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COMMON-LAW MARRIAGE IN MINNESOTA: A PROBLEM IN SOCIAL SECURITY†

By

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and

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INTRODUCTION

THE vanguard of the army of applications for Federal Old-Age Benefits filed under sections 203(a)[1] and 205[2] of the Social Security Act has made its appearance in the offices of the Social Security Board throughout the country. In this great rank and file are thousands of applications from widows of deceased wage earners. And plentifully sprinkled through the latter class are applications by women who allege that they are widows by virtue of a common-law marriage with the deceased.

The adjudication of these claims by the Social Security Board will open anew the law of common-law marriage in the fifty-one jurisdictions covered by the Act.[3] This revival results, in the

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[1](1935) Pub. No. 271, 74th Cong.; 49 Stat. 620, 623; 42 U. S. C. A., sec. 403(a):

"If any individual dies before attaining the age of sixty-five, there shall be paid to his estate an amount equal to 3½ per centum of the total wages determined by the Board to have been paid to him, with respect to employment after December 31, 1936."

[2]Id.; 49 Stat. 620, 624; 42 U. S. C. A., sec. 405:

"If any amount payable to an estate under section 203 or 204 is $500 or less, such amount may, under regulations prescribed by the Board, be paid to the persons found by the Board to be entitled thereto under the law of the State in which the deceased was domiciled, without the necessity of compliance with the requirements of law with respect to the administration of such estate."

[3]Title II of the Social Security Act which provides for Federal Old-Age Benefits is in force in the forty-eight states, Alaska, Hawaii and the District of Columbia.

first instance, from the fact that section 205 provides that, where the death benefit under section 203 is $500 or less, the Social Security Board (without administration of the estate) may pay directly to those persons found by it "to be entitled thereto under the law of the state in which the deceased was domiciled. . . ."

In this type of case the Social Security Board is directly concerned with the common-law marriage problem. This concern arises in the following manner: Let us assume that the legal widow of a deceased wage earner is entitled to the death benefit provided for in section 203(a) of the Act, under the law of the state in which her deceased husband died domiciled. If it so happens that the applicant alleges that she is a *common-law* widow, at least two findings must be made by the Board before payment can be certified directly to her under section 205: (1) that the law of the state in question recognizes common-law marriages, and (2) that the applicant has met the conditions prescribed by the law of that state for establishing herself as the common-law widow of the deceased. If the marriage is sought to be established by acts occurring outside the domiciliary state, an additional complication is added.

It is interesting to notice, however, that the problem of common-law marriage is not confined to the cases where payment is certified under section 205. Suppose the amount of benefit involved is more than $500, and consequently the payment is certified to the executor or administrator of the alleged husband's estate. True, the administrator is now substituted for the Social Security Board as the distributing medium, but the legal position of the common-law widow as distributee is, of course, determined by the same state law which governed the Social Security Board in certifying payment under section 205.

Not only has the advent of the Social Security Act accentuated the whole problem of common-law marriage, but the questions to be determined promise much activity for courts and lawyers. Heretofore, most of the court decisions which concern the legal rights of common-law widows have resulted from litigation over the estates of decedents who are alleged to be common-law husbands. This group of cases is decidedly limited, particularly as to the number of decisions which reach the appellate courts in certain jurisdictions, for the obvious reason that decedents in the class of society where common-law marriages flourish generally leave no property at all, and rarely leave enough property to

justify expensive litigation.[4] In contrast, the Social Security Act assures an "estate" to every wage-earner covered by the statute who dies before the age of sixty-five, and to a considerable number of wage-earners who die after attaining the age of sixty-five.[5] Consequently, as the amount of benefits becomes increasingly more substantial, considerable litigation is bound to arise with respect to the rights of surviving relatives (including common-law widows) to share in the distribution of the estates thus created by the federal government.

In view, therefore, of the direct interest which the Social Security Board has in the inheritance rights of these common-law widows, certain lawyers in the Office of the General Counsel to the Board have engaged in an intensive study of the legal problems of common-law marriage as reflected in the statutes and decisions of the several states. As Minnesota was one of the jurisdictions studied, the results of the investigation are submitted here for the consideration of the bar of that state.

Common-Law Marriage Generally

All the decisions which define the term "common-law marriage" agree that such a union grows out of a contract of marriage without solemnization in any particular form. The definitions are not uniform with respect to the need for cohabitation in the marital relation or the "habit and repute" of marriage in order that a valid union may be created. Thus, common-law marriage is a method of entering into the marital relationship without observing the solemnities or forms prescribed by either church or state. Such marriages are now denied legal sanction in some states[6] but, as will be shown later, Minnesota is not in this group.[7]

Common-law marriages may be divided into two types: (a) per verba de futuro cum copula and (b) per verba de praesenti.

[4]In some half dozen jurisdictions the total number of cases involving common-law marriage which reached the highest courts in their respective states were as follows: Alabama, 16; Florida, 11; Georgia, 13; Iowa, 13; South Carolina, 8; South Dakota, 4.

[5]See Social Security Act, sec. 203(b) and (c); 49 Stat. 620, 624; 42 U. S. C. A., sec. 403(b) and (c), Mason's U. S. Code, tit. 42, sec. 403(b) and (c). The term "qualified individual" is defined in the Act at sec. 210(c); 49 Stat. 620, 625; 42 U. S. C. A., sec. 410(c), Mason's U. S. Code, tit. 42, sec. 410(c).

[6]For general discussion of the effect of marriage statutes on common-law marriages, consult notes in 2 L. R. A. (N.S.) 353; L. R. A. 1915E 113. See also 39 A. L. R. 538 and 60 A. L. R. 541.

[7]Mason's 1927 Minn. Stat., secs. 8562 et seq.

The former class is virtually extinct by reason of statutes[8] and decisions.[9] Although no Minnesota case expressly denying validity to a marriage per verba de futuro cum copula has been found, it is our opinion that the general rule in the United States declaring such marriages invalid probably would prevail in this jurisdiction.[10] Since de futuro unions have at most only a small place in modern American jurisprudence, the elimination of that class of common-law marriages leaves the real problem untouched, for the reason that the de praesenti marriage is ordinarily the type with which the courts must deal.

De praesenti marriages in turn fall into two classes: marriage by express contract[11] and marriage by implied contract. The fundamental problem raised in the case of marriage by express contract is whether the marriage is legally valid without the subsequent cohabitation[12] of the parties as man and wife. In other words, suppose the parties have entered into a written contract of marriage but have never cohabited together.[13] Is such a con-

[8]See, for example, Nebraska Comp. Stats., (1929), sec. 42-104 and Collins v. Hoag & Rollins, Inc., (1932) 122 Neb. 805, 241 N. W. 766, reversing (1931) 121 Neb. 716, 238 N. W. 351.

[9]See, for example, Marsicano v. Marsicano, (1920) 79 Fla. 278, 84 So. 156.

