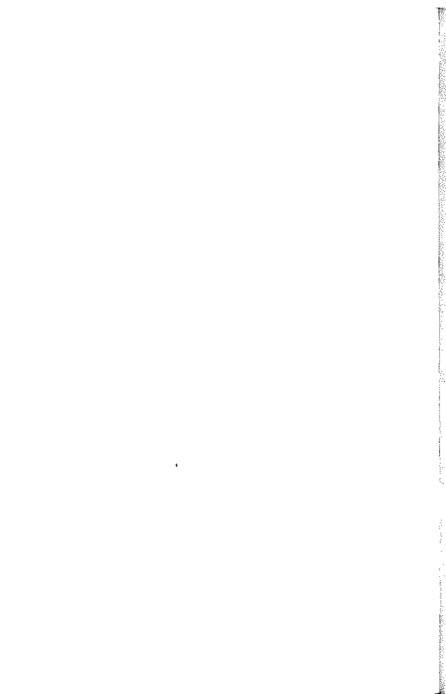
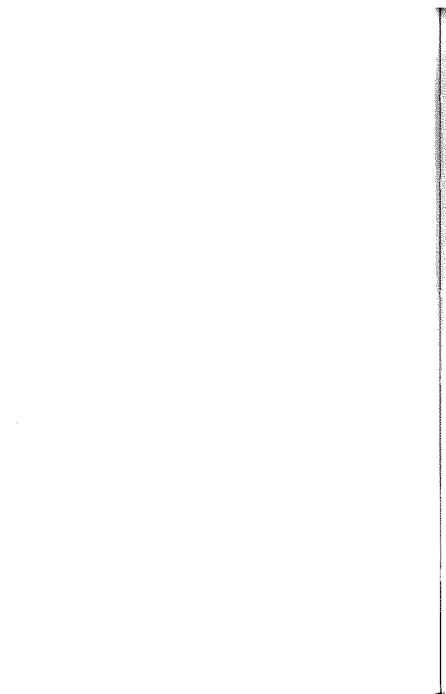


Piracy, Paramountcy and Protectorates



PIRACY PARAMOUNTCY AND PROTECTORATES

ALFRED P. RUBIN

PENERBIT UNIVERSITI MALAYA
KUALA LUMPUR MALAYSIA
1974

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To my Father

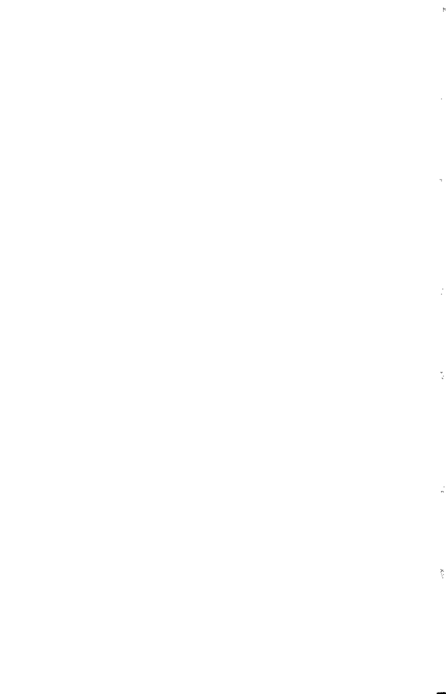
Introduction

In another book, *The International Personality of the Malay Peninsula; A Study of the International Law of Imperialism*, I have analysed the justifications asserted for their political actions by people of very different culture first confronting each other in the Malay Peninsula. That analysis ends when it became clear that European formulations would become the sole basis for the political reorganization of the Peninsula in the nineteenth century. In this book the evolution of European formulations during the nineteenth century is the focus of attention as arguments based on the supposed legal requirement that piracy be suppressed were abused, lost their persuasiveness, and were replaced with theories of right based more frankly on power relationships.

The research was done primarily in the Public Records Office in London and the University of Cambridge Libraries. A Summer Research Award from the Office of Scientific and Scholarly Research of the University of Oregon made it possible to devote some months to writing free of serious distraction.

ALFRED P. RUBIN

The Fletcher School of Law and Diplomacy
1974



1. Unresolvable Problems in Kedah

A. THE LAW AS AN OBSTACLE TO ACTION

The British acquisition of the island of Penang, renamed Prince of Wales's Island, one of the three settlements forming the territorial base for later British operations in the northern Malay Peninsula, were clouded in the shady dealing of a merchant adventurer named Francis Light. In 1786 Captain Light occupied Penang with the conditional permission of the Sultan of Kedah. The Sultan's conditions were never fulfilled by the British. Moreover, the Sultan had made it clear to Captain Light that the Thai had a claim to Kedah, thus to Penang; the Sultan did not have legal power to grant to the British rights in Penang held by the Thai.

Although the Thai did not immediately oppose the British occupation of Penang, Thai attempts to limit further British incursions in the northern Malay States led to great tension in the early 1820's when Thailand occupied with troops its claimed territory of Kedah. Two British missions were sent to Bangkok to attempt to stabilize relations between the British and the Thai. The first, ordered to negotiate trade matters and the status of Penang just before the Thai occupation of Kedah, arrived in Bangkok shortly after that Thai action. The British negotiator, John Crawfurd, later to be chief British administrator in Singapore and already author of a scholarly history of the Indian Archipelago, was able to make friendly contact with the highest officials of the Thai government, but he and his political superiors regarded his mission as in the main a failure. The second mission, led by Captain Henry Burney—perhaps less of a scholar than Crawfurd, but clearly a far more sensitive man and a very able diplomatist—resulted in a treaty concluded in

Bangkok on 20 June 1826. It also resulted in British recognition of Thai rights in Kedah (and north of Kedah on the West coast) and the extinguishing of Thai rights (hithereto based on custom) in Perak and perhaps other Malay States further South.[1] Complete British rights in Penang were recognized by the Thai.[2]

The Burney Treaty was unsatisfactory to British officials in Penang because it left the Thai in complete control of Penang's peninsular neighbor, Kedah, and left the British with responsibility for the ousted Sultan who had fled to British controlled territory when the Thai had marched into Kedah. Article 13 of the Treaty provided, in pertinent part, that:

> The English . . . will not . . . permit the former Governor of Quedah, or any of his followers, to attack, disturb, or injure in any manner the territory of Quedah, or any other territory subject to Siam. The English engage that they will make arrangements for the former Governor of Quedah to go and live in some other country, and not at Prince of Wales' [sic] Island or Prye, or in Perak, Selangore, or any Burmese country.[3]

Nonetheless, when Taju'd-din, the deposed Sultan of Kedah, refused to move to Malacca and accept the pension offered by the British in return for his withdrawing from political activities aimed at reconquering his Sultanate the British Government in Penang resolved not to press further proposals of that sort on him.[4] But the British Government in India (called the "Su-

[1]For a detailed analysis of the British-Thai negotiations of this period see Rubin, *Personality*, Ch. VIII. The text of Burney's Treaty may be found at Aitchison 115, and Maxwell and Gibson 77.

[2]Article 10 of the Treaty refers to "Prince of Wales' Island" as one of the "English countries", balanced against a reference to "Quedah" as one of the "Siamese countries".

[3]Aitchison 119. This language was deleted from the Treaty in 1842 after it had proved impossible for the British to discharge their obligation under it.

[4]I(3) Burney 475 letter from the ex-Sultan to Governor Fullerton dated 21 September 1826 at p. 477 and note following. See also British proposal to Taju'd-din dated 15 September 1826 and his revised reply (to the same effect as his reply of 21 September) dated 5 October 1826. 2(5) Burney 85 and 88.

preme Government" in contemporary records), after approving the Burney Treaty ordered the Penang Government to take "immediate steps" to remove Taju'd-din to Malacca.[5]

In response to this instruction Governor Fullerton of Penang again ordered Taju'd-din to move to Malacca, but Taju'd-din again refused. On 12 July 1827 he asked permission of Governor Fullerton to let him leave British protection and carry on alone his battle with the Thai for control of Kedah.[6] Rather than disobey his instructions and lend the appearance of British authority to the political activities of the ex-Sultan, Governor Fullerton continued to apply pressure on him to move to Malacca.

But Governor Fullerton seems to have been in a difficult position made no easier by his own ambiguous feelings about the Thai. He had argued strongly against the Supreme Government approving the Burney Treaty and had favored Taju'd-din in all the peaceful ways he could in the struggle over control of Kedah. Now, forced by the Supreme Government to act in ways he must have found distasteful indeed, he was opposed by a powerful segment of the British community in Penang. On 5 December 1827 he gave up his correspondence with Taju'd-din and asked the chief British legal officer in Penang, Sir John Thomas Claridge, "whether we are warranted by any Act or Statute to use force" to remove the ex-Sultan to Malacca. Claridge declined to answer what he as Recorder, a post that included the functions of judge, would do if Taju'd-din sought the protection of the court, on which he sat as one of three judges, against the actions of the Government of Penang, or if a criminal action were brought against agents of the British

[5]The notice of approval was sent to London on 2 April 1827. 2(5) Burney 192. The order to remove the ex-Sultan was dated 18 April 1827. 2(6) Burney 99. Ratifications of the Treaty had actually been exchanged on 17 January 1827. Aitchison 120.

[6]2(6) Burney 192–193.

Government seeking to remove him.[7] By the end of December 1827 Fullerton was completely exasperated by the evasiveness of Taju'd-din and the support he was receiving from even the official British community in Penang.

Meanwhile he proposed to the Supreme Government that he be authorized to institute a course of harassment and political pressure against Taju'd-din, including stopping his $10,000 annuity. The Supreme Government approved Governor Fullerton's proposal in a formal letter from the Governor-General in Council to the Governor in Council of Prince of Wales's Island dated 29 February 1828.[8] In that letter the Supreme Government indicated that force should not be used to remove the ex-Sultan from Penang, but that unless he went to Malacca, Siak or Delli (Sumatran Sultanates to which Taju'd-din had indicated in earlier correspondence that he might retire) his pension should be stopped. The Supreme Government alluded to the law of nations as adequate basis for suppressing the military activity of the ex-Sultan, which could, according to the Supreme Government, be regarded as "piracy".

On 24 October 1828 Governor Fullerton wrote directly to the Directors of the East India Company in London, bypassing the Supreme Government (Lord Amherst had retired as Governor-General in March 1828 and Lord Bentinck, his successor, had not yet arrived in India), to say that the ex-Sultan still refused to leave Penang and that his stipend was therefore being withheld.[9] A month later the situation was unchanged; Taju'd-din was still refusing to move to Malacca or the East coast of Sumatra. For a year, in fact, Taju'd-din re-

[7] 3(1) Burney 78–81. A fuller analysis of Governor Fullerton's position on the Burney Treaty and a detailed analysis of his actions to combat Thai control in Kedah is in Rubin, *Personality*, Chs. VIII and IX.A.

[8] 3(1) Burney 85–92, 94 *et seq*. The $10,000 annuity began as British compensation to Kedah for the loss of revenue entailed in the cession of Penang to the British, but was by this time regarded as a mere gratuity. See Rubin, *Personality*, Ch. VIII.

[9] 2(6) Burney 283.

mained in Penang while various members of his family raided the commerce of "Purlis and Quedah".

Whether the international law of "piracy" was generally regarded as applicable in 1828 to authorize summary suppression of politically-motivated behavior is a complex issue already analyzed elsewhere.[10] For the moment it is necessary merely to note that the concept was used against politically organized and motivated non-European groups in North Africa and the Malay Archipelago while felt improper for use against the political expeditions of unrecognized governments composed of Europeans in most cases. But in the 1820's most international lawyers did not distinguish on the basis of "race" or "culture" among the nations to which the law was felt to apply. Thus to attach the label "pirate" to a group against which the penalties of "piracy" were sought to be imposed as a political decision did not necessarily mean that many legists would have agreed that the international law cited by the British Government in India as the basis for political action would bear the weight apparently attributed to it by the Governor-General in Council. Interestingly, the Penang Government, which had always preferred Taju'd-din to the Thai in Kedah, did not treat the ex-Sultan's kin as "pirates", but ignored their depredations on Thai territory, explaining to London superiors that those chiefs were driven to plunder out of desperation regardless of political motives or consequences.[11] Even if "piracy" could be conceived to include depredations on land, not at sea, to hold that poverty excuses "piracy" while political motivation does not must have seemed logical only to those for whom the word itself carried meanings far different from the long international

[10]Rubin, *Personality*, Chs. IV.A and VI.B See also Rubin, *Piracy*. A substantial part of Tarling is devoted to a similar analysis from an historian's viewpoint. In his excellent monograph Tarling is acutely sensitive to the legal issues although, of course, not touching on them directly.

[11]2(6) Burney 285, letter from Fullerton and John Anderson to the Court of Directors dated 24 November 1828; p. 292, letter from Fullerton and Robert Ibbetson dated 21 April 1829.

law tradition that defined "piracy" as something akin to robbery at sea without political license.

The depredations of Taju'd-din's kinsmen, Long Puteh (the ex-Sultan's brother-in-law) and Tunku Din, called Kudin in all the correspondence (the ex-Sultan's nephew), continued throughout 1828. The principal Thai official in Kedah, son of the Chao Phya Ligor, made a formal complaint to the British in Penang on 23 February 1829 alleging "Twanku Koodin . . . and . . . the two sons of Twanku Long Puteh" under English colors to have made an attack on him personally and to be planning another. He asked that the ringleaders whom he named be seized "that there may be no infringement of the Treaty" of 1826.[12] In response the Penang Government ordered the British Superintendent of Police in Province Wellesley to proclaim that any persons residing there who aid or abet the ex-Sultan of Kedah in making an attack on Kedah "will be treated as pirates" and authorizing the seizure of the persons named by the "Young Chief".[13] Finding the British prepared to move actively, the Thai forwarded letters captured by them clearly implicating Taju'd-din in the February attacks on Kedah by Long Puteh.[14] Undeterred, on 8 October 1829 Taju'd-din moved to Province Wellesley, apparently to direct and take part in the grand attack his faction was preparing to mount to wrest Kedah from the Thai.[15]

Meanwhile, unable to get a sympathetic legal opinion from the Recorder in Penang, Governor Fullerton had had Claridge recalled and had written to the Supreme Government directly for legal guidance in case Taju'd-din should continue to refuse to leave Penang.[16] The legal opinion written by Jonathan

[12] 3(1) Burney 105.

[13] *Id.*, p. 103.

[14] *Id.*, pp. 131-137.

[15] *Id.*, p. 146, letter from Ibbetson to James Low, Superintendent of Police in Province Wellesley, dated 9 October 1829.

[16] 1 Kyshe lxviii.

Pearson, Advocate General of Bengal, to the British Government of Bengal dated 9 May 1829[17] displays the agony felt by those trying to accommodate the political dictates of imperial policy to the concepts of law to which they are trained:

> I conceive that if an attempt were made to remove a fugitive Prince from any part of the Presidencies in India where English law prevails [including Penang and Province Wellesley], the local Court would upon application being made to it, have the power to interfere and decide on the legality of the removal.

He then held that the treaty under which relations between the British and Kedah were formalized, giving the British rights in Penang and Province Wellesley and giving the Sultan of Kedah the annuity of $10,000, lapsed as far as the ex-Sultan of Kedah is concerned when he became "no longer able to fulfil" in favour of the British his obligations as ruler of Kedah. He concluded with the caution of a lawyer emphasizing the distinction between politically-oriented and law-oriented officials:

> If . . . the Ex Rajah should prefer a claim grounded on the Treaty of 1802 for the stipend originally payable under it, the Court will have to decide upon their authority to entertain the question . . . If it should happen that the Court [in Penang] determines that it is competent to enter the enquiry, and should decide against the United Company, an appeal is given by the Charter [of Justice establishing a system of British courts in Penang] to the King in Council, and of the result, I cannot bring myself to admit of a doubt.

Despite Pearson's apparent certainty as to the British legal obligation (or lack of obligation) to Taju'd-din under the treaty by which his predecessor purported to cede Penang and Province Wellesley to the British, it is clear that he knew the issues might be seen differently in Penang by law-trained officials. Furthermore, his silence on two other legal questions inevitably raised by the circumstances he was examining is positively

[17] 3(1)Burney 123.

thunderous. First, although acknowledging a legal purview in the courts in Penang over an attempt to remove Taju'd-din he did not indicate the probable result of a legal intervention by that court in the earliest stages of British action; he did not indicate what legal authority in British law Governor Fullerton might have, if any, to remove the ex-Sultan by force from Penang. Second, he did not mention that if the British obligations arising out of their occupation of Penang were owed to the possessor of sovereignty in Kedah, those obligations, including the obligation to pay the $10,000 annuity, were now owed to Thailand. Indeed there is much weak legal reasoning in what was the official position of the Supreme Government regarding British relations with Kedah and the Thai. In emphasizing the ex-Sultan's possible recourse to British courts the Advocate General in Bengal seems to have tried to ignore the international law problems that lay at the centre of the situation and reduce the entire complex of issues to one of British law-enforcement; to him the obstacles to effective action for the policy-makers to overcome were only obstacles in British municipal law that might be erected by British judges in Penang. Yet even in this limited sphere, his analysis was incomplete and probably erroneous to his law-trained contemporaries.

Nevertheless, the power of a lawyer to influence the course of action is well known, and when the lawyer gives his colleagues with power to command military force a legal-seeming authority for action that is desired anyhow, the action is taken without awkward questions being asked. The Thai Governor of Ligor was assured formally that the British would use force at least to prevent Taju'd-din from disturbing "the peace of Qhedah".[18] Money was offered Taju'd-din to go to Malacca or even back to Penang, and troops were ordered to Province Wellesley to prevent his going to Kedah as Thai troops patrol-

[18] *Id.*, pp. 155–156, Letter dated 29 October 1829.

led the Province Wellesley-Kedah border.[19] Finally, on 8 October 1830 the Supreme Government authorized Governor Fullerton of Penang to use force to take Taju'd-din to Malacca, and instructed him to pay the ex-Sultan $6,000 per year while he remained there.[20]

Still the British officials in Penang temporized,[21] but at last, on 6 June 1831, Taju'd-din was placed on a ship bound for Malacca, protesting to the end and surrounded by British police and military. British warships were stationed off the Kedah and "Mirabow" Rivers with instructions to cooperate with the Thai. Kudin and Long Puteh were called "pirates" and the British naval commanders were directed to treat them as such.[22]

Instructions from Bengal were apparently not regarded by the British in Penang as sufficient justification for the steps authorized. Before proceeding to carry out his instructions, the leading British official involved, Robert Ibbetson, who was to succeed Fullerton as Resident with a restored title of Governor in 1832, sent a detailed justification to the Deputy Resident at Penang.[23] Cutting through the legalities of the

[19]2(6) Burney 295–298, letters from Fullerton and Ibbetson to the Court of Directors dated 13 February and 30 June 1830.

[20]3(1) Burney 201.

[21]There were other reasons for this than community pressures favorable to Taju'd-din and antipathetic to the Thai. On 30 June 1830, largely as a result of Peninsular adventures undertaken by Fullerton in Perak and Selangor against the terms of the Treaty of 1826 with Thailand as interpreted by Burney, the Thai and the Supreme Government, Penang was reduced in administrative rank from a fourth "Presidency" of India to a mere "Residency" and the chief officers reduced to an overall "Resident" in Penang (Fullerton) and "Deputy Residents" with local responsibility in Penang and Malacca. The chief British official in Singapore was to be styled "First Assistant Resident". The garrison was cut to mere police-force size. The emotional and domineering Fullerton retreated into petulency his last two years in Penang and effective government was dominated by Robert Ibbetson, the First Assistant Resident in Singapore. See Rubin, *Personality*, Chs. IX.A and X.A.

[22]3(1) Burney 245–246, letter from Ibbetson to the Supreme Government dated 8 June 1831.

[23]*Id.*, pp. 239 *et seq.*, letter dated 19 May 1831.

Recorder and the reluctance of Fullerton, the representative of Great Britain in international correspondence, to use his powers to discharge British obligations toward Thailand, Ibbetson wrote:

> There cannot be a question, if the injury thus given [to the Thai by persons residing in Province Wellesley] had been sanctioned by the English Government, the Government so sanctioning it would have been guilty of the offense, and answerable accordingly to the Government of Siam, and it therefore behoves [sic] us, in proportion as we are anxious to avoid this imputation, to render to the State thus injured by our subjects every reparation in our power, and which can be done effectually only in punishing the offenders...
>
> That the 13th Article of the Treaty with Bangkok has seriously been violated by these acts there cannot in my judgement be a doubt...

While Taju'd-din was certainly not a "subject" of the British, Ibbetson, who had no official legal adviser from the time Claridge left in 1829 until B. H. Malkin arrived on 12 February 1833, regarded some of Taju'd-din's Malay followers as such.[24] Fortunately, however, Ibbetson was not confused by his own legalisms. The place in which a crime is committed is the main basis for criminal jurisdiction in English law; nationality is a basis for jurisdiction only with regard to acts specifically made criminal when performed by British subjects outside of the territorial jurisdiction of the Crown. Piracy is criminal if done, as by definition it must be (see below), outside the territorial jurisdiction of any state no matter what the nationality of the accused "pirate". To perform acts inconsistent with British international obligations is not criminal unless specially made so in British municipal law by action of a constitutionally empowered legislator. Therefore, the issue before Ibbetson was not one of nationality, but (a) what crime by British law is

[24] *Id.*, 232–234, letter from Ibbetson to the Government of Bengal dated 3 May 1831 promising to imprison British subjects who have had a hand in injuring the state of "our alliant", Thailand.

alleged to have been committed, and (b) when it was committed was the accused subject to the territorial jurisdiction of a British court.[25]

Ibbetson determined to treat Taju'd-din as not subject to British criminal law; those involved in the struggle in Kedah who were habitual "criminals" to an aggravated extent, in which class he expressly included Nakhoda Udin and (in later correspondence) Long Puteh, Ibbetson felt could be dealt with as pirates (regardless of what they had done or where or their nationality); and all *in British territory* who had taken arms against Thailand were to be confined. The effect of this was to permit Ibbetson to treat the ex-Sultan as a person to whom British municipal law did not extend, while at the same time applying British municipal law to his supporters, relying on his political superiors in India to protect him from any accusations that he acted beyond his legal authority under British law. Since pirates can be hunted down and killed without any state having a right to object, Ibbetson's decision to treat as pirates Udin and Long Puteh made it unlikely that they would ever reach British jurisdiction alive. Even if they did, their presence in British territory to seek the protection of British courts would, on the territorial principle of jurisdiction, subject them to the authority of the courts for whatever crimes against British municipal law committed in British territory, or in case of piracy the high seas, Ibbetson could discover that might be proved against them. As shown by his treatment of the third class, Ibbetson seemed confident that anybody taking action in British territory which the British were bound by an international undertaking to prevent was guilty of some crime. In

[25]This summary of legal rules rests on complex historical analysis. This paper is not the place to list citations dating back to the seventeenth century to support propositions that, while over-general, will be accepted without serious difficulty by most British-trained lawyers. Those interested in deeper study might start by referring to Latham and the case Fatimah and Ors. v. D. Logan and Ors., Penang (4 September 1871), 1 Ky. 255.

this he was probably mistaken, but by the time the legalities could be straightened out the immediate problem with Thailand would have been alleviated. In any case, he acted on his convictions of law and ran no serious risk in doing so: The law courts in the Straits Settlements had been closed in 1830 by Governor Fullerton in pique at having his title changed to Resident; the nearest courts with independent-minded judges available to Taju'd-din and his followers which could legally compel a change of policy in Penang were the British courts in Bengal.

To illustrate the difficulties felt in this period in determining the legal effect in British courts of the facts of imperial life and the impact strong-willed judges like Sir John Claridge can have on policy, the actual case of the Kedah annuity is instructive.[26] In 1809 Taju'd-din had been Sultan of Kedah receiving his $10,000 annuity from the East India Company. For safekeeping in that year his Laksamana had deposited the annuity for Taju'd-din in the Government Treasury in Penang. When the annuity was stopped in 1828 the Laksamana (son of the Laksamana of 1809) sought to withdraw the deposit. Governor Fullerton refused to release the money, apparently for political reasons: to keep the maximum pressure possible on Taju'd-din to bend to British desires that he move to Malacca; also, presumably, because of some doubt whether the money was properly owing to him or to the present rulers of Kedah, the Thai. The Laksamana, Ishmahel, brought suit against the East India Company in the Recorder's court in Penang before Sir John Claridge. It should be mentioned at this point that the law courts derived their powers from the Crown directly and the East India Company was merely a chartered organization which, despite many political ties to the Government of Great Britain, was amenable to suit in the normal way in British

[26]Ishmahel Laxamana v. East India Company, and *In re* Trebeck, Penang (20 August 1829) 1 Ky. 4.

courts. Following the normal course when a foreign "sovereign" seeks to use a British court, the Laksamana, who was clearly acting as agent for the ex-Sultan seeking to secure the assets of the state of Kedah, and not for the private individual Taju'd-din, made formal submission to the jurisdiction of the court for the purposes of this particular case. In the formal submission the Laksamana refused to acknowledge the general authority of the court. When Sir John objected to the form of submission to his judicial authority Ishmahel's lawyer, Mr. Trebeck, tried to avoid antagonizing the court and asserted merely that a general submission would be inconsistent with Ishmahel's religion, since the British court had ecclesiastical competence and Ishmahel was a Muslim who could not acknowledge the competence of a Christian court in matters of religion. Sir John was not deceived and apparently (the report is not entirely clear) asked why Ishmahel did not recite his submission to the jurisdiction of the court in the same general form as all other Muslim residents of Penang. The answer finally came that a foreign sovereign, the Sultan of Kedah, could not purport to remain "sovereign" if he admitted being subject to the general jurisdiction of any court, and that as a matter of British law, British courts are open *ad hoc* to foreign sovereigns who submit their particular cases to British courts. This argument clearly placed Sir John in a most uncomfortable position. If he upheld the submission of the Laksamana he would be agreeing that Taju'd-din was a foreign sovereign, thus jeopardizing British relations with Thailand, possibly violating by his official act the British obligation to abstain from interfering in the internal affairs of a foreign state (Thailand, if not Kedah). On the other hand, if he denied the validity of the Laksamana's submission he would, in a sense, equally be involving the British officially in internal affairs of Kedah and Thailand and striking a severe blow at Taju'd-din; it may be remembered that Sir John was personally a strong supporter of Taju'd-din's claims in Kedah

and had informed Governor Fullerton officially of his sympathies in harsh terms a year and a half earlier.

Sir John's feelings can be imagined as he turned to the Government's attorney and asked if the Government "recognizes any person to be King of Quedah". When the Secretary to Government replied, "No, my Lord, I believe not", Sir John told Mr. Trebeck: "Then do not let us hear anything more as to the King of Quedah".

Mr. Trebeck argued that he was astounded. He alleged the existence of a King of Kedah (by which he meant Taju'd-din) and denied to the court that the East India Company had any sovereign authority in Penang (again the report is unclear; the court was an arm of the Crown, not the Company. Presumably the argument was that since East India Company rights in Penang derive from a sovereign in Kedah, for the Government now to argue that there is no sovereign in Kedah is to argue against the basis of East India Company rights). Since the British rights were believed dependent on continued payment of a $10,000 annuity to the sovereign of Kedah there is substance to Mr. Trebeck's argument. The refusal of Fullerton to accord the perquisites of sovereignty to the Thai in Kedah had placed the court on the horns of a dilemma. Its own territorial jurisdiction, the right in international law of the British to issue a Charter of Justice and establish courts in Penang, was open to question. Sir John replied to Mr. Trebeck by having his name struck from the rolls of persons authorized to appear before the court as attorney. The Laksamana's case was never decided and the $10,000 deposited in 1809 remained in the Company's coffers.

The decade of the 1830's found the Government in Penang, anxious to stabilize relations on a peaceful footing with the Thai, again brought into difficulties by legal complications. As noted above in June of 1831 the British had instituted a naval patrol of the Kedah coast to suppress the "piracies" of Kudin

and Long Puteh and discharge British obligations under Article 13 of the Treaty of 1826. But in the absence of legislation making it a crime cognizable by British courts to disturb Thai territory there was no legal basis in British municipal law for prosecuting any "disturbers". Although the international law of "piracy" was regarded as an adequate legal basis for apprehending and summarily disposing of Taju'd-din's party when they were found at sea near Kedah, it was clear almost from the first that it would be desirable to fix some limit to the British involvement; a permanent patrol was unthinkable even to suppress "piracy", when the supposed piracy did not damage British trade.[27] On 15 August 1831 the Supreme Government in Bengal wrote a long instruction to Ibbetson in Singapore outlining the policy to be followed in carrying out British obligations under the Burney Treaty without doing any unnecessary fighting for the Thai.[28]

> [T]he extent to which our co-operation should be given to the Siamese . . . is a question of considerable nicety, and as no obligation to the effect is incurred under any Treaty, His Lordship [the Governor-General] is inclined to think it may be the better policy to avoid any operations of a hostile character either by land or sea.
>
> If those concerned in the enterprise against Quedah return for refuge or asylum into the British territory they must be seized and punished . . ., but there can be no reason to prevent their taking refuge elsewhere, if they do so peacefully . . . His Lordship would confine the measures of a hostile character. . . to the prevention of further assistance of men or arms joining them from Penang or Province Wellesley. Except so far as may be required for this specific purpose, His Lordship doubts if it can be necessary to maintain a strict blockade of the mouth of the river . . .

[27] 3(1) Burney 253, letter from Kenneth Murchison (Deputy Resident, Penang) to Ibbetson dated 1 August 1831.

[28] *Id.*, pp. 274 *et seq.*

When the Thai completed their re-pacification of Kedah shortly afterwards the British blockading ships were discharged.[29]

Within six months Ibbetson (now formally the chief British officer in the Straits and styled Governor) was asking for British naval support to blockade the Perlis River again. This time the reasons were ostensibly to prevent the commission of crime rather than to punish. Governor Ibbetson had been educated in international law by Rear Admiral Sir Edward W. C. R. Owen, British Commander-in-Chief of Naval Forces, East Indian Station, and realized the weakness of his legal position: With Long Puteh reportedly building his forces for another attack on Kedah (which included Perlis at this time) Ibbetson had discovered that he had no authority to arrest him because, 'in the words of Sir E. Owen, I could not treat as pirates any against whom no acts of piracy had been specifically alleged, or proof obtained.'

Governor Ibbetson wrote that he feared judicial process against himself in British territory and therefore felt he could not go against the ex-Sultan's party directly. The British naval authorities had advised him that they would not treat as pirates at sea any against whom there was no evidence of "piracy". Apprehensive that "piracy" was not an appropriate label for those merely taking part in a rebellion against recognized authority (and it should be borne in mind that although the Burney Treaty clearly recognized Thai authority in Kedah, and dozens of British official actions had carried the same legal implication, the Penang officials had been unable to bring themselves to believe it; rebellion against unrecognized authority would seem even less capable of being considered piracy, Governor Ibbetson felt his only recourse was to prevent Long

[29] *Id.*, pp. 284 *et seq.*, letters from Ibbetson to the Government in Bengal and the Captain of H.M.S. Wolfe dated 10 October 1831.

Puteh and his men reaching Kedah.[30] By avoiding the use of legal labels and confining action to areas outside the territorial jurisdiction of any British court it was hoped to avoid the legal problems raised by Admiral Owen.

The dates involved are also significant: Ibbetson sent his letter of justification on 25 April 1832. On 30 March 1832, less than a month before, notice had reached him that the legalism used by Governor Fullerton to close the courts of the Settlements was invalid. Ibbetson felt bound to re-open the courts, which he did on 9 June 1832 (although the new Recorder, B. H. Malkin, did not actually arrive until 12 February 1833).[31]

There is ample evidence that Ibbetson mistrusted the label "piracy" to justify political action. When Samuel G. Bonham, then Resident Counsellor at Singapore (he became Governor of the Straits Settlements himself before the decade ended), suggested a "pirate-hunting" expedition to Trengganu as a means of reminding the Thai of British interests on the East coast, Ibbetson refused.[32] Ignoring the talk of piracy, Ibbetson's grounds for refusal to send British forces to the waters off Trengganu rested on his interpretation of the Burney Treaty of 1826. He felt that Article 12 was intended to stop the British extending their influence north of Pahang on the East coast as a *quid pro quo* for the Thai agreeing in Article 14 to withhold consolidating their authority in Perak or any territory south of Perak on the West coast. It looked for the moment as if the British officials in Penang did not intend to try to use the concept of "piracy" to cover political advances in the Malay Peninsula and preferred to treat with the Thai as equal sovereigns in a single system of law.

