COMMON-LAW MARRIAGE IN OHIO*

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PRELIMINARY STATEMENT

On June 27, 1936, a decision was rendered by the probate judge of Cuyahoga County, Ohio, with the introductory statement that "This court is interested in the case at bar, from both a legal and a social point of view."[1]

The matter had come before Judge Brewer as a routine motion to vacate the appointment of an administratrix in favor of one claiming a prior right to administer the estate of Eva Speeler, deceased. However, the extraordinary feature of the case which aroused the court's interest, and which has had such a far-reaching social and legal history, lay in the fact that the acting administratrix was the daughter of the dead woman by an early marriage, whereas the person seeking to supplant that daughter was an alleged husband "by the common law." This man, William Feeney, asserted that during the last ten years of her life he and Eva Speeler had been united in a common-law marriage and that, as her surviving husband, he was entitled to priority of administrative appointment.

* All opinions expressed in this article are those of the author as an individual only. They are in no sense binding upon either the Social Security Board or the Office of the General Counsel to that Board. The author is indebted to Mr. David L. Waldron, Review Attorney, of the General Counsel's Office of the Social Security Board, for valuable suggestions during preparation of the manuscript.

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[1] *In re Estate of Eva Speeler, Deceased*, 6 Ohio Opinions 529, 22 O.L. Abs. 223 (1936).

A careful consideration of the evidence,[2] introduced in support of Mr. Feeney's claim, led the court to deny the motion in the following language:

We can only assume from these facts that Mrs. Speeler entered into this relationship for immoral purposes. She is a woman who had been twice married and was living with another man at the time Mr. Feeney entered the scene. He knew and the neighbors knew of the improper relationship of Mr. Marcus and this woman. (This court could as well be opened to the suggestion of whether Mr. Marcus is not or could not claim that he is the common-law husband.) The evidence does not show that Mrs. Speeler got a divorce from Mr. Marcus although it does show that they lived together for some years. This court cannot conceive of a man allegedly loving a woman enough to make her his common-law wife, and yet not being interested enough for the sake of common decency to avoid the slightest suspicion by marrying according to law. According to the contention of counsel for Mr. Feeney, the court could well assume Mr. Marcus was the common-law husband in the first place, and Mr. Feeney merely a man breaking supposedly matrimonial bonds. *Where, then, can this court draw a line of demarcation between adultery and common-law marriage?* (Italics the court's.)

Citing earlier Ohio decisions, which will be discussed in detail presently, Judge Brewer stated certain Ohio rules with respect to common-law marriage.

Common law marriages are recognized in Ohio, *but as a matter of public policy such marriages are not favored.*[3]

Adultery will never, however long continued, constitute marriage.[4]

[2] The syllabus of the case summarizes this evidence as follows: "Where the evidence shows that decedent entered into a ceremonial marriage with her first husband *N*, and after his death entered into a ceremonial marriage with *S*, and after the death of *S*, she lived and cohabited with one *M*, and later meeting *W*, said to *M*, 'Bill (*W*) is my man now and I don't want any more of you' and thereafter *W* began to cohabit with her, later moving into the hotel she owned, purchased her an engagement ring, and was introduced by her as her husband, *W* having no other employment save working around the hotel, such cohabitation continuing from October 1925 to March 1936, Held: such facts do not constitute a common-law marriage between decedent and *W*." Additional evidence indicated that Fenney (*W*) and Mrs. Speeler had opened joint bank accounts, and that nurses who had taken care of Feeney during a hospital stay had believed him to be her husband.

[3] *In re Barrett*, 49 Bull. 222 (1904).

[4] *Swartz* v. *State*, 13 O.C.C. 62 (1896), 7 O.C.D. 43, affirmed *State* v. *Swartz*, 35 Bull. 358. See also 18 O.C.C. 892, 9 O.C.D. 855.

A common-law marriage must be based on the meeting of minds and a mutual contract, and must be followed by cohabitation and conduct which establishes belief among the neighbors that the relationship exists.[5]

The court proceeded to distinguish the facts in the case at bar from those in the three[6] cases that have always been cited as landmarks in the judicial history of common-law marriages in Ohio. Of the two decisions recognizing that status, the legitimacy of children was involved in *Umbenhower* v. *Labus*, while in *Carmichael* v. *State* a common-law marriage was upheld in affirming a conviction for bigamy. Had Judge Brewer based his decision in the *Speeler* case on the law as stated in these precedents, and on the contrasting facts and insufficiency of the evidence in that case, that decision while justified would not have been remarkable. But in addition the Court buttressed its opinion with quotations from authorities interested in the status of common-law marriage from the sociological as well as the legal standpoint, such as Richmond and Hall,[7] Goodsell,[8] and Otto E. Koegel.[9]

[5] *Gillmore* v. *Dorning*, 31 O. L. Rep. 588 (1930).

[6] *Duncan* v. *Duncan*, 10 O.S. 181 (1859) reversing 4 O. Dec. Rep. 26, Clev. L. Rep. 29 (1856); *Carmichael* v. *State*, 12 O.S. 553 (1861); *Umbenhower* v. *Labus*, 85 O.S. 238, 97 N.E. 832 (1912), affirming 12 O.C.C. (N.S.) 289.

[7] "Marriage and the State," Russell Sage Foundation, New York, 1929.

[8] "History of the Family as a Social and Educational Institution." Judge Brewer, in quoting with approval Goodsell's reflection, credits it to "Matrimonial Institutions," an equally authoritative work, but written by Howard. The quotation appearing at page 537 of Goodsell's work reads: Is it not an amazing fact, that, in a matter which so profoundly affects the dignity and stability of a family institution, society should be so slow to take enlightened action? Surely, no legislative reform is more needed than clear and positive statutes declaring such loosely contracted unions null and void."

[9] "Common-Law Marriage," Washington, 1922, which undertakes to prove:

1. That common-law marriages have not been valid in England since 1753.
2. That such marriages were valid prior to that time, notwithstanding a decision of the House of Lords in 1843 that they were never valid in England.
3. That such marriages were invalid at common law for possessory pur-

In summarizing the history of non-ceremonial marriage on the continent, in England and in the United States, Judge Brewer listed (with particular emphasis on recent additions thereto) the states that have abolished common-law marriage either by statute or judicial decision. He ended by performing somewhat of a judicial miracle. This last feat consisted in resurrecting the one case[10] that had ever questioned the validity of a marriage because not performed in accordance with the Ohio

poses, that is, the children could not inherit, the wife took no dower, etc.

