firearms cannot be restricted, it lies in the power of either the Commonwealth or the States to keep track of every firearm that crosses a State border, and of the States to control the possession or use of firearms which are not 'in the course of' interstate trade.

C. J. CARR

KHAN v. KHAN[1]

Private International Law—Husband and Wife—Potentially Polygamous Marriage—Divorce Jurisdiction—Maintenance Jurisdiction—Matrimonial Causes Act (Cth) 1959, ss 28, 83, 84, 87

The petitioner in this action was a woman who sought dissolution of her marriage on the ground of adultery, custody of the two children of the marriage, and maintenance. The petitioner had been domiciled in Victoria until 1955, when she went to Pakistan for the purpose of marrying the respondent. The ceremony was performed in a house in Karachi before a Moslem priest and it was assumed, for the purposes of the petition, that the marriage was a lawful one according to Moslem law. A child was born to the parties in 1956. In 1958 the petitioner returned to Australia and in 1960 the respondent followed; both parties were resident and, as was held by Gowans J., domiciled in Australia at the commencement of proceedings. A second child was born in Australia in 1961. Gowans J. found that the respondent had been guilty of adultery in circumstances which would justify dissolution of the marriage were there power to do so. He also found that under Moslem law the marriage was a potentially polygamous one.

His Honour observed that section 28 of the Commonwealth Matrimonial Causes Act 1959 permits petitions for dissolution of marriage to be filed only by a 'party to a marriage'. There was, he said, no reason for not applying the definition of the word 'marriage' which had been formulated in *Hyde v. Hyde and Woodmansee*[2] since that meaning had been applied to the English Acts dealing with petitions for dissolution, nullity and proceedings for maintenance. Thus, on the principle established in *Hyde*, a potentially polygamous marriage, though valid by the *lex loci contractus*, and although both parties were single and competent to contract marriage, would not be recognized 'as a valid marriage in a suit instituted by one of parties for the purpose of enforcing matrimonial duties, or obtaining relief for a breach of matrimonial relations'. The conclusion was, therefore, that a party to a potentially polygamous marriage was not 'a party to a marriage' within section 28 and was unable to petition for divorce in Australia. More specifically, there was no jurisdiction to entertain Mrs Khan's petition for divorce.

This ruling, said Gowans J., did not mean that the children of the union were illegitimate, nor that the marriage was void. 'It merely means

[1] [1963] V.R. 203. Supreme Court of Victoria; Gowans J.

[2] (1866) L.R. 1 P. & D. 130, 133 *per* Lord Penzance. 'I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.'

that this Court cannot dissolve the marriage.'[3] Nor was he prepared to discuss the possible effect of a purported exercise by the respondent, at a time when domiciled in Australia, of his right under Moslem law to pronounce Talak to dissolve the marriage.

The learned judge then went on to dismiss the claims for custody and maintenance. Section 84, dealing with maintenance and custody applications, also referred to 'a party to a marriage' and therefore did not embrace the petitioner. Nor did the definition of 'marriage' in section 83 to include 'a purported marriage that is void' assist matters since on the authorities, this union was neither a marriage nor was it void.

There can be no doubt that the English authorities, as they have developed, fully support the interpretation placed upon the *Hyde* rule by Gowans J. *Hyde v. Hyde* itself was, of course, a case relating to the jurisdiction of the English courts to dissolve a potentially polygamous marriage. Barnard J. in *Risk v. Risk*[4] approved *Hyde v. Hyde* and stated that the words of Lord Penzance that the parties to a polygamous union were not entitled to the 'remedies, adjudication or the relief of the matrimonial law of England' were wide enough to embrace a petition for a decree of nullity sought in respect of the polygamous union. *Hyde v. Hyde* had been approved in *Baindail v. Baindail*[5] and, although the decision in the latter case, as well as the decision in *Srini Vasan v. Srini Vasan,*[6] had involved recognition of a potentially polygamous marriage 'all that the court decided was that a man who was domiciled in a country which permitted polygamy, and had contracted a valid polygamous marriage in that country had the status of a married man according to the law of his domicile and was therefore incapable of contracting a subsequent valid marriage in England'.[7] The *Hyde* principle is also regarded as applicable to suits for judicial separation and the restitution of conjugal rights.[8] The most recent extension to the doctrine was made in *Sowa v. Sowa.*[9] The question in that case centred on the right of the wife of a potentially polygamous marriage, celebrated by proxy in Ghana, to claim maintenance pursuant to the English Summary Jurisdiction (Married Women) Act 1895. The wife's claim failed in the Court of Appeal:

