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COMMON-LAW MARRIAGE: WHAT IT IS AND HOW TO PROVE IT

"Marriage" may be defined as a civil status of one man and one woman capable of contracting, united by contract and mutual consent for life, for the discharge, to each other and to the community, of the duties legally incumbent on those, whose associations are founded on the distinction of sex.¹ A common-law marriage is a civil contract and, in the absence of special statutory requirements, is completely consummated *per verba praesenti*, even though not followed by cohabitation.²

Common-law marriages are recognized in eighteen states.³ South Carolina is one of those states which recognizes them.⁴ Generally, the question of the validity of a common-law marriage comes into focus in settlements of decedents' estates, legitimacy of children situations, Workmen's Compensation cases, cases involving the wife's dower rights, bigamy proceedings, and Wrongful Death cases. The law of common-law marriage, as laid down by the case decisions in South Carolina, is not replete. In this note wherever possible the law applicable to South Carolina has been cited; however, where no South Carolina law covering the point could be found, the law from other jurisdictions which recognize the common-law marriage is cited.

CHARACTERISTICS OF COMMON-LAW MARRIAGE

The law of marriage in this country traces its origin back to the ancient canon law, which consisted of the decrees of the various Popes, was the basis of the matrimonial law in England, and has been recognized there ever since the establishment of Christianity.⁵

In view of the importance of marriage as a social institution and the benefits accruing therefrom, it is favored by pub-

1. 55 C.J.S. *Marriage* § 1 (1948).

2. *McGreery v. Davis*, 44 S. C. 195, 22 S. E. 178 (1893).

3. KEEZER, *MARRIAGE AND DIVORCE* § 20 (3d ed. 1946). Alabama, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Michigan, Mississippi, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Texas.

4. CODE OF LAWS OF SOUTH CAROLINA § 20-3 (1952). See also § 20-31 (marriage without a license); *Fryer v. Fryer*, Rich. Eq. Cas. 85 (S. C. 1832); *Tedder v. Tedder*, 108 S. C. 271; 94 S. E. 19 (1914), 2 A.L.R. 438 (1919).

5. 13 AM. JUR. *Marriage* § 2 (1941).

lic policy and the law.⁶ It follows that a marriage will, if possible, be upheld as valid⁷ and that its validity will be presumed unless disproved.⁸ A statute will not be construed to make a marriage void unless the legislative intent to such effect is clear and unequivocal.⁹

Ordinarily the status of marriage continues during the joint lives of the parties or until divorce or annulment.¹⁰ This is true of a common-law marriage.¹¹

The general rule in this country is that a common-law marriage, where its validity is recognized, carries with it the same rights and incidents as a ceremonial marriage.¹² In England, however, by the ancient common law, a common-law marriage, although binding and indissoluble, would not entitle the parties to all those legal privileges they would enjoy if married according to the form required by statute or ecclesiastical law.¹³ The ecclesiastical courts had exclusive jurisdiction to determine the question of the legality of a marriage, and held that the wife of a common-law marriage was not entitled to dower and that the children of the marriage were illegitimate.¹⁴

REQUISITES OF A COMMON-LAW MARRIAGE

An agreement or consent to become husband and wife immediately at the time of the agreement is necessary to a common-law marriage. This is known as a marriage *per verba de praesenti*.¹⁵

It has frequently been said that mutual promises to marry in the future, followed by sexual intercourse, constitute a common-law marriage, that consent *per verba de futuro cum copula* is sufficient.¹⁶ This apparently was the rule of the canon law and was, it seems, applied by the ecclesiastical courts in England prior to the Marriage Act of 1753.¹⁷ But

