MISTAKE OF LAW AS A CRIMINAL DEFENCE

By Peter Brett*

In December 1964 there were decided two cases, one in England and one in Victoria, which present some striking similarities. The English case was decided on 16 December, the Victorian on 18 December. Each case was a review of a decision by a Court of Petty Sessions dismissing a charge of a criminal offence. The English Divisional Court remitted its case to the justices with a direction to convict, and the Victorian Full Court of the Supreme Court made a similar order in the case with which it had to deal.

It might be contended by a reader of these two cases that at this point the similarity between them ends, for admittedly they deal with entirely different branches of the law. But in my submission the two cases contain one much more important and overriding point of similarity—namely, that in each of them the decision of the superior court to order a conviction perpetrated upon the respective defendants to the original charges a glaring injustice. It would be unfair of me, however, to fail to add at once that it quite plainly did not occur to either of the superior courts that any question of injustice was involved; and I should perhaps strengthen this point by saying that the two courts applied what is, at least apparently, a well-settled principle of law to the resolution of the cases before them. Indeed, it does not appear, from the respective reports, that counsel strongly urged any different doctrine to the court before which he was appearing. He may, indeed, quite properly have thought that in the present state of the authorities such a course would have been a waste of time. In short, then, my theme in this discussion is that one of our basic assumptions in the administration of the criminal law has been cast in misleadingly wide and over-simple terms, and stands in need of careful reconsideration. I refer to the principle enshrined in the well-known maxim, *ignorantia juris neminem excusat*.

I

Let us first consider the relevant facts of the two cases. In *Surrey County Council v. Battersby*[1] the Divisional Court had before it a case stated by the Surrey justices. The respondent, Miss (or Mrs) Battersby, had been charged, under section 14(1) of the Children Act 1958, with having received two children into her home as foster children without having first given to the Council notice of her

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1 [1965] 2 W.L.R. 378.

proposal to maintain and receive them as such: the giving of such a notice was required by section 3(1) of the Act. The justices found that Miss Battersby had been asked by the parents of twins aged one year to undertake their care and maintenance on the basis that she would receive £4 a week for looking after them, and that they would reside with her except for certain week-ends when they would return to their parents. The week-ends of return would be sufficiently frequent to ensure that at no one stage would a complete month elapse during which the children would fail to return to their parents. This arrangement was to continue for an indefinite period which might very probably exceed one month, and in fact it did continue from the end of February to the beginning of July. During this period the original agreement was scrupulously respected, so that in fact Miss Battersby did not at any time care for the children for a continuous period as long as 28 days. On two occasions the mother of the twins spent the week-end with them and Miss Battersby at the latter's home.

These facts gave rise to a nice point of statutory interpretation. Section 2(1) of the Act defines a foster child as one 'whose care and maintenance are undertaken for reward for a period exceeding one month' by someone other than his relative or guardian. There was no question as to the fact of reward—£4 a week. But were the twins cared for and maintained by Miss Battersby for a period exceeding one month? The Surrey justices thought not; in their view, there had been a series of successive periods of care and maintenance, none of them exceeding one month. And this was the arrangement that had been in view from the outset, even though it had been expected that the series of successive periods would extend over more than one month in the aggregate. The Divisional Court, however, thought otherwise. Sachs J., who delivered the leading opinion of the Court, set out the policy of the Act as being that of protecting, by means of local authority control, children living away from their homes. In light of that policy, he said that a court 'must take a realistic view of the overall length of time the child has been living in general with the foster parent, and for that purpose ignore such minor interruptions as on that realistic view do not really break the continuity of the period'. He added:

> What would constitute such a break in the period as to deprive it of continuity is something which I for one would not seek to define, but would only say that, if it was such a break as would result in a genuinely fresh arrangement having to be made to take the child again into the care and maintenance of the foster parent, that might well normally be a symptom of such a break.[2]

[2] [1965] 2 W.L.R. 378, 384.

Lord Parker C.J. gave a brief concurring opinion, and Ashworth J. was content to agree with his brethren.

The carping critic might urge that the remarks of Sachs J. scarcely constitute helpful guidance to parents of young children or those with whom they seek to make arrangements for their care; and that they lack the certainty which is often said to be an essential feature of a criminal prohibition. Nor did the learned judge give any reason for departing from the literal mode of interpretation normally applied to penal statutes and substituting for it an interpretation based on the policy of the Act. But I do not wish to discuss these matters, and am content to accept the Court's view of the Act's application to the proven facts as being the correct one.

What is, I submit, a much more serious problem arising from the decision is the fact that Miss Battersby, before undertaking the care and maintenance of the children, had enquired from an official of the Surrey County Council whether or not, in view of the fact that the children would be returning home at week-ends, they would be foster children within the meaning of the Act, and had been told by him that in his view they could not be so regarded. Hence she did not give to the Council notice of her proposal to maintain the children. Moreover, it was conceded in the Divisional Court that she had acted *bona fide* on the official advice given to her, and further that she was a respectable person and a proper person to have the care of children. In short, the case was brought to test the law. But these facts, although set out by Sachs J., did not affect his decision that the case should be remitted to the justices with a direction to convict. He did, however, say that they constituted very strong mitigation in relation to any sentence which the justices might have to consider, and that they might well feel that the case was one for an absolute discharge.

The Victorian case arose under the audit provisions of the Companies Act 1961. In *Crichton v. Victorian Dairies Ltd*[3] the defendant company was charged under section 379 of the Act with failing to carry out a duty imposed on it by the Act. The duty in question was that imposed by section 165(2), which provides that 'a company shall at each annual general meeting of the company appoint a person or persons to be the auditor or auditors of the company'. The scheme of section 165 is designed to protect the members of a company and others interested in the company. To that end it is provided that (normally) auditors are to be appointed by the company at its annual general meeting and that when appointed they shall hold office until the next such meeting. Auditors can be removed only

3 [1965] V.R. 49.

by following a prescribed procedure, and before being removed they are entitled to make representations which must be sent to every member of the company. In two instances, however, auditors may be appointed by the directors of the company; these are (a) an initial appointment of auditors before the first annual general meeting, and (b) if a casual vacancy arises.

It appeared that the company had held its annual general meeting for 1962 on 23 October of that year, and that one of the items on the agenda was the election of auditors for the ensuing year. The meeting was informed that the board of directors was of opinion that the auditors then acting should not be re-appointed; and that advice had been received from counsel that if the motion for their re-election was put and defeated, a casual vacancy would exist to which the directors could appoint new auditors. The motion for re-election was put and defeated on a show of hands, and no appointment of auditors was made at the meeting. In due course the company was charged with the statutory offence. The magistrate dismissed the charge on the ground that the shareholders believed that they could legally do what they were doing, and that there was thus no *mens rea* and no case for the company to answer.

