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BY

BASHIR A. MALLAL

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to represent their interests. No such orders were obtained and therefore, there being no service at all of the Originating Summons, I hold that the proper parties were not before the Court and, following the decisions of *Craig v. Kanseen*[1], *In re Maria Hertogh*[2] and *In the Estate of Haji Fatimah*[3] that the proceedings taken by the Official Administrator in Originating Summons 7 of 2605 were a nullity.

It was admitted that the purchase price of $30,842 (Occupation currency), was paid and there can be little doubt that the real purport of this application is to pave the way to setting aside the transfers and respondent's title. Mr. Seth has referred me to section 3(2) of Ordinance 29 of 1946 and asked that as the respondent was an innocent purchaser for value I should not set aside the order even if I decided it was a nullity as such a course would be most inequitable. I have considered the question raised by Mr. Seth very carefully and taken into account the fact that from the evidence before me the respondent has, apart from having the titles registered in her name, obtained little, if any, benefit from the transaction, the rents apart from a few months' being collected by the applicant or the applicant's agent. However, in view of the provisions of section 7 of the Estate Duties (Apportionment of Miscellaneous Provisions) Ordinance No. 27 of 1949 the estate can obtain the benefit of the estate duty paid by the Official Administrator and therefore, exercising the discretion vested in me by section 3(2) of the Japanese Judgments and Civil Proceedings Ordinance No. 29 of 1946, I set aside the order made on Originating Summons 7 of 2605, the subject matter of this application, and I order that the applicant do pay to the respondent the sum of $20,466.64 being $20,011.60 the amount of the estate duty and interest for which the estate will benefit under section 7 of Ordinance No. 27 of 1949 and $455.04 being the value of $10,830.40 (Occupation currency) the balance of the amount paid to the Official Administrator on 25th February, 1945, in pursuance of the Order of Court at the revalued rate under the Debtor and Creditor (Occupation Period) Ordinance No. 42 of 1948 within 14 days of the setting aside of the transfers and the rectification of the Register in respect of Johore Government leases Nos. 326 and 327 and the setting aside and cancelling of the agreement for sale and power of attorney in respect of the lands comprised in Surat Sementara No. 32 of 1925.

As to the costs of the application, in view of the fact that the majority of the time of the Court was taken up by grounds alleged by the applicant in which he was not successful, I order that each party should pay its own costs of this application.

The applicant is however entitled to an order for his costs as between Solicitor and Client to be paid out of the estate of S. T. P. S. Subramanian Chettiar (deceased).

Order accordingly.

In re MARIA HUBERDINA HERTOGH; INCHE MANSOR ADABI v. ADRIANUS PETRUS HERTOGH AND ANOR.

[Court of Appeal (Foster Sutton, C.J. (F. of M.), Wilkinson and Wilson, JJ.) August 30, 1951]

[Singapore — Civil Appeal No. 29 of 1950]

Guardianship of Infants Ordinance s. 11 — Marriage of Infant — Validity of marriage — Domicile of Infant — Muslim Marriage — Declaration of validity of Marriage — Jurisdiction of Supreme Court.

This was an appeal against the decision of Mr. Justice Brown reported in (1951) M.L.J. 12. The principal grounds of appeal were (1) that the Court had no jurisdiction to declare the marriage between the female infant and Inche Mansor Adabi to be illegal and void and of no effect, (2) that the female infant was a Muslim in fact and in law and that her marriage to Inche Mansor Adabi was valid.

Held, (1) that the Court in the exercise of its chancery jurisdiction had no power to make a formal declaration that the marriage was illegal and void and of no effect and therefore the judgment of the Court below must be varied by deleting that portion of it containing such declaration; (2) that the female infant in this case was domiciled in Holland and as there was no evidence that the domicile of Mansor Adabi was Singapore, the law of Holland would be applicable to determine the validity of the marriage; (3) that as the marriage would be void by the law of Holland the appellant had not shown that there was a valid marriage between him and the female infant and therefore the custody of the infant was rightly given to her parents.

Cases referred to:—

(1) *Cheang Thye Phin v. Tan Ah Loy* (1920) A.C. 369.
(2) *Chapman v. Bardley* 46 E.R. 842.
(3) *In re Paine* (1940) 1 Ch. 46.
(4) *Barker v. Edger* (1898) A.C. 754.
(5) *Duchess of Kingston's Case* 2 Smith's Leading Cases 13th Ed., 644.
(6) *In re Agar-Ellis* 24 Ch. D. 317.
(7) *Skinner v. Orde* L.R. 4 P.C. 60.
(8) *Sottomeyer v. De Barros* 3 P.D. 1; 5 P.D. 94.
(9) *Ogden v. Ogden* (1908) P.D. 46.
(10) *De Reneville v. De Reneville* (1948) P.D. 100.

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den (1908) P.D. 46.

v. De Reneville (1948) P.D.

(11) *Mette v. Mette* (1859) 1 Sw. & Tr. 416.
(12) *Regina v. Willans* 3 Ky. 16.
(13) *Eggar v. May* (1917) 2 Ch. 126.

APPEAL from the Judgment of Brown, J. reported in (1951) M.L.J. at p. 12.

N. A. Mallal and *Ahmad Ibrahim* for the appellant — 3rd. defendant.

K. A. Seth for the respondents — plaintiffs.

Cur. Adv. Vult.

Foster Sutton, C.J. (F of M): — The proceedings which led to this appeal were commenced by way of an Originating Summons, filed on behalf of the respondents, under the Guardianship of Infants Ordinance (Cap. 50) and O. 52 r. 23 of the Rules of the Supreme Court. The first two prayers of the Summons asked:—

(i) for a declaration that the marriage according to Mohammedan rites purporting to have taken place on the 1st day of August, 1950, between Inche Mansor Adabi, the appellant, and Maria Huberdina Hertogh, an infant, the 13 year old daughter of the respondents, was "illegal and void and of no effect", and that Inche Mansor Adabi, the appellant, was not entitled to the custody of the infant; and

(ii) that Inche Mansor Adabi be ordered to deliver up the infant into the care and custody of the Consul-General of the Netherlands in Singapore, on behalf of her parents, the respondents.

