STRICT RESPONSIBILITY: A REPLY.

I am most grateful to Mr. Edwards for his interesting critique of my article. Apart from being the present law of large areas of land, the general principles of responsibility laid down in the Australian criminal codes are of outstanding theoretical importance. Hitherto they have received very little attention from academic writers and not much more from the courts. Indeed, the High Court of Australia itself has shown no great comprehension of the structure of the codes of Queensland and Western Australia.[1] If the present discussion helps to bring this state of affairs to an end, I for one shall be more than satisfied.

Except for one point I do not propose to join issue with Mr. Edwards over our different interpretations of some of the cases cited. The case has yet to be decided the *ratio decidendi* of which is beyond argument, and anyone interested will make his own evaluation. The exception concerns the Queensland case of *Brimblecombe v. Duncan*[2] which Mr. Edwards cites to support the proposition that it "seems to have been generally accepted . . . that the exclusion of the rule in section 24 has the effect of depriving the accused completely of his defence of mistake of fact." I do not regard *Brimblecombe v. Duncan* as supporting this assertion in any degree, but as I have analysed Queensland authority on the inter-relationship of sections 23 and 24 in detail elsewhere[3] it would not be appropriate to pursue the point here.

I do not find the criticisms of my interpretation of sections 23 and 24 convincing. The most important difference between Mr.

1 In Brennan v. The King, (1936) 55 Commonwealth L.R. 253, the High Court handed down a decision on appeal from Western Australia on the responsibility of accomplices to murder under the Code. This decision so clearly rested on a misunderstanding of the structure of the Code that in Solomon, [1959] Queensland R. 123, the Queensland Court of Criminal Appeal, dealing with identical sections of the Queensland Code, felt free to escape through the loophole that Brennan was not a Queensland appeal and to come to the opposite conclusion from the one reached by the High Court. See a note on Solomon in (1959) 3 U. QUEENSLAND L.J. 410. For a second example, see the trenchant criticism by Brett in (1953) 27 AUST. L.J. 6, 89, of the High Court's decision on appeal from Western Australia in Callaghan v. The Queen, [1952] Argus L.R. 941.

2 [1958] Queensland R. 8.

3 See page 229, note 1, *supra*.

Edwards and myself is as to the meaning of "act" in section 23. I should be inclined to agree with the view that it means no more than "muscular contraction or bodily movement" were it not for the opening words of the section: "Subject to the express provisions of this Code relating to negligent acts and omissions . . ." I cannot understand how an act in the sense proposed by Mr. Edwards can rationally be described as negligent. His kind of act is a purely physical phenomenon. Such a phenomenon cannot for legal purposes be described as negligent unless certain other facts are added to the occurrence of the act, one of these other facts being the state of mind of the actor at the relevant time. If Mr. Edwards excludes this state of mind from his interpretation of "act" in section 23, he fails entirely to account for the reference to negligent acts. Still less does he explain how an omission can be referred to as negligent, for there is no muscular contraction or bodily movement about an omission. Since in so important a section as section 23 the opening words cannot be regarded as meaningless or superfluous, and since there is no legal meaning of "negligent" known to me which accords in the context with "act" as defined by Mr. Edwards, I regard his explanation of section 23 as impossible.

I find a similar logical shortcoming in Mr. Edwards's explanation of the word "reasonable" in section 24. Indeed, I hope he will forgive me for saying that in my view he has not really grasped the nettle here at all. The third paragraph of his article deals with the question whether section 24 imposes an objective test. Having conceded that it "seems" to do so, he continues by expressing doubt whether a restatement of the requirement of reasonableness in terms of negligence is helpful. I take this to imply that such a restatement does not elucidate the meaning of "reasonable" in the context. This may be so, but in my view Mr. Edwards does nothing to prove it. His own version is, "It would be more correct to say that the accused will be denied the defence if he has been negligent." If there is any significant difference between this statement and the statement that section 24 imposes an objective test, it eludes me. Possibly this is exactly the point that Mr. Edwards is making: That even in what he contends is its most correct form, a restatement in terms of negligence does not help. Be it so. The only alternative suggestion put forward in the remainder of the paragraph is that "reasonable" does not mean what it says, being only a cautionary indication to the jury. In support of this contention he quotes from Mr. Turner's writings on reasonableness *at common law*. This is a very different thing. The word "reasonableness" in a judgment has no particular binding force and can be

explained away relatively easily. Moreover, there is plenty of authority for the now generally accepted meaning of "reasonable" in indictable offences at common law.[4] None of these considerations applies to the interpretation of a statute. Again, in my view, the attempt to circumvent the statutory wording fails because it is impossible.

I will not take up the many points of disagreement in detail between Mr. Edwards and myself which follow from these two fundamental differences of opinion. They all stand or fall by our respective major premises. But perhaps, as a parting shot, I may refer to the suggestion at the end of his fourth paragraph that a "short, simple and practical" answer to some of these problems is to dismiss sections 23 and 24 as "not directly relevant." Such a solution is undoubtedly short and simple, and possibly practical. The trouble is that since section 36 of the Code expressly applies sections 23 and 24 to all Western Australian offences, it is unlawful.

COLIN HOWARD.

[4] The cases will be reviewed in 4 U. QUEENSLAND L.J. See also Glanville Williams, *Homicide and the Supernatural,* (1949) 65 L. Q. REV. 491; CRIMINAL LAW: THE GENERAL PART, 163 and 167; PERKINS on CRIMINAL LAW 827.