6. Sanders v. Sanders, 52 Ariz. 156, 79 P. 2d 523 (1938).

7. Tarleton v. Thompson, 125 S. C. 182, 118 S. E. 421 (1922).

8. Tyson v. Weatherly, 214 S. C. 306, 52 S. E. 2d 410 (1949).

9. Woodward v. Blake, 38 N. D. 38, 164 N. W. 156 (1917).

10. Smith v. Fuller, 138 Iowa 91, 115 N. W. 912 (1908).

11. Catlett v. Chestnut, 107 Fla. 493, 146 So. 241 (1933).

12. Lavery v. Hutchinson, 249 Ill. 86, 94 N. E. 6 (1911); 55 C. J. S. Marriage § 6 (1948).

13. Newberry v. Brunswick, 2 Vt. 151, 19 Am. Dec. 703 (1829), wherein Blackstone's Commentaries is quoted.

14. Newberry v. Brunswick, *supra*. See also Stringfellow v. Scott, Rich. Eq. Cas. 109, 111 (S. C. 1832).

15. Meister v. Moore, 96 U. S. 76 (1877).

16. 2 KENT. COMM. 87 (12th ed. 1896).

17. DOEZEL, *Common Law Marriage* (2d ed. 1920).

this writer cannot find a United States decision holding such a marriage valid. Indeed, if it were, there could be no such thing as seduction under promise of marriage, unless by a man who was already married or otherwise legally incapable of marriage, for the intercourse would make the parties man and wife.¹⁸ The American rule is that a mere agreement to marry in the future, though followed by cohabitation, is not a marriage, unless such cohabitation is intended and understood by the parties as a consummation of the marriage, and a converting of the executory agreement into a present actual marriage.¹⁹ If the cohabitation is not in consummation of the agreement, but is commenced in reliance upon a mere promise or agreement to marry in the future, a marriage *per verba de futuro* is not established.²⁰ To the extent, then, of refusing to recognize a marriage as arising out of consent *per verba de futuro cum copula*, our American common law of marriage probably differs from the common law of England prior to its Marriage Act.

A marriage *per verba de praesenti* may be valid, though no express words are used. All that is necessary is that the parties shall intend to marry, and that their intention shall appear either by their words, or by their conduct.²¹

As the law stands, a valid marriage, to all intents and purposes, is established by proof of an actual contract *per verba de praesenti* between persons of opposite sexes, capable of contracting, to take each other for husband and wife, especially where the contract is followed by cohabitation. No solemnization or other formality, apart from the agreement itself, is necessary.²²

It is not essential that the contract be entered into before witnesses.²³ The agreement being the essential element in these marriages, it may, like any other agreement, be proved by words or by conduct,²⁴ and by testimony of the parties themselves²⁵ or by the testimony of third parties.²⁶

18. Fryer v. Fryer, Rich. Eq. Cas. 85 (S. C. 1832).

19. Fryer v. Fryer, *supra*; 55 C. J. S. *Marriage* § 19 (1948).

20. Hill v. State, 41 Ga. 484 (1871).

21. Fryer v. Fryer, *supra* note 18; Rodgers v. Heron, 226 S. C. 317, 85 S. E. 2d 104 (1954).

22. Van Tuyl v. Van Tuyl, 57 Barb. 237 (N. Y. 1869).

23. Davis v. Stoaffer, 132 Mo. App. 555, 112 S. W. 282 (1908).

24. Fryer v. Fryer, Rich. Eq. Cas. 85 (S.C. 1832).

25. Tarleton v. Thompson, 125 S. C. 182, 118 S. E. 421 (1922).

26. Fryer v. Fryer, *supra* note 24.

When the consent to marry is manifested by words *de praesenti*, a present assumption of the marriage status is necessary.²⁷ That is, the parties must intend, then and there, immediately to become husband and wife. The marriage must be complete at the time of the agreement and not be left to the future. It is not sufficient to agree to present cohabitation,²⁸ and a future regular marriage when more convenient,²⁹ or when a husband or wife shall die, or when a license can be obtained, or a ceremony can be performed;³⁰ but there must be a present marriage by agreement.³¹ The rule that a present assumption of the marriage status is necessary to constitute a valid common-law marriage does not, according to the weight of judicial authority, mean that cohabitation as husband and wife must follow the agreement before the marriage is perfect.³² *Consensus non concubitus facit matrimonium* is the usual expression. It is the consent and not the cohabitation which constitutes the marriage.³³ It must be admitted, however, that in most of the cases where such expressions are found, there was, in fact, cohabitation,³⁴ and in only a few cases have marriages by consent, and without cohabitation, been actually involved and upheld.³⁵ There are, however, some jurisdictions in which marital cohabitation has actually been held to be a necessary element of a common-law marriage; the position apparently being that the cohabitation must be, not merely one or more acts of sexual intercourse, but

