FIFTEEN DECISIVE BATTLES OF THE LAW.

BEING A STUDY OF SOME LEADING CASES IN THE LAW OF ENGLAND.

BY

ERNEST ARTHUR JELF, M.A.,

(NEW COLLEGE, OXFORD),

Barrister-at-Law of the Honourable Society of the Inner Temple and of the South Eastern Circuit.

EDITOR OF "THE CORRUPT AND ILLEGAL PRACTICES PREVENTION ACTS, 1883—1895," "THE CRIMINAL EVIDENCE ACT, 1898," AND "THE EDUCATION ACT, 1902"; AUTHOR OF "WHERE TO FIND YOUR LAW."

LONDON:

SWEET AND MAXWELL, LIMITED,

3, CHANCERY LANE, W.C.

Law Publishers.

1903.

XIII.

THE BATTLE OF THE QUEEN AND TOLSON.

Of all the cases to which Queen Victoria of glorious memory was one of the nominal parties, that which was the subject of this decisive battle was perhaps the most important from the point of view of the legal principle involved.

It might easily have been decided the other way. Justices Denman, Field, and Manisty and Barons Pollock and Huddleston all thought that it ought to have been decided the other way. These five dissentients were overruled by the nine other members of the court.

The battle was fought during the Chancellorship of Lord Halsbury in 1889; and the whole then strength of the Queen's Bench Division, with the exception of Mr. Justice (now Lord Justice) Mathew, were upon the Bench, under the presidency of Lord Coleridge, the Lord Chief Justice of England.

Henry was counsel for the prisoner, Martha Ann Tolson, who had been convicted of bigamy. This unhappy woman had been married to Tolson on the 11th Sept., 1880. Tolson deserted her on the

13th Dec., 1881. She and her father made inquiries about him, and learned from his elder brother and from general report that he had been lost in a vessel bound for America, which went down with all hands on board. On the 10th Jan., 1887, the prisoner, supposing herself to be a widow, went through the ceremony of marriage with another man. The circumstances were all known to the second husband, and the ceremony was in no way concealed. In Dec., 1887, Tolson returned from America. Like Enoch Arden,

> ". . . The dead man come to life again beheld
> His wife his wife no more. . . ."

Mary Ann Tolson was indicted under sect. 57 of the statute 24 & 25 Vict. c. 100 (the Offences against the Person Act, 1861), which is in these terms:

"Whosoever being married shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England, Ireland, or elsewhere, shall be convicted of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years with or without hard labour; and any such offence may be dealt with, inquired of, tried, determined, and punished in

any county or place in England or Ireland when the offender shall be apprehended or be in custody in the same manner in all respects as if the offence had been actually committed in that county or place: Provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

Mr. Justice Stephen directed the jury that a belief in good faith on reasonable grounds that the husband of the prisoner was dead would not be a defence to a charge of bigamy, and stated in the case that his object in so holding was to obtain the decision of the Court for the Consideration of Crown Cases Reserved in view of the conflicting decisions of single judges on the point.

The jury convicted the prisoner, stating, however, in answer to a question put by the judge, that they thought that she had in good faith and on reasonable

grounds believed her husband to be dead at the time of the second marriage; and the judge sentenced her to one day's imprisonment.

Henry's flag which he carried into the battle bore these words emblazoned upon it: *Non est reus nisi sit mens rea.*

"The question," said Henry, "turns upon the construction of 24 & 25 Vict. c. 100, s. 57, which reproduces, with slight and immaterial variation of language, 9 Geo. IV. c. 31, s. 22, and 1 Jac. I. c. 11, by which latter statute bigamy was first made felony and removed from the cognisance of the ecclesiastical courts. At that time the offence was punishable with death, and it is difficult to believe that in 1603 the Legislature intended that a man or woman re-marrying under a *bonâ fide* and reasonable belief that the other party was dead should be liable to capital punishment. Sect. 57 should be construed in accordance with the well-known principle of English law, which is that emblazoned on my flag. It is true that the Legislature may for its own reasons dispense in any given case with the necessity of a *mens rea*, and may constitute certain acts crimes in themselves; but this is generally done in very clear language."