> The essential question is what is the nature of the union, and what are the bonds and implications of the marriage ceremony in question. If the ceremony is polygamous then it does not come within the word "marriage" for the purposes of the Acts relating to matrimonial matters, nor do the parties to it come within the words "wife", "married woman" or "husband".[10]

The fact that the potentially polygamous marriage was in fact monogamous was irrelevant since this situation could be altered at any time by the husband taking on another wife.[11]

[3] [1963] V.R. 203, 205. [4] [1951] P. 50. [5] [1946] P. 122. [6] [1946] P. 67.
[7] [1951] P. 50, 53. [8] *Dicey's Conflict of Laws* (7th ed. 1958) 288.
[9] [1961] P. 70. [10] *Ibid.* 84-85. [11] *Ibid.* 84.

Bearing in mind the antecedent case law, can the decisions in *Khan v. Khan* and *Sowa v. Sowa* be said to be desirable? In the latter case both the court of first instance[12] and the Court of Appeal[13] recognized that the merits of the case were entirely on the side of the wife, that the husband's conduct had been unmeritorious and that their decision had been reached with regret. It would seem, of course, unfortunate in the extreme that a woman validly married by the law of her domicile (both parties were, at the time of the proceedings, domiciled in Ghana) should be unable to secure maintenance from her husband, and, indeed should find herself refused recognition as a married woman in England for certain purposes. Much the same considerations apply to *Khan v. Khan,* although of course the parties in that case were domiciled in Australia at the commencement of proceedings. And, while the parties continued to be domiciled and resident here, it would appear that they would be unable to secure a valid divorce anywhere, yet would be unable to validly remarry.[14] Was it possible, then, for Gowans J. to reach any other conclusion?

Gowans J. may have been able to assume jurisdiction at least on the maintenance and custody matters by either refusing to follow *Sowa v. Sowa* or by confining it to a decision on the particular provisions of the relevant English Act. In fact Gowans J., not surprisingly, perhaps, refused to adopt this course and indeed expressly rejected a suggestion that he should do so.[15] But it may be hoped that the High Court will not regard itself as necessarily bound by the decision of the Court of Appeal on this matter. Holroyd Pearce L.J. with whom Harman and Davies L.JJ. agreed, found the reasoning of *Hyde* 'inescapable'. Yet surely this was not the case for, although the language of Lord Penzance was wide enough to apply to maintenance proceedings, such proceedings stand in a different category to petitions for dissolution or nullity, to which the *Hyde* principle had previously been applied. The latter class of proceedings affects the status of the parties, whilst maintenance orders act *in personam.* And, whilst the community may have no urgent interest in dissolving or decreeing the nullity of polygamous or potentially polygamous marriages there is most certainly an interest in seeing that the wife, even the wife of an actually polygamous marriage, is properly maintained whilst resident within the community.[16] Why then, can it not be said that the word 'marriage' in Part VIII of the Matrimonial Causes Act bears a wider meaning than elsewhere? This would certainly seem to be in line

[12] [1961] P. 70, 71.

[13] *Ibid.* 82. Apparently the wife had previously been advised to commence proceedings in bastardy, but the husband had successfully resisted these on the grounds that he was married. See a note in (1961) 10 *International and Comparative Law Quarterly* 190.

[14] See *Baindail v. Baindail* [1946] P. 122. However, the position might be different if the parties went through a second ceremony of marriage in Australia: *Ohochuku v. Ohochuku* [1960] 1 W.L.R. 183.

