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made bigamy an offence punishable by the courts of common law, we find an enactment substantially the same as that now in force, "If any person being married do marry any person, the former husband or wife being alive, every such offence shall be felony, and the person offending shall suffer death: provided always that neither this Act nor anything therein contained shall extend to any person whose husband or wife shall absent him or herself, the one from the other by the space of seven years together in any part within His Majesty's dominion, the one of them not knowing the other to be living within that time." When this Act was passed the presumption of a man's death after he had not been heard of for seven years had not been established. In *Doe d. Knight* v. *Nepean* (5 B. & Ad. 86, at p. 94), it is expressly stated by Lord Denman, C.J., that that period was adopted as the ground for such presumption in analogy to the statutes 1 Jac. 1, c. 11, relating to bigamy, and 19 Car. 2, c. 6, as to the continuance of lives on which leases were held. In the absence of such presumption it would have been difficult at that time for the accused to prove, even when her husband had been away seven years, that she had reasonable grounds for believing him to be dead; while, on the other hand, if she had succeeded in satisfying judge and jury that she honestly so believed on reasonable grounds, and had married in such belief after he had gone away six years only, if the contention on behalf of the Crown is right, the jury must have convicted her, and the judge must have sentenced her to death, for doing what they were satisfied she honestly and reasonably believed she had a perfect right to do. For these reasons I am of opinion that the conviction cannot be supported. In this judgment my brothers Day and Smith concur.

STEPHEN, J.—The cases were both reserved by me, *Reg.* v. *Tolson* on a trial which took place at Carlisle in the summer circuit of 1888, and *Reg.* v. *Strype* (*a*) on a trial which took place in December last at Winchester in the autumn circuit of 1888. In each case precisely the same point arose. In each the prisoner, a woman, was indicted for bigamy. In each case the prisoner lost sight of her husband, who deserted her, and in each case she was informed that he was dead, and believed the information, as the jury expressly found, in good faith and on reasonable grounds. In each case the second ceremony of marriage was performed within the term of seven years after the husband and wife separated. For the purpose of settling a question which had been debated for a considerable time, and on which I thought the decisions were conflicting, and not as the expression of my own opinion, I directed the jury that a belief in good faith and on reasonable grounds in the death of one party to a marriage was not a defence to the charge of bigamy against the other who married again within the seven years. In each case I passed a nominal sentence on the person convicted, and I stated, for the

(*a*) The question reserved in *Reg.* v. *Strype* was the same as that in the present case, and the decision in the present case was therefore followed in it.

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decision of this court, cases which reserved the question whether my decision was right or wrong. I am of opinion that each conviction should be quashed, as the direction I gave was wrong, and that I ought to have told the jury that the defence raised for each prisoner was valid. My view of the subject is based upon a particular application of the doctrine usually, though I think not happily, described by the phrase *Non est reus, nisi mens sit rea.* Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds: It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a *mens rea*, or "guilty mind," which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. *Mens rea* means in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman, without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory indeed to describe a mere absence of mind as a *mens rea* or guilty mind. The expression again is likely to and often does mislead. To an unlegal mind it suggests that by the law of England no act is a crime which is done from laudable motives, in other words, that immorality is essential to crime. It will, I think, be found that much of the discussion of the law of libel in *Shipley's case* (4 Doug. 73; 21 St. Tr. 847) proceeds upon a more or less distinct belief to this effect. It is a topic frequently insisted upon in reference to political offences, and it was urged in a recent notorious case of abduction, in which it was contended that motives said to be laudable were an excuse for the abduction of a child from its parents. Like most legal Latin maxims, the maxim of *mens rea* appears to me to be too short and antithetical to be of much practical value. It is, indeed, more like the title of a treatise than a practical rule. I have tried to ascertain its origin, but have not succeeded in doing so. It is not one of the *regulæ juris* in the Digest. The earliest case of its use which I have found is in the *Leges Henrici Primi*, vol. 28, in which it is said: "Si quis per coaccionem abjurare cogatur quod per multos annos quiete tenuerit non in jurante set cogente perjuriam erit. Reum non facit nisi mens rea." In Broom's Maxims the earliest authority cited for its use is 3rd Institute, ch. i., fo. 10. In this place it is contained in the marginal note, which says that when it was found that some of Sir John Oldcastle's adherents took part in an insurrection "pro timore mortis et quod recesserunt quam cito potuerunt" the judges held that this was to be adjudged no treason because it was for fear of death. Cooke adds: "Et