4. That such marriages were invalid in some of the American colonies, and certainly contrary to legislation and the policy of all the colonies.
5. That the earliest decisions in the United States are against the validity of such marriages, but these decision are not referred to in the decisions establishing the rule in this country.
6. That such marriages owe much of their validity to dicta of Chancellor Kent in 1809.
7. That the Kent doctrine was not generally accepted until more than half a century later, the Supreme Court of the United States being evenly divided on the question in 1843.
8. That the early decisions in this country, both those establishing the rule and those denying it, are extremely poorly considered cases, citing no authority and of only a page or two in length, whereas, the English cases show that no one subject in their jurisprudence was ever more carefully considered, one case alone covering nearly four hundred pages.
9. That some States, apparently upholding the validity of common-law marriages, have in effect discarded the rule *consensus non concubitas facit matrimonium,* and adopted *one, concubitas facit matrimonium.* In other words, some States require cohabitation in addition to words of consent and thus we have one law providing that persons must cohabit before they become husband and wife (in itself anomalous) and another law providing that persons who do this without marrying are guilty of a crime.
10. That, strictly speaking, the common-law doctrine is in most States recognized in name only; certainly in all of the states where the question has arisen marriage *per verba de futuro* has been discarded and the question of the validity of marriage *per verba de praesenti* without cohabitation has not frequently arisen.
11. That the American decisions show that the courts of this country have not carefully investigated the subject.
12. That such marriages are opposed by the American Bar Association, The Commission on Uniform State Laws, all modern authorities on Sociology, Marriage and kindred subjects and should be abolished.

[10] *Bates* v. *State,* 9 O.C.C. (N.S.) 273 (1906) affirmed in part 77 O.S. 622, 84 N.E. 1132 (1907) (See note 47, *supra*).

statutes[11] since 1861, when *Carmichael* v. *State*[12] had construed such provisions to be merely directory and not mandatory. Hailing this earlier opinion by Judge Hurin in *Bates* v. *State* as "the finest and boldest opinion on this subject," Judge Brewer twenty years later quoted verbatim from it, paragraph after paragraph, in deliberate renewal of the challenge that the Ohio Supreme Court had declined in 1907. That tribunal, while affirming the circuit court's decision on the ground that the evidence in the *Bates* case "did not establish a common-law marriage," had refused to consider "whether such marriage if proved would be a predicate for the indictment." As a result, the *Bates* case remained decently interred for some thirty years, although two years prior to the *Speeler* decision, Probate Judge McClelland of Franklin County had stirred the dust over its grave by quoting with approval one of Judge Hurin's paragraphs in deciding *In re Twellman.*[13] Moreover, its memory had been kept alive by reference to the circuit court's views on the degree of proof required for a common-law marriage in the *Drach* v. *Drach*[14] and *Dirion* v. *Brewer, Adm'r*[15] decisions.

Judge Brewer concludes his interesting opinion in the *Speeler* case as follows:

> In 1907 the court with broad vision realized that the Carmichael case was 45 years old. Now 30 years have again elapsed, this county has increased greatly in size, the roads greatly improved, transportation of such modern design never conceived at the writing of the Bates decision. The covered wagon days are over. In this county there lives no person who cannot in some manner easily reach the County Court House, and partake of the gracious bounty of those, who are by law endowed with the privilege of conducting the marriage ceremony. History has shown that at times, in years gone by, and still in some of the more remote parts of the United States, that in order to get to a Court

[11] Gen. Code, Secs. 11181-11198 (1) Throckmorton's Ohio Code, Annot. (1936). Title III, Ch. 4, Procedure in Probate Ct.

[12] 12 O.S. 553 (1861), f. n. 6, *supra.*

[13] 32 O.N.P. (N.S.) 201 (1934).

[14] 9 O.N.P. (N.S.) 353 (1910).

[15] 20 O. App. 298, 151 N.E. 818 (1925). Motion to certify record overruled in 23 O.L. Rep. 589.

House to obtain a marriage license, great hardships had to be undergone. . . . By the wildest stretch of one's imagination such could not be the case in Cuyahoga County and most certainly is not the fact in the case at bar. A five-minute walk would have brought them to the court house. . . .

Whether we seek to decide these facts in the light of common decency, by the great weight of judicial decisions rendered by a long line of illustrious jurists, or in the interests of those countless thousands who are yet to reach a marriageable age—we can come to but a single conclusion. In view of the authority vested in this court, it is impossible, in good conscience, from the evidence shown, to hold this a common-law marriage, or, to paraphrase the words of Judge Hurin "If the evidence produced in this case constitutes a common-law marriage, in accordance with the law of Ohio, some other court must first proclaim it."

It is unquestionably true that the facts in the *Speeler* case are not typical; more frequently it is a woman who seeks to obtain recognition as a common-law wife, or widow, as the case may be; and the issue has arisen in prosecutions for bigamy, divorce or annulment actions, proceedings to determine dower right, to partition lands or to establish heirship. But in most of the reported cases there are the same elements of uncertainty and secrecy, of questionable relationship, of a compact formed in wilful defiance of the practices of the society whose approval is nevertheless sought, and whose laws are invoked for protection or material advantage by those who have flouted their formal observance.

"There could be no better illustration," wrote Richmond and Hall[16] in 1929, "of the way in which customs persist after transplanting and after the excuse for them has long ceased to be valid than is found in the fact that in 24[17] of our States common-law marriages are still tolerated. They are unlicensed, unrecorded, and unaccounted, but recognized as legal. With the multiplication of modes of travel and of other forms of intercommunication, with the increasing need of an accurate and complete recording of social data, with social welfare deeply

[16] "Marriage and the State," (note 7, *supra*) pp. 29-30.

[17] Now 23, inasmuch as the New York Legislature finally abolished common-law marriage by Laws of 1933, Chap. 606.

involved in this question of the standards of marriage, these . . . States still leave to the courts the decision as to whether a given pair who have dispensed with the ceremony are married or not. Not only do the decisions of no two of these States agree, but courts in the same State are at variance and certain individual courts have handed down contradictory decisions. Hence there is little protection provided today for the woman who believes she is a wife by common law; there is now nothing better than a trap in this belated survival of early English law."

Somewhat irked, perhaps, by the persistent efforts of the "reformers" of the first quarter of the century to secure passage of legislation outlawing common-law marriage in those states that tolerated it, Robert Black of the Ohio Bar, in 1928[18] wrote a spirited defense of its continued recognition in which he asserted that "The rule accepted in the courts of the United States is Roman in concept if not in origin. It is not medieval but classical; it does not depend upon the notion of a promise being binding on the conscience and enforceable by a court of conscience. It is not metaphysical or sacramental but practical, depending verbally on proof [of] a status deliberately assumed and publicly maintained. Its sole difficulties are those of proof and lack of record." And in the same article he stated at page 115: "A legal doctrine will usually have a long history of precedent, showing a certain consistency in principle, but with a constant variation of application until the possibility of new situations is exhausted and the rule becomes final *unless a change of social conditions necessitates a new examination.* When, therefore, it is proposed to reverse by legislative fiat a settled formula of solution in a given set of conditions, it ought to require more than adjectives to justify a change so radical." (Italics supplied.)

