

GIBBON v. FITZMAURICE AND OTHERS

[FCA 143-152/1985]

1986. Supreme Court (Full Court): Neasey, Nettlefold and Underwood JJ.

March 17, Sept. 22, 1986.

Statutes — Interpretation — Rules of construction — Where meaning ambiguous or uncertain — Presumptions as to legislative intention — Presumption as to requiring mens rea — Where rebutted — National Parks and Reserves Regulations 1971, reg. 4(1).

Criminal Law — General principles — Criminal liability and capacity — Mens rea — In general — Whether an essential element in all offences — Exceptions to ordinary rule — As shown by language and objects of statute — National Parks and Reserves Regulations 1971, reg. 4 (1).

Criminal Law — General principles — Criminal liability and capacity — Mens rea — Effect of particular words and statutes — Permit — National Parks and Reserves Regulations 1971, reg. 4 (1).

Words, Phrases and Maxims — “Permit” — National Parks and Reserves Regulations 1971, reg. 4 (1).

[Aust. Dig., Criminal Law [3], [9], Statutes [27]]

The *National Parks and Reserves Regulations 1971* provide, by reg. 4(1), that except with the permission of the managing authority no person being the owner or immediate keeper of any dog or horse shall permit the same to be in or remain on any reserved land within the meaning of the *National Parks and Wildlife Act 1970*.

A complaint of contravening that sub-regulation was dismissed on the ground that because there was no proof that the defendant knew that the place of the alleged offence was such reserved land, there was no case to answer.

A motion to review the order of dismissal was dismissed on the ground that to permit something required knowledge of what was permitted and that included knowledge that the land concerned was such reserved land. On appeal,

Held, that—

(a) the knowledge implied by “permit” extended only to the control of the dog or horse:

Proudman v. Dayman (1943), 67 C.L.R. 536, followed;

- (b) whether the sub-regulation required knowledge that the place was reserved land was to be decided on the general principles of *mens rea* in statutory offences;
- (c) the offence being not truly criminal but created to promote the public welfare in relation to ecological conservation and difficult otherwise to enforce, the presumption that *mens rea* was required in respect of the nature of the land was displaced:
He Kaw Teh v. The Queen (1985), 157 C.L.R. 523, applied; and
- (d) the offence is one of strict but not absolute liability.

Semble, that honest and reasonable mistake as to the quality of the land would be a defence.

APPEAL from Green C.J.

Stanley Gibbon, a senior ranger of the National Parks and Wildlife Service, having on 27 January 1985 with other rangers found a party of men with horses and dogs camped in The Walls of Jerusalem National Park, proceeded against twelve of them severally for offences against the *National Parks and Reserves Regulations* 1971. There were similar charges in each case, that against Tony Clive Fitzmaurice being for "Breach of: Regulations 4(1)(b), 3(1)(a), 3(1)(b) and 4(1)(a) of the *National Parks and Reserves Regulations* 1971." Particulars of the breaches of reg. 4(1) were "1. On the 27th day of January, 1985, in reserved land, namely, The Walls of Jerusalem National Park Tasmania, being the owner of stock, namely a horse, did permit the said horse to be in the said reserved land, he not being then authorised by the permission of the Director for that purpose."

On 1 June 1985 all the complaints were by consent heard together by I. R. Elliott, Esq., Magistrate. At the close of the complainant's case counsel for the defendants submitted in respect of the breaches of reg. 4(1) that the defendants had no case to answer because the regulation required proof that they knew they were on "reserved land". The magistrate upheld the submission and dismissed the complaints.

On 30 September 1985 the complainant moved before Green C.J. to review the order of dismissal on the grounds that—

- "1. The Learned Magistrate erred in law in holding on the evidence then before the Court the Respondents had no case to answer.
- "2. The Learned Magistrate erred in law in dismissing the complaint."

Green C.J. dismissed the motion, saying:

"There are no words in the Regulations or in the *National Parks and Wildlife Act* 1970 under which they were made expressly prescribing any mental ingredient of the offence created by reg. 4. The question is therefore whether it should be implied as an

ingredient of the offence that the proscribed act must be accompanied by a certain mental state and, if so, what is the nature of that mental state.

"In *He Kaw Teh v. The Queen* (1985) 157 C.L.R. 523 the High Court reaffirmed the principle stated in *Sherras v. De Rutzen* [1895] 1 Q.B. 918, at p.921, that—

'There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered.'

"All members of the Court recognised that the state of mind which is required will vary depending upon the offence which is charged, but Gibbs C.J., with whose reasons Mason J. agreed, and Brennan J. cited with approval this statement by Jordan C.J. in *R. v. Turnbull* (1943) 44 S.R. (N.S.W.) 108, at p.109, which although not expressly characterised as such by Jordan C.J. must also be regarded as a presumption of statutory interpretation:

'... assuming his mind to be sufficiently normal for him to be capable of criminal responsibility, it is also necessary at common law for the prosecution to prove that he knew that he was doing the criminal act which is charged against him, that is, that he knew that all the facts constituting the ingredients necessary to make the act criminal were involved in what he was doing.'

At p.641 Brennan J., after citing that passage, expressed the view that—

'Prima facie, the requirement of knowledge relates not only to the facts which give character to the physical act involved in the commission of the offence but also to the circumstances which attend its occurrence and make it criminal.'

At p.582 his Honour summarised the general principles which he applied to the interpretation of the legislation which was under consideration in that case as follows:

1. There is a presumption that in every statutory offence, it is implied as an element of the offence that the person who commits the *actus reus* does the physical act defined in the offence voluntarily and with the intention of doing an act of the defined kind.
2. There is a further presumption in relation to the external elements of a statutory offence that are circumstances attendant on the doing of the physical act involved. It is implied as an element of the offence that, at

the time when the person who commits the actus reus does the physical act involved, he either—(a) knows the circumstances which make the doing of that act an offence; or (b) does not believe honestly and on reasonable grounds that the circumstances which are attendant on the doing of that act are such as to make the doing of that act innocent.

3. The state of mind to be implied under (2) is the state of mind which is more consonant with the fulfilment of the purpose of the statute. Prima facie, knowledge is that state of mind.
4. The prosecution bears the onus of proving the elements referred to in (1) and (2) beyond reasonable doubt except in the case of insanity and except where statute otherwise provides.'

