COMMENTS

CAPACITY TO CONTRACT A POLYGAMOUS MARRIAGE

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Many of the issues relating to polygamous marriages in the conflict of laws have been dealt with only very occasionally by the courts, and commentators have been free to develop their own, often differing, views on the choice of law questions involved. One issue, however, in which there had appeared to be increasing unanimity on all hands is the law governing capacity to enter into a polygamous marriage. The view expressed by Dr Morris,[1] that this question is governed by the "personal law", or law of each party's ante-nuptial domicile, has increasingly gained favour among other academic commentators, and apparently in the Parliaments of Australia and the United Kingdom.

In the seventh edition of Professor Cheshire's *Private International Law*[2] it may be assumed, although it is not entirely clear, that the learned author would refer the question of capacity to contract a polygamous marriage to the same law as that which he suggests governs all aspects of the essential validity of a marriage—*viz.* the law of the intended matrimonial home. But in the eighth edition of the same work, under the joint editorship of Professor Cheshire and Mr North, it is unequivocally submitted that "capacity to enter a polygamous marriage, potential or actual, should be referred to that law which governs capacity to marry generally, i.e. the law of both parties' ante-nuptial domicile."[3]

Professor Nygh[4] appears at first sight to disagree, since he argues that this question should be referred to the *lex loci celebrationis*. But when he goes on to expand what he means by this term, the learned author appears to mean no more than the law of the actual matrimonial home. It is stated that spouses must be given a degree of choice in the conditions under which they enjoy their marital status, and that if they choose to live under the polygamous conditions prevailing in a certain country, then that choice ought to be given effect to. One would find it hard to disagree with these sentiments, but it is submitted that it is equally true to say that if spouses choose to live in a certain country, then they are likely to be regarded as being domiciled there.

Further academic support for the view that the ante-nuptial domiciliary law is the proper one to which reference ought to be made comes from the English Law Commission's *Report on Polygamous Marriage*[5] which states that if a person domiciled in England goes through a

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[1] *The Conflict of Laws* (1971), 121; Dicey and Morris, *The Conflict of Laws*, 8th ed. (1967), Rule 35, 283.

[2] At 288.

[3] Cheshire & North, *Private International Law*, 8th ed. (1970), 303.

[4] *Conflict of Laws in Australia*, 2nd ed. (1971), 440.

[5] Law Com. No. 42, 1971.

polygamous form of marriage abroad, that marriage will be regarded as void under English law.[6]

It has already been pointed out that authority for these propositions is, to say the very least, tenuous, and it is submitted that it does not stand up to a critical examination. One of the oldest cases, and one relied on by both Dr Morris and the Law Commission, is *Re Bethell*,[7] which concerned the legitimacy of a child born of a union between Bethell, a domiciled Englishman, and Teepoo, a native of the Baralong tribe domiciled in Bechuanaland. The nub of the judgment delivered by Stirling J., it is submitted, is his conclusion[8] that

> I am bound to hold that a union formed between a man and a woman in a foreign country, although it may there bear the name of a marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England unless it be formed on the same basis as marriages throughout Christendom, and be in its essence 'the voluntary union for life of one man and one woman to the exclusion of all others'.

On the evidence before him, his Lordship concluded that Bethell's marriage was a marriage "in the Baralong sense only, and was not a valid marriage according to the law of England."[9] The case, it is contended, is concerned with the recognition of foreign polygamous marriages, and not with the law governing their validity, and it must, in the light of subsequent cases,[10] be regarded as confined to its own particular facts.

The same argument can also be made against *Re Ullee*,[11] which is cited by Dr Morris and by Cheshire and North. The principal matter before Chitty J. was a mother's right to the custody of her children, the issue of the Mohammedan marriage of a domiciled Englishwoman with the Nawab Nazum of Bengal. Dr Morris quotes Chitty J. as saying "[the marriage] was not a marriage binding on any spouse of English domicile" but he does not quote the reason for his Lordship's views—"the reason being that it was not intended to be a marriage. That was so decided in the case of *Hyde* v. *Hyde* (1866) L.R. 1 P. & D. 130, where Lord Penzance held that the English courts could not take judicial cognizance of a Mormon marriage." It may freely be admitted that Chitty J. took a view of *Hyde* v. *Hyde* which has subsequently been shown to be wrong but this merely serves to strengthen the argument that no weight can be placed on any of his Lordship's *dicta*.

