

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

(j) *Dissolution of marriage.*

The grounds for dissolution of marriage which apply equally to men and women are adultery, desertion for a period of at least three years, cruelty and unsoundness of mind.

Adultery may be defined as sexual intercourse between two persons of whom one or both are married but who are not married to each other. In order that adultery may constitute a ground of divorce it must be shown that the respondent has had sexual intercourse with someone other than the petitioner since the celebration of the marriage. There need not be full penetration to constitute adultery but there must be some penetration of the female by the male organ.¹ It would seem that a woman who has herself artificially inseminated with another man's seed without her husband's consent does not thereby commit adultery.² In order to be guilty of adultery a person must have had sexual intercourse voluntarily. Hence if a married woman is raped, she does not commit adultery.³

Desertion consists of the unjustifiable withdrawal from cohabitation without the consent of the other spouse and with the intention of remaining separated permanently. Four elements must generally be present before desertion can be proved:

- (a) The *de facto* separation of the spouses;
- (b) The *animus deserendi* — *i.e.*, the intention on the part of spouse in desertion to remain separated permanently;
- (c) The absence of consent on the part of the deserted spouse; and
- (d) The absence of any reasonable cause for withdrawing from cohabitation on the part of the deserting spouse.

1. *Dennis v. Dennis* [1955] P. 153. In that case the wife and the intervener attempted to have intercourse but owing to a nervous disability from which he suffered he had been unable to achieve his purpose and had neither penetration nor emission. It was held that there had been no penetration and therefore the wife was not guilty of adultery.
2. The Royal Commission in England has recommended that artificial insemination of the wife without the husband's consent should be introduced as a ground for divorce.
3. *Clarkson v. Clarkson* (1930) 143 L.T. 775.

The party who takes the physical step of leaving the matrimonial home or otherwise withdrawing from cohabitation is not necessarily the deserting spouse. In cases of simple desertion this is so, but where one spouse virtually drives the other from the home or behaves in such a way that the latter can no longer reasonably be expected to live with him or her, then it may be the spouse remaining in the matrimonial home and not the spouse who departs from it who is in desertion. Such a case is known as "constructive desertion".

In order that desertion may constitute a ground for divorce, the respondent must have deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition. This three years' period must be continuous, and two separate periods of less than three years cannot be added together so as to give a period of three years in the aggregate. Moreover, the period must immediately precede the presentation of the petition; in other words, the desertion must still be running when the proceedings are commenced. To this second proposition there is one exception, for if the petitioner has already obtained a judicial separation and the respondent has been in desertion for a continuous period of three years, preceding the institution of the earlier proceedings, the petitioner may rely upon that period of desertion as a ground for divorce, provided that the decree or order has been in force continuously and the parties have not resumed cohabitation since it was granted.⁴

There can be no desertion unless there is a *de facto* separation between the spouses. It is not sufficient for this purpose that one of the spouses has abandoned some of the obligations of matrimony or refused to perform duties, *e.g.*, refused to have sexual intercourse. There must be a rejection of all the obligations of marriage, in other words, there must be a complete cessation of cohabitation. Such a state of affairs is normally brought about by one spouse leaving the matrimonial home, so that they are no longer living under the same roof, in which case, there would clearly be a sufficient separation. But it may be impossible for the spouse wishing to leave to find accommodation elsewhere, and the situation may arise where the spouses continue to live under the same roof but where one shuts himself off from the other, so that they are living as two units rather than one. Although there is a presumption that in such a case there is no *de facto* separation sufficient to constitute desertion, this is rebuttable, for as has been stated by Lord Merrivale P. "desertion is not withdrawal from a place, but from a state of things".⁵ Hence, if there has been a total cessation of cohabitation there can be desertion just as effectively as if the husband and wife were living in two separate houses. The correct test to be applied in such a case is: are the spouses living in two households or in one? Cohabitation must have entirely ceased and therefore there cannot be desertion if any matrimonial services are performed even though these are isolated and intermittent.⁶ It has been held that an original involuntary separation could be converted into one of desertion by the

4. Divorce Ordinance, 1952, (No. 74 of 1952), ss. 7, 12

5. *Pulford v. Pulford* [1923] P. 18.

6. See *Naylor v. Naylor* [1961] 2 All E.R. 129; *Hopes v. Hopes* [1948] 2 All E.R. 920.

formation of an *animus deserendi* by the respondent when it was physically impossible for her to join the petitioner.⁷ Since all that must be proved is the *factum* of separation, it is irrelevant for this purpose that the spouses are forced to live apart and therefore could not live together even had they wished to do so.

Even though there is a *de facto* separation, there will be no desertion unless the guilty spouse has the intention of remaining permanently separated from the other. There will be no question of desertion if one spouse is temporarily absent on holiday or for reasons of business or health; nor *prima facie* will there be desertion if the absence is involuntary, for example owing to service in the armed forces or imprisonment. But in these cases there will be desertion if the intention can be specifically proved. A *de facto* separation may take place without there being an *animus deserendi*, but if that *animus* supervenes desertion will begin from that moment, unless there is consent by the other spouse.⁸

Desertion is a matrimonial offence; consequently if one spouse agrees to the other's departing, he cannot then complain of it. There can be no desertion if the separation is by consent. Whether or not consent to the separation has been given is a question of fact. It may be expressly given as a simple licence to go or be embodied in a separation agreement; alternatively, it may be implied by the party's conduct. It has been held in a case in Singapore⁹ that where a separation deed is in force it is an absolute answer to a charge of desertion. In the same way, if the deserted spouse obtains a judicial separation he cannot then allege that the other is in desertion, for the order itself relieves the petitioner from the duty of cohabiting with the respondent and therefore effectively puts it out of the latter's power to return. It also clearly shows a desire on the petitioner's part not to have the other spouse back. But the prosecution of proceedings for nullity or divorce will not preclude desertion from running, if the respondent's intention not to resume cohabitation is unaffected by the petitioner's acts. But if the consent to the separation is withdrawn, desertion will automatically commence provided that the other conditions are all satisfied. Even though the agreement was originally intended to last for ever, it may be brought to an end by its termination.¹⁰

If one spouse has a reasonable cause or excuse for leaving the other then there will be no unjustifiable separation and consequently he will not be in desertion. Generally the commission of a matrimonial offence (*e.g.*, adultery or cruelty) by one spouse, which would entitle the innocent spouse to petition for divorce or judicial separation, would be a good excuse for his breaking off cohabitation, for if he did not do so he would also run the risk of condoning the offence and thus putting all relief out of his own power. This is subject to two qualifications.

7. *Miller v. Miller* (1948) 14 M.L.J. 183. See *Pardy v. Pardy* [1939] P. 302; *Beeken v. Beeken* [1948] P. 302.

8. *Miller v. Miller* (1948) 14 M.L.J. 183; *Pardy v. Pardy* (1939) P. 302.

9. *Goh Soon Toon v. Yuen Yoke Chee* (1950) 16 M.L.J. 96.

10. *Pardy v. Pardy* (1939) P. 302. See *Koh v. Koh* [1965] 1 M.L.J. 99.

First, if the innocent party has put it out of his power to complain of the offence by having conducted to it, connived at it or condoned it, then he is no longer entitled to break off cohabitation because of it. Secondly, the commission of the offence must have been the cause (or at least one of the causes) for his leaving the guilty spouse, so that if he was ignorant of the adultery or was indifferent to it and intended to leave in any event he could not plead the commission of the offence as a reason for his doing so.¹¹

Conduct which does not in itself amount to a matrimonial offence may nevertheless be a good excuse for one spouse's leaving the other so as to preclude his being in desertion. The conduct must be so grave and weighty as to make married life quite impossible. It must have become practically impossible for the spouses to live properly together. It has been held that the ordinary wear and tear of conjugal life does not in itself suffice.¹² The courts in England have imposed a high standard. The view taken is that each spouse takes the other for better or for worse, and the duty to cohabit is not lightly to be abandoned. English law does not relieve the spouses of their marital obligations merely because of incompatibility of temperament or unhappiness.¹³

It has been held in England that, if one spouse has a reasonable belief that he has a good cause for leaving the other based upon the other's own conduct, then he is entitled to break off cohabitation and will not be in desertion even though the belief is a mistaken one. The belief must be based upon the other spouse's conduct and not upon circumstantial evidence; the cause of separation must still be the other spouse's own acts. The belief must be entertained reasonably and in good faith.¹⁴

It has been held that where one spouse behaves in such a way that the other is virtually compelled to leave, the former may in law be the deserter. In such a case it will be the spouse who intends to bring cohabitation to an end or whose conduct causes the separation who will be in desertion. Where it is the deserted spouse who actually departs, the other is said to be in constructive desertion. It has been held that where a husband's conduct towards his wife was such that a reasonable man would know — that the husband must have known — that in all

11. *Day v. Day* [1957] 1 All E.R. 848.
12. *Dyson v. Dyson* [1953] 2 All E.R. 1511; *Buchler v. Buchler* [1947] 1 All E.R. 319; *Lee Kah Wah v. Cheah Paik Yean* (1964) 30 M.L.J. 125 where it was held following *Buchler v. Buchler* that the criterion for assessing whether a spouse is justified in leaving the matrimonial home is that the conduct of the spouse remaining must exceed such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other for better or worse, though such conduct need not amount to a matrimonial offence such as cruelty or adultery.
13. *Buchler v. Buchler* [1947] 1 All E.R. 319; *Lee Kah Wah v. Cheah Paik Yean* (1964) 30 M.L.J. 125.
14. *Ousey v. Ousey* (1874) L.R. 3 P. & D. 223; *Glenister v. Glenister* [1945] 1 All E.R. 513; *Elliott v. Elliott* [1956] 1 All E.R. 122; *Cox v. Cox* [1958] 1 All E.R. 569.

probability it would result in the departure of the wife from the matrimonial home, than that in the absence of rebutting evidence, was sufficient proof of an intention on his part to disrupt the home. The fact that he nevertheless desired or requested her to stay did not rebut the intention to be inferred from his acts — that he intended to drive her out and was guilty of constructive desertion.¹⁵

It would appear that the test to determine whether one spouse is in constructive desertion is the same as that to be applied to see whether one of them has good cause for leaving the other so as to preclude his being in simple desertion himself. Thus, in the English case of *Buchler v. Buchler*,¹⁶ where the wife had left the husband because of his friendship with the bailiff on his farm and his general lack of attention and affection for her, it was held that, as his conduct was not sufficiently grave to entitle the wife to say that he was in constructive desertion, she herself must necessarily be in simple desertion.

Desertion is a continuing offence and the respondent must still be in desertion when the petition is presented. If the spouses resume cohabitation, there will then be no *de facto* separation and therefore no desertion. Just as desertion is “the withdrawal from a state of things”, so, in the words of Lord Merriman P., in *Mummery v. Mummery*:¹⁷

A resumption of cohabitation must mean resuming a state of things, that is to say, setting up a matrimonial home together, and that involves a bilateral intention on the part of both spouses so to do.

