

THE HISTORY OF MARRIAGE AND MODERN LAW

by

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1. *Introductory*

The recent decision of the Full Court of the Family Court of Australia in *In the Marriage of W and T*¹ raises a number of quite extraordinarily detailed issues of the interpretation of some not readily especially difficult statutory provisions. First, it is provided by s 41 of the *Marriage Act* 1961 that, for a marriage celebrated in Australia to be valid, it, "...shall be solemnised by or in the presence of an authorised celebrant." In s 5(2) of the same Act, it is provided that, "Where: (a) a marriage is solemnised in the presence of a person, being a person in whose presence a marriage may, in accordance with this Act, be lawfully solemnised; and (b) that person consents to the marriage being solemnised in his or her presence; that person shall, for the purposes of this Act, be deemed to solemnise the marriage." In addition, s 23B(1)(c) of the act specifies that a marriage will be void where, by reason of s 48 of the Act, the marriage is not a void marriage. Section 48(1) specifies that a marriage solemnised other than in accordance with the provisions of the legislation is not a valid marriage. Section 48(3) goes on to provide that, "A marriage is not invalid by reason that the person solemnising it was not authorised by this Act to do so, if either party to the marriage, at the time of the marriage was solemnised believed that that

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person was lawfully authorised to solemnise it, and in such a case the form and ceremony of the marriage shall be deemed to have been sufficient if they were to show an intention on the part of each of the parties to become thereby the lawfully wedded spouse of the other.”

In *W and T*, the parties had begun cohabiting in the late 1980's, when both were in their early twenties. There were two children of the relationship born in 1991 and 1993 and, at about that time, they became adherents of the Assemblies of God Australia Church.² In 1994, the parties were advised by members of the Church that they were “leading a sinful life” and should marry. The parties’ wedding ceremony was conducted by the celebrant of their choice whom the parties knew was not, at the relevant time, a celebrant authorised under the *Marriage Act* but who, the parties believed, had taken the necessary steps to ensure that the relevant formalities had been observed. There was no doubt that the clergyman who had performed the ceremony was not an authorised celebrant but the issue was whether another clergyman, who was an authorised celebrant, who had been present, though inconspicuous, throughout the ceremony, was “present” for the purposes of ensuring that the ceremony was valid.

In applying for a decree that the marriage was void,³ the wife argued that the requirement in s 41 of the *Marriage Act* earlier noted required that the authorised celebrant be in close physical proximity to the ceremony itself and be visibly present to the parties so as to be regarded as taking a sufficient part in the

ceremony. At first instance, having regard to all of the evidence, which included photographs and video footage of the ceremony, the trial judge concluded that the authorised celebrant was present during the ceremony, albeit inconspicuously at the rear of the church and that it was he who subsequently signed the marriage certificate and that he had consented to be there for the purpose of solemnising the marriage. Neither party knew that he was, in fact, present in the church for that purpose. Accordingly, it was held that the marriage was valid. The wife appealed to the Full Court and sought to introduce further evidence concerning the practices of the Uniting and Catholic Churches regarding the solemnisation of marriage. The Full Court dismissed her appeal which was notable for the detailed judgments of Fogarty and Baker JJ. The fact that the proceedings had reached this stage was, of itself, rather extraordinary as the husband had initially applied for dissolution of marriage based on parties' separation,⁴ which had been granted by the judge at first instance, so that the marriage had been legally terminated, albeit in another form.

2. *Legislation*

1) Fogarty J's Approach in Context

The central issue in *W v T* is the interpretation of the legislation, especially the interpretation of the word "presence" as therein found. Fogarty J. initially noted⁵ that, when the legislation came into operation in 1961, it was intended to codify the law in Australia relating to the celebration of marriage and other connected marriage. Although issues such as marriageable age, consents to marriage and legitimisation of marriage had generated considerable discussion, there had been

little comment on the issue involved in *W v T*. However, in the Second Reading speech by the then Attorney-General, it had been said⁶ that "...the bill maintains provisions for alternative ceremonies of marriage. It provides that a marriage performed by a minister of religion according to the form and ceremony followed by the religious body or organization to which the minister belongs is sufficient.

The bill also provides for the form of marriage before a marriage registrar who is an official. In connexion with the solemnization of a marriage wherever it takes place, the bill places on the parties and the celebrant the need to have in hand a birth certificate, or in default of it a statutory declaration explaining the absence and verifying the particulars which would be expected to be found in the birth certificate. The celebrant is placed under an obligation to satisfy himself as to the identity of the parties and to refrain from solemnizing the marriage if he has reason to believe that the relevant documents contain false statements or contain an error or are defective." There was nothing at all in the Parliamentary Debates, Fogarty J. noted, regarding s 5(2) of the Act, even though it was a novel provision.

In dealing with the submissions made by the parties, Fogarty J. commented⁷ that counsel for the wife had drawn the Court's attention to the meaning of the word "presence" as it was found in various dictionaries. Interestingly, Fogarty J. dismissed that particular approach, doubting that such exploration of the relevant legislation assisted the history of those, or equivalent, provisions and of the common law. Both Fogarty and Baker JJ. adopted that approach.

Fogarty J. began that part of his judgment by stating⁸ that the history of the formation of marriage in Western Europe, and particularly in England and, later, Australia, and the position of the celebrant were important for an understanding of the present legislation and that the history formed an integral part of both parties' submissions.

The first major substantive point made by Fogarty J. was that, in common law jurisdictions, the law relating to the formation of marriage was an amalgam of ecclesiastical law and statutory provision. "Under the former and notwithstanding the religious nature of the union," he said,⁹ "marriage was a formless affair, essentially constituted by the contract of the parties." The reason for that situation was that which had been outlined in the Finer Report in 1974:¹⁰ namely, that, "...in order to reduce the chances of exposure to deadly sin through sexual waywardness, the Church maximised the number of ways in which a lawful union could be contacted. In the result, marriage became a formless contract requiring little more than the consent of the parties."

In fact, the position of was even more confused than Fogarty J. suggested: although, in 1868, a Royal Commission had written¹¹ that a sound marriage law, "...ought to embrace the maximum of simplicity and the maximum of certainty," that was very far from actually being the case. In England, by 1949, it appeared that the law was to be found in as many as forty statutes.¹² Two cases illustrate the confusion: first, in *Chipchase v Chipchase*,¹³ a woman whose maiden name was Matthews had, in 1915, married a man called Leetch. He had deserted her

in 1916 and she had not heard from him since then. In 1928, she went through a form of marriage with the petitioner having had the banns published¹⁴ in the name of Matthews which she had used for some months before and by which she was generally known in the area where she lived. However, she admitted that her reason for having the banns published in that name was to conceal the fact, or at least not draw attention to it, that she had previously been married.

The Court remitted the case to the justices for rehearing, the justices initially having found that the second marriage was void on the grounds¹⁵ that the appellant had given her wrong name intentionally and wilfully and, hence, that there had been no proper publication of the banns.

Lord Merriman P, in the Divisional Court, considered the purpose and object of the relevant legislation.¹⁶ Lord Merriman P observed¹⁷ that “The object of this Act was to prevent clandestine marriages: there must be an element of intentional concealment of identity before it can be said that the marriage is void for undue publication of the banns...[T]he wife must have the opportunity of establishing, as her counsel says she is able to establish, that the name in which she was married was the name by which for years she was commonly known, and that there was no limitation to conceal her identity in the circumstances of this particular case. On the issue of clandestine marriages, Manchester has written¹⁸ that, even though the church formalities were not especially irksome (though, given the confusion represented by *Chipchase*, one might be forgiven for thinking otherwise) such marriages flourished. He stated that many couples elected to reject church marriages, “...in favour of an irregular or clandestine, yet

legally valid, union. Restoration comedy offers many variations upon the theme. A considerable number of parliamentary attempts were made to reduce the number of clandestine unions. They failed, chiefly because of the large number of unbeneficed clergy who profited from such marriages. London itself was the centre of a thriving trade, especially in the area of the Fleet.” Another reason for their popularity has been suggested by Stone,¹⁹ who points out that official weddings were heavily taxed, whilst “Fleet weddings” were cheap, as well as being legally valid. Their popularity was such that Stone has projected that, prior to about 1753, more than half of the population were not married strictly according to the rules of canon law.

Henn Collins J. agreed with Merriman P. considering²⁰ that the matter was entirely for the justices, who had misdirected themselves by regarding, “...the fact that a party to a marriage knowingly and wilfully, in the sense of consciously, used a name to which she or he is not by law entitled, is conclusive of the matter.” The use of the phrase “not by law entitled” seems rather strange; there could really be little doubt that the wife had used a name to which she was entered - it was, after all, that which had been registered at her birth!

