ESKIMO NATIVE MARRIAGE—COMMON LAW MARRIAGE—MARRIAGE ORDINANCE—INTESTATE SUCCESSION ORDINANCE.—The recent case of *Re Noah Estate*,[1] or as it is more commonly referred to, the "Eskimo marriage" case remarkably demonstrates the dilemma created by the attempt to apply the sophisticated rules of a highly developed civilization to a primitive society. A great public interest in the case was aroused by the removal of the court twelve hundred miles north to an Eskimo settlement for the purpose of receiving evidence on the nature and aspects of an Eskimo marriage, as distinct from the native custom of "trial marriage". It is suggested that the decision also merits the interest of the legal profession in respect to the learned judge's discussion of the common law marriage.

Briefly, the essential facts of the case were that the Eskimo Noah died in a fire while working in the employ of the government. As a consequence of sizeable insurance coverage and his own savings practices, Noah left a cash estate in excess of $26,000. If the *Intestate Succession Ordinance*[2] was applicable, which as we shall see later was not altogether definite in the learned judge's mind, the problem was who were the beneficiaries thereunder? Was Igah, the eighteen year old girl to whom Noah had been married only by Eskimo custom, his widow or merely his concubine? Was the infant child legitimate? The answer to these questions depended on whether an Eskimo marriage is a valid marriage according to the laws of the Northwest Territories.

A proper understanding and criticism of the decision of Mr. Justice Sissons can only be made on the basis of an appreciation of the law respecting so-called common law marriages. The very term "common law marriage" is today open to misunderstanding in view of the adoption of this phrase by laymen to describe a state of no marriage at all. The legal use of "common law marriage" is a description of a marriage valid by the common law. To determine what constitutes a common law marriage, it is necessary to examine the law of England before Lord Hardwicke's Act of 1753. What constituted a marriage in England prior to that first marriage statute constitutes a common law marriage.

The first essential of a common law marriage is that the parties should take each other for man and wife. Another essential is the presence of a minister in holy orders, meaning a minister who has received episcopal ordination, at the time of the union. The House of Lords in *Regina* v. *Millis*,[3] on an equal division, laid down this latter requirement which has been admitted, although reluctantly, in subsequent cases.[4] Chesire states:

> The rule was thus established that no common law marriage is valid without the intervention of an ordained priest. It is a rule that almost certainly lacks historical justification, but its applicability to English common law marriages cannot now be doubted.[5]

The facts of the instant case do not conform with the requirements for a marriage valid at common law in England in that no minister in holy

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1 (1961-62) 36 W.W.R. 577.
2 R.O.N.W.T., 1956, ch. 53.
3 (1843) 8 E.R. 844.
4 *Beamish* v. *Beamish* (1845) 11 E.R. 135.
5 *Private International Law*, 8th ed. at p. 341.

orders was present at the native ceremony. That this need not be a fatal flaw, however, we shall see in later discussion.

It must first be established that the native marriage is a marriage of a nature recognized by our courts. If this were not so, there would be no need to consider the formalities of a common law marriage, as there would be no marriage at all and the matter would end there. In *Hyde* v. *Hyde*,[6] Lord Penzance delivered his much quoted statement:

> I conceive that marriage, as understood in Christendom, may . . . be defined as the voluntary union for life of one man and one woman to the exclusion of all others.

This definition, quoted in part by Mr. Justice Sissons, has been accepted generally to lay down the essence of marriage for the purposes of the English law. Three conditions are evident: that marriage must be entered into voluntarily; that, as has been interpreted in later cases,[7] it is the intention of the parties that the marriage be for life; and lastly, that it be monogamous. Here the evidence showed that the parties had consented to the union; that the marriage, as distinct from the trial period, was for life; and that Eskimo custom permitted only one wife at the time. Nor was there any question as to the legal capacity of the partners to enter into the union.

