[HIGH COURT OF AUSTRALIA.]

THOMAS . . . . . APPLICANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF VICTORIA.

H. C. OF A. 1937.

MELBOURNE, *Oct.* 25.

SYDNEY, *Dec.* 17.

Latham C.J., Rich, Starke, Dixon and Evatt JJ.

Criminal Law—Mens rea—Mistake of fact—Bigamy—Honest and reasonable belief by accused that former marriage invalid—Case stated—Functions of Court of Criminal Appeal—Crimes Act 1928 (*Vict.*) (*No.* 3664), *secs.* 61, 478.

Sec. 61 of the *Crimes Act* 1928 (Vict.) provides: "Whosoever being married goes through the form or ceremony of marriage with any other person during the life of her or his husband or wife, shall be guilty of felony. . . . Nothing in this section contained shall extend to any person going through the form or ceremony of marriage as aforesaid whose husband or wife has been continually absent from such person for the space of seven years then last past and has not been known by such person to be living within that time; or shall extend to any person who at the time of her or his going through such form or ceremony of marriage has been divorced from the bond of marriage; or to any person whose marriage at such time has been declared void by the sentence of any court of competent jurisdiction."

Held, by *Latham* C.J., *Rich* and *Dixon* JJ. (*Starke* and *Evatt* JJ. dissenting), that upon a presentment under this section an honest and reasonable, though mistaken, belief by the accused that a prior marriage of the woman he first married had not been dissolved because the decree nisi had not been made absolute and that therefore his former marriage was invalid, so that he was lawfully entitled to go through the ceremony in respect of which the charge is laid, constitutes a good defence.

The accused was charged under sec. 61 of the *Crimes Act* 1928 (Vict.) with having gone through the form of marriage with A during the life of his wife, B, who had been previously married but whose former husband had obtained a divorce from her. The presiding judge put the following specific question to the jury, although directing them that, if it was answered in the affirmative,

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it did not constitute a defence to the charge : Did the accused at the time of going through a form of marriage with A believe bona fide and on reasonable grounds that the divorce granted to B's former husband had not been made absolute ? The jury returned a verdict of guilty but answered the specific question in the affirmative.

Held, by *Latham* C.J., *Rich* and *Dixon* JJ. (*Starke* and *Evatt* JJ. dissenting), that on the jury's finding the accused was not guilty of the offence charged.

R. v. *Tolson*, (1889) 23 Q.B.D. 168, applied.

R. v. *Wheat and Stocks*, (1921) 2 K.B. 119, not followed.

The distinction between a mistake of fact affording a defence to a criminal charge and a mistake of law considered.

On the hearing of a case stated under sec. 478 of the *Crimes Act* 1928 (Vict.) the Court of Criminal Appeal is limited to answering the specific questions referred to it and should not refer to any material not incorporated in the case stated.

Decision of the Court of Criminal Appeal of Victoria : *R.* v. *Thomas*, (1937) V.L.R. 283, varied.

APPLICATION for special leave to appeal and APPEAL from the Court of Criminal Appeal of Victoria.

On the trial of John Henry Thomas for bigamy *Martin* J. stated a case, which was substantially as follows, for the opinion of the Court of Criminal Appeal of Victoria pursuant to sec. 478 of the *Crimes Act* 1928 (Vict.).

1. John Henry Thomas was presented before me at the July sittings of this court in its criminal jurisdiction, charged with bigamy.

2. It was proved that the accused had married Agnes Julia Higgins on 25th October 1929 and that she was alive on 22nd April 1936, on which date the accused was a party to a form of marriage between himself and one Bessie Deed which was solemnized by a clergyman authorized to celebrate marriages in Victoria.

3. It was also proved that Agnes Julia Higgins had been the respondent to a petition in divorce by one Higgins, which had resulted in a decree nisi being granted on 27th April 1928 and that on 28th July 1928 the Prothonotary of this court had entered on the petition a memorandum that he had made the decree absolute in accordance with the provisions of sec. 89 of the *Marriage Act* 1928 (Vict.).

4. The accused admitted (or did not challenge) each of the facts set forth in pars. 2 and 3 hereof.

5. During the hearing, counsel for the accused tendered evidence of statements made on a number of occasions by Agnes Julia Higgins to the accused subsequent to his marriage with her, but prior to his going through the form of marriage with Bessie Deed, to the effect that the decree nisi obtained as aforesaid had not been made absolute on 25th October 1929 and that consequently the marriage between herself and the accused was not a valid one.

6. The evidence so tendered was objected to by the Crown Prosecutor but admitted by me on the authority of *R.* v. *McMahon* (1). At the same time I reserved the question whether or not I would direct the jury that a bona fide belief by the accused in such statements held on reasonable grounds was matter of defence to the charge.

7. The accused gave evidence that Agnes Julia Higgins had told him on a number of occasions subsequent to 25th October 1929 and prior to 22nd April 1936 that she was not married to him as there had been no entry made in the court papers of her divorce or that she used words to that effect.

8. I directed the jury (*inter alia*) that the defence raised by the accused was not a good defence, on the authority of *R.* v. *Wheat and Stocks* (2), but asked them to answer the following question : " Did the accused at the time of going through a form of marriage with Miss Deed believe bona fide and on reasonable grounds that the divorce granted to Mr. Higgins on 27th April 1928 had not been made absolute ? "

9. The jury returned a verdict of guilty and answered the question regarding the accused's belief in the affirmative.

The questions of law for the determination of the Court of Criminal Appeal were :—

1. Is it a good defence to the charge of bigamy contained in the indictment that the accused bona fide and on reasonable grounds believed that the divorce granted to Mr. Higgins had not been made absolute ?

(1) (1891) 17 V.L.R. 335 ; 13 A.L.T. 32.

(2) (1921) 2 K.B. 119.

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2. Should I have directed the jury that if they found that the accused did hold such a belief bona fide and on reasonable grounds, the verdict should be: Not guilty?

The court answered the questions:—1. It is a good defence to the charge of bigamy contained in the indictment that the accused bona fide and on reasonable grounds believed that the divorce granted to Mr. Higgins had not been made absolute. 2. No. The learned judge should have directed the jury that there was no evidence upon which they could properly find that the accused held such a belief bona fide and on reasonable grounds: *R.* v. *Thomas* (1).

The accused sought special leave to appeal to the High Court from his conviction and from the decision of the Court of Criminal Appeal.

Sholl, for the applicant. The accused set up a defence of bona fide belief in facts, which, if they had been true, would have been a defence. At the time the accused went through the second marriage he bona fide believed that his first marriage was invalid on the ground that the decree nisi had never been made absolute. That was a mistake of fact and not a mistake of law. He was mistaken as to whether the decree had been entered or not. There is a conflict between the Victorian and New Zealand authorities, on the one hand, which are in favour of admitting the evidence, and the English authority of *R.* v. *Wheat* (2), on the other. The test of whether a bona fide belief can be a defence depends on whether the mistake alleged is one of law or of fact. In some cases it is described as "honest," and in others as "honest and reasonable", belief. The authorities which are opposed to *R.* v. *Wheat* (2) are right. *R.* v. *Tolson* (3) shows that there must be *mens rea* to constitute an offence, and here there was none. Unless there is something to the contrary in a statute, the general rule in the case of an indictable offence is that, if the accused has a bona fide belief, based on reasonable grounds, in the existence of facts which, if true, would have made his actions innocent, he is not guilty of the offence. So long as there is a bona fide belief, even though it be not reasonable.

(1) (1937) V.L.R. 283.
(2) (1921) 2 K.B. 119.
(3) (1889) 23 Q.B.D. 168, at p. 178.

it will suffice (*Thorne* v. *Motor Traders Association* (1); *Maher* v. *Musson* (2); *R.* v. *Carswell* (3)). The decisions in England following *R.* v. *Tolson* (4) are contrary to *R.* v. *Wheat* (5) (See *R.* v. *Thomson* (6); *R.* v. *Connatty* (7); *R.* v. *Cunliffe* (8); *R.* v. *Bayley* (9)). *R.* v. *McMahon* (10), *R.* v. *Adams* (11) and *R.* v. *Kennedy* (12) are inconsistent with *R.* v. *Wheat* (5). The effect of the jury's finding is that the act complained of was not an offence at law; it amounted to a verdict of acquittal; at least there should have been a new trial (*Archbold's Criminal Pleading, Evidence and Practice*, 29th ed. (1934), pp. 217, 329; *R.* v. *Muirhead* (13); *R.* v. *Knight* (14); *R.* v. *Simpson* (15); *Roscoe's Criminal Evidence*, 15th ed. (1928), p. 311; *R.* v. *Duncan* (16); *R.* v. *Russell* (17); *R.* v. *Swan* (18); *R.* v. *Weaver* (19)). The Full Court travelled right outside the case stated and exceeded the authority conferred on it by sec. 478 of the *Crimes Act* 1928 (Vict.). Whether there was sufficient evidence or not in law, the jury has given an answer that is in favour of the accused and is one of not guilty when read with the direction. The court has no authority to answer questions not asked in the special case (*R.* v. *Reid* (20)). Whether there was sufficient evidence or not, the verdict now amounts to one of not guilty, and the trial judge and the Court of Criminal Appeal were not entitled to enter any verdict but one of acquittal.

Book K.C. (with him *Burbank*), for the Crown. No argument is submitted on the question whether it is a defence that the accused had a bona fide or reasonable belief. While the defence of the accused was open to great criticism, the jury had answered the question in favour of the appellant and found that he had a bona fide belief based on reasonable grounds. *R.* v. *Wheat* (5) is dis-

(1) (1937) 3 All E.R. 157, at pp. 161, 162.
(2) (1934) 52 C.L.R. 100, at p. 104.
(3) (1926) N.Z.L.R. 321.
(4) (1889) 23 Q.B.D. 168.
(5) (1921) 2 K.B. 119.
(6) (1906) 70 J.P. 6.
(7) (1919) 83 J.P. 292.
(8) (1913) 57 Sol. Jo. 345.
(9) (1908) 1 Cr. App. R. 86.
(10) (1891) 17 V.L.R. 335; 13 A.L.T. 32.
(11) (1892) 18 V.L.R. 566; 14 A.L.T. 79.
(12) (1923) S.A.S.R. 183.
(13) (1908) 1 Cr. App. R. 189.
(14) (1908) 1 Cr. App. R. 186.
(15) (1914) 1 K.B. 66.
(16) (1881) 7 Q.B.D. 198.
(17) (1854) 3 E. & B. 942; 118 E.R. 1394.
(18) (1915) 20 C.L.R. 315, at pp. 321, 322, 323, 334, 352, 353, 364, 373, 374.
(19) (1931) 45 C.L.R. 321, at p. 333.
(20) (1896) 22 V.L.R. 395, at p. 402.

