NOTES OF CASES

THE CHINESE CHRISTIAN and THE LAW OF MARRIAGE IN WEST MALAYSIA

Re Ding Do Ca[1]

I

The Federal Court decision in *Re Ding Do Ca* [1] provides an opportunity for re-examining the position of a Chinese Christian in relation to the law of marriage in West Malaysia. The issue was whether a Chinese who was married under the Christian Marriage Enactment [2] could subsequently contract a marriage under Chinese custom, while the "Christian marriage" [3] was subsisting.

The deceased, Ding Do Ca, had married one Madam Wong under the Christian Marriage Enactment. Subsequently, he married one Madam Ngoi according to Chinese custom. The case arose as a result of declaration proceedings by Madam Ngoi and her children claiming that she was the second widow of the deceased and that her children were his lawful children. She claimed that she was equally entitled to share with the first wife in the deceased's estate in accordance with the provisions of the Distribution Enactment.[4] In the Court of first instance, Ali J. granted the declaration. The appeal was dismissed by the Federal Court.

Thomson L.P., with whom the other members of the Court concurred, based his decision on the ground that there was nothing in the Christian Marriage Enactment corresponding to section 4 of the Civil Marriage Ordinance [5] which in terms renders a person who has married under it incapable during the continuance of the marriage of contracting a subsequent union, *if so allowed by his personal law.* According to his Lordship, as regards the Chinese, their personal law is based on race. And since polygamous marriages among the Chinese are recognised by the Courts, there is nothing to prevent a Chinese from taking a second wife even if he has previously contracted a "Christian marriage" which is still in existence.

It is plain that the prohibitive effect of section 4 of the Civil Marriage Ordinance necessarily makes every marriage contracted under the Ordinance a monogamous union.[6] True, there is no express provision in the Christian Marriage Ordinance to this effect. But it does not follow that the Christian Marriage Ordinance cannot be interpreted to have the same effect in the absence of an express provision. There are two not untenable grounds to support this point. First, the epithet "Christian" in the long title, *viz.*, Christian Marriage Ordinance, is not without significance. It might have been intended by the Legislature to denote the concept of Christian marriage as understood in Christendom. If Lord Penzance's definition,[7] though one of the most controversial judicial definitions, may be

1. (1966) 32 M.L.J. 220.
2. Cap. 109, Laws of the Federated Malay States. 1935, repealed and substantially re-enacted by Christian Marriage Ordinance, 1956.
3. The term within inverted commas is used in our discussion as meaning a marriage solemmned in accordance with the Christian Marriage Ordinance, 1956.
4. Cap. 71, Laws of the Federated Malay States, 1935.
5. No. 44 of 1952. Section 4(1) reads:
   "A male person married in accordance with the provisions of this Ordinance, shall be incapable, during the continuance of such marriage of contracting a valid marriage with any third person, whether as principal or secondary wife."
6. The marginal note to section 4 reads: "Marriage to be monogamous."
7. See *Hyde* v. *Hyde* (1866) L.R. 1 P.D. 130 at p. 133.

resorted to, then Christian marriage is monogamous in the sense of excluding other marriages. On the other hand, there is no concept of civil marriage other than that framed by the Civil Marriage Ordinance, it being purely a creature of statute. This may explain the necessity of express provisions as to the nature of "civil marriage." But, as regards Christian marriage, any such express provision might have been regarded as superfluous. (Of course, by now it has become *ex post facto* obvious that it would have been wise had such a provision been included). It may therefore be contended that the absence of a provision in the terms of section 4 of the Civil Marriage Ordinance cannot by itself lend to any inference as to the effect of the Christian Marriage Ordinance. On the contrary, it rather requires an express indication to abrogate from what plainly ought to have been the operative effect of the Christian Marriage Ordinance, *viz*., the importation of the notion of Christian marriage.