On an order to review, the Full Court, consisting of Winneke C.J. and Hudson and Gowans JJ., heard argument extending over two days, and ten days later delivered a written judgment. On the point taken by the magistrate, the Court held, citing the judgment of Dixon J. in *Proudman v. Dayman*,[4] that in construing a modern statute any presumption that *mens rea* in the sense of a specific state of mind, whether of motive, intention, knowledge or advertence, is an ingredient of the offence is a weak one; but that in the absence of express provision or clear implication to the contrary, an honest and reasonable belief by the defendant in facts which, if true, would have made his act innocent may be an answer to a charge under the statute. Here, however, said the Court, there was no evidence of any such belief. The members of the company

> were informed, and no doubt believed, that advice had been received to the effect that they were not legally bound to appoint an auditor. But obviously, if this represented a mistaken view of the law, their belief to the contrary is not sufficient to afford a defence. They merely shared a misapprehension as to the law.[5]

One might well quarrel with the way in which the Court phrased this part of its opinion. The passage appears to carry the suggestion that, in statutes which do not require proof by the prosecution of

[4] (1941) 67 C.L.R. 536, 540.

[5] [1965] V.R., 49, 52.

mens rea, the *only* possible defence is one of mistake as to the facts of the situation. If this were what the Court intended to convey, it is, in my submission, a misreading of the remarks of Dixon J. in *Proudman v. Dayman.*[6] In those remarks he referred specifically to the defence of mistake of fact because that was the defence that was raised in the case before him. The proposition that other general defences well known to the criminal law—such as insanity and duress —are not available where the statute is one of so-called 'strict liability' (so that the defence of mistake of fact would be given, as it were, a preferred position among the general defences) is one of doubtful rationality; and it is certainly far from being a necessary or even a probable inference from the remarks of Dixon J. We need not, however, devote further space to this matter, for the Full Court might well have said that, whether or not the Companies Act offence was one of strict liability, mistake of law does not afford a defence to a criminal charge.

The remainder of the case may be summarised very briefly. A long argument was put to the Court that the section did not require a company to appoint its auditors at the annual general meeting, but merely empowered it to do so; so that there was no duty imposed by it on the company with which the company had failed to comply. To construe the section as imposing a duty would, it was urged, lead to absurdities; and instances of such alleged absurdities were put forward. The Court recognized that certain rare situations would lead to difficulties, but thought that these should not have a decisive influence on the interpretation of the section; and that the word 'shall' used in the section meant 'shall' and not 'may'.

It is proper to add that it was not contended before the Court that on the facts of the case there was a casual vacancy within the meaning of the section; and the Court said that in its opinion it could not have been validly so contended. Thus counsel at the hearing did not seek to support the advice given by counsel to the company before the meeting (the report does not show whether the two counsel were one and the same person). Nevertheless, there was no suggestion —and there doubtless could not have been any suggestion—that the advice of counsel had been either sought or given otherwise than *bona fide.*

We thus have, in these two cases, examples of persons being held to have committed criminal offences despite the fact that one of them acted on the advice of counsel and the other on the advice of a responsible officer of the authority charged with the task of implementing the law. In both cases, it is said, this result is required by the

6 *Supra* n. 4.

principle that *ignorantia juris neminem excusat.* In both cases, I submit, the result is unjust and such as is calculated to bring our legal system into disrepute. It thus behoves us to enquire whether either principle or authority require such a result.

II

Blackstone, in discussing what persons are capable of committing crimes, begins by pointing out that to constitute a crime there must be an unlawful act consequent upon a vicious will. He proceeds at once to analyse the cases in which it cannot be said that there is a concurrence of will and act, and in this connexion he writes as follows:

> Fifthly; *ignorance* or *mistake* is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law . . . For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat,* is as well the maxim of our own law, as it was of the Roman.[7]

This pronouncement is in almost exactly the same terms as that made by Hale a century earlier.[8] Both authors cite as authority the same English case,[9] and Blackstone adds a reference to the Digest of Justinian.[10] These references, however, scarcely bear out the proposition which is allegedly based on them. The English case was an action for the replevin of cattle which had been taken by way of distress damage feasant. Its details are not material to the present discussion; but one of the points which fell to be decided was whether, under the Statute of Wills, lands purchased by a testator after he had made his will passed by a devise of 'all his lands' (this question arose out of the defendant's claim, as lessee of the devisee, to the land on which the cattle were supposed to have trespassed). In support of the proposition that the after-acquired lands did so pass, Serjeant Manwood argued that every man is presumed to know the law; and that the testator must therefore be presumed to have known the rule of law that a will speaks as from the date of the testator's death, and thus to have intended that his words of devise should be construed accordingly. This is a somewhat tortuous argument; and in the event the Court ruled against the Serjeant on this point and, indeed, on the

[7] 4 *Comm.* 27. [8] 1 *P.C.* 42 (Emlyn ed., 1736).
[9] *Brett v. Rigden* (1568) 1 Plow, 340, 342-3; 75 E.R. 516, 520. [10] Dig. 22.6.9.

whole case. The reference to the Digest is no more helpful. Keedy[11] has pointed out that the passage in it deals solely with the civil, as opposed to the criminal, law; and that even so it recognises certain exceptions, the most notable being that a person who has had no opportunity to obtain legal advice may plead this fact by way of excuse.

Maxims, Lord Esher M.R. once observed, 'are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them'.[12] As, however, our writers of authority leave us with no more than a maxim, we must, before embarking on a consideration of the cases, attempt to discriminate between the different situations which may be classified under the rubric 'ignorance of law'.

When it is held by a court that a specific act performed by a defendant constituted a crime, and the defendant replies that he did not know, at the time he performed the act, that his conduct was illegal, he may mean one of several different things. He may mean that he never addressed his mind to the question; and this may have been either because he did not care about the matter, or because he had no reason to suspect that there was a question to which he ought to address his mind. The latter situation might arise if he was carrying out some activity which, by the common understanding of the members of his trade or profession to which he belonged, was believed to be lawful;[13] or if he had recently come into the jurisdiction from another country where the activity in question was not criminal;[14] or yet again because at the time when he committed the act the law prohibiting it had not been promulgated.[15] On the other hand, the defendant may mean that he had addressed his mind to the question of the legality of his conduct and had come to a wrong conclusion about the matter; and this also might arise from several distinct situations. It might be that he had consulted the statutes and decisions without invoking outside aid and had mistaken their effect;[16] or he might have taken the advice of counsel (the phrase is, of course, to

[11] 'Ignorance and Mistake in the Criminal Law' (1908) 22 *Harvard Law Review* 75. [12] *Yarmouth v. France* (1887) 19 Q.B.D. 647, 653.

[13] See, for example, *Mitchell v. U.S.* (1925) 3 F.2d. 514. The defendant was charged with contravening a federal Act by prescribing narcotic drugs for an addict. The Court pointed out that in the major cities of Tennessee, in one of which he had practised, the leading doctors all believed that a doctor might, for therapeutic reasons, lawfully prescribe drugs for addicts; and that their belief, although wrong in law, was supported by the provisions of a State statute. It was not decided whether such facts could constitute a defence, as (a) there was evidence to suggest that the defendant had not acted in good faith, and (b) his acts had occurred after the legal position had been clarified by judicial decision.

[14] *Rex v. Esop* (1836) 7 C. & P. 456; 173 E.R. 203.

[15] *Rex v. Ross* [1945] 3 D.L.R. 574.

