

## THE STATUS OF WOMEN IN FAMILY LAW IN MALAYSIA, SINGAPORE AND BRUNEI

### SECTION 2: EFFECTS OF MARRIAGE ON THE LEGAL STATUS OF WOMEN.

#### A. THE LAW IN THE STATES OF MALAYA.

##### (i) *Personal status including civil capacity.*

The law relating to the status, rights and obligations of married women is contained in the Married Women Ordinance, 1957.<sup>1</sup> The Ordinance applies to all married women, subject in the case of Muslim married women and their property rights and obligations to the provisions of Muslim law and the customs of the Malays governing the relations between husband and wife.

The English Common Law rules, that on marriage the wife acquires the domicile of her husband, applies in the States of Malaya. The law relating to torts in the States of Malaya follows the English law. Both husband and wife have a right of damages against a third person for enticement, but it has been held in England that a wife cannot sue for harbouring *simpliciter* without enticement.<sup>2</sup> Each spouse may also maintain an action for damages under section 7 of the Civil Law Ordinance, 1956,<sup>3</sup> against a wrongdoer whose negligence caused the death of the other spouse.

The Married Women Ordinance, 1957, provides that a married woman shall be capable of rendering herself and being rendered liable in respect of any contract, debt or obligation and of suing and being sued in respect of any such contract, in all respects as if she were a *feme sole*.<sup>4</sup> The husband of a married woman shall not by reason only of being her husband be liable in respect of any tort committed by her whether before or after the marriage or in respect of any contract entered into or debt or obligation incurred by her before the marriage; or be liable to be sued or made a party to any legal proceedings brought in respect of any such tort, contract, debt or obligation.<sup>5</sup> An exception to the general rule that a husband is not liable for his wife's contracts is found in the doctrine

1. No. 36 of 1957.
2. *Winchester v. Fleming* [1957] 3 All E.R. 711.
3. No. 5 of 1956.
4. Married Women Ordinance, 1957, s. 4.
5. Civil Law Ordinance, 1956, s. 9.

that a wife may be deemed to be the agent of her husband and to have an implied authority to pledge his credit and to enter into contracts for necessaries. This authority of a wife may be assumed from cohabitation and extends generally to the purchase of such things necessary and suitable to the style in which her husband lives as fall within the domestic sphere usually under her management. This implied right to pledge her husband's credit may be withdrawn by the husband giving notice to his wife and in some circumstances notice to tradesmen. Separation is *de facto* a revocation of the wife's authority to pledge her husband's credit. However if a husband deserts his wife or if a wife has been forced to leave her husband through his conduct she may continue to pledge his credit for necessaries as if she has no means of supporting herself.

The Married Women Ordinance, 1957 also provides that a married woman shall be capable of suing and being sued in respect of a tort as if she were a *feme sole*.<sup>6</sup> A wife cannot sue her husband in tort save for the protection or security of her property. Thus a wife may sue her husband for such torts as detention or conversion of chattels belonging to her but not for such torts as libel, negligence or personal injury. Similarly a husband cannot sue his wife in tort, except for the protection or security of his property.<sup>7</sup>

No criminal proceedings may be taken by a wife against her husband or by a husband against his wife while they are living together as to or concerning any property claimed by her or him respectively, nor while they are living apart as to or concerning any act done by the husband or wife while they were living together concerning property claimed by the wife or husband respectively, unless such property has been wrongfully taken by the husband or wife when leaving or deserting or about to leave or desert the wife or husband respectively.<sup>8</sup> A wife may however take criminal proceedings against her husband for personal injuries inflicted on her.

The Married Women and Children (Maintenance) Ordinance, 1950,<sup>9</sup> provides that if any person neglects or refuses to maintain his wife, a court upon due proof thereof, may order such person to make a monthly allowance for the maintenance of his wife in proportion to the means of such person as the court considers reasonable.<sup>10</sup> If such a person wilfully neglects to comply with the order, the court may direct the amount to be levied in the manner provided for levying fines or may sentence him to imprisonment for a term which may extend to one month for each month's allowance remaining unpaid.<sup>11</sup> If any person against whom an order has been applied for or made for the maintenance of his wife, offers to maintain his wife on condition of her living with him, and his wife refuses to do so, the court shall consider any grounds of refusal

6. Married Women Ordinance, 1957, s. 4.

7. *Ibid.*, s. 9.

8. *Ibid.*, s. 9 (4).

