LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON

PROOF OF MARRIAGE IN CIVIL PROCEEDINGS

LRC 32

1977

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

The Commissioners are:

Leon Getz, Chairman
Ronald C. Bray
Paul D.K. Fraser
Peter Fraser
Douglas Lambert

Arthur L. Close is Counsel to the Commission
Anthony J. Spence is Legal Research Officer to the Commission
Patricia Thorpe is Secretary to the Commission.

The Commission offices are located on the 10th Floor, 1055 West Hastings Street, Vancouver, B.C. V6E 2E9.

British Columbia Cataloguing in Publication Data
British Columbia Law Reform Commission.

Report on Proof of Marriage in Civil Proceedings.
"LRC 32. "

1. Marriage law British Columbia.
I. Title.

law 346.711016

TABLE OF CONTENTS

TO THE HONOURABLE GARDE B. GARDOM, Q.C.
ATTORNEYGENERAL FOR BRITISH COLUMBIA

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
PROOF OF MARRIAGE IN CIVIL PROCEEDINGS

In this Report, the Commission examines the law and practice in British Columbia with respect to the proof of marriage in civil proceedings.

In view of the narrow compass of the issues considered in this Report, the Commission did not follow its normal practice of distributing for comment a working paper containing tentative proposals for change. Instead, we consulted informally with a number of persons experienced in the law and practice in this field, all of whom indicated dissatisfaction with the present state of the law.

CHAPTER I INTRODUCTION

The existence of a valid marriage is a matter that is frequently relevant in civil proceedings. For example, the institution of a matrimonial cause, such as a petition for divorce, implies that the parties are related to each other as husband and wife. Similarly, if a person claims an inheritance as the widow or widower of the deceased, a preliminary to the success of the claim is proof that the claimant was married to the deceased.

Whenever the existence of a valid marriage is relevant to an issue in this way the fact that a marriage ceremony took place must first be proved. The method of proving the ceremony is to produce the marriage certificate, together with evidence identifying the persons mentioned in the certificate with those whose marriage is to be proved. Such evidence will generally be supplied by the parties to the marriage if they are available. In some instances, however, it is possible for the celebration of a marriage to be presumed from proof of the fact of cohabitation, and repute within the community, even though no actual ceremony is proved to have taken place.[1] We point out

later, however, that this presumption is, in British Columbia, insufficient to prove the existence of a marriage which is the subject of divorce proceedings. Our courts require "strict proof" of a marriage which is sought to be dissolved.[2] They have adopted the practice of requiring in divorce proceedings, not only the evidence of the parties (or someone else present at the ceremony) but, in addition, that the marriage certificate or a certified copy be produced, unless good cause can be shown for its non-production.[3]

If the marriage was celebrated in British Columbia, the marriage certificate is admissible as prima facie evidence of the facts certified to be recorded, and these include the fact that a ceremony took place.

2. *Andrash* v. *Andrash*, [1967] 60 W.W.R. 442 (B.C.S.C.); *see also Foggo* v. *Foggo*, [1952] 2 D.L.R. 701 (B.C.C.A.) *per* Sidney Smith J.A. at 703.

3. *Ibid*.

4. Section 32(1), *Vital Statistics Act*. R.S.B.C. 1960, c. 66.

5. By virtue of s. 27(2) (e) of the *Evidence Act*, R.S.B.C. 1960, c. 134, judicial notice shall be taken of "all Acts and Ordinances of the Legislature of, or other legislative body or authority competent to make laws for, or any dominion, empire, commonwealth, state, province, colony, territory, possession, or protectorate of Her Majesty."

6. *Frew (otherwise Reed)* v. *Reed*, (1969) 69 W.W.R. 327 (B.C.S.C.). *See generally* Dicey and Morris, *The Conflict of Laws*, 232, 233 (8th ed. 1967); J.G. Castel, *Conflict of Laws*. 214220 (3rd ed. 1974). Where the marriage was celebrated in another Province, or some Commonwealth country, and legislation in the Province or country in question provides that the marriage certificate is admissible in its courts as evidence of a marriage ceremony, then the certificate is also admissible in the British Columbia courts as evidence of the ceremony.