This was not, however, to be the end of the matter, which resurfaced, again before Henn Collins J., some two years later.²¹ In holding that the marriage was void because there had been an undue publication of the banns, Henn Collins J. said²² that he had, “...first to ascertain what exactly is meant by concealing her identity. She did not conceal her identity from the persons in her parish who

knew her by that name, but I think that one of the purposes of the Marriage Act, 1823, would be defeated if it was open to a person to have banns called in a name by which he was known in the parish when the use of his legal name might lead to persons making uncomfortable inquiries. In my view, that is one of the very things against which the Act of Parliament was directed, and, although I do not feel that there is any moral obliquity in this case, there has been an infraction of the statute and this marriage was not a marriage at law. It, therefore, only remains for me to pronounce a decree of nullity.” The difficulty with this passage has been appositely pointed by Bromley and Lowe,²³ who comment that the problem was to ascertain under what name the banns ought to have been published: if she was generally known as Matthews it would have equally (if not, actually, more) defeated the purpose of the Act to have published them under any other name! Bromley and Lowe suggest that the “common sense answer” would have been to have published the banns under the names of both Matthews and Leetch; though they note that there was no precedent for doing that. In that context, Scots practice may be mentioned: as Walker describes²⁴ the situation, “For legal purposes [a married woman] is designated Mrs [Christian names] [maiden surname] or [married surname].” But, in *Chipchase*, the unfortunate woman was not married at the time and had not been for some years. She had also had to go through, certainly, four court hearings to discover that her second marriage was void for a technicality - however laudable the aims of the technicality might have been.

The reasoning of Lord Merriman P in *Chipchase* was later applied by Ormerod J. in *Dancer v Dancer*,²⁵ where the facts were only slightly less curious²⁶ than those in *Chipchase*. The wife was the daughter of a married couple, Mr and Mrs Knight. When she was aged three, her mother went to live with one Roberts, by whom she had five children. All the children, including the wife, passed as the legitimate children of that couple, the wife's mother having assumed the name of Roberts. It was not until she was seventeen, when Roberts died, that she realised that she was not his daughter. She continued to use the name of Roberts and, when she sought to marry, on the advice of the Vicar, who published the banns, she was named as Jessamine Roberts. Ormerod J. held that the banns had been duly published. The key factor in the ultimate decision was the clergyman's advice coupled with the fact, in the judge's own words,²⁷ that she proceeded, "...with the intention of avoiding any form of concealment..." The problem will be apparent: the wife in *Dancer* was using the name by which she was generally known; however, the wife in *Chipchase* was using the name under which her birth had been registered *and* the name under which she was generally known in the community. In the *Dancer* case, the banns had properly been published, whilst in *Chipchase* they had not. In *Dancer*, Ormerod J. had said²⁸ that, in various earlier cases,²⁹ there had been, "...in a greater or lesser degree, an element of fraud or an element of concealment in some form or other." It seems, particularly as Ormerod J. did not discuss the ultimate decision in *Chipchase* at all, the element of concealment need not be very great and Manchester is, thus, surely correct when he writes³⁰ that it was virtually impossible to advise upon the proper practice which a couple intending marriage

ought to follow even well into the second half of the twentieth century. In England, even now, the miasma represented by *Chipchase* and *Dancer* seems, according to Bromley and Lowe³¹ at least, to represent the state of the existing law.

In *W v T*, Fogarty J. noted³² that the requirement of two witnesses was introduced in Europe by the Council of Trent in 1563 and in England by Lord Hardwicke's Act in 1753. The essence of the English legislation was that no marriage should be valid unless it was solemnised according to the rites of the Anglican Church in the presence of a clergyman and two other witnesses. The Act also provided for the publication of banns - productive of problems themselves, as has been observed - and any clergyman who contravened the Act's provisions was liable to transportation for up to fourteen years. The Act did achieve its objectives and, from that time, it became impossible to marry in irregular or clandestine manner.

However, as Bromley and Lowe emphasise,³³ this apparently desirable development led to, "...an almost greater social evil." The situation has been well encapsulated by Jackson,³⁴ quoted by Fogarty J. in *W v T*,³⁵ that, "The Statute of 1753 did not apply to Scotland and Ireland where the old law breathed on heartily for many years more, not finally expiring in Scotland until 1940." The *Marriage (Scotland) Act* 1939 brought to an end two of the informal kinds of marriage, although marriage by habit and repute still remains competent.³⁶

It should be said that the forms of marriage abolished by the 1939 Act in Scotland were not without their own antedeluvian attractions. As regards the form of declaration *de praesenti*, Thomson has written³⁷ that, “The essence of this form of marriage was that the parties seriously and genuinely exchanged present consent to marriage. The couple were married as soon as consents were exchanged. Consummation was not required: as *consensus non concubitus facit matrimonium*. Because there was no need for witnesses, there could be formidable problems of proof, particularly where one of the alleged spouses had died and the issue arose in a claim by the other for rights of succession.” As might have been expected, some bizarre factual situations resulted from it: thus, in the notorious³⁸ case of *Steuart v Robertson*,³⁹ Major Steuart V.C., a most distinguished officer of the 93rd Highlanders and of distinguished family, had fallen into dissipated habits and had become a lodger in the house of a manufacturer of fishing tackle. His landlord’s daughter claimed that she and the major, who, at the time of the action, was dead, had been married *de praesenti*. The claim was based on the following incidents: “After supper according to the pursuer’s brother and the hairdresser, the only surviving witnesses, the following scene took place: the pursuer’s father said to Major Steuart, ‘You will have to hook it. I am getting a bad name with your staying in my house among my three daughters.’ Upon which the Major said, ‘I will show what I can do to shut up people’s mouths. I am poor now, and cannot marry, but I will marry her in the Scotch fashion,’ or words to that effect, and thereupon went down on one knee, took a wedding ring from his pocket, put it on the pursuer’s finger, and said, ‘Maggie you are my wife before Heaven, so help me,

oh God!' They then kissed, and the pursuer being 'bedded' according to an obsolete Scotch fashion." The Court of Session gave the pursuer the declarator of marriage which she sought. However, in the House of Lords,⁴⁰ the English and Irish judges unanimously reversed the Scots decision. Since *Steuart v Robertson* was decided after Lord Hardwicke's Act was passed in England, it may have been another⁴¹ instance of the House of Lords assuming that Scots law was the same as English.

Marriage by promise *subsequente copula* was, as Thomson points out,⁴² treated, in time with scepticism. The background was explained in 1933 by Lord Sands in the case of *N v C*⁴³ in the following terms, which can properly be described as both strident and censorious: "According to the theory of the law, when two persons who are engaged to be married indulge in sexual intercourse, presumably they there and then exchange matrimonial consent and become married persons. But, according to the view which prevails in those sections of the community in which antenuptial fornication is most apt to occur, they do nothing of the kind. They yield to desire and indulge in immoral intercourse, robbed doubtless of some of its danger by the prospect of future marriage...Parents, employers and clergymen in rural Scotland have often had occasion to deal sorrowfully with a girl whose betrothed had got her in the family way. I much doubt if it has ever happened that the girl advanced the plea in excuse that she was a married woman...Marriage by promise *cum subsequente copula* is a plant nourished by the law which has never taken root in the understanding or the conscience of the common people." Unlike *Steuart v*

Robertson, the facts in *N v C* were somewhat unexceptionable, but one must take account of Clive's comment⁴⁴ that early Scots marriage law was, "...a source of scandal, litigation and uncertainty. Irregular marriages might be completely latent and be subject to no state control whatsoever...Regular marriages were often regular in home only: it was common for session clerks to issue certificates of due proclamation of banns even though no banns had been proclaimed and to charge extortionate fees for doing so." However, as Clive continues,⁴⁵ old Scots marriage law must be judged against the standards of the times and that is an issue which must be continually borne in mind in some of the future discussion of *W v T*.⁴⁶ However, as Fogarty J noted in *W v T*,⁴⁷ the problem of couples eloping to Scotland to take advantage of the rather more anarchic situation existing there did not end until the enactment of the *Marriage (Scotland) Act 1939*.⁴⁸

As earlier mentioned,⁴⁹ the essence of the 1754 legislation was the necessity for the presence of witnesses, but, inevitably, the issue arose of who might adequately or properly be regarded as a witness. In that context, Fogarty J. referred to the Irish case of *Ussher v Ussher*,⁵⁰ which is possessed of features which might be described as peculiar to that jurisdiction. It appeared that, at about 10 p.m. on a particular date in 1910, the parties went through a form of marriage conducted by a Roman Catholic priest. Both parties were Roman Catholic, though it appeared that the husband petitioner had been received into the church immediately prior to the wedding. The respondent wife was ten years her husband's junior and was his housekeeper. The ceremony had been

performed, verbally at least, according to the rites of the Roman Catholic church, but there was only one witness, who was the cook in the petitioner's household.

