THE PRESUMPTION OF MARRIAGE ARISING FROM COHABITATION

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There is an old Chinese curse which states, "May it be your fate to live in interesting times"; for the student of the legal aspects and implications of the family and marriage, there can be no doubt but that the mid-1970s are an interesting time. There could be no doubt, at least until relatively recently, that the marriage relationship was a status in the eyes of the law,[1] however, two articles in legal journals have gone so far as to suggest that, in view of recent changes in divorce law, it has become some species of contract.[2] Similarly, social attitudes towards what is commonly known as "living in sin" have undergone profound change, at least amongst the Australian judiciary. Thus, in 1964, Bridge J. of the Supreme Court of the Northern Territory, in the case of *Re a Minor*,[3] made the following comment: "It was submitted to me by the applicant's counsel that as the two minors intend to continue living together as man and wife in any event, it would be futile for consent to their marriage to be further withheld. To this submission there are at least two answers. First, the intention being utterly contrary to proper standards of moral restraint, is attributable more to impatient irresponsibility than to practical sense and cannot be encouraged by the alarming encouragement now given to it by the female minor's parents. Secondly, the court cannot, and will not, join in that encouragement by taking any course suggesting approval or condonation of the immoral behaviour involved, or be influenced by any prediction of its continuation." On the other hand, nine years later, in the case of *Andrews v Parker*,[4] Stable J. of the Queensland

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1 See the South Australian case of Painter v Painter, (1963) 4 F.L.R. 216. For comment see F. Bates, "Behind the Law of Divorce: A Modern Prespective" (1976) 7 *Manitoba L.J.* 39 at 50.

2 K. G. McWalter, "Marriage and Contract: Towards a Functional Redefinition of the Marital Status" (1973) 9 *Col. J. Law and Social Problems* 607 and G. D. Goldberg, "Ad Justum Matrimonium" (1972) 5 *Ottawa L.R.* 296.

3 (1964) 6 F.L.R. 129 at 136. See, also, the remarks of Burbury C.J. in the Tasmanian case of Maddock v Beckett, [1961] Tas. S.R. 46 at 52.

4 [1973] Qd. R. 93 at 104. See, also, a note by E. K. Teh (1973) 4 *U. Tas. L.R.* 201. The cases to which Stable J. was referring were, of course, Uptill v Wright, (1916) 1 K.B. 506 and Pearce v Brooks, (1866) L.R. 1 Ex. 213.

Supreme Court stated that, "Surely what is immoral must be judged by the current standards of morality of the community. What was apparently regarded with pious horror when the cases were decided would, I observe, today hardly draw a raised eyebrow or a gentle 'tut-tut'. It is notorious that there are many people living together without benefit of clergy—so much so that in this century Parliament has recognized the fact . . . The point I have, perhaps too laboriously, been trying to make is that nortoriously the social judgments of today upon matters of 'immorality' are as different from those of last century as is the bikini from the bustle'. In 1973, the same year, in its issue for June 21st the *New Law Journal* produced a precedent for a "Cohabitation Contract" under which the parties agreed to live together without being bound by the laws of marriage.

In an earlier article,[5] the present writer, analysed the presumptions of formal and essential validity of marriage and concluded that, despite legal and social change, these presumptions are by no means irrelevant today. It is the purpose of this article to consider, in the same way, the presumption of marriage arising from cohabitation, particularly as it has arisen, albeit indirectly, in the recent decision of the Supreme Court of Canada in *Powell v Cockburn*.[6] The whole topic of presumptions is a much vexed one: in the words of Prosser,[7] " . . . a presumption, as a rule of law applied in the absence of evidence, is not itself evidence, and can no more be balanced against evidence than two and a half pounds of sugar can be weighed against half past two in the afternoon" or of Lamm J. of the Missouri Supreme Court in *Mackowik v Kansas City, St. J. and C.B.R. Co.*,[8] "[presumptions are] bats of the law flitting in the twilight, but disappearing in the sunshine of actual facts". In the same way, it is submitted that the various attempts to classify presumptions—whether the traditional manner[9] or that advocated by Lord Denning[10]—are singularly unhelpful and that the most realistic way of considering presumptions is that adopted in the present writer's text[11] namely, regarding them as the convenient products of particular fact situations.

