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LIMITED PURPOSE MARRIAGES

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THE CONCEPT

A LIMITED purpose marriage occurs when a man and a woman enter a full status legal marriage and yet at that time one or both of them do not intend to fulfil some or all of the important legal and social duties culturally expected of a “normal” marriage. That is, although the parties consent to the ceremony or commencement of the marriage, they do not fully consent to its cultural and legal functions.1

Apart from the label of “limited purpose marriage,” these kinds of marriages have also variously been called “sham,” “illusory,” “fictional,” “purported,” “pretended,” “ostensible,” “colourable” marriages, “marriages of convenience,” marriages of “conditional consent,” “mental reservation,” “defective intention” and “in name only.” Obviously, the suggested description raises the difficult question of what are the essential or core functions of marriage in a given time and culture.2

One of these labels might be attached where, at the time of marriage ceremony or commencement,3 the parties have clear unilateral or bilateral reservations about sexual intercourse,4 cohabitation5 or procreation. Or, one or both may intend to marry solely or predominantly for the purpose of circumventing or satisfying immigration or emigration laws.6

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3 The distinction between ceremony and commencement is mentioned here to emphasise that a de facto cohabitation marriage which today has limited legal status may also sometimes only be entered into for a limited purpose: see post, note 12.
a joke, legitimising children,7 acquiring money,8 sexual gratification,9 or minimising taxation.10 To this list can be added:

“The marriage might be performed as a result of a dare, or solely to win a bet, to obtain an engagement open only to married persons, to fulfil a promise made to a dying person, to comply with the terms of a settlement conferring gifts subject to the beneficiary’s marriages and so on. Marriages have been celebrated solely in order to avoid military call-up, in one case it seems in order to avoid court-martial.”11

In one sense, such marriages are at the opposite end of the spectrum to de facto marriages. A de facto marriage, to a sociologist, functions like a marriage, but because it did not begin with the socially and legally prescribed ceremony, is only given a limited legal status by the law.12 Whereas a limited purpose marriage, from a sociologist’s viewpoint, often does not function like a marriage at all,13 or perhaps functions as such only for a very short time,14 but because it began with a legally prescribed ceremony, it has often been given full legal status by the law.

The popularity of limited purpose marriages seems to, be increasing today perhaps because first, highly desirable benefits are accessible through marital status with the right person. Most notably, there are steadily increasing refugee populations trying to escape religious, racial and political persecution and perhaps also seeking access to the wealthy western nations.15 Secondly, divorce is now easily available and is relatively cheap. Thus one can now readily discard the marriage status once it has served its purpose.16 Thirdly, there is often little social or even family disapproval of the use of limited purpose marriage - it is only another harmless method of using the rules to beat the “system” or the “establishment.”

8 R. Brandon, The Dollar Princesses (1980); Shonfeld v. Shonfeld, 260 N.Y. 477, 184 N.E. 60 (1933) (false statements by woman concerning her wealth; marriage annulled); Ryan v. Wurmbrand-Stuppach Ryan 156 Misc. 251, 281 N.Y.S. 709 (1935)(woman married solely to obtain husband’s wealth; marriage annulled on ground that woman had deceived petitioner about her feelings of love towards him!); Woronzoff-Daschkoff v. Woronzoff-Daschkoff, 303 N.Y. 506; 105 N.E. (2d) 877(1952) (fortune-hunting male married solely to obtain money; marriage consummated; no annulment granted); Kelly v. Kelly (1933) 140 L.T. 143 (marriage ceremony undertaken for business convenience held void for mistake); Rheinstein ante, note 1, pp. 91-101. The writer understands that in Sydney, the compulsory counselling of broken short-term marriages under F.L.A., s. 14 (6), has revealed a substantial number of social security and immigration marriages.
10 e.g. marrying and if necessary divorcing, in order to avoid stamp duty on a transaction between male and a female under s. 90 of the Family Law Act 1975(Aust.); cf. formerly the Swedish “ tax-divorce” whereby a married couple divorced and secretly moved back together after their new single status had been accepted by the taxation authorities; J. W. F. Sundberg, “Recent Changes in Swedish Family Law: Experiment Repeated” (1975) 23 Am.J.Comp. Law 34, 38-39.
11 J. Jackson ante, note 1, p. 290. Cases are cited from many jurisdictions as illustrations.
13 e.g. H.M. Johnson, Sociology: A systematic Introduction (1960), pp. 146-174.
14 e.g. In the marriage of Suria (1977) F.L.C. 90-305 (three weeks of cohabitation; marriage valid); C. v. C. [1942] N.Z.L.R. 356 (two weeks of cohabitation; marriage valid).
15 Less notably, marriage status with a suitable employee of an airline company, may give rights to discount travel!
16 In the U.S.A. “[t]here is a statutory presumption of fraud when an alien and his spouse have been married less than two years before the alien enters the United States and have been divorced within two years after his
Limited purpose marriages can be arranged into different conceptual categories. For example, the limited purpose can be held by one or both of the parties to the marriage. If held by only one party, the other may actually know or ought to know of the limited purpose without so restricting his/her own marital expectations; or may be misled by silence concerning the limited purpose or deceived by positive misrepresentations. The purpose may be limited to one or more purposes within traditional marriage functions—for example, only to have companionship, or only to procreate children - or may be limited to purposes wholly outside traditional marriage functions - for example, to marry only to satisfy the letter but circumvent the spirit of immigration or taxation laws. The limited purpose may be the sole reason for entering the marriage or may only be the predominant reason. Finally, the alleged limited purpose may be proved by different kinds of evidence. It may be contained in a pre-marriage subjective uncommunicated mental reservation, in pre-marriage writing or formal agreement. The seriousness of the alleged pre-marriage limited purpose can be supported or questioned by post-marriage statements and conduct.

These conceptual differences may assist in deciding what degree of legal recognition should be given to these different kinds of limited purpose marriages.

