

(*Times Law Reports*, Vol. xxxvii, page 417.)

• REX *v.* WHEAT.

REX *v.* STOCKS.

C.C.A.

1921.

February 14.

*Criminal Law—Bigamy—Defence—Belief that Accused had been divorced—Offences Against the Person Act, 1861 (24 & 25 Vict., c. 100), s. 57.*

BRAY, J.  
AVORY, J.  
SHEARMAN, J.  
SALTER, J.  
GREER, J.

On a charge of bigamy an erroneous but *bona fide* belief on reasonable grounds that the accused had been divorced is no defence.

THE appellants were convicted at the Derby Assizes—Wheat of bigamy, and Stocks of aiding and abetting bigamy—and were each sentenced to one day's imprisonment. They appealed against conviction on certificate of Mr. Justice Sankey, before whom the case was tried. The jury, who returned the verdict of "Guilty," had also found that Wheat in good faith and on reasonable grounds believed that he was divorced from the bonds of his first marriage.

*Mr. Norman Birkett* appeared for the appellants; and the *Attorney-General* (*Sir Gordon Hewart, K.C.*), *Mr. H. D. Roome*, and *Mr. E. L. Hadfield* for the Crown.

*Mr. Birkett* contended that, where, under the *Offences Against the Person Act, 1861*, a prisoner charged with bigamy honestly believed that he was divorced, that was a complete answer to the charge. The jury had found that Wheat, in good faith and on reasonable grounds, believed that he was divorced; yet the learned Judge had directed them to return a verdict of "Guilty."

Wheat was married on the 5th June, 1911, at Nottingham, and had two children by his wife. On the outbreak of war he joined the Royal Engineers, and went to Egypt, where he remained until 1918. During his absence his wife sold his business, broke up the home, and went away with another man, by whom she had two other children. In 1918 Wheat discovered what was going on, and he obtained leave, and came home. He afterwards contracted malaria, and was discharged from his regiment on the 25th January, 1919. In December of that year he went to live at the house of the father of the appellant Stocks. He was perfectly straightforward with the girl, and he told her of the perfidy of his wife. Stocks took charge of his two children, and, as Wheat was illiterate, she conducted his

C.C.A.  
1921.  
REX  
v.  
WHEAT.  
REX  
v.  
STOCKS.  
—

correspondence with a solicitor, who was instructed to take proceedings to divorce Mrs. Wheat. Wheat, on finding that Stocks was about to become a mother, sent an urgent telegram to a solicitor, and a letter was received from him, which was construed by both the appellants to mean that the divorce had been accomplished. The letter was dated the 1st July, 1920, and it read: "We have received your telegram, and hope to send you papers for signature in the course of the next day or two." That was the letter on which the jury found that Wheat had a reasonable belief that he had obtained a divorce from his wife. On receipt of the letter he went to a friend, and, clapping his hands, said: "Thank God, my divorce has gone through." The friend said in evidence that Wheat's heart was full of joy. Within three weeks he married Stocks.

Counsel cited *Reg. v. Tolson* (5 T.L.R. 465; 23 Q.B.D. 168), which, he said, showed that the statute of 1861 was not a prohibitory statute, and that *mens rea* was necessary to create the offence.

MR. JUSTICE SHEARMAN said that *mens rea* might mean a guilty intention against a statute.

Counsel cited *Rex v. Lolley* (Russ. and Ry., 237), where the conviction was confirmed, but that case was before *Reg. v. Tolson* (*supra*). Bigamy became a crime by 1 James I, c. 11, which made it punishable by death.

MR. JUSTICE GREER.—Was Lolley hanged?

Mr. Birkett.—No, he was sent to the hulks for seven years, but after serving a year or two the rest of the sentence was remitted.

Counsel said that the Act of 1861 in its terms closely followed that of 1603.

MR. JUSTICE AVORY.—So closely that there is no difference.

MR. JUSTICE SHEARMAN referred to *Rex v. Russell* (17 T.L.R. 685; [1901] A.C. 446).

Mr. Birkett argued that the present case related to mistake of fact, and not to mistake of law. He cited *Rex v. Thompson* (70 J.P. 6); *Rex v. Connatty* (83 J.P. 292); *Sherras v. De Rutzen* (11 T.L.R. 369; [1895] 1 Q.B. 918, at 921); *Chisholm v. Doullton* (5 T.L.R. 437; 22 Q.B.D. 736); and *Reg. v. Prince* (L.R. 2 C.C.R. 154). He said that there was a case in which a whole family had believed that a marriage was invalid because the wedding-ring was of brass and not of gold. That was clearly a mistake of law, and was unreasonable. Here the mistake was one of fact, and the jury had found that it was reasonable.

