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Domestic Relations-Marriage of Insane Person Void-Common Law Marriage Presumed

DOMESTIC RELATIONS—MARRIAGE OF INSANE PERSON VOID—COMMON LAW MARRIAGE PRESUMED.—Grace Langdon and William Langdon were married Sept. 15, 1923, and since that time until the death of William Langdon in 1929, the two lived together as husband and wife. Grace Langdon upon her husband's death brought suit against the brothers and sisters of William Langdon to quiet the title to her interest in her husband's real estate, and for partition. The defendants filed a counterclaim alleging that William Langdon was insane at the time of the marriage to plaintiff, that she had no interest in the property, and asking that their title be quieted and the marriage of Grace Langdon and William Langdon be declared void. *Held,* altho the marriage of a person who is insane at the time of the ceremony is absolutely void under Burns R. S. 1926, Sec. 9862, still, if the parties to the ceremonial marriage continued to live and cohabit together as husband and wife, "the law will presume a good common law marriage, the presumption being in favor of morality and not immorality, legitimacy and not bastardy."[1]

It would seem that the court reached a desirable result in upholding the marriage. "Every intendment of the law is in favor of matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of proof, the law raises a strong presumption of its legality; not only casting the burden of proof on the party objecting, but requiring him throughout, and in every particular, plainly to make the fact appear, against the constant pressure of this presumption that it is illegal and void. So that it cannot be tried like ordinary questions of fact, which are independent of this sort of presumption."[2] In accordance with this theory it has been held that though a person once adjudged insane by a proper tribunal is presumed to continue to be insane until the contrary is shown,[3] a person adjudged insane three years before a marriage, was presumed to have regained his sanity at the time of such

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[22] *Westerfield-Bonte Co. v. Burnett* (1917), 176 Ky. 188, 195 S. W. 477.

[1] *Langdon v. Langdon,* Supreme Court of Indiana, Dec. 7, 1932, 183 N. E. 400.

[2] Bishop on Marriage and Divorce, Vol. I, 6th ed., sec. 457; quoted in *Boulden v. McIntire* (1889), 119 Ind. 574, 21 N. E. 445; and cited in *Weeing v. Temple* (1896), 144 Ind. 189, 41 N. E. 600. See also *Castor v. Davis* (1889), 120 Ind. 231; *Teter v. Teter* (1885), 101 Ind. 129, 51 Am. Rep. 742; *Franklin v. Lee* (1901), 30 Ind. App. 31, 62 N. E. 78.

[3] *Reden v. Baker* (1882), 86 Ind. 91.

marriage.[4] And where one of the parties to a marriage is shown to have been previously married and that the first spouse is still living, a divorce from the first spouse will be presumed unless the contrary is clearly shown.[5]

Marriage is made by statute a civil contract in Indiana,[6] but it is something more than an ordinary contract affecting the property rights of the parties—it is an institution in which the public have an interest and deep concern.[7] It has this aspect of other contracts, in that both parties must be mentally able to assent to it. If one of the parties to the marriage is insane at the time of the marriage there can be no assent. The insanity must in fact exist at the time of the marriage to avoid it;[8] neither prior nor subsequent insanity is sufficient, nor are both prior and subsequent insanity sufficient if the marriage took place in a lucid interval.[9] But the authorities are in conflict as to whether such a marriage creates a void, or merely a voidable relationship. It would seem the preferable rule to hold such marriages merely *voidable*. But Indiana has by statute declared the folowing marriages void: "First. Where either party has a wife or husband living at the time of such marriage. Second. When one of the parties is a white person and the other possessed of one-eighth or more of negro blood. Third. *Where either party is insane or idiotic at the time of such marriage.*"[10] By court decision, it is held the word "void" as used by the Legislature means void, and not voidable.[11] If this holding be followed to its logical conclusion, the validity of the marriage could be attacked collaterally by anyone, in any proceeding, and in any court whenever the question arises, but it was held in *Bruns v. Cope*[12] that "the validity of a marriage may not be assailed in a stautory action by heirs for partition of land of an alleged insane decedent." There the action was brought by a brother of a deceased wife against the husband to quiet his title and for partition of certain real estate possessed by the decedent at her death. Plaintiff there alleged the decedent was insane at the time of the marriage. This case was later cited with disapproval in *Wiley v. Wiley*[13] as being contra to general authority, and contra to authority cited with approval in the Bruns case. Evidently in the Bruns case the court adopted the theory that the marriage in which one of the parties is insane, is merely voidable and not void. For if it were merely voidable, then it could only be attacked directly and by a party to it,[14] but not collaterally. A void act cannot be ratified and the authorities agree that this also applies to marriage contracts, void *ab initio*.[15] Where

[4] *Castor v. Davis* (1889), 120 Ind. 231.