[15] See Cowen and Mendes da Costa, 'Matrimonial Causes Jurisdiction—First Year (1962) 36 *Australian Law Journal* 31, 40.

[16] See (1961) 10 *International and Comparative Law Quarterly* 190. But see Webb (1961) 24 *Modern Law Review* 183, 497 where the decision in *Sowa v. Sowa* is regarded as inevitable.

with the trend of thought which prompted the legislature to enact section 83. One potent objection however, to this line of attack lies in the provisions of section 5 (1) (c) of the Matrimonial Causes Act. That section requires, in order that the court should have jurisdiction to entertain maintenance and custody proceedings, that these proceedings be 'in relation to' proceedings for principal relief (for example, a petition for a decree of dissolution). Thus, if the court finds that it lacks jurisdiction to entertain the petition for principal relief, there may be no opportunity to refuse to follow *Sowa v. Sowa* since the ancillary proceedings may in any case automatically fall with the petition for principal relief. But the Act does not specifically define the interdependency of the two types of proceedings, and it is possible that the ancillary proceedings may succeed despite a lack of jurisdiction in respect of the principal relief sought. The point is as yet unresolved.[16a]

A second way of resolving the obvious injustice presented by the decision in *Khan v. Khan* was to hold that the marriage was not polygamous at all, within the *Hyde* rule. Formerly it was thought that the character of the marriage fell to be determined at its inception: thus, in *Mehta v. Mehta,*[17] English matrimonial relief was extended to the case of a marriage in India according to the rites of a monogamous sect, even though it was open to the parties to later become orthodox Hindus and thereby embrace polygamy. However difficulty was felt in reconciling this decision with the *Sinha Peerage Claim*[18] where the Committee of Privileges of the House of Lords held that the eldest son of a potentially polygamous marriage celebrated in India between parties there domiciled was entitled to succeed to his father's peerage, the parties having joined a monogamous sect before the son was born and the father never taking more than one wife. The House of Lords suggested that the relevant date for determining the character of the marriage was the date of the Patent and at that date his religion forbade polygamy. The editor of *Dicey* states that

> one way of reconciling these cases is to say that 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 might entitle the husband to take on another wife; if it is polygamous in its inception, it may become monogamous by reason of a change of religion, of domicile or of law before the happening of the events which give rise to the proceedings.[19]

This passage was approved in the recent case of *Cheni v. Cheni*[20] where a potentially polygamous marriage celebrated between Sephardic Jews in Egypt had, according to Jewish law, become irrevocably and inescapably monogamous by the birth of a child to the parties in 1926. In 1957, the parties having become domiciled in England, the wife sought a nullity decree on the ground that the marriage was consanguineous or, alterna-

[16a] Cowen and Mendes da Costa, *Matrimonial Causes Jurisdiction* (1961) 118.
[17] [1945] 2 All E.R. 690.
[18] [1946] 1 All E.R. 348. [19] *Dicey* 272. [20] [1963] 2 W.L.R. 17.

tively a divorce decree on the ground of cruelty. Sir Jocelyn Simon P. held that there was jurisdiction over the marriage since, at the date of the suit, it had become monogamous. Approving the statement in *Dicey,* the learned judge pointed out that the fact that the inception of the marriage is the relevant date for determining its monogamous character does not mean that it is also the relevant date for determining its potentially polygamous character.[21] In *Mehta v. Mehta,* the marriage was still monogamous at the institution of proceedings, so it could not be regarded as an authority for holding that the potentially polygamous character of the marriage is determined at its inception. Further,

