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Legalizing Proxy Marriages

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At the orthodox marriage ceremony, bride and groom are expected to be present in person.¹ They are united by a series of oral questions to which each makes an oral response. At the conclusion, again in person, they walk down the aisle arm in arm. In a proxy marriage, there are several differences but none more obvious than the fact that one of the principals is physically absent. Distance may lend enchantment, but in the case of a proxy marriage it is also the basis for a number of legal complications.² For example: The absent party has to be represented by a proxy.³ The proxy must be legally authorized to act or the responses he makes will have no legally binding consequences. Most troublesome is the present lack of certainty as to these legally binding consequences. Not infrequently, complicated, slow moving and expensive litigation is required to determine whether the principals in a proxy marriage are or are not husband and wife. Because of the practical difficulties of arranging for this sort of arms length union and because of the uncertainty as to the legal consequences even after it has taken place there is reason to endeavor to clarify the law. It would appear that the catalyst should be in the form of legislation.

Prior to World War I, American legal scholars do not appear to have been much concerned with proxy marriage. During that conflict, several U. S. service men attempted to create this type of domestic relation but the law was not thoroughly developed.³ After the World War I, the service man and his problems were of less urgent importance

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¹Emily Post, *Etiquette*, "The Blue Book of Social Usage," Funk & Wagnalls Company, New York (1937), Chapter 26, "The Day of the Wedding."

²Webster's New International Dictionary of the English Language (2d ed.) (1948). Defines proxy as "The action or practice of voting, making promises, etc. by means of an authorized agent or substitute; agency, function, sometimes office, of a procurator or deputy; as, to vote or appear by proxy; marriage by proxy."

³E. G. Lorenzen, "Marriage by Proxy and the Conflict of Law," 32 Harv. L. R. 473 (1919). Emphasizes the common law basis of proxy marriages.

to civilians who might be interested in doing something constructive. Proxy marriage came to be identified in the minds of many people with the subject of immigration. With the arrival of the chaos which we call World War II, and perhaps even more in its aftermath today in Korea, Berlin, the near East and elsewhere, the U. S. service man again confronts distance and his matrimonial difficulties have again come to the fore. We begin to find a respectable collection of relevant legal literature.⁴ This literature has been concerned primarily with two questions—what is the law of proxy marriage and what are the reasons behind the law. Some writers have mentioned the desirability of probing into a third question—how may the law be clarified so that it may be of greater value to client servers who desire to predict or solve domestic problems for the benefit of their clients. But this clue does not seem to have been followed through. It is this lead which forms the occasion of the present paper. We shall consider briefly the nature of proxy marriage and then suggest the framework of a remedial legislative enactment. The basic motive for such proposed legislation would appear to be one more contribution to the war effort. Men and women do not cease to be human merely because they become military personnel.

The Military Aspect of Proxy Marriage

Men and women in the armed forces of the United States have their share of legal problems.⁵ In times of peace, which we nostalgically think of as a normal condition of life, civilians are probably no more concerned over the legal problems of army and navy personnel than

⁴Howery, W. H., "Marriage by Proxy and Other Informal Marriages," 13 *Univ. of Kansas City L. R.* 48 (1945). Considers the proxy marriage as a ceremonial procedure and lists the statutory background as of 1944.

"Validity of Proxy Marriage in Kentucky," note in 35 *Ky. L. J.* 228 (1947).

"The Validity of Absentee Marriage of Servicemen," 55 *Yale L. J.* 735 (1946). Discusses both the common law and ceremonial aspects and comments on the federal administrative agencies which deal with the problem.

Lolordo, V., "Proxy and Common Law Marriages," (1943) 1 *N. A. L. A. O. Brief Case II.*

See also generally Goodrich, "Foreign Marriage and the Conflict of Laws," (1923) 21 *Mich. L. R.* 1; 2 Beale, "Conflict of Laws," § 124.1 (1935) p. 676; Stumberg, "Conflict of Laws," p. 283 (2 ed. 1951); Goodrich, "Conflict of Laws," § 116 (3 ed. 1949) p. 351, 353.

"Restatement of Conflicts," (1934) § 124: "A marriage by proxy, if permissible where celebrated, is valid everywhere only if the absent party consents to the marriage."

See also: 10 *Corn. L. Q.* 53; 4 *Boston Univ. L. R.* 274; 16 *Iowa L. R.* 534; 33 *Yale L. R.* 777; 27 *Journal State Bar of Calif.* 294 (1952); 25 *So. Calif. R. R.* 181 (1952); 10 *The Cambridge L. J.* 105 (1948).

⁵That the Army considers the matter serious appears from the amount of attention it pays to the subject. See "Legal Assistance Digest, prepared and distributed by the Office of the Judge Advocate, General Department of the Army, for the use, information, and guidance of Legal Assistance Officers," 1 September 1949. The Forward: ". . . It is primarily a topical digest of information contained in Legal Assistance Memorandums, numbers 1 through 50, and certain of the publications distributed therewith, and an index of other publications so distributed and to official publications of the military establishment which are of current interest."

they would be over similar difficulties of other groups. In times of war, shooting as well as cold, global or police action (and it appears that for a while to come, such circumstances are likely to be our lot) civilians have increased their interest in this as in many aspects of military life.⁶

Today, as more and more young people enlist or are drafted, the question of what to do about their legal involvements becomes more and more serious.⁷ Our information about legal difficulties of this particular group of persons is limited, if we confine our attention to statutes and case law. Rather the situations which interest us appear as matters handled in one way or another, frequently out of court, by such diverse agencies as: Bar Association Committee on War Work,⁸ legal aid societies,⁹ the Red Cross, governmental bureaus,¹⁰ and service men's organizations. It appears that when we classify these matters as to type, marital difficulties hold an important position.¹¹ Among marital difficulties, requests for divorce loom large.¹² The prospect of disorganized families is a bit discouraging.