The history of this matter is fully set out in the learned trial Judge's judgment and no useful purpose would be served by a recapitulation here.

The learned trial Judge concluded his judgment by saying:—

"There must be an order in the terms of the first two prayers of the Summons except that as the mother is now in the Colony the child will be handed into her care and custody and not into that of the Consul-General of the Netherlands",

and a formal order was made declaring that the marriage according to Mohammedan rites purporting to have taken place between Inche Mansor Adabi and the infant Maria Huberdina Hertogh on the 1st of August, 1950, was "illegal and void and of no effect." The order goes on to declare that Inche Mansor Adabi is not entitled to the custody of the infant and to order him to deliver up the infant into the care and safe custody of her mother.

The first point taken on behalf of the appellant was that the Court had no jurisdiction to make a declaration affecting the validity of the marriage, and that its jurisdiction is restricted to the matters set out in sub-section (1) of section 11 of the Courts Ordinance (Cap. 10). It was argued that such a declaration could only be made if it could formerly have been made in England by one of the four Courts referred to in paragraph (a) of the sub-section, and that they had no jurisdiction in matrimonial causes because such jurisdiction was exercised exclusively by the Ecclesiastical Courts.

On behalf of the respondents it was submitted that the argument that the Court had no jurisdiction to make a declaration of nullity was founded upon a fallacy, as the proceedings were brought under the Guardianship of Infants Ordinance, that the main relief asked for was custody of the infant, and that the Court had not been asked to make a declaration of nullity such as could be granted in nullity proceedings by the Probate, Divorce, and Admiralty Division of the High Court of Justice in England. It was further argued that paragraphs (a) and (e) of section 11(1) of the Courts Ordinance and the Charter of Justice, 1855, conferred jurisdiction upon the Court to make a declaration that the marriage was invalid when such relief is ancillary to the substantive relief asked for, in this case for the custody of an infant, and a number of cases were cited in support of that proposition.

Before arriving at a conclusion on the question of jurisdiction it seems to me necessary to determine the force and effect of the declaration made in this case. In view of the formal order made, embodying as it does a declaration that the marriage was illegal and void, it cannot, I think, be regarded merely as a finding of fact upon issue raised during the course of the proceedings. In my opinion, the declaration amounts to one of nullity and, if validly made, is as much a decree *in rem* as a decree of divorce. Nullity decrees are always declaratory because a void marriage is void *ab initio,* and declarations of nullity are made on the footing that one or both of the parties to the marriage have no contractual capacity.

Among the authorities cited in support of the proposition that the Court has jurisdiction to make a declaration of nullity when such relief is merely ancillary to the main relief asked for, were the cases of *Cheang Thye Phin v. Tan Ah Loy*[1], *Chapman v. Bradley*[2] and *In re Paine*[3].

In the first case the Court had to determine whether the respondent was a secondary wife and as such entitled to participate in the widow's third of the property in respect of which there had been found to be an intestacy. The matter for determination there was the question of a right of succession to a share in the property of a deceased person, and, in order to adjudicate upon the matter, a finding of fact upon the

question whether she was a secondary wife had to be made.

In *Chapman v. Bradley*[2], the question of the validity of a settlement made in consideration of an intended marriage was in issue, and the decision in the case depended on whether a ceremony of marriage performed in Switzerland, although constituting a valid marriage there, was valid in England, since the testator was a domiciled Englishman and the marriage was contracted with his deceased wife's niece. In those circumstances the Court held that the marriage was not a valid one under English law.

In re Paine[3] was also a case in which the question of the validity of a marriage was an issue incidental to the settlement of a claim to property.

In all the cases cited, one or both of the parties to the marriage were deceased at the time the proceedings were instituted, and in no case, therefore, did the decision of the Court affect the validity of a subsisting marriage.

The jurisdiction of the Court under paragraph (a) of section 11(1) of the Courts Ordinance is restricted to the jurisdiction formerly exercised in England by the four Courts therein referred to, and it is further restricted to such former jurisdiction as was exercised by His Majesty's High Court of Justice when the Ordinance came into force. No case has been cited which, in my opinion, would lead to the conclusion that any of those Courts ever purported to exercise jurisdiction in matrimonial causes. That being so, if my view regarding the effect of the order made in this case is correct, it follows that the Court had no jurisdiction, under the paragraph in question, to make a declaration of nullity.

Paragraph (c) of section 11(1) of the Courts Ordinance confers jurisdiction upon the Court under the Divorce Ordinance (Cap. 84). The relevant part of sub-section (2) of section 4 of that Ordinance, as amended by section of Ordinance No. 39 of 1939, reads as follow :—

> "(2) Nothing herein shall authorise the Court to make any decree of nullity of marriage except —
>
> (a) where the marriage between the parties was contracted under a law providing that or in contemplation of which marriage is monogamous."

It is obvious that this sub-section does not confer matrimonial jurisdiction upon the Court in a case such as that under consideration here.

The only remaining matter for consideration on the question of the Court's jurisdiction arises under the provisions of paragraph (e) of section 11(1) of the Courts Ordinance. On behalf of the respondents it was argued that the paragraph invests the Court with the Ecclesiastical jurisdiction conferred by the Charter of Justice, 1855, the relevant portion of which reads :—

> "And further, that the said Courts of Judicature shall have and exercise jurisdiction as an Ecclesiastical Court, so far as the several religions, manners and customs of the inhabitants of the said Settlement and places will admit."

In my view, the general provisions of paragraph (e) of section 11(1) were not intended to apply to any of the subjects specially dealt with in the preceding paragraphs of the sub-section, and the Court's matrimonial jurisdiction is specifically dealt with by paragraph (c). As Lord Hobhouse said in *Barker v. Edger*[4], in delivering the judgment of the Judicial Committee :—

> "When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general Enactment is not intended to interfere with the special provision unless it manifests that intention very clearly."

