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Prosecuting Polygamy in Early Modern England

John Witte, Jr.

Abstract

Already in Anglo-Saxon times, England condemned polygamy as a serious moral offense. But until 1604, it was left to church courts to punish polygamists using spiritual punishments. In 1604, however, Parliament enacted the Polygamy Act that made polygamy a capital crime, punishable by secular courts. Both individual victims of desertion or double marriage as well as church or state officials could initiate indictment of parties for polygamy. Other interested parties also had standing to press polygamy claims. Thousands of polygamy cases came before the criminal tribunals of England, not least the famous Old Bailey, which heard more than 500 such polygamy cases under the 1604 Act. Convicted parties faced punishments ranging from fines and short imprisonment, to transportation to a penal colony or execution orders, though almost all those convicted for a capital felony successfully pled benefit of clergy. The vast majority of polygamy cases were brought against men, and they were punished far more severely than women if convicted. The 1604 Polygamy Act -- while eventually replaced by Acts of Parliament in 1828 and 1861 that made felony a non-capital crime -- was a model for the common law world. This chapter analyzes the Act and samples several cases of prosecution for polygamy.

Keywords: Polygamy; polygyny; polyandry; marriage; divorce; precontract; secret marriage; licensed marriage; church courts; royal courts; Parliament; desertion; execution; transportation; prison; fine; statutes of limitation

Introduction

Once or twice a semester when I was his student, and every two or three years thereafter when I visited Cambridge, I would stop by Charlie Donahue's office. He was always gracious and welcoming. His office was always covered with books and manuscripts. An old folio volume or two usually lay open on his reading desk; leather leavings flecked the floor; pipe tobacco aroma hung in the air. Charlie always cleared a chair for me, told me about his latest work and asked me about mine. On one such visit, some two decades ago, he urged me to write about the history of "real polygamy" (*polygamia vera*), as Hostiensis had called it -- having two or more spouses at the same time.¹ "There's just not enough good work done on this topic," he said memorably. "And nobody seems to have done much at all about all the old cases on point."

In the ensuing years, Charlie himself,² his student Sara McDougall,³ and several others have taken up the medieval prosecution of real polygamy and the private law

¹ Hostiensis, *Summa Aurea in titulos decretalium* [1537 Lyon ed.], ed. and ann. Nicolas Superantii, repr. ed. (Aalen: Scientia Verlag, 1962), fol. 40v.

² See Charles Donahue, Jr., *Law, Marriage, and Society in the Later Middle Ages* (Cambridge: Cambridge University Press, 2007).

³ Sara McDougall, *Bigamy and Christian Identity in Late Medieval Champagne* (Philadelphia: University of Pennsylvania Press, 2012).

consequence of precontract impediments.⁴ I have tried my hand at the topic, too.⁵ In this chapter, I present some evidence of the prosecution of polygamy under a new 1604 Act of Parliament that, for the first time since Anglo-Saxon days, declared polygamy to be a capital crime in England prosecuted in the secular courts. Before then, as Charlie has shown definitively, polygamy questions remained within the jurisdiction of the English church courts. The English church courts annulled second marriages and engagements when there was still a valid first marriage, and ordered spiritual sanctions on intentional polygamists and their accomplices -- public penance, various shame punishments, and excommunication in serious cases. They looked to the secular courts to make appropriate marital property settlements for innocent duped fiancées, spouses, and children. In serious cases of brazen polygamy, secular courts could also impose corporal punishments -- flogging, prison, mutilation, banishment, even execution. But the crime for which these parties were punished was usually not polygamy, but perjury or adultery. Unlike Continental lands, medieval England did not have separate secular statutes prohibiting polygamy.

This began to change in the sixteenth century. Alarmed by the polygamous experiments and speculations unleashed by the Protestant Reformation, notably during Henry VIII's battles with the papacy, church courts and Parliament alike pressed for ever sterner punishment of polygamy. In 1604, Parliament made intentional polygamy a capital crime. Other laws passed in the same decade sought to rein in easy annulments, easy desertion, and self-divorce, especially among the lower classes. Still

⁴ See Donahue, *Law, Marriage, and Society*, 70-72; see also R.H. Helmholz, *Marriage Litigation in Medieval England* (Cambridge: Cambridge University Press, 1974), 57-66, and the chapter by Paul Brand herein.

⁵ John Witte, Jr., *The Western Case for Monogamy over Polygamy* (Cambridge: Cambridge University Press, 2015). This chapter is drawn in part from chapter 7 of this volume and used with the publisher's permission.

other laws sought to nullify private or secretly contracted marriages and second marriages that lacked parental consent, two witnesses, civil registration, and the church's blessing. Together, these new laws raised the threshold for valid marriage formation but closed the door firmly on divorce, save by a rare private bill passed by Parliament. Once validly married, spouses were stuck for life. Those who took a second fiancée or wife, in defiance of these new laws, now did so at their peril.

