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## An Evolutionary Consideration of the Marriage Formalities of Licensure and Solemnization as Manifested in Contemporary English and North Carolinian Statutory Law

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**AN EVOLUTIONARY CONSIDERATION OF THE  
MARRIAGE FORMALITIES OF LICENSURE  
AND SOLEMNIZATION  
AS MANIFESTED IN CONTEMPORARY  
ENGLISH AND NORTH CAROLINIAN STATUTORY LAW**

**DONALD A. POWELL\***

I would be married, but I'd have no  
wife,  
I would be married to a single life!!

**PREFACE**

It is the intention of this paper to explore the evolutionary ramifications of the marriage formalities of solemnization and licensure as manifested in contemporary English and North Carolinian statutory law. This study runs the full gamut from the early Dark Ages on the Continent, through the latter Middle Ages in England and the Continent, the growth of an indigenous English law separate and apart from its Continental heritage, its migration to proprietary and colonial North Carolina, the subsequent mutation thereof and development of an indigenous North Carolinian law, to the present day statutory scheme in England and North Carolina.

As is proper in such an undertaking, an attempt has been made to analyze the status of the licensure and solemnization prescriptions with respect to the generally accepted "turning points" in history, *e.g.*, the Council of Trent, the founding of the colonies, American Independence, etc. In addition, an attempt has been made to appreciate the underlying social, political and economic variables at each such milestone in relation to their respective legal developments.

This study is primarily an historical meditation rather than an examination of topical English and North Carolinian law and is, *ergo*, comparative in that sense only. The crux of the analysis then, is not an in-depth commentary on the laws themselves, but is, more precisely, an effort to disinter the compelling motives for such pronouncements, to see their faults and shortcomings, to understand the receptions given them by the people and, lastly, to impress upon the reader a sincere appreciation of tonal heritage in statutory law.

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I. R. CRASHAW, STEPS TO THE TEMPLE (1648).

THE EARLY CONTINENTAL PERIOD: 476-1000

The fall of Rome is formally attributed by most historians to Odoacer's deposing of Romulus Augustulus, the last emperor in the West, in 476 A.D.<sup>1A</sup> The wake which followed has habitually been categorized as the Dark Ages of Europe. Such was an age in which cultural progress was almost impossible. Centralization, critical to the development of legal and social orders, was lacking. The reign of Charles Magnus, ceremoniously commencing in 800 A.D. and admittedly fostering a "Renaissance" in Europe, was but a brief respite to the continued decay of order and culture, and upon his death the empire again divided. Feudalism, that is, decentralization, again set in. The attacks of the Norsemen, the Saracens and the Mongols, destroying the centers of wealth and culture, effectively denied maturity to the fruits of the Carolinian Renaissance.

As is ordinarily the case in a decentralized society, an obtaining legal system is largely non-existent, such inference being drawn in retrospect from that society's failure to make a bequeathal to the annals of history. Subsequent generations of students are thereby left little choice but to speculate as to the *modus operandi* of mundane endeavors and occurrences. This, broadly speaking, is the general framework of our historical understanding of the legal systems of the early continental period, and hence our legacy with respect to matrimonial formalities in particular.

It is generally accepted that the early Christians treated marriage as a civil contract, yielding perhaps to the Roman Law prevailing at the time.<sup>2</sup> And in its early development, the Canon Law was not able to shake such a conceptualization, as it was relatively simple for the inhabitants of the Dark Ages to flout the law in such a stagnant society. Accordingly, notorious concubinage and multiple marriages were quite common.<sup>3</sup>

Hence, among the Germanic tribes who peopled Europe after the fall of Rome, the term "marriage" was largely an empirical conception. The term itself had no restricted legal meaning. So long as it endured, a relationship of life between a man and a woman was properly called a "marriage" whether the relationship commenced and continued in accordance with law or custom, or not.<sup>4</sup>

As far as actual formalities were concerned, the newly wedded couples of the early Middle Ages, according to some authorities, formalized their marriages and rendered them binding between themselves and the rest of

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1A. 15 WORLD BOOK ENCYCLOPEDIA, *Roman Empire* 389 (1960).

2. 2 J. SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS § 1190 (6th ed. 1921) [hereinafter cited as J. SCHOULER].

3. R. DELORT, LIFE IN THE MIDDLE AGES 107 (R. Allen trans. 1973) [hereinafter cited as R. DELORT].

4. Engdahl, *Medieval Metaphysics and English Marriage Law*, 8 J. FAMILY L. 381, 382-383 (1968) [hereinafter cited as Engdahl].

5. Stein, *Common-Law Marriage: Its History and Certain Contemporary Problems*, 9 J. FAMILY L. 271, 271 (1970) [hereinafter cited as Stein].

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the world merely by going to bed together in the presence of witnesses.<sup>5</sup> The lack of historical data renders it fruitless to ascertain precisely whether this was in fact the case. In accord with the mores of those times, it is probably safe to say that there were no licensure or solemnization requirements. It nevertheless remains difficult to surmise so in terms of particularity.

In other words, was mere going to bed in the presence of witnesses the extent of the solemnization? Were words of present or future intent required to be spoken? Was an intent required to be manifested in some empirical way? Was the presence of clergy or lay authority necessary? As the general rule accepted by historians is that "any form" was a valid form,<sup>6</sup> the concept of a requisite formality becomes purely academic, as a decentralized society knows no sanctions. The argument then, that there were no required formalities, becomes a tenable position. Such a contention is all the more plausible inasmuch as the earliest uniform law concerning marriage in Europe was the Canon Law promulgated by the Roman Catholic Church.<sup>7</sup> The Canon Law required an inward exchange of mutual consent, but such law was generally not cognizable until the seventh century at the earliest.<sup>8</sup> Furthermore, the terms *per verba de praesenti* and *per verba de futuro cum copula* did not appear in common parlance until the rise of the ecclesiastical authorities (e.g., Lombard and Aquinas) during the latter years of the Middle Ages, approximately 1000-1300.<sup>9</sup> The Canon Law, eventually identical from Scotland to Cyprus, Portugal to Palestine, and the major unifying factor of the Western World, was slowly elaborated through centuries and did not attain a definite form until the eleventh and twelfth centuries.<sup>10</sup>

Hence, the picture presented by the early continental period is, at best, incomplete. Licensure was not required, as the populace was anything but literate. The existence of actual solemnization requirements is unclear, as there apparently was no centralized authority to promulgate them. That no outwardly visible solemnization was required is in all probability an accurate assessment. Whether some inward form, e.g., words of consent, was required is at best, pure conjecture. Neither the legal nor the ecclesiastical structures were securely lodged on the continent at that time.

**CONTINENTAL DEVELOPMENT FROM THE LATTER MIDDLE AGES  
UP TO THE COUNCIL OF TRENT: 1000-1545**

As previously indicated, the earliest uniform law concerning marriage in Europe was the Canon Law promulgated by the Roman Catholic Church.<sup>11</sup>

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6. Barry, *The Tridentine Form of Marriage: Is the Law Unreasonable?*, 20 JURIST 159, 161 (1960) [hereinafter cited as Barry].

7. Stein, *supra* note 5.

8. O. KOEGEL, *COMMON LAW MARRIAGE* 14-15 (1922) [hereinafter cited as O. KOEGEL].

9. Maitland, *Magistri Vacarii Summa de Matrimonio*, in *SELECTED ESSAYS ON FAMILY LAW* 104 (Comm. of the Assoc. of Am. L. Schools ed. 1950) [hereinafter cited as Maitland].

10. DELORT, *supra* note 3, at 125.

11. See note 7 *supra* and accompanying text.

While the earliest influences of such law can be traced back as far as the seventh century,<sup>12</sup> it was not until the twelfth century that the Church throughout the Western World was able to successfully claim for her courts an exclusive right to pronounce on the validity of marriages.<sup>13</sup> It was at this time that the canonical formalities of marriage first appeared, although they were restricted to an inward form of solemnization only and did not embrace licensure at all.<sup>14</sup>

Renewed acquaintance with the literature of classical Greece and Rome during the eleventh and twelfth centuries had stirred the ecclesiastical interest in problems of philosophy, in particular the dialectic and the ontological. The inescapable supernaturalism of the orthodox faith predisposed Christian philosophy toward metaphysics. Metaphysics then became inextricably enconced in the Canon Law of marriage.<sup>15</sup> This was the age of Aquinas and Anselm and other doctors of the early Western Church. It was an age characterized by a movement away from the Platonic theory of forms and an eager embracement of a newly resurrected Aristotelian philosophy.

Marriage was quickly losing its empirical notions and was coming to be viewed as a metaphysical bond.<sup>16</sup> Falling back on the Christian scriptures for supporting a metaphysical conceptualization of marriage, the ecclesiastical authorities now considered husband and wife as "two in one flesh."<sup>17</sup> The upshot of such an abstraction was that inasmuch as there could be no marriage without a metaphysical bond, it then became necessary for someone to create that bond. And so, the Canons came to require an inward exchange of mutual consent *per verba de praesenti* as requisite to a valid marriage. Thus did the demise of the Germanic empiricism come about. This is the first formal solemnization requirement of the Western Church. If this was lacking, not only was the marriage illegal, but also, and for the first time, the marriage was invalid, *i.e.*, there was no marriage at all. Hence, merely living together did not, as before, constitute a marriage. Furthermore, where there was a valid marriage, merely separating the parties physically could not and did not annul, as before, the marriage.<sup>18</sup>

This formal requirement of an inward exchange of consent gave rise to the famous classification of contracts *per verba de praesenti* and *per verba de futuro cum copula*, the distinction which historically has been attributed to Peter Lombard, a professor at the University of Paris and later an ordained bishop.<sup>19</sup> Briefly, the classification recognized two forms of marriage. The former was a marriage created by an inward exchange of consent expressed in words of present tense without any need for witnesses, banns, ceremony or physical consummation. The latter was an initial promise, again without any need for witnesses, banns, or ceremony, to become husband and wife at some future time,

12. See note 8 *supra* and accompanying text.

13. Maitland, *supra* note 9.

14. See Stein, *supra* note 5, at 273.

15. Engdahl, *supra* note 4, at 391.

16. *Id.* at 392.

