

Polygamous Marriages and the Principle of Mutation in the Conflict of Laws

M. L. Marasinghe*

I. Introduction

Polygamy is considered primarily a legal concept, giving rise to a particular legal status, but in fact polygamy symbolises a particular cultural and religious heritage.¹ Religious creeds traceable to Islam² limit the plurality of wives to four. Orthodox Hinduism has no such limitation³ and Buddhism, both of the Mahayana and the Theravada schools, sets out no rules at all to govern the institution of marriage; the Mahayanists practice polygamy mainly as a cultural tradition which is not prohibited by religion. African native law and custom espouse polygamy, both as a religious fact and as a cultural facet of African tribal life.⁴ It must therefore be emphasized that when immigrants from the Third World arrive in Canada, they bring with them the belief that polygamy is not only defensible, but also approved by their culture and religion.

Equally well rooted in Western culture and religion is the institution of monogamy represented by common law tradition.⁵ The accommodation of polygamy and its manifold consequences present a fundamental difficulty for the common law system. It is therefore proposed to examine the present position of polygamy in the common law world in order to determine what changes were necessary to accommodate this institution. An enquiry of this nature is particularly relevant in Canada for at least two reasons: first, immigration from the Third World in recent years has produced a large number of new immigrants whose cultural and religious heritage

* Professor of Law, University of Windsor, Barrister and Solicitor (Osgoode Hall) and Barrister-at-Law of the Inner Temple, London, England. Work on this was commenced during my tenureship of a Max-Planck-Institut Senior Research Fellowship at Hamburg, West Germany.

¹ Mayne, *Treatise on Hindu Law and Usages*, 11th ed. (1953), 172-73.

² *Viz*, Khojas, Bohoras, Memons, Ismailis, Ithna-Asharis, Shias. Of these principal creeds traceable to Islam, Ismailis alone have discarded the institution of polygamy. They are the followers of the Aga Khan.

³ *Supra*, note 1.

⁴ Farran, *Matrimonial Laws of the Sudan* (1963), chs.1 and 3.

⁵ *Warrender v. Warrender* (1835) 2 Cl & Fin. 532, 6 E.R. 1239 (H.L.) *per* Lord Brougham; but see Stone, *Sowa v. Sowa: Maintenance of Family Dependents* (1961) 24 Mod.L.Rev. 500, 501, for a contrary view.

recognizes the institution of polygamy; and second, the rarity of Canadian judicial pronouncements leaves this area of the law somewhat lacking.

More than a decade ago, Professor Mendes da Costa prefaced his article⁶ on polygamous marriages and the conflict of laws with a quote from *Sara v. Sara*:⁷

Our country welcomes immigrants, they become naturalized and take an oath to observe the laws of Canada yet they cannot have the benefit of those laws because of the polygamous or potentially polygamous nature of a marriage ceremony which our Courts recognize as valid for purposes of succession and legitimacy but not for any remedy, adjudication or relief of the matrimonial law.⁸

Since this passage was written and Professor da Costa's article was published, Australia,⁹ New Zealand¹⁰ and the United Kingdom¹¹ have by legislation extended matrimonial relief to parties of a polygamous marriage. Canada, however, appears to have remained faithful^{11a} to Lord Penzance's *dictum* in *Hyde v. Hyde*;¹² all parties to a polygamous or to a potentially polygamous marriage are precluded from seeking matrimonial relief from common law courts.¹³ At least until 1962,¹⁴ the Canadian judges had considered themselves bound to follow the rule in *Hyde v. Hyde*. In *Lim v. Lim*,¹⁵ despite the regret expressed by Coady J., the British Columbia Supreme Court held:

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

⁶ (1966) 44 Can.Bar Rev. 293.

⁷ (1962) 31 D.L.R. (2d) 566 (B.C.S.C.); aff'd on different grounds (1962) 36 D.L.R. (2d) 499 (B.C.C.A.).

⁸ *Ibid.*, 573 per Lord J.

⁹ See *Matrimonial Causes Act 1965*, No. 99, s.3, now *Matrimonial Causes Act 1959-1973*, s.6A. (Austl.). See also Jackson, *Monogamous Polygamy* (1966) 40 A.L.J. 148.

¹⁰ See *Domestic Proceedings Act 1968*, No. 62, s.3 (N.Z.).

¹¹ See the *Matrimonial Proceedings (Polygamous Marriages) Act 1972*, 1972, c.38, s.1(1) (U.K.), as am. by the *Matrimonial Causes Act 1973*, 1973, c.18, s.47 (U.K.).

^{11a} See Bartholomew, *Recognition of Polygamous Marriages in Canada* (1961) 10 Int.& Comp.L.Q. 305.

¹² (1866) L.R. 1 P.& D. 130.

¹³ *Ibid.*, 135-36.

¹⁴ That is, until *Sara v. Sara*, *supra*, note 7. At p. 572 of that judgment, Lord J. while recognising the rule in *Hyde v. Hyde*, proceeded to depart from that view by adopting the view expressed in *Dicey's Conflicts of Laws* 7th ed. (1958), 271-72.

¹⁵ [1948] 2 D.L.R. 353 (B.C.S.C.).

country, enjoyed the full civil status of wife, should be denied that status under our law, when, after a residence here of almost 30 years with the defendant as her husband, and after acquiring domicile in this country she seeks against her husband the remedy which our law provides to a wife to claim alimony.

It is understandable only on one basis set out in the *Hyde v. Hyde* case. However, it seems to me that there is no decided case in Canada which justifies me in taking the view that she has that status recognized by our law which will entitle her to maintain this action, and I do not think that I can in face of the decisions venture to blaze a new trail. . . . The implications arising from refusal to recognize 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.¹⁶

However, in 1962 the same Supreme Court in *Sara v. Sara* felt compelled to depart from such reasoning because "there [were] signs of a more modern and enlightened view being accepted such as is contained in Dicey".¹⁷

II. The recognition of polygamous marriages for the purpose of matrimonial relief

Courts have consistently held that parties to a polygamous or a potentially polygamous union cannot seek matrimonial relief from the common law. Lord Penzance wrote in *Hyde v. Hyde*:

I conceive 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.¹⁸

Now it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy. . . .¹⁹ We have in England no law framed on the scale of polygamy, or adjusted to its requirements. . . .²⁰

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 the polygamous unions, nor 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.²¹

¹⁶ *Ibid.*, 357-58.

¹⁷ *Supra*, note 7, 572. Lord J. quotes extensively from Dicey, *supra*, note 14, 272, the passage which lays down the germ of the doctrine of conversion. *Sara v. Sara* is perhaps one of the earliest decisions to grasp that principle.

¹⁸ *Supra*, note 12, 133.

¹⁹ *Ibid.*, 135.

²⁰ *Ibid.*, 136.

²¹ *Ibid.*, 138.

In succession and legitimacy, "marriage" has been defined so as to include polygamy, while in matrimonial matters, including matrimonial relief, have traditionally followed the *Hyde v. Hyde* rule. As recently as 1961, the English Court of Appeal in *Sowa v. Sowa*²² observed that "if the ceremony is polygamous then it does not come within the word 'marriage' for the purposes of the Acts relating to matrimonial matters, nor do the parties to it come within the words 'wife', 'married woman' or 'husband'.²³ In many decisions following *Hyde v. Hyde*,²⁴ the courts have often expressed regret that an innocent but victimized party had to be denied relief only because the character of the marriage in question was polygamous.

