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THE VALIDITY OF THE COMMON-LAW MARRIAGE  
WHEN ENTERED INTO IN KENTUCKY, OR WHEN  
ENTERED INTO IN ANOTHER STATE.

A recent decision of the Kentucky Court of Appeals, Hoffman v. Hoffman, makes appropriate an investigation of the validity of common-law marriages in this jurisdiction, both when entered into in Kentucky and when entered into in another state. In this case Dorothy Hoffman sought dower in the estate of Emil Hoffman as his common-law widow. There was evidence sufficient to establish a common-law marriage both in Kentucky and Ohio, a status recognized in the latter state only. The claim was allowed on the theory that the law of the state of performance determines the validity of a marriage. The position of the court is undoubtedly sound, but the manner in which the validity of the marriage arose suggests two problems which may confront a state, such as Kentucky, which does not permit the common-law marriage. First, if there had been a marriage in Kentucky only could dower have been awarded? Secondly, is there any reason why Kentucky should not recognize, for the purpose of awarding dower, a common-law marriage if it is valid where performed?

I.

Kentucky is clearly one of those states which denies validity to a marriage entered into without benefit of ceremony by present words of agreement as permitted at common law. This position was first taken by statute and subsequently strengthened by interpretive decisions. The court in Estill v. Rogers, in 1886, explicitly held that since the revision of the statutes in 1852 a marriage not solemnized or contracted in the presence of an authorized person or society was void. The general tone of this language was reflected in the subsequent cases of Harris v. Harris, in 1887, and Robinson v. Redd, in 1897. Findings since that time have rested their decisions on the foundation afforded by these early cases. An isolation of the facts of these three

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1. KY., 146 S.W. (2d) 347 (1941).
2. KY. Statutes (Carroll's 1936) Sec. 2097. (This provision for formal ceremony first appeared in the 1852 revision.)
3. 64 Ky. (1 Bush) 62 (1886).
4. 85 Ky. 49, 2 S.W. 549 (1887).
5. 19 Ky. L. Rep. 1422, 43 S.W. 1435 (1897).
cases will show some of the instances in which the validity or invalidity of a common-law marriage may be decisive, and will furnish a better understanding of their implications.

In the Estill case the common-law husband and wife lived together for fifteen or more years. Upon the death of the wife a contest arose in appointing an administrator. The court appointed the wife’s brother instead of her husband. The validity of the marriage arose in the Harris case in a contest between issue of the union and the husband’s next of kin as to who should be preferred in inheriting the husband’s property. In the Robinson case the common-law wife sought to have money paid over in advance by the executor for her use. Thus, the cases which led to the traditional statement that “common-law marriages are not good in Kentucky” involved, not prosecutions for bigamy, nor actions for divorce, nor claims for dower, as might well have been expected, but instead a determination of incidental property rights and the legitimacy of children.0

Paralleling these common-law marriage cases in Kentucky are a group of decisions dealing with the related problem of presuming a formal marriage; in the absence of positive proof, from evidence of cohabitation and reputation.7 McDaniel v. McDaniel8 is illustrative of these cases. No marriage license was available for proof of the marriage in this case, nor was there a recordation of the license, because county records had been destroyed previously by fire. The participating minister testified that he had no recollection of performing a ceremony, although some thirty years had elapsed and he had moved away from the community. The court found its way out of this maze of conflicting evidence by presuming a marriage from the evidence of cohabitation and reputation in the community, saying that the usual way of proving marriage is by general reputation, cohabitation and acknowledgement. Apparently this case, and the type it illustrates, stems from the language

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8 It is interesting to note that the legitimacy of children is not a problem involved in informal marriages in Kentucky because of Ky. Statutes (Carroll’s 1936) Sec. 2098 which legitimizes the issue of all marriages excepting those that are incestuous or between black and whites.


*212 Ky. 833, 280 S.W. 145 (1926) supra n. 7
used in two early Kentucky cases, *Ewing v. Bibb* and *Powell v. Calver*. The *Ewing* case involved the validity of a slave marriage entered into prior to revision of the statutes in 1852. The court said, although it was not necessary to reach the decision, that although evidence of mere cohabitation and reputation would not support a prosecution for bigamy, evidence of such circumstances would so far render a marriage valid as to make a subsequent marriage void. The *Powell* case went even further and proceeded on the theory that such evidence established a *prima facie* case of marriage.