Where, however, the desire of the parties is not for the dissolution, but for the creation, of a family, the surrounding legal and social atmosphere may be and should be quite different. The law is said to favor marriage.¹³ The law even offers certain presumptions to help the court sustain a particular union as a legal marriage rather than to pronounce it an illicit relationship.^{13a} The average layman, if we

⁶During World War II the American Bar Association had a Committee on War Work. So did the various State Bar Associations.

⁷At present the American Bar Association Committee responsible for this work is called "Special Committee on Legal Service to the Armed Forces." In its 1950 report (75 A. B. A. Rep. 283) it says: ". . . Although the volume of such referrals is, of course, considerably less than during the war, it has been demonstrated that there will always be a need for this service in a greater or lesser degree depending on the size of the Armed Forces and the world situation. This need is increasing, percentage wise and recent reports indicate that about once in every six months at least 10% of the members of the Armed Forces need some type of legal assistance. Although a large part of this volume, estimated at over 300,000 cases a year currently, is handled within the Armed Forces, there has been an increasing need to refer matters to the civilian bar due to the reduction of legal personnel within the Armed Forces."

⁸For example see 50 Pa. B. A. Rep. 149 (1944).

⁹The National Legal Aid Association annually publishes statistics showing the volume of cases handled by its member organizations.

¹⁰Among these agencies are: The Family Allowance Division of the Office of the Chief of Finance, the Comptroller General, the Veterans Administration, the Office of Dependency Benefits, the Federal Security Agency.

¹¹Legal Aid statistics show that the percentage of domestic problems is in the neighborhood of 35.

¹²During World War II the writer served as chairman of the Committee on War Work of the North Carolina Bar Association. Of the large number of requests for aid presented by service men and their families, perhaps 9 out of 10 were for divorce.

¹³Eversley, *Domestic Relations*, 5 (4th ed. 1926). "The marriage state being the chief foundation on which the superstructure of society rests, it follows naturally that the law, which is the expression of the sentiments prevailing among organized communities, assumes a favorable attitude toward it. The presumption of the law is clearly in its favor—semper praesumitur pro matrimonis."

^{13a}Eversley, *Domestic Relations*, 5 (4th ed. 1926). "Every intendment shall be made in favor of a marriage defacto; and where an act appears to have been done by proper persons, the law will intend that everything was done in a proper manner—omnia rite

may judge from the matrimonial columns in the daily newspapers,¹⁴ becomes emotional in support of matrimony. The civilian, when he desires to lead his bride to the altar, usually faces few obstacles which we would classify as insuperable. But when the principals in a proposed domestic setting are a service man under military discipline and his sweetheart, separated by the exigencies of a cruel war and thousands of miles of land and water, the disappointment over a postponed wedding is felt realistically by the two individuals most interested, and vicariously by a large section of the American people who give the impression of being incurably romantic.¹⁵

On the question as to whether postponement or abandonment of plans for an intensely desired marriage do in fact constitute a hardship, two extreme positions may be taken. On the one hand an impersonal nonmilitary observer, viewing with Olympian disinterestedness the frustrations of his neighbor in uniform, may minimize out of existence the inconvenience. He may point to the statistically poor chance of survival of a war marriage.¹⁶ He may argue that even in the comparative security of civilian life, family breakdown, whether or not it ends in divorce, is all too frequent.¹⁷ He may surmise that in the grip of the crisis induced by war young people are even less prepared than usual to make a careful selection of a life-time mate. Since success of the venture is problematical even under favorable peace time circumstances, it might seem to him wiser in a period of world wide conflict that the principals be required by the law to possess their souls in patience until a furlough or armistice arrives. To the man who argues in this fashion a proxy marriage law will appear hardly worth the effort to enact it. But there is another side to the picture. It is based

acta praesumunt—again, mere irregularity in the form of the ceremony is not fatal to the validity of a marriage.

"The presumption of marriage arising from cohabitation and repute can only be rebutted by clear and satisfactory evidence. Thus when a man and woman have lived together as man and wife, the law will presume, unless the contrary be clearly proved that they were living together by virtue of a legal marriage, and not in concubinage. It has also been held that where a man and woman intended to be married and lived afterwards together as man and wife, their cohabitation was matrimonial and not concubinary, though it was impossible for a valid marriage between them to be directly proved. . . . But this presumption of law in favor of marriage does not hold good under all circumstances. Thus, in criminal matters, as on a charge of bigamy, or in suit for dissolution of marriage, judicial separation, and restitution of conjugal rights, and the like, the fact of marriage must be strictly proved."

¹⁴Hildegard Dolson, *Dear Miss Dix, This Is My Problem*, Readers' Digest, Feb. 1945, pp. 39-42.

See *Time*, Dec. 24, 1951, p. 52. Note on death of Dorothy Dix.

¹⁵Kingsley Davis, "Romantic Love and Courtship," Chapter 22, *Modern American Society*, Rhinehart & Company, p. 587 (1949).

