***Hayatleh v Modfy:* presuming the validity of a known ceremony of marriage**

If a couple have gone through a ceremony of marriage that is subsequently challenged, how will the courts approach the question of its validity? Will the onus always be on the person challenging the validity of the marriage to show that it is not valid, or must certain additional conditions be satisfied before any presumption in favour of its validity can arise?

In recent years, the long-established presumption in favour of the validity of a ceremony of marriage has been invoked, with varying degrees of success, in favour of upholding marriages celebrated both in this jurisdiction and overseas.[[1]](#footnote-1) In *Hayatleh v Modfy*[[2]](#footnote-2) the Court of Appeal upheld the decision of HHJ Tolson QC to apply the presumption to a marriage that had taken place in Syria some years earlier. The question as to whether the parties were validly married had arisen in the course of divorce proceedings brought by the husband in February 2013. It was the District Judge dealing with the divorce who raised questions as to the adequacy of the paperwork regarding the parties’ marriage. The husband then sought to show that the ceremony that had taken place did not create a valid marriage.

There was no dispute between the parties as to certain key facts. There had, it was agreed, been a religious ceremony of marriage between the parties in Syria in 1999. The wife was present at the ceremony but the husband’s place was taken by his brother as his proxy. Nothing turned on the husband’s physical absence, since it was accepted that a religious marriage could be celebrated in this way.[[3]](#footnote-3) Two months after the ceremony, the Third Religious Court in Homs confirmed the parties' ‘unofficial marriage’ on the basis of the bridal money paid and determined ‘[t]hat the official registration of the marriage be conditioned to the presentation of the marriage permit issued by The Military Service Department, or the realisation of an infant.’[[4]](#footnote-4) Both parties then travelled to Jordan to obtain entry clearance for the wife to join the husband in England; in the correspondence relating to this, the husband at one point referred to the wife as his fiancée but also noted that they were ‘already married according to both Islamic and Syrian laws.’[[5]](#footnote-5) Entry clearance having been granted, the wife came to the UK, and became a British citizen by naturalisation in 2003. From the time of her arrival, the husband presented her as his wife and they lived together as a married couple until their relationship broke down.

The point in dispute was whether the marriage had subsequently been registered. There was some confusion as to whether registration was a necessary condition of validity, with conflicting accounts being given by the expert witness, but the case proceeded on the basis that it was.[[6]](#footnote-6) The question posed was thus ‘whether the ceremony of marriage, which it is common ground the parties went through, was converted by a registration into a binding civil marriage.’[[7]](#footnote-7)

In upholding the decision that it could be presumed that the ceremony had indeed been converted into a binding civil marriage through registration, McFarlane LJ, with whom Briggs and Underhill LJJ agreed, made a number of comments about the scope of the presumption that are worthy of close scrutiny, since they reflect some of the difficulties that have dogged this area of the law in recent years. This article will first look at the application of the presumption to the element of registration, and then go on to analyse the policy underpinning the presumption and the circumstances in which it will be triggered. It will then go on to evaluate the operation of estoppel, which was mentioned as a possibility by HHJ Tolson at first instance and dealt with only cursorily by McFarlane LJ on appeal.

**Presuming the registration of a known ceremony**

There is a well-established body of case-law to the effect that where a couple have lived together as husband and wife after going through a ceremony of marriage, it will be presumed that the ceremony in question was valid. The presumption may, however, be rebutted by evidence showing that the ceremony in fact failed to comply with the legal requirements for a valid marriage.[[8]](#footnote-8)

Counsel for the husband sought to distinguish the case at hand on the basis that the case-law focused on the validity of the ceremony, not the fact of registration. McFarlane LJ quite rightly dismissed this, noting that ‘the presumption cases are all concerned with looking at everything, on the facts of each case, that needs to take place to achieve a valid marriage.’[[9]](#footnote-9) This finds support from no less an authority than Lord Campbell in *Piers v Piers*, holding that ‘until the contrary is proved, we are bound to draw the inference that everything existed which was necessary to constitute a valid marriage.’[[10]](#footnote-10) In that case, the court presumed that a special licence had been duly granted,[[11]](#footnote-11) but the presumption has also been relied upon to support findings as to sufficient notice having been given,[[12]](#footnote-12) the registration of places of religious worship for the purposes of marriage,[[13]](#footnote-13) and the presence of a duly authorised person.[[14]](#footnote-14) It is perhaps significant that nineteenth-century courts began to use the more all-encompassing maxim *omnia præsumuntur pro matrimonio* – everything is to be presumed in favour of a marriage[[15]](#footnote-15) – rather than the more general maxim *semper præsumitur pro matrimonio* – always presume in favour of a marriage – that appeared in the earlier case-law.[[16]](#footnote-16)

The simple reason why registration has not tended to feature in the English case-law is that registration has never been essential to the validity of a marriage in this jurisdiction,[[17]](#footnote-17) so it has never been necessary for the courts to presume that this aspect of the formalities has been observed. As Lord Mansfield proclaimed in *St Devereux v Much Dew Church*,[[18]](#footnote-18) ‘God forbid that… the usual presumptive proofs of marriage should be taken away by this statute.’[[19]](#footnote-19) The statute in question was the Clandestine Marriages Act of 1753, which, while setting out in great detail how marriages should be registered, did not go so far as to make the register the sole proof of a marriage. Nothing in the subsequent Marriage Acts of 1836 or 1949 made registration essential to the validity of a marriage, although the fact that those who are tasked with the responsibility of ensuring that a marriage is registered may face penalties if they omit to do so has no doubt contributed to the importance attached to registration in practice.[[20]](#footnote-20)

In a number of other jurisdictions, by contrast, registration *is* essential to the validity of the marriage.[[21]](#footnote-21) The question of whether a marriage has been registered has therefore arisen on occasion in relation to ceremonies that have taken place overseas. The courts have sometimes proceeded on the basis that registration was not essential to the validity of the marriages in question,[[22]](#footnote-22) but with no suggestion being made that the presumption could not extend to this element of the process. Moreover, in *Pazpena de Vire v Pazpena de Vire*[[23]](#footnote-23) it was noted that there was ‘no evidence to rebut the strong presumption that local formalities, *including registration*, were complied with.’[[24]](#footnote-24) All of the case-law would thus support the application of the presumption to the registration of a marriage, as well as the ceremonial aspects.

