

Mens Rea in Bigamy in Maryland: an Obituary?

T. B. Hogan

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Family Law Commons](#)

Recommended Citation

T. B. Hogan, *Mens Rea in Bigamy in Maryland: an Obituary?*, 23 Md. L. Rev. 224 (1963)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol23/iss3/2>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

MENS REA IN BIGAMY IN MARYLAND: AN OBITUARY?

By T. B. HOGAN*

Art. 27, § 18 of the Maryland Code (1957) provides:

“Whosoever being married and not having obtained an annulment or a divorce a vinculo matrimonii of said marriage, the first husband or wife (as the case may be) being alive, shall undergo a confinement in the penitentiary for a period not less than eighteen months nor more than nine years; provided, that nothing herein contained shall extend to any person whose husband or wife shall be continuously remaining beyond the seas seven years together, or shall be absent himself or herself seven years together, in any part within the United States or elsewhere, the one of them not knowing the other to be living at that time. . . .”

In *Braun v. State*¹ a recent decision of the Court of Appeals of Maryland, D appealed against his conviction for bigamy on the ground, *inter alia*, “that when he entered into the marriage with his second wife in Maryland in 1961, he believed that his first wife had divorced him, [and] that he, therefore, lacked any wrongful intent and hence was not guilty of bigamy.”² Every student of criminal law will recognise the problem: is mistake a defence to a charge of bigamy? The court indicated that in Maryland it is not. D’s conviction and his sentence of five years’ imprisonment were affirmed.

In one sense that, so far as the law of Maryland is concerned, is that. The Court of Appeals has chosen to ally itself with the majority of jurisdictions in the United States in holding that a mistake as to the subsistence of the first marriage is not a defence to a charge of bigamy, rather than with the minority of states which hold that a *bona fide* mistake, or a *bona fide* mistake on reasonable grounds, does constitute a good defence.³ If there is room for anything, then, it is for lament rather than comment. Nevertheless, it is respectfully, and hopefully, submitted that *Braun* is not the last word on the matter in Maryland so that the matter is still open for comment.

* LL.B. Manchester; Lecturer of Law, University of Nottingham; Visiting Professor, Villanova University School of Law.

¹ 230 Md. 82, 185 A. 2d 905 (1962).

² *Id.*, 85.

³ See generally, PERKINS, CRIMINAL LAW (1957) 835-842.

The ratio decidendi of Braun.

The basis of this submission is that the *ratio* of *Braun* is contained in the statement of the court, towards the end of the judgment, that, "On the facts of this case we think that (D) has failed to establish a bona fide and reasonable belief that he was divorced."⁴ On any view this was enough to dispose of the appeal and it is urged that this may properly be treated as the *ratio*. What the court had to say about the relevance of a *bona fide* mistake was therefore unnecessary to the decision in the case and may be treated as *obiter*. This is not to say that what the court had to say about mistake can be lightly disregarded since the opinion on this point, even if *obiter*, was considered and deliberate.

The mens rea of bigamy.

The *mens rea* of bigamy cannot, of course, be defined in the abstract. Any self-respecting lawyer who is asked to define this will require, at least as a starting point, to see the relevant statutory provision if there is one. But as an abstract proposition *mens rea* is capable of definition. At any rate the philosophy underlying the concept is susceptible of explanation, and that philosophy was expressed by the Supreme Court of the United States in these words:

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution."⁵

Given that D brings about the *actus reus* of bigamy when, being married to A, he enters into a ceremony of marriage with B, that philosophy requires absolutely that D should

⁴ *Supra*, n. 1.

⁵ *Morisette v. United States*, 342 U.S. 246, 250 (1952). For a statement of that same policy in connection with the offense of bigamy see MODEL PENAL CODE (Tentative Draft No. 4, 1955, § 207.2) and commentary thereon at pp. 220-227.

intend to enter into the ceremony with B *in the knowledge that he is still married to A*. If D does not have that knowledge, if D believes that he is no longer bound by the ties of his marriage to A, then D has no rational basis to choose between what is legal and what is illegal, what is good and what is evil. In going through a ceremony of marriage with B, believing that he is free to do so, D is doing what he believes is good.

The problem of statutory construction.