5 "Formal and Essential Validity of Marriage—Some Reflections on the Presumption of a Valid Marriage" (1975) 49 *A.L.J.* 607.
6 (1976) 22 R.F.L. 155.
7 *Handbook of the Law of Torts* para 38 (4th Ed. 1971).
8 (1906) 94 S.W. 245 at 263.
9 See, for example, Cross *Evidence* 110-112 (4th Ed. 1975).
10 "Presumptions and Burdens" (1945) 61 *L.Q.R.* 79.
11 *Principles of Evidence* 27 (1976).

The presumption of marriage in its widest sense has been graphically stated by Irving J. of the Supreme Court of British Colombia in the case of *Marks v Marks*[12] where it was said that, "The one who seeks to disturb an apparently existing relation must shew that he or she has clear ground for doing it; instead of being aided by presumptions he (or she) will have all presumptions against him (or her). In mere questions of property, where there has been a long enjoyment, Courts will protect the possessor by entertaining presumptions in support of his right, but in favuor of recognizing the tie of marriage these principles are strengthened by other considerations, besides mere respect for the existing state of things . . . Where the peace and reputation of families, the integrity of the most intimate social relations, are concerned it is but right to presume that the relation of the parties is in fact what it has always appeared to be, until conviction is forced upon the court by clear and conclusive evidence". Further, Heydon[13] has outlined the presumption of marriage arising from cohabitation of the parties simply, when he wrote, "There is a persuasive presumption that parties are validly married where they are proved to have lived together as man and wife. It appears to be governed by the same rules as the presumption of formal validity; indeed the two often arise in the same case. It is difficult to rebut but may be rebutted by an admission". As the present writer has elsewhere suggested,[14] the presumption of formal validity may well be more complex and arise in more situations than had previously been envisaged; the same is true, it is suggested, of the presumption of marriage arising from cohabitation.

The *locus classicus* of the presumption's operation is to be found in the judgment of the Judicial Committee of the Privy Council in the leading case of *Sastry Velaider Arogenary v Sembecutty Vaigalie*[15] where it was stated that, " . . . where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage". The case most frequently used to illustrate the operation of this *dictum* is *Re Taplin, Watson v Tate*[16] where the deceased had lived with a particular lady in Rockhampton, Queensland, from 1860 to 1870. The couple held themselves out as man and wife, and they and their

12 (1907) 6 W.L.R. 329 at 339.
13 *Cases and Materials on Evidence* 54 (1975).
14 Supra n. 5.
15 (1881) 6 App. Cas. 364 at 371. The judgment was delivered by Sir Barnes Peacock.
16 [1937] 3 All E.R. 105.

children were received in local society, which would certainly not have been the case had there been any suggestion of irregularity. At the time of his death, the deceased was, in fact, one of the most prominent solicitors in Rockhampton. The children's birth certificates recorded the marriage of their parents as having taken place at Ballan, Victoria, but no such marriage was registered there even though registration had been compulsory in Victoria for some years. In 1873, the deceased's father, who lived in England, executed a deed covenanting to make certain payments to the children or their mother and this deed contained the words, " . . . the following reputed children of his deceased son . . . which children are now in England with their mother. Emily Morris, otherwise Emily Bellas". Simonds J. held first, that the absence of any entry in the register of marriages was insufficient to rebut the presumption of the validity of the deceased's marriage and, second, that the form of words used in the deed of 1873 were likewise insufficient to rebut the presumption, even though he commented[17] that he could not, " . . . guess the motive which induced the grandparent to put into that deed those words of stigma on his son . . . " The judge also remarked,[18] at the begining of his judgment that the evidence before him was, " . . . not cogent", but went on to say[19] that, in view of that evidence, " . . . the presumption of our law is that they were man and wife. This presumption is not to be disturbed except by evidence of the most cogent kind". A similar instance is the more recent case of *Re Taylor (decd.) Taylor v Taylor,*[20] where the *dictum* in *Sastry Velaider* was specifically adopted and the particular marriage held to be valid, even though Harman L.J. began[21] his judgment by saying that, "No one could listen to the wild story unfolded to us in this case without suspecting at one time or another that the interstate John Taylor never did marry Izender Amer or Lucas. The story is a strange one and with people who rotated on so small an axis, that is to say who lived within so comparatively confined an area, it is at least strange that if there was a marriage no documentary evidence nor any witnesses to prove or even suggest the existence of any ceremony of marriage has been forthcoming". In addition, Lord Evershed M.R. noted[22] that, " . . . the period covered by the evidence of reputation is short by comparison with some of the cases . . . " The evidence necessary to rebut the