In logic at least, it seems reasonable to argue that if mutual consent is considered to be a necessary and vital element of marriage, then qualified consent by either party should result in an improper or second-class marriage, both socially and legally. For example, by analogy it is clear that each participant is required to have mental capacity to consent not only to the ceremony, but also to the normal rights and duties attaching to marriage. “In order to ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage.” If the absence of capacity to consent to normal duties affects the legal status of marriage, then why not absence of actual consent to normal duties? This is indeed the conceptual position taken by the Roman Catholic Church though its sanction is expressed in the consequence of “invalidity.” For example, in the Codex Juris Canonici, Canon 1086, Section 2 states that “if either or both parties by a positive act of the will exclude marriage itself, or all right to the conjugal act, or any essential property of marriage, he contracts invalidly.” It is submitted that this appears to be conceptually a reasonable argument even though its practical administration has sometimes been criticised as cumbersome, expensive and unethical. For example, when discussing nullity decrees granted under Italian law due to the mental reservations of one or both parties, Max Rheinstein has commented:

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17 Dalrymple v. Dalrymple (1811) 2 Hag.Con.54, 106-107
18 If the post-marriage conduct includes consummation, the courts in most jurisdictions have rarely been willing to give any legal significance to the alleged limited purpose; Clark, ante, note 1; cf. Swinburne, ante, note 2, pp. 109-153.
19 In the estate of Park, Park v. Park [1953] 2 All E.R. 1411, 1430, per Singleton L.J.
“The most famous case of this kind is that of Guglielmo Marconi, the inventor of wireless telecommunication, whose marriage of thirty-three years was declared invalid when he proved that at the time of the marriage he and his bride had agreed to obtain a divorce if aversion should develop between them. Another prominent case is that of Caroline Lee Radzwill, the sister of Jacqueline Kennedy, and of the Italian movie star Renato Rascal. The latter’s eleven-year-old marriage was declared invalid when he convinced the tribunal that he and his bride had agreed never to procreate children. Gratefully Rascal dedicated funds for a chapel.”

Thus, to repeat, it seems reasonable to argue that socially a “proper” or “first class” marriage still ought to include consent to the normal rights and duties of marriage. That is, consent to be present at the ceremony and say a few words is not enough - there ought to be actual consent by both parties to the normal legal rights and duties which arise out of the legal status of marriage. However, the logical need for full marital consent has not been stretched in English law to its “logical” conclusions. The words of Justice Holmes again echo that “the life of the law has not been logic, it has been experience.” No doubt such logical conclusions would once have created great administrative inconvenience. For example, in those times when divorce was difficult to obtain, the courts would presumably have been rushed with applications for nullity decrees on the grounds of qualified consent or mental reservation. Moreover in cases of collusion, allegations of qualified consent would have been difficult to disprove and in effect would have provided an easy exit by agreement from the legal bond of marriage.

HISTORICAL BACKGROUND

Historically, limited purpose marriages have tended to become legally important in those cultures where divorce was (or is) difficult to obtain. For then, wealthy persons with broken marriages were eager to find methods, other than divorce, to terminate the legal status of marriages which had already terminated in function. It seems that the most popular European device, at least until the Reformation, and to a much lesser extent thereafter, was a nullity decree on the grounds of marriage within the prohibited degrees of consanguinity or affinity. An alternative, and certainly less popular method, was to argue that as full consent to the core rights and duties of marriage is vital to a valid marriage; qualified consent is no consent at all. Therefore such a marriage ought to be declared void ab initio.

It seems that this alternative basis for nullity of marriage has always been conceptually available in the Papal courts. However, between 1200 and 1918 the concept was apparently rarely utilised therein, due to the evidentiary dilemma of how ex post facto to determine

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22 Rheinstein, ante, note 1, p. 175; also Scott, ante, note 20.
23 Note the uncertainty attached to the concept “normal rights and duties of marriage”; post, note 10.
26 e.g. ibid. Jackson at pp. 1-77, esp. 21-24; J. Bryce, “Marriage and Divorce under Roman and English Law,” in Select Essays in Anglo-American Legal History (1907), Vol. 3, 782.
private motives and reservations.\textsuperscript{27} Likewise, in England after the Reformation, the concept of qualified consent was recognised though probably infrequently applied.\textsuperscript{28} Such recognition in England was facilitated by the fact that until 1753 a marriage celebrated by the non-ceremonial exchange of promises was legally “valid” for most purposes.\textsuperscript{29} However there was apparently a greater reluctance to legally recognise secret reservations if the parties subsequently married in a public church ceremony\textsuperscript{30} This practice was probably based partly upon the principle that the terms in a later solemn document ought not be qualified by earlier oral reservations\textsuperscript{31} That is, the terms of a public, written contract ought to take precedence over pre-existing private and informal terms. Presumably the strength of this analogy to the policy behind the Statute of Frauds would be weakened if the parties at the time of the ceremony were completely open about their mental reservations to everyone, including the marriage celebrant. In such a situation it would be difficult to argue that the overt terms of the ceremony\textsuperscript{32} supersede the pre-existing privately shared intention.\textsuperscript{33}

One conceptual method which has enabled the limited purpose to be rendered legally ineffective\textsuperscript{34} has been made possible by the use of slippery public policy. Thus several reported cases have decided that a pre-nuptial agreement to the effect that the marriage will not function as a normal marriage is void as being against public policy?\textsuperscript{35} Thus by rather doubtful logic, the pre-marriage agreement is void, and thereby the marriage is valid. The qualified imperfect consent to marry is made unqualified and perfect by notionally making the qualification disappear.

By the eighteenth century, English judges appear to have worked on the presumption that mental reservations would not affect the status of marriage at least in traditional cases of a “matrimonial” nature, such as nullity and property division. Thus in 1811, Sir William Scott, sitting as an ecclesiastical judge in a church court in Dalrymple v. Dalrymple, and interpreting Scottish law stated:

\begin{quote}
\textsuperscript{28} e.g. H. Swinburne, Spousals (1686), ante, note 2, pp. 109-153.
\textsuperscript{30} Swinburne, ante, note 2, Sect. XI, para. r3, p. 84.
\textsuperscript{31} In “contract law” this policy is reflected in the Statute of Frauds and the parole evidence rule, and yet is balanced by various exceptions contained in, for example, the rules of collateral contract and misrepresentation.
\textsuperscript{32} e.g. a civil celebrant at least is obliged to state at the ceremony that “ ‘Marriage according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life,’ or words to that effect.” Marriage Act 1961 (Cth.), s. 46 (1).
\textsuperscript{33} Presumably a civil or religious celebrant who consciously officiated at limited purpose, marriages would risk deregistration: Marriage Act 1961 (Cth.), ss. 31-34. To repeat, such marriages are “improper” for some purposes.
\textsuperscript{34} At least to the extent that the marriage remained “valid,” in that no subsequent legal marriage could be effected.
\textsuperscript{35} e.g. Brodie v. Brodie [1917] P. 271; Van Oosten v. Van Oosten [1923] C.P.D. 409; Martens v. Martens [1952] 3 S.A.L.R. 771 (pre-marriage agreements not to cohabit held to be void and therefore not an acceptable defence to actions for restitution of conjugal rights); cf. Morgan v. Morgan [1959] P. 92 (no suggestion that a companionship agreement prior to an elderly marriage is void); cf. Swinburne’s distinction, that where the condition is only “unhonest,” i.e. contrary to laws and good manners, as compared to being contrary to the substance of marriage, then the condition and not the marriage is void; ante, note 2, pp. 134-153.
“It is the intention of the parties that the substance of every species of contract subsists, and what is beyond or adverse, to their intent does not belong to the contract. But then that intention is to be collected (primarily at least) from the words in which it is expressed; and in some systems of law, as in our own, it is pretty exclusively so to be collected. You are not to travel out of the intention expressed by the words to substitute an intention totally different and possibly inconsistent with the words. By the matrimonial law of Scotland a latitude is allowed which to us (if we had any right to exercise a judgment on the institutions of other countries with which they are well satisfied) might appear somewhat hazardous, of substituting another serious intention than that which the words express, to be proved by evidence extrinsic, and totally, as we phrase it, dehors the instrument. This latitude is indulged in Scotland to a very great degree indeed, according to Mr. Erskine. In all other countries a solemn marriage in facie ecclesiae facit fidem; the parties are concluded to mean seriously, and deliberately, and intentionally, what they have avowed in the presence of God and man under all the sanctions of religion and of law; not so in Scotland where all this may pass, as Mr. Erskine relates, and yet the parties are at liberty to shew that by virtue of a private understanding between themselves, all this is mere imposition and mockery, without being entitled to any effect whatever.”36

Not only in England but also in South Africa, Australia and Canada, the argument that a limited purpose marriage per se is void, seems only rarely to “have even been attempted, or to have succeeded,”37 at least over the last 200 years38 Commentators state the present position of English law with certainty.

“[No] agreement or private determination is allowed to nullify a marriage, even though it involves the frustration of one of the principal ends of marriage. English law looks to the consent as expressed, and will not allow the parties privately to derogate from their public professions.”39

Nevertheless there are some cases within the last century where the concept of mental reservations has been given a degree of judicial recognition. English courts have refused to exercise traditional matrimonial jurisdiction over certain “pseudo-marriages,” as these arrangements involved an absence of consent to certain elements of marriage understood as vital or essential at the time. Usually, the consent has been defective in that it did not envisage a lifelong monogamous union. However the sanction imposed by the courts upon such unions has not usually been to declare them void, but rather the much harsher sanction of refusing to exercise any jurisdiction at all.40 For if the relationship is called a “void marriage,” “it is clear

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36 (1811) 2 Hag.Con. 54, 105-106.
38 e.g. Parker v. Parker (1757), 2 Lee 382; contra M’Innes v. More, 1782, House of Lords, ante, notes 6, 7.
39 The Church and the Law of Nullity of Marriage (1955), p. 27. For completeness, to this statement needs to be added the requirements of mental capacity and “free” volition, i.e. absence of fear, mistake and fraud.
40 e.g. Hyde v. Hyde and Woodmansee (1866) L.R. 1 P. & D. 130, (court refused to exercise divorce jurisdiction over a monogamous marriage celebrated in Utah, where however future polygamy was clearly contemplated), Re Bethell, Bethell v. Hildyard (1888) 38 Ch.D. 220, 233 (offspring of monogamous marriage according to Baralong custom held to be illegitimate, probably because it contemplated future polygamy; “the question must always be: Did the parties intend to contract marriage?”); contra Bamgbose v. Daniel [1955] A.C. 107 (for the purposes of intestacy legislation, a polygamous union is recognised as a marriage); Khan v. Khan [1963] V.R. 203 (no divorce jurisdiction over a potentially polygamous marriage); Risk v. Risk [1951] P. 50 (no nullity
that at least legal obligations relating to maintenance, property and now even legitimacy of children attach thereto. For example, in Nachimson v. Nachimson the parties had married in Russia at a time when marriage was dissoluble at will by a simple process of deregistration. Accordingly it was argued that even though the parties subjectively may have initially intended a lifelong union, objectively what they entered into was something less than that. This argument was accepted by the trial judge, but overruled by the Court of Appeal on the ground that it was a monogamous marriage by Russian law, even though easily dissoluble if the parties remained domiciled in Russia. However the principle was not doubted that there were certain essential incidents of marriage which the parties must consent to before English law should recognise the ceremony as resulting in the status of “marriage.” Moreover it was considered important by two of the judges to emphasise that both parties subjectively intended the union to be a lifelong one.

Today, by legislation in Australia and England, many of these formerly “deviant” forms of polygamous or potentially polygamous marriages have been given recognition at least in areas of traditional matrimonial law. However, if the parties to a monogamous marriage celebrated within these jurisdictions clearly agree upon future polygamy and/or short-term marriage, then the reasoning of such cases as Hyde and Nachimson clearly suggests that some degree of legal non-recognition should follow.

In any historical overview of this topic, mention must be made of the case of United States v. Rubenstein. There, the parties went through a ceremony of marriage prescribed by New Jersey law, but did so solely for the purpose, of preventing deportation of the wife. She paid the husband $200 for his co-operation. The parties had agreed never to cohabit and the marriage was not consummated. However, the lawyer who had arranged the marriage was charged with the crime of conspiracy to bring an alien into the country by misrepresentation and concealment. One of the lawyer’s arguments in defence was that since the marriage was valid, he had made no misrepresentations. However, in a famous judgment, Judge Learned Hand held, inter alia, that the parties had not consented to enter the marital relationship as it is generally understood and, therefore, no marriage had occurred. Thus the defendant’s criminal conviction was affirmed. It is important to note an additional comment in obiter dictum made by Judge Learned Hand. He stated that since the immigration legislation was

jurisdiction over a potentially polygamous marriage); Sowa v. Sowa [1961] P. 70 (no maintenance jurisdiction over a polygamous marriage).

42 e.g. Risk v. Risk [1951] P. 50; Family Law Act 1975 (Cth.), ss. 60, 71. See ibid.

