

EXHIBIT 1 TO PLAINTIFF MEMORANDUM
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

The History of T.C.A. § 36-3-103(a)

The Tennessee Code Commission¹ says the following about the history of TCA § 36-3-103:

Code 1858, § 2441 (deriv. Acts 1778, ch. 7, §§ 2, 3); Shan., § 4191; Code 1932, § 8414; Acts 1976, ch. 539; § 1; T.C.A. (orig. ed.), § 36-405; Acts 1986, ch. 582, §§ 1, 2; 1989, ch. 224, § 1; 1996, ch. 1031, § 2.

Accordingly, the following can be said, narratively speaking, about TCA 36-3-103(a). It was “derived” from the Laws of North Carolina of 1778 (hereinafter sometimes referred to as the “1778 Laws”), which were later codified in Section 2441 of the Code of 1858 (this is the first *official* codification of statutes in Tennessee), and then found in Section 4191 of the Shannon Code (part of Chapter 7 thereof), which was the Code as it existed in 1896.

The Shannon Code was replaced by a new Code, published in 1932, and the predecessor to the current statute was codified therein as Section 8414. Then, by virtue of Chapter 539 of the Public Acts 1976, the original version of the current T.C.A., the statute in question was codified as § 36-405, before it began to take on its current form under T.C.A. § 36-3-103(a).

However, not reflected in the Commission’s history is the fact that, prior to the Official Code of 1858, the marriage laws of the Laws of North Carolina of 1778 were found in what is called the “Scott’s Edition” of the Tennessee Code published in 1821, and it is in that Edition that the 1778 Laws can first be found.

A. The 1778 Laws of North Carolina – Scott’s Edition.

Section 1 of Chapter 5 of the 1778 Laws (see Exhibit 1A) stated the purpose of the Chapter, namely, “that it was *absolutely necessary* that rules should be observed concerning celebrating the *rites of matrimony*.” (emphasis added) Sections 2 and 3 authorized certain persons (“ministers

¹ The Tennessee Code Commission exists by virtue of T.C.A. § 1-1-101, which provides: “The Tennessee Code Commission directs the publication, sale, and distribution of an *official compilation* of the statutes, codes, and laws of the state.” (emphasis added). By virtue of T.C.A. § 1-1-111(b) the “text of the statutes, codes and code supplements (but not the annotations, footnotes and other editorial matter) appearing in the printed copies of the compilation, containing a copy of the commission's certificate of approval, shall constitute prima facie evidence of the statutory law of this state and be received, recognized, referred to and used in all courts, agencies, departments, offices of and proceedings in the state as the official compilation of the statutory law, ...”

of the gospel” and “justices of the peace”) to “solemnize the *rites of matrimony*” and authorized “the clerk of each county ... to grant marriage licenses,” respectively. (emphasis added). This, the Tennessee Code Commission, says is the forerunner of T.C.A § 36-3-103.

But it is in Section 5 we find the provision that justified the following observation made by the U.S. Supreme Court in *Meister v. Moore*, 96 U.S. 76 (1877):

statutes have been construed as denying validity to marriages not formed according to the statutory directions. Notably has this been so in North Carolina and in Tennessee, where the statute of North Carolina was in force. *But the statute contained a provision declaring null and void all marriages solemnized as directed*, without a license first had.

Id. at 79 (emphasis added).

That Section 5 of the 1778 Laws that Tennessee inherited states:

If any Minister ... shall knowingly join together in *Matrimony* any two persons, **in any Way or manner other than by this Act directed**, shall forfeit and pay for every such **Offence** the Sum of fifty Pounds to be recovered by action of debt, in any court of record having cognizance thereof, one half to him that shall sue for the same, and the other half to be applied by the court to the use of the county where such forfeiture ariseth, **and** he shall **also** liable to an action of damage to the party grieved. (emphasis added)

There are two key parts to Section 5. The first part says there is no “way or manner” by which a couple could be “joined together in Matrimony” – participate in the “rites of matrimony” as Sections 1 and 2 describe it - other than as “directed” in the Act. *The only logical construction of Section 5 is that a couple could not be married if they did not have a license*. If you did not have a license you were not able or allowed, or as we shall later see, “capable” of marrying. As we will see, herein lies the abrogation of the common law marriage.

