trial and equal opportunity for the same type of review as the prosecution. While it should be remembered that certiorari is a discretionary writ,[37] it is hoped that the Iowa Supreme Court will in the not too far distant future afford the accused in criminal cases the same quality of writ which has been granted the state.

C. O. LAMP

[37] Aplin v. Clinton County, 256 Iowa 1059, 129 N.W.2d 726 (1964).

Case Notes

Common-law Marriage—To Establish Common-law Marriage, Marital Intent, Cohabitation, and Public Declaration of Marriage Must Be Shown.—*In re Estate of Malli* (Iowa 1967).

Decedent from 1949 until his death in 1959 lived with the respondent intermittently in the alleged relationship of common-law marriage. The decedent referred to respondent on occasion as *the Mrs.* and *my wife.* The parties cohabited and treated each other as married in some instances but at other times and for other purposes asserted that they were single. Respondent, for example, continued to do business, transfer property, and testify in her own name. After decedent's death, respondent in her own name and as a creditor, filed an application for appointment of an administrator for the decedent's estate. The application stated that decedent left no spouse and that his parents were next of kin. After respondent's claim was disallowed, she filed a probate inventory referring to herself as a common-law wife. The parents of decedent filed an application to correct the list of heirs. Respondent resisted such correction, asserting her relationship with the decedent constituted a valid common-law marriage. Trial on the issues resulted in determination that no common-law marriage existed. Respondent appealed. The Supreme Court of Iowa, *Held,* affirmed, all justices sitting concurring. To establish the existence of a common-law marriage one must show intent and agreement *in praesenti* as to marriage, continuous cohabitation, and public declaration of the marital relationship. *In re Estate of Malli,* — Iowa —, 149 N.W.2d 155 (1967).

Although the case found no extant common-law marriage, it did identify and clearly delineate the elements which are essential to sustain such a relationship. These elements, like the problem of common-law marriage itself, are recurrent in legal disputes. Thus, where there has been no ceremonial marriage, these elements are determinative in any case depending upon the marital status of the parties. The existence or non-existence of a common-law marriage has, for instance, been the crucial issue in an action to appoint an administrator,[1] a divorce case,[2] a workmen's compensation action,[3] a proceeding to recover dower,[4] an action by children of deceased to prove their right to intestate share as legitimate issue,[5] an adultery case,[6] and a bigamy case.[7]

The elements outlined as essential take on meaning, of course, when the

1 *In re* Estate of Boyington, 157 Iowa 467, 137 N.W. 949 (1912).
2 Hoese v. Hoese, 205 Iowa 313, 217 N.W. 860 (1928).
3 Royal v. Cudahy Packing Co., 195 Iowa 759, 190 N.W. 427 (1922).
4 Smith v. Fuller, 108 N.W. 765 (1906). Also reported at 138 Iowa 91, 115 N.W. 912 (1908).
5 Brisbin v. Huntington, 128 Iowa 166, 103 N.W. 144 (1905).
6 State v. Grimes, 215 Iowa 1287, 247 N.W. 665 (1933).
7 State v. Nadal, 69 Iowa 478, 29 N.W. 451 (1886).

nature of common-law marriage is explained in its entirety. Although the name immediately suggests a concept carried over from the English system of jurisprudence, there actually appears to have been no general recognition of the institution in English law prior to the formation of the American colonies.[8] In fact, it is said that the doctrine of common-law marriage is a peculiarly American institution developing under the expediencies of sparsely populated frontier living conditions.[9] At any rate there were American cases discussing and recognizing the status of common-law marriages at least as early as 1809.[10]

The law of domestic relations has sometimes been thought of and developed as a separate field of jurisprudence and has taken on a social and cultural background of its own. Nevertheless, the basic relationship of marriage is contractual in nature.[11] Even more than in other fields, the parties do not have complete freedom of contract. Marriage must be entered into with some deference to the demands of society as to form and content.[12] In this respect, common-law marriage in Iowa is truly common law in the sense of being outside the statutes—a self-executed institution recognized but not created or prescribed by statute.[13] The question then arises, in the absence of formal solemnization and lacking legislative description, what type of contractual relationship must exist to warrant the judicial sanction of marriage? It is to this question that many Iowa cases have expressed themselves, culminating in the essential consensus as to elements which is expressed in the *Malli* case and others of similar expression.[14] Each element, therefore, also has a general field of judicial history and interpretation which lends meaning to the skeletal outline presented there.

