Common Law Marriages in Manitoba

The term common law marriage has two meanings.

One is a loose use of the term which in common parlance means any relationship involving cohabitation of reasonable duration between a man and woman without the benefit of a valid marriage ceremony. In Manitoba it is this use of the term which is prevalent and widespread. The general view is that a solemnization of any such relationship (with formalities such as those set out in The Manitoba Marriage Act R.S.M. 1970, c. M50) is necessary before a court will recognize that relationship as a legally valid marriage.

The second meaning is the common law marriage properly so called in law. It is our contention that this second particular species of common law marriage — that species wherein a man and a woman who have the capacity to marry declare their present intention to live in a "voluntary union for life . . . to the exclusion of all others" (*Hyde* v. *Hyde* (1866), 1 L.R. 130 (Div.)) — is a valid marriage at law without solemnization so that the words "wife", "husband", "issue" or "legitimate child" in any statute apply to that relationship, with the consequent rights and obligations thereunder.*

In fourteen American states (Alabama, Colorado, Florida, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina and Texas) and the District of Columbia such a common law relationship is indeed upheld as a valid marriage, as *ipsum matrimonium*. (See Clark, *Law of Domestic Relations* 46 (1968) for a citation of statutes and cases in these jurisdictions.)

It was long held in England that such a relationship was *ipsum matrimonium* (see 1 Blackstone 483-4, e.g.) before the imposition of Lord Hardwicke's Marriage Act (1753) 26 Geo. II, c.33. Such a relationship was known as a contract for marriage *per verba de praesenti*.

In Manitoba the issue is still unclear. To resolve it, we must examine:

I. the relevant legislation to see if there are express statutory words nullifying such relationships;

II. the ways in which courts have treated the traditionally-held view of English common law and the applicability of that law to Manitoba;

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* It must be stressed that in this article it is solely in the distinct legal context that the term common law marriage will be used.

III. the English common law position.

This is by nature a brief excursion. The nature of our enquiry leads into major fields of law-conflicts, ancient forms of real action, jurisdictional history, and canen law. We present herein the germ of the argument.

I. Relevant Legislation

The applicable statutes of England were introduced into Manitoba as of July 15, 1870.* By this time there had been considerable legislation in England aimed at nullifying secret marriages, which were the more common manifestation of common law marriages. The first such piece of legislation making solemnization necessary was the statute commonly called Lord Hardwicke's Marriage Act (1753) 26 Geo. IV, c.33. It had, however, a specific paragraph making it effective and binding only to England and did not extend "to any marriages solemnized beyond the seas" (s.18). Lord Hardwicke's Act made certain formalities into conditions precedent to a valid marriage in order to give the marriage notoriety. Marriages which failed to comply with these formalities were void. Lord Hardwicke's Act proved too severe and was amended and ultimately repealed by two subsequent Acts: (1823) 4 Geo. IV, c. 76; (1836) 6 & 7 W. IV, c. 85. Neither of these acts, however, did away with a requirement for solemnization of the marriage. Once again, however, these statutes were given no extra-territorial effect: "This Act shall extend only to that Part of the United Kingdom called England" (S. 33 of 1823 Act); "This Act shall extend only to England, and shall not extend to the marriage of any of the Royal Family" (s. 45 of 1836 Act). Therefore, the English statutes prior to 1870 as to solemnization have no relevance in so far as determining the common law position on such marriages in Manitoba.

The British North America Act 30 & 31 Victoria, c. 3 divides marriage jurisdiction between the Dominion and the provinces; the Dominion is given jurisdiction over "marriage and divorce" s. 91(26), while the provinces are given jurisdiction over the "solemnization of marriage in the province" s.92(12). In *Re Marriage Legislation in Canada,* (1912) A.C. 880 (P.C.) the Privy Council held that

> the provision in s.92 conferring on the provincial Legislature the exclusive power to make laws relating to the solemnization of marriage in the province operates by way of exception to the power conferred as regards marriage by s.91, and enables the provincial Legislature to enact conditions as to solemnization which *may* affect the *validity* of the contract. (at 887) (Our emphasis.)

Thus the question of the nature and effect of the Manitoba Marriage Act R.S.M. 1970, c. M50 becomes relevant.

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* See below for an extended discussion of the applicability, in general, of English law to Manitoba, and in particular, of the English law relating to common law marriages in Manitoba.

The critical matter is whether the Marriage Act has *invalidated* the common law marriage. This will depend on whether it constitutes a set of administrative directives only or whether it is mandatory and invalidates any marriage not complying with its solemnization requisites. The Privy Council has held that the province has the *right* to put forward conditions precedent to the validity of the marriage; the question is - *has it so done?*

The Marriage Act has provisions dealing with requirements of licences, publication of banns, persons authorized to solemnize marriages, parental consent necessary for marriages of persons under the age of majority, etc. Those who issue licences or perform marriage ceremonies contrary to the terms of the Act are subject to penal sanction. Section 36, the curative section, indicates that mere irregularities in the formalities, or failure to comply with certain conditions, will not invalidate the marriage:

> Every marriage heretofore or hereafter solemnized between persons not under a legal disqualification to contract such a marriage shall, after one year from the time of the solemnization thereof, or upon the death of either of the parties before the expiry of that time, be deemed a valid marriage so far as respects the civil rights in the province of the parties or their issue, and in respect of all matters within the jurisdiction of the Legislature, notwithstanding that the clergyman, minister, or other person, who solemnized the marriage was not duly authorized to solemnize marriages, and notwithstanding any irregularity or insufficiency in the proclamation of intention to intermarry, or in the dispensation thereof, or in the issue of the licence, or notwithstanding the entire absence of either . . . .

Nowhere in the Act is there an express provision stating that a marriage based on the common law, or a consensual marriage, is by the mere fact of the parties' having failed to comply with the relevant provisions of the Act, thereby ruled void.

The last point is extremely significant in light of the law postulated by Dr. Lushington in *Catteral v. Sweatman,* (1845) 1 Rob. Ecc.304, 163 E.R. 104 (Prob., Div. & Adm. Div.) that unless there are words in a marriage act expressly creating a nullity, a mere implication of nullity is not sufficient to vitiate a marriage:

> I draw two conclusions: first, that so far as my research extends, it appears that there never has been a decision that any words in a statute as to marriage, though prohibitory and negative, have been held to infer a nullity, unless that nullity was declared in the Act. Secondly, that viewing the successive Marriage Acts, it appears that prohibitory words, without a declaration of nullity, were not considered by the legislature as creating a nullity, and that this is a legislative interpretation of acts relative to marriage. (163 E.R. at 1052).

This rule has been heavily relied upon in Canada: *Hobson* v. *Gray* (1958), 25 W.W.R. (N.S.) 82 (Alb. S.C.); *Peppiatt v. Peppiatt* (1916), 36 O.L.R. 427 (C.A.); also see *Alspector v. Alespector,* (1957) O.R. 14 (H.C.)

affirmed (1957) O.R. 457 (C.A.); and *Clause* v. *Clause*, (1956) O.W.N. 449 (H.C.), which appear to support this rule.

The court in *Hobson* v. *Gray*, relying on Dr. Lushington's conclusions, held valid an under-age marriage on the ground that the parties under the common law were of an age capable of contracting a valid marriage. The provincial solemnization act did not expressly attach nullity to the absence of parental consent, and so nullity was not to be inferred. In a similar case, Mr. Justice Meredith in *Peppiatt* v. *Peppiatt* in reaching the same decision said:

> If it is intended that compliance with the requirements of the marriage law as to matters prior to the performance of the marriage ceremony shall be essential to the formation of a valid marriage, it is, I think, incumbent on the Legislature to say so in plain and unequivocal language. ((1956) O.W.N. at 434).

In *Alspector* v. *Alspector*, McRuer C.J.H.C. found a valid marriage to have subsisted "notwithstanding the entire absence of a licence as required by The Marriage Act" of Ontario ((1957) O.R. at 18). He gave two reasons for judgment. It was clear, he felt, that the parties' situation fell within the scope of the curative section of the Ontario Marriage Act (similar to s.36 of the Manitoba Act). But quite apart from this, McRuer C.J.H.C. regarded the Statute as a set of administrative directives which needed precise and unambiguous language if any clause is to have the effect of a voiding provision in respect of marriages not complying with it. For his second reason, he drew support from *Clause* v. *Clause* where Ferguson J. had expressed the same view in upholding the validity of a marriage attacked for lack of parental consent required by the Ontario Act. It may be noted that in a much earlier case, *Henderson* v. *Breem*, (1923) 2 W.W.R. 480 the Alberta Court of Appeal, when confronted with a similar type of fact situation to those discussed above, had also held that the marriage legislation in Alberta constituted a set of administrate directives, which do not effect nullification for non-compliance.

In *Gilham (falsely called Steele)* v. *Steele*, (1953) 2 D.L.R. 89 the Court of Appeal of British Columbia heard substantially the same argument but held that the British Columbia Marriage Act provision relating to the need of the officiating clergyman to be registered under the Act was a provision that went to the validity of the marriage. It is important to note, however, that the provision on which the court relied in the British Columbia legislation read:

> ...and notwithstanding the provisions of any law or Statute, general or special, to the contrary, no person shall solemnize any marriage unless he is at the time a minister or clergyman registered under this Act as authorized to solemnize marriage. (R.S.B.C. 1948, c.201, s.8 (3)).