43 e.g. Formerly based on Marriage Act 1961 (Cth.), s. 91 (where either party believed “on reasonable grounds” that the marriage was valid); now state legislation in Australia gives all illegitimate or “ex-nuptial” children at least some inheritance rights as legitimate children, e.g. Children (Equality of Status) Act 1976 (N.S.W.), ss. 6-9.


45 e.g. Lawrence I.J. at p. 233, ”The present case might, possibly, have assumed a different complexion if it could have been proved... that the particular marriage in question had in fact been a mere sham and a mere cloak for casual intercourse.” Cf. Romer I.J. at p. 244 who warns that if a court too readily declares a limited purpose marriage invalid, it may thereby merely be furthering the improper limited purpose.

46 Ibid. at pp. 233,244.

47 e.g. at least where such marriages are celebrated outside Australia and where the parties each has marital capacity by the law of his/her respective domicile, e.g. Family Law Act 1975 (Cth.), s. 6; Matrimonial Causes Act 1973 (U.K.), ss. 11 (d) 47; see generally S. Poulter, ”Hyde v. Hyde - A Reappraisal” (1976) 25 I.C.L.Q.475; ”The Definition of Marriage in English Law ” (1979) 42 Mod.L.R. 409.

48 151 F. 2d 915 (2d Cir. 1945); see generally Leidigh, ante, note 1.
concerned primarily with certainty of economic support for the alien, suppression of the fact that the parties “intend that the responsibility [for support] shall end as soon as possible,” may well be a wilful evasion of the legislation, even though the marriage, is declared to be valid. Thus the clear problem arises that even though a limited purpose marriage is called “valid” in the matrimonial jurisdiction, it may not be a “proper” or “satisfactory” valid marriage in some other jurisdiction concerned with, say, immigration or taxation.

Of course, it is very difficult to discuss the boundaries of proper and improper immigration marriages, when the administration decision maker, has an undefined discretion, hears evidence in private, is very cautious about issuing guidelines for his decision and whose decision is not usually subject to review by an appellate tribunal. Moreover, where both parties have a vested interest in misrepresenting the actual marital situation, there are obviously special difficulties in rebutting collusive stories. Once again, some degree of abuse of the legislation may be a necessary price to avoid the expense and adverse results of attempting full-scale enforcement. This seems to be true whether for purposes of social security the parties say they are not married, and/or cohabiting, or where, for immigration purposes, they say that they are. On the other hand, these administrative and evidentiary difficulties attached to discerning what is a “proper” marriage, may encourage a blanket prohibition against certain groups of people from using marital status as a ground for gaining access to or exit from a country.

Apart from the relative secrecy of administrative decisions, there is another reason for the recent lack of authority on limited purpose marriages. Numerous reported cases in the twentieth century which could well have been argued under the dormant principle of mental reservations have been argued and decided under the alternative categories of duress and occasionally fraud. The additional elements of fraud and/or duress are, of course, not

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48 ibid. at p. 918.
49 This dictum followed later in United States v. Lutwak 195 F. 2d 748 (C.A. 7th, 1952), aff’d 344 U.S. 604 (1953). (Defendants guilty of making misleading representations concerning their immigration marriages in order to gain entry to U.S.A. Conviction upheld without necessity of deciding upon the validity of the marriages.) Note (1953) 20 U.Chi.L.Rev. 710.
50 e.g. R. v. Cahill and Ors. (1979) 22 A.L.R. 361 (N.S.W.C.A.) (immigration marriages “valid”; but Minister of Immigration still deported the males); cf. Re Kannan and Minister for Immigration and Ethnic Affairs (1979) 23 A.L.R. 631 (immigration marriage “valid”; Appeal Tribunal recommends against deportation). The writer is grateful to Mr. Leslie Katz for bringing this case to his attention.
51 Granting a right of appeal from immigration and deportation decisions leads inter alia to the dilemmas of a massive backlog of appeals and then the use of appeals as a tactic of delay. At present in Australia, only a limited right of appeal exists. Administrative Appeals Tribunal Act, 1975 (Cth.), Sched. pt. 22; Migration Act 1958 (Cth.).
without difficulties. For example, what degree of duress is necessary? How explicit and serious must the fraud be, in order to be legally operative?

“[T]here would be general consternation if an application was granted on the basis of fraud by reason of one party deceiving the other as to being possessed of natural teeth. The case of the person who marries to gain money rank or title as distinct from the more usually professed reasons would also cause concern. Clearly the fraud relied on must be one which goes to the root of the marriage contract.”

Of course, what amounts to a fundamental fraudulent misrepresentation concerning the purpose of the marriage, will vary with time and culture. In summary, English law of late has not been attracted to any degree of recognition of a doctrine of mental reservations for at least the following reasons:

(1) It seems to provide an easy exit by agreement to marriage and thereby might have undermined desirable, moral convictions concerning the importance of marriage stability.

(2) Its legal existence would be conducive to perjury.

(3) Its legal existence would lead frequently to the expense, delay and uncertainty of difficult litigation.

(4) Its legal existence would involve the recurrence of difficult conceptual questions concerning what is an essential purpose of marriage.

(5) Once marriages were commonly or compulsorily celebrated by public ceremony, then arguably the parties ought to be bound by their public objective declarations of intent, rather than their private and possibly subjective declarations of intent. “Maitland thought that the stress laid by the canonists upon the mental attitude of the spouses did not appeal to English lawyers who were disinclined to “trouble themselves with obscure inquiries into the state of mind of the parties”.

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54 There are suggestions that the courts will investigate not only the degree of duress, but also the “legitimacy” of the duress, e.g. Sir Jocelyn Simon P., Szechter v. Szechter [1970] 3 All E.R. 905, 915; cf. the question - when is the duress used in a shotgun or arranged marriage legitimate? e.g. Singh v. Singh [1971] P. 226; In the Marriage of S. (1980) F.L.C. 90-820.

55 e.g. “I am marrying you because I love you, not because I want to reside here”; cf. “The maxim ‘caveat emptor’ seems as brutally and necessarily applicable to the case of marrying and taking in marriage as it is to the purchase of a rood of land or a horse,” Brennen v. Brennen (1890) 19 O.R. 327, 337-338, per Falconbridge J.