Once a ceremony is thus proved it will have to be established that that ceremony constituted a *formally* valid marriage. Generally speaking this means that it will have to be shown that the parties went through a ceremony that is recognized by the law of the place of celebration as sufficient to create a valid marriage. If the ceremony took place in British Columbia or, it would appear in a jurisdiction whose marriage certificates are admissible in the British Columbia courts as evidence of the ceremony without expert evidence, a party is assisted in establishing the formal validity of the marriage by virtue of a rebuttable presumption of law. Simply stated this is that where there is proof of a marriage ceremony followed by cohabitation it will be presumed that all the prerequisites to a valid marriage have been satisfied.[7]

If the marriage was celebrated in a Commonwealth country whose legislation does not afford the marriage certificate any evidentiary value, or in a country which is not part of the Commonwealth, direct expert evidence must be adduced, by oral testimony or affidavit,[8] to show
that according to the law of the country in which the marriage was celebrated, the certificate would be received as positive evidence of the ceremony, and that the ceremony would constitute a formally valid marriage.

8. The normal rule is that expert evidence as to foreign law must be given orally so that the court can satisfy itself that the witness is properly qualified. In the British Columbia courts, however, the practice has been adopted of receiving expert evidence to prove foreign marriages by way of affidavit *see, e.g., Slater* v. *Slater*, (1944) 61 B.C.R. 166. It used to be necessary for a separate application to be made to a Judge in Chambers for an Order giving leave to introduce such evidence by affidavit. More recently, however, such Orders have been obtainable without the need to make a formal application in Chambers which must be spoken to by Counsel. Instead, an application for such an Order can be made by submitting the application to the Registry under Rule 44(13) of the Supreme Court Rules.

9. *Andrash* v. *Andrash*, n. 2 *supra; Terry* v. *Terry & MacKenzie* [1948] 2 W.W.R. 152; *Grassick* v. *Grassick* [1935] 1 D.L.R. 351; *Me1len* v. *Dobenko* [1927] 4 D.L.R. 1128.

10. *Lyel1* v. *Kennedy* (1889) 14 App. Cas., appld *Finestone* v. *The Queen* [1953] 2 S.C.R. 107; *Saari* v. *Nykanen* [1944] O.R. 582. *See also, Re Anderson* [1924] 3 D.L.R. 246 (Man.). The same rules govern the admissibility of foreign birth certificates, *Re Stasun Estate, Stasun* v. *Nesterhoff* (1966) 57 W.W.R. 596.

See, e.g., Favor v. *Favor*, n. 7 *supra; Khan (otherwise Worresck)* v. *Khan*, (1959) 29 W.W.R. 181; *Kaur (or Kor)* v. *Ginder*, (1958) 25 W.W.R. 532.

Middlemiss v. *Middlemiss*, [1955] 15 W.W.R. 641 (B.C.C.A.) *per* Davey J. at 651; *Powell* v. *Cockburn*, (1976), 22 R.F.L. 155 (S.C.C.).

13. Complex rules have developed to determine the law that governs the essential validity of a marriage and there are conflicting cases on this *question see* Frew (*otherwise Reed*) v. *Reed*, n. 6 *supra*. Generally speaking, however, the law governing the essential validity of a marriage is determined by the law of the antenuptial domicile of each of the parties. *Crickmay* v. *Crickmay*, (1967) 60 D.L.R. (2d) 734 (B.C.C.A.). Such evidence is required to render the certificate admissible under an exception to the rule against hearsay which allows writings made pursuant to a public duty to be admitted in evidence. This exception can only apply in relation to foreign marriage certificates if it can be shown that the certificate would itself be evidence of the marriage in that country, or that in the case of a certified

extract from a foreign marriage register, the foreign law required the register to be kept and imposed a duty on the person who made the entry to make it.[10]

There are occasions, however, when a marriage certificate is not available. For example, the parties may have been married in a jurisdiction where it is not customary to issue a marriage certificate, or the certificate may have been lost and it is impossible to obtain another. In such circumstances it would appear that it is possible to prove that a valid marriage ceremony took place by the evidence of one or both of the parties (or someone else present at the ceremony) provided that expert testimony is adduced to establish that the ceremony described would constitute a valid marriage in the jurisdiction in question.[11]

Once a formally valid marriage is proved or presumed it will also be presumed in the absence of some evidence to the contrary that the marriage is *essentially* valid,[12] i.e. that the parties had the capacity to marry, and that their consent was real.[13] It would appear that this presumption can be relied on in all cases and, consequently, anyone required to prove a marriage, wherever celebrated, need not in the first instance at least, concern himself with proof of such matters as capacity to marry or the reality of the parties' consent.

