or acts involving destruction or damage to the property of others. I consider that such a construction is supported by the provision that the existence of an intent to defraud would deprive a defendant of the benefit of the protection.
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> The offences the subject of the present charge are clearly not offences relating to property as so defined. They do not involve as an element any interference by the person charged with the proprietary and possessory rights of others. They come within the prohibition in the Code of acts injurious to the public in general and involve an interference by the State with the proprietary and possessory rights of the individual in the interest of the State and for the protection of an industry which is of benefit to the community as a whole.
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> Accordingly, s. 22 can confer no immunity on the defendant".[11]

This narrow construction of s. 22 has not passed unchallenged in another Code jurisidction, Papua New Guinea. In *Hobart Magalu*[12] Frost A. C. J., after noting the generality of the definition of property in s. 1 of the Code as including "every thing, animate or inanimate, capable of being the subject of ownership", held that forging and uttering were offences relating to property within the meaning of s. 22. These offences are set out in Part VI but, as Frost A. C. J. pointed out, s. 22 applies to them not because they involve wrongful interference with the property of others but simply because they are offences relating to "property" within the meaning of s. 1.[13] In this respect, therefore, he declined to accept Virtue J.'s interpretation.

8. Otherwise it is no defence. See, e.g., *Hughes* v. *Hi-Way Ads. Pty. Ltd. Ex parte Hughes* [1963] Qd.R. 328, *per* Philp A.C.J. at p. 332.
9. [1962] Qd. R. 580.
10. [1968] W.A.R. 66.
11. *Ibid.*, at p. 72.
12. [1974] P.N.G.L.R. 188.
13. *Ibid.*, at pp. 198–199.

There is a further reason why *Pearce* v. *Paskov*[14] may not be followed. By virtue of s. 36 of the Code s. 22 applies "to all persons charged with any offence against the Statute Law of Queensland". Thus where the offence is one "relating to property" the defence is available whether the offence is set out in the Code or elsewhere. As a matter of interpretation it is arguable that, reading the Code as a whole, the similarity in phrasing in s. 22 and in the heading in Part VI means that the reference is only to offences of the character of those set out in that Part. However the argument is less persuasive when the offence has been created in legislation other than the Code.

This was the situation in *Olsen's* case[15] which has already been mentioned. The offence charged here was buying grain sorghum from a person other than The Grain Sorghum Marketing Board contrary to the provisions of The Primary Producers' Organisation and Marketing Acts 1926 to 1957. Mansfield C. J. and Stable J. simply ruled that this was not an offence relating to property. They did not, however, discuss the meaning of that phrase. The third member of the Full Court, Hanger J., decided the case on other grounds.

An Act Done or Omitted to be Done with Respect to any Property

S. 2 of the Code defines an offence as "an act or omission which renders the person doing the act or making the omission liable to punishment" and s. 1 defines the phrase "criminally responsible" as "liable to punishment as for an offence". S. 22 then relieves the accused from criminal responsibility for an act done or omitted to be done with respect to any property. The language used here is elliptical because an "act" in the sense of the accused's physical action without more is, except in cases of strict liability, not an offence at all. It is only an offence when accompanied by a specific intention or by some specific external circumstance. For instance, to constitute stealing the taking of the property must be accompanied by a fraudulent intention and to constitute unlawful user of a motor vehicle there must be a user without the consent of the owner. However, despite the difficulties of the language employed it is submitted that the word "act" in s. 22 refers only to the physical action of the accused which together with the other components of the offence makes him criminally responsible. The courts in applying s. 22 have assumed this interpretation to be correct and it is supported by the decisions of the High Court in confining the word "act" in s. 23 to the physical conduct of the accused apart from its consequences.[16]

When is an act done or omitted to be done with respect to any property with the meaning of s. 22? Here *Olsen's* case[17] provides some guidance. Mansfield C.J. and Stable J. ruled that buying sorghum from a person other than the Board was not doing an act with respect to any property. Their reasoning appears from the following passage in the judgment of the Chief Justice.