However, commencing with an opinion tendered by Lord Maugham to the Committee of Privileges in the *Sinha Peerage* case,²⁵ decisions developed around the principle that notwithstanding the fact that a marriage may be potentially polygamous at its inception, it could subsequently become converted or mutated into a monogamous marriage for the purpose of attracting the matrimonial relief available under the English common law. The facts of the *Sinha Peerage* case are as follows. On May 15, 1880, Baron Sinha of Raipur married Gobinda Mohini in India, under Hindu law. The marriage was potentially polygamous since the Baron could lawfully marry additional wives²⁶ during the subsistence of his marriage to Gobinda Mohini. However, it was established as a fact that this did not take place. In 1886 the Baron and his wife embraced a particular sect of the Hindu faith called Brahma Samaj. Devotees of the sect had taken a religious vow to follow monogamy. The petitioner, Aroon Kumar Sinha, was born in 1887 to Gobinda Mohini and the Baron. By 1919 the Baron had received his knighthood and was then the Under-Secretary of State for India at Whitehall. Baron Sinha died on March 5th, 1928. Aroon Kumar Sinha thereafter petitioned the Committee for Privileges of the Privy Council that a writ of summons to Parliament be issued to him as the second Baron Sinha of Raipur. The Committee was called upon to determine whether Aroon Kumar Sinha was the lawfully begotten heir of the first Baron

²² [1961] P. 70 (C.A.).

²³ *Ibid.*, 85.

²⁴ See Pearce L.J. and Harman L.J. in *Sowa v. Sowa*, *supra*, note 22; in *Lim v. Lim*, *supra*, note 15.

²⁵ Reported as an appendix to *Baindail v. Baindail* [1946] 1 All E.R. 342, 348. The Official Law Reports of this case in the Queen's Bench series do not carry a report of the *Sinha Peerage* decision.

²⁶ Hindu Law, unlike the Muhammadan Law, does not limit the number of wives one may marry. See Mayne, *supra*, note 1.

Sinha. Lord Maugham L.C. ruled that Aroon Kumar Sinha was such an heir, relying on the 1886 conversion of his parents' marriage into monogamy. However, Lord Maugham did place two substantial limitations on the application of the rule. First, the rule had

nothing to do ... with the jurisdiction of the Divorce Court, which for reasons not difficult to understand has adopted the view that in that court the term marriage means the voluntary union for life of one man and one woman to the exclusion of all others. We are not, therefore, concerned with such cases as *Hyde v. Hyde*.²⁷

This in effect excluded the application of the wider definition of "marriage" when questions of matrimonial relief were in issue. Second, Lord Maugham restricted the "conversion marriages" to those which did not involve an actual plurality of wives:

[I]t is apparent that great difficulties may arise in questions relating to the descent of a dignity where the marriage from which heirship is alleged to result is one of a polygamous character, using the word polygamous as meaning a marriage which did not forbid a plurality of wives, and where there has been a plurality of wives. . . . Our law as to heirship has provided no means for settling such questions as these. These difficulties, however, do not arise in the present case, since the late Lord Sinha not only never purports to marry any woman except Gobinda Mohini, but, after joining the Sadhasan Brahma Samaj long before the date of the Patent, put it out of his power so to do provided that he adhered to that religion.²⁸

Notwithstanding these two limitations the power to convert had been freed from its first limitation by the nineteen sixties. In *Sara v. Sara*,²⁹ the Court decided that a potentially polygamous marriage contracted in India had been converted into a monogamous union because the parties had acquired a new domicile of choice in British Columbia. Such conversion was considered sufficient to attract the matrimonial relief available under the common law. Relying on Lord Maugham in the *Sinha Peerage* case, the Court concluded that the marriage in question was no longer polygamous and therefore was outside the prohibition established in *Hyde v. Hyde*.³⁰

The trend to disregard the first limitation on the power of conversion appears to have continued through the sixties on both sides of the Atlantic.³¹ The reasoning was based more upon an explanation

²⁷ *Supra*, note 25.

²⁸ *Ibid.*

²⁹ *Supra*, note 7.

³⁰ *Ibid.*, 575.

³¹ Notably the argument in *Sara v. Sara* that a change of domicile could effect a conversion from a potentially polygamous marriage to a valid monogamous one has been followed in *Re Hassan and Hassan* (1976) 12 O.R. (2d) 432 (H.C.). In England a number of decisions have applied this doctrine of

of the decision in *Hyde v. Hyde* than upon a justification for disregarding the first limitation. In this way, the courts began to recognize jurisdiction for matrimonial relief³² in cases where there were sufficient grounds for converting a potentially polygamous marriage into a monogamous one. Dicey and Morris succinctly summarize the present law:

The proposition laid down in *Ali v. Ali* that a potentially polygamous marriage may become monogamous if the parties acquire an English domicile is a far-reaching one. It means that all those Commonwealth immigrants living in England who are parties to a potentially polygamous marriage become entitled to English matrimonial relief as soon as they formed the intention to remain here permanently or indefinitely. The proposition may not be very logical and is difficult to reconcile with prior authority, notably with *Hyde v. Hyde* itself. But it is to be welcomed on practical grounds because it narrowed the scope of that decision.

In all these cases of conversion, the marriage was only potentially polygamous; but there seems no reason why their principle should not be equally effective to convert an actually polygamous marriage into a monogamous one, after the number of wives has been reduced to one by death or otherwise.

There is no English authority on the converse problem, namely, can a monogamous marriage be converted into a polygamous one... The answer may be that the marriage has, so to speak, the benefit of the doubt: if it is monogamous at its inception, it remains monogamous although a change of religion or of domicile may entitle the husband to take another wife; if it is polygamous at its inception, it may become monogamous by reason of a change of religion, of domicile, or of law before the happening of the events which give rise to the proceedings...³³

The cases have explained that there has not been a whittling away of the rule in *Hyde v. Hyde*; once a marriage has been converted into a monogamous one, "the barrier raised by *Hyde v. Hyde* ... no longer exists ... and the court has jurisdiction"³⁴ to decree the matrimonial relief sought. Be that as it may, the legislatures in England,³⁵ Australia³⁶ and New Zealand³⁷ have recently enacted

conversion: *Parkasho v. Singh* [1968] P. 233; *Regina v. Sagoo* [1975] Q.B. 885 (C.A.). For a critical discussion of other English cases, among them *Baindail v. Baindail*, *supra*, note 25, see *Ali v. Ali* [1968] P. 564, *Ohochuku v. Ohochuku* [1960] 1 W.L.R. 183, and Tolstoy, *The Conversion of a Polygamous Union into a Monogamous Marriage* [1968] 17 Int.& Comp.L.Q. 721.

³² *Radwan v. Radwan* [1972] 3 All E.R. 967 (Fam.Div.).

³³ *Conflict of Laws* 9th ed. (1973), 283.

³⁴ *Sara v. Sara*, *supra*, note 7, 575 *per* Lord J.

³⁵ *The Matrimonial Causes Act 1973*, 1973, c.18, s.47 (U.K.) [amending the *Matrimonial Proceedings (Polygamous Marriages) Act 1972*, 1972, c.38, s.1(1) (U.K.)] states:

"A court in England and Wales shall not be precluded from granting

provisions to give their respective courts, under certain conditions, jurisdiction to grant matrimonial relief, notwithstanding that a marriage might be potentially polygamous. In these three countries, courts now have jurisdiction to grant matrimonial relief without having to rely on the nebulous rule of conversion.³⁸ In the absence of such legislation in Canada, the courts continue to depend on evidence of conversion before granting matrimonial relief.

There is judicial authority to support the view that the acquisition of a new domicile and thereby a new personal law which exclusively recognizes monogamy, is one of the means available for conversion; a change of one's personal law changes the character of one's matrimonial status from polygamous to monogamous.³⁹ In *Qureshi v. Qureshi*,⁴⁰ while Sir Jocelyn Simon admitted that jurisdiction could be established on the ground that "... both parties

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."

S.47(2)(a) to (e) lays down the types of matrimonial relief the courts are permitted to grant under the Act. See *Chaudry v. Chaudry* [1975] 3 All E.R. 687 (Fam.Div.).

³⁸ *Matrimonial Causes Act 1959-1973*, s.6A, grants jurisdiction to Australian courts to render matrimonial relief to parties to a polygamous marriage, provided that neither of the parties were domiciled in Australia at the time of entering into such a marriage. This limitation has caused some problems. See *Crowe v. Kader* (1967) 12 F.L.R. 357 (W.A.) and Jackson, *supra*, note 9.

