CROWN CASES RESERVED.

January 26 *and May* 11, 1889.

(Before Lord COLERIDGE, C.J., DENMAN, J., POLLOCK, B., FIELD, J., HUDDLESTON, B., MANISTY, HAWKINS, STEPHEN, CAVE, DAY, SMITH, WILLS, GRANTHAM, and CHARLES, JJ.)

REG. *v.* TOLSON. (*a*)

Bigamy—Absence of husband or wife for less than seven years—Boná fide belief in death—Finding by jury of reasonable grounds for belief—24 *&* 25 *Vict. c.* 100, *s.* 57.

It is a good defence to an indictment for bigamy, to prove to the satisfaction of the jury that the prisoner at the time of contracting the bigamous marriage boná fide believed, and had reasonable grounds for believing, that his or her wife or husband was dead. Such defence is good, although such wife or husband may not have been continually absent from the prisoner for seven years, or seven years had not elapsed at the time of such marriage since the prisoner last knew of his or her wife or husband being alive.

So held by the majority of the court (Denman, J., Pollock, B., Field, J., Huddleston, B., and Manisty, J., dissenting.

CASE reserved by Stephen, J., upon the trial of an indictment for bigamy, under 24 & 25 Vict. c. 100, s. 57 (*b*), which stated as follows:

On the 6th day of July 1888, at the assizes at Carlisle, Martha Ann Tolson was convicted before me of bigamy.

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

(*b*) By 24 & 25 Vict. c. 100, s. 57, it is enacted that: "Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour; and any such offence may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland, where the offender shall be apprehended or be in custody, in the same manner in all respects as if the offence had been actually committed in that county or place: Provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

REG. v. TOLSON. 1889.

Bigamy—Absence of husband or wife for less than seven years—Bonâ fide belief in death on reasonable grounds—24 & 25 Vict. c. 100, s. 57.

Her marriage took place on the 11th day of September, 1880. Her husband deserted her on the 13th day of December, 1881. She and her father made inquiries about him, and learned from his elder brother, and from general report, that he had been lost on a vessel bound for America, which went down with all hands on board.

On the 10th day of January, 1887, Martha Ann Tolson, supposing herself to be a widow, went through the ceremony of marriage with another man. The circumstances were well known to the second husband, and the ceremony was in no way concealed.

In December 1887 Tolson returned from America.

I directed the jury that a belief in good faith and on reasonable grounds that her husband was dead would not be a defence to a charge of bigamy, and I wish to add that, in so holding, my object was, if possible, to obtain the decision of the Court for Crown Cases Reserved on the point, as there are conflicting Nisi Prius decisions. The jury convicted the prisoner, stating however, in answer to questions from me, that they thought that she in good faith, and on reasonable grounds, believed her husband to be dead at the time of her second marriage, and I sentenced her to one day's imprisonment.

The question for the court is, whether my direction was right. If it is the conviction is to be affirmed. If not it is to be quashed.

Jan. 26.—*Henry*, on behalf of the prisoner.—This is an indictment under sect. 57 of 24 & 25 Vict. c. 100, which is a consolidating statute, and in which is consolidated 9 Geo. 4, c. 31. The offence of bigamy was first made a civil offence in the reign of James I., when the punishment was death. 1 Jas. 1, c. 11, was really the enacting statute; and the words in the present statute, though not literally, are virtually the same. In order to constitute the offence, it is necessary that there should be *mens rea*; that is to say, the mind must concur in doing the act. For it is a principle of natural justice, and of our law, that the intent and the act must both concur, in order to constitute the crime. The Legislature may dispense with the necessity for this concurrence, but before the court will come to the conclusion that the Legislature intended this, it is necessary that the language of the statute should be clear, and capable of no other interpretation. There is one other principle of law which applies to the present case—namely, *Ignorantia facti excusat*; for where the deed and the will act separately, there is not that conjunction between them which is necessary to form a criminal act: (Broom's Commentaries, vol. 4, c. 2, s. 5.) Now, both the above principles occur in this case, because of the findings of the jury—that the prisoner acted under a mistake. There is a third principle which is also applicable, which is, that wherever a statute uses the word "felony," the use of such word imports into the crime the element of guilty knowledge. In Coke on Littleton (bk. 3, c. 13, s. 745) it is said,

Bigamy— Absence of husband or wife for less than seven years — Bonâ fide belief in death on reasonable grounds— 24 & 25 Vict. c. 100, s. 57.

"Ex vi termini significat quodlibet capitale crimen felleo animo perpetratum." By the common law all felonies were punishable with death, and no man was ever punished capitally unless there was a guilty knowledge. The interpretation of the word "felony" in Termes de la Ley, tit. Felony, and Hawkins' Pleas of the Crown, bk. 1, c. 25, shows that the word by itself implies that the act was done with a guilty knowledge. The only difference between the present enactment and 1 Jas. 1, c. 11, is that contained in the proviso with regard to absence beyond the seas. The only other statute relating to bigamy is 35 Geo. 3, c. 57, which only refers to the punishment. The Legislature could not have contemplated that a woman who believed *bonâ fide* that her husband was dead should have been hanged. In those days, the Ecclesiastical Courts could have granted probate or administration upon the same evidence as that upon which the prisoner acted. The difference seems to turn upon the proviso, which says that nothing in the section is to extend to any person "whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time." It is said that the effect of that proviso is to incorporate into the enacting part of the section the words "whether the person had a belief formed upon reasonable grounds or not." Is not, however, the proviso merely intended to deal with the question of evidence? Does it not merely say that you may presume that the first husband or wife, as the case may be, is dead, if you have not heard of him or her for seven years; and is it not a strong thing to say that this proviso renders it necessary to wait for seven years, and prevents marriage, though there may be the best evidence that the husband or wife is dead? The case of *Reg.* v. *Prince* (32 L. T. Rep. N. S. 700; 13 Cox C. C. 138; L. Rep. 2 C. C. R. 154; 44 L. J. 122, M. C.) was that of an indictment under the same Act of Parliament, which makes it an offence to take a girl out of the possession of, and against the will of her parents, where such girl is under sixteen, and the jury found that the prisoner *bonâ fide* believed that the girl was over eighteen. The question having been reserved whether the conviction was good, the judges, with the exception of Brett, J., now the Master of the Rolls, decided that it was good, notwithstanding the *bonâ fide* belief. But they were careful not to say that *mens rea* was not necessary, because, as Blackburn, J. said: "No question arises as to what constitutes a taking out of the possession of her father; nor as to what circumstances might justify such taking as not being unlawful; nor as to how far an honest though mistaken belief, that such circumstances as would justify the taking existed, might form an excuse." All the judges held was that, as the prisoner there knew he was doing an unlawful act in taking the girl out of the possession of her parents, he, therefore, took her at his risk. In *Reg.* v. *Hibbert* (L. Rep. 1 C. C. R. 184), where the prisoner did not know whether a girl

REG. v. TOLSON. 1889.