In such cases the general provisions are read as silently excluding from their operation the matters which have previously been specifically provided for. It follows, therefore, that I am unable to agree with the contention of the respondents' counsel that the paragraph in question invests the Court with Ecclesiastical jurisdiction.

On behalf of the appellant, however, the matter was carried further. It was argued that once formal proof of a marriage had been given, the Court's power to adjudicate on the question of custody was ousted. With this contention I am unable to agree. The parents of the infant had the right to apply to the Court for its custody, and in order to resist successfully an order being made in their favour, the appellant was bound to establish a prior right, which he could only do by proving affirmatively that a marriage had taken place between himself and the infant. The dispute regarding the validity of the marriage was a collateral issue which, in my opinion, the Court had inherent power to determine. I am fortified in this view by the answers given by the Judges in the *Duchess of Kingston's Case*[5], but the determination of such an issue, in proceedings for the custody of an infant, is not in the nature of a judgment *in rem*.

I now turn to the question whether the infant is, in law, to be deemed to be a Christian, within the meaning of the Christian Marriage Ordinance, 1940. In the Court below and before us, it was submitted that if the infant is, in the eyes of the law, a Christian, the marriage between her and the appellant was invalid that is to say void *ab initio*, by virtue of the provisions

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of that Ordinance, section 3 of which reads as follows :—

"Every marriage between Christians and every marriage between persons one of whom is a Christian shall be solemnised in accordance with the provisions either of this Ordinance or of the Civil Marriage Ordinance, 1940, and every such marriage solemnised otherwise than as provided in this section shall be invalid."

On behalf of the appellant it was argued that the learned trial Judge misdirected himself as to the true meaning of the cases he was referred to, and that a distinction must be drawn between the legal right of a father to determine the religion his child shall follow until it reaches majority, and the fact that the infant in this case was a Muslim on the 1st August, 1950, the date upon which the marriage ceremony took place.

On behalf of the respondents it was submitted that in the eyes of the law the infant in this case is a Christian, that is to say it follows the religion of its father, until it ceases to be a minor, and that, in law, during its minority a child has no capacity of election or choice.

During the course of the arguments a number of cases were cited which support the proposition that, where the father has, or is entitled to, the custody of a child, unless he has, (1) by his gross moral turpitude forfeited his rights, or (2) by his conduct abdicated his paternal authority, the Court will treat his wishes as paramount, *In re Agar-Ellis*[6]. In *Skinner v. Orde*[7] and the other cases cited the Courts were being asked, in effect, to determine the religious teaching the infant concerned was to be permitted to follow.

While it is the case that in paragraph 16 of his affidavit the infant's father states :—

"I have been a Christian throughout my life. I have never consented, and would never have consented, to my daughter, Huberdina Maria Hertogh, becoming a Mohammedan",

and there is no suggestion that he has been guilty of any conduct which would justify the Court in overriding his wishes, in arriving at a conclusion on this question it must be remembered that a "Christian" is defined in section 2 of the Christian Marriage Ordinance as meaning "a person professing the Christian religion". The issue, therefore, which we have to determine is not what religious teaching the infant should be deemed, or permitted, to follow, but whether on the date of the marriage, the 1st August, 1950, she was "a person professing the Christian religion" within the meaning of the Ordinance. That is the real issue on this particular aspect of the case. What is the evidence on the point?

The infant was born on the 24th March, 1937, her father is a Duty subject and a Christian. On the 10th April, 1937, she was baptised in the Roman Catholic Church of St. Ignatius at Tjimahi, in Java, by a Roman Catholic priest named Father de Koster, and up to December, 1942, when she commenced to live with one Che Aminah binte Mohamed, she was brought up in a Roman Catholic environment. From then until the 1st August, 1950, she was brought up in a Muslim environment, and at some stage between the two dates she embraced the Muslim faith. In this connection the learned trial Judge, in his judgment, says :—

"Judged by the standard of a European child she is older than her years."

"As the child is thirteen years of age I thought it right to see her in my Chambers and to satisfy myself concerning her wishes. It is neither necessary nor desirable, nor would it be right, to record the various impressions which I formed, except to say that I am satisfied that it is her desire to remain in this country and to continue in the Muslim faith. Having regard to her environment it would have been surprising if she had expressed a contrary wish. Nevertheless, I am satisfied that those are her present wishes and that they are genuine and sincere."

In the face of the evidence and the opinion expressed by the learned trial Judge, I am unable to agree with the proposition that on the 1st August, 1950, the infant should be deemed to be "a person professing the Christian religion", within the meaning of the Christian Marriage Ordinance, 1940. It follows, therefore, that, in my view, the Ordinance in question is not applicable to the present case; and I do not think that the cases cited, in which totally different issues arose for determination, are of any real relevance to the issue before us.

Having regard to the conclusion I have reached as to the inapplicability of the Christian Marriage Ordinance, it is necessary to determine whether the marriage was in other respects valid. Under English law, which is applicable in the Colony, the essential validity of a marriage is governed by the *lex domicilii* of the parties, which is the determining factor in deciding whether, apart from form, the marriage is good. If by such *lex domicilii* it is void *ab initio,* not merely voidable, because prohibited, it will be equally void in the Colony. The marriage must be legal, according to the law of the domicil of both the contracting parties, not merely according to the law of the domicil of the husband, with this exception that, where the domicil of one of the parties is the Colony, and the marriage is celebrated here, the Courts of the Colony will not regard the validity of that marriage as affected if the law of the domicil of the other party imposes an incapacity not recognised by the law of the

Colony — *Sottomayer v. De Barros*[8]; *Ogden v. Ogden*[9]; *In re Paine*[3], (*supra*).

