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Informal Marriages in Tennessee--Marriage by Estoppel, by Prescription and by Ratification

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INFORMAL MARRIAGES IN TENNESSEE—MARRIAGE BY ESTOPPEL, BY PRESCRIPTION AND BY RATIFICATION

Common law marriages are still recognized as valid in slightly less than half of the American jurisdictions.[1] These jurisdictions usually construe their marriage statutes to be merely directory, rather than mandatory or exclusive of any other means of effecting the marriage contract.[2] They are not, however, in agreement as to the requisites of a common law marriage, beyond the uniform holding that mutual consent to become husband and wife at the time of the agreement is necessary. While some states hold such mutual consent sufficient by itself,[3] others require the consent to be followed by cohabitation openly as man and wife to make valid the informal marriage.[4] Sexual relations between a man and woman are not alone sufficient to constitute a common law marriage. There must be an agreement to assume the marriage status; and, where cohabitation and repute are relied on to show marriage, cohabitation must be as husband and wife, and not merely meretricious.[5]

Although Tennessee is always listed among those states not recognizing common law marriage,[6] the courts of the state have frequently used other techniques to hold parties to informal marriages to obligations normally incidental to statutory marriages. The present state of law in Tennessee is not accurately described by the statement that Tennessee does not recognize common law marriages,[7] and a collection and analysis of the cases on this subject may serve a useful purpose.

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1. On the general subject of common law marriages, see: 1 BISHOP, MARRIAGE AND DIVORCE §§ 268-92 (6th ed. 1881); KEEZER, MARRIAGE AND DIVORCE §§ 20-30 (Morland ed. 1946); KOEGEL, COMMON LAW MARRIAGE (1922); 2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS §§ 1169-1442 (6th ed. 1921); 1 VERNIER, AMERICAN FAMILY LAWS § 26 (1931); Black, *Common Law Marriage*, 2 U. OF CIN. L. REV. 113 (1928); Jacobs, *Common Law Marriage* in 4 ENCYC. SOC. SCI. 56 (1937); Myerberg, *Common Law Marriage*, 29 GEO. L. J. 858 (1941). For detailed treatment of informal marriages in individual states, see Hall, *Common-Law Marriage in New York State*, 30 COL. L. REV. 1 (1930); Moynahan, *Common-Law Marriage in Ohio*, 5 OHIO ST. L.J. 26, 175 (1938-39); Pacific, *Common-Law Marriage in Mississippi*, 16 MISS. L.J. 40 (1943); Note, *The Decline and Fall of Common-Law Marriage in Pennsylvania*, 18 TEMP. L.Q. 264 (1944); Note, *Common Law Marriage in Tennessee*, 19 TENN. L. REV. 83 (1945).

2. 1 VERNIER, AMERICAN FAMILY LAWS § 26 (1931); Notes, 39 A.L.R. 538 (1925), 60 A.L.R. 541 (1929), 94 A.L.R. 1000 (1935), 133 A.L.R. 758 (1941).

3. Hulett v. Carey, 66 Minn. 327, 69 N.W. 31 (1896); United States v. Simpson, 4 Utah 227, 7 Pac. 257 (1885).

4. Herd v. Herd, 194 Ala. 613, 69 So. 885 (1915), 14 MICH. L. REV. 260 (1916); Westfall v. J. P. Burroughs & Son, 280 Mich. 638, 274 N.W. 358 (1937); Griegsby v. Reib, 105 Tex. 597, 153 S.W. 1124 (1913). See Note, *Necessity of Cohabitation in Common Law Marriage*, 23 IOWA L. REV. 75 (1937).

5. *E.g.*, Edgewater Coal Co. v. Yates, 261 Ky. 335, 87 S.W.2d 596 (1935).

6. See note 2 *supra*.

7. "That Tennessee does not recognize common law marriages is a statement often used, but loosely, and with little support." Madewell v. United States, 84 F. Supp. 329, 332 (E.D. Tenn. 1949).

HISTORICAL DEVELOPMENT OF THE RULE THAT COMMON LAW MARRIAGES ARE VOID IN TENNESSEE

Bashaw v. State,[8] the first reported case questioning the validity of common law or informal marriages in Tennessee, held in 1829 that the common law on this subject had been wholly superseded by the statutes prescribing the formalities by which the marriage contract must be entered into;[9] and the court two years later reiterated this position, saying, "Since the year 1741, at the least, the common law mode of constituting a legal marriage is of no validity here." [10] But subsequently, in several decisions, the court used language which cast serious doubts upon the soundness of those early cases.[11] In 1871,[12] holding that a marriage between slaves with the assent of their owners, whether contracted in common law form or celebrated under the statute, always had been a valid marriage in Tennessee, the court declared, "There is nothing in either of those statutes[13] which expressly annuls or prohibits marriages in the common law form, and as the common law has been adopted, also by statute,[14] the two statutes should have been, in our opinion, so construed as to authorize a marriage in either mode." [15] And shortly thereafter a federal court interpreted Tennessee law as upholding marriages of the common law type.[16] However, in 1905 the State Supreme Court in the leading case of *Smith v. North Memphis Savings Bank* [17] foreclosed further discussion on the point, holding that the earlier rule of the *Bashaw*[18] and *Grisham*[19] cases was controlling. The court stated that the provisions of the statute construed in those cases had been re-enacted by the Code of 1858, and applied the rule of construction that where a statute has received a judicial interpretation and is thereafter re-enacted, such interpretation forms a part of the enactment. It therefore concluded that since the Code of 1858 the common law in this particular was abrogated

8. 9 Tenn. 177 (1829).
9. The court was not compelled to rule as broadly as it did in that case. The only express negative in the statutes which the court referred to was the provision that all marriages solemnized without license should be void. As a matter of fact, the marriage under consideration was solemnized without license and was therefore expressly void under this limited clause, and it was therefore not necessary to the decision for the court to hold void attempted marriages not solemnized. On this point, see Note, 39 A.L.R. 538, 557 (1925).
10. Grisham v. State, 10 Tenn. 589, 592 (1831).
11. *See* McCorry v. King's Heirs, 22 Tenn. 267, 273 (1842); Rice v. State, 26 Tenn. 14, 15 (1846); Johnson v. Johnson, 41 Tenn. 626, 630 (1860).
12. Andrews v. Page, 50 Tenn. 653 (1871).
13. N.C. Acts 1741, c. 1, TENN. COMP. STAT. 449 (Car. & Nich. 1836); N.C. Acts 1778, c. 7, TENN. COMP. STAT. 450 (Car. & Nich. 1836).
14. N.C. Acts 1715, c. 31, § 6, TENN. COMP. STAT. 437-38 (Car. & Nich. 1836); N.C. Acts 1778, c. 5, § 2, TENN. COMP. STAT. 438 (Car. & Nich. 1836).
15. Andrews v. Page, 50 Tenn. 653, 667 (1871).
16. Holabird v. Atlantic Mutual Life Ins. Co., 12 Fed. Cas. 315, No. 6, 587 (C.C.E.D. Mo. 1873).
17. 115 Tenn. 12, 89 S.W. 392 (1905).
18. Bashaw v. State, 9 Tenn. 177 (1829).
19. Grisham v. State, 10 Tenn. 589 (1831).

