[VASSILIADES, P.]

VARTAN HAROUTIUN MALIAN,

Petitioner,

v.

ZOERO MALIAN THEN ZOERO PATSALI,

Respondent,

(Matrimonial Petition No. 1/68).

Matrimonial Causes—Divorce—Desertion—Jurisdiction—No civil marriage—Parties domiciled in Cyprus—Husband's petition for dissolution of marriage on ground of desertion by wife—Husband, an Armenian and a member of the Roman Catholic Church and a British subject—Wife, a Greek Cypriot and a member of the Greek Orthodox Church of Cyprus; and presumably a British subject by reason of the marriage—Marriage celebrated in 1957 at the Roman Catholic Church—No civil marriage under the provisions of the Marriage Law, Cap. 279—And no marriage ceremony in the Greek Orthodox Church—Marriage of the parties a legal marriage, sufficient to create the status of married persons—On the other hand a marriage which the Ecclesiastical Courts of the Greek Orthodox Church would not recognise; and would decline to take cognizance of, or deal with, matrimonial causes arising therefrom—A marriage, also, where the jurisdiction of this Court is not affected by the provisions of Article 111 of the Constitution—Absence of a civil marriage not a reason for this Court to decline to entertain the present matrimonial cause in the exercise of its jurisdiction in matrimonial causes—Law applicable in the matter is the Matrimonial Causes Act, 1950—See sections 19(b) and 29(2)(b) of the Courts of Justice Law, 1960 (Law of the Republic No. 14 of 1960) and section 9(b) of the Administration of Justice (Miscellaneous Provisions) Law 1964 (Law No. 33 of 1964).

Desertion—Animus deserendi—Desertion by wife without reasonable cause—See, also, above.

Divorce—See above.

Matrimonial Causes—Divorce—Children of the marriage—Custody, maintenance, care and education—Order for custody

applied for by the wife, refused, the Court declining to exercise its jurisdiction under section 26 of the Matrimonial Causes Act, 1950—Jurisdiction under this section, parallel to the jurisdiction of the District Court under the Guardianship of Infants and Prodigals Law Cap. 277—Sections 6 and 7(1) of Cap. 277.

Custody—Matrimonial Causes—Custody of the children of the marriage—See immediately above.

Children—Custody—See above.

Jurisdiction—Jurisdiction of the Supreme Court in matrimonial causes—Absence of civil marriage no reason why the Court will not entertain a matrimonial cause—See above.

This is a husband's petition for divorce on the ground of desertion by the respondent wife. The parties were married on March 3, 1957 at the Roman Catholic Church of Limassol, in accordance with the rites and ceremonies of that Church. They are both residents of Cyprus where they have their domicile. The husband is an Armenian and a member of the Roman Catholic Church. At all material times he was a British subject. The wife is a Greek Cypriot and a member of the Greek Orthodox Church of Cyprus. Presumably she became by her marriage a British subject. *There was no civil marriage* between the parties under the Marriage Law, Cap. 279; and no marriage ceremony in the Greek Orthodox Church. There are two children of the marriage and the Court had to deal, also, with the question of their custody, claimed by the wife.

A point of outstanding interest in this case was whether, in the absence of a civil marriage as aforesaid, this Court had jurisdiction to entertain the present petition. The Court held that it had.

Held, I. Regarding the point whether the Court, in the absence of a civil marriage, has jurisdiction to entertain the suit:

(1) Soon after the establishment of the Republic of Cyprus, this Court, in the exercise of its matrimonial jurisdiction, had to deal with petitions in matrimonial causes arising in marriages where one of the parties was a Roman Catholic and the marriage was celebrated in a Ro-

man Catholic Church. (*Cosgrove v. Cosgrove,* 1961 C.L.R. 221; *Darmanin v. Darmanin,* 1962 C.L.R. 264; *Mantovani v. Mantovani,* 1962 C.L.R. 336; and other cases). In most of those cases, the religious marriage ceremony followed a civil marriage under the provisions of the Marriage Law, Cap. 279, which, the Court held, created a complete marriage bond between the parties, to which the religious ceremony added nothing to the legality of the marriage, and was merely a matter satisfying the religious feelings of one or other of the parties; a matter of conscience.

(2) In the present case there has been no civil marriage; and the first point I have to decide is, whether in the absence of a civil marriage this Court has jurisdiction to entertain the present petition. In my view it has, for the following reasons:

(*a*) The marriage in the Roman Catholic Church of Limassol in 1957 between the parties, was, in my view, a legal marriage, sufficient to create the status of married persons to both and each of them.