Secondly, the Christian Marriage Enactment was passed in 1915, long before the Civil Marriage Ordinance. Although this Enactment would *prima facie* appear to have been intended to govern marriages between persons both or one of whom are Christians, there is nothing in the Enactment to prevent two non-Christians from entering into a "Christian marriage". In addition, the Enactment provides as one of several alternatives the solemnisation of "Christian marriage" by or *in the presence of* a Marriage Registrar.[8] Obviously, this is mainly to accommodate the non-Christians who do not wish to follow a religious ceremony. It further indicates that a "Christian marriage" need not have any religious flavour. All these are consonant with the English law of marriage. The English Courts have always regarded the Christian concept of marriage as the core of their matrimonial law. At the same time, they have extended the meaning of Christian marriage to include other forms of monogamy even among the infidel people.[9] Thus, the Enactment could be one of the instances in which specific parts of the English law were imported into the Malay States by way of legislation prior to the Civil Law Enactment, 1937.[10] One characteristic of the Christian Marriage Enactment, however, is that, at *least so far as the non-Christians* are concerned, the English law of marriage thereby imported is operative on a voluntary basis.[11] Whatever may be the position outside the Enactment, it is submitted that once two persons have voluntarily contracted a "Christian marriage", they are governed by the statute which imposes monogamy to the exclusion of any form of polygamy.

Nevertheless, it is anomalous for persons who are not Christians and who want to form a monogamous union to contract a marriage to that effect yet statutorily entitled "Christian marriage". This may explain Why the Civil Marriage Ordinance was passed in 1952.[12] Its long title reads: "An Ordinance to provide for the solemnisation and registration of monogamous marriages by Registrars of Marriages." In consequence, when the Christian Marriage Ordinance, 1956 [13] re-enacted in substance the Christian Marriage Enactment, the provision in the Enactment for solemnisation by or in the presence of a Marriage Registrar was deleted. Moreover, the 1956 Ordinance prescribes that a Christian marriage may also be solemnised in accordance with the Civil Marriage Ordinance.[14] This further fortifies the view that the nature of a "Christian marriage" is the same as that of a "civil marriage", *viz*., both are monogamous as understood in English Law.[15]

The above submission as to the effect of the Christian Marriage Ordinance has at least one merit. It is in line with the modern mores which lean in favour of monogamy. From this standpoint, the decision in *Re Ding Do Ca* is disquieting. Prior to this case the issue was never before the Federal Court or the former Court

8. Section 4(e).

9. See e.g. *Brinkley* v. *Attorney-General* (1890) 15 P.D 76; *Mong Kucn Wong* v. *May Wong* [1948] N.Z.L.R. 348; *Nachimson* v. *Nachimson* [1930] P. 21.

10. No. 3 of 1937, Federated Malay States. It was extended to the other Malay States in 1951

11. *Cf. Rex* v. *Teo Kim Choon* (1948) M.L.J. 145.

12. No. 44 of 1962, Federation of Malaya.

13. No. 33 of 1956, Federation of Malaya.

14. Section 3.

15. In the former Straits Settlements, the Christian Marriage Ordinance (Cap. 82, Laws of the Straits Settlements, 1936) was repealed and replaced by the Civil Marriage Ordinance (No. 9 of 1940) and the Christian Marriage Ordinance (No. 10 of 1940) passed in the same year, *i.e.* 1940.

of Appeal as to whether a Chinese who has contracted a "Christian marriage" is prohibited from taking a second wife under his custom,[16] though it had been observed in *Re Loh Toh Met* that a Chinese, irrespective of his religion, can contract a polygamous marriage under Chinese custom.[17]

However, the absence of an express account in statute lor the nature of "Christian marriage" could and did give rise to different interpretations. A view which is squarely opposed to our above submission is that the Christian Marriage Ordinance merely deals with the *form* of marriage without any reference whatsoever to its substance or nature. That the marriage is monogamous or polygamous depends on the personal law of the parties.[18] It would, however, appear that Thomson L.P. approached the problem from a middle ground.[19] His view that a "Christian marriage" has not the effect of prohibiting other marriages does not necessarily imply that a "Christian marriage" is a mere form which has no substantive attributes at all. It has been regarded as a monogamous marriage for the purposes of the Divorce Ordinance.[20] This being so, the present dominating judicial view may, perhaps, be stated thus: A "Christian marriage" is monogamous in the sense that each of the parties thereto may resort to the matrimonial relief under the Divorce Ordinance, but it is not monogamous in the sense that it excludes all other marriages. And a man who has contracted a "Christian marriage" can during the continuance of the marriage form other lawful marriage or marriages insofar as his personal law allows him so to do.

