BIGAMY AND MENS REA

Some time ago an article appeared under the title, "The Eclipse of *Mens Rea*".[1] In Australia there are welcome signs that the eclipse has not led to total darkness, and recently the High Court refused to follow the decision of the English Court of Criminal Appeal, in *R.* v. *Wheat, R.* v. *Stocks*,[2] on the ground that it cut across the fundamental requirement of *mens rea*.[3] The facts were that the prisoner's wife, Agnes, deserted him remarking that her marriage to him was void because the decree *nisi* which the prisoner thought had terminated her previous marriage had never been made absolute. Actually the decree had been made absolute, but the prisoner believed her story and married again and for this marriage was charged with bigamy. One would have thought that the prisoner (a police constable) could easily have checked the statement, but the jury found that the prisoner *bona fide* and on reasonable grounds believed that his marriage with Agnes was void. Martin J. convicted the prisoner, following *Wheat's Case;* the Supreme Court reached the same result but disagreed with Martin J. both on the law and the facts holding that the verdict of the jury (if correct) was a defence in law, but that there was no evidence on which the jury could so find; finally the High Court agreed with the law as laid down by the Supreme Court, but quashed the conviction on the ground that the Supreme Court had no power to deal with the sufficiency of the evidence as that was going beyond the Special Case.

The majority, after a very full analysis of *Tolson's Case*,[4] decided that it should be applied in a thorough going fashion, instead of being whittled away by rather dubious exceptions. Some lawyers have considered that, if the matter were *res integra,* no court would now go as far as the Bench in *Tolson's Case,* as modern judges pay more respect to literal interpretation, at least where a statute is reasonably clear. In reply to this view, Dixon J. stated that no doubt the argument of "literal interpretation" might be applied "if there were no general *prima facie* rule by which even statutory offences, unless

[1] Stallybrass, 52 L.Q.R. 60.
[2] [1921] 2 K.B. 119.
[3] *Thomas* v. *The King*, [1938] Argus Law Reports 37. The Victorian Crimes Act 1928, s. 61 is substantially similar to the English Act, 24 and 25 Victoria, c. 100, s. 57.
[4] 23 Q.B.D. 168.

a *contrary intention*[5] appears from the words, subject-matter or nature of the enactment, are understood to admit of a defence based on essential mistake." No doubt in many modern statutes, particularly those dealing with "police and social and industrial regulation" there may be a tendency to rebut the prima facie rule that *mens rea* is necessary but this did not apply to the general criminal law. The majority held, therefore that a reasonable belief that the first marriage was void was a defence to a prisoner charged with bigamy and in spite of a sincere general desire to keep the criminal law of the Empire uniform, disapproved in set terms of *Wheat's Case*.[6] The judgments are learned, citing a great wealth of case law, many textbooks, review articles and even The Mikado.[7]

Parenthetically it may be noted that this is not the first occasion on which the High Court has emphasised the importance of the *mens rea* doctrine in the interpretation of statutes. In *Maher* v. *Musson*,[8] a prisoner was charged under a section which, if interpreted literally, made even innocent possession of "illicit" spirit an offence, and the argument for the exclusion of *mens rea* was made even stronger by the fact that another subsection specifically required knowledge that the spirits were "illicit" and, therefore, it was a reasonable inference that the legislature had directed its mind to the question and meant what it said.[9] But Dixon J. held that "the absolute language of the section should be treated as doing no more than throwing upon the defendant the burden of exculpating himself by showing that he reasonably thought the spirits were not illicit."[10] Evatt and McTiernan JJ. held that to suppose that the legislature meant to expose an innocent possessor to drastic penalties was a "palpable and evident absurdity".[11]

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[5] Italics added.

[6] *Supra.*

[7] Dixon J. cites *inter alia*, Jackson, 6 Camb. L.J. 83; Stallybrass, 52 L.Q.R. 60; Turner, 6 Camb. L.J. 31. He suggested that the "literal" argument if carried too far is that mocked at by the Mikado "in his answer to the assurance of Koko and his companions that they had no idea and knew nothing about it and were not there, viz. 'That's the pathetic part of it. Unfortunately, the fool of an act says "Compassing the death of the heir apparent". There's not a word about mistake, or not knowing, or having no notion or not being there. There should be, of course; but there isn't. That's the slovenly way these acts are drawn.' "

[8] 52 C.L.R. 100.