"In considering whether those presumptions have been displaced in respect of a particular crime or offence a court must first have regard to the terms of the legislation under consideration. In my view, the use of the word 'permit' in reg. 4 suggests not only that those presumptions have not been displaced, but provides a positive reason for concluding that proof of *mens rea* is required. As Dixon J. said in *Proudman v. Dayman* (1943) 67 C.L.R. 536, at p.541:

'The applicant contended, however, that, upon a charge under s.30 of permitting a person not being the holder of a licence for the time being in force to drive a motor vehicle on any road, it must be shown, not merely that the driver was unlicensed, but also that the defendant knew it or at all events was indifferent to the question whether he was licensed or not.

'This contention was based upon the ground that the very idea of permission connotes knowledge of or advertence to the act or thing permitted. In other words, you cannot permit without consenting and consent involves a consciousness or understanding of the act or conduct to which it is directed. Be it so.'

His Honour then proceeded to a consideration of the terms of s.30 which did not affect his acceptance of the contentions about the general effect of the word 'permit'. In *Sweet v. Parsley* [1970] A.C. 132 Lord Diplock expressed the same view of the effect of the word 'permit' used in legislation making it an offence to permit premises to be used for the purpose of smoking cannabis when he said at p.162:

'Where the crime consists of doing an act which is prohibited by statute the proposition as to the state of mind of the doer which is contained in the full definition of the crime must be ascertained from the words and subject matter of the statute. The proposition, as Stephen J. pointed out, may be stated explicitly by the use of such qualifying adverbs as "maliciously",

“fraudulently”, “negligently” or “knowingly” — expressions which in relation to different kinds of conduct may call for judicial exegesis. And even without such adverbs the words descriptive of the prohibited act may themselves connote the presence of a particular mental element. Thus, where the prohibited conduct consists in permitting a particular thing to be done the word “permit” connotes at least knowledge or reasonable grounds for suspicion on the part of the permittor that the thing will be done and an unwillingness to use means available to him to prevent it’

As to the effect of the word ‘permit’ in penal legislation see also *Somerset v. Wade* [1894] 1 Q.B. 574, at p.577; *Bond v. Reynolds* [1960] V.R. 601, at p.602; *Reeve v. Cornish* Serial No. 3/1973, at p.3; and *Dale v. Gerathy* 1980 Tas.R. 127, at pp. 131, 132.

“The issue is to what event or occurrence is the act of permitting in reg. 4 directed? Is it directed to the compound event of an animal being in or remaining on reserved land, in which case the prosecution would have to prove *inter alia* that the defendant knew that the land was reserved land, or is it directed merely to the event of an animal being in or remaining on land which turns out to be reserved land, in which case the prosecution would have to prove *inter alia* that it was reserved land, but would not have to prove that the defendant knew that it was reserved land. In my view, the passages which I have cited from the judgments of Jordan C.J. in *R. v. Turnbull* (1943) 44 S.R. (N.S.W.) 108 and Brennan J. in *He Kaw Teh v. The Queen* (1985) 157 C.L.R. 523 and the decisions as to the meaning and effect of the word ‘permit’ suggest that *prima facie* I should adopt the former construction. However, counsel for the applicant submitted that the decision in *Proudman v. Dayman* (1943) 67 C.L.R. 536 leads to the opposite conclusion. In that case the Court held that upon a charge of permitting an unlicensed driver to drive a motor vehicle proof that the defendant knew that the driver was unlicensed was unnecessary. At pp. 541 and 542 Dixon J. said:

“The material words of s.30 are: “employs or permits any person not being the holder of such a licence to drive a motor vehicle on any road”. It may be conceded that unless a defendant meant to consent to the three conditions involved in the words (1) drive, (2) a motor vehicle, (3) on a road, he could not be said to have permitted the doing of that thing. But it is to that act that the permission must be directed, not to the absence of a licence. The words “not being the holder of such a licence” do not form part of the act permitted. They are a negative qualification upon the word “person”, and operate to exclude persons so licensed from the class who may not be permitted to drive. There is nothing in the language of the section to suggest that the consent must

be directed to the failure of the driver to hold a licence, and the form in which the section is cast indicates the contrary. It is the driving which must not be permitted, that is, unless the driver holds a licence.'

Counsel for the applicant in this case submitted that the same reasoning should be applied to the construction of reg. 4. It may be that the decision in *He Kaw Teh v. The Queen* (*supra*) should be regarded as having weakened the authority of *Proudman v. Dayman* (*supra*), but even if it has not, the decision in that case does not assist the applicant because the terms of reg. 4 are different from those of the legislation which was being considered in *Proudman v. Dayman* and, in my view, lead to the opposite conclusion to that which was reached in that case. The statutory provision which was being considered in *Proudman v. Dayman* made it an offence for a person to permit 'any person' who did not fall into the category of licensed driver to drive a motor vehicle. But reg. 4 does not make it an offence to permit one of the specified animals to be in or remain on 'any land' unless that land is not reserved land: the offence is simply permitting one of the specified animals to be in or remain on reserved land. The legislation which was considered in *Proudman v. Dayman* made the act of driving a motor vehicle unlawful unless the driver was licensed so that any person who permitted another person to drive a motor vehicle would have known that the act of driving which he was permitting was unlawful unless that other person was a licensed driver. By contrast, there is no general prohibition against taking one of the specified animals on to land in Tasmania and a person who permits such an animal to be in or to remain on land is not put on notice that *prima facie* he is committing an offence unless some licensing requirement is satisfied.

"I am not persuaded that there are any grounds for concluding that the relevant *mens rea* of the offence created by reg. 4 is an absence of an honest and reasonable belief in a state of affairs which, if true, would have made he act of each of the respondents innocent. In *He Kaw Teh v. The Queen* (*supra*) Brennan J. said at p.579, referring to 'offences when the absence of an exculpatory belief is the relevant form of *mens rea*' —

'Criminal liability in cases to which that form of *mens rea* applies is imposed for the intentional doing of the physical act involved in the offence in circumstances where the supposed offender has no reasonable grounds for believing that his conduct is innocent. That is a liability imposed for doing the act, not for failing to take care in enquiring into the circumstances. That kind of criminal liability arises usually when the physical act is of such a kind that it ought not be done unless there are reasonable grounds for believing that the doing of the act is innocent. That is not to resurrect the discarded division of crimes into the classes

mala in se and *mala prohibita*; rather it is to ascertain whether the statute intends to prohibit the doing of the act involved unless the risk that it is attended by the circumstances which make it criminal can reasonably be thought to be excluded, or whether the statute intends not to prohibit the doing of the act unless it is known to be attended by those circumstances.'