[5] *Boulden v. McIntire* (1889), 119 Ind. 574, 21 N. E. 445.

[6] Burns Anno. Stat. 1926, Sec. 9859.

[7] *Castor v. Davis* (1889), 120 Ind. 231.

[8] *Baker v. Baker* (1882), 82 Ind. 146.

[9] *Banker v. Banker*, 63 N. Y. 409; Tiffany on Domestic Relations, p. 18.

[10] Burns Anno. Stat. 1926, Sec. 9862.

[11] *Wiley v. Wiley* (1919), 75 Ind. App. 456, 123 N. E. 252; *Teter v. Teter* (1885), 101 Ind. 129, 51 Am. Rep. 742.

[12] *Bruns v. Cope* (1914), 182 Ind. 289, 105 N. E. 471. See also *Castor v. Davis* (1889), 120 Ind. 231.

[13] *Wiley v. Wiley* (1919), 75 Ind. App. 456, 123 N. E. 252.

[14] *Pence v. Aughe* (1885), 101 Ind. 317.

[15] *Thompson v. Thompson*, 114 Mass. 566.

the act or contract is void *ab initio* no amount of ratification will make it valid, but there must be a new contract, for there cannot be a ratification of nothing.[16]

The theory of the principal case follows the dictum of *Wiley v. Wiley, supra*, that "should an insane party be restored to sanity and thereafter the two should live together as husband and wife for a long period of time under circumstances evincing pure motives and good faith from the beginning, then from their subsequent and continued conduct the presumption may arise that the parties actually entered into a new marriage, which new marriage, although there was no solemnization and no compliance with any of the provisions of the statute relating to procurement of a license, nevertheless in some cases may be valid at common law."[17] It seems to be the majority United States rule that where parties to an agreemnt and relationship which, but for the existence of an impediment, would have constituted a valid marriage, continue the relationship in good faith, upon the removal of the impediment, the law will establish between them a valid common law marriage.[18]

A common law marriage is valid in Indiana.[19] No formal ceremony is necessary to create a valid marriage and if the parties make an agreement to form a present matrimonial connection, followed by cohabitation as husband and wife, no particular form of words is essential, provided it appears that the engagement was entered into from pure motives, and not for the mere purpose of sexual commerce.[20] Cohabitation alone cannot constitute a common law marriage, but cohabitation, conduct, reputation, and actions are evidence to raise a presumption of marriage.[21]

The court in the principal case apparently overrules the case of *Compton v. Benham*[22] without mention in so far as the latter case holds that no common law marriage will be presumed to arise from cohabitation as husband and wife after the impediment is removed. In that case an undivorced man married a woman who was ignorant of his incapacity, the former wife subsequently obtained a divorce, and the second wife continued to live with him, wholly ignorant of such former marriage or of such divorce. It was held that the second marriage was void and that no presumption of a common law marriage arose merely from cohabitation, even though the parties were generally known as husband and wife. The

[16] *Wiley v. Wiley* (1919), 75 Ind. App. 456, 123 N. E. 252; *Teter v. Teter* (1885), 101 Ind. 129, 51 Am. Rep. 742.

[17] *Wiley v. Wiley* (1919), 75 Ind. App. 456, 123 N. E. 252; *Franklin v. Lee* (1901), 30 Ind. App. 31, 62 N. E. 78.

[18] *Blackburn v. Crawfords* (1865), 3 Wall. 175, 18 L. Ed.; *Matter of Ziegler v. Cassidy's Sons* (1917), 220 N. Y. 98; *In re Spondre* (1917), 162 N. Y. S. 943; *McClurkin v. McClurkin*, 206 Ala. 513, 90 S. 917; *Travers v. Reinhardt* (1906), 205 U. S. 423, 27 S. Ct. 563; *Stuart v. Schoonover* (Okla.) (1924), 229 P. 812.

