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## DOMESTIC RELATIONS

### COMMON LAW AND PROXY MARRIAGES

Under the canon law and later at common law, marriage was a civil contract which required no formal ceremony,<sup>1</sup> and such contract "per verba de praesenti" did not require consummation but "ipso facto et ipso jure" constituted the relation of man and wife.<sup>2</sup> This doctrine of the canon law was abrogated by the Council of Trent (1563) which required matrimonial consents thereafter to be exchanged in the presence of an ordained priest and at least two witnesses. But the Council of Trent was never accepted in England and, thus, had no effect upon the common law of marriage.<sup>3</sup> It would appear, therefore, that in all those states which adopted this part of the common law of England, and which still recognize the common law marriage,<sup>4</sup> the doctrine expressed in the old maxim "consensus et non concubitas facit nuptias" would be followed. It must be admitted, however, that much confusion is found in the cases as a result of the failure on the part of many of the courts to properly distinguish between the necessary elements of a common law marriage and the evidence required to establish the existence of the marriage.<sup>5</sup> While many

1. According to the prevailing opinion in *Queen v. Millis*, 10 Cl. and Fin. 534 (1844) a marriage contracted without the presence of an ordained clergyman was never valid by the English common law. But the competent scholars believe this view to be without historical foundation.
2. See 2 Kent's Commentaries (13th ed. 1884) \*87; 2 Greenleaf, "Evidence" (16th ed. 1899) §460; 1 Bishop, "Marriage, Divorce and Separation" (1891) §315; 18 R. C. L. 394; 35 Am. Jur. 201.
3. Proper informal marriages by consent were rendered illegal in England by the Marriage Act of 1753.
4. It may be said with some certainty that common law marriages are still recognized in Alabama, Colorado, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, and Wyoming. In some of the states validity is doubtful, as is the case in the District of Columbia. See Vernier, "American Family Laws" (1931) 106.
5. The courts of some of the states which recognize common law marriage require varying combinations of "essential elements" to establish the marriage. They fail to recognize that the consensual contract to presently assume the marriage relation is the only essential element, and require cohabitation, or both cohabitation and reputation, in addition to the contract. An example of the confusion between what constitutes and what is necessary to prove the common law marriage is found in the recent case of *Schilling v. Parsons*, — Ind. App. —, 36 N.E. (2d) 957 (1941). The court held that the contract, if written, or if oral and witnessed, must be followed by cohabitation to result in a marriage status; and, if the contract is oral and not witnessed, it must be followed by cohabitation plus an additional factor—a holding out by the parties of their marriage status to at least such part of the community where they live as is made up of their acquaintances, neighbors, and relatives. For a criticism of this case see Note (1942) 11 Fordham L. Rev. 90.

courts have insisted upon cohabitation, or both cohabitation and reputation, in addition to the contract to establish the marriage relation, the weight of American authority is in accord with the old common law rule and may be stated thus: In the absence of special statutory requirements, a common law marriage is constituted by a contract "per verba de praesenti" even though it is not followed by cohabitation.<sup>6</sup>

A distinction has been made, quite logically, between contracts "per verba de praesenti" and contracts "per verba de futuro," in the latter type it being held that consummation is a factor requisite to establishing the marriage relation.<sup>7</sup> This view, shared by eminent legal scholars, is well expressed by Chancellor Kent: "If the contract be made 'per verba de praesenti,' and remains without cohabitation, or if made 'per verba de futuro,' and be followed by consummation, it amounts to a civil marriage in the absence of all civil regulations to the contrary, and which the parties (being competent as to age and consent) cannot dissolve, and it is equally binding as if made in 'facie ecclesial.'"<sup>8</sup>

In 1919 a majority of the states recognized the validity of informal marriages.<sup>9</sup> Today only twenty-one<sup>10</sup> of the states recognize common law marriage, and it is significant that in recent years two of our largest eastern states, New York and New Jersey, have passed statutes abolishing them.<sup>11</sup> Such marriages, real and alleged, complicate the work of administrative agencies, notably that of the Social Security Board,<sup>12</sup> state industrial boards, and the United States Treas-

