|  |  |  |
| --- | --- | --- |
| CONFLICT OF LAWS II  LPI 402 | May 5  2020 | |
| ASSIGNMENT TITLE: MARRIAGES AND CONFLICT OF LAWS.  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 SUCCINTLY: MUTATION OR CONVERSION OF MARRIAGE IN CONFLICT OF LAWS. | | LECTURER-IN-CHARGE:  SESAN FABAMISE ESQ. |

ANSWER

**QUESTION 1:**

**LIMPING MARRIAGES**

**Limping marriages** refers to the marital status of people considered as married under the law of one state or country while under the law of another state such marriage is unrecognized, considered inexistent and not binding. It may also be referred to as a situation where the Nigerian court does not recognise the decree of annulment or dissolution, whereas it is recognised in the foreign country where it was granted. 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 strangers in another.”[[1]](#footnote-1) In *Padolechia v Padolechia[[2]](#footnote-2)*, the husband was domiciled in and married in

Italy in 1943 but subsequently obtained a divorce in Mexico and contracted another marriage in England. In a petition to annul the marriage on the ground that the first marriage was valid and subsisting, the court up held the submission.

In situations where it will be unjust and inappropriate for the decree to be binding extra territorially, a limping marriage will be created. In *Kendall v Kendall[[3]](#footnote-3)*, the husband’s lawyers deceived the wife into applying for a divorce which she was not desirous of obtaining. The processes were filed in a language she did not understand. The recognition was withheld in England on grounds of public policy.

**WAYS AT COMMON LAW BY WHICH THE INCIDENCE OF LIMPING MARRIAES HAVE BEEN REDUCED.**

In order to avoid this problem (of limping marriages), the House of Lords in the case of *Indyka v Indyka,[[4]](#footnote-4)* came up with the test of **‘real and substantial connection’**. In this case, it was stated that an English court should recognise a divorce decree granted in a foreign country where there was a real and substantial connection between the petitioner for the divorce and the country exercising the jurisdiction. As such, for a foreign decree to be recognised, the parties are only required to show a **‘real and substantial connection’** with the foreign country in question and the strict rules on domicile would be relaxed.

**QUESTION 2:**

**MUTATION OR CONVERSION OF MARRIAGES IN CONFLICT OF LAWS**

Polygamy is considered primarily a legal concept, giving rise to a particular legal status, but in fact polygamy symbolizes a particular cultural and religious heritage.[[5]](#footnote-5) African native law and custom espouse polygamy, both as a religious fact and as a cultural facet of African tribal life.[[6]](#footnote-6) Equally well rooted in Western culture and religion is the institution of monogamy represented by common law tradition.[[7]](#footnote-7) The accommodation of polygamy and its manifold consequences present a fundamental difficulty for the common law system. It is therefore proposed to examine the present position of polygamy in the common law world in order to determine what changes were necessary to accommodate this institution.

In 1962, the British Columbia Supreme Court in *Sara v Sara[[8]](#footnote-8)* felt compelled to depart from their reasoning in the case of *Lim v Lim[[9]](#footnote-9)* because “there [were] signs of a more modern and enlightened view being accepted such as it contained in Dicey”.[[10]](#footnote-10) In that case, the wife, domiciled in British Columbia, married the husband in India in accordance with a Hindu ceremony of marriage which allowed polygamy. After the marriage both parties came to British Columbia where the husband acquired a domicile. The husband sought a declaration that he was not a married person within the meaning of the law of British Columbia, on the ground that his marriage was polygamous. The wife sought a declaration of the validity of the marriage. ***Lord, J.*** dismissed the application of the husband and made the declaration sought by the wife. His Lordship based his decision on two factors: (a) acquisition by the husband of a domicile of choice in British Columbia; (b) the fact that subsequent to the marriage polygamy between Hindus in India was abolished by the **Hindu Marriage Act, 1955**.

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[[11]](#footnote-11)* rule. Ever since the decision in the *Hyde* case (now more than a century old) English and Australian Courts have declined to grant matrimonial relief in respect of a polygamous marriage. When is a marriage polygamous? Until recently it was generally thought that the nature or character of a marriage is immutably determined by the law of the place of celebration. In recent years, it has been conceded that the character of a marriage may be changed from polygamous to monogamous. In cases where such a mutation was recognised as in *Cheni v Cheni,*[[12]](#footnote-12) the change was in accordance with the law of the place of celebration itself. In that case the spouses were married according to Jewish rites in Egypt where they were domiciled. By Egyptian law the religious law of the parties determined the validity of the marriage; by Jewish law if there was failure of offspring of the union within a certain period the husband could take another wife without formally divorcing the first. On the other hand, the birth of a child within that period made the marriage monogamous for all purposes. A child was in fact born to the parties who later came to England where they were domiciled at the date of proceedings by the wife for a decree of nullity on the ground of consanguinity. The husband argued that the English Court had no jurisdiction to grant the decree because the marriage was potentially polygamous. The Court ***(Sir Jocelyn Simon, P.)*** held that the birth of the child rendered the marriage monogamous and that the proper time to consider the character of the marriage was the date of proceedings. The learned judge cited two instances in which a potentially polygamous union may assume the characteristics of a monogamous marriage:

***“Two spouses may contract a valid polygamous union and subsequently join a monogamous sect, or go through a second ceremony in a place where monogamy is the law. Again, a marriage in its inception potentially polygamous though in fact monogamous may be rendered monogamous for all time by legislative action proscribing polygamy.”***

Courts have consistently held that parties to a polygamous or a potentially polygamous union cannot seek matrimonial relief from the common law. As recently as 1961, the English Court of Appeal in *Sowa v Sowa*[[13]](#footnote-13)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’. In many decisions following *Hyde v Hyde,*[[14]](#footnote-14) 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,[[15]](#footnote-15)* 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.