Though these cases are not as strong on their facts as the language used would lead one to believe, Professor Madden points out that this type of decision is not unusual. He asserts that where there is evidence of reputation in the community, combined with cohabitation, the presumption of marriage is strong. If the jurisdiction recognizes the common-law marriage, such will be presumed. If not, a ceremonial marriage is presumed.

These cases cannot be said to contravene the common-law marriage cases because the evidence which raises the presumption may be overcome by the introduction of positive proof, but an assumption or two will show that any apparent distinction between the two types of cases is largely theoretical. Assuming that no positive evidence of marriage exists (no certificate or recordation of license) one who claims as a husband or wife may proceed to have his case established in one of two ways. First, he may assert that he cohabited with his alleged spouse under a mere agreement of marriage. Secondly, he may assert that he was formally married, but that he can prove it only by showing cohabitation and reputation. If he proceeds on the first theory, his claim will not be recognized in Kentucky. If he proceeds on the second theory he should have his claim recognized unless there is positive evidence to overcome the presumption raised by evidence of cohabitation and reputation. The absence of such evidence, i.e. a marriage certificate, recorded license, testimony of participating minister or official, etc. has been assumed. Therefore it would seem that the one who

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*70 Ky. (7 Bush) 654 (1871) supra n. 7
*5 Ky. L. Rep. 769 (1884) supra n. 7
*Madden, Domestic Relations (1931) 66 et. seq.*
contests the claim of marriage is simply at the mercy of the claimant's theory of his case. While it is always possible to show perjury, or to show that the reputation was for a common-law and not a ceremonial marriage, the former is at best an unlikely possibility. The latter is even more improbable for the repute in an average community would be that the parties were married and not that they were married in a particular manner.

The distinction made in the cases, and pointed out by Madden, is sound. It is the difference between a concept of substantive law and a principle of evidence. Moreover, the distinction may well have a basis in public policy, for ceremonial marriages are more desirable than informal ones, and the state should presume the moral rather than the immoral. Nevertheless, any rationalization of the status of the common-law marriage in Kentucky should be made with the idea firmly in mind that little practical difference can be shown between a case which recognizes a common-law marriage, and a case which recognizes a marriage presumed from evidence of cohabitation and reputation.

If the interpretation placed on the "cohabitation and reputation" cases be tenable, it seems to be the only method by which the accepted interpretation of Kentucky's attitude toward the common-law marriage can be questioned. In some instances a state's marriage statute is construed as directory rather than mandatory, with a resulting recognition to marriages which merely fail to conform to the explicit wording of the statute. Such a possibility has been suggested for the non-age provision of the Kentucky marriage statute, but the wording of the formality provision itself, as well as the language of the cases, does not permit of this construction when the statute is applied to common-law marriages.

II.

It is well established that the law of the state where the marriage is entered into determines is validity. The instant

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13 Id. at 49.
14 Town Hall, Marriage Below the Statutory Age—Effect of Cohabitation After Arriving at That Age (1935) 24 Ky. L. J. 75, 79.
15 Beale, Conflict of Laws (1935) Sec. 121; Stumberg, Conflict of Laws (1937) 255; Restatement, Conflict of Laws (1934) Sec. 121; Francis Deak, Recent Developments Concerning Marriage (1927) 27 Mich. L. Rev. 389, at 392 et. seq.
case reiterates Kentucky’s adherence to this doctrine. There are, however, two exceptions. First, if the marriage is “contrary to the law of nature of Christian countries” it will not be recognized though valid where entered into. Secondly, a marriage manifestly against the public policy of the state need not be recognized even if entered into abroad.

Into the first category fall incestuous and polygamous marriages. The application of this exception is largely academic for a Christian people do not recognize such marriages even in the first instance. In other words, if the state of performance does not consider an incestuous or polygamous marriage valid, the problem of subsequent recognition by a second state will not arise, or at least the question will arise infrequently.