6. *Mathewson v. Phoenix Iron Foundary*, 20 Fed. 281 (D.C.R.I. 1884); *Scroggins v. State*, 32 Ark. 205 (1877); *Peters v. Peters*, 73 Colo. 271, 215 Pac. 128 (1923); *Chaves v. Chaves*, 79 Fla. 602, 84 So. 672 (1920); *Love v. Love*, 185 Iowa 930, 171 N. W. 257 (1919); *Carey et al. v. Hulett*, 66 Minn. 327, 69 N. W. 31 (1896); *Davis v. Stouffer*, 132 Mo. App. 555, 112 S. W. 282 (1908); *Bey v. Bey*, 83 N. J. Eq. 239, 90 Atl. 684 (1914); *Craig's Estate*, 273 Pa. 530, 117 Atl. 221 (1922). See also Note (1932) 66 U.S.L. Rev. 165. In the interesting case of *Great Northern R. R. v. Johnson*, 254 Fed. 683 (C.C.A. 8th, 1918) a marriage was held valid where a woman residing in Missouri married a man residing in Minnesota by the interchange of written contracts stating a present intention of assuming the marriage relation.
7. *Love v. Love*, 185 Iowa 930, 171 N. W. 257 (1919); *Carey et al. v. Hulett*, 66 Minn. 327, 69 N. W. 31 (1896); *Davis v. Stouffer*, 132 Mo. App. 555, 112 S. W. 282 (1908); *Bey v. Bey*, 83 N. J. Eq. 239, 90 Atl. 684 (1914).
8. 2 Kent's Commentaries (13th ed. 1884) \*87. See also 2 Greenleaf, "Evidence" (16th ed. 1899) §460.
9. See Note (1919) 32 Harv. L. Rev. 848.
10. See note 4 supra.
11. N. Y. Dom. Rel. Law (1941) §11; N. J. Stat. Ann. (1939) tit. 37, §1-10.
12. See Billig and Lynch, "Common Law Marriages in Minnesota, A Problem in Social Security" (1938) 22 Minn. L. Rev. 177; Billig and Lynch, "Social Security Encounters Common Law Marriage in North Carolina" (1938) 16 N. C. L. Rev. 255.

ury Department, Bureau of War Risk Insurance.<sup>13</sup> While the social interests advanced by the abolition of informal marriages have been received favorably by some legislatures, the social interests to be served in continuing informal marriages should not be overlooked.

A marriage problem of current interest due to the war is the validity of marriage by proxy—that is, a marriage in which one (or both) of the parties is represented by an agent. Such marriages were looked upon as lawful in the continental countries prior to the Council of Trent (1563), but, thereafter for a time, they had no meaning because they did not obviate the necessity of another celebration between the parties themselves.<sup>14</sup> Long since, however, the canon law has been superseded by civil marriage acts in many of the continental countries and proxy marriages are permitted in some of them. Marriages by proxy were probably valid at common law but are not possible today in England under the modern English marriage acts.<sup>15</sup>

In the United States there is almost no legislation on the subject,<sup>16</sup> and whether such marriage is possible at common law is doubtful. The reported cases are almost as meager as the legislation, though in a few cases the validity of a marriage by proxy is indicated by way of dictum. In *Ex parte Suzanna*<sup>17</sup> the plaintiff, a Portuguese woman, married her fiancé, then living in Pennsylvania. The marriage ceremony was performed in Portugal (where proxy marriages are valid), the bridegroom being represented by a friend. The plaintiff's entry into the United States was permissible under the immigration laws only if she were legally married. In holding that her marriage was valid, the court said, "There is nothing in the laws of Pennsylvania which I have been able to discover requiring the personal presence of the parties at the ceremony, and . . . the proxy marriage celebrated in Portugal is valid in Pennsylvania."<sup>18</sup> In *United States ex rel. Modianos v. Tuttle*, Immigration Commissioner,<sup>19</sup> the same situation faced the court except that the marriage was celebrated in Turkey and the bridegroom was a resident of Louisiana where marriage by procuracy is specifically prohibited by statute.<sup>20</sup> The court held the marriage valid in spite of the statute.<sup>21</sup>

13. See Treas. Doc. 2834 (1919); see also Note (1941) 15 Temp. L. Q. 541, 542.

14. Brissaud, "History of French Private Law" (Continental Legal History Series 1912) 103, n. 5. But see Lorenzen, "Marriage by Proxy and the Conflict of Laws" (1919) 32 Harv. L. Rev. 473, 476.