by statute.[20] The proposition that common law marriages are void in Tennessee has never been seriously controverted since,[21] the subsequent cases raising only the question of other means of holding the parties or their representatives to obligations normally incidental to the marriage contract.

There has, however, been a code section enacted since that time which, if read literally, might throw doubt on the conclusion that every attempted marriage not contracted in conformance with the marriage statutes is void. In its present form, it provides: "Failure to comply with the requirements of this law, however, shall not affect the validity of any marriage consummated by ceremony." [22] The extent to which this section applies to the statutory

20. Doubts cast by language in intervening cases were expressly nullified, and the court further declared that if the question had been before it as one of first impression, it would hold as had the court in the *Bashaw* case. Smith v. North Memphis Savings Bank, 115 Tenn. 12, 31, 89 S.W. 392, 396 (1905). An interesting example of how two courts may draw directly opposite conclusions from a statute by statutory construction is provided by Snuffer v. Karr, 197 Mo. 182, 94 S.W. 983, 7 Ann. Cas. 780 (1906). Apparently unaware of the *Smith* case, the Missouri Court construed the marriage laws as codified in the Tennessee Code of 1858 to be merely directory, instead of mandatory as the Tennessee Court had done just a few months before. The court reasoned: "In our judgment the Bashaw and Grisham cases can be recognized as good law and yet as not authority in the case at bar. One of the statutes considered in the Bashaw Case provided: 'and all marriages solemnized as aforesaid without such license shall be, and are, hereby declared illegal and void.' This statute was one of the potent factors in the decisions in these two cases. At the time of the marriage involved herein, 1860, there was no such positive declaratory statute, but only the usual directory statutes described in the text from Encyclopedia of Law. [19 CYC. 1195] So that the court might properly hold at the one time, with this express statute, that no common law marriage could be recoguized, but would be unwarranted to so hold under the statutes in force at the date of this marriage, which was Code Tenn. 1858 (Meigs & Cooper), §§ 2436-2447. There are no words of nullification in these sections. . . . [T]he general rule . . . is that, unless there is an express nullifying statute, common-law marriages are valid. We find no civil case, even in Tennessee, where this doctrine had not received recognition." 94 S.W. at 987.

21. This is not to say that the courts of Tennessee will not recognize as valid a marriage of the common law mode entered into in a jurisdiction where such marriage is legally sufficient. So when a man and woman were married in territory held by the Cherokee nation within the boundaries of the State of Tennessee where all that was necessary by their usages was a public agreement to live together as man and wife, it was found that the woman was a feme covert having no right to sue. "Our courts of justice recognize as valid all marriages of a foreign country; and there is no reason why a marriage made and consummated in an Indian nation should be subject to a different rule of action." Morgan v. McGhee, 24 Tenn. 13, 14 (1844).

This proposition was reaffirmed recently in an opinion handed down by a federal district court in Tennessee. That court said: "The marriage, having been consummated as a common law marriage in Alabama, became a valid and subsisting marriage also as to all other states and so continued until the insured's death [citing Morgan v. McGhee, *supra;* Pennegar v. State, 87 Tenn. 244, 10 S.W. 305, 2 L.R.A. 703, 10 Am. St. Rep. 648 (1889); Keith v. Pack, 182 Tenn. 420, 187 S.W.2d 618, 159 A.L.R. 101 (1945); Smith v. Mitchell, 185 Tenn. 57, 202 S.W.2d 979 (1947)]. In Pennegar v. State the court stated the general rule to be that, unless some positive statute or pronounced public policy demands otherwise, 'a marriage, valid where solemnized, is valid everywhere.' Tennessee has placed two situations within the exception to the general rule. One is where the out-of-state marriage contravenes Tennessee's statute against marriage to the correspondent by a party divorced for adultery. Pennegar v. State, supra. The other is where parties, though validly married in another state, could not lawfully have been married in Tennessee because of this state's miscegnation statute. State v. Bell, 66 Tenn. 9, 32 Am. Rep. 549 (1872)." Madewell v. United States, 84 F. Supp. 329 at 335 (E.D. Tenn. 1949), 21 TENN. L. REV. 197.

22. Tenn. Acts 1937, c. 81, § 6, TENN. CODE ANN. § 8414.6 (Williams, Supp. 1948) [superseding § 8419 (Williams 1934)].

requirements for marriage is not entirely clear, inasmuch as the words "this law" may apply only to those sections added with it in 1937,[23] or they may also apply to other sections preceding it in the article on Marriage in the Code.[24] There is, unfortunately, no clear judicial interpretation in this regard, the section being considered in only one reported decision, and there very shortly and inconclusively.[25]

HISTORICAL DEVELOPMENT OF OTHER TECHNIQUES FOR HOLDING PARTIES BOUND BY INFORMAL MARRIAGES

A. *Reputation and Presumptions*

During the period of uncertainty as to the status of common law marriages in Tennessee, there was being laid a foundation in evidentiary rules for a technique which the court could later use to avoid some of the harsh results consequent to nonrecognition of informal marriages in certain cases. As early as 1834, or five years after *Bashaw v. State,* upon an indictment for incest, the court ruled that the relationship of the parties could be proved by reputation, stating that "Cohabitation as man and wife and general reputation, are evidence of marriage as well as relationship." [26] Again in 1844, the court held that a marriage may be presumed from proof of paternity established