Although sexual intercourse between the parties may be evidence of their intending to resume cohabitation and may amount to resumption of cohabitation it will not bring desertion to an end if there is no bilateral intention of starting life together again, even though it takes place on a number of occasions. In the English case of *Mummery v. Mummery*, (*supra*) the spouses had separated in consequence of the husband’s introducing another woman into the matrimonial home. On his return from Dunkirk in 1940, he called upon the wife and spent the night with her, having sexual intercourse. The wife consented to his doing so the hope of effecting a reconciliation. The husband left her again on the following day and it then became clear that he had never intended to resume cohabitation with her. It was held that the intention on the wife’s part alone was not enough to bring the husband’s desertion to an end. But once cohabitation has been resumed, it effectively brings the desertion to an end, and the parties cannot subsequently say that they merely intended to take each other back on trial and, since the experiment has proved unsuccessful, there has never been a resumption of cohabitation.¹⁸

15. *Lang v. Lang* [1955] A.C. 402. The House of Lords has now held in *Collins v. Collins* [1963] 2 All E.R. 966 that no particular mental attitude is essential to constitute cruelty and it would appear that similarly no particular mental attitude will be essential for constructive desertion.
16. [1947] 1 All E.R. 319.
17. [1942] P. 107; See *Miller v. Miller* (1948) 16 M.L.J. 183; where it was held that desertion continued notwithstanding a very near degree of proximity between the parties if the *animus deserendi* continued in the deserting spouse.
18. The Royal Commission in England has recommended that the spouses should be permitted to resume cohabitation once for a period of more than one month and

Desertion will similarly come to an end if the party in desertion loses the *animus deserendi*. But it is not sufficient in this case for him mentally to resolve to return to the other spouse; he must communicate his intention by offering to return. Moreover, the offer must be a genuine offer to resume cohabitation in the full sense of the word, and a spouse is not bound to accept an invitation to resume cohabitation, for example, on condition that the parties no longer have sexual intercourse or that the returning spouse does not interfere with the other's professional career.¹⁹

If the deserted spouse subsequently consents to living apart, the desertion will automatically come to an end. For example, obtaining a judicial separation or entering into a separation agreement will terminate an existing desertion.²⁰

If the deserted spouse commits some act which would justify the other in refusing to live with him any longer, the desertion will come to an end unless it can be shown that this act did not alter the other's intention to live apart. *Prima facie*, therefore, the desertion will cease, and the burden is upon the spouse originally deserted to prove that his conduct did not affect the other's mind.²¹

Once desertion has been started by a fault of a deserting spouse it is no longer necessary for the deserted spouse to show that during the material period he actually wanted the other spouse to come back. When a spouse is deserted he or she is in the position that the presumption is in his or her favour and against the deserting spouse as regards any offer to return. It is not until some offer to return is made by the deserting spouse that the question arises whether it is an offer which ought in the circumstances to be accepted. Notwithstanding that the husband, for example, did not expect or really want his wife to come back it is not incumbent on him to show that he was at all times during the three years next preceding the petition ready and willing to receive her.²²

Cruelty in the legal sense consists of conduct by one spouse of such character as to have caused danger to life, limb or health, whether bodily or mental or so as to put the other spouse in fear of danger. Physical violence is not necessary to establish cruelty. Thus, constant and perpetual nagging and moodiness accompanied by injury to health have been

that two periods of desertion, which together amount to at least three years, within a period of three years and one month before the commencement of the proceedings should be a ground for divorce. It has now been enacted in England that in calculating the period for which the respondent has deserted the petitioner without cause, no account shall be taken of any period (not exceeding three months) during which the parties resumed cohabitation with a view to a reconciliation — Matrimonial Causes Act, 1963, s. 2(2).

19. *Synge v. Synge* (1901) P. 317; *Casey v. Casey* (1952) 1 All E.R. 453; *Barrett v. Barrett* (1948) P. 277.

20. *Bottoms v. Bottoms* [1951] P. 221.

21. *Richards v. Richards* [1952] P. 307.

22. *Sifton v. Sifton* [1939] P. 221; *Church v. Church* [1952] P. 313; *Dowse v. Dowse* [1960] 18 M.L.J. 44.

held to amount to cruelty in particular cases.^{22A} No conduct can amount to cruelty in law unless it has the effect of producing actual or apprehended injury to the petitioner's physical or mental health.²³ The test applied by the courts is subjective and not objective and whether or not the conduct complained of is to be considered cruel must be judged by reference to its actual effect on the petitioner rather than its probable effect on a hypothetical reasonable spouse. But the conduct alleged may have to be judged by reference to the victim's capacity for endurance, in so far as that capacity is or ought to be known to the other spouse. It is open to the court to find that the petitioner was the victim of his or her own abnormal hypersensitivity and not of cruelty inflicted by the respondent.²⁴ It has recently been held in England that intention is not a necessary element in cruelty. If the conduct complained of and its consequences are so bad that the petitioner must be granted a remedy, it does not matter what was the state of the respondent's mind. When a reprehensible conduct or departure from the normal standards of conjugal happiness causes injury to health or an apprehension of it, it is cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances, would consider that the conduct complained of is such that the spouse should not be called upon to endure it.²⁵ The general rule is that the whole matrimonial relations must be considered and this rule is of special value when the cruelty consists not of violent acts, but of injuries, reproaches, complaints or taunts. In determining what constitutes cruelty regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties and their character and social status. It has been established that mere nagging, abusiveness and jealousy can in certain cases amount in themselves to such an interference in the life of the other spouse as to justify the court in coming to the conclusion that they constitute cruelty. Nagging may be of such a kind and so constant that it endangers the health of the spouse on whom it is inflicted.²⁶

Insanity is not a defence to cruelty and therefore an insane person can be held to have treated his wife (or her husband) with cruelty. It is not essential to show either malignity or an intention to hurt; nor is

- 22A. *Usmar v. Usmar* (1949) P.1; *Atkins v. Atkins* (1942) 2 All E.R. 637; *Lauder v. Lauder* (1949) P. 277.
23. *Russell v. Russell* [1897] A.C. 395. "Cruelty" means cruelty; cruelty has no artificial or esoteric meaning in the law of divorce. Before a charge of cruelty could be made out there must be some misconduct on the part of the offending spouse of a grave and weighty nature which an ordinary man would describe as cruel in the ordinary and natural meaning of that word — *McEwan v. McEwan* (1964) 108 Sol.J. 198 and *Le Brocq v. Le Brocq* [1964] 1 W.L.R. 1085.
24. *Jamieson v. Jamieson* [1952] A.C. 525.
25. *Gollins v. Gollins* [1963] 2 All E.R. 966, overruling *Kaslefsky v. Kaslefsky* [1951] P. 38.
26. *King v. King* [1953] A.C. 124; *Atkins v. Atkins* [1942] 2 All E.R. 637; *Usmar v. Usmar* [1949] P. 1; *Wong Siew Fong v. Wong Siew Fong* (1964) 31 M.L.J. 37 (where it was held that constant and persistent nagging by a wife without any justification against a husband resulting in a deterioration of his health amounts to cruelty); *Lee Kah Wah v. Cheah Paik Yean*, (*supra*), (where it was held that cruelty was not proved).

it necessary to show that the conduct of the respondent was aimed at the petitioner or that a reasonable person would have realised the position or that the respondent must be deemed to have foreseen or intended the harm he did. A decree may be given if the facts are such that after making all allowances for the disabilities of the respondent and for the temperament of both parties, it must be held that the character and gravity of his acts was such as to amount to cruelty.²⁷

Where unsoundness of mind is relied on as a ground for divorce it must be shown that the unsoundness of mind is incurable²⁸ and that the spouse has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. A person is deemed to be under care and treatment where he is detained or confined in a mental home in the Federation under the provisions of the Mental Disorders Ordinance, 1952, or the Criminal Procedure Code or the Prisons Ordinance or while he is receiving treatment as a voluntary patient in the Federation following a period of such detention or where he is detained or receiving treatment in any part of the British Commonwealth under the corresponding provisions of any written law in force in such part of the British Commonwealth.

In addition to the grounds of dissolution of marriage mentioned above a wife may obtain a dissolution of marriage if her husband has, since the solemnisation of the marriage been guilty of rape, sodomy or bestiality²⁹ or gone through a form of marriage with another woman. There is no need for the husband to have been prosecuted and convicted of the offence.³⁰

Either party to a marriage may apply to the court for an order presuming the death of the other party and to have the marriage dissolved, if reasonable grounds exist for such an application. Continued absence from the petitioner for seven years, if the petitioner has no reason to believe that the absent spouse is living within that period, is evidence of the absent spouse's death.³¹

A dissolution of marriage may not be sought by either party within three years of the date of the marriage, except by leave of the court upon application on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent. The court in granting leave is required to have regard to the interests of the children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties

27. *Williams v. Williams* [1963] 2 All E.R. 994.

28. *Whysall v. Whysall* [1960] P. 52.

29. The wife cannot base a petition on sodomy committed on herself if she was the consenting party to it provided the consent was genuine, *Bampton v. Bampton* [1959] 2 All E.R. 706. The Royal Commission in England has recommended that sodomy and bestiality should be grounds for divorce by the husband too.

30. *Coffey v. Coffey* [1898] P. 169.

31. Divorce Ordinance, 1952, s. 13.

before the expiration of the said three years.³²

On a petition for dissolution of marriage it is the duty of the court to inquire, so far as it reasonably can, into the facts alleged and whether there has been any connivance or condonation³³ on the part of the petitioner and whether any collusion exists between the parties. If the court is satisfied^{33A} on the evidence (i) that the case for the prosecution has been proved; (ii) that where the ground of petition is adultery, the petitioner has not in any way been accessory to, or connived at, condoned the adultery, or where the ground of the petition is cruelty the petitioner has not in any way condoned the cruelty;³⁴ (iii) the petition is not presented or prosecuted in collusion³⁵ with the respondent or either of the

32. *Ibid.*, s. 6. The Courts in England have declined to fetter their discretion by laying down any general rules for its exercise — see *Fisher v. Fisher* [1948] P. 263 and *Bowman v. Bowman* [1949] P. 353; In *Brewer v. Brewer* [1964] 1 All E.R. 539 it has been held by the Court of Appeal in England that before the court exercises its jurisdiction under section 2 of the Matrimonial Causes Act, 1950 (corresponding to this section) the court must first determine as a provisional finding of fact that the case is one of exceptional depravity or exceptional hardship. In that case it was held that leave should not be granted as the degree of hardship shown to be inflicted on the wife petitioner was not exceptional; moreover the alleged hardship was founded on past behaviour and there was no allegation of continuing or present exceptional hardship.
33. “To prove connivance it is necessary to show not only that the petitioner acted in such a manner that adultery might result; but also it must be proved that it was his intention that adultery should result” — *per* Lord Wensleydale in *Gipps v. Gipps* (1864) 11 H.L.C. 1. In *Godfrey v. Godfrey* [1964] 3 W.L.R. 524 it was held in the House of Lords that there is no absolute rule of “once connivance, always connivance”. Where there has been full and complete reconciliation between the spouses the connivance may be regarded as spent. But a full and complete reconciliation is not the only method whereby connivance can be terminated. There may be a variety of circumstances in which it may be spent, for example, by lapse of time or a lack of causal connection between the connivance and the adultery. In order however to show that the connivance had spent itself the husband had to show that it was not the effective cause of the subsequent adultery and played no effective part therein; and as the husband in this case had failed to show this, his petition was dismissed.
- 33A. It has been held by the House of Lords in England that the standard of proof required by the phrase “is satisfied” is not in all cases proof beyond reasonable doubt, but might vary according to the grounds of the subject-matter. So far as the grounds for divorce are concerned a case, like any civil case, may be proved by a preponderance of probability, but the degree of probability depends on the subject matter and in proportion as the offence is grave, so ought the proof to be clear. So far as the bars to divorce are concerned like connivance or condonation the petitioner need only show on balance of probability that he did not connive or condone — *Blyth v. Blyth* (1966) 1 All E.R. 524.
34. Condonation means the complete forgiveness and blotting out of a conjugal offence followed by cohabitation, the whole being done with full knowledge of all the circumstances of the past offence forgiven — Lopes L.J. *Bernstein v. Bernstein* [1893] P. 292. See also *Swan v. Swan* [1953] P. 258 and *Henderson v. Henderson* [1944] A.C. 49.
35. The essence of collusion is that the initiation or conduct of the suit has been in some measure procured or determined by agreement between the petitioner and respondent or correspondent — see *Churchward v. Churchward* [1895] P. 7 and *Dowse v. Dowse* (1957) 23 M.L.J. 12. Collusion has ceased to be an absolute bar to divorce in England and has become a discretionary bar like adultery during the marriage. The effect is that it is possible to have discussions between the parties on such matters as financial arrangements and the custody of children without the risk of collusion being alleged — see Matrimonial Causes

respondents, the court shall pronounce a decree nisi. The court is not bound to pronounce a decree and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery³⁶ or if in the opinion of the court the petitioner has been guilty of (i) unreasonable delay³⁷ in presenting or prosecuting the petition; (ii) of cruelty towards the other party to the marriage; (iii) where the ground of the petition is adultery or cruelty, of having without reasonable excuse deserted or having without reasonable excuse wilfully separated himself or herself from the other party before the adultery or cruelty complained of; or (iv) where the ground of the petition is adultery or unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion.³⁸ It is provided that no adultery shall be deemed to be condoned unless conjugal cohabitation has been continued or resumed.³⁹ A matrimonial offence which has been

Act, 1963, s. 4. As to the principles which determine whether the agreement is acceptable to the court see *Head v. Cox* [1964] P. 228; *Mulhouse v. Mulhouse* [1964] 2 W.L.R. 808; *Nash v. Nash* [1965] 2 W.L.R. 317.