[30] *Id.*, pp. 309–310, letter from Ibbetson to the Government of Bengal dated 25 April 1832. On Admiral Owen's responsibilities see Morse, *Chronicles*, Vol. IV, pp. 286–289; Fox, 28–30.

[31] 1 Kyshe lxxi – lxxii, lxxvi

[32] 3(1) Burney 317, 319, letters from Bonham to Ibbetson dated 9 August 1832 and from Ibbetson to Bonham dated 28 August 1832.

It was during this period that the borders of Province Wellesley were redefined much to the advantage of the British. In a letter dated the same day as the signing of the new agreement, 2 November 1831, the Thai official charged with the negotiation, the Chao Phya Ligor, wrote to Lord Beninck, Governor-General of India, that he had given much to the British in the new boundary agreement in order to gratify "the Raja of Singapore and Captain Low"—Ibbetson and the Superintendent of Police in Province Wellesley. He proposed a mutual defense treaty between Penang and Kedah and close co-operation in capturing and turning over to the other political offenders.[33] This Thai attempt to involve the British more closely in peninsular politics, if such it was, seems to have been ignored. The Thai concessions on the Province Wellesley border seem to have been accepted by the British with gratitude expressed, if at all, only in a formal way. There is no mention in later correspondence of any moral or other reason for co-operating with the Thai in peninsular matters beyond the express commitments of the Burney Treaty, and indeed, as has been seen, talk of sending British pirate-hunting expeditions to waters near the Thai-dominated territories of Kelantan and Trengganu persisted in some quarters among British officialdom in the Straits Settlements specifically to discourage the Thai from too great activity.

One of the reasons for the lack of gratitude on the part of the British for Thai concessions on the Province Wellesley border, less apparent than the general mistrust of this non-European people and the continuing fear of Thai designs on territory which the British were coming to regard as their exclusive preserve under theories of paramountcy (see Part II below), was a trick of mind that deserves mention. It is notable throughout British internal discussions concerning the Province Wellesley

[33] *Id.*, pp. 298,300. The text of the Agreement is also in Aitchison 123 and Maxwell and Gibson 206.

boundary and was the chief British negotiating point in asking for more territory to be carved out of Kedah for British administration that the territory was needed to permit adequate policing of the old Province Wellesley. The British police officials felt that in the absence of a "natural" boundary to Province Wellesley, malefactors could escape British territorial jurisdiction by skipping over the boundary with ease. But no thought at all seems to have been given the possibility of *reducing* rather than expanding Province Wellesley to a more easily policed area. In 1845 the Governor of the Straits Settlements asked his Bengal superiors for authority to seek still another concession from the Thai in order to straighten out what was felt to be an irregularity in the Province Wellesley-Kedah border. Again, no thought seems to have been given the possibility of retroceding part of the 1831 concession to produce the regularity felt to be desirable for policing the territory for which the British considered themselves responsible.[34]

Of course, as a matter of internal politics it is always easier to seek concessions from a foreign government than to give up rights believed in by part of an official's constituency. The merchant and planter community of Province Wellesley would have undoubtedly been strongly opposed to any yielding of even inchoate rights that might have any economic value. Furthermore, retroceding land to the Thai is not likely to have produced order along the boundary since Thai policing was not as effective as British and mobile bands would still have been able to base themselves in Thai territory to escape British policing, and skip to British territory to escape Thai expeditions. But the latter problems would remain regardless of the location of the border until the entire job of policing, on both sides, was put under some coordinated control. For that coordinated

[34] 4(2) Burney 155 *et seq.*, letter from Governor Butterworth to the Government at Bengal dated 31 January 1845, forwarding related correspondence.

control the British sought their own territorial expansion, but never seriously considered accepting the Thai invitation to negotiate some cooperative policing system at this time. The Thai internal constituency seems to have been as strong-willed as the British in fact, and the attempt at boundary negotiations in 1845 did not succeed.

B. THE END OF "PIRACY" IN KEDAH

In other places I have examined in some detail the process by which "piracy", a crime that in Europe was considered to be able to occur (by definition) only on the high seas or in territory outside the jurisdiction of any sovereign, was by 1830 acknowledged by British officials in India and the Malay Archipelago to be applicable to depredations in the land territory of the Malay Peninsula.[35] This development, giving British officials a means free of judicial interference to mingle in the political events of the Malay Peninsula, was climaxed by the correspondence following a "pirate-hunting" expedition led by Captain Low in 1827 at the order of Governor Fullerton. In that correspondence the Supreme Government at first took the view that "piracy" within the land territory of the Thai or the Malay Sultan of Perak was a definitional impossibility, but receded from that position when informed that the suspected "pirate" had been proved by captured documents to be a bad character and that the expedition occurred in Perak territory with the permission of the Sultan of Perak. While the British action in foreign territory with the permission of the local sovereign may have been justifiable at international law even in Europe at this time, the use of the label "piracy" in that context carried legal implications regarding the punishment to be meted out to the depredator that were not justifiable. The result was a confusion as to legal rights; the Penang officials felt authorized to treat some people as "pirates" who techni-

[35]Rubin, *Personality*, Chs. IV.A, VI.B and IX; *Piracy*, passim.

cally did not merit that label. As has been pointed out, the Penang officials, while feeling justified, had to yield to the sophistication of the senior British naval authorities when trying to use the label too broadly to justify suppressive action in the Peninsula, and were certainly apprehensive about what they regarded as the blind legalisms of British judges in cases of supposed "piracy". In 1811 the Penang court had sent accused pirates back to Calcutta for trial,[36] but by 1827 Governor Fullerton was using the lack of admiralty jurisdiction in the Penang courts as an excuse for hunting down suspected pirates and disposing of them without judicial review. In Fullerton's view, Malay officials acting outside their own territory, whether on the high seas or in the territory of some other peninsular sovereign, could be considered pirates:

> [F]or a noted pirate, one of the common enemies of mankind whom we are bound to destroy to be allowed to appear in a Municipal Court against an Act *committed in a sovereign capacity beyond its jurisdiction* is a novel idea certainly.[37] [Emphasis added]

The awkward wording is testimony to the depth of Fullerton's feeling.

The "pirates" involved in the correspondence of 1827 were Kudin, the nephew of ex-Sultan Taju'd-din of Kedah, and Nakhoda Udin, who held letters of authority from the Chao Phya Ligor.[38] The peninsular area involved was the tract between the Krian and Kurau Rivers along the border between Kedah and Perak.[39] Kudin was killed in 1829 during the up-

[36] R. v. Noquedah Allong and ors., 2 Ky. 3.

[37] 2(6) Burney 245, letter from Fullerton and Ibbetson to Lord Combermere, Vice-President of Bengal, in Council dated 27 August 1827, at p. 249.

[38] For the full tale see Rubin, *Personality*, Ch. IX.A.

[39] The British viewed this area as part of Perak; the Thai and ex-Sultan of Kedah viewed it as part of Kedah. Burney convinced the Thai to permit Fullerton to examine the evidence and determine the question as mediator between Kedah and Perak, which (surprisingly) was done with results (not surprisingly) favorable to Perak.

rising seeking to restore Taju'd-din to the throne of Kedah and Nakhoda Udin, the agent of the Thai in seeking to oust Taju'd-din's supporters from the Kurau-Krian area, had been forced to flee to Ligor and disappeared from peninsular politics soon after.[40]

The struggle to define the authority of British officials in the Straits Settlements to act to suppress "piracy" reached a climax during the last years of the decade of the 1830's and first of the 1840's as the Kedah succession was again fought over. Only this time the courts in the British colony had admiralty jurisdiction, so the clash between political and legal officers of Government could be fought out close to the scene of action.

Kenneth Murchison succeeded Ibbetson as Governor of the Straits Settlements in 1833. In 1836 Murchison reported to Bengal that Taju'd-din, now near 70 years old, had got a two months advance on his stipend and left British territory for Bruas in Perak, where he was attempting to stir up fresh intrigues against the Thai in Kedah.[41] Taju'd-din's immediate plans to stir up a concerted Malay effort against the Thai fell through, largely for lack of Perak's support as the British convinced the Sultan of Perak to withhold active help. The British determined to withhold his annuity from Taju'd-din as a lever to get him to leave Perak for Malacca.[42] Predictably, Taju'd-din preferred dignified misery in Perak to abandoning his life-long aim of returning to Kedah as Sultan. Things reached a crisis point shortly after Samuel Bonham assumed the Government of the Straits Settlements as Murchison's

[40] 4(2) Burney 118, James Low (now a Major) to William J. Butterworth, Governor of the Straits Settlements, report dated 4 February 1844, at pp. 122–124.

[41] 3(2) Burney 378 *et seq.*, 385 *et seq.*, letters from Murchison to the Government at Bengal dated 28 (18?) April and 25 June 1836.

[42] *Id.*, pp. 385 at 387–388; p. 393, letter from the Government of Bengal to Murchison dated 24 October 1836.

successor. On 29 April 1837 Bonham reported to Bengal that he had been:

necessitated in consequence of the conduct of the Ex Rajah of Quedah to remove him forcibly from Bruas, and . . . he is now in the harbour on board his own brig . . . under the guns of Her Majesty's Sloop Zebra.[43]

In fact, it appears that Taju'd-din had issued a call for all Muslims to invade Kedah; it had required a bloody battle with 300-400 of his Malay followers for the British to seize the ex-Sultan.[44]

Despite the physical removal of ex-Sultan Taju'd-din the situation did not stay quiet. By mid 1838 two nephews of Taju'd-din, Tuankus Mohamed Saad and Mohamed Taib, of whom we shall read much more in the next few pages, had established themselves at the Merbow River in Kedah and begun to tax or plunder (depending on whose version of legitimate sovereignty in Kedah is accepted) the surrounding peasants. Conscious of the Thai suspicion that the British in Penang supported Taju'd-din's pretensions and efforts to recover Kedah, Governor Bonham sent H. M. S. Wolf to go to the area. He instructed Captain Stanley of the Wolf to assist the Thai if he should find Mohamed Saad or Mohamed Taib "at sea engaged in combat with the Siamese".[45] Although Captain Stanley reported the Thai to be in no alarm and expecting reinforcements, Governor Bonham thought that some British intervention was called for by Article 13 of the Burney Treaty of 1826 as well as by wise policy "to remove from our immediate

[43] *Id.*, pp. 396 *et seq.*, letter from Bonham to the Bengal Government dated 29 April 1837.

[44] *Id.*, p. 403 for Taju'd-din's proclamation. The battle to capture him is described in Captain McCrea's report to Sir T. Bladen Capell, Commander-in-Chief East Indian Station, dated 25 April 1837, reprinted *id.*, pp. 409–418.

[45] *Id.*, p. 443, Instructions dated 22 July 1838; pp. 444 *et seq.*, letter from Bonham to the Bengal Government dated 30 July 1838.

vicinity a confederacy injurious to our commerce which disturbs the internal peace and welfare of this settlement". Knowing the Admiralty's views about piracy, however, and the Thai sensitivity to British operations in the territory of Kedah; and being wary of appearing to act in Kedah as an ally of the Thai rather than merely an independent British officer discharging British treaty obligations, Bonham proposed to act only at sea and not to permit a British engagement on land after the battle commenced. To better qualify his actions against the leaders of the ex-Sultan's party Governor Bonham tried to classify one of them a "*subject of the British Government*" by virtue merely of his holding lands in the Straits Settlements (emphasis Bonham's); he tried to deny the basic political motivation of the supposed "pirates" by asserting repeatedly that their object was just plunder.[46]

To take advantage of the supposed British nationality of some of Mohamed Saad's people Governor Bonham issued a proclamation on 27 July 1838 that:

All persons professing to be British subjects are hereby required to withdraw themselves from the Siamese territory . . . otherwise they will be considered as having forfeited all claim to protection as subjects . . .[47]

Clearly, the legal lever applicable to control the actions of British subjects abroad was felt to be less powerful in action than it was in contemplation; the threat to withhold protection was hardly likely to influence people fighting the Thai beyond the reach of British gunboats, particularly when the British were known to be bound by Treaty to support the Thai.

The "pirates" whose aim was just plunder according to Governor Bonham conquered the seat of government in Kedah on 2 August 1838 and Bonham predicted they would disperse after looting the state. But the plundering rebels refused to

[46] *Id.*, pp. 444 *et seq.*
[47] *Id.*, p. 455.

confine their acts to private plunder despite Governor Bonham's constantly calling them pirates. On 13 August 1838 they proclaimed Tuanku Abdullah, the eldest son of Taju'd-din, Sultan of Kedah and commerce between Kedah and Province Wellesley seems to have been opened despite British official attempts to keep the border closed.[48]

Although Governor Bonham attributed the new regime's success to the remissness of the Thai alone he asked permission to help the Thai by fighting on land in Kedah in order to discharge what he still felt were British obligations under the Burney Treaty "not to permit" Taju'd-din's party to disturb Kedah.[49]

In fact the situation was far more complex than admitted by Bonham at this time. The Thai had actually cited the Burney Treaty in June 1838, (just before Captain Stanley had reported there was no alarm in Kedah), requesting the British to drive the "pirates" from the seas, asserting them to be basing themselves in British territory for their attacks on Kedah and asserting the Thai inability to defeat them to be a result of the sanctuary in Province Wellesley which the British, the Thai believed, were

[48] *Id.*, pp. 460–463, letter from Bonham to the Bengal Government dated 6 August 1838; proclamation pp. 470–471. Governor Bonham felt it was legally impossible to close the border, presumably because the Burney Treaty provided for trade between Kedah and Province Wellesley in its Article 13. Why the trade term was considered to apply in circumstances certainly not envisaged by the Treaty is not clear. The Treaty of 1800–1802 between the British and Taju'd-din's uncle, by which the British first acquired Province Wellesley, has no term requiring the British to permit trade. Maxwell and Gibson 98. Perhaps Bonham's legal view related to lack of an ordinance in Bengal or in the Straits Settlements closing the border—but that should have been an easy lacuna to fill unless community sentiment in Penang was so strong that Government action along those lines would have raised serious morale problems; but if that were the case, the difficulty was not legal but administrative. Closing the border was the problem, not passing an ordinance through the appointed Council.

[49] *Id.* pp. 460–463, letter from Bonham to the Bengal Government dated 6 August 1838.

not policing effectively (!).[50] Furthermore, as Bonham was forced to admit later, the bulk of the British population of Penang and Province Wellesley, European and Malay, favoured Taju'd-din over the Thai in Kedah; the Penang merchants were profiting greatly from selling arms to Malays.[51]

The British in Bengal disagreed with Governor Bonham both as to his use of the concept of "piracy" and as to his recommendation that the British commit themselves to land action in the Peninsula. On 26 September 1838 the Secretary to Government in Bengal told Bonham[52] that the proclamation of 27 July was approved but recognized that no penalties were saddled on British subjects who ignored the requirement to withdraw from Thai territory, that there was a possibility that principles of free movement for British subjects might make it impossible politically to have an ordinance passed in Penang (or elsewhere) to restrict the activities of British subjects in foreign territory, and that the international law of piracy could not supply the lack of legal basis for compelling British subjects (or others) to refrain from political adventures in the Peninsula. The Bengal authorities therefore proposed that the penalty for British subjects disobeying the "requirement" be to turn them over to the Thai to be tried for offences committed in Thai territory (presumably including all of Kedah, even that part under the effective control of Mohamed Saad). The Government of Bengal did not consider the possibility that it might violate fundamental principles of English law to extradite in this way British subjects to a country with whom there was no extradition treaty and concerning which no ordinance existed with effect in British

[50] *Id.*, pp. 473 *et seq.*, letter from Chao Phya Pra Klang in Bangkok to Governor Bonham dated 24 June 1838.

[51] *Id.*, pp. 484 *et seq.*, 505 *et seq.*, letters from Bonham to the Secretary of the Bengal Government dated 31 December 1838 and 21 January 1839.

[52] *Id.*, pp. 478 *et seq.*

municipal law.[53] In response to Governor Bonham's comments about the Malay who held land in the Straits Settlements, Bengal indicated that land-holding was a sufficient basis for him to be treated as a British subject, although no coherent argument was given for this extraordinary view. Acknowledging that the legal authority of the Straits Settlements Government was inadequate to deal with British nationals disobeying the decree of 27 July, Bengal indicated that consideration was being given there to passing some sort of law imposing sanctions for engaging in prohibited activities "committed in the territory of our allies". With regard to military action, Governor Bonham was forbidden to engage in any land-based action, but was authorized to cooperate with the Thai at sea, even to blockading the coast of Kedah and Perlis and accepting surrenders at sea of those fleeing the Thai. For humanitarian reasons individuals (as opposed to places) surrendering to the British were not to be delivered to the Thai for barbarous treatment. It is a bit difficult to reconcile this last instruction with the authorization to turn over to the Thai British subjects who engaged in fighting against the Thai (or British subjects who merely failed to quit Thai territory, if the proclamation and the instructions on implementing are read literally). It may be presumed that the extradition instructions were never intended to be carried out but were intended merely to give Governor Bonham a threat to hold over the heads of British subjects involved in intrigues in Kedah.

Blockade ships were made available to the Penang authorities and on 7 December 1838 the Commander of the sloop Hyacinth posted in Kedah a proclamation that "the whole

[53]The Crown was at this time, and still is, without power at common law, *i.e.*, without the authority of a Parliamentary Act, to arrest a fugitive criminal of any nationality and turn him over to another state. The power was first conferred on the Crown by the Extradition Act, 1870, 33 & 34 Vict. c. 52. See Clarke, 126 *et seq.* See also O'Connell, 793 esp. note 13. Even under the Extradition Act, the extradition of "political offenders" is not authorized.

coast . . . is hereby . . . under effective blockade."[54] With regard to enacting legislation to inhibit the actions of British subjects in the Peninsula, Governor Bonham wrote that the legal problem was made extremely knotty by the involvement of Europeans in the support of Mohamed Saad and his party in Kedah. The basis for his distinguishing in law between British subjects of European ancestry and those of other ancestry is not clear, but it may have had something to do with his suspicion that British subjects of European background were likely to call on the British courts citing Magna Carta and other historical documents limiting the authority of the Crown over British subjects (of whatever ancestry). Since the trade in arms was proceeding through Province Wellesley it was not subject to interception by the naval blockade. Bonham suggested an enactment prohibiting any trade with insurgents, noting that it should be drafted with excruciating care as it "will have to undergo the ordeal of an English Court of Justice."[55]

On 7 March 1839 the Thai swooped in and reconquered all of Kedah; on 6 April they took Perlis. Mohamed Saad and Mohamed Taib escaped to Province Wellesley.[56]

While affairs in Kedah were progressing the views held by the British political officials with regard to "piracy" were undergoing a rapid evolution. It may be remembered that in

[54] 3(2) Burney 490. The declaration and the language about "effective" were legal requirements stemming from the customary international law of war at sea as it had evolved in Europe. The applicability of these technical rules of international law in areas unfamiliar with the European practices dated back at least to the wars with revolutionary France, when the British blockade of France was held not to apply to North African vessels in the absence of declarations and some substantial effectiveness to make continued trade at least risky. See *The Hurtige Hane*, 3 C. Rob. 324, 165 E. R. 480 (1801); *The Betsy*, 1 C. Rob. 93 (1798).

[55] 3(2) Burney 484 *et seq.*, 505 *et seq.*, letters dated 31 December 1838 and 21 January 1839. The quoted language is from the latter at p. 507. The Act was eventually passed in Bengal as Act X of 1839.

[56] *Id.*, pp. 524, 528–529, reports from the Commander of H.M. Sloop Hyacinth to Governor Bonham dated 20 March and 11 April 1839.

1832 Governor Ibbetson had rejected the suggestion made by Bonham when Bonham was merely Resident Counsellor at Singapore that a "pirate-hunting" expedition be sent to the Trengganu coast to intimidate the Thai. Now Bonham was Governor and in 1838 there was in fact a British patrol off Trengganu hunting "pirates."[57] But while there were in fact depredators operating in waters near Trengganu who may indeed have been "pirates" by the traditional definitions of the word,[58] British naval officers in the area had real doubts about calling the expeditions led by Mohamed Saad by that name. One such officer, Sherard Osborn, later to be appointed Commander-in-Chief of the Chinese Navy that died at birth in 1863,[59] referred to Mohamed Saad's fleet of 1838 as "styled by us a piractical one" and noted:

> [A]lthough many of the leaders were known and avowed pirates, still the strong European party at Penang maintained that they were lawful belligerents battling to regain their own.
>
> The East India Company and Lord Aukland, then Governor-General of India, took however an adverse view of the Malay claim to Quedah, and declared them pirates, though upon what grounds no one seemed very well able to show.[60]

Whether or not Osborn was correct in relating the views of Lord Aukland (there is nothing in the official correspondence of 1838-1839 indicating the Supreme Government to have determined that Mohamed Saad and his men were to be labelled "pirates"), it does appear that Governor Bonham in Singapore arranged with the Thai that all armed Malay prahus in the Kedah area during the period of the British blockade were to be treated as pirates. It also appears that some of the

[57]Osborn 20, 22.

[58]A very full rundown of British activities in the Malay Archipelago to suppress what seems to have been true piracy, *i.e.*, robbery at sea by a second vessel without any state authority and for private ends, is in Mills, 232 *et seq.*

[59]2 Morse, *Foreign Relations* 35 *et seq.*

[60]Osborn 22.

Malays captured by the British blockaders perceived the legal difference between "warlike" and "piratical" character and argued the impropriety of the British action.[61]

Thus, it appears that British administrators at the highest local levels, the Governor of the Straits Settlements and possibly even the Governor-General of India, were willing by 1839 to return to the practice of 1827, abandoned in the early 1830's, of labelling Malay claimants to political authority in the Peninsula as "pirates" in order to be able to justify British intervention without running the difficult course of seeking legislation in the British community necessary at British municipal law to authorize suppressing them. The declared policy of non-intervention in peninsular affairs was evaded by citing international law to authorize action that would not be authorized under the English law limiting the Crown's powers. British naval authorities, whatever their doubts, were subordinate to British political officials, and therefore served as agents in the suppression.

But British judges were (and are) not subordinate to British administrators. On 2 July 1840 Mohamed Saad was captured in Province Wellesley and on 26 October 1840 he was tried at Penang on a charge of "Piracy", Sir William Norris, Recorder, presiding.[62]

A single specific act of "piracy" was alleged against Mohamed Saad and his companions: That they forcibly captured a Malay boat of $150 value, putting the crew *in terrorem*, while on navigable waters. This was equivalent to a charge of robbery within the jurisdiction of the admiralty and outside the territorial jurisdiction of the historical common law courts of England.

[61] *Id.*, pp. 29, 86.

[62] 4(2) Burney 7, letter from Bonham to the Secretary to the Government in Bengal dated 26 January 1841; R. v. Tunkoo Mahomed Saad and ors. (Penang, 26 October 1840), 2 Ky. 18.

Since 1536 it was the proper accusation to bring in a British court in cases of suspected piracy.[63] Mohamed Saad's principal defence was that he was not a pirate by British municipal law or by international law but an agent of a foreign sovereign (the Sultan of Kedah) committing an act of war. From this premise he argued that he should be treated not as a criminal at British municipal law, but as a prisoner of war at customary international law. To further support his being not subject to the municipal law of England when performing his supposed piracies, he alleged that he was not a British subject. British obligations under the Burney Treaty were in no way applicable to him, either by British municipal law or international law since Kedah, a sovereign state fully independent of both Great Britain and Thailand, was not bound by that Treaty and the people of Kedah, of whom Mohamed Saad argued he was one, were under no legal obligation to abide by the wishes of the British or the Thai. Futhermore, neither British municipal law nor international law forbids revolutions in a second state. He may have violated Thai law if Thai law ever extended to Kedah, but not British law. In a long and scholarly submission based squarely on international law as perceived and applied in Europe, J. R. Logan as attorney for the defendents citied Grotius, Milton and Vattel, and analogized between the Malay rebels in Kedah and the Barons rebelling against King John in thirteenth century England and the Dutch rebelling against the Spanish Habsburgs at the end of the sixteenth century. He pointed out that the international law defining piracy, and exempting the agents of non-European sovereigns from the punishments visited on pirates, had been applied in Europe in favor of the Barbary states and their

[63]See 28 Hen. 8, c. 15. Later acts amended the definition of piracy but not in ways pertinent to note in this place.

corsairs.[64]

On 2 November 1840 the Recorder delivered his decision to the preliminary, jurisdictional points raised by Mohamed Saad. Brushing over the subject of nationality and not even mentioning that any of the defendents might own land in Penang, he conceded Mohamed Saad to have been an alien; but while being an alien might mean that he was not within the reach of British legislation it did not mean that he was outside the territorial jurisdiction of a British court to hear argument on the issue. Since no other court existed which could more conveniently hear the evidence, and since the legal implications of the facts must be considered somewhere, according to his reasoning there was *prima facie* jurisdiction in a British court. Sir William's reasoning seems weak in this argument, since it is by no means self-evident that all supposed infractions of law, even of international law, must be heard before the court of some specific sovereign. More than evidence of a sound legal position his argument seems evidence of the European penchant at this time to spread order through the interstices of state jurisdiction, to fill with European concepts of law the lacunae in the pattern of world order the better to accommodate the new phenomenon of world trade.[65] Since the commission of a state can be exceeded, and exceeding the commission may open a privateer to a charge of piracy according to sound prece-

[64]In this Logan was disingenuous. Views in Europe differed from time to time and from author to author and state to state as to whether the state authority of the Barbary states could be legally interposed between their agents and European powers seeking to treat those agents as pirates. See Mössner 1–33, 148–166 for a summary of European views and state practice from about 1600 to the present.

[65]This penchant persists. Cf. Lord Asquith's award in the Abu Dhabi Oil Arbitration (1951), 1 *International and Comparative Law Quarterly* (1952) 247, holding the municipal law of England to be the "modern law of nature" by which a contract between a Persian Gulf Sheikhdom and a private company was to be interpreted. Lord Asquith considered that the contract itself provided *against* the application of English law, but applied it anyhow!

dent,[66] and, although the prosecutor's office may withhold prosecution in a delicate case there are no English precedents for a court refusing to hear a piracy case merely because the accused alleges himself to be acting under the commission of a foreign state, Sir William concluded that the plea to jurisdiction must fail.

Having been defeated in the plea to jurisdiction, the defendent submitted an amended defense. Alleging basically the same facts, the defense denied that the facts fitted the mold of the legal concept of piracy. Sir William then formulated the issues for the jury whose function it was (as it still is) to determine facts and apply those facts to the law as formulated by the judge, thus to conclude on the legal "guilt" or "innocence" of the defendent.

As formulated by Sir William the central issue was whether Mohamed Saad and his friends acted as agents of a government; he accepted the postulate that public authority can authorize the use of force against others to protect the agents from the legal result of being considered pirates. Mohamed Saad and his friends were found not guilty under this instruction. His confederates were all released. Mohamed Saad himself was held as a prisoner of war by the British authorities and

[66]Sir William Norris cited R. v. Kidd (1701), 14 How St. Tr. 145, and R v. Potts (1781), Russ. and Ry. 353, on this point. The citations are reversed in the report and the Potts case is clearly irrelevant and misdated. The reporter used by Norton Kyshe seems to have confused the Potts case with some other. R. v. Kidd is relevant, although also miscited. Captain William Kidd relied on two commissions from King William III to justify his supposed piracies and the court rejected that defense in each of the several times it was brought up on the ground that Kidd had so far exceeded the commissions (which were to take only French ships and "Pirates") that he could not purport to have acted under them. The texts of the commissions appear in 14 How. St. Tr. 169–173. Kidd's defense was that the ships he plundered were actually French, but he could not produce credible evidence to support that contention. The court instructed the jury as to the law as follows:

". . . Whilst men pursue their commissions they must be justified; but when they do things not authorized, or never acted by them, it is as if there had been no commission at all". *Id.*, col. 186.

Captain Kidd was convicted for seven specific acts of piracy and one murder (of a crewman in his own ship), and was hanged.

habeas corpus was denied on 5 November 1840 on the ground that his defense to the accusation of piracy, accepted by the jury, was that he was a public enemy of the Crown, and that it was proper to hold public enemies in captivity at executive discretion. He was taken to India for three years and returned to the Straits Settlements in November 1843 where he was released.[67]

At this point, to understand the impact of the decision in the Mohamed Saad case on the law of piracy as applied by British administrators in the Malay Archipelago, a further detour into legal theory is necessary.

The relation between the law applied to defendents in national courts and the law of nations is complex. On the surface English courts apply only English municipal law. To the extent the law of nations has been adopted in rules of law applied by English courts it has become part of the municipal law of England. But there are two subtle corollaries of this basic position. First, in some cases the municipal law of England may claim to be silent on a substantive matter, adopting some other law, which may be international law, to determine the substantive rule to be applied in a case. This situation, not as uncommon as might be supposed, is a special subject of study by itself, called "Conflict of Laws" for convenience. The English conflict of laws rule may be to measure some cases of suspected piracy by international law.[68] Second, the municipal law of England applied in a case with public international law aspects becomes part of the "practice of states" which scholars look to to determine what is the "*opinio juris sive necessitatis*", the underlying conviction of legal judgment that, in gross, makes up the body of substantive rules considered to be public international law. Thus, a definition of the law of piracy applied in English municipal law becomes evidence of what the law of

[67] 2 Ky. 71–72, 74.

[68] *E.g.*, In re Piracy Jure Gentium [1934] A.C. 586.

piracy is at public international law.

In this second sense, the decision of Sir William Norris in R. v. Mohamed Saad and ors. had importance. In 1840 England was the dominant maritime power in the world, and the English municipal law view of piracy was extremely influential in determining the public international law of piracy particularly when the English judges purported to be applying the public international law of piracy in a conflict of laws situation.

But to understand the impact of the decision it is necessary to trace the parallel threads of English and public international law concepts of piracy prior to 1840. In other writings cited above I have traced the development of the international law of piracy and its application in the Malay Peninsula by British administrators to justify political interference within the territory of Malay Sultans up to 1830. In doing so, I indicated that the legal results of "piracy" purportedly derived from public international law were applied to facts different from the facts to which the label "piracy" was attached by public international lawyers, and that by 1827 the British authorities in Penang had convinced the Supreme Government that political action in the Peninsula could be legally justified in this way. I also pointed out that by taking this view the British deprived the Malay Sultans of a right to interpose between their subjects and foreign sovereigns which the British sovereign, and it may be supposed all European sovereigns, reserved for themselves. At the same time that British administrators were thus depriving Malay Sultans of some of the international legal perquisites of a sovereign, with a corresponding increase in the scope for British political activity that was felt legally justifiable in the Peninsula, the British administrators were holding the Malay Sultans to an undiminished legal authority to cede rights and make laws in their territories. In some cases the British (and others) even attempted to hold the Malay chiefs to a responsi-

bility to exercise a sovereign's rights in his own territory which, because of the constitution of some Malay societies, the apparent "sovereign" did not possess.[69]

It may be supposed that the British lawyers trained in English municipal law saw a distinction between the international law of piracy, at which the British actions might be justifiable, and the English municipal law of piracy, which would demand different facts for a criminal conviction; *i.e.*, that international law authorized the British action against accused "pirates", but that English municipal law was deficient, permitting some "pirates" to escape formal punishment. It is theoretically possible that the Malay Sultans were "pirates" at international law, justifying suppression, but not "pirates" as defined in the criminal law of England. In fact that was not the case: The judges of England purported to be applying international law in defining the municipal law of piracy in England in some cases; apparently the British statutes defining piracy were felt to be deficient in the matter of exculpation by reason of the depredator holding a "commission" or in some other way exercising state authority as in the Mohamed Saad case, and British judges felt that international law, by a conflict of laws logic, could supply the legal basis for the exculpation; furthermore, to the degree that English judges thought they were applying any law of "piracy", their views became a state practice accepted as law, and therefore part of the evidence of what the substantive international law of piracy was. But the acts of British administrators purportedly justified as necessary to suppress "piracy" were evidence of the necessary conviction of right only to the extent that circumstances of political expediency did not color their judgment. As has been pointed out, the circumstances of the Malay Peninsula in the 1820's (and

[69]This was particularly true in the handling of the Menangkabau communities in the Malay Peninsula. See Rubin, *Personality*, Ch. III.B.1; 1875 LIII 55–183, C. 1320 at pp. 11 *et seq.*

after) were certainly such as to color the judgment of a conscientious British administrator and ample evidence exists that it did so.

