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## The Validity of the Common Law Marriage in Ontario

# The Validity of the Common Law Marriage in Ontario

GARY MURRAY KEYES \*

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The recent decision in *Alspector v. Alspector*<sup>1</sup> throws into bold relief a number of significant questions related to the nature of the Ontario Marriage Act, and suggests the existence of a valid alternative method of marrying. The primary purpose of this article is not to analyze *Alspector* extensively but to demonstrate, by reviewing early English and Canadian statutes, and relevant case law, that there is substantial basis for the validity of the common law marriage in Ontario. After examining the problem exemplified by *Alspector*, it is intended to consider the meaning of the term "common law marriage", especially as it may apply in Ontario, the historical basis for its existence here, the statutory enactments allegedly precluding the existence of the common law marriage and, the nature and effect of the present Ontario Marriage Act.<sup>2</sup>

## *The Problem—Nature and Source*

When McRuer C.J.H.C., in *Alspector*, found a valid marriage to have subsisted "notwithstanding the entire absence of a licence as required by The Marriage Act",<sup>3</sup> his decision raised the question whether The Marriage Act constitutes a set of administrative directives only, or whether it is mandatory and invalidates any marriage not complying with its solemnization requisites. This question was not answered by the Court of Appeal, when, on the basis of section 33 of the Ontario Marriage Act,<sup>4</sup> it affirmed the lower court decision.

It should be noted, however, that section 33 was only the second of the reasons for judgment given in the lower court, and that the Court of Appeal neither approved nor disapproved the first reason which was based on a cardinal rule of statutory construction.<sup>5</sup> The *Alspector* case indicates some tendency by Ontario courts<sup>6</sup> to uphold the validity of a marriage when there is good faith, the intention to comply with some law respecting marriage, and to cohabit as man

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\* Mr. Keyes is in the second year at Osgoode Hall Law School.

<sup>1</sup> [1957] O.R. 14, affirmed at p. 454.

<sup>2</sup> R.S.O. 1950, c. 222.

<sup>3</sup> [1957] O.R. 14, at p. 18.

<sup>4</sup> R.S.O. 1937, c. 207; now R.S.O. 1950, c. 222, s. 44.

NOTE: sec. 33 and sec. 44 are not quite the same; sec. 33 of the 1937 Act says notwithstanding the entire absence of both banns and licence.

<sup>5</sup> [1957] O.R. 14, at p. 21.

<sup>6</sup> See for example, *Clause v. Clause*, [1956] O.W.N. 449.

and wife.<sup>7</sup> A further requirement seems to be that a marriage will be upheld provided that the statute does not state in plain and unequivocal language that failure to comply with the statute's provisions as to solemnization will render the marriage null and void.

The decision in *Clause v. Clause*<sup>8</sup> is apposite at this point. There an impugned marriage was upheld in spite of lack of the parental consent required by section 7 of the statute. Ferguson J. based his judgment on the fact that section 7 did not state in clear and unequivocal language that non-compliance with its requirements rendered the marriage a nullity. If the foregoing cases support the proposition that the Marriage Act in its present form constitutes a set of administrative directives which do not effect nullification for non-compliance, one may well wonder in what circumstances the courts will uphold a marriage which is irregular in form. It will be the burden of this article to establish that such an irregular marriage should be held valid when it amounts to a marriage at common law. Moreover, the writer will endeavour to demonstrate that the common law form of marriage is a valid alternative mode of marrying, even though it is not expressly recognized by The Marriage Act.

#### *The Meaning of the Term "Common Law Marriage"*

At the outset, it should be observed that a marriage irregular in form,—a common law marriage, does not refer to a woman living with a man as a "common law wife" in the colloquial sense of a clandestine relationship. According to some legal writers,<sup>9</sup> no particular ceremony is required by the common law for the valid celebration of a marriage. Prior to 1753, the common law form of marriage was valid,

... though it departed from the rubric in respect of being celebrated in a private house instead of a church; with no witnesses but the clergyman, instead of in the face of the congregation; with no person to give the bride away; without banns or a licence; without the use of a ring; without the repetition of the whole service; provided that the parties took one another by words in the present tense.<sup>10</sup>

