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POLYGAMOUS MARRIAGES

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POLYGAMOUS MARRIAGES

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POLYGAMOUS MARRIAGES*

I. INTRODUCTORY

Scope of Paper

1. In this Paper, in accordance with the terms of Item XIX of the Law Reform Programme of the Law Commission, we examine one branch of family law, namely, the extent to which polygamous marriages are recognised by English law, and make some proposals for reform. The scope of our examination is limited to the recognition of such marriages for purposes of family law and social security legislation. We do not deal, save incidentally, with the criminal law (e.g. the law of bigamy), the law of tort (e.g. whether a polygamously-married wife is a dependant within the meaning of the Fatal Accidents Acts 1846-1959), or with the law of nationality, or immigration, or taxation.

2. At present we are working towards our projected restatement of the law of matrimonial causes in comprehensive form. That restatement would clearly be incomplete without the law concerning polygamous marriages. Moreover, the problems which polygamous marriages raise are allied to those which arise in the fields of nullity and jurisdiction in divorce and are directly relevant to our study of financial provision in matrimonial and related proceedings. We have already circulated Working Papers on financial provision (1) and nullity (2) and hope soon to circulate one on the jurisdiction of the English divorce courts.

3. Not only, then, is it convenient for us to examine our law relating to polygamous marriages at this stage, as part of our general study of matrimonial causes, but it is also a field where reform is clearly needed. The present position regarding maintenance is particularly disturbing. It should be emphasised, however, that the urgent need for reform is not caused by the presence in this country of any significant number of husbands with several

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* This Paper is based on a study prepared at our request by Dr. J.H.C. Morris, Fellow of Magdalen College Oxford and University Reader in Conflict of Laws, to whom we are deeply indebted.

(1) Working Paper No.9.

(2) Working Paper No.20.

wives here. In fact, "the number is very small, ... there is no known incident of a man arriving with two wives and very few cases in which a second wife has joined a husband." (3) But the problem posed by polygamy is one which cannot be ignored. There are cases in which the husband has other wives in his country of origin, and more cases still where the marriage though in fact monogamous is potentially polygamous, because celebrated abroad in Mohammedan or customary law form, and therefore is treated as polygamous for the purpose of the rule in Hyde v. Hyde.(4)

Hyde v. Hyde

4. The leading case on polygamous marriages in English law is Hyde v. Hyde (4) which was a husband's undefended petition for divorce on the ground of his wife's adultery and bigamy. The petitioner was an Englishman by birth, and in 1847, when he was about 16 years old, he joined a congregation of Mormons in London, and was soon afterwards ordained a priest of that faith. In London he met the respondent and her family, all of whom were Mormons, and became engaged to her. In 1850 the respondent and her mother emigrated to Salt Lake City, in the Territory of Utah, in the United States, and in 1853 the petitioner joined them there. They were married there in 1853, the marriage being celebrated by Brigham Young, the president of the Mormon church, and the governor of the territory. They lived together in Utah until 1856, when the petitioner went on a mission to the Sandwich Islands, leaving the respondent in Utah. On his arrival in the Sandwich Islands he renounced the Mormon faith and preached against it. A sentence of excommunication was pronounced against him in Utah in 1856 and his wife was declared free to marry again, which she did in 1859 or 1860. Meanwhile in 1857 the petitioner resumed his domicil in England and petitioned for divorce. Lord Penzance refused to adjudicate on his petition on the ground 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,"

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(3) H.C. Debs 4th July, 1968, Col. 1663 (Mr David Ennals, the Under-Secretary of State for the Home Dept.).

(4) (1866) L.R. 1 P. & D. 130

and that this Mormon marriage was no marriage which the English Divorce Court could recognise, because there was evidence that polygamy was a part of the Mormon doctrine, and was the common custom in Utah. "It is obvious" he said "that the matrimonial law of this country is adapted to the Christian marriage, and that it is wholly inapplicable to polygamy." (5) He pointed out that to divorce a husband at the suit of his first wife on the ground of his bigamy and adultery with the second, or to annul the second marriage on the ground that it was bigamous, would be "creating conjugal duties, not enforcing them, and furnishing a remedy where there was no offence." (6) He refused to draw any distinction between the first of a series of polygamous unions and the later ones or between a marriage which was only potentially polygamous and one which was actually polygamous. At the end of his judgment he said: (7)

> "This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of polygamous unions, or upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."

5. As will be seen later in this Paper, we are of opinion that the rule in Hyde v. Hyde works hardship and injustice. But it does not necessarily follow that this problem can be solved by the mere process of abolishing the rule in Hyde v. Hyde or by simply enacting that polygamous marriages should be subject to our matrimonial laws. That we would like to find a remedy, is one thing; to find a just and satisfactory remedy is another. We, therefore, ask the reader to bear in mind, throughout this Paper, the underlying reason for the rule in Hyde v. Hyde, namely, the view that our matrimonial law is designed to deal only with monogamous marriages and that polygamous marriages cannot fit into our existing matrimonial

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(5) At p. 135

(6) At pp. 135, 136-137

(7) At p. 138

system. (8) It has even been said (9) that to apply our matrimonial law to a potentially polygamous marriage, which is in fact monogamous, would "be attended by many obvious incongruities and difficulties." We are very conscious of these judicial views and would not want it to be thought that we have overlooked the difficulties of solving the problem covered by this Paper.

6. The present law may be summarised in two propositions:

(1) Neither party to a polygamous marriage is entitled to any English matrimonial relief, even if the marriage is only potentially polygamous.

(2) However, a polygamous marriage which is valid by the law of the place of celebration and by each party's personal law is generally recognised as valid in England, except for purposes of matrimonial jurisdiction, even if the marriage is actually polygamous.

7. These two propositions will be discussed in detail in Parts IV and V of this Paper. But first we must consider what is a polygamous marriage, and when a polygamous marriage is recognised as valid. These questions are discussed in Parts II and III respectively.

II. WHAT IS A POLYGAMOUS MARRIAGE?

Characteristics of Polygamous Marriages

8. What English law means by a polygamous marriage can best be gathered from the following six propositions.

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(8) Hyde v. Hyde (1866) L.R. 1 P. & D. 130 at 135. (ante, para.4); Baindail v. Baindail [1946] P.122, per Lord Greene, M.R. at 125: "The powers conferred on the courts for enforcing or dissolving a marriage tie are not adapted to any form of union between a man and a woman save a monogamous union"; Sowa v. Sowa [1961] P.70, per Pearce, L.J. at 83: "[Lord Penzance in Hyde v. Hyde] deals with the various remedies and shows that they are inapplicable to polygamous marriage .... I find the reasoning in Hyde v. Hyde inescapable" and at 84 Pearce L.J. adopts Lord Greene's statement quoted above. See also Simon P. in Cheni v. Cheni [1965] P.85 at 91

(9) Sowa v. Sowa, supra, per Pearce L.J. at p.85

(1) It is immaterial that the husband never exercised his privilege of taking more than one wife and that he never intended to do so.[10] A potentially polygamous marriage is thus in the same category as an actually polygamous one. Moreover, if the husband does take more than one wife, no distinction can be drawn between them.

(2) If the husband's personal law does not permit him to take more than one wife, but does permit him to take concubines, a marriage celebrated under such a law is polygamous, at any rate if concubinage is a status recognised by that law.[11]

(3) On the other hand, in spite of the distinction drawn in Warrender v. Warrender[12] and Hyde v. Hyde[13] between "Christian" and "infidel" marriages, a marriage may be monogamous although neither party is a Christian. The crucial question is whether the law under which the marriage is celebrated permits polygamy; if it does not, the marriage is monogamous. On this ground Japanese marriages[14] and Jewish marriages[15] have been treated as monogamous, and so has a composite ceremony at Singapore in mixed Chinese and Jewish form.[16]

(4) A marriage may be monogamous although under the law of the place of celebration it can be dissolved by mutual consent or at the will of either party, with merely formal conditions of official

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(10) Hyde v. Hyde (1866) L.R. 1 P. & D. 130; Sowa v. Sowa [1961] P.70; Cheni v. Cheni [1965] P.85, 88-89. The law in Scotland is the same: Muhammad v. Suna 1956 S.C. 366.

(11) Lee v. Lau [1967] P.14.

(12) (1835) 2 Cl. & F. 488, 532.

(13) (1866) L.R. 1 P. & D. 130.

(14) Brinkley v. Att.-Gen. (1890) 15 P.D. 76.

(15) Spivack v. Spivack (1930) 46 T.L.R. 243.

(16) Isaac Penhas v. Tan Soo Eng [1953] A.C. 304 (P.C.)

registration. On this ground a Russian marriage celebrated in 1924 was treated as monogamous. (17)

(5) The nature of the ceremony according to the law of the place of celebration, and not the law of either party's domicil, determines whether a marriage is monogamous or polygamous. Hence, if a domiciled Englishman (18) or Englishwoman (19) goes through a ceremony of marriage in polygamous form in a country where polygamy is lawful, he or she contracts a polygamous marriage. (It does not follow that the marriage will be treated as valid. This question is discussed in Part III of this Paper). Conversely, if a Mohammedan domiciled e.g. in India or Pakistan goes through a ceremony of marriage in an English register office, he contracts a monogamous marriage. (20) This result may not be very logical, (21) but it is to be welcomed on practical grounds because it narrows the rule in Hyde v. Hyde and renders English matrimonial relief available to the parties to such a marriage.

(6) It was at one time supposed that the monogamous or polygamous character of the marriage had to be determined once and for all as at the date of its inception. (22) But now it is clear that a potentially polygamous marriage may become monogamous by reason

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(17) Nachimson v. Nachimson [1930] P.217

(18) Re Bethell (1887) 38 Ch.D. 220; cf. Hyde v. Hyde (1866) L.R. 1 P. & D.130, where however the husband had probably acquired a domicil of choice in Utah before the ceremony.

(19) Risk v. Risk [1951] P.50

(20) Chetti v. Chetti [1909] P.67; R. v. Hammersmith Registrar [1917] 1 K.B. 634; Srini Vasan v. Srini Vasan [1946] P.67; Baindail v. Baindail [1946] P.122; Maher v. Maher [1951] P.342; Ohochuku v. Ohochuku [1960] 1 W.L.R. 183; Russ v. Russ [1964] P.315. The law in Scotland is the same: MacDougall v. Chitnavis, 1937 S.C. 390.

(21) It is criticised in Cheshire, Private International Law, 7th Ed. pp. 266-270.

(22) Mehta v. Mehta [1945] 2 All E.R. 690.

of subsequent events, and that, therefore, English matrimonial relief may subsequently become available to the parties. This may happen if, for instance, the parties (being domiciled in an eastern country where the personal law is a religious law) change their religion from one which permits polygamy to one which does not; (23) or if the husband changes his domicil from a country whose law permits polygamy to a country whose law does not; (24) or if the law under which the marriage was celebrated subsequently prohibits polygamy; (25) or (perhaps) if the parties, having gone through a polygamous ceremony in a country where the law permits polygamy, subsequently go through a monogamous ceremony in England; (26) or (under some systems of law) if a child is born. (27) But it seems that the event relied upon to produce this result must take place before the cause of action arose. (28)

The Effect of a Change of Domicil

9. The proposition laid down in Ali v. Ali (29) that a potentially polygamous marriage may become monogamous if the parties acquire an English domicil is a far-reaching one. It means that all those now in this country who have entered into potentially polygamous marriages will find themselves entitled to English matrimonial relief as soon as they have been here long enough, and with the

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(23) The Sinha Peerage Claim (1939) 171 Lords' Journals 350, [1946] 1 All E.R. 348, as explained in Cheni v. Cheni [1965] P.85, 90-91, and in Parkasho v. Singh [1967] 2 W.L.R. 946, 952 B-D, 960 F.

