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COMMON LAW MARRIAGE—A LEGAL ANACHRONISM

Marriage is a status in which the public has the utmost interest.¹ To protect this interest the state regulates the formation of marriage by establishing a statutory procedure to be followed in creating the marriage

42. "In this country at least, the purpose of taxes is not limited to raising the money the government needs to spend. American statesmen have employed taxation with incidental, or even dominant, nonfiscal motives ever since the day of Hamilton's *Report on Manufactures*. Jefferson urged inheritance taxes to promote small proprietorships. Thomas Paine saw in death taxes a way to finance old-age pensions and grants to youth. In the twentieth century taxation began to assume a mounting share in the process of social adjustment." PAUL, *TAXATION FOR PROSPERITY* 214 (1947).

43. The following are some examples of taxes with no revenue raising purpose whatsoever and taxes with multiple functions: (1) the federal and state taxes on oleomargarine, which have no revenue-raising purpose whatsoever; 53 STAT. 248 (1939), (later repealed by 64 STAT. 20 (1950)); Wis. Stat. § 97.42 (1951); (2) the excise tax on liquor which is intended as a measure of social discipline as well as a source of revenue; 44 STAT. 104 (1926), as amended 26 U.S.C. § 2800 (1952); (3) the federal estate tax which has the dual purpose of raising revenue and of limiting inheritances; INT. REV. CODE OF 1954, § 2001-2207; (4) the gift tax which is intended more as a "policeman" than a revenue raiser; INT. REV. CODE OF 1954, § 2501-2524; (5) the corporation income tax with its special provisions designed to encourage the distribution of dividends and to refrain from accumulating surplus beyond "reasonable needs"; INT. REV. CODE OF 1954, § 531-537.

44. U.S. Department of Commerce estimates indicate that the national income for 1955 approached \$324,000,000,000 and federal income taxes paid for the same period amounted to \$21,500,000,000 by corporations, or 6.6% of national income, and \$31,300,000,000 by individuals or 9.7% of national income. 42 FED. RES. BULL. No. 9 at 972, 992 (1956).

1. *Maynard v. Hill*, 125 U.S. 190, 205 (1888); *Sweigart v. State*, 213 Ind. 157, 165, 12 N.E.2d 134, 138 (1938).

status.² Aside from statute, however, the common law marriage, another method by which the status may be created, has persisted. The circumstances under which a common law marriage usually arises are not clearly distinguishable from those surrounding an illicit cohabitation. Yet the socio-legal values attaching to the two relationships are antithetical. The Indiana courts have recently attempted to develop stricter standards adaptable to changed social conditions for distinguishing these relationships. In view of our changed social structure a complete re-evaluation of the bases for recognizing common law marriages is imperative.

Originally mutual consent was all that was required to create a marriage.³ The history of common law marriages is traceable to the canon law as it applied in England where the validity of a marriage was exclusively a matter of ecclesiastical cognizance. The Church, although disfavoring secret and unblessed marriages, recognized them to avert concubinage and give permanence to the relationship.⁴ After the Council of Trent in 1563 changed canon law, any marriage not solemnized by a priest in the presence of two witnesses was void. However, the change applied only to Roman Catholic countries and therefore did not affect the law in England where the Anglican ecclesiastical courts continued to recognize the irregular marriage *per verba de presenti*.⁵ In 1753 Lord Hardwicke's Act⁶ swept away the whole subject of irregular marriages by requiring a public and regular ceremony without which the relation of husband and wife could not be created.

Indiana adopted the common law of England and the statutes of the

2. IND. ANN. STAT. §§ 44-201 to -213 (Burns 1946), license regulations; IND. ANN. STAT. §§ 44-301 to -306 (Burns 1946), solemnization.

3. The first marriage, that between the common ancestors of mankind, obviously was based on mutual assent alone. *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54, 63, 161 Eng. Rep. 665, 669 (1811). Also see *Davis v. Stouffer*, 132 Mo. App. 555, 112 S.W. 282 (1908).

4. 32 HEN. 8, c. 38 (1540) which provided that an irregular marriage would not invalidate a subsequent ceremonial marriage to another person, was found quite unworkable and was soon repealed by 2 & 3 EDW. 6, c. 23 (1548). The provocation behind the second statute was that men and women were breaking their marriage promises. Repeal of the first statute was necessary, for it allowed the utter disintegration of common law marriage as an institution. Not infrequently the call of sensuality led persons to abandon their common law spouses, and to sanctify their desire for more attractive spouses with ecclesiastical ceremony. The church, therefore, became a vehicle for lust and carnality, rather than an instrument for faith and truth. Thus the first attempt to control the common law marriage was unsuccessful.

5. For a complete history of the common law marriage see *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54, 62-72, 161 Eng. Rep. 665, 668-672 (1811). See also 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 369-374 (2d ed. 1923); KEEZER, MARRIAGE AND DIVORCE § 28 (3d ed. 1946).

6. 26 GEO. 2, c. 33 (1753).

