The "Enoch Arden" And Related Problems

The "Enoch Arden" situation, although deriving its name from a romantic fiction, has become a practical problem in the family life of our civilization today. The situation arises under the following circumstances: A man and a woman have married and after maintaining that relationship for a period of time, one of the spouses disappears and is not heard of for a number of years. The remaining spouse not only faces social discomfort, but is also involved in serious legal problems, the foremost being the problem of remarriage. This comment is an attempt to deal with the various legal ramifications of the "Enoch Arden" situation, with special emphasis on Ohio law.

When an "Enoch Arden" situation arises, the first question is can the remaining spouse break the bonds of the first marriage and thus be free to remarry? In those states that allow divorce on the ground of desertion, the remaining spouse may, after the required period of time, seek a divorce on this ground. Ohio permits divorce on the ground of desertion, and the period of time required is one year.[1] With the first marriage legally dissolved, the deserted spouse need have no fear of the "Enoch Arden" returning and disrupting any new marital status which may have been assumed.

The more serious problems arise when the deserted spouse either cannot or does not have the first marriage legally dissolved, but nevertheless remarries. In those jurisdictions which do not recognize desertion as a ground for divorce, the deserted spouse cannot legally dissolve the marriage, unless, of course, other grounds independent of the desertion exist. Even in those jurisdictions which permit divorce for desertion, the fear and ignorance of legal proceedings plus the easily held belief that the absent spouse is dead often lead to a remarriage with no attempt to dissolve the ties of the former marriage. The courts then must decide whether to uphold the remarriage.

At common law, courts uniformly held that a marriage by one already legally married was void.[2] This rule was not altered by the fact that one spouse to the first marriage had been unexplainedly absent when the second marriage was consumated.[3] This strict rule resulted in great hardship, for after family disruption it is unfair to restrict the remaining spouse to thoughts of the former marriage, with no hope of entering into a new marital relationship secure from attack. Consequently, both the courts and the legislatures have attempted to modify the strict common law rule in its application to the "Enoch Arden" situation.

---

1 OHIO GEN. CODE § 8003-1.

2 Glass v. Glass, 114 Mass. 563, 84 A.L.R. 503 (1874); MADDEN, PERSONS AND DOMESTIC RELATIONS 39 (1931).

3 Matter of Kutter, 79 Misc. 74, 39 N.Y. Supp. 693 (1913).

The common law rule voiding the second marriage was based partly on a presumption that the absentee spouse was still alive. To modify the harsh result in the "Enoch Arden" situation, the courts began to impose a legal presumption of death after a certain period of unexplained absence. Most states, including Ohio, adopted a seven year period.[4] Ohio adopted the rule as early as 1857 in the case of *Rice v. Lumley*[5] and still follows it. Aided by this presumption, the abandoned spouse may remarry and suffer no legal consequences, provided the "Enoch Arden" remains absent. The presumption may be rebutted, however, by a showing that the absentee spouse was alive when the second marriage occurred. When this is shown, the second marriage will be declared void ab initio.[6] Illustrative of this is the Ohio case of *Fultz v. Fultz*[7] where the Court said: "This (the presumption) may be true but it is still only a presumption and cannot prevail against the fact that he is still alive . . . ."

When the absentee spouse returns, the courts are powerless to aid the abandoned spouse who has remarried. The legislatures in some jurisdictions have attempted to remedy this situation by statute. Some states make the second marriage voidable, rather than void, when the absentee spouse returns.[8] Other states make the second marriage valid if entered into subsequent to a certain period of time after the desertion.[9] New York's attempt to cope with the situation is typical. There the first statute stated: "A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living unless . . . such former husband or wife has absented himself or herself for five successive years then last past without being known to such person to be living during that time."[10] This statute was later changed, and, instead of having the second marriage voidable, it was declared void unless the remaining spouse had obtained a Court dissolution of the first marriage on the ground of unexplained absence for five years.[11] Under this Statute, if the party remarries after a court order dissolving the first marriage, the second marriage is valid even though the absentee spouse later returns; but if no order of dissolution is obtained, the remarriage is not voidable but void.[12] Ohio has not attempted to modify the common law rule, and a return of the "Enoch

4 Barsan v. Mulligan, 191 N.Y. 306, 84 N.E. 75 (1908); Davie v. Briggs, 97 U.S. 628, 24 L. Ed. 1086 (1878); Maley v. Pa. R.R. Co., 258 Pa. 73, 101 A. 911 (1917).