Bigamy—Absence of husband or wife for less than n years—Bonâ fide belief in death on reasonable grounds—24 & 25 Vict. c. 100, s. 57.

whom he had induced to go with him had a father or mother living or not, it was held that he could not be convicted of having unlawfully taken her out of the possession of her father under 24 & 25 Vict. c. 100, s. 55. In all the decisions upon the game laws, the judges have expressly referred to the necessity for showing *mens rea*; and though the law may have at times been somewhat strained, still they have said that the nature of the particular offence constituted *mens rea*. In *Mullins* v. *Collins* (9 Q. B. Div. 292) Archbold, J. said that where one of a series of clauses in an Act headed "offences against public order," in creating an offence omitted the word "knowingly," which was contained in the other clauses, such omission pointed to the conclusion that a person might be liable for the act of another person under such clause, although he himself had not knowingly committed an offence against it, and that in so construing the enactment the court were not interfering with the maxim that, before a person can be criminally convicted, he must be shown to have a *mens rea*. But in *Dickenson* v. *Fletcher* (L. Rep. 9 C. P. 1) the court refused to say that under the word "neglect" in the Mines Regulation Act (23 & 24 Vict. c. 151), s. 22, a person could be held liable to penal consequences for the default of some one in his employment, he not having been guilty of any personal default. In *Reg* v. *Turner* (9 Cox C. C. 145) Martin, B. upon an indictment for bigamy said: "The law says seven years shall elapse before it may be presumed that the first husband is dead. In this case seven years had not elapsed, and beyond the prisoner's own statement there was the mere belief of one witness, still the jury are to say if upon such testimony she had an honest belief that her first husband was dead; if they believe she had, then the prisoner would not be guilty." In *Reg.* v. *Horton* (11 Cox C. C. 670), Cleasby, B. in 1871 said: "It is submitted that although seven years had not passed since the first marriage, yet if the prisoner really believed which presupposes proper grounds of belief) that his first wife was dead, he is entitled to an acquittal. It would press very hard upon a prisoner if under such circumstances he could be convicted when it appeared to him as a positive fact that his first wife was dead." After referring to these two cases in his Digest of the Criminal Law, Stephen, J. says (art. 34): "I think the proviso in 24 & 25 Vict. c. 100, s. 57, ought clearly to be read not as excluding the general common law principle as stated in this article, but as supplementing and completing it, by providing that a second marriage, after seven years' ignorance as to the life of the first husband or wife, shall not be criminal, although the party so marrying has no positive reason to believe, and perhaps does not believe, that the absent person is dead." In *Reg.* v. *Gibbons* (12 Cox C. C. 237) Brett, J. dissented from the ruling in *Reg.* v. *Horton* (*ubi sup.*), and directed the jury that a *bonâ fide* belief in the death of the first husband was no defence to an indictment for bigamy, unless he had been continuously absent for seven years. But in a later case, *Reg.* v. *Moore* (13 Cox C. C.

544), Denman, J. after consulting Amphlett, L.J., held, notwithstanding the ruling in *Reg.* v. *Gibbons* (*ubi sup.*), that a finding of the jury that at the time of the bigamous marriage the prisoner had a reasonable and *bonâ fide* belief that her husband was dead, although seven years had not elapsed since she last heard of him, amounted to a verdict of not guilty. In *Attorney-General* v. *Bradlaugh* (52 L. T. Rep. N. S. 593; 14 Q. B. Div. 689) Brett, M.R. repeated his dissent from the decision in *Reg.* v. *Prince* (*ubi sup.*), and stated that in his opinion it was contrary to the proper view of the law to say that, without a wrongful intent, a person could be guilty of a crime, unless there were an Act of Parliament expressly providing that it should be so. It is, therefore, difficult to believe that his ruling in the case of *Reg.* v. *Gibbons* (*ubi sup.*) can have been accurately reported. The decision in *Reg.* v. *Curgewen* (13 L. T. Rep. N. S. 383; 10 Cox C. C. 152; L. Rep. 1 C. C. R. 1) shows that where it is proved that the prisoner and his first wife have lived apart for the seven years preceding the second marriage, the presumption is at once shifted, and the onus lies upon the prosecution of proving that during such period the prisoner was aware of his first wife's existence. The proviso to sect. 57 of 24 & 25 Vict. c. 100 relates therefore to procedure only, and where there is nothing but absence proved, the seven years rule applies; but when there is positive evidence of death, whether the marriage takes place within seven years or not is immaterial. The only decision which supports the conviction therefore is that of *Reg.* v. *Gibbons* (*ubi sup.*). [STEPHEN, J.—No; in *Reg.* v. *Bennett* (14 Cox C. C. 45) Bramwell, L.J. appears to have followed the ruling of Brett, J. in *Reg.* v. *Gibbons*.] The case of *Reg.* v. *Moore* (*ubi sup.*) appears not to have been reported at the time of such ruling, and in any case the preponderance of authority is in favour of the prisoner in the present case; and I submit that the conviction should be quashed.

No one appeared on behalf of the prosecution.

Cur. adv. vult.

May 11.—The following judgments were read, with the exception of that delivered orally by Lord Coleridge, C.J.:

WILLS, J.—In this case the prisoner was convicted of bigamy. She married a second time within seven years of the time when she last knew of her husband being alive, but upon information of his death, which the jury found that she, upon reasonable grounds, believed to be true. A few months after the second marriage he reappeared. The statute upon which the indictment was framed is the 24 & 25 Vict. c. 100, s. 57, which is in these words: "Whoever, being married, shall marry any other person during the life of the former husband or wife shall be guilty of felony, punishable with penal servitude for not more than seven years, or imprisonment with or without hard labour for not more than two years," with a proviso that "nothing in this Act shall extend to any person marrying a second time whose husband or wife shall

REG. v. TOLSON. 1889.

Bigamy—Absence of husband or wife for less than seven years—Bonâ fide belief in death on reasonable grounds—24 & 25 Vict. c. 100, s. 57.

REG. v. TOLSON
1889.