It is submitted that social conditions have changed even during the last ten years to such an extent as to justify a re-examination of this subject by the Ohio Bar. The operation of

[18] Common-Law Marriage, 2 Cincinnati Law Review, 113, 131.

the Social Security Act[19] will again bring the consent marriage to public attention and should be of particular interest to lawyers. This legislation in providing monthly old-age benefits[20] for millions of qualified wage earners in covered employments upon reaching sixty-five years, has at the same time provided for payments by the Federal Government in the event of the wage earner's earlier demise.[21] Moreover, if the wage earner should die shortly after beginning to draw the monthly benefit the difference between what the deceased received and 3½% of the total wages earned since December 31, 1936, will be paid on application.[22] In either event the "estate" or certain close relatives of the wage earner receive the death payment. As the Act becomes more familiar to our people and the benefits increase in amount with the lengthening work period of the wage earner, the "estates" thus created will be important to all strata of society. There is every likelihood that the crop of alleged common-law "widows" and "widowers" will show a marked increase, as that relationship is usually asserted when pecuniary gain warrants litigation.

Since January 1, 1937, the Social Security Board has been certifying lump-sum payments to the estates of deceased wage earners, as provided by Section 204[23] of Title II of the Act.

[19] Pub. No. 271, 74th Cong.; 49 Stat. 620 (1935); 42 U.S.C.A. secs. 301-1305 (Supp. 1937).

[20] 42 U.S.C.A. sec. 402 (a) (Supp. 1937), "Every qualified individual . . . shall be entitled to receive, with respect to the period beginning on the date he attains the age of sixty-five, or on January 1, 1942, whichever is the later, and ending on the date of his death, an old-age benefit . . . "

[21] 42 U.S.C.A., sec. 403 (a) (Supp. 1937), "If any individual dies before attaining the age of sixty-five, there shall be paid to his estate an amount equal to 3½ per centum of the total wages determined by the Board to have been paid to him, with respect to employment after December 1, 1936."

[22] 42 U.S.C.A., sec. 403 (b) (c) (Supp. 1937).

[23] 42 U.S.C.A., sec. 404 (a) (Supp. 1937), "There shall be paid in a lump-sum to any individual who, upon attaining the age of sixty-five, is not a qualified individual, an amount equal to 3½ per centum of the total wages determined by the Board to have been paid to him, with respect to employment after December 31, 1936, and before he attained the age of sixty-five." Section 404 (b) directs payment to the wage earner's estate of "any part of

When the amount payable to an estate is $500 or less, the Board in its discretion granted under Section 205 of Title II,[24] may certify payments directly to those persons "entitled thereto under the law of the State in which the deceased was domiciled." Payment must be certified to an administrator or executor instead of under Section 205,[25] when the amount of the benefit upon an alleged common-law marriage, his or her status must be determined by the Board (or by the Court) in accordance with the applicable laws governing the relationship in the particular case.[26]

Studies are now in progress in the Office of the General Counsel of the Social Security Board at Washington, as to bases for determining marital status under the varying laws. It can be readily understood that if the facts of any particular case indicate that the relationship was entered into in a State other than the domiciliary State of the deceased, additional complications arise.[27]

any payment under subsection (a) which is not paid to him before his death." A "qualified" individual must be at least sixty-five years of age and have earned not less than $2,000 in wages in covered employment before attaining that age during five calendar years after December 31, 1936 [42 U.S.C.A., sec. 410 (c) (Supp. 1937)]. "Employment" means service of every nature performed within the United States by an employee for his employer except: (1) Agricultural labor; (2) domestic service in a private home; (3) casual labor not in the course of the employer's trade or business; (4) service as an officer or seaman on an American or foreign vessel; (5) employment by the United States or an instrumentality thereof; (6) employment by a state, political subdivision thereof, or instrumentalities of a state or states or their political subdivisions; (7) service in the employment of exclusively religious, charitable, scientific, literary, or educational organizations not operated for private profit. [42 U.S.C.A., sec. 410 (b) (Supp. 1937)].

[24] 42 U.S.C.A.., sec. 405 (Supp. 1937).

[25] 42 U.S.C.A., sec 405 (Supp. 1937), reads as follows: "If any amount payable to an estate under section 403 or 404 of this chapter is $500 or less, such amount may, under regulations prescribed by the Board, be paid to the persons found by the Board to be entitled thereto under the law of the State in which the deceased was domiciled, without the necessity of compliance with the requirements of law with respect to the administration of such estate."

exceeds $500. In either event, if the applicant's claim is based

[26] See the language of sec. 405 quoted in note 25, *supra*.

[27] As to the practical difficulties and the question of good faith, the following quotation from one who encountered many, and grew somewhat skep-

Discussion

All authorities agree that of the two forms of common-law marriage, either (1) *per verba de futuro cum copula* or (2) *per verba de praesenti*, the former have been outlawed in the United

tical in consequence, may be of interest. Otto E. Koegel, now Professor of Domestic Relations in the National University Law School and formerly Associate Counsel of the United States Veterans Bureau, gives a revealing picture of the type of "common-law" marriage claims filed with that Federal agency:

"During the recent war the Bureau of War Risk Insurance had before it, perhaps, more cases of alleged common-law marriages than are contained in all of the reports of adjudicated cases put together. It must be remembered that there were upwards of four millions of men in the military and naval service. The men were compelled to make allotments from their pay to their wives and children unless good cause was shown for exemption. The Exemption Section of the Bureau of War Risk Insurance considered more than one hundred thousand claims for exemption from compulsory allotment, almost ten thousand of which were cases of married men who entered the service as single. Women claiming to be wives would file claim for family allowance and an investigation would be instituted. The writer had charge of these cases for a time and is in a position to say that 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 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. . . . Moreover, very few, if any, of the persons really 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 quo non to the* validity of such a union that the parties believe 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 this statement expresses a noble sentiment but the latter part borders on the ridiculous. 'Many persons 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. After a while the parties tire of each other and 'marry' someone else and have children." Koegel "Common Law Marriage," pp. 101-103, *supra*, Note 9.

States by judicial decree,[28] or have fallen with the State statutes prohibiting consent marriages *in toto*.[29]

It is interesting to note that of some thirty cases involving common-law marriages that have been reported in Ohio, the earliest, *Duncan* v. *Duncan*,[30] decided in 1859, expressly repudi-

[28] Marriage Laws and Decisions in the United States (1929); Vernier, Vol. I. American Family Laws, 107 (1931) and several authorities cited. L.R.A. 1915E 33; 38 C.J. 1319, 1320, sec. 94, n. 43, 45. Two authorities make the definite statement that there is no decision in the United States that *de futuro* marriages are valid. Madden, Persons and Domestic Relations (1931) 58; Jacobs, Cases on Domestic Relations (1933) 399 n. See general discussion on common-law marriage in American jurisdictions, 39 A.L.R. 538; 60 A.L.R. 541; 94 A.L.R. 1000; Billig and Lynch: Common-Law Marriage in Minnesota: A Problem in Social Security (1938), 22 Minn. L. Rev. 177.