But it is not necessary to rely on these psychological probabilities to determine what the law of piracy was as conceived by British judges and administrators in the Malay Archipelago in the nineteenth century. The key question was always one of the power of Malay Sultans or, as in Mohamed Saad's case, pretenders to sovereign authority, rebels, to prey on the trade of others. The approaches taken by British courts and administrators to the legal effectiveness of commissions authorizing depredations on trade are extraordinarily interesting and revealing both of the law and of the complex interplay of law and policy.

The law of England has always accepted the commissions of the King of England as sufficient to exculpate anybody from a charge of "piracy". Cases exist in which the holder of the King's commission has been convicted of piracy[70] but only when the commission has been proved to be exceeded. Despite the fact that letters of marque or reprisal were issued by which the privateers were to profit directly from their captures, the sovereign's permission to engage on a course of depredation was conceived to remove from the depredator the risk of being considered a "pirate". During the eighteenth century, under political pressures from the new world it would even appear that the revocation of letters of marque was not always effective to end the privateers' rights to prize in some Colonial Courts of Admiralty—but those cases are exceptional.[71] When the commissions were not revoked but merely exceeded to the detriment of neutral (but not English) shipping there were immense pressures from the privateers, who included some of the wealthiest and most influential colonial families, to

[70]R. v. Kidd (1701), 14 How. St. Tr. 145.
[71]Pares, 42–48.

uphold the capture and condemn it in prize proceedings regardless of the excess.[72]

When the commission was issued by a foreign sovereign the position was clear to British officials in most cases. Where the foreign sovereign was fully recognized, such as the King of France, his commission would protect a privateer from the accusation of piracy, but not from conviction for high treason if he were an Englishman.[73] Where the foreign sovereign was one whose position was less well known in England the question seemed important enough in the late seventeenth century for special reference. Finally, in 1680, Sir Leoline Jenkins, Judge in Admiralty and Privy Counsellor under James II, issued a formal opinion that "Moors and Turks" be treated as lawful combattants in war and not as pirates.[74] The commissions of non-European sovereigns were thus acknowledged to be as worthy of respect as commissions of the King of France.

When the holder of a commission issued by an acknowledged sovereign was directly involved in fighting against the capturing country political passions made the legal situation more doubtful. The most well known example of this sort of problem arose during the struggles of Dom Antonio to regain the throne of Portugal from Philip II of Spain in 1580-1595. French forces fighting for Antonio under the authority of the King of France, captured by Spain were treated as "pirates", despite the murmurings of Spanish officers who feared reciprocal mistreatment, and against the legal opinion of Alberico Gentili, the foremost international lawyer of the time resident in England.[75]

[72] *Id.*, pp. 82–84. Some of the first families of eighteenth century America owed their fortunes to privateering and smuggling. 1 Beard, 91–92; Preston, 2–3, 15–18, 293–294. In general, naval service was highly profitable to officers in England and America in time of war. Cf. Austen, ch. 4: "Captain Wentworth . . . was confident that he should soon be rich: . . . soon have a ship . . . that would lead to everything he wanted."

[73] R. v. Vaughan and ors. (1696), 13 How. St. Tr. 485.

[74] 2 Wynn 790–791, letter dated 11 February 1680.

[75] Gentili 26 (Book I, Ch. IV).

In the early 1690's in England the question was presented with great force in connection with the attempts of King James II to regain his throne. He commissioned privateers and his ally, the King of France, also commissioned privateers to sail against the forces of William and Mary. Eight privateers having been captured, the king's advocate, Dr. Oldish, was instructed to proceed against them as pirates and refused, giving his written opinion that they were not pirates because sailing under a commission issued by a king, therefore not acting "animo furandi", for private ends. Dr. Oldish and his colleague Dr. Pinfold maintained that as a matter of international law none can be considered pirates who act for some public purpose, even one which rendered them liable for penalties under the municipal law of treason. The "felonious intent" would be missing for the crime of piracy to be shown. In September 1693 Dr. Oldish and his colleagues were summoned before the Cabinet Council with the Lords of the Council and of the Admiralty present. Two of the six learned lawyers called refused to give opinion, and two, Dr. Littleton and Dr. Tindall, opposed the opinions of Drs. Oldish and Pinfold. The council thereupon discharged Dr. Oldish and replaced him as king's advocate with Dr. Littleton, who brought action against the privateers as "pirates" and secured their conviction. It is noteworthy that although some held their commissions from the King of France and not James II, all were convicted and "some of them, if not all," are reported to have been executed as pirates.[76]

In the heat of debate Dr. Oldish's central point, the lack of the requisite intention to act for private gain, was never resolved explicitly. Instead, the Lords focussed on the legal impact asserted for King James's commission in England. The Lords were horrified and nearly accused Dr. Oldish of high treason:

[76] 12 How. St. Tr. 1276–1280.

Sec. [Sir John] *Trenchard*, and Lord *Faulkland*, in great heat. I—pray, doctor, let us deal more closely with you, for your reasons are such as amount to high treason. Pray, what do you think of the Abdication?

Dr. *Oldish*. That is an odious, ensnaring question; however it may be, I think of the Abdication as you do; for since it is voted, it binds at least in England; but those gentlemen were in a foreign country, and knew nothing of it . . .[77]

In fact, the Lords were focussing on the municipal law of England not on the international law of piracy at all. The turning point of the debate as reported by Dr. Tindall[78] appears to have occurred in the following exchange:

One of the Lords then demanded of Him (Dr. Oldish), If any of their majesties' subjects, by virtue of a commission from the late king, should by force seize the goods of their fellow-subjects by land, whether that would excuse them from being guilty at least of robbery? if it would not from robbery, why should it more excuse them from piracy? To which he made no reply. Then the Lords asked Sir Thomas Pinfold and him, Whether it were not treason in their majesties' subjects, to accept a commission from the late king, to act in a hostile manner against their own nation? Which they both owned it was . . . The Lords further asked them, If the seizing the ships and goods of their Majesties's subjects were treason, why they would not allow it to be piracy? because piracy was nothing else but seizing the ships and goods by no commission; or what was all one, by a void or null one; and said, That there could be no commission to commit treason, but what must be so: To which they had had nothing to reply.

Dr. Tindall summed up his view of law saying:

These two . . ., I believe, are the only persons pretending to be lawyers, that are of opinion, That a king without a kingdom, or right to one, has, by the law of nations, a right to grant commissions to privateers, especially if they are subjects . . . to that king, against whom they, by their commissions, are to act.

[77] *Id.*, col. 1271.

[78] *Id.*, note beginning in col. 1271 at col. 1272, quoting from Dr. Tindall's *Essay Concerning the Law of Nations*, pp. 25–30.

But the view so forcefully presented in the name of the law of nations seems insupportable. In the first place, some of the "pirates" held French commissions and the Council's reasoning applied only to those who held James's commissions. The answer to the first question that Drs. Oldish and Pinfold refused to answer, concerning acts done under commission on land, was surely that the actors would indeed have been no robbers, but pillagers possibly violating rules of belligerency, for which their sovereign would be responsible but probably not they. It is understandable in the dangerous atmosphere of 1693, however, that the two doctors preferred not to risk their own necks further by seeming to allow James II a right to legislate in English territory. Secondly, Dr. Tindall and the Lords of the Council and Admiralty were really arguing only the power of an English court to try as pirates by English law those whose crime was treason. The final qualification, "especially if they are subjects . . . to that king against whom . . . they are to act", seems to confine the view of law taken by Dr. Tindall to one involving treason as well as "piracy". Only by neglecting the circumstances and giving no weight to the full context of words used by Dr. Tindall and the Lords can one conclude that the British view of piracy in 1693 included acts done by rebels against a foreign sovereign and not against English subjects or property.

Looked at another way, the question may be whether one who acts within the terms of a commission issued by a pretender to sovereignty, and not for his own personal gain (except, perhaps the personal gain that might come from fighting alongside one who may achieve the power to reward his friends), can have the necessary criminal intent. The doubts raised by Dr. Oldish in this regard had been ignored, not answered, by the Lords and Drs. Tindall and Littleton. In fact, in 1696 Sir Charles Hedges instructing a jury in the High Court of Admiralty, the same court that tried and convicted James's pri-

vateers not three years before, laid down that piracy was essentially the same as robbery and that a felonious intention was necessary to the concept of the crime of piracy punishable in England, and said further, "the intention will . . . appear by considering the end for which the fact was committed."[79] Presumably the "end for which the fact was committed" would have to be an end of private gain, as in robbery at English law. A political end, even if evidence of an intention to commit treason, would defeat a charge of "piracy".[80]

The doubt raised by the question of commissions issued by James II or Louis XIV to Englishmen to seize the ships and goods of other Englishmen at sea were resolved in the municipal law of England by statute in 1700:[81]

> That if any of His Majesty's natural-born Subjects or Denizens of this Kingdom, shall commit any Piracy or Robbery, or any Act of Hostility, against others His Majesty's Subjects upon the Sea, under colour of any Commission from any Person whatsoever, such Offender and Offenders, and every one of them, shall be deemed, adjudged, and taken to be Pirates, Felons and Robbers; . . . and suffer such Pains of Death, Loss of Lands, Goods and Chattels, as Pirates, Felons and Robbers upon the Seas ought to have and suffer.

It appears to be more nearly consistent with the evidence, and the simpler view, to regard this provision as creating a special rule of English municipal law and not as merely enacting for English courts' guidance an existing rule of international law. Indeed, it seems quite clear that international law has never accepted the British municipal law view that rebels are pirates.

[79] R. v. Joseph Dawson and ors. (1696), 13 How. St. Tr. 451 at 454–455.

[80] A commission to take a thing will defeat the accusation of "Robbery", but an invalid commission raises other problems in the case of robbery than it does in the case of piracy. Legally, only one sovereign can legislate in territory, while any sovereign can legislate for his subjects or for anybody aboard ships flying his flag at sea, regardless of where at sea the legislation takes effect. It is not proposed to analyse the law of robbery any more closely in this place.

[81] 11 & 12 W. 3, c. 7 sec. VIII.

Since a legal result of "piracy" at international law is that all states are bound to help hunt the malefactors down, many states involved in civil disturbances have attempted to convince the international community that parties of insurgents at sea are "pirates".[82] Yet, once insurgency is conceded it would be a violation of one of the basic rules of international law for second states to intervene on either side except as allies in war. To do otherwise would be to interfere in an internal affair of the state within which the rivals are struggling for power.[83] Since a legal result of attaching the label "pirate" is to submit the accused to the justice of any nation that catches him, to have a rule forbidding second countries to capture him is inconsistent with attaching the label. Therefore, the label cannot be considered appropriate for political actions. This is not to say that some other way cannot be used to save the goods of innocent merchants from the excesses of rebels—but only that it is not correct to call those rebels "pirates".

Sir William Norris in the Mohamed Saad case expressly adopted this view of international law and the restrictive municipal law interpretation given here of the statute of William III.

The Mohamed Saad decision was not a landmark; it did not electrify legal thinking in Great Britain; it was barely reported. But it was part of a larger movement defining the international law limiting the activities of colonial administrators in foreign territory. Holding a commissioner of a Malay Sultan not to be a pirate because lacking *animo furandi* gave to Malay Sultans at least in English municipal law a power which British administrators had been denying them in international law.

[82]A more or less recent attempt along that line was in 1961, when Portuguese political adventurers seized the Portuguese pleasure ship *Santa Maria* to bring world attention to their cause. Portugal labelled the adventurers "pirates", but in fact nobody, even in Portugual, treated them as such See Forman.

[83]There are technical qualifications to the proposition stated above concerning premature recognition and possible rights to aid the old regime, but it is not proposed to examine the minutiae of this side-issue in this place.

Worse yet for the British expansionists, Mohamed Saad was not even the commissioner of a Malay Sultan, but of a pretender to Sultanic dignity against the claims of a rival (Thailand) recognized, indeed supported, by the British Government. If he was not pirate, then who would be other than the utterly nonpolitical robbers of the Straits?

The answer to this question came in two highly influential opinions of Admiralty courts in England. The first, issued in 1845, concerned claims put in by the complement of H.M.S. Dido under Admiral (then Captain) the Hon. Sir Henry Keppel for bounty to be paid out of public money under British legislation of 1825[84] for the destruction of supposed pirates. The "pirates" involved were the entire community of Malays in the island of Serhassan, off the coast of Borneo, who were defeated in coastal waters and reduced to obedience to Raja Brooke on 10 May 1843.[85] The queen's advocate opposed the claim for bounty on the grounds that the Malays defeated do not appear to have been pirates within the contemplation of the statute. The court, in a unanimous opinion, apparently including the voice of Dr. Lushington, the leading British judge in admiralty of the time, decided in favor of the claimants without bothering to define piracy or its possible relation to sovereignty or commissions. "It . . . is sufficient, in my view of the question, to clothe their conduct with a piratical character if they were armed and prepared to commence a piratical attack upon any other persons".[86] The vagueness of this decision was resolved to some extent ten years later by Dr. Lushington[87] who, in a case involving insurgents stopping foreign vessels, found insurgents to be "pirates", and bounty money owing to the Royal

[84] 6 Geo. 4, c. 49.

[85] The accounts in 2 Keppel, *Expedition to Borneo* 2–10, and Keppel, *A Sailor's Life* 294–298, differ from the account recited by the court.

[86] Serhassan (Pirates) (1845) 2 W. Rob. 354, 166 E. R. 788.

[87] The Magellan Pirates (1853) 1 Spink Ecc. & Ad. 81, 164 E. R. 47.

Navy people involved in action against them:[88]

> It is true that where the subjects of one country may rebel against the ruling power, and commit diverse acts of violence with regard to that ruling power, that other nations may not think fit to consider them as acts of piracy. But . . . it does not follow that because persons who are rebels or insurgents may commit against the ruling power of their own country acts of violence, they may not be, as well as insurgents and rebels, pirates also; pirates for other acts committed toward other persons . . . especially if such acts were in no degree connected with the insurrection or rebellion.

This unexceptionable reasoning goes very far indeed. Applied to the facts in the Mohamed Saad case it seems to say that rebels would cross the line defining piracy when they attacked any ship not belonging to the authority they were seeking to overturn. A possible implication, regardless of the last phrase beginning "especially", is that British merchants might even be immune from blockades erected by rebels along the coast of the country they sought to rule. Since the determination of which party was the rebel and which the legitimate sovereign was one to be made by the British administrators on the basis of British policy alone, a powerful weapon was available to them to influence political events in places heavily dependent upon sea-borne trade such as the Sultanates of the Malay Peninsula. It appeared that British courts in England might support some significant political action taken in the name of suppressing piracy despite the decision of Sir William Norris.

Dr. Lushington went even farther. In oft-quoted dicta in the same place he wrote:

> Even an independent state may, in my opinion be guilty of piratical acts. What were the Barbary pirates of oldent times? What many of the African tribes at this moment? . . . Are they

[88] This was under a different statute, 13 & 14 Vic., c. 26 (1850), which repealed and replaced the statute 6 Geo. 4, c. 49.

not pirates, because, perhaps, their whole livelihood may not depend on piratical acts? I am well aware that it has been said that a state cannot be piratical; but I am not disposed to assent to such a dictum as a universal proposition.

It is doubtful in fact that the "Barbary pirates of olden times" were considered to be pirates by their European contemporaries. But the effect of legal pronouncements does not always depend on the soundness of the history relied on by judges. It is the willingness of other judges and of administrators to be swayed by an opinion that makes a precedent important. Dr. Lushington's opinion in *The Magellan Pirates* was immediately approved by that generation's most highly thought of British publicist, Sir Robert Phillimore, whose *Commentaries upon International Law* was first published a year after the opinion was delivered. While defining piracy to include "*animo furandi*" he cited *Serhassan (Pirates)* and the last quoted paragraph of Dr. Lushington's opinion in *The Magellan Pirates* with approval, apparently allowing for the legal possibility that some political communities need not be considered "states", *i.e.*, might have no legal power to issue commissions, if British administrators chose to treat with them differently. If not considered states, a politically organized community could be considered a rather elaborate pirate band, and suppressed accordingly. In contradistinction to this treatment which Phillimore seems to allow to be meted out to Africans and Asians, he absolves European privateers of the imputation of "piracy" even when exceeding their commissions. To Phillimore, the key appears to have been whether there was a state standing behind the depredators to which a European power could look for recompense. He did not feel that a Malay Sultanate could be considered such a state.[89]

[89] 1 Phillimore, Ch. XX, pp. 379–381, 392–393. The second edition of this work, dated 1871, contains identical language beginning on p. 411 of Vol. I.

These legal opinions of the mid-nineteenth century are not outrageous if taken in context. The Malay Archipelago was unsafe for commercial navigation. The political organization of the Malay Sultanates was insufficient for them to be able to deal with European powers on equal terms. Furthermore, it cannot be said that any abstract value would have been preserved by European states abstaining from commercial traffic in areas in which the politically organized societies with whom they dealt (willingly on both sides) were unable to adjust their habits to the commercial needs of a rapidly changing world.

In Penang the opinions of Sir William Norris were more important than the opinions of Dr. Lushington. The Mohamed Saad case was the precedent on which people would rely in the Straits Settlements whatever opinions were held in England. The result was that British administrators coming from other parts of the Empire could honestly feel that they were suppressing the evils of piracy, while the Malays of the Peninsula and the long-term British residents of the Straits Settlements would hold a different view. It became important to the administrators to act on their convictions politically, but to keep the cases out of the courts. Even if a British judge in the Straits Settlements should take Dr. Lushington's views and Sir Robert Phillimore's, the political results in the colony of appearing to change the law in such a sensitive matter could be expected to be enormous. Furthermore, common law judges being what they are when confronted with inconsistent precedents, it was clearly highly desirable to the administrators to avoid the uncertainty that must surround a prosecution of a Malay political figure for "piracy".

The interplay between law and policy was most dramatically evidenced at the time of the British advance of the 1870's. The informal legal view of the chief judicial officer of the Straits Settlements, Sir P. Benson Maxwell, asserting British actions off Selangore in 1871 to involve "war" rather than the suppres-

sion of "piracy", was disputed by Lt. Col. A. E. H. Anson, then chief administrator *pro tem.* of the colony.[90] Anson had served as Chief Justice *pro tem.* in Penang for a short time but reported candidly years later that "as I had received no legal education, [it] was a duty which I was not well qualified to perform, and one I found very irksome". He also noted that "Much jealousy existed on the part of the judges of the Supreme Court towards the new [1867] Government of the colony".[91] More to the point was the correspondence between David Logan, Solicitor-General, and Sir Harry Ord, Governor of the Straits Settlements in December 1872.[92] On 22 December Logan signed an opinion formally advising Ord that in order for an act to be considered piracy at international law it must be committed by persons without lawful authority, and be committed on the high seas. He strongly implied that a firing on a British ship by a "piratical" junk "at the mouth of the Perak River" was not piracy because committed within the territory of Perak.[93] The next day Governor Ord wrote asking Logan to reconsider. His reasoning seems useful as a statement of the view of law on which the British expansion was based:

> Passing over for the moment the question whether the law of civilized nations must be held to apply in its integrity to the acts of people such as the Malays and Chinese . . . I should submit that the lawful authority of the Rajah of Laroot had been forcibly superseded by no recognized Power, and that the eleven junks which at a mile distant from the mouth of the river, fired at the 'Fair Malacca' did not do so without a shadow of legal right or authority? and, if this be so, does not this constitute

[90] 1872 LXX 661, C. 466 at pp. 38–40. Maxwell's letter appeared in *The Times* 9 September 1871. Anson's principal memorandum answering it was dated 24 October 1871 and was addressed to the Earl of Kimberly, Gladstone's Secretary of State for the Colonies.

[91] Anson 288.

[92] 1874 XLV 611, C. 1111, pp. 24–25.

[93] *Id.*, pp. 26–27. See also the similar advice given by Logan to Col. Anson in September 1873, *id.*, pp. 64–65.

piracy, or at all events, furnish sufficient grounds for the intervention of a man-of-war to remove them from their position, and bring them into some . . . place where they may be afforded an opportunity to establish their claim to have acted legally?

The right of the British administrators to determine legal authority by granting or withholding recognition was impliedly asserted as well as the explicit extension of British law to an area of water too close to land to constitute high seas. This extension of British policing authority was, of course, a radical departure from concepts of the inviolability of territory (including territorial waters) held in Europe at the time. Also noteworthy is the undercurrent, stated but carefully removed from the logic of Governor Ord's legal views, of the proper legal relation between Europeans and non-Europeans being one of rulers and ruled because of the different degree of "civilization" in the two.

Logan's reply accepted as a postulate Ord's statement that the attacking junks had no lawful authority or right to commit the attack on the "Fair Malacca"; he concluded from that that it was "the duty of Government to send a man-of-war to enquire into the matter" and possibly even bring the junks into a British port. But, he remained adamant about labeling them "piratical". He wrote that their character should be "judicially inquired into" before that conclusion could be reached. He allowed that there may not have been time for such an enquiry, but stated:

I am not disposed, without more reliable evidence, to decide that these junks were piratical, as such a conclusion, if correct, might justify any man-of-war in dealing with them in the most summary manner on the spot.

The implication in the word "any" was enough to frighten any expansionist administrator. British men-of-war were not the only ones on the seas, and Thai, German or other warships might want to use reckless accusations of "piracy" to bring

order to the Malay Peninsula.

Ord acted on Logan's opinion. He ordered the naval arm to ascertain the authority on which the accused junks acted, if any, and in the absence of a satisfactory reply to bring them into port for enquiry. The Solicitor-General's opinion was given to the commander of the British naval vessel ordered *not* to proceed to suppress piracy, but only to enquire into alleged piracy and to bring in to a British port the "piratical junks" if he were satisfied of the commission of the offense and the identity of the junks.

When Sir Andrew Clarke succeeded Sir Harry Ord as Governor of the Straits Settlements in 1873 a different view of the legalities of British activities in the Peninsula soon became apparent. Instead of following the carefully phrased views of Solicitor-General Logan, Sir Andrew relied on the more aggressively permissive views of law taken by his Attorney-General, Thomas Braddell. J. W. W. Birch, Ord's Colonial Secretary, had written to the Secretary of the Singapore Chamber of Commerce on 21 August 1872 in response to a petition:

> [I]t is the policy of Her Majesty's Government not to interfere in the affairs of these countries unless where it becomes necessary for the suppression of piracy or the punishment of aggression on our people or territories . . [94]

and expressly refused to commit the Government to defend the person or property of traders venturing into the Peninsula at that time, thus leaving suppression of "piracy" the only justification that might persuade the colonial government to act there. The Colonial Office in London approved this position.[95] Thomas Braddell now had no difficulty justifying action in the Peninsula on the very ground withheld by David Logan: Piracy. Early in 1874 he wrote a long report on the proceed-

[94] *Id.*, p. 6.
[95] *Id.*, p. 7, letter dated 28 December 1872 from Lord Kimberley to Ord.

ings of January of that year at Perak and Larut in which he argued against the British policy of non-intervention and called the forces of one of the contending Malay parties:

the sea forces, which had long overstepped the limits of war, and . . . become piratical . . . On some occasions lately, the pirates, after committing atrocious acts of piracy, . . . had escaped through the net-work of intersecting creeks and rivers in this district; to enable Her Majesty's Government, therefore, effectually to protect the trade of Perak against these pirates, it was necessary that the Government should now take over the territory ceded in 1826.[96]

But despite Bradell's advice, Governor Clarke was aware that he was using the term "piracy" in a way that was legally incorrect. When Braddell urged the propriety of trying the captured Malays for piracy in Malacca, the Governor interposed and set up Tunku Dia Oodin, a British-favoured Malay claimant to political authority in Selangore, to try them in Selangore. Amusingly, the British supported claimant's formal letter seemed to imply that the justice to be done was the justice of the British Government—and this misapprehension was corrected in an exchange of further correspondence making it clear that legally (if not politically) it was Selangore's justice that was to be meted out to the "pirates".[97] The "pirates" were

[96]*Id.*, p. 160 at pp. 161, 165 and 174. The territory ceded in 1826 was the Dindings and Pangkor Islands-which the British had refused to accept; the treaty ceding the islands was never ratified and the transactions of which the cession was a part strongly criticised by the Supreme Government. See Rubin, *Personality*, Ch. IX.A. On the events of January 1874, and indeed the entire political circumstances of the British advance of the 1870's, see Parkinson, *passim*.

[97]C. 1111 at pp. 181 *et seq.* Tunku Dia Oodin was a Kedah noble and may ironically have been the very Tunku Udin so active against British interests 35 years before. See Cowan 71 *et seq.* He was Regent of Kedah during the interregnum between the death of Sultan Ahmad Taju'd-din Makarram Shah (1879) and the ascension of Sultan 'Abdu'l-Hamid Halim Shah (1882). See Lovat 306 *et seq.*

politically connected with a faction antagonistic to the political ambitions of Tunku Dia Oodin in Selangore.[98]

Further evidence that Governor Clarke was consciously using the law of piracy in a way he knew not to be proper lies in the contrast between his internal memoranda in the Straits Settlements and his reportage to Lord Kimberley. Internally, he referred constantly to piracies. In his report to Lord Kimberley dated 24 February 1874,[99] while he alleged that there had been clear piracy he indicated that he was confused on the legal question by saying "it was not clear that the crime had been committed on the high seas".[100] As noted above, if not committed on the high seas the crime could not have been "piracy" either at British municipal law or at international law as conceived in Europe at this time.

Braddell's views on "piracy" were never reduced to strict legal terms and his obvious intention to use the label to justify British action within Colonial Office guidelines regardless of the true intentions of his political superiors is too clear to warrant further analysis. Underlying his legal language was the assumption expressly disregarded by Governor Ord about two years before concerning the fundamental relations international law imposed between European and non-European states. In an undated memorandum written probably in March 1874 Braddell wrote:

> The innate superiority of the ordinary Englishman, in his sense of honour and justice, is sufficient to dominate the inferior character of the Malay . . .[101]

[98] C.1111, Continuation of Braddell's Report, p. 184 at p. 188.

[99] Actually Lord Carnarvon replaced Lord Kimberley as Secretary of State for the Colonies on 18 February 1874, when Disraeli succeeded Gladstone, but word of this did not reach the Straits Settlements until somewhat later. Events in the area having become politically significant in England, direct reporting was maintained for some time after.

[100] C. 1111, p. 180 at p. 181.

[101] *Id.*, p. 220 at p. 221.

Braddell saw no way to stop European merchants and adventurers making a game of peninsular politics than the British Government frankly to take over complete control of the politics of the Peninsula. The possibility that the very acts of Englishmen he considered to be improper were themselves indicative of character and a sense of honour and justice not of the highest, and that the Malay actors may have had similar motives less eloquently expressed, and used British advisers only because hopeful (or fearful) of British Governmental pressures being used to further the interests espoused by British adventurers and merchants, does not seem to have occurred to him.

II. Piracy, Paramountcy and Protectorates

A. THEORY AND TRENGGANU IN THE 1860'S

While the law of "piracy" was losing its usefulness to British administrators trying to bring their idea of order to the Malay Peninsula and the existence of Admiralty jurisdiction in the British court in Penang turned out to be the end of the flexibility found in using the label "piracy", instead of the help that Governor Fullerton had thought it would be, a second legal theory was being tried for the same purpose. This was the theory that the strongest had a legal duty to keep its weaker neighbors in sufficient order to permit trade. The legal roots of the authority claimed for police actions to keep order seem to have been rationalized in India as a succession to rights of Grand Moghul, but in the Malay Peninsula, where no such historical basis for authority was available the theory, called "paramountcy", flourished nonetheless. The roots really lay in a concept of world order that exalted rights of property, of goods in transit or in warehouses, to be free from interference. Since rival claims to sovereign, law-making, authority might interfere with rights of property, the "paramount" power assumed the right, even the "duty" to oversee questions of dynastic succession.

To illustrate let us look briefly at the events of 1862 and analyze the views of right held by the British in the East Coast intrigues leading up to the bombardment of Kuala Trengganu in that year.

In November 1862 the British authorities in Singapore ordered a naval bombardment of a Malay fort just outside the town of Kuala Trengganu[1]. One immediate reaction in

[1] 1863 XLIII 299 at pp. 31, 34–37, 40.

London to the news of this bombardment was a series of questions in Parliament and the publication of the British Government's internal correspondence dealing with that sorry affair.[2] Less than a year later Admiral Kuper bombarded Kagoshima in Japan and the Parliamentry reaction left the Liberal Government of Viscount Palmerston in little doubt as to the need to keep British officials at the periphery of empire under closer control. Sir John Hay, Conservative, indicated in Commons on 9 February 1864 that he saw a parallel between the Trengganu incident and the Kagoshima incident, stating that continued Government policy seemed to be involved. This threatened to raise to major political proportions in England the issue that was phrased in Parliament by Mr. Buxton in terms of international law: Citing the nineteenth century international law scholars Martens, Travers Twiss, Heffter, Wheaton, Klüber, Phillimore, the eighteenth century's Kent and even the seventeenth century Dutch publicist Grotius, Mr. Buxton accused the Government of violating the usages of civilised nations in the bombardments.[3] Viscount Palmerston, responding himself for his Government, denied the proposition that the bombarbment of towns is at variance with the practice of civilized nations in time of war, but agreed that "it is a practice which we disapprove."[4]

The Parliamentary debates focussed not on any purported illegality of extending the Empire by means of force, but only on the need to spare "private property" while doing so. The illegality adverted to by Mr. Buxton was that of the British risking damage to private property in Kuala Trengganu during the bombardment. The bombardment was not as such condemned by either side in the discussions in Parliament. It appears to have been generally felt by British statesmen in

[2]Hansard, 3rd ser., vol. 172, col. 586–593 (H.C. Deb. 10 July 1863).
[3]*Id.*, vol. 173, col. 335–424 (H. C. Deb. 9 February 1864).
[4]*Id.*, col. 421.

London in the 1860's that the use of force to safeguard or expand imperial interests was at least legally justifiable (whether it was wise policy is another matter). But rights of private property were felt somehow superior to interests of non-European sovereigns or the interests of non-European peoples in being left alone.

To understand later British actions in the Northern Malay States it is necessary to understand why in 1862 a bombardment of Trengganu had been decided on; what factors had been considered sufficient by local British authorities in the Malay Peninsula to justify such a serious (and expensive) step.

In 1824 the British and Dutch had agreed to abstain from political activity among the Malay Sultanates South and North of the Straits of Singapore respectively.[5] The British in Singapore proceeded to consolidate their authority there by securing from Malay magnates with a claim to legal authority in the territory of Singapore and the Peninsula an agreement by which the Temenggong of Johore and the British-recognized Sultan of Riau-Lingga-Johore agreed among other things that as long as they resided in Singapore "they shall enter into no alliance, and maintain no correspondence with any foreign Power or Potentate whatsoever without the knowledge and consent of the British authorities.[6] The Dutch concluded a similar arrangement with the Sultan's brother, whom the Dutch had recognized as Sultan of Riau-Lingga-Johore. The effect of these arrangements was to split the old Sultanate of Riau-Lingga-Johore into two parts with lesser Malay magnates in each free to deny the authority of the "Sultan" supported by the only European power acting politically in his neighbors-

[5]The best comprehensive analysis of this treaty's negotiation is Marks. This book is volume 27 of the Verhandelingen van het Koninklijk Instituut voor Taal-,Land- en Volkenkunde. The Treaty, dated 17 March 1824, is reproduced in Marks at pp. 252 *et seq*. See also 11 *BFSP* 194; Maxwell and Gibson 8. Marks points out (p. 235 note 2) that the text in Maxwell and Gibson is inaccurate.