27. Fryer v. Fryer, *supra* note 24.

28. Tedder v. Tedder, 108 S. C. 271, 93 S. E. 19 (1914). "Cohabitation, as applied to common-law marriage, means to live or dwell together, to have the same habitation, so that where one lives and dwells there does the other live and dwell also."

29. Fryer v. Fryer, Rich. Eq. Cas. 85 (S. C. 1832).

30. Fryer v. Fryer, *supra* note 29. R. and B. agreed to get married, and friends arranged an entertainment for the occasion. Unable to find a justice, it was agreed that they should pretend to the couple's company, including the girl's mother, that they were married, and that they would actually get married later. They informed their company as agreed, cohabited together for several years, but there was no proof of any actual marriage, though it was supposed by many that they were married. The alleged husband stated on one occasion that he had no wife. After the couple ceased to live together the woman married F., and B. threatened F.'s life for taking his wife, but did nothing more about it. It was held that R. was not the wife of B., and her marriage to F. was legal.

31. *Ex parte* Blizzard, 185 S. C. 131, 193 S. E. 633 (1937).

32. Rutledge v. Tunns, 69 S. C. 400, 48 S. E. 297 (1903).

33. Hulett v. Carey, 66 Minn. 327, 69 N. W. 31 (1896).

34. Gregby v. Reib, 105 Tex. 599, 153 S. W. 1124 (1913).

35. United States v. Simpson, 4 Utah 227, 7 Pac. 257 (1885); 32 HARV. L. REV. 473 (1919); 3 MINN. L. REV. 426 (1913).

marital cohabitation professedly and openly as man and wife.³⁶

As a general rule, an infant is not permitted to contract in marriage until he or she has attained the age of legal consent. At common law the age of consent in the case of males is fourteen years,³⁷ and in the case of females twelve years,³⁸ and, while in some jurisdictions, the common-law ages have been retained,³⁹ in a majority of jurisdictions they have been increased by statute.⁴⁰

At common law, the attempt of an infant under seven years of age to contract in marriage is nugatory and without legal significance,⁴¹ but the marriage of an infant over seven years of age, but below the age of legal consent, is not absolutely void, but is a voidable, or an imperfect, or inchoate marriage.⁴²

Where the marriage is voidable, only a party to the marriage may avoid it,⁴³ and, where only one of the parties is under the age of consent at the time of the marriage, the other may not avoid the marriage on such ground.⁴⁴ Marriages which are voidable because one or both of the parties were below the age of consent at the time of the marriage are valid and binding until disaffirmed⁴⁵ or until annulled by a judicial decree.⁴⁶

Where a party to the voidable marriage contracted within the nonage reaches the age of consent, he or she may elect to ratify or repudiate the contract, but, having elected to affirm, he or she may not thereafter disaffirm.⁴⁷ Likewise, where a party to a voidable marriage fails to exercise the option to avoid during his or her life and dies without repudiating the marriage by proper proceedings, the legality of the marriage cannot thereafter be attacked.^{47a}

36. *State of Maryland v. Baldwin*, 112 U. S. 490 (1884); *Herd v. Herd*, 194 Ala. 613, 69 So. 885 (1915); *Jenkins v. Jenkins*, 2 Dana 102, 26 Am. Dec. 437 (Ky. 1833).

37. *State v. Ward*, 204 S. C. 210, 28 S. E. 2d 785 (1944).