The second key part to Section 5 reinforces this conclusion and reflects the seriousness with which the legislature intended the requirement of the license be taken. It makes it an “offense” for a minister to marry someone contrary to the provisions of the Act and makes the ministers who do so subject to a monetary penalty as well.²

It is also important to note that there were two parts to the monetary penalty. The “offense” was “to be recovered by action of debt, ... One half to him that shall sue for the same, and the other half to be applied by the Court to the use of the county where such forfeiture ariseth.” But the minister was “**also** liable to **an action of damage** to the party grieved.” (emphasis added) The importance of both of these “penalties” will be seen momentarily.

² Section 5 applied the same penalty to the County Clerk who granted a license “in any way or manner other than by this act directed.”

B. The Code of 1858.

Chapter 1 of Title 4 the Code of 1858 (Exhibit 1B) sets forth the statutory provisions regulating marriage. According to the history set forth by the Tennessee Code Commission, Section 2441 of that Chapter and Title sets forth the provision corresponding to at least parts of Sections 1 and 2 of the 1778 Laws. It states:

Before being joined in marriage, the parties shall produce to the minister or officer aforesaid, a license under the hand of the Clerk of the County Court, where the female resides, or where the marriage is solemnized, directed to such minister or officer, authorize the solemnization of a marriage between said parties.

The question naturally becomes, “Why did the word “before” get inserted into the statute in 1858 and what is its import?”

The answer to that question comes, in part, from how one of the two key parts of Section 5 of the 1778 Laws - the two kinds of “penalties” applicable to ministers – was handled in the Code of 1858. The Code of 1858 broke the preceding penalty provision into two new sections, Section 2446 and 2447.

Taking those two sections in reverse order, Section 2447 provided:

In each of the foregoing cases [Section 2445 related to County Clerks and Section 2446 related to ministers, both related to non-compliance with the license law], the party violating these provisions shall be guilty of a misdemeanor.”

This provision clearly parallels the first part of the penalty to which the minister was subject under Section 5 of the 1778 Laws, namely, the “offense” resulting in what amounted to a fine going partly to the government, as happens with the fines for commission of a misdemeanor under current law.

But in Section 2446 we find the parallel to the “action of damage” found in Section 5 of the 1778 Law. Section 2446 provides:

If any minister or officer knowingly join together in matrimony any two persons **not capable thereof**, he shall forfeit and pay the sum of five hundred dollars, to be recovered by **action of debt**, for the use of the person using.

This provision clearly parallels the second part of the penalty to which the minister was subject under Section 5 of the 1778 laws, namely, the “action of damage to the party grieved.”

But here is the key. As previously indicated, a couple was “not capable” of marrying under Section 2446 if they did not have a license, because to marry without a license was a violation of the 1778 Laws which prohibited the “join[ing] together in *Matrimony* any two persons, *in any*

Way or manner other than by this Act directed.” (emphasis added)

Importantly, Section 2446, according to the history provided by the Tennessee Code Commission, is the precursor to current T.C.A. provisions 36-3-305, which provides that

[a]ny such minister or officer who knowingly joins together in matrimony two (2) persons **not capable thereof** commits a Class C misdemeanor and shall also forfeit and pay the sum of five hundred dollars (\$500), to be recovered by **action of debt**, for the use of the person suing. (emphasis added)

We now see in Section 2446 and 2447 what happened to one of the aforesaid key parts of Section 5 of the 1778 Laws, namely, the two penalty provisions creating a “fine” and an action for damages. But what of the other key part of Section 5, the part that said that a minister was not to join a couple in matrimony “in any *Way or manner* other than by this Act directed”? This is easily solved by thinking about how all the sections of the 1778 Laws read collectively.

The prohibition on marrying someone under the 1778 Laws who did not have a license and was therefore “not capable” of marrying meant that “*before*” a couple could be “joined in matrimony (Section 5), participate in the “rites of matrimony (Section 1), and have a minister “solemnize the rites of matrimony of matrimony (Section 2), that couple had to have a license from the County Clerk (Section 3).

And that explains precisely why T.C.A. § 36-3-103(a) says that “[b]efore being joined in marriage, the parties **shall present to the minister** or officer a license under the hand of a county clerk in this state, directed to such minister or officer, authorizing the solemnization of a marriage between the parties. Such license shall be valid for thirty (30) days from its issuance by the clerk.” This section of current law perfectly reflects what had to happen under the Laws of 1778 in order for a couple to get married, because the Laws of 1778 abrogated the common law of marriage.