British Parliament made in aid thereof as these existed prior to 1607,⁷ and has recognized the common law marriage as permitted by the common law.⁸ Even though Lord Hardwicke's Act had been passed before the Revolution, it is not surprising that its influence did not extend to this country.⁹ England was a compactly populated country. The United States was an expanding, loosely knit group of states. With the movement of the population away from the Atlantic Seaboard, control by the community was temporarily in abeyance.¹⁰ In this period marriage was a necessity as few women had independent means of support, and the physical hardships of frontier life made survival easier for married

7. The common law was adopted only if not inconsistent with the United States Constitution, United States statutes, the Indiana constitution, or Indiana statutes. IND. ANN. STAT. § 1-101 (Burns 1946). Even though Indiana has established a statutory procedure for marriage formation, the statute also provides that no marriage shall be void for want of a license or other formality required by law if the parties actually believed it to be a legal marriage. IND. ANN. STAT. § 44-302 (Burns 1946). This statute has been interpreted to leave unchanged the law on common law marriages. *Castor v. McDole*, 80 Ind. App. 556, 148 N.E. 643 (1923).

8. The English courts hold that the common law marriage was never part of the English common law. *Beamish v. Beamish*, 9 H.L.C. 274, 11 Eng. Rep. 735 (H.L.1861); *Regina v. Millis*, 10 Cl. & F. 534, 8 Eng. Rep. 844 (H.L. 1844). But see *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54, 161 Eng. Rep. 665 (1811). Lord Campbell strongly disagreed with this position in *Beamish v. Beamish*, *supra* at 334, 11 Eng. Rep. at 759.

9. This statute has had little effect on the doctrine in the United States. The United States Supreme Court has recognized such marriages. *Maryland v. Baldwin*, 112 U.S. 490 (1884); *Meister v. Moore*, 96 U.S. 76 (1877). The Indiana courts have always recognized such marriages. *Anderson v. Anderson*, 131 N.E.2d 301 (Ind. 1956); *Bolkovac v. State*, 229 Ind. 294, 98 N.E.2d 250 (1951); *Schumacher v. Adams County Circuit Court*, 225 Ind. 200, 73 N.E.2d 689 (1947); *Cossell v. Cossell*, 223 Ind. 603, 63 N.E.2d 540 (1945); *Norrell v. Norrell*, 220 Ind. 398, 44 N.E.2d 97 (1942); *Argiroff v. Argiroff*, 215 Ind. 297, 19 N.E.2d 560 (1939); *Cox v. Rash*, 82 Ind. 519 (1882); *Bowers, Adm'r v. Van Winkle*, 41 Ind. 432 (1872); *Trimble v. Trimble*, 2 Ind. 76 (1850); *Fleming v. Fleming*, 8 Blackf. 234 (Ind. 1846); *United States Steel Corporation v. Weatherston*, 131 N.E.2d 335 (Ind. App. 1956); *Deremiah v. Powers-Thompson Construction Co.*, 125 Ind. App. 662, 129 N.E.2d 425 (1955); *In re Dittman's Estate*, 124 Ind. App. 198, 115 N.E.2d 125 (1953); *Romey et. al. v. Glass*, 120 Ind. App. 279, 91 N.E.2d 850 (1950); *Guevara v. Inland Steel Co.*, 120 Ind. App. 47, 88 N.E.2d 398 (1949); *In re Lambert's Estate*, 116 Ind. App. 293, 62 N.E.2d 871 (1945); *Clayton v. Universal Construction Co.*, 110 Ind. App. 322, 38 N.E.2d 887 (1942); *Schilling v. Parsons, Adm'r*, 110 Ind. App. 52, 36 N.E.2d 958 (1941); *Young v. General Baking Company*, 104 Ind. App. 658, 12 N.E.2d 1016 (1938); *Dunlop v. Dunlop*, 101 Ind. App. 43, 198 N.E. 95 (1935); *Lowrance v. Lowrance*, 95 Ind. App. 345, 182 N.E. 273 (1932); *Vincennes Bridge Co. v. Vardaman*, 91 Ind. App. 363, 171 N.E. 241 (1930); *Castor v. McDole*, 80 Ind. App. 556, 148 N.E. 643 (1923); *Mayes v. Mayes*, 84 Ind. App. 90, 147 N.E. 630 (1925); *Hummel v. State*, 73 Ind. App. 12, 126 N.E. 444 (1920); *Meehan v. Edward Valve and Manufacturing Co.*, 65 Ind. App. 342, 117 N.E. 265 (1917).

In the following cases the courts recognized a common law marriage after the parties lived together as husband and wife after the removal of the impediment to their void ceremonial marriage: *Eddington v. Eddington*, 213 Ind. 347, 12 N.E.2d 758 (1938); *Langdon v. Langdon*, 204 Ind. 321, 183 N.E. 400 (1932); *Brun v. Cope*, 182 Ind. 289, 105 N.E. 471 (1914); *Teter v. Teter*, 101 Ind. 129 (1885); *Gunter v. Dealer's Transport Co.*, 120 Ind. App. 409, 91 N.E.2d 377 (1950); *Castor v. McDole*, 80 Ind. App. 556, 148 N.E. 643 (1923); *Wiley v. Wiley*, 75 Ind. App. 456, 123 N.E. 252 (1919); *Compton v. Benham*, 44 Ind. App. 51, 85 N.E. 365 (1908).

