Name: Okoro Uka Ifeoma

Matriculation Number: 16/Law01/165

Course Title: Conflicts of Laws II

Date:3/5/2020

Assignment

1. Limping marriage developed as the result of marriages being recognized in one country and not recognized in another.[1] It has also been defined a feature in private international law where a person is regarded as married by one country and as single by another.[2] This concept arises in a situation where a decree of dissolution or nullity of marriage is granted in a country and not recognized in another. Such failure to recognize the decree granted by the courts of other countries is what is referred to as "limping marriages". In the case of *Padolecchia v Padolecchia*[3], 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 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 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 '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."[4] In order to avoid this problem, the House of Lords, in the case of *Indyka v Indyka,*[5] 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

---

[1] Limping Marriages- EU Divorces| Brophy Solicitors: Brophy Solicitor

[2] http://www.britannica.com > topic

[3] (1968) P.314.

[4] Per Lord Penzance in Wilson v Wilson (1872) L.R. P&D 435 at 442

[5] (1969) 1 A.C. 53.

substantial connection' with the foreign country in question and the strict rules on domicile were relaxed,

2. Ever since the decision in *Hyde v Hyde*[6] English courts 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.[7] 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 recognized as in *Cheni v Cheni,*[8] the change was in accordance with the law of the place of celebration itself.

In *Ali v Ali,*[9] 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 a dissolution of the marriage on this ground. The suits were heard by Cumming-Bruce, J.

---

[6] (1866) L.R. 1 P & D. 130.
[7] The authorities are numerous, See, for example: A. V. Dicey, *Conflict of Laws* (7 ed. 1958) 270; R. H. Graveson, *The Conflict of Law* (4 ed, 1966) 103.
[8] (1965) P. 85; (1962) 3 All E.R. 873.
[9] (1966) 1 All E.R. 664.

held that the court could not exercise jurisdiction in respect of 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.

The decision is contrary to the supposed principle that the *lex loci celebrationis* immutably determines the nature of the marriage. The case often cited in support is *Mehta v Mehta,*[10] where an Englishwoman married a Hindu in India in accordance with the rites of a sect which permitted only monogamous marriage. Although it was relatively easy for the husband to change to a sect which would permit polygamy, this fact was held to be immaterial. What was important was the character of the marriage at the time of celebration, and therefore it was to be regarded as monogamous.

In recent years, a rule has developed that monogamous character may be impressed upon a polygamous marriage by a change in the circumstances surrounding the marriage. An example is *Cheni v Cheni*[11]. 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 resume 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

[10] (1945) 2 All E.R. 690.
[11] (1965) P. 85; (1962) 3 All E.R. 873.

> 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.[12]

It is clear that the judge did not invoke the principle later relied on by Cumming-Bruce, J. in *Ali v Ali* which was equally available in *Cheni v Cheni,* namely, that by the time the proceedings were commenced the parties had acquired an English domicile. But Sir Jocelyn Simon, P. did hint that the nature of a marriage might be altered by change of domicile. His Lordship stated that "there are no marriages which are not potentially polygamous, in the sense that they may be rendered so by a change of domicile and religion on the part of the spouses", and conversely it may be expected that spouses who marry polygamously might "by personal volition or act of state" change their union to a monogamous type.

An interesting case relevant to both decisions is *Sara v Sara*[13] where 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. The decision on the domicile aspect foreshadows *Ali v Ali* and his reference to abolition by statute anticipates the second instance of conversion noted *obiter* by Jocelyn Simon, P. in *Cheni v Cheni.*

The recent case of *Parkasho v Singh*[14] is interesting as a confirmation of *Ali v Ali* and particularly for the comments of Sir Jocelyn Simon, P. on *Cheni v Cheni* in the light of the former case. The parties were married in India in 1942 in potentially polygamous form. In 1950 a child was born of the union. In 1955 the husband came to England and was followed by his wife and

[12] (1965) P. 85 at 89.
[13] (1962) 31 D.L.R. (2d) 566.
[14] (1967) 2 W.L.R. 946.

child in 1963. In maintenance proceedings before magistrates the husband took the preliminary point that the tribunal had no jurisdiction because the marriage was potentially polygamous. The magistrates found (without reasons) that the marriage was potentially polygamous at its inception and that its character had not been altered by the Hindu Marriage Act 1955 which purported to confer monogamous character on potentially polygamous unions between Hindus in India. Consequently, they dismissed the wife's application for maintenance on the ground of neglect by the husband. The wife appealed. The court (Sir Jocelyn Simon, P., and Cairns, J.) held that the Hindu Marriage Act,1955, although not possibly in the contemplation of the parties at the time of the marriage, was capable of converting the potentially union into one of a monogamous nature.

In conclusion, it can be drawn from the case of *Ali v Ali* that the principle that the *lex loci celebrationis* immutably determines the character of a marriage has been displaced in favor of a limited recognition of the relevance of *lex domicilii* in this context. 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 change of circumstances. Other examples are change by religious conversion to monogamous faith and by act of state proscribing polygamy. Also, implicit in the cases is a principle that change of domicile, to be effective in altering the character of a marriage, must result from the operation of the intention of both spouses. If intention is to be regarded as necessary at all then it must be the intention of both parties. If the concept of dependent domicile compels the conclusion that intention on the part of the husband alone is sufficient then the same concept should compel the conclusion that the nature of a marriage can be changed even without an intention by either party to the marriage, for example, where the husband is under twenty-one and his domicile is therefore dependent on that of his father. This would be an absurd situation.

REFERENCE

1.https://www.google.com/url?sa=t&source=web&rct=j&url=http://brophysolicitors.ie/limping-marriages-eu-divorces/&ved=2ahUKEwjk8Z3DyZfpAhWH4YUKHUd-CIgQFjABegQIDBAG&usg=AOvVaw2fbz0j7xSOwiM8YpJy5Ruv-visited 3rd May 2020

2.https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.britannica.com/topic/limping&ved=2ahUKEwjk8Z3DyZfpAhWH4YUKHUd-CIgQFjACegQIARAB&usg=AOvVaw0FDijE1ayAh96k0rU0i2-b&cshid=1588611666097-visited 3rd May 2020

3.https://www.google.com/url?sa=t&source=web&rct=j&url=http://classic.austlii.edu.au/au/journals/SydLawRw/1968/5.pdf&ved=2ahUKEwiN5c7C4ZfpAhUSV8AKHY9nCv4QFjADegQIARAB&usg=AOvVaw2orrZ6zgumtFMwgKR9kZER-visied on 3rd May 2020

4.