14. [1968] W.A.R. 66.
15. [1962] Qd.R. 580. See also *Pusey* v. *Wagner, Ex parte Wagner* [1922] Qd. R. 181 in which the Full Court held that travelling stock without a permit contrary to the Diseases in Stock Act 1915 was not an offence relating to property and therefore s. 22 could not apply to it.
16. There are conflicting opinions on the matter in the three High Court cases, *Vallance* (1961) 108 C.L.R. 56, *Timbu Kolian* (1968) 119 C.L.R. 47 and *Kaporonovski* (1973) 47 A.L.J.R. 472, but it is submitted that the majority of judges who have considered the question have favoured the correct interpretation. See also *Stuart* (1974) 48 A.L.J.R. 517, *per* Gibbs J. at p. 524.
17. [1962] Qd. R. 580.

> "The claim asserted by the appellants was not a claim that they were entitled to buy the particular property the subject of the claim by reason of any right in or to that property peculiar to themselves, but was in effect a claim that they could buy any sorghum from any person because they honestly but wrongly believed that the provisions of *The Primary Producers' Organisation and Marketing Acts*, 1926 to 1957, did not apply to the transaction. This amounts to a claim that because they were ignorant of the law they were not criminally responsible.
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> I therefore think that the offence charged was not one relating to property and that the act done was not done in the exercise of an honest claim of right within the meaning of s. 22 of the Code".[18]

Both judges contrasted the action of the appellants here with that of the defendant in *Pollard*[19] in which a motor vehicle had been taken without the consent of the owner. The taking in that case was an action done to a specific piece of property, the vehicle, while in *Olsen's* case[20] the buying of non-exempted sorghum was not an action done to a specific piece of property at all.

In the Exercise of an Honest Claim of Right

S. 22 like the common law from which it was taken requires only that the claim be honest or *bona fide*[21] not that it be also reasonable. Indeed as the Court of Criminal Appeal said in *Gilson and Cohen*[22] "the fact that it is wrongheaded does not matter".[23]

The leading Queensland case on this aspect of the defence is *Pollard*.[24] The accused in this case had been convicted of the offence of unlawfully using a motor vehicle. He gave evidence that he had in fact taken the vehicle without the owner's consent. However, he also said that he had not asked for such consent but that he had taken the vehicle believing the owner would have granted permission had he been asked.

The presiding District Court judge had declined to leave the defence of claim of right to the jury but when the Court of Criminal Appeal reviewed the matter it decided he should have done so. The reasons for this conclusion appear in the judgment of Gibbs J.:[25]

> "An accused person acts in the exercise of an honest claim of right if he honestly believes himself to be entitled to do what he is doing. A belief that he may acquire a right in the future is not in itself enough. If, when he took the vehicle, the accused did not believe that he was then entitled to take it, he did not act in the exercise of a claim of right, and it does not matter for the purposes of s. 22 what other beliefs he may have held. On the other hand, if he honestly believed that he was entitled to take the vehicle without obtaining the owner's consent, either because

18. *Ibid.*, at p. 585.
19. [1962] Q.W.N. 13.
20. [1962] Qd. R. 580. See also *Sebulon Wat* v. *Peter Kari (No. 2)* [1975] P.N.G.L.R. 339 in which it was held that the act of encouraging others to steal property was not itself an act done with respect to property.
21. The heading of s. 22 refers to a "*bona fide*" claim of right whereas "honest" is the epithet used in the body of the section. It is submitted that the difference in wording is not material.
22. (1944) 29 Cr. App. R. 174.
23. *Ibid*, at p. 180. See also *Tiden* v. *Tokavanamur-Topaparik* [1967–68] P. & N.G.L.R. 231, and for a recent illustration of the corresponding English rule see *Smith* [1974] 1 Q.B. 354.
24. [1962] Q.W.N. 13.
25. The other members of the Court, Hanger J. and Stanley J., agreed with the reasons of Gibbs J.

he thought that the owner would not object, or because he thought that the owner would have given his consent if he had been asked for it, or for any other reason, the taking would have been in the exercise of an honest claim of right.

The question whether the proper inference to be drawn from the evidence was that the accused honestly thought that he was entitled to take the vehicle was one for the jury. It is true that the accused did not swear in terms that he believed that he was entitled to take it, but it is not the law that a claim of this kind is to be excluded from the consideration of the jury unless the accused has given evidence that he had the requisite state of mind. The claim was clearly raised by counsel for the accused, and the effect of the evidence in relation to it was a matter for the jury. Unless the jury were satisfied beyond a reasonable doubt that the accused had not acted in the exercise of an honest claim of right and without intent to defraud, they were bound to acquit him.

