SOME PROBLEMS OF CONFLICT OF LAWS IN WEST MALAYSIA AND SINGAPORE FAMILY LAW

The family law of West Malaysia and of Singapore is similar in that each has to cater to populations composed of broadly the same ethnic elements, that is leaving aside the aboriginal communities in Malaysia. Many differences can of course be discerned in the patterns of family behaviour, Singapore being more urban, more compact and more uniform in life style than Malaysia. These dissimilarities are superficially reflected in the main difference between the two countries' family law from the view point of the conflict of laws. For whereas in Malaysia there are a number of systems of personal law under any of which people may fall Singapore has since 1961 abandoned the principle that family matters are governed by personal law, and has brought all non-Muslim inhabitants under the single system of the Women's Charter.[1] Thus, whereas in Malaysia there frequently arise cases of *interpersonal* conflict, that is, cases in which persons cross the personal law boundaries when they marry or divorce, in Singapore this is much more rare since 1961, the possible interpersonal conflict between Muslim law and the Charter[2] being often averted by the conversion of the non-Muslim party to the Muslim faith. Both Malaysia and Singapore have the usual cases of *international* conflict, that is cases involving a foreign element — where one of the parties has a foreign domicile or where the relevent events took place under a foreign legal system. The peculiar problems of Singapore in this area arise from the strange wording of the Women's Charter; those of Malaysia occur when the legal system in question has no system of personal law.

It can be seen then that in dealing with Singapore and Malaysia a study of both international and interpersonal law conflict is necessary. The material for such a study will be English and local decisions and local statutes. One problem facing the courts has been to decide the extent

1. The term "personal law" can be used to mean merely the law of the domicile. In this article however unless the contrary intention appears it will be used to indicate the law that is personal to a person because of his race or religion or because he has chosen it and which governs family matters, that is for instance Muslim, Chinese, Hindu or Christian law. The Family law situation in Malaysia is complicated. In West Malaysia exist the customary laws of Chinese and Hindus, the federal laws governing the whole of West Malaysia dealing with Christian and civil marriages and with judicial divorce. Muslim law is administered by a different system of courts and is regulated at a State level by State legislation. Each state in East Malaysia has its own separate system of customary law, statute law and Muslim law. This article is confined to the family law of West Malaysia and the terms "federation" and "Malaysia" should be construed accordingly.
2. It was possible for persons of Singaporean domicile to marry under personal law outside the Women's Charter until the amendment to s. 21 of the Women's Charter in 1967. See Wee Kim Seng in (1972) 14 Mal. L.R. pp. 93-95.

to which principles established in English decisions should apply to cases of interpersonal conflict. Most writers confine the use of traditional conflict rules laid down by the English courts to cases involving a foreign legal system and exclude their application to cases involving different legal systems within the same territorial entity. Certainly these principles were developed by the English courts for cases involving a foreign element and one writer at least has suggested that the two spheres should be kept separate because traditional conflict rules cannot be appropriately adapted to deal with personal law conflicts.[3] In fact the local courts have on one occasion attempted to fit English principles into the law. The following is an introductory account of conflict of laws in Malaysia and Singapore. It deals with selected problems in family law and does not attempt to be comprehensive in scope or exhaustive in detail.

THE CONCEPT OF MARRIAGE

Singapore has since 1961 attempted to introduce monogamy for its non-Muslim inhabitants, but in West Malaysia monogamy remains voluntary although it may soon become compulsory.[4] In both countries polygamy is permitted for Muslims. In view of the polygamous element of the population it is not surprising that the local courts early accepted a definition of marriage that included polygamy, deciding for instance that the word "wife" in an English statute must be read to mean "wives".[5] Thus was English law modified to meet local circumstances. For the English have been increasingly hampered by the nineteenth century definition of marriage (the voluntary union of one man and one woman for life to the exclusion of all others)[6] which excluded both potentially polygamous[7] and actually polygamous marriages from its scope. The American view, now endorsed to some extent by English law, that included potentially polygamous marriage within the scope of monogamy is surely preferable.[8] The English view seems little more than repugnance to the institution of polygamy, for in practical terms there seems little purpose in excluding a couple from the benefits and obligations of monogamy on the ground that the husband may take another wife although he has not done so. This right only becomes relevant if he exercises it.

3. See for instance Bartholomew, G.W. "Private Interpersonal Law" 1 I.C.L.Q. 325; Hooker, M.B. "Private International Law and Personal Laws: A Note on the Malaysian Experience" (1968) 10 Mal. L.R. 55. Certainly notions like the *lex fori* and the *lex loci contractus* make little sense in interpersonal conflicts. See Bartholomew, *op. cit.*, pp. 325-327.

4. Report of the Royal Commission on Non-Muslim Marriage and Divorce Laws, Kuala Lumpur, 1971. See especially Draft Bill, ch. 4.

5. E.g. *Re Lao Leong Ann*, (1893) 1 S.S.L.R. 1; *Choo Eng Choon*, *Choo Ang Chee* (1908) 12 S.S.L.R. 120, especially pp. 191-192 *per* Hyndman-Jones, C.J.

6. Per Lord Penzance in *Hyde* v. *Hyde* (1866) L.R. 1 P. & D. 130.

7. The exclusion of potentially polygamous marriage rests on the case of *Re Bethell* (1888) 38 Ch.D. 220.

8. See, for instance, Bartholomew G.W. (1964) I.C.L.Q. 1022, 1073 and in (1952) 15 M.L.R. 280. One case in point is *Royal* v. *Cudhay Packing Co.* 190 N.W. 427.

It may now be queried whether or not the introduction of monogamy in Singapore has affected the earlier interpretation of the concept of marriage; whether, that is, "marriage" should be confined to monogamy, as either the English or American courts define it. It is clear of course that if a statute applies to both Muslims and non-Muslims, the word "wife" must be interpreted as "wives".[9] However, since polygamy is permitted to the former, what of a statute passed after 1961 and applying only to non-Muslims ? If either the American or the English definition of "wife" is adopted, those secondary wives married before 1961, the validity of whose marriages is recognised by s. 166 of the Charter and who are covered by it, would be excluded from the scope of the Charter; and if the English interpretation is adopted, the first wife of a valid [10] potentially polygamous union would also be excluded. Not only would this produce an unequal situation — a marriage recognised for some purposes and not others — but it would also work injustice to inhabitants of Singapore. Furthermore such an interpretation would also exclude the valid polygamous marriages of persons from other neighbouring countries who come to Singapore — as is the case in England, and as has proved undesirable there now that Asian immigrants are so many.[11] The English interpretation would be even more inappropriate in a region in which polygamy is still widely practised. Of course it is true that the intention of Parliament governs in questions of statutory interpretation and therefore if the legislature makes absolutely clear that for instance only one wife is to benefit or suffer under the law in question it is the duty of the courts to give effect to that interpretation. This discussion however concerns those cases in which the legislation has not made itself clear. In such a case it is submitted that "wife" should be interpreted as the wife of a valid marriage. The only issue then will be whether the marriage in question is valid under conflict of law rules. One further point should be made. If this approach is used it will be for the law of the domicile of the parties to decide whether or not a union is a marriage. So it will decide, for instance whether or not "marriage" includes polygamy (for, if not, its domiciled persons will lack the capacity to contract a polygamous marriage) or whether a *de facto* union is a marriage. The fact that we do not recognise *de facto* unions within our territory or for our own domiciliaries would be no reason for denying them recognition when by the conflict of law rules they would be valid. To invoke public policy to deny these unions recognition is totally inappropriate in a modern world in which the need for mutual tolerance is so emphasised. In conclusion it cannot be emphasised too strongly that the many English cases on the recognition of polygamy are of no help in interpreting local statutes and should therefore be ignored.

9. E.g. Inheritance (Family Provision) Act 1966. Compare, for instance, Singapore Statutes, Revised Edition 1970, Cap. 30, s. 10, s. 11, s. 12 with Cap. 35 s. 1(2), s. 3; see also Cap. 5, s. 120.

10. How such a marriage may be valid will be shown below, see pp. 187-190.

11. For an account of the gradual change in interpretation, see Cheshire and North, *Private International Law,* 8th ed. 1970, pp. 289-308. See also *Iman Din* v. *National Assurance Board* [1967] 2 Q.B. 213. For English legislation covering the wife of a potentially polygamous marriage, see e.g. Family Allowances Act 1965, s.17(9).