17. *Id.* at 391. See also *Genesis* 2:23; *Ephesians* 5:31; *St. Matthew* 19:4,6; *Mark* 10:8,9.

18. Engdahl, *supra* note 4, at 392.

19. O. KOEGEL, *supra* note 8, at 15.

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the promise to ripen into an actual marriage after sexual intercourse. The act of intercourse was presumed to change the prior words of future intent into words of present consent.<sup>20</sup> But mere *sponsalia per verba de futuro* did not create a marriage and gave rise to no change of status unless followed by consummation.<sup>21</sup>

The Church really had but little choice but to accept Lombard's contention that a marriage *per verba de praesenti* without a physical consummation was valid, for it was the only way to explain the existence of a valid marriage between St. Mary and St. Joseph.<sup>22</sup>

The classic case is Richard de Anesty's case, decided in 1143 A.D. in a decretal of Pope Alexander III addressed to the Bishop of Norwich, in the reign of Henry II. In that case a "marriage" solemnly celebrated in Church, a "marriage" of which a child had been born, was set aside as null in favor of an earlier marriage constituted by a mere exchange of words without carnal knowledge, witnesses, banns or ceremony.<sup>23</sup>

Although a precise date for the earliest instance of the Church's requirement of mutual consent cannot definitively be established, the decretal of Pope Alexander III in 1143 clearly predates the Council of Trent, 1545-1563. As the form of the consent is juridical in that if it is defective there is no marriage at all, it is respectfully submitted that it is improper for some authorities to state that there was, prior to Trent, merely a liturgical form of marriage in the Church and not an obligatory juridical form.<sup>24</sup>

The problem with the pre-Trent marriage was not that there was no juridical form, because there was, but rather that the Church recognized private or clandestine marriages as valid,<sup>25</sup> in which the juridical requirement of a mere inward exchange of consent was often difficult to prove.<sup>26</sup> Hence, until 1563 the validity or invalidity of a given marriage could easily be a secret known only to the parties themselves. It was well nigh impossible for the Church to know if a party was lying.<sup>27</sup> Many injustices thereby obtained. Frequently a man went through such a clandestine marriage and then tired of his wife. He then contracted a "new marriage" with someone else in full public solemnity. The result was that the first was his true wife, yet the Church was forced to accept the second as his true wife.<sup>28</sup>

20. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 367-372 (2d ed. 1898).

21. Andrews, *The Common Law Marriage*, 22 *MODERN L. REV.* 396 (1959) [hereinafter cited as Andrews].

22. Maitland, *supra* note 9, at 107.

23. O. KOEGEL, *supra* note 8, at 20.

24. Brown, *The Relation of Theology and Philosophy to the Forms of Marriage*, 1 *J. FAMILY L.* 126, 128 (1961) [hereinafter cited as Brown].

25. M. Sheehan, *The Formation and Stability of Marriage in Fourteenth-Century England: Evidence of an Ely Register*, in 33 *MEDIEVAL STUDIES* 228-264 (1971).

26. See Barry, *supra* note 6.

27. Chatham, *Evolution of the Juridical Form of Marriage in the Latin Rite*, 16 *JURIST* 298, 299 (1956) [hereinafter cited as Chatham].

28. Barry, *supra* note 6, at 162.

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True, from a religious consideration marriages unblest by the Church were condemned, and the parties often compelled by spiritual censures to celebrate their marriage *in facie Ecclesiae*. In fact, many, but not a substantial number, of marriages were ordinarily entered into with a public ceremony *in facie Ecclesiae*. Yet such religious sanctions however, were not necessary to render the marriage valid in a juridical sense, as the mutual consent, if already existing, had rendered the marriage valid *ab initio*, notwithstanding its clandestinity.<sup>29</sup>

Of course many of the regional ecclesiastics were most unhappy with clandestine marriages and a few took matters into their own hands. In the year 1200, Archbishop Hubert Walter, at the Council of Lambeth, demanded triple publication of banns and a "proper ceremony" *in facie Ecclesiae*<sup>30</sup> as requisite formalities to a valid marriage. At first, it was highly questionable whether such a decree had the full imprimatur of the Bishop of Rome and was therefore juridically cognizable. That it was not, was underscored by the subsequent Lateran Council of 1215. There, Pope Innocent III, while decreeing that all marriages henceforth were to be solemnized *in facie Ecclesiae* after due publication of banns, further decreed that such was merely directory, *i.e.*, liturgical and not juridical. Those who ignored the directory were censured, but the validity of their marriage remained unaffected.<sup>31</sup>

## DEVELOPMENTS IN ENGLAND: 476-1200

Integral to traditional English and American law is the notion of validity.<sup>32</sup> It was this natural, empirical conception of marriage which the Germanic tribes brought with them when they invaded the Roman province of Britannia in the fifth and sixth centuries.<sup>33</sup> Displacing the existing Roman civilization, it was the Germanic, not the Roman traditions, which formed the basis of the early Anglo-Saxon law of marriage.<sup>34</sup>

It may reasonably be inferred that early, *i.e.*, 476 A.D., Anglo-Saxon marriage formalities were largely identical to those of the continental period following the fall of Romulus Augustulus. And those crude empirical concepts formed the foundation of the Anglo-Saxon law of marriage. Although licensure, in all probability, was not required, the existence of the requirement of solemnization is unclear, as there was also no centralized legal or ecclesiastical authority in England at this time to promulgate such precepts. That no outwardly visible form was required is most likely an accurate assessment. Whether some inward form was required is, as in the case of the early continental period, merely conjecture.

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29. J. LONG, THE LAW OF DOMESTIC RELATIONS § 56, at 92 (2d ed. 1913) [hereinafter cited as J. LONG].

30. Stein, *supra* note 5, at 273.

31. *Id.*

32. Engdahl, *supra* note 4.

33. *Id.* at 383.

34. *Id.*

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Prior to the fall of Rome and the subsequent invasions of Britannia by the Germanic tribes of northern Europe, the Roman settlements in Britain had been Christianized, a fact that did not escape the attention of the early ecclesiastics who were determined to reconquer the Island for the Faith.<sup>35</sup>

In accord with the Church's plan to one day claim for her courts an exclusive right to pronounce on the validity of a marriage, a dream come true by 1200,<sup>36</sup> Christianity came to Britain at the end of the sixth century. Augustine, the doctor of the Eastern Church, was sent by Pope Gregory the Great to found an abbey and mission at Canterbury. Ecclesiastical authority immediately assumed control over all marriages here at Canterbury, and as Germanic tribal rites gradually came to be suppressed, the ecclesiastical Canon Law began to permeate the entire Island,<sup>37</sup> emanating from Canterbury which, to this day, has remained the seat of ecclesiastical, although no longer Roman Catholic, authority in England.

The Christian missions were hard put to stamp out the empirical German notions of marriage, and up until the eve of the Norman Conquest of 1066, marriage in England still exhibited the cardinal characteristics of the old Germanic conceptualizations.<sup>38</sup> It wasn't until after Hastings that the Western Church was able to realize an appreciable surge of influx in England. Thereafter the continental ecclesiastical Canon Law slowly infiltrated the Island, and when William the Conqueror separated the spiritual law from the temporal law, the ecclesiastical courts were given exclusive jurisdiction over marriage.<sup>39</sup>

By the year 1200 the Canon Law was firmly secured in Britain and was indistinguishable from its continental heritage. The metaphysical conceptualizations and the Church's juridical requirement of an inward exchange of mutual consent, of either the *de praesenti* or *de futuro* variety, were fully cognizable in English ecclesiastical marriage law. Thus do we know from the teachings and records of St. Anselm, Abbot of the Norman Abbey of Bec, who crossed the Channel in 1093 to become Archbishop of Canterbury and a strong leader in the early church in England.<sup>40</sup>

That the so called early common law of England was, with respect to marriage, identical to the continental ecclesiastical Canon Law is also the opinion of Blackstone and eminent early English jurists.<sup>41</sup> While marriage in solemn form was not unknown, by this law, identical in England and Europe, a mere inward exchange of consent, without more, was all that was juridically required to constitute a valid marriage in the eyes of the Church who exercised exclusive jurisdiction over such matters in the Western World.<sup>42</sup>