23. TENN. CODE ANN. §§ 8414.1-8414.5 (Williams, Supp. 1948).

24. TENN. CODE ANN. §§ 8408-8414 (Williams 1934). Section 8414.6 had its birth as section 5 of chapter 6 of the Public Acts of Tennessee, 1929. It then read: "Be it further enacted, that failure to comply with requirements of *this Act* shall not affect the validity of any such marriage." [Emphasis supplied]. Apparently in its enactment, the section was intended to apply only to those sections preceding it in this chapter. It was not until that chapter was later codified, TENN. CODE ANN. §§ 8415-8419 (Williams 1934), when section 5 became § 8419, that it was modified to read "this law" instead of "this Act." While it may be possible to interpret this change of wording as extending the application of the section to other requirements of the marriage laws in the Code beyond those embodied in the 1929 Act (§§ 8415-18 as codified), even more significant is what happened in 1935. That year the Tennessee General Assembly repealed §§ 8415-18 by chapter 116, section 1 of the Public Acts of Tennessee, 1935, but left § 8419 untouched. At that stage, the words, "this law," in § 8419 must have referred to at least part of the requirements set forth in the article on marriage, §§ 8408-14; or, else, the General Assembly, in leaving it alone of the sections originally enacted with it, left it to have no meaning or application whatsoever, a useless thing. It was in this position that § 8419 remained until 1937, when chapter 81 of the Public Acts of Tennessee, 1947, TENN. CODE ANN. § 8414.1-8414.6, was enacted. Section 6 of that Chapter (§ 8414.6) superseded § 8419 without change of wording. The problem is: Does § 8414.6 now have as extensive coverage as § 8419 may have had, or does it merely apply to the requirements brought into existence by chapter 81 (§§ 8414.1-8414.5)?

25. Keith v. Pack, 182 Tenn. 420, 187 S.W.2d 618 (1945). Speaking of section 8414.6, the court said: "Section 6 . . . removes the statute from that class of statutes which render void a marriage contracted between whites and negroes and between a defendant divorced for adultery and his paramour. Statutes such as the latter, as said in *Pennegar v. State, supra* [87 Tenn. 244, 10 S.W. 305 (1889)], are 'passed in pursuance of a determined public policy of the state, in the interest of public morals.' See also *Jennings v. Jennings, supra* [165 Tenn. 295, 54 S.W.2d 961 (1932)]. Evidently the legislature thought that public morals would be better subserved by recognizing the validity of a marriage consummated by ceremony even though it was contracted in violation of the provisions of Chapter 81 of the Public Acts of 1937." *Id.* at 423, 424, 187 S.W.2d at 619.

26. Ewell v. State, 14 Tenn. 364, 372 (1834). See also, Flowers v. Haralson, 14 Tenn. 494 (1834); Swink v. French, 79 Tenn. 78 (1883).

by reputation in a civil action, especially where the question arises incidentally, and not between persons claiming under conflicting rights of heirship.[27] Citing these cases, the court could later say in *Johnson v. Johnson*,[28] "It is a familiar doctrine that in all cases, except prosecutions for bigamy and actions for criminal conversation, a marriage may be presumed, or established by reputation after a lapse of many years." [29] "Upon established principles and analogies of the law, we think it may be held that under the circumstances of this case a lawful marriage for all civil purposes will be *conclusively presumed,* and that neither the parties themselves, nor third persons perhaps, will be heard to disprove or deny the marriage. . . . [I]n addition to the presumption of a subsequent legal marriage, the parties and all other persons are *positively concluded* after so great a lapse of time, from going behind the license to question the legality of the marriage, and that, at least for all civil purposes, the legality of the marriage must be *conclusively* taken to have been a lawful one." [30]

B. *Marriage by Estoppel*

Johnson v. Johnson [31] was the first of the Tennessee cases to hold that the doctrine of estoppel may be used to hold parties to an informal marriage to obligations normally incidental to statutory marriages. There the ceremonies were said before the license was procured, the parties and the clergyman believing that it would do just as well to obtain the license later and that it was a valid marriage from the beginning. After 25 years of cohabitation as man and wife, the wife sought to have the marriage declared void and

27. Rogers v. Lessees of Park, 23 Tenn. 480 (1844).

28. 41 Tenn. 626 (1860).

29. *Id.* at 631. See cases cited notes 57, 58 *infra.* A related presumption is sometimes raised that a marriage regularly solemnized is valid (those asserting the invalidity of it having the burden of proof), and the presumption remains though it is alleged that the marriage was entered into pending a valid prior marriage. If the former spouse be living, it will be presumed, in cases involving the settlement of property rights, that one or the other party to the former marriage had procured a divorce before the second marriage was entered into. Gamble v. Rucker, 124 Tenn. 415, 137 S.W. 499 (1911); Hall v. Hall, 13 Tenn. App. 683 (W.S. 1931). The presumption of divorce is one of fact, however, and may be rebutted by proof to the contrary, though the effect is to show the bigamous nature of the second marriage. Payne v. Payne, 142 Tenn. 320, 219 S.W. 4 (1919).

30. 41 Tenn. 626, 631, 634 (italics added). *But see* Jarnigan v. Jarnigan, 80 Tenn. 292, 293, 294 (1883), where the court said, "The commissioners . . . hold as their view of the law, that in a case like the present, where the widow claims dower as the wife of the husband while living, and resulted as such wife to dower on his decease, that parties having held themselves out to the world as husband and wife will be presumed in law to have been married, after cohabitation. For this they cite Johnson v. Johnson. . . . [T]he case cited is not authority for the conclusion reached by the commission, in a case of dower, where the right depends on the fact that complainant was the wife of deceased, and the question of her being the wife or lawfully married to the deceased is put in issue. On such an issue the marriage would have to be proven, and while reputation and cohabitation together with the conduct of the parties might, in some aspects of the question, be competent to show the fact, the law would not conclusively presume the fact from such circumstances."

