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ASSIGNMENT TITLE:

1. Explain the term limping marriage

b) Identify the ways, at common law, by which the incidence of limping marriage has been reduced

2) Explain succinctly, mutation or conversion of marriage in conflicts of laws

LIMPING MARRIAGES

Limping marriage is a situation created by failure to recognize the decree of dissolution of marriage granted by the courts of other countries. This is because in one country (where the decree was granted)the couple is no longer married, but in another country whose courts do not recognise the foreign decree of dissolution, the couple is still married and any attempt for any parties to contract another marriage in that country would be invalid, the marriage would be void. In the case of **Padolecchia v. Padolecchia**[[1]](#footnote-2)**,** the husband was domiciled in Italy. He got married there in 1943 but later obtained a divorce in Mexico. This decree was not recognised in Italy. He however proceeded to contract another marriage in England. He later petitioned for a nullity decree with regards to his second marriage o the ground 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 to contract the second marriage since his first marriage was still subsisting.

This phenomenon has been described as ‘the scandal which arises when a man and a woman are held to be a man and wife in one country and strangers in another.’[[2]](#footnote-3) In order to avoid this problem, the House of Lords, in the case of **Indyka v. Indyka[[3]](#footnote-4)** came up with the test of ‘real and substantial connection.’ Thus, for a foreign decree to be recognised, the parties were only required to show a ‘real and substantial connection’ with the foreign country in question and the strict rules on domicile was relaxed

2. Mutation and conversion of marriage in conflict of laws

Ever since the decision in **Hyde v. Hyde[[4]](#footnote-5)** (now more than a century old) common law have declined to grant matrimonial relief in respect of a polygamous marriage. 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. An example of case where such a mutation was recognised is in **Cheni v. Cheni[[5]](#footnote-6)**, the change was in accordance with the law of the place of celebration itself.

In addition, In **Ali v. Ali[[6]](#footnote-7)** where it was established that it could be done by change in domicile. In this case, the husband was born in India. At the age of 24 he came to England, obtaining a job and living permanently there. Four years later he returned to India where he married an Indian wife chosen by his father. The ceremony took place according to the rites of the Muslim faith which was the religion of both parties. By Muslim law the husband was permitted to take further wives. The marriage was therefore potentially polygamous at its inception. The husband left for England shortly after the marriage and resumed his employment there. The learned judge (Cumming-Bruce, J.) decided that by the middle of 1961 he had acquired a domicile of choice in England. The wife followed and cohabited with her husband in England. In 1959 the husband applied for British nationality and in the same year a child was born to the parties, shortly thereafter the wife left the matrimonial home with the child and returned to India. In 1960 the husband obtained a British passport, continuing to live permanently in England. In 1964 he began living with a woman and a child was born of this relationship. In 1963 the husband petitioned for divorce on the ground of desertion. The wife denied desertion and alleged cruelty. She also alleged that the Court had no jurisdiction on the ground that the marriage was polygamous .In 1964, when the husband committed adultery, the wife cross-petitioned for dissolution of the marriage on this ground.

The suits were heard by Cumming-Bruce, J. who held that the Court could not exercise jurisdiction in respect of the offences of desertion and cruelty because they took place, if at all, at a time when the marriage was still polygamous**. However, the learned judge granted the wife a decree nisi on the ground of adultery as this offence took place after the character of the marriage had been rendered monogamous by the acquisition of an English domicile of choice by the husband**. In reaching this conclusion, Cumming-Bruce, J. first considered the legal characteristics of the type of marriage over which English courts can exercise jurisdiction to pronounce a decree of divorce. His Lordship referred to Dicey Rule 38: and concluded that the vital characteristic required is that of an exclusive voluntary union of one man and one woman for life.

Secondly, his Lordship decided that a marriage potentially polygamous at its inception may be subsequently impressed with a monogamous character so as to found the jurisdiction of an English court. . **Cheni v, Cheni** was relied on in support. Cumming-Bruce, J. further investigated the precise effect of the acquisition of an English domicile by the husband. His Lordship concluded thus: "He has, by operation of the personal law which he has made his own, precluded himself from polygamous marriage to a second wife although he has not changed his religion. On the assumption that the law of England does not permit a domiciled Englishman to contract a valid polygamous marriage, Ali had by acquiring an English domicile lost the capacity to contract fresh marriages. Cumming-Bruce, J. 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** 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. His Lordship indicated that there had been no active assertion of monogamous intent and that it could not be said that the acquisition of an English domicile by the husband was intended to actively alter the character of the union. While agreeing that the legal validity of a marriage did not depend on personal intention, his Lordship thought it was "at the very least curious that a union originally polygamous should change its legal character without any conscious act on the part of either of the parties directed to that end."However, the learned judge accepted the point as an anomaly, comparing change by domicile with change by legislation in this respect. It is implicit in his Lordship's judgment that intention on the part of the husband alone to acquire a domicile may be sufficient to effect a conversion to monogamy. . His Lordship considered Hyde v. Hyde. If monogamous character can be impressed upon a potentially polygamous marriage, on what basis may that decision be explained? In that case the husband had acquired an English domicile before his wife married a second time and allegedly committed adultery by doing so. He had also changed his religion. The answer given by Cumming-Bruce, J. was that the importance of the concept of domicile in relation to the capacity to marry was at the time only "dimly appreciated". Ali v. Ali raises a number of questions.

1. Whether the law other than the law of the place of celebration can alter the character of the marriage. In Ali v. Ali, 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 lexi loci celebrationis rule. In **Parkasho v. Singh[[7]](#footnote-8)**, 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.
2. Is an intention on the part of the husband alone sufficient to alter 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 that intention on the part of the husband alone to acquire a domicile may be sufficient to alter the nature of the union.

In conclusion, this decision is contrary to the supposed principle that the lex loci celebrationis immutably determines the nature of marriage. There instances where a character of a marriage may be changed from polygamous to monogamous. These are cases of mutation or conversion and it happens mostly by a change in domicile as seen in the case of **Ali v. Ali** above or by change as regards circumstances surrounding the marriage as in the case of **Cheni v. Cheni**, 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 may be rendered monogamous for all time by legislative action proscribing polygamy.

1. (1968) P.314 [↑](#footnote-ref-2)
2. Per lord Penzance in Wilson v Wilson (1872) L.R P&D 435 at 442 [↑](#footnote-ref-3)
3. (1969) 1A.C.53 [↑](#footnote-ref-4)
4. (1866) L.R 1P&D130 [↑](#footnote-ref-5)
5. (1965) P.85; (1962) 3 All ER 873 [↑](#footnote-ref-6)
6. (1966) 1 All ER 664 [↑](#footnote-ref-7)
7. (1967) 2 W.L.R 946 [↑](#footnote-ref-8)