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QUESTION

1. Explain the term ‘limping marriage’. Identify the ways, at common law, by which the incidence of limping marriage have been reduced.
2. Explain succinctly, mutation or conversion of marriage in conflict of laws.

ANSWER

LIMPING MARRIAGE

The issue of recognition of foreign decrees is closely related to that of capacity to marry. This is because where a foreign decree has been recognized in the forum; a party can validly contract another marriage there. On the other hand, where the decree has not been recognized, the marriage is viewed as subsisting and neither party has capacity to contract another marriage in that ccountry.

In *Padolecchia v Padolecchia*[1]**,** the husband was domiciled in Italy. He got married there in 1943 but later obtained a divorce in Mexico. This decree was not recognized in Italy. He however proceeded to contract another marriage in England. He later petitioned for a nullity decree with regards to his second marriage on the grounds that he was still married to his first wife since the Mexican decree was not recognized by the law of his domicile. The court held that he lacked capacity to contract the second marriage since his first marriage was still subsisting.

A situation where the Nigerian court does not recognize the decree of annulment or dissolution, whereas it is recognized in the foreign country where it was granted, creates what has been referred to as a limping marriage. This phenomenon has been described as the scandal which arises when a man and a woman are held to be man and wife in one country and stranger in another[2]

LIMPING MARRIAGE AT COMMON LAW

In order to avoid, reduce or mitigate the problem of limping marriage, the House of Lords, in the case of *Indyka v Indyka*[3], came up with the test of 'real and substantial connection'. Thus, for a foreign decree to be recognized the parties were only required to show a real and substantial connection with the foreign country in question and the strict rules on domicile were relaxed.

[1] (1968) P. 314
[2] Per Lord Penzance in Wilson v Wilson (1872) L.R. P&D 435 at 442
[3] (1969) 1 AC. 53

MUTATION OR CONVERSION OF MARRIAGE

Ever since the decision in *Hyde v Hyde*[4], English and Australian courts have declined to grant matrimonial reliefs in respect of a polygamous marriage. Until recently, it was generally thought that the nature of marriage is immutably determined by the law of the place of celebration[5], however in recent years, it has been conceded that the character of a marriage may be changed from polygamous to monogamous. In cases where the mutation was recognized as in *Cheni v Cheni*[6], the change was in accordance with the law of the place of celebration itself. Courts have consistently held that parties to a polygamous or potentially polygamous union cannot seek matrimonial relief from the common law. Lord Penzance wrote in Hyde v Hyde that:

> I conceive that marriage as understood in Christendom may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

In succession and legitimacy, "marriage" has been defined so as to include polygamy, while matrimonial matters, including matrimonial relief, have traditionally followed the *Hyde v. Hyde* rule. As recently as 1961, the English Court of Appeal in *Sowa v. Sowa*[7] observed that "if the ceremony is polygamous then it does not come within the word 'marriage' for the purposes of the Acts relating to matrimonial matters, nor do the parties to it come within the words 'wife', 'married woman' or 'husband'[8]. In many decisions following *Hyde v. Hyde*[9], the courts have often expressed regret that an innocent but victimized party had to be denied relief only because the character of the marriage in question was polygamous.

However, commencing with an opinion tendered by Lord Maugham to the Committee of Privileges in the *Sinha Peerage* case[10], decisions developed around the principle that notwithstanding the fact that a marriage may be potentially polygamous at its inception, it could subsequently become converted or mutated into a monogamous marriage for the purpose of attracting the matrimonial relief available under the English common law.

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[4] (1866) L.R 1 P&D 130
[5] A.V Dicey, conflict of laws (7 ed, 1958) 270
[6] (1962) 3 ALL E.R 873
[7] (1961) P. 70 C.A
[8] Ibid., 85
[9] Pearce L.J and Harman L.J in Sowa v Sowa, supra
[10] Reported as an appendix to Baindail v Baindail (1946) 1ALL E.R. The official law report of the case in the Queen's Bench series does not carry a report of the Sinha peerage decision

In *Sara* v. *Sara*[11], the Court decided that a potentially polygamous marriage contracted in India had been converted into a monogamous union because the parties had acquired a new domicile of choice in British Columbia. Such conversion was considered sufficient to attract the matrimonial relief available under the common law. Relying on Lord Maugham in the *Sinha Peerage* case, the Court concluded that the marriage in question was no longer polygamous and therefore was outside the prohibition established in *Hyde v. Hyde*

Dicey and Morris succinctly summarize the present law:

> The proposition laid down in *Ali v. Ali*[12] that a potentially polygamous marriage may become monogamous if the parties acquire an English domicile is a far-reaching one. It means that all those Commonwealth immigrants living in England who are parties to a potentially polygamous marriage become entitled to English matrimonial relief as soon as they formed the intention to remain here permanently or indefinitely. The proposition may not be very logical and is difficult to reconcile with prior authority, notably with *Hyde v. Hyde* itself. But it is to be welcomed on practical grounds because it narrowed the scope of that decision. In all these cases of conversion, the marriage was only potentially polygamous; but there seems no reason why their principle should not be equally effective to convert an actually polygamous marriage into a monogamous one, after the number of wives has been reduced to one by death or otherwise. There is no English authority on the converse problem, namely, can a monogamous marriage be converted into a polygamous one.... The answer may be that the marriage has, so to speak, the benefit of the doubt: if it is monogamous at its inception, it remains monogamous although a change of religion or of domicile may entitle the husband to take another wife; if it is polygamous at its inception, it may become monogamous by reason of a change of religion, of domicile, or of law before the happening of the events which give rise to the proceedings…'

There is judicial authority to support the view that the acquisition of a new domicile and thereby a new personal law which exclusively recognizes monogamy, is one of the means available for conversion; a change of one's personal law changes the character of one's matrimonial status from polygamous to monogamous. Dicey stated that matrimonial relief in this case of conversion is restricted to instances where the marriage has remained merely potentially polygamous and has not actually become polygamous.

[11] (1962) 31 D.L.R (2d) 566 (B.C.S.C)
[12] (1966) 1 ALL E.R. 664

CONCLUSION

The foregoing is intended merely to introduce the complexity of the cultural problem one encounters while attempting to accommodate the institution of polygamy within the framework of a common law system. The concept of change of domicile affecting the status of parties to a marriage is simply one example of the general principle that the nature of a marriage may be altered by the change of circumstances. Other examples are change by religious conversion to monogamous faith and act of state prescribing polygamy.

The common law acceptance of the principle of mutation is one major step towards reconciling foreign law and culture with the established traditions of English private international law and the Western Judaic-Christian institution of monogamous marriage.

While the principle of mutation cannot assist the parties to an *actually* polygamous marriage, the United Kingdom legislature has released the courts from the narrow and rigid rule in *Hyde v. Hyde* by enacting the *Matrimonial Proceedings (Polygamous Marriages) Act*[13]. Thus English courts have been empowered to provide relief to a petitioner in a polygamous marriage, in spite of the fact that there may be more than one wife living at the time of the hearing.

[13] 1972, c.38 s.1(1), as am. By the Matrimonial Causes Act 1973, 1973, c18, s47(U.K)

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