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THE PRESUMPTION OF DEATH AND A SECOND MARRIAGE

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It is well-settled that under the common law a second marriage is invalid where one of the parties has a spouse living and undivorced.[1] Such marriages have generally been treated as void *ab initio*,[2] and the rule applies equally to common law and ceremonial marriages.[3] Generally this is true whether the second marriage is meretricious or founded on mistake.[4] No divorce is required to dissolve such invalid marriages.[5] All American jurisdictions today make a bigamous marriage void, and under their criminal statutes bigamy is a crime.

To give some relief from the harsh application of this rule, particularly in bigamy prosecutions, the courts have frequently applied the presumption that the prior marriage has been dissolved either by death or divorce, in order to hold the second marriage valid.[6] Generally this presumption is held to be stronger than that favoring the continued existence of the first marriage.[7]

In many states the presumption of validity of the second marriage is strengthened by statute. Some such statutes permit a remarriage when one of the spouses is generally believed to be dead or is absent and unheard of for a period of years, usually ranging from three to seven. Occasionally these statutes provide for presumption of death, and declare the second marriage valid until held void by a court of competent jurisdiction.[8] Others merely serve as a bar to a prosecution for bigamy. The Colorado statute on bigamy [9] is of the latter type, providing, after a definition of the crime:

> Nothing herein contained shall extend to any person or persons whose husband or wife shall have been continually absent from such person or persons for the space of five years prior to the second marriage, and he or she not knowing such husband or wife to be living at that time.

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[1] Riddlesden v. Wogan, Cro. Eliz. 858, 78 Eng. Rep. 1084 (1601); Pride v. Bath, 1 Salk 120, 91 Eng. Rep. 113 (1695).

[2] Glass v. Glass, 114 Mass. 563 (1874); Pain v. Pain, 37 Mo. App. 110 (1889); Fenton v. Reed, 4 Johns. (N. Y.) 52, 4 Am. Dec. 244 (1809); Thomas v. Thomas, 124 Pa. 646, 17 A. 182 (1889).

[3] Valdez v. Shaw, 100 Colo. 101, 66 P. 2d 325 (1937); Otte v. Pierce, 118 Colo. 123, 194 P. 2d 331 (1948); Greene v. Greene, 156 Fla. 408, 22 So. 2d 792 (1945); In re Cline's Est., 128 Pa. Super. 309, 194 A. 222 (1937).

[4] Bell v. Tenn. Coal, Iron & R. Co., 240 Ala. 422, 199 So. 813 (1941); Cartwright v. State, 64 Ga. App. 51, 12 S. E. 2d 370 (1940); Pain v. Pain, *supra*, note 2.

[5] Riddlesden v. Wogan, Pride v. Bath, *supra*, note 1.

[6] Shreyer v. Shreyer, 113 Colo. 219, 155 P. 2d 990 (1945); Tyll v. Keller, 94 N. J. Eq. 426, 120 A. 6 (1923); Smith v. Fuller, 138 Iowa 91, 115 N. W. 912 (1908); Lampkin v. Travelers' Ins. Co., 11 Colo. App. 249, 52 P. 1040 (1898).

[7] Shreyer v. Shreyer, Tyll v. Keller, *supra*, note 6; Smith v. Fuller, 138 Iowa 91, 108 N. W. (1906).

[8] Re Harrington, 140 Cal. 244, 73 P. 1000 (1903); Valleau v. Valleau, 6 Paige (N. Y.) 207 (1836).

[9] COLO. STAT. ANN., c. 48, §201 (1935).

Numerous cases have arisen where parties, in reliance on this statutory presumption, or on the common law presumption of death after seven years absence, have contracted a second marriage. The words are frequently quoted from *Glass v. Glass* [10] that,

> Though a man marry ever so often, he can have but one lawful wife living. So long as she is living and the marriage bond remains in full force, all his subsequent marriages, whether meretricious or founded on mistake, and at the time supposed to be lawful, are utterly null and void.

Nevertheless, the courts have not required direct proof that the first spouse is deceased or has been divorced. Instead they have treated the presumption of death or divorce as rebuttable. Failure to rebut it has resulted in almost uniform decisions that the second marriage was valid.[11]

In the Colorado case of *Shreyer v. Shreyer* [12] the court said:

> The presumption of the continuance of a previous marriage in itself is not equal in probative force to the presumption of the validity of the subsequent marriage. It is presumed in favor of the subsequent marriage, that the previous marriage has been dissolved by death, divorce, or annulment.

