occasions[15] that the State Parliament may incidentally bind the Crown in right of the Commonwealth. It may enact general laws affixing legal consequences to given descriptions of transactions, such as the sale of goods, and if the Commonwealth enters into such a transaction it may be bound by the rule laid down. What the court decided in the present case was that a State could not control the legal relations of its subjects with respect to the Commonwealth.

It would appear that this principle does not apply in converse—the Commonwealth may have power to control the legal rights of the States in respect to its subjects. This is due to the nature of the Federal system. It is a dual system, with supremacy, where it exists, belonging to the Commonwealth and not to the States. The power of the Federal legislature was specific and paramount; the powers of the State legislature are residual and subordinate. Because of the affirmative nature of its powers, the Commonwealth could, for example enact laws excluding or reducing the priority of the States in bankruptcy.[16] But the States could have no such power. This may appear to be an odd result, but is one which necessarily arises out of the nature of the Federal system. It does not detract in any way from the principle of the present case, but is merely a consequence of having a dual system of government.

D. J. BEATTIE

HAQUE v. HAQUE[1]

Private International Law—Change of Domicile—Tests Applied; Contract—Settlement in contemplation of polygamous marriage—its effect

The deceased Abdul born a Moslem in India in 1912, was married there in 1927 in accordance with Moslem rites to a Moslem named Bibi. He moved with his father to Western Australia to establish a business there, leaving Bibi behind in India where he visited her and their two children from time to time.

In 1951 in Western Australia Abdul took unto himself a second wife, Azra, another Moslem who had just arrived from India for the purpose of marrying him. This union was effected in accordance with Moslem rites and did not satisfy the Western Australian Marriage Act.[2] At this date too, a settlement was executed between Abdul and Azra, whereby in consideration of the proposed marriage, a matrimonial regime was established in all respects identical to that which would have been created by Moslem law had the marriage between Indian domiciliaries taken place in India. The provisions of this settlement were expressed to apply notwithstanding a contrary testamentary intention. This second marriage was subsequently dissolved in India by the Moslem triple talaknama. The fact that he went through a second ceremony of marriage with

[15] *Farley's* case (1940) 63 C.L.R. 278, 308: *Uther's* case (1947) 74 C.L.R. 508, 528.
[16] See decision of Dixon and Evatt JJ. in *Farley's case* (1940) 63 C.L.R. 278, 313, 322 and Dixon J. in *Uther's* case (1947) 74 C.L.R. 509, 529. See also *Commonwealth v. New South Wales (Royal Metals Case)* (1923) 33 C.L.R. 1.

[1] (1962) 36 A.L.J.R. 179. High Court of Australia; Dixon C.J., Kitto, Menzies and Owen JJ. [2] 58 Vict. No. 11 Pt III (W.A.) (1894).

Azra, informal by both Moslem and Australian domestic law is not here relevant.

On his death in 1961 Abdul bequeathed in effect all his property to his brother Nural, the defendant in the instant suit. The action was brought by the 'widow' Azra and her two children, and subsequently the widow Bibi and her two children sought a share.

Under Moslem law the property would be distributed among the four children and the widow Bibi only,[3] in fixed unequal proportions notwithstanding contrary disposition by will or settlement. Under Western Australian domestic law, the will would operate to pass the property to the defendant Nural subject to testator's family maintenance provisions and subject to the settlement deed, if effective.

The High Court in a joint judgment upheld the finding of the learned trial judge[4] that Abdul had not abandoned his domicile of origin in India, by reason of his long residence in Western Australia. It was held after a long examination of the facts, that in view of his close connexion with his motherland which he had visited on two occasions in 1937 to 1940 and again in 1953, and in view of the commercial nature of his residence in Australia, he had not sufficient *animus* to throw off his Indian domicile.[5] Accordingly his personal law was Moslem law and his movable property passed according to its provisions.

This meant of course that the High Court was not called to consider the interesting questions attending the right to succession of children of a polygamous marriage, the status of the polygamous marriage itself and the effect of the settlement both in the face of the inconsistent will and in the face of its perhaps illegal consideration. These issues and more have been considered elsewhere[6] so it is the concern of this note to outline the problems caused by two points which were thrown up by the judgment, the validity of the 1951 marriage with Azra and secondly the validity of the settlement.

The former raises difficulties since the marriage could be struck down on either of two grounds: non-compliance with *lex loci celebrationis* and because of its polygamous nature. The latter point is beset with problems but it would seem that, had the High Court been required to pronounce on the validity of the marriage their Honours would have held it void on this latter ground.[7] Nevertheless it is to the former that attention is here directed.

