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Myron Miller

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COMMON-LAW MARRIAGE

By MYRON MILLER*

At Common Law no formal ceremony is essential to a valid marriage, and an agreement between the parties *per verba de praesenti* to be husband and wife, there and then, constitutes a valid marriage, no other ceremony being necessary. The validity of such common-law marriage was recognized at an early date in our American jurisprudence.[1]

EARLY HISTORY

Under the canon law, the contract of marriage was regarded simply as consensual in nature, differing from other contracts only in its being indissoluble even by the consent of the parties. No ceremony or religious sacrament was required by this law, which was regarded in England as the Common Law of marriages. While the church elevated marriage to the dignity of a sacrament, it respected its natural and civil origin, and did not absolutely require the intervention of a priest. This canon law was changed by the decree of the Council of Trent in 1563, which declared void any marriage not solemnized by a priest in the presence of witnesses. But it was not within the power of an ecclesiastical decree to affect the status or civil relations of persons. This could only be affected by the supreme civil power. The church might punish by her censures those who disregarded her ordinances, but until the decree of the Council was adopted and confirmed by the civil power, the offspring of a clandestine marriage, which was ecclesiastically void, would be held as canonically legitimate. The decree never became effective in England, since that country, at the Reformation, disclaimed the doctrine of a sacrament in marriage, and retained those rules of the canon law which had their foundation, not in the sacrament nor in any religious view of the subject, but in the natural and civil contract. The canon and civil laws as they were administered in England were brought here by the early settlers of this country, and were regarded by them as parts of the Common Law, and those laws have been adopted and used in all cases to which they were applicable whenever there have been conditions existing to call for their use.[2]

THE ELEMENTS OF COMMON-LAW MARRIAGE

Consent

In order to constitute a valid common-law marriage there must be a contract or mutual agreement, that is to say a contract or mutual agreement to enter into a matrimonial relation or to become husband and wife; or, as frequently laid down, a contract or mutual agreement to enter into a matrimonial relation or to become husband and wife presently or as of the time of the contract or

* Student, University of Denver, College of Law.

[1] 35 A. J. 198, §128.

[2] 35 A. J. 201.

agreement, with resultant obligations of husband and wife. The contract or mutual agreement must be between persons capable in law of making such a contract or agreement and must contemplate a permanent union, exclusive of all others. A common-law marriage differs from a ceremonial marriage with respect to the method of expressing consent. The consent of the parties must be unequivocally evidenced, but it may be evidenced in any form or manner, either verbally, including expression either orally or in writing, or by conduct alone. No particular form of expression is necessary. It need not be manifested in the presence of witnesses.

An example of the Colorado decisions on this element is to be found in *Klipfel v. Klipfel* [3] as follows:

> A marriage simply by the agreement of the parties followed by cohabitation of the parties as husband and wife, and such other attendant circumstances as are necessary to constitute what is termed a common-law marriage may be valid and binding.

Also, actual words of agreement and consent are not always necessary to create a common-law marriage,[4] and the mutual consent may be inferred from cohabitation and repute.[5] Another case has held that when admitting the habit and repute of marriage while admitting the absence of consent and contract, the law will hold the relationship adulterous.[6] The *Radovich* case [7] states that the agreement must be in the present and not the future, as evidenced by these words:

> It is true that a mere contract for a future marriage can never amount to a common-law marriage even though followed by years of cohabitation and that a plan for a future ceremony is sometimes incompatible with a present marriage, but an agreement *in praesenti* to be now and henceforth husband and wife may be valid even though there is then an agreement for a future ceremony. And an agreement, made after a valid marriage, to have a ceremony, cannot vitiate the marriage.

Therefore, it is easily concluded that Colorado requires a consensual agreement, as confined by these cases briefly set out.

Cohabitation

Cohabitation is another one of the essentials for a valid common-law marriage. Cohabitation is not a mere gratification of sexual passion, or casual commerce between man and woman, and no presumption can elevate concubinage of whatever duration to the dignity of marriage. When the cohabitation is not clearly matrimonial (when the circumstances are ambiguous or suspicious.