17 Id. at 108.
18 Ibid.
20 [1961] 1 All E.R. 55.
21 Id. at 63.
22 Id. at 62.

presumption, said Harman L.J.,[23] must be, " . . . firm and clear".

In Australia, the first case to be decided on the matter was *Slater v Slater*,[24] which occurred as early as 1868. However, the report does not tell us a great deal, as Hanson C.J. gave no reasons for his decision and there was evidence, in addition to that of cohabitation and reputation, that the parties had gone to the house of a marriage celebrant with the intention of being married. A more interesting case, however, is the decision of McIntyre J. of the Supreme Court of Tasmania in *Re Waddle*,[25] the facts of which raise many of the issues involved in an acute form. In that case, Sarah Ann Waddle had cohabited with one Parker, by whom she had five children, from 1858 to 1869, when he was sentenced to a term of imprisonment, from which he soon escaped and never returned to Tasmania. In his prison record, he was described as, "married and having five children". The marriage, however, was not registered in any church or public registry, there was evidence of an intention by the parties to marry and there was no impediment to their doing so. Waddle was invariably known as Mrs. Parker, she wore a wedding ring, was recognized by her mother and by other persons as married, on her death certificate she was described as Sarah Ann Parker and several witnesses testified that they had never heard the marriage questioned. But, on the other hand, there was evidence that the marriage had never been recognized by Waddle's brother, his wife and their children. McIntyre J., despite his opinion[26] that, "Much of the evdience in this case is not very satisfactory, the alleged cohabitation having taken place so many years ago that most of the witnesses were necessarily of advanced age" and, noting that it was in Waddle's interest to represent herself as a married woman, held that the presumption was raised.

A particular example of the application of the presumption arises, in the case of jurisdictions where a marriage may be validly constituted by consent of the parties without a formal ceremony. In such cases, the presumption will generally be applied in favour of such consent having been given, even though the parties had begun to cohabit in circumstances in which the consent could not have been lawfully given. Thus, in the *Breadalbane Peerage Case, Campbell v Campbell*[27] effect was given to the presumption in Scotland even though the relationship had begun as adulterous. "There is nothing,"

23 Id. at 63.
24 (1868) 2 S.A.L.R. 77.
25 (1911) 7 Tas. L.R. 35.
26 Id. at 38.
27 (1867) L.R. 1 Sc & D. 182 (H.L.).

said Lord Westbury,[28] "to warrant the proposition that the subsequent conduct of the parties shall be rendered ineffectual to prove marriage by reason of the existence, at a previous period of some bar to the interchange of consent. It would be very unfortunate if it were so. Marriage may be contracted between parties in a foreign land, where certain observances are required which, from ignorance or mistake, may not have been fulfilled. The parties having cohabited on the strength of an imperfect celebration, may afterwards come to Scotland and reside there for years, continuing the same course of life. It would indeed be a very sad thing if such a course of conduct, lasting, perhaps for twenty or thirty years were insufficient to warrant the conclusion of marriage". The basis of the decision in the *Breadalbane* case was, of course, the Scots doctrine of marriage by "habit and repute", but is also important to note the comment of Lord Chelmsford L.C.[29] that the court was dealing with facts which had commenced more than eighty years previously.[30] That the presumption was not universally applied in such circumstances, however, may be observed from the earlier case of *Lapsley v Grierson*,[31] where more direct evidence was available. In that case, a Scot had married in Scotland and had gone abroad; his wife cohabited with another man and had children by him. The House of Lords held that the mere fact of cohabitation was insufficient for the children to be regarded as the legitimate offspring of the wife and the other man. The view taken by all three of the Lordships was that the relationship was illicit in its inception and there was no evidence to suggest that its character had in any way changed. Lord Brougham, in particular, stated[32] that he was of the view that the case was entitrely a matter of fact and that he was satisfied from the evidence that the parties did not live together as man and wife.