31. 41 Tenn. 626 (1860).

property she had owned before marriage restored to her on the ground that she had just discovered it was not according to statute. The court said: "[W]hether the complainant shall be held to be estopped to deny the validity of the marriage or otherwise, the result must be the same as respects the present bill. In neither view can it be maintained." [32] The court said that estoppel as applied here is based upon principles of morality, as well as of public policy, and continued, "Whether or not such persons can acquire rights as against others, it is clear that others may acquire rights against them. . . . And if they are estopped as to third persons, why shall they not, as against each other in all civil cases, be precluded from gainsaying the marriage? Do not the same reasons of morality and public policy apply in the one case as in the other? And more especially should they be held to be estopped as between themselves when either is seeking to disturb or defeat rights which may have been acquired by the other, either directly or indirectly, on the faith of the marriage." [33]

In perhaps the most widely known of the cases on the doctrine, *Smith v. North Memphis Savings Bank*,[34] the Supreme Court of Tennessee considerably extended the scope of application of estoppel to informal marriage relationships, inasmuch as the facts of that case showed no attempted compliance with the statutory requirements for marriage. The parties without license or ceremony simply agreed to live together as man and wife. Nor did it appear that either thought, or was led to believe, that a marriage according to the law had been contracted. For approximately 25 years they lived and cohabited together as married people and were so recognized and treated by the public at large, no one else knowing of the lack of formalities in the beginning. At the death of the husband, the wife sued the administrator (who admitted he knew of no next of kin), claiming as widow and sole distributee of the intestate. The court allowed recovery on the authority of the *Johnson* case,[35] saying that since the husband if alive would be estopped to deny his liability for any contracts which the complainant might have made which would have bound a husband in lawful marriage (such as for necessaries), and also in any proceeding begun by her to enforce a right claimed in virtue of the reputed marital relationship,[36] his personal representative was likewise estopped to controvert the rights of the complainant as widow and distributee of the decedent.

32. *Id.* at 630.
33. *Id.* at 632. But see Jarnigan v. Jarnigan *supra* note 30.
34. 115 Tenn. 12, 89 S.W. 392 (1905).
35. "We think that the case at bar is on all fours with that of Johnson v. Johnson. . . ." *Id.* at 36, 89 S.W. at 397. The cases are not on all fours, as the court in the later case of Rambeau v. Farris, 186 Tenn. 503, 212 S.W.2d 359 (1948), pointed out, inasmuch as in the *Johnson* case the parties went through a ceremony and in good faith believed they were married according to law, but the parties in the *Smith* case made no attempt to comply with the statute.
36. Compare this portion of the opinion with the language used in Jarnigan v. Jarnigan, *supra* note 30.

C. *Marriage by Ratification*

The Tennessee courts seemingly stand ready to use another device, usually applied only by courts recognizing common law marriages, on occasion, to avoid the harsh results consequential to nonrecognition.

It appears to be the general rule in those states permitting common law marriages, that a new agreement to live together as man and wife after the removal of an impediment [37] to a valid ceremonial marriage constitutes a valid common law marriage.[38] And where both parties were innocent when they married, either ceremonially or by agreement, and continue to cohabit after the unknown impediment is removed, most of these states by presumption give their continuing intention the legal effect of a new agreement and validate the relationship from the time of removal;[39] and some of them reach this result in cases where there was an impediment known to one of the parties but unknown to the other.[40] Implicit in some of the texts is the idea that such marriage by agreement or cohabitation following the removal is limited to states recognizing common law marriage.[41] But one text writer says that "in a few jurisdictions marriages under such circumstances are recognized, although common law marriages as such are invalid." [42]

The Tennessee decisions relating to this point indicate that Tennessee is among this latter group. It has been recognized, in accordance with the general rule, that a voidable marriage can be confirmed.[43] And when a man and woman married according to the form established by usage for slaves before emancipation, and after that proclamation mutually acknowledged each other as husband and wife, they were held to have been lawfully married from the time at which their subsequent living together commenced.[44] More recently, in a proceeding to recover workmen's compensation benefits, it appeared that the woman claiming as widow of deceased had discovered after their marriage that deceased had never obtained a divorce from his first

37. KOEGEL, COMMON LAW MARRIAGE 153-60 (1922); MADDEN, PERSONS AND DOMESTIC RELATIONS 73-74 (1931); Note, *Common-Law Marriage After Removal of Impediment to Valid Ceremonial Marriage*, 12 CORNELL L.Q. 513 (1927); Note, *Presumption of Consent After Removal of Impediment to Validity*, 39 HARV. L. REV. 901 (1926); Note, *Marriage—"Continuing Consent"—Creating Common Law Marriage After Removal of Disability Due to Restrictions After Divorce*, 14 VA. L. REV. 120 (1927); Note, 95 A.L.R. 1292 (1935).

38. *E.g.*, Schaffer v. Krestovnikow, 89 N.J. Eq. 549, 105 Atl. 239 (1918).

39. *E.g.*, Schuchart v. Schuchart, 61 Kan. 597, 60 Pac. 311 (1900); Davis v. Whitlock, 90 S.C. 203, 73 S.E. 171 (1911); Holgate v. United Electric Ry., 47 R.I. 337, 133 Atl. 243 (1926).

40. The courts are distinctly at variance as to this latter situation. See cases cited in 29 MICH. L. REV. 518 (1931) and 21 VA. L. REV. 331 (1935).

41. MADDEN, PERSONS AND DOMESTIC RELATIONS 73 (1931). See also Note, 14 VA. L. REV. 120 (1927).

42. KOEGEL, COMMON LAW MARRIAGE 153 (1922).

43. Cole v. Cole, 37 Tenn. 57 (1857) (marriage of a lunatic, cohabitation after mind restored); Warwick v. Cooper, 37 Tenn. 659 (1858) (parties to marriage below age of consent to marry, agreement to continue relationship after attaining age); Jordon v. Manning, 2 Tenn. C.C.A. 130 (1911) (same).

44. McReynolds v. State, 45 Tenn. 18 (1867).

wife, and thereupon the claimant prevailed upon him to procure the divorce. The court held she had been his lawful wife, for these purposes, from the time of the divorce without any necessity for a formal remarriage.[45] Although this latter case does not clearly hold the marriage was a binding one as between the parties to it, there is at least a suggestion to this effect,[46] the court citing in support of its conclusion one of the leading cases on the doctrine of marriage by agreement following the removal of an impediment to a valid ceremonial marriage.[47]

Present State of the Authorities

Since its original development, the doctrine of estoppel has been invoked in cases arising in various ways. In *Douglas v. Douglas*[48] the court of appeals held that the decedent who had lived with a woman as his wife during the five years preceding his death would have been estopped to deny the validity of the marriage on the ground that they were married in a county other than where the license was issued, and his heirs were estopped in that action to question the legality of their father's marriage with the woman.[49] In *Allen v. Allen*,[50] a suit to recover for maintenance of a child, the appeals court likewise held the husband and his administrator *ad litem* estopped as to the plaintiff to deny the validity of the marriage and the legitimacy of the child following cohabitation as man and wife and a holding out as such to the public over a period of twelve years. Estoppel was applied in a more recent case by the supreme court[51] in a prosecution of a husband for nonsupport, the court

45. Perry v. Sun Coal Co., 183 Tenn. 141, 191 S.W.2d 181 (1945). A Michigan court earlier in the year, in deciding that a marriage relationship entered into in Tennessee while there was an existing impediment was valid under Michigan law after the removal of the impediment, cited Johnson v. Johnson, 41 Tenn. 626 (1860), as indicating this may also be the rule in Tennessee. Jones v. General Motors Corp., 310 Mich. 605, 17 N.W.2d 770, 773 (1945).

