EARLY JUDICIAL ATTITUDES TO THE RIGHT TO MARRY IN CANADA AND AUSTRALIA

Synopsis and Introduction

This article is a study of the decisions of Canadian and Australian judges in the earliest reported cases from each country respecting the formal sufficiency of marriages. It considèrs only cases decided in the absence of local legislation, or cases in which such legislation received its earliest judicial application. The Canadian cases span the period 1812-1899; the Australian cases were decided between 1836 and 1880.

While the small number of cases from each country do not always present precisely identical issues of fact and law, the reported jurisprudence does bear comparison. The case law, as it arose in the courts, offered the respective judges an opportunity to pronounce upon the degree to which the values and expectations of the people of the Australian and Canadian communities, respectively, would be recognized and sanctioned as sources of positive law. The conclusion to be formed from the reported case law is that such community values and expectations were afforded a greater role as sources of law—in this field and at this time—in Canada than in Australia.

The specific field of formal prerequisites to marriage was selected for study for two reasons. First, a discrete body of case law exists. And second, this is an area where judicial decisions are relatively immune from economic influences: one major factor often found to affect judges' legal decisions can be discounted. But it is recognized that a host of socio-political factors also may have influenced judges' attitudes towards the propriety of sanctioning such values as sources of law. Hence this article will purport only to record the facts of legal history. The complex reason *why* a legal community affords greater or lesser validity to a set of social values must extend far beyond the bounds of legal academic research.

CANADA

The courts of several Canadian jurisdictions were confronted by a series of cases in the second half of the nineteenth century respecting marriages where the parties failed to comply with requirements of form thought to be required generally by the law of the place of

celebration. Many of these purported marriages were deemed valid nonetheless. None of the Canadian judgments disputed the basic rule that the law of the place of the act will govern the formal validity of marriages. Yet several qualified the basic rule. And the qualification which they attach offers a consistent statement about the place of communiy needs and expectations in the hierarchy of sources of law.

Connolly v Woolrich and Johnson[1] is the earliest case in point. Though a decision of a Canadian civil law court, is was decided upon Canadian common law. It also reflects diligent research upon common law authorities by Mr Justice Monk.

William Connolly was a clerk of the North West Company in the year 1803. He was posted at the shores of Rat River, at an Indian trading post. Rat River is in the present Province of Manitoba, midway between Southern Indian Lake, to the North, and Lake Winnipeg, to the South.[2] He took as his 'wife' a Cree woman described by the Lower Canada Court—disparagingly perhaps—as Susanne Pas-de-nom.[3] Being in 'one of the most remote districts' of his Company's jurisdiction,[4] an area then having no clergy or magistrates[5] within at least 1200 miles,[6] William Connolly married Susanne according to the Cree customs of the locality.

William and Susanne lived together in the Athabaska Territory until 1831. William's Company had been amalgamated by that time with the Hudson's Bay Company and he had prospered, becoming a chief factor and a member of the Hudson's Bay Company Council. The present plaintiff was one of several children born of Susanne by William during the period 1803-1831.

In 1831-1832, William and Susanne resided as husband and wife in St. Eustache, a community now a suburb of Montreal. They came to Montreal in 1832, whereupon William married his second cousin, Julia Woolrich, 'a lady of good social position and of high respecta-

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1 (1867) 11 LC Jur 197 (Lower Canada, Superior Ct, Monk J). The decision was rendered on 9 July, five days before Canadian Confederation and five days before the forum became the Superior Court of the Province of Quebec. The Lower Canada Jurist Reports are available at the New York University Law Library, in Manhattan. Other series of reports also include the judgment—more or less adequately reproduced: cf 3 Can LJ 14; 1 LCLJ 253, and 1 Revue Legale (os) 253.

2 Approximately 58°N, 111°W.

3 11 LC Jur 197, 198.