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tinguishable in view of the difference in the legislation in England and Victoria, but in any event that case cannot be supported. In that case the prisoner must have known his former wife, i.e., his divorced wife, was living, but the present accused believed he had not a lawful wife living. The Full Court did not confine themselves to the case stated, though they were entitled to inspect the evidence in considering whether there was a substantial miscarriage of justice. If this conviction is quashed, there should be a new trial.

Sholl, in reply, referred to the *Marriage (Validating) Act* 1918, the *Marriage Act* 1928, sec. 39, and the *Marriage (Validating) Act* 1932 (Vict.).

Cur. adv. vult.

Dec. 17.

The following written judgments were delivered :—

LATHAM C.J. Upon a trial for bigamy the accused man sought to rely upon evidence that he honestly and reasonably believed that a decree of divorce made against his " former wife " had not been made absolute, so that she was still a married woman when he married her. If this belief had been well founded, his marriage to her would have been invalid and he would therefore not himself have been a married person at the time of the second marriage upon which the charge of bigamy was based. In fact the decree had been made absolute, his belief to the contrary was mistaken, and, accordingly, his former marriage was a valid marriage and he was guilty of the offence charged unless the defence that he had an honest and reasonable belief in the fact stated afforded him an excuse. The evidence as to his belief and the ground therefor was admitted, but the learned trial judge directed the jury that such a belief, even if honest and based upon reasonable grounds, did not constitute a defence to the charge. In so directing the jury the learned judge followed *R.* v. *Wheat* (1). But the learned judge also asked the jury to answer a specific question. In so doing, he followed the procedure which the trial judge adopted in *R.* v. *Tolson* (2). The accused's former wife had been Mrs. Higgins, and the charge of bigamy was

(1) (1921) 2 K.B. 119.

(2) (1889) 23 Q.B.D. 168.

founded upon the allegation that while married to Mrs. Higgins, the accused had gone through a form of marriage with Miss Deed. The question which the learned judge asked the jury was: "Did the accused at the time of going through a form of marriage with Miss Deed believe bona fide and on reasonable grounds that the divorce granted to Mr. Higgins on the 27th April 1928 had not been made absolute?" The jury answered this question in the affirmative, but, following the direction given, brought in a verdict of guilty. The learned judge then stated a case for the opinion of the Full Court under sec. 478 of the *Crimes Act* 1928. The case stated by the judge summarized the evidence, included the summing up as part of the case, and referred the following questions to the Full Court:—

1. Is it a good defence to the charge of bigamy contained in the indictment that the accused bona fide and on reasonable grounds believed that the divorce granted to Mr. Higgins had not been made absolute?

2. Should I have directed the jury that if they found that the accused did hold such a belief bona fide and on reasonable grounds, the verdict should be: Not guilty?

The Full Court answered the questions as follows:—1. Yes. 2. No. The learned judge should have directed the jury that there was no evidence upon which they could properly find that the accused held such a belief bona fide and on reasonable grounds.

By reason of the answer given to the second question, the Full Court affirmed the conviction.

In order to arrive at a reply to the second question the court obtained and considered the full transcript of the evidence given at the trial.

An application is now made to this court for special leave to appeal.

It will be observed that the court, in the second part of its answer to the second question, answered a question which was not referred to it and which is not shown to have been raised at the trial. No question was asked as to whether the learned judge should have directed the jury that there was no evidence upon which they could properly find that the accused held the belief alleged bona fide and

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on reasonable grounds. No such question was reserved by the learned judge, and, in my opinion, the court had no authority to answer it. The case was stated under sec. 478 of the *Crimes Act* 1928. The words of the section are clear. The powers conferred upon the court by the section are limited to answering the specific questions referred to it (*R.* v. *Reid* (1)). Further, the court should not refer to any material not set forth in the case itself. Thus, the court was not entitled to go outside the case stated and use the transcript of evidence (*R.* v. *Murphy* (2)). (The *Crimes Act* 1928, sec. 600, empowers the Full Court to order the production of documents, but this section is applicable only in an appeal, and not in a case stated.) The latter part of the answer to the second question cannot, therefore, be treated as a determination authorized by law, and it should accordingly be struck out.

Before examining the other question which arises upon the case, it is, I think, desirable to say that I regard the belief relied upon by the prisoner as being a belief not as to a matter of law but as to a matter of fact. The belief was that a decree absolute had not been made by the Supreme Court of Victoria. Whether or not such a decree had been made was a question of fact. If no decree absolute had been made, the marriage of the accused's former wife would not have been dissolved and therefore, she would still have been a married woman when she married the accused. Thus, her marriage to the accused would have been invalid, and he would not have been a married person when he went through the ceremony of marriage with Miss Deed. Thus, if his belief as to the matter of fact mentioned had been true, he would not have been guilty of the offence charged. The case would, I agree, have been entirely different if his belief had only been a belief that, for some reason or other which he did not understand, the prior marriage of his wife had not effectually been dissolved. That belief might well be regarded as being a belief with respect to a matter of law, and a mistaken belief upon a question of law could not be a defence to a criminal charge. I deal with this matter upon the basis that the alleged belief of the accused was a belief as to a matter of fact.

(1) (1896) 22 V.L.R. 395.

(2) (1867) 4 W.W. & a'B. (L.) 63.

Until the decision in *Wheat's Case* (1) there was a strong current of authority from *Tolson's Case* (2) establishing the proposition that the general rule in all the graver class of crimes (*Laws of England*, 2nd ed., vol. 9, p. 15) is that the accused is not guilty if he had an honest and reasonable belief in the existence of facts which, if they had really existed, would have made his act both legally and morally innocent. In *Tolson's Case* (2) this principle was applied to a charge of bigamy and it was held that a woman charged with bigamy was not guilty, the jury having found that at the time of the second marriage she in good faith and on reasonable grounds believed her husband to be dead. *Tolson's Case* (2) was considered by fifteen judges, and a majority consisting of nine judges approved the proposition which I have stated. This proposition was treated, not as depending on any special legislative provisions with respect to bigamy, but as a statement of a well-established common-law principle applied in this case to an offence against a statute. In stating this principle, Mr. Justice *Wills* said :—" There is no doubt that under the circumstances the prisoner falls within the very words of the statute. She, being married, married another person during the life of her former husband, and, when she did so, he had not been continually absent from her for the space of seven years last past. It is, however, undoubtedly a principle of English criminal law, that ordinarily speaking a crime is not committed if the mind of the person doing the act in question be innocent. ' It is a principle of natural justice,' says Lord *Kenyon* C.J., ' that *actus non facit reum, nisi mens sit rea.* The intent and act must both concur to constitute the crime ' : *Fowler* v. *Padget* (3). The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong. That intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may coexist with respect to the same deed " (4). *Cave* J. says :— " At common law an honest and reasonable belief in the existence

(1) (1921) 2 K.B. 119.
(2) (1889) 23 Q.B.D. 168.
(3) (1798) 7 T.R. 509, at p. 514 ; 101 E.R. 1103.
(4) (1889) 23 Q.B.D., at pp. 171, 172.

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of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim *actus non facit reum, nisi mens sit rea.* Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy " (1). The rule in *Tolson's Case* (2) was applied by the Full Court of Victoria in *R.* v. *McMahon* (3), where it was held that, upon a trial for bigamy, statements made by the first wife to the prisoner before the second marriage to the effect that she, the first wife, had a husband living at the time of her marriage to the prisoner are admissible, as going to prove a belief in facts which, if true, would produce the result that the first alleged marriage of the prisoner was not an effective marriage —as in the present case. The principle in *Tolson's Case* (2) was also applied in *R.* v. *Adams* (4), though in this case the conviction was affirmed. The court stated the effect of cases in English and Victorian courts in the following words: " If a prisoner have a bona fide belief, upon reasonable grounds, of a fact which would have rendered her first marriage invalid, that was a permissible subject for the consideration of a jury, and was evidence proper to be submitted to a jury, upon which, if the jury believed in the prisoner's bona fide belief in the existence of the fact, they would be justified in finding the prisoner not guilty, as there was no *mens rea* in the prisoner " (5). The conviction was affirmed because the existence of the fact alleged to have been believed, namely, the forgery of a consent to marriage, would not have rendered the first marriage invalid, as it was a belief as to an irrelevant fact.

Against the principles recognized in these decisions stands the case of *R.* v. *Wheat* (6), with some decisions following that case. This was an appeal to the Court of Criminal Appeal. Five judges heard the appeal. It was unanimously held that " it is no defence in law to an indictment for bigamy that the prisoner, at the time of the alleged bigamous marriage, believed, in good faith and on

(1) (1889) 23 Q.B.D., at p. 181.
(2) (1889) 23 Q.B.D. 168.
(3) (1891) 17 V.L.R. 335; 13 A.L.T. 32.
(4) (1892) 18 V.L.R. 566; 14 A.L.T. 79.
(5) (1892) 18 V.L.R., at p. 568; 14 A.L.T., at p. 79.
(6) (1921) 2 K.B. 119.

reasonable grounds, that he had been divorced from the bond of his first marriage " (1). It will be observed that the question of whether or not the accused had been divorced is treated as a question of fact. There is nothing in the judgment in *Wheat's Case* (1) which even suggests that a belief as to whether or not a person has (to use the words of the judgment (2)), " in fact been divorced " should be regarded as a belief upon a question of law.