9. No. 36 of 1950.

10. Married Women and Children (Maintenance) Ordinance, 1950, s. 3(1).

11. *Ibid.*, s. 4.

stated by such wife and may make or enforce the order aforesaid, notwithstanding such offer, if it is satisfied that such person is living in adultery or for any other reason it is just to do so. No wife shall be entitled to receive an allowance from her husband under the provisions of the Ordinance if she is living in adultery or if, without sufficient reason, she refuses to live with her husband.<sup>12</sup>

The Maintenance Order (Facilities for Enforcement) Ordinance, 1949, provides for the enforcement of maintenance orders made in the States of Malaya in a number of British Commonwealth countries.

(ii) *Property rights.*

The Married Women Ordinance, 1957,<sup>13</sup> provides that a married woman shall be capable of acquiring, holding and disposing of any property in all respect as if she were a *feme sole*. Restraints on anticipation are abolished for the future. A married woman is liable for all her debts and obligations and she is subject to the law relating to bankruptcy and to enforcement of judgments and orders.<sup>14</sup> Section 120 of the Bankruptcy Ordinance, 1959,<sup>15</sup> provides that a married woman shall be subject to the Ordinance in all respects as if she were a *feme sole*.

It is provided that a married woman shall have in her own name against her husband the same remedies and redress for the protection of her property as if she were a *feme sole*, but criminal proceedings concerning property shall not be taken by a wife against her husband while they are living together, nor while they are living apart concerning any act done while living together, unless such property was taken by the husband when leaving or deserting or about to leave or desert his wife.<sup>16</sup>

In any question between husband and wife as to the title to or possession of property either party may apply by summons or otherwise in a summary copy to any Judge of the High Court or, where the value of the property does not exceed two thousand dollars, to the President of a Sessions Court and the Judge or President may make such order with respect to the property in dispute as he thinks fit or may direct such application to stand over and any inquiry touching the matters in question to be made in such manner as he thinks fit.<sup>17</sup>

In *Chin Shak Len v. Lim Fah*<sup>18</sup> the wife brought a summons against

12. *Ibid.*, s. 5. Where an offer is made by the husband to maintain his wife on condition of her living with him, the court must consider whether the offer was genuine and if the wife refused it, whether she had sufficient reason for refusing to live with her husband — *Chong Hooi v. Tee Ngi* (1958) 24 M.L.J. 83.

13. No. 55 of 1949.

14. Married Women Ordinance, 1957, s. 4.

15. No. 20 of 1959.

16. Married Women Ordinance, 1957, s. 9.

17. *Ibid.*, s. 11.

18. (1962) 28 M.L.J. 418.

her husband under section 11 of the Married Women's Ordinance, 1957 for the determination of the title to or possession of an undivided interest in land in the town of Kajang. The land was purchased in March 1951 and of the purchase money \$1,200 was provided by the wife and \$400 by the husband. The husband registered the title in his own name. The wife contended that the money was provided for the purchase of land in her own name but the husband alleged that the money was a loan which he had since repaid. The wife's evidence was preferred and it was held that there was a resulting trust in favour of the wife as to so much of the money she had provided. As the husband had disposed of more than the share of the interest due to him, the learned Judge declared that the remaining undivided interest in the land of which he was the registered proprietor belonged to the wife by reason of the resulting trust. The husband had left the wife in 1955, and the wife also argued that as a deserted wife she had an equitable interest in the matrimonial home which had been built on the land. The learned Judge observed *obiter* that a deserted wife in Selangor has no interest legal or equitable in the matrimonial home. He referred to a passage in the judgment of the Supreme Court of New South Wales in the case of *Dickson v. McWhinnie*<sup>19</sup> which reads:

Notwithstanding the many expressions of opinion by Lord Denning:, we think, with all respect, that a deserted wife has no interest, legal or equitable, in the matrimonial home, and no equity, as we understand the word, enforceable against a purchaser of the land whether with or without notice of her occupancy and that she is a deserted wife.

He held that in view of the provision of section 42 of the Land Code (which in effect provides that the title of a proprietor, chargee, or lessee shall be indefeasible, except that the title of a proprietor may be defeated by operation of law) that passage sets out the correct position as to the state of the law in Selangor. He added that if the applicant's claim had to be decided on this point alone, it would have failed.<sup>20</sup>

## B. THE LAW IN SINGAPORE.

### (i) *Personal status including civil capacity.*

The Common Law theory that on marriage a wife's legal personality merged in that of her husband, was considerably modified by the Married Women's Property Ordinance following the Married Women's Property Acts in England. The provisions of the Married Women's Property Ordinance have been re-enacted in the Women's Charter, 1961.<sup>21</sup> As a

19. (1958) 75 W.N. (N.S.W.) 204.