The ATTORNEY-GENERAL said that Mr. Birkett's argument was based on the confusion of two things which ought to be kept distinct. The finding of the jury was quite immaterial, and if it were held to be material he would contend that there was no evidence to support it. Section 57 of the Act of 1861, repeating the statute of James, declared it to be a felony to marry any other person during the lifetime of a former husband or wife, and there were only two provisos, one being the presumption of death after the lapse of seven years, and the other actual divorce. In the former case the excuse of absence was only valid if there were no knowledge on the part of the accused that the spouse was alive, but in the case of divorce there was no presumption, because it was an artificial thing the truth of which was ascertainable with mathematical precision. In this country it had required a statute to make bigamy an offence, and the statute should be strictly construed. He quoted Mr. Justice Manisty in *Tolson's case (supra)* at p. 201.

MR. JUSTICE SHEARMAN. — As I have said, *mens rea* is an intention to do an act forbidden by statute.

The ATTORNEY-GENERAL.—Yes ; a man who cycles in the dark with his lamp out is guilty of a crime.

MR. JUSTICE SHEARMAN.—Of intentionally bicycling with his lamp out : but he does not intend his lamp to go out.

The ATTORNEY-GENERAL.—In the case of divorce a man cannot rely upon reasonable grounds ; he must prove the divorce.

*Sir Gordon Hewart* added that the cases of *Rex v. Thompson (supra)* and *Rex v. Connatty (supra)* both related to presumption of death and not of divorce. In *Rex v. Russell (supra)*, as in *Rex v. Lolley (supra)*, where the subject was divorce, the question of presumption was not referred to. It would be wrong to give to *Reg. v. Tolson (supra)* the extension sought. What was asked was not only that there should be one law for the wise and another for the foolish, but that there should also be a number of laws in between.

MR. JUSTICE AVORY.—There would have to be different grades for different people, according to their intelligence.

*The Attorney-General* said that the whole question had arisen—not for the first time—because of the profound confusion of thought and of analogy which led people to suppose that what related to the presumption of death in bigamy cases related also to divorce. He asked their Lordships to say that the doctrine laid down in *Reg. v. Tolson (supra)* had no application to the proviso in the Act of 1861, which related to divorce.

C.C.A.

1921.

REX

v.

WHEAT.

REX

v.

STOCKS.

C.C.A.  
1921.  
—  
REX  
v.  
WHEAT.  
REX  
v.  
STOCKS.  
—

*Mr. Birkett*, in reply, urged that *Reg. v. Tolson (supra)* went very much farther than the restricted and narrow sense for which the Attorney-General contended. His own contention was that the decision in *Tolson's case (supra)* applied to every part of the statute.

MR. JUSTICE AVORY delivered the considered judgment of the Court.

HIS LORDSHIP said: The alleged bigamous marriage between the appellants took place on the 21st July, 1920. The jury, in answer to a question put to them by the learned Judge at the suggestion of counsel for the defence, found that the appellants, in good faith and on reasonable grounds, believed that the man Wheat had been divorced at the time when he went through the form of marriage with Stocks. The only evidence submitted to the jury on which the finding could be based was that Wheat's wife had committed adultery—that in 1919 he was admitted as a poor person to bring divorce proceedings against her; that in May, 1919, solicitors were assigned to him to conduct those proceedings; that after some delay he provided the solicitors with a sum of money to meet the out-of-pocket expenses; that on the 23rd April, 1920, the solicitors wrote: "We can now proceed with the matter, and will lose no time over your petition"; and that, in reply to a telegram sent by Wheat the terms of which were not in evidence, the solicitors wrote to him on the 1st July, 1920: "We have received your telegram, and hope to send you papers for signature in the course of the next day or two"; and Wheat gave evidence on oath that he was a man of little education, and that on receipt of the letter he believed that he was divorced. Stocks did not give evidence.

In these circumstances we are of opinion that there was no evidence on which the jury could find that the appellants, or either of them, believed, in good faith on reasonable grounds, that Wheat had been divorced, and assuming that such a finding would afford any defence the appeal would have to be dismissed on that ground alone.

The learned Judge, however, notwithstanding that finding, directed a verdict of "Guilty" in order that the question of law whether such a finding does afford any defence to a charge of bigamy might be determined in this Court.

Mr. Birkett, for the appellants, has contended that the decision in *Reg. v. Tolson (supra)*, in which it was held that a *bona fide* belief on reasonable grounds in the death of the husband

at the time of the second marriage afforded a good defence to the indictment, governed this case, and that it followed from that decision that a *bona fide* belief on reasonable grounds that the accused had been divorced afforded a good defence.

On reference to the statute 24 & 25 Vict., c. 100, s. 57, we find the offence defined in these words: "Whosoever being married shall marry any other person during the life of the former husband or wife shall be guilty of felony." To this absolute prohibition there are in the proviso three exceptions applicable to British subjects: (1) When the husband or wife has been continually absent for seven years then last past, and has not been known by the accused to be living within that time; (2) when the accused at the time of the second marriage has been divorced from the bond of the first marriage; (3) when the former marriage of the accused has been declared void by the sentence of any Court of competent jurisdiction.

