

THE STATUS OF WOMEN IN THE FAMILY LAW IN MALAYSIA AND BRUNEI

INTRODUCTION

This article deals with the family law (other than of the Muslims) in so far as they relate to the status of women in Malaysia and in Brunei. The law is to be found mainly in the local statutes of the States of Malaysia and of Brunei. The personal law relating to marriage, divorce, guardianship, maintenance, adoption and family law generally were in the Federal List in the original Constitution of the Federation of Malaya but are included in the Concurrent List for the Borneo States and for Singapore. There are therefore four groups of laws to be considered — the laws of the States of Malaya (the original Federation of Malaya) and the laws respectively of Singapore, Sarawak and Sabah. Brunei which is outside the Federation has its own laws.

PART I. MARRIAGE.

SECTION 1: SUBSTANTIVE MARRIAGE REQUIREMENTS.

A. THE LAW IN THE STATES OF MALAYA.

The law relating to marriage in the States of Malaya might be dealt with under four heads: Muslim marriages, Civil marriages, Christian marriages and Customary marriages. It is proposed to deal in this paper only with Civil, Christian and Customary marriages.

(i) *Betrothal.*

There are no statutory provisions relating to betrothal in the States of Malaya and breaches of contracts of marriage are dealt with under the ordinary law following the English Common Law. It is not necessary that a contract to marry should be evidenced by writing nor even that the mutual promises should be made by express words. So long as a promise to marry is supported by some kind of valuable consideration it will be enforceable even though the promisee has not in turn made an express promise to marry the promisor. In the English case of *Harvey v. Johnston*¹ it was held that the defendant could be sued on a promise to marry the plaintiff, made in consideration of the plaintiff's going to Ireland at the defendant's request to marry him. The conduct of the parties, such as the giving of an engagement ring, the fixing of a date for marriage or their behaviour towards each other, may justify an inference that they have mutually promised to marry. The only remedy for breach

1. (1848) 6 C.B. 295.

of contract to marry is an action for damages. The remedy is mutual, that is to say, either the man or the woman may sue for the breach. The damages in an action for breach of promise are not measured by any fixed standard and are in the discretion of the judge. The conduct of the parties may properly be considered in aggravation or mitigation of damages. The damages may be aggravated in the case of a male defendant by the fact that he has seduced the woman, she having relied on the promise of marriage or by the fact that he has infected her with a disease. If one of the parties to a contract to marry is, to the knowledge of the other party, already married, the contract is void as being contrary to public policy and will not support an action for damages at the suit of either party for not fulfilling the contract even after the death of the existing wife or husband.² The principle does not however apply in the case of promise, made after a decree *nisi* of divorce, to marry after the decree has been made absolute.³

In the English case of *Frost v. Knight*⁴ it was held that when the contract is to be performed at a future time the promisee has an inchoate right to the performance of the bargain which becomes complete when the time for performance has arrived and that in the meantime he has a right to have the contract open as a subsisting and effective contract. Accordingly he or she may sue immediately on breach, even though the defendant's promise is conditional and might never in fact have to be performed at all. In that case the defendant promised to marry the plaintiff after the defendant's father died. He repudiated the contract during his father's lifetime and the plaintiff sued him immediately. It was held that the plaintiff could recover notwithstanding that the defendant might die before his father. A breach will occur if the defendant by his own act puts it out of his power to perform the contract. Thus if he marries someone other than the plaintiff, the latter has an immediate cause of action.⁵

In *Khem Singh v. Anokh Singh*⁶ it was held that a marriage brokerage agreement is void as having an object opposed to public policy within the meaning of what is now section 24 of the Contracts (Malay States) Ordinance, 1950; but such an agreement falls within section 66 of the Ordinance and money paid under it can be recovered by the person who paid it.

Contracts of betrothal entered into on behalf of minors by their guardians and shown to be for their benefit can be enforced at the instance of the minors. Although section 11 of the Contracts (Malay States) Ordinance, 1950, provides in effect that a person is competent to contract only if he is of the age of majority according to the law to which he is

2. *Wilson v. Carnley* [1908] 1 K.B. 729.

3. *Fender v. St. John Mildmay* [1938] A.C. 1.

4. (1872) L.R. 7 Exch. 111.

5. *Short v. Stone* (1846) 8 Q.B. 358.

6. (1933) 2 M.L.J. 228; see the case of *Karpen Tandil v. Karpen* (1895) 3 S.S.L.R. 58 where it was held that such an agreement was not void, as the agreement was valid according to Hindu custom and usage. In that case there was no local legislation and it was held that native customs will be recognised unless they are contrary to justice and general public policy.

subject, this has no application to marriage contracts. Where the betrothal agreement provides for the payment of agreed damages or penalty for breach, even though such penalty clause might be unenforceable, this does not vitiate the whole of the contract and the agreement to marry is *per se* binding and enforceable.⁷

In England it is provided that the plaintiff cannot recover in an action for breach of promise unless his or her testimony is corroborated by some other material evidence but this statutory provision does not seem to be applicable in Malaysia.⁸

(ii) *Civil marriages.*

Civil marriages are governed by the Civil Marriage Ordinance, 1952.⁹ The Ordinance provides for the solemnisation and registration of monogamous marriages. It is provided that no marriage, one of the parties to which professes the religion of Islam, shall be solemnised or registered under the Ordinance. A marriage solemnised and registered under the Ordinance is however valid, even though one of the parties professes the Christian religion.¹⁰ The substantive requirements for a valid marriage under the Ordinance are as follows:—

(a) *Age.*

It is provided that a marriage purported to be solemnised under the Ordinance shall be void if on the date of such marriage the male party was under the age of sixteen years or the female party under the age of fourteen years.¹¹

(b) *Consent of parent or guardian.*

If either party to a marriage is a minor and has not been previously married the consent of the parent or guardian must be obtained. If such consent cannot be obtained by reason of the absence, inaccessibility or disability of the person whose consent is required, then the consent may be dispensed with by the State authority or the consent of the High Court may be obtained. If the person whose consent is required refuses his consent, the High Court may on application being made consent to the marriage.¹²

Where the minor is legitimate and is not a widow or widower, the consent of both parents, if living together, is required; if the parents are not living together the consent required is that of the parent who has

7. *Rajeswary v. Balakrishnan* (1958) 3 Malayan Cases 178. See case-note in (1961) 3 U.M.L.R. 127.

8. Evidence Further Amendment Act, 1869, s. 2.

9. No. 44 of 1952.

10. Civil Marriage Ordinance, 1952, s. 3 (as amended by the Civil Marriage (Amendment) Ordinance, 1955, (No. 31 of 1955)).

11. Civil Marriage Ordinance, 1952, s. 31.

12. *Ibid.*, s. 10.

custody and if both parents have custody during part of the year, each parent must consent to the intended marriage. If one parent has deserted another, the consent of the parent who has been deserted is required. If both parents have been deprived of the custody of the infant by order of court, the consent of the person to whom custody has been given must be obtained. If one parent is dead, the surviving parent's consent is required if there is no other guardian, and if there is a guardian appointed by the deceased parent, he must act jointly with the surviving parent. In the case of the death of both parents, consent of the guardian appointed by the deceased parents or by the court is necessary. In the case of an illegitimate child the mother alone is necessary as the consenting party, unless she has been deprived of custody by order of the court, when the consent of the person to whom the custody of the minor has been committed is required. If the mother is dead, the guardian appointed by the mother or the court is the appropriate person to consent.¹³

By the Adoption Ordinance, 1952, the adopter is the appropriate person to consent to the marriage of an adopted child.¹⁴

Failure to obtain the consent of the parent or guardian does not invalidate the marriage. A marriage under the Civil Marriage Ordinance can however only be solemnised if there is a certificate for marriage or a licence, and it is a condition for the issue of the certificate for marriage or licence that the Registrar or person issuing the licence must be satisfied by written declaration that if either party is a minor the consent of the appropriate person has been given in writing or has been dispensed with or given by a court. Penalties are provided for solemnising a marriage without first receiving a certificate for marriage or a licence dispensing with such certificate and for issuing a certificate of marriage otherwise than in accordance with the provisions of the Ordinance.¹⁵

(c) *Kindred and affinity.*

Marriage may not be solemnised between persons who come within the prohibited degrees of kindred and affinity and the Civil Marriage Ordinance, 1952, provides that marriage between parties within the prohibited degrees specified therein is void.¹⁶ By the Adoption Ordinance, 1952, an adopted child is deemed to be within the prohibited degrees of kindred with the adopter, and this is so notwithstanding that the child may be re-adopted by some other person.¹⁷

In general, the prohibited degrees which bar marriage include a person's direct ascendants, descendants and similar relatives of a spouse, brothers, sisters and their respective children, aunts and uncles. There are certain exceptions made in respect of persons related by marriage

13. *Ibid.*, First Schedule.

14. Adoption Ordinance, 1952, (No. 41 of 1952), s. 9.

15. Civil Marriage Ordinance, 1952, ss. 14, 15 and 37.

16. *Ibid.* s. 29.

17. Adoption Ordinance, 1952, s. 9(7).

only, and persons within these exceptions may marry. Briefly these exceptions include marriage with a deceased spouse's brother or sister, uncles or aunts of a deceased spouse, nephews and nieces by marriage. While marriage is permitted with a deceased spouse's relatives as enumerated in the Civil Marriage Ordinance, 1952, a purported marriage with any such relative of a spouse during the latter's lifetime is declared void.¹⁸

(d) *Avoidance of marriage by prior subsisting marriage.*

The Civil Marriage Ordinance, 1952, provides that any marriage purported to be solemnised under the Ordinance shall be invalid if either of the parties was at the date of such marriage married under any law, religion, custom or usage to any person other than the other party.¹⁹

It is provided that a male person married in accordance with the provisions of the Ordinance shall be incapable, during the continuance of such marriage, of contracting a valid marriage with any third person, whether as principal or secondary wife. Similarly, a female person married in accordance with the provisions of the Ordinance shall be incapable, during the continuance of such marriage, of contracting a valid marriage with any third person, either as his principal or as his secondary wife.²⁰

(e) *Consent of the parties.*

The marriage is solemnised before the Registrar and both parties must consent to the marriage. Both parties to the marriage are required to attest the entry in the marriage register and failure to do so will make the marriage void.²¹

(f) *Procedure and formalities.*

The Civil Marriage Ordinance, 1952, lays down the procedure and formalities for all marriages solemnised under the Ordinance. Marriages may be solemnised after the issue of a certificate for marriage or a licence.

- (aa) Where persons desire to marry, one of them is required to give notice of the marriage to the Registrar. The notice is filed and posted in the office of the Registrar. The notice must be accompanied by a written declaration made by the person given the notice that the male party is not under the age of sixteen years and that the female party is not under the age of fourteen years, that if either of the parties is under twenty-one years and has not been previously married, that the consent of the appropriate person has been given or has been dispensed with or has been given by the

18. Civil Marriage Ordinance, 1952, s. 29 and 2nd Schedule.

19. *Ibid.*, s. 30.

20. *Ibid.*, s. 4.

21. *Ibid.*, ss. 24-26 and 30.

court, that there is no impediment of kindred or affinity or any other lawful hindrance to the marriage and that neither of the parties is married under any law, religion, custom or usage to any person than the person with whom such marriage is proposed to be contracted. The Registrar may issue his certificate for marriage, if he is satisfied by the declaration of the matters therein contained. Any person may file a *caveat* against the issue of the certificate for marriage and the certificate for marriage shall not be issued until the *caveat* is withdrawn or it is decided by the Registrar or the court that the *caveat* ought not to obstruct the issue of the certificate. Where a certificate for marriage has been issued, the parties may be married within three months after the date of the notice by the Registrar. The form of the marriage before the Registrar is set out in section 25 of the Civil Marriage Ordinance, 1952. The marriage is required to be solemnised in the presence of at least two credible witnesses, besides the Registrar.²²

- (bb) The State Authority may upon proof made by statutory declaration that there is no lawful impediment to the proposed marriage and upon his being satisfied that the necessary consent, if any, to such marriage has been obtained or that the consent has been dispensed with or given by the court, dispense with the giving of notice and with the certificate for marriage, and grant a licence authorising the solemnisation of a marriage between the parties named in the licence. The marriage is solemnised by the Registrar but the State Authority may authorise the marriage to be solemnised at a place other than the office of the Registrar.²³

Marriages solemnised under the Civil Marriage Ordinance are solemnised by the Registrar, who is required to register the marriage. In effect therefore every marriage solemnised under the Ordinance is registered. It is specially provided that both parties to the marriage and the witnesses present must attest the entry in the marriage register and if this is not done the marriage will be void.²⁴

(iii) *Christian marriages.*

The Christian Marriage Ordinance, 1956,²⁵ provides for the solemnisation and registration of Christian marriages in the States of Malaya. It is provided that every marriage between persons one of whom is

22. *Ibid.*, ss. 11-19; 24-25.