Bigamy— Absence of husband or wife for less than seven years — Bonâ fide belief in death on reasonable grounds— 24 & 25 Vict. c. 100, s. 57.

have been continually absent from such person for the space of seven years last past, and shall not have been known by such person to be living within that time." There is no doubt that under the circumstances the prisoner falls within the very words of the statute. She, being married, married another person during the life of her former husband, and, when she did so, he had not been continually absent from her for the space of seven years last past. It is, however, undoubtedly a principle of English criminal law, that ordinarily speaking a crime is not committed if the mind of the person doing the act in question be innocent. "It is a principle of natural justice and of our law," says Lord Kenyon, C.J., "that *actus non facit reum, nisi mens sit rea.* The intent and act must both concur to constitute the crime:" (*Fowler* v. *Padget*, 7 T. R. 509, 514.) The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong. That may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may co-exist with respect to the same deed. There are many things prohibited by no statute—fornication or seduction for instance—which nevertheless no one would hesitate to call wrong, and the intention to do an act wrong in this sense at the least must, as a general rule, exist before the act done can be considered crime. Knowingly and intentionally to break a statute must, I think, from a judicial point of view, always be morally wrong in the absence of special circumstances applicable to the particular instance and excusing the breach of the law, as, for instance, if a municipal regulation be broken to save life or to put out a fire. But to make it morally right some such special matter or excuse must exist, inasmuch as the administration of justice, and, indeed, the foundations of civil society rest upon the principle that obedience to the law, whether it be a law approved of or disapproved of by the individual, is the first duty of a citizen. Although *primâ facie*, and as a general rule, there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day which is so conceived. Bye-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health, or convenience, and such bye-laws are enforced by the sanction of penalties, and the breach of them constitutes an offence, and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the bye-law that the person committing it had *bonâ fide* made an accidental miscalculation or an erroneous measurement. The Acts are properly

Bigamy— Absence of husband or wife for less than seven years — Bonâ fide belief in death on reasonable grounds— 24 & 25 Vict. c. 100, s. 57.

construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does it at his peril. Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable. There is no difference, for instance, in the kind of language used by Acts of Parliament which made the unauthorised possession of Government stores a crime, and the language used in bye-laws which say that if a man builds a house or a wall so as to encroach upon a space protected by the bye-law from building, he shall be liable to a penalty. Yet, in *Reg.* v. *Sleep* (L. & C. 44; 30 L. J. 170, M. C.) it was held that a person in possession of Government stores with the broad arrow could not be convicted when there was not sufficient evidence to show that he knew they were so marked; whilst the mere infringement of a building bye-law would entail liability to the penalty. There is no difference between the language by which it is said that a man shall sweep the snow from the pavement in front of his house before a given hour in the morning, and if he fail to do so shall pay a penalty, and that by which it is said that a man sending vitriol by railway shall mark the nature of the goods on the package on pain of forfeiting a sum of money; and yet, I suppose, that in the first case the penalty would attach if the thing were not done, whilst in the other case it has been held, in *Hearne* v. *Garton* (2 E. & E. 66), that where the sender had made reasonable inquiry and was tricked into the belief that the goods were of an innocent character, he could not be convicted, although he had in fact sent the vitriol not properly marked. There is no difference between the language by which it is enacted that "whosoever shall unlawfully and wilfully kill any pigeon under such circumstances as shall not amount to a larceny at common law" shall be liable to a penalty, and the language by which it is enacted that "if any person shall commit any trespass by entering any land in the daytime in pursuit of game," he shall be liable to a penalty, and yet, in the first case it has been held that his state of mind is material (*Taylor* v. *Newman*, 4 B. & S. 89); in the second that it is immaterial (*Watkins* v. *Major*, L. Rep. 10 C. P. 662). So, again, there is no difference in language between the enactments I have referred to in which the absence of a guilty mind was held to be a defence, and that of the statute which says that "any person who shall receive two or more lunatics" into any unlicensed house shall be guilty of a misdemeanour, under which the contrary has been held: (*Reg.* v. *Bishop*, 5 Q. B. Div. 259). A statute provided that any clerk to justices who should, under colour and pretence of anything done by the justice or the

REG. v. TOLSON. 1889.

Bigamy — Absence of husband or wife for less than seven years — Bonâ fide belief in death on reasonable grounds — 24 & 25 Vict. c. 100, s. 57.

clerk, receive a fee greater than that provided for by a certain table, should for every such offence forfeit 20*l*. It was held that where a clerk to justices *bonâ fide* and reasonably but erroneously believed that there were two sureties bound in a recognisance besides the principal, and accordingly took a fee as for three recognisances when he was only entitled to charge for two, no action would lie for the penalty. "*Actus*," says Lord Campbell, "*non facit reum, nisi mens sit rea*. Here the defendant very reasonably believing that there were two sureties bound, besides the principal, has not, by making a charge in pursuance of his belief, incurred the forfeiture. The language of the statute is 'for every such offence.' If, therefore, the table allowed him to charge for three recognisances where there are a principal and two sureties, he has not committed an offence under the Act: (*Bowman* v. *Blyth*, 7 E. & B. 26, 43.) If identical language may thus be legitimately construed in two opposite senses, and is sometimes held to imply that there is and sometimes that there is not an offence when the guilty mind is absent, it is obvious that assistance must be sought *aliunde*, and that all circumstances must be taken into consideration which tend to show that the one construction or the other is reasonable, and amongst such circumstances it is impossible to discard the consequences. This is a consideration entitled to little weight if the words be incapable of more than one construction; but I have, I think, abundantly shown that there is nothing in the mere form of words used in the enactment now under consideration to prevent the application of what is certainly the normal rule of construction in the case of a statute constituting an offence entailing severe and degrading punishment. If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognised as a matter fairly to be taken into account. In a case in which a woman was indicted under 9 & 10 Will. 3, c. 41, s. 2, for having in her possession without a certificate from the proper authority Government stores marked in the manner described in the Act, it was argued that by the Act the possession of the certificate was made the sole excuse, and that as she had no certificate she must be convicted. Foster, J., said, however, that though the words of the statute seemed to exclude any other excuse, yet the circumstances must be taken into consideration; otherwise a law calculated for wise purposes might be made a handmaid to oppression, and directed the jury that if they thought the defendant came into possession of the stores without any fraud or misbehaviour on her part they ought to acquit her: (Foster's Crown Law, 3rd edit.; App. pp. 439, 440.) This ruling was adopted by Lord Kenyon in *Rex* v. *Banks* (1 Esp. 144), who considered it beyond question that the defendant might excuse himself by showing that he came innocently into such possession, and treated the unqualified words of the statute as merely shifting the burden of proof and making it necessary for the defendant to show matter of excuse,

Bigamy—Absence of husband or wife for less than seven years—Bonâ fide belief in death on reasonable grounds—24 & 25 Vict. c. 100, s. 57.