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actus non facit reum, nisi mens sit rea." This is only Coke's own remark, and not part of the judgment. Now Coke's scraps of Latin in this and the following chapters are sometimes contradictory. Notwithstanding the passage just quoted, he says in the margin of his remarks on opinions delivered in Parliament by Thyrning and others in the 21st R. 2: "Melius est omnia mala pati quam malo consentire" (22-3) which would show that Sir J. Oldcastle's associates had a *mens rea*, or guilty mind, though they were threatened with death, and thus contradicts the passage first quoted. It is singular that in each of these instances the maxim should be used in connection with the law relating to coercion. The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition. Crimes are in the present day much more accurately defined by statute or otherwise than they formerly were. The mental element of most crimes is marked by one of the words "maliciously," "fraudulently," "negligently," or "knowingly," but it is the general—I might, I think, say the invariable—practice of the Legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity, and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined. The meaning of the words "malice," "negligence," and "fraud" in relation to particular crimes has been ascertained by numerous cases. Malice means one thing in relation to murder, another in relation to the Malicious Mischief Act, and a third in relation to libel, and so of fraud and negligence. With regard to knowledge of fact, the law, perhaps, is not quite so clear, but it may, I think, be maintained that in every case knowledge of facts is to some extent an element of criminality as much as competent age and sanity. To make an extreme illustration, can anyone doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing. A multitude of illustrations of the same sort might be given. I will mention one or two glaring ones. *Levet's case* (1 Hale, 474) decides that a man who, making a thrust with a sword at a place where, upon reasonable grounds, he supposes a burglar to be, killed a person who was not a burglar was held not to be a felon though he might be (it was not decided that he was) guilty of killing *per infortunium*, or possibly, *se defendendo*, which then involved certain forfeitures. In other words, he was

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in the same situation as far as regarded the homicide as if he had killed a burglar. In the decision of the judges in *Macnaghten's case* (10 C. & F. 200) it is stated that if under an insane delusion one man kills another and if the delusion was such that it would, if true, justify or excuse the killing, the homicide would be justified or excused. This could hardly be if the same were not law as to a sane mistake. A *bonâ fide* claim of right excuses larceny, and many of the offences against the Malicious Mischief Act. Apart, indeed, from the present case, 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. I am unable to suggest any real exception to this rule, nor has one ever been suggested to me. A very learned person suggested to me the following case: A constable, reasonably believing a man to have committed murder, is justified in killing him to prevent his escape, but if he had not been a constable he would not have been so justified, but would have been guilty of manslaughter. This is quite true, but the mistake in the second case would be not only a mistake of fact, but a mistake of law on the part of the homicide in supposing that he, a private person, was justified in using as much violence as a public officer, whose duty is to arrest, if possible, a person reasonably suspected of murder. The supposed homicide would be in the same position as if his mistake of fact had been true; that is, he would be guilty, not of murder, but of manslaughter. I think, therefore, that the cases reserved fall under the general rule as to mistakes of fact, and that the convictions ought to be quashed. I will now proceed to deal with the arguments which are supposed to lead to the opposite result. It is said, first, that the words of 24 & 25 Vict. c. 100, s. 57, are absolute, and that the exceptions which that section contains are the only ones which are intended to be admitted, and this it is said is confirmed by the express proviso in the section—an indication which is thought to negative any tacit exception. It is also supposed that the case of *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154) decided on s. 55, confirms this view. I will begin by saying how far I agree with these views. First, I agree that the case turns exclusively upon the construction of sect. 57 of 24 & 25 Vict. c. 100. Much was said to us in argument on the old statute (1 Jac. 1, c. 11). I cannot see what this has to do with the matter. Of course, it would be competent to the Legislature to define a crime in such a way as to make the existence of any state of mind immaterial. The question is solely whether it has actually done so in this case. In the first place I will observe upon the absolute character of the section. It appears to me to resemble most of the enactments contained in the Consolidation Acts of 1861, in passing over the general mental elements of crime which are presupposed in every case. Age, sanity, and more or less freedom from compulsion,

