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COMMON LAW MARRIAGES

IS THE COMMON LAW MARRIAGE COMPLETELY VOID?

INTRODUCTION

The term "common law marriage" in the sense that it is understood by the majority of laymen describes a meretricious relationship which is not recognized in a legal context. A common law marriage in its legal sense is a marriage valid by the common law "a marriage valid in England prior to the first marriage statute".[1] The requisite elements of a marriage according to the English common law have not been rigidly defined and as Jackson points out:[2]

> Even if one ascertains the requisite formalities according to English common law, there still remains the question of knowing whether it is necessary that all the requirements of common law must be observed in the case of a marriage abroad.

The elements of a common law marriage should be established before an attempt is made to appraise its validity in Canada.

Marriage 'by custom' is another area which cannot be overlooked in an analysis of common law marriages. There are numerous cases involving Indian and Eskimo marriages in which the courts have declared a marriage

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[1](1962) 2 Alta. L. Rev. 121.

[2]Jackson, The Formation and Annulment of Marriage 2nd ed. at 221.

having to have the elements of a common law marriage established.

It is only when an alleged marriage has not been solemnized in conformity with the formalities of a provincial marriage Act, that there is a need to derive its validity from other sources (i.e., the common law). However, failure to comply with provincial marriage legislation may completely invalidate any attempt at a union and leave no room for the existence of a common law marriage. Therefore in considering the validity of a common law marriage one must examine the effect of the existing marriage statute. According to Halsbury's Laws of England:[4]

> A valid marriage may be contracted in any place abroad where the English common law prevails if celebrated in accordance with that law, provided that the local law is inapplicable or cannot be complied with.

The question of what form the statute must take to invalidate a common law marriage is a difficult one, for the intent of the Legislature is not often clear. Does the Act require compliance with certain formalities (i.e., a marriage licence) in a directory manner or does the existence of such requirements completely nullify the common law marriage?

<u>THE ELEMENTS OF A COMMON LAW MARRIAGE</u>

(Lord Hardwicke's Act 175

Prior to the first marriage Act in England there were two methods of contracting a valid marriage; <u>per verba</u>

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[4] <u>Id</u>., at 810.

de praesenti and per verba de futuro cum copula. If a contract was made per verba de praesenti (in words of the present tense) that was sufficient in itself to constitute a valid marriage. If the contract was made per verba de futuro cum copula (in words of the future tense) the marriage would be valid if followed by consumation[5] or if the promise followed the consumation.[6] The present intention and agreement of the parties to marry is what is the essence of a marriage per verba de praesenti. Proof of that agreement is similar to that required for other agreements.[7]

> The agreement being the essential element in these marriages, it may like any other agreement be proved by words or conduct, and by the testimony of the parties themselves, or by the testimony of third parties.

Lord Penzance in Hyde v. Hyde[8] defined marriage "as understood in Christendom" as "the voluntary union for life of one man and one woman to the exclusion of all others." The elements of this definition are applicable

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[5] 2 Kent. Comm. 87 (12th ed. 1896).

[6] Keyes, The Validity of the Common Law Marriage in Ontario (1958) 1 Osgoode L.R. 59.

[7] Smith, Common Law Marriage: What It Is And How to Prove It, (1960) 12 S.C.L.Q. 357.

[8] (1886) L.R. 1 P. & D. 130 (adopted in Re Woah Estate (1961-62) 36 W.W.R. 557.

to the common law marriage.[9] It must be entered into voluntarily, the parties to the marriage should at the time of contracting have the intention that the union should be for life and the union should be monogamous. Dysart J. in Blanchett v. Hansell clarified two more elements of the common law marriage:[10]

> . . . whatever else the requirements of a "common law marriage" anywhere were, two essentials had to be present--(1) legal capacity to marry and (2) an agreement to marry.