4 Ibid, 202.

5 Ibid, 224.

6 Ibid, 199: The Red River settlement was 1,200 miles away, York Factory was 2,000 miles distant.

bility'. Susanne, relates Mr Justice Monk, 'felt very sensibly this desertion'; so much so that she was sent to a convent at Red River Settlement to live out her days.[7] Upon William's death in 1849, he left all his property by will to Julia and two children of his union with her. In contesting that will the present plaintiff had to prove the validity of William's marriage to the plaintiff's mother, the Cree woman, Susanne.

Mr Justice Monk undertook a detailed examination of the history of exploration, trade, settlement, and government by English trading companies in the remote Canadian North-West between 1670 and 1830.[8] He assumes, apparently for considerations of public international law, not solely English municipal law, that upon acquisition of the Athabaska region 'by discovery and occupancy' the law of England was transmitted 'and ipso facto in force' in that territory; '*. . . that the discovers and first inhabitants of these places carried with them their own inalienable birthright, the laws of their country*'.[9]

It is worthy of note that Monk J describes the laws received by a settled territory in terms such as those just quoted. This judge was writing about two generations after the cession of civil law Quebec to England, and at the very period when Quebec's unique legal heritage was being secured for its people by both codification of the laws and the formation of Canada as a federal and bilingual nation-state. Perhaps this explains why it could be so self-evident to Mr Justice Monk that European systems of law might be replicated in colonies not out of grand imperial designs, but primarily to make more secure the cultural values of the colonists.

So Mr Justice Monk began by ascertaining the purposes served by extension of the English legal system to British North America. He imputed reasons for the reception of law principle which the classical authorities—of which he was fully aware[10]—all offered simply as an arbitrary rule. Then the judgment continues to the issue at hand:

> Yet they [such colonists] took with them only so much of these laws as was applicable to the conditions of an infant colony. For the artificial refinements and distinctions incident to the property of a great and commercial people, the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a

7 11 LC Jur 197, 200.
8 Ibid, 202-04.
9 Ibid, 204. Emphasis added.
10 Ibid, especially 243-52.

> multitude of other provisions, were neither necessary nor convenient for them, and therefore not in force.[11]

Finding such 'artificial refinements and distinctions' to include English requirements of matrimonial form, Monk J affirmed the validity of the 1803 marriage. So, without deciding whether the realm of the common law necessarily extended to the shores of the Rat River in 1830[12] Monk J is certain that, if it indeed had, the circumstances of so sparsely populated and so ill-governed a territory would require that the law of England be adapted to acknowledge the validity of William Connolly's marriage with the Cree form.

The continuance of a 'birthright' of social values requires an attempt at replication of the English law of the person. But the more pressing need to permit validity for such an essential institution as marriage is recognized to be of greater importance still. No sophistic examination is made of the theoretical possibilities of implementing English-style rules for celebration of marriages. Ink is not expended in this thorough, 68-page opinion searching for the ways in which a 'formal' marriage *might* have been had by the parties in 1803. Being fully appreciative of the social purposes of law, and of the purposes for which English law accepted the reception of law processes, Mr Justice Monk evidenced absolute certainty as to the irrelevance of a sophisticated set of matrimonial rules to this setting. Canadian law so came to admit of the rule-creating role of social necessity in the development of a law of the person.

One well might evaluate the result of Mr Justice Monk's affirmation of the validity of this marriage on other bases. Quite possibly one might establish, upon evidence now available, the absence of jurisdiction over Athabaska by the British Crown or its trading companies in 1803. One then might ponder the Quebec Court's duty under *civilian* conflict of laws rules to recognize the marriage celebrated under the customs of the unconquered Cree Indian nation. But to do so would be beside the point. The importance of *Connolly v Woolrich and Johnson* follows from the natural presumptions voiced by the Canadian Court as to the manner in which it had to proceed in assessing which legal rules regulating marriages would apply to a frontier environment.

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11 Ibid, 204.

12 Ibid, 211-14. It may not have, due to the precise terms of the Hudson's Bay Company's Royal Charter. These provisions are considered at length, 208-11 of the judgment.