(24) Ali v. Ali [1966] 2 W.L.R. 620

(25) Parkasho v. Singh, supra.

(26) Ohochuku v. Ohochuku [1960] 1 W.L.R. 183. But, as was pointed out in Ali v. Ali, supra, at p.631C, if the polygamous marriage was valid, it is difficult to see how the registrar succeeded in marrying the parties again in England.

(27) Cheni v. Cheni [1965] P.85. This is the leading case on the conversion of a potentially polygamous marriage into a monogamous one.

(28) Ali v. Ali [1966] 2 W.L.R. 620

(29) Supra.

necessary intention to remain permanently, to change their domicil. The decision is therefore to be welcomed on grounds of practical convenience. However, the decision is open to the comment that it is difficult to reconcile with prior authority (30) and notably with Hyde v. Hyde itself. For if the petitioner's acquisition of an English domicil in Ali v. Ali converted the marriage into a monogamous one, why did it not have this effect in Hyde v. Hyde? The judge disposed of this point as follows: (31)

> "In 1866 the importance of domicil as affecting capacity to marry was still only dimly appreciated and it has been during the succeeding century that jurisprudence has developed the doctrine to the full degree which it has now attained in English law. The point argued by Mr Temple" (counsel for the husband) "was never argued before the judge ordinary" (Lord Penzance).

But the first of these comments must be accepted with some reserve because it was only five years before 1866 that the House of Lords decided, in what is still the leading case on the matter, (32) that capacity to marry is governed by the law of the domicil.

10. In Ali v. Ali the potentially polygamous marriage which was rendered monogamous by the husband's change of domicil had been at all times monogamous in fact, since the husband never married more than one wife. Presumably the result would be the same if the husband had in fact married two or more wives while domiciled in India, and the number of his wives was reduced to one by death or divorce before the change of domicil. And if the husband had two wives when he acquired an English domicil, and one wife subsequently died, the marriage would presumably then become monogamous. There is no English authority on the converse problem to that which was canvassed in Ali v. Ali, namely, when does a monogamous marriage become polygamous. (33)

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(30) E.g. Muhammad v. Suna, 1956 S.C. 366; Cheni v. Cheni [1965] P.85.

(31) At p.632 B.

(32) Brook v. Brook (1861) H.L.C. 193.

(33) See, however, Cheni v. Cheni [1965] P.85, 90, and Att.-Gen of Ceylon v. Reid [1965] A.C. 720 (P.C.), where the problem is discussed.

11. The decision in Ali v. Ali, convenient and beneficial though it undoubtedly is, involves some practical difficulties. For the judge held that he had no jurisdiction to dissolve the marriage on any ground which arose before the parties acquired an English domicil, which happened in the middle of 1961. Thus the husband's petition for divorce for desertion was dismissed, because the desertion had continued for less than three years from that date when the petition was presented; the wife's cross-petition for divorce for cruelty was dismissed, because the cruelty occurred before that date; but the wife's cross-petition (amended in consequence of the husband's discretion statement) for divorce for adultery was granted, because the adultery took place after the marriage became monogamous by virtue of the change of domicil. It is obvious that a court is not in a position to do justice to married persons if it has to shut its eyes to a substantial part of their married history. (34)

III. VALID AND INVALID POLYGAMOUS MARRIAGES

12. Under English rules of the conflict of laws, a polygamous marriage, like a monogamous one, may be valid or invalid. In English domestic law, a monogamous marriage may be void for lack of form, lack of age, want of consent of parties, consanguinity or affinity, or bigamy. The last of these factors does not affect the validity of a polygamous marriage, and the remaining four do not require separate discussion. What does need discussion is first, the validity of polygamous marriages celebrated in England; and secondly, the capacity of persons domiciled in England to enter into polygamous marriages in countries where the law permits polygamy.

The Validity of Polygamous Marriages celebrated in England

13. It is stated in Dicey and Morris on the Conflict of Laws that "a marriage celebrated in England in accordance with polygamous forms and without any civil ceremony as required by English law is invalid, whatever the domicil

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(34) For the detailed criticism of this aspect of the decision see Davis and Webb, (1966) 15 I.C.L.Q. 1186.

of the parties." (35) There is no English authority for this proposition, but we consider that it is correct. The formal validity of marriages celebrated in England is entirely a matter of statute law. There is no longer any room in which the principles of the common law can operate. There is no provision in the Marriage Act 1949 which could conceivably validate a "marriage" celebrated in England in accordance with polygamous forms and without any civil ceremony, e.g. a "marriage" performed in a private house or other unregistered building. It is true that under s.49 of the Act a marriage under the provisions of Part III of the Act is only void if the parties thereto "knowingly and wilfully" intermarry without (inter alia) having given due notice of marriage to the superintendent registrar, or without a certificate for marriage having been duly issued by the superintendent registrar to whom notice was given. But it is difficult to see how a marriage celebrated in an unregistered building could possibly be described as a marriage "under" the provisions of Part III.

14. It is otherwise of course if a civil ceremony in an English register office is followed by a religious ceremony in an unregistered building; or if there is a combined religious and civil ceremony in a registered building, e.g. a Mohammedan mosque which has been registered under s.41 of the Act. In the former case the relgious ceremony does not supersede or invalidate the prior civil ceremony and is not registered as a marriage in any marriage register book; (36) the religious ceremony is a nullity so far as English law is concerned and the civil ceremony is the only marriage which English law can recognise. In the latter case the marriage is no doubt not only valid but also monogamous.

Capacity of Persons Domiciled in England to Enter into Polygamous Marriages

15. Capacity to marry is, in general, governed by the law of the domicil of each of the parties. (37) Hence, it is stated in Dicey and Morris (38) that

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(35) 8th Ed., Rule 34, p.280.

(36) Marriage Act 1949, s.46(2)

(37) Dicey and Morris, op.cit. Rule 31, p.254.

(38) Rule 35, p.283.

"a man or woman whose personal law does not permit polygamy has no capacity to contract a valid polygamous marriage." (39) Until recently there was surprisingly little authority for this proposition. But in Ali v. Ali (40) it was held that a Mohammedan husband whose marriage, celebrated in India, was potentially polygamous was precluded from marrying a second wife after he changed his domicil from India to England. In the course of his judgment, Cumming-Bruce J. said: (41)

> "Does acquisition of English domicil preclude this husband from marrying a second wife while his first wife is alive? .... While he is thus domiciled and intends to reside, he, being the husband of the respondent wife, cannot by marriage confer the status of wife upon any other woman. 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. If he purported to marry a second wife in England, or on a second temporary visit to India for that purpose, that marriage would not be recognised by English law for any purpose whatsoever. This is because English law recognises the validity of his potentially polygamous marriage to the wife and denies him as a domiciled Englishman intending to reside in England the capacity to confer the status of wife on anyone else."

16. In our Working Paper on Financial Relief in Matrimonial and Related Proceedings (42) we quoted s.7(3) of the Uniform Maintenance Act, enacted in most of the Australian states in 1964-5, which provides that:

> "For the purpose of this Act a man and a woman married by a subsisting marriage, whether monogamous or polygamous, shall if the marriage is lawful and binding in the place where it was solemnised be regarded as husband and wife."

We recommended that a similar rule should apply in England for the purposes of s.22 of the Matrimonial Causes Act 1965 (wilful neglect to maintain) and for the

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(39) This is stated in terms of "personal law" and not in terms of "domicil" because in many eastern countries the personal law is a religious law. Hence an Englishman or Englishwoman who acquired a domicil of choice in, e.g. India, Pakistan or Ceylon could not contract a valid polygamous marriage without a change of religion to Islam.

(40) [1966] 2 W.L.R. 620.

(41) At pp. 629 E - 630 C.

(42) Working Paper No. 9.

purposes of magistrates' maintenance orders. (43) We said: "If a Nigerian domiciled in England enters into customary law marriages while on visits to Nigeria and then brings his wife or wives to England, we see no reason why he should not be made to maintain them; if he does not the Supplementary Benefits Commission will probably have to." (44) And again: "If the parties have gone through a ceremony of marriage recognised as binding in the country where it was celebrated, we think that the English courts should have power to order one party to maintain the other until the marriage has been dissolved." (45)

17. While we think it may be acceptable to test the validity of a polygamous marriage solely by reference to the law of the place of celebration, and without any reference to the law of the parties' domicil, if the question before the court is whether one party should be ordered to maintain the other, we do not on further reflection think it desirable to exclude all reference to the law of the domicil if other forms of matrimonial relief are in question. Still less do we think it desirable to do so if the validity of the marriage is in issue in proceedings where no matrimonial relief at all is being claimed. Our reasons are as follows.

18. Under the present law, it is an answer to a claim for maintenance under s.22 of the Matrimonial Causes Act 1965 or under the Matrimonial Proceedings (Magistrates' Courts) Act 1960 to show that the marriage is void. The invalidity of the marriage is also an answer to a petition for divorce, or (e.g.) to a claim by the "surviving spouse" to a share of the other party's estate on his or her death intestate. The marriage may be void either because the ceremony is formally invalid or because one party does not have capacity to marry the other, e.g. because the parties are within the prohibited degrees of consanguinity or affinity or because one party is under age. Matters of capacity are, as previously pointed out, (46) governed by the law of the parties' domicil. Hence if two parties,

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(43) Para. 219, p.95.

(44) Para. 220, p.95.

(45) Para. 220, p.96.

(46) Ante, para 15.

who are domiciled in England and within the prohibited degrees of English law, go through a ceremony of marriage in a foreign country where the marriage is valid, the marriage is nevertheless treated as void in English law. (47) The same is true if only one party is domiciled in England, (48) or if one party is domiciled in England and either party is under the age of sixteen. (49) In other words, a ceremony which is valid by the law of the place of celebration does not necessarily create a valid marriage in English law. We can see no reason why Nigerians domiciled in England who go through polygamous ceremonies in Nigeria should be in any better position than, e.g. an uncle and niece domiciled in England who go through a monogamous ceremony in Germany, or a man domiciled in England who marries a girl under the age of sixteen in Austria or Hungary.

19. If the law were altered so that a ceremony valid by the law of the place of celebration gave a right to maintenance under s.22 of the Matrimonial Causes Act 1965 or under the Matrimonial Proceedings (Magistrates' Courts) Act 1960, the effect might not be very far-reaching. For, if the marriage is monogamous, the woman can now get maintenance from the man under s.19 of the Matrimonial Causes Act 1965 in a nullity suit. Hence to permit the award of maintenance in direct maintenance proceedings under s.22 or under the Act of 1960 might seem to be merely a change of procedure, not a change of substance. The same argument would apply to a polygamous marriage if the recommendation which we make later, (50) were implemented so that parties to such a marriage could get maintenance. But to allow the court to dissolve a marriage which does not exist, or to award a widow's share of the husband's estate to a lady who never was his wife, would be to introduce startling and far-reaching changes for which we can see no justification.

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(47) Brook v. Brook (1861) 9 H.L.C. 193; Re De Wilton [1900] 2 Ch. 481.