Therefore if a woman lives with a man who does not have the capacity to marry then she cannot be considered to be his common law wife nor can the relationship be considered a common law marriage. The second element that Dysart J. sets out (i.e., an agreement to marry), usually distinguishes the layman's concept of a common law marriage from the legal one. The fact that a man and woman have cohabited as 'man and wife' will not constitute a common law marriage unless they have entered into a present agreement to marry. Without express evidence of an agreement the court may establish one from the conduct of the parties. Cohabitation and reputation are two means by which such an agreement may be inferred. If the parties are living totether and performing the obligation

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[9]Fisher v. Fisher (1929) 165 W.E.R. 460--as adopted in Re Noah Estate (1961-62) 36 W.W.R. 557, 38 C.J. paras. 89-90, p. 1316, as adopted in Coffir v. The Queen (1955) 21 C.R. 333 at p. 369.

[10][1944] 1 D.L.R. 26.

of a marital union and if they hold themselves out to the public as being husband and wife this may be sufficient for the court to infer a present agreement to marry.

REGINA V. MILLIS--THE REQUIREMENT OF THE INTERVENTION OF AN ORDAINED PRIEST

In Regina v. Millis[11] the House of Lords held that a common law marriage requires the intervention of an ordained priest.[12] The case involved a marriage celebrated in Ireland which at the time of the decision was governed by the common law as The Marriage Act of 1753 did not extend to Ireland. Although the decision is binding on English courts[13] it is possible that it does not extend any further. Therefore a common law marriage in England would require the presence of a minister in holy orders, but this is not necessarily true of common law marriages outside England. How far does the decision in Regina v. Millis apply? With reference to marriages outside of England Halsbury's Laws state that:[14]

> A valid marriage may be contracted in any place abroad where the English common law prevails. . . . The provision of the English common law that in order to be

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[11](1843-44) 10 Cl & Fin 534.

[12]In Regina v. Millis the Law Lords were equally divided and the matter was decided on the application of the maxim semper praesumitur pro negante.

[13]Cheshire, Private International Law, 6th ed. at 341.

[14]Supra n. 4.

> valid, the marriage must be celebrated before an episcopally ordained clergyman of the Church of England or of Rome does not apply; solemnization before any minister in holy orders or, indeed any form of ceremony showing an intention by the parties to marry one another is sufficient.

The case law following R. v. Millis has attempted to confine its effect to England and Ireland alone. In Catterall v. Catterall[15], Dr. Lushington held that a marriage held in New South Wales, was valid even though it was not performed by an episcopally ordained priest. With regard to the effect of Regina v. Millis he stated:[16]

> I am not disposed to carry the decision in that case one iota further than it went, for two reasons: first, as the law Lords were divided, it was only in consequence of the form in which that case came before them there could be considered to be any judgement at all; in the second place were I to hold that the presence of a priest in the orders of the Church of England to be necessary, I should be going the length of depriving thousands of couples married in the colonies and in the East Indies (where till of late years there were no chaplains) of the right to resort to this court for such redress as it can give in cases of cruelty and adultery.

In Wolfenden v. Wolfenden,[17] a Canadian couple went through a ceremony in China which was performed by a Minister of

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[15](1847), 1 Rob. Ecc. 580.

[16]Id.

[17][1946] P. 61.

the Church at Scotland Mission, who would not qualify as an episcopally ordained minister. Lord Merriman P., followed the decision in Catterall v. Catterall and held the marriage to be valid. In doing so he applied a principle of law which was stated in Maclean v. Cristall:[18]

> The rule in such case is that, although 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 Blanchett v. Hansell, a Manitoba Kings Bench decision, Dysant J. recognized the limitations placed on Regina v. Millis:[19]

> The English view as laid down in Regina v. Millis, 10 Cl & Fin 534, 8 E.R. 844, is more rigid than the view generally held in most of the United States and in Canada.

The réstrictions on Regina v. Millis have to be recognized in many other cases.[20]

However a recent Saskatchewan Court of Appeal decision Ex Parte Cote[21] followed Regina v. Millis in requiring the

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[18] (1849), Perry's Oriental Cases, 75

[19] Supra, n. 10.

[20] e.g., Issac Penhas v. Tan Soo Eng [1953] A.C. 304; Breakey v. Breakey (1845), 2 U.C.Q.B. 349 (Upp. Can.)