The same issue of the extent to which frontier exigencies might be allowed to affect the laws governing forms of marriage received appellate consideration in *Regina v Nan-e-quis-a-ka.*[13]

On trial for assault by the accused Indian, Nan-e-quis-a-ka, the Crown called and sought to compel to testify Indian women whom the accused had married. The supposed marriages followed Indian custom; Nan-e-quis-a-ka had exchanged words of present intent to marry with the women and cohabited with them; all, the Court accepted, as required by Indian usages. But Canadian Statute had transmitted to the North-West Territory (in the usual terms) the laws of England of 1870. The relevant English statute[14] was presumed by the Supreme Court to render a non-formal marriage void.[15]

Mr Justice Wetmore, for the five-judge appellate court, did not find any need to re-examine the ground traversed in *Connolly v Woolrich and Johnson.* He found in the views of Mr Justice Monk ample authority to establish the validity of the marriages before his Court—had they occurred before 1870.[16] Although the reception statute of that date created no exceptions for Indians—alhough the statute reflected the 'modern' conception of law as something purely territorial and not personal—Wetmore J still found the accused Indian and his wives unhindered in celebrating customary marriages by the Territory's law of the person. Looking at English rules for celebration of marriage, he said:

> I have great doubt if these laws are applicable to the Territories in any respect. According to these laws marriages can be solemnized only at certain times and in certain places or buildings. These times would be in many cases most inconvenient here, and the buildings, if they exist at all, are often so remote from the contracting parties that they could not be reached without the greatest inconvenience. 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 adhere to their own peculiar marriage custom and usages. It would be monstrous to hold that the law of England respecting the solemnization of marriage is applicable to them.[17]

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13 (1889) 1 Terr LR 211, per Wetmore J.

14 6 & 7 Wm 4, c 85, (1836).

15 1 Terr LR 211, 213-15, *passim. Sed quaere!* Consider the limitation in s 42, amending antecedent law so as to import nullity only to those non-formal marriages 'knowingly and wilfully' violative of formal requirements. Does 'knowingly and wilfully' require more than simple intent to do the act; does it require knowledge of the statutory requirements of form?

16 1 Terr LR 211, 213.

17 Ibid, 215.

The matter of the exclusion of indigenous populations from the general legal systems is, again, something beyond the scope of this study. It is the first ground for decision which is of interest presently. For although Mr Justice Wetmore, speaking for the full court of the Territorial Supreme Court, had a narrower ground for decision too, he alluded to the social disfunction of English formality requirements for marriage, so as to read them out of the body of law received in 1870.

Certainly the Court would not have been heard in 1889 to say that the North-West Territory had no law of the person; nor would it have been heard to say that its law of the person did not include rules as to the way in which marriage might be contracted. But it clearly conceived of the process symbolized by the 1870 reception statute as one of reason, not fiat. The Supreme Court posited a source of law more immediate than an Ottawa statute as delineating the expectations of settlers as to the regime of social regulation which *ought* to found *their* law of the person.

Two Canadian cases distinguish the line of jurisprudence examined so far. Yet both still accept the role of a people's needs, as they may exist from time to time, as a source of law.

Re Sheran, a decision of Mr Justice Scott sitting at first instance in the Supreme Court of the North-West Territory, was a claim by the 'widow' of the deceased upon his intestacy. The parties (he a white and she a native Canadian) had purported to marry within 30 miles of Lethbridge in 1874, by the simple exchange of words of present intent to become husband and wife.