[9] "No person shall, . . .

(4) Receive, carry, convey or conceal, or have on his premises or in his custody or under his control any illicit spirit.

(7) Purchase any illicit spirits *knowing them to be illicit spirits.*"

[10] At p. 105.

[11] At p. 109.

To return to the problem of bigamy, the High Court held that *Wheat's Case* was opposed to the real doctrine of *Tolson's Case*. The Court were quite prepared to face the fact that *Wheat's Case* had been generally accepted in England,[12] but the suggested grounds of the distinction between the two cases were subjected to severe criticism. In *Wheat's Case* it was held not to be a defence that the prisoner reasonably believed that his previous marriage had been dissolved by a divorce. One line of distinction is to say that Wheat made a mistake of law, whereas Tolson made a mistake of fact.[13] There is almost unanimous agreement among all writers that a mistake of law is no defence,[14] but dissension begins as soon as we attempt to draw exact boundaries between mistakes of law and of fact. Some writers have said that "a mistake as to marriage is a mistake of law",[15] but this is going rather far. Neither the cases nor writers on jurisprudence throw much light on this question.[16] The High Court, however, treated Thomas' view that the decree nisi had not been made absolute as a mistake of fact — "a mistake as to the existence of a compound event consisting of law and fact is in general one of fact and not a mistake of law".[17] The Chief Justice thought that "there is nothing in the judgment in Wheat's case which even suggests that a belief as to whether or not a person . . . has in fact been divorced should be regarded as a belief in a question of law".[18]

Earl Russell's Case[19] does raise difficulties. The Earl, quite honestly, thought that a divorce gained in America dissolved his previous marriage. He in fact thought he was free to marry again, yet he pleaded guilty on the advice of counsel.

[12] *E.g.* by Stallybrass, 52 L.Q.R. 65; Turner, 6 Camb. L.J. 31; Jackson, 6 Camb. L.J. 83.

[13] Thus Stallybrass, 15 Jo. Comp. Leg. at p. 236 writes: "Tolson did not intend to do the act forbidden by the Statute, i.e. to marry another during the life of the former husband, whereas Wheat did . . . His mistake was a mistake of law."

[14] One of the few exceptions is larceny: a reasonable claim of right may be a defence even although the belief is founded on a mistaken view of the law.

[15] *E.g.*, the writer in 167 Law Times, 46; Starke J. (who dissented) supported this, [1938] A.L.R. at p. 43.

[16] One of the better known passages of case law is the statement of Jessel M.R. in *Eaglesfield* v. *Londonderry* (*Marquis*) (1876), 4 Ch. D. at pp. 702 - 3. See also Keedy, 22 Harv. L.R. 75.

[17] Per Dixon J. at p. 47.

[18] Per Latham, C.J. in *R.* v. *Thomas*, [1938] A.L.R. at p. 40. It should be noted that in *Wheat's Case* the Court held that upon the facts the prisoner's mistake could not be found to be reasonable, but this did not affect the argument, as the Court went on to deal with the legal sufficiency of the defence of reasonable mistake.

[19] *R.* v. *Russell*, [1901] A.C. 446.

Similarly in *Lolley's Case*[20] the prisoner relied on a divorce in Scotland, but was convicted and the suggestion that an honest and reasonable belief that he was divorced should be a defence was not even made. In these two cases, however, all the facts were known to the prisoner — the sole question concerned the legal effect of a foreign divorce that had actually been granted. There is less excuse for treating the mistake as one of fact than in Thomas' case where the prisoner was right in his law but mistakenly thought that a particular event had not happened — the making absolute of a decree *nisi*. But a little analysis reveals how difficult it is to draw clear lines; in *Wheat's Case* what led to the prisoner's mistake of fact was a mistake as to the legal processes required to secure divorce. We may perhaps justify *Russell's Case* by its actual social effects—though conviction was severe on the prisoner, the ruling does at least protect the marriages of those with an English domicile and gives to the English community the sole right to determine the causes for which such a marriage is to be terminated. The poorer classes, clearly, cannot seek the luxury of a foreign divorce, and those that have the means to do so are not likely to act without legal advice. Hence, whatever we may think of the harshness of the sentence of three months on Earl Russell, the law laid down by the decision is not today as likely to lead to hardship as the rule in *Wheat's Case*, for on the question of the validity of a foreign divorce, few will act without knowledge of the precise position. It is not pretended of course that this is a legal justification or a solution of the difficulty that arises in drawing the line between mistakes of law and of fact.