[19] *Teter v. Teter* (1885), 101 Ind. 129, 51 Am. Rep. 742; *Haddow v. Crawford* (1911), 49 Ind. App. 551; *Trimble v. Trimble* (1850), 2 Ind. 76; *Bowers v. Van Winkle* (1872), 41 Ind. 432; *Wiley v. Wiley* (1919), 75 Ind. App. 456, 123 N. E. 252; see also *Cleveland, C., C. & St. L. R. Co. v. Blind* (1914), 182 Ind. 398; *Castor v. McDole* (1923), 80 Ind.App. 256, 137 N. E. 889.

[20] *Wiley v. Wiley* (1919), 75 Ind. App. 456, 123 N. E. 252; *Franklin v. Lee* (1901), 30 Ind. App. 31, 62 N. E. 78.

[21] *Compton v. Benham* (1909), 44 Ind. App. 51; *Williams v. Wiliams* (1879), 46 Wis. 464; *Foster v. Hawley* (1876), 8 Hun. 68.

[22] *Compton v. Benham* (1909), 44 Ind. App. 51.

latter case reaches a distorted and highly undesirable result; for the second wife, knowing neither of the previous marriage nor subsequent divorce, could not have contracted a meretricious marriage. *Teter v. Teter*,[23] a previous case had reached the opposite result than that in the Benham case, and under practically identical circumstances, did raise the presumption of a common law marriage.

It would seem then, that the law in Indiana is that where one of the parties to an ostensible marriage is insane at the time of such ostensible marriage, no marital relationship is created, but that it is absolutely void *ab initio*.[24] The marriage of two parties, one of whom has been previously married and is undivorced and the first spouse is still living at the time of the second marriage, is also absolutely void.[25] In either instance such relationship may be attacked by anyone, at any time, in any proceeding before any court. But, in the former instance, where a party is once adjudged insane by a proper tribunal, although such party is presumed to continue to be insane thereafter, in the absence of an averment and proof that the party was insane at the time of the marriage, the law will presume the party to have recovered his sanity and that a valid marriage was created.[26] Where there is an averment and proof that one of the parties was insane at the time of the marriage, but no averment that the incapacitated party thereafter continued to be insane, and where the parties continue thereafter to cohabit for pure motives and by their conduct are generally known as husband and wife, the law will presume a good common law marriage between the parties.[27] And in the latter instance, in the absence of any averment and proof that a divorce had not been secured prior to the second marriage, the law will presume that such divorce had been secured, and that the marriage was legal.[28] Where it is shown that a divorce was in fact not granted before the second marriage, the second marriage being therefore void, but a divorce was granted to the incapacitated spouse subsequent to the second marriage, and the parties afterward cohabit in good faith, and by their conduct are known as husband and wife, the law will presume a good common law marriage.[29] I. D. P.

INJUNCTION—EXERCISE OF DISCRETIONARY POWER GRANTED TO ADMINISTRATIVE BOARD.—In order to contract for the transportation of school children in the Washington school township of Daviess county for the school years 1931-32, 1932-33, 1933-34, 1934-35, the county trustee proceeded under chapter No. 59 of the Acts of 1931, page 144. Ray Browning submitted a bid of $3.00 per day, proposing to use a 1927 model Chevrolet truck. Erve Padgett submitted a bid of $3.40 per day, proposing to use a 1928 model Chevrolet truck. William Small submitted a $4.00 per day

[23] *Teter v. Teter* (1885), 101 Ind. 129, 51 Am. Rep. 752.

[24] *Wiley v. Wiley* (1919), 75 Ind. App. 456, 123 N. E. 252; *Teter v. Teter* (1885), 101 Ind. 129, 51 Am. Rep. 742.

[25] *Compton v. Benham* (1909), 44 Ind. App. 51.

[26] *Castor v. Davis* (1889), 120 Ind. 231.

[27] *Wiley v. Wiley* (1919), 75 Ind. App. 456, 123 N. E. 252; *Langdon v. Langdon* (principal case), 123 N. E. 400.

[28] *Boulden v. McIntire* (1889), 119 Ind. 574, 21 N. E. 445.

[29] *Teter v. Teter* (1885), 101 Ind. 129, 51 Am. Rep. 742.