[29] For effect of statutes on common-law marriages, see notes 2 L.R.A. (N.S.) 353; L.R.A. 1915E 113. Since *de praesenti* marriages continue, outside the States that have prohibited them, it should be remembered that such marriages may rest on either express or implied contract. Where the contract is in express terms, the courts must decide whether or not ensuing cohabitation as husband and wife is necessary before the union will be recognized as a common-law marriage. In cases of implied contract, the relationship of husband and wife by mutual consent is assumed to exist by reason of cohabitation and reputation. See 2 Schouler, Marriage, Divorce, Separation and Domestic Relations, 6th ed. (1921) sec. 1171, *et seq.*; Keezer, Marriage and Divorce 2nd ed. (1923) sec. 73. See 27 Harvard Law Review 378 on general subject of requisites and proof of common-law marriages.

[30] 10 O.S. 181 (1859). See note 6, *supra*. Eliza Duncan had filed a bill in chancery with the Common Pleas Court of Cuyahoga County praying assignment of dower as widow of Alexander Duncan, deceased. The lower and district (circuit) courts awarded dower. Upon further appeal the Supreme Court reversed the decree of the district court and ordered the original bill dismissed. The facts were these: Deceased had been married in Ireland and there abandoning his wife, he came to Ohio with two sons. Later at his request Eliza, the petitioner, who had grown up in the same neighborhood, and knew both deceased and his wife in Ireland, came to live with him in Cleveland on the understanding that he would divorce his wife and marry her. He introduced her as his wife and she passed as such among neighbors. Two children were born of this union. No divorce was ever obtained and when finally news arrived of the wife's death in Ireland, he renewed promise that "he would marry her," but they continued as before until his death. The Supreme Court, in excepting marriage *per verba de praesenti* from its reversing opinion, inferentially upheld the lower courts' view that non-ceremonial marriage was permissible under the Ohio Statute. In this connection read the intermediate opinion in *Dunvan* v. *Duncan*, 4 O. Dec. Rep. 26, Clev. L. Rep. 29 (1856), which held that the prohibitions and penalties in the statute applied only to the officers who issued marriage licenses or solemnized the

ated the *de futuro* marriage doctrine in the following words:

> It seem to us that grave considerations of public policy forbid it; that it would be alien to the customs and ideas of our people, and would shock their sense of propriety and decency. That it would tend to weaken the public estimate of the sanctity of the marriage relation; to obscure the certainty of the rights of inheritance; would be opening a door to false pretenses of marriage, and to the imposition upon estates of supposititious heirs; and would place honest, God-ordained matrimony and mere meretricious cohabitation too nearly on a level with each other.

The decision, however, was at pains to point out that there was no question involved of the validity of a marriage with words of present consent, nor as to the presumption of a marriage from reputation. Analyzing the celebrated English case of the *Queen* v. *Millis*,[31] the court decided that a mistaken doctrine had been advocated in the United States on the authority of Chancellor Kent[32] and Greenleaf's text on evidence,[33] that a contract for a future marriage, followed by cohabitation as husband and wife, is itself a valid marriage at common law. This doctrine was rejected by the *Duncan* decision.

In 1861, *Carmichael* v. *State*[34] reviewed the Ohio statutes regulating marriage then in force, and held that a marriage entered into without compliance therewith might be made the basis of a conviction for bigamy. The United States Supreme Court had already ruled that such regulatory statutes, unless express words of nullity in the statute so provide, shall be construed as merely directory.[35] In the Ohio case, John Carmichael had appealed to the state Supreme Court from a conviction for bigamy. The facts are not given in detail, but it appears from the report that Carmichael, with one wife living, had had a

marriage, leaving the marriages themselves valid and binding. See also *obiter dictum* on common-law marriages in *Roberts* v. *Roberts*, 1 O. Dec. Rep. 368 (1853) 8 West. L. J. 372.

[31] 10 Clark & Finnelly's Reports 534.

[32] Kent, 2 Com. 87.

[33] 2 Greenleaf, sec. 460.

[34] 12 O.S. 553 (1861). See note 6, *supra*.

[35] *Meister* v. *Moore*, 96 U.S. 76 (1877).

marriage "solemnized"[36] with another woman before a person who had no license, as required by the Ohio statutes, to perform such a ceremony. There was no other objection to the form of the marriage and thereafter the parties had cohabited as man and wife. Judge Gholson read the opinion of the court and first construed the marriage statutes of Ohio, as follows:

> . . . there is no provision that there shall be no marriage unless solemnized as provided in the act, or that a marriage, unless so solemnized, shall be void. We are brought, then, to a rule of construction which appears to be established by the authorities, that a marriage good at the common law is good notwithstanding the existence of any statute on the subject, *unless the statute contains express words of nullity.* Bishop on Marriage and Divorce, sec. 167, and cases cited. . . . The act of the general assembly[37] is "an act regulating marriages"; it does not profess to create or confer a right to marry, but only to regulate the exercise of a right, the existence of which is presupposed. The consequences of denying validity and effect to the exercise of the right, would be so serious, that an intention to do so, will not be inferred, but must be clearly expressed. . . .
>
> To constitute a marriage, it must appear from the acts of the parties, for words on such an occasion are acts forming a part of the *res gestae*, that they did, in the homely but strong language of our statute, "join together as husband and wife."

[36] In the *Carmichael* case also, a detailed discussion was had of *Queen* v. *Millis* (10 Clark & Finnelly Rep. 534). Inasmuch as the two cases were analogous, the issue turning on the authority of the person who solemnized the first marriage in the English and the second in the American case, it is interesting to note that the decision arrived at by the Ohio court was directly opposite to that of the majority of the English judges. Agreeing with the minority that private contract marriages had been recognized for certain purposes in England prior to Lord Hardwick's Act in 1753 (26 Geo. II, c.3) and could have been enforced by the ecclesiastical courts, Judge Gholson declined to admit such authority in the United States, owing to the constitutional separation of church and State. He nevertheless reasoned that the rule of the common law as understood in England prior to the decision in *Queen* v. *Millis* must have been in the minds of the Ohio legislators when they enacted the State statute, and concluded that "We cannot construe our statute as restrictive and prohibitory, as invalidating what, by natural law, the general law of society, independent of statutory prohibition, would be regarded as a valid marriage."

[37] Passed January 6, 1824; took effect June 1, 1824; 29 Vol. Stat. 429 (set forth in full Ohio Revised Statutes, Vol 1, 1860, cited in code as Swan & Critchfield 855).

How this shall appear, in any case in which it is alleged that persons have joined together as husband and wife, without pursuing the mode prescribed by the statute, must depend on the circumstances. There must be a contract of present marriage, it must appear that the woman was taken as a wife, and that the man was taken as a husband. The circumstances of publicity in entering into the contract, and of cohabitation thereafter as husband and wife, are most important to show the intent with which any words were used, and without such circumstances, under the manifest policy of our laws on the subject, and the habits and feelings of our people, an intent to form the honorable relation of marriage could not be properly found.

He then applied the law as above interpreted to the facts before the court.

In this case those circumstances are clearly shown. It was a contract of present marriage openly made, and followed by cohabitation as husband and wife and we think was a valid marriage under the laws of this state.