In my view, reg. 4 clearly falls into the latter of those two last mentioned statutory purposes: permitting an animal to be on land is not *ex facie* an act of 'such a kind that it ought not to be done unless there are reasonable grounds for believing that the doing of the act is innocent'. To construe the regulation otherwise would entail the conclusion that a person could not permit a horse, a dog or one of the other specified animals to be anywhere at all within the boundaries of the entire State of Tasmania without running the risk that he was committing an offence against reg. 4.

"I hold that an essential ingredient of the offence created by reg. 4 is that the defendant knew that the land which he permitted the animal to be in or remain on was reserved land. The extent to which 'wilful blindness' by a defendant might be sufficient to establish the requisite knowledge does not fall for determination in the circumstances of this case and I therefore express no view about the question.

"Insofar as they relate to the dismissal of the complaints alleging breaches of reg. 4(1) the motions to review are dismissed. The motions to review also relate to complaints alleging breaches of other regulations as to which different considerations apply and about which counsel did not make submissions. I shall hear counsel further as to the disposition of those parts of the motions to review."

Against this decision the complainant appealed to the Full Court on the ground, as amended, that "the learned judge erred in law in holding that an essential ingredient in the offence created by" the *National Parks and Reserves Regulations* 1971, reg. 4, "was that the respondent knew that the land which he permitted the animal to be in or remain on was reserved land."

C. R. Wright Q.C., S.-G., and A. G. Melick for the appellant.

John Kable and Andrea Trezise for the respondent.

The appellant's written submission was substantially as follows.

Ground 1. The *National Parks and Reserves Regulations* 1971 creates an offence in which there is no necessity for the prosecution to prove mens rea. *He Kaw Teh v. The Queen* (1985) 157 C.L.R. 523, at pp. 622-624. Knowledge on the part of the respondents that the land was reserved land is an element external to the offence. *Bank of New South Wales v. Piper* [1897] A.C. 383; *Maher v. Musson* (1934) 52 C.L.R. 100, at p.104; *Proudman v. Dayman* (1941) 67 C.L.R. 536, at pp.541, 542.

The majority in *He Kaw Teh v. The Queen* (*supra*) deals specifically with criminal rather than statutory offences and hence the above authorities are not over-ruled by that case. Brennan J. was in the minority when he advanced many of his propositions at pp.638-645 and it is to be noted that Green C.J. relied on this "minority" judgment. The presumption of *mens rea* in statutory offences may be displaced by express words or because the subject matter requires strict liability. *Sherras v. De Rutzen* [1895] 1 Q.B. 918, at p.921; *He Kaw Teh v. The Queen* (*supra*, at pp.622-624). The latter decision is not an authority for the conclusion that the prosecution has to prove *mens rea* in respect of every element of a statutory offence. The majority decided that *mens rea* is required for every element of an offence such as that created by the *Customs Act* 1985, s.223B(1)(b), where the harshness of the penalty suggests that no departure from the ordinary principles of common law with regard to the proof of *mens rea* was intended (pp.625, 651).

Regulation 4(1) is of such a kind that there is no necessity for the prosecution to prove the existence of *mens rea*, where the doing of the prohibited act *prima facie* imports the offence leaving it open to the respondent to avoid liability by proving he took all reasonable precautions. *Reg. v. Sault St. Marie* [1978] 2 S.C.R. 1299. A duty to take reasonable care may be inferred from the provisions of reg. 4 which provides that the respondents may avoid breach of that provision by obtaining permission to take the prescribed animals on to reserves.

Ground 2. It was open to the respondents to avoid liability by proving that they took all reasonable care. A defence would be available if they reasonably believed that the land was not reserved land. *He Kaw Teh v. The Queen* (*supra*, at p.624). This is a defence that had to be raised by the respondents although once raised, whether during the prosecution or defence case, the onus of negating it would be borne by the prosecution. *Reg. v. Tolson* (1889) 23 Q.B.D. 168, at p.181; *Bank of New South Wales v. Piper* (*supra*, at pp.389, 390); *Reg. v. Strawbridge* [1970] N.Z.L.R. 909, at p.916; *Reg. v. Reynhoudt* (1962) 107 C.L.R. 381, at pp.395, 396, 399, 400; *Iannella v. French* (1968) 119 C.L.R. 84. In this case the evidentiary burden was never discharged by the respondents and accordingly it was not lawful to rule that they had no case to answer.

The respondent's written submission was substantially as follows.

Ground 1. The respondent relies on the observations of Green C.J. based on *Proudman v. Dayman* (*supra*) as to the meaning of the word "permit" and also on the arguments of counsel before him at pp.100-102 of the Appeal Book. Further authorities on the meaning "permit" are: *Reeve v. Cornish* Serial No. 3/1973; *Somerset v. Wade* [1894] 1 Q.B. 574, at pp.576, 577. *Dale v. Gerathy* 1980 Tas.R. 127, at p.131; *Bond v. Reynolds* [1960] V.R. 601, at p.602. The respondent relies on the

arguments in the Appeal Book relating to the drafting of reg. 4, and the ease with which a regulation creating an offence of strict liability could have been drafted. Knowledge that the land was reserved land is not an external element of the offence. *Bank of New South Wales v. Piper* (supra), *Maher v. Musson* (supra) and *Proudman v. Dayman* (supra) are not authority for that proposition. It was not necessary for the prosecution to prove that the respondents knew that they were in breach of the law in being in the national park but rather that they knew as a matter of fact that they were in a national park. It is wrong to talk solely about guilty knowledge in the sense of knowing what is done is wrong. Here it means only that there is knowledge of the existence of the facts which are required to be proved to constitute the offence. One must distinguish between "the presumption of *mens rea*" as that phrase has been used to describe the crimes and the knowledge of facts which of themselves must be proved to constitute the offence. *Poyser v. Commissioner for Corporate Affairs* [1985] V.R. 533 and *Welsh v. Donnelly* [1983] 2 V.R. 173. There is nothing in the regulations to justify saying that the subject matter with which they deal or the enforcement of them require the defendants to be put on strict liability. That one can obtain permission to enter is not an argument but there exists a duty to take reasonable care. *R. v. Turnbull* (1943) 44 S.R.(N.S.W.) 108, at p.109, is significant. See too the observations of Barwick C.J. and Mason J. in *Cameron v. Holt* (1979) 142 C.L.R. 342, at pp.346, 348. The decision of Green C.J. is correct whether or not *He Kaw Teh v. The Queen* (supra) has any relevance to the interpretation of reg. 4. The reasoning in that case however, supports his conclusion. *F. v. Ling* 1985 Tas. R. 112 is also relevant.

