The decision, both at first instance and on appeal, that the question of whether a foreign manufacturer has used his trade mark in Australia should not be governed by an inquiry as to where the property in the marked goods passed is, it is respectfully submitted, a logical, useful and realistic one, having regard to the commercial importance of the point raised by this case. On the other hand, where an overseas manufacturer's goods, bearing his mark, are sold or displayed in Australia by a retailer who cannot be considered as the manufacturer's agent, it may well be suggested that it does not logically follow that this should constitute in law a use by the manufacturer of his mark in Australia. It is submitted, however, that this development in the law, flowing from the *Estex Case*, is the result of the application of high technique rather than strict logic. It has been said recently that "our law has always preferred good sense to strict logic".[77] and there is an appeal to such good sense in Windeyer, J.'s observation: "Had anyone asked the respondent 'do you use your trade mark "Eastex" in Australia?', I imagine that the answer would have been 'Yes: all the goods which we export to Australian retailers go with our mark on them'."[78]

That is the commonsense answer any businessman would have given to that question. It is clear since the *Estex Case* that it is also the answer given by the five members of the High Court.

W. J. COLMAN, Case Editor—Fourth Year Student.

CONVERTIBLE MARRIAGE

ALI v. *ALI*[1]

Ever since the decision in *Hyde* v. *Hyde*[2] (now more than a century old) English and Australian Courts have declined to grant matrimonial relief in respect of a polygamous marriage. When is a marriage polygamous? Until recently it was generally thought that the nature or character of a marriage is immutably determined by the law of the place of celebration.[3] In recent years it has been conceded that the character of a marriage may be changed from polygamous to monogamous. In cases where such a mutation was recognised as in *Cheni* v. *Cheni*,[4] the change was in accordance with the law of the place of celebration itself.

In *Ali* v. *Ali* the husband was born in India. At the age of 24 he came to England, obtaining a job and living permanently there. Four years later he returned to India where he married an Indian wife chosen by his father. The ceremony took place according to the rites of the Muslim faith which was the religion of both parties. By Muslim law the husband was permitted to

[77] *C. Van Der Lely* v. *Bamfords Ltd.* (1963) R.P.C. 61 at 75 *per* Lord Reid.
[78] *Supra* n. 4 at 424.
[1] (1966) 1 All E.R. 664.
[2] E.g., *Hyde* v. *Hyde* (1866) L.R. 1 P. & D. 130.
[3] The authorities are numerous. See, for example: A. V. Dicey, *Conflict of Laws* (7 ed. 1958) 270; R. H. Graveson, *The Conflict of Laws* (4 ed. 1966) 103; J. H. C. Morris, *Cases on Private International Law* (3 ed. 1960) 103, citing *Chetti* v. *Chetti* (1909) P. 67; *Reg.* v. *Hammersmith Registrar of Marriages* (1917) 1 K.B. 634; *Srini Vasan* v. *Srini Vasan* (1946) P. 67. For a contrary view, reasoning that the cases usually cited in support can be otherwise explained, see G. W. Bartholomew, *Recognition of Polygamous Marriages in America* (1964) 13 *Int. C. Comp. L.Q.* 1022.
[4] (1965) P. 85; (1962) 3 All E.R. 873.

take further wives. The marriage was therefore potentially polygamous at its inception. The husband left for England shortly after the marriage and resumed his employment there. The learned judge (Cumming-Bruce, J.) decided that by the middle of 1961 he had acquired a domicile of choice in England. The wife followed and cohabited with her husband in England. In 1959 the husband applied for British nationality and in the same year a child was born to the parties. Shortly thereafter the wife left the matrimonial home with the child and returned to India. In 1960 the husband obtained a British passport, continuing to live permanently in England. In 1964 he began living with a woman and a child was born of this relationship. In 1963 the husband petitioned for divorce on the ground of desertion. The wife denied desertion and alleged cruelty. She also alleged that the Court had no jurisdiction on the ground that the marriage was polygamous.

