MALAYSIAN LEGAL HISTORY

Cases and Materials

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Contents

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Introduction

The principal aim of this modest compilation of cases and materials is to meet the needs of the university student whose curriculum includes the study of Malaysian Legal System, of which Malaysian Legal History constitutes an integral part. There is at present a number of textbooks on Malaysian Legal System, but unfortunately a companion casebook on the subject has not, so far, been available.

Hopefully the extracts of cases and materials contained in this book will assist the student in overcoming his initial shock and difficulty in grasping the subject. Towards attaining that objective, the presentation of the cases and materials has adopted the segmented approach. Accordingly the selection of cases in Part I and the historical account in Part II has been likewise sequentially done – first, the book deals with the Straits Settlements of Penang and Malacca, and then subsequently, with the Malay States in their chronological sequence.

With regard to the "sources" of Malaysian law, the student will also notice that cases have been categorised under different headings – Malay custom, Islamic law, common law, equity. These are also presented in segments, having regard to where they are being applied, whether in the Straits Settlements or the Malay States.

Included in Part II are also extracts of some of the most important treaties and engagements entered into by the Rulers of the Malay States and the English administrators. The purpose of including these historical documents is to highlight the actual status of the Malay States and the Malay Rulers *vis-a-vis* the English administrators who first "ruled" this country consequent upon that infamous Treaty of Pangkor 1874. Students who are interested to study further the issue of

"legitimacy" or "legality" of British rule in this country are encouraged to read in full Alfred Rubin's thought-provoking book, *The International Personality of the Malay Peninsula*, of which a small part has been extracted and included in this compilation.

This book ends with the introduction of English common law and equity in the Malay States, Sabah and Sarawak. The Appendix contains the extracts of the relevant statutes which brought about this state of affairs into being.

In terms of actual utility, the greater number of law students will probably have no further need of this sourcebook once they have cleared this subject in their examinations. Hopefully a few will care enough to find the time and the effort to pick up where this book ends, and to ponder the question – What is the future of the common law and equity in Malaysia after 1990? After year 2000?

At the risk of stating the obvious and repeating a cliche, legal history is studied not only for the purposes of knowing "What happened?" and "How did it happen?", but also for the purposes of answering the question "Why did it happen?" and more importantly the ultimate question "What made it happen the way that it did?"

If at the end of studying Malaysian Legal History the student has learnt firstly that before the advent of the English administrators in this country Islamic law was the basic law of the land, and secondly that the eclipse of Islamic law in this country was due to the ascendancy of English common law and equity, the publication of this modest compilation will have more than achieved its objective.

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I also would like to acknowledge my debt of gratitude to the several authors and their publishers whose scholastic works I have extracted or otherwise referred to or made use of (in one way or another) in the compilation of this modest volume.

My thanks are also due to my family and my friends without whose encouragement and material help, respectively, this modest effort might have been still-born.

Abbreviations

AC	Appeal Cases
All ER	All England Reports
Ch.	Chancery Reports
CJ	Chief Justice
CJC	Chief Judicial Commissioner
FJ	Federal Judge
FMSLR	Federated Malay States Law Reports
J	Judge
JC	Judicial Commissioner
KB	King's Bench
Ky	Kyshe's Reports
LP	Lord President
Leic.	Leicester Reports
MC	Malayan Cases
MLJ	Malayan Law Journal
MLJ Rep.	Malayan Law Journal Reprint
QB	Queen's Bench Reports
R.	Recorder
SCR	Sarawak Cases Reports

Table of Cases

List of Statutes

SECTION ONE

The Straits Settlements

PART I

Selected Cases

I

Reception of English Law in the Straits Settlements

British connection with Malaysia (then Malaya) was begun by individual and trading ventures from 1576 to 1684. As an illustration, mention could be made of Sir Francis Drake's visit to Malaya in 1578.

In 1600 the English East India Company was formed and received a Royal Charter for fifteen years from the English Crown. Its principal objective was to trade. Thus, from the date of its first presence in these shores until 1684, the Company's connection with Malaya was entirely non-political. However, as of 1684 onwards until 1762 political considerations had become part of the overall objective.

On July 15, 1789 Francis Light landed in Penang with a garrison of marines. On August 11, the eve of the Prince of Wales' birthday, he hoisted the British flag and renamed the place as "Prince of Wales Island". The question which students of public international law should attempt to grapple is this: was this act by Light in consonance with the norms of international law? Was it justified?

Cross-reference should now be made to the purported cession (the first unsigned Treaty of 1786) and the subsequent treaties of 1791 and 1800 reproduced in Part II of this book.

The 1791 Treaty spoke of "peace and friendship" between the two parties and that it would continue "as long as the Sun and Moon gives light", giving the impression that the Sultan of Kedah was an independent sovereign, when he was then *de facto* a tributary of the King of Siam. Under the terms of the Treaty of Bangkok 1826, the Siamese King acknowledged the treaty of "cession" giving Penang to the British.

The question which does not have an easy answer, especially for students of public international law, is whether Penang was a "settled"

or "ceded" colony. A correct answer to this question is important, because the answer determines the nature of the *lex loci*, the law of Penang. Did the English settlers bring with them the law of England on the ground that the island was "acquired by occupation" (settled)? Or was the law of Kedah to be applied to the island on the ground that the island was "ceded" by the Sultan to the English East India Company?

For the first twenty years after the English traders set foot on the island, there was legal chaos. According to Dickens, the first professional judge from England who arrived in Penang in 1801, the only "law" in Penang then was the Regulations of 1794; besides that the only law in force was the "law of nature". Inevitably, Dickens had to fall back on the only law that he knew – English law.

On March 25, 1807 the English Crown granted the First Charter of Justice, which resulted in the establishment of a Court of Judicature in Penang. The effect of this Charter, as far as Penang was concerned, could be seen in *Kamoo* v. *Basset*, *In re Goods of Abdullah* and *Reg.* v. *Willans*.

In *Fatimah* v. *Logan*, arguments were submitted by the Attorney-General, appearing for the plaintiff in that case, that previous to the Charter of 1807, Muslim law was applicable to Penang and that the Charter made no difference in this respect. The arguments were, however, dismissed by Hackett J. who held that:

> "... either on the settlement of the island or if not then by the Charter of 1807, the law of England was introduced into Penang and became the law of the land ..."

In *Kamoo* v. *Basset*, the retrospective effect of the First Charter of Justice 1807 was clearly spelt out by the court. In addition, the court also held not only was criminal law extended to Penang but that civil injuries could also be redressed according to English law.

In the Goods of Abdullah, Benjamin Malkin R. held that the law of England was introduced into Penang by the 1807 Charter and consequently a Muslim could, by will, dispose of his entire property, even though such a will would be contrary to Muslim law.

In *Reg.* v. *Willans*, Sir Benson Maxwell R. held that Francis Light and his marines did not come to Penang as colonisers but as a garrison to take possession of a *ceded* territory. Therefore, the law of England could hardly become the *lex loci*; it could only become the personal law of the garrison members. At the same time, the Recorder also held that

the law of Kedah could not apply to Penang because the island was without inhabitants to claim the right of being governed by existing laws; there were also no tribunals on the island to enforce such laws.

Sir Benson Maxwell further observed that whatever law ought to be *de jure*, it was clear to him that for over twenty years there was no known body of laws applicable in Penang, save for the 1794 Regulations. With regard to the Charter, he observed that no law as such was introduced contemporaneously with it. However, the First Charter directed that the Court shall, in civil and criminal cases, "give and pass judgment and sentence according to Justice and Right". This, according to the Recorder, must mean a direction to the court to apply the law of England.

The importance of *Ong Cheng Neo* v. *Yeap Cheah Neo* must also not be missed. In holding that English law was to be applied to Penang, the Privy Council held that the island was a "deserted" territory and that being so, the law of the English "settlors" must be applied. The Privy Council held:

> "... It is really immaterial to consider whether ... Penang should be regarded as ceded or newly settled territory, for there is no trace of any laws having been established there before it was acquired by the East India Company ...
>
> In either view the law of England must be taken to be the governing law, *so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances.*" (Emphasis added)

At this point, immediate cross-reference to the text of the treaties between the Sultan of Kedah and the English East India Company and the relevant portions of the selected materials in Part II would be extremely beneficial.

Isaac Penhas v. *Tan Soo Eng* is a Singapore case decided not too long ago. In this case, the Privy Council held that a marriage between a Jew and a non-Christian Chinese lady, celebrated in Singapore, was valid according to the common law of England.

In *Leong & Anor* v. *Lim Beng Chye*, the court held that the English law relating to wills apply to Penang. In that case the main issue before the court was whether the interests of one Sally Leong and her daughter had been forfeited by a provision in the will of the testator requiring widows not to marry. Lord Radcliffe held that English law was applicable.

In *Seng Djit Hin* v. *Nagurdas Purshotumdas*, a case from Singapore, the Privy Council held that English statutes were applicable to Singapore in matters affecting mercantile law. In *Shaik Sahied* v. *Sockalingam Chettiar*, however, the Privy Council held, not following *Seng Djit Hin* v. *Nagurdas Purshotumdas*, that the Moneylenders Act of 1900 and 1927 did not apply to the Straits Settlements.

Kamoo* v. *Thomas Turner Bassett

(1808) 1 Ky. 1

The Charter of Justice applies retrospectively to civil injuries which have been sustained and crimes which have been committed before the Charter came into force. The object of the Charter is to protect the native inhabitants from oppression and injustice.

The plaintiff, a native of Bengal, had agreed in June 1806 to be employed by the defendant, who was a Lieutenant-Colonel of the 20th Regiment, Bengal Native Infantry, as a "khidmuggur" or a table-servant in Penang at a salary of $6 per month. Unfortunately, since his employment, the plaintiff had been severely ill-treated by the defendant. On July 20, 1807, the plaintiff was whipped 20 times with a rattan by order of the defendant, whereupon he complained to the Police Magistrate.

Angered by this complaint, the defendant sent a sepoy to fetch the plaintiff, and subsequently had him confined after being beaten again with 20 stripes of the rattan. On November 13, 1807, the defendant ordered the plaintiff to be brought into the Grand Parade where he caused the plaintiff to be tied up to a stake and had him whipped 100 times with a cat-of-nine-tails as punishment for having defamed the defendant to the Magistrate. Not satisfied with this, the defendant then placed the plaintiff again under confinement for two and a half months. Finally, he was dismissed from the defendant's service.

The plaintiff filed an action for assault, battery and false imprisonment against the defendant, claiming damages for $600. The defendant denied any liability.

Stanley R

"I am clearly of the opinion that the plaintiff is entitled to a verdict. This is an act which cannot be justified ... The defendant's acts were contrary to the usage of the army, and are repugnant to every principle of justice.

No man is subject to military jurisdiction, but an officer, soldier or sepoy; nor is any offence cognizable by the military tribunal, or within its jurisdiction, but some act which is a breach of military duty, or a neglect of military discipline, and in no case can any person be subject to military punishment, except in consequence of a trial, and the sentence of a Court-Martial.

The defendant, however, has undertaken to be accuser and judge in his own cause, and inflicted military punishment, expressly contrary to the articles of war. It is true this was done before the Chatter of Justice had been promulgated here, and before this Court had been established; but yet the Charter extends in terms to civil injuries which have been sustained, as well as to crimes that have been committed before the Charter ...

The object of the Charter is to protect the Natives from oppression and injustice, and I shall always consider it my duty to guard their persons, liberties and properties, with the same watchful care as I should the best European or British subjects; but as the case happened before the Charter, and the law might not be so generally known, I shall not give as large damages in this case as I should have done for a similar injury if it had been recently committed, or since the establishment and introduction of the British laws ...

Verdict for the plaintiff $150 with costs."

In The Goods of Abdullah

(1835) 2 Ky. Ec. 8

The law of England introduced into the Straits Settlements by the Second Charter of Justice in 1826 had superseded the previous law. Any local inhabitants of the Settlements who wish to leave their property by will in accordance with their personal laws must expressly indicate their intention that their will is to be construed by those personal laws. In the absence of such express declaration, English law shall apply.

The salient facts of the case are contained in the judgment of the court. The issue is can a Muslim, who died in Penang, devise his entire property by means of a will? According to Muslim law, a Muslim can only devise one-third of his property to non-beneficiaries. The court held, applying English law and the previous decision in *Rodyk & Ors.* v. *Williamson & Ors.*, that the will was valid. The administration granted to the widow must therefore be revoked.

Malkin, R

"This was an application to set aside the administration granted to the widow of the deceased, a Mohamedan, and to admit an alleged will to probate. There was no dispute as to the execution of the paper treated as a Will; but it was urged on the part of the widow that the Will was inoperative, as not being conformable to the rules of Mohamedan Law; the fact that it was not so conformable is admitted, and the only question is, whether for that reason, the Will ought not to be admitted to probate.

It would be sufficient for the decision of the present case to observe that the Will is only at variance with the rules of Mohamedan Law inasmuch as it professes to pass the whole property, and by that law, the power of the testator to bequeath his property extends only over a third part of it. As to that third part, the testator has not exceeded his power; and the Will is at all events good, *pro tanto*. The consequence is that the administration granted to the widow must be revoked as having been obtained on the supposition that there existed no Will at all; and the Will must be admitted to probate ... as being an authentic instrument, of some force and validity; the question, to what extent it will be operative, remaining unaffected by the mere fact of such admission ...

I refer to the case of *Rodyk & Ors.* v. *Williamson & Ors.* (May 24, 1834) in which I expressed my opinion that I was bound by the uniform course of authority to hold that the introduction of the King's Charter into these Settlements had introduced the existing Law of England also, except in some cases where it was modified by express provision, and had abrogated any law previously existing. I intimated much doubt, indeed, whether I should have agreed in such a construction of the effect of a Charter had the question been a new one; but I felt bound by the weight of authority, and decided against the continuance of the Dutch law at Malacca ...

I believe it would be very difficult to prove the existence of any definite system of law applying to Prince of Wales' Island or Province Wellesley previous to their occupation by the English; but that law, whatever it was, would be the only law entitled to the same consideration as the Dutch law at Malacca; indeed, even that would not in general policy, though it might in strict legal argument; for there might be much hardship in depriving the settled inhabitants of Malacca of a system which they had long understood and enjoyed ...

I should say that the Court ought very readily to collect from the

expressions of a Will that the testator intended his property, so far as not particularly disposed of, to follow the law to which he was accustomed. Thus, in a Will very recently before me, I should have no doubt that a direction by a Mohamedan that the property should be distributed "according to the law of God" imported a distribution by the Mohamedan law of descent. If such a party disposed of the third part of his property, expressly as that which only he could alienate by Will, I should treat it as a clear declaration of his expectation and intention that the rest should follow the course of that law by which, and by which only, his power was so limited ...

It may be desirable to call to notice that it is the fault of native holders of property if any inconvenience results from the present decision, supposing it to be established as law. The law to which I consider them as subject gives the most unlimited freedom of disposal of property by Will; and any man therefore who wishes his possessions to devolve according to the Mohamedan, Chinese, or other law, has only to make his Will to that effect, and the Court will be bound to ascertain that law and apply it for him.

The general result is that the administration granted to the widow must be revoked, the Will of Abdullah being established as a valid instrument ... "

Reg.* v. *Willans
(1858) 3 Ky. 16

When Penang became a British possession, there were no inhabitants to claim the right of being governed by any existing law and no tribunals to enforce such law. As such it is difficult to assert that the law of Kedah applies to the island of Penang after it was occupied by the English administrators. For the first 20 years since it was founded, there was no known body of law recognised as the law of the place. The first Charter of Justice 1807 introduced the law of England into Penang. As for the second Charter of Justice 1826, it introduced the law of England as it existed on that date not only to Malacca and Singapore, but also to Penang as well, in so far as the conditions and circumstances of the place and persons shall admit.

The respondent, Willans, a Police Magistrate, had refused to try a case involving one Chivatean, an agricultural labourer who had frequently absented himself from work. The issue before the court was whether the respondent's refusal was well-founded, which in turn

depended on whether a statute passed in England in 1824 is also applicable to Penang by virtue of the Charters of Justice.

Maxwell, R

"This is a rule calling upon the Police Magistrate of Province Wellesly to show cause why he should not hear and adjudicate upon a complaint preferred by Mr. Duncan Pasley against one Chivatean, an agricultural labourer in his employment, for having absented himself from his service ...

The question raised upon this state of facts is whether the Magistrate's refusal to adjudicate was well founded .... It is necessary to determine whether the Statute under which the defendant was called upon to act did give him any jurisdiction, as asserted in the affidavit; that is, in other words, whether it is part of the law of this Settlement ...

Sir Benjamin Malkin laid it down a quarter of a century ago that "the introduction of the King's Charter into these Settlements had introduced the existing law of England also ... and had abrogated any law previously existing." *In the Goods of Abdullah*, Morton's [Ind.] Rep. 19.

Having regard to the circumstances under which this place became a British possession, it may be doubted whether any, or if any, then what body of law ought *de jure* to have been considered at the time of the establishment of the Colony as its *lex loci*.

The general rule of law determining what is the law of a territory is that if the new acquisition be an uninhabited country found out by British subjects and occupied, the law of England, so far as it is applicable, becomes, on the foundation of the Settlement, the law of the land, but that if it be an inhabited country obtained by conquest or cession, the law in existence at the time of its acquisition, continues in force, until changed by the new Sovereign. In the one case the settlers carry with them to their new homes, their laws, usages and liberties, as their birthright. In the other, the conquered or ceded inhabitants are allowed the analogous, though more precarious privilege of preserving theirs, subject to the will of the conqueror.

This Settlement, however, did not fall exactly under either branch of the above rule. It was neither a colony of British subjects in the ordinary sense of the expression nor can it be said to have been an inhabited country when ceded, because four Malay families were found

encamped upon it when it was first occupied by us. It was a desert Island belonging to the Rajah of Quedah, and ceded by that prince in 1786 to an English Corporate body, which was invested with *quasi* sovereign powers over territories in its possession, but which it held in trust for the British Crown. Indeed, it was once considered to be not free from doubt, whether the sovereignty of the Island was ever ceded.

... Again, Penang being, at the time when it became a British possession, without inhabitants to claim the right of being governed by any existing laws, and without tribunals to enforce any, it would be difficult to assert that the law of Quedah continued to be the territorial law after its cession ...

But whatever ought, *de jure*, to have been the law of the land when the colony was founded, it is clear beyond all doubt that for the first twenty years and upwards of its history no body of known law was in fact recognised as the law of the place ... There were Courts and Judges here before the Charter, but the justice which they administered between man and man within their respective jurisdictions was not in accordance with the rules of British law ... The task of maintaining order among the early colonists was left to the Commandant of the garrison. Crime was repressed and punished by a kind of martial law ... In matters of succession, personal status, contract, and perhaps tort also, as many systems of law were in force as there were nationalities in the Island; and all those laws, again, were probably tempered or modified by that law of nature, or that natural justice which appears to have been the chief guide of the European Magistrate who constituted the Court of Appeal ...

It must be presumed that the Charter of 1807 was granted with a full knowledge of this state of things and was intentionally adapted to it. No law was introduced *aliunde*, contemporaneously with the Charter ... and the question to what extent English law became the law of the land is then a question of construction rather than of general legal principle or at least of the one as well as of the other ...

It does not seem to me, then, that the Charter has in any respect modified the law of England by any exceptional adaptation of it to the religions and usages of the East. With the exception of the perhaps superfluous instructions respecting the framing of process, it might have remained silent on the subject of religion and usage without affecting the administration of justice. In other matters of greater importance,

respecting which the Charter makes no provision, native religions and usages are equally respected ...

Again, if a Mohamedan divorce be valid here ... it must be, not because there is anything in the Charter to make it valid, but because the law of England recognises the right of a Mohamedan husband to dissolve the marriage contracted by him according to the Mohamedan law with a Mohamedan wife ...

Looking back then to the early history of the Settlement on the one hand and the language of the Charters of the other, I think that Sir Benjamin Malkin had good grounds independently of the uniform course of authority on which he relied, for stating that the King's Charter had introduced the English law into the Settlement ...

The Charter of 1807 having introduced the law of England into this Island, that law, as it existed at that date, would have been the law of this country, if another Charter had not been subsequently issued. This second Charter was granted in 1826, when Singapore and Malacca were first united to Prince of Wales' Island.

The question then arises, did it import the later law into this Station? The case of *Rodyk* v. *Williamson* was a Malacca case, and when Sir Benjamin Malkin decided in it that the law of England had been introduced there by the Charter so as to supersede the law of Holland, he must have held that the law introduced was the law of England as it stood in 1826, since the Charter of that date was the only Charter extending to Malacca. If so, the same law must, upon the same grounds, have been introduced into Singapore by the same instrument. Can it then have had a different effect in Penang?

... To treat the Charter *quo ad* one station, as merely recognising a Court, while *quo ad* the other two it was treated as introducing new law, would be to give to the same instrument different meanings in different localities; a construction which would have neither convenience nor good sense to recommend it. I am therefore of the opinion that whatever law the second Charter introduced into Malacca, was introduced into every part of the Settlement; and as it has been decided that the law of England, as it stood in 1826 was brought by it into Malacca, I am of the opinion that the same law became, by the same means, the law of Penang ...

How much of the English Statute law which was in existence in 1826 is in force here is, in some measure, as I have already said, a question of construction ..."

Fatimah & Ors. v. Logan & Ors.

(1871) 1 Ky. 255

The propositions that previous to the Charter of 1807 Islamic law was in force in Penang and that the Charter made no alteration in the law cannot be accepted. In 1786 Penang was a desert and uncultivated island, virtually uninhabited and without any fixed institutions. Either on the settlement of the island, or if not then, by the Charter of 1807, the law of England was introduced into Penang and became the law of the land.

A Muslim died in Penang, leaving behind him a will. The issue before the court was what law must be applied to determine the validity of the will. The Attorney-General, for the plaintiff, contended that Muslim law must be applied. The court held that since the *lex loci* of Penang is English law, then the validity of the will must be determined in accordance with English law.

Hackett, J

"In this case a petition has been filed on the Equity side of the Court by Fatimah ... The object of the petition is to obtain a decree of the court declaring that the deceased died intestate ... At the hearing of the cause there were three preliminary questions argued. First, whether the capacity of the deceased to make a Will was to be decided by the Mohamedan or by the English law ...

The Attorney-General, for the plaintiffs, maintained two propositions; first, that previous to the Charter of 1807, Mohamedan law was in force in Penang; and secondly, that the Charter made no alteration in the law in this respect. In support of the first proposition, he argued that Penang being a part of the territories of the Rajah of Quedah, a Mohamedan Prince, the Mohamedan law continued in force after the cession until it should be altered by competent authority, and he contended that there is no evidence of any attempt to alter the old law or to introduce a new one until the publication of the Charter of 1807.

It appears to me that this proposition is untenable. In 1786, Penang being then a desert and uncultivated island, uninhabited except by a few itinerant fishermen, and without any fixed institution was ceded by the Rajah of Quedah to Captain Light, an officer of the East India Company, for and on behalf of the Company ...

Here we have the fact that an island virtually uninhabited is occupied and settled by British subjects in the name of the King of

England. The case therefore would seem to fall within the general rule laid down in law books and which Lord Kingsdon thus expresses in a recent case – "When Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws but (also) the sovereignty of their own State and those who live amongst them and become members of their community become also partakers of and subject to the same laws ...