¹⁶In 1946 immediately following the war period the divorce rate jumped from 3.5 to 4.3 per 1000 population. It may be argued this reflects the result of hasty war marriages. 71 Statistical Abstract of the United States (U. S. Census Bureau 1950).

On post war problems see: James H. S. Bossard, "What War Is Still Doing to the Family." Becker & Hill, "Family, Marriage, and Parenthood," Heath & Co. (1948).

¹⁷U. S. Bureau of the Census, Statistical Abstract of the U. S.: 1950 (71st ed.) Washington, D. C. 1950. The number of divorces in 1948 is 408,000 as compared with 55,751 in 1900.

on ideas of fairness and an application of the principle of the equal protection of the law. One may argue plausibly that it is neither fair nor an application of the equal protection of the law to fail to make available to the service man, because he is a service man, an opportunity readily open to his civilian neighbor. The service man in any event has plenty of unavoidable hardships—absence from home, disruption of his life plans, the realistic possibility of loss of life or limb in combat. Consequent frustrations may well affect his fighting morale. On a non-legal level one may keep in mind what is happening to the young lady back home and the service man's rivals. Absence conceivably may make the lady's heart grow fonder of someone else. The rival may make hay while the sun shines. It is fair and it would be in aid of the equal protection of the law to make possible a bonafide proxy marriage. A carefully drawn local statute legalizing proxy marriages in the home state may well turn out to be a real contribution to the war effort.

Specific legislative references to local proxy marriages are scarce.¹⁸ Such laws as exist fall into two classes (1) those which by implication or otherwise allow or appear to allow this sort of marital union,¹⁹ and (2) those which directly or by implication prohibit it.²⁰ In most of the jurisdictions, however, the legislature has not been specific.

In the field of case law on proxy marriages there are two categories of authorities. In the period after World War I the cases deal generally with immigration matters.²¹ Later particularly after World War II

¹⁸Vernier, *American Family Laws*, Vol. 1, § 33, p. 142.

¹⁹31 Minn. Stat. Ann. § 517.09 Subd. 2. West 1947. "Whenever the application for the license is accompanied by an affidavit of a duly licensed physician that the female party to said application is pregnant, the marriage ceremony may be performed by proxy. Such proxy must be in writing, executed in duplicate and signed and acknowledged by the party who will be present by proxy, with all the formality required of a deed so as to entitle it to record. One duplicate shall be attached to and filed with the application for license and the other shall be attached to and filed with the certificate of marriage filed in accordance with Minnesota Statutes 1941 Section 717.12.

This provision is amended by laws 1951 c 255 § 1. "Subdivision 2 shall be in effect until July 1, 1953.

See also for proxy in securing marriage license. Revised code of Delaware 1935 § 3490.

²⁰Louisiana Civil Code Article 109, "No marriage can be contracted or celebrated by procuration." This provision was held not to apply to a proxy marriage to which a citizen of Louisiana was a party when the celebration was in Turkey. U. S. *Ex rel* Modianos v. Tuttle, 12 F.2d 927.

The statutes are collected in Howery, W. H., "Marriage by Proxy and Other Informal Marriages," 13 U. of Kansas City L. R. 48 *supra*.

These states in which both parties are expressly or by impliedly required by the statutes to be present would seem to belong in this negative category.

²¹The proxy marriage cases involving immigration problems.

Ex parte Suzanne, 295 Fed. 713. (1923) (D. C. D. Mass.). W in Portugal. H in Pennsylvania (C. L. State).

Marriage upheld by equating it with common law marriage. Note in 9 Minn. L. R. 78, 6 Iowa L. R. 534; 35 Yale L. J. 777. 4 B. U. L. R. 125. U. S. re Aznar v. Commissioner, 298 Fed. 103 (D. C. So. D. N. Y.) (1924).

W in Spain. H in Massachusetts (not a C. L. State).

Marriage upheld on ground a marriage valid where celebrated is valid everywhere. Noted in 25 Col. L. R. 672, 10 Corn. L. Q. 53, 4 Boston U. L. R. 274.

U. S. *ex rel* Modianos v. Tuttle, Immigration Commissioner 12 F.2d 927, (D. C.

we have cases involving service men and, therefore, more pertinent to the topic of the present paper.²²

Most of the existing proxy marriage law has been made by resourceful judges willing to proceed in the vicinity of judicial legislation. It is not unreasonable to suggest that even in connection with a matter

E. D. La. (1925).

W in Turkey. H in Louisiana.

A Louisiana Statute prohibited proxy marriages. Marriage upheld. Statute applied only to marriages in the State. Noted in 1 U. of Cincinnati L. R. 99.

Silva v. Tillinghast, 36 Fed.2d 801 (Mass. 1924).

W foreign. H in U. S.

Court admitted W but would not decide question of validity of C. L. marriage.

8 U. S. C. A. sec 224 (m) "The terms 'wife' and 'husband' do not include a wife or husband by reason of a proxy or picture marriage." Note 5. Subdivision (n) of this section is effective though the marriage is for other purposes valid.

Respole v. Respole, 34 Ohio Op. 1, 70 N.E.2d 465, 170 A.L.R. 942.

Proxy marriage held voidable. H in Burma. W domiciled in Ohio went to W. Va. and marriage there. No consummation. W claimed pregnancy by H. H requested W to live with him but she refused. Marriage by proxy not upheld by common law theory because no cohabitation.