It was not in dispute that the infant is a Dutch subject and that her country of domicil is that of her father, Holland; and it is clear from the evidence that, by the law of Holland, a girl under the age of sixteen years, being a Dutch subject, is prohibited from marrying unless the Queen of Holland grants a dispensation lifting the prohibition, and that is the position whatever the girl's religious beliefs may be. There is no suggestion that such dispensation was ever asked for or obtained. It cannot, I think, be held that the dispensation is a matter of form affecting only the sufficiency of the ceremony by which the marriage was affected. The law of Holland prohibits the marriage and, as Sir Gorell Barnes said in *Ogden v. Ogden*[9], (*supra*):—

> "Such a prohibition by a domiciliary law is not the less complete, as far as other tribunals are concerned, because the same domiciliary law, under certain circumstances, allows itself to be dispensed with."

That being so, by the law of Holland the Marriage was invalid, void *ab initio*. It follows, therefore, that the marriage is invalid under the law of the Colony unless the appellant could bring himself within the exception to the general rule I have already mentioned, and to do this he had to satisfy the Court that he was domiciled in the Colony, which he failed to do. The only evidence touching the point is to be found in paragraph one of the appellant's affidavit, where he states that he is a probationary school teacher attached to the Bukit Panjang Government School, Singapore, and the statement of Che Aminah that the appellant's mother "is from Kelantan. I know that Mansor was born in Kelantan". From this evidence, such as it is, it would appear probable that the country of domicil of the appellant is the State of Kelantan in the Federation of Malaya.

The appellant's counsel argued that in this case the domicil of the parties is unimportant, and that the true test is, is the appellant a Muslim and was he resident in the Colony where Mohammedan law is recognised.

In support of his contention the appellant's counsel cited, *inter alia,* passages from *Syed Ameer Ali on Mohammedan Law,* but that learned author does not bear out the proposition. At page 273 of the 5th edition the following passage occurs:—

> "The validity of a marriage under the Mohammedan law depends primarily on the capacity of the parties to marry each other. The performance of the marriage according to the form prescribed in the place where the marriage is celebrated, or which would impress on the woman by the customary law of the Musulmans the status of a wife is a matter of secondary consideration.
>
> It is a recognised principle of law that the capacity of each of the parties to a marriage is to be judged of by their respective **lex domicilii**. If they are each, whether belonging to the same country or to different countries, capable, according to their **lex domicilii**, of marriage with the other, they have the capacity required by the rule under consideration. In short, as in other contracts so in that of marriage personal capacity must depend on the law of domicile."

Stress was laid on another passage on the same page which reads:—

> "The capacity of a Musulman domiciled in England will be regulated by the English Law, but the capacity of one who is domiciled in Islamic countries or in countries where the Musulman Law is in force, by the provisions of the Musulman Law."

It is clear from the passages in question that under Mohammedan law, as under English law, the capacity of each of the parties to a marriage is to be judged by their respective *lex domicilii,* and that the last passage quoted does not affect the position here, because the domicil of the infant in this case is Holland, and her capacity must be ascertained by reference to the law of that country.

For the reasons I have given I would dismiss this appeal in so far as it relates to the order for custody, and although I agree wth the learned trial Judge that the marriage was void *ab initio,* I would vary the judgment of the Court below by deleting that portion of it which formally declares the marriage to be "illegal, void and of no effect".

With regard to costs, although the appeal has, in substance, failed, the costs have been substantially increased by the inclusion of the prayer for a declaration of nullity, and by the issue regarding the Christian Marriage Ordinance, upon which the respondents have now failed. In the circumstances I would limit the respondents' costs to two thirds of the amount which would ordinarily be allowed on this appeal.

Spenser-Wilkinson, J.: — This was an appeal against the decision of Brown, J. declaring invalid a marriage purporting to have been celebrated between an infant, Maria Hertogh and Inche Mansor Adabi the appellant, and giving the custody of the infant to her mother, Adelien Hertogh, the 2nd respondent.

The facts and history of the case, in so far as they are relevant to this appeal, can be briefly stated. The infant, who was born in 1937, came, in 1942, into the custody and control of Aminah binte Mohamed in circumstances which it is not necessary now to consider. From that date she was brought up as a Mohammedan, the father being at the material time a prisoner of war in the hands of the Japanese. After the war some time elapsed before the parents of the infant were able

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to trace her; but as soon as her whereabouts were discovered proceedings were commenced in the High Court in Singapore by the Consul-General for the Netherlands on behalf of the parents for custody of the child. These proceedings ultimately proved abortive on account of lack of parties, the Court of Appeal holding, on the 28th July, 1950, that they were a nullity. On the 1st August, 1950 a ceremony took place in Singapore purporting to be a marriage under Mohammedan law between Maria Hertogh and Inche Mansor Adabi. Thereupon the respondents, on the 24th August, 1950 commenced these proceedings by way of Originating Summons praying *inter alia* for a declaration that the marriage was invalid and for custody of the child. The application was by the parents, as plaintiffs, against Aminah binte Mohamed, Maria Hertogh (the infant) and Inche Mansor Adabi as defendants under the provisions of the Guardianship of Infants Ordinance.

The two questions upon which the decision of this appeal depend are (1) whether the Court had jurisdiction to adjudicate in any way upon the validity of the marriage and (2) if the Court had jurisdiction to decide the matter, whether the marriage was in fact a valid one or not. It was conceded on behalf of the appellant that if the marriage was in fact void, then the order for custody could not be resisted.

It was contended on behalf of the appellant that the Court had no jurisdiction even to try the issue of validity of this marriage, much less to make a declaration to its validity.

On behalf of the respondents its was argued that the Court had jurisdiction under the combined effect of paragraphs (a) and (e) of section 11(1) of the Courts Ordinance, both to consider the issue and to make the declaration. It was further submitted in the alternative that, in so far as the order was declaratory, it was not essential for the purposes of making the substantive order prayed for in regard to the custody of the infant.