36. In order that the court may be fully aware of all the facts a petitioner who has committed adultery must ask for the exercise of the court's discretion in the prayer of the petition and must set out the details of the adultery in a discretion statement. The discretion statement must be in a sealed envelope and unless the Judge otherwise orders it may normally be inspected only by the Attorney-General. The prayer in the petition may not be relied upon by the respondent as an admission of adultery nor may the discretion statement be put in evidence by the respondent unless the petitioner has put it or its contents in evidence in open court — see the Divorce and Matrimonial Causes Rules, 1953, rule 28. The practice that has recently been approved in England is that the petitioner is asked to deal with the fact of his or her adultery in examination-in-chief in the place in which that fact chronologically appears. This means that the respondent can amend his answer with the leave of the court so to cross-petition on the ground of adultery — see *Clueit v. Clueit* [1958] 1 All E.R. 417; *Clear v. Clear* [1958] 2 All E.R. 353; *Lewis v. Lewis* [1958] 1 All E.R. 859; *Dowse v. Dowse* (1960) 26 M.L.J. 44. See also the recent case of *Tunney v. Tunney* [1963] 1 All E.R. 303 where Omerod J. laid down two principles for the exercise of the judicial discretion. In the first place leave to amend should generally be granted where there appeared at the completion of the evidence, to be a real possibility that neither side would succeed in obtaining a decree. Where this principle is inapplicable the decision to give or withhold leave must depend on “whether the ultimate result of giving or refusing leave will represent substantial justice between the spouses, or in other words, on whether the ultimate view of the court will fairly and accurately reflect the court's assessment of the responsibility of each party for the breakdown of the marriage — see note in (1964) 27 M.L.R. 460.
37. There must be culpable delay, something in the nature of acquiescence, something which shows the husband to have been insensible to the loss of his wife and the injury done to him. Delay gives rise to a presumption of acquiescence, connivance or condonation but this presumption may be rebutted — *Saminathan v. Saminathan* (1941) 10 M.L.J. 79. See *Attias v. Non* (1958) 24 M.L.J. 8 (Delay of 30 years not culpable) *Palmer v. Young* (1958) 24 M.L.J. 90 (where it was held there was unreasonable delay and where the Court refused to exercise its discretion) and *Kathi-Rasen v. Kathi-Rasen* (1960) 26 M.L.J. 57.
38. Mere carelessness will not suffice to constitute conduct condoning. It must be shown the respondent must have realised from the circumstances that there was a danger that adultery, desertion or insanity would result and have been reckless as to the consequences — *Dering v. Dering* (1868) L.R. 1 P. & D. 531; *Brown v. Brown* [1956] P. 438.
39. Divorce Ordinance, 1952, s. 10. See *Henderson v. Henderson* [1944] A.C. 49 where Viscount Simon said “The conclusion of condonation by an innocent wife of her husband's previous conduct is not in all cases so strictly drawn from the

condoned is revived by another matrimonial offence subsequent to the condonation and, to this extent, the condonation is always assumed to be conditional and the condition extended not only to a repetition of the same offence, but of any other matrimonial offence — *Palmer v. Palmer*.⁴⁰

The court's discretion in granting a decree where there are discretionary bars is completely unfettered though it must be exercised according to established principles. In *Blunt v. Blunt*⁴¹ Lord Simon L.C. laid down that the following five points should be borne in mind:—

- (a) The position and interest of the children of the marriage who in the long run will probably suffer most from the collapse of the marriage;
- (b) The interest of the party with whom the petitioner has committed adultery, with special regard to the prospect of their future marriage;
- (c) The question whether if the marriage is not dissolved, there is a prospect of reconciliation between the parties;
- (d) The interest of the petitioner and in particular the interest that the petitioner should be able to remarry and live respectably;
- (e) The interest of the community at large to be judged by maintaining a true balance between respect for the binding sanctity of marriage and social considerations which make it contrary to the public policy to insist on the maintenance of a union which has utterly broken down.

In the case of *Rudman v. Rudman*⁴² the husband petitioner admitted

fact of subsequent intercourse, for there may be instances where the innocent wife, owing to the difficulties of her situation, may have no means of immediately breaking off relations". It is now provided in England that any presumption of condonation which arises from the continuance or resumption of marital intercourse may be rebutted on the part of a husband, as well as on the part of a wife, by evidence sufficient to negative the necessary intent — Matrimonial Causes Act, 1963, s. 1. It is also provided that adultery which had been condoned shall not be capable of being revived — *Ibid*, s. 3. Adultery or cruelty shall not be deemed to have been condoned by reason only of a continuation or resumption of cohabitation between the parties for one period not exceeding three months or of anything done during such cohabitation, if it is proved that cohabitation was continued or resumed, as the case may be, with a view to effecting a reconciliation. See *Brown v. Brown* [1964] 2 All E.R. 828, where it was held that this provision does not cover cases where a continuation or resumption of cohabitation is in consequence of reconciliation, but only where it is with a view to it.

40. (1860) 2 Sw. & Tr. 61. It is now enacted in England that adultery which has been condoned shall not be capable of being revived — Matrimonial Causes Act, 1963, s. 3.
41. *Blunt v. Blunt* [1943] A.C. 517 — followed in *Kathi-Rasen v. Kathi-Rasen* (1960) 26 M.L.J. 57 and *Lee Kah Wah v. Cheah Paik Yuen* (1964) 30 M.L.J. 125.
42. [1964] 2 All E.R. 102. See also *Devenport v. Devenport* [1965] 1 All E.R. 1

adultery and Sir Jocelyn Simon P. in considering whether the Court should exercise its discretion in his favour said:⁴³

The leading considerations which guide the court in the exercise of its discretion were authoritatively stated by Viscount Simon L.C., in *Blunt v. Blunt*. First, the position and interest of any children of the marriage. Beyond any question the interest of the children of this marriage would be promoted by their father being in a position to marry Mrs. Dobson. She looks after them well; nor is any one else available to do so. They could only be adversely affected were they to grow up in the knowledge that both their parents were living in irregular union. Secondly, the interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage. Mrs. Dobson is free to marry the husband and they wish to marry each other. Their present connexion is an affront to society and a detriment to the children born of it. Thirdly, the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife. There is not here the smallest prospect of any such reconciliation. Fourthly, the interest of the petitioner and, in particular, the interest that the petitioner should be able to remarry and live respectably. Both the general and the particular interest of the husband would be advanced by the termination of this marriage. I would add that the interest of the wife, who has also formed an irregular union and has borne an illegitimate child to the co-respondent, also weighs in the same direction. Fifthly, and regarded by Lord Simon as indeed of primary importance, the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. Except that the refusal of a decree to the petitioner could be considered as a punishment for the flagrant disrespect shown by both him and the respondent for the binding sanctity of their marriage, every consideration which I have so far reviewed, and especially the interest of the children of three different unions, tells in favour of ending this marriage.

In the case of *Bull v. Bull*⁴⁴ Sir Jocelyn Simon again had to deal with the factors which should be borne in mind by the court in exercising its discretion. He said:^{44A}

I have had a helpful review by counsel for both parties of the factors which are to be borne in mind by the court in exercising the discretion vested in it by the legislature. I think that these factors fall into three categories. First, factors relating to the interest of the persons directly or indirectly affected by the suit. Secondly, all other relevant factors relating to the married life of the parties. In both of those categories the interests of the community may be affected. The interests of the community are also affected in the administration of justice: this gives rise to a number of other factors which fall for consideration and weighing: and these constitute the third category. which may perhaps be summed up in the statement that it is in the public interest that matrimonial relief should be granted on the basis of complete candour and truthfulness on the part of the party seeking relief.

The learned Judge then listed the factors to be taken into consideration as follows:—

where it was held on a petition by the husband that the prospect of the children of the adulterous union formed by the wife becoming legitimated, if she and the co-respondent could marry, was a factor that should be taken into consideration by the Court in exercising its discretion to grant the decree of divorce, despite the long delay in presenting the petition.

43. [1964] 2 All E.R., at p. 106.

44. [1965] 1 All E.R. 1057.

44A. *Ibid.*, at p. 1060.

- (i) Whether, if the marriage is not dissolved, there is a reasonable prospect of reconciliation between the petitioner and the respondent.
- (ii) The position and interest of any children of the marriage.
- (iii) The interest of the party with whom the petitioner has been guilty of adultery, with special regard to their re-marriage.
- (iv) The interest of the petitioner, and in particular the interest that the petitioner should be able to remarry and live respectably.
- (v) The interest of any children born of the adulterous connexion between the petitioner and the person with whom he or she committed adultery.
- (vi) The interest of any children born of any adulterous connexion formed by the respondent.
- (vii) Was the petitioner or the respondent the more responsible for the break-up of their marriage?
- (viii) What was the nature of the misconduct which necessitated the prayer for discretionary relief? Was it, for example, with more than one man or woman? Was it promiscuous? Were there mitigating or aggravating circumstances?
- (ix) Was the party seeking discretionary relief partly, and if so to what extent, responsible for the break-up of any other marriage?
- (x) What was the general conduct otherwise of the party seeking discretionary relief; for example, his or her conduct towards the children?
- (xi) On the successful intervention of the Queen's Proctor, would the court have been likely to have exercised discretion in favour of the party seeking the discretionary relief if the facts now known had been before it on the original hearing?
- (xii) What were the reasons for the original, or indeed any subsequent, non-disclosure of adultery by the party seeking discretionary relief?
- (xiii) Was there perjury — that is a false statement on oath known to be false — in the original proceedings on the part of the party seeking discretionary relief?
- (xiv) Was the party seeking discretionary relief frank when first or subsequently questioned about the adultery and non-disclosure?

- (xv) Is the court finally satisfied that it has been told the whole truth by the party seeking discretionary relief, especially with regard to the course of adultery making it necessary to pray for discretionary relief?
- (xvi) Is the court satisfied that adultery, or further adultery, has been committed as to which a denial on oath has been maintained?
- (xvii) Scrutiny and determination by the court of the "quality" of its own judgment as to whether adultery has been committed.

