is not sanctioned by the local law. Clearly if they married by Moslem ceremony abroad where the marriage would be recognized in Australia, and then moved to Western Australia while retaining their Moslem Indian domicile, the Court would order succession as required by Moslem law[47] unless the succession laws themselves offended the Australian sense of propriety.[48] It would seem that the only mistake made by Abdul and Azra was to marry while temporarily resident in Australia[49] and not in India. While it is perhaps clear that where the issue is that of recognition of the marriage, the *locus* is a valid determinent,[50] the enforcement of a settlement deliberately entered into is surely worthy of greater indulgence since for these parties at least, the settlement was not an inducement as in *Coulson* but merely what a Moslem bride would expect. To invoke public policy to deny enforcement to such a settlement is, it is submitted, perhaps to extend the spirit of the rule under the cloak of preserving its letter.

D. M. BYRNE

THE QUEEN v. REYNHOUDT[1]

Criminal law—Crimes Act 1958 section 40—assaulting police officer in due execution of duty—necessity to prove intent as to all elements—effect of re-enactment subsequent to a particular judicial interpretation

This was an application by the Crown for special leave to appeal from a decision of the Full Court of the Supreme Court of Victoria, sitting as the Court of Criminal Appeal, which quashed a conviction of the respondent upon a count in an indictment charging him with the offence under section 40 of the Crimes Act 1958, of assaulting a member of the police force in the due execution of his duty. Section 40 provides that:

> Whosoever . . . assaults resists or wilfully obstructs any member of the police force in the due execution of his duty . . . shall be guilty of a misdemeanour.

The Chairman of General Sessions had instructed the jury that the prosecution was not obliged to prove that the respondent, at the time of the alleged assault, knew that the object of that assault was a police officer acting in the due execution of his duty. In so doing the Chairman acted

[47] *Polydore v. Prince* (1837) Ware, 402. *Williams v. Oates* 27 North Carolina Rep. 375, both cases are cited by Beckett *op. cit.* 350; *Srini Vasan v. Srini Vasan* [1946] P. 67, and *Sinha Peerage Case* (1939) 171 Lords Journals 350; [1946] 1 All E.R. 348 n. *per* Lord Maugham.

[48] Supposing a colony in Australia was established of persons whose custom required that wives passed to the heir with other moveable property, it would be expected that some limits be imposed on such liberty of conscience. This is an argument which found favour with MacFarlan J. in *Merwin Pastoral Co. Pty Ltd v. Moolpa Pastoral Co. Pty Ltd* (unrep.) but which was rejected on the facts by the High Court of Australia on appeal (1933) 48 C.L.R. 565.

[49] Their Honours found that Abdul had not acquired an Australian domicile.

[50] See for example *Brook v. Brook* (1861) 9 H.L.C. 193.

The writer wishes to thank the Registrar of the High Court in making available the transcript of this case which proved invaluable in the writing of this note.

[1] (1962) 36 A.L.J.R. 26. High Court of Australia; Dixon C.J., Kitto, Taylor, Menzies and Owen JJ.

in accordance with the decision in *The Queen v. Galvin (No. 1)*[2] but in ignorance of the decision in *The Queen v. Galvin (No. 2)*[3] where a second Court of Criminal Appeal consisting of five judges overruled the earlier decision. The Court of Criminal Appeal in the present case considered itself bound by *Galvin (No. 2)* and therefore quashed the conviction and ordered a new trial.

In *Galvin (No. 1)* Sholl J., delivering the judgment of the Court, stated that

> Knowledge on the part of the accused that the person assaulted . . . is a police officer, or that he is acting in the due execution of his duty, is not a part of the definition of the offence and need not be proved by the prosecution in the first instance as part of its essential case.[4]

He went on to say that it was sufficient for the Crown to prove an assault and that the person assaulted was in fact a police officer acting in the due execution of his duty. The accused might, however, exculpate himself by establishing on the balance of probabilities an honest and reasonable belief in a set of facts which, if true, would have made his actions innocent, such as a belief that the police officer was unlawfully assaulting him.

