TORT: MENS REA AND STATUTES.

In *Harding v. Price*[1] the appellant was driving a vehicle known as a mechanical horse to which a trailer was attached. The trailer caused damage to a stationary car and the appellant was convicted, under the *Road Traffic Act* 1930 s. 22 (2), of failing to report an accident and fined 20/-. The justices found that the reason he had not reported the accident was that, due to the noise made by the mechanical horse, he did not know that the accident had happened; nevertheless they held that, "having regard to s. 22 (2) of the *Road Traffic Act* 1930, the omission of any reference to intent or guilty knowledge therein, the greater precision of modern statutes, and the public evil of the offence disclosed in the information when compared with the smallness of the penalty prescribed by law therefor, the legislature did not intend guilty knowledge or *mens rea* to be essential to the offence."[2]

In short, the decision of the justices was in accord with what is usually regarded as the modern English approach to *mens rea* in statutory offences. This approach is exemplified by Lord Hewart C.J. in *Cotterill v. Penn*[3] where he said of the section under consideration:

> "It does not require the element of *mens rea* beyond the point that the facts must show an intention on the part of the person accused to do the act forbidden, which was here that of shooting. It seems to me immaterial that the bird which the respondent shot was of a different kind from that which he thought that he was shooting."

From this decision of the justices, Harding appealed to the King's Bench Division where the case was argued before Lord Goddard C.J., Humphreys and Singleton JJ. The prosecution argued that the statute imposed an absolute duty to report an accident, therefore a person must drive in such a way that he will know if an accident has happened or at least it is no defence to prove that he did not know. This assertion was strengthened by the fact that a similar section in the *Motor Car Act* 1903, which was repealed and replaced by the section in question, contained the word "knowingly" while the present section omitted that requirement.

The court held that this is not conclusive, but merely shifted the burden of proof.

> "While, therefore, under the Act of 1903, it is necessary for the prosecution to prove that the defendant knew of the accident, it is now no longer necessary to prove knowledge, but it does not follow that the defendant may not prove lack of knowledge as a defence."[4]

As the appellant had proved to the satisfaction of the justices that he did not know the accident had happened the conviction was quashed.

It is well to guard against giving this decision wider operation than it deserves. The peculiarities of this particular section must be taken into consideration. All the Judges were careful to emphasize the fact that this section imposes a duty to act in particular circumstances, not to

1. [1948] 1 All E.R. 283.
2. at p. 284.
3. [1936] 1 K.B., at p. 61.
4. [1948] 1 All E.R., at p. 284.

refrain from doing some act. They point out that it is a question of construction on the wording and policy of a particular section, whether absence of knowledge of the true facts would constitute a defence. Humphreys J.[5] gives instances where in the same Act (e.g. driving at more than the maximum speed) such a defence would not suffice. So it seems that the *ratio* of this case must be confined to statutes requiring positive action: the court, besides having a precedent of the Common Pleas in point,[6] looked at the question from the point of view of reasonableness. How can a man report if he does not know the accident has happened?

This decision is of interest here as there has been a cleavage of opinion in the High Court regarding the question of reasonable mistake of fact as a defence to a statutory offence. Dixon J. has consistently contended that the effect of the absolute language of a statute is not to do away with the defence of reasonable mistake of fact, but merely to throw the onus upon the defendant to prove this mistake. He argues that "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."[7]

This reasoning is criticized by Hannan,[8] who contends that there are not two such rules but merely one; namely, that the rule of defence of honest mistake is not a rule of interpretation but of evidence which only applies to the hearing of an offence in which *mens rea* is an essential ingredient. Therefore, as it is only to rebut proof of *mens rea*, when *mens rea* is not a necessary ingredient, the plea of honest mistake has no place in the defence. He regards the views of Dixon J. as incorrect and contrary to authority. The decision in *Harding v. Price* is in accord with the viewpoint of Dixon J., for there proof of knowledge was not a necessary ingredient, yet honest mistake succeeded as a defence.

Should the courts in future adopt this attitude toward honest mistake as a defence it would be in harmony with ordinary ideas of justice, for it seems unfair to penalize a person for doing something he mistakenly thought was right. But is it altogether desirable? In such cases as the present where the penalty is only a fine of twenty shillings, would it not have been better to have let the justices' decision stand, rather than give drivers who have knowingly contravened the statute the opportunity of convincing the justices that they did not know of the accident?

R. E. McGARVIE.

5. at p. 285.
6. *Nichols v. Hall*, (1873) L.R. 8 C.P. 322.
7. *Proudman v. Dayman*, (1941) 67 C.L.R., at pp. 540-1.
8. (1942) 16 A.L.J. 91.