(*b*) As a marriage celebrated in the Roman Catholic Church, between two persons one of whom did not belong to the Greek Orthodox Church, it was a marriage which the Ecclesiastical Courts of the Greek Orthodox Church of Cyprus would not recognise; and would decline to take cognizance of, or deal with, matrimonial causes arising therefrom (see the *Cosgrove's* case *(supra)* at p. 226). This would be the case even today, as far as I can say.

(*c*) In such circumstances, I take the view that the Supreme Court of the Colony of Cyprus would entertain prior to independence in 1960, a matrimonial cause arising out of the marriage. After independence, the position is, in my opinion, much the same. This is not a marriage where the jurisdiction of this Court was affected by the provisions of Article 111 of the Constitution (*infra*). The husband was at all material times, a British subject. I presume that the wife was also a British subject by marriage.

(*d*) As I have already said, there is a line of cases where this Court granted a decree of dissolution of a marriage celebrated in the Roman Catholic Church or in churches

of other denominations after a military or civil marriage. In *Darmanin's* case, *supra*, a decree nisi for dissolution was granted to a Greek Orthodox wife married to a Maltese Roman Catholic British subject, in Egypt, according to the rites of the husband's church. In *Bastadjian* v. *Bastadjian* 1962 C.L.R. 308, this Court, following the cases referred to therein, held that a Greek-Orthodox wife was entitled to have recourse to this jurisdiction for a matrimonial cause arising in her marriage at the Commissioner's Office and then at the Armenian Church to a Cypriot Armenian husband. See also *Bailie v. Bailie* (1966) 1 C.L.R. 283; *Dunne v. Dunne* (1966) 1 C.L.R. 164; *Wright v. Wright* (reported in this Vol. at p. 34 *ante*).

(3) Consequently, I take the view that the absence of a civil marriage in this case is no reason why this Court should decline to entertain the present matrimonial cause. The parties are husband and wife as a result of a marriage recognised by law. They have their domicile in the Court's jurisdiction. I see no reason why they should not have the remedy to which they may be entitled under the law applicable in this jurisdiction.

(4) Bearing in mind the importance of matrimonial causes to the individual parties concerned, as well as to the community as a whole, I take the view that until the legislature may otherwise provide by law, this Court should exercise its matrimonial jurisdiction, unless it appears, in the particular proceeding, that the Court cannot do so by reason of the provisions in Article 111 of the Constitution,* such jurisdiction having been vested in

*Article 111 of the Constitution reads as follows:

"1. Subject to the provisions of this Constitution any matter relating to betrothal, marriage, divorce, nullity of marriage, judicial separation or restitution of conjugal rights or to family relations other than legitimation by order of the court or adoption of members of the Greek-Orthodox Church or of a religious group to which the provisions of paragraph 3 of Article 2 shall apply shall, on and after the date of the coming into operation of this Constitution, be governed by the law of the Greek-Orthodox Church or of the Church of such religious group, as the case may be, and shall be cognizable by a tribunal of such Church and no Communal Chamber shall act inconsistently with the provisions of such law

2. Nothing in paragraph 1 of this Article contained shall preclude the application of the provisions of paragraph 5 of Article 90 to the execution of any judgment or order of any such tribunal".

some other tribunal *actually* operating where the litigant may have recourse and where his case may be judicially determined.

Held, II. Regarding the issue of desertion:

(1) The law governing the matter is the English Matrimonial Causes Act, 1950. (See sections 19(*b*) and 29(2)(*b*) of the Courts of Justice Law, 1960 (Law of the Republic No. 14 of 1960); section 9(*b*) of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law No. 33 of 1964) *Cosgrove v. Cosgrove* 1961 C.L.R. 221; *Wallis v. Wallis* 1962 C.L.R. 32; *Moring v. Moring* (1967) 1 C.L.R. 256; and several other cases.

(2)(*a*) On the evidence of the husband—which was corroborated by the evidence of I.K., a Welfare Officer, I find that in December 1964 the wife deserted the matrimonial home with the intention of putting an end to the marriage; and that she does so without reasonable cause.

(*b*) Therefore the petitioner is entitled to a *decree nisi* for the dissolution of the marriage by reason of the wife's desertion for three years prior to the filing of the petition.

