then the statute renders this expense a preferred claim against the wife's separate estate.[14]

Other legislative enactments which have subjected the wife to liability for necessaries have been consistently construed to create a liability secondary to the duty of the husband. Thus, a provision in the Missouri statutes providing that the personal property of a married woman shall be liable for the debts of her husband created for family necessaries[15] is applicable only when the husband is unable to pay,[16] and the wife may subsequently maintain an action against the husband for recoupment.[17] In other jurisdictions, Family Expense statutes, which provide that the estate of the wife may be held for the expenses of the family, have been similarly interpreted.[18] In the case of *In re Estate of Wood*, the Supreme Court of Missouri emphatically announced that the Married Woman's Act and related legislation have not diminished the common-law duty of the husband to provide the wife with necessaries.[19] It seems, therefore, in the light of this general legislative attitude,[20] and of the apparent intent and purpose of the administration statute, that this enactment should not modify the husband's primary obligation to pay the burial expenses of his wife. Of course, where the wife desires to assume the obligation of her funeral expenses, a provision in her last will to that effect will place the ultimate liability upon her separate estate rather than upon the husband.[21]

M. J. G.

FAMILY LAW—THE PRESUMPTION IN FAVOR OF THE VALIDITY OF THE SECOND MARRIAGE IN CIVIL CASES—[Missouri].—Two recent St. Louis Court of Appeals cases,[1] *De Ra Luis v. Carter Carbureter Co.* and *Ribas v. Stone and Webster Engineering Co.*, raise one of the most illusive conceptions in the field of family law—the presumption of the validity of a second marriage. Cases involving this presumption arise most often under the work-

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14. Carpenter v. Hazelrigg, 103 Ky. 538, 45 S. W. 666 (1898); Gould v. Maulahan, 53 N. J. Eq. 341, 33 Atl. 483 (1895); Fogg v. Halbrook, 88 Me. 169, 33 Atl. 792 (1895).

15. R. S. Mo. 1929, sec. 3003.

16. Nunn v. Carroll, 83 Mo. App. 135 (1900); Megraw v. Woods, 93 Mo. App. 647, 67 S. W. 709 (1902).

17. Madden, *Persons and Domestic Relations* (1931) 179-204; Brauwere v. Brauwere, 203 N. Y. 460, 96 N. E. 722, 38 L. R. A. (N. S.) 508 (1911); Kosanke v. Kosanke, 137 Minn. 115, 162 N. W. 1060 (1917).

18. Note, 13 A. L. R. 1396 (1921); Hyman v. Harding, 162 Ill. 357, 44 N. E. 754 (1896); Wilson v. McCarthy, 48 Cal. App. 697, 192 Pac. 337 (1920).

19. 288 Mo. 588, 600, 232 S. W. 671 (1921); See also, Rudd v. Rudd, 318 Mo. 935, 2 S. W. (2d) 585 (1928).

20. Supra, notes 12 and 13.

21. Wheeler's Estate, 4 Pa. Dist. Rep. 265 (1895); Re Stadtmuller, 96 N. Y. Supp. 1101, 1102 (1905); Gustin v. Bryden, 205 Ill. App. 204 (1917).

1. 94 S. W. (2d) 1130 (Mo. App., 1936); 95 S. W. (2d) 1221 (Mo. App., 1936). The cases were tried by the same Commissioner and Judges on June 2 and July 7, respectively.

men's compensation acts, in which two women claim to be the widow of the deceased and entitled to compensation.

Where there has been a valid marriage[2] and evidence is brought forward showing a prior marriage, but without evidence as to its prior termination the courts will presume either (1) that the prior marriage was invalid,[3] (2) that it had been dissolved by death,[4] (3) or that it had been ended by a decree of divorce.[5] Such presumptions are made because "the law presumes innocence, not guilt; morality, not immorality; marriage, not concubinage."[6] The law also presumes legitimacy not bastardy.

But these presumptions raise conflicts,[7] for the law also presumes the continuity of life[8] and the continuity of marriage.[9] The presumption of innocence, however, is generally held to govern.[10] In Massachusetts and Wisconsin the courts refuse to apply this presumption under the circumstances here involved,[11] and in Iowa the court has held that: "There must be something based on the acts and conduct of both parties inconsistent with the continuance of the (first) marriage relation before the presumption should be indulged."[12] Missouri is in that group of states[13] which

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2. In Missouri a common law marriage (entered into before 1921) is entitled to the presumption. Sanders v. Central Building Materials Co., 43 S. W. (2d) 863 (Mo. App., 1931); Contra, Calhoun v. Dotson, 32 S. W. (2d) 656 (Texas, 1930), common law marriage not favored over a prior formal marriage. But see Holman v. Holman, 288 S. W. 413 (Tex. Comm. App. 1926).