[16] *Reg. v. Price* (1840) 11 A. & E. 727; 113 E.R. 590.

be taken as including the advice of a solicitor);[17] or he might have taken the advice of an official whose task it is to administer the law in question.[18] Again, he might have acted in pursuance of a statutory provision which is later held to be unconstitutional,[19] or in pursuance of a provision of subordinate legislation which is later held to be *ultra vires*. In these two last instances it could reasonably be said that he had acted on the advice of the legislators concerned. Finally, he might have relied on a prior decision of a court which is later reversed by the court itself or overruled by a superior court.[20]

I have here listed the various situations which at one time or another have come before courts in the common law world. It is possible that other situations might arise, which I have regrettably failed to foresee. But even without considering such possibilities, it is surely evident that on any rational basis the different situations which have actually arisen call for different treatment. The man who does *not* bother about the legality of his conduct is poles apart from the man who makes an honest effort to behave in conformity with the law but is mistaken or misled. Honesty and good faith are of course essential; we can confidently disregard the pleas of those whose alleged efforts to discover the legality of their conduct are merely colourable. And it should be added that of course the mistaken belief must be a belief that the conduct in question is, from the standpoint of the law, innocent;[21] it would plainly not avail a man charged with one crime to say that he had studied the law and had thought he was committing a different crime.

One further possible discrimination needs to be noticed. The mistake of law may be either direct or collateral. The distinction is not always easy to make, but the two prototype situations are easily illustrated. A man who votes at an election although he is unqualified may do so either because he does not know that the law prohibits unqualified voters from voting, or because he has misunderstood the legal requirements for qualification. In the former case his mistake would be direct, in the latter collateral.

It has been assumed, in the foregoing discussion, that there can be little or no doubt as to whether a particular mistake is one of law and not one of fact. In many situations the mistake can be classified in one or other category without fear of contradiction, but there are

17 *Crichton v. Victorian Dairies Ltd* [1965] V.R. 49.

18 *Surrey C.C. v. Battersby* [1965] 2 W.L.R. 378.

19 *State v. Godwin* (1898) 31 S.E. 221.

20 *State v. Fulton* (1908) 63 S.E. 145, where the decision in *State v. Edens* (1886 59 Am. Rep. 294 was reversed.

21 Innocent, that is, in the same sense as is required in connexion with the defence of mistake of fact. There are differences of opinion as to precisely what kind of innocence is required; see the judgments of Bramwell B. and Brett J. in *Reg. v. Prince* (1875) L.R. 2 C.C.R. 154.

other situations in which the classification would be a matter calling for nice discrimination or perhaps for an arbitrary assignment to the one category or the other.[22] This difficulty is in itself a good reason for questioning the wisdom of a rule which makes a sharp distinction between mistakes of law and of fact, but I do not propose to pursue the matter further here. The present discussion is concerned solely with mistakes which fall to be treated as mistakes of law.

With these distinctions and discriminations in mind, let us turn to the cases. There is, it must at once be said, a dearth of authority on the subject within the common law jurisdictions of the British Commonwealth, indicating an acceptance by both the judiciary and the bar of Blackstone's principle as being applicable to every type of situation. There are, however, holdings to the effect that ignorance of the law does not excuse where the defendant never suspected that what he was doing was illegal;[23] and where his belief that his conduct was not illegal sprang from the fact that he had recently arrived within the jurisdiction from another country in which his conduct would have been lawful.[24]

It seems that a statute is effective (in the absence of some constitutional or statutory provision to the contrary) as soon as it receives the Royal assent.[25] But there is one case in which, despite this rule that promulgation is not a prerequisite to the operation of a statute, it was held that the fact that the defendant could not possibly have known of its existence would excuse him.[26] And there are two decisions to the effect that ignorance of the provisions of subordinate legislation which has not been promulgated is an excuse.[27] These three decisions could easily rest upon the principle *lex non cogit ad impossibilia*, and none of them seems to have occasioned the court any anxiety in reaching its holding.

Turning to the situations where the defendant has addressed his

[22] *Rex v. Thomas* (1937) 59 C.L.R. 279.

[23] *Carter v. McLaren* (1871) L.R. 2 Sc. & D. 120.

[24] *Rex v. Esop supra* n. 14; *Re Barronet and Allain* (1852) 1 E. & B. 1; 118 E.R. 337.

[25] *Craies on Statute Law* (6th ed., 1963), 34.

[26] *Rex v. Bailey* (1800) R. & R. 1; 168 E.R. 651. The case is often cited for the converse of the proposition stated in the text; but as the Twelve Judges decided to recommend a pardon (ultimately granted), which at that time was the only way of correcting the erroneous ruling of a trial judge, it seems probable that they thought Bailey's conviction wrong in law.

[27] *Rex v. Ross supra* n. 15; *Lim Chin Aik v. Reg.* [1963] A.C. 160. The latter case appears to have two *rationes decidendi*, the one in question appearing at p. 171 of the report. There is, of course, ample scope for overlooking a promulgation requirement in the rush of enacting subordinate legislation, and the matter may be overlooked until the last moment. For example, in *Panama Refining Co. v. Ryan* 79 L.Ed. 446 (1935), the failure to promulgate an Executive Order which was of great importance in the suit was not noticed by anyone (including the lower courts) until the argument in the Supreme Court of the United States. Again, in *O'Keefe v. City of Caulfield* [1945] V.L.R. 227, the defect in promulgation passed unnoticed, or at any rate unchallenged, for more than 40 years.

mind to the possible legality of his conduct, there are clear holdings that if, having considered the matter, he has wrongly concluded that his conduct does not fall within the prohibition of the law, he is none the less liable.[28] I have failed to find any holding, other than the recent Victorian case, dealing with the situation where the defendant has been wrongly advised by counsel. Nor have I found any clear holding, other than the recent English case, that reliance on the advice of a public official responsible for administering the law in question will not excuse.[29]

There are, however, the very strong *dicta* of Lords Simonds and Normand, in *Howell v. Falmouth Boat Construction Co.*,[30] to the effect that the advice of an official does not excuse one who has relied on it nor change the character of his act from being illegal to legal. The case arose out of a breach of a contract which was alleged by the appellant to contravene the requirements of an Order made pursuant to a statutory regulation, and the House of Lords held that on the proper construction of the Order no contravention had occurred. The remarks of the two noble and learned Lords were thus unnecessary to the decision, and they were not cited to or by the Divisional Court in the recent case. But they are well-known, and it would be unrealistic to doubt that the judges of the Divisional Court had them in mind when they gave their decision.

As regards the situation where the accused has acted in a manner declared by judicial decision to be no crime, which decision is later reversed or overruled, I have again found almost no authority. The matter was, however, alluded to by Lord Kenyon C.J. in *Rex v. Younger*,[31] where he said

> It would be cruel not only to the defendant, but also to those in a similar situation with him, if we were now to punish him for doing that which this Court publicly declared so many years ago might be done with impunity, and which so many persons have been doing weekly for such a number of years.

This consideration, among others, led his Lordship and the other members of the Court to decline to reverse the earlier construction of

28 *Reg. v. Price supra* n. 16; *Ross v. Sickerdick* (1916) 22 C.L.R. 197; *Marshall v. Foster* (1898) 24 V.L.R. 155. *Rex v. Kennedy* [1923] S.A.S.R. 183 is perhaps an instance of refusal to recognise reliance on official advice as a defence; but it is not clear that the giver of the advice intended to state a proposition of law, although the defendant may well have thought that he did.

