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Criminal Intent and Bigamy

IN THESE DAYS when divorces are numerous, and are sometimes obtained so speedily and carelessly that they are illegal, or when legal are sometimes followed by marriages contracted in such unseemly haste that the marriages are ineffective, it may be of interest to see whether or not a marriage contracted with no intent to violate the law, although a valid prior marriage is still existent, is a crime. This problem is of particular interest in California since the Supreme Court of that state in the recent case of In re Ahart[1] by way of dictum used some language apparently inconsistent with the rule contained in the leading California case of People v. Hartman.[2]

The specific question here involved is as follows: is the innocent belief of a person previously married that he is unmarried and legally competent to remarry, a good defense to a prosecution under the bigamy statute when he remarries, his previous marriage being still valid and in full force and effect?

Remarriage under such conditions takes place only because the person remarrying has assumed a wrong state of facts or because he has drawn a wrong inference as to the law governing a known state of facts, in other words, because of either a mistake of fact or one of law.

There are four possible situations in which these mistakes occur:

Where one spouse believing that the marriage has been ended by the death of the other, remarries, whereas the other spouse is still living;

Where one of the matrimonial partners believes that legal proceedings have been taken which led to the dissolution of the marriage, whereas no such proceedings were ever taken;

[1] (1916), 172 Cal. 762, 159 Pac. 160.
[2] (1900), 130 Cal. 487, 62 Pac. 823.

Where one party to a marriage believes that the marriage relation has been ended, because a divorce was obtained which he believes to be valid, or because of an agreement to separate, or because of the desertion of the other spouse, or because of some other combination of circumstances;

Where a person who has been married honestly believes that the marriage was invalid, and that he is therefore able to contract another marriage, whereas the first marriage was valid.

As can be seen from analysis of these situations, the first two mistakes are mistakes of fact, and the last two are mistakes of law.

In this discussion we shall not give any especial consideration to the case of a defendant who has violated the bigamy statute in utter ignorance of there being any law against plural marriages, as for instance a Mohammedan contracting a bigamous marriage while making a short stay in this country. This would present a clear case for the application of the maxim *ignorantia legis non excusat,* which all will admit should be applied here. This statement will relieve us from further considering the question raised by Professor Keedy in the Harvard Law Review[3] as to whether there is any distinction between ignorance of law and mistake of law, and the effect of any such distinction.

The question under consideration has been answered in three different ways: One line of cases holds that, where a statute simply declares that any person who marries another person when he has a spouse living, is guilty of bigamy, any person voluntarily doing the act forbidden by the letter of the statute is to be held guilty of the crime of bigamy, since the legislature made no exception in favor of persons honestly believing that they did not have a spouse living. The leading western case representing this view is the case of People v. Hartman,[3a] which is noticed and criticised by a prominent jurist in 3 California Law Review, 452.[4]

Another view is that absence of intent to do wrong is a good defense in bigamy prosecutions, which may be evidenced by showing a mistake of fact causing the crime, but if the mistake is one of law it is never a sufficient defense. One of the latest expressions of this view is the dictum of the California Supreme

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[3] "Ignorance and Mistake in the Criminal Law," by Prof. Edwin R. Keedy, 22 Harvard Law Review, 75.

[3a] Supra, n. 2.

[4] "Changing Conceptions of Law and of Legal Institutions," by Pro-

Court in the case of In re Ahart,[4a] in which it was considering a violation of a liquor ordinance. Judge Henshaw, speaking for the court, said:

> "Therefore, we do not construe section 5 of the Covina ordinance as designed to inflict punishment upon an innocent person who shall so transport intoxicants. The case comes quite clearly within the reasoning and principle of the English case of *Regina v. Tolson,* which case itself receives detailed consideration in 2 Lewis' Sutherland Statutory Construction, sec. 527. The case was a criminal charge against a woman for a bigamous marriage.
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> "It has been held that one who marries a second time under an honest but erroneous belief that a decree of divorce which had been granted was valid is afforded no protection by the invalid decree, and that evidence of his good faith will be excluded. But in the later Tolson case the woman had married five years instead of seven years after her husband's desertion of her under the belief held in good faith that her husband was dead. The proposition considered was whether honest belief and good faith constituted a defense. It was conceded that the prisoner 'falls within the very words of the statute.' Cave, J., said: 'At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense. . . . . So far as I am aware it has never been suggested that these exceptions do not equally apply to the case of statutory offenses unless they are excluded expressly or by necessary implication.'"