3. Palmer v. Palmer, 162 N. Y. 130, 56 N. E. 501 (1900). This is not often used because of the disagreeable incidents of calling a marriage void from the beginning.

4. Hunter v. Hunter, 111 Cal. 261, 43 Pac. 756, 52 A. S. R. 180, 31 L. R. A. 411 (1896); Smith v. Fuller, 138 Ia. 91, 115 N. W. 912, 16 L. R. A. (N. S.) 98 (1908); Sneathen v. Sneathen, 104 Mo. 210, 16 S. W. 497, 24 A. S. R. 326 (1891); Jackson v. Phalen, 237 Mo. 142, 140 S. W. 879 (1911).

5. The presumption of divorce is most often found in the cases. See note 17.

6. Griggs v. Pullman Co., 40 S. W. (2d) 463 l. c. 464 (Mo. App., 1931).

7. For article discussing presumptions in marriage law in general see Note, 82 U. of Pa. L. Rev. 508 (1934).

8. Brown v. Parks, 173 Ga. 228, 160 S. E. 238 (1931); Harris v. Harris, 8 Ill. App. 57 (1880); Johnson v. Johnson, 114 Ill. 611, 3 N. E. 232, 55 A. S. R. 884 (1885); Gilroy v. Brady, 195 Mo. 205, 93 S. W. 279 (1906).

9. Shepard v. Carter, 86 Kan. 125, 119 Pac. 533 (1911); Klein v. Laudman, 29 Mo. 259 (1860); Cargile v. Wood, 63 Mo. 501 (1876); Nelson v. Jones, 245 Mo. 579, 151 S. W. 80 (1912).

10. Supra, note 8. Presumption is that life continues for seven years from the time last heard from and death is presumed after that time. But where the remaining spouse remarries before seven years the presumption in favor of the second marriage operates. 18 R. C. L. 417.

11. Randlett v. Rice, 141 Mass. 385, 6 N. E. 238 (1886); Williams v. Williams, 63 Wisc. 58, 23 N. W. 110 (1885).

12. Ellis v. Ellis, 58 Ia. 720 l. c. 723, 13 N. W. 65 (1882). Also In re Colton's Estate, 129 Ia. 542, 105 N. W. 1008 (1906); Gilman v. Sheets, 78 Ia. 449, 43 N. W. 299 (1889). By the Iowa rule the courts have held that where the other party to the first marriage has behaved in a way which would not give grounds for divorce, the court will not presume that the

hold the presumption in favor of the second marriage to be a rigid presumption[14] which arises when the second marriage is attacked,[15] and places on the attacking party the burden of proving the continued existence of the first marriage, by means of "a chain of evidence which will aggressively exclude every indication or suggestion which might conceivably rescue the second marriage from invalidity."[16] The law in Illinois, Kansas, Oklahoma, and Arkansas is similar to that of Missouri on this point.[17]

In *De Ra Luis v. Carter Carburetor Co.* the presumption in favor of the second marriage was overcome. The wife of the deceased by his first marriage, seeking compensation under the workman's compensation act, established that the deceased knew at all times where the plaintiff lived, that she had not been notified of divorce proceedings,[18] that she had not her-

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deceased would have given false testimony to secure a divorce, and the presumption is rebutted. See also Maier v. Brock, 222 Mo. 74, 120 S. W. 1167, 133 A. S. R. 513, 17 Ann. Cases 673 (1909); Cole v. Cole, 153 Ill. 585 (1894). But see Potter v. Clapp, 203 Ill. 204 (1911). Interesting case on this point Rustia v. Ramos, 48 Philippine 292 (1925). Only ground of divorce adultery, and court would not presume it.

13. For classification of states in relation to this rule see Chesbrough, The Presumption of Divorce (1913) 7 Ill. L. Rev. 540.

14. Johnson v. St. Joseph Terminal R. R. Co., 203 Mo. 381, 101 S. W. 641 (1907); Philips v. Wilson, 298 Mo. 186, 250 S. W. 408 (1923); Woods v. American Coal and Ice Co., 25 S. W. (2d) 144 (Mo. App., 1930); Griggs v. Pullman Co., supra, note 6; Dinkelman v. Hovekamp, 336 Mo. 567, 80 S. W. (2d) 681 (1934); In re Wild's Estate, 90 S. W. (2d) 804 (Mo. App., 1936).

15. But where there is an attempt to prove the validity of the second marriage and the first marriage is attacked, the presumption in favor of the continuance of marriage will rise in favor of the first marriage. 62 Ga. 407 (1879); Cargile v. Wood, 63 Mo. 501 (1876); Re Hamilton, 76 Hun. 200, 27 N. Y. Supp. 813 (1894).