Ferraro v. Ferraro, Family Ct. Kings City. (1948) 192 Misc. 484, 27 N. Y. S., 292, 46. Affirmed Sub Nom, Fernandes v. Fernandes 1949, 275 App. Div. 777, 87 N. Y. S. (2d) 707.

Consulich Soc. Triestina Di Navigazione Elting. Collector of Customs, 66 Fed.2d 534 (2 C) 1933.

W in Italy. H in New Jersey.

Marriage not upheld. Law of Italy on topic proxy marriages was not proved.

Lorenz v. Lorenz, 70 N. Y. L. J. 121 (1924 Fed. D. C. S. D. N. Y.). "Recognition of Marriage by Proxy Abroad." Noted in 33 Yale L. J. 777 (1924).

Kane v. Johnson, (Dist. Ct., Mass., 1926) 13 Fed. (2d) 432. Alien resident of U. S. married by proxy in Portugal an illiterate Portuguese woman, W on attempt at admission to U. S. was detained and ordered deported because illiterate. Habeas Corpus. *Held*: Although Mass. has no C. L. marriage, court will uphold proxy marriage on grounds that body of Fed. law should control and that this marriage is different from ordinary C. L. marriage in that there was found compliance complete in form and valid under Portuguese Law.

Apt. v. Apt., 1 Int. Law Q. 73, noted in 10 Cambridge L. J. 105 (1948). Proxy marriage validly celebrated in Argentina held good on petition of wife, a resident in England. "Nothing abhorrent to Christian ideas in the adoption of that form . . . There was no doctrine of public policy which entitled him (his lordship) to hold that the ceremony, valid where it was performed, was not effective in this country to constitute a valid marriage."

See also in re Gabaldon 38 N. M. 392, 34 P. (2d) (1934). Comment on effect of Spanish law.

²²Recent proxy marriage cases. H away. W in U. S.

U. S. v. Layton, 68 F. Supp. 247 (1946) (S. D. Fla.).

H in Scotland, W in Florida. W claimed as beneficiary under National Service Life Insurance Act, 38 U. S. C. A. 817.

Marriage upheld as a valid common law marriage. Noted in 25 Tex L. R. 681 (1947). Noted in 35 Ill. B. J. 500 (1947). Noted in 33 Corn. L. Q. 129 (1947).

U. S. v. Barrona, 91 F. Supp. 319 (1950) affirmed 191 Fed. Rep. (2d) 92 (1951).

H in Africa. W pregnant in Nevada. W claimed under National Service Life Insurance Act. Marriage upheld. Court says: "In this instance, the law of Nevada no longer authorizes common law marriages but it is silent as to the status of proxy marriages. Such marriages are different from common law cohabitation; proxy marriages have legal sanctity attached to them by reason of the formality and solemnity of the proceedings which are performed by a public official. It is public policy to sustain marriages which are entered into in good faith."

Hardin v. Davis, 16 Ohio Supp. 19, 30 Ohio O. P. 524 (1945). H in England. W went to Mexico and marriage there. Noted in 33 Corn. L. Q. 129.

See also: Ferraro v. Ferraro, 77 N. Y. S. 2d 246 (1948); Fernandes v. Fernandes, 87 N. Y. S. 2d 707 (1949); Respole v. Respole, Ohio Com. P. (1946) 70 N.E.2d 465, 170 A.L.R. 743. Noted in 35 Ill. B. J. 500; Crawford's Estate, 69 Cal. App. 2d 609, 160 P.2d 65 (1945).

as important as marriage the resourceful judge deserves a statutory peg on which to hang his decision. In the long run it is the responsibility of the legislature to declare public policy. A law definitely banning the proxy marriage lock, stock and barrel would be preferable to an hiatus which courts, lawyers, and clients find hard to close.

Related Forms of Marriage

Let us now consider the areas of legal thought in which the concept of proxy marriage must struggle for existence. As a point of departure we note three pertinent concepts—the uncontrolled marriage, the partial compliance marriage, and the orthodox ceremonial marriage. We expect to find that proxy marriage is like one or the other of the three. For our purposes it is not enough to declare that the law favors marriage. The problem is not so simple. Becoming more specific our next step in reasoning takes us immediately into a conflict. We may say—marriage is a desirable relationship, and *therefore* the law should go out of its way to find that a properly motivated union between a particular man and a particular woman irrespective of formalities should amount to marriage. On the other hand, we may argue—marriage is a desirable relationship, and *therefore*, its approaches should be carefully guarded so that only "fit couples" are permitted to enter. The state may be said to favor not marriage generally but marriage under controlled conditions. Following the former line of reasoning we find justification for the uncontrolled marriage.

Uncontrolled Marriage

In western civilization marriage may be contrasted with a variety of illicit or irregular sex relationships. Concubinage and morganatic unions are not favored. But granted that circumstances as a matter of necessity often require a minimum of formality we find such concepts as common law marriage, putative marriage and perhaps proxy marriage.

A common law marriage is distinguishable for an illicit relationship by at least three factors:²³ an agreement *per verba de praesenti* by the principals to take each other as husband and wife;²⁴ cohabitation²⁵ and repute.²⁶

A putative marriage is said to be based upon: good faith; a ceremony; the belief by at least one party that the marriage is lawful.²⁷

²³I Vernier American Family Laws, p. 102 (1931) Common Law Marriages, Robert Black, "Common Law Marriage", 2 Cincinnati L. R. 1.