56 In the marriage of Suria, ante, note 53, pp. 76, 354; el. Swinburne, ante, note 2.

57 A similar argument to the recurrent suggestion that easy divorce laws undermine marital stability; e.g. M. Rheinstein, ante, note 1.

58 e.g. Dalrymple v. Dalrymple (1811) 2 Hag.Con. 54, 105, 106, per Sir William Scott; Warrender v. Warrender (1835) 2 C1. & Fin. 488, 530, per Lord Brougham.

59 E. J. Cohn, “The Nullity of Marriage: A Study in Comparative Law and Legal Reform” (1948) 64 L.Q.R. 324, 335-336. However, it is clear that in different areas of law, judges show differing degrees of willingness to investigate subjective intention. E.g. In the marriage of Feltus (1977) F.L.C. 90-212 (weekend cohabitation not a resumption of cohabitation, as only for male’s sexual convenience); Mummery v. Mummery [1942] P. 107, 110.
(6) Alternative legal categories, such as fraud and/or duress, have been more readily used to provide nullity decrees in cases of mental reservations.60

(7) In the many factual situations where the question of qualified motives could be raised, such a debate is not particularly attractive, as the less expensive and less complex alternatives of divorce or de facto separation are available.61

(8) Sometimes judges have allowed “logic” to dictate results and thereby thought only in terms of two possible consequences or sanctions - namely total “validity” or total “invalidity.” If one is limited to these two possibilities only, then total “validity” may seem the more attractive alternative. The possibility that a marriage would be legally recognised (“valid”) for some purposes, and not legally recognised (“invalid”) for others is not conceptually popular, though in practice it has been historically common.62

The following view has yet to be properly considered in modern English patterns of legal thought:

“[A]n act that is void in the primary intention may have some effect in some other capacity.’ Thus the difference: between an act that is void and an act that is valid is unlike the difference between ‘yes’ and ‘no,’ between ‘effect’ and ‘no-effect.’ It is a difference of grade and quantity. Some effects are produced, while others are not. What was the primary intention and what is therefore the primary effect is a matter that cannot be answered once and for all by an abstract formula. It must be decided separately for each individual case in accordance with the considerations of justice and convenience, that govern the case.”63

It is interesting to note that polygamous marriages have readily been “recognised” for some purposes, and not for others. Thus courts have formerly refused to exercise matrimonial jurisdiction over polygamous marriages64 but have readily recognised and exercised jurisdiction over polygamous marriages in such areas as succession, interpretation of contracts, declaration of property interests, social security and children’s welfare.65

(9) Its legal existence would multiply the number of illegitimate children. However, this is not a strong argument as once the parties have produced or adopted children, it should be very difficult to successfully argue the concept of mental reservations, as procreation and nurture of children are such core purposes of marriage in every culture.

60 See ante, text related to notes 53-56.
61 e.g. Silver v. Silver [1955] 2 All E.R. 614 (insufficient duress, but divorce granted).
62 e.g. between 1200-1753, in England, informal marriages were recognised in ecclesiastical courts, but probably were of dubious status for purposes of dower especially if competing with a formal marriage; see ante, note 29.
63 See Cohn, ante, note 60, pp. 324, 326, 335-336; for similar argument see Engdahl, post, note 80; Dixon, Hurley, Clark, post, note 25.
64 See ante, note 40.
LIMITED PURPOSE MARRIAGES AND THE TRADITIONAL “MATRIMONIAL” JURISDICTION

How will the courts adjudicating such traditional matrimonial areas as nullity, divorce, division of property, maintenance and custody, respond to the phenomenon of a limited purpose marriage? For example, in Australia the present grounds for avoiding a marriage are set out in the Marriage Act 1961 (Cth.) which provides that a marriage is void on seven grounds “and not otherwise.”66 Thus conceptually, a limited purpose marriage per se is presently not void although it may satisfy the alternative ground previously discussed namely where “consent of either of the parties is not a real consent because it was obtained by duress or fraud.”67

In those jurisdictions where such a procedure is available, presumably it can be argued that a limited purpose marriage could be declared “invalid” rather than “void.”68 This suggestion finds some conceptual support by the argument that some meaning should be given to statutory words such as “marriage”69 and “union.”70 For often legislation provides that “a marriage is void where...” and thereby begs the question of what is “a marriage.”71 However, it seems unlikely that judges will readily foster such a distinction between void and invalid marriages.72

Even though limited purpose marriages may not be affected by the present law of nullity, are they of significance elsewhere, such as in relation to divorce, property, custody and maintenance? In these areas of law, a judge could respond by either refusing to exercise jurisdiction, or in the exercise of jurisdiction, by taking into account the nature of the marriage. It is submitted that the former course is highly unlikely today even though in the past it has been common for English judges to refuse to exercise jurisdiction over “improper” (usually polygamous) marriages.73 Thus even though there is power to stay any proceedings, it seems to be very unlikely that a judge would refuse to hear an application concerning divorce, finances or custody on the ground that this was a “valid” though improper, or tainted, or limited purpose marriage.74

Nevertheless, once a judge has decided to exercise jurisdiction, he would, no doubt, take into account the nature of the marriage. This would then affect the exercise of his discretion to some extent. However, there is no readily available discretion to actually refuse to grant a

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66 s. 23.
67 Marriage Act 1961 (Cth.), s. 23 (1) (d) (i); ante, note 53.
68 Family Law Act, s. 4 (1), “matrimonial cause” means inter alia “(b) proceedings for a declaration as to the validity of a marriage,” and in such proceedings “the court may make such declaration as is justified” (s. 113).
69 Marriage Act, s. 23.
70 Family Law Act, s. 43.
73 Ante, note 40, Poulter, note 46.
74 e.g. in Australia, Family Law Act, s. 118, Reg. 16; In the marriage of Tansell (1977) F.L.C. 90-307, 76, 625 (inherent jurisdiction to dismiss “abusive” proceedings); cf. now Puttick v. Attorney-General [1979] 3 All E.R. 463 (court refused to declare immigration marriage valid inter alia due to applicant’s deceitful conduct).
dissolution of a limited purpose marriage. Some judges may be inclined to punish the practice of entering a limited purpose marriage by refusing a divorce and thereby perpetuating the bonds of matrimony\(^75\) (and acrimony). Some practices might become particularly irritating, such as marriages and divorces effected in order to avoid the payment of state stamp duties.\(^76\) Nevertheless, it is likely that judges would grant the divorce and refer the evidence of the limited purpose marriage to the appropriate taxation or immigration authorities for possible action under their own quasi-criminal legislation.