20. See the criticism of this case in D. Jackson, "A Wife's Right to Occupy the Matrimonial Home", 1963 5 Malaya L.R. at p. 213.

In *National Provincial Bank, Ltd. v. Hastings Car Mart, Ltd.* [1965] 3 W.L.R. 1 it has been held by the House of Lords that the rights of a deserted husband were of their nature personal rights as between the husband and wife and these rights do not affect third parties. They could not be treated as in any sense a clog on the property of the husband so as in the case of realty to run with the land; and, accordingly, a deserted wife could not resist a claim from a genuine purchaser of the matrimonial home from her husband whether the purchase took place after or before the desertion.

21. No. 78 of 1961.

result of these statutory provisions a married woman is in practically the same position as a *feme sole* with regard to civil capacity and property rights, although she is still under some disability in certain respects.

As in England it is customary for a woman on marriage to take her husband's name or title, although this is not compellable by law. The Women's Charter, 1961, provides that the wife shall have the right to use her own surname and name separately.<sup>22</sup> On marriage a woman acquires the domicile of her husband and a right to be maintained in the matrimonial home. At Common Law a husband is under a legal duty to maintain his wife according to his means and if he fails in this duty she has an implied authority to pledge his credit for necessaries. The right continues if she is deserted by her husband or if she is forced to live apart from him through his misconduct; but if she leaves her husband without his consent and without just cause, her right to be maintained by him is suspended during her absence. At Common Law a wife has no duty to support her husband and in no case has he any implied authority, by virtue of the relationship, to pledge her credit.

Both husband and wife have a right of action for damages against a third person for enticement. Each spouse may also maintain an action for damages under section 12 of the Civil Law Ordinance<sup>23</sup> against a wrong-doer whose negligence caused the death of the other spouse. The principle established in *Best v. Samuel Fox & Co.*<sup>24</sup> that a husband (but not a wife) may maintain an action against a third party who commits a wrongful act against his wife whereby he is deprived of her consortium, that is, the society and services of his wife, applies in Singapore.

The Women's Charter, 1961, provides that a married woman shall be capable of rendering herself liable in respect of and to the extent of her separate property on any contract and of suing and being sued in respect of any such contract, in all respects as if she were a *feme sole* and her husband need not be made a party to any action or other legal proceedings brought by or taken against her.<sup>25</sup> The husband of a married woman shall not by reason only of his being her husband be liable in respect of any tort committed by her whether before or after the marriage or in respect of any contract entered into or debt or obligation incurred by her before the marriage; or be liable to be sued or made a party to any legal proceedings brought in respect of any such tort, contract, debt or obligation.<sup>26</sup> An exception to the general rule that a husband is not liable for his wife's contracts, is found in the rule based on the English Common Law that a wife may be deemed to be the agent of her husband and to have an implied authority to pledge his credit and to enter into contracts for necessaries. The law in this respect follows the law in England and the States of Malaya.

22. Women's Charter, 1961, s. 45(3).

23. Cap. 24 of the Revised Edition.

24. [1952] A.C. 716.

25. Women's Charter, 1961, s.47(3) and (4).

26. Civil Law Ordinance, s. 9.

The Women's Charter, 1961, also provides that a married woman shall be capable of suing and being sued in respect of a tort as if she were a *feme sole* and her husband need not be made a party to any action or other legal proceedings brought by or taken against her.<sup>27</sup> A wife cannot however sue her husband in tort save for the protection of her separate property.<sup>28</sup> Thus, a wife may sue her husband for such torts as detention or conversion of chattels belonging to her but not for such torts as libel, negligence or personal injury. A husband can in no case sue his wife in tort, not even for the protection of his separate property.

No criminal proceedings may be taken by a wife against her husband while they are living together as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the husband while they were living together concerning property claimed by the wife, unless such property has been wrongly taken by the husband when leaving or deserting or about to leave or desert his wife.<sup>29</sup> A wife may however take criminal proceedings against her husband for personal injuries inflicted on her.