Being a valid marriage for other purposes, conferring on the parties the rights of husband and wife we see no reason why the party whose incapacity, from having another wife living, rendered the contract of marriage a nullity, should escape on the ground of a want of form, from the penalties of the statute against bigamy. On the contrary, if such a marriage be legal for other purposes, it would be dangerous in the extreme, to allow the mere form of the marriage to become a shield to protetc those who commit such a crime.

In some thirty years following the *Carmichael* decision no case directly involving a common-law marriage status seems to have reached the Ohio courts. It is true that in *Lawrence Railroad* v. *Cobb*[38] in 1878 and *Bruner* v. *Briggs*[39] in 1883, the

[38] 35 O.S. 94 (1878). Catherine Cobb had brought an action against the Lawrence Railroad Company for damage to her land and home by reason of the defendant's road construction, alleging that she was a married woman in order to save the action from the bar of the statute of limitations, which made such exception. The railroad's answer denied that the plaintiff was a married woman and the owner of the lot in question. Following a jury verdict for the plaintiff, the defendant appealed, excepting in particular to the trial court's charge that "to prove the marriage of the plaintiff, it is not necessary that there should be record evidence of her marriage, or that persons should testify, that they saw the wedding ceremony performed, but it would be sufficient if you find that plaintiff and Mr. Cobb lived and cohabited together as husband and wife and raised children." In which charge the Supreme Court found

highest court in the State upheld marriages established by proof of cohabitation and reputation, but whether the marriages themselves were ceremonial or by consent was not questioned. These decisions, however, led to some confusion in later cases where such evidence was offered in proof of an alleged common-law marriage. The exact language of the *Bruner* case was "It is now too well settled to admit of dispute, that in all civil actions, when the right to succession of an estate depends on the existence of a marriage, it may be proved by reputation, declarations and conduct of the parties." It is evident that this rule relates to *proof* of the marriage, not the *fact* of its existence.

no error because "the testimony showed that the plaintiff and Mr. Cobb had been living and cohabiting as husband and wife for many years previous to the construction of the railroad and had been regarded and treated in the neighborhood as husband and wife, down to the date of the trial below."

[39] 39 O.S. 478 (1883). Briggs, allegedly a surviving husband, brought action against Bruner to have curtesy assigned him in land conveyed to the latter by a daughter of Briggs' deceased wife. There had been no issue of the alleged marriage between Briggs and the deceased. The Ohio statute of descent and distribution (sec. 17 as amended by 66 O.L. 21) allowed curtesy to the surviving husband in all cases *except* when the deceased wife left issue or a legal representative of such issue *by a former marriage*. It was necessary, therefore, in order to recover, that Briggs not only prove his own marriage to the deceased but that his wife had not been previously married. An amendment (64 O.L. 105) to sec. 15 of the descent and distributions statute had provided that "bastards shall be capable of inheriting or transmitting inheritance from and to the mother . . . in like manner as if born in lawful wedlock." A general clause provided that said latter amendment did not affect the right to curtesy. The lower court found upon the evidence that Briggs had proved his case, necessarily holding that the daughter was illegitimate. No record evidence of Briggs' marriage to the deceased had been introduced on the trial, nor was there any witness who saw them married. But evidence was offered, running through many years, of cohabitation as husband and wife, of mutual treatment and recognition of each other as such, and of such reputation in the community and circle in which they moved. It was urged on the appeal that more direct evidence should have been offered, since the marriage itself was in issue, but the higher court considered the proof sufficient. The decision seems to have been upheld on the competency of such evidence to establish the marriage, its sufficiency being for the jury to determine. As to the conflicting sections of the statute, it was held as a matter of law that while the illegitimate daughter might inherit from her mother, the surviving husband's right to curtesy therein could not be defeated.

In *Swartz* v. *State*,[40] the Eighth Circuit Court sustained a conviction for bigamy, a judgment subsequently affirmed by the Supreme Court. The indictment had charged that the accused married Kitty Stoner while allegedly the husband of Henrietta. The jury found upon the evidence that a common-law marriage existed between Swartz and Henrietta, although the original intercourse between them had been illicit. But for that feature the appellate court stated that the marriage could unquestionably have been established by reputation and cohabitation in a criminal as well as in a civil action, provided the jury be convinced by such evidence beyond a reasonable doubt. However, the presumption that the original illicit relationship continued must be overcome. Stating that in this case "every action of these people for nine years was consistent with their being husband and wife," the court decided that "The jury were carefully instructed that unless they found beyond a reasonable doubt that the relation of husband and wife existed between Swartz and Henrietta, they could not find him guilty without direct evidence of the contract having been entered into, and that unless they found from all the evidence that such contract had actually been entered into between them, they must find him not guilty. We think that under the evidence the jury might well find the defendant guilty of bigamy." The trial court's definition of a common-law marriage, to the latter part of which special exception had been taken on the appeal, merits quotation:

> A simple agreement, between one man and one woman, who may lawfully so contract, that they will take one another as husband and wife henceworht, and that they will sustain this relation thenceforth so long as they both shall live, with the mutual understanding that neither

[40] 13 O.C.C. 62; 7 O.C.D. 43 (1896); affirmed *State* v. *Swartz*, 35 Bull. 358. Evidence was introduced to the effect that Swartz and Henrietta had cohabited for nine or ten years and were recognized in their community and church as husband and wife; that they were the parents of two children who bore family names, and were provided for by insurance taken out for their benefit by their father; that Swartz had qualified as a voter by registering himself a married man, and consistently spoke of Henrietta as his wife.

one nor both can rescind the contract or destroy the relation, followed by cohabitation; when they do this they are married. . . . And their marriage is just and valid in Ohio as though a chime of bells played a wedding march, and a half dozen bishops and clergymen assisted at the celebration before a thousand people.

In spite of the floridity of this statement, the circuit court held that "The definition of the common-law marriage was a correct statement of the law in Ohio. . . . that there may be the relation of husband and wife subsisting between parties where there has been no ceremony of marriage, is absolutely settled, not only in very many other States, but in this State as well," citing not *Carmichael* v. *State*[41] but *Railroad* v. *Cobb*.[42]

In the same year and basing its decision in part upon the *Swartz* decision, *Johnson* v. *Dudley*[43] held that a common-law marriage may be proved from acts of recognition, cohabitation and the birth of children, despite the fact that the parties originally came together under a void contract, and that the intercourse was at first illicit. The alleged wife had been the slave of a planter in Alabama, in which State, of course, a marriage between them was prohibited. The particularly involved facts of this case are not important in this discussion. Suffice it to say that the determination of the case turned on the legitimacy of the heirs.

The court held that in addition to some testimony indicating that a ceremonial marriage had been performed, the conduct and long-continued cohabitation of the parties justified a holding that a common-law marriage relationship during the years of residence in Ohio had been established.