[6]Maxwell and Gibson 122; 23 *BFSP* 1146.

hood, and claiming to be subordinate to the other "Sultan." The European powers, by preventing the "other Sultan" from communicating outside its area, contributed to the effective independence of the lesser magnates in the other area.[7]

In 1857 Mahmud, the descendent of the Dutch-supported Sultan, was deposed by the Dutch. To recoup at least part of his patrimony he went to Trengganu and began to take an active part in Malay politics in the Peninsula. In 1859, the decendent of the Temenggong of Johore had secured an agreement from the British-recognized Sultan exchanging the Sultan's claims to authority in Johore for an annuity to be paid by the Temenggong. Meanwhile, in Pahang, the old Bendahara, Ali, had died in 1857 and the new Bendahara, Tun Mutahir, was faced with a revolt when his younger brother, Wan Ahmed, disputed the succession. Mahmud and the Sultan of Trengganu sided with Wan Ahmed; The Temenggongs of Johore, Ibrahim and his son Abu Bakar, who succeeded his father in 1862, sided with Tun Mutahir. The struggle in Pahang thus had the ingredients of a major upheaval in Malay political alignments.[8]

But to the British officials the desirability of calming the dynastic struggle in Pahang was less important than the fear that British commercial and political interests in the Malay Peninsula would be jeopardized by the instrusion of non-Malay rivals of the British. The British-Dutch settlement of 1824 was proving stable as the Dutch turned their ambitions to developing their empire in the islands of the Malay Archipelago, leaving the Malay Peninsula and Singapore to British care. The Dutch interest was in fact that the British clearly assert their dominance to keep the Malay magnates of the Peninsula

[7]See Rubin, *Personality*, Ch. IX.B.

[8]A contemporary account of this Malay power-struggle by a highly interested British official is Cavenagh 273–274, 300–309. A more balanced account, one of several, is Linehan at pp. 66 *et seq*. A more recent analysis emphasizing the economic interests at play and the involvement of Singapore merchants is Turnbull at pp. 171 *et seq*.

from blowing storms in the political waters in which the Dutch were sailing and to help keep other non-Malay powers out of the Malay Archipelago.[9] In 1861 the principal non-Malay power interested in the Malay Peninsula was Thailand.

The British had nearly clashed with Thailand in the early 1820's when British commercial and political interests began to encroach on Thai tributaries in Perak and Kedah. In 1826 the Burney Treaty was concluded in Bangkok. That treaty confirmed Thai sovereignty in Kedah, permitted the British to manipulate affairs in Perak to pull that tin-rich territory out of the Thai shadow, and provided, in the case of Kelantan and Trengganu:

> Siam shall not go and obstruct or interrupt commerce in the States of Tringano and Calantan. English merchants, and subjects shall have trade and intercourse in future with the same facility and freedom as they have heretofore had, and the English shall not go and molest, attack, or disturb those States upon any pretence whatever.[10]

The British negotiator on his returning to Penang from Bangkok at the conclusion of the negotiations stopped at Trengganu and told the Sultan that the British regarded his country as under Thai authority. His report of this transaction leaves no doubt that as of 1826 the British and Thai were agreed that Thai authority extended to Kelantan and Trengganu.[11]

But, as is so often the case, the yearning for justification led British statesmen to interpret history to give them legal basis for action where history interpreted from greater distance gave no such justification. Sir Orfeur Cavenagh, British Governor of the Straits Settlements, in his anxiety to keep the Thai out of

[9] 1863 XLIII 299 at pp. 3–4, letter from Governor Cavenagh to the Government of India dated 19 July 1861. Cf. correspondence from E. Netscher, Dutch Resident in Riau, to Cavenagh dated 16 July 1861 warning of Thai intentions in Trengganu. *Id.*, p. 5.

[10] Article 12. The Treaty is discussed in Part I above.

[11] 2(5) Burney 173–174; 1(3) Burney 329; Rubin, *Personality*, Ch. VIII

peninsular affairs, came to the conviction that the Treaty of 1826 indicated Kelantan and Trengganu to be independent of Thailand, not subordinate.[12] He interpreted the intrusion of the ex-Sultan of Lingga into peninsular affairs as part of a Thai plot to expand non-Malay authority in the Peninsula at the expense of British traders, whose interest lay with the expanding power of the friendly Temenggong of Johore or the Singapore-based descendents of the British-supported Sultan of Riau-Lingga-Johore.[13]

In 1862 the British had not extended any formal authority beyond the Straits Settlements of Prince of Wales's Island (Penang), Malacca and Singapore. The terms of the Anglo-Dutch Treaty of 1824 had required the British to abstain from political activity West or South of the Straits of Malaca and the Straits of Singapore and from that time on it had been British formal policy to abstain from peninsular entanglements. But the formal British policy requiring local officials to refrain from peninsular adventures had never in fact been fully observed. Indeed, as a result of blatant violations of that policy Governor Fullerton had been severely censured by his superiors in India in 1827.[14] While the British authorities in India eventually acknowledged that the British had a right to act in the Peninsula in some circumstances involving "piracy", the garrison at Penang was cut to the bare minimum necessary to keep internal order and Governor Fullerton had retreated into petulence.[15] Even after the rebuff to Governor Fullerton, the

[12]1863 XLIII 299 at p. 56; Cavenagh 305–306.

[13]Cavenagh 273.

[14]2(4) Burney 205, esp. pp. 209–215.

[15]See Rubin, *Personality*, Ch. IX.A. Governor Fullerton's petulence took the peculiar form of seizing on a purported legal technicality (against the legal opinion of the British law officers in India) to close the British courts in the Straits Settlements. The British view of the international law of "piracy" and what countermeasures purported piracy would justify at this time were heavily colored by political desires. See Rubin, *Personality*, Chs. IV.A, VI.B. and IX.A.; Rubin, *Piracy*.

British continued to intervene from time to time in dynastic affairs in the Peninsula and to settle border questions.[16] Indeed, by 1862 Governor Cavenagh himself had attempted to settle the Johore-Pahang boundary and was writing to his superiors in India that "should ... Ahmet attempt to create any disturbance in Pahang, I should ... consider it my duty to adopt measures for ensuring his expulsion from the country."[17]

It is not clear whence came this sense of "duty", to whom Governor Cavenagh fancied he owed the duty, or why any British official should have felt obliged to take a hand in the dynastic affairs of territories with which the British had no formal relations. I have suggested above and elsewhere[18] that the concept of "paramountcy" was developing at this time as a legal rationalization for imperial policy. There were undoubtedly elements of that mode of thought in Governor Cavenagh's approach to peninsular affairs. There were probably also elements of the duty he felt to the residents of the Straits Settlements and the merchants based there to safeguard their security and commercial interests by keeping the Malay communities in the Peninsula as orderly as possible without ordering actual armed British intervention. But to preserve foreign commercial opportunities and remove distant threats to the security of an official's constituency is to involve the official necessarily in foreign adventures. If the "duty" of maintaining security is seen broadly enough, the "duty" to intervene in foreign dynastic struggles and boundary disputes is necessarily involved.

[16]Some of the Kedah involvements are analysed in Part I of this study. Maxwell and Gibson contains treaties involving the British in the Malay States between 1830 and 1860 on pp. 43, 45, 126, 127, 206, 207 and 208. There were, of course, many British actions to affect political affairs in the Peninsula that did not result in treaties being concluded. Cf. Cowan 12, 17; Skinner.

[17]Cavenagh 303–304; 1863 XLIII 299 at p. 16, letter dated 26 July 1862.

[18]Rubin, *Personality*, Ch. VIII.B.

Governor Cavenagh felt his duty to extend to safeguarding the peace in Pahang. The peace of Pahang was threatened not only by the disputed succession involving Tun Mutahir and Wan Ahmed and their allies, but also by the greater threat of Thai involvement. Regardless of the friendly attitude of the Thai in their official relations with the British[19], the local officials in the Straits Settlements had a deep mistrust of Thai intentions.[20] Sultan Mahmud of Lingga was willing to play on this mistrust for his own purposes by asserting that his taking up residence with his father-in-law in Trengganu was "by the desire of the King of Siam". Presumably Mahmud was seeking to involve the Thai on his side in his intrigues in Pahang; the letter telling Governor Cavenagh about Thai interest in his residing in Trengganu is less evidence of actual Thai involvement in Pahang than of Mahmud's wish.[21] It is perfectly possible, of course, that the Thai were in fact willing to support Mahmud's pretensions if they should prove enforceable, since the Thai must have seen British control in Pahang as a threat to Thai security in Trengganu.

Governor Cavenagh's first approach to the problem of a rival Malay authority in Pahang was to imply that no Malay could have political authority in the Peninsula without the approval of the British. In replying to Mahmud's letter mentioning the King of Siam, Cavenagh wrote:

. . . as his claims to exercise any control over the affairs of Johore and Pahang have never been recognized by the British Government, he will not be allowed to interfere in the Government of those states . . .[22]

[19]Sir John Bowring's treaty and regulations opening Thailand to trade on a formal basis were concluded in 1855 and 1856. Aitchison 124 *et seq.* Anna Leonowens was engaged to be the Governess of Prince Chulalongkorn in 1862. See D. G. E. Hall 579–583.

[20]The bases for this mistrust are examined in some detail in Rubin, *Personality*, Chs. VIII and IX.

[21]1863 XLIII 299 at p. 24, letter dated 30 September 1862.

[22]*Id.*, p. 25, letter dated 13 October 1862.

There is some conflict of evidence as to the Thai views. On the one side, Governor Cavenagh apparently heard that the Thai had yielded to his anxieties and ordered the Sultan of Trengganu, Baginda Omar, to ship Mahmud to Thailand.[23] Governor Cavenagh used this information in his ultimatum to Sultan Omar:

> ... we have learnt that our friend has received orders to send back the ex-Sultan of Lingga to Siam ... Unless within twenty-four hours from the receipt of this letter the ex-Sultan embarks on board the steamer which . . . we have despatched for his conveyance to Bangkok and the grant of all aid to [Wan Ahmed] . . . strictly prohibited, the officer in command of the naval forces has received instructions . . . to bombard our friend's fort, to seize his boats, and to establish a blockade of his coast ...
>
> We have now given our friend fair warning of the consequences likely to ensue in case of his neglecting to act upon our advice, which has always been tendered in a friendly spirit, and solely with a view of preserving the general peace and tranquility ...[24]

On the other hand, in a letter dated 27 November 1862 (thus, immediately after the Thai had learned of the bombardment) the Thai wrote to the British Principal Secretary for Foreign Affairs in London their view, surely inconsistent with the issuance of orders for the removal of Sultan Mahmud from Trengganu, that

> the demand [of Governor Cavenagh] that the Siamese should . . . take charge of him [Sultan Mahmud] because of the unsettled condition of the small State of Pahang, which is not a British territory, is, to say the least, most unjust ...[25]

[23]At least so Cavenagh asserted in a letter to "Sultan Omer" dated 3 November 1862. *Id.*, p. 31.

[24]*Id.* "Our friend" was the usual form of address between British Governors and Malay Sultans at this time. With such "friends" Sultan Omar may have felt he had no need of enemies.

[25]57 *BFSP* 1107. The word of the bombardment had reached Bangkok by 25 November 1862. 1863 XLIII 299 at p. 46, letter from Chow Phya Sri Sury Wongs to Sir Robert Schomburgk (British Consul in Bangkok) of that date.

In the correspondence following the bombardment the Thai attempted to twist to their own advantage the British emphasis on ordering the world to British wishes by granting or refusing recognition to awkward foreign claims to authority. The Thai cited two incidents to imply British recognition of Thai rights in Trengganu and Kelantan.[26] Governor Cavenagh's reaction assumed the same view of law: He merely denied that British actions implied recognition of Thai pretensions in Kelantan and Trengganu in the incidents cited.[27]

The British authorities in India did not rest on "recognition", however, but asserted to their London superiors that "there is nothing to show that Siam has ever exercised any sovereign rights either in Tringanu or Kalantan". The British authorities in India also defended the bombardment on the ground that Thai "promises" to remove ex-Sultan Mahmud from Trengganu had been broken.[28] Faced with a disagreement as to a matter of legal rights between the highest officials of India and the highest officials of a foreign government, the British Foreign Office had to decide whether the issues were to be pursued further with the foreigners. Rather than taking the views of the India Office as conclusive, the Foreign Office made its own investigation into the status of Thai authority in Kelantan and Trengganu. That investigation was memorialized by Mr. T. G. Knox in an undated paper apparently written in Decem-

[26] *Id.*, p. 48.

[27] *Id.*, letter to Sir Robert Schomburgk dated 26 December 1862. In the more significant of the two incidents mentioned, the Resident Counsellor of Singapore had written a letter to the British Consul in Bangkok dated 16 June 1858 mentioning "Siam to which Kalantan is subordinate". *Id.*, p. 56. As a result the British had successfully remonstrated with the Thai over an incident occurring at sea near Kelantan. While the Thai knew nothing of the internal British correspondence they cited the British remonstrance as a recognition of Thai authority in Kelantan. Governor Cavenagh's view of the incident was basically different. He denied Kelantan territory was the place of the significant events and construed it as a simple matter between Thailand and Great Britain with no implications for the northern Malay States. *Id.*, p. 49.

[28] *Id.*, pp. 25–26; 57 *BFSP* 1107, letter dated 21 February 1863.

ber of 1862 (it was amended by Mr. Knox in a memorandum dated 8 January 1863) in which it was noted that Kelantan and Trengganu were "provinces . . . tributary to Siam". "Tringanu . . . was never conquered by the Siamese," the memo points out, "but put itself under the protection of Siam about 100 years ago." The passage of *bunga emas*, a gold and silver tree sent by the Sultan of Trengganu to Bangkok every two and a half years along with other gifts worth totally about $3500 in return for which presents of equivalent value were sent to him by the King of Thailand, Knox mentions as a "token" of Thai "suzerainty".[29] The British Counsul in Bangkok had also advised his superiors that "The King of Siam . . . is suzerain of Tringanu and Kalantan".[30]

Leaving aside for a moment the question of what "suzerainty" may be, or more precisely, what the word may have meant in a Foreign Office context in the early 1860's, the Foreign Office decided that no further action should be taken against Bangkok. The strongest evidence the British administrators in the Straits Settlements and India had been able to furnish of Thai wrongdoing to justify the bombardment was a very doubtful interpretation of the Treaty of 1826, a possible confutation of an affirmative Thai argument which was not regarded as dispositive, and some self-serving correspondence dating back to 1787 and 1792 in which the then Sultan of Trengganu had asserted to a British frontier official his independence of Thailand.[31] On the other side of the balance, to be considered before making a formal argument to the alert and perceptive Thai officials, was the passage of *bunga emas* (a clear token of something, even if not complete Thai authority),[32] the evasive-

[29] 1863 XLIII 299 at pp. 67, 74–76; Cavenagh 300–301.

[30] 1863 XLIII 299 at p. 57, letter to Earl Russel dated 30 July 1862.

[31] *Id.*, p. 53. The British official was Francis Light, first British administrator of Penang.

[32] King Mongkut (Rama IV) of Thailand had himself sent *bunga emas* to the British in 1851 on his accession, apparently intending merely a diplomatic courtesy. G. Cœdès 4.

ness of the Sultan of Trengganu in discussing his relations with the Thai, and, although this is not mentioned in the correspondence, the apparent inconsistency of British action in holding correspondence with the ex-Sultan of Lingga while formally regarding him as a dependent of the Thai; the British had often expressed indignation at other powers addressing their stipendiary Sultans without addressing the correspondence through British officials.[33]

One implication of the internal British handling of the dispute between the Thai and British officials in the Straits Settlements is the degree to which it illustrates the primacy of international relations over constitutional relations in the British Government in the nineteenth century. In the 1860's the British legal specialists were still analysing the relations between the British Government and local rulers in India and the Malay States as basically international relations with rights and obligations determined by the special facts of each case. Much effort was spent in determining if the British, as "paramount" power in an area, had rights beyond those granted in written documents by the local "sovereigns" in whose territories those supposed rights were to be asserted.[34] Although the British at that time did not assert rights beyond the demonstrable donation of the local sovereign, the demands of the empire builders and the examples of French and German lawyers had already begun to make it difficult for the British to maintain a strict legal position against expanded assertions of their authority.

[33]On the evasiveness of the Sultan of Trengganu see Cavenagh 301, 303. British sensitivity to the international contacts of the Southeast Asian nobles with whom they had dealings is discussed briefly in Rubin, *Personality*, Chs. VIII.B and IX.B.

[34]See, *e.g.*, Sir Henry Maine's opinions on the sovereignty of the Káthiáwár States dated 22 March 1864, on British rights to transfer territory from one Indian Prince's jurisdiction to another's dated 11 August 1868, and on the power of Indian Princes to subject European British subjects to their criminal procedures dated 19 April 1869. All are reproduced in Grant Duff.

As a practical matter, in areas where the British acquired responsibility for foreign relations in a petty state foreign powers aggrieved by some incident there would have to correspond with the local officials through the intermediacy of the British. Instead of merely serving as a conduit for communications and safeguarding their minimal interests, the British felt forced by the pace of history and example to assert rights in the territory involved sufficient to eliminate the tension. Thus, a progression from mere interest to political interest, to interest in foreign relations, to control over foreign correspondence, to control over internal affairs, was set in motion.[35] By 1890 the progression was complete and in 1894 W. E. Hall, the foremost British authority on international law, in his very influential treatise on the foreign jurisdiction of the British Crown, was able to write:

> The mark of a protected state or people . . . is that it cannot maintain political intercourse with foreign powers except through or by permission of the protecting state . . . [I]t becomes at once evident that the interposition of the protecting state between the protected country and foreign powers deprives the latter of the means of exacting redress for themselves for wrongs which their subjects may suffer at the hands of the native rulers or people; and that, as the protecting state interposes voluntarily and for its own selfish objects, it is not morally in a position to demand that foreign governments shall patiently submit to wrong-doing from persons whose natural responsibility it covers with the shield of its own sovereign independence. A state must be bound to see that a reasonable

[35]The British actually did not until 1895 formally conclude as a matter of law that control over foreign correspondence necessarily implied complete jurisdiction within Asian territory over at least the conduct of all Europeans regardless of that jurisdiction not being ceded by the local ruler. See 1 McNair, 50–52, 54–55; W. E. Hall *International Law* [1880], pp. 127–29. In the 4th edition of Hall's treatise he pointed out (p. 132) that British authority in the Malay Peninsula "at the present moment [1895] is vastly greater than would have been possible in the early years of the protectorates exercised there". The matter is treated in some detail in W.E. Hall, *Foreign Powers*, 210 *et seq*.

measure of security is afforded to foreign subjects and property within the protected territory . . . It must consequently exercize whatever amount of control may be found necessary for the purpose.[36]

Even more, in analysing the legal process of European political expansion Hall noted that the "sphere of influence", the staking of a claim as against other European powers to seek closer connection with the non-European governments of a particular area to the exclusion of other European political involvements, is necessarily a transitory phase followed inevitably by the establishment of a protectorate or an annexation or by a relinquishment of influence, "and probably before long spheres of influence are destined to be merged into some unorganized form of protectorate analagous to that which exists in the Malay Peninsula".[37]

This analysis preceded by one year the establishment of the Federated Malay States. It was thirty years after the bombardment of Trengganu. The progression seen so clearly in retrospect was yet some thirty years ahead of our story.

In the 1860's the words of art used in international law to translate the political relationship growing out of "paramountcy" into legal relationships were not "spheres of influence" and "protectorates." Rather the key word was "suzerainty". There has never been a precise legal definition of the word "suzerainty" agreed to by all who use the word. In 1882 General Sir Evelyn Wood indicated that the British defined the word as referring to a country that "has entire self-govern-

[36]Hall, *Foreign Powers*, 218–219.

[37]*Id.*, pp. 229–230. An interesting essay of this period in effect finding the British to be sovereign in India by virtue of the mere existence of an "unequal treaty" is Shepheard. The lacunæ in logic in this purportedly scholarly work are filled with patently self-serving assertions that must have seemed incontestable to the author and the editors of the Journal. The international law situation in the Malay Peninsula was essentially the same as in India from the time the Moghul was deposed (1858) until India became a member of The League of Nations in its own right (1919) or even later.

ment as regards its own internal affairs, but that it cannot take action against, or with, an outside Power without the permission of the suzerain".[38] Clearly, by the preceding analysis this position taken in 1882 had become untenable by 1890 since the distinction between internal and external sovereignty was not logically viable and the power exercising international competence for a state was conceived by then to be necessarily the dominant power in all affairs of the state, therefore the sovereign. By 1914 the British were using the word "suzerain" as a meaningless honorific.[39] But in the 1860's the definition of "suzerainty" was embodied in Sir Henry Maine's legal Minutes: Basically a term with varying content depending on the specific relations between the two states sharing the responsibilities for the administration of a particular bit of territory over which the weaker of the two had historical "sovereignty". The point at which the "sovereignty" passed from the historical "sovereign" to the encroaching "suzerain" was a matter for analysis in each particular case.

Thus, when the Foreign Office used the word "suzerainty" to describe the subordination of Kelantan to Thailand in 1862, it seems likely that Thai claims were being supported. There is also implied an analogy to British legal rights in the southern Malay States.

In the East coast of the Malay Peninsula in the mid-1860's it may be concluded that the effect of the conduct of British administrators in the Straits Settlements, attempting to secure political influence over the Malay Sultanates under pressure from the ruler of Johore and the European mercantile community, was to create a boundary between British and Thai "protected states". The British had ousted all unwanted political influence from Pahang and in turn had been forced to

[38] 1 McNair 38.

[39] Westlake, *International Law* (1904), pp. 25–26, 120, 123 *et seq.*; Rubin, *Tibet* 120, 124–126, 137. An excellent scholarly analysis of the changing meaning of "suzerainty" is Kelke.

withdraw from Trengganu and Kelantan whatever claims had been immanent in British attitudes. This adjustment had come about as a result of legal analysis resulting from the British bombardment of Trengganu and, thus, indirectly from British respect for property rights.

On 31 December 1862 the Admiralty in London instructed British Naval commanders in Singapore to refer all "requisitions from British authority for interference on the part of men-of-war in territories not under the protection of Great Britain" to the Commodore in India except in most urgent and unusual cases—clearly intending to prohibit future incidents comparable to the bombardment of Trengganu.[40] Sultan Mahmud, the ex-Sultan of Lingga, was finally lodged in Bangkok[41] never to appear again as a significant actor in peninsular affairs. On 25 July 1863 Sir Charles Wood, the Secretary of State for India in the Liberal Palmerston cabinet of 1859-1865, ended the internal British correspondence over the incident by telling the Governor-General of India that the bombardment of Trengganu seemed unjustifiable: ". . . I still cannot see that the crisis was of such urgency as to have justified a subordinate Governor . . . in attacking a friendly port, without . . . instructions . . .".[42] The British Consul in Bangkok informed the Foreign Minister, Earl Russell, that the Trengganu incident "has not produced on the part of . . . the Siamese Government . . . any change in the friendly feelings they profess toward Her Majesty and Her Government."[43] The situation seemed settled.

But the underlying tensions that had produced the violent incident at Kuala Trengganu were not settled; only the immediate occasion for that violence. The British still confronted the Thai in the Malay Peninsula; Malay Sultans still fought for

[40] 1863 XLIII 299 at p. 88.
[41] *Id.*, p. 78, Schomburgk's report dated 6 April 1863.
[42] *Id.*, pp. 56–57.
[43] *Id.*, pp. 69–70, letter dated 16 December 1862.

taxable territory and prestige, calling on outsiders for help; European commercial adventurers still sought profit in the exploitation of the resources of the Peninsula and felt the need for the protection of a European armed power for their property rights however acquired; British administrators in the Straits Settlements were still closer to the urgings of their Malay and European friends than to the commands of their political superiors in London, and were still subject to the anxieties that seem part of the hazards of accepting responsibility for the security of others. The concepts of justifiable behaviour in international affairs, international law, continued to evolve towards holding unstable any exercise of external competence by non-European states and justifying measured action by European powers to reduce the number of "sovereignties" in the world to those sharing Europe-rooted culture.

B. BRITISH IMPERIAL LAW AND RECOGNITION

While "piracy" was losing its effectiveness as a legal theory to justify British political action in the Malay Peninsula due to the doubts sewed by the Mohamed Saad case, it was still influential for some years. In Part I.B above it was noted that Sir Andrew Clarke and Thomas Braddell differed as to the use of the legal concept of "piracy" to justify British action in the Peninsula. Through Braddell and, it may be supposed, the mercantile community of the Straits Settlements the idea that "piracy" could justify the British political advance had a brief resurrection in 1873–1874. But in the reapperance of the justification of suppressing supposed piracy the accusation carried more polemical than legal guiding force. At the same time, while concepts of race or cultural superiority were less spoken of they became gradually more and more influential in justifying the British expansion.

It is most enlightening to note the degree to which the opinions of their legal advisers influenced the successive

Governors of the Straits Settlements in the 1870's, and particularly to note how even when the legal officer of Government spoke of "piracy"he was not paid serious attention when the Governor did not share the *opinio juris*. International law was not made by publicists or legal advisers, but by the convictions of right on the basis of which the political officers of Government were actually willing to commit themselves and their constituents to action.

A second major thread to be noted in the story of the British expansion of the 1870's was the self-policing nature of international law in major political affairs. When the British acted under a "justification" that was unconvincing their acts resulted in political disaster. Despite the talk of suppressing piracy the Malay nobility, which had suffered pirate-hunting expeditions before, resisted the British advance when the purported rationale ceased to bear a clear relation to shared convictions of right. Instead of extending international law to the Peninsula, where all concerned had long regarded it as extending anyhow, the British found that they could not disguise with words the reality: They were extending British municipal law to the Peninsula. The forms of international relations remained, but the substance of British actions in the 1870's was the forcible conquest of Perak, Selangore and the territories reorganized eventually to form the Negri Sembilan. The use of international law forms rather than openly acknowledging the forcible expansion of British jurisdiction appears to have been a compound of attempts to minimize the political repercussions of the expansion, particularly among the political opposition in London, and the evolution of legal theory to give British administrators the feeling that they were somehow gaining authority without actually having to shoulder the responsibility for internal administration. In a sense it was an attempt by the British to avoid the progression from interest to domination that marked European political progress in Asia until the high

tide of empire in the 1890's. Their punishment for twisting the concepts of international law to justify the unjustifiable was to have their jobs made extraordinarily difficult and the unwanted burdens were thrust upon them anyhow.

A third thread was the conflict between frontier officials and London. If the international law arguments could not convince the Malay Sultans of the rightness of British advance, at least it could be tried as argument with the chief British officers of government in London to justify the political advances urged by mercantile interests in the far reaches of the Empire. It is on this level that international law developed a language to translate the polemics of insecure, *nouveaux riches*, race-proud merchants to the gentler councils of European statesmen.

Let us look at the legal mechanics of the British advance.

By the Pangkor Agreement of 20 January 1874 the chief nobles of Perak agreed that a British "Resident" should be "accredited" to the court of a Sultan "recognized" by the British, and that the Resident's "advice must be asked and acted upon on all questions other than those touching Malay Religion and Custom".

Sir William Jervois, who became Governor of the Straits Settlements in the Spring of 1875, interpreted the Pangkor Agreement as giving him the sort of ultimate authority that nineteenth century lawyers would not have hesitated to call "sovereignty" in Perak. To explain his having J. W. W. Birch, the British Resident, require Sultan Abdullah of Perak, the "recognized" sovereign, issue orders expanding Birch's direct authority in Perak to act without the intermediacy of Malay officials in some cases, Governor Jervois wrote to the Colonial Secretary, Lord Carnarvon:

> The idea of some is, that the states where we have our Residents are 'independent,' and that we are exercising an undue influence over them, by the action we are taking with respect to them.

My Lord, they are really not independent states, and I submit that they cannot be independent.

If we left them to themselves, the state of things which necessitated our intervention would again take place, and we should then be obliged to take matters again into our own hands. Given this view of the legal situation, it is not surprising that Governor Jervois could regard the expansion of Birch's explicit powers in Perak as a matter merely of political opportunity:

In the desire expressed by some of the most influential of the Perak Chiefs, that the British Government should undertake the Government of that State I saw an opportunity for dealing with difficulties of no ordinary character, and it appeared to me most desirable not to let the opportunity slip . . .

This letter was dated 18 October 1875. Birch was killed just two weeks later by Malay chiefs, including Sultan Abdullah, who did not share Jervois's view of either the law or politics of the Peninsula. In the original text of the last quoted paragraph the words "some" and "British Government should undertake the Government" are underlined in blue; the words "saw an opportunity" are underlined in red. In the margin is written: "cause of . . . war" with the word "war" underlined in blue.[44]

Sir Andrew Clarke's doubts about using the concept of "piracy" to justify continued British assumption of power had not left him or his successors without arguments to justify continued British expansion to themselves and perhaps their political superiors. The alternative was to conclude agreements

[44]C. O. 30/6 vol. 40, "Correspondence with the Governors of the Straits Settlements, 1874–1875", filed in the Public Records Office in London as *The Carnarvon Papers*. The letter is marked "Private"; and the red and blue underlinings and comment are apparently those of Lord Carnarvon or his private secretary. For historical perspective on the situation in the Peninsula at the time this letter was written see Parkinson 207 *et seq.* Parkinson's apt comments on the true meaning of the Pangkor Agreement to the Malay parties to it are on pp. 136 *et seq.* It should be remembered that an international agreement, like a contract at British municipal law, means only what the parties intend it to mean; where there is a problem of translation there is no agreement and he whose rights rest on the consent given in the purported agreement has therefore no right.

insinuating British authority as the ultimate authority in a Malay Sultanate; as the authority which even the Sultan, the nominal sovereign, had to obey. In future, the British Resident in a Malay Sultanate concluding a Pangkor-like agreement with the British Government was the one whose "advice" must be "acted upon", the Sultan was merely the conduit through which British policies were legislated and administered in the Sultanate.

To ensure the compliance of the Malay Sultans with British wishes there were two possibilities: One was to use military force. This possibility was used in the 1870's and after with great reluctance. The experience of Governor Cavenagh in bombarding Trengganu and the reaction of the British electorate to military adventures in Southeast Asia was enough to make the direct use of military force a last resort to responsible officials.[45] The second was to manipulate the facts to fit an acceptable legal framework that would justify British authority as a matter of right, not might. The technique used was derived from the international practice of formally "recognizing" the elemental legal facts of statehood and sovereignty. To a nineteenth century (or a twentieth century) international lawyer, an entity is not entitled to be treated as a "sovereign equal" merely because it bears the marks of sovereignty. The international society of states can be analogized to a club to which sovereigns gain admittance by being "recognized".[46] To

[45]Parkinson 106–109, 112–114, outlines some of the political implications in London of the complications in the Straits of Malacca.

[46]There is, of course, much dispute about the theory of recognition, and whether there is not a duty in the international community of states to "recognize" all who bear the burdens of sovereignty regardless of political ramifications of that recognition. However, non-recognition, or selective recognition, is still so widely practiced by states as different in philosophy of law and government as the United States (which doesn't "recognize" the Communist Government of China or of Mongolia) and the United Arab Republic (which doesn't "recognize" Israel, with whom it claims to be at war—also a contradiction in legal logic), that the analogy to a club still seems to hold today as a practical matter.

withhold "recognition" from a Sultan not sufficiently convinced of the desirability of concluding a Pangkor-type agreement, or not willing to live up to such an agreement, would be a way of covering with an international law label a *coup d'etat* that would be an illegal interference in internal affairs at international law, but which British administrators could consider merely a constitutional adjustment. To use international law labels to justify British *coups* meant the creation of techniques at law not proper to either British constitutional law or international law, but which now could be subsumed under the name "British imperial law" when a reference to these anomalous practices was unavoidable. Under British imperial law a Malay Sultan could be installed or deposed by the simple process of granting or rescinding "recognition", thus assuring a compliant figurehead to implement British policy in the Sultanate.[47]

The system was explicitly extended to Johore and Pahang in 1885 and 1887 respectively by the conclusion of Pangkor-type agreements.[48] It was extended to the other Malay States as British replaced Thai authority in them. It was used, to the confusion of those who have been unable to grasp the essential facts of British imperial law as seen by Sir William Jervois in 1875, as recently as 1946, when the threat of changing recognized Sultans was authorized to assure the Sultans' compliance with legal forms accompanying the constitutional changes involved in the creation of the Malayan Union. At that time

[47]The labels used here, ordering the legal adjustments of acquiring British dominion in the Malay Peninsula in conflict of law terms, caused difficulties to British lawyers well into the twentieth century. Cf. Westlake, Native States; Cmd. 3302, *Report of the Indian States Commission*, 1928–1929, *passim*.