The Law Commission find support for their views in *Risk* v. *Risk*,[12] but Barnard J. there held that he had no jurisdiction to declare a

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[6] *Id.*, 8, para. 18.
[7] (1887) 38 Ch.D. 220.
[8] *Id.*, 234.
[9] *Id.*, 236.
[10] See, *e.g. The Sinha Peerage Claim* [1946] 1 All E.R. 348n. and *Bamgbose* v. *Daniel* [1955] A.C. 107, in which the House of Lords and Privy Council respectively upheld the legitimacy of the children of valid polygamous marriages.
[11] (1885) 53 L.T. 711, 712.
[12] [1951] P. 50.

polygamous marriage to be either void or valid. The final English authority, relied on by both Dr Morris and the Law Commission, is *Ali* v. *Ali*[13] in which Cumming-Bruce J. held that the husband petitioner "has, by operation of the personal law he has made his own, precluded himself from polygamous marriage to a second wife . . . ."[14] But his Lordship was careful to go on to say that

> This is because English law recognizes 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.

His Lordship clearly regarded either domicile or intended matrimonial residence (or perhaps both) as being the necessary determinants of capacity.

Dr Morris and Cheshire and North are of the opinion that some of the comments of Lord Mackay in the Scots case of *Lendrum* v. *Chakravarti*[15] support the view that capacity to contract a polygamous marriage depends on each party's domiciliary law. The pursuer in this case sought a declarator of the nullity of her marriage to the defender. The pursuer was, at least before her marriage, domiciled in Scotland, while the defender was domiciled in British India, and was a Hindu by religion. The marriage took place in a church in Glasgow. The pursuer's principal argument was that she had given no true consent to the marriage, and it was on this ground that Lord Mackay held in her favour.[16] But her other argument was that the husband, being subject to a law which permitted polygamy, was unable to enter into a monogamous marriage. Lord Mackay rejected this view, and held the marriage to be monogamous, but he did let fall the comment:[17]

> If the contract between these two parties was one which recognized the defender's right to enter into subsequent and co-incident marriages, then it was not a Christian marriage or a monogamous one, and it would offend the law of capacity of the wife. She could not entertain such a contract.

It goes without saying that this comment is *obiter*, but in view of the cases referred to throughout the judgment, his Lordship clearly considered that he was expounding the law of both England and Scotland.

There are two further cases, both from South Africa, cited by Dr Morris alone in support of his view: *Seedat's Executor* v. *The Master (Natal)*[18] and *Hamid* v. *Minister of the Interior*.[19] But in *Seedat's* case the question of the validity of the deceased's second (polygamous) marriage was not argued before the Appellate Division,

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[13] [1968] P. 564.
[14] *Id.*, 577.
[15] 1929 S.L.T. 96.
[16] On this point the decision was overruled in *MacDougall* v. *Chitnavis* [1937] S.C. 390.
[17] 1929 S.L.T. 96, 99.
[18] [1917] A.D. 302.
[19] 1954 (4) S.A. 241.

and the main thrust of the judgment was that no foreign polygamous marriage ought to be recognized in South Africa; and in *Hamid's* case the Transvaal Provincial Division was concerned solely with the applicant's legitimacy, a question which *Seedat's* case shows to be not necessarily dependent on the validity of the marriage between the applicant's parents.

One may conclude, therefore, that there is only the most tenuous judicial support for the academic view that the *lex domicilii* governs capacity to enter into a polygamous marriage. It is also submitted that the cases cited by Professor Nygh do not give any real support to the views which he expounds. Those cases are *Kaur* v. *Ginder*[20] and *Sara* v. *Sara*;[21] and it is true that the only explanation of these decisions is that the respective Judges considered capacity to contract a polygamous marriage to be governed by the *lex loci celebrationis*. But in *Kaur* v. *Ginder* the parties remained in the country of celebration for only some twelve months after the marriage, thereafter continuing to live in British Columbia, and in *Sara* v. *Sara* they moved within a few weeks of the marriage from the *locus celebrationis* to British Columbia. One could scarcely say, in either case, that the country of celebration was the actual matrimonial home of the couple, and yet it is to the law of this latter place which Professor Nygh would look to determine the question of capacity. One might add that the much earlier Canadian case of *Connolly* v. *Woolrich*,[22] to which Professor Nygh does not refer, appears in effect to support his views, in that the polygamous marriage in that case was held valid by reference to the *lex loci celebrationis*, but that place was also the country in which the parties set up their matrimonial home for some 26 years.

