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COMMON LAW MARRIAGES IN PENNSYLVANIA

PAUL E. PENDEL*

In reading what may be called the "judicial rider" to the decision of the Superior Court of Pennsylvania in *Fisher v. Sweet & McClain*, 154 Pa. Superior Court 216, 35 A. 2d. 756, "that a valid common-law marriage cannot hereafter be entered into in this Commonwealth without first complying with the Act of (May 17,) 1939, (P. L. 148, 48 P. S. § 20 et seq.) and securing a marriage license pursuant to its provisions," several questions occur to the mind of the reader which cause speculation as to whether those questions were considered by the court before arriving at its unusual, if not unique, pronouncement. And this is especially true after a study of the Act and a consideration of the general principles of law relating to marriage and common-law marriages, as well as the constitution of our state.

This declaration by the court is unique, because it is a decision upon a point which was neither raised nor involved in the case before it, and because appellate courts have informed the Bar time and again, and particularly lawyers who have suffered by the application of the rule, that they will not pass upon questions that have not been raised in the court below and properly brought before the appellate tribunal. Not only that—they have refused the expression of opinion on questions unnecessary to the decision of the case, and have constantly avoided the declaration of rules in matters where they have not received the full benefit of argument and briefs by counsel. In this case such aid was entirely lacking. Of course, it may be that the Court, before coming to its conclusion, considered the several objections that can be urged against its decision and nevertheless decided as it did, and it may be too that those questions did not occur to those members of that tribunal who joined in the declaration so pronounced. This doubt therefore must linger in the minds of the Bar until the matter shall be decided after full argument, submission of briefs and a thorough consideration of the objections that can be raised against the logic of the declaration there made. But whether considered or not, the conclusion of the Court, as it appears to the writer, cannot be sustained under the Act of 1939. The natural and constitutional rights of individuals which will be considerably impaired in some respects and destroyed in others by a liberal construction of the Act as claimed for it by the Court are far too important to be disregarded so lightly.

This discussion, while concerned principally with the effect of the court's liberal interpretation of the Act of 1939 upon common-law marriages, will also touch upon other features of the statute to show its vulnerability to attack upon constitutional grounds.

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In the first place, although the statute may be considered a health measure, it must not be forgotten that, in view of the "natural rights of persons" affected by it and the penalties attaching to violations of its provisions, the Act is penal and must receive a strict construction. This is particularly true if persons entering into common-law marriages are to be brought within the sweep of its commands; because there is nothing in the phraseology of its language that can reasonably be construed to show that the legislature intended to alter or change in any way the manner of contracting marriages according to the common law. The statute simply provides that "No license to marry shall be issued until there shall be in the possession of the clerk of the orphans' court a statement signed by a duly licensed physician of the Commonwealth of Pennsylvania that each applicant, within thirty days of the issuance of the marriage license, has submitted to an examination to determine the existence or nonexistence" of the disease therein singled out. It does not provide that "no marriage, either ceremonial or common-law, may be entered into hereafter" until such certificate or statement shall be filed with the clerk of the orphans' court, with a penalty of nullity if contracted in violation of its terms. Yet this is how the statute would read in effect if the conclusion of the Superior Court is to stand. Such conclusion, it is submitted, is not warranted by any fair reading of the act. Supplying such intendment is purely judicial legislation—a function that has been disclaimed by the Court as late as *Goff v. Shenandoah Borough*, 154 Pa. Superior Ct. 239, 243, 35 A. 2d. 900, 901 (January 27, 1944, the same day as the decision in the Fisher case). Moreover, if the legislature had intended to affect common-law marriages it could have said so in clear and express language. It knew of the existence of this "institution" and of its recognition by all the courts of this Commonwealth down through our history. Why, then did it remain silent upon the subject if it intended any change in the formation of such marriages? The answer is plain that it did not; and even if it did, but did not say so, the omission may not be supplied by any court.

Another point that must be considered is, that the Act does not even provide for the nullity of ceremonial marriages contracted without compliance with its provisions. As stated in 35 Am. Jur. 188, § 15, "The general rule, however, is that statutes which direct that a license must be issued and procured, that only certain persons shall perform the ceremony, that a certain number of witnesses shall be present, that a certificate of marriage shall be signed, returned, and recorded, and that persons violating the conditions shall be guilty of a criminal offense, are addressed to persons in authority to secure publicity and to require a record to be made of the marriage contract. Such statutes do not void common-law marriages unless they do so expressly, even where such marriages are entered into without obtaining a license and are not recorded." Compare *Zeigler v. P. Cassidy's Sons*, 220 N. Y. 98, 115 N. E. 471. See also 48 P. S. § 2. And in the same volume of that authoritative work, 35 Am. Jur. at page 192, § 19, in speaking of statutes requiring health certificates of men before entering into

marriage, it is said: "Statutes may, and in many jurisdictions do, require a man to secure the certificate of a licensed practitioner of medicine that he is free from venereal disease and to present it to the public officer in order to obtain a marriage license, but failure of compliance with such a statute generally does not prevent the validity of a marriage, at least a common-law marriage."

A further objection to the construction placed upon that Act by the Superior Court is that any attempt to bring common-law marriages within its terms will render the Act void because of defective title. It is submitted that no fair reading of its title will put any person on notice that common-law marriages are affected by its provisions; in fact, the most careful reading of the statute will not give him any further information upon the point. To get that meaning, such person would have to possess a degree of clairvoyance far beyond that of the average person, even though such intention had been in the mind of the legislature.