29 *Reg. v. Dodsworth* discussed *infra* could be regarded as dealing with either, or both, of thesse situations. The decision, however, was based on a general *mens rea* principle.

30 [1951] A.C. 837, at pp. 845 and 849 respectively. Lord Simonds is prepared, it would seem, to recognise reliance on mistaken advice as a possible defence if knowledge is an element of the offence, but not otherwise; Lord Normand will not go even this far. Lords Oaksey, Radcliffe, and Tucker agreed with both speeches.

31 (1793) 5 T.R. 449, 450; 101 E.R. 253, 254.

the statute. It can thus be inferred that the Court would have felt bound to convict the defendant if it had decided that the construction of the statute must be changed.

The problem of the statute later declared unconstitutional could not arise in England; the Australian cases seem to assume the view that the statute must be regarded as if it had never existed.[32] And if a situation were to arise in which a statute had first been held by judicial decision to be valid and by a subsequent decision held invalid (or vice versa), the appropriate rule to apply would presumably be that which governs a change of judicial decision as regards the interpretation of a statute.

From the above it will be seen that the decisional law of the British Commonwealth for the most part applies the maxim that ignorance of the law does not excuse to all the different situations which may arise, without discrimination. This appears to be so, whether the mistake be direct or collateral.[33] It remains only to notice some exceptions, either apparent or real, to this general trend.

There are certain crimes to which it is now well recognised that a 'claim of right' on the part of the defendant will afford a complete answer. Larceny and cognate offences such as robbery are perhaps the best-known of these, and malicious damage to property also seems to fall within the same principle.[34] Plainly, if 'claim of right' is a defence to a particular charge, the defendant ought not to be debarred from asserting his claim on the ground that he based it on a mistaken view of the law; and this is the view taken by the courts.[35] Where, however, it is said in such a case that the rule as to ignorance of law does not apply, the exception is, I submit, only apparent. For the alleged mistake of law is not being put forward as a matter of substantive right (a claim of right can rest on a pure mistake of fact, as where I mistake some other person's umbrella for my own), but as a matter of evidence to support the alleged claim.[36]

To the same category of apparent exceptions one must assign the decision in *Rex v. Jackson*[37] refusing a criminal information against justices for misbehaviour in their office. It is true that Ashhurst J. said that 'when magistrates act uprightly and honestly, even though they mistake the law, no information ought to be granted against

[32] See, for example, the constant references to a 'void statute' by Dixon J. in *James v. Commonwealth* (1939) 62 C.L.R. 339.

[33] *Carter v. McLaren supra* n. 23 (direct); *R. v. Kennedy supra* n. 29 (collateral).

[34] The scope of the 'claim of right' doctrine is fully discussed in Williams, Criminal Law (2nd ed., 1961), secs. 108-117.

[35] See, for example, *Rex v. Bernhard* [1938] 2 K.B. 264. Occasional decisions to the contrary effect, such as *The Queen v. Dillon* (1878) 1 S.C.R. (N.S.) 159, cannot be regarded as authoritative.

[36] The point is clearly demonstrated in *Commonwealth v. Brisbois* (1932) 183 N.E. 168.

[37] (1787) 1 T.R. 653; 99 E.R. 1302.

them'. But, as he also pointed out, the essence of the offence is that they have acted corruptly. In the case before the Court, the only evidence of corruption was by way of inference from the alleged gross illegality of the magistrates' action; and plainly no such inference should be drawn if they had acted under a mistake as to the extent of their powers.

There are, however, three cases in which the Court has clearly treated a mistake of law as giving a substantive defence. The first of these, *Rex v. Crespigny*,[38]; was a prosecution for perjury before the King's Bench, heard by Lord Kenyon C.J. sitting at *nisi prius*. It appeared that the defendant had sworn an affidavit in a suit some years earlier in the Common Pleas, and that the facts therein stated by him were untrue. His misstatement of those facts, however, sprang from his having misconceived the effect of a deed of assignment which he had executed. The Lord Chief Justice said that 'where the injury arose from a misconception or mistake in the construction of a clause in a deed . . ., an indictment for perjury could not be supported'; and he directed an acquittal.

Regina v. Allday[39] was a prosecution for a statutory forgery. The defendant was authorised to issue licences for the letting of post-horses. These licences cost 7s.6d. each, and were renewable yearly. One Hinckley took out a licence in 1833, and again in 1834. In 1835 he applied to Allday for a further renewal, and Allday told him to bring in his former licence. He accordingly took in his licence for the year 1833-1834, and Allday altered it to read 1835-1836, instead of issuing a new one. He was indicted under a statute making it a felony to write upon any stamped document anything which rendered it liable to a new stamp unless that new stamp had already been put on. Lord Abinger C.B. in summing up said:

> The Act of Parliament does not say that an intent to deceive or defraud is essential to constitute this offence; but it is a serious question whether a person doing this thing innocently, and intending to pay the stamp duty, is liable to be transported. I am of opinion, and I hope I shall not be found to be wrong, that to constitute this offence there must be a guilty mind. It is a maxim older than the law of England, that a man is not guilty unless his mind be guilty. If a person through mistake thought he could alter this licence, and send the 7s.6d. to Somerset House, that would be no felony in law any more than it would be in reason, justice, or common sense.

He then added that there was no evidence of any intent on the defendant's part to defraud the government of the stamp duty, and that the jury could find him not guilty, or return a special verdict

[38] (1795) 1 Esp. 280; 170 E.R. 357. [39] (1837) 8 C. & P. 136; 173 E.R. 431.

so that the matter could be further investigated. They returned a verdict of not guilty.

Regina v. Dodsworth[40] was again a prosecution in the Queen's Bench, heard by the Lord Chief Justice (Denman) sitting at *nisi prius*. The accused was charged with giving a false answer when voting at a Parliamentary election. He had been registered as a qualified voter for the county of Middlesex by reason of his residing in premises of a certain value at Turnham Green. At the time of the election he had moved to other premises at Turnham Green, of equal or greater value. Before voting he was asked by the returning officer whether he had the same qualification for which his name was originally inserted in the register of voters, and he replied that he had. There was some doubt whether this answer was false according to the true interpretation of the Reform Act, but Lord Denman ruled that it was. The defendant, however, said that he had been informed by the committee of two of the candidates that in the circumstances he was entitled to vote and that he had believed this. Lord Denman pointed out that this would make little difference since an electioneering committee 'has a pretty strong bias one way or the other'. But his final words to the jury were

> I do not think you ought to convict a person of a misdemeanour who possessed property equal in value to that which he held at the time of the registration, if he has acted *bona fide*, and has been guided in his conduct in a matter of law by persons who are conversant with law, and who have told him that he possessed the same qualification to vote for which his name was originally inserted in the register of voters.[41]

The jury acquitted the defendant.

These three cases clearly accept the view that a mistake of law can, in certain circumstances, relieve a defendant from criminal responsibility. The first two can be explained on the ground that *mens rea* is clearly of the essence of the offence charged, and that its existence can be negatived by proving a mistake as to the law (though Blackstone's statement asserts the contrary). The third case deals with an offence which might well be said not to require proof of *mens rea*, in the sense in which that expression was used by Dixon J. in *Proudman v. Dayman*;[42] yet the mistake of law was again accepted as an excuse.