Ground 2. The authorities referred to by the appellant are to be distinguished.

Wright Q.C., S-G. There is no justification for reading into reg. 4 a requirement of knowledge that it was reserved land: *Alphacell Ltd. v. Woodward* [1972] A.C. 824. There is no justification for implying a need for such knowledge from the words of the regulation: *He Kaw Teh v. The Queen* (1985) 59 A.L.J.R. 620, at p.624, 157 C.L.R. 523, at p.535. *Poole v. Wah Min Chan* (1947) 75 C.L.R. 218. That the land is reserved land is an attribute or quality which is not a matter that the Crown should prove in making a *prima facie* case. "Permit" was considered in *Gammon (Hong Kong) Ltd. v. A.-G. of Hong Kong* [1984] 3 W.L.R. 437, at p.447, [1985] A.C. 1, at p.18. To permit means to exercise power to control: *Boucher v. G.J. Coles & Co. Ltd.* (1974) 9 S.A.S.R. 495. *Proudman v. Dayman* (1943) 67 C.L.R. 536, at pp.541, 542. *Reg. v. Reynhoudt* (1962) 107 C.L.R. 381. This is plainly not a criminal offence but regulatory of national parks and therefore absolute. *Reg. v. Strawbridge* [1970] N.Z.L.R. 909, at p.916. This is legislation that casts on the individual an obligation to conduct his affairs in a certain way.

If this is a half-way house case there is an evidentiary onus on the defendant to raise lack of knowledge. The expression "half-way house case" as used in *Reg. v. Strawbridge (supra)* is taken from *Sweet v. Parsley* [1970] A.C. 132, v. [1970] N.Z.L.R. at p.914. If this is not an absolute offence it is a half-way house type of offence [Nettlefold J. referred to *Bank of New South Wales v. Piper* [1897] A.C. 383. Australian cases tend to require *mens rea* in almost all cases.] *He Kaw Teh v. The Queen (supra)*, per Brennan J. at p.645). [Nettlefold J. Between what is it a house half-way?] Absolute offences on the one hand, and offences specifically requiring knowledge or intent, or in which the act is so heinous or so seriously punished that it must be added to the general criminal law [Nettlefold J. Professor Howard says one should not always go to the common law where there is a criminal code. Section 13 is basic]. *Acts Interpretation Act* 1931, s.36, *Criminal Code Act* 1924, s.4(3). The magnitude of the penalty is of less importance than heinousness. One does not look at the maximum penalty. In *Gammon (Hong Kong) Ltd. v. A-G. of Hong Kong (supra)* the maximum penalty was very high but that did not stop the Judicial Committee from holding the offence to be one of absolute liability: *He Kaw Teh v. The Queen (supra)* per Dawson J. at p.649. [Underwood J. Have you considered other provisions of the regulations?] No, it is usual not to use one to interpret another.

Kable. Generally one can go anywhere on roads, tracks and Crown Land with horses and dogs. The legislation deals with ordinary conduct which is not criminal in much bush land in Tasmania and therefore the regulation should be strictly construed.

Wright QC., S-G. asked for leave with the respondent's consent to amend his second ground of appeal. After discussion, he withdrew his application and withdrew ground 2. He also stated that 26% of the State is reserved land, 12.6% being conservation land, and 13.4% reserves.

Kable. We have two main contentions, the ordinary meaning of "permit" is given by Dixon J. in *Proudman and Dayman* (1943) 67 C.L.R. 536, at p.541, and the cases referred to by Green C.J. which agree with the S.O.E.D. and the Macquarie Dictionary, and is that permitting involves knowing and consenting. The act which must be permitted is having an animal on a reserve. The acts proscribed must be found in the Regulations. Regulation 4 was amended by S.R. 1977/101. On the original wording "remain" required knowledge that the animal was on reserved land. Permitted to remain requires such knowledge. The amendment was not intended to alter the requirement of knowledge. The situation has a number of components. Permitting the situation to remain requires knowledge of those components: *Sweet v. Parsley* [1970] A.C. 132; *Lim Chin Aik v. The Queen* [1963] A.C. 160; *Reg. v. Warner* [1969] 2 A.C. 256; *Cameron v. Holt* (1980) 142 C.L.R. 342. "Statutory offence" is used in contradistinction to criminal offence rather than "regulatory offence". In *Gammon (Hong Kong) Ltd. v. A-G. for*

Hong Kong (supra, at p.443) the Judicial Committee speaks of *mens rea* in connection with statutory offences. Not all regulatory offences are absolute. *Poyser v. Commissioner for Corporate Affairs* [1985] V.R. 533. [Neasey J. That is not an authority for your proposition. How can the offence be proved otherwise than by a confession if it is not absolute?] When the regulation had only "remain" there had to be knowledge before remaining can begin. Referring to the written submissions, Brennan J. was not in a minority. \$5000 penalty is a severe penalty compared with other statutory penalties.

Melick in reply. The penalty is an overall penalty covering all regulations and is not intended just for reg. 4. *Cameron v. Holt (supra)* was a case of a criminal offence, not a regulatory offence.

Cur. adv. vult.

SEPTEMBER 22.

NEASEY J. referred to the course of the proceedings, set forth the *National Parks and Reserves Regulations* 1971, reg. 4, and the definition of "stock" in reg. 2, and continued:

The principles governing the question whether particular statutory offences conform with the general principle of criminal responsibility that proof of *mens rea* is essential to proof of guilt have frequently occupied courts of highest authority in England, Australia and elsewhere in recent years. Two tendencies have emerged which are worthy of mention relative to the present case. These are:

- (1) in the High Court of Australia there has been over a period of time some difference of emphasis in relation to the strength of the presumption that *mens rea* is an essential ingredient of proof of a statutory offence of the modern regulatory kind, which is not "truly criminal in character"; and
- (2) some divergence has developed between the approach of the courts in England and Australia in respect of what may be called for simplicity, "the defence of honest and reasonable mistake".