Wheat's Case (1) would appear to be plainly inconsistent with the general proposition expressly formulated in *Tolson's Case* (3). But the Court of Criminal Appeal distinguished *Tolson's Case* (3), stating that the decision was based upon the words of the first exception to the section which creates a statutory offence of bigamy. That section, with its exceptions, is found, in not materially different form, in the Victorian *Crimes Act*, sec. 61, under which the prisoner in the present case was prosecuted. In the English statute (*Offences against the Person Act* 1861 (24 & 25 Vict. c. 100), sec. 57) the relevant provisions are :—" Whosoever, being married, shall marry any other person during the life of the former husband or wife . . . shall be guilty of felony. . . . Provided that nothing in this section contained shall extend . . . to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage."

Before proceeding to examine the reasoning in *Wheat's Case* (1) I call attention to two matters. The first exception relates to continued absence of a husband or wife for a period of seven years and to absence of knowledge by the accused person that the absent person was alive during that time. Absence for the last seven years is necessary in order to make the exception applicable, and nothing is said about any *belief* held by the accused person or about the grounds of any such belief. Further, the second exception relates to actual divorce, not to a divorce mistakenly believed to have taken place.

(1) (1921) 2 K.B. 119. (2) (1921) 2 K.B., at p. 125.
(3) (1889) 23 Q.B.D. 168.

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In *Tolson's Case* (1) the court held that belief in the death of the absent husband, if honest and based upon reasonable grounds, was a good defence where a woman was charged with bigamy, though the belief was based upon his absence for less than seven years. In *Wheat's Case* (2) the court held that belief that a divorce had been granted, even if it had been honest and based on reasonable grounds, would have been no defence to the charge. The Court of Criminal Appeal regarded its decision in *Wheat's Case* (2) as not being in conflict with *Tolson's Case* (1). The result of this view is that, while a mistaken belief as to the death of a wife or husband may be a good defence, a mistaken belief as to the divorce of a wife or husband cannot possibly be a good defence. It is necessary to examine the reasoning which led to such a result.

The Court of Criminal Appeal explains *Tolson's Case* (1) by saying that the proviso (" the first exception ") created a presumption of death which, unless rebutted by the prosecution, entitled the prisoner to an acquittal: " in other words the person accused is presumed to believe under such circumstances that the former wife or husband is dead at the time of the second marriage, and therefore has no intention of doing the act forbidden by the statute—namely, marrying during the life of the former husband or wife " (3). Thus, *Tolson's Case* (1) is regarded as being based upon a doctrine that continued absence for seven years creates a presumption of death and that the accused is therefore presumed to believe in the fact of death unless he is shown to have known that the presumption was not justified in fact. But the exception itself, in my opinion, gives no support whatever to this view. It makes no reference either to death or to any belief of the accused. The exception applies if the fact of continued absence for seven years is proved and the accused is not shown to have *known* that the other spouse was alive, whatever he or she may have believed or supposed. *Tolson's Case* (1), so far from being based upon and deriving its force from the first 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

(1) (1889) 23 Q.B.D. 168. (2) (1921) 2 K.B. 119.
(3) (1921) 2 K.B. at p. 125.

limited words of the first exception. The express exception requires seven years' absence in fact without knowledge that the absent person has been living during that time. The implied exception which *Tolson's Case* (1) establishes does not require absence for seven years, and, in spite of the statutory provisions relating to seven years' absence, allows exculpation of a wife charged with bigamy notwithstanding that the husband had not been absent for seven years and that the wife's second marriage took place within seven years after her husband had left her. This exculpation depends upon the wife believing in good faith and on reasonable grounds in the existence of a fact which, if it existed, would afford a good defence to the indictment. This is the *ratio decidendi* in *Tolson's Case* (1).

The reasoning of the nine judges who constituted the majority in *Tolson's Case* (1) does not depend in any way upon any special rule as to presumption of death affecting the interpretation of the statute. The first statute which made bigamy an offence, 1 Jac. I. c. 11, so far from recognizing or impliedly incorporating a special rule as to presumption of death after seven years' absence, was itself the source from which that rule was subsequently derived by analogy. When that Act was passed "the presumption of a man's death after he had not been heard of for seven years had not been established" (per *Cave* J. (2)).

More particularly, the decision in *Tolson's Case* (1) does not in any way depend upon the first exception to the section. That exception was the basis of the minority judgments and was the obstacle and the difficulty in the way of the majority judgments. That it was the basis of the minority judgments is made plain by *Manisty*, *Denman* and *Field* JJ. and *Pollock* and *Huddleston* BB. (3) and *Denman* and *Field* JJ. (4). That the majority judgments reached their conclusion, not by reason of, but actually notwithstanding and in spite of, the first exception, is shown by what is said by *Wills* and *Charles* JJ. (5), *Cave*, *Day* and *A. L. Smith* JJ. (6), *Stephen* and *Grantham* JJ. (7), *Hawkins* J. (8); and see per *Coleridge* C.J. (9).

(1) (1889) 23 Q.B.D. 168.
(2) (1889) 23 Q.B.D., at p. 184.
(3) (1889) 23 Q.B.D., at p. 196.
(4) (1889) 23 Q.B.D., at p. 201.
(5) (1889) 23 Q.B.D., at p. 178.
(6) (1889) 23 Q.B.D., at p. 182.
(7) (1889) 23 Q.B.D., at pp. 188, 189.
(8) (1889) 23 Q.B.D., at pp. 194, 195.
(9) (1889) 23 Q.B.D., at pp. 201, 202.

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Thus, the explanation of *Tolson's Case* (1) given in *Wheat's Case* (2) is not only different from, but is inconsistent with, the actual judgments in *Tolson's Case* (1). *Wheat's Case* (2) seeks to limit the decision in *Tolson's Case* (1) to an honest and reasonable belief in death. But the reasoning in *Tolson's Case* (1) definitely excludes any such limitation. It is necessary to choose between *Tolson's Case* (1) and *Wheat's Case* (2) as authorities. The reasoning in *Tolson's Case* (1) is, I think, much more satisfactory than that in *Wheat's Case* (2). *Tolson's Case* (1) has been regarded for so many years as a leading case stating a general principle of law that I do not think this court ought to depart from it.

It has, however, been urged that a distinction may be drawn between the various elements of the offence as stated in the relevant section. These elements are: (*a*) A married person; (*b*) going through the form or ceremony of marriage with any other person; (*c*) during the life of her or his husband or wife.

It is suggested that *Tolson's Case* (1) would admit as an excuse only a mistaken but honest and reasonable belief as to element *c* —the continued existence of the former husband or wife. It is put that the case may be different if the alleged belief relied upon is a mistaken belief, though honest and reasonable, with respect to *a* —namely, the status of the accused as married person. Apart from *Wheat's Case* (2), with which I have already dealt, I have not been able to discover any basis for the suggested distinction. In *Tolson's Case* (1) the belief of the accused wife was that her first husband was dead. This belief can be described with equal accuracy either as (1) a belief in the existence of a fact which removed the prisoner from the category of a married person, that is, a belief as to element *a*; or (2) a belief that her former husband was no longer alive, that is, a belief as to element *c*.

In *Wheat's Case* (2) emphasis is placed upon the latter method of describing the belief, but there is no reason why the former method of describing the belief should not be adopted. The offence consists in doing the act described in *b* in the circumstances stated in *a* and *c*. Mistaken belief as to any relevant element of the offence is sufficient to bring the case within the rule in *Tolson's Case* (1).

(1) (1889) 23 Q.B.D. 168. (2) (1921) 2 K.B. 119.

For the reasons which I have given I agree with the judgment of the Full Court in answering question No. 1 in the special case in the affirmative.

The jury answered in the affirmative and therefore in favour of the prisoner the question, " Did the accused at the time of going through a form of marriage with Miss Deed believe bona fide and on reasonable grounds that the divorce granted to Mr. Higgins on the 27th April 1928 had not been made absolute ? " If he did so believe, then, upon the foregoing reasoning, he should have been found not guilty. But the Full Court held that there was no evidence upon which the jury could reasonably answer this question in favour of the prisoner and accordingly affirmed the conviction. I have already said that the Full Court was not asked to answer any question as to sufficiency of evidence and, in my opinion, had no authority to answer it. I have already given reasons for this opinion. Further, the matter before the Full Court was not an appeal, but a case stated. *Wheat's Case* (1) was an appeal, and the court was prepared and entitled to disallow the appeal upon the independent ground that there was no evidence of the honest and reasonable belief alleged (See *Wheat's Case* (2)). The Full Court, however, in dealing with the question reserved by the learned judge, was not in the same position as a Court of Criminal Appeal.

There is an additional consideration affecting this part of the case which I regard as of great importance. The defence of an accused person should be left to the decision of the jury. Upon a criminal trial the judge has no power to direct a verdict of guilty. If the result of a special finding of a jury is that a verdict of not guilty should be entered, the accused is entitled to such a verdict, whatever may be the view of the trial judge as to the credibility, weight or sufficiency of the evidence upon which the finding has been made. The Crown has no right of appeal against an acquittal. The *Crimes Act* 1928, sec. 593, gives an appeal only to a person convicted. The effect of the second part of the answer given to the second question by the Supreme Court is that the Full Court not only sets aside a finding of the jury, which, in the opinion of the court, entitles a prisoner to an acquittal, but goes

(1) (1921) 2 K.B. 119.

(2) (1921) 2 K.B., at p. 124.

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further and in effect substitutes a contrary finding. Both on grounds of procedure and on grounds of substance I am of opinion that the part of the answer mentioned should be disregarded without any examination of the evidence at all. The second question should be answered in the affirmative, without the addition of the second part which, in the opinion of the Full Court, provided a reason for the negative answer to the second question.

Leave to appeal should be granted and the order of the Supreme Court varied by striking out the answer to the second question and substituting the answer "Yes," by striking out the affirmation of the conviction and by substituting an order that the conviction be quashed.

RICH J. I agree with the judgment of *Dixon* J.