Such holdings are usually based upon the presumption that no person will commit a crime.[13]

THE "ENOCH ARDEN" SITUATION

It is where the presumption has been successfully rebutted that serious questions arise under the so-called "Enoch Arden" situation, i.e., that after a subsequent marriage which is proper under the presumption of death, the prior spouse is discovered to be alive.

Even at common law, good faith in contracting the second marriage has been held a defense to a criminal action for bigamy. In *Reg. v. Tolson* [14] the wife reasonably believed her husband had been lost on a ship bound for America. Before seven years had elapsed, she married again, without benefit of a divorce. Upon the first husband's return, she was charged with bigamy. With an extended and valuable discussion of the doctrine of *mens rea*, the court held that a bona fide belief, based on reasonable grounds, in the death of the husband at the time of the second marriage afforded a good defense to the indictment, and a lower court conviction was reversed.

Most courts, however, hold that intent is not an element of the statutory crime of bigamy,[15] as it was under the English statute involved in *Reg. v. Tolson*.[16] To avoid the obvious injustice

[10] *Supra*, note 2.
[11] Inhabitants of Hiram v. Pierce, 45 Me. 367, 71 Am. Dec. 555 (1858); In re Duncan's Est., 190 S. C. 211, 2 S. E. 2d 388 (1939); Shreyer v. Shreyer, *supra*, note 6.
[12] *Ibid.*
[13] Lampkin v. Travelers' Ins. Co., *supra*, note 6.
[14] 23 Q.B.D. 168, 8 Eng. Rul. Cas. 16 (1889).
[15] Rand v. State, 129 Ala. 119, 29 So. 844 (1901).
[16] Clark & Marshall, Crimes, (4th Ed.) §41, note 9.

that might arise from this situation, most bigamy statutes today contain provisions similar to that of the Colorado statute, barring prosecution where the second marriage follows an absence of the first spouse for a stated period of time.[17]

But do such statutes validate the second marriage, where the presumption of death has been rebutted? It has generally been held they have no such effect. In *Fenton v. Reed* [18] the court ruled:

> The statute concerning bigamy does not render the second marriage legal, notwithstanding the former husband or wife may have been absent above five years, and not heard of. It only declares that the party who marries again, in consequence of such absence of the former partner, shall be exempted from the operation of the statute, and leaves the question on the validity of the second marriage just where it found it.

Strict compliance with provisions of the statute is generally required, and its protection is usually extended only to the innocent party. A deserting husband who remarried while his first wife continued to reside at the matrimonial domicile, the Colorado Supreme Court held, was not entitled to the benefit of the statutory exception.[19]

While exceptions to prosecution included in bigamy statutes have not been construed to validate a second marriage, occasional recourse has been had to other statutes to accomplish this purpose, where justice seemed to require such result.

LEGITIMACY STATUTES AND ESTOPPEL

In the Missouri case of *Phillips v. Wilson* [20] a liberal interpretation was given to a statute providing that, "the issue of all marriages decreed null in law, or dissolved by divorce, shall be legitimate."

The husband had separated from his first wife, without a divorce. He then told his second wife he was, "loose from that woman and we can make an agreement which is a common law marriage and it will be good." In reliance thereon, the second wife lived with the husband until his death. The first wife also remarried, making a statement under oath in her application for a license, that she was single and free to marry. On the husband's death she contested the second wife's right to administration of his estate. The court said:

> Although a marriage may be unlawful because either the man or the woman has another spouse living at the time of the marriage, from whom he or she was not divorced, still, if either one of them married in good faith, believing that death or divorce had removed all obstacle to their marriage, such marriage will be deemed void-

[17] *Supra*, note 9.
[18] 4 Johns. (N. Y.) 52, 4 Am. Dec. 244 (1809); See also In Re Kutter's Est., 139 N. Y. S. 693; 79 Misc. 74 (1913).
[19] Schell v. People, 65 Colo. 116, 173 P. 1141 (1918). *Cf.* Magee v. People, 79 Colo. 328, 245 P. 708 (1926).
[20] 298 Mo. 186, 250 S. W. 408 (1923).

> able only, and not void, and the children of such a marriage are legitimate and may inherit, as legal heirs, the property of their parents.