23. *Ibid.*, s. 20.

24. *Ibid.*, ss. 26, 30.

25. No. 33 of 1956.

Christian shall be solemnised in accordance with the provisions of the Ordinance or of the Civil Marriage Ordinance, 1952, and every such marriage solemnised otherwise than under the provisions of the Ordinance or the Civil Marriage Ordinance, 1952, shall be void.²⁶ It has been held in the case of *Re Loh Toh Met, Kong Lai Fung and others v. Loh Peng Heng*²⁷ that the former Christian Marriage Ordinances, (the provisions of which have been re-enacted in the Christian Marriage Ordinance, 1952) relate only to the form of solemnisation of monogamous marriages and that a Chinese, even if he is a Christian, can choose whether he wishes to contract as a Christian a valid monogamous marriage or to form a valid polygamous union or unions in accordance with his personal law. Thomson C.J. in that case said:

... it is clear that the whole object, purpose and scope of the Ordinance is to provide a code of law governing the solemnisation of Christian or monogamous marriages and the true effect of section 3 is clearly to avoid as such any purported Christian or monogamous marriage not solemnised in accordance with the provisions of the Code. It has nothing whatever to do with such matters as capacity to marry nor, what is more important for the purpose of the present case, does it affect in any way the capacity of any individual, which he otherwise enjoys, to enter into a marital relationship of some other sort.^{27a}

Hill J.A. said:

It is clear beyond doubt that the only valid monogamous marriage a Christian could contract was as provided for in these two laws [*i.e.*, the Christian Marriage Ordinance and the Civil Marriage Ordinance], but nowhere in them is a polygamous marriage by a Christian forbidden if his personal law based on his race recognises polygamy.

If a person is a Christian and at the same time his personal law based on his race recognises polygamous marriages, surely he is free to choose whether he will contract as a Christian a valid monogamous marriage or to form a valid polygamous union or unions in accordance with his personal law.^{27b}

(a) *Age.*

It is provided that a marriage purported to be solemnised under the Ordinance shall be void if, at the date of such marriage, the male party is under the age of sixteen years or the female party under the age of fourteen, unless such marriage is solemnised (notwithstanding the age of any party thereto) in accordance with a licence granted under the authority of the Canons of the registered Christian Church, religious denomination or other Christian religious body in accordance with the rites, ceremonies and usages of which the marriage was solemnised.²⁸

(b) *Consent.*

If either party to a marriage is a minor and has not been previously

26. Christian Marriage Ordinance, 1956, s. 3.

27. (1961) 27 M.L.J. 234. See note in (1963) 5 Malaya L.R. 383.

27a. *Ibid.*, at p. 245.

27b. *Ibid.*, at p. 249.

28. Christian Marriage Ordinance, 1956, s. 28.

married, the consent of the parent or guardian must be obtained. If such consent cannot be obtained by reason of the absence, inaccessibility or disability of the person whose consent is required, then the consent may be given by the High Court. If the person whose consent is required refuses his consent the High Court may on application being made consent to the marriage.²⁹ The persons whose consents are required are set out in the Schedule and are the same as in the case of a marriage under the Civil Marriage Ordinance, 1952.³⁰

Failure to obtain the consent of the parent or guardian does not invalidate the marriage. Any person who knowingly and wilfully solemnises a Christian marriage, when either of the parties to the marriage is a minor, without taking all reasonable steps to satisfy himself that the consent of the appropriate person has been given or has been dispensed with or has been given by a court is guilty of an offence under the Christian Marriage Ordinance, 1956.³¹

(c) *Kindred and affinity.*

Marriage may not be solemnised between persons who come within the prohibited degrees of kindred and affinity and the Christian Marriage Ordinance, 1956 provides that marriage between parties within the prohibited degrees specified therein is void. The prohibited degrees of kindred and affinity are set out in the Schedule and are the same as those in the case of a marriage under the Civil Marriage Ordinance. It is, however, provided that a marriage solemnised in accordance with the rites, ceremonies and usages of a registered Christian Church, religious denomination or other Christian religious body shall be valid if it is solemnised, notwithstanding the kindred or affinity of the parties, in accordance with a licence or permit in that behalf duly granted under the authority of the canons of such registered religious denomination.³²

(d) *Avoidance of marriage by prior subsisting marriage.*

It is provided that any marriage purported to be solemnised under the Ordinance shall be void if either of the parties was at the date of such marriage under any law, religion, custom or usage to any person other than the other party and such marriage, would under any other written law or rule of law in force in the Federation applicable to such party or parties be unlawful by reason of such subsisting marriage.³³

(e) *Consent of parties.*

Both persons must generally be present for the solemnisation and both must consent to the marriage. The entry in the marriage register

29. *Ibid.*, s. 9.

30. *Ibid.*, First Schedule.

31. *Ibid.*, s. 33.

32. *Ibid.*, s. 27 and the Second Schedule.

33. *Ibid.*, s. 29.

must be attested by both the parties to the marriage.³⁴

(f) *Procedure and Formalities.*

A marriage purporting to be solemnised according to the rites, ceremonies and usages of a registered religious denomination may be solemnised by any priest, clergyman, minister, officer or other person who, being a member of such denomination, is authorized by the canons of such denomination to solemnise such marriage. When the Christian marriage is to be entered into otherwise than in accordance with the rites, ceremonies and usages of a registered religious denomination, the marriage may be solemnised by any person authorised in writing by the Registrar-General for Christian Marriages.³⁵

No marriage shall be solemnised in accordance with the rites, ceremonies, or usages of a registered religious denomination unless the person solemnising such marriage is satisfied that the provisions of the canons of such denomination relating to the publication of banns or the giving of notice of the intended marriage have been complied with or lawfully dispensed with in accordance with such canons.³⁶ Where the persons desire to enter into a Christian marriage otherwise than in accordance with the rites, ceremonies and usages of a registered religious denomination, the provisions of the Civil Marriage Ordinance, 1952, relating to the giving of notice, the issue of a certificate of marriage and the granting of a licence, apply in the same manner as if the marriage had been a marriage under the Civil Marriage Ordinance, 1952.³⁷

A marriage under the Ordinance must normally be solemnised between the hours of six in the morning and seven in the evening, but this will not render it unlawful to solemnise any marriage in accordance with the rites, ceremonies or usages of a registered religious denomination at any other time provided that such marriage is solemnised at such time and at such place and in such manner and by such persons as may be authorized or required by the canons of such denomination or by any licence or permit duly granted under the authority of such canons. In the case of a marriage solemnised otherwise than in accordance with the rites, ceremonies and usages of a registered religious denomination the Registrar has power to give directions to vary the time of solemnising the marriage.³⁸

No marriage purporting to be solemnised in accordance with the rites, ceremonies and usages of a registered religious denomination shall be solemnised in any place other than a place authorized by the canons of such denomination or by any licence or permit duly granted under the authority of such canons as a place in which such marriage may be

34. *Ibid.*, ss. 15, 19(3).

35. *Ibid.*, s. 12.

36. *Ibid.*, s. 10.

37. *Ibid.*, s. 11.

38. *Ibid.*, s. 13.

solemnised. Every Christian marriage solemnised otherwise than in accordance with the rites, ceremonies and usages of a registered religious denomination shall be solemnised at such place as may on the application of the parties thereto be authorised in writing by the Registrar-General.³⁹

Every marriage purporting to be solemnised in accordance with the rites, ceremonies and usages of a registered religious denomination shall be solemnised in such manner as may be authorised or required by the canons of such denomination.⁴⁰ Where a Christian marriage is solemnised otherwise than in accordance with the rites, ceremonies and usages of a registered religious denomination it shall be solemnised in accordance with section 15(2) of the Christian Marriage Ordinance, 1956.

Every marriage under the Ordinance is required to be solemnised in the presence of at least two credible witnesses in addition to the person authorised to solemnise such marriage.⁴¹

Failure to register a marriage does not render it invalid. The person who solemnises a marriage under the Christian Marriage Ordinance, 1956, is, however, required to effect the registration of the marriage and if he fails to do so he is guilty of an offence and liable to punishment.⁴²

(iv) *Customary marriages.*

Marriages under Chinese custom and Hindu law are recognised in the States of Malaya by the application of the principle that where the local law is wholly unsuited to the conditions of the parties, by reason of peculiarities of religious opinion and usages, then their own laws or usages are applied to them. Under Chinese customary law as recognised in the States of Malaya marriage may be proved by long continued cohabitation with intention to form a permanent union and repute of marriage; and the marriage is recognised as a polygamous one. Similarly Hindu marriages are recognised in the States of Malaya.

In *Dorothy Yee Yeng Nam v. Lee Fah Kooi*,⁴³ Thomson C.J. said:

In the Straits Settlements, however, whatever may be the position as regards other races, the only conclusion that can be drawn from the *Six Widows Case*,⁴⁴ which is the classical case on the subject, is that as regards Chinese the question of personal law is based on race. The Courts in effect have given judicial recognition to certain customs prevalent or thought to be prevalent among persons of Chinese race irrespective of their domicile or religion. They have thus set up what might be called a sort of common law as affecting persons of Chinese race and it would seem that the case is the same in those portions of the present Federation, which were not formerly part of the Straits

39. *Ibid.*, s. 14.

40. *Ibid.*, s. 15(1).

41. *Ibid.*, s. 16.

42. *Ibid.*, s. 35.

43. (1956) 22 M.L.J. 257 at p. 263.

44. (1908) 12 S.S.L.R. 120.

Settlements or, perhaps more accurately, which were part of the former Federated Malay States.

The former Perak Order in Council, declared the Chinese laws and customs set out in the Order to be the law in the State of Perak, and this was also adopted in the other States, on the ground that the order was declaratory of the laws and customs of the Chinese. The Perak Order in Council was repealed on the 1st January, 1930 when the Distribution Enactment, 1929, came into force. It has been held that with the introduction of the English Common Law by the Civil Law Enactment, 1937,^{45a} the court can now act on the wide principle laid down by Sir Peter Benson Maxwell in *Reg. v. Willans*⁴⁶ where he says:

But where the law of the place is inapplicable to the parties, by reason of peculiarities of religious opinion and usages, then from a sort of moral necessity, the validity of the marriage depends on whether it was performed according to the rites of their religion.

The customs of the Chinese are in the main uniform throughout Malaya and therefore a consideration of the customs as regards marriage and divorce which have been established in the former Straits Settlements are relevant in considering a similar question in the Federated Malay States and now the States of Malaya.⁴⁷

It has been held in the States of Malaya following the Singapore case of *Re Yeow Kian Kee's estate*,⁴⁸ that for the legal requirements of a Chinese customary marriage the law merely requires a consensual marriage and that the requirements of a ceremony, of a formal contract and of repute of marriage are evidentiary only and not essential (*Re Lee Siew Kow*⁴⁹). In the case of *Re Lee Siew Kow* it was held that in order to establish a claim to be a secondary wife a consensual marriage must be proved; the means by which the mutual consent to marry is to be proved is a matter of evidence in each case. An agreement to keep a woman is not, however, equivalent to an agreement to marry her and strong evidence that a woman is a kept mistress would negative the inference that a marriage has taken place. That case was followed in *Chu Geok Keow v. Chong Meng Sze*⁵⁰ where it was held that for the legal requirements of a marriage with a *tsip* or a secondary wife the law merely requires a consensual marriage or mutual consent to marry. The requirements of a ceremony, of a formal contract and of repute of marriage are evidentiary only and not essential to the acquisition of the status of a *tsip*. However, in that case it was held on the facts that a photograph was not conclusive evidence of proof of marriage nor was the adoption of children by the parties in itself sufficient proof of marriage.