This dictum of the California Supreme Court is apparently inconsistent with its language in People v. Hartman, and because of this, it is proposed, a little later in this discussion, to examine the whole subject of bigamy rather fully in an effort to ascertain the true rule.

The third view is that if the state shows such facts as make out a prima facie case of voluntary violation of the bigamy statute the intent to do the act may be presumed, but the defendant should be allowed to show that he violated the statute under a mistake of fact as to the termination of a prior marriage. In other words, the presumption of criminal intent arising from such facts should be rebuttable by showing the mistake of fact above

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fessor Orrin K. McMurray, 3 California Law Review, 441.

[4a] Supra, n. 1.

mentioned and not conclusive as under the first view. This view is adopted by the writer of the annotated note to Baker v. State, in Lawyers' Reports Annotated,[5] citing State v. Cain,[6] and Robinson v. State.[7] We shall endeavor to show further on that this writer has fallen into the common error of confusing the intent to commit the act and the intent to violate the law. He recognizes that the criminal intent under the usual bigamy statute is only the intent to do the act. If this is the only intent required to be shown, proof of mistake of fact not negativing that intent is immaterial, because at most it only shows absence of intent to violate the law.

In discussing the effect of an innocent mind as a defense to a prosecution for a statutory offense we must first ascertain what the mens rea under a given statute is. One of the best known maxims of criminal law is: *"Actus non facit reum nisi mens sit rea,"* expressing the general rule that to constitute a crime there must be unity of act and intent.

At this point it will be wise to see just what criminal intent or mens rea means. These phrases are good illustrations of Justice Holmes' epigram contained in the recent case of Towne v. Eisner,[8] which was as follows:

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

Justice Stephen in Regina v. Tolson,[9] well points out the many different and confusing meanings mens rea has in the following words:

> "Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds. It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a 'mens rea', or 'guilty mind', which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. 'Mens rea' means in the case of murder, malice aforethought; in the case of

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[5] (1910), 27 L. R. A. (N. S.) 1097.
[6] (1902), 106 La. 708, 31 So. 300.
[7] (1909), 6 Ga. App. 626, 65 S. E. 792.
[8] (1918), 245 U. S. 418, 38 Sup. Ct. Rep. 158.
[9] (1889), 23 Q. B. D. 168.

> theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen."

The true rule is, it is submitted, the one laid down in the same case by Justice Stephen where he says: "the full definition of every crime contains expressly or by implication a proposition as to a state of mind." This definition has been adopted in the Criminal Responsibility Bill approved by the Institute of Criminal Law and Criminology, and by the Conference on Medical Legislation of the American Medical Association.[10]

The terms mens rea and criminal intent are further confusing because they cover two kinds of intent, general intent and specific intent. By general intent is meant simply the intent to do the act prohibited and by specific intent may be meant various things, such as, intent to violate the law, covered by the words, "feloniously", "unlawfully", "wilfully" and "knowingly"; or intent to steal; intent to burn; malice aforethought; and so on. Professor Beale states the difference as follows:

> "The distinction between a required specific intent and the general intent dealt with in the preceding section is this. The general intent, required in all crimes, is an intention to do the act done; and there is no need of an independent averment of it, since it would be naturally understood. The specific intent is some independent mental element which must accompany the physical act in order that the crime in question may be committed; it is an element of many but not of all crimes. An allegation of the act alone would not sufficiently charge such a crime; and it is therefore imperative that the specific intent should be explicitly stated. On this principle, if the offense must be done maliciously, wilfully or knowingly, the malice, intention or knowledge must be expressly averred."[11]

It is recognized that this classification is slightly different from that contained in several of the well known text books. A common way of treating the classification of criminal intent has been to say that all the common law crimes contain the element of criminal intent, but that it is inferred from the commission of the offense, and that some crimes contain as an

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[10] See "Insanity and Criminal Responsibility," by Prof. Edwin R. Keedy, 30 Harvard Law Review, 535.