Held, III. As regards the custody of the children, claimed by the wife:

(1) In the circumstances of this case, I take the view that the matter may be better dealt with under the provisions of the Guardianship of Infants and Prodigals Law, Cap. 277. With regard to the jurisdiction conferred on this Court in the matter of custody, maintenance and education of the children of the marriage, I am inclined to the view that this jurisdiction is parallel to that of the District Court under Cap. 277 *(supra)*.

(2) The parties have already made an agreement between them regarding the children in November, 1965. But I read any such agreement subject to the overriding interest of the children, as it may develop and change as time goes along.

(3) Reading carefully section 19(b) of the Courts of Justice Law, 1960, to which I have already referred, and considering that if either of the parties in this petition

has sufficient cause to show before the appropriate District Court, why the lawful father of these children should not continue to have their custody and be the guardian of their person as provided in section 6 of the Guardianship of Infants and Prodigals Law, Cap. 277, but that the mother or other person should be appointed as their guardian, solely or jointly with the father, as provided in section 7(1)(*a*), I have decided that, in the interest of the children, I should follow the course adopted by Golf J. *in re M. (infants)* (approved by the Court of Appeal as reported in [1967] 1 W.L.R. 1479, at p. 1481 F, per Willmer L.J.) and decline making any order for custody in the present case.

(4)(*a*) In view of the above, parents may now proceed to arrange between themselves as to the care and schooling of these children without undue interference from either side; especially interference in religious matters.

(*b*) If they fail to agree in making such arrangement with the help of the District Welfare Officer or other person competent to advise them in that connection, the party aggrieved by the other side's attidute regarding the children, may apply to the appropriate District Court for the necessary order under the provisions of the Guardianship of Infants and Prodigals Law, Cap. 277.

(*c*) The mother's application for custody is, therefore, refused without any order as to costs.

Decree nisi granted to the husband with costs in his favour to be taxed at the minimum of the lowest scale applicable in this proceeding. Application of the wife for the custody of the children refused with no order as to costs.

Cases referred to:

In re M. (Infants) [1967] 1 W.L.R. 1479, at p. 1481F, per Willmer L.J. *followed;*

Cosgrove v. Cosgrove 1961 C.L.R. 221;

Wallis v. Wallis 1962 C.L.R. 32;

Moring v. Moring (1967) I C.L.R. 256.

Darmanin v. Darmanin 1962 C.L.R. 264;

Mantovani v. Mantovani 1962 C.L.R. 336;

Bailie v. Bailie (1966) 1 C.L.R. 283;

Dunne v. Dunne (1966) 1 C.L.R. 164;

Wright v. Wright (reported in this Vol. at p. 34 *ante*;

Bastadjian v. Bastadjian 1962 C.L.R. 308;

Malian v. Malian (1967) 1 C.L.R. 120.

Matrimonial Petition.

Petition for dissolution of marriage because of the wife's desertion.

St. G. McBride, for the petitioner.

L. Demetriades, for the respondent wife in her application for custody.

The following judgment was delivered by:-

VASSILIADES, P. : This is a husband's petition for dissolution of marriage on the ground of desertion by the respondent wife.

The petition proceeded undefended. The respondent entered no appearance until later in the proceedings, when, on July 27, 1968, she entered an appearance through her advocate, "limited to the custody and guardianship of the children", as the advocate put it in the formal notice. A few days earlier, on July 13, 1968, the respondent wife had filed an application in the present petition for the custody of the children during the summer school-vacation; and moreover for the changing of an agreement made earlier (1966) between the parties regarding the schooling of the children of the marriage.

At the hearing of the application for custody, on July 22, 1968, it appeared that some more information was required regarding the care and schooling of the children; and that in the interest of all concerned, especially that of the children, it was desirable that the petition should also be proceeded with on the merits and be determined the earliest possible. Counsel for the petitioner readily agreed to this course;

and both proceedings, namely the husband's petition for dissolution and the wife's application for the custody of the children, were heard yesterday.

In the course of the hearing, the petitioner—to whom I shall hereafter refer as "the husband"—came to the witness stand in support of the petition; and later, when I was dealing with the wife's application for the custody of the children, she was called to the witness stand by her advocate, in support of that application. The husband was also examined in that connection.