46. A federal court sitting in Tennessee, in a recent case calling for analysis of the Tennessee law concerning informal marriages, had this to say of the *Perry* case: "The court in the Perry case did not find it necessary to hold that the marriage in that case had been cured of its bigamous character by dissolution of the prior marriage and continued cohabitation of the parties under the second, but the conclusion seems inescapable that had the issue been directly presented the court would have so held." Madewell v. United States, 84 F. Supp. 329, 334 (E.D. Tenn. 1949). The federal case there involved a soldier whose ceremonial marriage to *W-2* in Georgia was defective because his California divorce from *W-1* was not final. After finality of that divorce, he and *W-2* lived and cohabited together as husband and wife in Alabama. Though held to be a valid marriage in Tennessee because a valid common law marriage in Alabama, it was clear the court thought Tennessee would have recognized validity any how under the circumstances.

47. Perry v. Sun Coal Co., 183 Tenn. 141, 146-47, 191 S.W.2d 181, 183 (1945), citing Chamberlain v. Chamberlain, 68 N.J. Eq. 736, 62 Atl. 680 (1905), *affirming* 64 N.J. Eq. 414, 59 Atl. 813 (1905).

48. 6 Tenn. App. 12 (W.S. 1927).

49. This case is somewhat weakened for these purposes as the court also applied judicial estoppel, the same heirs in an earlier suit for partition having admitted the woman was their father's wife.

50. 8 Tenn. App. 48 (W.S. 1928).

51. Hale v. State, 179 Tenn. 201, 164 S.W.2d 822 (1942).

saying the defendant was in no position to assert that he and prosecutrix were never legally married after holding her out as his wife and cohabiting with her for twelve years, and observed that one may be estopped in a criminal case as well as in a civil proceeding.[52]

In another class of cases, where the elements of living and cohabiting together over a period of years as husband and wife and a holding out to the public as such were shown, the supreme court has consistently allowed the widow to recover against the employer of the deceased husband under the workmen's compensation laws of the state, utilizing both presumptions and estoppel to nullify the employer's attempt to disqualify her as a lawful claimant on the grounds of an informal marriage.[53] Later cases distinguish the holdings in the workmen's compensation cases by saying the controlling consideration in those cases is dependency rather than relationship, in view of the purpose of the law to relieve society by placing on industry the burden of caring for its injured workmen and the dependents of deceased workmen.[54]

On the other hand the courts have refused to apply the doctrine of estoppel in several instances. It was held not to apply to a situation where the party invoking it had married deceased and, after later finding out that there was a valid subsisting marriage with another woman, continued to live with him until his death.[55] And where a man had been divorced because of adultery and then he married the woman with whom the adultery had been committed, the court of appeals held that although the parties lived together as man and wife and such woman was held out to be his wife, the parties would not be estopped to deny the validity of the marriage or the legitimacy of their children, since a marriage under those circumstances is void, being prohibited by statute.[56] It was also held in the latter case that a marriage would not be presumed because "there can be no presumption of marriage where such marriage is prohibited by law." [57]

But, of course, this is not to say that the presumption of marriage has

52. *Id.* at 205, 164 S.W.2d at 823, citing State v. O'Brien, 94 Tenn. 79, 28 S.W. 311 (1894).

53. Perry v. Sun Coal Co., 183 Tenn. 141, 191 S.W.2d 181 (1945); Kinnard v. Tennessee Chemical Co., 157 Tenn. 206, 7 S.W.2d 807 (1928); Bohlen-Huse Coal & Ice Co. v. McDaniel, 148 Tenn. 628, 257 S.W. 848 (1924).

54. Rambeau v. Farris, 186 Tenn. 503, 212 S.W.2d 359 (1948); Sanders v. Altmeyer, 58 F. Supp. 67 (W.D. Tenn. 1944).

55. Payne v. Payne, 142 Tenn. 320, 219 S.W. 4 (1919).

56. Bennett v. Anderson, 20 Tenn. App. 523, 101 S.W.2d 148 (M.S. 1936).

57. *Id.* at 527, 101 S.W.2d at 150. This was in keeping with the opinion in Moore v. Moore, 102 Tenn. 148, 152, 153, 52 S.W. 778, 780 (1899), where the Tennessee Supreme Court had said: "And there is no doubt, if there had been no proof of the previous legal marriage of complainant and the defendant, that, as an independent fact, the evidence . . . would be ample upon which to rest a presumption of marriage between Mrs. Moore and Edwards. But will such evidence be sufficient where there is existing all the time a previous legal marriage? We think certainly not. . . . The indulgence of the presumption in the face of the fact of her previous and still subsisting marriage to complainant would be to make her guilty of the crime of bigamy. In such a case there is no ground for a presumption of marriage; the second or last relation is simply illicit and nothing more."

lost its force in Tennessee, the quoted statement being simply a limited exception. Just how limited was strikingly shown by the supreme court the very next year in deciding the ease of *Cole v. Parton.*[58] The facts were: *H* was divorced by *W-1* on the sole ground of desertion. *H* then married *W-2* and lived with her some 30 years before his death. Children by the former marriage sought to have property, conveyed to *H* and *W-2* as tenants by the entireties, decreed by the court to them on the ground that *H* and *W-2* were living in adultery both before and after *W-1's* divorce from *H* and that therefore the marriage between *H* and *W-2* was void. The court held that the legislature in prohibiting a defendant from marrying the person with whom he had committed adultery, had in mind a case where a divorce had been decreed on account of the adultery of the defendant. The court then said, "[T]he legislature in prohibiting a defendant from marrying the person with whom he had committed adultery . . . never contemplated . . . that thirty years after a marriage, the birth of children, the acquisition of property, and the death of parties and witnesses, interested parties could attack that marriage, have it declared void, and the issue thereof decreed illegitimate. Such an interpretation would likely subject many marriages to corrupt and fraudulent attacks by unscrupulous and designing persons, and would tend to make the legal status of marriage uncertain, while the policy of the law is to protect marriage with every presumption of legality. This is essential for the preservation and well being of society." [59] The general rule remains, as it was succinctly stated in the *Allen*[60] case: "Except in bigamy and criminal conversation a marriage may be presumed from cohabitation and reputation. . . . When it is sought to charge them with civil liability growing out of the relation of marriage, cohabitation and the assumption of the relation of husband and wife, and holding themselves out to the public as such, will constitute a conclusive presumption of such relation." [61]