In holding the marriage to be valid, O'Brien L.C.J. commented⁵¹ that, notwithstanding the verbal form⁵² of the marriage service, "The priest...does not unite in matrimony; the marriage union is not created by him; he merely expresses approval on the part of the Church of what has already taken place...the marriage has already taken place by the interchange of mutual consent, *per verba de praesenti*, in the presence, and with the intervention of, the priest, whether in the so-called espousals, the questions put and the answers received by the priest, or in the latter part of the formula of the marriage." On the issue of witnesses, the Lord Chief Justice was of the view⁵³ that the priest had seen what was going on and was, therefore, competent to give evidence of the marriage.

Palles C.B., an especially notable figure in Irish legal history,⁵⁴ seemed to assume⁵⁵ that, "...the Common Law never required the presence of any 'witness' other than the 'official' witness, the Priest." He also refused to accept⁵⁶ the suggestion that the Council of Trent required,⁵⁷ in the case of Roman Catholics in Ireland, banns and two witnesses for a marriage to be recognised at civil law.

Gibson J. overtly dealt⁵⁸ with matters of public policy which, he said, together with claims of issue, were paramount. "Error or mistake as to religious consequences," he said,"cannot affect the completeness or effect of the contract. Assuming that civil and sacramental wedlock were contemplated as one and inseparable, and that spouses regarded the religious element as

fundamental, the marriage completed according to the requirements of municipal law cannot be treated as wrecked or destroyed.” The primary intention to which the Court must give effect was the constitution of the status and where law and conscience could not be reconciled.

Quite apart from its general historical interest, *Ussher* is an illuminating decision in that it suggests that, in some Irish circles at least, Roman Catholicism had not, as such, become as entrenched and ingrained as might have been thought. O’Brien L.C.J.’s reduction of a priest to the standing of a mere witness would surely not have been acceptable to many Irish Catholics, even assuming they read, or were able to read, their own law reports. At the same time, it is, at least, arguable whether the priest would have regarded himself as acting in that role.

Although *Ussher* was decided as late as 1912, there was, as Fogarty J. pointed out,⁵⁹ contrary authority in the shape of the unsatisfactory House of Lords decision in *R v Millis*,⁶⁰ a case which is cited even in relatively recent times.⁶¹ In *Millis*, the defendant, who was a member of the established Church in Ireland, went through a form of marriage with a Presbyterian, the ceremony having been conducted by a Presbyterian minister according to the rites of the Presbyterian church. They lived together for some time as man and wife; the defendant, with his first wife still alive, went through another form of marriage in a parish church in England. The issue, therefore, was whether the first ceremony was sufficiently a marriage to support an indictment for bigamy. Ultimately, the matter came before the House of Lords who were equally divided⁶² with the

result that the conclusion of the lower court that the marriage was invalid was upheld.⁶³

The *ratio decidendi* of *Millis*, assuming that it is possible properly to derive one, is, and this was particularly emphasised by Lyndhurst L.C., that the common law required marriages to be celebrated by an episcopally ordained clergymen for them to be valid. In that context, Fogarty J. articulated the *ratio* as being that the marriage as being celebrated “in the presence of” an episcopally ordained clergyman. However, on the facts of *Millis*, like *W v T*, there was no question that the two ceremonies had actually been conducted by the officials in question.

On the matter of the status of the Presbyterian minister, Lyndhurst L.C. had this to say⁶⁴: “The claims made by the Presbyterians in Ireland cannot be supported upon any principle fact would not apply equally to every domination of dissenters. I respect the character of the Presbyterian ministers of Ireland, their learning and piety; but this is a question of mere legal interpretation, which must be determined without reference to the character or conduct of the parties.” Lord Cottenham expressed himself⁶⁵ in similar, though rather differently orientated terms, when he said that, “If...by the law of England the intervention of a person in holy orders was necessary to constitute a binding marriage, there is not, I think, any difficulty in coming to the conclusion that such person must be in orders recognised by the church of England. The necessity of such intervention, if it exists, must have arisen from the regulations of the church, in whose Courts all questions of marriage were decided; and when the church speaks of persons in holy orders, those only can be intended whom the church conceives to be

clothed with that character, in which number members of the Presbyterian church are not included.” If Lord Cottenham is to be taken at face value, then his use of the word “intervention” suggests something a deal more positive than merely being passively present at the ceremony. However, in *W v T*, Fogarty J. regarded⁶⁶ *Millis* as being important because it merely required the *presence* of the episcopally ordained cleric rather than his playing an active part. Lord Cottenham’s comments do not bear that view out.

On the other hand, Lord Campbell, who regarded the Irish marriage as being valid, had stated⁶⁷ that, “The condition contended for as indispensable to the validity of marriage, is the presence of a person believed by the parties to be in the priest’s or deacon’s orders. It is not considered essential that he should pronounce a benediction, or join in any religious ceremony.” Support for such a view may be found in an earlier case - *Herbert v Herbert*⁶⁸ - to which reference was made throughout the various judgments in *Millis*. The parties in this case had declared themselves to be married in the presence of a parish priest and two servants of the family. The ritual had taken place in Sicily where a law existed, described by Sir William Scott as “much dormant in its execution”, which provided for the imprisonment of parties to clandestine marriages. The parties had, in fact, been so imprisoned. On their return to England, the wife petitioned for restitution of conjugal rights,⁶⁹ which, of course, could not be granted were the parties not legally married.

In holding the marriage valid, Sir William Scott initially commented⁷⁰ that it was,

“...the established principle, that every marriage is to be universally recognized, which is valid according to the country in which it was had, whatever that law might be.” Evidence was given by four expert witnesses that, according to the decrees of the Council of Trent, it was not necessary for either priest or witnesses to say or do anything which signified their consent.⁷¹ Two matters arise: first, the marriage took place overseas and in a foreign jurisdiction and, second, in the early part of the Nineteenth Century, issues relating to proof of foreign law would be more complicated than they are today.⁷² Indeed, as recently as 1930, Maughan J. in the well-known conflict of laws case, *Re Askew*,⁷³ referred to, “...the doubtful and conflicting evidence of foreign experts.”

The issue, confusing already, is confused still further by the later decision, which sought to apply *Millis*, in *Beamish v Beamish*.⁷⁴ The factual situation in *Beamish* was different again: the bridegroom was himself an episcopally ordained minister and read to himself and his purported bride the marriage ceremony contained in the book of common prayer. They exchanged rings and the priest/bridegroom pronounced the prescribed form of blessing. *Beamish* was another case originating in Ireland and the same procedure was followed as in *Millis*. On this occasion, the judges had been directed, as Wilkes J. noted at the beginning of his advice to the House of Lords,⁷⁵ to proceed on the basis that *Millis* was binding authority for the proposition that, “...a marriage, however solemnly celebrated, was invalid at the common law unless contracted in the presence of a priest in holy orders.” The advice of Wilkes J. contains a number of interesting points which bear on the cases noted hitherto and on the discussion of *W v T*.

Wilkes J. advised in the negative, and that view was accepted by the House of Lords. In a detailed analysis of the history of Christian marriage, both in England and Europe, the judge identified⁷⁶ three essential functions performed by the clergyman. These were, in Wilkes J. own words: “first, the religious character of the ceremony; second, the notoriety and proof of marriage; and, third, the prevention of such marriages as are forbidden by law.” Shortly, Wilkes J’s stated,⁷⁷ as regards the first, that a person could not administer a sacrament to himself; second, that, “...the law requiring the presence of a clergyman as essential is not sufficiently explained by the desire to introduce a religious element alone: and that it was intended that he should be present as a trustworthy witness to the contract, who might be able to form a judgment whether the parties take one another, freely and entirely, for man and wife, and to bear witness thereafter to the fact.” Third, the question arose as to whether the clergyman had power to prevent the marriage if there were any impediment. In all three functions, it was apparent that a person could not act in his own behalf.

