code.[21] It is to be hoped that our own Law Reform Commissions and legislatures will also take up the challenge here to bring 19th century contract law into line with 20th century social conditions.

C. H. C. EDWARDS.*

DOMESTIC RELATIONS

When faced by two persons who wish to invoke the matrimonial jurisdiction of the courts but who have entered into a valid polygamous marriage the most important question to be asked is whether the marriage is actually polygamous or just potentially polygamous. A further question and one which has had little discussion, is whether it is necessary that there be two or more wives at the time of the petition for the marriage to be actually polygamous, or whether all that is necessary is that at some time during the marriage there has been more than one wife. In a recent decision, *Imam Din v. National Assistance Board*,[1] a man had contracted a valid polygamous marriage with a woman in Pakistan in 1948. At this time he already had a wife, but she died in 1949. In 1966 an action came before the English High Court concerning the marriage in 1948 and the court had no hesitation in holding that it was an actually polygamous marriage despite the fact that at the time of the proceedings in question there were only two parties to the marriage. This suggests that the rule is "once actually polygamous always polygamous."

The distinction between actually polygamous marriages and potentially polygamous marriages is of great importance because if the marriage is actually polygamous the law takes little cognizance of it. If it is merely potentially polygamous, however, the courts have taken the attitude that it is possible for a change of circumstances to turn the marriage into something so like marriage as we know it, that we will regard it as monogamus and allow the parties recourse to the matrimonial courts. There has been a gradual relaxing in the type of change of circumstances required for this purpose[2] but the law was still a little vague until the recent case of *Ali v. Ali*.[3] Mr. and Mrs. Ali contracted a valid polygamous marriage in India in 1958, and later that year moved to England, where Ali had in fact resided since 1954. In 1959

21. Law Notes (1967), Vol. 86, p. 74.

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1. (1967) 2 W.L.R. 257.
2. For a review of the development prior to All v. All see (1966) 2 Man. L.J. 113.
3. (1966) 1 All E.R. 664.

Mrs. Ali deserted him and returned to India. The court found as a question of fact that Ali had established a domicile of choice in England in 1961.[4] In 1963 Ali petitioned for a divorce on the ground of his wife's desertion, which the wife denied and cross-prayed cruelty. Subsequently in 1964 the wife amended the ground of her cross-prayer to adultery.

The problem facing the court was whether a change of domicile alone was sufficient to change the nature of the marriage; there had been additional factors in the earlier cases which had swayed the court's decision. Cumming-Bruce, J., held, and I think rightly, that the acquisition of English domicile in 1961 was sufficient to bring the marriage within the jurisdiction of the court. This seems abundantly reasonable since the union involved only two persons; while the husband's domicile was English he could not take another wife, and the major argument against the recognition of polygamous union, *i.e.* that the law has no appropriate machinery to deal with problems relating to them, did not of course apply.

Cumming-Bruce, J., then went on, however, to introduce what seems an unnecessary new complication. He held that although this union could, since 1961, be treated as a monogamous one, yet matrimonial relief could not be given on the basis of any offence committed prior to 1961. The husband's petition was therefore refused and the wife's petition allowed on the ground of adultery, since the adultery petitioned happened in 1964. Such a distinction would appear academic, and in practice unnecessary.

The case of *Imam Din v. National Assistance Board*[5] also raised one other interesting point. The facts are not of great importance but must be mentioned briefly to illustrate the point. As stated already the court considered the union an actually polygamous one. The wife and four children had been living in England and were being supported by the National Assistance Board. The National Assistance Board wished to recover some of this maintenance from the husband and were given power under the National Assistance Act so to do. The whole question turned on the meaning of the word "wife" since the court was here concerned with wives and legitimate children. The husband maintained that as their marriage was actually polygamous then the woman in question was not a "wife". A divisional Court of the Queen's Bench Division consisting of Lord Parker, Salmon, L. J., and Widgery, J., held that the recognition of a foreign

4. The Court remarked how easy it now seemed for a foreigner to go to England and satisfy the courts by little more than a statement to the effect he was domiciled there.

5. (1967) 2 W.L.R. 257.

marriage and the construction of the word "wife" in an English statute depended upon the purpose for which the marriage was to be recognized and the object of the Statute and that having regard to the purpose of the National Assistance Act the word "wife" should include the wife of a polygamous marriage.

The full implication of this decision if the court was formulating a general principle, which appears to be the case, could be that such Acts as our Testators Family Maintenance Act could be used to benefit wives of polygamous marriages, and of course the obvious significance if legislation similar to the National Assistance Act is enacted in Manitoba.[6]

Still in the realm of jurisdiction, an important point was raised in the recent case of *Leon v. Leon*.[7] This concerned section 40 (1) of the English Matrimonial Causes Act 1965, which is almost identical to Section 2 of our Divorce Jurisdiction Act 1952. Section 40 (1) states that the English Courts can hear a wife's petition for a divorce where she has been deserted by her husband, and immediately prior to the desertion he was domiciled in England. Section 2 differs only in that there must have been two years desertion before this right arises and instead of England, of course, a particular province would be involved. The question which has been mooted in the past was whether the wife had to be actually in the jurisdictional area in question when the desertion took place. Baker, J., held, however, that this was *not* necessary, and that the wife need never even have been to England at all. The husband in this case had left his wife in British Guiana (now Guyana) and established a domicile in England. He had deserted his wife while he was in England and petitioned for a divorce. The wife cross-petitioned. He withdrew his petition and left the country. The question was whether the wife's petition could be heard. The court held that it could be heard on the basis of Section 40 (1) or alternatively on the basis that at the time of the petition and answer the husband was domiciled within their jurisdiction and that jurisdiction was not lost by his leaving. In other words once competent always competent, as appears to have been the rule in Canada for some time.[8]

S. J. SKELLY.*

6. A brief requesting such legislation was recently submitted to the Manitoba Legislature by an organization of deserted wives called the "Minus-one" group.

7. (1966) 3 All E.R. 820.

8. Pearson v. Pearson (1951) O.R. 344; Meise v. Meise (1947) 1. W.W.R. 949 (Sask.) Both of which cite as authority the English case of Goulder v. Goulder (1892) P. 240, which was not cited in Leon v. Leon.

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