In concluding that he had jurisdiction to make the declaration asked for Brown, J. based himself mainly upon two English decisions in which, he said, declaratory orders declaring the marriage to be invalid had been made and held that the Court of Chancery in England in former days made declaratory orders which were introductory or ancilliary to the relief which it was proposed to administer. He referred in his judgment particularly to the cases of *Chapman v. Bradley*[2] and *In re Paine*[3]. In neither of those cases, however, was a declaratory order made as to the validity of the marriage. In the case of *In re Paine*[3], the decision was that a certain gift failed because at the time of the marriage the testatrix's daughter had not the capacity to contract the marriage, and in *Chapman v. Bradley*[2], the decision was that a beneficial interest comprised in a settlement vested in the settler at the time of his death, because there had not been a valid marriage. No case was cited before us, and I have been unable myself to find any, in which the Court of Chancery has made a declaratory order in regard to the validity of a marriage.

Although the form of the declaration made in this case differs somewhat in its wording from the normal decree made in a nullity suit it seems to me to be in substance indistinguishable from such a decree. I think there is no doubt that the proper and only way in which a decree of nullity can be obtained is under the divorce jurisdiction of the Court in proceedings brought by one spouse against the other by petition in accordance with the procedure laid down for such cases. Under the combined effect of paragraph (c) of section 11(1) of the Courts Ordinance and section 4 of the Divorce Ordinance the High Court could not, in regard to this particular marriage, in proceedings by way of Originating Summons and with the parties as here constituted make a decree of nullity. Much less could the Court, upon an application under the Guardianship of Infants Ordinance, make a declaration which is in substance a decree of nullity. I think, therefore, that the declaration should not have been asked for and should not have been made.

It does not follow, however, that the Court had no jurisdiction to decide the issue as to the validity of the marriage for the purpose of deciding the question of custody. It is clear that if the marriage between the infant in this case and the appellant was a valid one, then the husband would be entitled to the person of his wife and the Court could not make an order giving the custody of the infant to the parents. I am unable to see any reason, either on principle or on the authorities, why the Court, on an application by the parents for custody of their child, should not consider and decide the issue as to whether or not the alleged marriage is a valid one as a necessary preliminary to deciding whether or not the parents are entitled to such custody. To hold otherwise would in my view seriously detract from the powers of the Court to protect infants; for on an application by a parent for the custody of his child it would only be necessary to set up an alleged marriage to deprive the Court of its undoubted jurisdiction to control the welfare of the infant. A marriage so set up might be fraudulent or even farcical, yet, if the contention of the appellant

is correct, the Court is entirely precluded from considering whether or not the marriage is a real one.

Mr. Mallal, on behalf of the appellant, further submitted that there was no reported case in which the Court of Chancery had ever decided the issue as to the validity of a marriage between living persons, all the authorities cited being cases in which at least one of the parties to the marriage was dead.

I think, however, there is authority indicating that the Court has jurisdiction in a proper case to consider the issue of marriage. In the *Duchess of Kingston's Case*[5] this very question is discussed and the following passage appears to me to be relevant :—

"Upon the subject of marriage the Spiritual Court has the sole and exclusive cognizance of questioning and deciding, directly, the legality of marriage;..... but the Temporal Courts have the sole cognizance of examining and deciding upon all temporal rights of property: and, so far as such rights are concerned, they have the inherent power of deciding incidentally, either upon the fact, or the legality of marriage, where they lie in the way to the decision of the proper objects of their jurisdiction."

The judgment goes on to discuss certain exceptions and continues thus :—

"So that the trial of marriage, either as to legality or fact, was not absolutely, and from its nature, and object **alieni fori.**"

Although it is rights of property that are here discussed it seems to me that the same principle must apply to the undoubted right of the Court of Chancery to control the custody of infants; and that therefore the Court of Chancery has "the inherent power of deciding incidentally either upon the fact or the legality of the marriage where they lie in the way of a decision" regarding the custody of a child. In my opinion, therefore, the Court had jurisdiction under section 11 (1) (a) of the Courts Ordinance to decide the issue as to the validity of the marriage set up by the appellant in this case.

It therefore becomes necessary to decide whether or not the learned Judge was right in holding that the marriage was invalid.

I think it advisable first to make some observations in regard to the distinction between void and voidable marriage, although the point was not raised in argument before us. For if the marriage is only voidable then the consequence would be that the infant would, upon the marriage, have acquired the domicile of her husband and could not cast off that domicile before a decree of annulment was actually pronounced. (*De Reneville v. De Reneville*[10]). I think, however, there is no doubt that by the law of Holland this infant was wholly incapacitated from contracting a valid marriage and that therefore according to the law of her domicile the marriage is void *ab initio*. In addition to the requisite consent of the parents (which might be considered to be only a matter of form) there is an absolute prohibition in Article 86 of the Netherlands Civil Code which, according to the affidavits, can be translated as follows :—

"A young man not having attained the full age of 18, and a young girl not having attained the full age of 16 are permitted to contract no marriage. The Queen can, however, for important reasons, lift this prohibition by the granting of a dispensation."

It was laid down in *Ogden v. Ogden*[9] approving the judgment of Cotton, L.J. in *Sottomeyer v. De Barros*[8] that it could not be held that "papal dispensation is a matter of form affecting only the sufficency of the ceremony by which the marriage was effected", and a passage from Mr. Foote's Private International Jurisprudence is cited with approval. The relevant part of that passage is as follows :—

"Such a prohibition by a domiciliary law is not the less complete, as far as the other tribunals are concerned, because the same domiciliary law, under certain circumstances, allows itself to be dispensed with."

Although, therefore, by the law of Holland the Queen may in certain circumstances grant a dispensation in regard to an infant under age to marry, in the absence of any such dispensation the prohibition is absolute and the marriage contracted by an infant under age is void.