[11] Beale's Criminal Pleading and Practice, § 136.

essential element a specific intent such as intent to steal, malice aforethought and the like, which must be alleged and proved. Then in dealing with statutory offenses which are silent as to intent it is said that in many cases application of familiar rules of statutory construction will show that the intent with which an act is done is immaterial, in other words that criminal intent is not an element of such offenses.

Mr. Bishop in his able book on Criminal Law[11a] contends that all statutes must be construed in the light of the common law and that at common law the mens rea was always an element of every crime. From that he reasons that the showing by a defendant that his mind was innocent, that is, that he intended no wrong when he committed the act, should always be a good defense.

These two views are both illustrations of the erroneous results that may flow from not recognizing the fact that there are various kinds of criminal intent differing greatly from each other.

The textbooks were correct in stating that criminal intent is immaterial in certain statutory offenses, if we consider that the phrase "criminal intent" is used by them to mean intent to do wrong or intent to break the law. If "criminal intent" were used by them in the general sense of intent to do the prohibited act, various absurd and unsound results would follow. If no criminal intent had to exist as an element of a crime it would have to follow that the state of a defendant's mind while committing a crime would be immaterial and then the question would arise, whether the general rule that insanity is a complete defense would apply. The effect of showing insanity is to negative the existence of any criminal intent and if criminal intent is said to be immaterial in any case then it would seem meaningless to allege or prove insanity as a defense. The same result would apparently have to follow even though a person committed a crime entirely accidentally.

While some criminal intent is usually required certain statutory offenses do not require proof of any intention to transgress the law for the conviction of an offender coming within the letter of the statute. Whether the intent to do wrong is a necessary element of a statutory offense is a matter of construction to be determined from the nature of the offense, the

[11a] Bishop's New Criminal Law (8th ed.), §§ 303a, 304 and notes.

evil intended to be corrected and the punishment involved, as well as from the language of the statute, thus ascertaining the intention of the legislature.

As was well said in Commonwealth v. Weiss:[12]

> "Whether a criminal intent, or a guilty knowledge, is a necessary ingredient of a statutory offense, therefore, is a matter of construction. It is for the legislature to determine whether the public injury threatened, in any particular matter, is such, and so great, as to justify an absolute and indiscriminate prohibition."

To ascertain the intention of the legislature we must consider several elements; the nature of the offense, the evil sought to be remedied, the penalty and the language of the statute.

As was said before, statutory offenses can be divided into those requiring a general criminal intent and those requiring a specific criminal intent. When the statute is silent on the subject of intent, as it often is, the nature of the crime must be analyzed. If it is one of those offenses which involve some amount of moral turpitude, which have been generally considered as wrong by society, and which carry with them a prison punishment, it is safe to say that such statutory offenses require a specific criminal intent to accompany the act unless the legislature clearly indicates to the contrary.

However, if it is one of those offenses which Justice Wright, in Sherras v. De Rutzen,[13] described as "acts which are not criminal in any real sense, but which in the public interest are prohibited under a penalty", such as the sale of adulterated food, sale of oleomargarine with coloring matter in it, and sale of intoxicating liquors, only the intent to do the prohibited act need be shown in order to obtain convictions.

As the California bigamy statute is the common type of statute on this subject, we shall consider its language. It provides:

> "Every person having a husband or wife living, who marries any other person, except in the cases specified in the next section, is guilty of bigamy.[14]
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> "The last section does not extend—
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> 1. To any person by reason of any former marriage,

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[12] (1891), 139 Pa. 247, 21 Atl. 10. See also People v. O'Brien (1892), 96 Cal. 171, 31 Pac. 45.

[13] (1895), 1 Q. B. D. 918.

[14] Cal. Pen. Code, § 281.

whose husband or wife by such marriage has been absent for five successive years without being known to such person within that time to be living; nor,

2. To any person by reason of any former marriage which has been pronounced void, annulled, or dissolved by the judgment of a competent court."[15]

This language is particularly significant in that the words "knowingly" and "wilfully" do not appear in this statute, these being the words which are ordinarily used in statutes to indicate that the intent to violate the law is an essential element of the offense, although their absence is not conclusive on this point.[16]

Of especial significance in California is the legislative history of this statute. The Crimes and Punishment Act reads as follows:

"Bigamy consists in the having of two wives or two husbands at one and the same time, knowing that the former husband or wife is still alive."[17]

Under the Crimes and Punishment Act, the specific intent, "knowing that the former husband or wife is still alive", was an essential part of the offense and this intent had to be proved. When the legislature altered the wording of this statute in 1872 so as to leave out of consideration the knowledge as to the other spouse's existence it must be presumed it did so for a purpose,[18] and that purpose was to make the act of remarriage while the other spouse was still alive a crime irrespective of defendant's innocent belief or non-negligent lack of knowledge, the intent to do the act being the only intent required.

