
Volume 33
Issue 2 *Dickinson Law Review - Volume 33,*
Issue 2

1-1-1929

Domestic Relations-Conflicting Presumptions-Effect of Removal of Disability Upon Matrimonial Conduct

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Recommended Citation

Fred S. Reese, *Domestic Relations-Conflicting Presumptions-Effect of Removal of Disability Upon Matrimonial Conduct*, 33 DICK. L. REV. 94 (1929).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol33/iss2/6>

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assumption that reasoning applicable in vendee's suits is equally applicable in vendor's suits and that the rules must be the counterparts of each other.¹⁷

The instant decision was foreshadowed in one case, *Bartram v. Hering*,¹⁸ in which it was declared that a vendor who declines to perform a bad bargain, in such form as to be susceptible of specific enforcement, must pay the value of the bargain, if the vendee elects to bring *assumpsit*. It is well that the highest court has now set this matter at rest.

J. P. McKeehan

DOMESTIC RELATIONS—CONFLICTING PRESUMPTIONS—EFFECT OF REMOVAL OF DISABILITY UPON MATRIMONIAL CONDUCT—A recent Pennsylvania case, *Holben's Estate*, 93 *Super. Ct.* 472 (1928), presents some interesting questions of the law of marriage, (1) the conflict between the presumption of the continuance of a meretricious relationship and the presumption of marriage arising from subsequent cohabitation and reputation as husband and wife, (2) the creation of a true marital status after removal of a disability which has made the previous matrimonial conduct illicit.

The case involved the right to share as widow in the distribution of a decedent's estate. The claimant was married in 1871 to one Eastman, in Tennessee, where they lived until 1882. At that time, he left the state without her knowledge, and she never heard from him again. Soon after this desertion, she removed to Pennsylvania, and sometime prior to 1898 heard from a friend in Tennessee that her husband was reported to be dead. She employed an attorney to ascertain the truth of this report, which he was unable to do. In 1898, she married the decedent, and they lived together as husband and wife until his death in 1926. In 1903, the claimant learned that her first husband had died, after remarrying in Michigan in 1900. On these facts the Orphans' Court disallowed her claim as widow. On appeal the Superior Court, with two judges dissenting,

¹⁷See 3 Sedgewick on Damages, 9th Ed. sec. 1009. 2 Sutherland on Damages, sec. 583, p. 2003; *Parrish v. Koons*, 1 Pars. Eq. Cas. 78 (1844); *Twitchell v. Phila.* 33 Pa. 212 (1859); *Schultz v. Burlock*, 6 Super. 574 (1898); and other clearly erroneous decisions which might be cited.

¹⁸18 Super. 395 (1901).

reversed the decree of the Orphans' Court on the following grounds: (1) The presumption of innocence of Eastman in remarrying and the presumption that he had obtained a divorce from the claimant prior to her marriage to decedent in 1898; (2) even if the marriage of claimant and decedent was illegal in its inception, the presumption of a valid marriage from cohabitation and reputation as husband and wife for over twenty years after Eastman's death.

It is the present purpose to discuss the question presented in the second of the two grounds upon which the Court based its reversal. Where a person marries, having a spouse living, it is universally held that the second marriage is absolutely void. It is also clear that a relationship between a man and woman, illicit in its inception, is presumed so to continue until a changed relation is proved.¹ On the other hand, it is indubitable that cohabitation and reputation as husband and wife, although not per se marriage, are circumstances from which a valid marriage may be presumed.²

Often these two presumptions exist in the same case, sharply conflicting with each other and presenting the question as to which shall prevail. Suppose that A and B start to live together meretriciously and then after a period of years it can be shown that they lived together as husband and wife and were so regarded by their friends and neighbors. It has been generally held in Pennsylvania that the presumption of marriage which arises from proof of cohabitation and reputation will not prevail against nor defeat the presumption that the relationship, illicit in its inception, is presumed so to continue.³ In such a case, therefore, no marriage is proved. In order to overcome the presumption that the meretricious relationship continues, it is necessary to prove the fact of marriage by direct evidence, that is by proof of a ceremonial marriage in compliance

¹Hunt's Appeal, 86 Pa. 294 (1878); Appeal of Reading Fire Ins. and Trust Co., 113 Pa. 204 (1886); Grimm's Estate, 131 Pa. 199 (1890); Patterson's Estate, 237 Pa. 24 (1912); Fuller's Estate, 250 Pa. 78 (1915); Bisbing's Estate, 266 Pa. 529 (1920); Stevenson's Estate, 272 Pa. 291 (1922); Craig's Estate, 273 Pa. 530 (1922); McDevitt's Estate, 280 Pa. 50 (1924); *Comm. v. Phillips*, 83 Pa. Super. Ct. 213 (1924).

²Cases cited in note 1, *supra*, and *Wallace's Estate*, 40 Pa. Super. Ct. 595 (1909); but it is not a presumption of law, i. e., not conclusive, *Comm. v. Haylow*, 17 Pa. Super. Ct. 541 (1901); *Comm. v. Gamble*, 36 Pa. Super. Ct. 146 (1908).