[48]Maxwell and Gibson 132 and 66 respectively. The 1885 Johore Agreement did not contain the full Pangkor undertaking by the Maharajah of Johore; the formal arrangements were not concluded until 1914, but that is a long story not directly relevant to this study.

the instructions to the British official charged with accomplishing the legal adjustments, Sir Harold MacMichael, were:

> In any Malay State where the Ruler recognised by H.M.G. before the outbreak of war with Japan is either no longer in office or has so compromised himself in relations with the enemy as to be no longer prima facie worthy of being recognized as Ruler by H.M.G., you should telegraph ... the name and credentials of the Malay personage whom you recommend as competent and responsible to undertake such a commitment in respect of the State concerned.[49]

Under these instructions, although there is no authority for making an explicit threat to depose a Sultan solely for failure to sign the agreement felt necessary by British lawyers, at least some Sultans felt that threat to be present.[50]

As a means of acquiring legal rights in Kedah, Perlis, Kelantan and Trengganu, however, for the British to "recognize" a compliant Sultan and depose a rival through refusing to recognize his authority would be to run afoul of Thai claims. As was clear in the history of the Kedah succession in the 1830's and 1840's recited above, the Thai themselves used the technique of granting or withholding "recognition" in a sense, by granting or withholding "installation", to assure a ruler in Kedah (of which Perlis was a part) amenable to their policies. The precise arrangements used by Thailand to maintain ultimate policy control in Kelantan and Trengganu are less clear due in large part to the desire of Colonial Office officials reporting on the status of those territories to find them legally free of Thai entanglements and the corresponding desire of the Foreign Office officials to discourage British expansion at the expense

[49] MacMichael 4.

[50] Cf. 429 H. C. Deb. 5 s. 321–323 (oral answers to questions in Parliament 6 March 1946). It is not proposed in this place to analyse the very complex political and legal transactions accompanying the progression of the Malay States from being provinces of the British Empire to being constitutionally protected provinces of the Malayan state, 1945–1957.

of even mere claims to authority put about by Thailand. Thus the Colonial Office people tended to find Kelantan and Trengganu anxious to be annexed by the British, and the Foreign Office people tended to find them happily prosperous under full Thai control.[51] At least one Governor of the Straits Settlements tried to compromise by proposing the British not dispute Thai claims, but take over administration of Kelantan and Trengganu with Thai permission.[52]

Furthermore, whatever tendencies might have existed for using military measures to bring about a situation in the northern states that could be manipulated to British advantage were ended by the reaction to the bombardment of Trengganu analysed above. Even reference to "piracy" was impossible, for the Thai were advised by Europeans seconded to Thai service as to questions of international law and it could no longer be seriously argued to justify British action that "piracy" could legally be suppressed in a foreign sovereign's land territory or could be committed any place but the high seas. In one known case (in 1894) a British expedition based in Pahang did penetrate Kelantan and Trengganu without any permission either from the Sultans or the Thai, but that penetration was in violation of peremptory instructions (which did not reach the expedition until after it had departed—it returned to Pahang at once) and was not repeated; when a second expedition was felt necessary as part of suppressing the 1894-5

[51]Many citations could be contrasted here. Clear examples of Colonial Office perceptions may be seen in Sir Frank Swettenham's memoranda of the 1890's cited in Part III below and Sheppard 30–31, 40–44, 50–53. The Foreign Office view is maintained in many historical records from the negotiation of the Burney Treaty in 1825–1826 through the correspondence of the 1890's cited below. A persuasive, albeit not wholly disinterested, account of Kelantan's probable ultimate legal subordination to Thailand is in Graham 47–54. Graham was a British adviser in Kelantan under the Thai. See Part IV below.

[52]See Lovat 383 *et seq.*, correspondence of 1886 between Sir Frederick Weld, Governor of the Straits Settlements, and the Secretary of State for the Colonies, and between Weld and the British Minister in Bangkok.

insurrection in Pahang, permission was obtained and the expedition was accompanied by two Thai Commissioners.[53]

In general there was no lawlessness in the northern Malay Peninsula sufficient to justify even a clamor for suppressing "piracy" on the part of the British mercantile community in the Straits Settlements in the last years of the nineteenth century. What clamor existed was for the British to shoulder the burdens of government in territory where the populace was supposed to live in misery under oppressive Sultans. That rationale was never seriously argued by responsible policy-makers. To send force to bring order to Thai territory was as unthinkable to moderate British officers as sending armed force to suppress the Paris Commune of 1871 had seemed to moderate Englishmen in Europe.

The irrepressible drive to expand was instead based quite explicitly upon racial pride. It seemed natural to Lord Rosebery, Secretary of State for Foreign Affairs in Gladstone's Liberal Governments of 1886 and 1892-1894, Prime Minister himself in 1894-1895, to say on 29 May 1889 that he looked forward "to the absolute predominance of the Anglo-Saxon race throughout the world."[54] An elaborate system of international law was perceived by James Lorimer, Professor at the University of Edinburgh and considered by most of his contemporaries to be one of the great international lawyers of the late nineteenth century, by which "aggression" could be called "a natural right, the extent of which is measured by the power which God has bestowed on the aggressor, or permitted him to develop", and the "Aryan race", as distinguished from the "Shemitic races" (with the "Anglo-Saxons" predominant among "Aryans"), deriving from the right of aggression a

[53]Clifford 38–42; 1895 LXX 695, C. 7877, *Administration Report on Pahang, 1894*, at pp. 61–76; 1896 LVIII 303, C. 8257, *Administration Report on Pahang, 1895*, at pp. 62, 70.

[54]Lovat 409.

right of war.[55] Other, perhaps less forthright, lawyers justified unlimited European expansion in Asia on the supposed need to "civilize" what was regarded as barbaric society.[56] A second variation on the basic racial theme was not based on pride of "civilization" but on what were called "humanitarian" principles. Scholars justifying European conquests in Asia on "humanitarian" grounds referred only superficially to the supposed benefits of enlightened European rule over the rule of local despots (as all non-European rulers were on occasion regarded by some)—that would have been merely a type of pride based on European "civilization"—but to the needs of all humanity to have access to the resources of Asia which were

[55]Lorimer, *Institutes*, 332, 334–335. It is not proposed to dwell in this place on the theories of Professor Lorimer. To an American observer in 1971 the elaboration of his views seems a combination of ignorance, arrogance and fantasy; but the faults are in his premises, not his logic. To his European contemporaries other then the Rothschilds, Disraeli and the many others of non-Aryan "race" who did not fit the form, the premises seemed self-evident and the logic subtle and very persuasive. Modern proponents of grand theories of world order might well learn a lesson in humility from the fate of Lorimer's ideas.

[56]Cf., among many examples of this line of thought, Pillet. The American poet "e.e. cummings" published an ironic comment on the "civilizing mission" in 1944, during the war between the United States and Japan:

ygUDuh

ydoan
yunnuhstan

ydoan o
yunnuhstan dem
yguduh ged
yunnuhstan dem doidee
yguduh ged riduh
ydoan o nudn

LISN bud LISN

dem
gud
am

lidl yelluh bas
tuds weer goin

duh SIVILEYEzum

e.e. cummings 393.

regarded as being jealously hoarded by selfish Sultans.[57] The degree to which the resources to be exploited by European entrepreneurs were in fact to be shared with non-Europeans was not apparently considered. But lest sight be lost of the many scholars who neither approved of the actions of European statesmen nor agreed with the premises on which those actions were justified, it is well to point out that at no time were advocates of the fundamental principle of sovereign equality wholly silent.[58]

Although the drive to dominion was based largely on what seems today like a grotesque sense of racial pride or smugness about a supposed state of "civilization", or ability to allot the world's resources equitably, those motivations were not taken in practice to authorize conquest in the Malay Peninsula. The Thai, neither Aryans nor Shemites to Lorimer, but something between entitled to "partial recognition",[59] not only had the power to resist British aggression with some success, at least making it doubtful that God had intended British dominion to be gained easily over lands claimed by the Thai, but other European powers were seeking to expand their territorial bases in Southeast Asia at the expense of Thailand. To preserve peace in Europe and to keep aggressive Europeans from confronting each other directly in Southeast Asia it was an important part of British diplomacy to avoid the partition of Thailand among European powers. The British were willing to forego the prospect of a share of Thailand that should include some desirable parts of the Malay Peninsula in return for avoiding European neighbors in Southeast Asia.

[57]Cf. Rolin-Jaequemyns. An interesting variation on the same thought was expressed as recently as 8 March 1946 in the Parliamentary debate on the Straits Settlements (Repeal) Bill by Kenneth Younger, Labour Party member for Grimsby. Mr. Younger cited Articles 73 and 74 of the United Nations Charter and observed that ". . . the fact remains— and I am sure history proves it—that a small people in a large territory full of resources cannot keep that territory to themselves undeveloped. . . . The resources of the world do not belong to any small group of men, whatever their race". 420 H.C. Deb. 5 s. col. 668.

[58]Cf., among many, Field and Hornung.

[59]Lorimer, Doctrine, 336.

III. The Further Advance to the North; Law and Diplomacy

From the founding of Penang to the Mohamed Saad case the policy of imperial expansion sought legal justification in a concept of piracy that eventually became impossible to carry further. The search for new justifications for political action increasingly foundered upon rocks of conscience as they proved incapable of bearing the weight in a world community that they apparently could bear in the narrower community of Europe; rationales based on race or culture might justify action, but action so justified brought war. To avoid war diplomacy became more important and justifications within the aggressive community began to take account of the desirability of diplomacy. The sovereign equality of states became, thus, a fact of practical life even while legal rationales were available to ignore it.

The interplay of law and diplomacy is very complex. Diplomacy must take account of the interests of third and fourth parties that may be excluded from consideration by pure legal logic; thus the spectre of third party interest can be a very important bargaining tool in the hands of a trained diplomatist and improve the bargaining position of an otherwise weak power. In these circumstances it is difficult to say that the logic of international law can realistically be said to adhere to the oft-cited maxims *res inter alios acta* or *pacta tertiis nec nocent nec prosunt*. They apply only as technical rules and are normally restricted to cases of strict treaty interpretation. International law-as-the-language-of-diplomacy began in the 1890's in Southeast Asia to supplement, perhaps in part even to replace, international law-as-the-justification-for-direct-action.

To illustrate the interplay between law and diplomacy, and the relations between municipal law, British imperial law and international law as the high tide of empire was reached two case studies follow. The first is the story of the British acquisition of Reman from Thailand and the second traces the history of the Duff Development Company in Kelantan.

A. REMAN

The British Foreign Office was committed in the 1870's as it had been in the 1860's to peaceful relations with Thailand. The Colonial Office was not. A synthesis of views was achieved in London by which the Colonial Office was to keep its administrators from pressing too hard on the northern Malay Sultanates while Thai links to those territories were to be kept as weak as possible. The British Minister in Bangkok, Sir Ernest Satow, in a brilliant minute analysed British policy as taking the very same direction as French policy—to which the British were ostensibly opposed for good imperial reasons. As he saw the situation in the early 1880's the choice was either to support Thai power and the integrity of Thai authority throughout the Thai dominions, or to see Thailand broken up by French expansion based in Indochina. As British policy evolved, Satow gained the backing of the highest levels of the Foreign Office and the India Office who were concerned about French expansion; and the Colonial Office supported the expansionist arguments of the Governors of the Straits Settlements. In 1887 a compromise over British desires to acquire the Thai area of Reman was apparently reached when Frank Swettenham and Satow in London thought they had Thai concurrence in a lease arrangement that would give Perak rights of administration in Reman while preserving Thai "sovereignty". At the last minute the Thai refused to conclude the arrangement apparently fearing that similar "leases" favoring the French and perhaps others would then be unavoidable and the result would be a

dismembered Thailand with vestigial legal titles but no territory or income.[1]

On 6 April 1897 the British and Thai entered into a Convention by which the King of Thailand undertook not to cede to any third power without British consent any of his rights over Thai territories in the Malay Peninsula:

> III. . . . His Majesty the King of Siam engages not to grant, cede, or let any special privilege or advantage, whether as regards land, or trade, within the above specified limits, either to the Government or to the subjects of a third Power without the written consent of the British Government . . .

In return the British undertook to support the Thai in resisting any attempt by a third power to "establish its influence or Protectorate in the territories or islands above mentioned".[2] Apparently as part of the negotiation the British had acknowledged Thai sovereignty over Kelantan and Trengganu although neither name appears in the text of the Convention.[3] Until at least October 1899 the chief British administrators in the Straits Settlements were kept uninformed of this Convention.[4] Thus the correspondence concerning the Perak-Kedah boundary, *i.e.*, sovereignty over the district of Reman, proceeded on two levels: On one the Colonial Office officials proposing policy tied the Reman sovereignty question to British possibilities for expanding their control to Kelantan and Trengganu,

[1]Kiernan, *passim*. See also Thio.

[2]Aitchison 172; F.O. 93/95–13.

[3]This is not explicit in the Convention, but in later internal British correspondence is clearly stated. See, *e.g.*, F.O. 69/204, confidential letter dated 4 September 1897 from George Greville (British Minister in Bangkok) to Lord Salisbury (Prime Minister and Foreign Minister).

[4]F.O. 69/204, letter from H. Bertram-Cox, Undersecretary of State for the Colonies, to the Undersecretary of State for Foreign Affairs dated 26 October 1899. In the same file there is evidence in a letter from Sir Charles B. H. Mitchell, High Commissioner of the Federated Malay States and Governor of the Straits Settlements, to his Colonial Office superiors dated 24 October 1899 that rumors of the Convention had in fact reached him at that time.

on the other the Foreign Office officials insisted on treating the Reman question in isolation.

After the failure of the negotiations of 1887 to reach a conclusion favorable to British interest in Reman there was no correspondence for twelve years over the issue of sovereignty in that small area. Although the issue was referred to by British officials as a mere border problem, implying that surveyers could resolve it, the Colonial officials were pressing for full British sovereignty over a relatively well-defined area. Foreign Office officials were apparently not fully aware of the extent of Colonial claims.

When the Convention of April 1897 was concluded, without revealing that the issue of sovereignty in Trengganu and Kelantan was already decided Sir Charles B. H. Mitchell, High Commissioner of the Federated Malay States, asked Sir Frank Swettenham, the Resident General, for rumors of any commercial concessions to foreign businessmen in "the Malay States which are recognized as appertaining to Siam". Swettenham reported some intrigues in Kelantan involving a Malay noble who hoped for British support in his attempt to seize the throne, but raised the Reman "boundary" question as the issue upper-most in his mind.[5] The questions raised by Swettenham were apparently sent on to the British Minister in Bangkok, George Greville, who wrote to Lord Salisbury, acting as his own Secretary of State for Foreign Affairs while Prime Minister also:

> Siam has gained important advantages by the Secret Convention recently signed with Great Britain and H.M. Government have waived their objections in regard to Siamese rights over Kelantan and Trengganu. It is not unreasonable to expect that the Siamese Government should put such pressure as may be requisite on the Sultan of Reman to induce him to give way

[5] *Id.*, letter dated 25 June 1897.

on the points in question so that an end may be put to all frontier disputes in that region.[6]

As always in international affairs, as was the case when Chao Phya Ligor conceded territory to the British in 1831, gratitude did not extend to questions of territory; indeed it is difficult to say why Greville thought the Thai should have acquiesced in British wishes at all since the Secret Convention was clearly as much to British interest as to Thai. The Thai might with equal logic have asked the British to give up their pretentions in Reman. Greville found the Thai, Prince Devawongse, Minister for Foreign Affairs, temporizing.[7]

The Colonial Office would not let the matter drop. A killing occurred in Reman according to the British officer administering the Straits Settlements (C. W. S. Kynnersley) on 18 January 1898, and the administration of justice was alleged to require an agreement with the Thai as to which of the two Empires' provinces, British Perak or Thai Kedah, had jurisdiction in Reman. Kynnersley suggested an artificial boundary be fixed for purposes of criminal jurisdiction pending a final settlement of the issue.[8] Lord Salisbury concurred in Kynnersley's suggestion[9] and appropriate instructions were apparently sent to George Greville in Bangkok.

In response to Greville's arguments Prince Devawongse rejected the British legal position and pressed for the accused murderer to be sent to Bangkok or Kedah for trial.[10] Not surprisingly, James Alexander Swettenham (Frank's brother and the senior British official in the Straits Settlements at the time) did not feel that the need to do justice outweighed the

[6] *Id.*, letter dated 4 September 1897.

[7] *Id.*, Greville to Salisbury 8 December 1897.

[8] *Id.* See also letter from the Undersecretary of State for the Colonies to the Undersecretary of State for Foreign Affairs dated 23 February 1898.

[9] *Id.*, reply dated 2 March 1898 to the letter of 23 February.

[10] *Id.*, Devawongse to Greville 23 April 1898; Greville to Kynnersley 30 September 1898.

need to maintain the integrity of the British claim to Reman: "The scene of the murder and the residence of the accused persons are both within Perak territory, and therefore no cause for extradition has arisen".[11] The "Perak territory" referred to was actually Reman.[12] Both sides thus were asserting exclusive jurisdiction in the same area. Since the British had custody of the accused murderer they could try him whether or not the Thai agreed; the Thai were obviously not going to enter negotiations over jurisdiction with the situation clearly enabling the British to ignore their arguments.

Thai claims to the Reman district rested on what were asserted to be nearly fifty years of peaceful and unchallenged occupation by Thailand's personal vassal, the Malay Raja of Reman. His occupation began in 1834 and was not challenged by the British until 1882. Whatever the weaknesses of the original Thai claim against Perak's assertions of right in Reman were cured, according to the legal views put forth by Prince Devawongse, by "prescription": long continued, peaceful and unchallenged occupation.[13] It may be mentioned in passing that this Thai claim was similar to the legal basis that had been claimed by the British in 1821 to perfect their rights in Penang against the Thai themselves after thirty-five years of occupation that was far from peaceful.[14]

[11] *Id.*, Swettenham to Greville 1 November 1898.

[12] Francis Bertie, the Undersecretary of State for Foreign Affairs queried his opposite number in the Colonial Office about this on 5 January 1899. The Foreign Office obviously had its suspicions about the integrity of the Colonial officials in the Malay Peninsula. In view of the secrecy maintained about the Convention of April 1897 the accusations of disingenuous behaviour would cut both ways between Foreign Office and Colonial Office. If the Foreign Office would not tell Colonial officials *all* the facts involved in British frontier relations, whatever the reason for concealment, the Colonial officials could hardly be faulted by the Foreign Office for maintaining intrigues.

[13] *Id.*, Devawongse to Greville 23 April 1898.

[14] Rubin, *Personality*, Ch. VIII.A.

Frank Swettenham in a confidential memorandum to High Commissioner Mitchell dated 5 January 1899 acknowledged some force to the Thai legal position and rested his argument for the British not on legal but primarily on policy grounds. "[T]he question is one of sentiment with the Sultan of Perak and his Chiefs, and to gain the territory would be to increase British prestige", he wrote. To contrast with this, he denigrated the Thai claim saying, "The question . . . is of moment [to Thailand] only so far that, if it [Reman] reverted to Perak, the loss would be a blow to Siamese prestige with its Malay subjects". With the curious one-sidedness so often encountered in statesmen, he did not seem to realize that his own logic was equally likely to have been used, with names reversed, by Thai policy-makers. He thus seemed to lack ironic intent when he wrote, "The Perak claim is good, in that it is genuine, honest, and I think righteous. It is bad, in that it is difficult to prove, and that the Reman people have been in possession of at least a large part of the disputed territory for at least fifty years". His recommendation for action revealed Swettenham's real interest in the matter to extend far beyond issues of prestige. Labeling Kelantan and Trengganu as "two independent States *within the sphere of British influence*, where they [the Thai] had, at least, no better rights than we had", he wrote: "[T]o keep the Siamese out of these States, *which must shortly come under British possession*, was of far more importance than to recover for Perak the territory in dispute" (emphasis added). He concluded by proposing that the British tell the Thai ". . . 'If you don't agree to a reasonable settlement of the boundary, we shall resume our own freedom action in Kelantan and Trengganu' . . .", anticipating great benefits to British interests on the east coast from a firm British reaction to Thai intransigence in Reman.[15]

[15]F.O. 69/204.

Meanwhile in London the Colonial Office, resting on a Foreign Office acceptance of the justice of Perak's claim to Reman in 1885 when the first negotiations over Reman had been authorized (and foundered on the rock of Thai intransigence), proposed, and the Foreign Office agreed, that Mitchell and Frank Swettenham should go to Bangkok to negotiate with the Thai again.[16] But on 10 February 1899, Lord Salisbury rejected Swettenham's proposals, no doubt with the secret Convention in mind, and when Greville reported the Thai to be absolutely adamant about any change in position on Reman Mitchell requested that his instructions to visit Bangkok be cancelled.[17]

The issue now rose to a question of principle in the Colonial Office. Joseph Chamberlain, Secretary of State for the Colonies, had Lord Salisbury informed that he felt that Thailand "should not be allowed to take up a 'non possumus' attitude". Salisbury tried to soothe his Cabinet colleague by pointing out that if the British were to withdraw the visit of Mitchell and Swettenham, the Thai might be jollied into being more forthcoming; the British lever to induce a settlement was not to be threats on Thai territory, but the threat of a visit from Colonial expansionists from Singapore! The two Undersecretaries, Lucas and Bertie, exchanged letters agreeing that the visit of Mitchell and Swettenham to Bangkok would be cancelled, but that Greville would take up the cudgels confining negotiations to terms agreeable to Mitchell.[18]

For the Thai the issue was now one of resisting European (including French) pressures for territorial concessions. The Thai were willing to open up the Reman area to British mining interests if the British would drop their demands for cession or lease of territory. From the intensity of British interest the

[16] *Id.*, Lucas (Undersecretary of State for the Colonies) to Bertie secret letter 23 November 1898; reply dated 26 November 1898.

[17] *Id.*, correspondence dated 10, 18 and 19 February 1899.

[18] *Id.*, correspondence dated 22, 23 and 28 February, 1 March 1899.

Thai had got the impression that the Reman area contained valuable mineral deposits so they sent Henry G. Scott, a British subject working for the Thai Government as Director of the Royal Siamese Department of Mines, to visit the area. Since the mineral resources of Reman were in fact believed by the British not to be great, Greville was sanguine about the chances of the Thai being reasonable, "unless the C.O.'s (i.e. Frank Swettenham) [*sic*] exigencies are too great."[19]

The terms for the British position were formulated by Frank Swettenham in a memorandum for Mitchell dated 26 April 1899. He proposed presenting the full claim for "the whole territory drained by the Perak River and its tributaries" (which would have included quite a large piece of central Malaya north of Perak and east of Kedah), but indicated in three fall-back levels the lesser slices of territory that would satisfy his appetite for the moment. Again he emphasized ". . . the rectification of this boundary is of small importance as compared with the loss of British influence in Tringanu and Kelantan and the tightening of Siamese control in those places". Mitchell sent the Swettenham memorandum to Greville in Bangkok a month later and after some exchange of correspondence the Foreign Office instructed Greville to negotiate Swettenham's proposed territorial demand.[20]

Greville's negotiating tactic was to mix the Reman problem in with a general negotiation concerning the extradition of offenders between the British-controlled and Thai-controlled areas of the Malay Peninsula and abolition or heavy revision of the antiquated tariff and tax provisions of the Treaty between Great Britain and Thailand concluded in 1856.[21] Both the

[19] *Id.*, Greville to Foreign Office dated 18 February and 15 March 1899; private letter from Greville to Salisbury dated 16 March 1899.

[20] *Id.*, Correspondence dated 26 April, 27 May, 10 June and 7 August 1899.

[21] *Id.*, Greville to Salisbury dated 16 August 1899. The Treaty of 1856 is in Aitchison 132.

extradition agreement and the tariff and tax revisions were strongly desired by the Thai, thus Greville would have negotiating leverage to gain a minor boundary revision in return for British concessions on the larger issues.

The Reman part of the negotiation went well for the British. In their desire to avoid legal arguments based upon prescription, Mitchell and Swettenham had advised Greville to stay away from discussing history but to emphasize that Reman was more easily accessible from Perak than from Thai territory. The argument cut both ways; it turned out that the Thai had constructed roads into Reman. A compromise based on accessibility and the location of the houses of the Thai's acknowledged subordinate, the Raja of Reman, was reached in a few days. The British got some territory, enough to be more than the minimum fixed by Swettenham's proposed instructions, but the Thai retained the areas of concern to them.

When extradition was discussed the positions of the two sides proved impossible to reconcile. The Thai asked only that the terms of an extradition arrangement already applied between Thailand and British-controlled Burma be extended to apply in the Malay Peninsula. The Foreign Office found this request difficult to refuse; if the arrangement were mutually advantageous in the Thai-Burma boundary area, why not in the Thai-Malay boundary areas? Nonetheless, under his instructions from London Greville was bound to get the concurrence of his Colonial Office neighbors in the Malay Peninsula before yielding the point and Frank Swettenham and Charles Mitchell proved adamant. Their position was "that it is better not to introduce Siam's half-civilized methods into the Malay Peninsula". Unable to get a united British Government position on the question Greville was unable to agree to any change in the then current situation; no new extradition arrangement could be agreed to between Great Britain and Thailand. Although unsupported by logic other than the logic

of empire building, the Colonial Office was in a position under the British constitution to block the legal changes wanted by the Foreign Office and the Thai.

Before leaving the topic of extradition in this negotiation and the effect Colonial Office policy had on the external face of Great Britain, an incident is worth retailing. While the extradition negotiations were grinding to an embarassing silence as the Thai waited for Greville to give the answer he could not present logically, Henry Scott, the Englishman visiting Reman for the Thai Government, reported to Greville in Bangkok that he found the Thai administration in Singora, Patani, Reman, Kelantan and Trengganu, among other places in the southern region of Thailand, to be highly enlightened. He attributed Colonial Office expansionist aims to the British Government in general. This seems to have shocked either Bertie or Salisbury; a red line appears in the margin of Scott's report alongside some disparaging remarks about European powers treating weak Asian nations with less than respect. On 28 October 1899 Bertie wrote a secret memorandum to the Undersecretary of State for the Colonies that Mr. Scott would be disabused of his erroneous impressions of Her Majesty's Government's policy in the boundary question. It seems clear that Scott's misapprehension lay merely in attributing to the British Government the views of its Colonial Office administrators in the Malay Peninsula.[22]

The negotiation on tariff revisions also met with some difficulty, but that difficulty involved the India Office and not the Colonial Office; it is not significant to the present study. The negotiation did progress sufficiently that the Thai felt able to conclude the substance of the Reman negotiation containing their territorial concessions in November 1899 together with a

[22]F.O. 69/204, Greville to Salisbury dated 16 August 1899 enclosing Scott to Greville dated 5 August 1899; Greville to Salisbury dated 25 August 1899; Bertie to H. Bertram-Cox dated 28 October 1899.

mutually beneficial, non-controversial agreement relating to the registration of British subjects in Thailand, although the Agreement on tariffs and taxes was not formally concluded until 20 September 1900, almost ten months later.[23] The British consent to the tariff and tax changes was the explicit cost to the British of the Reman boundary adjustment. The British intransigence on extradition remained a point of Thai annoyance until 1911.[24]

B. THE LAST FRONTIER: KELANTAN

It is clear from the story of Reman that to the Colonial Office the prize in the Malay Peninsula was Trengganu and Kelantan. It will, of course, come as no surprise to the readers of this paper that the prize was won in 1909 together with Kedah and Perlis.[25] Having noted the interests at play in the Reman negotiation, however, the story of the final expansion of British dominion in the Malay Peninsula must have a certain fascination. It is a story of intrigue, the flag following trade, diplomacy, and the source of a series of decisions by British courts which still stand as landmarks of international and British imperial law despite their anomalies.

In the British expeditions to suppress the Pahang rebellion of 1894–1895 was Mr. Robert William Duff, Acting Superintendent of Police in Pahang. On his return to England Mr. Duff got the backing of British commercial interests and formed "The Duff Syndicate, Limited" to seek commercial mining concessions in Kelantan and Trengganu. The first word the Foreign Office received of his plan was a formal letter dated 24

[23]The Agreements are copied in Aitchison 173 *et seq.* The originals are in F.O. 93/95–5 and 14. A summary of the tariff problem is in Aitchison 110.

[24]See the Treaty of 4 March 1911, Aitchison 193.

[25]The Agreement between the United Kingdom and Thailand by which overlordship in the four Sultanates was transferred is in Aitchison 183; 1909 CV 905, Cd. 4646; 1909 CV 919, Treaty Series No. 19 for 1909.

April 1900 to the Undersecretary of State for Foreign Affairs. The Syndicate reported that it had capitalization of £10,000 and asked the Foreign Office to instruct the British Minister in Bangkok to use his influence there to help Duff obtain "letters of recommendation from the Government of Siam to the Rajas of Kelantan and Trengganu". The letter is ambiguous, implying that Kelantan and Trengganu are independent and that Thailand has mere influence there; in ink on the letter, however, a Foreign Office official has noted that "In the boundary Agreement recently concluded with Siam we have recognized Tringganu & Kelantan as dependencies of Siam . . .". After consulting with the Colonial Office proposing to give Duff the help he requested if his scheme were *bona fide*, and receiving a reply that "Mr. Chamberlain concurs in the instructions which it is proposed to send to H.M. Chargé d'Affaires at Bangkok as to the support which he should give to Mr. Duff's application," the Foreign Office wrote formally to the Duff Syndicate on 24 May 1900 that "all proper assistance" would be given him.

Duff arrived in Bangkok on 7 June and went immediately to see Mr. C. E. W. Stringer, British Chargé d'Affaires who succeeded George Greville at the conclusion of the Reman negotiation. Stringer directed him to Mr. Scott, the British national who was in Thai service as Director of Mines. Mr. Scott bluntly refused to consider a mining concession for Duff and advised him to leave the country. Duff replied that he had the backing of the British Government for his request, that he "was asking for nothing which I had not the right to ask for as a British subject", and threatened diplomatic complications if he were not given an interview with the Thai Minister of the Interior. Scott was apparently intimidated, for on the following day Duff had his interview and received from the Thai Minister permission to prospect for minerals in Kelantan and

Trengganu.[26] In reporting to Mr. Stringer on his activities Duff attributed his success to the threat of British diplomatic intervention on his behalf, and from this success reasoned also that he had a right to mining concessions under the provision of the Burney Treaty of 1826 by which the Thai undertook "not to go and obstruct or interrupt commerce in the States of Tringano and Calantan" and that:

> English merchants, and subjects shall have trade and intercourse in future with the same facility and freedom as they have heretofore had.[27]

The weakness of Duff's reasoning is clear: The Burney Treaty was never intended or interpreted by either side to open Kelantan and Trengganu to unrestricted British commerce, not to mention mining concessions of a sort and extent not known in those states in 1826. But Duff's greatest negotiating power with the Thai came not from his assertion of legal right, or even from Thai apprehension of British diplomatic intervention (although that was, probably, a very significant factor indeed). It came from Thai apprehension that the Sultans of Kelantan and Trengganu would seek profit and a political ally in Duff and the British Colonial Office, with the intrigue leading to eventual loss of those two Sultanates to the British and possibly further French demands in Eastern Thailand as "compensation". Duff was already thinking in terms of bypassing the Thai for his mining concessions and asked Stringer "if a reasonable grant of land made by one of these Malay Rulers would be supported by the British Government in the event of the Siamese questioning its validity."[28]

[26]F.O. 69/224, letter from Mr. C. E. W. Stringer, British Chargé d' Affaires in Bangkok, to Lord Salisbury and from Duff to Stringer, both dated 20 June 1900. The letter from Duff to Stringer is obviously misdated, since it is marked as having been received by Stringer on 19 June.

[27]The quotation is from Article 12 of the Burney Treaty. See above.

[28]F.O. 69/224, letters cited in note 26 above. On "compensation" as a basis for territorial aggrandizement, see Dickinson 4.

In the negotiations over Reman, one of the pettier issues had concerned the labels to be used in referring to Kelantan and Trengganu in the Agreement of 29 November 1899: The Thai had wanted them referred to as under Thai sovereignty while the draft tabled by George Greville in August 1899 with the approval of Foreign Office and the Colonial Office had referred to "the British Dependency of the Federated Malay States and the Siamese Dependencies of Kelantan and Tringano".[29] In the course of negotiating Greville convinced Prince Devawongse that the intention of the British wording was to reflect that the Federated Malay States were in exactly the same legal relation to the British Government as Kelantan and Trengganu were to the Thai. On this understanding the King accepted the compromise wording "Siamese province of Reman and the Siamese dependencies of Kedah, Kelantan and Tringanu". But at British request at the very last moment reference to the British "dependency" of the Federated Malay States was replaced with a reference to the "States of Perak and Pahang".[30]

Governor Mitchell, kept ignorant of the secret Convention of 1897, was very unhappy with the implied recognition of Thai authority in Kelantan and Trengganu and had apparently been overruled in his objections to the compromise arrangement by the Colonial Office in London.[31] Nonetheless, the Foreign Office must have agreed that the word "dependencies" might be interpreted to mean something less than ultimate authority because Greville was instructed specifically that: "The expression 'Sovereignty' must be avoided in connection with

[29]F. O. 69/204, letter from Greville to Salisbury dated 16 August 1899; letter from Bertie to Greville dated 17 August 1899.