If the contract of marriage be made *per verba de praesenti* (in words of the present tense), and is not followed by cohabitation, or if made *per verba de futuro* (in words of the future tense and suggesting conditions) and is followed by consummation, or if the promise is *subsequente copula* (after consummation) various writers have put forth the view that it amounts to a valid marriage. Such a marriage

<sup>7</sup> If the parties to a marriage solemnized in good faith and intended to be in compliance with this Act are not under a legal disqualification to contract such a marriage and after such solemnization have lived together and cohabited as man and wife, such marriage shall be deemed a valid marriage, notwithstanding that the person who solemnized the marriage was not authorized to solemnize marriage, and notwithstanding the absence of or any irregularity or insufficiency in the publication of banns or the issue of licence or special permit: R.S.O. 1950, c. 222, s. 44.

<sup>8</sup> [1956] O.W.N. 449.

<sup>9</sup> J. P. Bishop, *Marriage and Divorce* (Chicago, Flood & Co., 1891), p. 327.

<sup>10</sup> *Beamish v. Beamish* (1861), 9 H. of L. Cases 274, at p. 324.

was considered by the common law to be as binding as if made in the face of the congregation of a church. However, as Lord Campbell pointed out in *Regina v. Millis*<sup>11</sup>, the use of the expression "contract of marriage" is equivocal and a betrothment was not to be regarded as matrimony. As a result, the distinction seems to have existed between marriages contracted *per verba de praesenti*, when the parties used words of the present tense, and contracts *per verba de futuro*, which were in effect conditional and no more, in Lord Campbell's opinion, than betrothments.

The marriage *per verba de praesenti* gave rise to considerable difficulties of proof if the witnesses were no longer living or if there were no witnesses except the parties and they disagreed. A frequent answer to a petition for a divorce *a mensa et thoro* was the allegation that there was no valid marriage or that one of the parties was previously married. Thus if no witnesses were available and the parties chose not to raise the matter, subsequent marriages, even *in facie ecclesiae* would stand unimpugned. It was to remedy the confusion caused by these "clandestine" marriages that Lord Hardwicke's Act was introduced in 1753. While the practical effect of an irregular marriage was almost certainly as above stated, it was said in 1703 that "though the positive law ordains that marriage shall be by the priest, yet that omission makes such a marriage . . . irregular only, but not void".<sup>12</sup> However, there are some who consider such a common law marriage before 1753 actually invalid to all intents and purposes following the decision in *Regina v. Millis*.<sup>13</sup>

*Regina v. Millis* was a case to which the Marriage Act of 1753 did not apply. The appellant Millis, having contracted two marriages, and being indicted for bigamy, raised the question whether the first marriage was legal and complete, not having been celebrated according to the laws of the Church of England to which the appellant belonged. It was held that the presence of an episcopally ordained priest was essential to the validity of a common law marriage whether celebrated in Ireland or elsewhere. The judgment of the court below being against the validity of the first marriage, and the law Lords being equally divided, the rule *semper praesumptur pro negante* applied, and the judgment of the lower court was affirmed.

Pollock and Maitland, however, doubt the historical soundness of *Regina v. Millis* for the following reasons: First, it was the Council of Trent (1563) which required that the expression of consent to take each other as man and wife be made by the parties in the presence of the parish priest and at least two witnesses. Prior to the Council of Trent, though the Church insisted that the contracting act be made *in facie ecclesiae*, a clandestine marriage, even though forbidden, was nonetheless valid.<sup>14</sup> Secondly, because the Canons of the Council of Trent

<sup>11</sup> (1844), Cl. & Fin. 534.

<sup>12</sup> *Haydon v. Gould* (1703), Salk. 119, at p. 120.

<sup>13</sup> [1844], Cl. & Fin. 534.