³⁷ The New Zealand statute closely follows its counterpart in Australia. *The Domestic Proceedings Act 1968*, No. 62, s.3(1) and (2) reads:

"3(1) For the purpose of this Act, the term 'marriage' includes a potentially polygamous union in the nature of marriage entered into outside New Zealand, if

- (a) The law of the country in which each of the parties was domiciled at the time of the union then permitted polygamy; and
- (b) Neither party was at the time of the union a party to a subsisting polygamous or potentially polygamous union; and the terms 'husband', 'wife', and 'married' have corresponding meanings.

3(2) This section shall apply to a union in the nature of marriage, notwithstanding that either party has, during the subsistence of the union, entered into a further union in the nature of marriage, whether or not the further union still subsists."

³⁸ Even Cumming-Bruce J. who formulated the rule in *Ali v. Ali*, *supra*, note 31, expressed some doubts regarding the strength of that rule in the subsequent decision of *Radwan v. Radwan*, *supra*, note 32.

³⁹ *Supra*, note 31.

⁴⁰ [1972] Fam. 173.

were domiciled in England at the time of the petition",⁴¹ he preferred to base his decision on other reasoning. The mere fact that the potentially polygamous marriage was celebrated in an exclusively monogamous jurisdiction could have been considered sufficient grounds to make the necessary conversion.

Cheni v. Cheni,⁴² however, presents a novel problem. There the parties had entered into a marriage contract in which the husband was permitted to marry a second time during the subsistence of the first marriage if there were no offspring born within a specified period of time. Two children were born and subsequent to their births the wife sought matrimonial relief from an English court. Allowing her petition for relief, Sir Jocelyn Simon wrote:

If parties marry monogamously the law will readily and reasonably presume that they will not relapse into polygamy. After all, there are no marriages which are not potentially polygamous, in the sense that they may be rendered so by a change of domicile and religion on the part of the spouses. But, particularly in these days of widespread interpenetration of societies in different stages of development, it is not a reasonable presumption that spouses who marry polygamously will not by personal volition or act of State convert their marriages or have them converted into monogamous unions...⁴³

Therefore, on weight of authority, on principle and on ground of convenience I am of the opinion that if the marriage is monogamous at the time of the proceedings, albeit potentially polygamous on its inception, the court has jurisdiction to adjudicate upon it.⁴⁴

The birth of offspring was sufficient to make the marriage monogamous. As Dicey has said,⁴⁵ matrimonial relief in these cases of conversion is restricted to instances where the marriage has remained merely potentially polygamous and has not actually become polygamous. In the latter instance, Dicey believed that the parties might be required to delay their petitions to court until the number of polygamous wives was reduced to one, by death or extra-judicial divorce of the others. In that sense there is a practical limitation placed upon the application of this principle. In any event, this appears to be the only effective inroad which the common law courts have made on the rigorous rule in *Hyde v. Hyde*. Canadian courts would therefore be well advised to follow the decision in *Sara v. Sara* whenever possible.

⁴¹ *Ibid.*, 194.

⁴² [1965] P. 85 (H.C.).

⁴³ *Ibid.*, 90.

⁴⁴ *Ibid.*, 92.

⁴⁵ *Supra*, note 33.

III. The recognition of polygamous marriages for the purpose of succession

In a previous article⁴⁶ tracing the development of common law successions from Canon Law through the ecclesiastical courts it was shown how the ideas of morality which lay at the base of succession law were derived principally from Christianity.⁴⁷ These principles have long guided the probate courts of England as well as those of Australia, New Zealand and Canada.⁴⁸ Charles II attempted a codification by passing the *Statute of Distributions* in 1670.⁴⁹ From the beginning of the eighteenth century, a pattern⁵⁰ emerged defining the terms "wife", "widow" and "child" with exclusive reference to "monogamous" marriage. The belief among the judges was that consonant with Christian endorsement of monogamy and the 1670 *Statute of Distributions*, the courts should limit the devolution of property to those heirs who were related to the *propositus* by a monogamous marriage. As late as 1888, Sterling J. stated:

I conceive that, having regard to these authorities, 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".⁵¹

In that case, Christopher Bethell died leaving behind a wife and a posthumously born daughter. He had married Teepoo of the Baralong tribe according to native law and custom. It was held as a question of fact that such a marriage was potentially polygamous. Although there was sufficient *prima facie* evidence to raise the question of an acquisition of a domicile of choice in Bechuanaland,⁵² the Court appears to have avoided that issue and proceeded to rest

⁴⁶ Marasinghe, *Retrospect on O'Hearn v. Yorkshire Insurance Company* (1976) 22 McGill L.J. 630.

⁴⁷ *Ibid.*, 633-36.

⁴⁸ *Lundy v. Lundy* (1895) 24 S.C.R. 650; *Nordstrom v. Bauman* [1962] S.C.R. 147; *Deckert v. The Prudential Ins. Co. of America* [1943] O.R. 448 (C.A.) and *Re Gore* (1972) 1 O.R. 550 (H.C.).

⁴⁹ 22 & 23 Car. II, c.10. This statute was explained by another in 1677 (29 & 30 Car. II, c.6) and was perpetuated by a third in 1685 (1 Jam. II, c.17). Thus the rules of distribution as laid down by the principal 1670 statute were preserved for posterity and the introduction of the common law to the British colonies and the Dominions included the rules of succession laid down in that legislation.

⁵⁰ E.g., *Hyde v. Hyde*, *supra*, note 12; *Warrander v. Warrander*, *supra*, note 5.

⁵¹ *Bethell v. Hildyard* (1888) 38 Ch.D. 220, 234.

⁵² *Ibid.*, 234-36.

their judgment upon the grounds that Teepoo was not "a wife" and her daughter was not "a child" for the purposes of succession under the *Statute of Distributions*. In the course of his reasoning, Sterling J. wrote:

The evidence clearly proves that Christopher Bethell intended that the relationship between himself and Teepoo should at least be that of husband and wife in the sense in which those terms are used among the Baralongs. That relationship, however, is essentially different from that which bears the same name in Christendom, for the Baralong husband is at liberty to take more than one wife; and it must therefore be determined whether the union between Christopher Bethell and Teepoo was a marriage in the Christian or merely in the Baralong sense.⁵³

Declaring himself to be bound by Lord Penzance's words in *Hyde v. Hyde*,⁵⁴ Sterling J. concluded that neither Teepoo nor her daughter fell within the definition of "a wife" and "a child" (of the *Propositus*) in the English *Statute of Distributions*. It must be said at once that Lord Penzance's definition of "marriage" was limited to questions of matrimonial relief and expressly excluded issues concerning successions.⁵⁵ The failure to grasp this limitation of the *Hyde v. Hyde* rule weakens Sterling J.'s judgment considerably.

Another difficulty with the judgment is Sterling J.'s failure to take notice of the previous Court of Appeal decision of *In re Goodman's Trusts*.⁵⁶ In that case, the claimants' parents were married subsequent to the claimants' birth and at the time of the birth and the marriage, the parents were domiciled in Holland. Under Dutch law the claimants were legitimated *per subsequens matrimonium*. However, this was not the case under the law of England. The central issue in this litigation was whether the claimants were legitimate children and therefore entitled as heirs under the *Statute of Distributions*. The Court correctly referred the question of their status to the law of Holland. If the *lex domicilii* found them legitimated *per subsequens matrimonium*, they were legitimate for the *Statute of Distributions*. In concluding that the *Statute of Distributions* applied, James L.J. stated:

It must be borne in mind that the *Statute of Distributions* is not a statute for Englishmen only, but for all persons, whether English or not, dying intestate and domiciled in *England*, and not for any Englishman dying domiciled abroad. And it was to provide for what was thought an equitable distribution of the assets, as to which a man had,

⁵³ *Ibid.*, 235.

⁵⁴ *Ibid.*, 237.

⁵⁵ *Supra*, note 12, 138.