THE CONFLICT RULES WITH RESPECT TO MARRIAGE

According to the conflict of laws rules a marriage will be valid if it complies firstly with the formal requirements of the place of contracting and secondly with the essential requirements of the antenuptial domicile of both parties. In addition it seems that the law of the forum will not enforce a marriage which was contracted in contravention of its own law; so, in other words if the *lex loci celebrationis* is also the *lex fori* the parties must also comply with the essential requirements there.[12] Compliance with the essential requirements of the *lex loci celebrationis* would therefore seem unnecessary. Academic writers however seem on the whole to favour the contrary view, that compliance with the *lex loci celebrationis* should be necessary,[13] but the only case in point is against them.[14]

There is one Malaysian case, *Inderjit Kaur* v. *State Advocate General*[15] which is an interesting example of the application of their views. In that case a Sikh woman domiciled in India married there a Sikh man who was probably domiciled in Malaysia who had already one wife. The marriage took place in contravention of the Sikh Marriage Act which made a condition of a valid marriage that neither party was already married. The parties in the court case agreed that if the Act applied to them the marriage would be invalid. The court rejected counsel's argument that the Act only applied to persons domiciled in India and held that it applied to all marriages within India irrespective of domicile. The relevance of conflict rules was overlooked by the court. Can this decision nonetheless be justified in terms of the conflict rules? It is unlikely that the rule in the Act could be characterised as a formality. On the other hand if it was a question of capacity a straightforward reading of the Act makes clear that the wife's incapacity is to marry when she is already married, not an incapacity to marry a married man. Thus counsel should have said that the Malaysian court would merely look to whether he had capacity under the law of his domicile and the incapacity imposed on him by the Indian Act would not be recognised extraterritorially; and thus the marriage should have been valid. One way to avoid this unsatisfactory conclusion is to change the conflicts rule to read that the marriage must be essentially valid by the antenuptial domicile of each party and the fact that the Indian law of the woman's domicile would regard it as invalid would be sufficient to make it so in a Malaysian court. Yet this is no more satisfactory if one accepts that conflict rules should tend to validate marriages. It is unfortunate that the judge did not clarify his approach.

12. See Dicey and Morris, *Conflict of Laws,* 8th ed. pp. 267-268.

13. Fleming, 4 Int. L.Q. pp. 389-393.

14. *In the Will of Swann* (1817) 2 V.R. (1 E. & M.) 47. Dicey quotes *Breen* v. *Breen* [1964] P. 144 in support of the contrary principle. However, with respect, the case is of little help. The issue was whether or not a marriage celebrated in Ireland between two English domiciled persons was void by Irish law for taking place during the lifetime of the husband's former wife. The question of whether it was relevant for an English court to ascertain Irish law was never raised and the court assumed without discussion that it was, and held eventually that the marriage was *not* void by Irish law.

15. (1959) 25 M.L.J. 251.

Formalities: The Common Law Marriage

In a number of English and Commonwealth cases it has been held that where compliance with local form is impossible parties may marry in accordance with the old common law form,[16] that is by swearing to take each other for life in monogamous marriage. Dicey and Morris explain the impossibility in the following manner:

> The impossibility may arise either because such local forms of marriage as exist are completely alien to the social and cultural environment to which the parties belong; or because the form provided by the local law is one which it is morally or legally impossible for the parties to use.[17]

Strictly speaking these are cases in which no appropriate local form exists. Another situation is when the form exists but compliance with it is rendered impossible because of war, floods, and the like.

In *Isaac Penhas* v. *Tan Soo Eng* [18] the parties married in Singapore in the presence of a third party, the Chinese wife worshipping according to Chinese custom and the husband, a Jew, according to his custom. There was no statutory form of marriage available to them since neither party was a Christian and the Christian Marriage Ordinance was the only statute in existence, the Civil Marriage Ordinance being introduced a few years later. Arguably they could have married under Chinese custom, the wife being a Chinese, but whether the marriage would then have been potentially polygamous is difficult to decide.

The court in this case concentrated on deciding whether or not the parties had in fact intended a monogamous marriage, an element of the common law marriage, and whether it was necessary for a priest to officiate. The case is therefore not very helpful in deciding the two main issues that would confront the Malaysian courts faced with an alleged common law marriage. Firstly was the common law marriage form received into Malaysia as a local form, albeit one only available in exceptional circumstances ? By the Civil Law Ordinance 1956 English law was introduced into the Malay States "so far as the circumstances of the States and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary". Penang and Malacca received English law as colonies. It is most likely therefore that the courts will hold it part of the law of the Federation.[19]

Presuming it was received law when is it still available ? It is sometimes suggested that the question *is* then whether the common law marriage can be used whenever there is an available but no *com-*

16. See *R. v. Millis* (1844) 10 Cl. & F. 534; *Caterall* v. *Caterall* (1847) 1 Rob Ecc. 580; *Beamish* v. *Beamish* (1861) 9 H.L.C. 274; *Wolfenden* v. *Wolfenden* [1946] p. 61; *Limerick* v. *Limerick* (1863) 32 L.J. P. 92.

17. Dicey and Morris, *op. cit.,* p. 239.

18. [1953] A.C. 304.

19. In fact of course the courts in the Federation have not been unduly concerned about the strict reception of given rules of common law but have applied the English law whenever they felt it appropriate. It was assumed in *Chua Mui Nee* v. *Palianappan,* [1967] 1 M.L.J. 270, that the common law applied there.

pulsory form of marriage or only when there is no *available* form.[20] However the mere fact that marriage under the monogamous form provided is not compulsory does not lead to the conclusion that persons who want a monogamous marriage can marry outside it. It must be recalled that the common law marriage has become a form intended for the exceptional situation, and it is difficult to imagine how parties married at common law could prove that marriage under the Civil Marriage Ordinance would have been objectionable to them since that Ordinance has enacted the secular, monogamous, freely consenting marriage which formed the common law marriage.[21] The parties' inability to comply with the minimum age or any other requirements in the Ordinance is of course not reason enough to ignore it.

For policy reasons it is preferable that persons marry under the Civil Marriage Ordinance with all the safeguards it contains, with publicity and with registration than privately under the common law. For these reasons it is suggested that the common law marriage must be confined to cases in which there is no local form available and to those exceptional cases in which compliance with the Civil Marriage Ordinance would be fraught with insuperable difficulties. The former will be rarely applicable since the Civil Marriage Ordinance is a general marriage law which is available to all persons (except Muslims) who are prepared to be monogamous. The only case which falls outside both the Civil Marriage Ordinance and the Christian Marriage Ordinance is probably that of a Muslim man marrying a Jewess, undoubtedly a rare occurrence.

An interesting local development similar to the common law notion is to be seen in *Chua Mui Nee* v. *Palaniappan.*[22] In that case the husband, an Indian, had married in India. He then took a Chinese woman as his wife in Malaya. The marriage took place according to Hindu rites but it was alleged that not all the formal requirements were complied with. The judge held that this did not render the marriage invalid, since this was a marriage between a Hindu and a Buddhist, not a Hindu marriage, and therefore the law to govern its validity should not be Hindu law but the *lex loci,* that is presumably the common law. It could not however be a common law marriage because it was not monogamous. The judge therefore relied on dicta in *Carolis de Silva* v. *Tim Kim*[23] as the *lex loci:*

> The law will presume a contract of marriage from evidence of cohabitation with the habit and repute of matrimony without any, or with imperfect informalities for its commencement.

(That was a case involving the marriage of a Singhalese and a Chinese woman under an imperfect ceremony. A child was born to the marriage).

20. For an interesting statement on this, see Sir Benson Maxwell in *R.* v. *Willans* Leic. 66 at p. 81, cited in *Loh Toh Met* (1961) 27 M.L.J. 234 at p. 242.
21. See for instance *Ruding* v. *Smith* (1821) 2 Hag. Com 371 but note that the parties here as in the other English cases are foreigners to the country.
22. [1967] 1 M.L.J. 270.
23. (1905) 9 S.S.L.R. app. p. 8.

It is difficult to know the scope of this principle. Firstly it is submitted that there is no justification for treating it as an attempt to lay down a new conflict rule that compliance with the formalities of the *lex loci celebrationis* is not necessary for a valid marriage if there is cohabitation and repute. This is not to say that such a rule might not be desirable but merely that the court did not raise conflict rules at all. Its concern was merely to decide the formal requirements for marriage under the law of the Federation.

Given that the cases raise questions of local family law rather than of international conflicts the scope of the principles laid down are still to be decided. Both cases involved interpersonal law marriages. Is this then confined to a rule of interpersonal conflicts, that where parties from different personal law systems marry no formalities as such are required and that cohabitation and repute alone are necessary? It is certainly understandable that in these mixed marriages the parties may not know and find it impossible to find out what formalities they should observe. However in both cases it was regarded as crucial that children had been born and that they would be illegitimate if the marriage was declared invalid. If that is the basic policy behind the decision there seems no reason to confine the rule to mixed marriages but it should be applied whenever there is a kind of marriage the invalidity of which renders children illegitimate, irrespective of whether there would be illegitimate children of the marriage in question. This is of course not the case with marriages taking place under the Christian Marriage Ordinance or the Civil Marriage Ordinance.

Compliance with Essentials

For a marriage to be valid each party must have capacity to contract by the law of his domicile, which in those countries having systems of personal law will be the personal law system applicable to him.[24] The initial problem in the conflict of laws is to differentiate the question of formalities from the question of essentials (or capacity). It has been suggested that the difference lies in the consequence of the non-observance of the rule in question. If non-observance renders the marriage void the rule is an essential; if it renders it voidable or does not affect the validity of the marriage itself it is a formality. However it is submitted that this is true only in so far as it reflects a more basic distinction between factors which relate to the substance of the contract like for instance personal impediments and factors which regulate the method of making the contract.[25] The former which relate to personal status are logically matters for the law of the domicile, while the latter, which relate to the conduct of the ceremony of marriage, are logically for the place of celebration to decide. This distinction has not been articulated by the courts, who have seemed uncertain as to

24. On the relationship between the law of the domicile and personal law, see Thompson, C.J. in *Loh Toh Met* (1961) 27 M.L.J. 234 at p. 236 and Bartholomew, G.W. *op. cit.,* p. 335.