The court said that the curative section (our s.36) could not validate a marriage solemnized contrary to this section. But in the Manitoba Act the only section similar to the above states:

> No marriage is invalid by reason only that the person performing the ceremony was not registered under this Act, or that his registration had been cancelled; but any person performing, or purporting to solemnize, a ceremony of marriage who is not registered or otherwise authorized under this Act to solemnize ceremonies of marriage is guilty of an offence and liable, on summary conviction, to a fine of one hundred dollars.

Thus, the curative provision in the Manitoba Act, although similar to the one in the British Columbia Act, has a completely different effect from that in the British Columbia Act when read in conjunction with the relevant Manitoba section. Read in context together, the relevant sections of our Act specifically validate, while those in the British Columbia Act at that time invalidated, a marriage solemnized by an unauthorized person. *Gilham* v. *Steele* is thus distinguishable.

In the United States, because fourteen states and the District of Columbia continue to recognize common law marriage, the issue of how marriage legislation affects the validity of common law marriage has been much studied in the American courts. It has been held that the fact that a state has a detailed marriage licence statute prescribing who may marry, requiring the issuance of a marriage licence and blood tests, and also designating the officials who can legally perform marriage ceremonies, does not mean that common law marriages have been abolished in that jurisdiction.

The leading case is *Meister* v. *Moore*, 96 U.S. 76 (1877) in which the Supreme Court of the United States had to consider the effect of an early Michigan marriage statute which set up a scheme of licensing, solemnization and other regulations, but which did not in so many words declare invalid those marriages not so solemnized. Strong J. said:

> . . . No doubt, a statute may take away a common law right; but there is always a presumption that the Legislature has no such intention, unless it be plainly expressed. A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a licence, or publication of banns, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common law right to form the marriage relation by words of present assent . . . .
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> As before remarked, the statutes are held merely directory; because marriage is a thing of common right, because it is the policy of the State to encourage it, and because, as has sometimes been said, any other construction would compel holding illegitimate the offspring of parents conscious of no violation of law. (at pp. 78-9).

Other American cases have taken the same position (In *re Stopps' Estate*, 57 N.W. 2d 221 (1955) (Iowa S.C.), *Buradus* v. *General Cement Products Co.*, 52 A. 2d 205 (1947) (Pa. S.C.)). For instance, in *State* v. *Ward*, 28 S.E. 2d 785 (1944) (S.C.S.C.) although South Carolina

legislation prescribed sixteen as the age of consent for females and required a blood test and a marriage licence, a thirteen year old girl was held lawfully married to the defendant when she eloped to live with him as his wife. But for the common law marriage, the defendant would have been guilty of rape. The court states:

> It is now generally held by the great weight of authority, that statutes prescribing the procurement of a license and other formalities to be observed in the solemnization of marriage, do not render invalid a marriage entered into according to the common law, but not in conformity with the statutory formalities, unless the statutes themselves expressly declare such marriage invalid; and this although the statutes prescribe penalties for ignoring their provisions. Such statutes have uniformly been held directory merely. Such being the case, we hold, upon principle and authority, that the marriage of a person who has not reached the age of competency as established by our statute, but is competent by the common law, is valid, provided such marriage is entered into in accordance with the rules of common law. . . . (at p. 786-87).

Thus it may be readily suggested that non-compliance with the Marriage Act of Manitoba will not necessarily nullify the marriage if in fact at common law it can be shown that such a marriage is valid.

Indeed, the foregoing is the type of reasoning accepted by the court in *Re Noah Estate* (1961), 36 W.W.R. 577 (N.W.T.T.C.) when considering whether the solemnization legislation of the Northwest Territories nullified the Eskimo marriage under review. The court held that the Eskimo marriage conformed to a marriage as valid at common law, and that the Marriage Ordinance of the Northwest Territories (R.O.N.W.T., 1956, c. 14) did not invalidate such a marriage. The reason given by Sissons J., inter alia, was that "(n)owhere in this statute, can one fine a specific paragraph stating, in so many words, that a marriage based on the common law . . . (is) ruled null and void or invalid" (at p. 596).

Finally, in commenting upon the analogous curative section 36 in the Manitoba Act, s. 44 in the Ontario Act (R.S.O. 1950, c.222), one writer has commented that the provision was "intended to exemplify a cardinal principle of domestic law: The marriage state being one of the chief foundations of society, it follows naturally that the law tends to favour the presumption of validity for any questioned marriage" (G. Keyes, "The Validity of the Common Law Marriage in Ontario", (1958)1 Osgoode Hall L.J. 58).

In our view the Marriage Act constitutes a set of administrative directives only. It is not mandatory in nature and does not invalidate any marriage not complying with its solemnization requisites. The province has the power to prescribe what is a proper solemnization; but this power has been used by the province to dictate the *method* of solemnization only *if* such a solemnization is decided by the contracting parties.

Accordingly, the Marriage Act is simply irrelevant to the question of whether marriages at common law can be considered valid if contracted between two parties with full capacity. The common law marriage exists entirely *outside the Act* as an alternate means of marrying.

Other legislation relevant to the rights of the spouses in marriage which refer to relationships similar to common law marriages indicate the generally held belief that such relationships do not constitute "marriage", but does not strike down our contention that a common law marriage is sufficient in itself to come within the meaning of "marriage". The Canada Pension Plan R.S.C. 1970, C.C.5 deems a person a surviving spouse who "establishes to the satisfaction of the Minister that he had, for a number of years immediately before the death of a contributor with whom he had been residing, been maintained and publicly represented by the contributor as the spouse of the contributor" (s. 63(1) (b)). The Workman's Compensation Act R.S.M. 1970, c. W200 defines a "common law wife" as "a woman who, although not legally married to a man cohabits with him as his wife or lives with him as such, and has a general reputation as such in the community in which they live" (s. 2(1) (e)) and provides to such a woman who lived with her husband for three years immediately preceding his death, "the compensation to which a dependent widow would have been entitled under this Act . . . in the discretion of the board" (s. 25(7). The Wives' and Children's Maintenance Act R.S.M. 1970, c. W170, provides relief to wives in situations "Where (a) a woman has lived and cohabited with a man for a period of one year or more; and (b) he is the father of any child born to her" (s.6).

These provisions indicate the concern of the legislature for persons who are dependent on other persons without what might be a legal relationship subsisting between them; but in our view these provisions include more kinds of relationships than would be included in our concept of common law marriage and further have narrower restrictions on eligibility than would a spouse married in a true common law marriage.

Other legislation conferring rights on the spouses, such as dower legislation, testators' family maintenance legislation, tax legislation, devolution of estates legislation, etc. use the word "wife", "husband" and "legitimate issue" without definition. Since it is our contention that such words can be used to apply to marriages not solemnized under the appropriate Marriage Act, no complications are created either by such legislation, or by case law showing that particular relationships do not constitute valid marriages.

Having indicated that there is no legislation against the view we are taking, we must show that at common law a simple contract to marry

was valid; and that certain authorities which hold that such a contract is not valid are not applicable to Manitoba.

II. Applicability of Common Law to Manitoba

In every province of Canada except Quebec the applicable common law of England prevails subject to any provincial or other statutes enacted by competent authority and applicable to the province. In the final analysis all the common law provinces were once English colonies in substance despite varying degrees of French control at certain times. To this extent, the common law rules governing the migration of English law to new colonies applied.

The initial determination to be made, according to these rules, is whether the root colony of the province was a conquered or a settled colony.

> A colony conquered from an European ruler and possessing its own civilized laws is deemed to retain its law until the English monarch sees fit to alter it, but this rule has no application to any of the Canadian common law provinces, all of which have been held to have been not conquered, but acquired by settlement. (J. Cote, "The Introduction of English Law into Alberta", (1964) 3 Alta. L.R. 262).

In a settled colony, the initial settlers are deemed to have imported so much of the law of the homeland as was from time to time applicable to the needs of the colony. (See Blackstone, 1 *Commentaries on the Laws of England* (Kerr ed.), 81).

It is of course important to define the precise date of the introduction of England's law for the purpose of deciding which case decisions and which British statutes are in force in a particular province.

After the establishment of the Province of Manitoba on July 15, 1870, it was initially unclear as to when English law was received in the province. It was first held that the common law was introduced on May 2, 1670, the date of the charter of the Hudson's Bay Company (*Sinclair* v. *Mulligan* (1888), 5 Man. R. 17). Both Manitoba and Canada (in respect of the laws in force in Manitoba subject to Canada's jurisdiction), however, subsequently passed acts naming July 15, 1870, as the date upon which the law of England was introduced: (1874) 38 Vict. c. 12 (Man.), now The Queen's Bench Act, R.S.M. 1970, c. C-280, s.51; (1888) 51 Vict. c. 33, s.1 (Can.), now Manitoba Supplementary Provisions Act, R.S.C. 1927, c. 124, s.4 (not since repealed and still in force). The relevant Manitoba section reads:

> The court shall, with or without a jury as provided by law, decide and determine all matters of controversy relative to property and civil rights both legal and equitable, according to the laws existing or established and being in England, as

they were, existed, and stood, on the fifteenth day of July in the year 1870, *so far as they can be made applicable* to matters relating to property and civil rights in the province. (R.S.M. 1970, c. C-280, s. 51(3)).

The relevant Canadian section is similar:

Subject to the provisions of this Act, the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the fifteenth day of July, one thousand eight hundred and seventy, were from the said day and *are in force in the Province, in so far as applicable to the Province,* and in so far as the said laws have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of Great Britain applicable to the Province or of the Parliament of Canada. (R.S.C. 1927, c. 124, s.4).

Clearly, in order to discuss the applicability of The English common law, we must first delineate what "applicable" means in general.

