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Mistake of Fact as a Defense

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MISTAKE OF FACT AS A DEFENSE

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THE rule as to ignorance or mistake stated in its simplest terms is found in the legal maxim: *ignorantia juris non excusat, ignorantia facti excusat.*

This is a maxim recognized at common law in the field of criminal jurisprudence as a defense aimed at demonstrating the lack of the criminal mind, or *mens rea,* which is a requirement of a crime. As a general rule it is a belief in the existence of facts which, if they did exist, would render an act innocent.[1] To illustrate the application of the rule, let us take a typical statute. A statute in the state of Alabama provided in part that no person could vote unless and until he had attained the age of 21. The defendant voted in an election and the state proved conclusively that on election day he was under the statutory age. In his defense, the defendant offered as witnesses his mother and an acquaintance who had known him since his birth. Both testified that they considered the defendant to be 21 and had so informed him. According to their testimony, he had attained age 21 in the month of August preceding the election. In holding that this was a good defense, the court said:

> "'All crime exists, primarily, in the mind.' A wrongful act and a wrongful intent must concur, to constitute what the law deems a crime. When an act denounced by the law is proved to have been committed, in the absence of countervailing evidence, the criminal intent is inferred from the commission of the act. The inference may be, and often is removed by the attending circumstances, showing the absence of a criminal intent. Ignorance of law is never an excuse, whether a party is charged civilly or criminally. Ignorance of fact may often be received to absolve a party from civil or criminal responsibility. On the presumption that everyone capable of acting for himself knows the law, courts are compelled to proceed. If it should be abandoned, the administration of justice would be impossible, as every cause would be embarrassed with the collateral inquiry of the extent of legal knowledge of the parties seeking to enforce or avoid liability and responsibility.
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> The criminal intent being of the essence of crime, if the intent is dependent on knowledge of particular facts, a want of such knowledge, not the result of carelessness or negligence, relieves the act of criminality." [2]

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[1] CLARK & MARSHALL, A TREATISE ON THE LAW OF CRIMES 83 (4th ed. 1940).

[2] Gordon v. State, 52 Ala. 308, 23 Am. Rep. 575 (1875).

The doctrine of *ignorantia facti* is not without its limitations. The Alabama court stated, however, that the want of knowledge must not be the result of carelessness or negligence. The same court, in a bigamy case three years later cited the *Gordon* case, and expressed the rule in this manner:

> "The rule of the common law, of very general application is that there can be no crime when the criminal mind or intent is wanting. When that is dependent on a knowledge of particular facts, ignorance or mistake as to these facts, honest and real, not superinduced by the fault or negligence of the party doing the wrongful act, absolves from criminal responsibility. . . . The belief must be honest and real, not feigned. . . ." [3]

Thus, under another set of facts, the court added the qualification that the ignorance or mistake must be honest and real.

One other limitation must be added; the act would not be a crime if the facts were as mistakenly believed.[4]

In light of the foregoing the general rule may be stated that mistake of fact will disprove a criminal charge if the mistaken belief is honestly entertained, based upon reasonable grounds, and of such a nature that the conduct would have been lawful had the facts been as reasonably believed.[5]

A scholarly treatment of this subject indicates that the doctrine as to ignorance or mistake dates back to the Romans, and that it is a rule of both the Roman and the English law. The author, Professor Keedy, notes that the rule originally had application solely to civil actions.

The earliest reported case in the English law where the court considered the doctrine of *ignorantia facti* was decided in Hilary Term 1231.

Quoting from Professor Keedy:

> "In this case Robert Wagehastr' was summoned to answer one Wakelinus for breach of a fine committed by entering upon the land in question, which was in the possession of the mother of Wakelinus. Robert pleaded as a defense that he entered upon the land under the belief that the estate belonged to him, which belief was founded upon the advise of counsel. The court held that this was no defense, and ordered Robert to be imprisoned for breach of the fine." [6]

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[3] Dotson v. State, 62 Ala. 141, 34 Am. Rep. 2 (1878).

[4] Regina v. Lynch, 1 Cox C. C. 361 (1846).

[5] Perkins, *Ignorance and Mistake in Criminal Law,* 88 U. PA. L. REV. 35 (1939).

[6] Keedy, *Ignorance and Mistake in the Criminal Law,* 22 HARV. L. REV. 75, 78 (1908).