In relation to the first of these, one may refer to *Proudman v. Dayman* (1943) 67 C.L.R. 536, in which Dixon J. said (pp.540 *et seq*):

"There may be no longer any presumption that *mens rea*, in the sense of a specific state of mind, whether of motive, intention, knowledge or advertence, is an ingredient in an offence created by a modern statute; but to concede that the weakening of the older understanding of the rule of interpretation has left us with no *prima facie* presumption that some mental element is implied in the definition of any new statutory offence does not mean that the rule that honest and reasonable mistake is *prima facie* admissible as an exculpation has lost its application also. Doubtless over a wide description of legislation the presumption

in favour of its application is but a weak one: see *Maher v. Musson* (1934) 52 C.L.R. 100; *Thomas v. The King* (1937) 59 C.L.R. 279 . . .”

More recent cases in the Privy Council and the House of Lords in England and the High Court of Australia, however, have reaffirmed the strength of the primary presumption that establishment of *mens rea* is essential to proof of any such offence unless examination of the provision in question shows that the presumption must be regarded as having been displaced. In *He Kaw Teh v. The Queen* (1985) 59 A.L.J.R. 620, at p.622, 157 C.L.R. 523, at pp.528, 529, Gibbs C.J., in reference to the development said this:

“There has in the past been a tendency in Australia to regard this presumption [i.e., that *mens rea* is an essential ingredient in every offence — my interpolation] as only a weak one at least in the case of modern regulatory statutes: *Proudman v. Dayman* (1941) 67 C.L.R. 536 at 540; *Bergin v. Stack* (1953) 88 C.L.R. 248 at 261. However, the principle stated in *Sherras v. De Rutzen* has more recently been reaffirmed in the Judicial Committee and the House of Lords (*Lim Chin Aik v. The Queen* [1963] A.C. 160 at 173; *R. v. Warner* [1969] 2 A.C. 256 at 272 and *Gammon Ltd. v. A.-G. of Hong Kong* [1984] 3 W.L.R. 437 at 441; [1984] 2 All E.R. 503 at 507; and in this Court: *Cameron v. Holt* (1980) 142 C.L.R. 342 at 346, 348.”

Nevertheless, given that the strength of the presumption must be regarded as unabated even in the modern regulatory type of quasi-criminal offence, that is the area in which instances are most likely to be found of the presumption being displaced.

The second tendency may be illustrated in a summary way for the present purpose by reference to the following passage from Lord Diplock's speech in *Sweet v. Parsley* [1970] A.C. 132, in which his Lordship said (pp.163, 164):

“It may well be that had the significance of *Reg. v. Tolson* (1889) 23 Q.B.D. 168 been appreciated here, as it was in the High Court of Australia, our courts, too, would have been less ready to infer an intention of Parliament to create offences for which honest and reasonable mistake was no excuse.

“Its importance as a guide to the construction of penal provisions in statutes of general application was recognised by Dixon J. in *Maher v. Musson* (1934) 52 C.L.R. 100, 104, and by the majority of the High Court of Australia in *Thomas v. The King* (1937) 59 C.L.R. 279. It is now regularly adopted in Australia as a general principle of construction of statutory provisions of this kind.

“By contract, in England the principle laid down in *Reg. v. Tolson* (1889) 23 Q.B.D. 168, has been overlooked until recently . . .”

It is also noteworthy that in many of the modern authorities, even where it is clear that *mens rea* is an essential ingredient in proof of the offence, the meaning of that expression and its application in the context is often a matter of difficulty, and has occasioned frequent discussion. Much of the content of the judgments in *He Kaw Teh v. The Queen* (1985) 59 A.L.J.R. 620, 157 C.L.R. 523, is occupied with it — see particularly the opinions of Gibbs C.J. and Brennan J. That matter, however, is not a problem in this appeal.

As to the present regulation, the question was whether the prosecution was obliged to prove that the respondents knew at the relevant time that the land in question was reserved land, in order to establish a *prima facie* case against them, respectively. Both judicial determinations in the case so far have held that this is necessary, and so there has been no need to make a determination whether an honest and reasonable belief on the part of the respondents in a state of fact which if true would make their actions innocent (e.g., a mistaken belief that the land was not reserved land) would afford them a defence. The first issue to be considered is whether the language of the regulation is such as to confirm or displace the presumption that proof of *mens rea* is an essential ingredient. If it is, that ends the matter. The learned Chief Justice took the view that use of the word “permit” in the formulation, “permit the same to be in or remain on any reserved land”, on its true interpretation required that the prosecution should prove that the permission extended to and embraced the fact that the land was reserved land. That is to say, his Honour held that the offender must be shown to have voluntarily and intentionally countenanced the animal being on land which he then knew was reserved land. He distinguished the case of *Proudman v. Dayman* (1943) 67 C.L.R. 536 principally upon the basis that the formulation in the present case indicated the opposite result from that indicated therein. With great respect, I am not able to agree with that view. In my opinion, the formulation under review, properly interpreted, should lead to the same result as in that case.

In *Proudman v. Dayman* (*supra*), I think the judgment of Dixon J. on the relevant point turned upon the scope of the concept of permitting, rather than upon the formulation of words in which the concept was used. That is to say, that which was permitted was the act of driving a motor vehicle on a public road. The act of permission in its ordinary connotation did not go beyond that. The words “not being the holder of such a licence” constituted, as his Honour said, a negative qualification upon the word “person”, and operated to exclude persons so licensed from the class who may not be permitted to drive. His Honour continued by saying:

“There is nothing in the language of the section to suggest that the consent must be directed to the failure of the driver to hold a

licence, and the form in which the section is cast indicates the contrary. It is the driving which must not be permitted, that is, unless the driver holds a licence.”[67 C.L.R., at p.542.]

I think his Honour meant by that, for example, that the section might have been formulated, “employs or permits any person whom he knows to be not the holder of such a licence to drive a motor vehicle, etc.”. Such a formulation would by its terms have extended the idea of knowledge which is inherent in the word “permit” to the failure of the driver to hold a licence.

In the present case, the formulation is, “No person . . . shall permit the same to be in or remain on any reserved land”. Knowledge of the thing permitted is inherent in the word “permit”. But what is permitted? The act of permission extends to allowing or countenancing the prescribed animal to be on a given area of land. That the land should be reserved land so as to make the regulation relevant is a qualification which is external to the act of permission. I am of opinion that the line of reasoning which Dixon J. followed in *Proudman v. Dayman* (*supra*) is equally applicable in the present case, and leads to the result that use of the word “permit” is not decisive of the question whether some form of *mens rea* must be proved by the complainant in order to establish the offence. It is a case where, since the regulation is silent as to whether or not *mens rea* must be proved, wider considerations must be taken into account in order to decide the question.