And it explains why Plaintiffs, as state-authorized marriage officiants, are concerned that they are subject to sanctions is the purport to marry a couple without a valid Tennessee marriage license.

1778.

Newbern, in the month of December, in the year one thousand seven hundred and seventy; also one act, entitled "an act for the relief of insolvent debtors, with respect to the imprisonment of their persons," made and passed at Newbern the sixth day of March, one thousand seven hundred and seventy-three, but since repealed by proclamation; and the following acts passed the last session of assembly, but which expire with this session, if not revived, to wit, an act to prevent hunting with a gun by fire light in the night; and an act to ratify an act entitled "an act for the better regulation of the town of Newbern, and for securing the titles of persons who hold lots in the said town; also to ratify an act entitled "an act for the better regulation of the town of Newbern, and for securing the titles of persons who hold lots in the said town;" also to ratify an act entitled "an act for amending an act entitled "an act for the better regulation of the town of Newbern, and for securing the titles of persons who hold lots in the said town;" be, and are hereby revived, and declared to be in force, so far as the said acts are not destructive of, repugnant to, or inconsistent with the freedom and independence of this state, and the form of government therein established.

The acts respecting card playing and hunting, are not published in Iredell, at the times mentioned in this act but are provided for subsequently

CHAP. 7. An Act to establish rules to be observed in solemnizing the rites of matrimony.

See acts Apl. 1741, c. 1. Nov. 3. 1766. ch. 9. Nov. 1809, ch. 25. declaring certain marriage rates.

1. Whereas it is absolutely necessary that rules should be observed concerning celebrating the rites of matrimony;
2. Be it therefore enacted by the General Assembly of the state of North Carolina, and it is hereby enacted by the authority of the same, That all regular ministers of the gospel of every denomination having the cure of souls, and all justices of the peace in this state, are hereby authorised and empowered to solemnize the rites of matrimony, according to the rites and ceremonies of their respective churches, and agreeable to the rules in this act prescribed; and the said ministers may demand and take for every couple by them married, if by licence, the sum of twenty shillings lawful money of this state, and if by publication, the sum of ten shillings like money, to their use and no more.
3. And be it further enacted by the authority aforesaid, That the clerk of each county is hereby authorised and empowered to grant marriage licences to any person applying for the same, first taking bond, in the name of the governor for the time being, and his successors with sufficient security, in the sum of five hundred pounds lawful money of this state, with condition that there is no lawful cause to obstruct the marriage for which such licence is desired, to be recovered by action of debt in any court of record having cognizance thereof, by the party grieved; which bond aforesaid shall be taken, and licence granted, by the clerk of the county in which the same

Matrimony how solemnized. Licence granted.

HUSBAND AND WIFE.

art. 8

Property set
tle. or child
under power
or trust to be
collated.

2434. Where a power or trust is granted to a parent to bestow property conveyed or settled by the instrument creating the power or trust, in favor of any one or more of the children of such parent, any property given under such power or trust to a child, shall be collated and brought into contribution by such child claiming a share in the distribution of the property of the parent.

Jurisdiction of
distribution.

2435. All courts having jurisdiction to partition real estate and order distribution among heirs and distributees, shall have full power and authority to cause accounts to be taken and valuations of lands to be made, so as to enforce equality of partition and distribution.

TITLE 4.

OF RIGHTS IN THE DOMESTIC RELATIONS.

- CHAPTER 1. Of Husband and Wife.
- CHAPTER 2. Of Guardian and Ward.
- CHAPTER 3. Of Master and Apprentice.
- CHAPTER 4. Of Master and Slave.

CHAPTER 1.

OF HUSBAND AND WIFE.

- ARTICLE I. Marriage.
- II. Divorce.
- III. Provisions for the Benefit of Married Women and their Children.

ARTICLE I.

MARRIAGE.

SECTION

- 2436. Marriage, with what kindred not to be contracted.
- 2437. Between whites and negroes forbidden.

SECTION

- 2438. Second marriage may be contracted, when.
- 2439. Solemnized by whom.
- 2440. Formula of solemnization.

HUSBAND AND WIFE.

SECTION
 2441. License.
 2442. Licensee to give bond.
 2443. Return of license.
 2444. Form of return.
 2445. License to incapable persons, forfeiture.

