Volume 40 | Number 1 Article 16

12-1-1961

Domestic Relations -- Evidence -- Presumption of Validity of Second Marriage

H. Morrison Johnston Jr.

be that the Constitution affords no protection against such invasions of individual security?[15]

It is regretted that the Court in *Silverman* failed to give heed to the warning sounded by Mr. Justice Brandeis. An intrusion by stealth upon individual privacy by police officers should be unlawful under the search and seizure clause of the fourth amendment whether the intrusion be in form of an electronic or microwave beam, a light wave, or a sound wave and regardless of the absence or presence of a "physical invasion."

Indeed, one might even question whether in the principal case the spike's touching the heating duct and thereby transforming it into a sounding board was actually a *physical* invasion of the defendants' house. This is especially so in view of the Court's curt dismissal of technical trespass property law as insignificant. Moreover, there would seem to be little difference between the "usurpation" of the heating system of a house by converting it into a "giant microphone" and simply plucking from the air the sounds within a house by means of an electronic device that may not even touch any part of the house.

Should the Court discard the premise upon which *Olmstead, Goldman, On Lee* and *Silverman* are based, the effect of such a decision would undoubtedly be detrimental to the present practices of police investigations and criminal prosecutions. But, as stated by Mr. Justice Franfurter in a dissenting opinion in *On Lee*,[16] "criminal prosecution is more than a game. And in any event it should not be deemed to be a dirty game in which 'the dirty business' of criminals is outwitted by the 'the dirty business' of law officers."

THOMAS M. STARNES

Domestic Relations—Evidence—Presumption of Validity of Second Marriage

It is generally held that where a marriage in fact has been proved or admitted, the law raises a presumption that it is valid.[1] This rule

[15] Olmstead v. United States, 277 U.S. 438, 474 (1928) (dissenting opinion). (Emphasis added.)

[16] 343 U.S. 747, 758 (1952) (dissent).

[1] *E.g.*, Gee Chee On v. Brownell, 253 F.2d 814 (5th Cir. 1958); Brooms v. Brooms, 151 Cal. App. 2d 343, 311 P.2d 562 (Dist. Ct. App. 1957); Whelan v. Whelan, 346 Ill. App. 445, 105 N.E.2d 314 (1952); Wilson v. Mitchell, 10 Misc. 2d 559, 169 N.Y.S.2d 249 (Sup. Ct. 1957). See generally Annot., 77 A.L.R. 729 (1932); Annot., 34 A.L.R. 464 (1925).

is applied without difficulty where only one marriage is in question. However, if successive marriages of the same person are involved, the situation becomes more complex in that the courts are confronted with conflicting presumptions.[2] A great majority of jurisdictions[3] in this situation follow the position taken in *Parker v. American Lumber Corp.*[4] where the court stated:

> The decided weight of authority, and we think the correct view, is that where two marriages of the same person are shown, the second marriage is presumed to be valid; that such presumption is stronger than and overcomes the presumption of the continuance of the first marriage, so that a person who attacks a second marriage has the burden of producing evidence of its invalidity. Where both parties to the first marriage are shown to be living at the time of the second marriage it is presumed in favor of the second marriage that the first was dissolved by divorce. These presumptions arise, it is said, because the law presumes morality and legitimacy, not immorality and bastards.[5]

Although the presumption is of great value to the party for whom it operates in that it places the burden of proving the invalidity of the second marriage on the party attacking it,[6] it has no additional value. Its effect is merely to invoke a rule of law compelling the jury to reach a certain result in the absence of testimony to the contrary.[7] Thus the presumption is not conclusive, but may be rebutted by proof of a valid prior marriage and by proof that such marriage has not been terminated by death or divorce.[8]

---

[2] For example, the presumption of the continuance of a status, or condition, once proved to exist (here the first marriage) and the presumption of the continuing life of the wife of the former marriage.