[10]Madden, Domestic Relations 58; Jacobs, Cases on Domestic Relations 399 n.; 38 C. J. 1319. The first two authorities state unequivocally that there is no decision in the United States which holds that a marriage per verba de futuro is valid. But see Hulett v. Carey, (1896) 66 Minn. 327, 336, 69 N. W. 31, 33, where it was said by way of dictum that if the contract was made per verba de futuro, "and be followed by consummation, it amounts to a valid marriage, in the absence of any civil regulations to the contrary. 2 Kent, Comm. 87; 2 Greenleaf Evidence, sec. 460; 1 Bishop, Mar. & Div., secs. 218, 227-229." To the notewriter in L. R. A. 1915E, 33, the "doctrine of marriage per verba de futuro cum copula thus seems to be a shadow of its former self, even in the jurisdictions that have not expressly repudiated it as a whole; and it seems a fair conclusion that the doctrine is nearly, if not quite, obsolete." See also L. R. A. 1915E 70.

[11]See note 17, infra.

[12]Cohabitation, as used in this article, means cohabitation in the marital relation. Obviously, cohabitation in any other relation could not give rise to the status of husband and wife. Thimgan v. Mathews, (1923) 74 Colo. 93, 94, 219 Pac. 211, 212; Grigsby v. Reib, (1913) 105 Tex. 597, 608, 153 S. W. 1124, 1130, L. R. A. 1915E 1, 7; Ann. Cas. 1915C 1011, 1018; McClurkin v. McClurkin, (1921) 206 Ala. 513, 515, 90 So. 917, 918; Reppert v. Reppert, (1932) 214 Iowa 17, 24, 241 N. W. 487, 491. And see 38 C. J. 1318, n. 28, 29, 30. On the general subject of the requisites and proof of common-law marriages, see note in (1914) 27 Harv. L. R. 378; and "Cohabitation as Essential to a Common-Law Marriage," (1919) 3 Minn. L. Rev. 426.

[13]Such was the situation in Great Northern Ry. Co. v. Johnson, (C.C.A. 8th Cir. 1918) 254 Fed. 683. In that case, the plaintiff, who alleged that she was the common-law wife of E. R. Spiers, recovered judgment against the Great Northern Railway for damages growing out of the death of her common-law husband. Plaintiff based the marriage upon a written

tract sufficient in itself to make them man and wife? Marriage by implied contract raises this fundamental question: When will the "habit and repute" of marriage, i.e., the various incidents of cohabitation, justify the inference of a contract of marriage even though no express oral or written agreement exists?[14]

With respect to marriage by express contract, oral or written,

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contract sent from Minnesota (where the husband was and continued to be for some time afterward) to her in Missouri, where she resided and was employed. The contract read as follows:

"St. Paul, Minn., March 10, 1916.

"It is hereby agreed, by and between E. R. Spiers and Mayme Woodall, from this date henceforth to be husband and wife, and from this date henceforth to conduct ourselves towards each other as husband and wife, the said E. R. Spiers to contribute to the support and maintenance of the said Mayme Woodall as her husband, and the said Mayme Woodall to conduct herself towards the said E. R. Spiers as a dutiful wife.

[Signed] E. R. Spiers
Mayme Woodall."

Apparently no other evidence was introduced to show that the parties were married.

The circuit court of appeals affirmed the judgment of the district court, and held the marriage valid. In its opinion the court pointed out that, while this was a Missouri contract, both Minnesota and Missouri recognize common-law marriage; also that in Missouri it is necessary only for the parties to have made a legally binding agreement to become husband and wife. The latter fact is emphasized forcibly in the following language:

"... Mutual assent to the present institution of the status is all sufficient. No other act, such as cohabitation (Davis v. Stouffer, 132 Mo. App. 555, 112 S. W. 282), is necessary to complete the institution of the status where the mutual assent contemplates a marriage in praesenti. Why should the physical presence of the parties be essential to the legality of this contract, any more than of any other? It is not for us to devise means of making common-law marriages difficult. It is our duty to recognize the law as it exists. Nor is there any reason why the parties should be within the same jurisdiction. The existence and validity of the contract must be determined by the law of the place where it is legally regarded as made. Here, however, there is no point in the suggestion, for both of the states involved approve common-law marriages."

In direct contrast to the holding in Great Northern Ry. Co. v. Johnson is Herd v. Herd, (1915) 194 Ala. 613, 69 So. 885. In that case the parties engaged in a supposed ceremonial marriage which thereafter proved invalid because the license had been issued by a justice of the peace who had no such authority under the law of Alabama. Sexual intercourse had preceded the alleged ceremony but, following it, the couple never cohabited together, nor did the man contribute to the woman's support. A child was born to them about four months after the alleged ceremony. Following the death of the man, the probate court granted letters of administration to the woman as his widow. The supreme court of Alabama reversed the decree on the theory that, while the necessary present consent to marry existed, the element of cohabitation *following that consent* was absent and, therefore, no common-law marriage could be spelled out under the Alabama decisions.

[14]See notes, L. R. A. 1915E 72, 91. This situation often arises where parties have cohabited as husband and wife despite an impediment, known or unknown, precluding an actual marriage, and have continued to do so after the removal thereof. See also note, 3 L. R. A. (N.S.) 244.

followed by cohabitation in the relation of husband and wife, such a union is concededly *a marriage* in all states recognizing the validity of common-law marriage.[15] Difficulty arises, however, when the alleged marriage is based only on an oral or a written contract. The various states are in irreconcilable conflict on the question of the sufficiency of the agreement alone to create a marriage in the absence of matrimonial cohabitation in pursuance thereof.[16] Therefore one of the primary purposes of this article will be to ascertain the need for cohabitation as an element of common-law marriage in Minnesota.

Common-Law Marriage in Minnesota

A statement appears in Dunnell's Minnesota Digest[17] that marriage is, by statute, a civil contract, in so far as its validity in law is concerned, and that the essence of the contract is the consent of the parties. If it is made per verba de praesenti and the parties do not thereafter cohabit, the union is nevertheless a legally binding common-law marriage because its creation requires only the present consent of competent parties. Cohabitation is merely evidence of marriage and not conclusive evidence at that.

Such being some of the general propositions which have been formulated with respect to common-law marriage in Minnesota,

[15]See cases collected in 38 C. J. 1318, n. 35.

[16]The Alabama and Texas courts, for example, take the position that cohabitation as man and wife is a necessary element of the common-law union. Herd v. Herd, (1915) 194 Ala. 613, 69 So. 885; White v. White, (1932) 225 Ala. 155, 142 So. 524; Grisby v. Reib, (1913) 105 Tex. 597, 153 S. W. 1124. On the other hand, a contract of marriage, which may or may not be followed by cohabitation, is all that is necessary to establish a common-law marriage in Georgia, Missouri, and South Carolina. Askew v. Dupree, (1860) 30 Ga. 173; Davis v. Stouffer, (1908) 132 Mo. App. 555, 112 S. W. 282; Jewell v. Magood, (1833) Rich. Eq. (S.C.) 113. It has been pointed out that one weakness in the rule which requires cohabitation as an independent element of the common-law marriage is the period of time which must elapse before the marital status is fixed. Carried to its logical extreme the result of this rule would be to require sexual relations between the parties before the matrimonial relationship was legally established, "a result exactly contrary to the real purpose of the marriage laws." See note L. R. A. 1915E 24-25.