In 1930 the Privy Council said of the rule *locus regit actum* with regard to all aspects of marriage except capacity of the parties, that it is 'one

[3] Since Azra had been irrevocably divorced in the Moslem style, Moslem law would allow her no share in the estate. [4] Wolff C.J.

[5] This is perhaps a little surprising in view of the fact that Abdul had applied for Australian naturalization. Their Honours relied on *Winans v. Attorney General* [1904] A.C. 287 and *Bowrie (or Ramsay) v. Liverpool Royal Infermary* [1930] A.C. 588.

[6] Cowen and Mendes da Costa 'Matrimonial Causes Jurisdiction—Second Year' (1963) 36 *Australian Law Journal* 283.

[7] '. . . the ceremony was performed in Australia where the law would not recognize a polygamous marriage entered into within Australia' (1962) 36 A.L.J.R. 179, 184 and examine critically the cases cited therein.

question better settled than any other in international law'.[8] While *lex domicilii* has been found most suitable for questions of status generally, in this one field it has been felt that every society has a vital interest in and a need to control the important institution of local matrimony.[9]

Despite strenuous efforts on the part of some text writers[10] the sanctity of this rule has since 1957[11] been impugned and the rule relegated to a mere presumption, admitting two principal exceptions, where the *lex loci* is inapplicable[12] and where the *lex loci* is rejected.[13] Thus if the instant ceremony had taken place for example in New Zealand, it is conceivable that an Australian Court would recognize the marriage (polygamy question aside) on the ground that a Christian or secular ceremony would be contrary to the conscience of the parties or even on the grounds that the Moslems, being a self-contained society in New Zealand may be presumed to have rejected the *lex loci.*[14] If the Australian Court were satisfied that the presumption had been rebutted on either ground it would probably apply the *lex domicilii.*[15]

From this conclusion Sir Eric Beckett in his illuminating article[16] argues that considerations of reciprocity would, in a situation such as confronted the Court in the instant case, demand a like recognition of the Western Australian ceremony. In support of this he adduces *Re*

[8] *Berthiaume v. Dastous* [1930] A.C. 79, 83. See too *Scrimshire v. Scrimshire* (1752) 2 Hagg. Cons. 395; *Ruding v. Smith* (1821) 2 Hagg. Cons. 371; *Dalrymple v. Dalrymple* (1811) 2 Hagg. Cons. 51; *Starkowski v. Attorney-General* [1954] A.C. 155.

[9] *Brook v. Brook* (1861) 9 H.L.C. 193; *Harvey v Farnie* (1882) 8 App. Cas. 43, 50 *per* Lord Selborne L.C. approved in *Russ v. Russ* [1962] 1 All E.R. 649, 655. Schmittoff speaks in terms of the *lex domicilii* delegating its authority in this matter to *lex loci,* thereby affirming the primacy of the *lex domicilii* for matters of status: *The English Conflict of Laws* (3rd ed. 1954) 316-317.

[10] See for example Mendes da Costa, 'The Formalities of Marriage in the Conflict of Laws' (1958) 7 *International and Comparative Law Quarterly* 217. Despite the learned author's misgivings *Milder v. Milder* [1959] V.R. 95 seems to have decided the issue for Victoria.

[11] *Taczanowska v. Taczanowski* [1957] P. 301.

[12] *E.g.* where conformity is physically impossible: *Milder v. Milder* [1959] V.R. 95; or where there is no *lex loci: Savenis v. Savenis* [1950] S.A.S.R. 309; or where facilities are denied: *dictum* of Smith J. in *Milder v. Milder;* or where compliance is against conscience.

[13] For example an army in belligerent occupation: *Taczanowska v. Taczanowski* [1957] P. 301, *cf. Lazarewicz v. Lazarewicz* [1962] 2 All E.R. 5, or a social unit severing all contact from the State in which it is resident *e.g.* ghetto or concentration camp: *Kochanski v. Kochanska* [1958] P. 147. The intention must be shown objectively: *Milder v. Milder* [1959] V.R. 95, 100.

[14] Morris 'The Recognition of Polygamous Marriages in English Law' (1953) 66 *Harvard Law Review* 961, 982. In all the cases cited above, n. 12, the two elements present were involuntary residence of a self-contained group. The question of the *voluntary* residence of a self-contained group has not been raised, but from *dicta* of Smith J. in *Milder v. Milder* [1959] V.R. 95, 99-100 *semble* the presumption would not be rebutted in the instant case at least.

