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The Evidential Force of Habit and Repute as Opposed to the Substantive Law Concerning Marriage

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It would seem that a statute rendering nugatory a contract of employment between a corporation and a stranger for a fixed and definite term is harsh and not consonant with business practices. Law is unceasingly harmonizing itself with customs and rules extant in the marts of trade and adopting them as its own after they have been firmly established. Under present conditions, the person who offers his personal services to a corporation is penalized and placed at a disadvantage suffered by no other one dealing with a corporate body All others who enter into a contract with a board of trustees receive a valid instrument even though it extends over a period of time.

The interests of the stockholders should weigh no more heavily in connection with the employee to his prejudice than with the countless others dealing with the corporation. The evils of allowing the trustees to contract for supplies, equipment and kindred commodities have never been so great that they have been placed under the attention of the legislators of this state. The privilege, allowed in other jurisdictions but denied in this, has not been disastrous to the well-being of foreign corporations. Neither has it been irksome to the stockholders nor the cause of diminishing profits.

W Harold Hutchinson.

THE EVIDENTIAL FORCE OF HABIT AND REPUTE AS OPPOSED TO THE SUBSTANTIVE LAW CONCERNING MARRIAGE—The Washington decisions have settled beyond a doubt that a valid marriage can not take place in this state in any manner other than that prescribed by statute. The statutes were originally enacted in 1854 and have come down to us with practically no alterations and with but few additions.[1] As early as 1892 it was decided that the statutory requirements were mandatory, that a ceremony was essential and that common law marriages, in this state, were invalid. Thus the substantive law has become fixed.[2]

The necessary consequence of the recognition by the common law of the validity of marriage by private consent, was that such a marriage could be proven by co-habitation and reputation, such co-habitation and reputation being required as the equivalent of a contract in present words between the parties and as effective to render them husband and wife.[3] It was not the public acknowledgment of each other as husband and wife, nor the assumption of the marital rights and duties, nor the general reputation of the parties as husband and wife that constituted a marriage. The substantive common law required a present agreement between the parties to take each other as husband and wife. Yet, because of the private nature of the marriage, there was rarely an eye witness to prove such consent. To foster wholesome living, the law therefore adopted a rule of evidence allowing

[1] Rem. Comp. Stat., §§ 8437-8454, inc.
In re McLaughlin's Estate, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699 (1892).
[3] *Travers v. Reinhardt*, 205 U. S. 423, 51 L. Ed. 865, 27 Sup. Ct. Rep. 563; *Eaton v. Eaton*, 66 Nebr. 676, 92 N. W 995, 1 Ann. Cas. 199 (1902).

the defect of proof of consent to be supplied by proof of co-habitation and reputation.

The following review of our cases is designed to ascertain the extent to which this rule has survived the abrogation of the common law in this regard.

In *In re McLaughlin s Estate,*[4] it appeared that McLaughlin died intestate, leaving an alleged wife to whom he had been properly married, so far as the ceremony was concerned, but who was incapacitated at the time of such marriage by reason of having a former husband whom she believed to be dead. When she learned otherwise she left McLaughlin, secured a divorce from her first husband and then resumed living with McLaughlin without the formality of another ceremony Thereafter, and until his death, they held themselves out to the public as husband and wife and believed themselves to be such. The trial court found that she was the widow of the deceased and granted her letters of administration as against the petition of the decedent's daughter. It was urged on appeal that there could be no common law marriage in this state, and that the proof was insufficient to establish the marital relation even though the parties could have become husband and wife by mere agreement between themselves. Scott, J., rendered the opinion of the Court and in the course thereof, page 585, said "In all cases, whether common law marriages are recognized or not, evidence of co-habitation and repute is admissible as tending to show a valid marriage, holding each other out as husband and wife to the public and continued living together in that relationship, has ordinarily, but not universally, been held sufficient proof, unless contradicted, to establish it even within those states where common law marriages are not recognized." Yet the evidence of co-habitation and repute, in this case, though uncontradicted, was not regarded as sufficient to raise a presumption of marriage and the holding of the trial court was, therefore, reversed. A similar decision was reached in *In re Smith s Estate.*[5]