(48) Mette v. Mette (1859) 1 Sw. & Tr. 416; Re Paine [1940] Ch. 46.

(49) Pugh v. Pugh [1951] P.482.

(50) Post, paras. 33-35.

20. The choice therefore seems to lie between (a) having one test for the validity of polygamous marriages (the law of the place of celebration) in proceedings for maintenance, and another test (the law of the place of celebration as regards form and the law of the domicil as regards capacity) in all other matrimonial proceedings and for all other purposes; and (b) having one uniform test, that of the present law, in all proceedings and for all purposes. As between these two alternatives, we prefer the second.

IV. MATRIMONIAL RELIEF

Scope of the Rule in Hyde v. Hyde

21. The rule in Hyde v. Hyde which denies matrimonial relief to either party to a polygamous marriage, applies to divorce, (51) nullity, (52) judicial separation, (53) restitution of conjugal rights, (54) proceedings for maintenance in magistrates' courts (55) and (presumably) petitions for a declaration of legitimacy or legitimation under the same section and (presumably) to petitions under s.14 for a decree of presumption of death and dissolution of marriage. It does not apply to petitions for a declaration as to status under Order 15, rule 16 of the Rules of the Supreme Court, at any rate if the declaration can be granted without determining whether the marriage is valid. (57) Nor does it apply to a wife's claim against her husband for "deferred dower" under a marriage contract governed by Mohammedan law, since the wife is asserting a contractual

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(51) Hyde v. Hyde (1866) L.R. 1 P. & D. 130. The law in Scotland is the same: Muhammad v. Suna, 1956 S.C. 366.

(52) Risk v. Risk [1951] P.50.

(53) Nachimson v. Nachimson [1930] P.217.

(54) There is no English authority for this proposition: but it must follow from the others.

(55) Sowa v. Sowa [1961] P.70.

(56) Brinkley v. Att.-Gen. (1890) 15 P.D. 76.

(57) Lee v. Lau [1967] P.14.

claim and not seeking matrimonial relief. (58) The authority of Hyde v. Hyde has been recognised on two occasions by the Court of Appeal (59) and applied and extended on a third occasion (60) to a form of matrimonial relief which did not exist when Hyde v. Hyde was decided. It can therefore be got rid of only by the House of Lords or by legislation.

Injustice of the Rule

22. To close the doors of all matrimonial courts in England to either party to a polygamous marriage of course produces hardship. As Lord Walker pointed out in Muhammad v. Suna: (61)

> "It is perhaps not altogether satisfactory that a man who ventures into a polygamous union while domiciled abroad should, on acquiring a domicil in this country (62), be unable to sue in the court of his domicil for divorce and yet be regarded by the court of his domicil as not free to marry." (63)

The hardship is perhaps most acute when the wife is seeking maintenance from the husband. This is vividly illustrated by two cases, one decided by the Supreme Court of British Columbia, the other by the English Court of Appeal.

23. In Lim v. Lim (64) the husband, a Chinese domiciled in China, married two wives there, one in 1912 and the other in 1919. Chinese law at all material times permitted polygamy. In 1919 the husband and his second wife emigrated to British Columbia, where they acquired a domicil of choice. The second wife was admitted by the Canadian immigration authorities on the ground

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(58) Shahnaz v. Rizwan [1965] 1 Q.B. 390.

(59) Nachimson v. Nachimson [1930] P.217; Baindail v. Baindail [1946] P.122.

(60) Sowa v. Sowa [1961] P.70.

(61) 1956 S.C. 366, 370.

(62) Lord Walker used these words before it was decided that a change of domicil to England converts the marriage into a monogamous one. See ante, para. 9.

(63) For this proposition Lord Walker cited Baindail v. Baindail [1946] P.122, which is considered post, para. 55.

(64) [1948] 2 D.L.R. 353.

that she was the wife of a permitted immigrant. Nearly thirty years later (when the first wife was still living in China) the husband deserted the second wife, whose claim for maintenance was dismissed with obvious reluctance on the authority of Hyde v. Hyde. Coady J. said: (65)

> "It does not seem to me consistent with common sense that this plaintiff who was admitted into this country under our immigration laws as the wife of the defendant and who, in China prior to her coming to this country, enjoyed the full civil status of wife, should be denied that status under our law, when, after a residence here of almost thirty years with the defendant as her husband, and after acquiring a domicil in this country, she seeks against her husband the remedy which our law provides to a wife to claim alimony. .... I express the hope that this case will go to a higher court so that this matter which, I have no doubt, affects perhaps many other Chinese men and women residing in this Province, may be authoritatively decided. The implications arising from refusal to recognise the plaintiff's status for the purpose in question are so many and so repellent to one's sense of justice that it is with regret that I come to the conclusion which I am on the authorities as I read them forced to arrive at."

24. In Sowa v. Sowa (66) the parties, who were domiciled in Ghana, married there in accordance with African law and custom. Those customs permitted polygamy, but the husband never took a second wife. He promised solemnly on the Bible to convert the marriage into a Christian one, but failed to do so. The parties came to England in search of employment. The wife had a baby. Her application to a magistrates' court for an affiliation order was adjourned because she was not a single woman. Her subsequent application for maintenance under what is now the Matrimonial Proceedings (Magistrates' Courts) Act 1960 was granted. But the decision of the magistrates was reversed by the Divisional Court and the Court of Appeal because the marriage was potentially polygamous. The judges in the Divisional Court reached their decision "with deep regret." (67) In the Court of Appeal Holroyd Pearce L.J. said: (68)

> "The husband has behaved so badly that I fully share the regrets expressed by the Divisional Court at finding itself unable to uphold the magistrates' order. One is inclined to echo the words

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(65) At pp. 357-358.

(66) [1961] P.70.

(67) At p. 77.

(68) At p.82.

of Crew C.J. in the case of the Earldom of Oxford when he said that there was none but would 'take hold of a twig of twine-thread to uphold it'."

25. Something is gravely wrong when learned and humane judges are compelled by ancient authority to come to conclusions which manifestly shock their sense of justice. It is assumed to be wrong to grant a divorce to the first wife of a polygamist on the ground of his bigamy and adultery with the second, for that would be "creating conjugal duties, not enforcing them, and furnishing a remedy where there was no offence." (69) Therefore it is said to be wrong to grant a divorce to a potential polygamist, even though he only married one wife. Therefore it is wrong to grant any kind of matrimonial relief to either party to even a potentially polygamous marriage. Therefore the second Mrs Lim had no right to maintenance when her husband deserted her after nearly thirty years of married life; nor could the one and only Mrs Sowa get maintenance (though perhaps she might have got maintenance for the child in proceedings under s.3(2) of the Guardianship of Infants Act 1925).

Anomalies of the Rule

26. The result of these decisions was not, of course, that the unfortunate Mrs Lim and Mrs Sowa had to starve. No doubt they received national assistance at the expense of the Canadian and British taxpayer respectively. Some relief to the British taxpayer was afforded by the recent case of Imam Din v. National Assistance Board. (70) The husband married his second wife in Pakistan in 1948 while both were Mohammedans domiciled there. The first wife was still alive but she died in the following year. In 1961 the husband and his second wife came to England, where the husband abandoned the wife and four of their children, leaving them destitute. The wife obtained assistance from the Board which preferred a complaint against the husband under s.43 of the National Assistance Act 1948, alleging that he was liable to maintain the wife under s.42(1)(a), which

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(69) Hyde v. Hyde (1866) L.R. 1 P. & D. 130, 135.

(70) [1967] 2 Q.B. 213.

provides that "a man shall be liable to maintain his wife and children." The justices made an order for the husband to pay £5 a week, and this was affirmed without hesitation by the Divisional Court on the ground that common sense and justice required that the word "wife" in s.42(1)(a) should include the wife of a polygamous marriage. Thus the somewhat odd result is that, although the wife cannot obtain maintenance in direct proceedings against her husband, even if the marriage is only potentially polygamous, the husband can, indirectly, be made liable to pay for her maintenance if she has been in receipt of national assistance (now supplementary benefit), even if the marriage was at one time actually polygamous, and even if she is the second wife.

27. Another anomaly was revealed by the recent decision of the Court of Appeal in R. v. Bow Road Justices, ex parte Adedigba. (71) A man and a woman domiciled in Nigeria lived together there and had two children. Although they were regarded as a married couple they were not lawfully married. They came to England with the two children. The man refused to pay for the children's maintenance. The woman applied to justices for an affiliation order. The justices held that they had no jurisdiction because the children were born abroad and the mother was domiciled abroad at the dates of the births. The Court of Appeal reversed this decision unanimously and without hesitation, even though this meant overruling a decision of the Court of Queen's Bench (72) that had stood for 120 years and two more recent decisions of the Divisional Court; (73) and Salmon L.J. said in the course of his judgment: (74)

> "any woman resident in this country is entitled to the protection of our law."

(One is tempted to wonder whether Hyde v. Hyde itself would have withstood a frontal attack before a similarly-constituted Court of Appeal). Hence the odd result is that if a woman domiciled in a country where the law permits

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(71) [1968] 2 W.L.R. 1143.

(72) R. v. Blane (1849) 13 Q.B. 769.

(73) O'Dea v. Tetau [1951] 1 K.B. 184; R. v. Wilson, ex parte Pereira [1953] 1 Q.B. 59.

(74) [1968] 2 W.L.R. 1143, 1149 E.

polygamy has an illegitimate child there, she can get an affiliation order in England if the father resides here; but if the parties went through a polygamous ceremony of marriage, so that the child is legitimate, she cannot get anything in matrimonial proceedings, (75) though she might get maintenance for the child in proceedings under the Guardianship of Infants Acts 1886 and 1925.

The Case for Reform

28. For many years the rule in Hyde v. Hyde was tolerable only because, as we have seen, (76) English judges held that a marriage celebrated in monogamous form in England is not a polygamous marriage and so not within the rule, even though the personal law of one or both parties permits polygamy. The result is that an Englishwoman married to a man whose personal law permits polygamy is denied matrimonial relief only if the ceremony of marriage was a polygamous form of ceremony, e.g. if it took place in the country of his domicil or in a private house in England. Thus, so far as English women are concerned, the ban imposed by Hyde v. Hyde applies only in a very limited number of cases. But the whole situation has been transformed in the last fifteen years by immigration from countries recognising polygamy. Some of the immigrants may marry in monogamous form in England, e.g. in a register office or in a registered building; while others who married in polygamous form in their country of origin may acquire a domicil of choice in England, which (if Ali v. Ali (77) is correct) has the effect of converting their marriage into a monogamous one, provided of course there is only one wife. But, even when all these allowances have been made, there still remains the risk of a social problem, which the law should not ignore.

29. At the end of his judgment in Shahnaz v. Rizwan (78) (where he held that the rule in Hyde v. Hyde did not preclude the wife of a polygamous marriage

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(75) Sowa v. Sowa [1961] P.70; ante, paras. 24, 25.

(76) Ante, para 8(5).

(77) [1966] 2 W.L.R. 620; ante, para 9.

(78) [1965] 1 Q.B. 390, 401, 402.

from asserting a claim to "deferred dower" under a marriage contract governed by Mohammedan law), Winn J. said:

> "As a matter of policy, I would incline to the view that, there being now so many Mohammedans resident in this country, it is better that the court should recognise in favour of women who have come here as a result of a Mohammedan marriage the right to obtain from their husbands what was promised to them by enforcing the contract and payment of what was so promised, than that they should be bereft of those rights and receive no assistance from the English courts."