[15] This proposition is by no means free from difficulty. *Savenis v. Savenis* [1950] S.A.S.R. 309; *Taczanowska v. Taczanowski* [1957] P. 301; *Kochanski v. Kochanska* [1958] P. 147 (*dubitante*) all favour *lex fori i.e.* common law. Against them *Fokas v. Fokas* [1952] S.A.S.R. 152 (Napier C.J.); *Maksymec v. Maksymec* (1954) 72 W.N. (N.S.W.) 522. See generally Donovan (1951) 25 *Australian Law Journal* 165, 592; (1956) 30 *Australian Law Journal* 95 and *cf.* Fleming (1951) 25 *Australian Law Journal* 406 and authorities cited therein. Mendes da Costa, 'The Formalities of Marriage in the conflict of laws—Australia' (1959) 33 *Australian Law Journal* 72.

[16] Beckett 'The Recognition of polygamous Marriages under English Law' (1932) 48 *Law Quarterly Review* 341, 365 ff.

Ullee[17] where the children of a Moslem polygamous marriage celebrated in England were thought by Chitty J. to be legitimate, and *Re Belshah*[18] where the wives of a polygamous marriage celebrated informally in England were implicitly recognized for intestate succession purposes. The authority of the pair of cases may be strengthened by *Rex v. Rahman,*[19] a later case where a Moslem ceremony in London was held to be a 'marriage' requiring registered *premises* under the English Marriage Act 1836.[20]

On the other hand, in all of these cases one of the parties was domiciled in England so that the English Court had a domestic interest to protect.[21] Moreover the poorly reported *Belshah* case is not strictly in point since, as in the instant judgment, the question before the Court was whether the *lex domicilii* would recognize the marriage for purposes of succession to moveables and not whether the *lex fori* would recognize it. Finally the authority of these cases is diminished by the fact that in *Re Ullee* itself, Chitty J. held the marriage to be 'not binding on any spouse of English domicile, the reason being that it was not intended to be a marriage'.[22]

Moreover Beckett's analogy that an Australian Court should recognize an informal marriage contracted in Australia by aliens in circumstances identical to those where it would recognize a marriage of Australians abroad, that is where compliance with *lex loci* is inapplicable or is rejected, has been exploded by Professor Morris in his latest edition of *Dicey,*[23] since in the instant case the *lex loci* is that of Western Australia, the place of the *forum.* So that to ask an Australian Court to sanction the violation of a domestic statute is something that the cases following *Taczanowska v. Taczanowski*[24] would never urge a court to do. In every one of these cases *forum* has been riding through a foreign statute to preserve the integrity of persons stranger to that statute.[25] From earliest times the common law has recognized this difficulty.

There is a *jus gentium* upon this matter, a comity that treats with tenderness, or at least with toleration, the opinions and usages of a distinct people in this transaction of marriage. It may be difficult to say, *a priori,* how far the general law should circumscribe its own authority in this matter: but practice has established the principle in several instances; and where the practice is admitted it is entitled to acceptance and respect.[26]

[17] *Re Ullee; The Nawab Nazim of Bengal's Infants* (1885) 53 L.T. 711.
[18] *Re the Estate of Abdul Belshar Majid* 'The Times' 16, 18 December 1926, 14, 18 January 1927.
[19] [1949] 2 All E.R. 165 (Leeds Assizes). [20] 6 & 7 Will. IV c. 85 s. 39.
[21] As in *Sottomayor v. De Barros (No. 2)* (1879) L.R. 5 P.D. 94.
[22] (1885) 53 L.T. 711, 712; affirmed 54 L.T. 286 (C.A.). Three reasons suggest themselves: non-compliance with the *lex loci,* the husband's prior subsisting marriage, and the incapacity of the wife under her *lex domicilii* to enter into a polygamous union.
[23] *Dicey's Conflict of Laws* (7th ed. 1958) 275; Morris, 'The Recognition of Polygamous Marriages in English Law' (1953) 66 *Harvard Law Review* 961, 978-983; Bartholomew, 'Polygamous Marriages and the English Criminal Law' (1954) 17 *Modern Law Review* 344, 347-9; Wolff, *Private International Law* (1950) 319.
[24] [1957] P. 301. [25] *Ibid.* and see *Savenis v. Savenis* [1950] S.A.S.R. 309.
[26] *Ruding v. Smith* (1821) 2 Hagg. Con. 371, 886 *per* Lord Stowell.

