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SOLEMNIZATION OF MARRIAGES: THE COMMON LAW MARRIAGE — NEVER SOLEMN AND NO LONGER COMMON — WILL IT REMAIN LAW?

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It is often difficult for lawyers to discuss laws relating to marriage without undue cynicism on the one hand, or inflated pontification on the other. There are times, however, in the course of legislative or judicial history when the necessity for change in the law becomes apparent without the prodding of crusaders, and in spite of the inertia of cynics. A brief review of the status of ceremonial and common law marriages in Florida and elsewhere should demonstrate to the most pragmatic observer that laws relating to marriage can no longer pretend to the solemnity of regulation while admitting of continuing informality, frivolity, or outright fraud.

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,¹ and as a social institution is subject to regulation by public authority. The state is a party at interest in every marriage contract,² and the preservation of the marital relation is deemed essential to the public welfare.³

Pursuant to this fundamental attitude the Legislature of Florida has enacted a series of statutes of long standing⁴ purporting to prescribe and regulate the entry into the marriage relationship. Before a ceremonial marriage may be entered into, the parties must obtain a license from the County Judge,⁵ after making affidavits that they are over the age of 21 years,⁶ or after producing the sworn consent of their parent in lieu thereof. No license with or without such consent should be issued where the male is under the age of 18 years, or the female under 16, unless both acknowledge under oath that they are the parents or expectant parents of a child.⁷ Any County Judge issuing a license without these sworn proofs of age, and without posting the application for three days⁸ before issuing the license, may be guilty of a felony punishable by a fine of \$500.00

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1. *Marsicano v. Marsicano*, 79 Fla. 278, 84 So. 156 (1920).
2. *Potter v. Potter*, 101 Fla. 1199, 133 So. 94 (1931).
3. *Gallemore v. Gallemore*, 94 Fla. 516, 114 So. 371 (1927).
4. FLA. STAT. §§ 741.01-741.22 (1957).
5. FLA. STAT. § 741.01 (1957).
6. FLA. STAT. § 741.04 (1957).
7. FLA. STAT. § 741.06 (1957).
8. FLA. STAT. § 741.01 (1957).
9. FLA. STAT. § 741.05 (1957).

or imprisonment for one year.⁹ A 1945 amendment¹⁰ to the statutes regulating ceremonial marriages requires the parties to obtain health certificates stating that they are free from venereal disease as a prerequisite to the issuance of the license.¹¹ The certificate is valid for a period of 30 days after its issuance.¹² The certificate must be based upon a serological test administered according to statutory specifications.¹³ A license based upon such certificate is valid for a period of 30 days.¹⁴

After the license is issued, the statutes specify the persons authorized to solemnize the marriage;¹⁵ that is, to conduct the ceremony or ritual whereby the parties manifest their mutual consent to enter into the married state as husband and wife. Persons so authorized are regularly ordained ministers in communion with some church, judicial officers of this State, and notaries public. An exception is made in the case of Quakers, whose congregations and rites do not encompass a regularly ordained minister. After the ceremony is performed, the license with a record of the marriage ceremony is returned to the County Judge, who is required to keep careful records thereof.¹⁶

These statutes also declare marriages between white and negro persons to be absolutely void,¹⁷ and upon conviction of attempting such marriage provide a penalty of ten years imprisonment or a \$1,000.00 fine.¹⁸ No Judge shall issue a license for such a marriage,¹⁹ and the penalty for so doing is two years in prison or a \$1,000.00 fine.²⁰ All statutes regulating ceremonial marriages are applicable to white and negro persons alike.²¹ The statutes also prohibit attempted marriages between persons related by lineal consanguinity, or a sister, aunt, niece, brother, uncle or nephew.²²

It would appear from the foregoing cursory glance at this statutory undertaking of marriage regulation, providing as it does, somewhat stringent penalties for certain violations, that the policy of the law does in fact regard the entry into marriage as a serious undertaking, affected with a legitimate public interest justifying its regulation and control. But the well known fact is, that all of the statutory requirements set forth above, with the exceptions of the prohibitions against miscegenation and consanguinity,²³

10. FLA. STAT. §§ 741.051-741.058 (1957); Fla. Laws 1945, ch. 22738, §§ 1-8, at 410.

11. FLA. STAT. § 741.051 (1957).

12. *Ibid.*

13. FLA. STAT. §§ 741.052-741.054 (1957).

14. FLA. STAT. § 741.058, (1957).

15. FLA. STAT. § 741.07 (1957).

16. FLA. STAT. § 741.09 (1957).

17. FLA. STAT. § 741.11 (1957).

18. FLA. STAT. § 741.12 (1957).

19. FLA. STAT. § 741.13 (1957).

20. FLA. STAT. § 741.13 (1957).

21. FLA. STAT. § 741.17 (1957).

22. FLA. STAT. § 741.21 (1957).

23. *Goldman v. Dithrich*, 131 Fla. 408, 179 So. 717 (1938) holding consanguinity as invalidating common law marriage, and stating that a common law marriage must not be contrary to public policy nor obnoxious to prevailing social mores. Validity of miscegenation statutes is beyond the scope of this article. See 2 U. FLA. L. Rev. 283 (1949).

may be totally ignored or attempt to do so, without any statutory or ceremonial procedures or regulations whatever.