The courts, including the Judicial Committee of the Privy Council, have taken the word "applicable" in analogous statutes to mean the reasonable suitability of the English laws to the young English colonies in the new country. (See *In re Simpson Estate,* (1927) 3 W.W.R. 534 (Alta. C.A.), aff'd (1928) S.C.R. 329; *Doe Anderson v. Tudd* (1845), 2 U.C.Q.B. 82; *Jex* v. *McKinney* (1889), 14 App. Cas. 77 at 81-2 (J.C.P.C.)). As such s.51(3) of the Manitoba Queen's Bench Act and s.4 of the Manitoba Supplementary Provisions Act are to be looked upon as codifications of the common law meaning of applicability, and as fixing a specific date for the applicability concept. Blackstone's test is as follows:

If an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with many and great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of the infant colony: Such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. (1 Bl. Com. (Kerr ed.) 81).

The test of applicability has significant implications with respect to the introduction of the common law marriage into Manitoba.

The traditional view of the English position on common law marriages is that England, from time immemorial divided from the church, held the presence of a Minister in holy orders as an element necessary to the validity of a common law marriage. This is the traditional interpretation of the leading House of Lords decision in *R.* v. *Millis* (1844), 10 Cl. & F. 534, 8 E.R. 844. We will submit below that this is an incorrect interpretation, but for the present we are concerned with the traditional view of *Millis*. We submit that even this traditional rule was never part of that common law introduced into Manitoba.

On any matter as to the applicability of a rule of law, the social and economic conditions of England and Manitoba must be compared. It is not clear, however, at which times the conditions must be considered. There is strong authority that the correct date at which to examine the English conditions is the date on which the English statute took effect or the case was decided (*In re Simpson Estate,* (1927) W.W.R. 534 (alta. C.A.), aff'd on other grounds (1928) S.C.R. 329; *In re Budd Estate* (1058, 24 W.W.R. 383 (Alta. S.C.). However, for an opposing view on this particular issue see Cote at 270).

More relevant to our consideration is the date at which conditions in Manitoba should be examined — on July 15, 1870; or today? Cote (at 269) points out that the problem resolves itself to this:

> Was the introduction of English law an instantaneous process, a sudden transplantation of all the law which in 1870 was applicable to the crude condition of (Manitoba), or is it a continuous process whereby rules of law which were formerly not applicable to the simple circumstances of the Canadian West may become applicable as social conditions change and the economy develops?

Cote comprehensively canvasses both points of view and adopts the latter train of thought — that the body of the common law as of July 15, 1870, is a potential body of law, different parts of which become applicable at different times in the development of Manitoba. However, there is no clear authority on this point (*Cooper* v. *Stuart* (1889), 14 Appl. Cas 269 (J.C.P.C. on appeal from N.S.W.); *Fraser* v. *Kirkpatrick* (1970), 5 W.L.R. 286 (S.C. en banc) at 289 — both support Cote's view. But in *In re Simpson Estate,* above, the opposite view seems to prevail.).

To determine, therefore, whether a pre-1870 statute or rule of English law meets the test of applicability within the context of s.51(3) of the Manitoba Queen's Bench Act and of s.4 of the Manitoba Supplementary Provisions Act, the method to follow is this:

1. Consider the English social and economic conditions as of the date on which the statute or rule of law in question was formulated. With respect to *Millis,* the relevant date is 1844.

2. According to one view, consider the conditions in Manitoba as of July 15, 1870. According to the other view, consider the conditions in Manitoba as of today.

3. If the first view is adopted, resolve whether the conditions in Manitoba in 1870 correspond to the conditions in England at the relevant time. If the alternate view is adopted, compare the present day conditions in Manitoba to the conditions in England at the relevant time.

4. The issue of applicability then depends on how substantially similar the two sets of conditions compared are.

The general principles which govern the matter of applicability are unquestionably difficult to apply, and therefore it is more fortunate that there is substantial authority on this point, both in Canada and England,

concerning the particular rule as enunciated in the traditional interpretation of *R.* v. *Millis*.

In *Blanchett v. Hansell,* (1943) 3 W.W.R. 275 (Man. Q.B.) affirmed without reasons (1944) 1 W.W.R. 432 (Man. C.A.), Dysart J. (as he then was) had to consider the subject of common law marriage. In that case, under a benefit certificate on the life of a member, a fraternal society had agreed to pay the amount payable thereunder "to Nellie Hansell, the beneficiary under this certificate, related to the said member as wife." When the insured, John Hansell, died, Nellie Blanchett had lived with him for twenty years (his wife having left him to live with her paramour). Nellie Blanchett's rights to the insurance were contested initially on the basis of a by-law of that society which formed part of the insurance contract and declared that:

> Death benefits shall be made payable only to the wife, husband (excluding common law wife and husband) . . . whom the applicant shall designate in the application.

If the court were to define "common law wife" in the sense popularly understood, there is no question that Nellie Blanchett would have been excluded. But the court held that "common law wife" has a distinct legal meaning:

> A common law wife is a woman who is united to a man by marriage which though informal is such as was recognized as valid by the common law. There is some confusion as to what formalities could be dispensed with without invalidating the marriage. The English view as laid down in *Reg.* v. *Millis* is more rigid than the view generally held in most of the United States and in Canada. (at 280).

For a common law wife to fall under the technical meaning two essentials had to be present according to Dysart J., —"(1) legal capacity to marry, and (2) an agreement to marry". John Hansell clearly did not have capacity, since he had not acquired a divorce. Therefore, Nellie Blanchett could not have been John Hansell's common law wife. Thus, Dysart J. held that "the express exclusion of a 'common law wife' did not affect Nellie Blanchett" and she was "therefore not, on this ground at any rate, excluded from eligibility as beneficiary".

It is clear that this case rests on the technical definition of common law marriage which Dysart J. gives, and that he was prepared to recognize the possibility of a legal marriage at common law in Manitoba — one which need not conform to the requirements set out in the rule attributed to *Millis*. If this were not so, there would have been no need to take the trouble to point out so carefully why, in this particular case, lack of capacity made such common law marriage impossible. Unfortunately Dysart J. did not elaborate with respect to his statement that *Millis'* view is too rigid; but this is very strong authority. It was followed in *Kirby* v. *Booth* (1963), 42 D.L.R. (2d) 32 (Ont. H.C.) although this case rested on the definition of "wife" as used in a particular contract of insurance being large enough to encompass a woman who lives with a man.

From an early time the English House of Lords recognized there was a question of whether *R.* v. *Millis* had any application outside England, Wales and Ireland. In *R.* v. *Millis* itself, this was the source of much discussion, especially among the dissenting Law Lords. Lord Campbell attempted to limit the scope of the decision emphasizing that "(t)he necessity for the presence of such a(n) (episcopally ordained). clergyman, must be qualified with the condition that his attendance may by possibility be produced" (at 786 in 10 Cl. & F.). In *Beamish* v. *Beamish* (1860), 9 H.L.C. 274 the House of Lords held, reluctantly, that *Millis* bound them to the view that the common law of England required the presence of an episcopally ordained clergyman. But Lord Cranworth said that as to the matter of "whether the case of *The Queen* v. *Millis* would apply to marriages of British subjects in the colonies . . . (i)n this case at least the question is left open" (at 353). On this point, Willes J. in his advice to the Lords in that case, said that in respect of "British subjects in the colonies . . . where no priest could be procured," he doubted "if the law was ever rightly held to apply under such circumstances" (at p. 332). It should be pointed out that two of the four Law Lords in *Beamish* — Lord Campbell and Lord Wensleydale — doubted the decision in *Millis* but felt bound by a previous decision of the House of Lords, no matter how arrived at. See also *Lightbody* v. *West and others* (1902), 87 L.T. 138 (Probate) at 141, where similar views in regard to the inability to procure a priest, are strongly expressed.

In light of the recent decisions of *Wolfenden* v. *Wolfenden,* (1946) P. 67 and *Isaac Penhas* v. *Tan Soo Eng,* (1953) A.C. 304 (J.C.P.C. on appeal from Singapore), it is indeed clear that it is the general rule — and not the exception — that *Millis* has no applicability outside of Britain. These two decisions provide the basis from which it may be cogently argued that *R.* v. *Millis* was never applicable in the area which became Manitoba.

In *Wolfenden* v. *Wolfenden,* the matter before Lord Merriman involved the validity of a marriage in China between two missionaries. There was no prior notice of intended marriage and the marriage itself was unlicenced. It took place before a minister of The Burgess Church and the Church of Scotland Mission in the province of Hupeh in China, who was not authorized under the Foreign Marriage Act, 1892, to perform a marriage. Therefore the question in the case resolved itself to whether, in order to effect a valid marriage at common law in Hupeh, China, in 1938, it was or was not necessary that the ceremony should be performed by an episcopally-ordained priest.

Lord Merriman recognized that Hupeh was subject to English law of which *Millis* must be taken to be a part, but nevertheless held the union to be a valid marriage. Lord Merriman confined the authority of *Millis* to England and Ireland, citing this doctrine laid down by Sir Erskine Perry, C.J. in *Maclean* v. *Cristall:*

> (A)lthough colonists take the law of England with them to their new home, they only take so much of it as is applicable to their situation and condition. In many cases no question will arise as to the inapplicability of several provisions of English law, which are clearly seen to be merely municipal. . . . Blackstone lays down the rule very authoritatively on this subject: What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by the colonists' own provincial judicature, subject to revision of the King in Council. ((1849) 7 Notes of Cases Supplement 17 at 24).