It is, no doubt the fact that the legislature may dispense with *mens rea*, and where a statute does so in clear terms the court has no choice but to obey. But it is also the fact that in many, if not most, instances the legislature gives no clear clue as to its intent and the court must then determine the issue having regard to such matters as the historical background of the statute, its policy, the gravity of the offence and the severity of the penalty, and the administration of the statute. What is not often *expressly* recognised is that the evaluation of these factors usually presents the court with a choice. In *Braun*, it is respectfully submitted, the court tacitly recognised this choice when it said, "The problem of statutory construction is primarily whether or not a requirement of *mens rea* to establish guilt *should*⁶ be read into the statute."⁷

The court concluded that *mens rea* should not be read into the statute because (i) in Maryland the statutory offences of being in possession of lottery tickets or of narcotics had been held to be offences not requiring *mens rea*,⁸ (ii) the underlying social purpose of the bigamy statute was such as to put the offence on a par with "police regulations", (iii) most other jurisdictions considering the matter had concluded that *mens rea* was not essential to the offence, and (iv) honest mistake was not an exception enumerated by the statute. These reasons call for scrutiny.

⁶ My italics.

⁷ *Supra*, n. 1, 89. Cf. Commentary to MODEL PENAL CODE, *supra*, n. 5, 222: "The prevailing view is that such a defense is unavailing even if the mistake was based on reasonable grounds. This position was reached largely as a matter of construction of the language of statutes rather than on policy grounds. Thus where the bigamy provision contains no words like 'knowing' or 'wilful,' and where the legislature has explicitly excepted cases of remarriage following actual death or divorce of the former spouse, some courts feel themselves precluded from holding that a supposed death or divorce is a defense. However, when the matter is considered afresh on policy grounds, there seems to be no valid reason to stigmatize or punish remarriage by people who in good faith believe themselves to be widows or widowers."

⁸ In *Ford v. State*, 85 Md. 465, 37 A. 172 (1897) and *Jenkins v. State*, 215 Md. 70, 137 A. 2d 115 (1957) respectively.

(i) The argument by analogy certainly carries some force in the construction of statutory offences, as it does generally. English students are always puzzled to understand why in 1884 it was held that D could be convicted, under the Licensing Act, 1872, § 13, of selling liquor to a drunken person whom he did not know to be drunk,⁹ and in 1895 it was held that D could not be convicted, under § 16(2) of the very same Act, of selling liquor to a constable on duty because he did not know that the constable was on duty.¹⁰ The analogy between the two provisions appears to be too close to resist. But it is submitted that no student, English or American, would be puzzled to discover that a court had once held that being in possession of lottery tickets or of narcotics did not require that D should know that what he had in his possession was lottery tickets or narcotics, and then subsequently held that D could not be convicted of bigamy where he did not know of the subsistence of his first marriage. There is no real analogy here at all, and the possession cases afford no plausible basis for the court's conclusion that *mens rea* was not required for the offence of bigamy.

(ii) The court's opinion that bigamy is to be considered on a par with that well known, if ill defined, class of minor regulatory offences for which *mens rea* is not required is, with respect, astonishing. By its language the court acknowledged the fact that the gravity of the offence is a significant factor in determining whether to include or exclude *mens rea*, but chose to meet this difficulty by deciding that bigamy "is to be considered on a par with various police regulations where criminal intent is unnecessary." It is just possible that these days society views bigamy with little more disapprobation than selling adulterated milk or failing to halt at a stop sign, but bigamy is viewed as a serious crime by the Maryland legislature and by the Maryland courts; as witness D was here sentenced to five years' imprisonment.

(iii) It is certainly the case that most jurisdictions have held that mistake is not a defence to a charge of bigamy.¹¹ In view of the fact that bigamy is a statutory offence in most jurisdictions, and that these statutes tend to follow a similar pattern, this point clearly made its weight felt in the court's decision. It is, after all, a weighty point. But the court was concerned to interpret the legislation of Maryland, was concerned to make a choice — for choice,

⁹ *Cundy v. LeCocq*, 13 Q.B.D. 207 (1884).

¹⁰ *Sherras v. DeRutzen*, 1 Q.B. 918 (1895).

¹¹ See PERKINS, *CRIMINAL LAW*, *loc. cit. supra*, n. 3.

it is submitted, there was — for Maryland. In this choice the weight of authorities in other States could not have decisive importance. And it is not a matter of being insular here: no one would have accused the Court of Appeals of Maryland of insularity had it favoured *mens rea* in the interpretation of its statute.

