Conspiracies Contra Bonos Mores

For there is scarce anything so clearly written, that when the cause thereof is forgotten, may not be wrested by an ignorant grammarian, or a cavilling logician, to the injury, oppression or perhaps destruction of an honest man.[1]

Introduction

The ancient common law offence of acting in conspiracy with another in a manner such as to corrupt the morals "of an individual and *a fortiori* of the public"[2] was foisted upon the common law world by the House of Lords in 1961. Observations of their Lordships at that time to the effect that the new-found crime encompasses any conspiracy, "to commit a wrongful act which is calculated to cause public injury",[3] or which is "prejudicial to the public welfare"[4] have been applied of late to justify convictions for the offences of conspiracy to outrage public decency[5] and conspiracy to effect a public mischief.[6]

---

[1] Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Law of England*, Ascarelli ed., (Giuffrè, Milan: 1960), at p. 120.

[2] *Shaw* v. *D.P.P.*, [1962] A.C. 220, at p. 287, *per* Lord Tucker.

[3] *Ibid.*, at p. 290, *per* Lord Tucker.

[4] *Ibid.*, at p. 268, *per* Viscount Simonds.

[5] *Knuller (Publishing, Printing and Promotions) Ltd.* v. *D.P.P.*, [1972] 3 W.L.R. 143 (H.L.).

[6] *The Queen* v. *Howes*, (1971) 2 S.A.S.R. 293 (S.C. *in banco*). Thankfully, the form of indictment being considered probably cannot be preferred in Canada. Section 423(2)(a) of the *Criminal Code*, R.S.C. 1970, c. C-34, reads: "Every one who conspires with another to effect an unlawful purpose... is guilty of an indictable offence...". *Unlawful purpose* apparently cannot be read too restrictively, as it has been held by the Supreme Court of Canada to include the violation of provincial quasi-penal laws: *Wright, McDermott and Feeley* v. *The Queen*, [1964] S.C.R. 192, 43 D.L.R. (2d) 597; see also *R.* v. *Layton, Ex parte Thodas*, [1970] 5 C.C.C. 260 (B.C.C.A.). Nonetheless, some scope must be afforded the very absolute words of section 8(a) of the Code: "Notwithstanding anything in this Act or any other Act no person shall be convicted (a) of an offence at common law...". In the absence of any reported consideration in the case law of the possible mutual effects of sections 8 and 423, it is submitted that the former, if it is to be given any meaning at all, must stand to restrict the term *unlawful purpose* in the latter section, so as to exclude the catch-all *Knuller* or *Shaw* indictment. Note though that the case law cited above well might find the facts of the *Howes* case within the scope of section 423(2)(a), involving as it does the breach of some statutory injunction.

The facts of the *Shaw* and *Knuller* cases are fully reviewed in the note of Mr. Julius Grey.[7] In brief though, a 1959 Statute prohibited England's prostitutes from soliciting in the streets. One Shaw published a booklet containing prostitutes' names and addresses; each woman listed had paid Shaw for her advertisement. A majority in the House of Lords not only found the appellant guilty of a statutory offence (living on the earnings of prostitution), but also of the "common law misdemeanour of conspiracy to corrupt public morals".

The Queen v. *Howes*[8] and *Knuller (Publishing, Printing and Promotions) Ltd.* v. *Director of Public Prosecutions,*[9] both purporting to follow the *Shaw* precedent, extended that ground of criminal liability to new fields of endeavour. In the former case a defendant was convicted of conspiring (with persons unknown) to gain a non-pecuniary advantage from a public authority: he had someone else sit for a matriculation examination in economics using the accused's name. The latter case saw the House of Lords affirm the convictions for conspiracy to corrupt public morals of company directors whose magazine published advertisements placed by men seeking others with whom to enjoy homosexual practices. The homosexual practices in question themselves had ceased to be illegal by virtue of a statute enacted some five years earlier. The Law Lords — or at least three-fifths of this high bench — further affirmed the existence in the common law of an offence, "conspiracy to outrage public decency", though they allowed the specific appeals before the House in respect of that count.