[17]4 Dunnell, Minn. Dig., 317, sec. 5784. This section concludes with the following sentence: "A [marriage] contract may be entered into by correspondence." However, the authority for this statement is Great Northern Ry. Co. v. Johnson, (C.C.A. 8th Cir. 1918) 254 Fed. 683, cited supra, note 12. As the offer of marriage in the Johnson Case was accepted in Missouri, the law of Missouri rather than that of Minnesota governed, a fact pointed out by the court.

As to marriage by correspondence, see also Lorenzen, Marriage by Proxy and the Conflict of Laws, (1919) 32 Harv. L. R. 473; and note, Marriage by Mail, (1919) 32 Harv. L. R. 848; Beale, The Conflict of Laws (1919) 33 Harv. L. R. 1, 13.

let us now investigate the Minnesota decisions in the field for whatever additional light they may cast.

The leading Minnesota case concerning common-law marriage is the much-cited *Hulett v. Carey*.[18] The facts of this case were substantially as follows:

One Lucy A. Pomeroy, who alleged that she was the common-law widow of Nehemiah Hulett—a man generally supposed and reputed to be a bachelor—filed two petitions against Hulett's estate, through which she sought (a) to have his homestead and certain personal property set apart to her, and (b) to have the probate of his will set aside. The probate court denied both petitions. In her appeal to the district court Lucy predicated her case on a written contract of marriage[19] which the jury found was in fact executed by Hulett. The evidence showed that Hulett had employed Lucy Pomeroy as his housekeeper prior to the execution of the contract. Immediately thereafter she moved into Hulett's room, and from that time until his death the couple occupied the same sleeping apartment and cohabited as husband and wife. As the marriage was kept secret, the parties never held themselves out as a married couple. Instead, they deliberately conducted themselves in such a manner as to give the impression that their previous relation of employer and employee still existed. Hulett's administrator contended, upon this state of facts, that there had been no marriage because, through their failure to assume the

[18](1896) 66 Minn. 327, 69 N. W. 31.

[19]The contract, which was alleged to have been executed on January 7, 1892, but which by mistake was dated Jan. 6, 1892, read as follows:

"Contract of marriage between N. Hulett and Mrs. L. A. Pomeroy.

"Believeing a marriage by Contract to be perfectly lawful, We do hereby agree to be husband and wife, and to hereafter live together as such.

"In witness whereof we have hereunto set our hands the day and year first above written.

[Signed] N. Hulett.
L. A. Pomeroy."

The court submitted to the jury the single question of whether the foregoing paper was in fact executed by Nehemiah Hulett. In its submission to the jury the court excluded (as a self-serving declaration and not part of the res gestae) evidence of a mortgage which Hulett made subsequent to the date of signing the alleged contract of marriage, and which, in the certificate of acknowledgment, described him as a single man. The court also excluded for the same reason other testimony of a similar character which was offered by the administrator.

The court admitted in evidence a letter written by Lucy to her sister, which contained references to her relationship with Hulett, who was designated therein as "my husband" and "your brother Hulett." This letter, according to Lucy's testimony, was written in Hulett's presence and handed to him to read. He did read it, and after sealing it in an envelope placed the letter in his pocket. The next morning Hulett died suddenly and the letter was mailed by a nephew, who received it from the undertaker.

marital relation publicly, they had failed to establish the habit or repute of marriage.

The district court held that Lucy Pomeroy was the wife of Hulett and that therefore she was entitled to the homestead of the deceased, and also to an allowance out of the estate for her maintenance during the period of administration.

The supreme court of Minnesota affirmed this judgment. It reversed, however, for reasons not material here, the judgment of the district court setting aside the probate of Hulett's will.

In its opinion the supreme court used the following language,[20] which has become classic in the Minnesota law of common-law marriage:

"Upon this state of facts, the contention of the appellants is that there was no marriage, notwithstanding the execution by them of the written contract; that, in order to constitute a valid common-law marriage, the contract, although per verba de praesenti, must be followed by habit or reputation of marriage,—that is, as we understand counsel, by the public assumption of marital relations. We do not so understand the law.

"The law views marriage as being merely a civil contract, not differing from any other contract, except that it is not revocable or dissoluble at the will of the parties. The essence of the contract of marriage is the consent of the parties, as in the case of any other contract; and, whenever there is a present, perfect consent to be husband and wife, the contract of marriage is completed. The authorities are practically unanimous to this effect. Marriage is a civil contract *jure gentium,* to the validity of which the consent of parties able to contract is all that is required by natural or public law. If the contract is made per verba de praesenti, and remains without cohabitation, or if made per verba de futuro, and be followed by consummation, it amounts to a valid marriage, in the absence of any civil regulations to the contrary. . . . The whole law on the subject is that, to render competent parties husband and wife, they must and need only agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status. If cohabitation follows, it adds nothing in law, although it may be evidence of marriage. It is mutual, present consent, lawfully expressed, which makes the marriage. . . ."

While *Hulett v. Carey* is the leading Minnesota case in the field of common-law marriage, it is not the oldest. As early as 1877 the supreme court of Minnesota decided *State v. Worthingham.*[21] This case was a bastardy proceeding on the complaint of one Mary Sullivan, who charged that the defendant Worthingham

[20] (1896) 66 Minn. 327, 336, 69 N. W. 31, 33, 34.

[21] (1877) 23 Minn. 528.

was the father of her illegitimate child. Worthingham entered a plea of not guilty on the premise that the child was legitimate by reason of an alleged common-law marriage between him and the complainant. The trial court excluded evidence[22] of the common-law marriage as incompetent, irrelevant, and immaterial and gave the case to the jury on the theory that the existence of a ceremonial marriage was necessary in order to establish a marital status between the defendant and Mary Sullivan.

On appeal it was held that the evidence offered by the defendant should have been received. In reaching this decision the supreme court of Minnesota used the following language:[23]

". . . Not only was such evidence competent for the consideration of the jury upon the question of a present mutual consent and agreement of marriage, made after the alleged divorce, but sufficient, if not overcome by a preponderance of evidence to the contrary, to support a finding in favor of a valid marriage, so far, at least, as to invest the issue with the legal rights and claims of legitimacy, and to subject the parents to the duty of providing for their maintenance and support."

For the next seventeen years no case involving common-law marriage reached the supreme court of Minnesota. Then, within the next two-year period, two cases were decided. The first was *In re Frederick Terry's Estate*[24] in 1894, and the second *Hulett v. Carey*[25]—previously discussed—in 1896.

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[22]Mary Sullivan testified that she had lived with the defendant for almost eight years under a promise of marriage, five children being born of their union. She alleged that at the beginning of the cohabitation the defendant promised to marry her as soon as he could obtain a divorce from his wife and that her cohabitation with him had been on that condition. However no marriage ceremony ever was performed. The defendant admitted the paternity of the child and his legal responsibility for its support. He offered to prove, however, that during the entire period of cohabitation the complainant had held herself out to her friends, neighbors and the world generally, as his wife, the relationship having started at a time when the two of them had gone to a neighboring city for a single night and thereafter had represented themselves as married. He offered further proof that complainant had assumed the name of Worthingham and that their children had been given that name; also that some five years before the birth of the child in question, he had obtained a divorce from his former wife.