STARKE J. Motion for special leave to appeal from a decision of the Supreme Court of Victoria, in Full Court, upon a Crown case reserved for its determination pursuant to sec. 478 of the *Crimes Act* 1928 (Vict.). The prisoner was charged upon presentment before the Supreme Court of Victoria with the crime of bigamy (*Crimes Act* 1928, sec. 61). The case states that it was proved that the accused on 25th October 1929 married Agnes Julia Higgins and that on 22nd April 1936, Higgins then being alive, he went through the form or ceremony of marriage with Bessie Deed. It was also proved that on 27th April 1928 the Supreme Court of Victoria granted a decree nisi for the dissolution of the marriage of Agnes Julia Higgins with one Higgins and that on 28th July 1928 the decree was made absolute in the manner prescribed by sec. 89 of the *Marriage Act* 1928 (Vict.).

Evidence was allowed on behalf of the prisoner that Agnes Julia Higgins had made statements to him on a number of occasions that the decree nisi for the dissolution of her marriage with Higgins had not been made absolute on or before 25th October 1929 and that the marriage between herself and the prisoner was invalid. The trial judge directed the jury that they should convict the prisoner, which they did, but in reply to a question of the judge they found that the prisoner at the time of going through the form or ceremony

of marriage with Bessie Deed bona fide and on reasonable grounds believed that the divorce granted to Higgins on 27th April 1928 had not been made absolute.

The question is whether this finding should exonerate the prisoner from criminal culpability. The *Crimes Act* 1928 (Vict.), sec. 61, enacts: "Whosoever being married goes through the form or ceremony of marriage with any other person during the life of her or his husband or wife, shall be guilty of felony." The section makes several exceptions, one of which is that nothing in the section contained shall extend to any person who at the time of her or his going through such form or ceremony of marriage has been divorced from the bond of marriage. But this exception has no application to the present case. It might be thought that the case then falls within the very words of the section. However, in *R.* v. *Tolson* (1) it was laid down as a general rule that a bona fide belief on reasonable grounds in the death of a husband or wife at the time of the second marriage afforded a good defence in an indictment for bigamy. *Stephen* J. thus stated the principle: "It may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence" (2). But it is an honest and reasonable belief in the state of fact which, if true, would make the act of the alleged offender an innocent act that exonerates him from criminal culpability. A mistake of law would not exonerate him. It was the belief of the prisoner in her husband's death that led in *R.* v. *Tolson* (1) to her exoneration. It was a mistake wholly and entirely of fact.

Does a mistaken belief in divorce or marriage on reasonable grounds likewise exonerate a person from criminal culpability? The Court of Criminal Appeal (*Bray*, *Avory*, *Shearman*, *Salter* and *Greer* JJ.) in *R.* v. *Wheat and Stocks* (3) unanimously held that it did not and denied that these decisions conflicted with *R.* v. *Tolson* (1). The learned judges said that in *R.* v. *Tolson* (1) the person accused believed on reasonable grounds that the husband was dead; therefore she did not intend at the time of the second marriage to

(1) (1889) 23 Q.B.D. 168. (2) (1889) 23 Q.B.D., at p. 188.
(3) (1921) 2 K.B. 119.

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do the act forbidden by the statute—namely, to marry during his life. I think Australian courts should follow that decision. Uniformity of decision in the criminal law is manifestly desirable, and, in my opinion, *R.* v. *Wheat and Stocks* (1) was rightly decided. Whether a person is divorced or married is not a mere matter of fact, as is the question whether a person is dead or alive. It involves the status or position in law of a person, which is in truth a conclusion in law and not of fact. It is not a mistake of fact that a person makes in concluding that marriage exists or does not exist or that divorce has or has not been granted but a mistake in law, and such a mistake does not exonerate him from criminal culpability. It is this view that I think is at the root of *R.* v. *Wheat and Stocks* (1), and in any event is, to my mind, a satisfactory ground upon which the decision may be rested.

Another question raised by the case stated must be mentioned. It was, in substance: Should the jury have been directed to find the prisoner not guilty if they found that he believed bona fide and on reasonable grounds that the divorce granted to Higgins had not been made absolute? It was determined in the negative on the ground that there was no evidence upon which the jury could properly find that the accused had such a belief. The case was stated under sec. 478, and the question whether there was or was not evidence on which the jury might act was not stated for the consideration of the court. There is good reason for doubting the authority of the court investigating matters that were not stated for its consideration. Be that as it may, it is clearly a matter that this court ought to consider in exercising the authority conferred upon it of granting special leave to appeal in criminal cases. Upon the facts stated by the trial judge in his charge to the jury, which is part of the case, and by the Full Court for its decision, it is apparent that the defence raised by the prisoner was based on the flimsiest grounds and that the finding was such that no reasonable jury ought to have reached on the evidence before them.

In my opinion the conviction of the prisoner was right and leave to appeal should be refused.

(1) (1921) 2 K.B. 119.

DIXON J. Agnes Julia Westacott, a widow, married William Higgins on 13th January 1916. After some years of cohabitation they parted, and Mrs. Higgins obtained employment as housekeeper for the prisoner, who now seeks special leave to appeal from a decision of the Supreme Court confirming a conviction of bigamy. He was then a widower with young children. After some time Mrs. Higgins and he went through the ceremony of marriage. She assured him that her husband, William Higgins, was dead. This was untrue. Thus, Mrs. Higgins committed bigamy. If the prisoner had been aware that her former marriage had not been dissolved by death or otherwise, his participation would apparently have amounted to aiding and abetting the commission of that crime and he would have been liable to prosecution as a principal. At all events, in *R.* v. *Thomas Wheat and Marion Stocks* (1) Marion Stocks, an unmarried woman, was convicted of bigamy because she went through the ceremony of marriage with Thomas Wheat, a married man, and her conviction was affirmed by the Court of Criminal Appeal. However, when the prisoner went through the form of marriage with Mrs. Higgins he believed her story of the death of her husband to be true. This ceremony took place on 12th June 1925. On 10th January 1928 William Higgins filed a petition for dissolution of marriage with his wife on the ground of adultery. He joined the prisoner as co-respondent. When the citation was served upon the prisoner, Mrs. Higgins admitted to him that she had lied to him about the death of her previous husband. A decree nisi was pronounced in the suit on 27th April 1928. The prisoner was present in court when this was done. On 25th October 1929 Mrs. Higgins and the prisoner again went through the ceremony of marriage. He believed that her marriage had then been effectually dissolved. This was correct; the decree had been made absolute on 28th July 1928. After Mrs. Higgins had in this manner become the lawful wife of the prisoner, she appears to have formed a propensity for denying the status to which previously she had laid groundless claims. She told her husband repeatedly that she was not his wife, that she had not been divorced because there had not been an entry in the court. At length, still protesting that her marriage

(1) (1921) 2 K.B. 119.

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with him was no marriage, she went off with another man. Then the prisoner met a Miss Bessie Deed. To her he explained how he had gone through the marriage ceremony with Mrs. Higgins, believing that she was divorced, but that Mrs. Higgins had left him, denying that it was a marriage on the ground that the entry of her divorce had not been made in court. The prisoner was a police constable and, being one day at the Law Courts in the course of his duties, he asked some counsel whom he saw what was necessary to complete a divorce. Fortified with the explanation he received, he proceeded to marry Miss Deed. The marriage took place on 22nd April 1936. In respect of this marriage he was prosecuted and convicted of bigamy. Miss Deed was not presented with him. But, if he was guilty and *Marion Stocks' Case* (1) was rightly decided, it would appear that Miss Deed also was guilty of aiding and abetting. For she had no more reason than he did for supposing that he was free to marry.

Martin J., before whom the prisoner was tried, directed the jury, on the authority of *R.* v. *Wheat and Stocks* (1), that the prisoner's reason did not in law afford him any excuse, and he was convicted. But, the learned judge having requested them to answer the question, the jury found that at the time of going through the form of marriage with Bessie Deed the prisoner believed bona fide and on reasonable grounds that the divorce granted to Higgins had not been made absolute.

Under the law of Victoria, it is the duty of the Prothonotary of the Supreme Court upon the expiration of the time limited by a decree nisi for dissolution of marriage to enter a memorandum upon the decree nisi unless in the meantime the petitioner has given him a written direction not to do so, or there has been an appeal or an intervention. Upon such an entry being made the decree becomes absolute and the memorandum whenever made operates from the time when it ought to have been made (secs. 89 and 91 of the *Marriage Act* 1928 (Vict.)).

Doubtless the prisoner did not know all this, and the jury, upon having it explained to them, do not appear to have regarded it as militating against the reasonableness of the prisoner's faith in the

(1) (1921) 2 K.B. 119.

assertions of Agnes Julia that she was not his wife. *Martin* J., acting under sec. 477 of the *Crimes Act* 1928, reserved for the consideration of the Full Court two questions, which were, in effect, whether the finding of the jury afforded an answer to the charge of bigamy and whether the judge should have directed them that a belief, such as they found, entitled the prisoner to an acquittal. The learned judge did not include the evidence in the case reserved, but the Full Court sent for it, a course which under the section they were not entitled to pursue. Forming the opinion that the evidence did not support the jury's special finding, the court confirmed the conviction. At the same time their Honours held that in point of law a bona fide belief based upon reasonable grounds in facts which, if true, would be inconsistent with the validity of the earlier marriage would afford an answer to a charge of bigamy in going again through the form of marriage.

Upon the hearing of the prisoner's application for special leave to appeal to this court, the learned counsel for the Crown would not contest the correctness of this general proposition, although it was said to be inconsistent with the decision in *R.* v. *Wheat and Stocks* (1). That decision he declined to support. This does not, however, relieve us of the responsibility of determining how far a belief in a state of facts, which, if correct, would mean that the prior marriage was void, affords an answer to a charge of bigamy. The question appears to me to go deeply into the principles of the common law.

Whenever a legal standard of liability includes some exercise or expression of the will, some subsidiary rules of law must be adopted with respect to mistake. States of volition are necessarily dependent upon states of fact, and a mistaken belief in the existence of circumstances cannot be separated from the manifestation of the will which it prompts. Whether consent, intention, or motive, is the element which a legal criterion of liability includes, it is undeniable that a misapprehension of fact may produce a state of mind which though apparently of the required description is yet really of an entirely different quality. Thus, the assent involved in an agreement to sell a specific thing founded, as it is, upon a belief in the continued existence of the thing, becomes, when the belief proves mistaken,

(1) (1921) 2 K.B. 119.