There seems little to be gained from subjecting the reader to another installment of an irresolvable debate as to whether or not the courts were "correct" in their application of the black-letter-law rules of precedent in the process of resurrecting from its just tomb the role of Her Majesty's Justices of Queen's Bench as custodians of the morals of the realm. This author willingly concedes that, seen purely *in abstracto,* the judgment in *Shaw's* case was *a* technically viable application of the tools of legal interpretation.

It will be contended, however, that the judicial imposition of the offence of conspiracy *contra bonos mores,* and its extension to new fields of activity in the *Knuller dicta* and in the *Howes* judgment, was bad in law — in the larger sense of the term. Firstly, it represents an unconstitutional usurpation of a social function long

[7] (1973) 19 McGill L.J. 130.
[8] (1971) 2 S.A.S.R. 293.
[9] [1972] 3 W.L.R. 143.

allocated to a popularly elected legislature. Secondly, the line of cases demonstrates poor application of the judicial process, in that precedent was applied either blindly, or with a view towards achieving social policies totally out of keeping with modern cultural expectations of justice. Thirdly, the new crime was defined in a manner irreconcilable with today's requirements for a meaningful mental element in penal laws, and strong repugnance against *ex post facto* deprivations of liberty.

I. The Judiciary and the Constitution

Purely as a matter of historical fact, it is quite true that the Court of King's Bench, perhaps some three centuries ago, did have full authority to punish whatever acts its judges deemed inimicable to the political order. The Court of King's Bench found itself possessed of this jurisdiction upon the demise of the Court of Star Chamber. This power of Star Chamber, and the attitude with which it was exercised, is exemplified by a statement of the Lord Keeper in 1602, regarding the legal methodology followed by its judges: "[If] necessary for the public good, a precedent was not necessary to direct them, but they could make an order according to the necessity and nature of the thing itself."[10]

The paramountcy of social order and entrenched powers over the civil liberties of the subjects, at large during this era, also is reflected in the development of the English law of conspiracy by this Court of Star Chamber. Given this socio-political context, "It was inevitable," writes Sir William Holdsworth about the Star Chamber,

> ...that conspiracy should come to be regarded as a form of attempt to commit a wrong. ...it punished all kinds of attempts to commit wrongful acts, so, *a fortiori*, it punished all kinds of conspiracies to commit the many varied offences punishable either by it or by the common law courts.[11]

The open-ended nature of the list of the "many varied offences" punishable by this Court has already been mentioned.

This intellectual framework for judicial decision making is totally foreign to today's legal process. There has come to be woven, so inextricably into English public law as to make it of constitutional status, the principles encompassed under the rubric "the rule of law", or the Latin maxim *"nulla poena sine lege"*. Thus there is agreement among jurisconsults of this century that, as regards the individual citizen, these most basic notions of justice demand, at

---

[10] *Les Rapports del Cases*, at p. 144.

[11] *A History of English Law*, vol. 5, (1924), at pp. 204-205.

the least, that penal laws, strictly construed, are to remain within a more or less predetermined ambit. No act is to be deemed criminal which is not clearly so identified before the act. The adjudicative function is to operate solely within these principles of the rule of law.[12]

To the extent that the English constitution is formed of a body of conventions, tacitly accepted by the governed and all of their governors alike, the House of Lords upset this delicate equilibrium through a technically valid process of applying rules long ago relegated to desuetude. The past century's developments in the realm of Parliamentary government notwithstanding, even the criminal bar of the late eighteenth century would have expressed surprise to find reasserted the power of judicial legislation of this magnitude. One publicist of the period, speaking of the power of judges to combat new challenges to the public morality, put it this way:

> Though the existence of this power as inherent in the judges has been asserted by several high authorities for a great length of time, it is hardly probable that any attempt to exercise it would be made at the present day; ... That the law in its earlier stages should be developed by judicial decisions from a few vague generalities was natural and inevitable. ... the courts have done their work; they have developed the law. ... parliament [sic] is regular in its sittings and active in its labours; and if the protection of society requires the enactment of additional penal laws, parliament will soon supply them.[13]

If anything, the past century of representative government has added all the more weight to Sir James Stephen's observations.