The New Criminalization of Polygamy

Before 1604, the formation of a valid marriage in England required only a mutual promise of marriage stated in the present tense ("I take you for my husband/wife") between a man and woman with freedom, fitness, and capacity to marry each other. A future promise ("I promise to take you as my wife/husband") followed by consensual sexual intercourse also constituted a valid marriage. No parental consent, testimony of witnesses, publication of banns, or religious ceremonies were necessary, although some couples did marry with all these formalities. In 1604, a comprehensive new set of Canons and Constitutions Ecclesiastical required parental consent for parties under 21 years old, and public banns and church consecration for all prospective couples. But these same Canons also confirmed the traditional "licensing exception," which eventually undercut these publicity rules and again allowed for clandestine "licensed" marriages.⁶ Only in 1753 did Parliament try to put a stop to this clandestine marriage industry for good by passing Lord Hardwicke's Act that made banns, witnesses,

⁶ Edward Cardwell, ed., *Synodalia: A Collection of Articles of Religion, Canons, and Proceedings of Convocations in the Province of Canterbury*, 2 vols. (Oxford: Oxford University Press, 1842), 1:305, Canons 100, 101; 2:580-83.

parental consent for minors, and consecration prerequisites for every valid marriage, and voided marriages that defied these formation steps.⁷

Marriages, once validly contracted could be dissolved either by annulment (which allowed remarriage) or divorce (which did not). An order of *annulment* required proof of one of the impediments to marriage that survived Tudor statutory reform—a blood or family relationship between the parties prohibited by Leviticus, a precontract to an earlier marriage by one of the parties, coercion, fraud or mistake in the formation of the marriage, or proven impuberty, frigidity, or impotence discovered shortly after the wedding. Once a marriage was annulled, the parties were generally free to remarry, at least the innocent and healthy party. Annulments had hidden costs, however, beyond the costs of litigation. The annulment dissolved a woman's right to collect dower interests in her former husband's estate, and it could lead to the illegitimation of any children born of the first union.⁸

A decree of *divorce* required proof of adultery, desertion (for more than seven years), or protracted ill treatment by one's spouse. Until the mid-nineteenth century, a decree of divorce in England was an order for separation from bed and board alone, with no right of remarriage for either party while the other spouse was still alive. Only if the party could get a rare private bill for divorce passed by Parliament could they remarry before the death of their estranged spouse. The 1604 Canons underscored this traditional rule by ordering church court judges to enjoin divorced parties to "live

⁷ 26 Geo. II, c. 33.

⁸ See Cardwell, ed., *Synodalia*, 1:152–155, 161–163; Sir Edward Coke, *The First Part of the Institutes of the Lawes of England* (London: Societie of Stationers, 1628), folios 32, 33v, 235; id., *The Third Part of the Institutes of the Lawes of England* (London: M. Flesher, 1644), 93; Richard Burn, *Ecclesiastical Law*, 8th ed., 4 vols. (London: A. Strahan, 1824), 1:118–135; John Godolphin, *Repertorium Canonicum*, 3d ed. (London: Assigns of R. & E. Atkins, 1687), 508-13.

chastely and continently” and with no other mate, until the death of their estranged spouse.⁹ Divorced parties who did remarry prior to the (presumed) death of their ex-spouse faced prosecution. Before 1604, the criminal charges were usually for adultery or perjury. After 1604, the new crime was called “polygamy” or “bigamy.”¹⁰

The 1604 Act of Parliament that initiated this new regime was entitled: “An act to restrain all persons from marriage until their former wives and former husbands be dead.” The full Act reads:

Forasmuch as diverse 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 diverse honest men’s children, and others;

[I.] Be it therefore enacted ... that any person or persons within His Majesty’s dominions of England and Wales, being married, or which hereafter shall marry, do at any time at the end of the said session of this present Parliament, marry any person or persons, the former husband or wife being alive;

⁹ Cardwell, ed., *Synodalia*, Canon 107.

¹⁰ Coke urged his fellow common lawyers to use the term “polygamy” to describe only the crime of having two or more spouses at the same time and “bigamy” to refer to “clerical bigamy,” the canon law rule that prohibited prospective priests from having two or more wives in a row before their ordination, or from marrying even one non-virginal wife. Coke, *The First Part of the Institutes*, 80a-80b, n.1. See also William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford: Oxford University Press, 1765), 4.13.2.

that then every such offence shall be [a] felony, and the person and persons so offending shall suffer death as in cases of felony, and the party and parties so offending shall receive such and the like proceeding, trial, and execution in such county where such person or persons shall be apprehended, as if the offence had been committed in such county where such person or persons shall be take or apprehended.

II. Provided always, that this Act, nor anything therein contained, shall extend to any person or persons whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or whose husband or wife shall absent him or herself the one from the other by the space of seven years together, in any parts of within His Majesty's dominions, the one of them not knowing the other to be living within that time.

III. Provided also, and be it enacted by the authority aforesaid, that this Act, nor anything herein contained, shall extend to any person or persons that are or shall be at the time of such marriage divorced by any sentence had or hereafter to be had in the ecclesiastical court; or to any person or persons where the former marriage hath been or hereafter shall be by sentence in the ecclesiastical court declared to be void and of no effect; nor to any person or persons for or by reason of any former marriage had or made, or hereafter to be had or made, within [the] age of consent.