10. HARPER, PROBLEMS OF THE FAMILY 150-51 (1952).

couples than for single persons. The difficulties in reaching officials authorized to issue licenses and perform marriage ceremonies provided valid reasons for failure to comply with the statutory procedure.¹¹ The conditions of the frontier provided impetus for a doctrine which European countries had long discarded as undesirable. The willingness of American courts to find a marriage based on cohabitation and reputation is, therefore, not surprising.¹²

Today common law marriages should be viewed in a different light. With an informed public, no member of which is more than a few hours travel from the county clerk and persons authorized to solemnize marriages, hardships are no longer apparent which might excuse failure to comply with the statutory requirements.¹³ The Twentieth Century has also heralded the legal, social, and economic independence of the American woman. Unlike the 1800's, cohabitation now does not necessarily indicate an intent to be married. More effective means of birth control has led to cohabitation merely for the convenience of the parties.¹⁴ Coupled with changes in the social and economic pattern of society, Workmen's Compensation¹⁵ and Social Security¹⁶ have accentuated the

11. This is one of the reasons why recognition was given common law marriages in the 1800's. See KEEZER, *MARRIAGE AND DIVORCE* 57 (3d ed. 1946); Comment, *A New Look at Common Law Marriages in Florida*, 10 *MIAMI L. Q.* 87, 102 (1955). However, only four cases worthy of appeal are reported in the 19th century compared with twenty-two such cases in this century. See note 9, *supra*. That difficulty of complying with the law should not be overemphasized in this area is one conclusion to be drawn from the above comparison. For another reason for this increase in litigation see note 15, *infra*.

12. *Cox v. Rash*, 82 Ind. 519, 520 (1882); *Bowers, Adm'r v. Van Winkle*, 41 Ind. 432, 435 (1872); *Trimble v. Trimble*, 2 Ind. 76, 78 (1850); *Fleming v. Fleming*, 8 Blackf. 234 (Ind. 1846).

13. *Anderson v. Anderson*, 131 N.E.2d 301, 307 (Ind. 1956). The Texas Court of Civil Appeals has said that ". . . [T]he courts should review with care a common law marriage claimed to have been contracted in the shadow of the county clerk's office and within the sound of church bells." *McChesney v. Johnson*, 79 S.W.2d 658, 659 (1934).

14. "Consensus non concubitus facit matrimonium, the maxim of the Roman civil law is, in truth, the maxim of all law upon the subject; for the concubitus may take place for the mere gratification of present appetite without a view to anything further; but a marriage must be something more; it must be an agreement of the parties looking to the consortium vitae. . . ." *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54, 62, 161 Eng. Rep. 665, 668 (1811).

15. Eight of the twenty-two cases reported in Indiana since 1917 have been claims under the Workmen's Compensation Act: *United States Steel Corp. v. Weatherton*, 131 N.E.2d 335 (Ind. App. 1956); *Deremiah v. Powers-Thompson Construction Co.*, 125 Ind. App. 662, 129 N.E.2d 425 (1955); *Guevara v. Inland Steel Co.*, 120 Ind. App. 47, 88 N.E.2d 398 (1949); *Clayton v. Universal Construction Co.*, 110 Ind. App. 322, 38 N.E.2d 887 (1942); *Young v. General Baking Co.*, 104 Ind. App. 658, 12 N.E.2d 1016 (1938); *Dunlop v. Dunlop*, 101 Ind. App. 43, 198 N.E. 95 (1935); *Vincennes Bridge Co. v. Vardaman*, 91 Ind. App. 363, 171 N.E. 241 (1930); *Meehan v. Edward Valve and Manufacturing Co.*, 65 Ind. App. 342, 117 N.E. 265 (1917).

16. Family status for Social Security benefits is determined by applicable state law. 64 STAT. 511 (1950), 42 U.S.C. § 416 (h) (1) (1952). The common law marriage was recognized as a problem when Social Security was first adopted. Although the common

whole problem of the informal marriage by increasing the number of cases involving such marriages. Decedents in that part of society where informal marriages flourish now leave estates sufficient to justify litigation.

The circumstances providing the basis for an asserted common law marriage must be carefully examined. A contract *per verba de futuro* cannot support a valid marriage.¹⁷ The party relying on the marriage must plead and prove a contract *per verba de presenti*.¹⁸ Although the offer must be in words of the present tense it need not be in writing. However, acceptance can be either by words or acts according to the terms of the offer.¹⁹ Testimony of cohabitation and community reputation alone is not sufficient to prove an informal marriage,²⁰ but may corroborate other testimony that a contract actually existed.²¹ Even if there is a purported contract the court will examine it closely to find actual mutual assent of the parties.²² A cohabitation illicit in its incep-

law marriage cases were decidedly limited, authorities realized that giving estates to decedents in the class of society where such marriages flourish and where decedents seldom leave estates of value would increase litigation. For discussions of the problems under Social Security see Billig and Lynch, *Common-Law Marriage in Minnesota: A Problem in Social Security*, 22 MINN. L. REV. 177 (1938); Lynch, *Social Security Encounters Common Law Marriage in North Carolina*, 16 N.C. L. REV. 254 (1938).

17. The court has expressly stated that contracts in the future tense will not support a valid marriage. *Anderson v. Anderson*, 131 N.E.2d 301, 306 (Ind. 1956); *Cossell v. Cossell*, 223 Ind. 603, 606, 63 N.E.2d 540 (1945). This impliedly overrules dicta in prior cases that such a contract would support a valid marriage. *Bolkovac v. State*, 229 Ind. 294, 304, 98 N.E.2d 250, 255 (1951); *Norrell v. Norrell*, 220 Ind. 398, 404, 44 N.E.2d 97, 99 (1942).