The English law as to the validity of marriages is summed up in one of the most recent cases on the subject. In the case of *In re Paine*[3] Bennett, J. after referring to the case of *Mette v. Mette*[11], proceeds as follows :—

"That statement of the law has been recognized by text book writers. In particular I refer to Dicey's Conflict of Laws, 5th edition, page 732 where the following statement appears: 'Rule 182. Subject to the exception hereinafter mentioned a marriage is valid when each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other'. In Westlake's Private International Law, 7th edition, page 57, r. 21 this statement is to be found: 'A marriage is invalid.....if either party is by his personal law under an incapacity to contract it, whether absolute, in respect of age, or relative in respect of the prohibited degrees of consanguinity or affinity'. In Halsbury's Laws of England, 2nd edition, volume VI, page 286, it is stated: 'The marriage must be a good and legal marriage according to the law of the domicile of both contracting parties at the time of the marriage."

It is not disputed that Maria Hertogh is domiciled in Holland but it was argued in the Court below that the exception to the general rule based upon the case of *Sottomayer v. Barros*[8] governed this case and that therefore the marriage was valid. The exception referred to is set out in Dicey's Conflict of Laws, 6th edition, page 784, as follows :—

"Exception 1. The validity of a marriage celebrated in England between persons of whom the one has an English, and the other a foreign, domicile is not affected

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The learned Judge in the Court below held that this exception did not apply because neither of the parties to this marriage was domiciled in Singapore. No specific evidence was given by the appellant as to his own domicile and such evidence as there is on the record suggests that he is domiciled in Kelantan, for not only was he born there but his mother is described as a Kelantan woman. There is certainly no evidence that he is domiciled in Singapore. I am of opinion that the exception does not apply in this case.

It was argued by Mr. Mallal on behalf of the appellant that the English law on this subject is not applicable here and that it is only residence that counts in considering these matters and he cited some dicta from the case of *Regina v. Willans*[12]. I am unable to accept this contention. Nor can I agree with his further submission that domicile is of no importance in regard to Mohammedan marriages. Even if it be right to apply the Mohammedan law in this case on the somewhat uncertain ground that the parties to the marriage are both Mohammedans the same result appears to me to be arrived at. In *Ameer Ali on Mohammedan Law,* 5th edition, Volume 2 of the following passages appear at page 273 :—

"The validity of a marriage under the Mohammedan law depends primarily on the capacity of the parties to marry each other.....

"It is a recognized principle of law that the capacity of each of the parties to a marriage is to be judged by their respective lex domicilii.....

"The capacity of a Musulman domiciled in England will be regulated by the English law but the capacity of one who is domiciled in Islamic countries or in any countries where the Islamic law is in force by the provisions of the Musulman's law."

From the last quoted passage I deduce that the capacity of a Muslim domiciled in Holland would be regulated by the Dutch law.

It appears to me to be clear, therefore, that whether English law or Mohammedan law is to be applied, one of the parties to this alleged marriage, namely the infant had not the capacity to contract a valid marriage and that the marriage is therefore void.

It was argued by Mr. Seth on behalf of the respondents that the infant was in fact a Christian at the time of the marriage so that the marriage was void under the Christian Marriage Ordinance. The numerous cases cited before us on this point were nearly all decisions as to how the infant should in future be brought up. The only case cited in which the question of the actual existing religion of an infant was discussed was *Eggar v. May*[13]. In that case the infant, who was 11 years of age, was held not to be a Roman Catholic at the material date although he had been baptized and brought up in the faith by his father who desired that he should continue in that faith. That decision, however, turned upon the construction of a will and depended upon the intention of the testator, and it was held that the testator meant the infant to exercise a choice, which he could not do until he reached the age of 21. Whilst it may be arguable that an infant can only profess a religion through the mouth of its parent or guardian I should find it difficult to hold that the infant in the present case, who had been brought up as a practising Mohammedan from the age of about 4 until the age of nearly 13, was at the time of the marriage a professing Christian. I do not think that the legal right of the father to bring up his child in a particular religion can affect this question. However this may be, it appears to me unnecessary to decide whether the infant was in law a Christian or a Mohammedan or neither, for whatever the infant's religion may have been at the time the alleged marriage was contracted, her capacity must, in my view, be governed by the law of her domicile.

For the above reasons, I would hold that the marriage was invalid and that the order in regard to custody was right but I would vary the judgment of the Court below by deleting that part of it which formally declares the marriage to be illegal, void and of no effect.

Wilson, J. : — In this case the plaintiffs were the father and mother of the 2nd defendant, Maria Huberdina Hertogh, an infant, and they instituted proceedings in the High Court of the Colony of Singapore by way of Originating Summons against the 1st defendant, one Aminah binte Mohamed, and the 3rd defendant, one Inche Mansor Adabi, under the Guardianship of Infants Ordinance claiming that the 3rd defendant be ordered to deliver up the infant into the care and custody of the Consul-General for the Netherlands in Singapore on their behalf. In the same Originating Summons they prayed for a declaration that the marriage according to Moslem rites purported to have taken place between the 3rd defendant and the infant on the 1st of August, 1950, was illegal and void and of no effect. So far as Aminah binte Mohamed is concerned any claim that she may have had to the custody of the infant prior to the infant's alleged marriage to the 3rd defendant, or any claim she might have to the custody of the infant, if the alleged marriage were declared to be invalid is no longer a matter for the consideration of this Court in

as much as the appeal of Aminah had already been dismissed.

The first point taken by Counsel for the 3rd defendant in this appeal is that the Court had no jurisdiction to make the order, which it did, declaring the alleged marriage between the 2nd defendant and the 3rd defendant illegal, void and of no effect. Counsel for the respondents has argued that the Court had jurisdiction under section 11 (1) (a) and (e) of the Courts Ordinance. No reliance was placed on sub-section (e) in the Court below, and this sub-section is not referred to in the learned Judge's judgment. Counsel for the respondents has urged that sub-section (e) of section 11 (1) of the Courts Ordinance confers the necessary jurisdiction upon the High Court by reason of the Charter of 1855. In my opinion, the Charter of 1855 does not confer, at the present time, upon the High Court any jurisdiction for declaring a marriage null and void, or to pass a decree of nullity. Jurisdiction in these matters is now expressly conferred on the High Court by section 11 (1) (c) of the Courts Ordinance which gives jurisdiction under the Divorce Ordinance. This Ordinance, however, applies only in the case of a monogamous marriage, and is not applicable to the alleged marriage in this case. Section 11 (1) (a) of the Courts Ordinance gives to the High Court certain jurisdiction, including the jurisdiction formerly exercised in England by the High Court of Chancery, and also including therein the jurisdiction to appoint guardians of infants, but it does not confer upon the High Court any jurisdiction previously exercised by Ecclesiastical Courts. The jurisdiction conferred upon the High Court in regard to the appointment and control of guardians of infants is clearly conferred upon the High Court as a jurisdiction previously exercised in England by the High Court of Chancery had jurisdiction in ecclesiastical matters, and, therefore, jurisdiction to annul a marriage.