The judgment of Wright J. in *Sherras v. De Rutzen* [1895] 1 Q.B. 918, contains the formulation so often cited, viz.:

“There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered.” [*Ibid.* at p.921]

I have already expressed the opinion that the “presumption” has not been displaced by the “words of the statute creating the offence”. The other question is whether the presumption is to be regarded as displaced by “the subject-matter with which it deals”. Recent authorities have examined and extrapolated that consideration a good deal. Brennan J. in *He Kaw Teh v. The Queen* (1985) 59 A.J.L.R. 620, at p.638, 157 C.L.R. 523, at p.566, cited the useful formulation from the judgment of the Judicial Committee in *Gammon (Hong Kong) Ltd. v. A-G. of Hong Kong* [1985] A.C. 1, at p.14, in which the following propositions were stated:

“(1) There is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is ‘truly

criminal' in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act."

Brennan J. went on to say:

"The fourth proposition, if I may say so with respect, seems to be too categorical an approach to what is, after all, a question of statutory interpretation. It is not possible to decide that mens rea can be excluded only where the subject-matter answers a given description (even so general a description as 'an issue of social concern'), without regard to the whole of the statutory context." (A.L.J.R. at p.638, C.L.R. at p.567.)

With respect, I agree. However, taking the other propositions in turn; the first three in relation to the present case are easily applied. The offence which this regulation sets up is certainly not "truly criminal" but on the contrary is "regulatory" merely. No public condemnation or stigma are attendant upon conviction, as with a truly criminal offence — see per Lord Reid in *Sweet v. Parsley* (*supra*, at p.149). The nature of the subject-matter is to be distinguished at once from, for example, that involved in *He Kaw Teh's* case (importation of dangerous drugs). The subject-matter is concerned with promoting the public welfare in relation to ecological conservation, and regulates an activity in which people may choose whether they participate or not. In addition it is a subject-matter in respect of which the person who chooses to participate, if an absolute or near-absolute obligation of this kind is to be imposed, can certainly take steps to ensure his own immunity from the reach of the regulation and promote its observance — see also, *Lim Chin Aik v. The Queen* [1963] A.C. 160, at p.174. *He Kaw Teh v. The Queen* (1985) 59 A.L.J.R. 620, per Brennan J. at p.639, 157 C.L.R. 523, at pp.568, 569.

A person who contemplates taking an animal or animals of the prescribed kind upon land which is not his, and of the ownership of which he is unsure, can and should take steps to find out who does own it. The first thing to ascertain is whether it is private land or Crown land. If it is private land, presumably he would not take animals on it without permission. If it is Crown land, then, leaving aside whatever general rights he may or may not have to enter it at will, with or without animals, since ignorance of the law is no excuse he will be

presumed to know at least that certain Crown lands are reserved land within the meaning of the *National Parks and Wildlife Act* 1970, and that a permit is needed before certain animals are taken on such reserved land. He can and should take steps to find out whether the land on which he proposes to take the animals is reserved land or not.

The converse of the latter proposition is that in most cases it would be exceedingly difficult for an officer of a conservation authority to be able to prove that a person who had taken a prescribed animal upon reserved land knew at the time that it was reserved land. To hold that such a requirement is essential for proof of the offence would render the regulation in substance nugatory. This is an important consideration. In *He Kaw Teh v. The Queen* (*supra*) their Honours considered it in relation to an offence which was criminal in a real sense, and they thought that it should not be inordinately difficult to prove that a person who brought a case containing heroin into Australia knew that heroin was present in it. With the regulation under review, however, proof that the person knew the land was reserved land would be practically impossible unless he admitted that he knew. In many cases of course the person would not have taken steps to find out, and would not know.

It appears to me that all of these considerations lead strongly to the conclusion that the legislative effect of the regulation is to exclude the presumption that *mens rea* is required to be proved in the form of knowledge that the land is reserved land. It is not necessary to examine in this appeal the questions whether some alternative or lesser form of knowledge may constitute required *mens rea*, or whether an honest and reasonable belief in a state of affairs which if true would make the act innocent would provide a defence. The established tendency of the law in Australia, however, seems to leave little doubt that to hold such an honest and reasonable belief would be exculpatory — *Proudman v. Dayman* (1943) 67 C.L.R. 536, *Maher v. Musson* (1934) 52 C.L.R. 100, *Sweet v. Parsley* [1970] A.C. 132, per Lord Diplock at p.164; and see the helpful summary of the applicable principles by Brennan J. in *He Kaw Teh v. The Queen* (1985) 59 A.L.J.R. 620, at p.642, 157 C.L.R. 523, at pp.574-577.

For the above reasons, the appeal in my view should succeed, and the matter should be remitted for rehearing by a magistrate.

NETTLEFOLD J.: The sole question is whether the following ground of appeal should be upheld:

“(1) The Learned Judge erred in law in holding that an essential ingredient of the offence created by Regulation 4 of *The National Parks and Reserves Regulations* 1971 was that the respondent knew that the land which he permitted the animal to be in or remain on was reserved land;”

As a result of the decision of the High Court in *He Kaw Teh v. The Queen* (1985) 59 A.L.J.R. 620, 157 C.L.R. 523, the following proposition stated in *Sherras v. De Rutzen* [1895] 1 Q.B. 918, at p.921, has been firmly reinforced at the level of basal principle:

“There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or the subject-matter with which it deals, and both must be considered.”

Thus the principle requires us, when considering whether the presumption that guilty knowledge is an essential ingredient of the offence has been displaced, to consider the words of the statute creating the offence. I find that aspect of the matter important in this case. The regulation does not say “no person . . . shall permit the same to be in or remain on any reserved land, he knowing the land to be reserved land”. I do not doubt that you cannot correctly be said to have permitted animals to be on a piece of land, unless you knew the animals were there or at the least you created a state of affairs which rendered it probable that they would go there. But you can permit animals to be on reserved land without knowing that the land has that character in law; it may be sufficient that you permitted them to be at the relevant place, that place then being shown by other evidence to have that legal character.

