THE TREND TOWARDS RECOGNITION OF POLYGAMOUS MARRIAGES IN COMMON LAW COUNTRIES AND MATTERS INCIDENTAL THERETO

The problem of the recognition of polygamous marriages has become one of the classic problems in the conflict of laws.

(G.W.Bartholomew, "Recognition of Polygamous Marriages in Canada", (1961) 10 Int. & Comp. L.Q. 305)

None of our laws, however fundamental it may be, requires exclusive, absolute application. No foreign legal institution, however much we may disapprove of it, can be simply ignored by us.

(Kahn, TREATISE ON PRIVATE INTERNATIONAL LAW (1st ed. 1898), cited in (1923) 32 Yale L.J. 474, n.19)

The Conflict of Laws is professedly a series of devices for deciding what legal system should govern a matter and it should, therefore, with minimal exceptions on the ground of public policy, be devoid of value judgments as to what substantive result is to be preferred.

(M.P.Furmston, "Polygamy and the Wind of Change", (1961) 10 Int. & Comp. L.Q. 180)

During the 19th century English courts introduced and adopted an attitude of non-recognition towards polygamous marriages treating them as the outcome of a barbarous institution not deserving to be given effect to in a Christian European country. This attitude has frequently been traced to some obiter remarks of Lord Brougham in Warrender v. Warrender (1835) 2 Cl. & F. 488; 6 E.R. 1239, where the question for determination actually was whether at a time when judicial divorce was not possible in England the Scottish courts were competent to dissolve a marriage celebrated in England between an Englishwoman and a domiciled Scotsman. In the course of his judgment in that case his Lordship said:

> But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we regard it as a wholly different thing, a different status, from Turkish or other marriages among infidel nations, because we clearly never should recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put upon any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same everywhere. (At 532;1255).

Though it has since been pointed out that Lord Brougham's remarks should be read in the context in which they were made and were not meant to deny recognition to all polygamous marriages, including the first one, for all purposes[1], they were taken as support for a general attitude of non-recognition towards polygamous marriages which received strong judicial approval in the subsequent case-law of the 19th century. In

1. See S.G.Vesey-Fitzgerald, 'Nachimson's and Hyde's Cases', (1931) 47 L.Q.R. 253, 255-7; J.H.C.Morris, 'The Recognition of Polygamous Marriages in English Law', (1953) 66 Harv. L.Rev. 961, 965-6.

more recent times, as the old attitude of looking down on alien 'infidel' concepts of marriage ceased to be fashionable, a trend developed in the courts as a result of which many of the old decisions have been largely limited to their own facts, distinguished in a restrictive manner, or otherwise accorded a narrow interpretation. Thus polygamous marriages, which were formerly treated on the hypothesis that they constituted no marriage at all, are now recognised for a variety of purposes.

The leading case in the old line of decisions is Hyde v. Hyde (1866) L.R. 1 P. & D. 130, where Lord Penzance declared that marriage, "as understood in Christendom", meant "the voluntary union for life of one man and one woman, to the exclusion of all others",[2] and accordingly refused to act on a petition for dissolution of a Mormon union which his Lordship found to be potentially polygamous. As polygamy was shown by the evidence to be part of the Mormon doctrine, there was no marriage which the English divorce court could recognise and the parties were not entitled to the remedies, adjudication, or relief of English matrimonial law.

Following Hyde v. Hyde, Stirling J., in another well-known 19th century case, Re Bethell (1888) 38 Ch.D.220,[3] refused to recognise as valid a marriage between a domiciled Englishman and the niece of an African Chief, which had been celebrated in Bechuanaland according to the custom of the Baralong tribe which permitted polygamy. Accordingly the child of the marriage was held to be illegitimate and not entitled to succeed under her paternal grandfather's will. These decisions led to the belief, which was incorporated for a long time in the standard text-books[4], that the only kind of marriage which English courts would recognise at all was that which came within the definition of a Christian

2. At 133. Shortly afterwards in his judgment (at 134) his Lordship cited (inter alia) the passage in the judgment of Lord Brougham in Warrender v. Warrender already quoted.
3. Here again Lord Brougham's words in Warrender v. Warrender were cited in the judgment (at 233-4).
4. See the references to the 'text book view' made by Barnard J. in Srini Vasan v. Srini Vasan [1946] P.67, 68-9.

marriage as propounded by Lord Penzance in Hyde v. Hyde; and this clearly excluded those of a polygamous character.