²⁴Madden: Persons and Domestic Relations, West Pub. Co. (1931) p. 57.

²⁵Meister v. Moore, 96 U. S. 76; 24 L. ed 826 (1877).

²⁶Keogel, "Common Law Marriage in the United States." (1922) p. 166, has supplied us with a tabular analysis showing distribution among the states of types of allowable marriage—*per verba de praesenti*, without cohabitation, same with cohabitation, and *per verba de futuro cum copula*.

²⁷Webster's New International Dictionary (2 ed.) defines Putative marriage as:

It should be no surprise to us to find that originally proxy marriage was identified with uncontrolled domestic unions.

Public opinion today seems less favorably disposed toward recognition of these uncontrolled marriages.²⁸ By judicial decision and by act of the legislature common law marriage has been abolished in more than half of the States.²⁹ Putative marriages are recognized at most in only a few jurisdictions.³⁰ There is no reason to suppose that the popular trend toward insistence on ceremonial marriage is slowing down. Therefore, we hesitate to leave proxy marriage in this category.

Partial Compliance Marriages

If, instead of using as our starting point the illicit relationship and moving toward the ceremonial union only so far as we must, we reverse the process, we find ourselves shortly in the field of marriages in which there has been only partial compliance with the provisions of the statute.³¹ In jurisdictions with a mandatory marriage

"Cannon Law. A marriage in due form of parties between whom existed any of certain impediments, as consanguinity, either or both acting in good faith. It was invalid but the children born prior to a divorce were legitimate at canonical law; and if continued in good faith until the death of the husband, the wife if surviving was entitled to dower. Some modern civil law systems, as the French, adopted this view, and it was recognized in the English common law in the 13th century, but is not now recognized in Great Britain or the United States.

Black's Law Dictionary (4 ed.) West Publishing Co. 1951.

Putative Marriage. A marriage contracted in good faith and in ignorance (on one or both sides) that impediments exist which render it unlawful. Mackeld Rom. Law. 556.

Putative Marriage is discussed in: 37 Calif. L. R. 671 (1949). Rights and remedies of the putative spouse. 33 Min. L. R. 321 (1949). Noting *Roberts v. Roberts*, 196 P.2d 361 (Wyo. 1948). 10 Tulane L. R. 435 (1936). Noting succession of the *Marinari* 164 So. 797 (La. 1935). *Funderbunk v. Funderbunk*, 38 So.2d 502 (1949 La.) In re *Hall* 70 N. Y. S. 406 (1901).

U. S. Fidelity & Guaranty Co. v. Henderson.

53 S.W.2d 811, 816 (1932) Tex. Civ. App. The court lays down the elements of a putative marriage: "A putative marriage is one which has been contracted in good faith and in ignorance of some existing impediment on the part of at least one of the contracting parties. Three circumstances must concur to constitute this species of marriage: (1) There must be bona fides. At least one of the parties must have been ignorant of the impediment not only at the time of the marriage, but must also have continued ignorant of it during his or her life. (2) The marriage must be duly solemnized. (3) The marriage must have been considered lawful in the estimation of the parties or of that party who alleges the bona fides.

²⁸Note in 23 Iowa L. R. 75 (1937) indicates how judicial treatment of the concept of common law marriage in one state has imposed distinctions between it and the illicit relationship. An example of legislative imposition is the case of *Fisher v. Sweet and McClain*.

154 Pa. Super 216; 35 Atl. (2d) 756 later clarified by the case of *Buradus v. General Cement Products Co.*, 159 Pa. Super 501 (1940) noted in 50 Dickenson L. R. 137. 15 Temple L. Q. 541. The statute required a health certificate as a prerequisite to marriage.

²⁹For a recent summary of the states which have outlawed common law marriage see: *Richard v. Mackany*, "Law of Marriage and Divorce," (2 ed. by Irving Mandell), *Legal Almanac Series*, Oceana Publications (1951).

³⁰See: 24 Tex. L. R. 92; 37 Calif. L. R. 671; 33 Minn. L. R. 321; 10 Tulane L. R. 435.

³¹*Vernier American Family Laws*, Vol. I. 25 Effect of non compliance with Legal Requirements, p. 98. "It is clear, on principle, that not every violation of regulations governing the licensing and solemnizing of marriage should affect adversely the validity

law there are from time to time couples who for one reason or another are unable, or who fail, or who neglect, or who even refuse completely to conform. The courts, in the cases which come before them, have found it proper to distinguish situations where there has been substantial, from those where there is inadequate, compliance.³² The good faith of the parties is a significant factor in determining whether the compliance is substantial or only partial. Specific examples of what may amount to substantial compliance laws are those: allowing a form of ceremony appropriate to the practices of certain religious groups;³³ and those in which two forms of ceremony—one more elaborate than the other are prescribed.³⁴

The proxy marriage on occasion has been held to belong in this category of ceremonies amounting to substantial compliance with the mandatory statute.

Our subject, then, proxy marriage, in the present state of the law, partakes of the nature both of uncontrolled and partial compliance relationships. It is this diversity of basic philosophy, this possibility of two divergent grounds for justification which helps to confuse the lawyer who is trying to predict, for the benefit of a client, whether a particular course of conduct will succeed in creating a valid marriage or may result ultimately in landing him in jail for some sort of sex irregularity. Therefore, as a first step in laying the ground work for remedial legislation, we should select the theory, the category on which it is desirable to base proxy marriage.