The Women's Charter, 1961, provides that upon the solemnisation of marriage the husband and the wife shall be mutually bound to co-operate with each other in safeguarding the interests of the union and in caring and providing for the children. The husband and wife shall have the right separately to engage in any trade or profession or in social activities and they shall have equal rights in the running of the matrimonial household.<sup>30</sup>

(ii) *Maintenance.*

The Women's Charter, 1961, provides that any married women, whose husband has (a) been convicted of any offence affecting the human body under Chapter XVI of the Penal Code against her or any or her children; (b) deserted her; (c) neglected to provide reasonable maintenance for her and her children whom he is liable to maintain; (d) has treated her or any of her children with cruelty; (e) is a habitual drunkard; or (f) is living in adultery with another woman, may apply to the court and the court may upon due proof thereof order the husband of such married woman to make a monthly allowance for her maintenance in proportion to his means as to the court seems reasonable.<sup>31</sup> If default is made in compliance with the order the court may direct the amount due to be levied in the manner provided for levying fines and may sentence the person in default to imprisonment for a term not exceeding one month for each month's allowance remaining unpaid.<sup>32</sup> Provision is also made for the making of an attachment of earnings order to enforce payment

27. Women's Charter, s. 47(3).

28. *Ibid.*, s. 52.

29. *Ibid.*, s. 52(3).

30. *Ibid.*, s. 45.

31. *Ibid.*, s. 62.

32. *Ibid.*, s. 63.

of the maintenance order.<sup>33</sup> The Reciprocal Enforcement of Maintenance Orders Ordinance<sup>34</sup> provides for the enforcement of maintenance orders made in Singapore in a number of British Commonwealth countries.

It has been held, following the decisions in England, that the question whether the potential earning capacity of a wife is to be taken into account in assessing maintenance depends on the facts of each case and no general rule can be laid down. If the wife is a young woman with no children and obviously ought to go to work in her own interest, but does not, then her potential earning capacity ought to be taken into account.<sup>35</sup>

(iii) *Property rights.*

The Women's Charter, 1961 provides that a married woman shall be capable of acquiring, holding and disposing of all her own property by will or otherwise, as if she were a *feme sole*.<sup>36</sup> Restraints on anticipation are abolished for the future and restrictions on alienation have been removed.<sup>37</sup> The property of a married woman is liable for all her debts and obligations. Section 120 of the Bankruptcy Ordinance<sup>38</sup> provides that a married woman shall in respect of her separate property, if any, be subject to the Ordinance, in the same way as if she were unmarried. It has been held that the Court has no jurisdiction to adjudge a married woman bankrupt without proof that she has separate property at the time of the hearing of the bankruptcy petition.<sup>39</sup>

It is provided that a married woman shall have in her own name against all persons, including her husband, the same remedies and redress by way of civil or criminal proceedings for the protection of her property as if she were unmarried, but criminal proceedings concerning property shall not be taken by a wife against her husband while they are living together nor while they are living apart concerning any act done while living together, unless such property was taken by the husband when leaving or deserting or about to leave or desert his wife.<sup>40</sup>

In any question between husband and wife as to the title to or possession of property either party may apply by summons or otherwise in a summary way to the High Court and the Judge may make such order with respect to the property in dispute as he thinks fit or may direct such application to stand over and any inquiry touching the matters in question

33. *Ibid.*, ss. 70-79.

34. Cap. 19 of the Revised Edition.

35. *Thevathasan v. Thevathasan* (1960) 26 M.L.J. 254.

36. Women's Charter, 1961, s. 47.

37. *Ibid.*, s. 48.

38. Cap. 11 of the Revised Edition.

39. *Re Lim Quee Geok* (1935) 4 M.L.J. 3; *Re Mahmooda binte Ismail* (1961) 27 M.L.J. 195.

40. Women's Charter, 1961, s. 52.

to be made in such manner as he thinks fit.<sup>41</sup>

In Singapore, following the English law, a deserted wife would appear to have the right to ask the Court to exercise its discretion to allow her to remain in possession of the matrimonial home even contrary to his wishes and even against her husband's successors in title who take an interest in the home with notice of the wife's position.<sup>42</sup>

It has been suggested that the right of the deserted wife may be regarded as a licence relating to the use or enjoyment of land which is by law binding on the assigns of the licensor within the meaning of section 74(2) of the Land Titles Ordinance, 1956, and therefore it can be protected by a covenant.<sup>43</sup> The House of Lords has however held in *National Provincial Bank, Ltd. v. Hastings Car Mart, Ltd.*,<sup>43A</sup> that the rights of a deserted wife were of their nature personal rights and as such they could not be treated as in any sense constituting a clog on the property of the husband and in the case of the property being registered land the deserted wife was not entitled to any overriding interest within the meaning of the Land Registration Act, 1925.

