Page 22

269 P. 22 (Colo. 1928)

84 Colo. 250

RADOVICH

v.

RADOVICH.

No. 11874.

Supreme Court of Colorado

June 25, 1928

Department 1.

Error to District Court, San Miguel County; Straud M. Logan, Judge.

Action by George Radovich against Mary O. B. Radovich. Judgment for plaintiff, and defendant brings error.

Affirmed.

[84 Colo. 251] Underhill & Hotchkiss, of Grand Junction, for plaintiff in error.

Moynihan, Hughes & Knous, of Montrose, and John M. Woy, of Telluride, for defendant in error.

DENISON, C.J.

Defendant in error was plaintiff below and had judgment against plaintiff in error upon his first cause of action for a divorce, and upon his second cause of action for a division of certain property. She brings error.

The evidence is not brought up; we must, then, assume that it was sufficient to sustain the judgment. The briefs show that the evidence was of a common-law marriage only, and that the parties lived together for about five years.

[84 Colo. 252] The defendant demurred to the amended complaint, and also attacked the replication. She raised these questions in various ways to the end of the proceedings in the district court, and the only question before us is whether, taking the pleadings together, any right in plaintiff to a divorce or to the property in question is shown.

The first cause of action is sufficiently stated. Omitting the evidential matter, it states that plaintiff and defendant are husband and wife; that she has treated him with extreme cruelty, by nagging him to convey the property in question to her till he did it, by falsely pretending great love and affection for him to obtain such conveyance, and, when she had obtained it, by excluding him from the house by violence, striking him on the head, refusing to live with him, and

Page 23

threatening to shoot him. This states a cause of action for divorce.

The claim is made, however, that the answer and replication destroy the complaint, so that on the pleadings defendant was entitled to judgment. We do not think this claim can be sustained. The argument is that, since the defendant by her answer denies that the parties were husband and wife, and alleges that she cohabited with plaintiff upon his promise to marry her legally, and since plaintiff in his reply alleges that he repeatedly requested her to marry him ceremonially, but she refused, it conclusively appears that there was no marriage contract in praesenti, and so the parties were not husband and wife, and therefore there could be no divorce.

This reasoning is unsound. The allegation in the answer that the parties lived together on a promise of a future marriage is no more than an evidential fact, in argumentative support of the negative of the issue, husband and wife or not, and is not traversable. Code 1921, §§ 62, 78, 188, 190; Foley v. Gavin, 76 Colo. 286, 230 P. 618; Sylvis v. Sylvis, 11 Colo. 319, 17 P. 912; Payne v. Williams, 62 Colo. 86, 160 P. 196; Swanson Co. v. Pueblo Co., 70 Colo. 83, 197 P. 762, and many other Colorado cases. The allegation in the replication that

[84 Colo. 253] plaintiff had requested defendant to marry him by ceremony is also merely evidential, not a material fact under the Code, and is not conclusive that they were not already married at common law. There are obvious reasons why a marriage ceremony is often desirable, even to those who, in contemplating of law, are already married. See Employers' Ins. Co. v. Morgulski, 69 Colo. 223, 193 P. 725. Notwithstanding these statements in the answer and replication, therefore, the issue was simply marriage vel non.

The defendant relies on Cordas v. Ryan, 72 Colo. 521, 212 P. 490, and Ryan v. Cordas, 76 Colo. 191, 230 P. 680, which are one case. That case, however, is carefully distinguished from the Morgulski Case. Ryan was defeated because the evidence of a contract of marriage in praesenti was lacking, while Morgulski won because there was such

evidence. It is true that a mere contract for a future marriage can never amount to a common-law marriage, even though followed by years of cohabitation, and that a plan for a future ceremony is sometimes incompatible with a present marriage; but an agreement in praesenti to be now and henceforth husband and wife may be valid, even though there is then and there an agreement for a future ceremony. See the Morgulski Case, supra. And an agreement, made after a valid marriage, to have a ceremony, cannot vitiate the marriage. In the present case there is before us no question upon the evidence, and it follows, from what we have said, that the court committed no error as to the pleadings in the first cause of action.

The second cause of action alleges that plaintiff and defendant are husband and wife; that after marriage he bought a hotel, and together they operated it; that, by pretending great love and affection for him, she persuaded him to convey this property to her; that she did this for the purpose of obtaining the property, and then abandoning him; that, having obtained it, she refused to live with him, and drove him from the house with blows and threats, as we have stated above.

[84 Colo. 254] This states a cause of action for the recovery of the property. Meldrum v. Meldrum, 15 Colo. 478, 24 P. 1083, 11 L.R.A. 65. The fact that the court found reason to give him but half of it is just here irrelevant.

The defendant makes the same argument here as in regard to the first cause of the action, the answer and replication being substantially the same, and adds that, since no marriage is shown, the relation appears in the pleadings to be illicit, and equity will not interfere with the results thereof. This argument is, of course, refuted by what we have said in regard to the first cause of action. The ultimate fact--husband and wife--(Foley v. Gavin, 76 Colo. 286, 230 P. 618)--is alleged. The statement of evidential facts in the pleadings cannot affect that allegation. The issue thereon, we must assume, has been found for plaintiff. The parties, therefore, so far as concerns this case, were husband and wife, and the argument based on their illicit relation falls to the ground.

Judgment affirmed.

WALKER, WHITFORD, and BURKE, JJ., concur.