25. See, adopting this approach, Sutton, C.J. in *Maria Hertog's* case (1951) 17 M.L.J. 164, at p. 168 and Thompson, L.J. in *Loh Toh Met* (1961) 27 M.L.J. 234 at p. 245.

the exact basis for such a distinction. They have for instance ruled that parental consent is a formality,[26] when clearly so long as the requirement applies only to minors it will be a personal impediment on the minor who is contracting marriage. Perhaps a rule that provided for registration of parental consent on the marriage certificate rather than a rule which prevented the grant of a marriage licence without such consent would be considered a formality. This distinction between substance and method is observed in the conflict of laws rules relating to commercial contracts.

(i) *The Ability to Take a Second Wife as a Question of Capacity*

There are a number of questions of capacity, the requirement of a minimum age and of free consent for instance, and under the Muslim law the incapacity of a girl to marry a non-Muslim. The ability to take a second wife should also be considered a question of capacity — a rule which prohibits one who marries from taking a second wife is clearly not related to the ceremony of marriage.

Dicey and Morris state two rules which are relevant here. The first is that the character of the marriage is determined by the *lex loci celebrationis* and the second that a person whose domicile does not permit polygamy does not have the capacity to take a second wife.[27] Cheshire and North prefer the law of the domicile or the law of the matrimonial domicile to the *lex loci celebrationis.* However they recognise there is one important defect in the use of either of these connecting factors. If the law concerned (viz, matrimonial domicile or law of the domocile) permits monogamy and polygamy the only way in which the character of the marriage in question could be ascertained would be by reference to the form under which it was contracted.

The respective positions of Dicey's two rules can thus be readily explained. Obviously a man permitted a plurality of wives by the law of his domicile (which might in fact be the personal law recognised in the law of his domicile) is not incapacitated from contracting a monogamous marriage and if he does choose to do so his domicile regards him as bound by that system and as having lost his previous capacity. In short the law of his domicile gives him a choice whether to enter into a monogamous or a polygamous marriage. Thus the law of the domicile must characterise the marriage as monogamous or polygamous. In order to do so it must necessarily look to the *lex loci celebrationis*[28] for any provisions that will indicate whether marriage under the relevant form is monogamous or polygamous.

If the law of the domicile permits only monogamy then a potentially polygamous marriage contracted in another State may either be considered invalid by the law of the domicile or treated as monogamous. Similarly if a person, after contracting a valid potentially polygamous marriage,

26. Dicey and Morris, *op. cit.*, pp. 275, 283.

27. Cheshire and North, *op. cit.,* p. 295.

28. See for instance *Mehta* v. *Mehta* [1945] 2 All E.R. 690.

becomes domiciled in a country which prohibits polygamy he will no longer have the capacity to take a second wife and so in essence his first marriage will become monogamous.[29]

The capacity to marry either monogamously or polygamously results from the fact that the law of the domicile recognises the existence of different systems of personal law. In countries with a multi-racial, multi-religious population as in South Asia this is to be expected. Equally it should be more surprising to find it in a racially homogeneous, Christian country like England.[30] The consequences of imperialism were not sufficiently felt by the English courts to present the need for modification of their view that marriage means monogamy, and that an Englishman has no capacity to contract a potentially polygamous marriage.[31] One can understand the Victorian attitude that considered English social institutions as superior to those of the "uncivilised" colonies. Such views are not acceptable today. There would seem little reason to prohibit a person from opting out of the religious-moral value system of his domicile into another, provided of course that his conversion is genuine[32] and perhaps that he lives overseas. That the English law is inherently adaptable enough to admit of personal law systems was the basis of early judgements from the Straits Settlements.[33] It would be interesting to speculate whether or not that adaptability might not be put to the test within England itself by the influx of Asians to England.[34] Of course if the notion of domicile really corresponded to that of one's home the act of a man in marrying under customary law would in itself be a very strong indication of his change of domicile and the anomalies of the failure of English law to recognise personal law would be avoided.

(ii) *Capacity to Take a Second Wife in Singapore and Malaysia*

Having stated the conflict of law rule that capacity to marry includes the capacity to take a second wife it is necessary to ascertain whether or not a domiciled Singaporean has such a capacity.

29. *Ohuchuku* v. *Ohuchuku* [1960] 1 All E.R. 253.

30. Originally in England the ecclesiastical courts gave effect to the personal law of the Jews. The secular courts which in 1857 superceded the ecclesiastical one limited this recognition to questions of formality. See Bartholomew, G.W. "Application of Jewish Law in England" (1961) 3 Mal. L.R. 83 at p. 100.

31. *Re Bethell* (1888) 38 Ch.D. 220.

32. The justiciability of the genuineness of religions conversion was recognised by the Privy Council in *Skinner* v. *Skinner* (1897) L.R. 25 I.A. 34. See generally Siraj, M., "The Legal Effect of Conversion to Islam" (1965) Mal.L.R. 95, and Bartholomew in 1 I.C.L.Q. at p. 338 *et. seq.*

33. See, for instance, *Chulas & Kachee* v. *Kolsom* Leic. 462; *Khoo Hooi Loong* v. Khoo *Chong Yeok* [1930] A.C. 346 at p. 353; *Ngai Lan Shi v. Low Chee Neo* (1921) 14 S.S.L.R. 35; *Loh Toh Met* (1961) 27 M.L.J. 234 at p. 239.

34. One step in this direction is the Martimonial Proceedings (Polygamous Marriages) Act, 1972. On the intransigence of the Australian courts as regards the aborigines see, Nygh, P.E. "The Common Law Approach to Interpersonal Law in Marriage Relations" in LAWASIA, Family Law.

The prohibition on polygamy laid down at length in section 4 of the Charter[35] applies by virtue of section 3 to all those in Singapore and all those domiciled in Singapore but resident outside. The original wording applied to all those "resident in Singapore" and all those "domiciled in Singapore who are resident outside Singapore". Section 4 could be interpreted as a transitional provision intended to catch all persons who were domiciled or resident in Singapore in 1961 and to prohibit polygamy for them. All subsequent residents and domiciliaries would be caught by s. 3 so long as their second marriage took place in Singapore but they could not be guilty of bigamy and would have capacity to take a second wife so long as they left Singapore to do so. It cannot have been the contemplation of the legislature to differentiate in so marked a fashion between pre-1961 and post-1961 residents or domiciliaries. The emphasis in section 4 on the date of coming into operation of the Charter was a somewhat clumsy means of preserving the validity of pre-Charter polygamous marriages and at the same time ensuring that all subsequent ones would be covered. The second interpretation is that the relevant time for applying section 3 is the date of the first marriage. This is compatible with the wording which lays down an incapacity attaching to the person from the time of the first marriage. The third interpretation is that the relevant date is that of the second marriage since that is the action which attracts the penalty envisaged by section 6 and which brings section 4 into operation.

If the relevant time is that of the first marriage then under the present wording of section 3 anyone who marries in Singapore or anyone domiciled in Singapore but resident elsewhere at the time of the first marriage will be incapable from that time of taking a second wife wherever that second marriage may take place. He will also be guilty of bigamy under the Singapore Penal Code. In other words the legislature has made a clear statement that marriage under the Women's Charter is monogamous. Whether or not the person is domiciled in Singapore he will have lost his capacity to take a second wife by virtue of his having contracted a monogamous marriage. In other words this

35. S. 4.— (1) Every person who on the date of the coming into operation of this Ordinance is lawfully married under any law, religion, custom or usage to one or more spouses shall be incapable, during the continuance of such marriage or marriages of contracting a valid marriage under any law, religion, custom or usage with any person other than such spouse or spouses.

(2) Every person who on the date of coming into operation of this Ordinance is lawfully married under any law, religion, custom or usage to one or more spouses and who subsequently ceases to be married to such spouse or all such spouses, shall, if he thereafter marries again, be incapable during the continuance of that marriage of contracting a valid marriage with any other person under any law, religion, custom or usage.

(3) Every person who on the date of the coming into operation of this Ordinance is unmarried and who after that date marries under any law, religion, custom or usage shall be incapable during the continuance of such marriage of contracting a valid marriage with any other person under any law, religion, custom or usage.

(4) Nothing in this section shall affect the operation of Part III of this Ordinance in relation to marriages solemnized in Singapore after the date of the coming into operation of this Ordinance.

is an application of the first of Dicey's principles cited above. The person domiciled and resident in Singapore who makes his first marriage outside Singapore will be unable to remarry under the Women's Charter but will be able to remarry outside Singapore.

Under the third interpretation the place and nature of the first marriage is immaterial but if the party remarries in Singapore or if he becomes domiciled in Singapore although still resident outside at the time of the second marriage it will be void and he will have committed bigamy. However this interpretation makes section 11, which refers to marriages in Singapore, redundant and it has two undesirable consequences. Firstly it enables a person domiciled in Singapore and resident here, which is after all the very person who should first be covered by the prohibition of polygamy, to evade it merely by crossing the causeway to contract his second marriage; in short it makes the ability of domiciled Singaporeans to take a second wife depend on their residence and makes residence outside Singapore the qualifying factor instead of residence inside Singapore. This defect is sufficiently serious in itself to make this interpretation undesirable. Secondly it means, and this is the necessary corollary of the first point, that marriage under the Women's Charter is not necessarily monogamous, a factor which will be seen to have some importance. The first of these undesirable consequences applies in a similar fashion to the second interpretation under which a domiciled Singaporean can marry polygamously so long as he contracts *both* marriages outside Singapore. Not only does the second interpretation seem best to comply with the intention of the drafters it also involves fewer anomalies than either of the other interpretations. For these reasons it should be adopted by the courts and will be used in the ensuing discussion.

