

—not an absurdity in it, but is "the perfection of reason." And a judge, under the rule of *stare decisis*—how could he get on if he did not occasionally see from the back side of his head? How, in Massachusetts, could a prosecuting officer?

An excellent and clear-headed lawyer and upright man, who for several years served as prosecuting officer in the most populous county in Massachusetts, has just informed the public through what contortions, in this state, such an officer can so adapt himself to the adjudications on the present subject as to render himself comfortable, if not absolutely happy. He commences an article in the *American Law Review** with the following formulated eclipse, so absolutely total that even the stars appear: "In this country, at least, it is still an open question whether a person who honestly does that which appears to him to be lawful, right, and proper, but which, in point of fact, is in violation of a law which punishes the act as a crime, can properly be convicted." The stars here revealed are two, named Peter and John, who demanded of the legal authorities, "Whether it be right, *in the sight of God*, to hearken unto you more than unto God, judge ye;"† John Rogers, who was burned at the stake, with nine small children and one at the breast;" John Brown, hung at Harper's Ferry, whose "soul is marching on;" and various others whose names are not important in this connection. They raised the question of *ethics*, as to the comparative obligation of the law of the land and the law of God. But that it is, or ever was, in this country, or any other, a question in the criminal law of the land, whether or not one who violates it, even by honestly doing "that which appears to him to be lawful, right, and proper," "can properly be convicted," is a contortion, pleasant undoubtedly to him who is compelled to it, but startling to the looker-on. Well, he proceeds to picture Massachusetts standing manfully on the side of the law! Those who disobey the criminal law in this state "can properly be convicted," however proper in their own eyes may be the thing which they do. To sustain this proposition he states or cites various cases, of the sort which I have already commented on, wherein the court

ignores the most familiar rules of statutory interpretation; mingled with other cases relating to pleading and evidence, wherein the universal doctrine was followed, yet not distinguishing them from the former, and accepting them as upholding the same proposition. In this way he makes it appear that Rhode Island, in the case which I have already stated, stands side by side with Massachusetts. No one knows but she will—she has not done it yet. And something like the same thing appears as to Connecticut and Kentucky.

The contortion need not consist of any intentional unfairness, nor do I discover any in the writer I am now considering. He gives, with entire candor, what he esteems to be the authorities on the other side, namely, to the proposition which, in his language, is that, if a man "honestly does that which appears to him to be lawful, right, and proper, but which, in point of fact, is in violation of a law which punishes the act as a crime," he cannot "properly be convicted." He admits that the courts of some of our states have placed themselves squarely on this doctrine, and that it has considerable English support. But, candid as he is, he cannot bring himself fully to the conclusion that England stands on it; and, on the whole, he places her on the side of law and order! For this he cites several cases, particularly some penal actions, in which the law was permitted to prevail over the honest convictions of the party; ignoring the fact that a penal action is not a criminal proceeding, but a civil, and that by all opinions the doctrine of the criminal intent does not necessarily prevail in civil cases as in criminal. I might add that there are cases criminal in form, but civil in their nature and purposes, in which being governed by the rules of civil causes, it does not prevail.* "In fact," he concludes, "we doubt whether any court could be found to assert the doctrine of the *mens rea* in the face of the statute distinctly dispensing with it. It is for the Legislature to judge whether the injury to the public from the indulgence of any particular practice is so great as to justify the risk of possible injustice to an individual in providing for its punishment. Moreover, should such a case of injustice arise, though the courts cannot

* 12 Am. Law Rev. 469.
† Acts iv, 19.

* 1 Bishop's Cr. Law, 6th ed., secs. 1074-1076, and the places there referred to.