

The Marriage License

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History of the Marriage License

Since a license is permission granted by an authority to do a task that otherwise, that is, without the authority given, would be illegal, the marriage license can be traced back to the first marriage. When God gave Adam and Eve permission to marry, this was their verbal license to do so. Without the authority of God their marriage would have been wrong. Later, God granted His authority for a couple to marry through His family representative, the Patriarch, or father. In Scripture, marriage was the uniting of two families in a covenant approved by the fathers, the ecclesiastical authorities, and by God.

Actual state licensing of marriages came when certain ecclesiastical groups, mostly of the Roman Catholic faith, controlled the church and family laws of a country. The Council of Trent, 1545-1563, determined to pass decrees “as an effective means of stemming the tide of Protestantism.”¹ “Clandestine marriages were by new law made invalid.”² The United States Supreme Court, in *Hallett v. Collins* stated:

“The Council of Trent... required that marriage should be celebrated before the parish or other priest, or by license of the ordinary and before two or three witnesses.”³

This law would not hinder people from marrying with a civil license. The court stated, “This decree did not effect the civil relations of the status of persons marrying without regard to its provisions.”⁴ The decree was made to force Protestants and Baptists to cease marrying in their own churches, by their own ceremonies, and to place the marriages under the civil authorities, who were already under Papal authority.

“After the Revolution, when marrying became a civil act in the Netherlands, in 1574, and 1580, the Baptist ceased to marry in their own assemblies, and resorted to the civil authorities.”⁵

“The decree was adopted by the king of Spain in his European dominions, and by other countries ruled by Rome.”⁶ The book on Baptist Martyrs states emphatically that:

“The Baptists on the continent of Europe, at that period, refused to be married by the clergy of the dominant church, but were united before the church of which they were members... This was made a reproach and accusation by their enemies, as if they were encouraging licentiousness, than which nothing could be farther from the truth.”⁷

Two letters written in 1551 between a married couple, both imprisoned for their Baptist faith, show of the reason for their persecution and imprisonment for marrying outside of the Catholic church or its state-run laws. His name was Jeronimus Segerson. His letter to his wife, Lysken Dirks, a fellow prisoner started,

“Grace, peace, gladness, joy and comfort, a firm faith, good confidence, with ardent love to God, I wish my most beloved wife, Lysken Dirks, whom I married in the presence of God and his holy church, and took thus agreeably to the Lord’s command, to be my wife.”⁸

Her response to him is even more revealing as to the attitude of the authorities to their plight.

“My dear husband in the Lord, whom I married before God and his people, but with whom they say I have lived in adultery, because I was not

married in Baal; the Lord saith, 'rejoice when men shall say all manner of evil against you; rejoice and be exceeding glad, for great is your reward in heaven' .”⁹

In England, the licensing of marriages was actually done by licensing the ministers who performed the ceremonies. Several pastors, such as John Bunyan, refused to be licensed by the State-Church, the Church of England, believing that God gave them permission to perform all pastoral duties to their flock, including preaching, baptizing, and marrying. Religious intolerance again was the cause for licensing.

“In England marriage licenses were originally issued solely by the pope of Rome, as head of the catholic church, until by the statute of 25 Henry VIII c. 21, it was provided that they should be issued by the Archbishop of Canterbury under the supremacy of the king. Under the English Marriage Act the issue of special license still remained vested in the archbishop. The common license could not license persons to be married in any other place than the parish church... while a special license issued by the archbishop of Canterbury could license persons to be married at any convenient time or place.”¹⁰

Since the marriages of non-Anglicans could only be permitted by special license, and ministers needed a license from the state to solemnize or perform the wedding, it became more and more difficult for marriages of other faiths. It is even stated in English laws that “the law of England a contract of marriage without due solemnization is null and void,”¹¹ and “all marriages must be performed in a parish church, or in some chapel belonging to the parish.”¹² In the Supreme Court case of *United States Bank v. Dandridge*, the Court stated:

“By the English marriage act, registers of marriage are required to be kept in public books, in every parish, and signed by the parties and the minister, and attested by two or three witnesses.”¹³

Again it is seen in these nations that the religion in power regulated the laws of marriage, the licensing of marriage, and the registration of marriage, all under the auspices of the civil authorities. In other words, a license from the archbishop of Canterbury was actually a state license from the king.