But it seems to have been thought that Penang did not come within the operation of the rule to which I have referred for two reasons; first, because the island was not altogether vacant of inhabitants, and secondly, because it was taken possession of on behalf of the East India Company and was therefore not directly subject to the English Crown. But it can scarcely be seriously contended that the few wandering fishermen who were found on the shores of the island could be regarded in the same light as the inhabitants of a settled country with laws of their own and who are entitled to the benefit of them until changed by competent authority. Neither do I think that the circumstances of possession of the island being taken by an officer of the East India Company, for and on behalf of the Company, prevented the transfer of the sovereignty and dominion of the island to the Crown of Great Britain ...

It has also been argued by the Attorney-General that Penang was a dependency of Fort William in Bengal, and therefore subject to the same laws at that Presidency. And as by the laws in force in Bengal, Mohamedans were entitled in all matters of contract, inheritance, or succession, to the benefit of their own law, Mohamedans in Penang must be held entitled to the same privilege.

Sir Benson Maxwell, in the case of *Regina* v. *Willans* (1858) 3 Ky. 16, seemed to think that Penang could not be considered a British Colony in the ordinary sense of the word, and expressed his opinion that Capt. Light and his companions were a mere garrison, and that having regained the temporary nature and object of their inhabitancy, the law of England can hardly have been made the *lex loci* by them; but with all respect for the opinion of that learned Judge, I think the facts do not support it. Capt. Light was not merely the commander of a garrison, but was also an able administrator ...

Whatever ought *de jure* to have been the law of the land when the colony was founded, it is quite clear that for the first twenty years of its

existence, no body of known law was in fact recognised as the law of the place.

The Charter of Justice of 1807 seems to have set at rest this vexed question of the *lex loci* of Penang ... The question has been re-opened by the Attorney-General and he has maintained, in opposition to the views I have mentioned, that the King's Charter of 1807 had no effect upon the law of the place, being a mere machine through whose instrumentality the law is enforced. He also relied on the circumstances that the Court is directed in civil matters to give judgment, not according to the law of England, but according to justice and right ... But if the current of authority which has flowed so long in one direction is to be disturbed, it cannot be in this Court.

I am therefore of the opinion that [*qua cunque via*], either on the settlement of the island, or if not then, by the Charter of 1807, the law of England was introduced into Penang and became the law of the land, and that all who settled here became subject to that law.

It follows from what I have said, that inasmuch as English law has prevailed in Penang certainly ever since the publication of the first Charter in 1807, and Mahomed Noordin was domiciled here at the time of making his Will and up to the time of his death, that his capacity to make a Will must be decided not by Mohamedan law, but by the *lex loci*, which here is the law of England as it has been modified by the Indian and Colonial Legislatures. And it appears to me that there is no hardship to Mohamedans in holding this. As Sir Benjamin Malkin observed in *Abdullah's* case, it is the fault of native holders of property if any inconvenience results from such a decision ... "

Choa Choon Neoh* v. *Spottiswoode

(1869) 1 Ky. 216; Woods Oriental Cases Appendix p. 1

In the Straits Settlements, so much of the law of England as was in existence when it was imported here which was of general policy and adapted to the local conditions is the law of the land. That law, when applied to the various races here, is subject to such modifications as are necessary to prevent it from operating unjustly and oppressively on them.

A Chinese, domiciled in Singapore, died leaving behind him a will in which he devised certain properties for the purpose of performing certain religious ceremonies known as "Sin Chew". The

issue before the court was whether the devise was valid. The court held that despite the acceptance of its religious nature according to Chinese custom, for the purpose of the law in England (which applied to the "colony" of Singapore) the devise did not have a "charitable" object, and that being so the devise was void.

Maxwell, CJ

"In this case the testator, Chan Chong Long, a person born and domiciled in Singapore ... by his Will, in the English language, after bequeathing legacies of $500 a piece to each of his two sons and daughters and making provision for another son, and after reciting that he was erecting a building for charitable purposes, and for the performance of religious ceremonies according to the custom of his ancestors, called *Sin-Chew*, to perpetuate the memories of his departed wives, as also of himself after his decease, devised certain houses and land in Singapore and Malacca and also his residuary estate to trustees upon trust to apply the rents and profits, after providing for repairs and insurance, "in the performance of such *Sin-Chew* or Charity, in and to the names of myself and my said wives hereinbefore named and mentioned, to be performed four times in each and every year at the least, and as much oftener as the funds applicable thereto will admit ..."

Several Chinese men of learning have been examined for the purpose of ascertaining what are the nature and object of this devise, and the substance of their evidence is as follows. The word *Sin-Chew* is composed of Sin, which means spirit, soul or ghost, and *Chew*, which means ruler; and the composite word means the spirit ruler or spiritual head of the house. When a man dies, his name, with the dates of his birth and death, is engraved on a tablet; this is enclosed in an outer casing on which a new name, which is now for the first time given to him, and the names of his children, are engraved. This tablet is kept either in the house of the worshipper, or in that which has been set apart for the *Sin-Chew*. It is sacred, and can be touched only by the male descendants or nearest male relatives of the deceased, who alone may look upon the name on the enclosed tablet. It is the representation of the deceased. At certain periods, namely, on the anniversary of his death, and once in each of the four seasons, his son or sons, or if he has none, his nearest male relative, but never his daughters or other females, go to the place where the tablet is and lay on a table in front of it a quantity of food ... They light joss-sticks, fire crackers, burn small squares of thin brown

paper ... they bow their hands three times, kneel, touch the ground with the foreheads, and call on the *Sin-Chew* by his new name to appear and partake of the food provided for him ...

The question is whether this devise or bequest is valid ... Although the Statute of Charitable Uses may not be law here, I think that it may be laid down that not only the various objects mentioned its Preamble, such as gifts and devises for poor people, for sick and maimed soldiers and sailors, for schools, education and learning, for the repair of churches, bridges, and other public works, and for other purposes which it is unnecessary to enumerate, but also, as in England, all objects having any analogy to such uses, would be regarded as charitable ...

In the case before me, however, the devise is plainly not charitable; it has not any charitable object whatever, whether general or special, in the sense of a benefit to any living being. Its object is solely for the benefit of the testator himself... But if the devise is not a charity, on what ground can it be supported? It is clear that in England it would be void ...

It seems to me that all such legacies, whether they be designated superstitious or otherwise, are void upon another ground, namely, that not being for a public or *quasi* public benefit, they attempt to create a perpetuity ...

The law of England, as I understand it, does not allow the owner of property, whether real or personal, to dispose of it for all future ages as he desires except in one case, and that is when his object is of some general benefit to men, or charitable, in the legal senses of the word. He may not settle either money or land on his children or descendants or other persons except for the limited period of lives in being and twenty-one years beyond; still less may he devote his property in perpetuity for his own supposed private benefit, or for any other purpose not charitable. On this ground alone, and not because the law condemns as unsound the theological dogma which such a legacy implies ...

I should consider a bequest for masses for departed souls void and the devise in this case void, unless the law of these Settlements differs in this respect from the law of England. It remains to consider this question.

In this colony, so much of the law of England as was in existence when it was imported here and as is of general (and not merely local) policy and adapted to the conditions and wants of the inhabitants is the law of the land; and further, that law is subject, in its applications to

the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them. Thus in the question of marriage and divorce, it would be impossible to apply our law to Mohamedans, Hindus, and Buddhists, without the most absurd and intolerable consequences, and it is therefore held inapplicable to them.

Tested by these principles, is the rule of English law which prohibits perpetuities either of local policy, unsuited to an infant settlement, or inapplicable by reasons of the harshness of its operation, to people of oriental races and creeds? The rule is not founded by any statute but is a rule of the common law, and it seems to me to be one of a general and fundamental character, of great economical importance, and as well fitted for a young and small community as a great State, for both are interested in keeping property, whether real or personal, as completely as possible an object of commerce, and a productive instrument of the community at large.

I am therefore of the opinion that in this colony it is not lawful to tie up property and take it out of circulation for all ages for any purpose not of any real or imaginary advantage to any portion of the community, and if the rule against perpetuities be law here, it might suffice to add that as the property in question in this present case is chiefly, if not wholly real, the rule must apply to it invariably, whatever may be the creed, race or nationality of its owner.

There is, I believe, nothing in Chinese law or customs ... which requires the owner of property to dispose of any part of it for the use of his own soul after death. It has not been shown that such a devise would be valid in China or indeed that the power of testamentary disposition is known there at all.

No similar devise appears to have been ever brought under the cognizance of the Court of these Settlements, though one of them, Penang, has been under British rule and inhabited by Chinese for upwards of eighty years ... Certainly it would require strong evidence to establish that it was regarded as a duty, in any religion, to disregard the claims of natural affection, and as in this case, to dispose of the bulk of one's property in providing for the supposed benefit and comfort of his own soul, while he left his sons and daughters almost wholly unprovided for.

As there is no such evidence, I am unable to see any reason for holding that the rule against perpetuities is less applicable to property

in the hands of a Chinese and a Buddhist than to property in the hands of an Englishman and a Christian, and I think that the former has no power to devise or bequeath property to be devoted to any purpose not charitable. For these reasons, I think this devise (is) void, and that the property is distributable among the testator's next of kin living at his death."

Ong Cheng Neo* v. *Yeap Cheah Neo & Ors.
(1872) 1 Ky. 326, 337 P.C.

It is immaterial whether Penang was regarded as a ceded or settled territory because there was no trace of any laws having been established there before it was acquired by the East India Company. In either view the law of England must be taken to be the law of the land in so far as it is applicable to the circumstances of the place and modified in its application by these circumstances.

The question before the court was whether a devise of two plantations to be reserved as a burial place for the deceased and his family and another devise of a house for the purposes of performing religious ceremonies ("*sow chong*") were valid as gifts for charitable purposes. The Privy Council held, applying the law of England, that the said devises were void as being contrary to the English common law against creating perpetuities.

The Judgment of the Privy Council

"In considering what is the law applicable to bequests ... in the Straits Settlements, it is necessary to refer shortly to their history.

The first Charter relating to Penang was granted by George III in 1807 to the East India Company ... The Charter made provision for the government of the Island and the Administration of Justice there. It established a Court of Judicature, which was to exercise all the jurisdiction of the English Courts of Law and Chancery "as far as circumstances will admit". The Court was also to exercise jurisdiction as an Ecclesiastical Court "so far as the several religions, manners and customs of the inhabitants will admit".

A new Charter was granted by George IV in 1826 when the Island of Singapore and the town and the fort of Malacca were annexed to Prince of Wales' Island, which conferred in substance the same

jurisdiction on the Court of Judicature as the former Charter had done.

The last Charter granted to the East India Company in the year 1855 again conferred the like powers on the Court; and this jurisdiction was not altered in its fundamental conditions by the Act of the 20th and 30th Vict. c. 95 and the Order of the Queen in Council made in pursuance of it, by which the Straits Settlements were placed under the government of Her Majesty as part of the colonial possessions of the Crown, nor by Ordinance No. 5 of 1868, constituting the present Supreme Court.

With reference to this history, it is really immaterial to consider whether Prince of Wales' Island, or as it is called Penang, should be regarded as ceded or newly settled territory, for there is no trace of any laws having been established there before it was acquired by the East India Company. In either view, the law of England must be taken to be the governing law, so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances.

The learned Judge below has not ... held the gifts in question to be void on the ground that they infringed any statute, but because they were opposed to the rule of the English (common) law against creating perpetuities.

Their Lordships think it was rightly held by Sir Benson Maxwell, Chief Justice, in the case of *Choa Choon Neoh* v. *Spottiswoode* (1869) 1 Ky. 216 ... that whilst the English statutes relating to superstitious uses and to Mortmain ought not to be imported into the law of the colony, the (common law) rule against perpetuities was to be considered a part of it. This rule, which certainly has been recognized as existing in the law of England independently of any statute, is founded upon considerations of public policy, which seem to be as applicable to the condition of such a place as Penang as to England; namely, to prevent the mischief of making property inalienable, unless for objects which are in some way useful or beneficial to the community ...

The question then is whether the Judge below is right in holding that the bequests in question infringed the rule ...

The devise of the two plantations in which the graves of the family are placed, to be reserved as the family (burial) place and not to be mortgaged or sold, is plainly a devise in perpetuity. The only question is whether it can be regarded as a gift for a charitable use. The weight of authority is against a devise of this nature being so held in the case

of an English Will; and the only point, therefore, requiring consideration ... (is) whether there is anything in Chinese usages with regard to the burial of their dead ... which would render such an appropriation of land beneficial or useful to the public ... In the absence of any information respecting usages of the kind adverted to ... their Lordships feel unable to say that the decree (of the trial Judge) on this point is wrong.

The remaining devise to be considered is the dedication by the testatrix of the *Sow Chong* house for the performance of religious ceremonies to her late husband and herself ... This usage (has been) minutely described by Sir Benson Maxwell in his judgment in the case of *Choa Choon Neoh* v. *Spottiswoode*.

Although it certainly appears that the performance of these ceremonies is considered by the Chinese to be a pious duty, it is one which does not seem to fall within any definition of a charitable purpose or use. The observance of it can lead to no public advantage and can benefit or solace only the family itself. The dedication of this Sow Chong house bears a close analogy to gifts to priests for masses for the dead ... The learned Judge was therefore right in holding that the devise, being in perpetuity, was not protected by its being for a charitable use ... "

Isaac Penhas* v. *Tan Soo Eng

(1953) MLJ 73 P.C.

The common law of England was in force in Singapore in 1937 except in so far as it was necessary to modify it to prevent hardships upon the local inhabitants who were entitled by the terms of the Charters of Justice to exercise their own respective religious customs and practices.

The question before the court was whether a marriage celebrated in Singapore between a Jew and non-Christian Chinese in a modified form constituted a valid marriage according to the laws of Singapore. The court held, applying the common law of England, that the marriage was valid.

Lord Oaksey

"This is an appeal from a judgment of the Court of Appeal of the Colony of Singapore ... (the issue of which was) ... whether the petitioner Tan Soo Eng is or is not the lawful widow of Abraham Penhas and if the

answer is in the affirmative when the said Tan Soo Eng married the said Abraham Penhas. Both the learned trial judge and the Court of Appeal decided the said issue in favour of the respondent, determining that she had been lawfully married to the deceased on or about the 22nd December 1937.

The question to be determined upon this appeal is whether the learned trial judge and the Court of Appeal were right in their conclusion that a marriage celebrated in Singapore between a Jew and non-Christian Chinese in a modified form constituted a valid marriage according to the laws of the Colony ...

In the year 1875 their Lordships' Board had occasion to review the history of the Straits Settlements in the case of *Yeap Cheah Neo* v. *Ong Cheng Neo* (1872) 1 Ky. 326, 337 P.C. and held that the English common law was in force in Singapore in so far as it is applicable, but that the Charter of 1826 provided that the Court of the Colony was to exercise jurisdiction as an Ecclesiastical Court in so far as the religions manners and customs of the inhabitants will admit.

The principal question to be decided is therefore whether there was in 1937 anything in the religions manners or customs of Jews or Chinese domiciled in Singapore which prevented them from contracting a common law monogamous marriage. No case has been cited which suggests that mixed marriages between domiciled inhabitants of different religions or races cannot validly be contracted. On the contrary, the case of *Carolis De Silva* v. *Tim Kim* (1902) 2 SSLR App. 8 is authority that they can, and indeed the appellant's counsel did not contend that such marriages were impossible.

In accordance with these decisions their Lordships hold that the common law of England was in force in Singapore in 1937 except in so far as it was inapplicable and except in so far as it was necessary to modify it to prevent hardships upon the inhabitants who were entitled by the terms of the Charter to the exercise of their religious manners and customs ...

There was no form of a ceremony of marriage in the present case which was applicable to both parties to the marriage and accordingly they seem to have adopted a composite ceremony, the wife worshipping according to her Chinese custom and the husband according to his Jewish custom. Such a ceremony performed in the circumstances already stated was indubitably intended by the parties to constitute a valid marriage.

The only question which in their Lordship's view admits of any doubt is the question whether the marriage intended by the parties to be constituted by the ceremony was a common law monogamous marriage or a Chinese polygamous marriage. The question was not raised in the courts below ...

Abraham Penhas was dead and in such circumstances it would, in their Lordship's opinion, be altogether wrong to invalidate a marriage so solemnized followed as it was by years of cohabitation as man and wife and to bastardize the two children of the marriage, even if the other evidence were equivocal as to the status intended. But it is not necessary to decide the case on this narrow ground for their Lordships hold that the evidence as it stands sufficiently proves a common law monogamous marriage ..."

Leong & Anor* v. *Lim Beng Chye
[1955] MLJ 153

The English rule (that a condition subsequent in partial restraint of marriage when annexed to a bequest of personality was ineffective to destroy the gift unless the will contained an explicit gift over of the legacy to another legatee) must be applied in Penang.

One Lim Kia Joo (the testator) died on 19th November, 1936, leaving a will. The main question in the appeal is whether the interests of the appellants, Sally Leong and her daughter, or the interest of Sally Leong alone, has been forfeited by a provision in the will requiring widows not to marry.

Lord Radcliffe

"It is very natural to see something anomalous in the introduction into Malaya of a special rule of English law of this kind. But English law itself has been introduced into Penang, as part of the Straits Settlements 'so far as it is applicable to the circumstances of the place' (*Yeap Cheah Neo* v. *Ong Cheng Neo*) and, while so much of that law as can be said to relate to matters and exigences peculiar to the local condition of England and to be inapplicable to the conditions of the overseas territory is not to be treated as so imported, their Lordships are of the opinion that the process of selection cannot rest on anything less than some solid ground that establishes the inconsistency. And it is any solid ground of that sort

which is lacking in this case; not the less when it is recalled that the testator made his will in the English language, and employed in it forms and legal conceptions that are wholly derived from English law.

In fact, if the English law was so far imported into Penang as to nullify through the rule against perpetuities a Chinese lady's testamentary disposition relating to a family burying place and a house for performing religious ceremonies to the memory of her dead husband (see *Yeap Cheng Neo* v. *Ong Cheng Neo*), it would be very hard to say why there was not also imported the English rule as to the effect of conditions in partial restraint of marriage.

It was said that the rule against perpetuities was a rule of law, whereas the rule now in question was no more than a rule of construction. But the distinction proposed does not appear to their Lordships to be a significant one. This rule too is a rule of law in the sense that every Court is bound to apply it and give effect to it, once it is clearly ascertained what are its terms and under what conditions it is required to operate. It is not merely a rule of construction ..."

Seng Djit Hin* v. *Nagurdas Purshotumdas & Co.

[1923] AC 444

English statutes are applicable to the colony (Singapore) as part of the mercantile law of England for the purposes of section 5 of the Civil Law Ordinance No. 111 (Straits Settlement No. VIII) of 1909.

In August 1917 the appellant sued the respondents in the Supreme Court of the Straits Settlements for the price of goods sold and delivered. The respondents counterclaimed for damages due to the appellant's failure to deliver under a contract dated June 17, 1917, to ship sugar from Java and have them delivered at Bombay. The shipment of the sugar had been prevented by the requisition of ships by the British Government. The main issue before the court was whether the Defence of the Realm (Amendment) Act No. 2 of 1915 and the Courts (Emergency Powers) Act 1917 applied to the Colony.

Lord Dunedin

"The appellant averred that all available shipping for carrying sugar from Java to Bombay had been requisitioned by the Admiralty and that the inability to find tonnage was due to such requisition and that on this

account he was excused performance. The learned trial judge gave effect to this plea. The Court of Appeal, by a majority, reversed (the decision) upon the grounds that the English Acts cited were not made available by the terms of the Civil Law Ordinance above cited. From this judgment appeal had been taken to His Majesty in Council.

The learned judges of the Court of Appeal based their judgments upon the view that the English statutes above cited were no part of the mercantile law which they thought was the law to be administered in terms of s. 5 of the ordinance. Their Lordships are quite unable to agree with this view, which they think fails to appreciate that it is not the "mercantile law" but "the law" which is to be the same as the law which would be administered in England in the like case ...

Now the question here to be decided in the colony is a question as to the law of sale. No one can doubt that the law of sale is part of the mercantile law ... That being settled the section goes on to say not, as the learned judges seem to assume, that "the mercantile law" ... but that "the law" to be administered shall be the same as would be administered in England in the like case at the corresponding period. Now if the same question as to sale had to be decided at the same time in England it is clear beyond all doubt that the above cited statutes of 1915 and 1917 could be pleaded if the facts allowed of their application ..."

Shaik Sahied* v. *Sockalingam Chettiar

[1933] MLJ 81

For the purposes of section 5 of the Civil Law Ordinance No. 111 of 1920 of the Straits Settlements, the Moneylenders Acts of 1900 to 1927 of England do not apply to the Straits Settlements.

The respondent issued a writ of summons against the appellant claiming the payment of $14 000, the balance of a principal sum due on a promissory note for $15 000 and of a further sum of $3200 on a cheque drawn by the appellant and payable to the respondent and which was dishonoured upon presentation. In his defence, the appellant pleaded *inter alia* the Moneylenders Act, 1900 to 1927, and alleged that the respondent at all material times carried on the business of a moneylender. He further pleaded that the promissory note and cheque had been given for and in respect of moneys lent by the respondent in breach of section 6 of the Moneylenders Act 1927. The Privy Council held, distinguishing *Seng Djit Hin*, that the Moneylenders Act were not applicable to the Straits Settlements.

Lord Atkin

"The action was brought by the plaintiff, a professional moneylender, against the defendant, a landowner, upon a promissory note payable on demand and a post-dated cheque given in respect of money-lending transactions.

The only defence material to this appeal is that there was no memorandum in writing of the contract signed by the borrower in pursuance of section 6 of the English Moneylenders Act. The question is whether the provisions of section 6 apply to this transaction in Singapore.

The suggestion is that the section is made applicable by section 5(17) of the Civil Law Ordinance No. 111 of 1920 of the Straits Settlements ...

It is to be noted that the section does not purport to apply in every mercantile transaction. It applies only where a question or issue has to be determined with respect to mercantile law. The general object no doubt is to secure uniformity of mercantile law in Singapore and the United Kingdom ... It is obvious that there are mercantile transactions in which no question with respect to mercantile law arises ...

If such a case as this arose in England between a professional moneylender and a landowner it would not, I think, occur to anyone that an issue raised under any of the sections of the Moneylenders Acts related to mercantile law ...

It is unnecessary to rehearse the various provisions in the Moneylenders Acts which indicate that the Act is intended solely for the English regulation of the activities of moneylenders in England, and would be unsuitable and impossible of the performance in the East. In no event could it be included in the law to be administered in pursuance of the ordinance ..."

Note

The question of the reception of English law relating to mercantile matters does not seem to be of any great practical importance now because much of the local mercantile law is now contained in local statutes.

2

Application of Malay Custom in the Straits Settlements

Early History of Malacca

According to the legend of Malacca, the place was first opened (or discovered) by Parameswara, who had fled from Singapore, through Muar, after staying there for six years with his followers. According to Portuguese account, Parameswara was expelled from Singapore by the Siamese but according to the *Malay Annals* he was driven out by the Javanese.

Again according to Portuguese records, when Parameswara first settled in Malacca, there were only about twenty to thirty *anak negeri*, who eked out their living partly by fishing and partly by piracy. The number soon increased after Parameswara's arrival and the settlement grew larger as time passed.

According to Tom Pires (Albuquerque's druggist who stayed in Malacca between 1512 and 1515), Parameswara ruled Singapore for five years, then became a fugitive in exile (in Muar) for six years, subsequently founded Malacca in 1403, became a Muslim at the age of 72, and died in 1424. According to the *Malay Annals*, he ruled Malacca for 20 years.