45. No. 23 of 1893.

45a. No. 3 of 1937.

46. (1858) 3 Ky. 16 at p. 32.

47. *Woon Ngee Yew v. Ng Yoon Thai* (1941) 10 M.L.J. 37.

48. (1949) 15 M.L.J. 171.

49. (1952) 18 M.L.J. 184.

50. (1961) 27 M.L.J. 10.

It was held that there was no mutual consent to marry and that the appellant in the case was not a secondary wife of the respondent.

The Registration of Marriages Ordinance, 1952,⁵¹ enables the parties to a marriage solemnised or contracted in the States of Malaya, other than a marriage one of the parties to which professed at the time of such marriage the Christian or Muslim religion, to have the marriage registered.⁵² The Ordinance also allows the parties to a marriage solemnised or contracted outside the States of Malaya to apply for registration of the marriage.⁵³ Normally both parties to the marriage must appear before the Registrar, but the Registrar may dispense with the appearance of one of the parties if he is satisfied that there exists good and sufficient reason for the absence of that party.⁵⁴ Registration is voluntary and in the case of a marriage solemnised or contracted after 1st January, 1955, it can only be registered within three months of the date when it was solemnised or contracted unless the Registrar is satisfied that it was not registered within the said period for good cause.⁵⁵ It is provided that any male person having a wife living and being debarred according to the institutions of the religion he professes, or which he professed at the time of his marriage to such wife, or by the law or custom having the force of law applicable to the parties or either of them from having more than one wife at a time, who procures or attempts to procure the registration of a marriage between himself and any other woman or female child, shall be liable to the same penalty as if he had committed an offence punishable under that section.⁵⁶ When the law or custom applicable to the parties allows polygamy, it is possible for a man to marry more than one wife and the law recognises the polygamous marriage as valid. It is expressly provided that neither the registration of nor the omission to register any marriage shall affect the validity of the marriage, nor shall any error in the particulars recorded, nor any omission to record any particular which ought to have been recorded, affect the validity of the registration of the marriage.⁵⁷

B. THE LAW IN SINGAPORE.

The law relating to marriage (other than Muslim marriages) is now codified in Singapore in the Women's Charter, 1961.⁵⁸ In order that a union may give rise to a valid marriage the parties must have the capacity to enter into the marriage and the marriage must, if solemnised in Singapore, be solemnised according to the formalities laid down in the Women's Charter, 1961.

51. No. 53 of 1952.

52. Registration of Marriages Ordinance, 1952, s. 4.

53. *Ibid.*, s. 5.

54. *Ibid.*, s. 6.

55. *Ibid.*, s. 15.

56. *Ibid.*, s. 14(2).

57. *Ibid.*, s. 11.

58. No. 18 of 1961.

(i) *Betrothal.*

There are no statutory provisions relating to betrothal in Singapore and breaches of contracts of marriage are dealt with under the Common Law. The law is the same as that in England and the States of Malaya. It has been held in Singapore that a promise of marriage made by a married man, who at the time of the promise, holds himself out as a widower, is not against public policy and that the man will be liable on an action for breach of promise. Although it has been held to be contrary to public policy to enforce a promise to marry when the plaintiff knew that the defendant was married already, no such question arises when the plaintiff did not know that the defendant was married; *a fortiori* a defendant who is married cannot escape the consequences of a breach of promise when he has deceived the plaintiff into thinking that he was not married.⁵⁹ At common law the fact that the plaintiff was an infant when the contract was made did not affect his right to enforce it;⁶⁰ on the other hand if the defendant was an infant he could not be sued during his infancy and the Infants' Relief Act, 1874, renders unenforceable any ratification made by the promisor when he comes of age, whether or not there is any new consideration. But the Act does not apply to a fresh contract made by a party after he comes of age.

(ii) *Marriage requirements.*

The substantive requirements of the law for a valid marriage apply equally to both men and women and are as follows:—

(a) *Age.*

It is provided that a marriage purported to be solemnised under the Ordinance shall be invalid if at the date of the marriage either party is under the age of eighteen years.⁶¹ The Minister for Social Affairs is however given power in his discretion to grant a licence to authorise the solemnisation of a marriage although the female party to the marriage is under the age of eighteen years.⁶²

(b) *Consent of parent or guardian.*

If either party to a marriage is under the age of twenty-one years and has not been previously married, the consent of the parent or guardian must be obtained. If such consent cannot be obtained by reason of the absence, inaccessibility or disability of the person whose consent is required, then the consent may be dispensed with by the Registrar of Marriages or by the Minister for Social Affairs or the consent of the High Court may be obtained. If the person whose consent is required refuses his consent, the High Court may on application being made consent to

59. *Arokiasamy v. Sundram* (1938) 7 M.L.J. 4, where it was also held that a promise of marriage made by a Hindu man to a Christian girl is actionable at law, as the status of a Hindu does not prevent his contracting a valid marriage with a Christian.

60. *Ibid.*

61. Women's Charter, 1961, s. 9.

62. *Ibid.*, s. 20(2).

the marriage.⁶³

Where the minor is legitimate and is not a widow or widower, the consent of both parents, if living together, is required; if the parents are not living together the consent required is that of the parent who has custody and if both parents have custody during part of the year, each parent must consent to the intended marriage. If one parent has deserted another, the consent of the parent who has been deserted is required. If both parents have been deprived of the custody of the infant by order of court, the consent of the person to whom custody has been given must be obtained. If one parent is dead, the surviving parent's consent is required if there is no other guardian, and if there is a guardian appointed by the deceased parent, he must act jointly with the surviving parent. In the case of the death of both parents, consent of the guardian appointed by the deceased parents or by the court under the Guardianship of Infants Ordinance is necessary. In the case of an illegitimate child the mother alone is necessary as the consenting party unless she has deprived of custody by order of the court when the consent of the person to whom the custody of a minor has been committed is required. If the mother is dead, the guardian appointed by the mother or the court is the appropriate person to consent.⁶⁴

By the Adoption of Children Ordinance, the adopter is the appropriate person to consent to the marriage of an adopted child.⁶⁵

The lack of consent of the parent or guardian does not make the marriage invalid. A marriage cannot be solemnised under the Ordinance without either a certificate for marriage or a licence and a condition for the issue of a certificate for marriage or a licence is that that the Registrar or person issuing the licence must be satisfied by statutory declaration that, where either party is a minor, the consent of the parent or guardian has been given or has been dispensed with or has been given by a court. Penalties are imposed for a person who solemnises a marriage without first receiving a certificate for the marriage or a licence dispensing with such certificate and also for a Registrar who issues a certificate of marriage contrary to the provisions of the Ordinance.⁶⁶

(c) *Consanguinity and affinity.*

Marriage may not be solemnised between persons who come within the prohibited degrees of consanguinity and affinity and the Women's Charter, 1961 provides that marriage between parties within the prohibited degrees specified therein is void.⁶⁷ By the Adoption of Children Ordinance, an adopted child is deemed to be within the prohibited degrees of consanguinity with the adopter and this is so notwithstanding that the child may be re-adopted by some other person.⁶⁸

63. *Ibid.*, s. 12.

64. *Ibid.*, Second Schedule.

65. Adoption of Children Ordinance, (Cap. 36), s. 6(1).

66. Women's Charter, 1961, ss. 16, 39.

67. *Ibid.*, s. 10.

68. Adoption of Children Ordinance, s. 6(8).

In general, the prohibited degrees which bar marriage include a person's direct ascendants, descendants and similar relatives of a spouse, brothers, sisters and their respective children, aunts and uncles. There are certain exceptions made in respect of persons related by marriage only, and persons within these exceptions may marry. Briefly these exceptions include marriages with a deceased spouse's brother or sister, uncles or aunts of a deceased spouse, and nephews and nieces by marriage.⁶⁹ While marriage is permitted with a deceased spouse's relatives as enumerated in the Women's Charter, 1961, a purported marriage with any such relative of a spouse during the latter's lifetime is declared void.⁷⁰ Thus, a marriage solemnised between a man and a sister of his divorced wife and a marriage between a woman and a brother of her divorced husband is void if solemnised during the lifetime of such divorced wife or divorced husband as the case may be.

Power is given in the Women's Charter, 1961, to the Minister for Social Affairs to grant a licence for a marriage to be solemnised, notwithstanding the kindred or affinity of the parties, if he is satisfied that such marriage is valid under the law, religion, custom or usage applicable to the parties thereto and such marriage shall thereupon be deemed to be valid.⁷¹

(d) *Avoidance of marriage by prior subsisting marriage.*

The Women's Charter, 1961, provides that any marriage purported to be solemnised under the Ordinance shall be invalid if either of the parties was at the date of such marriage married under any law, religion, custom or usage to any person other than the other party.⁷² Thus for the future all marriages solemnised in Singapore (other than Muslim marriages) are monogamous. Past polygamous marriages are recognised but the parties are prevented from marrying again so long as such marriages subsist. If a person who is already married, marries again, the second marriage is bigamous and void.⁷³

(e) *Consent of the parties.*

It is necessary that both parties should consent freely to the marriage. The Women's Charter, 1961 provides that no marriage shall be solemnised under the Ordinance unless the person solemnising the marriage is satisfied that both the parties to the marriage freely consent to the marriage.⁷⁴ It is also provided that any person who uses any force or threat either to compel a person to marry against his will or to prevent a person who has attained the age of twenty-one years from contracting a valid marriage shall be guilty of an offence under the Ordinance.⁷⁵

69. Women's Charter, 1961, First Schedule.

70. *Ibid.*, s. 10(3), (4).

71. *Ibid.*, s. 10(5).

72. *Ibid.*, s. 11.

73. *Ibid.*, ss. 5, 6.

74. *Ibid.*, s. 21(3).

75. *Ibid.*, s. 35.

(f) *Procedure and Formalities.*

The Women's Charter, 1961, lays down the procedure and formalities for all marriages (other than Muslim marriages). Marriages may be solemnised after the issue of a certificate for marriage or a licence.

(aa) Where persons desire to marry, one of them is required to give notice of the marriage to the Registrar. The notice is filed and posted in the office of the Registrar. After the expiration of twenty-one days and before the expiration of three months from the date of the notice, the parties may apply to the Registrar for the issue of a certificate for marriage. Before issuing the certificate for marriage the parties must satisfy the Registrar by statutory declaration made by each of them that neither party is below the age of eighteen years, that, if either of the parties is under twenty-one years and has not been previously married, the consent of the appropriate person has been given or has been dispensed with or has been given by the court, that there is no lawful hindrance to the marriage and that neither of parties is married under any law, religion, custom or usage to any person than the person with whom such marriage is proposed to be contracted. Any person may file a *caveat* against the issue of the certificate for marriage and the certificate for marriage shall not be issued until the *caveat* is withdrawn or it is decided by the Registrar or the court that the *caveat* ought not to obstruct the issue of the certificate. Where a certificate for marriage has been issued, the parties may be married within three months after the date of the notice, by the Registrar or any person licensed to solemnise marriages. The forms of the marriage before the Registrar is set out in section 22 of the Women's Charter, 1961, but no restrictions are placed on any religious or customary forms of marriage, if the marriage is solemnised by persons licensed to solemnise the marriage. All that is required is that the person solemnising the marriage shall be satisfied that both of the parties freely consent to the marriage and that the marriage is solemnised in the presence of at least two witnesses.⁷⁶

(bb) The Minister may upon proof made by statutory declaration that there is no lawful impediment to the proposed marriage and upon his being satisfied that the necessary consent, if any, to such marriage has been obtained or that the consent has been dispensed with or given by the court, dispense with the giving of notice and with the certificate for marriage, and grant a licence authorising the solemnisation of a marriage

76. *Ibid*, ss. 13-22.

between the parties named in the licence. Where a licence has been issued, the marriage may be solemnised either by the Registrar or by a person licenced to solemnise marriages.⁷⁷

The Women's Charter, 1961 provides that every marriage solemnised in Singapore after the coming into operation of the Ordinance (other than Muslim marriages) shall be registered under the provisions of the Ordinance.⁷⁸ It also provides that marriages may be solemnised only by the Registrar of Marriages or a person licensed to solemnise marriages.⁷⁹ Penalties are imposed for the unauthorised solemnisation of marriages and for failure to effect registration of a marriage not solemnised by the Registrar.⁸⁰ It is however expressly provided that nothing in the Ordinance or in the rules made thereunder shall be construed to render valid or invalid merely by reason of its having been or not having been registered any marriage which otherwise is invalid or valid.⁸¹

(iii) *Chinese marriages.*

The Women's Charter, 1961, provides that any marriage solemnised under any law, religion, custom or usage prior to the coming into operation of the Ordinance shall, if valid under the law, religion, custom or usage under which they were solemnised, be deemed to be registered under the provisions of the Ordinance.⁸² It will therefore still be necessary to determine the validity of Chinese marriages, for example, and this will have to be determined by the court.

