MENS REA AND MISTAKE OF LAW

The decision of the High Court of Australia in *Iannella v. French*[1] has drawn attention to the operation of the maxim *ignorantia juris non excusat* and its relationship to that other well-worn adage, *actus non facit reum nisi mens sit rea.*

The defendant was charged with breaches of section 56a (1) of the Housing Improvement Act 1940-1965 of South Australia. This reads:

> Any person who, whether as principal or agent or in any other capacity, wilfully demands or wilfully recovers as rent in respect of any house in respect of which a notice fixing the maximum rental thereof is in force under this Part, any sum which by virtue of this Part is irrecoverable, shall be guilty of an offence against this Act.

In January 1962, a house belonging to the defendant had been declared sub-standard and its maximum rental fixed by the Housing Trust. The defendant was informed by notice of these developments. At the end of 1962, however, the Landlord and Tenant (Control of Rents) Act 1942-1961, under which rents generally in South Australia were pegged or controlled, expired. The defendant read in the press that the effect of this would be that rents of dwellings in South Australia would no longer be fixed. He believed that this change applied to his house. He did not take legal advice nor did he make any other inquiries. If he had done so he might have discovered that the termination of rent control did not apply to houses already declared to be sub-standard. The defendant did not increase the rent for the house until 31 March 1966 when there was a change of tenancy. He then charged the new tenant a rent higher than that stated in the notice of January 1962 which, unknown to them, was still operative. By virtue of the Housing Improvement Act, which had been in force throughout the material period, the excess rent would have been irrecoverable.

The information against the accused for breach of section 56a (1) was dismissed by the magistrate on the ground that the defendant's honest belief that he was free to demand the increased rent meant

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1 (1967-68) 41 A.L.J.R. 389; [1968] A.L.R. 385.

that he had not "wilfully" demanded an irrecoverable amount of rent. The appeal by the complainant to a single judge of the Supreme Court of South Australia was allowed on the basis that the magistrate's decision 'overlooks a fundamental principle, and one which has been authoritatively applied to a provision identical with the one in question, namely, that ignorance of the law is no excuse'.[2] The Full Supreme Court by a majority dismissed the defendant's appeal on the ground that the Full Supreme Court had in an earlier case held that the use of "wilfully" did not override the *ignorantia juris* maxim.[3]

On appeal to the High Court, two of the five judges (Barwick C.J. and Windeyer J.) held in favour of the defendant on the ground that the requirement of a "wilful" demand had not been proved; two (Taylor and Owen JJ.) held in his favour because of duplicity in the convictions recorded, although they were of the view that the mistake of the defendant was one of law and therefore no defence; one judge (McTiernan J.) held in favour of the complainant because, on the judge's construction of the statute, mistake as to whether rent was irrecoverable or not was irrelevant, as "wilfully" did not apply to that specific element in the description of the offence.

The High Court case, therefore, does not appear to have a ratio decidendi over and above the rationes of the individual judges, for it is submitted that in a five judge court a rule of law cannot be the ratio of the case unless it is acted on by at least three of the assenting judges.[4] Such was the sharp difference in judicial reasoning, however, that the issues involved merit analysis.

1. COINCIDENCE OF MENS REA WITH ACTUS REUS

Glanville Williams defines actus reus as 'the whole situation forbidden by law with the exception of the mental element (but including so much of the mental element as is contained in the definition of an act)'.[5] According to Smith and Hogan, the actus reus 'includes all the elements in the definition of the crime except those which relate to the accused's state of mind and is not merely an "act"

2 Chamberlain J., [1967] S.A.S.R. 226, 227 sub. nom. French v. Ianella. The spelling of the defendant's name is apparently in dispute.

3 Travers and Hogarth JJ., Bray C.J. dissenting: [1967] S.A.S.R. 231. Travers J. expressed some doubt about his conclusion but felt himself bound by what he considered to be the ratio of the South Australian Full Supreme Court in Davies v. O'Sullivan (No. 2) [1949] S.A.S.R. 208.

4 See Fellner v. Minister of Interior, (1954) (4) S.A. 523; Walsh v. Curry [1955] N.I. 112; DIAS, JURISPRUDENCE 57-58 (1964); Honoré, (1955) 71 L.Q.R. 196-201.