<sup>14</sup> Sir F. Pollock and F. W. Maitland, *History of English Law*, 2nd ed. (Cambridge, University Press, 1899), II, pp. 369-372.

were never promulgated in England, the old canon law of marriage presumably would have continued in England as civil law until marriages *per verba de praesenti* were terminated by the Marriage Act of 1753. In effect, Pollock and Maitland consider the reasons given by the House of Lords in *Millis* to restrict the solemnization of a valid common law marriage to an episcopally ordained priest, to be of doubtful historical validity. It is submitted that even if the rule in *Regina v. Millis* actually existed in England prior to 1753, it was never applied in the territory which later became Upper Canada especially in the light of the recent decision of *Wolfenden v. Wolfenden*.<sup>15</sup> This case followed two earlier decisions and held that a common law marriage could be validly contracted, under certain circumstances, outside England, despite the absence of an episcopally ordained priest. It also held that *Regina v. Millis*, insofar as it was authoritative, was confined to England and Ireland, and that colonists were assumed to take so much of the law of England with them to their new homes as was applicable to their new situations and conditions. This decision covers cases where colonies have been settled in the absence of other peoples and those that have been secured by conquest of the natives or other claimants.

*The Historical Basis for the Introduction of the Common Law  
Marriage into Ontario*

The reasons for judgment of Lord Merriman in *Wolfenden v. Wolfenden* are of particular significance. It is there inferred that the English law of common law marriage, without the presence of an episcopally ordained priest, was first introduced into the territory which is now called Ontario prior to 1791, when, according to some, Lord Hardwicke's Act of 1753 precluding common law marriages in England, became law in the Province of Upper Canada. In *Wolfenden*, the question concerned the validity of a common law marriage between two missionaries in China where there was no prior notice of the intended marriage, no licence procured, no banns published, and the minister was not a person authorized to perform a marriage under the Foreign Marriage Act, 1892. In finding a valid common law marriage, Lord Merriman reasons that though English law was administered in the district, the whole of English law did not necessarily apply; he adopted the principle laid down in *Maclean v. Cristall*:

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 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.<sup>16</sup>

As a result, it was held that in such a territory there is, so far as the

<sup>15</sup> [1946] P. 61.

<sup>16</sup> (1849) 7 Notes of Cases Supplement 17, 24.

requirements of English law are concerned in relation to a common law marriage, no obligation that the ceremony should be performed in the presence of an episcopally ordained priest.

For similar reasons, it is submitted that colonists who, after 1759, settled in what later was named Upper Canada, brought with them only so much of the law of England as was applicable to their new situations and conditions. Indeed, there is a striking similarity between conditions in early Upper Canada, and those considered in *Wolfenden*. Historically, therefore, it is possible to say that if any law on common law marriages was transported to Upper Canada, it would exclude the requirement that the ceremony be performed in the presence of an episcopally ordained priest. In addition, the territory was one to which adherents of many faiths gravitated from Europe and, after 1776, from the United States. These colonists looked to the Imperial Government to protect their interests. Surely it would have been unsound policy to render marriages of colonists invalid on the ground that English law prior to 1753 required the presence of an episcopally ordained priest to constitute a valid common law marriage. That such a policy was adopted is improbable in the light of the religious policy of the colonial authorities which, in statutes increasingly recognized the former dissenting sects, and which culminated in the dislodging of the Church of England as the Established Church and Religion.<sup>17</sup>

Hence on the basis of *Wolfenden v. Wolfenden*, there are sound historical grounds to support the introduction into Ontario of the English law related to the common law marriage. Further, it is submitted that such a common law marriage, that is, one which is irregular due to its non-compliance with some formal ceremonial requirement, was never invalidated because the marriage was not solemnized by an episcopally ordained priest, and that such a requirement was never part of the common law brought by the early colonists to "Ontario".

#### *A Review of Statutes Held to Vitate the Common Law Marriage*

The foregoing, then, was the state of the Common Law when on December 26, 1791, the Province of Upper Canada began its separate provincial existence. It is, however, necessary to examine the various Marriage Acts after 1791, because in *O'Connor v. Kennedy*,<sup>18</sup> Armour C.J.O. held that The Ontario Marriage Act of 1874<sup>19</sup> implied the existence of Lord Hardwicke's Marriage Act of 1753. If sound, this conclusion vitiates the validity of the common law marriage in Ontario because the Act of 1753<sup>20</sup> had been passed by the British Parliament expressly to invalidate such clandestine marriages as the common law marriage had become by that time. If the Ontario Act of 1874 pre-supposes the existence of Lord Hardwicke's Act, then it follows that the present

<sup>17</sup> Edgar McInnis, *Canada: A Political and Social History* (Toronto, Rinehart & Co., 1954), p. 199.