In order to give the court jurisdiction to make a decree of dissolution of marriage it must be shown that the marriage is monogamous and that the husband is domiciled in the Federation. But the Divorce Ordinance, 1952, provides that the court shall have jurisdiction, although the husband is not domiciled in the Federation, if the wife has been deserted by the husband or the husband has been banished or excluded from the Federation under any written law relating to banishment or exclusion of persons other than citizens and the husband was immediately before the desertion, banishment or exclusion domiciled in the Federation or if the wife is resident in Federation and has been ordinarily resident in the Federation for a period of three years immediately preceding the commencement of the proceedings.⁴⁵

Even where there are cross-petitions the Court has a discretion to make orders on both petitions. Even though one party is more to blame than the other the Court in the exercise of its discretion may pronounce a decree on the petition and the cross-petition.⁴⁶

A husband may claim damages in proceedings for dissolution of marriage or judicial separation, or he may claim damages alone from any person who has committed adultery with his wife.⁴⁷ A wife does not have this right but both the husband and wife can bring a common law action for damages for enticement where anyone entices away the wife or the husband. In such an action the plaintiff must prove that the defendant was in some way positively responsible for the spouse leaving the matrimonial home. It is not sufficient that the defendant has merely alienated the spouse's affection from the plaintiff. The plaintiff must prove that the spouse's finally leaving the house and breaking off consortium was caused or procured or induced by some action of the defendant as opposed to the voluntary going of the spouse in pursuit of the defendant. It has been said that the action for enticement is an anomaly and should not be extended; and that a spouse cannot sue the parents of the other for enticement the reason being that it would be

45. Divorce Ordinance, 1952 (as amended by Divorce (Amendment) Ordinance, 1959) s. 4(1), 49.

46. *O'Brien v. O'Brien* [1950] W.N. 330; *Wong Siew Fong v. Wong Siew Fong* (1964) 30 M.L.J. 37; *Lee Kah Wah v. Cheah Paik Yean* (1964) 30 M.L.J. 125.

47. Divorce Ordinance, 1952, s. 28.

unseemly that families should bring such troubles into court.⁴⁸

(ii) *Judicial separation.*

A decree for judicial separation may be applied for by either spouse on the same grounds as a petition for dissolution of marriage may be presented and also on the ground of failure to comply with an order for restitution of conjugal rights. The circumstances in which a petition for judicial separation may be granted or dismissed are the same as those applicable to a petition for dissolution of marriage. In addition failure to comply with an order for restitution of conjugal rights allows the petitioner to apply for a judicial separation forthwith and it is *prima facie* evidence of desertion. Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced may at any time thereafter present a petition to the court praying for a reversal of such decree on the ground that it was obtained in his or her absence and that there was reasonable ground for the alleged desertion, where desertion was the ground of such decree.⁴⁹ A petition for judicial separation can, unlike divorce, be brought during the first three years of marriage and it may be useful therefore as a means of preserving evidence of a matrimonial offence with a view to applying for dissolution of marriage later.

The court has jurisdiction to make a decree of judicial separation where the marriage is monogamous and where both parties to the marriage reside in the Federation at the time of the commencement of the proceedings.⁵⁰

(iii) *Restitution of conjugal rights.*

When either the husband or the wife has without reasonable excuse withdrawn from the society of the other, either wife or husband may apply by petition to the court for restitution of conjugal rights. The court on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights. Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which would not be a ground for a suit for judicial separation. Disobedience to the decree would render the party guilty of desertion for which a decree of judicial separation may be obtained immediately without any waiting period.⁵¹

(iv) *Effect of nullity, dissolution of marriage and judicial separation.*

Nullity and dissolution of marriage are granted in two stages, *i.e.* a decree nisi followed by an absolute decree, which may not be made until the expiration of three months from the pronouncing of the decree nisi

48. *Place v. Searle* [1932] 2 K.B. 497; *Best v. Samuel Fox* [1952] A.C. 716; *Gottlieb v. Gleiser* [1958] 1 Q.B. 267.

49. Divorce Ordinance, 1952, s. 19.

50. *Ibid.*, s.4(3).

51. *Ibid.*, ss. 22, 27.

unless the High Court fixes a shorter period.

Where the purported marriage is void the marriage is regarded as never having taken place and no status of marriage as having been conferred on the parties. Where the marriage is annulled on the ground of insanity or venereal disease any child of the marriage is deemed to be a legitimate child.⁵² Similarly, where a marriage is annulled on the ground that the former husband or wife is living and it is adjudged that the subsequent marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, children begotten before the decree nisi is made are specified in the decree and are entitled to succeed in the same manner as legitimate children to the estate of the parent who at the time of the marriage was competent to contract the marriage. In all other cases where the marriage is annulled, the children of the marriage are regarded as illegitimate.⁵³

A decree of dissolution of marriage when made absolute puts an end to the status of marriage between the parties and thereafter the husband and wife are strangers to one another as regards person and property, the wife becoming a *feme sole*. The parties may marry once the decree has been made absolute and no appeal has been presented against it.

An order of judicial separation merely permits the parties to cease cohabitating. The parties are still husband and wife and so neither of them can marry during the lifetime of the spouse. It is provided however that the property of a wife who at the time of her death is judicially separated from her husband, shall in case she dies intestate, go as it would have gone if her husband had been then dead.⁵⁴ A wife judicially separated from her husband and to whom alimony has been ordered to be paid, may not pledge her husband's credit for necessaries so long as alimony under the order is duly paid.

(v) *Maintenance — Custody of children.*

The court may on a decree absolute of nullity or dissolution of marriage or a decree of judicial separation obtained by a wife order the husband to secure to his wife such gross sum of money or annual sum as the court may deem reasonable. A similar provision with regard to a secured sum for the husband or annual payment to a husband by a wife may be ordered where a petition for dissolution of marriage is presented by a wife on the ground of the husband's insanity.⁵⁵ In any suit for dissolution of marriage or for nullity of marriage or for judicial separation or for restitution of conjugal rights, the court may at any stage of the proceedings or after a decree absolute has been pronounced, make such orders as it thinks fit with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the

52. Divorce Ordinance, 1952, s. 15(3).

53. *Ibid.*, s. 17.

54. *Ibid.*, s. 20.

55. *Ibid.*, ss. 31, 37(2).

subject of such suit and may vary or discharge the said orders and may if it thinks fit, direct proceedings to be taken for placing such children under the protection of the court. The court may if it thinks fit, on any decree of dissolution of marriage or nullity of marriage order the husband (or in the case of a petition for dissolution of marriage by a wife on the ground of her husband's insanity order the wife) to secure for the benefit of the children such gross sum of money or an annual sum of money as the court may deem reasonable, but the term for which any sum of money is secured for the benefit of a child shall not extend beyond the date when the child attains the age of twenty-one years.⁵⁶

When the court pronounces a decree of dissolution of marriage or of judicial separation on account of the adultery, desertion or cruelty of the wife and when the wife is entitled to any property, the court may order such settlement as it thinks reasonable to be made of such property or any part thereof for the benefit of the husband or of the children of the marriage or of both. Power is given to the court to inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties and to make such orders with reference to the application of the whole or a portion of the property settled, whether for the benefit of the husband or the wife or of the children of the marriage or of both children and parents as to the court seems fit. The court may not however make any order for the benefit of the parents or either of them at the expense of the children.⁵⁷ The granting of maintenance is in the discretion of the court and may be granted even to a guilty wife. In awarding maintenance the court must have regard to the conduct of the parties.⁵⁸

The court has a wide discretion in making orders for the custody of the children and it has been held in England that the benefit and interest of the infant is the paramount consideration and not the punishment of the guilty spouse. The adultery of the mother ought not to be regarded for all time and under all circumstances as sufficient to disentitle the mother to access to her daughter or even to the custody of her daughter. Generally speaking the Court would be reluctant to remove a very young child from the mother's care and the order is sometimes made giving "custody" to the innocent father and "care and control" to the guilty mother. Such an order forbids the father to remove the child from the mother while giving him greater control over the child's upbringing and education than in the case where custody is granted to the mother.⁵⁹

56. Divorce Ordinance, 1952, s. 36.

57. *Ibid.*, s. 36.

58. See *Sydenham v. Sydenham* [1949] 2 All E.R. 196 and *Dowse v. Dowse* (1960) 26 M.L.J. 44.

59. *Stark v. Stark* [1910] P. 190. The provisions of the Matrimonial Proceedings (Children) Act, 1958, which enact that the Court should be make absolute a decree of divorce or nullity or pronounce a decree of judicial separation unless and until it is satisfied that satisfactory arrangements have been made for the care and upbringing of every child of the family under sixteen years of age, do not apply in the States of Malaya.

(vi) *Customary marriages.*

There are two forms of Chinese customary divorce — that based on mutual consent of the parties to terminate the marriage and the unilateral repudiation of the wife by the husband. Divorce by mutual consent may be either contained in a deed of divorce, including *inter alia* a declaration that the husband and wife respectively are free to contract any other lawful marriage with any other man or woman, or may appear as a newspaper announcement of the declaration of the parties of their consent to the dissolution of their marriage. Divorce by repudiation of the wife by the husband occurs more frequently in secondary marriages and it is doubtful whether a husband can divorce his principal wife by this method, though it has been stated that a principal wife and a secondary wife are for the purpose of divorce in the same position. According to the Chinese custom, as accepted by the courts in Malaya, a Chinese may divorce his secondary wife unilaterally, if she has been disobedient to him or to his principal wife or has been guilty of immoral conduct, by declaring publicly to his clansmen or relatives that he has divorced her. In *Re Sim Siew Guan's Estate*⁶⁰ Shaw C.J. stated that the only evidence he had of the manner in which a divorce could be effected by Chinese custom was the evidence of the Consul-General of China, who had stated that divorce was recognised, and that it was at the will of the husband, who was entitled to divorce his wife if she was disobedient to himself or his principal wife or if she did not conform to the household regulations or was guilty of immoral conduct. The custom was that the husband should notify the dissolution either to his near relatives or to his clansmen. In *Woon Ngee Yew v. Ng Yoon Thai*⁶¹ it was held that there was sufficient evidence that the deceased had divorced his wife according to Chinese custom, when he refused to return to her and informed various friends and relatives that he had done so; and that these facts were sufficient to constitute, a divorce of a secondary wife according to the custom among Chinese as recognised in Perak. Divorce is at the will of the husband but such divorce must not be merely capricious but should be justified by such definite causes as desertion or misconduct. It would appear that a secondary wife cannot be unilaterally divorced by her husband if she has borne him a son during the marriage.⁶² A Chinese married woman cannot unilaterally divorce her husband according to Chinese custom.⁶³

There are no decided cases in the Federation dealing with Hindu divorce. As Chinese and Hindu marriages are not monogamous, they cannot be dissolved by order of court as the court has jurisdiction only where the marriage is monogamous. There are no provisions for the registration of Chinese, Hindu and other customary divorces. While

60. (1932) 1 M.L.J. 95. See *Re Lee Choo Guan* (dec'd.) (1935) S.S.L.R. 166 where it was held that a Chinese can divorce his secondary wife at will. No actual ceremony is needed; it depends on the definite intention to break off the relationship and the notoriety given to the fact of dissolution.

61. (1941) 10 M.L.J. 37.

62. *Khoo Hooi Leong v. Khoo Chong Yeok* [1930] A.C. 346.

63. *Cheng Ee Mun v. Look Chung Heng* (1962) 28 M.L.J. 411.

persons of Chinese race may marry according to Chinese custom and may dissolve their marriage without recourse to the court, this applies only where they marry according to their custom. If they choose voluntarily to contract a marriage under any law which provides that their marriage is a monogamous one, its solemnization creates a status which carries with it the obligations which the law imposes on parties having such status. If they enter into a marriage under the Civil Law Ordinance, such a marriage can only be dissolved under and in accordance with the Divorce Ordinance.⁶⁴

B. THE LAW IN SINGAPORE.

The law relating to dissolution of marriage is contained in Part IX of the Women's Charter, 1961,⁶⁵ which deals with nullity of marriage, divorce, judicial separation and restitution of conjugal rights.