There is of course one potential problem with presuming that a known ceremony has been converted into a valid marriage by means of subsequent registration. As McFarlane LJ acknowledged, normally all of the elements necessary to achieve a valid marriage ‘will be coterminous with the ceremony’.[[25]](#footnote-25) The potential for there to be a significant lapse of time between the ceremony and registration raises the possibility of the presumption arising on one set of facts – the ceremony and subsequent cohabitation of the parties – that do not necessarily cast any light on whether or not the marriage has subsequently been registered. This difficulty does not seem to have been recognised in *Hayatleh*, possibly because of the mistaken assumption that the presumption only arises after a significant period of cohabitation rather than immediately after the ceremony. In practice, however, the difficulty may be more apparent than real. Where it is known that the marriage was not registered – as was the case in *Asaad v Kurter*[[26]](#footnote-26) – the presumption will be rebutted. Where it is not known whether the marriage was registered, the presumption will apply. While a marriage could be registered at some time after the ceremony, there is no requirement as to any particular lapse of time,[[27]](#footnote-27) so logically the presumption can operate as usual.

As a result, with the starting point being the presumption that the marriage was registered, and all other elements for a valid marriage having been observed, it was unsurprising on the facts of the case that the court should find in favour of the validity of the marriage. The available evidence as to registration was conflicting: one official document referred to the husband and wife as married, another described the husband as ‘single’.[[28]](#footnote-28) The judge at first instance had held that ‘as there are two conflicting documents of apparently equal weight they cannot affect the balance of the case’[[29]](#footnote-29) and reverted to reliance on the presumption. On appeal, counsel for the husband contended that the judge should have found that the presumption had been rebutted by the wife’s failure to produce the original registration document after she had claimed that it was in her possession, but the Court of Appeal felt that this did not prove that such a document never existed and fell far short of the ‘clear, positive or compelling’[[30]](#footnote-30) evidence needed to rebut the presumption.

Yet while the outcome of the case can be defended as a logical application of the presumption, McFarlane LJ’s exposition as to the nature of the presumption will do little to add clarity to this notoriously muddled area of the law.

**Validating the irregular, or assuming validity?**

The ‘underlying policy’ was identified by McFarlane LJ as being ‘in favour of holding to the validity of a “marriage” which has been evidenced by co-habitation as a married couple for a substantial period of years.’ One problem with this formulation is that referring to a ‘marriage’ in inverted commas gives the impression that the court is upholding a ceremony that is irregular in some way. A number of commentators have similarly described the presumption in terms that suggest it operates to validate doubtful ceremonies rather than assuming the regularity of the ceremony that was known to have taken place. The most explicit suggestion that the presumption operates to validate irregular ceremonies is to be found in the judgment of Robert Walker LJ in *Chief Adjudication Officer v Bath*,[[31]](#footnote-31) whostated that ‘[w]here there is an irregular ceremony which is followed by long cohabitation, it would be contrary to the general policy of the law to refuse to extend to the parties the benefit of a presumption which would apply to them if there were no evidence of any ceremony at all.’[[32]](#footnote-32) In that case, the parties had gone through a ceremony in the early 1950s and lived together for 37 years until the death of Mr Bath, with no questions being raised as to the validity of their marriage until Mrs Bath was refused a widow’s pension.[[33]](#footnote-33)

Yet both presumptions – whether based on a known ceremony or not – have at their root the assumption that the couples whose marriage is in question have gone through a valid ceremony of marriage at some point. The case of *Martin v Myers*[[34]](#footnote-34) illustrates how the presumption operates where there is *no* evidence of a ceremony. The case had certain parallels with *Bath*, in terms of the longevity of the parties’ relationship, in that they had been living together as husband and wife for 40 years and had had 7 children. They were known as Mr and Mrs Myers, and her passport, death certificate, and headstone all reflected the assumption that she was his wife. Against this was evidence that Mrs Myers had always been evasive as to the details of her marriage and had told one of her daughters that she was not married. This, coupled with the absence of a marriage certificate, was held to rebut the presumption that they were married. In other words, cohabitation and reputation cannot lead to a marriage being presumed to exist where there is good evidence that it does not. Exactly the same principle applies to the presumption that arises following a ceremony of marriage: once it has been shown that the ceremony did not comply with the law, the presumption is rebutted.

But this begs a further question as to the facts that trigger the presumption in the first place. Is it necessary for the couple to have cohabited ‘for a substantial period of years’,[[35]](#footnote-35) as McFarlane LJ implies? And what weight should be given to the ‘manner in which the parties had “regarded themselves” or were treated by others as man and wife’?[[36]](#footnote-36)

**Triggering the presumption**

It is clear from a number of recent authorities that there is an impression that the presumption in favour of the validity of a known ceremony only operates where the parties have lived together for a substantial period of time. The ‘brief’ cohabitation of the parties in *AAA v ASH*,[[37]](#footnote-37) for example, was held to be insufficient to give rise to the presumption, while in *Dukali v Lamrani[[38]](#footnote-38)* it was suggested that ‘a longer period than seven or eight years must be required.’[[39]](#footnote-39) In *Hayatleh* itself, 14 years was thought sufficient to engage the presumption.[[40]](#footnote-40)

Before commentators begin to speculate on the precise period between eight and 14 years that might be sufficient to give rise to the presumption, the lack of logic underpinning this particular requirement should be pointed out. If there has been a ceremony of marriage, its validity cannot depend on the period of time that has elapsed since it was celebrated. A marriage does not become valid over time. Nor, indeed, is any such requirement of lengthy cohabitation to be found in any of the case-law relating to the presumption in favour of marriage prior to 2000.