<sup>18</sup> (1888), 15 O.R. 20, at p. 22.

<sup>19</sup> 37 Vict. c. 6.

<sup>20</sup> 26 Geo. II, c. 33.

Ontario Marriage Act, which is similar in form to the Act of 1874, similarly presumes the existence of the Act of 1753 with its nullity provision for non-compliance.

In *O'Connor v. Kennedy*, the Chief Justice traced the introduction of Lord Hardwicke's Act of 1753 to the statute enacted by the first Parliament of Upper Canada enacted in 1791, which provided that the laws of England should apply in matters of property and civil rights. At the outset, it should be observed that Lord Hardwicke's Act specifically precludes the application of its provisions "to any marriages solemnized beyond the Seas".<sup>21</sup> Yet, Armour C.J.O. refers to provisions of that Act as if they had been introduced *in toto* as the law of Upper Canada in 1791 and seems to ignore the aforementioned restriction in its application. On this ground alone, therefore, the learned Chief Justice's reliance on the existence of Lord Hardwicke's Act in Ontario law is open to question.

The Chief Justice then enumerates the various Upper Canada and Ontario Statutes relating to marriage and solemnization. The first Marriage Act was enacted in 1793.<sup>22</sup> This validated marriages theretofore irregularly solemnized before a magistrate, commander of a post, adjutant or surgeon or any other person in any public office or employment. It also provided for solemnization by Justices of the Peace until such time as there should be five parsons or ministers of the Church of England in the district; and prohibited Justices of the Peace from performing the ceremony after such parsons became incumbents in the district. The next two Acts (1798 and 1830)<sup>23</sup> enabled ministers or clergymen of other sects to solemnize marriages. Then the 1874 Act is discussed as to the publication of banns, and the Chief Justice concludes that notwithstanding the lack of any express provision nullifying a marriage for non-publication of banns, the marriage in question would still be void because Lord Hardwicke's Act of 1753 was by implication of the foregoing statutes still in force.

His reasons are that this early legislation impliedly recognized the force of the English Marriage Act of 1753 in Ontario by from time to time passing laws modifying and qualifying its provisions. Since there was no express enactment in Ontario rendering void a marriage solemnized without full compliance with the Marriage Act of his day, and that since the Ontario Legislature had never deemed it necessary to make any such provision, the Chief Justice reasoned that there was cogent evidence that it did not do so because the provisions of Lord Hardwicke's Act of 1753 had always been treated as in force in Ontario if not before 1791, at least from that date forward.

The Chief Justice declared that the provisions of the Act of 1753 preventing clandestine marriages were introduced into this province so far as they were suitable to the circumstances and were not

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<sup>21</sup> *Ibid.*, sec. 18.

<sup>22</sup> 33 Geo. III, c. 5 (U.C.).

<sup>23</sup> 38 Geo. III, c. 4 (U.C.); 2 Geo. IV, c. 36 (U.C.)



inconsistent with the civil institutions.<sup>24</sup> But the rough and unsettled circumstances of early Upper Canada were in sharp contrast to the civilized but somewhat decadent and immoral times that existed at the time of the passing of Lord Hardwicke's Act (1753). Indeed, the implied object of that Act was to prevent the reprehensible clandestinity exemplified by the "Fleet Marriages" solemnized so hurriedly by the "Fleet Parsons". The various Marriage Acts of early Upper Canada, on the other hand, were concerned to encourage a respect for the sanctity of marriage as an institution by recognizing the difficulties of solemnization due to lack of clergy and the influx of many new sects hitherto unrecognized by the state as having authority to perform marriages.<sup>25</sup>

This does not mean that the Legislature did not intend to adopt the regulations on solemnization set out in the Act of 1753; however, it does not necessarily follow, as Armour C.J.O. suggests, that because subsequent Marriage Acts adopt many of the regulatory provisions of Lord Hardwicke's Act of 1753, those Acts *ipso facto* adopt the same nullity provisos merely because they have no such provisos in them.