The question arose again in *Stans v. Battey.*[6] In that case the decision that the parties were not husband and wife was probably justified on the ground that the relations between them were wilfully illicit. Yet it is apparent that the court did not regard proof of co-habitation and reputation as sufficient to raise a presumption that a prior valid marriage had been contracted. Witness the statement of the court to the effect that the co-habitation of the parties in California, a common law state, was insufficient, standing alone, to establish a common law marriage.[7]

In *In re Wilbur s Estate*[8] it appears that Wilbur had married an Indian girl, according to the custom of her tribe. The law at that

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[4] See Note 2, *supra.*
[5] 4 Wash. 702, 30 Pac. 1059, 17 L. R. A. 573 (1892).
[6] 9 Wash. 115, 37 Pac. 316 (1894).
[7] L. R. A. 1915E, 50.
[8] 8 Wash. 35, 35 Pac. 407, 40 Am. St. Rep. 886 (1894) affirmed in 14 Wash. 242, 44 Pac. 262 (1896).

time prohibited white men from inter-marrying with Indians. That law was repealed shortly after the marriage and Wilbur thereafter co-habited with this girl as his wife and continuously and openly acknowledged the children to be his legitimate sons. No presumption of marriage was raised in that case from the fact of co-habitation.

In the case of *Summerville v. Summerville,*[9] the doctrine announced but not applied in the *McLaughlin* case, *supra,* was again invoked and again not applied. There, in a suit by the wife for divorce, the husband challenged the sufficiency of the evidence to establish that the parties had been properly married. She testified that there had been some form of a ceremony, followed by co-habitation, that a child had been born which he had admitted to be his, and that he had held her out as his wife. The actual evidence as to co-habitation and reputation seems to have consisted of little more than reference to occasional remarks upon the part of the man which might be construed as acknowledging her as his wife.[10] He denied that there was a ceremony or that there had been more than a contract to marry. His testimony was impeached, hers was corroborated. There was no evidence of a license having been obtained or a certificate issued. The court said. "The intendment of the law is to presume from such testimony that valid marriage existed and when such facts appear in evidence the burden of proof is cast upon the party denying it to clearly show the contrary 'If a ceremony of marriage appears in the evidence, it is presumed to have been rightfully performed and to have been preceded by all needful preliminaries.' "[11]

By way of *dictum* the court further pointed out that a valid marriage may be presumed to exist from general reputation among the acquaintances of the parties that such is the fact when that reputation is accompanied by co-habitation and arises from their holding themselves out to the world as occupying that relation to which the law refers when marriage is mentioned. It is clear from the opinion that the court based its decision, not on the presumption, but rather upon the evidence of a ceremony. The decision is the one naturally to be expected from an application of the presumption rule. It can be reconciled with the former cases, however, only on the assumption that the presumption of validity will not apply in cases where the proof clearly shows that the inception of the marital relation was illegal. If, however, there is any attempt to establish a ceremony, then it seems the presumption will be applied. In either event, the rule as stated in the *dicta* was not applied in the solution of the respective cases.

For the first time we find the presumption rule applied in all its force in *Shank v. Wilson.*[12] The property of decedent was distributed to his widow. She was sued by the plaintiffs who claimed as heirs of

[9] 31 Wash. 411, 72 Pac. 84 (1903).
[10] L. R. A. 1915E, 50.
[11] *Accord, In re Emmans' Estate,* 117 Wash. 182, 200 Pac. 1117 (1921).
[12] 33 Wash. 612, 74 Pac. 812 (1903).

decedent and who further claimed that the property in question was acquired by decedent before his marriage to the defendant and was therefore separate property The date of the marriage therefore became the decisive point in the controversy The plaintiffs showed that the marriage ceremony was performed in 1900 and that the property had been acquired prior thereto. The defendant showed that she and the decedent had lived together many years priod to 1900 co-habiting and holding themselves out as husband and wife. It was held that when no common law marriage is allowed, proof of continued co-habitation and conduct consistent with the marriage relation, raises a presumption that they were preceded by a legal marriage. Nor was this presumption combated by proof of the subsequent ceremonial marriage.[13]

In *Nelson v. Carlson*,[14] plaintiff sued to quiet title and the question was whether the decedent acquired a community interest in the premises as plaintiff's wife. The decedent's son by a former marriage testified that he was brought from Sweden to the home of his mother and the plaintiff in Colorado, that he understood that they had married, that they had co-habited and been regarded as husband and wife and that the plaintiff had never denied that they were such until he filed his reply in this suit; that he had in fact erected a monument to the decedent as Mrs. Nelson. The court held that the presumption of a valid marriage was not overcome. That the court was influenced solely by the presumption rule is indicated by its rejection of the plaintiff's argument that there could not have been a common law marriage in Washington and that the evidence did not show that such a marriage had been consummated in Colorado.