5 CRIMINAL LAW, GENERAL PART 22 (2nd Ed. 1961).

in the ordinary, popular usage of that term. It is made up not only of the accused's conduct and its consequences but also of the surrounding circumstances, in so far as they are relevant'.[6] On these definitions, the phrase "any sum which by virtue of this Part is irrecoverable" is clearly part of the actus reus. If the sum had been recoverable, or if it had been irrecoverable for a reason other than by virtue of Part VII, then the offence in section 56a (1) would certainly not have been committed.

In *Iannella v. French,* McTiernan J. said:

> It is necessary to limit the subject matter in respect of which an offender under section 56a (1) should be ignorant if he is to be excused on such ground. He should, I think, be ignorant about something within the purview of this subsection. The central matter is the notice fixing a maximum rental, proved by the prosecutor. An offence under section 56a (1) can only be committed in respect of a notice of that kind. There are no provisions making a notice proof against mistake or ignorance. Having regard to the mixed classes of possible offenders against section 56a (1), and that by reason of section 56 (1) a notice fixing a maximum rental survives all changes of ownership or occupation of the house to which it applies, it is reasonable to assume that some persons in those classes may act contrary to the notice owing to ignorance of its existence or mistake as to essential matters covered by it. To my mind there is no ground for the presumption that the legislature expressly made mens rea a necessary ingredient of an offence under section 56a (1) out of consideration for persons who might think that this is a temporary Act and the period of its operation has ceased. I am unable to strain the meaning of "wilfully" to admit of such a mistaken belief in this context, even though sincere and not just fancy, to be pleaded as an excuse for any contravention of section 56a (1). The word "wilfully" does not, in my judgment, apply in relation to any matter beyond the purview of this subsection.[7]

Thus McTiernan J. based his judgment on his construction of the Act that "wilfully" did not apply to the phrase—"which by virtue of this Part is irrecoverable".

Is there any authority for thus breaking up an actus reus and applying the mens rea requirement to part only of it?

Lord Kenyon, as long ago as 1798, in *Fowler v. Padget* declared that 'it is a principle of natural justice, and of our law, that *actus non facit reum nisi mens sit rea.* The intent and the act must both concur

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6 CRIMINAL LAW 27 (1965).
7 41 A.L.J.R. 389, 395.

to constitute the crime . . .'[8] The definitions of mens rea imply the same. Williams defines mens rea as 'intention or recklessness as to the elements constituting the actus reus'.[9] Smith and Hogan define it as 'intention or recklessness with respect to all the consequences and circumstances of the accused's act (or the state of affairs) which constitute the actus reus, together with any ulterior intent which the definition of the crime requires'.[10] In *Iannella v. French,* Windeyer J. quoted with approval[11] a passage from the judgment of Jordan C.J. in *Turnbull* in which Jordan C.J. said: 'It is also necessary at common law for the prosecution to prove . . . that he knew that all the facts constituting the ingredients necessary to make the act criminal were involved in what he was doing.'[12]

If these definitions were valid for all crimes then, in so far as they purport to link mens rea with all the factual elements of the actus reus, we could declare McTiernan J.'s interpretation to be wrong and proceed immediately to see whether a mistake of law had any effect or not. The definitions, however, are not comprehensive. First, many crimes, particularly the so-called regulatory offences, do not require mens rea at all. They are committed simply by voluntary performance of the actus reus. In these circumstances it is a waste of time to ask whether a mistake of law as to some part of the actus reus would provide a valid defence since even a mistake of fact, however honest and reasonable, does not excuse.[13] The extent to which this rule has been modified by Australian practice will be considered later. Section 56a (1), however, by containing the word "wilfully" took the offence out of the category of crimes for which no mens rea at all need be proved.

Secondly, some crimes have been held to be offences of strict liability with respect to some only of the elements making up the actus reus, though they retain mens rea as a requirement for other elements. The leading authority is *Prince.*[14] There the defendant was charged under section 55 of the Offences Against the Person Act 1861 which reads:

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8 (1798) 7 T.R. 509, 514.

9 Williams, op. cit., at 31.

10 Smith and Hogan, op. cit., at 39.

11 41 A.L.J.R. 389, 398-399.

12 (1943) 44 S.R. (N.S.W.) 108, 109.

13 See generally, HOWARD, STRICT RESPONSIBILITY (1963); EDWARDS, MENS REA IN STATUTORY OFFENCES (1955); Warner v. Metropolitan Police Commissioner, [1968] 2 All E.R. 356 (H.L.).

14 (1875) L.R. 2 C.C.R. 154. The Supreme Court of Canada in R. v. Rees, [1956] 4 D.L.R. (2d) 406, distinguished Prince on the ground that the word "knowingly" was used in the Canadian Statute.

