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Belief in Death of Absent Consort as a Defence to a Charge of Bigamy

Sterling Case

It is noteworthy, however, that the State Department of Public Health in its Regulations Governing Fluoridation of Water, has recommended that a municipality test the popular demand for fluoridation by popular vote or straw vote.[23] Following this suggestion the City of Rock Springs in November of 1954 went to the polls to vote on fluoridation as a "recommendation and guide" for the council. The council had adopted a resolution several months earlier asking the Public Service Commission to allow an increase in water rates to inaugurate fluoridation. A majority of the popular vote was against fluoridation. In December of 1954, the council passed a bill killing the earlier resolution in favor of fluoridation.[24]

In view of the consistent line of decisions favorable to fluoridation and the fact that the U. S. Supreme Court has three times refused to hear the question,[25] it is fair to predict that the Supreme Court of Wyoming could uphold the legality of municipal fluoridation. A glance at the tabulation of fluoride content in the water supplies of sixty-two Wyoming cities and towns[26] will show that the potential trouble areas are almost everywhere; hence a ruling on fluoridation might come from any of the District Courts. Less than 15% of Wyoming communities have fluoride contents of 0.9 ppm or higher, which means that about 85% of the communities are potential fluoridation areas. Twenty-nine per cent have only 0.1 or 0.2 ppm. These include such towns and cities as Evanston, Jackson, Rawlins, Buffalo, Kemmerer, Lander, Moorcroft and Newcastle. Twenty-five per cent have from 0.3 to 0.4 ppm. On this group are Casper, Cody, Douglas, Green River, Duck and Worland. In the 0.5 and 0.6 ppm group, which is still far below optimum is another 25% including Lovell, Riverton, Rock Springs, Torrington and Wheatland.

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BELIEF IN DEATH OF ABSENT CONSORT AS A DEFENSE TO A CHARGE OF BIGAMY

The problem suggested by the title of this law note is as old as the legendary tales of "men who go down to the sea in ships." It is called the "Enoch Arden situation" because the perplexing question was posed in Tennyson's poem bearing that title:

23. Regulations Governing Fluoridation of Water, State Department of Public Health, Cheyenne, Wyoming (February 8, 1952).

24. A Report of Fluoridation Activities As They Occurred in Eight States in 1954 and Part of 1955, Regional Dental Consultant, Public Health Service, Denver, Colorado, Region VIII.

25. DeAryan v. Butler, 119 Cal.App.2d 674, 260 P.2d 98 (1953); cert.den. 347 U.S. 1012 (1954); Chapman v. Sheveport, 225 La. 859, 47 So.2d 142 (1954); app. dism. 348 U.S. 892 (1954); Dowell v. Tulsa, 273 P.2d 859 (Okla. 1954); cert. den. 348 U.S. 912 (1955).

26. Table 27, Chemical Analysis of Municipal Water Supplies, State Department of Public Health, Cheyenne, Wyoming (undated).

Here on this beach a hundred years ago,
Three children of three houses, Annie Lee,
The prettiest little damsel in the port,
And Phillip Ray, the miller's only son,
And Enoch Arden, a rough sailor's lad
Made orphan by a winter shipwreck, play'd
Among the waste and lumber of the shore.

Enoch Arden wooed and won the hand of his Annie Lee, and to them were born three children. Then Enoch, "hungering for his own ship to go to sea, reported to a vessel China-bound" and sailed away to seek fortune for his family upon the seven seas. The ship, the crew, the cargo, all were wrecked and lost upon a lonely island in the southern sea, where only Enoch survived and lived his solitary life "year in and year out and saw no sail from day to day."

At last, in poverty and despair—believing, but still not knowing that Enoch was dead, Annie was wed to Phillip Ray and together they reared the children of Enoch and of their own.

Then Enoch Arden returned:

Up by the wall behind the yew tree,
Thru the square of light
Enoch saw his wife, his children grown,
Beside the burnished board of the household
To which "he must be the living dead;"
For he must have strength
Not to tell her, never to let her know.
He therefore, turning softly like
A thief, lest he should swoon and tumble and be found,
Left the window, crept to the gate and opened it
and closed; and went his desolate way.

The legal questions involved in the Enoch Arden case began years after Enoch "left the cottage window," and when the later turned up very much alive. The complications and consequences are often as dramatic and emotional to modern day courts, administrators, executors, spouses and would-be spouses as they were in Tennyson's poem. Among many others, there arise questions of descent under the statutes of the property of the "deceased" absent spouse, of the validity of marriages, the legitimacy of heirs, the probate of wills, the title to real property and liability for the crime of bigamy. This note will be limited to a discussion of whether, under the facts and circumstances, the crime of bigamy has been committed by the spouse who remarries.