We think it is equally true that, there being now many polygamously married persons resident in this country, the law should cease to deny them access to the matrimonial courts of England.

30. In Australia the problem is smaller and the courts have only once or twice been called upon to consider Hyde v. Hyde. Yet amending legislation was considered necessary only two years after Hyde v. Hyde was first followed and applied. (79) The Australian Matrimonial Causes Act 1965, s.3 adds a rather complicated and tortuously-drafted s.6A to the principal Act (the Matrimonial Causes Act 1959). (80) The text of the section is given in Appendix A to this Paper. It applies to actually as well as to potentially polygamous marriages, but draws a rather arbitrary distinction between the first marriage and subsequent ones. The effect seems to be that potentially polygamous marriages, and the first (but not subsequent) actually polygamous ones, are marriages for the purposes of proceedings for matrimonial relief in Australia. The section appears to have evoked no opposition in the Australian Parliament: it was welcomed as a piece of non-controversial law reform.

Basic Considerations

31. In forming our views on how far the abolition of the rule in Hyde v. Hyde should extend, we have borne the following considerations in mind:-

(a) So far as is consistent with English public policy, family relationships validly created under a foreign system of law

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(79) Khan v. Khan [1963] V.R. 203

(80) For a criticism of the drafting of this section, see Jackson, 40 Austr. L.J. 148 (1966).

should be recognised here.

(b) In the absence of compelling reasons, it is undesirable that people should be regarded as married for some purposes and not for others.

(c) When people have been allowed to settle in this country they and their children should receive the protection of English law.

(d) But immigrants are not in a privileged position; while here they are expected to conform to English standards of behaviour.

(e) Hence an alteration of the law should not be such as to encourage polygamy.

(f) The interests of the taxpayer should not be lost sight of. A man who has several "wives" and who can afford to maintain them should not be allowed to leave them as a charge on the Supplementary Benefits Commission.

To some extent these considerations pull in opposite directions. (a), (b) and (c) suggest that the rule in Hyde v. Hyde should be scrapped completely. But (d) and (e) may be thought to point to a further relaxation rather than to a total abrogation of the rule. And consideration (f) suggests that the most obvious reform is to ensure that a polygamous husband cannot escape from the obligation to maintain his wives and children.

32. It is largely for this reason that we propose to deal first with maintenance (whether under section 22 of the Matrimonial Causes Act 1965 or in magistrates' courts) and then with the forms of matrimonial relief which are most important and the most likely to be sought in practice - divorce and nullity (including in each case ancillary relief like maintenance and custody of the children). Our proposals relating to maintenance could, if that were thought desirable, be implemented without necessarily going further for the time being.

Maintenance

33. We do not think there can be any doubt that public opinion in this country no longer favours (if it ever did) the denial of maintenance to the wife or wives of a polygamous marriage. The man in the street will not readily understand why a polygamously married wife (unlike every other wife resident in this country) should be left without a remedy when she is left destitute and a charge on our welfare services. Nor will it increase his respect for the law if he is told that, while the wife cannot get maintenance in direct proceedings against her husband, the husband can, indirectly, be made liable to pay for her maintenance if she has been in receipt of supplementary benefit. (81)

Maintenance of wives resident abroad.

34. In our Working Paper on Financial Relief in Matrimonial Proceedings (82) we recommended that the wife of a polygamous marriage should be able to obtain maintenance from her husband, even if he brought more than one wife to this country; and we pointed out that this would relieve the British taxpayer from the necessity of having to maintain them. As will be seen from the preceding paragraphs, we are still of this opinion. But we must point out, after further reflection, that so far as the taxpayer is concerned the arguments are not all one way. For if there is one wife in England and another e.g. in Pakistan, we cannot see any acceptable principle under which the former should, but the latter should not, be able to obtain maintenance from the husband in England. If this is so, then to the extent that the husband has to maintain the wife who lives in Pakistan, to that extent he may be the less able to maintain the wife who lives in England, and to that extent she is more likely to become a charge on public assistance. In practice, however, claims for maintenance by wives resident abroad are likely to be few, if only because of difficulties about legal aid. We therefore remain of the opinion that maintenance should

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(81) See Imam Din v. National Assistance Board [1968] 2 Q.B. 213; ante, para 26.

(82) Working Paper No.9, paras. 220-221.

be obtainable in England by the wife of a polygamous union, whether there is one wife or several, and whether she lives in England or abroad.

Effect of talak

35. It has to be borne in mind that Mohammedan law, as well as permitting polygamy, also allows the husband to divorce his wife unilaterally and extra judicially by a process known as talak; and that, so long as the parties were domiciled in e.g. Pakistan at the time of the talak, such a divorce would almost certainly be recognised in England. (83) Similar types of divorce are recognised under some customary laws. It has been suggested that it is useless to give the wife a right to maintenance if her husband can divorce her by his own unilateral act before she can obtain an order. We do not agree. In the first place, if there was a marriage contract providing for deferred dower, it might be very expensive for the husband to exercise his right of talak. (84) Secondly, we think that the suggested difficulty is part of a wider problem involved in the recognition of foreign divorces generally and that it is not peculiar to extra-judicial divorces or to polygamous marriages. Already English law recognises the right of a monogamously married husband to obtain a divorce by something very like his own unilateral act. For if he changes his domicil to a far distant country where divorce is easy and judicial control is reduced to a shadow and the wife has not the means to follow, he can effectively deprive her of her right to maintenance, provided it has not crystallised in a court order before the divorce. (85) We propose to make some recommendations on this wider problem in our review of the recognition of foreign divorces. We do not consider that it needs separate consideration here.

Divorce

36. The question whether the English court should have jurisdiction to dissolve a polygamous marriage undoubtedly raises more difficult problems than

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(83) Russ v. Russ [1964] P.315

(84) See Shahnaz v. Rizwan [1965] 1 Q.B. 390; Ali v. Ali [1966] 2 W.L.R. 620, 633 H - 634 B

(85) Wood v. Wood [1957] P.254

does the question of maintenance. At the outset of the discussion it is important to bear in mind that there are at least four different situations in which the court now has no such jurisdiction; and different considerations may be applicable to each case. These are as follows:

(1) Where the marriage has at all times been in fact monogamous (that is, there has only been one wife though more are legally permitted): e.g. cases like Sowa v. Sowa. (86)

(2) Where the marriage was at one time in fact polygamous, but has become monogamous in the above sense at the time of the presentation of the petition: e.g. cases like Imam Din v. National Assistance Board. (87)

(3) Where the marriage is at the time of the presentation of the petition in fact polygamous because there is one wife living in England and another (or others) living abroad, e.g. cases like Lim v. Lim. (88)

(4) Where the marriage is at the time of the presentation of the petition in fact polygamous because there are two or more wives living in England. As already pointed out, the number of cases in this class is very small.

In the first and second of these cases it must be assumed that the husband is domiciled abroad and that the wife would (if the rule in Hyde v. Hyde were abolished) be invoking jurisdiction under s.40(1)(a) or (b) of the Matrimonial Causes Act 1965. This is because, if the marriage is in fact monogamous and the husband has acquired an English domicil, the marriage would become monogamous in law as well as in fact. (89)

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(86) [1961] P.70; ante, para. 24.

(87) [1967] 2 Q.B. 213; ante, para.26.

(88) [1948] 2 D.L.R. 353; ante, para.23.

(89) Ali v. Ali [1966] 2 W.L.R. 620; ante, paras. 9 and 10.

Grounds for divorce

37. Under s.1(1)(a) of the Matrimonial Causes Act 1965 the grounds for divorce are that the respondent

(a) has committed adultery; or

(b) has deserted the petitioner for a period of at least three years immediately preceding the presentation of the petition; or

(c) has treated the petitioner with cruelty; or

(d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. (90)

Under clause 1 of the Divorce Reform Bill now before Parliament, the sole ground of divorce is that the marriage has broken down irretrievably; and under clause 2 irretrievable breakdown will be inferred (in the absence of evidence to the contrary) if, and only if, the petitioner satisfies the court of one or more of the following facts:

(i) that the respondent has committed adultery and the petitioner finds it intolerable to live with him;

(ii) that the respondent has behaved in such a way that the petitioner cannot be expected to live with him;

(iii) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(iv) that the parties have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted;

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(90) Under s.1(1)(b) the wife can also petition on the ground that the husband has been guilty of rape, sodomy, or bestiality: but these grounds are hardly ever used and need not be discussed here.

(v) that the parties have lived apart for a continous period of at least five years immediately preceding the presentation of the petition.

The Bill also provides that the court must dismiss the petition if the respondent opposes the grant of a decree and satisfies the court that the dissolution of the marriage would result in grave financial or other hardship to him and that it would be wrong to dissolve the marriage. There are other provisions designed to give financial protection to the respondent when breakdown is inferred from separation, whether for two years or five.

38. We now proceed to consider whether any of these grounds for divorce under the present law or reasons for inferring breakdown under the Bill is inappropriate to polygamous marriages. We must first point out that English courts always apply English law when dissolving marriages, irrespective of the domicil, the nationality or the religion of the parties at the time of the marriage or at any other time. Thus, if two Roman Catholics domiciled in Italy (where there is no divorce) marry there and then acquire an English domicil, there is no legal reasons which prevents either of them from obtaining a divorce on any ground known to English law. Moreover, when a deserted wife, or a wife who has been ordinarily resident in England for three years, obtains a divorce under s.40(1), English law is applied even if her husband is domiciled, e.g. in Italy at the time of the proceedings. (91) It would be no defence to a petition based on adultery to show that by Italian law this is not a ground for divorce. Nor would it be a defence to a petition based on incurable insanity to show that by Italian law this is not a ground for complaint. Thus the mutual rights and duties of the spouses under the law of their domicil or religion at the time of the marriage or at any other time are irrelevant in English divorce proceedings. But it does not necessarily follow from this that a divorce law framed for

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(91) Matrimonial Causes Act 1965, s.40(2); Tursi v. Tursi [1958] P.54. Cf. Zanelli v. Zanelli (1948) 64 T.L.R. 556, where the Court of Appeal assumed that this was the law before what is now s.40(2) was first enacted.

monogamous marriages can be applied without qualification to those which are in fact polygamous. Lord Penzance in Hyde v. Hyde had no doubts on this matter. He said: "It is obvious that the matrimonial law of this country is adapted to the Christian marriage and that it is wholly inapplicable to polygamy." But his reasons were that to divorce the husband at the suit of his first wife on the ground of his bigamy and adultery with the second would be "creating conjugal duties, not enforcing them, and furnishing a remedy where there was no offence." These words have led some commentators to suspect that Lord Penzance was assuming that the law of the parties' domicil at the time of the marriage governed their right to a divorce. (92) The contrary is now well established. In any case the grounds for divorce are quite different now from what they were in 1866, and will be different again if the Divorce Reform Bill becomes law. A re-examination of the matter therefore seems desirable.

39. If a marriage is in fact monogamous there seems no reason why these grounds should be inapplicable merely because in law it is potentailly polygamous. So far as marriages which are polygamous in fact are concerned, the only grounds which we think could cause any difficulty are adultery, cruelty (and perhaps constructive desertion, which in practice is often indistinguishable from cruelty), and (under the new Bill) separation for five years. (93) We proceed to consider each of those in turn.