The early case-law discloses no requirement of lengthy cohabitation before a known ceremony could be presumed to be valid. In *Grant v Grant*,[[41]](#footnote-41) for example, the ceremony had taken place in 1748 and six years later was upheld in a suit for restitution of conjugal rights. In *Cunningham v Ross*[[42]](#footnote-42) the gap between the marriage and the litigation was even shorter, being only three years. It is also worth noting that the only reason why evidence of cohabitation and reputation was produced in these cases was because the marriages in question had taken place clandestinely. Given the propensity of the Fleet parsons for fabricating or concealing evidence of marriages, it was understandable that the courts would wish to have confirmatory evidence that a ceremony had in fact taken place between these two people.[[43]](#footnote-43)

By contrast, where the ceremony had been conducted in a way that appeared to comply with the law’s requirements, judges justified the presumption of validity by the very fact of solemnization. As Sir John Nicholl noted in *Smith v Huson, Falsely Called Smith*¸[[44]](#footnote-44) ‘the presumption of law is in favour of the marriage—*semper præsumitur pro matrimonio*. Where a marriage has been solemnized, the law strongly presumes that all the legal requisites have been complied with.’[[45]](#footnote-45) While in practice the courts were more likely to uphold marriages where the parties had cohabited for some time than those where they had not, this was largely due to the ecclesiastical courts’ purposive approach to the interpretation of the statute.[[46]](#footnote-46) Where the suit was brought by an irate parent on discovery of the marriage, the courts tended to seize on minor defects in the marriage in order to annul it and reinforce parental control over marriage. In such cases the parties had rarely had any chance to cohabit or enjoy the reputation of married persons; indeed, they had generally been living separately and hiding their marital status.[[47]](#footnote-47)

Where a lengthy period of time had elapsed between the ceremony and the litigation, judges often alluded to the length of the period as providing additional justification for presuming the validity of the marriage, or at least for making them reluctant to annul a marriage save on the strongest evidence.[[48]](#footnote-48) In *Piers v Piers*,[[49]](#footnote-49) for example, the Lord Chancellor, Lord Cottenham, noted that ‘there is a strong legal presumption in favour of the validity of the marriage, particularly after the great length of time which has elapsed since its celebration.’[[50]](#footnote-50) It seems clear from the cases that followed that *Piers* was not interpreted as introducing any requirement that a considerable period of time *must* have elapsed before the presumption could arise.[[51]](#footnote-51) Some reference was made to the presumption from ‘long cohabitation’ in the coverture case of *Sichel v Lambert*,[[52]](#footnote-52) but more important to the outcome was the fact that the marriage had been solemnised ‘by a person and in a place which appears to be duly authorised.’[[53]](#footnote-53) In such a case, as Williams J noted, ‘the presumption that all has been rightly done arises until the contrary appears.’[[54]](#footnote-54) It was, moreover, clearly recognised that if the marriage was void then no length of time could render it valid.[[55]](#footnote-55)

Had long cohabitation been a requirement, then the House of Lords would have had difficulty in upholding the marriage in *The Lauderdale Peerage*,[[56]](#footnote-56) in which the man had died two days after the ceremony had taken place. Lord Fitzgerald explicitly addressed the point, noting that the fact that the marriage had not been followed by cohabitation was more than offset by the fact that it had been recognised by the family as valid. This underlines the fact that the main significance of cohabitation was that it operated as evidence of the parties’ belief in the validity of their marriage, just as the significance of reputation was that it provided evidence of the community’s belief in the validity of the marriage. In practical terms, of course, a lengthy period of cohabitation might well affect the outcome of the case in making it more difficult as a matter of fact to prove that the ceremony had not complied with the law. But exactly the same practical obstacles existed where a lengthy period of time had elapsed between the ceremony and the litigation – as in the Lauderdale case itself, where the disputed marriage had taken place in New York, in 1772, 113 years earlier.

The twentieth-century case-law continued to refer to the presumption operating in favour of a ceremony that was followed by cohabitation, without any indication as to the need for this to be for a particular period.[[57]](#footnote-57) Indeed, in *Goldstone v Goldstone*,[[58]](#footnote-58) it was suggested that the case-law on ‘habit and repute’[[59]](#footnote-59) was positively misleading where the issue was the validity of a particular ceremony. The formulation of the presumption set out in *Russell v AG*[[60]](#footnote-60) referred simply to there being ‘evidence of a ceremony followed by cohabitation’,[[61]](#footnote-61) and this was quoted in a number of subsequent cases.[[62]](#footnote-62)

It is only in the relatively recent decision of *Chief Adjudication Officer v Bath*[[63]](#footnote-63) that we find the idea emerging that a lengthy period of cohabitation is *necessary* to the operation of the presumption. Evans LJ suggested that the duration of the period of cohabitation could affect the strength of the evidence needed to rebut the presumption:

How positive, and how clear, must depend among other things upon the strength of the evidence which gives rise to the presumption — primarily, the length of cohabitation and evidence that the parties regarded themselves and were treated by others as man and wife.[[64]](#footnote-64)

This, however, seems to confuse the difficulty of rebutting the presumption where the ceremony took place some time ago with the evidence that gives rise to the presumption in the first place. Robert Walker LJ, meanwhile, noted that he felt ‘real doubt’ as to whether the couple could have been ‘regarded as lawfully married under English law’ had they been ‘compelled by adverse circumstances to separate soon after the ceremony.’[[65]](#footnote-65) Again, this idea that a marriage might become more valid over time – for such is the logical implication of his words – finds no support in any of the earlier cases.

The better view is that the presumption arises where the parties have gone through a ceremony of marriage that is prima facie capable of constituting a valid marriage according to the *lex loci*. Cohabitation is relevant insofar as it indicates that the parties believed that they had gone through a valid ceremony,[[66]](#footnote-66) but the duration of such cohabitation is immaterial. This resolves the ‘practical problem’ that Michael Harrison QC, sitting as a deputy judge of the High Court, identified in *Pazpena de Vire v Pazpena de Vire*,[[67]](#footnote-67) following the decision in *Bath*, namely that ‘at some imprecise moment in time parties who were not lawfully married for want of proper formalities become parties who are presumed to be lawfully married.’[[68]](#footnote-68) The lapse of time between the ceremony and the litigation challenging the validity of that ceremony may affect the outcome only insofar as it makes it more difficult to provide the evidence to rebut the presumption.

