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BY

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In re MARIA HUBERDINA HERTOGH; ADRIANUS PETRUS HERTOGH AND ANOR. v. AMINA BINTE MOHAMED AND ORS.

[Orig. Civ. Juris. (Brown, J.) December 2, 1950]

[Singapore — Originating Summons No. 248 of 1950]

Guardianship of Infants Ordinance, s. 11 — Marriage — Marriage between Moslem and non-Moslem — Capacity to marry — Country of domicile of non-Moslem bride — Custody — Mohammedan marriage — Declaration of validity of marriage — Jurisdiction of Supreme Court — Courts Ordinance, s. 11(111)(a).

This was an originating summons taken out under the Guardianship of Infants Ordinance by the father and mother of Maria Huberdina Hertogh (an infant) against Amina binte Mohamed, Maria Huberdina Hertogh and Inche Mansoor Adabi praying for the following reliefs:—

1. That it be declared that the marriage according to Mohammedan rites purporting to have taken place between the said Inche Mansoor Adabi and the abovenamed infant at the house of M. A. Majid in Rangoon Road, Singapore, on the 1st day of August 1950 is illegal and void and of no effect and that the said Inche Mansoor Adabi is not entitled to the custody of the said infant;

2. That the said Inche Mansoor Adabi be ordered to deliver up the said infant into the care and safe custody of the Consul-General for the Netherlands in Singapore on behalf of the plaintiffs, her parents, such delivery up to take place in the Chambers of His Lordship the Judge or at such other place as may be ordered;

3. That the said Consul-General be at liberty to restore the said infant to the care and protection of her lawful parents, the said Adrianus Petrus Hertogh and Adeline Hertogh, and for the purpose to send the said infant outside the jurisdiction of this Honourable Court to the place where her said parents may be residing;

4. That pending the hearing of this application the said Inche Mansoor Adabi and Amina binte Mohamed be prohibited from removing the said infant or allowing the said infant to be removed and the said infant be prohibited from departing from the jurisdiction of this Honourable Court;

5. That such other directions and orders may be given and made as this Honourable Court shall seem just and equitable.

It was contended on behalf of the husband (third defendant) that the Court had no jurisdiction to declare the marriage invalid, that the Guardianship of Infants Ordinance gave the Court no such jurisdiction and that the jurisdiction of the Court was restricted to the matters set out in section 11 of the Courts Ordinance. It was further contended (1) that Maria, having attained puberty in or about July 1949, is according to Mohammedan Law no longer an infant in law; (2) that as she was a major according to Mohammedan Law she was entitled to change her religion and become a Muslim; (3) that she, being a Muslim before her marriage, was lawfully married to Mansoor Adabi; and (4) that until the competent Court has declared the marriage void the husband was lawfully entitled to the custody of his wife.

The case for the plaintiffs was (1) that the Court has jurisdiction to declare the marriage invalid; (2) that according to the law of Holland, which was the country of domicile of the child's parents, she has no capacity to marry because she has not attained the age of sixteen; and (3) that the father was lawfully entitled to his child's custody.

Held, (1) that the Court has jurisdiction to make the declaration asked for; (2) that the marriage between Mansoor Adabi and Maria Hertogh was invalid; (3) that after considering all the circumstances the custody of the infant should be given to the mother who was now in the Colony.

Cases referred to :—

(1) *Chapman v. Bradley* 46 E.R. 842.
(2) *In re Paine* (1940) 1 Ch. 46.
(3) *Noordin v. Shaik Mohamed Meah Noordin Shah* (1908) S.S.L.R. 72.
(4) *Sottomayer v. De Barros* 5 P.D. 94.
(5) *In re Agar-Ellis* 24 Ch. D. 317.
(6) *In re Thian* (1926) 1 Ch. 689.
(7) *In re Agar-Ellis* 10 Ch. D. 49.
(8) *Skinner v. Orde* L.R. 4 P.C. 60.
(9) *In re Newton* (1896) 1 Ch. 740.
(10) *In re W.* (1907) 2 Ch. 557.

ORIGINATING SUMMONS.

E. D. Shearn and *K. A. Seth* for the plaintiffs.

Sardon Jubir for the 1st defendant.

Ahmad Ibrahim for the 2nd defendant.