Under Chinese customary law marriage with a *tsai* or principal wife must follow certain formalities. Its characteristics are that it is preceded by a betrothal in which the contracting parties are the members of the respective families of the betrothed couple and not the betrothed couple. A formal contract was not infrequently drawn up after negotiation by a go-between, but acceptance by the parents of the family of the bride of a present was sufficient evidence of a contract. Good faith in relation to any matter which would influence the parties in arranging marriage was required from both sides but unless there had been deception neither family could withdraw and the betrothed pair must necessarily proceed to marriage. According to Jamieson the essentials are:—

- (1) betrothal as evidenced by the go-between or by written contract;
- (2) receipt by the bride's family of presents which could be

77. *Ibid.*, s. 20.

78. *Ibid.*, s. 24.

79. *Ibid.*, s. 8.

80. *Ibid.*, ss. 33, 38.

81. *Ibid.*, s. 32.

82. *Ibid.*, s. 166.

used as evidence to prove a contract and seems therefore to have been an alternative to (1) ;

- (3) handing over of the woman as wife whether or not there was any red chair ceremony or obeisance to the ancestral tablets and to the bridegroom's parents.⁸³

A Chinese may after marriage lawfully espouse other wives agreeable to his own choice and with fewer ceremonies as well as without regard to family connection. These wives are all subordinate to the first wife but are equal in rank among themselves. Chinese custom requires a public announcement of the man's intention to take the woman as his *tsip* by giving a dinner party to his relatives and friends. Besides, the *tsip* must be initiated to the family of the husband by kowtowing and serving tea to the first wife. This is called "*Yap Kong*".⁸⁴

The English judges in applying the Chinese customary law have tended to treat all the wives, whether *tsai* or *tsip*, as having equal rights and to regard the Chinese customary marriage in the same way as an English common law marriage, in which the essential requirement is a mutual agreement to constitute the relationship of marriage.

In *Re Lao Leong An*,⁸⁵ Sir Peter Benson Maxwell said:

... I had to consider the question some years ago, in Penang, and ... I was of opinion that a second or inferior Chinese wife was to all intents and purposes a lawful spouse and was entitled to share with the first or superior wife in the property of her deceased husband ... The first wife is usually chosen by the husband's parents of a family of equal station, and is espoused with as much ceremony and splendour as the parties can afford; while the inferior wives are generally of his own choice made without regard to family connection. But that they are wives not concubines seems to me clear from the fact that certain form of espousal are always performed, and that, besides, their children inherit in default of issue of the principal wife, and that throughout the Penal Code of China they are treated as wives to all intents and purposes as well as the first.

It was held that a secondary wife of a Chinese was entitled to an equal share of the intestate's property with the first wife.

In the matter of the *Estate of Choo Eng Choon, (deceased) Choo Ang Chee v. Neo Chang Neo & others*,⁸⁶ (the *Six Widows case*), Law Ag.C.J. said:

On the whole, in view of the statements referred to above, that in the case of secondary wives, as I will call them, some sort of ceremony is usually required, and that they were regarded as belonging to the family of the man they lived with, in view of the law that these secondary wives cannot be divorced except for the same reasons as a first wife, in view of their . . . right to apply to Court to secure such maintenance and in view of the other points . . . already

83. *Chinese Law and Custom in Hongkong*, (Government Printer, Hongkong, 1953), at p. 20.

84. *Ibid.*, at p. 22f.

85. (1893) 1 S.S.L.R. 1 at pp. 1-2; See *In the Goods of Ing Ah Mit* (1888) 4 Ky. 380.

86. (1908) 12 S.S.L.R. 120 at pp. 148-149.

referred to above, I think that in regard to these secondary or inferior wives (or concubines as they have been called), though socially their position is no doubt very inferior to that of the first wife, yet legally their position more clearly resembles that of a wife where polygamy is allowed than it resembles anything else; and I think myself, though I do not think the matter is free from doubt, that Chinese marriages must be regarded as polygamous as Sir Benson Maxwell held and as Sir Theodor Ford and other Judges have taken to be the case

I believe myself that there are other cases besides those to which reference has been made, where plurality of wives among Chinese has been recognised in the Courts here, but of course cases of this sort would not be reported indefinitely, and it must be remembered that a very great number of these who can afford to support more than one wife dispose of their property by will, and that the question we have been considering may thus not arise.

It was held in the Court of Appeal (Hyndman Jones C.J. and Braddell J., Sercombe-Smith J. dissenting), affirming the decision of Law, Ag.C.J., that the Chinese are polygamous and that the court will recognise polygamous unions for the purposes of succession and legitimacy among the Chinese.

In the case of *Choo Ang Chee v. Neo Chan Neo*⁸⁷ a great deal of evidence was given about the rites and ceremonies of the Chinese in the taking of principal and secondary wives, but the court in that case, and the Privy Council in the case of *Cheang Thye Pin v. Tan Ah Loy*,⁸⁸ held that, although some sort of ceremony was usual when a secondary wife was taken, proof of the performance of a ceremony was not essential to the validity of a secondary marriage.

In *Woon Kai Chiang v. Yeo Pah Wee & Others*,⁸⁹ Murison C.J. said:

Before leaving the question of the so-called usual and essential ceremonies in the Chinese wedding of a principal wife, I would like to observe that the whole matter is in my opinion most unsatisfactory and vague. There seems to be no real and final authority as to what are the actual essentials of the marriage I am not sure that some day the Courts here will not have to hold that the only real essential of the Chinese marriage of a principal wife is intention; and that it is a question of fact in each case whether or not there has been a performance by the parties in this Colony of so much of the ceremonies usual in Chinese principal marriages as would justify the Court in finding that there is an intention to perform a principal marriage, and that therefore such a marriage has taken place.

In *Re Lee Choon Guan*⁹⁰ it was held that in order to prove a Chinese secondary marriage, though no ceremony need be proved, it is necessary to prove (a) long continued cohabitation; (b) an intention to form a permanent union; and (c) repute of marriage. Recognition by the husband's family is one of the strongest forms of reputation of marriage. "As in the case of a secondary marriage ceremonies of any kind are unnecessary, such ceremonies as are proved to have been performed are only

87. (1908) 12 S.S.L.R. 120.

88. [1920] A.C. 369. See also *Khoo Hooi Leong v. Khoo Chong Yeok* [1930] A.C. 346.

89. (1926) 1 S.S.L.R. 26 at pp. 33-34.

90. (1935) 4 M.L.J. 78.

valuable as far as they go as proof of intention and of recognition.”^{90a}

In *Re The Will of Tay Geok Teat*⁹¹ it was held by the Court of Appeal, that a secondary marriage between a Chinese man and a Japanese woman may on proper evidence be presumed from cohabitation and repute and also from recognition of issues as legitimate children.

In *Tan Ah Bee v. Foo Koon Thye*,⁹² Carey J. said

It is established that a Chinese man may have as many wives as he may be disposed to. Usually he has a principal wife and may have several secondary wives as well. No precise ceremony of marriage is requisite in the case of a secondary wife, but there must be some evidence of intention and some recognition of the status of a wife in order that a secondary marriage may be established....

There is the general presumption in favour of marriage where the parties have cohabited as man and wife over a period of years.

Of course such a presumption is immediately rebutted by proof that one of the parties cohabiting is not free to contract a marriage with the other, for instance where the man is already the lawful husband of another woman or the woman is already the lawful wife of another man (*Khoo Hooi Leong v. Khoo Heng Kwee*....)⁹³

When one appreciates that a secondary wife may be acquired with so little formality and when acquired, she and her children, if any, in the event of an intestacy, share in the estate of the late husband, there is, if marriage is to remain a recognised honourable estate, an urgent necessity to ensure that a mistress or kept woman and her children, if any, should not step in to minimize the shares on distribution of the legal wives and children of the deceased.

In that case it was held on the facts that the plaintiff had failed to prove that she was the secondary wife of the deceased.

In *Re The Estate of Yeo Seng Whatt (deceased)*⁹⁴ it was held that although there was no sufficient proof of marriage by ceremony in the case, the plaintiff had substantiated her claim to be the secondary wife of the deceased by proof of (a) long continued cohabitation; (b) intention to form a permanent union; and (c) repute of marriage.

In *Re The Estate of Yeow Kian Kee, (deceased), Er Gek Cheng v. Ho Ying Seng*⁹⁵ Murray-Aynsley C.J. held (a) by the law of Singapore a male Chinese, not a Christian, who is domiciled in Singapore can have an unlimited number of *tsips*; (b) that for the legal requirements of a marriage with a *tsai* or *tsip* the law of Singapore merely requires a consensual marriage, that is, an agreement to form a relationship that comes within the English definition of marriage, a relationship which

90a. *Ibid.*, at p. 81.

91. [1934] S.S.L.R. 83.

92. (1947) 13 M.L.J. 169.

93. [1926] A.C. 529.

94. (1949) 15 M.L.J. 241.

95. (1949) 15 M.L.J. 171.

need not be lifelong but must be of indefinite duration; (c) that the requirements of a ceremony, of a formal consent and of repute of marriage are evidentiary only and not essential to the acquisition of the status of *tsip*; (d) that on the facts of the case the plaintiff had acquired the status of a *tsip*. This case was approved by the Court of Appeal in *Re Lee Siew Kow*.⁹⁶ In that case Matthew C.J. said:^{96a}

In his judgment in *Er Gek Cheng v. Ho Ying Seng*, the learned Chief Justice has set out with great clarity the law of the Colony on the subject of the acquisition of the status of a *tsip* or secondary wife, and has removed certain obscurities which clouded earlier decisions. He has laid down that for the legal requirements of a marriage with a *tsip* the law of the Colony merely requires a consensual marriage and the requirements of ceremony, of a formal contract and of repute of marriage are evidentiary only and not essential to the acquisition of the status of a *tsip*. With this exposition of the law I am in complete agreement.

Brown J. said:^{96b}

I think that upon the authorities the law can now be regarded as settled that in order to establish a claim to be a secondary wife a consensual marriage must be proved. The means by which the mutual consent to marry is to be proved is a matter of evidence in each case.

The case of *Er Gek Cheng v. Ho Ying Seng*, (*supra*) was followed in *Re Ho Khian Cheong, (deceased)*⁹⁷ where it was held that a consensual marriage is sufficient to enable a woman to secure the status of a secondary wife. Where a Chinese, having a principal wife living in Singapore, goes through a ceremony of marriage with another woman and such ceremony is appropriate for the purpose of marrying a principal wife according to Chinese custom, both justice and common sense require that the other woman be accorded the status of a secondary wife. The Court has to determine the issues not by Chinese custom exclusively but by the relevant portion of the law of Singapore applicable at the material time; that portion of the law of Singapore is a fusion of the principles of English law and Chinese custom.