'whosoever shall unlawfully take . . . any unmarried girl being under the age of sixteen years, out of the possession and against the will of her father or mother . . . shall be guilty of a misdemeanour.' Prince had performed the actus reus but believed on reasonable grounds that the girl was over sixteen. Nevertheless his conviction was upheld by fifteen out of the sixteen judges who sat in the Court for Crown Cases Reserved. Ten of the majority judges reached their conclusion from a study of other sections of the Act and from the mischief expressed in the preamble that the intention of the legislature was not to require mens rea in respect of the girl's age; seven judges, including three who had concurred in the first judgment, held that the answer depended on the construction of the statute but that mens rea was not necessary here as 'the act forbidden is wrong in itself, if without lawful cause; I do not say illegal, but wrong'.[15] The fifteenth judge argued that, even on Prince's view of the facts, he had committed an unlawful act, namely aiding and abetting the girl to escape from the lawful care of her natural guardian, and 'he cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which in fact he was committing.'[16]

It is clear from the facts of *Iannella v. French* that the "moral wrong" or "lesser crime" doctrines would not have applied to the defendant in this case. This conclusion compels us to consider the argument based on the construction of the statute.

In the first place, some statutes which define an offence in terms requiring mens rea to be proved include definitions of circumstances under which the offence is not committed. This is often done by means of a separate paragraph or clause. Does the requirement of mens rea apply equally to the "escape clause" making it necessary for the prosecution to prove that the defendant knew facts which would make the escape clause inoperative? In *Brooks v. Mason*[17] the accused was charged that, being a licensee, he knowingly sold intoxicating liquor to a child under fourteen. The statute made an exception for liquor sold and delivered in corked and sealed vessels. The licensee knew that his customer was under fourteen but believed that the bottles were properly corked and sealed. Lord Alverstone, after conceding that the case raised a question of some difficulty, continued:

> There can be no doubt that with respect to the great majority of criminal offences it is necessary to prove mens rea. But I doubt

[15] Id. at 174, per Bramwell B.
[16] Id. at 179, per Denman J.
[17] [1902] 2 K.B. 743.

> whether the particular difficulty here can be answered by simply applying that general principle. One must look at the statute creating the offence, and see what that offence is, and whether the words giving rise to the difficulty are intended to make an exception which, if proved, constitutes a defence, or are intended to be part of the description of the offence.[18]

The court held that the exception was not part of the description of the offence as 'it would be altering the language of the statute, and departing from its intention, to read the word "knowingly" into the exception'. Yet, in *Gaumont Distributors Ltd v. Henry,*[19] where the statute prohibited any person from "knowingly" making a record of a dramatic or musical work without the consent in writing of the performers, the Divisional Court held that "knowingly" applied to all the elements of the offence. Lord Hewart remarked: 'The knowledge, which is part of the essence of the offence, extends to knowledge of the absence of consent on the part of the performers.'[20]

No clear conclusion emerges from these cases. It would be unsatisfactory, however, if the requirement of mens rea depended on the grammatical construction rather than on the express words of a statute. It is irrational to hold that mens rea is not required if the defence is written as a separate clause whereas it is required if the defence is introduced more subtly in the body of the definition of the offence.

In Australian courts the most important case which raised the problem of partial mens rea was *Proudman v. Dayman.*[21] The defendant was charged under the Road Traffic Act of South Australia for being one who 'permits any person not being the holder of [a current driving licence] to drive a motor vehicle on any road'. She believed that the driver was duly licensed but did not have any reasonable ground for her belief. The High Court affirmed the conviction. Rich A.C.J. and Dixon J. (as he then was) held that there was no evidence of a belief based on reasonable grounds, though only Dixon J. stated that it would have been a defence if such a belief had been held.[22] McTiernan J., on the other hand, considered that the defence of reasonable mistake would not have availed the defendant in any

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18 Id. at 746.

19 [1939] 2 K.B. 711.

20 Id. at 717. See, also, ex parte Bedser; Re Kotze, (1968) 88 W.N. (Pt. 1) (N.S.W.) 53, and Warner v. Metropolitan Police Commissioner, [1968] 2 All E.R. 356, 384, per Lord Guest.

21 (1941) 67 C.L.R. 536.

22 Id. at 540-541.

circumstances as, on his construction of the statute, that part of the actus reus specifying that the driver must not be the holder of a current driving licence did not require mens rea.