John Eber (*in forma pauperis*) for the 3rd defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Brown, J. : — The history of this matter is that on the 22nd of April of this year an order was made in chambers *ex parte*, upon an application under the Guardianship of Infants Ordinance by the Consul-General of the Netherlands, that Che Amina binte Mohamed deliver up the infant Maria Huberdina Hertogh into the care and safe custody of the Social Welfare Department, Singapore, until further order. On the 28th of April an order was made, upon the application of the foster-mother Che Amina, giving her liberty to be made a party. On the 19th of May, a further order was made, upon the application of the Consul-General, that the Secretary for Social Welfare deliver up the infant into the care and custody of the Consul-General and that the Consul-General be at liberty to restore the infant to the care of her parents in Holland. From the orders dated the 22nd of April and the 19th of May Che Amina appealed, and on the 28th of July both orders were set aside by the Court of Appeal upon the ground that the necessary parties

had not been served as required by the Rules of the Supreme Court, and that the proceedings were therefore a nullity. These procedural defects could have been remedied without difficulty, as they have been. And the Court would have been left to determine a straight issue of fact of who should be given the custody of the child having regard to section 11 of the Guardianship of Infants Ordinance. But three days after the Court of Appeal had set aside the orders, and before there had been time to remedy the defects in the procedure, an event supervened which has greatly complicated these proceedings. On the 1st of August a ceremony took place at a house in Rangoon Road, Singapore, purporting to be a marriage under Mohammedan law, whereby the infant is said to have been married to one Mansoor Adabi (who has been made the third defendant in this originating summons.) The timing of the event and the age of the child (the birth certificate states that she was born on 24th March, 1937) could not fail to put this Court upon enquiry.

The present summons has been taken out under the Guardianship of Infants Ordinance by the father and the mother, who claim the custody of their child. The first prayer asks for a declaration that the purported marriage is "invalid." Mr. John Eber, on behalf of the third defendant, contends that I have no jurisdiction to declare this marriage to be invalid. He says that the Guardianship of Infants Ordinance gives me no such jurisdiction, and that my jurisdiction is restricted to the matters set out in section 11 of the Courts Ordinance, of which the material provisions are contained in paragraph (a) of sub-section (1). Section 11 (1) (a) reads as follows :—

"(1) The original Civil Jurisdiction of the High Court shall consist of —

(a) the same jurisdiction and authority within the Colony as was formerly exercised in England by —

(i) the High Court of Chancery, including therein the jurisdiction to appoint and control guardians of infants;

(ii) the Court of Queen's Bench;

(iii) the Court of Common Pleas at Westminster; and

(iv) the Court of Exchequer as a Court of Revenue as well as a Common Law Court,

and is now exercised therein by His Majesty's High Court of Justice;"

Thus I have no jurisdiction to make the declaration asked for unless it could formerly have been made in England by one of the four courts referred to *and* could be made now by His Majesty's High Court of Justice. Mr. Eber contends that in former days none of the four courts could have made a declaration of nullity of marriage because, being a matrimonial matter, the jurisdiction to make such a declaration was exercisable only by the ecclesiastical courts. In support of this argument he cited three local cases in which the Court refused to grant relief for want of jurisdiction. In each case the dispute was between husband and wife; and in each case the relief sought by the husband or wife was a relief which in former days in England could only have been given by the ecclesiastical courts. The first was a suit by the wife for restitution of conjugal rights. The other two were suits by the wife for a declaration that her marriage was valid. But this is not a nullity suit between husband and wife. It is an originating summons under the Guardianship of Infants Ordinance, in which the plaintiffs' main purpose is to obtain the custody of their child. The first prayer which asks that the purported marriage may be declared invalid is merely ancillary to that purpose. In former days the Court of Chancery exercised jurisdiction over infants, as the High Court of Justice does now. And in former days the Court of Chancery made declaratory orders which were introductory or ancillary to the relief which it proposed to administer, as the High Court of Justice does now. It is only necessary to refer to two cases out of many — one before the passing of the Judicature Acts, and one since. In the case of *Chapman v. Bradley*[1] and in the case of *In Re Paine*[2] declaratory orders were made declaring a marriage to be invalid, and those declarations were ancillary to the main relief which was sought. I have no doubt that section 11 (1) (a) (i) gives me jurisdiction to make the declaration asked for.