15. See 1 Vernier, "American Family Laws" (1931) 143.

16. Only one state has specifically outlawed proxy marriages. The Civil Code of Louisiana, Article 109, provides that "No marriage can be contracted or celebrated by procuracy."

17. 295 Fed. 713 (D.C. Mass. 1924).

18. 295 Fed. 713, 717 (D.C. Mass. 1924). Accord, *Silva v. Tillinghast*, Commissioner, 36 F. (2d) 801 (D.C. Mass. 1929).

19. 12 F. (2d) 927 (E. D. La. 1925).

20. See note 16 supra.

21. The court held that the statute only applied to marriages in Louisiana.

In those states which recognize the common law marriage and require only a contract "per verba de praesenti" to constitute it, such contract is a civil one and the general rules of contract and agency seem applicable. It logically follows, then, that in those states a proxy marriage by informal contract is valid.<sup>22</sup> Obviously, in those states where consummation in addition to the contract is required to establish the marriage, it could not be effected through an agent. Relative to contracts of marriage by statutory solemnization, logic would seem to favor their validity when entered into through an agent if the statutory provisions do not specifically require the personal presence of the parties. In such case there is no act which is peculiarly personal to the principal.

There is comparatively little interest in the problem of marriage by proxy in peace-time. In time of war, however, men in the armed forces frequently desire to marry their fiancées at home and the validity of such marriages assumes great importance. During World War I it is interesting to note that the Judge Advocate General of the Army issued an opinion that soldiers of the American Expeditionary Forces could not be legally married by proxy to American women who remained in the United States.<sup>23</sup> During the present war the validity of proxy marriages has apparently not been before the courts. The newspapers have reported an unusual marriage by telephone between a woman residing in Oklahoma and a soldier in Honolulu.<sup>24</sup> But the validity of this type of marriage was denied by the Assistant Attorney General of Missouri in his reply to an inquiry by a woman who had written from New Mexico asking if Missouri would allow her marriage to a soldier in Hawaii by telephone.<sup>25</sup>

France, Italy, and Hungary have by governmental decree permitted proxy and other unusual types of marriage. The Fascist party executives have arranged with the ecclesiastical and Italian civil authorities for marriages by radio between soldiers at the front and their fiancées at home.<sup>26</sup> In France<sup>27</sup> and Hungary,<sup>28</sup> fiancées of

22. See Lorenzen, "Marriage by Proxy and the Conflict of Laws" (1919) 32 Harv. L. Rev. 413.

23. Opinions of the Judge Advocate General of the Army, Sept. 9, 1918.

24. N. Y. Times, July 6, 1942, p. 12, col. 5. By Associated Press from Clinton, Okla. "Vows exchanged over 3500-mile telephone hook-up united in marriage yesterday Miss Elaine Dougherty and Ensign Harold E. Fry, now on duty in Honolulu."

25. N. Y. Times, Oct. 6, 1942, p. 44, col. 4. The Assistant Attorney General's answer concluded, "I have diligently searched our law and have failed to find any provision to authorize a marriage in the manner as described in your letter."

26. N. Y. Times, Jan. 28, 1942, p. 8, col. 7. The report by telephone from Berne, Switzerland stated that the arrangement was an improvement on marriage by proxy which was "a current practice in most armies during the first World War." The ceremony follows as swiftly as possible after publication of the banns. Then when the mayor pronounces the couple to be legally wed and the priest blesses them the bridegroom at the front listens in on a special broadcast for his benefit.

27. N. Y. Times, Mar. 8, 1940, p. 4, col. 7.

28. N. Y. Times, Mar. 28, 1943, p. 12, col. 3.

soldiers killed in action are permitted to marry their dead sweethearts by complying with statutory registration proceedings. This type of legislation is designed to legitimize children and facilitate widows' pensions. While marriage by proxy is not permitted in Germany, French war prisoners interned in prison camps in Germany and in occupied France may marry their fiancées at home by proxy.<sup>29</sup>

By purely logical reasoning, the validity of proxy marriages in America might be upheld (1) where the marriage is by consensual contract in states which recognize common law marriage, the contract being one in which the parties mutually agree in the present tense to assume the relation of man and wife, and (2) where the marriage is by statutory solemnization in states where the statutory provisions do not expressly require the personal presence of the parties.