The reputation of the parties as married persons is similarly only relevant insofar as it casts light on the validity of the ceremony. With this in mind, we should review McFarlane LJ’s comment in *Hayatleh* that ‘it is of note that Evans LJ in *Bath* identified evidence that might support the existence of the presumption as not simply being confined to a measure of the period of cohabitation, but as including the manner in which the parties had “regarded themselves” or were treated by others as man and wife.’[[69]](#footnote-69)

Assessing the role of ‘reputation’ is complicated by the varying contexts in which the presumption has been applied. In many of the older cases the validity of the marriage was not directly in issue before the court, and the presumption that a couple who had lived together and were reputed to be married were in fact validly married was a useful way of dealing with the issue without referring all such cases to the ecclesiastical courts. It is difficult to apply these authorities to cases in which the validity of the marriage is in issue. There are a number of cases from the eighteenth century in which the courts drew on evidence of cohabitation and reputation after the parties had gone through a ceremony of marriage, but these tended to be cases in which direct evidence of the ceremony could not be given, for example where it had been celebrated clandestinely[[70]](#footnote-70) or where the register was inadmissible for other reasons.[[71]](#footnote-71) In the nineteenth century, the courts on occasion attached weight to the fact that the couple had enjoyed the reputation of married persons in presuming that they had complied with all necessary formalities,[[72]](#footnote-72) but more weight tended to be given to the basic assumption that a couple who wished to be married would be anxious to ensure that all necessary formalities had been observed.[[73]](#footnote-73) Twentieth-century formulations similarly focused more on the fact of the ceremony than on the reputation of the parties.[[74]](#footnote-74)

The reason for the relative lack of weight given to the way in which the parties are regarded is simple. The fact that a couple have gone through a ceremony of marriage is generally sufficient for family and friends to regard them as married, so the evidence that they so regard them adds little of weight in assessing the likelihood of that ceremony being properly conducted. Given the diversity of routes to a valid marriage that now exist, it can no longer be assumed that there is sufficient knowledge of the legal requirements for the formation of a valid marriage for those in attendance to be able to distinguish between marriages that comply with the law and those that do not. Evidence that a couple were thought to be husband and wife by those around them simply provides evidence that no one was aware of any defect in the marriage, whereas evidence that they were *not* thought to be husband and wife might suggest some doubts about the nature of the ceremony they had gone through.

So the suggestion of Evans LJ that ‘evidence that the parties regarded themselves and were treated by others as man and wife’ could affect the strength of the presumption finds some support in the earlier case-law,[[75]](#footnote-75) but should not be taken as indicating that the parties’ own belief in the validity of their marriage is a material factor, save that a lack of such belief might indicate some personal knowledge that the relevant formalities were not observed. It should not be forgotten that in order for the presumption to arise, the ceremony must be one that is at least *capable* of giving rise to a valid marriage according to the *lex loci celebrationis*.[[76]](#footnote-76)

The discussion of the parties’ own beliefs and conduct leads on to the issue of estoppel, which was canvassed as a possibility at first instance in *Hayatleh*.

**Marriage by estoppel**

At first instance HHJ Tolson noted that he was unable to attach ‘any significant weight’ to the assertions made by Professor Hayatleh given that they were ‘so starkly in conflict with his words and actions over the years’, adding that he was ‘tempted to elevate this to the level of an evidential estoppel.’[[77]](#footnote-77) McFarlane LJ, dismissing the husband’s appeal, noted that the judge had not in fact placed any reliance on the possibility of estoppel having a role to play in this context and confirmed, if only obliquely, that it should not: ‘there is no indication that the judge, in the event, erred in law in his approach by relying upon estoppel.’[[78]](#footnote-78)

The fact that estoppel was contemplated as a possibility, and the rather cursory way in which it was dismissed, makes it important to provide a more detailed consideration of the availability – or rather non-availability – of estoppel in this context, for the avoidance of doubt on this point. There is in fact good reason, both as a matter of principle and of precedent, to hold that estoppel has no role to play here.[[79]](#footnote-79)

Echoes of estoppel can be found in the idea that an individual should be prevented from seeking to annul a marriage where he or she has previously behaved as if it was a valid marriage, which finds expression in the doctrine that has been variously termed approbation, insincerity, or ratification of marriage.[[80]](#footnote-80) On occasion, the term ‘estoppel’ has even been used in this context, as in the much-cited speech of Lord Selbourne LC in *G v M*.[[81]](#footnote-81) While this has been described as the ‘authoritative’ statement of the doctrine of approbation,[[82]](#footnote-82) it should be noted that his comments were strictly obiter. The wife was petitioning for nullity on the basis of the husband’s incapacity to consummate the marriage; this, however, had been a response to the husband’s earlier petition for divorce on the basis of her adultery and he in turn pleaded that her petition should be barred. The initial proceedings were heard in Scotland, where the parties were resident, and the House of Lords made it clear that there was nothing in Scottish law that would bar the wife’s petition. Nonetheless, Lord Selbourne took the opportunity to review the concept of ‘sincerity’, which had been held in a number of English cases to act as a bar to a decree where the petitioner had mixed motives in seeking a decree, and opined that ‘the real basis of reasoning’ underlying this term was:

that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed.[[83]](#footnote-83)

That, he thought, was not a principle specific to matrimonial law but could be ‘referred to known principles of equitable, and, I may say, of general jurisprudence.’[[84]](#footnote-84)

His desire to locate the principle in a broader jurisprudence holds the key to his use of the term ‘estop’. The case-law of the time discloses a somewhat derogatory attitude to the ecclesiastical courts that had exercised jurisdiction over the validity of marriages before 1858.[[85]](#footnote-85) The reorganization of the courts in 1873 had also prompted a greater interest in developing principles that were of universal application. Nonetheless, subsequent courts preferred to use the language of approbation rather than estoppel. It was also clear that the doctrine of approbation applied only to marriages that were voidable, not those that were void.[[86]](#footnote-86) When the Nullity of Marriage Act 1971 (subsequently consolidated in the Matrimonial Causes Act 1973), substituted a statutory bar for the old doctrine of approbation, it too only applied to marriages that were voidable.[[87]](#footnote-87)