According to Albuquerque, Parameswara had married a Muslim princess from Pasai and that upon the entreaty of his wife (or his father in law) he embraced Islam. According to Chinese records, as early as 1413, Parameswara was already wearing a "white turban and a green flowered robe". He had taken the name of Megat Iskandar Shah, thereby confusing the Portuguese and Chinese historians into mistaking him for two persons.

By the middle of the 15th century, Malacca had already established

trading links with the Chinese Empire to the east and the western traders from Asia and Europe. This was due not only to its favourable geographical position but also its stable government.

Despite palace intrigues, Malacca grew in strength and was able to beat off the Siamese attacks by land and sea. It was also able to render assistance to Pahang in fighting off the Siamese invaders. Assistance was also given to Patani and Kedah, which were Muslim States since 1474; in time these two states declared themselves as vassal states of Malacca.

On September 10, 1509, Diago Lopez de Sequeira sailed into Malacca harbour, and from then on the history of Malacca entered the dark age. What was once the seat of a large sprawling Malay Islamic Empire, it soon crumbled under the tyranny of two European Christian conquerors; first the Portuguese, and then the Dutch. The ensuing story of Malacca is a sad tale of treachery, greed, murder, love, loyalty – and religious fervour. The upshot of the sad saga was that when Sequeira left Malacca for home, with Magellan on board, the Portuguese were forced to leave behind 20 of their men who were held captive by the Bendahara. Malacca was to pay heavily for this in the years and centuries to come.

On May 2, 1511, Albuquerque sailed for Malacca with 19 ships, 800 Portuguese soldiers and some 600 Malabaris. They had one burning desire – revenge. When the ships dropped anchor at the harbour, Sultan Mahmud Shah sent across the message stating that the Bendahara had already been executed. The question was put to the Portuguese – did they want war or peace? The Portuguese demanded the immediate release of the prisoners and compensation to be paid out of the Bendahara's estate. The Sultan countered this by insisting that there would be no talk of compensation unless the two parties "made peace" first.

The stand-off lasted for six days in which neither party wished to give way. This came to an abrupt end when the Portuguese started burning down several houses on the waterfront and all the ships in the port except five Chinese junks. To placate the Portuguese and to avoid further harm to his subjects, the Sultan released the prisoners to the Portuguese; in addition he gave them a site in the city for the purposes of constructing a fort.

Several days later, some two hours before dawn, the Portuguese made a sneak attack on the bridge, thereby effectively splitting the

Malay force into two parts and rendering them easy target for defeat and ultimate destruction.

The position of the Malay warriors became worse when the Chinese traders treacherously allied themselves with the Portuguese by offering their five junks and crew to the Portuguese side.

After the fall of Malacca, the Sultan crossed overland to Pahang. In Malacca, Albuquerque sent emissaries to Siam and received delegations from neighbouring States. The Sultan of Kampar (in Sumatra) and the King of Java pledged friendship and cordial relations.

Administration under the Portuguese

Portuguese rule in Malacca was headed by the Supreme Commander, who was also known as the "Captain of the Fortress" and at times "Governor". The Supreme Commander had his circle of "advisers" consisting of senior officials, namely the Chief Justice, the Mayor, the Bishop and the Secretary of State.

There was a rudimentary system of administration of justice. Seven Magistrates were appointed by the Portuguese from amongst the local community leaders, and these were empowered to hear civil and criminal cases involving local citizens only and not over the Portuguese. Appeal from the Magistrate's court lay to the Chief Justice.

With regard to civil administration, the Portuguese retained the three important positions found amongst the Malay society – the office of the Temenggong had control over the Minangkabau, the people of Naning and Linggi. He adjudicated over their disputes, punished their misdeeds and generally was answerable for their welfare to the Governor. The Bendahara had control over the foreign Asiatics in Malacca. He had civil and criminal jurisdictions over them. The Bendahara had a Deputy to assist him in his tasks; he was also assisted by the Shahbandar. The latter's function was to supervise foreign vessels, receive foreign envoys and was generally responsible for the safety of the port of Malacca.

Under the Portuguese, the city State of Malacca was partitioned into four distinct parts or quarters. In the city centre lay the fortress, with its garrison and 300 fighting men. Within its four walls were sited the castle, the palaces of the Governor and the Bishop, the Council Hall, five churches and a hospital. To the north was Lepeh (Tranqueira,

presently known as Trankera), occupied by the Chulias and the Chinese. To the south was Bandar Hilir, occupied by the Malay fishermen and timber traders. At the river mouth were the Javanese and their bazaars in which trade in spices and all kinds of merchandise was carried.

Land administration was in bad shape. Large tracts of land were given out to the Portuguese as "country estates". Some of these alienated estates were unbelievably large, such as those which extended from Cape Rachado to Batu Pahat, with no stipulation to carry out cultivation. As a result, Malacca had large tracts of idle lands during Portuguese occupation.

The Portuguese also sold off or leased out lands in Malacca which were unoccupied as well as those lands formerly owned by the Malay Sultans and the ruling classes who had since fled the country. To put it plainly, as far as the Portuguese colonialists were concerned, land was in abundance everywhere, simply for their taking.

The Portuguese ruled Malacca for over a hundred years, their supremacy unchallenged. Then in June 1640 the Dutch appeared on the horizon. The Dutch attack on Portuguese Malacca was launched at the behest of the Dutch Governor-General in Batavia. The Dutch had the support of the Johore Sultan, who had fitted out a fleet of 40 ships with 1400 fighting men to assist the Dutch.

Fighting between the Dutch and the Portuguese lasted for almost seven months, until finally in January 1641 when the Portuguese conceded defeat. The death toll was extremely high – 7000 townsmen and 1500 Dutch troops. Of the original population of Malacca of some 20 000 people, only 3000 remained after the war, the others having either perished in the fighting or had fled to the neighbouring states.

After taking over Malacca from the Portuguese in 1642, the Dutch were primarily concerned with their lucrative trade. As far as local administration or legal development of the settlement were concerned, the Dutch had no interest, just like the Portuguese before them. In time, they became embroiled in wars with the Minangkabaus of Naning and Rembau.

When the English finally came to take control of Malacca some two centuries later, the land administration was in a chaotic state. Large tracts of land were in the hands of a few Dutch proprietors (these were known as the "Dutch grants") who in turn farmed them out to Chinese middlemen. The latter were able to pay off the Dutch owners

handsomely for these favours, in return for which they were given the right to take a "tenth" (one-tenth of the proceeds of the harvest in accordance with Malay customary tenure) from the Malay peasant farmers who actually worked the land as mere tenants of the Chinese owners and their Dutch overlords.

Malacca Under English Rule

Malacca came under English rule consequent to the Treaty of Holland 1824, details of which appear in Part II of this book.

Thus, unlike Penang, when the English came to Malacca they found that there was already in existence a firmly entrenched *lex loci*. As Malacca was a "ceded" colony, the law of the place must continue in its application to the local population unless the new ruler determined otherwise, by means of new legislation providing to the contrary. The case of *Sahrip* v. *Mitchell & Anor* reproduced below amply described the paramount position of the Malay customary tenure, based to a certain extent on Islamic law.

Sahrip* v. *Mitchell & Anor
(1870) Leic. 466

Under the old Malay law or custom of Malacca, while the Ruler was the owner of the soil, every person has the right to clear and occupy forest and wasteland, subject to the payment of one-tenth of the proceeds of the land to the Ruler. This custom was recognised by the Portuguese and the Dutch, and when the law of England was introduced into the Settlement by the Charter of Justice, the law so introduced did not supersede this local custom.

The plaintiff had brought an action of trespass against the defendants, alleging that the defendants had unlawfully ejected him from his land. The defendants contended that the plaintiff had been lawfully ejected from the land because he had failed to take out a proper title to the land as required by law. The court held, applying the old Malay law or custom of Malacca, that the plaintiff was the lawful owner of the land and that being so the eviction was therefore unlawful.

Sir P. Benson Maxwell, CJ

"This is an action of trespass. The petition contains two counts, one for expelling the plaintiff from his land and preventing him from reaping

the growing crops; the second, for breaking and entering into his dwelling house and expelling him from it ...

The first three pleas deny the trespass and the possession. The fourth alleges that the plaintiff, not being a cultivator or resident tenant holding by prescription, was by a duly served notice informed that the land in question had been assessed by the Government from the first of January 1870 at 97 cents per annum, and was therein also called upon by the Collector to take out a proper title for the land within a month from the date of the service of the notice, and that in default he would be ejected. The pleas then avers that the plaintiff would neither comply with the terms of the notice nor remove from the land; and that the defendants by the order of the Collector, and in the exercise of the powers given to him by Act XVI of 1839, assisted him in ejecting the plaintiff ...

The Act referred to authorises the Collector, by section 3, to eject persons in occupation of land otherwise than under a grant or title from the Government ... But the last section of the Act excepts from its provisions "such cultivators and resident tenants of Malacca as hold their lands by prescription, subject only to a payment of one-tenth part of the produce thereof, whether such payment be made in kind or in money".

The trespass was clearly proved; indeed, it was in substance admitted ... We had no Statute of Limitations in this country relating to land until 1859, and if "prescription" were to be understood as referring to a title to land acquired by long occupation, the section in question would find little or no application here, because the title acquired by the cultivators and tenants in Malacca does not depend on any statute or law of limitations. But there is another sense in which the term may have been used, namely, in the sense of "custom", and in this sense it would make the section so widely and justly applicable to the circumstances of this Settlement that it appears to me beyond doubt that it is in this sense that the Legislature used it.

"Prescription", properly so-called, is personal; it is the title acquired by long usage by a particular person and his ancestors ... A "custom" is also established by long usage, but unlike prescription, it is "local" and not personal; when once established, it becomes the law of the place where it prevails, to the exclusion of the ordinary law ... I think it plain, from the history of the land tenure of Malacca that it was

in the sense of "custom" that the term "prescription" was used in the Act of 1839.

It is well known that by the old Malay law or custom of Malacca, while the Sovereign was the owner of the soil, every man had nevertheless the right to clear and occupy all forest and wasteland, subject to the payment, to the Sovereign, of one-tenth of the produce of the land so taken. The trees which he planted, the houses which he built, and the remaining nine-tenths of the produce, were his property, which he could sell, or mortgage, or hand down to his children. If he abandoned the paddy land or fruit trees for three years, or his gambier or pepper plantations for a year, his rights ceased, and all reverted to the Sovereign. If, without deserting the land, he left it uncultivated longer than was usual or necessary, he was liable to ejectment ...

It is clear that rights thus acquired are not prescriptive, in the technical senses of the term, but customary. They are acquired as soon as the land is occupied and reclaimed, and the title requires no lapse of time to perfect it.

It was contended ... that such a custom was unreasonable and therefore invalid; but if such an objection could now be raised after its long recognition, as I shall presently show, I should not hesitate to hold that the custom was not only reasonable, but very well suited to any country like this, where the population is thin and the uncleared land is superabundant and of no value. It must be for the advantage of the State to attract settlers to lands which are worthless as forest and swamp, and thus to increase at once the population and wealth of the country. A similar custom or law prevails in Sumatra ... (and) in Java ...

The Portuguese, while they held Malacca, and after them, the Dutch, left the Malay custom or *lex non scripta* in force. That it was in force when this Settlement was ceded to the Crown appears to be beyond dispute, and that the cession left the law unaltered is equally plain on general principles ...

Further, the custom has always been recognised by the Government; down to the present time, tenths are collected, both in kind and in money, from the holders of land acquired under the custom, and from 1838 to 1853 commutations of tenths into money payments were frequently made by deeds between the East India Company and the tenants ...

The Malacca Land Act of 1861 plainly refers to and recognizes the same customary tenure when it declares that "all cultivators and

resident tenants of lands ... who hold their title by prescription are, and shall be, subject to the payment of one-tenth of the produce thereof to the Government" either in kind or in money fixed in commutation ...

It is plain that the plaintiff was not liable to ejectment by the Collector for declining "to take out a proper title" for the land in his occupation under the Act of 1839. It was forest and uncultivated land when he cleared it in 1829, and he paid tenths to the Government from that time until 1853, when he was appointed Penghulu. This appointment he held until 1868, and during his tenure of it he was, as is usual, exempted from payment. He was deprived of the appointment in 1868, and he paid tenths again in 1869. He is therefore plainly one of the customary tenants protected by the 12th Section of the Act of 1839."

3

Application of Muslim Law in the Straits Settlements

As could be seen from the two Penang cases of *In the Goods of Abdullah* and *Fatimah* v. *Logan*, the former decided in 1835 and the latter in 1871, details of which appeared in Chapter 1 (*supra*), English common law was held to be applicable to wills made by Muslims. *In the Goods of Abdullah*, the court held that although according to Muslim law a Muslim can only devise one-third of his party to non-beneficiaries, the devise of the testator's entire property was nevertheless held valid because according to English law such a will was valid. In short, English law was held to have prevailed over Muslim law.

In *Fatimah* v. *Logan*, despite the valiant attempts by the Attorney-General to show that Muslim law should have been applied in Penang to determine the validity of a Muslim will, the court held that English law must be applied. The court justified its decision by stating that if the testator had wished Muslim law to govern his will, he should have expressed that desire clearly in his will.

In the case of *Maria Hertogh*, a 1951 decision from Singapore, the court held that the validity of a marriage between a Muslim man and Maria Hertogh, a Dutch girl who had been adopted by a Muslim family and brought up as a Muslim girl (named Natrah), must be determined by her *lex domicili*. By virtue of that law, the marriage was not valid and therefore Maria's parents still had custody over her. Never mind the fact that according to Muslim law, that marriage had been perfectly solemnised and valid. The decision in *Maria Hertogh* had led to civil riots in Singapore. Even as late as 1988, *Maria's* case still caught the imagination and held the attention of the Malaysian Muslims.

The last case is *Nafsiah* v. *Abdul Majid*, a comparatively recent

decision from post-independence Malacca. In this case the High Court had held, in the light of preliminary objections from the defendant, that it had jurisdiction to hear the plaintiff's claim for damages for breach of contract of marriage. On the merits of the case, the court consequently held that the plaintiff was entitled to damages.

Problems of overlapping jurisdictions between the High Court and the *Syariah* courts are now resolved due to the recent amendment of Article 121 of the Federal Constitution. If the facts of *Nafsiah* v. *Abdul Majid* were to occur again, a similar action by the plaintiff in the High Court might be successfully challenged in view of this recent constitutional amendment.

In The Goods of Abdullah
[1835] 2 Ky. Ec. 8

For the facts of the case and the decision of Malkin, R. see Chapter 1 (*supra*).

Malkin, R

"... It is the fault of native holders of property if any inconvenience results from the present decision ... any man ... who wishes his possessions to devolve according to the Mohamedan ... law has only to make his will to that effect, and the Court will be bound to ascertain that law and apply it for him ..."

Fatimah & Ors. v. Logan & Ors.
[1871] 1 Ky. 255

For the facts of the case and the decision of Hackett, J. see Chapter 1 (*Supra*).

Hackett, J

"... Either on the settlement of island, or if not then, by the Charter (of Justice) of 1807, the law of England was introduced into Penang and became the law of the land, and that all who settled here became subject to that law.

... In as much as English law has prevailed in Penang certainly ever

since the ... first Charter in 1807, and Mahomed Noordin was domiciled here at the time of making his Will and up to the time of his death, his capacity to make a Will must be decided not by Mohamedan law but by the *lex loci*, which here is the law of England ..."

In Re Maria Huberdina Hertogh
[1951] 17 MLJ 164

Under the law in the Colony, the validity of a marriage is governed by the lex domicilii of the parties. The court in the Colony has the jurisdiction to determine the validity of the marriage for the purpose of deciding the question of custody.

Maria Hertogh, born 1937, came into the custody of one Aminah binte Mohamed in 1942 and from that date she was brought up as a Muslim (named Natrah). During that time, Maria's father, a Dutch citizen, was a prisoner of war interned by the Japanese. After the war, the father commenced proceedings in the High Court in Singapore seeking Maria's custody, but the proceedings were held to be a nullity.

On August 1, 1950 Maria was married to one Mansor bin Adabi in Singapore. On August 24, 1950 the father resumed proceedings, this time asking for a declaration, *inter alia*, that the marriage was invalid that he, as Maria's father, be given custody of the child.

The court held, on the facts, that since Maria was under 16 years of age during the purported marriage, the marriage was not valid because according to her *lex domicilii* (which was the law of Holland), the consent of the Queen of Holland was a pre-condition for its validity. As the consent had not been obtained, the marriage was void and that being so custody was awarded to the father.

Foster Sutton, CJ

"Under English law, which is applicable in the Colony, the essential validity of a marriage is governed by the *lex domicilii* of the parties, which is the determining factor in deciding whether, apart from, the marriage is good. If by such *lex domicilii* it is void *ab initio*, not merely voidable, because prohibited, it will be equally void in the Colony. The marriage must be legal, according to the law of the domicile of both the contracting parties, not merely according to the law of the domicile of the husband, with this exception that, where the domicile of one of the parties is the Colony, and the marriage is celebrated here, the Courts

of the Colony will not regard the validity of that marriage as affected if the law of the domicile of the other party imposes an incapacity not recognised by the law of the Colony ...

It was not in dispute that the infant is a Dutch subject and that her country of domicile is that of her father, Holland; a girl under the age of 16 years, being a Dutch subject, is prohibited from marrying unless the Queen of Holland grants a dispensation lifting the prohibition, and that is the position whatever the girl's religious beliefs may be. There is no suggestion that such dispensation was ever asked for or received...

That being so, by the law of Holland the marriage was invalid, void *ab initio*. It follows, therefore, that the marriage is invalid under the law of the Colony unless the appellant could bring himself within the exception to the general rule I have ready mentioned, and to do this he had to satisfy the court that he was domiciled in the Colony, which he failed to do ... It would appear ... that the country of domicile of the appellant is the State of Kelantan in the Federation of Malaya.

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

[The Judge then referred to *Syed Ameer Ali on Mohamedan Law*, 5th edition at page 273, and concluded]. "It is clear from the passages in question that under Mohamedan law, as under English law, the capacity of each of the parties to a marriage is to be judged by the respective *lex domicilii*, and that the last passage quoted does not affect the position here, because the domicile of the infant in this case is Holland, and her capacity must be ascertained by reference to the law of that country."

Spenser-Wilkinson, J

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

The facts and history of the case, so far as they are relevant to this appeal, can be briefly stated. The infant, who was born in 1937, came, in 1942, into the custody and control of Aminah binte Mohamed in

circumstances which it is not necessary now to consider.

From that date she was brought up as a Mohamedan, the father being at the material time a prisoner of war in the hands of the Japanese. After the war some time elapsed before the parents of the infant were able to trace her; as soon as (their) whereabouts were discovered proceedings were commenced in the High Court in Singapore by the Consul-General for the Netherlands on behalf of the parents for the custody of the child. These proceedings ultimately proved abortive on account of lack of parties, the Court of Appeal holding, on the 28th July, 1950, that they were a nullity.

On the 1st August, 1950, a ceremony took place in Singapore purporting to be a marriage under Mohamedan law between Maria Hertogh and Inche Mansor Adabi. Thereupon the respondents, on August 24, 1950 commenced these proceedings by way of Originating Summons praying, inter alia, for a declaration that the marriage was invalid and for custody of the child. The application was by the parents, as plaintiffs, against Aminah binte Mohamed, Maria Hertogh (the infant) and Inche Mansor Adabi as defendants, under the provisions of the Guardianship of Infants Ordinance ...

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

On behalf of the respondents it was argued that the Court had jurisdiction under the combined effect of paragraphs (a) and (e) of section 11(1) of the Courts Ordinance, both to consider the issue and to make the declaration ...

[The Judge then referred to the relevant provisions of the Courts Ordinance and stated] ... I think, therefore, that the declaration should not have been asked for and should not have been made.

It does not follow, however, that the Court had no jurisdiction to decide the issue as to the validity of the marriage for the purpose of deciding the question of custody. It is clear that if the marriage between the infant in this case and the appellant was a valid one, then the husband would be entitled to the person of his wife and the Court could not make an order giving the custody of the infant to the parents. I am unable to see any reason, either on principle or on the authorities, why the Court, on an application by the parents for custody of their child, should not consider and decide the issue as to whether or not the alleged marriage is a valid one as a necessary preliminary to deciding whether

or not the parents are entitled to such custody. To hold otherwise would in my view seriously detract from the powers of the Court to protect infants; for on an application by a parent for the custody of his child it would only be necessary to set up an alleged marriage to deprive the Court of its undoubted jurisdiction to control the welfare of the infant. A marriage so set up might be fraudulent or even farcical, yet, if the contention of the appellant is correct, the Court is entirely precluded from considering whether or not the marriage is a real one ...

I think ... there is no doubt that by the law of Holland this infant was wholly incapacitated from contracting a valid marriage and therefore according to the law of her domicile the marriage is void *ab initio*. In addition to the requisite consent of the parents ... there is an absolute prohibition in Article 86 of the Netherlands Civil Code ... Although ... by the law of Holland the Queen may in certain circumstances grant a dispensation in regard to an infant under age to marry, in the absence of any such dispensation the prohibition is absolute and the marriage contracted by an infant under age is void ..."

Wilson J

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

Nafsiah* v. *Abdul Majid

[1969] 2 MLJ 174 and 175

The Courts of Judicature Act 1964 prevails over any other written law other than the Federal Constitution, and expressly bestows upon the High Court jurisdiction to entertain claims for damages arising out of breach of promise to marry, and such jurisdiction is not excluded merely because the parties are Muslims.

The plaintiff alleged that on August 19, 1963 the defendant had promised that he would marry her. This promise was subsequently reduced into writing. The plaintiff also alleged that she was seduced by the defendant and as a result she became pregnant and on July 29, 1964 a child was born.

In his statement of defence the defendant initially raised the question of jurisdiction of the High Court to hear the case. The defendant also denied ever having made any promise to marry her and ever having seduced her. He also denied that he was the father of the child. He also said that the written promise to marry the plaintiff was void *ab initio* because he was forced to sign the document under duress.

Sharma J

"At the start of these proceedings I ... asked counsel for the defendant to argue (the question of jurisdiction) ... as a preliminary point so that if he did succeed the suit could be disposed of under the provisions of O. 25 r. 3 of the Rules of the Supreme Court ... Reliance was placed ... on the provisions of section 40(3)(b) of the Administration of Muslim Law Enactment, 1959 of the State of Malacca, the relevant provisions of which read as follows:

> "The court of the *Kadhi Besar* shall in its civil jurisdiction hear and determine all actions and proceedings in which all the parties profess the Muslim religion and which relate to marriage."

It was urged upon me that both the plaintiff and the defendant were prosecuted under section 149(3) of the Administration of Muslim Law Enactment, 1959 before the *Kadhi Besar* in Malacca and convicted and the plaintiff's claim now before the court should have been brought in those proceedings before the *Kadhi Besar*'s court. A suggestion was also made that the matter is *res judicata*. I do not see any strength in that argument. The prosecution in the *Kadhi Besar*'s court was under section 149(3) of the Administration of Muslim Law Enactment, 1959 and no question of any issues relating to civil rights of the parties could arise in those proceedings.

I find no provision in the Administration of Muslim Law Enactment, 1959 that the *Kadhi Besar* has the exclusive jurisdiction in all matters relating to or arising out of the marriage of Muslims. The

Courts of Judicature Act, 1964 expressly gives jurisdiction to this court under section 24(a) and 25(1)(a) to try matters arising in the present suit which is nothing more than a suit for damages arising out of a breach of promise to marry.