The foundation for recognition of common-law marriages is prepared by

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8 Kirkpatrick, *Common-Law Marriages: Their Common Law Basis and Present Need*, 6 St. Louis L.J. 30 (1960); Davis, *Common-Law Marriage in Texas*, 21 Sw. L.J. 647 (1967).

For prior discussion of the general area of this case note *see* 11 Drake L. Rev. 64 (1961).

9 Davis, *Common-Law Marriage in Texas*, 21 Sw. L.J. 647 (1967).

10 Fenton v. Reed, 4 Johns, 52 (N.Y. 1809). Discussed in Kirkpatrick, *Common-Law Marriages: Their Common Law Basis and Present Need*, 6 St. Louis L.J. 30 (1960).

11 Iowa Code § 595.1 (1966): "Marriage is a civil contract, requiring the consent of the parties capable of entering into other contracts, except as herein otherwise declared."

The phrase, *capable of entering into other contracts*, would seem to make operative the prior law as to contractual ability. The ability of the parties to enter such contract for common-law marriage is also limited by the restrictions of Iowa Code § 595.19 (1966) as to prohibited marriages between parties in specified relationships and parties presently married.

12 Common-law marriages are not subject to the same requirements as solemnized marriages for which a license is obtained (Iowa Code § 595.3 (1966)) but no marriage may be recognized as valid if it falls within the prohibitions of Iowa Code § 595.19 (1966). Any marriage is also voidable if one of the parties was a minor at the time of the marriage (Iowa Code § 595.2 (1966)). *See also* Hopping v. Hopping, 233 Iowa 993, 10 N.W.2d 87 (1943), as to social considerations affecting the marital relationship.

13 Iowa Code § 595.11 (1966) recognizes that marriages may be performed other than by the method of solemnization specified in chapter 595 but provides for a $50 forfeiture by each party to the marriage or any person aiding or abetting such marriage.

14 The elements specified in *Malli* are quoted from *In re* Estate of Long, 251 Iowa 1042, 102 N.W.2d 76 (1960). Earlier cases use similar language in describing the requisites but they are not uniform.

elemental statements such as the one found in *Smith v. Fuller*[15] to the effect that record evidence of marriage is not required to prove the marriage relationship. Other Iowa cases also recognizing the non-essential nature of record evidence have declared that the existence of the marriage may be proven as any other fact necessary to be determined in the case.[16] This same idea is expressed in the case of *Brisbin v. Huntington*[17] where the court stated that no particular form of ceremony is necessary to create a marriage if the minds of the parties have met in common consent. This was achieved, however, said the court, only if the parties lived together and in so doing intended to sustain the relationship of husband and wife. Neither the requisite intent nor consent may be inferred from cohabitation alone.[18]

It was further recognized that although Iowa had statutes regulating marriage, they did not by exclusion prohibit the recognition of common-law marriages.[19] Thus, the societal interest in the relationship of marriage demands an assumption by the parties of the duties and responsibilities of the marital status before a marriage will be recognized as valid—not the performance of any specified ceremony. As stated by the court in *McFarland v. McFarland:* "It is sufficient if parties cohabiting intend present marriage, and it is immaterial how the intention is evidenced."[20] Approached from a contract theory then, marriage being a civil contract requires mutual consent. Further, the term *mutual consent* as applied to marriages means precisely what it does in other contractual contexts—that the minds must meet in mutual consent to the total status of marriage.[21] At least one contractual exception applies to this requirement of mutual consent. One party may be entitled to marital rights if that party intended present marriage even though the other party did not so intend. Such a result follows only if the parties have cohabited and if the other party's conduct has been such as to justify their believing that the other intended present marriage also.[22]

This consent on behalf of the parties requires more than outward agreement to be husband and wife.[23] Such an agreement whether written or oral is of no effect unless the parties have an actual present intent to assume the

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15 108 N.W. 765, 767 (Iowa 1906). Also reported at 138 Iowa 91, 95, 115 N.W. 912, 914 (1908).

16 State v. Rocker, 130 Iowa 239, 244, 106 N.W. 645, 647 (1906); State v. Nadal, 69 Iowa 478, 483-84, 29 N.W. 451, 454 (1886); State v. Hughes, 58 Iowa 165, 169, 11 N.W. 706, 707 (1882); Kilburn v. Mullen, 22 Iowa 498, 503 (1867) by reference to State v. Williams, 20 Iowa 98, 100 (1868).