38. *Ibid.*

39. *State v. Ward*, *supra* note 37.

40. *Eskew v. Eskew*, 198 Ga. 513, 34 S. E. 2d 697 (1945).

41. *Hitchens v. Hitchens*, 47 F. Supp. 73 (D. C. Cir. 1942).

42. *State v. Sellers*, 140 S. C. 66, 134 S. E. 873 (1923).

43. *Peefer v. State*, 42 Ohio App. 276, 182 N. E. 117 (1931).

44. *Ibid.*

45. *Walls v. State*, 32 Ark. 565 (1877).

46. *Kibler v. Kibler*, 180 Ark. 1152, 23 S. W. 2d 867 (1930). See also, CODE OF LAWS OF SOUTH CAROLINA § 20-43 (1952).

47. *Kibler v. Kibler*, *supra* note 46.

47a. *Bennett v. Bennett*, 195 S. C. 1, 10 S. E. 2d 23 (1939). [involving incest.]

PRESUMPTIONS

In General

There is no presumption that persons are married.⁴⁸ However, it is a fundamental maxim of our law that where a man and woman are living together as husband and wife, marriage should always be presumed. *Semper praesumitur pro matrimonio*.⁴⁹ In other words, marriage is presumed from cohabitation. The burden of proving a marriage rests on the party who asserts it,⁵⁰ particularly where a common-law marriage is asserted.⁵¹ And the proof must be a preponderance of the evidence.⁵²

As to Validity of Marriage

It is one of the strongest presumptions of the law, grounded in public policy favoring and presuming morality, marriage, and legitimacy, that a marriage, once being shown, is presumed to be legal and valid.⁵³ The presumption of validity applies not only to ceremonial marriages but also to common-law marriages.

The strength of the presumption increases with lapse of time, acknowledgments by the parties to the marriage, and the birth of children;⁵⁴ and the fact that the legitimacy of a child may be involved is a factor in sustaining the validity of the marriage.⁵⁵

In accordance with the rule that a marriage will be presumed to be valid, where a marriage in due form is proved, all the prerequisites to its validity will be presumed, in the absence of countervailing evidence.⁵⁶ Thus the capacity of the parties will be presumed, as will also their consent.

In South Carolina there is a presumption against the marriage involving a white man and a Negro woman, or a Negro

48. *Judd v. Skidmore*, 33 Minn. 140, 22 N. W. 183 (1885).

49. *Hilton v. Raylance*, 25 Utah 129, 69 Pac. 660 (1902).

50. *Ex parte Blizzard*, 185 S. C. 131, 193 S. E. 633 (1937).

51. *Ibid.*

52. *Ex parte Blizzard*, *supra* note 50.

53. *Tarleton v. Thompson*, 125 S. C. 182, 118 S. E. 421 (1922).

54. *Id.* at 186. In this case the Court said: "The presumption is in favor of a marriage; . . . that children born in wedlock are legitimate." Evidence that part of deceased husband's penis had been removed by an operation was held not to overcome the presumption that children born in wedlock were legitimate, in view of evidence that they looked like him, and that he was fond of them, and conflicting evidence as to whether he could have sexual intercourse.

55. *Pooler v. Smith*, 73 S. C. 102, 52 S. E. 967 (1904).

56. *Reed v. Reed*, 202 Ga. 508, 43 S. E. 2d 539 (1947).

man and a white woman.⁵⁷ Intermarriage is prohibited by statute in South Carolina.⁵⁸

From Cohabitation and Reputation

Unless a marriage between the parties is prohibited by law,⁵⁹ the fact that a man and woman have openly cohabited as husband and wife for a considerable length of time, holding each other out and recognizing and treating each other as such by declarations, admissions, or conduct, and are accordingly generally reputed to be such among their relatives and acquaintances, and those who come in contact with them, may give rise to a presumption that they had previously entered into an actual marriage, although there is no documentary evidence thereof or direct testimony to that effect.⁶⁰