While, for the purposes of some proceedings, proof of a marriage may not cause too many difficulties, the requirement that there must be "strict proof" of a marriage which is the subject of divorce proceedings, and the need to adduce expert evidence in respect of foreign marriage, can cause considerable inconvenience, expense and delay. These requirements are therefore considered in this Report with a view to facilitating proof of a marriage in these cases.

CHAPTER II THE "STRICT PROOF" RULE

The view taken by the British Columbia courts that a marriage must be strictly proved in divorce proceedings appears to be based on what is known as the "best evidence" rule. The classic statement of this "rule" is that of Lord Hardwicke when he said in 1745 that:

> The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow.

2. *Phipson, ibid*. 61.

3. [1969] 1 All E.R. 451.

4. *Ibid*. 457.

5. *Andrash* v. *Andrash*, [1967] 60 W.W.R. 442; *Foggo* v. *Foggo*, [1952] 2 D.L.R. 701, *per* Sidney Smith J.A. at 703.

6. *Phipson on Evidence*, 129 para. 130 (11th ed. 1970).

The rule was of general application in the eighteenth century, excluding not only hearsay, secondary evidence, and proof of documents by nonattesting witnesses, but also circumstantial evidence if direct evidence could be obtained, real evidence if not physically produced, proof of handwriting by opinion evidence if the writer himself could attend, and proof of consent otherwise than by calling the consenting party if alive.[2]

Since the eighteenth century the rule has suffered a progressive decline and is now regarded as a maxim which affords little guidance. Modern judicial attitudes to it were exemplified by Lord Denning in *Garton* v. *Humber*[3] where he said:

The only remaining instance of it that I know is that if an original document is available in one's hands, one must produce it. One cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility.

In British Columbia, however, the rule also appears to have survived in relation to proof of marriage in divorce proceedings, and hence the requirement for "strict proof." The British Columbia courts appear, in practice, to consider the "best evidence" to be the production of the marriage certificate together with the evidence of one of the

parties, or someone else present at the ceremony. This application of the "best evidence" rule appears to be founded on a statement in *Phipson on Evidence* where, in a discussion of that rule, it is stated:

> ... there are certain cases in which the old rule enjoys a precarious survival. Thus, strict proof of marriage is required in cases of bigamy or divorce, though not usually in other cases.

This statement has been quoted as authoritative by the Supreme Court of British Columbia in *Andrash* v. *Andrash*[7] where Dryer J. went on to say:

> it has been the uniform practice of this court for so many years to require, in divorce proceedings, that the marriage be strictly proved, that I do not feel that I should depart from it in this case.

8. n. 5 *supra*, 443.

9. 4 Burr. 2057, 98 E.R. 73, appld *Zdrahal* v. *Shatney* [1912] 3 W.W.R. 239 (Man.); *Winfrey* v. *Clute* [1922] 1 W.W.R. 526 (Alta.)

10. *Taylor on Evidence*, 181, para. 172 (7th ed. 1878).

11. *See Birt* v. *Barlow*, (1779) 1 Doug. K.B. 171, 99 E.R 113 where Lord Mansfield C.J. stated quite emphatically that an action for criminal conversation is the *only* civil case where it is necessary to prove an actual marriage.

12. *See, e.g., Re Shephard, George* v. *Thyer*, [1904] 1 Ch. 456; *Robb* v. *Robb et al.*, (1891) 20 O.R. 591; *Baran* v**.** *Wilensky*, (1960) 20 D.L.R. (2d) 440 (Ont.); *Meszaros* v. *Meszaros*, [1969] 2 O.R. 336. *See also Leong Sow Nom* v. *Chim Yee Yon*, [1934] 3 W.W.R. 686 (B.C.) noted Falconbridge (1935), 13 Can. Bar Rev. 317, where two Chinese domiciliaries underwent some sort of marriage in China and were regarded by the community there as husband and wife, the court held that under similar circumstances a presumption of marriage could have been made in British Columbia but that it was not in a position to say what presumptions would be drawn in Chinese law from their cohabitation without actual proof of the Chinese law. This decision, however, has been criticized by Falconbridge, *supra*, as follows:

> Obviously the decision .. .is based upon the implied characterization of the rule as to presumption of marriage from cohabitation and reputation of marriage as being a rule relating to the formalities of celebration, and therefore governed by the *lex loci celebrationis*. It is submitted, however, that the characterization and the decision are both wrong. It would seem that the presumption of law now in question is merely a rule relating to the burdenof proof, falling within the principle that all matters of procedure are governed by the *lex fori*, and that consequently the court ought to have held that the marriage was sufficiently proved, without regard to the law of China.