There are some offences, however, where mens rea has not been required for part of the actus reus even though that part was expressed in positive, descriptive terms. In *Cotteril v. Penn*[23] where the offence was "unlawfully and wilfully" killing a house pigeon contrary to section 23 of the Larceny Act 1861, it was held to be no defence that the defendant honestly believed it to be a wild pigeon. Similarly, on a charge under the Offences Against the Person Act 1861 of 'assulting a peace officer in the due execution of his duty', it was held by a Recorder that it was not necessary for the prosecution to prove that the defendant knew that the person he assaulted was a constable.[24] In *Galvin (No. 1)*[25] this was followed by the Full Court of the Supreme Court of Victoria on similar wording in the Victorian Crimes Act, but promptly overruled by a majority of a Full Bench in *Galvin (No. 2)*.[26] The majority held that the mental element was the intention to do the whole act which was prohibited. *Galvin (No. 2)* was in its turn overruled by a majority of the High Court in *Reynhoudt*.[27] The majority held that, as the view taken in *Galvin (No. 1)* dated from at least 1864, it was reasonable to assume that the legislature, in enacting and re-enacting the provision in 1915, 1928 and 1958 had adopted this interpretation.

Dixon C.J. and Kitto J. dissented. Dixon C.J. declared:

> It seems to me that the general doctrine that a guilty mind is needed is not satisfied or fulfilled by a mere reliance on the intent necessary to the assault independently of the additional elements of the crime. In short, I agree in the statement by which the majority of the Court in the second *Galvin Case* summarized their view,—'The mental element, in our opinion, is the intention to do the *whole act* which is prohibited.' A primary consideration justifying this view is, I think, the natural application of the principle to the provision and the absence of anything to rebut it.[28]

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23 [1936] 1 K.B. 53.

24 Forbes and Webb, (1865) 10 Cox C.C. 362.

25 [1961] V.R. 733.

26 Id. at 740.

27 (1962) 107 C.L.R. 381.

28 Id. at 387. See also Samuels v. Centofanti, [1967] S.A.S.R. 251, 258, where Reynhoudt was cited to convince Bright J. that a certain element of the offence in s. 70 (d) of the South Australian Brands Act 1933-63 did not require mens rea.

In *O'Sullivan v. Harford*[29] the Full Court of the Supreme Court of South Australia had to construe a statute which read:

> No person shall wilfully:—
> (a) prevent any member of the police force or other person acting in his assistance under a warrant under this Act to enter any house, room, or place, from entering the same or part thereof; or
> (b) obstruct or delay any such member of the police force or person in so entering . . .

The point of law for the Court was whether, for an offence under (b), the prosecution had to prove that the defendant knew that the constable was acting under a warrant. The Court considered various authorities such as *Gaumont British Distributors Ltd v. Henry, Brooks v. Mason* and *Proudman v. Dayman,* concluded that they led to no clear principle and said that the answer must depend on the form of the enactment and the purpose it was intended to serve. The Court continued:

> But we think that there are two general principles that we *can* invoke. First, it seems to us that we can assume that the statute law intends nothing that is plainly impossible, and, secondly, there is the general principle that, although mens rea must generally be found in order to justify a conviction, there are many cases in which proof of the act may—either by reason of its own nature or by reason of the form of the statute—import prima-facie proof of the mens rea.[30]

The Court decided the appeal against the defendant on the grounds that he had in effect been reckless.[31] As this is a state of mind accepted as equivalent in most crimes to mens rea the case does not advance the argument very far except that the two "general principles" invoked by the Court would not have justified a conviction in *Iannella v. French.*

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29 [1956] S.A.S.R. 109.

30 Id. at 115.

31 The Court said:

> It seems to us that we must distinguish between 'knowingly' and 'wilfully'. Both words import scienter or intention, but whilst 'knowingly' will generally import knowledge of the attendant circumstances which make the act unlawful, we think that, in this context, the natural meaning of 'wilfully' can be satisfied either by knowledge, or by a state of mind which adverts to the possibility of the existence of the attendant circumstances, but forbears to make enquiry and wills to do the act whether or not. (Id. at 115).
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> If this implied that "knowingly" excludes liability for recklessness it would seem too wide.

The conclusion to be drawn from these conflicting authorities is that it is too simple to assert that mens rea must apply to all the elements of the actus reus. Even the word "knowingly" occasionally has not been construed as extending the requirement of mens rea to all the elements. "Wilfully" is even less predictable. Nevertheless it is submitted with respect that McTiernan J.'s method of restricting its ambit by reference to the "purview" of the subsection[32] does not ease the task of persons called upon to advise on the interpretation of statutory offences.