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so entirely different that it does not operate in the formation of a contract of sale. If an intention to pay over a sum of money, that is, to invest the payee with the property in the money, is founded upon a belief in a state of facts which would render the payer liable to make the payment, and it turns out that the belief is mistaken, the nature of the intention is so affected that the payment is no longer voluntary and may be recovered back. A recent decision in a very different branch of law affords another example. The mental consent of a husband to acts of adultery by his wife does not amount to connivance when the basis of his willingness that they should be committed is the belief which he prematurely forms that an adulterous relationship already exists, of which the acts he contemplates will merely be proof (*Haevecker* v. *Haevecker* (1)). These are only examples of the general recognition which the law gives to the truth that the nature of an act of volition may be of an entirely different description if it is based on mistake of fact. The state of facts assumed must often enter into the determination of the will. It would be strange if our criminal law did not contain this principle and treat it as fundamental.

It cannot be disputed that the common law gave full effect to it. In *Hawkins, Pleas of the Crown* (1824), book I., c. 7, sec. 3, the doctrine is stated that felony " is always accompanied with an evil intention, and therefore shall not be imputed to a mere mistake or misanimadversion." This passage is quoted by *Hawkins* J. in *Tolson's Case* (2). *Cave* J. states the principle in modern form thus : " At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence " (3). This doctrine is deeply embedded in our criminal law. It goes to that mental element in crime which relates to foresight of or advertence to the consequences of the act done, or perhaps what in relation to bigamy may be described as the significance of the act, that is, the act of going through the form of marriage. The matter is one which, since *Bentham*, has been a commonplace of analytical jurisprudence. *Bentham* in his *Principles of Morals and*

(1) (1936) 57 C.L.R. 639.
(2) (1889) 23 Q.B.D. 168, at p. 193.
(3) (1889) 23 Q.B.D. at p. 181.

Legislation (c. 9, sec. 6 ; c. 12, sec. 19 et seq. ; c. 13, sec. 10, Oxford ed., pp. 90, 106, 163, 174) deals with what he calls " misadvised acts " and " mis-supposal." " Whether a man did or did not suppose the existence or materiality of a given circumstance, it may be that he *did* suppose the existence and materiality of some circumstance, which either did not exist, or which, though existing, was not material. In such case the act may be said to be *misadvised*, with respect to such imagined circumstance : and it may be said that there has been an erroneous supposition, or a *mis-supposal* in the case." Under the heading of " Cases unmeet for punishment," *Bentham* puts " the case of mis-supposal ; where, although he may know of the tendency the act has to produce that degree of mischief, he supposes it, though mistakenly, to be attended with some circumstance, or set of circumstances, which, if it had been attended with, it would either not have been productive of that mischief, or have been productive of such or greater degree of good, as has determined the legislature in such a case not to make it penal." Apart from the terms employed by *Bentham*, this speculative treatment of principle has been taken to accord with the actual state of English law. Sir *John Salmond*, in dealing with mistake of fact (*Jurisprudence*, 9th ed. (1937), sec. 147, p. 561), says :—" In the criminal law, on the other hand, the matter is otherwise and it is there that the contrast between mistake of law and mistake of fact finds its true application. Absolute criminal responsibility for a mistake of fact is quite exceptional." On the side of history, the development of the doctrine has not received any full, or perhaps adequate, treatment. For the most part, writers are content to begin with the decision given in 1639 that an honest and reasonable belief that the victim was a burglar was a sufficient justification for homicide, although the belief was in fact mistaken (*R.* v. *Levett* (1)). This case is mentioned by Sir *William Holdsworth*, whose account of the later history of the mental element in crime will be found in *Holdsworth's History of English Law*, vol. 8, pp. 443 et seq. Sir *James Fitzjames Stephen* (*History of the Criminal Law* (1883), vol. 2, p. 117), after saying that the effect of ignorance or mistake as to a particular matter of fact connected with an alleged offence is a matter which varies according to the definition of

(1) (1639) Cro. Car. 538 ; 79 E.R. 1064.

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particular offences, makes the following observations :—" It will be found upon examination of the list of crimes known to the law of England that there are very few upon which any real difficulty as to criminal knowledge can arise. The only common ones with which I am acquainted are bigamy and certain offences against the person. In regard to bigamy it is a moot point whether, if a person marries within seven years after the death of his or her wife or husband, honestly believing on good grounds that the other party is dead, he is or is not guilty of bigamy if the other party is in fact alive. There are decisions both ways on the subject." In his judicial capacity, Sir *James Fitzjames Stephen* afterwards joined, in *R.* v. *Tolson* (1), in deciding that an honest and reasonable mistake did afford an answer to a charge of bigamy, when the mistake consisted in a supposal by the prisoner that his prior marriage had been dissolved by death. It is difficult to see how, consistently with any humane or liberal system of law or with the acknowledged principles of the common law, any other conclusion could be reached. The only answer given by the dissenting judges was, as might have been expected, a rigid adherence to the inflexible English principle of literal interpretation of statutory enactments. Bigamy is a statutory offence. It was made a felony in 1603. " With us in England " (says *Blackstone, Commentaries*, book IV., c. 13, sec. 2) " it is enacted by statute, 1 Jac. I. c. 11, that if any person, being married, do afterwards marry again, the former husband or wife being alive, it is felony; but within the benefit of clergy. The first wife in this case shall not be admitted as a witness against her husband, because she is the true wife* ; but the second may, for she is indeed no wife at all ; and so vice versa, of a second husband. This act makes an exception to five cases, in which such second marriage, though in the three first it is void, is yet no felony. 1. Where either party hath been continually *abroad* for seven years, whether the party in England hath notice of the other's being living or no. 2. Where either of the parties hath been absent from the other seven years *within* this kingdom, and the remaining party hath had no knowledge of the other's being

(1) (1889) 23 Q.B.D. 168.

* As to this, see now, in Victoria, *Crimes Act* 1928, sec. 432 (*c*), and, in England, 4 & 5 Geo. V. c. 58, sec. 28 (3).

alive within that time. 3. Where there is a divorce (or separation *a mensa et thoro*) by sentence in the ecclesiastical court. 4. Where the first marriage is declared absolutely void by any such sentence, and the parties loosed *a vinculo*. Or, 5. Where either of the parties was under the age of consent at the time of the first marriage, for in such case the first marriage was voidable by the disagreement of either party, which the second marriage very clearly amounts to. But if at the age of consent the parties had agreed to the marriage, which completes the contract, and is indeed the real marriage; and afterwards one of them should marry again; I should apprehend that such second marriage would be within the reason and penalties of the Act." The Act of James I. was superseded by 9 Geo. IV. c. 31, sec. 22, which, in turn, was superseded by 24 & 25 Vict. c. 100, sec. 57. So far as material, the last statute enacts: "Whosoever, being married, shall marry any other person during the life of the former husband or wife . . . shall be guilty of felony. . . . Provided that nothing in this section contained shall extend . . . to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage."

The argument in *Tolson's Case* (1) that reasonable mistake afforded no excuse rested upon the presence of the express exceptions and the absence of any reference to mistake. No doubt the inference drawn from these considerations would find some justification in our principles of literal construction if there were no general prima facie rule by which even statutory offences, unless a contrary intention appears from the words, subject matter or nature of the enactment, are understood to admit of a defence based upon essential mistake. But, after all, such a mode of dealing with a crime known to our law for centuries simply because it is the creation of statute 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.

(1) (1889) 23 Q.B.D. 168.

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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 in which these Acts are drawn." Against such a view, however, there stood the much more reasonable doctrine that when a statute introduced into our criminal code a new offence it should be understood prima facie to intend the offence to take its place in a coherent general system and to be governed by the established principles of criminal responsibility.

Tolson's Case (1) was taken to reaffirm and finally to establish that a general doctrine of the common law existed opposed to what I may call the principles of the Mikado. It was, indeed, a decision that a contrary presumption was applicable alike to offences created by statute and to crimes existing at common law. The rule accepted was that in the case alike of an offence at common law and, unless expressly or impliedly excluded by the enactment, of a statutory offence, it is a good defence that the accused held an honest and reasonable belief in the existence of circumstances which, if true, would make innocent the act for which he is charged. Thus, in *Bank of New South Wales* v. *Piper* (2) the principle was stated as indisputable by Sir *Richard Couch* in the course of the judgment of the Privy Council. Speaking of a New South Wales enactment penalizing sales of stock subject to a lien, he said :—" It was strongly urged by the respondent's counsel that in order to the constitution of a crime, whether common law or statutory, there must be *mens rea* on the part of the accused, and that he may avoid conviction by showing that such *mens rea* did not exist. That is a proposition which their Lordships do not desire to dispute; but the questions whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of *mens rea* in the accused, are questions entirely different, and depend upon different considerations. In cases when the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which,

(1) (1889) 23 Q.B.D. 168.

(2) (1897) A.C. 383.

if true, would make the act charged against him innocent. The case of *Sherras* v. *De Rutzen* (1), where the conviction of a publican for the offence of selling drink to a constable on duty was set aside by the court because the accused believed and had reasonable grounds for the belief that the constable was not on duty at the time is an illustration of its absence " (2). This doctrine was adopted in the Supreme Court of Victoria in *R.* v. *McMahon* (3) and in *R.* v. *Adams* (4), cases of bigamy not unlike the present, and in *Marshall* v. *Foster* (5). In this court it had been enunciated by *Griffith* C.J. in *Hardgrave* v. *The King* (6) as follows :—" The general rule is that a person is not criminally responsible for an act which is done independently of the exercise of his will or by accident. It is also a general rule that a person who does an act under reasonable misapprehension of fact is not criminally responsible for it even if the facts which he believed did not exist. I do not think the first rule has ever been excluded by any statute." No doubt, in the application of the principle of interpretation to modern statutes, particularly those dealing with police and social and industrial regulation, a marked tendency has been exhibited to hold that the prima facie rule has been wholly or partly rebutted by indications appearing from the subject matter or character of the legislation. Learned and interesting papers upon the confusing course thus taken by judicial decision, by Mr. *R. M. Jackson* (*Cambridge Law Journal*, vol. 6, p. 83) and by Dr. *Stallybrass* (*Law Quarterly Review*, vol. 52, p. 60), contain a full treatment of the authorities. See, too, a paper on *The Mental Element in Crimes at Common Law* by Mr. *J. W. C. Turner* (*Cambridge Law Journal*, vol. 6, p. 31). But the general rule has not been and could not be impaired in its application to the general criminal law, to which the crime of bigamy belongs. The rule or rules have been embodied in the three criminal codes of Australia—Queensland, secs. 22 and 24, Tasmania, secs. 12 and 14, and Western Australia, secs. 22 and 24, These provisions, which are in the same terms, state, in my opinion,

(1) (1895) 1 Q.B. 918.
(2) (1897) A.C., at pp. 389, 390.
(3) (1891) 17 V.L.R. 335 ; 13 A.L.T. 32.
(4) (1892) 18 V.L.R. 566 ; 14 A.L.T. 79.
(5) (1898) 24 V.L.R. 155 ; 19 A.L.T. 198.
(6) (1906) 4 C.L.R. 232, at p. 237.