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[3] 41 Colo. 40, 92 P. 26 (1907).
[4] James v. James, 97 Colo. 413, 50 P. (2d) 63 (1935).
[5] Smith v. People, 64 Colo. 290, 170 P. 959 (1918).
[6] Peters v. Peters, 73 Colo. 271, 274, 215 P. 128 (1923).
[7] Radovich v. Radovich, 84 Colo. 250, 269 P. 22 (1928).

or the evidence meager), evidence of repute is quite essential to give character to an ambiguous relation or to colorless circumstances.[8] Where the relationship between a man and woman is meretricious, it affords no basis for a common-law marriage.[9] Yet some jurisdictions hold the fact that the relations of the parties were at first illicit or meretricious does not prevent them from afterwards contracting a valid common-law marriage. Whether the parties intend to convert their meretricious relationship into a common-law marriage is determinable from their conduct.[10] Cohabitation is clearly an element in Colorado, and has been so stated from as early as 1897 and subsequent cases.[11] It is interesting to note that cohabitation is presumed to be matrimonial—a presumption of fact, not of law in Colorado.[12]

Consummation

It is generally conceded that the agreement must be consummated. A Colorado case states that admitting the existence of the contract and its consummation, and the absence of habit and repute (reputation in this use) the law will uphold the marriage relation.[13] Thus, the writer is left with the impression that consummation is an essential element in Colorado.

Repute

Although in some jurisdictions repute is deemed an element of common-law marriage, it is not one of the essentials in Colorado. In the *Klipfel* case it is stated that by general reputation and repute is meant the understanding among the neighbors and acquaintances with whom the parties associate in their daily life, that they are living together as husband and wife and not in meretricious intercourse.[14] A later Colorado case has stated that while habit and repute of marriage are not essential to the legality of the relationship, evidence thereof is always competent and in itself properly may be the basis for inferring consent to a contract of marriage.[15] It has also been stated that in cases where the contract or agreement is denied and cannot be shown, its existence may be proved by, and presumed from, evidence of cohabitation as husband and wife and general repute.[16] Therefore, it can be concluded that repute is a means of establishing the primary element of consent, and possibly the other two elements.

SOME OF THE ARGUMENTS CONCERNING COMMON-LAW MARRIAGE

As far as could be ascertained, 30 of the 48 states do not

[8] 35 A. J. 328, §221.
[9] Pickett v. Pickett, 114 Colo. 59, 161 P. (2d) 520 (1945).
[10] *Supra*, note 8.
[11] Taylor v. Taylor, 10 Colo. App. 303, 50 P. 1049 (1897); Klipfel v. Klipfel, 41 Colo. 40, 92 P. 26 (1907); Employers Mutual Liability Ins. Co. of Wis. v. Industrial Comm., 124 Colo. 68, 234 P. (2d) 901 (1951); and others.
[12] Foley v. Gavin, 76 Colo. 286, 230 P. 618 (1924).
[13] Peters v. Peters, 73 Colo. 271, 215 P. 128 (1923).
[14] *Supra*, note 11.
[15] Moffat Coal Co. v. Industrial Comm., 108 Colo. 388, 118 P. (2d) 769 (1941).
[16] Taylor v. Taylor, 10 Colo. App. 303, 50 P. 1049 (1897).

allow common-law marriages to be formed in their jurisdiction.[17] It is obvious then that the trend has been away from common-law marriages. We can ask ourselves why, and arguments for both sides quickly appear.

Those advocating common-law marriage have three main arguments:

1. Where no ceremony is employed and no record is made to attest the marriage, the protection of the parties (mainly their children) coupled with considerations of public policy require some public recognition of such an arrangement as evidence of its existence.