18. The burden of proving a common law marriage is on the party asserting it. *Schumacher v. Adams County Circuit Court*, 225 Ind. 200, 204, 73 N.E.2d 689, 691 (1947). Recent cases have stressed the importance of an express contract in the present tense. *Anderson v. Anderson*, 131 N.E.2d 301, 306 (Ind. 1956); *Cossell v. Cossell*, 223 Ind. 603, 63 N.E.2d 540 (1945); *United States Steel Corp. v. Weatherston*, 131 N.E.2d 335 (Ind. App. 1956); *Deremiah v. Powers-Thompson Construction Co.*, 125 Ind. App. 662, 129 N.E.2d 425, 429 (1955); *In re Dittman's Estate*, 124 Ind. App. 198, 205, 115 N.E.2d 125, 128 (1953); *In re Lambert's Estate*, 116 Ind. App. 293, 302, 62 N.E.2d 871, 874 (1945).

19. "Cohabitation, reputation, tax returns, insurance provisions, and the birth of a child do not constitute a contract of marriage per verba de presenti. . . . It cannot be an implied contract, such as the law raises in the case of quasi contracts or in actions of *assumpsit*." *Anderson v. Anderson*, 131 N.E.2d 301, 306-307 (Ind. 1956). This standard seems stricter than the one used by the appellate court in 1930, which recognized common law marriage "as valid and binding when made between parties of contracting capacity by their mutual consent, either express or implied . . . and followed by cohabitation and reputation of marriage." *Vincennes Bridge Co. v. Vardaman*, 91 Ind. App. 363, 364, 171 N.E. 241 (1930). See also note 27, *infra*.

20. *Lowrance v. Lowrance*, 95 Ind. App. 345, 356, 182 N.E. 273, 276 (1932).

21. *Anderson v. Anderson*, 131 N.E.2d 301, 306 (Ind. 1956).

22. "[I]t must be examined with great scrutiny, and, in order to sustain it, it must plainly appear that there was an actual mutual assent between the parties. . . ." *Anderson v. Anderson*, 131 N.E.2d 301, 305 (Ind. 1956); "We believe the existence of a common-law marriage is dependent upon there being a contract of marriage between the parties in words of the present tense; that there must be mutuality to such contract

tion is presumed to continue as such and cannot be transformed into marriage by evidence falling short of establishing an actual contract to marry.²³

Not only must there be proof of an actual contract of marriage but the contract must also be followed by cohabitation.²⁴ In this respect the historic common law marriage has been modified in Indiana.²⁵ It is indicated that the courts will recognize such marriages to prevent undue hardships only when the parties have relied upon the contract and acted accordingly.

In some circumstances a third requirement is essential to establish an informal marriage. If the contract is oral and witnessed, or in writing, and the parties subsequently live together as husband and wife, the marriage is established. But if the contract is oral and unwitnessed, even though followed by cohabitation, the parties must establish a general reputation of marriage in their community before the relationship assumes the status of marriage.²⁶

All the reported cases in Indiana have involved the unwritten and unwitnessed contract. In the early cases, and to the extent that precedent has influenced later decisions, the courts seemingly failed to realize that

and that the minds of both parties must meet in mutual consent to said marital status." In re Dittman's Estate, 124 Ind. App. 198, 209, 115 N.E.2d 125, 130 (1953).

23. Anderson v. Anderson, 131 N.E.2d 301, 305 (Ind. 1956); United States Steel Corporation v. Weatherston, 131 N.E.2d 335, 339 (Ind. App. 1956); In re Dittman's Estate, 124 Ind. App. 198, 207, 115 N.E.2d 125, 129 (1953); Young v. General Baking Co., 104 Ind. App. 658, 661, 12 N.E.2d 1016, 1017 (1938); Lowrance v. Lowrance, 95 Ind. App. 345, 355, 182 N.E. 273, 276 (1932); Mayes v. Mayes, 84 Ind. App. 90, 92, 147 N.E. 630, 631 (1925).

24. In re Dittman's Estate, 124 Ind. App. 198, 206, 115 N.E.2d 125, 129 (1953); Romey v. Glass, 120 Ind. App. 279, 91 N.E.2d 850 (1950); In re Lambert's Estate, 116 Ind. App. 293, 302, 62 N.E.2d 871, 874 (1945); Schilling v. Parsons, Adm'r, 110 Ind. App. 52, 58, 36 N.E.2d 958, 960 (1941).

25. At common law the only requirement was a contract *per verba de presenti*. Dalrymple v. Dalrymple, 2 Hagg. Const. 54, 64, 161 Eng. Rep. 665, 669 (1811); Meister v. Moore, 96 U.S. 76 (1877). Dicta in Indiana cases might suggest that the contract itself is sufficient, but cohabitation had in fact existed in all these cases. Bolkovac v. State, 229 Ind. 294, 304, 98 N.E.2d 250, 255 (1951); Norrell v. Norrell, 220 Ind. 398, 404, 44 N.E.2d 97, 99 (1942). See also cases cited in note 12, *supra*.

26. Anderson v. Anderson, 131 N.E.2d 301, 306 (Ind. 1956). For cases in which the marriage failed because proof of reputation was not sufficient see In re Dittman's Estate, 124 Ind. App. 198, 115 N.E.2d 125 (1953); Clayton v. Universal Construction Co., 110 Ind. App. 322, 38 N.E.2d 887 (1942); Schilling v. Parsons, Adm'r, 110 Ind. App. 52, 36 N.E.2d 958 (1941); Meehan v. Edward Valve and Manufacturing Co., 65 Ind. App. 342, 117 N.E. 265 (1917). However, the Indiana Supreme Court has said that reputation involves only a manner of proof. Norrell v. Norrell, 220 Ind. 398, 404, 44 N.E.2d 97, 99 (1942). The Appellate Court has said that to hold that reputation is not a necessary element of the common law marriage is to open the door to fraud and perjury, deny the parties themselves the protection to which each is entitled and jeopardize the sanctity of the home. In re Dittman's Estate, 124 Ind. App. 198, 206, 115 N.E.2d 125, 129 (1953); Schilling v. Parsons, Adm'r, 110 Ind. App. 52, 58, 36 N.E.2d 958, 961 (1941). The Indiana Supreme Court cited these cases on this point. Anderson v. Anderson, 131 N.E.2d 301, 305 (Ind. 1956).