> the reasoning in *Hyde v. Hyde* and *Sowa v. Sowa* is applicable only to a marriage that is still potentially polygamous at the time of the proceedings. It was that the structure and machinery of our matrimonial law is so inappropriate to resolving the problems thrown up by adjudication upon potentially polygamous marriages as to show that such terms as "marriage", "husband", "wife" and "married woman" must be used in the matrimonial statutes with a strictly monogamous connotation. . . . This reasoning has no relevance to a marriage of originally polygamous potentiality which has become strictly monogamous by the time of the proceedings. . . . [I]t is useful to bear in mind the observation of . . . Lord Walker, in *Muhammed v. Suna:*[22] "It is perhaps not altogether satisfactory that a man who enters into a polygamous union while domiciled abroad should, on acquiring a domicile in this country, be unable to sue in the court of his domicile for divorce (*Hyde's* case) and yet be regarded by the court of his domicile as not free to marry (*Baindail's* case)." This, as well as the general undesirability of closing the doors of our courts to suitors is an argument against any unnecessary extension of the rule in *Hyde v. Hyde.*[23]

The question is, of course, the extent of the doctrine that a marriage potentially polygamous in its inception may be rendered monogamous by supervening events. Webb suggests, though 'with some measure of diffidence', that, if potentially polygamous marriages are to be given the benefit of the doubt as far as jurisdiction is concerned, 'an appropriate supervening change of domicile by the husband ought to be held capable of rendering monogamous his potentially polygamous marriage'.[24] Presumably, in the Australian context, this should be amended to include the acquisition by the wife of a statutory domicile at the commencement of proceedings pursuant to section 24 of the Act. If the Australian courts were prepared to accept this test of 'monogamization' the decision in *Khan v. Khan* would have been different. Webb overcomes the difficulty that this type of monogamization is not as voluntary on the wife's part as, say, a change in religion, by pointing out that legislation monogamizing polygamous marriages is equally involuntary. This view receives some support from *Ohochuku v. Ohochuku*[25] which apparently decided that a potentially polygamous marriage, celebrated in Nigeria, had been con-

[21] *Ibid.* 22. [22] [1956] S.C. 366, 370. [23] *Ibid.* 23-24.
[24] Webb, 'Potentially Polygamous Marriages and Capacity to Marry' (1963) 12 *International and Comparative Law Quarterly* 672, 676. [25] [1960] 1 W.L.R. 183.

verted into a monogamous union by a second ceremony performed in London.[25a] There are, however, great difficulties with this case.[26] The view is also supported by the Canadian case of *Sara v. Sara*,[27] though there the fact situation was much stronger. The greatest difficulty with the view that the acquisition by the husband to a potentially polygamous marriage of a domicile whose law permits monogamy alone renders the marriage monogamous, is the decision in *Hyde v. Hyde* itself. For in that case the petitioning husband himself was domiciled in England, though this fact was more or less accidental.[28] Webb merely comments that his view would mean that *Hyde v. Hyde* would be decided differently today. However that may be, it certainly seems at the present day that a potentially polygamous marriage will more easily be rendered monogamous by events subsequent to the ceremony, though this movement may not have progressed far enough as yet to hold hope for Mrs Khan.

Finally, in view of the problems which have been associated with the application of the *Hyde* rule it may well be asked, even apart from any questions of monogamization, whether there is any warrant to retain the rule itself at the present time. It is difficult to resist the conclusion that *Hyde v. Hyde* was a 'product of its time',[29] especially in view of the facts that potentially polygamous marriages have been recognized for many purposes since 1866[30] and there is increasing intercourse with nations whose laws permit polygamy. There seems to be no compelling reason why the present matrimonial law cannot be adapted to accommodate potentially polygamous marriages which have remained monogamous in fact; perhaps the law may even be adapted to accommodate actually poly-

[25a] See *Cheni v. Cheni* [1963] 2 W.L.R. 17, 23.

[26] See (1961) 10 *International and Comparative Law Quarterly* 180, 183ff. The main criticism of the case offered here (though there are others) is that it is very doubtful whether the second marriage could be effective to alter the existing relations between the parties—that is, a potentially polygamous union.

