In re BOOYSEN.

Application by a deserted spouse for authority to marry again refused.

B. had abandoned his wife F. and had not been heard of by her for the space of 20 *years. F., who had no children, was then desirous of re-marrying, but the Magistrate and the clergyman of the district in which she lived refused to perform the marriage ceremony for her. F. thereupon prayed the Court to grant an order authorizing her to enter into a fresh marriage.* Held, *that the application must be refused.*

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This was an application made by one Lecntje Booysen (born Fischer) for an order authorizing her to enter into the holy estate of matrimony or granting her such other relief as the Court might see fit.

The facts of the case were as follows. Applicant was married to one Piet Booysen in 1859. He absconded eighteen months after the marriage, and had not since been heard of by applicant, who was ignorant as to his whereabouts. Applicant had no children and was desirous of re-marrying, but the Magistrate and the clergyman of the district in which she lived refused to marry her. Hence the present application.

Maasdorp, for applicant. Applicant cannot act in this matter upon her own responsibility as the Magistrate and the minister refuse to allow her to avail herself of her natural means of relief. This application is in effect one for an order in the nature of a *mandamus* calling upon the Magistrate to marry applicant. If it be urged that the proper course for applicant to have pursued would have been to have proceeded against her husband for malicious desertion and obtained a divorce from him, the answer is that, the presumption being that her husband is dead, applicant comes to the Court to have her rights of re-marriage declared. It has been decided in this Court that where a person has not been heard of for a period exceeding seven years, the presumption is that the person is dead.

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DE VILLIERS, C.J.:—Applications have before this been made to the Court for the payment to the wife of her half share of the property held in community, owing to the continued absence of the husband, but this is the first case, within my recollection, where the Court is asked to aid the wife by enabling her to marry again, although it is uncertain whether the husband is alive or dead. In the case of *Wilhelmina Miller* (Buch. Rep. 1874, p. 28) the husband and wife who were married in community had removed in 1861 to Banda Orientale, but owing to the disturbed state of that country she had returned to this Colony, and after that time she had not heard anything from him. The Court directed the payment to her of one half of an inheritance accruing to her and the payment of the other half into the hands of the Master to be administered in terms of the 13th section of *Ord. No.* 105. The order was made not because of any presumption of death, but because there was no other mode of giving the wife the benefit of her half share of the inheritance for the support of herself and her children. In the case of *Nelson* (Buch. Rep. 1876, p. 130), the husband had suddenly disappeared and, notwithstanding every inquiry, had not been heard of for eleven years. Upon the application of the wife the Court went a step further than in the previous case, and not only ordered one half of some property brought by her into the community to be paid to her, but directed the interest on the balance in the hands of the Master to be also paid to her. I believe that in 1878, during my absence from the Colony, an application was granted for the payment to her of the remaining half, but this order could only have been made upon the assumption that she required the money for her support and not by reason of any presumption that the husband was dead. If such a presumption existed the proper course would have been to apply to this Court for the appointment of a person to administer and liquidate his estate as that of a deceased person, due security being given to the Master for the restitution of the property to the absent husband in case he should prove to be alive and return to the Colony. In the course of such administration the wife would only have become entitled to her husband's share of the property held in community upon failure of next of kin. In neither of these cases was it decided that a person who has not been

heard of for seven years or more is presumed to be dead. The commentators upon the Dutch Law show that great diversity existed as to the period of absence which would justify the liquidation under security of the estate of an absent person. According to the law of some places, seven years were sufficient, according to others sixteen and even thirty years were required (*Voet*, 10–2–18, 19, & 20). In this diversity we should, in my opinion, be quite justified in applying the analogy of the English law and holding that in this Colony seven years would be sufficient to justify this Court in ordering a distribution of the estate of the absent person upon due security, subject however to those considerations regarding the age and occupation of the absent person and the perils to which he may have been exposed which are mentioned by *Voet* (10–2–20). But I can find no authority, and Mr. *Maasdorp* has mentioned none, for the general proposition that by our law a person who has not been heard of for seven years is absolutely presumed to be dead. If, then, such a presumption does not exist, how can we authorize the petitioner to marry again or compel an unwilling Magistrate or marriage officer to perform the rites? She is not without her remedy. If her husband has maliciously deserted her, which he appears to have done, she can obtain a decree of divorce in the ordinary way and after that she can marry again. If she chooses to marry again without such a decree she must do so at her own risk, and cannot expect this Court to lend her any assistance. The English statutes relating to bigamy are not in force in this Colony, but I cannot conceive of any prosecution for bigamy where a woman, believing her husband to be dead and not having heard of or from him for seven years, marries again. The law upon the point is somewhat obscure and has undergone many modifications from the time of *Justinian* to the present. In the time of *Justinian* a person whose husband or wife had been five years in captivity could marry again without dissolving the first marriage (*Dig.* 24, 2, 6, and *Nov.* 22, 7), but he afterwards modified this rule (*Nov.* 117, 11) in regard to the wives of soldiers in actual service. The offence of bigamy was punishable as adultery in the countries subject to the Civil Law until *Charles V.* by his *Criminal Ordinance* (Article 121) provided special punishments for the offence

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of bigamy or polygamy. Under the Canon Law according to *Van der Keessel* (Thes. 64), if a second marriage has been contracted in good faith by both parties, the former spouse being supposed to be dead, it was so far putative that the children born thereof were legitimate, and this rule, he says, was approved of by the Court and States of Holland. The result of the authorities, which I had occasion not long ago to examine, appears to me to be this, that by our law a person, whether husband or wife, is not punishable as for bigamy if he or she reasonably and *bonâ fide* believed that his oher spouse was dead at the time of the subsequent marriage. Whether the belief is reasonable and entertained in good faith is a question for the jury, but as a general rule it may be broadly stated that such belief is neither unreasonable nor *malâ fide* if the spouse has been absent for seven years or more and, notwithstanding due inquiries, has not been heard of or from during that period. Such being the rule, the applicant will be the best judge whether she comes within its protection or not, and the marriage officer to whom she may apply must exercise his best judgment in the matter. In the absence of a decree of divorce this Court cannot, upon an *ex parte* application like the present, declare judicially that the mere absence of her husband for a period of twenty years entitles her to marry again, nor ought the Court to deprive any marriage officer of his discretion in the matter. The application must therefore be refused.

DWYER and SMITH, JJ., concurred.

[Applicant's Attorney, H. P. DU PREEZ.]