IV. Provided also, that no attainder for this offence, made [a] felony this act, shall make or work any corruption of blood, loss of dower, or disinherison of heir or heirs.¹¹

This 1604 Polygamy Act remained on the books until it was replaced by new acts of 1828 and 1861 which made polygamy a non-capital crime, punishable by up to seven years of “transportation” or two years of prison.¹²

The 1604 Polygamy Act created a new relationship between church courts and state courts in the prosecution of polygamy. English state courts, for the first time since Anglo-Saxon days, now had jurisdiction over polygamy, with power to punish convicted polygamists with a range of criminal sanctions, including execution in grave cases. But church courts still retained jurisdiction over marital formation and dissolution, with power to judge the validity of a marriage, to issue orders of annulment or divorce, and to impose a range of spiritual sanctions on delinquent parties, including excommunication in cases of serious sin. This continued into the nineteenth century.

This created three possible scenarios in a typical polygamy case. (1) If it was clear from the evidence, or if the church court on request found that a defendant had two or more valid intact marriages, that defendant was a polygamist and subject to prosecution and criminal punishment by the secular court. (2) If the church court had properly *annulled* or “voided” one of the defendant’s two marriages, the defendant’s second marriage was not an act of polygamy. The defendant would be acquitted of any crime of polygamy and free from both church court discipline and secular court punishment. (3) If the church court had properly granted the defendant a *divorce*

¹¹ 1 Jac. 1, c. 11 (spelling and capitalization modernized). See Coke, *The Third Part of the Institutes*, cap. 27, page 88.

¹² 9 Geo. 4, c. 31.

(meaning a separation) but the first spouse was still alive, the defendant's second marriage was still an act of polygamy, albeit a less serious crime. Absent aggravating factors, such defendants were usually not criminally punished much but sent to a church court for spiritual discipline and for the annulment of their second marriage.¹³ The secular courts, in turn, would make the necessary adjustments to dower and other marital property. Those three scenarios seem to have been the intent of the Polygamy Act, and that was how the English courts came to interpret and apply it.

The 1604 Polygamy Act was designed to provide relief to long deserted spouses who wanted the freedom to remarry. The medieval canon law had required such parties to furnish absolute proof of the death of their long-gone spouse before they could remarry – an impossible burden of proof in many cases. This posed a “heartbreaking dilemma” for many lonely spouses, and especially for mothers with young children.¹⁴ If they remained single, these mothers and their children were often condemned to poverty and exploitation. If they remarried without proof of their first husband's death, they were vulnerable to charges of bigamy and the spiritual sanctions that followed, including the illegitimizing of any children born from the second marriage. The 1604 Act sought to resolve this dilemma by building in a clear statute of limitations on desertion. If deserters remained hidden somewhere within Great Britain for seven years, or if even good faith travelers “beyond the seas” remained away for more than seven years, the abandoned spouse at home could remarry with impunity. Those who remarried within the seven-year window on the good faith assumption that their first spouse had died sometimes could still face charges of polygamy if the spouse unexpectedly turned up.¹⁵

¹³ Coke, *Third Part of the Institutes*, cap. 29, page 89; Matthew Hale, *Pleas of the Crown* (London: Richard Atkyns et al. 1678), 1:693ff.

¹⁴ R.H. Helmholz, *Roman Canon Law in Reformation England* (Cambridge: Cambridge University Press, 1990), 166.

¹⁵ *R. v. Gibbons*, 12 Cox 237 (holding bigamy); cf. *R. v. Moore*, 13 Cox 544 (holding no bigamy).

It was prudent to wait seven years before remarriage, but at least there was now relief available to the patient.

The 1604 Polygamy Act was also designed to shield minors from youthful marital mistakes or arranged marriages that might later put them in the frame for polygamy. If a person of the age of consent (12 for girls, 14 for boys) but under 21 years old got consensually married and had procured their parents' consent to the marriage as well, that marriage was valid, and would count against them if they were charged with polygamy. But if the minor had been forced into an arranged marriage by their parents, or had contracted their marriage without parental consent, that first marriage was presumptively invalid. If later charged with polygamy, those parties could defend themselves by challenging the validity of this first premature marriage. That defense became stronger still after Lord Hardwicke's Act of 1753 made parental consent for a minor's marriage a clear requirement for the validity of the marriage.

In application, the 1604 Polygamy Act did allow a polygamist to escape capital punishment on the technical grounds of "benefit of clergy." By this point, both clergy and laity, and both men and (after 1691) women, too, could plea "benefit of clergy."¹⁶ The success of their plea turned on their ability to read the opening verse of Psalm 51: "Have mercy on me, O God, according to thy steadfast love...." If the plea succeeded, the convicted defendant was branded on the thumb with a "B" for bigamist, or "P" for polygamy (though peers and Anglican priest escaped even that). A 1717 statute allowed courts to condemn convicted polygamists and other felons, even if they had

¹⁶ 21 Jas. 1, c. 6 for larceny, and extended to all felonies by 3 & 4 W. & M., c. 9 and 4 & 5 W. & M., c. 24.

successfully pled benefit of clergy, to transport for up to seven years.¹⁷ An 1827 statute abolished the “benefit of clergy” for all persons in all crimes, including polygamy.¹⁸