It is clear from the cases previously discussed that the presumption will be of particular importance in relation to questions of legitimacy, which in turn, is important in matters of succession. However, in order to place the presumption of marriage in its proper perspective in this area, it is important to note the changing approach of the law to the status of illegitimacy. Previously, the presumption of legitimacy had

28 Id. at 212.

29 Id. at 195.

30 For another case involving a marriage by habit and repute in Scotland see De Thoren v Attorney-General, (1876) 1 App. Cas. 686. In that case, however, a marriage ceremony, albeit defective, had undoubtedly taken place.

31 (1848) 1 H.L. Cas. 498; E.R. 853.

32 Id. at 506.

been difficult to rebut, as witnesses the leading New Zealand case of *Ah Chuck v Needham*.[33] There, a child of Mongoloid appearance, born to a married couple of Caucasian origin, was held to be legitimate even though it was proved that the wife had been carrying on a liaison with a Chinese market gardener. However, following the lead of New Zealand[34] itself, four jurisdictions in Australia, Tasmania,[35] Victoria,[36] South Australia[37] and New South Wales[38] have legislated to abolish the status of illegitimacy and inroads have been made into the legal disabilities suffered by such children in England[39] and the state of Western Australia.[40] Despite the comment of an eminent New Zealand commenator[41] that, " . . . the fact remains that any really substantial equation of the legal position of legitimate and illegitimate children does tend to devalue marriage and the orthodox family structure as institutions", it seems safe to say that the status of illegitimacy will eventually disappear throughout the common law world. Indeed, if legislation of the New Zealand variety does have the effect claimed, then the present writer would go so far as to suggest that it is the value of marriage and the orthodox family structure which should be questioned rather than the various *Status of Children* and similar Acts. For the purposes of this article, the importance of the changes in both law and social attitudes towards illegitimacy[42] lies in that they may well affect the way in which the presumption ought to operate both now and in the future.

As has already been observed, in dealing with cases involving the presumption, the courts were concerned with events which had taken place a long time previously and where, often, both of the parties to the marriage were dead. But is clear that death or passage of time is not a prerequisite for the application of the presumption. In *Elliott v Totnes Union*,[43] another case which involved illegitimacy, a man

33 [1931] N.Z.L.R. 559.
34 Status of Children Act 1969.
35 Status of Children Act 1974.
36 Ibid.
37 Family Relationships Act 1976.
38 Children (Equality of Status) Act 1976.
39 See Family Law Reform Act 1969.
40 See Administration Act Amendment Act 1971; Property Law Amendment Act 1971; Wills Act Amendment Act 1971.
41 B. D. Inglis, *Family Law* 398 (2nd Ed., 1970).
42 There is much evidence to the effect that social attitudes to the status of illegitimacy are by no means as intransigent as once they were. See H. D. Krause, *Illegitimacy: Law and Social Policy* 166-175 (1971).
43 (1892) 9 T.L.R. 35.