Let us now turn to the United States case law on these matters. In contrast to that of the British Commonwealth, it is abundant—so much so that it would be quite impossible to canvass all the decisions

40 (1837) 8 C. & P. 218; 173 E.R. 467.
41 8 C. & P. 218, 222; 173 E.R. 467, 469.
42 (1941) 67 C.L.R. 536, 540.

here. The results of the many decisions can, however, be summarized quite briefly.

For the greater part of their judicial history, the various United States jurisdictions have adopted the same attitudes as those of the British Commonwealth. Taking their cue from Hale and Blackstone, they have said that ignorance of the law affords no excuse, whether it is direct or collateral, and whether it proceeds from a lack of endeavour to find out what the law is, or the mistaken advice of those who might be expected to know.[43] Some of the decisions, indeed, have gone to extreme lengths. Thus it has been held that at a trial of a woman for the wilful murder of a deputy sheriff who was endeavouring to enforce a dispossession order, evidence could not be introduced to show that the defendant had been advised by an attorney that the dispossession order was no longer in force and had acted in that belief;[44] yet if she had, as she believed, been resisting an illegal attempt to dispossess her from her land, her crime could at most have been manslaughter. Again, a man was convicted of bigamy in respect of a marriage ceremony which he had gone through after he had broken up his existing former marriage; and the Court brushed aside his plea that he had been advised by three different lawyers whom he had consulted that the former marriage was incestuous and void, and had even been threatened by the county attorney with prosecution for incest if he did not abandon it.[45] It was also held, at a time when, as we have seen, an English court was arriving at a different result,[46] that disobedience of a statute which could not possibly have been known to the defendant was nevertheless criminal;[47] the Court pointed out that as promulgation of a statute is not needed to make it legally effective, the defendant's inability to know of the statute could not excuse him.

During the course of this century, however, a gradual change has been observable in the course of decision. Several jurisdictions have had to grapple with the problem which results from a change in the judicial interpretation of a statute; and the general consensus of opinion is that a defendant, who acted in accordance with the earlier interpretation which had held conduct of the kind in question to be lawful, cannot be penalised because of a change, subsequent to his own act, in the judicial interpretation.[48] The underlying theory of

[43] See 1 *Wharton's Criminal Law and Procedure* (Anderson ed., 1957), secs. 120, 162, 163; 22 *Corpus Juris Secundum*, "Criminal Law", sec. 48.

[44] *Smith v. State* (1904) 81 S.W. 936.

[45] *Staley v. State* (1911) 131 N.W. 1028.

[46] *Rex v. Bailey* (1800) R. & R. 1; 168 E.R. 651; *supra* n. 26.

[47] *The Brig Ann* (1812) 1 Fed. Cas. 926, No. 397. The owners of the forfeited ship were thus sacrificed to sustain the fiction that the knowledge of legislators is the knowledge of those whom they represent.

[48] See annotation, 'Reliance on judicial decision as defense to prosecution', 49 A.L.R. 1273.

the decisions to this effect will be discussed in the following section. It seems, however, that the erosion of the broad general rule, to which these decisions have given rise, has tended to carry over into other fields; so that there is now an increasing tendency to hold that in crimes which require proof of some specific intent on the part of the defendant, such as wilfulness or malice, a belief in the lawfulness of one's conduct may afford an excuse.[49] (The apparent exceptions to the general rule which are found in the British Commonwealth cases are also recognised in the United States.[50]) It is also usually held that where a defendant has acted in a way which would be legal according to a statute subsequently held void for unconstitutionality, his conduct cannot be penalised; but it is otherwise if he has failed to comply with a statute in the mistaken belief that it is unconstitutional,[51] and there are occasional decisions which disregard reliance on a subsequently voided statute on the theory that as law it has never had any existence.[52] Finally, there have in recent times been decisions recognising that reliance on the advice of counsel may excuse (even though the crime did not require proof of a specific intent);[53] and so also in the case of reliance upon the advice of an official responsible for administering the branch of the law in question.[54]

The result of these authorities can, I submit, be fairly stated as being that for a long period the United States courts adopted the same attitude as those of the British Commonwealth. But there is a general and perceptible trend towards a relaxation of the strictness of the rule, which has apparently resulted from a willingness on the part of a number of courts to investigate its theoretical basis; this investigation has in its turn led to an understanding that the applicability of the rule depends upon a careful discrimination among the various situations which may arise. It is appropriate, accordingly, to turn to a consideration of the underlying theory.

III

A striking feature of the decisions in courts of the British Commonwealth is that they are content to state and enforce the rule

[49] See the authorities referred to *supra* n. 43. In the federal court system this approach is now accepted without demur: typical examples are *Williamson v. U.S.* (1907) 52 L.Ed. 278; *Shushan v. U.S.* (1941) 117 F.2d. 110; certiorari denied (1941) 85 L.Ed. 1531; *U.S. v. Inciso* (1961) 292 F.2d. 374; certiorari denied (1961) 7 L.Ed.2d. 135; *James v. U.S.* (1961) 6 L.Ed.2d. 246.

[50] See annotation, 'Reliance upon advice of counsel as affecting criminal responsibility', 133 A.L.R. 1056.

[51] See annotation, 'Mistaken belief as to constitutionality or unconstitutionality of statute as affecting criminal responsibility', 61 A.L.R. 1153.

[52] Such as *Carolina-Virginia Racing Association v. Cahoon* (1954) 214 F.2d. 830.

[53] *Long v. State* discussed *infra*.

[54] *People v. Ferguson* discussed *infra*.

refusing recognition to mistake of law as an excuse, without staying to ask why such a rule should exist. Blackstone and Hale, as we have seen, were content to rely for its existence upon one early English decision and upon Roman Law, although in neither instance was the authority as clear or as all-embracing as they appeared to suggest. Later decisions which have enforced the rule have done no more than state it or, at most, to say in addition that every man is presumed to know the law. This, however, is in many contexts no more than another form of stating the rule itself; and if it is intended to be more than this it is obviously at variance with the facts. The Roman lawyers admittedly based their rule upon the view that the law was certain and capable of being known by every man (in which respect they contrasted it with the facts of a particular transaction)[55] but it may be doubted whether they really believed this; and no one would attempt to defend such a position today. A century ago, Maule J. pointed out that the existence of courts of appeal showed that the law is uncertain and that the judges themselves cannot be expected to know it in all its detail.[56] Possibly he was speaking ironically; yet not many years ago, the House of Lords gave official recognition to the possibility of judicial ignorance of the law when it framed a rule of precedent with an exception for the decision given *per incuriam*.[57]

As there is nothing to be said for a judicial requirement that laymen must attain standards which the judges recognize their own inability to attain,[58] we no longer hear talk of a presumption that everyone knows the law. But we find no other basis advanced for the rule; even Stephen, the great historian of the criminal law, was content to state it without endeavouring to justify its existence.[59]

Once again we find, by way of contrast, that American courts and writers have been at great pains to justify their recognition and enforcement of the rule. For the most part they have stated that it is a requirement of public policy. Thus in *People v. O'Brien*[60] the Court said

> The rule rests on public necessity. The welfare of society and the safety of the state depend upon its enforcement. If a person accused of crime could shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result. No system of criminal justice could be sustained [with] such an element in it to obstruct the course of its administration. The

55 See Keedy, *op. cit. supra* n. 11.
56 *Martindale v. Falkner* (1846) 2 C.B. 706, 719-20; 135 E.R. 1124, 1129-30.
57 *Young v. Bristol Aeroplane Co.* [1946] A.C. 163, 169.
58 *Pace* Lord Coleridge C.J., who did just this in *Reg. v. Dudley and Stephens* (1884) 14 Q.B.D. 273, 288.
59 2 *History of the Criminal Law of England* (1883), 114-5.
60 (1892) 31 Pac. 45, 47.