Another suggested distinction between *Wheat's Case* and *Tolson's Case* is that of Avory J.,[21] which is based on the particular wording of the statute. As is well known, the second exception creates a defence if the husband or wife has been continuously absent for seven years and has not been known by the accused to be living within that time, whereas the third exception refers to *actual* divorce. Avory J. propounded the amazing theory that the Court in *Tolson's Case* based their decision on the view that seven years absence created a presumption of death and therefore that the accused may be presumed, even before the lapse of seven years, "to believe in the fact of death unless he is shown to have known

[20] (1812), Russ & Ry. C.C. 237.
[21] In *Wheat's Case* at p. 125.

that the presumption was not justified in fact";[22] and added that, owing to the language, similar liberties could not be taken with the third proviso dealing with divorce. Stroud remarks: "The difference between the two classes of cases is, not that *mens rea* may be absent in the one and is requisite in the other, but that in the one case, the law imposes an ordinary, and in the other an extreme, degree of care upon the person contemplating a second marriage."[23] The first difficulty of this theory is that it is a very forced interpretation of the statute — no one reading the statute, apart from the cases, could even dream that this was its meaning; the second is that the ratio decidendi of *Tolson's Case* itself is far removed. Indeed the greatest difficulty that the Court faced was to rebut the argument that since specific defences were laid down, all others were impliedly excluded. The second exception categorically states that, inter alia, seven years absence is a defence and there is no reference either to a presumption of death or honest mistake. As Latham C.J. put it, "*Tolson's* case, so far from being based upon and deriving its force from the (second) exception, is notable for the reason that it is a clear decision, admitting a further implied exception based upon a general principle of criminal law which was held to be applicable *in spite of the express and limited words of the (second) exception*".[24] Any careful reading of *Tolson's Case* (as distinguished from its interpretations) shows that Wills and Charles JJ.,[25] Cave, Day and A. L. Smith JJ.,[26] Stephen and Grantham JJ.,[27] and finally Hawkins J.,[28] reached their decision on the general view that it was revolting to the moral sense that such a statute should be interpreted without reference to the *mens rea* doctrine and that the second exception, so far from being the basis was, in reality, the main obstacle. There may be merit in distinguishing between a mistake of law and of fact, but there is none in the argument that depends on the language of the exceptions.

So far, we have discussed possible distinctions between *Wheat's Case* and the ratio decidendi of *R.* v. *Tolson*. Actually an analysis of the facts shows that it would have been possible for the High Court to distinguish *Wheat's Case*, for although

[22] This is the summary of his argument by Latham C.J., [1938] Argus L.R. at p. 41.
[23] 37 L.Q.R. 492.
[24] [1938] Argus L.R. at p. 41. Italics added.
[25] 23 Q.B.D. 168 at p. 178.
[26] At p. 182.
[27] At. pp. 188 - 9.
[28] At pp. 194 - 5.