[30]*Id.*, letter from Greville to Salisbury dated 25 August 1899; telegrams from Foreign Office to Greville and Greville to Salisbury dated 27 and 29 November 1899 respectively.

[31]*Id.*, telegrams from Greville to Bertie and from Foreign Office to Greville dated 13 and 23 September 1899 respectively.

relationship of Siam to Kelantan and Trengganu which should be treated as Siamese dependencies".[32] How much leeway this technical haggling was intended to give the British in possible later attempts to wrest Kelantan and Trengganu from Thailand is not clear. The substitution of preambular language deleting the parallel reference to British "dependencies" at the last minute was less evidence of a too-subtle plot than of a still subtler technical British reference to their constitutional relations with the Malay Sultans of Pahang and Perak in whose name British policy was promulgated. Since the Thai relation to Kedah had been acknowledged by the British to be one of complete dominance since at least 1826, and the language in question put Kelantan and Trengganu in the same "dependency" relation to Thailand as it put Kedah, the Thai were presumably satisfied that their asserted rights in Kelantan and Trengganu were being acknowledged also. The distinction between the "province" of Reman and the "dependencies" of Kedah, Kelantan and Trengganu, was presumably rationalized by the Thai (and possibly by Greville also) to reflect Thai constitutional pecularities, since Kedah, Kelantan and Trengganu each had a Sultan issuing decrees in his own name (as the Sultans of Pahang and Perak did also), while Reman did not.

Duff did not know this background. Furthermore, he misread the Agreement of 1899 to class Kedah as a "province" and only Kelantan and Trengganu as "dependencies". He was ignorant of the secret Convention of 1897 and convinced that Kelantan and Trengganu existed in a legal limbo, with Thai assertions of authority being rejected by the Sultans and the British Government refraining from recognizing the ultimate validity of Thai claims. Now, in June of 1899 he felt the Thai were pushing forward rapidly to acquire control, but that it was not yet too late for the British to block this Thai movement.

[32] *Id.*, Foreign Office to Greville, telegram dated 27 October 1899.

"Neither state . . . is sufficiently strong to repudiate the Siamese assumption of authority and therefore in time, both states must become *provinces* [*sic*] of Siam unless the British Government interfere".[33] His proposal to seek British Government support of concessions he might be able to get directly from the Sultans was made in the context of his belief, thus, that his actions might play a part in British plans to expand governmental influence into Kelantan and Trengganu before the Thai could solidify their control.

Lord Salisbury proposed to Mr. Chamberlain that Stringer be instructed to reply to Duff:

> that the authority of Siam over Tringanu and Kelantan having been recognized by Her Majesty's Gov't [*sic*], no grant of land by the Sultan of one of those states, to which the Siamese Government objected, could be regarded as valid and that any support which he might give to Mr. Duff, should be limited to endeavoring to obtain the confirmation by the Siamese Government of any such grant.

In reply, Mr. Chamberlain concurred but again wanted to maintain a little ambiguity. He suggested that the words "should be supported" be substituted for "could be regarded as valid", thus implying that although the British Government might not support the validity of any concession on a diplomatic level, it might be supported at some other level.[34]

Apparently to Duff or his backers the implications of this communication were unclear; on 3 August 1900 Major Wemyss, a Director of the Duff Syndicate, wrote to the Colonial Office a report of an interview he had just had with an unnamed Assistant Undersecretary of State for Foreign Affairs (prob-

[33]F.O. 69/224, report from Duff to Syndicate enclosed with Duff's letter to Stringer dated 20 June 1900.

[34]*Id.*, exchange of letters between the Undersecretaries of Foreign Affairs and the Colonies dated 1/9 August 1900.

ably F. A. Campbell[35]), saying that he had been assured "any title granted by a local Sultan or chief would have a legitimate claim to Foreign Office support provided that it did not conflict with established rights already exercised by Siam in the past" and that although "the support of the Foreign Office was not formal, . . . the Syndicate could depend on its being pushed with energy so long as we made legitimate demands".[36]

This was enough for Duff, who travelled to Kelantan and on 11 October 1900 obtained a concession from the Sultan of exclusive mineral and timber rights for forty years in about 2,000 of the 5,350 square miles of the State of Kelantan (about 37 1/2% of the total land area of Kelantan).[37]

Despite the enormous land area of the concession, the terms could be defended as "legitimate" in a manner of speaking. Paragraph one gave Duff personally, and companies formed by him for the purpose, the exclusive right to "work minerals and timber and every other kind of work in whatever manner he pleases" in the described area for forty years. But an important restriction in paragraph seven of the agreement said:

> 7. . . . Duff or his representative may not sell or sublet or give away the land except with the consent of the Raja of Kelantan.

[35]Campbell's initials appear under a pencilled note in the margin of a letter by Wemyss to the Foreign Office dated 18 February 1901. The substance of the pencilled note relates to what Wemyss was told at a later interview concerning the affairs of the Syndicate. No other indication appears in the correspondence in F.O. 69/224 to identify the Assistant Undersecretary of State for Foreign Affairs having dealings with Major Wemyss.

[36]F.O. 69/224, letter from the Syndicate to the Undersecretary of State for Foreign Affairs dated 28 January 1900 (clearly an error for 1901); letter from Wemyss to the Foreign Office dated 18 February 1901.

[37]The Concession Agreement is not dated but was reported by the Syndicate to be dated 11 October 1900. It is in F.O. 69/224 as an enclosure to the Syndicate's letter of 28 January 1900 (1901). The size of the concession was determined with care and reported in official British correspondence with Thailand on 10 July 1901 - Report from Mr. Bourke, Acting Director of Mines to the Royal Thai Government, to William Archer, British Minister in Bangkok.

On the other side, Duff undertook to pay $20,000 "to the Government of Kelantan" immediately on entering the state "to commence work", and to share the profits of exploitation with the "Government of Kelantan" according to a complex formula by which Kelantan was to get 4% of the stock of the Duff Development Company and 5% of the value of any precious stones or metals and timber or other agricultural products exported from Kelantan.

There were no British rights of criminal or civil jurisdiction provided for, as Paragraph 6 specifically provided:

> 6. . . . Duff agrees in respect of any persons within the two districts [the whole territory of the Concession] that any action which may arise may be settled in the Police Court in Kelantan and that no case may be taken for settlement outside Kelantan and moreover the Police of Kelantan may arrest any evildoers within the two aforesaid districts.

There are many ambiguities and legal uncertainties in the Agreement. For example, in paragraph 6 quoted above, Duff's agreeing to the jurisdiction of a Kelantan court could not legally derogate from rights the Thai may have had to alter the court system in Kelantan, but could Duff allege the Agreement gave his people immunity from a Thai court? Did the confirming of Kelantan police authority in the two districts impliedly negative Thai police authority there?

At the same time the Thai, hearing of Duff's trip to Kelantan, issued "Regulations" to the Sultans of the northern Malay States claimed by Thailand. Regulation No. 4 provided:

> If a man of any race or a Siamese wishes to make an agreement with the ruler of . . . [a Malay State or territory] both the rulers of the country and the concessionaire must report everything to the . . . [Thai Commissioner] who governs the country who will see if it is fair and if it is . . . will ratify the agreement and it can be acted on. But if the . . . [Commissioner] whom the country belongs to does not ratify the agreement it is in-

validated and anything contained therein will not be allowed the concessionaire . . .[38]

According to the Duff Syndicate, this Thai Regulation was not handed to the Sultan of Kelantan until six days after he had signed the Concession Agreement with Duff.

The first formal British reaction to the conclusion of the Concession Agreement was in the form of a secret letter from James Alexander Swettenham, Administrator of the Straits Settlements, to Joseph Chamberlain dated 19 November 1900. James Alexander was not as directly urgent as his brother Frank had been about detaching Kelantan and Trengganu from Thailand. His major concern was that the Thai Regulation be supported despite the impact on Duff of requiring Thai approval before the concession could be considered valid. He pointed out that the Thai Government,

at our instance recently vetoed a German scheme for leasing or obtaining extensive rights to Germans in Pulau Lang Kawi, north of Penang . . . If Mr. Duff may receive a concession in Kelantan without the formal consent of Siam or Great Britain, or both, an awkward precedent may be set which may quickly be utilised by Russians, French, or Germans.

The reference to possible British consent without Thai consent also hints that the problem might be solved as far as the Colonial administrators on the scene were concerned by the complete British acquisition of Kelantan. But James Alexander seems to have been prepared to see Duff lose his concession to support Thai interests, as the notion of keeping European rivals out of the Malay Peninsula was more important in his view than either degrading Thai interest or expanding British interest.[39]

But there was a major inhibition to British expansion in Kelantan that both Swettenhams ignored (whether from

[38] *Id.*, attachment to the Syndicate's letter of 28 January 1900 (1901).
[39] *Id.*, Swettenham to Chamberlain letter dated 19 November 1900.

ignorance or policy is not clear). British and French pressures on Thailand in the 1890's had forced the European powers to consider whether as a matter of policy they wished to extinguish the independence of Thailand and confront each other across a single border. On 15 January 1896 they had agreed to maintain an independent Thai "heartland", the valley of the Menam Chao Phya, the central river basin of Thailand. The map delimiting as between Great Britain and France the area which both acknowledged to be part of the Siam whose independence they pledged each other to maintain, showed Kelantan clearly within Thai territory; the British would have to face complications with France if they annexed Kelantan.[40]

The correspondence and agreements with France were not secret and the officers of the Duff Syndicate, seeking Foreign Office support, did not urge British annexation of Kelantan. It may be doubted that they would have wanted British annexation even if there had been no legal inhibition; Duff certainly seemed able to get the essentials of a profitable concession from the Sultan of Kelantan and the extent to which British administrators in Kelantan would have been equally obliging was questionable. What the Duff Syndicate wanted was British Foreign Office support to maintain the validity of the Duff concession against anticipated Thai objection. Following the sound principle that he who seeks the help of another should make it as easy as possible for that help to be given, the Syndicate presented the Foreign Office with a legal argument for possible use in Bangkok supporting the validity of the Duff concession regardless of Thai ratification. The argument boils

[40]See 1894 XCVI 399, *Correspondence Respecting the Affairs of Siam*, esp. pp. 182 *et seq*. The area of immediate concern in 1893 was the upper Mekong and the Burma-Laos border. Two Protocols of 25 November 1893 settled that issue between the British and French. *Id.*, pp. 212–213; 1893–1894 CIX, C. 7231. The 1896 Protocol is in 1896 XCV 73, C. 7976; 1896 XCV 83, C. 8010 (Treaty Series No. 5, 1896). A. H. Oakes wrote a memorandum dated 23 April 1901 pointing out these complications in the Foreign Office. That memorandum is in F. O. 69/224.

down to one of historic right, evidenced by the continuous past practice of the Sultans of Kelantan, to alienate land without Thai permission, and the absence of any treaty or agreement between the Sultan and the Thai to derogate from that historic right. The Syndicate alleged that the Thai officials in Kelantan had already begun interfering with Duff's attempts to explore his concession. To give the Foreign Office an incentive to use its influence in Bangkok, the letter closed with a cryptic reference to European rivals—presumably intending to remind the policy-making officials in London of the German concession referred to by James Alexander Swettenham:

> [M]y directors are anxious to feel assured of the support . . . of H.M.G. against the vexatious interference of Siam in their operations which support they have reason to know would be granted by certain foreign Governments which are endeavor - ing to obtain a footing in this state . . . [41]

In response to this letter, there was a meeting between the Syndicate and the Foreign Office at which British reluctance to interfere with Thai assertions of right in Kelantan was made clear. There was some question as to whether the Syndicate was told "that England had already recognized that Siam had obtained land rights, rights of alienation of land, in Kelantan" (that was the Syndicate's impression of what it had been told), or merely that the British "recognised that the 2 States were dependencies of Siam" (which is what F. A. Campbell said he told them in a note penciled in the margin of the Syndicate's letter to the Foreign Office).[42] It is overwhelmingly likely that the Syndicate correctly interpreted what was said to them by the Foreign Office official with whom they talked, and Campbell's quibbling note does not alter the substance: Whatever "dependencies" means, the Foreign Office did not want to

[41]F. O. 69/224, letter dated 28 January 1900 (1901)

[42]*Id.*, letter dated 18 February 1901.

support Duff in Kelantan at the expense of Thai assertions of right.

Reacting to this interview, which the Syndicate regarded as most unsatisfactory, the Syndicate wrote to the Foreign Office repeating its legalistic arguments about rights of alienation. The alienation argument seems to have fascinated Duff and his Syndicate, although the Foreign Office found it far more cunning than convincing. Not only had the Foreign Office already rejected the plea for support based on that legal argument, but the argument itself falls when it is remembered that the Duff concession did not involve actual alienation of land. There was no precedent in Kelantan for sweeping exploitation concessions of this kind, therefore arguments based on evidence of past practice left a gap for imagination to fill in. The rights in Kelantan which the Duff people claimed had never been acquired by the Thai were analagous to rights the British claimed in the Federated Malay States without explicit authority other than the general "advice" term of Pangkor-type agreements, and it may be remembered that in the Agreement of 29 November 1899 Thai rights in Kelantan and Trengganu were deliberately analogized to British rights in the Federated Malay States.

A further Duff Syndicate argument based on labeling Thailand a mere "suzerain" and denying the right of a suzerain to control land rights seems similarly to have been ignored. Again, it may be remembered that as the label "suzerain" was losing its legal meaning in the last years of the nineteenth century the rights of the former "suzerain" were not necessarily considered to be lost as a matter of law; merely replaced by the new label "Protecting Power" or the parallel label "Paramount Power".

Other, lesser, legalisitic arguments of the Syndicate were raised and ignored.

But the political arguments of the Duff Syndicate carried more weight. These were based on two considerations: 1) Were it not for Duff (the Syndicate argued) Kelantan would be in rebellion against Thailand, which Thailand would be forced to suppress if it wanted to hold any power there. Rebellion in Kelantan would upset the stability of Pahang. Therefore, British interest in the Federated Malay States depended on supporting Duff in Kelantan. 2) Duff's departure would leave a vacuum which would be filled by some other European enterprise less willing than the Duff Syndicate to follow the policy directions of the British Government; a broad intimation was given:

> If the British Foreign Office has, from questions of higher policy which do not come into the range of vision of this Syndicate, decided that they cannot support the claims of British subjects in the manner that similar claims would be supported by Foreign Governments, then the only course open to this Syndicate is to dispose of their rights to a foreign company . . . [T]hey have already been approached on the subject . . .

To the Foreign Office now the nub of the problem was whether the Thai could keep non-British Europeans out of Trengganu and Kelantan (and, as James Alexander Swettenham had reminded London, Langkawi Island and other territory near the Peninsula as well). If not, then some other way to achieve that desired result would have to be found; the secret Convention of 1897 would be useless and the British would have recognized Thai authority in Kelantan and Trengganu to no clear advantage. Oddly, the Foreign Office proposed to ignore what by its own analysis was the central issue, and on 1 March 1901 suggested to the Colonial Office that William Archer, the British Minister in Bangkok who succeed George Greville as Mr. Stringer's superior, be told to intimate to the Thai that the British Government "hoped" there would be no

interference by the Thai with the "deed of partnership" between the Sultan and Mr. Duff.[43]

The Colonial Office saw a further ramification to the apparent inability of the Thai to prevent the Sultan of Kelantan granting concession agreements to foreigners. In replying to the Foreign Office proposal on 6 March 1901 the Colonial Office asked that Archer be instructed to explain to the Thai,

> that it is impossible to allow a state of things under which the English, through having recognized the authority of Siam over those states, are placed at a disadvantage as compared with other nationalities who do not recognize Siamaese authority and deal with the Rajahs alone.

Mr. Chamberlain is reported to have wanted to change the Foreign Office's language concerning the "hope" of the British Government to:

> Her Majesty's Government must request that under existing conditions there will be no interference by the Siamese Government with the arrangement: otherwise political complications of various kinds might arise which could endanger the present position.[44]

It seems clear that the Colonial Office had not abandoned the idea of the British assuming direct control in Kelantan and Trengganu.

Noteworthy in the Foreign Office proposal and the Colonial Office reaction is the general support given to the Duff Syndicate. The possibility of supporting the Thai legal position in Kelantan by ordering Duff out, thus joining with the Thai to destroy the credibility of any purported concession by a Sultan in the northern Malay states without Thai approval, was not even mentioned. Instead the final position of the British Government was formulated by Francis Bertie, who toned

[43]*Id.*, confidential letter dated 1 March 1901.

[44]*Id.*, secret letter dated 6 March 1901.

down the Colonial Office language and sent the following instruction to Mr. Archer:

> You should point out to the Siamese Government the anomaly of a state of affairs, under which British subjects, owing to Great Britain having recognized the authority of Siam over these States, are placed at a disadvantage compared to the nationals of other Powers who have not recognized Siamese authority and who deal with the Rajahs direct.
>
> You should state that Her Majesty's Government request that under existing conditions there may be no interference by the Siamese Government with the arrangement made with the Rajah of Kelantan by the Duff Syndicate; as otherwise, complications of various kinds might arise which would endanger the present position . . .[45]

Bertie, in internal correspondence with Lord Lansdowne, who had succeeded Lord Salisbury as Foreign Minister, did propose a general support of Thai authority in the northern Malay States. He thought the advantages to the British of the 1897 secret Convention could still be secured if Thailand would so consolidate its authority there "that Foreign Powers may not have any reason to dispute its existence". But in the harsh world of international affairs he did not propose committing British policy to explicit support of the Thai; the British blockade of Kedah in the 1830's was not to be repeated on the East coast. Instead Bertie implied that the British should sit back and watch developments as he wrote: "Whether he [the King of Thailand] should do this by corruption or other means is for him to judge".[46]

On receiving his instructions, Mr. Archer was understandably confused as to British intentions; he had not been sent a copy of Bertie's memorandum, nor, indeed, had that memorandum been approved as policy by Lord Lansdowne and Joseph Chamberlain. On 25 April 1901 it was felt necessary to instruct

[45] *Id.*, dispatch dated 13 March 1901.

[46] *Id.*, memorandum dated 11 March 1901.

Archer specifically that the secret Convention of 1897 was still to be fully respected. (Archer had been British Chargé d' Affaires at Bangkok on 6 April 1897 and had signed the secret Convention on behalf of the British Government.)

On 6 May 1901 Archer reported to Lord Lansdowne on his talk with Thai officials in Bangkok concerning the Duff concession and proposed what was to become the official British optimum solution to the entanglement: That the Thai exercise their authority in Kelantan by ratifying the Concession Agreement. He pointed out as a counterweight to the Duff Syndicate's political arguments about rebellion that the Sultan's actions in granting the concession were good indications of increasing Thai power in Kelantan as the Sultan seemed to be trying to profit quickly before losing control of Kelantan's administration.

On 13 May 1901 Mr. Chamberlain concurred in a further instruction to Mr. Archer proposed by the Foreign Office, telling Archer to suggest to Mr. Duff that he (Duff) should talk the matter over with Archer in Bangkok, and that until they had conferred together Duff should not begin work in Kelantan.

This temporizing position was intended to give London a chance to grapple with the major policy issue opened by Duff: Should the British Government be asserting any right at all to grant or withhold consent from British subjects holding concessions in the Malay States. Duff was anxious to press ahead with exploiting his concession—as long as the profits began to roll in he was undoubtedly unconcerned about whether he had permission or not. But the Foreign Office was very concerned that his actions could jeopardize British relations with Thailand and indeed weaken the power of the Thai to resist the importuning of French, German and other entrepreneurs of an aggressive temperament. On the back of a message from Archer to Lansdowne reporting Duff's threats to open work in Kelantan immediately, F. A. Campbell wrote that he thought

Duff should not be in such a "violent hurry as this" and it was specifically to slow him down that the conference between Duff and Archer was proposed by Archer, recommended by Campbell and approved by Lord Lansdowne.[47]

The Duff Syndicate, presumably not realizing that its arguments cut both ways, reported to the Foreign Office that Duff in Singapore had discovered Germans buying coasting steamers from Danes. Duff seems to have exaggerated the impression this would make, for in a letter a month later which the Syndicate furnished the Foreign Office he referred again to German purchases of steamers, giving the impression that a whole German fleet was about to descend on the northern Malay States.[48] Duff seems never to have thought that the spectre of German enterprise in the Malay Peninsula was more likely to encourage the Foreign Office to bolster Thai authority in order to avoid a direct confrontation of European interests than to encourage the Foreign Office to participate with commercial adventurers in direct competition with their European rivals.

The need to slow Duff down, if not, indeed, to stop him completely, was a move in desperation by the Foreign Office. Already on 27 April 1901 Duff had reported that he had entered Kelantan, paid the Sultan the $20,000 promised in the Concession Agreement on the commencement of "work", and persuaded the Sultan to indicate his independence of Thailand and propose a treaty between himself and the King of Thailand by which Thailand would promise to "refrain from attempting to administer Kelantan". "This letter", wrote Duff, "will at any rate silence those who say that the Ruler of Kelantan

[47] *Id.*, telegram from Archer to Lansdowne dated 11 May 1901. Campbell's note on the back is approved by Lord Lansdowne by his initialing in his usual red ink.

[48] *Id.*, letter from the Syndicate to the Undersecretary of State for Foreign Affairs dated 15 April 1901; letter from Duff to the Syndicate dated 16 May 1901.

admits his dependence".[49] Dealing, as he supposed, from strength, Major Wemyss now suggested to Campbell that the Foreign Office support a resolution of the Kelantan-Thailand-Duff embroilment on lines favorable to the Duff Syndicate. Kelantan, under Duff's influence, would acknowledge Thai "suzerainty" and pay as tribute to Thailand 25% of the export duties authorized to Kelantan in the Concession Agreement. An Englishman would be collector of customs to assure against graft. In return, Thailand would withdraw its officers from Kelantan, leaving that Sultanate *de facto* independent—actually strongly under British influence and only nominally subordinate to Thailand.[50] A note on the back of this letter, probably by Campbell, says:

> This suggestion might suit Kelantan & Siam & the Syndicate, but it would not square with our interpretation of Article 3 of the 1897 Convention under which we hold that Siam must submit to us all Concessions in the Malay States before ratifying them.

This note seems to miss the point. It was not the failure of Thailand to get British approval of a concession that raised problems—the British could have approved the Duff agreement along with this arrangement if the Foreign Office had been willing—but the problems lay in Duff's and the Sultan's not being under effective British policy control. For profit Duff might stand aside while the Sultan of Kelantan (or Trengganu, which, of course, is South of Kelantan, thus further from Bangkok) granted concession to Germans or others whom the British Government, for reasons involving European policy, would not want as neighbors in the Malay Peninsula. British policy demanded a Foreign Office veto on peninsular concessions.

[49] *Id.*, Duff's letter of 16 May 1901.

[50] *Id.*, Wemyss to Campbell dated 20 May 1901.

The Duff Syndicate and the Foreign Office had now come to a parting of the ways. To the Syndicate the consummation to be wished was for Kelantan to be subordinate to no external policy control; in that way Duff could manipulate the Sultan sufficiently to assure a highly profitable operation for the Syndicate. French and German pressures that might bring about a collapse of Thailand were irrelevant to the Syndicate. Perhaps it was even hoped that out of the collapse of Thailand British enterprise, meaning the Syndicate itself, would have an easier job staking out concessions in Trengganu or even Patani, Singgora, Langkawi and other areas of southern Thailand in which people of Malay race and language resided. Duff was prepared to seek German official backing if the British Government would not support him by getting Thailand to withdraw from Kelantan. He claimed to be be worried about Danes and Chinese exploring Kelantan—including the territory of the Duff concession, and reported that the Sultan had told him these Danes and Chinese had official Thai backing in Bangkok.[51]

To the Foreign Office the collapse of Thailand would not be a tragedy, but it would certainly be a misfortune. European powers could be expected to stake claims to territory contiguous to territory already administered by Great Britain. Not only was German and Danish activity in the Malay Peninsula worrisome, but Burma would touch French Indochina if Thailand were to disappear. If aggressive British adventurers of Duff's stamp began meddling in the power relationships of territory dominated by some other European power, the complications in Europe would be difficult to control. The urging of the British public and the Colonial Office for Great Britain itself to assume control over parts of a dismembered Thailand might be irresistable, and the competition with European powers for pieces of that Kingdom would

[51] *Id.*, letter from Duff to the Syndicate dated 16 May 1901.

also create political problems. It would not have appeared to the Foreign Office that the economic worth of the pieces of Thailand which the British might gain would be worth the effort necessary to get and hold that territory against European rivals, even if the Thai themselves raised no problems requiring military intervention. It was this last consideration that gave the Foreign Office power within the British Government to override the Colonial Office. Duff's actions were threatening not to present the Colonial Office with a nice new bit of territory to administer, as it seemed from Singapore, but with the possibility of war.

While these policy considerations were being mulled in Bangkok and London Duff was carrying on in Kelantan. On 17 May 1901 the Syndicate wrote to the Foreign Office that if the British insisted on Kelantan's subordination to Thailand by requiring the Duff concession to be ratified by the Thai, the Sultan of Kelantan might, in his own political interest, cancel the concession (leaving Duff with no recourse if the British Government refused backing) and turn to other foreign powers for political support. He might offer the Duff concession to some foreign Europeans, thus presenting the British with unmanageable neighbors in the Malay Peninsula. Commenting on this possibility on 8 June 1901 Archer telegraphed that "Independent action on the part of Rajah with regard to agreement seems probable".

Forced thus to act, Lord Lansdowne did not pause to discuss with Joseph Chamberlain the philosophy of the Conservative British Government's hindering the activities of British entrepreneurs overseas. On 12 June he wired to Archer in Bangkok that he should inform Mr. Duff ". . . that H.M. Government do not authorize him to prospect without the concurrence of the Siamese Government." The policy proposed by Francis Bertie was impliedly accepted at least as an interim matter; Archer was further instructed to support the appearance of

Thai authority in Kelantan by trying to "effect an arrangement between the Siamese Government and Mr. Duff by which he would nominally receive their authorization to carry on operations in Kelantan". It was acknowledged that the Thai lacked the power, if not the authority, in Kelantan itself to interfere with the Sultan's actions, but that was considered an argument for restraining Duff, not for expanding British activities in Kelantan.

Archer was successful. The Thai immediately promised Duff a prospecting license valid for one year, to be issued without application upon payment of the usual fees and to be accepted without prejudice to further negotiations about the Concession. Duff's reports about Danes and Chinese exploring Kelantan with Thai official support were denied by Mr. Bourke, the British subject who was Acting Director of Mines for the Royal Thai Government, and by Phya Sri Sahadheb, Thai Vice-Minister of the Interior. Archer made the presentation directed by Lord Lansdowne to encourage the Thai to avoid further difficulties and complications by ratifying the Concession Agreement. Archer apparently made it clear that aside from Duff's desires to have the Thai leave Kelantan the British Government supported him.[52] Archer then gave his detailed analysis of the situation and his recommendations for British official policy.[53]

The principal facts as seen by Archer were that the Sultan of Kelantan (Muhammad IV, asc. 1899) was found by Duff, whether rightly or wrongly seems unimportant at this point, to be "an uneducated boy, weak and unreliable", and the Thai were aiming to strengthen their control in the Sultanate. From this Archer concluded: "In the absence of British support, he [Muhammad IV] must either fall under the influence of the Siamese, or be ousted by them". He felt that the Thai would

[52]*Id.*, telegrams from Archer to Lansdowne dated 18 and 22 June 1901.
[53]*Id.*, telegram of 22 June 1901.

ultimately prevail because British policy as expressed by Lord Lansdowne in his instructions to Archer was clearly to support Thai pretentions in Kelantan, not to oppose them. As to possible action by Mr. Duff, Archer believed that he had convinced Duff of the inevitable and thus convinced him to abandon whatever plans he may have had for manipulating the Sultan into proclaiming his independence. "He has I think come to recognize," wrote Archer, "the fact that the existence of a small and badly governed independent State like Kelantan, hedged in between British and Siamese dominions would be an anachronism that could not long be tolerated by its more powerful neighbors." Archer cited Duff's old position, that Kelantan was independent, but from the fact of Great Britain having recognized "Siamese suzerainty over Kelantan" he inferred that Duff would be forced to abandon hope that the Sultan could continue independent "even in his internal affairs." Archer felt that Duff's primary motivation for fighting the inevitable Thai domination of Kelantan was pecuniary: The concession might become less valuable if its methods of operation were subjected to Thai regulation, while Duff could himself control the Sultan of Kelantan sufficiently to assure no oppressive governmental interference with his activities. Archer doubted Duff's logic in this, arguing that the stability of Thai control should seem more attractive to investors than the inherently precarious climate Duff was fighting for, which depended so much on the personal relations between Duff and an "unreliable" Sultan. Also on Archer's mind was the knowledge that Thai regulation was not capricious or wholly beyond the influence of the British Government. Within the Royal Thai Government the former Director of Mines, Mr. Scott, and the Acting Director at the time of Archer's telegram, Mr. Bourke, were both British subjects and both personally known to Archer. Archer thought that British influence within the Royal Thai Government could keep Duff happy, failing which

British diplomatic intervention might be necessary. He did point out too that Duff could not be seriously hurt by any difficulties, since he could always sell out to non-British interests after he got his concession working. Archer very much doubted that Duff could find a willing non-British European buyer before he got the Concession working, and therefore dismissed that possibility. He specifically indicated that Germany, Russia and Denmark were trying to achieve their ends in Southeast Asia without alienating the Thai at that moment. France, he wrote, showed "no disposition to encourage enterprise in the Malay States, and it is very doubtful whether they will ever assume an aggressive policy towards Siam in that direction". Implied, but not stated, is the assumption that the entrepreneurs of other European nationalities would have the same problems as Duff in gaining the cooperation of the Thai government and that in any case it was not British policy to hinder foreign private activity as long as other European governments did not obtrude into the British border areas.

Archer's principal policy recommendation, in view of all this, was to "encourage the growth of Siamese influence and control over those [northern Malay] States; on the understanding that the Siamese Government, in return, give all assistance to British subjects." He believed that the self-interest of the Thai would be enough to assure their agreeing to such a policy and regarded Duff's alternative proposal for "encouraging local petty chiefs against the Siamese Government" to be likely to have results "prejudicial to British enterprise, and to the aims of British policy" regardless of possible "petty advantages in individual cases."

Archer's analysis and recommendation were clearly consistent with the policies the Foreign Office at least had already adopted. It was also clear that despite Archer's analysis of what Duff should have been thinking, Duff remained convinced that his own best interests lay in disputing Thai authority in

Kelantan. While Duff was willing to accept a Thai license to explore his concession, he was obviously unwilling to accept the possibility of the Thai withholding from him any "rights" he felt he had acquired by his direct bargain with the Sultan.[54]

On 22 July 1901 the Colonial Office joined in, approving the adoption as British Government policy of the approach outlined by Archer.[55]

Archer outlined the British position to the Thai Prime Minister and the Minister for Foreign Affairs, Princes Damrong and Devawongse, a few days later. Facing the British position, which made Thai assistance to British commercial activities in the northern Malay States a condition of continued British abstention from the political affairs of those States, the Thai Government had little choice. It did not yet have sufficient power in Kelantan (or Trengganu) to prevent British entrepreneurs from dealing directly with the local Sultans, and saw that formal British backing for businessmen of Duff's stamp would result in eventual loss of authority not only in those States but possibly throughout the distant provinces and possibly even threaten the independence of Thailand as a whole. The Thai restricted their shift of policy to Kelantan alone, probably in order to slow the European penetration by making Great Britain sue separately for each political action desired and to force the British to argue prematurely for entrepreneurial rights in Trengganu or elsewhere that had not yet come to Thai attention.

In Kelantan, unable to keep Duff out, the Thai now sought to water down his influence by granting concessions to commercial rivals of his in Kelantan. A British subject of Chinese

[54]Cf. *id.*, Archer to Lansdowne dated 11 July 1901 reporting Duff furious at Bourke's insistence that the license was not carte blanche or an agreement by the Thai to ratify the entire concession.