It is therefore true to say that a person who marries under the Women's Charter and a domiciled Singaporean resident outside Singapore is incapable of contracting a second marriage. It is not true to say therefore that the law of the domicile prohibits polygamy since those persons living in Singapore and domiciled here can marry polygamously if they cross the causeway to contract all their marriages.

Finally it is submitted that in view of the express provisions of the Charter *re Bethel,* in which it was held that a domiciled Englishman has no capacity to contract a potentially polygamous marriage, is inapplicable to Singapore. Because the Women's Charter only imposes an incapacity on taking a second wife and is not directly concerned with the nature of the first marriage one can in fact marry in polygamous form. Secondly, as has been explained, it is not true as a general rule that a Singaporean has no capacity to take a second wife. Added to this of course a domiciled Singaporean can marry polygamously within Singapore if he becomes a Muslim and thereby enables himself to come within the jurisdiction of the Shariah courts.

The issue was also raised above whether a domiciled Singaporean can take on a personal law which may involve polygamy or whether like the English he is compelled to follow the monogamous system.

The anaysis of the Women's Charter has made it evident that the assumption of a personal law system is in theory possible for a domiciled Singaporean who evades the Women's Charter by marrying outside Singapore. It seems, for reasons given above, that his wives will be able to inherit because *ex hypothesis* the marriages are valid.

The position in Malaysia is of course more complex because of the diversity of personal law systems. It is not proposed to deal with the question alone but as part of the broader study of the Malaysian law of conflicts but it will be noted initially that the Civil Marriage Ordinance is successful in imposing monogamy on all people who choose to marry under it.[36] One other general point should be made. The Civil Marriage Ordinance provides in section 3(1) that "all marriages solemnised in accordance with this Ordinance shall be good and valid in law for all purposes whatsoever". Does this exclude the operation of the conflict rules as to capacity? It is difficult to know what other interpretation could be placed on the words unless they were just meant to cover incapacity under personal law. There is however no justification in the wording for distinguishing between a capacity that is foreign and one that is local, although under another personal law system, thus it seems that the Civil Marriage Ordinance does exclude the operation of the conflict rules of capacity. It is to be noted however that the new draft uniform Family Law for West Malaysia contains no such provision.

CONFLICT OF LAWS IN FAMILY LAW OF THE FEDERATION

In his article on the subject, Hooker has specified three kinds of conflict situation.[37]

1. The traditional private international law situation where there is a conflict between two systems of municipal territorial law.

2. The opposite situation of conflict between two systems of personal law within one territorial entity.

3. Intermediate situation where the private international law and personal law conflict.

All three situations are applicable to the Federation. Hooker submits that in the third area the international conflict rules are inappropriate and that the rules of personal law should be preferred to them. This is of course to eliminate the question whether or not the law of the domicile permits a person to take on a personal law and to judge its validity purely by reference to the personal law rules.

This question will now be examined through the cases.

36. *Cf.* s.4(1) & (2).

37. *Op. cit.*, fn. 3, at p. 67.

(a) *Cases Involving both an International and Personal Law Conflict*

The first case of interest here is *Maria Hertogh's* case.[38] Maria Hertogh, whose father was at all times domiciled in Holland, was abandoned in Indonesia during the war and brought up as a Muslim there. She was married according to Muslim law in Singapore to a Muslim man when she was aged fifteen. Subsequently the Singapore courts had to adjudicate on the validity of her marriage. Under Dutch law a girl had no capacity to marry at fifteen except with certain permissions which had of course not been obtained. Both courts decided that the marriage was invalid but the judges' reasoning differed. The judges in the Court of Appeal used the orthodox approach starting with the conflict principle that capacity is governed by the law of the domicile and that therefore the marriage was invalid, and they added that even under Muslim law the marriage would be invalid since personal law required validity by the law of the domicile. One judge on the other hand used a more ingenious argument. In his view the marriage was valid if valid by the Muslim law. Muslim law required validity by the law of the place of contracting which included the conflict principles. Having opted for one conflict principle, namely that Muslim law should govern he then used it to introduce another conflict principle.[39] One can see from the judgments a certain amount of confusion. No doubt the forceful arguments of counsel that the Muslim law, not the law of the domicile, determined the validity of marriage and that by Muslim law the place of residence not of contracting was relevant contributed to their confusion.[40] Another international conflict principle, the rule in *Sottomayer* v. *de Barros (No. 2)*[41] was briefly introduced by the judges only to be discarded as of no use in the present case since neither party was domiciled in the forum.[42]

In the judgments in this case can be seen both approaches, one using international conflict principles, the other personal law alone. There is certainly nothing commendable in the results of the former approach which subjected her to the law of a country with which she had had no connection herself and which thereby disregarded the law of the community into which she had been assimilated and of which she regarded herself as a member. Had Muslim law alone been applied and applied correctly, this result would have been avoided. However this case demonstrates the major imperfection in the concept of domicile that it does not perfectly respond to the notion of one's home but is hampered by technical rules like that of dependent domicile. Had it done so *Maria Hertogh* would have been held domiciled in the Federation instead of in Holland and the decision of the court would have been the converse and as such most acceptable. Ideally it may be preferable

38. (1951) 17 M.L.J. 12, 164.

39. *Ibid.*, p. 15 *et. seg., per* Brown J.

40. See Sutton J., *op. cit.*, at p. 169.

41. (1879) 5 P.D. 94.

42. *Ibid* ., pp. 170-171, 174.

to improve that concept than to abandon it. It is to be noted that none of the judges perceived what it is submitted was the correct question to ask, namely whether the Dutch law permits its domiciliaries to contract a marriage under the personal law of another country. The court merely presumed that the Dutch marriage law must automatically apply to all marriages of Dutch persons irrespective of where it was contracted and under what law. It is of course unlikely, for the reasons advanced above with respect to England that the courts would have already developed law to cope with marriage of its own domiciliaries under personal law.

An even more unsatisfactory decision is that of *Martin* v. *Umi Kelsom.*[43] A marriage was celebrated under the Christian Marriage Enactment in Selangor between a Muslim girl domiciled there and an Englishman domiciled in England. The Muslim girl had under Muslim law no capacity to marry a non-Muslim. Subsequently the husband became domiciled in Selangor and in divorce proceedings the validity of the marriage was put in issue. Thompson, C.J. had no hesitation in using international conflict rules in this case. With a complete misuse of the principle in *Sottomayor* v. *de Barros* and of local statutes he held that the girl's incapacity was foreign and should therefore be ignored. This was on the basis that the notional forum was England and that Malaysian (incorporating Muslim) law was foreign.[44] It is submitted that the correct approach would have been to use the normal rule of international conflicts, this case involving persons domiciled in different states, and to require each to have prenuptial capacity. The law of the girl's domicile would then say that this question was governed by personal law and in that personal law would be found that incapacity in question. Her marriage would thus be held invalid.

A case involving a European is of course increasingly atypical. More interesting are the early case involving Chinese people from China and Indians from India and the possibility more recently of Chinese from Taiwan, Hongkong and Australia. If for instance a domiciled Australian man of Chinese race were to contract a Chinese customary marriage in the Federation should the courts just be content with the proposition that Chinese have a personal law based on race and that a marriage contracted in accordance with the requirements of that personal law is valid ? This would be similar to having held in *Hertogh's* case that the girl was a Muslim and that therefore a marriage contracted in accordance with Muslim law would be valid. In other words the court would be ignoring the relevance of the law of the domicile. Suppose that the law of the domicile would not recognise the marriage as valid. Then a limping status would be created. This would of course be more serious if it were the male who had the foreign domicile since in that case the couple would now be domiciled there. If the Malaysian law submitted all questions of personal status, divorce, status of the children and succession to personal law that would be workable. However the Malaysian law follows international conflicts in this area

43. (1963) 29 M.L.J. 1.

44. For a full criticism of this case see Jackson in (1963) 5 Mal.L.R. pp. 388-392.

and submits these questions to the law of the domicile. Because of the extent to which domicile is entrenched in the law and the fact that the legislative trend is towards unification of personal law under a single statutory system it is suggested that the concept of domicile must be retained. The unsatisfactory decision could be averted or at least minimised in two ways. Firstly the courts in looking to the law of the domicile should ask not whether or not this person could have married in this way within the territory but whether or not the law of his domicile will permit him to contract a marriage under personal law if he lives elsewhere or more simply whether it will regard this marriage as valid in essentials. Secondly the concept of domicile should be more realistically applied so that in many cases in which a party chooses to marry under personal law he will be found to have acquired a domicile of choice in the country concerned. If as a result it will not be automatically possible for a person to contract a valid marriage by ignoring the law of his domicile and marrying under personal law that is consonant with general principle. For the law of the domicile is itself a personal law, the law with which the person concerned is most intimately connected. The fact that any particular person may in fact qualify because of his race or religion for another personal law system is not reason for allowing it to override the claim of the law of his domicile. So for instance a person brought up in Australia who also happens to be a Chinese should not be able to take advantage of the system of polygamy among the Chinese of Malaya. It is conceded however that unless the rigid notions of domicile of dependence of minors and domicile of origin are modified there will be cases of hardship, when persons have genuinely adopted the ways of a foreign country but are unable to marry under it.

