PROXY MARRIAGES

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The question of proxy marriages has received scant attention from legal writers. Until 1948 when the case of *Apt* v. *Apt*[1] was decided, the only articles on the matter in recent years appear to be those of Lorenzen[2] and Howery.[3]

Since the war, many persons have immigrated to Canada from parts of Europe where proxy marriages are recognized by law. A great number of these immigrants, after their arrival, have taken advantage of the laws of their homeland and married by proxy the sweethearts they left behind.

Proxy marriages are recognized in Italy, the Netherlands, Spain and many Central and South American countries such as Mexico, Argentina, Nicaragua, Brazil, Bolivia and Ecuador. It is conceivable therefore, and in fact probable that sooner or later our Canadian courts may have to consider the validity of such marriages, as the laws of these foreign countries are being advantageously used not only by persons who have emigrated from them but also by persons who have never resided in these countries.[4] The purpose of this article is to consider some of the legal aspects of this method of contracting marriage.

It is settled law that from the standpoint of form the *lex loci celebrationis* determines the validity of a marriage. If the law of the place where the marriage is celebrated permits a marriage to take place in a certain way then the law of the forum will, if questions of capacity are not raised, recognize the validity of such a

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[1] [1948] P. 83 (C.A.).

[2] Marriage by Proxy and the Conflict of Laws (1919), 32 Harv. L. Rev. 473.

[3] Marriage by Proxy and Other Informal Marriages (1945), 13 U. Kan. City L. Rev. 48. The latest editions of Falconbridge's Essays on the Conflict of Laws (2nd ed., 1954) p. 721, Cheshire's Private International Law (4th ed., 1952) p. 311, and Dicey's Conflict of Laws (6th ed., 1949) p. 764, also deal with the matter in considering *Apt* v. *Apt*.

[4] As I write, I note in (1957), 40 Time Magazine at p. 94, a news item concerning the marriage of a movie star. Both she and her spouse were represented in Mexico by proxy.

marriage, even though the marriage could not be contracted in that way in the forum, so long as it is not contrary to its public policy.

This proposition is crystallized in the judgment of Lord Dunedin in *Berthiaume* v. *Dastous*:[5]

> If there is one question better settled than any other in International Law, it is that as regards marriage—putting aside the question of capacity—*locus regit actum*. If a marriage is good by the laws of the country where it is effected, it is good all the world over no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of domicil of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere although the ceremony or proceeding if conducted in the place of the party's domicil would be considered a good marriage.

Many American courts have considered the question of a marriage contracted in a foreign country by an American citizen through the intermediary of a proxy, and in the majority have upheld the validity of such marriages.

In *Ex parte Suzanna*[6] a proxy marriage was celebrated in Portugal, the husband being resident in Pennsylvania, and it was decided that as common-law marriages were recognized in Pennsylvania, the Portuguese marriage, being an informal marriage would be recognized.

In *Kane* v. *Johnson*[7] the marriage concerned a man domiciled in Massachusetts (where common-law marriages are not recognized) who married a woman by proxy in a foreign jurisdiction where such proxy marriages were recognized, and the court held that the *lex loci celebrationis* was the governing law. This was also the result in *United States ex rel. Modianus* v. *Tuttle*.[8]

It should be noted in passing that in proxy marriages the proxy's authority is to be confined within certain limits, and the proxy is not to go off on a frolic of his own! Evidence of this is seen in *Consulich Societa Triestina Di Navigazione* v. *Elting*[9] in which the court stated: "Here the [proxy] marriage was plainly to secure a status which should admit the alien; it had not been consummated, in spite of the startling assertion in one of the plaintiff's letters that it had been 'consummated by proxy'."

A proxy marriage involves two contracts, firstly the contract whereby the principal names the proxy as his agent, and secondly,

[5] [1930] A. C. 79.
[6] (1924), 295 F. 713.
[7] (1926), 13 F. (2d) 432.
[8] (1925), 12 F. (2d) 927.
[9] (1933), 66 F. (2d) 534.

the marriage contract whereby the proxy goes through the form of marriage on behalf of and in the name of his principal.

In *Apt* v. *Apt*[10] a lady domiciled and resident in England executed a power of attorney authorising another person as her proxy at her marriage to her intended husband, who was domiciled and resident in Argentina. The marriage was celebrated by proxy in Argentina, and was held to be valid in England, although if such marriage had been celebrated in England it would have been invalid. It appears from this case that not only the validity of the second contract (the marriage) is determined by the *lex loci celebrationis* but also the validity of the first contract (the power of attorney) and all matters relating to the power of attorney. This is inferred from the fact that the court quotes with approval Lord Esher M. R. in *Chateney* v. *Submarine Telegraph Company Limited.*[11] "But the business sense of all business men has come to this conclusion that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary it is to be concluded that the parties must have the intention that it should have been carried out according to the law of that country."