Adultery

40. As we have pointed out, (94) it is no defence to an Italian husband whose wife seeks to divorce him on the ground of adultery to show that by Italian law (the law of the parties' domicil) adultery is not a ground for divorce. Equally we think that if the wife of a Mohammedan husband domiciled in India or Pakistan

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(92) Morris, "The Recognition of Polygamous Marriages in English Law," 66 Harv. L.Rev. 961, 990 (1953); Mendes da Costa, "Polygamous Marriages in the Conflict of Laws," 44 Can. Bar Rev. 293, 333 (1966).

(93) In the case of desertion it might sometimes be more difficult to decide whether there was in fact desertion or whether the respondent had cause for leaving: e.g. where the husband failed to take all his wives with him if he emigrated.

(94) Ante, para. 38

seeks to divorce him on the ground that he committed adultery with some woman not his wife, it should be no defence to show that adultery is not a ground for divorce in Mohammedan law as administered in India or Pakistan. (95) Nor should it be a defence if the husband seeks a divorce on the ground that the wife has committed adultery. To hold otherwise would be to put polygamously married persons in a privileged position and give them a licence to commit adultery with impunity. On the other hand, we do not think that any wife of a polygamous marriage should be entitled to divorce the husband on the ground of his "adultery" with another wife (or with a concubine whose status is legally recognised). (96) We do not think it would make sense to the man in the street (any more than it did to Lord Penzance) to divorce the husband at the suit of his first wife on the ground of his adultery with the second, or to divorce him at the suit of his second wife on the ground of his adultery with the first. We think that a better reason for this conclusion can be given than that of Lord Penzance. If a Mohammedan domiciled in Pakistan marries two wives there in Muslim form, both marriages are recognised as valid by English law, and both women as wives, at least for many purposes. (97) Hence it can be argued that the husband cannot commit adultery with either wife, because adultery is "consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse, during the subsistence of the marriage." (98) On the other hand, if a Mohammedan domiciled in Pakistan marries a wife there in Muslim form, and then goes through a monogamous ceremony in England with another woman, the potentially polygamous ceremony is recognised to the extent that it constitutes a bar to the subsequent ceremony, the monogamous ceremony is void,

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(95) See the (Indian) Dissolution of Muslim Marriages Act 1939 (No.VIII), the text of which is given in Appendix B to this Paper.

(96) Cf. Lee v. Lau [1967] P.14. It seems to us that a concubine whose status is legally recognised is in effect a "wife," albeit a second class one, at any rate to the extent that sexual intercourse with her is not illicit.

(97) Post, paras. 54 et seq.

(98) Rayden on Divorce, 10th Ed., p.173 (italics added). However Lord Greene, M.R expressly left this question open in Baindail v. Baindail [1946] P.122.

and the second wife can obtain a decree of nullity of that marriage. (99) Provided the legal meaning of adultery is borne in mind, and the distinction between valid and invalid polygamous marriages, we do not hink there need be any difficulty in applying adultery as a ground for divorce to polygamous marriages.

Cruelty

41. This, as we have seen, is not mentioned in the Divorce Reform Bill, which instead provides that irretrievable breakdown is to be inferred if the respondent has behaved in such a way that the petitioner cannot be expected to live with him. This formula preserves the law as declared by the House of Lords in Gollins v. Gollins (100) and Williams v. Williams (1) but without the requirement of actual or apprehended injury to the petitioner's health and without using the emotive word "cruelty." We can see no reason why this ground for divorce (or reason for inferring breakdown) should not be appropriate to a polygamous marriage. Behaviour on the part of one spouse which makes it unreasonable to expect the other to live with him (or her) is equally intolerable, and therefore should equally be a ground for divorce, whether the marriage is monogamous or polygamous. This is not to say that behaviour which might amount to cruelty in the case of a monogamous marriage would necessarily do so if the marriage were polygamous, or vice versa. "In a cruelty case the question is whether this conduct by this man to this woman , or vice versa, is cruelty." (2) Hence the court can and does take into account the social background of the parties, the class of society to which they belong, and their mores generally. "The particular circumstances of the home, the temperaments and emotions of both the parties

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(99) Baindail v. Baindail [1946] P.122; post, para. 55.

(100) [1964] A.C. 644.

(1) [1964] A.C. 698.

(2) Lauder v. Lauder [1959] P.277, 308, per Pearce J., approved in Gollins v. Gollins [1964] A.C. 644, 672 per Lord Evershed.

and their status and their way of life, their past relationship and almost every circumstance that attends the act or conduct complained of may all be relevant." (3) Hence there seems no reason to fear that the application of cruelty as a ground for divorce to polygamous marriages will dilute or adulterate the concept in English law.

Separation for five years

42. At first sight this might not seem appropriate to a polygamous marriage. Consider, for example, the case of H, who is domiciled in Ghana. He lives in Accra, where he runs a taxi business; he also owns a farm in the country. He is married by native law and custom to W 1, who keeps house for him in his Accra home, and to W 2, who helps to run the farm. He emigrates to England with W 1, leaving W 2 in Ghana, and acquires an English domicil. At first sight it might seem unreasonable and unjust to allow H to divorce W 2 against her will after five years' separation. But now let us vary the facts a little. Suppose that H only married one wife in Ghana, that he married her under the Ghana Marriage Ordinance of 1884, and that when he emigrated to England, he left her behind. The marriage is monogamous, not having been celebrated in accordance with native law and custom, and therefore the court would have jurisdiction to dissolve it. But the question whether it would be reasonable and just to do so would be exactly the same as in the previous example: it is not confined to polygamous marriages as such. Of course Parliament may decide that it is wrong to divorce an unwilling respondent on the ground of five years' separation, and cut clause 2(1)(e) out of the Bill. But if it does not, we can see no reason why relief on this ground should not be available to the parties to a polygamous marriage.

43. We conclude from this brief review of the principal grounds for divorce that their application to a foreign marriage would not be inappropriate merely because that marriage is polygamous, subject only to what we have said about a man's inability to commit adultery with his own wife. Before we consider the

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(3) Gollins v. Gollins [1964] A.C. 644, 696, per Lord Pearce (italics added).

application of these grounds to each of the four types of polygamous marriage which we have mentioned, we must first consider the question whether English law or foreign law should be applied to the dissolution of a polygamous marriage.

English law or foreign law?

44. The arguments for applying English law in English divorce proceedings despite the foreign domicil or nationality of one or both of the parties will be fully rehearsed in a forthcoming Working Paper on Divorce Jurisdiction of the English Courts, and need not be anticipated here. The strongest argument is that to require English judges to dissolve marriages on novel grounds unknown to English law would be unwelcome to them and unacceptable to public opinion. This argument derives additional strength when the parties come from a country where the law permits polygamy. Anyone who doubts this is invited to consider the Dissolution of Muslim Marriages Act 1939 which is in force for Mohammedans in India and Pakistan and which is quoted in Appendix B to this Paper. We cannot believe that English judges would welcome the task of applying these provisions in ignorance of the social and religious background against which they were intended to operate, or that public opinion would approve if they did. And it must be remembered that Mohammedan law as administered in India and Pakistan is a relatively sophisticated system: the grounds for dissolving polygamous marriages in other countries are likely to be even more exotic. The application of two systems of divorce law in England hardly seems likely to facilitate the integration of immigrants into English society.

Four types of "polygamous" marriage

45. We now consider in relation to each of the four types of polygamous marriage which we have mentioned whether the rule in Hyde v. Hyde should be reversed and proceedings for divorce (and ancillary relief) allowed. We propose to consider the case of two Mohammedans domiciled in Pakistan who marry there in polygamous form, and subsequently come to England. (We take this particular case in order to shorten discussion: what we say about this case would equally apply to Mohammedans domiciled and marrying in some other

country in polygamous form, or to Africans domiciled in some African country and marrying there in accordance with native law and custom). We ask the reader to bear in mind that the parties or one of them must be so closely connected with England that it is reasonable for the court to exercise jurisdiction in respect of their marriage. (We do not put it more precisely because we have in mind not only the existing jurisdictional rules, which are summarised in Dicey and Morris on the Conflict of Laws [4] and need not be repeated here, but also the reforms which may follow from our Working Paper on Divorce Jurisdiction of the English Courts). We assume that the court will always apply English law.

(1) Where the marriage has in fact at all times been monogamous

46. E.g. H and W, Mohammedans domiciled in Pakistan, marry there in polygamous form and subsequently come to England, H never having taken a second wife.

If the marriage has in fact at all times been monogamous, we can see no reason why divorce should not be available in England to either party to the marriage. In such a case, the wife can obtain social security benefits under s.113(1) of the National Insurance Act 1965, [5] s.86(5) of the National Insurance (Industrial Injuries) Act 1965, or s.17(9) of the Family Allowances Act 1965, even though the marriage is potentially polygamous. One reason which has been advanced for refusing to adjudicate in a case of this kind is that, if the law were changed, the husband could oust the jurisdiction of the court by simply taking another wife. [6] We think it rather far-fetched to suggest that it is likely that the husband would assume a second matrimonial tie merely to avoid dissolution of the first. Moreover, we think the husband's power to oust the jurisdiction in this way is so limited that in practice it could be disregarded.

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(4) Rule 38, p.295.

(5) Post, para 61.

(6) Sowa v. Sowa [1961] P.70, 84, per Holroyd Pearce L.J. Cf. Morris, "The Recognition of Polygamous Marriages in English Law," 66 Harv. L. Rev. 961, 973 (1953).

For, in the first place, the husband would normally have to travel to some country where the law permits polygamy, since any second marriage celebrated in England would be void (7) and therefore the first marriage would remain monogamous in fact. Secondly, if the husband had acquired a domicil of choice in England, he could not contract a second marriage which would be recognised as valid here even if he did travel to a country where the law permits polygamy, since he would have no capacity by the law of his domicil to contract such a marriage. (8) Thirdly, it is not certain that any valid second marriage contracted by the husband after the commencement of the proceedings would oust the jurisdiction of the court, any more than would the husband's resumption of a foreign domicil after such commencement. (9) Fourthly, even if the husband did contract a valid second marriage in Pakistan before he acquired an English domicil and before the first wife commenced proceedings, that would only preclude her (under the recommendations we are going to make) from obtaining a divorce on the ground of his "adultery" with the second wife. It would not preclude her from obtaining a divorce on any other ground. We therefore do not think that the husband's power to oust the jurisdiction of the court is any argument against the reform that we suggest. But, for reasons now to be explained, we do not think that this reform would go far enough.

(2) Where the marriage was at one time in fact polygamous, but has become monogamous in fact at the time of the presentation of the petition

47. E.g. H, a Mohammedan domiciled in Pakistan, marries W 1 and W 2 there in polygamous form. Shortly after the second ceremony, W 1 dies or is divorced. H and W 2 then come to England.

We think that divorce should be available to the husband or to the second wife, just as we have recommended that it should be in Case (1) above.

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(7) Ante, para. 13

(8) Ali v. Ali [1966] 2 W.L.R. 620; ante, para.15

(9) See Leon v. Leon [1967] P.275.

For during the whole time that the parties have lived in England, the marriage has in fact at all times been monogamous; and we cannot see any justification for treating the two cases differently. The only qualification we make is this. We do not think that the second wife should be able to obtain a divorce on the ground of the husband's "adultery" with the first, because ex hypothesi the first marriage was valid, the first wife was a wife, and therefore the husband should not be capable of committing adultery with her.