Another writer indicates that the *mens rea* doctrine was applied prior to the seventeenth century in criminal cases.[7] The writer stated:

> "The modern doctrine of mistake or ignorance of fact is built largely upon Levett's Case (Cro. Car. 538) decided in 1638. In this case the defendant reasonably but erroneously supposing that Frances Freeman, an intruder in his house in the night, was a burglar, killed her with a thrust of his rapier. The court resolved that it was not manslaughter, for the defendant 'did it ignorantly without intention of hurt to the said Frances.' After this decision courts evolved the important well-recognized doctrine that one acting under a reasonable mistake of fact is not criminally liable if, had his erroneous supposition been true, he would not have been liable." [8]

These writers demonstrate that the doctrine is firmly embedded in our jurisprudence.

It is appropriate at this point to pause and analyze the doctrine of *ignorantia facti.* Why may such a defense be interposed?

The answer to this question lies in the concept of what constitutes a crime. Court language expresses the concept:

> "It is a sacred principle of criminal jurisprudence, that the intention to commit the crime, is of the essence of the crime, and to hold, that a man shall be held criminally responsible for an offense, of the commission of which he was ignorant at the time, would be intolerable tyranny." [9]

Similarly:

> "There can be no crime, large or small, without an evil mind. It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it cannot exist." [10]

If there can be no crime without an act plus intent, any method by which an accused is able to establish that he did the act without the criminal intent should be an acceptable defense. It is on this theory that the doctrine of *ignorantia facti* is buttressed.[11]

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[7] Sayre, *Mens Rea,* 45 HARV. L. REV. 974, 1014 (1932).

[8] *Id.* at 1016.

[9] Duncan v. State, 7 Humph. 148, 150 (Tenn. 1846).

[10] 1 BISHOP, CRIMINAL LAW § 287 (9th ed. 1930).

[11] KEEDY, *op. cit., supra* note 6.

"The defendant's criminality must be determined by his state of mind toward the situation in which he acted, and his state of mind will depend upon his impression of the facts. Hence he should be dealt with as if the facts were what he believed them to be. Then if, according to his belief concerning the facts, his act is criminal, he has the criminal mind as distinguished from motive, desire, or intention, and should be punished. If, on the other hand, his act would be innocent provided the facts were what he believed them to be, he does not have the criminal mind, and consequently should not be punished for his act.

Ignorance and mistake of fact, therefore, are important insofar as they negative the criminal mind."

Although the rule as to ignorance or mistake of fact is easily understood, it is not so easily applied. Crimes vary as to their nature and elements, and the rule, consequently, varies in its application to each crime. Moreover, we are not dealing with an act which may be either witnessed and described when performed, or judged by results and after-effects. Rather, we are concerned with an intangible, i.e., the mind and thinking process existent at the time the acts were performed. No man can truly know what goes on in another man's mind. We can be told by an individual that he is thinking in a certain fashion and either believe or disbelieve, or we can observe his actions and conduct, and draw our own conclusions as to his mental attitude; but at best these are crude attempts at guessing.

We have tried to obviate this difficulty through the use of presumptions such as a man being presumed to intend the natural and probable consequences of his acts, or a man being presumed sane. Such presumptions are merely judicial attempts by indirection or substitution to overcome human inability to pierce the periphery of thought. In other words, it is a conclusion that from external conduct certain mental conditions may be assumed to exist.

How can it be demonstrated that a person is not to be held accountable for conduct otherwise criminal because his thinking at the moment was not of a quality to render his act criminal? Courts have devised rules for the myriad fact situations confronting them in an effort to permit the defense of ignorance or mistake of fact to be applied without undue hardship to defendants, and without subverting justice. These judicial attempts, however, have not always yielded uniform results. In part this is due to the ambiguity of language used to express a thought, and many times by the fact situation wherein the hard case makes bad law. Other variables are added when the court must first determine the nature of the crime, isolate its elements, determine the purpose of the criminal statute, and then determine whether the conclusions lend themselves to an application of the defense of mistake of fact.

Despite these hurdles, it is possible to run a course through the cases and to reach certain conclusions which should assist the practitioner in disposing of problems involving mistake of fact.

Illustrative of the problem is the application of the requirements of honesty and reasonableness of the mistake. Theoretically, if the criminal mind does not exist, the accused should not be convicted. The existence or non-existence of the criminal mind is a question of fact which must be submitted to the jury under suitable instructions. In establishing guideposts for the jury in deciding this factual question, the courts impose qualifications.

