an accused, but it seems hard to see how one can say that the offence has not been committed. However, since Lord Denning's remarks are neither supported by any other authority nor given any support from the speeches of the other Law Lords, the offence cannot at this point of time be said to be subject to any such qualification.

It is Lord Denning, again, who leaves us with another hope that the offence may one day be properly defined and limited when he says:

> The judges have not been called upon further to define the just limitations to misprision, but I do not doubt their ability to do so when called upon.[27]

As well as limiting this offence some time in the future, the court will also decide if the non-disclosure of a contemplated offence is to be included in it. It seems that Lord Denning is in favour of imposing upon the citizen a duty to disclose any knowledge he has of a meditated crime for he says, "This is good sense and may well be good law".[28] Lord Goddard, on the other hand, would " . . . hesitate to hold that it is established that there is such a duty",[29] but since Lord Goddard felt in 1948[30] that the offence of misprision of felony was itself obsolete, it may well be that he will overcome his hesitation on this point at some later date. How certain a criminal law is this!

In any case, one must question the necessity for the courts today to create new offences or revive ones long regarded as obsolete. In times when legislative intervention was rare, some useful purpose may have been served, but now Parliament sits regularly and if additional penal laws are required for the protection of society, Parliament should enact them. If it does not, the presumption must be that the misconduct complained of is better left to be controlled by the moral feeling of the community, which feeling changes according to the values of the age.

We are happily now living in a period where respect for the judiciary is high, but this has not always been so, and surely it is better now to guard against what may be done in the future than to leave the way open for generations less fortunate than ours to be harassed and oppressed under a spurious cloak of legality by introducing into our law such a vague and ill-defined crime as that of misprision of felony.

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MENS REA IN STATUTORY OFFENCES

R. v. *REYNHOUDT*

In *R.* v. *Reynhoudt*[1] the High Court of Australia was again confronted with the problem of *mens rea* in statutory offences. Reynhoudt was indicted under a statutory provision that anyone who "assaults, resists or wilfully obstructs any member of the police force in the due execution of his duty . . . shall be guilty of a misdemeanour".[2] The Chairman of General Sessions, before whom Reynhoudt was tried, instructed the jury that it was not incumbent upon the prosecution to prove that the accused knew that the person whom he was

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[27] (1961) 3 W.L.R. 371 at 385.
[28] *Id.* at 386.
[29] *Id.* at 388.
[30] *R.* v. *Aberg* (1948) 1 All E.R. 601.
[1] (1962) 36 A.L.J.R. 26.
[2] Crimes Act, 1958 (Vic.) s.40.

alleged to have assaulted was a member of the police force acting in the due execution of his duty. Once the assault was proved it was sufficient, the Chairman said, "for the Crown to prove he was, in fact, a policeman and that he was acting in pursuance of his duty".[3] This direction was in conformity with *R.* v. *Galvin* (*No.* 1)[4] but it was not in conformity with the later decision in *R.* v. *Galvin* (*No.* 2).[5] Indeed the Chairman was not aware of the decision in *R.* v. *Galvin* (*No.* 2) where a Full Bench[6] of the Supreme Court of Victoria overruled *R.* v. *Galvin* (*No.* 1) and decided that a direction given in accordance with it was contrary to law. Reynhoudt was convicted in General Sessions but he appealed to the Supreme Court of Victoria sitting as a Court of Criminal Appeal and that Court, following *R.* v. *Galvin* (*No.* 2), quashed the conviction. The Victorian Attorney-General applied to the High Court for leave to appeal. The High Court, by a majority of three to two, granted leave to appeal and, proceeding immediately to deal with the appeal, allowed it. In the result the conviction of the accused was affirmed.

The majority in the High Court consisted of Taylor, Menzies and Owen, JJ., with Dixon, C.J. and Kitto, J. dissenting. Because of the diversity of the judgments delivered it is instructive to summarise the reasoning of each member of the Court and to consider the judgment separately.