It is also to be noted that section 282 of the Penal Code of California sets forth two combinations of circumstances under which remarriage while the other spouse is living, is not bigamy; absence of the other spouse for five years without being known

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[15] Cal. Pen. Code, § 282.

[16] Reg. v. Prince, L. R. 2 C. C. 154.

[17] Section 121, Crimes and Punishment Act of California, Cal. Stats. 1850-3, p. 662.

[18] Reed v. Goldneck (1905), 112 Mo. App. 310, 86 S. W. 1104; In re More's Estate (1914), 179 Mich. 237, 146 N. W. 319; Ex parte Welborn (1911), 23 Mo. 297, 309, 141 S. W. 31. While this presumption is a rule of statutory construction, still as a matter of history it is safe to say that, while the codifiers made the change in the law consciously, the legislature in the confusion of adopting several codes bodily did not appreciate the change they were effecting.

to the party remarrying to be living, and the ending of the marriage relation by a competent court.

The maxim, *"expressio unius est exclusio alterius"*, might well be applied here to indicate that the above mentioned exceptions to the statutory definition of bigamy are the only ones intended by the legislature. As is said by the Supreme Court of Colorado in Schell v. People:[18a]

> "The prevailing view in the United States is that it is the clear intent of the statutes that one who marries within the period designated by the statute shall do so at his peril."

This proviso, which is substantially the usual proviso found in bigamy statutes, it must be admitted, is the source of much doubt and difficulty. Justice Cave, in Reg. v. Tolson, very ably makes the ingenious argnment that because, as must be admitted, the usual common law defenses of insanity, infancy and compulsion obtain in bigamy even though not specified as a defense in the statute, that therefore the statutory proviso is intended to be broader than the general common law exception of insanity, and is not inconsistent with nor intended to exclude the defense of mistake of fact as showing lack of intent to violate the law. It seems to us that the learned Justice's construction, while very plausible, is unsound, in that he confuses the nature of these defenses with that of the defense of mistake of fact when he assumes they are similar, and that thereby he has fallen into error. On reflection it will be admitted that insanity, infancy and compulsion are universal defenses not dependent on the intention of the legislature nor ever expressed in a statute. On the other hand mistake of fact is not a universal defense in statutory offences, and the presence or absence of intent to violate the law as an essential element in statutory offenses depends on the intention of the lawmakers which can only be determined by applying the usual rules of statutory construction.

Since mens rea therefore is a matter of construing the statute, it is submitted that we are limited to the usual methods of construction, namely, studying the wording of the statute, the nature of the crime, the penalty and the conditions the statute is intended to affect. Since statutes are to be construed as a whole it is

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[18a] (1918), 173 Pac. 1141.

rather illuminating to note that under section 284 of the Penal Code of California it is provided that "every person who knowingly and wilfully marries" a bigamist, is guilty of a criminal offense. Considering the language of the statute alone it would seem clear that the legislature intended to disregard the element of intent to violate the law. Next considering the nature of the offense and the michief sought to be repressed we find that bigamy has been abhorred and severely punished for centuries.

That the statutory offense of bigamy is not merely a police regulation passed by the legislature in the exercise of its police power, but is an offense evil of itself, or *malum in se* as expressed by some, is clear when the history of bigamy in the common law is considered. Bigamy was at first an ecclesiastical offense in England, and any person guilty of it was deemed incapable of taking orders and was without benefit of clergy. This was recognized by the statute of 4 Edward I, and bigamy was made a felony in England in the reign of James the First. The church punished bigamy as immoral and shocking the conscience, and then the state made it a felony for the same reason.

