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Article 13

Domestic Relations--Common-Law Marriages--Sufficiency of Evidence (Matter of Akeson v. Salvage Process Corp., 305 N.Y. 438 (1953))

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there would be no relitigation of the same facts and issues and it would be more in keeping with the stated purpose of the full faith and credit clause.[21] More important, the child's welfare would be of first importance. It is feared that this decision will introduce greater confusion and uncertainty into the already complicated field of custody.

DOMESTIC RELATIONS — COMMON-LAW MARRIAGES — SUFFICIENCY OF EVIDENCE. — In a proceeding before the Workmen's Compensation Board, claimant sought benefits as the widow of decedent-employe, alleging a valid common-law marriage.[1] In reversing the Appellate Division [2] which had affirmed an award, the court *held* that a valid common-law marriage was not established since the probative evidence was insufficient to overcome the presumption that the relationship, meretricious at inception, continued as such after the impediment of the claimant's prior subsisting marriage was removed. *Matter of Akeson v. Salvage Process Corp.*, 305 N. Y. 438, 113 N. E. 2d 788 (1953).

The concept of common-law marriage is of ecclesiastical origin.[3] Such marriages were recognized in England until Lord Hardwicke's Act of 1753, at which time they were abolished by the establishment of statutory regulation of marriage.[4] Although this Act did not pertain to the American colonies,[5] the majority of states have adopted its policy and today refuse to recognize common-law marriages contracted within their borders.[6] In 1901, New York first prohibited

458, 102 P. 2d 22 (1940); Wilcox v. Wilcox, 32 Wash. 2d 633, 203 P. 2d 328 (1949).

[21] *See* Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, 439 (1943).

[1] The record showed that claimant married Carl Akeson about 1890 and left Akeson in 1918 to cohabit meretriciously with the decedent-employe until his death in 1944. Akeson died on April 17, 1933, thus removing the impediment to the common-law marriage of his wife and the decedent-employe twelve days prior to the effective date of the law of 1933, which abolished such marriages (Laws of N. Y. 1933, c. 606).

[2] 280 App. Div. 841, 113 N. Y. S. 2d 400 (3d Dep't 1952).

[3] See KEEZER, MARRIAGE AND DIVORCE § 28 (3d ed. 1946).

[4] Law of Marriage, 1753, 26 GEO. II, c. 33, repealed by 4 GEO. IV, c. 76 (1823); see KEEZER, *op. cit. supra* note 3; EVERSLEY, LAW OF DOMESTIC RELATIONS 15 (6th ed. 1951).

[5] See DILLON, COMMON LAW MARRIAGE 4, 5 (1942).

[6] See JACOBS AND GOEBEL, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 115 (3d ed. 1952). However, the states do recognize common-law marriages if they are valid where contracted. See Note, 133 A. L. R. 765 (1941), and cases collected therein.

the contracting of such marriages [7] but, by inadvertent omission in the revision of 1907,[8] they were reinstated to legal status.[9] However, by statutory amendment in 1933,[10] the contraction of common-law marriages has since been prohibited in this state.[11]

To establish that such marriages were validly contracted during the period in which they were legally recognized, New York courts require evidence sufficient to ascertain the intent of the parties, *in praesenti,* to enter into a valid husband and wife relationship, without benefit of ceremony.[12] The necessary matrimonial intent, in the absence of documentary proof, may be manifested by continuous cohabitation, general repute, and a holding out as husband and wife.[13] Evidence of this relationship raises one of the strongest presumptions known, for "[t]he law presumes morality, and not immorality; marriage, and not concubinage. . . ." [14] This presumption may be rebutted only by contradictory evidence that is strong, distinct, satisfactory and conclusive.[15] Where, however, the parties cohabiting are aware of an impediment preventing a valid common-law union between them, the courts have held that it is presumed that such relationship continued meretricious,[16] even subsequent to the removal of the impediment.[17]

Thus the court in the instant case, in deciding that a valid common-law marriage had not been contracted, upheld the New York judicial requirements of substantiating evidence. Here, not only did the claimant fail to establish a general repute of marriage, but what evidence she did submit [18] was contradicted by her own prior state-

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[7] Laws of N. Y. 1901, c. 339, § 6, effective Jan. 1, 1902.

[8] Laws of N. Y. 1907, c. 742, effective Jan. 1, 1908, revising Laws of N. Y. 1901, c. 339, § 6.

