Volume 40 | Issue 1 Article 11

December 1933

Bastardy--Common Law Marriage--What Constitutes

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found in the STATUTE OF WESTMINSTER II.[21] "The purpose of the bill of exceptions is to exhibit on the record the supposed mistakes of the trial court which do not appear on the record and could not otherwise be brought before the appellate court for review or correction if erroneous."[22]

Where no objection is made when the trial judge absents himself from the courtroom during a civil trial, courts are not in accord as to the effect of such absence but are unanimous in holding that it is the duty of the judge to be present at all phases of the trial.[23] If no objection be raised because of the trial judge being absent, it is presumed he is absent by consent of parties litigant.[24] Hence, they may be said to have waived the right to have the arguments certified to the appellate court.[25]

While the instant case was reversed because of excessiveness of the verdict, it is to be observed that the adjudication that affidavits of counsel are not a part of the record is not dicta. In view of decisions in other jurisdictions, the present adjudication in accord, and the reason and logic found in an analysis of the situation, the law on the point is undoubtedly settled.

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BASTARDY — COMMON LAW MARRIAGE — WHAT CONSTITUTES. — Seeking to be declared the heirs of one K the petitioners averred that F agreed with K to be man and wife; that she moved with her parents and family into the home of K and lived there for seven years bearing two children, the petitioners; that F with K's consent moved to an adjoining farm owned by K; that the father visited them regularly; that after two years they moved

[21] 13 EDW. I, c. 31 (1285), cited in Dryden v. Swinburne, 20 W. Va. 89, 108 (1882).

[22] Hinton Milling Co. v. New River Milling Co., *supra* n. 5, at 320; Penix v. Grafton, 86 W. Va. 278, 100 S. E. 106 (1920).

[23] Peters Branch of International Shoe Co. v. Blake, 74 Okla. 97, 176 Pac. 892, 895 (1918).

[24] Allen v. Ames College Ry. Co., 106 Iowa 602, 76 N. W. 848 (1898); Gorman v. Sioux City Stockyards, 118 Iowa 749, 92 N. W. 698 (1902).

[25] Horne v. Rogers, 110 Ga. 362, 35 S. E. 715 (1900); State v. Hammer, 116 Iowa 284, 287, 89 N. W. 1083 (1902) (*dicta*); Smith v. Sherwood, 95 Wis. 558, 70 N. W. 682 (1897). *Contra*: Brownlee v. Hewitt, 1 Mo. App. 360, 368 (1876); O'Brien v. People, 17 Colo. 561, 31 Pac. 230 (1892). But see dissent in State v. Carnagy, 106 Iowa 483, 76 N. W. 805 (1898), where at page 491 arguments against reversal where the judge was absent are presented. See also cases cited in 17 AM. AND ENG. ENCY. OF LAW (2d ed. 1900) 720.

back to the K home and lived there for four more years during which time was born a third child which died and that K paid the expenses attendant upon the birth and burial of the child; that the relationship continued for twenty-one years at the end of which time F and K mutually agreed to discontinue their marital relationship. It was alleged that F upon the advice of her father retained her maiden name for herself and her children because she was not formally married by a preacher; that K always recognized petitioners as his sons and taught them to call him "daddy". Defendants demurred. *Held*: The pleadings were insufficient; they must be construed strictly. *Fout v. Hanlin.*[1]

In West Virginia a common law marriage is not valid,[2] but issue of such a marriage are legitimate by statute[3] which is construed liberally.[4] The purpose of the statute is to prevent the penalizing of innocent children for the sins of their parents.[5]

From a continuous cohabitation and reputation may be inferred something more than a protracted liaison or an arrangement of convenience.[6] Cohabitation and reputation establish a presumption of marriage where there is no proof of an actual marriage.[7] The agreement of the marriage may be implied from the acts and conduct of the parties.[8] They need not live together continually[9] and it has been held that cohabitation for nine years with an interval during this period, with birth of two children, is sufficient to establish a valid common law marriage regardless of the ceremonial marriage attempted,[10] and if from this relationship there are children born the presumption of marriage and legitimacy applies with peculiar force.[11] Paying of expenses attendant upon

[1] 169 S. E. 743 (W. Va. 1933).
[2] Kester v. Kester, 106 W. Va. 615, 146 S. E. 625 (1929). VA. REV. CODE, c. 48, art. 2, § 1 provides what marriages shall be null and void from the time of inception, but common law marriages are nowhere mentioned; c. 42, art. 1, § 7 provides that "the issue of marriages deemed null in law or dissolved by a court shall nevertheless be legitimate." Since common law marriages are not included in the specifications of marriages null in law it is arguable that they are not within the meaning of the legitimizing statute. The argument was rejected in the principal case. The court relied on the Kester case wherein it was decided without reference to this argument that this section applied to common law marriages.
[3] W. VA. REV. CODE (1931) c. 42, art. 1, § 7.
[4] Kester v. Kester, *supra* n. 2.
[5] Stones v. Keeling, 5 Call. (9 Va.) 143 (1804).
[6] Travers v. Reinhardt, 205 U. S. 423, 27 S. Ct. 563 (1907).
[7] People v. Spencer, 199 Mich. 395, 165 N. W. 921 (1917).
[8] Adger v. Ackerman, 115 Fed. 124 (C. C. A. 8th 1902).
[9] Reifschneider v. Reifschneider, 241 Ill. 92, 89 N. E. 255 (1909).
[10] Sprung v. Morton, 182 Fed. 330 (E. D. Va. 1909).
[11] Teter v. Teter, 101 Ind. 129 (1884).

the birth of a child is strong evidence of marriage and nothing less than positive proof may impugn the validity of the relation.[12] These presumptions the court did not consider.

The retention of her maiden name by F because she thought a church wedding was necessary is not inconsistent with the alleged agreement. If the consent was consummated by the cohabitation and reputation the marriage status existed without regard to what the parties believed to be the legal effect of their agreement[13] and if the general reputation existed the law will create a common law marriage even though one of the parties purposely avoided the marriage ceremonial,[14] or even though both parties believe a ceremony is requisite to a marriage.[15] Then the common law marriage existed before the petitioners were born and the retention of the maiden name may have been an afterthought which should not have been controlling and which could not invalidate the marriage which was prior in time. The capacity to inherit exists when the child is yet in the womb[16] and a subsequent failure of a third party to give to the child the proper appellation should not be determinative.

—JOHN L. DETCH.

CRIMINAL LAW — JUDICIAL COMMENT CONSTITUTING PREJUDICIAL ERROR. — Appellant was convicted of violating the Federal Narcotic Drug Act. His conviction was affirmed by the Circuit Court of Appeals. On a writ of certiorari to the Supreme Court appellant sought a reversal on the grounds that the instruction of the trial court calling the jury's attention to the fact that the defendant had wiped his hands while giving testimony and stating that such mannerism was an indication of lying, was error. *Held,* that the instruction was prejudicial. Judgment reversed. *Quercia v. United States.*[1]

In the federal courts trial by jury according to the purest

[12] Adger v. Ackerman, *supra* n. 8.
[13] McClurkin v. McClurkin, 206 Ala. 513, 90 So. 917 (1921).
[14] Severance v. Severance, 197 Mich. 327, 163 N. W. 924 (1917).
[15] Richard v. Brehm, 73 Pa. 140 (1873).
[16] W. VA. REV. CODE (1931) c. 42, art. 1, § 8.

[1] 53 S. Ct. 698 (1933).