It is difficult to see what actually deterred the Court from giving such effect to a "Christian marriage" as to preclude the parties from other marriages. It would appear that the question as to the nature of "Christian marriage" has often been intermingled with a different question relating to the interpretation of section 3 [21] of the Christian Marriage Ordinance (or its forerunner).[22] The latter question is concerned with whether section 3 is merely prescriptive or mandatory. These two questions are separate. Either answer to the latter question is logically compatible with any of the three approaches mentioned earlier as regards the effect of a "Christian marriage". Although, from the standpoint of a purposive inquiry, if one treats section 3 as mandatory, it may appear quite ridiculous not to declare at the same time that a "Christian marriage" is monogamous. The courts have in a number of cases[23] shown a strong tendency in favour of the view that section 3 is merely prescriptive. That is to say, no Christian is compelled to marry under the Christian Marriage Ordinance in order to contract a valid marriage. And the purport of section 3 is merely to prescribe the proper and only form to be followed by parties who "desire that their union shall afterwards be recognised as a valid Christian marriage." [24] This "benevolent" attitude has purportedly (though always tacitly) been justified on the ground that some social injustice or hardship may ensure if the section is to be construed as mandatory. Assuming the ground be true, would it go so far as to justify also a "benevolent" approach in ascertaining the effect of a "Christian marriage"? Or rather, is it at all justifiable that, whereas two persons have voluntarily contracted a "Christian marriage", the Court should still find it too hard on them to declare such a marriage monogamous? This *is,* at least, obvious: Section 3 having been made prescriptive only, whatever justification

16. *Cf. Public Prosecutor* v. *White* (1940) M.L.J. 214.

17. It is noteworthy that in *Re Loh Toh Met* none of the marriages was contracted under the Christian Marriage Enactment.

18 Some grounds in support of this view may by way of analogy be gathered from Bartholomew "Polygamous Marriages" (1952) 15 M.L.R. 36.

19. See his view expressed in *Dorothy Yee* V. *Lee Fah Kooi*, *Re Loh Toh Met* and *Re Ding Do Ca.*

20. *Dorothy Yee* v. *Lee Fah Kooi* (1966) 22 M.L.J. 257.

21. This section reads:

> "Every marriage between persons one or both of whom is or are Christian or Christians shall be solemnised in accordance with the provisions of the next following section and such marriage solemnised otherwise than in accordance shall be void."

22. See. *e.g., Chia Teck Leong* v. *Estate & Trust Agencies* (1947) Ltd. (1939) M.L.J. 118; *Dorothy Yee* v. *Lee Fah Kooi* (1966) 22 M.L.J. 257; *Re Loh Toh Met* (1961) 27 M.L.J. 234.

23. See note 23.

24. *Per* Horne J., in *Chia Teck Leong* v. *Estate & Trust Agencies* (1927) Ltd, (1939) M.L.J at p. 123.

there might be for having done so, the same could not be pressed with equal force so as to vindicate the view that a voluntarily contracted "Christian marriage" is "monogamous" only for the purposes of the Divorce Ordinance. The absence of any indication showing the awareness of the courts of the above consideration has made us feel that the courts might have been unduly influenced by their attitude towards section 3 when they were considering the nature of a "Christian marriage". It is felt that once section 3 is construed as merely prescriptive (in which case the Christian Marriage Ordinance becomes operative on a voluntary basis not only as regards the non-Christians but also as regards the Christians), it is all the more desirable to advocate that public policy[25] demands that the court should attribute to a "Christian marriage" all legal incidents of a monogamous marriage as understood in English law. The role that is being carried out by the Civil Marriage Ordinance ought to have been played and to be shared by the Christian Marriage Ordinance.

II

But, even if we take it that a "Christian marriage" does not preclude subsequent marriages, Thomson L.P.'s judgment in *Re Ding Do Ca* is not free from other objections.

To make lawful a marriage subsequent to a "Christian marriage", the man must be allowed *by law* to contract a polygamous marriage. In the case of a Chinese man, he is allowed to practise polygamy by virtue of Chinese custom which has long been recognised by the courts in the former Straits Settlements as well as in the Malay States. But what if the Chinese is a Christian? Would this take him out of the class of persons who are governed by Chinese custom? If so, what is the law of marriage which governs a Chinese Christian?