The first major land-mark towards a more liberal view of polygamous marriages was the delivery of the Opinion of the Committee of Privileges of the House of Lords in the Sinha Peerage Claim in 1939, (1939) 171 Lords Journal 350, [1946] 1 All E.R. 348. It concerned a marriage between two Hindus domiciled in India which marriage was at first potentially polygamous under Hindu law but became monogamous, at least for the time being, when the spouses joined a religious sect which believed in and required monogamy. The eldest son of the marriage, who was born after the parents' conversion to the monogamous sect, claimed the right to succeed to his father's peerage 'as heir male of his body lawfully begotten'. The Committee of Privileges approved the claim. It was noted that the father could have left the sect at any time in which case he could then under Hindu law have taken a second wife lawfully. Lord Maugham L.C., delivering the Opinion of the Committee, declared '... it cannot, I think, be doubted now (notwithstanding some earlier dicta by eminent judges) that a Hindu marriage between persons domiciled in India is recognised in our court, that the issue are regarded as legitimate, and that such issue can succeed to property in this country' with certain possible exceptions, [1946] 1 All E.R. 348, 349. At the same time the old rule was still considered applicable to cases where recognition was sought for the purpose of dissolution of marriage. This last type of situation was excluded by Lord Maugham from the scope of his statement in the Sinha Peerage Claim, when his Lordship distinguished Hyde v. Hyde from the case before him, [1946] 1 All E.R. 348.

The views of Lord Maugham were expressly adopted by Barnard J. in Srini Vasan v. Srini Vasan [1946] P.67, 69. Here the judge recognised a potentially polygamous Hindu marriage between two Hindus domiciled in India for the purpose of annulling a subsequent ceremony in England between a woman domiciled in England and the Hindu husband of the first marriage on the ground that the husband was already married when he went through the English ceremony. Barnard J. pointed out that the first marriage was recognised as valid

by Hindu law, the law of the domicile, and therefore by the courts of British India. He declared that it would be strange if English law afforded no recognition to polygamous marriages when England was the centre of a great Empire whose Mohammedan and Hindu subjects numbered many millions.

Shortly afterwards, in Baindail v. Baindail [1945] 2 All E.R. 374 on similar facts, Barnard J. followed his decision in Srini Vasan v. Srini Vasan and was upheld by the Court of Appeal [1946] P.122. In the latter court Lord Greene M.R. pointed out that in general a person's status is determined by his personal law, which was the law of his domicile, and by the law of the husband's domicile in the present case he undoubtedly acquired the status of a married man which status he never lost. Citing Lord Maugham's opinion the Master of the Rolls declared that such status would have to be recognised by English law for many purposes. Lord Penzance's ruling had not been intended to apply to purposes other than those with which he was immediately concerned. The court had to bear in mind that the question of the validity of Hindu marriages was of great practical importance in the running of the Commonwealth and Empire.

The question of the recognition of polygamous marriages for purposes of legitimacy and succession has also come up directly in two recent cases before the Privy Council. In Bamgbose v. Daniel [1955] A.C. 107 the Judicial Committee held applicable to children of a polygamous union the rule laid down in Re Goodman's Trusts (1881) 17 Ch.D. 266, C.A. that, if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the English law of succession to personalty recognises and acts on that status. Their Lordships declared that though that principle was laid down in a case dealing with a monogamous marriage it could not be confined within such a narrow field. Accordingly the children of an intestate person domiciled in Nigeria, who were the issue of nine polygamous marriages entered into by him in accordance with native law and custom, were held entitled to share in his personal estate under the English Statute of Distributions 1670 (applicable in Nigeria under the Marriage Ordinance 1884) subject only to their establishing that they were legitimate children of the deceased by the law of their domicile of origin.