⁵⁶ (1881) 17 Ch.D. 266 (C.A.).

through inadvertence, not expressed his testamentary intentions. And, as the law applies universally to persons of all countries, races, and religions whatsoever, the proper law to be applied in determining kindred is the universal law, the international law, adopted by the comity of States.⁵⁷

It was a firm principle, even in 1888, that questions of status were governed by the *lex domicilii*. The facts relevant to the question of Christopher Bethell's domicile were therefore crucial to the decision in *Re Bethell*. There was evidence that Bethell had joined the Baralong tribe by the time he married Teepoo. Besides rejecting a Christian marriage in favour of a Baralong ceremony, Bethell explained that he was no longer a European but a Baralong, and that he therefore found the Christian ceremony meaningless. These were valuable *indicia* in favour of acquiring a domicile of choice in Bechuanaland at the time of his marriage. If he had acquired this domicile, his marriage would have been valid; the *lex loci celebrationis* and the *lex loci domicilii* would both have been Bechuanaland, and both Teepoo and her daughter should have succeeded under the *Statute of Distributions*.

There is, of course, another fundamental issue raised by the foregoing case. Recognizing the fact that *In re Goodman's Trusts* concerned a dispute surrounding a monogamous marriage, one may question whether a submission to the *lex domicilii* under the rules of English private international law could be justified where the marriage was in effect potentially polygamous or actually polygamous. This issue was not finally settled until the 1954 Privy Council decision of *Bamgbose v. Daniel*.⁵⁸ There, the plaintiff's father was married monogamously under the *Lagos Marriage Ordinance* of 1884.⁵⁹ The plaintiff's deceased uncle had contracted nine polygamous marriages under native law and custom. The defendants were his children, born of these polygamous marriages. At his death in 1948, the deceased left in Nigeria personal property valued at £100,000. Under the *Lagos Marriage Ordinance*, questions of succession were to be settled "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 to the contrary notwithstanding."⁶⁰ By virtue of this ordinance, Nigeria received *inter alia* the *Statute of Distributions* of 1670. The relevant issue in these

⁵⁷ *Ibid.*, 300.

⁵⁸ [1955] A.C. 107 (P.C.).

⁵⁹ *Lagos Marriage Ordinance*, (1884), no. 14, in *Laws of the Colony of Lagos*, 1901, vol.1.

⁶⁰ *Ibid.*, s.41.

proceedings was the legitimacy of the children of the deceased. If they were not legitimate, then they could not succeed to their father's personal estate and in default such estate would go to the plaintiff nephew who was unquestionably legitimate, born in wedlock of a monogamous marriage.

The West African Court of Appeal in *Bamgbose v. Daniel*⁶¹ followed the landmark decision of *In re Adadevoh*,⁶² in which the principle of *In re Goodman's Trusts* was first applied to a polygamous marriage. The Privy Council in *Bamgbose v. Daniel* rejected the argument that different considerations should govern the rights of succession of children from polygamous as opposed to monogamous marriages. Provided that a child was legitimate by the law of the country where at the time of its birth its parents were domiciled, the English courts would recognize such status for succession purposes. The principle of *In re Goodman's Trusts* was thus extended to include the children of polygamous unions. If the marriage was validly celebrated according to the native law and custom of the parties, it was a valid marriage and the issue of such a union were legitimate for the purposes of succession, notwithstanding the polygamous nature of the marriage.

The Privy Council in *Coleman v. Shang*⁶³ reaffirmed the correctness of this rule. At issue in this case was whether the wife in a potentially polygamous marriage could succeed to a part of the intestate succession of her husband, the appellant son's claim being that his mother could not be treated as a valid wife. It was argued that *In re Goodman's Trusts* which had decided that the child of a polygamous marriage is legitimate, should be extended to legitimate the wife of a polygamous marriage or, as it was put in argument, "what is sauce for the gosling must be sauce for the goose".⁶⁴

The Privy Council acceded to this argument, though their approval was qualified; Lord Tucker distinguished those cases where "special circumstances exist which necessitate a distinction between the position of *children* of a potentially polygamous marriage and the *wives or widows* of such marriage . . .".⁶⁵

Although *Bamgbose v. Daniel* marks the beginning of the application to West African disputes of the rule that matrimonial

⁶¹ (1952) 14 W.A.C.A. 111.

⁶² (1951) 13 W.A.C.A. 304.

⁶³ [1959] Ghana L.Rep. 390, aff'd [1961] A.C. 481 (P.C.).

⁶⁴ *Ibid.*, 488.

⁶⁵ *Ibid.*, 495 [Emphasis added].

status for succession purposes is governed by the *lex domicilii*, the Privy Council had applied that rule to Chinese *t'sips* marriages. Under such marriages a person has one "principal wife" and a number of "secondary wives". In a series of decisions commencing with *The Six Widow's Case*⁶⁶ the English courts have regarded *t'sips* "wives" as wives for the purposes of succession under the *Statute of Distributions*.⁶⁷ In none of those cases did the courts rely on *In re Goodman's Trusts*. Rather, as in *Khoo Hooi Leong*, they referred back to the "canon law which governed western continental Europe till about a century ago..."⁶⁸

It is now possible to examine the leading Canadian decisions. In *Yew v. Attorney-General for British Columbia*,⁶⁹ Lee Cheong, a Chinese national, died on a brief visit to British Columbia, leaving property in that province. At the time of his death he was domiciled in China and survived by two widows. It was accepted as a fact that the law of China recognized polygamy and Lee Cheong's marriages were valid by that law. By a will, valid under Chinese law, Lee Cheong left his estate to his widows. Under the *Succession Duty Act*⁷⁰ of British Columbia, the Minister of Revenue claimed succession duties for the property situated in the province. The Minister argued that neither of the two claimants, the wives of the polygamous marriage, should be recognized as "a wife" under the *Succession Duty Act*. He further submitted that the Act spoke of "a wife" and not of "wives", which was cogent evidence to support his contention that the Act was meant to exclude persons married in polygamy. At first instance, McDonald J. of the British Columbia Supreme Court accepted the Minister's argument⁷¹ based on *Hyde v. Hyde*. The claimants appealed successfully to the Court of Appeal. After a careful scrutiny of the relevant case law, the Court decided that wives and legitimate children recognized by the *lex domicilii*

⁶⁶ *In the matter of the Estate of Choo Eng Choon* (1908) 12 Straits Settlements L.R. 120; *Cheang Thye Phin v. Tan Ah Loy* [1920] A.C. 369 (P.C.) and *Khoo Hooi Leong v. Khoo Hean Kwee* [1926] A.C. 529 (P.C.).

⁶⁷ In *Cheang Thye Phin v. Tan Ah Loy*, *ibid.*, 372f., Viscount Finley said: "With regard to Chinese settled in Penang, the Supreme Court recognizes and applies the Chinese law of marriage. It is not disputed that this law admits of polygamy. By a local ordinance the Statute of Distributions has been applied to Chinese successions, and the Courts have treated all the widows of the deceased as entitled among them to the widows' share under the statute."

⁶⁸ *Supra*, note 66, 543 *per* Lord Phillimore.

⁶⁹ [1924] 1 D.L.R. 1166 (B.C.C.A.).

⁷⁰ R.S.B.C. 1911, c.217.

⁷¹ *Supra*, note 69, 1167.

could succeed to property situated in British Columbia, notwithstanding the polygamous nature of the relevant marriages. The fact that the *Succession Duty Act* spoke of "a wife" did not preclude the Court from construing the singular to include the plural.⁷²

Thus far, *Yew* stands as the only Canadian decision recognizing succession rights of polygamous wives. But even this decision must be viewed in the context of the traditional "wide" interpretation given to taxation statutes, a fact Martin J.A. took care to mention in his judgment.⁷³ As the foregoing indicates, the submission of questions of status to the *lex domicilii* is an established rule in English private international law. The fact that it has been applied to polygamous marriages both in Asia and Africa is evidence of its extended use to meet new social developments. Furthermore, although the dispute in *Yew* did arise under a fiscal statute, the essential issue was whether the two widows of Lee Cheong could succeed to property situated in British Columbia. The decision may thus be treated as having strong persuasive value for future succession cases.

IV. The recognition of polygamous marriages for the purpose of bigamy

Under the Canadian *Criminal Code*⁷⁴ and English law,⁷⁵ bigamy is conceived of in terms of one valid marriage being followed by another marriage which was contracted during the subsistence of the first marriage. The critical question here is whether there can be a conviction for bigamy where one or both of the marriages are polygamous. It is intended to examine this area of the law under the following sub-headings.