contested a claim for maintenance of a child on the grounds that he had never been married to its mother, who had since died. The Divisional Court upheld the decision of the justices, who had disbelieved the man's evidence. Bruce J. was of the opinion[44] that, " . . . there was no reason, in the absence of satisfactory evidence to the contrary, why the ostensible relations of the parties should not be referred to a legitimate and correct connexion rather than to an illegitimate one". Bruce J. appeared to rely on some extremely uncompromising *dicta* in the early case of *Doe decd. Fleming v Fleming*[45] where, *interalia,* it was said by Best C.J.[46] that, "It appeared on the trial that the mother of the lessor of the Plaintiff was received into society as a respectable woman, and under such circumstances improper conduct ought not to be presumed". There can be no doubt that, in *Elliott v Totnes Union,* the crucial factor was the highly doubtful credibility of the alleged husband.[47] A notably important and problematical case is the decision of Kekewich J. in *Re Shepherd, George v Thyer.*[48] In *Re Shepherd,* the legitimacy of children was again in issue and the parents gave evidence that they went through a form of marriage in France and had lived together as man and wife for some thirty years. There was also some evidence as to the recognition of the children. However, on the other hand, expert evidence to the effect that the kind of marriage ceremony undergone by the parties was impossible in France, was offered, Kekewich J. did not hear this evidence but, instead, assumed[49] that the marriage was impossible in accordance with French law and the, " . . . habits of law-abiding people in France". Nonetheless, it was held that this evidence was insufficient to rebut the presumption: in the words of Kekewich J.,[50] "Now here I have the intention to marry: about that there is not a shadow of doubt. There is a somewhat romantic story, doubtful in its details, of a marriage de facto, of something gone through to perfect the intention of marriage, and I have some evidence of recognition of children. Now, after thirty years, the Court has been asked to say that because the marriage has not been proved, and cannot be proved, these children are not to be admitted share." *Re Shepherd* is a very difficult case indeed; for, if

44 Id. at 36.
45 (1827) 4 Bing. 266; 130 E.R. 769.
46 Id. at 266.
47 For a case where both parties were alive at the time of the hearing, see the jactitation of marriage action in Goldstone v Smith (1922).
48 [1904] 1 Ch. 456.
49 Id. at 463.
50 Ibid.

the profered expert evidence and Kekewich J's assumption could not rebut the presumption, then it is difficult to see what other evidence could do so. One attempt to explain the decision has been made by Edwards J. of the New Zealand Supreme Court in *Williamson v Auckland Electric Tramways Co.*[51] who considered that the only way in which *Re Shepherd* could be explained was by assuming that the judge was not willing to rely on the recollections of the spouses as to events which had taken place so long before the action. This may possibly be the case, but there is no internal evidence in Kekewich J's judgment that he was adopting that view. Despite the fact that Cross regards *Re Shepherd*[52] as a case involving the presumption of marriage arising from cohabitation, the better view would be to regard it as a case arising from the presumption of formal validity, a presumption which, it will be later argued, at least ought to be regarded as stronger. The best view is probably the same as that taken by Edwards J.[53] of Kekewich J's other decision in *Re Thompson, Langham v Thompson*:[54] namely, that it is not good law and ought not to be followed. In *Re Thompson,* there was no evidence of the marriage, apart from the cohabitation of some ten years and the fact that the couple were regarded as married by friends, neighbours and relatives, even though the male partner was described as a "bachelor" in a subsequent marriage certificate. On the other hand, it was argued, if it was to be held that the couple were married, it would follow that the husband had committed bigamy. Despite this contention, Kekewich J. held that the presumption had not been rebutted and further stated[55] that, even though the couple had cohabited for only ten years, the validity of their relationship had not been challenged and, thus, he felt obliged to treat it as if it had been longer. Kekewich J. appears to have overlooked the rather obvious fact that there was no need to challenge its validity until the will which was in question raised the issue.

Although questions of legitimacy and succession were most important in relation to the presumption, the abolition of the rule in *Hill v Crook,*[56] as effected in the jurisdictions earlier referred to[57] would

51 (1911) 31 N.Z.L.R. 161 at 175.
52 Supra note 9 at 123.
53 Supra note 51 at 176.
54 (1904) 91 L.T. 680.
55 Id. at 681.
56 (1973) L.R. 6 H.L. 265. That the word "children" in a disposition must be taken to mean "legitimate children".
57 Supra text, at nn. 33-36, 39.