Sometimes the charge merely requires that the mistake be honest, while on other occasions it must be honest and reasonable. It is appropriate, therefore, that this language be analyzed to determine whether a thread of uniformity runs through the decisions which will permit generalization.

"Honesty" is defined by Webster as, "characterized by integrity or fairness and straightforwardness in conduct, thought, speech, etc., truthful, free from fraud, guile; free from fraud or deception." Thus it becomes apparent that honesty requires the person acting under the mistake must actually believe that which he says he believes.

As was stated by the court in the *Dotson* case: "The belief must be honest and real, not feigned, and whether it is honest or feigned, the jury must determine in view of all of the evidence." [12]

Research has disclosed no cases *contra* to this proposition. Some courts apparently have taken it as a statement of the obvious and have not discussed honesty of belief, but no court has negatived this requirement. Frequently, the language of the court imposes the requirement of honesty without using the word. In a Georgia case, one Miley was charged with giving a mortgage on personal property, held by him under a conditional bill of sale, in violation of the state penal code which declared the act criminal if done with intent to defraud. Miley claimed that when he bought the property nothing was said about reserving the title, and that when he signed the note he was ignorant of the fact that title was reserved. In holding this to be a good defense the court said:

> "But if the defendant believed that he had perfect title when he executed the mortgage—if he did not know that the note reserved title in the the vendor —then the mortgage could not have been made with criminal intent." [13]

Note that nowhere in this language does the word "honest" appear. However, the court in this same opinion expands the law as to ignorance and mistake of fact generally and states: "A pretense of ignorance will, of course, afford no protection." This is indicative of the recognition that if the defendant's ignorance is a sham he has no defense.

While there is substantial agreement in the requirement of honesty of belief, reasonableness presents a far more difficult problem.

Webster defines "reasonable" as, "not beyond the bounds of logic, probability, etc.; as a reasonable assumption." From this definition it may be seen that, unlike the requirement of honesty, which was subjective, reason-

[12] Dotson v. State, 62 Ala. 141, 34 Am. Rep. 2 (1878).
[13] Miley v. State, 118 Ga. 274, 45 S.E. 245 (1903).

ableness is an objective requirement. This limitation calls on the triers of fact to measure the quantum of the mistake against their own standards or against a tenuous yardstick set up by the court in its instructions. To require reasonableness is to depart from the basis for the rule and require that the mistake of the defendant be equated to the judicially defined standards of judgment and knowledge to which all men must measure up or be convicted.

Such a requirement has been often criticized. Professor Jerome Hall states:

> "The major defect in the Anglo-American criminal law on mistake of fact is the frequent requirement of 'reasonableness' which results in treating blameless persons as though they had actually sought the harms that occurred. . . . 'Reasonableness' functions validly as a necessary methodological device to ascertain a defendant's actual state of mind. It is not justifiable in penal law as a standard of conduct because it contradicts the basic requirement of mens rea." [14]

Keedy said:

> "Must the mistake be reasonable? An act is reasonable in law when it is such as a man of ordinary care, skill, and prudence would do under similar circumstances. To require that the mistake be reasonable means that if the defendant is to have a defense, he would have acted up to the standard of an average man, whether the defendant is himself such a man or not. This is the application of an outer standard to the individual. If the defendant, being mistaken as to material facts, is to be punished because his mistake is one which an average man would not make, punishment will sometimes be inflicted when the criminal mind does not exist. Such a result is contrary to fundamental principles, and is plainly unjust, for a man should not be held criminal because of lack of intelligence. If the mistake whether reasonable or unreasonable, as judged by an external standard, does negative the criminal mind, there should be no conviction." [15]

However well-founded these criticisms may be, they are directed toward the departure from the basis for the rule, but they overlook the reasons for the departure. The reasons are substantial and with merit.

First, there is the type of crime involved when mistake of fact is limited by reasonableness. Courts appear to require the mistake to be reasonable only when the crime does not involve a specific intent or knowledge. For example, in jurisdictions where mistake of fact is recognized as a defense to bigamy, the courts generally hold that the mistake must be reasonable.[16]

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[14] HALL, PRINCIPLES OF CRIMINAL LAW 343 (1947).