contract was the essence of these marriages, rather than cohabitation and reputation.²⁷ However, in recent cases the requirement of an express contract has been emphasized.²⁸ A spouse asserting such a marriage must necessarily be prepared to testify that a contract was entered.²⁹

Although the Indiana case law cannot serve as a thorough study of what the parties actually think of common law marriages, it does offer some significant revelations.³⁰ All the Indiana cases involving the in-

27. "In civil suits, except for criminal conversation, cohabitation and reputation are sufficient evidence of marriage." *Cox v. Rash*, 82 Ind. 519, 520 (1882); *Bowers, Adm'r v. Van Winkle*, 41 Ind. 432, 435 (1872); *Trimble v. Trimble*, 2 Ind. 76, 78 (1850); *Fleming v. Fleming*, 8 Blackf. 234 (Ind. 1846).

Trimble v. Trimble, 2 Ind. 76, 78 (1850) was cited with approval in the more recent case of *Norrell v. Norrell*, 220 Ind. 398, 44 N.E.2d 97 (1942) in which the Supreme Court said: "We construe the language to mean that a contract by which the parties agree to immediately become husband and wife is sufficient . . . and that the fact of marriage may be inferred from continual cohabitation and reputation. . . . It is also quite clear that in the absence of direct proof of a marriage contract, proof that the parties lived together as husband and wife and held themselves out publicly and represented themselves to be husband and wife is sufficient to establish the relationship." *Norrell v. Norrell*, *supra* at 404, 405, 44 N.E.2d at 99. However, in this case the plaintiff testified that a contract was entered into and the defense offered no evidence to contradict the existence of a contract.

"Appellant testified concerning the relation which existed but she did not testify that she and decedent at any certain time or place, orally or by written instrument, agreed to take each other as consorts. There is, however, some evidence in the record which tends to prove such fact *indirectly*; and such fact may be proven by circumstantial evidence." *Young v. General Baking Company*, 104 Ind. App. 658, 662, 12 N.E.2d 1016, 1018 (1938).

"[T]he existence of a common law marriage . . . must appear either by the signature of the parties, where the contract is in writing, or by witnesses present when made; and if there is no evidence, then it may be proved by cohabitation, reputation, conduct, and all other circumstances having to do with the acts and conduct of the parties with respect to the marriage relation." *Meehan v. Edward Valve and Manufacturing Co.*, 65 Ind. App. 342, 344, 117 N.E. 265, 266 (1917).

28. See notes 19 and 22, *supra*. "The mere living together in the ostensible relation of husband and wife does not of itself constitute a marriage." *In re Dittman's Estate*, 124 Ind. App. 198, 209, 115 N.E.2d 125, 130 (1953). See also note 22, *supra*. The Dittman case was discussed and approved in *Anderson v. Anderson*, 131 N.E.2d 301, 304 (Ind. 1956). Note the strict requirements established in this case. See note 19, *supra*. "[C]ohabitation, reputation and other conduct cannot constitute words which were never spoken or used." *Id.* at 306. See also *Deremiah v. Powers-Thompson Construction Co.*, 125 Ind. App. 662, 129 N.E.2d 425 (1955). For a searching cross examination of the plaintiff to see whether an actual contract of marriage was entered into see *United States Steel Corp. v. Weatherston*, 131 N.E.2d 335 (Ind. App. 1956).

29. The spouse claimants who have been successful have testified that a contract actually was entered into. *Norrell v. Norrell*, 220 Ind. 398, 44 N.E.2d 97 (1942); *Romey v. Glass*, 120 Ind. App. 279, 91 N.E.2d 850 (1950); *In re Lambert's Estate*, 116 Ind. App. 52, 36 N.E.2d 958 (1941); *Dunlop v. Dunlop*, 101 Ind. App. 43, 198 N.E. 95 (1935); *Lowrance v. Lowrance*, 95 Ind. App. 345, 182 N.E. 273 (1932); *Vincennes Bridge Co. v. Vardaman*, 91 Ind. App. 363, 171 N.E. 241 (1930).

30. During World War I the Bureau of War Risk Insurance had before it perhaps more cases of alleged common law marriage than were contained in all the reports of cases on the subject. One of the persons who had charge of these claims wrote his opinion on the merits of continued recognition of these marriages. "By far the greater number of alleged marriages were meretricious relationships, for the convenience of the parties alone, and in a large percentage of the cases the reason no formal celebration of

formal marriage arise from alleged contracts which are neither written nor witnessed.³¹ If the parties actually intended to enter such an important contract, it seems they would demand a more certain and formal expression of that intent.³² Usually the party claiming an informal marriage has knowledge of the statutory scheme for marriage³³ and is uncertain whether a valid marriage actually exists.³⁴ That any person could