Then too, the provision for summary conviction of persons charged with violations of the Act must run counter to the constitutional provision guaranteeing the right of trial by jury. In this respect, it is submitted, there are several possible and probable factual situations which should, by right, be left to the decision of a jury and not to the whim or caprice of a magistrate. What if a physician passes an applicant in good faith—as he has a right to do under the statute—although the applicant he has examined is infected with the disease but not in a stage "which is likely to become communicable," and later it turns out that he was mistaken in his judgment and a prosecution follows—is his reputation and life's work to be placed at the mercy of the minor judiciary, or is he to be given the opportunity of proving his innocence and defending his good name before a jury of his peers? Surely, he ought to be allowed the forum where his rights will be given the fullest possible protection, as guaranteed by our basic laws, and not be left to the chance of the erring judgment or biased opinion of one individual. And why should not any other person charged with criminality under that Act be protected with similar rights? Or have we come to the point in our jurisprudence where "short-cuts" are the order of the day, and constitutional provisions designed for the protection of life, liberty and property are now archaic and obsolete? One wonders at times. Yet, such cases as *District of Columbia v. Colts*, 282 U. S. 63, 51 S. Ct. 52, 75 L. Ed. 177, (1930), although decided fourteen years ago, may still have vitality enough to render unconstitutional the easy procedure allowed by the Act of 1939 to make a criminal of a person, regardless of his purity of motive or intent in the premises. Most certainly, if a person charged with a traffic violation, as in that case, is entitled to a jury trial, a person, such as a physician, or a person in the exercise of one of his most natural rights—that of entering into marriage—, is likewise entitled to the same protection.

Finally, since the Act derogates from man's most elemental right—that of mating—it must receive not only a strict construction, but the strictest construction. That it is designed as a health measure does not entitle it to be a liberal

interpretation when, as in this case, it is in collision with one of the "certain inherent and infeasible rights" of man. Our State Constitution provides (Art. I, Sec. 1): "All men are born equally free and independent, and have certain inherent and infeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Under this clause, it is not a question of how far a court may go in extending by implication a statute destructive of those rights, but to what extent the state itself may go in impairing those rights under the guise of regulation, health or otherwise. The trouble with us in America is that we are constantly prating about our "inherent," our "natural," and our "infeasible" rights at bar banquets, association meetings and patriotic celebrations, but seem to forget them completely in the legislative and judicial forums, especially in the latter, where courts should ever be on the alert to preserve those rights, regardless of public clamor or the howling of demagogues who, while pretending to serve the State, are steadily impairing, if not destroying, those "liberties" and "freedoms" essential to our way of life. What we once considered inalienable rights are now held to be privileges; witness the federal statute on the making of gifts. Others could be catalogued, but would serve no purpose here. One further point, however, must be emphasized. Where courts should be quite liberal in the construction of statutes, such as those intended to simplify litigation or create new remedies, we find them very technical. The best illustration of this attitude is the emasculation of the Declaratory Judgments Act, which today, because of strict construction, does not afford the remedy originally intended by its enactment. See Borchard, *Declaratory Judgments*, (2d. Ed.), page 318 et seq., under the heading "The Pennsylvania Muddle."

On the other hand, statutes, such as the act abolishing breach of promise suits and actions for alienation of affections, have been sustained by the courts with amazing alacrity. There has been no strict construction in such cases; no critical eye upon the constitution to ascertain whether fundamental rights have been impaired; no regard for the fact that many individuals suffer far more from such torts than do many others from physical mishaps. And it has all been done because fraud and perjury have been practised in these claims. But who has ever had any thought of abolishing *assumpsit* and trespass actions because of the fraud and perjury encountered so often in trials of such cases? Yet the injury in the first class of case may often be greater than in the other class. A broken home is far more serious than a broken bone.

While this is somewhat digressive from the main discussion, it nevertheless throws light upon the attitude of the courts towards individual rights. It seems, that instead of preserving and enlarging them whenever possible, the judiciary is restricting or aiding in their restriction whenever opportunity presents itself. The individual is no longer the important unit he was at one time. The State is now supreme. What it decrees, is final. Rights once thought to be reserved in the

people are now found within its "plenary power"; and constitutional limitations expressed in the eloquent and hopeful language of clauses such as the one guaranteeing to the people the right "of pursuing their own happiness" are becoming empty phrases in constitutions slowly dying because of the failure of the judiciary in their highest role in the American scheme of constitutional government—that of protecting the individual from the growing and usurping might of the State.

Upon these considerations, it is submitted, concurrence in the pronouncement of the Superior Court is impossible. That such restriction on common-law marriages will tend to "eliminate fraud and perjury" is not a sufficient warrant to the court to invade a field where even the power of the legislature must be exercised with caution. The right to marry is not created by statute. It existed long before municipal law was known and will continue to exist long after our jurisprudence has been buried beneath the dust and ruin of our civilization and life has returned to its primitive formlessness. Mating is coeval with the sexes. Any interference with that right must be limited to the most urgent and sternest necessity, and should only be done by language clearly expressive of the extent to which impairment is intended, provided, of course, the "extent of impairment" is within the constitutional limit of regulation. It should never be done by implication; least of all, by a high court, the last bulwark between preservation and destruction of individual rights, no matter how justified the end may seem.