I therefore turn to the evidence of how this marriage came about. There is no evidence of the age of the third defendant, Mansoor Adabi, but I saw him on a Summons in Chambers on the 15th September and judged him to be a young man in his early twenties. Prior to the child leaving the Social Welfare Department's York Hill Home on the 28th of July this young man had seen her on two occasions only, when he had come to the York Hill Home in the company of Che Amina. Che Amina was unable to give the approximate dates of these visits, nor an approximate estimate of the interval between the two visits, nor any estimate of the interval between the second visit and the child's departure from the Home. But when the child left the Home on the 28th July, Mansoor Adabi went with Che Amina to fetch her, and thus he met her for the third time. Che Amina has stated in evidence that on the day they fetched her it had not been decided that he was to marry her. They took her to live in the house of a man named Majid in Rangoon Road, where they were both staying. The ceremony

of marriage took place at this man's house on the evening of the 1st of August, he being one of the two witnesses of the marriage whose names appear in the Register. No affidavit by this man has been filed, so he could not be ordered to attend for cross-examination under Order 36 rule 1. But Che Amina has stated on oath that she did not discuss the question of whether this marriage was in the child's interests with anybody other than the child. I have recorded in my notes that this answer was given after the question had been asked four times. She said that her reason for not discussing the matter with anyone was because the girl was "grown up." This refers to the fact, which is stated both in her affidavit and the child's, that the child attained puberty in July 1949. She said: "She (the child) had attained puberty, so what could I do?" She said that she told the child to consider the matter carefully, and that the child replied that she had considered the matter carefully and that she wanted Mansoor Adabi. In the absence of the child's father, the Kathi who performed the ceremony acted as 'wali', (that is the guardian who gives the bride in marriage). He was asked by what authority he did so, in the case of a child of this age; and he replied that he relied for his authority on the document appointing him as a kathi. This document is issued by the Governor under section 22 of the Mohammedans Ordinance and is in evidence as Exhibit 2. It contains no express provision for acting as 'wali', but it gives a general power to act as Kathi. He claims that it is implicit in his general power to act as Kathi that he should have power to act as 'wali', and that he has done so on many occasions. He said that he believed the child to have been a Muslim from birth. He admitted that he was aware of the order which the Court of Appeal had made three days before. He admitted that he made no enquiries about the child's father, but said that he knew from the newspapers that the father had not a Muslim name. And he said that it is not necessary by Mohammedan law to ascertain the wishes of the father if he is a non-Muslim, provided the girl has attained puberty. I thought it right to ask him if, having regard to the child's age, it would not have been prudent (even if it was not legally necessary) to have consulted some other authority. And I understood him to agree that it would have been prudent, but to repeat that it was not necessary.

After the most careful consideration of all the evidence which bears upon this marriage, the age of the child, the opportunities which she had of knowing Mansoor, and the date of the marriage in relation to the date of the Court of Appeal decision, I am compelled to the conclusion that this purported marriage was a manoeuvre designed to prejudice these proceedings, which is discreditable to all concerned. In saying that, I wish to make it clear that I am satisfied that the child was neither forced nor tricked into it. I have seen her in my Chambers, alone (with the Malay interpreter). Judged by the standard of a European child she is older than her years. And I see no reason to disbelieve the statement contained in her affidavit that on the two occasions when she and Mansoor met at the York Hill Home they were (so far as she was concerned at any rate) "mutually attracted." But it was just this "attraction" which made this manoeuvre possible. And what is to be said of people who will allow an attraction, which is formed by a child of thirteen for a man whom she has scarcely met, to be used as the basis of a manoeuvre which within the space of three days causes her to become his wife? Che Amina says, in effect, that because the girl had attained puberty, therefore she considered that it was no concern of hers. I do not believe that. Bearing in mind that Che Amina is a Malay and a Muslim who would attach more importance to the fact of puberty than I would myself, I still do not believe it. And if I did believe it I should say that she was unfit any longer to have the custody of this child. This Malay lady is not a kampong woman. In Europe she would be described as belonging to the 'bourjoisie' or middle class. And whatever may be said of her as a witness of truth, I believe that she has been a good and devoted foster-mother. I do not believe that any good Muslim, who had the interests of his or her daughter at heart, would allow her at the age of thirteen to marry within three days a man whom she had previously met twice. Neither do I believe her answer that she did not discuss this matter with anyone else. And from my observation of Che Amina I am unable to resist the impression that she was persuaded to agree to this discreditable manoeuvre by some other person, in whose mind the idea of it was conceived.