In the case of *Re The Estate of Lee Gee Chong, (deceased), Tay Geok Yap and others v. Tan Lian Cheow*⁹⁸ the Federal Court held that it was bound by the decision in *Re Lee Siew Kow, Yeo Siew Neo v. Gan Eng Neo, (supra)*, with which it was in full agreement, to hold that in order to constitute a Chinese secondary marriage it was only necessary to prove (a) a common intention to form a union as husband and secondary wife; and (b) the formation of the union by man taking the woman as his secondary wife and the woman taking the man as her husband; it is unnecessary to prove further that the marriage was performed or celebrated in accordance with Chinese rites and customs. Wee Chong Jin C.J. said:

96. (1952) 18 M.L.J. 184.

96a. *Ibid.*, at p. 185.

96b. *Ibid.*, at p. 186.

97. (1963) 29 M.L.J. 316.

98. (1965) 31 M.L.J. 102.

It may well be that the consequences which were held by our Courts to follow when a woman successfully establishes that she has acquired that status may not have accorded with the consequences which follow in China where a woman acquires the status of a "tsip" i.e. a secondary wife in China but those consequences flow from the fact that the law applicable here is the law of England modified only to the extent necessary to prevent injustice or oppression to the local inhabitants here and those consequences have obtained ever since our courts have held polygamous unions among the Chinese here are valid marriages.⁹⁹

Although cohabitation and repute are not essential to the validity of a Chinese marriage, yet they may provide the grounds for the presumption of such a marriage. In *Yeap Cheah Neo v. Ong Cheng Neo*¹⁰⁰ it was stated by the Privy Council:

It is said that, with the Chinese, the difference between the social status of a wife and that of a concubine, and in the position and treatment of legitimate and illegitimate children, is so slight, that what is termed reputation, affords no satisfactory ground for presuming a marriage. But if this be so, which, however, is not very clearly established, their Lordships see no reason, in the absence of satisfactory evidence to the contrary, why the ostensible relations of the parties should not be referred to a legitimate and correct connection, rather than to an illegitimate, and to say the least, a less correct one.

In *Khoo Hooi Leong v. Khoo Hean Kee*¹ it was held that the doctrine of presumption of marriage applied to the union of a non-Christian Chinese with a Christian woman. The Privy Council said:

If consent is enough it is not easy to see why a Christian woman should be incapable of consent. True her religion forbids a polygamous union, but it also prohibits illicit cohabitation. If the woman be free to contract marriage, *soluta*, and the man according to his personal law, also free, *solutus*, and the particular class of marriage or union is in the abstract recognised by the law of the land, it may well be that the religious obstacle is no bar.^{1a}

In *Isaac Penhas v. Tan Swee Eng*² it was held that a marriage in 1937 between a Jew and a non-Christian Chinese in a modified Chinese form constituted a valid Common Law marriage. There was no form of ceremony of marriage which was applicable to both parties to the marriage and accordingly they adopted a composite ceremony, the wife worshipping according to Chinese custom and the husband according to Jewish custom. Such a ceremony performed in the circumstances was it was held indubitably intended by the parties to constitute a valid marriage. With the coming into operation of the Women's Charter, 1961, all marriages, other than Muslim marriages, are however required to be solemnised and registered under the provisions of the Ordinance.

C. THE LAW IN SARAWAK.

The law relating to marriage in Sarawak might be dealt with under

99. *Ibid.*, at p. 112. The position has now been altered by the Women's Charter, 1961, which has taken away the right to enter into a polygamous marriage.

100. (1872) 1 Ky. 326 at pp. 338-339.

1. [1926] A.C. 529.

1a. *Ibid.*, at p. 543.

2. (1953) 19 M.L.J. 73.

four heads: Church and Civil marriages, Muslim marriages, Chinese marriages and Native Customary marriages. This paper does not deal with Muslim marriages.

(i) *Betrothal.*

There are no statutory provisions relating to betrothal in Sarawak, except for Chinese and customary marriages. Breaches of contract of marriage are dealt with under the English Common Law and the law is the same as in England and the States of Malaya. In *Maureen v. Bong Tom*³ it was held that in Sarawak it is not necessary for the evidence of the plaintiff to be corroborated where the claim is for damages for the breach of a promise to marry. The provisions of the English Evidence (Further Amendment) Act, 1869 do not apply in Sarawak because of the provisions of the Evidence Ordinance, which is intended to be a code and a definitive enactment concerning evidence in all civil and criminal matters before the courts in Sarawak. On the facts of the case it was held that the plaintiff had not produced evidence to show that the defendant had promised to marry her. The Infants Relief Act, 1874, which is an Act of general application, applies in Sarawak and an infant would not be bound by a promise to marry. The age of majority in Sarawak, for other than Europeans, is, however, eighteen and not twenty-one as is the age of majority in England.

(ii) *Church and Civil Marriages.*

Church and Civil marriages are governed by the Church and Civil Marriages Ordinance.⁴ This defines marriage following the English law as the voluntary union for life or until the marriage is dissolved by a court of competent jurisdiction, of one man with one woman to the exclusion of all others.⁵ The Ordinance does not apply to marriages contracted according to the usages of Muslims, Hindus, Dayaks, and other persons governed by their own laws or customs of marriage.⁶ It is enacted that every marriage, other than a marriage contracted according to the usages of Muslims, Hindus, Dayaks or other persons governed by their own laws and customs, to which one or both of the parties is monogamous by religion or by the law of his domicile, shall be void unless solemnised under the Ordinance either by a Christian minister of religion or before a Marriage Registrar.⁷ Where it appears that there has been any irregularity in form or procedure or otherwise in any marriage, whether celebrated under the Ordinance or not, the High Court on the application of any person interested may declare such marriage as valid if satisfied that the parties thereto intended to contract a marriage as defined in the Ordinance or were debarred by the law of their religion or their domicile from contracting a marriage otherwise than in accordance with the Ordinance; and that there is no

3. [1959] S.C.R. (Sarawak, North Borneo and Brunei) 77.

4. Cap. 92.

5. Church and Civil Marriage Ordinance, s. 2.

6. *Ibid.*, s.1(2).

7. *Ibid.*, s. 4.

factor which under the provisions of section 3 of the Ordinance would render the marriage void.⁸

(a) *Age.*

The Church and Civil Marriage Ordinance provides in effect that in order to contract a valid marriage both parties to the intended marriage must have reached the age of fourteen years.⁹

(b) *Consent of parent or guardian.*

If any party to an intended marriage is a minor, that is a person who in the case of Europeans is under the age of twenty-one years and in any other case under the age of eighteen years, and who is not a widow or widower, the marriage shall not be solemnised unless such minor first obtains the consent of the father of such minor; or if the father be dead or his consent is not reasonably obtainable, the consent of the guardian of such minor or failing such guardian, the consent of the mother (if living) of the minor. If the person whose consent is required is of unsound mind or withholds the requisite consent, the High Court, if satisfied that the consent is unreasonably withheld, may issue an order of consent in lieu of the consent of the parent or guardian. Where there is no one living who is capable of giving a valid consent, the marriage may in the discretion of the minister of religion or Marriage Registrar proceed without such consent. No marriage solemnised without the consent or order of the court as required shall be void only by reason of the absence of such consent but the Minister of religion or Registrar solemnising the marriage will be liable to the penalties prescribed under the Ordinance.¹⁰

(c) *Kindred and affinity.*

No two persons shall be capable of contracting a valid marriage if the parties to the intended marriage are related to each other within the degrees of kindred set out in the Schedule to the Church and Civil Marriage Ordinance.¹¹ The list includes as in the States of Malaya a person's direct ascendants, descendants and similar relatives of a spouse, brothers and sisters and their respective children, aunts and uncles but also includes in the case of a man the father's brother's wife, mother's brother's wife, wife's father's sister, the wife's mother's sister, brother's wife, brother's son's wife, sister's son's wife, wife's brother's daughter, wife's sister's daughter and in the case of a woman the father's sister's husband, the mother's sister's husband, the husband's father's brother, the husband's mother's brother, the sister's husband, the brother's daughter's husband, the sister's daughter's husband, the husband's brother's son and the husband's sister's son.¹² It appears that a man may marry his wife's

8. *Ibid.*, s. 38.

9. *Ibid.*, s. 3(1) (a).

10. *Ibid.*, s. 7.

11. *Ibid.*, s.3(1)(b).

12. *Ibid.*, Schedule.

sister and a woman her husband's brother on the decease or divorce of the spouse. It is provided however that if the parties to the intended marriage are domiciled outside Sarawak, they must not marry each other within a degree of kindred prohibited by the law of the country of their domicile.¹³

(d) *Avoidance of marriage by prior subsisting marriage.*

A valid marriage may only be contracted under the Church and Civil Marriage Ordinance if neither party to the intended marriage is bound by a valid subsisting marriage to third party.¹⁴ The marriage under the Ordinance is monogamous.

It has been held in *Lopez v. Sockalingam Kalli*¹⁵ that a person who according to his own personal law, for example, Hindu law, recognised by the laws of Sarawak, is already validly married cannot contract a valid marriage under the Church and Civil Marriage Ordinance.

(e) *Consent of the parties.*

It is provided that a valid marriage may only be contracted if the parties to the intended marriage freely consent to marry each other but the absence of consent shall not be inferred merely from the fact that one party was induced by fraud to marry the other.¹⁶ It is also a condition for a valid marriage that neither party is of unsound mind, an idiot or a person whose mental condition makes him or her incapable of understanding the nature of the marriage contract.¹⁷

The Marriage Registrar is given a discretion to refuse to accept a notice of marriage or to solemnise a marriage if it appears to him that the parties to an intended marriage, not being Christians, are though of sound mind, incapable by reason of their antecedents, mentality or education of fully understanding and fulfilling the duties and obligations of a marriage as defined by the Ordinance. In exercising his discretion the Registrar shall consider whether the parties are able to marry each other under a custom more suited to their mentality and understanding.¹⁸

(f) *Procedure and Formalities.*

A marriage under the Church and Civil Marriage Ordinance may be solemnised either by a Christian Minister of religion or before a Marriage Registrar.¹⁹

13. *Ibid.*, s.3(1)(c).

14. *Ibid.*, s.3(1)(d).

15. [1947] Sarawak L.R. 22.

16. Church and Civil Marriage Ordinance, s. 3(1)(f).

17. *Ibid.*, s.3(1)(e).

18. *Ibid.*, s. 25.

19. *Ibid.*, s. 4.(1).

In the case of a religious marriage notice of marriage is required to be given in the prescribed form; either banns of the marriage must be published on at least three occasions or the notice must be exhibited for at least fourteen days in some conspicuous part of the Church, Chapel or building in which it is intended to solemnise the marriage or in the office of the Marriage Registrar of the district. No Minister of religion shall solemnise a marriage until one of the parties has made either verbally or in writing a solemn declaration before him that he or she believes that there is no impediment of kindred or affinity or other legal hindrance to the marriage and further if either party to the intended marriage is a minor that the consent required has been obtained. A Minister of religion may solemnise any marriage on the certificate of another Minister of religion of the same denomination or of a Marriage Registrar that the provisions relating to banns or notice of marriage have been complied with. Any person whose consent to the marriage is required or any person who is aware of any just impediment to the marriage may, before the solemnisation of the marriage, give notice of his objection verbally or in writing and thereupon the marriage shall not be solemnised until the Minister of Religion has inquired into the matter and is satisfied that the marriage may lawfully proceed. The marriage shall be solemnised within three months after the date of the due publication of the banns or the due exhibition of the notice.²⁰ A marriage by a Minister of religion shall be solemnised according to the rules, rites and ceremonies of the Anglican Church, the Church of Rome, the Church of Scotland, the Presbyterian Church of England, or the Methodist Church in Sarawak by a duly authorised priest or Minister of one of these churches.²¹ Provision is made for the registration of the marriage by the Minister of religion who solemnises the marriage.²²

In the case of civil marriages the marriage is required to be solemnised by a Marriage Registrar appointed under the Ordinance.²³ One of the parties is required to give notice to the Marriage Registrar in the prescribed form. The Marriage Registrar receiving the notice shall cause a copy thereof to be exhibited in some conspicuous position in his office for at least fourteen days. If neither of the parties to the intended marriage has resided in the district in which notice is given for at least fourteen days before the date of the giving of the notice, the Marriage Registrar shall not solemnise the marriage until the notice has been duly exhibited in the office of the Marriage Registrar of the district in which one of the party resides. The Marriage Registrar shall not solemnise the marriage unless one of the parties has made either verbally or in writing a solemn declaration that he or she believes that there is no impediment of kindred or affinity or other legal hindrance to the marriage and further if either party to the intended marriage is a minor, that the required consent has been duly obtained. The Marriage Registrar solemnising a marriage may accept the certificate of another Marriage Registrar that the provisions relating to the exhibition of the notice in

20. *Ibid.*, ss. 9-13.