At Galvin's second trial (ordered for reasons not here material) the trial judge gave directions in accordance with the Full Court decision. Galvin was convicted and appealed to a specially constituted Court of Criminal Appeal. The majority[5] stated that the offence created by section 40 required that the accused intended to assault (or resist or obstruct) a *policeman in the execution of his duty:*

> Section 40 . . . is creating a crime consisting of an aggravated form of assault. . . . Surely the common law requirement that the assault must be intentional is to be carried forward into these aggravating elements of the new offence. The accused must intend to assault and he must intend to assault a policeman in the due execution of his duty.[6]

The onus of proving this intention was always on the Crown. But this did not mean that *knowledge* on the part of the accused that his victim was a police officer acting in the due execution of his duty was necessary in all cases to prove intention. '[A] man may intend to assault a policeman without knowing that he is a policeman.'[7]

Barry J. went further. His Honour held that actual knowledge on the accused's part that the victim was a police officer in the due execution of his duty was an essential part of the Crown case.[8] He contended that

[2] [1961] V.R. 733; Gavan Duffy, Sholl and Adam JJ.
[3] [1961] V.R. 740; O'Bryan, Barry, Dean and Hudson JJ.; Sholl J. dissenting.
[4] *Ibid.* 738. [5] O'Bryan, Dean and Hudson JJ. [6] [1961] V.R. 740, 748.
[7] *Ibid.* 750. At 748-749 the illustration is given of an evilly disposed person who says: 'This fellow looks like a policeman on duty, I hate all policemen, I will assault him.' This, according to the majority judgment, constitutes the *mens rea* necessary for the offence even if the accused did not know the victim was a policeman, for he nevertheless intended to assault a police officer in the due execution of his duty. If the victim were not, in fact, a policeman then the *actus reus* necessary for the offence would not of course have been proved.
[8] *Ibid.* 753-754. But by the use of the term 'actual knowledge' he includes a reckless, as distinct from a negligent omission to use readily available means of

no practical problem would be caused by this analysis for, normally, once it was proved that the victim was in fact a policeman acting in the due execution of his duty, the surrounding circumstances would be sufficient to raise an inference that the accused was aware of this state of affairs. Sholl J. dissented, standing by his judgment in *Galvin* (*No. 1*).

These, then, were the two conflicting views with which the High Court was faced in determining the question which fell for decision in *Reynhoudt's* case—that is, the sort of guilty mind which it is necessary for the Crown to prove an accused to have possessed at the time of the assault in order to constitute an offence within section 40.

The majority of the High Court granted special leave to appeal and allowed the appeal. Their view was that section 40 required intention in respect of the assault alone, and it was sufficient for the Crown to prove that the victim was in fact a policeman acting in the due execution of his duty. Taylor J. disposed of an argument advanced in *Galvin* (*No. 1*) to the effect that the word 'wilfully' in the section indicated that the Crown had to prove intention as to all elements of the offence, by the contention that the word referred only to the following word—that is, its purpose was to show that the section was only concerned with intentional obstructions. He reasoned that the section was not merely intended to apply to cases where a specific intent was proved, but rather to all cases of assaults on a policeman in the execution of his duty even if committed in ignorance of the policeman's identity. Further, the section (and its predecessors) had received practically a uniform interpretation, from the decision of a Recorder in 1865[9] approved by a great majority of the judges in *Reg. v. Prince*[10] and more recently in *R. v. Mark*,[11] and this interpretation must be taken to have been adopted by the legislature in view of the persistent re-enactment of the section. The only contrary authorities were *Galvin* (*No. 2*) and two cases in other Commonwealth jurisdictions.[12] But it would seem that, at best, authority is inconclusive on the point. Further the view of the Chief Justice in his dissenting

information, drawing on the method of Devlin J. in *Roper v. Taylor's Central Garages (Exeter) Ltd* [1951] 2 T.L.R. 284, 288-289.

[9] *R. v. Forbes and Webb* (1865) 10 Cox C.C. 362, where Mr Russell Gurney Q.C. stated that: 'the offence was, not assaulting them knowing them to be in the execution of their duty, but assaulting them being in the execution of their duty.' The learned Recorder was dealing with a predecessor of the instant section—Offences Against the Person Act 1861 24 & 25 Vict. c. 100 s. 38.