In 1964, when the husband committed adultery, the wife cross-petitioned for a dissolution of the marriage on this ground.

The suits were heard by Cumming-Bruce, J. who held that the Court could not exercise jurisdiction in respect of the offences of desertion and cruelty because they took place, if at all, at a time when the marriage was still polygamous. However, the learned judge granted the wife a decree nisi on the ground of adultery as this offence took place after the character of the marriage had been rendered monogamous by the acquisition of an English domicile of choice by the husband.

In reaching this conclusion, Cumming-Bruce, J. first considered the legal characteristics of the type of marriage over which English courts exercise jurisdiction to pronounce a decree of divorce. His Lordship referred to Dicey Rule 38,[5] and concluded that the vital characteristic required is that of an exclusive voluntary union of one man and one woman for life. Secondly, his Lordship decided that a marriage potentially polygamous at its inception may be subsequently impressed with a monogamous character so as to found the jurisdiction of an English court. *Cheni* v. *Cheni*[6] was relied on in support.

Next Cumming-Bruce, J. investigated the precise effect of the acquisition of an English domicile by the husband. His Lordship concluded thus: "He has, by operation of the personal law which he has made his own, precluded himself from polygamous marriage to a second wife although he has not changed his religion."[7]

On the assumption that the law of England does not permit a domiciled Englishman to contract a valid polygamous marriage, Ali had by acquiring an English domicile lost the capacity to contract fresh marriages. The validity of this view is connected with Dicey's interpretation of *Re Bethell*,[8] which will be discussed later.

Cumming-Bruce, J. went on to consider the important question of whether the acquisition of an English domicile had the effect of impressing a monogamous character on the potentially polygamous marriage. His Lordship relied on the dictum of Sir Jocelyn Simon, P. in *Cheni* v. *Cheni*[9] to the effect that change of domicile may be effective to alter the nature of a union. "The chief difficulty" felt by the learned judge was to determine whether change of domicile did more than merely "frustrate one of the features of the potentially polygamous union".[10]

His Lordship indicated that there had been no active assertion of monogamous intent and that it could not be said that the acquisition of an English

[5] A. V. Dicey, *Conflict of Laws* (7 ed. 1958) at 288.
[6] (1965) P. 85; (1962) 3 All E.R. 873.
[7] (1966) 1 All E.R. at 668.
[8] (1887) 38 Ch. D. 220.
[9] (1962) 3 All E.R. 873 at 877.
[10] (1966) 1 All E.R. at 668.

domicile by the husband was intended to actively alter the character of the union. While agreeing that the legal validity of a marriage did not depend on personal intention, his Lordship thought it was "at the very least curious that a union originally polygamous should change its legal character without any conscious act on the part of either of the parties directed to that end".[11]

However, the learned judge accepted the point as an anomaly, comparing change by domicile with change by legislation in this respect. It is implicit in his Lordship's judgment that intention on the part of the husband alone to acquire a domicile may be sufficient to effect a conversion to monogamy.

His Lordship considered *Hyde* v. *Hyde*. If monogamous character can be impressed upon a potentially polygamous marriage, on what basis may that decision be explained? In that case the husband had acquired an English domicile before his wife married a second time and allegedly committed adultery by doing so. He had also changed his religion. The answer given by Cumming-Bruce, J. was that the importance of the concept of domicile in relation to the capacity to marry was at the time only "dimly appreciated".

Ali v. *Ali* raises a number of questions. First of all, whether a law other than the law of the place of celebration can alter the character of the marriage. In *Ali* v. *Ali*, the law of a subsequently acquired domicile was held to be relevant in deciding the nature of a marriage at the time of divorce proceedings and in displacing the effect of the *lexi loci celebrationis* rule. In *Parkasho* v. *Singh*,[12] which will be discussed later, a change in the *loci celebrationis* which could not have been in the contemplation of the parties at the time of the marriage, was held to affect the nature of that marriage. Secondly, is an intention on the part of the husband alone sufficient to alter the character of a union by change of domicile? Or must the change be the result of some bilateral decision before a change will be recognised as effected? It is implicit in his Lordship's reasoning in *Ali* v. *Ali* that intention on the part of the husband alone to acquire a domicile may be sufficient to alter the nature of the union.