clearly reduce its importance in that sphere. But the presumption of marriage arising from cohabitation has arisen in other areas, where different considerations may be pertinent. In the early case of *Morris v Miller*.[58] in an action for criminal conversation,[58a] it was held that, as in prosecutions for bigamy, a marriage must be proved, (in fact) "[A]cknowledgment, cohabitation, and reputation", said Lord Mansfield.[59] "are not sufficient . . . " In *R. v Burtles*,[60] the judge at first instance, in a prosecution for bigamy, and directed the jury that they would, from a certificate of marriage and the fact of cohabitation, infer that the accused was the person who had married a particular woman on a particular day. It was argued, on appeal, that the production of the certificate without further proof of the names certified in it was not enough that there must be proof of the actual marriage and that evidence of reputation of the marriage was inadmissible. The Court of Criminal Appeal upheld the conviction, with Coleridge J. commenting[61] that whether the production of the certificate or the fact that the accused had spoken of her as his wife would, of itself, amount to proof of the marriage was doubtful, but that, " . . . the two facts taken together are some proof of the connection or identification of the prisoner with the person mentioned in the marriage certificate." The point of the decision in *Burtles* was, therefore, not whether the fact of marriage in prosecutions for bigamy need be proved, but what information was necessary for the fact to be regarded as proved. In the Australian case of *R. v Umanski*,[62] which concerned a prosecution for incest committed by the accused on his step daughter, the Full Court of the Supreme Court of Victoria held that, where proof of marriage was an essential ingredient in a criminal trial, such marriage must be strictly proved and could not be sufficiently proved by admissions by the accused or by evidence of cohabitation or repute. The only exception that the Full Court would permit[63] was where it was impossible or highly impractical to obtain evidence of foreign law. Thus, it is clear from the cases considered, and from the earlier cases which were analysed by the Court in *Umanski*,[64] that the presumption of marriage is totally irrelevant in the criminal law.

58 (1767) 4 Burr. 2057; 98 E.R. 73

58a Now abolished in Australia by reason of s. 120 of the Family Law Act 1975.

59 Supra note 58 at 2059.

60 (1911) 6 Cr. App. Rep. 177.

61 Id. at 178.

62 [1961] V.R. 242.

63 Id. at 248.

64 Id. at 245-248. The only apparent exception to the clear line of authority is the decision of the Supreme Court of Ontario in R. v Lindsay [1916] 30 D.L.R.

Of fundamental importance to the operation and value of the presumption is the matter of evidence in rebuttal. The various formulae which have been used to describe the kind of evidence required in rebuttal in the cases so far discussed suggest strongly that the presumption is a strong one: " . . . clear and conclusive evidence" in Marks,[65] . . . the contrary be clearly proved . . . " in the *Sastry Velaider* case[66] ". . . evidence of the most cogent kind." in *Re Taplin*,[67] " . . . firm and clear [evidence]" in *Re Taylor*,[68] and so on. Cross, however, points out[69] that the, " . . . precise manner in which the tribunal of fact should act when all the evidence leaves it in doubt concerning the existence of a valid marriage ceremony has never been fully considered". He goes on to say that it is also doubtful how far the formulae used to describe the kind of evidence needed to rebut the presumption arising from cohabitation differ from those used to describe the kind needed to rebut the presumption of formal or essential validity. One case where the presumption was rebutted was *Re Bradshaw, Blandy v Willis*,[70] where the couple in question had cohabited for eight years and subsequently married. In the banns and marriage certificate they had been described as bachelor and spinster respectively and Bennett J. held this certificate rebutted any presumption of the validity of that marriage. Bennett J. said[71] that, "The parents must have known that they were described as bachelor and spinster in the marriage register, and must have known that they had been so described publicly on three occasions when their banns were called. I cannot bring myself to believe that they would have permitted these things to be done if the truth had been that they had been validly married to each other many years earlier". Apart from the fact that *Re Bradshaw* finally screws down the lid on *Re Thompson*,[72] it is hard to see how any other conclusion could have been possible; to have given effect to the

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417, where it was held that, in a prosecution for incest, a marriage might be proved by cohabitation or repute. No reasons for the decision and no authority was cited. The accused was charged with incest with his daughter and it is not easy to see from the report why it was necessary to prove the fact of marriage.