The court has jurisdiction to make a decree of divorce, nullity of marriage or judicial separation where the marriage is monogamous and also where the marriage is registered or deemed to be registered under the provisions of the Women's Charter, 1961.⁶⁶ In effect as all previous marriages (other than Muslim marriages) which are validly solemnised are deemed to be registered under the Women's Charter, 1961, and all future marriages (other than Muslim marriages) solemnised in Singapore have to be registered under the Women's Charter, 1961, the court has jurisdiction in all cases where the marriage is solemnised in Singapore except in the case of Muslim marriages. It is provided that marriages which are solemnised in Singapore or are deemed to be registered under the Women's Charter, 1961, shall continue in force until dissolved by the death of the parties or an order of court.⁶⁷ No customary or religious form of divorce will therefore be recognised. The Women's Charter, 1961, 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.⁶⁸

(i) *Nullity of marriage.*

The grounds for nullity of marriage are the same as in the States of Malaya. The provisions relating to the prohibited degrees of consanguinity and affinity are contained in section 10 of the Women's Charter, 1961, and the First Schedule to the Ordinance. It is provided that a marriage solemnised between persons within the prohibited degrees is void. Power is given to the Minister in his discretion 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

64. *Soo Hai San v. Wong Sue Fong* (1961) 27 M.L.J. 221.

65. No. 18 of 1961.

66. Women's Charter, 1961, s. 82.

67. *Ibid.*, ss. 7, 166.

68. *Ibid.*, s. 81.

is valid under the law, religion, custom or usage applicable to the parties thereto and where a marriage is solemnised under such licence, it shall be deemed to be valid.⁶⁹

In Singapore a marriage is invalid if at the date of such marriage neither party is under the age of eighteen years unless the solemnization of such marriage was authorized by licence granted by the Minister. 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.⁷⁰ The Minister is given power to grant a licence authorizing of a marriage although the female party to the marriage is under the age of eighteen years.

The court has jurisdiction to make a decree of nullity of marriage where the marriage to which the decree relates was celebrated in Singapore.⁷¹

(ii) *Divorce.*

The grounds for divorce are the same as those for dissolution of marriage in the States of Malaya.⁷² When the ground for divorce is that the respondent is of unsound mind and has been continuously under care and treatment for a period of at least five years, it is provided that a person of unsound mind shall be deemed to be under care and treatment not only when he is detained or receiving treatment under the Mental Disorders and Treatment Ordinance or confined under the Criminal Procedure Code, but also while he is being detained in pursuance of any order for his detention or treatment as a person of unsound mind or a person suffering from mental illness or while he is receiving treatment as a voluntary patient, in a country where it is proved that he is receiving care and treatment according to standards which are substantially the same as those obtaining in respect of the care and treatment of patients suffering from mental illness in Singapore.⁷³

In *Goh Soon Toon v. Yuen Yoke Chee*⁷⁴ it appeared that the parties had entered into a separation deed under which the parties agreed to separate and the husband agreed to pay maintenance to the wife. It was alleged that both parties had repudiated the agreement as the husband had not paid the stipulated sums for maintenance and the wife had taken no steps to recover them, but had on the contrary by concealing her whereabouts made payment difficult, if not impossible. The husband brought a petition for divorce based on the ground of the alleged desertion by the wife. It was held that in the circumstances there were

69. Women's Charter, 1961, s. 10.

70. *Ibid.*, ss. 9, 11.

71. *Ibid.*, ss. 82(2), 92.

72. *Ibid.*, s. 84.

73. *Ibid.*, s. 84(4).

74. (1950) 16 M.L.J. 96.

no grounds for holding that the wife had been guilty of any breach of the terms of the separation deed or that she had by her conduct abrogated the separation deed and therefore the separation deed was still in force, and was an absolute answer to the charge of desertion.

In *Koh v. Koh*⁷⁵ the parties had entered into a separation deed under which they agreed to live apart from each other and the husband agreed to pay maintenance to the wife. The husband made an offer to be reconciled with his wife and to resume cohabitation with her but this offer was refused. Subsequently the husband continued to pay maintenance under the terms of the deed. On a claim for payment of the sums due for maintenance the husband pleaded that the wife must be deemed to have deserted him and was therefore not entitled to maintenance. It was held that there was no evidence that the wife had any intention of repudiating the deed of separation or that husband was putting an end to the deed and as the deed provided for the parties to live separately at all future times, the husband had in the circumstances failed to prove desertion on the part of the wife.

A divorce may not be sought by either party within three years of the date of the marriage, except by leave of the court upon application on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent. The court in granting leave is required to have regard to the interests of the children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said three years; and the court may before determining the application refer the differences between the parties to a Conciliation Officer so that a reconciliation between the parties might be effected.⁷⁶

On a petition for divorce it is the duty of the court to inquire, so far as it reasonably can, into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties. If the court is satisfied on the evidence (i) that the case for the prosecution had been proved; (ii) that where the ground of petition is adultery the petitioner has not in any way been accessory to, or connived at, or condoned the adultery, or where the ground of the petition is cruelty the petitioner has not in any way condoned the cruelty; and (iii) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents, the court shall pronounce a decree nisi. The court is not bound to pronounce a decree and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or if in the opinion of the court the petitioner has been guilty of (i) unreasonable delay in presenting or prosecuting the petition;^{76A} (ii) of cruelty towards the other party to the marriage; (iii) where the ground of the petition is adultery or cruelty, of having without reasonable excuse deserted or having without reasonable excuse wilfully separated himself or herself from the

75. [1965] 1 M.L.J. 99.

76. Women's Charter, 1961, s. 83.

76A See the cases of *Saminathan v. Saminathan* (1941) 10 M.L.J. 79; *Attias v. Non* (1958) 24 M.L.J. 8; *Palmer v. Young* (1958) 24 M.L.J. 90.

the other party before the adultery or cruelty complained of; or (iv) where the ground of the petition is adultery or unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion. It is provided that no adultery shall be deemed to be condoned unless conjugal cohabitation has been continued or resumed.⁷⁷

In order to give the court jurisdiction to make a decree of divorce it must generally be shown that the husband is domiciled in Singapore, but the Women's Charter, 1961, provides that the court shall have jurisdiction, although the husband is not domiciled in Singapore, if the wife has been deserted by the husband or the husband has been deported from Singapore under any law relating to the deportation of persons and the husband was before the desertion or deportation domiciled in Singapore; or if the wife is resident in Singapore and has been ordinarily resident in Singapore for a period of three years immediately preceding the commencement of the proceedings.⁷⁸

A husband may claim damages in proceedings for divorce or judicial separation or he may claim damages only from any person who has committed adultery with his wife.⁷⁹ A wife has not got a similar right but she may bring a Common Law action for damages for enticement.

(iii) *Judicial separation.*

A decree for judicial separation may be applied for by either spouse on the same grounds as a petition for divorce may be presented and also on the ground of failure to comply with an order for restitution of conjugal rights. The circumstances in which a petition for judicial separation may be granted or dismissed are the same as those applicable to a petition for divorce; but disobedience to a decree for restitution of conjugal rights renders the person guilty of desertion for which a decree of judicial separation can be obtained immediately without a waiting period. The court has jurisdiction to make a decree of judicial separation where both parties to the marriage reside in Singapore, at the time of the commencement of the proceedings.⁸⁰

(iv) *Restitution of conjugal rights.*

The statutory provisions as to the power of the Court to make an order for restitution of conjugal rights, the grounds on which a petition for conjugal rights may be applied for and answer which may be pleaded to such a petition are the same as in the States of Malaya.⁸¹

(v) *Effect of nullity, divorce and judicial separation.*

Nullity and divorce decrees are in two parts, a *decree nisi* followed

77. Women's Charter, 1961, ss. 86, 87.

78. *Ibid.*, 1961, ss. 82, 126.

79. *Ibid.*, 1961, s. 105.

80. *Ibid.*, 1961, ss. 96, 82(3).

81. *Ibid.*, ss. 99, 100.

by an absolute decree, which may be made after the expiration of such time, not less than three months from the pronouncing thereof, as is prescribed or is fixed by the court in any suit.

Where a marriage is annulled the marriage is regarded as never having taken place and no status of marriage as having been conferred on the parties. Where however the marriage is annulled on the ground of insanity or venereal disease, any child of the marriage is deemed to be a legitimate child.⁸² Where a marriage is annulled on the ground that the former husband or wife was living and it is adjudged that the subsequent marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, children begotten before the *decree nisi* is made shall be specified in the decree and be entitled to succeed in the same manner as legitimate children to the estate of the parent who at the time of the marriage was competent to contract.⁸³ In all other cases of annulled marriage the children are not regarded as legitimate children.

A decree of divorce when made absolute puts an end to the status of marriage between the parties and thereafter the husband and wife are strangers to one another as regards person and property, the wife becoming a *feme sole*. The parties may marry once the decree has been made absolute and no appeal has been brought against it.

An order of judicial separation merely permits the parties to cease cohabitation. The parties are still husband and wife and so neither of them can marry during the lifetime of the other spouse. It is provided however that the property of a wife who at the time of her death is judicially separated from her husband shall, in case she dies intestate, go as it would have gone if her husband had been then dead.⁸⁴ A wife judicially separated from her husband and to whom alimony has been ordered to be paid, may not pledge her husband's credit for necessaries so long as alimony under the order is duly paid.

The court may on a decree absolute for nullity or for divorce or on a decree of judicial separation obtained by a wife order the husband to secure to his wife such gross sum of money or annual sum as having regard to her fortune, if any, the ability of the husband and the conduct of the parties the court may deem reasonable. A similar provision with regard to a secured sum for the husband or annual payment to a husband by a wife may be ordered where a petition for divorce or judicial separation is presented by a wife on the ground of the husband's insanity.⁸⁵ In any suit for divorce or for nullity of marriage or for judicial separation or for restitution of conjugal rights, the court may at any stage of the proceedings or after a decree absolute has been pronounced make such orders as it thinks fit with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of such suit, and may vary or discharge the said

82. Women's Charter, 1961, s. 92(3).

83. *Ibid.*, s. 94.

84. *Ibid.*, s. 97.

85. *Ibid.*, ss. 108, 114(2).

orders and may, if it thinks fit, direct proceedings to be taken for placing such children under the protection of the court. The court may, if it thinks fit, on any decree of divorce or nullity of marriage order the husband or (in the case of a petition for divorce by a wife on the ground of her husband's insanity) order the wife, to secure for the benefit of the children such gross sum of money or annual sum of money as the court may deem reasonable, but the term for which any sum of money is secured for the benefit of a child shall not extend beyond the date when the child will attain the age of twenty-one years.⁸⁶

When the court pronounces a decree of divorce or of judicial separation on account of the adultery, desertion or cruelty of the wife and when the wife is entitled to any property, the court may order such settlement as it thinks reasonable to be made of such property or any part thereof for the benefit of the husband or of the children of the marriage or of both.⁸⁷ Power is given to the court to inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties and to make such orders with reference to the application of the whole of a portion of the property settled, whether for the benefit of the husband or the wife or of the children of the marriage or of both children or parents, as to the court seems fit. The court may not however make any order for the benefit of the parents or either of them at the expense of the children.⁸⁸

C. THE LAW IN SABAH.

(i) *Monogamous marriages.*

The law relating to divorce and matrimonial causes in relation to monogamous marriages is contained in the Divorce Ordinance, 1963,⁸⁹ which deal with nullity 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.⁹⁰

(a) *Nullity of marriage.*

The grounds for nullity of marriage are the same as in the States of Malaya. There are no specific provisions relating to the prohibited degrees of consanguinity and affinity in the written law in Sabah but it is provided that Ministers of Religion or Marriage Registrars shall not issue the required certificate for marriage unless one of the parties has appeared personally before the Minister or Registrar and made oath

86. Women's Charter, 1961, s. 113.

87. *Ibid.*, s. 110.

88. *Ibid.*, s. 111.