and to negative the guilty mind instead of its being necessary for the Crown to show the existence of the guilty mind. *Primâ facie* the statute was satisfied when the case was brought within its terms, and it then lay upon the defendant to prove that the violation of the law which had taken place had been committed accidentally or innocently so far as he was concerned. Suppose a man had taken up by mistake one of two baskets exactly alike and of similar weight, one of which contained innocent articles belonging to himself and the other marked Government stores, and was caught with the wrong basket in his hand. He would by his own act have brought himself within the very words of the statute. Who would think of convicting him? And yet what defence could there be except that his mind was innocent, and that he had not intended to do the thing forbidden by the statute? In *Fowler* v. *Padgett* (7 T. R. 509) the question was whether it was an act of bankruptcy for a man to depart from his dwelling-house whereby his creditors were defeated and delayed, although he had no intention of defeating and delaying them. The statute which constituted the act of bankruptcy was 1 Jac. 1, c. 15, which makes it an act of bankruptcy (amongst other things) for a man to depart his dwelling-house "to the intent or whereby his creditors may be defeated and delayed." The Court of King's Bench, consisting of Lord Kenyon, C.J., and Ashurst and Grose, JJ., held that there was no act of bankruptcy. "Bankruptcy," said Lord Kenyon, "is considered as a crime, and the bankrupt in the old laws is called an offender; but," he adds in the passage already cited, "it is a principle of natural justice and of our law, that *Actus non facit reum, nisi mens sit rea*," and the court went so far as to read "and" in the statute, in place of "or," which is the word used in the Act, in order to avoid the consequences, which appeared to them unjust and unreasonable. In *Rex* v. *Banks* (1 Esp. 144) above cited, Lord Kenyon referred to Foster, J.'s ruling in this case as that of "one of the best Crown lawyers that ever sat in Westminster Hall." These decisions of Foster, J. and Lord Kenyon have been repeatedly acted upon: see *Reg.* v. *Willmett* (3 Cox C. C. 281), *Reg.* v. *Cohen* (8 Cox C. C. 41), *Reg.* v. *Sleep*, in the Court for C. C. R., (L. & C. 44; 30 L. J., 170, M. C.); *Reg.* v. *O'Brien* (15 L. T. Rep. N. S. 419). Now, in the present instance one consequence of holding that the offence is complete if the husband or wife is *de facto* alive at the time of the second marriage, although the defendant had, at the time of the second marriage, every reason to believe the contrary, would be that though the evidence of death should be sufficient to induce the Court of Probate to grant probate of the will or administration of the goods of the man supposed to be dead, or to prevail with the jury upon an action by the heir to recover possession of his real property, the wife of the person supposed to be dead, who had married six years and eleven months after the last time that she had known him to be alive, would be guilty of felony in case he should turn up twenty years afterwards. It would be scarcely

REG. v. TOLSON. 1889.

Bigamy— Absence of husband or wife for less than seven years— Bonâ fide belief in death on reasonable grounds— 24 & 25 Vict. c. 100, s. 57.

less unreasonable to enact that those who had, in the meantime, distributed his personal estate, should be guilty of larceny. It seems to me to be a case to which it would not be improper to apply the language of Lord Kenyon, when dealing with a statute which, literally interpreted, led to what he considered an equally preposterous result, "I would adopt any construction of the statute that the words will bear, in order to avoid such monstrous consequences:" (*Fowler* v. *Padget*, 7 T. R. 509, 514.) Again, the nature and extent of the penalty attached to the offence may reasonably be considered. There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest. To subject him, when what he has done has been nothing but what any well-disposed man would have been very likely to do under the circumstances, to the forfeiture of all his goods and chattels, which would have been one consequence of a conviction at the date of the Act of 24 & 25 Vict., to the loss of civil rights, to imprisonment with hard labour, or even to penal servitude, is a very different matter; and such a fate seems properly reserved for those who have transgressed morally as well as unintentionally done something prohibited by law. I am well aware that the mischiefs which may result from bigamous marriages, however innocently contracted, are great: but I cannot think that the appropriate way of preventing them is to expose to the danger of a cruel injustice persons whose only error may be that of acting upon the same evidence as has appeared perfectly satisfactory to a Court of Probate, a tribunal emphatically difficult to satisfy in such matters, and certain only to act upon what appears to be the most cogent evidence of death. It is, as it seems to me, undesirable in the highest degree without necessity to multiply instances in which people shall be liable to conviction upon very grave charges when the circumstances are such that no judge in the kingdom would think of pronouncing more than a nominal sentence. It is said, however, in respect of the offence now under discussion, that the proviso in 24 & 25 Vict. c. 100, s. 57, that "nothing in the section shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for seven years last past, and shall not have been known by such person to be living within that time," points out the sole excuse of which the Act allows. I cannot see what necessity there is for drawing any such inference. It seems to me that it merely specifies one particular case, and indicates what in that case shall be sufficient to exempt the party without any further inquiry from criminal liability; and I think it is an argument of considerable weight, in this connection, that under 9 & 10 Will. 3, c. 41, s. 2, where a similar contention was founded upon the specification of one particular circumstance under which the possession of Government stores should be justified, successive judges and courts have refused to accede to the reasoning, and have

Bigamy— Absence of husband or wife for less than seven years — Bonâ fide belief in death on reasonable grounds— 24 & 25 Vict. c. 100, s. 57.

treated it, to use the words of Lord Kenyon, as a matter that "could not bear a question" that the defendant might show in other ways that his possession was without fraud or misbehaviour on his part: (*Rex* v. *Banks*, 1 Esp. 144, 147.) Upon the point in question there are conflicting decisions. It was held by Martin, B., in *Reg.* v. *Turner* (9 Cox C. C. 145), and by Cleasby, B., in *Reg Horton* (11 Cox C. C. 670), that *bonâ fide* belief, at the time of the second marriage, upon reasonable grounds, that the first husband or wife was dead was a defence. In *Reg.* v. *Gibbons* (12 Cox C. C. 237) it is said that it was held by Brett. J., after consulting Willes, J., that such a belief was no defence. The report, however, is most unsatisfactory, as, if the facts were as there stated, there was no reasonable evidence of such belief upon any reasonable grounds, and in *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154) Brett, J. gave a very elaborate judgment containing his matured and considered opinion upon a similar question, which it is quite impossible to reconcile with the supposed ruling in *Reg.* v. *Gibbons* (12 Cox C. C. 237). In *Reg.* v. *Bennett* (14 Cox C. C. 45), Bramwell, L.J. is reported to have followed *Reg.* v. *Gibbons* (12 Cox C. C. 237), and to have said that he always refused to act upon *Reg.* v. *Turner* (9 Cox C. C. 145). But here again the report is eminently unsatisfactory, for it proceeds to state that the prisoner was convicted of two other offences, forgery and obtaining money by false pretences, and sentenced to ten years' penal servitude, which is a greater sentence than he could have received for bigamy. Except for the purpose of bringing out the sort of man that the prisoner was, and so emphasising the fact that he deserved condign punishment, the bigamy trial might have been omitted. In *Reg.* v. *Moore* (13 Cox C. C. 544) Denman, J., after consultation with Amphlett, L.J., directed the acquittal of a woman charged with bigamy, the jury having found that although seven years had not elapsed since she last knew that her husband was living, she had, when she married a second time, a reasonable and *bonâ fide* belief that he was dead—saying that in his opinion, and that of Amphlett, L.J., such a belief was a defence. He added, however, that his opinion was not to be taken as a final one; and that had the circumstances been such that the prisoner would, if the conviction could be sustained, have deserved a substantial sentence, he should have directed a conviction and reserved the question. There is nothing, therefore, in the state of the authorities directly bearing upon the question to prevent one from deciding it upon the grounds of principle. It is suggested, however, that the important decision of the court of fifteen judges in *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154) is an authority in favour of a conviction in this case. I do not think so. In *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154) the prisoner was indicted under 24 & 25 Vict. c. 100, s. 55, for "unlawfully taking an unmarried girl, being then under the age of sixteen years, out of the possession and against the will of her father." The jury found that the prisoner *bonâ fide* believed upon reasonable grounds