(3) Where the marriage is at the time of the presentation of the petition in fact polygamous because there is one wife living in England and another living in Pakistan

48. E.g. H, a Mohammedan domiciled in Pakistan, marries W 1 and W 2 there in polygamous form. He subsequently comes to England with W 2, leaving W 1 in Pakistan without divorcing her by talak.

Here, in contrast with cases (1) and (2), we are concerned with a situation in which the marriage is actually and presently polygamous. Unless it is felt that this makes the exercise of our matrimonial jurisdiction incongruous, exactly the same considerations appear to apply as in Case (2), and with the samequalification. Clearly, neither wife should be able to obtain a divorce on the ground of the husband's "adultery" with the other (even if the alleged adultery consisted of intercourse with the first wife during a temporary visit to Pakistan by the husband). On the other hand there seems to be no reason in principle why either wife or the husband should not be able to obgain a divorce on any other ground. Moreover, to dissolve either marriage would have the effect of reducing the incidence of polygamy, because it would leave the husband with only one wife. And if the first marriage is a "dead" one, the public interest would seem to require that it should be dissolved. It is difficult to defend a state of the law which would enable the wife of a cruel and adulterous husband to divorce him in this country if she happened to be the only wife at the time but to deny this right if there happened to be another wife in Pakistan whom, perhaps, he had not seen for twenty years.

(4) Where the marriage is at the time of the presentation of the petition in fact polygamous because there are two wives living in England

49. E.g. H, a Mohammedan domiciled in Pakistan, marries W 1 and W 2 there in polygamous form, and subsequently comes to England with both, or causes both to join him here.

This too is a marriage which is actually and presently polygamous. It is distinguishable from (3) only in that both wives are present in England. That, we suggest, is not an adequate ground for treating it differently from (3). Clearly neither wife should be able to obtain a divorce in England on the ground of the husband's "adultery" with the other. On the other hand in principle either wife or the husband should be able to obtain a divorce on any other ground. And cogent reasons can be advanced why our divorce jurisdiction should be available. Let us suppose that both the wives leave the husband and go to live with other men. It does not seem just for the law to say to the husband (as it does at present): "Because you are domiciled in England, you cannot divorce your wives by talak in accordance with your religion; if you do we will not recognise it. Because you are domiciled in England, you cannot marry any other woman until both your wives die; if you do we will not recognise it. But although you are domiciled in England, and both your wives have given you grounds for divorce, we will not dissolve either of your marriages."

Nullity

50. Proceedings for nullity are not nearly so important as proceedings for divorce because the number of cases is proportionately very much smaller.(10) In contrast to proceedings for divorce, English courts sometimes apply foreign law in annulling a marriage, at any rate if it is alleged to be void and not voidable. Thus they will apply the law of the place of celebration if it is alleged that the marriage is formally void, or the law of the party's domicil

(10) An average of about 750 decrees per annum, compared with about 40,000 divorces.

at the time of the marriage if it is alleged that he or she had no capacity to contract the marriage. The rules regulating the jurisdiction of the court to annul a marriage are complicated. They are summarised in Dicey and Morris on the Conflict of Laws [11] and need not be repeated here. They will be reviewed with a view to their reform and clarification in a later Working Paper. [12]

51. In Hyde v. Hyde, Lord Penzance suggested that to annul the second marriage of a polygamous series on the ground of bigamy would be "creating conjugal duties, not enforcing them, and furnishing a remedy where there was no offence." In 1866 and for many years afterwards it was assumed that all polygamous marriages were wholly unrecognised by English law. But the contrary is now well established. [13] Such marriages are recognised as valid for many purposes if they are valid by the law of the place of celebration and by each party's personal law. The question therefore arises, why should the law refuse to allow the annulment of a polygamous marriage which is void or voidable? The reasons were stated by Barnard J. in Risk v. Risk. [14] In that case a woman domiciled in England went through a polygamous ceremony of marriage in Egypt with a Mohammedan domiciled there. She petitioned for nullity on the ground that by the law of her domicil she had no capacity to contract such a marriage. In dismissing her petition for want of jurisdiction under the rule in Hyde v. Hyde, Barnard J. said:

> "If English law regards such a polygamous marriage as the one now before me as no marriage, it might seem at first sight that there could be no objection to the court's saying so, for the decree would be declaratory. But this would mean that a successful petitioner would have the right to apply for maintenance and for custody."

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(11) Rule 44, pp. 344-345.

(12) The rules relating to jurisdiction are not dealt with in our Working Paper No. 20 on Nullity.

(13) Post, paras. 54 et seq.

(14) [1951] P. 50, 53

We assume that his Lordship meant, not that it is wrong ever to grant ancillary relief in respect of a polygamous marriage, but merely that it would be anomalous to deny a divorce (and ancillary relief) in respect of such a marriage but to grant a decree of nullity (and ancillary relief) in respect thereof. If this is right, the anomaly which we think Barnard J. must have had in mind would disappear if that divorce and ancillary relief were made available to the parties to a polygamous marriage. We therefore think that the court should have jurisdiction to annul an invalid polygamous marriage and to grant ancillary relief where appropriate, to the same extent as it would have jurisdiction to grant a divorce had the marriage been a valid polygamous one. We can see no reason why the marriage should not be annulled on the ground, e.g. of impotence, or that the ceremony was formally invalid, or that one party was under age, or did not consent, or that the parties were within the prohibited degrees, or that one party had no capacity to contract a polygamous marriage by the law of his or her domicil. In practice we think that this last ground will be the one most often relied upon, and that the petitioner is likely to be English. The only qualification we make is this. If the marriage is actually polygamous and the marriages are recognised as valid, we do not think that either the second or any later wife or the husband should be able to obtain a decree of nullity on the ground that the second or any later ceremony was void for bigamy, for ex hypothesi it was not. Thus the distinction we have drawn between valid and invalid polygamous marriages (15) is relevant to annulment just as it is to divorce.

The Field of Choice

52. The Law Commission is not a policy-making body competent to decide social issues. It may be desirable therefore to indicate briefly what the field of choice is for the benefit of those who will have to decide how far the reform of the law should go.

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(15) Ante, para 15 et seq.

(a) One possibility is to limit reform to allowing the wife or wives of a polygamous marriage to obtain an order for maintenance on the ground of wilful neglect to maintain. This would remove what is probably the worst injustice and the most glaring anomaly in the present law. But so to limit it would mean that a number of persons who are parties to polygamous marriages and resident more or less permanently in this country would be unable to contract a second marriage if the first had broken down.

(b) A second possibility is to allow divorce or nullity if the marriage has in fact at all times been monogamous. This could be justified on the analogy of s.113(1) of the National Insurance Act 1965, s.86(5) of the National Insurance (Industrial Injuries) Act 1965 and s.17(9) of the Family Allowances Act 1965 as to which see para 61 below.

But we think this is too restrictive even in the context of those Acts (as we shall proceed to explain in paras 61-63 below) and still more so in the context of divorce.

(c) A third possibility is to allow divorce or nullity if the marriage is in fact monogamous at the time of the presentation of the petition. We think this would be preferable to (b) above because it would include cases where the marriage was once in fact polygamous (perhaps many years ago) but is so no longer.

(d) A fourth possibility is to allow divorce if the marriage is potentially or actually polygamous, but to apply the personal law of the parties at the time of the marriage. We have pointed out the objections to this in para 44 above.

(e) The fifth possibility is to follow the Australian precedent (16) and to allow divorce and nullity also in the case of the first of two or more actually polygamous marriages but not in the case of

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(16) See para 30 and Appendix A.

subsequent ones. If, however, the objection to the exercise of matrimonial jurisdiction is that our law is inappropriate to actually polygamous marriages it seems to us that this objection must apply to all such marriages and that there is no merit in drawing an arbitrary distinction between the first wife and subsequent ones.

(f) The sixth possibility is to allow divorce and nullity if, though the marriage is actually polygamous, there is only one wife in England at the time of the presentation of the petition. In our view this is not a practicable solution; no justifiable distinction can be drawn between polygamous marriages according to whether the wives are here or abroad.

(g) The seventh and final possibility is to go all the way and to confer matrimonial jurisdiction to dissolve or annul marriages whether potentially or actually polygamous.

Possibilities (d), (e) and (f) seem to us to be obviously undesirable. The question, as we see it, is whether reform should stop at (a) (b) or (c) or should also extend to (g). The answer depends on whether it is thought that it is inappropriate to apply English matrimonial law in relation to the dissolution or annulment of polygamous marriages. We can see no reason for regarding it as inappropriate to marriages which are actually monogamous though potentially polygamous; indeed English courts already exercise matrimonial jurisdiction over marriages which have been polygamous but which have become monogamous in law as well as in fact by the change of the husband's domicil. For reasons set out in paragraphs 37-43 and 51 we are not convinced that our law is in fact inappropriate even to marriages which are actually polygamous. On the other hand we are conscious of the fact that there may be an instinctive recoil from going so far at present as to apply English law and procedure to the resolution of questions of matrimonial offence or marriage breakdown in relation to a type of marriage different from that for

which the law and procedure were devised. It might be thought, for example, that if there are in fact several wives all should be parties to any suit seeking to dissolve or annul the marriage tie between their husband and any one of them, and that there would accordingly be procedural complications.

Conclusions

53. Subject to the above considerations our provisional conclusions on this part of the subject may be summarised as follows. (We emphasize that they are provisional and may be changed in the light of the comments which we hope to receive from our readers):

(1) Any wife of a valid polygamous marriage should be able to obtain an order for maintenance under s.22 of the Matrimonial Causes Act 1965 or in a magistrates' court, whether the marriage is potentially or actually polygamous.

(2) Either party to a valid polygamous marriage should be able to obtain a decree of divorce (and ancillary relief where appropriate), notwithstanding that the marriage is potentially polygamous or was in the past actually polygamous, so long as it is in fact monogamous at the date of presentation of the petition.

(3) However, no wife who is a party to such a marriage should be able to obtain a decree of divorce on the ground of her husband's "adultery" with another wife.

(4) Either party to an invalid polygamous marriage should be able to obtain a decree of nullity (and ancillary relief where appropriate) notwithstanding that the marriage is potentially polygamous so long as it is actually monogamous at the date of presentation of the petition.

(5) Neither the husband nor any second or later wife of a valid polygamous marriage should be able to obtain a decree of nullity on the ground that the marriage was void for bigamy.

(6) If all cases of hardship are to be avoided the reform of the law should go further and, subject to the qualifications in (3) and (5), divorce or nullity should be available even if the marriage is actually polygamous at the date of presentation of the petition.

V. RECOGNITION OF POLYGAMOUS MARRIAGES FOR PURPOSES OTHER THAN MATRIMONIAL RELIEF

54. In spite of Lord Penzance's emphatic statement in Hyde v. Hyde [17] that his decision was limited to the question of matrimonial relief, there was for many years a tendency to assume that all polygamous marriages were wholly unrecognised by English law. [18] However, since 1939 [19] it has become clear that they are recognised for many purposes. There is slowly growing support for the statement in Dicey and Morris [20] that:

> "A marriage which is polygamous under Rule 31 and not invalid under Rule 34 [21] or Rule 35 [22] will be recognised in England as a valid marriage unless there is some strong reason to the contrary."