89. No. 7 of 1963.

90. North Borneo Divorce Ordinance, 1963, s. 3.

that he or she believes that there is not any impediment of kindred or affinity or other lawful hindrance to the marriage.⁹¹

It is provided that notwithstanding any written law or custom any marriage between persons who in the case of a man is under the age of sixteen years or in the case of a female is under the age of fourteen years shall be void.⁹²

The court has jurisdiction to make a decree of nullity of marriage where the marriage between the parties was contracted under a law providing that in contemplation of which the marriage is monogamous and where the marriage to which the decree relates was celebrated in Sabah.⁹³

(b) *Dissolution of marriage.*

The grounds for dissolution of marriage are the same as in the States of Malaya, except that there is no provision for a wife to present a petition on the ground that her husband has gone through a form of marriage with another woman.⁹⁴

A dissolution of marriage may not be sought by either party within three years of the date of the marriage, except by leave of the court upon application on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent. The court in granting leave is required to have regard to the interests of the children of the marriage and to the question whether there is reasonable probability of a reconciliation between the parties before the expiration of the said three years.⁹⁵

On a petition for dissolution of marriage it shall be the duty of the court to inquire, as far as it reasonably can, into the facts alleged and whether there has been connivance or condonation on the part of the petitioner and whether any collusion exists between the parties. If the court is satisfied on the evidence (i) that the case for the petitioner has been proved; (ii) that where the ground of petition is adultery the petitioner has not in any way been accessory to or connived at or condoned the adultery or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty; and (iii) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents, the court shall grant a *decree nisi*. The court is not bound to pronounce a decree and may dismiss the petition if it finds that the petitioner has been guilty of adultery or if in the opinion of the court the petitioner has been guilty of (i) unreasonable

91. North Borneo Christian Marriage Ordinance (Cap. 24), ss. 17, 36.

92. North Borneo Marriage Ordinance, 1959, (No. 14 of 1959), s. 2.

93. North Borneo Divorce Ordinance, 1963, s. 4(2). Section 48 of the Ordinance gives additional jurisdiction in certain cases, notwithstanding that the husband is not domiciled in Sabah, but it is difficult to see how this can apply in proceedings for nullity of marriage.

94. North Borneo Divorce Ordinance, 1963, s. 7.

95. *Ibid.*, s. 6.

delay in presenting or prosecuting the petition; (ii) of cruelty towards the other party to the marriage; (iii) where the ground of petition is adultery or cruelty, of having without reasonable excuse deserted or having without reasonable excuse wilfully separated himself or herself from the other party before the adultery or cruelty complained of; or (iv) where the ground of the petition is adultery or unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion. It is provided that no adultery shall be deemed to be condoned unless conjugal cohabitation has been continued or resumed.⁹⁶

In order to give the court jurisdiction to make a decree of dissolution of marriage it must generally be shown that the marriage between the parties was contracted under a law providing that the marriage is monogamous and that both parties to the marriage are at the time when the petition is presented domiciled in Sabah. It is however provided that the court has jurisdiction although the husband is not domiciled in Sabah, if the wife has been deserted by her husband or the husband has been banished or excluded from Sabah under any written law relating to banishment or the exclusion of persons other than citizens and the husband was immediately before the desertion, banishment or exclusion domiciled in Sabah; or if the wife is resident in Sabah and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings.⁹⁷

A husband may claim damages in proceedings for dissolution of marriage or judicial separation or he may claim damages alone from any person who has committed adultery with his wife.⁹⁸ A wife has not got a similar right but she may bring a common law action for damages for enticement.

(c) *Judicial separation.*

A decree for judicial separation may be applied for by either spouse on the same grounds as a petition for dissolution of marriage may be presented and also on the grounds of failure to comply with a decree of restitution of conjugal rights. The circumstances in which a petition for judicial separation may be granted or dismissed are the same as those applicable to a petition for dissolution of marriage but disobedience of a decree of restitution of conjugal rights renders the person guilty of desertion without reasonable cause, for which a decree of judicial separation can be obtained immediately without a waiting period. The court has jurisdiction to make a decree of judicial separation where the marriage between the parties was contracted under a law providing that in contemplation of which marriage is monogamous and where both parties to the marriage reside in Sabah at the time of the commencement of proceedings.⁹⁹

96. North Borneo Divorce Ordinance, 1963, s. 9.

97. *Ibid.*, ss. 4, 48.

98. *Ibid.*, s. 28.

99. *Ibid.*, s. 4(3).

(d) *Restitution of conjugal rights.*

The statutory provisions as to the power of the Court to make an order for restitution of conjugal rights, the grounds on which a petition for conjugal rights may be applied for and answer which may be pleaded to such a petition are the same as in the States of Malaya.¹

(e) *Effect of nullity, decree and judicial separation.*

Nullity and divorce decrees are granted in two stages, *i.e.*, a *decree nisi* followed by a decree absolute which may not be made until the expiration of three months from the pronouncing thereof, unless the court by general or special order from time to time fixes a shorter period.²

Where a marriage is annulled the marriage is regarded as never having taken place and no status of marriage as having been conferred on the parties. Where however the marriage is annulled on the ground of insanity or venereal disease, any child of the marriage is deemed to be legitimate, notwithstanding that the marriage is avoided.³ Where a marriage is annulled on the ground that a former husband or wife was living and it is adjudged that the subsequent marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, children begotten before the *decree nisi* is made shall be specified in the decree and shall be entitled to succeed in the same manner as legitimate children to the estate of the parent who at the time of the marriage was competent to contract.⁴ In all other cases of annulled marriages the children are not regarded as legitimate children.

A decree of dissolution of marriage when made absolute puts an end to the status of marriage between the parties and thereafter the husband and wife are strangers to one another as regards person and property; the wife becoming a *feme sole*. It is specially provided that when the time limited for appealing against a decree absolute of dissolution of marriage or nullity of marriage has expired, and no appeal has been presented against such decree, or when any appeal has been dismissed, but not sooner, the respective parties may marry again as if the prior marriage had been dissolved by death.⁵

An order of judicial separation merely permits the parties to cease cohabiting. The parties are still husband and wife and so neither of them can marry again during the lifetime of the other. It is provided however that the property of a wife who at the time of her death is judicially separated from her husband, shall in case she dies intestate,

1. North Borneo Divorce Ordinance, 1963, ss. 22-27.
2. *Ibid.*, s. 18.
3. *Ibid.*, s. 15(3).
4. *Ibid.*, s. 17.
5. *Ibid.*, s. 45.

go as it would have gone if her husband had been dead.⁶ A wife judicially separated from her husband and to whom alimony has been ordered to be paid may not pledge her husband's credit for necessaries so long as such alimony under the order is duly paid.

The court may on a decree absolute for nullity or dissolution of marriage or on a decree of judicial separation obtained by the wife, order the husband to secure to his wife such gross sum of money or annual sum as having regard to her fortune, if any, to the ability of the husband and to the conduct of the parties, the court deems reasonable.⁷ A similar provision with regard to a secured sum for the maintenance of the husband or annual payment to a husband by a wife may be ordered where a petition for dissolution of marriage or judicial separation is presented by the wife on the grounds of her husband's insanity.⁸

In any suit for dissolution of marriage or for nullity of marriage or for judicial separation or for restitution of conjugal rights the court may at any stage of the proceedings or after a decree absolute has been pronounced make such orders as it thinks fit with regard to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of such suit, and may vary or discharge such orders and may if it thinks fit, direct proceedings to be taken for placing such children under the protection of the court. The court may, if it thinks fit, on any decree of dissolution of marriage or nullity of marriage order the husband (or in the case where the petition for dissolution of marriage by a wife on the ground of her husband's insanity order the wife), to secure for the benefit of the children such gross sum of money or annual sum as the court may deem reasonable, but the term for which any sum of money is secured for the benefit of a child shall not extend beyond the date when the child will attain twenty-one years of age.⁹

When the court pronounces a decree of dissolution of marriage or judicial separation on the ground of the adultery, desertion or cruelty of the wife and when the wife is entitled to any property, the court may order such settlement as it thinks reasonable to be made of such property or any part thereof for the benefit of the husband or of the children of the marriage or of both.¹⁰ Power is given to the court to inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties and to make such orders with reference to the application of the whole or a portion of the property settled, whether for the benefit of the husband or the wife or of the children of the marriage or of both children and parents, as to the court seems fit. The Court may not however make any order for the benefit of the parents or either of them at the expense of the children.¹¹

6. North Borneo Divorce Ordinance, 1963, s. 20.

7. *Ibid.*, s. 31.

8. *Ibid.*, s. 37(2).

9. *Ibid.*, s. 36.

10. *Ibid.*, s. 33.

11. *Ibid.*, s. 34.

(ii) *Native customary divorces.*

Among the Dusuns and the Muruts, the husband and wife have equal rights regarding divorce. Either husband or wife can divorce the other at will, with or without specific reason. There is no special ceremony required beyond the formal notification to the *waris* or blood relations on either side.

If one or both of the parties are finally resolved on a divorce, the question of the *brian* or marriage presents — its retention, or return or partial return by the wife — will be the main subject for discussion, apart from any efforts to effect a reconciliation. The question of the disposal of the *pencharian laki-bini* (joint acquisitions during marriage) will also have to be dealt with. If a man has no good reason for divorcing his wife he cannot recover the *brian* he paid. Similarly if the wife has no just complaint against the husband she must return the *brian* or its equivalent. The only ceremony essential is an open discussion with the *waris* or blood relations of each side, and, if possible, the local headman as witnesses and a mutual statement that the marriage is dissolved.

The divorce is revocable if the parties make up their differences and decide to come together again, before either has married again and if each of them pays *kemaluan* (penalty) to the chief *waris* on the other side. If there has been any intervening marriage, the original pair can remarry without paying any *kemaluan*.

Divorced persons may marry again at once.

The grounds for divorce may be that the other party is lazy, untruthful, bad-tempered, jealous or indulges in ill-treatment as, for example, assault or abuse or has been guilty of desertion, adultery, fornication or incest.¹²

(iii) *Chinese customary divorce.*

Chinese customary divorces are recognised in Sabah. The parties may bring their union to an end by mutual consent. Very often they go to the Commissioner of Labour and Welfare to have some sort of separation document drawn up and signed by the parties and witnesses. Questions relating to the custody and maintenance of children may be discussed and settled and embodied in the separation agreement. After such a separation the parties are free to marry again.¹³

D. THE LAW IN SARAWAK.

The law relating to dissolution of marriage in Sarawak is contained in the Matrimonial Causes Ordinance.¹⁴ This Ordinance does not apply

12. Li Yun Ken, "Status of Women in the Family Law in North Borneo", Paper submitted to the United Nations Seminar on the Status of Women in the Family Law, Tokyo, 1962.

13. *Ibid.*

14. Cap. 94 of the Laws of Sarawak, 1958.

to marriages by Muslim law or custom, native law or custom, Chinese law or custom, Hindu law or custom or other law or custom repugnant to English law for purposes of the definition of marriage 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.¹⁵

(i) *Nullity of marriage.*

The grounds for making a decree that a marriage be declared null and void are as follows:—

- (a) that the marriage is invalid for non-compliance with provisions of section 3 of the Church and Civil Marriage Ordinance¹⁶ in respect of the age of the parties, the relationship of the parties, the marital status of the parties, the mental state of parties, or because of the lack of consent of the parties;
- (b) that the marriage was not celebrated in accordance with the provisions of the Church and Civil Marriage Ordinance, provided that if it appears that there has been any irregularity in form or procedure the court may declare such marriage to be valid if satisfied that the marriage is not void by reason of non-compliance with respect to the matters referred to in section 3 of the Church and Civil Marriage Ordinance;
- (c) that the marriage has not been consummated owing to the incapacity or wilful refusal of the respondent;
- (d) that the marriage is invalid by the law of the place in which it was celebrated.¹⁷

The Church and Civil Marriage Ordinance provides that a marriage shall be void unless —

- (a) both parties to the marriage have reached the age of fourteen years;
- (b) the parties to the marriage are not related to each other within the degrees of kindred set out in the Schedule to the Ordinance or if domiciled outside Sarawak are not related to each other within the degrees of kindred prohibited by the law of the country or domicile;
- (c) neither party to the intended marriage is bound by a valid subsisting marriage to a third person;¹⁸

15. Matrimonial Causes Ordinance, s. 1(2).

16. Cap. 93 of the Laws of Sarawak, 1958.

17. Matrimonial Causes Ordinance, s. 10.

18. In *Lopez v. Lopez* [1947] S.C.R. 22 the petitioner prayed for a decree of nullity of marriage. At the time of the marriage which took place in Kuching, Sarawak.