REG. v. TOLSON. 1889.

Bigamy— Absence of husband or wife for less than seven years — Bonâ fide belief in death on reasonable grounds— 24 & 25 Vict. c. 100, s. 57.

that she was eighteen. The Court (*dissentiente* Brett, J.) upheld the conviction. Two judgments were delivered by a majority of the court, in each of which several judges concurred, whilst three of them, Denman, J., Pollock, B., and Quain, J., concurred in both. The first of the two, being the judgment of nine judges, upheld the conviction upon the ground that, looking to the subject-matter of the enactment, to the group of sections amongst which it is found, and to the history of legislation on the subject, the intention of the Legislature was that if a man took an unmarried girl under sixteen out of the possession of her father against his will, he must take his chance of whether any belief he might have about her age was right or wrong, and if he made a mistake upon this point so much the worse for him; he must bear the consequences. The second of the two judgments, being that of seven judges, gives a number of other reasons for arriving at the same conclusion, some of them founded upon the policy of the Legislature as illustrated by other associated sections of the same Act. This judgment contains an emphatic recognition of the doctrine of the "guilty mind," as an element, in general, of a criminal act, and supports the conviction upon the ground that the defendant, who believed the girl to be eighteen and not sixteen, even then, in taking her out of the possession of the father against his will was doing an act wrong in itself. "This opinion," says the judgment, "gives full scope to the doctrine of the *mens rea*" (L. Rep. C. C. R. 175). The case of *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154) therefore is a direct and cogent authority for saying that the intention of the Legislature cannot be decided upon simple prohibitory words, without reference to other considerations. The considerations relied upon in that case are wanting in the present case, whilst, as it seems to me, those which point to the application of the principle underlying a vast area of criminal enactment, that there can be no crime without a tainted mind preponderate greatly over any that point to its exclusion. In my opinion, therefore, this conviction ought to be quashed. My brother Charles authorises me to say that this judgment expresses his views as well as my own.

CAVE, J.—In this case the prisoner was convicted of bigamy. She was married on the 11th day of September, 1880, and was deserted by her husband on the 13th day of December, 1881. From inquiries which she and her father made about him from his brother, she was led to believe that he had been lost in a vessel bound for America, which went down with all hands. In January, 1887, she married again, supposing herself to be a widow. Her first husband returned from America in December, 1887. The jury found that the prisoner in good faith, and on reasonable grounds, believed her husband to be dead at the time of her second marriage. At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act,

Bigamy — Absence of husband or wife for less than seven years — Bonâ fide belief in death on reasonable grounds — 24 & 25 Vict. c. 100, s. 57.

has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim, *Actus non facit reum, nisi mens sit rea.* Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy. Instances of the existence of this common law doctrine will readily occur to the mind. So far as I am aware, it has never been suggested that these exceptions do not equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication. In *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154), in which the principle of mistake underwent much discussion, it was not suggested by any of the judges that the exception of honest and reasonable mistake was not applicable to all offences, whether existing at common law or created by statute. As I understand the judgments in that case the difference of opinion was as to the exact extent of the exception, Brett, J., the dissenting judge, holding that it applied wherever the accused honestly and reasonably believed in the existence of circumstances which, if true, would have made his act not criminal, while the majority of the judges seem to have held that in order to make the defence available in that case the accused must have proved the existence in his mind of an honest and reasonable belief in the existence of circumstances which, if they had really existed, would have made his act not only not criminal but also not immoral. Whether the majority held that the general exception is limited to cases where there is an honest belief not only in facts which would make the act not criminal, but also in facts which would make it not immoral, or whether they held that the general doctrine was correctly stated by Brett, J., and that the further limitation was to be inferred from the language of the particular statute they were then discussing, is not very clear. It is, however, immaterial in this case, as the jury have found that the accused honestly and reasonably believed in the existence of a state of circumstances, viz., in her first husband's death, which, had it really existed, would have rendered her act not only not criminal, but also not immoral. It is argued, however, that assuming the general exception to be as stated, yet the language of the Act (24 & 25 Vict. c. 100, s. 57), is such that that exception is necessarily excluded in this case. Now, it is undoubtedly within the competence of the Legislature to enact that a man shall be branded as a felon and punished for doing an act which he honestly and reasonably believes to be lawful and right; just as the Legislature may enact that a child or a lunatic shall be punished criminally for an act which he has been led to commit by the immaturity or perversion of his reasoning faculty. But such a result seems so revolting to the moral sense that we ought to require the clearest and most indisputable evidence that such is the meaning of the Act. It is said that this inference necessarily arises from the language of the section in question, and particularly of the proviso. The section (omitting immaterial

REG. v. TOLSON. 1889.