The only suggestion that an individual might be estopped by his or her conduct from challenging a marriage that was void is to be found in the judgment of the Divisional Court in *Bullock v Bullock*.[[88]](#footnote-88) The question for the court was one of desertion, the defence being that there was no marriage at all on the basis of the wife’s prior marriage. The lapse of time between the first husband’s disappearance and the second marriage was sufficient for the court to presume that the first husband had died and that the second marriage was therefore valid. It was clear, however, that the court took a very dim view of the conduct of the second husband in seeking to challenge the validity of a marriage after 15 years, especially as he had known of the wife’s first marriage at the time they went through a ceremony together, and Lord Merriman P noted that he was ‘not really convinced’ that it would be ‘impossible for an estoppel *in pais* to operate merely because what is being dealt with is a void marriage.’[[89]](#footnote-89)

Against this was the clear decision in *Hayward v Hayward (Orse Prestwood)*[[90]](#footnote-90)that a spouse was not estopped from pleading the invalidity of a marriage even if he had previously asserted its validity in judicial proceedings. Phillimore J rested this decision on the nature of a void marriage, the importance of the court being able to declare the truth, and the issue of status. First, he suggested that ‘it would be contrary to all principle if a ceremony, which is by definition null and void, could be converted into something valid and binding and capable of conferring status by the act or inaction of a party to it.’[[91]](#footnote-91) Second, ‘[i]t would surely be remarkable as a proposition of law if this court were to be prevented from declaring the truth’ as to the nature of a marriage ‘merely because one or both of them had chosen to assert its validity or because one of them had failed to dispute or had concurred in the assertion of its validity by the other.’[[92]](#footnote-92) And third, there was the fact that marriage was ‘an institution which confers status on the parties to it and upon the children that issue from it.’[[93]](#footnote-93)

The importance of the court being able to declare the truth was echoed by Ormrod J in *Corbett v Corbett (otherwise Ashley)*,[[94]](#footnote-94) pointing to the anomaly that would result if estoppel operated as between the parties to the marriage but any third party whose interests were affected could challenge the validity of the marriage.[[95]](#footnote-95) In the later case of *Vervaeke v Smith,*[[96]](#footnote-96) Lord Hailsham LC referred to both *Hayward* and *Corbett* and noted that counsel had had no difficulty in persuading him ‘that in the case of a marriage absolutely void …the inquisitorial nature of the jurisdiction in nullity would prevent the court from accepting as true facts which on grounds of estoppel or misconduct would otherwise be found false or apply any legal consequences other than those which would follow from the true facts.’[[97]](#footnote-97)

Does it, or should it, make any difference if the marriage is void on the basis of a failure to comply with the requisite formalities, rather than on the basis of capacity to marry? It is clear from the early authorities decided by the ecclesiastical courts that there was extreme reluctance to annul a marriage where the suit was brought by one of the parties many years after its celebration. Where the marriage had been celebrated by licence and was being challenged on the basis of lack of the appropriate consent, if the court could find that the alleged minor was in fact of age at the time of the marriage or, if underage, that parental consent had been given, it would do so. Yet if the evidence was clear that parental consent had not been given to the marriage of a minor, the court would, with evident reluctance, declare it to be void. In *Johnston v Parker*,[[98]](#footnote-98) for example, the court annulled a marriage that had lasted 22 years and produced 7 children, at the instance of a husband who had sworn that he was of age at the time of the ceremony but had since produced evidence that he was around seven weeks short of his majority. But as Sir William Scott noted, it was ‘better to stop at any time, lest the continuance of the marriage should involve the interest of a greater number of persons.’[[99]](#footnote-99) Dr Lushington alluded to this line of cases in *Miles v Chilton*,[[100]](#footnote-100) adding that he had never heard it suggested ‘that either party was, in consequence of any such false averment, barred from instituting a suit of nullity.’[[101]](#footnote-101) He noted that one of the reasons why the ecclesiastical courts had continued to exercise jurisdiction after the Clandestine Marriages Act of 1753 had put the formalities required for a valid marriage on a statutory basis was ‘on the ground that it was to the interest of the public not only that the status of the parties themselves should be known, but that the legitimacy of the offspring should be beyond doubt ascertained, which, without a sentence in these Courts, might in after times be placed in considerable peril.’[[102]](#footnote-102)

Whether estoppel might operate to prevent one spouse from relying on evidence as to any deficiencies in the marriage was directly considered in *Pazpena de Vire v Pazpena de Vire*.[[103]](#footnote-103) The judge was very clear in rejecting the idea that estoppel should play a role:

I cannot see how any dictum from the authorities cited could possibly afford the foundation for a principle that a state of no-marriage might effectively to be translated into a state of lawful marriage by operation of an estoppel.

He pointed out the distinction between the operation of estoppel and the operation of the presumption in favour of marriage:

An estoppel in pais would operate regardless of the strength of the evidence sought to be admitted, and so would shut out even irrefutable evidence that the parties were never married at all.

While noting the possibility of *estoppel per rem judicatem* operating, he held that

it does not follow from the fact that an *estoppel per rem judicatem* might leave a bigamous marriage in place that an estoppel by conduct should be erected with the same or equivalent consequence.[[104]](#footnote-104)

Yet the force of this was somewhat undercut by his tentative suggestion in the following paragraph that estoppel ‘as regards mere formalities (i.e. not going to the fundamentals of the concept of marriage) might have better prospects’ since ‘[t]here is less reason for a counterbalancing public interest to weigh against it.’

It is difficult to understand what formalities he had in mind here. It seems clear from his earlier statement that he was not willing to contemplate an estoppel validating a marriage that would otherwise be regarded as a non-marriage, i.e. where none of the required formalities has been observed. But it is equally clear from the case-law that as long as the parties have observed *some* of the required formalities as to the giving of notice or the location of the marriage, the marriage will be regarded as falling within the scope of the Marriage Act 1949. The significance of this is that the marriage will be valid unless both parties knowingly and wilfully failed to comply with the residual requirements.[[105]](#footnote-105) In other words, there is either no scope for the doctrine of estoppel to operate, or there is a specific statutory provision rendering the marriage void in the case of deliberate non-compliance. There are in fact very few cases where marriages have been invalidated for a knowing and wilful failure to comply with the law, and even fewer where there was any scope for the doctrine of estoppel to apply. Most date from the nineteenth century and, as noted above, involve parents swiftly intervening to undo their offspring’s unsuitable marriage, with little or no opportunity for the couple to establish married life together or derive any benefits from the union.[[106]](#footnote-106)

In short, while some of the cases on the presumption in favour of marriage might have something ‘of the flavour of estoppel’,[[107]](#footnote-107) it is clear that the two doctrines are distinct, and there is nothing in the case-law to support the idea that one might be ‘married by estoppel.’