This situation can be contrasted with disputes in the areas of maintenance,\(^77\) division of property\(^78\) and, in rare cases, custody.\(^79\) There, evidence of a limited purpose marriage as planned, and especially as executed, will no doubt be relevant to the manner in which judicial discretion is exercised. The non-functioning nature of most limited purpose marriages may well prompt a judge to award an applicant spouse no maintenance or property whatsoever.

**LIMITED PURPOSE MARRIAGES IN OTHER AREAS OF LAW**

Apart from traditional areas of family law, there are obviously many areas of law where the existence of rights and duties depends upon the existence of a “marriage.” Decision-makers are constantly called upon to interpret the word “marriage” in the legislation or common law before them. What attitude will the judges and other decision-makers administering these areas of law take towards limited purpose marriages? Will there be a retreat to the safety of the position that where no nullity decree would be granted by the Family Court, then this is a recognised marriage for all purposes? Or will such marriages be recognised for some legal purposes and not for others?\(^80\)

Now it seems clear that in many of these areas of law, these difficult issues of what is a “marriage”? and is a limited purpose marriage a “marriage”? can and will be avoided. This avoidance is only possible where the quantum of the right or duty arising from the status of marriage is also subject to judicial or administrative discretion. Thus a judge is able to say,

> “Even if I concede that this limited purpose marriage is strictly a ‘marriage’ under the terms of the legislation, I have a statutory discretion to take into account, inter alia, the nature of the marriage, and having done so, I will substantially reduce the applicant spouse’s entitlement or obligation.”

Thereby, even though qualifying as a married person, a limited purpose spouse may be awarded little or nothing as maintenance from the deceased spouse’s estate under Testator’s

\(^75\) Power for such a practice could, with strain, be found in s. 43, “the need to preserve and protect the institution of marriage”; cf. Penny v. Penny (No. 2) (1966) F.L.R. 128 (contrary to public interest to grant a divorce where the petitioner could not meet his financial obligations to his first and second wives and wished to marry a third wife); Singh v. Singh (1977) 25 R.F.L. 20.


\(^77\) e.g. Family Law Act, s. 75 (2) (j), (k), (o).

\(^78\) *Ibid.* s. 79 (4) (a), (b).

\(^79\) *Ibid.* s. 64 (1). The nature of the limited purpose agreement may assist in identifying the less qualified custodian.

\(^80\) “It is not necessary to assume that a given jurisdiction has used a word like ‘marriage’ with a uniform meaning even in its own statutes and rules,” *per* D. Engdahl, “English Marriage Conflicts Law Before the Time of Bracton” (1967) 15 Am.J. of Comp. Law, 109, 135.
Family Maintenance legislation\textsuperscript{81}; be awarded little or nothing under Worker's Compensation legislation on the death of his/her working spouse in the course of employment\textsuperscript{82}; may have her maintenance, rights\textsuperscript{83} reduced to little or nothing, thereby also prejudicing her claims under the law of trusts to a share in property\textsuperscript{84}; will be able to seek criminal prosecution for assault,\textsuperscript{85} even though she would not be able to have her “husband” prosecuted for rape \textsuperscript{86}; have social security benefits at the “married” rate, reduced to the single rate pursuant to a departmental discretion\textsuperscript{87}; have damages reduced to nil when claiming for lo.s.s of consortium arising from the negligent injury of his spouse\textsuperscript{88}; likewise have damages substantially reduced when claiming under Lord Campbell's Act of 1846 for economic loss suffered due to the wrongful death of a spouse\textsuperscript{89}; have his/her payment from the deceased spouse’s superannuation fund reduced by the trustees exercising their discretion in favour of more deserving dependants\textsuperscript{90}; be denied an injunction at equity\textsuperscript{91} or under family legislation\textsuperscript{92} to prevent publication of marital confidences\textsuperscript{93} be refused any compensation under the Criminal Injuries Compensation legislation for the death of a spouse\textsuperscript{94}; be deported even though validly “married “ to a local citizen.\textsuperscript{95}

Thus in all these cases, a decision-maker is able to take into account the nature of the particular marriage, and to adjust the remedy accordingly, without being forced towards the all or nothing consequences which flow from the labels of “valid” or “invalid.” In the discretion available to a decision-maker, he can in effect say “I take into account the mental reservations and thereby classify this as a valid but second-class marriage to which some rights will not fully attach.”

\textsuperscript{81} See generally, J. Davern Wright, Testator’s Family Maintenance in Australia and New Zealand (1974).
\textsuperscript{82} Even though dependants are usually entitled to a fixed sum upon the death of the worker, there is a discretion in the decision-maker to reduce that sum where they were only partly dependent on him, e.g. Worker’s Compensation Act 1926(N.S.W.), s. 9 (2).
\textsuperscript{83} Under the Family Law Act, s. 75.
\textsuperscript{84} Leibrandt v. Leibrandt (1976) F.L.C. 90-058 (equity will recognise the contribution of a wife who lives in sub-standard accommodation and thereby does not insist on her right to be properly maintained); also headnote in Richards v. Dove [1974] 1 All E.R. 888.
\textsuperscript{85} e.g. R. v. Miller (1954) 38 Cr.App.R. 1 (husband not guilty of rape, but guilty of actual bodily harm).
\textsuperscript{87} e.g. Student Assistance Act 1973 (Cth.) and 1974 Rules thereunder. A higher student grant was paid to married students under the Tertiary Education Assistance Scheme (T.E.A.S.). The difficulties of expense and civil rights have supposedly prevented detection of the allegedly widespread limited purpose student marriages.
\textsuperscript{88} e.g. J. Fleming, The Law of Torts (1977), pp. 641-644.
\textsuperscript{89} Ibid. pp. 648-658.
\textsuperscript{90} Family Law Council, Superannuation and Family Law, W.P. No. 8 (1980).
\textsuperscript{91} e.g. Argyll v. Argyll [1967] 1 Ch. 302 (Injunction granted to Duchess of Argyll against former husband to prevent publication of intimate details of the marriage).
\textsuperscript{92} e.g. Family Law Act, ss. 114 (1), 121; In the marriage of Simpson (1978) F.L.C. 90-497; In the marriage of Gibb (1978) F.L.C. 90-405; (1979) F.L.C. 90-694 (Injunctions refused to singing celebrities attempting to prevent spouses talking to the press).
\textsuperscript{93} Both at equity and under the Family Law Act, the granting of an injunction to protect marital confidences is discretionary, and would presumably be influenced by the nature of the marriage.
\textsuperscript{94} e.g. Criminal Injuries Compensation Act 1963 (New Zealand), s. 18; D. Chappell, “Compensating Australian Victims of Violent Crime” (1967) 41 A.L.J. 3.
\textsuperscript{95} Ante, note 50, Cahill, Suria.
However, there are other areas of law where such a compromise cannot be reached. That is, a judge has no discretion to vary the quantum of the right and/or duty attached to the marriage status. It is an all or nothing decision. Either there is a recognised marriage and, therefore, the applicant spouse is entitled to his/her full rights, or there is not a recognised marriage and that having been decided, the decision-makers no longer has power to confer any rights or duties at all upon the applicant non-spouse. Examples of areas of law in this category are as follows: the spouse in a recognised marriage is entitled to refuse to testify against his/her spouse, when he is charged with a criminal offence, has a privilege to refuse to testify in any court proceedings, civil or criminal, concerning confidential communications with his/her spouse; is subject to criminal prosecution for bigamy if he/she goes through second or subsequent multiple forms of marriage while present within the jurisdiction; is entitled to use the summary procedure available to decide ownership of property under the Married Women’s Property legislation; is entitled to claim a fixed share of the spouse’s estate if he/she dies intestate; in some jurisdictions, is entitled to a fixed share of the matrimonial property upon the dysfunction of the marriage; is entitled to a tax deduction or rebate for his/her dependent spouse; has a right to receive full payment if his/her deceased spouse’s will and/or life insurance policy names “husband,” “wife” or “spouse” as beneficiary; may be effected by the rule that a marriage revokes a will.

