POLYGAMOUS MARRIAGES AND THE DESERTED WIFE

Sara v. *Sara*[1] involved the validity of a marriage which took place in India in 1951 between a man domiciled in India and a woman who was held to be domiciled in Canada. The marriage was performed according to Hindu law, which at that time recognized and allowed polygamy. Almost immediately thereafter they came to British Columbia, where the husband acquired a domicil of choice. The marriage remained monogamous in fact, and in 1955 the Hindu law was changed, making polygamous marriages illegal, and prohibiting the husband taking further wives. Shortly after their arrival in Canada the husband deserted the wife, and went to live with another woman. In 1961 he applied to the British Columbia Supreme Court for a declaration that since the purported marriage was a polygamous one, he did not have the status of a married person within the meaning of the matrimonial laws of British Columbia and Canada.

It will be remembered that the English Court of Appeal, in *Baindail* v. *Baindail*,[2] had dispelled the many illusions which had arisen from Lord Penzance's famous judgment in *Hyde* v. *Hyde*[3] that our law would give no recognition at all to polygamous marriages. In *Baindail* v. *Baindail* the court stated quite clearly that Lord Penzance had only laid down that the parties to a polygamous marriage were not entitled to "the remedies, the adjudication or the relief of the matrimonial law of England." Outside these limits, the extent of the recognition which our courts will give to such marriages is still far from certain. However, the *Sara* case fell *within* these limits. If the marriage in this case was polygamous, then the matrimonial laws of British Columbia (or of Canada for that matter) would have no application thereto, and thus Mrs. Sara would never, for example, be entitled to a divorce or to maintenance.

This very hardship had in fact happened only last year in the English case of *Sowa* v. *Sowa*.[4] The parties there were Ghanaians, who had gone through a potentially polygamous marriage ceremony in Ghana in 1955, and then come to reside in England. In 1958 the husband deserted the wife in England, and her application to the magistrate's court for maintenance was rejected on the grounds that this potentially polygamous marriage could not give rise to "the remedies, the adjudication or the relief of the matrimonial law of England." In the *Sara* case, therefore, the learned judge, Mr. Justice Lord, was faced with the dilemma, to use his own words, that:

> our country welcomes immigrants, they become naturalized and take an oath to observe the laws of Canada yet they cannot have the benefit of these laws because of the polygamous or potentially polygamous nature of a marriage ceremony which our courts recognize as valid for purposes of succession or legitimacy, but not for any remedy, adjudication or relief of the matrimonial law.[5]

1. (1962) 31 D.L.R. (2nd) 566.
2. (1946) 1 All E.R. 342.
3. (1866) L.R. 1 P. & D. 130.
4. (1961) 1 All E.R. 687.
5. (1962) 31 D.L.R. (2nd), at p. 573.

The only way out of this impasse would be to find that the Sara marriage was in fact monogamous and not polygamous. The learned judge managed to take this escape route, but it is respectfully submitted that his escape, while entirely commendable, was rather circuitous.

The basic question, of course, is what law determines whether a marriage is monogamous or polygamous? The traditional view is that this is decided by application of the *lex loci celebrationis* on the basis that it is the *lex loci* which governs all questions of the formal validity of the marriage ceremony. But as Dr. Cheshire points out,[6] if two parties go through a ceremony of marriage and become husband and wife in accordance with the *lex loci*, the problem in which we are now interested is not whether they are related, but what is their position *vis-a-vis* each other once the relationship has been created. He then submits that:

> this is a question of status, of the essential validity of the marriage, with which the *lex loci celebrationis* has nothing whatsoever to do.[7]

Now, of course, the consequences of the marriage union do not affect only the parties themselves, but also the community in which they will make their home, and therefore Dr. Cheshire submits that these consequences should be determinable by the law of the country of the "matrimonial domicil", that is to say, that country in which the parties intend at the time of the marriage to establish their home, and in which they do in fact establish it. A good illustration of the reasonableness of this proposition can be seen in the *Sowa* case. If two Ghanaians make their matrimonial home in England, is it right that the husband should be able to escape his domestic responsibilities by refusing to go through an English marriage ceremony (as he in fact did), and thereby cast his wife as a liability on the community of their matrimonial domicil?

