

years' continued absence, without knowledge of the contrary, to warrant a belief that the absent person is actually dead. One, therefore, who marries within that time, if the other party be actually living, whether the fact is believed or not, is chargeable with that criminal intent, by purposely doing that which the law expressly prohibits.*

Here is a jumble: "If the statute," says the judge, "has made it criminal to do any act under particular circumstances"—that is, to marry a second husband *while the former one is living*—"the party voluntarily doing that act is chargeable with the criminal intent of doing it." But in fact, as the court admitted, this woman did not intend to do what the statute forbids. Her *intent* was to marry a second husband, her *former husband being dead*. The statute did not forbid this. It was a very different thing from the intent to marry again, her former husband being alive. But the judge tells us that the statute has prescribed "what shall be sufficient evidence of the death of an absent person to warrant a belief of the fact," should it afterward appear that he was alive. Insanity is not set down in the statute among the evidences; hence, if this view is correct, an insane person marrying in such circumstances should be punished. But, no; we all see that the court would not hold this. The act of the insane person was not "voluntary;" it was impelled by disease. Neither was the act of the woman marrying under mistake "voluntary;" it was impelled by the mistake. This is so even in civil affairs; for, if one enters into a contract through mistake of fact, there is no "voluntary" concord of minds, and the formal undertaking is not binding. The act is of the same sort as the constable's is in arresting a person supposed to be drunk, while he is not. The mistake caused it. Nor did the learned judge further intimate that the seven years' absence is the only evidence which can ever be received of the death of an absent person. Suppose a husband is riding on a train of cars, and it is thrown down an embankment, and he is killed. His mangled body is taken back to the widow, and she buries it. A year afterward she marries again, but she is indicted for polygamy. This court would not hold that she could prove the death of the absent husband

only by showing a seven years' absence, so that she must go to prison for remarrying, while her former husband was known to be buried. But suppose the body to have been greatly mangled, yet the identification was satisfactory to all, and it should afterward appear to have been the body of some other person, while the real husband ran away and concealed himself. Here was evidence adequate in any court; and, in this case of mistake, the intent of the woman was precisely the same as in the case of actual death. She proceeded cautiously and honestly; she meant to obey the law, not to break it; and the central, fundamental principle of our criminal jurisprudence forbids that she should be punished. The statute screens the woman who does not know whether her former husband is dead or alive, if his absence has continued seven years. If she knows he is dead, she may at once marry. And, if there is an unavoidable mistake in such knowledge, she is still not to be punished for what she could not avoid. Nor could the Massachusetts court, in the actual case we have been considering, so blind itself by sophistry as to come to any other conclusion; for the case was continued to allow the woman to apply to the governor for a pardon, which was procured and pleaded, and then she was discharged. But, if the court interpreted aright the legislative will, with what propriety could the governor frustrate it, or the court connive at its frustration? A pardon, as well as a judicial judgment, may be wrongly granted. And it is not a just function of the pardoning power to annul what the Legislature has intentionally established.

In the law, precedents are so prevailing that, unless a false step is pointed out by some one who can succeed in arresting the attention of the judges, it almost necessarily leads to another. So it was in Massachusetts. I shall not attempt to trace the whole course of subsequent erratic *dicta* on this subject of mistake of fact in criminal cases, including one or two or more actual decisions contrary to sound doctrine, but something further seems desirable. The case of the arrest by a police-officer, the decision in which was right, was subsequent to this one of polygamy. Subsequent, also, were the following:

The General Statutes of Massachusetts provide that "whoever commits adultery shall be pun-

* The Commonwealth v. Mash, 7 Metc. 472, 474.