Bigamy was not a crime at common law but constituted merely an "offense" punishable by decree of the ecclesiastical courts.[1] This was the state of the English law until the reign of James I when, by statute, bigamy was made a felony punishable in the criminal courts of England:

1. State v. Sellers, 140 S.C. 66, 134 S.E. 873 (1926).

> AN ACT TO RESTRAIN ALL PERSONS FROM MARRIAGE UNTIL THEIR FORMER WIVES AND FORMER HUSBANDS BE DEAD: Be it therefore enacted by the King's Majesty . . . That if any person or persons within his Majesty's dominions of England and Wales, being married, or which hereafter shall marry, do at any time after the session of this present parliament, marry any person or persons, the former husband or wife being alive; that then every such offense shall be felony and the person and persons so offending shall suffer death as in cases of felony, . . . Provided always, That this act nor anything therein contained, shall extend to any person or persons whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or whose husband or wife shall absent him or herself the one from the other by the space of seven years together, in any parts within his Majesty's dominions, the one of them not knowing the other to be living within that time.[2]

This statute was carried into the American Colonies by Provincial Legislatures; for example, it was declared to be in force in Maryland in 1706.[3] Resultant from this historical development, the offense today is one defined primarily by statute in most jurisdictions of the United States;[4] and it is interesting to note that the majority of bigamy statutes are substantially the same as the Act of James I;[5] however, the early English rule was contrary to that prevailing in the United States, in that, in Great Britain, a bona fide belief, on reasonable grounds, in the death of the spouse at the time of the second marriage was a good defense to a prosecution for bigamy.[6]

In the leading English case propounding this rule, *Regina v. Tolson,* the defendant (wife) was convicted of bigamy. She had been married in 1880 and was deserted by her husband in 1881. From inquiries which she and her father made about him from his brother, she was led to believe that he had been lost at sea in a vessel bound for America. In 1887, supposing herself to be a widow, she married again. Her husband returned from America that same year and before the seven-year absence statute had run. It was found that the wife, in good faith and on reasonable grounds, believed her husband to be dead at the time of her second marriage. The House of Lords held that "at common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the defendant is indicted an innocent act, has always been held to be a good defenese." In an English case[6a] of later date, under a different fact situation, the court did not follow *Regina v. Tolson,* but distinguished the two cases on the ground that in the latter, "she did not intend at the time of the second marriage to do the act forbidden by the statute," the court further clarifying its ruling by stating that "in our opinion this

2. Act of James 1, 2 James 1.c.11 (1604).
3. Barber v. State, 50 Md. 161 (1878).
4. Note, 27 Dicta 414 (1950).
5. Annot., 8 Ann.Cas. 1105 (1908).
6. Reg. v. Tolson, 23 Q.B.D. 168 (1889).
6a. Rex v. Wheat, 2 K.B. 119 (1921).

decision is not in conflict with the majority of the judges in *Regina v. Tolson.*" But the great majority of American courts have declined to follow the early English rule and have, in the absence of statute, held that an honest belief in the death of the former spouse is no defense to such a prosecution.[7]

The leading American case supporting the rule here is the old Massachuetts case of *Commonwealth v. Mehitabel Mash.*[8] Here, a woman remarried within the statutory period believing her husband to be dead. She was convicted in the trial court and her conviction was affirmed in the Supreme Judicial Court, that court holding that "in a matter of this importance, so essential to the peace of families and the good order of society, it was not the intention of the law to make the legality of a second marriage whilst the husband or wife is in fact living, depend upon ignorance of such party's being alive, or even upon an honest belief of such person's death."

In the case of *Jones v. State,* four decades later, the doctrine of the *Mash* case was rigidly followed by Alamaba, the court holding that "whoever marries a second time, having a former husband or wife living, absent for a less period than five years, violates the statute, and is subject to punishment." "Belief honestly entertained, founded on mere report or rumor will not excuse;"[9] and, returning to the battle, Massachusetts in 1895 affirmed the rule of the *Mash* case in *Commonwealth v. Hayden,* where the court held that an honest and reasonable belief in the death of a former wife or husband is not a defense to a prosecution for bigamy.[10]

Following the American cases within this group, both in point of time as well as in reasoning, is a line of cases which may be referred to as the "peril" decisions, and which seem to reflect the current trend in the greater number of jurisdictions of the United States. Foremost among these is *State v. Ackerly,*[11] where the statute creating the offense of bigamy provided that it should not extend to "a person whose husband or wife has been continually beyond the seas or out of the state for seven years together," the party marrying again not knowing the other to be living within that time. The Supreme Court of Vermont held that "it is clearly the intent of the statute that one who remarries within seven years shall do so at his peril." In *Schell v. People,*[12] the rule of the *Ackerly* case was followed by the Colorado court, which stated that "the prevailing view in the United States is that one who marries within the period designated by the statute shall do so at his peril."[13] Almost ten years later, the Colorado high court again opined that one who marries a second spouse because of