While Phipson cites no authority for the proposition that in all divorce proceedings the marriage must be strictly proved, it has been suggested that this statement is based on the observations of Lord Mansfield in the 1767, case of *Morris* v. *Miller*, one of the earliest and leading cases on the subject. *Morris* v. *Miller* was an action for criminal conversation where Lord Mansfield, intervening in an argument that marriage could be proved by cohabitation, name and the acceptance of the woman by everyone as the man's wife, said:

> It certainly may be done so in all cases except two: one is prosecution for bigamy; and in this case (if such proof cannot be received here) is the other.

The requirement of strict proof in such cases appears to be based on the fact that such proceedings are of a penal nature; and a further reason for the exception in cases of criminal conversation seems to have been to prevent parties from setting up a fictitious marriage "for "10
evil purposes. There is no suggestion in Lord Mansfield's observations, however, that there must be strict proof of marriage in all cases of divorce.[11]

Notwithstanding the doubt that surrounds Phipson' s statement, it would appear from the decision in *Andrash* v. *Andrash* that in divorce proceedings in British Columbia, a marriage cannot be proved by cohabitation and repute. Such evidence is not "strict proof." For the purposes of other proceedings, however, where a man and woman have cohabited for a long time, and in such circumstances as to have acquired the reputation of being man and wife, it will generally be presumed that a valid marriage exists.[12] Moreover the British Columbia view does not appear to be supported by authorities in other jurisdictions,

14. *See e.g., Taylor*, n. 10 *supra; Cross on Evidence*, 118 (3rd ed. 1967) .

15. [1953] 9 W.W.R. 704

See also, the Ontario case of *Baran* v. *Wilensky* n. 11, *supra* where Kelly J. said at 443, "It would appear from a review of the authorities dealing with marriages, including foreign *marriages*, that there are three presumptions of law which might be taken into consideration: The first is *semper praesumitur pro matrimonio*. . . ."

17. n. 5. *supra*. nor other writers.[14] Indeed, in other jurisdictions, the presumption has even been held to apply to foreign marriages. For example, it has been held in Saskatchewan, in *Sedgewick* v. *Sedgewick,*[15] that a foreign marriage could be presumed and proved for the purposes of divorce proceedings by the evidence of the

plaintiff that a ceremony took place together with evidence of cohabitation, provided there was no decisive evidence to the contrary. When this case was cited in British Columbia in *Andrash* v. *Andrashl* it was dismissed on the basis that the Phipson "distinction" had not been taken into account.

CHAPTER III ASSESSMENT OF PRESENT POSITION

1. The "Strict Proof" Rule

As a consequence of the "strict proof" rule a marriage cannot be proved in divorce proceedings by the evidence of the parties alone, even if evidence is also given as to cohabitation and repute. Ordinarily the marriage certificate must also be produced in court. As Sidney Smith J.A. pointed out in *Foggo* v. *Foggo*,

2. *Ibid*., at 703.

3. R.S.B.C. 1960, c. 66.

4. *Lewkowicz* v. *Korzewich*, [1956] S.C.R. 170. *See also Datzoff* v. *Miller*, [1963] 37 D.L.R. (2d) 110; *Bogert* v. Bogert, [1955] O.W.N. 119.

5. N. 4, *supra per* Kellock J. in delivering the judgment of the majority at 176.

6. W. Kent Power, *The Law of Divorce in Canada*, 364 (2 ed. 1964) . when talking of the manner in which judges actually deal with the proof of a marriage:

Even where a wife's petition is unopposed they call for strict proof in the sense of calling for official records as well as oral evidence.

Yet in so far as the certificate is concerned, section 32 (l) of the *Vital Statistics Act*[3] provides that a marriage certificate issued under that Act is admissible in any court in the Province only as *prima facie* evidence of the facts certified to be recorded. The Supreme Court of Canada, indeed, has held that the production of a marriage certificate which was only *prima facie* evidence of the facts recorded did not constitute "strict proof," but at most raised a presumption as to its
validity and constituted "some evidence of the statement it contains."

