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COMMON-LAW MARRIAGES.

Although there have been several decisions in the last few years in the State of New York declaring that the so-called common-law marriage was valid in New York since the amendment to the Domestic Relations Law in 1907, and one in particular in an appellate court¹, nevertheless it seems to have been seriously doubted by members of the judiciary and the bar whether any marriage other than one performed according to the rules prescribed by statute was valid. The fact that there has existed a serious doubt on the question is emphasized by the dissent of three judges out of seven in the Court of Appeals from the conclusion reached in a very recent case² in that Court sustaining the views enunciated in the lower courts. Before discussing the decision in this case it may be well to consider in general the nature of the common-law marriage.

According to the law of the State of New York "marriage so far as its validity is concerned continues to be a civil contract."³ The discussion as to whether marriage is really a contract seems now to be mainly academic. It is generally conceded that marriage, if it is a contract, is not merely a contract. Inasmuch as in its inception it requires voluntary mutual assent it seems contractual in its nature. But it is universally accepted that it cannot be rescinded by mutual private agreement of the parties. This is because of the general recognition that the State is a third party to every marriage and protects the society of the family, which is the foundation of the larger society of the State. Furthermore the constitutional provision concerning the impairment of the obligation of contracts does not apply to marriages, and divorce statutes are held constitutional. Thus the character of marriage as a contract is subordinated to its character as a domestic relation and to the marital status, with its rights, duties and obligations. These considerations have an important bearing on the question of the validity of common-law marriages.

It is the custom in all civilized countries that marriages be attended with solemnity and also with festivity. The reputation of the parties demands public notice of a marriage, and it is wise

¹Matter of Hinman. 147 App. Div. 452.

²*Re* Ziegler, N. Y. Court of Appeals, Feb. 27, 1917.

³Dom. Relations Law. Section 10.

that some record of marriage be had. Nevertheless there seems at all times to have been a tendency on the part of courts to regard informal marriages unattended with any ceremony as valid. There is absolutely no record of such marriages and frequently the parties are not reputed to be married. Theoretically such marriages consist of the mutual consent of the parties to become husband and wife. The maxim of the Roman law was "Nuptias non concubitus, sed consensus, facit." The present mutual consent is therefore the ultimate fact to be proved in establishing such a marriage. This fact being, however, not ordinarily susceptible of direct proof, the relations of the parties to each other are held to lead to the inference that there was at some time a mutual consent. In this connection there is the presumption of innocence and in favor of a valid marriage.⁴ Thus probably arises the popular idea of the common-law marriage that it consists of "an apparently decent and orderly cohabitation of two persons of opposite sex."⁵ It is true that in very many instances the courts seem to have lost sight of the fact that the rule by which a marriage may be presumed from cohabitation is a canon of evidence. In these cases the courts have regarded the rule one of good policy, *i. e.*, where the law finds two parties living together, unless there is something directly contradictory, the law will deem them married because of the policy of the law favoring marriages and the legitimacy of children.⁶

This question arises most distinctly in a case where two parties are living together, one of whom has an absent spouse, living and undivorced, of which the other party has knowledge. After the death of the absent spouse, unknown to either of the parties, they continue to cohabit without any new ceremony or contract. In such a case it would seem that the cohabitation of the parties would not be sufficient proof of a marriage, because having been begun illicitly the presumption of innocence would be offset. Nevertheless even in such cases there seems to be a tendency to "infer the consent to have been given the first moment when you find the parties able to contract".⁷ Whether they knew of the existence of the impediment or of its removal is entirely immaterial.⁸ If the legitimacy of offspring of the second union is concerned of course the courts are more eager to consider the union

⁴Gall *vs.* Gall, 114 N. Y. 109.

⁵Gall *vs.* Gall, *supra*.

⁶See Collins *vs.* Voorhees, 46 N. J. Eq. 411.

⁷Breadalbane case, L. R. 1 H. L., Sc. 182.