Comment

The decision is contrary to the supposed principle that the *lex loci celebrationis* immutably determines the nature of the marriage. The case often cited in support is *Mehta* v. *Mehta*[13] where an Englishwoman married a Hindu in India in accordance with the rites of a sect which permitted only monogamous marriage. Although it was relatively easy for the husband to change to a sect which would permit polygamy, this fact was held to be immaterial. What was important was the character of the marriage at the time of celebration, and therefore it was to be regarded as monogamous.

In recent years a rule has developed that monogamous character may be impressed upon a polygamous marriage by a change in the circumstances surrounding the marriage. An example is *Cheni* v. *Cheni*.[14] In that case the spouses were married according to Jewish rites in Egypt where they were domiciled. By Egyptian law the religious law of the parties determined the validity of the marriage. By Jewish law if there was failure of offspring of the union within a certain period the husband could take another wife without formally divorcing the first. On the other hand, the birth of a child within that period made the marriage monogamous for all purposes. A child was in fact born to the parties who later came to England where they were domiciled at the date of proceedings by the wife for a decree of nullity on the ground

[11] *Id.* at 669.
[12] (1967) 2 W.L.R. 946.
[13] (1945) 2 All E.R. 690
[14] (1965) P. 85; (1962) 3 All E.R. 873.

of consanguinity. The husband argued that the English Court had no jurisdiction to grant the decree because the marriage was potentially polygamous. The Court (Sir Jocelyn Simon, P.) held that the birth of the child rendered the marriage monogamous and that the proper time to consider the character of the marriage was the date of proceedings. The learned judge cited two instances in which a potentially polygamous union may assume the characteristics of a monogamous marriage:

> Two spouses may contract a valid polygamous union and subsequently join a monogamous sect, or go through a second ceremony in a place where monogamy is the law. Again, a marriage in its inception potentially polygamous though in fact monogamous may be rendered monogamous for all time by legislative action proscribing polygamy.[15]

It is clear that the learned judge did not invoke the principle later relied on by Cumming-Bruce, J. in *Ali* v. *Ali* which was equally available in *Cheni* v. *Cheni*, namely, that by the time the proceedings were commenced the parties had acquired an English domicile. But Sir Jocelyn Simon, P. did hint that the nature of a marriage might be altered by change of domicile. His Lordship stated that "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", and conversely it may be expected that spouses who marry polygamously might "by personal volition or act of state" change their union to a monogamous type.

An interesting case relevant to both decisions is *Sara* v. *Sara*[16] where the wife, domiciled in British Columbia, married the husband in India in accordance with a Hindu ceremony of marriage which allowed polygamy. After the marriage both parties came to British Columbia where the husband acquired a domicile. The husband sought a declaration that he was not a married person within the meaning of the law of British Columbia, on the ground that his marriage was polygamous. The wife sought a declaration of the validity of the marriage. Lord, J. dismissed the application of the husband and made the declaration sought by the wife. His Lordship based his decision on two factors (a) acquisition by the husband of a domicile of choice in British Columbia (b) the fact that subsequent to the marriage polygamy between Hindus in India was abolished by the Hindu Marriage Act, 1955. The decision on the domicile aspect foreshadows *Ali* v. *Ali* and his reference to abolition by statute anticipates the second instance of conversion noted *obiter* by Sir Jocelyn Simon, P. in *Cheni* v. *Cheni*.