In view of this, the question arises as to why production of the certificate should be regarded as having any greater weight or significance than the oral testimony of the parties. Power,[6] for example, takes the following view:

> In the absence of a statute saying that documentary evidence must be producedand our statutes do not go that farthe fact of a marriage can be proved by the testimony of a party thereto or of a person or persons present at the ceremony, in other words, the burden of impeaching the fact of marriage so testified lies upon the impeaching party.

He cites Wigmore who has said:

> .. . a heresy which arises with phoenix like persistence is the supposition that, as between possible sorts of eyewitness evidence, the celebrant's certificate or register entry is preferred to the oral testimony of the celebrant, clerk or bystander ... there is no such rule.... That the certificate or register, or a copy, should have been thought to be preferred to oral testimony could hardly be due to Lord Mansfield's language in the original cases. Nor did the later English rulings give the notion any countenance.

8. n. 5 *supra*, 443.

Nevertheless, as Power has said,[8] however heretical the supposition may be, the practical situation in Canadian courts is that where a marriage is sought to be proved without the production of documentary evidence, a satisfactory explanation as to why such evidence is not forthcoming will usually be required. It seems, therefore, that the requirement that a marriage certificate be produced in divorce proceedings has developed as a rule of practice and not as a rule of law.

2. Practical Consequences of the Rule

Little difficulty ordinarily arises if the marriage was celebrated in a jurisdiction whose marriage certificates are admissible in the British Columbia courts without the need for expert testimony, and the petitioner has a certificate acceptable to the court readily available. A petitioner may be faced, however, with considerable expense or delay if his marriage was celebrated in a jurisdiction whose marriage certificates are only admissible if expert evidence is given as to their evidentiary value.

The expense involved in producing such expert testimony was emphasized by several of the lawyers we consulted on this subject. One lawyer pointed out that:

> The cost to litigants in obtaining an Affidavit of a foreign attorney to prove the validity of a marriage frequently is very high, ranging in my experience, for a simple Affidavit previously prepared for signature, to as high as $250.00 and $100.00 and $150.00 charges are not uncommon.

The petitioner may not only have to pay for such expert evidence but also for translation charges if the certificate and affidavit are in a language other than English. Furthermore, his lawyer's fees will inevitably reflect the extra work and time involved in making arrangements for such expert evidence.

The need to adduce expert evidence can also delay the progress of the divorce since if the petitioner[1]s lawyer cannot find an expert locally who would be acceptable to the court, and who is willing to provide evidence, a lawyer will have to be found in the jurisdiction in question who is willing to make the necessary affidavit.

If the marriage certificate is not readily available further delays may ensue as a copy of the certificate must be obtained from the appropriate foreign authority. This may in some cases be a relatively simple procedure. In others, we have been informed, lawyers have great difficulty in identifying the appropriate authority. Once identified, that authority might require the prepayment of a fee, and time can also be lost in ascertaining the correct amount. It seems, further that it is often very difficult to get any response at all from government departments in some Middle Eastern and Eastern European countries.

These considerations have suggested to us that, if it is at all possible to eliminate these sources of frustration, cost and delay with respect to proving foreign marriages in our courts, a way should be found for relaxing the present requirements.

CHAPTER IV REFORM ELSEWHERE

Although, as we have pointed out, there are jurisdictions in which marriage need not be strictly proved in divorce proceedings, the courts in those jurisdictions nonetheless, as a matter of practice, often require production of the marriage certificate where this is possible. In a number of places, however, there is an increasing disposition to relax the strict requirements for proof of foreign marriages.

1. England

There is a trend in England, both statutory and judicial, towards admitting foreign marriage certificates as evidence of a valid marriage without requiring the attendance of an expert, or an affidavit by him, to testify to the effect that the certificate of marriage would be recognized in the country in which the marriage took place.

Of particular note are the *Evidence (Foreign, Dominion and Colonial Documents) Act, 1933*
1963 Eliz. 2, c. 27.

1 & 2 Geo. 6, c. 28.

[1966] 1 W.L.R. 598. and the *Oaths and Evidence (Overseas Authorities and Countries) Act, 1963*. Both statutes provide that entries in specified registers in countries in respect of which Orders in Council under the Acts have been made, are admissible in evidence; and provide for their proof by official certificate. Under the *Evidence (Foreign, Dominion and Colonial Documents) Act, 1933* an Order in Council cannot be made unless there is a reciprocal

agreement as to the recognition of the public register of the United Kingdom with the country in question as to recognition of the United Kingdom register.