2. MISTAKE OF LAW IN STATUTES REQUIRING MENS REA

Although we have seen that under certain ill-defined circumstances a particular element of the actus reus is not interpreted as requiring mens rea, can it be said that wherever that element has some legal content mens rea must *necessarily* be excluded?

It is frequently asserted that mistake of law is generally no defence to a criminal charge. Thus in *Marshall v. Foster,* Hood J. said:

> He wilfully disobeyed that order under the honest belief that he was justified in doing so as a matter of law. His mistake, therefore, was not of fact, but of law; and this neither shows any absence of mens rea nor does it afford any defence (see Stephen's Com., Vol. IV, p. 103) except of course where otherwise provided by statute; and even the absence of mens rea is not always an answer to a statutory charge.[33]

Similarly, Chamberlain J. in the Supreme Court said in *French v. Ianella*:

> I can find no support in any of the decisions to which I have been referred for the proposition that a mere mistake of law can be treated as sufficient to answer a charge that an act forbidden by law was done wilfully.[34]

In his dissenting judgment in the Full Supreme Court, Bray C.J. first set out a line of authorities to support the proposition that "wilfully" meant fraudulently or iwth an evil or guilty intention. In some of the cases he mentioned, the mistake involved was clearly one of fact. Thus in *R. v. Badger,*[35] which was relied on by Bray C.J., Coleridge J. remarked: 'Here it was purely a dispute upon facts'.[36]

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32 41 A.L.J.R. 389, 395.
33 (1898) 24 V.L.R. 155, 159.
34 [1967] S.A.S.R. 226, 228.
35 (1856) 6 El. & Bl. 138.
36 Id. at 166.

The cases under the Landlord and Tenant Act 1730, quoted by Bray C.J.,[37] though they are some authority for a wide construction of "wilfully", do not seem to be criminal actions at all but cases of a civil remedy given by statute.

But even if it is admitted that "wilfully" means more than mere advertence, does it exculpate in those particular circumstances where the mistake concerns the existence or interpretation of a legal rule, whether set out in a statute, judicial decision or in custom?

It is evident that the authorities conflict, but it is submitted that there is enough authority to contest the view of Hogarth J. in *French v. Ianella* that such a fundamental principal as *ignorantia juris haud excusat* cannot be excluded so perfunctorily as by the simple inclusion of the word "wilfully".[38]

In *Jackson v. Butterworth*,[39] for example, the defendant was charged under section 230 of the Income Tax Assessment Act 1936 in that he "knowingly and wilfully" understated his income. The prosecution argued that the section meant that the offence was made out if the defendant knew the facts which in law meant that his income was understated. The defendant argued that "knowingly and wilfully" had the effect of requiring proof that the defendant knew or believed that money received by him was, in law, income and that he wilfully omitted from his return that which he knew or believed to be income. Fullagar J. concluded that 'no offence is committed under section 230 if the defendant is merely inadvertent or if he entertains an honest belief that what he is omitting is not income. There must in my opinion be either knowledge or belief that what is omitted is income or an advertence to the probability or possibility that it is income and a recklessness in the sense of not caring whether it is income or not'.[40] The burden of proving this lay on the prosecution.

In *Frailey v. Charlton*[41] the defendant was charged under a statute which made it an offence knowingly to harbour prohibited goods with intent to evade the prohibition. The Court held that, as he did not know that the goods had been prohibited by Order in Council, he could not be convicted because he did not have the required intent. If the requirement of intent to evade the prohibition had not been

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37 Swinfen v. Bacon (1861) 6 H. & N. 846; French v. Elliott, [1959] 3 All E.R. 866.

38 [1967] S.A.S.R. 226, 251.

39 [1946] V.L.R. 330. See also Donnelly v. Commissioner of Inland Revenue, [1960] N.Z.L.R. 469.

40 [1946] V.L.R. 330, 332.

41 [1920] 1 K.B. 147.

specifically stated, however, we may wonder whether the decision would have been the same.