[23](1877) 23 Minn. 528, 536. supra. note 21.

Cf. State v. Lindskog. (1928) 175 Minn. 533, 221 N. W. 911, wherein it was held that the evidence submitted was not sufficient to establish a common-law marriage in order to hold a father liable for the support of his minor children under G. S. 1923, sec. 10136. During the period of cohabitation the woman had a husband living to whom she had been joined by a ceremonial marriage. As the statute in question did "not have reference to illegitimate children," the supreme court, per Dibell, J., held that no crime had been committed, although the defendant had abandoned the woman and her offspring, of which he was admittedly the father.

[24](1894) 58 Minn. 268, 59 N. W. 1013.

In the *Terry Case,* Ellen Balderson appeared in the probate court at the time of final settlement of the estate of one Terry and alleged that she was Terry's widow, which was denied by the next of kin. The probate court held against her. A jury in the district court upheld her claim. Terry's administrator appealed to the supreme court, where the question for adjudication was whether sufficient evidence[26] had been presented to the jury to sustain its

[25]Hulett v. Carey, (1896) 66 Minn. 327, 69 N. W. 31, supra, notes 10, 18, 20.

[26]The evidence showed that Terry was unmarried at the time he met Miss Balderson, some seven years before his death. The two began sexual relations, and for a period of six months Terry was a frequent visitor to Ellen in her rooms. He also contributed to her support. Later, he sent her to White, a rental agent, in order that she might rent a house which he (Terry) owned, with money supplied by him. For the next two or three years she lived in this house, and paid the rent with Terry's money, the receipts therefor being issued to her as Ellen Balderson. At the end of this period Terry told White that he would thereafter collect the rent himself. Ellen continued to live in the house until it was sold some five years later, when she moved to other quarters which Terry rented for her until the time of his death.

Ellen testified that during all this period Terry lived with her. No evidence was offered that he ever lived anywhere else. She admitted that he occasionally visited his relatives unaccompanied by her; that he never brought friends or acquaintances to the house; that she never saw any of his brothers or sisters who were in the vicinity; that, with few exceptions, the couple never had any persons visit them; that they never went out in public together.

She testified further that she had nursed Terry at various times, including his last illness and death, in the house where they both lived. A physician who had attended them in this house testified that he did not know her as Mrs. Terry until 1885. A dentist testified that in 1885 Terry requested him to do some work on his wife's teeth and that the woman who came to his office was Ellen Balderson. Another witness testified that Ellen was often referred to by Terry as his wife. Another said that Terry had often given him money in payment for coal furnished to his wife and that he had often heard Terry refer to Ellen Balderson as such. Another witness said that Terry had asked her to visit his wife who was ill. All this evidence was uncontroverted.

After Terry's death, White, who was Terry's administrator, with Ellen's assistance and consent took charge of Terry's affairs and sent his body and his personal effects to his relatives. Ellen then told White for the first time that she had lived with Terry during the entire period since she had first rented his house.

Ellen testified that, after telling White that she and Terry were married, she retracted and told White that Terry had *promised* to marry her, and that he had also promised to remember her in his will and that she was very much disappointed to find he had not done so. She informed White of her services to Terry during his last illness and, upon being paid therefor, gave a receipt in the name of Ellen Balderson. Ellen admitted that she had signed a postcard addressed to White with the initials "E. B." and that she had had several conversations with him concerning payment for her services as Terry's housekeeper, and that she had not told White during these conversations that she was Terry's wife. *She admitted further that she had first learned of her possible rights as Terry's common-law wife when she consulted her lawyers.*

finding of a common-law marriage between Terry and Ellen Balderson. In holding that the evidence was insufficient to prove a common-law marriage, the court said:[27]

"The marriage relation is too important a matter, and of too much consequence to others besides the immediate contracting parties, to permit it to be established by vague or shadowy proof.

"The order appealed from should be reversed. . . ."

The two foregoing cases, *State v. Worthingham* and *In re Frederick Terry's Estate,* merely set the stage for *Hulett v. Carey,* and the basic law governing common-law marriage in Minnesota may be said to date from the *Hulett Case.*

In 1902, six years after the *Hulett Case,* the Minnesota supreme court decided the case of *Hemmway v. Miller.*[28] That case involved an action by the heirs-at-law of one Forrest against the defendant who maintained that she was the widow of Forrest. The district court entered judgment for the plaintiffs on a jury verdict in their favor.[29] The supreme court examined the evi-

[27](1894) 58 Minn. 268, 275, 59 N. W. 1013, 1015, supra, note 24.

[28](1902) 87 Minn. 123, 91 N. W. 428.

[29]The evidence before the trial court had been as follows:

Forrest had asked the sister of the defendant to consent to their marriage.

A witness testified that Forrest had called the defendant his wife in her presence, and the witness believed that the defendant was Forrest's wife.

(The supreme court regarded this testimony as a conclusion drawn from the fact that Forrest and the defendant were seen together frequently, and that Forrest had referred to the defendant as his wife on one or two occasions.)

Two other witnesses testified that Forrest had acknowledged the marriage.

A physician said that the defendant had been introduced by Forrest as his wife and that at the time of this introduction the two were living together.

Another physician, and also a real estate agent from whom an apartment was rented, testified that Forrest introduced or referred to the defendant as his wife in the course of conversations with each of them. However, it was shown also that the defendant always used her unmarried name at the various houses which she and Forrest occupied and also in the presence of their friends and acquaintances. Then, too, it appeared that Forrest was often referred to by the parties as her uncle, and she as his niece.

The defendant testified that for a period of about six years she and Forrest had cohabited together through the use of adjoining rooms, but that they had studiously avoided disclosing their true relationship.

For the purpose of proving that Forrest and the defendant were not married, the district court received in evidence a mortgage, which described Forrest as a widower, and to which the defendant subscribed her maiden name as a witness.

(The supreme court held this mortgage to be competent evidence inasmuch as it was a declaration in writing to the effect that Forrest and defendant were unmarried during a period when they were orally asserting the existence of a marriage by introductions and admissions to third parties. See infra, note 41.)

To establish the marriage contract, the defendant relied on the co-

dence and affirmed the judgment. In so holding, the court observed:[30]

"In the first place, it must be clearly borne in mind that there is no direct evidence of a marriage contract. . . . No witness heard it and there is no contract in writing. The fact of the marriage is sought to be established purely by the inference or presumption which arises from the conduct of the parties. First, as to cohabitation. It is true that, where persons cohabit together as husband and wife in the matrimonial relation, and hold out each other as such in the community in which they reside, then they will be presumed to be husband and wife, in the absence of any direct evidence of a marriage contract. But, in order to establish such inference, it is the universal holding that the cohabitation must in all respects be matrimonial. In this case we have the appellant's own testimony of the fact that she cohabited with Mr. Forrest continuously for six years. But she admitted that during that time she passed as his niece, was known by her maiden name, and that their true relations were kept from the knowledge of the people with whom they lived. While it is not necessary to go so far as to say that this condition raised the presumption that their relations were illegitimate, it certainly does not establish a presumption that the relation was matrimonial. Therefore, to give appellant all that can be conceded, no presumption will be drawn either one way or the other from the mere fact of cohabitation, as testified to by her."

