Bill as Introduced

2005 SESSION

05-0531
05/09

HOUSE BILL ***427***

AN ACT repealing common law marriage.

SPONSORS: Rep. Bickford, Straf 3

COMMITTEE: Judiciary

ANALYSIS

This bill repeals common law marriage in New Hampshire by repealing RSA 457:39, which provides that a couple who lives together as husband and wife for 3 years may be considered legally married.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

05-0531
05/09

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Five

AN ACT repealing common law marriage.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Repeal. RSA 457:39, relative to common law marriage, is repealed.

2 Effective Date. This act shall take effect January 1, 2006.

Speakers

SIGN UP SHEET

To Register Opinion If Not Speaking

Bill # HB 427 Date 2/8/2005

Committee Judiciary

** Please Print All Information **

Name	Address	Phone	Representing	(check one) Pro	Con
John BADZIAK	356 SLAB CITY Rd	523 8915 GRAFTON	LOIUH		X
SETH LOHN	CONCORD	731-1628	SELF		X
RICHARD MARPLE	DIST 9				X
LINDA GRIEBSCH	Concord	224-8893	NHCADSV		X

Hearing Minutes

HOUSE COMMITTEE ON JUDICIARY

PUBLIC HEARING ON HB 427

BILL TITLE: **repealing common law marriage.**

DATE: **Feb. 8, 2005**

LOB ROOM: **208** **Time Public Hearing Called to Order:** 10:40 A.M

Time Adjourned: 10:55 A.M

(please circle if present)

Committee Members: Reps. Dokmo, Soltani, Rowe, Desmarais, Mooney, Morris, Sorg, J. Wheeler, Pilliod, Buxton, N. Elliott, B. Francoeur, Mead, Hunt, Wall, Lasky, Rotter, D. Cote, Espiefs, Buzzell, Morrison and Shurtleff

Bill Sponsors: Rep. Bickford

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Rep. Bickford, sponsor, supporting
- -distributed copy of New Hampshire Common Law Statute RSA 457:39 for file
- -New Hampshire Common Law Statute was established in 1842
- -finds current law confusing and ambiguous
- -spouse who dies in a common law marriage has no way to defend him/herself
- -common law marriage is not fair to other members of the family when one spouse dies
- -most recent New Hampshire Supreme Court Case regarding common law marriage was in 1991
- -will provide committee with cites of New Hampshire Supreme Court cases regarding common law marriage
- -submitted copies of individual cases for files

*Seth Cohn – opposes

Respectfully submitted

Maureen Mooney

Rep. Maureen C. Mooney,
Clerk of the Committee

Testimony

State of New Hampshire

HOUSE OF REPRESENTATIVES

Legislative Office Building, 33 North State Street
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COMMITTEE ON JUDICIARY

To: Rep. Cynthia J. Dokmo, Chairman
House Judiciary Committee

From: Jim Cianci, Committee Researcher
House Committee Research

Date: February 10, 2005

Re: HB 427 repeal of common law marriage

The following is an overview of In re Estate of Buttrick, 134 N.H. 675 (1991) which is the most recent New Hampshire Supreme Court case concerning common law marriage, interpreting RSA 457:39. Of the ten or so cases decided under the current statute and its prior versions, it also represents the best explanation of the factors which would allow a court to find that a common law marriage exists.

The supreme court accepted the following facts as found by the probate court:

-the parties, Charlene Miller and Clifton "Kip" Buttrick, cohabitated from 1978 until Buttrick's death in 1988, living at Buttrick's home in Loudon during the winter and at three homes owned by either Miller or Buttrick on Lake Winnipesaukee during the summer. Buttrick at 675.

-after the couple began to live together, Buttrick began to suffer some financial difficulties; Miller made payments on Buttrick's back taxes, paid for living expenses (food, power, telephone, insurance), and made payments on Buttrick's bank loans. The probate court found that Miller paid approximately 75% of the couple's combined living expenses. Id. at 676.

-in 1987, the couple exchanged marriage vows before a former justice of the peace and witnessed by close friends. Both the couple and the witnesses were aware that the ceremony was unofficial, but the couple was, nevertheless, "glad to do it" - the ceremony reflecting the couple's commitment to each other. Id.

There was no challenge to the fact that the couple cohabitated and acknowledged each other as husband and wife for the requisite three years prior to Buttrick's death; the sole challenge offered by the estate was the probate court's finding that the couple were "generally reputed to be husband and wife" as required by RSA 457:39. The New Hampshire Supreme Court upheld the probate court's finding in this issue, relying on the following evidence:

-Miller's brother testified:

1. that his sister referred to Buttrick as her husband or "hubby."

2. that Miller's mother also referred to Buttrick as her son's brother –in-law" several times.

3. that mutual friends of the couple believed them to be married, not knowing otherwise until informed of the truth after Buttrick's death. Id. at 677.

-one friend referred to by Miller's brother testified that "I thought they were married soon after I met them," only learning otherwise after Buttrick's death. She further testified that she always invited them over as a couple, stating, "To me he was her husband and they were a couple." Id. at 678.

-a co-worker of Miller believed the couple to be married until she learned otherwise that the couple "had not gone through the traditional legal channels of marriage." Id.

-the couple received mail at their home addressed to "Kippy and Charlene Buttrick" and to "Kip and Charlene Buttrick." Id.

Based upon these findings by the probate court, the New Hampshire Supreme Court found that, as a matter of law, the couple was "generally reputed to be husband and wife for the three years leading to the death of Buttrick." Id. As such, the court found a valid common law marriage existed under RSA 457:39.

State of New Hampshire

HOUSE OF REPRESENTATIVES

CONCORD

Monday, February 14, 2005

Rep. David A. Bickford, 183 Brackett Road, New Durham, NH 03855
859-7899, david1@worldpath.net

To: Rep. **Dokmo**, Chair Judiciary Committee

Subject: HB 427, repealing common law marriage.

In regards to: Rep. Rowe's request for the NH Supreme Court's decisions relating to "common law marriage".

Enclosed are the NH Supreme Court's decisions relating to "common law marriage".

Also enclosed is a copy of the statute RSA 457:39 Cohabitation, etc. that HB 427 repeals and a copy of the annotations.

Please deliver this copy to Rep. Rowe.

Respectfully,

Rep. David A. Bickford

§ 457:39. Cohabitation, etc.

Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them, shall thereafter be deemed to have been legally married.

History

Source. RS 149:11. CS 158:19. GS 161:16. GL 180:16. PS 174:15. PL 286:36. RL 338:39.

CROSS REFERENCES

Validity of marriages solemnized improperly, see RSA 457:36.

Annotations

Analysis

1. Common-law marriage.
2. Application of section.
3. -Limitations.
4. Evidence of marriage.

1. Common-law marriage.

New Hampshire does not recognize the validity of common-law marriages except under specific circumstances set forth in this section. In re Buttrick, 134 N.H. 675, 597 A.2d 74 (1991).

New Hampshire does not recognize the validity of common-law marriages, except to the limited extent of this section, which provides that certain persons cohabiting prior to the death of one of them are deemed thereafter to have been legally married. Bisig v. Bisig, 124 N.H. 372, 469 A.2d 1348 (1983).

New Hampshire is a jurisdiction which does not recognize the validity of common-law marriages

except pursuant to this section to the limited extent that the status of common-law spouse obtains to the survivor of two people who had cohabited and acknowledged each other as husband and wife, and who had been generally reputed as such, for a period of three years and until the decease of one of them. Joan S. v. John S., 121 N.H. 96, 427 A.2d 498 (1981).

2. Application of section.

Cohabitation plus mutual acknowledgment as husband and wife plus general reputation as husband and wife which is continuous for a period of at least three years until dissolved by death constitutes a valid marriage by force of this section whether solemnization is irregular or absent. Delisle v. Smalley, 95 N.H. 314, 63 A.2d 240 (1949).

3. - Limitations.

This section cannot be so construed as to validate a polygamous marriage or to legitimize the offspring of such a union. Hilliard v. Baldwin, 76 N.H. 142, 80 A. 139 (1911).

This section applies only to such persons as are competent to contract matrimony together. Emerson v. Shaw, 56 N.H. 418 (1876).

4. Evidence of marriage.

Cohabitation, acknowledgment and reputation do not of themselves constitute a marriage, but are merely evidence of a marriage. Dunbarton v. Franklin, 19 N.H. 257 (1848).

Long continued cohabitation and general reputation are sufficient evidence of the marriage to make a prima facie case. Young v. Foster, 14 N.H. 114 (1843).

A marriage may be established by proof of familiarity and reputation. Pettingill v. McGregor, 12 N.H. 179 (1841).

Long continued cohabitation as husband and wife is prima facie evidence of marriage. State v. Kean, 10 N.H. 347 (1839). See also Dalton v. Bethlehem, 20 N.H. 505 (1846).

Cited. State v. Winkley, 14 N.H. 480 (1843); Fowler v. Fowler, 96 N.H. 494, 79 A.2d 24 (1951); Gray v. Gray, 117 N.H. 826, 379 A.2d 442 (1977).

Library References

NH Practice 3 N.H.P. Family Law §§ 2.11, 4.07.

7 N.H.P. Wills, Trusts & Gifts § 2-1.

11 N.H.P. Probate Law and Procedure §§ 46-9, 49-5(c).

Bar Journal For article, "Marital Agreements in New Hampshire," see 32 N.H.B.J. 169 (1991).

CJS Marriage § 21.

ALR Communication between unmarried couple living together as privileged. 4 ALR4th 422.

Property rights arising from relationship of couple cohabiting without marriage. 69 ALR5th 219.

In re ESTATE OF CLIFTON R. BUTTRICK, SR.
SUPREME COURT OF NEW HAMPSHIRE
134 N.H. 675; 597 A.2d 74; 1991 N.H. LEXIS 114
No. 90-351
October 4, 1991

Notice:

Released for Publication October 16, 1991.

Editorial Information: Prior History

Appeal from Merrimack County Probate Court.

Disposition

Affirmed.

Headnotes

New Hampshire does not recognize the validity of common law marriages except under specific circumstances set forth by statute. RSA 457:39 .

2. Husband and Wife--Common-Law Marriage--Recognition

Probate court properly found that petitioner and the decedent were deemed to have been legally married at the time of the latter's death, so that the petitioner was entitled to a spousal share of the estate of the decedent; finding was not plainly erroneous and clearly could be reasonably made, in that there was testimony by a family member and friends that the petitioner and decedent were considered as married in the community and they received mail at their home addressed to them as though they were married. RSA 567-A:4 (Supp. 1990).

Counsel *McSwiney, Semple, Bowers & Wise P.C.*, of Concord (*Maureen F. O'Neil* on the brief, and *George B. Waldron, Jr.*, orally), for the Estate of Clifton R. Buttrick, Sr.

Sulloway Hollis & Soden, of Concord (*Warren C. Nighswander* on the brief and orally), for the petitioner, Charlene L. Miller.

Judges: Johnson, J. Thayer, J., with whom Brock, C.J., joined, dissented; the others concurred.

Opinion

Opinion by: JOHNSON

{134 N.H. 675} {597 A.2d 75} This is an appeal from a decree of the Merrimack County Probate Court (*Cushing*, J.) which found that the petitioner, Charlene L. Miller, was entitled to a spousal share of the estate of Clifton R. Buttrick, Sr., by virtue of the probate court's finding that the petitioner and the decedent were "deemed to have been legally married" as of the time of Buttrick's death. RSA 457:39 . The question presented is whether there is sufficient evidence to satisfy the statute. We affirm.

The petitioner, Charlene L. Miller, and the decedent (Buttrick, also referred to as "Kip") met in late

1977 and began to date. In early 1978 they agreed to live together. For the cold weather portion of each year they shared a home, owned by Buttrick, in Loudon. During the warmer months they generally lived together in Miller's house in Meredith and Buttrick's boat house in Moultonboro, as well as at a cottage on Bear Island in Meredith owned by Miller's parents. Miller's brother estimated they spent about one-half of their time in Loudon and one-half in the Meredith, Bear Island, Winnipesaukee area. The couple lived together from 1978 until Buttrick's death on October 22, 1988, during which time they spent all but two or three nights together.

{134 N.H. 676} At the time the petitioner moved in with the decedent, he was suffering financial difficulties. Miller, upon moving in with Buttrick, made payments on his back taxes; and, during their years together, she paid for many of the couple's daily living expenses such as food, power, telephone, and insurance (business and personal). She also made payments on loans Buttrick owed to various banks. In total, she paid approximately three-quarters of their combined living expenses.

On or about August 17, 1987, on the occasion of a meeting of close friends following a funeral service reception, Miller and Buttrick exchanged marriage vows in front of a former Justice of the Peace. Although the parties appeared to be well aware that the ceremony was not official, Miller testified that Buttrick "was glad to do it" and that, as for her, "it made me feel happy and good. It was nice." Other witnesses testified that the ceremony reflected the couple's commitment and devotion to each other. The probate court found that Miller and Buttrick enjoyed "a close, strong, loving relationship."

The standard for our review in this case is set forth in RSA 567-A:4 (Supp. 1990) as follows: "The findings of fact of the judge of probate are final unless they are so plainly erroneous that such findings could not be reasonably made." Hence we must review the record of the proceedings before the probate court to determine if the findings, as made by the probate judge, could be reasonably made, given the testimony he had before him. In reviewing this record, we are guided by the rule that "[t]he trier of fact is in the best position to measure the persuasiveness and credibility of evidence and is not compelled to believe even uncontroverted evidence." *Restaurant Operators, Inc. v. Jenney*, 128 N.H. 708, 711, 519 A.2d 256, 259 (1986) (citing *93 Clearing House, Inc. v. Khoury*, 120 N.H. 346, 350, 415 A.2d 671, 674 (1980)).

The petitioner in this case asserts that she is entitled to a share of the estate of **{597 A.2d 76}** Buttrick by virtue of RSA 457:39 . This statute reads as follows:

> "457:39 *Cohabitation, etc.* Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them, shall thereafter be deemed to have been legally married."
>
> The estate does not challenge that the petitioner and the decedent cohabited and acknowledged each other as husband and wife for a period in excess of three years prior to the death of Buttrick. The **{134 N.H. 677}** sole challenge by the estate to the probate court's finding that Charlene L. Miller and Buttrick are "deemed to have been legally married" is that the couple were "not generally reputed to be" husband and wife. New Hampshire "'does not recognize the validity of common-law marriages'" except under the circumstances set forth in RSA 457:39 . *Joan S. v. John S.*, 121 N.H. 96, 98, 427 A.2d 498, 499 (1981) (quoting *Fowler v. Fowler*, 96 N.H. 494, 497, 79 A.2d 24, 27 (1951)); *see Bisig v. Bisig*, 124 N.H. 372, 375, 469 A.2d 1348, 1350 (1983).

On the sole disputed point, the probate court found, in the narrative portion of its decree, that the petitioner and the decedent "were generally known in the community where they lived and among their friends and family as husband and wife." In a specific finding requested by the petitioner, the probate court found that "Petitioner and Buttrick were generally reputed to be husband and wife for the three years leading up to the death of Buttrick on October 22, 1988." In addition, in response to requests for rulings of law, the probate court granted the following requests:

> "1. Petitioner and Buttrick, by cohabitating and acknowledging each other as husband and wife

and by being generally reputed to be such for the period of three years immediately prior to the decease of Buttrick, are deemed to have been legally married as of the decease of Buttrick. RSA 457:39 .

2. Petitioner, as the legal spouse of Buttrick, is entitled to one-half of the intestate estate. RSA 561:1(d) ."

A review of the record reveals the following testimony, which is sufficient to sustain the probate court's findings of fact and rulings of law. First, Richard Miller, brother of the petitioner, who at the time was one of the owners of the Red Hill Inn in Center Harbor, testified that Miller "referred to Mr. Buttrick as her husband. Or 'hubby,' I guess is what she called him." He further testified that "[m]y mother referred to Mr. Buttrick several times, to me, as my brother-in-law." Finally, in discussing mutual friends of the witness and of the petitioner and Buttrick (whose names were given to the probate court), all of whom frequently joined together in social events, Mr. Miller stated, "A number of them felt that, until I told them otherwise *after his death*, that they were married." (Emphasis added.) He went on, "And at least two of them that I met and have seen for the first time in two years -- I've seen them in the last two weeks and they did not know of Mr. Buttrick's death, felt that they were married. They **{134 N.H. 678}** asked how *Charlene and her husband* were." (Emphasis added.) The people he referred to were Jonathan James and Joan Christina Olitsky, both of Meredith.

Second, Joan Christina Olitsky's deposition testimony confirmed Mr. Miller's testimony. She stated, "I thought they were married soon after I met them," and she learned that they were not legally married only "when he died." She further testified that friends and family understood "[t]hat they were a couple." She continued, "I wouldn't think of inviting Charlene over to dinner without Kip . . . any more than I would invite you without your wife." Later, she stated, "To me he was her husband and they were a couple."

Third, Joan Westphal of Laconia testified, "For the first couple of months I worked at Trexler's [where Miller worked as well] I, in fact, thought that they were married." She testified that she learned at a later date through "a conversation" with Betty Trexler that "they had not gone through the traditional legal channels of marriage." She further stated that, "In fact, my roommate Susan Cohen thought **{597 A.2d 77}** that they were married, for longer than I did." The witness further testified that Miller described to her the wedding ceremony, noted above, and stated, "I felt as though she [Charlene Miller] took it very seriously and it meant very much to both of them."

Fourth, Miller and Buttrick received mail at their home addressed to "Kippy and Charlene Buttrick" and to "Kip and Charlene Buttrick." Finally, the probate court granted the following requests, which are supported by a review of the record:

"Even though Petitioner and Buttrick knew they were not legally married in the eyes of the law, they acknowledged their relationship to be that of husband and wife, conducted themselves as such and held themselves out to the public as such . . . .

Several people testified that Petitioner and Buttrick lived together as husband and wife and were reputed as such by their friends, family and acquaintances . . . ."

Based on a review of the record, we hold that the findings of the probate court, particularly the finding that "Petitioner and Buttrick were generally reputed to be husband and wife for the three years leading up to the death of Buttrick on October 22, 1988," are **{134 N.H. 679}** not "plainly erroneous" and clearly could be "reasonably made." RSA 567-A:4 (Supp. 1990).

Affirmed.

Dissent

Dissent by: THAYER

Thayer, J., dissenting:

The legal questions before us are how a community reputation is established and, more specifically, whether, utilizing a "*plainly erroneous*" standard, the trial record supports the probate court's determination that the petitioner and Mr. Buttrick were generally regarded in the community to be husband and wife. Because I disagree with my colleagues that the evidence supports a finding that the petitioner and decedent were reputed to be husband and wife, *i.e.* married, I must respectfully dissent.

Since the issue presented is fact-based, a summary of the trial evidence and findings of the probate court is necessary. It is clear, after reviewing the record, that the petitioner and Mr. Buttrick lived in Loudon during the winter and alternated among three locations on Lake Winnipesaukee during the summer. The uncontroverted evidence from family members was that they knew the petitioner and decedent were not married. It is also clear that all the witnesses from Loudon testified they knew Mr. Buttrick was not married. The record also shows that other witnesses, who had been present for a mock wedding ceremony which occurred fourteen months before Mr. Buttrick's death, testified that at least from that time forward they knew that the petitioner and decedent were not married. Karen Beyerly, a summer resident of Bear Island, testified that she considered the petitioner her best friend and that she knew the petitioner and the decedent were not married. Bill Rooney, who has a summer home on Lake Winnipesaukee, testified he also knew the petitioner and the decedent were not married.

Joan Westphal, a co-worker of the petitioner, testified that for the first few months she worked with the petitioner she thought the petitioner was married, but that she then found out from their employer that the petitioner was not married. Joan Westphal further testified that her roommate thought the petitioner and Mr. Buttrick were married for an even longer period than she did. For exactly how much longer, the record is silent.

The testimony and evidence favorable to the petitioner's position, cited by my colleagues in upholding the probate court's finding, included testimony of Richard Miller, petitioner's brother, and of Joan **{134 N.H. 680}** Christina Olitski. Richard Miller testified that while he knew his sister and Mr. Buttrick were not married, he knew a number of persons in the community who thought they were. Joan Olitski was the only one to offer first-hand evidence, however. She stated, by deposition, that she was a summer resident of Bear Island and kept her boat where petitioner worked. She further testified that petitioner had introduced the **{597 A.2d 78}** decedent to her as someone important to her, that petitioner never said the decedent was her husband, and that Olitski never noticed a wedding ring or any other indicia of marriage. She testified that, nevertheless, she thought they were married because they lived together. The only other evidence cited by the majority in support of the petitioner's position is two Christmas cards sent by Dave Piper, who was not further identified and did not testify, one in October 1987 and the other in December 1987. Mr. Piper addressed the envelopes to "Kippy and Charlene Buttrick." It is clear that both cards were sent within one year of Mr. Buttrick's death, but it is impossible to determine from the record whether Mr. Piper actually believed the petitioner and decedent to be married and, if so, whether he had believed it for a period of three years before Mr. Buttrick's death.

Reputation, as an element of common-law marriage, should be generally known and undivided in the appropriate community. *See In re Manfredi's Estate*, 159 A.2d 697, 700 (Pa. 1960) (reputation must be broad and general, not partial and divided); *see also Walter v. Walter*, 433 S.W.2d 183, 195 (Tex. Civ. App. 168); 52 Am. Jur. 2d *Marriage* § 52 , at 907 (1970). "'The mere fact that they [the alleged contracting parties] were known to a few people as man and wife is not sufficient evidence to establish marriage. Proof of reputation for such purpose must be general and not confined to a few persons in the immediate neighborhood, as the relationship may be established merely for the purpose of

deceiving others.'" *In re Manfredi's Estate*, 159 A.2d at 700 (quoting *In re Hilton's Estate*, 263 Pa. 16, 19, 106 A. 69, 70 (1919)). "[T]he community in such context is composed of those persons who have had the opportunity through social or business contact to form an opinion of the character of the person, or of the relationship, under inquiry." *In re Greenfield's Estate*, 141 S.E.2d 916, 920 (S.C. 1965); *see also Commonwealth v. Stump*, 53 Pa. 132, 135 (1866) (reputation consists of the speech of the people who have had an opportunity to know the parties).