[3] *E.g.*, Ellenwood v. Ellenwood, 157 Fla. 640, 26 So. 2d 655 (1946); Rose v. Rose, 274 Ky. 208, 118 S.W.2d 529 (1938); Davis v. Davis, 2 Wash. 2d 448, 101 P.2d 313 (1940).

[4] 190 Va. 181, 56 S.E.2d 214 (1949).

[5] *Id.* at 185, 56 S.E.2d at 216.

[6] Gainey v. Gainey, 119 Cal. App. 2d 564, 259 P.2d 984 (Dist. Ct. App. 1953); Keller v. Linsenmyer, 101 N.J. Eq. 664, 139 Atl. 33 (Ct. Ch. 1927); Williams v. Smith, 16 Misc. 2d 585, 184 N.Y.S.2d 176 (Sup. Ct. 1959).

[7] Vaughan v. Vaughan, 195 Miss. 463, 16 So. 2d 23 (1943). See generally 9 WIGMORE, EVIDENCE § 2491 (3d ed. 1940).

[8] Hamburgh v. Hys, 22 Cal. App. 2d 508, 71 P.2d 301 (Dist. Ct. App. 1937). Although proving that a divorce has not taken place involves proof of a negative, this task would seem to have been made considerably easier in North Carolina by the enactment of N.C. GEN. STAT. § 130-52.1 (1958),

In *Kearney v. Thomas*[9] North Carolina adopted the majority view of presuming the second marriage to be valid. It was there stated that the majority view was "so abundantly supported by well considered cases, so consonant with reason, and so consistent with analogous practices, as to justify its adoption."[10]

In the recent case of *Williams v. Williams*,[11] however, the court refused to hold that upon proof of a subsequent marriage a presumption of its validity was raised. In this case *A*, the admitted first wife of *W*, the decedent, petitioned the court that she be allotted dower in his lands. Thereafter *B* filed an interplea in which she alleged that she was the surviving widow. In support of her claim *B* introduced evidence of a certificate authorizing the marriage and of its return showing that the marriage ceremony had been performed. She also offered evidence to the effect that until *W*'s death they had lived together as man and wife for nearly five and one-half years, and that her name appeared on his death certificate as the surviving spouse. Instead of presuming *B*'s marriage valid upon this proof, the court held that the burden was upon her to show that *W*'s prior marriage to *A*, which was admitted to be valid, had been invalidated or dissolved.

The court justified its decision on the grounds that the intervenor has the burden of proving his case and establishing the rights claimed,[12] and that one who asserts a property right which is dependent upon the invalidity of a marriage must make good his cause by proof.[13] However, there would seem to be no reason why an intervenor could not be aided by the operation of presumptions.[14] By failing to recognize the presumption, the court has clearly failed to give the intervenor the benefit of the rule announced in the

which provides for the central registration of all divorces granted by the North Carolina courts.

[9] 225 N.C. 156, 33 S.E.2d 871 (1945). In this case the plaintiffs, children of the first marriage, were heirs at law of Alexander Kearney. The defendant was the second wife. Plaintiffs contended that the property which was the subject of the suit descended to them on the death of their father free of any dower claim of the defendant because the second marriage was bigamous and, therefore, void.

[10] *Id.* at 164, 33 S.E.2d at 877.

[11] 254 N.C. 729, 120 S.E.2d 68 (1961).

[12] *Id.* at 730, 120 S.E.2d at 69.

[13] *Id.* at 731, 120 S.E.2d at 70.

[14] In Parker v. American Lumber Corp., 190 Va. 181, 56 S.E.2d 214 (1949), the court allowed the plaintiff the benefit of the presumption. For the purpose of determining the availability of presumptions there would seem to be no difference between a plaintiff and an intervenor.