Further section 109 of the Courts Ordinance, 1948 which has not been repealed by the Courts of Judicature Act, 1964 clearly stipulates that in the case of any conflict or any inconsistency between the provisions of the Courts Ordinance, 1948 and the provisions of any other written law in force at the commencement of the Courts Ordinance, 1948 the provisions of the Courts Ordinance, 1948 should prevail. Whilst it is true that the Administration of Muslim Law Enactment 1959 was not in force at the time of the coming into force of the Courts Ordinance, 1948 the High Court has undoubtedly jurisdiction to deal with all matters relating to the rights of the parties who come before it, and there is no provision in any law which I can find, and no law has been referred to me, which excludes the jurisdiction of this court.

I also find that section 4 of the Courts of Judicature Act, 1964 provides that the provisions of the said Act must prevail in the event of any inconsistency or conflict between that Act and the provisions of any other written law other than the Constitution in force at the commencement of the Courts of Judicature Act 1964. I consequently hold that this court has jurisdiction to try the present suit. [In the subsequent hearing the learned Judge continued] ... I find it very difficult ... to believe that the defendant was forced into signing the (document)... I consequently disbelieve the evidence of the defendant and find that he voluntarily and willingly executed (it)... The fact remains that a child was born to the plaintiff on July 29, 1964. I have not been asked to determine the paternity of the child. The suit is a simple suit for damages for breach of contract of marriage ...

... I find as fact that a promise was made by the defendant that he would marry the plaintiff ... I am therefore of the view that the defendant is guilty of a breach of promise to marry the plaintiff ...

... It was urged upon the court that because the plaintiff knew that the defendant was already married, even if the defendant had made any promise to marry the plaintiff, such a promise or agreement in such circumstances was void *ab initio*. This might very well be true of a society in which marriage is a monogamous institution. The parties in the present suit, however, are governed by Muslim law and the defendant is under his own personal law entitled to more than one wife and I consequently hold that such an argument does not apply to the conditions which prevail in

this country and more particularly to males professing the Muslim faith.

Having found that defendant had promised to marry the plaintiff and that the defendant had committed a breach of such promise I assess the damages at the sum of $1200."

SECTION TWO

The Malay States

4

Sovereignty of the Malay States

The following two leading cases clearly show the sovereign status of the Malay States, which were placed under the protection of the English Crown but were never "ceded" or "settled" like the Straits Settlements. In short, the Malay States were never colonies.

In *Duff Development* v. *The Government of Kelantan & Anor*, the English court held that it had no jurisdiction over the Government of Kelantan in view of the certificate from the Colonial Office that Kelantan was an independent State in the Malay Peninsula and that its Sultan was a sovereign monarch in his own right.

In the *Pahang Consolidated Co. Ltd.* v. *The State of Pahang*, the Privy Council held that the State of Pahang was a constituent member of the four Federated Malay States, and as such, no suit could be maintained against it.

Reference should also be made to the interesting case of *Mighell* v. *Sultan of Johore* [1894] 1 QB 149. In this case, the Court of Appeal held that the English courts have no jurisdiction over the Sultan, who was an independent foreign sovereign, unless he consented to submit to the jurisdiction of the English courts. Such a submission could not take place until the jurisdiction had been invoked. The fact that the defendant Sultan had been residing in England for some time, and had entered into a contract therein under an assumed name, as if a private individual, did not amount to a submission to the jurisdiction or rendered him liable to be sued for breach of such contract. The court further held that a certificate on the status of such a defendant from the Colonial Office was conclusive and binding on the court.

For further reading, see *Nairne* v. *Ahmed Tajuddin* (*Rajah of Quedah &*

Anor. (1861) 1 Ky. 145; Leic. 151, *Sultan of Johore* v. *Tungku Abubakar & Ors.* [1952] MLJ 115 PC).

Duff Development Ltd.* v. *Govt. of Kelantan & Anor
[1924] AC 797

Kelantan is a sovereign State and is therefore entitled to immunity from execution of its property unless there has been a waiver. An arbitrator is not a court, and therefore by appearing before an arbitrator the State cannot be deemed to have submitted itself to the jurisdiction of the court.

The appellant company acquired, pursuant to an agreement made in 1905, certain commercial rights and privileges in the State of Kelantan. This agreement was subsequently replaced by an indenture in 1915, under which the appellant was granted certain lands in the State. Disputes arose and by the terms of the indenture, the dispute was referred to an arbitrator. The State contested the action but nevertheless appeared during the arbitration proceedings. The question before the court was whether, having appeared before the arbitrator, the State could be deemed to have waived its immunity and had submitted itself to the jurisdiction of the court.

Viscount Finlay

"The appellants are a company formed for the purpose of working concessions in Kelantan. The respondents are described as "The Government of Kelantan". The appellants held certain rights and privileges in the State of Kelantan under an agreement made with them by the Raja of that State in 1905. This agreement was cancelled by an indenture made on July 15, 1915, between the Crown Agents for the Colonies, acting for and on behalf of the Government of Kelantan, and the appellant company, and by the same indenture grants were made of certain lands and rights in Kelantan to the company.

By the 21st clause of the indenture, all disputes relating to it were to be referred to a sole arbitrator, and this clause was to be deemed a submission to arbitration under the Arbitration Act of 1889 ....

The first question to be determined is as to the status of Kelantan – is the Sultan a sovereign prince? ... The letter of the Colonial Office ... (stated that) – "I am directed by Mr. Secretary Churchill to inform you in reply to your letter of July 18th, that Kelantan is an independent

State in the Malay Peninsula and that His Highness Ismail ... is the present sovereign ruler thereof."

This is an official answer by the Secretary of State on behalf of the Government.

The question put was as to the status of the ruler of Kelantan ... It is obvious that the Sultan of Kelantan is to a great extent in the hands of His Majesty's Government. We were asked to say that it is for the Court ... to decide whether these restrictions were such that the Sultan had ceased to be a sovereign. We have no power to enter into any such inquiry. The reply of the Colonial Office ... states that Kelantan is an independent State in the Malay Peninsula and that the Sultan is the sovereign ruler, that His Majesty's Government does not exercise or claim any rights of sovereignty or jurisdiction over Kelantan, and that the Sultan makes laws, dispenses justice through Courts and, generally speaking, exercises without question the usual attributes of sovereignty ...

It is true that by the agreement of October 22, 1910, the Sultan is bound not to have relations with any foreign power except through His Majesty the King, and to follow the advice given him by the advisers appointed by His Majesty in all matters of administration, other than those touching the Mohamedan religion and Malay custom. But it would be idle to contend that sovereignty is destroyed by the fact that a protecting Power has charge of foreign relations ...

It is beyond question that Kelantan as a sovereign State is entitled to immunity from execution against the property of the Sultan, unless there has been a waiver."

Lord Dunedin

"The only question to my mind is whether the Sultan has submitted to the jurisdiction by entering into the agreement to refer or by appearing in the reference ...

An arbitrator is not a Court, and therefore by appearing before the arbitrator he did not submit himself to the jurisdiction of the Courts ... True it is, that the Sultan contracted to allow the jurisdiction to be exercised against him, but he did so out of Court, and now he has changed his mind. He has broken his contract, but the Court has no jurisdiction to enforce any performance of it ..."

The Pahang Consolidated Co. Ltd. v. *The State of Pahang*
[1933] MLJ 247

Pahang is one of the sovereign Federated Malay States and as such is immune from any suit or proceedings against it.

The appellants were granted a lease of a large tin mine in Pahang in 1898. The lease was for a term of 77 years, with full mining rights in respect of tin and other minerals obtainable from the area covered by the lease. A law was passed in 1931 which adversely affected these rights. The appellants contended that the law did not apply to them. Alternatively, if the law were to apply to them, the appellants should be able to recover damages from the State of Pahang.

The trial court and the Court of Appeal disallowed the claim. On further appeal by the appellants, the Privy Council held that the suit against the respondents could not be maintained because Pahang was one of the sovereign Federated Malay States.

Lord Tomlin

"The appellants are a mining company incorporated in England under the English Companies Acts. As assigns of the original lessees who were the Pahang Corporation the appellants are entitled to the benefit of a lease of a large tin mine in Pahang granted on December 8, 1898, by the British Resident in Pahang on behalf of His Highness the Sultan of Pahang. The respondent is the State of Pahang which is one of the four Federated Malay States.

The appellants seek ... to have it declared that a certain enactment of the Federated Malay States passed in the spring of 1931, limiting the production and export of tin in and from the Federated Malay States, has no application to their mine, or, if it has, to recover damages from the State on the ground that the State in concurring in passing the enactment in question committed a breach of the lessors' covenants in the lease.

The appellants have failed in the Court of first instance and in the Court of Appeal, though in the Court of Appeal one judge dissented in part from his colleagues and would have given the appellants some relief. The appellants now appeal to His Majesty in Council.

The constitutional position in Pahang so far as it is material to the matters under consideration in this appeal may be summarised thus:

(1) The Sultan of Pahang is an absolute ruler in whom resides

all legislative and executive power, subject only to the limitations which he has from time to time imposed upon himself in the circumstances hereinafter mentioned.

(2) In 1888 he agreed to administer his country with the advice of a British Resident.

(3) In 1889 he appointed and there has since existed a State Council, but this is only an advisory body, and though since 1889 laws for the State have been enacted by the Sultan in Council, the legislative power has remained in the Sultan acting with the advice of the British Resident.

(4) In 1895 the Federation of the Malay States was first formed by Treaty between the States, but that Treaty did not curtail any of the powers of this Ruler of the State of Pahang within his State ...

The lease of 1898, granted by the British Resident on behalf of the Sultan of Pahang, contained in substance the following provisions:

(1) It provided for the demise to the Pahang Corporation, their successors and assigns, for a term of 77 years from September 1, 1891 of full mining rights in the area covered by the Lease, together with full and free liberty for the Corporation to win work and obtain from the area all the tin and other minerals therein contained and for the payment to the Treasurer of Pahang of royalties upon tin and minerals so contained and exported from the State.

(2) The Corporation, its successors and assigns, were to be exempted from payment of all duties, taxes, tolls now or hereafter to become payable in the State of Pahang with certain named exceptions.

(3) The Corporation, its successors and assigns, were to be subject to the Mining Regulations and laws from time to time in force in the State of Pahang in all matters not otherwise provided by the Lease.

(4) The Corporation performing its covenants was to have quiet enjoyment of the premises demised during the term without any lawful interruption from, or by the Sultan, or any person lawfully claiming under him.

(5) The Corporation was to be entitled to assign the subject

> matter of the Lease to a Company formed or to be formed in Great Britain ... subject to the approval of the Secretary of State.

On the 27th February, 1931 an international agreement was entered into between the tin producing countries of the world, including the Federated Malay States, for limiting the production and export of tin from the countries of contracting parties.

In order to give effect to the obligations of the Federated Malay States under this agreement the ordinance now complained of was passed by the Federal Council, was signed by the Rulers of the Federated Malay States, including the Sultan of Pahang and became operative on the 26th April, 1931.

Before, however, the enactment came into force, the appellants ... launched their action a *quia timet* form, asking in effect to have it declared that they could not be affected by legislation limiting output and export or either of them and that if they so affected the State would be liable in damages. The plaint was amended after the enactment became operative in order to deal with the situation thereby created ...

The appellants' case is put in two ways. First, it is said that the enactment and the rules thereunder do not apply to the appellants' mine at all and secondly, it is said that if the enactment and rules do apply there has been a breach of the lessors' obligations for which damages can be recovered from the State ....

Their Lordships are satisfied that in the present case there is ample indication on the fact of the enactment of an intention that the rules to be made under it should be wide enough to apply to every case, indeed, it was essential to the very purpose of the enactment that this should be so. In the circumstances their Lordships are of the opinion that the scope of the enactment is such that the rules under it are *intra vires* and wide enough to cover the appellants.

(With regard to the) second ground of appeal ... it is admitted that an action for breach of covenant can be maintained against the respondent, but it is said by the respondent that the action which the appellants contemplate is expressly prohibited by section 5 of the enactment.

In their Lordships' opinion such an action would, within the meaning of section 5, be a suit against one of the Federated Malay States in respect of a matter or thing arising under or resulting from the operation of the Enactment or the Rules made thereunder and could not therefore be maintained."

5

Application of Malay Custom in the Malay States

The following two cases, selected from a large body of case-law (which is still growing), are sufficient to show the potency and relevance of Malay custom as a source of law in Malaysia.

The first case, *Jainah* v. *Mansor & Anor*, dealt with one aspect of the Malay custom prevalent in Pahang – the custom relating to adoption of children. In this case the court took judicial notice of such custom as forming part of the personal laws of the Malays in that State.

The second case, *Roberts* v. *Ummi Kalthom*, dealt with the Malay custom relating to *harta sepencarian* – the distribution of matrimonial properties upon divorce. The importance of this case could not be emphasised enough. Close attention should be given to the judgment of Raja Azlan Shah J. (as he then was) which had been considered as a watershed in the development of the law on *harta sepencarian* as far as the High Court is concerned.

For further reading, the following publications are recommended:

1. Hooker, M.B. 1967. *A Source Book of Adat, Chinese Law and the History of Common Law in the Malayan Peninsula.* Malaya Law Review Monograph No. 1.
2. Hooker, M.B. 1970. *Readings in Malay Adat Law.* Singapore.
3. Rigby, J. 1929. "The Ninety-nine Laws of Perak" in *Papers on Malaysia Subjects*, Law Part II.
4. Taylor, E.N. 1929. "The Customary Law of Rembau" in *JMBRAS 15*, Part I, 1 – 289.
5. Taylor, E.N. 1937. "Malay Family Law" in *JMBRAS 15*, Part I, 1 – 78.

6. Salleh Buang 1988. *New Frontiers in Harta Sepencarian*. Kuala Lumpur.

Jainah v. Mansor & Anor
(1915) 17 MLJ 62

The personal law of the Malays is composite; it is ancient Malay custom modified by Islamic law. According to the custom of Pahang Malays, adoption exists as part of their personal law.

The plaintiff claimed custody of a girl of 12 years old on the ground of adoption. The child was the infant daughter of the plaintiff's brother-in-law. After the adoptive father (the plaintiff's husband) died, the child's natural father took her away by force from the adoptive mother. Since then, the child was brought up by his paternal grandfather, not by his own natural father.

The question before the court was who had a better right to the custody of the child. The court found that there was a practice prevalent amongst the Pahang Malays relating to adoption. The court took judicial notice of such custom as forming part of the personal law of the Malays in that State. In the event, the court held that the custody of the child be given to the adoptive mother.

Taylor J

"In this action a Malay woman claimed the custody of a girl 12 years old on the ground of adoption. The plaintiff and her husband, whose name was Jalil, adopted the infant daughter of Jalil's brother and brought her up from birth to the age of 11 years. The adoptive father died and shortly afterwards the natural father took the child, by force and stratagem, away from the adoptive mother. The child thereafter lived, not in her original home but in her paternal grandfather's house ...

The main questions to be decided were whether what happened amounted to a legal adoption and, if so, what is the position where the adoptive father dies and the blood relations compete with the adoptive mother for the custody of the child.

The *Ketua Kampung* gave evidence that adoption is a recognised institution or practice among Pahang Malays and that the parties are usually related but may be unrelated ...

The grandfather of the child ... agreed that the child had been

adopted but he contended that the adoption was by Jalil alone, not by Jalil and his wife jointly ... Further, he contended that adoption is revocable by the "guardian" if the child is in moral danger and that according to Mohamedan law he, the grandfather, was the guardian of the child ...

It was clear that the grandfather was confusing Malay custom with Mohamedan law and this directly raised the question whether evidence of this kind is admissible.

In *Laton* v. *Ramah* (1927) 6 FMSLR 128, the majority of the Court of Appeal held that such evidence is not admissible. They said that a question arising on the death of a husband was a question of "the law of the land" which must be propounded by the Court; witnesses must state facts, not law; if, however, it were a matter of foreign law, which is treated as fact, it could only be proved as such, either by an expert witness or by authoritative publications. In effect they held that all laws must be either the law of this country or the law of a particular foreign country.

Both these propositions are fallacious; the Mohamedan law is not foreign law in that sense; it varies from country to country; also, in many instances, it varies in some respects between different communities in the same country; the Judges shut their eyes to the fact that Malaya is one of those countries which apply different rules of law to different classes of subjects according to their races and creeds ... Thus, the only "law of the land" is that the personal law depends upon the community; to determine the actual rule is a matter of evidence.

Although the judgment in *Laton's* case was reported more than 25 years ago I cannot find any case where it was followed, or even cited. There are, however, several later cases where it was not followed. For instance, in *Woon Ngee Yew* v. *Ng Yoon Thai* (1940) FMSLR 128, the Court of Appeal treated Chinese family law as a matter of evidence. In principle, there is no possible distinction ... between Chinese customary law and Mohamedan or Hindu law; all are of foreign origin and each forms part of the personal law of a local community.

What is sometimes called "pure Mohamedan law" does not recognise adoption in the sense of this case but the relevant law of these States is not pure Mohamedan law; the treaties call "Mohamedan law as varied by Malay custom"; historically, that is put the wrong way round; the personal law of the peninsular Malays is composite; it is ancient Malay custom modified or supplemented by subsequent

adoption of part of the Mohamedan law; the extent to which the Mohamedan law has superseded the customary law varies from place to place but nowhere has the customary law wholly disappeared ...

For all these reasons I am clearly of the opinion that the decision of the Court of Appeal in *Laton* v. *Ramah* is not a valid authority. It is in direct conflict with an earlier decision of the Privy Council and also with later decisions of the same Court. It stands alone; it has often been disregarded, consciously or unconsciously, and it cannot be followed.

The evidence being admissible, and part of it having been accepted, I find that the practice of adoption exists among the Malays of central Pahang and I recognise it as part of their personal law ... Where ... as in this case, a young infant is adopted by a married couple the adoption must, in the nature of things, be by the couple jointly; it is not revoked by death of the adoptive father, if the adoptive mother survives.

Whether it is revocable in any circumstances is another open question. I only decide here that if it is revocable, the right to revoke is vested in the natural parents; the child's grandfather cannot intervene to revoke it over their heads ..."

Roberts @ Kamarulzaman v. Ummi Kalthom
[1963] 1 MLJ 163

Property acquired by the joint resources of the parties during their marriage is "harta sepencarian". A Muslim divorced husband can claim a share of immovable property as "harta sepencarian" and the fact that the property was registered in the name of the wife was no bar to his claim as the provisions of the Land Code with regard to indefeasibility of title of registered land did not affect matters relating to "harta sepencarian".

The plaintiff, who had divorced the defendant, claimed a half share of a house at Setapak, Kuala Lumpur, which had been purchased during their marriage. The plaintiff had contributed $40 000 whilst the defendant had contributed $10 000 towards the purchase price. The property was registered in the name of the defendant. The defendant contended that the plaintiff had made a gift of the property to her in accordance with Muslim law.

Raja Azlan Shah J

"The question for determination which in the precise form in which it comes before me can be formulated as follows. It is whether a Muslim divorced husband can claim to a half share as *harta sepencarian* of immovable property jointly acquired by both spouses during the coverture of their marriage but registered in the name of the wife.

The latest exposition of the law on *harta sepencarian* was judicially considered by Briggs J. in 1950 in *Hujah Lijah binti Jamal* v. *Fatimah binti Mat Diah* [1950] MLJ 63. He defined it as "acquired property during the subsistence of their marriage of a husband and wife out of their resources or by their joint efforts". After stating that "on full consideration of those cases and of the views of the learned author" in the valuable treatise of *Taylor* on "Malay Family Law" printed in Part I of Volume XV of the *Journal of the Malayan Branch, Royal Asiatic Society* (May 1937) the trial judge said at page 64:

> "I think there can be doubt that the rules governing *harta sepencarian* are not a part of Islamic law proper, but a matter of Malay *adat*."

And in a later passage:

> "In view of the clear recognition of *harta sepencarian* both in various States and by the courts, I am prepared to hold that the rules governing it now form part of the general law of the State ..."

In Perak the question of *harta sepencarian* was set at rest by a Perak State Council Minute dated the 18th January, 1907, which declared and ordered to be recorded:

> "that the custom of the Malays of Perak in the matter of dividing up property after divorce, when such property after divorce, when such property has been acquired by the parties or one of them during marriage, is to adopt the proportion of two shares to the man and one share to the woman and that gifts between married persons are irrevocable either or after divorce."

Kadhis are called in as advisers on principle where claims to such property are dealt with by the court or Collectors of Land Revenue in the case of land registered in the Mukim Registers ...

In Kedah it was held that on the dissolution of a Malay marriage the property acquired by both husband and wife is divided between them but there is no established rule or principle to guide the court in

deciding their respective share: *Wan Nah* v. *Jasin* (Kedah Civil Appeal No. 37 of 1922)...

In Kelantan in *Hujah Lijah bte Jamal* v. *Fatimah binti Mat Diah*, *supra* a widow claimed as *harta sepencarian* one-half share of certain land registered in the Mukim register in the name of her deceased husband. It was proved that prior to her marriage she owned certain land. Her husband owned no land. Both spouses worked her land and from the income of the land they bought more land and again it was worked by both of them. Briggs J. awarded the widow a half-share of the land as *harta sepencarian*.

In Pahang, *harta sepencarian* is fixed by Pahang custom. A divorced wife can claim *harta sepencarian* but there is no fixed rule as to her share. But it would appear that she can get either equal or unequal share pursuant to an agreement between the parties or confirming a gift or by judgment of the *Kadhi*.

In Selangor there is an absence of reported cases as to the share of a divorced wife in *harta sepencarian*. In *Laton* v. *Ramah* [1927] 6 FMSLR 116, on the evidence of *Kadhis* the trial judge allowed a claim by a widow to a share in her deceased husband's estate at the time of his death, but the Court of Appeal held that the evidence of the *Kadhis* was not admissible ... A re-trial was ordered, but eventually the parties arrived at a settlement and a consent order was made ...

A principle gleaned from these cases established that *harta sepencarian* is a matter of Malay adat and is applicable only to the case of a divorced spouse who claims against the other spouse during his or her lifetime; this rule of law is local law which the court must take judicial notice and it is the duty of court to propound it: see *Ramah* v. *Laton*, *supra*. In the face of the compelling authorities above, I am of the view that once it is clearly established that property was acquired subsequent to the marriage out of their joint resources or by their joint efforts a presumption arises that it is *harta sepencarian*. The presumption is rebuttable such as by evidence that the property was acquired by the sole efforts or resources of the husband or by the evidence that it was a gift made to the wife. With regard to the division of the *harta sepencarian* I can safely say that generally throughout the States of Malaya a divorced spouse is entitled to a share. The share of a Perak woman is fixed at one-third following the State Council Minute of 1907. In other States the general trend is a half share depending on the particular circumstances ..."

6

Position of Muslim Law in the Malay States

The following 13 cases aptly portray the "pendulum syndrome" in the application or non-application (as the case may be) of Muslim law *to Muslims* in the country. In *Ainan* v. *Syed Abu Bakar*, for example, Aitken J. held that in determining the status of legitimacy (or otherwise) of the child, the court must apply section 112 of the Evidence Enactment. In doing so, the court held that the child was legitimate, notwithstanding the fact that if Muslim law were to be applied (since all the parties involved were Muslims) the child would have been declared illegitimate as he was born approximately three months after the date of his parents' marriage.

With regard to *Public Prosecutor* v. *White*, where a Muslim convert who married a Muslim girl after his conversion (whilst his first wife by a Christian marriage was still alive) was convicted of bigamy under the Penal Code, if similar cases were to occur today, the decision would probably be different. In the light of the subsequent decision in *Attorney-General* v. *Reid* (a Privy Council decision from Sri Lanka), the local court might conceivably arrive at a different decision.