In the next case on the point[15] the wife testified positively to a ceremony, but the husband denied there ever was one. It was held that where the testimony conflicts a *ceremonial* marriage may be proven by circumstances such as co-habitation and reputation as husband and wife. When such circumstances are shown the presumption of marriage exists and the burden is on the party denying the marriage to show that such ceremony had never been performed.[16] Thus the court evaded the propositions propounded by counsel based upon the *Mc Laughlin* case, *supra,* to the effect that a common law marriage could not be held legal and that here no marriage was proven although there was evidence of co-habitation and repute.

In *Weatherall v. Weatherall*[17] it was said "The uniform and unbroken current of opinion in this court has been that while a common law marriage is invalid in this state, yet evidence of co-habitation and reputation is admissible for the purpose of raising a legal pre-

[13] As to the effect of subsequent ceremonial marriage, see also *Kromer v. Friday,* 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671 (1895). It will be noticed here that there was no testimony as to how the marital relationship continued. This, however, may be sufficient to distinguish it from the earlier cases.

[14] 48 Wash. 651, 94 Pac. 477 (1908).

[15] *Potter v. Potter* 45 Wash. 401, 88 Pac. 625 (1907).

[16] *Accord, Thomas v. Thomas,* 53 Wash. 297, 101 Pac. 865 (1909).

[17] 56 Wash. 344, 105 Pac. 822 (1909).

sumption of a prior ceremonial marriage. The cogency of the presumption will, of course, depend upon the facts of each particular case

Their conduct towards each other is equivalent in law to a continuing declaration by each that they were occupying the relation of husband and wife."

It seems that almost any testimony as to a ceremony, if uncontradicted, will establish a valid marriage.[18] On the other hand, no presumption of marriage seems to arise where the marriage was void because of the incapacity of the parties;[19] nor where it positively appears that the parties made no *bona fide* attempt to change their relationship after the removal of the disability;[20] nor where the parties lived together as husband and wife after an attempt to perform the ceremonial marriage which was, in fact, no ceremony at all;[21] nor where the woman is lewd and free with her favors for in such case co-habitation is not very strong evidence of marriage, and moreover, decency, already lost, does not call upon the law for a protective presumption.[22] Where a ceremony has been performed the authority of the officer and all the prerequisites of a valid marriage will be presumed until the contrary appears.[23] The statutes concerning the issuance of licenses and recording of certificates are regulatory merely, and violations thereof may subject the violators to punishment, but will not affect the validity of the marriage.[24]

In conclusion, then, we find that the substantive law definitely established that no marriage is valid in this state unless ceremonially performed. The *dicta* in the decisions, however, assert the broad doctrine that evidence of co-habitation and repute will raise the pre-

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[18] *Koloff v. Chicago, Milwaukee & Puget Sound Railroad Co.*, 71 Wash. 543, 129 Pac. 398 (1913), *Potts v. Potts*, 81 Wash. 27, 142 Pac. 448 (1914) *McDonald v. White*, 46 Wash. 334, 89 Pac. 891 (1907).

[19] *Johnson v. Johnson*, 57 Wash. 89, 106 Pac. 500, 26 L. R. A. (N. S.) 179 (1910).