A. *Where the first marriage was potentially (or in fact) polygamous, would a subsequent marriage contracted monogamously with a different woman constitute the crime of bigamy?*

The earliest case concerning this issue was *R. v. Naguib*.⁷⁶ The accused had come to England from Egypt in 1901. In 1903 he mar-

⁷² *Ibid.*, 1170.

⁷³ *Ibid.*, 1171f.

⁷⁴ R.S.C. 1970, c.C-34, s.254.

⁷⁵ *Offences Against the Person Act*, 1861 24 & 25 Vict. c.100, s.57; *Webb, ... I'll Marry Yez Both...* [1964] Crim.L.R. 793; Andrews, *The Prosecution of Bigamy* (1965) 4 Sol.Q. 141.

⁷⁶ [1917] 1 K.B. 359 (C.A.).

ried A., a woman domiciled in England. During the subsistence of that marriage, the accused married T., domiciled in England. Both marriages were celebrated in England. The accused was charged with bigamy. The principal defence raised by the accused was that he was married polygamously in Egypt before he reached England and therefore his marriage to A. was void. If that marriage was void, he argued, then the marriage to T. was not contracted at a time when he was "a married person", and the charge of bigamy pertaining to his marriage to T. could not be sustained. This defence raised two separate issues; the first of which was the status of the polygamous marriage in Egypt under English law. Unless the Court recognized that marriage as conferring upon him the status of "a married person", his defence could not be upheld. Second, if the Court were to consider his status to be that of "a married person" as a result of the polygamous marriage, then his marriage to A. would clearly be bigamous. A decision on the status of the accused could therefore have provided a valuable clue to answering the foregoing question. Unfortunately, the Court of Criminal Appeal, affirming his conviction, chose to avoid that issue altogether. Avory J. stated:

He insists that this marriage was void because he had in 1898 married an Egyptian woman who was still his wife in 1903. The learned judge at the trial disposed of this defence on two grounds — first, that the Egyptian marriage was according to the Muhammedan religious law which permits polygamy and could not be regarded in England as a marriage. That raises an interesting question, but we need not deal with it, because we are satisfied that this appeal fails on the second ground, namely, that there was no sufficient evidence of the marriage in Egypt.⁷⁷

Snippets of information may be gleaned from two other English decisions. Both *Sirinivasan v. Sirinivasan*⁷⁸ and *Baindail v. Baindail*,⁷⁹ raised similar facts. The defendants were Hindus who, while domiciled in British India, had entered into their first marriages under Hindu law. Both marriages were potentially polygamous. The defendants came to England as students and thereafter were married a second time to persons who were domiciled in England. The marriages were celebrated in England. Subsequently, the English wives sought a declaration of nullity based upon the validity of their husbands' first Hindu marriages. In each case, Barnard J. at first instance gave recognition to the first Hindu marriage, more

⁷⁷ *Ibid.*, 361.

⁷⁸ [1946] P. 67 (H.C.).

⁷⁹ [1946] P. 122 (C.A.).

on grounds of policy⁸⁰ than of law. In doing so, he declared the marriages celebrated in England to be a nullity. However, he did not consider the possibility of this decision leading to a conviction for bigamy. Of the two defendants, Baidail alone appealed to the Court of Appeal.⁸¹ While dismissing the appeal, the Court did affirm the decision in the *Sirinivasan* case but avoided the issue of bigamy, a logical consequence of recognizing the first Hindu marriage. Lord Green M.R. wrote:

The opinion which I have formed relates and relates solely to the facts of the present case which are connected with the validity of the English marriage in the circumstances of this case. I must not be taken as suggesting that for every purpose and in every context an Indian marriage such as this would be regarded as a valid marriage in this country. Mr. Pritt in his reply drew an alarming picture of the effect of our decision on the law of bigamy if we were to decide against him. I think it right therefore to say that so far as I am concerned nothing that I have said must be taken as having the slightest bearing on the law of bigamy. On the question of whether a person is "married" within the meaning of the statute (which is a criminal statute) when he has entered into a Hindu marriage in India I am not going to express any opinion

⁸⁰ The following passage illustrates the basis for the decision:

"I have come to the conclusion that the text book view is wrong and, relying as I do on the above passages from Lord Maugham's speech, I ought to recognize this Hindu marriage as a valid marriage. To refuse recognition would mean that the respondent would be lawfully married to his Hindu wife in India, and to his English wife in England, but if he brought his Hindu wife to this country and lived with her here, he would be living in adultery with her. It would mean that if the respondent were to live with his Hindu wife in India for a part of the year and for the remainder of the year live with his English wife in England, he would be living with his lawful wife in each country. It would therefore mean that English law would be encouraging polygamy and not frowning on it. Again, a Hindu marriage is indissoluble; but, according to Mulla on Hindu Law, 9th ed., p.513, a Hindu wife, deserted by her husband, can sue him for restitution of conjugal rights in the civil courts of British India. If, therefore, the respondent deserted both his Hindu wife and his English wife, he could be sued for restitution of conjugal rights by both wives, in the courts of their respective countries, and he might be ordered by those courts to return to two different wives in two different parts of the world. To deny recognition of a Hindu marriage for the purpose in hand would, in my opinion, be to fly in the face of common sense, good manners and the ordered system of tolerance on which the Empire is based; and, as I decide, to deny such recognition would be bad law. I, therefore, recognize as a fact the respondent's Hindu marriage, which was subsisting at the time he went through the ceremony of marriage with the petitioner, and I hold that this ceremony is a nullity and the petitioner is entitled to a decree *nisi*, with costs." (*Supra*, note 78, 69-70).

⁸¹ *Supra*, note 79.

whatever. It seems to me a different question in which other considerations may well come into play. I hope sincerely that nobody will endeavour to spell out of what I have said anything to cover such a question. In the result the appeal must be dismissed.⁸²

Thus a second opportunity to express an opinion on this important question was lost.

Two further decisions require attention before leaving this area. In *R. v. Sarwan Singh*,⁸³ the accused was charged with bigamy. He had first contracted a potentially polygamous marriage in India under Sikh law while he was domiciled there. Several years later the accused emigrated to England, where he married a second time during the subsistence of the first marriage. Commissioner Fitzwalter-Butler, acquitting Sarwan Singh of the charge, observed:

Having given my careful consideration to this matter, and recognizing as I do that there is no express authority which directs me to any conclusion, I have formed the clear view that the marriage which is to be the foundation for a prosecution for bigamy must be a monogamous marriage, and that any polygamous marriage cannot afford a foundation for the prosecution.⁸⁴

Since 1939,⁸⁵ the English courts have adopted the principal of "mutation" as a general rule. Under that rule, the courts have begun to recognize the possibility that under certain conditions, a marriage which is potentially polygamous at its inception could be converted or mutated into one which is monogamous.⁸⁶ Using the principle of mutation as their pivotal point, the Criminal Division of the English Court of Appeal in 1975 overruled *Sarwan Singh* in *R. v. Sagoo*.⁸⁷ In that case, the appellant while domiciled in Kenya married under Sikh religious law in 1959. The potentially polygamous marriage was celebrated in Kenya where his Sikh personal law was in fact recognized. Subsequently in 1960 the *Hindu Marriage and Divorce Ordinance* of Kenya was passed, prohibiting prospective polygamous marriages, but leaving the validity of marriages contracted up to 1960 intact.⁸⁸ In 1966, the appellant and his wife emigrated to England. In 1973, the appellant went through a form of marriage with a woman in England. It was held as a question of fact that the appellant had by then acquired a domicile

⁸² *Ibid.*, 130.

⁸³ [1962] 3 All E.R. 612. See comment by Polonsky, [1971] Crim.L.R. 401.

⁸⁴ *Supra*, note 83, 615.

⁸⁵ The *Sinha Peerage* decision, *supra*, note 25.

⁸⁶ See *supra*, p.399.

⁸⁷ [1975] 2 All E.R. 926 (C.A.).