Such reasoning is untenable not only because it does not take proper cognizance of the intention and purpose of the Legislature in the circumstances, but because it completely neglects one of the classic canons of construction of statutory provisions.

Enactments prescribing formalities which are to be observed in solemnizing a marriage are not absolute, although expressed in negative and prohibitory language and, if there is no declaration of nullity, neglect of these formalities does not invalidate the marriage.<sup>26</sup> Thus, in *Catteral v. Sweetman*<sup>27</sup> the interpretation of a Colonial Act's provision as to a signed declaration in writing prior to a marriage was questioned. Dr. Lushington declared:

There never appears to have been a decision where words in a statute relating to marriage, though prohibitory and negative, have been held to infer a nullity, unless such nullity was declared in the Act. In viewing successive Marriage Acts, it appears that prohibitory words, without a declaration of nullity, were not considered by the Legislature to create a nullity.<sup>28</sup>

On this ground, Dr. Lushington held the marriage in question to be valid, although irregular in form.

With respect to the Marriage Act of 1874, it is submitted that the reasoning of Armour C.J.O. in *O'Connor v. Kennedy* is suspect when he suggests that the then current Marriage Act vitiates a marriage for neglect of some formality of solemnization because its prohibitory and negative language infers nullity based on the implied existence of the

<sup>24</sup> *O'Connor v. Kennedy* (1888), 15 O.R. 20 at pp. 23-24.

<sup>25</sup> See: 33 Geo. III, c. 5 (U.C.); 38 Geo. III, c. 4 (U.C.).

<sup>26</sup> *Craies on Statute Law*, 5th ed. (London, Sweet & Maxwell, 1952), p. 312 and cases there cited.

<sup>27</sup> (1845), 9 Jur. 951.

<sup>28</sup> *Ibid.*, at p. 954.

nullity provisions of the Act of 1753. His disregard for the accepted canon of construction in *Catteral v. Sweetman*, and his misreading of history in regard to the intention of prior Marriage Acts, lends support to the submission that Lord Hardwicke's Act allegedly vitiating the common law marriage in Ontario cannot exist simply by implication of the subsequent Ontario Marriage Acts. Indeed such statutes might be taken to have repealed by implication any possible existence of the Act of 1753.<sup>29</sup> In addition, it is submitted that, since the 1874 Marriage Act resembles our present Statute and contains none of the nullity provisos of Lord Hardwicke's Act, the Marriage Act R.S.O. 1950 does not necessarily imply the existence of the Act of 1753 either. If the foregoing reasoning is valid, there does not seem to be any real statutory basis for denying the existence of an alternative means of marrying, namely, the common law marriage. However, it remains to see if there is any impediment to the existence of the common law marriage by virtue of the nature and effect of the present Marriage Act.

*The Nature and Effect of The Marriage Act R.S.O. 1950*

The true nature of The Marriage Act might be best indicated by an inspection of the cases concerning solemnization. In the past, there has been some dispute as to the constitutional competence of the provincial government to impose nullity provisions for failure to comply with the statutory provisions. The only legislative provision since Confederation that purported to declare marriages void for failure to comply with the requirements of the Marriage Act followed the decision in *Peppiatt v. Peppiatt*<sup>30</sup>. This case principally turned on the constitutional validity of those provisions of the Marriage Act which dealt with the consent to the marriage of a person under 18 years of age. After this decision, the Act was amended<sup>31</sup> to provide that parental consent was to be deemed an absolutely essential condition precedent to the solemnization of a valid marriage with the penalty of nullity for non-compliance. In 1932 the nullity proviso was struck out,<sup>32</sup> and no similar words have since been inserted. In *Peppiatt v. Peppiatt*, moreover, Meredith C.J.O. followed the long line of authorities which scrutinize meticulously the provisions of any statute which purports to render a marriage void where cohabitation has followed. They declare that it is incumbent on the Legislature to say in plain and unequivocal language whether conditions subsequent to and including ceremonial requirements are absolutely necessary to a valid marriage.