The probate court, in reaching its determination of community reputation, must have concluded that not everyone in the community who knew the individuals and had an opinion as to their reputation **{134 N.H. 681}** had to agree unanimously or even to reach a general consensus on what that reputation was. The court also had to have concluded that the personal beliefs of the petitioner's and decedent's family, friends, neighbors, and business associates were outweighed by the testimony of the petitioner's brother, which was that some individuals thought the petitioner and the decedent were married, along with the testimony of a person who was in the community for only three months a year, and evidence of two Christmas cards, addressed to the petitioner and the decedent. The evidence does not support, as reasonable, the latter conclusion, and I would find plain error and reverse. Today's holding should be noted by those unmarried persons who are living with someone in a "loving relationship," but who do not want their companions to share in their estates.

Joanne M. Bisig v. Richard W. Bisig
SUPREME COURT OF NEW HAMPSHIRE
124 N.H. 372; 469 A.2d 1348; 1983 N.H. LEXIS 402
No. 82-443
December 29, 1983

Editorial Information: Prior History

Appeal from Rockingham County.

Disposition

Affirmed.

Headnotes

1. Divorce--Alimony--Subsequent Marriages

In *Eaton v. Eaton*, 90 N.H. 4 (1939), wherein the supreme court held that marriage terminates the right to further alimony, unless extraordinary circumstances would make it inequitable for the alimony to cease, the court reasoned that a new marriage, bestowing upon the former wife the right to support from a new source, terminated her right to support from the former husband because she ought not to have two sources of support at the same time.

2. Divorce--Alimony--Subsequent Marriages

The reasoning behind the supreme court's prior holding in *Eaton v. Eaton,* 90 N.H. 4 (1939) that marriage terminates the right to further alimony, that anew marriage bestows upon the alimony recipient the right to support from a new source and terminates her right to support from her former husband, does not apply to the case of an unmarried cohabitant receiving alimony, because unmarried cohabitants are under no legal obligation to support each other.

3. Husband and Wife--Common Law Marriage--Generally

Generally, a person who cohabits with another acquires no rights in the accumulations of the other.

4. Husband and Wife--Separation and Support--Generally

The right to "spousal" support is predicated upon the existence of a valid marriage.

5. Divorce--Alimony--Subsequent Marriages

Since various benefits, including legal rights and duties, arise from marriage which do not arise from cohabitation, and since the right to support does not arise from cohabitation, the mere resemblance of cohabitation to marriage does not require that alimony to an unwed cohabitant be suspended; it would be incongruous for a court to impose on the parties to cohabitation the same consequences of marriage that they sought to avoid when they entered into their arrangement.

6. Husband and Wife--Common Law Marriage--Recognition

New Hampshire does not recognize the validity of common-law marriages, except to the limited extent provided in the statute which provides that certain persons cohabiting prior to the death of one of them are

deemed thereafter to have been legally married. RSA 457:39 .

7. Divorce--Alimony--Subsequent Marriages

Where former husband filed a motion seeking suspension or reduction of alimony payments on the basis that his former wife was cohabiting with a third person, the master properly determined that the former wife and the third person were not living together as man and wife, since the conditions of the statute governing marriage, which are required for a marriage to be recognized in New Hampshire, had not been met. RSA ch. 457.

8. Divorce--Alimony--Subsequent Marriages

The supreme court holds that cohabitation by a former spouse does not automatically *suspend*the right to alimony.

9. Divorce--Alimony--Discretion

New Hampshire's alimony statute merely directs the courts to award alimony as they deem "just;" therefore notwithstanding the numerous considerations involved, which considerations apply to the original award as well as to any modifications thereof, trial courts have broad discretion in matters involving alimony. RSA 458:19 (Supp. 1983).

10. Divorce--Alimony--Modification or Vacation

To obtain a modification of an alimony award, a substantial change in circumstances in the financial condition or needs of the parties must be shown.

11. Divorce--Alimony--Modification or Vacation

Cohabitation by an alimony recipient is not, in and of itself, a ground upon which alimony may be modified or suspended, but it is to be considered a substantial change in circumstances if it substantially changes the financial condition or needs of the recipient so that a continuance of the original decree would be unjust.

12. Divorce--Alimony--Modification or Vacation

A modification of an alimony award will be set aside only if upon the evidence it clearly appears that there has been an abuse of discretion.

13. Divorce--Alimony--Modification or Vacation

Where former husband filed a motion seeking suspension or reduction of alimony payments on the basis that his former wife was cohabiting with a third person, and where the master ordered that the alimony payments be reduced during the period in which the former wife was cohabiting with the third person, based on the master's finding that the former husband had alleged and proved substantial changed circumstances of the former wife consisting of her cohabitation with a third person and the latter's financial assistance to her, the supreme court could not say that the master abused his discretion since the record showed that the master went beyond the mere fact of cohabitation and considered the change in the financial condition or needs of the former wife, and the evidence supported the master's recommendation.

14. Divorce--Alimony--Modification or Vacation

Absent a provision incorporated into a divorce decree to the effect that alimony will be suspended or reduced if the recipient engages in a relationship resembling marriage, the trial court may not suspend or modify alimony payments based upon cohabitation by the alimony recipient unless there is a substantial change in the economic circumstances of the recipient.

15. Divorce--Alimony--Particular Cases

The supreme court found no merit in a former wife's argument that the trial court's determination that the

facts surrounding her cohabitation with a third person constituted a substantial change in circumstances, warranting a reduction of alimony payments during the period of cohabitation from $1,500 to $1,100 per month, violated her constitutional right of freedom of association.

Counsel *Nadeau Professional Offices*, of Rye (*J. P. Nadeau* on the brief and orally), for the plaintiff.

Sanders & McDermott P.A., of Hampton (*Lawrence M. Edelman* on the brief, and *Patricia McKee* orally), for the defendant.

Judges: Douglas, J. All concurred. (Souter, J., did not sit.)

Opinion

Opinion by: DOUGLAS

{124 N.H. 374} {469 A.2d 1349} The issue in this appeal is whether cohabitation by a former spouse is a ground for relieving the other former spouse of his or her obligation to pay alimony. We hold that cohabitation is not a ground, in and of itself, for suspending or reducing the obligation to pay alimony.

The parties were divorced by decree of the superior court in June 1981. The decree provided that the defendant, Richard W. Bisig, was to pay the plaintiff, Joanne M. Bisig, alimony in the sum of $ 1,500 per month until she died or remarried. In April 1982, the defendant moved to suspend alimony on the basis that the plaintiff was cohabiting with a third person. The defendant claimed that the facts surrounding the cohabitation constituted a substantial change in circumstances warranting either suspension of alimony or, in the alternative, reduction of the alimony award. After a hearing, the Master (*Larry B. Pletcher*, Esq.) recommended that "said alimony payment shall be reduced to $ 1,100 per month during such period as [p]laintiff cohabits with Donald Mayer. . . ." The Superior Court (*Bean*, J.) approved the master's recommendation and ordered that the alimony payments be reduced to $ 1,100 per month. The plaintiff appealed, and argues here that the reduction was unjust because it was based solely upon her cohabitation with a third person. The defendant alleges that the trial court erred in declining to suspend payment of alimony during the period of cohabitation.

The defendant urges this court to adopt a rule prescribing, in the absence of special circumstances, *suspension* of alimony during a period of unmarried cohabitation. His argument is that since under *Eaton v. Eaton*, 90 N.H. 4, 3 A.2d 832 (1939), alimony is terminated upon the solemnization of a subsequent marriage, irrespective of the new spouse's income, and since cohabitation as in the instant case so closely resembles marriage, a rule like that in *Eaton* should be adopted and applied for unmarried cohabitation.

In *Eaton*, we held that marriage terminates the right to further alimony, unless extraordinary circumstances would make it inequitable for the alimony to cease. *Id.* at 7, 3 A.2d at 834. We reasoned that the "new marriage, bestowing upon [the former wife] **{124 N.H. 375}** the right to support from a new source, terminates her right to support from the [former husband]. . . . [S]he ought not to have two supports at the same time." *Id.* This reasoning does not apply to the case of an unmarried cohabitant receiving alimony, because unmarried cohabitants are under no legal obligation to support each other. "Generally, a person who cohabits with another . . . acquires no rights in the accumulations of the other." Douglas, 3 New Hampshire Practice, Family Law § 53 (1982). The right to "spousal" support is predicated upon the existence of a valid marriage.

Various benefits, including legal rights and duties, arise from marriage which do not arise from cohabitation. This court recognized this principle when it stated: "[c]ouples enter into . . . unstructured domestic relationships in order to avoid the rights and responsibilities that the State **{469 A.2d 1350}** imposes on the marital relationship." *Tapley v. Tapley*, 122 N.H. 727, 730, 449 A.2d 1218, 1220 (1982). The right to support does not arise from cohabitation. Hence, the mere resemblance of cohabitation to marriage does not require that alimony be suspended. "It would be incongruous for a

court to impose on the parties the same consequences of marriage that they . . . sought to avoid when they entered into their arrangement." *Id.*

There can be no claim of marriage in the case at bar. New Hampshire "does not recognize the validity of common-law marriages," *Joan S. v. John S.*, 121 N.H. 96, 98, 427 A.2d 498, 499 (1981) (quoting *Fowler v. Fowler*, 96 N.H. 494, 497, 79 A.2d 24, 27 (1951)), except to the limited extent provided in RSA 457:39 . Generally, for marriage to be recognized in New Hampshire, the conditions of RSA chapter 457 must be met. Here, the statutory conditions have not been met. Thus, the master correctly determined that the "[p]laintiff and Donald Mayer are not living together as man and wife as alleged."

We hold that cohabitation does not automatically *suspend* the right to alimony and now consider whether cohabitation can be a ground for *reducing* alimony. New Hampshire's alimony statute does not include criteria for determining alimony, but merely directs the courts to award alimony as they deem "just." RSA 458:19 (Supp. 1983). "Notwithstanding the numerous considerations involved, trial courts have broad discretion in matters involving alimony. . . ." *Marsh v. Marsh*, 123 N.H. 448, 451, 462 A.2d 126, 128 (1983). "These considerations apply to the original award as well as to any modification thereof. . . ." *Fortuna v. Fortuna*, 103 N.H. 547, 548, 176 A.2d 708, 709 (1961). To obtain a modification of an alimony award, a substantial change in circumstances in the financial **{124 N.H. 376}** condition or needs of the parties must be shown. *Id.* at 549, 176 A.2d at 710.

Cohabitation, in and of itself, is not a ground upon which alimony may be modified or suspended. Cohabitation by an alimony recipient is, however, to be considered a substantial change in circumstance if it substantially changes the financial condition or needs of the recipient so that a continuance of the original decree would be unjust.

In the instant case, the master found that the defendant "alleged and proved substantial changed circumstances of the [p]laintiff consisting of her present cohabitation with Donald Mayer and Donald Mayer's financial assistance to [p]laintiff for rent, utilities, food and travel and entertainment." He then ordered that the alimony payments be reduced during the period in which the plaintiff cohabits with Mr. Mayer. "[A] modification will be set aside only if upon the evidence it clearly appears that there has been an abuse of discretion." *Fortuna v. Fortuna*, 103 N.H. 547, 548, 176 A.2d 708, 709 (1961). The record demonstrates that the master went beyond the mere fact of cohabitation and considered the change in the financial condition or needs of the plaintiff. The evidence supports the master's recommendation and, consequently, we cannot say that the master abused his discretion.

The parties' intent, as expressed in their stipulations which were incorporated into the divorce decree, is clear. The plaintiff is to receive alimony as long as she lives and does not remarry. The parties could have avoided a court appearance by agreeing that alimony would be suspended or reduced if the recipient engaged in a relationship resembling marriage by using words such as: "if she enters into a quasi-conjugal living arrangement." Absent such a provision, a court may not suspend or modify alimony payments unless there is a substantial change in the economic circumstances of the recipient.

We find no merit in the plaintiff's argument that the trial court's determination violates her constitutional right of freedom of association.

Affirmed.

Joan S. v. John S.
SUPREME COURT OF NEW HAMPSHIRE
121 N.H. 96; 427 A.2d 498; 1981 N.H. LEXIS 263
No. 80-083
March 6, 1981

Editorial Information: Prior History

Appeal from Hillsborough County.

Disposition

Affirmed.

Headnotes

1. Husband and Wife--Common-Law Marriage--Recognition

New Hampshire is a jurisdiction which does not recognize the validity of common-law marriages except to the limited extent that the status of common-law spouse obtains to the survivor of two people who had cohabited and acknowledged each other as husband and wife, and who had been generally reputed as such, for a period of three years and until the decease of one of them. RSA 457:39 .

2. Husband and Wife--Common-Law Marriage--Recognition

Where plaintiff appealed from superior court order dismissing her petition requesting the court to impose alimony, child support, and other obligations on defendant with whom she had lived without benefit of marriage from 1963 or 1964 until June 1979, and requested the court to decree the relationship of the parties a void marriage and impose on defendant the obligations and restrictions of a marriage, trial court properly dismissed her claim, because plaintiff did not come within the terms of the limited exception to the general nonrecognition of common-law marriages in New Hampshire. RSA 457:39 .

3. Husband and Wife--Common-Law Marriage--Recognition

If a common-law marriage is to be more broadly recognized in New Hampshire, a request for such a determination should be addressed to the legislature.

4. Divorce--Generally

Right to a divorce is predicated upon the existence of a valid marriage between the parties, and in the absence of a valid marriage, the court may not exercise its statutory powers incident to a divorce.

5. Declaratory Judgments--Availability of Remedy--Property Settlements

Even without alleging a valid or de facto marriage, either party to an unstructured domestic arrangement may bring a bill in equity or petition for declaratory judgment to determine equitably the rights of the parties in particular property.

6. Contracts--Enforceability of Agreements

Although transfers of property or money based on illicit sexual relations have fared badly in the courts, a court will enforce an action in contract, if one can be shown to exist, to the extent that it is not founded

upon the consideration of meretricious sexual relations.

7. Partition--Basis for Partition

Where plaintiff appealed from superior court order dismissing her petition requesting the court to impose alimony, child support, and other obligations on defendant with whom she had lived without benefit of marriage, and requesting that their real estate be partitioned, petition was properly dismissed for plaintiff's failure to state her interest and to name all the interested parties as required by statute relating to partition of real estate. RSA 538:2.

8. Limitation of Actions--Paternity

Where plaintiff appealed from superior court order dismissing her petition requesting the court to impose alimony, child support, and other obligations on defendant with whom she had lived without benefit of marriage, and requesting defendant be ordered to pay support for both herself and the children, request for relief was properly denied for plaintiff's failure to comply with the statute of limitations governing proceedings under the Uniform Act on Paternity. RSA 168-A:12 (Supp. 1979).

Counsel *Craig, Wenners, Craig & McDowell*, of Manchester (*Thomas E. Craig* on the brief and orally), for the plaintiff.

Hanrahan, Brennan & Michael, of Manchester (*John W. Hanrahan* on the brief and orally), for the defendant.

Judges: King, J. Bois, J., did not sit; the others concurred.

Opinion

Opinion by: KING

{121 N.H. 97} {427 A.2d 498} The plaintiff, Joan S., appeals from an order of the Hillsborough County Superior Court dismissing her petition requesting the **{427 A.2d 499}** court to impose alimony, child support, and other obligations on the defendant, John S. The petition alleged the following facts. The plaintiff and the defendant lived together without benefit of marriage continuously from 1963 or 1964 until the filing of the petition in June 1979. The parties have four children, ranging in age from ten to fourteen. Both the plaintiff, who is unemployed, and the children are totally dependent for their support upon the defendant. The defendant operates his own business with an estimated equity of $ 80,000. The parties' homestead is in their joint names, as are certain bank accounts. The parties also own certain household furnishings and personal property. Their automobiles are owned separately.

The petition requested the court to decree the relationship of the parties a void marriage and "impose the obligations and restrictions upon the defendant pursuant to the statutory laws of the State . . . with regards to alimony, child support, property division and injunctions . . . as may be just and equitable. . . ." In the alternative, the plaintiff requested that the defendant be enjoined from entering the homestead, pursuant to RSA 498:2 . The plaintiff further requested that the defendant be ordered to pay support for **{121 N.H. 98}** both herself and the children pursuant to RSA ch. 168-A and for herself on the basis of assumpsit and quantum meruit. Finally, the plaintiff requested that the parties' property be divided between them pursuant to RSA ch. 538.

In answer to the petition, John S. alleged that he supports, and will continue to support, his minor children and that he acknowledges the interest of Joan S. in the jointly owned real estate and any joint bank accounts. The defendant alleged, however, that his business is owned by him alone and was so owned before he had any acquaintance with Joan S. He also alleged that Joan S. was always aware that he never intended to marry her. The Trial Court (*Bean*, J.) granted the defendant's motion to dismiss the petition.

The question presented to this court is whether the petition of Joan S. alleges grounds for relief. We

hold that it does not and affirm the dismissal of the petition.

The primary contention of Joan S. is that the relationship between the parties should be considered a marriage. She seeks to dissolve this "marriage" under RSA ch. 458. The brief description of the nature of the case in the notice of appeal states: "[T]his case involves a determination of the rights and liabilities of the parties to a common law marriage." The specific question to be raised on appeal is the "[r]ights and liabilities of the parties to a common law marriage." A secondary request of Joan S. is to have this court apply New Hampshire law concerning the disposition of marital property in a divorce proceeding to the disposition of property of parties who have cohabited and raised a family but have never married.

"New Hampshire is a 'jurisdiction which does not recognize the validity of common-law marriages' . . . except to the limited extent provided by [RSA 457:39]." *Fowler v. Fowler*, 96 N.H. 494, 497, 79 A.2d 24, 27 (1951), *citing Delisle v. Smalley*, 95 N.H. 314, 315, 63 A.2d 240, 240 (1950). RSA 457:39 provides that the status of "common law" spouse obtains only as to the survivor of two people who had cohabited and acknowledged each other as husband and wife, and who had been generally reputed as such, for a period of three years and until the decease of one of them. The statute has been in effect in substantially the same form since 1842. *See* RS 149:11 (1842). Because the plaintiff does not come within the terms of RSA 457:39 , it was proper for the trial court to dismiss her claim based upon the "marriage" of the parties. If a **{121 N.H. 99}** common-law marriage is to be more broadly recognized in this State, a request for such a determination should be addressed to the legislature.

The plaintiff asks us, however, to follow the reasoning of *In re Marriage of Cary*, 34 Cal. App. 3d 345, 353, 109 Cal. Rptr. 862, 866 (1973), and to apply a divorce-like property settlement to this case. This we decline to do. The right to a divorce is predicated upon the existence of a valid **{427 A.2d 500}** marriage between the parties. *Brown v. Brown*, 234 Ga. 300, 302, 215 S.E.2d 671, 673 (1975); 27A C.J.S. *Divorce* § 1 (1959). In the absence of a valid marriage, the court may not exercise its statutory powers incident to a divorce. *See Whitney v. Whitney*, 192 Okla. 174, 177, 134 P.2d 357, 361 (1942). We find the reasoning in *Cary* unpersuasive, and we note that the California Supreme Court has itself expressly rejected this reasoning in *Marvin v. Marvin*, 134 Cal Rptr. 815, 829, 557 P.2d 106, 120 (1976).

Our refusal to apply RSA ch. 458 to the dissolution of non-marital living arrangements does not, however, prevent equitable adjustment of the rights of the parties. *See id.* at 819, 557 P.2d at 110; *Du Vall v. Du Vall*, 543 P.2d 766, 767 (Okla. Ct. App. 1975). Even without alleging a valid or "de facto" marriage, either party may bring a bill in equity or petition for declaratory judgment to determine equitably the rights of the parties in particular property. *See* RSA 498:1 ; RSA 491:22 . Furthermore, although "[t]ransfers of property or money based on illicit sexual relations have fared badly in the courts," *Levesque v. Cote*, 102 N.H. 297, 299, 156 A.2d 120, 122 (1959), a court will enforce an action in contract, if one can be shown to exist, to the extent that it is not founded upon the consideration of meretricious sexual relations. *Marvin v. Marvin*, 134 Cal. Rptr. at 819, 557 P.2d at 110; *see Levesque v. Cote, supra* at 299-300, 156 A.2d at 122; *Gauthier v. Laing*, 96 N.H. 80, 84, 70 A.2d 207, 209-10 (1950). In this case, however, the plaintiff's petition failed to raise adequately either of these theories of relief.

With respect to the plaintiff's request that the real estate be partitioned, we conclude that the petition was properly dismissed for the plaintiff's failure to state her interest and to name all the interested parties as required by RSA 538:2. Likewise, the plaintiff's request for relief under RSA ch. 168-A was properly **{121 N.H. 100}** denied for her failure to comply with the statute of limitations. RSA 168-A:12 (Supp. 1979).

In the appeal before us, we are not concerned with the broad social ramifications of the property rights of *de facto* spouses in what are commonly referred to as unstructured domestic arrangements. The

case before us arises solely from the plaintiff's pleadings, all of the prayers of which were properly dismissed by the trial court upon motions of the defendant. While there may be viable theories for legal and equitable relief available to Joan S., they were not presented to the trial court.

We affirm the dismissal of the petition by the trial court with the understanding that our decision does not bar the commencement of an appropriate proceeding for legal and equitable relief, provided it is commenced within sixty days from the date of this decision. Otherwise, any further proceeding is barred.

Affirmed.

Marion De Lisle, Ex'x Estate of Mary Lavigne, Ap'ee v. Albert E. Smalley, Ap't.
SUPREME COURT OF NEW HAMPSHIRE
95 N.H. 314; 63 A.2d 240; 1949 N.H. LEXIS 160
No. 3772
January 5, 1949, Decided

Disposition

Judgment for the appellant nisi.
All concurred.

Headnotes

Cohabitation plus mutual acknowledgment as husband and wife plus general reputation as husband and wife which is continuous for a period of at least three years until dissolved by death constitutes a valid marriage by force of the statute (R. L., *c.* 338, *s.* 39) whether solemnization is irregular or absent.