In *Martin* v. *Umi Kelsom*, a British soldier had married a Muslim woman in accordance with the Christian Marriage Enactment. Several years later, after the parties had separated, the husband (petitioner) had applied for a declaration that his marriage to the respondent was void on the ground that at the time of the marriage he was a Christian whilst the respondent was a Muslim and according to Muslim law (the respondent's personal law) such a marriage would be void. The court held, applying the petitioner's law of domicile (the law of England), that

the marriage was valid. *Martin's* case is therefore important for its ouster of Muslim law.

Fortunately, with increased knowledge in Muslim law and with the recent amendments to Article 121 of the Federal Constitution (giving the *Syariah* courts the exclusive jurisdiction over Muslim family law matters), if cases similar to *Martin* were to occur, the case would be disposed of differently.

The single most important case in this chapter is clearly the last, *Re Dato Bentara Luar*. This case is worth reading in full, although the portion extracted here is already quite extensive. In this case, the Federal Court held that the law of *wakaf* in Johore (before the Privy Council became part of its judicial structure) was Muslim law. Salleh Abas FJ (as he then was) held that as *basic law* of Johore at the material time was Islamic law and the rule against perpetuities was a "concept entirely foreign to Islamic law", it followed that the validity of the *wakaf* "must be governed by Islamic law as understood and interpreted by Islamic scholars."

Koh Cheng Seah Administrator of the Estate of Tan Hiok Nee, Decd. v. Syed Hassan & Anor

[1930] 1 MC 180

The English common law rule against perpetuities was not part of the law of the State of Johore, and accordingly the deed of wakaf *was not invalid as being against public policy.*

On April 20, 1890, the deceased executed a document by which he purported to create a private *wakaf* in respect of certain lands under the terms of which the first defendant was appointed manager during his lifetime. The deceased passed away on May 21, 1902 and a grant of letters of administration with the will annexed was made to the plaintiff and the second defendant on January 25, 1904. In an action to recover possession of the lands, the plaintiff alleged that the *wakaf* was void as being against public policy.

The court held that the English common law rule against perpetuities was not part of the law of the State of Johore and accordingly the *wakaf* was valid.

Thorne, J

"The plaintiff's case is that on the 20th day of April, 1890, the deceased signed a document by which he purported to create a private *wakaf* in respect of lands enumerated in paragraph 3 of the plaint under the terms of which the first defendant was appointed manager during his lifetime. The effect of this deed, the plaintiff alleged, was that the lands could never be sold or transferred, and that the first defendant entered into possession of the lands with the permission of the testator. For these reasons the plaintiff alleged that the *wakaf* was against public policy, and therefore void ....

Mr. Johannes for the plaintiff ... argued that the *wakaf* was invalid by reason of its being against public policy, there being a restraint upon alienation. He referred to section 4 of the Wakaf Prohibition Enactment of 1911 and urged that this provision applied only to a valid *wakaf*. He contended that this *wakaf* was void *ab initio*, and should be so declared. The plaintiff called no evidence.

With regard to the submission that the *wakaf* was void as being against public policy, Mr. Johannes quoted two cases, the first that of *Yeap Cheah Neo* v. *Ong Cheng Neo*. That case decided that the rule against perpetuities, which prevails in England and as such became part of the law of the Colony of the Straits Settlements, is founded upon the public policy of England, and prevented the creation in the Colony of a *wakaf*.

He also relied on the case of *Renaud* v. *Tourangeau*, in which case it was held that a restriction upon alienation was invalid as being contrary to the French Law which then prevailed in Lower Canada.

The principle to be extracted as common to both these cases would appear to be that a plaintiff in such a case must establish affirmatively that a restraint upon alienation is invalid by the *lex loci* as being against the public policy declared by law. I invited counsel to show me what was the law in the State of Johore at the material date, but he was unable to assist me in this matter ...

The question of what is the Mohamedan law of this State cannot be determined by the citing of Indian cases, since we know that the Mohamedan law as declared in different countries which profess the Mohamedan faith varies considerably, and that which may be established as a sound expression of the law in India is not necessarily good law in this State.

No authority as to the law in the State was quoted to me, nor was I

invited to act under the provisions of the Mohamedan Law Determination Enactment of 1919.

The document itself is signed by the Judge, Johore, who, by his certificate thereon, declares that the *wakaf* is legal and binding. It seems to me that this may well be the case, since a bequest for the superstitious uses which would be invalid in England might well be regarded as highly meritorious and be supported in Italy.

The Wakaf Prohibition Enactment of 1911 by section 4 declares that:

> "If at any time prior to the commencement of this Enactment any land should have been declared to be *tanah wakaf* other than for some public or charitable purpose, the ownership thereof shall, as from the commencement of this Enactment, be deemed to vest exclusively in the person or persons beneficially entitled to the rents and profits thereof."

It is to be observed that this Enactment does not declare such a *wakaf* to be void, but confirms the *wakaf* and bestows the beneficial interest upon the persons entitled to the rents and profits, which would appear to suggest that the legislature did not regard such *wakaf* as invalid.

The deceased divested himself of all his estate and interest in these lands by virtue of the deed of *wakaf*, and I much doubt whether he or those claiming under him have any *locus standi* to set aside that document. The claim of the plaintiff is in derogation of the grant of the deceased through whom he claims, and I mention these matters as being some of the difficulties which the plaintiff must supervene before he can establish his case ..."

Ramah binti Taat* v. *Laton binti Malim Sutan

(1927) 6 FMSLR 128

Muslim law is not foreign law but local law and the law of the land. The Court must take judicial notice of it and must propound the law.

In this case, the issue before the court was a claim by the respondent for a share of the property of her deceased husband as *harta syarikat*. At the trial, the *Kadhi* of Hulu Langat and the Chief *Kadhi* of Selangor were called to give their expert opinions on Muslim law. On appeal, Thorne J (delivering the majority judgment of the court) held that Muslim law is not foreign law; it is the law of the land,

and as such the court must take judicial notice of it. It must propound the law itself and it is not competent for the court to allow evidence to be led as to what is the local law.

In a separate dissenting judgment, Farrer-Manby J held that the trial court was competent to take evidence of Muslim law. He disagreed that the court should abandon their established practice for many years of receiving evidence on Muslim law.

Thorne J

"The appellant in this case is one of the widows and administratrix of the estate and effects of one Mat Dawi bin Suroh, deceased. The respondent is another widow who sued the appellant as administratrix for a declaration that all the movable and immovable property of the deceased at the time of his death was *harta syarikat* according to the Shafii school of Mohamedan Law, and that the respondent was entitled to a one half share in that property. The learned Chief Justice gave judgment for the respondent declaring that all the immovable property of the deceased at the time of his death was *harta syarikat* ... From this judgment the appellant has appealed. The main issue in this case was whether the principle of Mohamedan Law, commonly called "*harta syarikat*" had application in this case and if so, whether in the circumstances the respondent was entitled to the declaration she sought ...

At the trial, witnesses were called to prove the Mohamedan Law, and in particular, the *Kadhi* of Hulu Langat ... and the Chief *Kadhi* of Selangor ... Neither of these witnesses appears to have expressed any confident personal opinion as to the Mohamedan Law, but each quoted from publications upon Mohamedan Law, and stated what in their view was the law on the matter as gleaned by them from these publications.

The question in debate was not, in the view which I take, a question of foreign law at all, but the question was ... what were the rights of the plaintiff according to the law of this land in the estate of her deceased husband.

The local law is a matter of which the Court must take judicial notice. The Court must propound the law, and it is not competent for the Court to allow evidence to be led as to what is the local law ... For these reasons the books and the oral testimony of the witnesses who quoted from those books were wrongfully admitted ...

The matter has not been sufficiently argued before me either in this

or any other case for me to express any very decided opinion on this subject, but I have always understood that the rule of Mohamedan Law, commonly spoken of as *harta syarikat*, but which I believe is more properly called *harta sepencarian*, is a rule of law applicable only to the case of divorced wife who claims against her husband during his lifetime, and more strictly at the time of divorce for labour undertaken by her during marriage, and that if this claim is not made during the lifetime of the husband her rights are gone. I have always understood that the claim of a Mohamedan widow to share in the estate of her deceased husband is confined to her distributive share in his estate called *pusaka* ...

With the greatest respect which I entertain for the opinion of the learned trial Judge, I think the appeal must be allowed and his judgment reversed. The question then arises as to what is to be done ...

It seems to me the only course will be to send the case back for retrial and suggest to the learned trial Judge that the better plan will be for him to refer the case to a special referee under the provisions of section 14 of the Arbitration Enactment ...

It is perhaps not out of place for me to remark that the time has now arrived when the attention of the executive, might well be drawn to the existing state of the law as affecting Mohamedans in the Federated Malay States. Mohamedan Law is varied in the different States of the Federation, and in some instances in different districts of the same State, by local customs having the force of law, and it would not be practicable therefore to pass a Federal Enactment dealing with all the States of the Federation.

It seems to me, however, that State Enactments might well be passed dealing with the questions of the rights of the parties upon divorce, and upon succession to the estate of deceased intestates .... Although I have held that the Supreme Court has jurisdiction to deal with such cases as the present, the further question emerges as to whether or not the Supreme Court is the proper tribunal for dealing with these cases and whether it would not be more consonant with the views of those professing the Mohamedan religion that His Highness the Sultan in Council in each State should establish special courts for dealing with these cases with an appeal to His Highness the Sultan in Council in each case; of course the jurisdiction of the Supreme Court and the Court of Appeal would properly be excluded by such Enactment."

Farrer-Manby, J (dissenting)

"In this suit the question was as to whether the principle of *harta syarikat* should be enforced in this State ...

In the Court of Appeal the preliminary point was taken ... that ... evidence was wrongly admitted since the Courts ought to instruct themselves without evidence of the law within their jurisdiction ...

With great respect I wish to record my opinion at this stage on this point. I am not at the moment in agreement with the majority of the Court. I think the Courts are competent to take evidence on Mohamedan Law as well as on matters of custom by virtue at least of section 57 of the Evidence Enactment ... I do not at present think that it has been made out that these Courts should abandon their established practice for many years of receiving evidence on Mohamedan Law not only in disputed cases but also almost weekly in the administration of the estates of Mohamedans, where it is the practice for the *Kadhis* to certify the proper shares of the beneficiaries in the circumstances of each case."

Re Ismail bin Rentah, Decd.
Haji Hussain bin Singah* v. *Liah binti Lerang & 3 Ors.
[1940] 9 MLJ 98

Islamic law is part of the common law of the land, as far as the Malays are concerned.

A member of a co-operative society nominated his daughter to receive his share or interest in the society in the event of his death. He died, leaving behind certain beneficiaries who are entitled to a share in his estate according to Islamic law. The issue before the court is whether the nomination conferred a right on the nominee to take the aforesaid share or interest in the society beneficially.

Raja Musa, Ag. J

"The deceased died on 15 July 1937. ... At the time of his death the following were the beneficiaries entitled share in his estate according to the Mohamedan Law:

1. Liah binti Lerang (mother of the deceased)
2. ...

3. ...
4. ...
5. Maznah binti Ismail (the nominee)
6. ...

The Deputy Registrar ... ordered that (the estate) be distributed among all the beneficiaries according to Mohamedan Law. The mother now comes before me on appeal.

The sole contest in this case is whether the money with the Society belonging to the deceased should go to the nominee beneficially or to all the beneficiaries under the Mohamedan Law, and the answer to that seems to me to depend solely upon the effect of section 22 of the Co-operative Societies Enactment ...

The question in this case is whether the sum of $271.58 standing to the credit of the deceased in the Society forms part of his estate ... I hold that the sum ... forms part of the estate and effects of the deceased and should be distributed amongst his beneficiaries ....

Mohamedan Law, so far as the Malays are concerned ... is, without doubt, part of the common law of the land. By Mohamedan Law, so far as my research goes:

1. A man may make a gift *inter vivos* of a definite ascertainable thing;
2. A gift *mortis causa* is treated as a disposition by will;
3. A man may not will away more than one-third of his property. A bequest in excess of this limit is bad to that extent, unless the heirs consent. A bequest to an heir to wholly inoperative, unless the heirs consent thereto.

Looking at (the letter of nomination) from the purely Mohamedan Law point of view I have no hesitation in saying that it must be governed by the law of wills. As a will, the bequest is bad because it is made to an heir and the other heirs definitely do not consent thereto.

I am of the opinion that this document cannot be treated as a gift *inter vivos* because there was never any transfer to the donee. At most, it is a gift *mortis causa* and such a gift ... is governed by the law of wills.

In the result therefore under the Mohamedan Law this sum of money falls to be divided among all the beneficiaries.

That is the common law of the land ..."

In re Timah binti Abdullah, Decd.
The Official Administrator, FMS* v. *Magari Mohihiko & 3 Ors.
[1941] 10 MLJ 51

Islamic law is part of the law in force in Pahang and is the law of the land as regards Muslims. Under Islamic law, a non-Muslim is excluded from and cannot succeed to the estate of a Muslim.

The deceased, a Japanese woman, had embraced Islam and then married a Malay. The deceased's husband, who died before her, was at the time of his death domiciled in Pahang. The deceased died on 23 April 1937 in Pahang and the question was whether or not her next of kin (who were not Muslims) could inherit her estate.

Gordon-Smith, J

"The 1st and 2nd Defendants are respectively the mother and brother of the deceased. The estate of the deceased consists of both movable and immovable property .... It is quite clear from the facts that the deceased husband was, at the time of his death, domiciled in the State of Pahang and that similarly, the deceased was also domiciled.

As the deceased's immovable property is situated in Pahang it is clear also that the law of Pahang is applicable ...

Mohamedan Law is part of the law in force in Pahang and is not foreign law to be proved by expert evidence but is law of which the court must take judicial notice and it is for the Court to declare what the law is. (See *Ramah binti Ta'at* v. *Laton binti Malim Sutan*, 6 FMSLR page 128) ....

The Shafii school or interpretation of Mohamedan Law is applicable in Malaya and both according to Tyabji's *Principles of Mohamedan Law* (2nd Edition) page 834 paragraph 4 and Howard's Translation of the *Minhaj et Talibin*, paragraph 9 page 253, an infidel is excluded from and cannot succeed to the estate of a Mohamedan ....

It is ... argued that the court should interpret Mohamedan Law as it is in Malaya and not according to the strict theoretical Mohamedan Law as it is to be found in text books ...

There has been no evidence whatsoever before me ... showing any local custom at all which would amount to a variation of Mohamedan Law either in this or in other respect. In the absence of such evidence ... and in the absence of any specific local legislation to such effect, the

only grounds on which this court could ... hold that any specific part of Mohamedan Law was not or could not be in force here is that such would be contrary to the principles of natural justice.

Mohamedan Law as to exclusion of inheritance by infidels has been in force for centuries in various parts of the world and I can see nothing in this particular exclusion which is contrary to natural justice. The fact that both in the Colony and in India legislation was necessary to abrogate the Mohamedan Law in this respect only strengthens my view that it is not for this court to attempt such abrogation ..."

Ainan bin Mahmud* v. *Syed Abu Bakar & Ors.
[1939] MLJ Rep. 163

The Evidence Enactment is a statute of general application and all the inhabitants of the Federated Malay States are subjects to its provisions, whatever may be their race or religion.

The main issue before the court was what law should be applied to determine the legitimacy of Mat Shah, who was born approximately three months after the date of his parents' marriage. The court held, applying section 112 of the Evidence Enactment, that Mat Shah was a legitimate son of Mahmud.

Aitken J.

"It is clear that one issue of paramount importance is raised, and that all the other questions in issue are merely subsidiary thereto. That paramount issue may be settled thus: is Mat Shah the natural and lawful son of Mahmud; and before I proceed to consider and discuss the very considerable amount of evidence which has been adduced to prove or disprove Mat Shah's paternity, I must endeavour to ascertain to what extent such an issue is affected by the law of the land.

All the parties concerned in this case are Mohamedans, and if our Enactments were silent on the point, I should have no hesitation in holding that the question of Mat Shah's legitimacy must be dealt with and decided in accordance with Mohamedan Law. We have, however, a section of the Evidence Enactment which provides that the birth of a child during a valid marriage or within 280 days after its dissolution, is conclusive proof of legitimacy, unless it can be shown that "the parties

to the marriage had no access to each other at any time when the child could have begotten".

It was suggested on behalf of the plaintiff that this section 112 of the Evidence Enactment does not apply to the Mohamedan inhabitants of the Federated Malay States ... I hold ... that our Evidence Enactment is a statute of general application, and that all the inhabitants of the Federated Malay States are subject to its provisions, whatever may be their race or religion. As a matter of principle I do not see how I could come to any other conclusion ...

It may be that I have fallen into error in deciding that section 112 of the Evidence Enactment ousts the provisions of the Mohamedan Law in regard to legitimacy, and it would be little short of tragic were the parties to be compelled to litigate this question again because I am wrong on a point of law.

Section 112 ... following the English law, adopts the period of birth, as distinguished from conception, as the turning point in all questions of legitimacy. Birth within either period specified in the section is "conclusive proof" of legitimacy, unless it can be shown that there was non-access. That is the only way in which the presumption created by this section can be rebutted, and those who seek to rebut the presumption must prove that sexual intercourse between the parties did not take place at any time when, by such intercouse, the husband could, according to the ordinary course of nature, be the father of the child.

Under the Mohamedan Law, questions of legitimacy are referred to the date of the conception of the child, and not to the period of its birth. Thus to quote from *Baillie* on *Mohamedan Law of Inheritance*, page 36:

> "To establish the descent of a child from a man, it is necessary that the relation between its parents, which legalises their intercourse, should have subsisted at the supposed period of its conception. Accordingly, if a married woman should produce a child within six months from the date of her marriage, which is the shortest period of gestation in the human species according to the Mohamedan lawyers, its descent is not established from her husband unless he claims it; and even in the event of his claiming it, if he should admit that it was the fruit of fornication, its descent is not established."

I do not think that I need quote passages from other authorities ... because all of them appear to be agreed that the paternity of a child born

within six months of marriage is only established if the husband acknowledges that the child is his."

Chulas and Kachee* v. *Kolson binte Seydoo Malim
(1867) Leic. 462

The general rules of the law of England do not apply to the local inhabitants who have their own different religions and social institutions. To apply such rules will result in intolerable injustice and oppression.

The question before the court was whether a Muslim married woman is under any disability to bind herself in contract. The court held that her capacity to do so must be determined by the law which governs her contract of marriage, which is Muslim law.

Sir P.B. Maxwell, Recorder

"In this case, which was tried before me lately at Malacca, the question arose whether to an action on a bond, a plea of coverture, by a Mohamedan woman, was an answer to the action ...

The question how far the general rules of the law of England are applicable to races having religions and social institutions differing from our own is of occasional recurrence in this Court and is seldom free from difficulty. It has been repeatedly laid down as the doctrine of our law that its rules are not applicable to such races when intolerable injustice and oppression would be the consequence of their application ...

Having this rule in view, I came to the conclusion, in a case of *Hawah* v. *Daud* (1865) Leic. 253 which came before me in Penang two years ago, that the rule of English law which vests in the husband various rights in the property in his wife were inapplicable to a Mohamedan marriage ...

The Mohamedan woman's contract is wholly different ... her right of property and her powers of contract are unaffected by the marriage; under Mohamedan Law she remains in this respect like an English *femme sole* ...

The question now before me is whether a Mohamedan married woman is under any disability to bind herself by a bond. Here again, if the question were brought within the operation of the principles of the Court of Equity, the woman would be liable as for us her separate property extended to the payment of this bond, and to the performance

of her general engagements. But I see no necessity for resorting to equity.

It seems to me that the question of her capacity or incapacity to contract must be determined, and for the same reasons, like that of her rights to property, by the law which governs her contract of marriage, namely, the Mohamedan Law; and for these purposes the Mohamedan subjects of the Queen here must be considered as governed by the law of their religion in the same manner as the rights and capacities of a foreign husband and wife are governed by the law of their matrimonial domicile ...

The incapacity to contract which affects a married woman at common law is founded on the fiction that she and her husband are one person; but I think that fiction may well be confined to that kind of marriage for which it was intended, the Christian and indissoluble marriage. To extend it to the Mohamedan marriage would be to apply it to something different, and to establish but a weak foundation for a law absurdly unjust and intolerably oppressive. I am therefore of the opinion that this plea is no answer to the action."

Anchom binte Lampong* v. *Public Prosecutor
[1940] M.L.J Rep. 18

Johore has always been an independent State. The State Constitution is in the nature of an Enactment and the Court has no power to pronounce on its validity. Islamic law has never been adopted in its entirety in the State.

The appellant, together with another person, were charged and convicted with the offence of adultery under the Offences by Mohamedans Enactment No. 47 of 1937. Subsequently, doubts arose as to whether the Enactment was valid or *ultra vires* the Johore State Constitution. The court held that it had no power to pronounce on the validity or invalidity of the Enactment.

Poyser CJ (FMS)

"The appellants were convicted of adultery, an offence punishable under Enactment No. 47 of 1937 (The Offences by Mohamedans Enactment). They were each sentenced to a short term of imprisonment ... The appeals were instituted at the instance of the Johore Law Officers, who had doubts, whether the above Enactment and also other Johore Enactments were valid or *ultra vires* on the ground that they

infringed the (Johore) Constitution ...

... The State of Johore ... is an independent State and the relations between the Sultan and His Majesty are relations of alliance regulated by treaty and not relations of dependency. Prior to 1895 there was no written law, only proclamations, customary and unwritten law, and the Sultan's power was absolute. On April 14, 1895 Sultan Abu Bakar abrogated his absolute sovereignty, and granted the inhabitants of this State the Constitution, the effect of which we are now called on to decide ...

The Constitution of Johore is not ... a rigid constitution. It is in the nature of an Enactment which can at any time be amended or varied ... In view of its terms I have no hesitation in coming to the conclusion that this court has no power to pronounce on the validity or invalidity of any Enactment passed by the Council of State and assented to by the Sultan, any more than the English Court could pronounce an Act of Parliament to be invalid ...

Further, if there were any doubts as to the competence of the Sultan and State Council to interpret the constitution such doubts have been removed by the July amendment of this year which lays down in the clearest possible terms that only the Sultan with the concurrence of the Council of State can determine the interpretation and meaning of Article XLIX of the Constitution ...

It follows, therefore, that even if the Enactment No. 47 of 1937 is contrary to the provisions of the constitution, this Court cannot hold it to be so. I would only add that the Mohamedan Law was never adopted, in its entirety, in the State of Johore ... In recent years ... the majority of Enactments ... contain provisions which are not in accordance with Mohamedan Law. Enactment No. 47 of 1937 is one such Enactment, for under Mohamedan Law the penalty for adultery is death, but under the Johore law only imprisonment and fine ..."

Gordon-Smith, Ag. JA

"... Prior to 1895, the Sultan ... was an absolute Monarch ... Then in 1895 ... (the Sultan) granted a written Constitution to the State whereby ... he voluntarily became a Constitutional Ruler in terms of that written Constitution ... In 1912, an Executive Council was added comparable to the Cabinet in England ... It declares that the State religion is the Mohamedan religion but at the same time tolerates other religious

beliefs, and the concluding Article LXIV provides for amendments and addition to the Constitution and its interpretation ...

It is ... quite clear that this Constitution of 1895, with its subsequent amendments, has the force of law. It is part of the law of the State and is binding on the Sultan and the State, and the Sultan himself is subject thereto (vide *Wong Ah Fook* v. *State of Johore* [1937] MLJ 128) ...