The husband's case is that the wife, without reasonable cause, left the matrimonial home with *animus deserendi*, taking away the two children with her, on December 15, 1964; and that in the same *animus* she has stayed away ever since. This is the ground on which the husband seeks a decree of dissolution of the marriage. As regards the children, the husband claims their custody on the ground that this serves their interest best; and also on the ground that in the circumstances of the case, he is entitled to an order for their custody.

The wife while in the witness stand in support of her application regarding the children, admitted the desertion, but tried to explain it by stating that relations with her husband were so strained that "life was unbearable with him;" and so she decided to leave him, taking the children away with her out of Cyprus. She made it clear that she never changed her mind in that connection; and that she now has definite plans for getting married to another person, from a distant foreign country, if her present marriage be dissolved. In such a case she intends to settle either in England or in Cyprus. As regards the children she is anxious to have them with her, she said, as she believes that such an arrangement would serve best the interest of the children. She claims that under an agreement made and signed by the parties on November 8, 1966, pending other divorce proceedings between them, the husband agreed that she should have the custody and care of the children.

From the material before me there can be no doubt, I think, that the marriage between the parties has been irreparably damaged; and that it has actually become nothing more than a "holy deadlock" creating difficult problems and unhappiness to them all, as well as dangers for the children.

The material facts as I find them, from the evidence of the parties and that of a welfare officer called for the petitioner to support and corroborate his evidence, are as follows:-

The husband, born in Greece of Armenian refugees in October, 1925, came to Cyprus with his parents in 1932, where the family settled and lived ever since; and where he has acquired a domicil of choice which he still retains. He is now nearly 43 years of age and works in the employment of the British Ministry of Defence in the Department of the British Forces Broadcasting Services. At present he is employed as a stage manager of live shows. He has to travel about a good deal for his work, sometimes away from the Island. In 1951 he became a naturalized British subject, retaining his British nationality to the present day. He is a Roman Catholic born and brought up in a Roman Catholic home where, according to his evidence, religious practices and beliefs are matters of great importance.

The wife, according to the husband's evidence, is a Greek Cypriot with whom he met in 1956, at Limassol where she was working as a typist in the employment of the British Forces at Episkopi. She was then 23 years of age, he said, and he was 31. They are now 35 and 43 respectively. She belongs to a Greek Orthodox family who also seem to attach considerable importance to religion. For that reason they were opposed to the parties' marriage.

Nevertheless, the parties were married at the Roman Catholic Church of Limassol at the instance of the husband, on March 3, 1957. She had to get married, she said in the course of her evidence, and that is why she "formally" agreed that the children of the marriage would be brought up in the Roman Catholic religion. She also stated, however, that to her own Church Authorities, from whom she had to obtain a certification that she was a spinster, for the purposes of the marriage, she stated that the children, if any, would be brought up in the Greek Orthodox religion. And later in her evidence, she added that the arrangement made with her prospective husband was that the male children of the marriage would be christened as Roman Catholics while the female children would be christened in the Greek Orthodox Church. This part of her evidence was, however, contradicted by the husband, who stated that the agreement between them regarding the children, was that they would all be brought up as

Roman Catholics; and that this was expressly declared to his own Church Authorities who otherwise declined to celebrate the marriage.

There was no civil marriage between the parties under the Marriage Law (now Cap. 279); and no marriage ceremony in the Greek Orthodox Church.

After their marriage the couple lived at various addresses in Limassol where they established their matrimonial home until 1962. Their first child, a girl, was born to them on December 15, 1958; and their second child, also a girl, was born on April 21, 1961. These are the only children of the marriage, named Ann and Elizabeth respectively, now 9 and 7 years of age, staying at present with the mother.

The first child was christened in the Greek Orthodox Church, in the circumstances to which I shall presently refer; and the second was christened Elizabeth, in the Roman Catholic Church. The christening of the children was apparently one of the big differences between the parties, which gradually developed into one of the causes that ruined their marriage. Unfortunate as this may be, it offers one more example of the harm which fanaticism in religious matters may cause to a marriage where religion is intended to build and sustain love and harmony in the family. In this case the christening of the first child in the Greek Orthodox Church by the wife, instigated by the religious fanaticism of one of her aunts, at the back of the husband and against his wishes, shook the foundation of this marriage and set it rolling down to the precipice where it is now found in ruins.

As I have already stated, according to the husband, the arrangement between the couple was that the children should be brought up in his religion. And on the evidence, I find accordingly.