The court's reasoning on the "reputation" element is arresting:

It is true that very many estimable people from Oberlin testified that the general reputation, regarding the family at Oberlin was that they were not married, but I think this is to be accounted for somewhat by the reason that it was a case of a white man living with a colored

[41] Note 34 *supra*.
[42] Note 38 *supra*.
[43] 3 O.N.P. 196, 4 O.D. (N.P.) 243 (1896).

woman. Had Malachi Warren been living with a woman of the same blood as himself, under precisely the same circumstances, during all these years, I doubt whether anybody in the town of Oberlin would have ever questioned, from the fact of the relationship, his conduct and treatment of his family, anything other than a lawful union. The very fact therefore, of the difference between the husband and the wife as to color, would give occasion to remark, and by degrees acquire the force of general reputation, . . . I do not feel like taking the testimony as to reputation, and allow it to overcome the established fact as to the relationship and the origin of that relationship between Warren and his wife. I think that in such a case, the law should make every reasonable presumption in favor of legitimacy.

Three cases decided after the turn of the century in lower Ohio courts may be briefly mentioned.

Mieritz v. *Insurance Co.*[44] which was a Common Pleas decision, definitely recognized that marriage in Ohio may be entered into by present agreement followed by cohabitation and holding out. The case involved recovery under an insurance policy which the insurer sought to avoid because of certain fraudulent misrepresentations made by the insured, one of which was alleged to be that the deceased and plaintiff had stated they were husband and wife. It appeared that at the time the parties had entered into a ceremonial marriage in Ohio in 1892 the wife had not been legally divorced from a former husband in Germany, though the divorce decree was proved to have been entered the following year. While stating that a common-law marriage to be valid must be made in good faith, the court charged the jury:

If you find that in September 1892, this plaintiff and the decedent intended and agreed then to become husband and wife, and from that time on to decedent's death cohabited as husband and wife, so treated each other and so held themselves out in the community, they were from and after March 18, 1893, legally husband and wife; for from that time she was marriageable, and continuance of the relation after that date, entered into in September, 1892, in the way and for the purpose I have stated, would be a ratification and a consummation of that agreement.

[44] 8 O.N.P. 422, 11 O.D. (N.P.) 759 (1901). For opinion on exceptions to depositions, see 8 O.N.P. 460, 11 O.D. (N.P.) 601.

In *Fergus* v. *Nash*,[45] decided in the Franklin Probate Court in 1903, a marriage between a white woman and colored man, although penalized under a prohibitory statute which nevertheless did not declare such marriages absolutely void, was held valid inasmuch as the parties were considered to have entered into the marriage according to the common law.

In re Barrett,[46] decided the year following in the Hamilton County Probate Court, presented an unusual situation, and is an illustration of how steadfastly the courts of Ohio have upheld the common-law form of marriage. The evidence clearly established the existence of such a relationship during some 17 years, both by contract and acts of the parties following cohabitation. However, during her last illness the wife, because of religious scruples, had sought to repudiate the relationship. The court held that she could not divorce herself from Mr. Barrett simply because she had changed her views on the subject of common-law marriages.

We come now to the much discussed *Bates*[47] case.

This matter went through three courts and originated in an indictment for bigamy charging that David Bates had married a Miss Miller, having previously contracted a common-law marriage with one Hazel Gintner which had not been dissolved by death or divorce. The trial jury convicted the accused upon evidence indicating that he and Hazel Gintner had cohabited as husband and wife intermittently during a two-year period; that he had acknowledged her as his wife to various friends; and that in his mother's presence, he not denying the fact, he had heard her say they had been married. Furthermore, that at the time their child was expected he had assumed a husband's responsibilities, engaging a physician, renting rooms and furniture to make a home for Hazel, and, the child having been

[45] 48 Bull. 442 (1903).

[46] 49 Bull. 222 (1904), *supra*, note 3.

[47] *Bates* v. *State*, 9 O.C.C. (N.S.) 273, 19 O.C.D. 189 (1906), reversing *State* v. *Bates*, 4 O.N.P. (N.S.) 503, 17 O.D. (N.P.) 301 and affirmed in part by *Sttae* v. *Bates*, 77 O.S. 622; 84 N.E. 1132 (1907). See notes 10, *supra*, and 52, *post*.

still-born, he had arranged for its burial, stating to the undertaker that he was the husband and father.

On the appeal from sentence to the penitentiary, the circuit court was requested by the attorney for Bates to consider the one question as to "whether an indictment for bigamy can be based upon a so-called common-law marriage followed by a marriage to another person in accordance with the statutes of the State." It was on this issue "and in the hope that our Supreme Court may once for all establish a rule as to the standing of a so-called common-law marriage in Ohio" that Judge Hurin, his associates on the circuit bench concurring, delivered the opinion so commended in the *Speeler* case.[48]

Reviewing the statutory requirements affecting marriage, and noting the detailed information necessary for record purposes combined with the liberal provision made for either a civil or religious ceremony, *(preceded by publication of banns or obtaining a license to marry)* the court stated[49]—and these are the paragraphs emphasized by Judge Brewer twenty years later in the *Speeler* decision:

> It thus appears that the Legislature has by most stringent rules provided for marriage in accordance with law. These requirements are in form mandatory. There is an evident purpose of the Legislature to strictly guard the institution of marriage with such legal requirements as shall effectually protect the contracting parties and all others interested, and shall at the same time safeguard the interest of the state and provide reliable records for future reference.
>
> But notwithstanding these strict requirements of statute, it is claimed by counsel for the state that there is another form of marriage equally legal; that a marriage consummated in total disregard of the statutes will be equally valid; that a private arrangement called a common-law marriage entered into by the parties, without a license from the state, without the publication of bans, without the services of minister or magistrate, without any ceremony whatever, without witnesses to the marriage itself, without any record of the existence of the marriage, without any definite promise of marriage, is just as effectual, just as legal and confers just the same rights upon the parties as a marriage

[48] See note 1, *supra.*

[49] At p. 275.

in strict conformity to the statutory requirements which, in positive terms, specify the exact course of procedure requisite to a legal marriage, and impose severe penalties for any violation of the rules prescribed.

The proposition is a startling one. If this be true, of what use are the statutory requirements? Why punish with fine and imprisonment the minister or magistrate or probate judge who inadvertently omits to do any one of a dozen formal things required by statute to be done, when none of these things are essential to a valid marriage? Why impose upon the contracting parties the expense and labor of filing statements, under oath, regarding all sorts of statistical matters, and the procuring of a license, and the securing of the services of minister or magistrate, when all these things add nothing to the validity of a contract which they themselves may enter into without any of these formalities and without the embarrassment of witnesses? Why require statistics to be compiled or provided for, when, if all these formalities are unnecessary, they will certainly be neglected and the statistics will certainly be incomplete and inaccurate?