That much is very plain, but Wilkes J. concluded in rather stronger vein. The judge stated⁷⁸ that the clergyman must be present but, “...that the duties are other than those of a mere bystander, and the character in which the minister attends is not only that of a witness to the contract, but that of a functionary entrusted with the duty of preventing the marriage from taking place, if a just impediment be brought to his knowledge.”⁷⁹ Still more emphatically, Wilkes J. encapsulated⁸⁰ the law in these terms: “The law assumed to exist appears to

us...to require that, equally in the case of clergy, as of the laity, marriage in this country should (in the absence of express statute), take place in the presence and with the assent of a clerk in holy orders, who must be a third person, and whose duty it is to prevent or put off the marriage if there be opposed a just impediment; and who, in case he allows of its proceeding, is then, in the primary sense of the word to marry the parties by reserving their consent to become man and wife.” That is clearly something far more than was envisaged in *Millis* and *Herbert*.

In *W v T*, Fogarty J. referred⁸¹ to Campbell's L.C's response in *Beamish* where he had said,⁸² relying on *Herbert* and *Millis*, that, "...it is a difficult compliance with the law if a priest be bodily present, and although against his will, and although he take no part in the ceremony, the bodily presence of the priest while the marriage is celebrated is, at all events, indispensable." Fogarty J, in *W v T* doubted whether that view represented the general view of the House of Lords in *Beamish*. In fact, the responses of the remaining judges was distinctly indecisive of the issue. Lord Chelmsford appeared to be the most in favour of the clergyman's playing a central role when he said⁸³ that the "intervention" of the clergyman, "...seems to have been regarded not as formal merely but as substantial and essential." Lord Wensleydale made reference⁸⁴ to "intervention," but seemed to regard it as meaning only to require the presence of a third party. Lord Cranworth dealt largely with the specific issue which had arisen in *Beamish*, but did remark⁸⁵ that, "...the presence of a minister is not required merely for the purpose of securing a religious sanction to the contract."

Campbell L.C., as Lord Campbell had by then become, though, was the only member of the unanimous Court who took issue with Wilkes J's formulation and all of the members of the House enthusiastically praised the advice given by Wilkes J.

Lord Cranworth⁸⁶ and Lord Wensleydale⁸⁷ both adverted to another, related issue - that of marriages celebrated overseas or on board ship. That situation had, in fact, occurred in another decision which Fogarty J. had noted in *W v T*, the decision of Dr Lushington in the Consistory Court in *Catterall v Catterall*.⁸⁸

That case involved a marriage in the then colony of New South Wales which had significant contribution to the development of ecclesiastical law has been variously lauded,⁸⁹ refused to hold the marriage invalid and, in so doing, refused⁹⁰ to "...carry the decision [in *Millis*] one iota further than it went for two reasons..." The first was that, since the House of Lords was equally divided, it could only be said, as a matter of form, that a judgment truly existed. The second reason was strictly policy orientated: "...were I," he said,⁹¹ "to hold the presence of a priest in the orders of the Church of England to be necessary, I should be going the length of depriving thousands of couples married in the colonies and the East Indies (where till of late years there were no chaplains) of the right to resort to this Court..."

Catterall, thus, adds another dimension to the conundrum. The law, hence, seems to be that where a clergyman is, or may be, available, the marriage should be conducted in his presence. However, Dr Lushington had gone on to say that: "Unless I am controlled by a superior authority, for no further

examination of the question will induce me to change my opinion, most unquestionably I shall hold that in this and all other similar cases that, where there has been a fact of consent between two parties to become man and wife, such is a sufficient marriage..." It, thus, seems to follow that, had the marriage in *Beamish* taken place in the colonies rather than in the west of Ireland, then it would have been regarded as valid, despite the various learned disquisitions, especially that of Wilkes J., regarding its doctrinal incompetence. The role of the clergyman, if he is available, is less certain as, indeed, is matter of the clergyman's relative availability. Thus, might it not be legitimate to seek to show, as a matter of fact, that a clergyman was not reasonably available, say, in County Kerry or on Dartmoor, the colonial issue having been resolved by Dr Lushington in *Caterall*?

Having caused this confusion, it is, perhaps surprising to find, as Fogarty J. pointed out in *W v T*,⁹² that *Millis* has, in general been followed in Australia. In *Kuklycz v Kuklycz*,⁹³ the wife petitioned for divorce on the grounds of desertion, as divorce law then stood.⁹⁴ It appeared that the parties had gone through two ceremonies of marriage on March 2nd 1942 in the Ukraine at the time of its occupation by German forces. The first of these ceremonies was conducted by a German police officer at a police station and the second was an Orthodox ceremony of marriage conducted by a Russian Orthodox priest at the petitioner's parents' home. Under the previous Russian administration, a civil marriage ceremony was required, but, with the German occupation, the relevant administration had ceased to exist. Much of the town in question had been

destroyed and practical recourse to any civil authority was impossible. Norris A.J. held, first, that, in all the circumstances, that it was not possible for the parties to have complied with the *lex loci celebrationis*. Second, he held that Australian courts would recognise as valid ceremonies of marriage conducted abroad where the local law was inapplicable if the ceremony created a valid marriage at common law, irrespective of the nationality or domicile of the parties at the relevant time.⁹⁵ Third, following *Millis*, that a valid common law marriage could only be conducted by an episcopally ordained priest. However, an Orthodox priest should, for this purpose, be regarded as an episcopally ordained priest.

Norris A.J.'s reason for following *Millis* was an early Victorian decision⁹⁶ which had disapproved Dr Lushington's dictum in *Catterall*⁹⁷ and which he considered⁹⁸ to be binding on a Victorian Judge sitting alone. Given the earlier authorities, the problem arose as to the denomination of the priest: Norris A.J. noted⁹⁹ that there was no direct authority on the matter of Orthodox priests, but referred to the decision of *R v Inhabitants of Brampton*,¹⁰⁰ where Lord Ellenborough had said that the particular marriage appeared, "...to have been per verba de praesenti and to have been celebrated by a priest, that is by one who publicly assumed the office of priest and appeared habited as such; of what persuasion indeed, whether Roman Catholic or Protestant does not appear. But even if it were performed by a Roman Catholic priest that would not vary the case; for such a person would be recognized by our Church as a priest capable of officiating as such, upon his mere renunciation of the errors of the Church of Rome, without

any new ordination.” The other judges in the *Inhabitants of Brampton* case¹⁰¹ made no reference to renunciation of the errors of the Church of Rome, but seemed to presume that the marriage had been validly celebrated. In *Kuklycz*, Norris A.J. commented¹⁰² that, “...such early Church history as a judge may be allowed to take notice of would lead to the conclusion that Orthodox priests should be so regarded...”

Although the reasoning adopted by Norris A.J. in *Kuklycz* enabled the marriage to be regarded as valid so that the petitioners could obtain a divorce decree, it was, surely, a most convoluted method of so doing. This is the more so as there is clear authority for the proposition that *Millis* does not apply to cases other than in England or Ireland: in *Wolfenden v Wolfenden*,¹⁰³ Lord Merriman P., applying *Catterall*, held that there was no need for a marriage celebrated in China to be celebrated by an episcopally ordained priest and that view was approved in both the Court of Appeal¹⁰⁴ and the Judicial Committee of the Privy Council.¹⁰⁵

Academic responses to *Millis* have, as might reasonably have been expected, been rather mixed: Mendes da Costa¹⁰⁶ supports its application regardless of where the marriage is celebrated and regards cases such as *Catterall* as aberrant. Andrews is unimpressed by the racionative processes in *Millis*¹⁰⁷ and accepts that, by reason of *Wolfenden*, it has no application outside England or Ireland, though he takes no account of Mendes da Costa’s justification of it. Hodson L.J. seems to make very much the same assumption in an article published coterminously with that of Mendes da Costa.¹⁰⁸ However, as noted

by Fogarty J. in *W v T*,¹⁰⁹ the most significant critique of the decision is that of Hall.¹¹⁰ That commentator regards *Millis* as having been a policy decision aimed at seeking to expunge the two kinds of marriage which existed at the time of the decision. He considers¹¹¹ that the strength of the *Millis* decision was that it was sought to eliminate the lower grade of marriage - and few could disagree with Hall that the status of marriage needs uniform legal consequences¹¹² - but its weakness was its requirement that a particular kind of clergyman be present at the solemnisation.