The primary purpose of this regulation is to avoid damage in reserved areas. That being so, it is a law analogous to some of the cases referred to as exceptions to the general principle by Wright J. in *Sherras v. De Rutzen* [1895] 1 Q.B. 918. That primary purpose would not be adequately achieved if the prosecution could not make out a case to answer against an alleged offender without showing that he knew that the land in question had the legal character of reserved land. It has long been the practice to recognise strict or absolute offences in this quasi-criminal regulatory area (see Lord Reid: *Sweet v. Parsley* [1970] A.C. 132, at p.149). There is a strong contrast between a provision of this kind and a provision which is truly part of the criminal law. A conviction under this provision would fall far short of branding a person a criminal although it may be a step above the parking offences. The following proposition stated by Lord Pearce in *Sweet v. Parsley* (*supra*, at p.156) is very relevant:

“Before the court will dispense with the necessity for mens rea it has to be satisfied the Parliament so intended. The mere absence of the word ‘knowingly’ is not enough. But the nature of the crime, the punishment, the absence of social obloquy, the particular mischief and the field of activity in which it occurs, and the wording of the particular section and its context, may

show that Parliament intended that the act should be prevented by punishment regardless of intent or knowledge."

The bearing of that observation on this case is in favour of the view that the court should not find that knowledge in the offender of the legal status of the land is an ingredient of the offence to be proved by the prosecution as a condition of making out a *prima facie* case. To place that hurdle in the path of the prosecution would mean that many prosecutions with merit would fail. Because of the character of many areas of reserved land it is obviously difficult to detect offenders and, presumably, in many cases, virtually impossible to prove knowledge in the defendant of the relevant status of the land in the absence of an admission (cf. *Reg. v. Woodrow* (1846) 15 M.& W. 404, at p.417). This is the type of case where strict liability will promote the objects of the relevant legislation, that is the *National Parks and Wildlife Act* 1970 (for the relevance of that see *Gammon (Hong Kong) Ltd. v. A-G. of Hong Kong* [1984] 2 All E.R. 503, at p.508, [1985] A.C. 1, at p.14; *Lim Chin Aik v. The Queen* [1963] A.C. 160, at p.174; *Reg. v. Strawbridge* [1970] N.Z.L.R. 909, at p.910).

This decision by this Court should not produce any injustice in prosecutions of this kind. On the contrary it will avoid the injustice of prosecutions failing which, in the public interest, ought to succeed. Any risk of injustices can be avoided if the regulation is treated as creating "strict liability" as distinct from "absolute liability" within the meaning of those terms as used by Dawson J. in *He Kaw Teh v. The Queen* (1985) 59 A.L.J.R. 620, at p.649, 157 C.L.R. 523, at pp.591 et seq. That is to say, the prosecution does not have to prove as part of its case that the defendant knew that the land in question was reserved land. But the defendant may produce or refer to evidence tending to show that he was honestly and reasonably mistaken on the question whether the land in question was reserved land. Of course, if he did not know that it was reserved land because he could not care less whether he was offending or not then he ought to be convicted (cf. *Proudman v. Dayman* (1941) 67 C.L.R. 536, at pp.538, 539).

But a responsible citizen who makes appropriate enquiries as to whether he is in a reserve and, for some reason, is honestly and reasonably mistaken about that fact will have a defence. To be precise about it I should quote the following passage from the reasons of Gibbs C.J. in *He Kaw Teh v. The Queen* (1985) 59 A.L.J.R. 620, at p.623, 157 C.L.R. 523, at p.533:

"These cases establish that if it is held that guilty knowledge is not an ingredient of an offence, it does not follow that the offence is an absolute one. A middle course, between imposing absolute liability and requiring proof of guilty knowledge or intention, is to hold that an accused will not be guilty if he acted under an honest and reasonable mistake as to the existence of facts,

which, if true, would have made his act innocent.”

As a result of *He Kaw Teh v. The Queen* (*supra*) it is now clear that the prosecution will carry the ultimate burden of proving beyond doubt that the defendant's act was not innocent in the relevant sense. In view of a submission which was made in the hearing before the single judge I should add that a mistake as to whether a given piece of land is inside or outside of the reserve boundary is a question of fact.

A long line of Australian cases show that this should be treated as a strict liability type of case and not absolute liability (see *Maher v. Musson* (1934) 52 C.L.R. 100, at pp.104, 105; *Thomas v. The King* (1937) 59 C.L.R. 279, at p.303; *Proudman v. Dayman* (1941) 67 C.L.R. 536, at p.540; *Kain & Shelton Pty. Ltd. v. McDonald* (1971) 1 S.A.S.R. 39, at p.43; *Mayer v. Marchant* (1973) 5 S.A.S.R. 567, at pp.568, 569; *He Kaw Teh v. The Queen* (1985) 59 A.L.J.R. 620, at pp.623 and 649, 157 C.L.R. 523, at pp.533 and 591 et seq.). The following extract from the decision of Bray C.J. in *Kain & Shelton v. McDonald* (*supra*, at pp.43, 44) explains the position:

“It is now, in my view, firmly established in Australia that, even in a case where it is not necessary for the prosecution to prove *mens rea*, the defendant is none the less entitled to acquittal if he acted under an honest and reasonable mistake of fact, that is, if he had ‘reasonable grounds for believing in the existence of a state of facts, which, if true, would take his act outside the operation of the enactment and that on those grounds he did so believe’ (*Proudman v. Dayman* per Dixon J. as he then was at p.541) . . .

“Of course, Parliament can exclude this defence if it wants to, but, extraordinary and unusual cases apart, I see no reason why it should be presumed to have excluded it unless it expressly says so.”

The appeals should be allowed and an order made that the complaints be re-tried by a magistrate.

UNDERWOOD J. referred to the course of the proceedings, set forth the *National Parks and Reserves Regulations* 1971, reg. 4, and the amended ground of appeal, and continued:

The question for determination is whether knowledge by each respondent that the land was reserved land is, by implication, a necessary element in the regulatory offence described by the *National Parks and Reserves Regulations* 1971, reg. 4(1). It is a question of statutory interpretation. The first consideration is whether the words of the regulation are such as to require proof of knowledge of the existence of all or some of the matters of fact which constitute the offence. The regulation makes it an offence to permit certain animals

"to be in or remain on any reserved land". The word "permit" connotes knowledge. Knowledge of or at least advertence to the act permitted must exist before it can be said that permission for the act has been given. *Proudman v. Dayman* (1941) 67 C.L.R. 536; *Sweet v. Parsley* [1970] A.C. 132, at p.162; *James and Son Ltd. v. Smee* [1955] 1 Q.B. 78.

