

What then, if any, is its effect upon the relations of Philinda Todd and Parley Hunt the elder? In their inception, in 1826, clearly none. Not because Gideon Todd was still alive. That is the very circumstance to which, and to which only, this legislation has application: *Re Nesbitt*, 3 Demarest at p. 336. But because the requisite period of 5 years had not then elapsed. These parties, it is admitted, went through a ceremony of marriage in 1826. They never intended to cohabit illicitly. The 5 years from her desertion by Gideon Todd expired, I have found upon the evidence, prior to the time, in November, 1829, when Philinda Ellison gave birth to Parley Hunt the younger. If it were proved that a marriage had taken place between these parties during this interval, the Act of 1830 would apply to it. Should such a marriage by mutual consent be presumed?

I do not see how such a presumption can be made. The fact of the continued existence of Gideon Todd being established, there was no presumption of his death. Nothing had occurred to remove or extinguish the impediment of the marriage to him up to the end of 1829. Though, if there had been actual proof of a marriage in 1829, after the 5 years had expired, the statute of 1830, by its retrospective operation, might validate it, it is quite another thing, in the absence of such evidence, to presume that these parties did an act which, though not criminal, by reason of the saving statute of 1788, would certainly have been, at that time, illegal. Nothing in the statute of 1830 compels or even countenances a presumption so contrary to the fundamental principles of jurisprudence. It is only upon the cesser of the impediment, actual or presumed, that even the strong presumption in favour of marriage can prevail. It being, therefore, impossible to presume that a marriage took place between his parents in 1829, the statute of 1830 finds no subject of that date upon which it could operate, and it necessarily follows that Parley Hunt the younger was born out of lawful wedlock and as an illegitimate child.

But, if the effect of the statute of 1830 when it became law was, in the case of a person whose husband or wife had been absent for 5 successive years, without being known to such person to be living during that time, to extinguish or neutralize the obstacle opposed to his or her marriage by the former marriage undissolved, and to render such a person capable of entering into a new marriage contract, may not and should not it be presumed that parties in the position occupied by Philinda Ellison and Parley Hunt the elder married eo instanti that the statute became law? Upon the