Scott J held the claimant's purported marriage to the intestate void in law. He was fully prepared to admit that a marriage such as this would be valid under certain conditions, as where the 'barbarous' character of life rendered compliance with formal requirements impossible. But such he said, was not the case before him, for civil marriage celebrants were available within a day's journey of the parties. Justices of the peace, having statutory competence to solemnize marriages, had sat at Lethbridge since 1873.[18]

The reasoning of *Re Sheran* necessarily reflects a fluid view of the process by which an English-style law of the person was founded in Canada. A federal statute had declared the law of England to apply in the North-West Territory as of 1870. Yet Mr Justice Scott would not have required compliance with aspects of it concerning the law

18 4 Terr LR 83, 90-91.

of the person until some time in 1873. Thereafter, one had to celebrate a marriage in accordance with statutory 'law' for it to be valid. Prior thereto, one did not. Scott J thus must have accepted, in the spirit of *Connolly v Woolrich and Johnson,* that the 'birthright' of living by a familiar law of the person inured in the settlers of the Canadian frontier, for supra-legal reasons of community expectation. Only when actual social circumstances (such as the establishment of an adequate magistracy) rendered reasonable such expectations as to how marriage *ought* to be contracted were expectations converted into law. Only then did *ought* become *must.*

A final Canadian decision distinguishing *Connolly v Woolrich and Johnson* requires consideration.

Robb v Robb[19] also arose upon an intestacy. The claimant was born of the union of a white father and a Comox mother. They had married in British Columbia in 1869 'or thereabouts', the Court relates, pursuant to Comox custom. That is to say, the deceased gave his 'wife's' father 20 dollars in half-dollar coins and cohabited with her.[20] Robertson J decided in favour of the claimant by applying the general presumption in favour of a child's legitimacy. As the evidence tendered was fragmentary, he deemed it 'quite possible' that a Christian ceremony of marriage occurred between the parents, either in British Columbia or after their subsequent move to Kingston, Ontario.[21]

Mr Justice Robertson also considered the precedent of *Connolly v Woolrich and Johnson.* The bases upon which he distinguished the latter precedent were two-fold. First, he found significance in the fact that the colony of British Columbia enjoyed responsible government in 1869. Second, he 'presumed', in the absence of any evidence at all of geographic, social or political conditions in the region where the parties found themselves in 1869, that they *could* have reached a legally-qualified marriage celebrant, had they tried.[22]

In view of the actual basis for decision, this consideration of *Connolly's* case certainly is just *obiter dictum.* But its significance lies in the fact that Robertson J still accepted that requirement of general application might still be inapplicable if circumstances of dire necessity could be established. That is to say, it is still accepted that the legal system necessarily grants people the right to undertake juridical

19 (1891) 20 OR 591 (Robertson J).
20 Ibid, 592.
21 Ibid, 598-99.
22 Ibid, 595-96.

acts deemed essential by the society—eg contracting marriage—in some realistic fashion.

To reiterate, the nineteenth century Canadian case law consistently recognized the basic community expectation, that men and women might always find it possible to contract a lawful marriage, as a primary source of law. It was deemed primary in that the Canadian jurisprudence consistently admitted that it might, in appropriate circumstance, create exceptions to applicable statutory requirements as to the forms which might be used to contract marriage.

AUSTRALIA

One very early case from New South Wales displays a similar attitude to that of the nineteenth century Canadian courts towards the law-creating role of community expectations respecting forms of marriage. This is the judgment of Sir Francis Forbes CJ in *Regina v Maloney*.[23] It stands in stark contrast to the attitude respecting this potential source of law shown in all other cases in this field decided in the Australian colonies in the century prior to federation.

Regina v Maloney was an appeal from a bigamy conviction. The question of the accused's guilt rested upon the validity of the first of the two marriages he had purported to contract. Forbes CJ speaking for a two-to-one majority in the full court of the Supreme Court of New South Wales, affirmed the accused's conviction for bigamy. He rejected the accused's defence that an English statute in 1824,[24] rendering null marriages not in the forms and chapels of the Church of England, had the effect of invalidating the accused's first marriage. That marriage was celebrated in a Roman Catholic rite in New South Wales. The Court advanced lawyer-like grounds for its decision. An unreported decision rendered by Sir Francis Forbes on the same issue in 1812, while Chief Justice of Newfoundland, was cited.[25] The provisions of the Act anticipating the existence of regular ecclesiastical boundaries, buildings and bishops were cited to support the theory that Parliament at Westminster could not have intended the 1824 Act to apply beyond Britan itself.[26]