Chancellor Kent gives a very good account of the history and nature of bigamy in his Commentaries, where he says:

> "The direct and serious prohibition of polygamy contained in our law is founded on the precepts of Christianity, and the laws of our social nature, and it is supported by the sense and practice of the civilized nations of Europe. Though the Athenians at one time permitted polygamy, yet, generally, it was not tolerated in ancient Greece, but was regarded as the practice of barbarians. It was also forbidden by the Romans throughout the whole period of their history, and the prohibition is inserted in the Institutes of Justinian. Polygamy may be regarded as exclusively the feature of Asiatic manners, and of half-civilized life, and to be incompatible with civilization, refinement, and domestic felicity."[19]

Davis v. Beason,[20] contains the view of the United States Supreme Court as to the criminal nature of bigamy. The court said in part:

> "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the

[19] 2 Kent Comm. 81.

[20] (1890), 133 U. S. 333, 33 L. Ed. 637, 10 Sup. Ct. Rep. 299. See also Reynolds v. United States (1878), 98 U. S. 145, 25 L. Ed. 244.

> laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment."

From these authorities it is clear that bigamy is not a violation of a mere police regulation but is a crime involving moral turpitude. This being so, in the absence of statutory language which is controlling, this offense should be considered as involving the specific intent of consciously violating the law. It must be remembered however that the nature of the crime is not the controlling element in ascertaining the intent involved, but is only one of several factors to be considered.

The probable intention of the legislature and the reasons underlying it are best summed up by Chief Justice Shaw in the case of Commonwealth v. Mash,[21] where he says:

> "It appears to us, 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 former husband or wife is in fact living, depend upon ignorance of such absent party's being alive, or even upon an honest belief of such person's death. Such belief might arise after a very short absence. But it appears to us, that the legislature intended to prescribe a more exact rule, and to declare, as law, that no one should have a right, upon such ignorance that the other party is alive, or even upon such honest belief of his death, to take the risk of marrying again, unless such belief is confirmed by an absence of seven years, with iguorance of the absent party's being alive within that time."

From our study of the language of the bigamy statute, the nature of this crime, and the mischief sought to be prevented, the question remains just what intent does the bigamy statute require to be proved. The answer to this question depends of course upon the particular statute being considered and the correct construction of that statute. Where we are considering such a statute as the one in California and others similar to it, it is submitted, the intent required is merely the intent to do the act which is inferred from the voluntary doing of the act, and

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[21] (1844), 7 Metc. 472.

not the intent to violate the law. This is pointed out by Chief Justice Shaw in Commonwealth v. Mash, where he says:

> "Whatever one voluntarily does, he of course intends to do. If the 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."

As the learned Chief Justice indicates, the act of marriage under the prohibited circumstances must be voluntary, in other words, must be his own act as distinguished from the act of some other person done through him as an involuntary agent, and any other interpretation of the phrase "criminal intent" in this connection, is eliminated by Chief Justice Shaw.

The weight of authority in the United States is to the effect that the only criminal intent essential to the crime of bigamy, is the intent to do the prohibited act, and California and Nevada are among those in accord with the general rule.[22] As the California Supreme Court very clearly put it in the case of People v. Hartman:[22a]

> "If defendant, by reason of being unconscious, did not know what he was doing when he contracted the second marriage, then this case is similar to the Harris case. But here the defendant did know exactly and fully what he was doing when he married the second time; and it was the act of marrying the second time that constituted the crime, for, as we have seen, he had another wife living when he contracted the second marriage. The intent of defendant, as referred to in the code, is the intent to do the act, namely, contract the marriage. It does not refer to any intent to violate the law."

In other words all that is necessary is to contract the marriage under the forbidden circumstances voluntarily, and the innocence of mind of the person embarking on another matrimonial voyage is immaterial, thus ignoring the specific intent of intending to violate the law, which the California legislature intended should be iguored in this crime.

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[22] Supra, n. 2; State v. Zichfeld (1896), 23 Nev. 304, 46 Pac. 802; State v. Trainer (1911), 232 Mo. 240, 134 S. W. 528; Rand v. State (1901), 129 Ala. 119, 29 So. 844; Parnell v. State (1906), 126 Ga. 103, 54 S. E. 804; Cornett v. Commonwealth (1909), 134 Ky. 613, 121 S. W. 424; Commonwealth v. Hayden (1895), 163 Mass. 453, 40 N. E. 846; State v. Goulden (1904), 134 N. C. 743, 47 S. E. 450; State v. Ackerly (1906), 79 Vt. 69, 64 Atl. 450; People v. Spoor (1908), 235 Ill. 230, 85 N. E. 207.