Neither reputation without cohabitation⁶¹ nor cohabitation without reputation⁶² will give rise to the presumption of marriage, although it has also been held without qualification that a presumption of marriage may arise from reputation⁶³ or from cohabitation.⁶⁴

When it is sought to raise a presumption from cohabitation and reputation, the cohabitation must have been apparently matrimonial,⁶⁵ and the parties must have recognized and treated each other as husband and wife, holding each other out as such, so as to create the reputation that they are married.⁶⁶ Where, also, it is sought to raise a presumption of marriage from reputation, it must be general and not divided, and contemporaneous with the cohabitation, not subsequent to its termination.⁶⁷

By the statement that proof of reputation must be single and not divided, the courts have uniformly meant that a reputation must reflect the common opinion of the community and

57. *Tedder v. Tedder*, 108 S. C. 271, 94 S. E. 19 (1914).

58. CODE OF LAWS OF SOUTH CAROLINA § 20-7 (1952).

59. *Ibid.*

60. *Fryer v. Fryer*, Rich. Eq. Cas. 99 (S. C. 1832); *James v. Mickey*, 26 S. C. 273, 2 S. E. 130 (1886).

61. 38 C. J. *Marriage* § 98 (1925). "Reputation and cohabitation at best are only presumptive proofs, and where either of these grounds fail, the courts should not allow the presumption of marriage to be built upon the other."

62. *McArthur v. Hall*, 169 S. W. 2d 724 (Tex. Civ. App. 1943).

63. *Griffith v. Lunney*, 300 Ky. 66, 187 S. W. 2d 431 (1945).

64. *Succession of Marinoni*, 183 La. 776, 164 So. 797 (1935).

65. *Fitzpatrick v. Miller*, 129 Pa. Super. 324, 196 Atl. 83 (1937).

66. *Fryer v. Fryer*, Rich. Eq. Cas. 85 (S. C. 1832).

67. *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477 (1899). [Virginia does not recognize common-law marriage today.]

not the differing opinions of the neighbors.⁶⁸ This is in accord with the majority view.⁶⁹ "A divided reputation is no reputation at all," for if the individual opinions differ there is no general reputation.⁷⁰

From Records or Lack of Records

In an action by the children of the deceased, claiming to be heirs at law of decedent for the partition of a tract of land, the plaintiffs alleging that they and the defendants were tenants in common, the defendants alleging that the plaintiffs were illegitimate when the plaintiffs offered a certificate showing that deceased parents were lawfully married, the parties having previously stipulated that the marriage, if valid, was a common-law marriage, the court refusing admittance into evidence of the certificate said:

. . . it was not shown that the minister who furnished the certificate was not living. If still alive he could have been examined as to the fact of the marriage, or another certificate, if admissible, could have been procured. If dead, the record of the marriage, if he was required to keep a record of the same, could have been obtained. If not bound to keep a record of same, his certificate, whether he was alive or dead, would have been merely the statement of a private person and would be rejected.⁷¹

Since common-law marriages require no records, there can be no presumption arising as to their validity from a certificate sought to be put into evidence. And if admitted into evidence the parties named therein must be identified,⁷² and the certificate will be subject to the requirements for admitting any other document into evidence.⁷³

From Acts, Declarations, and Admissions of the Parties

A presumption of marriage may arise from the declarations, admissions and conduct of the parties; and a valid marriage may be inferred from circumstances accruing after the time of any possible ceremony and from scanty facts.⁷⁴ It has been said that:

68. 4 WIGMORE, EVIDENCE § 603 (2d ed. 1923).

69. Eldred v. Eldred, *supra* note 67.

70. *In re Boyington's Estate*, 157 Iowa 467, 137 N. W. 949 (1912).

71. *Frederick v. Culler*, 118 S. C. 102, 190 S. E. 889 (1921).

72. *Ibid.*

73. 1 GREENLEAF, EVIDENCE § 498 (16th ed. 1899).

74. *Application of Durkin*, 93 N. Y. S. 2d 354 (1948).