(b) *Interpersonal Conflicts*

(i) *Marriage under personal law*

The main interest of the conflict lawyer in the area of interpersonal law is to ascertain the principles which the courts or legislatures have used to resolve conflicts between personal law systems. However this area of the law has not yet been developed. The law is still very young in the Federation and the courts have been occupied in settling the more fundamental questions of requirements for a valid marriage under the various systems. In this area therefore there is much room for speculation.

One of the first issues which the courts have settled is that the personal law for the Chinese is based on race; a problem which has caused them some concern is whether or not there is a personal law based on profession of the Christian religion. How these matters have arisen and the problems which they have involved will be seen in the analysis of the cases.

A conflict situation arises when one party crosses the personal law boundaries when he marries. Chinese custom and the various Indian customs based on religion do not seem to impose an incapacity on a member of their group from marrying outside it[45] but Muslim law imposes incapacities on both man and woman. It was argued in *Loh Toh Met*[46] that the Straits Settlements Christian Marriage Ordinance 1898 had imposed a compulsory form of marriage on all Christians, that in other words there was a personal law based on Christianity to which all Christians belonged and which prohibited them from marrying under other law. On a literal wording of section 3, this does certainly seem the correct interpretation.[47] However Thompson, C.J. had no hesitation in deciding that this section did not refer to capacity to marry but merely to the invalidity of Christian marriages celebrated otherwise then under the Christian Marriage Ordinance and therefore was intended not to restrict the rights of the Christian Chinese to marry under his personal law. The provision can not of course be interpreted differently for a Chinese than for a European or an Indian. He also drew attention to the fact that the legislation had no rules on capacity and concluded that therefore the Act did not attract any substantive law but merely dealt with form. The judge then quoted with approval the Privy Council statement that religion does not constitute a bar to marriage under customary law:

> If a woman be free to contract marriage soluta and the man according to his personal laws is also free solutus and the particular class of marriage or union is in the abstract recognised by the law of the land it may well be that the religious obstacle is no bar.[48]

The present Christian Marriage Ordinance is different since it does deal with questions of capacity. Does that fact alter this situation[49] It is submitted that it should not. It is undesirable to impose a compulsory form of marriage on a person merely because he happens to

45. The inability of a Hindu to marry outside his caste and to make a monogamous marriage were argued to be incapacities of an Indian Hindu in *Chetti* v. *Chetti* [1909] P. 67 but Sir Gorell Barnes rejected the argument for lack of evidence then holding, on the authority of *Sottomayer* v. *de Barros (No. 2)* that this incapacity would not at any rate invalidate a marriage contracted in England with an Englishwoman.

46. (1961) 27 M.L.J. 234. *Rex* v. *Teo Kim Choon* (1948) 14 M.L.J. 145, a decision contrary to *Loh Toh Met,* was not mentioned by Thompson, C.J. although he had noted it in *Dorothy Yee's* case.

47. S. 3 provides "every marriage between persons one or both of whom is or are a Christian or Christians which is solemnised otherwise than in accordance with the provisions of this Ordinance shall be void".

48. *Khoo Hooi Leong* v. *Khoo Hean Kwee* [1926] A.C. 529, at p. 543.

49. Before the amendment of the Straits Settlements Divorce Ordinance (Cap. 84, 1936 Edition) in 1939, by which profession of Christianity was removed as a requirement to petition for divorce, the case for a personal law based on Christianity was much stronger. Cp. also the situation in India. See for instance *Lopez* v. *Lopez* I.L.R. 12 Cal. 706; *Saldanha* v. *Saldanha* A.I.R. 1930 Bom. 105.

be a Christian. To do so would also be contrary to the general situation in the Federation which is to enable parties the choice of a system under which to marry. To deprive Chinese Christians of their right to marry according to Chinese custom would be to invite popular disapproval. Furthermore it would enable litigants to argue that a customary marriage was invalid because one party was a Christian at the time. To establish this would be problematic particularly if the person was dead at the time of the dispute. Even if adherence to religious practices rather than actual belief is the criterion of belonging to the Christian faith, proof is not free of difficulties. For these reasons it is submitted that Thompson's interpretation should be applied to section 3 of the current Christian Marriage Ordinance. It is quite compatible with this view that those who marry under the Ordinance should be unable to take a second wife. The Christian Marriage Ordinance imposes a personal law system not on all Christians but merely on those who marry under it, as is the case with all other kinds of marriage (except Muslim marriage) in the Federation. What then of a Christian Indian or a Christian European domiciled in the Federation? It seems that they are free to contract polygamous marriages so long as they can bring themselves within one of the polygamous systems. As Thompson, C.J. said in *Dorothy Yee's* case:[50]

> apart from any question of capacity but otherwise irrespective of any law of the domicile parties may voluntarily agree to contract and then proceed to contract a marriage of any sort which is recognised by the law of the locus contractus.

A different question, one as to the scope of Chinese customary law, is whether or not Chinese custom permits a marriage between a non-Chinese and a Chinese or whether the principle that for the Chinese personal law is based on race works restrictively as well as expansively in order to preclude non-Chinese ? There are decisions in which secondary marriages with respectively a Eurasian[51] and a Japanese[52] were held valid under Chinese custom and the court suggested in the latter case that the only relevant factor was whether or not the Chinese forms were complied with.

The next problem is whether the rule that a person must have capacity by the law of his domicile is used in interpersonal conflicts by referring to personal law rather than to the law of the domicile. For instance a Muslim girl is incapable by Muslim law of marrying a non-Muslim. If she were to do so by marrying under the Christian Marriage Ordinance or under personal law the courts, if they were to apply the international conflict rule, would hold the marriage invalid. From the comments of Thompson in *Dorothy Yee's* case one might suspect

50. (1956) 22 M.L.J. 257 at p. 263.

51. *Khoo Hooi Leong* v. *Khoo Hean Kwee* [1926] A.C. 529.

52. *Re Will of Tay Geok Teat* [1934] S.S.L.R. 88.

that this would not be the case. He said in the course of a long judgment. "Nor does the fact that his personal law restricts him to monogamy prevent him from entering a polygamous marriage providing the locus actus permits it".[53]

This statement seems merely question begging, unless the locus actus is outside the Federation for if the locus actus means just the forum this of course includes personal law. If the suggestion was that the extent of recognition of personal law is controlled by statute this does not help very much since in practice it just means the obvious, that an Act of Parliament will override personal law.[54] Thompson's judgment is unsatisfactory on this point. It seems in principle a good reason to follow the international conflict rules. To ignore the incapacity imposed by personal law is to deprive it of its effect.

In *Martin* v. *Umi Kelsom* the court said that it would have made no difference to their judgment if Martin had been domiciled in the Federation at the date of the marriage. In other words if the case had been one purely of interpersonal conflict they would have nonetheless used the international conflict principle in *Sottomayor* v. *de Barros (No. 2)* in order to refuse to give ecect to a "foreign"[55] incapacity imposed by Muslim law. It is certainly true that Muslim law is a different legal system and if that is all that was meant in *Sottomayor* v. *de Barros (No. 2)* the principle could of course be applied in order to disregard the Muslim law incapacity if one substituted for *lex loci celebrationis* the system of personal law. It takes little reflection however to understand how unrealistic this principle would be from a social point of view. Since it implies the unimportance of the foreign law it would strike at the autonomy of the Muslim law system. For the same reason it is submitted that the solution offered by Hooker, to refuse to give effect to the incapacity on the ground that to give it recognition and effect would be unconscionable,[56] is impractical, however much one may disapprove of the particular Muslim law in question.

Another possibility, argued by one writer is that by analogy with the matrimonial domicile theory adopted by Cheshire and recently applied in the English case of *Radwan* v. *Radwan,*[57] the husband's personal law alone is relevant and an incapacity of the wife should therefore be ignored.[58] Whether or not the analogy is to be taken to the extent

53. (1956) 22 M.L.J. 257, 266.

54. *Cf.*, for instance, s. 3, Civil Marriage Ordinance.

55. Dicey's word, not that used in the case itself.

56. Hooker, *op. cit.*, fn. 3, at p. 61.

57. *Radwan* v. *Radwan.* "*The Times*", July 18th 1972, p. 6.

58. Farran, pp. 169-171. He cites the Indian case of *Lucas* v. *Lucas* (1904) 32 Calcutta 87 as support for his view.

of ignoring the husband's incapacity if the parties marry into the personal law system of the wife is not made clear by the writer. However any principle which has behind it an assumption of male predominance has little to commend it. In the absence of directions from the legislature the courts should give clear effect to incapacities imposed by personal law whether they result in a marriage under custom or a marriage under statute being declared invalid. Otherwise they would be detracting from the principle which they have purported to establish, that questions of marriage are governed by personal law.[59]

(ii) *Conversion from One Personal Law to Another*

The next problem which has bothered the courts is the validity of a man's second marriage, often contracted after religious conversion. An early case *P.P.* v. *White*[60] provided some clear principles on this. An Englishman probably domiciled in the Federated Malay State married his first wife under the Christian Marriage Enactment and then took a second wife under Muslim Law, both he and the woman having converted to the Muslim faith before hand. He was convicted on a charge of bigamy. Horne, J. held that this was a Christian marriage as defined in *Hyde* v. *Hyde* and that the parties were bound by one of the legal incidents of that status, the inability to take a second wife. He then concentrated on the main issue put before him, whether or not the husband could divest himself of this obligation by changing his personal law. He held that he could not. Underlying this decision is a principle that on marrying one chooses a personal law system to govern one's marriage (for in many cases a person will have more than one system of law from which to choose) and that one is bound by that decision and cannot later have recourse to rights under any other personal law system in order to evade these obligations. The judge also considered the point that the Muslim marriage would be valid by Muslim law. While deciding that it would not be valid he did suggest that even if it had been he would have decided the same way. This sounds the most sensible and acceptable approach. Finally, one factor in this case is that both parties converted to Islam just before marrying. Their conversion, therefore, may not have been genuine but have only been effected to evade the requirement of monogamy imposed on the husband. How far this influenced the judges is not known.