[15] KEEDY, *op. cit. supra* note 6, at 84.

[16] The leading English case in this area is Reg. v. Tolson, 23 Q.B.D. 168 (1864). Also see McDonald v. State, 138 Tex. Crim. 510, 136 S.W.2d 816 (1940), wherein the court stated: "His belief . . . would necessarily have to be based upon reasonable grounds before he would be excused by the law for this offense."

Another class of cases in which the mistake must be reasonable are the homicides where self-defense based on a mistake of fact is raised by the defendant.[17]

If the defense is available at all in crimes requiring no specific intent, it must be available on some basis that can be measured. We ascribe to these "general intent" crimes the mental element of *mens rea* or the criminal mind, and tell a jury, that if they find certain facts established, the requisite criminal mind may be inferred from the acts. Clearly, such a means of determining the mental state of the accused is a subterfuge. It is an attempt by indirection to establish the mental element, but it is the only means available to determine the fact. Similarly, the requirement that the jury use the measurement of reasonableness in determining whether defendant has put forth facts which will counterbalance and override such an inference is entirely appropriate. It is a scale by which juries can weigh evidence, and a standard of conduct by which the citizen can assure himself that he may avoid prosecution. A bigamy case occurring in the Army illustrates this concept quite clearly. An Army chaplain arranged with his wife for a divorce in August 1944. The wife's attorney indicated the divorce would be granted in September 1944. In fact it was not granted until November 1944. The chaplain, however, on the strength of the attorney's prediction that the divorce would be effected, married again in September 1944. At the trial he contended that he honestly believed he was divorced from his first wife when he married his second wife. In rejecting the defense, the Board of Review stated:

> "An honest mistaken belief that a spouse of a prior marriage has obtained a divorce, where reasonable diligence has been exercised to ascertain the truth constitutes a legal defense to a prosecution before courts-martial for the offense of bigamy." [18]

The board pointed out that while undoubtedly the defendant possessed the honest belief that he was single at the time he contracted the second marriage, his efforts to ascertain the true facts were not reasonable. His conduct bordered on intentional avoidance of the true facts. In the interest of protecting the orderly state of matrimony, courts are entitled, even in the criminal field, to hold everyone to minimum standards of conduct.

In the field of self-defense a man who shoots and kills another does so at his peril. While the imminence of an attack, real or imaginary, may call for action not based on calm deliberation, society still has the duty to protect

[17] Hill v. State, 194 Ala. 11, 69 So. 941 (1915); People v. Williams, 32 Cal. 280 (1867); Kyle v. People, 215 Ill. 250, 74 N.E. 146 (1905); State v. Towne, 180 Iowa 339, 160 N.W. 10(1916); State v. Allen, 111 La. 154, 35 So. 495 (1903); Loy v. State, 26 Wyo. 381, 185 Pac. 796 (1919).

[18] CM 276 297 Lewis, 48 B.R. 275.

its members from needless killing. The act of killing in self-defense is only permissible when done according to strict standards of conduct. Maintaining these standards is a function of the judiciary and again the use of the reasonable mistake is but a necessary tool of measurement.

A different situation exists when the offense requires a specific intent. Here the crime consists of an act plus a highly specialized and limited mental attitude which we call specific intent. In larceny, for example, there must be a taking with the intent to permanently deprive the true owner of his property. Certain types of aggravated assaults, such as with intent to kill, and with intent to inflict grievous bodily harm, require a specific intent. In cases of this type there is a greater burden thrust upon the prosecution. It must prove each element of the offense, including proof that the act was done with the specific intent alleged. Likewise, if the defense can disprove any element of the crime the prosecution has failed to sustain the burden of proof. In these situations, ignorance or mistake of fact is available as a defense, and if the lack of knowledge or mistake as to facts tends to prove that the requisite specific intent was lacking, then the mistake need only be honest and need not be reasonable. In a Colorado case, for example, the defendants, directors of a loan association, took certain commissions as compensation for themselves which caused them to be brought to trial for embezzlement. Defendants asserted that they, in good faith, believed that they were entitled to the commissions. In holding this to be a defense to the crime of embezzlement, the court said: "If they did so believe, it is not material whether their belief was well founded or not." [19]

Similarly, the courts hold that there can be no larceny if one who takes and carries away the property of another honestly believes it to be his own, even though the belief be unreasonable.[20]

Research has failed to disclose any court which has stated the reason for the variance in application of the *ignorantia facti* rule, but it is submitted that the reason probably lies in the greater ease of definition found in "specific intent" cases. An intent to permanently deprive an owner of his property manifests itself in the conduct of the taker more clearly than the belief of the bigamist that he was single. The social harm resulting from killing and dual marriage, and the attendant difficulty or impossibility for the victim to seek recourse in the civil courts for damages, are all factors to be considered. Moreover, in the "specific intent" cases we adhere more closely to the common

[19] Lewis v. People, 99 Colo. 102, 117, 60 P.2d 1089, 1096 (1936).