Perhaps then this is one area where the Courts can say that the question is one for legislative policy. Where the alien society is sufficiently strong yet distinct then its needs may be expected to be satisfied in future Marriage Acts. Suffice it to say that in the new Commonwealth Marriage Act[27] and the Matrimonial Causes Act[28] the government, although its mind has turned towards the problem raised by resident Moslems,[29] presumably has not considered them sufficiently numerous to warrant special attention.

In fact the *lex loci* rule of *Scrimshire v. Scrimshire* has been affirmed[30] subject to the common law exceptions following *Taczanowska v. Taczanowski.*[31]

The second point arose from the *dictum* of the High Court[32] that the settlement would probably be enforced notwithstanding the argument that it should be held bad on the ground of public policy since it was executed in consideration of future adulterous cohabitation.

Public policy has required that the courts suspend the normal respect given to contracts where they tend to endanger sanctity of the marriage state, for example a promise to marry where the promisor was already married,[33] or where they tend to endanger the virtue of young maids, for example a mortgage where the mortgagor covenanted that the mortgagee should have access to his daughter.[34] It is clear on either of these grounds of public policy that a settlement made in consideration of future illicit cohabitation is void since it would induce young ladies to compromise their innocence and *a fortiori* where the settlor is already married since it interferes with the rights of the wife.

The evidence in the instant case suggested that the deceased Abdul realized that the Moslem ceremony would have no effect in Australia, indeed this is the reason for his having the settlement drawn up. The state of mind of Azra, the 'wife', was not proven but, since Abdul shewed to her a forged bill of divorcement as an added inducement to marry, it would not seem unreasonable to suppose that although an educated woman, she would have thought herself the only valid wife of Abdul. The question then is whether the deceased, through his personal representative, could avoid the settlement.

Where one party knows of the facts which give rise to illegality in a contract while the other is ignorant, the cases would seem to indicate that the 'guilty' party could not avoid the contract if it was executed[35] and could not enforce it if it was still executory.[36] Azra, the ignorant party although safe from enforcement proceedings at suit of Abdul, could probably have the settlement set aside.[37] Moreover she, as ignorant party, could enforce the deed against Abdul or obtain remedies for its

[27] No. 12 of 1961 (Cth) s. 94. [28] No. 104 of 1959 (Cth) s. 18 (1) (a).
[29] Sir Garfield Barwick, 'The Commonwealth Marriage Act 1961' (1962) 3 *M.U.L.R.* 277, 293. [30] Matrimonial Causes Act 1959 s. 18 (1) (Cth).
[31] *Ibid.* ss. 22 (3), 25 (3). [32] (1962) 36 A.L.J.R. 179.
[33] *Fender v. St John Mildmay* [1938] A.C. 1; [1937] 3 All E.R. 402; *Psaltis v. Schultz* (1948) 76 C.L.R. 547. [34] *Willyams v. Bullmoore* (1863) 32 Beav. 574.
[35] *Ayerst v. Jenkins* (1871) L.R. 16 Eq. 275.
[36] *Pearce v. Brooks* (1866) L.R. 1 Ex. 213.
[37] *Willyams v. Bullmoore* (1863) 32 Beav. 574.

breach since it would be inequitable for him to set up his own illegality as a defence.[38] Likewise where the trustees of the settlement sought directions, they could not be compelled to carry out the contract since they are not estopped in the same way as the settlor, but they would be entitled to treat the trust as an unenforceable gift binding in honour only.[39]

Different considerations would apply if it could be shown that both the parties knew that the ceremony was ineffective but yet executed the deed in the hope that the matrimonial regime would be carried out. In such a case there is a well established principle that 'men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice'.[40] But equally well established is the principle that 'there are some classes of contract whose characteristics are such that their enforcement by the courts is barred by the paramount principle of public policy'.[41]

Like other aspects of British jurisprudence public policy has been subjected to the rule of precedent[42] and especially is this so in this jurisdiction where the judges have repeated again and again warnings against expanding the already established principles in any direction which the presiding judge might personally feel to be in the public interest.[43] This of course tends to the contrary extreme and distorts the true role of public policy which does and indeed must change from age to age, representing what may be called 'the inner certainties or convictions of the law. . . . In the very fullest sense it is the law itself that speaks'.[44] Hence a development may be traced in the law of contracts in restraint of trade from the *laissez-faire* attitude that contract is a meeting of equal minds and the modern principles of employer-employee law that the individual must be protected against the corporation from an abuse of this equality of bargaining power.[45]

In the area of marriage articles, it has been decided that a settlement in contemplation of future cohabitation which both parties know to be illicit is void,[46] since the insecurity of the lady is in the eye of the law a great deterrent against such impolitic relationships. But the instant situation imports a new element. Far from the paradigm of a wealthy rake seeking to seduce a foolish virgin with promise of lucre, the instant case reveals two aliens seeeking to do what they believe to be right but which

[38] *Wild v. Harris* (1849) 7 C.B. 999; *Millward v. Littlewood* (1856) 5 Exch. 775; *Shaw v. Shaw* [1954] 2 Q.B. 429.

