DOMESTIC RELATIONS — COMMON LAW MARRIAGE — APPLICATION OF ENGLISH LAW TO COLONY — NEW BRUNSWICK MARRIAGE ACT, R.S.N.B., 1952, c. 139 — NECESSARY INTENTION.

The Marriage Act of New Brunswick[1] sets out a procedure by which a valid marriage may be contracted. It is clear that a marriage performed here in accordance with the Act will be valid in form, but there is no provision specifically invalidating a marriage which has not been performed in conformity with its terms. There is then a question whether conformance to the terms of the Act is essential to contracting a valid marriage in this province. The question does not appear to have come directly before the New Brunswick courts.

If an alleged marriage has not been solemnized in conformity with the Act, any validity it has must be derived from the common law. The nature of the ceremony required to contract a marriage at common law was "involved in much obscurity".[2] While it is not necessary for the purposes of this note to determine precisely what these requirements were, the principle of common law marriage must briefly be examined as it existed in England and in the colonies. It will then be necessary to determine whether this principle continues to exist in New Brunswick in the face of the Marriage Act.

The mere fact that two people agreed to, and did live together as man and wife was never sufficient to constitute a marriage under English law. Marriage, under English law, was defined as the voluntary union of one man and one woman for life, to the exclusion of all others.[3] To enter into such a union the common law required, as a minimum formality, that the parties agreed to be married in the presence of a minister in holy orders.[4] The English Marriage Act of 1753[5] provided that only an episcopally ordained minister could solemnize marriage. The result of combining this statutory provision with the common law requirement is to require all marriages to be solemnized before an episcopally ordained clergyman. This conclusion was reached by the House of Lords in *R. v. Millis*[6] where a marriage solemnized in Ireland before a Presbyterian Minister was held to be invalid.

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1 R.S.N.B., 1952, c. 139.
2 *R. v. Millis* (1843-44), 10 C. & F. 532, *per* Tindal, C.J., at p. 654; 8 E.R. 844, at p. 899.
3 *Hyde v. Hyde & Woodmansee* (1866), L.R. 1 P. & D. 130.
4 *R. v. Millis* (1843-44), 10 C. & F. 532, *per* Tindal, C.J., at p. 654; 8 E.R. 844, at p. 899.
5 26 Geo. 2, c. 33.
6 (1843-44), 10 C. & F. 532; 8 E.R. 844.

The law as expressed in *R. v. Millis* has been restricted by subsequent decisions to England under the principle that only such portions of English law apply to the colonies as are suitable to their situation and conditions. Dr. Lushington, in *Catterall v. Catterall,*[7] held a marriage performed in New South Wales was a valid common law marriage, despite the fact that it had been solemnized before a Presbyterian Minister contrary to a local statute similar to the English Marriage Act. This decision has been approved by both the English Probate, Divorce and Admiralty Division[8] and by the Privy Council.[9] Consequently, whatever the statutory requirements for a valid marriage in England may be, in the colonies the law may be thus stated:

> A valid marriage may be contracted in any place abroad where the English common law prevails, if celebrated in accordance with that law, provided that the local law is inapplicable or cannot be complied with or does not invalidate such a marriage.[10]

Of the three conditions in the proviso in the quotation, the first two would seem inapplicable in New Brunswick. It would now be practically impossible to support the validity of a marriage on the ground that the local Marriage Act did not apply. Similarly it would be extremely difficult, if not impossible, to show that it was impossible to comply with the Act. The main consideration in determining whether the principle of common law marriage applies here is: does the Marriage Act invalidate any marriage performed in the province which does not conform with its provisions? An affirmative answer must be given to this question only if the Act specifically or by necessary intent leads to this result.[11] The New Brunswick Marriage Act contains no express provision rendering any marriage invalid.[12] The existence of the principle of common law marriage depends, therefore, upon the necessary intent of the Act.