Shattuck v. Shattuck's Estate[31] was decided in 1912. This case involved the single question of whether or not a woman who called herself Don Lynn Shattuck was the widow of Arthur C. Shattuck, deceased. No provision for or recognition of her was contained in Shattuck's will, but nevertheless, she entered a claim against his estate as his surviving widow. The probate court dismissed the claim and she appealed to the district court where, on conflicting evidence,[32] the jury found that the woman was the common-law

habitation referred to and the declarations set forth above. There was no attempt to establish the relationship by reputation and the defendant conceded that there was no sufficient evidence to that effect.

[30](1902) 87 Minn. 123, 127, 91 N. W. 428. 429.

[31](1912) 118 Minn. 60, 136 N. W. 409.

[32]Don Lynn Shattuck, who did business in Minneapolis as a "fashionable dressmaker," testified that—at some time after her divorce from her first husband—she and Shattuck, who was a bachelor and by occupation a traveling salesman, mutually agreed to become husband and wife and thereafter cohabited as such until his death. The trial court refused to permit respondent to testify expressly as to this agreement, but found sufficient corroboration of her statements in the subsequent cohabitation of the parties and the general repute of the marriage to give judgment for Mrs. Shattuck.

The parties had rented and lived in apartments where the landlord understood they were husband and wife. Shattuck, in letters to his relatives, had referred to his relationship with respondent and had been advised

widow of Shattuck. The supreme court of Minnesota affirmed the judgment of the district court in her favor on the theory that, while some items of evidence (particularly the secrecy surrounding the relationship of the parties) tended to negative the existence of a marital relationship, nevertheless, the existence of a marriage agreement was a question for the jury and the jury had decided it.

One year later (1913) the case of *Le Suer v. Le Suer*[33] was decided. This case involved three actions by one Mary Jane Le Suer against certain parties, to one of whom E. P. Le Suer had conveyed various parcels of land during his lifetime. The plaintiff, as the alleged wife of Le Suer who had not been joined in the conveyances, claimed an undivided one-third interest in the lands. The woman based her claim on a ceremonial marriage which the trial court found did not exist. Consequently it was necessary for her to establish the fact that she had been the common-law wife of Le Suer. While the evidence revealed cohabitation and an announcement of marriage by the parties at the time of the alleged ceremony and the birth of a child later, the subsequent conduct of the couple was such that the trial court found that no common-law marriage existed.[34] The supreme court of

by one of them that, under the laws of some states, respondent was his common-law wife. In other letters Shattuck spoke of the respondent in endearing terms but nowhere did he refer to her as his wife. He did inform a close friend that he intended to marry Don Lynn.

Various witnesses testified as to the cohabitation and the demeanor of the parties toward each other; that they (the witnesses) believed the parties to be husband and wife; and that Don Lynn's conduct during Shattuck's various illnesses, particularly his last one, had been that of a wife.

[33](1913) 122 Minn. 407, 142 N. W. 593.

[34]The evidence showed that E. P. Le Suer and Mary Jane Le Suer had cohabited for a considerable time in New York State, a child being born to them. Thereafter Mary Jane left Le Suer and went to Minnesota with another man. About a year later she wrote Le Suer that she had been abandoned and he brought her back to New York where they lived together for another year.

Mary Jane then disappeared once more with the same man, and about a year later she wrote Le Suer that she had again been abandoned in Minnesota. Le Suer then went to that state and for a second time they resumed cohabitation and a second child was born.

Shortly thereafter, Mary Jane left both Le Suer and her children and never lived with him again.

The children were placed by Le Suer with his relatives, from whom Mary Jane obtained them by means of a forged letter purporting to have been signed by Le Suer. Le Suer then went south, in order to locate his children; he returned shortly thereafter with another woman whom he presented as his wife, and with whom he lived until she died.

Later Le Suer married again, several children being born of that union. Thereafter Le Suer married once more and lived with his ultimate wife for some thirty years, one child being born of this marriage.

Meanwhile Mary Jane had been living in New Orleans and had in-

Minnesota, in affirming the judgment, used the following language:[35]

"That parties cohabit as husband and wife and hold themselves out as such is evidence of marriage, but not conclusive evidence. It may be done for the purpose of concealing their illicit relations. To constitute a valid common-law marriage the parties must contract with each other to be husband and wife. 'It is mutual, present consent, lawfully expressed, which makes marriage.' If they cohabit without such understanding and agreement, they are not husband and wife however long such relation may continue. . . ."

During the last seven years, four cases involving common-law marriage have been decided by the supreme court of Minnesota. The first of these was *In re Estate of Babetha Noser*[36] in 1930. This was the only Minnesota case found which concerned a common-law husband. The man in question was Werner Noser, who filed a claim as common-law husband against the estate of Babetha Noser. The probate court denied the claim, and an appeal was taken to the district court, where a jury found the parties had agreed to become husband and wife and had cohabited together under this agreement.[37] The supreme court of Minnesota held that the jury's verdict should not be disturbed. Cohabitation between Babetha and Werner Noser (the nephew of Babetha's first husband, August Noser, and twelve years her junior) began at a time when Babetha was still married to August. August left home

formed her relatives that she was married to a man named Thompson, and was known from that time on as Mrs. Thompson. She never made any claim that she was Le Suer's wife until after his death, although she knew of each of his marriages.

[35](1913) 122 Minn. 407, 410, 142 N. W. 593, 594.

[36](1930) 180 Minn. 463, 231 N. W. 199.

[37]Although Babetha and Werner Noser had apparently cohabited continuously from 1886 to 1917, and although three illegitimate children had been born to them, the evidentiary facts on which the jury found a common-law marriage to exist occurred subsequent to the latter date. After August's death in 1917 Werner and Babetha moved to Pine Island, Minnesota, where they lived together, occupied the same bedroom, and "in other ways evidenced a changed and more intimate relationship." Many witnesses testified that thereafter the couple were reputed to be husband and wife and lived together as such. Cards were received addressed to them as Mr. and Mrs. Werner Noser, Sr. and the grandchildren called them "Grandpa" and "Grandma." Their children, who formerly referred to Werner as "Uncle," now started calling him "Dad."

The court submitted three questions for the jury's determination: (1) Did Werner Noser, Sr. and Babetha Noser, at a time when they could lawfully make such an agreement, agree by mutual present consent to be husband and wife? (2) Did they cohabit, that is, live together under said agreement, as husband and wife? (3) Did they hold each other out to the public, under said agreement, as being husband and wife?

The jury answered all three questions in the affirmative.

in 1887, after an illegitimate son had been born to Babetha and Werner, but he continued to live in the neighborhood until 1917, the year of his death. Although the union of Babetha and Werner was criminal in its inception and continued to be such until the death of August thirty years later, the jury found, nevertheless, that after August's death the relationship had changed sufficiently (particularly in its external manifestation) to warrant the inference of a common-law marriage.