Whether justice requires an amendment to the record transferred to the Supreme Court on an agreed statement of facts is determinable by the Trial Court.

Probate appeal, from a decree that appellant had not statutory interest in the decedent's estate. Appellant filed in the Probate Court a waiver of the provisions of the decedent's will and release of his estate by curtesy and his homestead right under R. L., *c.* 359, *ss.* 12-14 and claimed his distributive share of the estate as husband of the testatrix. Appellee denied that appellant was the husband of the decedent. "On the facts found and recited in the opinion of the Probate Court, all questions of law are reserved and transferred without ruling" by *Grimes*, J.

The following facts were found by the Probate Court:

"Briefly summed up, the undisputed evidence is to the effect that from late 1935 until her death on July 27, 1946 the testatrix and Mr. Smalley cohabited and acknowledged each other as husband and wife. She assumed the name of Smalley and during the entire period both were generally reputed in the community to be husband and wife, it being admitted, however, that no actual marriage ceremony was ever performed. In this connection, claimant Smalley testified that the understanding between them was that they were to get married' but that the marriage never took place, it being always postponed week after week, month after month.'" The Probate Court further found "that there was no marriage in fact" and "for the above and other reasons this court finds as a fact and rules as a matter of law that the claimant is not the husband of the deceased."

Counsel

Joseph J. Betley (by brief and orally), for the appellant.
Ernest R. D'Amours (by brief), for the appellee.

Opinion

Opinion by: KENISON

{95 N.H. 315} {63 A.2d 240}

New Hampshire has been considered and classed as a jurisdiction which does not recognize the validity of common-law marriages. *Dunbarton* v. *Franklin*, 19 N.H. 257; *Norcross* v. *Norcross*, 155 Mass. 425; 39 A. L. R. 538, 551, 29 N.E. 506. The question presented in this case is whether our cohabitation statute operates to give limited recognition to such marriages under certain definite and strict conditions stated therein. The statute provides that "Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for **{63 A.2d 241}** the period of three years, and until the decease of one of them, shall thereafter be deemed to have been legally married." R. L., *c.* 338, *s.* 39. This statute has been in force substantially in its present form since 1842. R. S., *c.* 149, *s.* 11. There has been no definitive construction of the statute. In the *Dunbarton* case *supra*, it was held that it could not apply retroactively and in *Hilliard* v. *Baldwin*, 76 N.H. 142, it was decided that the statute did not validate polygamous or void marriages. R. L., *c.* 339, *s.* 1; R. L., *c.* 338, *ss.* 1-3.

Another section of the marriage law provides that "evidence of acknowledgment, cohabitation, and reputation is competent proof of marriage." R. L., *c.* 338, *s.* 40. In this section there is no requisite period of time while *s.* 39 requires "the period of three years, and until the decease of one of them." It is unlikely that these two statutes would employ totally dissimilar phraseology to accomplish a single result. The word "deemed" in *s.* 39 is a stronger word of finality (*State* v. *Cohen*, 73 N.H. 543, 547, 63 A. 928) than the evidential phrase "competent proof" in *s.* 40. Cohabitation plus mutual acknowledgment as husband and wife plus general reputation as husband and wife which is continuous for a period of at least three years until dissolved by death constitutes a valid marriage by force of the statute (*s.* 39) whether solemnization is irregular (R. L., *c.* 338, *s.* 36) or absent. Cf. *Franklyn* v. *Franklyn*, 93 N.H. 90, 35 A.2d 801.

The case is transferred here without ruling "on the facts found and recited in the opinion of the Probate Court." It is stated therein in effect that there was the requisite statutory cohabitation, acknowledgment and reputation "from late 1935 until her death on July 27, 1946." Upon that record the appellant was "deemed to have been legally married" and is entitled to his distributive share as a husband under R. L., *c.* 359, *ss.* 12-14.

There appears from the briefs to be some dispute whether certain declarations in the decedent's will may be referred to as showing lack of mutual acknowledgment as husband and wife prior to her decease. **{95 N.H. 316}** Since the will is not part of the case, we cannot speculate on its effect. Whether justice requires amendment or reconsideration for that purpose will be determined by the Superior Court. *Venus Corporation* v. *Hanover Store*, 88 N.H. 478, 479, 189 A. 352; R. L., *c.* 398, *s.* 1; *Bull* v. *Gowing*, 85 N.H. 483, 486, 160 A. 475.

Judgment for the appellant nisi.

All concurred.

Hilliard v. Baldwin & a.
SUPREME COURT OF NEW HAMPSHIRE
76 N.H. 142; 80 A. 139; 1911 N.H. LEXIS 171
[NO NUMBER IN ORIGINAL]
May 2, 1911

Disposition

Judgment for the defendants.
All concurred.

Headnotes

The statute providing that persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of three years and until the decease of one of them, shall thereafter be deemed to have been legally married, cannot be so construed as to validate a polygamous marriage or to legitimize the offspring of such a union.

Trespass *quare clausum fregit.* Plea, the general issue with a brief statement alleging soil and freehold. Transferred from the December term, 1910, of the superior court by *Pike*, J.

Only two questions were in dispute respecting the title to the land. The jury were excused from returning a general verdict, but were required to answer the questions, which they did. Their answers and other facts are stated in the opinion.

Counsel

Sullivan & Daley and *Drew, Shurtleff & Morris*, for the plaintiff.
Jason H. Dudley, Herbert I. Goss, and *Jesse F. Libby*, for the defendants.

Opinion

Opinion by: BINGHAM

{76 N.H. 142} {80 A. 139} This is an action of trespass *quare clausum fregit.* The defendants pleaded the general issue, with a brief statement alleging soil and freehold. Both parties claimed to own the same tract of land. Upon the issue of title the burden of proof was upon the plaintiff. *Tabor* v. *Judd*, 62 N.H. 288. George Merrill is the source from which each party derives title. He died, intestate, June 28, 1892, leaving surviving him Alice (his alleged widow), two children, and Daniel Merrill, his father. Subsequently to his death, the plaintiff purchased the property from Alice and the children, and the defendants purchased it from Daniel. If upon the death of George the title descended to Alice and the children, or to the children alone, the plaintiff is the legal owner of the land. If it descended to Daniel, then the defendants are the owners.

January 11, 1872, Alice married Warren Heath, who is now alive. December 21, 1879, without having procured a divorce, she married George Merrill and lived with him as his wife down to the time of his death, a period of about twelve years. The two children were the result of this union.

{76 N.H. 143} "All marriages prohibited by law on account of the consanguinity or affinity of the

parties, or where either has a former wife or husband living, knowing such wife or husband to be alive, if solemnized in this state,... [are] absolutely void without any decree of divorce or other legal process." P.S., *c.* 175, *s.* 1. The plaintiff concedes that the marriage into which George and Alice entered in 1879 was illegal and void. This concession involves an admission that Warren was alive at the time the marriage was solemnized, that the contracting parties knew that he was alive, and that Alice was not divorced from him. If it were true that the contracting parties did not then know that Warren was alive and honestly believed him to be dead, and that that fact, if proved, might present the question whether the marriage was voidable and not void, it is unnecessary in this case to consider it, as the plaintiff, upon whom the burden of the issue rested, has failed to establish the fact. It would seem, however, from the decision in *Emerson* v. *Shaw*, 56 N.H. 418, 420, as hereinafter pointed out, that the marriage would nevertheless be regarded as void.

The plaintiff rests his case upon section 15, chapter 174, of the Public Statutes, which reads as follows: "Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of three years, and until the decease of one of them, shall thereafter be deemed to have been legally married." His contention is (it being found that George and Alice cohabited and acknowledged each other to be husband and wife, and were generally reputed to be such for the period of three years and until George died) that they must be deemed legally married; that the statute was enacted to quiet inheritances, and entitled Alice to inherit from George as his widow and the children to inherit from him as though they were legitimate. The defendants' contention is that the statute--conceding it to be a statute of repose to quiet inheritances--was only intended to apply to cases where there was no legal obstacle disqualifying the parties from entering into a valid marriage.

In interpreting the statute it is necessary to take into consideration the state of the law, both statutory and common, upon the subject of marriage and inheritance, as it existed at the time the statute was passed, and such subsequent enactments as may lend aid in ascertaining its meaning. It was first enacted in 1842. R.S., *c.* 149, *s.* 11. At the same time laws were passed providing that "all marriages prohibited by law on account of the consanguinity **{76 N.H. 144}** or affinity of the parties... shall, if solemnized in this state, be absolutely void without any decree of divorce or other legal process" (R.S. *c.* 148, *s.* 1); that such marriages shall be "incestuous," and the issue "illegitimate." R.S., *c.* 147, *s.* 3; P.S., *c.* 174, *s.* 3. At common law, marriages within the prohibited degrees of consanguinity and affinity were voidable only, and until set aside were practically **{80 A. 140}** valid. *Hayes* v. *Rollins*, 68 N.H. 191; 1 Bish. Mar. Div. & Sep., *ss.* 259, 271. The children of such a marriage, in the absence of a decree of nullity, were treated as legitimate; and the wife, if she survived her husband, was entitled to dower. *Ib., s.* 272. Its validity could be inquired into only in a proceeding to obtain a decree of nullity, and that had to be procured during the lives of both the contracting parties to preclude the wife and children from inheriting. *Ib., ss.* 259, 277. But since the enactment of the above statutes, marriages of persons within the prohibited degrees are held to be absolutely void; the husband or wife takes nothing in the other's estate, and the children are illegitimate. *Hayes* v. *Rollins*, 68 N.H. 191; *Bickford* v. *Bickford*, 74 N.H. 448, 453; P.S., *c.* 174, *s.* 3. As it appears that the legislature, in 1842, reversed the rule of the common law as to incestuous marriages by making them void, not voidable, and by making the children illegitimate, it is highly improbable that the same legislature, in the enactment of the statute upon which the plaintiff relies, intended to legalize the incestuous relation provided the parties continued in it for three years and until one of them died, or to make the children legitimate.

Again, at common law, a marriage was held to be absolutely void if at the time it was entered into either party had a former wife or husband living. *Heffner* v. *Heffner*, 23 Pa. 104; *Smith*, J., in *Emerson* v. *Shaw*, 56 N.H. 418, 420; 1 Bish. Mar. Div. & Sep., *ss.* 717, 719, 721. Neither party could inherit from the other (1 Bish. Mar. Div. & Sep., *s.* 724), and their children, being illegitimate, could not inherit from father or mother. *Morgan* v. *Perry*, 51 N.H. 559; *Bickford* v. *Bickford*, 74 N.H. 448; *Fenton* v. *Reed*, 4 Johns. 52; 1 Salk. 121; 1 Bl. Com. 436; 2 Kent 79; 1 Bish. Mar. Div. & Sep., *s.* 725. As to such marriages, section 1, chapter 175, of the Public Statutes (R.S., *c.* 148, *s.* 1), is a reenactment of

the common law, to the extent, at least, that it declares them to be absolutely void. *Bickford* v. *Bickford*, 74 N.H. 448, 453. And even since the enactment of this statute, such a marriage has been held to be absolutely void in a case where it was not made to appear **{76 N.H. 145}** that the parties, at the time their marriage was solemnized, knew the husband or wife by the prior marriage was alive. *Emerson* v. *Shaw* (1876), 56 N.H. 418, 420.

This was the state of the law on the subject down to 1845, when the legislature, thinking no doubt that it visited too great a punishment upon innocent children born out of lawful wedlock, enacted a statute providing that "bastards and their issue shall be heirs of the mother," and that "her real estate shall descend and her personal estate shall be distributed... in equal shares to her legitimate and illegitimate children and their issue." Laws 1845, *c.* 238, *ss.* 1, 2; P.S., *c.* 196, *ss.* 4, 5. And in 1860, in further recognition of this situation, it was enacted that "where the parents of children born before marriage afterward intermarry, and recognize such children as their own, such children shall inherit equally with other children under the statute of distribution, and shall be deemed legitimate." Laws 1860, *c.* 2343, *s.* 1; P.S., *c.* 174, *s.* 18; *Morgan* v. *Perry*, 51 N.H. 559. This statute gives a child born out of wedlock, whose parents afterward marry and recognize him as their own, full rights of inheritance and makes him legitimate. It does not in terms state that the father and mother shall be legally capable of entering into the marriage relation in order to confer the benefits of the act upon their children, but such an intent is clearly implied; and if they are not legally capable of marrying, that the *status* of the child shall be governed by the provisions of the act of 1845, under which he is illegitimate and is only allowed to inherit from his mother (*Goodwin* v. *Colby*, 64 N.H. 401; P.S., *c.* 196, *s.* 4), except in cases arising since the amendment of 1905, which permits him to inherit from her kindred. Laws 1905, *c.* 4.

It is apparent from what has been said that the statute under which the plaintiff claims cannot be given the construction for which he contends; that the result of such a holding would be either that Alice, by living in adultery with George, effected a divorce from Warren, or if this is not so, that she must be regarded as the legal wife of both and entitled to inherit from both. That parties cannot divorce themselves by their own acts, or be divorced by a legislative fiat or anything short of a judicial decree, are propositions too well recognized to require discussion. And that it was intended in the enactment of the law that a person standing in the relation which Alice did to George and Warren should be regarded as the legal wife of both and entitled to inherit from both, is altogether too improbable to merit serious consideration.

{76 N.H. 146} Neither can it be presumed that the act contemplates that children born of parents whose marriage is absolutely void because it was either incestuous or polygamous should be regarded as legitimate, especially when in one case a statute expressly declares them to be illegitimate and in the other they are so regarded at common law. If the legislature intended to accomplish such a result, it is reasonable to suppose it would have used unequivocal language declaring such an intent.

In compliance with the order made in the superior court, there must be,

Judgment for the defendants.

All concurred.

Emerson v. Shaw
SUPREME COURT OF NEW HAMPSHIRE
56 N.H. 418; 1876 N.H. LEXIS 162
[NO NUMBER IN ORIGINAL]
March 22, 1876

Disposition

Exceptions overruled.

Headnotes

Proof of marriage by cohabitation.

On the trial of an action to recover damage for loss of service and expense occasioned to the plaintiff by an assault made by the defendant upon A B, who was alleged to be the plaintiff's wife--*Held.* that evidence that A B was, at the time of the assault, the lawful wife of another man was properly received, and showed a bar to the action.

From Merrimack Circuit Court.

Action, to recover damages by reason of the loss of service and expense occasioned to the plaintiff on account of an assault made upon the plaintiff's wife by the defendant.

Under the act of 1874, this action was referred, and at this term the referee reported the following facts proved before him:

Some time in the month of May, 1867, the plaintiff went through the form of a marriage with Elvira Emerson, named in the plaintiff's declaration as his wife, before a properly authorized person, sufficient to constitute them husband and wife had both of them been then free to contract that relation; that such form of marriage was followed by cohabitation of the parties, and an acknowledgment of each other as husband and wife, and a reputation to some extent that such relation existed between them up to the time of the hearing. Evidence was offered on the part of the defendant tending to show that the said Elvira Emerson was at said time, and ever since has been, incapable of contracting said relation with the plaintiff, by reason of her then, and ever since, and now, having a legal husband, one George W. Pillsbury. The plaintiff objected to the introduction of this evidence; but the referee overruled the objection, and finds that, on September 30, 1854, said Elvira Emerson was lawfully married to one George W. Pillsbury, who was her legal husband at the time of her said form of marriage with the plaintiff, and also at the time the cause of this action is alleged to have occurred, and is such at the time of this hearing. The defendant then moved for a nonsuit; but the referee *pro forma* denied the motion,--and, if the court hold that this action can be maintained on the foregoing statement of facts, he finds the defendant guilty in manner and form as is alleged against him in the plaintiff's declaration, and assesses the damages in the sum of fifteen dollars, and costs of reference taxed at ten dollars and fifty cents, and costs of court to be taxed by the court: otherwise, he finds for the defendant in the sum of seventy-five cents, costs of reference and costs of court to be taxed by the court.

At this term the defendant moved for judgment in his favor, which motion the court granted, and the plaintiff excepted.

The questions of law thereupon arising were transferred to this court for determination by Stanley, J.

Counsel

Barnard, for the plaintiff.
Pike & Blodgett, for the defendant.

Opinion

Opinion by: LADD

{56 N.H. 419} The construction of Gen. Stats., ch. 161, secs. 16, 17, contended for by the plaintiff, would assuredly be, as the defendant says, to legalize bigamy. This extraordinary consequence is avoided, if we understand that the acts have reference only to such persons as are competent to contract matrimony together; and that this must be so is quite too plain for argument. A contrary view would be no less absurd than to hold that when the legislature point out the mode in which any other contract may be entered into, and the evidence by which it must be sustained (as, for example, in case of the statutes of frauds), they thereby remove all disqualifications, such as infancy, coverture, and the like, and empower all persons to bind themselves by such contracts as they may enter into with the formalities prescribed. These acts were, beyond question, intended for those who might legally **{56 N.H. 420}** become husband and wife, and not to encourage and protect adultery by pointing out a mode in which an existing matrimonial tie might be dissolved at the option of the parties, and another equally yielding and temporary be substituted in its place.

The evidence entirely fails to support the declaration. The fault was not matter of abatement, and there should be judgment on the report for the defendant.

Cushing, C. J. This case cannot be controlled by sec. 16, ch. 161, Gen. Stats., because that section requires that the cohabitation should have continued until the decease of one of the parties. It might be that, after the decease of one of the parties, the policy of the law would not deem it necessary to inflict upon other innocent persons--as, for instance, the children of such a marriage--the unfortunate consequences--as, for instance, illegitimacy--of their parents' transgression, but would deem persons so cohabiting to have been legally married, *i. e.*, treat the survivor and the children as if there had been a legal marriage. It may be that the policy of the law would not deprive children of the inheritance of their father's property in favor of collateral, perhaps remote, heirs. There is no pretence for applying the statute here, because neither party is dead.

By section 17, the evidence mentioned in that section is made competent, but not conclusive; and it may therefore be, as in the present case, rebutted.

Smith, J. The plaintiff seeks to recover damages for the loss of service and expense occasioned by an assault upon his wife by the defendant. The evidence shows that the marriage ceremony was performed in May, 1867, and that they have lived together as husband and wife since that time, acknowledging each other as such, and being generally reputed as such; but the evidence also shows that Mrs. Emerson had been previously married to one Pillsbury, who is still alive, and from whom she has never been divorced. Her subsequent marriage with Emerson was, therefore, absolutely null and void--2 Kent Com. 79; and it plainly follows that he cannot maintain this action. The relation of husband and wife, which is so essential in order to maintain this action, does not exist. It is true, that the statutes make acknowledgment, cohabitation, and reputation evidence of marriage; but there is no ground for arguing that such evidence is conclusive. It is evidence to be received, but subject to be explained and rebutted, as any other evidence is. To parties capable of contracting marriage, it affords an opportunity to supply proof of marriage when the witnesses of the marriage ceremony may be dead or unknown; but to hold that evidence that either party had been previously married, and that the marriage had never been dissolved, cannot be received, would be lending the assistance of the law to

conceal the crime of bigamy. To adopt the language of the defendant's counsel,--"The statute does not authorize bigamy, nor offer a premium and cloak to adultery by way of estoppel."

Exceptions overruled.

Young vs. Foster & a.
SUPERIOR COURT OF JUDICATURE
14 N.H. 114; 1843 N.H. LEXIS 23
[NO NUMBER IN ORIGINAL]
August, 1843

Disposition

Judgment for the plaintiff.

Headnotes

Long continued cohabitation and general reputation are sufficient evidence of the marriage to make a *prima facie* case on behalf of a claimant of dower.

Dower, wherein the plaintiff, as the widow of Caleb Young, deceased, demanded her dower in lot No. 14, on the west side of the Ammonoosuck, river in Lisbon.

The case was submitted to the court upon a statement of facts. The defendant Foster resides upon the place which is owned by him and Dyer Hibbard, the other defendant, jointly. Hibbard does not live on the farm, and did not at the time of the commencement of the suit.

The plaintiff's right to recover was admitted, provided it is competent to prove her marriage with Caleb Young, by evidence of long continued cohabitation and general reputation of the marriage; and provided, that the defendants were properly and legally joined.

Counsel

Goodall & Morrison, for the plaintiff.

Hibbard, for the defendants.

Goodall & Morrison, for the plaintiff. The questions that arise upon the case made are, 1. Are the defendants properly joined in the action?

2. Is evidence of long continued cohabitation and general reputation of marriage *competent* to prove the marriage of the demandant?

It would be a sufficient answer to the first question to say, that if the defendants *are not* rightly joined, the exception should have been taken by plea in abatement, and cannot prevail upon a case made. *1* Me. *Rep. 30, Fosdick* vs. *Gooding; 5 N.H. 222, Morse* vs. *Calley.*

But the statute provides that the writ may be sued out against the "person or persons" who have or "claim to have" the "freehold." The case finds that the defendants are joint owners, and it is to be taken that they are the persons claiming the freehold. They are, therefore, the very persons who should and must be joined.

The second question we think is equally clear, both upon principle and authority.

Starkie says, "It seems to be a general rule in all civil personal actions, except for criminal conversation, that general reputation and cohabitation are sufficient evidence of marriage." *2 Stark. Ev. 939.* He does not state that the rule applies to any but personal actions; but the cases referred to by him contain no such restriction, and other authorities show that none exists. *Peake's Ev. 330; 2 Phil. Ev. 285; Bull. N. P. 27; Morris*

vs. *Miller, 4 Burr. 2057; Birt* vs. *Barlow, 1 Doug. 171; Fleming* vs. *Fleming, 4 Bing. 266; Leader* vs. *Barry, 1 Esp. 353; Newburyport* vs. *Boothbay, 9 Mass. 414; Purcell* vs. *Purcell, 4 Hen. & Mun. 507; Fenton* vs. *Reed, 4 Johns. R. 52; Jackson* vs. *Claw, 18 Johns. 346.*

If the question were *res integra*, it should be decided in the same manner. No reason can be given why courts should make any distinction in this respect between real and personal actions. In but very few cases in which the marriage took place many years since, was a record made and kept of the marriage. The witnesses in many instances are dead, and in other cases in parts unknown. So that if direct proof of the marriage should now be required in actions of dower, it would deprive many worthy claimants of all remedy for what they are legally and equitably entitled to recover.