But the Chief Justice also found other reasons for affirming the validity of the first marriage. His starting point in legal analysis was

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23 (1836) Legge 74 (FC).
24 4 Geo 4, c 76, s 22.
25 Robinson v Gibbs.
26 Legge 74, 78-79.

that, ' . . . all unnecessary impediments to this union of the sexes [a reference to lawful marriage], are innovations upon the *rights of mankind,* and become injurious to the *interests of society.*'[27] While Sir Francis Forbes clearly treated the question of marital formalities as one to be decided on the basis of statutory law, he thus also evidenced a predisposition to find that law in accord with general social practices in the community. Note these references (see in italics above) to *a priori* 'rights of mankind' and 'interests of society'. Perhaps there is even some cause to suspect that, had it been necessary in the circumstances, Forbes CJ might have found these alone to be adequate grounds to affirm the legal validity of Roman Catholic marriage ceremonies in early New South Wales.

Three New South Wales cases which arose in the nineteenth century related to matrimonial requirements of form imposed by local statute. All might have offered opportunities for reflection upon the role of community custom as a source of law. But in only one of these cases was this done—and even then only in a minority judgment. That sole case was the earliest of the three, *Regina v Roberts.*[28]

Roberts' Case too was a bigamy prosecution. The accused's second marriage had been performed by a Presbyterian minister. But Roberts had not first executed a written declaration of his membership in that sect as required by the Colonial statute which then regulated marriages by the local Presbyterian clergy.[29] The members of the full court voted unanimously (though for different reasons) to affirm Roberts' conviction. The narrow *rationes decidendi* of Stephen CJ and Therry J were founded upon the proposition that the invalidity of the second ceremony of marriage did not afford any defence to the crime. Only Dickson J, following *Regina v Maloney,* found the ceremony sufficient to create a marriage despite the local Act.

The minority concurring judgment of Mr Justice Dickson began by reviewing the purposes of legal interventon in the subject area, in New South Wales in 1850. He said:[30]

> Admitting, as every Christian is likely to allow, and every decent woman will certainly insist, that in all communities it is desirable that regulations should be made for the prevention of clandestine marriages, and believing that the generality of mankind will always desire to perform that contract with the solemnities of

27 Ibid, 77-78. Emphasis added.
28 (1850) Legge 544 (FC).
29 5 Wm 4 (NSW) No 2, s 2 (1835).
30 Legge 544, 570-71. Emphasis as in the original.

> religion, the question is whether the natural law should be restrained, and those most desirable objects be effected in this colony according as they originally were in England by the ordinances of Edmund and Lanfranc. I am clearly of opinion that the Court ought not to adjudicate that the marriage law of England, which was founded on those ordinances, is applicable to the circumstances of this colony. For, on consideration of the statute of 9 Geo. IV., c.83, sec. 24, I think this Court can only declare such portions of English law applicable to this colony, as the Colonial Legislature would declare to be applicable by *ordinances to be by them for that purpose made.* I am satisfied that the Legislature of this colony (representing a community comprising Roman Catholics, Hebrews, and persons professing the opinions of the Church of England, and other Protestant religionists), would not and ought not at this advanced age of the British Empire, in a colony where there is no Church established as in England to declare applicable to its circumstances and condition a marriage law, which originated in the circumstances of England 900 years ago, when the whole population professed the Roman Catholic religion; a law which was found so inapplicable to the condition of England after the Reformation, that a marriage by a deacon of the Church of England came to be considered as effectual, as one celebrated by a priest of the Church of Rome; a law which was so offensive to the feelings and consciences of Protestant Dissenters, and caused such heart-burnings and excitement in England, that the British Legislature virtually declared it inapplicable to the condition of Great Britain and Ireland in these times by enacting the recent statutes for the registration of births, deaths and marriages; a law which the legislature of this colony, by enacting the local law 5 Wm. IV, No. 2 (the draftsman of which evidently imagined that the English Marriage Laws were in force here), has shown to be inapplicable to New South Wales; a law which would compel every Methodist, Quaker, and Jew, to be married (unless his case could be brought within the 5 Wm. IV, No. 2) by a clergyman of either the Church of Rome or England. Such a law is, I think, too inconsistent with the religious equality existing in this colony, to be by us adjudged applicable to its condition.