both cases were based on a mistake as to the existence or non-existence of a divorce, actually the plea in *R.* v. *Thomas* was that the prisoner's *first marriage was invalid,* because his wife had not been divorced. It may seem rather subtle to distinguish between a prisoner's belief that he had been divorced (which according to *R.* v. *Wheat* is no defence) and a prisoner's belief that his first marriage was invalid (*e.g.,* because his first "wife" had not been divorced from her previous husband when he went through the marriage ceremony with her); but some authorities do so. Thus, Burrows writes that "a bona fide but erroneous belief that the first marriage was dissolved by a divorce is not a defence . . . . . though a similar belief that the first marriage was null and void and therefore no marriage is a valid defence.[29]" There are three English decisions which, prior to *Wheat's Case,* had held that it was a defence that the prisoner reasonably and honestly believed that the first marriage which was the subject-matter of the indictment was invalid because of a prior subsisting marriage. In *R.* v. *Thomson,*[30] the Common Serjeant, Bosanquet, K.C., gave this direction. The facts were that prisoner married Ada in 1892 and Eileen in 1903. His defence was that Ada was already married and that he honestly and reasonably believed that her husband was alive in 1892 and therefore that his marriage with her was invalid.[31] The report is very short and there is neither any discussion of the principles involved nor citation of authority — but after all, it was a direction to a jury. In 1913 this ruling was followed by Bailhache J. at Assizes,[32] where the basis of fact raised a similar point of law, and in 1919 by the Recorder, Sir Forest Fulton,[33] who confessed with some surprise that such a defence was new to him and had been overlooked by the text-books. In *R.* v. *McMahon* in 1891,[34] and in *R.* v. *Adams*[35]

[29] 51 L.Q.R. 44. It is convenient to speak of the two marriages which are the subject-matter of the indictment as the first and second marriages, and any marriage which prisoner alleges (to prove that the first marriage was invalid) as a prior subsisting marriage. Chronologically this usage may be confusing, but it is sanctified by tradition and regards the position from the point of view of the indictment.

[30] (1905), 70 J.P. 6. See the discussion of these cases, 167 Law Times Jo. 44.

[31] Actually the jury did not find that he had reasonable grounds for his belief.

[32] *R.* v. *Cunliffe,* 57 Sol. Jo. 345.

[33] *R.* v. *Conatty* (1919), 83 J.P. 292. In this case prisoner met Jane in 1902. She was living with Perkins as his wife although she was really his mistress. In 1907 prisoner met her again, and she said that her previous husband, Perkins, was dead. Prisoner married her, but in 1910 meeting Perkins he concluded that his marriage was invalid and in 1916 he married Rose. The prisoner was, however, found guilty and bound over.

[34] (1891), 17 V.L.R. 335.

[35] (1892), 18 V.L.R. 566.

in 1892, the Supreme Court of Victoria had laid down a similar doctrine — if the prisoner honestly and reasonably believed that the first marriage was invalid, he had no *mens rea* and therefore should not be convicted. Many believed that these cases were opposed to the *ratio decidendi* of *Wheat's Case* and therefore no longer law — indeed Avory J. in *Wheat's Case* expressed doubt as to the correctness of the ruling in *Thomson's Case*. In 1922 the same point arose again in *R.* v. *Kircaldy*,[36] but the prisoner was convicted because he failed to *prove* that the first woman he married was at the time possessed of a living husband.

It is noticeable, however, that although English writers have been content to accept *Wheat's Case*, *R.* v. *Kircaldy* has received criticism. Thus Stallybrass doubts its correctness,[37] and in Kenny[38] we read that if the distinction between *Tolson* and *Wheat* is that in the first case the prisoner made a mistake of fact and in the second a mistake of law, then *Kircalday* was wrongly decided since the mistake was one of fact. It is possible, however, to reject the decision in *Kircaldy* without trespassing on the difficult borderland which separates mistakes of law from those of fact, by the argument that the onus of proof of the validity of the first marriage was on the Crown. Hence if there is any doubt of the validity of the first marriage the accused should be acquitted — this statement of the law is supported by Crompton J. in 1862,[39] and the Court of Criminal Appeal in 1938.[40] Archbold states that, if the Crown prove the first and second marriages of the prisoner, the onus then falls on the prisoner to prove a prior subsisting marriage.[41] It may be true that it is the duty of the prisoner to produce evidence of a prior subsisting marriage, but if he raises a reasonable doubt concerning the validity of the first marriage which is part of the charge against him, then the Crown has not proved that the prisoner was validly married when he "married" again — in other words the foundation of the charge disappears.

