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Domestic Relations: The Presumption of the Validity of the Second Marriage

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commencement of the action".[7] In pertinent language on the subject the New Hampshire court in *Easter v. Easter*[8] said, "One honestly prosecuting a supposedly sound suit for divorce cannot be guilty of desertion while so engaged; and one charged with offenses which imply the consent of the other to a separation cannot be charged with desertion within the meaning of the statute for refraining from he matrimonial relation, both because the absence is justifiable and consented to. One who has caused a separation by a groundless suit cannot charge the other spouse with desertion." The time so consumed has been quite appropriately termed "time out."[9]

The requirement of good faith as a necessary limitation to the rule is best calculated to insure justice to both spouses. As was stated by the New Jersey court in *Weigel v. Weigel*,[10] "In all the cases which state the proposition in general terms there is an assumption that the case which relieves from the duty of cohabitation is one brought in good faith in order to submit to the courts a condition of facts which the complainant really believes entitles her to the relief sought. It is undoubtedly the injured spouse's right to have a judicial determination of the action unembarrassed by the adverse presumptions raised by her continued cohabitation with the other party." Conversely, if the action is not brought in good faith, it is a fraud on the court which justifies it in refusing to give any effect to the action.

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Domestic Relations — The Presumption of the Validity of the Second Marriage — The deceased married Mabel Von Pilcher in Lyon county, Kansas, in 1901. They lived as husband and wife until their separation in 1925. Sometime thereafter the deceased told his wife that he had divorced her and, in 1926, relying on the deceased's statement, Mabel began living with one Hal F. Showers as his wife. On June 21, 1941, the deceased married Mildred Pilcher at Logan county, Utah. One month later Mildred learned of his prior marriage. During the years 1942 and 1943, Mildred and the deceased lived in California where Mabel and Hal Showers, holding themselves out as husband and wife, also lived. The two families became quite well acquainted, and Mabel claimed that during this time the deceased came to her and told her that he had never divorced her, and further that she had never divorced him, nor had she ever been served with divorce papers. Upon his death, Mildred was appointed administratrix of his estate. Mabel filed suit to have Mildred removed as administratrix and herself substituted.

[7] WIS. STAT. (1947) 247.07(4).
[8] 75 N.H. 270, 73 Atl. 30 (1909).
[9] Holmstedt v. Holmstedt, 383 Ill. 290, 49 N.E.(2d) 25 (1943).
[10] 63 N.J.Eq. 677, 52 Atl. 1123 (1902).

Held: judgment for Mabel reversed. Where a first wife attacks the validity of her husband's second marriage, the burden of rebutting the presumption of dissolution of the first marriage rests with her. Furthermore, a mere declaration by the first wife that she had never obtained a divorce herself nor had been served by her husband with divorce papers is insufficient evidence to rebut a presumption of divorce. In Re *Pilcher's Estate, Von Pilcher v. Pilcher, 197 P. (2d) 143 (Utah, 1948).*

In the vast majority of American jurisdictions, the rule is followed that the second marriage is presumed valid as against a prior marriage and that the law will presume the dissolution by death or divorce of the prior marriage.[1] A fundamental rule of evidence is the basis for the presumption in favor of the validity of the second marriage—the elemental precept that a man is always presumed innocent until he is proven guilty. Thus the law will presume divorce or death when necessary to sustain the validity of a second marriage of a person who has previously been legally married.[2] The indulgence of this presumption has a long and favorable history in American courts, and most authorities agree that to hold otherwise would result in undue hardship on the parties to the second marriage in cases where either or both of them were innocent of unlawful intent, and would also bastardize millions of blameless children.[3]

On pondering the courtroom effect of the presumption, great differences in opinion appear as to just what its strength should be. The preponderance of authority credits it as one of the strongest presumptions known to law,[4] and one case has gone so far as to state that "proof of second marriage alone makes out a prima facie case of its validity".[5] Despite the tendency of the courts to emphasize the strength of this presumption, however, it is not generally considered conclusive in law. It may be overcome by evidence, and almost universally our courts place the burden of bringing forth evidence and overcoming the presumption upon the party or parties seeking to attack such validity.[6]

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[1] Hager et al v. Brandt et al, 111 Iowa 746, 82 N.W. 1016 (1900); Harper v. Fears, 168 Miss. 505, 151 So. 745 (1934); U.S. v. Hays, 20 Fed. 710 (1884); Kolombatovich v. Magma Copper Co., 43 Ariz. 314, 30 P.(2d) 832 (1934); Spears v. Spears, 178 Ark. 720, 12 S.W. 875 (1928); Louisa Coleman Che Mah Dunn v. Starke Co. Trust and Savings Bank, 98 Ind. App. 86, 184 N.E. 424 (1933); Ray v. Social Security Board, 73 Fed. Supp. 58 (1947); Denton v. Denton, 37 N.Y.S.(2d) 704 (1942); Kopit v. Ziberzmidt, 35 N.Y.S.(2d) 558 (1942); Roberts v. Roberts, 124 Fla. 116, 167 So. 808 (1936); Donofrio v. Donofrio, 167 Wash. 80, 8 P.(2d) 966 (1932).

[2] Harper v. Fears, 160 Miss. 505, 151 So. 745 (1934).

[3] *Ibid.*

[4] Pittinger v. Pittinger, 28 Col. 308, 4 Pac. 195 (1901).

[5] Schaffer v. Richardson's Estate, 125 Md. 88, 93 Atl. 391 (1915).