> plea would be universally made, and would lead to interminable questions incapable of solution. Was the defendant in fact ignorant of the law? Was his ignorance of the law excusable? The denser the ignorance the greater would be the exception from liability.

This argument that the rule really sprang from the difficulty of ascertaining whether the defendant's plea was or was not genuine would justify its invocation only in cases where the evidence of the defendant's error was his own testimony. Even so, Holmes rightly retorted that if justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try.[61] However, he gave a different version of the public policy justification of the rule, saying that it 'sacrifices' (the word is apt) the individual to the general good. He added

> It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the lawmaker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.[62]

This argument reflects Holmes's philosophy of 'social Darwinism'—the view that in human societies the fittest only ought to survive and that the strong majority are entitled to sacrifice the weak in order to achieve their own welfare. It is not a philosophy which commends itself to modern thought, and it may be doubted whether courts today would wish to invoke it. Even so, Holmes's own expansion of his theme would seem to call for the recognition of mistake of law as an excuse where the defendant has done all that in the circumstances he can do to ascertain the law.

Indeed, the very examples which Holmes selects to illustrate his point reveal the weakness of his position. Of course we need to put an end to robbery and murder. And no one would contend that we should normally[63] allow a man to excuse himself (if he ever attempted to do so) by pleading that he did not know that there was a law penalising either of these crimes. But this is not, as Holmes seems to imply, because the force which restrains a man from committing robbery or murder is his knowledge that there is a law prohibiting such acts; so that its deterrent effect must be achieved by forcing men to learn of its existence. This Benthamite view of the law and the penal process bears no relation to the reality of existence in a civilised community. What restrains a man from committing such an offence is the fact that he is brought up to regard such conduct as wrong—in

61 *The Common Law* (1881), 48.
62 *Ibid.* 63 The case of the foreigner, discussed *infra*, is a very special one.

short, the force of the ethical views held by the community to which he belongs. The ordinary citizen knows that he ought not to steal another man's property—that it is wrong for him to do so. And thus if he were to say 'I did not know there was a law against robbery', this would add nothing of any relevance—no more than if he were to say 'I knew there was a prohibition on robbery but I did not know the extent of the prescribed penalty'. The important factor is that he cannot and does not say 'I did not know it was wrong to rob'.

Doubtless it is an instinctive perception of these matters that has led some of the American courts, which have recognized in certain situations a defence of mistake of law, to suggest that it should be limited to those crimes which are classifiable as *mala prohibita* and not admitted for those classifiable as *mala in se*. It cannot be said on the authorities that there is any clear formulation of such a rule, but the underlying notion appears from time to time in some of the judgments.[64] This theory reflects the view, outlined above, that one does not resort to a lawyer to find out whether certain types of conduct are wrong. Interestingly enough, it is the converse of the theory which permits ignorance of law as a defence where the crime is one of wilfulness, malice, or other specific intent.[65]

To argue, however, that ignorance of the existence of a criminal prohibition against the commission of a *malum in se* is always irrelevant is to paint with too broad a brush. Most, if not all, civilised communities take the view that murder is wrong, yet different communities have different ideas as to what constitutes murder and what killings may be justifiable.[66] Again, in matters of sexual morality one community may regard certain conduct as wrong, and another may see no objection to it.[67] Because of these differences we need to beware of invoking the notion that ignorance of the existence of a law is irrelevant when, for example, a foreigner to the community is charged with committing a crime which the community would clearly class as a *malum in se*. The pervasive force of community ethics on these matters is such as to lead the ordinary man to suppose that the ideas of right and wrong which he has learned by living in his own community are commonly held in other communities; and he thus has

[64] A typical example is *State ex rel. Williams v. Whitman* (1934) 156 So. 705 where it was held that a dentist, who had contravened the provisions of a statute which had, before his act, been wrongly held unconstitutional by an inferior court, could not be penalised by a disciplinary Board. The Court mentions in its opinion that the dentist's offence was not *malum in se*, but does not say whether this is an essential feature of its holding.

[65] *Supra*. This perhaps merely supports the observable fact that one cannot achieve complete consistency in any theory of human affairs without becoming, or appearing to become, insane.

[66] The Texas Penal Code, for example, makes it justifiable homicide to kill a man caught in the act of committing adultery with one's wife.

[67] *Cf. Rex v. Esop*, *supra* n. 14.

little or no incentive to enquire, when he visits a new country, whether his ideas of right and wrong are held by the citizens there. To penalise him when his traditional beliefs turn out to be erroneous can thus be a real injustice to him; and it is difficult to see how the act of penalising him can have any educative force for the citizens of the community where he has offended. Indeed, the only reason which has been traditionally advanced for refusing to allow the visiting foreigner to plead ignorance of law is that justice requires that every offender must be treated alike.[68] Yet this in itself is a position which can only be justified on the assumption that their respective cases are alike in every respect—an assumption which the facts of the case themselves falsify.

When one begins to probe the reasons for the rule as to mistake of law, it becomes clear that the rule cannot be applied to every situation without discrimination, if any semblance of doing justice to individuals is to be maintained. Doubtless considerations of the kind just discussed have led many American courts to recognise ignorance or mistake of law as a possible method of excuse where some specific intent or other state of mind is an essential ingredient of the crime. Just as courts throughout the common law world have recognised that a claim of right as a defence to a charge of stealing is not vitiated merely because it springs from ignorance of law, so American courts have recognized that wilfulness or malice may be negatived in much the same way.[69] Indeed, even the most rigid conceptualist would find it hard to justify the exclusion of one type of evidence tending to disprove a specific criminal intent, while allowing every other type of such evidence, merely because an old Latin maxim appears at first blush to support the exclusion.

Once the initial step had been taken of opening a breach in the wall of rigid doctrine, there remained, for American courts, only the problem of deciding how far they should go in permitting that breach to be widened. The cases which have perhaps caused the most difficulty, and perhaps the most fascinating theoretical problems, are those which arise when a court feels bound to change its interpretation of a statute. Suppose, for example, that a statute makes it a criminal offence to offer a flick-knife for sale, and that Jones is charged with this offence in 1963. It is proved that he is proprietor of a shop and exhibited in the shop window a flick-knife bearing a price tag. The court, however, importing a rule from the law of contract, holds that to exhibit an article in a shop window does not constitute an offer of that article for sale, and Jones is acquitted.[70] In 1964, Smith, having learned of this decision, exhibits a price-

68 *Re Barronet and Allain*, *supra* n. 24.