One evening, he said, when he came home from work, some time after the birth of the first child, his wife came up to him with the baby in christening attire and said to him: "Kiss your daughter who has been christened this afternoon". The surprising news shocked him. It was a nasty trick on her part. Without going any further in the evidence, I find that this incident started the most serious trouble between the couple. The husband to the present day feels strongly in the matter; and his conduct thereafter, I have no doubt,

was considerably influenced by that feeling. He desires and intends that the children should be brought up in his religion.

The wife, on the other hand, feels equally strongly and wishes the children to be brought up in her own religion. This is also the wish and intention of her family. The christening of the elder girl in the Greek Orthodox Church was the desire of her dying mother, she said; adding that her aunt who became the Godmother of the girl, gave property of the value of £6,000 or £7,000 to this child on account of the fact that she had her christened in her own religion.

The wife having left the matrimonial home in December 1964, stayed away from the island until the summer of 1966 when she returned with the two children and went to stay with one of her aunts. One of the reasons she returned to Cyprus, she said, was to take divorce proceedings for the dissolution of the marriage. When she met her husband, soon after her return, she made it clear to him that there was no intention on her part to resume cohabitation; and apparently she found that this was also his attitude to their marriage. As neither of them had a home to offer to the children, these were placed temporarily at a hotel until arrangements were made for their admission in St. Mary's School for girls at Limassol, also known as the Terra Santa school, run by Roman Catholic Nuns. The parents continued living apart; but both were naturally taking an interest in their children.

At the end of the first school year, in June 1967, the question arose as to the care and custody of the children during the summer. There were divorce proceedings pending between the parents at the time, Matr. Pet. No. 6/66. As that was subsequently discontinued, the Court's decision* in the application for the custody of the children was produced by consent in the present petition, and is on the record as *exhibit 2*. It speaks for itself; and I shall refer to it again later when I come to deal with the question of the children. In that connection, as I have already stated, the wife relies on the agreement between the parties of November 8, 1966, a photostat copy of which was exhibited in her affidavit in support of the application she filed on July 13, 1968, regarding the children. It is thus on the record; and it has been referred to by counsel on both sides. Found also on the record,

Note: Vide *Malian* v. *Malian*, (1967) 1 C.L.R. 120.

are several reports from Welfare Officers regarding the children, copies of which were supplied in due course to both sides. There are four of such reports, dated April 29, May 10, June 13 and July 20, 1968, respectively. They constitute, together with the other evidence, the material before the Court on the question of the custody of the children.

On this material, I find that neither of the parents, in their present circumstances, can offer to the children a suitable home. The husband lives in another town, with his own old parents who, apart of the question of religion, have never taken much interest in the children; and his work takes him frequently away. The wife is now planning a new life with another man; but her plans are still very uncertain. Her conduct regarding the children, particularly their religious education, gave rise to serious difficulties in the family. She now wants to take away the children from their school—(a long established and apparently well attended boarding school for girls)—and for that purpose she made herself a nuisance to the management, and takes objection to their returning there. I can well understand the husband's anxiety; and I would not be prepared to give her the custody, or even the sole care of the children. In the parties' present circumstances, I think that a suitable boarding school is the best answer to that question. Their best interest requires that kind of training and stability at least for the time being.

Before concluding with the facts, I may add that the evidence of the husband regarding desertion, was corroborated by the evidence of witness Irma Kapsali, a Welfare Officer, called by the husband, whose evidence I accept. It is also corroborated by the evidence of the wife. By her version of the facts, the wife tried to create the impression that when she deserted the matrimonial home in December 1964, she had good causes for doing so on account of the husband's conduct; but this part of her evidence, inconsistent as it is with her decision to let the petition proceed undefended, I find unacceptable in any case. I find that the wife deserted the matrimonial home with the intention of putting an end to the marriage; and that she did so without reasonable cause.

On these facts, I shall now proceed to apply the law.

The parties are both residents of Cyprus where they have their domicile. The law governing the matter is the Matrimonial Causes Act of 1950. (See sections 19*(b)* and 29(2)

(b) of the Courts of Justice Law, 1960; section 9*(b)* of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (No. 33/64); *Angela Cosgrove* v. *Alfred Cosgrove* 1961 C.L.R. 221; *Wallis* v. *Wallis* 1962 C.L.R. 32; *Moring* v. *Moring* (1967) 1 C.L.R. 256; and several other cases).