Lorenzen is of the same opinion: "If the *lex loci celebrationis* allows this mode of celebration [i.e. by proxy] it will determine not only all the special questions relating to the power of attorney but also the formalities applicable to the marriage in general. This law would decide, for example, whether the power of attorney must be in writing, whether the government consent to such marriage is necessary, and the effect of failure to obtain such consent. It will control the question whether a mere consent to take each other from the present moment as husband and wife is sufficient to constitute the parties husband and wife, or whether they must be joined in marriage by some official before witnesses and after the publication of banns etc." [12]

It would seem that if the principal revokes the power of attorney at any time before the ceremony, but such revocation does not come to the attention of the other party to the ceremony or to the attention of the proxy, then under the law of many European countries, the wedding if celebrated will be valid notwithstanding the revocation of the proxy's authority. In *Apt* v. *Apt*[13] it was stated that this also was the law of Argentina, and the English court recognized that if a revocation had been made under

[10] [1948] P. 83 (C.A.).
[11] [1891] 1 Q. B. 79 (C.A.).
[12] *Ante*, footnote 2, at p. 484.
[13] *Ante*, footnote 1.

the above circumstances it would not affect the validity of the marriage. The opinion of the court is presumably *obiter* on this point particularly in view of the fact that in this same case the court states:[14] "the method of giving consent, as distinguished from the fact of consent, is essentially a matter for the *lex loci celebrationis* and does not raise a question of capacity . . . or essential validity." It would seem that the question of revocation has very much to do with the "fact of consent".

It can also be inferred from this case that if the authority of the proxy is revoked by operation of law by reason of the principal's loss of capacity for example by an intervening marriage, or by his becoming of unsound mind, that this, being a question of capacity, would be governed by the law of the domicil.

It is submitted that the question of what law would govern the validity of the marriage, in the event of the state of mind of the principal at the time the power of attorney is given being affected by fraud, mistake, duress or drunkenness, has not yet definitely been decided, although the *lex loci celebrationis* would seem to be the favoured one. *A fortiori* the law of the place of celebration would seem to be the proper law if it is a question of the state of mind of the agent at the time of the ceremony.

Furthermore it appears to be firmly established in common-law jurisdictions that the law of the place of celebration of the marriage will be recognized, and the validity of the marriage upheld, notwithstanding the fact that there has been an evasion of the law of the domicil of the parties by reason of the fact that the parties to the marriage are under age by the law of the domicil.

It is further submitted that the law of the forum must uphold the validity of a marriage celebrated in accordance with the *lex loci celebrationis* even though neither of the principals to the marriage are present in person. Under the law of Mexico it is permissible for both parties to be represented by proxy. It further appears that this situation was permitted by the old canon law, and such a situation does not appear to be opposed to the present Code of Canon Law of the Roman Catholic Church,[15] which has never treated the subject of marriage lightly.

Turning now to another aspect of marriages contracted by proxy, the question arises whether such a marriage would be valid

[14] *Ibid.*, at p. 88.

[15] Canon 1088 (1) reads: "Ad matrimonium valide contrahendum necesse est ut contrahentes sint praesentes sive per se ipsi sive procuratorem." I am advised that by a Rescript of one of the Roman Congregations in 1917 it was stated that this canon was to be interpreted so as to permit both parties to be represented by proxy.

if celebrated in England or in any of the states of the United States of America or in any of the provinces of Canada.

Two matters must be considered here. Firstly, as marriage by proxy is essentially an informal marriage, it may be recognized in a common-law jurisdiction if that jurisdiction still recognizes common-law marriages. Secondly it may be possible to apply the law of agency to the statute law of the common-law jurisdictions if that statute law is not so restrictively phrased as to exclude entirely marriage by proxy.

Froude[16] tells us that Queen Mary of England married Philip II of Spain before Bishop Gardiner, Philip being represented by his proxy Count Egmont. Closer examination would seem to indicate that this was a betrothal, for the actual marriage was celebrated in the Cathedral at Winchester on July 25th, 1554 with both Mary and Philip present.[17]

In *R.* v. *Millis*[18] it was held that the presence of an episcopally ordained priest was essential to the validity of a marriage celebrated in Ireland, and in *Apt* v. *Apt*[19] Lord Merriman stated that he was precluded by that decision from holding that the common law ever recognized the validity of a marriage *per verba de praesenti* unless such marriage was celebrated before an episcopally ordained priest.

The historical soundness of the decision of the House of Lords in *R.* v. *Millis* is however open to question, as it was the Council of Trent in 1563 which required that the expression of consent to take each other as man and wife be made by the parties in the presence of the parish priest and at least two witnesses. Prior to the Council of Trent, although the Church insisted that the contracting act be made *in facie ecclesiae* a clandestine marriage even though forbidden was nonetheless valid.[20] Because the Council of Trent was never promulgated in England the old canon law of marriage would presumably have continued in England as civil law until marriages *per verba de praesenti* were terminated by Lord Hardwick's Act in 1753.