Similarly, where the statute expressly or by implication requires an intent to defraud or deceive, a mistake as to the application of a rule of law is usually a defence.[42]

Glanville Williams thinks that a mistake of *civil* law is a defence to a charge involving statutory "wilfulness", but concedes that the authorities conflict.[43] In *Buttons v. Justices of Melbourne*[44] the defendant refused to admit a constable into his hotel on a Sunday. He believed that he was legally justified in refusing to unlock the door. On a charge under the Licensing Act of "wilfully delaying" admittance, he was acquitted by the Full Court of the Supreme Court of Victoria. However, in *Lamberton v. Hill*[45] where the charge was "wilfully" erecting a building without first obtaining written permission of the council, it was no defence for the defendant to say that he did not know of the existence of the by-law stipulating that permission must be obtained. But there was no evidence of a positive belief in the non-existence of the by-law.

In the Victorian case of *Marshall v. Foster*[46] the defendant was charged with "wilful disobedience" of a lawful command. The command was held to be lawful, but the Court, following *Prince,* held that a reasonable belief by the defendant that it was unlawful was not a good defence. The Court held that the mistake was one of law and therefore fatal to the defendant's case. In *Wells v. Hardy*[47] where the defendant was charged with "unlawfully and wilfully" attempting to take fish in any water where there was a private right of fishery, the Divisional Court held that a bona fide belief in a claim of right was no defence. It is submitted that these cases are wrong in principle and that offences such as these should be put into the category of those for which the legislature have expressly provided that mistake of law is a defence.

A defence of mistake or even ignorance of law can, of course, be specifically included in a statute.[48] Thus the Larceny Act 1916 requires as an element of the offence a taking "fraudulently and without a claim of right made in good faith". The burden of proving absence

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42 WILLIAMS op. cit. n. 5 above pp. 329-331.
43 Id. at 317-320.
44 (1890) 16 V.L.R. 604. See also R. v. Sanderson, (1910) 12 W.A.L.R. 92.
45 [1944] V.L.R. 11.
46 (1898) 24 V.L.R. 155.
47 [1964] 2 Q.B. 447.
48 See Trade Practices Act 1965, s. 43 (4) (Cwlth.)

of such a claim rests with the prosecution. This defence covers ignorance as well as mistake of law. In *Hall*,[49] a gamekeeper took wires from a poacher. By a statute it was lawful for the wires to be so seized. The poacher retook the wires after menacing the gamekeeper. It was held that if the poacher had the honest impression that he was only getting back the possession of his own property he had no *animus furandi*. In *Bernhard*[50] a defendant who had received incorrect advice on English law from a foreign lawyer was held not guilty of larceny as she believed she had a claim of right.

In all cases where mistake of law can exculpate, the defendant must have a positive and affirmative belief; connivance or deliberate blindness is of no assistance. Thus, in *Davies v. O'Sullivan* (No. 2),[51] a case regarded as crucial by the majority of the Full Supreme Court of South Australia, the same Court had held that on a charge of "wilfully receiving as rent" a sum which by virtue of an Act was irrecoverable, the prosecution had to prove that the money was 'so received intentionally and without any honest belief in a state of facts which would have made the receipt innocent'. The Court then held that the defendant had, in effect, been reckless in that she had deliberately abstained from making enquiries. On this basis, the case could be said to lack a ratio on whether a positive, honest belief in the lawfulness of her action would have meant that no offence was committed, a point which was taken by Bray, C.J. in *French v. Ianella.*

Then in *Fenwick v. Boucaut and Hodder* Napier C.J. said:

> The fact, that they err in ignorance of the law, may be urged as extenuating the fault, but it does not entirely exculpate them.[52]

Mere ignorance of the law, however, is different from the situation in *Iannella v. French* where there was a genuinely held belief, though wrong, as to the expiration of a statute.

It is submitted that the *ignorantia juris* doctrine alone did not stand in the way of a holding by the High Court that "wilfully" referred also to the clause, "which by virtue of this Part is irrecoverable". The authorities conflict to some extent but, leaving aside *Marshall v.*

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49 (1828) 3 C. & P. 409.

50 [1938] 2 K.B. 264. See also Criminal Code, s. 22 (Qld. and W.A.) and Pearce v. Paskov, [1968] W.A.R. 66, which by restricting the ambit of the words "bona fide claim of right, without intent to defraud" implies that the defence is otherwise not available.

51 [1949] S.A.S.R. 208.

52 [1951] S.A.S.R. 290.

Foster and *Wells v. Hardy* as of doubtful value, they generally support such a conclusion at least where the defendant had a positive and honest, though mistaken, belief and was not simply recklessly indifferent. Barwick C.J. and Windeyer J. indeed held that "wilfully" qualified the whole actus reus and it was irrelevant whether the defendant's mistake was one of fact or law.

