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QUESTION

1a. Explain the term 'limping marriage'.

1b. 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.

ANSWERS

1a. Explain the term ‘limping marriage’.

The phrase “limping marriage” means those marriages in which a spouse is presumed to be divorced according to the law of one country, but retains the status of a married person according to the law of another country.

In the case of **WILSON v WILSON**¹, Lord Penzance described the phenomenon 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”. Such a situation arises where the forum court does not recognize the annulment or dissolution decree of a foreign court, as such the couple are regarded as married in one country (forum court’s jurisdiction), while in another country (the foreign court’s jurisdiction) they are deemed divorced and have the capacity to contract another marriage. Similarly, in the case of **JOAO GLORIA PIRES v MRS. ANA JOAQUINA RODRIGUESE PIRES**² the court explained the term “limping marriage” as situations where a couple is considered to be married in one country and divorced in another. This was also the position of the court in the case of **PADOLECCHIA v PADOLECCHIA**³.

1b. Identify the ways at common law, by which the incidence of limping marriage have been reduced.

Legislators, law reformers and Judges consider limping marriages as an unfortunate result of the law of Conflict of laws. That spouses should be married in one country and single in another, it is thought to be a consequence of the imperfections inherent in our present system of private international law.

It has involved so many married couples in anomalous legal situations, as such ways of reducing the incidence are being sought, since it cannot be totally extinguished as a result of the inevitable existence of varied legal systems across the world and the principle of sovereignty.

At common law, the House of Lords in the case of **INDYKA v INDYKA**⁴ provided a way of reducing the incidence of limping marriage, coming up with the test of “Real and Substantial

¹ (1872) L.R. P&D 435 at 442

² AIR (1967) GOA, DAMAN & DIU, 113

³ (1968) p.314

⁴ (1969) 1 A.C. 53

connection". Which entails that for a foreign decree to be recognized, the parties were only required to side a real and substantial connection with the foreign country in question. And in showing this connection the strict rule of domicile was relaxed, as such the real and substantial connection could be by either of spouses' domicile, nationality, habitual residence (which shows a past and continuous connection) or the Lex loci celebrations.

2. Explain succinctly, Mutation or Conversion of Marriage in Conflict of laws.

Since the decision in **HYDE v. HYDE**⁵ English and Australian Courts have declined to grant matrimonial relief in respect of a polygamous marriage, reason being because their definition of marriage is founded on the Christian belief if it being a union of one and one woman (monogamous) as husband and wife. As such they do not recognize polygamous marriage. Generally, it was thought that the nature of a marriage is immutable and its character determined only by the law of the place of celebration (lex loci celebrationis). Until recent years, it has now been conceded that the character of a marriage may be changed from polygamous to monogamous.

In the case of **ALI v. ALI**⁶ 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

⁵ (1866) L.R 1P&D130

⁶ (1966) 1 ALL ER 664

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**⁷ 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**⁸ to the effect that change of domicile may be effective to alter the nature of a union. The main 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

⁷(1965) P. 85

⁸ Ibid

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 not appreciated. **ALI v. ALI**⁹ raises a number of questions.

- 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**¹⁰, 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.
- 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 recognized 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.

⁹ *Ibid*

¹⁰ (1967) 2 W.L.R 946