In *Ali* v. *Ali*, Cumming-Bruce, J. stated:

> The husband in this case carried into effect his intention of making England his country of domicile. Thereby he subjected himself to monogamy as a rule of his personal law and, in my view, this was as effective to convert a potentially polygamous marriage to a monogamous marriage as specific legislation would have been having the same intendment.[17]

The statement of Cumming-Bruce, J. implies that an act on the part of husband alone will be sufficient to render the marriage monogamous. It is submitted with respect that a conversion ought not to be recognised in cases where it is a matter of an act wholly unilateral by which a conversion to monogamy is sought to be effected. There must be evidence of intention on the part of both spouses to effect a conversion unless, of course, the event causing the conversion is in the nature of an act of state, as in *Cheni* v. *Cheni* (*obiter*) and *Sara* v. *Sara*. In *Ali* v. *Ali* itself there was undeniably evidence of intention on the part of both spouses to acquire a domicile of choice in England. This

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[15] (1965) P. 85 at 89.
[16] (1962) 31 D.L.R. (2d) 566.
[17] (1966) 1 All E.R. 664 at 669-70.

important concept is implicit in *Cheni* v. *Cheni* where his Lordship spoke[18] of acts of the "spouses" altering the nature of the marriage—citing as instances acts of change of domicile and religion. That statement by Sir Jocelyn Simon, P. was recently approved by the Privy Council in *Attorney-General of Ceylon* v. *Reid*.[19] *Attorney-General of Ceylon* v. *Reid* was not a case concerned with principles of private international law. It involved a question of local Ceylonese law. The parties were married in monogamous form according to Christian rites. The respondent was later converted to the Muslim faith and remarried according to Muslim rites. The respondent was charged with and convicted of bigamy. The Privy Council held that the appeal from the quashing of the conviction ought to be dismissed. After referring to the statement of Sir Jocelyn Simon, P. in *Cheni* v. *Cheni* noted above, their Lordships concluded:

In their Lordships' view, in such countries (countries not purely Christian) 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 recognised by the laws of the country notwithstanding an earlier marriage."[20]

The Court expressed no opinion on the situation in a purely Christian country. The act of the husband in this case was wholly unilateral. Counsel for the appellant adverted to this but the case is ambiguous on the point: it does not clearly appear whether the Court was merely reciting argument or putting forward its own view when their Lordships said that the argument against change "is strengthened where the change of faith is unilateral on the part of the husband only".[21] Even if this statement be mere recital of argument it was not expressly rejected in the judgment: the question of unilateral change may assume importance in other cases.

An interesting case which lends support to *Ali* v. *Ali* and which has been the subject of much judicial and academic discussion is the *Sinha Peerage Claim Case*.[22] In that case the Committee of Privileges of the House of Lords held that the eldest son of a potentially polygamous marriage celebrated in India between orthodox Hindus domiciled there, was entitled to a peerage which had been conferred on his father. The parents had joined a sect permitting monogamy before the claimant was born or the peerage was created. The husband had never in fact taken a second wife.

In his important argument Lord Maugham placed some importance on the fact that the spouses eventually adhered to a monogamous form of marriage. In *Ali* v. *Ali* the event was a change of domicile, but Professor Vesey-Fitzgerald says[23] in this regard in relation to *Sinha Peerage Claim*:

> . . . The acquisition of an English domicile would equally have had the effect of removing any doubts as to the monogamous character of the marriage. Such an acquisition of English domicile must clothe the parties with the whole status of married persons in English law . . . why should the parties to a *de facto* monogamous marriage be denied the protection of the courts of their domicile which alone determines their matrimonial status?

Dicey suggests[24] that *Sinha Peerage Claim* is an exception to the rule that the character of a marriage is determined once and for all at its inception. Professor Morris[25] proffers several possible *rationes decidendi* of the case and

[18] (1965) P. 85 at 89; 3 All E.R. 873 at 876.
[19] (1965) A.C. 720; (1965) 1 All E.R. (P.C.) 812.
[20] (1965) A.C. 720 at 734.
[21] (1965) A.C. 720 at 730; (1965) 1 All E.R. (P.C.) 812 at 815.
[22] (1939) 171 Lords' Journals 350; (1946) 1 All E.R. 348, n.
[23] S. G. Vesey-Fitzgerald, "Mixed Marriages" in *Current Legal Problems* 1948 (Faculty of Laws, University College, London) 222 ff., cited in J. D. Falconbridge, *Essays on the Conflict of Laws* (2 ed., 1954) at 786.
[24] A. V. Dicey, *Conflict of Laws* (7 ed., 1958) at 272.
[25] J. H. C. Morris, "The Recognition of Polygamous Marriages in English Law" (1953) 66 *Harv. L.R.* at 972.