... I think that it is quite clear that it is not competent for any Court in the State to hold that any Enactment duly passed by the Council of State and assented to by the Ruler is *ultra vires* the Constitution and therefore void ...

In conclusion, I would add that I am by no means assenting to the proposition ... that it is not competent for Courts to interpret and construe Enactments duly passed by the Council of State and approved by His Highness. That is one of the duties of the Court here and elsewhere, but the conferring of jurisdiction upon Courts to declare Enactments ... to be null and void owing to their being *ultra vires* the Constitution is quite another matter ..."

In the Matter of Omar bin Shaik Salleh
Shaik Salleh v. *Mariambee*
(1948) 14 MLJ 186

The Guardianship of Infants Ordinance is a statute of general application and must be taken to supersede whatever law might have been applied previously. In exercising his discretion under this Ordinance the Judge should bear in mind the custom and religion of the parties, but if he were to consider himself bound by them he would not be exercising the discretion properly.

The question before the court concerns the custody of two infant children. The trial judge, Jobling J., had given custody of the two children to the respondent (the children's mother), pursuant to The Guardianship of Infants Ordinance (Cap. 50). The mother had married another man after her divorce from the children's father. On appeal to the Court of Appeal, the court unanimously upheld the trial judge's decision. In doing so, the court expressly stated that Muslim law does not form part of the law of the colony of Singapore.

Murray-Aynsley, CJ

"This appeal raises points of importance as to the application of Mohamedan Law to this Colony (Singapore). The present case

concerns the guardianship of two infants (Omar bin Shaik Salleh and Hanisah binte Shaik Salleh). It is contended that by Mohamedan Law the father would have an absolute right to the guardianship in circumstances of the present case. The Judge who made the order regarded Cap. 50 (The Guardianship of Infants Ordinance) as regulating the matter.

It must be remembered that Mohamedan Law as such does not form part of the law of the Colony. Any application of Mohamedan Law apart from Statute can only flow from the provisions of the Charter. Even in countries in which Mohamedan Law is the law of the country it is within the power of the legislature to abrogate the Mohamedan Law on particular matters or modify it. An example of this is found in the FMS case of *Ainan bin Mahmud* v. *Syed Abu Bakar bin Habib Yusoff & Or.* (1939) MLJ 209. In this Colony the legislature has in express terms altered the rules of Mohamedan Law (e.g. section 27 of Cap. 57).

In the matter now under consideration we have a legislation in general terms regulating the matter. There is no exception in the case of Muslims. It is therefore clear that the Ordinance supersedes whatever law might have been applied previously .... In exercising his discretion under Cap. 50 a Judge is no doubt well advised to bear in mind the customs of the parties, but if he were to consider himself bound by them he would not be exercising the discretion given him by the Ordinance ..."

Pretheroe, Ag. CJ

"Section 5 of the Guardianship of Infants Ordinance provides that the father of an infant shall ordinarily be the guardian of the infant's person and property. A proviso to the section however confers a discretionary power on the Court or a Judge to make such other order as it or he thinks fit. Then section 11 provides that when exercising this discretionary power the Court or a Judge "shall have regard primarily to the welfare of the infant."

It was suggested that the learned Judge failed to exercise the discretion properly because he did not consider the requirements of Mohamedan Law on the subject of guardianship before making his order .... These notes (of the proceedings in Chambers) satisfy me that the learned Judge regarded the welfare of the infants as the paramount consideration and consequently that he exercised his discretionary power in the manner required by section 11 of the Ordinance ..."

Brown J

"The parties to this appeal are Mohamedans who have been twice married and twice divorced, and the present position is that the respondent wife (after being divorced by the appellant for the second time) is now married to another man, by whom she has one child. The appeal is from the Order of Jobling J. giving the custody of the two infant children to the respondent ...

The learned Judge, in exercising his discretion in favour of the mother, has given his reasons; but it does not appear from his grounds of decision that he gave any consideration to Mohamedan Law ...

I think the true position is that just as section 5 of the Guardianship of Infants Ordinance ordinarily gives the custody to the father but allows the Court a discretion, so by the rules of Mohamedan Law a woman who marries a stranger is ordinarily deprived of the right to the custody of her infant children by a former marriage, but there too the Court has a discretion to depart from the ordinary rule.

In this case if the learned Judge had applied the ordinary rule, whether under the Guardianship of Infants Ordinance or under Mohamedan Law, he would have given the father the custody. But believing this to be a case in which he ought to exercise his discretion he gave the custody to the mother and this discretion would have been exercisable as well under Mohamedan Law as under the Guardianship of Infants Ordinance. I only mention this because it would appear to me that even if the learned Judge had taken Mohamedan Law into account the result in this case would have been the same ..."

Shaik Abdul Latif & Ors.* v. *Shaik Elias Bux
[1915] 1 FMSLR 204

The validity of will of a Muslim domiciled in the Federated Malay States is governed by Islamic law. The only law applicable to the Malays in the Malay States before the arrival of the British administrators is Islamic law modified by local custom.

The question before the court concerned the validity of a will made by a Muslim who was domiciled, and who died, in Selangor in 1914. In his will, the testator had stated that his property should be divided equally between his adopted son, his two widows and an infant daughter. The court held, appyling Muslim law, that the will

> must be held to be inoperative with respect to such part as had been bequeathed to the adopted son in excess of one-third of his estate.

Innes J.C. (the trial Judge)

"The plaintiff in this suit is the brother of one Shaik Balu Bux who died on June 10, 1914, after having made a will on August 13, 1913, by which he appointed executors and trustees and directed that his estate subject to certain trusts should be distributed equally between his adopted son, Shaik Abdul Latif, his two widows, Halimah and Jainab, and his daughter, Fatimah, an infant ...

Under the law of Islam a testator has the power to dispose by will of not more than one-third of the property belonging to him at the time of death .... The residue of such property must descend in fixed portions to those whom Mohamedan Law declares to be his heirs unless the heirs consent to a deviation from this rule. It is not contended that there has been any such consent in this case ...

On each occasion when the introduction of British influence upon the administration of the States has been formally recognised by their Rulers the only law which existed and was accepted by the Malays and other Mohamedans as applicable to questions of inheritance and testamentary dispositions was that of Mohamedan Law modified in a few districts by local custom. As observed by Mr. Justice Jackson in *Ong Cheng Neo* v. *Yap Kwan Seng* (1897) 1 SSLR Supp. 1:

> "English law as such does not prevail in these Courts except in so far as it has been adopted and neither written law nor judicial decision can be cited to show that the testamentary power of Mohamedan domiciled here have ceased to be governed by the law of Islam because of the adoption in its stead of the law of England upon that subject."

There is then in my opinion ample reason for holding that the validity of a will of a Mohamedan domiciled in the Federated Malay States is governed by the Mohamedan Law on the subject and when the will now in question is judged according to the requirements of this law, it must be held to be inoperative with respect to such part of the property bequeathed to testator's adopted son as exceeds the one-third of the estate which it was permissible for him to leave to a stranger as also

inoperative in so far as it deprives testator's two brothers and sister of their legal shares as heirs ..."

Edmonds, JC

"The British treaties with the Rulers of these States merely provided that the advice of the British administrators should be followed and in accordance with such advice Courts have been established by Enactment, British Judges appointed, and a British administration established. Before the first treaties the population of these States consisted almost solely of Mohamedan Malays with a large industrial and mining Chinese community in their midst.

The only law at that time applicable to Malays was Mohamedan Law modified by local customs. In Selangor, Perak and Pahang amongst Mussalmans successions on death was regulated by unmodified Mohamedan Law; in parts of Negeri Sembilan there are special local customs based on matriarchy ...

In Selangor there is a law, the Mohamedan Law, capable of deciding the succession to property of Muslims. Though a domicile in England or Hong Kong would take away from this Selangor Law the determination of the distribution of movables, I do not see on what principle the regulation of succession to immovables should be decided by any other than local law ..."

Public Prosecutor* v. *D.J. White @ Abdul Rahman
[1940] MLJ Rep. 170

It is not sufficient for the accused to say that he is a Muslim; he must go further and prove that his conduct has always been governed by that law. The penal law of the Federation applies to all persons in the State.

The accused, a converted Muslim since 1936, was charged with the offence of bigamy under section 494 of the Penal Code. The accused had married one Aisha soon after his conversion, whilst his first wife (by a Christian marriage) was still alive. In his defence, the accused contended that as a Muslim he was entitled to have up to four wives.

The court held that the penal law of the Federation applied to all and it made no difference whether the marriage between the accused and Aisha was valid under Muslim law or not. The accused was accordingly convicted.

Horne J

"The accused, David John White, is charged with bigamy and has claimed trial. He was married to Birdie Rose Moreira in the Church of All Saints, Taiping, Federated Malay States, on 28th December 1918, according to the rites and ceremonies of the Church of England. On 10th January, 1936, his wife being alive, the accused and Miss Webb were converted to Islam by Haji Mohamed, the *Kadhi* of Seremban and thereupon the accused and Miss Webb, having been named Abdul Rahman and Aisha respectively, were married according to Mohamedan Law by the *Kadhi* in the presence of witnesses. The accused in his statement from the dock admits the facts.

Section 494 of the Penal Code punishes the offence known as bigamy and in these terms:

> "Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

Mr. Goho, who appears for the accused, has argued that on the facts the accused ought not to be convicted of bigamy. He submits that under Mohamedan Law, the second marriage does not become void by reason of its having taken place during the life of the wife of the first marriage; the accused is domiciled in the Federated Malay States and has become a Mohamedan by conversion and has thus acquired a personal law, which personal law allows him to marry contemporaneously as many as four wives.

Mohamedan Law is part of the law of the Federated Malay States and it has been laid down by the Court of Appeal that this Court must propound that law in cases where the same is applicable – *Ramah binti Ta'at* v. *Laton binti Malim Sutan* (1927) 6 FMSLR 128.

It must also be accepted that the question whether the second marriage is void by reason of its taking place during the subsistence of the first marriage must be decided according to the civil law. As there are several different bodies of civil law recognised by the Court in the Federated Malay States there is said to be a conflict of law. It is not suggested that the first marriage does not still subsist; but it is contended that upon conversion the convert is able to do an act which, before his

conversion, would have been a crime, but is now not a crime.

In my opinion it is not sufficient for the accused to say "I am a Mohamedan" and consequently (that) the question whether the second marriage is void must be decided solely by Mohamedan Law; he must go further and show that his conduct, so far as it affects the question at issue, has always been governend by that law, and I do not think he is able to do so ...

The accused ... married under the Christian Marriage Enactment in 1918. A marriage celebrated under the Enactment falls within the description given by Lord Penzance in *Hyde* v. *Hyde* (1866) LR 1 P&D 130:

> "Marriage has been well said to be something more than a contract, either religious or civil – to be an institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of husband and wife is a recognised one throughout Christendom; the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite legal rights upon their offspring."

One of the legal incidents thrown about that status by the laws of the Federated Malay States is that the parties to such a marriage are during its subsistence precluded from marrying anyone else ...

I am therefore bound to hold ... (that) a man who enters into a marriage relationship with a woman according to monogamous rites takes upon himself all the obligations springing from a monogamous relationship and acquires by law the status of "husband" in a monogamous marriage. He cannot, therefore, whatever his religion may be, during the subsistence of that monogamous marriage marry or go through a legally recognised form of marriage with another woman. A conversion to another faith of either spouse of such a marriage has no legal effect on the status of that spouse ...

Under Mohamedan Law in a purely Muslim country there may be no penal sanction for entering upon a second marriage in these imagined circumstances. But the Penal Law of the Federation applies to all and it makes no difference whether the marriage is valid under Mohamedan Law or not; it is in this case valid in point of form but is void under the civil law of the Federated Malay States for the reason of its having taken place during the life of his wife.

I convict the accused of bigamy."

Martin* v. *Umi Kelsom

(1963) 29 MLJ 1

In the exercise of its jurisdiction under the Divorce Ordinance 1952, the court must determine the validity of the marriage according to the law of the husband's domicile, which was English law. According to that law, the marriage was valid, despite the fact that the marriage would not be valid according to Islamic law.

The petitioner in this case, a Christian, had married the respondent, a Malay woman of the Muslim faith, in accordance with the Christian Marriage Enactment 1950. At the time of the marriage, the petitioner, a British soldier, was domiciled in England whilst the respondent was domiciled in Selangor. In 1960 the two parties separated.

In his petition the petitioner had asked the court that the marriage be declared void on the ground that at the time of the marriage he was a Christian whilst the respondent was a Muslim and by reason of her personal law she was therefore incapable of marrying him. The court held, applying the law of England (being the law of domicile of the petitioner), that the marriage was valid. The petition was therefore dismissed.

Thomson CJ

"In this case the petitioner, John Martin, is seeking a decree of nullity of marriage. The respondent, Umi Kelsom binti Pakeh, has been served with the petition but has taken no part in the proceedings. The petition is brought by virtue of the provisions of the Divorce Ordinance, 1952 ... Section 3 (of the Act) provides that:

> "The court shall in all suits and proceedings hereunder act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings."

The facts of the present case are not in dispute. On February 25, 1950, the parties went through a form of marriage before a Registrar of Marriages for Selangor in accordance with the provisions of the then Christian Marriage Enactment (F.M.S. Cap. 109), which has since been repealed by the Christian Marriage Ordinance, 1956.

At the time of solemnisation the petitioner was a British soldier who

was domiciled in England and who professed the Christian religion. He was a bachelor and of full age. The respondent who was a widow and of full age was of the Malay race. She was domiciled in the State of Selangor and professed the religion of Islam.

After the marriage the parties lived together in Malaya for a number of years and I am satisfied that at some time the petitioner has acquired a domicile in this country. There were no children. They separated some time in 1960.

The petitioner now asks that his marriage be declared invalid *ab initio* on the ground that at the time of its solemnisation he was a Christian and the respondent was a Muslim and therefore by reason of her personal law incapable of inter-marrying with him.

It is, I think, generally accepted that by the Mohamedan Law a Mohamedan male may contract a valid marriage with a Mohamedan woman or with a *Kitabia*, that is a Jewess or a Christian, but not with an idolatress or a fire-worshipper. A Mohamedan woman, however, cannot contract a valid marriage except with a Mohamedan man ...

It is clear that in the eyes of the Mohamedan Law the respondent had no capacity to marry the petitioner. The petitioner, on the other hand, as a domiciled Englishman was under no incapacity which prevented him from marrying the respondent; at the time of the marriage both parties were of full age, neither of them was married to any other person and they were not within any degree of affinity with each other ...

What is actually the question here is a question of a conflict of laws. The putative husband had by his personal law capacity to inter-marry with the putative wife but the personal law of the putative wife forbade her to inter-marry with the putative husband. The general principle recognised by the law is that the capacity of a party to contract a marriage depends on his or her personal law at the time the marriage contract is entered into and this in its turn depends on domicile ...

At this point it is desirable to go back to section 3 of the Divorce Ordinance which provides that in all proceedings under it, and this proceeding is brought under it, the court should act on the principles on which the English Courts could act ... Now in my opinion if this marriage had been solemnised in a Registry Office in London and not in Kuala Lumpur the English Divorce Court would hold it to be valid ...

At the time of the marriage the domicile of the husband was in

England and his personal law was the law of England. And there has been no change in his personal law by reason of his change of domicile in Malaya, for his domicile is now in Malaya in the group of persons whose personal law is the English law ...

The petition is dismissed."

Attorney-General of Ceylon* v. *Reid

[1965] 2 MLJ 34

In a country of many races and creeds, there must be an inherent right of the inhabitants domiciled there to change their religion and personal law and so to contract a valid polygamous marriage if recognised by its laws notwithstanding an earlier marriage. If such inherent right is to be abrogated it must be done by statute.

The respondent married one Edna Margaret de Witt according to Christian rites in 1933. In 1959, the respondent, having converted to Islam, married a Muslim convert by the name of Fatimy Pansy. On October 28, 1961 the respondent was charged with the offence of bigamy and was duly convicted. He appealed.

The Privy Council held that as a Muslim the respondent had an inherent right to contract a polygamous marriage and that being so the conviction must be quashed. The appeal was allowed.

Lord Upjohn

"The relevant facts are not in dispute. The respondent married Edna Margaret de Witt according to Christian rites ... on September 18, 1933. Both were Christians at the time and they lived as man and wife until 1957. There were eight children of the marriage. In May 1957 the wife left the respondent and obtained a maintenance order against him in the Magistrates Court of Colombo.

On June 13, 1959 the respondent and a divorced lady of the name of Fatimy Pansy were converted to the Muslim faith. A month later on July 16, 1959 they were duly married in the District of Colombo by the Registrar of Muslim Marriages under the provisions of the Muslim Marriage and Divorce Act, 1951, notwithstanding that the earlier marriage was subsisting.

On October 28, 1961 the respondent was indicted at the instance of the appellant for the offence of bigamy ... He was duly convicted ...

and sentenced to three months rigorous imprisonment from which judgment, as already mentioned, he successfully appealed ..

The Muslim Marriage and Divorce Act applies only to marriages and divorces and to ancillary matters of those inhabitants of Ceylon who are Muslims. ... It makes full provision for a male Muslim inhabitant of Ceylon to contract more than one marriage provided certain notices are given by the Muslim to the *Quazi* of the District and by the *Quazi* to the existing wife or wives.

It is important to state at the outset that this appeal has been argued before their Lordships upon the express admission of counsel for the appellant on the footing that the conversion of the respondent to the Muslim faith on June 13, 1959 was sincere and genuine notwithstanding doubts expressed in the courts below. ...

Ceylon is a country of many races, many creeds and has a number of Marriage Ordinances and Acts ... Whatever may be the situation in a purely Christian country ... (their Lordships) cannot agree that in a country such as Ceylon a Christian monogamous marriage prohibits for all time during the subsistence of that marriage a change of faith and of personal law on the part of a husband resident and domiciled there ...

In their Lordships' view in such countries there must be an inherent right in the inhabitants domiciled there to change their religion and personal law and so to contract a valid polygamous marriage if recognised by the laws of the country notwithstanding an earlier marriage. If such inherent right is to be abrogated it must be done by statute. Admittedly there is none ...

It follows that as the Attorney General of Ceylon cannot establish that this second marriage was void by the law of Ceylon by reason of the earlier Christian monogamous marriage, the appeal must fail. For these reasons their Lordships have humbly advised Her Majesty to dismiss the appeal."

Myriam* v. *Mohamed Ariff

[1971] 1 MLJ 265

The Selangor Administration of Muslim Law Enactment does not oust the jurisdiction of the civil court. The provisions of the Guardianship of Infants Act 1961 do not conflict with the Muslim religion or Malay custom. Both under the English law and the Muslim law, the primary consideration is the welfare of the child.

In this case, the applicant had applied for the custody of her two infant children, a girl eight years old and a boy three years old. The appellant and the respondent, mother and father respectively of the two infant children, had been divorced and both parties had since remarried. The applicant had married a man who was not in any way related to the two children.

The main issue before the court was whether the applicant was still entitled to the custody of the children after she had duly consented to the order of the Syariah Court giving custody of the two children to the respondent.

Abdul Hamid J

"This is an application by originating summons for the custody of two infant children, a girl by the name of Nor Izan, eight years, and a boy, Mohamed Faizal, about three years old ...

[The Judge then recounted the facts of the case in detail, highlighting the marriage of the parties, their consequent divorce through *talak ta'liq* and the order by the *Kadhi* giving custody of the two children to the respondent based on the voluntary and free consent of the applicant].

It was ... contended by the respondent that under Muslim law of the Shafii School a mother loses the custody of the infant children if she stays away from her husband without his knowledge and consent, or subsequently marries a man who is a stranger, that is, a person not within the prohibited degree of marriage to the applicant's children ... And that, even if the custody of the children is given to the applicant, it is still doubtful whether the children will be well cared for because the applicant's present husband has five other children from his previous two marriages to look after and to maintain; furthermore, there is a risk of the children being taken out of this country in the event that the applicant's present marriage fails as what had happened to the applicant's present husband's two former marriages, and as such, there is also the danger that the children will not be properly brought up as Muslims in view of the applicant's religious background.

The respondent further averred that the two children had been staying with him for more than a year now, and ... there is a strong bond of love and affection existing between the children and his (present) wife and himself ...

Under section 46(3)(iii) of the Selangor Administration of Muslim

Law Enactment, a *Kadhi* does have the power to hear and determine proceedings relating to custody of infants and an appeal committee may hear an appeal from the decision of a *Kadhi's* Court .... Notwithstanding the fact that the applicant had not filed any appeal and applied for leave to appeal, it cannot, I think, be seriously challenged in view of subsection (6) of section 45, that the applicant is estopped from making this application. Subsection (6) of section 45 reads:

> "45(6) Nothing in this Enactment contained shall affect the jurisdiction of any Civil Court and, in the event of any difference or conflict arising between the decision of a Court of the *Kadhi Besar* or a *Kadhi* and the decision of a Civil Court acting within its jurisdiction, the decision of the Civil Court shall prevail."

Under the English law, it is settled law that the primary consideration is the welfare of the children. Under the Muslim law certain rules have been laid down regarding the custody of infants. However, it would seem that even under the Muslim law the general principle that governs the custody of infants is the welfare of the infants ...

In the matter of *Omar bin Shaik Salleh* [1948] MLJ 186, a Singapore case, the learned acting Chief Justice Pretheroe in dismissing the appeal said that ... the welfare of the infants (was) the paramount consideration and exercised his discretionary power in the manner required by section 11 of the Guardianship of Infants Ordinance (Cap. 50). Brown J. who gave a separate judgment observed that even in Muslim law, the court has a discretion to depart from (the) ordinary rule. Though this case may not be binding upon me, it has its persuasive value. It tends to support the proposition that even under the Muslim law, custody of infants may be given in departure to the ordinary rule ...

In my endeavour to do justice, I propose to exercise my discretion and have regard primarily to the welfare of the children. In doing so, it is not my intention to disregard the religion and custom of the parties concerned or the rules under the Muslim religion but that does not necessarily mean that the court must adhere strictly to the rules laid down under Muslim religion. The court has not, I think, been deprived of its discretionary power.

In the instant case, both parties to the proceedings profess the Islamic faith and under Muslim law, it seems to be the rule that where the parents are separated and the mother has not (remarried), the

custody of a boy until he has reached his seventh year and of a girl to the age of puberty belongs to a mother; (but) a woman entitled to the custody of a boy or girl is disqualified if:

(a) she remarries a man not related to the minor within the prohibited degree, so long as the marriage subsists;
(b) she resides at a distance from the father's place of residence;
(c) she fails to take proper care of the child; and
(d) she commits an act of a gross and open immorality.

I do not propose to deal at length with each of these disqualifications. I am of the opinion that the court is not disentitled to make an order for custody, giving the infant to any of the parents if the welfare of the infant so demands ...

As I said earlier, the primary consideration before this court is the welfare of the children and in considering the custody of Nor Izan, the infant daughter, it is essential to bear in mind that she is now about eight years old and the question as to her education and religious instruction becomes, I think, an essential factor to be considered .... I am satisfied that she is well looked after by the respondent ... I therefore order the respondent shall have the custody of Nor Izan.

As regards the infant boy, Mohamed Faizal, unlike his sister, he is still in the tender age ... When the applicant and the respondent came into the chambers, he seemed overjoyed at the sight of the applicant. I do not think that words alone are adequate to describe the expression of love and affection that his eyes seemed to convey when he greeted the applicant particularly judging from the manner he sat upon the applicant's lap with one arm around her neck. To my mind, it would not be in the interests and welfare of this infant that he should be denied of the natural mother's love, care and affection. It is proper that he should be in the custody of the applicant until at least he reaches the age of seven or eight years at which time either party may be at liberty to apply ..."