Those being my views of the facts of this purported marriage it is now necessary to consider whether in law it is a valid marriage. A feature of this case which has caused me some concern is the evidence of Haji Ahmad bin Haji Abdul Hallim, the Kathi who performed the ceremony. His view that it is within his general power as Kathi to act as 'wali' for a girl aged thirteen (if she has reached puberty), no express power to set as 'wali' being given to him in his commission, without taking any steps to ascertain the wishes of her father if he is a non-Muslim, is

contradicted in the affidavit of Tungku Mahmood Suhdi, who is the Shaikh-ul-Islam for the State of Selangor, in the Federation of Malaya. The latter's opinion is supported by that of Suleiman bin Abdul Kadir, who obtained the degree of Moulwi in Mohammedan Law at the University of Allahabad. Sub-paragraphs (iv) to (vi) of paragraph 4 of Tungku Mahmood Suhdi's affidavit read as follows :—

> "(iv) If a Christian girl who has never been married before becomes a Mohammedan, then in order to get married she must be given in marriage by the Kathi on behalf of the Head of the State otherwise the marriage is bad;
>
> (v) before giving a girl in marriage in the circumstances mentioned in sub-paragraph (iv), the Kathi acting on behalf of the Head of the State must ascertain if he can the wishes of the father and the Kathi may either give regard to those wishes or may disregard them;
>
> (vi) the Kathi can only give a female in marriage or authorize someone else to do so if he is authorized so to do by his commission from the Head of the State. If he is not so authorised he has no power in Mohammedan Law to give a girl in marriage."

On page 278 of Vol. II of the 4th edition of *Ameer Ali's* work on Mohammedan Law, in Chapter IV which deals with the Right of Guardianship for Marriage, the following passage appears :—

> "Persons not **sui juris** labour under the same legal disabilities as in other systems of law. They cannot enter into any contract or legal transactions without the consent of their natural guardians.
>
> The want of capacity, which results from minority, is founded on the principles of right reasoning and the desire to protect people not competent to exercise sound discretion in the affairs of every-day life from the consequences of their own acts."

That, if I may say so, in its application to the contract of marriage, appears to be in accordance with common sense, decency and humanity. But I am conscious of treading on unfamiliar ground, and I am mindful of the dangers, which Mr. Ahmad Ibrahim on behalf of the second defendant has pointed out, of relying upon such authorities as *Ameer Ali* which deal with Mohammedan Law as it applies in India, where the ordinary courts had jurisdiction to deal with matrimonial matters under Mohammedan law, which the Courts in this country have not. Nevertheless the passage which I have quoted has received judicial recognition in this Colony in the case of *Noordin v. Shaik Mohamed Meah Noordin Shah*[3] where the following passage occurs :—

> "There is no doubt that in the case of followers of the Shafee sect, a daughter remains under the **patria potestas** until she is married."

It is not disputed that, if the child is in law a Mohammedan, she belongs to the Shafi sub-sect of the Sunni sect. But neither the case cited nor the passage from *Ameer Ali* make any specific reference to a case where the girl's father is a non-Muslim.

It will however only be necessary to decide whether the marriage is invalidated as a Mohammedan marriage upon the ground that the Kathi had no authority to act as the girl's 'wali', if the marriage is otherwise valid by the law of the Colony. No doubt has been cast upon the following passage from *Ameer Ali* at page 187 :—

> "A marriage between a Moslem and a non-Moslemah celebrated in a foreign country is valid under the Mahommedan Law, if it is performed in accordance with the requirements of **lex loci contractus.**"

Thus it follows that if by the law of the Colony this marriage is invalid by reason of an incapacity of one of the parties, it is invalid not only by the law of the Colony but also by Mohammedan law under which it purported to be solemnized.

The general rule of English law (which applies in Singapore) is that a person's capacity to marry is governed by the law of his or her domicile, and that no marriage is valid unless each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other. But to this general rule there is an exception, following the difficult case of *Sottomayer v. De Barros*[4] which has been formulated in *Dicey's* Conflict of Laws (6th Edition) at page 784. Applying this exception, as formulated in *Dicey*, to the law of Singapore it would read as follows :—

> "The validity of a marriage celebrated in Singapore between persons of whom the one has a Singaporean, and the other a foreign, domicile is not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of Singapore."