65 Supra text at n. 11.

66 Supra text at n. 14.

67 Supra text at n. 18.

68 Supra text at n. 22.

69 Supra note 9 at 124. See Bates, supra note 5.

70 [1938] 4 All E.R. 143.

71 Id. at 146.

72 Supra text at n. 53.

presumption in these circumstances would have been tantamount to recognizing marriage by declaration of the parties.

Yet there is clearly more to the matter if the difficulty raised by Cross[73] is to be resolved. It is the opinion of the present writer that the Courts should not regard the presumption of marriage arising from cohabitation as being so strong as they appear to have done in the past. Quite apart from the legal and social changes which have taken place in recent years, and are documented elsewhere in this article, and which have, to a considerable extent, rendered the reasons for the existence of the presumption obsolete, there is some authority for the view that the presumption should not require such strong evidence in rebuttal. In the Canadian case of *Henderson v Weis,*[74] Spragge J. of the Ontario Court of Chancery emphasised that conduct, habit and repute were no more than items of evidence[75] and did not constitute marriage and that the repute must be uniform and general.[76] Spragge J., in addition, noted that many of the cases in which the presumption had been applied had originated in Scotland. This fact is unlikely to strengthen the presumption in other jurisdictions because of Scots law's recognition of marriage by habit and repute, an irregular form of marriage which still remains competent even today[77] and which has no counterpart in England, Australia or Canada. Similarly, in South Africa, Ogilvie Thompson A.J., in *Ex parte L,*[78] commented that the presumption was likely to be less cogent in countries where some kind of ceremony was required. In the same way, the presumption is likely to be of less practical value as the chances of records being lost or destroyed are not as great as they were during the Nineteenth Century particularly in the, then, new countries of Australia and Canada. Taken together with the fact of its irrelevance in criminal proceedings, the presumption of marriage arising from cohabitation cannot be regarded as a strong one and ought not to be so treated by the courts.

There is recent evidence for the view that the presumption of marriage as a whole, whether based on cohabitation or formal or essential

73 Supra text at n. 69.
74 (1877) 25 Cr. 69.
75 Id. at 78.
76 Id. at 80.
77 See D. M. Walker, *Principles of Scottish Private Law* 247-248 (2nd Ed., 1975). The other irregular forms of marriage (marriage by declaration *de praesenti* and by promise *subsequente copula*) were abolished by s. 5 of the Marriage (Scotland) Act 1939.
78 (1947) 3 S.A. 50 (C) at 56.

validity, is decreasing in importance. In *Powell v Cockburn*[79] a decision of the Supreme Court of Canada, Dickson J., with whom the remainder of the court concurred, was of the view[80] that the presumption should not be given an artificial probative value. Notwithstanding this comment and the fact that *Powell v Cockburn* concerned essential validity, it is suggested that there are good reasons why the presumption of marriage based on its formal or essential validity should be regarded as stronger than its counterpart arising out of cohabitation. First, situations giving rise to questions of formal or essential validity are likely to arise more frequently and in a wider variety of situations[81] and, second, in such cases there is, by definition, evidence of a ceremony (albeit a possibly defective one) having taken place. The intention, therefore, to enter into the marriage relationship is more apparent and the presumption should, accordingly, be given greater effect than one where the intention is less so.

Finally, a possibly lesser point; an analysis of the cases on this topic have reinforced the writer in this opinion of the futility of attempting to classify presumptions in the ways usually attempted. Thus, Cross[82] seems to assume that the presumption of marriage arising out of cohabitation is one of law, but the Irish Supreme Court, for example, in *Barry decd., Mulhern v Clery*[83] seemed to regard it as one of fact. The practical value of this distinction seems very limited: what is important is how a particular presumption works in the context of the general law affecting both it and its applicable social environment, not any kind of process of dubious categorization.

79 Supra note 6.
80 Id. at 161.
81 See Bates, supra note 5.
82 Supra note 9 at 124.
83 [1930] I.R. 649.