The courts in England have also begun to accept foreign marriage certificates as evidence of a valid marriage without expert testimony. Under section 1(1) of the *Evidence Act, 1938* statements in documents are admissible; under section 1(2) the court may admit such statements although the maker is available but not called as a witness, and although the original document is not produced, provided a copy is certified in such form as the court may approve. In *Henaff* v. *Henaff* Scarman J. exercised his powers under the latter provision and admitted a certificate of marriage celebrated in a register office in Guernsey. The certificate recorded a marriage celebrated according to the law of Guernsey and Scarman J. said:

> It seems to me that, in a case where there is no contest between the parties as to the validity of the marriage, I can infer from a document such as this notwithstanding the absence of any expert evidence, that it would be received in the courts of the island of Guernsey as evidence of a valid marriage ...

1973 Eliz. 2, c. 18.

N. 2, *supra*, Rule 37(2).

Walz v. *Walz* [1966] N.Z.L.R. 254

This trend towards the relaxation of the rules governing the admissibility of foreign marriage certificates in English courts, in cases where the existence and validity of the marriage is not in dispute, has culminated in Rule 40 of the *Matrimonial Causes Rules 1973* made by virtue of the *Matrimonial Causes Act,1973*. Rule 40 reads as follows:

> 40. -- (l) The celebration of a marriage outside England and Wales and its validity under the law of the country where it was celebrated may, in any matrimonial proceedings in which the existence and validity of the marriage is not disputed, be proved by the evidence of one of the parties to the marriage and the production of a document purporting to be
>
> (a) a marriage certificate or similar document issued under the law in force in that country; or
>
> (b) a certified copy of an entry in a register of marriages kept under the law in force in that country.
>
> (2) Where a document produced by virtue of paragraph (1) is not in English it shall, unless otherwise directed, be accompanied by a translation certified by a notary public or authenticated by affidavit.
>
> (3) This rule shall not be construed as precluding the proof of a marriage in accordance with the Evidence (Foreign, Dominion and Colonial Documents) Act 1933 or in any other manner authorised apart from this rule.

These provisions, however, do not affect the power of the judge at the trial to refuse to admit such evidence.[8]

2. New Zealand

The rules governing the admissibility of foreign marriage certificates in matrimonial proceedings have been relaxed in New Zealand by virtue of section 70 of the *Matrimonial Proceedings Act, 1963*. This section provides as follows:

> In any proceedings under this Act, a document purporting to be the original or a certified copy of a certificate, entry, or record of a birth, death, or marriage alleged to have taken place, whether in New Zealand or in any other country, may be received without further proof as evidence of the facts stated in the document.

The Supreme Court of New Zealand has held that the intention of the Legislature in enacting this provision was to put foreign marriage certificates in the same position as marriage certificates issued in New Zealand. These are accepted as *prima facie* evidence, not only of the marriage ceremony, but also of the validity of the marriage. The section is, however, permissive in form, and the court may reject the certificate if it finds reason to do so.

Nova Scotia

Nova Scotia appears to be the only Canadian jurisdiction where some attempt has been made to simplify the law concerning the proof of foreign marriages. Sections 40 (2) and 40A of the *Evidence Act* provide:

> 40 (2) Wherever in any cause or matter in any court in the Province it is necessary to prove a foreign marriage and the fact of the solemnization of such foreign marriage is proved, there shall thereupon arise a *prima facie* presumption that such foreign marriage was duly solemnized in accordance with the foreign law.
>
> 40 A A court may receive as evidence of the facts stated in it, a document purporting to be either the original or a certified copy of a certificate, entry or record of a birth, death or marriage alleged to have taken place anywhere outside the Province.

Section 40 A seems to have been enacted to facilitate the proof of "the fact of the solemnization" of a foreign marriage that is referred to in section 40 (2). Without it, it is doubtful that section 40 (2) simplified the law for it would appear that expert evidence would still have had to be adduced in order to prove the fact of solemnization of the marriage.

CHAPTER V CONCLUSION AND RECOMMENDATION

1. Conclusion and Recommendation

We have concluded that compliance with the requirement that a marriage be strictly proved in divorce proceedings can cause a petitioner financial and, by delaying the progress of proceedings personal hardship, especially where expert evidence is needed in order to prove a "foreign marriage." We have concluded further that there is no convincing basis or rationale for requiring such "strict proof" and, accordingly, it is our view that the law relating to proof of marriage in such circumstances needs simplifying.