[22a] Supra, n. 2.

This rule is not as unjust as it might seem because in the case of a remarriage after the disappearance of the other spouse the law specifies a certain period after which the remarriage can safely take place, and in other cases if the party remarrying takes the precautions the seriousness of his step calls for he will seldom transgress even the letter of the law. As the court stated in Staley v. State:[23]

> "In civil controversies involving property rights only, individuals often refuse to act without an order of court; but, if the evidence on behalf of the state is believed, defendant, on the mere advice of counsel that his marriage was void, was willing to abandon his wife as an adultress, and leave her with the prospect that she would become the mother of a bastard child. The obligations of one who has voluntarily entered into the marriage relation require a greater degree of care than that exercised by defendant. He acted on the advice of counsel at his peril, and under the law it is no defense in this case."

In real cases of injustice there still remain the remedies of probation, nominal sentences, and pardons.

The second view referred to in the beginning of this article is that an honest mistake of fact causing a violation of the terms of the bigamy statute is a good defense. This doctrine is followed in England,[24] Canada,[25] the Philippine Islands,[26] and in a few of the American states.[27] The fundamental theory underlying this doctrine is that the legislature purposely required the specific intent of intending to violate the law to be proved as an element of bigamy, and that when it appears that the remarriage was made under a mistake of fact such specific intent is negatived.

In California and in Arizona[28] the Penal Codes mention mistake of fact as making a person incapable of committing a

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[23] Staley v. State (1911), 89 Neb. 701, 131 N. W. 1028.

[24] Supra, n. 9.

[25] Reg. v. Smith, 14 U. C. Q. B. 568.

[26] United States v. Biasbas (1913), 25 Philippine 71; United States v. Reyes (1902), 1 Philippine 375.

[27] State v. Stank, 9 Oh. Dec. 8; Leseuer v. State (1911), 176 Ind. 448, 95 N. E. 239; Squire v. State (1874), 46 Ind. 459; Baker v. State (1910), 86 Neb. 775, 126 N. W. 300; Welch v. State (1904), 46 Tex. Cr. App. 528, 81 S. W. 50; Watson v. State (1904), 13 Tex. App. 76. Note—The Texas cases were decided under a statute making a mistake of fact a good defense in all crimes.

[28] Cal. Pen. Code, § 26; Ariz. Pen. Code, § 24.

crime because the mistake disproves any criminal intent. The California provision reads as follows:

> "All persons are capable of committing crimes except those belonging to the following classes:
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> * * * * * * * *
>
> (4) Persons who committed the act or made the omission charged under an ignorance or mistake of fact which disproves any criminal intent."

The last part of this section, "which disproves any criminal intent", must be taken to mean criminal intent in the sense of guilty knowledge, because mistake of fact does not necessarily disprove the intent to do the act prohibited. The Arizona case of Troutner v. State,[29] in construing the Arizona section as to mistake of fact adopts this construction in the following words:

> "This clearly has reference to crimes in which 'criminal intent' or gnilty knowledge is an essential ingredient. It is manifest by the language itself as also by the whole context of section 24. The other 'persons' mentioned in section 24 as incapable of committing crimes are children under fourteen years of age, not knowing the wrongfulness of their acts, and idiots, lunatics, and insane persons, etc., —persons incapable of having or entertaining a criminal intent. Persons of sound mind and unquestioned mental competency, and therefore capable of committing crimes, may, in those cases in which a criminal intent is essential, plead as a defense ignorance or mistake of fact for the purpose of disproving any criminal intent. They are, for the purposes of their defense, placed in the same category with persons mentally incompetent to form a criminal intent, but, in that class of acts the mere doing of which is made by law the crime regardless of the purpose or intent, persons of sound mind are not entitled to immunity because of ignorance or mistake of fact. Therefore subdivision 4 can only have reference to those crimes in which a 'criminal intent' is necessary."