Dixon, C.J. felt that as the offence was an aggravated assault and thereby a compound offence, the guilty mind should go to every element of which it is composed. To justify this conclusion, he pointed to the *prima facie* principle of common law, that a guilty mind is essential to every crime, the natural application of this principle to the provision and the absence of anything to rebut it. He also felt that "if the section is read as a whole, there can be seen in the association of offences it enumerates, the phrases in which it describes them and in their general character an almost necessary reference in all of them to guilty intention".[7]

Kitto, J., while agreeing with this conclusion, differed somewhat in his reasoning. He indicated that the offence depended on the existence of certain objective facts which made it especially blameworthy and appropriate for deterrent treatment. He then pointed out that it was an extension of an existing offence and concluded that the requirement of intention was extended accordingly.

However, Taylor, J. could see no reason for extending the requirement of intention beyond that necessary to constitute a common assault, apparently basing this conclusion upon the fact that a fixed interpretation had been placed upon virtually identical legislation for some hundred years without serious question. He said that he felt it was impossible "to say that on the various occasions on which the substance of s.40 has been enacted and re-enacted the legislature intended anything other than its settled meaning".[8]

Menzies, J. categorised the question as being whether or not the prosecution must show that it was in the accused's mind that the person assaulted was a member of the police force in the due execution of his duty. As a matter of construction, he concluded that it was not necessary to establish any mental element beyond that imparted by the words "assault", "resist" and "wilfully obstruct". Four reasons were offered for this decision. Firstly, he felt that the use of the word "wilfully" before the word "obstruct" was significant because

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[3] (1962) 36 A.L.J.R. at 29.
[4] (1961) V.R. 733.
[5] (1961) V.R. 740.
[6] When the Supreme Court of Victoria is asked to reconsider a previous decision of the Full Court it sits as a Full Bench of five or more Justices.
[7] *Op. cit.* at 27.
[8] *Ibid* at 31.

if it were essential to the offence to show an intention to obstruct a member of the police force in the due execution of his duty, this limitation would not have been necessary. He also regarded it as important that elsewhere in the group of sections in which s.40 falls, there is to be found express reference to knowledge where it is made a necessary ingredient of the offence created. Next, he relied on the aim of the legislation, which he decided was to give police officers protection and freedom from interference in the discharge of their duties by imposing an additional penalty upon persons assaulting them who cannot excuse their conduct by proving honest mistake upon reasonable grounds. Finally, he said that his conclusion was reinforced both by long-standing authority and the re-enactment of the section again and again after a particular interpretation had been placed upon it.

Owen, J. also placed considerable weight on this last factor, and after a careful review of the history of the section and the decisions upon it, concluded that the proper inference was that the provision was intended to bear its *prima facie* meaning. As the section made no reference to any requirement that the accused should be shown to have had knowledge that the person assaulted, resisted or obstructed was a police officer acting in the due execution of his duty, he decided that it was not an essential part of the Crown case to establish such knowledge.

Which of these varied and conflicting judgments seems most consistent with the existing authorities? The general rule of English law is that there can be no crime unless there is *mens rea*.[9] However in many cases involving statutory offences the courts have held that the presumption has been displaced. In *Sherras* v. *De Rutzen*[10] it was said by Wright, J. that the presumption is "liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered".[11] This statement was approved, recently, by the Judicial Committee of the Privy Council in *Lim Chin Aik* v. *R.*[12] but, at best, it furnishes a vague and imprecise general guide. Even if it is established that *mens rea* is not a necessary ingredient of the statutory offence it is necessary to consider the further and separate question whether it is a defence to a prosecution under the statute that the accused acted under an honest and reasonable mistake of fact.[13] In general, an accused makes a good answer to a prosecution for a statutory offence if he shows that he held an honest and reasonable belief in a state of facts which would have made his acts innocent if the facts were as he had believed them to be. However, this defence may be denied also where the statute contains clear language denying the defence or where, although the terms of the statute leave the matter in doubt, the object and scope of the enactment, the nature of the duty imposed or other considerations arising from the subject matter of the legislation make it probable that the legislative authority intended to impose a duty of absolute liability.