The child's country of domicile is that of her father, Holland. And it is quite clear from the affidavits which are before me that by the law of Holland she has no capacity to marry because she has not attained the age of sixteen. In order that the above-quoted exception to the general rule may apply, two conditions have to be satisfied — (a) Mansoor Adabi's country of domicile must be the Colony of Singapore, (b) the child must be in law a Mohammedan, because only if she is a Mohammedan would she have the capacity by the law of Singapore to contract a valid marriage being under the age of fourteen. There is no evidence of Mansoor Adabi's domicile. Che Amina has said in evidence that his mother is from Kelantan and that he was born in Kelantan. He himself states, in paragraph one of his affidavit, that he is a probationary teacher attached to Bukit Panjang Government School, Singapore. Although there is no sufficient evidence of it, it would appear probable that his country of domicile is the State of Kelantan in the Federation of Malaya, and not the Colony of

Singapore. And I consider that *Dicey's* exception to the general rule does not apply in this case because there is no evidence that Mansoor Adabi is domiciled in Singapore.

But I think that the exception is also to be excluded upon the ground that, whatever the child may say and whatever ceremonies and teaching she may have undergone, she is not in the eyes of this Court a Mohammedan. Paragraph 16 of the father's affidavit states that he has been a Christian throughout his life, and that he has never consented and would never have consented to his daughter becoming a Mohammedan. And this Court must recognise his legal right, as her father, to control the religion, education and general upbringing of his child. The Court may deprive him of his right, if he shews himself to be unfit to exercise it or has in some other way abrogated it. But until that is done it is a legal right which this Court must recognise. (*In Re Agar-Ellis*[5]). Mr. John Eber argues that a distinction must be drawn between the legal right of the father and the fact that the child is now in fact a Mohammedan, and he says that the father's legal right cannot alter the fact. I put to him the hypothetical case of a Christian father whose child aged six is persuaded by one of the father's Mohammedan servants to embrace the Muslim faith, and to recite the necessary words in the presence of the necessary witnesses. Is the father, when he discovers this fact, to be deprived of his legal right to bring his child up in the Christian religion? It seems to me that in the present case as the father has never abrogated his legal right or consented to his child embracing the Muslim faith she cannot in law be regarded as a Mohammedan. If this is correct, then for this reason also the general rule must apply and the exception formulated in *Dicey* is inapplicable to this case, for neither by the law of her domicile nor by the law of this Colony had she the capacity to marry. I hold that the purported marriage is invalid.

I now come to the final and most difficult question in this case of who is to have the custody of the child. I am satisfied that it would not be to her interests to leave her in the custody of the third defendant. He is a probationer teacher with his way to make, and he has had the advantage of being ably represented by Mr. John Eber "in forma pauperis". Except for the two visits to the York Hill Home he first appeared on the scene as one of the parties to a discreditable manoeuvre, which resulted within three days in an invalid marriage with a child of thirteen. Apart from the fact that I am satisfied that it would not be in her interests to leave her in his custody, it seems to me that such a course would be entirely derogatory of the sanctity of Mohammedan marriage.

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. I am also satisfied that she has a real devotion for her foster-mother, Che Amina.

Mrs. Hertogh described herself as a Eurasian, whose mother is Eurasian. Her story is that in December 1942, when she was living with her mother at Tjimahi in Java, Che Amina asked if she would allow this child to stay with her for a few days at Bandoeng, which is a short distance away. Mr. Hertogh, a Sergeant in the Dutch Army, was then a prisoner of war in the hands of the Japanese. She says that Che Amina made this request on three occasions during the month of December, and on each occasion she refused. Mrs. Hertogh at that time had five children and towards the end of December a sixth child was born. She says that her mother, who had known Che Amina in Singapore, persuaded her to allow the child to go on a visit for three or four days, and three days after her confinement Che Amina arrived to fetch her. As the child did not return on the third or fourth day, she took her bicycle on the fifth day (eight days after her confinement) and set out for Bandoeng to bring back the child. On the outskirts of Bandoeng she was arrested by a Japanese sentry because she had no pass, and was thereupon interned. She says that until she was interned she was in the habit of taking the child to a Roman Catholic Church from a very early age.