To this extent Lord Merriman held that colonists entering a new territory as Hupeh do not transport the common law rule of *Millis*.

Wolfenden was approved in *Isaac Penhas* v. *Tan Soo Eng*, (1953) A.C. 304 (J.C.P.C.) by the Privy Council. In that case a marriage took place between a Jew and a non-Christian Chinese, both British subjects, who were domiciled in Singapore. The marriage was celebrated in only a modified Chinese form. The couple lived together afterward as man and wife and had two children. When Abraham Penhas died, the respondent Tan So Eng petitioned for letters of administration of his estate. The deceased's brother, Isaac Penhas, entered a caveat against the petition. The issue to be tried was whether Tan Soo Eng was the lawful widow of Abraham Penhas. On a review of the history of the settlement their lordships held that

> the common law was in force in Singapore in 1937 except insofar as it was necessary to modify it to prevent hardships upon the inhabitants . . . (I)n a country such a Singapore, where priests are few and there is no true parochial system . . . it is neither convenient nor necessary that two persons . . . should be required to call in an episcopally ordained priest to effect a marriage. The case of *Wolfenden* v. *Wolfenden* and the cases there cited are in point and were in their Lordships' opinion rightly decided. (at 319).

The Privy Council rejected the appellant's argument that there had been no valid marriage because of the rule in *Millis*, and held that the spouses had contracted "a common law monogamous marriage".

It may be suggested that when the first group of Selkirk Settlers in 1812 established their community at the junction of the Red and Assiniboine Rivers, they brought with them only that law of England as was applicable to their new situation and conditions, and that these conditions did not change that much by 1870. There was no officially recognized religion, nor were priests easily available.

There is no question that in Canada there has been judicial recognition that the presence of an episcopally ordained priest as a condition to a valid marriage at common law is inapplicable. In *Re Marriage Legislation* (1912), 46 S.C.R. 132, reversed but not on this point in (1912) A.C. 880, Idington J. of the Supreme Court of Canada said that it was "open to argue that such holdings as in the *Millis Case* is not . . . law in Canada unless where declared otherwise" (at p. 386).

Prior to the enactment of the British North America Act it was held in two cases, one in Upper Canada and one in Lower Canada, that *Millis* was not supposed to be applicable to the colonies. The first case is- *Breaky* v. *Breaky* (1863), 2 U.C.Q.B. 349 and the second is *Connally* v. *Woolrich* (1867), 11 L.C. Jur. 147 — both discussed in H. Elphinstone, 5 L.Q.R. 44 at 58.

Later, in 1885, Wetmore J. in *The Queen* v. *Nan-E-Quis-A-Ka* (1889), 1 Terr L.R. 211 (S.C. of N.W.T. en banc) had to consider the English laws respecting solemnization of marriages, the North West Territories Act held the laws of England as they existed on July 15, 1870, to "be in force in the Territories in so far as they are applicable to the Territories . . . " Wetmore J. Made it clear that in his opinion no law of England as to forms and ceremonies was applicable to the Territories:

> . . . are the laws of England respecting the solemnization of marriage applicable to these Territories quoad the Indian population? I have great doubts if these laws are applicable to the Territories in any respect. According to these laws marriages can be solemnized only at certain times and in certain places or buildings. These times would be in most cases inconvenient here and the buildings, if they exist at all often are so remote from the contracting parties that they could not be reached without the greatest inconvenience. (at 215).

In the very recent case of *Re Noah Estate* (1961), 36 W.W.R. 577 (NWTTC) Sissons J. of the North West Territorial Court cited the above passage with approval. In this case he held that a common law marriage is valid in the Northwest territories, and furthermore that the Eskimo marriage in question contained the necessary elements to be recognized at common law as a valid marriage. These elements were a voluntary agreement to marry and the intention that the marriage be monogamous and for life. It is to be emphasized that the lack of the presence of an episcopally ordained priest at the ceremony was not an impediment in the way of recognizing the marriage as valid by the common law of the Northwest Territories.

There are two Canadian cases which have held *Millis'* rule to be binding law.

In *Re Sheran* (1899), 4 Terr. L.R. 83 (S.C. of N.W.T.) the Court held that the only exception to the rule laid down in *R.* v. *Millis* were cases where the marriage *per verba de praesenti* takes place in a strictly barbarous country. In the case at hand a white man and Indian woman in 1878 in the Territories verbally agreed between them that they should live together as husband and wife as long as both lived, he agreeing "never to get another woman" and she agreeing "to have no other husband during his life." This agreement was carried out and the two lived together as husband and wife until his death. Scott J. held this was not a legally valid marriage because the Territories, not being a strictly barbarous country in 1878, did not fall within the scope of the exception to *Millis*. It is respectfully submitted that *Re Sheran* is not good law. The

Court cited absolutely no case authority in support of the principle it laid down. *R.* v. *Nan-E-Quis-A-Ka,* a decision of the same court rendered ten years earlier, was dismissed in one sentence as not holding that a voluntary union between man and woman for life to the exclusion of all others was all that was necessary to render a marriage valid. In fact, this was precisely what *R.* v. *Nan-E-Quis-A-Ka* held — there can be no other interpretation of that case.

More recently in *Re Cote* (1971), 5 C.C.C. (2d) 49 (Sask. C.A.) reversing 3 C.C.C. (2d) 383 (Sask. Q.B.) the Saskatchewan Court of Appeal held that a valid marriage at common law requires the intervention of an episcopally ordained priest. The court followed the English case of *Merker* v. *Merker,* (1962) 3 All E.R. 938 (Prob. Div.) which stated that *Millis* is binding law, even though historically inaccurate. It appears, however, that the Saskatchewan Court of Appeal failed to differentiate between what is binding as part of the common law of England and what is binding as part of the common law of Canada or Saskatchewan in particular. That this distinction must be made follows clearly and naturally from what Sir Jocelyn Simon said in his judgment in *Merker:*

> . . . In *R.* v. *Millis,* the House of Lords on an equal division of voices held that the "common law" of England differed from the general canon law in requiring that the *verba de praesenti* must be pronounced in the presence and with the intervention of an episcopally ordained priest in order to constitute a valid marriage. This, though of course binding law, is now however limited by two factors. First, Lord Hardwicke's Marriage Act, 1973, having required various public formalities before a valid marriage can be contracted, common law marriages can today only take place abroad, where the Marriage Act does not apply. Secondly, British subjects are deemed to take abroad only such provisions of English law as are appropriate to their situation and condition; and it has been held that the requirements of an episcopally ordained priest to hear and intervene in the exchange of consents is not such a provision. (at 928).

Merker does not stand, therefore, for the proposition that *Millis* is binding law in Canada, and the court in *Re Cote* did not consider whether *Millis* was applicable.*

Other cases which have held common law marriages not valid did not apply *Millis* directly, nor did they consider argument directed to the applicability of the rule. In an earlier case, *Petshl* v. *Bucki,* (1926) 4 D.L.R. 1185 (Alta. S.C.) the Alberta Supreme Court held that a complete absence of any solemnization by any person, either authorized or not, would not fall under the curative section in the Alberta Marriage Act. In this case there was no mention of *Millis, Beamish* or discussion of a common law marriage. The action was one for a declaration seeking that the two were never married to each other, even though they had

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* This point was also not considered by Mr. Hilton in his article "The Validity of Common Law Marriages," (1973) 19 McGill L.J. 577 wherein he concluded that the Saskatchewan Court of Appeal was correct in law.

lived together for ten years. In *Stockholder* v. *Stockholder* (1934), 42 Man. R. 85 (Man. K.B.) Montague J. (as he then was) of the Manitoba King's Bench held that the Marriage Act contemplated that there must be an official solemnizing the marriage, and that he must be distinct from either of the contracting parties. He cited as authority for this proposition *Beamish* v. *Beamish,* which is indeed authority for this proposition as far as England is concerned, but which limits the proposition as far as colonies are concerned. He also cites Schouler's treatise, 6th ed., vol. 1, s. 29.

> Thus, the essence of formal marriage seems to consist in the performance of the ceremony by or in the presence of some responsible third person, and hence,- *unless* parties can take refuge in natural law and an informal marriage, they are not permitted to tie their own knot.

Surprisingly, Montague J. ignored the last part of this sentence. There was no mention of *Millis,* nor any discussion as to the applicability of English law to Manitoba. In *No. 673* v. *M.N.R.* 60 D.T.C. 21 (Tax App. Bd.) the appellant attempted to deduct the support of a Mrs. O, a woman who had been living with him as his wife, had taken his name, and had been openly acknowledged by him as being his wife. The appeal was dismissed. It is important to note, however, that the appellant conceded that the two were not legally married; his argument was an attempt to extend the meaning of wife in the Income Tax Act to include common law wife in the *popular sense,* that is a woman living with a man. This was followed in two cases, *Oleksj Sokil* v. *M.N.R.* 68 D.T.C. 314 (Tax App. Bd.) and *Schapira* v. *M.N.R.* 66 D.T.C. 157 (Tax App. Bd.) in both of which there was lack of capacity in one of the two parties to the purported marriage relationship. In *Larsen and Larsen* v. *Prince Albert & Northern Bus Lines,* **(1951)** 2 W.W.R. 625 (Saskatchewan District Court) the court stated in obiter that the husband could not collect damages for tortious injury to his common law wife; but there was no argument as to the legal meaning of wife as it relates to a marriage *per verba de praesenti.*

III. The English Common Law Position

Until 1844, when the House of Lords decision in *R.* v. *Millis* (1844), 10 Cl & F. 534; 8 E.R. 844 (all future references to the Cl & F report) was handed down, it was generally understood that by the common law in England before the passing of Lord Hardwicke's Marriage Act (1753), "the consent of two parties expressed in words of present mutual acceptance constituted an actual and legal marriage technically known by the name of *sponsalia per verba de praesenti*" (per Sir Wm. Scott in- *Dalrymple* v. *Dalrymple* (1811), 2 Hagg Cons Rep. 54 at p. 64-5); and that in those parts of the world where the common law still held sway and where Lord Hardwicke's Act did not apply (i.e., Ireland, Scotland, and colonies beyond the sea), such a contract *per verba de praesenti* was a marriage for all purposes.