Bigamy— Absence of husband or wife for less than seven years — Bonâ fide belief in death on reasonable grounds— 24 & 25 Vict. c. 100, s. 57.

parts) is in these words: "Whosoever being married shall marry any other person during the life of the former husband or wife shall be guilty of felony; provided that nothing in this section contained shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time." It is argued that the first part is expressed absolutely; but, surely, it is not contended that the language admits of no exception, and therefore that a lunatic who, under the influence of a delusion, marries again, must be convicted; and, if an exception is to be admitted where the reasoning faculty is perverted by disease, why is not an exception equally to be admitted where the reasoning faculty, although honestly and reasonably exercised, is deceived? But it is said that the proviso is inconsistent with the exception contended for; and, undoubtedly, if the proviso covers less ground or only the same ground as the exception, it follows that the Legislature has expressed an intention that the exception shall not operate until after seven years from the disappearance of the first husband. But if, on the other hand, the proviso covers more ground than the general exception, surely it is no argument to say that the Legislature must have intended that the more limited defence shall not operate within the seven years, because it has provided that a less limited defence shall only come into operation at the expiration of those years. What must the accused prove to bring herself within the general exception? She must prove facts from which the jury may reasonably infer that she honestly and on reasonable grounds believed her first husband to be dead before she married again. What must she prove to bring herself within the proviso? Simply that her husband has been continually absent for seven years; and, if she can do that, it will be no answer to prove that she had no reasonable grounds for believing him to be dead, or that she did not honestly believe it. Unless the prosecution can prove that she knew her husband to be living within the seven years she must be acquitted. The honesty or reasonableness of her belief is no longer in issue. Even if it could be proved that she believed him to be alive all the time, as distinct from knowing him to be so, the prosecution must fail. The proviso, therefore, is far wider than the general exception; and the intention of the Legislature, that a wider and more easily established defence should be open after seven years from the disappearance of the husband, is not necessarily inconsistent with the intention that a different defence, less extensive and more difficult of proof, should be open within the seven years. Some difficulty in seeing that the proviso is wider than the general exception has arisen from the establishment of the presumption of a man's death after he has not been heard of for seven years, and from the increased facilities for transmitting intelligence which are due to modern science. If we turn to the 1 Jac. 1, c. 11, the first statute which

Bigamy— Absence of husband or wife for less than seven years — Bonâ fide belief in death on reasonable grounds— 24 & 25 Vict. c. 100, s. 57.

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

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

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

REG. v. TOLSON. 1889.

Bigamy— Absence of husband or wife for less than seven years — Bonâ fide belief in death on reasonable grounds— 24 & 25 Vict. c. 100, s. 57.

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

Bigamy— Absence of husband or wife for less than seven years — Bonâ fide belief in death on reasonable grounds— 24 & 25 Vict. c. 100, s. 57.

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

REG. v. TOLSON. 1889.

Bigamy— Absence of husband or wife for less than seven years— Bonâ fide belief in death on reasonable grounds— 24 & 25 Vict. c. 100, s. 57.

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

Bigamy—Absence of husband or wife for less than seven years—Bonâ fide belief in death on reasonable grounds—24 & 25 Vict. c. 100, s. 57.

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

REG. v. TOLSON. 1889.

Bigamy— Absence of husband or wife for less than seven years— Bonâ fide belief in death on reasonable grounds— 24 & 25 Vict. c. 100, s. 57.

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

Bigamy—Absence of husband or wife for less than seven years—Bonâ fide belief in death on reasonable grounds—24 & 25 Vict. c. 100, s. 57.

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

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

REG. v. TOLSON. 1889.

Bigamy— Absence of husband or wife for less than seven years— Bonâ fide belief in death on reasonable grounds— 24 & 25 Vict. c. 100, s. 57.

absence of that *mens rea* which is an essential element in every charge of felony. In Hawkins, P. C., book 1, c. 25, s. 3, Of Felony, it is said: "It is always accompanied with an evil intention, and therefore shall not be imputed to a mere mistake or misanimadversion." In Hale's P. C., vol. 2, p. 184, it is said "an indictment of felony must always allege the fact to be done *felonice*." To the same effect is the language of Hawkins, P. C., book 2, c. 25, s. 55, and many cases are to be found in the books which put it beyond doubt that an indictment for felony is bad if it omits to aver the act charged to have been done "feloniously," and this whether the felony be one at common law or created by statute: (*Reg.* v. *Gray*, L. & C. 365.) As to the meaning of the term "feloniously" I do not think I can better define my understanding of it when introduced into an indictment as descriptive of the act charged than by saying that I look upon it as meaning that such act was done with a mind bent on doing that which is wrong, or, as it has been sometimes said, with a guilty mind. As to this I may refer to Hawkins, P. C., c. 7, s. 1, where it is said that the term "felony" *ex vi termini* signifies "Quodlibet crimen felleo animo perpetratum." In support of this view a whole list of authorities might be quoted. I shall, however, content myself by citing the most recent of them, viz., *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154), in which most of the cases bearing on the subject are very carefully reviewed by the present Master of the Rolls, then Brett, J., whose language I cheerfully adopt as expressive of my own views touching the principles of law which govern such questions as that now before us. He says (at p. 162): "It would seem that there must be proof to satisfy a jury ultimately that there was a criminal mind, or *mens rea*, in every offence really charged as a crime;" "in some cases the proof of the committal of the acts may *primâ facie*, either by reason of their own nature, or by reason of the form of the statute, import the proof of the *mens rea*. But even in those cases it is open to the prisoner to rebut the *primâ facie* evidence, so that if in the end the jury are satisfied that there was no criminal mind, or *mens rea*, there cannot be a conviction in England for that which is by the law considered to be a crime." In this view of the law, so stated by Brett, J., all the other judges, fifteen in number, before whom the matter was heard, practically acquiesced. They differed, however, in the application of the law to the facts of the particular case, Brett, J. thinking that there was in the prisoner no such *mens rea* as was necessary to constitute a crime; the rest of the court thinking that the act of abduction of which the prisoner was guilty, being a morally wrong act, afforded abundant proof of his criminal mind. It has, however, been suggested that the intention of the Legislature to make a second marriage during the life of the former husband or wife a crime, whatever may have been the circumstances attending it, unless the case is brought within the proviso which follows in the same section, is proved by the

Bigamy— Absence of husband or wife for less than seven years — Bonâ fide belief in death on reasonable grounds— 24 & 25 Vict. c. 100, s. 57.

introduction of that proviso, which runs as follows: "Provided that nothing in this section contained shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past and shall not have been known by such person to be living within that time." I cannot take that view of the proviso. It seems to me to be far more reasonable to look upon that portion of the section as intended simply and absolutely to exempt from the operation of it any person who should not have had actual knowledge of his or her former wife or husband being alive within seven years before the second marriage, and not to deprive a person indicted for bigamy of any defence which would have been open to him or her had the proviso never been introduced at all. I cannot for a moment suppose that the Legislature ever contemplated that a woman who within seven years from the day she last knew her husband to be living, *bonâ fide* trusting and relying upon a body of evidence overwhelmingly sufficient to satisfy the best of judges and juries that he was dead, and honestly believing upon such evidence that he was so, married again, feeling that in so doing she was doing a perfectly legal and moral act, should nevertheless be liable to be indicted for the felony of bigamy, and convicted and condemned to a long term of penal servitude, upon mere proof that, though honestly and reasonably believed by her to be dead, her former husband was in fact alive. A thousand illustrations to demonstrate the cruelty and injustice of such a state of the law might be suggested, but I cannot think that even one is necessary. If the views of those who support this conviction could be upheld, no person could with absolute certainty of immunity marry a second time until seven years had elapsed after the supposed death of a former husband or wife, no matter how strong and cogent the proof of such death might be. I do not think it will assist in the solution of the question to refer to the conflicting opinions of single judges upon the point, beyond calling attention to the fact that the case of *Reg.* v. *Gibbons* (12 Cox C. C. 237), in which Brett, J. (after consulting Willes, J.) ruled that such circumstances as are relied on in the present case afforded no defence, occurred in the year 1872, whereas the case of *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154), in which the same learned judge delivered the judgment to which I have referred, was not decided till three years later. After the latter judgment I doubt if that learned judge would have adhered to the opinion expressed by him in the year 1872. I am, for the reasons above expressed, of opinion that the conviction ought to be reversed.