We proceed to consider some situations in which polygamous marriages, valid by the law of the place of celebration and by the personal law of the parties, have been recognised as valid marriages.

As a bar to a subsequent monogamous marriage

55. A valid polygamous marriage will be recognised to the extent that it constitutes a bar to a subsequent monogamous marriage in England, and so entitles

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(17) (1866) L.R. 1 P. & D. 130, 138; quoted ante, para. 4.

(18) See Harvey v. Farnie (1880) 6 P.D. 35, 53; Re Bethell (1887) 38 Ch.D. 220; R. v. Hammersmith Marriage Registrar [1917] 1 K.B. 634, 647; R. v. Naguib [1917] 1 K.B. 359, 360.

(19) The Sinha Peerage Claim (1939) 161 Lords' Journals 350, [1946] 1 All E.R. 348 n., is usually considered to mark the turning point.

(20) Rule 36, p.285; aproved by Winn J. in Shahnaz v. Rizwan [1965] 1 Q.B.390, 397, and by Lord Parker C.J. in Mohammed v. Knott [1968] 2 W.L.R. 1446, 1456C-D.

(21) I.e. the rule that a marriage celebrated in England in accordance with polygamous forms and without civil ceremony is void. See ante, para.13.

(22) I.e. the rule that a man or woman whose personal law does not permit polygamy has no capacity to contract a valid polygamous marriage. See ante, para.15.

the second "wife" to a decree of nullity on the ground of bigamy.[23] Otherwise the husband would be validly married to his first wife in the country where he married her and to his second wife in England - a state of affairs which would encourage rather than discourage polygamy.

Legitimacy of and succession by children

56. "It cannot, I think, be doubted now" said Maugham L.C., delivering the opinion of the Committee of Privileges of the House of Lords in The Sinha Peerage Claim,[24] "(notwithstanding some earlier dicta by eminent judges)[25] that a Hindu marriage between persons domiciled in India is recognised by our courts, that the issue are legitimate, and that such issue can succeed to property in this country, with a possible exception which will be referred to later."[26] Provided the marriages are valid by the law of the place of celebration and by the personal law of the parties, it seems to be immaterial that the husband married more than one wife or that the succession is governed by English law. Thus, in Bamgbose v. Daniel,[27] children of no less than nine polygamous marriages celebrated in Nigeria between persons there domiciled were held entitled to succeed to their father's property on his death intestate, although by a Nigerian Marriage Ordinance of 1884 the property was distributable "in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates, any native law or custom

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(23) Srini Vasan v. Srini Vasan [1946] P.67; Baindail v. Baindail [1946] P.122. The husband's domicil at the date of the second ceremony is irrelevant. On the other hand, a polygamous marriage is not a sufficient first marriage to support an indictment for bigamy: R. v. Sarwan Singh [1962] 3 All E.R. 612.

(24) (1939) 171 Lords' Journals 350; [1946] 1 All E.R. 348, n. Cf. Baindail v. Baindail [1946] P.122, 127 per Lord Greene M.R.

(25) The reference is apparently to the decision of Stirling J. in Re Bethell (1887) 38 Ch. D. 220.

(26) The Hindu Marriage Act 1955 has now abolished polygamy between Hindus in India; but the principle stated by Lord Maugham is no doubt applicable to Mohammedan marriages celebrated in India or elsewhere, or to marriages celebrated under native law and custom in Africa.

(27) [1955] A.C. 107 (P.C.)

to the contrary notwithstanding." Therefore, the word "children" in the English Statute of Distribution 1670 (and presumably the word "issue" in the Administration of Estates Act 1925) is wide enough to cover the children of a valid polygamous marriage. If this is so, it is tempting to assume that the decision in Bamgbose v. Daniel would have been the same if the father had acquired an English domicil after the celebration of his marriages and before his death, and if the case had come before the Chancery Division and not (as it did) before the Privy Council.

57. The "possible exception" referred to by Lord Maugham in The Sinha Peerage Claim is the right to succeed as heir to real estate in England (which after 1925 is restricted to succession to entailed property and one or two other exceptional cases) (28) and no doubt, to a title of honour and property limited to devolve therewith. (29) This exception was considered necessary because it was thought that difficulties would arise if there was a contest between the first-born son of the second wife and the later-born son of the first wife, each claiming to be the heir. We do not consider that this matter is sufficiently important or likely to arise to merit alteration by legislation.

58. Under section 2(1) of the Legitimacy Act 1959, the child of a void marriage is treated as the legitimate child of his parents if at the time of the act of intercourse resulting in the birth (or at the time of the celebration of the marriage if later) both or either of the parents reasonably believed that the marriage was valid. Under s.2(2) the section applies, and applies only, where the father of the child was domiciled in England at the time of the birth, or if he died before the birth, was so domiciled immediately before his death. Under s.2(5) a "void marriage" means a marriage, not being voidable only, in respect of which the High Court has or had jurisdiction to grant a decree of nullity, or would have or would have had such jurisdiction if the parties were domiciled in

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(28) Law of Property Act 1925, ss.131, 132; Administration of Estates Act 1925, s.51(2).

(29) See Doe d. Birtwhistle v. Vardill (1840) 7 Cl. & F. 895; Legitimacy Act 1926, ss.3(1) and (3) and 10(1).

England. The effect (presumably unintended) of this definition is that the section may be inapplicable if the marriage was celebrated in polygamous form. Thus if H. a Mohammedan domiciled in England, goes through a ceremony of marriage with W in Muslim form while on a temporary visit to Pakistan, and a child C is born, C is illegitimate. He is not born in lawful wedlock, since H, being domiciled in England, had no capacity to contract a polygamous marriage. (30) He is not rendered legitimate by s.2 of the Legitimacy Act 1959, even if W reasonably believed that the marriage was valid, because owing to the rule in Hyde v. Hyde the High Court would not have jurisdiction to annual a potentially polygamous marriage. The result seems anomalous and unfortunate. The problem would of course disappear if our proposals to abolish that rule are accepted.

Succession by Wives

59. It seems that the surviving wife of a valid polygamous marriage could succeed to the husband's property on his death intestate, at any rate if the marriage was only potentially polygamous. In Coleman v. Shang (31) the widow of a potentially polygamous marriage celebrated in Ghana between parties domiciled there was held entitled to a grant of letters of administration to the husband's estate on his death intestate, although by a Ghana Marriage Ordinance of 1884 two-thirds of the property was distributable "in accordance with the provisions of the law of England relating to the distribution of the personal estate of intestates in force on November 19, 1884, any native law or custom to the contrary notwithstanding." Therefore, the word "wife" in the English Statute of Distribution 1670 (and presumably the word "spouse" in the Administration of Estates Act 1925) is wide enough to cover the wife of a polygamous marriage, at any rate if it is only potentially polygamous. Once again it is tempting to assume that the decision in Coleman v. Shang would have

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(30) Ali v. Ali [1966] 2 W.L.R. 620; ante, para.15.

(31) [1961] A.C. 481 (P.C.)

been the same if the husband had acquired an English domicil after the celebration of the marriage and before his death, and if the case had come before the Chancery Division and not (as it did) before the Privy Council.

60. There does not appear to be a reported case in which an English court has had to consider whether several surviving widows of a polygamously married man could claim a widow's share of his estate if the succession was governed by English law. In Coleman v. Shang (32) the Privy Council said:

> "Difficulties may no doubt arise in the application of this decision in cases where there are more than one widow, both in dealing with applications for the grant of letters of administration and in the distribution of the estate, but they can be dealt with as and when they arise."

On the other hand, the Privy Council has adopted the practice, in dealing with the estates of deceased Chinese who died domiciled in Malaya, of assigning the one-third share of the widow under the Statute of Distribution equally between the several widows. (33) And there is Canadian and Rhodesian authority for the proposition that gifts by will to a surviving wife attract succession duty at the lower rate applicable to a spouse, even if there was more than one wife. (34) We can see no reason why the several wives of a polygamously married man should not share equally between them the widow's share on his death intestate. We think that the courts are likely to reach this result without the aid of legislation.

Social Security Legislation

61. It was held in a number of decisions rendered by tribunals under the National Insurance and Family Allowances Acts that the polygamously married wife

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(32) Supra, at p.495.

(33) Cheang Thye Phin v. Tan Ah Loy [1920] A.C. 369 (P.C.); of The Six Widows' Case (1908) 12 Straits Settlements L.R. 120.

(34) Yew v. Att.-Gen [1924] 1 D.L.R. 1166 (British Columbia Court of Appeal); Estate Mehta v. Acting Master 1958 (4) S.A. 252 (Supreme Court of the Federation of Rhodesia and Nyasaland). In the latter case there was only one wife, but reliance on this fact was expressly disclaimed (at p.262).

of a contributor was not entitled to e.g. maternity benefit or widow's benefit under those Acts. (35) The reason given was that "the question whether the words 'marriage,' 'husband,' 'wife' and 'widow' when used in an Act of Parliament or statutory instrument are intended to include polygamous marriages and the parties thereto must be decided in the light of the language of the Act or instrument in question taken as a whole, and of its manifest scope and purpose." It was thought that it could not have been the intention to allow several wives of one contributor each to claim benefits under the Acts. But it was obviously unjust to deny such benefits to the one and only wife of a man who was compelled to pay contributions because of his employment in this country, simply because his marriage was potentially polygamous. Accordingly, s.113(1) of the National Insurance Act 1965, s.86(5) of the National Insurance (Industrial Injuries) Act 1965 and s.17(9) of the Family Allowances Act 1956) provide that "a marriage performed outside the United Kingdom under a law which permits polygamy shall be treated for any purpose of [those Acts] as being and having at all times been a valid marriage if and so long as the authority by whom any question or claim arising in connection with that purpose falls to be determined is satisfied that the marriage has in fact at all times been monogamous."

62. These enactments are significant as being the only occasion on which the Parliament of the United Kingdom has legislated on the subject of polygamous marriages. They undoubtedly effect an improvement in the law as previously administered. But we question whether the sections go far enough. They do not cover cases where the marriage was once actually polygamous, but is so no longer, e.g. because the first wife died or was divorced before the parties came to England. Nor do they cover cases where the marriage is in fact polygamous at the time when the social security benefits are sought. The problems involved in these two situations are quite different. They will therefore be discussed separately.

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(35) Decisions Nos. R(G) 18/52, 11/53, 3/55, 7/55.

63. (1) As we have seen, the second Mrs Imam Din [36] obtained assistance from the National Assistance Board, and the Board was held entitled to recover part of it from the husband. But if her marriage had turned out differently, she would not have been entitled to any social security benefits payable to a wife or widow, because her marriage was not in fact at all times monogamous. We regard this as both unfortunate and anomalous. It is unfortunate because the second wife, having been admitted into this country as the wife of a permitted immigrant, should be treated just like any English wife if she was in fact her husband's only wife throughout the period of their residence in England. It is anomalous because, as we have previously pointed out in para 47 above, we cannot see any justification for treating differently the wife of a marriage which was in fact at all times monogamous, and the wife of a marriage which was in fact monogamous at all times during the parties' residence in England. It cannot, surely, be right to compel the husband to suffer deductions from his wages because of his employment in England, and then deny social security benefits to the woman who, throughout the period of those compulsory deductions, was his one and only wife, merely because he might have married another. Suppose that three workmen are killed in the same industrial accident. All three are married; all three have for many years contributed to the social security funds. One is an Englishman born and bred; the second is a Pakistani whose marriage, celebrated in Pakistan before he came to this country, has in fact at all times been monogamous though potentially polygamous; the third is a Pakistani who divorced his first wife in Pakistan before he came to England, but after he married his second wife there. Before 1956, only the wife of the first workman would have been entitled to benefits under the National Insurance (Industrial Injuries) Acts; under the present law, so also would the wife of the second; in our opinion, so also should the wife of the third.