It is submitted that the statement in Archbold is expressed rather too absolutely, although it may be supported by *R.* v.

[36] 167 Law Times Jo. 46.
[37] 52 L.Q.R. at p. 60; 15 Jo. Comp. Leg. 236.
[38] CRIMINAL LAW, 1936, pp. 363 - 4.
[39] *Queen* v. *Wilson* (1862), 3 F. & F. 119. "Although there might be some technical difficulty in proving the marriage in Canada, still, if there was reasonable doubt of the fact, the prisoner ought to be absolved" (at p. 122). (The prisoner relied on a marriage in Canada as proving the invalidiyt of the "first marriage".)
[40] *R.* v. *Morrison*, [1938] 3 All E.R. 787.
[41] CRIMINAL PLEADING, 1326.

Naguib.[42] In this case the prisoner pleaded that the first marriage (on which the Crown relied) was invalid because he had already been married in Egypt. The defence was without merit, as, on his own evidence, he had committed bigamy and his plea amounted to an argument that the Crown had chosen the wrong marriages on which to prosecute.[43] The Court rejected the defence, but there is not a word concerning *mens rea* in the judgment — the sole basis of the decision was that an expert in Egyptian law should have been called in order to prove the validity of the Egyptian marriage. But it is an inference from this decision that the onus was on the prisoner to produce such an expert to complete his proof. It is submitted that, whatever be the rule where the first marriage *is in fact valid* and the prisoner's only defence is that he reasonably thought it was invalid, the prisoner should be acquitted if, at the end of all the evidence, there remains a doubt whether the first marriage was invalid or not. In other words instead of saying with Archbold that the onus of proving a prior subsisting marriage is on the prisoner, we prefer to say that it is enough if the prisoner raises a reasonable doubt whether the first marriage was a valid one.[44]

On the present state of the authorities, however, it is not possible to be dogmatic as to the position in England. In Australia all the subtleties and obscurities in the law have been removed by the High Court decision which laid down, in simple and emphatic terms, that the doctrine of *mens rea* must be applied to all these problems. There are enough difficulties in the criminal law without creating more and it is submitted that (a) it is illogical to allow prisoner's honest belief in death to be a defence and to reject the plea of honest belief that a divorce had been granted: (b) that the prisoner should be acquitted if he raises a doubt as to the validity of the first marriage: (c) that honest belief in the invalidity of the first marriage should be a defence. All these propositions flow from the Australian decision.

[42] [1917] 1 K.B. 359. See also *R.* v. *Moscovitch*, 44 T.L.R. 4.

[43] Prisoner had married in England in 1903 and 1914. He pleaded that the marriage of 1903 was invalid, because he had already been married to an Egyptian lady whom he divorced after the marriage of 1903 but before that of 1914. On this statement of fact the marriage of 1903 was bigamous.

[44] See Stallybrass, 15 Jo. Comp. Leg. 236. In *R.* v. *Morrison*, [1938] 3 All E.R. 787, prisoner's defence was that his first wife was already married. There was a weakness in the evidence adduced by the prisoner, but the C.C.A. thought that the question was one of fact for the jury (under proper direction from the judge) and that if the jury had any doubt as to the validity of the first marriage they should acquit the accused.

The Supreme Court of New Zealand has also refused to follow *Wheat's Case*.[45] In America, the main current of authority is in the other direction, as even *Tolson's Case* is rejected in many jurisdictions, on the ground that the statute must be rigidly applied according to its proper construction.[46]