In England, New Zealand and Nova Scotia the relaxation of the rules governing the admissibility of foreign marriage certificates has obviously facilitated proof of marriages celebrated outside those jurisdictions if comparable provisions were enacted in British Columbia the expense and delay involved in proving "foreign" marriages would undoubtedly be minimized.

The question arises, however, whether one is not warranted in going further. Should there be any need to produce a marriage certificate at all? We have already pointed out that this necessity frequently causes difficulty and delay. Quite apart from this, however, we question, with Wigmore, the notion that as between possible sorts of eyewitness evidence, the celebrant's certificate or register entry is to be preferred to the oral testimony of the celebrant, clerk or bystander"

2. At present, a marriage certificate issued in British Columbia is, by virtue of section 32(1) of the *Vital Statistics Act*. *prima facie* evidence of the facts certified to be recorded therein. These include, *inter alia*, the fact of the ceremony. Thus, as far as British Columbia marriage certificates are concerned, there will be some overlap between our recommendation and that section. To eliminate this overlap we have considered recommending a parallel amendment to section 32(1) so that the evidentiary value of a marriage certificate issued in British Columbia would be governed exclusively by our principal recommendation. Since, however, that section embraces documents other than marriage certificates, and provides that a marriage certificate is evidence of facts otherwise and in addition to the fact of the marriage ceremony, we have concluded that any such amendment could only be accomplished in a manner the complexity of which outweighs the disadvantage of overlapping statutory provisions, and we accordingly make no recommendation in this regard.. or, for that matter, the oral testimony of one of the parties. We are unable to justify that preference.

We have concluded therefore that in divorce proceedings it should be possible to prove the fact of a marriage ceremony by the oral testimony of one of the parties or some other person present at the ceremony, regardless of where that ceremony took place. Moreover we take the view that the recommendations we make below should extend to any civil proceedings in which proof of a marriage is in issue. In view of the safeguards inherent in our recommendations it does not seem to us that anyone could be prejudiced by extending them to all civil proceedings.

There will no doubt still be occasions when it is sought to prove a marriage by producing the marriage certificate, and where this will be the most convenient course to follow. We take the view, however, that in such circumstances it should not be necessary to adduce expert evidence as to the certificate's evidentiary value, and that it should be admissible as evidence of the fact that a ceremony took place, regardless of where the certificate was issued.

We have also concluded that if the fact of a marriage ceremony is proved in the manner suggested, then the marriage should be deemed to be formally valid. There may, of course, be occasions when the formal validity of a marriage is disputed. In such cases, in our view the conclusion as to formal validity should not be drawn if evidence is adduced that raises a reasonable doubt as to its formal validity.[3]

There may also be occasions when although the formal validity of a marriage is not in dispute, the court may have doubts as to its formal validity due to the unusual nature of the ceremony described or the document tendered. In such circumstances the court should have a discretion to require further evidence before a formally valid marriage is deemed to have taken place. This discretion, however, should be exercised only in exceptional circumstances.

Finally, for the sake of completeness and the avoidance of any doubt, it should be stipulated that once a marriage is deemed formally valid in the manner suggested, that marriage should be presumed to be essentially valid in the absence of evidence to the contrary.

4. *See Powell* v. *Cockburn*, (1976)22 R.F.L. (S.C.C.) *per* Dickson J. at 162 as to the weight of evidence required to rebut the presumption of essential validity

5. *See, e.g., Foggo* v. Foggo, [1952] 2 D.L.R. 701 (B.C.C.A.) where it was held that although a divorce decree is treated, in effect, as a judgment *in rem* so far as it decides status, the only part of the decree that binds third parties is the award of dissolution. Consequently, although the finding of a valid marriage is essential to the granting of a divorce, it is only a collateral finding which is not binding on third Parties.

6. *Hayward* v. *Hayward*, [1961] 1 All E.R. 236; *Postnikoff* v. *Popoff*, (1964) 46 D.L.R. (2d) 403 (B.C.S.C.). Earlier cases, however, conflict with this view see *Woodland* v. *Woodland*, [1928] P. 109 appld; *Crosby* v. Constable, (1957) 10 D.L.R. 220 (B.C.S.C.). Despite this conflict, it would appear that the *Postnikoff* and Hayward decisions better reflect the present law *Re Insurance Act: Re Rogers*, (1963) 42 W.W.R. 200 (B.C.C.A.) affirming (1962) 40 W.W.R. 317; *Fife* v. *Fife*, (1964) 50 W.W.R. 591 (Sask. Q.B.).