If acknowledgment of marriage and cohabitation are established, a presumption of marriage is raised.⁷⁵

It has also been said that such presumption will arise provided the parties' "behavior" be consistent with the "status alleged."⁷⁶

As to Foreign Marriage

In the absence of proof to the contrary, the marriage laws of another state or country are presumed to be the same as the laws obtaining in the forum;⁷⁷ and there is no presumption that the marriage laws of another state or country are different from the laws obtaining in the forum.⁷⁸

In determining what law governs a common-law marriage, the court will presume, in the absence of evidence to the contrary, that it was contracted in the state wherein the acts occurred which are relied on as establishing the marriage.

As to Conflicting Marriages

In the case of conflicting marriages of the same spouse, the presumption of validity operates in favor of the second marriage.⁷⁹ Moreover, even where a valid first marriage has been established, it may be presumed in favor of the second marriage that at the time thereof the first marriage had been dissolved,⁸⁰ so as to cast the burden of adducing evidence to the contrary on the party attacking the second marriage, even though he is thereby required to prove a negative.⁸¹

The presumption of the validity of the last marriage has been held to be the strongest presumption known to the law, and in the absence of additional facts or circumstances it must prevail over all conflicting presumptions, such as presumptions as to the law obtaining in other states and presumptions as to the validity or continuance of a prior marriage.⁸²

As to Relations Once Shown to Exist

The fact that a marriage exists at a certain time raises no presumption of its prior existence.⁸³ However, if the marriage relation is shown once to exist it will be presumed to

75. *Ibid.*

76. *Lockett v. Adams*, 212 Ark. 899, 208 S. W. 2d 438 (1948).

77. *Bell v. Southern Casualty Co.*, 267 S. W. 531 (Tex. Civ. App. 1925).

78. *Scheper v. Scheper*, 125 S. C. 89, 118 S. E. 178 (1923).

79. *Hallums v. Hallums*, 74 S. C. 407, 54 S. E. 613 (1905).

80. *Scheper v. Scheper*, *supra* note 78.

81. *Reed v. Reed*, 202 Ga. 508, 43 S. E. 2d 539 (1947).

82. *Roberts v. Roberts*, 124 Fla. 116, 167 So. 808 (1936).

83. *Reavis v. Gardner*, 6 Cal. Unrep. Cas. 477, 60 Pac. 964 (1900).

continue in the absence of evidence of its dissolution by death or divorce.⁸⁴

If intercourse between the parties was illicit in its inception because of their failure or disability to enter into a marriage by ceremony or by agreement, it is presumed to continue so;⁸⁵ and the mere fact that the parties continued to cohabit does not give rise to a presumption of marriage.⁸⁶

The presumption that the relation once shown to exist will continue applies where a prior marriage is shown to have been in existence at the time of a second marriage.⁸⁷

From Absence for Seven Years

In the case of *In re Duncan's Estate*,⁸⁸ evidence that a woman had received no information concerning the existence of her first husband for more than seven years prior to her second marriage was held to establish a presumption of death. It seems that in this case the Court is referring to the presumption of death arising from a seven years' absence rather than a presumption of death arising from the fact of a second marriage.

These Presumptions Are All Rebuttable

The presumptions of marriage, as discussed hereinbefore, are not conclusive, but are open to rebuttal;⁸⁹ and if it appears that there was in fact no marriage between the parties either by ceremony or by informal contract the presumptions are dispelled.⁹⁰ So, for example, the presumption in favor of the validity of the second marriage of two conflicting marriages may be rebutted by evidence of a valid prior marriage of one of the parties.⁹¹ The presumption of continuance of an illicit intercourse may also be rebutted, and a matrimonial relationship may be shown, by direct or circumstantial evidence of a subsequent intermarriage of the parties.⁹²

The presumption of marriage arising from marital cohabitation and repute may be rebutted by proof that the cohabita-

84. *Hardeman v. Hardeman*, 179 Ga. 4, 175 S. E. 9 (1934).