17 128 Iowa 166, 169, 103 N.W. 144, 145 (1905).

18 *Id.*

19 *In re* Estate of Stopps, 244 Iowa 931, 57 N.W.2d 221 (1953), quoting from Meister v. Moore, 96 U.S. 76 (1877) (a Michigan case reviewed by the United States Supreme Court).

20 51 Iowa 565, 570, 2 N.W. 269, 274 (1879).

21 Reppert v. Reppert, 214 Iowa 17, 241 N.W. 487 (1932).

22 McFarland v. McFarland, 51 Iowa 565, 570, 2 N.W. 269, 274 (1879). This court speaks of the party being entitled to *marital rights* but in the context of a divorce action where alimony was sought. The remarks would seem properly to be limited to proprietory marital rights since it is difficult to imagine a court forcing a person to live in wedlock by some theory of estoppel.

23 State v. Grimes, 215 Iowa 1287, 247 N.W. 664 (1933).

marriage relationship.[24] This is especially so if the agreement is entered into for another purpose.[25]

The existence of such an intent may of course be shown by written agreement or evidence of an express oral agreement, but more often it is inferred from the circumstances shown. *In re Estate of Boyington*, for instance, points out that cohabitation and reputed relationship of husband and wife may be shown to give color to the relation of the parties and to show recognition by each alleged spouse of the existence of the marriage.[26] Public repute if uniform may be considered along with the public conduct of the parties toward each other, on the issue of the existence of a common-law marriage[27] but such reputation is important only as bearing upon the intention of the parties.[28] If such reputation is shown to be divided rather than uniform, it has no probative force.[29]

Lack of such a bona fide intent may be shown by any factual evidence tending to show that the parties did not really intend to be married. Particularly, the continued use of a single or maiden name by the woman seems to be persuasive in several Iowa cases. In *Pegg v. Pegg*,[30] for instance, the fact that the plaintiff had conveyed and received land in her former name after the beginning[31] of the alleged marriage and the fact that she manifested no unwillingness to be called by her former name in her day to day conduct were given significant consideration in determining that no marriage existed. Likewise, in *In re Estate of Boyington*[32] the court also considered the fact that the putative wife received land in her maiden name and also did business in that name, never ostensibly objecting to others referring to her by that name. The court in both cases apparently took notice of what they referred to as a universal instinct of women to insist on disclosure and recognition of their marital status, both in name and in treatment.[33]

The agreement between the parties, like the relationship itself must meet certain standards to warrant the recognition of marital status. An agreement to live together "as husband and wife," for example, has been noted by the court to be subject to the interpretation that the parties were agreeing only

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24 *Id.*

25 Pegg v. Pegg, 138 Iowa 572, 115 N.W. 1027 (1908). The intent of the parties was there found to be to avoid prosecution for illicit relations rather than to assume the marital relation. It is plausible that the court actually meant in this case that the parties had no true agreement because of the lack of valid intent although there existed an evidenciary document.

26 157 Iowa 467, 470, 137 N.W. 949, 950 (1912).

27 Pegg v. Pegg, 138 Iowa 572, 115 N.W. 1027 (1908).

28 *In re* Estate of Boyington, 157 Iowa 467, 474, 137 N.W. 949, 951 (1912).

29 *Id.*

30 138 Iowa 572, 115 N.W. 1027 (1908).

31 No cases have been found which discuss the actual *date* of a common-law marriage but such date would logically be the date at which time all requisites were met. Thus a later intent to marry might consumate a marriage where cohabitation had preceded the required intent by considerable time.

32 157 Iowa 467, 137 N.W. 949 (1912).

33 Pegg v. Pegg, 138 Iowa 572, 579, 115 N.W. 1027, 1030 (1908); *In re* Estate of Boyington, 157 Iowa 467, 475, 137 N.W. 949, 951-52 (1912).

to live in an illicit relationship resembling marriage in appearance.[34] The most important requirement respecting the agreement itself (or at least the one with which most cases concern themselves), is the requisite that the parties be in *present* agreement to be husband and wife, followed by cohabitation as such.[35]

The distinction between present agreements and future promises is often discussed in the cases in terms of agreements *per verba de praesenti*[36] and *per verba de futuro*.[37] Agreements *per verba de praesenti* are, of course effective to create a common-law marriage if followed with the other requisites, since they show the intention of the parties to take each other as husband and wife in the present tense, signifying the immediate acceptance of the marital relation. Agreements *per verba de futuro*, on the other hand, are ineffectual to create any marital status. That is, agreements to marry at some later time (be that time specified or not) do not create any marital rights at the present time. A written agreement to live together as husband and wife "until lawfully married," for instance, has been held to support a finding of no common-law marriage.[38]