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the common law with complete accuracy. They are as follows:— "Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence. But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud (Queensland *Criminal Code*, sec. 22). "A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject" (Queensland *Criminal Code*, sec. 24).

Apart from the authority of *Wheat's Case* (1), the application of these principles to the finding of the jury would present little difficulty. The prisoner knew that Agnes Julia's former husband was alive. He knew that, unless she was effectively divorced, his own marriage with her was a nullity. He rightly supposed that in point of law her divorce was not effective unless it were made absolute, completed, or, as he called it, "entered in the court." According to the jury, he honestly and reasonably supposed this had not been done. Whether it had been done or not was a matter of fact, not law. But, in any case, in the distinction between mistakes of fact and of law, 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. This is brought out by an apposite passage in the judgment of *Jessel* M.R. in *Eaglesfield* v. *Marquis of Londonderry* (2):—"A misrepresentation of law is this: when you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, there is still a statement of fact and not a statement of law. Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer

(1) (1921) 2 K.B. 119.

(2) (1876) 4 Ch. D. 693, at pp. 702, 703.

is, 'You may, she is a single woman of large fortune.' It turns out that the man who gave that answer knew that the lady had gone through the ceremony of marriage with a man who was believed to be a married man, and that she had been advised that that marriage ceremony was null and void, though it had not been declared so by any court, and it afterwards turned out they were all mistaken, that the first marriage of the man was void, so that the lady was married. He does not tell the tradesman all these facts, but states that she is single. That is a statement of fact. If he had told him the whole story, and all the facts, and said, 'Now, you see, the lady is single,' that would have been a misrepresentation of law. But the single fact he states, that the lady is unmarried, is a statement of fact, neither more nor less; and it is not the less a statement of fact, that in order to arrive at it you must know more or less of the law. There is not a single fact connected with personal *status* that does not, more or less, involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that the man was the first-born son after the marriage, or, in some countries, before. Therefore, to state it is not a representation of fact seems to arise from some confusion of ideas." In *Wheat's Case* (1), however, a mistake on reasonable grounds as to a dissolution by judicial decree of the prisoner's own prior marriage was said to afford no excuse. The court held upon the facts that the prisoner's mistake could not be found to be reasonable, but went on to state the court's opinion of the legal insufficiency of the ground in any event. Dr. *Stallybrass* (*Law Quarterly Review*, vol. 52, p. 65) explains the case as dealing with mistake of law. He says:—"It is sometimes suggested that the authority of *R.* v. *Tolson* (2) is impugned by the decision of the Court of Criminal Appeal in *R.* v. *Wheat and Stocks* (1), and in *R.* v. *Denyer* (3) Lord *Hewart* certainly seems to give some support to that view. But it is submitted that the two cases are perfectly reconcilable. In *Tolson's Case* (2) the prisoner's mistake was one of fact (Cp. per *Stephen* J. (4)). In *Stocks' Case* (1) an uneducated

(1) (1921) 2 K.B. 119.
(2) (1889) 23 Q.B.D. 168.
(3) (1926) 2 K.B. 258, at pp. 265, 266.
(4) (1889) 23 Q.B.D., at p. 188.

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man wrongly believed in good faith and on reasonable grounds that he had been divorced from his first wife and went through a second marriage ceremony. Tolson did not intend to do the act forbidden by the statute, i.e., to marry another during the former husband's life, whereas Wheat did. Wheat's was a mistake of law, and therefore he was guilty of an offence. So *Earl Russell* (1) honestly believed his divorce valid and that he was free to remarry, but it was not a defence and merely went in mitigation of punishment." Mr. *Roland Burrows* K.C. (*Law Quarterly Review*, vol. 51, p. 44) expresses his understanding of the position as follows: " A bona fide but erroneous belief that the first marriage was dissolved by a divorce is not a defence (*R.* v. *Wheat* (2)) though a similar belief that the first marriage was null and void, and therefore no marriage is a valid defence (*R.* v. *Connatty* (3))." A majority of the Supreme Court of New Zealand has simply said the decision is wrong and has refused to follow it (*R.* v. *Carswell* (4)). The judges of the Supreme Court of Victoria (*Mann* C.J., *Macfarlan* and *Gavan Duffy* JJ.) adopted the same course.

The Court of Criminal Appeal did not affect in *Wheat's Case* (2) to overrule *R.* v. *Tolson* (5). But, if their decision assumed to do so, I should certainly think that it ought not to be followed. For it would be fundamentally inconsistent with established principle and a reversion to the objective standards of early law. But, if it is to be reconciled with *Tolson's Case* (5), it must be either upon the ground that the prisoner's mistake was one of law and not of fact, or else upon the ground that the express references to divorce in the exception to the statute impliedly excluded a mistake as to the prisoner's own divorce. The first ground leaves the case an authority on the nature of Thomas Wheat's particular mistake and on no general principle of law. For no one disputes that a mistake of law is no excuse. The second ground depends on the inference drawn from a particular exception. *Tolson's Case* (5) shows that the inference must be limited, because as to other kinds of mistake it is exactly the inference of construction which that decision negatives. At the end of the judgment of *Avory* J. on behalf of

(1) (1901) A.C. 446.
(2) (1921) 2 K.B. 119.
(3) (1919) 83 J.P. 292.
(4) (1926) N.Z.L.R. 321.
(5) (1889) 23 Q.B.D. 168.

the Court of Criminal Appeal, the following passage occurs:— "One other case remains to be noticed which was relied on by Mr. *Birkett*—namely— *R.* v. *Thomson* (1), in which the late Common Serjeant directed the jury that if at the time of the second marriage the prisoner bona fide believed that his first marriage was invalid on the ground that the woman he then married had a husband alive at the time he would be entitled to an acquittal. The prisoner was convicted and the question was not further discussed. It is not necessary in the present case to express an opinion on the ruling of the learned Common Serjeant, which was probably based on *R.* v. *Tolson* (2), but we doubt if it can be supported consistently with our present decision" (3). It appears to me that either this doubt is ill-founded or else *Wheat's Case* (4) is contrary to *Tolson's Case* (2). The truth appears to be that a reluctance on the part of courts has repeatedly appeared to allow a prisoner to avail himself of a defence depending simply on his own state of knowledge and belief. The reluctance is due in great measure, if not entirely, to a mistrust of the tribunal of fact—the jury. Through a feeling that, if the law allows such a defence to be submitted to the jury, prisoners may too readily escape by deposing to conditions of mind and describing sources of information, matters upon which their evidence cannot be adequately tested and contradicted, judges have been misled into a failure steadily to adhere to principle. It is not difficult to understand such tendencies, but a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code. No more striking illustrations could be obtained of the consequences of doing so than those supplied by the application of such an exclusion to the crime of bigamy. If upon such a charge the accused were not permitted to exculpate himself by showing that on reasonable grounds he mistakenly believed in facts, which, if true, would make his earlier marriage void, the following cases might occur: (*a*) The accused, having learned that the woman whom he first married had already been married, might after the most exact inquiries ascertain

(1) (1906) 70 J.P. 6.
(2) (1889) 23 Q.B.D. 168.
(3) (1921) 2 K.B., at p. 127.
(4) (1921) 2 K.B. 119.

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that the man she married was alive at the date of the accused's marriage and that no divorce had been pronounced *in foro domicilii*. On the faith of this information, he might remarry and then discover that at the time of the celebration of the marriage the existence of which he thought he had so completely established one of the parties thereto was incapacitated by an existing marriage. He would be guilty of bigamy if *Tolson's Case* (1) does not apply. (*b*) The accused, like the now applicant, might actually be made a co-respondent in divorce proceedings, although he had gone through the ceremony of marriage with the respondent. Assured beyond doubt in this manner of the invalidity of his own marriage with the woman, he might remarry only to find that he had been the victim of a conspiracy to obtain damages from him. Nevertheless, he would be guilty of bigamy if *Tolson's Case* (1) did not apply. (*c*) Under the law of Victoria, he might obtain a decree nisi, await the full time for its being made absolute and then remarry. If the Prothonotary had failed to carry out his duty and enter the memorandum on the decree nisi, the accused would be guilty of bigamy unless *Tolson's Case* (1) was applied. (*d*) It must be remembered that in *Wheat's Case* (2) Marion Stocks was held guilty as an accessory. In concluding the reasons which he gave for the court's decision that, even if Thomas Wheat's belief had been based on reasonable grounds, he would, nevertheless, have been guilty, *Avory* J., in the passage I have set out, said, in effect, that the court were inclined to the view that it was no answer to a charge of bigamy that the prisoner held an honest and reasonable belief that at the time of his earlier marriage his wife had a living husband. There seems to be no valid distinction for such a purpose between a belief in the existence of one person and a belief in the death of another. Although under *Tolson's Case* (1) an honest and reasonable belief in the death of her first husband would exculpate Mrs. Higgins from a charge of bigamy, she in fact knew he was alive. If the doubt expressed in the passage I have quoted from *Wheat's Case* (2) is well founded, there would seem to be no intelligible reason why the prisoner should not be guilty of aiding and

(1) (1889) 23 Q.B.D. 168. (2) (1921) 2 K.B. 119.

abetting Mrs. Higgins when he went through the form of marriage with her believing her story of the death of her husband.