He then cited Coke upon Littleton (391*a*), Hawkins' Pleas of the Crown (book 1, c. 25), and Termes de la Ley, tit. Felony, to show that "a person cannot innocently commit felony."

The effect of the proviso in sect. 57, which was Henry's real difficulty, was explained by him thus. It merely raised, he said, a presumption of death after an absence of seven years, during which the other party to the marriage had not known that the absent husband or wife was living. This presumption was wholly different from the ground taken in the present defence, which was based on a reasonable *bonâ fide* belief of the death of the husband, excluding all possibility of the existence of a *mens rea*. After the seven years there was a legal presumption of death, and the burden of proof was on the prosecution; while the seven years were running, the burden of proof was upon the prisoner, and honest and reasonable belief in the death of the husband or wife was a good defence.

No counsel appeared to argue on behalf of the Crown, and yet the result hung in the balance for some time. "There is no doubt," as Mr. Justice Wills said, "that under the circumstances the prisoner falls within the very words of the statute. She, being married, married another person during the life of her former husband, and, when she did so, he had not been continually absent from her for the space of seven years last past."

As we have already intimated, the majority of the court decided in favour of the prisoner.

Mr. Justice Manisty, who was of the minority,

said: "What operates strongly on my mind is this—that if the Legislature intended to prohibit a second marriage in the lifetime of a former husband or wife, and to make it a crime subject to the proviso as to seven years, I do not believe that language more apt or precise could be found to give effect to that intention than the language contained in the 57th section of the Act in question."

Sir Henry Hawkins (now Lord Brampton) gave judgment, on the other hand, as follows: "I am clearly of opinion that she ought to have been acquitted. The ground upon which I have arrived at this conclusion is simply this—that, having contracted her second marriage under an honest and reasonable belief in the existence of a state of things which, if true, would have afforded her a complete justification, both legally and morally, there was an absence of that *mens rea* which is an essential element in every charge of felony. As to the meaning of the term 'feloniously,' I do not think I can better define my understanding of it when introduced into an indictment as descriptive of the act charged than by saying that I look upon it as meaning that such act was done with a mind bent upon doing that which is wrong, or, as it has been sometimes said, with a guilty mind. If the views of those who support this conviction could be upheld, no person could with absolute certainty of immunity marry a second time

until seven years had elapsed after the supposed death of a former husband or wife, no matter how strong and cogent the proof of such death might be."

How true this is may be seen upon reference to the story told in the case of *Westwood* v. *Chettle*, related in the *Law Times* for the 5th Jan., 1895, on p. 228, under the title "Alive or Dead," which shows that even a conclusion formed *super visum corporis* may be erroneous; for in that case an unhappy woman saw the nine days' dead body of the man she supposed herself to identify as her husband, and yet reason was found afterwards to question the correctness of her supposition.

It must also, however, be remembered that nothing can make a second marriage in such a case good, or the children of such a second marriage legitimate—not even if the seven years have elapsed.

The view of Sir Henry Hawkins was also that of Lord Coleridge and of Justices Stephen, Cave, Day, A. L. Smith, Wills, Grantham, and Charles; and the Battle of Mens Rea was won by Henry, whose name will probably be associated with this victory as long as the law of England lasts.

Many a battle for a prisoner's liberty has been won under the shadow of his banner—*Non est reus nisi sit mens rea*—though sometimes that banner has waved over defeated forces by reason of the fact that, as Henry said in his speech, "It is true that

the Legislature may for its own reasons dispense in any given case with the necessity of a *mens rea*, and may constitute certain acts crimes in themselves": (see, *e.g.*, *Betts* v. *Armstead*, 58 L. T. Rep. 811).