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## Domestic Relations: Conflict between the Civil Code and the Penal Code with Respect to the Effect of Plural Marriages Resolved

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derer to conceal his presence from the intended victim while watching and waiting for the opportunity to carry out his purpose. It is submitted that this definition of concealment affords a sound evaluation and solution of the problem, because, along with the requisites of watching and waiting to kill, it also requires a showing, beyond a reasonable doubt, of a lying in wait. On the other hand, it will be flexible enough to apply in cases where the victim was aware of defendant's presence or where the defendant was observed by others while he was *lying in wait*.

*Theodore Marois, Jr.*

#### DOMESTIC RELATIONS: CONFLICT BETWEEN THE CIVIL CODE AND THE PENAL CODE WITH RESPECT TO THE EFFECT OF PLURAL MARRIAGES RESOLVED

Until recently a serious inconsistency existed between a section of the California Penal Code and a section of the Civil Code. Because of this inconsistency, it was possible for a person to be a bigamist in the eyes of the criminal law, even though the second marriage, for which he was prosecuted, would be valid civilly.

Penal Code section 281 prohibits plural marriages, and makes such marriages criminal:

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.<sup>1</sup>

This section does not extend to:

Any person by reason of any former marriage, 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.<sup>2</sup>

It has been the rule in California under section 281 that an erroneous but reasonable and honest belief that the former spouse was dead is not a defense to a bigamy prosecution.<sup>3</sup> The rule seemed to be based on the theory that the statute contains a flat prohibition of all remarriages while the first husband or wife is living and enumerates certain exceptions which should be strictly construed. In *People v. Hartman*<sup>4</sup> the court said:

". . . It is claimed that if defendant thought he was not married when he entered the marriage relation the second time, then he had no intent to commit the crime of bigamy and having no intent to commit the crime he could not, as a matter of law, be guilty of committing it. While this position is plausible it is apparent that it cannot stand when the tests furnished by the law are applied to it.

". . . [T]he law says: 'every person having a husband or wife living, who marries any other person except in cases specified in the next section, is guilty of bigamy.' . . . But here 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 the defendant as referred to in the code, is the intent to do the act, namely, contract the marriage. It does not refer to any intention to violate the law."<sup>5</sup>

In order to avoid the risk of a bigamy prosecution, under the legal principle enun-

<sup>1</sup> CALIF. PENAL CODE § 281.

<sup>2</sup> CALIF. PENAL CODE § 282.

<sup>3</sup> *People v. Hartman*, 130 Cal. 487, 62 Pac. 823 (1900). See Trowbridge, *Criminal Intent and Bigamy*, 7 CALIF. L. REV. 1 (1918).

<sup>4</sup> 130 Cal. 487, 62 Pac. 823 (1900).

<sup>5</sup> *Id.* at 490-92, 62 Pac. at 824.

ciated in the *Hartman* case, a person would have to wait for at least five years after the last contact with the former spouse before remarrying.

Civil Code section 61 provides that, although plural marriages are generally void, under certain circumstances they are quite valid. The Civil Code exception to the rule that a bigamous marriage is void reads as follows:

Unless such former husband or wife is absent and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, *or* is generally reputed or believed by such person to be dead at the time such subsequent marriage was contracted. In either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal. (Emphasis added.)<sup>6</sup>

Civil Code section 83, subdivision 2 provides that a suit for the annulment of the second marriage must be brought by either party during the life of the other, or by the former husband or wife. If such a suit is not brought by any of the three parties, the first marriage is suspended and remains in abeyance and the second marriage continues in full force and effect.<sup>7</sup> It is conceivable that the second marriage might never be annulled. It seems quite evident from the wording of Civil Code section 61, subdivision 2 that the absence of the former spouse for five successive years and the belief that the former spouse is dead are to be treated as two different things, either one of which would be sufficient to protect the validity of the marriage in question.

The California cases<sup>8</sup> which have come up under Civil Code section 61, subdivision 2 have involved situations in which the absentee spouse has been gone for five years or more. These cases have presented no difficulty for the courts with respect to the construction of Civil Code section 61, subdivision 2, and the result reached by the courts in each case has been compatible with the decisions of the criminal courts in bigamy cases under Penal Code sections 281 and 282. Where the second marriage is entered into five years after the last contact with the former spouse in the good faith belief that the former spouse is dead, the marriage is neither felonious nor void. However, the discrepancy between the Penal and Civil Codes appears in the case where the second marriage is contracted within the five-year period. Such a marriage is felonious under the rule announced in the *Hartman* case if the former spouse is alive at the time of the second marriage. Would such a marriage be valid under the Civil Code? Research has failed to reveal a single case in which the court was called upon to decide whether a bona fide and reasonable belief that the former spouse was dead would be sufficient to validate a second marriage, contracted within the five-year period, while the first spouse was still alive.