**Conclusion**

Where a couple have gone through a ceremony of marriage in a form recognised by the law, the importance that is still attached to marital status means that it is reasonable to hold that the onus of proof should be on the person challenging the marriage to show that it is invalid, rather than on the other party to show that it is valid. The strength of the presumption, and of the evidence needed to rebut it, reflects a policy preference for holding couples to be married wherever possible. But it is somewhat ironic that the sympathy evinced by the Court of Appeal in *Bath* should have led to an additional hurdle being placed on couples as regards the duration of cohabitation necessary to give rise to the presumption: the length of time that the parties had lived together since the ceremony was irrelevant in the earlier case-law and should be irrelevant in both establishing and analysing the strength of the presumption where the parties have gone through a ceremony. Ultimately, however, if the evidence discloses that the ceremony that the parties went through was not valid, the presumption should be held to be rebutted, even if the parties behaved as if they were married.

1. See eg *MA v JA* [2012] EWHC 2219 (Fam); *Asaad v Kurter* [2013] EWHC 3852 (Fam); *K v A* [2014] EWHC 3850 (Fam). [↑](#footnote-ref-1)
2. [2017] EWCA Civ 70. [↑](#footnote-ref-2)
3. The courts have previously accepted the validity of proxy marriages in *Apt v Apt* [1948] P 83 and *Pazpena de Vire v Pazpena de Vire* [2001] 1 FLR 460. [↑](#footnote-ref-3)
4. [2017] EWCA Civ 70, at [5], quoting the official English translation. [↑](#footnote-ref-4)
5. Quoted at [6]. [↑](#footnote-ref-5)
6. This was in line with the decision in *Asaad v Kurter* [2013] EWHC 3852 (Fam), in which a Syrian marriage that was known not to have been registered was held to be void. [↑](#footnote-ref-6)
7. [2017] EWCA Civ 70, at [19]. [↑](#footnote-ref-7)
8. For discussion of the presumption see eg A Borkowski, ‘The presumption of marriage’ [2002] 14 CFLQ 251. [↑](#footnote-ref-8)
9. [2017] EWCA Civ 70, at [34]. [↑](#footnote-ref-9)
10. *Piers v Piers* (1849) 2 HL Cas 331; 9 ER 1118, at p 1136. [↑](#footnote-ref-10)
11. On the facts, it seems likely that a special licence had indeed been granted in that case: while the then Bishop of Sodor and Man denied having granted any such licence, it was established that he had also forgotten other things that he had done. [↑](#footnote-ref-11)
12. *Russell v Russell* [1949] P 391. In this case, which concerned the legitimacy of the child of the marriage, there was some doubt as to whether the required 21 days had elapsed, but there was no documentary evidence to prove that it had not. [↑](#footnote-ref-12)
13. See eg *R v Henry Mainwaring* (1856) 1 Dears & Bell 132; 169 ER 948 (evidence that the chapel was licensed for marriage had not been provided in the correct form but the presence of the registrar provided independent evidence that it had been); *Sichel v Lambert* (1864) 15 CB (NS) 781; 143 ER 992 (Roman Catholic chapel presumed to be licensed). [↑](#footnote-ref-13)
14. *Russell v Russell* [1949] P 391 (no evidence that the priest who had presided over the ceremony was not authorised to register the marriage). [↑](#footnote-ref-14)
15. See eg *Armitage v Armitage* (1866) LR 3 Eq 343. [↑](#footnote-ref-15)
16. *Smith v Huson, Falsely Called Smith* (1811) 1 Phill 287; 161 ER 987; *Ryan v Ryan* (1816) 2 Phill 332; 161 ER 1161; *Sullivan v Oldacre, falsely called Sullivan* (1819) 3 Phill 45; 161 ER 1253. [↑](#footnote-ref-16)
17. See e.g. *Quick v Quick* [1953] VLR 224. [↑](#footnote-ref-17)
18. (1762) 1 Blackstone W 367; 96 ER 205; SC Burr Sett Ca 509. [↑](#footnote-ref-18)
19. (1762) 1 Wl Bl 367; 96 ER 205. [↑](#footnote-ref-19)
20. See further R Probert, ‘The registration of marriages’ [2017] Fam Law 1103. [↑](#footnote-ref-20)
21. See eg D Zbeidy, ‘Problematizing marriage registration in Jordan: Identities, Legalities, and Customs’ and M Voorhoeve, ‘Law and social change in Tunisia: the case of unregistered marriage’, papers presented at the symposium on ‘Unregistered Muslim Marriages – Regulations and Contestations’, De Montfort University, 24-25 April 2017. [↑](#footnote-ref-21)
22. See eg *Carlin v Carlin* (1906) 70 JP 143; *Goldstone v Goldstone* (1922) 127 LT 32. [↑](#footnote-ref-22)
23. [2001] 1 FLR 460. [↑](#footnote-ref-23)
24. At [55], emphasis added. [↑](#footnote-ref-24)
25. At [34]. [↑](#footnote-ref-25)
26. [2013] EWHC 3852 (Fam). [↑](#footnote-ref-26)
27. While McFarlane LJ referred to the requirement for registration following the birth of a child, it should be noted that this was only one of two alternative grounds for registration set out by the Third Religious Court. [↑](#footnote-ref-27)
28. [2017] EWCA Civ 70, at [42]. [↑](#footnote-ref-28)
29. At [21], quoted at [23]. [↑](#footnote-ref-29)
30. At [42]. [↑](#footnote-ref-30)
31. *CAO v Bath* [2000] 1 FLR 8. [↑](#footnote-ref-31)
32. At p 24. [↑](#footnote-ref-32)
33. The case itself is susceptible to a range of different interpretations: see R Probert and S Saleem, ‘Judicial treatment of Islamic marriage ceremonies’ (under consideration). [↑](#footnote-ref-33)