SECTION
 2446. Solemnization of marriage between incapable persons, forfeiture.
 2447. Misdemeanor.

2436. Marriage cannot be contracted with a lineal ancestor or descendant, nor the lineal ancestor or descendant of either parent, nor the child of a grandparent, nor the lineal descendants of husband or wife, as the case may be, nor the husband or wife of a parent, or lineal descendant. Marriage, with what kindred not to be contracted.

2437. Nor between a white person and a negro, mulatto, or person of mixed blood, to the third generation inclusive. Whites and negroes, etc.

2438. A second marriage cannot be contracted before the dissolution of the first. But the first shall be regarded as dissolved, for this purpose, if either party has been absent five years, and is not known to the other to be living. Second marriage may be contracted, when.

2439. All regular ministers of the gospel of every denomination, having the care of souls, and all Justices of the Peace, Judges and Chancellors in the State, may solemnize the rite of matrimony. Solemnized by whom.

2440. No formula need be observed in such solemnization, except that the parties shall respectively declare, in the presence of the minister or officer, that they accept each other as man and wife. Formula.

2441. Before being joined in marriage, the parties shall produce to the minister or officer aforesaid, a license under the hand of the Clerk of the County Court, where the female resides, or where the marriage is solemnized, directed to such minister or officer, authorizing the solemnization of a marriage between said parties. License.

2442. The clerk may issue such license to any one applying for the same, unless he know that one of the parties is incapable of marriage, first taking bond to the State, with sufficient surety, in the sum of twelve hundred and fifty dollars, conditioned that there is no lawful cause to obstruct the marriage, for which the license is desired; for which penalty any person aggrieved by the marriage may sue. Licensee to give bond.

2443. The minister of the gospel or Justice of the Peace, or Judge or Chancellor, who solemnizes the rite of matrimony, shall endorse on or append to the license the time of the marriage, and sign his name thereto, and return the license to the Clerk of the County Court, within six months thereafter. Return of the license.

2444. The clerk shall at the foot or on the back of each license place the following form of certificate, to be signed by the person solemnizing the marriage: Form of return.

"I solemnized the rite of matrimony between the above (or within) named parties, on the _____ day of _____ 18__."

License to incapable persons, forfeiture.

Solemnizing marriage between incapable persons, forfeiture.

Misdemeanor.

2445. If a clerk knowingly grant marriage license to persons incapable thereof, he shall forfeit and pay a fine of five hundred dollars, to be recovered by action of debt, for the use of the person suing.

2446. If any minister or officer knowingly join together in matrimony any two persons not capable thereof, he shall forfeit and pay the sum of five hundred dollars, to be recovered by action of debt, for the use of the person suing.

2447. In each of the foregoing cases, the party violating these provisions shall be guilty of a misdemeanor.

ARTICLE II.

DIVORCE.

SECTION

2448. Causes of divorce from bonds of matrimony.
2449. Causes of divorce from bed and board.
2450. Petitioner must be resident of the State two years.
2451. Bill, in whose name and where to be filed.
2452. Statements of the bill.
2453. Verification of the bill.
2454. Process to compel appearance to be issued on security for costs; taking bill for confessed.
2455. Trial at first term if subpoena served.
2456. Trial at first term without service, when.
2457. Appearance and defence.
2458. Issues.
2459. Decree for divorce not to be made without proof.
2460. Adultery of applicant, when a defence to bill for that cause.
2461. Restoration of conjugal rights.
2462. Evidence, how to be adduced.

SECTION

2463. Proof, when wilful absence is the cause assigned for application.
2464. When the cause is that defendant is a convict.
2465. Relief, form of.
2466. Ill conduct of complainant when a defence to wife's bill.
2467. Annulling marriage or decreeing separation.
2468. Alimony.
2469. Amount of alimony, how to be estimated.
2470. Decree for alimony, how enforced.
2471. Wife's own property, when to be decreed to her.
2472. When not.
2473. Dower, distributive share, and alimony, when denied to wife.
2474. Disability of wife divorced for adultery.
2475. Marrying again.
2476. Legitimacy of children.
2477. Costs.

causes of divorce from bonds of matrimony.

2448. The following shall be causes of divorce from the bonds of matrimony:
1. That either party, at the time of the contract, was and still is naturally impotent and incapable of procreation.
 2. That either party has knowingly entered into a second marriage, in violation of a previous marriage, still subsisting.
 3. That either party has committed adultery.