7. Annot., 8 Ann.Cas. 1104 (1908); 7 Am.Jur., Bigamy § 24 (1937).
8. 7 Metc. 472 (Mass. 1844).
9. 67. Ala. 84 (1880); see also Rand v. State, 129 Ala. 119, 29 So. 844 (1901).
10. 163 Mass. 453, 40 N.E. 846 (1895).
11. 79 Vt. 69, 64 Atl. 450 (1906).
12. 65 Colo. 116, 173 Pac. 708 (1918).
13. But see Baker v. State, 86 Neb. 775, 126 N.W. 300 (1911).

the first spouse's continued absence for the statutory period, although believing the former spouse to be dead, does so at his peril.[14] In the court's opinion it was not a prima facie defense that the statutory period had in fact run, holding that "if the defendant relies upon the statute, he must produce evidence thereof." The "absence" meant by the statute is not the absence of the party contracting the second marriage, but of his or her wife or husband.[15]

At least two states which adhere to the "peril" doctrine add that proof tending to show good faith in believing a former spouse to be dead when the second marriage was contracted may be considered only in mitigation of punishment.[16]

At a very early date, a New York court held that the bigamy statute did not render the second marriage legal, notwithstanding the former husband or wife may have been absent and not heard of beyond the statutory period: "It only declares that the party who remarries in consequence of such absence of the former partner, shall be exempted from the operation of the statute and leaves the validity of the second marriage just where it found it."[17]

A very few American courts have followed the rule of *Regina v. Tolson* and have held that if, after careful and reasonable investigation by the defendant, he makes a mistake of fact and believes himself single through the death of his former spouse which never occurred, it is impossible for him to have the necessary mens rea to commit the crime of bigamy.[18] It is obvious that these courts revert to the common law and require mens rea as an element of bigamy. The great majority of state courts that have passed on the subject have followed the precedent of the *Mash* case, supra, which held that "if a statute has made it criminal to do any act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it." The majority rule is therefore that criminal intent is not essential to the crime of bigamy, except the intent to do the thing prohibited by statute.[19]

In Wyoming, the problem seems to be as yet open. No cases have been decided by the Supreme Court of Wyoming covering this issue; however, Wyoming does have a "presumption" statute concerning the legitimacy of children:[20]

14. Magee v. People, 79 Colo. 1328, 245 Pac. 708 (1926).
15. Parker v. State, 77 Ala. 47, 54 Am.Rep. 43 (1884); Schell v. People, 65 Colo. 116, 173 Pac. 1141 (1918).
16. Russel v. State, 66 Ark. 185, 49 S.W. 821 (1899); Rose v. Rose, 274 Ky. 208, 118 S.W.2d 529 (1938).
17. Fenton v. Reed, 4 Johnson 52, 4 Am.Dec. 244 (N.Y. 1809).
18. Leseuer v. State, 176 Ind. 448, 95 N.E. 239 (1911); Squire v. State, 46 Ind. 459 (1874); Baker v. State, 86 Neb. 775, 126 N.W. 300 (1910). Since Indiana is the state of origin of the Wyoming Criminal Bigamy statute, the Indiana cases might have special significance for the Supreme Court of Wyoming.
19. 5 Wis. L. Rev. 100, 101 (1929); State v. John Demeo, 118 A.2d 1 (N.J. 1955).
20. Wyo. Comp. Stat. § 3-5925 (1945).

> When a marriage is dissolved on account of a prior marriage of either, and it shall appear that the second marriage was contracted in good faith and with the full belief of the parties that the former wife or husband was dead, or that one of the parties was ignorant of the fact that the other had a wife or husband living, the fact shall be stated in the decree of divorce or nullity, and the issue of such second marriage born or begotten before the commencement of the action shall be deemed to be the legitimate issue of the parent who at the time of the marriage was capable of contracting.

It is clear that the issue of the bigamous marriage, under the circumstances set forth in the above statute, will be deemed to be the legitimate issue of the innocent spouse; but the act is silent as to the validity of the second marriage. This question may be answered by the Wyoming statute defining "void" marriages:[21]

> Marriages are void without any decree of divorce that may hereafter be contracted in this state:
> First—When either party has a husband or wife living at the time of contracting marriage.

The Wyoming criminal bigamy statute reads as follows:

> Whoever, being married, marries again, the former husband or wife being alive, and the bond of matrimony being still undissolved, and no legal presumption of death[22] having arisen, is guilty of bigamy, and shall be imprisoned in the penitentiary not exceeding five years.