In affirming the judgment of the trial court, the supreme court observed:[38]

". . . In order to prove a common-law marriage, the evidence must show facts and circumstances establishing a contract between the parties to be husband and wife. A present mutual consent lawfully expressed is necessary; mere cohabitation as husband and wife is evidence of marriage but is not conclusive. . . ."

The second decision in this recent group of cases is *In re Lust's Estate (Ghelin v. Johnson)*[39] decided in 1932. The Minnesota Loan & Trust Company, Minneapolis, was appointed administrator of the estate of Frank Ghelin, on petition of three sisters and a brother of the deceased. The appointment was opposed by one Marie Chapman, or Marie Chapman Ghelin, who alleged that she was the surviving widow of the deceased and that therefore she should be appointed sole administratrix.

The probate court found that Marie was not the surviving widow of Ghelin. She thereafter appealed to the district court, where a jury made a similar finding, and judgment was entered accordingly. The supreme court of Minnesota reversed the judgment on the ground that certain evidence[40] which had been admitted should have been excluded.

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[38](1930) 180 Minn. 463, 466, 231 N. W. 199, 200.

[39](1932) 186 Minn. 405, 243 N. W. 443.

[40]This evidence was as follows:

1. An application made by the deceased for a passport, wherein he stated that he was unmarried. This was held to be merely a self-serving declaration.

2. A holographic will made by Ghelin in which substantial bequests were made to Mrs. Marie Chapman, who was not referred to as the decedent's wife. As it was conceded that the instrument was not so executed as to be a valid will, or to be valid for any purpose, it amounted to nothing more than a private written memorandum, and was merely a self-serving declaration made by the deceased.

3. Charts and records from a hospital in New York City, wherein Ghelin had been a patient, and in connection therewith, certain statements made by him to hospital attendants. The charts and records described Ghelin as a single man. These documents, as well as statements made by Ghelin to the hospital attendants, were merely hearsay, self-serving and

The *Ghelin Case* is of primary importance in Minnesota law for the reason that it reviews the preceding Minnesota cases dealing with common-law marriage, and then sets forth certain general propositions with respect to the kind of evidence[41] which is admissible to prove such a marriage.

The third case in the series is *In re Welker's Estate,*[42] decided in 1936. In that case one Doris Halstead, who alleged that she was the common-law wife of the deceased, filed objections in a proceeding which had been instituted by a third party for the

inadmissible.

In the three foregoing instances the evidence was excluded because the documents in question were not made in the presence of the alleged common-law widow nor brought to her attention.

However, the supreme court held that a certain income tax statement filed by Ghelin, in which he described himself as a single man, was admissible, on the theory that it was a declaration against interest. Had Ghelin described himself as a married man, he could thereby have effected a considerable saving in his income tax.

[41]These propositions follow:

(1) The best evidence is a written contract of marriage such as was in existence in the case of Hulett v. Carey.

(2) If there is no written contract of marriage, the claimant cannot testify to a verbal contract of marriage because the other party to the alleged contract is dead. Therefore, she must prove the contract of marriage by what is referred to in the Hulett Case as evidence of "habit and repute."

(3) Such "habit and repute" are shown most clearly by evidence of cohabitation as man and wife, or the assumption openly of marital duties and obligations, for such time and to such extent as to reasonably sustain the conclusion or inference that parties have agreed to become husband and wife.

(4) General reputation that the parties are married is not alone sufficient to prove marriage but may be shown in connection with cohabitation and other circumstances.

(5) Where the claimant seeks to prove a common-law marriage by circumstantial evidence, the oral or written admissions of the other party to the alleged contract are admissible.

(6) Evidence of oral or written admissions or declarations of the claimant that she was unmarried at the time when she later claimed a marriage existed, are admissible against her.

(7) The claimant cannot present only her own admissions or declarations that the marriage exists, made to third persons, not in the presence of, or consented to by, the other party to the alleged marriage contract. Declarations in denial of the marriage, made by the other party to third persons, not in the presence of, or acquiesced in by, the claimant, are inadmissible, unless admissible under some exception to the hearsay rule.

(8) ". . . What was said in the Hulett case . . . about it not being necessary to show cohabitation or the assumption of marital duties and obligations, has reference to the express written contract of marriage in praesenti, which was the matter in issue in that action. What was said in the Heminway case . . . about the admission of evidence in denial of the marriage goes only to the extent of holding that a mortgage executed by the alleged husband, describing him as a single man, was admissible in evidence because the one claiming to be his wife signed it as a witness. Having by her signature attested it, it was admissible against her."

[42](1936) 196 Minn. 447, 265 N. W. 273.

appointment of an administrator. The probate court held that Doris was not the common-law wife of the deceased. Thereafter a jury in the district court found that a common-law marriage existed.[43] On appeal from the resulting judgment, the supreme court pointed out that no direct proof of a marriage contract had been submitted, and held the circumstantial evidence offered to be insufficient to support a finding that a marriage contract existed in fact. The court said that the cohabitation shown was of a kind that could not give rise to the inference of marriage and observed[44] that

". . . No case can be found where, there being no other evidence of the contract, habit and repute of the scant and equivocal sort shown here have been held sufficient to sustain judicial affirmation of marriage."

The last case in the recent group is *Guptil v. E. O. Dahlquist Contracting Company,*[45] also decided in 1936.

This was an action under the Minnesota Workmen's Compensation Act by Margaret Guptil, the unmarried mother and natural guardian of a child whose father was alleged to be Roy Scheid, deceased. The proceeding sought compensation for the child as a dependent of Scheid, and was opposed by Scheid's employer and the Sun Indemnity Company as insurer. The woman brought certiorari to review an order of the Industrial Commission denying compensation to the child. The supreme court discharged the writ and affirmed the order of the commission on the ground

[43]The following evidence was submitted to the jury:

The deceased had "kept company" with Doris for about four months, before he began operating a certain hotel. She then became his employee, and as such received wages for about four months, during which time he bought her a diamond ring. Thereafter the parties cohabited for sixteen months, but kept their relationship secret. After the gift of the ring, Doris received no more wages but she did get all the money she needed in small amounts, together with gifts, including an automobile which the deceased considered as belonging to her.

Letters which Doris maintained she had received from the deceased were not in evidence. She did not maintain that he had addressed her as his wife. In fact she continued to go under her maiden name, and she did not even maintain that the letters in question saluted her as the wife of the deceased.

The couple did not suggest to third parties that their relations had become matrimonial. On the contrary, Doris continued to address her alleged husband as "Mr. Welker," "Elmer," "Uncle Elmer," "Daddy," "Uncle," or "Unk." Also, Doris continued her former work as waitress in the hotel.

Although Doris nursed the deceased on his deathbed, he gave the keys of the hotel to an acquaintance.

[44](1936) 196 Minn. 447, 451, 265 N. W. 273, 275.

[45](1936) 197 Minn. 211, 266 N. W. 748.

that the proof established nothing beyond an agreement to marry at a future date.[46]

CONCLUSIONS

1. *Substantive Law.*—The foregoing analysis of Minnesota decisions warrants the conclusion that legal sanction will be given by the courts of this state to a common-law marriage entered into between legally competent parties by means of a contract presently operative. The contract may be either oral or written, express or implied.