In *W v T*, Fogarty commented¹¹³ that, first, the requirement that the minister had to be episcopally ordained had, in fact, gradually been eroded by statute. Second, his Honour synthesised the prior case law in policy terms (as had Hall) in that the presence of the clergyman was not regarded as essential for the fundamental character of the marriage. Hence, in the judge's own words, "...the presence may be entirely passive unless some question of impediment arises in which case the clergyman would be required to intervene. The bestowal of any church blessing is optional and dependent on the form and ceremony of marriage of that denomination, and the presence in the character of a formal witness for the church and State is essentially a passive function. But it does involve the potential for intervention and the celebrant is required to satisfy himself or herself that the marriage is valid and to sign the certificate of marriage; otherwise the degree of participation beyond presence will depend upon the form and ceremony of the particular religious denomination and the arrangements in the particular marriage." It followed¹¹⁴ that the marriage was not celebrated by

the clergyman other than in the sense that his presence was required as a particular witness, but he might intervene if some issue of validity arose or that he was required to sign the marriage certificate. Otherwise the degree of involvement depended on the practices of particular religious denominations. In the end, there was a difference, the judge suggested, between “by” and “in the presence of,” presence being a matter of degree. However, with respect to Fogarty J, as we have seen,¹¹⁵ the matter might not be quite as straightforward as the judge has suggested. Fogarty J., though, did remark that the matter was essentially pragmatic - but just how pragmatic will be later considered.¹¹⁶

There has been prior Australian authority which suggests that a marriage in the circumstances of *W v T* might be regarded as valid. In *Purins v Klismets*¹¹⁷ the facts were not dissimilar to those in *W v T*, although there were some additional issues involved. The petitioner husband had alleged that a ceremony of marriage had been performed at a church by a priest, Father B, who was not registered as an officiating minister. The marriage certificate showed the ceremony as having been performed before Father D, who was registered as an officiating minister and who had signed the certificate. The petitioner, however, denied that Father D, who had died before the hearing of the petitioner had been present at the ceremony at all. On the other hand, there was evidence that, although Father B had been officiating priest, Father D had been present in the church at the time of the ceremony. According to the respondent wife, the marriage ceremony had been conducted by Father B who, she believed was entitled, as a priest to officiate at marriages. At first instance, it was held that the

petitioner failed to establish that Father D was not present during the ceremony and, even if the ceremony had actually been conducted by Father B, the marriage would still be valid. In addition, as one of the parties *bona fide* believed that Father B was qualified to perform marriages, the marriage was valid by reason of s 37 of the *Marriage Act*,¹¹⁸ which provided that, “No marriage in fact celebrated by any minister shall be avoided by reason of such minister not being so registered if either of the parties to the marriage at the time *bona fide* believed that the minister was qualified to celebrate marriages.”

The applicant appealed to the Full Court, essentially on another ground.¹¹⁹ The Full Court unanimously rejected his appeal: Bray C.J. took the view¹²⁰ that legislation has followed the common law as represented by *Millis* and *Herbert*. He went on to say¹²¹ that, “Some day it may have to be decided whether it is necessary that the authorised person must not only be present, but visibly present to the parties. If, for example, unknown to them he were looking through a keyhole or concealed in a cupboard while they were exchanging mutual promises of marriage *de praesenti* it may be that that would not constitute a sufficient presence.” The Chief Justice did not pursue that inquiry as evidence showed that Father D was standing in fair proximity to Father B. Mitchell J. saw no need¹²² to interfere with the trial judge’s findings of fact. Sangster J. took a similar view,¹²³ though he appeared to have been influenced by untrue statements made by the petitioner in both his affidavit and oral evidence.

In relation to the point made by Bray C.J. in the *Purins* case, it was argued on

behalf of the wife in *W v T* that the authorised celebrant should be visibly present to the parties. That view was rejected by Fogarty J.¹²⁴ on the grounds that there was nothing in the *Marriage Act* which could be used to justify such a submission. At the same time, Fogarty J. was more sympathetic to a further submission based around s 5(2) of the Act¹²⁵ which required that the authorised celebrant, “...consents to the marriages being solemnised in his or her presence...” It was argued that the celebrant must have consented to being there in the capacity of celebrant, rather than from any extraneous reason. Consent, in such circumstances, was a bilateral concept in that it involves a prior agreement and, at least, knowledge of the parties to the marriage as well as the consent of the authorised celebrant.

Fogarty J. considered¹²⁶ that the problem posed would be very rare, the more so as, in non-religious ceremonies, the authorised celebrant was required to identify her or himself at the beginning of the ceremony as being authorised to solemnise the marriage.¹²⁷ The problem did, though, exist in the present case and, with respect to Fogarty J., it is hard to see why a celebrant, who is not a minister of religion, should be required to carry out an exercise in self identification whilst ministers of religion need not. If the provision were to be extended to ministers of religion, it would go a considerable way towards obviating situations such as those in *W v T*. Indeed Fogarty J, himself expressed such a view, when he stated¹²⁸ that, “...the person solemnising the marriage or deemed to do so should make that known to the parties and the congregation, and that ordinarily there should be a closer physical proximity than

this case demonstrates.”

However, the marriage in *W v T* was not one to which the self-identification provision applied. Fogarty J. was of the opinion¹²⁹ that s 5(2) excluded cases where the celebrant is present at the ceremony by chance or as a stranger or against his or her will or in any capacity other than the one who has consented to the marriage been solemnised in her or his presence. A further, and related, submission had been made on behalf of the wife: it was argued that s 5(2) indicated a requirement that the parties themselves, or someone acting on their behalf with at least their knowledge had requested the presence of the authorised celebrant and/or that there be some overt indication by that person to the parties and/or the congregation of consent to perform that role in that ceremony. Fogarty J. noted that neither party had directly requested the authorised celebrant to act as such: the requested, in fact, had been issued by the clergyman who actually conducted the marriage and who was acting on behalf of the parties in the sense of involving the celebrant in such a way as to ensure a valid marriage. Fogarty J. considered that that was sufficient even though the role which the celebrant was to play was not explained to the parties. Hence, provided that the celebrant was present in the sense which he had described, the marriage was valid.

2) Baker J’s Approach

Baker J. referred¹³⁰ to much of the same authority as had Fogarty J., though his emphasis was somewhat different. Thus, in relation to the decision in *Herbert*,¹³¹

Baker J. emphasised¹³² that the decree of the Council of Trent had never been incorporated into English domestic law. That, of course, is correct,¹³³ but it does not mean that *Herbert* is irrelevant from the point of view of private international law nor does it mean that appropriate analogy cannot be drawn from it. Unlike Fogarty J., Baker J. referred¹³⁴ to various definitions to be found in dictionaries which he regarded as “authoritative.”¹³⁵ Given the nature of the definitions, the present writer is inclined to agree with Fogarty J.¹³⁶

Baker J. went on briefly to outline the development of marriage law in England and Australia, centering his discussion of the case law on *Millis* and *Purins v Klismets*. In particular, and this is of general interest for the purposes of this discussion, he noted that the State Acts which governed marriage law were by no means uniform so that the legislation involved in *Purins* was similar to that involved in *W v T*. However, the equivalent provision in New South Wales¹³⁷ was wholly different and provided that, “No marriage shall be celebrated except by some minister of religion ordinarily officiating as such whose name, designation and usual residence have been and thus continue registers in the office of the Registrar-General for marriages in Sydney or by a distinct registrar.” Such a provision, applied *mutatis mutandis* to civil celebrants as well,¹³⁸ would obviate the need for quaint proceedings such as *W v T*.

Further, as regards the *Purins* decision, Baker J. was critical of Bray C.J.’s acceptance of the *dictum* of Campbell L.C. in the *Beamish* case¹³⁹ on the grounds that it had been derived from *Herbert* which, in turn, was concerned with

the Council of Trent.¹⁴⁰ In doing so, he considered¹⁴¹ that Campbell L.C., “...would appear to understate the role to be performed by the presence of the authorised celebrant or minister.” This, as has already been observed,¹⁴² is almost certainly the case.

Baker J. then went on to quote from the Second Reading speech by the, then, Australian Attorney-General, to which reference has already been made.¹⁴³ Fogarty J. had stated that there was no reference to s 5(2), although it was a novel provision; however, taking the whole context of Baker J’s remarks into account, it is worth revisiting a part of the speech. “The celebrant,” the Attorney-General stated, “is placed under an obligation to satisfy himself of the identity of the parties and to refrain from solemnizing the marriage if he has reason to believe that the relevant documents contain false statements or contain an error or are defective.” There does, if one takes that statement at its face value, seem to be some implication that there is an obligation cast upon the celebrant to solemnise the marriage if there is no visible impediment. Of course, one, perhaps, should not lay too much emphasis on a politician’s parliamentary speech, particularly one which was made prior to 1984. In that year, a new s 15AB had been introduced into the Commonwealth *Acts Interpretation Act* 1901 which permitted, *inter alia*, that, in interpreting a statutory provision, reference might be made to extrinsic materials existing, “...the speech made to a House of Parliament by a Minister on the occasion of the moving by the motion that the Bill be read a second time in the House.”¹⁴⁴ That may be done, first, when, “...the provision is ambiguous or obscure,”¹⁴⁵ or, “...the ordinary meaning

conveyed in the text talking into account its context in the Act and the purpose of the object underlying the Act leads to the result that is manifestly absurd or unreasonable.”¹⁴⁶ The fact that *W v T* reached the Full Court of the Family Court of Australia at all might, of itself, suggest that the provisions might fall into the first category and the fact that the authorised celebrant was not celebrating the marriage might well invoke the second!