[27] (1962) 31 D.L.R. (2d) 566. In this case a marriage had been celebrated in Hindu form in India in 1951 and was potentially polygamous at its inception. Almost immediately after the ceremony the parties went to Canada and acquired a domicile in British Columbia (the wife's ante-nuptial *lex domicilii* being British Columbian). In 1955 the Hindu Marriage Act was passed which forbade polygamous marriages in India. The marriage remained monogamous in fact. The husband petitioned for a declaration that the purported marriage constituted a polygamous marriage and that the matrimonial laws of British Columbia had no applications thereto. It was held that, as the marriage was monogamous in fact, and as the husband was now prohibited from taking further wives both by his present domiciliary law and also by the law of the place of celebration, the marriage was no longer polygamous, but had been rendered monogamous for the purposes of the matrimonial law of British Columbia. This would seem to be an eminently sensible decision and there is no apparent obstacle to such an approach being adopted in Australia, should an appropriate fact situation arise. *Cf. Lim. v. Lim* [1948] 2 D.L.R. 353, 357-358.

[28] *Hyde v. Hyde* was decided before *Le Mesurier v. Le Mesurier* [1895] A.C. 517 finally established that domicile was the basis of domestic jurisdiction in petitions for dissolution.

[29] Cowen and Mendes da Costa, *op. cit.* 40.

[30] *Baindail v. Baindail* [1946] P. 122; *Srini Vasan v. Srini Vasan* [1946] P. 67; *Khoo Hooi Leong v. Khoo Chong Yeok* [1930] A.C. 346; and *Bamgbose v. Daniel* [1955] A.C. 107 (Privy Council cases dealing with the claims of the children of a polygamous marriage to succeed on an intestacy to their father's property); *Coleman v. Shang* [1961] A.C. 481 (a wife of a polygamous marriage claiming a grant of letters of administration upon her husband's death).

gamous marriages.[31] The difficulties in dealing with such marriages in this context are not insuperable—can it not be said that, provided a man confines his sexual activities to his wives, he is not an adulterer? With only relative minor adjustments can it not be said that the law of desertion and cruelty, for example, may still apply to such marriages? Certainly there would be problems associated with the recognition of an institution unknown to Western civilization but these problems need not be incapable of solution, nor need they be any more difficult than other branches of private international law which require difficult investigations into foreign legal systems.

R. SACKVILLE

CECIL BROS PTY LTD v. COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA[1]

Income tax—Liability of retailer to tax—Profit made by interposed family company on goods bought from wholesaler and resold to taxpayer—Income Tax and Social Services Contribution. Assessment Act 1936-1960, sections 5 (1), 260.

The judgment of Owen J. in relation to the applicability of section 260 of the Income Tax and Social Services Contribution Assessment Act 1936-1960[1a] to a family company in the recent High Court case of *Cecil Bros Pty Ltd v. Commissioner of Taxation of the Commonwealth of Australia,*[2] could apply equally, it seems, to many other existing family companies, and even to service companies generally. In that case the taxpayer was a family company which carried on business as a retailer of footwear and in its return for the year ended 30 June 1960, claimed a deduction of £804,400 in respect of purchases of footwear. The Commissioner reduced the claim for purchases by £19,777, and it was against this disallowance that the taxpayer appealed.

The facts briefly stated were that of the total purchases of the taxpayer of £804,400, about £230,000 were made from Breckler Pty Ltd, most of the shareholders of which also held shares in the taxpayer company. Breckler Pty Ltd had its registered office at the same address as the taxpayer company and derived a considerable proportion of its income from

[31] See the extract from *Cheni v. Cheni, supra* p. 273, and the comments *supra* p. 274.

[1] (1962) 36 A.L.J.R. 65. High Court of Australia; Owen J.

[1a] 'Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the purpose or effect if in any way, directly or indirectly—
(a) altering the incidence of any income tax;
(b) relieving any person from liability to pay any income tax or make any return;
(c) defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or
(d) preventing the operation of this Act in any respect,
be absolutely void, as against the Commissioner, or in regard to any proceeding under this Act, but without prejudice to such validity as it may have in any other respect or for any other purpose.'

[2] (1962) 36 A.L.J.R. 65.