[20] People v. Devine, 95 Cal. 227, 30 Pac. 378 (1892); Dean v. State, 41 Fla. 291, 26 So. 638 (1899); People v. Shaunding, 268 Mich. 218, 255 N.W. 770 (1934); Stanley v. State, 61 Okla. Crim. 382, 69 P.2d 398 (1937).

law concept of the basis for the rule. Thus the criticism of the rule rests in the *requirement* of reasonableness, not in the absence of the requirement.

Consequently, it may be said that where the crime requires only a general intent or *mens rea,* mistake of fact becomes an affirmative defense and it must be both honest and reasonable. Where the crime includes specific intent as an element and mistake of fact is raised for the purpose of negativing the existence of that element, the mistake need only be honest.[21]

As seen above the defense of ignorance or mistake of fact, as we know it today, stems from a homicide case,[22] and in its early history was confined to the traditional common law crimes against the person and against property. As society developed, the law grew with it. New offenses were created, usually by statute, and the defense of *ignorantia facti* was raised in varying fact situations. "Specific intent" and "general intent" crimes have been discussed in considering the requirements of honesty and reasonableness, and it was concluded that the defense is available in both classes of crimes. Several other categories of criminal conduct should also be considered.

One of these is negligence-type offenses. Negligence has a dual role in criminal law. In some types of crime, negligence serves as a substitute for criminal intent in establishing the requisite mental element.[23] In other cases the legislature has declared that certain types of negligent acts are crimes in and of themselves.[24] In considering the application of mistake of fact as a defense to crimes where negligence is in issue, this distinction will be preserved, despite the fact that the conclusions, as will be seen presently, are the same.

In *Com. v. Rodes,*[25] we find the first type of negligence aptly illustrated. In that case a County Clerk was charged with embezzling public funds. It was shown that the clerk, in the course of his duties, had received tax payments from numerous members of the county, and recorded them, but he had failed to account for them in his semi-annual audits. In his defense, the clerk claimed that he was so busy with settling the estate of a deceased relative that he had left these matters to his deputy, and was ignorant of the

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[21] The conclusions reached in this paragraph must be viewed in each instance in the light of the jurisdiction in which the offense occurred, inasmuch as the legislatures of some states have included in their criminal codes provisions as to mistake of fact. In a particular state reasonableness may be required by legislative mandate in all offenses.

[22] Levett's Case, Cro. Car. 538 (1638).

[23] Regina v. Lowe, 3 Car. & K. 123 (1850).

[24] DEERING, PENAL CODE OF CALIFORNIA §§ 20, 380 (1949).

[25] 6 B. Mon. (Ky.) 171 (1845).

facts which formed the basis for the charges. In rejecting this defense, the court stated:

> "Gross negligence in the discharge of a fiduciary trust is evidence of fraud. And the excuse relied on by the defendant's counsel for his defalcation, is made to rest upon the concession of the most palpable and reckless negligence, which in itself, amounts to misbehavior in office." [26]

In a federal case, a ship's master was charged with a violation of a statute by intentionally carrying a number of passengers in excess of the authorized maximum from Hong Kong to the United States. The defendant claimed that the loading of passengers was handled by the charterer, and that when the port authorities in Hong Kong cleared his ship for departure, he assumed everything was in order, and had no knowledge of his overload until after he arrived in the United States. He then pointed out that this was an offense requiring a specific intent, i.e., the intent to bring these passengers to the United States, and that since he lacked knowledge of the fact, it was impossible for him to possess the requisite specific intent. In rejecting this defense, the court conceded that specific intent was a part of the crime and that the government had not established specific intent as such. The court then continued:

> "But in many cases negligence or indifference to duty or consequences is equivalent to a criminal intent. . . . It was the duty of the master, before leaving the port of Hong Kong to have taken steps to ascertain how many passengers he had on board, if he had not taken an account of them as they came on, as he should have done. This duty should have been performed in person, or by his officers under his direction. The omission of it was an act of gross negligence, in consequence of which this 160 passengers were unlawfully brought to the United States, which consequence he must be held to have intended." [27]

In arriving at a rationale in these cases it should be noted that the offenses require a specific intent which, as was already observed, demands only that the mistake be honest, no matter how unreasonable. Such a conclusion is not without merit. When the ignorance or mistake of fact is based on conduct so grossly negligent as to be the equivalent of intentional avoidance of truth or knowledge, it cannot be honest.[28] The same is true of complete in-

[26] 6 B. Mon. (Ky.) at 175.

[27] U.S. v. Thompson, 12 Fed. 245, 248 (D.C. Oregon, 1882). *Accord:* People v. Campbell, 237 Mich. 424, 212 N.W. 97 (1927).

[28] Professor Keedy's theory varies somewhat. He states: "Though it is not correct to say that negligence is the same as intent, yet negligence supplies the place of intent, and, like intent, makes the mind criminal. Hence, if the defendant is negligent a mistake will not excuse, for mistake is material only as it negatives a criminal mind, and here this is shown *aliunde*.

The defendant's mind is equally criminal when he does a criminal act through negligence or when the mistake under which the defendant acted was due to negligence. Therefore a negligent mistake can be no defense." Keedy, *op. cit. supra* note 6, at 84.

difference to consequences. If the mistake is not honest, one never reaches the problem of reasonableness.

Negligence so gross as to provide a substitute for criminal intent will negative any claim of honest ignorance, thereby precluding the use of *ignorantia facti* as a defense.

In the second class of negligence cases, the field of statutory criminal negligence, it is always necessary to read the language of the statute to determine just what conduct is prescribed. Frequently the language is somewhat ambiguous as to which acts are prohibited when done maliciously or negligently.[29]

Such statutes more properly belong in the preceding class of cases, for they are legislative declarations that negligence may be so gross as to supply a substitute for malice. That is not the type of negligence statute intended for inclusion in the second category. Rather, the type statute referred to in this category is one where negligence is the crime. For example, Revised Statutes, Sec. 5344 of the United States (now repealed) provided that every steamboat captain who by misconduct, negligence or inattention to his duties on such vessel, caused the death of any person, would be deemed guilty of manslaughter. A case interpreting this statute stated:

> "Under the statute it was necessary for the United States to prove three propositions: First, that the defendant was Captain of the Slocum. Second, that he was guilty of misconduct, negligence or inattention to his duties on the Slocum. Third, that by reason of such misconduct, negligence or inattention human life was destroyed. Intent is not an element of the offense, malice need not be proved and it is unnecessary to show that the acts or omissions which caused the loss of life were willful or intentional." (Citing cases.)[30]

In this type statute it is apparent that the mental state of the negligent ship's captain is not a factor in determining guilt. No criminal mind is required, and negligent conduct, if established, completes the crime. Thus if neither general nor specific intent is made an element of the crime, there is nothing which ignorance or mistake of fact may negative, and it is, therefore, unavailing as a defense.

In view of the foregoing, it is submitted that, in negligence-type cases, mistake of fact is no defense.

Certain other offenses require the element of knowledge. "Knowledge" or "Knowingly" refers to the state of mind of an accused person. It "is an

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[29] Com. v. Foley, 292 Pa. 277, 141 Atl. 50 (1928).

[30] Van Schaick v. U.S., 159 Fed. 847, 850 (2d Cir. 1908). *Accord:* State v. Taylor, 59 Idaho 724, 87 P.2d 454 (1939).

essential element in some common law offenses and also is found in a number of statutory crimes. . . ." [31]

> "In criminal law the term "knowingly" means the possession of information concerning facts; that is, a perception of the facts requisite to constitute the crime charged. Positive or actual knowledge is not required since it is sufficient if the circumstances impart knowledge; that is, such information as would cause a person of ordinary prudence to believe, or which one should have known from facts sufficient to put him on inquiry." [32]

It would appear, from the foregoing, that inasmuch as knowledge is a mental element and one of the essential elements of the offense, a defense which negatives such knowledge would be a good defense. The cases support this theory.