In a comparatively recent case a federal district court sitting in Tennessee was confronted with an interesting situation calling for an interpretation of Tennessee law on informal marriages.[62] The facts were these: *H* and *W-1* lived together for ten years under conditions which would have constituted marriage at common law, and then separated. Subsequently, *H* entered a marriage with *W-2* fully complying with the Tennessee statutes; and, though they became separated before *H's* death, they were not divorced. The Social Security Board settled with *W-1* as the surviving widow. *W-2* then sued the Board contending that she was the surviving widow. The Board defended by saying *H* and *W-1* created a marriage by estoppel having the civil

58. 172 Tenn. 8, 108 S.W.2d 884 (1937).
59. *Id.* at 11, 12, 108 S.W.2d at 885.
60. Allen v. Allen, 8 Tenn. App. 48 (W.S. 1928).
61. *Id.* at 50.
62. Sanders v. Altmeyer, 58 F. Supp. 67 (W.D. Tenn. 1944).

effects and legal incidents of a lawful marriage under the laws of Tennessee.[63] The court granted judgment for the plaintiff, *W-2*. Since common law marriages are void in Tennessee, the term "wife" used in the Tennessee statutes of devolution[64] was held to refer only to one who is a lawfully wedded wife or one who has married in accordance with the state's statutory requirements. The Tennessee cases applying the doctrine of estoppel were noted, the court saying they were correctly decided but not applicable to the case at bar. "Common law marriages were recognized in some of these cases under their peculiar facts and under the doctrine of estoppel in order that the purpose of the compensation law would not be defeated, especially where the marital status of the parties was incidental to the main question and was not directly involved in a contest between heirs over the property." [65]

Two years ago the Supreme Court of Tennessee in deciding *Rambeau v. Farris*[66] handed down an opinion which apparently places important limitations upon the application of estoppel in cases involving informal marriages. There a man and woman were alleged to have agreed to become husband and wife and lived together for nearly seven years until his death. However, during the same time the man maintained a bedroom in another part of town which he occupied occasionally, and among his friends in that neighborhood he had the reputation of a single man, having at times told them he was a bachelor. At his death, the woman petitioned to be declared the de facto widow, and, relying on *Johnson v. Johnson* and *Smith v. Bank,* claimed that a marriage between her and the deceased should be conclusively presumed. The court held that the petition was rightly denied below, saying that the facts of the case did not come within the rule of the cited cases, for in all those cases, except *Smith v. Bank,* there was an attempted compliance with the statutory requirements, the party seeking to invoke the doctrine having in each case believed in the validity of the marriage and evidenced that belief by cohabitation. The court also pointed out that the facts in the case before it failed to show any representation made by the deceased upon which petitioner relied, but to the contrary that both parties fully understood the illicit character of their relationship. The court concluded the opinion by saying it was not disposed to extend the holding in *Smith v. Bank.*[67] Actually the material facts of *Smith v. Bank* and *Farris v. Rambeau* are much alike, except that in the latter case the deceased was believed to be a single man by certain acquaintances in another part of town and the period of cohabitation was

63. The Social Security Act sets out that the state laws of devolution relating to personal property in the state where the insured was domiciled when he died controls in determining whether an applicant for benefits under the Act is the surviving widow 53 STAT. 1377, 1378 (1939), 42 U.S.C. § 409(j), (m) (1940).

64. TENN. CODE ANN. § 8389 (Williams 1934).

65. Sanders v. Altmeyer, 58 F. Supp. 67, 69 (W.D. Tenn. 1944).

66. 186 Tenn. 503, 212 S.W.2d 359 (1948), 20 TENN. L. REV. 621 (1948).

67. *Id.* at 508, 212 S.W.2d at 361.

cut short by death at seven years, whereas in the former case it was not shown that anybody besides the parties themselves knew of the lack of formalities in the beginning and the relationship continued for 25 years. However, neither of these differences in fact was emphasized. The factors upon which the court based its refusal to apply the doctrine—the lack of compliance with statutory requirements, full knowledge from the beginning by the party seeking to invoke the doctrine, and a lack of representation by the other party of the validity of the marriage—were likewise present in *Smith v. Bank*. This has led one commentator to the conclusion that the court in the future probably would not apply the doctrine in a case with facts like *Smith v. Bank*, but will now require as a prerequisite to its application a good faith attempt to comply with the marriage statutes, or else belief and reliance by the party seeking to invoke the doctrine upon a representation by the other that they were validly married.[68]

Critical Analysis of the Tennessee Technique

Estoppel has been defined as a bar or impediment raised by law which precludes a man from alleging or from denying a certain fact or state of facts, in consequence of his previous allegations or denial or conduct or admission.[69] "Equitable estoppel" or "estoppel in pais," is raised when one, knowing the true facts of a situation, falsely represents by word of mouth, conduct or silent acquiescence that the facts are otherwise to a person who is ignorant of the truth of the matter, with the intention that the latter should act upon it, and with the result that he is actually induced to act upon it, so that if the party making the representation were not estopped to deny its truth, the party relying thereon would be subjected to loss or injury.[70]

From the foregoing definition of estoppel, it is manifest that some of the Tennessee cases considered herein to which "estoppel" was applied were not, strictly speaking, apt situations for the application of true estoppel. The two leading cases will suffice as examples. In *Johnson v. Johnson*,[71] though the man involved represented that the marriage would be just as valid if the license were procured after the ceremony, as before, when as a matter of law that statement was not true, and the woman acted in reliance thereon, he made the representation in good faith, believing it to be true. *Smith v. Bank*[72] met even fewer of the requirements, in that it was not shown that *either* party there thought, or was led to believe by representations of the

68. 20 Tenn. L. Rev. 621 (1948).
69. Black, Law Dictionary 687 (3d ed. 1933).
70. *Id.* at 688-89. For other definitions of estoppel and equitable estoppel, see 15 Words and Phrases 266 *et seq.* (Perm. ed. 1940); Bigelow, Law of Estoppel 489, 602-03 (6th ed., Carter 1913).
71. 41 Tenn. 626 (1860).
72. Smith v. North Memphis Savings Bank, 115 Tenn. 12, 89 S.W. 392 (1905).