A new 1828 polygamy statute, however, declared polygamy to be a non-capital felony punishable by up to seven years of transport or two years of prison.¹⁹ This was confirmed in the 1861 Offenses Against the Persons Act, a comprehensive criminal law that remains on the books in England, and is echoed in many countries in the British Commonwealth.²⁰

The Prosecution of Polygamy in the Old Bailey

In the 224 years that the 1604 Polygamy Act was the law of England, the Old Bailey in London and various assize and appellate courts around England heard hundreds if not thousands of criminal cases of polygamy – though exactly how many is unclear. The *All English Law Reports* lists 368 cases touching “bigamy” and 51 more cases touching “polygamy” from 1604 until the new statute of 1828 was enacted. These *Reports* are far from complete, however: a great number of court records from these earlier centuries did not survive, and many cases went unreported officially by the courts, even if sometimes reported by local chroniclers, newspapers, or private diarists.

A superb on-line collection of cases from 1674 to 1913 in the Old Bailey, London’s central criminal court, holds a total of 2,384 criminal cases of bigamy or

¹⁷ 5 Geo. 1, c. 11.

¹⁸ 7 & 8 Geo. 4, c. 28, s. 6.

¹⁹ 9 Geo. 4, c. 31.

²⁰ U.K. Stat. 1861, c. 100, s. 57.

polygamy (out of a grand total of 197,000 plus criminal cases).²¹ Of all these bigamy cases, 507 were brought under the 1604 Act before the 1828 statutory reform.²² Of these 507 cases, 6 of them ended with execution – 2 women, 4 men. In 110 cases, the defendants successfully pled benefit of clergy and were branded – 14 women, 96 men. In 59 cases, the defendants were sentenced to transport for seven years – 1 woman, 58 men. In 32 cases, they were sent to prison from two weeks to two years – 2 women, 30 men. In 5 cases, they were simply fined – all men. In 211 cases, the defendants were found not guilty – 67 women, 144 men. Eight cases, all involving men, ended inconclusively.

Several patterns are clear in this 500 plus case sample. First, polygamy remained very much “a male crime,” in Sara McDougall’s apt phrase, as it had been in the Middle Ages.²³ Both men and women were equally subject to the 1604 Act. But only 19% of the Old Bailey cases (95/507) were brought against women. Fully 70% of these women defendants (67/95) were acquitted; an additional 15% of them (14/95) successfully pled benefit of clergy, escaping with a branded thumb. Fewer than 5% of these women defendants faced harsh punishment: 2 went to prison, 1 was transported, and 2 were executed (both in the seventeenth century). Men were prosecuted much more frequently, and punished much more severely for polygamy. More than 81% of the polygamy cases were brought against men. Men were severely punished through imprisonment, transportation, or execution in 22% of these cases, compared to 5% of

²¹ See <http://www.oldbaileyonline.org/> [hereafter “OB”], which provides transcripts, and many facsimiles of all the criminal cases reported in the *Old Bailey Proceedings* from 1674 to 1913, and of the *Ordinary of Newgate’s Accounts* between 1676 and 1772.

²² I have omitted the 23 cases in 1828, because they do not make clear whether they are applying the 1604 act or the 1828 act.

²³ Sara McDougall, “Bigamy: A Male Crime in Medieval Europe,” *Gender and History* 22 (2010): 430-46.

the women. And men were acquitted in only 35% of these cases, women in more than 70%.

Second, though the 1604 Polygamy Act declared polygamy to be a capital felony, executions for polygamy were rare. Only 6 out of the 507 defendants in the Old Bailey were executed, and all these took place before 1693. There were no doubt more executions ordered for convicted bigamists by the Old Bailey from 1604 to 1674, the year the first records have survived. There were certainly more executions ordered by criminal courts outside of London. But the number of executions for polygamy is very small – perhaps surprisingly so, given the moral outrage heaped upon this crime by early modern jurists and theologians alike. “Benefit of clergy” was the real safety net: 22% (110/507) of Old Bailey defendants successfully pled benefit of clergy and escaped execution.

Third, transportation for seven years was the preferred harsh punishment for particularly brazen polygamists. Some 11% (58/507) of the defendants, all but one of them men, were so sentenced. Transportation was usually a form of banishment to a penal colony – often North America, after 1787 Australia as well, and occasional other outposts in the vast British Empire. Convicts were often put to hard work on the “hulks” – think of Charles Dickens’ *Great Expectations* -- that provided passage over, and they could be sold as indentured servants, a few times as slaves, to the ship captains on arrival to their grim new home.²⁴

Fourth, imprisonment was a relatively rare form of punishment in these cases, imposed on only 6% (32/507) of the defendants, with sentences rarely over a year. Imprisonment for any crime was not a common form of long-term punishment in

²⁴ J.M. Beattie, *Crime and the Courts in England, 1660-1800* (Princeton: Princeton University Press, 1986), 450-618.