In 1956, Thomson J. (as he then was) had categorically stated his opinion in the following words:[26]

> In the Straits Settlements, however, whatever may be the position as regards other races, the only conclusion that can be drawn from the *Six Widows* Case, which is the classical case on the subject, is that as regards Chinese the question of personal law is based on race. The Courts in effect have given judicial recognition to certain customs prevalent among persons of Chinese race irrespective of their domicile or religion.

This view was followed up and further expounded by His Lordship in *Re Loh Toh Met* (although this case did not concern Chinese Christian). And it eventually formed a premiss to his decision in *Re Ding Do Ca.* If Thomson L.P.'s previous observations in *Re Loh Toh Met* and *Dorothy Yee's* case were but *dicta,* his proposition as to the ethnic nature of the personal law of the Chinese has undoubtedly become a rule of law as it now stands after *Re Ding Do Ca.* This is most unfortunate. It may be pointed out that prior to D*orothy Yee's* case, the class of persons who have Chinese customs as their personal law had never been exhaustively defined. In the *Six Widows' Case* the question before the Privy Council was simply whether modification of English law under the Second Charter of Justice, 1826 allowed for Chinese polygamous marriages. That case concerned a non-Christian Chinese. The position of a Chinese Christian was not in issue and was not even discussed. Thus this leading authority for the recognition of Chinese custom in no way precludes further demarcation of the class of persons to be governed by the custom. It is submitted that a, proper criterion for such demarcation should be sought in an inquiry as to the basis on which Chinese custom has been recognised.

In *Khoo Hooi Leong* v. *Khoo Chong Yeok,* Lord Russell of Killowen, giving the opinion of the Privy Council, said:[27]

> The modifications of the law of England which obtain in the Colony in the application of that law to the various alien races established there, arise from the necessity of preventing the injustice or oppression which would ensue if that law were applied to alien races unmodified.

25. It is our belief that monogamy is conducive to a better society Perhaps, this is also the legislative policy underlying the Civil Marriage Ordinance.

26. *Dorothy Yee* v. *Lee Fah Kooi, supra,* at p. 263.

27. [1930] A.C. 346 at p. 355.

It is puzzling to see how the application of this "injustice and oppression" test could support Thomson L.P.'s view. Indeed, justice was not done when Chinese custom was imposed on the Chinese Christians in disregard of their religion. It is inherent in the justification for the recognition of Chinese custom that there should be limitations set to it in action not only with reference to its substance[28] but also to the class of persons whom it affects.

Thomson L.P. adopted an ethnic criterion. Even then, His Lordship was not consistent when he made observation in *Re Ding Do Ca* in respect of the testamentary power of a Chinese Muslim.[29] It would appear that he would exclude Chinese Muslims from the class of persons who are subjected to Chinese custom in matrimonial matters.[30] It is submitted that this should be the position. Although almost all Malays are Muslims, the Muslims are considered as a religious and not as an ethnic group for the application of Muslim law. Thus a Chinese Muslim would be governed by Muslim law even though he is Chinese by race. By a parity of reasoning which is consonant with the criterion we suggested, a Chinese Christian should not be subjected to Chinese custom simply because of his race, but should rather be included in a different class of persons, *i.e.* the Christians, and be governed by the law of marriage that applies to the Christians.

The question, then, is: What law governs the Christians? In the former Straits Settlements where English law was imported under the Second Charter, 1826, the recognition of Chinese polygamous marriages has usually been referred to as a modification of the English law.[31] Accordingly, if it is correct to say that there is no justification for any modification of the English law in the case of Christians, then the English law remains unmodified and applicable to them. In the Malay States, the answer is not easy to find. In *Re Loh Toh Met,* when Thomson C.J. (as he then was) was seeking a basis for the recognition of Chinese custom in the Malay States, he observed that the element of adaptability which is inherent in English law had also been present in the legal system formerly existing in those States.[32] According to his Lordship, it is the principle of adaptation that has operated to accord legal recognition to Chinese custom. Thus the recognition of the Christian law of marriage for the Christians could also be accounted for on the same basis. What remains is a submission that the Christian law of marriage so recognised is not just any general abstraction but is embodied in the English law.[33]

In conclusion, it is our view that the law that governs Chinese Christians in matrimonial matters is one which only allows monogamy to the exclusion of any form of polygamy. A Chinese Christian is therefore not allowed by his personal law to have more than one wife.