69 *Supra.*

70 *Cf. Fisher v. Bell* [1961] 1 Q.B. 394.

tagged flick-knife in his shop window and the authorities, being dissatisfied with the earlier decision, prosecute him and seek a reversal of the earlier holding. It will be recalled that the injustice of penalising Smith in such circumstances led Lord Kenyon C.J. to refuse to reverse an earlier decision.[71] Such an attitude, however, may well create an injustice to the public; for the mischief which it is desired to prevent can then only be cured by legislative action, which may for one reason or another (such as pressure on Parliamentary time) be difficult to obtain. The court might thus feel that it ought to reverse the earlier holding. Yet it is then faced with the question whether it can do so without being unjust to Smith.

In one such case, an American court declined to convict the accused and merely remarked that the plainest principles of justice required his acquittal.[72] Other courts, however, while they would no doubt be fully in agreement with this position, have endeavoured to probe deeper and have evolved two different theories, either of which may lead to acquittal.[73] One of them assumes that the earlier decision now to be reversed was wrong, and that what the court is now announcing as the true interpretation of the statute has always been the law. Yet it would be difficult to deny to a defendant the right to rely on a mistaken view of the law when the judges' own predecessors in office have plainly held the same mistaken view. The court therefore now says that the defendant was entitled to rely on the opinion announced in the earlier decision. The rival theory eschews the view that the court in its later decision is merely declaring what always has been the law—a view which Bentham once described as a 'childish fiction'. It recognizes that a court in giving a decision makes law, and that this is not the less so when the decision announces the interpretation of a statute instead of merely announcing a rule of the common law.[74] It follows from this that the earlier decision of our hypothetical court created a rule of law that to expose a flick-knife in a shop window does not amount to offering that flick-knife for sale. The new rule announced by the court today changes the former rule, but only from today. Thus, when Smith 'offended' during the period between the two decisions, the law was as stated in the former of them, and his conduct was not then illegal.

As between these two theories I would submit that the second is more in accord with the realities of the situation; but each of the

[71] *Supra.* [72] *State v. Jones* (1940) 107 P.2d. 324, 329.

[73] Both are discussed in *State v. O'Neil* (1910) 126 N.W. 454. The case actually arose from conflicting decisions as to the constitutionality of a statute rather than its interpretation; but the reasoning is equally applicable to the interpretation of a statute—and, for that matter, to conflicting decisions as to the reach of the common law. [74] *State v. Fulton* (1908) 63 S.E. 145, 147.

two gives rise to some difficulties. The former calls for some showing on the part of the defendant that he had known of the existence of the earlier decision and relied upon it; if he has not done so his case is no better than that of the man who had never addressed his mind to the topic. The 'change of law' theory avoids this difficulty, but leads to the enquiry whether the court which gave the earlier decision was one recognized as possessing a law-making function. In a sense, of course, all courts possess that function; yet trial courts are concerned rather more with the investigation of facts than appellate courts, while the latter take the facts as given by the trial court's findings and address themselves more to the function of law-making. Considerations of this kind have led some American courts to hold that the invocation of an earlier decision of a court, as justification for one's conduct now held to be illegal, can only be made when that earlier decision was given by the highest appellate court of the jurisdiction concerned.[75] This may be theoretically justifiable, but situations may arise where the strict theory would produce a result instinctively felt to be too harsh. Perhaps the problems can be resolved best by invoking the 'change of law' rule where the earlier decision was given by the highest appellate court, while at the same time allowing a defendant to prove his reliance on an earlier decision of a lower court in the hierarchy if in fact he has relied on that decision.[76]

Similar arguments lead to the view that where a defendant has acted in a manner which was lawful by reason of a statutory provision later held to be unconstitutional, he ought to be permitted to rely upon the statute by way of defence. In the reverse of this situation, where a man is charged with an offence against a statutory provision declared to be unconstitutional, it is universally held that he has committed no offence, on the theory that the statute has never existed in the eye of the law. That theory would lead to the exclusion of any defence by him based upon such a statutory provision, but once again the result seems too harsh, and courts have held that he can invoke the voided statute by way of defence.[77] As was said in one case, the individual citizen cannot be required by the courts to be wiser than the whole people represented in their legislature. 'Until the . . . statute was declared to be unconstitutional by competent authority, the defendants, under every idea of justice and under our theory of government, had a right to presume that the law-making power had acted within the bounds of the constitution.'[78]

[75] *State v. Striggles* (1926) 210 N.W. 137.
[76] *Wilson v. Goodin* (1942) 163 S.W.2d. 309.
[77] See authority cited *supra* n. 51.
[78] *State v. Godwin* (1898) 31 S.E. 221, 222.

If, however, as these decisions indicate, a citizen is entitled to rely by way of exculpation upon the advice given to the community in general by either its legislature or its courts, what good reason can be advanced for refusing to allow him to rely on advice given (either to the community at large by way of a published opinion or to him personally) by the public official responsible for administering the particular law? Or upon advice given to him by a qualified lawyer? One possible reason advanced by a well-known writer is that the power of law-making and law-declaring is vested exclusively in courts and legislatures and is not given to lawyers who advise clients.[79] This seems to be the same reason as is wrapped up, by some courts which have denied the defence of advice of counsel, in the remark that to hold otherwise would be to render such advice paramount to the law.[80] It is a theory which seems to place the need for doing justice to an individual on a lower scale than that of maintaining the consistency of a constitutional doctrine. Even so, the same writer finds it hard to maintain it to the extent of denying to an individual the right to plead that he has acted on the advice of a public official; and he accordingly achieves consistency in his own theory by arguing that a public official responsible for administering a particular branch of the law is vested with power, by means of interpretation, to make law on that topic.[81] Although American courts afford far greater weight to administrative interpretation of statutes than do our own,[82] they do not go this far.

The simpler method, I submit, is to adopt the same course as that taken in recent years by courts in California and Delaware, and to regard reliance upon the advice of public officials or of counsel as being an appropriate excuse under certain safeguards. Thus, in *People v. Ferguson*,[83] where the defendant had been charged with selling securities without a licence from the State Corporation Commissioner (a statutory felony), the Court allowed him to plead by way of excuse that he had acted as he had after being advised by the Commissioner that no permit was needed for the particular transaction; and this, even though the defendant was himself a qualified lawyer of considerable experience. The Court pointed out that the relevant statute was a complicated one which could be read either strictly or liberally, that it was under the administration of the Commissioner, and that the Commissioner's decisions were in most cases final. They thought that it would be unconscionable to brand the defendant as a felon for relying on the advice he had obtained,

79 Hall, *General Principles of Criminal Law* (2d. ed., 1960), 382-8.

80 *People v. McCalla* (1923) 220 P.436, 441.

81 Hall, *loc. cit. supra* n. 79.

82 Contrast *Skidmore v. Swift & Co.* (1944) 89 L.Ed. 124 with *The Queen v. Australian Stevedoring Industry Board* (1953) 88 C.L.R. 100.