⁸⁸ *Ibid.*, 928.

of choice in England. He was accordingly charged with bigamy and convicted of that offence. Dismissing the appeal, James L.J. rested his decision squarely on the principle of mutation:

For the purposes of the present appeal it is unnecessary to consider other circumstances which may imprint a change of character from polygamous to monogamous or vice versa. In the two cases cited of *Ali v. Ali* and *Parkasho v. Singh*, there is strong persuasive authority for the view that such a change can be brought about by a change in the husband's domicile and by legislation changing the law of the country where the marriage was celebrated. Both reasons for the change are applicable to the present appeal. It is highly desirable that the criminal law and the family law should be the same in the recognition of the status created by a marriage. For the purposes of the criminal law, the relevant time for determining the question was the defendant party to a valid marriage within the meaning of the words 'being married' in s.57 of the 1861 Act, is the time of the alleged bigamous ceremony of marriage — in the present case 9th March 1973. By that date the appellant's potentially polygamous marriage still subsisted, but it had become monogamous in character by operation of the 1960 Ordinance and by his acquisition of an English domicile which has monogamy as part of the personal law.

The trial judge was in our judgment correct in his ruling on the question of law put to him. *R. v. Sarwan Singh* was wrongly decided. The appeal is dismissed.⁸⁹

Whatever the merits of the view that it is necessary to harmonize the status created by a marriage for the purposes of family and criminal law, it must be observed that a principle which has resulted from the ingenuity of the courts to provide matrimonial relief, has now inveigled itself into the administration of the criminal law in England. Such borrowing from the non-criminal areas of English jurisprudence may be justified in other areas such as criminal negligence or manslaughter.⁹⁰ However, it is best to avoid encroaching upon areas of personal morality and various forms of matrimonial relief.

The Law Reform Commission of Canada has recommended that, "in the light of present social attitudes, inquiry should be made whether [bigamy] should be abolished or redefined or whether the law needs strengthening".⁹¹ It has included "polygamy" in the list of "offences whose wrongfulness and seriousness today is controversial [and requires careful reconsideration]".⁹² It is thus strongly urged that it is against both principle and policy to in-

⁸⁹ *Ibid.*, 930. See comment by Morse (1976) 25 Int. & Comp.L.Q. 229.

⁹⁰ Cross & Jones, *An Introduction to Criminal Law* 7th ed. (1972), 133-36 & 158-60.

⁹¹ The E. Patrick Hartt Commission (report dated March 1976), 35.

⁹² *Ibid.*

roduce the notion of mutation into the area of criminal law. As shown earlier,⁹³ mutation was no more than a stratagem worked out by the courts to render matrimonial relief and was necessitated by the strict attitude of Lord Penzance in *Hyde v. Hyde* towards non-Christian marriages. Its use in *R. v. Sagoo* is to be regretted⁹⁴ and the view taken in *Sarwan Singh*⁹⁵ is preferable.

B. *Where the first marriage was monogamous, would a subsequent marriage contracted polygamously with a different woman constitute bigamy?*

The answer to this question is a complex one. It raises an incidental question, particularly in light of the absence of any cogent authorities in Canada, England, Australia or New Zealand. What was the prohibition of bigamy designed to protect? Blackstone, lecturing at Oxford in 1758, attempted to explain the offence of bigamy in terms of protecting the fabric of a monogamous society. He equated polygamy to bigamy and proceeded to show that in certain parts of Europe, particularly in Sweden, the offence was punishable by death:

Another felonious offence, with regard to this holy estate of matrimony, is what some have corruptly called *bigamy*, which properly signifies being twice married; but is more justly denominated *polygamy*, or having a plurality of wives at once. Such second marriage, living the former husband or wife, is simply void, and a mere nullity, by the ecclesiastical law of England: and yet the legislature has thought it just to make it felony, by reason of its being so great a violation of the public economy and decency of a well-ordered state. For polygamy can never be endured under any rational civil establishment, whatever specious reasons may be urged for it by the eastern nations, the fallaciousness of which has been fully proved by many sensible writers: but in northern countries the very nature of the climate seems to reclaim against it; it never having obtained in this part of the world, even from the time of our German ancestors, who, as Tacitus informs us, "*prope soli barbarorum singulis uxoribus contenti sunt.*" It is therefore punished by the laws both of ancient and modern Sweden with death.⁹⁶

Subsequent decisions have suggested that the rules against bigamy were designed to protect the monogamous marriage.⁹⁷ This

⁹³ See *supra*, p.402.

⁹⁴ *Supra*, note 87.

⁹⁵ *Supra*, note 83.

⁹⁶ The lectures were printed in 1765 under the title of *Commentaries on the laws of England*. See Chitty (ed.), *Blackstone's Commentaries* (1826) vol.IV, ch.XIII, 163-64 [author's emphasis].

⁹⁷ See the exposition and the cases cited and discussed in Bartholomew, *Polygamous Marriages and English Criminal Law* (1954) 17 Mod.L.Rev. 344.

may lead to a situation in which clergymen who solemnize a polygamous or potentially polygamous marriage would not be liable for an offence such as the one expressed in section 258 of the *Criminal Code*,⁹⁸ while the parties to such a ceremony might be considered guilty of bigamy. In *R. v. Bham*,⁹⁹ the accused was acquitted of celebrating a marriage contrary to the provisions of the *Marriage Act, 1949*¹⁰⁰ since the Mohammedan ceremony he performed did not *prima facie* confer on the parties the status of man and wife under English law. However, as Professor Bartholomew wrote, "any ceremony, whether defective as a ceremony to create a status of marriage or not, is a sufficient second marriage for the purposes of the law of bigamy."¹⁰¹ The same rule would apply in Canada under the *Criminal Code*.¹⁰² This conclusion can be sustained upon the grounds usually cited in the English common law, namely that bigamy constitutes an act which is tantamount to a threat to the stability of a monogamous union. A second marriage ceremony is no more than a threat, for it is in fact void — even though it may have been the kind of ceremony which could have generated a valid status, had there been no subsisting marriage. This means that the second polygamous marriage cannot be a "threat" to monogamy in jurisdictions recognizing the existence of both institutions of monogamy and polygamy. At present, the common law jurisdictions in Africa and Asia recognize what is known as a "dual matrimonial regime". Bigamy is committed when a person, married monogamously, undergoes a second ceremony which could have produced a valid monogamous marriage had there been no valid first marriage. However, if a person married monogamously contracts a valid polygamous marriage, having become qualified to do so, Commonwealth decisions indicate that he is neither guilty of bigamy nor is his second marriage a nullity; his first marriage has mutated into a potentially polygamous one. This is the reverse of the mutation process described in *Ali v. Ali*,¹⁰³ *Radwan v. Radwan No (2)*,¹⁰⁴ and *Sara v. Sara*.¹⁰⁵

⁹⁸ *Criminal Code*, R.S.C. 1970, c.C-34, s.258 reads:

"Every one who

a) solemnizes or pretends to solemnize a marriage without lawful authority, the proof of which lies upon him, ... is guilty of an indictable offence..."

⁹⁹ [1965] 3 All E.R. 124 (C.A.).

¹⁰⁰ 1949, 12-13-14 Geo.VI, c.76, s.75(2)(a) (U.K.).

¹⁰¹ *Supra*, note 97, 357.

¹⁰² R.S.C. 1970, c.C-34, s.257(1)(a).

¹⁰³ *Supra*, note 31.

¹⁰⁴ [1972] 3 W.L.R. 939 (Fam.Div.).

¹⁰⁵ *Supra*, note 7.