Hibbard, for the defendants. In certain cases it is settled that evidence of long cohabitation and general reputation is competent to prove the fact of marriage; as in questions of pedigree, suits against husband for goods bought by wife during coverture, and some other civil suits.

There are other cases, both civil and criminal, where this kind of evidence is not admissible to prove the fact of marriage.

1. In an action for crim. con. the proof of marriage must be made by record of some authentic character, or by the testimony of witnesses present. "Mere proof of cohabitation and general reputation will not be sufficient evidence of marriage." *1 Saunders on Pl. & Ev. 396.*

2. So on an indictment for adultery. *Commonwealth* vs. *Norcross, 9 Mass. 492.*

3. So on an indictment for lascivious cohabitation. *Commonwealth* vs. *Littlejohn, 15 Mass. 163.*

4. In a libel for a divorce for the cause of adultery, the libellant offered to prove a second marriage of the respondent, and the court refused to admit the certificate of the minister who solemnized the second marriage, as sufficient evidence of the fact, but required the testimony of witnesses under oath. *Ellis* vs. *Ellis, 11 Mass. 92.*

5. So in certain real suits in a few particular instances, viz.: Where issue is joined on the record on the legality of marriage, *or its immediate consequences*, general bastardy, or on the fact of deprivation or profession. In those cases, upon the issue so formed, the mode of trying the question is by reference to the ordinary, and his certificate, when returned and entered upon the record in the temporal courts, is a perpetual and conclusive evidence against all the world on that point. *1 Phil. Ev. 341.*

The action of dower is not mentioned in any of these authorities as one in which evidence of this kind may or may not be admitted. It is difficult to conceive what real action would more legitimately and necessarily come within the reason of this rule, than an action for dower.

This is a question as to one of the "immediate consequences" mentioned by Phillips.

This right of dower is one which the widow claims to have solely by virtue of her alleged marriage. The marriage is the substantial matter of her case; it is one of the matters which are necessary to be distinctly alleged in her declaration, and which, as we think, should be proved by direct evidence.

That there has been a distinction made against the admission of this kind of evidence in certain *real actions*, see the following authorities: *Crouch & Ux.* vs. *Eveleth, 15 Mass. 305; Big. Dig. 321*, referring to various cases; *1* Me. *Ev. § 27, 207.*

Opinion

Opinion by: PARKER

{14 N.H. 117}

A marriage may be proved by the evidence of cohabitation, where the woman is supplied with goods during the cohabitation on the credit of the husband. *Greenleaf's Evid. 27, 207.* In such cases the evidence is conclusive. The woman has acquired a credit by being held out to the world as a wife, and he who has thus enabled her to obtain credit in his name cannot be permitted **{14 N.H. 118}** to deny his liability for the goods purchased, as that would operate as a fraud upon the vendor.

Other authorities carry the principle still farther, and hold that cohabitation and reputation are sufficient evidence of marriage in all cases except in prosecutions for bigamy and adultery, and actions for damages for crim. con. See *3 Cow. & Hill's Phil. Ev. 1147.*

In cases where no credit has been given by reason of a holding out, the evidence is not conclusive, but may be rebutted.

There are some authorities, however, which hold, (and it is contended in this case,) that such evidence is not admissible except where a credit has been given; and we have considered the question as one of principle, disconnected from the direct authorities upon it.

If cohabitation and reputation are such evidence of a marriage that tradesmen may act upon that evidence, and deliver articles to the reputed wife, it has of itself some force and effect to prove that a marriage actually exists. If it were not so, no person could be authorized to act upon such a state of facts.

If it be conclusive evidence against the husband in certain cases, it may well be evidence for him, *prima facie* at least. It has of itself the same significance in his hands as in those of another. The fact that a party relying upon it has parted with his goods, has no tendency of itself to prove the marriage. It only shows that the husband should not be permitted to contradict the evidence which has been offered to prove it.

Again: If it be evidence against the husband, because it has some tendency to show that a marriage in fact existed, it is evidence against those claiming under him. And there seems to be no good reason why it should not be evidence when adduced by the wife or any other person. It is evidence, because of its tendency to prove the fact itself, being the usual result of that fact. **{14 N.H. 119}**

Possession is evidence of title, whether of real or personal property, because, as a general rule, it accompanies the title, although there are many exceptions to this.

So, acting in an office without opposition is *prima facie* evidence of a right so to act, &c.

Were not the authorities so strong it might well be questioned whether this evidence of cohabitation and reputation ought not to be admitted in cases of crim. con., and in prosecutions for adultery and bigamy, for the simple reason that it has a legitimate tendency to prove the fact. If larceny, and robbery, and murder, may be proved by circumstantial evidence, the enquiry naturally arises why cases of crim. con. &c. may not be so also. It is very clear that they may except in the matter of proof of the marriage. And it is not easy to perceive why an exception should be made in favor of defendants in such cases. If they have nothing better to rely upon for a defence than the non-existence of a marriage, they certainly could not complain of being put to show it, after *prima facie* evidence had been adduced on the other side.

Judgment for the plaintiff.

Pettingill vs. McGregor & ux
SUPERIOR COURT OF JUDICATURE
12 N.H. 179; 1841 N.H. LEXIS 27
[NO NUMBER IN ORIGINAL]
December , 1841

Disposition

New trial.

Headnotes

A commenced an action of assumpsit against B. and C., alleging a promise on the part of B. to marry the plaintiff on the 20th day of June, 1840, and a refusal to fulfil that promise, and an intermarriage between B. and C. on the 22d day of June, 1840. For the purpose of showing the fact of the marriage of B. and C., the plaintiff proved that he had been attentive to B. for two or three years, and that B. made preparation for marriage with the plaintiff on June 21st, 1840, and that on the night or evening of the 19th day of said June, B left her father's house, and on the 28th day of the same June B. and C. returned together to H., and on that day attended the church together where B's friends worshipped. That a few days after their return, B. resided with F., who was a sister of C., and afterwards with S., in the vicinity of B.'s parents. While B. was boarding with S., C. usually attended B. to church on the Sabbath day, and sat with her, and dined with her on that day, and in several instances was seen leaving S.'s at a very early hour, after having spent the evening with B. A sister of B., whose deposition was offered in evidence in the case, spoke of B. as the wife of C.--B., also, being enquired of, at the place where she resided, by the officer who served the writ in this action, where her husband C. was, replied, that he was employed on the rail road, and he was shown to have been so employed--*Held*, that the foregoing facts furnished competent and sufficient evidence to be submitted to the jury, from which they might infer a marriage between B. and C.

Where a writ is not properly indorsed before service, the court have no authority to permit the same to be subsequently indorsed, without the assent of the defendant.

But where a writ is properly indorsed before service, it is the uniform practice in this state, and the court are fully authorized to permit, any such change of endorsers as in their judgment the exigency of the case or as justice may seem to require.

Where a plaintiff resides within this state, and employs an attorney in his behalf to commence an action for him, such attorney is fully authorized by the employment to place the name of the plaintiff upon the writ as indorser, and to bind him as such.

Accordingly, in such case, if the indorsement be thus: "A., plaintiff, by his attorney B.," in this state the plaintiff is regarded as the indorser, and the attorney is not personally bound.

Where a plaintiff resides out of this state, he is not authorized by the statute to indorse his own writ; neither is his attorney authorized, by reason of his employment, to place his name upon a writ as indorser.

Where a plaintiff resided out of the state, and his attorneys, who resided within this state, before the service of the writ, indorsed it, thus: "A. B.; plaintiff, by his attorneys, C. & D.," it was *held*, that the attorneys, having no authority to bind the plaintiff, bound themselves as endorsers, and that the writ was

therefore properly and sufficiently indorsed--*Held*, also, that the court in that case were authorized to allow a new indorser to be furnished instead of those who originally indorsed the writ.

Syllabus

Assumpsit. The action was commenced on June 22, 1840.The plaintiff, in his first count, declared upon a promise of the defendant Emily, alleged to have been made May 1, 1840, to marry the plaintiff on the 20th day of June, then next, and a refusal of Emily to perform that promise, and alleged an intermarriage of the defendants on June 22, 1840.In the second count, the plaintiff also declared upon a promise of Emily to marry him, and alleged that he had remained unmarried, &c., and that Emily had refused to perform her promise, but had intermarried with the other defendant, McGregor.Upon the trial, which was had upon the general issue, the plaintiff offered evidence tending to show a promise of said Emily, as set forth in the declaration.For the purpose of proving the marriage of the defendants, the plaintiff offered the following evidence, viz: Said Pettingill had for two or three years been attentive to Emily, and Emily had made preparations for her marriage (as the witnesses supposed) to the plaintiff, in June, 1840, by preparing dresses and furniture, and having certificates of the publication of bans, and she invited a sister of her's to her wedding, which was to have taken place on the 21st day of June, 1840. On the evening or night of the 19th day of said June, the defendant, Emily, left her father's house, and on the 28th day of said June, Emily, and McGregor, the other defendant, returned together to Hampton Falls, and on that day attended church together at the church where her friends worshipped. A few days after their return, Emily resided with a Mrs. Fife, who was a sister of the defendant, John McGregor, and afterwards with a Mrs. Sanborn, in the vicinity of her parents. While she was boarding at Mrs. Sanborn's, said John usually attended her to church on the Sabbath day, and sat with her, and dined with her on that day; and he was in several instances seen leaving said Sanborn's at a very early hour, after having spent the evening with Emily. A sister of Emily spoke of her as the wife of John McGregor, although she said that neither of the defendants had informed her that they were married. And the officer who made service of the writ testified that he called at a house where Emily lived, and enquired for her husband, and was informed by her that he was at work on the rail-road; and it was proved that said McGregor was employed upon said rail-road as a contractor.It was objected by the defendant, that the foregoing evidence offered by the plaintiff was not competent to be submitted to the jury, to sustain the allegation of the marriage, and it was so ruled by the court; and a verdict was thereupon returned for the defendant, and the plaintiff moved to set the same aside, for alleged misdirection of the court in the matter aforesaid.At the commencement of the trial, the defendant's counsel moved the court to quash the writ for matter apparent upon the record, and called the attention of the court to the fact that the plaintiff was described as "of Salisbury, in the county of Essex and state of Massachusetts," and that the writ was indorsed as follows, viz., "Joseph M. Pettingill, by his attorneys, Bell & Tuck."On motion of the plaintiff's counsel, the court ruled that the plaintiff should be allowed to furnish an indorser. To that ruling the defendant's counsel excepted. The case was thereupon transferred to this court, for their decision of the several questions arising upon the foregoing case.

Counsel

Bell & Tuck, for the plaintiff.

Hackett, for the defendants.

Bell & Tuck, for the plaintiff. The purpose of proving the marriage was, to show that there was no misjoinder of the defendants, and not to show a breach of the contract. It was offered and relied upon for that purpose only.

The record described the defendants as husband and wife, and the existence of that relation was not denied upon the record. It was therefore admitted, and was not open to controversy upon the general issue, which was the plea pleaded in this case. Even without the evidence offered and rejected by the court, the action was well maintained, and the plaintiff entitled to a verdict.

But at all events, the facts offered to be proved sufficiently showed cohabitation of the parties, and reputation of marriage, and that was sufficient and

competent evidence of the fact of marriage, in this case. *Cayford's Case, 7* Me. *57; Commonwealth* vs. *Littlejohn & a., 15 Mass. R. 163; Roscoe's Crim. Ev. 239; 2 Stark. Ev. 653; Morris* vs. *Miller, 4 Burrow's R. 2057; East's P. C. 470; 2 Stark. Ev. 1105, 6-8; Doe* vs. *Fleming, 4 Bing. 266.*

Hackett, for the defendants. The writ was not indorsed according to the provisions of the statute requiring original writs, where the plaintiff resides out of the state, to be indorsed by some responsible person resident within this state.

In this case, the plaintiff, at the time of commencing his action, resided in Massachusetts, and is set up in the writ as being a resident of that state. The writ was indorsed thus: "John M. Pettingill, by his attorneys, Bell & Tuck."

Now this is to be regarded as the indorsement of the plaintiff. It certainly was not the indorsement of Bell & Tuck; and no personal obligation was intended to have been assumed by them, nor was any in fact imposed by it upon them.

But Pettingill could not himself be an indorser, such as the statute requires. His residence out of the state disqualified him to become an indorser at all. The writ, then, is to be regarded as not having been indorsed at all before its service.

The motion to quash the writ, for want of a sufficient legal indorser, should have prevailed in the court below.

The evidence offered to prove the marriage was clearly insufficient.

The reply of Emily to the enquiry made of her by the officer who served the writ, was the only material evidence offered, and that was certainly insufficient evidence alone from which to infer a marriage.

The verdict returned in this case is right, and must be sustained, unless the evidence offered went directly to prove acts inconsistent with the honor of the defendant Emily.

Bell & Tuck, in reply. The motion to quash the writ came too late.

The evidence offered in relation to the marriage, proved either marriage or seduction; and the acts relied upon having taken place in the presence of friends, are inconsistent with any other reasonable supposition than that of marriage. The question is as to the tendency of the evidence, and not as to its weight.

Opinion

Opinion by: WOODS

{12 N.H. 184}

The first question presented by this case is, whether the evidence offered by the plaintiff, for the purpose of proving the marriage of the defendants, was competent for that purpose, or had any legal tendency to prove that fact?

In all civil actions, except for criminal conversation, cohabitation, or reputation, is sufficient evidence of marriage. *2 Starkie's Ev. 939; 2 Phill. Ev. 207, (2d Ed.;) Birt* vs. *Barlow, Doug. 170;* Me. *Ev. 119.* Did the facts offered in evidence by the plaintiff tend to prove the fact of the cohabitation of the defendants as man and wife, or did the facts, offered to be proved, furnish evidence of a reputation of that relation? If so, it was clearly competent for the purpose of proving the marriage.

It appears that prior to, and until the evening or night of, June 19, 1840, the defendant, Emily, resided with her father, and on that evening, or night, she left her father's house, and on Sunday, the 28th day of said June, the said Emily and the other defendant, McGregor, returned together to Hampton Falls, and on that day attended together the church where her friends worshipped--that a few days after their return, Emily resided with a Mrs. Fife, who was the sister of the defendant, John McGregor, and

afterwards with a Mrs. Sanborn, in the vicinity of her parents--that while she was boarding at said Sanborn's said John usually attended her to church on the Sabbath day, and sat with her, and dined with her upon that day, and that he was in several instances seen leaving said Sanborn's at a very early hour, after having spent the evening with Emily. **{12 N.H. 185}**

The court are of opinion that these facts so far tended to prove the fact of the cohabitation of the parties and reputation of the relation of man and wife, as to have entitled the plaintiff to submit the same to the consideration of the jury, as evidence of the fact of marriage. The evidence offered was evidence of facts from which the marriage might have been inferred. The fact that she left her father's house, and went and resided with a sister of the defendant, John McGregor, in the immediate neighborhood of the father's residence; was conducted there by McGregor, and soon after was boarding at the house of Mrs. Sanborn, also in the immediate neighborhood of her father's family; the fact that McGregor, while Emily was boarding with Mrs. Sanborn, usually attended her to church, and sat with her, and dined with her upon the Sabbath day, and in several instances spent the evening and the night with Emily at the house at which she boarded; and that on the same day after her return with him to Hampton-Falls he attended church with her; that his attentions to her were of the most open and unreserved character, in the presence and in the dwellings of friends, without complaint on their part; that she was spoken of as the wife of McGregor by her sister, who would be likely to know the character of the familiarity existing between the defendants; and that when inquired of by the officer who served the writ where her husband, the said McGregor, was, the defendant, Emily, replied that he was employed on the rail-road--tend to prove the cohabitation of the defendants and the character of that cohabitation, as well as the manner in which the relation subsisting between them must have been regarded by their friends and the public.

The familiarity that existed, and its character, must have been known, not only to his, but also to her friends, and was, without complaint, tolerated by all; and so far as the character of the relation existing between the parties was shown to have been spoken of at all, which was by Emily and her**{12 N.H. 186}** sister, the relation of husband and wife was admitted and recognized.

The point of view in which the parties are regarded by their relations, and the manner in which they are received and treated and spoken of by them, are proper matters to be submitted to a jury upon the question under consideration. Me. *Ev.* 119, § 107. In 2 *Phillips' Ev. 286*, it is said, that, even in a case in which it is proved that the marriage was originally void for want of license, or the regular publication of bans, "there may be sufficient ground for proving a subsequent legal marriage, from the cohabitation of the parties as man and wife, and from the manner in which they were always received by their relations. Whether such presumption is reasonable, the jury are to determine, upon all the various circumstances of the case."

In the case of *Wilkinson* vs. *Payne, 4 Term. R. 468* , in which a question arose respecting the marriage of the plaintiff, and it clearly appeared that the marriage when it took place was not a legal and valid marriage, Grose, J., who tried the cause, left it to the jury to presume a subsequent legal marriage, from the fact that the plaintiff and his wife had always been received and treated by the defendant, and by all his family, to the time of her death, as man and wife; and the jury having found the existence of a legal marriage upon exceptions taken the verdict was sustained by the unanimous opinion of the court of king's bench. The court in that case held, that there was some ground for a presumption of a subsequent legal marriage. Lord Kenyon, C. J., remarked, in pronouncing the judgment of the court, "Though the first marriage was defective, a subsequent one might have taken place. The parties cohabited together for a length of time, and were treated by the defendant himself as man and wife. These circumstances afforded a ground on which the jury presumed a subsequent marriage."

We deem the evidence slight; but, upon mature consideration, are clearly of the opinion that it has some tendency, **{12 N.H. 187}** and so is legally competent to prove the fact of marriage. A criminal intimacy is not to be inferred from the facts proved, when they are at least equally, if not more,

consistent with the supposition of the lawful and innocent intercourse of the defendants. In fact, it is not suggested by the counsel for the defendants that the intimacy was other than lawful, but only that the intimacy and attentions proved, did not evidence marriage. In *Doe* vs. *Fleming, 4 Bing. 266* , Park, J., said, "the general rule is, that reputation is sufficient evidence of marriage." Best, C. J., said: "The rule has never been doubted. It appeared on the trial that the mother of the lessor of the plaintiff was received into society as a respectable woman, and under such circumstances improper conduct ought not to be presumed."

The court are of the opinion, therefore, that the evidence offered by the plaintiff should have been submitted to the jury, and that the ruling of the court rejecting the same was erroneous.

But another question arises upon this case, involving the power of the court below to permit the plaintiff, under the circumstances disclosed by the case, to furnish an indorser of the writ after the service thereof, and after the entry of the action in the court, at the time of the trial of the action. By the laws of this state, original writs are required to be indorsed by some responsible person resident within this state, in case the plaintiff is not an inhabitant of this state, and the indorsement to be made upon the writ before its service. And in case the plaintiff is a resident within the state, then the writ is required to be indorsed before its service, by the plaintiff or his attorney. 1 *N.H. Laws 91.*

It is believed to have been long the well settled and uniform practice in this state, in all cases where writs were properly indorsed at the time of service, for the court to exercise the power of permitting such changes of the endorsers, as the exigencies of the case, or as justice might seem to require--the court taking care at all times to see that no prejudice**{12 N.H. 188}** should result to either party from the change thus permitted. This has been done, as well upon the application of defendants as of plaintiffs.

In *Whitcher* vs. *Whitcher, 10 N.H. 440* , in discussing the question of the proper form of the copy of the writ to be filed as a substitute for a lost writ, Parker, C. J., remarks that "the new writ to be filed is no more than a copy of the old one. There may be a new indorser, for it is competent for the court to give leave to change the indorsement, and to require a new one." "The indorser of a writ is no more discharged by the loss of it, than the maker of a note is discharged by its loss." Here, then, as I understand it, is a clear recognition of the rule of law before stated. The foundation of the opinion in this respect is not stated; but it must have been, as I suppose, the practice which was recognized by the chief justice, as amounting to a rule of law. In that case the writ is assumed to have been properly indorsed originally, and the power of the court to give leave to change such indorsement is distinctly recognized and asserted.

In the case of *Farnum* vs. *Bell, 3 N.H. 72* , Chief Justice Richardson remarks: "We are aware that, by our practice, permission is frequently given to indorse a writ after the action is entered; and we entertain no doubt of the validity of such an indorsement, for no court would in such a case permit the indorser to show that the writ was indorsed after it had been served, for the purpose of avoiding his contract." Here, too, is recognized the power as well as the practice of the court to allow new indorsements of writs, after service, and even after entry in court. The remarks of the chief justice probably had reference only to the case where the writ was originally properly indorsed, and to the well established and familiar rule of practice in such cases, and were not intended to go beyond that case. The language is, however, broad enough to reach and embrace also the case of a writ not indorsed at all before service, but does not necessarily go to that extent. This case of Farnum vs. **{12 N.H. 189}** Bell was *scire facias* against bail; and the defendant demurred, and assigned as a cause, that it was not alleged in the writ of *scire facias* that the name of the defendant was indorsed upon the original writ before it was served, and the demurrer was sustained. And the remarks quoted followed the opinion stating that result in regard to the demurrer. It is not necessary, as I have said, that the language of the judge should be considered as going beyond the case of a writ originally well indorsed; for even in that case the new indorsement which is allowed is after the service and entry in court; and if not obligatory when made, it clearly should not be allowed.