85. *Cave v. Cave*, 101 S. C. 40, 85 S. E. 244 (1914).

86. *Howell v. Littlefield*, 211 S. C. 462, 46 S. E. 2d 47 (1947); *Bannister v. Bannister*, 150 S. C. 411, 148 S. E. 228 (1929); *Lemon v. Lemon*, 158 S. C. 71, 155 S. E. 285 (1929).

87. *Clark v. Glenn*, 249 Ala. 342, 31 So. 2d 507 (1947).

88. 190 S. C. 211, 2 S. E. 2d 388 (1939).

89. *Allen v. Hall*, 2 Nott & McC. 114 (S. C. 1819).

90. *Peacock v. Peacock*, 196 Ga. 441, 26 S. E. 2d 608 (1943).

91. *Long v. Brown*, 186 Okla. 407, 98 P. 2d 28 (1940).

92. *Agnew v. Agnew*, 58 S. D. 164, 235 N. W. 644 (1931).

tion was in its inception illicit and nonmaterial,⁹³ as where it is proved that at its commencement either party had a prior spouse living and undivorced or was otherwise incapacitated to contract in marriage,⁹⁴ or that he or she had previously cohabited with another in such a manner as to give rise to a presumption of marriage.⁹⁵ Moreover, if, during the cohabitation with one woman, the man cohabits also with another woman, no presumption of a marriage with either arises.⁹⁶ This presumption may likewise be rebutted by proof that the parties to the cohabitation finally separated without just cause and that one or both afterward entered into a marriage with another or afterward cohabited with another as a spouse.⁹⁷

It has generally been held that the presumptions are also dispelled by reason of the disparity of the parties in race or color.⁹⁸

In order to overcome the presumption of marriage, the evidence must be, in some jurisdictions, "cogent and satisfactory."⁹⁹ In South Carolina it is stated that the evidence must be "clear and convincing."¹⁰⁰ However, if sufficient evidence is not introduced to rebut the presumptions then the controversy is settled in favor of the presumptions.^{100a}

CONCLUSION

It would appear that courts are following a definite trend to curtail common-law marriages.¹⁰¹ Whether or not common-law marriages are in the social interest seems to have occasioned little dispute. Eminent authorities condemn this practice as a "custom which legalizes and virtually invites impulsive, impure and secret unions."¹⁰² Logical reasons in support of this disfavor are scarce. It has been asserted that the institution furthers clandestine relations.¹⁰³ This ignores

93. *Cave v. Cave*, 101 S. C. 40, 85 S. E. 244 (1914).

94. *Ex parte Blizzard*, 185 S. C. 131, 193 S. E. 633 (1937).

95. 38 C. J. *Marriage* § 111 (1925).

96. *Fryer v. Fryer*, Rich. Eq. Cas. 85 (S. C. 1832).

97. *Fryer v. Fryer*, *supra* note 96.

98. *Tedder v. Tedder*, 108 S. C. 271, 84 S. E. 19 (1914).

99. *In re Foels' Estate*, 146 Misc. 428, 263 N. Y. Supp. 327 (1933).

100. *Hallums v. Hallums*, 74 S. C. 407, 54 S. E. 613 (1905).

100a. MCKELVEY, *EVIDENCE* § 36 (2d ed. 1907).

101. KEEZER, *MARRIAGE AND DIVORCE* § 20 (3rd ed. 1946).

102. HOWARD, *HISTORY OF MATRIMONIAL INSTITUTIONS* (2d ed. 1904).

103. *Wilmington Trust Co. v. Hendrixsen*, 31 Del. 303, 114 Atl. 215 (1921).

the fact that the usual method of establishing its existence is through notoriety and repute.¹⁰⁴

Critics point out that it encourages false claims and promotes fraud on the part of adventuresses seeking to share in decedents' estates.¹⁰⁵ This is in a large measure true of all oral contracts.¹⁰⁶ Public policy does not favor divesting widows and orphans for fear that a few imposters may abuse the court system. The remedy lies rather in the direction of improving the calibre of juries and punishing perjury.¹⁰⁷ Associated with this objection is the plea that common-law marriages foster stale claims and constitute a clog on titles, because of the possibility that a widow may appear who was unknown to creditors and friends. But a very small amount of investigation will usually reveal whether a man has a wife. The property interests involved are usually titles to realty into which an exhaustive search is commonly made. The trend has widely been to curtail dower;¹⁰⁸ this eliminates the most frequent clog.