In 1843-4, the House of Lords split 3-3 on the question of whether a marriage performed in the presence of witnesses by a Presbyterian minister in Ireland between George Millis, a member of the Established Church, and Hester Graham (who, according to the jurors in that case, was not a Roman Catholic and was either a member of the Established Church or a Protestant Dissenter), was a marriage in the eyes of the common law sufficient to support an indictment against Millis for bigamy upon his subsequent marriage to Jane Kennedy in England "according to the forms of the said Established Church" (535), while Hester was still alive.

The Irish court below had split 2-2 on this question, but one of the justices withdrew his judgement in order for the issue to be brought before the House of Lords. Because the House also split, the decision of the lower court was affirmed and because of this circumstance the judgement was that Hester and George's marriage was not sufficient to bring an indictment of bigamy. This judgment was later affirmed, although with great reluctance in *Beamish* v. *Beamish* (1860), 9 H.L. Cas. 274; 131 R.R. 165 as binding in most circumstances. The case of *Millis* has since stood for the proposition

> that by the law of England, as it existed at the time of the passing of the Marriage Act (i.e., Lord Hardwicke's Act), a contract of Marriage *per verba de praesenti* was a contract indissoluble between the parties themselves, affording to either of the contracting parties, by application to the Spiritual Court, the power of compelling the solemnization of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy order (per Tindal, Chief Justice of the Court of Common Pleas, 10 C1 & F. at 655).

In fact, *Millis* is more complex than this proposition stands for. It is only Chief Justice Tindal and Lord Abinger (whose speech lacks depth and length) who take this view; the other two Law Lords whose view prevailed (the Lord Chancellor, Lord Lyndhurst, and Lord Cottenham) take a far more subtle approach.

At any rate, the lengthy decision, as we shall see, has been much criticized in current case-law as simply not being an accurate representation of the history of marriage and the state of the marriage contract. Most criticism of the result in *Millis* stem from Pollock and Maitland's *History of English Law,* whose exposition has been quoted many times:

> It is hardly likely that the question will ever again be of any practical importance, and we are therefore the freer to say that if the victorious cause pleased the lords, it is the vanquished cause that will please the historian of the middle ages. (2nd ed., 1898 (reprinted 1968), ii, 372, hereafter cited P. & M.).

An exposition of the opinions and bases for opinions in *Millis*, and of the view Pollock and Maintland take, will give us both the opportunity to expand *Millis* to allow common law marriages, and the insight to enable us to deal with the problems of common law marriages.

Lord Hardwicke's Marriage Act did not apply to Ireland. There were two Irish statutes, however, which are relevant to the facts in *Millis*. The first is 21 & 22 Geo. III, c.25 (Irish) (1781-2) which allowed a Presbyterian minister to marry two Presbyterians only; thus the presence of the Presbyterian minister at the marriage between George and Hester was not sufficient to bring it into the rule as set out by Tindal C.J., and the issue became whether a marriage celebrated without the presence of a priese of the Established Church was a marriage. The second statute is 58 Geo. III, c. 31, s. 3 (1818) which states:

> That in no case whatsoever shall any Suite or Proceeding be had in any Ecclesiastical Court of that Part of the United Kingdom called *Ireland,* in order to compel a Celebration of any Marriage in *facie Ecclesiae,* by reason of any Contract of Matrimony whatsoever, whether *per verba de presenti* (sic), or *per verba de futuro,* which shall be entered into after the End and Expiration of Ten Days next after the passing of this Act; any Law or Usage to the contrary notwithstanding.

This statute (taken from Lord Hardwicke's Act) was relied heavily upon by the Law Lords whose view prevailed that the contract *per verba de praesenti* had been changed by statute so that it was no longer to be recognized in as many circumstances as it had once been (see Tindal C.J., at 689, Lyndhurst L.C. at 871, and Cottenham L.J. at 887). No Law Lord disagreed that at English ecclesiastical law one party could compel the other to solemnize the marriage. We will also rely heavily on this statute, because it is not applicable to Canada; and therefore the contract *per verba de praesenti* is a more powerful contract than it was when the Law Lords discussed it.

The contract *per verba de praesenti* - wherein the two parties, with full capacity, and not necessarily in the presence of witnesses or an ordained minister, declare their present intention to live together in a monogamous relationship (as in *Hyde v. Hyde* (1866) 1 L.R. 130 (Div.) - "the voluntary union for life of one man and one woman, to the exclusion of all others") — is generally considered now, and was considered by all the Law Lords then, to be a marriage valid by the general canon law prevalent throughout Europe, until the Council of Trent, between 1545 and 1563, enacted that "the presence of a priest was an essential requisite of a valid marriage ceremony" (Joseph Jackson, *The Formation and Annulment of Marriage,* (2nd ed.) 1969, London, p. 16). By the time of the Council of Trent, the English Church had separated. The questions on which the Law Lords differed were (1) What effect of the contract *per verba de praesenti* was at common law and (2) whether the English ecclesiastical law on this point was the same as the general canon law of Europe.

1. *The effect of the contract per verba de praesenti at common law:*

Chief Justice Tindal's view has already been cited above: basically, that the contract *per verba de praesenti* was an executory contract, one

that could be used only to compel one of the parties to enter into a full and complete contract through the solemnization of the marriage (655). Only Lord Abinger expressly agrees with Chief Justice Tindal's view. While the other two Law Lords whose view prevailed agreed with Tindal C.J. and Abinger L.J. in the final analysis — that the contract *per verba de praesenti* between Hester Graham and George Millis was not sufficient to allow a criminal charge of bigamy to stand against Millis — they take a more subtle view of the argument.

Dissenting Law Lords: Lord Brougham, dissenting, spoke immediately after Tindal, C.J. and expressed the opposite point of view. If all admit that the marriage *per verba de praesenti* is valid and indissoluble, then

> . . . we . . . ask how such a contract as this can be said not be be perfect as soon as made, or to have any reference to the future, or to contemplate any further operations for its perfection, or to require any further act towards the completion? How can it be made more lasting than by being perpetual? (704)

The Ecclesiastical Courts, it is said, could compel the parties to solemnize such a contract. But Lord Brougham says:

> That this solemnization could add nothing to the force of the contract, or the rights of the parties under it, is clear; because if it were necessary to perfect the contract, or to make those rights vest completely, we are left in total inability to conceive what the contract was during the interval between the making of it civilly and its alleged completion ecclesiastically . . . .
> . . . The object of these formalities was something wholly foreign to the validity of the contract already executed, and had no force to improve its binding nature. It was to appease the conscience of parties who had neglected a religious observance. . . . (705-6)

Lord Brougham distinguishes between a valid contract *per verba de praesenti* and a mere executory contract, which "may justly be termed imperfect, and only completed by the religious celebration" (708). It is clearly for him a matter of the intention of the parties.

Lord Campbell makes this distinction too:

> . . . The use of the expression 'contract of marriage' is equivocal, and may mean the actual formation of the relation of husband and wife; but it may mean an irrevocable engagement to be afterwards carried into effect, the parties not meaning then to become husband and wife, and their engagement therefore, though words in the present tense are used, not amounting to *nuptiae*. (749-50).

In effect, both these Law Lords look to the intention of the parties at the time of the formation of the contract.

Lord Denman uses the concept of intention as well, but he focuses more on the question of the burden of proof:

> . . . Now, I must confidently maintain that marriage, being a civil contract flowing from the natural law, must be taken as lawful till some enactment which annuls it can be produced and proved by those who deny its lawfulness.

> . . . It is not enough that there should be strong requirements that the forms must be observed, strong censures upon the impropriety and irregularity of informal marriages, but there must be declarations of their illegality. (806-7).

It is clear, also, from his discussion of some of the difficult cases, that he considers the intention of the parties to be at the root of the matter.

Prevailing Law Lords: It is the Lord Chancellor and Lord Cottenham, both of whom delayed their speeches until over 7 months from Lord Denman's and over a year from the beginning of the proceedings, who bring greater subtlety to the question of the nature of the contract *per verba de praesenti.*

Lord Cottenham, it will be noted, considered the English ecclesiastical law to be different from the general canon (or civil) law. He says:

> ...What the civil law considered as a whole, the law of England considered as an essential part of marriage. But if the authorities spread over a period of 700 years are uniform in holding that this essential part, without the intervention of a person in holy orders, did not confer upon the parties the rights of property which belong to husbands and wives, or of legitimacy to their issue, or impose the incapacities of coverture, or order a subsequent marriage of either of the parties void (sc. *"ab initio,* but simply voidable"); it is, I think, demonstrated that by the law of England, the intervention of a person in holy orders was essential to a marriage for all civil purposes. (896)

Lord Lyndhurst resolved the conflict concerning the English ecclesiastical law and the general canon law differently from Lord Cottenham. He cites the same cases as authority that the dissenting Law Lords do, and then goes beyond:

> Such, then, were the principle incidents of this species of contract (*per verba de praesenti*); the engagement was indissoluble, the parties would not, even by material consent, release it; either party could not be punished for fornication, though liable to ecclesiastical censure; either party cohabiting with another person might be punished for adultery; and lastly, such a subsequent marriage entered into by either of the parties, and solemnized *in facie ecclesiae* . . .
> But then the same authorities inform us that such marriages were irregular, that they were a looser sort of marriage. (834-4)
> . . . (B)y the law of England, according to the concurrent opinion of both the ecclesiastical and temporal lawyers this irregular and looser sort of marriage did not confer those rights of property (e.g. Dower), or the more important right of legitimacy, consequent on a marriage duly solemnized according to the rites of the Church. Whatever name, therefore, is given to the connexion, this is, I conceive a correct description of the situation of the parties who, previously to the Marriage Act, had entered into a contract of marriage *per verba de praesenti,* not followed by solemnisation. (855).