3. MISTAKE OF LAW AND MISTAKE OF FACT UNDER THE PROUDMAN v. DAYMAN RULE.

We have already seen that a statute can, on its construction as well as by specific words, import the necessity for mens rea in respect of a legal element in the actus reus. We must now consider the situation where, on the construction of the statute, the prosecution has no need to prove mens rea at all but where, in Australia at least, the defendant can plead an honest and reasonable mistake of fact. In this context the distinction between mistake of law and mistake of fact is vital.

It is clearly established by Australian[53] practice in respect of statutory offences that, even where the whole or part of an actus reus does not require mens rea, a defendant is generally entitled to an acquittal if he establishes an honest belief upon reasonable grounds in the existence of facts which, if true, would have rendered his acts innocent.[54] In *Proudman v. Dayman*[55] Dixon J., who, as we have seen, interpreted the clause "not being a licensed driver" as falling outside the act prohibited, nevertheless was of the opinion that the defendant would have had a valid defence if she had established an honest and reasonable mistake of fact in respect of the clause, which, if true, would have taken her act outside the operation of the enactment.

In *Iannella v. French,* Barwick C.J. and Windeyer J. had no need to rely on the *Proudman v. Dayman* rule because it applies only where the prosecution does not have to prove the specific mental intent, a situation which they held was not before them. In the Full Supreme Court of South Australia, Bray C.J. considered the rule irrelevant to the case as it did not apply to a mistake of law, which he considered the defendant's error to be. The rule would seem applicable, however, to the construction of the statute as interpreted by McTiernan J. The fact that he made no mention of it could have

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53 English courts have taken a different view; see Warner v. Metropolitan Police Commissioner, [1968] 2 All E.R. 356.

54 See HOWARD, STRICT RESPONSIBILITY, Ch. 5, for a full discussion of the doctrine. See also Samuels v. Centofanti [1967] S.A.S.R. 251.

55 (1941) 67 C.L.R. 536.

been because he thought the accused's belief unreasonable, though nowhere does he state so, or because he thought it a mistake of law, though nowhere does he refer to this, or because he considered that the irrecoverable rent clause imported such strict liability that not even an honest and reasonable mistake of fact would be a defence. If the last possibility is the true one then the learned judge would seem to be restating his view twenty-seven years previously in *Proudman v. Dayman,* reasoning which, it is submitted, is out of step with the almost consistent practice of the High Court since that case.[56]

Taylor and Owen JJ. do not mention the possibility of a defence based on an honest and reasonable mistake of fact. This may not be surprising in that they held the mistake to be one of law, but it is not clear whether they omitted to discuss the defence on the basis that the clause in the subsection imported full strict liability, in which case the reasonable mistake defence could not even be considered, or whether this defence could not apply, on the basis that mistake of law did not have the same effect as a mistake of fact.

In *Iannella v. French,* Barwick C.J., obiter, thought that a defendant's mistaken belief that an Act had been repealed was a mistake of fact.[57] Windeyer J., also obiter, was of the same view. He thought that the mistaken belief was in thinking that a notice fixing a maximum rent was not in force. He thought that this was a mistake of fact even though it was caused by a 'mistake as to the law'.[58] Taylor J., on the other hand, considered that the defendant's mistake was 'as to the general law' and that it would be 'a heresy of the first order' for this to exculpate him.[59]

It is submitted that the view of Barwick C.J. and Windeyer J., that a mistaken belief that an Act had been repealed is a mistake of fact, merits consideration. It is in line with the reasoning in the bigamy cases in the High Court of Australia and the English Court of Appeal (Criminal Division). In *Gould*[60] the latter Court followed the High Court of Australia in *Thomas*[61] in holding that a mistaken belief that a court had made a decree dissolving a marriage was a mistake of

56 HOWARD, STRICT RESPONSIBILITY 85. State Courts have not been so consistent, see, for example, Gepp v. Anderson [1949] S.A.S.R. 135; Hawthorn v. Bartholomew, [1954] V.L.R. 28.
57 41 A.L.J.R. 389, 394.
58 Id. at 401.
59 Id. at 396.
60 [1968] 1 All E.R. 849.
61 (1937) 59 C.L.R. 279.

fact. Can it, however, be reconciled with the generally accepted view that a mistaken belief as to the proper construction and operation of an Act is a mistake of law, whether the mistake has been made initially by the defendant or by his legal advisers?[62] But in this type of case there would generally be no mistake as to a fact such as the existence of a statute, the mistake would be with regard to the interpretation of the Act. As Barwick C.J. said: 'The passing of an Act, as distinct from changes it makes in the law, is, in my opinion, a fact, so is its repeal . . .'[63]