Che Amina's story is that towards the end of 1942 Mrs. Hertogh asked if she would like to have one of her children, as Mrs. Hertogh had many and she had none. Mrs. Hertogh said that she did not know if her husband was dead or alive, but that in any case she was prepared to take the responsibility and answer to him for her action. Che Amina told her that if she took the child it must be on the understanding that she would regard her absolutely as her child, and that she would bring her up in the Muslim faith. To this Mrs. Hertogh is said to have replied that she was glad because she herself had been brought up as a Muslim.

Che Amina denied that Mrs. Hertogh was ever interned, and says that about a year after the child was handed over to her, the child was circumcised according to the Muslim faith and that both Mrs. Hertogh and her mother were present at the ceremony.

Having observed the two women in the witness-box I am constrained to say that the conflict between their stories is only matched by the unreliability of their evidence. I do not propose to set out the various unsatisfactory features in the evidence on both sides. But manifestly the person who could have thrown some light on this matter is Mrs. Hertogh's mother, and no explanation has been given on either side of why no affidavit by her has been filed. After the most careful consideration of the evidence before me I regret that I have been unable to arrive at any finding of fact between the two conflicting stories of how the child came into custody of Che Amina.

But the first plaintiff in this summons is the child's father, Adrianus Petrus Hertogh. I have not seen him, but he describes himself in his affidavit as a pensioner of the Royal Netherlands East Indies Army, now employed as a warehouseman by the Netherlands War Department. He states that his father, Cornelius Hertogh, was born in Holland, died in Holland, and never resided outside Holland. He himself was born in Holland in 1905 and resided in Holland until 1924 when he joined the Royal Netherlands East Indies Army, from which in 1948 he obtained his discharge in Holland, where he has resided since. Whatever may be the truth of the events which occurred at the end of the year 1942, it is clear that he took no part in them. He was then a prisoner of war in the hands of the Japanese. And whether he was deprived of his child through the voluntary act of her mother or through the unscrupulous conduct of Che Amina, it is clear that he was never consulted, has never at any time consented, and that no fault or blame, indifference or neglect, can be attached to him.

In determining this question of who is to have the custody of the child I must be guided by section 11 of the Guardianship of Infants Ordinance (Cap. 50 of the Laws of the Colony). That section reads as follows :—

> "11. The Court or a Judge, in exercising the powers conferred by the foregoing provisions of this Ordinance, shall have regard primarily to the welfare of the infant, and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be."

This section lays greater stress on the wishes of the parents than does section one of the corresponding Act in the United Kingdom. And it has been held that that section of the United Kingdom Act made no new law. (*In Re Thain*[6]). Therefore the judicial decisions made before the Act was passed in 1925 are still applicable and authoritative, and any stress which those authorities lay upon the rights of the father must *a fortiori* apply to section 11 of our Ordinance.

In the case of *In Re Thain*[6] the child was seven years old. In 1919, shortly after she was born, her mother had died, and the father having no suitable home for the child accepted the offer of the child's maternal aunt and her husband to take charge of her and bring her up with their own children. As in the case of Che Amina, they brought her up with care and affection and the child was devoted to them. In 1922 the father greatly improved his position in life, and in 1925 he desired to get back his child. Lord Hanworth (at page 689), in considering the words in section 1 of the Guardianship of Infants Act ("shall regard the welfare of the infant as the first and paramount consideration,") said :—

> "That is no new law, and the welfare referred to there must be taken in its large signification as meaning that the welfare of the child as a whole must be considered. It is not merely a question whether the child would be happier in one place or another, but of her general well-being."

That case differs from the present in two respects. In the present case, because of the age of this child, I attach an importance to a consideration of her wishes, which could scarcely be attached in the case of a child of seven. In that case it was said that "both sides are of the highest moral character." In the present case, while I am satisfied that Che Amina has brought up the child with care and affection, and while I am prepared to overlook the unfortunate impression which she made on me as a witness, I cannot blind myself to the fact that she was a party to the discreditable "marriage."