What then is the act to which the permission is directed? In *Proudman v. Dayman* (*supra*) Dixon J. held that the act to which the permission was directed was the act of driving and the status of the driver was a matter external to the act permitted. In that case the fact that the driver was unlicensed was not affected by the granting or withholding of permission. The status of the driver was unrelated to the act permitted which was the driving of the motor vehicle. With great respect to the learned Chief Justice who took a contrary view, I am of the opinion that the reasoning in *Proudman v. Dayman* (*supra*) is applicable to an interpretation of reg. 4. The act to which permission is directed by that regulation is the presence or continuing presence of certain animals in a particular place. The status of the place, viz. reserved land, is external to the act permitted and is unrelated to that act. In his reasons for judgment the learned Chief Justice said [at p.142 of this report]:

"The statutory provision which was being considered in *Proudman v. Dayman* made it an offence for a person to permit 'any person' who did not fall into the category of a licensed driver to drive a motor vehicle. But reg. 4 does not make it an offence to permit one of the specified animals to be in or remain on 'any land' unless that land is not reserved land; the offence is simply permitting one of the specified animals to be in or remain on reserved land. The legislation which was considered in *Proudman v. Dayman* made the act of driving a motor vehicle unlawful unless the driver was licensed so that any person who permitted another person to drive a motor vehicle would have known that the act of driving which he was permitting was unlawful unless that other person was a licensed driver. By contrast, there is no general prohibition against taking one of the specified animals on to land in Tasmania and a person who permits such an animal to be in or to remain on land is not put on notice that *prima facie* he is committing an offence unless some licensing requirement is satisfied."

In my respectful view, such reasoning overlooks the basis of the judgment of Dixon J. in *Proudman v. Dayman* (*supra*) on this question. There his Honour was concerned to ascertain the act to which the permission had to be directed rather than the form of words used to describe that act. No significance was attached to the form of expression "permits *any person* not being the holder of such a licence to drive a motor vehicle . . ." His Honour's reasoning would have been

equally apposite had the statute in that case expressed the offence in the words, "permits a person who is not the holder of such a licence to drive a motor vehicle . . ."

The word "permit" in reg. 4 relates to the presence of animals in a particular place and not the status of that place. The absence of any word such as "knowingly" which of necessity, would make knowledge that the land was reserved land an element in the offence gives rise to a second consideration. Did the legislature by inference, intend proof of such knowledge to be a pre-requisite of guilt?

The decision of *He Kaw Teh v. The Queen* (1985) 59 A.L.J.R. 620, 157 C.L.R. 523, has put beyond doubt the proposition that when a statute creates and defines an offence only by reference to its external elements a mental element is usually implied in the definition but

- (a) the presumption may be displaced;
- (b) the nature of the mental element will not be the same in every case.

Regard must be had to the language of the statute and its subject-matter. *He Kaw Teh v. The Queen* (*supra*, at p.638 (A.L.J.R.), p.567 (C.L.R.); *Sherras v. De Rutzen* [1895] 1 Q.B. 918, at p.921. The matter was expressed in *Gammon (Hong Kong) Ltd. v. Attorney-General* [1984] 2 All E.R. 503, at p.508, [1985] A.C. 1, at p.14, in the following terms:

"(1) there is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is 'truly criminal' in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern; public safety is such an issue; (5) even where a statute is concerned with such an issue the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act."

In *Wings Ltd. v. Ellis* [1984] 3 All E.R. 577, [1985] A.C. 272, Lord Scarman at p.589 (All E.R.), p.295 (A.C.), referred to that passage in *Gammon (Hong Kong) Ltd. v. Attorney-General* and said:

"At the end of the day the question whether an offence created by statute requires *mens rea*, guilty knowledge or intention, in whole, in part, or not at all, turns on the subject-matter, the language and the structure of the Act studied as a whole, on the language of the particular statutory provision under consideration construed in the light of the legislative purpose embodied in the

Act, and on 'whether strict liability in respect to all or any of the essential ingredients of the offence would promote the object of the provision.'"

Applying the above principles to the matter in hand the following observations can be made about the regulations made under the *National Parks and Wildlife Act* 1970 and reg. 4 in particular.

1. The prohibited acts "are not criminal in any real sense but acts which in the public interest are prohibited under a penalty": see *Sherras v. De Rutzen* [1895] 1 Q.B. 918, at p.922.

2. It is now widely recognised that reserved lands constitute a valuable and irreplaceable community asset which enhances the quality of life. The ecology of these areas is often fragile and the preservation of native fauna and flora can truly be said to be a matter of social concern, not only for the present generation but for those which follow.

3. In general terms keepers and owners of animals are expected to ensure their animals do not stray or trespass. It is likely that Parliament intended to cast an obligation upon those who permitted their animals to be in or remain on land not in private ownership to make enquiry to ascertain the status of that land and any statutory restrictions on its use.

4. The maximum penalty for an infringement of the regulations is \$2,000. Whilst not a trifling amount it cannot be said to be a heavy penalty.

5. In the absence of an admission, knowledge that the land was reserved land would be difficult to prove and the creation of such difficulty is inconsistent with the social purpose of the legislation.

6. The provisions of the *National Parks and Wildlife Act* 1970 provide in effect, that land becomes reserved land upon a proclamation made by the Governor. Thus the existence and boundaries of reserved land are capable of being ascertained by any member of the public.

I reach the conclusion that upon a proper construction of reg. 4 knowledge that the land is reserved land is not an element in the offence. Such construction is consistent with the social purpose of the legislation and in accordance with the ordinary and natural meaning of the words used.

Such a conclusion does not of necessity mean that the language and subject-matter of the regulation wholly displaces the presumption that *mens rea* is an element in every statute. Parliament may have intended that criminal responsibility would not ensue in the event of a mistaken belief honestly held and based on reasonable grounds that the land was not reserved land. However, there was no evidence before the learned magistrate that any of the respondents may have held such

a mistaken belief and so the question does not fall for determination upon this appeal. Accordingly I would allow the appeal and order that the complaints be remitted for rehearing by a magistrate.

Appeal allowed. Matter remitted for rehearing by a magistrate.

Attorney for the appellant: *B. H. Burkett*, Crown Solicitor.

Attorneys for the respondents: *Zeeman Kable & Page*.

FDC-S.