Thus the only impediment in the way of recognizing this native marriage as valid by the common law of England was the lack of the presence of an episcopally ordained priest at the ceremony. This formality has been rejected many times as unnecessary in the case of marriages performed abroad, upon the reasoning that only such laws of England are to be applied in another country as are applicable to the conditions and circumstances of that territory.[8] When Christian beliefs are not held by the parties to the union or when it is virtually impossible to obtain the services of such a minister, it is clear that this requirement for common law marriages in England to be valid is not applicable.[9] Thus the Judicial Committee of the Privy Council in 1953 held that a minister was unnecessary to effect a marriage in Singapore between non-Christians in consideration of the facts:

> that in a country such as Singapore . . . priests are few . . . there is no true parochial system, and . . . the vast majority are not Christians.[10]

In Canada also, there has been judicial recognition that the presence of an episcopally ordained priest as a condition to a valid marriage at common law may be inapplicable. Wetmore J. in the *Queen* v. *Nan-E-Quis-A-Ka*[11] made it clear that in his opinion no law of England respecting solemnization of marriages was applicable at that time to the Indian population of the Northwest Territories:

> In the first place are the laws of England respecting the solemnization of marriage applicable to these Territories quoad the Indian population? I have great doubts if these laws are applicable to the Territories in any respect. . . . I am satisfied, however, that these laws are not applicable to the Territories quoad the Indians. The Indians are for the most part unchristianized; they yet

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[6] (1866) L.R. 1 P. & D. 130.
[7] *Nachimson* v. *Nachimson* [1930] P. 217.
[8] See, *Northwest Territories Act*, R.S.C. 1952, ch. 331, s. 17.
[9] *Wolfenden* v. *Wolfenden* [1946] P. 61 (China).
Catterall v. *Catterall* (1847) 163 E.R. 1142 (New South Wales).
[10] *Isaac Penhas* v. *Tan Soo Eng* [1953] A.C. 304 at p. 309.
[11] (1885) 1 Terr. L.R. 211.

> adhere to their own peculiar marriage custom and usage. It would be monstrous to hold that the law of England respecting the solemnization of marriage is applicable to them.[12]

On the other hand, Scott J. in *Re Sheran*[13] made it clear that where the facilities for solemnization existed and were convenient to the parties, some form of solemnization was necessary for the marriage to be upheld.

In *Re Noah Estate*,[14] the circumstances are such that one could not expect an episcopally ordained minister to have been present. The nearest Anglican priest was 120 miles south of the settlement where Noah and Igah lived and nearly impassable mountains separated the territory between the priest and the settlement. Furthermore, the Eskimos are not conventional Christians in that apparently they see little need for Christian marriage ritual. Thus, in light of the circumstances, the native marriage of Noah and Igah contained the necessary elements to be recognized at common law as a valid marriage.

The laws of England as of July 15, 1870 were introduced to the Northwest Territories. The English statutes as to solemnization, beginning with *Lord Hardwicke's Marriage Act* of 1753, were not extra-territorial in effect; in any case, they could not be considered as applicable to the circumstances of the untamed Territories. Therefore with the introduction of English law, the position in the Northwest Territories in respect to marriages was that of the common law. The critical question in the instant case was whether the law relating to marriages had been altered, or more specifically, whether the *Marriage Ordinance*[15] had invalidated the common law marriage?

It was in answering this question that a certain confusion was evidenced. Firstly, Mr. Justice Sissons attempted to get round the perplexing *Ordinance* by demonstrating how closely the native customs came to meeting its requirements. Clearly however, there was not compliance with the *Marriage Ordinance*. Secondly, the learned judge leads one to believe that the *Marriage Ordinance* will not be permitted to take away rights now vested in the Eskimos as to their marriage customs. He reasons that it is against the *Canadian Bill of Rights*[16] for Parliament to authorize by the *Marriage Ordinance* the invalidation of native marriage customs without an express pronouncement to that effect. It is suggested that this line of reasoning is not only irrelevant but wrong in part and muddles the decision.

In the first place the vested rights of the Eskimos, in so far as their marriage rituals are concerned, need not be considered. So long as the native marriage was a marriage recognized by English courts, and all the requirements of common law were met, then the question is whether a common law marriage is valid in the Northwest Territories. It is not whether an Eskimo marriage, as distinct from a marriage at common law, is valid. This distinction may be better appreciated by pointing out that had there been no intention that the marriage be for life, a question with which Mr. Justice Sissons was concerned to take evidence, the union probably could not have been upheld as a valid marriage,

12 *Ibid.* at p. 215.
13 (1885) 1 Terr. L.R. 83.
14 *Supra*, footnote 1.
15 R.O.N.W.T., 1956, ch. 64.
16 *Statutes of Canada*, 1960, ch. 44.

notwithstanding that it may have been the Eskimo custom for their marriages to be of such a nature. It is submitted that on the particular facts of the case under review, an Eskimo marriage need be considered only in so far as it conformed to a valid marriage at common law. Even if distinct Eskimo rights were in question, it is difficult to construe any special protection to them in an examination of the fundamental rights and freedoms to be protected by the *Bill of Rights*.