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35. *Id.*

36. See note 13 *supra* and accompanying text.

37. Engdahl, *supra* note 4, at 384.

38. *Id.*

39. Stein, *supra* note 5, at 274.

40. Engdahl, *supra* note 4, at 394.

41. See J. LONG, *supra* note 29.

42. *Id.*



## DEVELOPMENTS IN ENGLAND: 1200-1545

As previously discussed, the ecclesiastical courts in England were eventually successful in asserting jurisdiction over the entire province of marriage, and at an early period, to wit, 1200, the marriage law of England was the Canon Law of the Western Church.<sup>43</sup> The exclusivity of the early church in England is underscored by the fact that the parties to a marriage were not, until later, denied any of the civil rights attendant to the marital relationship. King Aethelbernt (late sixth century) refused to deny civil incidents, *e.g.*, dower, descent of real property, etc., to clandestine marriages which, although considered unlawful by the Crown and censured by the Church, were nevertheless held to be valid marriages by both.<sup>44</sup> The censured parties were merely admonished that "their souls would go to hell" which apparently, in retrospect, was an unsuccessful deterrent to clandestine marriages. The sole exception, *i.e.* the case in which civil incidents were denied, was the instance of marriage to a nun, to whom dower rights were denied and whose child was not permitted to inherit real property.<sup>45</sup>

Such exclusive ecclesiastical jurisdiction of marriage was not destined to last, and early in the history of England the courts of common law began to divest the ecclesiastical courts of jurisdiction over the civil incidents of marriage. Nonetheless, the temporal law, *i.e.* the common law, still had no doctrine for marriage *per se*, and that remained the exclusive province of the ecclesiastical courts.<sup>46</sup>

This jurisdictional bifurcation led to much friction between the ecclesiastical and common law courts. This division, to which there is nothing parallel in the classical Roman Law, was of course due to the fact that medieval Christianity, regarding marriage as a sacrament, had placed it under the exclusive control of the Church and her tribunals in those aspects which were deemed to affect the spiritual well-being of the parties to it.<sup>47</sup>

In practice, the common law courts soon began to ignore the decrees of the ecclesiastical courts. While the Church insisted that marriage be relatively easy to enter into, requiring at this point in time merely an inward exchange of mutual consent, the common law courts, perhaps playing their cue to a rising landed aristocracy, refused to make it equally easy to inherit or otherwise acquire title in English soil. The common law courts, early on, consistently stated that, "The acts which give rights in land should be public, notorious acts."<sup>48</sup> The resilient impetuosity of the common law courts, confirming a triumph for the landed aristocracy, is conclusively evinced in those death bed weddings, valid marriages

43. C. FOOTE, R. LEVY & F. SANDER, *CASES AND MATERIALS ON FAMILY LAW* 172 (1966) [hereinafter cited as C. FOOTE, R. LEVY & F. SANDER].

44. See Engdahl, *supra* note 4, at 385-88.

45. *Id.* at 388.

46. See C. FOOTE, R. LEVY & F. SANDER, *supra* note 43, at 173.

47. See O. KOEGEL, *supra* note 8, at 13.

48. See C. FOOTE, R. LEVY & F. SANDER, *supra* note 43, at 173. See also J. LONG, *supra* note 29, § 56.

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under the common law and the ecclesiastical Canon Law, which “may do well enough for the Church and may, one hopes, profit the sinner’s soul in another world, but [which] must give no rights in English soil.”<sup>49</sup>

This then, was the beginning of civil regulation of marriage in England. But such initial regulation was essentially negative in that it affected only rights in real property and did not disturb the validity of the marriage itself. As far as formalities were concerned, there would be no acts passed by the Parliament until Lord Hardwicke’s Act in 1753, *infra*.

Hence, the Canon Law of the Church still governed the validity of a marriage in England in 1545. Concerning the civil incidents, obviously more than hearsay evidence of mutual consent was necessary before the courts of common law would affirm the administration of an estate in land. But inasmuch as this was solely a common law and not a statutory requirement, the formal criteria of proof most surely varied from assizes to assizes. As a representative case, see *Haydon v. Gould*, 1 Salk 119 (1723) which held that a marriage performed by a layman was not sufficient to entitle the man, after the woman’s death, to administer her estate. Note that the court does not decree the marriage invalid.

THE COUNCIL OF TRENT: 1545-1563

Until the Council of Trent, requisite marriage formalities were identical in England and on the Continent, and were governed exclusively by the Canon Law. True, the common law courts early wrested control of the civil incidents of marriage from the ecclesiastical courts, but they declined to pronounce on the validity of a marriage *per se*. Parliament declined such pronouncement until 1753, *infra*.<sup>50</sup>

As the only juridical requirement until 1563 was that of an inward exchange of mutual consent, the validity or invalidity of a given marriage was often a secret known only to the parties themselves.<sup>51</sup> As far as the Church was concerned, such clandestine abuses had pernicious spiritual and social repercussions.<sup>52</sup> Prior to the Council of Trent, it is an established fact that no procedure existed for a declaration of nullity of marriage.<sup>53</sup>

Viewed as a sacrament by the ecclesiastical authorities, marriage was unique in that it was administered not by a priest or bishop but by the contracting parties themselves. It was indubitably a desire to preserve this doctrine which prevented the Church for fifteen hundred years from enacting a law which would require solemnization *in facie Ecclesiae* as a requisite formality to the validity of a marriage.<sup>54</sup>

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49. *Id.*

50. See O. KOEGEL, *supra* note 8, at 13.

51. See note 27 *supra* and accompanying text.

52. Chatham, *supra* note 27, at 300.

53. Carberry, *Lack of Form Marriages and Proof for Declaration of Nullity*, 15 JURIST 374, 375 (1955).

54. Chatham, *supra* note 27.

In the ages of faith, when there was comparative unity in the external life of Christendom, the emphasis was on the validity of marriage as it affected the life and conscience of the individual Christian. The age of the Council of Trent was an age of expansionism and New World discoveries. It was the age of Erasmus, Luther, Copernicus, Descartes and Galileo. It was a time of skepticism and unrest. It was the beginning of a new era, of the rise of the nation states of Europe and of the birth of modern philosophy. With the attendant disruption of Christian unity, a viable juridical form was now necessary for the validity of a marriage, thus making it possible for the Church to pass effective judgment upon the marital status of her children.<sup>55</sup>

In the Church's desire to curtail the widespread incidences of adultery, to regularize cohabitation, to save the children of such unions from the stigma of bastardy, to save the parents from the sin of fornication and to make good the expectations of the parites at the time of their consent,<sup>56</sup> Catholic theology began to teach that although consent makes a marriage under the supernatural law (metaphysical conceptualizations, *supra*, inextricably ensconced in the Canon Law), the exercise of the right of marital consent could be limited by an ecclesiastical form of marriage, extrinsic in nature, under reasonable conditions.<sup>57</sup> But the Fathers labored to make it clear that they were not touching upon the question of the intrinsic matter or form of the sacrament, as it was highly questionable whether even the Church had jurisdiction to nullify the effect of a sacrament.<sup>58</sup> They were setting up a new extrinsic form: the impediment of clandestinity.<sup>59</sup>

The decree *Tametsi* of the Council of Trent ushered in a new era of Canon Law. It put a formal end to the remnants of the empirical form of marriage that still existed on the Continent.<sup>60</sup> It introduced the externally cognizable juridical form of marriage.<sup>61</sup> In addition to the requirement of mutual consent, *Tametsi* decreed that a marriage be celebrated *in facie Ecclesiae* and before two or three witnesses.<sup>62</sup>

*Tametsi* did not require a celebration before an active priest at all,<sup>63</sup> and was unclear as to whether the mutual consent was to be exchanged in the presence of a priest. Mutual consent was required to be exchanged *in facie Ecclesiae*, literally in front of the facade of the Church where the witnesses generally were gathered.<sup>64</sup> Thereafter, the parties would move into the Church for Mass and Holy Communion and a blessing by the priest—the actual marriage having already taken place outside.<sup>65</sup> The priest could not and did not solemnize the

55. *Id.* at 305.

56. *Id.* at 299.

57. See Brown, *supra* note 24, at 127.

58. See O. KOEGEL, *supra* note 8, at 22.

59. Chatham, *supra* note 27.

60. Stein, *supra* note 5, at 274.

61. Brown, *supra* note 24, at 128.

62. See Chatham, *supra* note 27, at 300.

63. *Id.*

64. Stein, *supra* note 5, at 272.

65. Cahill, *Historical Note on the Canon Law on Solemnized Marriages*, 2 CATH. LAW. 108, 116 (1956) [hereinafter cited as CAHILL].

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marriage, so to speak. Only the couple could do this, due to the sacramental connotations.<sup>66</sup>

The authorities are sharply divided on the interpretation to be given the phrase *in facie Ecclesiae*. Some contend that the words are not to be literally construed, but rather are to be understood to mean in the presence of an ecclesiastical authority, *i.e.*, an authorized priest.<sup>67</sup> Under this interpretation, the mutual consent must be exchanged in the actual presence of a priest and witnesses, thereby eliminating the prospects of a valid "surprise marriage." But even here, the priest did not play an active role, and so long as the consent was exchanged in his presence, his dissent could not affect the validity of the marriage.

