THE PRESUMPTION OF MARRIAGE IN AUSTRALIA—THE END IN SIGHT?

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'Why do presumptions exist?' asks Heydon,[1] who subsequently provides seven reasons. First, they often accord with the preponderance of probability and second, some save time at the end; third, it is often easier for one party to prove a fact than his opponent to prove the contrary; fourth, they can be valuable when the ordinary rules of evidence lead to an impass; fifth, some presumptions have arisen as the result of social policy; sixth, presumptions promote convenience and seventh, they frequently facilitate matters of procedure. In regard to the presumption of marriage, the aspect of convenience is especially important: in many of the cases, particularly the earlier ones, records, if kept at all, were not done so systematically or ran significant risk of loss or destruction.[2] In addition, it is well known that the presumption arises in three situations: the presumptions of formal and essential validity[3] and the presumption arising from cohabitation of the parties.[4] Although these presumptions overlap and interact to some degree, there are significant differences in their operation. Thus, the present writer has argued[5] that the presumption arising from cohabitation ought to be regarded as less cogent than the others on the basis that, in the presumptions of formal and essential validity, there is evidence of some kind of ceremony,[6] albeit a possibly imperfect one, which provides evidence of intention by the parties to formalise their relationship.

In addition, there have been social and legal changes which have gone, at least, some way towards undermining the *ratio vivendi* of the presumption, especially as it arises from cohabitation. The common law

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1 Heydon, J. D., *Evidence: Cases and Materials* (1975) at 46.

2 See, for example, cases such as Re Taplin, Watson v. Tate [1937] 3 All E.R. 105; Re Taylor (Decd.), Taylor v. Taylor [1961] 1 All E.R. 55; Re Waddle (1911) 7 Tas. L.R. 35.

3 For comment, see Bates, F., 'Formal and Essential Validity of Marriage' (1975) 49 *A.L.J.* 607.

4 For comment see Bates, F., 'The Presumption of Marriage Arising from Cohabitation' (1978) 13 *U.W.A.L.R.* 341.

5 Id. at 352.

6 The phrase used by Kekewich J. in In re Shephard, George v. Thyer [1904] Ch. 456 at 461.

no longer looks with horror on couples who live together, in Stable J.'s phrase,[7] '. . . without benefit of clergy'. The legal disabilities imposed by the status of illegitimacy, where that status has not been abolished, have been significantly reduced and records are kept more systematically and accurately and not lost or destroyed with the disarming frequency with which once they were. Yet, all this notwithstanding, cases involving the presumption of marriage, in one form or another, still arise with sufficient frequency to be of not inconsiderable interest, both to students of the law of evidence and of the changing nature of familial and marital structure and function.

The most recent of these cases to arise in Australia is *Re Pennington, decd.* (No. 2).[8] The facts, which are of some interest in themselves, were as follows:

By her will, T. bequeathed part of her estate to two brothers and one sister, or if they died before the period of distribution, then to the children of those brothers and the sister. One of the brothers, Louis James Tantau, who died before the period of distribution, left seven children. It was conceded that only legitimate children were entitled to benefit, and the same point also arose with respect of the intestate estate of T's son. The question was whether these seven children were the brother's legitimate children, and depended on whether Tantau had married the mother of the children. He had lived with her as though they were married for nearly 50 years, but no marriage certificate could be produced.

A certified copy of his birth certificate stated that he was born at St Arnaud in Victoria on 29 October 1867. Various 'no record' searches stated that he had not married the mother either in Victoria, New South Wales or Queensland between the dates given, and these searches were under the name 'Taunton'. Certified copies of the birth certificates of the two eldest children born in Queensland were produced, and in each certificate the father was said to be the informant 'Louis James Taunton' and he is said to have married Eliza Tweed at Sydney, New South Wales on 10 January 1902. Certified copies of the entries of birth of the remaining children born in New Zealand from 1906 to 1922 inclusive disclosed that the father was 'Tantau' and the mother was 'Eliza Tantau' and her maiden name was 'Tweed'. A certified copy of the entry of death of Louis James Tantau in New Zealand on 10 January 1950 stated that he had been married at 'Munda' Queensland at the age of 30 to Eliza Ann Tweed, and a 'Copy of Register of Marriage' from

[7] Andrews v. Parker [1973] Qd. R. 94 at 101. Though this case is perhaps the most graphic instance, there are others; see, for example, Eves v. Eves [1975] 2 All E.R. 768.

[8] [1978] V.R. 617.

New Zealand purporting to be signed by the officiating minister recorded the marriage of Eliza Ann Tantau on 15 December 1950 and described her as a widow and stated the date of her husband's death as 17 January 1950.