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(36) See Imam Din v. National Assistance Board [1967] 2 Q.B. 213, ante, para. 26.

64. We appreciate that this problem may only arise so long as the parties remain domiciled in e.g. Pakistan. For as soon as they acquire an English domicil, the marriage would become monogamous in law as well as in fact, (37) and therefore there would probably be no need to invoke the sections we have quoted in order to give social security benefits to the wife. Nevertheless, we think the present law is too restrictive in denying all benefits unless the marriage has been in fact at all times monogamous. We think it would be an improvement if the law required merely that the marriage should be in fact monogamous at the relevant time. This is normally the time at or in respect of which the benefits are payable. (In the case of widow's pension and of a woman's retirement pension by virtue of her husband's insurance, it may be a period of up to three years before that time or before the husband's death). (38)

65. (2) More difficult problems are involved if the marriage is in fact polygamous at the time when the benefits are sought. To deny social security benefits in such a case may involve hardship and injustice. Why, for instance, should the wife of a Pakistani, resident with her husband in England, be denied benefits merely because he has another wife (or wives) resident in Pakistan? We have considered numerous proposals for coping with this situation, but we have not been able to discover a solution which we are sure would be both administratively workable and acceptable to public opinion. The proposals that we have considered are as follows:

(a) Contributors with more than one wife should be required to pay an increased contribution, and social security benefits should be payable to each of the wives in full. The objection to this is that the administrative inconvenience, not only to the Ministry of Social Security but also to employers, would probably be

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(37) Ali v. Ali [1966] 2 W.L.R. 620; ante, paras. 9 and 10.

(38) See National Insurance Act 1965, s.28(2)(a) and (3)(b); s.32(3)(a) and regulations made thereunder.

unacceptable. Every contributor's marital status would have to be ascertained in advance, checked from time to time, and notified to his employer. There would have to be special cards and special stamps and special records kept for what is probably quite a small number of cases. At present the employer need know nothing of the man's status, nor need the Ministry unless and until a benefit is claimed.

(b) Contributors with more than one wife should be required to pay the same contribution as everyone else, but social security benefits should be payable to each of the wives in full. Monogamously married contributors would thus to some extent subsidise those whose marriages are in fact polygamous, just as at present unmarried contributors to some extent subsidise those who are married. There is probably no insuperable objection to this proposal on the ground of cost, since the number of cases involved is likely to be relatively small. But there are two other objections which we regard as fatal. The first is that, if it were generally known that benefits were payable to several wives in full, there would be a temptation to produce spurious "wives" in order that they might qualify for benefits, and the task of the Ministry of Social Security in checking their credentials would be virtually impossible. The second objection is that it would probably be unacceptable to public opinion that polygamously married contributors should be in a better position than monogamously married ones. In particular, there would be a conspicuous contrast between the position of the wives of a polygamous marriage (who under this proposal would be entitled to benefits) and the divorced wives of monogamous marriages (who under the present law may be treated less well than widows).

(c) The social security benefits that would have been payable to one wife should be equally divided between all the wives of a polygamous marriage. The objection to this is that if the butter were thus thinly spread, it would need to be supplemented by payments from the Supplementary Benefits Commission, at any rate so far as wives resident in England are concerned; the administrative expense of this double procedure does not seem to be justified.

(d) If there is one wife living in England and another (or others) living e.g. in Pakistan, the social security benefits should be payable to the former but not to the latter. The superficial attraction of this proposal is that it would relieve the Supplementary Benefits Commission, and therefore the taxpayer, from having to look after the wife living in England. But in our opinion the proposal must be rejected on grounds of equity. Under the present law, if there is only one wife living e.g. in Pakistan, she may be entitled to social security benefits. To deprive her of those benefits merely because there is another wife living in England would be quite as unjust as to deprive the wife living in England of benefits merely because there is another wife living in Pakistan.

(e) The Ministry of Social Security might be given a discretionary power to select the wife to whom the benefits should be paid. But it is difficult to see how such a power could be exercised without an investigation into the contributor's marital circumstances; and in the case of the most valuable and important benefits the contributor would be dead when the payments were due. The Ministry would presumably be reluctant to undertake such an examination. Nor is it easy to see on what basis the Ministry should make its selection.

(f) The husband might be given power to nominate the wife to whom the benefits should be paid, either by a signed writing or by his will. We can see four objections to this proposal. First, it seems undesirable to encourage husbands to discriminate in this way between wives; indeed it would conflict with the principle of equal treatment contained in many polygamous systems of law. Secondly, it would be administratively difficult to notify some contributors of this right without notifying them all; and to notify all seems likely to induce ribald comment rather than to increase the public's respect for the law. Thirdly, if the husband failed to nominate, this proposal would not solve the problem. Fourthly, the husband should presumably have the power to vary his nomination from time to time. In that case, the power to nominate could be used in a way which would be very profitable to a polygamously married family. For instance, on each spell of sickness or unemployment he could nominate for an increase of benefit whichever wife happened not to have earnings at that time.

66. Accordingly we must record that we have not yet been able to formulate satisfactory proposals for making social security benefits available if the marriage is in fact polygamous at the time when the benefits are payable. On the other hand we regard it as obviously objectionable that a contributor who is recognised as married should be denied the benefits for which he has contribued merely because he has two legal wives rather than one. We shall welcome suggestions.

Miscellaneous Problems Affecting Wives

67. We have not at this stage of our inquiry thought it our duty to ransack the statute book for any reference to the words "wife" or "husband" or "spouse" in order to make specific recommendations on whether these should be amended so as to make it clear that they include the parties to a polygamous marriage.

But we may mention that we see no reason in principle why the summary procedure for settling property disputes between husband and wife, introduced by s.17 of the Married Women's Property Act 1882, should not be available if the marriage is polygamous, even actually polygamous. Nor can we see any reason why the provisions of the Matrimonial Homes Act 1967 should not be applied to such a marriage. We therefore recommend that both these enactments should be amended so as to make it clear that the words "husband," "wife" and "spouse" contained therein include the parties to a polygamous marriage. Indeed we think that any Bill containing these or similar expressions should make clear whether or not they are intended to include such parties. In our Working Paper on Financial Relief in Matrimonial Proceedings (39) we drew attention to the surprising number of unjustifiable differences between classes of children which are contained in Parts II and III of the Matrimonial Causes Act 1965. We think that there is as much need to clarify what is meant in each case by "husband" and "wife" as there is to clarify what is meant by "child."

VI SUMMARY OF RECOMMENDATIONS

68. In this Part of this Paper we set out such provisional recommendations as we have been able to make concerning the reform of the law concerning polygamous marriages. They are only provisional and may be changed in the light of the comments which we hope to receive from our readers. As regards the first five of these recommendations, which deal with the most important matters, we draw particular attention to the various possibilities canvassed in para 52.

(1) Any wife of a valid polygamous marriage should be able to obtain an order for maintenance under s.22 of the Matrimonial Causes Act 1965 or in a magistrates' court, whether the marriage is potentially or actually polygamous (paras 33-35).

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(39) Working Paper No. 9, paras 165-173.

(2) Either party to a valid polygamous marriage should be able to obtain a decree of divorce (and ancillary relief where appropriate) on any ground known to English law, notwithstanding that the marriage is potentially polygamous or was in the past actually polygamous, so long as it is in fact monogamous at the date of presentation of the petition (paras 46-47).

(3) However, no wife who is a party to such a marriage should be able to obtain a decree of divorce on the ground of her husband's "adultery" with another wife (paras 40, 47).

(4) Either party to an invalid polygamous marriage should be able to obtain a decree of nullity (and ancillary relief where appropriate), notwithstanding that the marriage is potentially polygamous, so long as it is actually monogamous at the date of presentation of the petition (para 51).

(5) Neither the husband nor any second or later wife of a valid polygamous marriage should be able to obtain a decree of nullity on the ground that the marriage was void for bigamy (para 51).

(6) If all cases of hardship are to be avoided the reform of the law should go further and, subject to the qualifications in (3) and (5), divorce or nullity should be available even if the marriage is actually polygamous **at the date of presentation** of the petition (paras 48, 49 and 51).

(7) Section 113(1) of the National Insurance Act 165, s.86(5) of the National Insurance (Industrial Injuries) Act 1965 and s.17(9) of the Family Allowances Act 1965 should be amended so as to require no more than that the marriage should be in fact monogamous at the time at or in respect of which the benefits are payable or (in certain cases) for a period of up to three years before that time or before the husband's death (paras 61-64).

(8) An attempt should be made to formulate proposals to make social security benefits available even if the marriage is in fact polygamous at the time when the benefits are payable (para 66).

(9) Section 17 of the Married Women's Property Act 1882 should be amended so as to make it clear that it includes the parties to a polygamous marriage (para 67).

(10) The Matrimonial Homes Act 1967 should also be so amended (para 67).

APPENDIX A

Australian Matrimonial Causes Act 1959 (No.104)
as amended by Matrimonial Causes Act 1965 (No.99)

6A. (1) Subject to this section, a union in the nature of marriage entered into outside Australia or under Division 3 of Part IV of the Marriage Act 1961 that was, when entered into, potentially polygamous is a marriage for the purposes of proceedings under Part VI of this Act in respect of the union, and for the purposes of proceedings in relation to any such proceedings, where it would have been a marriage for those purposes but for the fact that it was potentially polygamous.

(2) This section does not apply to a union unless the law applicable to local marriages that was in force in the country, or each of the countries, of domicil of the parties at the time the union took place permitted polygamy on the part of the male party.

(3) This section does not apply to a union where, at the time the union took place, either of the parties was a party to a subsisting polygamous or potentially polygamous union, but this section does apply to a union notwithstanding that the male party has, during the subsistence of the union, contracted, or purported to contract, a further union in the nature of marriage, whether or not the further union still subsists.

APPENDIX B

Indian Dissolution of Muslim Marriages Act 1939 (No.VIII).
now in force in India and (as amended in 1961) in Pakistan

2. A woman (40) married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

[(iia) that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance 1961; (41)]

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(v) that the husband was impotent at the time of the marriage and continues to be so;

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

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(40) The Act is confined to petitions by wives because under Mohammedan law the husband can divorce the wife by talak without assigning any reason.

(41) This sub-clause was added by the Pakistan Muslim Family Laws Ordinance 1961 (No.VIII). By s.6(1) thereof, no man, during the subsistence of an existing Arbitration Council, contract another marriage. By s.2, the Arbitration Council means a body consisting of the Chairman of the Union Council (a kind of Town Council) and a representative of each of the parties.

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, [42] repudiated the marriage before attaining the age of eighteen years: provided that the marriage has not been consummated;

(viii) that the husband treats her with cruelty, that is to say, -

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment,

or (b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunction of the Qoran;

(ix) on any other ground which is recognised as valid for the dissolution of marriages under Muslim law.

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(42) The Pakistan Muslim Family Laws Ordinance 1961, s.13(b), substituted "sixteen" for "fifteen" in this sub-clause.