If this question were now presented for the first time, or if it might be treated as an open question, whether the court have the power to order the discharge of the liability of the original indorser, and to permit another to be substituted in his stead; certain it is, that reasons of weight would not be wanting to be urged against the exercise of any such authority, without the assent of the party to whom and for whose benefit the obligation of indorser is assumed. It is the duty of courts of justice ordinarily to enforce, rather than to destroy the obligation of contracts. But however that may be, the usage which exists had its foundation in a desire and purpose to promote the ends of justice. It often happened that the indorser of the writ, who had no other interest than what arose from the indorsement itself, was a material witness in the cause; and through inadvertence and ignorance of the effect of the indorsement in creating an interest in himself in the result of the action, and thus rendering him an incompetent witness, his testimony was forever lost to the party calling him, if he must remain still the indorser of the writ. To relieve from embarrassments of this sort, the practice was resorted to, to permit a change of endorsers, the court always having a careful regard to the entire responsibility of the substituted indorser. No prejudice is known to have resulted to any one from this rule of practice, but great good**{12 N.H. 190}** must in many cases have been the consequence of it; and from that consideration, and its long and uniform application in practice, it must now be regarded as among the well settled rules of law in this state, which we are not disposed to disturb. And this practice thus established tolerates no disregard of the express provisions of the statute, as would a practice of allowing plaintiffs to indorse writs that are not indorsed before service. It relieves the plaintiff from no burdens imposed, or prerequisites required, by law to the right to require the defendant to come into court and answer to the action.

We are not aware that the practice has gone to the extent, and it is not believed that the court possesses the power, where the writ is not indorsed at the time of its service, to permit a plaintiff to cause the writ to be indorsed at any subsequent period, without the assent of the defendant. The plaintiff in such action is not properly in court at all. The indorsement of the writ is as much a prerequisite to the right to call upon the defendant to answer to the action, as is the proper service and notice of the pendency of the action. The writ is not in fact properly in court, in contemplation of law. There is good reason why the indorsement should be made, and that it should be done before the defendant is compelled to answer to the merits of the action. The time of the indorsement is material. It is made so by the statute. A defect of the character under consideration is good ground of plea in abatement, or, upon motion, to quash. To permit any such indorsement of a writ, after service, not before indorsed, and the plaintiff thereupon to stand well in court, as though his writ had been originally well indorsed, would be a virtual repeal of the provisions of the statute requiring such indorsement to be made before the service of the writ, or at least would render the same wholly nugatory and inoperative. No precedent for it is found in our Reports, or known to us in practice; and we think any such exercise of power in the court would be wholly unwarranted. **{12 N.H. 191}**

The question, then, for consideration is, Was the writ in this case indorsed in such manner as the statute requires? If it was, then the power was properly exercised in the court below, permitting a new indorsement, or a change in the indorsement of the writ after its service. If it was not thus properly indorsed, then the court had no such power as was exercised in the case.

We think the writ was properly indorsed at the time of its service, and that the fact appeared upon the writ itself. The language of the indorsement as written upon the writ was: "John M. Pettingill, by his attorneys Bell & Tuck." The plaintiff was not an inhabitant of this state, and that appeared in the writ itself. He therefore could not have been a proper indorser, such as the statute requires. It is apparent, then, that if he could not be the indorser, Bell & Tuck could have no implied authority to place his name upon the writ, and bind him as such; and this want of authority in Bell & Tuck was apparent upon the writ itself.

Bell & Tuck, then, did not bind the plaintiff as indorser, for the law recognizes no such person as indorser. Did they bind themselves as endorsers? We think they did. There is nothing in the manner of

the indorsement, or in its substance, inconsistent with their personal obligation; and if it was their intention to bind the plaintiff, failing to do it they bound themselves.

It is a well settled rule of law, that when one, not having authority, assumes to bind another, he binds himself, if apt words are used for that purpose, or if the language used in the contract does not preclude the idea of personal obligation on the part of him assuming to be the agent. If a contract entered into by one assuming to act as the agent of another, but who had not the requisite authority, when stripped of what the agent had no right to put there, still contains apt words to charge the agent with a personal obligation, he is bound to the performance of the contract. *Woodes* vs. *Dennett, 9 N.H. 55, and the authorities there cited.*{**12 N.H. 192**}

In the present case, the language used, to wit: "Joseph M. Pettingill, by his attorneys," was placed upon the writ improperly, and that fact appearing upon the fact of the writ, it is not to be regarded as being there at all. The indorsement is to be stripped of what appears to be improperly there, and its sufficiency to bind the assumed agents is to be judged of by what may still remain thereon. All, therefore, that is to be regarded as upon the writ, for the indorsement thereof, is the name of the firm of Bell & Tuck.

What the contract is, that is implied by law as being entered into by indorsing a writ, when drawn out at large, it is not necessary now to determine; but it is conceived that when drawn out its language would apply as appropriately to the name of the firm of Bell & Tuck as to that of John M. Pettingill, and would as aptly charge them with the obligation of endorsers of the writ. Bell & Tuck were, then, endorsers, and bound as such. The writ, then, was properly indorsed, and there was no foundation for the motion to quash the writ.

We are aware that it was remarked by the late chief justice Richardson, in delivering the judgment of the court in *Miner* vs. *Smith, 6 N.H. 219* , that a writ indorsed like this under consideration, in a case where the plaintiff lives out of the state, and where the statute requires a responsible person who is an inhabitant of the state, "is considered as having no such indorser as the statute requires." But that is to be regarded as a mere dictum. It was not a point necessary to the decision of that case, nor can it therefore be regarded as furnishing any reason or foundation for the decision that was made in that case. The point decided in that case was, that when an attorney is employed to commence an action in the name of an individual, he is authorized to place the name of such individual upon the writ as indorser; and when the plaintiff in such case is an inhabitant of this state, and the indorsement is made in the manner adopted in this case, it is always considered as the indorsement{**12 N.H. 193**} of the plaintiff, and not of the attorney. The decision in that case was undoubtedly correct. No doubt the attorney of a party is, by implication of law, from the employment itself, clothed with all the authority necessary to carry out the purposes of his engagement. And in a case in which the party could properly, and in conformity with the provisions of law, bind himself, and it is necessary, for the purposes of the action, that an obligation should be entered into, connected with the suit, and as a part of it, in its regular course, such obligation, when entered into by the attorney in behalf of his client, and the language of the obligation plainly manifests an intention to bind the client, the client is bound, and not the attorney. In such case, the client being bound, and it being the intention that he should be bound, there would seem to be no reason for holding the attorney bound, against the intention of all parties.

But that is not the case under consideration. In this case the party had no lawful authority to indorse the writ himself. If his name had been placed upon the writ by himself, the writ would not be regarded as indorsed at all, and his attorneys could have no better or higher authority than the party himself. Indeed, in such case the writ could not be regarded as indorsed at all in conformity with the requirements of the statute, if it is to be considered as indorsed by the plaintiff only.

But it does not necessarily follow, that because the plaintiff may not be regarded as a lawful indorser, that the attorney who placed his name there, and who may even have intended to bind him, but failed

to do it, has not bound himself. We believe that no sound reason exists why the rules of law applicable to other cases of assumed agency, are not equally applicable to that of an attorney assumed and exercised, but not possessed, in behalf of his client. An attorney at law is but an agent, and we are certainly unable to discover any good reason for holding that when he shall be found assuming obligations in behalf of his client which he is not authorized{**12 N.H. 194**} to enter into in his behalf, he is not to be regarded as binding himself like other agents. In such case, as we have seen, if apt words are used for imposing personal obligation upon the agent, he is himself bound, if he fails or has not the proper authority to bind his principal, whatever may have been his intention.

The court below, therefore, acted within the scope of their legal authority in permitting the indorser to be changed, and the ruling on that subject was correct.

The verdict, however, must be set aside for error in the ruling of the court in the rejection of the evidence offered to prove the fact of marriage, and the action transferred to the court of common pleas for a

New trial.

The State vs. Kean
SUPERIOR COURT OF JUDICATURE
10 N.H. 347; 1839 N.H. LEXIS 20
[NO NUMBER IN ORIGINAL]
December, 1839

Disposition

Judgment against the respondent.

Headnotes

The testimony of a witness, that he was present at the marriage of the respondent, in another state, and that the services were performed by the settled minister of the place, who was in the custom of officiating in such services in other instances, is sufficient evidence of a marriage.

An ordained minister of the gospel, in regular standing with the denomination to which he belongs, is authorized by our present statute to solemnize marriages in any county within the state, after causing the credentials of his ordination to be recorded in the county where the marriage is solemnized.

In an indictment for bigamy, the omission of the words, "with force and arms," will not vitiate the indictment.

Where surnames, with a prefix to them, are ordinarily written with an abbreviation, the names thus written in an indictment are sufficient.

The provision in the constitution, requiring all indictments to terminate with the words, "against the peace and dignity of the state," is sufficiently complied with by an indictment concluding, "against the peace and dignity of our said state."

Syllabus

Indictment for bigamy. A witness on the part of the state testified that the defendant, at Cornish, in the county of York, and state of Maine, on the 12th of November, 1820, was, in presence of the witness, married to Olive McKusic, by one Timothy Remick, a resident in the town of Cornish and state of Maine, and who long before and ever since has officiated as a minister at said Cornish. The witness further testified that said Remick officiated as a clergyman at the marriage of the witness, and that he, the witness, had also been present at several other marriages where the marriage ceremony was performed by said Remick in Cornish, and also that said Olive McKusic is still living.Elihu Scott testified that he was a Methodist minister, ordained to the office of a deacon, at Portsmouth, and to that of an elder, at Lisbon, N.H., and that he had been stationed, according to the rules of his order, as a minister for two years at Somersworth, in said county of Strafford; at the expiration of which time he left, and went out of the county, and that while thus there, on the third of April, 1839, at said Somersworth, he married the defendant to Nancy Peckham.It further appeared, by the testimony of this witness, that said Olive and said Kean, after the marriage, lived together as husband and wife, in Moultonborough, N.H.; then in Newfields, in the county of York; afterwards in some town in the eastern part of Maine, and from thence they removed to Somersworth, N.H., and were living there as husband and wife in December, 1835. Since that time said Olive has resided part of the time in Somersworth, but principally with her connections in the

state of Maine, with whom she was living at the time of the trial, about thirty miles distant from said Somersworth. No other evidence was offered on either side.The defendant objected that the evidence was insufficient, 1. Because it did not appear that the person who solemnized the marriage in Maine was an ordained minister. 2. Because it did not appear that by law, in Maine, ordained ministers, or any ministers, were authorized to solemnize marriages. 3. Because it did not appear that the person who solemnized the supposed second marriage was authorized so to do by the laws of this state.These objections were overruled, and the court instructed the jury that the evidence, if believed, was sufficient to maintain the indictment. The jury found the defendant guilty, and the defendant excepted to the ruling and instructions of the court, and moved for a new trial; and also moved the court in arrest of judgment, for the following defects in the indictment, viz.:1. That the offence is not therein alleged to have been committed "with force and arms." 2. That the indictment is not drawn in words at length, but contains abbreviations or characters for, or instead of words. 3. That it does not conclude, as required by the constitution, "against the peace and dignity of the state."

Counsel

Woodman, solicitor, for the state.

Christie, for the respondent.

Woodman, solicitor, for the state, cited as to sufficiency of the evidence of marriage, *Elizabeth Sears' case, 2 CityHall Record. 3; 7 Johns. 314, People* vs. *Humphries; 2* N.H. *276, Londonderry* vs. *Chester*; and, that it is sufficient that the minister officiates habitually as an officer duly empowered to solemnize marriages, to render such marriage legal, *4 D. & E. 366, Berryman* vs. *Wise; 2 N.H. 202,* Johnson vs. *Wilson; 1 N.H. 266,* Jones vs. *Gibson; 7 N.H. 113,* Tucker vs. *Aiken; 6 Me. R. 148, Damon's case; 13 Petersdorf's Ab. 453, note.*

As to the exceptions taken in arrest of judgment, he cited *2 Hawk. P. C. ch. 25, § 90; 2 Hale's P. C. 189; 11 Mass. R. 279, Commonwealth* vs. *Stockbridge.*

Opinion

Opinion by: UPHAM

{10 N.H. 349} The evidence offered to show the first marriage of the respondent was by a witness who was present at the time of the marriage, and who testified that it was solemnized at Cornish, in the state of Maine, and that the settled minister of Cornish officiated in the services on that occasion. The witness testified that the same clergyman officiated in the marriage services of the witness, and that he had also been present at several other marriages at Cornish, when the marriage ceremony was performed by him. There was farther evidence showing a cohabitation of some years subsequent to this marriage.

In many cases, long continued cohabitation as husband and wife is *prima facie* evidence of marriage. *9 Mass. 414, Newburyport* vs. *Boothbay; 7 Johns. 314, People* vs. *Humphrey; 18 Johns. 346, Van Buskirk* vs. *Claw.* A copy of the record of the certificate, however, of the person by whom the ceremony is performed, is the evidence which is most ordinarily offered of a marriage. But this evidence is in no case indispensable. In *Commonwealth* vs. *Littlejohn, 15 Mass. 163* , which was an indictment for lascivious cohabitation, it was holden that the marriage of one of the parties might be proved either by the record of the minister**{10 N.H. 350}** or magistrate who solemnized the marriage, or by the testimony of witnesses who were present; and in *Commonwealth* vs. *Norcross, 9 Mass. 492* , which was an indictment for adultery, it was remarked by the court that the testimony of witnesses who were present at the solemnization of the marriage is more satisfactory than a copy of the record, and is, moreover, necessary to prove the identity of the party.

In the case before us, the marriage was in another government, and the rule as settled in England in such cases is that the marriage may be proved by any person who was present at the ceremony,

provided that such circumstances are also proved from which the jury may presume that it was a valid marriage according to the laws of the country in which it was celebrated. Proof that the ceremony was performed by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony, according to the rites and custom of the foreign country where they were residing at the time, is presumptive evidence of marriage. *10 East 282, Rex* vs. *Brampton; 2 Stark. Ev. 938.*

Under these authorities the evidence of the marriage offered in this case is clearly sufficient.

The objection to the evidence showing a second marriage is, that it does not appear that it was solemnized by any person authorized to do so by the laws of this state. This exception is founded on the statute of 1791, (*1 Laws N.H. 172*) which provided that every ordained minister of the gospel, in the county where he is settled, or hath his permanent residence, and in no other place, is empowered to solemnize marriages; but this restriction is withdrawn by the act of December 12, 1832. By that act, every regular ordained minister of the gospel, residing in this state, and in regular standing with the denomination to which he belongs, is authorized and empowered to solemnize marriages in any county within the state, after having caused the credentials of his ordination to be recorded in the office of the clerk of**{10 N.H. 351}** the court of common pleas, in the county where he shall solemnize any marriage as aforesaid.

The obligation of causing such record to be made is directory upon the minister, and may be presumed to be complied with, until the contrary is shown. The case is silent upon that point. As the facts now appear, the exception cannot prevail. There was a marriage in fact, and that is sufficient.

Motion is also made in arrest of judgment, for the reasons that the offence is not alleged in the indictment to have been committed with force and arms; that the indictment contains characters and abbreviations instead of words; and that it does not conclude, as required by the constitution, "against the peace and dignity of the state."

Courts hold to a high degree of strictness in pleadings in criminal cases; but this strictness has been much relaxed from the earlier decisions. It is very questionable, however, whether under any former decisions the exceptions here taken would prevail. Hawkins says, in his Pleas of the Crown, that the words, *vi et armis*, are necessary in indictments for offences which amount to an actual disturbance of the peace, as nuisances, assaults, &c., but that they were never necessary where it would be absurd to use them, as in indictments for conspiracies, slanders, cheats, escapes, and such like. *2 Haw. P. C. ch. 25, § 90.*

The abbreviation complained of in the indictment is the writing of the original name of the former wife, as McKusic; but this has become the more ordinary spelling, or at least writing of names with such a prefix, and custom must govern in this respect.

The indictment concludes, "against the peace and dignity of our said state," instead of, "the peace and dignity of the state," as required by the constitution. It is unnecessary for us to determine here how far a departure from the precise words required by the constitution would be admissible in indictments. We are satisfied, however, that a departure to this extent from the words, "the state," to "our said state"-- **{10 N.H. 352}** is not such a variance from the provision of the constitution, and from a strict and rigid compliance with the same, as to vitiate an indictment.

Judgment against the respondent.

457:39 Cohabitation, etc. – Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them, shall thereafter be deemed to have been legally married.

Source. RS 149:11. CS 158:19. GS 161:16. GL 180:16. PS 174:15. PL 286:36. RL 338:39.

99 N.H. 362; Smith v. Smith; 111 A.2d 531

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ELLIS W. SMITH v. RENEE G. SMITH.

[Cite as Smith v. Smith, 99 N.H. 362]

Merrimack,

Argued January 4, 1955. Decided January 28, 1955.

No. 4376.

While jurisdiction is conferred upon the Superior Court to entertain annulment proceedings between nonresidents with respect to marriages solemnized here, the right to relief is not governed exclusively by New Hampshire law, and when such a marriage was void because one of the parties was a married woman, the effect of the subsequent conduct of the parties as domiciliaries of another state in cohabiting as husband and wife there must be considered in determining whether an annulment will be granted.

In such case the effect of the conduct of the parties in the other state where they were domiciled at the time the impediment to their marriage was removed will be determined according to the law of that jurisdiction.

Hence, in accordance with Massachusetts law (G. L., c. 207, s. 6), a marriage void in this state but entered into here in good faith by the parties before the wife's decree of divorce in Massachusetts became absolute was properly recognized as valid upon the removal of the impediment during their subsequent cohabitation as domiciliaries there in good faith.

The Massachusetts marriage evasion statute (G. L., c. 207, s. 10) is not controlling where a marriage entered into in good faith in this state was followed by the requisite cohabitation by the parties in that state in accordance with Id., s. 6.

The finding that both parties knew when they were married here that a

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Massachusetts decree of divorce to the wife had not become final did not preclude as a matter of law the further finding that the parties entered into the ceremony in good faith believing the marriage to be lawful in this state when one of the parties was so advised by counsel and both parties acted with honest intentions.

There is no authority conferred upon the Superior Court to enter an order for temporary support of a wife pending her husband's appeal from a decree denying his petition for annulment of the marriage.

PETITION, for annulment of a marriage entered into by the parties at Wilton, on June 1, 1947. They were then domiciled in Massachusetts and intended to and did return to that jurisdiction following the ceremony. The defendant, as the plaintiff knew, had previously been married in Massachusetts. In divorce proceedings in that state her husband had been granted a decree *nisi*, on April 14, 1947, which did not become absolute until after six months from that date.

Trial by the Court (*Wheeler*, C. J.) who found the facts stated above and the further fact that following the ceremony the parties lived together as man and wife in Massachusetts until 1952. The Court found that both parties "knew that the Massachusetts decree was not final when they came to New Hampshire to get married," but that "they entered into the ceremony in good faith in the belief that the marriage was lawful in this state." It ruled that the marriage solemnized here was "absolutely void," but that by virtue of G. L., Mass., (Ter. *ed.*), *c.* 207, *s.* 6, their status at the time of the petition was that of a validly married couple, and entered a decree denying the petition.

The plaintiff excepted to the ruling that the law of Massachusetts determines whether the impediment to the marriage has since been removed and to the ruling that under that law it had been removed. The defendant excepted to the denial of her motion to dismiss the petition without determination of the validity of the marriage, upon the ground that under the law of Massachusetts the plaintiff was barred from relief by his own misconduct. The bills of exceptions of both parties were allowed by the Presiding Justice.

Thereafter, pending transfer of these exceptions to this court, the defendant filed a petition for temporary support, seeking an allowance for support of herself and her minor child by her former marriage, and to discharge debts incurred, and to provide funds for medical attention. After hearing, the Court (*Griffith*, J.) ruled

"as a matter of law" that it was without jurisdiction "to grant a support order where neither party ever was or is now a resident of New Hampshire where the sole jurisdiction is of a petition for annulment of a marriage performed in New Hampshire." The Court found that if there were authority to grant support, the plaintiff would be ordered to pay the defendant ten dollars a week. The defendant's bill of exceptions, presenting her exception to the ruling that the Court had no jurisdiction to grant the petition, was approved and allowed by the Justice who made the ruling.

Robert D. Branch (by brief and orally), for the plaintiff.

George P. Cofran and Paul A. Rinden (Mr. Rinden orally), for the defendant.

DUNCAN, J. Neither party questions the ruling of the Trial Court that since the defendant was a married woman at the time of the ceremony in New Hampshire, the marriage in this state was absolutely void. R. L., *c.* 339, *s.* 1; *Bickford* v. *Bickford*, 74 N.H. 448; *Fowler* v. *Fowler*, 96 N.H. 494. The plaintiff contends that the law of New Hampshire is the sole applicable law, relying upon Laws 1945, *c.* 12, which provides that the Superior Court shall have jurisdiction to annul a marriage entered into in this state "even though neither party has been at any time a resident herein." Since neither party to this action was a resident of New Hampshire, the jurisdiction of the court depended upon this statute. *Cf. Roop* v. *Roop*, 91 N.H. 47; *Turner* v. *Turner*, 85 N.H. 249. The extent to which a decree of nullity entered under this statute would be entitled to recognition in the state of domicile of the parties is a question not presented, and requires no consideration here. See *Feigenbaum* v. *Feigenbaum*, 210 Ark. 186, 190. As the Trial Court pointed out, the validity of the ceremony performed here is controlled by the law of this jurisdiction. *Foster* v. *Foster*, 89 N.H. 376. The effect of the subsequent conduct of the parties in cohabiting as man and wife in Massachusetts must be determined according to the law of that jurisdiction, where they were domiciled at the time the impediment to their marriage was removed. *Fowler* v. *Fowler*, 96 N.H. 494, 496. See Goodrich on Conflict of Laws (3rd *ed.*) 357. "It is a general principle, that the status or condition of a person, the relation in which he stands to another person ... is fixed by the law of the domicil; and that this status

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... [is to be] upheld in every other state, so far as ... not inconsistent with its own laws and policy." *Ross* v. *Ross*, 129 Mass. 243. See *Kapigian* v. *Minassian*, 212 Mass. 412, 413; 50 Harv. L. Rev. 1119, 1190.

By conferring upon the Superior Court authority to entertain annulment proceedings between nonresidents with respect to marriages solemnized in this state, the Legislature did not prescribe that rights arising out of subsequent conduct of the parties in another jurisdiction where they were domiciled should be determined solely with reference to the laws of this state, nor could our statutes have such extraterritorial effect.