[21] [1972] S.C.C.C. 49.

intervention of an episcopally ordained minister. In that case an Indian couple were living together as 'husband and wife' with the consent of their parents and with the intention of living with each other forever. The question was whether or not the woman had the status of 'wife' so that she could not be compelled to testify against the man under the provisions of the Canada Evidence Act.[22] At trial MacDonald J. found that the relationship between the couple would constitute a valid marriage at common law,[23] accordingly the wife was not held to be a competent and compellable witness for the prosecution.[24]

> I cannot see why the exemption given to a wife by common law, should not be given to a wife who is a wife by the standards of the common law.

However, on appeal Maguire J.A. premising that he was not considering the validity of a marriage by custom, held that the relationship was not a common law marriage in that it lacked the R. v. Millis requirement. In that decision he made no reference to either Wolfenden v. Wolfenden or Catterall v. Catterall but rather followed Merker v. Merker.[25] The Merker case held that a couple serving with the Polish Army in Germany in 1946 were validly married, on the basis

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[22] R.S.C. 1970, C.E10, s. 4.

[23] [1971] 4 W.W.R. 308.

[24] Id., at 312.

[25] [1962] 3 W.L.R. 1389; [1962] 3 All E.R. 928. This is difficult. Marriage held good as common law marriage because it was celebrated within lines of British Army of Occupation. There was a clergyman. Sir J. Symon says however at p. 933 as

[Footnote 25 continued on next page.]

[continuation of Footnote #25.]

his second comment on Willis that requirements of ordained priest is not applicable where it is not appropriate to the parties' situation and conditions. (This observation was applied by Cairns J. in Preston v. Preston [1962] 3 All E.R. 1057 at 1065.

of the English common law, even though they did not comply with the formalities of the existing German marriage statute. The court held that Regina v. Millis was binding law although historically erroneous,[26] and that the English common law was applicable insofar as the husband and wife were married as members of and within the lines of occupation, where the English common law was in force as the lex fori.

The decision in Ex parte Cote does not seem to be based on solid ground. Firstly, Merker v. Merker is cited for the proposition that Regina v. Millis is binding law outside of England. However, in that decision Sir Jocelyn Simon P. specifically limits Regina v. Millis:

> The practical effect of the decision is, however limited by two factors. . . . Secondly, British subjects are deemed to take abroad only such provisions of English law as are appropriate to their situation and condition; it has been held that the requirement of an episcopally ordained priest to hear and intervene in the exchange of consents is not such a provision.
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> Parties have thus in special circumstances been held to have contracted valid marriages abroad by mere exchange of present consents to marry:- for example, in colonies planted by this country, so that the common law prevailed there, there being no other relevant local law which governed the marriage in question.

Secondly, what was appropriate to the situation and condition of Canadian settlers may be a different thing entirely than the

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[26] See, Pollock and Maitland, History of English Law, 2nd edition, vol. 2, 372, n. 1.

common law of England in 1946. Thirdly Merker v. Merker, in my opinion, held that the common law of England was not applicable as the local law nor as the personal law of the parties but as the lex fori. Therefore there is no question of taking abroad only the provisions of the English common law which are applicable for the law which is applicable as the law of England.

> The law of the forum, or court; that is, the positive law of the state, country or jurisdiction of whose judicial system the court where the suit is brought or remedy sought is an integral part.[27]

There is no question that Regina v. Millis establishes the requirement of an ordained priest as an element of an English common law marriage. The question has been, does this requirement extend to the colonies. The decision in Merker v. Merker does not answer that question. I think it says "not necessarily". Conditions are relevant.

If contrary to the preceding argument, Regina v. Millis is applicable in Canada that does not mean common law marriages are invalid. What it does mean is that in order for a marriage to be valid at common law, the presence of a clergyman of the holy orders is required. Therefore if a provincial marriage Act requires the obtaining of a marriage licence, where one is not obtained, but where a contract per verba de praesenti, in the presence of a clergyman is made the marriage would be a valid common law marriage. The validity of such a union would however

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[27]Definition of Lex Fori, Blacks Law Dictionary Revised Fourth Edition, 1055.

have to be premised on the assumption that failure to comply with a provincial marriage Act would not necessarily invalidate the marriage. A point to be discussed later in this paper.