The literal interpretation of *in facie Ecclesiae*, *i.e.*, in front of the facade of the Church, is plausible when considered in light of the then prevailing custom of couples actually meeting in front of the Church to exchange consent before witnesses and thereafter moving into the Church, where the priest would be waiting to bless them.<sup>68</sup>

Hence, there were at least two ways in which the decree *Tametsi*, while technically complied with, could be reduced to mockery. In the first instance, the parties would exchange consent *in facie Ecclesiae* before both priest and witnesses, regardless of whether or not the priest approved or actually protested. The marriage was still valid. In the second instance, the couple would exchange consent *in facie Ecclesiae* in front of the facade of the Church and thereafter go inside and inform the priest that they were married. These were the so called "surprise marriages."<sup>69</sup>

### ENGLAND AFTER THE COUNCIL OF TRENT

The decree *Tametsi* was intended to embrace all persons in the Western World, whether or not they were actually members of the Church. The reasoning behind such an essay was that inasmuch as the greater part of the Western World was Catholic, there was good hope that all others might eventually be brought under the fold of one shepherd.<sup>70</sup>

However, such grandiose dreams of empire were not to be realized, as this was the beginning of the Modern Era and the rise of the nation states. It was simply too late in the day to arrest the tide of dissidents then appearing at all levels of society. Luther had spoken, Geneva had received Calvin, Savonarola had been burned at the stake, and the dynastic rivalries and power struggles that threatened the existence of the newly established orders throughout the Continent had all but started. The seeds had been planted for the struggles among the claimants to the Hapsburg, Hohenzollern and Bourbon thrones.

66. See O. KOEGEL, *supra* note 8, at 22-23.

67. See Brown, *supra* note 24, at 128.

68. See note 65 *supra* and accompanying text.

69. See 2 J. SCHOULER, *supra* note 2, § 1194 for an exhausting comment on the endless debate as to what function, if any, the priest actually served under *Tametsi*.

70. Cahill, *supra* note 65, at 117.

This great council, which was intended to secure the union of Christendom under the See of Rome, really contributed to intensifying the separatist forces then at work; and from it onwards one can no longer speak of a general marriage law even for Western Europe. Custom and legislation took thence forward different courses, not only as between Protestant and Roman Catholic nations, but even different Protestant nations, there being no common ecclesiastical authority which Protestant States recognized.<sup>71</sup>

The initial problem with *Tametsi* was that it was not selfexecuting.

The Council, fearful lest the immediate universal application of the law might do more harm than good by multiplying invalid marriages, particularly in Protestant localities, decreed that its provisions should not come into force . . .<sup>72</sup> [until the priests of the local parishes] as soon as possible see to it that this decree be published and explained to the people in all the parish churches of their dioceses, and that this be done very often during the First year and after that as often as they deem it advisable . . . *This decree shall begin to take effect in every parish at the expiration of thirty days, to be reckoned from the day of its first publication in that diocese.*<sup>73</sup>

The upshot of this was that inasmuch as publication was withheld in Protestant areas, *Tametsi* remained inoperative in large tracts of Europe. Hence, in those dioceses wherein publication was not had, the Canon Law remained unchanged and the only juridically required formality was the old inward exchange of mutual consent. In these dioceses clandestine marriages were still valid marriages.

Meanwhile, in Elizabethan England, Pope Pius IV had requested that the decree be introduced, but as the Reformation in England was then in full swing, neither the Crown nor the English ecclesiastics dared publish *Tametsi*.<sup>74</sup> Accordingly, the authorities are in agreement that there never was a publication of *Tametsi* in England.<sup>75</sup> The law governing marriage in England, then, was not affected by the decree *Tametsi* of the Council of Trent.<sup>76</sup> As there was still no civil legislation concerning marriage, and there would be none until Lord Hardwicke's Act in 1753, *infra*, the common law of England, as respects marriages, remained the ecclesiastical Canon Law, unaffected by *Tametsi*. The sole juridical formality remained that of an inward exchange of mutual consent. Clandestine marriages continued to be valid marriages in England. The common law

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71. O. KOEGEL, *supra* note 8, at 28.

72. Barry, *supra* note 6, at 163.

73. Chatham, *supra* note 27, at 301 (emphasis added).

74. O. KOEGEL, *supra* note 8, at 28.

75. Cahill, *supra* note 65, at 114. See also Hodson, *Common Law Marriage*, 7 INT'L & COMP. L. Q. 205, 208 (1958) [hereinafter cited as Hodson]; Stein, *supra* note 5, at 274; J. LONG, *supra* note 29, § 56.

76. See *id.*

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courts did not pronounce on the validity of a marriage *per se*, as this remained the exclusive province of the ecclesiastical courts, but rather limited their jurisdiction to the civil incidents of marriage, as previously enunciated.

But there was a caveat to this. The ecclesiastical authorities generally held that if *Tametsi* had been promulgated in the parish wherein a person had domicile, then although that person thereafter moved to a parish where the decree had not been promulgated, said person nevertheless remained bound by the decree.<sup>77</sup>

Technically speaking, those persons domiciled in dioceses on the Continent wherein *Tametsi* had been promulgated, were still bound thereto notwithstanding their subsequent migration to England, although it is doubtful that any ecclesiastical authority in England was ever aware of such an isolated instance. And, assuming *arguendo* it were so aware, it is even more doubtful that such authority would, in view of the strong inroads made by the Reformation, have invalidated or censured such a marriage. It is speculative whether the children of such "star-crossed" emigrants were also bound by *Tametsi*.

THE MIGRATION FROM ENGLAND  
TO NORTH CAROLINA: 1629-1776

In 1629, King Charles I of England granted his attorney general, Sir Robert Heath, the southern part of the English claim in North America. The claim was first made in 1497 on the basis of John Cabot's voyage. Heath made no attempts at settlement and the first permanent white settlers came to the Carolinas from Virginia about 1660.<sup>78</sup>

In 1663 King Charles II gave a charter for Carolina to eight Englishmen as proprietors of the colony. The grant of land included all of the territory between Virginia and Spanish Florida, and westward to the "south seas."<sup>79</sup> The northern section of this grant, which later became known as North Carolina, was settled by the pioneers from Virginia, the survivors and descendants of the early English settlements in the New World. Virginia was at that time a royal colony ruled directly by the Crown.<sup>80</sup>

The threshold consideration then, is what law respecting marriage formalities, if any, did these early English settlers bring with them to North Carolina? As has already been shown, the common law of England as respects formalities of marriage was at this time the ecclesiastical Canon Law, unaffected by *Tametsi*, and having as its sole juridical requirement the inward exchange of mutual consent. This is the only "law" of marriage the English settlers could have brought with them to North Carolina. *Tametsi*, although published in a few areas in the United States, was published at a much later date, and even then,

77. *Chatham*, *supra* note 27, at 301.

78. 13 WORLD BOOK ENCYCLOPEDIA, *North Carolina* 380 (1960).

79. L. P. TODD & M. CURTI, *RISE OF THE AMERICAN NATION* 41 (1961).

80. *Id.* at 23.

only in a few isolated regions, none of which were in North Carolina or any of the thirteen original colonies for that matter.<sup>81</sup>

Did the English settlers of North Carolina bring over with them the English common law of marriage, the ecclesiastical Canon Law unaffected by *Tametsi*? Later cases and authorities have generally held that English subjects were understood to have taken with them abroad to an English colony so much of the Common Law as was applicable to their present situation.<sup>82</sup> As a representative case, see *Wolfenden v. Wolfenden*<sup>83</sup> wherein two British subjects were held to have taken with them to a British Colony so much of the common law as was applicable to their present situation, which was found to be enough to constitute a valid common law marriage between them.

Inasmuch as the juridical requirements of the English common law were restricted to an inward exchange of mutual consent, there could not have been much difficulty in transporting such a formality to the colony of North Carolina. It is safe to conclude that the English common law, as respects marriage formalities, was brought over in its entirety. As such a juridical requirement was almost impossible to verify empirically, clandestine marriages, whether valid or not, must have flourished in the early proprietary and colonial period.

However, and this is generally seen to be the case with colonies, an indigenous law early attempts to make its appearance on the scene, in the process thereby striving to modify the common law of the founding settlers. The evidence indicates that several of the early American proprietary and colonial legislatures made every effort to ensure that certain outwardly cognizable formalities would be complied with, and North Carolina was no exception.<sup>84</sup>

With the aid of John Locke, a young English philosopher, the proprietors, the eight English noblemen, drew up a Constitution for North Carolina. This Constitution, dated 1669, provided that "No marriage shall be lawful, whatever contract and ceremony they have used till both the parties mutually own it, before the register of the place where they were married."<sup>85</sup> This Constitution was unrealistic in several respects and was doomed from its inception. As far as the marriage provisions were concerned, since there were few, if any, registers to go to at that time, the constitutional formality was almost completely ignored.<sup>86</sup> And furthermore, a close reading of the Constitution reveals that the common law formality of solemnization was not altered at all. All that was now required was an *ex post facto* registration. The English common law's sole requirement of an inward exchange of mutual consent was not affected by this Constitution.

81. Cahill, *supra* note 65, at 114. Publication was made in the Ecclesiastical Province of Sante Fe, excluding the northern part of the territory of Colorado; in the entire Province of New Orleans; in the Province of San Francisco and, with some exceptions, in the territory of Utah; in the Diocese of Vincennes, Indiana; in the City of St. Louis and in a few towns within that diocese; in several towns in the present Diocese of Belleville, Illinois. In the rest of the country, it was never published.

82. Hodson, *supra* note 75, at 210.

83. [1945] 2 All E.R. 539; [1946] P. 61; 115 L.J.P. 1; 173 L.T. 301; 62 T.L.R. 10.