An affidavit by the wife of the second eldest of Tantau's children, and who married in 1928, stated, *inter alia* that Louis James Tantau and Eliza Ann Tantau 'lived as man and wife' in New Zealand 'and were considered by general repute to be husband and wife. Certainly, within the Tantau family, they were regarded as lawfully married to one another', and it stated also that she had been told by Eliza Ann Tantau that on the journey from Australia to New Zealand (which took place in 1905 or 1906) the couple had 'lost all their personal effects, including wedding presents and their papers'. Further an affidavit by the youngest of the said children stated, *inter alia,* that he 'always believed' that his parents were 'lawfully married. Certainly, they lived together as man and wife and were generally considered by public repute to be husband and wife. They were always treated within the Tantau family as being married.' He understood that they were married at Gympie in Queensland, and in addition to being told of the loss of all their personal belongings on the journey from Australia, he had been told by his father that he had written to the Registrar at Gympie for the purpose of obtaining copies of lost documents but a fire had destroyed the Register and no trace could be found of the documents required. Three letters written by relatives, after the death of T., to Louis James Tantau were exhibited to the son's affidavit. The first was from a sister informing him of the death and sending 'kindest regards to your wife and family'. The others were from two brothers-in-law, and contained details of the disposition of the estate including a reference to his 'children' sharing. There was no relevant evidence from the other children of Louis James Tantau, all of whom were still living, nor was there any evidence of searches of the records of the other colonies of Australia where he might have lived and married before he came to be in Queensland in 1902. The judge held that, in all the circumstances, the presumption of the validity of the marriage had been rebutted.

First, Harris J. commented[9] that, unlike the presumptions of formal and essential validity[10], there was no long standing authority for the application of the presumption of marriage arising from cohabitation. However, reference was then made[11] to the Privy Council decision in

9 Id. at 624.
10 See Piers v. Piers (1849) 11 H.L.C. 331.
11 [1978] V.R. 617 at 625.

Sastry Velaider Aronegary v. *Sembecutty Vaigalie,*[12] where Sir Barnes Peacock had said that, '. . . where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage.' The judge went on to refer to other cases where the presumption had arisen[13] and finally adopted the statement contained in the joint judgment of Dixon C.J. and Fullagar and Menzies JJ. in the High Court of Australia's decision in the well known case of *Jacombe* v. *Jacombe.*[14] There, it was stated that '. . . proof that the parties lived together and were accepted as man and wife raised a presumption that they were validly married . . . which is rebuttable only by clear and cogent evidence.'

The kind of evidence which is necessary to rebut the presumption has, indeed, been variously described. Apart from the 'clear and cogent' formula utilised by the High Court in *Jacombe* and, thus, in *Re Pennington,* other expressions have been used, such as '. . . clear and conclusive evidence'[15], '. . . evidence of the most cogent kind'[16] and, '. . . firm and clear evidence'[17]. All these formulations suggest that the presumption is a strong one, even if there is scant uniformity in the manner of expression. Members of the judiciary are not alone in this regard, Harris J. went on, in *Re Pennington*[18], to refer to the standard works on the law of evidence and to note that, curiously, authors differ very considerably in the ways in which the presumption was stated. In *Halsbury's Laws of England,* the presumption is, in fact, stated in three separate and distinct ways: first, '. . . and mere cohabitation as man and wife, if the parties were esteemed and reputed by those who knew them, may suffice to raise the presumption'.[19] Second, 'Where a man and a woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife a lawful marriage between them will generally be presumed, though there may be no positive evidence of any marriage having taken place, and the presumption can be rebutted only by strong and weighty evidence to the contrary.'[20] Third, and more recently, 'Where a man and a woman have cohabited

12 (1881) 6 App. Cas. 364 at 371.
13 Re Taylor (decd.), Taylor v. Taylor, supra; Re Peatling (decd.) [1969] V.R. 214; Sheludko v. Sheludko [1972] V.R. 82; Solomko v. Solomko (Sup. Ct. Victoria, 1977, Unreported): Jacombe v. Jacombe (1961) 105 C.L.R. 355.
14 (1961) 105 C.L.R. 355 at 360.
15 Marks v. Marks (1907) 6 W.L.R. 329 at 339 per Irving J.
16 Re Taplin, Watson v. Tate [1937] 3 All E.R. 105 at 108 per Simonds J.
17 Re Taylor, Taylor v. Taylor [1961] 1 All E.R. 55 at 63 per Harman L.J.
18 [1978] V.R. 617 at 625.
19 *Halsbury's Laws of England* 3rd ed. (1956), para. 627.
20 Id. para. 1323.