MARRIAGE BY CUSTOM (NATIVE MARRIAGES)

In Re Noah Estate, Noah, an Eskimo, was killed in a fire, while in the employ of the government. The Insurance coverage amounted to $25,000, and was the majority of Noah's Estate. One of the questions before the court was whether, Igah, a girl who Noah had married by Eskimo custom, could recover as his widow or merely be treated as his concubine. Sissons J.T.C., in holding the Eskimo marriage to be valid stated that:[28]

> The kind of marriage which English law recognizes is one which is essentially "the voluntary union for life of one man with one woman to the exclusion of all others.". . . . The old law of England recognized a consensual marriage.

Further, after stating that American decisions "generally follow the same line as the English and the Canadian cases" he quoted from Fisher v. Fisher, an American case, as follows,[29]

> Marriage is a civil contract, and law deals with it as it does with other contracts, and pronounces a marriage to

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[28]Re Noah Estate (1961-62) 36 W.W.R. at 593.

[29](1929) 165 W.E.R. 460.

> be valid wherever a man and a woman able and willing to contract do, per verba de praesenti, promise to become husband and wife.
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> According to common law of all Christiandom, consensual marriages, that is marriages resting simply on consent per verba de praesenti, between competent parties are valid, but this common right or common law does not extend to marriages which are polygamous or incestuous or which civilization commonly condemns.

Sissons J.T.C. did not, however, find the marriage valid as a common law marriage but as a marriage in accordance with Eskimo custom. Similarly, in Connolly v. Woolrich[30] and The Queen v. Wan-E-Quis-A-ka[31] marriages were held to be valid as they were in accordance with Indian customs. However in the recent Saskatchewan Court of Appeal decision, already mentioned, Ex Parte Cote,[32] Maguire J.A. made the following statement:[33]

> Counsel for the respondent endeavoured to restrict his argument to this type of "marriage" between Indians living on a reserve. I point out again that this is not a marriage according to custom, and in my opinion, consideration of the issue cannot be so limited. If a common law marriage is valid in this jurisdiction or in Canada, it must apply to all persons.

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[30] (1867) 11 Lower Can. Jur. 197.

[31] (1885) 1 Terr. Law Reports 211.

[32] Supra, n. 21.

[33] Supra, n. 21 at 52.

A similar line of reasoning was put forward by Clifton O'Brien in a case comment, in the Alberta Law Review[34]

> So long as the native marriage was a marriage recognized by English courts, and all the requirements of common law were met, then the question is whether a common law marriage is valid in the Northwest Territories. It is not whether an Eskimo marriage, as distinct from a marriage at common law is valid.
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> The pertinent point is not as suggested by Mr. Justice Sissons, that the Marriage Ordinance has not abolished Eskimo marriage custom; it is that the common law marriage has not been abolished, and this applies whether such a marriage is contracted by an Eskimo or white man.

The conflict between these positions and the problem of what law, common law or 'customary', should be applied to native marriages raises other complex issues. Should natives be considered to be bound by the common law of England. Connolly v. Woolrich seems to indicate that they should not:[35]

> It (the applicable common law) did not apply to the Indians, nor were the native laws or customs abolished or modified, and this is unquestionably true in regard to their civil rights. (Insert mine.)

However, if Canadian courts are free to develop the details of the common law for themselves[36] then perhaps Indian

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[34] Eskimo Native Marriage - Common Law Marriage - Marriage Ordinance - Intestate Succession Ordinance (Re Noah Estate) (1962) 2 Alta. L. Rev. 123, 125.

[35] Supra n. 30 at 214.

[36] Cote, The Introduction of English Law Into Alberta 1964 3 Alta. L. Rev. 271.

marriages should have to look to that common law for their validity. The fact that a native community may recognize polygamous unions and allow divorce at will however may cause difficulties. Although such recognition would not appear to be a bar to marriage by custom[37] it is certainly not consistent with the elements of a common law marriage.

PRESUMPTION OF MARRIAGE

In certain circumstances, where a couple have cohabited as man and wife and held themselves out as such, there is no need for a common law marriage to be found for the court may presume the existence of a marriage. To the parties concerned there would usually be no real distinction in the effect. Eversley, on Domestic Relations explains the rational behind the presumption clearly:[38]

> The marriage state being the chief foundation on which the superstructure of society rests, it follows naturally that the law, which is the expression of the sentiments prevailing among organised communities, assumes a favorable attitude towards it. The presumption of law is clearly in its favor--*semper praesumitur pro matrimonio*.