Most of the Iowa cases, prescribing the elements necessary, give lip service at least to the requirement that the parties cohabit in order for the relationship to constitute a valid marriage.[39] Treatment of the cohabitation element, however, has not been entirely uniform. The court in *In re Estate of Malli*, reiterating what was said in *In re Estate of Long*,[40] declared that the parties must have cohabited continuously. The court further stated that each element of the relationship must be shown to exist before the marriage will be recognized. The former Iowa case of *Love v. Love*,[41] on the other hand says that consummation of the marital contract does not depend on cohabitation for any period of time. In fact if the agreement is acknowledged, the court said no cohabitation need be shown nor had.[42] Mere cohabitation itself, of course, is not determinative.[43]

The cases are also replete with discussion of parties *holding themselves out to the world as husband and wife*.[44] The cited cases, however, seem to treat

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34 State v. Grimes, 215 Iowa 1287, 247 N.W. 664 (1933).

35 *Id.*; Reppert v. Reppert, 214 Iowa 17, 241 N.W. 487 (1932); *In re* Estate of Medford, 197 Iowa 76, 196 N.W. 728 (1924).

36 "Per Verba De Praesenti: By words of the present [tense]." BLACK'S LAW DICTIONARY 1294 (4th ed. 1951).

37 "Per Verba De Futuro: By words of the future [tense]." *Id.*

38 State v. Grimes, 215 Iowa 1287, 247 N.W. 664 (1933).

39 Coleman v. Graves, 255 Iowa 396, 122 N.W.2d 853 (1963); *In re* Estate of Long, 251 Iowa 1042, 102 N.W.2d 76 (1960); *In re* Estate of Allen, 251 Iowa 177, 100 N.W.2d 10 (1959); *In re* Estate of Wittick, 164 Iowa 485, 145 N.W. 913 (1914).

40 251 Iowa 1042, 102 N.W.2d 76 (1960).

41 185 Iowa 930, 932, 171 N.W. 257, 257 (1919). Followed in Bradley v. Bradley, 230 Iowa 407, 411, 297 N.W. 856, 858 (1941).

42 *Id. But see* Pegg v. Pegg, 138 Iowa 572, 115 N.W. 1027 (1908).

43 Gammelgaard v. Gammelgaard, 247 Iowa 980, 980, 77 N.W.2d 479, 480 (1956).

44 Coleman v. Graves, 255 Iowa 396, 122 N.W.2d 853 (1963); Bradley v. Bradley, 230 Iowa 407, 297 N.W. 856 (1941); State v. Rocker, 130 Iowa 239, 106 N.W. 645 (1906); State v. Sanders, 30 Iowa 582 (1870); State v. Wilson, 22 Iowa 364 (1867).

the element of public declaration or manifestation as a substitute for actual evidence of an agreement to assume the marital relation. They say, for example, that in the absence of other evidence, the law will presume a legal marriage if it is shown that the parties held themselves out to the world as husband and wife and lived and cohabited together as such.[45]

The early Iowa case of *McFarland v. McFarland*[46] provides a good example of the specific types of acts which evidence a sufficient *holding out* or public declaration. In that case it was shown that the putative wife entertained company with the alleged husband, extended invitations in her married name, presided at the husband's table, watched with him beside the sick and dying of their neighbors, followed in funeral processions in the family carriage, made purchases for the household, purchased her wardrobe on his account without his repudiating such purchases, and was treated with the normal marital affections.[47] As illustrated by the *Malli* case, however, mere occasional or casual references to the alleged spouse in terms such as *the Mrs.* or *my wife* are insufficient of themselves to indicate a true marriage. Likewise, the fact that a woman uses the name "Mrs. ——" does not of itself signify an existing marriage.[48]

Although the *Malli* case maintains that a public declaration that the parties are husband and wife *must* be shown, prior case law seems to recognize the existence of an exception to that requirement also. The court in *Love v. Love* averred that an agreement to keep the marriage secret does not invalidate the relationship, although such an agreement might be evidence that no present marriage actually took place.[49]

Even if the cohabitation of the parties was illicit when begun, it may evolve into a valid marriage if the prerequisites are later complied with or the legal impediments are later removed.[50] Cohabitation may be begun, for instance, while one of the parties is impaired from entering the required contract[51] and may be validated by continued cohabitation with present intent to be husband and wife after the impediment has abated.[52]

Once sustained by the parties of course, the status of common-law marriage (like any other marriage) continues during the joint lives of the parties or until divorce or annulment.[53]

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45 State v. Rocker, 130 Iowa 239, 244, 106 N.W. 645, 647 (1906); citing also State v. Sanders, 30 Iowa 582 (1870) and State v. Wilson, 22 Iowa 364 (1867).