When a common-law marriage has been validly contracted, it will be recognized as valid in another state in which the parties later became domiciled, even though such a marriage may not legally be contracted in the latter state. *Henderson* v. *Henderson*, (Md. App.) 87 A. (2d) 403; *In re Gallagher's Est.*, 35 Wash. (2d) 512. The same principle applies in this case. See *Keezer*, Marriage & Divorce (3rd *ed.*) 278; Note, 36 Va. Law Rev. 665, 672. If the requirements of the Massachusetts statutes were met, the marriage of the parties became valid upon the removal of the impediment during their cohabitation as domiciliaries there. G. L. Mass. (Ter. *ed.*) *c.* 207, *s.* 6. If it became valid in the state of domicile, their marriage is properly to be recognized as valid here. See Griswold, Renvoi Revisited, 51 Harv. L. Rev. 1165, 1199--1200. The domiciliary state "has a substantial interest in the marriage," while this state has no interest "in the intrinsic validity of the status, unless the status is to be enjoyed" here. *Sirois* v. *Sirois*, 94 N.H. 215, 216. If the status of the parties might better have been determined in the state where they were domiciled at marriage and thereafter, and the Court in its discretion have declined to exercise the jurisdiction conferred upon it by the statute (see *Jackson* v. *Company*, 86 N.H. 341), the plaintiff is in no position to complain that it did not, having chosen to bring his petition here. See also, *Thistle* v. *Halstead*, 95 N.H. 87.

The plaintiff further contends that if the status of the parties is properly determinable according to the law of Massachusetts, then under that law he is entitled to an annulment. This argument is based upon General Laws of Massachusetts (Ter. *ed.*) *c.* 207, *s.* 10, commonly known as the marriage evasion act, which provides that a marriage entered into in another jurisdiction by a person residing and intending to continue to reside in Massachusetts who is

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prohibited from marrying in Massachusetts shall be void for all purposes in that commonwealth, as if entered into there. In support of his argument the plaintiff relies principally upon the decisions of *Tyler* v. *Tyler*, 170 Mass. 150, and *Levanosky* v. *Levanosky*, 311 Mass. 638. In denying the petition, the Trial Court relied upon G. L. (Ter. *ed.*), *c.* 207, *s.* 6, the pertinent provisions of which are that where a person having a spouse with whom a marriage is in force has entered into a subsequent marriage contract, and that contract was entered into "by one of the parties in good faith, in the full belief ... that the former marriage had been annulled by a divorce ... they shall, after the impediment ... has been removed ... be held to have been legally married from and after the removal of such impediment," provided they have continued "to live together as husband and wife in good faith on the part of one of them."

Tyler v. *Tyler, supra*, was a libel for divorce brought by a wife from whom a prior divorce had been granted and who was forbidden by the provisions of G. L. (Ter. *ed.*), *c.* 208, *s.* 24, to remarry "within two years after the decree [became] absolute." Her second marriage within the two-year period was held invalid under *c.* 207, *s.* 10, *supra*, and not to be within *c.* 207, *s.* 6, and it was said that section 6 was not intended to repeal section 10. However in *Vital* v. *Vital*, 319 Mass. 185, 192, 193, the court reviewed

Tyler v. *Tyler*, and held that although the result of the case was right "on its facts," because the plaintiff was not entitled to relief grounded upon her own misconduct (*Ewald* v. *Ewald*, 219 Mass. 111), "the implication, if any ... to the effect that what is now G. L. (Ter. *ed.*), *c.* 207, *s.* 6, did not apply to marriages entered into in violation of *s.* 10 was unnecessary to the decision." The court proceeded to overrule the holding of *Wright* v. *Wright*, 264 Mass. 453, and of *Murphy* v. *Murphy*, 249 Mass. 552, "that *s.* 6 does not apply to cases coming within the provisions of *s.* 10" (*Vital* v. *Vital, supra*, 195), and entered a decree affirming a marriage entered into in Rhode Island in violation of section 10, because the conduct of the petitioner fell within the provisions of section 6 with respect to entry into the ceremony in good faith by one of the parties followed by the requisite cohabitation in Massachusetts. Thus it appears that *Tyler* v. *Tyler*, as qualified by *Vital* v. *Vital*, is not conclusive authority in the plaintiff's favor.

The argument is made by the plaintiff that the Trial Court erred in relying upon section 6 of the Massachusetts statute in

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denying the petition, because it found that both parties knew when they were married that the Massachusetts decree of divorce had not became final. The inference is that this finding foreclosed any finding that either party entered into the New Hampshire ceremony "in good faith in the full belief ... that the former marriage had been annulled by a divorce," as required by section 6. This contention would give no effect to the further finding made, that the parties entered into the ceremony "in good faith in the belief that the marriage was lawful in this state." We are of the opinion that these findings were not inconsistent as a matter of law. There was evidence that the defendant, as the plaintiff knew, had been advised by an attorney that she "might go up to New Hampshire and be married and it would be legal." The impediment to the marriage lay in the fact that the defendant's divorce had not become absolute because under G. L. (Ter. *ed.*), *c.* 208, *s.* 21, the decree entered was a decree *nisi* which would become absolute only "after the expiration of six months from the entry thereof." The divorce had nevertheless been decreed, and the advice which the evidence indicates had been given to the defendant was not impossible of belief, in good faith.

Section 24 of the same chapter imposed a further impediment by its provision that "after a decree ... has become absolute" either party may marry again, "except that the party from whom the divorce was granted shall not marry within two years after the decree has become absolute." Marriages in violation of such a penal provision have been held not to be invalid where performed in another jurisdiction within the period of prohibition. Of such a marriage the Massachusetts court has said: "It is assumed that the marriage in New Jersey was valid, and must be so recognized in this Commonwealth. ..." *Palmer* v. *Palmer*, 265 Mass. 242, 244. See also, *Commonwealth* v. *Lane*, 113 Mass. 458; *Phillips* v. *Madrid*, 83 Me. 205; *State* v. *Richardson*, 72 Vt. 49; *Moore* v. *Hegeman*, 92 N. Y. 521. Had the New Hampshire ceremony taken place after October 14, 1947, the marriage would have been valid under New Hampshire law. *Commonwealth* v. *Lane, supra*, 462. See 26 So. Cal. L. Rev. 280, 291. The difference in the effect of section 24, and that of section 21, upon remarriage is one not likely to be understood by laymen. The Trial Court could reasonably find upon the evidence that the parties in good faith believed that they had contracted a valid marriage in New Hampshire, even though they appreciated that they could not have done so in

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Massachusetts. The defendant testified that she entered into the marriage "with the belief that [she] had a right to marry in New Hampshire." The plaintiff likewise testified that he "honestly intended to get married" although it was not his "full belief that the former marriage had been annulled ... because you

have a case of the two separate states." He continued: "I was not a lawyer. I do not know the legal implications of all these things."

The existence of the "good faith" required by G. L., *c.* 207, *s.* 6, was a question of fact as to "whether there [was] actual honesty of purpose" (*Gardner* v. *Gardner*, 232 Mass. 253, 258), and did not depend upon "freedom from knowledge of any circumstances which ought to put a person of ordinary intelligence and prudence upon inquiry." *Lufkin* v. *Lufkin*, 182 Mass. 476, 479. See also, *Carmichael* v. *Carmichael*, 324 Mass. 118; *Hopkins* v. *Hopkins*, 287 Mass. 542; *Turner* v. *Turner*, 189 Mass. 373. In *Levanosky* v. *Levanosky, supra*, 311 Mass. 638, 640, it was expressly held: "The statute applies only to one who innocently intends honestly to contract a presently valid marriage."

Within the meaning of these decisions, the Trial Court's finding that the parties entered into the New Hampshire ceremony in good faith in the belief that the marriage was lawful in this state, was not necessarily inconsistent with its further finding that both knew that the Massachusetts decree was not final; and it was warranted upon the evidence. The evidence was "not so clear as to require the conclusion that [they] did not act in good faith." *Gardner* v. *Gardner, supra*, 258. This case is to be distinguished from the *Levanosky* case, *supra*, relied upon by the plaintiff, because of the implied finding in that case that the parties did not enter into the marriage ceremony in good faith, and the holding that the libelant's contention to the contrary found "no support in the testimony." *Id.*, 640.

We conclude that there was no error in the rulings of the Trial Court upon which denial of a decree of nullity was based. *Carmichael* v. *Carmichael, supra.* This conclusion removes any necessity for considering the defendant's exception to the denial of her motion to dismiss, grounded upon *Ewald* v. *Ewald*, 219 Mass. 111, *supra*, which is not urged if denial of the petition is sustained.

The defendant's exception to the denial of her petition for temporary support *pendente lite* remains for consideration. It presents the question of whether the Court could properly enter such an order pending an appeal from the decree denying the petition for annulment. Doubtless it was intended by the enactment of

Laws 1945, *c.* 12, as the defendant argues, that the court should have all of the authority with respect to annulment proceedings between nonresidents that it has with respect to like proceedings between residents. We are of the opinion however, that the authority to enter orders for temporary support, *pendente lite*, does not reside in the court upon any petition for annulment. The power to require the payment of money "upon a decree of nullity" is plainly conferred by statute, and has long been exercised. R. L., *c.* 339, *s.* 16. *Bickford* v. *Bickford*, 74 N.H. 448; *Fowler* v. *Fowler*, 97 N.H. 216. In the latter case an order for temporary support of the defendant was upheld as incident to her cross petition for separate maintenance, and expressly authorized by statute. R. L., *c.* 339, *s.* 31. Since the defendant in the case before us is a nonresident, this mode of relief is not open. *Eckstrom* v. *Eckstrom*, 98 N.H. 177.

Apart from its settled interpretation, the concluding clause of R. L., *c.* 339, *s.* 16, *supra*, authorizing the Court to make such orders as may be necessary "before or after the decree" of nullity, might be thought to furnish statutory authority to order temporary support in this case. But as was pointed out in *Veino* v. *Veino*, 96 N.H. 439, the section has never been considered to furnish such authority in divorce cases, (*Rowell* v. *Rowell*, 63 N.H. 222; *Wallace* v. *Wallace*, 75 N.H. 217); and the Court lacked such authority until 1919 when R. L., *c.* 339, *s.* 14, was amended to permit an order for temporary support in divorce actions alone. *Veino* v. *Veino, supra*, 441. No comparable provision has ever been made with respect to annulment proceedings, and we conclude that no such authority was intended.

We recognize that the rule is otherwise in some jurisdictions, where the matter of temporary support in annulment proceedings has been held to rest in the discretion of the Trial Court even in the absence of statute. See *Levy* v. *Levy*, 309 Mass. 230, 237; *Higgins* v. *Sharp*, 164 N. Y. 4; 3 Nelson, Divorce and Annulment, *s.* 31.56. The law of this jurisdiction to the contrary is too well established to permit it here, in the absence of legislative action. *Veino* v. *Veino, supra*; *Clough* v. *Clough*, 80 N.H. 462. Although not for the grounds stated, the order denying the defendant's motion for lack of jurisdiction was properly entered.

Exceptions overruled.

All concurred.

117 N.H. 826; Gray v. Gray; 379 A.2d 442

PHEBE L. DUNN GRAY v. LOUIS N. GRAY, ADMINISTRATOR OF THE ESTATE OF CLARK A. GRAY

[Cite as Gray v. Gray, 117 N.H. 826]

Merrimack County Probate Court

Nos. 7776 & 7777

October 24, 1977

1. Appeal and Error---Right to Appeal---Applicable Statute

Rights of appellate review are governed by statute in effect on date appeal is filed unless there is some specific language in amending statute which saves rights of appeal for cases still pending in trial court as of date of inception of new appeal statute.

2. Appeal and Error---Right to Appeal---Applicable Statute

On appeal from petition to probate court to have plaintiff named common-law wife of decedent for purpose of participating in estate to extent of widow's distributive share, defendant's right to appeal was governed by statute in force on date defendant took his appeal which provided that appeal from decision of probate court was to supreme court. RSA 567-A (Supp. 1975).

3. Courts---Probate Courts---Rules

Under statute providing that any interested person, in any proceeding before probate court involving material facts which are in dispute, may petition probate court to certify issues of fact to superior court and permitting a request for jury determination of factual controversies in superior court, fact that probate court rule 34 setting forth time limits mandated by statute was not in effect on date of first hearing on petition to probate court to have plaintiff named common-law wife of decedent for purpose of participating in estate to extent of widow's distributive share, did not prevent defendant from moving for a jury trial before final hearing, or at any rate before decree was issued, rather than waiting until adverse hearing was received, and court's denial of defendant's request for jury trial would be taken as implicit finding that no good cause existed for late application for jury trial. RSA 567-A (Supp. 1975).

4. Husband and Wife---Common---Law Marriage---Recognition

It was not unreasonable for probate court to make finding that plaintiff was wife of decedent by common-law marriage pursuant to statute, and as such entitled to all rights of widow in estate of decedent, where ample evidence existed to support finding that plaintiff and decedent acknowledged themselves to be husband and wife and that they were generally reputed to be such in their community, and it was uncontested that they were cohabiting for more than three years immediately prior to decedent's death, and it was admitted that defendant administrator himself

initially named plaintiff as decedent's widow on list of heirs submitted to probate court. RSA 457:39, :40, and 567-A:4 (Supp. 1975).

McSwiney, Jones & Semple, of Concord, and Robert E. Bowers, Jr. (Mr. Bowers orally), for the plaintiff.

David S. Sands and James R. Patten, of Ossipee, by brief and orally, for the defendant.

BOIS, J. These are two appeals presenting for review (1) appellate procedures as a result of an intervening change in the governing statute and (2) a challenge as to the sufficiency of the evidence to support a finding that the plaintiff was the common-law wife of the decedent Clark A. Gray, thereby entitling her to a widow's distributive share of his estate.

The history of this case is as follows: On June 17, 1957, the decedent and the plaintiff decided to cohabit. They lived together for more than sixteen years, until the decedent's death on March 31, 1974. The decedent's brother, Louis N. Gray, was appointed administrator of the estate on April 28, 1974. Plaintiff petitioned the probate court on April 21, 1975, to have herself named the common-law wife of the decedent for the purpose of participating in the estate to the extent of the widow's distributive share under the provisions of RSA ch. 561. The defendant administrator opposed the relief sought.

An initial hearing on this petition was had on October 7, 1975. At that time appeal from a decision of the probate court was to the superior court under the provisions of RSA ch. 567. A second and final hearing was held on August 5, 1976, and on November 16, 1976, the Court (*Gushing*, J.) decreed that, pursuant to RSA 457:39, :40, the plaintiff was in fact decedent's common-law wife and therefore entitled to a widow's intestate share of his estate. At the time of the decree, an appeal from a decision of the probate court was to the supreme court under the provisions of RSA ch. 567-A, which became effective January 1, 1976. The defendant duly excepted and on December 15, 1976, simultaneously filed an appeal to both the superior and supreme courts pursuant to both statutes.

A hearing on these appeals was held by *Cushing*, J., who ruled that the defendant had no right of appeal to the superior court but did have a right of appeal under RSA ch. 567-A (Supp. 1975). Defendant seeks a review of this decision as well as the decree

granting the plaintiff a widow's intestate share of decedent's estate. All questions of law were reserved and transferred.

We first deal with the issue of whether or not the defendant is entitled to an appeal to the superior court and to an incidental jury trial on disputed factual issues. As previously noted, at the time of the first hearing, under RSA 567:1 (1955), "[a]ny person aggrieved by a decree, order, appointment, grant or denial of a judge, which may conclude his interest and which is not strictly interlocutory, may appeal therefrom to the superior court." The superior court had discretion to frame issues of fact to be tried by a jury, RSA 567:11, although any jury verdict or finding was to be merely advisory. RSA 491:16. Defendant points out that a party thus had two chances at the trial level for a decision in his favor, one in the probate court and then one in the superior court.

After the first hearing in the instant case but before the second one, RSA ch. 567 was superseded by RSA ch. 567-A (Supp. 1975), which provides that appeals of probate court decisions are to be taken directly to the supreme court. As noted above, the new statute became effective on January 1, 1976.

[1] The defendant claims that the court below erred in not allowing him to appeal to the superior court. As the probate court correctly observed, however, rights of appellate review are governed by the statute in effect on the date the appeal is filed unless there is some specific language in the amending statute which saves rights of appeal for cases still pending in the trial court as of the date of inception of the new appeal statute.

[2] In the instant case, defendant's right to appeal was governed by RSA 567-A:1 *et seq.* (Supp. 1975), in force on the date defendant took his appeal. The only exception to the application of the new statute is to be found in chapter 395, section 13 of the Laws of 1975, which states: "Notwithstanding the effective date of [RSA 567-A], any proceedings had or begun under RSA 567 prior to January 1, 1976 shall continue to be governed by RSA 567." As the defendant concedes, that transition provision is not relevant here because no appellate proceedings had been commenced prior to January 1, 1976. The superior court thus had no jurisdiction to hear an appeal of the probate court decree. *Chesley v. Estate of Chesley*, 117 N.H. 280, 372 A.2d 281 (1977).

A party may still request a jury determination of factual controversies in superior court under the new statute. RSA 567-A: 10

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(Supp. 1975) provides that "[a]ny interested person, in any proceeding before a probate court involving material facts which are in dispute, may petition the probate court to certify the issues of fact to the superior court ... for ascertainment by jury trial." The time limits mandated by this section are set forth by probate court rule 34, which provides that: "Such petition must be filed not later than five (5) days prior to the date of hearing on such matters; except, for good cause shown, the court may grant an extension of time for filing said petition, as justice may require." Under this new procedure, factual disputes are decided by either the superior court or the probate court, but not by both. The new law thus does not bar an aggrieved party from seeking a jury trial, but rather promotes a more efficient appellate procedure.

[3] The defendant contends that he was unfairly foreclosed from a jury trial under RSA ch. 567-A. He argues that he could not have complied with the rule 34 requirements because the rule was not in effect on the date of the first hearing (October 7, 1975). We are not convinced that the defendant, as a result, has shown good cause to permit his late application for a jury trial. Although rule 34 was not effective until January 1, 1976, we see no reason why defendant could not have moved for a jury trial before the August 5, 1976 hearing, or at any rate before November 15, 1976, when a decree was issued, rather than waiting until he received an adverse decision. Moreover, the court's denial of the request must be taken as an implicit finding that no "good cause" existed. We cannot as a matter of law hold that this was error.

The second question before us is whether or not the determination by the probate court that a common-law marriage existed between the plaintiff and the decedent is supported by the evidence.

RSA 457:39 provides that: "Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of three years, and until the decease of one of them, shall thereafter be deemed to have been legally married." And pursuant to RSA 457:40, "[i]n all civil actions, except actions for criminal conversation, evidence of acknowledgement, cohabitation, and reputation is competent proof of marriage."

The probate court found that the plaintiff was the common-law wife of the decedent pursuant to the

statute, and accordingly was entitled to all the rights of a widow in the estate of the decedent. The standard to be applied in reviewing such findings is set out in

RSA 567-A:4 (Supp. 1975): "The findings of fact of the judge of probate are final unless they are so plainly erroneous that such findings could not be reasonably made."

[4] There is ample evidence in the record to support a finding that the plaintiff and the decedent acknowledged themselves to be husband and wife and that they were generally reputed to be such in their community. It is uncontested that they were cohabiting for more than three years immediately prior to Clark A. Gray's decease. Finally, it was admitted that the defendant administrator himself initially named the plaintiff as the decedent's widow on a list of heirs submitted to the probate court.

We hold that it was not unreasonable for the court to make a finding that the plaintiff was the wife of the decedent by common-law marriage pursuant to the statute, and as such entitled to all the rights of a widow in the estate of the decedent. The judgment is affirmed.

Exceptions overruled.

GRIMES, J., did not sit; the others concurred.

121 N.H. 96; Joan S. v. John S.; 427 A.2d 498

JOAN S. v. JOHN S.

[Cite as Joan S. v. John S., 121 N.H. 96]

Hillsborough

No. 80-083

March 6, 1981

1. Husband and Wife---**Common-Law Marriage**---Recognition

New Hampshire is a jurisdiction which does not recognize the validity of common-law marriages except to the limited extent that the status of common-law spouse obtains to the survivor of two people who had cohabited and acknowledged each other as husband and wife, and who had been generally reputed as such, for a period of three years and until the decease of one of them. RSA 457:39.

2. Husband and Wife---**Common-Law Marriage**---Recognition

Where plaintiff appealed from superior court order dismissing her petition requesting the court to impose alimony, child support, and other obligations on defendant with whom she had lived without benefit of marriage from 1963 or 1964 until June 1979, and requested the court to decree the relationship of the parties a void marriage and impose on defendant the obligations and restrictions of a marriage, trial court properly dismissed her claim, because plaintiff did not come within the terms of the limited exception to the general nonrecognition of common-law marriages in New Hampshire. RSA 457:39.

3. Husband and Wife---**Common-Law Marriage**---Recognition

If a **common-law marriage** is to be more broadly recognized in New Hampshire, a request for such a determination should be addressed to the legislature.

4. Divorce---Generally

Right to a divorce is predicated upon the existence of a valid marriage between the parties, and in the absence of a valid marriage, the court may not exercise its statutory powers incident to a divorce.

5. Declaratory Judgments---Availability of Remedy---Property Settlements

Even without alleging a valid or de facto marriage, either party to an unstructured domestic arrangement may bring a bill in equity or petition for declaratory judgment to determine equitably the rights of the parties in particular property.

6. Contracts---Enforceability of Agreements

Although transfers of property or money based on illicit sexual relations have fared badly in the courts, a court will enforce an action in contract, if one can be shown to exist, to the extent that it is not founded

upon the consideration of meretricious sexual relations.

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7. Partition---Basis for Partition

Where plaintiff appealed from superior court order dismissing her petition requesting the court to impose alimony, child support, and other obligations on defendant with whom she had lived without benefit of marriage, and requesting that their real estate be partitioned, petition was properly dismissed for plaintiffs failure to state her interest and to name all the interested parties as required by statute relating to partition of real estate. RSA 538:2.