Finally, common-law marriages are said to impair the effect of statutes aimed at preventing certain types of marriages.¹⁰⁹ Even assuming that justices of the peace and license clerks were universally conscientious inquirers into the age and capacities of the parties appearing before them, in face of the temptation of the fee, the law as it stands today still does not often prevent a meretricious relationship between the parties denied a license. Moreover, a couple prohibited by statute from marrying, who undertake to marry by mutual consent, do not defeat the statute. Their marriage is void or voidable, according to the nature of the disability, as it would have been if they had obtained a license through misrepresentation.¹¹⁰

104. *Fryer v. Fryer*, Rich. Eq. Cas. 99 (S. C. 1832). See also, *Hulett v. Carey*, 66 Minn. 327, 69 N. W. 31 (1896), wherein it is stated that common-law marriages can be secret when their existence is established by direct testimony of mutual assent to be husband and wife. But cases which find a marital and not meretricious relationship in a clandestine affair are scarce.

105. 3 BROOKLYN L. REV. 155 (1933). This reason has been given as the moving force behind New York's abandonment of common-law marriages.

106. 2 U. CIN. L. REV. 113 (1928). The majority of cases involving common-law marriages arise in relation to decedent's estates rather than in maintenance, alimony, or bigamy proceedings.

107. 245 CRIM. L. REV. (N. Y.) 901 (1928).

108. 19 GEO. L. J. 306 (1931).

109. 20 MICH. L. REV. 244 (1921).

110. *Matter of Wright*, 110 Misc. 480, 180 N. Y. Supp. 625 (1920). It is obvious, for instance, that a common-law marriage between father

The desirability of abolishing common-law marriage is open to serious question. The legitimacy of children and the sanctioning of the status of the *bona fide* widow are important social factors.¹¹¹ The real bias against common-law marriage seems based on the feeling that there is something unholy and impure about them. This can probably be traced to the influence of the church on our marital institutions.¹¹² The Church Fathers for the most part failed to understand the spiritual nature of marriage — joys of comradeship, mutual understanding and sympathy. As a reaction from Roman licentiousness they swung to the concept of marriage as a sacrament and sex as a sin. In later times, this conception was congenial to an industrial society whose standards of thrift and industry left little time for the less concentrated aspects of sex.¹¹³ Since World War I, the economic and religious bonds involved have weakened,¹¹⁴ and the resulting emphasis on comradeship in marriage¹¹⁵ has tended to reduce the demands for the ceremonial. Courts and legislatures which set themselves against this tendency evince the customary "cultural lag."¹¹⁶ The English law has sought again and again to control sexual morality for the English peoples; the number of the attempts is of itself an indication of the difficulties and the failures.¹¹⁷

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and daughter would be void; nor would the written consent of a girl of eight years to marry an adult be a defense to the charge of statutory rape.

111. 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, §§ 385-389 (1891).

112. *Ibid.*

113. PARRINGTON, COLONIAL MIND p. 133 (2d ed. 1954).

114. REPORT OF PRESIDENT HOOVER'S COMMITTEE ON SOCIAL TRENDS p. 153 (1933).

115. OGBURN AND TIBBETS, THE FAMILY p. 233 (1st ed. 1934).

116. BRNEST, CHANGING LAWS AND CHANGING ATTITUDES § 21 (2d ed. 1934).

117. MAY, SOCIAL CONTROL OF SEX EXPRESSIONS p. 9 (1st ed. 1929).