MANISTY, J.—I am of opinion that the conviction should be affirmed. The question is, whether if a married woman marries another man during the life of her first husband and within seven years of his leaving her she is guilty of felony, the jury having found as a fact that she had reason to believe and did honestly believe that her first husband was dead. The 57th section of the

REG. v. TOLSON. 1889.

Bigamy— Absence of husband or wife for less than seven years— Bonâ fide belief in death on reasonable grounds— 24 & 25 Vict. c. 100, s. 57.

24 & 25 Vict. c. 100, is as express and as free from ambiguity as words can make it. The statute says, "Whosoever being married shall marry any other person during the life of the former husband or wife . . . shall be guilty of felony, and being convicted, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour." The statute does not even say if the accused shall feloniously or unlawfully or knowingly commit the act he or she shall be guilty of felony, but the enactment is couched in the clearest language that could be used to prohibit the act and to make it a felony if the act is committed. If any doubt could be entertained on the point it seems to me the proviso which follows the enactment ought to remove it. The proviso is that "nothing in the 57th section of the Act shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time." Such being the plain language of the Act, it is, in my opinion, the imperative duty of the court to give effect to it, and to leave it to the Legislature to alter the law if it thinks it ought to be altered. Probably, if the law was altered, some provision would be made in favour of children of the second marriage. If the second marriage is to be deemed to be legal for one purpose, surely it ought to be deemed legal as to the children who are the offspring of it. If it be within the province of the court to consider the reasons which induced the Legislature to pass the Act as it is, it seems to me one principal reason is on the surface, namely, the consequence of a married person marrying again in the lifetime of his or her first wife or husband, in which case it might and in many cases would be, that several children of the second marriage would be born and all would be bastards. The proviso is evidently founded upon the assumption that after the lapse of seven years and the former husband or wife not being heard of, it may reasonably be inferred that he or she is dead, and thus the mischief of a second marriage in the lifetime of the first husband or wife is to a great extent, if not altogether, avoided. It is to be borne in mind that bigamy never was a crime at common law. It has been the subject of several Acts of Parliament, and is now governed by 24 & 25 Vict. c. 100, s. 57. No doubt, in construing a statute the intention of the Legislature is what the court has to ascertain, but the intention must be collected from the language used, and where that language is plain and explicit and free from all ambiguity, as it is in the present case, I have always understood that it is the imperative duty of judges to give effect to it. The cases of insanity, &c., on which reliance is placed, stand on a totally different principle, viz., that of an absence of *mens*. Ignorance of the law is no excuse for the violation of it, and if a person chooses to run the

Bigamy— Absence of husband or wife for less than seven years— Bonâ fide belief in death on reasonable grounds— 24 & 25 Vict. c. 100, s. 57.

risk of committing a felony he or she must take the consequences if it turn out that a felony has been committed. Great stress is laid by those who hold that the conviction should be quashed upon the circumstance that the crime of bigamy is by the statute declared to be a felony and punishable with penal servitude or imprisonment with or without hard labour for any term not exceeding two years. If the crime had been declared to be a misdemeanour punishable with fine or imprisonment, surely the construction of the statute would have been, or ought to have been, the same. It may well be that the Legislature declared it to be a felony to deter married persons from running the risk of committing the crime of bigamy, and in order that a severe punishment might be inflicted in cases where there were no mitigating circumstances. No doubt circumstances may and do affect the sentence, even to the extent of the punishment being nominal, as it was in the present case, but that is a very different thing from disregarding and contravening the plain words of the Act of Parliament. The case is put by some of my learned brothers of a married man leaving his wife and going into a foreign country intending to settle there, and it may be afterwards to send for his wife and children, and the ship in which he goes is lost in a storm with, as is supposed, all on board, and after the lapse of say a year, and no tidings received of anyone having been saved, the underwriters pay the insurance on the ship, and the supposed widow gets probate of her husband's will and marries and has children, and after the lapse of several years the husband appears, it may be a few days before seven years have expired, and the question is asked, Would it not be shocking that in such a case the wife could be found guilty of bigamy? My answer is that the Act of Parliament says in clear and express words, for very good reasons, as I have already pointed out, that she is guilty of bigamy. The only shocking fact would be that someone for some purpose of his own had instituted the prosecution. I need not say that no Public Prosecutor would ever think of doing so, and the judge before whom the case came on for trial would, as my brother Stephen did in the present case, pass a nominal sentence of a day's imprisonment (which in effect is immediate discharge) accompanied, if I were the judge, with a disallowance of the costs of the prosecution. It may be said, but the woman is put to some trouble and expense in appearing before the magistrate, who would of course take nominal bail, and in appearing to take her trial. Be it so; but such a case would be very rare indeed. On the other hand, see what a door would be opened to collusion and mischief if in the vast number of cases where men in humble life leave their wives and go abroad it would be a good defence for a woman to say and give proof, which the jury believed, that she had been informed by some person upon whom she honestly thought she had reason to rely, and did believe, that her husband was dead, whereas in fact she had been imposed upon and her husband was alive. What

REG. v. TOLSON. 1889.