License to incapable persons, forfeiture.

Solemnizing marriage between incapable persons, forfeiture.

Misdemeanor.

2445. If a clerk knowingly grant marriage license to persons incapable thereof, he shall forfeit and pay a fine of five hundred dollars, to be recovered by action of debt, for the use of the person suing.

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ARTICLE II.

DIVORCE.

SECTION

- 2448. Causes of divorce from bonds of matrimony.
- 2449. Causes of divorce from bed and board.
- 2450. Petitioner must be resident of the State two years.
- 2451. Bill, in whose name and where to be filed.
- 2452. Statements of the bill.
- 2453. Verification of the bill.
- 2454. Process to compel appearance to be issued on security for costs; taking bill for confessed.
- 2455. Trial at first term if subpoena served.
- 2456. Trial at first term without service, when.
- 2457. Appearance and defence.
- 2458. Issues.
- 2459. Decree for divorce not to be made without proof.
- 2460. Adultery of applicant, when a defence to bill for that cause.
- 2461. Restoration of conjugal rights.
- 2462. Evidence, how to be adduced.

SECTION

- 2463. Proof, when wilful absence is the cause assigned for application.
- 2464. When the cause is that defendant is a convict.
- 2465. Relief, form of.
- 2466. Ill conduct of complainant, when a defence to wife's bill.
- 2467. Annulling marriage or decree, when separation.
- 2468. Alimony.
- 2469. Amount of alimony, how estimated.
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- 2471. Wife's own property, when to be decreed to her.
- 2472. When not.
- 2473. Dower, distributive share, and alimony, when denied to wife.
- 2474. Disability of wife divorced for adultery.
- 2475. Marrying again.
- 2476. Legitimacy of children.
- 2477. Costs.

Causes of divorce from bonds of matrimony.

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1. That either party, at the time of the contract, was and still is naturally impotent and incapable of procreation.
 2. That either party has knowingly entered into a second marriage, in violation of a previous marriage, still subsisting.
 3. That either party has committed adultery.

4. Wilful or malicious desertion or absence of either party, without a reasonable cause, for two whole years.

Causes of divorce from bonds of matrimony.

5. Being convicted of any crime which, by the laws of the State, renders the party infamous.

6. Being convicted of a crime which, by the laws of the State, is declared to be a felony, and sentenced to confinement in the penitentiary.

7. That either party has attempted the life of the other, by poison or any other means showing malice.

8. Refusal, on part of a wife, to remove with her husband to this State, without a reasonable cause, and wilfully absenting herself from him for two years.

9. That the woman was pregnant at the time of the marriage, by another person, without the knowledge of the husband.

2449. The following shall be causes of divorce from bed and board, and from the bonds of matrimony, at the discretion of the court:

Causes of divorce from bed and board, or from bonds of matrimony.

1. That the husband is guilty of such cruel and inhuman treatment or conduct towards his wife, as renders it unsafe and improper for her to cohabit with him, and be under his dominion and control.

2. That he has offered such indignities to her person as to render her condition intolerable, and thereby forced her to withdraw.

3. That he has abandoned her, or turned her out of doors, and refused or neglected to provide for her.

2450. A divorce may be granted for any of the aforesaid causes, though the acts complained of were committed out of the State, or the petitioner resided out of the State at the time, no matter where the other party resides, if the petitioner has resided in this State two years next preceding the filing of the petition.

Petitioner must be resident of State two years.

2451. The bill may be filed in the proper person and name of the complainant, in the Circuit or Chancery Court of the county or district in which the defendant resides or is found, if a resident; but if a non-resident, or convict, then in the county where the applicant resides.

Bill, in whose name and where to be filed.

2452. It shall set forth particularly and specially the causes of the complaint, with circumstance of time and place, with reasonable certainty; and pray for a divorce from the defendant only, or for a divorce and such other and further relief as the complainant may think him or herself entitled to.

Statements of the bill.

2453. The bill shall be verified by an affidavit, upon oath or affirmation, before a Justice of the Peace, or the Judge or clerk of the court, that the facts stated in the bill are true to the best of the complainant's knowledge and belief, and that the complaint is not made out of levity, or by collusion with the defendant, but in sincerity and truth, for the causes mentioned in the bill.

Verification of the bill.