59. Section 71 of the Straits Settlement Christian Marriage Ordinance, 1898, stated that "nothing in this enactment shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter". Although conflict principles are not in this enactment but arise from common law the section indicates a general intention to preserve the recognition of incapacities of personal law. However this section is absent from the Christian Marriage Ordinance currently in force in Malaysia and also from the Civil Marriage Ordinance. On personal law incapacity in India see Fyzee, *Outlines of Muhammedan Law,* 2nd ed. p. 81.

60. (1940) 9 M.L.J. 214. See also *R.* v. *Davendra* 1 M.C. 51.

In 1953 the Privy Council dealing with a similar situation arising in Ceylon decided differently.[61] It found no provision in the statute governing his first marriage, the Marriage Registration Ordinance, that prohibited a man, converting to another personal law, from enjoying the rights of a plurality of wives under that law. The Ordinance did not *state* that it provided for monogamous or even Christian marriage although section 53 *implied* it and furthermore it seems from the general system of marriage law in Ceylon that this was intended.

It would be attractively easy to distinguish the cases on the ground that they are dealing with different statutes. However the difference goes far deeper than this to the policy which made the Privy Council decline to follow the P.P. v. *White* reasoning. In the earlier case the judge implied an incapacity to take a second wife, in the other the court was not prepared to do so because they felt that this imposed an unrealistic straitjacket in a country of many religions and races in which conversion from one personal law to another is to be expected. The Privy Council said that there was an inherent right to change personal law and that this could only be abrogated by statute.[62] The court was concerned with upholding the policy of freedom of religion and did not feel prepared to make a value judgment on polygamy, the consequence of their policy. Those who follow P.P. v. *White* would argue that freedom of religion is upheld so long as a person can choose before marrying which system of personal law to enter and that the prohibition on taking a second marriage may be the logical consequence of that choice. To allow a religious conversion to affect that pre-existing status is to take the principle of freedom of religion too far, to bring insecurity into the marriage and to make the law unduly complicated. To have only one system of law to govern the matrimonial relationship seems preferable.

Closely similar themes are found in the case of *Dorothy Yee* and *Ding Do Ca*.[63] In the former it was held that marriage under the Christian Marriage Ordinance is "under a law providing that or in contemplation of which marriage is monogamous" and that therefore the court had jurisdiction under the Divorce Ordinance to pronounce a divorce. In the latter it was held that marriage under the Christian Marriage Ordinance was not monogamous in that it did not incapacitate persons married under it from taking a second wife under their personal law. Therefore a Chinese man after marrying under the Christian Marriage Ordinance could then exercise his personal law rights to take other wives under Chinese custom. To a large extent the decision was based on a comparison of the Civil Marriage Ordinance, which expressly prohibits polygamy for those married under it, and the Christian Marriage Ordinance which does not do so expressly. Like the law in *A.-G.* v. *Reid* the Christian Marriage Ordinance imposes a personal law system which contemplates monogamy, but does not prevent a person from contracting

61. *Attorney-General for Ceylon v. Reid* [1965] A.C. 720. See a discussion of this case and *P.P.* v. *White* by Koh Kheng Lian in 29 M.L.R. 88.

62. [1965] A.C. 720, at p. 727.

63. [1966] 2 M.L.J. 220.

out of it either by religious conversion or by reversion to customary law. Like the Privy Council in *A.-G.* v. *Reid* the local court was concerned to uphold the freedom to exercise personal law rights and was therefore not prepared to imply a prohibition on the taking of a second wife.

There is of course a vital distinction between *A.-G.* v. *Reid* and *Ding Do Ca* which makes the latter less justifiable. This case does not deal with religious conversion and therefore cannot be justified on the ground of religious freedom. To enable a Chinese to exercise his personal law is not a necessary consequence of the decision that for the Chinese personal law is based on race but is simply an unwarranted refusal to restrict the use of personal law rights. Presumably also, since only one party need be a Christian, if the man was a Hindu, he too could remarry under his personal law.[64] In both of these circumstances marriage under the Christian Marriage Ordinance is potentially polygamous.

There are passages in the judgment of Thompson L.P. in *re Ding Do Ca* which suggest that the Christian Marriage Ordinance imposes no personal law.[65] It is certainly a consequence of his decision that it does not in his view impose a personal law based on the concept of Christian marriage for if that were the case a Chinese Christian, once having chosen to marry under it could not opt out unless perhaps he ceased to be a Christian. However the consequence of marriage under the Christian Marriage Ordinance is to attract a volume of law dealing with the rights of husband and wife and of the children, divorce and nullity, legitimacy which do not apply to customary marriages. It does therefore impose a secular marriage personal law based on monogamy. Thompson, C.J. said in *Dorothy Yee:*

> "Marriage is a matter of status arising from a contract the terms of which are determined by law. The parties agree to marry and when that contract leads to the solemnisation of the marriage then each of them acquires the status of a married man or woman with all the incidents which the law attaches to that status".[66]

The Christian Marriage Ordinance then imposes a system of personal law, monogamous in contemplation but imposes no prohibition on a married person from contracting out of it to marry under another personal law.[67] The only way of rationalising *Dorothy Yee* with *Ding Do Ca* is to rely on the very narrow distinction between a law that *contemplates* monogamy and one that *requires* it. Under the former the wife has the right of exclusive consortium of the husband and she is entitled to the normal remedy, divorce, if that is broken. There are not however the additional consequences as under a law which requires

64. That is if the Hindus in Malaysia are polygamous. See as regards Ceylon Tamil Hindus *Paramesuari* v. *Ayadurai* (1959) 25 M.L.J. 195.

65. [1966] 2 M.L.J. 220, at p. 222.

66. (1956) 22 M.L.J. 257, at p. 262.

67. Cp. with this the Civil Marriage Ordinance which has an express prohibition on taking another wife. Thus a man married under this Ordinance has an incapacity by his personal law to take a second wife.

monogamy — that the second marriage is void and the husband guilty of bigamy. This means in effect that the husband can marry again without having to divorce the wife, which he may find difficult as well as expensive, and can leave it for her to decide whether she wishes to divorce him. This seems to be the main practical result of *Ding Do Ca.* Seen in this light the decision has nothing to commend it.

It is to be noted also that by an amendment to the Women's Charter in 1967 the application of *Reid's case* and *Ding Do Ca* in Singapore is removed. The incapacity to take a second wife applies to any Muslim who contracts a marriage which is registered or deemed to be registered under the Women's Charter or which was contracted under a law providing that or in contemplation of which marriage is monogamous.[68]

CONFLICT PROBLEMS IN DIVORCE AND NULLITY

The separate but related situations in divorce and nullity are firstly the granting of decrees by the local courts and secondly the recognition of decrees granted by foreign courts. The questions of jurisdiction and choice of law arise in both cases.

Decrees Granted by Local Courts

A. Singapore Jurisdiction

Divorce and nullity are means of terminating a monogamous marriage. However under the Women's Charter jurisdiction to grant divorce and nullity decrees extends to all marriages which are "registered or deemed to be registered" under sections 166 and 167 of the Charter. These sections deal respectively with the registration of valid pre-Charter marriages and the voluntary registration of marriages that are not "void" under the Charter. The purpose of section 167 was presumably to allow persons whose marriage was deemed to be registered to have the extra safeguard of actual registration if they wished. It was probably with women in mind that the section was introduced. The purpose then of the two sections is to permit pre-Charter marriages,

68. See s. 3(2) thereof. Since this part of the article was written the new draft Family Law Act for West Malaysia has appeared. If this Bill is enacted as it stands it will introduce compulsory monogamy for the future marriages of non-Muslims. Its provisions on this point are identical to those in the Women's Charter and therefore all the same problems will be encountered. This seems most unfortunate since these problems could be so easily avoided by slight changes in wording. Since the validity of all marriages contracted prior to the marriage law will be unaffected by it the interpersonal conflicts discussed and problems raised in this article will remain relevant for some years until the courts cease to be confronted with pre-Uniform Law marriages. Interpersonal conflict problems can still arise. Not only is the Muslim personal law untouched by the new Act, so also are the customs of the aborigines in West Malaysia. Also East Malaysia is not covered, the Constitution having reserved a large degree of autonomy to Sarawak and Sabah in respect of family law. Unfortunately it is not possible at this juncture however to give an account of possible problem areas.