Still more recently, in Coleman v. Shang [1961] A.C. 481, a case concerning the personal property in Ghana of an intestate domiciled in that country who had contracted a potentially polygamous marriage there in accordance with its laws, the Judicial Committee held that having regard to the attitude of English courts to the status of parties who had been validly married by the laws of the country of their domicile the courts of Ghana were not precluded from granting letters of administration of the estate of a person domiciled in Ghana to a woman who had been validly married to the intestate under the laws of Ghana, merely by reason that the words "wife" and "widow" appear in the singular in the Statute of Distributions 1670 (applicable in Ghana under the local Ordinances). It may be pointed out at this stage that the old case of In re Bethel (1887) 38 Ch.D. 220, has been generaly distinguished on the ground that the father in that case was domiciled in England and hence had no capacity to contract a polygamous marriage. Indeed, in Kenward v. Kenward Denning L.J. even expressed the opinion (obiter) that he doubted whether In re Bethel itself would be the same today, [1951] P.124, 145. C.A. His Lordship took the view that where a domiciled Englishman marries a woman of a polygamous race in her homeland by the ceremonies of her country with the intention of living with her there, well knowing the kind of marriage into which he is entering, then the substantial validity of the marriage, as well as its formal validity, should depend on the personal law of the wife and not on his. Such a marriage, though potentially polygamous, should, for many purposes be treated as valid by English courts.

Furthermore the recent decision of Wrangham J. in Ohochuku v. Ohochuku [1960] 1 W.L.R. 183, shows how even the remedy of dissolution can be applied in effect to a case involving a polygamous marriage in certain circumstances. That case concerned a marriage ceremony in Nigeria between two persons domiciled in Nigeria which was potentially polygamous in character under Nigerian law, but which was followed by a second marriage ceremony between the same parties at a Register Office in London.

The Judge held that he had no jurisdiction to dissolve the Nigerian marriage for though polygamous marriages are now

recognised for various purposes they are not recognised for that purpose. However he went on to hold that he could dissolve the marriage which had been solemnised in London and granted a decree nisi in respect thereof. This, his Lordship exressly pointed out, would have the effect of dissolving the Nigerian marriage under Nigerian law though that consideration formed no part of his judgment.

At the same time if there is no subsequent Christian marriage ceremony then the above mode of evading Hyde v. Hyde (1866) L.R. 1. P. & D. 130, cannot be availed of, and the rule of that case still fully applies in matrimonial proceedings. This was affirmed by the Court of Appeal in Sowa v. Sowa [1961] P.70, C.A., where it was pointed out that it was within the power of the Legislature to change the law in such cases. In the latter case it was held that the principle of Hyde v. Hyde applied to matrimonial courts in general. Accordingly matrimonial relief in the form of an order for maintenance could not be made in the Magistrate's Court on the application of a party to a potentially polygamous union. Nonetheless, the fact that even in the particular circumstances of Ohochuku v. Ohochuku [1960] 1 W.L.R. 183 the rule in Hyde v. Hyde has now been evaded indirectly in a dissolution case shows the waning influence today of the old attitude of non-recognition towards polygamous marriages.

The present views of the English courts on the subject of polygamous marriages are manifested in the recent judgment of Ormrod J. in Kassim v. Kassim [1962] P.224. His Lordship held in that case that a person's mistaken belief that he is entering into a polygamous marriage is not such a fundamental mistake as to vitiate his consent to the monogamous marriage solemnised with the other party and thus render that marriage a nullity. In rejecting the contrary submission of the petitioner's counsel, based partly on Hyde v. Hyde, his Lordship declared (at 230-1):

> "In my judgment a polygamous marriage recognised as valid by the law of the domicile of the parties cannot be regarded in these courts as a ceremony which in no way affects the status of the parties to it. It is enough to render a second marriage

> in this country void: Baindail v. Baindail. It will also be recognised as establishing the legitimacy of the children born to the parties: Sinha Peerage case. However much it may differ from the concept of a Christian marriage, a polygamous marriage clearly alters the status of the parties to it and creates a relationship between them which is recognised for some purposes by the courts of this country".