No mention was made in the *Phillips* decision of the fact the first wife had also remarried. The Mississippi court, however, in the decision of *Harper v. Fears*,[21] which has apparently been overruled, relied on estoppel of the first wife to speak, in holding a second marriage by the husband valid, under similar circumstances. This case involved a dispute over the estate of the husband. The language of the court is interesting in that it demonstrates a reluctance frequently shown in other decisions against flatly saying a second marriage is absolutely void under all circumstances where the presumption of dissolution of the first has been rebutted:

> It seems to us, when the period of absence has existed for seven years, the absent party not being heard from during that time, and the presumption being that he is dead, and the wife having acted upon such presumption in good faith and contracted another marriage, such marriage is legal . . . if the law itself acts upon the presumption, we see no reason why a party acting upon it in good faith, by contracting an irrevocable status affecting the honor and legitimacy of other people, should not so act and such act be valid.
>
> Why should the law permit a person to withdraw himself for a long period, such as seven years, without communication to his family and friends, and by such act cause another to remarry, and then by returning to his original surroundings, bastardize innocent children? Under the facts in the case at bar, the appellant was estopped to set up her claim.

In *Frank v. Frank* [22] the majority of the court disclaimed that they were overruling *Harper v. Fears*, and said that decision was based on (1) the presumption of a divorce arising from the contraction of a second marriage, and (2) the estoppel of the wife who had entered into a second marriage to challenge the validity of the second marriage of her former husband. Two justices dissented, one of them saying, "The statutory presumption of death ought to be conclusive in such a case. In other words it ought to be equivalent to a divorce." Both said the language of *Harper v. Fears* was "too plain to be brushed away by interpretation."

In order to hold issue of a second marriage legitimate, the Georgia court, in *Eubanks v. Banks*,[23] placed its decision squarely on an exception in a bigamy statute saying that under the common law such a marriage was excused from the penalties of bigamy, "and unless the marriage was dissolved by the judgment of law, the marriage was treated as legal and the issue held to be legitimate." At most, the court added, "by common law, the second marriage would have been held simply voidable," but cited no authority to support this view.

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[21] Harper v. Fears, 168 Miss. 505, 151 So. 745 (1934), apparently overruled by Frank v. Frank, 193 Miss. 605, 10 So. 2d 839 (1942).

[22] *Ibid.*

[23] 34 Ga. 407 (1866).

In a later case,[24] however, the Georgia court declined to pursue this line of reasoning further. It held that where a wife remarried in good faith after her first husband had been absent for seven years, without knowing that the first husband was still alive, the second marriage was void. The wife, furthermore, was not incompetent to testify against the second husband in a prosecution of the second husband for murder. "The presumption of death of a spouse, arising after an absence of seven years," the court said, "must yield to proof of facts to the contrary."

COLORADO'S SITUATION AND REMEDIES THEREFOR

Colorado has apparently never held its bigamy statute to validate a second marriage in reliance on the presumption of death of or divorce from the first spouse. But in *Davis v. People* [25] it was said that death of or divorce from the former spouse may validate the subsequent marriage contracted in good faith.

An analogy could perhaps be drawn between the reasoning applied in the Missouri case of *Phillips v. Wilson* and the Colorado statutes on divorce and annulment which provide that neither a decree of divorce or annulment shall affect the legitimacy of any child born as the issue of such voided, void, or voidable marriage.[26] The provision for legitimatizing the issue of a marriage which has been annulled was strictly construed, however, by the Colorado Supreme Court. In *Valdez v. Shaw* [27] it was held that the provision of the statute applied only to cases where an annulment proceeding is brought. No element of good faith was involved in this case, however. A different result might be reached were that element present.

The Colorado court indulged in some interesting language in *Otte v. Pierce*,[28] indicating that the purported wife who had married a second time without divorce has at least some right to recognition under this second marriage. In denying the equitable relief of annulment to the husband on the grounds he had continued to live with the wife some six months after he learned of the impediment to her second marriage, the court added:

> In case there should be further proceedings between the parties for divorce or separate maintenance, it is pertinent here to observe . . . that repeated references to the defendant in the trial court as "Mrs. Otte," or "Florence Otte" or in any manner other than "Pierce," was unfair, improper, and probably prejudicial to her rights. Defendant's name is now, and ever since August 2, 1939 (the date of the second marriage to Pierce), has been "Pierce," and will so remain until her marriage is annulled or dissolved by proper decree of the court.

[24] Cartwright v. State, 64 Ga. App. 51, 12 S. E. 2d 370 (1940).
[25] 83 Colo. 295, 264 P. 658 (1928).
[26] 1935 COLO. STAT. ANN., c. 56, §38.
[27] 100 Colo. 101, 66 P. 2d 325 (1937).
[28] 118 Colo. 123, 194 P. 2d 331 (1948).

This would seem to indicate that the Colorado court sees some necessity for divorce or annulment to invalidate the second marriage where one of the parties has a living, undivorced spouse by a prior marriage.