If one analyses the cases and authorities upon which the Law Lords based their various opinions, one finds that in truth the only cases directly on point — in which a subsequent marriage *in facie ecclesiae* constituted grounds for bigamy were Irish cases. Since *Millis* was

dealing with the same question in higher court, it was not necessary for the Law Lords to deal with them to any great degree. The authorities relied on by each individual Law Lord are numerous, but there are only a few on which all the speeches (except Lord Abinger's two-page speech) dwell, and they are clearly those authorities which are most clearly for or against the view that each Law Lord has on the subject.* In each case it can be seen that the Law Lords are groping in vague and scattered territory, bringing predispositions to allow them to distinguish or to apply. The Lord Chancellor is able to synthesize the conflict better than the others because he agrees with the dissenting Law Lords that there is no conflict with the general canon law, but simply that at common law, for certain civil rights, a marriage in *facie ecclessiae* is required.

The earliest two cases afford the simplest example:

> *Foxcroft's Case*, 1028 (cited in Pollock and Maitland as De Banco Roll, Pasch. 10 Edw. 1 (No. 45), m. 23); Because R was infirm, the Bishop of London married R and A privately with no celebration of mass. A was already pregnant by R. Within 12 weeks of the marriage a son was born to A and adjudged a bastard, and so the land escheated to the lord, by the death R without heir. (Taken from Tindal C.J.'s speech, 660). According to Pollock and Maitland, "It was an action of cosinage against a lord claiming by escheat, a purely possessory cause." (P & M, ii, 384).
> *Del Heith's Case*, 1306 (cited in Pollock and Maitland as De Banco Roll, Trin. 34 Edw. (No. 161), m. 203); John and Katherine lived together. When John was taken ill, he was advised by the Vicar of Plumstead to marry Katherine. Because he was ill, the ceremony was performed in his house; the usual words were pronounced but there was no celebration of mass. After this ceremony they lived together as man and wife and had another son called William. On John's death his brother Peter entered upon John's land as his next heir. William as son and heir brought a possessory action (Lord Lyndhurst: a writ of ejectment; Pollock and Maitland: a writ of novel disseisin). Because it was not proved that John was ever married to Katherine *in facie ecclesiae*, William had no right to the land (Taken from Lord Lyndhurst's speech, 851).

Tindal C.J. uses these cases simply to show that the marriage *per verba de praesenti* was not considered a valid marriage (660-1). Lords Brougham (at 716), Campbell (at 760), and Denman (at 814) counter by saying that these cases do not stand for the extreme proposition that a marriage contracted by a vicar in one case and the Bishop of London in the other were not considered valid simply because they were not performed in a church and without the celebration of a mass. This represented a statement of marriage law which goes far behond anyone's imagination, and therefore must be bad law. Lord Cottenham (at 883) replies by saying that these cases show that the nature of the solemnization ceremony might have changed, but it was always required. Both Lord Lyndhurst (at 850-1) and Lord Cottenham (at 883) use the cases to show that in those days the contract *per verba de praesenti* was not sufficient to give property rights to the issue.

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* They are also, aside from one other cited by P & M, the only cases cited by current texts, eg. Jackson, Holdsworth. That is, no modern discussion of **R. v. Millis** goes beyond the basic material available to the Law Lords, other than one case and one decretal, both cited by P & M. In effect, there has been no real critique of **R. v. Millis** since P & M.

Bunting v. Lepingwell (1585) 4 Co. Rep. 29 (also Moore K.B. 169); John Bunting contracted marriage *per verba de praesenti* with Agnes. Agnes afterward married Thomas Twede. A few months later John Bunting sued Agnes, and the Court of Audience compelled her to marry John and further pronounced that her marriage to Twede "fore nullum". They did marry and had as issue Charles. John died. John's father Richard who was a copyholder in fee of certain lands, had surrendered to the lord to the use of Richard's wife Margaret and their son Robert. Richard died. Margaret died. Robert surrendered to the use of his wife Emme. Robert died. Emme entered the land. Charles entered upon Emme. Emme's servant, Lepingwell, by her command, re-entered. Robert brought this action — *Held*, that the sentence of the Ecclesiastical Court ("although it be against the reason of our law") should prevail "as the conusance of the right of marriage belongs to the Ecclesiastical Court", and therefore Charles was legitimate. *Held* further, that Robert took only for his life, reversion back to Richard's heirs, i.e. Charles.

Lord Cottenham takes "fore nullum" as indicating that the marriage *per verba de praesenti* made the subsequent marriage voidable but not void — that "fore" means "to be" rather than "was" (at 884). Lord Brougham (at 711) argues that the true interpretation of "fore nullum" is that the marriage was void *ab initio* — for otherwise by compelling Agnes to solemnize the marriage with John while still married to Twede would have meant compelling her to commit bigamy. Lords Campbell (at 763) and Denman (at 815) agree that "fore nullum" probably means voidable, and therefore the contract between John and Agnes must have been not a true contract *per verba de praesenti,* but an executory contract.

This case is, as Lord Denman points out (at 815), inconclusive and can be used on both sides. It is not indicated when Charles was born — before or after the solemnization; it treats as a given the Ecclesiastical Court's declaration of a good marriage, and thus bypasses the very question at issue in *Millis*. If anything, this case indicates that the contract *per verba de praesenti* is valid to establish legitimacy, but all the Law Lords approach it through predisposed eyes.

In his copy of Coke upon Littleton, Lord Hale noted a case on the margin next to Lord Coke's discussion at 33a of the passage in Littleton concerning the age at which a wife can collect dower (she must be past the age of nine years at the time of his death):

A contracts *per verba de praesenti* with B and has issue by her, and afterwards marries C in *facie ecclesiae*. B recovers A for her husband by sentence of the ordinary, and for not performing the sentence he is excommunicated, and afterwards enfeoffs D and then marries B *in facie ecclesiae,* and dies. She brings dower against D and recovers because the feoffment was *per fraudem* mediate between the sentence and the solemn marriage, *sed reversatur coram rege et concilio quia praedictus A non fuit seisitus* during the espousals between him and B. Nota, *neither the contract nor the sentence was a marriage.* (note 203, MSS.)

The "coram rege et concilio" reversed the decision because A was not seised during the espousals between him and B. On the face of it, this

case proves nothing. But the Lord Chancellor (at 848-9) and Lord Cottenham (at 878) take this case to show that dower did not come with the contract *per verba de praesenti*. Lord Brougham (at 713), Lord Campbell (at 758), and Lord Denman (at 816-20) cast grave doubts on the authority of the case; for it is simply a note appended to a book, with no indication of what opinion Hale himself had of the case. Lord Brougham and Lord Campbell say it must have been an executory contract, while Lord Denman says that the case seems to be wrong on principle. It is certainly true that the case does not tell us enough in order to distinguish between the different interpretations of it that the Law Lords give. Once again, one must already have a predisposition to the answer, before one can derive authority.

It is important to note that Littleton, as Coke points out (336),

> divideth dower into five parts, viz. dower by the common law. Secondly, dower by the custome. Thirdly, dower *ad ostium ecclesiae*. Fourthly, dower *ex assensu patris*. And fifthly, dower *de la pluis beale*.

Now dower *ad ostium ecclesiae* was in fact dower that was given by the husband openly, at the church door at the time of solemnization. If the husband in this case was not seised of land at the time of the solemnization, and if the first contract was executory, this explains the case. Lord Cottenham's suggestion (at 880) that the want of seisin was the issue, and not the kind of dower, is not really fair — for the time of seisin seems to have been the issue in the case, and the time of seisin would be important so far as the kind of dower that was being claimed. (See Littleton, S.39; Holdworth, H.E.L., iii, 190.) The different kinds of dower were abolished in 1837, it is important to note.

Collins and Jesson (or *Jessot,* depending on the report) (1704) Holt, K.B. 459; 6 Mod 155; 2 Salk 433 and *Wigmore's Case* (1707) Holt, 459; 2 Salk 438 contain obiter statements by Holt that a marriage *per verba de praesenti* "viz I marry you: you and I are man and wife" is not releasable, and that by the canon law such a contract is a marriage. Holt in *Wigmore* (as reported in Holt, K.B. 459) says further "marriage ought to be solemnized according to the rite of the Church of England, to intitle the privileges attending legal marriage, as dower, thirds, etc."