If such a case had arisen, the court could have found that the clear import of the words of Civil Code section 61 made the marriage valid until its nullity was adjudged, even though it was bigamous under the Penal Code. This result, of course, would be practically and logically an absurdity. True, it would do justice to the literal meaning of the words, but at the same time, it would have the effect of declaring a bigamous marriage civilly valid. On the other hand, in the hypo-

<sup>6</sup> CALIF. CIV. CODE § 61(2).

<sup>7</sup> Estate of Harrington, 140 Cal. 244, 73 Pac. 1000 (1903).

<sup>8</sup> Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957 (1892); Moran v. Moran, 54 Cal.App.2d 221, 128 Pac.2d 796 (1942); *In re Borneman's Estate*, 35 Cal.App.2d 455, 96 Pac.2d 182 (1939); *In re Perry's Estate*, 58 Cal.App. 420, 208 Pac. 987 (1922).

thetical case posed, the court might have read Civil Code section 61, subdivision 2 so that the requirement of five years absence with no knowledge that the spouse is alive and the belief in the death of the former spouse, taken together, constitute the one exception to the rule that plural marriages are void. To do this the court would have had to read the disjunctive "or" in the statute, connecting the five-year absence and the belief in death, as the conjunctive "and." Perhaps this does violence to the language of the statute, but there has been such great laxity in the use of these terms that courts have said that the words are interchangeable and that one may be substituted for the other, if to do so is consistent with the legislative intent or would avoid absurd or unreasonable results.<sup>9</sup> Since the California criminal courts have attributed to the legislature the intent to declare the second marriage within the five-year period bigamous, would not the court, faced with the question of the civil validity of the marriage, feel constrained to rule that it is void? This decision would be supported by the general rule of statutory construction that statutes should be construed in the light of other legislation dealing with the same subject matter.<sup>10</sup> The effect of this construction would be that notwithstanding a bona fide belief in the death of the former spouse, a second marriage contracted while the first spouse was still alive would be void from the beginning unless the full five years had elapsed since the last contact with the first spouse. At least this construction would have the salutary effect of avoiding the incongruity of giving a marriage, criminal under the Penal Code, some civil validity.

The possibility of this enigma occurring has been eliminated, and the exceptions to Penal Code section 281 and Civil Code section 61 have been brought into harmony by a recent decision of the California Supreme Court. The case, *People v. Vogel*,<sup>11</sup> is noteworthy, not only because it expressly overruled *People v. Hartman* but because of its incidental effect on Civil Code section 61, subdivision 2.

The *Vogel* case involved the prosecution for bigamy of Robert S. Vogel, who was found guilty of having married Stelma Roberts in San Diego in March of 1953, at which time his New Orleans marriage to Peggy Lambert Vogel in 1944 was still in effect.

In the trial court, Vogel tried to introduce testimony designed to prove his contention of good faith belief that his first wife had divorced him, but the judge excluded it. However, on appeal the Supreme Court of California said:

"The exclusion of this evidence was clearly prejudicial, for it deprived the defendant of the defense of a bona fide and reasonable belief that facts existed that left him free to remarry."<sup>12</sup>

The court interpreted the law in regard to bigamy to mean that, "As in other crimes, there must be a union of act and wrongful intent,"<sup>13</sup> and said that this construction was "consistent with good sense and justice."<sup>14</sup>

In support of this closely reasoned decision, the court referred to the wording of section 61, subdivision 2 of the Civil Code as tending to shed light on the construction of Penal Code sections 281 and 282. The court said:

<sup>9</sup> *Santos v. Dondero*, 11 Cal.App.2d 720, 54 Pac.2d 764 (1936); *Abbey v. Board of Directors of Honcut-Yuba Irrigation Dist.*, 58 Cal.App. 757, 209 Pac. 709 (1922). See SUTHERLAND, STATUTORY CONSTRUCTION § 4923 n.3 (3d ed. 1943).

<sup>10</sup> See SUTHERLAND, STATUTORY CONSTRUCTION § 6101 (3d ed. 1943).

<sup>11</sup> 46 Cal.2d 798, 299 Pac.2d 850 (1956).

<sup>12</sup> *Id.* at 805, 299 Pac.2d at 856.

<sup>13</sup> *Id.* at 801, 299 Pac.2d at 852-53.

<sup>14</sup> *Id.* at 804, 299 Pac.2d at 855.