34. [2004] EWHC 1947 (Ch). [↑](#footnote-ref-34)
35. [2017] EWCA Civ 70, at [34]. [↑](#footnote-ref-35)
36. At [36]. [↑](#footnote-ref-36)
37. [2009] EWHC 636, at [70]. In that case the couple had gone through an Islamic ceremony of marriage in August 2006 and the wife had left the country in March 2008. See also *Al-Saedy v Musawi* [2010] EWHC 3293 (Fam), at [59]. [↑](#footnote-ref-37)
38. [2012] EWHC 1748 (Fam). [↑](#footnote-ref-38)
39. At [33]. [↑](#footnote-ref-39)
40. [2017] EWCA Civ 70, at [39]. [↑](#footnote-ref-40)
41. (1754) 1 Lee 592; 161 ER 217. [↑](#footnote-ref-41)
42. (1757) 2 Lee 478; 161 ER 411. [↑](#footnote-ref-42)
43. Fleet marriages – i.e. marriages conducted in the vicinity of the Fleet prison, or by clergymen operating out of it – were a significant problem for the authorities in the first half of the eighteenth century (see R Probert, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment* (Cambridge University Press, 2009). It has been estimated that by the 1740s around half of all marriages in London were celebrated there (see RL Brown, ‘The Rise and Fall of the Fleet Marriage’ in RB Outhwaite (ed), *Marriage and Society* (Europa Publications Ltd, 1981)). The validity of marriages celebrated at the Fleet continued to arise for determination well into the nineteenth century, as descendants of the parties sought to establish their legitimacy and entitlements: see eg *Doe on the demise of Davies v Gatacre* (1838) 8 Car & P 578; 173 ER 625. [↑](#footnote-ref-43)
44. (1811) 1 Phill 287; 161 ER 987. [↑](#footnote-ref-44)
45. At p 294. See also *Sullivan v Oldacre, falsely called Sullivan* (1819) 3 Phill 45; 161 ER 1253. [↑](#footnote-ref-45)
46. See R Probert, ‘The Judicial Interpretation of Lord Hardwicke’s Act of 1753’ (2002) 23 *Journal of Legal History* 129. Under the short-lived Marriage Act 1822 there was also a specific provision ratifying marriages where the parties had continued to live together until the passage of the Act or had only separated to determine the validity of their marriage. [↑](#footnote-ref-46)
47. This was the approach of the courts both under the Clandestine Marriages Act 1753, under which a failure to comply with the law automatically rendered the marriage void, and under the Marriage Acts of 1823 and 1836, under which only a knowing and wilful failure to comply with the legal requirements had this effect. For cases decided under the 1753 Act see eg *Pouget v Tomkins, falsely calling herself Pouget* (1812) 2 Hag Con 142; 161 ER 695 (teenager married his grandmother’s maid; family only learned of the union some months after it had taken place); *Meddowcroft v Gregory* (1816) 2 Hag Con 207; 161 ER 717; *Green, falsely called Dalton, v Dalton* (1822) 1 Add 289; 161 ER 101. For cases decided under the subsequent law see *Tongue v Allen* (1835) 1 Curt 38; 163 ER 13; *Tooth v Barrow* (1854) Sp Ecc & Ad 371; 164 ER 214; *Wormald v Neale and Wormald (falsely called Neale)* (1868) 19 LT 93. [↑](#footnote-ref-47)
48. See eg *Diddear (falsely called Faucit, orse Savill) v Faucit* (1821) 3 Phill 580; 161 ER 1421, at p 581, noting that a union that ‘has produced children, and united parties by a long cohabitation… is not to be dissolved unless by some pressing obligations of law.’ [↑](#footnote-ref-48)
49. (1849) 2 HL Cas 331; 9 ER 1118. [↑](#footnote-ref-49)
50. At p 367. [↑](#footnote-ref-50)
51. See eg *Harrison v Southampton Corporation* (1853) 4 De G M & G 137; 43 ER 459 (reliance on the general principle *omnia rite acta praesumuntur*); *Harrod v Harrod* (1854) 1 K & J 4; 69 ER 344 (‘everything is to be presumed in favour of a marriage solemnly contracted’); and *R v Mainwaring* (1856) 1 D & B 132; 169 ER 948 (validity of 1848 ceremony in Wesleyan chapel that had been duly registered for marriage presumed despite the husband’s subsequent bigamous marriage). [↑](#footnote-ref-51)
52. (1864) 15 CB (NS) 781; 143 ER 992. [↑](#footnote-ref-52)
53. At pp 787-88. [↑](#footnote-ref-53)
54. Ibid. [↑](#footnote-ref-54)
55. *Mather v Ney* (1807) 3 M & S 265n; 105 ER 610. See also *Hayes, falsely called Watts, v Watts* (1819) 3 Phill Ecc 43; 161 ER 1252 (marriage annulled after 18 years); *Johnston v Parker, falsely called Johnston* (1819) 3 Phill Ecc 39; 161 ER 1251 (marriage annulled after 22 years and the birth of 7 children). [↑](#footnote-ref-55)
56. (1885) 10 App Cas 692. [↑](#footnote-ref-56)
57. *Spivack v Spivack* [1930] All ER Rep 133; *Spurgeon v Spurgeon* (1930) 46 TLR 396; *Russell v AG* [1949] P 391; *Hill v Hill* [1959] 1 WLR 127; *Taylor v Taylor* [1964] P 25; *Mahadervan v Mahadervan* [1964] P 233; *Collett v Collett* [1968] P 482. [↑](#footnote-ref-57)
58. (1922) 127 LT 32. This was a case of jactitation of marriage brought by the husband which the wife countered by claiming that they had married in a Jewish ceremony of marriage in Poland in 1889. [↑](#footnote-ref-58)
59. The use of the Scottish formulation here is an indication of how intertwined the lines of authority had become. [↑](#footnote-ref-59)
60. [1949] P 391. [↑](#footnote-ref-60)