Kearney case that "proof of the second marriage adduced by the defendant, if sufficient to establish it before the jury, raises a presumption of its validity, upon which property rights growing out of its validity may be based."[15]

The court attempted to distinguish this decision from the *Kearney* case on the ground that in *Kearney,* the death of the first wife being admitted, the question before the court was whether or not the evidence was sufficient to be submitted to the jury upon the validity of a subsequent marriage. The validity of this distinction is questionable. In *Kearney* the court stated that the question before it was whether the burden of the issues submitted to the jury was properly placed on the plaintiffs or on the defendant. This would seem to be the substance of the problem before the court in the *Williams* case. Moreover, in *Kearney* the first wife was alive at the time of the subsequent marriage although it was admitted that she was dead at the time suit was brought. Both cases, therefore, involved a second marriage while the first wife was alive. One factual distinction between the cases is that in the *Kearney* case the defendant was seeking to establish the second marriage rather than the intervenor as in *Williams.* However, the position of the parties to the suit would not seem to be determinative of whether the presumption applies.

Furthermore, there would seem to be better grounds for applying the presumption in *Williams* than in *Kearney.* In *Williams* the first wife was a party to the suit and was present to give evidence rebutting the presumption, but in *Kearney* the first wife was not

[15] 225 N.C. 156, 163-64, 33 S.E.2d 871, 876-77 (1945). As to the amount of proof necessary to raise the presumption, the court in this case stated: "It is to be noted here that the existence, or fact, of the second marriage was supported not only by reputation and cohabitation, but by the direct evidence of the defendant as to the ceremony of marriage, and by the certified copies challenged by the plaintiffs." *Id.* at 164, 33 S.E.2d at 877. In refusing to allow the presumption in *Forbes v. Burgess,* 158 N.C. 131, 73 S.E. 792 (1912), the court said: "Although where a marriage is established by a proof of the fact in any competent way, it raises a presumption that any prior marriage which is relied on to invalidate the second marriage has been dissolved by death or divorce, the presumption of death or divorce will not be indulged in favor of an alleged second marriage, the proof of which rests only on cohabitation and reputation." *Id.* at 133, 73 S.E. at 792-93.

The proof offered in the principal case consisted of more than proof of cohabitation and reputation; in fact it was almost the same as that offered in the *Kearney* case. Therefore, applying the standard prescribed by these two cases, it would seem that the proof was sufficient to raise the presumption.

present. Thus in *Kearney* the court put the burden of proving the validity and continued existence of the first marriage upon parties who did not have personal knowledge of the facts, but in *Williams* it refused to place the burden on the party who did have personal knowledge.

If the court is basing its refusal to allow the intervenor the benefit of the presumption because she is an intervenor rather than a defendant, the court is putting unwarranted stress on who gets to court first and instigates the suit. The fact that the second wife has gone through the requisite marriage ceremony and has lived with a man as his wife for several years without any objection from his former wife should have the same significance regardless of whether she is the plaintiff, defendant or intervenor. If, on the other hand, the court is refusing to allow the intevenor the benefit of the presumption because it has decided to no longer afford the second marriage a presumption of validity, the court, as stated in the dissenting opinion in *Williams,* should expressly overrule the *Kearney* case and specifically state what the law is in this state.

Regardless of why the court in *Williams* failed to give the benefit of the presumption to the intervenor, the better policy would seem to be to uniformly place the burden on the party attacking the validity of the second marriage. Not only does public policy[16] dictate that the second marriage be presumed valid, but also the first wife is in a better position to give evidence about the contract to which she is a party than the second wife. Thus it is hoped that at its next opportunity the court will make clear that the presumption of validity of the second marriage, as adopted in the *Kearney* case, is available to all parties, regardless of their position in the action.

H. MORRISON JOHNSTON, JR.

Federal Jurisdiction—Diversity of Citizenship—Corporation's Principal Place of Business—Multiple Incorporation

In *Kelly v. United States Steel Corp.*[1] the Third Circuit Court of Appeals was called upon for the first time to interpret the term "principal place of business" as used in the diversity jurisdiction

[16] Marriage being an accepted and desirable social institution, the court should favor the parties alleging the marriage by presuming them innocent of bigamy and by presuming the children by the union legitimate.

[1] 284 F.2d 850 (3d Cir. 1960).