It is impossible to reconcile all the decisions on the interpretation of statutes if we look at the mere words of the sections which were in question. Apparently courts consider the object of the statute as a whole, and weigh both the nature of the conduct and the seriousness of the penalty. If the act of the prisoner is one which the Legislature desires to discourage at all costs and the penalty is a trifling one, then all courts will apply a statute fairly but strictly. Where the penalty is a heavy one or such that it carries with it a moral stigma, courts *may* be more liberal. There is no injustice in convicting a motorist for driving without his rear light being illuminated, for if the crown had to prove that he knew it was not burning, there would be few convictions. There are many types of offence where the *mens rea* doctrine may well be dispensed with. But when we are considering the serious offences of the general criminal law, the moral sense of the ordinary man is revolted by the conviction of a prisoner who has no *mens rea*, and unless there are strong reasons to justify it, a prisoner should not be convicted in such circumstances. Theoretically the Legislature has considered this problem and given the answer in the wording of the statute, and courts occasionally take their stand upon this point. There are numerous illustrations of this in the various learned articles which have been cited in this paper. A recent one might be added, *Chajutin* v. *Whitehead*.[47] Applicant had been convicted of being in possession of an altered passport without lawful authority and the plea before the Divisional Court was that it had been found as a fact that the prisoner did not know that the passport had been altered, but honestly believed on reasonable grounds that it had been issued to him in the ordinary course by a proper authority. The appeal was dismissed on the ground that the order in certain sections used such adverbs as *knowingly* and since no such adverb appeared in the definition of the offence with which prisoner was charged,

[45] *R.* v. *Carswell*, [1926] N. Z. L.R. 321.

[46] See Sayre, 33 Col. L.R. at p. 74; also 13 Harv. L.R. 50. Many American jurisdictions follow a Massachusetts case of 1844, *Commonwealth* v. *Mash*, 7 Metc. 472, which laid down that reasonable belief in the death of a husband is no defence.

[47] [1938] 1 K.B. 506.

mens rea was not required. This is, it is submitted with respect, a perfectly logical argument — but is the necessary care in fact used by the Legislature? If the doctrine of *mens rea* has no application to modern statutory offences, on the ground that the statute itself prescribes the mental element which is necessary, Stallybrass urges that the Legislature must be very circumspect and even perhaps go to the length of amending statutes actually in force, in order to prevent injustice.[48] But whatever be the case concerning *modern* statutory offences, it can hardly be contended that bigamy falls within this class and as the *Tolson Case* laid down a broad principle it should be applied in general to the offence as a whole and not limited to the one case of death.

There are various arguments for the imposition of a strict rule in the case of bigamy. Firstly, that the sentence may be made nominal in appropriate cases of moral innocence and therefore that no great harm is done. But why should the prisoner suffer the slur of a conviction, which, in some cases at least, is as great a penalty as imprisonment itself? Secondly, that the jury cannot be trusted to determine the truth of any defence that depends on the prisoner's state of mind. It is true that the juries are occasionally somewhat charitable in their interpretation of a prisoner's belief, but the court has some control in that it may rule that there is no evidence of reasonable mistake. If the jury is a fit tribunal to determine the facts there is no reason why it should not be asked to say whether the prisoner actually possessed a certain belief or not. No one suggests that because a prisoner thinks there is some technical informality about his first marriage that he can without further enquiry marry again with impunity.[49] The mistake must be reasonable and made in good faith. Thirdly, that the sanctity of marriage must be protected and that the defence of reasonable mistake offers too many opportunities for evasion of the rules that protect this important institution. But this argument is not as sound as it appears. It is true that it would prevent a jury making a mistake and giving a verdict of not guilty when in fact the prisoner's mistake was not reasonable — but if the mistake be a reasonable one would not the prisoner have acted as he did whatever be the rules of the criminal law, for he thought that his conduct was legal? The criminal law has no deterrent effect on those who reasonably

[48] 52 L.Q.R. 60, at p. 66. See also the note on *Chajutin* v. *Whitehead* in 54 L.Q.R. at p. 333.

[49] *R.* v. *Bayley*, [1908] 1 Cr. App. Rep. 86.

think their conduct is innocent. Smith's conviction for bigamy does not help the unfortunate woman who believed herself a wife, nor can it be supposed that the subtleties of case law are known to those of poor education, who are the normal actors in a drama of this kind.[50] It is respectfully submitted that the High Court of Australia has wisely removed, so far as its jurisdiction extends, some of the evil effects of "*The Eclipse of Mens Rea*".

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[50] The question of the validity of a foreign divorce frequently does not concern those of humble station, for the expense of securing one would be prohibitive in the case of parties domiciled in England. But the greater number of the cases in the reports concern people who had not the necessary money to secure legal advice.