Note

The recent amendment to Article 121 of the Federal Constitution, effective since June 1988, has altered the legal position. Henceforth, all matters which fall within the jurisdiction of the State Syariah courts can no longer be heard before the civil courts. See, for example, the latest decision in *Mansur bin Mat Tahir* v. *Kadi Daerah Pendang Kedah & Anor* [1989] 1 *MLJ* 106.

Abdul Rahim* v. *Abdul Hameed & Anor
[1983] 2 MLJ 78

In Islamic law, a testator has power to dispose of not more than one-third of his estate and the residue descends in fixed proportions unless his heirs consent. Further, he cannot delay the vesting of his estate in his heirs.

A Muslim made a will in 1939 and later a codicil, annexed to the will, in 1947. Probate was duly granted by the Singapore High Court in 1951 and subsequently was resealed by the High Court at Johore Bahru in 1953. In his will the deceased directed that 21 years after the death of the last survivor of his children his trustees are to wind up the deceased's business, convert into cash all his assets and properties and then divide the proceeds of the sale of all the properties into nine shares.

The issue before the court was whether the will, in purporting to dispose more than one-third of the deceased's estate and in delaying the vesting his estate, is valid. The court held, applying the *lex situs*, which is Muslim law, that the will is not valid.

Yusof Mohamed J

"This ia an application to declare invalid a provision of a will of a deceased Muslim, Rahiman Sahib s/o Oosainsa Rowther dated July 10, 1939 and a Codicil dated June 18, 1947 annexed, relating to disposition of his properties.

The Probate was granted by Singapore High Court in August, 1951 and has been resealed in the Supreme Court (High Court) at Johore Bahru on September 30, 1953.

The deceased was a Muslim of Sunni Sect belonging to the School of Hanafi. His will devised and bequeathed the whole of his properties ... Clause 7 of the Will provides that:

> "I declare and direct that twenty-one (21) years after the death of the last survivor of my children my Trustees are to wind up my said business and to sell, call in and convert into cash every other property, real and personal estate of whatsoever nature and wheresoever situate and to divide the proceeds of such sale, calling in and conversion into nine (9) shares ..."

The applicant contends that this provision of the Will and Codicil infringes the Muslim law in purporting to dispose of more than one-third

of the deceased's estate; in delaying the vesting of his estate; and also offending the rule against perpetuity ...

Now, in respect of the disposal of various lands, the deceased's capacity to devise immovable property is governed by *lex situs* .... This means, the Malaysian domestic law. Being a Muslim, the deceased's testamentary capacity in Malaysia is regulated by Muslim law. The Wills Ordinance 1959 does not apply to persons professing the Muslim religion – section 2(iii) of the Ordinance ...

In Muslim law, a testator has power to dispose of not more than one-third of his estate and the residue descends in fixed proportions unless the heirs consented. (See *Shaik Abdul Latif* v. *Shaik Elias Bux* (1915) 1 FMSLR 204).

(Clause 7 of the Will) clearly shows that the deceased attempted to dispose of all his properties by his will. This contravenes his power of disposal exceeding the legal one-third of his properties. It cannot therefore be valid .... By this clause (also), the deceased seemed to direct the vesting of his estates in his heirs be deferred to 21 years after the demise of his last surviving children. Again under the Muslim law, a testator cannot delay the vesting of his estates in his heirs.

In *Saeda* v. *Hj. Abdul Rahman* (1918) 1 FMSLR 352 it was held that a direction in the will of a Muslim instructing the executors to deal with his estate for 10 years and then distribute it is invalid. On this ground, this part of the Clause 7 also becomes invalid .... As regards ... the perpetuity rule ... the rule ... is not applicable ... (to) Muslims in the State of Johore ..."

Re Dato Bentara Luar Decd.
Haji Yahya & Anor v. Hassan & Anor
[1982] 2 MLJ 264

The law applicable to determine the validity of a wakaf *made in Johore in 1909 is Islamic law. The Privy Council's decisions on* wakaf *do not apply to this case because the system of appeals to the Privy Council was only introduced in 1920.*

Dato Bentara Luar died in 1915. During his lifetime, sometime in 1909, he had executed a *wakaf* in respect of Lot 883 situated in Johore Bahru in favour of the respondents and their children. The appellants challenged the validity of the *wakaf*, but the learned trial Judge held it to be valid. The appellants appealed to the Federal Court.

The Federal Court held that the validity of the *wakaf* must be determined in accordance with Muslim law as prevailing in Johore in 1909 (the date of the creation of the *wakaf*), and as such the Privy Council's decisions on *wakaf* could not apply to the instant case. In the event, the *wakaf* was held to be valid.

Salleh Abas FJ

"A certain Mohamed Salleh bin Perang known as Dato Bentara Luar, a Johore resident, died in 1915 leaving amongst his property a piece of land, Lot 883 Grant No. 1072 situated in Johore Bahru town. The appellants are the administrators *de bonis non* of the Dato's estate whilst the respondents are the offspring of two of the Dato's children ...

The appellants as administrators sought to sell the land and distribute the proceeds amongst the beneficiaries of the Dato's estate ... The sale could not take place because the respondents have caveated the land on the ground that they were entitled to it by virtue of a *wakaf* deed executed by the Dato on May 20, 1909 in favour of their descendants and themselves ... Abdul Razak J on December 6, 1980 ... held that the *wakaf* was valid. Hence this appeal.

Before us counsel for the appellants submitted that the *wakaf* was not valid on two grounds. In the first place the *wakaf* was wholly for the benefit of some of the descendants of the *wakif* only and in view of the Privy Council's famous decisions in *Mohamed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1889) 17 I.A. 28 and in *Abul Fata Mohamed Ishak* v. *Russomoy Dhur Chowdhry* [1894] 22 I.A. 76 the *wakaf* was invalid. In the second place the *wakaf* was not valid because by having the land registered in his name right to this day and by dealing and managing the land as his own the *wakif* never allowed the *wakaf* to take effect, nor did he intend that it should have any effect whatsoever.

Counsel for the respondent on the other hand submitted that a *wakaf* to one's children and descendants is valid under Muslim law as applied in Johore and that the decision of the Privy Council in *Abul Fata's* case has no application to this *wakaf*, because of Johore's Wakaf Prohibition Enactment, 1911 which came into force on November, 1911.

In order to deal with these conflicting submissions, it is necessary for us to examine the scope and effect of the 1911 Enactment, and secondly to determine whether the Privy Council's decisions are

applicable to this *wakaf* and thirdly whether the subsequent conduct of the Dato had any effect at all on the *wakaf* ...

In 1911 when the Enactment was passed, Johore State was still a very much independent State internally. Her relationship with the British Government was governed by the 1885 Treaty ... It was not until 1914 that Johore agreed to accept a British officer to be called the British General Adviser ... Thus Johore was the last Malay State to accept British protection ...

Only in 1920 did the Johore legislature provide for appeals to the Privy Council from the decisions of the Johore Court of Appeal (Section 33 of the Courts Enactment No. 17 of 1920)...

The *wakaf* under appeal was created on May 20, 1909 and the Dato (the *wakif*) passed away on July 22, 1915 .... As the law applicable in Johore at the time governing the estates of Muslims was the Muslim law of succession and inheritance, the *wakaf* must inevitably fall to be decided by that law. But the matter does not end here, because another question arises as to whether the Muslim law applicable was that which was understood and interpreted by the religious authorities and scholars in Johore or that which was interpreted by the Privy Council in those two cases mentioned earlier.

Johore in 1909 when the *wakaf* was created was still treated by the British Government as a sovereign State: *Mighell* v. *Sultan of Johore* [1894] 1 QB 149. She was enjoying internal autonomy and some sort of the English legal system was introduced ... Only in 1912 by the Courts Enactment of that year. In 1915 when the Dato died, Johore had just accepted the stationing of a British General Adviser, whose advice, though binding on the State, did not extend to matters pertaining to Muslim law and Malay custom.

We have already observed earlier that at the time the highest court in the State was the court of His Highness the Sultan in Council from which there was no further appeal to anybody. Appeal to the Privy Council was only instituted in 1920 by section 33 of the Courts Enactment No. 17 of 1920, following the lead by the Federated Malay States in 1919 ...

As the basic law of the State was Muslim law and the Privy Council had no jurisdiction as yet on cases decided by Johore court, we cannot see how the Muslim law as interpreted by the Council's decisions could be held to be part of the law of Johore.

[This historical approach was not adopted in *Tengku Mariam's* case

[1970] 1 MLJ 222 and *Haji Embong's* case [1980] 1 MLJ 286 ...]

As at the material time the basic law was Muslim law and the rule against perpetuity which is a concept entirely foreign to Muslim law was not yet part of the law of Johore, it follows therefore that the *wakaf* must be governed by Islamic law as understood and interpreted by Muslim scholars and not by decisions based on such concept.

The rule against perpetuity was introduced into the Federated Malay States only on March 12, 1937 by the passing of the FMS Civil Law Enactment No. 3 of 1937 ... The rule ... became part of the law of Johore by virtue of section 74 of the Courts Enactment No. 1/1931 (in force on 6.5.1931)... It is therefore clear ... that this *wakaf* was made at the time when the rule against perpetuity was not even heard of in Johore ...

The validity or otherwise of this *wakaf* must be determined solely by reference to the Muslim law as understood, observed and interpreted by Muslim scholars trained and learned in the jurisprudence of Syariah law. Further even after the rule was introduced in the FMS and Johore in 1937, the authorities in this country jealous in protecting the Muslim religion and Malay custom made a clear reservation or saving in favour of the disposal of property according to Muslim law. Thus in our view the Privy Council's decisions in the two cases cited are not applicable to this *wakaf*.

What remains to be decided now is whether according to Muslim law this particular *wakaf* is valid. Muslim law is not law in the sense that it is passed by a human legislative body. The Administration of Muslim Law Enactment does not attempt to enact what the Muslim law on a given topic is, but merely provides a framework for an administration in order to apply the law. The law itself is either a direct command from the Quran or Hadith, i.e. the ways of the Prophet Mohamed or an interpretation of either or both these legal sources. Being God's law, Muslim law is therefore immutable.

The *wakaf* law as it existed in 1909 when this particular *wakaf* was created remains the same as it is today. We have referred to the Wakaf Prohibition Enactment, 1911, in which the Johore legislature seemed to recognise two types of *wakafs*:

(a) *wakaf* for some public or charitable purpose; and
(b) *wakaf* for non-public or non-charitable purpose.

Under section 41 of the Administration of Muslim Law Enactment No. 14 of 1978, the legislature adopted more or less similar classifications, i.e.

(a) *Wakaf Ahli*, a *wakaf* which benefits the descendants of the *wakif* and those of the beneficiaries;
(b) *Wakaf Am*, a *wakaf* which benefits the public; and
(c) *Wakaf Khas*, a *wakaf* which benefits a specific person or groups of persons.

Wakaf Ahli and *Wakaf Khas* really belong to the same category as *wakaf* for non-public or non-charitable purpose mentioned in the 1911 Enactment. By mentioning such *wakaf* in the Enactment it is obvious that Muslim law recognises such *wakaf* ...

The *Mufti* of Johore in his *fatwa* issued sometime in 1970 stated that the *wakaf* is valid. Whilst we are not bound to accept his *fatwa* as we are entitled to expound what Islamic law on a given topic is, we are equally not bound to reject the opinion stated in the *fatwa* just because Islamic law is the law of the land and the duty to expound this law falls on us. In our view as the opinion was expressed by the highest Islamic authority in the State, who had spent his lifetime in the study and interpretation of Muslim law and there being no appeal against the *fatwa* to His Highness Sultan in Executive Council under the relevant State Enactment ... we really have no reason to justify the rejection of the opinion, especially when we ourselves were not trained in this system of jurisprudence and moreover the opinion is not contrary to the opinions of famous authors of books on Muslim law ....

Wakaf is not like a marriage which requires consummation. A valid *wakaf*, like the one under appeal, takes effect immediately from the moment of its creation. The ownership of *wakaf* property is in law immediately vested in God Almighty. The legal requirement that the property must be registered in the name of the beneficiary or the *mutawalli* is only for the purpose of its administration. We cannot see anything wrong or objectionable that this *wakaf* land was registered in the Dato's name, and continued to be so registered, because there being no *mutawalli* appointed, he must be taken to assume the role of the *mutawalli* ...

The *wakaf* is valid ... "

7

Reception of English Law in the Malay States

(a) Common Law

The following eleven cases dealt with the reception of English common law and equity in Malaysia. As noted in Chapter 1, common law and equity was applied in the Straits Settlements by virtue of the three Charters of Justice. The Charters, however, did not apply to the Malay States. The reception of common law and equity must therefore be implemented through a different mechanism.

With the introduction of the Residential System in Perak, made possible by the terms of the 1874 Pangkor Treaty, English-style courts were established by the Sultan (on the "advice" of the British Resident) and English judges were appointed. With such a judicial "apparatus" in place, it was therefore only a matter of time that common law and equity were applied.

No one questioned the legitimacy of such a judicial practice. Be that as it may, beginning with the Civil Law Enactment No. 3 of 1937 (see Appendix) such judicial practice received the official stamp of approval (or authority) by the legislature. Section 2 (i) of the Enactment provides that "Save in so far as other provision has been or may hereafter be made by any written law in force in the Federated Malay States, the common law of England, and the rules of equity, as administered in England at the commencement of this Enactment ... shall be in force in the Federated Malay States ..." By December 31, 1951, the law was extended to the other Malay States and by 1956, it was extended to Penang and Malacca.

With regard to the position of equity, section 2(ii) of the 1937 Enactment had already expressly provided that "in the event of conflict

or variance between ... common law and ... rules of equity with reference to the same matter, ... rules of equity shall prevail in all courts in the Federated Malay States so far as the matters to which those rules relate are cognizable by those courts ..."

Government of Perak* v. *A.R. Adams
[1914] 2 FMSLR 144

In dealing with tort cases, the courts in this country have always turned for guidance, as far as fundamental principles are concerned, to English common law.

The plaintiff had granted a piece of land to the defendant's predecessor in title. The plaintiff's road adjoined the land. The defendant had, in the course of cultivating the land, caused silt from his land to be deposited on the road and the drains alongside it. The defendant knew of the damage being caused to the road but he took no steps to remedy the situation.

The court held that it had jurisdiction to hear the case and accordingly found the defendant liable in damages.

Woodward J.C.

"The action is brought to recover damages for an alleged tort. This Court has always entertained such actions. The existence of a possible alternation or additional remedy in the shape of criminal proceedings in a lower Court ... cannot affect the civil jurisdiction of this Court ...

In dealing with cases of tort, this Court has always turned for guidance, as to fundamental principles, to English decisions. The occupation of land has always been held in England to impose upon the occupant the duty of using it as not to injure his neighbour – *sic utere tuo ut alienum non laedas*. That was the maxim laid down in *Rylands* v. *Fletcher* ...

The question in this case seems to me to be whether the defendant is exempt from liability on the ground that he was without wilfulness or negligence using his land in the ordinary and natural manner, or whether he should be held liable on the principle that a man must use his own (land) as not to damnify another ...

The defendant cannot be said to have brought upon the land something which would not naturally come upon it, and which is in itself dangerous as the reservoir was in *Rylands* v. *Fletcher*, or noxious as the filth

in *Tenant* v. *Goldwin*, or poisonous as the yew-tree in *Crowhurst* v. *The Burial Board of Amersham*. The rain water must in all case fall upon the sides of the hills and is bound eventually to find its way into the plaintiff's road drain. Still the defendant may be liable if he deals with it in such a way as to damage his neighbour's property ....

I think under all the circumstances he is liable for the damage caused, at all events from the time when he first had notice ..."

In Re The Will of Yap Kwan Seng, Decd.

[1924] 4 FMSLR 313

The rule of perpetuities, as a rule of public policy, was well-suited to the needs and conditions of the Federated Malay States, and should be applied. A trust for ancestral worship was not a public religious or charitable use.

A testator gave directions in his will that his houses and land be held in trust for ever for a family house for ancestral worship and as a family burial ground in accordance with Chinese customs. The issue before the court was whether such a trust was valid or not.

The Court held that as the trust could not be deemed to be a public, religious or charitable trust it was void *ab initio* because it infringed the rule against perpetuitites.

Sproule, Acting C.J.C.

"This is an application for construction of a clause in the will of Yap Kwan Seng, executed on December 12, 1901 ...(which states)

"I direct my trustees that my houses ... and also all my land in ... Kuala Lumpur, which is prepared for and intended to be used as a private family burial place and ornamental ground appertaining thereto ... shall be held by my trustees to be used as a family house for the use of my wives, children and descendants and for ceremonial purposes and as a family burial ground respectively in accordance with the Chinese custom so far as may be without infringing any laws which may be in force for the time being in Selangor, and if at any time it shall be held by a competent Court in Selangor that the foregoing direction cannot take effect – then I direct that the said houses and lands shall form part of my residuary estate and be disposed of in the same manner."

... The trustees propound the questions whether these trusts for a family house and for a family burial ground are or are not void by reason

of perpetuity; and if so, whether the *corpus* of the trusts falls into residue.

The argument before me was upon three heads:

(1) That the rule against perpetuities does not exist in and should not be adopted in the Federated Malay States.

(2) That even if the rule be applied, the trusts are saved from offence against it by the proviso "so far as may be without infringing any laws which may be in force for the time being in Selangor."

(3) That having regard to Chinese customs the trusts should be regarded as religious and charitable and therefore without offence to the rule.

... I therefore come next to consider whether the rule against perpetuities exists in or should be introduced into the Federated Malay States. Counsel before me are agreed that the rule has never been applied in these States, and I am bound to accept that.

The argument against the rule is based partly upon the fact of its novelty, but mainly upon its being a rule of English common law alleged to be unsuitable to the needs and conditions of these States. The argument that the rule has never yet been applied, does not appeal to me with very great force ...

The rule ... is alleged to be unsuitable by reason of the danger of its hampering religious or charitable Mohamedan or Chinese endowments. But of course the rule does not apply to a public charity, and the Court will be tender, if upon no other ground than that of public policy, to respect religious customs and to protect every good *wakaf* and every good Chinese or other charitable endowment.

Then it is said that the rule was only adopted in the Colony of the Straits Settlements because, apart from its being a rule of good policy, it was a rule of English law, and was adopted as such. Their Lordships of the Privy Council said in *Ong Cheng Neo* v. *Yeap Cheah Neo*:

> "... the law of England must be taken to be the governing law, so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances ..."

It is submitted to me ... that one prime cause for the adoption of the rule in the Colony is absent here, seeing that these States never were either ceded or newly settled territory, but States which by treaty invited a certain measure of British protection and control.

The general law of England was never introduced or adopted here at any time. The most that could be said was that portions of that law were introduced by legislation which adopted, not English law, but English principles and models for local laws.

That is a fair and cogent argument and the only one in this matter which has caused me hesitation. I overcome it by reason of my strong belief in the rule against perpetuities as a rule of good public policy ... To my mind the question to be put is "Why reject a good public policy because it is English?" The law fails in virtue if it is not progressive to study the needs and further the best interests of these progressive States.

We have as a matter of fact adopted freely in these States a great mass of English rules of law and equity, civil and criminal law and procedure, either directly or derivatively. The latter might be said to a certain extent even of our land tenure and registration. The commercial law of England is welcomed here. Our Judges are interchangeable with those of the Colony ...

I think, also, that a certain measure of uniformity of rules and principles of law throughout the Colony and the Federated Malay States, subject to the same proviso, has rightly been the policy of the legislature of these States, and is on the face of it desirable in view of the close ties and common interests that bind us and the Colony.

These considerations are so strong as, in my opinion, to render almost mischievous any objection to the rule against perpetuities based entirely upon its English origin or its prevalence in the Colony ...

The Privy Council ... in the *Ong Cheng Neo* case condemned a Chinese trust for a family burial ground and ... held ... that a trust for a family house for ancestral worship was not a charitable use ...

I am anxious to point out that this Court in no way expresses or feels any lack of respect or consideration for ancient Chinese custom. At the same time, it is necessary that the exact nature of the Testator's trust should be understood .... The pious rites in reverence of an ancestor do not constitute a religion any more than the honouring of parents, enjoined by Moses, was the religion of the Jews ... Ancestral worship is merely a pious duty, like many others, endorsed and countenanced by religion. It is, however, is no sense a public duty.

It is impossible, therefore, to regard these trusts either as trusts for religious purposes or as trusts concerning or benefitting the community at large or any portion of it. It follows that they are in no way to be saved or excepted from repugnancy to the rule against perpetuities, and are

therefore void, in my opinion ... I hold that since the trusts here were void *ab initio* as offending against the rule, the property fell into residue by operation of law ..."

Ong Guan Hua* v. *Chong
[1963] MLJ 6

In Malaya there is no distinction between wagering on games and other types of gaming and in every case the question of gaming is to be considered in the light of the local statutes which correspond to the English Gaming Acts of 1845 and 1892.

At various dates in 1955 the plaintiff, who is the respondent in the present appeal, paid $4000 to one Lim Beng Hean. The money was used to finance a series of gambling transactions in "paper rubber" with a firm of Gee Hong. These transactions resulted in losses. The plaintiff's (respondent's) story was that he knew nothing about the gambling transactions with Gee Hong, and that the money given to Lim was merely a "friendly loan". Lim's story was that the money was handed to him by the plaintiff (respondent) for the purpose of speculating on the plaintiff's behalf with Gee Hong.

Some time later, Lim endorsed and delivered to the plaintiff a series of seven cheques each for $500 in purported repayment of the $3500. Each of these cheques was drawn to "cash" by one Ong Guan Hua. When the cheques were presented for payment, none of them was paid. Three of them were returned by the bank "refer to drawer", the other four were returned marked "out of date". The plaintiff filed action, pleading that he was suing on the cheques which were given to him in repayment of the friendly loan. The defendant contended that the cheques were given in repayment of losses in respect of gaming transactions and that accordingly the plaintiff had no enforceable claim against him.

The trial judge, Suffian J. found that the cheques were given by way of repayment of money advanced by the plaintiff for the purpose of gaming and lost in the course of gaming transactions. Consequently, by reason of section 26(4) of the Civil Law Ordinance 1956 the transaction was unforceable. On appeal to the Court of Appeal, Thomson C.J. dismissed the appeal.

Thomson C.J.

"What we are dealing with is not an action on an agreement which is set up as a contract; it is an action on negotiable instruments. The

difference which is important here is that in an action based on a contract it is for the plaintiff to prove the consideration. In an action on a negotiable instrument, however, consideration is presumed and it is for the maker or the endorser of the instrument if he wishes to defend the action to prove that there was no consideration ...

It is to be observed that the law in this country relating to contracts or agreements by way of gaming and wagering is not the same as the law of England. Section 26(1), (2) and (3) of the Civil Law Ordinance, 1956 and section 30(1) of the Contracts (Malay States) Ordinance 1950 reproduce section 18 of the English Gaming Act of 1845, and section 26(4) of the Civil Law Ordinance is the same as section 1 of the English Gaming Act of 1892.

These are the provisions of the law in England which make certain contracts relating to gaming and wagering unenforceable. There is, however, nothing in our law which corresponds with the English Gaming Acts of 1710 and 1835, one result of which is that securities given in respect of wagers on games and pastimes (including horse-racing) are to be deemed to be given upon an illegal consideration. In this country then, there is no distinction between wagering on games and other types of gaming and in every case the question of gaming is to be considered in the light of the local statutes which correspond to the English Gaming Acts of 1845 and 1892 ..."