On this matter of formal prerequisites to marriage, Dickson J shares the view of his contemporaries then sitting in Canada as to the hierarchy of legal sources. Unlike his fellow judges in *Regina v Roberts,* he is seen to give primacy to the matter of what society requires in a law about forms of marriage, in passing upon the content of that law.

The second New South Wales case in point was *Regina v Bondsworth.*[31] It was only briefly reported. The judgment, though, is typical

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31 (1854) Legge 870 (FC).

of the Australian courts' attitudes regarding community expectation as a source of law. It too arose in the context of a bigamy prosecution, and concerned the validity of a non-Church of England marriage ceremony conducted in the absence of the declaration of membership in the celebrant's Church required by New South Wales statute.[32]

The sole relevant passage in the Sydney Morning Herald's report of the case, as reproduced forty years later in *Legge's Reports*, explains the validity of the marriage because, in the statute imposing the formal requirement of a declaration of membership in the clergyman's sect, 'there was no declaratory clause as to the absence of all previously existing power to marry, even if such a clause could have had a practical weight'.[33]

The Court thus seems satisfied to pass judgment in this cause merely upon an examination of the statutes as enacted. No competing legal sources are conceived to exist.

The last New South Wales decision involving local statutory requirements as to the form of marriages arose much later in New South Wales colonial history. The case of *Tyson v Logan, falsely called Tyson,*[34] also arose in the context of a statute passed in 1856,[35] in modification of the older enactments passed upon in the cases just discussed.[36]

The alteration of statutory form and purpose is of relevance. For whereas the 1835 statute had required a declaration of membership in a sect other than the Church of England before a clergyman of such a sect might marry one of its adherents, the succeeding Act of 1856 required of all a declaration that they laboured under no impediment to their respective contemplated marriages, such as consanguity, absence of consent, or a prior existing marriage. This then was the prelude to *Tyson v Logan, falsely called Tyson,* when the full court of the Supreme Court of New South Wales had to pass upon the validity of a Roman Catholic marriage, contracted in the absence of the declaration required by statute.[37]

Three separate judgments were given; still, the reasoning of the Chief Justice, Darby CJ, was adopted in the opinions of his colleagues on the full court bench, Innes and Stephen JJ. Mr. Chief Justice

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32 5 WM 4 (NSW) No 2 (1835).
33 Legge 870, 870.
34 (1891) 12 LR (NSW) (D) 29 (FC).
35 Marriage Act 19 Vict (NSW) No 30 (1856).
36 5 WM 4 (NSW) No. 2 (1835).
37 19 Vict (NSW) No 30.

Darby first noted precedents in English black-letter law to the effect that only direct statutory words ought to lead a court to interpret matrimonial requirements of form as mandatory, and import nullity for non-compliance.[38] However, he reasoned, the New South Wales Act then in force seemed to him to have imposed the declaration requirement in lieu of the posting of banns, and English decisions had deemed null any marriages celebrated without banns having been posted. Thus Darby CJ felt it appropriate to read literally those sections of the statute of 1856[39] making the declaration at issue a precondition to marriage.[40]

It is true that the full court in *Tyson v Logan, falsely called Tyson,* was passing upon an enactment the very words of which suggested a legislative intent to make void such informal marriages. It still can be noted, though, that the judges took no cognizance whatever of the purpose served by the text of law. Surely the examination of the role served in the society of New South Wales in the late nineteenth century by the posting of banns *might* have played a part in the decision of the case.