All these aspects were considered by the Privy Council in *Attorney General for Ceylon v. Reid*.¹⁰⁶ There, the respondent married Edna according to Christian rites. Both parties were domiciled in the Colony of Ceylon at the time of their marriage. As the first Christian marriage was under the *Marriage Registration Ordinance* of Ceylon, the Privy Council had to consider two relevant sections.¹⁰⁷

Under section 18, "[n]o marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void".¹⁰⁸ Under Section 19(1), "[n]o marriage shall be dissolved during the lifetime of the parties except by judgment of a divorce *a vinculo matrimonii* pronounced in some competent court . . .".¹⁰⁹ By 1957, the respondent and his wife developed marital difficulties and in May of that year Edna left the respondent and obtained a maintenance order against him. In 1959 the respondent found a substitute for Edna in Fatima Pansy, and together they were duly converted to the Muslim faith. It must be emphasized that conversion into Islam involves no difficult procedures.¹¹⁰ In *Abdool Razack v. Aga Mahomed*,¹¹¹ Lord MacNaghten said:

No Court can test or gauge the sincerity of religious belief. In all cases where, according to Mohammedan Law, unbelief or difference of creed is a bar to marriage with a true believer, it is enough if the alien in religion embraces the Mohammedan Faith. Profession with or without conversion is necessary and sufficient to remove the disability.¹¹²

The respondent and Fatima Pansy embraced Islam in June 1959 and were married under the *Muslim Marriage and Divorce Act*.¹¹³ As this second marriage was celebrated while his first marriage under the *Marriage Registration Ordinance* subsisted, the Attorney General charged Reid with the crime of bigamy under section 362B of the *Ceylon Penal Code*.¹¹⁴ At first instance, Reid was convicted. In the trial judge's view:

¹⁰⁶ [1965] A.C. 720 (P.C.).

¹⁰⁷ *Ibid.*, 728.

¹⁰⁸ *Marriage Registration Ordinance*, Ceylon, 1907, no. 9, ch.95.

¹⁰⁹ *Ibid.*

¹¹⁰ Fyzee, *Outlines of Muhammadan Law* (1964), 61-62.

¹¹¹ (1893) 21 L.R.Ind.Ap. 56 (P.C.).

¹¹² *Ibid.*, 64.

¹¹³ *Supra*, note 106, 721.

¹¹⁴ The *Penal Code of Ceylon*, Legislative Enactments of Ceylon (1956 Rev.), c.19, s.362B reads: "Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to a fine."

Monogamy is an unalterable part of the status of every person who marries under the Marriage (General) Registration Ordinance and a change of religion cannot affect that status. Conversion to the Muslim Faith, even if genuine, cannot enable one who has married under the General Marriage Ordinance to contract a polygamous marriage. Such a marriage is void in the lifetime of a former wife.¹¹⁵

A full bench of the Ceylon Supreme Court allowed Reid's appeal. Basnayake C.J. noted that:

The proximity of the date of the second marriage to the date of conversion gives room for the suspicion that the change of faith was with a view to overcoming the provisions of section 18 of the Marriage Registration Ordinance. But that circumstance does not affect the validity of the second marriage. The evidence of the Quazi and the priest who registered the marriage indicates that the requirements of the Act as to registration of the marriage have been observed and that they were satisfied that the parties were persons professing Islam.¹¹⁶

While it would appear that the fact of conversion into Islam alone constituted the condition precedent for the adoption of Muhammadan law as Reid's personal law, the overriding requirement was clearly that his *lex domicilii* must permit such a conversion. Dismissing the Crown's appeal to the Privy Council,¹¹⁷ Lord Upjohn explained the rationale behind the lower Court's refusal to convict for bigamy:

Whatever may be the situation in a purely Christian country (as to which their Lordships express no opinion) they cannot agree that in a country such as Ceylon a Christian monogamous marriage prohibits for all time during the subsistence of that marriage a change of faith and of personal law on the part of a husband resident and domiciled there. . . . In their Lordships' view in such countries there must be an inherent right in the inhabitants domiciled there to change their religion and personal law and so to contract a valid polygamous marriage if recognized by the laws of the country notwithstanding an earlier marriage. If such inherent right is to be abrogated, it must be done by statute. Admittedly there is none.¹¹⁸

The *Reid* case raises large questions of policy and law. A person domiciled in jurisdictions which have "a dual matrimonial regime" can marry both monogamously and polygamously without actually violating the prohibition of bigamy. Professor Bartholomew predicted "that a British subject whose personal law sanctions polygamy, and who celebrates his second marriage in a country whose matrimonial law also sanctions polygamy, cannot be indicted for bigamy in [England]".¹¹⁹

¹¹⁵ Judgment of Bultjens A.D.J. quoted by Lord Upjohn, *supra*, note 106, 730.

¹¹⁶ (1964) 65 New L.Rep. 97, 99-100.

¹¹⁷ *Supra*, note 106. See comment by Weston, (1965) 28 Mod.L.Rev. 484.

¹¹⁸ *Supra*, note 106, 734.

¹¹⁹ *Supra*, note 97, 359.

It is submitted that this succinct statement of law applies equally to Canada. A landed immigrant may either retain his domicile of origin or may reacquire it upon returning to his country of origin. His domicile of origin may give him the power to marry polygamously. Provided the original *lex domicilii* permits such a marriage it should be recognized as valid by all jurisdictions. Clearly, some immigrants will not be entitled to such power, which raises the question of whether such differential treatment is conducive to maintaining a cohesive social fabric. It also presupposes that the individuals involved retain or reacquire their domicile of origin. As long as the capacity to marry is governed by the *lex domicilii*, the legal system to which a person's nationality alone is linked may have no authority over the offence of bigamy. As a matter of policy, this conclusion is not altogether satisfactory. Moreover, there are a number of issues of law that require attention.

First, upon conversion, does the initial marriage automatically convert itself from a monogamous union to one of polygamy? Does the principle of mutation operate now so as to reverse the change from polygamy to monogamy? Dicey has submitted that a marriage has the benefit of any doubt as to monogamy,¹²⁰ but other authors appear to accept that a monogamous union can in fact mutate into a polygamous union, and the *Reid* case has been cited in support of this proposition.¹²¹ If such is the case, it must lead to the conclusion that a marriage contracted in Canada could, under certain circumstances, be mutated into a potentially polygamous one.

On a subsequent occasion the Privy Council in *Drammeh v. Drammeh*¹²² appeared to lean in favour of such a proposition. Specifically relying on the *Reid* case, Lord Morris distinguished the case at bar.

She [the petitioner in the instant case] never accepted him on the basis that she would be one of two or more wives. She went to the Gambia with the rights which her marriage gave to her. Unless there is some compelling authority requiring a different view, it would seem most unjust and unreasonable if the wife could be compelled to accept a relationship wholly different from that which both she and her husband assumed.¹²³

It is therefore submitted that unless *both* parties to the monogamous union accept the religious conversion, the basic monogamous nature of the marriage will not change into one of polygamy.

¹²⁰ Dicey, *supra*, note 14, 283.

¹²¹ North (ed.), *Cheshire's Private International Law* 9th ed. (1974) 310-11; see also Webb, *Undissolved Christian Monogamous Marriage Followed by Mohammedan Marriage — Bigamy?* (1965) 14 Int'l & Comp.L.Q. 992, 996-97.

¹²² (1970) 78 Ceylon L. Weekly 55.

¹²³ *Ibid.*, 59.

The above proposition appears to be supported by the answer to our next question. Namely, could the monogamous wife sue her husband for a divorce, charging adultery and basing her allegation upon the consummation of the second polygamous marriage. The Privy Council, having raised this very question in *Reid*,¹²⁴ appears to have ignored the need to answer it. In citing a number of decisions, Lord Upjohn was content to find that the second marriage was valid. However, in *Drammeh v. Drammeh* the issues centred around the question of adultery and therefore the *ratio* provides valuable assistance in reaching an answer to this important question. The wife, domiciled in Jamaica, came to England as an immigrant in 1955. The husband was born in Gambia, and went to England in 1946 to pursue his studies in law. In 1956, the parties entered into a monogamous marriage. Six children were born of that marriage. The husband returned to Gambia in 1963 with the six children and his wife joined him a short while later. Sometime after the family was reunited, the husband married the present correspondent polygamously, under the Muhammeden law of Gambia. The petitioner protested and commenced these proceedings for a dissolution of the monogamous marriage. Citing the second "wife" as a correspondent and alleging adultery as the basis for her petition, she was successful in the Gambian courts. The husband then appealed to the Privy Council. Lord Morris distinguished¹²⁵ the present proceedings from the *Reid* case and dismissed the husband's appeal, holding that the *Reid* case was concerned with the criminal offence of bigamy while here the issue was the matrimonial wrong of adultery. Insofar as the wife had not participated in the religious conversion, the Board thought that her relationship with the husband remained within the monogamous matrimonial regime. Therefore, she was entitled to seek a dissolution of her marriage upon adultery.