It is suggested that the English courts today might well adopt the wisdom offered by a bench of the Supreme Court of the United States which included John Marshall and Joseph Story as regards a purported jurisdiction of that Court to convict persons for "common law" federal criminal offences. Although it was the first time the point had been argued before that Court, its judgment stated conclusively that no such jurisdiction existed. The reason for which that Court so held is equally apt. They said, "we consider it as having been long settled in public opinion."[14]

---

[12] Hall, *Nulla Poena Sine Lege*, (1937) 47 Yale L.J. 165; Jennings, *The Law and the Constitution*, 5th ed., (1959), at p. 51; Wade and Phillips, *Constitutional Law*, 8th ed., (1970), at pp. 66, 67, 76-77; de Smith, *Constitutional and Administrative Law*, (1971), at pp. 39-40.

[13] Stephens, *A History of the Criminal Law of England*, vol. 3, (1882), at pp. 359-360.

[14] *U.S.* v. *Hudson and Goodwin*, 7 Cranch (U.S.) 32, at p. 32. H.L.A. Hart concludes the following:

> As a result of Shaw's case, virtually any cooperative conduct is criminal if a jury consider it *ex post facto* to have been immoral. Perhaps the

The policy error in the present line of cases, one so grave as to be of constitutional dimensions, is apparent when the implications of *Shaw* upon the civil liberties of the subject are contrasted with the general predisposition of the law in penal matters. As regards statutory offences, now the bulk of English penal law (and the totality of it in Canada), one always must be found to have violated some specific statutory injunction.

Acts — even conspiratorial acts — merely "calculated to defeat, frustrate or evade the purpose of an Act of Parliament" clearly are not illegal. The distinction between tax evasion and tax avoidance is the ready example. "If it were otherwise," the House of Lords itself has declared of late with unanimity, "freedom under the law would be but an empty phrase."[15]

While it is recognized that the character of a judicial decision never can be merely declaratory of preexisting law and, as the *Knuller* and *Shaw* benches both argued, judges must retain a power to apply recognized general rules even to ingeniously new fact patterns, it must still be concluded that the judgments in the *Shaw* line of cases are unconstitutional, as they are not referable to any generally recoguized rule of universal application which could have been identified prior to the respective decisions. The approach of Hans Kelsen might be adopted to develop this point. That is, it could be said that the general norms which the three benches purported to apply in the respective cases may be stated as follows:

(1) *Shaw's* case: It is illegal, in concert with another, to act so as to corrupt the morals of persons who might patronize prostitutes as a consequence of your actions.

(2) *Knuller's* case: It is illegal, in concert with another, to act so as to either corrupt the morals of would-be homosexuals, or outrage heterosexual persons who gain knowledge of your actions.[16]

---

nearest counterpart to this in modern European jurisprudence is the idea to be found in German statutes of the Nazi period that anything is punishable if it is deserving of punishment according 'to the fundamental conceptions of a penal law and sound popular feeling'. (*Law, Liberty, and Morality,* (London, Oxford University Press: 1963), at p. 12; citing the German "Act of June 28, 1935").

[15] *D.P.P.* v. *Bhagwan,* [1972] A.C. 60, at p. 82. The issue of certainty in penal law will be developed in greater depth in division II, *infra.*

[16] It should be noted that the second norm alleged to exist in the *Knuller* case, the "conspiracy to outrage public decency" count of the indictment, was not actually given effect in the decision. While Lord Morris of Borth-y-Gest, Lord Simon of Glaisdale, and Lord Kilbrandon found such an offence unquestionably to be known to the common law ([1972] 3 W.L.R. 143, at pp. 158,

(3) *Howes'* case: It is illegal, in concert with another, to act so as to gain a non-pecuniary advantage from the state.