[55]*Id.*, secret letter from Lucas to Bertie.

descent, "Seet Tiang Lim," was granted a concession similar to the Duff concession by the Sultan of Kelantan and the Thai decided to ratify that one. The Thai themselves granted prospecting licenses similar to Duff's one-year license to Englishmen named Leech and Armstrong.[56]

The balance of interests within the British Government had now shifted significantly. The Colonial Office having committed itself at its highest level to the British policy of supporting Thai pretentions in the northern Malay states, arguments about the desirability of encouraging British merchants to act there without the concurrence of the British Government lost their bureaucratic significance, and thereby their importance to the Colonial Office. Furthermore, the telling argument about foreign enterprise gaining concessions in the states north of the British controlled area of the Malay Peninsula, which was one of bases for the shift in Colonial Office position allowing to Thailand the ultimate control over commercial concessions, had awakened the Colonial Office officials to the possibility that the Duff Syndicate might sell out to some foreigners. It was becoming clear to the Colonial Office that its interests and Duff's were not identical and that its interests and those represented by the Foreign Office were very close indeed. On 17 August 1901 Lord Lansdowne approved Archer's negotiations in Bangkok and explicitly confirmed the necessity of a form of Thai ratification for Duff's concession. He signaled the changed Colonial Office position by adding: "Colonial Office is rather disposed to fear foreign intrusion into Malay States. Please keep Sir F. Swettenham fully informed as to this." When Archer asked whether he should restrict the information for Sir Frank Swettenham to matters involving foreign in-

[56]*Id.*, confidential telegram from Archer to Lansdowne dated 14 August 1901.

trusion he was instructed to keep Swettenham fully informed on the entire Duff case.[57]

The British Government now had a single, strong position to which the Royal Thai Government had in principle agreed: British enterprise in Kelantan was to be favored; Thai ratification of licenses and concessions was to be required.

Duff was not happy.

On 29 August 1901 Duff bowed to the inevitability of accepting Thai confirmation of his concession, but asked in return that the Thai undertake to abstain from the administration of Kelantan. Since the British position was that the ratification was to be an empty form so far as British enterprises were concerned, but that Thai administration in the northern Malay States was to be real in order to keep other European powers from interfering politically in those states, Archer considered this demand by Duff to be "inadmissable". He indicated that he felt it proper for him to continue to support Duff in seeking ratification in full of the commercial terms of the Concession, just that Duff had reached too far in his political conditions.[58]

In commenting on this development Francis Bertie, Undersecretary of State for Foreign Affairs, wrote to Lord Lansdowne that Duff was in a weaker position than he knew and that he personally thought "that it would be a good thing if Mr. Duff failed to get any Concession." The legal basis for Duff's entire position, after all, was merely a grant from a Sultan of doubtful legal effect. If a foreign syndicate were to get a similar grant and then cite Thai confirmation of the Duff concession as a precedent it would be difficult for the Thai to avoid rati-

[57]*Id.*, Lansdowne to Archer and Archer to Lansdowne telegrams of 17 and 29 August 1901 respectively; note from Bertie to Lansdowne dated 29 August 1901. On the bottom of Bertie's note suggesting Archer be told to keep Sir Frank Swettenham fully informed is Lansdowne's rueful comment, "That is all we can do".

[58]*Id.*, telegram from Archer to Lansdowne dated 29 August 1901.

fying the new concession. What was needed was an end to the authority of the Sultan of Kelantan to grant even inchoate concessions. The Colonial Office was concerned about the situation even more than the Foreign Office, and Bertie reported that his colleagues in the Colonial Office "will suggest that Sir F. Swettenham be instructed to use his influence with the Rajah of Kelantan to come to terms with the Siamese Government."[59]

The expected initiative from the Colonial Office was in fact received by the Foreign Office in a secret note dated 2 September 1901. On 9 September Swettenham reported that the Thai had in fact asked his advice. They proposed to approve the Duff concession subject to its being split into three parts to disguise the enormous extent of the operation in Kelantan (with a separate formal concession for each part) and subject also to a requirement that Thai approval be made an explicit condition of any transfer by the Duff Syndicate of rights gained under the Concession Agreement. Swettenham considered these Thai terms to be "quite reasonable and settlement very satisfactory". He advised Duff to consent.[60]

On 14 September 1901 the final instructions were issued to Sir Frank Swettenham basically agreeing with the Thai and Swettenham's comments. No question as to the validity of Thai "sovereignty" over Kelantan was to be admitted for what were termed "political reasons", and at Foreign Office instance the instructions contained what seems a rather useless complaint that the Concession seemed to Her Majesty's Government to be unduly large.[61]

While this was going on Duff, in ignorance of the backdoor

[59] *Id.*, note from Bertie to Lansdowne dated 29 August 1901.

[60] *Id.*, Swettenham to Chamberlain dated 9 September 1901.

[61] *Id.* Lord Lansdowne had written a note to Bertie on 6 September 1901: "The C.O. would perhaps give Sir F. Swettenham a hint that we regard the extent of the concession as unduly large . . .". This peevish comment was then repeated in the instruction of 14 September 1901.

negotiations, was also active. He spoke with Mr. Leech, who, on returning from Bangkok had begun talking about his own large concession. That concession turned out to be not in Kelantan at all, but in Legeh, adjoining Kelantan and the Duff concession. Leech attributed his success not to any British activity but to the help of a Dane in Thai service, Admiral de Richelieu, who had taken a ten percent interest in Leech's concession in return for seeing it through the Royal Thai Government.[62] The concessions of "Seck Tan Lim", apparently the same man as the "Seet Tiang Lim" whose concession was reported confirmed by the Thai at their interview with William Archer outlining the new policy, was being sought by Duff as agent for another commercial concern in Singapore (Wallace Bros.). A third Singapore entrepreneur, Charles Dunlop, was reported by Duff to have just got a concession from the King of Thailand that overlapped the Duff concession and ominously, as Duff thought, was dated back to 1890. The truth of Duff's allegations cannot be determined with available materials. In time, none of them proved significant to the future of the Duff Syndicate. They did, however, color Duff's evaluation of his bargaining position. He felt the Thai were deliberately trying to diminish the value of the Duff concession by favoring other entrepreneurs whose prospects in the area looked shorter term. He exaggerated his own influence somewhat (surely a pardonable fault in a report to his

[62]The truth of this allegation and its implications are difficult to assess at this remove. Certainly graft has not been unknown in Thailand—or among Europeans such as Admiral de Richelieu. Indeed Duff mentioned that de Richelieu's capital is "almost exclusively Russian Court capital"; the Czar's Governments have never been considered above reproach in this regard either. On the other hand, if graft were as common in Thailand as Duff intimates, it is hard to understand why he found it so difficult himself to grease the path for his own concession. Except for Bertie's hint reported above about the Thai possibly finding it to their advantage to expand their control in the Malay Peninsula "by corruption", there is no trace in the correspondence of graft in Thailand being a significant factor on the diplomatic level.

employers) by attributing the shift in Thai policy to his own activity in opening up Kelantan.[63] Of course, in a sense he was perfectly right in that.

When Duff was told the Thai conditions for ratifying his concession, and realized that the British Government, Colonial Office as well as Foreign Office, was united in regarding them as reasonable, he understood that his overt political game was over. Now the apprehension of European rivals getting concessions which might diminish the value of his—if not the real value then at least the unique position of his in the investment market—made him focus directly on commercial matters. He did not object to splitting the concession into three parts; perhaps he fancied himself Caesar dividing Gaul. He did, however, refuse the restriction on transferring rights. He told Archer that the requirement of Thai approval of a sub-lease or transfer would "detract from the value of Concessions". He telegraphed to the Syndicate:

> England has forbidden signature unless we accept the conditions that all transfers and subleases be subject to confirmation Siam—Cannot agree to these terms under any circumstances—You had better apply to Government to remove the obstacle immediate. Guarantee Government will not give transfer foreigners, but negotiability of rights must be well secured—Keep your relations with Government friendly.[64]

It is interesting to note that Duff apparently attributed the unacceptable proposal to the British Government and not to the Thai. Since, as has been seen, it actually came from the Thai and was first presented to London by Sir Frank Swettenham the origin of Duff's apparent misunderstanding is not clear.

To remove the obstacle he thought was raised by the British Government Duff proposed specific language by which the

[63] F.O. 69/224, letter from Duff to Wemyss dated 14 September 1901.

[64] *Id.*, telegrams from Archer to Lansdowne and from Duff to the Syndicate, dated 25 September and 3 October 1901 respectively.

Syndicate would undertake to inhibit its powers to transfer rights under the Concession. First he proposed that the lessee (the Duff Syndicate) agree with the Thai to make no assignment or sublease except to British subjects or companies. Alternatively he proposed that the lessee undertake that any sub-lease or assignment restrict the new holder of rights to act in Kelantan solely for commercial purposes and not more than 1/5 of the area of the Concession would be sublet to a Company not registered in Great Britain. Duff was willing to talk further about these proposals and Archer passed the problem on to London saying that the Thai had asked for his advice.[65]

The Colonial Office was concerned only about maintaining a British (*i.e.*, Colonial Office) veto on Duff's subleases as on all other Thai concessions. With regard to other Thai concessions this veto was given by the secret Convention of 1897.

Duff's proposal for the Syndicate to give the undertaking instead of the Royal Thai Government was not even seriously considered at this stage as far as the correspondence in the files shows. Instead, Francis Bertie proposed the Thai right to approve subleases be acknowledged subject to the under - standing "that such confirmation shall not be withheld except on the demand of Her Majesty's Government". Lord Lansdowne saw "no better way out of it". C. P. Lucas passed the suggestion up in the Colonial Office recommending approval and the appropriate instructions were apparently sent to Archer in Bangkok.[66]

Bertie's solution proved unacceptable to the Syndicate and to Duff. The issue was the simple one of the appearance of a

[65] *Id.*, Archer to Lansdowne telegram dated 25 September 1901.

[66] *Id.*, confidential note, Lucas to Bertie dated 30 September 1901; memorandum from Bertie to Lansdowne dated 5 October 1901; Lucas memorandum dated 7 October 1901. The actual text sent to Archer does not seem to be in the file. A reference to it appears in a note initialed by Bertie on the back of a letter dated 21 October 1901 from the Syndicate to the Foreign Office.

Thai veto over sub-leases making it difficult to find financial backers for potential buyers; the Thai by opposing British commercial enterprise in the northern Malay States for so long had made British (and other) entrepreneurs wary of entering into contracts whose effectiveness depended on Thai good will. The Directors of the Syndicate felt that it would be impossible to attract money for a subsidiary company they might want to form to exploit the Duff concession if they could not state that the subsidiary would definitely have the right to operate under the concession's terms in Kelantan. The fact that they knew that the Thai were bound to approve the necessary sub-lease or assignment of rights was irrelevant since potential investors would not be inclined to risk their money on mere assertions of what the Thai *would* do. Yet no application for Thai approval could be submitted until after the new company had been formed; until then there would be no legal entity to receive the rights whose transfer the Thai were supposed to approve. The Thai would not agree to a general publication of their obligation to approve sub-leases or assignments for the same reason they refused to permit the secret Convention of 1897 to be published: They feared that if the French or others discovered the degree to which the Thai were subject to British pressures in matters concerning foreign enterprise in Thai territory the demands for similar foreign controls on Thai discretion would be irresistible.[67]

To resolve the problem in the way most favorable to its own interests the Syndicate again proposed the Duff plan but with the ingenious modification that the restriction on sub-leases to non-British nationals or companies be inserted in the basic concession itself. With Chamberlain's approval for the Colonial Office an appropriate instruction was sent to Archer

[67] *Id.*, telegram from Archer to Lansdowne dated 22 October 1901; letter from the Syndicate to the Foreign Office dated 29 October 1901; F.O. 69/204, memorandum from Bertram-Cox to Bertie dated 26 October 1899 with note on the back by Lord Lansdowne.

in Bangkok.[68] The Thai refused this proposal alleging a conflict between it and their treaty obligations to other powers. The alleged conflict presumably involved "most favored nation" treatment for foreign merchants. Under the usual "most favored nation" provision of commercial treaties, each country undertakes to grant to all merchants of the other treatment with regard to terms of trade (customs duties, export controls etc.) no more burdensome then those applied to merchants of any other foreign nation. Thus concessions in terms of trade given to English merchants in Thai territory would apply to, for example, Germans as well in Thai territory under Article 8 of the treaty of 1862 between Germany and Thailand.[69] Although it was not made clear in the correspondence, it seems that the Thai felt that granting a concession to an English firm would oblige them to grant similar concessions to the entrepreneurs of other European nations at their request.

In an attempt to get round the Thai objection based on treaty obligations to third powers the Foreign Office and the Colonial Office in London came up with wording giving the Thai a partial veto: A veto only on proposed transfers by the Syndicate to non-British interests. Transfers to British interests were not to be subject to Thai approval. Thus the Syndicate's ability to get backing for the new company they hoped to form to exploit the Duff concession would not be hindered if the new company were formed under British law; the Foreign Office and the Colonial Office could, through Article III of the secret

[68] F.O. 69/224, Syndicate to Bertie letter dated 6 November 1901; Antrobus (Undersecretary of State for the Colonies) to Bertie, secret memorandum dated 9 November 1901; telegram from Lansdowne to Archer dated 12 November 1901.

[69] In a memorandum in F.O. 69/224 dated 12 July 1901 Bertie cited this treaty and pointed out that if the Germans insisted on a right to prospect in Kelantan or Trengganu on the same terms Duff had prospected, the Thai would have no legal way to oppose the move except by admitting the inhibitions imposed on them by Article III of the 1897 secret Convention with Great Britain. It has been impossible to find a copy of the text of the 1862 treaty within the library facilities available as this is written.

Convention of 1897, prevent Thai approval of any transfer to a third country interest; and it was presumably expected that Thai approval of the Duff concession with this nod in the direction of Thai sovereignty in Kelantan would leave Thailand no worse off than before vis-à-vis the entrepreneurs of third powers.[70]

Reginald Tower succeeded Archer as British Minister at Bangkok soon after the new instruction reached Thailand. Early in January 1902 he reported back to London that the Thai refused the new plan. Apparently the British wording was conceded to be sufficient to take care of the third country problem; it is not clear that the Thai were ever really as concerned about demands from French or German or other concession seekers in Thai territory as they led the British to think. But the Thai now raised a different objection: If Duff could submit to a veto by the Raja of Kelantan on transferring his concessionary rights even to Englishmen, which is expressly part of Article 7 of the Concession Agreement, then why should the Thai, whom the British had acknowledged in 1897 were the sovereigns of Kelantan, have lesser veto rights? If the Raja's veto did not endanger the Syndicate's market position, why should a veto to be exercised (or not exercised) by the less mercurial Thai have such a dire effect on the Syndicate's position? Tower was unable to shake Prince Devawongse on this. The farthest the Thai would go was a secret agreement that they would consent to a sublease if the British Government requested that consent.[71]

This hardened Thai position remained unacceptable to the Syndicate. Apparently they saw a significant difference in the credibility to potential investors in asserting Duff's influence over the Sultan of Kelantan and asserting any control over the

[70] *Id.*, confidential telegram dated 3 December 1901.

[71] F.O. 69/275, confidential telegram from Tower to Lansdowne dated 8 January 1902.

actions of the Royal Thai Government. Furthermore, as the Syndicate was now prepared to state unequivocally, one of their main objects in the entire struggle was to keep Thai administration out of Kelantan by asserting some rights in the Sultan, such as a right to approve sub-leases, which could be exercised without reference to the Thai! Two alternative courses now seemed to the Syndicate to warrant consideration: One, for the British Government as a matter of law to recognize the efficacy of the Sultan of Kelantan granting rights in Kelantan without reference to Thailand as a matter of the legal meaning of the relationship labelled "suzerainty"; or, two, for the Thai to play the game by granting an unconditional ratification of the Concession Agreement. In the latter case, the Syndicate would be willing to commit itself to the British Government in any form desired, suggesting a change in the Articles of Association (the "constitution" of the Syndicate), to make it legally impossible for the Syndicate to transfer rights to non-British interests. The Colonial Office concurred with the second of these two proposals by the Duff Syndicate.[72]

The Syndicate at this point, perhaps sensing that a very favorable solution was possible and anxious to anticipate all objections the Foreign Office might raise, wrote a letter pointing out to the Foreign Office that Articles of Association can legally be changed, and offering to conclude a separate agreement with the British Government by which the Syndicate would undertake not to transfer any of Duff's concessionary rights to non-British interests. The legal mechanism by which a Foreign Office signature could commit British (or Thai) courts to disregard a transfer in violation of this agreement are not self-evident, and the Duff files contain no clues on the point; the only concurrence sought (and obtained) by the

[72] *Id.*, letter from Bertie to the Syndicate dated 14 January 1902; reply dated 17 January 1902; secret memorandum from Lucas to Bertie dated 24 January 1902.

Foreign Office for the agreement proposed by the Duff Syndicate was that of the Colonial Office. The Foreign Office considered the new proposal to be "honest on the part of the Syndicate & will do just as well as an alteration of the Articles of Association".[73] Obviously, this solution was the very solution proposed by Duff on 3 October 1901 that had been disregarded by the Foreign Office then. There is no clear explanation for the apparent shift in Foreign Office position. Perhaps it was weariness.

On 18 February the Officers of the Duff Syndicate signed the appropriate agreement not to transfer any of the rights, powers or privileges conferred by the concession to any but British entities who gave similar undertakings. The next day Lansdowne instructed Tower in Bangkok by confidential telegram of the news of the Syndicate's signing that agreement, adding: "A simple ratification of the Concession by the Siamese Government will therefore be sufficient". Tower was asked to request the Thai Government in Bangkok to authorize its legation in London to execute the ratification.[74]

Prince Devawongse forthwith refused. In a formal memorandum to Tower dated 20 February 1902 he pointed out that:

> [T]he simple ratification will clearly amount to a confirmation of Clause 7 of the same Concession which provides for any transfer of rights or lands subject only to the consent of the Rajah of Kelantan, and thereby confirming a new principle that the local Rajah has the sole authority to dispose of lands & c., an important point of which both Governments of Siam and of Gt. Britain have already agreed to disallow . . .[75]

[73] *Id.*, letter from Syndicate to Foreign Office dated 7 February 1902; note on the back of that letter in Lord Lansdowne's hand. The Colonial Office concurrence in this proposal is dated 11 February 1902, secret letter from Lucas to Bertie.

[74] *Id.*, confidential telegram from Lansdowne to Tower. The Agreement of 18 February 1902 is written on parchment.

[75] *Id.*, The awkward sentence structure *sic*.

Prince Devawongse overstated, probably intentionally, the British position; Thai confirmation (subject to British veto) was never regarded by the British as necessary for sub-leases except as a means to assure British control over them. Thai confirmation of the primary concession was what had been agreed (with a British veto on the confirmation) in order to keep other European concessions limited. As has been noted, British policy on this point was to encourage the Thai to exercise their authority to veto sub-leases through controlling the local Sultan. As long as Article 7 of the Duff concession were the standard form for such concessions, and the British had a veto over issuing them, the Thai were to be encouraged to gain and exercise ("by corruption or other means") the requisite control over the local Sultans.

Tower was not aware of this aspect of British policy, or, if he was, disregarded it. Prince Devawongse was clearly right in implying that a form of concession which allowed sub-leasing without a Thai review would make it difficult for the Thai to resist demands from foreign powers for the same treatment—sub-leases thus being freed of British veto. Thus Tower was convinced by Prince Devawongse that the new British proposal was inconsistent with the Foreign Office's expressed policy in the northern Malay States. As a result, the Thai legation in London was instructed to hold the line on the necessity of Thai approval of sub-leases while the British Foreign Office found itself in a most embarassing position. On the one side its Plenipotentiary in Bangkok indicated sympathy with the position taken by the Royal Thai Government; on the other, the Duff Syndicate was still unable to get started in Kelantan with Thai approval as the Foreign Office had assured the Syndicate it would. A note of urgency was injected into the problem by the news that the Directors of the Duff Syndicate were running

out of funds and that their entire project was in danger of collapse.[76]

Two developments shifted the entire balance of the negotiation at this point. One was the British realization that Thai opposition to the Duff Syndicate was motivated at least in significant part by Duff's personality. The British had little sympathy with this ground for opposition and may even have suspected that it was Duff's unwillingness to pay graft to officials in Thailand that was the root of the problem. The Thai dislike of Duff was, of course, much more likely to have arisen out of his having precipitated the entire question of Thai control in the northern Malay Peninsula at a time when the Thai were unwilling to expend their resources in this area. Duff's method of operating, seeking to avoid Thai control by negotiating directly with the Malay Sultans and then claiming them to be rightfully independent of Thai legal authority, can hardly have endeared him to the Thai. Animosity towards Duff was apparent in the European officials seconded to the Royal Thai Government and it is hardly likely that this uniform animosity was the result of intrigue within the Thai Government. It may be significant that Duff had got a concession from the Raja of Legeh of "all lands which have not yet been occupied in the country of Legeh" on 19 September 1901, in the midst of the negotiations over Thai ratification of the Kelantan concession. While the Thai must have known of this operation soon after it occurred, the Syndicate did not tell the Foreign Office in London about it until nearly a year later—after the Kelantan concession problem had been solved.[77]

[76] *Id.*, note on the back of confidential telegram from Tower to Lansdowne dated 26 April 1902.

[77] *Id.*, letter from the Syndicate to the Foreign Office dated 16 September 1902. The Thai removed the Rajas of Legeh, Patani and Reman shortly after, replacing them with Thai appointees not as ready as their predecessors had been to deal with Duff. See letter from Duff to Foreign Office dated 25 April 1903.

The second, and far more important development was the British decision to take a more active hand in helping the Thai to reduce Kelantan and Trengganu to direct and clear subordination. Instead of merely encouraging the Thai to undermine local rule, and facing the possibility of British (or non-British) entrepreneurs subverting Thai authority by dealing directly with the Sultans of Kelantan and Trengganu, in the Spring of 1902 the British Foreign Office decided to help the Thai directly and render irrelevant the political activities of Duff and his like. On 23 April Frank Swettenham was still suggesting that the British abandon any support of Thai claims in Kelantan and let Duff's political activities take their acquisitive course. But on 26 April 1902 Tower referred to "arrangements with Rajahs" then under negotiation between the British and Thai in Bangkok.[78] Those "arrangements" were eventually concluded between the British and Thai on 6 October 1902 and provided directly for British support of Thai attempts to reduce the Sultans of Kelantan and Trengganu to obedience.[79]

Apparently, from Sir Frank Swettenham's letter, the London authorities were keeping British officials in the Malay Peninsula ignorant of the latest developments. This was consistent with the British refusing to tell the chief officers of the Straits Settlements about the secret Convention of 1897. One can only imagine the frustration felt by Sir Frank and his companions (not to mention Duff and his merchant friends in the Peninsula) as the inevitable rumours reached them of British policy changes. Deprived of information as to the logic being followed in London, the policy recommendations of British officials in Asia were irrelevant to the London policy-makers. Suggestions for permitting Duff to lead the British political advance in the northern Peninsula must have seemed quaint in London

[78] *Id.*, letter from Swettenham to Colonial Office enclosed with a secret memorandum from Lucas to Bertie dated 23 April 1902; Tower to Lansdowne confidential telegram dated 26 April 1902.

[79] Aitchison 177; Maxwell and Gibson 85.

where the decision had already been taken and communicated to the Thai that the British would support direct Thai control in the northern Malay states.

Once the decision was made to support the Thai overtly in their attempts to exercise direct control over the Sultanates of Trengganu and Kelantan the question of the form of Thai ratification of the Duff concession became a mere bothersome detail. Article 7 of the Concession Agreement already provided for the Sultan to be able to veto subleases. If the Thai had absolute control over the political activities of the Sultan they would have no compelling basis for refusing the simple ratification sought by the British except the precedent for French or German arrangements in other areas of Thailand. The British were not concerned about that as long as the heartland of Thailand remained as a buffer between British interests in the Malay Peninsula and Burma on the one hand, and French Indochina (or German incursions) on the other. The heartland, the valley of the Menam Chao Phya, seemed secure by virtue of the Anglo-French agreement of 1896. There remained for the British the problem of assuring that Thai control in Kelantan and Trengganu would be exercised in a way sympathetic to British commercial and other interests—but that problem could be solved through the arrangement with the Thai by which British support was being given to the Thai consolidating their authority there. We shall return to that problem below.

In April 1902 Reginald Tower found that Thai policy with regard to the northern Malay States had been entrusted to Mr. Rivett-Carnac, a personal adviser to the King. On 4 May Tower told Lord Lansdowne: "The correspondence on the proposed agreements with the Rajahs of Kelantan and Trengganu has now been placed in Mr. Rivett-Carnac's hands; his is the pen which drafts the Siamese replies". At about the same time Tower reported that "Mr. Rivett-Carnac tells me that he will guarantee an unconditional ratification of Duff Concession

provided that wording of agreements with Rajahs [of Kelantan and Trengganu] is agreed upon simultaneously". But in commenting upon the reliability of this promise Tower was inclined to discount it. For negotiating purposes Tower asked for authority to insist on immediate ratification of the Duff concession promising in return that "His Majesty's Government . . . have every intention of proving this [their friendship for Thailand] in the assistance they will render to Siam in preparing the agreements with Rajahs". Tower anticipated that the technical drafting of the arrangement by which the Thai were to secure treaties of submission from the Sultans of Kelantan and Trengganu would take some time, and doubted the Duff Syndicate could remain solvent long enough to take advantage of Rivett-Carnac's promise even if the promise were faithfully kept. A few days later Tower further discounted Rivett-Carnac's promise by reporting: "For some reason entirely unknown to me, Mr. Rivett-Carnac has developed the most virulent antagonism to Mr. Duff and his concession in Kelantan." It was in the same telegram reporting this discouraging development that Tower reported that the correspondence on the proposed agreements with the two Sultans had been placed in the hands of Mr. Rivett-Carnac. Two days later, on 6 May 1902, Tower reported to Lansdowne that Rivett-Carnac was adamant and that negotiations for a simple ratification of the Duff concession had completely broken down. He recommended that ratification be dispensed with and that the Duff Syndicate be permitted by the British Government to proceed in Kelantan regardless of Thai obduracy. At the same time, the British proposal to resolve the question of assuring that Thai rule in Kelantan and Trengganu would be sympathetic to British sensitivities was meeting Thai evasions. The British proposal was that in return for British help in securing the submission of the Sultans the Thai would appoint British nationals to be the senior employees of the Royal Thai Government in

Kelantan and Trengganu (as they were in some other Departments of the Royal Thai Government, *e.g.*, the Department of Mines).[80]

The British lost patience and played their trump card. On 5 June 1902 Lord Lansdowne relayed to Tower the news of an interview he had just had with the Thai Minister in London demanding that the Thai Foreign Ministry inform Tower officially "that the Siamese Government were prepared to agree to the appointment of British subjects as advisers to the Rajahs. In addition to this the Duff concession ought to be ratified without further loss of time." Lord Lansdowne closed with a threat:

I told the Minister that unless this were done without further delay we should certainly be pressed to come to terms with the Rajahs without further reference to the Siamese Government.[81]

On 10 June 1902 the Thai capitulated, accepting Lansdowne's two terms.[82]

On 13 June 1902 the Foreign Office outlined the settlement to the Duff Syndicate: The Concession was to be ratified unconditionally; The British and Thai agreed that the Syndicate would have to satisfy the Foreign Office with regard to any subleases; the Thai would forthwith ratify any sub-leases acceptable to the Foreign Office. It is clear that this letter assumes an identity between the Sultan of Kelantan and the Royal Thai Government, since the unconditional ratification for which Duff fought so long and hard had been conceived by him and his Syndicate as placing discretion in the influencible Sultan of Kelantan alone, while the Foreign Office letter speaks solely of the necessity of Thai ratification of subleases.

While winning its battle, the Duff Syndicate had been re-

[80]F.O. 69/275, Tower to Lansdowne confidential telegrams dated 26 April, 29 April, secret telegram dated 4 May and unmarked (confidential?) telegram dated 6 May 1902.

[81]*Id.*, confidential telegram from Lansdowne to Tower dated 5 June 1902.

[82]*Id.*, confidential telegram from Tower to Lansdowne dated 10 June 1902.

duced from a political power in Kelantan to a mere commercial enterprise. The Sultan's prospects of gaining British support in his struggle to gain (or maintain) his independence of Thai administrators had ended; his powerful neighbors to the north (Thailand) and south (the British through the Federated Malay States) had decided that for him to be able to deal directly with third powers was an anachronism and so had by agreement between them deprived him of whatever claims he had to be master in his hereditary domains. Merchants like Duff could no longer threaten the political interest of the British or Thai governments by dealing directly with the Sultan; those dealings would be regarded as illegal and therefore null. The force of the British and Thai empires would be used to assure local adherence to a legal order in the Malay Peninsula that emphasized political over commercial interests.

The Agreement of 6 October 1902 between the British and the Thai provided British acknowledgement of Thai dominance in Kelantan and Trengganu, which are termed "Siamese Dependencies" in the exchange of notes appended to the Declaration and the Draft Agreement to be concluded between the Thai and the two Sultans. The Draft Agreement provided for the two Sultans to acknowledge formally Thai competence to conduct their foreign relations for them, to receive from the Thai an Adviser and Assistant Adviser who had the power to veto any mining or agricultural concessions above a stated size sought by somebody not "a native or natives of the State of Kelantan/Trengganu," and some other terms not relevant to this study. The British undertook to "instruct their Representatives in the Malay Peninsula to use their influence to secure the peaceful adoption by the Rajas of Kelantan and Trengganu of the draft Agreement" and the Thai undertook to appoint as Adviser and Assistant Adviser in each of the two states only British subjects acceptable to the British Government.[83]

[83]Aitchison 177; Maxwell and Gibson 85.

IV. The End of an Era

Having been reduced to the status of a mere concessionaire, Duff found the going a bit more difficult. The Foreign Office refused to help secure Thai ratification of his concession in Legeh when they were told about it in September 1902. When the Thai removed the Sultans of Patani, Legeh and Reman from authority in the Peninsula Duff was left without maleable Sultans to seek concessions from. His proposal to build a railway line across the Peninsula from Kuala Kelantan through Legeh, Reman and Kedah to connect the East and West coast trunk lines was too grandiose for the Syndicate (now reorganized as the Duff Development Company) and Major Wemyss's request for British support in Bangkok for the more modest project of a spur line to run 40 or 50 miles from Kuala Kelantan to the northern boundary of the Duff concession were referred to the British Adviser in Kelantan, W. A. Graham.[1]

A request by Wemyss for Foreign Office support to seek Thai approval of a small concession in Jalor, ostensibly sought to preclude "the Americans . . . from obtaining a footing there", was granted,[2] but in general the operations of the Duff Development Company were restricted to the existing Kelantan concession.

The dismissal of the Duff interests from the centre of the stage did not solve all problems in Kelantan, nor did the British-Thai arrangement of 6 October 1902 resolve the prob-

[1]F.O. 69/275, memorandum from Campbell to Lansdowne dated 15 September 1903. A telegram from Foreign Office to Ralph Paget (the new British Chargé d'Affaires in Bangkok) dated 14 November 1903 authorized Paget to support the Duff scheme. See below.

[2]*Id.*, letter from Wemyss to Campbell dated 22 September 1903 and attached telegram to Paget.

lems rooted in the British search for stability in the northern borders of the Federated Malay States. The second problem was the simpler, so we turn to it first.

A. THE END OF INDEPENDENT SULTANATES

The Colonial Office favored the Thai as neighbors because the Thai were too weak to oppose British demands in the administration of Kelantan and Trengganu. The irony was that the very weakness of the Thai that made them desirable neighbors for the Colonial Office made then incapable of enforcing their authority directly. To the Foreign Office it was precisely because the Thai pretentions were strong enough to block other states' dealing directly with the Sultans while weak enough to make the Thai susceptible to British demands that made the situation so attractive. It is notable that the British never favored strong Thai control in Kelantan or Trengganu and the arrangement of 6 October 1902 was supportable to the British only to the extent the Thai rights in those States were in fact to be exercised by Englishmen as Advisers. In approving F. A. Campbell's draft authorizing the new British Minister in Bangkok, Ralph Paget, to support the Duff Railway plan Lord Lansdowne in his own hand added to the instruction to be sent to Paget:

> . . . but that he should be careful and avoid the use of language which might suggest to the Siamese Government the idea that the matter is not one which the Raja and his Adviser are competent to deal, without interference on the part of the Siamese Government.[3]

Despite the grammar of this caution its intention was clear.