In the end, though, Baker J. agreed¹⁴⁷ with Fogarty J. there was nothing in the legislation which suggested that the phrase “in the presence of” should be given anything other than its ordinary meaning. Hence, it was not necessary to establish any further relationship of proximity to the solemnization other than that the authorised celebrant was able both to hear and see the ceremony and, therefore, being a witness to it, and is able to intervene in the ceremony if it is not proceeding according to law.

3. *Another Route? The Presumption of Marriage*

Towards the end of his judgment, Fogarty J. commented¹⁴⁸ that the approach he had taken was, “...consisted with an approach which emphasises the presumptive validity of a marriage entered into by parties who believe or at least one of whom believes that it was a valid ceremony.” This statement seems to reaffirm the existence and utility of the presumption of marriage as it exists in modern Australia law. Recent legislative developments¹⁴⁹ in Australian evidence law seem to have left the traditional presumptions such as death, marriage, legitimacy and the presumption of negligence where *res ipsa loquitur* is applied

largely untouched.¹⁵⁰ At the same time, in the most recent Australian edition of *Cross on Evidence*, the learned editor had declined¹⁵¹ to describe the operation of those presumptions, adopting Thayer's description of the exercise as being, "...an unprofitable and monstrous task."¹⁵²

As it is well known,¹⁵³ the presumption of marriage exists in three forms: formal validity, essential validity and the presumption arising out of cohabitation.¹⁵⁴ It is, of course, the first of these which immediately concerns us, and, without attempting a detailed history¹⁵⁵ of the presumption, some landmark decisions are worth noting. The decision of the House of Lords in *Piers v Piers*¹⁵⁶ is generally regarded as being the leading early authority, where a marriage had been celebrated in a private house was regarded as valid, even though there was no evidence that a valid special licence had been obtained. Lord Campbell, whose activity in the area will be remembered from the earlier discussion,¹⁵⁷ made these comments¹⁵⁸ regarding the operation and rationale of the presumption: "My opinion is, that a presumption of this sort, in favour of a marriage, can only be negatived by disproving every reasonable possibility. I do not mean to say that you must show the impossibility of any supposition which can be suggested to support the validity of the marriage; but you must show that this is most highly improbable, and that it is not reasonably possible. Because, otherwise there is a tremendous responsibility cast upon you with regard to the *status* of the woman and of the children. See the peril which you are encountering; because you may be deciding that a woman is a concubine, and that the children are bastards, upon a mere speculation, when in fact, contrary evidence may

afterwards be produced, when it is too late, to show that there was that in existence which would render the marriage valid...[To] avoid such a peril, the law requires that you should negative every reasonable possibility.”¹⁵⁹

It seems likely that the high point of the presumption’s operation in the terms expressed by Lord Campbell was probably reached in the decision of Kekewich J. in *Re Shephard; George v Thyer*.¹⁶⁰ *Shephard* was an extraordinary case decided by an extraordinary judge:¹⁶¹ an English man and woman had travelled to France with the intention of getting married and, there, allegedly went through a form of marriage although there was no evidence of any legal form of marriage ever having taken place. The couple, though, had lived together in England for some thirty years and had several children. It was assumed by the Court that a marriage such as was alleged was impossible by the law of France. During the course of his judgment, in refusing to hold the marriage invalid, Kekewich J. referred to, “Something like a ceremony,”¹⁶² “some kind of ceremony,”¹⁶³ “something like a certificate”¹⁶⁴ and described the evidence as, “...a somewhat romantic story” about which he had a great deal of doubt.¹⁶⁵ The marriage seems to have been saved by the length of cohabitation¹⁶⁶ and the existence and recognition of children.

In Australia, subsequent to the *Family Law Act* 1975, attitudes towards the presumption have been rather uncertain: in an early case, *In the Marriage of Kirby and Watson*,¹⁶⁷ Watson S.J. stated that, “The presumption of marriage can be taken too far. Once there is a challenge to validity the court being put on

notice should apply ordinary rules of common sense to the inferences to be drawn from what facts are known. Where status is involved it may avail little to erect artificial rules as to presumptions and onus of proof.” Again, in *Re Pennington Decd (No 2)*,¹⁶⁸ Harris J. of the Supreme Court of Victoria specifically refused to follow *Re Shephard*. He further stated that the facts, which included the failure to produce a marriage certificate and a party giving two or three different versions of where he had been married as well as there being no record of his marriage, did not provide any strong evidence of marriage or went to a context which, instead of strengthening the probabilities that the parties were married, tended to have the opposite effect.

But that is not the end of the process: in *In the Marriage of Latimour*,¹⁶⁹ Connor J., of the Family Court of Western Australia, refused to accept that the presumption was no longer a part of Australian law. He continued¹⁷⁰ by saying that it was the responsibility of the judge to consider all of the evidence and draw any inference which could fairly be drawn from the proven facts and to apply such aids or presumptions as were appropriate in arriving at a decision.¹⁷¹

Formal validity was, *inter alia*, in issue in the decision of Baker J. in *In the Marriage of Barriga (No 2)*.¹⁷² There, the parties had married in Mexico in 1969 by proxy in a civil ceremony; in 1973, they went through a religious ceremony in Australia. At the time of their marriage in Mexico, the parties were domiciled in Argentina and, at the time of their marriage in Australia were domiciled in Australia. The first issue¹⁷³ related to the validity of the Mexican and Australian

marriages. Baker J. emphatically stated¹⁷⁴ that, “There is a presumption in law of the validity of a marriage properly celebrated...[T]here seems little doubt that a presumption as to the validity of a marriage properly celebrated is an integral part of our law.” In the event, Baker J. found the marriages in both Mexico and Australia to be formally valid.¹⁷⁵

Fogarty J’s comment in *W v T* and the statement of Baker J in *Barriga (No 2)* represent the last words on the applicability of the presumption of formal validity of marriage in Australian law. Presumably, the reason why it was not used more in argument in *W v T* that there was evidence regarding the conduct of the ceremony, although Fogarty J. seemed to regard its rather extraordinary circumstances as affecting the presumption’s existence, rather than, perhaps, its vitality. Given cases such as *Latimour*, it does seem as though it will be easier to rebut the presumption of formal (and, indeed, essential) validity than it was, say , one hundred years ago. This is as it clearly should be: the need for presumptions depends effectively on the absence of evidence and in the case, especially, of the presumption of formal validity on records which have not properly been kept or have been lost or destroyed. We all know that that cannot be the case today!

4. *Conclusions*

There are a number of issues which arise out of *W v T* and not all of them are capable of immediate or easy resolution. The first is surely obvious - that is, why was the matter litigated in the first place? One can only surmise that, for some reason, that the wife would rather never have been married at all than have been married and then divorced.

One will, in all probability, never really know why. The reason was, it appears, not known to any of the three judges.¹⁷⁶

The second relates to the interpretation of the statute, which, given the existence of the case at hand, cannot be said to be satisfactory in its structure and syntax.

At various stages in this paper, I have sought to draw attention to other parts of the *Marriage Act* 1961,¹⁷⁷ and other legislation prior to it, which seems to have accomplished the task more adequately than the totality represented by ss 41, 5(2), 23B(1)(c) and 48. However, the major interest generated by *W v T* is the historical analysis generated in the judgments of Fogarty and Baker JJ.

In that context, it is important, in this writer's view, to emphasise that the issue is perhaps not as clear cut as the judges seemed to suggest. In other words, there is some suggestion that the role of the celebrant is more active than might have been thought from a reading of *W v T*, without exploring some of the earlier case law.

The real question, it is suggested, lies in the expectations of the parties to the marriage. What do they expect the celebrant to do? In very few situations would they expect the celebrant to play as little part in the proceeding as the authorised celebrant did in *W v T*. That case may have clarified the meaning of the relevant provisions in the Act, but, at the same time, it has thrown a palpable absurdity into clear relief. A change in the Act is both necessary and desirable.