concludes that the most acceptable *ratio* is that the marriage, though potentially polygamous in its inception, became monogamous before the petitioner was born. The learned writer concluded thus "because that ground on the whole does least violence to previously decided cases". Morris formulated the following rule, which is cited in Dicey and approved by Sir Jocelyn Simon, P., in *Cheni* v. *Cheni*:

> The marriage, so to speak, has the benefit of the doubt: if it is monogamous in its inception, it remains monogamous although a change of religion, or domicile, or of law might render it polygamous; if it is polygamous in its inception, but becomes monogamous by a change of religion, or domicile, or of law before the events giving rise to the proceedings, then it is monogamous.[26]

This formulation in respect of marriages polygamous in inception is supported by *Ali* v. *Ali* (change of domicile) and *Sara* v. *Sara* (change of law). It is submitted with respect that this formulation is acceptable with one major qualification viz. that the change of religion or of domicile must be the result of a move by both parties before the character of the marriage may be recognised as altered. *Attorney-General of Ceylon* v. *Reid* is concerned with a problem of local Ceylonese law, and, as the Court there admitted, the situation raises problems different from those encountered in purely Christian countries. Further, as submitted above, the Court possibly left open the question of unilateral change for future discussion. It does not necessarily follow from adherence to the concept of the dependent domicile of the female party to the marriage that she can have no say in the future characteristics of that marriage. A learned writer has said that recognition should not be extended to a conversion that operates to defeat "the contractual expectations of a wife"[27] and over which she has no control. In *Hyde* v. *Hyde* itself the husband had changed his religion and his domicile before he petitioned. The decision in that case is consistent with the submission made above that a change in the nature of a marriage must, to be effective, be in accordance with the intention of both spouses. Mr. Hyde could not unilaterally alter the nature of his Utah marriage simply by acquiring an English domicile. Why was this point not made explicitly in *Hyde* v. *Hyde*? It is submitted that the answer given by Cumming-Bruce, J. in *Ali* v. *Ali* is correct: when *Hyde* v. *Hyde* was decided the importance of domicile in questions of capacity to marry was only "dimly appreciated".[28]

Ali v. *Ali* in deciding that a change of domicile may be sufficient to alter the character of a marriage, raises the issue generally of the relevance of domicile in cases of capacity to marry polygamously. In *Re Bethell*[29] a question of succession to English property was involved. A domiciled Englishman went through a form of marriage with a girl belonging to a primitive African tribe. Polygamy was the prevailing custom amongst this tribe, in accordance with whose forms the "marriage" was celebrated. The question was whether a child of the union could be recognised by English law for succession purposes. Stirling, J. held that a union was not a marriage according to English law unless it was the voluntary union of one man and one woman to the exclusion of all others. The union was therefore not a valid marriage. Dicey explains this decision on the basis that a domiciled Englishman can have no capacity to contract a valid polygamous marriage.[30] It is submitted that the case cannot be so explained, in view of *Sara* v. *Sara* and *Khan* v. *Khan*.[31] In the former

[26] (1965) P. 85 at 90.
[27] D. Mendes Da Costa, "Polygamous Marriages in the Conflict of Laws" (1966) *The Canadian Bar Review* at 307.
[28] (1966) 1 All E.R. at 670.
[29] (1887) 38 Ch. D. 220.
[30] A. V. Dicey, *Conflict of Laws* (7 ed., 1958) at 276.
[31] (1963) V.R. 203.