It will be remembered that the Colonial Office in London agreed with the Foreign Office on the need to oppose other European countries' attempts to gain rights in the northern

[3] *Id.*, handwritten note on Campbell's memorandum dated 15 September 1903.

Malay States and accepted the idea of strengthening Thai legal claims (and British leverage in Bangkok) as the most politic way to do this. It will also be remembered that London had never fully informed the principal officers of the Colonial Government of the Straits Settlements of its logic; to the extent Sir Frank Swettenham was asked, he clearly disagreed, arguing at every opportunity for an outright British annexation of Kelantan and Trengganu. The Straits Settlements officials consistently pressed for British territorial expansion in the Peninsula as a natural result of the Sultans' supposed "independence"—meaning only independence of Thailand.

When the Sultan of Trengganu refused to sign any agreement with the Thai and refused to accept a British Adviser, Mr. Taylor, the Officer Administering the Government of the Straits Settlements between the departure of Sir Frank Swettenham and the arrival in 1904 of Sir John Anderson, tried the old game again. He proposed direct negotiations between the Sultan of Pahang, who was bound to British wishes by the constitutional arrangements creating the Federated Malay States, and the "independent" Sultan of Trengganu over some purported boundary question. Lord Lansdowne in London had little difficulty rejecting that proposal on the basis of the boundary agreement of 29 November 1899 and the recognition of Thai legal rights in Trengganu contained in the arrangement of 6 October 1902.[4] But when Sir John Anderson arrived on the scene he took an early opportunity to restate the entire Straits Settlements case to the Secretary of State for the Colonies, Arthur Lyttelton (who succeeded Joseph Chamberlain on 6 October 1903).

Buckling under British and Thai pressures, and without the support of Duff, who had been rendered powerless by the action of his own Government, the Sultan of Kelantan had

[4] *Id.*, confidential telegram from Lansdowne to Paget dated 9 January 1904.

acceded to the British-Thai arrangements and accepted a British Adviser as an agent of the Royal Thai Government, W. A. Graham. Graham wrote a report on 18 October 1904 outlining the evidence of Kelantan's subordination to Thailand as a matter of history and law. In a long letter dated 23 November 1904 Sir John Anderson argued that cultural differences between the Thai and Malays made it clear that the Malay State of Kelantan cannot have been legally subordinate to Thai authority (surely a strange argument for an Englishman (or Scot!) in the Colonial Service to make, but one that recurs throughout the entire era of British expansion to negative the claims of others). He argued strongly that only the British could administer Kelantan well, and that the Duff Railway scheme should be adopted by the British and put through regardless of Thai opposition. He identified Graham as part of the Thai opposition.[5]

Although Anderson's report was dismissed in the Foreign Office as less likely to be accurate than Graham's[6] the view that British interest would be served by a political advance at least through Trengganu was gaining favor. Anderson had a strong ally in Ralph Paget, who had already on 23 January 1904 come to the conclusion that British acknowledgment of Thai authority in Trengganu at least was "practically a gift . . . since the claims of the Siamese Government to influence and control in Trengganu were borne out by nothing further than their own strenuous protestations". Paget argued that the arrangement of 1902 was motivated on the British side by a desire to achieve "(1) the exercise of a certain control over the Sultans of Kelantan and Trengganu lest they should enter into direct relations with or make undesirable concessions to foreign

[5]All cited reports noted are in *id.* filed by date.

[6]*Id.*, memorandum from Campbell to Lansdowne dated 29 December 1904.

Powers" and "(2) The better administration of those States". But, he went on:

[T]he necessity for exercising a control over the foreign relations of the Sultans has now probably . . . disappeared. The constant reference in the press to British action in Kelantan and Trengganu . . . will have conveyed to other Powers the impression that the Malay Peninsula is regarded by Great Britain as being exclusively within her sphere of influence and that foreign interference would not be tolerated.

From this he concluded that British policy should not be rigid in supporting Thai continued claims to authority in Trengganu. The alternative, support of Trengganu's claims to "independence", could no longer hurt British interests and would be likely to result in a situation in which the Colonial officials of the Straits Settlements "will presumably again enter into direct relations with the Sultan." In that case, argued Paget, "it would be no difficult matter by Agreement or otherwise to exercise whatever control might appear necessary."

The ease with which Paget dismissed the legal necessity of some sort of Agreement ("or otherwise") to assure that the Sultan of Trengganu would never have independence is indicative of how far British thinking had progressed during the years of negotiation over the Duff concession. The "anachronism" of a small Malay state being independent, which was pointed out by William Archer on 22 June 1901, was now resolved merely by asserting rights in the British or Thai (there was no other choice) so far superior to the rights of an "independent" Malay Sultan that in the world of 1904 the anachronism had simply ceased to exist. Trengganu might object, but legally it was subordinate to either the British or Thai regardless of history or such quaint theories as those upholding the "sovereign equality" of rulers. Trengganu had ceased to be a "personality" in international affairs, and become merely a floating impurity to be dissolved in either the Thai or British empires as those

two great powers might decide. Whether the forms of dissolution involved documents looking like international agreements or something else was regarded by Paget as a matter for British imperial law or Thai constitutional law to resolve. The label given great power incorporation was "sphere of influence". If Trengganu had not disappeared into the Thai constitution, then it had been incorporated by events into the British "sphere of influence" and thus removed from international concern. Its disposition in that case was a matter for British imperial law alone.[7]

The British concept underlying Paget's analysis was not confined to British statesmen. Spheres of influence, spheres of interest and other euphemisms for territory removed from international contacts prior to some European power's completing its ultimate political subjugation had become part of the regular vocabulary of all European statesmen by 1900.[8] Indeed, the expansion of British concepts as to their "rights" in the Malay Peninsula at the expense of rights formerly believed to reside in the Malay Sultans of Kelantan and Trengganu was matched by a parallel French growth of "conviction of right". On 8 April 1904 the British and French exchanged expressions of agreement in each other's exclusive "influence" in parts of Thailand. In the guise of confirming the Declarations of 15 January 1896, which had inhibited the British acquisition of Kelantan, the French acknowledged in the new Declaration:

> [A]ll Siamese possessions on the west of . . . [the basin of the Menam Chao Phya] and of the Gulf of Siam, including the Malay Peninsula and the adjacent islands, coming under English influence.

The Declaration then disclaimed "all idea of annexing any Siamese territory", but provided:

[7]*Id.*, confidential letter from Paget to Lansdowne dated 23 January 1904.

[8]See Lindley 181–246; Nys, *passim*. Westlake, *International Law* (2d ed. 1910), pp. 130 *et seq.*

[S]o far as either of them is concerned, the two Governments shall each have respectively liberty of action in their spheres of influence as above defined.[9]

The direction of policy and the legal rationales for eventual British acquisition of ultimate authority in Trengganu were complete. The Colonial Office had embarked on its drive to gain control of Kelantan as well. The negotiation culminated in the complex of agreements signed at Bangkok on 10 March 1909 cancelling the secret Convention of 6 April 1897 and transferring to the British Government all Thai "rights of suzerainty, protection, administration, and control whatsoever which they possess over the States of Kelantan, Tringganu, Kedah, Perlis and adjacent islands."[10] Ralph Paget was the British Ambassador in Bangkok signing for Great Britain.

Unfortunately, the files concerning the final negotiations were not yet open to researchers when I completed my student days in England, therefore, the detailed analysis of that phase of the story will have to await some other opportunity.

B. THE END OF THE DUFF DEVELOPMENT COMPANY

Meanwhile, with his wings singed from flying too close to the sun of imperial politics, Duff turned his remarkable energies, negotiating abilities and abrasiveness to developing his Syndicate's fiefdom in Kelantan. All his other concessionary plans had been refused help by the Foreign Office except for the petty bit in Jalor. The Railway scheme had been reduced by his own backers to a mere spur line within Kelantan, and even to construct that line seemed now to require the approval of the British Adviser in that Sultanate, not merely the approval of a pliable Sultan. Duff had to come to terms in 1903 not with the chief officers of Government, but with the middle-level

[9] Aitchison 181.

[10] *Id.*, pp. 183 *et seq.* The quotation is from Article I of the basic Treaty (Siam No. XVII in Aitchison). The Convention cancelling the 1897 Convention is on p. 191 (Siam No. XVIII).

officer, W. A. Graham, British national, Adviser to the Sultan of Kelantan for the Royal Thai Government.

Graham was responsible to the Royal Thai Government for the efficient administration of Kelantan and had the legal authority through arrangements between Bangkok and the Sultan of Kelantan to control relations with the Federated Malay States. Graham's performance had also to be satisfactory to the British Government, meaning the Colonial Office as well as the Foreign Office, since their approval had been necessary for his first appointment and it was obvious that Thailand could not strongly resist any British demand that he be recalled. His position was, therefore, very delicate.

On the other hand, Duff could expect both the British and the Thai to support Graham in any steps reasonably necessary to assure that Graham could in fact exercise authority throughout Kelantan. A private Raja-dom like that of the Brookes in Sarawak could not be established in an era in which the parent Sultanates themselves were being extinguished as a matter of law.[11] Therefore, when Graham suggested to Duff that some terms of the Duff concession might be construed to derogate from the Sultan's (thus Graham's) public authority in the area of the concession Duff consented to an "explanatory Agreement" to make it clear that he "claims no rights of government within the limits of his concession".[12] Duff did succeed, however, in having the agreement "confirm" in him some rights that were beyond the terms of the original Concession![13] The

[11]There is no evidence that even Duff dreamed of becoming an "independent" Raja like the first Brooke. The history of Sarawak and how James Brooke achieved independence from the Sultan to whom he had promised tribute is another story too complex to set out here. See Irwin and Runciman for a beginning.

[12]Undated Agreement and covering letter in F.O. 69/275 filed between 15 and 22 September 1903. The Agreement was later referred to as having been drafted in August 1903 (letter from Paget to Lansdowne dated 14 April 1905).

[13]*Id.* At least that is how Paget saw the situation.

effect of the new Agreement was to increase Duff's rights in Kelantan relating to imports of arms and fixing custom duties at the expense of giving up some police jurisdiction (and patrolling) which Duff was satisfied to see exercised (and paid for) by the Sultan. The Sultan signed for Kelantan (with Graham's "advice").

Graham at this time was not only less experienced in negotiations than Duff, but he was also having difficulty appreciating his own role in Kelantan as politically subordinate to two governments. For reasons which are not fully stated in the files of correspondence he refused Duff permission to build his Railway line in Kelantan. On 12 December 1903 Paget wrote to F. A. Campbell at the Foreign Office that Graham may have a "swelled head"; that he had been acting high-handedly in Kelantan against the interest of "a Chinese British Subject"; and that he "seems to have lost sight of the fact that although he may be a little king in Kelantan he is still amenable to the jurisdiction of our Court here," presumably meaning the British Consular Court at Bangkok, "and cannot deal as he likes with British Ss [Subjects?]".[14]

Graham's report of 18 October 1904 supporting with legal arguments and a good deal of historical analysis the claims of the Thai to absolute authority in Kelantan was the occasion for Sir John Anderson's long letter to Secretary Lyttelton dated 23 November 1904, mentioned above, arguing for a more flexible British attitude with regard to the northern Malay Peninsula. In that letter Anderson strongly supported Duff's Railway scheme at its grandest—a cross-Peninsula line connect-

[14]*Id.* On the authority of British courts over officials for acts done in their official capacity overseas at this time see The Secretary of State for India v. Kamachee Baye Sahiba (1859) 13 Moo. P.C. 22; Dicey 326–327. Paget exaggerated his own authority in implying absolute certainty as to Graham's improprieties being punishable under British municipal law. A foreign sovereign's order may in some cases justify a British subject acting "high-handedly" with another British subject. See Dobree v. Napier (1836) 2 Bing. N.C. 781, 132 E. R. 301. Cf. Holdsworth 1318–1319.

ing the East and West coasts from Kelantan to Kedah—and argued the British interest in supporting Duff's side in seeking to remain free of the customs and tax burdens sought to be imposed on the Duff Development Company (and all people in Kelantan) by Graham.

After more than a year of quarreling Duff apparently became reconciled to Graham as a burden the Company would have to bear, and Graham modified his drive for absolute control sufficiently to permit a compromise to be worked out. Another Agreement was worked out to replace the old Concession Agreement entirely. It received the ratification of the Thai Government in April 1905 and was signed by the Sultan (with Graham's advice) and Duff soon after. In the new Agreement the extent of the Duff Development Company's tract remained enormous and all sides apparently felt that its commercial interests were fully maintained. The Government of Kelantan, on the other hand, got Duff's unequivocal consent to refrain from interfering with its police and fire-arms regulations. Import duties and taxes remained unsettled, as Graham agreed to advise the Sultan not to apply import duties but merely to consider lowering export duties in agricultural products. Clearly a lot of what are today regarded as matters entirely within the control of the state were still within the influence of the Duff Development Company as a result of Duff's strong personality and the rights he got in the first Concession Agreement.[15] Graham still smarted under the restraints on his administration in Kelantan and the two personalities lapsed into an uneasy peaceful co-existence. The Duff Development Company, in difficulties financially since 1902, was still active in 1905 although with no great capital available to finance Duff's grander plans.

[15]F.O. 69/275, Paget to Lansdowne confidential letter dated 7 February 1905, unmarked (confidential?) letters dated 28 February and 14 April 1905 and telegram dated 7 April 1905.

As noted above, on 10 March 1909 the British secured by Treaty all Thai rights in Kelantan. The Treaty was ratified on 10 July 1909. On 15 July 1909 the first British Adviser, J. S. Mason, took over from W. A. Graham, who had been there more than six years. The four other British officers in Kelantan merely switched from Thai to British service and stayed on. At the end of the year Mason reported the state to be prosperous and attributed the prosperity to Graham's "efficient administration". The Duff Development Company was reported to be maintaining 1,218 acres of planted rubber (about a third of the rubber acreage in Kelantan at the time), the sole gold exporter, exporting tin and oil as well, and operating a saw-mill at a profit. The total assets of the State of Kelantan on 13 January 1910 are listed at $171,734.33 of which $52,000 is accounted for as 8,000 Duff Development Company shares at $6.50 per share.[16]

Toward the close of the next year the Company issued £250,000 of stock in order to gain £180,000 additional working capital. Large expenditures were incurred as the Company tried to develop its concession more fully. The shares held by the Government of Kelantan were revalued to $5., so only $40,000 of the State's total assets of $193,718. 23 3/4 (*sic*) were attributable to its interest in the Duff operation by the end of 1910.[17]

On 22 October 1910 Sultan Muhammed of Kelantan and Sir John Anderson, British High Commissioner for the Protected Malay States, concluded directly an Agreement similar to the 1902 Agreement between Kelantan and Thailand. Kelantan undertook formally to receive an Adviser and Assistant Adviser from the British and to "follow and give effect to the advice of the Adviser . . . in all matters of administration other than

[16]1910 LXVI 919, Cd. 5374, *Kelantan Administration Report for the period ending 12 January 1910.*

[17]1911 LIII 388, Cd. 5956, *Kelantan Administration Report for 1910.*

those touching the Mohammedan religion and Malay custom".[18] The conclusion of this Agreement made no change in the affairs of Kelantan. The British had already successfully asserted the right to give determinative advice as successors of the Thai in Kelantan. It may be regarded, therefore, as merely a legalistic adjustment within British imperial law to satisfy those Colonial officials who had been denying Thai rights in Kelantan. The inconsistancy of the Colonial Office—particularly Sir John Anderson—is too clear to need further comment.

Now, where Graham had found the Colonial Office people with whom he was involved insisting on the rights of Duff at the expense of efficient administration in Kelantan, now it was the Colonial Office that was responsible for the administration of Kelantan, and Duff's rights looked less important. Furthermore, the Duff Development Company had clearly been undercapitalized and was incapable of exploiting at a swift pace the vast concession Duff had obtained in 1900. It therefore seemed to the Colonial Office desirable to cut Duff's holdings down to a size the Company could manage in order to open Kelantan to other developers; once economic development is determined to be good (and it was not questioned seriously in 1910) then efficiency in economic development must also be considered important by administrators. The Colonial Office determined to resolve the entire status of the Duff Development Company in Kelantan by buying, for enough money to enable the Company to develop its most promising holdings, all Duff's rights to land that was beyond the range of the Company's expanded operations. Furthermore, to clarify the state's rights as ultimate sovereign over the land, it was decided to assert rights in even the land to be left to the Duff Company. An offer was made in 1910.[19] The issuing of new debentures late in that

[18]Maxwell and Gibson 109. The quotation is from Article II on p. 110.

[19]1911 LIII 388, Cd. 5956, *Kelantan Administration Report for 1910*, at p. 5.

year seems to have been part of an attempt by the Company to avoid having to give up part of the land in the Concession.

Negotiations continued without agreement throughout 1911, but the Directors of the Duff Company must have known of the expropriation of the Tanjong Pagar Company in 1905 by Colonial Office decision[20] and more ominous yet, the British administration in Perlis expropriated the Kangar Market in 1911.[21] Finally on 15 July 1912 an agreement was reached between the Government of Kelantan and the Duff Development Company cancelling entirely the Duff concession as from December 31st of that year. Duff Development retained rights to only 50,000 acres (about 78 square miles; the original tract had been about 2,000 square miles) for which it would have to pay to the Government of Kelantan a small annual "quit rent", and rights to prospect and lease mining lands up to 3,000 acres within a radius of five miles from Mason's Shaft. In return, the Government undertook to pay the Company £300,000, build a railway through Kelantan (through the Company's shrunken concession if appropriate) and build a cart road from a point within the concession to the railway.[22]

The Company had used the railway as its strongest bargaining lever. It was part of the plan of the British administration for the Federated Malay States to build the line from Pahang to Kelantan and the best route lay through the Duff concession. The Company refused permission to the Government and was successful in bringing the work to a halt while the legal questions were analysed. It was the Federated Malay States Government that furnished the State of Kelantan the £300,000

[20]1906 LXXVIII 287, Cd. 3249, *Correspondence Respecting the Expropriation of the Tanjong Pagar Company, Limited, passim.*

[21]1912–1913 LX 183 at p. 225, Cd. 6563, *Perlis Administration Report for 1911*, at p. 39.

[22]The pertinent terms of the 1912 Agreement are set out in Government of Kelantan v. Duff Development Company, Ltd. [1923] A. C. 395 at pp. 396–398.

demanded by the Duff Company for its yielding up its legal power in Kelantan to inhibit the building of the railway.[23]

The money was paid to the Duff Company £200,000 immediately and £50,000 each on 31 December 1913 and 1914.[24] But even before the final payment was made difficulties arose as the Government of the Federated Malay States did not in fact continue work on the railway. The issues were submitted to arbitration in London pursuant to the 1912 Agreement. The arbitrator's award came down in 1916 and supported the Government's position. Nonetheless, it had cost the State of Kelantan $28,000 to defend the case and the British Adviser regarded this amount as "a sum of considerable importance considering its [Kelantan's] financial position."[25]

Even this award did not end the matter as the Duff Development Company remained unable to find the money to carry on profitable operations. One might speculate as to the efficiency of its management in the circumstances, perhaps too much of the annual profit was being returned to the investors and too little devoted to reinvestment. In any case, the Company found it advisable and feasible to borrow £52,500 from the Government of Kelantan in two "deeds" dated 4 February and 21 July 1921 respectively (for £22,500 at 6 per cent and £30,000 at 7 per cent respectively) in return for surrendering still more of the Concession. Again the Government of Kelantan borrowed the money to pay Duff Development from the Government of the Federated Malay States.

On 12 April 1920, while those negotiations were going on, the Company was successful in having the Secretary of State

[23]1914 LX 331, Cd. 7208, *Report for 1912 on the Federated Malay States*, at paragraphs 224–226.

[24]*Id.*, paragraphs 11–12; 1914 LX 385, Cd. 7209, *Kelantan Administration Report for 1912*, paragraph 86; 1914–1916 XLVI 343, Cd. 8155, *Report for 1914 on the Federated Malay States*, paragraph 10.

[25]1914–1916 XLVI 493, Cd. 8125, *Kelantan Administration Report for 1914*, paragraph 100. 1917–1918 XXIII 533, Cd. 8812, *Kelantan Administration Report for 1916*, paragraph 122.

for the Colonies, Lord Milner, resubmit to arbitration the questions arising out of the failure of the Government of Kelantan to build the cart road or the railway that had been envisaged in the settlement of 1912. Sir Edwin Arney Speed was appointed arbitrator. His decision, favorable to the Company, came down on 17 November 1921. He specifically found that the Government's failure to build the cart road within four years from 15 July 1912 was a breach of the contract cancelling the Concession and that the failure of the Government to complete the railway line within the same period of time was also a breach of the contract. He awarded costs to the Company and undertook to conduct further hearings to determine damages.

The Government of Kelantan having lost in the arbitration provided for by its 1912 contract with Duff Development, took the matter to the English courts. In accordance with the procedures for such matters, the Government moved in the Court of Chancery to have the arbitrator's award set aside. That motion was dismissed with costs against the Government on 23 March 1922. An appeal to the Court of Appeal in Chancery was denied on 24 May 1924 with further costs against the Government. By 30 June 1922 the costs awarded to the Company amounted to £5637 1 *s.* 8 *d.*—and damages for the basic breach of contract had still not been determined. At this point the Company refused to pay the installment of interest due on the loans of £52,500 and through some complex manœuvers on both sides ended up paying the interest due to the Crown Agents then moving in Chancery for the money to be returned as part of the "costs" owing from Kelantan to the Company.[26]

The decision of Mr. Justice Russell affirmed the arbitrator's

[26]This complicated statement of facts is a simplified version of the recital in Duff Development Company, Ltd. v. Government of Kelantan and the Crown Agents for the Colonies (Garnishees) [1923] 1 Ch. 385 at pp. 385–388, and Government of Kelantan v. Duff Development Company, Ltd. [1923] A. C. 395 at pp. 396–400.

and other courts' awards of costs in favor of the Duff Development Company on 21 November 1922. But he then eviscerated this judgment as far as the Company was concerned by holding (a) that Kelantan was a "sovereign State", and (b) that a British court does not have the power to create a right in a litigant to any assets of a foreign sovereign state without that state's consent. Since the State of Kelantan had not specifically submitted to the jurisdicition of British courts for the purpose of execution, Justice Russell held, the court could not award any specific sums belonging to the state of Kelantan to the creditor company. In oft-quoted language he wrote:

> The initial submission to the jurisdiction does not extend beyond that and does not preclude the sovereign State from now invoking that international comity which induces this country to decline to exercise by means of its Courts any of its territorial jurisdiction over the property of a sovereign State within its territory.[27]

This rule has been accepted and applied without significant dissent in many courts.[28]

On the other hand, Justice Russell's acceptance of Kelantan as a sovereign state was based solely on a letter from the Secretary of State for the Colonies. In pointed language he wrote:

> The enclosures in the letter when perused certainly afford considerable material for contending that a conclusion different to that set forth in the letter might have been arrived at. But, however that may be, the letter definitely states that Kelantan

[27][1923] 1 Ch. 385 at p. 400.

[28]Questions have arisen about the basic principle of sovereign immunity in more recent days when states commonly engage in what have traditionally been regarded as commercial activities. But these questions involve changes in the concepts of governmental functions and changes in the substance of international law that some feel to be appropriate in view of the changed governmental activity. The formulation of Mr. Justice Russell was universally acceptable at the time of the Duff Case and for many years afterwards. See Whiteman 709–726.

is an independent State . . . This letter has the same effect as a communication from the King, and is conclusive that Kelantan is an independent sovereign State.[29]

It is clear that Russell had severe doubts as to whether at international law Kelantan could be considered independent, but since the determination of the Crown was regarded as conclusive on the courts at English law, he had to accept the assertion of the Secretary of State for the Colonies on this key point. The result of this line of legal logic was clearly to confuse international law with British imperial law. The conclusion of the Crown as to the legal status before a British court of some component of the Empire was not a pronouncement of international law but a pronouncement of imperial law. It is noteworthy that the pronouncement came from the Colonial Office and not from the Foreign Office. It may be doubted whether the Colonial Office had the authority to speak for the King in questions of international law, since within the British Government the Colonial Office was not the agency of the Crown for purposes of extending recognition to (or deciding to withhold recognition from) entities purporting to have international personality. Justice Russell seems to have perceived these difficulties, but for sound constitutional reasons refused to look behind a letter attributable to the King merely because signed by a Minister of the Crown whose purview was inconsistent with the view of law taken by the letter.

The Duff Development Company appealed Justice Russell's decision on this point to the Court of Appeal. The decision of the Court of Appeal on 17 January 1923 affirmed the decision of Justice Russell. After a close examination of the precedents the Master of the Rolls, Lord Sterndale, held the Crown's letter to be conclusive of the status of Kelantan before British courts as a "sovereign State." Once again, the question

[29][1923] 1 Ch. 385 at pp. 397–398.

was clearly reduced to one of British constitutional law and not of international law:

> We have therefore to accept the statement that this State is a sovereign State, although it is quite true that these documents raise a considerable doubt as to how far that independence is practically asserted and exercised in reality. I have grave doubt myself whether the Sultan of Kelantan has practically any control at all over what is done . . .: but although that may be so we have to accept the statement that Kelantan is an independent sovereign State.[30]

Lord Justice Warrington took the same view, as did Lord Justice Younger. So ended the issue of costs.

The Government of Kelantan while agreeing with that part of Justice Russell's decision that held it immune from execution in British courts, took issue with that part of the decision that upheld the arbitrator's award. Appeal from that aspect of the decision was taken to the House of Lords, which heard argument in February 1923. In that forum the attorneys for the Duff Development Company urged the court to dismiss the appeal on the ground that the immunity claimed by the Government of Kelantan from execution, having been upheld by Chancery and the Court of Appeal, the Government of Kelantan was now in the position of having all to gain and nothing to lose from the decision of the House of Lords—an inequity not to be suffered.

> If an independent sovereign comes before this House asking that an award made against him shall be set aside and has at the same time obtained an order that the award is not enforceable against him by reason of this sovereignty, he ought not to be heard unless he waives his sovereignty to the extent of having execution levied against him. This House will [should?] not entertain an appeal to set aside an ineffective judgement.[31]

[30] *Id.*, at p. 414.

[31] [1923] A. C. 395 at p. 401.

Viscount Cave, the Lord Chancellor, delivered the principal judgment on 22 March 1923 denying that the decision is moot primarily because if favorable to the Government its effects would be obvious and if favorable to the Company "would be a strong ground for an application by the respondents to the Colonial Office (which controls the Government of Kelantan) to give directions for carrying out the award".[32] Viscount Cave then affirmed the arbitrator's award, specifically that part of it relating to costs, and closed his opinion observing:

> . . . I think it right to say that it is now incumbent on that Government and on the British Colonial Office, under whose directions it carries on its operations, to consider carefully whether and to what extent the plea of sovereignty can justly be insisted upon in order to prevent the enforcement of the award and of the orders of the Courts for payment of costs. The appellant Government has appealed to the British Courts to declare whether the award is binding upon it; and now that this question has been finally determined in favour of the respondents, it would not (I think) be creditable to the appellant Government (which claims the dignity of a sovereign State) that the respondents should be deprived by a technical plea not only of the fruits of that decision, but even of the costs of obtaining it.

The four other Law Lords hearing the case with Viscount Cave expressed no dissent from these conclusions.

It is noteworthy that the issues analysed here remain issues of concern, indeed increasing concern, to the legal profession. State trading has if anything vastly increased since the period 1900-1923. The plea of sovereign immunity to avoid execution in foreign countries in circumstances in which private traders performing precisely the same way would be subject to execution on their assets within the territorial jurisdiction of the court hearing the case is looked upon with increasing disfavor. Courts today are more reluctant than was Viscount Cave to

[32] *Id.*, at p. 408.

rely on the dignity of governments engaged in commercial activities as a spur to their dealing honorably with their creditors.[33]

As to the Crown's certificate attaching a legally significant label to its attestation of a state of facts, the Duff case seems to have marked a major change in British law. Without apparently being fully aware of the implications of their action the Law Lords raised the previous persuasiveness of the Crown's certificate to a legal conclusiveness.[34]

As to the legal status of Kelantan, the courts were very careful not to pronounce any opinion on that point; indeed, all the indications are that Kelantan would have been held to be a British possession, not an independent international entity at all, if Justice Russell, Lord Sterndale or Viscount Cave had felt free to consider the issue on its legal merits. The most the Duff case can be clearly said to have represented with regard to the status of Kelantan is that at the time the Colonial Office, for reasons internal to it, wished to be able to act in Kelantan without the inhibitions of British municipal law. As a matter, then, of British imperial law a legal structure was erected which British judges found convincing for according to the Colonial Office the freedom from legal restraint that it wanted. British municipal law was interpreted to permit the Crown to remove from the purview of British courts questions involving the governance of overseas territories which by international law were part of the British Empire.

The story of the Duff Development Company can be quickly concluded. Although immune from execution, the validity of

[33]See the panel discussion in *Proc. ASIL 1969* 182 *et seq.* for an indication of the changing view of the legal community on this problem, particularly remarks of Monroe Leigh. See also Lauterpacht, *passim*.

[34]See Lyons 273–274. Lyons's excellent article devotes four pages to the Duff decisions. He includes Colonial and India Office certificates with "Foreign Office" in his analysis. The leading precedent for mere "persuasiveness" also involved the Malay Peninsula: Mighell v. the Sultan of Johore [1894] 1 Q. B. 149.

Sir Edwin Speed's arbitration had been upheld. On 27 November 1925 the arbitrator completed his work by publishing his final award adjudging to the Company £378,000 damages for breach of contract.[35] A year later the matter was settled by arrangement among the State of Kelantan, the Federated Malay States Government, the Straits Settlements Government and the Duff Development Company. The Federated Malay States Government forgave the State of Kelantan the £300,000 loan of 1912, 1913 and 1914 (the money that had gone to buy off the Duff concession under the Agreement of 15 July 1912) and agreed to repay to the state the installments that had been paid in the ensuing years ($977,142.82). The Legislative Council of the Straits Settlements approved a loan of $4,250,000 to Kelantan free of interest for five years. The State of Kelantan arranged to pay the amount of Sir Edwin's award to the Duff Development Company.[36] In 1930 Kelantan was apparently unable to meet the payments schedule and borrowed $600,000 and $300,000 for ten years at two per cent. from the Straits Settlements and Federated Malay States Governments respectively in order to be able to continue payments to the Duff Development Company.[37] The last mention of the Duff Development Company in official reports seems to be the melancholy news in the Annual Report for 1932 that in April of that year the Company went into voluntary liquidation and the State of Kelantan gave up its 8,000 shares. Their value had dropped by this time from the $40,000 of 1910 through 1930 to $7,714 (1931), which was written off.[38] Presumably whatever was

[35]Colonial Office, "Kelantan," *Colonial Reports—Annual, No. 1319, Unfederated Malay States under British Protection, Reports for 1925*, London, 1926, p. 14.

[36]*Id., No. 1357, Reports for 1926*, London, 1927, p. 3.

[37]*Id., No. 1534, Report for 1930*, London, 1931, p. 8.

[38]*Id., No. 1622*, p. 45. The value of the shares is listed in the assets column of Appendix A of each of the Annual Reports for Kelantan.

left of the State's debt to the Company that had not yet been paid, was paid in the usual way to the bankrupt Company's creditors.

[39]The reorganization of the Company was successful and after the Japanese occupation it recommenced operations, primarily rubber plantations, "Paying good dividends and steadily increasing its financial resources." Owen Tomlinson, "Duff Development Company Ltd., "*Year Book of the Kelantan Planters' Association, 1971/72*, 11 at Page 12.

ABBREVIATIONS

BFSP	British and Foreign State Papers
BYIL	British Year Book of International Law
CQ	China Quarterly
CLR	Columbia Law Review
H.C. Deb.	House of Commons Debates, including Hansard's Reports
ICLQ	International and Comparative Law Quarterly
JAG Journal	Journal of the Judge Advocate General of the (U.S.) Navy
JMBRAS	Journal of the Malayan Branch of the Royal Asian Society
JMH	Journal of Modern History
JSCL (NS)	Journal of the Society of Comparative Law (New Series)
JSEAH	Journal of Southeast Asian History
JSS	Journal of the Siam Society
LQR	Law Quarterly Review
Proc. ASIL	Proceedings of the American Society of International Law
RDILC	Revue de Droit International et de Législation Comparée
RGDIP	Revue Général de Droit International Public

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