Soon after the establishment of the Republic of Cyprus, this Court, in the exercise of its matrimonial jurisdiction, had to deal with petitions in matrimonial causes arising in marriages where one of the parties was a Roman Catholic and the marriage was celebrated in a Roman Catholic Church. (*Cosgrove* v. *Cosgrove* (*supra*); *Darmanin* v. *Darmanin* 1962 C.L.R. 264; *Mantovani* v. *Mantovani* 1962 C.L.R. 336; and other cases).

In most of those cases, the religious marriage ceremony followed a civil marriage under the provisions of the Marriage Law (Cap. 279) which, the Court held, created a complete marriage bond between the parties, to which the religious ceremony added nothing to the legality of the marriage, and was merely a matter satisfying the religious feelings of one or other of the parties; a matter of conscience. In this case there has been no civil marriage; and the first matter which I have to decide is, whether in the absence of a civil marriage this Court can entertain the present petition.

The marriage in the Roman Catholic Church of Limassol in 1957 between these parties, was, in my view, a legal marriage, sufficient to create the status of married persons to both and each of them. As a marriage celebrated in the Roman Catholic Church, between two persons one of whom did not belong to the Greek Orthodox Church, it was a marriage which the Ecclesiastical Courts of the Greek Orthodox Church of Cyprus would not recognise; and would decline to take cognizance of, or deal with matrimonial causes arising therefrom. (The *Cosgrove* case (*supra*) at p. 226). This would be the case even today, as far as I can say.

In such circumstances, I take the view that the Supreme Court of the colony of Cyprus would entertain prior to independence in 1960, a matrimonial cause arising out of the marriage. After independence, the position is, in my opinion, as at present advised, much the same. This is not a marriage where the jurisdiction of this Court was affected by the provisions of Article 111 of the Constitution. The husband was at all material times, a British subject. I

presume that the wife was also a British subject by marriage. As I have already said, there is a line of cases where this Court granted a decree of dissolution of a marriage celebrated in the Roman Catholic Church or in churches of other denominations after a military or a civil marriage. In *Darmanin* v. *Darmanin* 1962 C.L.R. 264, a decree *nisi* for dissolution on the ground of persistent cruelty, was granted to a Greek Orthodox wife married to a Maltese Roman Catholic British subject, in Egypt, according to the rites of the husband's Church. In *Bastadjian* v. *Bastadjian* 1962 C.L.R. 308, the Court, following the cases referred to therein, held that a Greek-Orthodox wife was entitled to have recourse to this jurisdiction for a matrimonial cause arising in her marriage at the Commissioner's Office and then at the Armenian Church to a Cypriot Armenian husband. See also *Bailie* v. *Bailie* (1966) 1 C.L.R. 283; *Dunne* v. *Dunne* (1966) 1 C.L.R. 164; *Wright* v. *Wright* (reported in this Vol. at p. 34 *ante*).

I take the view that the absence of a civil marriage in this case is no reason why this Court should decline to entertain the present matrimonial cause. The parties are husband and wife as a result of a marriage recognised by law. They have their domicil in the Court's jurisdiction. They are before the Court with a Petition for a matrimonial remedy. I see no reason why they should not have the remedy to which they may be entitled under the law applicable in this jurisdiction.

Bearing in mind the importance of matrimonial causes to the individual parties concerned, as well as to the community as a whole, I take the view that until the legislature may otherwise provide by law, this Court should exercise its matrimonial jurisdiction, unless it appears in the particular proceeding, that the Court cannot do so by reason of the provisions in Article 111 of the Constitution, such jurisdiction having been vested in some other tribunal actually operating where the litigant may have recourse and where his case may be judicially determined.

As I have already said, the marriage between these parties has been irreparably damaged and has in fact ceased to exist otherwise than as a legal bondage, creating difficulties and unhappiness to all concerned. I, therefore, hold that this Court should entertain the petition; and that on the facts as established by the evidence, the husband is entitled to a decree

nisi for dissolution of the marriage by reason of the wife's desertion for three years prior to the filing of the petition. And I hereby grant him a decree *nisi* accordingly.