The argument of counsel as to the effect of the *Ordinance* was quoted:

> *Nowhere in this statute*, either, *can one find a specific paragraph* stating, in so many words, *that a marriage based on the common-law, or a consensual marriage, or a marriage such as we have in the case*, is, by the mere fact of the parties having failed to comply with the licensing and other provisions of the Ordinance, *thereby ruled null and void or invalid*.[17]

This argument is decisive in answering whether a common law marriage is invalidated by the *Ordinance*, yet a coherent and logical use of its reasoning was not made and the judgment suffers thereby.

It was long ago laid down by Dr. Lushington in *Catterall* v. *Sweetman*[18] that unless there be words in a marriage act expressly creating a nullity, an implication of nullity will not suffice to invalidate the marriage. In that case a marriage, purported to have been made under the authority of the Colonial Act of New South Wales, was held not to be invalid by reason of non-compliance with its provisions, there being no words expressly creating a nullity. In his judgment, Dr. Lushington expressed two conclusions:

> First, so far as my research extends, it appears that there never has been a decision that any words in a statute as to marriage, though prohibitory and negative, have been held to infer a nullity, unless that nullity was declared in the Act. Second, that, viewing the successive Marriage Acts, it appears that prohibitory words, without a declaration of nullity, were not considered by the Legislature as creating a nullity, and that this is a legislative interpretation of acts relative to marriage.[19]

This opinion of the famous Dr. Lushington has been heavily relied upon in at least two Canadian cases. Chief Justice Haultain in *Wylie* v. *Paton*[20] employed the reasoning to uphold a marriage in which *inter alia* there had been no publication of banns, for which the Saskatchewan statute provided a penalty but no nullity. Mr. Justice Egbert in the case of *Hobson* v. *Gray*,[21] relying upon the same opinion, upheld an "under-age" marriage on the ground that the parties were of an age capable of contracting a valid marriage at common law. Nullity was not to be implied where the provincial solemnization act did not expressly attach nullity to the absence of consent, as the Legislature might competently have done.[22]

Thus it may be confidently asserted that nullity will not be a consequence of non-compliance with the *Marriage Ordinance* of the North-west Territories, as nowhere do express words state that nullity will result from non-compliance. The marriage of Noah and Igah should be upheld as a good marriage at common law which the *Marriage Ordinance* has not invalidated. The pertinent point is not, as is suggested by Mr.

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17 *Supra*, footnote 1, at p. 596.
18 (1845) 163 E.R. 1047.
19 *Ibid.* at p. 1052.
20 [1930] 1 W.W.R. 216.
21 (1959) 25 W.W.R. 82.
22 *A.G. Alberta & Neilson* v. *Underwood* [1934] S.C.R. 635.

Justice Sissons, that the *Marriage Ordinance* has not abolished Eskimo marriage custom; it is that the common law marriage has not been abolished, and this applies whether such a marriage is contracted by Eskimo or white man.

If this reasoning had been consistently followed without introduction of the confusing question of distinctly Eskimo rights and customs, the problem of whether or not to apply the *Intestate Succession Ordinance* would never have arisen. The succession ordinance, like the marriage ordinance, is a law of the Northwest Territories and of general application.[22] In its interpretation and application there is no room left for the application of distinctly Eskimo customs as to succession. As it was, the learned judge found great difficulty in deciding whether the *Intestate Succession Act* displaced Eskimo custom as to succession. It is of course not difficult to see the problem which confronted Mr. Justice Sissons. In holding that Eskimo marriage rights had not been displaced by the marriage ordinance, to be consistent he would also have had to hold that Eskimo rights as to succession had not been displaced by the succession ordinance. Thus he placed himself in the embarrassing position of having to create an exception for this ordinance to apply.

While one cannot help but share in the evident enthusiasm of Mr. Justice Sissons to uphold the marriage, any gratification over the result is dissipated by the tortuous manner of its attainment. The doctrine of Eskimo rights and their protection by the *Canadian Bill of Rights* need never have been expressed. Once the facts relating to the native marriage had been established, the decision should have been easy. Simply stated, the Eskimo marriage conformed to a marriage recognized as valid at common law, and the *Marriage Ordinance* of the Northwest Territories did not invalidate such a marriage.

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[22] See, *Statutes of Canada*, 1960, ch. 20, s. 2.