2. An older argument, which was re-affirmed by the General Assembly of the United Nations in its proclamation of the *Universal Declaration of Human Rights* in 1948,[18] is that men and women of full age have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. Furthermore, marriage shall be entered into only with the free and full consent of the intending spouses. It is then contended that the only consent necessary should be the parties and that if they so consent and assume the duties and obligations of marriage, that such a marriage should be sanctioned and deemed valid.

3. The third argument is the familiar argument that if the parties were together through sickness, health, etc., and actually lived in the same manner as they would have if they had gone through a ceremony, then why should the mere failing of a ceremony deprive the parties of the status of marriage.

A good argument against common-law marriage is presented in 39 A.L.R. 547, which states as follows:

> It has been said that there was a time, perhaps, when the doctrine of a liberal construction of the testimony and the slight proof of a common-law marriage subserved a useful purpose, but that time is now passed, especially since the legislature has undertaken to provide for the formal solemnization of the marriage rites and to have the fact of marriage preserved in records provided for that purpose. This ancient doctrine is alien to the ideas and customs of our people. It tends to weaken the public estimate of the sanctity of the marriage relation. It puts in doubt the certainty of the rights of inheritance. It opens the door to false pretenses of marriage and the imposition upon estates of supposititous heirs. It places honest, God-ordained matrimony and mere meretricious cohabitation too nearly on a level with each other.

Keezer [19] feels that where two persons intend to form a union for life they can have no reasonable excuse for concealing the fact

[17] Keezer, ON THE LAW OF MARRIAGE AND DIVORCE, 3rd Ed. (1946).
[18] U.N. Universal Declaration of Human Rights, Article 16 (1) (2).
[19] Keezer, MARRIAGE AND DIVORCE, 3rd Edition, §§29, 30.

from the rest of the world, for the celebration can be obtained with little expense. Then there is always difficulty in determining whether persons so loosely joined together are married or not, and it requires very unpleasant and expensive litigation to determine the question. He also feels common-law marriages furnish a means of defeating the effectiveness of reform sought to be brought about through legislation. Laws requiring pre-marital physical examinations are rendered ineffective. It cheapens marriage and gives instability to the home. Common-law marriage is seldom availed of to protect children from the bane of illegitimacy. Other effective means are being devised to protect such unfortunates. He concludes by stating that the pioneer conditions which fostered common-law marriage in the United States have disappeared.

Briefly stated, these are some of the arguments concerning common-law marriage. When one considers the prevailing system of statutory formality and records reflecting the present increase of interest on the part of the state and society in the institution of marriage, it would seem an anachronism that some eighteen American states are willing to recognize the validity of a marriage solely on the basis of the statement by a man and a woman that they are husband and wife. Such a practice must be conducive of instability in marriage and thus fosters the very evil which the statutory requirements of license issuance, registration and public administration were designed to prevent. Of necessity the standard of record for all marriages is thereby lowered. The difficulty is increased by the fact that no two states are in entire accord as to what constitutes a common-law marriage.

Nevertheless, there is a deep rooted sentiment in various parts of the country in favor of the institution. This is due to the feeling that innocent children ought not to suffer because their parents have neglected the statutory formalities and that the refusal of sanction to an informal union constitutes an invasion of the most sacred right of the individual. It is true that by means of a common-law marriage many marriages are upheld which otherwise due to some impediment would be void. Frequently, however, the judicial determination of the common law relationship comes at so late a date—often after the death of one or both of the parties, when the evidence is difficult to obtain—that there is little truth in the popular idea that it furnishes "protection". The existence of common-law marriage often opens the door to blackmail. After the death of a man it is frequently possible for his mistress to claim the rights of a common-law wife. On the other hand, if the claims based upon illicit relations are presented during the lives of the parties, a subsequent ceremonial marriage of one of them may be made bigamous and the children bastardized. The recognition of common-law marriages thus involves fundamental moral and practical dilemmas. [20] And the question remains, should common-law marriage be abolished?

[20] Encyclopedia of the Social Science, Vol. IV, P. 57.