The question whether the accused took the vehicle in the exercise of an honest claim of right should therefore have been left to the jury. It is not to the point that the accused had no right to take the vehicle. If he had honestly believed that he was entitled to take it, or if the jury had a reasonable doubt whether he had such a belief, he should have been acquitted, however wrong his belief may have been, or however tenuous and unconvincing the grounds for it may seem to the judge".[26]

Pollard[27] is a strong case because the accused had not in his evidence asserted a present claim of right. His evidence merely supported various competing inferences as to his belief at the relevant time. One was that he believed he was entitled to take the vehicle. The Court held that it was for the jury to determine whether that inference had been negatived beyond reasonable doubt.

Pollard[28] is also authority, if authority be needed, for the proposition that a claim of right may be exercised without any accompanying express declaration of the existence of the right. The claim may be implicit in the accused's conduct. Gibbs J. reiterated this in certain *obiter dicta* in the later Full Court case of *Mitchell* v. *Norman, Ex parte Norman*[29] when he said:

" . . . it is perfectly clear that there can be a claim of right within the meaning of such statutory provisions as s. 22 of *The Criminal Code* or s. 1 of the English *Larceny Act* 1916[30] although there is no formal or express declaration of the existence of the right. For example a man takes another's chattel, honestly believing it to be his own and that he is entitled to take it, takes it 'in the exercise of an honest claim of right' within the meaning of s. 22 and does not take it 'without a claim of right made in good faith' within the meaning of s. 1 of the *Larceny Act*, even if he says nothing to anyone at the time when he takes it".[31]

The right claimed in *Pollard*[32] was the right to take the motor vehicle. What was claimed in *Olsen*[33] was, as Hanger J. pointed out, a juristic notion of different character. This was a "liberty"[34] or "immunity"[34a] from the re-

26. [1962] Q.S.N. 13 at p. 29.
27. [1962] Q.W.N. 13.
28. *Ibid.*
29. [1965] Qd. R. 587. This case was concerned with the interpretation not of s. 22 but of s. 276 of the Code which sets out the defence available to a person who uses force to obtain possession of moveable property held by another without claim of right. However Gibbs J., with whom Hanger J. agreed, referred to the s. 22 cases concerning the interpretation of claim of right.
30. See now s. 2(1) of the English Theft Act 1968.
31. [1965] Qd. R. 587, at p. 594.
32. [1962] Q.W.N. 13.
33. [1962] Qd. R. 580.
34. *Ibid*, at p. 590.
34a. *Ibid.*

straint imposed by the Queensland legislation on the appellant's power to purchase grain sorghum from a person other than the Board. It was argued that as the purchasers had transported the grain to New South Wales before delivery to its destination in Queensland s. 92 of the Constitution applied to the transaction and that therefore the appellants had a right to do as they did. This, said Hanger J., was not the sort of "right" contemplated by s. 22. The other judges in *Olsen*[35] expressed no opinion on this point but it is submitted that the distinction referred to by Hanger J. is an appropriate one in this context. There appears to be no cases decided under Queensland or English law in which a claim of immunity from statutory restraint has succeeded under the guise of claim of right.

Without Intention to Defraud

In *Olsen's*[35a] case Stable J. expressed the opinion that the words "without intention to defraud" must have "considerable significance"[36] in the construction of the section. However he did not indicate what that significance might be. The other cases shed no light on the matter. One leading commentator, Professor Howard, has suggested that the words are surplusage because the section already requires that the claim be an honest one.[37] If it is honest then necessarily it is non-fraudulent for in the words of Sir James Stephen "fraud is inconsistent with a claim of right made in good faith to do the act complained of".[38]

It is submitted, however, that under the Code the words "without intention to defraud" do have some independent work to do. It is the *act done* in the exercise of an honest claim of right which must be done without intention to defraud. Thus not only must the claim be honest but it must be asserted in an honest way. The significance of this may be illustrated by a variation of the facts in *Pollard*.[39] Suppose the accused had taken the vehicle not from the boarding house where he and the owner resided but from a parking station where the owner had left it temporarily. If he obtained possession of the vehicle there by falsely representing to a parking attendant that he was the owner then the defence under s. 22 would not be available to him. His claim of right might be an honest one but his means of exercising it would not be.