for a long time and in such circumstances as to have acquired the reputation of man and wife . . . there will generally be a presumption that a lawful marriage exists . . .'[21] It will be observed that only one of these descriptions, the second, refers to the kind of evidence necessary to rebut the presumption and, hence, to the presumption's weight. Harris J. then referred to *Phipson on Evidence*[22] which contained the statement, '. . . mere cohabitation may suffice to raise a presumption of valid marriage.' In the Australian Edition of *Cross on Evidence,*[23] the *dictum* in the *Sastry Velaider* case was adopted and the author expressed doubt as to whether—and, if so, how—required evidence in rebuttal differed in the cases of the presumption arising from cohabitation and the presumptions of formal and essential validity.[24] Taken together with the cases on the matter, these comments by text writers serve to show that there is considerable uncertainty as to the precise operation of the presumption and the kind of evidence which is necessary to rebut it.

To return to the actual decision in *Re Pennington,* Harris J. held that the evidence of the particulars, the declarations and the reputation should raise the presumption which, unless rebutted, should lead to the conclusion that Louis James Tantau and Eliza Tweed were married. Accordingly, it fell to be decided whether the available evidence was sufficient to rebut the presumption. The judge was of the opinion[25] that the evidence of the absence of any record of the marriage in either Queensland or New South Wales was 'clear and cogent' evidence as required by the *Jacombe* test. Particular emphasis was laid by the judge on the issue of the absence of records and noted[26] the remark of Lord Evershed M. R. in *Re Taylor*[27] to the effect that the absence of such records were, '. . . formidable points'. The judge had earlier commented[28] that, by 1900, a compulsory system of registration of marriages had been in force for some time in New South Wales, Victoria and Queensland and, '. . . whilst these systems could be defective at a number of points, it seems unlikely that the clergy and official persons who celebrated marriages and the public servants whose duty it was to compile the registers, would have failed to carry out their statutory

21 *Halsbury's Laws of England* 4th ed. (1976), para. 627.
22 *Phipson on Evidence* 11th ed. (1970), para. 2019. The same form of words is used in the following edition, see 12th ed. (1976), para. 2122.
23 *Cross on Evidence* Aust. ed. (1970), at pp. 147-149. The same approach is adopted in the following edition, see 2nd ed. (1979) at 131-133.
24 Cf. Bates, supra text at n. 5.
25 [1978] V.R. 617 at 630.
26 Id. at 630.
27 [1961] 1 All E.R. 55 at 62.
28 [1978] V.R. 617 at 627.

duty. There is nothing in the evidence to show that use of the registers has revealed that they are defective for the relevant period.' In addition, Harris J. specifically refuted[29] the view which seems to emerge from the judgment of Kekewich J. in *Re Shephard*[30] to the effect that rebuttal of the presumption was all but impossible.

Despite the fact that Harris J. reiterated[31] that the presumption arising out of cohabitation was a strong one and that social considerations arose from its rebuttal, he decided against the marriage's validity. Since the proximity of the facts in *Pennington* to cases such as *Re Taylor* and *Re Taplin* is only too apparent, it is hard to avoid one of two alternative conclusions. First, despite the reiteration of the *Jacombe* formula, less evidence is now required to rebut the presumption in the past or, second, that the word 'cogent' has somehow changed its meaning since *Jacombe* was decided.

There are good policy reasons for adopting the former course, quite apart from the fact that it is altogether more elegant and easier to apply. As we have seen,[32] the social consequences of rebuttal are far less stringent than they were in the past and the law, broadly based, should take proper cognisance of such social change. In addition, with regard to the operation of the presumption, such a view would accord with other developments: in Canada, Dickson J. of the Canadian Supreme Court, in *Powell* v. *Cockburn*[33], warned that the presumption should not be given an artificial probative force. In Australia, Watson S.J. of the Family Court of Australia in *In the Marriage of Kirby and Watson*[34] similarly stated that, 'The presumption of validity of marriage can be taken too far. Once there is a challenge to validity the court being put on notice should apply ordinary rules of common sense to the inferences to be drawn from what facts are known. Where status is involved it may avail little to erect artificial rules as to presumptions and onus of proof.'

The presumption of marriage arising from cohabitation has served the law and individuals well over the years. There are strong signs, including *Re Pennington,* that that utility is diminishing. In recognition of that service, the best course, it is suggested, would be formally to recognise the fact and refurbish the presumption to suit contemporary needs.

29 Id. at 630.
30 [1904] 1 Ch. 456. For comment, see Bates, supra n. 4 at pp. 348-349.
31 [1978] V.R. 617 at 630.
32 Supra text at n. 7; also Bates, supra n. 4 at 341-342.
33 (1976) 22 R.F.L. 155 at 161.
34 (1977) F.L.C. 90-261 at 76, 403.