In these areas of law, a judge will be forced to decide the question whether a limited purpose marriage per se should be called “valid” or “invalid.” As present authorities stand, such a marriage will very probably be called “valid,” despite possible judicial dislike of the results which flow therefrom. Nevertheless, the question remains in all these cases - in what circumstances is a limited purpose marriage so improper that the legal rights and duties attached to it should be reduced or extinguished?

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96 e.g. Crimes Act, 1900 (N.S.W.), s. 407 (spouse is competent but not compellable). Achina v. People 135 Colo. 8, 307 P. 2d 1083 (1957). [Parties held not to be married and therefore wife compellable to testify against husband. Court expressly held that its decision was limited to the application of the evidence statute, thereby implying, that for other purposes the parties’ marriage might have been recognised] cf. Hoskyn v. Commissioner of Police for the Metropolis [1978] 2 All E.R. 136 (one year after knife attack, assailant male and his victim married only two days before his trial. Held that victim wife not compellable; possibility of limited purpose marriage apparently not discussed). See generally Wigmore, The Law of Evidence, Vol. II, para. 605.

97 e.g. Evidence Act 1898 (N.S.W.), s. 11 (1); cf. Australian Family Law Act, s. 100.

98 e.g. Marriage Act 1961 (Cth.), s. 94; cf. R. v. Bham [1966] 1 Q.B. 159; R. v. Mohamed [Ali] [1964] 2 Q.B. 350n (religious ceremonies of marriage did not amount to “solemnising a marriage” as they produced no valid monogamous marriage in England).

99 e.g. Married Women’s Property Act 1882 (U.K.), s. 17.

100 e.g. Wills, Probate and Administration Act 1898 (N.S.W.), s. 61A. If other relatives make a testator’s family maintenance application for a share of the intestate estate, then the nature of the marriage would be relevant when deciding whether to reduce the spouse’s fixed share.

101 Homestead legislation in North America. Sometimes the claim of a limited purpose spouse could be defeated if such legislation has provision for disqualification due to gross fault. E.g. Matrimonial Property Act 1976 (New Zealand), s. 14 “there are extraordinary circumstances which render [equal sharing] repugnant to justice”; D. B. Collins [1977] N.Z.L.J. 238.

102 Income Tax Assessment Act 1971 (Cth.), s. 159 J (rebate for dependants including a spouse to whom some maintenance is paid).

103 e.g. Wills, Probate and Administration Act 1898 (N.S.W.), ss. 15-17 (unless the will is expressly made in contemplation of marriage).
THE RELATIONSHIP BETWEEN DIFFERENT JURISDICTIONS

There are two important incidental questions which arise here and which will be briefly discussed. First, when should the issue, of whether there is a “valid” or recognised marriage be referred to an independent court for decision? Secondly, when will a decision in one case that a marriage is valid, invalid, recognised or unrecognised, be governed by the doctrine of res judicata or estoppel when that same issue arises in a later case? To restate the first question, who should interpret the words “marriage,” “husband” and “wife” each time they appear in state or federal legislation? Rarely are these words defined extensively. Certainly the current practice is for the judge or administrator who happens to be interpreting and applying the legislation to do so. This practice has the benefit of providing speedy and cheap determination of the question. However, it has been seen that there are extensive historical precedents for referring the interpretation of the meaning of “marriage” to a specialist court, which in those times was the ecclesiastical court. Should this practice be repeated today with the Family Court being the sole arbiter of the meaning of “marriage,” whenever the interpretation of the word is in issue in either state or federal legislation? No doubt this would result in excessive delays and expense, not to mention deeply ruffled jurisdictional egos. Nevertheless, the argument is mentioned here as it is especially important in a federation such as Australia or Canada where there is a constitutional division of powers between different court systems.105

For example, under the Australian Constitution Federal Parliament has clear power to determine when the legal status of marriage exists. Parliament has exercised this power by specifying the prerequisites for a “valid” marriage. Moreover Parliament has provided that a declaration concerning the validity of a marriage is a “matrimonial cause” and as such can only be heard by a Family Court. Therefore it is arguable that whenever the question of the “validity” of a marriage is seriously raised in any proceedings, at least where the marriage status is a prerequisite to traditional rights of consortium vitæ, then the case must be adjourned and referred to the Family Court for decision. Having decided whether on the facts this was a “valid” or “invalid” marriage, then the Family Court would return the case to the original court or decision-maker. However, it remains to be seen what will happen if for substantive or tactical reasons, one of the parties does approach the Family Court and seeks a declaration concerning the validity of the particular marriage and, if necessary, an injunction to temporarily delay the proceedings in the other venue. Perhaps the Family Court will seek to minimise such jurisdictional clashes, and maintain some judicial comity, by refusing to, make such a declaration unless the validity of the marriage is directly relevant to the