8. Limitation of Actions---Paternity

Where plaintiff appealed from superior court order dismissing her petition requesting the court to impose alimony, child support, and other obligations on defendant with whom she had lived without benefit of marriage, and requesting defendant be ordered to pay support for both herself and the children, request for relief was properly denied for plaintiff's failure to comply with the statute of limitations governing proceedings under the Uniform Acton Paternity. RSA 168-A:12 (Supp. 1979).

Craig, Wenners, Craig & McDowell, of Manchester (Thomas E. Craig on the brief and orally), for the plaintiff.

Hanrahan, Brennan & Michael, of Manchester (John W. Hanrahan on the brief and orally), for the defendant.

KING, J. The plaintiff, Joan S., appeals from an order of the Hillsborough County Superior Court dismissing her petition requesting the court to impose alimony, child support, and other obligations on the defendant, John S. The petition alleged the following facts. The plaintiff and the defendant lived together without benefit of marriage continuously from 1963 or 1964 until the filing of the petition in June 1979. The parties have four children, ranging in age from ten to fourteen. Both the plaintiff, who is unemployed, and the children are totally dependent for their support upon the defendant. The defendant operates his own business with an estimated equity of $80,000. The parties' homestead is in their joint names, as are certain bank accounts. The parties also own certain household furnishings and personal property. Their automobiles are owned separately.

The petition requested the court to decree the relationship of the parties a void marriage and "impose the obligations and restrictions upon the defendant pursuant to the statutory laws of the State ... with regards to alimony, child support, property division and injunctions ... as may be just and equitable. ..." In the alternative, the plaintiff requested that the defendant be enjoined from entering the homestead, pursuant to RSA 498:2. The plaintiff further requested that the defendant be ordered to pay support for
writ of injuction

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both herself and the children pursuant to RSA ch. 168-A and for herself on the basis of assumpsit and quantum meruit. Finally, the plaintiff requested that the parties' property be divided between them pursuant to RSA ch. 538.

In answer to the petition, John S. alleged that he supports, and will continue to support, his minor children and that he acknowledges the interest of Joan S. in the jointly owned real estate and any joint

bank accounts. The defendant alleged, however, that his business is owned by him alone and was so owned before he had any acquaintance with Joan S. He also alleged that Joan S. was always aware that he never intended to marry her. The Trial Court (*Bean*, J.) granted the defendant's motion to dismiss the petition.

The question presented to this court is whether the petition of Joan S. alleges grounds for relief. We hold that it does not and affirm the dismissal of the petition.

The primary contention of Joan S. is that the relationship between the parties should be considered a marriage. She seeks to dissolve this "marriage" under RSA ch. 458. The brief description of the nature of the case in the notice of appeal states: "[T]his case involves a determination of the rights and liabilities of the parties to a common law marriage." The specific question to be raised on appeal is the "[r]ights and liabilities of the parties to a common law marriage." A secondary request of Joan S. is to have this court apply New Hampshire law concerning the disposition of marital property in a divorce proceeding to the disposition of property of parties who have cohabited and raised a family but have never married.

[1--3] "New Hampshire is a 'jurisdiction which does not recognize the validity of common-law marriages' ... except to the limited extent provided by [RSA 457:39]." *Fowler v. Fowler*, 96 N.H. 494, 497, 79 A.2d 24, 27 (1951), *citing Delisle v. Smalley*, 95 N.H. 314, 315, 63 A.2d 240, 240 (1950). RSA 457:39 provides that the status of "common law" spouse obtains only as to the survivor of two people who had cohabited and acknowledged each other as husband and wife, and who had been generally reputed as such, for a period of three years and until the decease of one of them. The statute has been in effect in substantially the same form since 1842. See RS 149:11 (1842). Because the plaintiff does not come within the terms of RSA 457:39, it was proper for the trial court to dismiss her claim based upon the "marriage" of the parties. If a

common-law marriage is to be more broadly recognized in this State, a request for such a determination should be addressed to the legislature.

[4] The plaintiff asks us, however, to follow the reasoning of *In re Marriage of Cary*, 34 Cal. App. 3d 345, 353, 109 Cal. Rptr. 862, 866 (1973), and to apply a divorce-like property settlement to this case. This we decline to do. The right to a divorce is predicated upon the existence of a valid marriage between the parties. *Brown v. Brown*, 234 Ga. 300, 302, 215 S.E.2d 671, 673 (1975); 27A C.J.S. *Divorce* § 1 (1959). In the absence of a valid marriage, the court may not exercise its statutory powers incident to a divorce. *See Whitney v. Whitney*, 192 Okla. 174, 177, 134 P.2d 357, 361 (1942). We find the reasoning in Gary unpersuasive, and we note that the California Supreme Court has itself expressly rejected this reasoning in *Marvin v. Marvin*, 134 Cal Rptr. 815, 829, 557 P.2d 106, 120 (1976).

[5, 6] Our refusal to apply RSA ch. 458 to the dissolution of non-marital living arrangements does not, however, prevent equitable adjustment of the rights of the parties. *See id.* at 819, 557 P.2d at 110; *DuVall v. DuVall*, 543 P.2d 766, 767 (Okla. Ct. App. 1975). Even without alleging a valid or "de facto" marriage, either party may bring a bill in equity or petition for declaratory judgment to determine equitably the rights of the parties in particular property. See RSA 498:1; RSA 491:22. Furthermore, although "[transfers of property or money based on illicit sexual relations have fared badly in the courts," *Levesque v. Cote*, 102 N.H. 297, 299, 156 A.2d 120, 122 (1959), a court will enforce an action in contract, if one can be shown to exist, to the extent that it is not founded upon the consideration of meretricious sexual relations. *Marvin v. Marvin*, 134 Cal. Rptr. at 819, 557 P.2d at 110; *see Levesque v.*

Cote, supra at 299--300, 156 A.2d at 122; *Gauthier v. Laing*, 96 N.H. 80, 84, 70 A.2d 207, 209--10 (1950). In this case, however, the plaintiffs petition failed to raise adequately either of these theories of relief.

[7, 8] With respect to the plaintiffs request that the real estate be partitioned, we conclude that the petition was properly dismissed for the plaintiffs failure to state her interest and to name all the interested parties as required by RSA 538:2. Likewise, the plaintiffs request for relief under RSA ch. 168-A was properly

denied for her failure to comply with the statute of limitations. RSA 168-A:12 (Supp. 1979).

In the appeal before us, we are not concerned with the broad social ramifications of the property rights of de facto spouses in what are commonly referred to as unstructured domestic arrangements. The case before us arises solely from the plaintiffs pleadings, all of the prayers of which were properly dismissed by the trial court upon motions of the defendant. While there may be viable theories for legal and equitable relief available to Joan S., they were not presented to the trial court.

We affirm the dismissal of the petition by the trial court with the understanding that our decision does not bar the commencement of an appropriate proceeding for legal and equitable relief, provided it is commenced within sixty days from the date of this decision. Otherwise, any further proceeding is barred.

Affirmed.

Bois, J., did not sit; the others concurred.

124 N.H. 372; Bisig v. Bisig; 469 A.2d 1348

JOANNE M. BISIG v. RICHARD W. BISIG

[Cite as Bisig v. Bisig, 124 N.H. 372]

Rockingham

No. 82-443

December 29, 1983

1. Divorce---Alimony---Subsequent Marriages

In Eaton v. Eaton, 90 N.H. 4 (1939), wherein the supreme court held that marriage terminates the right to further alimony, unless extraordinary circumstances would make it inequitable for the alimony to cease, the court reasoned that a new marriage, bestowing upon the former wife the right to support from a new source, terminated her right to support from the former husband because she ought not to have two sources of support at the same time.

2. Divorce---Alimony---Subsequent Marriages

The reasoning behind the supreme court's prior holding in Eaton v. Eaton, 90 N.H. 4 (1939) that marriage terminates the right to further alimony, that a new marriage bestows upon the alimony recipient the right to support from a new source and terminates her right to support from her former husband, does not apply to the case of an unmarried cohabitant receiving alimony, because unmarried cohabitants are under no legal obligation to support each other.

3. Husband and Wife---Common Law Marriage---Generally

Generally, a person who cohabits with another acquires no rights in the accumulations of the other.

4. Husband and Wife---Separation and Support---Generally

The right to "spousal" support is predicated upon the existence of a valid marriage.

5. Divorce---Alimony---Subsequent Marriages

Since various benefits, including legal rights and duties, arise from marriage which do not arise from cohabitation, and since the right to support does not arise from cohabitation, the mere resemblance of cohabitation to marriage does not require that alimony to an unwed cohabitant be suspended; it would be incongruous for a court to impose on the parties to cohabitation the same consequences of marriage that they sought to avoid when they entered into their arrangement.

6. Husband and Wife---Common Law Marriage---Recognition

New Hampshire does not recognize the validity of common-law marriages, except to the limited extent provided in the statute which provides that certain persons cohabiting prior to the death of one of them

are deemed thereafter to have been legally married. RSA 457:39.

7. Divorce---Alimony---Subsequent Marriages

Where former husband filed a motion seeking suspension or reduction of alimony payments on the basis that his former wife was cohabiting with a third person, the master properly determined that the former wife and the

third person were not living together as man and wife, since the conditions of the statute governing marriage, which are required for a marriage to be recognized in New Hampshire, had not been met. RSA ch. 457.

8. Divorce---Alimony---Subsequent Marriages

The supreme court holds that cohabitation by a former spouse does not automatically suspend the right to alimony.

9. Divorce---Alimony---Discretion

New Hampshire's alimony statute merely directs the courts to award alimony as they deem "just;" therefore notwithstanding the numerous considerations involved, which considerations apply to the original award as well as to any modifications thereof, trial courts have broad discretion in matters involving alimony. RSA 458:19 (Supp. 1983).

10. Divorce---Alimony---Modification or Vacation

To obtain a modification of an alimony award, a substantial change in circumstances in the financial condition or needs of the parties must be shown.

11. Divorce---Alimony---Modification or Vacation

Cohabitation by an alimony recipient is not, in and of itself, a ground upon which alimony may be modified or suspended, but it is to be considered a substantial change in circumstances if it substantially changes the financial condition or needs of the recipient so that a continuance of the original decree would be unjust.

12. Divorce---Alimony---Modification or Vacation

A modification of an alimony award will be set aside only if upon the evidence it clearly appears that there has been an abuse of discretion.

13. Divorce---Alimony---Modification or Vacation

Where former husband filed a motion seeking suspension or reduction of alimony payments on the basis that his former wife was cohabiting with a third person, and where the master ordered that the alimony payments be reduced during the period in which the former wife was cohabiting with the third person, based on the master's finding that the former husband had alleged and proved substantial changed circumstances of the former wife consisting of her cohabitation with a third person and the latter's

financial assistance to her, the supreme court could not say that the master abused his discretion since the record showed that the master went beyond the mere fact of cohabitation and considered the change in the financial condition or needs of the former wife, and the evidence supported the master's recommendation.

14. Divorce---Alimony---Modification or Vacation

Absent a provision incorporated into a divorce decree to the effect that alimony will be suspended or reduced if the recipient engages in a relationship resembling marriage, the trial court may not suspend or modify alimony payments based upon cohabitation by the alimony recipient unless there is a substantial change in the economic circumstances of the recipient.

15. Divorce---Alimony---Particular Cases

The supreme court found no merit in a former wife's argument that the trial court's determination that the facts surrounding her cohabitation with a third person constituted a substantial change in circumstances, warranting a reduc-

tion of alimony payments during the period of cohabitation from $1,500 to $1,100 per month, violated her constitutional right of freedom of association.

Nadeau Professional Offices, of Rye (J. P. Nadeau on the brief and orally), for the plaintiff.

Sanders & McDermott P.A., of Hampton (Lawrence M. Edelman on the brief, and Patricia McKee orally), for the defendant.

DOUGLAS, J. The issue in this appeal is whether cohabitation by a former spouse is a ground for relieving the other former spouse of his or her obligation to pay alimony. We hold that cohabitation is not a ground, in and of itself, for suspending or reducing the obligation to pay alimony.

The parties were divorced by decree of the superior court in June 1981. The decree provided that the defendant, Richard W. Bisig, was to pay the plaintiff, Joanne M. Bisig, alimony in the sum of $1,500 per month until she died or remarried. In April 1982, the defendant moved to suspend alimony on the basis that the plaintiff was cohabiting with a third person. The defendant claimed that the facts surrounding the cohabitation constituted a substantial change in circumstances warranting either suspension of alimony or, in the alternative, reduction of the alimony award. After a hearing, the Master (*Larry B. Pletcher*, Esq.) recommended that "said alimony payment shall be reduced to $1,100 per month during such period as [p]laintiff cohabits with Donald Mayer. ..." The Superior Court (*Bean*, J.) approved the master's recommendation and ordered that the alimony payments be reduced to $1,100 per month. The plaintiff appealed, and argues here that the reduction was unjust because it was based solely upon her cohabitation with a third person. The defendant alleges that the trial court erred in declining to suspend payment of alimony during the period of cohabitation.

The defendant urges this court to adopt a rule prescribing, in the absence of special circumstances, *suspension* of alimony during a period of unmarried cohabitation. His argument is that since under *Eaton v. Eaton*, 90 N.H. 4, 3 A.2d 832 (1939), alimony is terminated upon the solemnization of a subsequent marriage, irrespective of the new spouse's income, and since cohabitation as in the instant case so closely resembles marriage, a rule like that in *Eaton* should be adopted and applied for

unmarried cohabitation.

[1--4] In Eaton, we held that marriage terminates the right to further alimony, unless extraordinary circumstances would make it inequitable for the alimony to cease. *Id.* at 7, 3 A.2d at 834. We reasoned that the "new marriage, bestowing upon [the former wife]

the right to support from a new source, terminates her right to support from the [former husband]. ... [S]he ought not to have two supports at the same time." *Id.* This reasoning does not apply to the case of an unmarried cohabitant receiving alimony, because unmarried cohabitants are under no legal obligation to support each other. "Generally, a person who cohabits with another ... acquires no rights in the accumulations of the other." DOUGLAS, 3 NEW HAMPSHIRE PRACTICE, FAMILY LAW § 53 (1982). The right to "spousal" support is predicated upon the existence of a valid marriage.

[5] Various benefits, including legal rights and duties, arise from marriage which do not arise from cohabitation. This court recognized this principle when it stated: "[c]ouples enter into ... unstructured domestic relationships in order to avoid the rights and responsibilities that the State imposes on the marital relationship." *Tapley v. Tapley*, 122 N.H. 727, 730, 449 A.2d 1218, 1220 (1982). The right to support does not arise from cohabitation. Hence, the mere resemblance of cohabitation to marriage does not require that alimony be suspended. "It would be incongruous for a court to impose on the parties the same consequences of marriage that they ... sought to avoid when they entered into their arrangement." *Id.*

[6, 7] There can be no claim of marriage in the case at bar. New Hampshire "does not recognize the validity of common-law marriages," *Joan S. v. John S.*, 121 N.H. 96, 98, 427 A.2d 498, 499 (1981) (quoting *Fowler v. Fowler*, 96 N.H. 494, 497, 79 A.2d 24, 27 (1951)), except to the limited extent provided in RSA 457:39. Generally, for marriage to be recognized in New Hampshire, the conditions of RSA chapter 457 must be met. Here, the statutory conditions have not been met. Thus, the master correctly determined that the "[p]laintiff and Donald Mayer are not living together as man and wife as alleged."

[8--10] We hold that cohabitation does not automatically *suspend* the right to alimony and now consider whether cohabitation can be a ground for *reducing* alimony. New Hampshire's alimony statute does not include criteria for determining alimony, but merely directs the courts to award alimony as they deem "just." RSA 458:19 (Supp. 1983). "Notwithstanding the numerous considerations involved, trial courts have broad discretion in matters involving alimony. ..." *Marsh v. Marsh*, 123 N.H. 448, 451, 462 A.2d 126, 128 (1983). "These considerations apply to the original award as well as to any modification thereof. ..." *Fortuna v. Fortuna*, 103 N.H. 547, 548, 176 A.2d 708, 709 (1961). To obtain a modification of an alimony award, a substantial change in circumstances in the financial

condition or needs of the parties must be shown. *Id.* at 549, 176 A.2d at 710.

[11] Cohabitation, in and of itself, is not a ground upon which alimony may be modified or suspended. Cohabitation by an alimony recipient is, however, to be considered a substantial change in circumstance if it substantially changes the financial condition or needs of the recipient so that a continuance of the original decree would be unjust.

[12, 13] In the instant case, the master found that the defendant "alleged and proved substantial changed circumstances of the [p]laintiff consisting of her present cohabitation with Donald Mayer and Donald Mayer's financial assistance to [p]laintiff for rent, utilities, food and travel and entertainment." He then ordered that the alimony payments be reduced during the period in which the plaintiff cohabits with Mr. Mayer. "[A] modification will be set aside only if upon the evidence it clearly appears that there has been an abuse of discretion." Fortuna r. Fortuna, 103 N.H. 547, 548, 176 A.2d 708, 709 (1961). The record demonstrates that the master went beyond the mere fact of cohabitation and considered the change in the financial condition or needs of the plaintiff. The evidence supports the master's recommendation and, consequently, we cannot say that the master abused his discretion.

[14] The parties' intent, as expressed in their stipulations which were incorporated into the divorce decree, is clear. The plaintiff is to receive alimony as long as she lives and does not remarry. The parties could have avoided a court appearance by agreeing that alimony would be suspended or reduced if the recipient engaged in a relationship resembling marriage by using words such as: "if she enters into a quasi-conjugal living arrangement." Absent such a provision, a court may not suspend or modify alimony payments unless there is a substantial change in the economic circumstances of the recipient.

[15] We find no merit in the plaintiff's argument that the trial court's determination violates her constitutional right of freedom of association.

Affirmed.

All concurred.

(SOUTER, J., did not sit.)

134 N.H. 675; In re Estate of Buttrick; 597 A.2d 74

In re ESTATE OF CLIFTON R. BUTTRICK, SR.

[Cite as In re Estate of Buttrick, 134 N.H. 675]

Merrimack County Probate Court

No. 90-351

October 4, 1991

1. Husband and Wife---Common-Law Marriage---Recognition

New Hampshire does not recognize the validity of common law marriages except under specific circumstances set forth by statute. RSA 457:39.

2. Husband and Wife---Common-Law Marriage---Recognition

Probate court properly found that petitioner and the decedent were deemed to have been legally married at the time of the latter's death, so that the petitioner was entitled to a spousal share of the estate of the decedent; finding was not plainly erroneous and clearly could be reasonably made, in that there was testimony by a family member and friends that the petitioner and decedent were considered as married in the community and they received mail at their home addressed to them as though they were married. RSA 567-A:4 (Supp. 1990).

McSwiney, Semple, Bowers & Wise P.C., of Concord (Maureen F. O'Neil on the brief, and George B. Waldron, Jr., orally), for the Estate of Clifton R. Buttrick, Sr.

Sulloway Hollis & Soden, of Concord (Warren C. Nighswander on the brief and orally), for the petitioner, Charlene L. Miller.

JOHNSON, J. This is an appeal from a decree of the Merrimack County Probate Court (*Cushing*, J.) which found that the petitioner, Charlene L. Miller, was entitled to a spousal share of the estate of Clifton R. Buttrick, Sr., by virtue of the probate court's finding that the petitioner and the decedent were "deemed to have been legally married" as of the time of Buttrick's death. RSA 457:39. The question presented is whether there is sufficient evidence to satisfy the statute. We affirm.

The petitioner, Charlene L. Miller, and the decedent (Buttrick, also referred to as "Kip") met in late 1977 and began to date. In early 1978 they agreed to live together. For the cold weather portion of each year they shared a home, owned by Buttrick, in Loudon. During the warmer months they generally lived together in Miller's house in Meredith and Buttrick's boat house in Moultonboro, as well as at a cottage on Bear Island in Meredith owned by Miller's parents. Miller's brother estimated they spent about one-half of their time in Loudon and one-half in the Meredith, Bear Island, Winnipesaukee area. The couple lived together from 1978 until Buttrick's death on October 22, 1988, during which time they spent all but two or three nights together.

At the time the petitioner moved in with the decedent, he was suffering financial difficulties. Miller, upon moving in with Buttrick, made payments on his back taxes; and, during their years together, she paid for many of the couple's daily living expenses such as food, power, telephone, and insurance (business and personal). She also made payments on loans Buttrick owed to various banks. In total, she paid approximately three-quarters of their combined living expenses.

On or about August 17, 1987, on the occasion of a meeting of close friends following a funeral service reception, Miller and Buttrick exchanged marriage vows in front of a former Justice of the Peace. Although the parties appeared to be well aware that the ceremony was not official, Miller testified that Buttrick "was glad to do it" and that, as for her, "it made me feel happy and good. It was nice." Other witnesses testified that the ceremony reflected the couple's commitment and devotion to each other. The probate court found that Miller and Buttrick enjoyed "a close, strong, loving relationship."

The standard for our review in this case is set forth in RSA 567-A:4 (Supp. 1990) as follows: "The findings of fact of the judge of probate are final unless they are so plainly erroneous that such findings could not be reasonably made." Hence we must review the record of the proceedings before the probate court to determine if the findings, as made by the probate judge, could be reasonably made, given the testimony he had before him. In reviewing this record, we are guided by the rule that "[t]he trier of fact is in the best position to measure the persuasiveness and credibility of evidence and is not compelled to believe even uncontroverted evidence." *Restaurant Operators, Inc. v. Jenney*, 128 N.H. 708, 711, 519 A.2d 256, 259 (1986) (citing *93 Clearing House, Inc. v. Khoury*, 120 N.H. 346, 350, 415 A.2d 671, 674 (1980)).

[1] The petitioner in this case asserts that she is entitled to a share of the estate of Buttrick by virtue of RSA 457:39. This statute reads as follows:

> "457:39 *Cohabitation, etc.* Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them, shall thereafter be deemed to have been legally married."