46 51 Iowa 565, 2 N.W. 269 (1879).

47 *Id.* at 571, 2 N.W. at 274.

48 *In re* Estate of Clark, 228 Iowa 75, 290 N.W. 13 (1940). The case declares that such use of the appellation "Mrs." does not constitute legal evidence that the woman is married. Apparently the case means that such evidence is not conclusive since such usage is in fact allowed as evidence.

49 185 Iowa 930, 932, 171 N.W. 257, 257-58 (1919), quoting from *In re* Estate of Hulett, 66 Minn. 327, 69 N.W. 31 (1896). *See also* State v. McKay, 122 Iowa 658, 98 N.W. 510 (1904).

50 *In re* Estate of Boyington, 157 Iowa 467, 476, 137 N.W. 949, 952 (1912).

51 This doctrine is applied particularly in cases where one party is incapable of entering the marriage because of another previous marriage, that is, still having a living spouse.

52 Blanchard v. Lambert, 43 Iowa 228 (1876).

53 Smith v. Fuller, 108 N.W. 765 (1906). Also reported at 138 Iowa 91, 115 N.W. 912 (1908).

Several other rules are reiterated by the court in the *Malli* case[54] as being elements of common-law marriage. In reality, those rules seem to be procedural considerations rather than elements of the relationship itself. The court stated for instance, that the burden of proof is on the one asserting the claim.[55] All elements of the relationship as to marriage must be shown to exist. Further, a claim of such marriage will be closely scrutinized since regarded with suspicion. *Coleman v. Graves* was also cited to the effect that when one party is dead the elements must be shown by "clear, consistent, and convincing evidence."[56]

Thus, according to the *Malli* case, a common-law marriage may be established sufficiently in Iowa if there is shown by *clear, consistent, and convincing evidence* the *intent and agreement in praesenti as to marriage on the part of both parties, together with continuous cohabitation and public declaration that they are husband and wife.* This statement is, of course, a general summary of the requirements for recognition of such marital status, and each requirement must be interpreted by the numerous explanations and exceptions or modifications of the prior cases.[57] All the materials taken together constitute a judicial attempt to accord proper status to factually existent relationships regardless of the mode of their creation.

DAVID L. PHIPPS

Scope of Review—ON APPEAL TO DISTRICT COURT FROM THE SUSPENSION OF A DRIVER'S LICENSE BY THE DEPARTMENT OF PUBLIC SAFETY, THE DISTRICT COURT HEARS THE APPEAL DE NOVO.—*Needles v. Kelly* (Iowa 1968).

Having determined that Wayne Francis Kern committed a "serious violation" of the motor vehicle law of the State of Iowa,[1] the Commissioner of Public Safety[2] suspended Mr. Kern's license to operate a motor vehicle. On appeal from the suspension, the Hamilton County District Court, acting upon a transcript of the proceedings before the Commissioner and additional evidence, vacated the suspension and the Commissioner made application for

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54 149 N.W.2d 155, 158 (Iowa 1967).

55 Following Gammelgaard v. Gammelgaard, 247 Iowa 980, 77 N.W.2d 479 (1956).

56 255 Iowa 396, 403, 122 N.W.2d 853, 856 (1963).

57 Several presumptions are also used by the courts in considering alleged common-law marriages. While no attempt is made in this Case Note to discuss the presumptions, they may be helpful to the attorney in presenting cases involving claims of such marriages. Some of the presumptions are discussed in 14 IOWA L. REV. 215, 216 (1929).

1 IOWA CODE § 321.210 (1966): "The department is hereby authorized to suspend the license of an operator or chauffer without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee:

. . . .

"7. Has committed a serious violation of the motor vehicle laws of this state."

2 The Commissioner heads the Department of Public Safety, which constitutes the motor vehicle department of the State of Iowa. IOWA CODE § 321.1(34) (1966).