How The Widow Davis Lost Her Pension

Second marriage based upon presumption of death of one of the parties to the *first* marriage is governed in Kentucky by the State statute on the subject, which says: " If any person who shall have *resided* in this State go from and do not *return* to this State for (seven successive years, he shall be presumed to be dead in any case where his death shall come in question, unless proof be made that he was alive within that time."

Assistant Secretary Bussey to the Commissioner of Pensions, Jan. 31,1891.

Herewith are returned the papers which accompanied your report of January :!2, 1891, upon the appeal of Mary Davis, from the action of your Bureau refusing to restore her to the pension roll as the *widow of* Zachariah Davis (deceased), late private, Company K, Fortieth Kentucky Volunteers.

The deceased soldier is shown by the War Department records to have enlisted August 25, 1863, and to have died in the service in May, 1864.

The appellant filed her application for pension January 26,1872, claiming to be the *widow* of said soldier and alleging his death as aforesaid. Her claim was admitted in July, 1876, and pension granted to her as the widow of the soldier.

On November 11,1879, appellant's pension was stopped, and she was dropped from the roll upon the ground that she had not been the lawful wife of said soldier and was not his widow. From said action she appealed to the Department, January 16, 1891.

The appellant has filed, in connection with her said appeal, a lengthy brief and argument in which she endeavors to show that, at the time she was married to the soldier in the State of Kentucky, the presumption of the *death* of said soldier's former wife had arisen under the statute of said State; that he was free to marry again; and that, in the absence of positive proof to the contrary, said presumption of the death of said former wife became absolute, rendering her the legal and only *widow* of the soldier and entitling her, under the law, to pension as such. She further insists that the question of the legality of her marriage to said soldier shall be determined by the law of the *place* of their residence at the time tt was consummated—the State of Kentucky.

The Department concedes that *lex loci contractus* would govern in determining either the legality or the illegality of the appellant's marriage to the soldier, nor is it disposed to dispute any of the abstract principles of law contended for in the said argument in support of this appeal; but said argument "begs the question" entirely in this case, since it assumes and is wholly based upon a state of facts widely different from that shown by the proof. The appellant's law is sound enough, but it is not applicable to the facts that are established by the evidence in her case.

The appellant is shown to have married the soldier in Carter county, Kentucky, in December, *Ifitj0,* and to have lived with him as his wife for about two and one-half years

until his *enlistment* in the service in 1863. It is also proved by the testimony of several credible witnesses, who testify from personal knowledge, from having been present at the marriage and witnessed the ceremony, that the soldier had been lawfully married in *1853* or *1854* to one Susan Sanders in the county of Johnson, Kentucky, from whom he had never been divorced, and who was living in said county (a *neighboring* county to that in which he was married to appellant) at the date of his marriage to the appellant. It is true that the appellant charges these witnesses with interested, malicious, and sinister motives in giving this adverse testimony, but, unfortunately for her, they are reported to be persons of respectability and good character, whereas the appellant herself appears to have borne a character exactly the reverse. These witnesses are besides corroborated very strongly by the records of Johnson county, Kentucky, which show the issuance of a license for the marriage of the soldier and said Susan Sanders about the time they state the soldier's first marriage took place; but said records do not show a return of said license nor a record of the marriage. There can be no doubt, however, from the evidence, that said marriage was duly consummated between the parties in accordance with said license in Johnson county, Kentucky, sometime during the years 1853 or!854..