The Proxy Marriage

Let us follow through a proxy marriage procedure as it appears to some of us who are attempting to arrange them for the benefit of service men and their prospective spouses.

Here is a typical fact situation.

M and W desire to marry. They are presently in different jurisdictions and an orthodox marriage ceremony is out of the question.

of the marriage. Many of the detailed steps specified by statutes are of relative unimportance . . . Statutes expressly dealing with the effects of non compliance with legal requirements governing marriage exist in two-thirds of the jurisdictions, and are of varying scope.

³²Presumptions aiding irregular marriages. 82 U. of Penn. L. R. 508 (1934). 20 Tenn. L. R. 621 (1949). Schouler, "A Treatise on the Law of Marriage, Divorce, Separation, and Domestic Relations, (6 ed.) Bender 1921 Vol. II Chap. XIII § 1196. "Legalizing Defective Marriages."

³³Vernier, "American Family Laws," Vol. I, p. 95 Sect.; 24 sects. ". . . A large majority of the jurisdictions expressly sanction the celebration of marriage in accordance with the customs of particular religious acts or societies."

³⁴California: Deering Civil Code (1949). Part III Personal Relations-Marriage § 68 deals with the formal and procedural requirements: Effect of non compliance. § 79 deals with marriage without license. "When unmarried persons, not minors, have been living together as man and wife, they may, without a license, be married by any clergyman. A certificate of such marriage must, by the clergyman be made and delivered to the parties, and recorded upon the records of the church of which the clergyman is a representative. No other record need be made."

M seeks (or is already in) Jurisdiction A where common law marriages are recognized as legally valid. M executes a legal document appointing a suitable person to serve as M's proxy at the marriage ceremony to be performed at a definite place. W in the meantime seeks (or is already in) Jurisdiction B where proxy marriages are recognized as legally valid. B is selected as the definite place where the ceremony is to take place. The document and the ceremony to be effective must conform to the requirements of the law of B. The ceremony takes place in B as planned and then the question arises: Are M and W really husband and wife?

If the question arises in B, the judicial answer is probably in the affirmative. If the question arises in A or in C, a disinterested jurisdiction, the decision is also probably in the affirmative. But the word "probably" bothers us. The reason for our uncertainty is the theory on which we seek to sustain the status.

Proxy marriages have been sustained by the courts on the theory that, by and large, they were like common law marriages. The similarities are obvious. Presently, we are more concerned with the factors which distinguish one from the other. These differences may be listed under two headings: in a proxy marriage the principals are not present as they usually are in a common law marriage; in a proxy marriage the principals intend not a common law but a proxy marriage.

This element of intent deserves attention. We may make three comments about it.

The phrase "*consensus non concubitus facit matrimonium*" is often found in court decisions discussing common law marriages. In one sense the word "consensus" may appear to be of the same quality as that which we are discussing when we talk about commercial contracts. However, courts in general have taken the position that marriage is something more than a civil contract. Some call it a status. It may be argued with some force that the intent required by law to support a civil contract is different, possibly less complete, comprehensive, sincere than that to be expected in case a status is the desired goal. In the case of the creation of a status the court may well insist that the principals both be present at the ceremony. A statute could make this clear.

The consensus in the proxy marriage is not merely to be distinguished in quality from that required in making a contract. A proxy marriage intent differs in objective from a common law marriage intent. In the former the parties clearly intend a formal ceremonial marriage and proceed as far along the road to that end as the circumstances permit. The court may, of course, do violence to their expressed intent and insist that while they say they want a ceremonial marriage the court, in its wisdom, will pronounce them joined together by an in-

formal marriage. If there were a suitable statute available, such improvisation by the judge would not be necessary.

The third aspect of consensus (not only quality and objective but mutuality) relates to the contrasted phrases "per verba de praesenti" and "per verba de futuro." The law views the former and not the later as essential to the validity of a common law marriage. In the proxy marriage the words are at least partly in "futuro." A document in a proxy marriage must be prepared. The person signing the document makes a present appointment of a proxy; but directs the proxy to carry out his responsibilities in the future.

Considering the basic concept on which we are to establish our statute, we reject the idea of common law marriage. Proxy marriages are distinguishable from common law marriages and the latter appear to be on the way out. If we rely on the common law marriage basis, it is certain that today in half of the states of this country we cannot arrange a proxy marriage for the service man and his prospective bride. In the near future it is not impossible that the remaining basis will be abolished in whole or in part. The answer to our primary problem—the client's problem—does not lie in this direction.

Proxy marriages have also been sustained by the courts on the theory that they are a form of partial compliance with the ceremonial marriage law. They do not fit too well into this category either, because of the physical absence of one of the principals at the time of the ceremony. However, the evidence does indicate: a bonafide intent to proceed with a formal ceremony and substantial compliance with the ceremonial marriage laws of B. If the acts they perform do not amount to substantial compliance with the ceremonial marriage laws in B, there is of course no basis, either in A or B, for arguing the existence of a valid ceremonial marriage. If the laws of B are strictly or even substantially complied with, the union, one submits, may be recognized as a valid formal marriage: first in B, and thereupon everywhere—unless it happens to involve factors so repugnant to the policy of the forum A, that the courts do not feel justified in allowing recognition. But it is quite logical to sustain it first as being ceremonially valid in B and then by application of a familiar conflicts doctrine as a valid ceremonial marriage in A.