#### C. THE LAW IN SARAWAK, SABAH AND BRUNEI.

##### *Personal status including civil capacity.*

There are no special statutory provisions in Sarawak, Sabah and Brunei relating to the status, rights and obligations of married women. It would appear that the law in England is applicable by reason of the Application of Laws Ordinances and (in Brunei) the Application of Laws Enactment, which provide that save in so far as other provision has been made or shall hereafter apply by any written law in force, the common law of England and the doctrine of equity, together with statutes of general application, as administered or in force in England in the case of Sarawak on the 12th December, 1949, or in the case of Sabah on the 1st December, 1951, or in the case of Brunei on the 25th April, 1951, shall be in force.<sup>44</sup> It would appear that the Law Reform (Married Women and Joint Tortfeasors) Act, 1935,<sup>45</sup> might be applicable in Sarawak, Sabah and Brunei but this will be subject to the customary laws and (in the case of Muslims) to the Muslim law.

In Sarawak the Criminal Procedure Code provides that if any person having sufficient means neglects or refuses to maintain his wife the court

41. *Ibid.*, s. 57.

42. See *Errington v. Errington* [1952] K.B. 209; *Bendall v. McWhirter* [1952] 2 Q.B. 466; *Westminster Bank v. Lee* [1956] Ch. 7.

43. Baalman, *The Singapore Torrens System*, (Singapore, 1961), at p. 162; D. Jackson, "A Wife's Right to occupy the Matrimonial Home," *op. cit.*, n. 20 *supra*, at p. 240.

43A. [1965] 3 W.L.R. 1.

44. Sarawak Application of Laws Ordinance (Cap. 2); Sabah Application of Laws Ordinance (Cap. 6); Brunei Application of Laws Enactment (Cap. 2).

45. See Schedule to Sarawak Application of Laws Ordinance.



may upon due proof thereof order such person to make a monthly allowance for the maintenance of his wife, such allowance not to exceed \$50 a month in the whole for the wife and children. If any person neglects to comply with such order the court may direct the amount due to be levied in the manner provided for levying fines or may sentence him to imprisonment for a term not exceeding one month for each month's allowance remaining unpaid. If any person against whom an order has been made for the maintenance of his wife offers to maintain his wife on condition of her living with him, it shall be lawful to consider any grounds of refusal stated by such wife and the court may make the order notwithstanding such offer if it is satisfied that such person is living in adultery or that he has habitually treated his wife with cruelty. No wife shall be entitled to an allowance from her husband if she is living in adultery or if without any sufficient reason she refuses to live with her husband or if they are living separately by consent.<sup>46</sup>

In Sabah the Maintenance Ordinance, 1959,<sup>47</sup> provides that if any person having sufficient means neglects or refuses to maintain his wife the court may upon due proof thereof order such person to make a monthly allowance for the maintenance of his wife in proportion to the means of such person as to the court seems reasonable. If any person neglects to comply with such order the court may direct the amount due to be levied in the manner provided for levying fines or may sentence him to imprisonment for a term not exceeding one month for each month's allowance remaining unpaid. If any person against whom an order has been made for the maintenance of his wife offers to maintain his wife on condition of her living with him, the court may consider any grounds of refusal stated by such wife and may make or enforce the order notwithstanding such offer if it is satisfied that such person is living in adultery or that he has habitually treated his wife with cruelty. No wife shall be entitled to an allowance from her husband if she is living in adultery or if without any sufficient reason she refuses to live with her husband.<sup>48</sup>

In Brunei the Criminal Procedure Code provides that if any person having sufficient means neglects or refuses to maintain his wife the court may upon due proof thereof order such person to make a monthly allowance for the maintenance of his wife, such allowance not to exceed \$200 a month in the whole for the wife and children. If any person neglects to comply with such order the court may direct the amount due to be levied in the manner provided for levying fines or may sentence him to imprisonment for a term not exceeding one month for each month's allowance remaining unpaid. If any person against whom an order has been made for the maintenance of his wife offers to maintain his wife on condition of her living with him, it shall be lawful to consider any grounds of refusal stated by such wife and the court may make the order notwithstanding such offer if it is satisfied that such person is living in adultery or that he has habitually treated his wife with cruelty. No wife shall be entitled to an allowance from her husband if she is living in adultery or if without any sufficient reason she refuses to live with her