Admitting that common-law marriage exists in many jurisdictions, Judge Hurin proceeded to investigate its historical basis. He analyzed the English and American cases, particularly the *Queen* v. *Millis* and *Carmichael* v. *State*, observing with regard to the Ohio decision:

1st, That the opinion thus enunciated was an *obiter dictum*, not necessarily involved in the case then at issue which only related to the question whether the absence of authority in the officiating clergyman or magistrate, to solemnize a marriage, *otherwise legal*, render such marriage void. The broad question of the validity of a marriage in total disregard of the statutory law was not involved in that case; 2d, That as that case was decided before the adoption of the rule making the syllabus the law of the case, we are permitted to look to the actual facts of that case and to disregard the strict rule of its syllabus except in so far as it applies to the case then decided; 3d, That an examination of the reasoning of the learned judge, who rendered that opinion, makes it plain that his opinion is based, not on any authority in England or elsewhere, but upon his conception of what ought to be the law applicable to such a case. In fact, he reaches his conclusions after a somewhat painstaking effort to show that the English authorities support an exactly contrary view.

And concluding:

Ordinarily this court would feel bound, of course, to follow a

decision of the Supreme Court, but a *dictum* of that court in a case not involving the exact question before us, and especially when avowedly opposed to the recognized authorities of common law, seems at least to require careful consideration before it can be applied to the case at bar, where the facts present no analogy to those of the case, in which such *dictum* was expressed.

The Carmichael case was decided forty-five years ago. In that time there has been a vast change in the condition of society. It is a matter of common knowledge that in these latter days the stability of the family is threatened as never before by loose ideas of marriage. The family is the foundation of the state. Marriage is the basis upon which the family rests.

It seems to us that the importance of the question is such as to demand an independent consideration, and in the hope that the Supreme Court will have an opportunity of finally passing upon this question and settling the law of the state, we venture to disregard the decision of *Carmichael* v. *The State*, in so far as it seems to us to extend beyond the actual facts of that case and to lay down a rule on matters not involved therein.

The court then considered the evidence in the *Bates* case and held that David Bates and Hazel Gintner had deliberately ignored the law and that the State had failed to prove any promise of marriage either present or future, though the accused admitted the latter. Indeed the actual basis of the State's claim appeared to be the cohabitation. While acknowledging that such evidence had been held sufficient in divorce proceedings to establish the marriage sought to be dissolved, the court cited authority[50] that it could not be adduced in proof of a former marriage as a ground for the divorce, and discussed other Ohio cases in which proof of marriage was involved.[51] Moreover, in a criminal action more direct evidence of an actual marriage was held essential; cohabitation, and admission of marriage by the accused being regarded as merely corroborative.

Noting that one of the reasons stated in the *Carmichael* case for upholding non-ceremonial marriages was that "notwith-

[50] *Houpt* v. *Houpt*, 5 O. 539.

[51] *Wolverton* v. *State*, 16 O. 173; *Edgar* v. *Richardson*, 33 O.S. 593; *Bruner* v. *Briggs*, 39 O.S. 478, *supra*, note 39.

standing any statute on the subject a common-law marriage is good, *unless the statute contains express words of nullity*, the court, at page 285, remarked:

But if our understanding of the common law rule as to marriage is correct, such marriage was never good in England, except for limited purposes and has never been adopted in Ohio and therefore the supposed historic reason for this rule as to the interpretation of statutes fails.

The marriage statutes of Ohio are in form mandatory. We have found no rule of common law or ecclesiastical law that would justify us in supposing that the Legislature meant anything else than what the statute so expressly declares. We know no rule of statutory construction that justifies us in reading into the statute a negation of its express terms. The repeated provisions for severe penalties on all those who neglect or fail to follow the precise formalities of the law as to marriage, seem to negative any idea that the Legislature ever intended or had in mind any other legal form of marriage.

It would seem a strange anomaly if a civil contract leasing real estate, or agreeing to answer for the debt of another or an agreement made upon consideration of marriage, is to be held void unless in writing signed by the parties to the agreement; yet marriage itself, the most sacred and momentous contract in its consequences which it is possible for man to enter into, may be made by merely verbal promises or even without such promises.

It is strange if our laws, in order to insure the stability of land titles, require a record of every deed and instrument conveying title, yet require (by implication) no record of the title on which the family name and honor, the property rights of wife and children, and the very legitimacy of the children themselves depends.

Reiterating that the evidence under review tended to show that Hazel Gintner did not consider herself legally married to David Bates, Judge Hurin concluded:

But common-law marriages, however we are to understand that term, are not yet so common as to be recognized anywhere as anything but exceptional. Our marriage laws are, and have always been, well known and understood, and a legitimate ceremonial marriage, either civil or religious, is the universal desire of all decent people contemplating matrimony.

To break down the bars established by the statute, to make possible the substitution of loose and uncertain requirements for the time honored,

fixed forms of the law is to open the way to all the forms of fraud and crime with which designing men may seek to destroy womanly virtue and with which unscrupulous women may seek to appropriate the good name and wealth of men to whom in life they were perhaps perfect strangers.

If a private arrangement without any formalities, and without any writing or any record or any witnesses, is to be upheld as a civil contract; if secret marriages, known only to the parties themselves and participated in by none other are to be authorized; if the state is to have no right to protect its own interests, it is but one step further to the practice, now publicly advocated by certain notorious criminals and others, of having marriages on probation, the relation to cease at the will of either of the parties.

If such is to be the law of Ohio, some other court must be the first to proclaim it. The judgment of the court of common pleas will be reversed, and the cause remanded for further proceedings.

The Supreme Court of Ohio, however, to which further appeal was taken by the accused, did not avail itself of the opportunity to reconsider the subject of common-law marriage, so eloquently afforded to it by Judge Hurin. Instead, it affirmed[52] the judgment entered on his decision solely on the ground that the evidence in the *Bates* case "did not establish a common-law marriage."

It was not until 1912, in *Umbenhower* v. *Labus*[53] that the highest court in the State rendered an authoritative decision affecting common-law marriages in Ohio.

In the interval one other case was decided by the Insolvency Court of Hamilton County in 1910. This was *Drach* v. *Drach*,[54] a divorce action in which a common-law marriage was held to be established by a writing acknowledging the same by the husband, followed by cohabitation and publicity. Citing the

[52] *State* v. *Bates*, 77 O.S. 622; 84 N.E. 1132 (1907). "Judgment affirmed, on the ground that evidence did not establish a common-law marriage. Whether such marriage, if proved, would be a predicate for the indictment not considered."

[53] 85 O.S. 238, 97 N.E. 832 (1912), affirming *Umbenhower* v. *Umbenhower*, 12 O.C.C. (N.S.) 289, 21 O.C.D. 317.

[54] 9 N.P. (N.S.) 353, 55 Bull. 86 (1910). This case is also quoted as authority for the indissolubility of common-law marriages except by death or divorce.

Duncan[55] and *Carmichael*[56] decisions in answer to defendant's assertion that there existed some doubt that consent marriages were valid in Ohio, the Court concluded that, "As the common law is the foundation of the law of the State of Ohio, it follows that until the Legislature in its wisdom declares against the validity of common-law marriages that they must, when proven, be enforced by the courts of the State."

This case is particularly interesting because it distinguished the evidence required in proof of a common-law marriage.