Since a marriage is essentially a civil contract, the essentials of its formation are the capacity of the parties to contract, and their present mutual assent to the contract.²⁴ In the ceremonial marriage this present mutual assent — marriage *per verba de presenti* — is evidenced by a ritual performed in the presence of an authorized third person,²⁵ pursuant to a license.²⁶ But in the absence of a statute either making the performance of a ceremony after obtaining a license mandatory, or expressly abolishing common law marriages, the common law rule prevails, whereby the present mutual assent of the parties is evidenced by cohabitation and repute as husband and wife.²⁷ Such is the rule presently prevailing in Florida. The detailed statutes regulating the entry into marriage are deemed to be directory only, are not mandatory, and do not invalidate common law marriages.²⁸ No interposition by any third person authorized to solemnize marriages is necessary to the formation of a valid common law marriage.²⁹

Judicial decisions have, however, set minimum requirements for the establishment of common law marriages. A pre-existing marriage of either party not terminated by death or divorce is a bar.³⁰ Cohabitation and repute without words of present assent are not sufficient.³¹ Cohabitation with a promise to marry in the future — marriage *per verba de futuro cum copula* — is not recognized in Florida.³² Clandestine or concubinage relations rebut any presumptions of a valid common law marriage.³³ In the more recent cases, the Supreme Court of Florida has become increasingly stringent in setting the evidentiary requirements for their establishment,³⁴ and indeed most of the cases wherein it is sought to establish a common law marriage involve money claims against the estates of wealthy decedents,³⁵ or claims for alimony against a wealthy alleged husband,³⁶ rather than the legitimation of the marital relations of the rural poor or ignorant, as has been supposed by some, in justification of the common law rule.

24. *Marsicano v. Marsicano*, 79 Fla. 278, 84 So. 156 (1920).

25. FLA. STAT. § 741.07 (1957).

26. FLA. STAT. § 741.01 (1957).

27. *Caras v. Hendrix*, 62 Fla. 446, 57 So. 345 (1912).

28. *Ibid.*

29. *Marsicano v. Marsicano*, 79 Fla. 278, 84 So. 156 (1920).

30. *Maliska v. Dion*, 62 So.2d 4 (Fla. 1953); *Greene v. Greene*, 156 Fla. 342, 22 So.2d 792 (1945).

31. *Carretta v. Carretta*, 58 So.2d 439 (Fla. 1952).

32. *Marsicano v. Marsicano*, 79 Fla. 278, 84 So. 156 (1920).

33. *LeBlanc v. Yawn*, 99 Fla. 328, 126 So. 789 (1930).

34. Rothstein, *A New Look at Common Law Marriages in Florida*, 10 MIAMI L. Q. 87 (1955) and cases cited therein.

35. *In re Campbell's Estate*, 73 So.2d 883 (Fla. 1954); *In re Klinger's Estate*, 73 So.2d 50 (Fla. 1954); *McClish v. Rankin*, 153 Fla. 324, 14 So.2d 714 (1943); *Goldman v. Dithrich*, 131 Fla. 408, 179 So. 717 (1938); *Caras v. Hendrix*, 62 Fla. 446, 57 So. 345 (1912).

36. *Chaachou v. Chaachou*, 73 So.2d 830 (Fla. 1954).

While the Supreme Court of Florida has manifested the closest judicial scrutiny of common law marriages, it has properly refused to invade the province of the legislature to prohibit or otherwise regulate such marriages. Thus, the evasion of public health standards and other social and spiritual preparation for entry into marriage cannot be prevented or corrected by judicial fiat, but is the direct responsibility of the legislature. The Court has made its attitude abundantly clear in these words:

The thought that there may have been at one stage of the development of this country reasons for entering the marriage contract without the performance of any rite is suggested by an opinion of one of the civil courts of appeals of Texas. *McChesney v. Johnson*, 79 S.W. 2d 658. It was commented in that decision that sparseness of settlements, difficulty of travel, inaccessibility of ministers or officers given the right to perform the ceremony and unfamiliarity, through illiteracy, furnished some justification for dispensing with the formal marriage vows.