It is, therefore, essential to bear in mind that, when dealing with a statutory offence, there are two distinct questions to be considered: firstly, whether *mens rea* has been excluded, and secondly, if so, whether the defence of honest and reasonable mistake has also been excluded. The failure to do this has, to a large extent, been responsible for the confusion surrounding this area of the law. The essential point is that to set up honest and reasonable

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[9] See *R.* v. *Turnbull* (1944) 44 S.R. 108 at 109 *per* Jordan, C.J., and *Allchurch* v. *Cooper* (1923) S.A.S.R. 370.

[10] (1895) 1 Q.B. 918.

[11] *Ibid* at 921.

[12] (1963) A.C. 160 at 173.

[13] See D. J. MacDougall, "The Burden of Proof in Bigamy" (1958) 21 *Mod. L.R.* 510 at 512-513; *Proudman* v. *Dayman* (1943) 67 C.L.R. 536; *Maher* v. *Musson* (1934) 52 C.L.R. 104 and *McRae* v. *Downey* (1947) V.L.R. 194 (judgment of O'Bryan, J.)

mistake of fact in the case of an offence involving full *mens rea* is to destroy an essential part of the Crown case, whereas in the case of an offence where *mens rea* is not a necessary ingredient of the offence, it is a substantive defence which must be raised and proved by the accused.[14]

This distinction has always been strictly observed by the High Court in Australia[15] and was not in issue in the present case, the only question being the correctness of the direction that it was not incumbent on the Crown to show that the accused knew that the person assaulted was a police officer in the due execution of his duty.[16]

A particular construction was placed on a provision in *ipsissimis verbis* to the section presently under consideration in 1865 in *R.* v. *Forbes and Webb*[17] where the Recorder, Mr. Russel Gurney, Q.C., observed that the offence was "not assaulting a police officer knowing him to be in the execution of his duty, but assaulting him being in the execution of his duty". This decision was referred to with approval by Bramwell, B. in *R.* v. *Prince*,[18] *R.* v. *Maxwell and Clancy*[19] and *R.* v. *Galvin* (*No.* 1), and has become the construction generally accepted by the text books.[20]

It was also the accepted construction in Australia until judgment was handed down in *R.* v. *Galvin* (*No.* 2). A different approach, however, had been adopted in Canada[21] and South Africa[22] where it has been held that knowledge that the person assaulted was a police officer engaged in the execution of his duty is an essential ingredient of the offence that must be proved by the prosecution. An intermediate view was adopted by O'Bryan, Dean and Hudson, JJ. in *R.* v. *Galvin* (*No.* 2). In their own words:

> . . . The accused must intend to assault and he must intend to assault a policeman in the due execution of his duty. In most cases this intent would be proved by evidence that he knew it was a policeman and supposed that he was acting in the due execution of his duty. But knowledge in the strict sense may not be necessary in all cases. . . . He may believe his victim to be a policeman acting in the due execution of his duty and assault him. He would in such a case intend to assault a policeman in the due execution of his duty.[23]

Because of this conflict, it might have been expected that the High Court in *R.* v. *Reynhoudt* would have made every effort to establish a definite rule for the guidance of future courts, but even from a cursory examination of the judgments delivered, it can be seen that such a hope would be doomed to instant disappointment. The decision is notable for the diversity of opinions offered, and even more remarkable for the difficulty that is met in pointing to the fallacy in any argument. Almost every possible argument was canvassed in the case and the diversity of opinions reflects the inadequacy of the principle laid down in *Sherras* v. *De Rutzen* when a particular section has to be considered. The principle in *Sherras* v. *De Rutzen* required the court to construe the section having regard to the words of the statute and the subject matter

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[14] See D. J. MacDougall, "The Burden of Proof in Bigamy" *op. cit.* n. 13, *supra.*

[15] See C. Howard, "Strict Responsibility in the High Court of Australia" (1960) 76 *L.Q.R.* 547; P. Brett and P. L. Waller, *Cases and Materials in Criminal Law* (1962), Problem No. 16, "Mikado Rides An Unruly Horse" at 523 and *contra* A. J. Hannan, "Mens Rea in Statutory Offences" (1942) 16 *A.L.J.* 91 esp. at 93.