Coming to the question of the custody of the children, I take the view that, in the circumstances of this case, the matter may be better dealt with under the provisions of the Guardianship of Infants and Prodigals Law, (Cap. 277). It is true that section 26 of the Matrimonial Causes Act, 1950, provides that in a proceeding of this nature, the Court may, from time to time "either before or by or after the final decree" make such provision as appears just with respect to the custody maintenance and education of the children of the marriage; and that this Court has exercised such power in several cases. It has made, in this case, the order regarding the arrangements for the children of the parties herein, during the summer of 1967. (*Exhibit 2*, order made on June 26, 1967 in Matr. Pet. 6/66).* But I am inclined to the view that this jurisdiction is parallel to the jurisdiction of the District Court under the Guardianship of Infants and Prodigals Law (Cap. 277) which provides in section 6 that subject to the provisions of that statute the lawful father of an infant shall be the guardian of the infant's person and property; and in section 7(1) that the Court may, at any time, on good cause shown, make other arrangements including such order as it thinks fit, regarding the custody of an infant and the right of access thereto of either parent.

In the present case, the difficulties which the parents of these children have created for them by their attitude in religious matters, are likely to be increased, I think, by any order for custody made in these proceedings. The father, in the present circumstances of the mother and her attitude towards the school authorities, appears to be entitled to an order for custody in his favour. But at the same time I am inclined to think that he is likely to use such an order in a way which may cause emotional disturbance and unnecessary unhappiness to the children of the marriage, the two girls described in the welfare officer's reports before me, and referred to earlier in this judgment.

In case of an order for custody in favour of the father, I should in any case, consider it necessary to make provision

*Note: Vide *Malian* v. *Malian*, (1967) 1 C.L.R. 120.

enabling the mother to have access to the children, sufficient to maintain and cultivate proper relations between the children and both their parents, so necessary for their happiness and proper upbringing.

The parties have already made an agreement between them regarding the children in November, 1966. I read any such agreement subject to the overriding interest of the children, as it may develop and change as time goes along.

It has been submitted by learned counsel for the mother, that this is a binding agreement between the parties, already approved by this Court. I do not accept this submission; and I do not read *exhibit 2* before me, (the judgment and order on June 26, 1967, in Matr. Pet. 6/66)* as an approval of the agreement between the parties regardless of the interest of the children. On the contrary, it is clear, in my view from *exhibit 2*, that Josephides, J. in dealing with the matter in June, 1967, gave primary consideration to the interest of the children; and read the agreement between their parents subject to that interest.

Reading carefully section 19*(b)* of the Courts of Justice Law, 1960, to which I have already referred, and considering that if either of the parties in this petition has sufficient cause to show before the appropriate Court, why the lawful father of these children should not continue to have their custody and be the guardian of their person, as provided in section 6 of the Guardianship of Infants and Prodigals Law (Cap. 277) but that the mother or other person should be appointed as their guardian, solely or jointly with the father, as provided in section 7(1) *(a)*, I have decided that in the interest of the children, I should follow in this case, the course adopted by Goff J. in *re M. (Infants)* approved by the Court of Appeal as reported in [1967] 1 W.L.R. p. 1479, and decline making any order for custody in the present proceedings. Willmer L.J. in the course of his judgment on appeal, emphasised the importance of the religious education of the children in that case and had this to say regarding the non-making of a custody order by the trial Judge:- (at p. 1481, F)

> "In all the circumstances of this particular case, I think that the judge made a wise decision when he refrained from making an order for custody, but dealt

*Note: Vide *Malian v. Malian*, (1967) 1 C.L.R. 120

only with care and control. The effect of that is to leave both parents with a say in the future education of the children. In this case I think that that was a wise course to take, even though it may lead hereafter to further dispute between the parties if they cannot agree on what course of education should be pursued".

In view of the result of the petition as stated above, parents may now proceed to arrange between themselves as to the care and schooling of these children, without undue interference from either side; especially interference in religious matters.

If they fail to agree in making such arrangement with the help of the District Welfare Officer or other persons competent to advise them in that connection, the party aggrieved by the other side's attitude regarding the children, may apply to the appropriate District Court for the necessary order under the provisions of the Guardianship of Infants and Prodigals Law.

The mother's application for custody is, therefore, refused without any order for costs in the application.

In the result, I grant the petitioner a decree *nisi* for dissolution of the marriage on the ground of desertion by the wife, with costs to be taxed at the minimum of the lowest scale applicable in this proceeding. The application of the wife for custody is refused without any order for costs.

Decree nisi on the ground of desertion by the wife granted to the petitioner with costs to be taxed at the minimum of the lowest scale applicable in this proceeding.
Application of the wife for custody refused without any order for costs.