The difficulty lies in that none of the supposed general norms listed above could have been identified as universal injunctions prior to the respective decisions. The French translation of *Pure Theory of Law* seems to make this point more concisely than does Kelsen's English translator:

> Le tribunal qui a à appliquer à un cas concret les normes générales en vigueur d'un ordre juridique doit trancher la question de savoir si la norme qu'il doit appliquer a été créée de façon constitutionnelle, c'est-à-dire selon la procédure législative définie par la Constitution, ou par la voie de la coutume déléguée par la Constitution.[17]

The counter-argument to the Kelsenite attack upon the constitutionality of the present line of cases, an argument which appears at least to have been adopted by Lord Hodson in *Shaw's* case, is that English constitutional and criminal practice recognizes as a prime norm the general rule that acts violative of, "*the* moral judgment of society, . . . something about which any twelve men or women drawn at random might after discussion be expected to be unanimous"[18] (at least when the acts are done by two or more people in combination), are illegal.

This judicial attempt to postulate such an artificial norm must fail for two reasons. Firstly, as English constitutional practice, and specifically the principle of the rule of law, will not allow judges today the unfettered legislative powers of Star Chamber's day, so too it cannot allow questions of law to be decided by a jury. While it well deserves to be a highly contentious issue whether a legally trained judge or a panel of sincere laymen should decide questions of fact, surely the possible abuses of *ad hoc* decisions as to the confines of the criminal law are all too easy to imagine. Indeed, even if the jury system be abolished one must ask how it can be expected that the legal training of the judiciary equips them to decide — with the consistency rightly demanded of modern criminal law — what conduct offends the morality or sense of decency of "the public" sufficiently to deserve to be punished by the state.

Secondly, as jurisprudential writers have been quick to show, Lord Devlin's supposed prime norm of criminal law cannot guide a court as it is tautologous. It is not functionally descriptive of a

---

159, 183, and 186-87), the latter two allowed the appeals in respect of the convictions on this count for procedural reasons. Lord Reid and Lord Diplock each denied the existence of the offence.

[17] Eisenmann, tr., *Théorie Pure du Droit,* (Paris: 1962), at p. 319; *cf.* Knight, tr., *Pure Theory of Law,* (Berkely: 1967), at p. 238.

[18] Devlin, *The Enforcement of Morals,* (1959), at p. 16, emphasis added.

determinate class of human conduct so as to state a rule of law upon which a trier of fact can operate. Dr. John J. Bray, Chief Justice of South Australia, has stated Lord Devlin's tautology as follows:

Q. 'Why is this conduct criminally punishable?'

A. 'Because it is condemned by right-minded men.'

Q. 'Who are right-minded men?'

A. 'Those who condemn this sort of conduct.'[19]

Even if one accepts Lord Devlin's test, notwithstanding the objection of Mr. Justice Bray that it gives us no real test at all, there remains the serious objection that it forces society to revert to the acceptance of "the positive morality of a given society" as the rule governing the legal validity of actions by each citizen.[20] It serves to disentitle the citizen to the status of an independent moral actor in his society. There appears scant danger of overstatement in stating the question, Can it be that we live in a legal order which has discarded the test of liberal Western ethics, founded in reason and applied with deliberation, for the impulsive gut reactions of whichever dozen people happen into the jury room?

II. The Role of Precedent

As was emphasised above, the three benches in the *Shaw* line of cases may or may not have followed the most legalistic of paths through the ancient case law to reach their conclusions; that really is of little more than passing interest and, perhaps, only in a pedantic sort of way. As is clear from the speeches of Lords Reid [21] and Diplock,[22] these cases clearly are of the type in which more than one decision might be reached by the expert judge, given the facts and the scant legal precedents directly applicable.[23] A case such as

---

[19] Bray, *Law, Liberty and Morality*, (1971) 45 A.L.J. 452, at pp. 457-458.

[20] Basil Mitchell, *Law, Morality and Religion in a Secular Society*, (1967), at p. 42. See also: R.F.V. Heuston, *Morality and the Criminal Law*, (1972) 23 N.I. Legal Q. 274, at pp. 281-282.

[21] [1962] A.C. 220, at p. 269.

[22] [1972] 3 W.L.R. 143, at p. 160. Professor Hart's criticism of *Shaw* might well be repeated of each successive extension:

> ...the antique cases relied upon as precedents plainly permitted, even under the rigorous English doctrine of precedent, a decision either way. ...the judges seemed willing to pay a high price in terms of the sacrifice of other values for the establishment — or reestablishment — of the Courts as *custos morum*. (*Law, Liberty, and Morality*, (London, Oxford University Press: 1963), at pp. 11-12).