The difficulties with sustaining the proxy marriage as a ceremonial or partial compliance marriage do not lie exclusively in the field of legal theory. Rather they involve factors of expense, delay, and confusion in finding a Jurisdiction B wherein statute proxy marriages may be performed.

In so far as we are dealing with cases of wealthy clients, these practical difficulties are not insuperable. There are, however, people in other income brackets and for the latter a remedy a thousand miles or a thousand dollars away may be of no practical value.

One can only speculate as to why the legislature has not already grasped and solved this problem. Perhaps the volume of requests for such aid was not yet strong enough to reach legislative ears. Perhaps the concept of proxy marriages calls to mind a picture of a ceremony taking place far away in some other country, perhaps under a very different system of law. Perhaps there was a faint reaction that this was not an American problem.

Let us attempt to visualize it as an American problem.

Proxy Marriage Patterns

The fact situations presenting the legal problem may be grouped roughly under three patterns: (1) In peace time the marriage takes place abroad; (2) In war time the marriage takes place in this country; (3) In war time the marriage takes place abroad.

Under Pattern No. 1 M is a resident, perhaps a citizen, of the United States. W is a resident, and probably a citizen, of a foreign country. The element of distance is caused by factors such as: inconvenience to M in going to the foreign country, a desire to evade the immigration laws. In other words, M is not legally or otherwise compelled to stay where he is. M prepares and executes documents conforming to the requirements of the law of the country in which the marriage takes place in the foreign country with W and X making the proper responses. W thereupon applies for admission to the United States as a wife. The immigration authorities raise the question in the courts—Is she his wife?

In Pattern No. 2 both principals are probably American citizens. W is presently residing in the United States. M is serving in the armed forces and is stationed, under military orders, outside the continental limits of the country. The factor of geographical distance in this situation is present not because it suits the convenience of the parties to stay where they are, but because the state or an agency thereof has an overriding policy. The urge to marry may arise from: natural romantic affection, the sense of propriety which prompts a parent to legitimate a child present or anticipated, the economic desire to enable the woman to share as a wife in government allotments or other material benefits. Popular reaction to Pattern No. 2 may vary widely. At one extreme the disinterested observer may feel sympathy for the welfare of the two young people who, but for the catastrophe of a world conflict entirely beyond their control, would be leading normal lives at home. At the other extreme one may suspect that some people will regard it as a device for extending a racket by which some, and maybe a great deal, of the taxpayers' money will find its way to the hands of persons who have little or no moral claim to it. There are said to be situations in confidential files of women who have, under

different names, achieved multiple marriages (with a series of service men) and a corresponding number of allotments until the facts came to light and retribution finally caught up with them. On the whole there appears to be a reasonable number of situations under this pattern of a favorable than of an unfavorable nature. The rackets might of course exist in peace time as well as in war; but there should be other ways of guarding against them than by failing to permit a marriage to those who seek it in good faith. It should not be necessary to throw the baby out with the bath.

Pattern No. 3 reverses the main points of Pattern No. 2. In this final category W is resident in a foreign country. M has at some previous time been in that country as a member of the United States Armed Forces and is now temporarily stationed in the United States. The circumstances promoting the proposed union are generally of the same sort as those mentioned in Pattern No. 2. But in Pattern No. 3 again, the obstacle of distance is caused by order of the state or by an agency thereof and not by voluntary act of the parties. The observer may be sympathetic or hard to convince. The facts are not as appealing as those in Pattern No. 2 but they are generally more persuasive than those in Pattern No. 1. Two possible factors need be mentioned by way of caveat: immigration evasion and the lessened chances of success of a marriage where the parties come from such different geographical and social backgrounds.

When we talk about proxy marriage, we are dealing with at least the three foregoing fact situations. If we are going to attempt a clarification in the form of legislative recognition of these unions, we should decide whether that solution shall extend to all or only to some of these patterns.

Those of us who, from time to time, are faced with the practical problem of advising flesh and blood M and W how to get themselves legally married are more immediately impressed by the equities in Pattern No. 2 than we are by those in No. 1 and No. 3.

We start with the general assumption that marriage is to be preferred above illicit relations; that where there is a child, or an expected child, the legitimacy of that innocent bystander should be taken into account. We realize that the intent to marry is, in fact, a matter of delicate balance affected by frustration, delay, red tape, expense, uncertainty.

Then we start looking for the ideal jurisdictions A (approving common law marriage) and B (approving proxy marriage). We must get one party in A and the other into B. This is always troublesome and often so expensive as to be impracticable. All this takes time, correspondence, the finding of friendly and cooperative people in A and B who will take the trouble, often with no financial reward, to do the endless detail acts which must be done. If a child is expected,

the mental attitude of W is naturally disturbed—hoping that the marriage may occur before the birth. If the child is already on hand, W is worried for fear M will change his mind. If there is no child involved, M is worried for fear his rivals closer home may make the most of their opportunities. The lawyer who attempts to solve a client's problems under these pressing circumstances has a substantial task on his hands. When it seems that the completed union may still be held not to be a legal marriage, the problem becomes unnecessarily complex.

A statute legalizing proxy marriages under Pattern No. 2 seems presently justified. By such action the legislature will declare a policy; aid in the war effort by improving the morale of M and W; establish proxy marriage (in Pattern No. 2) on its own legal foundation; guard against rackets; control locally a ceremony involving a home town girl and an absent boy; and in general clarify a field of the law which, at present is in need of clarification.