Another example would be where forged documents are used to support a genuine claim. It has been held at common law that in these circumstances a jury may find the intent to defraud requisite for forgery.[40] Similarly the Court of Criminal Appeal in the Queensland case of *Procter and Perry*[41] has held that there may be a conspiracy to defraud contrary to s. 430 of the Code when fraudulent means are used to enforce a claim which is genuine. It is submitted that this is the distinction referred to in s. 22.

35. [1962] Qd. R. 580.
35a. *Ibid.*
36. *Ibid*, at p. 593. The only significance attributed to it in any of the other cases is that it supports the restrictive definition of an offence against property adopted by Virtue J. in *Pearce* v. *Paskov* n. 11 *supra.*
37. *Australian Criminal Law*, 3rd ed. (Melbourne, Law Book Co.), 1977, p. 218.
38. *History of the Criminal Law of England* (London, Macmillan & Co.), 1883, Vol. 3, p. 124.
39. [1962] Q.W.N. 13.
40. See, e.g., *Hopley* (1915) 11 Cr. App. R. 248 and *Smith* (1919) 14 Cr. App. R. 101.
41. [1963] Qd. R. 335.

Honest Claim of Right and Ouster of Jurisdiction

There was for many years considerable confusion in the Queensland cases between s. 22 and a jurisdictional rule applicable to justices of the peace. The exact scope of the rule was a matter of debate but in substance it provided that the jurisdiction of justices was ousted by a *bona fide* and reasonable claim of title to property. The rule did not apply where the claim of title was necessarily involved in the issue which the court had to decide.[42]

In 1949 in *Clarkson* v. *Aspinall*,[43] *Ex parte Aspinall*, Philp J. succinctly stated the distinction between the two rules in these terms:

> "The first concept [the ouster rule] affects jurisdiction only and in no way touches criminal responsibility. It applies both in civil and criminal matters; its reason is that justices are not fitted to determine such claims; to oust jurisdiction the claim must be not only *bona fide* but also reasonable and when established in penal cases the defendant is not entitled to an acquittal.
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> The second concept affects criminal responsibility only and not jurisdiction—it is part of the doctrine of *mens rea* at common law that (except in offence involving absolute liability) a defendant who establishes a *bona fide* claim of right is entitled to acquittal; it applies only in criminal matters and applies in superior courts as well as before justices where they have jurisdiction; its reason is ethical and has nothing to do with the competence of any tribunal; to succeed the claim need only be honest; it need not be reasonable".[44]

This statement clarifies the matter but there remains some potential for confusion if as in some of the earlier Queensland cases the jurisdictional rule is regarded as applicable to personalty as well as realty.[45] The better opinion, it is submitted, is that the rule is confined to realty only.[46] Thus, as Professor Howard has observed, whereas s. 22 "applies to all offences against *property*, the jurisdictional rule applies only to questions of title to *land*, which is but one form of property".[47]

42. In the leading Queensland case, *Clarkson* v. *Aspinall, Ex parte Aspinall* n. 43 two members of the Full Court, Macrossan C. J. and Townley J. approved this qualification to the ouster rule. The third judge, Philp J. left the matter open. See also *Reg* v. *R. M. at Rabaul, Ex parte Kereku and ors.* [1969–70] P.N.G.L.R. 457.
43. [1950] St.R.Qd. 79.
44. *Ibid.*, at p. 89.
45. See, e.g., *Doyle* v. *Anyon* [1910] St.R.Qd. 180 and *Croft* v. *Campbell, Ex parte Campbell* [1940] St.R.Qd. 55.
46. Although the point has not been authoritatively determined. See *Clarkson* v. *Aspinall, Ex parte Aspinall* [1950] St.R.Qd. 79, *per* Philp J. at p. 86, and Williams, *Criminal Law—The General Part*, 2nd ed. (London, Stevens & Sons), 1961, at p. 306.
47. *Op.cit.*, at p. 219.