7. Rule 787, Supreme Court of Ontario Rules of Practice.

It is of course conceivable that occasions might arise when, as a result of this relaxed mode of proof and because evidence impugning the validity of the marriage is not adduced, an invalid marriage is found to be valid. We are not unduly concerned about this possibility, however, since it is likely to be rare, and the danger involved is far outweighed by the desirability of enabling marriages to be proved with a minimum of difficulty. We would also point out that it has been held that if there is a finding of a valid marriage in some proceeding, that finding will not preclude a third party from impugning the validity of the marriage in subsequent proceedings, provided that the validity of the marriage was only a collateral finding in the prior proceedings.[5] Thus, if an invalid marriage is found to be valid as a result of this relaxed mode of proof, a third party who is prejudiced thereby will be able to question the validity of the marriage in any subsequent proceedings. It would also appear that, as between the parties, the better view is that if the validity of the marriage is not contested and decided upon, neither party is estopped from asserting in subsequent proceedings that the marriage is invalid.[6]

If, as we recommend, it should no longer be necessary to produce the marriage certificate at the hearing in order to prove a marriage, we would also urge that the effect of this recommendation should be made secure by taking appropriate steps to ensure that the practice of the court registry of requiring production of the certificate at the time the petition is filed as, in effect, a precondition to the commencement of proceedings, should be discontinued. Unlike the position in other jurisdictions, such as Ontario,[7] this practice is not sanctioned by the Rules of Court. The adoption of our principal recommendation would be pointless if it could be rendered nugatory by what is no more than an administrative practice. Registry officials are apparently concerned that if they are unable to confirm that the details of the marriage on the petition are correct, by examining the marriage certificate, then they will be unable to carry out an accurate check with the Central Divorce Registry in Ottawa to determine whether there is a "competing" divorce action, that is one launched by the other party to the marriage, in some other province. The evidence suggests, however, that the risk of competing petitions going undetected is slight. We have been informed by the Central Divorce Registry that since July 1968 a total of 347,886 petitions have been filed. In only 644 cases, that is, less than onefifth of one per cent of all cases, have such competing actions been discovered.

It is obvious that the frequency of competing divorce actions is exceedingly low. It seems reasonable to suppose that the proportion of those that do occur that would concern marriages, the proof of which would be facilitated by our recommendation, is even smaller. In our view, the slight danger that might arise of such competing actions going undetected if the registry were to abandon its insistence upon production of the certificate is hardly worth the anxiety, cost and delay that the continuance of the practice represents for some litigants.

The Commission recommends that:

The Evidence Act *be amended to reflect the following principles:*

1. *In any civil proceeding where it is alleged that a ceremony of marriage took place, either in British Columbia or in another jurisdiction,*

   (a) *the evidence of a party to the ceremony, or some other person present thereat, shall be evidence of the fact that the ceremony took place;*

   (b) *a document purporting to be the original or certified copy of a certificate of marriage alleged to have taken place is admissible as evidence of the fact that the ceremony took place.*

2. *Where evidence of a ceremony is adduced in accordance with paragraphs 1(a) or 1(b), a marriage that is formally valid shall be deemed to have taken place unless evidence to the contrary sufficient to raise a reasonable doubt has been adduced, or, in exceptional circumstances, by reason of the unusual nature of the ceremony described or the document tendered the court requires further evidence that a formally valid marriage took place.*

3. *In the absence of evidence to the contrary a marriage deemed formally valid in accordance with paragraph 2 shall be presumed to be essentially valid.*

2. Acknowledgment

We wish here to acknowledge the assistance we have received in this project from Mr. Peter W. Brown, Mr. Gerald J. Lecovin, Mr. Donald S. Moir and Mr. Edward Mortimer, all members of the legal profession actively engaged in the practice of matrimonial law, and to Professors Donald J. MacDougall and Keith B. Farquhar of the Faculty of Law, University of British Columbia. They responded promptly and freely to our requests for advice and information, and we are most grateful to them.

We also wish to record our appreciation to Mr. Anthony J. Spence, our Legal Research Officer, who conducted this project, and who was responsible for the preparation of this Report.

LEON GETZ, Chairman
RONALD C. BRAY
PAUL D. K. FRASER
PETER FRASER
DOUGLAS LAMBERT

April 25, 1977.