Common Law Marriage Not Common Law

The marriages spoken of above were done according to the ecclesiastical laws of England. The ecclesiastical laws were under the English common law. The American common-law marriage “is basically an American doctrine with but weak ties to early English and European law.”¹⁴ In fact, it has been convincingly argued that “informal or non-ceremonial marriages never were a part of the English common law.”¹⁵ An early English case used to argue the validity of common-law, or co-habitation marriages, *Dalrymple v. Dalrymple* “was actually decided under the law of Scotland, not England,”¹⁶ and “the court was careful to point out that the contrary result would have been reached under English law.”¹⁷ Also, other English cases denying the validity of verbal consent marriages, i.e., persons who simply hold themselves out as married in public, state “that there is ‘grave doubt’ that such informal non-ceremonial marriages were in fact valid at common law.”¹⁸ Based on the fact that English common law was so Biblically based, it would seem logical that the American common-law marriage would

not have been a part of the common law of England. Hence, the true common law marriage would have been typified in a church ceremonial wedding.

Marriage in America

When America borrowed the English common and civil laws, she refused to bring the ecclesiastical laws with them. The ecclesiastical laws included family laws, laws of births, deaths, and marriages. The reason for this was the fact that there was no established church in America with which to decree or carry out ecclesiastical laws. Americans did not desire a state-church, as England had, or a church-run state, as France, Spain, et.al., had. Therefore, many of the ecclesiastical laws were placed under the civil (or statutory) law. This was against the advice of Blackstone, who stated, “The civil law (was) partly of pagan origin.”¹⁹ The result was placing married couples under the civil authorities and not under church authorities. West’s Indiana Law Encyclopedia states:

“The purpose of the statutory characterization of marriage as a civil contract is to place the subject of marriage under the control of the civil authorities to the exclusion of the ecclesiastical.”²⁰

The Law Encyclopedia goes on to state:

“Under this statute marriage is a status founded on contract and is an institution regulated and controlled by law upon principles of public policy. Marriage has been further described as a contract in which the public is interested, and to which the state is a party.”²¹

Since the state civil authorities in this country could no longer place themselves over the churches and pastors, as was the case in England, the only alternative was to place the churches and pastors under state law and state civil authorities. Of course, this had to be done legally and voluntarily. This was done legally by forming a nexus through licensure. The churches’ nexus came in the form of voluntary state incorporation, registration, or both. The pastor’s nexus came in the form of a written license, as many pastors have in the state of Kentucky, or a verbal affirmation of a license, spoken during the ceremony when the minister says, “by the power vested in me by the state of _____, I now pronounce you man and wife.” At this point, he is under the State Statutes much like the archbishop of Canterbury is under the Queen. Is it any wonder that the American Jurisprudence Encyclopedia states:

“A pastor... in the administration of the marriage ceremony, is a public civil officer, and in relation to this subject is not at all to be distinguished from a judge of the superior court, or a justice of the peace in the performance of the same duty.”²²

Civil Marriages’ Achilles Heel

The problem for civil authorities has always been the fact that God-given rights, like marriage, cannot be easily codified or statutized. The reason is that civil law is a law of license, and God’s law is a law of liberty under His guidance. Thus, statutes concerning marriage procedures have always been considered directory, and not mandatory, because “marriage is a thing of common right, and it is the policy of the state to encourage it.”²³ Although some of the following quotes are older cases, all are found in the most recent law digests and encyclopedias, and therefore, are unrepealed and valid. The Meister decision went on to state:

“A statute requiring all marriages... be preceded by a license or publication of banns or be attested by witnesses is merely directory.

Unless the statute prescribing regulations of the marriage ceremony directs that marriages not complying with its provisions shall be deemed void, a marriage good at common law is valid, notwithstanding statutory directions have been disregarded.”²⁴

West’s Indiana Law Encyclopedia states that marriage statutes are “construed as directory.”²⁵

“Statutes on the subject of marriage, even though penal, are merely directory, and a marriage celebrated though not in accordance with the forms of the statute, is nevertheless valid.”²⁶

The Franklin case also stated:

“A penal statute declaring that no one shall solemnize a marriage until a license has been obtained from the clerk of the county court where the female resides, is directory merely, and failure to comply therewith does not render a marriage formally celebrated invalid.”²⁷

Because of the ease of marriage in sixteen of the fifty states, in my opinion, it would be highly improbable that any of the other thirty-four states could, or would ever want to, invalidate a formal church wedding with guests, families, witnesses, and pastor in attendance, even though no state license was involved.

What is Wrong With State Marriage Licenses?

In the book *The American Family and the State*, there are several reasons for attacking the worth of a state-imposed marriage license. First, the book says that “the state-imposed contract is not well understood by most couples.”²⁸

Lenore Weitzman states: “The marriage contract is unlike most contracts: its penalties are unspecified, and the terms of the contract are typically unknown to the ‘contracting’ parties.”²⁹

It has been previously stated that the state is a party in the marriage license or contract. The provisions and terms of the contract are provided by the third party in the contract. In this case, it places the couple under the Department of Health and all its agencies (Welfare, Child Protection, et.al.), and all the rules and regulations of those agencies.