England before the nineteenth century, and a good number of such convicts were held in private prisons or had their sentences commuted into indentured servitude.²⁵

Fifth, the vast majority of cases involved a party with two spouses only, rather than multiple spouses. A few traveling cads did keep multiple wives in different cities, or just rotated through a series of wives without bothering to end their prior marriages. They were the ones who were usually sentenced to death, although most pled benefit of clergy. A good example is the 1676 case against an unnamed handsome charlatan who ultimately seduced 17 different wives around England. He “inveigled them to marry him, and for some small time enjoyed their persons, and got possession of their more beloved Estates, he would march off in Triumph with what ready money and other portable things of value he could get, to another strange place, and there lay a new plot” to seduce another wife. He was finally caught and prosecuted, foolishly waived benefit of clergy in hopes of a sentence of transportation, but was instead sentenced to be hung.²⁶ Mary Stokes presented a comparable case, albeit a rarer one for women in the day. She married four men in the space of five years, slept with them a few nights – the second husband got just one night – and then made off with their property. She then moved down the road and took up with the next handsome wealthy man she could find. A scandalized judge accused her of being “an idle kind of a Slut,” and ordered her executed.²⁷

While these sensational cases made for good gossip, news, and occasional plays and novels, most polygamy cases involved rather ordinary people who had gotten remarried and were now charged with bigamy or polygamy. The cases were often brought at the instigation of their first or second spouse, or of an interested family

²⁵ Ibid., 573-610.

²⁶ Case of May 10, 1676, OB no. t16760510-1.

²⁷ Case of Mary Stokes (December 6, 1693), OB no. t16961206-14.

member or third party. Occasionally an aggressive church or state official instigated prosecution. Many of the cases turned on the simple factual question whether the defendant had two valid marriages intact at once. Defendants' honest and reasonable mistakes of fact or law did not exonerate them, but these mistakes often mitigated their punishment. Defendants who were impoverished, abused, manipulated, or otherwise victimized by their first spouses and were trying to make thin ends meet by forming a second marriage, tended to get more sympathy. The more knowing and deliberate the defendant was in entering a second illegal marriage the more likely it was that severe punishment would follow. Defendants who compounded their crime by stealing marital property, abandoning their minor children or pregnant wife, or leaving massive debts for the abandoned spouse and family to cover generally faced harsher punishments. Those who bragged about their multiple marriages or defamed their abandoned spouses and families also got harsher punishment. So did those who changed their names, posted false banns, or manipulated the legal process to gain the hand of their second spouse.

Female Defendants. A typical case against a woman brought under the 1604 Polygamy Act was the Crown's prosecution of Mary Picart in 1725.²⁸ Mary had been properly married more than twenty years before to Jean Gandon – in a church wedding with witnesses. Jean's brother testified that the couple had two or three children, but Jean had since become old and decrepit. Mary was livelier. One day, she went into London, and got drunk with one Philip Bouchain. They went to a Fleet Street marriage licenser, and Philip paid a license fee for them to marry on the spot which they did in a brief ceremony. The drunken couple then collapsed into bed together, only to be interrupted loudly a few hours later by Mary's relatives who ordered her home and him out. Philip had evidently passed out, because he remembered nothing of getting married. Mary, too, denied any second marriage though she remembered vaguely the

²⁸ Case of Mary Picart, alias Gandon (1725), in James Montagu, ed., *The Old Bailey Chronicle*, 4 vols. (London: S. Smith, 1788), 1:377-78.

brief ceremony. Both insisted that they had not had sex with each other. Because the second marriage was not consummated, the jury acquitted her. They could well have convicted her, since consummation was not a condition for a valid marriage. But execution for an interrupted one night drunken tryst was evidently too much for the jury.

A 1726 case against Mary Jane Bennett also ended in acquittal, this time because the first marriage was declared void.²⁹ When she was fourteen, Mary had gone to live with an Italian man, named Dr. Letart, to serve as his interpreter. He “debauched” her, getting her pregnant. He then threatened to kill her or to “send her to Brideswell” if she would not marry his friend Peter Dorfille. If she would marry Peter, Letart promised to maintain and compensate her handsomely. She married Peter, but Letart then abandoned her and “never took the least notice of her.” Peter proved to be a “poor weakly Thing,” a “Tool of a Husband,” who did nothing and took whatever she earned. Despondent, Mary eventually took up with Thomas Smith, was impregnated by him, and now wanted to marry him. She told Thomas she was a widow, and they were promptly married by a Fleet licenser. Mary was then indicted for bigamy under the 1604 Act. The jury acquitted her, finding no evidence of a lawful first marriage to Peter given Letart’s coercion and extortion, and probably taking pity on her for being so exploited.

Pity was also evident in a later case against a destitute woman, Mary Burns.³⁰ Seven years earlier, Mary had wed Richard Winter. They lived as husband and wife for a few months. He then enlisted in the military and went away on foreign service, never to return. Just over a year after Richard’s departure, a desperately poor Mary wed one Francis Burns, and the new couple produced two children. After the seven year statute of limitations for desertion built into the 1604 Act had expired, Mary must have thought

²⁹ Select Trials at the Session-House in the Old-Bailey for Murder, Robberies, Rapes, Sodomy, Coining, Frauds, Bigamy, and other Offences, 4 vols. (London: J. Applebee, 1742), 3:32-33.