albeit polygamous ones, the benefit of the dissolution procedures in the Charter. However section 167 fails to specify that only pre-Charter marriages are included thus giving rise to the possibility that persons not covered by the prohibition of polygamy in sections 3, 4 and 11 (whose marriages are therefore not "void" under section 167) will be able to register and get matrimonial relief for their post-Charter polygamous marriages. The only way to avoid such an interpretation is to construe the opening words of section 167 "notwithstanding the provisions of section 166" as demonstrating the intention to link the two articles in the way suggested above. Thus section 167 must be read as co-extensive with section 166 and therefore confined to pre-Charter marriages. Unfortunately these opening words are equally as capable of the opposite interpretation. This then is one of the unfortunate loopholes of the Charter which, it is to be noted is absent from the draft Family Law Act in Malaysia.[69]

Apart from this special jurisdiction over polygamous marriages, jurisdiction for divorce and nullity extends over marriages contracted under a law "providing that or in contemplation of which marriage is monogamous". Despite the unfortunate words of Thompson, C.J. in *Dorothy Yee's* case[70] it is submitted that this does not refer to the contemplation of the particular parties at the time of marriage but rather the contemplation of the law under which they married.[71] In short, it must be a law that provides expressly or by implication for monogamy. The third limb of the jurisdictional requirements, namely common domicile for divorce, and common residence for nullity, accords approximately with the common law position. At common law domicile is always a sufficient basis to grant either a nullity or a divorce decree since the law of the domicile has the prime right to decide questions of status. It is unfortunate therefore that the Charter makes residence the sole basis of jurisdiction for nullity decrees. It seems apparent from the wording of section 80 "Nothing herein shall authorise the court to make any decree of divorce [nullity] except..." that the legislature has intended the grounds therein to be exhaustive, and that therefore it is not possible to use section 79 to enable common law principles to supplement the statute. The common law rules on jurisdiction in nullity proceedings distinguish between void and voidable marriages and have allowed residence of the respondent[72] and in the case of void marriages the fact of celebration within the country[73] to suffice. The Singapore provisions are therefore more restrictive than the common law. While they avoid the technical complexities of the common law they may cause hardship most particularly because a person domiciled but not resident in Singapore will be unable to get a nullity decree.

69. See Draft Bill, s. 4.

70. (1956) 22 M.L.J. 257, at p. 267.

71. On the problems of this interpretation in relation to the dissolution of Chinese customary marriages contracted between 1961 and 1967, see Wee, K.S. *loc. cit.* pp. 95-98.

72. *Russ* v. *Russ (No. 2)* (1962) 106 Sol. Jo. 632; *Magnier* v. *Magnier* (1968) 112 Sol. Jo. 233.

73. *Padolecchia* v. *Padolecchia* [1968] P. 314.

The supplementary jurisdictional provisions for divorce and nullity are to be found in section 126 of the Charter which are taken from English legislation.[74] This section provides:

> (1) Notwithstanding anything to the contrary in section 80 of this Ordinance the court shall have jurisdiction to entertain proceedings by a wife under this Part of this Ordinance, although the husband is not domiciled or resident in Singapore if
>
> *(a)* the wife has been deserted by the husband [or deported]... and the husband was before the desertion or deportation domiciled in Singapore; or
>
> *(b)* 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.

Presumably the phrase "although the husband is not domiciled or resident" is to be read disjunctively so that domiciled refers to divorce and resident to nullity proceedings. The alternative interpretation, that the husband must be neither domiciled nor resident in Singapore before section 126 can operate, leads to the absurd result that a wife resident in Singapore must show that her husband is not resident here if she seeks a divorce and not domiciled here if she seeks a nullity decree when these factors are not relevant in either case in establishing jurisdiction in the main jurisdictional section. Section 126 is designed to overcome the injustice of the dependent domicile of the wife by which she can become domiciled in a country to which her husband has gone but with which she has not the same connection. So far as nullity jurisdiction is concerned the dependent domicile of the wife is of course not relevant as a justification for the different treatment for the wife. In effect the section means that a wife resident in Singapore for three years or a wife who is deserted can get a nullity decree wherever a husband can only do so under section 80 if his wife is resident here also. This seems unfair on the husband as it assumes that it is always he who leaves the matrimonial home or at least he who can afford to chase the wife to wherever she has taken up residence.

Choice of Law

Section 126(2) ousts choice of law for proceedings commenced under this section with respect to divorce. Since domicile is the necessary basis for jurisdiction in divorce under the main section the court will always be applying the law of the domicile in using Singapore law to grant a divorce. No choice of law problem arises. The same is not true with respect to nullity however because residence is the jurisdictional ground. It is here then that choice of law is relevant. A marriage is invalid according to the conflict of law rules if firstly the formalities of the place of celebration and secondly the rules of capacity of either party's prenuptial domicile are not complied with. The first is specifically provided for as a ground for nullity in section

74. See Matrimonial Causes Act 1937 s. 13; Law Reform (Miscellaneous Provisions) Act 1949, s. 1.

82(e) of the Women's Charter. The second is not although most of the factors which affect capacity are listed as separate grounds for nullity. For instance section 92 provides:

> *(b)* that the parties are within the prohibited degrees of consanguinity or affinity, whether natural or legal;
>
> *(c)* that the former husband or wife of either party was living at the time of the marriage and the marriage with such former husband or wife was then in force;
>
> *(d)* that the consent of either party to the marriage was obtained by force or fraud in any case in which the marriage might be annulled on this ground by the law of England.

In accordance with common law conflict rules these grounds should be taken to refer to the relevant law of the domicile rather than to Singapore law. However the legislator has in section 91(l)(d) expressly overridden the conflict rules by his exclusive reference to English law.[75] There seems no reason why the other grounds cannot be used in accordance with conflict rules to cover foreign law. If for instance a person domiciled outside Singapore has married within the prohibited degrees of the law of his domicile, although not the law of Singapore, he should be able to get a nullity decree in Singapore under section 91(l)(b). What if the converse situation arises? If for instance a marriage is valid by the law of the parties' prenuptial domicile it may nonetheless offend the prohibited degrees or rules of consent of Singapore law. For it to be annulled on this ground would seem most unjust particularly if the parties have never acquired a Singapore domicile. If the marriage was actually contracted in Singapore in contravention of Singapore law the Singapore court will probably annul it but otherwise there seems no reason why it should.

It can be seen that section 91 should not be construed as comprehensive— since the section omits marriages of parties one of whom at least is below the minimum age (which by virtue of section 9 are void), it would be difficult so to construe it — so that the court can apply the normal conflict rule of capacity and therefore apply any incapacity found in the foreign law of the domicile in order to grant a nullity decree. Of course, on the authority of *Sottomayor* v. *de Barros (No. 2)* such foreign incapacity could not be the ground for a nullity decree if the marriage took place in Singapore between persons one of whom was domiciled in Singapore. English academics raise the additional possibility of a nullity decree's being granted on the ground available under the law of the parties' domicile, although not under the law of the forum.[76] In view of the primary right of the law of the domicile to determine questions of status this seems both sensible and desirable although one cannot see the local courts doing this for many years to come. Other grounds provided for are impotence and wilful refusal to consummate, grounds which make the marriage voidable.

75. This section is clearly a reference to English domestic law. Does it then render inapplicable a decision like *Szechter* v. *Szechter* [1971] 2 W.L.R. 170 by which the question of consent was referred to the parties' antenuptial domicile.

76. Dicey and Morris, *op. cit.,* p. 359 *et. seq.;* Cheshire and North, *op. cit.,* 392 *et. seq.*

It is suggested by Dicey and Morris [77] that possibly whether a decree should be granted should be governed either by the law of the husband's domicile at the time of the marriage or by local law. It is much more likely that local courts will follow the latter suggestion.

B. Malaysia

The jurisdictional provisions of the Malayan Divorce Ordinance differ from the Singaporean in two respects, first that there is no jurisdiction over polygamous marriages and secondly that the basis for nullity jurisdiction is celebration of the marriage within the Federation not residence. Since the place of celebration of marriage is often purely fortuitous this is an anomalous basis of jurisdiction, a fact which the Law Reform Commission has noted. The draft Family Law substitutes common residence of the parties.

Under the present law choice of law problems in nullity are no different from those in Singapore since the Divorce Ordinance is in *pari materia* with the Women's Charter.

The Recognition of Foreign Divorce and Nullity Decrees

There are no provisions relating to the recognition of foreign divorce and nullity decrees in either Singapore or Malaysia and the principles of the common law therefore apply.

The application of the English rules of recognition of divorce decrees poses no particular problems but the position of nullity decrees is more complex. At English law decrees granted or recognised by the court of the common domicile and those granted by the place of common residence will be recognised. Also there seems no reason in principle why the *Travers* v. *Holley* [78] and *Indyka* v. *Indyka* [79] principles should not be utilised.

One point of interest is that at present the Malaysian courts exercise nullity jurisdiction on the ground that the marriage was celebrated in the Federation. At common law such jurisdiction is only recognised for void marriages. Will the Singapore courts feel it necessary to refuse these decrees recognition unless the parties are also domiciled or resident in the Fedration ? It seems unlikely that they could consider the fact that the marriage was celebrated in Malaysia as itself a real and substantial connection and yet it would be extraordinary for a Singapore court to refuse recognition to the decrees of Malaysian courts. This problem may never arise if the jurisdictional provisions in the Family Law Bill are enacted.[80]

77. Dicey and Morris, *op. cit.,* p. 359 *el. seq.*

78. [1953] P. 246.

79. [1969] 1 A.C. 33.