(iv) The most telling point the court made in favour of its interpretation of the statute was that, applying the ordinary canons of construction, it did not lend itself easily to the inclusion of *mens rea*. On the face of it, where a statute is in terms absolute (i.e., does not by the use of words such as 'knowingly', 'maliciously' or 'unlawfully' import *mens rea*) and then goes on to provide a specific exception to its operation, this affords some ground for the conclusion that the only defence the legislature intended was the legislative exception. But is this the proper inference from § 18 of Art. 27 of the Maryland Code? Surely this exception is of an extraordinary character in that it provides a defence which, but for the exception, would not have been available at common law. If the proviso had been omitted from § 18 it must be clear that though a court might legitimately conclude that what is a defence to a charge of crime at common law (insanity, duress, mistake of fact and the like) would be a defence under the statute, the court would hardly conclude that seven years absence of the former spouse, coupled with an absence of belief that the former spouse is alive during that time, could constitute a defence. That would be a clear arrogation of the legislature's powers. The exception thus has a perfectly understandable explanation which does not compel the conclusion that it was intended to be the only defence. The exception may be taken merely to add to the defences which are available: it need not negative all other defences.¹²

If the court takes the other view, that the legislative creation of a specific defence negatives other defences, then the court may find itself embarrassed where the defence is insanity or duress. Since the statute makes no mention

¹² In other words it is at least plausible to assume that the legislature wished to provide for those unhappy cases where D, not knowing of anything which would induce a belief in the death of the former spouse, had yet not heard of the former spouse for a number of years. It is thus tacit in the legislative intention that a belief in the death of the former spouse would constitute a defence, and the exception was to provide for those cases where there was no actual belief in the death of the former spouse. It is really inconceivable that the legislature would provide a defence for which an actual belief in the death of the former spouse was not necessary, and yet leave defenceless the person who has an actual belief in the death of the former spouse.

of these as a possible defence, must the defence of insanity and duress also go to the wall? It is thought that no court would take so extreme a view, but if the statute is approached in the same fashion it is difficult to see why it must exclude the defence of mistake of fact but not the defence of insanity.

The court also recognised § 18 as being the child of a statute of James I in 1604,¹³ and if the two provisions are put side by side it is certainly a case of like father like son. The preamble to the Act of James is illuminating:

“Forasmuch as divers evil disposed persons being married, run out of one country into another, or into places where they are not known, and there become to be married, having another husband or wife living, to the great dishonour of God, and utter undoing of divers honest mens children. . . .”

Although the preamble is not part of the Act, and although “evil disposed” is a crude expression for *mens rea*, it is submitted that if the Stuart courts had felt any doubt whether the Act of James imported *mens rea*, the preamble would have resolved those doubts in favour of *mens rea*.

The problem of mistake of Law.

The court did not decide whether D's mistake was one of fact or law but it took the position, following its own previous decision in the civil case of *Geisselman v. Geisselman*,¹⁴ that a mistake of law would no more constitute a defence than mistake of fact. Given that the offence of bigamy does not require *mens rea* it follows inevitably that mistake of law is no more a defence than mistake of fact. But given that the court holds, or is prepared to hold, that bigamy requires *mens rea* then it may become relevant to discuss whether D's mistake is one of law or fact, because, as is well known, mistake of fact is generally a defence whereas mistake of law generally is not.

Whether D made a mistake of fact or law in *Braun* is perhaps difficult to ascertain affirmatively from the report. Probably his mistake was one of fact since it appears that he simply believed (or alleged that he believed) that his wife had divorced him. A useful rule of thumb guide is that D cannot make a mistake of law unless he knows the facts, and as D was not apparently in possession of the facts, his mistake was not of law but of fact. Suppose,

¹³ 1 Jac. I, c. 11.

¹⁴ 134 Md. 453, 107 A. 185 (1919).

however, that his mistake is one of law: is he now rendered defenceless by virtue of the general rule that mistake of law is no defence?

In England the offence of bigamy is governed by § 57 of the Offences Against the Person Act, 1861,¹⁵ which is, in terms, much the same as § 18 of Art. 27 to the Maryland Code, deriving, as it does, from the same parent statute of James I. In *Braun* the court adverted to the two well known English cases of *Tolson*¹⁶ and *Wheat & Stocks*¹⁷ in the former of which it was held that a belief in the death of the former spouse was a good defence to bigamy, and in the latter that a belief in the dissolution of the former marriage was no defence. The distinction between the two cases is sometimes put on the ground that the mistake in *Tolson* was one of fact but in *Wheat & Stocks* was one of law. If this is the case then the result is unfortunate. In the first place it may be an exceedingly complex matter to determine whether the mistake is one of law or fact, and, secondly, D's guilt is then made to turn upon a technical matter which it is unlikely he would ever comprehend.