That the existence of a contract is the fact fundamental to the existence of a common-law marriage is stated positively by the supreme court of Minnesota.[47] Furthermore, once the contract is established, it is not necessary to show cohabitation between

[46]The facts of the case were not in dispute. The defendant was employed by the contracting company as a truck driver. He died on July 2, 1931, as the result of injuries suffered in the course of his employment. At the date of his death he and Margaret Guptil, whom he had courted for about one year, had agreed to marry two days later, on July 4, 1931, in a double wedding ceremony with Margaret's younger sister and the sister's fiance. The marriage banns had been published for three successive Sundays in the Roman Catholic church, and the license for the marriage had been procured.

About eight and one-half months after Scheid's death, Margaret Guptil gave birth to the child in question. The only proof with respect to the child's paternity was Margaret's testimony that Scheid was the father of the child. No proof was offered that the parties had agreed upon any other kind of marriage than the ceremonial marriage scheduled for July 4, 1931.

Margaret's counsel urged the court to find that at the time when the child was begotten, the parties must have intended a present legal status of husband and wife; that "in their own minds" they regarded "themselves as husband and wife" and thereby "consummated that marriage relation."

The supreme court rejected this contention, and quoted with approval the following language from the case of United States v. Dorto, (C.C.A. 1st Cir. 1925) 5 F. (2d) 596, 597:

"In order to constitute a marriage per verba de presenti, the parties must agree to become husband and wife presently. The consent which is the foundation and essence of the contract must be mutual and given at the same time, and it must not be attended by an agreement that some intervening thing shall be done before the marriage takes effect, or that it be publicly solemnized. That is to say, it must contemplate a present assumption of the marriage status, in distinction from a mere future union."

[47]"The law views marriage as being merely a civil contract, not differing from any other contract, except that it is not revocable or dissoluble at the will of the parties. The essence of the contract of marriage is the consent of the parties, as in the case of any other contract; and, whenever there is a present, perfect consent to be husband and wife, the contract of marriage is completed."—Mitchell, J., in Hulett v. Carey, (1896) 66 Minn. 327, 336, 69 N. W. 31, 33, cited supra, notes 10, 18, 20, 25. Accord: In re Welker's Estate, (1936) 196 Minn. 447, 450, 265 N. W. 273, 274, cited supra, notes 42, 44.

the parties subsequent to their agreement of marriage. In this respect, as has been pointed out previously, the law of Minnesota differs from that of some other American states. Therefore, since the existence of a contract of marriage is the fundamental fact, the manner in which such fact must be proved becomes highly important. If the contract is express, that is, in writing or made orally in the presence of witnesses, the problem of proof usually is easily solved. However, as the Minnesota decisions so clearly demonstrate, the average couple who enter into the common-law marriage relationship rarely reduce their agreement to writing or make their bargain in the presence of third parties. Their more usual course is to begin living together. And it is from the factual incidents of this "living together" or cohabitation that the law determines whether an *implied* common-law marriage contract has been entered into.

2. *Evidence.*—Since Minnesota requires only a contract in order to establish a common-law marriage, it is unnecessary to consider what evidence[48] would be acceptable to show matrimonial cohabitation as an independent element in setting up the marriage. However, evidence which in other states would be required for that purpose is valuable in Minnesota in those cases in which *proof* of the contract must be inferential. In our discussion of the types of evidence necessary in Minnesota to prove the marriage contract by inference we shall follow the outline used in other states where cohabitation must be shown as an independent *substantive* element following the making of the contract.

a. *Cohabitation.*—Evidence of cohabitation[49] to be admissible

[48]Mason's 1927 Minn. Stat., sec. 9899: "When the fact of marriage is required or offered to be proved before any court, evidence of the admission of such fact by the party against whom the proceeding is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent."

[49]The meaning of the term "cohabitation" as used here is that given by the court in the case of State v. Gieseke, (1914) 125 Minn. 497, 498, 147 N. W. 663, 664:

". . . Where it is sought to prove cohabitation as evidence that the relation of husband and wife existed between the parties, it means living together as husband and wife and holding themselves out as such, as distinguished from occasionally associating together and from meretricious relations. . . ."

However, as pointed out by the court, the meaning to be given to the term "cohabit" will depend on the subject matter to which it relates. In the Gieseke Case a much more limited meaning was ascribed to the word for purposes of prosecution under a criminal statute which read: "Whenever any man and a single woman cohabit with each other, both shall be guilty of fornication."

must be of cohabitation in the relation of man and wife.[50] A mere living together, where the parties never received guests in the manner of married persons and did not so conduct themselves in their home, is insufficient.[51] A surreptitious cohabitation, accomplished through the use of adjoining rooms, with the woman retaining her unmarried name, is not of the matrimonial character required to establish a marriage.[52] No presumptions arise from a cohabitation frequently interrupted and finally stopped altogether, the parties thereafter entering into other marriages which on their face were bona fide.[53]

As cohabitation is merely evidence of a marriage contract and not conclusive on the point, it is for the jury to determine whether any particular "living together" was matrimonial, or whether a cohabitation illicit in its inception later became marital in character.[54] A mere secret cohabitation will not be sufficient to establish a marriage where other surrounding circumstances show clearly that there had been no assumption of matrimonial responsibilities.[55] The cohabitation must in all respects be matrimonial.[56] It must be matrimonial in nature, professed and open, such as will create some public recognition that their intentions were matrimonial.[57]

b. *Attitude of the Parties.*—As the Minnesota courts admit evidence of the attitude of the parties toward their relationship for the purpose of showing whether a bona fide marriage was contemplated, it is error to exclude evidence of such attitude.[58] This evidence may take various forms. For instance, the fact that the alleged husband never brought his relatives or friends to his home; that the alleged wife on various occasions used her maiden name and referred to herself as his housekeeper rather than his wife; and that she first learned from her lawyers after

[50]State v. Worthingham, (1877) 23 Minn. 528, 533, supra, notes, 21,23.

[51]In re Frederick Terry's Estate, (1894) 58 Minn. 268, 272, 59 N. W. 1013, 1014, supra, notes 24, 27.

[52]Heminway v. Miller, (1902) 87 Minn. 123, 125, 91 N. W. 428, supra, notes 28,30.

[53]Le Suer v. Le Suer, (1913) 122 Minn. 407, 410, 142 N. W. 593, 594, supra, notes 33, 35.

[54]In re Estate of Babetha Noser, (1930) 180 Minn. 463, 466, 231 N. W. 199, 200, supra, notes 36, 38.

[55]In re Welker's Estate, (1936) 196 Minn. 447, 451, 265 N. W. 273, 275, cited supra, notes 42, 44, 47.

[56]Heminway v. Miller, (1902) 87 Minn. 123, 128, 91 N. W. 428, 429, supra, notes 28, 30.

[57]In re Lust's Estate, (Ghelin v. Johnson), (1932) 186 Minn. 405, 408, 243 N. W. 443, 445, supra, note 39, quoting from 38 C. J. 1318.