It seems to follow from the view of Barwick C.J. and Windeyer J., that a mistaken belief that legislation has or has not been passed, repealed, or amended, being mistakes of historical fact, could constitute a valid defence. A mistaken belief in the existence or not of a judicial decision should surely also fall under the same reasoning. This reasoning clearly would not apply where the defendant had never considered such a possibility, which would be the case in most circumstances. Here he would not have a belief at all. The precedent cited by Taylor J., *In the matter of Etienne Barronet and Edmond Allain* and *In the matter of Emanuel Barthelemy and Philippe Eugene Morney,*[64] concerned Frenchmen duelling in England. Their belief, if it could be so called, that duelling was not legally prohibited was apparently not based on any mistake about a fact such as the existence of a statute. They were held rightly convicted of "wilful murder". It is submitted that they were simply under a general misapprehension as to the law and, as discussed above, such a misapprehension is not a defence unless it comprises a positive belief in the truth of some fact such as the existence of a piece of legislation or binding judicial decision.[65]

There is no doubt that the Barwick-Windeyer view will cause surprise to some lawyers because it appears to strike at the fundamentals of the *ignorantia juris* doctrine. But in the vast majority of cases in which the courts have held that a mistake of law is no defence to a criminal charge, the mistake has been either on the interpretation of

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62 See, for example, Surrey County Council v. Battersby, [1965] 2 Q.B. 194 and Crichton v. Victorian Dairies Ltd. [1965] V.R. 49 discussed by Brett in 5 M.U.L.R. 179-204.

63 41 A.L.J.R. 389, 394.

64 (1852) 1 E. & B. 1; see also Esop, (1836) 7 C. & P. 456; Bergin v. Stack, (1953) 88 C.L.R. 248.

65 Similarly in the context of the Proudman v. Dayman defence, the defendant must put forward a positive affirmative belief; Green v. Sergeant, [1951] V.L.R. 500.

a rule of law of the existence of which the defendant or his legal adviser was aware, or, more usually, it has consisted of simple ignorance at the best, or wilful blindness at the worst, of the state of the law. There does not appear to have been a case similar to the facts in *Iannella v. French* in which the defendant introduced a defence of a positive though mistaken belief as to the existence, or absence, of a legislative or judicial event. However, there is high persuasive authority for the proposition that such a mistaken belief about a statute could be a mistake of fact in the well-known case of *London Tramways Company v. London County Council.*[66] The Earl of Halsbury L.C. said:

> . . . It is said that this House might have omitted to notice an Act of Parliament, or might have acted upon an Act of Parliament which was afterwards found to have been repealed. It seems to me that the answer to that ingenious suggestion is a very manifest one—namely, that that would be a case of a mistake of fact. If the House were under the impression that there was an Act when there was not such an Act as was suggested, of course they would not be bound, when the fact was ascertained that there was not such an Act or that the Act had been repealed, to proceed upon the hypothesis that the Act existed. They would then have ascertained whether it existed or not as a matter of fact, and in a subsequent case they would act upon the law as they then found it to be, although before they had been under the impression, on the hypothesis I have put, either on the one hand that an Act of Parliament did not exist, or on the other hand that an Act had not been repealed (either case might be taken as an example) and acted accordingly. But what relation has that proposition to the question whether the same question of law can be re-argued on the ground that it was not argued or not sufficiently argued, or that the decision of law upon the argument was wrong? It has no application at all . . .

The Lord Chancellor seems in this passage to have directed his thoughts towards the distinction between a mistake of law and a mistake of fact and to have concluded that such a mistake was one of fact.

The line between a mistake of law and a mistake of fact is notoriously hard to draw. It is submitted that because of the unfortunate results for the defendant if his mistake is considered to be one of law there should be a tendency in the courts to restrict the effect of the *ignorantia juris* doctrine. In *Thomas v. R.*, Dixon J. declared that 'a mistake as to the existence of a compound event consisting of law

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[66] [1898] A.C. 375, 380-1.

and fact is in general one of fact and not a mistake of law'.[67] If the view of Barwick C.J. and Windeyer J. is accepted, the ambit of the doctrine has been reduced still further. It remains to be seen, however, whether future courts will act on their opinion or whether the doctrine will be used, as Taylor and Owen JJ. used it, as a blunt instrument to strike down those unlearned in the law.

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67 (1937) 59 C.L.R. 279, 306.

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