Second, the state license has provisions “that relate to status, and is concerned with public policy issues, both of which have no place in a relationship that concerns two people.” In *Graham v. Graham*, the court stated:

“Under the (statutory) law, marriage is not merely a private contract between the two parties, but creates a status in which the state is vitally interested and under which certain rights and duties incident to the relationship come into being, irrespective of the wishes of the parties.”³⁰

Also, being placed under these agencies, provide the conflicts with state agents who believe all families should be run according to public policy. It is feared that this is “no more than a rationale for the state to interfere where they have no right.”³¹

“Third, many persons make the point that the state-imposed marriage contract is outdated.”³² Gregg Temple in the *Harvard Journal of Law and Public Policy* said:

“If marriage has lost many of the economic and social functions, it follows that the state’s interest in regulating marriage has lessened. It also follows that personal preferences as to the substance of the marriage should be honored. Our society is based on diversity and tolerance of that diversity. If marriage has truly become a personal rather than a social

institution, we should defer to the personal, private ordering of the relationship.”³³

A final, major hole in the state marriage license is the ease of statutory laws in which divorce can be procured. Under the English common law, divorce was strongly disdained. The reason was that the English prided themselves in their strong nation, which was a direct result of strong families. The English courts had a unique way of keeping families together. A woman seeking a divorce would receive no alimony or settlement. Also, the husband would get custody and care of any and all children. Although on the surface this would seem rather unfair to the modern American, it did deter women from starting divorcement proceedings. Early America frowned upon divorce mainly because of the laws of England, but also from the effects in other countries.

“In 1792, in the midst of the French Revolution, divorce was easy to obtain in France, and six years later divorces outnumbered marriages in Paris; then, by 1816, the pendulum had swung so dramatically that divorce was outlawed in France. Similar phenomena have been observed in marriage regulation in the People’s Republic of China, following their early and dramatic revisions of Marriage.”³⁴

The state license leaves divorce as an easy out to a relationship. Thus, we see the bottom line to the license – revenue. The license which cost a few dollars twenty years ago now costs upwards of fifty dollars. Health Departments are using this revenue to fund projects such as Homes for Unwed Mothers, Homes for Battered Wives, Child Abuse Agencies, and other anti-family and anti-marriage projects. Add to this the divorce costs which fill the coffers of lawyers, family and juvenile courts, adult and child psychologists, court referees and judges, and many others. The marriage license leads to and fuels an industry that encourages divorce.

What To Do

To end the problems caused by a license is no easy matter. However, the laws of each state already provide for marriages without a state license for Quakers, Friends, German Baptists, Indians, and many others. Catholic marriages performed in other countries are recognized by every state, in spite of the lack of a license. Other religious ceremonies performed in every country around the world, by every form of religion imaginable is accepted as valid.

¹ Encyclopedia Americana, Vol. 27, Copyright, 1949, pg. 43

² Funk & Wagnalls Encyclopedia, Vol. 23, pg. 8634, Copyright, 1961

³ Hallett v. Collins, 10 Hov. 174, 13 L.Ed. 375

⁴ Ibid., pg. 174, 181

⁵ Baptist Martyrs, pg. 124, Copyright, 1850.

⁶ Ibid., pg. 174

⁷ Loc. Cit., pg. 123

⁸ Loc. Cit., pg. 124

⁹ Loc. Cit., pg. 139

¹⁰ 38 Corpus Juris 74, pg. 1307, footnote 81a

¹¹ Ibid., pg. 1310

¹² Loc. Cit., pg. 1313

¹³ U.S. Bank v. Dandridge, 12 Wheat. 64, at 81, 6 L.Ed. 552

¹⁴ 52 Am. Jur. 45, pg. 901

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Blackstone's Commentaries, Book 1, pg. 441

²⁰ West's Indiana Law Encyclopedia, Marriage, Chapter 1, Section 1, pg. 328

²¹ Ibid., pg. 328-329

²² 66 Am. Jur., 2d, section 23, pg. 775

²³ Meister v. Moore, 96 U.S. 76, 24 L.Ed. 826

²⁴ Ibid.

²⁵ Marriage, Chapter 2, Section 11

²⁶ Franklin v. Lee, 62 N.E. 78, 30 Ind. App. 31

²⁷ Ibid.

²⁸ The American Family and the State, 1986, Peden and Giahe, editors, pg. 207

²⁹ Ibid., pg. 208, quoting Lenore Weitzman, "Legal Regulations of Marriage: Tradition and Change. California Law Review.

³⁰ Graham v. Graham, 33: F.Supp. 929, at 938, 1940

³¹ Loc. Cit., pg. 208

³² Ibid., pg. 208

³³ Ibid., quoting Harvard Journal of Pub. Pol., 8, 151

³⁴ Loc. Cit., pg. 251