The same considerations, of course, applied to Florida as it progressed from infancy to its present state of development. These conditions, however, do not now obtain. Distances to cities have shrunk because of modern methods of travel; a network of improved roads and arterial highways has made county seats, cities and towns accessible to nearly every dweller; churches have been established galore; and a school system furnishes the advantages of education even to the slothful. Why then, should the common-law marriage be given the same recognition and dignity now that Florida has emerged from the status of a frontier? We can not give any logical reason and although we will not attempt to abolish it by judicial fiat we will examine the evidence of such transactions with increasing caution for as the reasons for making informally a contract of such moment become more obscure so should the effort to establish it grow more difficult. This seems harmonious with the trend of late decisions and modern thought toward the abolition of consensual marriage.³⁷

It doesn't make any difference whether we approve or disapprove of common-law marriages, in this State such marriages are legal. Once a common-law marriage has been established, it continues until death or divorce. Several efforts have been made in the Legislature to abolish common-law marriages and on each occasion, the Legislature has refused to enact any law abolishing such marriages. This is a legislative matter and common-law marriages can only be abolished in this State by the Legislature.³⁸

37. *McClish v. Rankin*, 153 Fla. 324, 331, 14 So.2d 714, 717 (1943). Mr. Justice Thomas delivered the opinion of the court.

38. *In re Colson's Estate*, 72 So.2d 47, 58 (Fla. 1954). Mr. Justice Mathews delivered the opinion of the court.

Although the opinion in *McClish v. Rankin*³⁹ was written in 1943, the legislature has so far still failed to act. The 1957 session considered a bill⁴⁰ which passed the House by a vote of 58 to 28,⁴¹ but which died in the Senate Judiciary Committee.⁴² This bill, in its final form, would have specifically abolished common law marriages in this state by the following language:

Section 1. All marriages termed and known as "common law marriages" are hereby abolished, prohibited, and barred for any and all purposes whatsoever in this State, from and after the effective date of this Act. Provided, nothing herein shall affect any such marriage recognized as such prior to the effective date of this Act, or any right, privilege, or benefit arising thereunder.⁴³

It might have preserved the legitimacy of common-law marriages and the offspring thereof prior to the effective date of the Act. Such a statute should, however, prescribe a definite effective date at least six months after passage so as to give notice of the change. The saving clause should also use words such as "entered into" or "lawfully entered into" in lieu of "recognized as such." The terms "recognized as such" imply judicial recognition, and the saving clause in its present form might operate only in saving such common-law marriages established by litigation prior to the effective date of the Act. The real purpose of the saving clause is to protect actually existing unions undertaken prior to the effective date of the Act, even though the judicial recognition of such unions might not occur until later. This is the sense of the Illinois Act abolishing common law marriages in the following language:

. . . all marriages commonly known as "common law marriages" hereafter entered into shall be and the same are hereby declared null and void . . .⁴⁴

An alternative method of abolishing common law marriages would be by amendment of Section 741.07, Florida Statutes, which authorizes certain persons to solemnize marriages.⁴⁵ This statute is at present directory only,⁴⁶ but could be made mandatory by specifying that *all* marriages *must* be solemnized in the manner thereafter provided. Such is the type of statute in effect in New York.⁴⁷ However, a statute expressly abolishing common law marriages is to be preferred over one attempting to accomplish this purpose by making solemnization mandatory, because the distinction between mandatory and directory marriage statutes is useful and should

39. 153 Fla. 324, 14 So.2d 714 (1943).

40. H. R. BILL 41; S. BILL 108, Reg. Sess. (1957).

41. H. R. JOUR., Reg. Sess. 139 (1957).

42. S. JOUR., Reg. Sess. 92 (1957).

43. See statute cited *supra* note 40.

44. ILL. REV. STAT. ch. 89, § 4 (1956).

45. FLA. STAT. § 741.07 (1957).

46. See note 27 *supra*.

47. N.Y. DOM. REL. LAW ch. 14, § 11.

be preserved.⁴⁸ A strictly construed mandatory statute regulating the licensing and solemnization of marriages might invalidate many ceremonial marriages entered into in good faith, but subject to technical or formal defects through no fault of the parties. But the value of a possible waiver of formal defects should not be confused with tacit or express approval of common law marriages wherein no ceremonial or statutory compliance is even attempted. A bill similar to that proposed to the 1957 Legislature, could, if adopted by the 1959 Legislature, effectively abolish common law marriages attempted to be contracted after its effective date, preserve the legitimacy of existing common law marriages, and also preserve a certain flexibility in sustaining ceremonial marriages entered into in good faith pursuant to existing directory marriage statutes.