other, that their agreement to live together as man and wife was a marriage according to law. Yet the doctrine was applied in both instances. Apparently the early Tennessee courts in developing the idea of marriage by estoppel were not so much concerned with whether their brand of estoppel exactly paralleled the conventional equitable estoppel point by point, as they were in evolving a means which the court could use to give effect to the general public policy in favor of upholding marriages instead of overturning them,[73] and to alleviate in meritorious cases the harsh consequences which would result from an automatic or mechanical application of the old nonrecognition rule. However, it was not to be supposed that the Tennessee courts in developing this useful escape device was going to let the nonrecognition rule be swallowed up by exceptions, because there was, and is, a sound public policy behind that rule, too—that of not condoning or tolerating relationships entered into in complete disregard for the moral and legal rules society has formulated for establishing the marriage status. This latter policy was the one given effect in the *Rambeau* case, it being clear from the opinion that neither the probate court nor the appellate court was favorably impressed with the motives of the participants or the character of the relationship they maintained.[74] Besides

73. As the *Johnson* case expressed it, the question is "one in which not only the parties but the public also have a deep interest, in view of the consequences, as affecting the status of children born of the marriage, the relations of affinity and consanguinity which may have sprung from it; the rights of property which may have been acquired on the faith of it, and all the consequential rights, obligations, and duties growing out of it." Johnson v. Johnson, 41 Tenn. 626, 631 (1860). See also Cole v. Parton, 172 Tenn. 8, 108 S.W.2d 884 (1937); Gamble v. Rucker, 124 Tenn. 415, 137 S.W. 499 (1911); Duggan v. Ogle, 25 Tenn. App. 467, 159 S.W.2d 834 (E.S. 1941); Hall v. Hall, 13 Tenn. App. 683 (W.S. 1931). "The public policy of Tennessee and, this court believes, the public policy of the civilized world, is to sustain marriages, not to upset them." Madewell v. United States, 84 F. Supp. 329, 332 (E.D. Tenn. 1949).

74. Said the probate court: "Relationships of this kind are immoral and against public policy, and I don't think the court should undertake to broaden the rule for the benefit of any person who is a party to a relationship of that kind." Rambeau v. Farris, 186 Tenn. 503, 507-08, 212 S.W.2d 359, 361 (1948). And the Supreme Court added, "It was simply an illicit relationship carried on with the full and mutual understanding of the parties." *Id.* at 508, 212 S.W.2d at 361.

An infrequently cited case in the Court of Civil Appeals, had earlier presaged the decision in the *Rambeau* case with language strikingly of the same tone. That language is now worthy of review. "But we have reached the conclusion that appellant is not in position to invoke the doctrine of estoppel and that the chancellor was not in error in repelling her. We are of this opinion notwithstanding the very cogent language of *Smith v. Bank, supra,* bottomed as it is in the early case of *Johnson v. Johnson,* 1 Cold. 626. We can readily conceive of cases where the survivor of an alleged marriage can insist that the heirs of the other be restrained from disputing the validity of the arrangement, just as neither party can deny the marriage during their joint lives. . . . [T]he doctrine of estoppel . . . is available to shield the innocent . . . and to protect the unwary from the designs or conduct of others. It can ever [*sic*] be made available for the wicked, the wise or designing. We are of the opinion that estoppel can never be resorted to in the case of a void marriage where the illegality of the marriage is known to the party insisting upon the estoppel and where there is no pretense of deception upon the part of the other partner to the arrangement. We do not believe that Courts of equity should even for civil purposes and property rights invoke this shielding doctrine where neither good faith nor lack of knowledge nor honest belief in the validity of the marriage, nor a bona fide effort to comply with the laws of the land and the dictates of morality are present as considerations. We think this is the doctrine of the case of *Johnson v. Johnson, supra,* and it is certainly the rule obtaining

the failure to comply with the statutory formalities, it was evident that they never completely regarded or treated themselves as married, or even desired that legal status until one of them died leaving property. The technique, marriage by estoppel, being in the nature of equitable estoppel, it is not surprising that, where the controversy concerns supposed rights as between the parties growing out of their relationship, rather than rights of a third party who has acted in reliance upon the validity of the apparent marriage relationship, the court should inquire into the motives of the parties and the good faith with which they entered and carried on the arrangement. But the court in the *Rambeau* case, in deciding that estoppel between the parties to deny the existence of a marriage should not be raised under the circumstances, rested its decision on other grounds besides policy considerations, requiring a stricter compliance with the elements of estoppel as they are found in the ordinary use of that doctrine. The court stressed the fact that the proof failed to show any representation, or claimed representation, made by the deceased upon which the woman petitioning to be declared his widow had relied to the extent that she believed they were validly married (or that there was an attempted compliance with the statutory requirements of marriage).[75] If the court in the future will require of the party invoking the application of the doctrine a good faith belief in, and reliance upon, a representation by the other that the relationship they are entering into is a lawful marriage as a prerequisite to its application, it is apparent that one relying on *Smith v. Bank* as authority for the proposition that a present agreement, without ceremony, between parties to live together as husband and wife, followed by cohabitation and holding out as such over a period of years is sufficient to raise an estoppel between the parties to deny the existence of a valid and subsisting marriage, will be on unfirm ground.[76] But estoppel is a slippery concept which is hard to hold down by a few decisions, and it is not likely that the *Rambeau* case will eliminate its usefulness with respect to informal marriages. Especially is this not likely where the court feels strongly that public policy will be better served by treating the parties as married than not.

Before leaving the subject of estoppel, reference should be made to

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in other jurisdictions [citing 26 Cyc. 867 (1907)]. . . . There is not any testimony whatever upon which this woman can urge that she was misled by Horn and honestly believed that she was married and remained his wife until his death upon the assumption in good faith that she was lawfully married. The reverse is the truth. Hence the lack of any basis for an estoppel. The general rule is that no estoppel against a palpably illegal marriage ever arises either on the part of the parties or of the heirs of either. . . . We are persuaded that it would not be good morals to sanction such an arrangement, or treat it as the basis for the acquisition of rights by parties *inter se*. For we are not dealing with the rights of third parties against the one or the other upon the assumption that there was a marriage. . . . Moreover, we are of the opinion that she should be repelled upon the equitable rule that she does not possess clean hands." Horn v. Shelton, 6 Tenn. C.C.A. 530, 532-33, 534, 535 (1916).