A change has also taken place in the attitude of English courts towards forms of divorce appropriate to polygamous unions or otherwise not in accordance with English concepts. In R. v. Superintendent Registrar of Marriages, Hammersmith, Ex parte Mir-Anwaruddin [1917] 1 K.B. 634, C.A., the Court was asked to issue a writ of mandamus to the Marriage Registrar to grant a licence for a second marriage on the application of a Moslem domiciled in India who had married a domiciled Englishwoman at an English Registry Office and, after she had left him, had purported to divorce her by a Mohammedan form of irrevocable divorce known as "Talak". The court rejected the application for mandamus. It refused to recognise the alleged dissolution of marriage on the grounds that it had not been effected by a judicial process, that a monogamous marriage could not be dissolved by a process appropriate to polygamous unions, and that the purported divorce was the result of unilateral action without notice to the wife having been given and as such contrary to natural justice.

The first of these grounds namely, the want of judicial process, was not allowed to stand in the way of the Court in Har-Shefi v. Har-Shefi (No.2) [1953] P.220. [5] Here the English court recognised a Jewish form of divorce given by a Rabbinical court to two spouses domiciled in Israel whose law recognised the divorce as valid though, as was expressly

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5. This decision was followed by Lowe J. of the Supreme Court of Victoria in Mandel v. Mandel [1955] V.L.R. 51. It may be noted that in New Zealand the Divorce and Matrimonial Causes Act 1928 s.12A(2) expressly refers to this possibility of the recognition in the Courts of New Zealand of foreign divorces "otherwise than by judicial process."

pointed out, it was in no sense a judicial investigation consisting merely of the handing to the wife of a bill of divorcement at the Rabbinical court.

The third ground, abovementioned, namely unilateral action, also came to be recognised as untenable (at least in any absolute form) as English courts themselves began to dispense with personal service and notice to the respondent in divorce proceedings.[6] Indeed an argument based on this ground was rejected by Barnard J. in Maher v. Maher [1951] P.342, 344-5. Here a Mohammedan domiciled in Egypt married an Englishwoman at an English registry office, deserted her and returned to Egypt where he purported to divorce her by talak. However, the Judge's refusal to recognise the divorce as valid was based on the remaining ground of the Hammersmith Registrar decision, namely that a marriage in the Christian sense could not be dissolved by a form of divorce appropriate to a polygamous union. This decision itself has been strongly criticized[7] and was not followed in Yousef v. Yousef [1957] C.L.Y. No. 515 and El-Riyami v. El-Riyami [1958] C.L.Y. No.497. Both concerned talak divorces of English marriages where the wife had before marriage been domiciled in England. In the former case the husband was domiciled in Egypt, and in the latter he was domiciled in Zanzibar. In each case the marriage was held to have been validly dissolved because divorce was valid by the law of the parties' domicile at the time of the decree.

Still more recently, in Russ v. Russ [1962] 3 W.L.R. 930, C.A., the Court of Appeal affirmed a decision of Scarman J. [1962] 2 W.L.R. 708, recognising (for the purpose of a nullity suit) the talak divorce of an English marriage between a Mohammedan domiciled in Egypt and a woman domiciled in England. After the marriage ceremony in England the parties went through a Mohammedan ceremony of marriage in Egypt and