5 10 Ohio St. 596.

6 Glass v. Glass, 114 Mass. 563, 84 A.L.R. 503 (1874).

7 9 Ohio N.P. (N.S.) 593, 21 Ohio Dec. 159 (1910).

8 CALIF. CIV. CODE § 61; WILLIAMS TENN. CODE 1938 § 8439.

9 LA. REV. CIV. CODE, Art. 80; ARK. STATS. (1947) § 9024.

10 N. Y. DOMESTIC RELATIONS LAWS §6.

11 L. 1922, CL. 279, March 25, 1922.

12 Anonymous v. Anonymous, 186 Misc. 772, 62 N.Y.S. 2d 130 (1940); See text discussion of New York Enoch Arden Statutes, Comment, 6 BROOKLYN L. REV. 423.

Arden" voids the second marriage.[13]

In states such as Ohio which have not modified the common law rule by statute, the use of the presumption of death after seven years of unexplained absence involves the collateral problem of the burden of proof. When there is an attempt to rebut the presumption, who should bear the burden of proving that the absentee spouse was dead or alive at the time of the second marriage? This problem arose in the Ohio case of *McHenry v. McHenry*,[14] where the defendant in a divorce action instituted by his wife filed a cross-petition claiming that the plaintiff had a husband living and therefore the marriage between the plaintiff and the defendant was a nullity. The plaintiff claimed that the legal presumption of death after seven years absence placed the burden on the defendant to show that the plaintiff's first husband was still alive. Although the Court did not need to answer the contention, since they found that in fact "seven years had not elapsed at the time of her marriage to defendant," the Court nevertheless went on to say that even had the seven year period elapsed, the presumption of death would not arise in this case for the reason given in a former Ohio case,[15] that "The rule that an absentee who has not been heard of for seven years is presumed to be dead is subject to limitations, and circumstances may be such that no presumption of death will arise. Where the failure of an absentee to communicate with his friends is satisfactorily accounted for on some other hypothesis than that of death, the presumption of death resulting from his absence, unheard of for seven years, does not arise." The Court went on to say that not only did no presumption of death arise, but there was a presumption that the status of the parties to the first marriage continues which must be rebutted by the party (here the plaintiff wife) claiming the validity of the second marriage. As authority for this, the Court cited the Supreme Court case of *Industrial Commission of Ohio v. Dell*,[16] decided the previous year. In the *Dell* case, one of the parties had entered into two marriages and the record was silent as to whether or not the first marriage had ever been dissolved. The Court held that it would be more reasonable to place on the party claiming the validity of the second marriage the burden of overcoming the presumption that the first marriage continues. The Court recognized that when two marriages by the same person are shown to exist, two legal presumptions conflict; the presumption that a marriage once shown to exist (referring to the first one) is presumed to continue,[17] and the presumption that a marriage once shown to exist (referring to the second one)

---

13 26 Ohio Jur. 68.

14 19 Ohio App. 187 (1923).

15 Curry, Trustee v. Pierot, 12 Ohio App. 506 (1920).

16 104 Ohio St. 389, 135 N.E 669 (1922).

17 18 R.C.L. 416.

is presumed to be valid.[18] By their decision, the Court gave priority to the first presumption, even while recognizing that this was contrary to the weight of authority, which, by holding that the second presumption, prevails, places on the party claiming the invalidity of the second marriage the burden of overcoming the presumption that the first marriage had been dissolved.[19]