[6] Patterson v. Gaines, 6 How. 550 (U.S. 1840); Gaines v. City of New Orleans, 6 Wall. 642 (U.S. 1856); Brownell v. Brownell, 74 N.Y.S.(2d) 136 (1947); Reed v. Reed, 202 Ga. 508, 43 S.E.(2d) 539 (1947); J. J. Cater Furniture Co. v. Banks, 152 Fla. 377, 11 So.(2d) 776 (1943).

As to what proof is necessary to overcome the presumption of validity, there is no universal agreement. Negatively, it is to be noted that in one instance the mere discovery of the prior spouse still alive without further evidence of no divorce was insufficient.[7] Another case has held that the mere testimony of a prior wife that she had not obtained a divorce is not of such strength as to rebut.[8] In a case before the United States Supreme Court, the fact that an examination of state records did not reveal the recording of a final decree of divorce was held to be of doubtful value in overcoming the presumption.[9] Affirmatively discussing the question, the last mentioned case in its opinion calls for "substantial" evidence to rebut the presumption.[10] In an Arizona case in 1934, the court called for evidence "clear and conclusive as to fairly preclude other results".[11] Further examination of cases points out many differences in terms as to the degree of evidence necessary in such a situation,[12] but a very recent California case holds that the burden of proof is sustained if it may be reasonably ascertained from all of the evidence that the first marriage was not dissolved by death of the spouse, or by annulment or divorce.[13] On the other hand, the United States District Court held in a 1949 Missouri case that the burden of proof is not sustained unless the parties "complete a chain of evidence" showing not only the validity of the first marriage and its continuance, but also excludes ever possibility of the validity of the second.[14]

In direct opposition to the decision of the case at bar, and to the results reached by the majority of American courts, the Wisconsin Court in 1885, laid down the rule that there is no absolute presumption against the continuance of the life of one of the parties to a prior marriage in order to establish the innocence of the other party, and that further, there is no absolute presumption of the dissolution of the first marriage by a divorce prior to the second marriage.[15] This decision

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[7] United States v. Hays, 20 Fed. 710 (1884).
[8] Calloway v. Cox, 74 Ga. App. 555, 40 S.E.(2d) 578 (1946).
[9] Ray v. Social Security Board, 73 Fed. Supp. 58 (1947).
[10] *Supra,* note 9.
[11] Kolombatovich v. Magma Copper Co., *supra,* note 1.
[12] "Subsequent Remarriage of both Husband and Wife; Presumption of Validity of Husband's Second Marriage," 6 Miss. L.J., 443-7.
[13] In Re Smith's Estate, 201 P.(2d) 539 (1949). Here a wife married a second time during the life of her first husband and relying upon his statement that he had divorced her; she now claims against his estate as widow. Held: evidence that there are no records of divorce between the parties to the prior marriage in the state of California is sufficient.
[14] Derrell v. United States, 82 F. Supp. 18 (1949).
[15] Williams v. Williams, 63 Wis. 58, 23 N.W. 110 (1885). In this case the husband remarried during the life time of his first wife and without obtaining a divorce or annulment; the second wife afterwards married again under similar circumstances. Held: presumption was against the validity of husband's second marriage.

has never been overruled in Wisconsin, and a later case decided in 1908, substantially affirmed it in that point of law.[16]

The minority ruling as presented by the Wisconsin courts is upheld in Pennsylvania,[17] Ohio,[18] Montana,[19] Iowa,[20] and Massachusetts.[21] The Montana Court states its view of the question by saying that a prior marriage, being shown undissolved, casts upon the relationship of the parties to the second marriage the shadow of illegitimacy; they further rule that upon this showing the "law's favorite presumption of innocence" disappears, and the presumption of wrongdoing takes its place. The burden of proof requires those asserting legitimacy to show the validity of the subsequent marriage.[22]

The intention of the Wisconsin courts and of those other jurisdictions following the minority view has been to preserve the integrity of the marital status, a status which can only be properly dissolved by death or by the legal fiction of divorce. The courts sustaining the majority view feel that their position, on the other hand, causes a lesser hardship upon modern society, the innocent parties to the second marriage, and the children of the second marriage. Nevertheless, although the ruling case in Wisconsin was recently cited, erroneously it would seem, as authority in a case following the majority view,[23] the minority opinion has been so long sustained in this state that it seems apparent that Wisconsin will continue to uphold the rule first laid down in this state in 1885.

MARGADETTE MOFFATT

Federal Taxation — Collateral Estoppel Where Decisional Law is Changed or Clarified Between Trials Involving Different Tax Years — The taxpayer was principal stockholder of a corporation, which he licensed, under various royalty contracts, to manufacture and sell various devices, on which he had applied for patents. The taxpayer assigned his rights, title and interests in the contracts to his wife, at various times, without consideration, and the royalty payments were made to the wife. In 1935, the Board of Tax Appeals held the taxpayer was not liable for income tax on payments made the wife during

[16] Hilliard v. Wisconsin Life Insurance Co., 137 Wis. 208, 117 N.W. 999 (1908).
[17] Madison v. Lewis, 151 Pa. Super. 138, 30 A.(2d) 357 (1943). In this typical fact situation the husband entered into a subsequent marriage while his prior undivorced spouse was still living. Held: presumption of the continuing validity will be sustained.
[18] Industrial Commission of Ohio v. Dell, 104 Ohio St. 389, 135 N.E. 669 (1922).
[19] Welch v. All Persons, etc., 85 Mont. 114, 278 Pac. 110 (1929).
[20] Barnes v. Barnes, 90 Iowa 282, 75 N.W. 851 (1894).
[21] Turner v. Williams, 202 Mass. 500, 89 N.E. 110 (1909).
[22] *Supra,* note 19.
[23] *Supra,* note 13.