21. *Ibid.*, s. 5(1).

22. *Ibid.*, s. 14.

23. *Ibid.*, s. 5,(2).

the district which one of the parties resides have been complied with. Any person whose consent is required to a marriage or any person who is aware of any impediment to the marriage may before the solemnisation of the marriage give notice of his objection verbally or in writing and thereupon the marriage shall not be solemnised until the Marriage Registrar has inquired into the matter and is satisfied that the marriage may lawfully proceed. A marriage shall be solemnised within three calendar months of the due exhibition of the notice of marriage but a marriage solemnised after the expiration of that period shall not for that reason alone be invalid.²⁴

The Senior Marriage Registrar may on receiving the prescribed notice of marriage and the required statutory declaration issue a special licence authorising a Minister of religion or a Marriage Registrar to solemnise a marriage notwithstanding that the notice has not been exhibited as required.²⁵ The form of marriage before the Marriage Registrar is prescribed and provision is made for the registration of the marriage.²⁶

It is provided that a marriage solemnised under the Ordinance shall not be void merely on account of any irregularity in the registration of the marriage²⁷ but failure to keep a proper register of marriages is an offence punishable under the Ordinance. Marriages may only be solemnised by a Minister of religion or before a Marriage Registrar and they are required to register the marriage.

(iii) *Chinese Marriages.*

The Chinese Marriage Ordinance²⁸ provides for the control and registration of marriages contracted according to established Chinese law or custom. Chinese marriage is defined as a marriage contracted according to established Chinese law or custom and including a marriage constituted by the marital intercourse of persons betrothed according to such law or custom.²⁹ The Chinese Marriage Ordinance does not affect the validity of betrothals contracted according to established Chinese law or custom. No such betrothal shall be registered but if by subsequent marital intercourse a betrothal has constituted a marriage, the Registrar shall register the marriage and issue a certificate of marriage.³⁰ Every Chinese marriage contracted in Sarawak is required to be registered within one month with the Registrar of the district in which the husband resides. No Chinese marriage contracted in Sarawak shall be valid unless so registered, but the Registrar's Court may on the application

24. *Ibid.*, ss. 15-20.

25. *Ibid.*, s. 21.

26. *Ibid.*, ss. 22-24.

27. *Ibid.*, s. 36.

28. Cap. 74 of the Laws of Sarawak, 1948.

29. Chinese Marriage Ordinance, s. 2.

30. *Ibid.*, s. 8.

of either party or of any party interested declare that the marriage is valid if satisfied that it is otherwise valid by established Chinese law or custom and thereupon the marriage shall be registered.³¹ Any Chinese marriage contracted before 1st September, 1933 (the date of commencement of the Ordinance) or contracted outside Sarawak may be registered on the application of either party. The validity of an unregistered marriage contracted within the State before the commencement of the Ordinance or contracted outside the State shall be decided by application to the Registrar's Court, which may order such marriage to be registered forthwith.³²

The Registrar shall not register a Chinese marriage until he is satisfied that the ceremonies required by established Chinese law or custom have been duly performed and that the marriage is valid according to such law or custom. The Registrar shall normally register a marriage only if both parties are present and consent to the registration. Provision is made for the cases where the other party is unable to be present or refuses or withholds his consent. In such a case the matter is referred to a Magistrate, who will hear the parties and if the Magistrate is satisfied that the marriage is valid he may order that it shall be registered. No marriage between a Chinese man and a woman of a race other than Chinese shall be registered except with the sanction in writing of a Magistrate. Where a marriage is registered it shall be deemed to be valid, until it is proved to be invalid.³³

It is provided that no Chinese marriage shall be registered nor shall it be valid, until the female is fifteen years of age by English computation.³⁴ Any person who marries in Sarawak according to Chinese law or custom and, the marriage not having been registered, fails within one month of the marriage to register such marriage shall be guilty of an offence.³⁵ Chinese customary law is applicable in Sarawak and it has been held that any proved or accepted Chinese custom shall prevail over English law.³⁶ In *Loh Chai Ing v. Lan Ing Ai*³⁷ the facts disclosed that the petitioner was given to the father of the respondent at the age of seven, so that he might in due course become the wife of the respondent and she married him at the age of eighteen. It was held that the marriage was valid for although there were elements of strong influence, they do not amount to a forcing of the petitioner into a marriage against her will.

31. *Ibid.*, s. 4.

32. *Ibid.*, s. 4(4), (5). Some registration of marriage takes place immediately prior to the filing of an action or as an attempt to prevent a party from dissolving the marriage. See *Lo Siew Ying v. Chong Fay* [1959] S.C.R. (Sarawak, North Borneo and Brunei) 1.

33. *Lo Siew Ying v. Chong Fay*, *supra*.

34. Chinese Marriage Ordinance, s. 6(1).

35. *Ibid.*, s. 9.

36. *Tay Sok Ann v. Tay Sok Hiong* [1955] S.C.R. (Sarawak, North Borneo and Brunei) 17 at p. 20.

37. [1959] S.C.R. (Sarawak, North Borneo and Brunei) 1.

(iv) *Native Marriages (other than Muslim marriages).*

Among the Sea Dayaks cases of breach of promise of marriage can be heard by the *Tuai Rumah*. The person breaking the promise is liable to a fine. The engagement gifts may not be demanded back but in the case of a large sum of money being wasted, action for damages may be taken in the proper court.³⁸

Among the Sea Dayaks marriage may be effected by the ceremony of *blah pinang*, but many do not use it. Apart from this, if a man lives with a woman for seven days and nights, they are deemed to be man and wife, but a report must be made to the *Tuai Rumah*, failing which a penalty is payable to the complainant. Cousins may marry without offence but a person may not marry the child of a cousin (cousin once removed) without a fine. There is also a prohibition of marriage with ascendants, descendants and other relatives, sexual intercourse with whom is classified as incest. It is an offence for a person to marry a second husband or wife while cohabiting with the first. But if such person discards his former husband or wife, he or she can marry again on payment of the divorce fine.³⁹

Among the *Orang Ulu* when a couple wishes to become engaged they must report to the *Penghulu* or to the *Tua Kampong* of the house in which they live. The *Penghulu* must enquire whether the engagement gifts have been paid. An engagement should not last more than six months and after six months have elapsed no case for breach of promise may be brought by either party. The engagement gifts to be given by a man to a woman follow a prescribed scale. If a woman having received the engagement gifts from the man, then refuses to marry him, the engagement gifts shall be returned to him and the woman shall be fined. She shall also pay to the man \$3.00 for each month, if any, that he has lived in her room, to a maximum of six months. If a man refuses to marry a woman after having given her the engagement gift he shall be fined and shall pay \$10.00 to the woman as cancellation of the engagement. The engagement gifts remain with the woman.⁴⁰

Among the *Orang Ulu* when a couple wishes to become engaged or to marry they must both report either to the *Penghulu* or to the *Tua Kampong* of the house in which they live. The *Penghulu* or *Tua Kampong* must enquire whether the engagement gifts or marriage gifts (*brian*) have been paid or not in order that if a divorce is requested in the future he may know how to settle the case. If a couple on becoming engaged or married does not inform the *Penghulu* or *Tua Kampong* and lives together six days or more as though married, each of them will be fined, after which they shall be regarded as man and wife. Until the

38. Third Division Sea Dayak Customary Code of Fines, Laws of Sarawak, 1958, Vol. VII, at p. 620.

39. *Ibid.*, at p. 625; Dayak Adat Law, Sarawak, 1963, at pp.25, 29. The Code of Fines states that if a man lies with a woman for six successive nights they are deemed to be man and wife.

40. Orang Ulu Customary Code of Fines, Laws of Sarawak, 1958, Vol. VII, pp. 658-659.

fine is paid neither party will be able to bring a case for divorce or for maintenance in the future as they are not considered properly engaged or married. Persons falling within the prescribed degrees of kinship are forbidden to marry and sexual intercourse between them are classed as incest; these include father and daughter, mother and son, brother and sister, step-brother and step-sister, parent and step-child, persons who have been fed at the same breast, uncle and niece, aunt and nephew, adopted parent and adopted child, uncle and adopted niece and aunt and adopted nephew.⁴¹

D. THE LAW IN SABAH.

The law relating to marriage in Sabah might be dealt with under three heads: Christian marriages, Muslim marriages and Customary marriages. It is proposed to deal in this paper only with Christian and Customary marriages.

(i) *Betrothal.*

There are no statutory provisions relating to betrothal in North Borneo and breaches of contracts of marriage are dealt with under the English Common Law. The law is the same as in England and in the States of Malaya.

(ii) *Christian marriages.*

Christian marriages are governed by the Christian Marriage Ordinance.⁴² The Ordinance provides for the solemnisation and registration of Christian marriages, that is marriages between persons one or both of whom is or are a Christian or Christians.⁴³ It is provided that all Christian marriages shall be solemnised in accordance with the provisions of the Ordinance and any such marriage solemnised otherwise than in accordance with such provisions shall be void.⁴⁴ The substantive requirements for a valid marriage under the Ordinance are as follows:—

(a) *Age.*

The Marriage Ordinance, 1959, provides that any marriage between persons who in the case of a male is under the age of sixteen years or in the case of a female is under the age of fourteen years shall be void.⁴⁵

(b) *Consent of parent or guardian.*

It is provided that the father, if living of any minor, that is a person under twenty-one years of age who has not been previously married, or if the father is dead, the lawful guardian of such minor and

41. *Ibid.*, at pp. 659-661.

42. Cap. 24 of the Laws of North Borneo, 1953.

43. Christian Marriage Ordinance, s. 2.

44. *Ibid.*, s. 4.

45. Marriage Ordinance, 1959, (No. 14 of 1959), s. 2.

in case there is no such guardian then the mother of such minor may give consent to the minor's marriage and such consent shall first be obtained for such marriage unless no person authorised to give such consent be resident in Sabah.⁴⁶ Where any person whose consent is necessary to any marriage is of unsound mind or where any person (other than the father) without just cause withholds his consent to the marriage, the parties intending marriage may apply by petition to the High Court and such court may examine the allegations of the petition and if upon each examination such marriage appears proper, shall declare the marriage so to be. Such declaration shall be as effectual as if the person whose consent was needed had consented to the marriage.⁴⁷

Where one of the persons intending marriage is a minor and notice of the marriage has been given to a minister of religion, such minister shall send by post or otherwise a copy of such notice to the Marriage Registrar for the district wherein the marriage is intended to be solemnised, to be fixed in some conspicuous place in his office. Moreover where either of the parties intending marriage is a minor and the Minister of religion is not satisfied that the consent of the person whose consent is required has been obtained, such minister shall not issue the certificate of notice given and declaration made under the Ordinance until the expiration of fourteen days after the receipt by him of the notice of marriage.⁴⁸

Where the notice of marriage is sent to a Marriage Registrar and one of the parties is a minor, the Marriage Registrar shall affix a copy in some conspicuous place in his office and shall also within twenty-four hours after the receipt by him of such notice send by post or otherwise a copy of such notice to each of the other Marriage Registrars, if any, in the same district who shall affix the copy in some conspicuous place in his office. The certificate of notice given and oath made required under the Ordinance shall not be issued, where one of the parties intending marriage is a minor, until fourteen days have expired after the receipt of such notice.⁴⁹

Failure to obtain the consent of the father, guardian or mother does not in itself invalidate a marriage. All marriages are however required to be solemnised by a Minister of religion or a Marriage Registrar and penalties are provided for the solemnisation of a marriage, except under a licence or special licence of the Governor, where one of the parties is a minor before the expiration of fourteen days after the receipt of the notice of marriage.⁵⁰ It is also provided that any person who, except in the case where the High Court has declared the marriage to be proper, knowingly and wilfully solemnises a marriage without the consent of the person whose consent is required shall be guilty of an offence under

46. Christian Marriage Ordinance, s. 8.

47. *Ibid.*, s. 9.