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6. Though recognition may be refused where the foreign divorce is pronounced by a court without the knowledge of the respondent and the petitioner's fraud is the cause of the respondent's ignorance of the proceedings: See Macalpine v. Macalpine [1958] P.35.
7. E.g. see M.P.Furmston, 'Polygamy and the Wind of Change', (1961) 10 Int. & Comp. L.Q. 180, 182 and G.W.Bartholomew, Polygamous Marriages (1952) 15 Mod.L.Rev.35,45. See also Z.Cowen and D.Mendes Da Costa, Matrimonial Causes Jurisdiction (1961), at pp.82-83.

the marriage became potentially polygamous but the judges treated the case simply as one involving the question of recognising the talak dissolution of a Christian marriage. The Lords Justices distinguished the Hammersmith Registrar case pointing out that in that case, unlike in the present case, there had been no satisfactory evidence that the talak divorce was recognised by the law of the parties' domicile as an effective dissolution of the English marriage. Willmer and Donovan L.JJ. declared (and Davies L.J. agreed) that the decision in the Hammersmith Registrar case should not be regarded as laying down a universal rule that English courts will never recognise the talak dissolution of a Christian marriage. The general rule was that the status conferred on persons by the law of their domicile would be recognised in England. This was not an absolute rule and special circumstances might make it proper for a court to depart from it and refuse to apply the law of the domicile but there were no such circumstances in the present case. The Hammersmith Registrar decision may have been a proper case for the exercise of such a discretionary power but, as Willmer L.J. declared (at 939), "its application must ... be confined to cases where the facts are the same or similar". Consequently his Lordship went on to say (at 940) it was impossible to support the decision of Barnard J. in Maher v. Maher [1951] P.342.

In the present case the talak divorce was pronounced before an authorised Egyptian court official in the presence of the wife. It was recorded in the court records and judicially recognised in subsequent maintenance proceedings in Egypt. Hence the Court of Appeal was able to distinguish without much difficulty those grounds of the decision in the Hammersmith Registrar case which were based on the absence of any judicial proceeding and denial of natural justice. However both Willmer and Donovan L.JJ. referred with apparent approval to the decision in Har-Shefi v. Har-Shefi (No.2) [1953] P.220 and Donovan L.J. expressly noted (at 943) that as "later decisions have shown that English law will recognise a foreign divorce in some cases where the decree of the foreign tribunal seems to have been a long way from our notions of a judicial proceeding".

On the whole it seems that in the absence of a flagrant denial of natural justice or the like talak and other non-judicial divorces will now be recognised in English courts where there is satisfactory evidence, especially in the form of judicial recognition of the divorce in the courts of the domicile, that they are valid or recognised as valid under the law of the domicile.

The decision in Hyde v. Hyde has also raised the question whether any marriages other than those clearly and unquestionably polygamous in character fall outside the definition propounded by Lord Penzance. In Nachimson v. Nachimson [1930] P.217, C.A., a Russian marriage was upheld by the Court of Appeal though under Soviet law it could be terminated by mutual consent or at the will of one of the parties subject merely to a formality of registration. Lord Hanworth M.R. declared (at 227) that the marriage was a union of the parties to the exclusion of all others to last for life until dissolved in a manner made definite and final by registration. It was duly entered into in accordance with the forms required by the lex loci of the domicile of the parties and thus the marriage had the essential ingredients of a valid legal marriage. Romer L.J. in the same case referred (at 238) to the difficulty created by the words 'for life' in Lord Penzance's definition and pointed out that by the time of the judgment in Hyde v. Hyde the Matrimonial Causes Act 1857 had already been in operation for several years and also by that time dissolution of marriage was possible for various causes in most Christian countries. Accordingly it was clear that in deciding whether any particular union of spouses was for life the fact that the union was made dissoluble in certain events by the laws of the country where it was entered upon had to be disregarded.