84. Stein, *supra* note 5, at 276.

85. XXV THE STATE RECORDS OF NORTH CAROLINA, 132-33.

86. Semonche, *Common Law Marriage in North Carolina*, 9 AM. J. LEGAL HIST. 320, 324 (1965).

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Same did not purport to constitute a marriage but merely to give effect to an already existing marriage, however entered. The common law of marriage, the English ecclesiastical Canon Law, was then, in 1669, the same in England as in North Carolina.

With the failure of Locke's Constitution, the Carolinas divided into North and South, the North also being known as the Albemarle Sound Colony. This was in late 1669 and early 1670.<sup>87</sup>

An early act of the Albemarle Assembly, 1669, provided that an exchange of vows before the Governor or a Councilman and three or four witnesses, and a deposit of a certificate in the Secretary's Office constituted a valid marriage.<sup>88</sup> Again, this did not alter the English common law of the pioneer settlers, for at least four reasons. First, with the growth of the colony, access to the Governor or to a Councilman became impossible and the statute was largely ignored. Second, Quaker colonists who married according to their own religious rites which differed from the statute, were not excepted by the statute, and yet such marriages were permitted by the Assembly, thereby rendering the statute merely directory. Third, the statute only provided another scheme for getting married. It did not repeal the English common law.<sup>89</sup> And lastly, the statute in no sense purported to be exclusive.

Of course this is not to say that fornication and adultery flourished in North Carolina. Despite the continuing viability and exclusivity of the English common law of marriage, prosecutions could be and were instituted when scandalous conduct was viewed as a threat to the colony's welfare.<sup>90</sup> The minutes of the early colonial courts indicate that prosecutions were usually confined to those cases wherein a woman had had a child out of wedlock or in which the parties were living together in adultery.<sup>91</sup>

The act of 1715, "An Act For Establishing The Church & Appointing Select Vestrys,"<sup>92</sup> is also regarded as not having repealed the English common law of marriage. That act required a marriage to be performed, after the procurement of a valid license and triple publication of banns, by a minister of the Church of England, or a Justice of the Peace if there was no such minister available. In addition, a penalty of five pounds was to be assessed for violations of the act. Yet even these strong words were not considered to have affected the vitality of the common law, for several reasons. First, the act was left to the Church of England to enforce, and as this body was at that time almost totally nonexistent in North Carolina, there was no enforcement and the statute was ignored. Second, the statute also contained a provision which flew in the face of the new "requirements," to wit, a provision which allowed couples 12 months to establish that they were married without questioning how such a marriage was entered. Third,

87. *Id.* at 325.

88. *Id.*

89. *Id.* at 326-27.

90. *Id.* See also N.C. General Court Minutes, 1695-1703, February 25, 1695, folio 25; N.C. General Court Minutes, 1695-1712, March 28, 1701, folios 134-135.

91. *Id.*

92. XXIII RECORDS OF NORTH CAROLINA, 6-10.



nothing in the statute professed it to be exclusive, and fourth, there was no invalidating clause for the common law.<sup>93</sup> In addition, the legislature in 1715 affirmed, "That the laws of England are the laws of this Government, so far as they are compatible with our Way of Living and Trade . . . The common Law is, and shall be, in Force in this Government,"<sup>94</sup> And, Col. William Byrd, in his 1728 expedition surveying the boundary line between Virginia and North Carolina, remarked, upon observing that although there were requests for his Chaplain to baptize infants, there were no requests for his Chaplain to perform marriages: "Marriage is reckon'd a lay contract in Carolina."<sup>95</sup>

The acts of the colonial legislature thus were merely directory and did not invalidate the common law of England which, identical to the ecclesiastical Canon Law of England, had at that time the sole juridical requirement, empirically unenforceable, of a mere inward exchange of mutual consent. That the intent of the legislatures was actually being frustrated is, at first glance, hardly questionable. But, upon a consideration of the difficulties of enforcement, the hardships of frontier living, the inaccessibility of the colonists to their Governor and Councilmen, inadequate communications and transportation facilities, the scarcity of justices of the peace and clergy of any denomination, the preponderance of destitute and ignorant settlers, and in the light of the foregoing factors the hardships which enforcement of the statute would have entailed (*e.g.*, bastardy, annulment, etc.), it becomes extremely difficult to suppose that the lawmakers ever intended by their acts to repeal the common law of England.

In any event, in 1729, shortly after North Carolina had ceased to be a proprietorship and had become a royal colony, the Board of Trade declared the Act of 1669 and the act of 1715 to be obsolete.<sup>96</sup> From 1729 to 1741 then, there existed no legislative pronouncements on marriage and the common law continued in full force.

The Act of 1741,<sup>97</sup> while expressly stating as its purpose the prevention of clandestine and unlawful marriages, and containing provisions for licensure, banns, solemnization by a minister of the Gospel or a justice of the peace and penalties for noncompliance therewith, was also considered to be merely directory, as it did not purport to be exclusive, it failed to invalidate the common law and was rarely, if at all, enforced.<sup>98</sup> In addition, various religious sects, most notably the Quakers and Presbyterians, considered their religious rites for marriage immune from any legislative interference. Accordingly, the Act of 1741 was amended in 1766<sup>99</sup> and again in 1778,<sup>100</sup> expressly securing the already claimed exclusive right of religious sects to their own marriage formalities.

93. See Semonche, *supra* note 86, at 330-31.

94. XXIII RECORDS OF NORTH CAROLINA, 39.

95. W. BYRD, *History of the Dividing Line*, in THE WRITINGS OF COLONEL WILLIAM BYRD 63, 60 (J.S. Bassett ed. 1901).

96. III RECORDS OF NORTH CAROLINA, 175-176.

97. XXIII RECORDS OF NORTH CAROLINA, 158.

98. See Semonche, *supra* note 86, at 334-36.

99. XXIII RECORDS OF NORTH CAROLINA 672-673.

100. XXIV RECORDS OF NORTH CAROLINA, 997.

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Hence, the common law of England, the English ecclesiastical Canon Law, remained intact throughout the entire proprietary and colonial period of North Carolina. Although the common law was repealed in England by Lord Hardwicke's Act in 1753, *infra*, that act was on its face expressly made applicable to England and Wales only<sup>101</sup> and, as held by the courts and authorities, not to the colonies.<sup>102</sup>

It should also be noted that there is no indication of a bifurcation of civil and ecclesiastical marriage jurisdiction in North Carolina, or in any of the colonies for that matter. In those colonies which recognized a common law marriage, of which North Carolina was one, the civil incidents of marriage were not separated from the validity of the marriage as had been the case in England.<sup>103</sup>

DEVELOPMENTS IN ENGLAND: 1563-1836

Meanwhile, in England the law of marriage continued to be the common law, the ecclesiastical Canon Law as it existed unblemished by *Tametsi*, and remained such until the passage of Lord Hardwicke's Act in 1753.<sup>104</sup> Up until that date the marriage law of England was administered exclusively by the ecclesiastical courts. These courts, applying the Canon Law of England, recognized contracts of marriage *per verba de praesenti* and *per verba de futuro cum copula*. This consensual basis had been the accepted Canon Law of England since the twelfth century, when it was propounded by Peter Lombard.<sup>105</sup>

Of course, the civil authorities had early on become quite unhappy with the decisions of the ecclesiastical courts and their assumption of jurisdiction over the civil incidents of marriage.<sup>106</sup> The civil authorities were not content with the ever increasing incidence of clandestine marriages. Under the Canon Law it was simply too easy to get married and almost impossible to prove the invalidity of any given marriage. And in any event, the existing scheme precipitated an incidence of lewd behavior far in excess of that desired for a pretentious society so eager to commence its Victorian Age.

Accordingly, it was a desire to regularize cohabitation, to save the children of such unions from the stigma of bastardy, to save the parents from the sin of fornication and to make good the expectations of the parties at the time of their consent—in short, a desire to destroy informal, consensual marriages—which marked the end of the common law, the English ecclesiastical Canon Law, regulation of marriage. These were essentially the identical reasons underlying the decree *Tametsi*,<sup>107</sup> although as will be seen *infra*, the juridical force of Lord Hardwicke's Act far surpassed that of *Tametsi*.

101. Lord Hardwicke's Act, 1753, 26 Geo. 2, c. 33 (1753) See also O. KOEGEL, *supra* note 8, at 29; Andrews, *supra* note 21.