Legislation securing this objective has not only been favored by the Supreme Court of Florida, but also by the Florida Bar Committee on Family Law,⁴⁹ and by leading text writers,⁵⁰ among whom this comment is typical:

By far the greater number of alleged marriages were meretricious relationships, for the convenience of the parties alone, and in a large percentage of the cases the reason no formal celebration of marriage was had was because one or the other, and in many cases, both of the parties were already married but separated from a former spouse. There was nearly always a ghost in the closet. Moreover, very few, if any, of these persons really believe that they are married. Scarcely any of these persons believe that a divorce is necessary to dissolve the marriage; in fact, nearly all believe that common law marriage and living in adultery are synonymous terms. If it were a sine qua non to the validity of such a union that the parties believe that a divorce is necessary to dissolve such a marriage (and a divorce is necessary as in any other marriage.), then there are few if any common law marriages. As is elsewhere shown, however, the parties may doubt the validity of the marriage and need not consider themselves married 'in the eyes of the law'. Few of such persons believe that children of these unions are legitimate. But, says the Supreme Court, a strong reason for upholding such marriages is to legitimate the offspring of many parents conscious of no violation of law. The first part of this statement expresses a noble sentiment but the latter part borders on the ridiculous. 'Many parents conscious of

48. For a complete discussion of various classes of statutes regulating solemnization of marriages in the various states, see I VERNIER, *AMERICAN FAMILY LAWS* 103 (1931). It has been held in at least one jurisdiction that even a "mandatory" statute will not be construed as abrogating the common law rule, but that such abrogation must be accomplished by a statute expressly prohibiting common law marriages. *Hoage v. Murch Bros. Const. Co.*, 50 F.2d 983 (D.C. Cir. 1931).

49. *Annual Report, Florida Bar Committee on Family Law*, 31 *FLORIDA BAR JOURNAL* 230 (1958).

50. III HOWARD, *A HISTORY OF MATRIMONIAL INSTITUTIONS* 184 (2d ed. 1940); KEEZER, *MARRIAGE AND DIVORCE* 59 (3d ed. 1946).

no violation of law' is a phrase which does not sound very well to one who has had actual experience in the handling of many of these cases. Again considering the first part of the statement, if these unions must be held valid marriages in order to render legitimate the unfortunate children thereof, the children of subsequent formal marriages of the parties must be bastardized. The great majority of common law marriages so called, are not permanent unions. After a while the parties tire of each other and 'marry' some one else and have children . . .⁵¹

The State of Florida is today a member of an everdwindling minority of American states and territories which still recognize common law marriages. A survey⁵² of fifty-four states and territories conducted by the Navy Department in 1945 revealed that at that time common law marriages were recognized in twenty jurisdictions, and were not recognized in thirty-four jurisdictions. Since 1945, three states, Indiana,⁵³ Michigan⁵⁴ and Mississippi⁵⁵ have adopted legislation abolishing common law marriages, all three of them within the last two years. At present, of fifty-four American jurisdictions, thirty-seven do not recognize common law marriages, while seventeen do. Of the states exclusive of the territories, thirty-four do not accord recognition, while fourteen do. The survey indicates that since the turn of the century the states have undertaken the abolition of common law marriage in increasing numbers.

But opposition to such a reform in this state persists in some quarters and among members of the legislature. It is said that recognition of common law marriage aids and protects the poor and the ignorant in their family relations, and that such persons should not be penalized solely for a supposed ignorance which renders them incapable of applying for a license to enter a status which the law and society generally have deemed to be sacred and vital to the public welfare. This writer is unaware of any such sympathy or of any such supposed ignorance or incapacity giving rise to such exemptions in other areas of the law where some regulation by the state has been deemed necessary. Has any claim yet been made on such grounds for exemption from filing an income tax return, or from obtaining

51. KOEGEL, COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES 101-103 (1922).

52. U.S. NAVY DEPARTMENT, COMMITTEE ON UNIFORM ADMINISTRATION, *Family Allowances, Administrative Policies* 15, 15a, 15b (1945). *Recognized*: Alabama, Alaska, Colorado, District of Columbia, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Michigan, Mississippi, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas. *Not Recognized*: Arizona, Arkansas, California, Canal Zone, Connecticut, Delaware, Hawaii, Illinois, Minnesota, Missouri, Nebraska, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Phillipine Islands, Porto Rico, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

53. IND. REV. STAT. tit. 44, ch. 1, § 11 (Burns 1958).

54. MICH. PUBLIC LAW No. 44 (1956) (effective Jan. 1, 1957).

55. MISS. CODE ANN. § 465 (1942), as amended, (effective April 5, 1956).

a driver's license, a fishing license, a hunting license, a liquor license, or a junk dealer's license, or from proving financial responsibility in operating a motor vehicle, or from draft registration or military service? Actual experience in the administration of regulatory statutes governing activities sometimes trivial in comparison with the marital undertaking certainly leaves no valid reason today for further procrastination by the legislature in adopting this long overdue and fundamental reform in the domestic relations laws of Florida.