In Mehta v. Mehta [1945] 2 All E.R. 690 decided six years after the Sinha Peerage case, the above judgments in Nachimson v. Nachimson were applied by analogy to allow the annulment of a marriage celebrated in India between a woman domiciled in England and a Hindu domiciled in India, the woman having gone through the ceremony under the mistaken belief that she was being coverted to the Hindu faith. The husband belonged to a sect which required monogamy. While he was with

the sect he could not by Hindu law validly take another wife, although he could, by leaving the sect and altering his faith, validly marry again and so convert his initially monogamous marriage into a polygamous one. Barnard J. declared that no distinction could be drawn between Nachimson v. Nachimson and the case before him and all that had to be looked at was the character of the marriage at its inception which was clearly monogamous; whether or not it could subsequently be got rid of or altered in accordance with the laws of different countries was irrelevant. In that way a marriage in a sense clearly potentially polygamous was taken out of the purview of Hyde v. Hyde and recognised as conferring jurisdiction on the English court to make a declaration of nullity in respect thereof.

Long before Mehta v. Mehta it had been held in Brinkley v. Attorney-General (1890) 15 P.D. 76 that a marriage may be monogamous and entitled to recognition in English courts even if one of the parties to the marriage was not a Christian. The phrase 'Christian Marriage' was only one of convenience to express the idea of union for life to the exclusion of all others. Thus in the last mentioned case the court recognised as valid a Japanese marriage between a British subject (presumably domiciled in Ireland) and a woman domiciled in Japan. Evidence was adduced and accepted by the Court that marriage under Japanese law met the requirement of a union for life to the exclusion of all others. Hannen P. pointed out (at 80) that Japan had long taken its place among civilised nations.

No evidence appears to have been given in Brinkley v. Attorney-General that at the time concubinage was recognised in Japan and allowed by its laws. In In re Ah Chong (1914) 33 N.Z.L.R. 384, 388 the Supreme Court assumed that the Japanese law must have been known to the English court which thus must have distinguished concubinage from polygamy. Acting on that basis the New Zealand court recognised a Chinese marriage although Chinese law at the time allowed concubinage and it was in fact widely practised in China.

A different view of concubinage in China was taken in

Malaya[8] and in Canada[9], where Chinese marriages were assumed to be potentially polygamous, the union with the concubine or t'sip being taken as of a permanent nature under Chinese law. Although that position now appears to be out of date since the prohibition of concubinage by law in China in 1931 and although a Chinese marriage was in fact subsequently recognised in New Zealand on that basis (regardless of whether or not concubinage amounted to polygamy[10]), the early Canadian cases remain of value as showing how far Canadian courts were prepared to go in recognising for various purposes marriages they considered polygamous or potentially polygamous.

Thus in Yew v. Attorney-General for British Columbia [1924] 1 D.L.R. 1166, the British Columbia Court of Appeal recognised the status as wives of two women married to the deceased in China in accordance with Chinese law, the lex domicilii of the parties, for the purpose of granting exemption from succession duty to both of them as 'wives' under the local Succession Duty Act. As has been pointed out[11], this decision went further than any English decision to date insofar as recognition was conferred on both the wives of a de facto polygamist. Hyde v. Hyde was distinguished by the Canadian courts as not applying to matters of succession and legitimacy. Martin J.A. pointed out (at 1172) that "the former ecclesiastical conception of 'Christian marriage' must be altered to conform to ... the 'wider and more modern view of International and Imperial relations and necessities.' "

In a more recent case, Re Leong Ba Chai [1953] 2 D.L.R. 766, the same Canadian court (which was upheld on appeal by the Supreme Court of Canada [1954] 1 D.L.R. 401 (S.C. of Canada)) recognised as legitimate for the purposes of the local Immigration Act the son of a domiciled Chinese resident in Canada though the son was the offspring of

8. See Choo Ang Chee v. Neo Cham Neo (1908) 12 S.S.L.R. 120.
9. See generally G.W.Bartholomew, Recognition of Polygamous Marriages in Canada (1961) 10 Int. & Comp. L.Q. 305, 313-327.
10. Mong Kuen Wong v. May Wong [1948] N.Z.L.R. 348.
11. G.W.Bartholomew, loc. cit., 317.

the father's union with a second or concubine wife entered into before 1931. As the son was legitimate by the law of China, the law of the father's domicile, which recognised the status of secondary wives at the time of the second marriage, the principle of In re Goodman's Trusts (1881) 17 Ch.D. 266, C.A., was held to apply. Thus the Canadian court anticipated the decision in Bamgbose v. Daniel [1955] A.C. 107, adding further support to a restrictive interpretation of the old English cases.