[23] Julius Stone, *Legal Systems and Lawyers' Reasonings*, (1964), at p. 293.

these, dealing with what Rupert Cross terms, "the penumbra" of legal rules,[24] is not solved by simple deductive reasoning: the process in reality is the farthest thing from syllogistic. While the judge may cloak his reasoning in such a form, "[n]ot only is the syllogism constructed after the facts have been found, but it is also constructed after any legal problems concerning the scope of the rule have been solved."[25]

The House of Lords traditionally has tended to be, and still is, a judicially conservative, "strict-constructionist" court. That is well and good. Indeed, it may well be that that remains the proper role of the Law Lords in today's constitutional setting. Yet they cannot do their job in a social vacuum or, worse still, anachronously.

The application of law by a responsible organ cannot be a task remote from the ongoing expectations of Western society. One commentator has described the function this way:

> It involves, first of all, an analysis and appreciation of the different factors in the living situation, to which the law is to be applied, and secondly, a comprehensive perception of the relative importance and subordination of the different possible legal principles. The former involves a definite attitude to ethical and social problems based on some (conscious or unconscious) philosophy of life, and the latter on a definite philosophy of the particular legal system, its functions and limitations.[26]

With all due respect to the majority in *Shaw,* and to the majority in *Knuller* and the full court in *Howes,* the latter two cases having expanded the ambit of the *Shaw* rule, scarce attention was evidenced either to the intensity of the competing arguments presented, from the perspective of modern Western liberal thought, or to the social values collected under the rubric "rule of law" which existed just beneath the surface of each case.

In conceptualizing the competing values at play in both resurrecting the questionable role of custodian of national morals in the *Shaw* case and in expanding the scope of the rule, the respective courts might have considered — openly or covertly, as meets the individual judges' notions of judicial propriety and fastidiousness — the following principle of common justice: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence at the time it was committed."[27]

---

[24] Rupert Cross, *Precedent in English Law,* 2nd ed., (1968), at p. 178.

[25] *Ibid.* See also: Oliver Wendell Holmes, *Law in Science and Science in Law,* (1899) 12 Harv. L. Rev. 458, at pp. 460-461.

[26] Morris R. Cohen, *The Process of Judicial Legislation,* (1914) 48 Am. L. Rev. 161, at p. 189.

[27] European Convention on Human Rights, art. 7, 213 U.N.T.S. 221, I. No. 2889 (Rome: 1950).

Applying the process discussed, a perfectly proper judgment in each of these three cases might have read as follows:

> It is too late now to assume jurisdiction over a new class of cases, under the idea of their being *contra bonos mores*. We must consider the practice of the English courts, from which we derive the principle as having settled in the course of many centuries the true limits and proper subjects of this principle. If we are to disregard these landmarks, and take up any case which may arise under this principle, as *res integra*, then might it be extended to cases which no one has yet thought of as penal. A case of slander may display as much baseness and malignity of purpose, as much falsehood in its perpetration, ...as this case of seduction. And yet none would think of prosecuting it criminally.[28]

III. A Crime Unlike All Other Crimes

Two arguments are advanced under the present title. Firstly, the type of conspiracy described (one cannot say defined) by the *Shaw* line of cases is such that each "offence" may well require a court to declare an act illegal after the fact, as no one could have predicted its illegality. Secondly, and in consequence of this, the so-called common law crime — unlike every other non-statutory offence in English law — excludes the requirement that an offender have a criminal mental attitude of any realistic description.

A. *Ex post facto law*

The general opposition of Western thought to *ex post facto* rule creation is typified by Thomas Hobbes' statement, "Harm inflicted for a fact done before there was a law that forbade it, is not punishment but an act of hostility: for before the law, there is no transgression of the law .." [29]

For various reasons, courts have long resolved any doubt in interpreting those crimes described in penal statutes in favour of the person who would be liable to the penalty.[30] Rationale relating to the basic conceptions of justice in this legal system have been mentioned in prior contexts. Justice Felix Frankfurter felt this attitude of legal disdain for loosely constructed law, laws not susceptible of any but the most vague of common interpretations, to be justified on yet another ground. In a context not too dissimilar from the present one,[31] he expressed the view that laws neither "...