In the case of *In re Agar-Ellis*[7] a Protestant, on his marriage with a Roman Catholic lady, promised that the children of the marriage should be brought up as Roman Catholics. Soon after the birth of the first child he determined that they should be brought up as Protestants, to which determination he adhered. The mother, unknown to the father, had so indoctrinated them with Roman Catholic teaching that ultimately they refused to go with their father to a Protestant church. The father thereupon commenced an action to have them made wards of court and took out a summons for directions as to their education. It seems to me that the following passage from the judgment of James, L.J. (at p. 74) goes directly to the

point of where the duty of this Court lies in the present case :—

"If a good and honest father, taking into his consideration the past teaching to which his children have been, in fact, subject, and the effect of that teaching on their minds, and the risk of unsettling their convictions, comes to the conclusion that it is right and for their welfare, temporal and spiritual, that he should take means to counteract that teaching, and undo its effect, he is by law the proper and sole judge of that, and we, as Judges of the land, have no more right to sit in appeal from the conclusion which he has conscientiously and honestly arrived at than we should have to sit in appeal from his conclusion as to the particular church his children should attend, the particular sermons they should hear, or the particular religious books to be placed in their hands. He is quite as likely to judge rightly as we are to judge for him. At all events, the law has made him, and not us, the judge, and we cannot interfere with him in his honest exercise of the jurisdiction which the law has confided to him."

In *Skinner v. Orde*[8] an infant, the child of a Christian father and the issue of a Christian marriage, was left in India, by the death of her father, of very tender age, and brought up by her mother as a Christian during her early years. Her mother, after cohabiting with a man having a wife and professing the Christian religion, became with him a Mahomedan. The infant, after attaining the age of fourteen years, and being with her mother, professed a desire to become a Mahomedan, and adopted the Mahomedan mode of life. The Courts in India, having been applied to by the child's relatives to remove the infant from the custody of the mother, made an order placing her under a Christian guardian. In the judgment of the Privy Council (at page 73) this passage appears :—

"An eloquent appeal was made to their Lordships' feelings not to sanction such a violation of the young lady's present religious convictions and natural feelings as was involved in tearing her from her Mahomedan home and mother, and committing her to the care of a Christian strange schoolmistress."

Nevertheless, the recommendation of the Privy Council was that the order of the High Court in India should be affirmed. I quote the above passage because it serves to act as a reminder that, while the contemplated change from the Muslim religion to the Christian religion is a matter which cannot fail to cause me grave concern, it is necessary to view it in its proper light. This child, according to paragraph 4 of the mother's affidavit, which is corroborated in paragraph 2 of the father's, was baptized in the Roman Catholic faith on the 10th of April, 1937. She has had as little opportunity of understanding that faith as she has had of knowing her natural parents, who now desire that she should live with them and revert to the faith in which she was baptized. In the present case I have thought it right to give the most careful consideration to the wishes of the child herself, and I find support for so doing in the following passage from the judgment in *Skinner v. Orde* (at page 74) :—

"Considering the present age of the young lady, their Lordships think it would be very proper for the Court to ascertain for itself what her present opinions and wishes are, and what, having regard to those wishes and opinions, would in the present state of things be best for her."

But in that case the father was dead, and the mother's home was, to quote the judgment at page 72, "no longer a fit home for a Christian young girl."

In the case of *In Re Newton*[9] a Roman Catholic father allowed his two infant children by a deceased Protestant wife to be brought up in the Protestant faith. He was an intemperate man and neglected his children, dissipating the money which had been allowed him for their maintenance. The children were wards of Court, and when one of them was fifteen and the other eleven, the father, wishing to resume his parental authority, applied to the Court for an Order that they might thenceforth be brought up in the Roman Catholic faith. In that case it was held that he had, by his conduct, abdicated his right as a father. But Lindley L.J. at page 748 said :—

"In no case, however, that I am aware of, where the father has been alive, has the Court disregarded his wishes concerning the religious education of his children, unless, as in this case, he has been himself a man so ill-conditioned and of such bad conduct that the Court thought fit altogether to deprive him of the custody of his children."

The only authority, on this aspect of the case, which was referred to me on behalf of the defendants was cited by Mr. Ahmad Ibrahim on behalf of the child. It is the case of *In re W.*[10]. There is a Jewish boy, who was a ward of Court, both his parents being dead, had at the age of ten been ordered by the Court to be brought up in his father's religion and for this purpose was placed in a Jewish household. Three years later he wrote to his guardian that he no longer wished to be educated a Jew, and the Court made an Order that he should henceforth be brought up in the Christian religion. I need only point out that one reason why that authority affords little assistance in the present case is that both the parents were dead.