102. O. KOEGEL, *supra* note 8, at 58.

103. See J. LONG, *supra* note 29, § 57.

104. Lord Hardwicke's Act, 1753, 26 Geo. 2, c. 33 (1753).

105. See Hodson, *supra* note 75, at 206.

106. See note 46 *supra* and accompanying text.

107. Andrews, *supra* note 21.

Hence, the reform of English marriage law must date from the celebrated Lord Hardwicke's Act of 1753. In addition to the above underlying considerations of the Act, the Parliament especially intended to prohibit the so called "Fleet Marriages" which had become a national disgrace to England. The following excerpt perhaps best describes a most amusing scandal:

The Fleet Prison [London] was used for persons committed by Chancery, Exchequer, Common Bench and the Ecclesiastical courts, and was preeminently a debtor's prison. Within its precincts (the "Liberty of the Fleet," which embraced a considerable area of lodgings outside the prison proper) were housed innumerable disreputable parsons immunized from the jurisdiction of the bishop. These inmates improved their purses by solemnizing marriages without banns or licenses. One worthy is said to have performed on an average of 6000 "services" a year. A contemporary states: "In walking along the street in my youth on the side next to the prison, I have often been tempted by the question, *Sir, will you be pleased to walk in and be married?* Along this most lawless space was hung up the frequent sign of a male and a female hand cojoined, with, *Marriage performed within*, written beneath. A dirty fellow invited you in. The parson was seen walking before his shop: a squalid profligate figure, clad in a tattered plaid nightgown, with a fiery face and ready to couple you for a dram of gin or a roll of tobacco." (*cf.* 2 Yorke, *Life of Hardwick* [1913] 58 et seq).<sup>108</sup>

Effectively repealing the common law, Lord Hardwicke's Act provided an exclusive civil form for valid marriages in England, to the express exclusion of the Royal Family, Quakers and Jews.<sup>109</sup> For a marriage to be valid, it was now necessary that there be a celebration in the church or public chapel of the parish wherein the parties dwelt, unless elsewhere by special license, in the presence of at least two witnesses and after the publication of banns for three consecutive Sundays prior, unless specially dispensed therefrom. In addition there was a licensure requirement. Penalties for violations included "transportation to some of his Majesty's Plantations in America for the space of fourteen years, according to the laws in force for transportation of felons."<sup>110</sup>

The Act, immediately criticized as unduly harsh, was strictly enforced. An inadequate number of witnesses or mere undue publication of banns, *i.e.*, banns with technical defects, was enough to invalidate the marriage.<sup>111</sup> In addition, the cases construing the Act consistently held that the "church or public chapel" in the Act was the Established Church of England, the Anglican Church, and not a

108. M. G. PAULSEN, W. WADLINGTON & J. GOEBEL, JR., *CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS* 78-79 (2d ed. 1974).

109. Lord Hardwicke's Act, 1753, 26 Geo. 2, c. 33 (1753).

110. *Id.*

111. O. KOEGEL, *supra* note 8, at 34-36. Although some decisions early held that while the statute was mandatory and not directory, "substantial compliance" therewith was all that was warranted by the Act and technical deficiencies would not invalidate an otherwise valid marriage. This was especially true in decisions construing the statutory requirements for publication of banns. *See also* notes 148-153 *infra* and accompanying text. *Accord*, *Standen v. Standen*, 170 Eng. Rep. 73 (N.P. 1791).

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church or public chapel of another denomination.<sup>112</sup> That latter injustice was not remedied until the Marriage Act of 1836,<sup>113</sup> *infra*, which permitted temporal marriage by a registrar. The Act of 1836 in turn was revised by the Marriage Act of 1949, *infra*.

The easing of restrictions by the Marriage Act of 1836 may be understood to have been a Parliamentary impetus to the courts to invoke equity and common sense in construing the marriage statutes. Accordingly, mere technical deficiencies came to be waived by the courts. In *Gompertz v. Kensit*<sup>114</sup> the use of incorrect surnames and incorrect Christian names in the banns was held not to have rendered the banns "undue" where there was a stated purpose of brevity and no evidence of fraud. Likewise, in *Dancer v. Dancer*<sup>115</sup> the incorrect listing of the bride's name in the banns was held not to have rendered the banns "undue" in view of the fact that there was no evidence of fraud and that a preponderance of the witnesses had showed that the bride was not known by her true name at all, but rather by another name. The leading case is *Piers v. Piers*<sup>116</sup> wherein a marriage celebrated in a private home was held valid, notwithstanding that there was no evidence that a valid special license had ever been obtained. Lord Campbell brushed aside the statutory requirements by reasoning that to hold otherwise "you may be deciding that a woman is a concubine, and that the children are bastards, upon a mere speculation, when in fact, contrary evidence may afterwards be produced, when it is too late, to show that there was that in existence which would render the marriage valid."<sup>116A</sup>

Two further considerations of Lord Hardwick's Act deserve mention. In the first place, a close reading of the Act indicates that a celebration in the presence of a clergyman was not expressly mandated, but rather presumed. In view of the requirements for licensure and banns, the issue is most probably academic. Secondly, in concession to the violent opposition in the Parliament, the Act was made applicable to England and Wales only. Thus began the famous "runaway marriages" to Gretna Green, a small town just within the borders of Scotland. There, the common law, the English ecclesiastical Canon Law, was still in force and Lord Hardwicke's Act was easily avoided.<sup>117</sup>

The year 1753 then, officially marks the end of the exclusive jurisdiction of the common law, the English ecclesiastical Canon Law, over marriage in England. Henceforth, the formal validity of a marriage would be regulated by the Parliament, and not the ecclesiastical authorities. Marriage was thereafter considered to be a civil matter.

112. O. KOEGEL, *supra* note 8, at 35.

113. Marriage Act of 1836, 6 & 7 Will. 4, c. 85 (1836).

114. [1872] L.R. 13 Eq. 369; 41 L.J. Ch. 382; 26 L.T. 95; 36 J.P. 548; 20 W.R. 313.

115. [1948] 2 All E.R. 731.

116. 9 Eng. Rep. 1118 (H.L. 1849).

116A. 9 Eng. Rep. at.

117. Anton and Francescakis, *Modern Scots "Runaway Marriages,"* 3 JURID. REV. 253 (1958). See also *Dalrymple v. Dalrymple* 161 Eng. Rep. 665 (Ecc. Adm. P & D. 1811) in which the common law was held to be valid in Scotland and unaffected by Lord Hardwicke's Act.

Before returning to North Carolina, a few words are in order concerning *Regina v. Millis*.<sup>118</sup> Therein, in deciding the validity of an Irish marriage, to which the common law, the English ecclesiastical Canon Law, still governed and not Lord Hardwicke's Act, their Lordships, equally divided, held that the common law of England required that a marriage be celebrated in the presence of a clergyman of the established church. That this decision was an inaccurate assessment of the common law is manifested in the severe criticisms of the authorities<sup>119</sup> and frequent disapproval of other courts.<sup>120</sup> Today, *Regina v. Millis* is not considered an authority on the common law of marriage. While the debate continues as to what constrained their Lordships to hold as they did, the following excerpt is perhaps one of the better analyses:

The opinion that the presence of a priest was required by the common law of marriage was based on a law of the reign of King Edmund made in 940 to the effect that at the nuptials there shall be a mass priest who shall by God's blessing bind their union to all posterity. This was followed by a number of constitutions of bishops and archbishops to the same effect including one of Archbishop Lan Franc in 1070. These constitutions did *not* enact law and since Church and State were separated by William I, the general canon law of Europe was recognized as prevailing in England.<sup>121</sup>

### DEVELOPMENTS IN NORTH CAROLINA: 1776-1976

The common law of England continued to be the marriage law of North Carolina long after American independence was declared and North Carolina's subsequent entry into the Union. This is indicated by early reported decisions. *Whitehead v. Clinch*<sup>122</sup> is generally understood to be the first decision tolerating a common law marriage in North Carolina. In that case, which involved a widow's petition for dower, the court, while holding that, "The rules of the common law are never to be departed from but where the legislature have expressly directed it, or where it necessarily follows from what they have directed," chose to leave to the jury the question of whether or not there was a valid marriage.

That case was followed by *Felts v. Foster*,<sup>123</sup> which involved title to a tract of land in a will. Therein, the court again paved the way for recognition of a

118. 8 Eng. Rep. 844 (H.L. 1843).

119. J. LONG, *supra* note 29, § 56; O. KOEGEL, *supra* note 8, at 39; Semonche, *supra* note 86, at 321; Andrews, *supra* note 21, at 400.

120. Dalrymple v. Dalrymple 161 Eng. Rep. 665 (Ecc. Adm. P. & D. 1811) See also Beamish v. Beamish 11 Eng. Rep. 735 (H.L. 1861) which, while condemning *Regina v. Millis*, nevertheless felt constrained to and did affirm *Regina v. Millis*. The effect of *Regina v. Millis* in American courts was largely one of confusion, with the cases going both ways. As representative examples, see Estate of Baldwin, 162 Cal. 471 (1912), holding that a ceremony was a prerequisite to a valid common law marriage, and Hulett v. Cary, 66 Minn. 327 (1896), noting that *Regina v. Millis* was incorrectly decided. There are no reported North Carolina decisions in point.

121. Hodson, *supra* note 75, at 209. See also notes 30, 31 and 39 and accompanying text.

122. 3 N.C. (2 Hayw.) 3 (Super. Ct. 1797).

123. 1 N.C. (Tay.) 164 (Super. Ct. 1799).

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common law marriage by sending the issue to the jury, instructing them that they had the power to find that a common law marriage existed and was valid from the evidence of cohabitation as husband and wife, and the subsequent birth of children.

Likewise in *Weaver v. Cryer & Moore*,<sup>124</sup> involving trover for cattle, the court instructed the jury that it must find a common law marriage from proof of cohabitation as husband and wife, "I apprehend that the law was correctly stated; that general reputation and cohabitation are evidence of a marriage." And *State v. Robbins*,<sup>125</sup> while holding that a marriage without a license was illegal, also held that such a marriage was not necessarily invalid.

The statutory scheme for marriage, although slightly altered in 1820 and 1838,<sup>126</sup> remained essentially that of the 1778 legislation,<sup>127</sup> *i.e.*, merely directory. It was not until the Marriage Act of 1872,<sup>128</sup> *infra*, that the common law was effectively repealed and replaced by an exclusive statutory scheme, as the construing cases were to so hold, *infra*.