In Texas a statute, which plainly purports to make mistake of fact a good defense to all crimes alike, has been construed to apply to all crimes including bigamy, even though the bigamy statute is silent as to intent.[30]

Most of the decisions expressly indicate that only a mistake

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[29] (1916), 17 Ariz. 506, 154 Pac. 1048.
[30] Watson v. State, supra, n. 27.

of fact can negative this specific intent, but many of them base their reasoning very generally on the doctrine that an innocent mind is a good defense. In all the writer's research however he has not been able to find a single case where an honest mistake of law causing a breach of the bigamy statute has been allowed as a defense, while all the cases of bigamy involving a mistake of law have held it was not a good defense.[31] It is the stringently enforced general rule that a mistake of law is not a defense to criminal offenses. The only exception is where a mistake of law is shown to negative a specific intent which is required in some crimes.[32]

This exception to the rule theoretically should be available to defendants in jurisdictions where mistake of fact is a good defense. As has been shown the defense of mistake of fact is only material where the specific intent of intending to break the law is an essential element of the crime. Accordingly where a defendant shows a mistake of law which establishes that he was innocent of any intention of wilfully transgressing the law, the jurisdictions recognizing mistake of fact as a defense should, to be consistent and logical, acquit a defendant proving a mistake of law. That the courts have treated these two mistakes so differently is due probably to their failure to recognize that the intention to be a law-breaker is a specific intent and not merely a general intent. The main reason the courts have been blind to this is probably their intense reluctance to ever recognize mistake of law as a defense to a criminal prosecution.

In taking up the third doctrine obtaining on this subject, namely, that proof of the violation of the statute should only raise a rebuttable presumption of criminal intent on the part of the defendant and that he should be allowed to rebut the presumption by proof of a mistake of fact, the writer will first

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[31] People v. Hartman, supra, n. 2; State v. Zichfeld, supra, n. 22; McConico v. State (1873), 49 Ala. 6; Commonwealth v. Hayden, supra, n. 22; People v. Weed (1883), 29 Hun. 628; State v. Robbins (1845), 28 N. C. 22; Medrano v. State (1893), 32 Tex. Cr. 214, 22 S. W. 684; The King v. Brinkley (1907), 14 Ont. L. 434; State v. Hughes (1882), 58 Iowa 165, 11 N. W. 706; State v. Goodenow (1876), 65 Me. 30; State v. Armington (1878), 25 Minn. 29; Russell v. State (1899), 66 Ark. 185, 49 S. W. 821; Staley v. State, supra, n. 23; Davis v. Commonwealth (1911), 13 Bush. 318.

[32] May's Criminal Law (3rd ed.), § 52; Rex. v. Hall, 3 C. & P. 409; Reg. v. Reed, Car. & M. 306; Commonwealth v. Stebbins (1857), 8 Gray (Mass.) 492; Reg. v. Towse (1879), 14 Cox C. C. 327; United States v. Conner (1845), Fed. Cas. No. 14, 847.

consider the cases cited in support of this view in some detail.

The case of State v. Cain,[32a] does support the view outlined, and the conclusions of the court are stated in paragraphs 3 and 5 of the syllabus prepared by it as follows:

> "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", citing Com. v. Mash, 7 Metc. 472; 4 Am. & Eng. Enc. Law, p. 40, note; and,
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> "Where a defendant, prosecuted for bigamy, undertakes to defend by showing that he contracted the second marriage in the honest belief that the first had been dissolved by a decree of divorce, the burden of proof rests upon him to show that he had reasonable grounds (his mental capacity and surroundings considered) for such belief, and that he did in fact so believe. It is not enough that he should merely create a doubt upon that subject in the minds of the jury."

However this case is inconsistent in approving the case of Commonwealth v. Mash, which expressly holds that any intention other than intending to do the act forbidden is immaterial and that no evidence is admissible to show a mistake of fact. Furthermore this case is from Louisana, a civil law jurisdiction.

Robinson v. State[32b] is not in point and can be dismissed from further consideration because the Georgia Penal Code of 1895[33] expressly defines bigamy as "knowingly having a plurality of husbands or wives at the same time," thereby expressly recognizing the absence of intent to do wrong to be a good defense.