Into the second category fall miscegenous marriages and such others as are clearly against the public policy of the state. A variance in policy among the several states is reflected in the application of this second exception. For instance, in the states of the deep South marriages between blacks and whites are so against the policy that they are not recognized even though entered into in a state which does allow them. The reverse is true of those sections of the country which do not have a particular race problem.

Marriages forbidden because of consanguinity are within the second category it would seem, but because this type of

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16 In Re Miller’s Estate, 239 Mich. 455, 214 N.W. 428, 430 (1927); commented on (1928) 26 Mich. L. Rev. 327.
18 United States v. Rodgers, 109 Fed. 866 (1901) (For a criticism of the case and the doctrine which has resulted from it see: Beale, Conflict of Laws (1935) Sec. 133.1.
20 Wilson v. Cook, 256 Ill. 460, 100 N.E. 222 (1912); Lando v. Lando, 112 Minn. 257, 127 N.W. 1125 (1910); Lanham v. Lanham, 136 Wis. 380, 117 N.W. 787 (1908).
21 State v. Tutty, 41 Fed. 753 (1890); Dupre v. Boulard, 10 La. Ann. 411 (1855); State v. Dennedy, 76 N.C. 251 (1877).
22 In Re Miller’s estate, op. cit. supra n. 16; Johnson v. Johnson, 57 Wash. 89, 106 Pac. 590 (1910)
marriage does not in and of itself shock the public conscience it becomes necessary to find a policy for or against. Courts faced with the problem of finding a policy have looked to the local marriage statute. If the statute is a penal one it is usually indicative of an attitude sufficiently strong to bring the exception into play, although this may not always be the case.\textsuperscript{23} Also if the statute is not a penal one, but contains the word \textit{void} this may be sufficient to show a policy against recognition.\textsuperscript{24} On the other hand, even a strongly worded statute may not represent a strong policy against recognition if the marriage is valid where performed.

Kentucky courts seldom if ever discuss the policy of the marriage statute and herein lies the real difficulty with respect to recognizing common-law marriages entered into abroad. There should be little question that the attitude is clearly drawn against incestuous, polygamous and miscegenous marriages in this state. The policy is not so strong against marriages of close blood.\textsuperscript{25} but what is the feeling toward common-law marriages? They are invalid if entered into within the state and valid if recognized in the state of performance. Putting it more abstractly, the policy in the first instance is sufficiently strong to prevent recognition, while in the second instance the policy is not strong enough to prevent recognition. In each instance the policy flows from the same statute, although this does not necessarily make the policy the same.

This difference in policy is not as unexplainable as a dispassionate analysis would make it appear. Two forces are really in conflict. The first is a reluctance to permit informal marriages; the second is a desire to let marriages exist when they are validly created. It is desirable that both forces operate. One prevents promiscuous use of the marriage status, a thing in which the state has a vital interest. The other protects the parties to a valid relationship.

By way of recapitulation it has been shown that Kentucky does not recognize the common-law marriage either by statute or


\textsuperscript{24} McLennan \textit{v.} McLennan, 31 Ore. 480, 50 Pac. 802 (1897); State \textit{v.} Yoder, 113 Minn. 503, 130 N.W. 10 (1911) (\textit{dictum}); Estate of Scull, 183 Pa. 625, 39 Atl. 16 (1898); Pennegar \textit{v.} State, 87 Tenn. 244, 10 S.W. 305 (1889).

\textsuperscript{25} Stevenson \textit{v.} Gray, 56 Ky. (17 B. Mon.) 193 (1856).
decisions. She does allow proof of a ceremonial marriage by way of presumption arising from evidence of cohabitation and reputation, a distinction which is both sound and explainable in policy. If the marriage is entered into in a state which does recognize common-law marriages it will be given effect here. Moreover, a common-law marriage is apparently not so against the public policy of the state as to make it come within an exception to the general rule. The court might cast considerable light on the problem involved by discussing directly, rather than inferentially, the policy toward common-law marriages entered into in a state where they are valid.

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