³⁰ The Case of Tywning, Gloucestershire, 106 Eng. Rep. 407 (1819).

she was free. But an ambitious local official had her prosecuted for bigamy, since she had married within a year of her first husband's departure, not after seven years of waiting. The trial court evidently convicted her, but the case was appealed to the King's Bench, whose judges were divided. The dissent thought the 1604 Polygamy Act created a presumption that the absent party was alive for the first seven years, and could only be presumed dead thereafter. Any other rule, the dissent said, would allow a woman to "marry a week after her husband's departure" but leave her free from prosecution unless and until her first husband returned within seven years of the first wedding. The majority ruled in Mary's favor, holding that the first husband Richard could be presumed dead, which the ensuing seven years of his absence confirmed. That was a more defendant-friendly reading of the statute than many courts offered.³¹

Not all women defendants escaped liability. Mary Stoakes compounded her crime with fraud and was more severely punished.³² In 1688, she married Thomas Adams before several witnesses. In 1692, she left Thomas and married William Carter, again before several witnesses. But she soon left William, too, changing her name to Mary Elliott, and holding herself out to yet another man as a single maid with an estate. She was tried and convicted for polygamy. She escaped execution by claiming benefit of clergy, newly available to women, and was branded.

Elizabeth Wood Lloyd proved even more brazen.³³ In 1812, she had married Thomas Lloyd, a baker. Around 1816, she began consorting with a sailor, suspiciously named Captain Bligh, and the couple would take a room together when he was between voyages. Thomas found her out, and told her in front of Bligh and other witnesses: "If

³¹ See comparable result in Case of Rebecca How (July 5, 1749), OB no. t17490705-85.

³² The Trials of all the Felon Prisoners, Tried, Cast, and Condemned, This Session at the Old Bailey (London: n.p., 1798), 6.

³³ Case of Elizabeth Wood Lloyd (April 6, 1826), OB no. t18260406-790

you like the sailor better than me, you had better go with him.” Bligh gave Thomas five shillings and made off with Elizabeth. Whether Bligh and Elizabeth ever formally married is unclear, but in 1822 she was formally married to William Henry Truss, signing the marriage registration as “Betty Wood Louthier Bligh, the widow of Captain Bligh.” Truss later found out about her prior marriage to Thomas, and he promptly left her, albeit after giving her a rather handsome severance. But seeking to end the marriage, and recoup his settlement, Truss had Elizabeth prosecuted for polygamy. She was convicted and sentenced to seven years transport.

Male Defendants. While most courts gave women charged with bigamy the benefit of the doubt – particularly before they could plead the benefit of clergy – they tended to treat male defendants more firmly, even when the facts seemed to call for leniency. Take the case of William Morgan Manners.³⁴ He had married Eliza Redkison in a proper church wedding. Shortly after their honeymoon, Eliza took up with an old boyfriend. William moved their marital home to another town in an effort to end the affair. But one day, when William was traveling, Eliza returned to her old flame, taking much of their marital property with her. William made sixteen attempts to persuade her to come back home, but Eliza’s boyfriend threatened to shoot him if he returned. William waited three years, and then got remarried to Susan Anderson. He was convicted for bigamy. An unsympathetic court sentenced him to seven years transport.³⁵

³⁴ Case of William Morgan Manners (September 12, 1821), OB no. t18210912-95.

³⁵ See same results on similar facts in Case of Henry Sanders (April 17, 1822), OB no. t18220417; Case of Thomas Sale Denby (May 22, 1822), OB no. t18220522-165. But see Case of John W.K. Kitchingmam (July 3, 1822), OB no. t18220703-23 who received only one year of prison on similar facts.

John Fisher lost any hope of getting the court's sympathy because of his perjury and premarital sex.³⁶ In June, 1812, he had married Mary Arlett in a church wedding. She was apparently already pregnant because in November that year, John testified that she promptly "left her home with all the child's clothes, and everything she could lay h[o]ld of, and left me only just enough to put on in the morning." He spent time settling their ample debts and then sought to start over by changing his name to John Ingram. Holding himself out as a bachelor, he married Ruth Elcock four years after his first marriage to Mary. His bigamy and perjury were discovered, and he was convicted for seven years of transport.³⁷

Brazen polygamists, particularly those who compounded their offense with serious crimes, found no sympathy from the Old Bailey and other criminal courts.³⁸ The case of Thomas Brown provides a good example. Brown, a tobacconist in London, had properly married a maidservant named Ann Mussels in February, 1747. Six months later, he picked up a second woman, Susannah Watts, in a local pub, courted her briefly, and then promptly married her in a proper ceremony. They went on a honeymoon, and he then took her home. His first wife Ann raised the roof when Thomas arrived with his new wife, and a mortified Susannah had him prosecuted for bigamy. Given his long criminal record already, which included earlier charges of robbery and rape, the court said "they hoped they should live to see this crime punished with death." But Thomas successfully pled benefit of clergy.

Samuel Taylor aggravated his bigamy with fraud, theft, and desertion of his pregnant wife.³⁹ Seventeen years earlier, he had properly married Mary Hayter, but the

³⁶ Case of John Fisher (July 10, 1816), OB no. t18160710-77.