South Australia's early case law offers two causes worthy of note. The first in time, *Re Warren,*[41] is noteworthy for what it does not say; *The Queen v Green,*[42] decided by the Colonial full court some ten years later, is of interest due to the approach adopted by the South Australian bench.

Re Warren was a bigamy prosecution. The officiant at the second marriage was a Church of England minister whose name was not entered on the registry of authorized celebrants as required by local statute.[43] But the minister's name was mistakenly gazetted as being on the registry and the South Australian *Marriage Act* made the Gazette entry determinative.[44] The full court, of two judges, was content in its page-and-a-half opinion to hold that the Government Gazette had made the minister ' . . . what he was not, namely, on the roll as an officiating minister'.[45]

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38 12 LR (NSW) (D) 29, 31.
39 Ss 2, 4, and 5 of 19 Vict (NSW) No 30.
40 12 LR (NSW) (D) 29, 33-36.
41 (1870) 4 SALR 25 (FC) per Gwynne J.
42 (1880) 12 SALR 10 (FC). Three opinions were delivered.
43 Marriage Act No 15 of 1867 (SA) ss 9-10. Recourse has been had to the copy of the sessional acts in the collection of the Barr Smith Library of the University of Adelaide.
44 Ibid s 13.
45 4 SALR 25, 26.

Contrast *The Queen v Green*.[46] It too was a bigamy case. The wife's first marriage was in the Church of England form, unquestionably valid in all respects—save that the woman and her first husband were not asked by the priest in the words required by local statute[47] then in force whether, in the presence of named witnesses, they intended to take each other as man and wife. Mr Chief Justice Way and Mr Justice Gwynne found the traditional Anglican ceremony to comply with the bare requirements of the local Act. But it is other bases advanced for affirming Green's conviction which warrant interest.

Boucaut and Gwynne JJ, each noted English precedent to the effect that courts ought to favour those legalistic avenues leading to the affirmation of the validity of marriages, and concluded section 29 of the local *Marriages Act* thus to be merely directory.[48] Mr Chief Justice Way, however, in addition to evoking that easy 'out',[49] also delivered himself of the following remarks:[50]

> I address myself to the construction of that Act with the conviction, that, if the Legislature had intended to pass a law which would be so offensive to so large a section of the community as embracing the members and adherents of the Church of England, as the introduction of a change in its ritual would be, I should find that intention of the Legislature expressed in clear and positive words.

In contrasting the several judgments in the two South Australian cases, one is left with the impression that in all of the reasons for judgment—save those of Way CJ, in *The Queen v Green*—the various judges approached issues respecting formal prerequisites to marriage as technical and abstract issues of law. No attempts appear in the judgments to appreciate the social implications of legal rules, and hence to understand better the scope of such rules. This seems to typify the approach to like issues by the New South Wales Court too.

The judgment of Mr Chief Justice Way in *The Queen v Green* and the judgment of Mr Chief Justice Dickson in *Regina v Roberts* differ significantly. Both accepted that legislation, be it Imperial or local, *had* to be interpreted in a fashion commensurate with basic community expectations as to the way in which people might marry. Like the Canadian cases of the era examined previously, and in

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46 (1880) 14 SALR 10 (FC).
47 Marriage Act, No 15 of 1867 (SA), s 29.
48 14 SALR 10, 16-17 and 17 respectively.
49 Ibid, 20.
50 Ibid, 19-20.

contrast with the other contemporary Australian judgments, these two judges appear to accept the authority of basic community values and expectations as sources of law in their own right.

CONCLUDING REMARKS

The history of the reception of English law in Australia and in Canada was adequately chronicled long ago. Hence there is little point at this time in once again methodically determining what exact criteria for the applicability of English law can be distilled from the multitude of otherwise irrelevant judicial decisions.

If the early history of colonial courts and their law-making function is to be studied purposefully, the legal and social historians will have to join forces. One suspects that the record of early adjudication only can be fully understood if studied alongside the social factors which cause judges in any historic circumstance to impute various values to aspects of the legal regulation of society.

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