46. Criminal Procedure Codes (Cap. 62 of 1947 Edition of Laws of Sarawak), ss. 335-340.

47. No. 7 of 1959.

48. Maintenance Ordinance, 1959, ss. 3-6.

husband or if they are living separately by consent.<sup>49</sup>

Provision is made for the enforcement of maintenance orders made in Sarawak, Sabah and Brunei in a number of British Commonwealth countries.<sup>50</sup>

### SECTION 3: DISSOLUTION OF MARRIAGE, ANNULMENT AND SEPARATION, INCLUDING THEIR EFFECTS ON THE STATUS OF HUSBAND AND WIFE.

#### A. THE LAW IN THE STATES OF MALAYA.

##### (i) *Monogamous marriages.*

The law relating to divorce and matrimonial causes in relation to monogamous marriage is contained in the Divorce Ordinance, 1952,<sup>1</sup> which deals with nullity of marriage, dissolution of marriage, judicial separation and restitution of conjugal rights.

The Ordinance provides that subject to the provisions contained in the Ordinance, the Court shall in all suits and proceedings under the Ordinance act and give relief on principles which in the opinion of the Court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings.<sup>2</sup>

In *Martin v. Umi Kelsom*<sup>3</sup> it was held that where a question of conflict of laws arises in relation to a matter regarding which the court's jurisdiction comes from the Divorce Ordinance, such question should be determined on the same principles as those on which such a question would be determined by the English Courts. In its actual decision in the case however the court would appear to have gone further and to have decided the issue in the case as an English court would decide that particular issue. Thomson C.J. said:

In my opinion if this marriage had been solemnised in a Registry office in London and not in Kuala Lumpur, the English Divorce Court would hold it to be valid.

A Chinese domiciled in Perak can validly enter into a monogamous form of marriage. Although the Christian Marriage Ordinance, 1940, of Penang, does not expressly provide that a marriage under it is monogamous it is a law enabling the parties to enter into a marriage which they contemplate or intend shall be monogamous and therefore a Chinese

49. Criminal Procedure Code (Cap. 7), ss. 335-340.

50. Sarawak Reciprocal Enforcement of Maintenance Orders Ordinance (Cap. 50); North Borneo Reciprocal Enforcement of Maintenance Orders Ordinance (Cap. 118); Brunei Reciprocal Enforcement of Maintenance Orders Ordinance (Cap. 10).

1. No. 74 of 1952.

2. Divorce Ordinance, 1952, s. 3.

3. (1963) 29 M.L.J. 1.

married under the Ordinance can apply for dissolution of the marriage under the Divorce Ordinance, 1952.<sup>4</sup>

(ii) *Nullity of marriage.*

This is a judicial proceedings for a decree that an apparent marriage is null and void. A marriage can be void for non-compliance with the provisions relating to the validity of marriage and such marriages are invalid without the requirement of a judicial decree, though a decree is sought for its evidentiary value. There are other marriages which are voidable and in such cases a judicial decree is necessary to invalidate the marriage.

In *Martin v. Umi Kelsom*, (*supra*) it was held that a marriage between a British soldier who was domiciled in England and who professed the Christian religion and a Malay woman domiciled in Selangor and professing the Muslim religion, which was solemnised in Selangor in accordance with the provisions of the Christian Marriage Ordinance was *not* invalid on the ground that by reason of her personal law the woman was incapable of marrying with the man. It was held that the man as a domiciled Englishman was under no incapacity which prevented him from marrying the woman. The parties voluntarily entered into a contract of marriage and had that marriage solemnised according to the law of the husband's domicile and therefore the marriage was, applying the law of the husband's domicile, a valid one. The general principle of the English law is that the question of capacity to marry is governed by the law of the ante-nuptial domicile of the respective parties. There is an exception to the general principle based on the decision in *Sottomayer v. De Barros* (No. 2)<sup>5</sup> to the effect that the validity of a marriage celebrated in England between persons of whom one has an English and the other a foreign domicile, is not affected by any incapacity which though existing under the law of such foreign domicile does not exist under the law of England. Thomson C.J. purported to apply this exception in the case of *Martin v. Umi Kelsom*, but it is submitted that the application of the exception in effect reversed the rationale of the decision establishing the exception. The incapacity in that case which prevented the woman because she was a Muslim from entering into a valid marriage with a non-Muslim, was one which was recognised by the court of the domicil and imposed within the jurisdiction of that court which was also the court within the jurisdiction of which the marriage took place.