³⁷ Same result in another perjury Case of John Harwood (December 6, 1820), OB no. t18201206-156.

³⁸ Case of Thomas Brown (Sept. 9, 1747), OB no. t17470909-22.

³⁹ Case of Samuel Taylor (October 28, 1818), OB no. t18181028-148.

couple had separated by mutual consent, and Mary had then taken in another woman and did not want him back. Sixteen years after that first marriage, Taylor held himself out as a widower and married Harriet le Sturgeon. She got pregnant, and he left her in her seventh month, taking some of her goods, too. He was convicted for bigamy and got seven years of transport. John Maude left his wife Harriet of 13 years and their six children. He pretended to be a bachelor and married Esther Barrett, and sired another child by her. He was convicted for bigamy and perjury and sentenced to seven years transport.⁴⁰ John Crooks left his pregnant wife once, returned to impregnate her again, and then left her and their two young boys for good, rendering them impoverished wards of the local parish.⁴¹ Crooks then bragged to someone that “he had a great many wives.” Local authorities began to look into his case and found an earlier marriage still intact. They prosecuted John for bigamy, and he was sentenced to seven years transport.⁴² All three men were lucky to have escaped with their lives.

Lewis Houssart, a French emigrant barber living in England, was not so lucky.⁴³ In 1723, Lewis had married Elizabeth Heren in a church wedding before several witnesses. A parish clerk testified to the new marriage with Elizabeth, but he also mentioned that Lewis was rather nervous after the wedding for no seeming reason. That raised the court’s suspicions. They subpoenaed another pastor serving in the French émigré community who testified that he had, in fact, several years earlier married Lewis to another woman named Ann Rondeau. That name was familiar to the court because Ann had just been murdered. Lewis was called back for investigation, now on suspicion both of bigamy and murder. He eventually admitted knowing Ann, but

⁴⁰ Case of John Maude (December 1, 1789), OB no. t18191201-109. See similar result in Case of John Mackiah Collins (April 17, 1782), OB no. t18220417-121.

⁴¹ Case of John Crooks (January 9, 1822), OB no. t18220109-134.

⁴² See similar result in Case of William Guy (April 9, 1923), OB no. t18230409-175.

⁴³ Select Trials at the Session-House in the Old-Bailey, 2:72-87.

denied that they were ever married. He also cast ample aspersions on Ann's character and chastity to the great chagrin of her family. Ann's brother testified that Ann and Lewis had been married, and claimed that Lewis in fact had murdered her. Lewis was then tried for murder, too. The evidence was largely circumstantial, but the court had lost all sympathy for him. He was convicted and hung. It was not clear whether he tried to plead benefit of clergy, but his broken English testimony recorded in the case suggests that he could not have recited Psalm 51 accurately enough to escape.

Robert Fielding, Esq. was also convicted for polygamy, but he escaped execution by successfully pleading benefit of clergy.⁴⁴ The facts sound like a Jane Austen novel. Fielding, a handsome bachelor but also a high society rake, was in hot pursuit of a new widow, Barbara, the Duchess of Cleavland and former mistress of King Charles II. Using his legal connections, he had checked on her will, and found her legacy of some 80,000 pounds inducement enough. He began pursuing her through intermediaries and letters in August, 1704. The Duchess's servants evidently did not like Robert, because they secretly protected her against his pursuits, burning one of his letters of inquiry and blocking his agent's efforts to see her. Robert was not so easily put off. When he took up his pursuit in person, one of the servants, the comely Mary Wadsworth, dressed up like the Duchess, and allowed Robert to see her through a window on one of Robert's frequent visits to the home. This made Robert doubly eager to meet the Duchess, and he kept trying to find a way. The servants then had Mary go to meet Robert at his home, holding herself out as the Duchess. Robert was infatuated, and after a lengthy interview, proposed marriage to her. A demur Mary eventually accepted. Robert collected a Roman Catholic priest who married them on the spot. They consummated their marriage that night, and slept together several more times in coming weeks as she

⁴⁴ The Arraignment, Trial, and Conviction of Robert Fielding, Esq. for Felony in Marrying Her Grace, the Duchess of Cleavland; His First Wife, Mrs. Mary Wadsworth Being Then Alive as the Session of the Old-Bailey (London: John Morphew, 1708).

prepared her move into his home. Robert gave Mary gifts, money, furniture, and clothing. He also gave her an expensive wedding ring. He wrote her several letters thereafter always addressed to “his wife,” “the countess of Fielding,” and the like. Mary became pregnant. The pretense continued for the next six months. Robert then discovered that Mary was in fact a penniless maidservant, and he promptly threw her out. He then resumed his pursuit of the Duchess, whom he married in November, 1705. But when he began to abuse his new wife, the Duchess, and was then found sleeping with her granddaughter as well, whom he impregnated, the Duchess sued him and brought him up on criminal charges.⁴⁵