case (as stated previously) a woman domiciled at all material times in British Columbia married a Hindu in India in potentially polygamous form. Soon after the marriage the parties came to British Columbia where the husband acquired a domicile of choice. If Dicey's explanation of *Re Bethell* is correct then no marriage at all came into existence. Yet the learned judge (Lord, J.) concluded that "the status of the parties (to the marriage) must be regarded as being changed", basing his decision on the two factors of abolition of polygamy by the Hindu Marriage Act, 1955 and the acquisition by the husband of a domicile of choice in British Columbia.[32]

In *Khan* v. *Khan* a case decided before the enactment of s. 6A Matrimonial Causes Act, a woman whose domicile of origin was in Victoria went through a ceremony of marriage in potentially polygamous form in Pakistan where her husband-to-be was then domiciled. A matter of importance is the precise time at which the wife acquired a Pakistani domicile. If that domicile arose only when she married in Pakistan, then her pre-marital domicile was Victorian. The alternative possibility is that she acquired a Pakistani domicile upon her arrival in that country and therefore her pre-marital domicile was Pakistani. If the former interpretation is correct the case would not now be covered by s. 6A. Further, it would follow that the decision is contrary to Dicey's explanation of *Re Bethell*. In his judgment Gowans, J. stated that "the petitioner (the wife) was born in Victoria and it appears was domiciled there at all times until she went to Pakistan in 1955 for the purpose of being married to the respondent".[33] It is submitted that this statement does not clearly indicate which of the above interpretations is correct.

The wife returned to Australia three years after the marriage. The husband joined her two years later. There were two children of the marriage. The husband became an Australian citizen shortly after his arrival. Gowans, J. was satisfied that the husband was domiciled in Australia when the proceedings were comenced. The wife petitioned for a decree of dissolution on the ground of adultery. His Honour referred to s. 28 Matrimonial Causes Act, 1959, which states that a petition for dissolution may be presented by "a party to the marriage", and applied the dictum of Lord Penzance in *Hyde* v. *Hyde* to the facts. He concluded that a party to a potentially polygamous union is not "a party to a marriage" in terms of s. 28 (above) and that therefore a decree of dissolution could not be granted. His Honour also declined to grant relief in respect of the wife's claim for custody of the children and maintenance.

Sara v. *Sara*, and on one interpretation *Khan* v. *Khan*, are therefore inconsistent with Dicey's explanation of *Re Bethell*. What is the relevance of *Ali* v. *Ali* in this respect? In that case, by the operation of the personal law which he had made his own the husband had precluded himself "from polygamous marriage to a second wife". It must be admitted that Cumming-Bruce, J. accepted the principle of Dicey's interpretation of *Re Bethell* as a cornerstone of his judgment. However, it is submitted that the question with which *Re Bethell*, as explained by Dicey, is concerned is one step removed from the situation actually confronting the Court in *Ali* v. *Ali*. *Re Bethell* would only have become directly relevant had the husband Ali, having acquired an English domicile and now divorced, attempted to enter a new polygamous union.

It is therefore submitted that while *Ali* v. *Ali* provides indirect support for Dicey's explanation of *Re Bethell*, that explanation is contradicted by *Sara* v.

[32] The husband in *Sara* v. *Sara* appealed to the British Columbia Court of Appeal (reported in (1962) 36 D.L.R. (2d) 499) *inter alia* on the ground that "the defendant (wife) being domiciled in British Columbia, did not have the capacity to enter into a polygamous marriage" (at 502). The Court assumed that the marriage was a valid polygamous union, but did not explain why this assumption was made.

[33] (1963) V.R. at 203.

Sara and possibly *Khan* v. *Khan*. Both cases assume a valid polygamous union existed.