Every academic commentator makes reference to the fact that in *Kenward* v. *Kenward*[23] Denning L.J. devoted a considerable part of his judgment to expressing the view that capacity to contract a polygamous marriage ought to be governed by the law of the parties' intended matrimonial home. It is well known that the case concerned the formal validity of a marriage in Russia, which it was not suggested was even potentially polygamous, and that his Lordship's views thus have no bearing on the decision of the case. Less comment, however, is made upon the fact that in all but one of the illustrations Denning L.J. gives of his thesis, he refers to marriages which take place in a country in which the parties intend to continue living. His Lordship would appear to be more in favour of the law of the actual matrimonial home, rather than that of the intended matrimonial home, governing the essential validity of a polygamous marriage. It is also often overlooked that in the same case Sir Raymond Evershed M.R. remarked that the

[20] (1958) 13 D.L.R. (2d) 465 (B.C. Sup. Ct.).
[21] (1962) 31 D.L.R. (2d) 566 (B.C. Sup. Ct.).
[22] (1867) 11 Lower Canada Jurist 197; a synopsis of the report is appended as a note to Beckett, "The Recognition of Polygamous Marriages under English Law" (1932) 48 L.Q.R. 341, 369.
[23] [1951] P. 124, 144-146.

marriage before the court might in some circumstances be "for a domiciled Englishman no more a marriage than would be a polygamous marriage."[24] The comments of Denning L.J. have been applied by Rudd J., in the Supreme Court of Kenya, in *Re Howison's Application*,[25] but in the circumstances of that case the court was not called upon to decide any question of the conflict of laws, and hence the support of Denning L.J.'s comments was *obiter*. It may also be observed that after applying these views to the facts before it, the court went on to say that the marriage was equally valid, under Kenyan conflict of laws rules, on the application of the ante-nuptial domiciliary laws of each party.

It will be seen from the above that none of the major academic writers on the conflict of laws has had any clear authority on which to base his views, but that the trend of judicial thought appears to lean in favour of the application of the law of each party's domicile immediately prior to the marriage. It is suggested that if, to borrow from Denning L.J.'s illustration in *Kenward* v. *Kenward*, two persons go to a particular country, marry there and intend to continue living there, they ought to be regarded as being domiciled there, and that the law of that country, *qua lex domicilii*, ought to govern the essential validity of their marriage. It has been mentioned above that this view is apparently supported by the Parliaments both of Australia and of the United Kingdom.

In 1965 the Australian Parliament enacted s. 6A of the Matrimonial Causes Act 1959-1965, under sub-section (1) of which a court may exercise matrimonial jurisdiction over a limited number of potentially polygamous marriages. Sub-section (2) goes on to provide:

> 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 domicile of the parties at the time the union took place permitted polygamy on the part of the male party.

Thus, whatever law may be applicable to test the essential validity of a polygamous marriage for the purposes, say, of succession, legitimacy of issue, workmen's compensation, *etc.*, it is clear that unless each of the parties to a polygamous marriage has the capacity, under the law of their respective domiciles, to enter into such a marriage, no court in this country will be able to regard it as valid for the purposes of exercising matrimonial jurisdiction over it.[26]

The United Kingdom Parliament has recently indicated a preference for the same choice of law rule. Acting on the recommendations contained in the Law Commission's *Report on Polygamous Marriages*, referred to above, that Parliament has passed the Matrimonial Proceed-

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[24] *Id.*, 136.
[25] [1959] E.A.L.R. 568.
[26] The only example to date of the operation of s. 6A(2) is *Crowe* v. *Kader* [1968] W.A.R. 122.

ings (Polygamous Marriages) Act 1972, s. 1(1) of which abrogates the rule in *Hyde* v. *Hyde*[27] by providing that:

> A court in England and Wales shall not be precluded from granting matrimonial relief or making a declaration concerning the validity of a marriage by reason only that the marriage in question was entered into under a law which permits polygamy.