104 Ante, notes 29, 62. This dual court system created some tension and after at least 1200, the secular courts tried wherever possible in disputes over dower to interpret “marriage” without referring the case to the ecclesiastical courts.
106 Constitution Act 1900 (63 & 64 Vict., c. 12), s. 51 (xxi).
107 Marriage Act 1961 (Cth.).
109 This very important Latin phrase has often been used without proper attempt at elaboration of its possible meanings; see H. Clark, Domestic Relations, West (1968), pp. 261-262; note (1953) 20 U.Chi.L.R. 710, 711-712; In the Marriage of Pavey (1976) F.L.C. 90-051; 1 Fam.L.R. 11, 358; 10 A.L.R. 259.
110 e.g. to effect delay, or to preclude a consideration of mental reservations as a basis for invalidity.
111 See ante, note 74 re powers to refuse to proceed; Puttick v. Attorney-General [1979] 3 All E.R. 463.
rights and obligations of consortium vitæ actually specified in the Family Law Act?\textsuperscript{112} One could only hope for the acceptance of some distinction which would prevent the repetition of the historical struggle in England between two court systems each trying to prevent the other from universally defining the concept of “marriage.”\textsuperscript{113}

This leads to the second issue. When will a decision by one court that a marriage is valid or invalid, recognised or unrecognised, bind later courts under the doctrine of res judicata?\textsuperscript{114} For example, when a nullity application has been dismissed,\textsuperscript{115} does this decision that the marriage is “valid” bind later courts who are considering that whether a marriage exists for the purposes of evidence, worker’s compensation and interpretation of insurance policies? Conversely, when for the purpose of the law of evidence or intestacy, a court decides that a marriage is valid or invalid, how does this judgment later effect a court considering whether a marriage exists for the purposes of worker’s compensation or maintenance? Obviously a huge number of permutations and combinations of fact situations could be discussed by varying the order of decision and areas of law.\textsuperscript{116}

For the purposes of this article, it is submitted that the principle of res judicata should not be too readily applied, as a marriage void or valid for some purposes is not necessarily thus for all.\textsuperscript{117} This is because a judge may not have the issue of invalidity properly argued before him and may often accept merely the evidence of a marriage certificate\textsuperscript{118}, because a judge may only apply his mind to the consequences of validity or invalidity directly before him; and finally because the conclusion of invalidity due to mental reservations may not be available in Family Courts due to the terminology of nullity legislation, whereas arguably it is potentially available in courts considering other areas of law.\textsuperscript{119}

FUTURE LEGAL RESPONSES

It is presumed that in the future, judges whether appointed by federal or state governments, whether interpreting federal or state laws, will be called upon to regularly interpret the word “marriage” and to reconsider the way other decision-makers have interpreted that word. Moreover it is presumed that each judge will normally interpret the word “marriage” without referring the question for statutory and/or constitutional reasons to another jurisdiction. No doubt arguments can be assembled that exclusive jurisdiction to decide the validity or invalidity of a marriage for some purposes rests elsewhere, such as with courts administering

\textsuperscript{112} e.g. the duty to maintain, s. 72.
\textsuperscript{113} See ante, notes 29, 62, 5.
\textsuperscript{115} Family Law Act, s. 51; Marriage Act 1961 (Cth.), s. 23.
\textsuperscript{116} Ante, note 15, Hubbard and Clark.
\textsuperscript{117} e.g. In the marriage of Deniz (1977) F.L.C. 90-252 (a nullity decree granted for an immigration marriage on the grounds of fraud. Applicant’s plight gave rise to special sympathy). Would this marriage have been void if the applicant had been seeking worker’s compensation or insurance benefits?
\textsuperscript{118} e.g. Postnikoff v. Popoff (1964) 46 D.L.R. (2d) 403 (B.C.S.C.) (suggestion that a prior judgment creates an issue estoppel re the validity of marriage only if that particular issue on that particular ground had been contested in the prior proceeding).
\textsuperscript{119} See ante in text related to notes 81-4.
the Family Law Act in Australia. However, such a jurisdictional division would be looked upon with disfavour by most judges.

Presumably, if each judge is normally left to decide for himself/herself concerning the meaning of “marriage” for the purposes of the legislation or issue before the court, there will be an unwillingness to open the pandora’s box of limited purpose marriage. Administratively, it is far more convenient to promote the idea “if married for one purpose, then married for all.” Thus if there is clear evidence of a limited purpose, then in many situations this will in itself not affect the status of marriage but may be very relevant to the outcome of the case. That is, limited purpose will often not affect jurisdiction, but will affect discretion. However, it has already been noted that there are situations where once the parties are classified as “married,” there remains no apparent discretion in the court to deny the “married” person a legal right due to his/her limited purpose. Presumably many judges in these latter areas will feel constrained by precedent to “recognise” the limited purpose marriage even though this may be morally distasteful to them.

CONCLUSION

It appears that the concept of mental reservations is not dead in English common law systems, especially when “consent” still remains as the essence of marriage. Rather it has laid dormant and virtually unargued for 200 years for good reasons of its inherent conceptual and evidentiary difficulty, and the availability of other satisfactory legal remedies to meet social needs. But as the social need arises in such areas as immigration and social security to make distinctions between “proper” and “less than proper” marriages, then the concept will be, and has already in practice, been awakened. It has often been pointed out in other areas of law that the law has created problems by allowing only two categories of classification, namely void or valid, and by then drawing out “logical” conclusions from each category. There is today again a social pressure (and indeed a current practice) to recognise and at least attach some consequences to intermediate and “second class” categories of marriage. Thereby a marriage would be “recognised” for some purposes, but not for others; or a marriage would be valid for all purposes but tainted or disapproved of for some.

Thus it is suggested that so long as rights are attached to “marriage,” and so long as that word is subject to judicial and administrative interpretation, then decision-makers at all levels will find it increasingly difficult to continue to judiciously ignore the recurring phenomena of limited purpose marriage.

120 See ante in text related to notes 5-12.

121 See ante in text related to notes 81-95.

122 See ante in text related to notes 96-4.

123 e.g. divorce.