The distinction between a void and a voidable marriage has been judicially explained by Lord Greene M.R.<sup>6</sup> as follows:

A void marriage is one that is regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it: a voidable marriage is one that will be regarded by every court as a valid

4. *Dorothy Yee Yeng Nam v. Lee Fah Kooi* (1956) 22 M.L.J. 257.

5. (1879) 5 P.D. 94.

6. *De Reneville v. De Reneville* (1948) 1 All E.R. 56 at p. 60. Prof. Newark considers that historically this distinction is incorrect: "The operation of Nullity Decrees," (1945) 8 M.L.R. 203.

subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction<sup>7</sup>.

The grounds of annulment are as follows:—

- (a) *Parties within the prohibited degrees of consanguinity or affinity whether natural or legal.*

If the marriage is celebrated in the States of Malaya, the relevant provisions are contained in section 29 of the Civil Marriage Ordinance, 1952,<sup>7</sup> and the Second Schedule to the Ordinance and section 27 of the Christian Marriage Ordinance, 1956.<sup>8</sup> A marriage solemnised between persons within the prohibited degree of consanguinity or affinity is declared to be void.

The Christian Marriage Ordinance provides that the provision relating to the prohibition of marriage within the prohibited degrees shall not render void a marriage solemnised in accordance with the rites, ceremonies and usages of a registered religious denomination 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 denomination.<sup>9</sup>

- (b) *Marriage invalid by the law of the place in which it is celebrated.*

If the marriage is celebrated in the States of Malaya the Civil Marriage Ordinance, 1952, provides that a marriage purported to be solemnised under the Ordinance shall be void if —

- (a) one of the parties to it professes the Muslim religion;
- (b) either of the parties was at the date of the marriage married under any law, religion, custom or usage to any person other than the other party;
- (c) both parties knowingly and wilfully acquiesce in its solemnization —
  - (i) under a false name or names for the purpose of concealment from any person whose consent to the marriage is required and had not been obtained;
  - (ii) without valid certificates for the marriage or without a licence;
  - (iii) by a person who is not a Registrar; or
- (d) the entry in the marriage register is not duly attested by the parties to the marriage and the two witnesses;

7. No. 44 of 1952.

8. No. 33 of 1956.

9. Federation Christian Marriage Ordinance, s. 27(5).

- (e) if at the date of such marriage the male party was under the age of sixteen or the female party under the age of fourteen.<sup>10</sup>

Under the Christian Marriage Ordinance, 1956, a marriage purported to be solemnised under the Ordinance is void if at the date of such marriage the male party was under the age of sixteen or the female under the age of fourteen, unless such marriage was celebrated notwithstanding the age of any party thereto in accordance with a licence granted under the authority of the canons of the religious denomination in accordance with the rites, ceremonies and usages of which the marriage was solemnised. Moreover a marriage solemnised under the Ordinance is void —

- (a) if it is solemnised by a person not authorized to solemnise such marriage;
- (b) if both parties have knowingly and wilfully consented to or acquiesced in its solemnisation —
- (i) in a place other than the place in which such marriage may be lawfully solemnised;
- (ii) otherwise than in the presence of two credible witnesses in addition to the person by whom it was solemnised;
- (c) 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 and such marriage would be unlawful by reason of such subsisting marriage.<sup>11</sup>

(c) *Absence of consent on the ground of force or fraud.*

It is provided that a decree of nullity may be made where the consent of either party was obtained by force or fraud in any case in which the marriage might be annulled on this ground by the law of England. Under English law neither a fraudulent or an innocent misrepresentation will of itself affect the validity of marriage. But if the misrepresentation induces an operative mistake, for example as to the nature of the ceremony, the marriage will be avoided.<sup>12</sup> If owing to fear or threats, one of the parties is induced to enter into a marriage, which in the absence of compulsion he would never have contracted, the marriage will be void. The test to be applied was laid down by Collins J.