Yet it now seems established that a Provincial Legislature can enact conditions on solemnization of marriages in the Province which may affect the validity of the contract. In *Kerr v. Kerr*,<sup>33</sup> Duff C.J. put it this way:

<sup>29</sup> See footnote 25 *ante*.

<sup>30</sup> (1916), 36 O.L.R. 427.

<sup>31</sup> The Marriage Law Amendment Act, 1919 (Ont.), c. 35, s. 2.

<sup>32</sup> The Statute Law Amendment Act, 1932 (Ont.), c. 53, s. 17.

<sup>33</sup> [1934] S.C.R. 72.

The authority of the provinces, therefore, extends not only to prescribing such formalities as properly fall within the matters designated by "Solemnization of Marriage": they have the power to enforce the rules laid down by penalty, by attacking the consequence of invalidity, and by attaching such consequences absolutely or conditionally.<sup>34</sup>

Such power, it should again be noted, has not been exercised in express terms since 1932. This suggests that the grave consequences of affecting the status of marriage is perhaps the underlying reason why the courts approach the matter as does Meredith C.J.O. in the earlier case of *Peppiatt v. Peppiatt* referred to above.

In *Alspector*,<sup>35</sup> McRuer C.J.H.C. also seems to approve the canon of construction that the legislature must state in plain and unequivocal language that failure to comply with the requirements as to solemnization will result in nullity. Indeed, he adopts in part the reasoning in *Rea v. Birmingham*.<sup>36</sup> That case held that the intention of Parliament in regard to certain penalty clauses in the English Marriage Act was not to be interpreted as rendering a marriage void because the minister was not duly authorized, but merely to prevent fraudulent and clandestine marriages, by depriving the guilty party of any pecuniary benefit. In *Alspector* the Chief Justice decided that a marriage was valid where the cantor was subject to a penalty for performing the marriage without a licence. He also refers with approval to the decision of Ferguson J. in *Clause v. Clause*,<sup>37</sup> who arrived at a similar conclusion where the validity of the marriage was attacked for lack of the consent required by the Act.

In the *Alspector* case, Roach J.A. bases his decision on the second of McRuer C.J.H.C.'s reasons for judgment, namely section 33, but he qualifies it by declaring that the requirement of the section that the parties must intend to comply with this Act really means that they must intend to comply with some law, it not being the intention of the Legislature that every couple marrying in Ontario would be fully conversant with "this" Act. In addition, he finds that the Legislature has sought to enforce compliance with the solemnization requirements by imposing a penalty on the official who solemnizes a marriage contrary to section 33. In his opinion, the Legislature has enacted the consequence of invalidity in this case conditionally so that section 4 (licence) and section 33 must be read together. On the facts, Roach J.A. decided that the marriage was valid notwithstanding the lack of a licence, because the parties complied with section 33, and that there was sufficient evidence of good faith, intention to adhere to the law, and cohabitation so as to comply with the law of the Province.

There seems, however, to be conflicting *dicta* in *Alspector*: In the High Court, McRuer C.J.H.C. appears to regard the statute as a set of administrative directives which need the teeth of clear and unquali-

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<sup>34</sup> *Ibid.*, at p. 75.

<sup>35</sup> [1957] O.R. 14.

<sup>36</sup> 8 B. & C. 29.

<sup>37</sup> [1956] O.W.N. 449.