The general trend of the decisions today seems directed toward holding the second marriage invalid in accordance with the general common law rule, where only the parties to the marriage are involved in the suit. But where the legitimacy of children is involved, there is a strong tendency to find grounds for holding the marriage valid, or at least only voidable, without too much discussion of the common law rule, even in the absence of statute. Logically, since the court is dealing with a problem of status in most such cases, there seems no reason why the rule should not be the same under either circumstance. No decision was found where the court admitted there was such a difference in application of the general rule. The same tendency applies to a lesser extent where the attack is made on the second, disputed marriage after the death of one of the parties to such marriage. There is an especial tendency to support validity of marriages that have continued uninterrupted for a long period of years, and where the rights of children to the estate of the deceased parent are involved.

Today the legitimacy of children of such marriages has been pretty well cleared up by statute. There is also a strong trend toward rendering these second marriages voidable only by statute. A California law is typical of these. It holds the second marriage valid until its nullity has been adjudged by a competent tribunal.[29] Other statutes make a person whose spouse has not been heard from for a specified time competent to marry.[30] But good faith in presuming the former spouse is dead or divorced is generally held essential under statutes of this type, and again, in absence of express provisions for validity, the second marriage would probably be held voidable. A realistic approach is shown by the New York statute which provides for dissolution of the first marriage.[31] The subsequent marriage then is valid, even though the former spouse should later be discovered to be alive.

Obviously the safest approach to the problem is to advise divorce or annulment before a second marriage is undertaken, if there is any doubt as to the death of the first spouse. But such a course will seldom take care of those persons who, in a reasonable belief their spouse is dead, remarry, only to have the first spouse reappear. Typical of such situation is that where the husband has been reported a war casualty. The dearth of cases involving this question indicates that the parties settle the problem amicably among themselves when "Enoch Arden" returns. These

[29] Re Harrington, 140 Cal. 244, 73 P. 1000 (1903).
[30] Rhea v. Rhenner, 1 Pet. (U. S.) 105, 7 L. Ed. 72 (1828) (Md. statute).
[31] Thompson's Laws of New York (1939), Domestic Relations, §7a. *Cf.* Goset v. Goset, 112 Ark. 47, 164 S. W. 759 (1914).

amicable settlements arising out of World War II may yet come back to harass the administrators of estates and cloud titles in the years to come unless handled by resort to the courts.

In view of the present state of the law, the proper solution probably would be legislation similar to that of California, holding such second marriages, contracted in good faith, valid until declared invalid by a court of competent jurisdiction. Such legislation should also include a bar to any collateral attack on the second marriage, in order to preserve with some degree of certainty the rights of children or heirs of parties to such marriage.

JOHNSON V. SHRIVER: POWERS, USES AND THE RULE IN SHELLEY'S CASE

In *Barnard v. Moore*,[1] Mr. Justice Denison said, "We shall assume, without deciding, that the rule in Shelley's Case is in force in Colorado, i.e., if a freehold estate be limited to A, remainder to his heirs, he takes a fee simple. . . ."

Johnson v. Shriver [2] comes very close to deciding that the Rule in Shelley's Case is not in force in Colorado. The interests involved were created by the following language: " . . . in trust for the said Ada Conroe, for and during her natural life. . . . Upon the death of the said Ada Conroe . . . then said property shall vest in the heirs at law of said Ada Conroe. . . . "

This language falls squarely within the Rule in Shelley's Case as that Rule was stated by Mr. Justice Denison. A freehold is limited to Ada Conroe, remainder to her heirs. Yet it was held, without referring to the Rule, that Ada Conroe did not take a fee simple. Is this a repudiation of the Rule, or did the facts bring this case within an exception to the Rule? This is a difficult question.

Ada Conroe's interest was expressly limited to a life estate, but that of course would not prevent the operation of the Rule—in fact, it is one of the prerequisites that the ancestor be given an estate less than a fee simple. Otherwise the interest limited to his heirs would not be a remainder, but would be an executory interest, and the Rule applies (except in the case of appointed interests) only to remainders.

It might be proper to suggest parenthetically that the remarkable persistence of the Rule seems not to be attributable so much to a fondness for the feudal doctrine, or to an indifference to manifested intention, as to its modern effectiveness as a means of clearing titles.

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[1] 71 Colo. 401, 406, 207 P. 332, . . . (1922).

[2] — Colo. —, 216 P. 2d 653 (1950). It is assumed that the reader of these comments will have read the opinion itself; therefore, no statement of the case will be made.