---

[28] *Anderson* v. *Commonwealth*, 5 Randolph 627; 16 Am. Dec. 776, at pp. 778-779 (Va. C.A., 1827), Dade, J., *per curiam*.

[29] *Leviathan*, Molesworth ed., (1839), chapter 28, at p. 300.

[30] *London and Country Commercial Property Investments, Ltd.* v. *Attorney-General*, [1953] 1 W.L.R. 312, at p. 319, *per* Upjohn, J. See also: *Jenkinson* v. *Thomas*, (1792) 4 T.R. 665, at p. 666; 100 E.R. 1233, at p. 1234.

[31] Frankfurter, J. was then dealing with cinema censorship laws.

responsive to the common understanding of men [nor] susceptible of explicit definition... lead to timidity and inertia and thereby discourage the boldness of expression indispensable for a progressive society."[32] Though Frankfurter, J. was speaking of expression through words, his statement is equally applicable to all other forms of expression.

It might be argued that most cases reaching the higher courts represent situations in which one or another of the litigants was unable to know his actual legal position before the specific judgment was rendered. Yet, as Lon L. Fuller points out,[33] this analogy to civil suits is really false. The decision of the courts on an obscure point in the law of contract may create at the time of judgment a debt then exigible for conduct known to have taken place in the past, yet the court's judgment is still prospective: it is in the grammatical form, You shall pay damages for your civil wrong.

The private law of civil obligations is dissimilar from the public criminal law. The law of crimes does not see a fine or imprisonment as a permissible alternative, legitimately open, as of right, to all who prefer it rather than obedience to nominate penal injunctions; rather, it is termed *punishment* and is meant to deter one from proscribed actions. There is no counterpart in this realm of the public law to the maxim that a contract does not oblige one to its execution, but only obligates each co-contractant to fulfill the contract or to pay an appropriate quantum of damages.

If it thus be accepted that rules of the criminal law always should remain within the ability of mortal man to discover, and in view of the fact that even had Mr. Shaw's solicitor sought out the leading silk in the land, before the first edition of the *Ladies' Directory* went to press, he could not have been given any inkling as to the illegality of the act of publication at common law, it is difficult by all but the most contorted of reasoning to deem his conviction anything but the enactment of penal rules *ex post facto.*

Trends in the present era all have been to require publicity for all non-parliamentary acts of rule creation; the very process of their enactment itself serves to publicize statutes.[34] The logical cul-

---

[32] *Kingsley International Pictures Corp.* v. *Regents of the University of the State of New York,* (1958) 360 U.S. 684, at p. 695.

[33] Fuller, *The Morality of Law,* rev. ed., (New Haven: 1969), at pp. 58-60.

[34] *Johnson* v. *Sargant & Sons,* [1918] 1 K.B. 101. See also: J. Noel Lyon, *Constitutional Validity of Sections 3 and 4 of the Public Order Regulations, 1970,* (1972) 18 McGill L.J. 136; *R.* v. *Ross,* (1944) 84 C.C.C. 107 (B.C. Co. Ct.); *1962 Ford Thunderbird Serial #ZY87Z155562* v. *Division of Narcotic Control, State of Illinois,* 198 N.E. 2d 155, at pp. 158-59 (Ill. C.A., 1964).

mination of this process should be the discouragement of judges from the arbitrary expansion of common law doctrines of penal responsibility. Judges today might well be advised to heed John Austin's "Third Tenable Objection to Judiciary Laws", and restrict expansions of common law offences to those cases where " ... the parties can infer, by probable argumentation, the decision which the tribunals will come to". As Austin says:

> In every such case the law is strictly *ex post facto*, and the parties cannot therefore obey the law, but they nevertheless have an inkling of the rule by which their case will probably be decided.[35]

B. *Mens Rea*

Concisely stated by Lord Devlin, the idea of *mens rea* unites two requisites for criminal liability: there must be "an intent to do an act ... [and] knowledge of the circumstances that make that act a criminal offence."[36] As regards common law offences there is no sound authority for finding criminal liability in the absence of *mens rea*.[37]

The case law has proceeded to hold that knowledge of circumstances making an act criminal is rebutted by a mistake of fact, but not by a mistake of law.