Tindal C.J. (at 668-9) said that these were obiter and to be disregarded because the question in both cases seemed simply whether the ecclesiastical court had jurisdiction, which it did. Also, in *Wigmore* Holt simply referred to the general canon law of Europe and not the law of England. He says further that *Dalrymple* v. *Dalrymple* relies on *Collins,* and all the other more modern cases which say that a marriage *per verba de praesenti* is valid rely either on *Collins* or *Dalrymple* which relies on *Collins*. As can be expected, Lord Brougham (at 726) and Lord Campbell (at 766), place great weight on this dictum and use a broad

interpretation of it. Lord Cottenham (at 893-6) points out the inconsistency in finding that the contract *per verba de praesenti* does not entitle the wife to dower in *Wigmore* when it is recognized as a contract in *Collins*.

Hayden v. Gould (1711) 1 Salk 119 was notably relevant:

> *Haydon v. Gould,* (1711) 1 Salk 119; Rebecca loaned money to Gould, her sister's husband. Rebecca and Haydon, her husband, were both Sabbatarians and were married by a layman not in orders. Rebecca died and Haydon took administration. Gould "sued a repeal upon this suggestion, that Rebecca and Haydon were never married . . ." *Bunting v. Lepingwell* was cited for the proposition that "by the law of nature the contract was sufficient", but the Court of Delegates ruled that Haydon, "demanding a right due to him as husband, by the ecclesiastical law, must prove himself a husband according to that law, to entitle himself in this case." Either the wife ("who is the weaker sex") or the issue — neither of whom is at fault — "might entitle themselves by such marriage to a temporal right."

Lord Cottenham points out (880-1) that 29 Charles 2 c.3 gave the right of the husband to administer to the estate of wives who died intestate, and that therefore the only question was — Was Rebecca Gould's wife? — and the answer came — She was not. The "fault" suggestion must therefore, he said, have come from the reporter of the case. Both Lord Cottenham and Lord Lyndhurst (at 855) take this case to stand for the proposition that a contract *per verba de praesenti* was not sufficient to give the husband the right to administer his wife's estate. As expected, Lord Brougham (at 717) places greater emphasis on the fault of the husband — "as a matter of discipline the Court Christian will not countenance his conduct in contracting an irregular marriage", and so does Lord Campbell (at 764) who adds that the marriage was not considered void because the court "appeared to have intimated an opinion that under it the wife could have been entitled to dower, and the children would have been legitimate" (765).

On these cases the decisions of the Law Lords on either side rest. We must confess a sense of frustration in dealing with these cases; for they seem to involve issues that are immersed in the murky waters of vague legal history, give no details that would help to rationalize them, involve jurisdictional and procedural questions that are no longer relevant, and only *en passant* deal with the heart of the matter — what the common law treatment of the contract *per verba de praesenti* was.

Lord Lyndhurst rationalizes these cases by agreeing with them all. *Collins* and *Wigmore* and *Bunting* show that the general rule was the canon law's rule, that the marriage *per verba de praesenti* was *ipsum matrimonium* in the eyes of the ecclesiastical courts. But for the property rights that came from marriage, there was the requirement of solemnization. Hale's case shows that dower does not flow; *Del Heith's* and *Foxcroft's*, that legitimacy does not flow; and *Haydon's* that the

right administration of estate does not flow. In other words, the looser, irregular marriage called the marriage *per verba de praesenti* was not as good for certain purposes as the marriage celebrated in the face of the church. And thus it is not sufficient to uphold a criminal charge of bigamy.

2. Relationship of general canon law on marriage to English ecclesiastical law:

There is a conflict of authority on this point, but it is generally understood that *Millis* decided that English ecclesiastical law was different from the general canon law (cf. 13 Halsubry (3d) 10, footnote (s)). The unanimous opinion of the judges of the Court of Common Pleas, expressed by Tindal C.J., was that in fact there was a difference (see 679); the principal authorities relied on were a law attributed to Kind Edmund (c. 1000 A.D.), which said there shall be a masspriest at nuptials "who shall, with God's blessing, bind their union to all prosperity", and a constitution issued by Archbishop Lanfranc in 1076 saying that a union without a priestly benediction would be "coniugium fornicatorium, an unlawful and fornicatory marriage" (per P & M ii, 370). Lord Abinger (at 745) and Lord Cottenham (at 877) relied on these two authorities to overcome textwriters in England writing around the same time, texts about the general canon law relating to marriage, decretals of Popes written around the same time, and *Dalrymple v. Dalrymple* which had hitherto been considered to be the last word on the subject. Lord Cottenham said, for instance:

> I see no reason to doubt the authenticity of these ancient ordinances; and if genuine, they establish the fact that from the earliest time the laws of England upon this subject differed from the civil and canon law, and required the intervention of an ecclesiastical authority to make a valid marriage (at 877).

Lord Campbell (at 751), Lord Brougham (at 719) and Lord Denman (808) say that the general canon law was the same as the English Ecclesiastical law. They tried to overcome the two authorities in three ways: (a) by interpreting them as not invalidating a marriage *per verba de praesenti,* but simply censuring one (cf. Lord Denman at 809-10); (b) by showing that a decretal from Pope Gregory IX (1227-1241) 150 years later, contradicted these authorities saying that a contract *per verba de praesenti* was sufficient to void a subsequent marriage, "et primum in sua firmitate manere" (see Lord Brougham at 720); (c) by relying on the great authority of Sir Wm. Scott in *Dalrymple's Case* who said "Shew the variation, and the Court must follow it; but if none is shewn, then must the Court lean upon the doctrine of the ancient general law..." (1 Hagg. Cons. Rep 54 at 81).

To the argument of the three dissenting Law Lords, Pollock and Maitland add one more decretal, from Alexander III (1159-1164) which they quote at length (ii, 371):

". . . (I)f the first man and the woman received each other by mutual consent directed to time present, saying the one to the other, "I receive you as mine (*meum*)," and "I receive you as mine (*meam*)," then, albeit there was no such ceremony as aforesaid, and albeit there was no carnal knowledge, the woman ought to be restored to the first man, for after such a consent she could not and ought to marry another . . ."

We have given this decretal at length (Pollock and Maitland go on to say), for it shows how complete was the sway that the catholic canon law wielded in the England of Henry II's time, and it also briefly sums up that law's doctrine of marriage . . . (ii, 372) . . . It would have been as impossible for the courts Christian of this country to maintain about this vital point a schismatical law of their own as it would now be for a judge of the High Court to persistently disregard the decisions of the House of Lord . . . (ii, 373).

It will be noted that Pollock and Maitland's "proof" consists of as much negative conjecture as Lord Cottenham's consists. (See Jackson, *Formation and Annulment of Marriage*, 2nd ed., at 31 n.1, for a discussion of authorities on this subject.)

Contrary to the general reputation of *Millis* on this point, Lord Lyndhurst, instead of agreeing with Lords Abinger and Cottenham, agreed rather with the dissenting Law Lords; it is his judgment which, we believe, is most misunderstood and — because of *Millis'* reputation - maligned. His speech, delivered over a year from the beginning of the proceedings in the House of Lords, shows that he believed the English ecclesiastical law agreed with the general canon law of Europe. He quotes Sir William Scott in *Dalrymple* with great approval:

In these passages Lord Stowell is speaking of the ecclesiastical law of England. No man knew better than he did what the law was, and upon what it was founded. When he mentions the canon law he must obviously mean that portion of the canon law received here, and which forms so considerable a part of the ecclesiastical law of this country. (at 836).

He makes, in our opinion, a better speech in favour of the relationship than the three Law Lords who dissented. It is because he takes this view that his speech is most important in our discussion of the common law marriage. He was, on our view, groping toward resolution to a conflict not merely of authorities, but of jurisdictions. We will return to Lord Lyndhurst's speech later on in this paper.

The end result is that on the relationship of the English ecclesiastical law to the general canon law of marriage, four Law Lords held that it was the same, and two held that it was different.*

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* In **Bishop of Exeter** v. **Marshall** (1868), L.R. 3 H.L.R. 17, Lord Chelmsford, L.C. at 46 approved Chief Justice Tindal's statement at 680; but no other Law Lord in that case took such a broad view of the issue at hand, which was the sufficiency or insufficiency of the grounds of refusal by the Bishop to institute a clerk.

3. *What does Millis stand for?*

It would be simple from our point of view simply to say that *Millis* is historically inaccurate, as some of the cases and textbooks say. But as tempting as that course might be, we must point out that the matter is not so clear.

The most reasonable interpretation of *Millis,* without recourse to other authorities, is this — that Tindal, C.J. and Lord Abinger were too simple in their "either-or" proposition concerning the validity of the contract *per verba de praesenti,* that Lord Lyndhurst and the three dissenting Law Lords were right concerning the general canon law's relationship in English ecclesiastical law, and that Lord Lyndhurst and Lord Cottenham disagreed with the three dissenting Law Lords on the kinds of legal actions which would be borne up by the weight of the contract *per verba de praesenti.*

It is important, however, for an understanding of the historical point of view of this case, to give an indication of Pollock and Maitland's explanation of the nature of the contract. It is by no means the completely accepted view, but it rationalizes not only the cases used in *Millis,* but also the great weight of historical analysis which succeeded *Millis* and which they consider in their great *History of English Law.*

"The canon law begins to affect our temporal law sometimes by way of repulsion, sometimes by way of attraction. It is in opposition to 'the canons and Roman Laws' that (if we may so speak) our English law becomes conscious of its own existence" (P & M, i, 131). To understand the argument that Pollock and Maitland put forward, it is best to deal with *Del Hieth's* case:

> . . . We believe that it merely decides that such a marriage is no marriage for purely possessory purposes. William, after failing in the assize, was quite free to bring a writ of right against Peter. If he had done so, the question whether the marriage was valid or not would have been sent to the bishop, and we have no doubt that he would have certified in favour of its validity. The application to marital relationships of the doctrine of possession, and the requirement of a public ecclesiastical ceremony for the constitution of a marriage which shall deserve possessory protection though no such ceremony is required for a true and 'droiturel' marriage — all this is so very quaint that no wonder it has deceived some learned judges . . . . (ii, 384).