- (d) at the time of the marriage, 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;
- (e) the parties to the marriage freely consent to marry each other, provided that absence of consent shall not be inferred merely from the fact that one party had been induced by fraud to marry the other.¹⁹

The court may only make a decree of nullity of marriage in any case where the marriage is voidable if the husband is domiciled in Sarawak at the time when the petition is presented. Where the marriage is void *ab initio* the court has jurisdiction if the marriage was celebrated in Sarawak or the husband is domiciled or both parties are resident in Sarawak at the time when the petition is presented; but the court may grant a decree on the petition of the husband or wife, if the husband being wholly or partly of the Asiatic race has been habitually resident in Sarawak for two years or more and on the petition of the wife, if the wife is of race indigenous to Sarawak or would but for the marriage be domiciled in Sarawak or being wholly or partly of the Asiatic race has been habitually resident in Sarawak for two years or more. In making an order of nullity of marriage the court may make it subject to such conditions as the court may think fit to attach.²⁰

(ii) *Dissolution of marriage.*

Any married person may present a petition for dissolution of marriage on any of the following grounds, that is, that the respondent—

- (a) has since the marriage committed adultery;²¹
- (b) has since the marriage committed sodomy;
- (c) has wilfully deserted the petitioner for a period of two years or more without reasonable excuse;²²

according to the rites of the Church of Rome, he was already married according to Hindu custom and that marriage was still subsisting. It was held that a person who according to his own personal law is already validly married cannot contract a valid marriage under the Church and Civil Marriage Ordinance and the marriage was therefore declared null and void.

19. Church and Civil Marriage Ordinance, s. 3.

20. Matrimonial Causes Ordinance, s. 4.

21. In *F. v. F.* [1949] S.C.R. 7 the husband petitioner based a charge of adultery against his wife solely on the fact of the birth of a child to her. If the husband was in fact the father the earliest possible date on which conception could have taken place was 177 days prior to the birth. The child was a full-term infant and the respondent admitted intercourse with another man. It was held that in the circumstances the child could not be that of the petitioner and therefore the petitioner had established a case of adultery against the wife.

22. In *Lau Sui Ngit v. Wing Siew Thin* [1959] S.C.R. 28 the facts were that the parties were married under the Church and Civil Marriage Ordinance in 1956 and shortly afterwards the petitioner deserted the respondent but later returned to him. The respondent deserted the petitioner in January, 1957. The petitioner

- (d) has failed to support the petitioner or the children of the marriage being under the age of eighteen years for six months or more without reasonable excuse;
- (e) has been presumed to be dead by a decree of the court;
- (f) has disobeyed a decree of the court for restitution of conjugal rights;
- (g) has since the marriage treated the petitioner cruelly and by such cruelty has caused substantial physical or mental suffering;
- (h) is insane and has been insane for a period of at least three years immediately preceding the petition;
- (i) is an incurable habitual drunkard, that is a person who habitually takes or uses any intoxicant or any sedative, narcotic or stimulant drug and while under the influence or in consequence of the effects thereof is at any time dangerous or the cause of serious harm or suffering to himself or others or is incapable of managing himself or his affairs;
- (j) is undergoing a sentence of imprisonment of five years or more;
- (k) wilfully refuses to have sexual intercourse with the petitioner without reasonable excuse;
- (l) has communicated a venereal or loathsome disease to the petitioner;
- (m) was at the time suffering from a venereal disease;
- (n) was at the time of the marriage pregnant by some person other than the petitioner.²³

In the case of the last grounds — that is “(m) and “(n)” it is provided that the court shall not grant a decree of dissolution unless it is satisfied that the petitioner was at the time of the marriage ignorant of the facts alleged, that proceedings were instituted within a year from the date of the marriage and that sexual intercourse has not taken place since the discovery by the petitioner of the facts alleged.

brought a petition for divorce for this desertion in August, 1958, that is before the period of two years prescribed by paragraph (c) of section 6(1) of the Matrimonial Causes Ordinance had elapsed. That petition was abortive. The petition was again brought after the period mentioned in the section had elapsed. It was held that the facts showed that the petitioner had continued to affirm the marriage for the statutory period of two years and the fact that the petitioner had brought premature proceedings for divorce did not of itself mean that she had ceased to affirm the marriage so as to interrupt the said period.

23. Matrimonial Causes Ordinance, s. 4(1).

The court may if it thinks fit grant a decree of dissolution of marriage subject to the condition that it shall not be made absolute until further order made by the court within such time not exceeding six months as the court shall fix.²⁴

If the petition is opposed the court may not grant a decree of dissolution of marriage in any of the following circumstances:—

- (a) where the petition is made on the ground of adultery or cruelty and the petitioner has condoned or by wilful neglect or misconduct has condoned to the adultery or condoned the cruelty;
- (b) where the petition is made on the ground of desertion and the petitioner has since the marriage committed a matrimonial offence;
- (c) where the petition is made on the ground of insanity or habitual drunkenness, and the petitioner has been guilty of such wilful neglect or misconduct as has condoned to the insanity or habitual drunkenness;
- (d) where the petition is made on the ground of refusal of intercourse and the respondent if a woman is over fifty years of age or if a man is over sixty years of age;
- (e) where the petitioner has unduly delayed making the petition or prosecuting the suit.²⁵

The court is not precluded from making a decree of dissolution of marriage by reason of the fact that the petitioner has committed a matrimonial offence if it considers that having regard to all the circumstances it is reasonable that a decree should be granted.²⁶

It is provided that any married person may present a petition praying for a decree of dissolution of marriage on the ground that circumstances having arisen which make it reasonable and just that the marriage should be dissolved. If satisfied that circumstances have arisen which in the opinion of the court make it reasonable and just that the marriage should be dissolved, the court may grant a decree on such terms as may be just and subject to such conditions as the court may think fit to attach. Before making such a decree the court shall take into consideration how the interests of any child or children of the marriage or of either party will be affected if the marriage is dissolved. The court may, if for any reason it so thinks fit, grant the decree subject to the condition that it shall not be made absolute until further order made by the court within such time not exceeding six months as the court shall fix.²⁷

24. Matrimonial Causes Ordinance, s. 4.

25. *Ibid.*, s. 9(1).

26. *Ibid.*, s. 9(2).

27. *Ibid.*, s. 6(2)-(4).

In *Ong Kim Yam v. Teo Guan Hua*²⁸ it was held that both the ground of the desertion relied on by the husband in his petition for divorce and the ground of the cruelty relied on by the wife in her cross-petition for a decree of judicial separation had not been proved. There were two children of the marriage, both infants. The court exercised its discretion under section 6(3) of the Matrimonial Causes Ordinance and granted a divorce after proper consideration of the interests of the children. Briggs J. said:²⁹

I am of opinion that by taking everything into consideration this is a case in which I should exercise my discretion and grant a divorce. This marriage has completely broken down. Of that there can be no doubt. That however does not stand alone. The parties have shown by their conduct a total inability to compromise and they have only been living together for a period of eighteen months or so though they have been married as long ago as 1950.... Finally I must consider the position of the two boys. It is obviously to their advantage that the marital position of their parents should be settled. At present this is not the case. If the parties are divorced there is every possibility of the two families living separate and contented lives. This will be of advantage to the children.

It is provided that if two married persons mutually agree that their marriage should be dissolved and if the marriage was celebrated before a civil authority and neither of the petitioners professes the Christian religion, they may present a joint petition accordingly and the court may, if it thinks fit, dissolve such marriage on being satisfied that both parties freely consent and that proper provision is made for the support, care and custody of the children, if any, of the marriage; and the court may attach such conditions to the decree of dissolution as it may deem fit.³⁰

In order to give the court jurisdiction to make a decree of dissolution of marriage it must be shown that the petitioner is domiciled in Sarawak at the time the petition is presented; but the court may grant a decree (a) on the petition of the husband or wife, if the husband being wholly or partly of Asiatic race has been habitually resident in Sarawak for two years or more; or (b) on the petition of the wife, if the wife is of a race indigenous to Sarawak or would but for her marriage be domiciled in Sarawak or being wholly or partly of Asiatic race has been habitually resident in Sarawak for two years or more.³¹

(iii) *Judicial separation.*

A decree of judicial separation may be granted on application on any of the grounds for which a decree of dissolution of marriage can be granted.³²

The provisions of the Matrimonial Causes Ordinance with respect to the defences to proceedings for dissolution of marriage and the circumstances in which a decree for dissolution of marriage may be granted

28. [1959] S.C.R. 102.

29. *Ibid.*, at p. 104.

30. Matrimonial Causes Ordinance, s. 7.

31. *Ibid.*, s. 4.

32. *Ibid.*, s. 8.

or refused apply to proceedings for judicial separation. The Court may make a decree of judicial separation where the husband is domiciled in Sarawak or where both parties are resident in Sarawak at the time when the petition is granted; the court may also grant a decree if it thinks fit (a) on the petition of either husband or wife, if the husband being wholly or partly of Asiatic race has been habitually resident in Sarawak for two years or more or (b) on the petition of the wife, if the wife is of a race indigenous to Sarawak or would but for her marriage be domiciled in Sarawak or being wholly or partly of Asiatic race has been habitually resident in Sarawak for two years or more.³³

In addition any married person may apply to the court for an order of separation on the ground that the respondent (a) has since the marriage committed adultery; (b) has since the marriage treated the petitioner cruelly and such cruelty has caused substantial physical or mental suffering; (c) is an incurable habitual drunkard, as defined in the Ordinance or (d) is suffering from a venereal or loathsome disease. The court if satisfied of the truth of the facts may make an order of separation for such period as it may deem fit and while in force such order shall have the same effect as an order of judicial separation.³⁴

(iv) *Restitution of conjugal rights.*

Any married person may present a petition praying for a decree of restitution of conjugal rights on the ground that the defendant has without reasonable cause deserted the petitioner and the court, if satisfied of the facts alleged, may grant a decree. The court may refuse a decree if in its opinion the petitioner has been guilty of misconduct or neglect as to render the conduct of the respondent excusable. Disobedience to a decree of the court for restitution of conjugal rights is a ground for dissolution of the marriage.³⁵

(v) *Effect of decree of nullity, dissolution of marriage and judicial separation.*

On a decree of nullity being made absolute the marriage shall be treated as null and void as if it had not been solemnised. Where a decree of dissolution of marriage has been made absolute the marriage shall be dissolved and it shall be lawful for the parties to marry again. The effect of a decree of judicial separation is to release the petitioner from the duty of cohabitation with the respondent.³⁶

If a petition for dissolution of marriage, judicial separation, restitution of conjugal rights or nullity is presented by a wife, the court may order that the husband shall pay to the wife, until the suit is disposed of, such alimony as it may deem fit.³⁷

33. Matrimonial Causes Ordinance, ss. 4, 8-9.

34. *Ibid.*, s. 15.

35. *Ibid.*, ss. 11, 6(1)(e).

36. *Ibid.*, s. 13.

37. *Ibid.*, s. 14.