> There are two ways in which a common-law marriage may be shown. One is specified in the statute on divorce and alimony in this state wherein it is enacted that proof of cohabitation and reputation may be given, and may be sufficient in the opinion of the court to establish marriage and justify subsequent divorce. This is, perhaps, the usual way in which common-law marriages are determined to exist.
>
> It will be observed that where the proof relates to cohabitation and reputation that evidence is not introduced of the original contract, but the original contract is assumed and presumed to exist from the fact of cohabitation and reputation, and this kind of evidence being purely presumptive, may be rebutted by other evidence, and when this occurs it becomes the duty of the court under such circumstances to determine whether or not under all the evidence a common-law marriage should be presumed to exist in the case.
>
> The other mode of showing the existence of a common-law marriage is to prove the contract by direct evidence thereof, and when the contract is proven, clearly and decidedly, no evidence under the common law is required as to subsequent cohabitation or reputation to establish such contract.

Admittedly, the decisions in *Carmichael* v *State*[57] and *Bates* v. *State*[58] may have thrown some doubt on these rules, the former emphasizing the necessity of publicity and reputation; the latter that of cohabitation and reputation. The court called attention to the stricter rule followed in criminal cases where the element of intent is important and more direct evidence

[55] Note 30, *supra.*
[56] Note 34, *supra.*
[57] Note 34, *supra.*
[58] Note 47, *supra.*

required. The *Drach* contract was held sufficient to establish the marriage, but "if it needed cohabitation and reputation and publicity to give point to the marriage and to make it valid, that exists in this case."

In *Umbenhower* v *Labus*[59] the leading case on common-law marriages in Ohio, the issue arose in this wise: In a partition action brought by Lee Umbenhower against his sister Hazel, each alleged to be seized in fee of undivided one-half interest in land sought to be divided, as sole heirs of Willard P. Umbenhower, one Grace Helen Labus (called Umbenhower) intervened and was made party defendant. The latter claimed to be one of the heirs of Willard P. and as such seized in fee of one-third interest in such lands, as tenant in common with Leo and Hazel. She alleged that she was the issue of Willard P. and his second wife Margaret. The children of the first marriage denied the validity of the second and asserted that Grace Helen was illegitimate offspring. The lower court found in her favor and ordered partition among the three children, which judgment was affirmed by the circuit court, and further appeal taken to the Supreme Court.

It appeared that the first wife of Willard P., the mother of Leo and Hazel, had divorced him in 1900, inferentially because of his friendship with Margaret, later the mother of Grace Helen. Margaret and Willard were not married as prescribed by statute but, said the court, "It is asserted that they entered into a solemn contract of marriage to take effect in *praesenti*, which was accomplished and followed by cohabitation as man and wife, with notice to the society in which they moved and by announcement on all proper occasions that they sustained that relation to each other."

[59] Note 53, *supra*. It is interesting to note that on the authority of the circuit court's decision, while final appeal still pending, *Fultz* v. *Fultz*, 9 O.N.P. (N.S.) 593 (1910), held that a common-law marriage might not be predicated upon the presumption of a former husband's death, without an agreement between the parties to become husband and wife, followed by cohabitation as such.

Reviewing the earlier Ohio cases of *Carmichael* v. *State*,[60] *Railroad* v. *Cobb*, [60a] and *Bruner* v. *Briggs*,[61] but ignoring the *Bates*[62] decision, the Supreme Court affirmed the judgment of the lower court that a common-law marriage had been proved by the evidence adduced.[63] Equal validity in Ohio of ceremonial and consent marriages was declared in the following language:

A contract of marriage is essential in either case. The performance of a mere ceremony does not constitute a marriage. It must follow and be founded on contract. In one case, the consummation of the contract may be celebrated and observed with or according to statutory ceremony. In the other, the evidence of the marriage, in part at least, consists in the immediate and continued course of conduct of the parties in reference to each other in their domestic and social life. The contract of marriage

[60] Note 34, *supra.*

[60a] Note 38, *supra.*

[61] Note 39, *supra.*

[62] Note 10, *supra.*

[63] Margaret's testimony was as follows:

"Billy then said to me 'The court won't give us no license' and he took my hand, and he said 'I pledge myself as true and lawful husband to you the longest day I live,' and I said to Billy, 'I pledge myself as true and lawful wife to you the longest day I live,' and he slipped his mother's wedding ring on my finger, and he kissed me, and he said, 'if we ever have any children, they will hold us together."

The ring was put in evidence. With regard to this testimony the Court said:

"The terseness and precision of the above language almost staggers belief; for it would, on first impression, seem inconceivable that persons of such walk in life would be capable of selecting and adopting such apt language to express their contract of marriage. * * * No one was present to corroborate or deny what the witnesses said, and if there were no circumstances of corroboration a court might hesitate in believing the story to such degree as to determine important interests resting solely on its verity."

The corroborative evidence consisted of the birth of a child (Grace Helen) entered in a Bible in their possession; the fact that the woman gave up her position in a laundry and cohabited with Willard as man and wife and that they held themselves out to the public as such. After the child's birth he treated her as his child and cared for her until his death.

Noting that the lower court had sustained the marriage on this proof, "While the narrative of the mother is not alone above suspicion and lacks conviction beyond doubt, we cannot say the lower court was clearly wrong in founding its judgment on the evidence adduced and found in the record. If true, there was a contract of marriage *per verba de praesenti*, and the event was followed consistently by the usual indicia of the marriage relation."

need not be in writing in either, but may exist in parol. If it is ceremonially solemnized, the evidence of its consummation may be made a matter of record, if authorized by statute, and may be proved by eyewitnesses, admissions, cohabitation, etc. if the record evidence is not made, or, if made, is lost or destroyed. So it would seem that marriage rests on contract, and the state recognizes it as a civil contract, and it may be proved by competent parol proof and circumstances, when the degree of proof is clear and satisfactory to the court or jury. . . .

. . . the validity of a so-called common-law marriage has never been repudiated, when established by sufficient competent evidence, but has been clearly recognized. Indeed, the history of civilized society will show that in primitive times, and all down the line of its advancement, marriage relations were created by mutual contract of competent parties, without ecclesiastical or statutory ceremony. While it is true, Legislatures, from time to time, have endeavored to prescribe methods and formalities of marriage, and proper records of the same, in the interest of decency and good morals, and to thus exalt and make sacred the married state, it cannot be forgotten that no law has made such methods and formalities exclusive. In this respect, as in many others, there is always a stratum of society that prefers to shun or disregard legal ceremonies and adopt a coarser and less conspicuous way of forming domestic ties. It is the innocent offspring of such citizens that the law would mercifully protect, and rather call them heirs than bastards.

The syllabus by the court definitely states that "An agreement of marriage in *praesenti*, when made by parties competent to contract, accompanied and followed by cohabitation as husband and wife, they being so treated and reputed in the community and circle in which they move, establishes a valid marriage at common law; and a child of such marriage is legitimate and may inherit from the father."*

* Editor's Note. This is the first part of Miss Moynahan's article. The remaining part will appear in the March issue.