It has been decided in the case of the first exception that, upon proof of the continuous absence for seven years, the accused is entitled to an acquittal, in the absence of proof by the prosecution that the accused knew that the wife or husband, as the case may be, was living within that time; and, as the Attorney-General has pointed out in his argument for the Crown, this exception creates or involves a presumption of death, which, unless rebutted by the prosecution, entitles the accused to be acquitted: in other words, the accused is presumed to believe in such circumstances that the former wife or husband is dead at the time of the second marriage, and therefore the accused has no intention of doing the act forbidden by the statute. In the case of the second exception there is no indication in the statute that any presumption or belief is to afford any defence. The words do not admit of any such qualification, and the only defence under this head appears to be that the accused has in fact been divorced from the bond of the first marriage. If he has not, then at the time of the second marriage he is a person who, being married, intends to do the act forbidden by the statute—namely, "to marry during the life of the former wife." Having regard to this distinction between the two exceptions, we are of opinion that a *bona fide* belief on reasonable grounds that the accused has been divorced, when in fact he has not been divorced, affords no defence in law to the charge of bigamy, although it may afford good reason for the infliction of a nominal punishment; and in our opinion this decision is not in conflict with the decision of the majority of the Judges in *Reg. v. Tolson*

C.C.A.

1921.

REX

v.

WHEAT.

REX

v.

STOCKS.

C.C.A.  
1921.

REX  
v.  
WHEAT.

REX  
v.  
STOCKS.  
—

(*supra*), but is in accord with the principle of the judgment in *Reg. v. Prince (supra)*.

In the case of *Reg. v. Tolson (supra)* the accused believed on reasonable grounds that her husband was dead, therefore she did not intend at the time of the second marriage to do the act forbidden by the statute—namely, to marry during his life—and it was said in that case that the exception in the proviso showed that mere separation for seven years has the effect which reasonable belief of death caused by other evidence would have at any other time (*vide* particularly the judgment of Mr. Justice Stephen at p. 192).

It is true that the judgment in *Reg. v. Tolson (supra)*, though influenced to a great extent by that proviso, proceeded mainly on the application of the maxim "*Actus non facit reum, nisi mens sit rea*"—a maxim admitted to be uncertain and often misleading in its application—but it was limited in that case to the belief in the death of the former husband; and the case now in question, of a belief in a divorce, was not discussed or considered. In our opinion, the maxim in its application to this statute is satisfied if the evidence establishes an intention on the part of the accused to do the act forbidden by the statute—namely, "to marry another person during the life of the former wife or husband": *vide* the judgment of Baron Bramwell in *Reg. v. Prince (supra)*, at p. 175, as to the application of this maxim, and *Bank of New South Wales v. Piper* (13 T.L.R. 413; [1897] A.C. at p. 390).

Mr. Birkett placed great reliance on the statement in the judgment of Mr. Justice Cave at p. 181 of *Reg. v. Tolson (supra)*: "At common law, an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim *Actus non facit reum, nisi mens sit rea*. Honest and reasonable mistake stands, in fact, on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy. Instances of the existence of this common-law doctrine will readily occur to the mind; so far as I am aware it has never been suggested that these exceptions do not equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication."

If the learned Judge was laying this down as a principle applicable to all statutes we do not agree with him. The principle

is stated too widely. In any event it was not necessary for the decision of that case. In the case of *Rex v. Lolley (supra)*, where the accused relied upon a divorce in Scotland by way of defence to a charge of bigamy under 1 James I, c. 11, which contains a similar proviso, and which was argued before all the Judges by Mr. Brougham for the prisoner, it was not even suggested that a *bona fide* belief on reasonable grounds of validity of divorce would afford any defence.

In the case of *Rex v. Russell (supra)*, reported fully in *The Times* of the 19th July, 1901, where the defendant had obtained a divorce in one of the States of America and it was not disputed that he honestly believed that the divorce was valid and that he was free to marry again, it was recognized that this was no defence in law, the divorce in fact being invalid according to English law, and the defendant was permitted to plead the circumstances in mitigation of punishment.

One other case remains to be noted which was relied on by Mr. Birkett—*Rex v. Thompson (supra)*—in which the late Common Serjeant directed the jury that if, at the time of the second marriage, the accused *bona fide* believed that his first marriage was invalid on the ground that the woman he then married had a husband alive at the time, he would be entitled to an acquittal. The prisoner was convicted and the question was not further discussed. It is not necessary in the present case to express an opinion on the ruling of the learned Common Serjeant, which was probably based on *Reg. v. Tolson (supra)*, but we doubt whether it can be supported consistently with our present decision.

On both grounds, therefore, the appeal fails and must be dismissed.

Solicitors: *The Registrar of the Court; the Director of Public Prosecutions.*

C.C.A.

1921.

REX

v.

WHEAT.

REX

v.

STOCKS.