marriage was had was because one or the other, and in many cases, both, of the parties were already married but separated from a former spouse. There was nearly always a ghost in the closet. Moreover, very few, if any, of these persons believe that they are married. Scarcely any of these persons believe that a divorce is necessary to dissolve the marriage; in fact, nearly all believe that common law marriage and living in adultery are synonymous terms. If it were a *sine qua non* to the validity of such a union that a divorce is necessary to dissolve such a marriage (and a divorce is necessary as in any other marriage), then there are few if any common law marriages. As is elsewhere shown, however, the parties may doubt the validity of the marriage and need not consider themselves married 'in the eyes of the law!' Few of such persons believe that children of these unions are legitimate. But, says the Supreme Court, a strong reason for upholding such marriages is to legitimate the offspring of many parents conscious of no violation of law. The first part of the statement expresses a noble sentiment but the latter part borders on the ridiculous. 'Many parents conscious of no violation of law,' is a phrase which does not sound very well to one who has had actual experience in the handling of many of these cases. Again considering the first part of the statement, if these unions must be held valid marriages in order to render legitimate the unfortunate children thereof, the children of subsequent formal marriages of the parties must be bastardized. The great majority of common law marriages, so called, are not permanent unions." KOEGEL, *COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES* 101 (1922).

31. A careful search of the cases reported in Indiana revealed no marriages based on a written or witnessed contract.

32. However, some parties have evidently intended to live together permanently. But length of the relationship does not necessarily identify the union as a marriage. *United States Steel Corp. v. Weatherston*, 131 N.E.2d 335 (Ind. App. 1956) (seventeen years not a marriage); *Anderson v. Anderson*, 131 N.E.2d 301 (Ind. 1956) (sixteen years not a marriage); *In re Dittman's Estate*, 124 Ind. App. 198, 115 N.E.2d 125 (1953) (ten years not a marriage); *Schilling v. Parsons, Adm'r.*, 110 Ind. App. 52, 36 N.E.2d 958 (1941) (thirty years not a marriage).

33. "Four or five years before the trial she asked him about obtaining a marriage license and having a preacher marry them. . . ." *Anderson v. Anderson*, 131 N.E.2d 301, 304 (Ind. 1956).

In *Cossell v. Cossell*, 223 Ind. 603, 63 N.E.2d 540 (1945), the parties were married by a ceremony June 4, 1926; plaintiff found defendant was still married to a former wife. After the defendant divorced the first wife, the parties went back together, each knowing another ceremony was necessary.

In *In re Lambert's Estate*, 116 Ind. App. 293, 62 N.E.2d 871 (1945), the parties were divorced in 1939. They talked about going back together and trying it over again and finally agreed to do so. The second marriage was held valid.

Other cases in which a reading of the record can leave no doubt of the knowledge of the parties of the statutory procedure are *United States Steel Corp. v. Weatherston*, 131 N.E.2d 335, 337 (Ind. App. 1956); *Deremiah v. Powers-Thompson Construction Co.*, 125 Ind. App. 662, 129 N.E.2d 425 (1955); *Romey v. Glass*, 120 Ind. App. 279, 91 N.E.2d 850 (1950); *Clayton v. Universal Construction Co.*, 110 Ind. App. 322, 38 N.E.2d 887 (1942); *Young v. General Baking Co.*, 104 Ind. App. 43, 198 N.E. 95 (1935); *Mayer v. Mayer*, 84 Ind. App. 90, 147 N.E. 630 (1925).

34. "I didn't ask him no more because he told me he was going to marry me, but he didn't ever do it. He kept on putting it off." *Anderson v. Anderson*, 131 N.E.2d 301, 304 (Ind. 1956).

be ignorant of the basic requirements of a license and a ceremony seems inconceivable. In several recent cases the testimony of the party asserting the relationship has shown that no marriage existed.³⁵

Marriage is seldom asserted to determine status alone.³⁶ Rather, the object is to establish a basis for a property right or a right to recover damages. That the parties are little interested in the exact nature of their relationship until a cause of action based on that marriage arises may be suspected.

"Q. Did you know there is no common law marriage in California? A. I wasn't sure, I was told there was and told there wasn't."

"Q. So that from the time you were living in Minnesota, where you went in 1939, you and he had some doubts? A. Not in Minnesota, they told him it was all right, he asked some men on the job, they said it was recognized there."

"Q. So you said at that time you were his housekeeper. A. Yes sir."

"Q. Now what was your reason for changing the words on the face from Leita Mae Francis Weatherton, wife and putting Leita Mae Francis, friend in Petitioner's Exhibit No. 3? A. Because they kept telling me there was no such thing."

"Q. No such thing, what? A. A common law wife."

Excerpts from examination of alleged wife in *United States Steel Corp. v. Weatherton*, 131 N.E.2d 335 (Ind. App. 1956).

"[S]he asked him if he didn't think it was about time we should go through another ceremony to make the marriage legal, and he said we were just as much married then as we would be if we had gone through another ceremony and I told him I thought just the same we should go through with another one." *Cossell v. Cossell*, 223 Ind. 603, 63 N.E.2d 540 (1945).

"He [plaintiff] testified, however, that during much of the time they so lived together the decedent occasionally talked about getting married; she wanted to get married but he wasn't ready yet. She wanted to get married and he didn't." *Romey v. Glass*, 120 Ind. App. 279, 282, 91 N.E.2d 850, 852 (1950). The common law marriage was upheld, the court saying that plaintiff was referring to a marriage ceremony, not the marriage itself.