Pollock and Maitland contrast possessory actions (at the bottom end of hierarchy of actions which can be taken in relation to land) with proprietary actions (at the top of the hierarchy) (ii, 62). There were different requirements for bringing the action and different defences depending on the kind of action it was. One could always try an action at the higher level if one failed at the lower level. The higher level of

action would take longer because it would go deeper into the matter of title. The lower the level, the less certain the title; the higher the level, the more certain the title. Even the highest writ, the writ of right, gives a relative title "as between the parties to it" (75, ii); but it is the final decision on the matter.

Thus a writ of novel disseisin might be tried on a very simple basis: He disseised me last Tuesday. In defence, one *cannot* say — it's my land because he's illegitimate. The question in issue is not the final title, or the relative title as between the two, but merely *who disseised whom?*

At the lower level, therefore, questions were not asked of the ecclesiastical courts, but simply of juries.

> Now, when a question about a marriage arrises in a possessory action, it must be dealt with in what we may call a possessory spirit, and, as we have to get our facts from juries, it is necessary that we should lay stress on those things, and those only, which are done formally and in public. (ii, 380)

Thus the requirement in possessory actions for a marriage *in facie ecclesiae* is the expression of the court's need for certainty and publicity; and while such action does not go to the heart of the contract (for only the final, proprietary action does), it is a more convenient action to use.

Thus, both the view that Lord Lyndhurst takes, and the view that the three dissenting Law Lords take, are reconciled. On the one hand, Lord Lyndhurst understands the authorities to be more rigid in their need for evidence of marriage for particular possessory actions; on the other hand, the three dissenting Law Lords understand the authorities to require a certainty of intention at the time of forming the contract for any actions. They are the two sides of the same evidentiary box: from the inside — what is the intention of the parties?; from the outside — what is the evidence that such a contract exists?

In our view, *Millis* stands for a very broad and a very narrow concept of the law relating to marriages: (1) the broad concept is that the general canon law of Europe regarding marriages applied to the common law of England, and that this law regarded a marriage *per verba de praesenti* as *ipsum matrimonium* if the intention of the parties was clear, if the parties had full capacity, and if it is clear that there was such a marriage; (2) the very narrow concept is that under the law relating to bigamy at that time, a marriage *per verba de praesenti* was not sufficient to make a subsequent marriage *in facie ecclesiae* a criminal offence.

Given, then, that neither Lord Hardwicke's Act preventing clandestine marriages, nor the Irish Act which bound the Law Lords in *Millis* and which prevented one party to a marriage *per verba de*

praesenti from being able to compel the other party to solemnize the marriage, apply to Canada; that the Dower Act of 1834 changed the law relating to Dower in England and Canada; that the nature of possessory actions and procedure has changed a great deal in the past number of years and for the most part are governed by statute with the writ system abolished - given all this, how applicable is the real decision in *Millis* to the law relating to common law marriages in Canada in general, and Manitoba in particular?

IV. Common Law Marriages Valid in Manitoba

We believe that our analysis, both of the common law in England and its relevance to Manitoba, establishes a number of grounds by which a contract between two people with full capacity to live together in a monogamous relationship would be a valid marriage, and by which the words "wife", "husband", "children" and "issue" would be applicable to that relationship and its issue as used in any statute in force in Manitoba.

I. We have shown that there is no statute that opposes this view; that the Marriage Act must be taken as directory but not mandatory, unless there are express nullifying clauses. Thus we have shown that the question of the validity of the contract must be seen in the perspective of the common law relevant to Manitoba.

II. Our second analysis was of the applicability even of the commonly held notion of *Millis*, and of the common law in general. We have seen grave doubts expressed that *Millis* ever did apply to colonies beyond the seas, and certain positive authority that it did not apply in most circumstances.

A. If the time of application of English law to Manitoba is taken to be July 15, 1870, we have seen cases which accordingly do not apply *Millis*. A strong argument can be made for the complete dissimilarity in conditions between a densely-populated and economically complex society, with a highly-evolved land system and judiciary, as in England, and 1870 Manitoba's sparsely-populated rural society yet to grow into economic complexity, with a judicial system as yet undeveloped, soon to take on a different system of land tenure. (Note Blackstone at 81: "the artificial refinements... incident to the property of a great and commercial people... are not in force.")

B. If the time of application of English law to Manitoba is taken to be today, then we must weigh the similarity in economic complexity and population, with a different social order. There is no established church and religion as there was in England in 1844. The social ethic and family ties are different in Manitoba today.

III. Our next analysis was of the case that is commonly held to say that the common law, throughout its history, required the presence of an ordained minister in order to validate a marriage. In fact, we have seen that the decision is both broader and narrower than that. On the one hand, the decision of the House of Lords is decidedly that by the general canon law of Europe, applicable to England, a marriage so contracted is *ipsum matrimonium,* but that there is some question as to how much weight would be given to such contracts in the ancient possessory actions, now discarded. On the other hand, the decision of the House, by a split of the House, is that a marriage so contracted is not sufficient to sustain a charge of bigamy.

A. *Millis* was decided on the authority of a statute applicable to Ireland only, taken from Lord Hardwicke's Act which was applicable to England only, that a marriage *per verba de praesenti* could not compel one of the parties to solemnize that contract. This statute was never applicable to Canada.* Thus the marriage *per verba de praesenti* at common law was a stronger contract than the one the Law Lords discussed, and their discussion must be seen in that light.

B. *Millis* was decided before the 1857 Divorces and Matrimonial Causes Act 20 & 21, Vict., Ch. 85, took away jurisdiction over marriage from the ecclesiastical courts; in addition, it was decided before the various statutes in England and in Canada fused the courts, abolished the writ system and changed the nature of possessory actions. The cases and authorities which were relied on by the Law Lords whose view prevailed relate to the old actions and the split jurisdictions.

(a) The laws relating to Dower, inheritance, and possession of land are decidedly different now and are governed by statute and not the common law.

(b) These statutes use the words "wife", "husband", "children" and "issue" without reference to the kind of marriage that created those relationships.

(c) For the definition of "wife", "husband", "children" and "issue" we go back to the common law. And by a vote of 4-2 the Law Lords in *Millis* decided that a marriage *per verba de praesenti* was *ipsum matrimonium,* although they differed on the effects of such a contract according to the old forms of action.

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* Note, therefore, that the common law of Manitoba, with no statute to the contrary, is that a contract **per verba de praesenti** can be used to compel one of the parties to solemnize that contract. This is indisputable and in line with all the authorities.

IV. Even if *Millis* is interpreted as it generally has been, and even if it is decided that *Millis* is applicable in Manitoba, then we suggest that it can be narrowly construed to relate to the relative weight of the contract *per verba de praesenti* — that it is not of sufficient weight to sustain a charge of bigamy. But for certain purposes — for giving rights to the spouse and children upon death or dissolution of the relationship — it *is* sufficient.

V. *EFFECTS AND POLICY CONSIDERATIONS*

Assuming that we have made our case, we must consider briefly the effects of finding such contracts to be valid.

1. Not all couples who live together would find themselves married. The key to this is the intention of the parties, and a court might well ask — Why was this marriage not solemnized? — and might well hear as an answer — Because we didn't want to make it permanent. In addition, it is clear that parties to a contract *per verba de praesenti* must satisfy the usual requirements of capacity.

2. A couple who were married in this way would have to get a divorce in the usual way. A common law marriage, according to our view, creates a marriage pure and simple; and to dissolve a marriage, one must get a divorce.*

3. A case can be made for using the normal contractual principles for ascertaining the intention of the parties. The trend in current cases is toward ascertaining intention, at times, from the conduct of the parties — see *Hillas & Co. v. Arcos* (1932), 147 L.T. 503 (H.L.) - and thus it may be possible — especially in those cases of hardships where the spouses believed they were married and one died intestate — to infer a contract.

We have seen that the major concerns of the church and of the courts were publicity and uncertainty of intention. One American writer has said:

> The difficulties of proof are not otherwise than those necessarily incurred in litigation involving any other relation of life and courts have had always to come to decisions affecting not only property in large amounts but life itself and human liberty, depending upon the veracity of statement and reliability of memory and witnesses whose personal interest may be as much involved in one issue as in another. So long as only human agencies can be employed to resolve human disputes, there is no particular reason for excluding a single class of controversies from hearing because of the hazard of mistake common to all. It is public policy that a public record be kept of marriages and that policy is defeated in the instance of common law marriage, but it is also public policy to prevent illegitimacy, to reduce promiscuity in sexual relations and to promote and encourage marriage. In government, a choice is always to be made between ends

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It must be recalled that the term common law marriage here as elsewhere throughout this article is to be understood in the strict legal context discussed in the opening paragraphs.

but a record of marriage is not an end in itself but a means towards social order. It is not wise to defeat social order for the sake of orderliness in method. The recognition of common law marriage does not involve the abandonment of ceremonial marriage. That form is sustained by social pressure, and it is only by simulating it that irregular unions escape censure and ostracism. (Black, "Common Law Marriages," 2 Cin. L. Rev. 113 at 131-2 (1928)).

With this we agree. We believe that it is in line with both legal precedent and social need to recognize legally that category of common law marriages historically known as contracts *per verba de praesenti*. The flexible application of the law relating to such contracts can only result in greater justice for those acting in good faith.

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