Conformity with the Marriage Act as a condition of solemnizing a marriage came obliquely before the New Brunswick court in *Currie v. Stairs.*[13] The action was for slandering the character of a married man; the defendant pleaded that the plaintiff was not married by a clergyman properly qualified under the Marriage Act and was therefore not a married man. Allen, C.J., held that

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7 (1847), 1 Rob. Ecc. 579; 163 E.R. 1142.
8 *Wolfenden v. Wolfenden,* [1946] p. 61.
9 *Isaac Penkas v. Tan Soo Eng.,* [1953] A.C. 304.
10 Halsbury's *Laws of England,* 3rd ed., vol. 19, s. 1317, at p. 810.
11 *Wylie v. Paton,* [1930] 1 D.L.R. 747; see also *Penner v. Penner,* [1947] 4 D.L.R. 829; *Gilham v. Steele,* [1953] 2 D.L.R. 89.
12 R.S.N.B., 1952, c. 139.
13 (1885), 25 N.B.R. 4.

there was undoubtedly a marriage *de facto* but went on to state that anyone impeaching the validity of the marriage must discharge the onus of rebutting the presumption in favour of its validity.[14] The only defects alleged in this case were formal and it may be inferred, though it was not decided, that had the formal defect, a failure to comply with the Act, been proved the marriage would have been invalid. The reasoning of Allen, C.J., suggests that even at this early date (1885) the court considered conformity with the Act to be essential. Proof of the *de facto* marriage before any minister in holy orders would have been sufficient to solemnize a valid common law marriage and the question of the Minister's coming within the Act would have been immaterial if such a marriage was valid.

The effect of a statute similar in terms to the New Brunswick Act came before the Court of Appeal of Saskatchewan in *Wylie v. Paton*.[15] There the court held that failure to comply with section 3 of the Marriage Act of that province did not render the marriage void. That section[16] states that:

> No marriage commissioner shall solemnize marriage unless the parties to the intended marriage produce to him the license provided for by this Act; and no minister or clergymen or other person authorized to perform the ceremony of marriage shall solemnize marriage unless the parties to the intended marriage produce to him such license or unless the intention of the parties to marry has been published . . .

No provision was made in the Act specifically invalidating a marriage not solemnized in conformity with the Act, and none of the penalties set out for violation of the Act were directed to the parties to the marriage. Haultain, C.J.S., said:

> In the present case the Act under consideration, while prohibitive, does not declare a nullity or penalize the parties to the marriage . . . On the highest grounds of public policy, all legal presumptions are in favour of the validity of a marriage. I would therefore hold the marriage in question not invalid.[17]

The New Brunswick Act is, like the Saskatchewan Act, prohibitive, but does not declare a nullity. The only penalty provided in the Act is set out in section 30:[18]

> A person who violates any provision of this Act is guilty of an offence, and liable to a penalty of not more than one hundred dollars.

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14 *Ibid.*, at p. 9.
15 [1930] 1 D.L.R. 747.
16 R.S.S., 1930, s. 188, s. 3.
17 *Wylie v. Paton*, [1930] 1 D.L.R. 747, at p. 752.
18 R.S.N.B., 1952, c. 139, s. 30.

In view of the fact that the prohibitions in the Act seem to be directed to persons solemnizing the marriage, and not to the parties to the marriage, the statement by Haultain, C.J.S., quoted above would seem to apply with equal force to the New Brunswick Act.