It has been argued, however, that the Court has jurisdiction to make a declaration that the marriage was invalid, if such a declaration is ancillary to the main declaration sought, and a number of cases have been cited in support of this proposition. It is true that the Courts have considered and come to a decision as to whether a marriage was valid or not when it has been necessary to do so in order to come to a decision on the main question at issue. No such case, however, has been cited where both the parties were alive, and in every case cited the decision reached was *in personam* and not *in rem*, and, as such, did not affect the status of living persons. The decision made in this case does purport to affect the status of the 2nd and 3rd defendants who are both alive and declares that their marriage was invalid. In my opinion the declaration in this case, if valid, is *in rem*, and in effect purports to pronounce a decree of nullity, and as such would constitute the exercise of the jurisdiction previously exercised by the Ecclesiastical Courts. In my opinion the High Court in the exercise of its jurisdiction as the High Court of Chancery had no power to make such a declaration of nullity. Further the procedure in this case was by way of Originating Summons which is quite inapplicable to a petition for a declaration of the nullity of the marriage.

This, however, does not end the matter. This was an application for the custody of an infant child of 13 to which the father would be entitled, unless he has divested himself, or been divested of his rights to the custody. In anticipation of a claim by the 3rd defendant that he was entitled to the custody of the infant by reason of his alleged marriage to her, the plaintiffs requested a declaration that the marriage was void, and as I have said the Court had no power to make such a declaration. I do not think this vitiates the whole proceedings as, in my opinion, it was unnecessary for them to require any such declaration. *Prima facie* by reason of section 5 of the Guardianship of Infants Ordinance, the father is entitled to the custody of his infant child, and, without requesting a declaration that the marriage was void, he could have brought proceedings under the Guardianship of Infants Ordinance, and would necessarily have succeeded in such proceedings, unless the 3rd defendant could show that, by reason of his marriage to the infant, he had a better claim than the father to the custody of the infant. In this case a marriage registration certificate has been put in evidence, and it has been argued by Mr. Mallal that this Court cannot query the validity of the marriage, unless some other Court, or authority, having jurisdiction therein shall have previously issued a decree of nullity. I am unable to agree with this contention. In my opinion, the plaintiffs were perfectly entitled to query the validity of the marriage in respect of which the marriage registration certificate had been issued, and the Court in deciding who is to have the custody of the infant is entitled to come to a conclusion on the evidence as to whether the marriage was valid or not without making any specific declaration. My views on this matter appear to me to be in accordance with the opinions of the Judges in the *Duchess of Kingston's Case*[5].

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It has been urged by counsel for the respondents that the 2nd defendant was a Christian in as much as not having reached the age of discretion it was not open to her to change her religion by professing the Moslem religion, and, therefore, under section 3 of the Christian Marriages Ordinance, any marriage contracted by her other than under the Christian Marriages Ordinance, or the Civil Marriages Ordinance, is null and void. With this contention I cannot agree. The definition of "a Christian" in the Christian Marriages Ordinance is "a person who professes the Christian religion". A number of cases have been cited, with a view to showing that an infant cannot adopt a religion other than the religion in which the father wishes him or her to be instructed. That seems to me to be immaterial in this case. The infant, according to the evidence, is the daughter of two members of the Roman Catholic Church. She was born on the 24th day of March, 1937, and is a Dutch subject. She was baptised on the 10th April, 1937, by a member of the Roman Catholic Church. She herself says that since going to live with the 1st defendant and her husband, she was brought up as their own child, and brought up as a Moslem. She states that, since she was given over to the 1st defendant, she has faithfully followed and adhered to the Moslem religion and is a true believer of Islam, that she has voluntarily adopted the Moslem faith, and will follow that faith to the end of her life. Whatever may be the restriction on an infant adopting a religion contrary to her father's wishes, I find it impossible to find that she herself within the meaning of the Christian Marriages Ordinance professes herself to be a Christian. For this reason, I am satisfied that she was not debarred by reason of section 3 of the Christian Marriages Ordinance from contracting a marriage other than one under the Christian Marriages Ordinance, or the Civil Marriages Ordinance.

For reasons which I shall explain later I do not think it is necessary to come to a conclusion whether or no in the circumtances she was entitled, without her father's consent, to become a Moslem, and profess the Moslem religion, and in my view, it is not necessary to consider those authorities which have been cited, with a view to showing that, as an infant she was unable to adopt a faith, which is one of which her father does not approve and without his consent.

In my opinion the question of the validity of the alleged marriage must be decided in the same way whether she is a Moslem, or whether she is a Christian, and it is to be decided on the question of domicile. Mr. Mallal has argued that domicile of the parties is not material in this case in deciding the capacity of the parties to contract a marriage. He has urged that the only material thing is residence, and there is no doubt that at the time of the alleged marriage both parties were resident in the Colony. I can find no authority in English Law or Mohammedan Law for this proposition.