80. Clause 64 (c) Residence of both parties at the time of the commencement of proceedings.

For many years it has been accepted in English law that divorce effected in accordance with the law of the common domicile will be valid with the exception of course that English matrimonial relief could not be granted for a polygamous marriage. This has been changed by recent legislation.[81] One consequence of this is that a talak divorce, the form of extra judicial divorce available to the Muslim husband, has been upheld as a valid means of dissolving a monogamous marriage.

In the *Hammersmith Marriage* case[82] an English woman married a domiciled Indian Muslim by civil ceremony in England. The husband later divorced her in England by a written talak. The Divisional Court and the Court of Appeal refused to recognise the decrees on a number of grounds, including that a monogamous marriage could not be dissolved by a Muslim method of divorce. Reading, L.C.J. also stated:

> Once the marriage has been celebrated according to the law of the place where it is celebrated the status of marriage with all its incidents is conferred by law upon the parties.[83]

Another ground was that since the wife was not a Muslim her husband's personal law was not applicable to her and she could not be divorced in accordance with it. This is to replace the law of domicile of the married couple by the law of the place of the celebration of the marriage as the law governing the matrimonial status and as such is an unwarranted departure from principle. The question for the court should have been whether the law of the domicile permitted this form of divorce for this marriage. This case was distinguished by the Court of Appeal in *Russ* v. *Russ* [84] and the divorce by talak of an English wife who had married under English law but lived with her Egyptian Muslim husband for 19 years in Egypt was upheld— on the ground that the law of the domicile should prevail. It seems that the wife did not convert to the Muslim faith. The Court did acknowledge a residual discretion[85] to refuse to apply the law of the domicile "where it is not proper to do so in the particular circumstances to the particular case" but they saw no reason to do so in this case.

In the most recent case, *Quereshi* v. *Quereshi* [86] two Muslims married in England, the wife being a citizen of India and the husband a citizen of Pakistan, where the court held him to be domiciled. The husband divorced the wife by talak in accordance with the elaborate provisions of Pakistan law. Lord Jocelyn Simon upheld the decree, acknowledging that the doctrine of public policy could be used to refuse to give effect to the law of the domicile but that talak was not so repugnant to English concepts as to require such action. As he said "Nor can I close my

81. See *infra* note 33.
82. [1917] 1 K.B. 634.
83. *Ibid.,* p. 641. See also the statement of grounds by Donovan, L.J. in *Russ* v. *Russ* [1964] P. 315, at pp. 329-331.
84. [1964] P. 315.
85. *Ibid., per* Willmer L.J., at p. 327.
86. [1971] 2 W.L.R. 518.

eyes to the fact that English law now allows repudiation of the innocent spouse".[87] To suggest as textbook writers have done[88] that talak is merely the method of getting a divorce and is therefore compatible with divorce as applied in the systems of monogamous marriage is to ignore that talak embodies a ground of divorce, unilateral repudiation, which is completely alien to the marriage laws in question. Divorce under these systems is available with some difficulty for specified reasons, or if unilaterally after a long period of time.[89] The only decision to have expressly decided that talak cannot dissolve a monogamous marriage is *Maher* v. *Maher.*[90] *At* least Lord Simon recognised the difference. His remarks about the new English law should not be taken as a serious belief that divorce with consent after five years' separation could be equated with talak.

Despite the fact that the first case is based on reasoning opposite to the other cases each decision seems fair on the facts. In the first case it was an English woman whose marriage took place under her personal law — to use the term both in the legal sense of that law attaching to her by virtue of her domicile and that with which she was most closely acquainted. Her husband purported soon after to divorce her under his personal law which she had not adopted by her own choice, but which was forced upon her by the arbitrary rules of domicile. It would thus have been unfair to have upheld this divorce. In the second case however prior to the divorce the wife would have undoubtedly acquired her husband's domicile by her own actions had she the right to an independent domicile and while she may not have changed her personal law to his, in establishing her domicile there she has adopted whatever personal law her domicile provides for non-Muslim like herself. It may be said that unless she had also taken on Muslim personal law the change in the nature of the marriage is not complete and she could not be divorced under it. It may be possible to refuse recognition of a decree on this ground when it is a case of purely interpersonal conflict but it is not the function of the foreign court to examine whether other methods of divorce would have existed under the foreign law and if not, to refuse the decree recognise on the ground that there should have been. Their role is merely to find out whether the divorce that has in fact been effected is regarded as valid by the law of the domicile. In *Qureshi* v. *Qureshi* both parties were Muslims at all times and their marriage was monogamous merely because the *lex loci celebrationis* allowed no other form. The divorce was granted in accordance with the personal law of both parties and the dependent domicile of the wife therefore worked no injustice.

Two factors emerge from this discussion. Firstly marriage does confer a status and in accordance with the law of the domicile rights and obligations result from it. The *lex loci celebrationis* does not, as

87. *Ibid.,* at pp. 537-538.

88. E.g. Cheshire, *op. cit.,* pp. 369-370; Dicey and Morris, p. 363.

89. In Singapore seven years. See Women's Charter s. 84(1) (e), s. 84(2) (g). For a contrary view to that stated in the text see Bartholomew, G.W. in (1961) 3 Mal.L.R. at p. 107.

90. [1951] 2 All E.R. 37.

suggested in the *Hammersmith Marriage* case, confer the status and its incidents. It merely indicates whether the marriage is monogamous or polygamous for the purpose of any rules in the law of the domicile which differentiate between monogamous and polygamous marriages. Since it is the domicile which is relevant, it is evident that a change of domicile may mean a change in the incidents of the status of husband and wife including the grounds and means of divorce. However unfortunately the dependent domicile of the wife means that this principle will sometimes lead to an inequitable result if she has neither adopted the personal law of her husband nor alternatively become sufficiently attached to his country to have acquired an independent domicile herself. If hardship does result in such a case it is suggested that the courts should make use of its residual discretion not to give effect to the law of the domicile. It would have been better to have used this in the Hammersmith Marriage Case for it is felt that to have allowed the husband to use talak would have been most inequitable.

The position established by conflict of law rules is then that extra judicial divorces will be recognised if they are valid by the law of the domicile. However the Women's Charter provides in s. 166 that pre-Charter marriages can only be dissolved by judicial decree. The attempt to confine the section to marriages in Singapore has already been unsuccessful.[91] Section 166 could be interpreted literally on its wording to prohibit the recognition of all extra-judicial divorces prior to 1961. Section 7 on the other hand limits the requirement of judicial divorce for post-Charter marriages to those contracted in Singapore. The result of such an interpretation of section 166 is thus to allow the recognition of an extra judicial divorce of a couple domiciled in the Federation for instance, only if the divorce occurred after 1961. Surely this result is too absurd to be taken as the legislative intention. A better interpretation is to read the section as not changing the conflict situation. Thus extra judicial divorce will still be recognised in Singapore provided that the couple was not domiciled here and that the marriage, if after 1961, took place outside Singapore.

Different issues arise when dealing with interpersonal conflicts. Would it be possible for a Chinese man married under the Christian Marriage Ordinance to divorce his Chinese wife under Chinese custom? In one local case *Re Soo Hai San & Wong Sue Fong*[92] Hashim, J. has expounded the more stringent approach of the *Hammersmith* case, *Maher* v. *Maher,* and *P.P.* v. *White.* In dicta he stated:

> While persons of Chinese race may marry according to Chinese custom and may dissolve their marriage without recourse to Court, it is so only as long as 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 solemnisation creates a status which carries with it the obligations which the law imposes on parties having such status. In other words any marriage under the Civil Law Ordinance, as any Christian or other monogamous form of marriage, can only be dissolved under and in accordance with the Divorce Ordinance.

91. *Doshi* v. *Doshi* [1965] 2 M.L.J. 267.

92. (1961) 27 M.L.J. 221.

It is of course unlikely in the light of *A.-G.* v. *Reid* and *Ding Do Ca* that this dictum will be followed. Presuming this divorce would be valid by Chinese custom the logical consequence of *Ding Do Ca* is that neither party has lost their rights at personal law and that therefore in the absence of a prohibition in the Christian Marriage Ordinance such a divorce would be possible. Both parties have two systems under either of which they may choose to operate. The absence of a prohibition on extra judicial divorce in the Christian Marriage Ordinance can be compared with the prohibition of it in the Civil Marriage Ordinance. What if the wife were not Chinese ? This approach has some demerits. It is submitted that there is no justification for the courts to regard her as automatically having acquired his personal law by virtue of the marriage since that is to introduce all the inequities of the dependent domicile. It is preferable if the personal law of the parties by virtue of race or religion differs to require them to divorce in accordance with the law which attaches to them both by virtue of their marriage under the Christian Marriage Ordinance. This, as *Dorothy Yee* decided, is the Divorce Ordinance.

Conclusion

The law of interpersonal and international conflict in Singapore and Malaysia is unsettled and undeveloped. There are few cases and those, despite their compendious references to local and English precedents, contain much vagueness and inconsistency. The undiscriminating application of English law has in some cases blurred the issues. This is a difficult area of the law but an especially important one in view of the high degree of social mobility between Malaysia and Singapore and in the Asian region as a whole. There must be an increasing number of people in the shifting populations who need advice as to their status of their rights and obligations in family law. It is to be hoped that legislatures and judges will see to the development of a coherent body of doctrine in this area of the law.

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