61. At p 394. [↑](#footnote-ref-61)
62. *Gatty v AG* [1951] P 444; *Taylor v Taylor* [1964] P 25. [↑](#footnote-ref-62)
63. [2000] 1 FLR 8. [↑](#footnote-ref-63)
64. At p 15. [↑](#footnote-ref-64)
65. At p 22. [↑](#footnote-ref-65)
66. Whether or not the cohabitation of the parties does in fact indicate such a belief is more complex in a period of widespread cohabitation. There is however case-law confirming that the fact that the parties have lived together before marriage does not preclude weight being attached to the fact that they did so afterwards: see *Piers v Piers* (1849) 2 HL Cas 331; 9 ER 1118; *Hill v Hill* [1959] 1 WLR 127. [↑](#footnote-ref-66)
67. [2001] 1 FLR 460 [↑](#footnote-ref-67)
68. At [70]. [↑](#footnote-ref-68)
69. [2017] EWCA Civ 70, at [36]. [↑](#footnote-ref-69)
70. See eg the numerous cases involving Fleet marriages: *Walton v Rider* (1752) 1 Lee 16; 161 ER 7; *Grant v Grant* (1754) 1 Lee 592; 161 ER 217; *Cunningham v Ross* (1757) 2 Lee 478; 161 ER 411; Read v Passer (1794) 1 Esp 213; 170 ER 332. [↑](#footnote-ref-70)
71. See eg *Leader v Barry* (1795) 1 Esp. 353; 170 ER 382, in which the court refused to accept a copy of the marriage register from the Swedish ambassador’s chapel at Paris as evidence, but held that evidence of cohabitation and reputation was admissible. [↑](#footnote-ref-71)
72. This comes through particularly strongly in the decision of the House of Lords in *Piers v Piers* (1849) 2 HL Cas 331; 9 ER 1118. [↑](#footnote-ref-72)
73. See eg *Steadman v Powell* (1822) 1 Add 58; 162 ER 21; *The Lauderdale Peerage* (1885) 10 App Cas 692. [↑](#footnote-ref-73)
74. See eg *Russell v AG* [1949] 391. [↑](#footnote-ref-74)
75. *CAO v Bath* [2000] 1 FLR 8, at [31]. [↑](#footnote-ref-75)
76. *Kalinowska v Kalinowska (Ballentine intervening)* (1964) 108 SJ 260; *Collett v Collett* [1968] P 482. [↑](#footnote-ref-76)
77. At [22], quoting [18]. [↑](#footnote-ref-77)
78. At [45]. [↑](#footnote-ref-78)
79. This section is concerned solely with the question of whether an estoppel arises as a result of the conduct of one of the parties, rather than with the question of whether a court is bound by its own previous decisions as to the status of the marriage, by means of estoppel *per rem judicatem*. On the latter issue see the authorities reviewed in D Tolstoy, ‘Marriage by Estoppel or an Excursion into *Res Judicata*’ (1968) 84 LQR 245 and the decision of the House of Lords in *Vervaeke v Smith* [1983] 1 AC 145. [↑](#footnote-ref-79)
80. *D v D (Nullity: Statutory Bar)* [1979] Fam 70, at 73. [↑](#footnote-ref-80)
81. (1885) 10 App Cas 171. [↑](#footnote-ref-81)
82. *D v D (Nullity: Statutory Bar)* [1979] Fam 70, at 73. [↑](#footnote-ref-82)
83. (1885) 10 App Cas 171, at 186. [↑](#footnote-ref-83)
84. Ibid. [↑](#footnote-ref-84)
85. See eg *The Office of the Judge Promoted by Phillimore v Machon* (1876) LR 1 PD 481, at 487. [↑](#footnote-ref-85)
86. Law Commission, *Nullity of Marriage* (1968), WP No 20, [37]. [↑](#footnote-ref-86)
87. Matrimonial Causes Act 1973, s 13(1), which states that where a decree of nullity is sought on the basis that the marriage is voidable, it will not be granted if the court is satisfied that (a) the petitioner ‘with knowledges that it was open to him to have the marriage avoided, so conducted himself in relation to the respondent as to lead the respondent reasonably to believe that he would not seek to do so’ and (b) that ‘it would be unjust to the respondent to grant the decree’. [↑](#footnote-ref-87)
88. [1960] 1 WLR 975. [↑](#footnote-ref-88)
89. At 979. [↑](#footnote-ref-89)
90. [1961] P 152. [↑](#footnote-ref-90)
91. At 158. [↑](#footnote-ref-91)
92. Ibid. [↑](#footnote-ref-92)
93. Ibid. [↑](#footnote-ref-93)
94. [1971] P 83. [↑](#footnote-ref-94)
95. At 108. [↑](#footnote-ref-95)
96. [1983] 1 AC 145 [↑](#footnote-ref-96)
97. At 157. [↑](#footnote-ref-97)
98. (1819) 3 Phill Ecc 39; 161 ER 1251. [↑](#footnote-ref-98)
99. At p 41. [↑](#footnote-ref-99)
100. *Miles v Chilton, falsely calling herself Miles* (1849) 1 Rob Ecc 684; 163 ER 1178. [↑](#footnote-ref-100)
101. At 695. [↑](#footnote-ref-101)
102. At 698. [↑](#footnote-ref-102)
103. [2001] 1 FLR 460. [↑](#footnote-ref-103)
104. At [68] [↑](#footnote-ref-104)
105. Marriage Act 1949, s 25 (where the ceremony was conducted according to the rites of the Church of England) and s 49 (where the ceremony took place under the provisions of Part III of the Act). [↑](#footnote-ref-105)
106. See eg *Tongue v Allen* (1835) 1 Curt 38; 163 ER 13 (marriage between schoolboy and 35-year-old widow: former continued as a pupil after the wedding and then went home to his parents); *Tooth v Barrow* (1854) Sp Ecc & Ad 371; 164 ER 214 (marriage between the 16-year-old son of a gentleman and a woman who had applied for the post of schoolmistress to the workhouse; discovered three days after the wedding and the husband was sent away to Australia); *Wormald v Neale and Wormald* (1868) (marriage between 15-year-old daughter of a banker and a butler; no cohabitation after the marriage). [↑](#footnote-ref-106)
107. *Pazpena de Vire v Pazpena de Vire* [2001] 1 FLR 460 at [70]. [↑](#footnote-ref-107)