In the light of my examination of the authorities and of the guidance which they afford in determining the right course to be adopted under section 11 of the Guardianship of Infants Ordinance, I can have no doubt where the duty of this Court lies. First, the section requires me to "have regard primarily to the welfare of the infant." I have to consider her welfare in the terms of her general well-being in life, not merely for the present but for the future, not merely in the terms of her present wishes (at the age of thirteen) but also in the terms of a prospect which

a wider experience will afford. It is natural that she should now wish to remain in Malaya among people whom she knows. But who can say that she will have the same views some years hence after her outlook has been enlarged, and her contacts extended, in the life of the family to which she belongs? And can it be for her general well-being in life to deny her such experience and the opportunities that go with it, and to continue the unnatural separation from her father and mother and her family whom she has had no means of knowing since she was five years old? Secondly, the section requires me to "consider the wishes of the parents." I attach particular importance to the wishes of the father for two reasons. Firstly, whatever conflict of evidence there may be about the actions of the mother in 1942, it is beyond question that the father was parted from his child in circumstances in which he took no part and over which he had no control. Secondly, it is clear from the authorities that the father has a legal right to bring up his child in the way he thinks best for her welfare. I refer again to the words of James L.J. in *In re Agar-Ellis*[7], which I have quoted in this judgment. "The law has made him, not me, the judge of what is best for his child's welfare, and I cannot interfere with him in his honest exercise of the jurisdiction which the law has confided to him." Having regard primarily to the welfare of the child, I could take away his jurisdiction if it were not being honestly exercised. But through no fault of his he has had no opportunity of exercising his jurisdiction, and he now comes to this Court to claim it. Upon what ground am I to deprive him of a right which the law gives him? In not one of the authorities that have been cited has the Court deprived a father of this right unless he has in some way, or by his own misconduct, abrogated it. And I am satisfied that if I refused him the relief which he claims I should be acting contrary to the established principles of the law which it is my duty to administer.

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.

Costs against first defendant.

Order accordingly.

TAN GUEK EE & ANOR. v. LEE BEE CHOO *(m.w.)*.

[Orig. Civ. Juris. (Murray-Aynsley, C.J.)
January 18, 1951]

[Singapore — Suit No. 750 of 1950]

Civil Law Ordinance — Claim for damages arising out of death of a person — Liability of owner of vehicle — Amount of damages.

This was an action for damages arising out of the death of one Yeo Ah Khoon which was caused by a motor lorry belonging to the defendant. The defendant had hired the lorry to one Lee Ah Gee and at the time of the accident it was being driven by one Low Bah Bee who was the servant of Lee Ah Gee and not of the defendant. At the time of the accident the lorry was, owing to the mode of user, not insured against third party risks.

Held, (1) that as in this case the defendant knew that Low Bah Bee was driving and as she could, if she chose, have prevented him from driving, she must be considered to have permitted him to drive; (2) that as she had permitted the person to drive, the obligation to keep the vehicle insured whilst he was driving, was absolute, that it was immaterial whether she knew that he was insured or not and that she was therefore liable for damages.

ACTION for damages.

D. H. Murphy for the plaintiffs.

D. S. Marshall for the defendant.

Murray-Aynsley, C.J. : — This is an action for damages arising out of the death of one Yeo Ah Khoon which was caused by a motor-lorry belonging to the defendant. At the time of the accident the lorry was hired to one Lee Ah Gee and driven by one Low Bah Bee who was the servant of Lee Ah Gee and not of the defendant. At the time of the accident, owing to the mode of user, the lorry was not insured against third party risks. I found that the accident was caused by the negligence of Low Bah Bee. Both Low Bah Bee and Lee Ah Gee would be unable to satisfy a judgment for any substantial amount. In the circumstances the plaintiffs seek to recover from the defendant, the owner of the lorry.

As far as I am aware this is the first case of the kind in the Colony, but cases in England show that where an offence has been committed by permitting a person to drive a vehicle which is not insured against third party risks, an action lies at the instance of any person who suffers damage as the result of such failure to insure, which means that the actual driver and, I shall assume, the employer of such driver, is unable to compensate the injured person.

As regards liability, I think that the question in this case is whether the defendant permitted Low Bah Bee to drive. If that is the case, as I read the section, it is immaterial whether she knew that he was not