Mr. Mallal has referred to the exposition of Mohammedan Law by Syed Ameer Ali (5th Edition p. 273), and has contended that, by reason of passages quoted by him, where a marriage between two persons professing the Moslem faith is concerned, the question of domicile is immaterial and the question of residence alone must govern their capacity to marry. I am unable to agree that any such construction can be placed upon the passages to which he referred. In the first place, the learned author states that it is a recognised principle of law that the capacity of each of the parties to a marriage depends upon their respective *lex domicilii*. He states that a Moslem domiciled in England is bound by the Law of England, so far as his capacity to marry is concerned. It is true that he states that the capacity of a Moslem domiciled in a country where Mohammedan Law is in force is governed by Mohammedan Law. It does not seem to me, however, that that proposition in any way qualifies the previous statement that the capacity of the parties to a marriage under Mohammedan Law depends upon the *lex domicilii*. In this connection, I think it is not unimportant to refer to the evidence relating to the authority of the Kathi to act as Wali for the purpose of this alleged marriage. According to the affidavits Tungku Mahmood Sudhi, and Suleiman bin Abdul Kadir, the Kathi in the State of Selangor, can only give a female in marriage, if he is authorised so to do by his commission from the Head of the State. It is not disputed that the Kathi of Singapore is not expressly so authorised. It follows that, if this marriage ceremony had taken place in the State of Selangor, and the Kathi had a commission similar to that issued to the Kathi of Singapore, the Kathi could not have acted as Wali, and, in my opinion, the marriage would have been null and void for that reason. That being so, the question of domicile must be regarded from a practical, as well as a technical, point of view, because, if the 3rd defendant had not a domicile in Singapore, it may well be that, if the marriage had taken place in the country of his domicile, the marriage would have been invalid, according to the law of that country.

The main rule set out in *Dicey's Conflict of Laws*, 6th Ed. p. 758 is that, subject to the exceptions hereinafter mentioned, a marriage is valid only, when each

of the parties has, according to the law of his, or her, respective domicile, the capacity to marry the other, and that certain conditions as to the form of celebration therein stated had been complied with. This general rule is supported by authority, and is not disputed in so far as its application in England is concerned. In my view, it applies equally in Singapore.

In this case there can be no doubt that the infant's domicile was, at the time of her marriage, that of her father's, in other words in Holland. On the evidence before the trial Court, there can be equally be no doubt that, by reason of the Laws of Holland, the infant had no capacity to marry in as much as that at the time of the marriage she was under the age of 16 years, and could not, under that age, contract a legal marriage, unless the consents of the Queen of Holland and the girl's parents had first been given. There is no suggestion that these consents had ever been given.

There is, however, an exception to the general rule based on the decision in the case of *Sottomeyer v. De Barros*[8] that the validity of a marriage celebrated in England between the persons of whom the one has an English and the other a foreign domicile is not affected by any incapacity in the party having a foreign domicile, if the incapacity under the law of such foreign domicile does not pertain under the law of England. In considering the facts of and the law in this case the word "Singapore" must be substituted for the word "England" in construing this exception to the general rule.

In these circumstances it becomes necessary, having regard to the fact that the infant was undoubtedly domiciled in Holland, to consider whether the appellant was domiciled in Singapore. The 3rd defendant's own evidence is that he was a probationary school teacher attached to Bukit Panjang Government School, Singapore. That, in itself, does not establish a domicile in Singapore. The evidence of the 1st defendant is that the 3rd defendant was born in Kelantan. Although that does not necessarily establish a domicile in Kelantan, the fact remains that there is no evidence of domicile in Singapore.

For these reasons being of opinion that neither of the parties to the marriage was domiciled in Singapore, and it being clear that the infant had not the capacity to marry according to the law of her own domicile, I would dismiss the appeal of the 3rd defendant, in so far as the order relates to the custody of the infant, but I would vary the order by the deletion of that part which declares the marriage between the 2nd and 3rd defendants to be illegal, void and of no effect.

Order accordingly.

BUJANG BIN TUNGGAL v. REX.

[App. Crim. Juris. (Brown, Ag. C.J.) August 15, 1951]

[Singapore — Magistrate's Appeal No. 74, of 1951]

Penal Code, s. 211 — Intentional omission to apprehend on part of public servant — Distinction between 'motive' and 'intention'.

The appellant was an Inspector in the Singapore Police Force, and on the evening of Monday, December 11th was the senior officer at Geylang Police Station. Geylang Police Station took its orders from Beach Road Police Station which was under the command of Detective Inspector Ong. The appellant was charged under section 221 of the Penal Code with intentionally omitting to apprehend any persons who were liable to be apprehended as members of an unlawful assembly.

The learned District Judge found the appellant guilty of the offence charged giving his reasons and conclusions as follows:—

> "The accused was at all times material to the charge the senior police officer at Geylang Police Station. He had a considerable number of Police, fully armed, under his command, and it is not suggested that he took any effective steps towards the apprehension of any of the rioters in the immediate vicinity of the Police Station. I think the conclusion is inescapable that he was afraid to do so."

Held, that motive should always be distinguished from fear. The burden of proving the criminal intent remained throughout on the prosecution. And if the evidence shewed that appellant's failure to apprehend the rioters was consistent with the innocent intent of saving the injured by avoiding a course which might have put them in greater peril, the appellant was entitled to be acquitted.

[**Editorial Note:** — Although the major portion of the judgment deals with question of fact we have considered it advisible to publish the judgment in full so that it may be a guidance to the lower Courts.]

Cases referred to :—

(1) *Rex v. Steane* (1947) K.B. 997; (1937) 3 All E.R. 920.

(2) *Ram Lal v. The Emperor* A.I.R. (1936) All. 651.

MAGISTRATE'S APPEAL.

K. A. Seth and *A. J. Braga* for the appellant.

E. P. Shanks (Crown Counsel) for the Crown.

Cur. Adv. Vult.

Brown, Ag. C.J. : — The appellant was an Inspector in the Singapore Police Force, and on the evening of Monday, December 11th, was the senior officer at Geylang Police Station. Geylang Police Station took its orders from Beach Road Police Station which was under the command of Detective Inspector Ong. The appellant was charged under section 221 of the Penal Code with intentionally omitting to apprehend any persons who were liable to be apprehended as members of an unlawful assembly.