[58]State v. Worthingham, (1877) 23 Minn. 528, supra, notes 21, 23.

his death of the possibility of establishing an interest in his estate as his common-law widow, all constitute valuable evidence of the non-existence of a marriage.[59] On the other hand, it is sometimes possible to establish the existence of a marriage by showing a change in the attitude of the parties toward their relationship. At the outset they may consider themselves paramour and mistress; later they may regard their status as that of husband and wife, and so conduct themselves as to effect that change.[60]

It should be emphasized also that the decisions attach decided weight to the attitude of the woman toward the relationship. Where she has been content to pass herself off as an unmarried woman and has made statements to that effect, the Minnesota courts have concluded that no marriage existed.[61] Also, a woman separated from her alleged husband cannot subsequently establish the fact that she is his common-law wife where she made no such claim over a period during which he—with her knowledge—contracted several other marriages.[62] On the other hand, testimony as to the demeanor of the woman during illness of the man (serving as his nurse, etc.) is entitled to considerable weight.[63]

In determining the attitude of the parties toward their relationship, the supreme court of Minnesota has stated several general rules as to how far the statements or admissions of one or the other of them may be received in evidence. Although these rules were set forth previously in a footnote,[64] their importance justifies repetition here:[65]

1. Where the claimant seeks to prove a common-law marriage by circumstantial evidence, the oral or written admissions of the other party concerning the alleged contract are admissible in evidence.

2. In the same connection, evidence of oral or written admissions or declarations of the claimant that she is unmarried,

[59]In re Frederick Terry's Estate, (1894) 58 Minn. 268, 272, 273, 59 N. W. 1013, 1014, 1015, supra, notes 24, 27.

[60]In re Estate of Babetha Noser, (1930) 180 Minn. 463, 231 N. W. 199, supra, notes 36, 38.

[61]Heminway v. Miller, (1902) 87 Minn. 123, 125, 91 N. W. 428, supra, notes 28, 30.

[62]Le Suer v. Le Suer, (1913) 122 Minn. 407, 409, 142 N. W. 593, 594, supra, notes 33, 35.

[63]Shattuck v. Shattuck's Estate, (1912) 118 Minn. 60, 62, 136 N. W. 409, 410, supra, note 31.

[64]See note 41 supra.

[65]In re Lust's Estate (Ghelin v. Johnson), (1932) 186 Minn. 405 409, 243 N. W. 443, 445, supra, note 39. See Mason's 1927 Minn. Stat.. sec. 9899.

made at a time when it is claimed the marriage existed, are admissible against her.

3. The claimant cannot present her own admissions or declarations that the marriage exists, made to third persons, not in the presence of, or consented to by, the other party to the alleged marriage contract.

4. Declarations in denial of the marriage, made by the other party to third persons, not in the presence of, or acquisced in by, the claimant, are inadmissible, unless admissible under some exception to the hearsay rule.

c. *Reputation.*—The reputation which the association of the parties in question bears in the particular community is also of value in proving or disproving a common-law marriage.[66]

"The thing wanted in such a case is the verdict of the community, 'the understanding among the neighbors and acquaintances with whom the parties associate in their daily life that they are living together as husband and wife, and not in meretricious intercourse.' "[67]

Of course if such evidence is to be worth anything it must be generally uniform in character. If some persons in the community believe the couple to be associating illicitly and other persons believe them to be man and wife, virtually nothing has been proved.[68]

Such reputation cannot be established by scant and equivocal testimony, as, for instance, that of two witnesses who testified "almost altogether from their own observations."[69] However, in certain instances witnesses have been permitted to testify that they understood the parties were married.[70] Furthermore, evidence of reputation is admissible to show circumstantially the attitude of the parties toward their relationship. And, in order to explain why the existence of the alleged marriage was not known generally in the community, the testimony of one of the parties is proper.[71]

[66]Evidence of "general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent." Mason's 1927 Minn. Stat., sec. 9899.

[67]In re Welker's Estate, (1936) 196 Minn. 447, 451, 265 N. W. 273, 275, supra, notes 42, 44, 47.

[68]Heminway v. Miller, (1902) 87 Minn. 123, 128, 91 N. W. 428, 429, supra, notes 28, 30.

[69]Heminway v. Miller, (1902) 87 Minn. 123, 128, 91 N. W. 428, 429, supra, notes 28, 30.

[70]Shattuck v. Shattuck's Estate, (1912) 118 Minn. 60, 62, 136 N. W. 409, 410, supra, note 31.

[71]Shattuck v. Shattuck's Estate, (1912) 118 Minn. 60, 63.

d. *Written evidence.*—From the cases examined it appears that written evidence of all types is of peculiar value in determining the true nature of any relationship which is alleged to be a common-law marriage. The value of such evidence lies in its power to reveal the attitude of the parties thereto and the manner in which they desired other to look upon their relationship—that is, the *repute* which they intended to establish. For this purpose the following kinds of written evidence have been admitted: receipts;[72] correspondence between the parties, and their correspondence with third persons;[73] a mortgage which the alleged wife attested in her maiden name as a witness.[74]

In one case the supreme court, in denying the existence of a common-law marriage, noted particularly the fact that although the woman testified she had letters from the deceased, she did not introduce them in evidence or maintain that they were addressed to her as his wife.[75] Where circumstantial evidence is relied on, the written admissions of the parties as to the existence or non-existence of a marriage are generally admissible.[76] However, certain papers, such as an invalid holographic will, hospital records, a passport application—all describing the man as unmarried—are inadmissible as self-serving declarations unless previously called to the attention of the woman and acquiesced in by her.[77] But not so in the case of an income tax return in which the man described himself as unmarried. This was held to be an admission against interest, as he would have received a larger exemption from tax payment if he had stated that he was married.[78]

[72]In re Frederick Terry's Estate, (1894) 58 Minn. 268, 273, 59 N. W. 1013. 1015, supra, notes 24. 27.

[73]In re Frederick Terry's Estate, (1894) 58 Minn. 268, 273, 59 N. W. 1013, 1015, supra, notes 24, 27; Hulett v. Carey, (1896) 66 Minn. 327, 333, 69 N. W. 31, 32, supra, notes 18. 20. 25. 47; Shattuck v. Shattuck's Estate, 1912) 118 Minn. 60, 62, 136. N. W. 409. 410, supra, note 31; In re Estate of Babetha Noser, (1930) 180 Minn. 463, 464, 231 N. W. 199, 200, supra, notes 36,38.

[74]Heminway v. Miller, (1902) 87 Minn. 123, 129, 91 N. W. 428, 430, supra, notes 28, 30.

[75]In re Welker's Estate, (1936) 196 Minn. 447, 449, 265 N. W. 273, 274, supra, notes 42. 44, 47.

[76]In re Lust's Estate (Ghelin v. Johnson), (1932) 186 Minn. 405, 409, 243 N. W. 443, 445, supra, note 39.

[77]In re Lust's Estate (Ghelin v. Johnson), (1932) 243 N. W. 443, 445, 446.

[78]In re Lust's Estate (Ghelin v. Johnson), (1932) 186 Minn. 405, 410, 411, 243 N. W. 443, 446.