The exclusion of the doctrine of mutation in a case like *Drammeh v. Drammeh* is welcomed. Otherwise, the non-assenting first wife would be deprived of an "escape route" from polygamy. Indeed it seems unfair that a previous monogamous marriage in accordance with the parties' personal law should be capable of being mutated into a polygamous union by the mere unilateral adoption of another faith by *one* of the spouses. However, regarding succession, legitimation and bigamy, the *Reid* rule appears to be both just and correct. As long as English private international law continues to tie capacity and status to the *lex domicilii*, the *lex patriae* cannot

¹²⁴ *Supra*, note 106, 731.

¹²⁵ *Supra*, note 122, 59.

complain. Civil law jurisdictions such as France and Germany would have no such difficulty.¹²⁶ In such jurisdictions, matters of capacity and status are governed by the national law. Therefore, any second marriage would be bigamous. This rule would bring the criminal law, the law of succession and the law relating to legitimacy and matrimonial offences into line with a person's *lex patriae*. Perhaps that is the solution for Canada in the light of her cultural mosaic attributable largely to varying immigration patterns.

V. The recognition of polygamous marriages for causes other than matrimonial relief, succession or bigamy

English courts have shown a remarkable degree of flexibility concerning issues collateral to a polygamous marriage.¹²⁷ In *Shahnaz v. Rizwan*,¹²⁸ the husband, domiciled in Pakistan, divorced his wife by "talaq" at the Pakistan High Commission in London. The wife by this action claimed her "Mehtar", or dower, on the basis that the marriage contract evidenced an agreement to pay a deferred dower at her husband's death or at their divorce. The husband resisted the claim on the grounds that the consideration for the agreement was immoral. Mr Justice Winn held that the claim was *in personam*, arising out of a contract of marriage which was valid by the personal law of the parties. Moreover, the Court ruled that polygamous marriages are not immoral under English public policy.¹²⁹

The question reappeared recently in *Re Hassan and Hassan*¹³⁰ where the husband and wife were parties to a potentially polygamous marriage in Egypt. There were three children from that marriage and in 1971 the Hassans immigrated to Canada with the intention of taking up a permanent residence. In 1974 the husband obtained a divorce from the Egyptian Consul in Montreal. The wife then claimed maintenance under the *Deserted Wives' and Children's Maintenance Act*¹³¹ of Ontario. The husband opposed her application on the ground that the marriage was potentially polygamous and therefore, under the *Hyde* rule, the Court had no jurisdiction. Mr Justice Cory allowed the wife's petition, resting his decision on

¹²⁶ In Quebec, status and capacity are governed by the *lex domicilii*, art.6 C.C.

¹²⁷ See Blaikie, *Polygamy, A New Approach* (1970) 15 Jur.Rev.n.s.135.

¹²⁸ [1965] 1 Q.B. 390; see comment by Webb (1965) 14 Int'l & Comp.L.Q., 273-76.

¹²⁹ *Supra*, note 128, 399.

¹³⁰ (1976) 12 O.R. (2d) 432 (H.C.).

¹³¹ R.S.O. 1970, c.128.

the principle of mutation. Relying on *Sara v. Sara*,¹³² *R. v. Sagoo*¹³³ and *Ali v. Ali*,¹³⁴ the Court held that the acquisition of the new domicile in Ontario had changed the potentially polygamous marriage and that such new domicile gave the Court the jurisdiction¹³⁵ to hear the wife's petition.

VI. Conclusion

The foregoing is intended merely to introduce the complexity of the cultural problem one encounters while attempting to accommodate the institution of polygamy within the framework of a common law system. The trend would thus appear to favour the reconciliation of the sharp distinctions between polygamy and monogamy. The common law acceptance of the principle of mutation is one major step towards reconciling foreign law and culture with the established traditions of English private international law and the Western Judaic-Christian institution of monogamous marriage.

While the principle of mutation cannot assist the parties to an *actually* polygamous marriage, the United Kingdom legislature has released the courts from the narrow and rigid rule in *Hyde v. Hyde*¹³⁶ by enacting the *Matrimonial Proceedings (Polygamous Marriages) Act 1972*.¹³⁷ Thus English courts have been empowered to provide relief to a petitioner in a polygamous marriage, in spite of the fact that there may be more than one wife living at the time of the hearing. Presently, Canada has no corresponding statutes.

Although there is little¹³⁸ reform in contemplation in Canada currently, it must be said that the cultural conflicts which un-

¹³² *Supra*, note 7.

¹³³ *Supra*, note 87.

¹³⁴ *Supra*, note 31.

¹³⁵ *Supra*, note 130, 438-39.

¹³⁶ *Supra*, note 12.

¹³⁷ 1972, c.38 s.1(1), as am. by the *Matrimonial Causes Act 1973*, 1973, c.18, s.47 (U.K.).

¹³⁸ *The Family Law Reform Act, 1978*, S.O. 1978, c.2.

"This Act applies to persons whose marriage was actually or potentially polygamous if the marriage was celebrated in a jurisdiction whose system of law recognizes the marriage as valid."

By subjecting the validity of the polygamous marriage to the *lex loci celebrationis*, a number of problems could arise. *Firstly*, although such a wife may be able to invoke the benefits under the Act, she could not claim to be validly married, unless the *lex loci celebrationis* is also the *lex domicilii* of the husband, at the time of their marriage. *Secondly*, the wives of a polygamous marriage in fact could claim under the Act, but will not be able

derlie the institutional conflicts of monogamy versus polygamy cannot be easily reconciled. The institutions and the concepts of the common law cannot easily absorb a notion of marriage defined in terms of a plurality of wives. It is this fact which persuaded the British government, in its dealings with the Indian sub-continent, to abandon the hope of finding a place within the framework of the common law for an institution espousing a plurality of wives. It was instead persuaded to recognize the fact of a plural society¹³⁹ in British India and the consequent need to have three separate and distinct legal systems functioning within a single framework.¹⁴⁰ While such an approach was truly justifiable from the standpoint of Indian society as the British found it at the end of the eighteenth century, this would be totally unworkable considering the structure of British or Canadian society as presently constituted. It is therefore necessary to conclude with the *caveat* that any attempt to find a place for the concept of polygamy and its legal consequences within the common law will not be complete. The success of this type of conceptual assimilation depends largely on the ingenuity of the judge and the flexibility of the common law.

to seek matrimonial relief (assuming the marriage was valid) under the principle of mutation. *Thirdly*, a landed immigrant, for example, from the sub-continent of India could marry several wives there while domiciled in Canada. In such an event, quite clearly, he would be guilty of bigamy under the Canadian *Criminal Code*, (R.S.C. 1970, c.C-34) which presupposes that his marriages subsequent to the first one are invalid. Notwithstanding this fact, the wives may claim property rights under s.72 of the Act. The confusion that will result from s.72 boggles the mind. It is hoped that the legislature would alter the contents of the section in such a way that the validity of the polygamous marriage would be made subject to the *lex loci domicilii*, rather than to the *lex loci celebrationis*. Such a change in the wording would avoid the foregoing problems.

¹³⁹ Commenting on the British attitude to the multitude of Hindus and Muslims in India, Sir William Jones, a judge of the Calcutta High Court, in 1788 wrote:

"Nothing could be more obviously just than to determine private contests according to those laws which the parties themselves had ever considered as the rules of their conduct and engagements in civil life; nor could anything be wiser than, by a legislative act, to assure the Hindus and Muselman subjects of Great Britain that the private laws which they severally hold sacred, and a violation of which they would have thought the most grievous oppression, should not be superseded by a new system, of which they could have no knowledge, and which they must have considered as imposed on them by a spirit of rigour and intolerance."

See Fyze, *supra*, note 110, 53f.

¹⁴⁰ Namely, the Hindu and the Muhammeden laws, functioning within a common law framework in India.