However, prior to 1872, there were a few isolated cases which held the 1778 legislation to be exclusive. As a representative example, *see State v. Samuel*,<sup>129</sup> wherein it was held that there could be no common law marriage and that the statutory scheme was the exclusive form for effectuating a valid marriage. The reasoning of the court in this case is particularly interesting in that it does not focus on the institution of marriage or on the traditional reasons for repealing clandestine marriages (such as those underlying *Tametsi* and Lord Hardwicke's Act<sup>130</sup>), but instead concerns itself solely with the institution of slavery. Briefly, in *State v. Samuel* a slave was charged with murder. The key witness was a woman with whom he had cohabited for ten years. In his defense, the slave contended that the woman was his common law wife and therefore could not be called to testify. In rejecting the defense of a common law marriage, the court stated that the recognition of a common law marriage would undermine the stability of the institution of slavery upon which the economy of the South rested and that, moreover, a slave was considered "married" only for the duration of his master's sufferance.

Such isolated cases have not been considered persuasive authority as both the facts and holdings more often than not have rested upon considerations of property rights, such as slavery, and/or the proof of an existing marriage, hence falling short of a consideration of exactly what was required to constitute a marriage *ab initio*. The cases which dealt with proof of marriage generally focused upon *ex post facto* evidentiary matters such as cohabitation, holding out as husband and wife, birth of children, and duration of relationship. They consistently failed to consider the nature of the marriage act itself.

124. 12 N.C. (1 Dev.) 337 (Super. Ct. 1827).

125. 28 N.C. (6 Ired.) 23 (Sup. Ct. 1845).

126. Semonche, *supra* note 86, at 341.

127. *See* note 100 *supra*.

128. N.C. GEN. STAT. §§ 51-1, 51-6.

129. 19 N.C. (1 Dev. & Bat.) 177 (Sup. Ct. 1836).

130. *See* note 107 *supra*.

The Marriage Act of 1872,<sup>131</sup> while on its face failing to repeal the common law and also failing to assert its exclusivity, has been construed by the courts, nevertheless, to have such effect, and hence represents a turning point in the marriage law of North Carolina. The leading case is *State v. Wilson*,<sup>132</sup> in which the court held the statutory provisions for an exchange of consent in the presence of a minister (of any denomination) or a justice of the peace, a declaration by the minister or justice of the peace to the effect that the parties were husband and wife, and a procurement of a license prior to the ceremony to be mandatory and not directory.<sup>133</sup> The court said: "Consent is essential to marriage, but it is not the only essential. . . . In this state it must be acknowledged in the manner and before some person prescribed by the section of the Code. . . . *There is no such thing as marriage simply by consent in this State.*"<sup>133A</sup>

The present day statutory provisions for solemnization are the same as those which appeared in the 1872 legislation. Briefly, the following is required:

1. procurance of a valid license
2. consent of the parties in the presence of each other and in the presence of an ordained minister of any faith or a justice of the peace
3. a declaration by the minister or justice of the peace to the effect that the parties are now husband and wife

In addition, the statute expressly exempts marriages performed pursuant to the rites of Quakers and Baha'. Notice how this differs from the common law. Whereas prior to the statute, the common law, the English ecclesiastical Canon Law, required merely an inward exchange of mutual consent, now that consent must be outward and made in the presence of a designated official. Furthermore, the designated official is required to take an active and affirmative role in the ceremony, hence leaving no leeway for "surprise marriages" or "dissenting marriages" as was possible under *Tametsi*.<sup>134</sup>

With respect to licensure, the 1872 legislation merely prescribed that no ceremony was to be performed prior to the officiating person's receipt of a license. However, this requirement was merely directory as the courts early held. Failure to procure a license to marry would not in itself invalidate an otherwise valid marriage.<sup>135</sup>

In addition, section 51-7 of the original statute merely imposed, as a penalty for violations of the licensure requirement, a fine on the minister or officer.

The licensure provisions are essentially the same today as in 1872, although a 1967 amendment imposed, for the first time, the additional requirement of two witnesses to the marriage ceremony.<sup>136</sup> Whether this provision is mandatory or directory remains to be seen.

131. N.C. GEN. STAT. §§ 51-1, 51-6.

132. 121 N.C. 650, 28 S.E. 416 (1897).

133. *Accord*, *State v. Melton*, 120 N.C. 591, 26 S.E. 933 (1897); *State v. Parker*, 106 N.C. 711, 11 S.E. 517 (1890).

133A. 121 N.C. at 655, 28 S.E. at 420 (emphasis added).

134. *See note 69 supra*.

135. *Woolley v. Bruton*, 184 N.C. 438, 114 S.E. 628 (1922); *Maggett v. Roberts*, 112 N.C. 71, 16 S.E. 919 (1893); *State v. Parker*, 106 N.C. 711, 11 S.E. 517 (1890).

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DEVELOPMENTS IN ENGLAND: 1836-1976

In the meantime, the marriage law of England remained essentially that of the Marriage Act of 1836<sup>137</sup> until it was overhauled and revised by the Marriage Act of 1949,<sup>138</sup> which, with minor revisions, has continued to be the law today. Briefly, the present Act prescribes two general avenues for effectuating a valid marriage in England. The first avenue is a marriage pursuant to the rites of the Church of England.<sup>139</sup> There are four ways for a couple to be married in that fashion:

1. after due publication of banns
2. by special licensure of the Archbishop of Canterbury
3. by common license granted by an ecclesiastical authority
4. by license issued by a superintendent registrar<sup>140</sup>

Sections 5 thru 25 of the Act expressly detail what is required in each of the four subdivisions above (*e.g.*, place, time and manner of publication of banns, licensing provisions, etc.). In addition, all marriages solemnized according to the rites of the Church of England must be so solemnized in the presence of two or more witnesses.<sup>141</sup>

The second avenue for effectuating a valid marriage is a marriage performed pursuant to the superintendent registrar's certificate.<sup>142</sup> There exist five ways to be married under this scheme:

1. in a registered building according to the form and ceremony as the parties so wish (*e.g.*; a Roman Catholic service)
2. in the office of the superintendent registrar
3. pursuant to Quaker rites
4. pursuant to Jewish rites
5. according to the rites of the Church of England.<sup>143</sup>

Sections 26 thru 46 extensively detail the requirements for a marriage via the superintendent registrar's certificate, with or without a license (*e.g.*, provisions for notice, licensure, registry of buildings and persons authorized to solemnize). Subdivisions 1 and 2 above expressly require two witnesses, words of present intent, consent of the officiating authority and the presence of the officiating authority.<sup>144</sup>

Hence in England, as in North Carolina, from the passing of Lord Hardwicke's Act in 1753, the form of the solemnization has been an outward expression of consent by the couple in the presence of a designated official. And, in England too, such designated official plays an affirmative role in the marriage

136. N.C. GEN STAT. § 51-6.

137. Marriage Act of 1836, 6 & 7 Will. 4, c. 85 (1836).

138. Marriage Act of 1949, 12, 13 & 14 Geo. 6, c 76 (1949).

139. *Id.* §§ 5-25.

140. *Id.* § 5.

141. *Id.* § 22.

142. *Id.* §§ 26-46.

143. *Id.* § 26.

144. *Id.* §§ 44-45.



ceremony. Sections 8, 16 and 29, among others, of the Marriage Act of 1949 expressly vest discretion in the designated official to refuse to perform the marriage ceremony if requisite formalities have not been met. The couple cannot "marry themselves" so to speak, as was possible at common law and, on the Continent, in the "surprise marriages" and "dissenting marriages" of *Tametsi*. And with respect to licensure, English courts, like the North Carolina courts, have consistently held statutory licensure provisions to be merely directory and not mandatory.

Generally speaking, English courts have long been constrained to a strong presumption in favor of the validity of a marriage. For example, buildings wherein a marriage is performed are presumed to be properly licensed, and an English court and jury will so presume in the absence of evidence to the contrary.<sup>145</sup> As a general rule, per *Spivack v. Spivack*:<sup>146</sup> "In civil cases, where there is evidence of the fact of a ceremony of marriage, followed by cohabitation of the parties, everything necessary for the validity of the marriage will be presumed in the absence of decisive evidence to the contrary, even though it may be necessary to presume the grant of a special license, etc. The burden of impeaching a marriage lies on the impeaching party."

Equity is consistently invoked in interpreting the statutory requirements in those fact situations wherein application of the letter of the law would otherwise defeat the spirit. This is particularly so in many of the so called "banns cases" wherein there is an allegation of "undue publication" of banns, contrary to the statute. These cases often involve a "change of heart" whereby one spouse seizes upon a technical defect in the banns, a defect of which the other spouse is ordinarily unaware and often of which the impeaching spouse was unaware at the time of the marriage.

The cases have long held that no particular form of words in the banns need be employed and that the words set forth in the statute are merely directory. They need not be copied in verbatim.<sup>147</sup>

Inasmuch as the object of the publication of banns is to notify the world generally,<sup>148</sup> to awaken the vigilance of parents, guardians and other concerned citizenry,<sup>149</sup> a marriage solemnized after publication of banns, allegedly "undue" due to the omission of a few Christian names for the sake of brevity, is not a null and void marriage unless there is evidence that both parties "knowingly and willingly" concurred in such "undue" publication.<sup>150</sup>

Similar results have obtained where the allegation is that a party is known to others not by his Christian name but by another, the latter being the one inserted in the banns and not the former.<sup>151</sup>

145. See, e.g., *R. v. Cresswell* (1876), 1 Q.B. 446 and *Sichel v. Lambert*, 143 Eng. Rep. 992 (C.P. 1864).

146. *Spivack v. Spivack*, [1930] All E.R. Rep. 133.