75. Is this an indication that section 8414.6 of the Tennessee Code may be given the broader interpretation? See notes 22-25, *supra*.

76. See 20 TENN. L. REV. 621 (1948).

problems it creates. Since estoppel acts on the person, when there is a marriage by estoppel, who is estopped? The parties cannot contest the validity of their relationship as a marriage between themselves or as against third parties who have acted in reliance on the apparent regularity of it. But on the other hand, it is not certain that third parties are in turn precluded from questioning the validity of it where to uphold it would be to benefit the participants against the third parties.[77]

If the Tennessee court has required that its marriage-by-estoppel device shall conform more to the general pattern of equitable estoppel in the particulars set forth above, it does not necessarily follow that the courts are left without a tool in many cases for upholding relationships as valid marriages where it would be desirable to do so. Suppose a case involving an informal marriage followed by circumstances such as would make the court want to uphold it because of the general public policy in favor of sustaining marriage, but in which some of the elements of equitable estoppel are missing. For example, suppose the parties in the *Rambeau* case had lived together for twenty years preceding the man's death; that they had come to regard and treat each other with love and respect; that during that time they had acquired the general reputation of being married; that children had been born to the union; that they had jointly saved and bought and otherwise come into the ownership of property; that third parties had extended credit to each of them in reliance on the supposed marriage; and that he died intestate. There having been in its origin no attempted compliance with the marriage statutes, nor representation by one party that they were lawfully married which the other in good faith relied on, the court would have just as hard a time finding all the elements of true estoppel there as it did in the actual case. However the court could save this relationship as a marriage by the use of conclusive presumptions. This device was developed by the *Johnson* and *Smith* cases, which also originated the estoppel doctrine. It has never been repudiated since that time, and not even the *Rambeau* case placed any real restriction on it beeause the facts were not there appropriate for its application. In the *Rambeau* case, the opinion made no specific reference to the argument that a marriage might be conclusively presumed, though that argument was in fact made by the petitioner. The language in the *Johnson* and *Smith* cases has not, therefore, been repudiated. It is significant that the

77. Suppose a man and woman, *H* and *W*, fail to meet all the statutory requirements for a formal marriage in the beginning, but live together thereafter for twenty years, all the while regarding and treating each other as husband and wife, with the attendant love and respect, and holding themselves out as such to the world. On these facts, the parties would certainly be held to be estoppel to deny the validity of their relationship between themselves and as against third parties who changed their positions in reliance on it. But suppose further, that a third party struck *W* with his automobile causing her to be permanently disabled. In a suit by *H* in which he claims damages for loss of consortium, can the third party question the validity of their relationship as a marriage?

parties in the *Rambeau* case had cohabited for only seven years, whereas the parties in the other two cases had cohabited for 25 years.

An analogy can be drawn between the use of conclusive presumptions to uphold the validity of a relationship as a marriage where the parties have lived together as husband and wife over a long period of time, and have been holding themselves out and have acquired the general reputation as such through the years, and the manner in which rights in land were acquired by prescription at common law. The common law courts made use of a fiction of lost grant. It was presumed from the adverse user for a period presumptively beyond legal memory, ultimately fixed at twenty years, that the easement had been created in due form between the owner of two parcels by grant, and that the grant had been lost. In the beginning this was probably a presumption of fact, the idea being that there actually was a lost grant. Soon, however, it came to be a conclusive presumption, and, thus, a rule of law; this presumption could not be rebutted even by the most conclusive proof that no grant had, in fact, been made in the beginning and the juries were directed so to find in cases where the presumption was known to be a mere fiction. Significantly, this doctrine of prescription is one which was developed by the courts themselves, without the assistance of statutes. Prescription was based from the beginning on the same broad principle on which statutes limiting actions for the recovery of land were based, the settling of conflicting claims in favor of long continued adverse user and enjoyment of the incorporeal rights.[78] So an annotator of Tennessee cases said, "Independent of the statutes of limitation, and upon common law principles and the general principle of public policy, a grant from the state will be presumed where there has been a continued and uninterrupted adverse possession and enjoyment . . . for 20 years, though there be no paper title nor color of title. . . ." [79] If public policy requires that the property rights in land be definitely and finally settled by presumption of a lost grant after a long continued claim of right and user in order to cut off further disputes over it, many times after the death of parties and witnesses, some of which would probably be fraudulent, it would seem that public policy in the stability of marital relationships and the home, and legitimacy of children would even more call for a type of "marriage by prescription" or conclusive presumption. This technique when applied should have the force and effect to make the relationship under consideration a valid and subsisting marriage for all purposes and to all the world, so as not be a half-way measure as marriage

78. See 7 HOLDSWORTH, HISTORY OF ENGLISH LAW 345-50 (1926); 2 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY 595 (1947); WALSH, A HISTORY OF ANGLO AMERICAN LAW 273 (2d ed. 1932). See also Angus v. Dalton, 4 Q.B. Div. 162 (1878), on the development of the idea that the presumption of a lost grant after twenty years is irrebuttable.

79. 6 TENN. CODE ANN. p. 28 (Williams 1934). See Tennessee cases there cited.

by estoppel appears to be—*i.e.,* where the parties may be estopped to question the validity of their relationships between themselves, and against third parties who have changed their position in reliance on it, but third parties are not in turn estopped to raise the question.

CONCLUSION

The result is that the Tennessee courts have the means for upholding informal marriages whenever the social reasons are sufficiently strong to impel them to do so. This is a very desirable result, and one which is not open to the criticism that the courts are inviting or encouraging informal marriages as against the ceremonial, statutory marriage. These devices are not alternative means of attaining the marriage status *ab initio,* but are merely remedial devices looking backwards, which the courts may use on occasion when satisfied that it is for the good of the state and society, as well as for the parties and their children and descendants. Of course, the application of these devices will continue not to be mechanical, but the courts will carefully consider the motives of the parties and the character of the relationship they maintained, both in the inception and in subsequent years, and weigh in the balance the somewhat conflicting public policies noticed above, before deciding which result would be more for the overall good.

It may be urged that this remedial scheme is objectionable for lack of certainty. This is no real objection, however, since certainty is needed primarily for governing conduct, and parties who want to be sure their marriage will be valid need only to comply with the statutes. The remedies discussed in this Note are for the purpose of providing a just result in regard to past events which the parties cannot now change.

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