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are always presumed, and I think it would be impossible to quote any statute which in any case specifies these elements of criminality in the definition of any crime. It will be found that either by using the words wilfully and maliciously, or by specifying some special intent as an element of particular crimes, knowledge of fact is implicitly made part of the statutory definition of most modern definitions of crimes, but there are some cases in which this cannot be said. Such are sect. 55, on which *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154) was decided, s. 56, which punishes the stealing of "any child under the age of fourteen years," s. 49, as to procuring the defilement of any "woman or girl under the age of twenty-one," in each of which the same question might arise as in *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154); to these I may add some of the provisions of the Criminal Law Amendment Act of 1885. Reasonable belief that a girl is sixteen or upwards is a defence to the charge of an offence under sects. 5, 6, and 7, but this is not provided for as to an offence against sect. 4, which is meant to protect girls under thirteen. It seems to me that as to the construction of all these sections the case of *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154) is a direct authority. It was the case of a man who abducted a girl under sixteen, believing, on good grounds, that she was above that age. Lord Esher, then Brett, J. was against the conviction. His judgment establishes at much length, and, as it appears to me, unanswerably, the principle above explained, which he states as follows: "That a mistake of facts on reasonable grounds, to the extent that, if the facts were as believed, the acts of the prisoner would make him guilty of no offence at all, is an excuse, and that such an excuse is implied in every criminal charge and every criminal enactment in England." Lord Blackburn, with whom nine other judges agreed, and Lord Bramwell, with whom seven others agreed, do not appear to me to have dissented from this principle, speaking generally; but they held that it did not apply fully to each part of every section to which I have referred. Some of the prohibited acts they thought the Legislature intended to be done at the peril of the person who did them, but not all. The judgment delivered by Lord Blackburn proceeds upon the principle that the intention of the Legislature in sect. 55 was "to punish the abduction unless the girl was of such an age as to make her consent an excuse." Lord Bramwell's judgment proceeds upon this principle: "The Legislature has enacted that if any one does this wrong act, he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of the *mens rea*. If the taker believed he had her father's consent, though wrongly, he would have no *mens rea*; so if he did not know she was in anyone's possession nor in the care or charge of any one. In those cases he would not know he was doing the act forbidden by the statute." All the judges, therefore, in *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154) agreed on the general principle, though they all, except Lord Esher, considered

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that, the object of the Legislature being to prevent a scandalous and wicked invasion of parental rights (whether it was to be regarded as illegal apart from the statute or not) it was to be supposed that they intended that the wrongdoer should act at his peril. As another illustration of the same principle, I may refer to *Reg.* v. *Bishop* (42 L. T. Rep. N. S. 240; 14 Cox C. C. 404; 5 Q. B. Div. 259). The defendant in that case was tried before me for receiving more than two lunatics into a house not duly licensed, upon an indictment on 8 & 9 Vict. c. 100, s. 44. It was proved that the defendant did receive more than two persons, whom the jury found to be lunatics, into her house, believing honestly, and on reasonable grounds, that they were not lunatics. I held that this was immaterial, having regard to the scope of the Act, and the object for which it was apparently passed, and this court upheld that ruling. The application of this to the present case appears to me to be as follows. The general principle is clearly in favour of the prisoners, but how does the intention of the Legislature appear to have been against them? It could not be the object of Parliament to treat the marriage of widows as an act to be, if possible, prevented as presumably immoral. The conduct of the women convicted was not in the smallest degree immoral, it was perfectly natural and legitimate. Assuming the fact to be as they supposed, the infliction of more than a nominal punishment on them would have been a scandal. Why, then, should the Legislature be held to have wished to subject them to punishment at all? If such a punishment is legal, the following amongst many other cases might occur: A number of men in a mine are killed, and their bodies are disfigured and mutilated, by an explosion; one of the survivors secretly absconds, and it is supposed that one of the disfigured bodies is his. His wife sees his supposed remains buried; she marries again. I cannot believe that it can have been the intention of the Legislature to make such a woman a criminal; the contracting of an invalid marriage is quite misfortune enough. It appears to me that every argument which showed, in the opinion of the judges in *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154), that the Legislature meant seducers and abductors to act at their peril, shows that the Legislature did not mean to hamper what is not only intended, but naturally and reasonably supposed by the parties, to be a valid and honourable marriage, with a liability to seven years' penal servitude. It is argued that the proviso, that a re-marriage after seven years' separation shall not be punishable, operates as a tacit exclusion of all other exceptions to the penal part of the section. It appears to me that it only supplies a rule of evidence which is useful in many cases, in the absence of explicit proof of death. But it seems to me to show not that belief in the death of one married person excuses the marriage of the other only after seven years' separation, but that mere separation for that period has the effect which reasonable belief of death, caused by other evidence,