10. Federation Civil Marriage Ordinance, 1952, ss. 30-32.

11. Federation Christian Marriage Ordinance, 1956, ss. 28-29.

12. *Kelly v. Kelly* (1932) 49 T.L.R. 99 (mistaken belief that ceremony was formal betrothal); *Mehta v. Mehta*, (1945) 2 All E.R. 690 (mistaken belief that Hindu marriage ceremony was ceremony of religious conversion).

in *Cooper v. Crane* as follows:—<sup>13</sup>

In order to hold that the ceremony was not binding I think I should have to infer one of two things — either that the petitioner was so perturbed by terror that her mind was unhinged and she did not understand what she was doing or that though she understood what she was doing her powers of volition were so paralysed, that by her words and acts, she gave merely expression to the will of the respondent and not her own.

(d) *Unsoundness of mind.*

The marriage is voidable if it is shown that either party was at the time of the marriage of unsound mind or subject to recurrent fits of insanity or epilepsy. Annulment in such cases is subject to the conditions set forth in the Ordinance which provides that the petitioner must have been at the time of the marriage ignorant of the facts, proceedings for annulment must have been commenced within a year from the date of the marriage and marital intercourse with the consent of the petitioner must not have taken place since the discovery by the petitioner of the circumstances. The petition is based on the general state of health of the petitioner or of the respondent at the time of the ceremony; the petitioner may therefore obtain relief even though the party in question understood the nature of the contract he was entering into.<sup>14</sup>

(e) *That the former husband or wife of either party was living at the time of the marriage and the marriage with such former husband or wife was then in force.*

This ground makes the marriage void.

(f) *Venereal disease in a communicable form.*

(g) *Pregnancy by some person other than the petitioner,*

If either of these facts are proved to have been present at the time of the marriage they are grounds of annulment, subject to the same conditions as apply to unsoundness of mind.

(h) *Impotence.*

The marriage is voidable if the respondent was impotent at the time of the marriage and at the time of institution of the suit. A spouse may not as he can in England apply for annulment in reliance on his own impotence. Inability to consummate the marriage may be due to physiological causes and may be either general or *quod* the particular spouse.<sup>15</sup> It is generally said that relief will be granted only if the

13. [1891] P. 369. In this case the respondent, who had unknown to the petitioner obtained a licence and arranged the wedding took her out and having got her to the church, threatened to blow his brains out unless she went to the church and married him. It was held that the petitioner had not discharged the burden of proving that the marriage was invalidated by fear.

14. The provision corresponds to that in section 8 of the Matrimonial Causes Act, 1950. Under the English law a marriage will be void if either party was so insane at the time of the ceremony as to be unable to understand the nature of the contract he was entering into but this provision does not apply in the States of Malaya.

15. See *L. v. L.* (1956) 22 M.L.J. 145.

impotence is incurable but the impotence will be considered incurable not only if it is wholly incapable of any remedy but also if it can be cured only by an operation attended by danger or, in any event, if it is improbable that the operation will be successful or if the party refuses to undergo it.<sup>16</sup>

(i) *Wilful refusal to consummate the marriage.*

In order to amount to consummation the intercourse must in the words of Dr. Lushington in *D. v. A.*<sup>17</sup> be "ordinary and complete and not partial and imperfect". There will be no consummation if the husband does not achieve full penetration in the normal sense. The principle established in *Baxter v. Baxter*<sup>18</sup> would be applicable in the States of Malaya. In that case a husband petitioned for nullity on the ground that his wife had wilfully refused to consummate the marriage by refusing to have marital intercourse with him unless he used a contraceptive. It was shown that the husband had acquiesced in the practice for about ten years though under consistent protest. The House of Lords held that such intercourse amounted to consummation in the eye of the law. The House of Lords in *Baxter v. Baxter* left open the question whether coitus interruptus would amount to consummation but the general trend of the decisions in England would appear to show that it would.<sup>19</sup>

The court has jurisdiction to make a decree of nullity of marriage where the marriage is monogamous and where the marriage to which the decree relates was celebrated in the Federation.<sup>20</sup>

*(to be continued)*

AHMAD BIN MOHD. IBRAHIM\*

16. *S. v. S.* (1954) 3 All E.R. 736; *S. v. S.* [1962] 1 All E.R. 33.

17. (1845) 1 Rob. Eccl. 279.

18. [1948] A.C. 274.

19. *Cockett v. Cockett* [1950] 1 All E.R. 677.

20. Divorce Ordinance, 1952, s. 4(2).

\* M.A. (Cantab.); LL.D. (S'pore); Attorney-General of Singapore.