³See cases cited *supra*, note 1.

with the statutory regulations or a "common-law marriage" by proof of an exchange of words in the present tense, "per verba de praesenti".⁴ There is apparently no case to be found in which the Courts of Pennsylvania have held that the presumption of the continuance of a meretricious relationship can be overcome by circumstantial evidence, that is, facts from which a presumption of marriage will arise, for instance, cohabitation and reputation. Two recent cases, however, have intimated that the change from a meretricious relationship to lawful common-law marriage may be established by circumstantial evidence, but the circumstances must be such as to exclude the presumption that the original relationship continued and to prove satisfactorily that it was changed to matrimonial union by mutual consent.⁵ In both these cases there was sufficient proof of cohabitation and reputation justifying a presumption of marriage but in each case the alleged widow, on cross examination, admitted that no marriage had ever occurred and consequently the presumption of the continuance of the meretricious relationship prevailed. In view of the fact that "society rests upon marriage and the law favors it",⁶ that the Courts are anxious to find marriage where the legitimacy of children is involved, and further that the law ought to presume compliance with the requirements of law, of morality and of common decency,⁷ the Courts might well follow the intimation of the Supreme Court that the presumption of the continuance of a meretricious relationship may be overcome by strong circumstantial evidence of marriage.

The conflict between these presumptions arises in another class of cases. Suppose that A and B are married but the marriage is void because A already had another living spouse, C. Of course, as seen above, the relationship between A and B, being illicit in its inception, is presumed so to continue. But supposing the disability or impediment to the validity of the marriage of A and B is removed by the divorce or death of C, and the cohabitation and reputation of A and B as husband and wife continues. Will the presumption of marriage arising therefrom destroy the con-

⁴McCausland's Estate, 213 Pa. 189 (1906); *Knecht v. Knecht*, 261 Pa. 410 (1918).

⁵McDevitt's Estate, *supra*, note 1; *Edwards v. Enterprise Mfg. Co.*, 283 Pa. 420 (1925); both quote from 18 R. C. L. 420.

⁶*Comm. v. Haylow*, *supra*, note 2.

⁷*Thewlis' Estate*, 217 Pa. 307 (1907).

flicting presumption that the void or illicit relationship continues? In other words if the parties continue their matrimonial conduct after the removal of the impediment, what is the effect of such removal on the matrimonial conduct, i. e. cohabitation and reputation, as evidence of a valid marriage? With respect to the good faith of the parties the cases involving this problem may be grouped into three classes.

The first class consists of those cases where the matrimonial conduct of the parties entering into a marriage contract while under an impediment was known to both parties to be illicit. Here it is generally held that the presumption of continuance of the meretricious relationship will not be overcome by the presumption of marriage arising from subsequent cohabitation and reputation and that a new contract of marriage must be shown after removal of the impediment,⁸ although the English and New York cases incline to a contrary view.⁹

In the second class of cases both parties desire marriage and contract in good faith, neither knowing of the existence of the impediment. In such a case, lawful marriage will, in all jurisdictions, be presumed at once from continued cohabitation and reputation upon the removal of the impediment.¹⁰

The conflict arises in the third class where one party knows of the impediment but conceals it from the other who, in good faith, enters into the supposed marital relationship under a void marriage. One of the leading cases involving this problem holds that marriage cannot be presumed from continued cohabitation and reputation after the removal of the impediment,¹¹ the Court stating that the subsequent cohabitation of the parties and their reputation as husband and wife must necessarily be understood as having had their origin in the first marriage and could not be treated as presumptive evidence of a second marriage at a later date. On the other hand it has been held in

⁸White v. White, 82 Cal. 427 (1890); Rose v. Rose, 67 Mich. 619 (1888); Clark v. Barney, 103 Pac. (Okla.) 598 (1909). This would be the view in Pennsylvania under the principles stated in the cases, cited supra, note 1.

⁹Geiger v. Ryan, 123 App. Div. (N. Y.) 722 (1908); In re Biersack, 96 Misc. (N. Y.) 161 (1916); Campbell v. Campbell, L. R. 2 H. L. 269 (1867).

¹⁰Chamberlain v. Chamberlain, 68 N. J. Eq. 736 (1904).

¹¹Collins v. Voorhees, 47 N. J. Eq. 315 (1890).

Pennsylvania in a similar situation that the presumption of the continuance of an illicit relationship gives way to the superior presumption in favor of compliance with the requirements of law, of morality, and of common decency and that marriage may be presumed from cohabitation and reputation after the removal of the impediment.¹² However the cohabitation and reputation subsequent to the removal of the impediment must be of such duration as to justify a presumption of marriage. Accordingly it has been held that cohabitation and reputation for a period of one week,¹³ or two months,¹⁴ after the removal of the impediment was insufficient and the presumption of the continuance of the illicit relationship prevailed.

The principal case would fall under either the second or third class of cases hereinabove discussed and accordingly the Court reached the proper conclusion that marriage could be presumed from the continued cohabitation and reputation of the claimant and decedent after the death of the claimant's first husband.

The Court also sustained the contention that the claimant and decedent were validly married on the ground that there was a presumption of innocence on the part of Eastman in remarrying, that is, it must be presumed that he obtained a divorce from the claimant before his second marriage and that, therefore, the marriage between the claimant and the decedent was valid from its inception. Similar reasoning is to be found in other cases.¹⁵

Fred S. Reese

CORPORATE LOANS TAX—FOREIGN CORPORATION DOING BUSINESS IN PENNSYLVANIA—NON-RESIDENT TREASURER—The decision in *Commonwealth v. Sun Oil Company*¹ shows an important development in the application of Pennsylvania Corporate Loans

¹²Thewlis' Estate, *supra*, note 7; and see 1 Bishop, *Marriage and Divorce*, sec. 970.

¹³Grimm's Estate, *supra*, note 1.

¹⁴Hunt's Appeal, *supra*, note 1.

¹⁵Wiles' Estate, 6 Pa. Super. Ct. 435 (1898); Thewlis' Estate, *supra*, note 7.

¹294 Pa. 99 (1928).