[20] *Blodgett v. Blodgett*, 109 Wash. 597, 187 Pac. 340 (1920) *In re McLaughlin's Estate, supra.*

[21] *Meton v. Industrial Ins. Dept.*, 104 Wash. 652, 177 Pac. 696 (1919). In this case the parties, unable to read or speak English, acting through a supposed interpreter, filed their affidavit and procured a marriage license, which proceeding they believed to constitute the marriage itself. Cohabitation and reputation were held as insufficient to raise a presumption of a valid marriage in this case because as the court said, the evidence overcame any such presumption; it proved too much. The effect of this decision would seem to be that parties making an honest but mistaken attempt to comply with the law and who set up such attempt at the trial, will be held not properly married, whereas, under the former cases, parties who have made no attempt to perform a ceremonial marriage, but who nevertheless produced no evidence at the trial as to the manner of the inception of the marital relation, under the presumption rule will be held to be married properly.

[22] *Weatherall v. Weatherall*, 63 Wash. 526, 115 Pac. 1078 (1911) *Kelley v. Kitsap County*, 5 Wash. 521, 32 Pac. 554 (1893), *Goldwater v. Burnside*, 22 Wash. 215, 60 Pac. 409 (1900).

[23] *In re Sloan's Estate*, 50 Wash. 86, 96 Pac. 684, 17 L. R. A. (N. S.) 960 (1908).

[24] *In re Hollopeter* 52 Wash. 41, 100 Pac. 159, 17 Ann Cas. 91, 21 L. R. A. (N. S.) 847 (1909) *Cushman v. Cushman*, 80 Wash. 615, 142 Pac. 26 (1914), *State v. Nelson*, 39 Wash. 221, 81 Pac. 721 (1905).

sumption of a prior valid ceremonial marriage. With the possible exception, however, of the case of *Shank v. Wilson, supra,* that doctrine has not been applied without certain qualifications. For instance, the doctrine was not applied where the evidence showed positively that there had been no prior valid marriage, nor was the doctrine applied in the earlier cases where the testimony was silent as to the manner of the commencement of the relation. It will be noted, however, that the later cases seem to hold that where such proof is silent the presumption will arise. Where there is evidence of a ceremonial wedding, the presumption of the validity of the ceremony will be indulged even though such evidence be contradicted.

Perhaps the only safe deduction that can be drawn from the decisions is that the presumption favors the legality of a marriage only when the case is tried on the theory that there had been a valid marriage, although the *dicta* in the cases would indicate that the court would find in favor of the validity of the marriage on proof of cohabitation and reputation alone.

Burton J. Wheelon.

RECENT CASES

CHARITIES—LIABILITY FOR SERVANT'S NEGLIGENCE.—T, for pay, became a patient at defendant's hospital, operated as a charitable institution. A student nurse negligently failed to remove an aluminum hot water bottle from the bed wherein the patient was placed after the operation. T sued the defendant corporation for injuries sustained, alleging negligence by the nurse in her care of him and negligence by the defendant in the selection and retention of the nurse assigned to take care of him. *Held.* T could recover only on the latter ground. *Tribble v. Missionary Sisters of the Sacred Heart,* 37 Wash. Dec. 285, 242 Pac. 372 (1926).

The tort liability of a charitable corporation for the negligence of its servants and agents is a perplexing question. Some courts insist that the liability for a pay patient, at least, should be that of an ordinary private corporation either because of the public interest in the careful performance of the duties assumed by the corporation or because exemption from liability is a legislative and not a judicial matter. *Glavin v. Rhode Island Hospital,* 12 R. I. 411 (1879), though by statute now *contra; Tucker v. Mobile Infirmary Association,* 191 Ala. 572, 68 So. 4, L. R. A. 1915D 1167 (1915), *City of Shawnee v. Roush,* 101 Okla. 60, 223 Pac. 354 (1923).

Other courts go to the other extreme and exempt charitable corporations from all liability to beneficiaries even for negligence in selecting servants or agents. *Roosen v. Peter Bent Brigham Hospital,* 235 Mass. 66, 126 N. E. 392, 14 A. L. R. 563, *Adams v. University Hospital,* 122 Mo. App. 675, 99 S. W 453 (1907) *Hamburger v. Cornell University,* 204 App. Div. 664, 199 N. Y. S. 369 (1923), (fee-paying student). Ordinarily, if due care has been used in selecting servants, no liability for the torts of the servant is recognized. See cases *infra.*

This exemption from liability does not ordinarily extend to strangers or employes injured, and they may recover. *Hordyn v. Salvation Army,* 199 N. Y.