When the court grants a decree of dissolution of marriage, judicial separation or nullity, it may make such other interim or permanent orders as it may deem just, regarding (a) the care, custody, maintenance and education of the children of the marriage, and (b) the payment by the respondent to the petitioner or, in the discretion of the court, by the petitioner to the respondent, of such monthly or weekly sums for maintenance and support as the court deems reasonable. If a co-respondent has committed adultery with the respondent the court may order the co-respondent to pay any actual pecuniary loss suffered by the petitioner or to make such payments to the parties to the marriage or either of them as it may deem just.³⁸

Section 4 of the Law Reform (Miscellaneous Provisions) Act, 1949, which is applicable in Sarawak by virtue of the Application of Laws Ordinance provides that where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage had it been dissolved, instead of being annulled, on the date of the decree shall be deemed to be their legitimate children notwithstanding the annulment.³⁹

(vi) *Divorce according to Native Customary Law.*

The following are the types of divorce recognised by Dayak custom:

- (i) divorce by mutual consent (*Sarak manis* or *Bercherai Kaseh*), evidenced by the offering by one party (husband or wife) and the acceptance by the other of a ring or bracelet (*besua tinchin*). Both parties are required to appear before the penghulu or at least two *tuai rumah*. If the husband or wife accepts the pledge publicly then the divorce is recognised;
- (ii) divorce by payment of fine by either party. A husband can divorce his wife at any time and for any reason on application to his penghulu and by payment of a fine of \$30.00. In the same way a wife can obtain a divorce by payment of a fine through her penghulu. The divorce is known as *Tunggu Tinggal*;
- (iii) divorce by desertion or infidelity by either party. Either party may apply to the District Native Court for a divorce on the plea of desertion and this may be granted by the court if one party has been left by the other and no maintenance money or gift in lieu has been received and the whereabouts of the other party cannot be ascertained; or if the other party is mad or a leper or is serving sentence of imprisonment for more than one year. Divorce may be granted to the injured party by a penghulu if adultery is proved;

38. Matrimonial Causes Ordinance, s. 14.

39. Application of Laws Ordinance (Cap. 2 of the Laws of Sarawak, 1958).

- (iv) temporary divorce or *Sarak belega*. This divorce can be agreed upon by a newly married couple to avert the evil consequence of bad omens. A certain period of separation is allowed at the end of which the parties cohabit again. If the bad omens persist, the parties may prefer a mutual divorce. If after the separation period has expired one party refuses to cohabit though the bad omens have been dealt with, he or she would incur the usual divorce fine.⁴⁰

Among the Orang Ulu, if a couple wishes to divorce by mutual agreement the Tua Kampong or Penghulu shall give them fifteen days in which to think the matter over, after which he can grant their request to be divorced, on payment of the prescribed fine. If a person divorces his spouse the discarding party shall pay a fine, half payable to the Government and half to the injured party; the injured party may report a suspicion that the person is being divorced so that the discarding party may marry someone else; if the discarding party and the suspected person marry within six months of the divorce they shall each be fined. If a woman discards her husband and she has received the agreed *brian* (or marriage gift) the *brian* and engagement gifts shall be returned to the husband, but if there are children of the marriage only half the *brian* shall be returned, the remainder reverting to the children. If a man discards his wife and the *brian* has not been paid, he must pay it forthwith; if the *brian* has already been paid the wife shall retain it. If a man discards his wife while she is pregnant, he shall pay pregnancy expenses to the wife, in addition to the fine; if the wife discards the husband while she is pregnant, she shall be fined and will not be entitled to the pregnancy expenses. If a person discards his spouse, the injured party having no property, the discarding spouse shall pay on account of each child under the age of fourteen years the sum of \$16.00. If a person discards his spouse while the latter is so ill as not to be able to earn a living, the discarding party shall pay \$50.00 to the sick spouse.⁴¹

Among the Dayaks, real or personal property acquired by the divorcing persons before marriage will revert to the original owner. Real or personal property acquired by the divorcing persons after marriage will be divided between them in equal shares. If there is one or more child of the marriage or any other members of the family or relatives of the husband or wife in the room each of them receives an equal share irrespective of age or sex. Members of the family includes the husband, the wife and those living and feeding in the same room but excludes lodgers, who have come from another house, usually to work. It is customary that all property obtained by their common effort must be divided in equal shares. This division of property is known as *bagi laok*. Real or personal property acquired by the children as gifts from either or both of the divorcing parents will revert to those children as it is a disgrace to take away what one has given.⁴²

40. See notes in Laws of Sarawak, 1958, vol. VII, at p. 631; The Tusun Tunggu. Laws of Sarawak, 1958, vol. VII, at p. 620.

41. The Orang Ulu Customary Code of Fines, Laws of Sarawak, 1958, vol. VII, at p. 664.

42. Laws of Sarawak, 1958, vol. VII, at p. 633; A. J. N. Richard, *Dayak Adat Law in the Second Division*, (Sarawak, 1963), at p. 83.

Among the Orang Ulu, the property of a couple divorcing by mutual consent which has been obtained by them while married will be divided equally half to each party.⁴³

(vii) *Divorces according to Chinese custom.*

In *Chan Bee Neo v. Ee Siok Choo*⁴⁴ it was held that section 1(2) of the Matrimonial Causes Ordinance which provides that the Ordinance shall not apply to "marriages by Mohammedan law or custom, native law or custom, Chinese law or custom or other law or custom repugnant to English law" by necessary implication recognises Chinese customary law relating to divorce and matrimonial causes; and therefore the court has power to apply the Chinese customary law in such cases.

It has been held in *Liu Kui Tze v. Lee Shak Lian*⁴⁵ that the High Court has jurisdiction to grant divorces to persons married according to Chinese custom. According to Chinese customary law, divorce may be obtained by mutual consent. When petitions are presented on other grounds the Judge may call in the assistance of one or more suitable persons as assessors to decide whether such grounds are recognised by Chinese custom. In *Chien Mau Ong v. Wong Suok Ing*⁴⁶ it was held that the High Court has jurisdiction to grant a decree of judicial separation where the parties are married according to Chinese custom.

In *Thia Whee Kiang v. Kueh Eng Seng*⁴⁷ the trial Judge had granted a dissolution of marriage on the ground that there was no possibility of a reconciliation. On appeal the order was set aside and Williams C.J. said a married women should not be deprived of her status except on good grounds supported by acceptable evidence. The learned Chief Justice also stated that it would be greatly in the interests of the Chinese community if questions relating to Chinese divorce, judicial separation and the like were regulated by Ordinance, rather than by Chinese custom, as an Ordinance would make for greater certainty in the law.

It has been held in *Wong Chu Ming v. Kho Lieng Hung*⁴⁸ that although the Chinese customary law relating to divorce is recognised in Sarawak the Chinese customary practice relating to divorce is not so recognised. Any Chinese customary practice whereby divorce may be effected by a joint declaration or advertisement in a newspaper without any court process is of no application in Sarawak where all non-native divorces can only be granted by and in accordance with the recognised procedure of the High Court.

43. The Orang Ulu Customary Code of Fines, Laws of Sarawak, 1958, vol. VII, at p. 666.

44. [1947] S.C.R. 1.

45. [1953] S.C.R. 85.

46. [1956] S.C.R. 97.

47. [1955] S.C.R. 75.

48. [1952] S.C.R. 1.

There have been a number of recent cases where modern Chinese custom has been applied in granting divorce in Sarawak. In *Lo Siew Ying v. Chong Fay*⁴⁹ the Court granted a divorce according to modern *Hakka* custom. Evidence was given by a former Registrar of Chinese Marriages that it would be within *Hakka* custom to grant a divorce to a wife who has left her husband of her own free will where he had failed to get her back provided the separation may be considered to be final, that is where there is no possibility of reconciliation. If there were a reason for the wife leaving him it would strengthen the case in her favour. One important factor is whether the husband can support the wife; if the husband cannot support the wife and children adequately and provide them with education then the wife is justified in asking for a divorce from her husband. In *Loh Chai Ing v. Lau Ing Ai*⁵⁰ the Court applied the *Foochow* custom that the failure of the husband to maintain his wife is a ground for granting a divorce; but it was held that the fact that the husband is below normal intelligence is not a valid reason for divorce by that custom. In *Siaw Moi Jea v. Lu Ing Hui*⁵¹ the Court was prepared to apply the *Henghua* customary rules for divorce under which a divorce will be granted if the petitioner can prove that the respondent maltreated her and in addition that he failed to maintain her for a year or more. It was held however that the petitioner and the respondent had come to a settlement under which she had received a sum of money as expenses and they had signed an agreement, which was binding according to custom; and that she had therefore condoned the assaults on her by the compounding. Moreover she did not satisfy the Court that the respondent had failed to maintain her and support her adequately and therefore her petition was dismissed.

In *Chong Foong v. Chan Hwe Seng*⁵² it was held that where the parties are married by Chinese custom the Court in Sarawak has power to make a decree of judicial separation, due consideration being taken of local custom. Briggs J. in that case said:⁵³

Now cases such as this must be governed to some extent by custom. Not however, custom which is outdated, outmoded and is not in line with modern Chinese thought. Custom is always changing; never more quickly perhaps than today among the expatriate Chinese people. I find as proved in this case that the petitioner was not treated as the wife of the respondent would have expected to be treated, that is, she was treated by the parents of the respondent as a menial rather than as the wife of the son of the house; that the respondent knew of this, and may have resented the position; but that he was under the domination of his mother to such extent that he did not stand up for his wife, and behave towards her as a husband should behave towards a wife. Rather he acquiesced in the treatment of his wife accorded to her by his mother.

In *Tang Sui Ing v. Goh Tien Ling*⁵⁴ the petitioner asked for dissolution of her marriage on the grounds of desertion, cruelty, failure to

49. [1959] S.C.R. 1.

50. [1959] S.C.E. 13.

51. [1959] S.C.R. 16.

52. [1959] S.C.R. 33.

53. *Ibid.*, at p.

54. (1964) 30 M.L.J. 406.

maintain and on the general ground that the circumstances which have arisen made it just and reasonable that the marriage should be dissolved. The evidence of the *Foochow* Chinese headman in Sibü was that a marriage contracted under *Foochow* Chinese custom may be dissolved if (1) there is a complete and absolute desertion by one party or the other for at least two years; (2) there is absolute failure on the part of the husband to maintain the wife or children for at least two years or (3) the parties are completely out of sympathy with each other, are incompatible and find it impossible despite genuine efforts, to live reasonably together as man and wife. On the facts, it was held that the husband had failed to maintain his wife and children for more than two years and therefore the wife was entitled to a decree for dissolution of the marriage and the custody of the children.

In *Yung Mong Yung v. Chui Sheng*⁵⁵ the petitioner sought divorce from her husband on the ground of cruelty. The parties were married according to Chinese *Hakka* custom. Evidence was given that there was no custom governing divorce among the *Hakka* community, the modern practice being to leave it to the courts. It was held on the facts that the petitioner had not established cruelty as understood in the usual legal sense of the word and therefore the petition was refused. Mere incompatibility between the husband and wife (in the sense that there were frequent quarrels between them) did not amount to cruelty at law.

In *Kong Nyat Moi v. Leong Sing Chiang*⁵⁶ the wife applied for divorce alleging cruelty, desertion and failure to maintain. The respondent opposed divorce and denied all the allegations and stated that he wanted the wife to return to him. The witnesses called to establish the custom were unable to assist the court concerning the *Khek* customary rules for divorce. They could only say that if both parties agreed to mutual divorce it might be granted. It was held on the facts that the petitioner had failed to satisfy the court that she was entitled to divorce on good grounds according to the customary law of her community and therefore the petition must be dismissed.

(to be concluded)

AHMAD BIN MOHD. IBRAHIM*

55. (1964) 30 M.L.J. 424.

56. [1965] 1 M.L.J. 73.

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