The present Marriage Acts of England however seem to eliminate all possibility of the validity of a marriage performed by

[16] History of England (1899), vol. VI, p. 189.
[17] Dictionary of National Biography (1893), vol. XXXVI, p. 344; see also Simpson, The Spanish Marriage (1933) p. 149.
[18] (1843) 10 Cl. and F. 534; 8 E.R. 844.
[19] [1947] P. 127.
[20] See Pollock and Maitland, History of English Law (1899), vol. II, pp. 369-372 and also *Re Marriage Legislation in Canada*, [1912] A.C. 880, at p. 887.

proxy in England being upheld there, as the wording of these Acts seem to require the personal presence of the parties at the ceremony.

In the United States however, it appears that the more correct historical view has been followed as the American courts take the position that the English common law imported into the American Colonies at the time of their foundation recognized the validity of a marriage *per verba de praesenti* without any religious ceremony.[21]

Howery in his article[22] on this question considers the common law and the statutory law of each of the states of the Union and indicates that in a number of the states common-law marriages are to this date recognized as valid. It is true that in most of these American states there are also statutory provisions for solemnizing marriages but the opinion is that these statutory provisions do not take away the right to marry at common law unless the statute expressly states that a common-law marriage is invalid.[23]

Having considered both the common law and the statutory law of each state, Howery[24] concludes that wherever common-law marriages are recognized there exists the possibility that a proxy marriage may be held valid if celebrated in that jurisdiction, provided that consummation subsequent to the marriage is not required as an essential factor to the marriage.

Howery also believes that a valid marriage by proxy can be entered into under the statutory requirements of the many states by applying the law of agency. He concludes that there is need for legislation on the question as in his opinion the matter cannot be adequately solved by judicial determination.

In Canada, it has been held that Lord Harwick's Act, which required that a marriage in order to be valid be performed before a minister and two witnesses, was introduced into Ontario by the Act of 1792,[25] which provided that in all matters of controversy over property and civil rights resort should be had to the English law.[26]

Despite the view that common-law marriages are invalid in Ontario, it is also held that where a man and woman are proved to have lived together as man and wife over a long period the law

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[21] Cf. *Wolfenden* v. *Wolfenden*, [1946] P. 61.

[22] *Ante*, footnote 3.

[23] See Lawyer's Reports Annotated (1915), pp. 17-20 and 58 Am. L. Rev. at p. 283 for those states in which common-law marriages are recognized.

[24] *Ante*, footnote 3, at p. 64. [25] 32 Geo. III, c. 1.

[26] See *O'Connor* v. *Kennedy* (1887), 15 O.R. 20.

will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage.[27]

The question of whether a marriage could be celebrated by proxy under the common law prevailing in Ontario seems to be somewhat dubious. On the other hand, it seems entirely possible that a valid marriage could be celebrated by proxy pursuant to the provisions of the Ontario Marriage Act[28] by applying the law of agency thereto, provided that the parties to the marriage subsequently lived together. Section 44 of the Ontario Act indicates that if the parties have after the solemnization of the marriage lived together and cohabited as man and wife the marriage will be deemed a valid marriage, notwithstanding that the person who solemnized the marriage was not authorized to do so and notwithstanding the absence of, or any irregularity or insufficiency in the publication of banns or the issue of the license or special permit.[29]

This contrasts with the provisions of the Nova Scotia Marriage Act,[30] which makes marriage entered into, without complying with the conditions of solemnization prescribed in it, absolutely null and void. It would seem therefore, that in any province where there is marriage legislation similar to the Marriage Act of Ontario, a proxy marriage may be validly contracted by applying the law of agency, provided that the parties to the marriage later lived together as man and wife. On the other hand, it would seem that in those provinces where marriage legislation is similar to that of the province of Nova Scotia, a marriage could not be celebrated by proxy and hope to obtain recognition in other common- law jurisdictions.

It is submitted that as some judges would feel that participation in a marriage ceremony is an act so personal that it cannot be delegated, they would hold proxy marriages invalid in jurisdictions having legislation similar to that of Ontario. This would seem to point to the need of positive legislation on this matter declaring such marriages to be either valid or invalid if contracted in the common-law provinces.

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[27] *Re Sheppard* (1904), 1 Ch. 456; see also 43 N.B.R. 154.

[28] R.S.O., 1950, c. 222.

[29] See also R.S.B.C., 1948, c. 201, s. 15 and R.S.N.B., 1952, c. 139, s. 12 (4), but s. 14(1) of the latter Act requires personal presence of both parties. Note also that in Newfoundland the absence of witnesses is not fatal to validity: R.S.N., 1952, c. 160, s. 3.

[30] R.S.N.S., 1954, c. 269, s. 11.