Perhaps, though also, *W v T* may go some way to bearing out T.S. Eliot, when he wrote,¹⁷⁸

“Think now
History has many cunning passages,
contrived corridors
And issues, deceives with whispering
ambitions,
Guides us by vanities.”

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1. (1998) F.L.C. 92-808
 2. Prior to that time, the wife had been of the Unitarian belief and the husband a Roman Catholic.
 3. The notion of voidable marriages was abolished by s 57 of the *Family Law Act 1975*.
 4. See *Family Law Act 1975* ss 48, 49. For comment on the operation of these provisions, see F. Bates, "The Grounds for Dissolution of Marriage and the Philosophy of the Family: The Australian Experience" (1989)18 *Anglo-American Law Review* 7.
 5. (1998) F.L.C. 92-808 at 85, 113.
 6. Sir Garfield Barwick, later Chief Justice of the High Court of Australia. Hansard, House of Representatives, 19th May 1960 at 2005.
 7. (1989) F.L.C. 92-808 at 85, 117.
 8. Ibid at 85, 117.
 9. Ibid at 85, 117.
 10. *Report of the Committee on One Parent Families* (1974; London, HMSO) Vol 2 at 86.
 11. *Report of the Royal Commission on the Laws of Marriage* no 1216 (1868) at XXV.
 12. See A.H. Manchester, *Modern Legal History* (1980; London, Butterworth) at 361.
 13. [1939] P 391.
 14. Banns are described by D.M. Walker, *Oxford Companion to Law* (1980; Oxford, Clarendon Press) at 112 as follows: "Public legal notice of intended marriage. The practice was early adopted in the Christian church of giving advance notice. The practice was known in France in the ninth century and in England was ordered by a synod of Westminster in 1200. The Lateran Council of 1215 made the publication of banns compulsory throughout Christendom. In England and Scotland by church law and statute banns long had to be published in church as a normal preliminary to marriage, but alternatives came to be allowed, normally publication by notice by a registrar. The matter is regulated by statute. In 1977 banns were abolished in Scotland, notice to the registrar being substituted in all cases. In the U.S. the practice of banns was general in the colonial period but is now much restricted." For comment on the present situation, see P.M. Bromley and N.V. Lowe, *Bromley's Family Law* (8th Ed, 1992; London, Butterworth) at 45ff.

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15. They had also held that, as there was no evidence that the first husband was dead, the first marriage was still subsisting and, hence, the second marriage was invalid. The matter was remitted that no ground also.
 16. *Marriage Act* 1823 s 22, which provides that, "...if any persons shall...knowingly and wilfully intermarry without due publication of banns or licence...the marriages of such persons shall be null and void to all intents and purposes whatsoever."
 17. [1939] P 391 at 398.
 18. Above n 12 at 364.
 19. L.Stone, *The Family, Sex and Marriage in England 1500-1800* (1977; London, Weidenfield and Nicholson) at 33ff.
 20. [1939] P 391 at 400.
 21. [1942] P 37.
 22. Ibid at 40.
 23. Above n 14 at 47.
 24. D.M. Walker, *Principles of Scottish Private Law* (4th Ed. 1988; Oxford, Clarendon Press) Vol I at 244.
 25. [1949] P 147.
 26. That word was used by Henn Collins J. in *Chipchase* [1942] P 37 at 38.
 27. [1949] P 147.
 28. Ibid at 151.
 29. See *Small v Small* (1923) 67 Sol. J. 277; *Tooth v Barrow* (1854) 1 Spinks, Ecc & Ad. 371; *Wormald v Neale* (1868) 19 L.T. 93.
 30. Above n 12 at 361.
 31. Above n 14 at 47.
 32. (1998) F.L.C. 92-808 at 85, 117.
 33. Above n 14 at 31.
 34. J.Jackson, *The Formulation and Annulment of Marriage* (2nd Ed., 1969; London, Butterworth) at 70.
 35. (1998) F.L.C. 92-808 at 85, 118.
 36. For comment, see F. Bates, "Irregular Unions and Social Policy" 1980 *Scots Law*

Times (News) 149.

37. J.M. Thomson, *Family Law in Scotland* (2nd Ed. 1991; Edinburgh, Butterworth/Law Society of Scotland) at 14.
38. See T.B. Smith, *A Short Commentary on the Law of Scotland* (1962; Edinburgh, W.Green and Sons) at 310-311.
39. (1874)1 R. 532. The Court of Session report covers 150 pages.
40. (1875)2 R (H.L.) 80.
41. In relation to the leading tort/delict decision *Donoghue v Stevenson* [1932] A.C. 562. For comment see Smith above n 53, at 37, 659, 667.
42. Above n 37 at 15.
43. 1933 S.C. 492 at 501.
44. E.M. Clive, *The Law of Husband and Wife in Scotland* (3rd Ed. 1992; Edinburgh, W. Green/Sweet and Maxwell) at 6.
45. Ibid at 7.
46. Especially, below text at n 60ff
47. (1998) F.L.C. 92-808 at 85, 119.
48. It probably did not end entirely then: anecdotally, the writer knows of elopement to Gretna Green, particularly, continuing significantly after 1940, when the Act came into force.
49. Above text at n 32.
50. (1912)2 Ir R 445.
51. Ibid at 488.
52. The words, "Ego conjungo vos in matrimonium."
53. (1912)2 Ir R 445 at 489.
54. See W.N. Osborough in A.W.B. Simpson (Ed), *Biographical Dictionary of the Common Law* (1984; London, Butterworths) at 397ff.
55. (1912)2 Ir R 445 at 507.
56. Ibid at 509.
57. Below text at n 133.

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58. 1912)2 Ir R. 445 at 525. Note also the words of O'Brien L.J.C. (ibid at 484) to the effect that, were the petitioner's claim to be accepted, "...it would be competent for him to fling the respondent aside, a degraded castaway, the mere refuse of his sated passion, the unhappy mother of a bastard child. This gives us pause indeed."
 59. (1998) F.L.C. 92-808 at 85, 119.
 60. (1844)10 Cl & Fin 534.
 61. See *Kuklycz v Kuklycz* [1972] V.R. 50. For comment, see below at n 93.
 62. Lyndhurst L.C., Lord Cottenham and Lord Abinger were of the view that the marriage was invalid, whilst Lord Brougham, Lord Denham and Lord Campbell were of the view that it was not.
 63. The case was referred to the Court of Queens Bench in Ireland which was equally divided (2:2); one of the judges then withdrew his verdict with the result that the marriage was elected as invalid and Millis was acquitted. The matter then came before the House of Lords on a writ of error. The hearing took place before six Lords of Appeal, who were advised, as was the custom, by ten judges who advised that the marriage was invalid. Since the House was equally divided, the maxim *semper presumitur pro negante* was applied and the defendant, accordingly, was acquitted.
 64. (1844)10 Cl. & Fin 534 at 862.
 65. Ibid at 906.
 66. (1988) F.L.C. 92-808 at 85, 119.
 67. (1844)10 Cl & Fin 534 at 751.
 68. (1819)2 Hag Con 268.
 69. For comment on that and related areas, see H.A. Finlay, "Jactitation and Restitution of Conjugal Rights" (1974)11 *University of Western Australia Law Review* 264.
 70. (1819)2 Hag Con 268 at 271.
 71. One witness also testified that, "...the priest or the minister of the parish ought to know, at the time of contracting such marriage, the names and surnames of the witnesses present - and that it is customary for either the intended husband or wife to furnish him with such information on the spot, or leave the same with him written down on a piece of paper."
 72. For comment, see F. Bates, "Proof of Foreign Law and the Expert Witness" (1983)30 *Chitty's L.J.* 278. For recent Australian intervention, see *Evidence Act* 1995 s 174 (Cth), (NSW).

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73. [1930]2 Ch 259 at 278.
 74. (1861)9 H.L.C. 274.
 75. Ibid at 284.
 76. Ibid at 303.
 77. Ibid at 304.
 78. Ibid at 331
 79. The judge continued by saying that the evidence of any such impediment is left to the knowledge of the minister himself, to the conscience of the parties and to the unenforced interference of third parties.
 80. (1861)9 H.L.C. 274 at 340.
 81. (1988) F.L.C. 92-808 at 85, 120.
 82. (1861)9 H.L.C. 274 at 340.
 83. Ibid at 356.
 84. Ibid at 350.
 85. Ibid at 346.
 86. Ibid at 348
 87. Ibid at 352.
 88. (1847)1 Rob. Ecc. 580.
 89. See, for example, J.A. Wightman in Simpson (Ed) above n 54 at 328; D.M. Walker, above n 29 at 789.
 90. (1947)1 Rob. Ecc. 580 at 582.
 91. Ibid at 583.
 92. (1988) F.L.C. 92-808 at 85, 121.
 93. [1972] V.R. 50.
 94. See *Matrimonial Causes Act* 1959 s 28 (b).
 95. See *Savenis v Savenis* [1950] S.A.S.R. 309; *Fokas v Fokas* [1952] S.A.S.R. 152; *Macksymek v Macksymek* (1952)72 W.N. (N.S.W.) 522; *Taczanowska v Taczanowska* [1957] P 201.