147. See, e.g., *Standen v. Standen* 170 Eng. Rep. 73 (N.P. 1791).

148. See, e.g., *Frankland v. Nicholson* 105 Eng. Rep. 607 (K.B. 1805).

149. See, e.g., *Wakefield v. MacKay*, 161 Eng. Rep. 593 (1807).

150. *Gompertz v. Kensit*, L.R. 13 Eq. 369 (1872).

151. See, e.g., *Wyatt v. Henry* 161 Eng. Rep. 720 (1817).

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In all of these cases it cannot be said that the object of the publication was frustrated, as all concerned persons knew exactly the persons named in the banns. Indeed, per *Wright v. Elwood*,<sup>152</sup>

[I]n all cases of this description, it is the duty of the court to be extremely cautious in pronouncing a marriage, solemnized between two parties, null and void, and to examine the whole of the evidence produced in proof of the nullity with great vigilance and jealousy, because, in these cases, opportunities are offered to parties to practice fraud and collusion; and this is the more necessary where the party, whose interests are apparently affected, and whose object it is to uphold the marriage endeavoured to be set aside, seems to have afforded every facility to the other party. Where the party before the Court, whose interests are affected, abandons his cause, the Court would be inclined to withhold its interposition for the protection of such a party; but where, . . . the interests of third parties and the public are concerned, it is a duty incumbent on the Court to be upon its guard against surprise.

In cases concerning licensure, both in England and North Carolina, the validity of same has been held not to depend on the merits of the descriptions contained therein. Such a license is still a valid one and does not, in and of itself, affect the status of the marriage.<sup>153</sup> While not void by mere description, a license obtained for one person with the intention that it be used for another is most likely a void license and ditto for the marriage.<sup>154</sup>

Equity is also to be found on the other side of the altar. Taking a practical view of the matter, the court in *Hawke v. Corri*<sup>155</sup> observed that:

It seems to be a generally accredited opinion that, if a marriage is had by the ministrations of a person in the Church who is ostensibly in holy orders, and is not known or suspected by the parties to be otherwise, such marriage shall be supported. Parties who come to be married are not expected to ask for a sight of the minister's letters of orders, and if they saw them could not be expected to inquire into their authenticity.

### CONCLUSION

This then, is a general outline of the evolution of the contemporary statutory scheme for licensure and solemnization of marriage in England and North Carolina. Whether such pronouncements effectively deal with their purported objectives<sup>156</sup> has been and will continue to be a subject of endless dispute. Negatively viewed, a licensing procedure can hardly be an entirely effective enforcement

152. 163 E.R. 231, 233 (1837); *previous proceedings* 163 Eng. Rep. 17 (1835); 162 Eng. Rep. 969 (1829).

153. *Wooley v. Bruton*, 184 N.C. 438, 114 S.E. 628 (1922); *Maggett v. Roberts*, 112 N.C. 71, 16 S.E. 919 (1893); *Clowes v. Jones*, 163 Eng. Rep. 697 (1842).

154. See, e.g., *Lane v. Goodwin*, 114 Eng. Rep. 935 (Q.B. 1843).

155. 161 Eng. Rep. 743, 746 (1820).

156. See notes 56 and 107 *supra* and accompanying text.

device. A licensing official cannot be expected to verify at the time of application the parties' compliance with some of the very complex legislative requirements. For example, an applicant may believe a prior divorce to be valid, and the clerk is in no position to disbelieve.<sup>157</sup> In addition, the decisions of subsequent suits in equity for bigamy, adultery, bastardy and intestate succession leave no room to suppose otherwise than that marriage is more often than not recognized as a natural right which existed before the statutes, that it is favored by the law, and is to be protected rather than discouraged.<sup>158</sup>

Of course the other side of the argument, *i.e.*, the affirmative view of licensure requirements, is that taken by, among others, the Royal Commission on Marriage and Divorce, noting the ease with which a marriage can be entered as a factor going "far to explain why so many marriages are predisposed to break down under the first sign of serious strain."<sup>159</sup> Indeed, many of the witnesses before the Commission urged amendment of the marriage laws so as to discourage hasty and ill-considered marriages.

Considered in *pari materia*, solemnization prescriptions evince analogous disputes. While the cases have continually construed the pertinent statutory language to be merely directory, even where held to be mandatory, the courts have found "substantial compliance" therewith in order to protect the innocent spouse from the stigma of bigamy or adultery, to legitimize the issue of questionable unions and to preserve an equitable devolution of property. Other cases have invoked the statutes to justly dispose of sham unions which so offended the mores of the community to be at an impermissible degree of variance with the accepted social order.

Inasmuch as such controversies precipitate no prospects for resolution and there seemingly always will exist exceptions to every rule, it must necessarily be admitted that both sides present merits which do not escape judicial/legislative scrutiny and which partake of judicial/legislative approval. In short, both the pros and cons for statutory formalities of licensure and solemnization evince a societal interest which is distinctively pro marriage—hence the presumptions in favor of the validity of a given marriage. The burden of impeachment rests upon the impeaching party.<sup>160</sup>

The unpopularity of the common law marriage may be said to have arisen from the fact that we are living in an increasingly status conscious society. Compulsory elements in marriage are on the rise. The influence of institutional marriage is heavily noticeable. The label of common law marriage does not fit well in these newer social patterns. The rugged individualism of the American colonial days, which favored the preservation of the common law marriage in North Carolina, is gone. Likewise in England, the decline of the landed aristocracy, the rise of an Empire and the gradual recession to Commonwealth status

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157. C. FOOTE, R. LEVY & F. SANDER, *supra* note 43, at 171.

158. J. LONG, *supra* note 29, at 101.

159. ROYAL COMMISSION ON MARRIAGE AND DIVORCE, REP. 1951-1955, CMD. No. 9678, 330 (1956) quoted in C. FOOTE, R. LEVY & F. SANDER, *supra* note 43, at 236.

160. See note 146 *supra* and accompanying text.

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of a second rate power lend credence to a craving for greater certainty in the law.<sup>161</sup> The stature of the family has diminished in the highly organized industrial societies of England and North Carolina.<sup>162</sup> The lord of the manor and the master of the plantation have both given in to *parens patriae*, leaving a void which could only be filled by society via the machinery of its legislature and courts. This is strikingly analogous to the disruption of Christian unity in the 1500's which the Fathers of the Council of Trent, the sole unifying force in the Western World, likewise sought to ameliorate via the pronouncement of Canons and the decrees of the ecclesiastical courts.

The trend away from the common law marriage may be briefly categorized as follows. First, a common law marriage is recognized. This is evinced in the early North Carolina cases and in the English cases prior to 1753. Second, although a common law marriage is valid, some public recognition is desirable. This has been seen in North Carolina in the acts of the proprietary and colonial legislatures, which were held to be merely directory. And in England, this is seen in the early bifurcation of the courts and the censures of the authorities. Third, a genuine controversy exists. This is reflected in the isolated North Carolina cases such as *State v. Samuel, supra*, which held the statute to be exclusive, and in England, in the opinion of the ill-advised Lords in *Regina v. Millis, supra*. The fourth and last stage is the progressive breakdown of the common law marriage, culminating in North Carolina in the Marriage Act of 1872 and *State v. Wilson, supra*, and in England, in Lord Hardwicke's Act of 1753.

A common law marriage is found to exist in those societies wherein legal and social orders are yet to be established or are newly established but have yet to assert themselves. This was the case in colonial North Carolina and medieval England. The transition to a statutory scheme accompanied the gradual demise of the family stature as the society changed. In North Carolina the frontiers vanished westward from the coast, and in England, northward from Canterbury. The industrial revolution came, and women were emancipated. The growth in population and technology fostered the beginnings of a transfer of wealth and power to the proletariat, and a middle class thereby emerged. As centralization was critical to the stability of the legal and social orders of a civilized society, the incidents of common law life one by one were assumed by the legislature and Parliament, marriage being no exception. The voice of the family was hushed, as a preponderance of discordant views could only serve but to wreak havoc upon the grandiose dreams of Manifest Destiny and Empire. Accordingly, citizens and subjects appeared on the scene, the plurality directing the everyday developments of the particular and leaving the latter no choice but to bequeath to future generations a subconscious anxiety for a compulsive ritual, which has today become firmly embedded in the heritage of North Carolina and England.

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161. Weyrauch, *Informal and Formal Marriage—An Appraisal of Trends in Family Organization*, 28 U. CHI. L. REV. 88, 98 (1960).

162. See Semonche, *supra* note 86, at 323.

Hence, today it is a truism recognized by the public and supposedly well ingrained in the law that while marriage is a contract between two persons, it is something more. It is also a status, vitally affecting the public welfare, and as a social institution, subject to regulation by public authority. The state and crown are parties in interest to every marriage contract, and the preservation of the marital relation is deemed essential to the public welfare.<sup>163</sup>

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163. Williams, *Solemnization of Marriages: The Common Law Marriage—Never Solemn and No Longer Common—Will It Remain Law?*, 13 U. MIAMI L. REV. 447 (1959).