vocal language in every pertinent clause in order to render a marriage null and void for non-compliance with the Act; in the Court of Appeal, Roach J.A. expressly held that there is a conditional invalidity, basing his reasons for judgment on *dicta* of Duff C.J. in *Kerr v. Kerr*. His reasons are that the issuance of a licence or special permit and the publication of banns as pre-ceremonial requirements, are formalities falling within the matters designated by "Solemnization of Marriage" in *Kerr v. Kerr*. The legislature has sought to enforce compliance with those requirements by the imposition of a penalty on the official who solemnizes a marriage without one of these three alternative requirements having been complied with. He concludes that the legislature has also enacted the consequence of invalidity conditionally for non-compliance with these solemnization requirements—that is, that section 4 (licence requirement) and section 33 must be read together to ascertain the legislature's intention. At first glance, then, this latter judgment might seem to support the contention that the Marriage Act is more than a mere set of administrative directives, so that it can be viewed as mandatory in nature, imposing invalidity on a marriage that is irregular in form, and does not meet the required state of mind set out in section 33 of the Marriage Act. But it must be noted that *Kerr v. Kerr*, on which Roach J.A. relies so heavily, also approves the *dicta* in *Rex v. Birmingham* which held that in construing penalty clauses in the English Marriage Act, such sections should not be interpreted as rendering a marriage void.<sup>38</sup> It is therefore suggested that this conditional invalidity interpretation of The Marriage Act is questionable on its authority, and is not, alone, a firm basis for considering the Statute mandatory in nature and effect.

### Conclusion

It is submitted 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 of the Act.<sup>39</sup> In essence, section 44 of the present Act seems to substantiate what are historically understood to be the requirements of a common law marriage, namely, good faith and intention on the part of the parties to comply with some law related to marriage solemnization, followed by cohabitation as man and wife. If these are present, a marriage, though irregular in form because of the absence of witnesses, or lack of licence, banns, etc., would nevertheless have been considered a valid marriage at common law. Hence it is suggested that a marriage considered valid under section 44, is no different from the common law marriage defined in the second section of this article.

Moreover, an important problem is raised as to the nature of the Marriage Act in conjunction with section 44 by such an interpretation

<sup>38</sup> See footnote <sup>30</sup> *ante*.

<sup>39</sup> For the policy of the English courts, see for example: *Taczanowska v. Taczanowski* [1957] 3 All E.R. 563; *Kochanski v. Kochanski* [1957] 3 All E.R. 142.

of the section: that is, if the statute is directory in nature, as suggested above, the common law marriage, as an alternate means of marrying may exist entirely outside the Act. Given good faith and intention by the parties to comply with some law related to solemnization, it is submitted that a marriage irregular in form still may be valid, notwithstanding the lack, for some *bona fide* reason, of cohabitation as required by section 44. This proposition, however, evokes the vital question as to the nature and purpose of section 44.

If the Statute *in toto* is directory rather than mandatory, why was section 44 enacted? To put the question another way: if the Act is a set of administrative directives, non-compliance with any specific section would work no more adverse result on the validity of the questioned marriage than would lack of adherence to any of the three elements of section 44. In this instance, section 44 appears superfluous. One possible explanation for the enactment of the section, even if the whole Act is directory, is that it might have been 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.<sup>40</sup>

Therefore it might be said that section 44 embodies the essentials of the common law marriage,<sup>41</sup> and implies its existence in Ontario. Yet this is but a possible explanation of the purpose of the section; it does not satisfactorily explain its effect.

There is no clear-cut decision on the effect of section 44. The decision in *Alspector*, based on conditional invalidity, might be said to be inapplicable because section 33 of the 1937 Marriage Act governed in that case and differs slightly from section 44 of the 1950 Statute.<sup>42</sup> Such a state of the law, makes one wonder when the courts will refrain from applying the accepted presumptions in favour of the validity of marriage. Will our courts uphold a marriage which lacks one or more of the essential requirements of section 44? Or is there a conditional invalidity? In view of these questions, it is suggested that the line between a valid and invalid marriage is too wide and has too often resulted in the impugning of a marriage solely to frustrate the intended devolution of an estate.<sup>43</sup> Therefore it is submitted that there is a need for legislative amendment or a clear decision by The Supreme Court of Canada as to the nature of the Marriage Act, especially the effect of section 44.

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<sup>40</sup> Eversley on Domestic Relations, 6th ed. (London, Sweet & Maxwell, 1951), p. 4.

<sup>41</sup> See footnote 7 *ante*.

<sup>42</sup> See footnotes 4 and 7 *ante*.

<sup>43</sup> See for example, *Alspector v. Alspector* [1957] O.R. 14.