> An error of fact takes place, either when some fact which really exists is unknown, or some fact which is supposed to exist does not. On the other hand, when a person is truly acquainted with the existence or non-existence of the facts, but is ignorant of the legal consequences, he is under an error of law.[38]

The highest courts of common law have held as well that " ... a mistake as to the existence of a compound event consisting of law and fact" is a mistake of fact, negativing the existence of *mens rea*.[39]

Examining the supposed *mens rea* of Mr. Shaw, Knuller Ltd. and its three directors, and Mr. Howes on the eve of their respective "crimes", what *mens rea* can be found? Perhaps one is bound to admit that each knew of the circumstances which, after the fact only, were held to make their respective acts criminal. So much has

---

[35] Austin, *Lectures on Jurisprudence*, 5th ed., (1885), at pp. 651-652.

[36] Devlin, *Statutory Offences*, (1958) 4 J. Soc. Pub. Teachers of L. 213.

[37] *R.* v. *St. Margarets Trust Ltd.*, [1958] 1 W.L.R. 522, at pp. 525-527 (C.C.A., Lord Goddard, C.J., and Donovan and Havers, JJ.), and authorities cited therein.

[38] *White Bros.* v. *Treasurer-General*, (1883) 2 S.C. 322, at p. 349 (South Africa, De Villiers, C.J.). See also: Glanville Williams, *Criminal Law: The General Part*, 2nd ed., (1961), at pp. 287 *et seq.*

[39] *Thomas* v. *The King*, (1937) 59 C.L.R. 279, at p. 306, *per* Dixon, J. Note as well the cases cited in n. 40, *infra*, at p. 147.

to be admitted. Still, it is submitted that this alone cannot be what the law is to require to establish guilt. While the literature detailing the theoretical bases of the *mens rea* notion is scant — perhaps because of the unsatisfactory ambiguities surrounding the doctrine — it will be a matter of general agreement that the doctrine exists because of an accepted need for a "mental element" to be displayed in the more serious criminal offences.

If the present argument, as to the absence of a "mental element" from the three supposed cases of criminality cannot be expressed in terms of a claim that the respective courts ignored the doctrine of *mens rea* as it now stands, then surely these present cases, seen in the light of the bigamy judgments,[40] suggest most strongly the need to reexamine and to rationalize the common law rules through statutory codification and amendment. Should not the accuseds' minds at the operative moments be deemed to have been operating under an error as to a *sine qua non* of legality of at least the magnitude of that present in the bigamy cases?

If the latter cases are to be admitted — somehow — into the class "mistake of fact" so as to keep the law from departing totally the bounds of logic and common sense, surely the court which has but just ended the absurdities of a legalistic *non est factum* rule[41] should be expected to recognize the absence of *mens rea* — of subjective, mental guilt — in the present instance.

Conclusion

Though the examination of this line of cases proceeded under three headings, the conclusion of each was the same. The very norm postulated in these decisions, that all conspiracies *contra bonos mores* are today crimes at common law, as well as the jurisprudential processes by which the two panels of the House of Lords and a Commonwealth appellate court devised and extended this offence, is simply heterodox within the context of the society served by these courts.

J. David Fine *

---

[40] *Ibid.; Long* v. *State,* 65 A. 2d 489, at p. 498 (Del. S.C., 1949); *R.* v. *Gould,* [1968] 2 Q.B. 65, at p. 75 (C.A., Diplock, L.J., *per curiam*). *Long* and *Gould* are on all fours with the earlier *Thomas* case, *supra,* n. 39, at p. 146.

[41] *Gallie* v. *Lee,* [1971] A.C. 1004.

* Third year Law Student, of the Senior Board of Editors of Volume 19 of the *McGill Law Journal.*

The author acknowledges with appreciation the critical review by Philip W. Slayton, Assistant Professor of Law at McGill University, of the initial manuscript from which this text evolved.