These examples appear to me to show that if a rule were adopted which would exclude honest and reasonable belief in the invalidity of the accused's earlier marriage because the decree nisi dissolving his wife's first marriage had not been made absolute, it would lead to consequences which would not only be contrary to principle but which would be discreditable to our system of criminal law. It must be remembered that, although it is going through the ceremony of marriage that exposes the party to punishment, marriage in itself is perfectly innocent. The essence of the offence of bigamy lies in the previous marriage and its continuance. It is only because of the wrong done by the wickedness of going through a form of marriage with the knowledge of the impediment of a prior marriage that the subsequent marriage merits punishment.

In my opinion the finding of the jury meant in law that the present applicant was not guilty.

The only ground in the circumstances for refusing to give him special leave to appeal lies in the view of the Supreme Court that the jury's finding was not justified by the evidence. That question was not submitted to the Supreme Court by the case reserved. If what, according to my view, would be a correct direction in law had been given to the jury either before or after they had answered the question put to them, it is evident that the accused would have been acquitted, and I do not think that he ought to have been deprived of the jury's verdict as, in effect, he has been.

I think special leave should be granted and the appeal allowed forthwith and the conviction quashed.

EVATT J. In October 1929 the appellant married Agnes Julia Higgins, and in 1936, in the State of Victoria, he went through a ceremony of marriage with one Bessie Deed. At the time of this second marriage Agnes Julia Thomas, his first wife, was alive.

The appellant seeks to exculpate himself from the crime of bigamy, constituted by sec. 61 of the *Crimes Act* of the State of Victoria, by the defence that, at the time of the second marriage, he believed, honestly and on reasonable grounds, that his wife Agnes Julia (who

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had been previously married to one Higgins and against whom a decree nisi had been made in July 1928) was still a married woman because such decree nisi had not been made absolute. The appellant's basis for his supposed belief was that, during his married life with Agnes Julia Thomas, against whom the decree of dissolution had been pronounced on the ground of her adultery with the appellant, she had informed him that she was not "properly married to him," that "the divorce had not been entered" and that "she had not got a writing in the court."

Although the appellant said in evidence that his wife was a woman "who would say anything," he made no inquiries as to whether the formal step of decree absolute had been taken. In 1934 his wife left home, in 1935 he met Miss Deed, and in 1936 he went through the ceremony of marriage with her.

The present case has assumed a very unusual form. *Martin* J., who presided at the trial, rejected the contention that a defence was established if the jury found that the appellant had the belief already mentioned. At the same time, *Martin* J. thought that he should give the appellant the benefit of the jury's finding of fact so that the point of law could be raised before the Full Court.

The jury found as a fact that the accused at the time of going through the form of marriage with Miss Deed believed bona fide and on reasonable grounds that the divorce granted to Mr. Higgins on April 27th, 1928, had not been made absolute. The jury convicted the appellant in accordance with *Martin* J.'s ruling on the law, but a case was stated to the Full Court.

The first question asked of the Full Court was: "Is it a good defence to the charge of bigamy contained in the indictment that the accused bona fide and on reasonable grounds believed that the divorce granted to Mr. Higgins had not been made absolute?" This question was answered: Yes.

The second question asked was: "Should I have directed the jury that if they found that the accused did hold such a belief bona fide and on reasonable grounds the verdict should be: Not guilty?" The answer of the Full Court was:—"No. The learned judge should have directed the jury that there was no evidence upon which they

could properly find that the accused held such a belief bona fide and on reasonable grounds."

In my opinion, the Full Court's opinion that there was no evidence warranting a finding that the appellant's belief was a belief entertained on reasonable grounds is correct. As *Martin* J. very properly emphasized, a most serious and special responsibility rests upon a person who has been previously married and who goes through the solemn ceremony a second time, when to his knowledge his first wife is still alive. It was utterly beyond all reason for the appellant to accept his first wife's say-so, especially as her statements were made in bursts of temper, and he thought that she was not a truthful person.

Further, neither the finding of the jury nor question 1 of the case stated, although referring to the belief of the appellant that his first wife's divorce had not become definitive, includes any mention of the fact that, as part of his defence, the appellant, on his own showing, had to prove his belief that the decree nisi had not been made absolute at any time prior to April 22nd, 1936, the date of his second marriage, which was two years after his first wife had left him for another man. So far as I can see, the jury's attention was not devoted to this important aspect of the facts. But the point has not been stressed by the learned Crown Prosecutor, and I have no desire to base my judgment upon it.

Although I entirely agree with the Full Court's view of the facts of the case, I think that *Martin* J. did not intend to raise any question as to whether the jury's special finding of fact as to belief could be supported by the evidence. Therefore, I hold that, in view of the course of proceedings, the appellant is entitled to an acquittal providing he shows that the Full Court's view is correct as to the particular application of the doctrine of *mens rea*. For, in effect, the jury's verdict was intended to be the foundation of an acquittal, subject to the Full Court's overruling *Martin* J. on the point of law. If the Full Court's view of the law is correct, I agree that the only course open to this court is to direct an acquittal. In my opinion, *Martin* J.'s view of the law was correct.

The question of law is whether under sec. 61 of the *Crimes Act* of Victoria it is a defence for an accused person to prove that, at

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the time of the second marriage, he honestly and reasonably believed that he himself was not then married because he believed that his first marriage was void because his first wife, though previously married, had not been legally divorced. Sec. 61 of the *Crimes Act* corresponds to sec. 57 of 24 & 25 Vict. c. 100, in relation to which the two leading cases of *R.* v. *Tolson* (1) and *R.* v. *Wheat* (2) were decided. In the latter case, the Court of Criminal Appeal in England, constituted for the occasion by five judges, held that, although at the time of the second marriage the prisoner believed honestly and reasonably that he had been divorced from the bond of his first marriage, that was no defence. The distinction between *R.* v. *Wheat* (1) and the present case is that the present appellant believed that his first marriage was void because his first wife was then still married, whereas in *R.* v. *Wheat* (1), the prisoner believed that his first marriage had been duly dissolved. In each case the contention of the accused was based upon proof of a belief relating to a question of fact—in *Wheat's Case* (1) a belief that the court had actually decreed a divorce, in this case a belief that the court had not actually decreed a divorce. In each case, moreover, the belief of the defendant was that, at the time of the second marriage, he was not a married man. If *Wheat's Case* (1) is correct, as I think it clearly is, it shows conclusively that the defendant's honest and reasonable belief that, at the time of the second marriage, he was not a married man is not a defence, even although the belief is in the existence or non-existence of a fact which would necessarily result in his not then being a married man.

As we have to construe a statute, we must pay great attention to its purpose and its form. At the same time, we must obey the ruling in *R.* v. *Tolson* (2) to the effect that, if, at the time of his second marriage, the accused believed, bona fide and on reasonable grounds, that his first wife was dead, the doctrine of *mens rea* operates as a defence to the charge of bigamy. In my opinion, the principle of *mens rea* which underlies *R.* v. *Tolson* (2) is stated in *R.* v. *Wheat* (1). The only "intention" which is relevant is the "intention" to go through the ceremony of marriage, and the "intention" to do so during the lifetime of another person. According to *Avory* J., the relevant intention,

(1) (1889) 23 Q.B.D. 168. (2) (1921) 2 K.B. 119.

so far as *mens rea* is concerned, is " to do the act forbidden by the statute, namely, ' to marry during the life of the former wife ' " (1). This principle explains the decision in *R.* v. *Tolson* (2), for, as *Avory* J. pointed out, " in *R.* v. *Tolson* (2) the person accused believed on reasonable grounds that her husband was dead ; therefore she did not intend at the time of the second marriage to do the act forbidden by the statute, namely, to marry *during his life* " (1) (Italics are mine).

It has been said that the further explanation of *R.* v. *Tolson* (2) which appears in *R.* v. *Wheat* (3) contains unsatisfactory reasoning by *Avory* J., a most distinguished master of criminal law. But clearly the gist of *R.* v. *Wheat* (4) is the principle that, in relation to the crime of bigamy, the doctrine of *mens rea* is satisfied if it is shown that, at the time of the second marriage, the accused intended to marry another person during the lifetime of a specified person, viz., the person to whom in fact and in law he was still married. In *R.* v. *Tolson* (2), there was no such intention, because the belief of the accused was that the second ceremony was not taking place " during the life " of the particular person indicated by the statute. Equally, in *R.* v. *Wheat* (4) there *was* such an intention, because the accused intended to go through the ceremony of marriage while A was still alive to his knowledge. The fact that he believed that A was not then his lawful wife was nothing to the point.

The bigamy statute is intended to protect the status which the law confers upon husband and wife, and it is addressed to all who occupy such status ; in other words, to every person " being married."

While the doctrine of *mens rea* must be applied to the statute, the form of the statute suggests that a mere belief that some fact exists which would make the defendant not married at the time of the second marriage should not be allowed as a defence. *R.* v. *Wheat* (4) illustrates such principle, for it is plain that there the defendant believed in a state of facts which, if true, showed that he was not married at the time of the second ceremony. In the present case the accused intended to marry Miss Deed, and he knew and

(1) (1921) 2 K.B., at p. 125.
(2) (1889) 23 Q.B.D. 168.
(3) (1921) 2 K.B., at p. 126.
(4) (1921) 2 K.B. 119.

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intended that such marriage was to take place during the lifetime of the person indicated by the statute. The person indicated by the statute is the person who, at the time of the second marriage, is the spouse of the accused. The fact that the accused believed that his spouse had never been lawfully married to him, and so was not his wife at the time of the remarriage, is immaterial. It is the law which determines the existence of the status of marriage and the binding force of the ceremony of marriage, although necessarily the law takes account of all material facts.

In some respects the appellant's case is weaker than that of the defendant in *R.* v. *Wheat* (1), who merely set up a belief that his status had duly terminated. The appellant sets up a belief that his status had never begun. But the law attached that status to him upon his marriage, and it was never duly determined.