In this field of law, ignorance of fact plays a far greater role than mistake of fact, because the defendant usually tries to show that he did not possess the requisite knowledge. When this defense is raised, the cases hold that the ignorance must be honest, but it is immaterial how careless the person might be in failing to acquire knowledge.

For example the essence of the offense of perjury is a conscious false statement under oath. Thus, a Federal Court stated:

> "His negligence or carelessness in coming to that belief or conclusion of the mind, without taking proper pains to enable him to ascertain the truth of the facts to which he swears, does not make his oath corrupt, and perjury cannot be willful where the oath is according to the belief and conviction of the witness as to its truth." [33]

In a Kansas case a defendant was charged with receiving bank deposits, knowing the bank to be insolvent. On appeal the instructions to the jury were held to be error and a portion of the opinion set out the requirement of knowledge as follows:

> "While the instructions fairly state the law in the main, the concluding paragraph of the fourteenth instruction given seems to imply that the defendant might be held guilty in a criminal prosecution if, through his negligence he did not know the actual condition of the bank when it was in fact insolvent. It was proper for the jury to take into consideration the defendant's relation to the bank as a managing officer, and the duties he owed to it for the purpose of determining whether he actually knew its insolvent condition; but mere negligence would not render him guilty of a crime. It was incumbent upon the state to establish not only the fact of insolvency, but the defendant's knowledge of it." [34]

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[31] 1 BURDICK, LAW OF CRIMES § 127 (1946).

[32] *Ibid.*

[33] U.S. v. Shellmire, 27 Fed. Cas. 1051, 1055, No. 16,271 (C.C.E.D. Pa. 1831). Also see People v. Von Tiedeman, 120 Cal. 128, 52 Pac. 155 (1898).

[34] State v. Tomblin, 57 Kan. 841, 48 Pac. 144 (1897).

It is submitted that crimes involving knowledge as an essential element are closely parallel to larceny and other "specific intent" crimes. Mistake or ignorance of fact, when raised, is used in attacking the prosecution's case by negativing one of the elements of proof, and the same rule applies. *Ignorantia facti* is a defense, and need only be honest. Reasonableness is not required.[35]

There are other offenses in which no intent is required. With the growth and development of our society, there has emerged a body of legislation under the police power of the state, which commands that the citizen do or refrain from doing certain acts at his peril. A violation of such regulatory provisions renders the actor criminally liable, regardless of his mental state. The doing of the act is all that need be shown. Professor Sayre [36] calls such crimes "Public Welfare Offenses" and defines them as "the group of police offenses and criminal nuisances, punishable irrespective of the actor's state of mind." [37]

In considering the applicability of *ignorantia facti* as a defense, we are met at the outset by the realization that the crime, by its very definition, excludes the use of such a defense. It has been established that the plea of ignorance or mistake is made solely to negative the criminal mind which was traditionally an element of every crime. This area departs from this concept and declares that the act alone is criminal, and that no mental element is required. Therefore, ignorance or mistake becomes a futile plea as there is nothing to which it can attach.

Illustrative of this proposition is a case in which a statute provided:

> "It shall not be lawful of any person to have during the hours when the sale of liquors is forbidden, any screen or blinds, or any curtain or article or thing covering any part of any window; or to have in, near to, or back of any window or door any opaque or colored glass or article or thing that obstructs or in any way prevents a person passing from having a full view from the sidewalk, alley, or road in front of, or from the side or end of the building, of the bar and room or any part of such bar and room where liquors are sold or kept for sale; or to traffic in liquors in any interior bar or room or place not having in the principal door of entrance to such room or bar a section of such door fitted with clear glass through which during prohibited hours and times, a clear unobstructed view of the bar and room where liquors are sold and kept for sale can be had. And it shall be unlawful to have at any time in the room where liquors are sold any inclosed box or stall or any obstruction which prevents a full view of the entire room by every person present there." [38]

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[35] State v. Lintner, 141 Kan. 505, 41 P.2d 1036 (1935); Com. v. Wilson, 266 Pa. 236, 109 Atl. 913 (1920); State v. Alpert, 88 Vt. 191, 92 Atl. 32 (1914).

[36] Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55 (1933).

[37] *Id.* at 56.

[38] N.Y. Consol. Laws 1909, c. 34.