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96. *Hodgson and Wife v Stawell* (1854)1 V.L.T. 51 at 52 *per a'* Beckett C.J. and Williams J.
 97. Above Text at n 105.
 98. [1972] V.R. 50 at n 53.
 99. *Ibid* at 54.
 100. (1908)10 East 282 at 288.
 101. Grose, le Blanc and Bayley JJ.
 102. [1972] V.R. 50 at 534.
 103. [1946] P 61 at 66.
 104. *Apt v Apt* [1948] P 83.
 105. *Isaac Penhas v Ton Soo Eng* [1953] A.C. 304
 106. D.Mendes da Costa, "The Formalities of Marriage in the Conflict of Laws" (1958)7 *International and Comparative Law Quarterly* 217 at 239ff.
 107. J.A. Andrews, "The Common Law Marriage" (1959)22 *Modern Law Review* 396 at 400.
 108. Hodson L.J., "Common Law Marriage" (1958)7 *International and Comparative Law Quarterly* 205 at 210.
 109. (1998) F.L.C. 92-808 at 85, 119.
 110. J.C. Hall, "Common Law Marriages" (1987)46 *Cambridge Law Journal* 106.
 111. *Ibid* at 121.
 112. *Ibid* at 120.
 113. (1998) F.L.C. 92-808 at 85, 121.
 114. *Ibid* at 85, 122.
 115. Above text at n 60ff.
 116. Below text at n 137
 117. (1973)6 S.A.S.R. 493 at 498.
 118. In fact, s 38 of the South Australian *Marriage Act* 1936 was in force at the time the marriage was celebrated. However, the provisions were identical.

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119. Whether Father B had given evidence in the first instance proceedings without properly being sworn.
 120. (1973) 6 S.A.S.R. 493 at 498.
 121. Ibid at 499.
 122. Ibid at 507.
 123. Ibid at 512.
 124. (1998) F.L.C. 92-808 at 85, 124.
 125. Above text at n 1.
 126. (1998) F.L.C. 92-808 at 85, 124.
 127. *Marriage Act* 1961 s 46(1) which provides that, "...before a marriage is solemnized by or in the presence of an authorized celebrant, not being a minister of religion of a recognized denomination, the authorized celebrant shall say to the parties, in the presence of the witnesses, the words - 'I am duly authorized by law to solemnize marriages according to law. 'Before you are joined in marriage in my presence and in the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter. '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."
 128. (1998) F.L.C. 92-808 at 85, 125.
 129. Ibid at 85, 124.
 130. Ibid at 85, 130ff.
 131. Above text at n 68.
 132. (1998) F.L.C. 92-808 at 85, 131.
 133. J.H. Baker, *An Introduction to English Legal History* (3rd Ed, 1990; London, Butterworths) at 548.
 134. (1998) F.L.C. 92-808 at 85, 131.
 135. These were the definitions of "solemnize" in the *New Shorter English Dictionary* (1993; Oxford, Clarendon Press) at 2939 and *Macquarie Dictionary* (2nd Rev. Ed., 1990; Sydney, Macquarie Library) At 1610 and "presence" in the same dictionaries at 2340 and 1343 respectively.
 136. Above text at n 7.

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137. *Marriage Act* 1899 s 3(1).
138. Above text at n 126.
139. Above text at n 74.
140. Above text at n 133.
141. (1998) F.L.C. 92-808 at 85, 133.
142. Above text at n 78ff.
143. Above text at n 6.
144. *Acts Interpretation Act* 1901 s 15AB (2)(f).
145. *Ibid* s 15AB (1)(b)(i).
146. *Ibid* s 15 AB (1)(b)(ii).
147. (1998) F.L.C. 92-808 at 85, 135.
148. *Ibid* at 85, 125.
149. The effectively identical *Evidence Act* 1995 (Cth) and *Evidence Act* 1995 (NSW).
150. *Evidence Act* 1995 (Cth) ss 9(1), 9(3)(a); *Evidence Act* 1995 (NSW) 9(1), 9(2)(a).
At least insofar as they do not conflict with other provisions in the Acts.
151. J.D. Heydon, *Cross on Evidence* (5th Aust Ed., 1996 Sydney, Butterworths) at 233.
152. J.B. Thayer, *Preliminary Treatise on Evidence at the Common Law* (1898; Boston, Little, Brown and Co) at 13.
153. See, for Example, P.Gillines, *The Law of Evidence in Australia* (2nd Ed, 1991; Sydney, Legal Books) at 79.
154. See F. Bates, "The Presumption of Marriage Arising From Cohabitation" (1978)13 *University of Western Australia Law Review* 341.
155. See F. Bates, "Formal and Essential Validity of Marriage - Some Reflections on the Presumption of a Valid Marriage" (1975)49 *Australian Law Journal* 607.
156. (1849) 2 H.L.C. 331.
157. Above text at nn 67, 85.
158. (1849)2 H.L.C. 331 at 380.

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159. There remarks are similar to those of O'Brien L.C.J. in *Ussher*, above.
 160. [1904]1 Ch. 456.
 161. There are innumerable anecdotes regarding Kekewich J.: he was apparently described as, "An extremely learned man, but who had difficulty in applying law to fact." On one occasion, before the Court of Appeal, counsel began his opening speech by saying, "My Lords, this is an appeal from a decision of Kekewich J..." He was interrupted by one of the Lords Justices of Appeal who inquired, "Yes, but are there any other grounds for the grounds for the appeal?" On another occasion, it is alleged, Lady Kekewich returned from shopping to be greeted by her daughter who asked, "Mummy, mummy, can we have jam to tea? Daddy's had a decision upheld in the Court of Appeal!" Perhaps that decision was either *Re Oldfield*; *Oldfield v Oldfield* [1904]1 Ch 549 or *Re Hanbury*; *Hanbury v Fisher* [1904]1 Ch 415.
 162. [1904] 1 Ch. 456 at 461.
 163. Ibid at 461.
 164. Ibid at 462.
 165. Ibid at 463.
 166. See *Sastry Velaidar Arogenary v Sembecutly Vaigalie* (1881)6 App Cas. 364. Also F. Bates, above n 154.
 167. (1977) F.L.C. 90-261 at 76, 403. *Kirby and Watson* was not a case involving formal validity of marriage, but essential validity. See also, *In the Marriage of Manning* (1978) F.L.C. 90-456.
 168. [1978] V.R. 617 at 630. For more detailed comment on this case, see F.Bates, (1981)14 *University of Western Australia Law Review* 166.
 169. (1979) F.L.C. 90-635 at 78, 322.
 170. Ibid at 78, 323.
 171. Like *Kirby and Watson*, *Latimour* involved essential validity and, on the facts of the case, even applying the presumption, Connor J. could not hold the marriage to be valid.
 172. (1981) F.L.C. 91-088.
 173. The other issues related to the parties' capacity to marry and the validity of a Mexican divorce which the husband had obtained.
 174. (1981) F.L.C. 91-088 at 76, 601.
 175. Neither, though, was essentially valid.

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176. Lindenmayer J. delivered an extremely short judgment in which he agreed with Fogarty and Baker JJ as to the ultimate result. He took the view, (1998) F.L.C. 92-808 at 85, 154, that, "...the *consensual* presence of an authorized celebrant its essential to the validity of a marriage in Australia. However, I am also of the view that beyond that consensual presence, the authorized celebrant (in the case of one who is a minister of religion) is not required by law to take any particular part or occupy any particular place during the marriage ceremony. In saying that that presence must be 'consensual' I mean that it must be both voluntary *and* with knowledge on the part of the celebrant that he/she is at the ceremony in the capacity of the supervising authorized celebrant. The fact that neither of the parties to the marriage knows of that presence, or is aware of its significance, is irrelevant." On the question of why the case was litigated at all, the author bases his comment on a discussion with Baker J. in October 1998. The author is grateful to the judge for his kindness.
177. Above text at nn 127, 137.
178. *Gerontion* (1920).