[10] (1875) 13 Cox C.C. 138, 142-143. Bramwell B. (with whom five of the judges concurred) stated with approval that: 'A man was held liable for assaulting a police officer in the execution of his duty, though he did not know he was a police officer (*R. v. Forbes and Webb*).'

[11] [1961] *Criminal Law Review* 173.

[12] *R. v. Wallendorf* [1920] South African L.R. App. Div. 383 and *R. v. McLeod* (1954) III Can. Cr. C. 106. It might be added that Dr Glanville Williams in *Criminal Law—The General Part* (2nd ed. 1961) 194 remarks that 'the only useful comment that can be made on *Forbes* is that it is a mere direction to the jury by a recorder and is unsound' and that this view is accepted by Smith, 'The Guilty Mind in the Criminal Law' (1960) 76 *Law Quarterly Review* 78, 84, n. 12. However, as Owen J. points out, many of the standard texts adopt the treatment of *R. v. Forbes and Webb*: *Archbold's Criminal Pleading and Practice* (34th ed. 1959) 23, 1042; *Russell on Crimes* (11th ed. 1958) i, 764; *Halsbury's Laws of England* (3rd ed. 1956) x, 274, 275.

opinion on the effect of re-enactment is surely preferable from a practical point of view.

Menzies J. contended that the difficulty with the view put forward in *Galvin* (*No.* 2) was that, if the Crown had to prove a fulfilled intention to assault a policeman in the due execution of his duty, this normally could only be done by proof that the accused *knew* his victim was such a policeman. And mere proof of the fact that the victim *was* such a policeman is no proof that the accused was aware of the fact for this approach, in practice, would amount to something little different from treating knowledge as no part of the definition of the offence.[13] Such a burden would be too heavy a load to place on the Crown. This view, according to His Honour, was supported by the use of the word 'wilfully' before 'obstructs' for the limitation would have been unnecessary had an intention to obstruct a policeman in the due execution of his duty been essential to the offence in any case. Further, where knowledge was intended by the legislature to be essential to an offence in sections surrounding section 40 the word 'knowingly' had been used. This was also reinforced by the aim of the legislature which was to protect policemen in the execution of their dangerous duties by imposing an additional penalty on persons assaulting them who could not prove honest and reasonable mistake. But it is a little difficult to see how this interpretation of section 40 can achieve the aim of the legislature. Surely an assault on a person not known to be, but who is in fact a policeman will not be deterred by the fact that the penalty for assaulting a policeman is more severe.[14] If the attacker is aware that the victim *may* be a policeman then, according to *Galvin* (*No.* 2) and the judgment of Kitto J. in the present case, this is a sufficient intention to bring him within section 40.

Owen J. substantially reiterated the views of Taylor and Menzies JJ.

Dixon C.J., in a dissenting opinion, preferred the majority approach of *Galvin* (*No.* 2), although he questioned the practical value of the controversy. His conclusion was that:

> to be guilty of the offence of assaulting a member of the police force in the due execution of his duty the intent of the supposed offender must go to all the ingredients of the offence.[15]

The offence was a compound one—an aggravated assault, aggravated by the fact that the victim was a policeman acting in the due execution of his duty. The guilty mind had therefore to go to all the elements of the offence, for the common law doctrine was that 'the intent and the act must both concur to constitute the crime',[16] and this was supported by an interpretation of the section as a whole. No difficulty in enforcement would be caused by this view for generally 'the facts will speak for themselves and if the man is acquitted it will be for some other reason'. He was not moved by the remarks of the Recorder in *R. v. Forbes and Webb*, despite their apparent approval by the judges in *Reg. v. Prince*[17] and

[13] (1962) 36 A.L.J.R. 26, 33. The approach rejected by Menzies J. had been argued in *R. v. McLeod* and accepted in *R. v. Wallendorf* as well as by Barry J. in *Galvin* (*No.* 2).

[14] Williams, *op. cit.* 195.

[15] (1962) 36 A.L.J.R. 26, 27.