And s. 4 of the same Act makes it quite plain that the legislature views capacity for polygamous marriage as dependent on the *lex domicilii*, by providing:

> In section 1 of the Nullity of Marriage Act 1971 (which states as respects England and Wales the grounds on which a marriage taking place after the commencement of that Act is void) after paragraph (c) there shall be added—
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> "(d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.
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> For the purposes of paragraph (d) of this section a marriage may be polygamous although at its inception neither party has any spouse additional to the other."

It is submitted that there are sound policy reasons to support this clear legislative and academic view that capacity to enter into a polygamous marriage ought to be governed by the parties' ante-nuptial domiciliary laws. In the first place, it now appears to be well settled[28] that capacity to enter into a monogamous marriage is governed by the domiciles of the parties, and no sound reason can be seen for adopting a different test in relation to polygamous marriages. The reason for applying the dual domicile test to monogamous marriages is that the country to which a person "belongs" and by the laws of which he is primarily controlled is the best judge of such matters as the age at which he may marry and the persons whom he may or may not marry on grounds of consanguinity or affinity. In *Padolecchia* v. *Padolecchia*[29] it was held that the law of the domicile is also competent to determine whether a man is prohibited from entering into a second monogamous marriage by reason of the fact that he is still party to a subsisting monogamous marriage. It is submitted that there are no social or public factors which distinguish that question from the similar one of whether a man is able to enter into a second marriage because his first one was polygamous. Professor Nygh[30] considers that "monogamy and polygamy represent the same status of 'marriage', though they represent different conditions of marriage" and he therefore argues that the question of capacity ought to be referred to the *lex loci celebrationis*. But it may be argued that a man's ability to marry his niece or his cousin raises the same issues as his ability to marry one woman or

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[27] (1866) L.R. 1 P. & D. 130.
[28] Since *Padolecchia* v. *Padolecchia* [1968] P. 314.
[29] [1968] P. 314.
[30] *Conflict of Laws in Australia*, 2nd ed. (1971), 441.

several concurrently, or that his capacity to marry one wife who is not of marriageable age[31] is essentially similar to his capacity to marry several wives of full age, and that all these matters ought to be governed by the same law.

It has already been suggested that Professor Nygh's reference to the *"lex loci celebrationis"* is in fact a reference to the law of the parties' actual matrimonial home and not to the place at which the ceremony happened to take place. It is not disputed that the *lex loci*, as the place at which the marriage itself was celebrated, is the proper determinant of the forms of that marriage, since persons who are in a particular country at the time of their marriage ought, in general, to submit themselves to the formal requirements laid down by the laws of that country for the celebration of marriages. But no one has suggested that the *lex loci*, in its traditional sense, ought to govern any matter other than formal validity. The main reason is that this would facilitate evasion of the laws of the country to which a person more properly "belongs", as was made clear in 1861 by the House of Lords in *Brook* v. *Brook*.[32]

Mention was made, at the beginning of this comment, of the fact that Professor Cheshire had apparently formerly espoused the law of the intended matrimonial home as the proper law to determine capacity for polygamy, but it was also pointed out that in the eighth edition of Cheshire and North this view has been abandoned. With great respect, one cannot but applaud the view taken in the latest edition of this work. If it is accepted that capacity for monogamous marriage is governed by the parties' domiciles, it is difficult to see why capacity for polygamous marriage should be so much easier to acquire, by merely intending to live in a country in which polygamy is permitted, without necessarily carrying that intention into effect. Professor Cheshire's earlier views have already been cogently criticized by Dr Morris[33] and it would therefore appear pointless further to pursue the merits or otherwise of these views, were it not for the surprising decision of Cumming-Bruce J. in *Radwan* v. *Radwan (No. 2)*[34] which clearly and unequivocally determines capacity to enter into a polygamous marriage by reference to the law of the intended matrimonial home.