The liberal attitude of the Canadian courts is also shown by a number of early decisions recognising Red Indian marriages - although these were regarded as potentially polygamous - until polygamy was made illegal and a criminal offence at the end of the 19th century by legislation which was held to apply to Indians (as well as to others) regardless of their tribal customs. In the leading case of Connolly v. Woolrich (1867) 11 Lower Can.Jur. 197 (Superior Court, Montreal), Monk J. declared that the existence of polygamy among the Cree Indians could not invalidate an Indian marriage between a woman of that tribe and a white Canadian as the marriage was not in fact polygamous. This decision was expressly followed by another Canadian judge, Whetmore J. in R. v. Nan-e-quis-a-ka (1889) 1 Terr. L.R. 211. It is submitted that this view, that a marriage must be de facto polygamous in order to be denied recognition at all, is untenable as it is opposed to the express language of Lord Penzance in Hyde v. Hyde, whose ruling on this point has never been doubted by an English court. However as Connolly v. Woolrich and the other cases cited did not involve petitions for matrimonial relief, they may be explained on the basis that recognition was extended to the Indian marriages involved for some purpose falling outside the scope of the decision in Hyde v. Hyde.

The legal position of Indian marriages in the United States, which are often potentially polygamous under tribal customs, is very different from the position in Canada. As Marshall C.J. declared in Cherokee Nation v. The State of Georgia (1831) 30 U.S. 1, 16:

> the condition of the Indians in relation to the

> United States is perhaps unlike that of any other two people in existence.... They have been uniformly treated as a State from the settlement of our country.

In a long line of decisions American courts have held that marriages between tribal Indians celebrated according to the laws and customs of their tribes are to be recognised in the absence of a Federal statute to the contrary. The same rule has been held to apply to marriages between a white man and an Indian celebrated according to Indian custom at the place where the tribe was located.[12] Furthermore only such Federal legislation applies to Indians and Indian marriages in the United States as has been made so applicable in express terms. Thus in U.S. v. Quiver (1915) 241 U.S. 602, 605-6, the Supreme Court of the United States of America held that a Federal Court had no jurisdiction to entertain the prosecution of an Indian for adultery committed on an Indian reservation, as none of the statutes which dealt with bigamy, polygamy, adultery, fornication or incest referred in terms to Indians as such. Van Devanter J., delivering the opinion of the Court, pointed out that these matters had always been left to the tribal laws and customs and to such preventive and corrective measures as could reasonably be taken by the administrative officers. This view is embodied in the Restatement of The Law of Conflict of Laws (1934) (para.128).

As regards the recognition of other types of polygamous marriages in the United States, the view held by American text-writers and commentators appears to be that matrimonial relief in the form of divorce, the right to maintenance, or the privilege of cohabitation would not be granted in the United States to one of the spouses, as such marriages are regarded,as utterly repugnant to public policy and morals.

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12. See H.F.Goodrich, Handbook of the Conflict of Laws (3rd ed., 1949) 372-374.

However, such a foreign matrimonial union, if valid by the lex loci celebrationis, may nevertheless be recognised in the United States for purposes of legitimacy, succession or the like[13] for, as Professor Lorenzen has pointed out: "... it seems that our courts cannot completely ignore the fact that polygamy is a lawful institution among a large body of people on the face of the globe." Loc. cit., 474. This view is supported by the case of Royal v. Cudahy Packing Co. (1922) 195 Iowa 759, where the Supreme Court of Iowa held entitled to compensation as a widow under the Workmen's Compensation Act the wife of a Mohammedan marriage celebrated in Syria in accordance with the Mohammedan religion, that marriage being potentially polygamous under Mohammedan law and custom. The decision in each case may well depend on whether recognition for the purpose at hand 'can be brought into harmony with the legal order of the forum'. (1923) 32 Yale L.J. at 477.