[16] *Fowler v. Padget* (1798) 7 T.R. 509, 514 *per* Lord Kenyon.

[17] The Chief Justice suggests that the judgment of the one dissentient, Brett J.,

although their authority was expressly preserved in *R. v. Maxwell and Clanchy*.[18] Further, the fact that since 1865 the Crimes Act had been consolidated several times and this section repeated *verbatim* lent no confirmation to the Recorder's view, for in a jurisdiction where consolidation is practised periodically, such consolidation cannot be taken to imply legislative acceptance of a particular judicial interpretation. To say that it does is to adopt an artificial approach, contended the Chief Justice.

Kitto J., who also dissented, agreed that the intention required for the commission of an offence under section 40 extended to all three elements comprising it. This did not involve the Crown proving the accused *knew* his victim was a policeman acting in the due execution of his duty—the accused might even hope that his victim would not be such a policeman, but he would nevertheless be said to possess the requisite intention provided it was proved that he intended to continue with the assault if in fact his victim turned out to be a policeman. 'Advertence to the possibility of his being such a policeman is, I think, required, but not knowledge.'[19] Even if this intention were proved to exist there was still room for the substantive defence of an honest and reasonable belief in a state of facts which, if true, would have made the action no assault at all, the accused to establish this defence on the balance of probabilities. *R. v. Forbes and Webb* merely decided that *knowledge* did not have to be proved as part of the Crown case; it did not decide that the intention required by section 40 was simply that required for common assault. If the new offence were to be especially blameworthy then intention had to extend to the new elements, even though they were expressed as objective facts, for the presumption is that there must be an intention to do the whole of that which is proscribed.

Thus, the High Court, although divided, chose to follow the stricter of two fairly clearly defined paths in its interpretation of section 40. However, the choice would appear to be unfortunate. In recent years, the High Court has indicated its willingness to mould the criminal law so that it should be concerned to place guilt upon an accused because of the existence of some criminal intent in the accused rather than because of the existence of what might be termed 'objective' facts, even in the sphere of statutory offences. The judgment of Dixon J. in *Proudman v. Dayman*[20] has been interpreted as a marked step away from the doctrine which permits the conviction of a person for a statutory offence despite the absence of guilty intent on his part. And certainly this would appear to be the case (or, at least, should be so) with those statutory offences which might truly be labelled 'crimes', as opposed, for example, to an

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in *Prince's* case is probably preferable to that of the majority and his disapproval of *R. v. Forbes and Webb* may be regarded as of equal authoritative value. However, it may be doubted whether Brett J. disapproved of *R. v. Forbes and Webb* as strongly as the Chief Justice suggests, for in the latter part of his judgment Brett J. indicates that a defence of honest and reasonable mistake is available to an accused only where the mistaken belief, if true, would render his actions entirely innocent. In *R. v. Forbes and Webb* the accused knew he was assaulting *someone*, whether or not a policeman. [18] (1909) 2 Cr. App. R. 26.

[19] (1962) 36 A.L.J.R. 26, 28. [20] (1941) 67 C.L.R. 536.

offence of selling adulterated meat. There would appear to be every reason in such a case for the application of the principle laid down in *Proudman v. Dayman* as follows:

> If the purpose of the statute is to add a new crime to the general criminal law, it is natural to suppose that it is to be read subject to the general principles according to which that law is administered.[21]

Should this principle be accepted it would apply in this case to cast the burden onto the Crown of proving an intent on the part of the accused as to those aggravating elements which make this type of assault especially blameworthy, even though the section, in terms, makes no reference to that intent. Taylor J., indeed, stated that this principle was a sound one, but he declined to apply it as it had received no uniform application—but this is surely the fault of the judges within whose province alone lies the acceptance of such a rule.