III

We have so far concerned ourselves with challenging the reasoning of Thomson L.P. in *Re Ding Do Ca* in coming to his conclusion that Ding Do Ca could validity contract a subsequent marriage. The actual decision, nevertheless, may still be supported (whether desirable or not) on a different basis. It would be recalled that the trial judge found that Ding Do Ca had ceased to be a Christian and had embraced Buddhism before his second marriage. Thomson L.P. however regarded his conversion as having "no bearing whatsoever on questions relating to his personal law."[34] This is, of course, consistent with his view that the personal law of a Chinese is

28. *E.g. Khoo Hooi Leong* v. *Khoo Chong Yeoh, ibid.*

29. To quote him: "And it must be remembered that a Chinese domiciled in this country, unless possibly he has embraced Islam . . . has complete freedom of testation." *Re Ding Do Ca, ante*, at p. 223.

30. To quote him again: "As regards persons professing Islam the position is tolerably clear." *ibid.*, at p. 224.

31. Strictly speaking, in most cases, it is merely a limitation on the application of English law rather than a modification thereof. However, it may be said to be a modification as regards the rule that all lawful wives of a Chinese man who died intestate are equally entitled to the share which the Statute of Distribution originally allocates exclusively to the one and only lawful wife in a monogamous marriage.

32. *Re Loh Toh Met, ante*, at p. 237.

33. This submission can be supported in view of the legal history in the Malay States.

34. *Re Ding Do Ca, ante*, at p. 223.

based on race irrespective of his religious belief. But if our view as to the personal law of a Christian is accepted, then the fact that Ding Do Ca ceased to be a Christian between the dates of his two marriages would become material. For the actual decision might be supported on the ground of conversion. It may be argued that since Ding Do Ca ceased to be a Christian, his personal law was no longer that of a Christian. If he had been converted to Islam, he might, on the recent authority of *Attorney-General of Ceylon* v. *Reid*,[35] have been entitled to contract a valid polygamous marriage notwithstanding his earlier subsisting marriage. In that case, the respondent who became a Muslim after he had contracted a Christian monogamous marriage was held by the Privy Council not guilty of bigamy when he married a Muslim woman as his second wife a month after his conversion. The decision, however, appears to have been based on a very wide principle, *viz*., that in a country where persons are governed by different personal laws in matrimonial matters, a man has an inherent right to change his religion and personal law and so to contract a valid polygamous marriage notwithstanding an earlier subsisting marriage. Thus, it may further be argued by way of analogy that when Ding Do Ca became a Buddhist he changed his personal law from that of a Christian to Chinese custom. There being no established body of rules in Buddhism relating to marriage, a Chinese Buddhist is governed by Chinese custom.

It may be noted that it is beyond the intended scope of our note to consider whether *Reid's* case ought to be followed here. Its desirability has been challenged.[36] It should also be pointed out that the above discussion has not dealt with many other relevant problems. The distinction between a Chinese and a Chinese Christian may be a great practical difficulty. Does a Chinese Christian cease to be a Christian on marrying a second wife? What constitutes an abandonment of the Christian religion? Can the concept of conversion be used when a Chinese Christian simply abandons his religious belief? At the same time, intermarriages between Christians and non-Christians may also pose difficult problems. In a country like Malaysia, questions of conflict are bound to arise as between the different laws governing different groups of persons. What has been said in Private International Law may not be of help when dealing with questions of conflict of laws which are of intranational in nature *viz*., questions which concern conflicts between *laws co-existing and enforceable within one and the same jurisdiction.* No consideration of the law of marriage for any group of persons is complete without understanding it in the context of conflict of laws. The state of law relating to marriages in West Malaysia is, indeed, urgently in need of research, careful meditation and stock-taking.

WONG SIONG YONG

K. L. KOH.

35. [1965] A.C. 720.

36. See Koh, *"Attorney-General* v. *Reid* — the Malayan Experience" (1966) M.L.R. 88.