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would have at any time. It would, to my mind, be monstrous to say that seven years' separation should have a greater effect in excusing a bigamous marriage than positive evidence of death, sufficient for the purpose of recovering a policy of assurance or obtaining probate of a will, would have, as in the case I have put, or in others which might be even stronger. It remains only to consider cases upon this point decided by single judges. As far as I know there are reported the following cases:—*Reg.* v. *Turner* (1862) (9 Cox C. C. 145). In this case Martin, B., is reported to have said: "In this case seven years had not elapsed, and beyond the prisoner's own statement there was the mere belief of one witness. Still the jury are to say if upon such testimony she had an honest belief that her first husband was dead." In *Reg.* v. *Horton* (1871) (11 Cox C. C. 670), Cleasby, B. directed the jury that if the prisoner reasonably believed his wife to be dead he was entitled to be acquitted. He was convicted. In *Reg.* v. *Gibbons* (1872) (12 Cox C. C. 237), Brett, J., after consulting Willes, J., said: "*Bonâ fide* belief as to the husband's death was no defence unless the seven years had elapsed," and he refused to reserve a case, a decision which I cannot reconcile with his judgment three years afterwards in *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154). In *Reg.* v. *Moore* (1877) (13 Cox C. C. 554), Denman, L.J., after consulting Amphlett, L.J., held that a *bonâ fide* and reasonable belief in a husband's death excused a woman charged with bigamy. In *Reg.* v. *Bennett* (1877) (14 Cox C. C. 45), Lord Bramwell agreed with the decision in *Reg.* v. *Gibbons* (12 Cox C. C. 237). The result is that the decisions in *Reg.* v. *Gibbons* (12 Cox C. C. 237) and *Reg.* v. *Bennett* (14 Cox C. C. 45) conflict with those of *Reg.* v. *Turner* (9 Cox C. C. 145), *Reg.* v. *Horton* (11 Cox C. C. 670), and *Reg.* v. *Moore* (13 Cox C. C. 554). I think, therefore, that these five decisions throw little light on the subject. The conflict between them was in fact the reason why I reserved the cases. My brother Grantham authorises me to say that he concurs in this judgment.

HAWKINS, J.—The statute 24 & 25 Vict. c. 100, s. 57, enacts that "whosoever, being married, shall marry any other person during the lifetime of the former husband or wife, shall be guilty of felony." Undoubtedly the defendant, being married, did marry another person during the life of her former husband. But she did so believing in good faith and upon reasonable grounds that her first husband was dead; and the sole question now raised is whether such belief afforded her a valid legal defence against the indictment for bigamy upon which she was tried. I am clearly of opinion that it did, and that she ought to have been acquitted. The ground upon which I have arrived at this conclusion is simply this: that, having contracted her second marriage under an honest and reasonable belief in the existence of a state of things which, if true, would have afforded her a complete justification, both legally and morally, there was an