Although the position of the Supreme Court in the *Dell* case was consistent with previous holdings in Ohio,[20] and is supposedly still the law,[21] later cases have raised some doubt. Five years after the *Dell* case, a Court of Appeals expressly adopted the majority view in the case of *Machransky v. Machransky*,[22] stating: "The presumption . . . is that the former marriage has been legally dissolved, and the burden that it has not rests upon the party seeking to impeach the last marriage." Ohio Jurisprudence attaches no significance to this case, limiting it to its facts, that it was a marriage performed in a foreign country after a questionable divorce from the former spouse.[23] Since the Court in the *Machransky* case actually quoted from Ruling Case Law which sets forth the majority position[24] and made no attempt to limit the rule to the facts in the particular case, the view of Ohio Jurisprudence is hardly tenable. Further significance was added to the *Machransky* case in 1946 by another Court of Appeals decision which also distinguished the *Dell* case and stated: "It must be conceded also that the great weight of authority is contrary to this holding (in the *Dell* case), even upon the facts that were then before the court."[25] This Court too repeated the majority rule quoted in the *Machransky* case. Since there has been no Supreme Court decision on the point since these two modifying Court of Appeals cases, it remains to be seen whether or not the Supreme Court will abandon the minority position of the *Dell* case and adopt the majority view.

In general, two solutions for the "Enoch Arden" problem have been attempted. Some jurisdictions have smoothed the way for the abandoned spouse by statute, for example New York. In addition, the majority of jurisdictions invoke the presumption that the second marriage is valid and that the former marriage has been terminated.[26]

---

18 *Ibid.*

19 18 R.C.L. 428, 26 Ohio Jur. 77.

20 Smith v. Smith, 5 Ohio St. 32 (1855); Evans v. Reynolds, 32 Ohio St. 163 (1877); Heath v. Heath, 25 Ohio N.P. (N.S.) 123, 14 A.L.R. 2d 33 (1924).

21 *In re* Zemmick's Estate, 49 Ohio L. Abs. 353, 76 N. E. 2d 902 (1946); 26 Ohio Jur. 77.

22 31 Ohio App. 482, 166 N. E. 423 (1927).

23 26 Ohio Jur. 78, 79.

24 18 R.C.L. 417.

25 Olijan v. Lubin, 38 Ohio L. Abs. 393, 50 N. E. 2d 264 (1943), *aff'd without opinion on this particular point*, 143 Ohio St. 417, 55 N. E. 2d 658 (1944).

26 See note 19, SUPRA.

Ohio has done neither, if the *Dell* case is still controlling. As a result, in Ohio, the abandoned spouse cannot safely enter into a new family relationship without waiting at least seven years. If a marriage entered into before that period is attacked, no presumptions arise in favor of it, and the burden of upholding the second marriage falls upon the abandoned spouse. Furthermore, if the abandoned spouse patiently waits for seven years and then enters into a new family pattern, if the "Enoch Arden" returns that new family pattern will be declared a nullity. Such uncertainty is to be deplored in a State as progressive as Ohio. Since case law is apt to be slow and awkward, the matter should be resolved by the legislature.

Another problem involved in the "Enoch Arden" situation is the possibility of a bigamy prosecution. Because many remarriages have been entered into in good faith, both parties believing the absentee spouse to be dead, a criminal prosecution for bigamy seems unjust. For this reason, bigamy statutes in many states contain a provision to the effect that the statute shall not apply to a person whose former spouse has ben absent and unheard of for a stated period of time.[27] In Ohio the period is five years.[28] Because the statutes and case law on this phase of the "Enoch Arden" situation are much in conformity in the various jurisdictions, a review of the Ohio law will illustrate the general pattern.

In *Stanglein v. State*[29] the Ohio Supreme Court set forth the procedural rule that the bigamy indictment need not allege facts showing the five-year exception to be inapplicable to the defendant, but rather that it is incumbent on the defendant to show that he comes within the exception by proof that the former spouse had absented himself or herself for the statutory period, and that the defendant had no knowledge that the absentee spouse was alive within that time. A later case stated that once the defendant shows that the deserting spouse was continually absent during the five-year period, the defendant is not required to show the exercise of due diligence to ascertain the whereabouts of the absentee spouse.[30] The Court reached this result by reasoning that although generally, in Ohio, a mistake of fact to be a defense to a crime must have been made both in good faith and with the exercise of due care, the Ohio legislature had placed the five-year exception in the bigamy statute with no mention of due care, and so had "intended to and did leave the general defense available during the first five years' separation, but established a milder rule, more favorable to the accused, available after five years separation." In pursuing this line of reasoning, the Court was influenced by the case

27 VERNIER, AMERICAN FAMILY LAWS (Vol. 1, 1931).

28 OHIO GEN. CODE § 13022.

29 17 Ohio St. 453 (1867).