48. *Ibid.*, ss. 15, 20.

49. *Ibid.*, ss. 33(2), 35.

50. *Ibid.*, s. 54.

the Ordinance.⁵¹

By the Adoption Ordinance, 1960, the adopter is the appropriate person to consent to the marriage of an adopted child.⁵²

(c) *Kindred and affinity.*

The Christian Marriage Ordinance provides that the certificate of notice given and declaration made under the Ordinance shall not be issued by the Minister of religion or Marriage Registrar until one of the persons intending marriage shall have appeared personally before the Minister of religion or the Marriage Registrar and make a solemn declaration or oath that he or she believes that there is not any impediment of kindred or affinity or other lawful hindrance to the said marriage.⁵³ The prohibited degrees of kindred or affinity are not set out in the Ordinance but would appear to be the same as those in England by virtue of the Application of Laws Ordinance.⁵⁴ In general the prohibited degrees which bar marriage include a person's direct ascendants, descendants and similar relatives of a spouse, brothers, sisters, and their respective children, aunts and uncles. Certain statutory exceptions are made in respect of persons related by marriage only, and persons within these exceptions may marry. Briefly these exceptions include marriage with a deceased spouse's brother or sister, uncles, or aunts of a deceased spouse, nephews, and nieces by marriage.⁵⁵

By the Adoption Ordinance, 1960, an adopted child is deemed to be within the prohibited degrees of kindred with the adopter and this is so notwithstanding that the child may be re-adopted by some other person.⁵⁶

(d) *Avoidance of marriage by prior subsisting marriage.*

The Christian Marriage Ordinance provides for the solemnisation and registration of Christian marriages. Although there is no provision in the Ordinance expressly forbidding a marriage to be solemnised under the Ordinance if either of the parties was married at the date of such marriage it would appear that this would be a lawful hindrance to the marriage. A person who being married under the Ordinance marries again during the subsistence of marriage would be guilty of an offence under section 494 of the Penal Code.

(e) *Consent of the parties.*

The Marriage Ordinance, 1959, provides that where any marriage is solemnised or contracted it shall be the duty of the person or persons

51. *Ibid.*, s. 56(1).

52. Adoption Ordinance, 1960, (No. 23 of 1960), s. 16.

53. Christian Marriage Ordinance, ss. 17, 36.

54. Chapter 6 of the Laws of North Borneo, 1953.

55. See P. M. Bromley, *Family Law*, (London, 1962), at pp. 33-34.

56. Adoption Ordinance, 1960, s. 16(3).

solemnising such marriage or where by any law or custom applicable to either of the persons contracting such marriage it must be contracted in the presence of any official or specially qualified witness or witnesses it shall be the duty of any such person or persons to ascertain and record that both of the parties to such marriage have freely expressed their consent to such marriage.⁵⁷

(f) *Procedure and Formalities.*

Marriages under the Christian Marriage Ordinance are required to be solemnised either by a person who has received episcopal ordination or a clergyman of the Church of Scotland or a Minister of the Presbyterian Church or a Minister of religion licensed under the Ordinance to solemnise marriages or by or in the presence of a Marriage Registrar. Marriages solemnised by a person who has received episcopal ordination or by a clergyman of the Church of Scotland are required to be solemnised according to the rules, rites, ceremonies and customs of the church whereof he is a Minister or clergyman.⁵⁸

Provision is made for the registration of such marriages. The entry in the register of marriages shall be signed by the person solemnising the marriage and the persons married and shall be attested by two credible witnesses present at the solemnisation of the marriage. The person solemnising the marriage shall send the certificate to the Marriage Registrar for the district in which the marriage was solemnised and the Marriage Registrar shall cause the certificate to be copied into a book kept by him for that purpose.⁵⁹

Where a marriage is intended to be solemnised by a Minister of religion licensed to solemnise marriages or a Minister of the Presbyterian Church one of the parties shall give a notice of marriage in the prescribed form. The notice shall be fixed in some conspicuous part of the Church or, where the marriage is to be solemnised at a place other than a Church, the notice shall be sent to the Marriage Registrar for the district who shall fix it in some conspicuous place in his office. If either of the persons intending marriage is a minor the notice shall be sent to the Marriage Registrar of the place where the marriage is intended to be solemnised to be fixed in some conspicuous place in his office. The Minister of religion consenting or intending to solemnise the marriage shall after the expiry of four days from the date of receipt of the notice and if no lawful impediment has been shown and the issue of the certificate has not been forbidden issue a certificate of notice given and declaration made. The certificate shall not be issued until one of the persons intending marriage has appeared personally before the Minister of religion and made a solemn declaration that he or she believes that there is not any impediment of kindred or affinity or other lawful hindrance to the said marriage; and where either or both of the parties is or are a minor or minors that the consent required by law has been

57. Marriage Ordinance, 1959, s. 3.

58. Christian Marriage Ordinance, s. 5.

59. *Ibid.*, ss. 28-30.

obtained thereto or that there is no person resident in Sabah having authority to give such consent. Every person whose consent is required may prohibit the issue of the certificate by the Minister of religion by notice in writing to the Minister and the Minister on receipt of such notice shall not issue the certificate or solemnise the marriage until he has examined into the matter and is satisfied that the person prohibiting the marriage has no lawful authority for such prohibition and until such notice is withdrawn by the person who gave it. Where either of the persons intending marriage is a minor and the Minister of religion is not satisfied that the consent of the person whose consent is required has been obtained, such Minister shall not issue the certificate until the expiration of fourteen days after receipt by him of the notice. After the issue of the certificate of marriage the marriage may be solemnised according to such form or ceremonies as the Minister thinks fit; but the marriage must be solemnised in the presence of at least two witnesses besides the Minister. Where the marriage is not solemnised within two months after the date of the certificate and all proceedings thereon shall be void; and no person shall proceed to solemnise the marriage until the notice has been given and a certificate thereof issued.⁶⁰ Provision is made for the registration of such marriages. The entry in the register of marriages shall be signed by the person solemnising the marriage and the persons married and shall be attested by two credible witnesses present at the solemnisation of the marriage. The person solemnising the marriage shall send the certificate of marriage to the Marriage Registrar of the district in which the marriage was solemnised and the Marriage Registrar shall cause the certificate to be copied into the book kept by him for that purpose.⁶¹

When the marriage is intended to be solemnised by or in the presence of a Marriage Registrar one of the parties to such marriage shall give notice in the prescribed form to the Marriage Registrar having jurisdiction in the place where both the parties have been dwelling or if the parties dwell in the places within the jurisdiction of different Marriage Registrars to the Marriage Registrars of each place and the Marriage Registrar on receiving the notice shall cause a copy to be affixed in some conspicuous place in his office. Where one of the parties intending marriage is a minor the Marriage Registrar shall send a copy of the notice to each of the other Marriage Registrars in the same district and such Marriage Registrars shall likewise affix the copy of the notice in some conspicuous place in their offices. The notices of marriage are filed and copies entered in a Marriage Notice Book. After the expiry of four days from the date of the notice, or where one of the parties is a minor, after the expiry of fourteen days from the date of entry of such notice in the Marriage Notice Book, and if no lawful impediment has been shown to the issue of the certificate and if the issue of the certificate has not been forbidden, the Marriage Registrar shall issue a certificate of notice given and oath made. Before the certificate is issued one of the parties must appear personally before the Marriage Registrar and make oath (a) that he or she believes that there is not any impediment of kindred or affinity or other lawful hindrance to the marriages; (b) that both the

60. *Ibid.*, ss. 12-24.

61. *Ibid.*, ss. 28-30.

parties have or, where the parties dwell within the jurisdiction of different Marriage Registrars, that the party making such oath has had his usual place of abode within the jurisdiction of such Marriage Registrar; and (c) where either of the parties is a minor, that the consent to such marriage required by law has been obtained or that there is no person resident in Sabah authorised to give such consent. The Governor may at any time after the marriage notice has been given grant a licence authorising the Marriage Registrar to issue his certificate on or after the day mentioned in such licence and may in his discretion grant a special licence dispensing with the certificate of the Marriage Registrar and authorising a marriage between the parties to be solemnised by any competent person on the day named. Any person whose consent to a marriage is required may enter a protest against the issue of the Marriage Registrar's certificate by writing at any time before the issue of such certificate and when such protest has been entered no certificate shall issue until the Marriage Registrar has examined into the matter of the protest and is satisfied that it ought not to obstruct the issue of the certificate for such marriage or until the protest is withdrawn. Where a Marriage Registrar refuses to issue a certificate, either of the parties may apply by petition to the High Court, which shall examine the petition and decide thereon. The Marriage Registrar may if not satisfied that the person forbidding the issue of the certificate is authorised by law to do so himself apply by petition to the High Court, which may after examining into the matter declare that the person forbidding the issue of the certificate is or is not so authorised. After the issue of the certificate of the Marriage Registrar or where notice is required to be given to the Marriage Registrar for various places, after the issue of the certificate of the Marriage Registrar for such places, the marriage may, if there be no lawful impediment to the marriage of the parties, be solemnised in such form and ceremony as they think fit to adopt; but the marriage shall be solemnised in the presence of a Marriage Registrar and of two or more credible witnesses. The marriage can only be solemnised within two months after the copy of the notice has been entered in the Marriage Notice Book. After the solemnisation of the marriage the Marriage Registrar present at such solemnisation shall forthwith register the marriage.⁶²

Any irregularity in respect of the registration of a marriage does not affect its validity but the person who fails to comply with the provisions of the Ordinance is liable to penalties under the Ordinance.⁶³

(iii) *Customary marriages.*

Customary marriages including Chinese marriages are recognised in Sabah but such marriages are subject to the provisions of the Marriage Ordinance, 1959. It is provided that notwithstanding any written law or custom any marriage between persons who in the case of a male is under the age of sixteen years or in the case of a female is under the age of fourteen years shall be void. Where any marriage is solemnised or contracted it shall be the duty of the person or persons solemnising such

62. *Ibid.*, ss. 32-45.

63. *Ibid.*, s. 60.

marriage or where by any law or custom applicable to either of the persons contracting such marriage it must be contracted in the presence of any official or specially qualified witness or witnesses it shall be the duty of such person or persons to ascertain and record that both the parties to such marriage have freely expressed their consent to such marriage. It is also provided that save where provision is made in any other written law for the registration of marriage it shall be the duty of any person who by law or custom is required to be present at or to witness any marriage after the commencement of the Ordinance or who being qualified under such law or custom acts as such, to record the same particulars as shall from time to time be required under the provisions of the Christian Marriage Ordinance and to forward such particulars to the person appointed under such Ordinance to be the Marriage Registrar for the district in which such marriage was contracted and such Registrar shall keep a register of such marriages as nearly as may be following the provisions of such Ordinance. Failure to discharge a duty under the provisions of the Ordinance is an offence for which the person upon whom the duty is placed is liable to penalties.⁶⁴

There are no statutory provisions in Sabah relating specially to Chinese marriages. The non-Christian Chinese are usually married according to the reformed Chinese style.