It remains to consider *Khan* v. *Khan*. As indicated above, that case was decided before the enactment in 1965 of s.6A Matrimonial Causes Act 1959. By s. 6A(1) Matrimonial Causes Act 1959 as amended "subject to this section" a marriage entered into outside Australia or under Division 3 of Part IV of the Marriage Act 1961 that was potentially polygamous when entered into is a marriage for the purposes of proceedings under Part VI (that is the part dealing with matrimonial relief) "and for the purposes of proceedings in relation to any such proceedings". By s. 6A(2) the section does not apply "unless the law applicable to local marriages that was in force in the country, or countries, of domicile of the parties at the time the union took place permitted polygamy on the part of the male party". By s. 6A(3) the section does not apply where at the time of the union either party had already contracted a polygamous or potentially polygamous marriage.

From s. 6A(2) it is clear that the section will not apply, in effect, where one party immediately before the marriage was domiciled in virtually any Western country. In many Australian cases, one of the parties will have been domiciled here before marriage. In cases where s. 6A is excluded the provisions of the general law regarding polygamous marriages will continue to apply.

Assuming that the *Khan* v. *Khan* situation is not now subject to the operation of s. 6A it is submitted that the decision ought not to be followed in the future. The decision is clearly contrary to *Ali* v. *Ali* which, while a decision of a single judge, has been approved by an English Divisional Court in *Parkasho* v. *Singh*.[34] Further, considerations of common sense and justice in relation to maintenance applications were implicitly approved in *Imam Din* v. *National Assistance Board*[35] and *Parkasho* v. *Singh*. Such considerations were totally disregarded in *Khan* v. *Khan*. It is significant that the Court in the latter case did not apparently have the benefit of argument before it, the solicitor for the petitioner being the only representative of the parties reported as present at the hearing of the suit.

Future Development

The recent case *Parkasho* v. *Singh*[36] is interesting as a confirmation of *Ali* v. *Ali* and particularly for the comments of Sir Jocelyn Simon, P. on *Cheni* v. *Cheni* in the light of the former case.

The parties were married in India in 1942 in potentially polygamous form. In 1950 a child was born of the union. In 1955 the husband came to England and was followed by his wife and child in 1963. In maintenance proceedings before magistrates the husband took the preliminary point that the tribunal had no jurisdiction because the marriage was potentially polygamous. The magistrates found (without reasons) that the marriage was potentially polygamous at its inception and that its character had not been altered by the Hindu Marriage Act 1955 which purported to confer monogamous character on potentially polygamous unions between Hindus in India. Consequently they dismissed the wife's application for maintenance on the ground of neglect by the husband. The wife appealed. The court (Sir Jocelyn Simon, P., and Cairns, J.) held that the Hindu Marriage Act, 1955, although not possibly in the contemplation of the parties at the time of the marriage, was capable of converting the potentially polygamous union into one of a monogamous nature.

[34] (1967) 2 W.L.R. 946.
[35] (1967) 2 W.L.R. 257.
[36] (1967) 2 W.L.R. 946.

Cairns, J., in upholding the appeal, posed four questions for consideration:

1. Can a marriage be converted from one category to another: from the category of potentially polygamous marriages to that of monogamous marriages?
2. If such a transmutation can take place, what is the proper time to consider the nature of the union in order to ascertain jurisdiction?
3. Can the relevant change be effected by legislation?
4. Did the Hindu Marriage Act of 1955 have this effect?

His Lordship relied on *Cheni* v. *Cheni* answering questions (1) and (2) directly, and question (3) by way of *obiter dicta*. He therefore gave affirmative answers to the first three questions, holding in respect of the second question that the proper time to consider the nature of the union is the date of the proceedings. This holding confirms *Ali* v. *Ali*. Counsel for the husband argued that it is only circumstances in the contemplation of the parties at the time of marriage that can alter its character. Cairns, J. dismissed this contention, relying on *Starkowski* v. *Attorney-General*.[37] In that case the parties could not have had in mind that subsequent legislation would occur. Cairns, J. also indicated that in *Cheni* v. *Cheni* it was arguable that the parties knew from the outset what effect the birth of a child would have and hence the ultimate monogamous character of the marriage was in the contemplation of the parties at the time of celebration. Sir Jocelyn Simon, P. reiterated his dicta in *Cheni* v. *Cheni* and fully endorsed the view that subsequent legislation is capable of effecting a change in the nature of a marriage. Neither judge expressly contemplated the effect a change of domicile would have had on the marriage. However, it is submitted that the approval given by Cairns, J. to *Ali* v. *Ali* constitutes an implicit assent to the consequences of change of domicile on the nature of a marriage. It is curious that Sir Jocelyn Simon, P. did not refer to *Ali* v. *Ali*; and further, that he did not refer to the change of domicile which occurred in *Cheni* v. *Cheni* and which, on the principle laid down by Cumming-Bruce, J. in *Ali* v. *Ali*, would have been sufficient to alter the character of the union. One can only conclude that Sir Jocelyn Simon, P. quite rightly did not consider the point relevant for the purpose of the case before him.

