POLYGAMOUS MARRIAGES NOT FULLY RECOGNISED IN ENGLAND

Sowa v. *Sowa*

'Fy! Madam, do you think me so ill-bred as to love a husband?'
Wycherley: Love in a Wood.

The recent decision of the Court of Appeal in England in *Sowa* v. Sowa[1] concerning a claim for maintenance by a deserted wife of a polygamous marriage should interest all lawyers and rejoice the hearts of husbands who marry under polygamous marriage laws and later abandon their wives.

The facts were simple enough. The parties were natives of, and domiciled in Ghana, though the husband had been living in England for fourteen years. In September, 1955, he returned to Ghana and became engaged to the wife, giving her a ring and a Bible which the evidence of an expert showed was a symbol of an intention to convert what was potentially a polygamous tribal marriage into a Christian monogamous marriage. In October, 1955, the husband returned to England, and in November, 1955, a marriage by proxy was carried out in Ghana which was valid according to the customs of the tribe of Ga to which both parties belonged. In January, 1956, the wife came to England, and unfortunately for her, before insisting, in accordance with the promise implicit in the presentation of the ring and Bible, that a ceremony should be gone through converting the marriage into a Christian and a monogamous one, she began to live with him as man and wife at Liverpool. From that time she made many requests to convert this marriage into a Christian and monogamous one in accordance with the promise, but those requests were consistently refused. A child, a girl, had been born to them and the wife left her husband. Proceedings were taken under the Affiliation Proceedings Act, 1957 *(i.e.* bastardy proceedings) which when the hearing began, was met with the defence put forward by the husband that the wife was not a single woman, an essential requisite to being able to proceed under the Act. Accordingly no adjudication was made.

So again, under advice, the wife took proceedings under section 4, of the Summary Jurisdiction (Married Women) Act, 1895 alleging that the husband had deserted her. The husband now changed his ground. Having argued before that she was not a single woman, but validly married to him under the tribal custom, he took the point that she was not validly married at all so as to be recognised by the general marriage laws of England. When reminded by the wife's lawyers of his promise to convert the marriage into a monogamous one the husband's lawyers wrote, "He is therefore not prepared to pander to a suggestion on the part of your client which he regards as fatuous and completely whimsical". Lord Merriman P. later called this the lowest form of deceit on the part of the husband. However, the Liverpool magistrate made an order that the complaint against the husband was found proved, and granted maintenance to the wife and child. Against that order the husband appealed to the Divisional Court. The husband succeeded. The wife appealed to the Court of Appeal where the Lords Justices although shocked by the conduct of the husband followed the case of *Hyde* v. *Hyde* [2] and dismissed the appeal. Holroyd Pearce L.J., who gave the leading judgment, said, "Although, like the Divisional Court, I have listened with every sympathy to the arguments put forward by the wife, I too find its conclusion inevitable. I would therefore dismiss the appeal."[3] The upshot of it was that after going through four courts the wife

1. [1961] 2 W.L.R. 313.
2. (1866) L.R. 1 P. & D. 130.
3. [1961] 2 W.L.R. 313, 317.

found that she was not married when in England although she may be married when in Ghana.

This is a remarkable decision, for the Court of Appeal regarded itself as compelled to deliver a judgment which it clearly admitted was iniquitous.

The whole problem in this case revolved around the famous case of *Hyde v. Hyde* in which Sir James Wilde, in the lofty fashion of those days, laid down the law that only monogamous marriages were marriages as understood in Christendom and this was interpreted as meaning that potentially polygamous could not be recognised in England.

The first explicit break with this interpretation came in the *Sinha Peerage Claim*[4] when the House of Lords held that the son of Baron Sinha, an Indian of Hindu faith, could succeed to his father's hereditary peerage and sit in the House of Lords. This matter was carried further in *Baindail* v. *Baindail*[5] when the Court of Appeal affirming a similar decision in *Srinivasan* v. *Srinivasan*[6] held that a potentially polygamous marriage could be recognised for the purpose of invalidating a subsequent English marriage.

The case of *Hyde* v. *Hyde* on which their Lordships relied cannot be regarded as technically binding on the Court of Appeal as the only other cases in which potentially polygamous marriages have come before the Court of Appeal were not in any way similar to the present case and what was said by their Lordships in those cases can be regarded as mere *obiter*.

All that was in issue in *Sowa* v. *Sowa* was simply whether *Hyde* v. *Hyde* should receive approval from the Court of Appeal. This was done to the accompaniment of pious expressions of regrets on the ground that the reasoning underlying that decision was so strong as to render the conclusion inevitable though the result was iniquitous. If their Lordships had examined the case of *Hyde* v. *Hyde* a little more carefully they would, it is submitted, have found numerous means by which iniquity could be avoided for it is easy to show that the reasoning in *Hyde* v. *Hyde* cannot stand up to even an elementary analysis. Let us analyse this case and consider the authorities relied on by Sir James Wilde. He cited two cases to support him. The first was *Warrender* v. *Warrender*.[7] Considering that this was a case concerned with the recognition of Scottish divorces in England whatever Lord Brougham may have said must be regarded as pure *obiter*. The other case he cited was the decision of the Privy Council in *Ardasseer Cursetjee* v. *Perozeboye*[8] an appeal from the Supreme Court of Bombay in respect of a Parsee marriage. This has already been shown[9] to provide no authority for Sir James Wilde's decision.

Finally it should be noted that the earlier cases of Jewish marriages in England were conveniently ignored by his Lordship; the authority of which also went the other way.[9] So far as authority was concerned therefore, such authority that existed tended to support if any, the opposite conclusion than that which was reached in *Hyde* v. *Hyde*.

In addition to relying on authorities Sir James Wilde also advanced certain arguments to support him but most of the difficulties referred by Sir James Wilde only arise if there is a *de facto* plurality of wives. The argument that the problem

4. (1939) 171 Journals of the House of Lords, 350; [1946] 1 All E.R. 348.
5. [1946] P. 122.
6. [1946] P. 67.
7. (1835) 2 Cl. & F. 488.
8. (1856) 10 Moo. P.C. 375.
9. (1961) 3 U.M.L.R. 83 at pp. 91-2.

is the same whether a man comes to England with ten wives or with one, is not convincing. Their Lordships should, in our submission, have differentiated a potentially polygamous but *de facto* monogamous marriage from a *de facto* polygamous marriage as was done in the *Sinha Peerage Claim* when Lord Mangham said, "It seems desirable also clearly to state that nothing in our decision of this petition is intended to apply to a case where the petitioner is claiming as a son of a parent who has in fact married two wives .... These difficulties, however, do not arise in the present case . . ."[10]

Thus where a man has only one wife and is before an English court what difficulty can be faced by the court is hard to understand, whether he comes from a place where a man can have one hundred wives or one. It need hardly be said that polygamous marriages are like any other marriages and to deny them recognition is, in the words of one judge, to fly in the face of common sense.

By English Law divorce may be granted at the instance of either husband or wife when the respondent has (a) committed adultery or (b) deserted the petitioner or (c) treated the petitioner with cruelty, or (d) is incurably of unsound mind and at the instance of the wife if the husband since the marriage has been guilty of rape, sodomy or bestiality. All these situations can equally apply to a polygamous marriage provided the judges use some common sense and do not throw up their hands in defeat.

Hyde v. *Hyde* has been so often criticised and rests on such an insecure basis that it is remarkable to find the Court of Appeal applying it to a situation which their Lordships recognised as iniquitous.

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10. [1946] 1 All E.R. 348, 349.