The learned writer of the note referred to has unwittingly fallen into an inconsistency due to confusing the various kinds of criminal intent. He says:

> "The American courts, although falling into error further on, have for the most part adopted the other and more reasonable view, that the inference from the failure of the legislature expressly to specify the mental element involved in the crime of bigamy is that *no other guilty intent is to be considered as an element of the crime than that which may be inferred from the voluntary doing of the particular act.*"[34]

Note that he unqualifiedly says that the only intent to be

[32a] Supra, n. 6.
[32b] Supra, n. 7.
[33] Penal Code of Georgia (1895), § 376.
[34] 27 L. R. A. (N. S.) 1098, n.

shown is the intent connected with voluntarily doing an act. Every one is constantly doing things which he would not do if the facts were contrary to what he supposed them to be, but his acts are none the less voluntary even though done because of a mistake of fact. The mistake of fact only goes to the quality of the mind accompanying or the motive leading up to the act, but it does not negative the intent to do the act, the only intent we are interested in. However later he goes on to say that it is unfortunate that the courts did not hold "that where the contracting of a second marriage during the lifetime of a former spouse is shown, the burden of proof shifts to the defendant to disprove the guilty intent which might otherwise be supposed to exist, by showing an honest mistake of fact on his part with respect to the termination of the former marriage by death or legal divorce."[35] This would at most show only the underlying motive or ethical quality of the defendant's mind and would no whit detract from the deliberateness of the second marriage. How then is it material in view of the assertion that the only intent to be considered is "that which may be inferred from the voluntary doing of the particular act"?

All that can be shown in defense of bigamy, where the statute does not require a specific intent, is that the defendant was not acting voluntarily. This could be shown by proof that defendant acted while drugged, hypnotized or under compulsion. Occasionally a mistake as to some of the facts might conceivably show that the defendant did not intend to commit the act prohibited. If the defendant in a spirit of fun should pretend to marry one whom all believed to be a man but who really was a woman in disguise, or if at a mock marriage he should be married by one whom all believed to be a layman, whereas he really was a minister or magistrate, it would be clear that he did not intend to do the act prohibited, namely, to marry a woman while he still had a wife living. The marriages above mentioned could of course only occur where there are no statutory requirements as to marriage licenses and persons solemnizing marriages, or where such requirements are held to be only directory and not mandatory.[36]

However in the language quoted from the note, the mistakes

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[35] 27 L. R. A. (N. S.) 1099, n.
[36] 26 Cyc., p. 840.

of fact did not have any bearing on the only intent we can consider, namely, the intent to commit the act of marriage. The third doctrine would be sound if it were clearly understood that the only matters the defendant could introduce to rebut the presumption of guilt following from proof of the act, would be those going simply to the voluntary nature of the defendant's act of remarriage.

In closing it may be well to point out that while the language in In re Ahart, and the dictum in People v. Hartman are apparently inconsistent, still the cases are not necessarily inconsistent. In the Hartman case the mistake was as to the validity of a "common law" marriage, the defendant believing it to be invalid, whereas in the Ahart case, both that case and the dictum quoted from Regina v. Tolson considered mistakes of fact. As has been pointed out earlier the cases almost unanimously recognize and enforce the distinction between a mistake of fact and a mistake of law, holding that the former in many cases excuses while the latter never does, unless it negatives a specific intent which is an essential element of a particular offense.

We have throughout endeavored only to state fairly and impartially the various doctrines which govern this vexatious question, and it is difficult to lay down any hard and fast rule which shall govern all cases. The problem must be solved by applying the usual rules of statutory construction. Proper construction of the statute will determine whether under any given statute only a general intent is required to be shown or whether a specific intent is also an essential element. It is believed that under the Massachusetts and the present California acts only the intent to do the act prohibited is involved. Under the Georgia and first California acts on the other hand a specific intent was also required to be proved, namely, knowledge that the first spouse was still living. Other statutes may require the mental element of intending to break the law or some other specific intent. Since bigamy is a serious criminal offense and involves long sentences, the courts should, where not controlled by statutory langnage, require proof of conscious wrongdoing.

Some people may say that it is unjust under acts like the present California act to convict a person of bigamy who, after the estate of his spouse had been probated, remarried while his spouse was still alive, he in common with all others believing

her to be dead. To such persons we can only say as the United States Supreme Court said in United States v. Caminetti:[37]

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms."

The Supreme Court did not go on and say, as it might also have said, that, if the enforcement of an act according to its terms seems harsh, that is a matter for the legislature and not for the courts.

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[37] Caminetti v. United States (1917), 242 U. S. 470, 61 L. Ed. 442, 37 Sup. Ct. Rep. 192.