Conclusions

It is respectfully submitted that the following conclusions may be drawn from *Ali* v. *Ali*:

1. The principle that the *lex loci celebrationis* immutably determines the character of a marriage has been displaced in favour of a limited recognition of the relevance of *lex domicilii* in this context. The concept of change of domicile affecting the status of parties to a marriage is simply one example of the general principle that the nature of a marriage may be altered by change of circumstances. Other examples are change by religious conversion to monogamous faith and by act of state proscribing polygamy.
2. Implicit in the cases is a principle that change of domicile, to be effective in altering the character of a marriage, must result from the operation of the intention of both spouses. If intention is to be regarded as necessary at all then it must be the intention of both parties. If the concept of dependent domicile compels the conclusion that intention on the part of the husband alone is sufficient then the same concept should compel the conclusion that the nature of a marriage can be changed even without an intention by either party to the marriage, for example, where the husband is under twenty-one and his domicile is therefore dependent on that of his father. This would be an absurd situation.

[37] (1954) A.C. 155.

3. Dicey's explanation of *Re Bethell* on the basis that a domiciled Englishman cannot contract a valid polygamous union is contrary to decided cases, including *Sara* v. *Sara* and possibly *Khan* v. *Khan*. In *Ali* v. *Ali*, Cumming-Bruce, J. decided that the effect of the acquisition of an English domicile preclude the husband from taking further wives. The point of Dicey's explanation of *Re Bethell* was not directly relevant, but his Lordship does appear to have assumed its validity. It is submitted that the approach of Lord, J. in *Sara* v. *Sara* is to be preferred to that of Cumming-Bruce, J. The mere fact of domicile in a country permitting only monogamous marriage should not render a person incapable of contracting a valid polygamous union.

4. There remains considerable scope for the application of common law principles in this area of the law despite s. 6A Matrimonial Causes Act. The Victorian case of *Khan* v. *Khan* may not now be covered by s. 6A if the wife immediately prior to her marriage was domiciled in Victoria. If this is so then it is submitted that *Khan* v. *Khan* is anachronistic and ought not to be followed in the future for the reason outlined in discussion.

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INDEFEASIBILITY OF TITLE

FRAZER v. *WALKER*[1]

I INTRODUCTION: WHAT IS INDEFEASIBILITY OF TITLE?

> The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. . . . It does not involve that the registered proprietor is protected against any claim whatsoever . . . there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam.[2]

The Act referred to in the above quote was the Land Transfer Act 1952, the New Zealand counterpart of our Real Property Act, 1900-1967. Although the definition enunciated is equally applicable wherever what may be referred to as Torrens Title land is situated, at least as between New Zealand and New South Wales there are certain differences in the wording of one corresponding section of the respective Acts which must be borne in mind when considering the application of judicial decisions under the statutes. The variations between the statutes will be illustrated in the discussion of *Frazer* v. *Walker*.

Probably most lawyers would agree with the above definition. There would be less agreement, however, as to what is the correct practical application of the indefeasibility doctrine. Two schools of thought have come into existence, the first of which is typified by the following statement:

> The cardinal principle of the Statute is that the register is everything and except in cases of actual fraud on the part of the person dealing with the

[1] (1967) 1 All E.R. 649.
[2] *Id.* at 652.