A Proposed Statute

A generalization regarding statutes is that they are seldom written. Rather they are rewritten. Consequently, in the present instance, instead of dashing recklessly into the text of a statute on proxy marriage it seems wiser to confine the article to a statement of general principles. One reason is the obvious difficulty of evolving language which will be interpreted by the courts in the sense intended by the draftsman. Another is the unlikelihood that any draftsman can, on a national level, set down words designed to implement a new idea into many existing local legal systems so that the result will dovetail smoothly and with equal neatness into each of the great variety of legal settings in which it will have to rest. Phraseology adequate for integration of the proposal with the existing law in Jurisdiction A might turn out to be quite awkward if one attempted to insert it into the legal system in Jurisdictions B, C, or D. It appears that the preparation of a model text at the moment would be premature.

In general terms, then, and subject to local differences and circumstances, the outline of the proxy marriage statute might appear in some such form as the following:

1. Proxy marriage should be defined functionally. There is no serious objection to defining it also in terms of legal concepts but this legislative act is designed to be used by the members of the armed forces perhaps sitting in a foxhole in Korea; perhaps in an isolated European air base; perhaps on a small lonely South Pacific island. Lawyers competent to interpret the language will be few and far between. Law books themselves, for all practical purposes, will be non-existent. We may visualize a pamphlet copy of the act itself and perhaps explanatory notes as containing about all the information

available in the great majority of instances. Unless the act is written in language largely self explanatory, it will lose most of its anticipated value. In any event, those who need to use it will have so much trouble finding out what to do and doing it correctly that a text which requires judicial interpretation will tend to cause frustration.

2. The act should describe those persons who are entitled to its benefits. Presently, it is proposed to apply it only to situations presented under Pattern No. 2 above. Both parties there are citizens of the United States. The man is in the armed forces overseas. The woman is resident at home. It is not clear for the moment that the benefits should be extended beyond this one pattern. Certainly the proponents should not, without more experience in the manner of its functioning, assume that proxy marriage is a panacea and stretch it boldly into unknown areas. It is far more rational to make sure that it is receiving public support in restricted limits before one attempts to take in more territory.

3. The act should make clear that those who comply with its terms shall be considered as completely married as if they had celebrated the nuptials under the terms of the regular local ceremonial statute. The practical consequences of compliance should be set out so as to give fair warning to the principals that marriage has economic as well as romantic and spiritual aspects. At present there may well be spouses who do not awaken until after the ceremony to the far reaching significance of their acts, the nature and extent of the obligations they have assumed, and the legally imposed limitations of their own conduct. Some reasonable effort would not be out of place to inform them in advance. At present we, as a nation, seem to rely rather heavily on the motion picture and the novel to produce this result. If the armed forces carried a corps of competent marriage counsellors, desirable results might be obtained. Lacking this professional type of aid, the statute and the explanatory literature accompanying it should be clear to those laymen who may be persuaded to read it.

4. The act should designate some official perhaps on the state level to have charge of the local procedure. Applications should be made to him. He should have power to prescribe and from time to time to modify the various forms and documents necessary to make a record. He should keep the record and charge the fees. He should be responsible for seeing that the proxy in each case is a suitable person and that the ceremony is performed by another suitable and legally authorized official.

5. The act should specify the procedure to accomplish a proxy marriage in as simple language as can be found for the purpose. The steps should include:

- a. The document appointing the proxy: its basic form, the manner of its execution, authentication, and delivery.
- b. Similar information as to any further acts or documents to

be required of the groom. For example: birth certificate; health certificate; authenticated copy of a divorce or annulment decree, if any; application for a marriage license in the home town; authorization to publish notice of intention to marry; other documents of evidence of acts required by the religious denomination of which the groom is a member or under whose rules and disciplines the marriage is to take place.

c. The classes of persons who are eligible to serve as proxy and those disqualified.

d. By whom the documents sent by the groom should be received and what recipient should do with them by way of publication, recording, etc.

e. The details of the ceremony: who may officiate; the language to be employed under the unusual circumstances; the witnesses.

f. The recording of the fact of the completion of the ceremony and the notification of that fact; by whom, how, and to whom it should be sent.

g. The fees and other charges and to whom and when they should be paid.

Naturally the act would also include the other formal parts: preamble; definition of other terms; provisions as to separability of the paragraphs; time of going into effect.

Conclusion

Any proposal for a new statute has its limitations. The only way to determine its effectiveness is to test its operation. After a year or two of trial and error the more serious errors probably will come to light and can be corrected. One reason for writing it on the law books of each of the states and territories is that it appears to be a contribution to the morale of the service man. Another is to bring the proxy marriage ceremony into the United States where it can be controlled locally and where any rackets which may arise can be more readily detected, discouraged, and guarded against.

The persons for whose benefit the particular statute is designed to operate are the distant service man and his fiancée. There are plenty of impediments in the way of successful accomplishment by them of a normal peace time marriage. The catastrophe of failure to marry to the individual young couple may seem to the disinterested observer a comparatively minor matter, but one may be pardoned for trying to look at the situation through the eyes of those most affected. In large measure and for most practical purposes these young people are inarticulate. Their private disappointment is swallowed up in the greater volumes of sound. Yet there may be those who will care to listen and to do something about the matter.