The safest advice on the problem would undoubtedly be for a party to seek a divorce or annulment before a second marriage is contracted, if there is the least doubt as to the death of a former spouse; but this precautionary measure would not help those persons who, in a reasonable belief their spouses are dead, remarry without a divorce or annulment, only to have "Enoch Arden" return. Examples of this situation are to be found where the husband has been reported as a war casualty and the wife remarries, only to have the first husband later reappear.[24] An exhaustive search of the case law involving this question shows a dearth of recent cases in point since World War II, which indicates that the parties have adjusted their serious marital problems among themselves after "Enoch" returned. But these "amicable settlements" may yet come back to haunt and harass the courts and the administrators and executors of estates, and to cloud titles in the years to come, unless handled at the inception of the predicament by resort to the courts.[25]

From a study of the Wyoming statutes and from a survey of the substantive and case law of the United States, it is indicated that the Wyoming

21. Wyo. Comp. Stat. § 3-5901 (1945).
22. Note: The Wyoming Presumption of Death statute is Wyo. Comp. Stat. § 6-3001 (1945) as amended in 1954 and contains the provision of seven years absence.
23. Wyo. Comp. Stat. § 9-501 (1945).
24. Wyo. Comp. Stat. § 3-128 (1945). The legislature of 1954 passed and enacted a statute which provides for "a written finding of presumed death" made by the Army and/or Navy Departments.
25. Note, 27 Dicta 414 (1950).

courts would probably follow the majority rule of the state courts; i.e., that one remarrying within the Wyoming statutory period of seven years, believing, but not knowing, that the former spouse was in fact dead, would do so at his peril so far as concerns the crime of bigamy.

STERLING CASE

EVIDENCE COURT CONSIDERS ON MOTION TO DIRECT VERDICT

Formerly many courts applied the scintilla doctrine as a basis for determining the quantity of evidence required in order to defeat a motion for a directed verdict.[1] Under that doctrine the motion was denied if the party resisting it produced any evidence tending to support each material allegation in his pleadings.[2] The scintilla doctrine has been replaced by the substantial evidence rule which requires submission of a case to the jury if there is sufficient evidence upon which reasonable men could reach different conclusions.[3] The party opposing the motion must support each essential element in his pleadings with substantial evidence.[4]

Although the substantial evidence rule has been adopted in most states, there is a split of authority concerning how much evidence the courts will examine in applying the rule.[5] Here it should be mentioned that this article is considering only the motion for a directed verdict made after all the evidence has been introduced, and no consideration is given to a motion for a directed verdict or an involuntary non-suit entered by the defendant after the plaintiff has presented his case. In most jurisdictions only the evidence in favor of the party resisting the motion will be considered.[6] If the defendant moves for a directed verdict, the court looks at the plaintiff's evidence, and the motion is denied if the plaintiff has established a prima facie case.[7] In applying the majority rule there are two situations which present some difficulty.[8] One arises when the defendant's evidence helps the plaintiff establish his cause of action. The cases hold that any evidence in favor of the plaintiff will be considered

1. Louisville & N.R. v. Chambers, 165 Ky. 703, 178 S.W. 1041 (1915).
2. Hamden Lodge No. 517, I.O.O.F. v. Ohio Fuel Gas Co., 127 Ohio St. 469, 189 N.E. 246 (1934).
3. Nugent v. Nugent's Ex'r, 281 Ky. 263, 135 S.W.2d 877 (1940); Hamden Lodge No. 517, I.O.O.F. v. Ohio Fuel Gas Co., 127 Ohio St. 469, 189 N.E. 246 (1934). Contra, Birmingham Electric Co. v. Freeman, 32 Ala. App. 479, 27 So.2d 231 (1946).
4. Leary v. Macheski, 92 Ohio App. 452, 110 N.E.2d 800 (1951).
5. Note, 22 Tex. L. Rev. 359 (1944); McBaine, Trial Practice . . . 31 Cal. L. Rev. 454 (1943).
6. Yance v. Hoskins, 225 Iowa 1108, 281 N.W. 489 (1938); Hamden Lodge No. 517, I.O.O.F. v. Ohio Fuel Gas Co., 127 Ohio St. 469, 189 N.E. 246 (1934); Klein v. York, 149 Tenn. 81, 257 S.W. 861 (1924); Burghardt v. Detroit United Ry., 206 Mich. 540, 173 N.W. 360, 5 A.L.R. 1333 (1919); Karr v. Milwaukee Light, Heat & Traction Co., 132 Wis. 662, 113 N.W. 62 (1907).
7. Wilson v. Kansas City Life Ins. Co., 233 Mo.App. 1006, 128 S.W.2d 319 (1939). For a discussion of prima facie case see: 9 Wigmore, Evidence, § 2494 (3d ed. 1940).
8. 9 Wigmore, Evidence, § 2495 (3d ed. 1940).