[16] See Menzies, J. in *R.* v. *Reynhoudt, op. cit.* at 31-33.

[17] (1865) 10 Cox, C.C. 362.

[18] (1875) 13 Cox, C.C. 138.

[19] (1909) 73 J.P. 176.

[20] See 10 Halsbury, *Laws of England* (3 ed., 1952) 274-5; Archbold, *Criminal Pleading and Practice* (34 ed., 1959) 23, 1042; *Roscoe's Criminal Evidence* (16 ed., 1952) 379; 1 *Russell on Crimes* (11 ed., 1958) 764.

[21] *R.* v. *McLeod* (1954) 111 Can. Cr. Cases 106.

[22] *R.* v. *Wallendorf* (1920) South African L.R. App. Div. 383.

[23] *Op. cit.* at 748.

with which it deals. But where the words do not expressly cover the doctrine of *mens rea* and the defence of an honest and reasonable mistake of fact there is considerable scope for dispute concerning the inferences which can be drawn from the words of the statute and its subject matter. In *Lim Chin Aik* v. *R.* the Judicial Committee suggested an additional test. Their Lordships stated:

> It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations.[24]

The Judicial Committee applied this principle in the *Lim Chin Aik Case* to reach a decision that where a person was charged under a Singapore Ordinance which made it an offence for a prohibited person to enter the colony, it was incumbent on the prosecution to show that the accused knew, or, at least could have discovered by reasonable inquiries, that he had been prohibited by an order under the Ordinance.

If it is possible to generalise from the decision in the *Lim Chin Aik Case* and the judgments of Dixon, C.J. and Kitto, J. in *Reynhoudt's Case*, the following comment might be made. Although there has been no express departure from the principles suggested in *Sherras* v. *De Rutzen* there is an increasing judicial reluctance to hold that the presumption of *mens rea* has been displaced by implication. Of course, such a generalisation may be rash because every case depends upon the terms of the particular section involved, but it is interesting to compare the judgment of Dixon, C.J. in *Reynhoudt's Case* with his judgment in *Proudman* v. *Dayman*[25] where he stated:

> There may be no longer any presumption that *mens rea*, in the sense of a specific state of mind, whether of motive, intention, knowledge or advertence, is an ingredient in an offence created by a modern statute; but to concede that the weakening of the older understanding of the rule of interpretation has left us with no *prima facie* presumption that some mental element is implied in the definition of any new statutory offence does not mean that the rule that honest and reasonable mistake is *prima facie* admissible as an exculpation has lost its application also.[26]

Reynhoudt's Case and the *Lim Chin Aik Case* suggest that the presumption that *mens rea* is required in statutory offences is a stronger presumption than Dixon, J. admitted in *Proudman* v. *Dayman*.

But whatever the general rule may be it is submitted that in *Reynhoudt's Case* itself the offence fell within the category of offences where proof of *mens rea* is not required although a charge may be answerable by a defence of honest and reasonable mistake. Clearly there is nothing in the wording of the section to extend the requirement of knowledge and intention to every element of the offence. If we turn to the subject matter the provision appears in a category of other sections, all of which are clearly intended to protect certain classes of designated persons from intentional interference in the performance of their functions when they are acting in specified capacities. The common feature of this group of sections is that the aggravating component is the character of the person suffering interference and the activity in which he is engaged at the time. To require the Crown to prove knowledge or intention extending to every part of the section would be to impose an almost impossible burden of proof and to deprive the section of all practical effect.

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[24] *Op. cit.* at 174.
[25] (1943) 67 C.L.R. 536.
[26] *Ibid* at 540.

It is, therefore, submitted that the majority decision was correct and that there is no obligation on the Crown to show guilty knowledge or intention on the part of the accused, beyond that necessary to constitute an assault, resistance or obstruction as the case may be. Any hardship or possible embarrassment which might appear to result therefrom, would clearly be counter-balanced by the availability of the defence of honest and reasonable mistake. Moreover, as it has been pointed out,[27] the facts will normally speak for themselves.

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[27] (1962) 36 A.L.J.R. 26 at 27 *per* Dixon, C.J.