It is argued here that there have been some misconceptions about mistake of law as a defence to crime. If D's mistake of law is such that he is unaware that he is bringing about the *actus reus* of a crime (as, for example, where D, knowing that he is married to A, marries B in the belief that the law permits polygamy) then his mistake is no defence. No one would doubt that. On the other hand, if D's mistake of law is such that it prevents him forming the *mens rea* of the crime this may be held to be a good defence without in any way invalidating the general principle. Thus if D, by virtue of a mistake of law, believes that he is free to marry again he does not have the *mens rea* of bigamy, although he has brought about the *actus reus*, and he ought to be acquitted. If this view were accepted the court would not need to determine the character of D's mistake as to the first marriage, since in either event the mistake prevents the formation of *mens rea*.¹⁸

The effect of the exclusion of mens rea.

It is often thought that whatever demerit the exclusion of *mens rea* may have, it is offset by its simplification of the administration of the law. Thereafter the court is not concerned with any difficulties in the proof of *mens rea*;

¹⁵ 24 & 25 Vict., c. 100.

¹⁶ 23 Q.B.D. 168 (1889).

¹⁷ 2 K.B. 119 (1921).

¹⁸ Cf. PERKINS, CRIMINAL LAW (1957) 836.

it is enough to fix D with liability that he has brought about the acts prescribed by law. In bigamy this usually means that the court is not concerned to discover whether D knew that he was still bound by the first marriage when he entered into the second ceremony. But is this really the fact? Surely the single most important factor the court will consider in sentencing D will be whether D knew, or did not know, that he was married to A when he went through the ceremony with B. No court that is satisfied that D made a genuine mistake is going to send him to prison; to do so would be to return to a darker age. In short the court will want to know in any event whether D had *mens rea*. Thus in most jurisdictions when a court holds that bigamy does not require *mens rea* it merely removes its determination from the jury to the court. It is submitted the position is in substance the same where, as is usually the case in Maryland, the case is tried before a judge alone. The only difference would seem to be that where the judge sits alone he can do overtly (since determination of the facts is within his province) what the judge who sits with a jury is doing covertly.¹⁹

The reasonableness of the mistake.

It was pointed out by the court that in those states where mistake has been held to be a defence it has usually been required not only that the mistake be *bona fide* but that it be based on reasonable grounds. Just a word about this. On principle, D does not have *mens rea* where he makes a *bona fide* mistake, whether it is a reasonable mistake or not. The reasonableness of the mistake may be taken into account by the jury in deciding whether D is to be believed, but if D is believed he ought to be acquitted no matter how unreasonable his mistake. Insisting on the reasonableness of the mistake makes bigamy a crime of negligence. There may be something to be said for this in view of the uncertainty which shrouds the exercise of divorce jurisdiction in some of the states, but it is submitted that a requirement only that D act in good faith is enough to protect the interest of the prosecuting state. Proof that D failed to take reasonable steps to assure himself of the

¹⁹ What happens in Maryland in the unusual contingency of a bigamy trial with a jury is less clear. I am indebted to the Editor for calling my attention to special features of Maryland Constitutional Law, particularly 9 MD. CODE (1957) Art. 15, § 5, of which I was ignorant. My limited acquaintance with this somewhat bizarre provision leads me to conclude that the end result must be the same — the court will want to be satisfied that D's mistake was not genuine before he is sentenced to a term of imprisonment.

validity of the dissolution of the former marriage will be potent evidence of bad faith which D will find hard to challenge, but if it is shown, notwithstanding the unreasonableness of the mistake, that D did in fact act in good faith and genuinely believed that he was free to marry again, it is submitted that there is no good policy which requires that D be treated as a criminal.²⁰

Conclusion.

The basic trouble with *Braun* is its timidity. The Court of Appeals, called upon to face an old problem, produced the old answer. It affords an excellent example of what Dean Pound called mechanical jurisprudence.²¹ In go the authorities at one end, and they are briefly incubated by the court to produce an infant which can be recognised by all as the child of its parents. It is respectfully submitted that it would have been better if this infant had been still-born in Maryland. It has been further submitted that *Braun* is not decisive on the *mens rea* of bigamy and it is to be hoped that this important problem will be reconsidered.

²⁰ The Model Penal Code, although it does not require that the mistake be reasonable when it concerns the death of the first spouse or the validity of an existing judgment purporting to dissolve the marriage, otherwise requires a reasonable belief in eligibility for remarriage for a defence. MODEL PENAL CODE § 230.1. For further information see MODEL PENAL CODE § 207.2 (Tentative Draft No. 4, 1955) and commentary thereon.

²¹ III JURISPRUDENCE, pp. 510-512.