The estate does not challenge that the petitioner and the decedent cohabited and acknowledged each other as husband and wife for a period in excess of three years prior to the death of Buttrick. The

sole challenge by the estate to the probate court's finding that Charlene L. Miller and Buttrick are "deemed to have been legally married" is that the couple were "not generally reputed to be" husband and wife. New Hampshire "'does not recognize the validity of common-law marriages'" except under the circumstances set forth in RSA 457:39. *Joan S. v. John S.*, 121 N.H. 96, 98, 427 A.2d 498, 499 (1981) (quoting *Fowler v. Fowler*, 96 N.H. 494, 497, 79 A.2d 24, 27 (1951)); *see Bisig v. Bisig*, 124 N.H. 372, 375, 469 A.2d 1348, 1350 (1983).

On the sole disputed point, the probate court found, in the narrative portion of its decree, that the petitioner and the decedent "were generally known in the community where they lived and among their friends and family as husband and wife." In a specific finding requested by the petitioner, the probate court found that "Petitioner and Buttrick were generally reputed to be husband and wife for the three years leading up to the death of Buttrick on October 22, 1988." In addition, in response to requests for rulings of law, the probate court granted the following requests:

"1. Petitioner and Buttrick, by cohabitating and acknowledging each other as husband and wife and by being generally reputed to be such for the period of three years immediately prior to the decease of Buttrick, are deemed to have been legally married as of the decease of Buttrick. RSA 457:39.

2. Petitioner, as the legal spouse of Buttrick, is entitled to one-half of the intestate estate. RSA 561:1(d)."

A review of the record reveals the following testimony, which is sufficient to sustain the probate court's findings of fact and rulings of law. First, Richard Miller, brother of the petitioner, who at the time was one of the owners of the Red Hill Inn in Center Harbor, testified that Miller "referred to Mr. Buttrick as her husband. Or 'hubby,' I guess is what she called him." He further testified that "[m]y mother referred to Mr. Buttrick several times, to me, as my brother-in-law." Finally, in discussing mutual friends of the witness and of the petitioner and Buttrick (whose names were given to the probate court), all of whom frequently joined together in social events, Mr. Miller stated, "A number of them felt that, until I told them otherwise *after his death*, that they were married." (Emphasis added.) He went on, "And at least two of them that I met and have seen for the first time in two years---I've seen them in the last two weeks and they did not know of Mr. Buttrick's death, felt that they were married. They

asked how *Charlene and her husband* were." (Emphasis added.) The people he referred to were Jonathan James and Joan Christina Olitsky, both of Meredith.

Second, Joan Christina Olitsky's deposition testimony confirmed Mr. Miller's testimony. She stated, "I thought they were married soon after I met them," and she learned that they were not legally married only "when he died." She further testified that friends and family understood "[t]hat they were a couple." She continued, "I wouldn't think of inviting Charlene over to dinner without Kip ... any more than I would invite you without your wife." Later, she stated, "To me he was her husband and they were a couple."

Third, Joan Westphal of Laconia testified, "For the first couple of months I worked at Trexler's [where Miller worked as well] I, in fact, thought that they were married." She testified that she learned at a later date through "a conversation" with Betty Trexler that "they had not gone through the traditional legal channels of marriage." She further stated that, "In fact, my roommate Susan Cohen thought that they were married, for longer than I did." The witness further testified that Miller described to her the wedding ceremony, noted above, and stated, "I felt as though she [Charlene Miller] took it very seriously and it meant very much to both of them."

Fourth, Miller and Buttrick received mail at their home addressed to "Kippy and Charlene Buttrick" and to "Kip and Charlene Buttrick." Finally, the probate court granted the following requests, which are supported by a review of the record:

"Even though Petitioner and Buttrick knew they were not legally married in the eyes of the law, they acknowledged their relationship to be that of husband and wife, conducted themselves as such and held themselves out to the public as such. ...

Several people testified that Petitioner and Buttrick lived together as husband and wife and were reputed as such by their friends, family and acquaintances. ..."

[2] Based on a review of the record, we hold that the findings of the probate court, particularly the finding that "Petitioner and Buttrick were generally reputed to be husband and wife for the three years leading up to the death of Buttrick on October 22, 1988," are

not "plainly erroneous" and clearly could be "reasonably made." RSA 567-A:4 (Supp. 1990).

Affirmed

THAYER, J., with whom BROCK, C.J., joined, dissented; the others concurred.

THAYER, J., dissenting: The legal questions before us are how a community reputation is established and, more specifically, whether, utilizing a "*plainly erroneous*" standard, the trial record supports the probate court's determination that the petitioner and Mr. Buttrick were generally regarded in the community to be husband and wife. Because I disagree with my colleagues that the evidence supports a finding that the petitioner and decedent were reputed to be husband and wife, *i.e.* married, I must respectfully dissent.

Since the issue presented is fact-based, a summary of the trial evidence and findings of the probate court is necessary. It is clear, after reviewing the record, that the petitioner and Mr. Buttrick lived in Loudon during the winter and alternated among three locations on Lake Winnipesaukee during the summer. The uncontroverted evidence from family members was that they knew the petitioner and decedent were not married. It is also clear that all the witnesses from Loudon testified they knew Mr. Buttrick was not married. The record also shows that other witnesses, who had been present for a mock wedding ceremony which occurred fourteen months before Mr. Buttrick's death, testified that at least from that time forward they knew that the petitioner and decedent were not married. Karen Beyerly, a summer resident of Bear Island, testified that she considered the petitioner her best friend and that she knew the petitioner and the decedent were not married. Bill Rooney, who has a summer home on Lake Winnipesaukee, testified he also knew the petitioner and the decedent were not married.

Joan Westphal, a co-worker of the petitioner, testified that for the first few months she worked with the petitioner she thought the petitioner was married, but that she then found out from their employer that the petitioner was not married. Joan Westphal further testified that her roommate thought the petitioner and Mr. Buttrick were married for an even longer period than she did. For exactly how much longer, the record is silent.

The testimony and evidence favorable to the petitioner's position, cited by my colleagues in upholding the probate court's finding, included testimony of Richard Miller, petitioner's brother, and of Joan

Christina Olitski. Richard Miller testified that while he knew his sister and Mr. Buttrick were not married, he knew a number of persons in the community who thought they were. Joan Olitski was the only one to offer first-hand evidence, however. She stated, by deposition, that she was a summer resident of Bear Island and kept her boat where petitioner worked. She further testified that petitioner had introduced the decedent to her as someone important to her, that petitioner never said the decedent was her husband, and that Olitski never noticed a wedding ring or any other indicia of marriage. She testified that, nevertheless, she thought they were married because they lived together. The only other

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evidence cited by the majority in support of the petitioner's position is two Christmas cards sent by Dave Piper, who was not further identified and did not testify, one in October 1987 and the other in December 1987. Mr. Piper addressed the envelopes to "Kippy and Charlene Buttrick." It is clear that both cards were sent within one year of Mr. Buttrick's death, but it is impossible to determine from the record whether Mr. Piper actually believed the petitioner and decedent to be married and, if so, whether he had believed it for a period of three years before Mr. Buttrick's death.

Reputation, as an element of common-law marriage, should be generally known and undivided in the appropriate community. *See In re Manfredi's Estate*, 159 A.2d 697, 700 (Pa. 1960) (reputation must be broad and general, not partial and divided); *see also Walter v. Walter*, 433 S.W.2d 183, 195 (Tex. Civ. App. 168); 52 AM. JUR. 2d *Marriage* § 52, at 907 (1970). "'The mere fact that they [the alleged contracting parties] were known to a few people as man and wife is not sufficient evidence to establish marriage. Proof of reputation for such purpose must be general and not confined to a few persons in the immediate neighborhood, as the relationship may be established merely for the purpose of deceiving others.'" *In re Manfredi's Estate*, 159 A.2d at 700 (quoting *In re Hilton's Estate*, 263 Pa. 16, 19, 106 A. 69, 70 (1919)). "[T]he community in such context is composed of those persons who have had the opportunity through social or business contact to form an opinion of the character of the person, or of the relationship, under inquiry." *In re Greenfield's Estate*, 141 S.E.2d 916, 920 (S.C. 1965); *see also Commonwealth v. Stump*, 53 Pa. 132, 135 (1866) (reputation consists of the speech of the people who have had an opportunity to know the parties).

The probate court, in reaching its determination of community reputation, must have concluded that not everyone in the community who knew the individuals and had an opinion as to their reputation

had to agree unanimously or even to reach a general consensus on what that reputation was. The court also had to have concluded that the personal beliefs of the petitioner's and decedent's family, friends, neighbors, and business associates were outweighed by the testimony of the petitioner's brother, which was that some individuals thought the petitioner and the decedent were married, along with the testimony of a person who was in the community for only three months a year, and evidence of two Christmas cards, addressed to the petitioner and the decedent. The evidence does not support, as reasonable, the latter conclusion, and I would find plain error and reverse. Today's holding should be noted by those unmarried persons who are living with someone in a "loving relationship," but who do not want their companions to share in their estates.

BROCK, C.J., joins in the dissent.

TESTIMONY BEFORE THE NEW HAMPSHIRE HOUSE JUDICIARY COMMITTEE, IN OPPOSITION OF HB427 — February 8, 2005
By: Seth Cohn, private citizen

Good morning, Ms. Chairman, ladies and gentlemen of the Committee. For the record, my name is Seth Cohn. I am here today as a private citizen, who might be affected by this passage of this bill. I oppose HB 427, and urge this Committee to declare this bill Inexpedient to Legislate.

I am in what would be considered a 'common law' marriage. My "wife" and I consciously chose not to get a marriage license or involve the State in our relationship, for a variety of personal reasons. This serves to protect both of us, both financially and legally. We live together, for almost 2 years now, and plan on living together for much much longer, with a private written commitment between ourselves. We've kept our own last names, and we maintain separate accounts for many things. Many things people take for granted with a 'normal marriage', we can handle ourselves using written legal documents which make clear our intentions, such as medical care authorization, power of attorney, financial and property ownership, and other 'personal' matters, similar to any other contract between individuals,. Matters involving other parties who wish to see a marriage license before they grant privileges, such as employer sponsored insurance coverage for spouses, or jointly filed tax benefits, we do not have, nor do we seek them, by our own choice.

The state of NH has a unique status with regard to its' position on 'common law marriage' and I'm convinced that it is a wise and valuable position to have. In many other states, common law marriage is recognized based on living together for a certain amount of time, and that is often the sole requirement. Under current law, RSA 457:39 recognizes so called 'common law' marriage only under one very limited circumstance: upon the death of one of the 'spouses'. Upon the death of one 'spouse', for the purposes of survivorship, the other is, uniquely here in NH thanks to RSA 457:39, considered to have been legally married, but not before. By having the requirement of death of one person, the only time this recognition comes into play is when the deceased party can no longer speak for themselves, and with RSA 457:39, the state is protecting the rights of the survivor, insuring that they have a claim to retirement benefits, pensions, and other so-called widow's benefits.

In my mind, thanks to RSA 457:39, should something tragically lethal happen to me, my 'wife' would not have to worry about having a marriage license in order to act on my property's behalf, handle my estate, my burial, or otherwise inherit my property and any benefits accrued. While a well written will could provide some of these things otherwise, the added protection of the state law ensures a much smoother avenue for all concerned, in what might already be a difficult and painful situation. If someone decided to contesting my 'wife's' property rights, or claim that she is not otherwise eligible for survivor benefits, I'd be unable to help or step in, except for leaving a will stating my intention, and I would welcome the state's protection of her claim of 'spouse' at that point. While I'm alive, here in the State of New Hampshire, the state's position under RSA 457:39 is that I'm not married in a legal sense, and I'm fine with that and agree with that position, but should I die, I would welcome the State's stepping forward to ensure that my 'widow' has full rights and privileges, whether or not I realized beforehand that I should added yet another specific clause in my will to cover something I'd neglected otherwise.

The NH Bar's website has a paper explaining the reach and scope of the current law which is quite clear and reasonable: http://www.nhbar.org/pdfs/7-02comlaw.pdf (A copy of this is included with my testimony for the committee's review)

Again, I urge you to declare this bill Inexpedient to Legislate, and leave the current law, which is most reasonable and almost solely for the protection of widow's survivor rights, alone.
Ladies and gentlemen, thank you for your time.

Seth Cohn 120 Fisherville Rd #144 Concord, NH 03303 ■ Tel. 738-8628 - Email sethcohn@gnuhampshire.org

This article is **not** presented as specific advice, which may only be provided by an attorney based upon each individual situation. If you need a referral to an attorney, the NHBA Lawyer Referral Service is available to assist you. For more information, call 229-0002 or e-mail them at *lrsreferral@nhbar.org*.

INFO CURRENT AS OF 07/12/02

COMMON LAW MARRIAGE

QUESTION: Would you please explain the laws governing common law marriage in New Hampshire?

ANSWER: A common law marriage is generally understood to be a union of two people which resembles a marriage but which has not been solemnized in accordance with the applicable state requirements.

New Hampshire law requires couples who wish to be legally married to obtain a marriage license and then have their marriage properly solemnized by a justice of the peace or member of the clergy. After the marriage ceremony, the officiant signs a marriage certificate, which is later forwarded to the State Register of Vital Records and Health Statistics.

Except for one specific exception, New Hampshire does not recognize the common law marriage. This exception, embodied in N.H. RSA 457:39, provides that persons "cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of three years, and until the decease of one of them, shall thereafter be deemed to have been legally married."

What this means is that if a couple lives together for at least three years, treats and acknowledges one another as husband and wife, and is viewed by the community to be a married couple, and if one of them dies, then a legal marriage can be said to have existed. Prior to the death of one of the parties, however, the relationship is not deemed to be a common law marriage.

R.S.A. 457:39 has its most significant impact on inheritance rights as the surviving common law spouse may inherit as would a spouse of a legally solemnized marriage. If the deceased did not have a will, the surviving common law spouse would be entitled to take a spousal share under the intestacy laws, or to elect to take a spousal share instead of the share designated in the will for the spouse. One factor to consider in deciding whether or not to seek recognition as a common law spouse is that if a couple is not married and one dies, leaving assets to the other, the portion passing to the survivor is subject to New Hampshire legacy and succession tax. Spouses, on the other hand, are exempt from the tax. (Note: the legacy and succession tax has been repealed and would only apply to deaths that occur on or before December 31, 2002.)

In order to be declared a common law spouse, the surviving live-in partner would file a petition in the probate court that is overseeing the deceased's estate. The petition should identify the factual allegations and evidence which would support a finding of a common law marriage. A common law spouse finding would not be made if there are other legal impediments to the marriage and applies only to people who would have been otherwise competent to marry. For example, RSA 457:39 cannot be utilized to validate a polygamous or incestuous marriage.

If a couple has been living together in what would, in the event of the death of one of them, qualify as a common law marriage, there are no legal steps that can be taken during their lives to obtain a legal divorce because the couple is not considered to be legally married. If an unmarried couple has had a

child and wishes to separate, both parents are presumed to be the natural legal guardians of that child, and either parent could petition the court for an order regarding custody, visitation and child support. The court would not, however, enter any orders for alimony.

Any property that an unmarried couple has acquired in joint name, such as real estate, would need to be addressed in an equity action and not through a divorce action. It is possible to obtain a court order which awards or divides jointly owned property through an equity action called a petition to partition.

If the couple incurs any debts in their names jointly, such as credit card debt or a mortgage obligation, the couple is jointly and severally liable for that debt, which means that the creditor has the option of seeking to recover the entire debt from one or both of the parties. The party against whom a joint obligation is enforced, however, may be entitled to seek compensation from the other party based upon the common law action of contribution.

As far as the filing of tax returns is concerned, the Internal Revenue Service only authorizes the filing of a joint tax return if, on the last day of the tax year, a couple is considered to be married under the governing state law. Therefore, residents of New Hampshire may not file a joint tax return unless they are legally married, since New Hampshire does not recognize common law marriage during the lifetime of the couple.

Answered by ***Attorney Judith A. Fairclough***,
Orr & Reno, P.A., Concord

If you have a legal question, you may call **1-800-868-1212** to reach **LawLine** on the **second** Wednesday of each month from 7 to 9 p.m., when volunteer lawyers are available to answer your legal questions.

Voting Sheets

HOUSE COMMITTEE ON JUDICIARY

EXECUTIVE SESSION on HB 427

BILL TITLE: **repealing common law marriage.**

DATE: February 15, 2005

LOB ROOM: 208

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ~~ITL~~, Interim Study (Please circle one.)

Moved by Rep. Hunt

Seconded by Rep. Lasky

Vote: 17-5 (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE:

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Maureen C. Mooney, Clerk

HOUSE COMMITTEE ON JUDICIARY

EXECUTIVE SESSION on HB 427

BILL TITLE: **repealing common law marriage.**

DATE: 2/15/05

LOB ROOM: 208

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Hunt

Seconded by Rep. Laskey

Vote: 17-5 (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE: NO

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Maureen C. Mooney, Clerk

OFFICE OF THE HOUSE CLERK 2005 SESSION

JUDICIARY

Bill #: HB427 Title: repealing Common law marriage

PH Date: ____/____/____ Exec Session Date: 2/15/05

Motion: ITL Amendment #:

MEMBER	YEAS	NAYS
Dokmo, Cynthia J, Chairman	✓	
Soltani, Tony F, V Chairman		✓
Rowe, Robert H	✓	
Desmarais, Vivian J	✓	
Mooney, Maureen C, Clerk		✓
Morris, Richard W	✓	
Sorg, Gregory M		✓
Wheeler, James E		✓
Pilliod, James P	✓	
Buxton, Donald R	✓	
Elliott, Nancy J	✓	
Francoeur, Bea	✓	
Mead, Robert D	✓	
Hunt, John B	✓	
Wall, Janet G	✓	
Lasky, Bette R	✓	
Potter, Frances D	✓	
Cote, David E	✓	
Espiefs, Peter S	✓	
Morrison, Gail C	✓	
Buzzell, Bernard E		✓
Shurtleff, Stephen J	✓	
TOTAL VOTE:	17	5

Printed: 2/2/2005

Committee Report

MAJORITY
COMMITTEE REPORT

COMMITTEE: **Judiciary**

BILL NUMBER: **HB 427**

TITLE: repealing common law marriage.

DATE: Feb. 17, 2005 CONSENT CALENDAR YES ☐ NO ☒

☐ OUGHT TO PASS

☐ OUGHT TO PASS WITH AMENDMENT

☒ INEXPEDIENT TO LEGISLATE

☐ REFER TO COMMITTEE FOR INTERIM STUDY
(Available only in second year of biennium.)

STATEMENT OF INTENT
(Include Committee Vote)

New Hampshire does not recognize common law marriage, as that term is generally known. However, for the limited purpose of establishing inheritance rights, New Hampshire does have a Cohabitation statute that dates back to our original 1842 revised statutes, which reads: Persons cohabitating and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them, shall thereafter be deemed to have been legally married." To qualify as a spouse for purposes of inheritance, the survivor must prove all three elements set forth in the law. Clearly the requirements of this law ensure that it is rarely used today but its original intent is still applicable. No surviving spouse should be deprived of their inheritance rights if their spouse were to die and they were not lawfully married. The committee heard no evidence that this ancient law was being abused.

Vote 17-5.

Rep. John B. Hunt
FOR THE MAJORITY

Original: House Clerk
cc: Committee Bill file

USE ANOTHER REPORT FOR MINORITY REPORT

Judiciary

HB 427, repealing common law marriage. **INEXPEDIENT TO LEGISLATE**

Rep. John B. Hunt for the Majority of Judiciary: New Hampshire does not recognize common law marriage, as that term is generally known. However, for the limited purpose of establishing inheritance rights, New Hampshire does have a Cohabitation statute that dates back to our original 1842 revised statutes, which reads: Persons cohabitating and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them, shall thereafter be deemed to have been legally married." To qualify as a spouse for purposes of inheritance, the survivor must prove all three elements set forth in the law. Clearly the requirements of this law ensure that it is rarely used today but its original intent is still applicable. No surviving spouse should be deprived of their inheritance rights if their spouse were to die and they were not lawfully married. The committee heard no evidence that this ancient law was being abused. **Vote 17-5.**

MINORITY
COMMITTEE REPORT

COMMITTEE: **Judiciary**

BILL NUMBER: **HB 427**

TITLE: repealing common law marriage.

DATE: Feb. 17, 2005 CONSENT CALENDAR YES ☐ NO ☒

☒ OUGHT TO PASS

☐ OUGHT TO PASS WITH AMENDMENT

☐ INEXPEDIENT TO LEGISLATE

☐ REFER TO COMMITTEE FOR INTERIM STUDY
(Available only in second year of biennium.)

STATEMENT OF INTENT
(Include Committee Vote)

When the original predecessor of RSA 457:39 was enacted in the nineteenth century, under the mores of the time cohabitation was relatively rare, and cohabitating couples overwhelmingly would wish to be, and would be, reputed as married. Now, however, that it is normal and accepted for couples to live together without benefit of marriage, the nature of a couple's commitment to each other can be ambiguous, not just to the community, but even to themselves and their families. This is an invitation to confusion and discord over the administration of the estate of the first one of them to die, with that first one no longer available to testify. The minority believes that the concept known as common law marriage has outlived its usefulness and should be abolished. If couples desire the advantages of marriage, they should get married.

Rep. Gregory M. Sorg
FOR THE MINORITY

Original: House Clerk
cc: Committee Bill file

USE ANOTHER REPORT FOR MINORITY REPORT

Judiciary

HB 427, repealing common law marriage. **OUGHT TO PASS**

Rep. Gregory M. Sorg for the Minority of Judiciary: When the original predecessor of RSA 457:39 was enacted in the nineteenth century, under the mores of the time cohabitation was relatively rare, and cohabitating couples overwhelmingly would wish to be, and would be, reputed as married. Now, however, that it is normal and accepted for couples to live together without benefit of marriage, the nature of a couple's commitment to each other can be ambiguous, not just to the community, but even to themselves and their families. This is an invitation to confusion and discord over the administration of the estate of the first one of them to die, with that first one no longer available to testify. The minority believes that the concept known as common law marriage has outlived its usefulness and should be abolished. If couples desire the advantages of marriage, they should get married.