It may be noted that the Second Restatement, Tentative Draft No.4, para.132 provides that a marriage will be invalid everywhere, even if it complies with the requirements of the state where the marriage took place, if it is invalid under the law of the state of paramount interest, though, by Comment (b) thereto, only where the over-riding public policy of the state of paramount interest so requires, should this rule be invoked; and the case of polygamous marriages is given as an instance where the rule might be invoked. The state of paramount interest is defined as the state where at least one party is domiciled at the time of the marriage and where both parties intend to make their home thereafter. The old rule contained in the First Restatement, that a polygamous marriage will be invalid everywhere if against the law of the state of domicile of either party was thus amended by the new draft so as to limit the application of the invalidity rule.

Polygamous marriages in a territory or other place over which the United States have exclusive jurisdiction became a

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13. See Goodrich, op.cit., 374-375; G.W.Stumberg, Principles of Conflict of Laws (1937) 258, 266-267; E.G.Lorenzen, Polygamy and the Conflict of Laws (1923) 32 Yale L.J. 471.

criminal offence punishable by fine and imprisonment by legislation specifically enacted against polygamy approved by Congress on March 22, 1882, (1882) 22 Stat.30, Ch.47. Even earlier, in 1862 (July 1) Congress had passed an Act (1862) 12 Stat.501, ch CXXVI, which (inter alia) provided for the annulment of acts of the legislature of Utah which established, supported, maintained, shielded, or countenanced the practice of polygamy. By the same Act of Congress it was provided that every person with a living husband or wife who married another person in a territory of the United States, or other place over which the United States had exclusive jurisdiction was guilty of bigamy and liable to fine and imprisonment (subject to a proviso relating to annulment or valid dissolution of an existing marriage or the absence for five years of the other spouse without being known to be alive).

Under the 1882 statute persons who came within the scope of the above enactment, as well as persons who simultaneously or on the same day married more than one woman in a territory or other place over which the United States had exclusive jurisdiction, became guilty specifically of the offence of 'polygamy' as distinct from the offence of 'bigamy' (subject to a similar proviso as contained in the 1862 Act). However in 1890 the Mormon church authorities publicly renounced the doctrine of polygamy as a tenet of their faith. That renunciation was accepted by President Harrison who in 1893 by Proclamation granted a general amnesty and pardon to all those liable to the penalties of the law before November 1, 1890 who have since abstained from 'such unlawful cohabitation under the colour of polygamous or plural marriage'.[14] The renunciation received judicial recognition in Toncray v. Budge (1908) 14 Idaho 621, 654-655, where the Supreme Court of Idaho held that the disqualification from civil office contained in the State Constitution, as regards persons practising polygamy or belonging to an organisation teaching such doctrine, did not apply to members or adherents of the Mormon faith as such. Their belief in the celestial or patriachal marriage as remaining binding not only during this life but throughout the life to come was a matter of

14. Vol. IX, Messages and Papers of the Presidents, p.368 (Compilation by J.D.Richardson, 1898).

belief with reference to a future existence not prohibited by the Constitution.

Finally it may be noted that by Act of February 5, 1917 '... polygamists, or persons who practice polygamy or believe in or advocate the practice of polygamy' are excluded from admission to the United States. (1917) 39 Stat.875, ch.29; U.S.C. (1958 ed.) 869 - s.1182 (a) para.11. This however has not been applied to prevent the entry for temporary study purposes of students from Mohammedan countries who may well believe in polygamy. There is a qualification to the above rule that it 'shall not be applicable to any alien who in good faith is seeking to enter the United States as a non-immigrant' (At 872 - s.1182 (d) para.1). An exemption is also granted to accredited officials of foreign governments, their immediate families and servants. (At 873 - s.1182(d) para.8).

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