[9] Ziegler v. Cassidy's Sons, 220 N. Y. 98, 115 N. E. 471 (1917).

[10] Laws of N. Y. 1933, c. 606.

[11] Adams v. Adams, 188 Misc. 381, 67 N. Y. S. 2d 752 (Sup. Ct. 1946); Caplan v. Caplan, 164 Misc. 379, 300 N. Y. Supp. 43 (Sup. Ct. 1937).

[12] Matter of Pratt, 233 App. Div. 200, 251 N. Y. Supp. 424 (4th Dep't 1931), *appeal dismissed,* 258 N. Y. 577, 180 N. E. 340 (1932); *see* Boyd v. Boyd, 252 N. Y. 422, 426, 169 N. E. 632, 633 (1930).

[13] Matter of Haffner, 254 N. Y. 238, 172 N. E. 483 (1930); see 7 WIGMORE, EVIDENCE § 2083 (3d ed. 1940).

[14] Hynes v. McDermott, 91 N. Y. 451, 459 (1883).

[15] *Id.* at 458.

[16] Hill v. Vrooman, 242 N. Y. 549, 152 N. E. 421 (1926).

[17] *Ibid.; cf.* Gall v. Gall, 114 N. Y. 109, 117-118, 21 N. E. 106, 109 (1889) ("Where . . . the cohabitation is illicit in its origin, the presumption is that it so continues, until a change in its character is shown by acts and circumstances strongly indicating that the connection has become matrimonial."). *But cf.* Matter of Wells, 123 App. Div. 79, 108 N. Y. Supp. 164 (4th Dep't 1908), *aff'd mem.,* 194 N. Y. 548, 87 N. E. 1129 (1909) (where the impediment, causing the meretricious relationship, was unknown to one of the parties).

[18] The claimant's evidence consisted solely of two witnesses who testified that on a few occasions during 1923 and again in 1937, claimant was referred to as the wife of the decedent-employe, but further information regarding the general repute and the actual marital status of the parties was lacking.

ments in which she referred to herself as *Mrs. Akeson,* even in the instant application, and not as the wife of the decedent-employe. Furthermore, testimony was given to the effect that Akeson had, at various times, lived with claimant and decedent-employe at their home, indicating full knowledge on the part of all parties that the relationship in question was meretricious. This contradictory evidence was further enhanced by testimony showing that the decedent-employe, in his application for employment and later for compensation, stated that he was single, thus indicating that he never considered himself married to claimant nor intended that they contract a common-law marriage. Thus in determining the validity of common-law marriages, the burden of proof rests upon the party asserting the marriage.[19] The sufficiency of this proof, particularly when one of the parties is dead, must be clear, convincing, and consistent, or it will fail,[20] as in the present case.

New York courts, in recognizing the validity of common-law marriages contracted within this jurisdiction prior to April 29, 1933, should, as in the instant case, continue to require a preponderance of positive evidence showing a valid husband and wife relationship, particularly where there is any doubt as to the contractual intent of the parties, or where there is suspicion of a contrary relationship. This reasoning, as a matter of public policy, is necessary to prevent the practice of fraud on the courts in the settling of estates, in claims for compensation, and in other instances involving the matrimonial relationship. That some hardship will result cannot be denied. However, the legislature, in abolishing common-law marriages, correctly asserted the interest of the state in the marriage contract, in order to protect that institution, the parties themselves, and the general welfare of society.

PARTNERSHIPS—LIMITED PARTNERSHIP SEPARATE ENTITY FOR PURPOSES OF PLEADING.—In an action by a limited partnership to enforce a partnership claim, defendant counterclaimed a non-partnership liability against members of the limited partnership as individuals. The Court of Appeals decided that the counterclaim was improper, *holding* that a limited partnership is a separate entity for the purposes of pleading and that partners suing in a partnership capacity are not proper adversary parties of counterclaims asserted against them in their individual capacities. *Ruzicka v. Rager,* 305 N. Y. 191, 111 N. E. 2d 878 (1953).

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[19] Matter of Wells, 276 App. Div. 822, 93 N. Y. S. 2d 354 (4th Dep't 1949), *aff'd mem.,* 301 N. Y. 796, 96 N. E. 2d 95 (1950).

[20] *See* Boyd v. Boyd, 252 N. Y. 422, 428, 169 N. E. 632, 634 (1930); Matter of Wells, *supra* note 19 at 823, 93 N. Y. S. 2d at 356.