16. Griggs v. Pullman Co. 40 S. W. (2d) 463 l. c. 464 (Mo. App., 1931).

17. *Arkansas:* Goset v. Goset, 112 Ark. 47, 164 S. W. 759 (1914); Latham v. Latham, 175 Ark. 1032, 15 S. W. (2d) 67 (1928); Spears v. Spears, 178 Ark. 720, 12 S. W. (2d) 875 (1929).

Kansas: Schuchart v. Schuchart, 61 Kan. 597, 60 Pac. 311, 50 L. R. A. 180, 78 A. S. R. 342 (1900); Lyon v. Lash, 79 Kan. 342, 99 Pac. 598 (1909); Shepard v. Carter, 86 Kan. 125, 119 Pac. 533 (1911); Kinney v. Woodmen of the World, 110 Kan. 323, 203 Pac. 723 (1922).

Illinois: Cartwright v. McGown, 121 Ill. 388 (1887); Schmisseur v. Beatrie, 147 Ill. 210 (1893); Cole v. Cole, 153 Ill. 585 (1894); In re Estate of Dedmore, 257 Ill. App. 519 (1930), where showing that no bill for divorce was filed in places of residence was held sufficient to rebut the presumption of divorce. Harris v. Harris, 8 Ill. App. 57 (1880); Coal Run Coal Co. v. Jones, 127 Ill. 379 (1886); Potter v. Clapp, 203 Ill. 592 (1903); Winter v. Dibble, 251 Ill. 204 (1911); Crysler v. Crysler, 330 Ill. 74 (1928).

Oklahoma: Coachman v. Sims, 36 Okla. 536, 129 Pac. 845 (1913); Hale v. Hale, 40 Okla. 101, 135 Pac. 1143 (1913); Chancey v. Whinnery, 47 Okla. 273, 147 Pac. 1036 (1915); James v. Adams, 56 Okla. 450, 155 Pac. 1121 (1916); Zimmerman v. Holmes, 59 Okla. 253, 159 Pac. 303 (1916); Templeton v. Jones, 127 Okla. 1, 259 Pac. 543 (1927).

18. Jackson v. Phalen, 237 Mo. 142, 140 S. W. 879 (1911); Osmak v. American Car and Foundry Co., 328 Mo. 159, 40 S. W. (2d) 714, 77 A. L. R. 722 (1931), where the first wife was in Hungary.

self instituted suit for divorce, and that she had treated her husband with kindness. The inference was that the plaintiff had not given the deceased grounds upon which he might have obtained a divorce.[19] The deputy circuit clerk of St. Louis had searched the records for a divorce between the parties and had found none, and it was proved that both parties had, at all times, resided in St. Louis. Thus the criticism, made in other cases,[20] that the evidence of the absence of divorce proceedings was not the best available, was surmounted. The deceased, in applying for his second marriage license, had used an assumed name and a false address. The court was convinced by the accumulation of circumstances. The decision is more satisfying to the practical sense than earlier cases which have placed an impossible burden upon the party seeking to sustain the first marriage.[20a]

In *Ribas v. Stone and Webster Engineering Co.*, another compensation case, efforts to support the continuance of the first marriage were defeated by the length of time between the desertion of the first wife and marriage to the second,[21] uncertainty as to the deceased's whereabouts during this period, which made it practically useless to search the records for divorce proceedings, and a statement by the deceased to his second wife that he was not married. Against this evidence the plaintiff relied largely on false statements by the deceased in his application for his second marriage license, to the effect that he had not been previously married. The court upheld the presumption in favor of the second marriage, affirming the decision of the commissioner.

The case is unique in that the second wife had divorced the deceased and was not claiming compensation. The defendants were the employer and the insurance company, and the result of the decision was that they paid no one. At the trial, absent all presumptions, the defendants would, of course, be entitled to prove that there was no widow. Here, in addition, they were permitted to bolster their case by means of the presumption. The decision breaks new ground, since ordinarily the presumption has the purpose of supporting continuing marriages and the legitimacy of children.

The presumption in favor of the validity of second marriages is justified in a practical sense. The deceased, of course, is unable to testify to the death or divorce of his former spouse. The presumption gives the court an opportunity to come to the aid of a second wife or the children of a second marriage when they are without means of proving a previous death or divorce and when the other claimant, though fortified with testimony, is lacking in the equities.

B. W. T.

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19. See supra, note 12.

20. Griggs v. Pullman Co., supra, note 16; Osmak v. American Car and Foundary Co., supra, note 18.

20a. See cases in notes 14, 17.

21. Apparently the longer the lapse of time the greater the odds that the deceased had obtained a divorce. See Maier v. Brock, supra, note 12, where the court gave much weight to the long lapse of time between the desertion and the subsequent marriage.