The New Brunswick Act, however, contains three sections which were not included in the Saskatchewan Act interpreted in *Wylie v. Paton*. The first provides that, a marriage shall not be solemnized between parties, one of whom is under eighteen, without consent as specified in the Act, "provided that lack of such consent . . . shall not invalidate a marriage":[19] This last provision suggests that the effect of non-conformance with the Act renders the marriage invalid. The second and third sections not included in the Saskatchewan Act provide that marriages not solemnized under the Act may in certain cases be deemed valid,[20] or if "solemnized in good faith and in ignorance of the requirements of the law by a clergyman who was not at the time duly authorized to solemnize marriage"[21] may be validated by Order in Council. These provisions would be unnecessary if common law marriages were intended to be recognized as valid. It appears, therefore, that the necessary intent of the Act is to restrict marriages to those solemnized or subsequently validated under its terms. This approach is in accord with that taken by the British Columbia Court of Appeal. In *Gilham v. Steele*,[22] that court dealt with the effect of the British Columbia Marriage Act upon a marriage solemnized by a clergyman who was not registered under the Act. The Marriage Act there contained a provision,[23] similar to section 27(1) of the New Brunswick Act, whereby such a marriage could be validated; the court held the marriage void since it had neither been solemnized nor validated under the Marriage Act. O'Halloran, J.A., disposed of the question as follows:[24]

> It appears this deficiency could have been easily cured under s. 37(1) of the Marriage Act . . . and the solemnization of the marriage thereby made "valid and lawful". Since this was not done it seems to me . . . the provisions of the Marriage Act lead to the unavoidable conclusion that the marriage was invalid and unlawful and in the result a nullity ab initio.

In separate judgments, Robertson, J.A., and Bird, J.A., gave reasons similar to those stated by O'Halloran, J.A. The conclusion which was found "unavoidable" by the British Columbia Court of

19 *Ibid.*, s. 6.
20 *Ibid.*, s. 26.
21 *Ibid.*, s. 27.
22 [1953] 2 D.L.R. 89.
23 R.S.B.C., 1948, c. 201, s. 37(1).
24 *Gilham v. Steele*, [1953] 2 D.L.R. 89, at p. 90.

Appeal would seem to be equally so under the New Brunswick Marriage Act, with the result that only marriages performed in accordance with, or subsequently validated by the terms of the Act, are valid in New Brunswick.

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REAL PROPERTY — CONCURRENT OWNERSHIP — TENANCY BY ENTIRETIES — PROPERTY ACT, R.S.N.B., 1952, c. 177, s. 19 — MARRIED WOMAN'S PROPERTY ACT, R.S.N.B., 1952, c. 140, s. 2(c) — INTERPRETATION ACT, R.S.N.B., 1952, c. 114, s. 38(13).

Today we ordinarily hear of only two types of concurrent ownership in land: tenancy in common and joint tenancy. However, the common law knew two other types of concurrent ownership: tenancy by entireties and coparcenary. Coparcenary was the descent of land on intestacy in the absence of a male heir to several daughters as co-heirs. This form of tenure has now vanished because of its inconsistency with the provisions of the Devolution of Estates Act.[1] But tenancy by entireties raises more difficult problems, and the purpose of this note is to consider whether or not this old form of common law tenancy has also, in effect, been abolished by provincial legislation.

Tenancy by entireties was peculiar to the marital status. If a husband and wife took land in such a way as would make them joint tenants but for the fact that they were married, they were deemed to have taken as tenants by entireties,[2] and this was so even if the land were expressly conveyed to them as joint tenants.[3] The interests of the spouses were joint and unseverable; neither spouse could alienate any part of the estate without obtaining permission to do so from the other. Upon the death of one spouse, the other became seised of the whole estate, but during their joint lives, there were, as between husband and wife, no moieties.[4] A tenancy by entireties could exist in any estate, whether in fee, for life, for years, or otherwise.[5]

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1 R.S.N.B., 1952, c. 62.

2 *Green d. Crew v. King* (1778), 2 Wm. Bl. 1212, at p. 1212; 96 E.R. 713, at p. 714.

3 *Pollok v. Kelly* (1856), 6 I.C.L.R. 367.

4 *Marquis of Winchester's Case* (1583), 3 Co. Rep. 1a, at p. 52; 76 E.R. 621, at p. 631.

5 Megarry, *A Manual of the Law of Real Property*, 2nd ed., at p. 261.