The defendant owned a saloon. On a Sunday afternoon a policeman inspected the premises and found that there was a shade covering the clear glass section of the entrance door, and a partition inside running from floor to ceiling which obstructed the view of the bar from the outside. The defendant was charged with a violation of the statute quoted above, and at the trial he pleaded ignorance of fact. His testimony tended to establish that the obstruction was not there before he left the saloon prior to the date of the alleged violation and that at the time of the offense he was in California. He did not know of the violation and was not in such a position that he could know. In rejecting this defense the court stated:

> "A conviction under this statute does not depend upon proof of a criminal intent, but simply of a violation. There is a well-recognized distinction between acts mala in se and mala prohibita. Under the latter it is well settled that criminal intent forms no part or element of the offense." [39]

The courts have not abandoned the traditional concept of act plus intent in criminal law without objection. Whenever the language of the statute permits the judiciary to read into the law a mental element, they are prone to do so. As was stated by a Pennsylvania court:

> "Whether a criminal intent, or a guilty knowledge is a necessary ingredient of a statutory offense is a matter of construction to be determined from the language of the statute, and in view of the manifest purpose of the same. Com. v. Weiss 139 Pa. 247; 21 A. 10, 11 LRA 530, 23 Am. St. Rep. 182. As we stated in Com. v. Hackney, 117 Pa. Super. 519 at page 524, 178 A. 417, 419; 'Direct Proof of a guilty intent is not always necessary in a prosecution for violation of a statute. Whether it is incumbent upon the commonwealth to show a criminal knowledge or intent as an essential ingredient of a statutory offense is generally a matter of construction, to be determined by the language of the statute.' " [40]

With this thought in mind a word of caution is extended. Particular statutes should be carefully studied in the light of decided cases which have interpreted them. If a mental element can be read into the statute, then mistake of fact will be an available defense. When, however, the law is finally determined to be declaratory of the act without the intent concept, ignorance or mistake of fact is no defense.

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[39] People v. D'Antonio, 134 N.Y. Supp. 657 (1912). *Accord:* People v. Werner, 174 N.Y. 132, 66 N.E. 667 (1903), where the court said:

> "The law on this subject seems to be that an act *malum prohibitum* is not excused by ignorance or a mistake of fact when a specific act is made by law indictable, irrespective of the defendant's motive or intent. . . . The general rule that the criminal intention is the essence of crime does not apply to such prohibited acts."

[40] Com. v. Fine, 166 Pa. Super, 109, 70 A. 2d 677, 679 (1950).

Viewed in retrospect, there appears to be a pronounced tendency towards uniformity in the application of the defense of *ignorantia facti.* Courts generally recognize the applicability of the defense to crimes where knowledge or a criminal mind constitutes an essential element. The peculiar facts of a given case may cause a trial court to reject the claim of ignorance of fact as lacking in honesty or reasonableness, but appellate tribunals are quick to observe such acts of discretion, and may disagree as to whether or not such decisions are abuses of discretion. None, however, disagree as to the applicability of the defense if the evidence fairly raises the issue.

Considerable case law has developed in the "public welfare-offense" field because of the reluctance of courts to recognize crimes without a mental element. When forced to conclude that there is no mental element required in conduct denounced by statute, the courts are quite unanimous in holding that *ignorantia facti* is not a defense.

The text writers seem to take issue with the application of external standards, i.e., reasonableness, as measured by the jury according to the imaginary prudent man. To this writer such criticism is theoretically correct because it is possible to be honestly but unreasonably mistaken and in truth be lacking in the necessary mental element to make conduct criminal. However, this field of criminal law, where a general criminal mind or *mens rea* is recognized, has always caused difficulty. Courts say that it is presumed a person intended the natural and probable consequences of acts intentionally performed. If the act is shooting and the result is the killing of another human, it is called murder. The fact that the killer intended to frighten his victim by a near miss is disregarded. The death which resulted is called a foreseeable consequence. In criminal negligence cases we use proximate cause. All these concepts are founded in *tort* and are inappropriate in criminal law, but they spring from the same basic need—the need for tools to cope with intangibles.

Juries are made up of human beings. None are clairvoyant; all are responsible for deciding fact issues involving intangibles. They must have some means or method of determining whether an intangible mental status exists as a fact. So the reasonableness of a mistake is merely a practical tool for approaching a difficult problem and approximating a just and equitable result. The time may come when the rules will change, but in the present state of the law there appears to be no tendency to break away from tradition.