35. The courts have used the plaintiff's own testimony to disprove the existence of an express contract and thus have found no marriage existed. *Moreover, the testimony of the appellee herself, who would be presumed to state the case as favorably as she could to maintain the alleged marriage, affirmatively proved there never was a contract in the present tense to be married.* *Anderson v. Anderson*, 131 N.E.2d 301, 307 (Ind. 1956). See also *Cossell v. Cossell*, 223 Ind. 603, 606, 63 N.E.2d 540 (1945); *Deremiah v. Powers-Thompson Construction Co.*, 125 Ind. App. 662, 129 N.E.2d 425, 429 (1955).

36. No action can be found in the Indiana reports which was brought solely to protect children from the taint of illegitimacy, or to establish the true nature of the relationship. In one case a child asserted he was legitimate in order to claim from his deceased common law father. *Castor v. McDole*, 80 Ind. App. 556, 148 N.E. 643 (1923). The state has tried to protect the children of such unions by criminal actions for non-support brought against the alleged father; as might be expected, the defense to such prosecutions is no marriage. *Bolkovac v. State*, 229 Ind. 294, 98 N.E.2d 250 (1951); *Hummel v. State*, 73 Ind. App. 12, 126 N.E. 444 (1920).

Various authors have noted the fallacy of the argument that children of such marriages should be protected by the common law marriage. 3 HOWARD, *A HISTORY OF MATRIMONIAL INSTITUTIONS* 184 (2d ed. 1904); KEEZER, *MARRIAGE AND DIVORCE* § 30 (3rd ed. 1946); KOEGEL, *op. cit. supra* note 30.

One solution to this problem is to abolish the common law marriage for all purposes except the legitimacy of children. Woodbridge, *The Issue of Marriages Deemed Null in Law . . . Shall Nevertheless Be Legitimate*, 30 VA. L. REV. 352 (1944); Note, 40 W. VA. L. Q. 77 (1933).

In Indiana the informal marriage has allowed the alleged spouse to subject innocent parties to expensive and embarrassing litigation springing from these questionable relationships. Legality of common law marriages has compounded difficulties in the administration of Workmen's Compensation.³⁷ The Indiana Legislature attempted in 1945 to correct this by providing that recovery under the act be limited only to those who are dependents in fact, or are related by blood or marriage to the injured workman.³⁸ In 1947 a further limitation was placed upon persons eligible to recover under the latter clause by defining "husband-wife" to exclude common law spouses unless the relationship has existed openly and notoriously for a period of not less than five years immediately preceding death.³⁹ Prior to 1945, a party to an adulterous union might have qualified for the benefits of Workmen's Compensation by proving she was dependent in fact on her paramour.⁴⁰ The 1947 legislation sought to reduce further the possibility of recovery by a party to a relationship not attaining the status of marriage. Prior to this time no distinction had been made between common law spouses and those joined by formal ceremony. The legislature obviously desired to introduce an element of certainty that awards be not granted to parties to a merely transitory meretricious relationship.⁴¹ Although the amendment does not completely protect against meretricious unions being asserted as marriage for purposes of Workmen's Compensation awards,⁴² it does at least contribute a degree of certainty that awards will be granted only in those cases where the relationship was intended to be permanent.

Meanwhile other areas of the law lie prone to assaults by judgment-hungry plaintiffs claiming rights derived from purported marriage. Heirs and decedents' estates are frequent targets for the claims of bogus common law spouses, since the one party most likely to be able to disprove a marriage is dead.⁴³ Land titles are jeopardized by unrecorded

37. See note 15, *supra*, and cases cited.

38. IND. ANN. STAT. § 40-1403 (b) (Burns 1946).

39. IND. ANN. STAT. § 40-1403 (a) (Burns 1946).

40. *Russell v. Johnson*, 220 Ind. 649, 46 N.E.2d 219 (1943). The Court noted that if the act allowing recovery under these circumstances was against public policy, it was within the precinct of the General Assembly to amend it.

41. The legislature apparently felt that denying recovery if meretricious relationships were asserted served a greater social interest than assuring recovery to lawful spouses in those isolated cases in which the relationship had existed for less than five years. See *Guevara v. Inland Steel Co.*, 120 Ind. App. 47, 54, 88 N.E.2d 398, 401 (1949).

42. "The five year requirement was not intended to modify the law on what constitutes a common law marriage." *Guevara v. Inland Steel Co.*, 120 Ind. App. 47, 54, 88 N.E.2d 398, 401 (1949).

43. Although seventeen of the twenty-two appellate cases since 1917 have involved actions in which one spouse was dead, they have not all involved actions against heirs and estates. See *Schumacher v. Adams County Circuit Court*, 225 Ind. 200, 73 N.E.2d 689 (1947); *Norrell v. Norrell*, 220 Ind. 398, 44 N.E.2d 97 (1942); *In re Dittman's*

marriages about which the owner could not know.⁴⁴ The possibility of receiving a lucrative property settlement and alimony may move one partner to an illicit union to bring divorce proceedings, alleging that the union was in reality a common law marriage.⁴⁵

The continued existence of the common law marriage weakens state health control by allowing the licensing procedure to be circumvented.⁴⁶ The blood test requirements which protect the parties, their children, and the public from syphilis are not fulfilled.⁴⁷ Although certain impediments void a marriage whether it be ceremonial or common law,⁴⁸ others are grounds for refusal of license only.⁴⁹ If a license is granted through fraud or inadvertence and the parties do marry, the marriage is valid but the wrongdoer may be subject to certain sanctions.⁵⁰ Thus a common law marriage under these circumstances would be valid even though the state's policy had been subverted.