[39] *Phillips v. Probyn* [1899] 1 Ch. 811.

[40] *Printing & Numerical Registering Co. v. Sampson* (1875) L.R. 19 Eq. 462, 465, *per* Jessel M.R.

[41] *Fender v. St John Mildmay* [1937] 3 All E.R. 402, 414 *per* Lord Thankerton.

[42] *Ibid.* 431 *per* Lord Wright.

[43] See for example *Egerton v. Earl Brownlow* (1853) 4 H.L.C. 1, 123 *per* Parke B. and *Fender v. St John Mildmay* [1937] 3 All E.R. 402 *passim*.

[44] Lord Radcliffe, *The Law and its Compass* (1960) 38.

[45] *Ibid.* 57 ff. and see Ginsberg (ed.), *Law and Opinion in the Twentieth Century* (1959); and see Cardozo, *The Nature of the Judicial Process* (1925) 94-97.

[46] *Coulson v. Allison* (1861) 2 De G.F. & J. 521, 525 *per* Lord Campbell L.C.; *Butcher v. Vale* (1891) 8 T.L.R. 93.

is not sanctioned by the local law. Clearly if they married by Moslem ceremony abroad where the marriage would be recognized in Australia, and then moved to Western Australia while retaining their Moslem Indian domicile, the Court would order succession as required by Moslem law[47] unless the succession laws themselves offended the Australian sense of propriety.[48] It would seem that the only mistake made by Abdul and Azra was to marry while temporarily resident in Australia[49] and not in India. While it is perhaps clear that where the issue is that of recognition of the marriage, the *locus* is a valid determinent,[50] the enforcement of a settlement deliberately entered into is surely worthy of greater indulgence since for these parties at least, the settlement was not an inducement as in *Coulson* but merely what a Moslem bride would expect. To invoke public policy to deny enforcement to such a settlement is, it is submitted, perhaps to extend the spirit of the rule under the cloak of preserving its letter.

D. M. BYRNE

THE QUEEN v. REYNHOUDT[1]

Criminal law—Crimes Act 1958 section 40—assaulting police officer in due execution of duty—necessity to prove intent as to all elements—effect of re-enactment subsequent to a particular judicial interpretation

This was an application by the Crown for special leave to appeal from a decision of the Full Court of the Supreme Court of Victoria, sitting as the Court of Criminal Appeal, which quashed a conviction of the respondent upon a count in an indictment charging him with the offence under section 40 of the Crimes Act 1958, of assaulting a member of the police force in the due execution of his duty. Section 40 provides that:

> Whosoever . . . assaults resists or wilfully obstructs any member of the police force in the due execution of his duty . . . shall be guilty of a misdemeanour.

The Chairman of General Sessions had instructed the jury that the prosecution was not obliged to prove that the respondent, at the time of the alleged assault, knew that the object of that assault was a police officer acting in the due execution of his duty. In so doing the Chairman acted

[47] *Polydore v. Prince* (1837) Ware, 402. *Williams v. Oates* 27 North Carolina Rep. 375, both cases are cited by Beckett *op. cit.* 350; *Srini Vasan v. Srini Vasan* [1946] P. 67, and *Sinha Peerage Case* (1939) 171 Lords Journals 350; [1946] 1 All E.R. 348 n. *per* Lord Maugham.

[48] Supposing a colony in Australia was established of persons whose custom required that wives passed to the heir with other moveable property, it would be expected that some limits be imposed on such liberty of conscience. This is an argument which found favour with MacFarlan J. in *Merwin Pastoral Co. Pty Ltd v. Moolpa Pastoral Co. Pty Ltd* (unrep.) but which was rejected on the facts by the High Court of Australia on appeal (1933) 48 C.L.R. 565.

[49] Their Honours found that Abdul had not acquired an Australian domicile.

[50] See for example *Brook v. Brook* (1861) 9 H.L.C. 193.

The writer wishes to thank the Registrar of the High Court in making available the transcript of this case which proved invaluable in the writing of this note.

[1] (1962) 36 A.L.J.R. 26. High Court of Australia; Dixon C.J., Kitto, Taylor, Menzies and Owen JJ.