30 Harns v. State, 16 Ohio C. C. (N. S.) 433, 31 Ohio C. D. 615 (1906).

of *State v. Stank*[31] where the Court had held that an innocent mistake, resulting in an honest belief that a former spouse was validly divorced, is a defense to an accused who has exercised reasonable diligence. Ohio Jurisprudence voices the opinion[32] that the *Stank* case is not only contrary to the weight of authority,[33] but is difficult to reconcile with an earlier Ohio Supreme Court decision[34] which held that a foreign divorce decree which is void in Ohio is no defense to a bigamy prosecution in Ohio. Although on the surface the *Stank* case seems out of line with this Supreme Court decision, that decision might be limited to its facts and so not be applicable where the accused thought the former spouse dead and not merely divorced. In *Harms v. State*[35] the Court held that the five-year exception is not a defense to the spouse who deserted without just cause.

Ohio's position as to the burden of proof for the five-year exception is supposed to have been stated in *Hanley v. State*,[36] where a Circuit Court ruled that the state is not bound to prove that the defendant and his first wife were not divorced, the burden of proving the disolution of the first marriage being on the defendant. In its dictum, however, the Court said: "If she (the former spouse) had been absent or unheard of for any period of time, it is quite likely the burden would devolve upon the state to show that she was alive—especially if she had been absent and unheard of for seven years, when a presumption, of course, would arise that she was dead." It is uncertain whether the Court meant by this that an unexplained absence raises a presumption of death before seven years, a position not accepted in Ohio;[37] and also whether, after a period of unexplained absence of the former spouse, the burden of proving the dissolution of the first marriage would fall on the party claiming the invalidity of the second marriage, a view followed by the majority of courts but one supposedly not accepted in Ohio.[38] This dictum has never been explained or distinguished by any subsequent decisions, and could well be made the basis for arguing that the majority position had been accepted by the Court.

When a spouse deserted by an "Enoch Arden" remarries and has children, the problem of their legitimacy arises. Obviously, if the second marriage is valid, they are legitimate. But when the validity of

---

31 9 Ohio. Dec. Repr. 3, 10 Bull. 16 (1883).

32 5 Ohio Jur. 620, 621.

33 3 R.C.L. 802.

34 Van Fossen v. State, 37 Ohio St. 317, 41 Am. Rep. 507 (1881).

35 See note 30, *supra.*

36 5 Ohio C. D. 488, 120 Ohio C. C. 584 (1896), sometimes cited Whalen v. State.

37 Supreme Commandery, O.K.G.R. v. Everling, 20 Ohio C. C. 689, 11 Ohio C. D. 419 (1893).

38 See note 21, *supra.*

the second marriage is successfully attacked and it is declared void or bigamous, a serious problem results. At common law, the generally accepted rule was that children born of a bigamous marriage were illegitimate.[39] Fortunately, the Ohio legislature has remedied the situation. Section 10503-15 of the General Code declares: "The issue of parents whose mariage is null in law shall nevertheless be legitimate." This positive legislation, plus the well established Ohio doctrine that the law favors legitimacy,[40] protects the issue of any subsequent marriage by the deserted spouse, even though that remarriage is later declared a nullity or bigamous.[41]

In summary, a spouse deserted by an "Enoch Arden" not only faces social embarrassment, but serious legal problems as well. The Ohio Legislature has successfully met the problems of bigamy and the legitimacy of the children, should they not afford further relief to the abandoned spouse? The case law is inadequate and uncertain, and what certainty there is gives no protection to this spouse. Other states have shown that the problem can be met adequately by statute. It is hoped that the Ohio Legislature will soon see fit to meet this discomforting social problem in the same manner.

James D. Primm, Jr.

---

39 Blackburn v. Crawford, 70 U. S. (3 Wall.) 175, 18 L. Ed. 186 (1865); Comment, 7 OHIO ST. L. J. 87.

40 Dirion v. Brewer, 20 Ohio App. 298, 151 N. E. 818 (1925); see cases collected in 5 West's Ohio Dig. 527, 528.

41 Wright v. Lore, 12 Ohio St. 619 (1861); Gardner, Gdn. v. The B. F. Goodrich Co., 136 Ohio St. 397, 26 N. E. 2d 203 (1940).