The presumption arises from cohabitation and reputation. Where a couple have cohabited as husband and wife for a

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[37] *Connolly* v. *Woolrich*, supra n. 30, 55 Corpus Junis Secundum p. 815, subpor (c).

[38] Eversley, *Domestic Relations*, 6th ed., p. 4.

considerable length of time, "holding each other out and recognizing and treating each other as such by declarations, admissions or conduct, and are accordingly generally reputed to be such among their relatives and acquaintances, and those who came in contact with them"[39] a marriage may be presumed. The strength of the presumption may increase with the birth of children, the lapse of time[40] and the factor that a finding against a marriage may simultaneously make the children of the union illegitimate. Further, the presumption may be "so strong, that those who would impeach the validity of the marriage are required to make the alleged illegality clearly appear."[41] However, there are circumstances in which the presumption of marriage from cohabitation and repute cannot be raised. For example:[42]

> . . . in prosecutions for bigamy or adultery; or actions for criminal conversation; or claims for damages against a co-respondent.

But, in cases involving property or maintenance the presumption as to the validity of a marriage and its effect on the burden of proof is very important. As I stated earlier to the interested parties, who have not complied with the letter of a particular marriage statute, the

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[39] Supra n. 7 at 361.

[40] Breakey v. Breakey (1845), 2 U.C.Q.B. 354.

[41] Id., at 354.

[42] Power on Divorce 2nd edition, pp. 365-6.

effect of the court finding a common law marriage or of presuming a valid marriage ceremony upon proof of cohabitation and repute is the same. Also in jurisdictions recognizing common law marriages evidence of cohabitation and repute may be used to presume a mutual present agreement, to marry and therefore a common law marriage could be presumed.

THE EFFECT OF THE MARRIAGE STATUTE

A common law marriage can only exist if the provincial marriage Act allows it to. With reference to common law marriages, Halsbury's Laws state:[43]

> A valid marriage may be contracted in any place abroad where the English common law prevails, if celebrated in accordance with that law, provided that the local law is inapplicable or cannot be complied with or does not invalidate such a marriage.

The question is what form the marriage statute must take in order to invalidate the common law marriage. Is the marriage Act which lays down certain requirements for marriages in that province to be interpreted as a set of administrative directives, or is it mandatory in the sense that failure to comply with its requisites will invalidate a marriage? Power on Divorce indicates that the criterion for deciding that question should be:[44]

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[43] 19 Halsbury's Laws, 810, (3rd ed. Simonds).

[44] Supra n. 42 356.

> Although a marriage licence, the publication of banns, or the consent of parents, is made by statute a prerequisite to the solemnization of marriage, the non-fulfilment of such requirements does not render a marriage void or voidable unless the statute expressly or by clear necessary intendment so provides; and even the fact that a statute prohibits, under penalty other than nullity, solemnization without observance of the requirement does not imply nullity.

That principle has been applied in numerous Canadian cases. In Wylie v. Patton[45] a marriage solemnized without the licence or publication of banns as required by the Marriage Act, R.S.S. 1920, c. 152, was held to be valid. In an Alberta case, Hobson v. Gray[46] a marriage licence was issued in contravention of section 24(1) of The Solemnization of Marriage Act, which provided that a marriage licence should not be issued and a marriage should not be solemnized where either party is under 16 years of age. It was held that the breach of 24(1) did not invalidate the marriage, and that section "did not purport and was not intended to have the effect of restricting the capacity of persons capable at common law of marrying." In Gilham v. Steele[47] it was held that the clear intent of the Marriage Act, R.S.B.C. 1948, c. 201, was to render void abinitio a marriage solemnized by an unregistered person, and therefore

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[45] [1930] 1 D.L.R. 747.

[46] (1958) 25 W.W.R. 82.

[47] (1953) 2 D.L.R. 96.