Bigamy—Absence of husband or wife for less than seven years—Bonâ fide belief in death on reasonable grounds—24 & 25 Vict. c. 100, s. 57.

operates strongly on my mind is this, that if the Legislature intended to prohibit a second marriage in the lifetime of a husband or wife, and to make it a crime, subject to the proviso as to seven years, I do not believe that language more apt or precise could be found to give effect to that intention than the language contained in the 57th section of the Act in question. In this view I am fortified by several sections of the same Act, where the words "unlawfully" and "maliciously and unlawfully" are used (as in sect. 23), and by a comparison of them with the section in question (sect. 57) where no such words are to be found. I especially rely upon the 55th section, by which it is enacted that "whosoever shall unlawfully" (a word not used in sect. 57) take or cause to be taken any unmarried girl being under the age of sixteen years out of the possession of her father or mother or any other person having the lawful care or charge of her, shall be guilty of a misdemeanour." Fifteen out of sixteen judges held in the case of *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154), that, notwithstanding the use of the word "unlawfully," the fact of the prisoner believing, and having reason to believe, that the girl was over sixteen afforded no defence. This decision is approved of upon the present occasion by five judges making in all twenty against the nine who are in favour of quashing the conviction. To the twenty I may, I think, fairly add Tindal, C.J. in *Reg.* v. *Robins* (1 C. & K. 456) and Willes, J. in *Reg.* v. *Mycock* (12 Cox C. C. 28). I rely also very much upon the 5th section of the Act passed in 1885 for the better protection of women and girls (48 & 49 Vict. c. 69), by which it was enacted that "any person who unlawfully and carnally knows any girl above thirteen and under sixteen years shall be guilty of a misdemeanour," but to that is added a proviso that "it shall be a sufficient defence if it be made to appear to the court or jury before whom the charge shall be brought that the person charged had reasonable cause to believe and did believe that the girl was of or above the age of sixteen." It is to be observed that, notwithstanding the word "unlawfully" appears in this section, it was considered necessary to add the proviso, without which it would have been no defence that the accused had reasonable cause to believe and did believe that the girl was of or above the age of sixteen. Those who hold that the conviction in the present case should be quashed really import into the 57th section of the 24 & 25 Vict. c. 100, the proviso which is in the 5th section of the 48 & 49 Vict. c. 69, contrary, as it seems to me, to the decision in *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154), and to the hitherto undisputed canons for construing a statute. It is said that an indictment for the offence of bigamy commences by stating that the accused feloniously married, &c., and consequently the principle of *mens rea* is applicable. To this I answer that it is to the language of the Act of Parliament, and not to that of the indictment, the court have to look. I consider the indictment would be perfectly good if it stated that the accused,

Bigamy—Absence of husband or wife for less than seven years—Bonâ fide belief in death on reasonable grounds—24 & 25 Vict. c. 100, s. 57.

being married, married again in the lifetime of his or her wife or husband contrary to the statute, and so was guilty of felony. I am very sorry we had not the advantage of having the case argued by counsel on behalf of the Crown. My reason for abstaining from commenting upon the cases cited by Mr. Henry in his very able argument for the prisoner is because the difference of opinion among some of the judges in those cases is as nothing compared with the solemn decision of fifteen out of sixteen judges in the case of *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154). So far as I am aware, in none of the cases cited by my learned brothers was the interest of third parties, such as the fact of there being children of the second marriage, involved. I have listened with attention to the judgments which have been delivered, and I have not heard a single observation with reference to this, to my mind, important and essential point. I am absolutely unable to distinguish *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154) from the present case, and, looking to the names of the eminent judges who constituted the majority, and to the reasons given in their judgments, I am of opinion, upon authority as well as principle, that the conviction should be affirmed. The only observation which I wish to make is (speaking for myself only), that I agree with my learned brother Stephen in thinking that the phrases "mens rea" and "non est reus nisi men sit rea" are not of much practical value, and are not only "likely to mislead," but are "absolutely misleading." Whether they have had that effect in the present case on the one side or the other it is not for me to say. I think the conviction should be affirmed. My brothers Denman, Pollock, Field, and Huddleston agree with this judgment, but my brother Denman has written a short opinion of his own, with which my brother Field agrees. This opinion is as follows:

DENMAN, J.—Having done my best to form a correct judgment as to the real intention of the statute on which the question turns, I have come to the conclusion, notwithstanding the reasons which have been given to the contrary, that it was intended to provide, and does provide, that any person who marries another (his or her wife or husband, as the case may be, being at the time alive) does so at his or her peril; and can only make good a defence to a prosecution for bigamy by proving a continuous absence for seven years; and that even such an absence will not be a defence if the prosecution can prove knowledge on the part of the accused within seven years of the second marriage that the first wife or husband, as the case may be, was still alive. I am desired by my brother Field to add that he agrees in this view, but that he also agrees with me that it is not necessary to give any detailed reasons for dissenting from the judgment of the majority.

Lord COLERIDGE, C.J.—At the conclusion of the arguments in this case I was one of those who was inclined to dissent from the opinion of the majority, and if the statute had not contained the proviso which it does contain, I should not have at that time

REG. v. TOLSON. 1889.

Bigamy—Absence of husband or wife for less than seven years—Bonâ fide belief in death on reasonable grounds—24 & 25 Vict. c. 100, s. 57.

dissented from that opinion. My reasons were—as has been very well put by the judges who differ from the conclusion at which I have now arrived—that, the enactment of the statute being positive, and there being in the very same section a proviso limiting the positiveness of that construction, the whole section must be read together, as if it lay upon the prosecution to show that the case did not lie within the proviso. If that were so, I should have maintained my opinion, and I am very far indeed from saying that there is no considerable ground and reason for maintaining that view. But I have had the great advantage of reading the judgment of my brother Cave in this case, and I have found myself unable to answer satisfactorily to my own mind the view which he puts forward as to the effect of the proviso upon the positive enactment of the statute. If there had been no proviso, I confess I should have thought that this statute was to be read like any other statute, and that it was to be shown, or evidence was to be given, of the felonious intention with which the act in question was performed. That might be an inference to be drawn from the mere fact of the marriage being contracted, but it might also well be an inference that might be rebutted, as it might in any other case, by the distinct and absolute proof that the intention to violate the statute—I do not mean the intention to do the particular act, and the intention to violate any particular statute, but what has been defined, and for all purposes sufficiently defined, as the *mens rea*—existed in the person who was indicted. If that had been so, I should have thought at the beginning that the majority were right. I do not think so for the reason that I have given. I am unable to answer the view of the proviso which has been put forward by my brother Cave, and I have, therefore, perhaps with some reluctance, come to the conclusion that the reasoning of the judgment of the majority is in this case correct. I think it desirable to add, that, as far as I understand, none of the learned judges in this case differ from the judgments in *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154). I certainly have no intention of differing from those judgments. An effort has been made, apparently not satisfactory to my brother Manisty, to distinguish this case from *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154); but it would be unbecoming in a single judge, and unbecoming in any judge to presume to overrule the decision arrived at by so powerful a court, by a single—no doubt very able—dissenting judge. I accept it, in my view of it, as fully as my learned brother, and I believe that all my learned brethren would concur with me in saying that, though they may perhaps be wrong in taking the view of that decision, that they do take (nobody can be infallible), they intend to accept the decision of the majority of the judges in *Reg.* v. *Prince* (L. Rep. 2 C. C. R. 154). I am therefore of opinion that this conviction should be quashed.

Conviction quashed.

Solicitor for prisoner, *Atter*, Whitehaven.