Robert was charged with bigamy as well. Part way through the case, the judge seemed to be leaning in favor of Robert’s argument that his first marriage to Mary was void because of his mistake of marrying “this false woman.” There was also a serious question of whether the Catholic priest could officiate at a proper English wedding, and whether he had even administered the proper marital vows.⁴⁶ But then Robert overplayed his hand. He argued that Mary couldn’t validly marry him anyway, since she had already been married for two years to another man, Lilly Brady. Robert triumphantly produced a copy of her marriage registration from the Fleet and urged the court to charge her with bigamy, not him. Counsel for Mary cleverly turned that argument against Robert: for him to charge Mary with bigamy was to admit that he had married her, too, since his marriage to her was the indictable second marriage. Robert sought to escape his dilemma by petitioning a church court to annul his marriage with Mary on grounds of precontract, fraud, or mistake. The church court eventually did so, but not before the criminal court convicted him under the 1604 Polygamy Act. He pled

⁴⁵ See Amanda Foreman, “Valentine’s Revenge,” *Smithsonian* (February, 2014): 29-31, 102.

⁴⁶ See Rebecca Probert, *Marriage Law and Practice in the Long Eighteenth Century* (Cambridge: Cambridge University Press, 2009), 136-37.

benefit of clergy, was branded on the thumb, and sent away on payment of bail in lieu of prison.

Sometimes an irregularity in the formation of one of the marriages allowed the court at least to mitigate the punishment of a defendant rather than exonerate him. This can be seen in a 1794 case of John Taylor in the Old Bailey.⁴⁷ In 1771, John had married Sara Marshall in a proper church wedding. The marriage was evidently never consummated, and Sara, who was incapable of sexual intercourse, eventually persuaded the long suffering John to marry another younger woman. In 1792, John married Margery Sophia Richardson, with his first wife's approval. All was going well until "some great reformer of morals," as the defense called him, had John prosecuted for the "abominable and atrocious felony" of bigamy. There was enough dispute about the character and motivations of the prosecutor and the quality of the evidence against the defendant to give the court pause. But they hung their light sentence on the stated suspicion that the second marriage had not been properly formed. John was given a two-week prison sentence and small fine.

Thomas Wardropper, a butcher, was also very lightly punished on suspicion that his first marriage was invalid.⁴⁸ In 1787 he had married Ann Archer, but there was some evidence he was coerced to marry her and that he was drunk on the wedding day, further impeding his consent. This was evidently a shotgun wedding, because the couple had a child shortly before or after the wedding. They were soon estranged, and Anne seems to have gone to France, leaving Thomas to care for the child. In 1791, Thomas was persuaded to marry the "beautiful" Alice Doyle, who was the ward of one of his friends and eager to have Alice married off. Thomas and Alice were properly married, and lived together with the child for more than a year. But then Alice

⁴⁷ R. v. John Taylor (November 11, 1794), OB no. t179411111-44.

⁴⁸ Case of Thomas Wardropper (December 6, 1797), OB no. t17971206-2.

discovered Thomas's prior marriage to Ann and moved out on her own. Alice then began taking up with a Mr. Douglas, who provided her with ample furnishings, and evidently came over regularly to test the bed. Douglas wrote Thomas letters trying to force him to end his marriage with Alice so he could marry her. With that failing, he instigated the prosecution of Thomas for bigamy. After hearing all this tawdry and self-serving testimony, the court concluded that this "is not one of those cases in which severe punishment ought to be inflicted." Thomas was fined one shilling and discharged.

Summary and Conclusions

Already in Anglo-Saxon times, England condemned polygamy as a serious moral offense. But until 1604, it was left to church courts to punish polygamists using spiritual punishments. During the sixteenth century Anglican Reformation, Parliament took firmer control of marital formation and dissolution, though church courts were still left to administer much of England's family law. Parliament and Convocation worked hard to stamp out the medieval practice of self-marriage and self-divorce. They instituted firm new marital formation rules of parental consent, two witnesses, civil registration, and church consecration for valid marriage. They restricted divorce to very rare cases that could occasion a special bill in Parliament, and truncated impediments to rein in a runaway annulment practice. When private licensing arrangements to make marriage, and simple desertion and remarriage practices continued, Parliament enacted the 1604 Polygamy Act that made polygamy a serious crime, punishable by the secular courts. But the Act also provided relief for long-deserted parties, by allowing them to remarry if abandoned for more than seven years.

Using this 1604 law, both individual victims of desertion or double marriage as well as church or state officials could initiate indictment of parties for polygamy. Other interested parties also had standing to press polygamy claims, effectively as private attorneys-general. Thousands of polygamy cases came before the criminal tribunals of England, not least the famous Old Bailey, which heard more than 500 such polygamy cases under the 1604 Act. Convicted parties faced punishments ranging from fines and short imprisonment, to transportation to a penal colony or execution orders, though almost all those convicted for a capital felony successfully pled benefit of clergy. The vast majority of polygamy cases were brought against men, and they were punished far more severely than women if convicted. The 1604 Polygamy Act -- while eventually replaced by Acts of Parliament in 1828 and 1861 that made felony a non-capital crime --

was a model for the common law world and broader British Commonwealth. Particularly North American colonies used the basic structure of the 1604 Polygamy Act, and it continues to shape American and Canadian criminal laws against polygamy still today.