In my opinion, it is erroneous to permit further extension of *mens rea* to such cases as *R.* v. *Wheat* (1) and the present case. The bigamy enactment is of vast importance, because it is designed to protect an existing status as well as to protect innocent and unsuspecting persons who intend to assume such a status, and, of course, the children of either union. Adopting *Bentham's* famous words, marriage is " that noble contract, the tie of society and the basis of civilization," it is a " permanent community of life." What does the status import ? Viscount *Haldane* said that it means

> " something more than a mere contractual relation between the parties to the contract of marriage. Status may result from such a contractual relationship, but only when the contract has passed into something which private international law recognizes as having been superadded to it by the authority of the State, something which the jurisprudence of that State under its law imposes when within its boundaries the ceremony has taken place. This juridical result is more than any mere outcome of the agreement *inter se* to marry of the parties. It is due to a result which concerns the public generally, and which the State where the ceremony took place superadds ; something which may or may not be capable of being got rid of subsequently by proceedings before a competent public authority, but which meantime carries with it rights and obligations as regards the general community until so got rid of " (*Salvesen or Von Lorang* v. *Administrator of Austrian Property* (2)).

The status of marriage is considered of such significance that many countries (including England) punish the bigamy of their

(3) (1921) 2 K.B. 119. (4) (1927) A.C. 641, at p. 653.

nationals wherever the second marriage takes place. The prevention of bigamy is the purpose of the statute, and, of necessity, the commands contained in the definition of the crime should be regarded as being addressed to all persons who are in the state of matrimony. Whether they occupy this status may involve questions of law as well as of fact. The very least that the court should attribute to the legislature is the intention that, if a person to whom the law of the land affixes the status of husband because intentionally and advisedly he has gone through a ceremony of marriage with A goes through the ceremony a second time, then knowing and intending that such ceremony shall take place during the lifetime of A, he does so at the risk of punishment, if his original status was still subsisting at the time of the second ceremony. Having regard to the object of the statute, this interpretation of *R.* v. *Tolson* (1) gives an adequate application of the principle *actus non facit reum nisi mens sit rea*. To go through so solemn a ceremony a second time with full knowledge that the co-partner of the first ceremony is still alive is an act which, if the status resulting from the first ceremony is still subsisting, is so calculated to injure the persons concerned as well as the public generally, that the power to inflict punishment is absolutely necessary. A person acting with the knowledge and intention defined should do so at the peril of its turning out that his status of marriage still subsists.

I am satisfied that *R.* v. *Tolson* (1) is not inconsistent with *R.* v. *Wheat* (2) or with the opinion here expressed. In *R.* v. *Tolson* (3) *Stephen* J. said : " I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence."

But the application of this general proposition is necessarily affected by the form and object of the particular statute. For instance, there are many offences which the legislature has created in relation to persons who are bankrupts. Assuming that *mens rea* is a principle to be applied to the particular offence, I can hardly conceive cases in which a defendant could escape by saying :

(1) (1889) 23 Q.B.D. 168. (2) (1921) 2 K.B. 119.
(3) (1889) 23 Q.B.D., at p. 188.

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"I honestly and reasonably believed that the court's order making me a bankrupt had not been formally pronounced, or that an order had been made setting aside the bankruptcy or granting me a discharge." As in the case of the status of husband and wife, it may always be asserted that a mistake as to the making or not making of a curial order is a mistake of fact. The point of the illustration I have suggested is that the legislature is addressing its commands to all those who in law occupy the status of bankrupt, whatever their belief on *that* particular point. People can seldom occupy the status of husband or wife, or that of bankrupt, without there being the most cogent reason for supposing that, if they do not know they occupy it, it is due to some negligence or inadvertence. Similarly with aliens. If a law punishes an alien for some action or inaction, is it to be permitted to him to say: "I honestly believed that I had got my certificate of naturalization"? It is difficult, of course, to deal generally with such offences, because of the importance of the form of the legislation and the particular policy it may embody. It has been held under the English statute that, if a person assaults a peace officer wearing plain clothes but then in the execution of his duty, the fact that the defendant did not know that the man assaulted was a peace officer is no defence. *Bramwell* B. expressed the opinion that knowledge is immaterial. This decision has been criticized, but it seems to have been accepted (*Roscoe's Criminal Evidence*, 15th ed. (1928), at p. 410). But a case more analogous to the present would be an enactment penalizing conduct on the part (say) of an officer of customs. If it said that a customs officer who accepted a present from any person arriving in Australia by ship was guilty of an offence, I can understand that the principle of *mens rea* might be invoked so as to permit a defence that the officer honestly and reasonably believed that what was handed to him was not a present, or honestly and reasonably believed that the person who gave him the present was not in the class mentioned in the enactment. But I should think it quite impossible for the principle of *mens rea* to enable a defendant to say: "At the time of this offence I was under suspension, and I honestly and reasonably believed that although I was still acting as an officer, I had been formally dismissed. I therefore believed that I was not an officer to whom the statute was

addressed." For such an enactment would be addressed to a class of persons who are officers in fact and in law just as the bigamy enactment is addressed to those who are married persons in fact and in law.

The case of *R.* v. *Wheat* (1) has frequently been discussed, but, so far as I am aware, none of the very learned persons who have discussed it have ever suggested that it was wrongly decided. It is accepted as good law by *J. W. C. Turner* and *R. M. Jackson* in their articles on *Mens Rea* in the *Cambridge Law Journal*, vol. 6, pp. 31, 83. Mr. *Jackson* takes the view, in my opinion rightly, that since *R.* v. *Wheat* (1) the cases of *R.* v. *Thomson* (2) and *R.* v. *Connatty* (3) "are of doubtful authority" (*Loc. cit.*, p. 90). In my opinion, both cases are quite inconsistent with the principle of *R.* v. *Wheat* (1). The same learned authority correctly sums up the decision in the latter case by pointing out that in it "the contention that *mens rea* applies to bigamy generally was emphatically rejected" (*Loc. cit.*, p. 90).

Perhaps the most important contribution to the subject is that of Dr. W. T. S. *Stallybrass*. In an article in the *Law Quarterly Review*, vol. 52, p. 60, that learned author contended that *R.* v. *Tolson* (4) and *R.* v. *Wheat* (1) "are perfectly reconcilable" (at p. 65). He continued :—"Tolson did not intend to do the act forbidden by the statute, *i.e.*, to marry another during the former husband's life, whereas Wheat did. Wheat's was a mistake of law, and therefore he was guilty of an offence." With the first sentence of Dr. *Stallybrass*, if I may say so, I entirely and respectfully agree. But I am unable to accept the view that in *Wheat's Case* (1) *mens rea* was excluded because there was a mistake of law. That is not the ground of the judgment. It may, in a sense, be accurate to say that the mistake made by the accused in *Wheat's Case* (1) was in part a mistake of law, but the principle of the decision was that the application of *mens rea* to the bigamy enactment is satisfied wherever there exists an intention to marry another during the lifetime of a specified person, that person being the one with whom the defendant has gone through the first ceremony of marriage.

(1) (1921) 2 K.B. 119.
(2) (1905) 70 J.P. 6.
(3) (1919) 83 J.P. 292.
(4) (1889) 23 Q.B.D. 168.

H. C. OF A. 1937. THOMAS v. THE KING. Evatt J.

For the reasons I have already suggested, I agree with the decision of *Humphreys* J. in *R.* v. *Kircaldy* (1) and with the approval of this decision by another learned writer (*Law Quarterly Review*, vol. 51, p. 286). In *Kircaldy's Case* (1), the facts of which are set out by Dr. *Stallybrass* and correspond closely to those of the present case, the prisoner who was married to T., and who during the lifetime of T. married B., put forward the defence that when he went through the form of marriage with B. he honestly and reasonably believed that his first marriage with T. was void, because T. was then married to someone else. Dr. *Stallybrass* makes two comments on the decision. One deals with the degree of proof required to show the existence of the first marriage at the time of the second and is beside the present point. His other comment is that the prisoner's mistake was probably one of fact. Again this should be conceded. His final criticism is: "If his bona fide and reasonable belief had been correct he did not marry another during the life of his former wife, for the former 'wife' had never been his wife." I think, with respect, that the only intention relevant to the defence of absence of *mens rea* is the intention to go through a ceremony, and the intention to do it during the lifetime of the person who is, in law and in fact, married to the defendant at the time of the second marriage. I quite admit that upon this, as upon all questions of applying the *mens-rea* doctrine to statutes, it is impossible to dogmatize. But I am strongly of opinion that *R.* v. *Wheat* (2) finally lays down the intention to which *mens rea* relates, and that it should be followed. If so, the opinion of *Humphreys* J. in *R.* v. *Kircaldy* (1) is correct. It is quite reconcilable with *R.* v. *Tolson* (3), and it is necessitated by the only principle which can explain the main reasoning of the judgment in *R.* v. *Wheat* (2). For the same reasons I agree with the learned author who criticizes the decisions in *R.* v. *Connatty* (4) and *R.* v. *Thomson* (5), both of which were decisions at nisi prius.

For the above reasons I am of opinion that *Martin* J.'s ruling of law was correct, that the appellant's belief that his first wife was not

(1) (1929) 167 L.T. Jo. 46.
(2) (1921) 2 K.B. 119.
(3) (1889) 23 Q.B.D. 168.
(4) (1919) J.P. 292.
(5) (1905) 70 J.P. 6.

divorced at the time of his marriage is quite immaterial, that *R.* v. *Wheat* (1) was correctly decided, that its principle covers this case, and that the verdict of guilty should stand. The case is obviously one where special leave should be granted, but the appeal proper should be dismissed.

Special leave to appeal granted. Appeal allowed. Order of Supreme Court varied by striking out the answer to the second question and substituting the answer: Yes, by striking out the affirmation of the conviction and substituting an order that the conviction be quashed.

Solicitors for the applicant, *Clarke & Ness.*

Solicitor for the respondent, *F. G. Menzies*, Crown Solicitor for Victoria.

H. D. W.

(1) (1921) 2 K.B. 119.