The respondent husband in this case had a domicile of origin in Egypt and he retained that domicile until 1959, when he acquired a domicile of choice in England. His religion since childhood had been Muslim and all his three marriages were in Mohammedan form and were regarded as polygamous in character. His first marriage was to an Egyptian girl, and took place in Cairo in 1947; it was dissolved by the recognized Mohammedan form of *talaq* some five months after its celebration. The husband's second marriage was also to an Egyptian

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[31] *Cf. Pugh* v. *Pugh* [1951] P. 482.
[32] (1861) 9 H.L. Cas. 193.
[33] Especially in Dicey & Morris, *op. cit.*, 256-258.
[34] [1973] Fam. 35.

girl, and again took place in Cairo, but in August 1951. Approximately six weeks after this second marriage, and while it was still subsisting, the husband celebrated his third marriage, this time before the Egyptian Consul-General in Paris; this marriage was to the petitioner in the present case and was the one which Cumming-Bruce J. was asked to dissolve under the terms of the Divorce Reform Act 1969 (Eng.). In order to complete the picture of the husband's matrimonial adventures, it may be added that he divorced his second wife by *talaq* in Cairo in June 1952. The petitioner in this case was found by his Lordship to have been domiciled in England immediately before her marriage to the respondent, and to have been at that time a member of the Church of England.

It has already been observed that the court could exercise jurisdiction over this polygamous marriage, because of the enactment of s. 1(1) of the Matrimonial Proceedings (Polygamous Marriages) Act 1972 (U.K.). And further, the amendment made by that Act to the Nullity of Marriage Act 1971 (Eng.) did not apply, since the marriage had taken place before the commencement of that latter statute. Again, it has been noted above that the state of authority binding on Cumming-Bruce J. was such that the matter was regarded as *res integra.*

Counsel for the Queen's Proctor argued that the marriage was void, since the wife's pre-marital domicile in England prohibited her from entering into a polygamous marriage, but his Lordship held that this question of capacity was to be determined by the law of Egypt, as the intended matrimonial home of the parties, and that by that law it was valid. His Lordship distinguished those cases which support the dual domicile test by saying that they were concerned solely with capacity for monogamous marriage, and did not therefore require him to take the same view when dealing with a person's capacity to enter into a polygamous marriage. With the greatest respect to the learned Judge it is submitted that, as already argued, there is no difference between these different kinds of capacity.

Cumming-Bruce J. found support for his views principally in the speeches in *Brook* v. *Brook*[35] and *Warrender* v. *Warrender*[36] and, to a very much lesser extent, in some *dicta* in *De Renneville* v. *De Renneville*[37] and *Kenward* v. *Kenward.*[38] It may be remarked that *Brook* v. *Brook* was the only one of these cases in which the question of capacity to marry was in issue and they may therefore appear to be of less relevance than cases which were directly concerned with capacity to marry, but which his Lordship distinguished. It may further be remarked that one has but to read the judgments in *Brook* v. *Brook* and in *Warrender* v. *Warrender*, where passing allusions are made to

[35] (1861) 9 H.L. Cas. 193.
[36] (1835) 2 Cl. & F. 488.
[37] [1948] P. 100, 114 *per* Lord Greene M.R. and 121 *per* Bucknill L.J.
[38] [1951] P. 124, 144-146 *per* Denning L.J.

"Turkish or other marriages among infidel nations"[39] to realize that their Lordships had nothing further from their minds than the question of the possible validity of a polygamous marriage. And even if, in some strange way, these latter two cases laid the common law foundations for the determination of the law governing capacity to contract a polygamous marriage, it is remarkable that no other court over the last 110 years, when considering the general question of capacity to marry, has caught so much as a glimpse of these foundations.

After reading the judgment in *Radwan* v. *Radwan* one may be left with the impression that the consequences to Mrs Radwan of finding her marriage void were such that this is a hard case which has made bad law; and that it is ironic that Professor Cheshire's views have found a judicial champion only after their author has abandoned them. In any event, it is hoped that the arguments adumbrated above are sufficient to indicate that *Radwan* v. *Radwan* ought not to be followed in this country.

[39] The phrase is that of Lord Brougham in *Warrender* v. *Warrender* (1835) 2 Cl. & F. 488, 532.