Under the old Dusun custom the betrothal could be held, if the parents desired, when the children were as young as eight to ten years old, but it has become more usual to wait until the parties are of the age of puberty. In any case the betrothal was a provisional arrangement and either party, the boy or the girl could refuse consent to a marriage when he or she comes of age. The parents cannot force a child into a marriage against its will and if a boy and girl insist on a marriage disapproved by the parents they could go off together and if the girl becomes pregnant the Native Court would order them to marry. Under the Dusun custom, there is no religious formula or ceremony which is essential to a valid marriage.

E. THE LAW IN BRUNEI.

The law relating to marriage in Brunei might be dealt with under four heads: Church and Civil marriages, Muslim marriages, Chinese marriages and Native Customary marriages. This paper does not deal with Muslim marriages.

(i) *Betrothal.*

There are no statutory provisions relating to betrothal in Brunei and breaches of contracts of marriage are dealt with under the English Common Law. The law is the same as in England and in the States of Malaya.

(ii) *Church and Civil Marriages.*

Church and Civil marriages are governed by the Marriage Enact-

64. Marriage Ordinance, 1959, ss. 2-5.

ment.⁶⁵ This defines marriage following the English law as the voluntary union for life or until the marriage is dissolved by a court of competent jurisdiction, of one man with one woman to the exclusion of all others.⁶⁶ The Enactment does not apply to marriages contracted according to the usages of Muslims, Hindus, Buddhists, Dayaks and other persons governed by their own laws or customs of marriage which are recognised as valid and effective if one of the parties to such marriage is a member of the race or religion according to whose usages the marriage is contracted.⁶⁷ It is enacted that every marriage, other than a marriage contracted according to the usages of Muslims, Hindus, Dayaks or other persons governed by their own laws and customs, to which either one or both of the parties is monogamous by religion or by the law of his domicile, shall be void unless solemnised under the Ordinance by a Minister of religion or before a Marriage Registrar.⁶⁸ Where it appears that there has been any irregularity in form or procedure or otherwise in any marriage, whether celebrated under the Enactment or not, a Judge of the High Court on the application of any person interested may declare that such marriage is valid if satisfied that the parties thereto intended to contract a marriage as defined by the enactment or were debarred by the law of their religion or their domicile from contracting a marriage otherwise than in accordance with the Enactment; and that there is no factor under the provisions of section 3 of the Enactment which would render the marriage void.⁶⁹

(a) *Age.*

It is provided that in order to contract a valid marriage both parties to the intended marriage must have reached the age of fourteen years.⁷⁰

(b) *Consent of parent or guardian.*

If any party to an intended marriage is a minor, that is a person who in the case of Europeans is under the age of twenty-one years and in any other case under the age of eighteen years, and who is not a widow or widower, the marriage shall not be solemnised unless such minor first obtains the consent of the father of such minor; or if the father be dead or his consent is not reasonably obtainable, the consent of the guardian of such minor; or failing such guardian, the consent of the mother (if living) of the minor. If the person whose consent is required is of unsound mind or withholds the requisite consent, the High Court if satisfied that the consent is unreasonably withheld, may issue an order of consent in lieu of the consent of the parent or guardian. Where there is no one living who is capable of giving a valid consent, the marriage may in the discretion of the Minister of religion or Marriage Registrar proceed

65. Chapter 76 of the Laws of Brunei, 1951.

66. Marriage Enactment, s. 2.

67. *Ibid.*, s. 1(2).

68. *Ibid.*, s. 4.

69. *Ibid.*, s. 35.

70. *Ibid.*, s. 3(1) (a).

without such consent. No marriage solemnised without the consent or order of the court as required shall be void only by reason of the absence of such consent but the Minister of religion or Registrar solemnising the marriage shall be liable to the penalties prescribed under the Enactment.⁷¹

(c) *Kindred and affinity.*

No two persons shall be capable of contracting a valid marriage if the parties to the intended marriage are related to each other within the degrees of kindred set out in the Schedule to the Marriage Enactment.⁷² The list is the same as that in Sarawak. It would appear that as in Sarawak a man may marry his wife's sister and a woman her husband's brother on the decease or divorce of the spouse. It is provided however that if the parties to the intended marriage are domiciled outside Brunei, they must not marry each other within a degree of kindred prohibited by the law of the country of their domicile.⁷³

(d) *Avoidance of marriage by prior subsisting marriage.*

A valid marriage may only be contracted under the Marriage Enactment if neither party to the intended marriage is bound by a valid subsisting marriage to a third party. The marriage under the Enactment is monogamous.⁷⁴

(e) *Consent of the parties.*

It is provided that a valid marriage may only be contracted if the parties to the intended marriage freely consent to marry each other but the absence of consent shall not be inferred merely from the fact that one party was induced by fraud to marry the other. It is also a condition for a valid marriage that neither party is of unsound mind, an idiot or a person whose mental condition makes him or her incapable of understanding the nature of the marriage contract.⁷⁵

The Marriage Registrar is given a discretion to refuse to accept a notice of marriage or solemnise a marriage if it appears to him that the parties to an intended marriage, not being Christians, are though of unsound mind, incapable by reason of their antecedents, mentality or education of fully understanding and fulfilling the duties and obligations of a marriage as defined by the Ordinance. In exercising his discretion the Registrar shall consider whether the parties are able to marry each other under a custom more suited to their mentality and understanding.⁷⁶

71. *Ibid.*, s. 7.

72. *Ibid.*, s. 3(1)(b).

73. *Ibid.*, s. 3(1)(c).

74. *Ibid.*, s. 3(1)(d).

75. *Ibid.*, s. 3(1) (e), (f).

76. *Ibid.*, s. 25.

(f) *Procedure and formalities.*

A marriage under the Marriage Enactment may be solemnised either by a Christian Minister of religion or before a Marriage Registrar.

In the case of a religious marriage notice of marriage is required to be given in the prescribed form; either banns of the marriage must be published on at least three occasions or the notice must be exhibited for at least fourteen days in some conspicuous part of the church, chapel or building in which it is intended to solemnise the marriage or in the office of the Marriage Registrar of the district. No Minister of religion shall solemnise a marriage until one of the parties has made either verbally or in writing a solemn declaration before him that he or she believes that there is no impediment of kindred or affinity or other legal hindrance to the marriage and further if either party to the intended marriage is a minor that the consent required has been obtained. A Minister of religion may solemnise any marriage on the certificate of another Minister of religion of the same denomination or of a Marriage Registrar that the provisions relating to banns or notice of marriage have been complied with. Any person whose consent to marriage is required or any person who is aware of any just impediment to the marriage may, before the solemnisation of the marriage, give notice of his objection verbally or in writing and thereupon the marriage shall not be solemnised until the Minister of religion has inquired into the matter and is satisfied that the marriage may lawfully proceed. The marriage shall be solemnised within three months after the date of the due publication of the banns or the due exhibition of the notice.⁷⁷ A marriage by a Minister of religion shall be solemnised according to the rules, rites and ceremonies of the Anglican Church, the Church of Rome, the Church of Scotland or the Presbyterian Church of England by a duly authorised priest or Minister of one of these churches or according to the rules, rites and ceremonies of the denomination of a Minister of religion licensed under the Enactment.⁷⁸ Provision is made for the registration of the marriage by the Minister of religion who solemnises the marriage.⁷⁹

In the case of civil marriages one of the parties is required to give notice to the Marriage Registrar in the prescribed form. The Marriage Registrar receiving the notice shall cause a copy thereof to be exhibited in some conspicuous position in his office for at least fourteen days. If neither of the parties to the intended marriage has resided in the district in which notice is given for at least fourteen days next before the date of the giving of the notice, the Marriage Registrar shall not solemnise the marriage until the notice has been duly exhibited in the office of the Marriage Registrar of the district in which one of the parties resides. The Marriage Registrar shall not solemnise the marriage unless one of the parties had made a solemn declaration that he or she believes that there is no impediment of kindred or affinity or other legal hindrance to

77. *Ibid.*, ss. 9-13.

78. *Ibid.*, s. 5.

79. *Ibid.*, s. 14.

the marriage and further if either party to the intended marriage is a minor, that the required consent has been duly obtained. The Marriage Registrar solemnising a marriage may accept the certificate of another Marriage Registrar that the provisions relating to the exhibition of the notice in the district in which one of the parties reside have been complied with. Any person whose consent is required to a marriage or any person who is aware of any impediment to the marriage may before the solemnisation of the marriage give notice of his objection verbally or in writing and thereupon the marriage shall not be solemnised until the Marriage Registrar has inquired into the matter and is satisfied that the marriage may lawfully proceed. A marriage shall be solemnised within three calendar months of the due exhibition of the notice of marriage but a marriage solemnised after the expiration of that period shall not for that reason alone be invalid. The Senior Marriage Registrar may on receiving the prescribed notice of marriage and the required statutory declaration issue a special licence authorising a Minister of religion or a Marriage Registrar to solemnise a marriage notwithstanding that the notice has not been exhibited as required. The form of marriage before the Marriage Registrar is prescribed and provision is made for the registration of the marriage.⁸⁰

(iii) *Chinese marriages.*

The Chinese Marriages Enactment, 1959,⁸¹ provides for the control and registration of marriages contracted according to established Chinese law and custom. Chinese marriage is defined as a marriage contracted according to established Chinese law or custom and including a marriage constituted by the marital intercourse of persons betrothed according to such law or custom.⁸² It is provided that nothing in the Enactment shall affect the validity of a betrothal contracted according to established Chinese law or custom. No such betrothal shall be registered but if by subsequent marital intercourse a betrothal has been constituted a marriage, the Registrar shall register the marriage and issue a certificate of marriage.⁸³ Every Chinese marriage contracted in Brunei is required to be registered within one month with the Registrar of the district in which the husband resides. No Chinese marriage contracted in Brunei shall be valid unless so registered, but the court of a First Class Magistrate may on the application of either party or of any party interested declare that the marriage is valid if satisfied that it is otherwise valid by established Chinese law or custom and thereupon the marriage shall be registered. Any Chinese marriage contracted before 1st June, 1955 (the date of commencement of the Enactment) or contracted outside Sarawak may be registered on the application of either party. The validity of an unregistered Chinese marriage contracted within the State before the commencement of the Enactment or contracted outside the State shall be decided by application to the Court of a First Class Magis-

80. *Ibid.*, ss. 15-24.

81. Enactment No. 6 of 1955.

82. Chinese Marriage Enactment, 1955, s. 2.

83. *Ibid.*, s. 8.

trate, which may order such marriage to be registered forthwith.⁸⁴

The Registrar shall not register a Chinese marriage until he is satisfied that the ceremonies required by established Chinese law or custom have been duly performed and that the marriage is valid according to such law or custom and that neither of the parties is precluded by his or her personal law from contracting a marriage in such form. The Registrar shall normally register a marriage only if both parties are present and consent to the registration. Provision is made for the cases where the other party is unable to be present or refuses or withholds his consent. In such a case the matter is referred to a Magistrate, who will hear the parties and if the Magistrate is satisfied that the marriage is valid he may order that it shall be registered. No marriage between a Chinese man and a woman of a race other than Chinese shall be registered except with the sanction in writing of a Magistrate. Where a marriage is registered it shall be deemed to be a valid marriage until it is proved to be invalid.⁸⁵

It is provided that no Chinese marriage shall be registered nor shall it be valid, until the female is fifteen years of age by English computation. Any person who has carnal connection with a female under fifteen years shall be guilty of an offence under the Unlawful Carnal Knowledge Enactment, notwithstanding that a marriage ceremony by Chinese law or custom has been performed.⁸⁶

It is provided that any person who marries in Brunei according to Chinese law or custom and the marriage not having been registered fails within one month of the marriage to apply for such marriage to be registered shall be guilty of an offence under the Enactment.⁸⁷

iv. *Customary marriages.*

Customary marriages are recognised in Brunei but there are no statutory provisions for their solemnisation and registration.

(to be continued)

AHMAD BIN MOHD. IBRAHIM*

84. *Ibid.*, s. 4.

85. *Ibid.*, s. 5.

86. *Ibid.*, s. 6.

87. *Ibid.*, s. 9.

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