Cumming-Bruce, J., from the case of *Ali v Ali,[[16]](#footnote-16)* went on to consider the important question of whether the acquisition of an English domicile had the effect of impressing a monogamous character on the potentially polygamous marriage. His Lordship relied on the dictum of ***Sir Jocelyn Simon, P.*** in *Cheni* v. *Cheni[[17]](#footnote-17)*to the effect that change of domicile may be effective to alter the nature of a union. "The chief difficulty" felt by the learned judge was to determine whether change of domicile did more than merely "frustrate one of the features of the potentially polygamous union". Regardless, *Ali v. Ali* raised a number of questions – First of all, whether a law other than the law of the place of celebration can alter the character of the marriage. In this case, the law of a subsequently acquired domicile was held to be relevant in deciding the nature of a marriage at the time of divorce proceedings and in displacing the effect of the *lex loci celebrationis* rule. In *Parkasho v. Singh*[[18]](#footnote-18), a change in the *loci celebrationis* which could not have been in the contemplation of the parties at the time of the marriage, was held to affect the nature of that marriage; Secondly, is an intention on the part of the husband alone sufficient toalter the character of a union by change of domicile? Or must the change be the result of some bilateral decision before a change will be recognised as effected? It is implicit in his Lordship's reasoning in *Ali v. Ali*[[19]](#footnote-19) that intention on the part of the husband alone to acquire a domicile may be sufficient to alter the nature of the union.

Conclusively, **Dicey** and **Morris** succinctly summarize the present law as follows:

**“The proposition laid down in *Ali v. Ali* that a potentially polygamous marriage may become monogamous if the parties acquire an English domicile is a far-reaching one… 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...[[20]](#footnote-20)”**

As **Dicey** has said, matrimonial relief in these cases of conversion is restricted to instances where the marriage has remained merely potentially polygamous and has not actually become polygamous. In the latter instance, Dicey believed that the parties might be required to delay their petitions to court until the number of polygamous wives was reduced to one, by death or extra-judicial divorce of the others. In that sense, there is a practical limitation placed upon the application of this principle. In any event, this appears to be the only effective inroad which the common law courts have made on the rigorous rule in *Hyde v. Hyde[[21]](#footnote-21).*

REFERENCES

* Class note on matrimonial causes – limping marriages.
* <https://www.nou.edu.ng/sites/default/files/2018-10/JIL%2520514_docx.pdf> accessed on the 4th day of May, 2020.
* https://lawjournal.mcgill.ca>...PDF accessed on the 4th day of May, 2020.
* https://www.austlii.edu.au>5...PDF accessed on the 4th day of May, 2020.

1. Per ***Lord Penzance*** in *Wilson v Wilson* (1872) L.R. P & D 435 at 442. [↑](#footnote-ref-1)
2. (1968) P.314. [↑](#footnote-ref-2)
3. (1977) Fam 208 [↑](#footnote-ref-3)
4. (1969) 1 A.C. 53 [↑](#footnote-ref-4)
5. Mayne, *Treatise on Hindu Law and Usages*, 11th ed. (1953), 172 - 73 [↑](#footnote-ref-5)
6. Farran, *Matrimonial Laws of the Sudan* (1963), chs.1 and 3 [↑](#footnote-ref-6)
7. *Warrender v Warrender* (1835) 2 Cl & Fin. 532, 6 E.R. 1239 (H.L.) per ***Lord Brougham***; but see Stone, *Sowa v Sowa: Maintenance of Family Dependants* (1961) 24 Mod.L.Rev. 500, 501, for a contrary view [↑](#footnote-ref-7)
8. (1962) 31 D.L.R. (2d) 566 (B.C.S.C.); aff’d on different grounds (1962) 36 D.L.R. (2d) 499 (B.C.C.A.) [↑](#footnote-ref-8)
9. (1948) 2 D.L.R. 353 (B.C.S.C.) [↑](#footnote-ref-9)
10. Lord J. quotes extensively from Dicey, the passage which lays down the germs of the doctrine of conversion. *Sara v Sara* is perhaps one of the earliest decisions to grasp that principle [↑](#footnote-ref-10)
11. (1866) L.R. 1 P. & D. 130 [↑](#footnote-ref-11)
12. (1965) P.85; (1962) 3 All E.R. 873 [↑](#footnote-ref-12)
13. (1961) P.70 (C.A.) [↑](#footnote-ref-13)
14. See Pearce L.J. and Harman L.J. in *Sowa v Sowa*, supra; in *Lim v Lim*, supra [↑](#footnote-ref-14)
15. Reported as an appendix to *Baindail v Baindail* (1946) 1 All E.R. 342, 348. The Official Law Reports of this case in the Queen’s Bench series do not carry a report of the *Sinha Peerage* decision. [↑](#footnote-ref-15)
16. (1966) 1 All E.R. 664 [↑](#footnote-ref-16)
17. Supra [↑](#footnote-ref-17)
18. (1967) 2 W.L.R. 946 [↑](#footnote-ref-18)
19. Supra [↑](#footnote-ref-19)
20. Conflict of Laws 9th ed. (1973), 283 [↑](#footnote-ref-20)
21. Supra [↑](#footnote-ref-21)