Estate, 124 Ind. App. 198, 115 N.E.2d 125 (1953); *In re Lambert's Estate*, 116 Ind. App. 293, 62 N.E.2d 871 (1945); *Schilling v. Parsons, Adm'r.*, 110 Ind. App. 52, 36 N.E.2d 958 (1941); *Lowrance v. Lowrance*, 95 Ind. App. 345, 182 N.E. 273 (1932); *Castor v. McDole*, 80 Ind. App. 556, 148 N.E. 643 (1923); *Mayes v. Mayes*, 84 Ind. App. 90, 147 N.E. 630 (1925).

44. *In Romey v. Glass*, 120 Ind. App. 279, 91 N.E.2d 850 (1950), the wife executed a deed to a purchaser, her common law husband failing to join. The deed was held void.

One author states that social considerations seem to have been of less account in bringing about a New York marriage statute (New York had no statutory procedure for marriage formation until 1830) than the perception of those responsible for invested capital that land titles are left in jeopardy if an unknown and unrecorded alliance can be asserted. *Hall, Common Law Marriage in New York State*, 30 COLUM. L. REV. 1 (1930).

45. See *Anderson v. Anderson*, 131 N.E.2d 301 (Ind. 1956); *Cossell v. Cossell*, 223 Ind. 603, 63 N.E.2d 540 (1945); *Argiroff v. Argiroff*, 215 Ind. 297, 19 N.E.2d 560 (1939).

46. The additional importance of the state's ability to withhold the right to marry, and to keep an accurate and complete registration of marriage is discussed in 1 VERNIER, *AMERICAN FAMILY LAWS* 59 (1931).

47. *Anderson v. Anderson*, 131 N.E.2d 301, 307 (Ind. 1956). Statutes requiring a blood test prior to marriage are an innovation of the Twentieth Century, and present the problem of whether their provisions are mandatory or simply directory. The first statute interpreted was held to be mandatory, *Woodward Iron Company v. Cornelia Walton Dean*, 217 Ala. 530, 117 So. 52 (1928), but much confusion on the point remains. For example, while the Pennsylvania courts once indicated that their statute was mandatory and a valid common law marriage could not thereafter arise, *Fisher v. Sweet & McClain*, 154 Pa. Super. 216, 35 A.2d 756 (1944) (dictum), this dictum was later overruled. *Buradus v. General Cement Products Co.*, 159 Pa. Super. 501, 48 A.2d 883 (1946), *aff'd per curiam* 356 Pa. 349, 52 A.2d 205 (1947). See Notes: 20 *TEMPLE L. Q.* 589 (1947) and 95 *U. OF PA. L. REV.* 245 (1946).

For a discussion of a lower court case in Michigan which held the statute directory and voided the asserted common law marriage, see Roxborough, *Antenuptial Physical Examination on Common Law Marriage in Michigan*, 16 *U. OF DET. L. J.* 174 (1953).

48. All marriages are void if either party had a husband or wife living at the time of such marriage, or if miscegenation is present, or if either party is insane or idiotic at the time of the marriage. *IND. ANN. STAT.* § 44-104 (Burns 1946).

49. *IND. ANN. STAT.* §§ 44-202, -205, -207 (Burns 1946).

50. *IND. ANN. STAT.* §§ 44-204, -210, -212 (Burns 1946).

In order to achieve uniformity, the state has adopted a statutory procedure for the formation of marriage. If the parties comply with the procedural requisites, little doubt of their intentions can arise. The procedure is complex enough and lengthy enough to impress upon them that they are entering a relationship in which society demands permanence. The parties know that this marriage can be dissolved only by death or divorce, and that divorce is given only for certain reasons. If the marriage is questioned afterwards, the court will start with the natural presumption that the parties intended to be married. On the other hand, the common law marriage is a loose and doubtful system. Even the parties themselves are seldom certain of the exact nature of the relationship. Little wonder then that the decisions cannot have the degree of certainty desirable. To prove or disprove such a marriage is a momentous task. Proof of the ceremonial marriage, however, is facilitated by regarding the marriage record as presumptive evidence of the facts it recites.

Continued existence of the common law marriage necessarily means the compromise of certain interests of society. A relationship the parties do not intend to elevate to the level of a regular marriage is given the same recognition when a property right is dependent upon the existence of a marriage. Society could function without laws regulating the formation of marriage;⁵² therefore it can no doubt function when laws on the formation of marriage are merely directory. But experience has indicated that mandatory laws in this area are desirable.⁵³ Recognition of the informal marriage gives Indiana a double standard of marriage. In the penumbra area of common law marriage, it is difficult to distinguish valid marriages from illicit unions. Elevation of an inferior union to the status of marriage, invasion of the rights of third parties, and subversion of the state control over marriage, all of which stem from the legal recognition of common law marriage, seem needless. The present trend in the United States to abolish this outmoded concept indicates that the utility of the common law marriage must rest in the past.

51. IND. ANN. STAT. § 44-303 (Burns 1946). Lord Hardwicke's Act provided for a record in order to preserve the evidence of the marriage and to make proof more certain and easy. 26 GEO. 2, c. 33 (1753).

52. *E.g.*, New York had no statutory requirements for marriage formation until 1830. Hall, note 44, *supra*.

53. The Indiana Court has noted that England abolished such marriages in 1753 and that thirty states now hold such marriages invalid. *Anderson v. Anderson*, 131 N.E.2d 301, 307 (Ind. 1956); *Bolkovac v. State*, 229 Ind. 294, 304, 98 N.E.2d 250, 254 (1951).