"deny the validity of a common law marriage performed in British Columbia". In Alspector v. Alspector[48] a couple were married according to a ceremony performed with all the requirements of the Jewish faith but no marriage licence was obtained. In the Ontario High Court, McRuer C.J.H.C. held the marriage to be valid, for there was no provision in the Act which rendered void a marriage for lack of a licence. His second reason for the judgment and the only one mentioned by the Court of Appeal, in upholding his decision, was that the marriage was expressly saved by section 33 of the Marriage Act. Section 33 read as follows:

> Every marriage solemnized in good faith and intended to be in compliance with this Act between persons not under a legal disqualification to contract such marriage shall be deemed a valid marriage so far as respects the civil rights in Ontario of the parties or their issue, and in respect of all matters within the jurisdiction of this Legislature, notwithstanding that the clergyman, minister or other person who solemnized the marriage was not duly authorized to solemnize marriage, and notwithstanding any irregularity or insufficiency in the proclamation of intention to intermarry or in the issue of the licence or certificate, or notwithstanding the entire absence of both; provided that the parties, after such solemnization, lived together and cohabited as man and wife.[49]

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[48](1957) 9 D.L.R. (2d) 679.

[49]Note, this section seems to set out the requirements of a common law marriage, a point which will be discussed later in this paper.

McRuer C.J.H.C. seemed to approve the position that the Legislature must state in clear language that failure to fulfill the requirements as to solemnization will result in a nullity before the court will declare a marriage void. However, in the Court of Appeal Roach J.A. held that the Legislature had enacted invalidity conditionally so that section four of the Act requiring a licence had to be read together with section 33, the saving clause. As Mr. Keyes points out in his article, The Validity of Common Law Marriages in Ontario,[50] there seems "to be conflicting dicta in Alspector". McRuer C.J.H.C. appears to "regard the statute as a set of administrative directives which need the teeth of clear and unequivocal language in every pertinent clause in order to render a marriage null and void for non-compliance with the Act," whereas Roach J.A. "expressly held that there is a conditional invalidity."[51] However, he concludes that there " is a tendency on the part of Ontario courts to treat the provisions of the Ontario Marriage Act as directory, and a marked reluctance to find invalidity without express provisos of nullity for non observance with the Act." This would seem to be the position in Alberta as well, in light of Hobson v. Grey and particularly section 23(1) of our Marriage Act which reads as follows:[52]

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[50]Supra n. 6

[51]Supra n. 6 at 67.

[52]Provincial: Marriage Act, R.S.A. 1970, c. 226.

> A marriage is not invalidated by reason only of a contravention of or non-compliance with this Act
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> (a) by the person who solemnized the marriage, or
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> (b) by the person who issued the license for the marriage.

There still remains the question as to whether or not the English Marriage statutes which prohibit the common law marriage are in force in Alberta. The majority of the authorities would seem to indicate that they are not. In Re Noah Estate, Sissons J.T.C. in discussing whether or not the English statutes where applicable in the Northwest Territories stated that Lord Hardwicke's Act, (1753) 26 Geo. II, ch. 33, and The Marriage Act 1823 (4 Geo. IV ch. 76) were both inapplicable in that they contained specific paragraphs stating that they were effective and binding only to England and had no extra-territorial effect. The next Act, concerning marriage, was not passed until 1898 after the 'cut off' date for the introduction of English Law into Alberta. Penner v. Penner[53] would seem to substantiate the position set out in Re Noah Estate with regard to the applicability of the English statutes in British Columbia. However Power on Divorce makes the following statement:[54]

> The question whether a "common law" marriage entered into in Ontario without any ceremony or attempt to comply with

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[53] [1947] 4 D.L.R. 879.

[54] Supra n. 42 at 356.

> The Marriage Act is valid, appears never to have been expressly determined though the view has been expressed that the provisions of the English Marriage Act, 1753, which would prevent the possibility of such marriage, were in force in Ontario: O'Conner v. Kennedy (1887) 15 O.R. 20.

The most recent decision on the common law marriage, Ex Parte Cote[55] recognizes the validity of the common law marriage, although it applies the restricted interpretation of a marriage at common law as set out in Regina v. Millis. Although the rationale for that interpretation as I stated earlier is in doubt, on the basis of Ex Parte Cote and the fact that the requirements of the Marriage Act in Alberta appear to be directory it is my opinion that a common law marriage in Alberta would not be completely void. Although if the Cote case is followed to the letter, the realm of the common law marriage would be greatly limited.

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[55] Supra n. 22.