Now, there can be no question about the proposition that, if the soldier had a lawful wife living in a neighboring county from whom he had never been divorced when he married the appellant in I860, said second marriage was absolutely null and void; and, if said association between the soldier and appellant was not subsequently legalized by another marriage ceremony after the removal of the *impediment* of said first marriage by either the death or the divorce of the first wife, or if the conduct of the parties was not such, after said impediment was removed, that such subsequent marriage between them could be inferred, then she was never the legal *wife* of the soldier and is *not* his lawful *widow.*

The appellant contends, however, that the soldier's first wife had left him, had been unheard of for more than *seven years* prior to his marriage to appellant, and that, at the time of said marriage, the legal presumption of her death had arisen and the soldier was free, to marry under the statutes of Kentucky. She quotes the statute of Kentucky on the subject, as follows:

If any PERSON, who shall have resided in this State, go from and do not return to this State for seven successive years, he shall he presumed to be dead, in any case wherein his death shall come in question, unless proof be made that he was alive within that time.

In view of the facts proven in this ease, it is not necessary to disease nor to consider the effect of the peculiar wording of the Kentucky statute thus quoted, which seems to require an absence of seven years *out of the said State* to raise the presumption of death in any case, for it is shown, as a matter of fact, that said presumption could not have arisen in any event with regard to the first wife of the soldier at the date of his marriage to the appellant. It is shown, conclusively, that the first marriage of the soldier took place not earlier than the year 1853 nor later than 1854. Giving him the benefit of

the earlier date (1853) there would just be a sufficient lapse of time between his two marriages to give rise to the *presumption* of the death of his first wife under said statute, *provided she had left the State of Kentucky* and disappeared *immediately after* her marriage to the soldier, and had never been heard of or returned to said State. A number of credible witnesses testify, however, that the soldier and his first wife lived together from two to three years after their marriage and prior to their separation, that after said separation his first wife continued to reside in the same county and the same neighborhood with the soldier, and so continued to do until he removed from said county to the *neighboring* county, in which he married the appellant, about three years prior to said second marriage. It is thus apparent that, at the date of soldier's marriage to appellant, he had not been separated from his former wife more than four or five years at most, and that it had not been more than three years since he had removed from the, immediate neighborhood where she was then living with his full knowledge.

It is clear from the foregoing that no presumption of the first wife's death had arisen at the date of soldier's marriage to appellant, that said statute has no application whatever to her case, and the argument in support of this appeal, based on such an assumption, falls to the ground with neither tact nor reason to support it.

But even if sufficient time had elapsed between the separation of the .soldier from his first wife and his marriage to the appellant, and if the other conditions of the statute had been complied with so as to give rise to the presumption of her death at the date of said second marriage, such a state of facts would not inure to the appellant's benefit, nor suffice either to legalize IHT marriage to the soldier or render her his lawful widow under the evidence.

It is true, as held by the court of appeals of Kentucky, in the case of Foulks v. Rhea, 7th Bush., 568, cited by appellant, that "evidence of conflicting and unsatisfactory rumors that a party had been seen and recognized during the seven years embraced by the statute is *not sufficient* to repel the legal presumption of death;" but, in this case, we have the positive, direct, and unequivocal testimony of trustworthy and unimpeached witnesses who swear that they *saw* her and *talked* with her, and personally *knew* her to be living in the year 1863, only a short time prior to the soldier's death, in the same county and in the same neighborhood in which the soldier had married her. Here the presumption of death relied upon to legalize the marriage of appellant is positively, directly, and conclusively rebutted, even if it had ever existed.

There is no evidence on file tending to show that the impediment of-the soldier's former marriage was ever removed by the death of his first wife, the preponderance of the evidence going to show that she is still living or was very recently; and it is not even pretended or contended by the appellant that said first marriage was ever dissolved by divorce. This being the case it is useless to discuss the question as to whether the conduct and relations of the soldier and appellant were such, after the removal of the impediment to their legal union, that a legal marriage between them could be inferred and presumed therefrom, since it appears that said impediment never was removed, as

a matter either of law or of fact, but existed in full force up to the time of the soldier's death in the service.

It is manifest, therefore, that the appellant, never having been the legal *wife* of the soldier, is not his lawful *widow,* and, not being entitled to pension as such, the action of your .Bureau in dropping her from the roll for that reason was not error. It is affirmed accordingly.

Glen Haney