In *Sara* v. *Sara* the learned judge found as a fact that as far as the husband was concerned there was no doubt that he intended to emigrate to Canada, and he did not deny marrying his wife for that very purpose. The learned judge also felt that Mrs. Sara at all times had it in mind that they would return to Canada. Therefore, not only did the parties have the necessary *animus* to establish their matrimonial domicil in Canada, but they had also carried this into effect by the time that the present proceedings were launched. This marriage could therefore surely be regarded as monogamous by virtue of the line of reasoning that its incidents should be governed by the law of the matrimonial domicil, British Columbia, which prohibits polygamy.

Unfortunately, however, although the learned judge quoted from Dr. Cheshire[8] to the effect that the law of domicil governs capacity to contract marriage and the essential validity thereof, he did not follow the writer through to the submission mentioned above. Rather, he preferred

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6. *Private International Law* (6th ed.), p. 310. 7. *Ibid.*
8. For some strange reason, he referred to the 4th edition, rather than the current, 6th, edition.

to accept the traditional view that the marriage was, by virtue of the *lex loci celebrationis*, a potentially polygamous one. However, he then went on to hold that as the marriage had always been monogamous *de facto*, and as the husband was now prohibited from taking further wives both by his *lex domicilii* and by the *lex loci celebrationis*, "the status of the parties must be regarded as being changed" and "the marriage must be considered as no longer polygamous."[9]

It is respectfully submitted that the lengths to which the learned judge was prepared to go in his judgment to reach the desired end leave one with an unhappy feeling that maybe a little too much straining was necessary to achieve justice for a deserted wife, who could have been helped to the same end by an approach more directly consonant with sociological and legal realism.[10]

C. H. C. EDWARDS*

LAW AND THE ESKIMOS

In a recent case[1] of vital importance to Canada's Eskimo population, Mr. Justice John H. Sissons, of the Territorial Court of the Northwest Territories, was called upon to write on a clean slate;[2] or, to vary the metaphor, to embark upon a legal course with little but commonsense and imagination for his guide.

Noah, an Eskimo, died from injuries received during a fire which destroyed a bunkhouse in which he was sleeping. Some two years before his death, he had married Igah, a woman of his own blood, in accordance with native Eskimo custom. His marriage took place on Broughton Island, an isolated settlement of about 100 persons, having few of the recognized attributes of the white man's civilization.

The Vital Statistics Ordinance of the Northwest Territories provides for the registration of marriages entered into in accordance with Eskimo custom. Noah's marriage was not registered under this ordinance.

One child was born of his union with Igah. He died intestate, leaving an estate of some $26,000. The administrator of his estate applied to the court for an order to determine Noah's next-of-kin.

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9. (1962) 31 D.L.R. (2nd), at p. 574.

10. Since writing the above this case has gone on appeal to the British Columbia Court of Appeal, whose decision is reported in 40 W.W.R., at p. 257. Both the husband's and the wife's applications for a declaration as to the effect of the Indian marriage were dismissed, but on grounds of procedure and equity. The appeal judgment again appears to assume that the marriage was basically polygamous because of the ceremony and the *lex loci*, and fails to consider the intention of the parties with regard to their matrimonial home.

*Recorder, Manitoba Law School.

1. *Re Noah Estate* (1962) 36 W.W.R. 577.

2. These are Mr. Justice Sisson's own words. The phrase is not in good favour with the Supreme Court of the United States. On three recent occasions, this Court has said, "We do not write upon a clean slate." See Frederick Bernays Wiener's Selden Society lecture for 1962, at p. 16.