⁸Bishop on Marriage, Divorce and Separation, Vol. 1, Sec. 970.

valid. A similar situation arose in a recent New York case in which the Court goes into an exhaustive review of the law, and the validity of the second union is upheld.⁹ The conclusion arrived at seems to have been strongly induced by the presumption of legitimacy. The Court says in conclusion: "even though the marriage cannot be supported *inter partes*, there is still the presumption that its progeny is legitimate and there is nothing to countervail the presumption".¹⁰

From the above it appears that while theoretically the informal marriage consists of an actual present mutual consent to become husband and wife, the concept of the layman of the "common-law marriage" is not so far wrong, in view of the manner in which the Courts allow such consent to be proved, aided by presumptions, in the absence of any direct evidence or even of matrimonial repute. The presumptions are so strong and the zeal of the law to find matrimony rather than vice so extravagant, that the consent becomes an imaginary basis for a theory alleged to be derived from good policy. The question of the advisability of legalizing such marriages must be considered with this in view. The principles which are advanced in favor of the recognition of informal marriages are substantially to the effect that the right to marry derived from nature should not be unnecessarily circumscribed by rules or prescribed forms. Custom, however, is undoubtedly against the recognition of informal marriages, and the statement of Reeve in his work on Domestic Relations that "there is nothing in the nature of a marriage contract that is more sacred than that of other contracts"¹¹ is most astounding. Aside from any religious considerations the civil law in very many respects undeniably shows that it regards the marriage contract of infinitely greater dignity than the ordinary contract. It is not contended that the law should insist on some religious observance, but universal testimony as to the fitness of a marriage ceremony gives evidence of the custom. As is shown by the statutes prescribing forms for marriage in England and the various states the law deems it essential to good order that proper records of marriages be had. There is further the very great danger that in very many cases the law has elevated the illicit relations of a man and woman to the higher and dignified status of marriage, impressing on such relations a character never contemplated by

⁹*Re Biersack*, 159 N. Y. Supp. 519.

¹⁰*Re Biersack*, *supra*.

¹¹Reeve *Dom. Rel.*, 4th Ed. 251.

the parties. Such recognition by the law of an informal marriage by mere consent, considering the manner in which the consent may be proved, can easily become the instrument of fraud and blackmail. It may be safely said that an honest marriage without any ceremony and without any witnesses is exceedingly rare. It seems that in this respect the law has placed the marriage contract in the manner of proof even on a plane beneath the ordinary contract, for unaided by the presumptions of innocence and legitimacy, there is not, in very many cases, sufficient to infer even an apparent mutual consent.

In this country it seems to have been generally conceded, whatever may have been the law of England at various times that informal marriages are valid by common law.¹² Thus the question of the advisability of legalizing such marriage has come up for consideration generally for legislatures and not for courts, because it has been held in the United States Supreme Court that in order to invalidate the common-law marriage it must be expressly declared void by statute.¹³ In that case the effect of a statute directing that marriages "must" be solemnized according to certain prescribed forms was held to be only directory and not prohibitive, and that in the absence of a provision expressly declaring common-law marriages void, they were valid.

In New York up to January, 1902, a statute substantially similar to that discussed in the Meister case was in effect. Following that decision common-law marriages were up to that time valid in New York. In January, 1902, there went into effect an amendment of the former statute providing that thereafter no marriage contracted otherwise than as provided in the Statute should be valid for any purpose whatsoever.¹⁴ The provisions prescribing that marriages be solemnized in certain ways were re-enacted. Common-law marriages were thereafter admittedly invalid. In 1907, however, the Domestic Relations Law was again amended and the section above mentioned providing that marriages contracted otherwise than as prescribed by statute would be invalid was repealed.¹⁵ From that time up to a few days ago there has been great doubt as to the condition of the law in New York. The statute remained substantially as it was before 1902 and yet very many were not willing to concede that common-law marriages had again been rendered valid.

¹²Hallett v. Collins, 10 How. (U. S.) 181.

¹³Meister vs. Moore, 96 U. S. 76.

¹⁴L. 1901, Chap. 339, Sec. 6.

¹⁵Laws 1907, Chap. 742.

In the Ziegler case¹⁶ the whole question is one of statutory construction and it seems to have been properly decided that the section expressly prohibiting common-law marriages having been repealed it must have been the intent of the Legislature to again permit informal marriages. It is conceded in the opinion that the law was not "in all respects scientifically and plainly expressed"¹⁶ and that its meaning admits of argument. Many would have been better satisfied if the Court had gone more fully into the point raised with reference to the effect of the provision concerning written contracts of marriage. By this provision a mere private transaction is deemed a solemnization if the contract is duly acknowledged as required, and it is provided that the contract "in order to be valid" must be acknowledged before a judge of a court of record. It has been argued that the Legislature intended such mode of marriage as a substitute for the common-law marriage. It is unfortunate that there was no dissenting opinion, for if there had been, it is possible that there might have been a digression from the main point of statutory construction which would have been instructive to legislators and interesting to all.

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¹⁶*Re Ziegler, supra.*