83 (1933) 24 P.2d. 965, 970.

and that to do so would be more calculated to engulf the innocent law-abiding business man than to punish the guilty or to protect the security buyer. Again, in *Long v. State*[84] the defendant, who was domiciled in Delaware, had obtained advice from an attorney that if he changed his domicile to Arkansas and secured a divorce there, that divorce would be recognized in Delaware. He acted on this advice, but later returned to Delaware, where he was again advised that his Arkansas divorce was regarded as valid; and he accordingly went through a ceremony of marriage with another woman. The trial court refused to allow him to introduce evidence as to the attorney's advice, but the Supreme Court of Delaware reversed this decision and awarded him a new trial. Their reasons may be summarised as being that the criminal law consequences of any particular contemplated conduct cannot be determined in advance with certainty under our system of law; that the best that can be ascertained are predictions of varying degrees of probability of eventuation. Accordingly, they thought that if a defendant had made *bona fide* diligent efforts, as well designed to accomplish ascertainment of the law as any available under our system, his conduct ought not to be held criminal. This would require evidence showing that he had made full and *bona fide* disclosure of the facts to his attorney, on the basis of which he had received advice; and that he had no substantial reason to believe that this advice was ill-founded, such as that the attorney was incompetent to give advice on the matter or had not given the question sufficient consideration, or that the advice was lacking in candour. The Court noted the argument[85] that to recognize such a defence might foster dishonest practices among attorneys, but they replied (rightly, I submit) that such practices might well be expected to be deterred by the availability of disciplinary measures for non-professional conduct. They also noted the possibility, which is so often referred to in the cases, of meeting the situation by mitigating the penalty either partially or wholly, but they replied (again, it is submitted, rightly) that the circumstances should entitle the defendant to full exoneration as a matter of right, rather than to something less as a matter of grace.

IV

Let us now return to the two recent cases which led us into our enquiry. The survey of common law authority and of principle is, I

[84] (1949) 65 A.2d. 489, 497-9.
[85] *Cf. Hunter v. State* (1928) 12 S.W.2d. 361, 363: 'such a holding [i.e., one allowing the defence of advice of counsel] would be productive of disastrous results, opening a way of escape from prosecution for the criminally inclined through a door held ajar by ignorant, biased, or purchaseable advisors.' I have no reason to suppose that such disastrous results have occurred in Delaware.

submit, sufficient to suggest that each of these two cases might well have resulted in an acquittal of the defendant. The result reached by the court in each case was not inevitable as a matter of authority nor was it sound in its principle or its teaching.

This last point is a vital one. Every criminal conviction should surely punish the defendant because he has acted wrongly, and should convey to him and to the community a lesson to be learned for the future. If it were otherwise, the law would be doing no more than pounce on the nearest convenient victim; and there is high authority for saying that this it must not do.[86]

It is therefore, I submit, pertinent to ask what lessons the defendants in these two cases could have learned from the decision of the court. What did the court think, and say, that the defendant ought to have done and had failed to do? In one sense, of course, this question can be answered by saying that the one defendant should have appointed auditors at its annual general meeting, and that the other should have given to the local authority notice of her proposal to take in children. But how were the defendants to find this out, except by adopting the course which they did? The decision in the Victorian case itself reveals that situations may arise—described by the court as 'rare occurrences'—in which a literal compliance with the terms of the section in question could not be had. And in the English case the decision was arrived at by abandoning a literal reading of that statute. How, then, could either defendant foresee the eventual decision by reading the statute? Our legal system provides no means whereby a defendant can ascertain, in advance and with certainty, what is the true judicial construction of a statute or, for that matter, what is the precise range and scope of a common law doctrine; he cannot ask the court for an advisory opinion. Hence, to hold him guilty if he seeks the best advice he can get, and this turns out to be erroneous, places him in an impossible situation. Suppose, for example, that he believes that his proposed activity requires a licence from a public official who tells him, however, that it does not. It is useless for him to contradict the official, for the latter would still doubtless refuse to issue the licence. What then is he to do? He could refrain from carrying out his proposed activity, but this is not the requirement of the law. It might be suggested that he should apply to the court for a *mandamus* directing the official to issue a licence; but it is doubtful whether he would succeed in such an application and, in any event, this seems to be a hopelessly costly and cumbersome way of proceeding. It might even embarrass the court by leading to an excessive number of applications of this kind.

[86] Lord Evershed in *Lim Chin Aik v. Reg.* [1963] A. C. 160, 174, echoing Devlin J. in *Reynolds v. G. H. Austin & Sons* [1951] 2 K.B. 135, 149.

If we are seeking to achieve respect for law, it is surely unwise to tell citizens that they must disregard the considered advice of the public officials whose duty it is to administer the law and who may therefore be expected to have made a careful study of its scope and effect. It is equally unwise to tell citizens, in effect, that the advice which they received *bona fide* from qualified lawyers is to be treated as worthless.

Nor does it help to record a conviction but to seek to mitigate its effect either by imposing a nominal penalty or refraining from imposing any penalty at all. A criminal conviction results in the public labelling of the defendant as one who has done wrong; and this label he must bear for the remainder of his life. Miss Battersby, for example, might at some future time find the conviction recorded against her used as a reason for denying her the right to take in foster children; it might be well said that a person who has contravened the notice provisions of the Children Act 1958 is not fit to be entrusted with their care. She could, of course, point out, if this were to occur, that the court which convicted her clearly said that she was quite fit to have the care of children and had acted in the best of faith. But a busy official who might have to pass upon her future application might well counter such a plea by asking her why, if that were so, the court convicted her.

Nor can it reasonably be doubted that defendants who receive similar treatment to that meted out in these two cases leave the courts with a sense that they have suffered an injustice. The point is not met by saying that they have received justice according to law. For the moment that one seeks to qualify the notion of justice in this way, one impliedly admits that justice in the fullest sense of the term has not been meted out. Again, it will not help to say that the difficulty can be cured by resort to legislative or executive action. It is the business of courts to administer justice. A shopkeeper who tells his customers that he does not keep the goods which he professes to sell, and that they must go elsewhere for them, will soon find himself bankrupt. The process may take longer to achieve, but courts will find themselves in the same position if they tell litigants that they must go elsewhere in order to obtain justice.

It must, however, be repeated that the Victorian and English courts which decided our two cases cannot, from one point of view, be criticised for holding as they did. The existing state of legal opinion justified their decisions. It has been my purpose here to point out that the matters canvassed have not received in the past the full attention they deserve, especially in the common law jurisdictions of the British Commonwealth; and to endeavour to show, for the future,

that the rule barring ignorance of law as an excuse needs to be, and can be, applied with caution and discrimination. Let us hope that when the question next arises the court which has to determine it will bear in mind the wise counsel uttered by an American court some years ago:

> Respect for law, which is the most cogent force in prompting orderly conduct in a civilized community, is weakened, if men are punished for acts which according to the general consensus of opinion they were justified in believing to be morally right and in accordance with law. If we should sustain the conviction, we would do so in the belief that the case was one in which executive clemency ought to be exercised. But is it quite fair to throw upon the executive the responsibility of relieving from punishment on account of the very nature of the act committed which is made apparent to this court . . .? We think we would be shirking our responsibility if we should leave it to the executive to do what we believe to be manifest justice in this case, and should stigmatize the defendant with a conviction for crime when as it appears he was innocent of any real wrong.[87]

[87] *State v. O'Neil* (1910) 126 N.W. 454, 456.