One further point should be noted. Three of the judgments in *Reynhoudt's* case deal briefly and parenthetically with the possibility of an accused person escaping conviction under section 40 by raising the defence of a mistaken, but honest and reasonable belief in a set of facts which, if true, would render the actions of the accused quite innocent. It is at this point that a disturbing element enters the case. Owen J. (with whom Kitto J. agreed on this question) put the matter thus:

> I agree . . . that the accused may exculpate himself by showing, *on a balance of probabilities,* that he held an honest and reasonable belief in the existence of facts which, if they had existed, would have made his act a lawful one.[22]

This passage would seem to seriously undermine the principle laid down by Viscount Sankey L.C. in *Woolmington v. Director of Public Prosecutions*[23] which has been accepted many times since:

> it is the duty of the prosecution to prove the prisoner's guilt . . . subject to the defence of insanity and subject also to any statutory exception.[24]

Viscount Sankey's principle has had to withstand one or two attacks in recent years, the most important being *The Queen v. Bonnor*[25] where the Full Court of the Supreme Court of Victoria, by a bare majority, held that it is incumbent upon the accused in a bigamy prosecution to establish the defence of honest and reasonable mistake upon a balance of probabilities. Although this was a bigamy prosecution, the majority judgment is framed in general terms and would not appear to be confined to the case where a defence of honest and reasonable mistake is raised in answer to a prosecution for bigamy. However, there would seem to be great force in the dissenting judgment of Sholl J., where he points out that the term 'burden of proof' is susceptible of two meanings and

[21] *Ibid.* 540. [22] (1962) 36 A.L.J.R. 26, 36. [23] [1935] A.C. 462.
[24] *Ibid.* 481. See *Mancini v. D.P.P.* [1941] 3 All E.R. 272, 279 (H.L.) *per* Viscount Simon L.C.; *Chan Kau v. Reginam* [1955] 1 All E.R. 266, 267 (P.C.) *per* Lord Tucker.
[25] [1957] V.R. 227.

that it is a failure to appreciate those meanings which has led to much confusion in this area of the law. The first meaning is the 'risk of non-persuasion'—that is, should the trier of fact be in doubt as to whether a particular fact be proved, the party on whom the risk of non-persuasion lies has failed to establish the existence or otherwise of that fact. The second meaning is the duty of adducing sufficient evidence for the judge to allow the matter to go to the jury. Sholl J. suggests that the correct analysis where a defence of honest and reasonable mistake is involved is that the duty of adducing evidence lies on the accused but, once this duty is satisfied, the risk of non-persuasion remains on the prosecution, as it does throughout all criminal cases, except where a defence of insanity is involved, or a statutory exception is created. In this way the 'golden thread' of English law is preserved and the cases successfully reconciled.

Thus, it would seem that the minority judgment in *Bonnor's* case is to be preferred to the majority view. Be that as it may, it is clear that the question is a vexed one, so that it is to be regretted that at least two of the judges of the High Court seem prepared not only to accept *Bonnor* as good law, but to extend its application, without engaging in a discussion of the merits of such an extension.

R. SACKVILLE

GARTNER v. KIDMAN[1]

Nuisance—Water and watercourses—Distinction between natural watercourse in which riparian rights can exist and the natural flow of surface water—Rights of proprietors of higher and lower lands in respect of surface waters

Prior to 1909, water in wet seasons collected in a swampy basin situated mainly on the respondent Kidman's land, but also partly on the appellant Gartner's land. When the flood in the swamp became great enough it overflowed at a point in the appellant's land, whence it ran for some three hundred yards along a depression on the appellant's land to a sandpit and there escaped into the ground. This mode of natural drainage still left the swamp covering some sixty acres, and in 1909 a predecessor in title of the respondent had constructed a shallow ditch along the course followed by the superabundant water. In 1938 improvements to the drain almost completely drained the swamp. In 1951 the adjoining parcels of land came into the ownership of Kidman and Gartner, and in that year Gartner's father filled in a section of the drain just inside the boundary fence. However, this barrier was not very effective, and water flowed over the obstruction. In 1958 Gartner and his father, having discovered that the sandpit was of considerable commercial value, erected sandbanks in the drain which retarded the flow of water and caused the swamp on Kidman's land to cover some seventy acres. Kidman claimed that Gartner was obliged in law to remove the sandbanks and to allow the water from

[1] (1962) 36 A.L.J.R. 43. High Court of Australia; Dixon C.J., McTiernan and Windeyer JJ.