Leong Bee & Co.* v. *Ling Nam Rubber Works
[1970] 2 MLJ 45

A common law presumption which had been displaced by an English statute formed no part of the common law of England as administered in England on 7th April, 1956.

A fire broke out in the early hours of a Sunday morning at a factory building occupied by the respondents at Tampoi, Johore Bahru and it spread to the building next door which was owned and occupied by the appellants and destroyed it also. The appellants claimed damages, citing negligence and nuisance. The trial judge gave judgment for the appellants on the claim in negligence, but the claim in nuisance was dismissed. On appeal to the Federal Court, the decision of trial judge on the claim in negligence was reversed. A cross appeal on the claim in nuisance was dismissed.

On further appeal to the Privy Council, it was held that the

Federal Court was right in setting aside the judgment of the trial court as the finding of negligence against the respondent was unsupported by evidence.

Sir Frank Kitto

"The appellants sued the respondents in the High Court in Malaya at Johore Bahru for damages for the loss occasioned to them by the fire, asserting causes of action which, as the case proceeded, were identified by common consent as negligence and nuisance. The doctrine of *Rylands* v. *Fletcher* was relied upon in the early stages of the case, but the evidence provided no basis for its application and it was put aside ...

... The common law presumption referred to in *Becquet* v. *Mac Carthy* (1831) 2 B & Ad. 951, 958, *Musgrove* v. *Pandelis* [1919] 1 KB 314, 317, and *Mason* v. *Levy Auto Parts of England Ltd.* [1967] 2 QB 530, 538–9, that a fire which began on a man's property arose from some act or default for which he was answerable, has no application in Malaysia and has had no application there at least since the coming into force of the Civil Law Ordinance, 1956, s. 3. The reason is that having been displaced by statute ... the presumption formed no part of the common law of England as administered in England at that date.

Upon the appellants lay the burden of proof as to both negligence and nuisance ... without the aid of the presumption ..."

Lee Kee Choong* v. *Empat Nombor Ekor (NS) Sdn. & Ors.
[1976] 2 MLJ 93

Section 3 of the Civil Law Ordinance 1956 adopted the English law as administered in England at its effective date, i.e. 7th April 1956, so that any subsequent march in English authority is not embodied.

The issue before the court was whether a valuation made by an independent firm of chartered accountants, appointed by the parties and duly approved by the court, to determine the fair and just price of shares, could be questioned.

Lord Russell of Killowen

"Their Lordships do not need to comment on possible developments since 1956 in the law in England concerning ability to go behind a

valuation on ground of mistake or error in principle, having regard to the emergence of an ability to sue such a valuer for negligence: see for example *Campbell* v. *Edwards* [1976] 1 WLR 403. For present purposes it appears that the Civil Law Ordinance 1956, section 3, adopted English law as administered at its effective date, so that any subsequent march in English authority is not embodied."

Jamil bin Harun* v. *Yang Kamsiah & Anor
[1984] 1 MLJ 217

It is for the courts in Malaysia to decide, subject always to statutory provisions in force, whether to follow English law. Modern English authorities may be persuasive, but are not binding. In determining whether to accept their guidance the Courts will have regard to the circumstances of the States of Malaysia and will be careful to apply them only to the extent that the written law permits and no further than in their view it is just to do so.

The second respondent, Yang Salbiah, had been run down by a bus and as a result of the accident suffered very serious brain injury which turned her into a sub-normal child with permanent mental and physical disabilities. The trial judge awarded a global sum of $75 000 as general damages. On appeal to the Federal Court, it was held that in personal injury cases where there was an element of future loss or damage, it was necessary for the court to itemise and make a separate assessment under each head of loss or damage. In doing so, the Federal Court was following the English authority laid down by the House of Lords in the case of *Lim Poh Choo* v. *Camden and Islington Area Health Authority* [1980] AC 174 and its own earlier decision in *Murtadza bin Mohamed Hassan* v. *Chong Swee Pian* [1980] 1 MLJ 216.

The Privy Council held that the Federal Court was fully entitled to do so.

Lord Scarman

"The appellant's counsel developed in his submissions to the Board a wide-ranging attack upon the judgment of the Federal Court, which, he said, represented not the law of Malaysia but the law of England. His general submission was that the Federal Court had erred in law in following English authorities. He referred to section 3 of the Civil Law Act 1956, the effect of which is that developments in English law after the dates specified in the section do not in themselves form part of Malaysian law ...

The importance of the submission is that the Federal Court accepted the guidance of the House of Lords in the English case of *Lim Poh Choo* v. *Camden and Islington Area Health Authority*. By doing so they incorporated the principle of itemisation of damages in personal injury cases into Malaysian law ...

Their Lordships do not doubt that it is for the courts of Malaysia to decide, subject always to the statute law of the Federation, whether to follow English case law. Modern English authorities may be persuasive, but are not binding. In determining whether to accept their guidance the courts will have regard to the circumstances of the States of Malaysia and will be careful to apply them only to the extent that the written law permits and no further than in their view it is just to do so. The Federal Court is well placed to decide whether and to what extent the guidance of modern English authority should be accepted.

On appeal the Judicial Commitee would ordinarily accept the view of the Federal Court as to the persuasiveness of modern English case law in the circumstances of the States of Malaysia, unless it could be demonstrated that the Federal Court had overlooked or misconstrued some statutory provision or had committed some error of legal principle recognised and accepted in Malaysia ..."

Permodalan Plantations Sdn. Bhd.* v. *Rachuta Sdn. Bhd.

[1985] 1 MLJ 157

Legal set-off which is based on English statute is not included in the expression "the common law of England". Only equitable set-off is part of the local law and consequently the court can only deal with an equitable set-off.

The appellants had entered into an agreement with the respondents to buy mawa coconut seeds from them. Subsequently disputes arose and the appellants filed two civil suits against the respondents. The issue before the court was whether the respondents had the right to set off part of the sum claimed by the appellants.

The Senior Assistant Registrar, who heard the appellants' application for final judgment, decided that the appellants were not entitled to the full sum as claimed by them but only part thereof, the balance to be withheld until the respondents' set-off and counterclaim was tried. An appeal to the High Court was dismissed and the appellants appealed to the Federal Court. The appeal was again dismissed.

Salleh Abas L.P.

"At common law a right of set-off was not recognised despite the fact that a defendant had a valid claim against a plaintiff. Thus, in order to prevent imprisonment of such a defendant, two statutes, known as Statutes of Set-off, were passed in 1728 and 1734. Although these statutes and the subsequent statutes were repealed, the principle has been preserved by successive statutes even to this day. In addition to the statutory set-off, the court of equity has all along been in the habit of allowing a defendant to restrain a plaintiff from proceeding at law where in view of the defendant's cross-claim, the court thinks that it is unjust for the plaintiff to proceed with his suit at law. This is known as "equitable set-off" and it operates ... where there is an equity which goes to impeach the title of the legal demand: *Rawson* v. *Samuel* (1841) 41 Cr. & Ph. 161,178; E.R. 451. The fusion of the law and equity in 1873 does not affect this principle either ...

As regards our law, section 25(2) of our Courts of Judicature Act gives a number of additional powers to the High Court, one of which is to allow a defence of set-off (see item 13 of the Schedule). However, the proviso to the section requires this power to be exercised "in accordance with any written law or rules of court relating to the same."

We know that in English law there are two types of set-offs, statutory set-off and equitable set-off. The question is whether both these set-offs are applicable as part of our law? The answer to this question depends upon the effect of section 25(2) together with its proviso and the Schedule ...

We have no statutes dealing with a defence of set-off as are available in the United Kingdom. Neither have the United Kingdom statutes on the subject been incorporated in our Civil Law Act 1956 which deals with the reception of English law in this country. Section 3(1) of this Act only enacts that:

> "the Court shall, in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956".

Clearly, equitable set-off is included in the expression "rules of equity" which the Court is required to apply under the section. But the legal set-off which is based on statute is in no way included in the expression "the common law of England" which we are required to

apply. Thus, there being no Malaysian statutes comparable to the United Kingdom statutes on the subject, we therefore hold that only equitable and not legal set-off is part of our law, and consequently the Court can only deal with an equitable set-off ..."

(b) Equity

Haji Abdul Rahman & Anor* v. *Mahomed Hassan
[1917] A.C. 209

The land administration system of the State of Selangor is a system of registration of title modelled on the Australian Torrens system. Under such a system there is no room for the application of equity.

A written agreement made in 1895 provided that, as security for a debt, land belonging to the debtor was transferred to the creditor. It was a condition in the agreement that if the debtor repaid the debt within six months, the land should be retransferred to him. In 1913 the debtor, who had not repaid the debt, sued to redeem the land. The Court held that the action was statute-barred unless the agreement was a mortgage.

On appeal to the Privy Council, Lord Dunedin held that the agreement did not confer on the debtor a real right in the land but merely a contractual right.

Lord Dunedin

"Before the trial judge the argument of (the) parties seems to have been as follows: The plaintiff argued that the agreement, on a proper construction, proved that what was *ex facie* an out-and-out transfer, evidenced by the registered title, was in reality only a conveyance in security, and that he was therefore entitled, on paying the debt to get a reconveyance of the land. To this the defendant made several replies.

First, he said that on a true construction the agreement showed, not a conveyance in security, but a transfer with a conditional contract for resale, a *pactum de retrovendendo*, and that, payment not having been made within the time stipulated, there was no obligation to reconvey. He also pleaded that if the agreement on construction showed a conveyance in security, then it was null and void in terms of section 4 of the Registration of Titles Regulation, 1891. He also pleaded that any action

founded on the agreement was barred by the Limitation Enactment of 1896.

The learned trial judge ... (held) the agreement in question on a proper construction shows that the transaction was one of conveyance in security, and not of transfer with appended *pactum de retrovendendo*. To this view he has the adherence of the majority of the two learned judges of the Court of Appeal. The dissenting judge ... thought that the agreement was a *pactum de retrovendendo* conditioned by payment within the stipulated time of six months ...

The land system of the State of Selangor, in which the land in dispute is situated, is a system of registration of title modelled on the well-known Torrens system in Australia. It is unnecessary to describe it in detail; the law thereupon is contained in the Act cited, which forms a code on the subject. Section 4 is as follows:

> "After the coming into operation of this Regulation, all land which is comprised in any grant ... shall be subject to this Regulation and shall not be capable of being transferred, transmitted, mortgaged, charged, or otherwise dealt with except in accordance with the provisions of this Regulation, and every attempt to transfer, transmit, mortgage, charge, or otherwise deal with the same, except as aforesaid, shall be null and void and of none effect ..."

In Part VII, dealing with purchases, section 41 is as follows:

> "Whenever any land is intended to be charged or made security in favour of any person, the proprietor shall execute a charge in the form contained in Schedule E, which must be registered as hereinbefore provided."

Now the agreement under discussion was not in the form of Schedule E and therefore could not be and was not registered. It is therefore clear that it conferred no real right in the land, which remained after the transfer duly registered as the unburdened property of the defendant ...

It seems to their Lordships that the learned judges, in these observations, have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were here dealing with a totally different land law, namely, a system of registration of title contained in a codifying enactment. The very phrase "equity of redemption" is quite inapplicable in the circumstances ..."

Note

This decision of the Privy Council must now be read in the light of the recent decision in *Mahadevan s/o Mahalingam* v. *Manilal & Sons (M) Sdn. Bhd.* [1984] 1 MLJ 266. See also Salleh Buang, "Equity and the National Land Code – Penetrating the Dark Clouds" [1986] 1 *MLJ* cxxv, and Teo, KS "The Scope and Application of Section 6 of the Civil Law Act, 1956" [1987] 1 *MLJ* lxix.

Motor Emporium v. *V. Arumugam*
[1933] MLJ 276

The Courts of the Federated Malay States have on many occasions acted on equitable principles, not because English rules of equity apply, but because such rules happen to conform to the principles of natural justice.

By a letter in writing dated September 17, 1932 and stamped as an assignment, a judgement-debtor (contractor) assigned his rights to the respondent to draw $390 from the Public Works Department, Klang. Meanwhile, the appellant obtained judgement against the judgement-debtor and, in pursuance of that judgement, served a prohibitory order on the Senior Executive Engineer, Klang on October 26, 1932.

The Court held that after the judgment-debtor had executed the assignment in September 1932, he had in fact transferred such interest and accordingly nothing remained for the appellant to attach. The Court also held that although there was (at that point in time) no Civil Law Enactment incorporating into the law of the Federated Malay States the equitable principles applied in England, yet under the provisions of section 49(i) of the Courts Enactment, the Supreme Court has the widest possible jurisdiction in all suits, matters and questions of a civil nature, and has inherent jurisdiction to apply such principles of natural justice as are necessary or desirable.

Terrel, Ag. CJ

"It is said that the English rules of equity, as administered by the Courts of Chancery, have no application in the Federated Malay States, as the Court has not been given the jurisdiction of the Court of Chancery, nor is there any Civil Law Enactment incorporating into the law of the Federated Malay States the equitable principles applied in England.

This is perfectly true so far as it goes, but under section 49(i) of the Courts Enactment, the Supreme Court has the widest possible jurisdiction in all suits, matters and questions of a civil nature, and

although the legislature has given no indication on what principles such jurisdiction should be exercised, every Court must have inherent jurisdiction to do justice between the parties, and apply such principles as are necessary or desirable for attaining such object, and for giving decisions which are in conformity with the requirements of the social conditions of the community where the law is administered.

Looked at it in this light, it would hardly be reasonable to exclude in the Federated Malay States a principle of natural justice merely because a not less civilised community, namely England, has adopted such a principle as part of its recognised legal system. On the contrary, it is a cogent reason for adopting the same principle in the Federated Malay States.

The Courts of the Federated Malay States have on many occasions acted on equitable principles, not because English rules of equity apply, but because such rules happen to conform to the principles of natural justice ..."

Chin Choy & Ors.* v. *Collector of Stamp Duties
[1981] 2 MLJ 47

The principle that once a valid contract of sale is concluded the vendor becomes in equity a trustee for the purchaser is a peculiarity of English land law. In view of section 6 of the Civil Law Ordinance 1956 it is doubtful whether the principle applies to Malaysia.

The main issue before the Court concerned the *ad valorem* duty on the transfer of property. The property was sold pursuant to an agreement dated October 30, 1971 in which the purchase price was stated as $49 000. The memorandum of transfer was executed on June 26, 1973. The Collector assessed the market value of the property as at the latter date at $65 000 and computed the stamp duty accordingly. The appellant appealed to the High Court and the Federal Court against the assessment but the appeals were dismissed. On further appeal to the Privy Council, it was held that the assessment of stamp duty, made pursuant to section 12A of the Stamp Ordinance, 1949 had been correctly done by the Collector.

In the course of his judgment, Lord Roskill made reference to the Malaysian Torrens system and section 6 of the Civil Law Ordinance 1956. Unfortunately no definitive ruling was made on the matter.

Lord Roskill

"Much emphasis was laid by learned counsel for the appellant in his argument upon the existence in Malaysia of the Torrens system and upon the differences between that system and conveyancing practice in England. Nonetheless learned counsel also contended that the effect of the agreement of October 30, 1971 was to transfer the equitable of the property to the appellant notwithstanding that the legal title could only be transferred by registration in accordance with the National Land Code. The respondent was prepared to concede that the equitable title was transferred on that date and in that manner.

However, the principle that once a valid contract for sale is concluded the vendor becomes in equity a trustee for the purchaser of the estate sold is peculiarity of English land law. But section 6 of the Civil Law Ordinance, 1956 of the Federation of Malaya expressly provides that nothing in that part of that Statute should be taken to introduce into the Federation "any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein."

It is not, however, necessary for their Lordships further to pronounce upon this question in the present appeal. ..."

UMBC & Anor* v. *Pemungut Hasil Tanah Kota Tinggi
[1984] 2 MLJ 87

Laws relating to the tenure of land must, applying the ordinary and natural meaning of these words, embrace all rules of law which govern the incidents of tenure of land, and among these incidents is the right to grant relief against forfeiture. The National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents of it and there is no room for the importation of any rules of English law in that field except in so far as the Code itself may expressly provide for it.

In 1966 the Johore State Authority alienated 20 680 acres of land to the second appellants for a term of 99 years in consideration of a stipulated annual rent and other conditions. Large sums of money had been spent by the second appellants to develop the land for the purpose of a sugar plantation. Loans were obtained from the first appellant and as security thereof the land had been charged to the first appellant.

In 1977 the second appellants were in default of the annual rents

due to the State and subsequently foreclosure proceedings were instituted. In due course the respondent made the order declaring the land forfeit to the State Authority. The main issue before the court was whether the appellants could seek relief in equity from the court.

The High Court gave judgment for the appellants but on appeal to the Federal Court, the court gave judgment allowing the appeal. On further appeal to the Privy Council, it was held that as the National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia, there is no room for the importation of any rules of English land law and hence relief in equity against forfeiture could not be granted to the appellants.

Lord Keith of Kinkel

"It was further argued for the appellants that the English rules regarding relief against forfeiture were imported generally into the law prevailing in Johore by section 3(1) of the Civil Law Act 1956 ... For the reasons already given, their Lordships are of opinion that the relevant provisions of the Code evince an intention that the English rules of equity relating to relief against forfeiture should not be available to proprietors of alienated and section 3(1) of the 1956 Act cannot therefore avail the appellants, since these provisions are inconsistent with the rules in question.

It is necessary to notice finally section 6 of the Civil Law Act 1956 ... It was argued for the appellants that this enactment did not preclude the application of the English equitable rules as to relief against forfeiture since these rules were not part of the law of England relating to the tenure of immovable property. "Tenure", so it was maintained, meant only the mode of holding land, and the rules of equity were something different.

But, in their Lordships' opinion, laws relating to the tenure of land must, applying the ordinary and natural meaning of these words, embrace all rules of law which govern the incidents of tenure of land, and among these incidents is the right, in appropriate circumstances, to the grant of relief against forfeiture.

The National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents of it, as well as other important matters affecting land there, and there is no room for the importation of any rules of English law in that field except in so far as the Code itself may expressly provide for this ..."

SECTION THREE

East Malaysia (Sabah and Sarawak)

8

Application of Custom in Sabah and Sarawak

The East Malaysian States of Sabah and Sarawak have a different course of legal history when compared with the 11 states of West Malaysia. In East Malaysia, there was no question of Portuguese or Dutch presence; there was no uncertainty as to the content of the *lex loci* of either place at any time whatsoever. Students who wish to read further on the legal history of these two East Malaysian states are recommended to read in full M.B. Hooker's *Native Law in Sabah and Sarawak* (1980), a small portion of which has been extracted and included in Part II of this book.

The acquisition of Sabah (then known as British North Borneo) began in 1881. By 1888 British North Borneo had already become a protectorate of the British Government. By a series of laws and proclamations, native law and native land rights were safeguarded. In 1938, with the passing of the Civil Law Ordinance, English common law and equity began to be applied in the State, with the usual proviso relating to local conditions and local custom.

As regards Sarawak, its modern legal history began in 1846 when the then Sultan of Brunei, Sultan Omar Ali, gave the province of Sarawak (which he then owned) to James Brooke. Brooke's Code of Laws (see Part II of the book) then became the first set of modern laws in Sarawak. By 1870 Native Courts were established where native laws were administered. Legal development in Sarawak continued through the years until it culminated in 1949 when, by the Application of Laws Ordinance, English common law, rules of equity and statutes of general application were applied to Sarawak (with the usual proviso regarding local conditions and local custom).

The following five cases from Sarawak dealt with various issues – the powers of the Sarawak Native Officers' Court (*Abdul Latif*), the legal position of the Chinese people and their customary law in Sarawak (*Chan Bee Neo*), and the legal position of the Malay custom or Malay Undang-Undang of Sarawak (*Mahadar* and *Serujie*). The case of *Kho Leng Guan* is significant because in this case (which dealt with the problem of a contractual relationship between two Chinese brothers in respect of a joint family house), the court expressly said that the material legal sources of the law in Sarawak are:

(a) Orders and written laws enacted by Brooke;
(b) English law in so far as it is not modified by the law comprised in (a) above and in so far as it is applicable to Sarawak, having regard to native customs and local conditions; and
(c) Certain laws and customs of the races indigeneous to Sarawak, including Mohamedan law and other native law or custom in so far as it is reasonable.

Abdul Latiff Avarathar* v. *Lily Muda
[1982] 1 MLJ 72

Whether the Sarawak Native Officer's Court has jurisdiction or not in any given case is for the that court to decide.

The parties were married in 1964. During the marriage, the appellant had made a number of investments in the name of the respondent with the purported intention that she should be a trustee for him and their children. One such investment was Lot 3284 in Kuching. On May 15, 1974 the Native Officer's Court in Kuching dissolved their marriage and ordered that all properties acquired during their marriage be divided between them in the proportion of one-third to the respondent and two-thirds to the appellant.

The appellant did not appeal against this decision to the Native Court of Appeal. Instead he filed an action in the High Court, seeking a declaration that he is the absolute owner of Lot 3284 and for an order that the respondent transfer it back to him. The respondent resisted the action, claiming that the said Lot 3284 was an absolute gift to her, or alternatively, that she was entitled to one-third share of therein. The trial judge ordered proceedings to be stayed pending the outcome of the appeal against the decision of the Native Officer's Court. The appellant appealed to the Federal Court.

Lee Hun Hoe C.J. (Borneo)

"Both parties are Muslims. Section 5(1) of the Native Courts Ordinance provides in no uncertain terms that:

"5. (1) Native Courts shall have jurisdiction, concurrent with such other courts as may be empowered to try the same, over ...

(c) cases arising from the breach of the Malay Undang-Undang or Malay custom of Sarawak in which all the parties are Muslims; ...

...

(f) any matter in respect of which it may be empowered by any other written law to exercise jurisdiction".

Under section 5 of the said Ordinance it is provided quite clearly that "Native Courts shall have jurisdiction, concurrent with such other courts as may be empowered" to try a variety of topics ...

It may be useful to point out that the Application of Laws Ordinance (Cap. 2) makes provision for local circumstances in the general application of English law ...

The learned judge was apparently concerned over the question of jurisdiction for he pointed out in his judgment at page 33 of the Appeal Record that:

> "Against the decision of the Native Officer's Court in case No. 13/74 the plaintiff herein has lodged an appeal which is yet to be heard and the outcome of which may well affect all or some of the reliefs claimed by the parties in this action."

Although the appellant has contended, *inter alia*, that the question of the division of property was not an issue tried before the Native Officer's Court, that court, nevertheless, acting under section 41 of the Undang-Undang Mahkamah Melayu Sarawak, has made an order with regard to the "*harta pencarian*", consequent upon the making of the decree of divorce. Any appeal against this decree being made would necessarily involve consideration of the above consequential order regarding the division of property (unless the appeal against divorce is allowed); and in this respect, the final forum to decide the appeal should be the Native Court of Appeal in the circumstances. Otherwise the

assumption by the High Court of jurisdiction to decide upon the matter of the land in question would be in effect tantamount to the assumption of jurisdiction to decide upon a matter connected with the appeal, or to anticipate the result of the appeal ...

The right to appeal through the Native Court hierarchy should not be denied. If a party wishes to abandon his or her right that is his or her concern. There is nothing to say that a Native Court has no jurisdiction to deal with *harta pencarian*. Such question should be left to the Native Court hierarchy. Whether the Native Officer's Court has jurisdiction or not is a matter for the Native Court hierarchy to decide. Until the matter has been finally decided there is nothing to prevent the learned judge from properly exercising his discretion to stay (proceedings). There is no reason for us to interfere with the exercise of his discretion. Accordingly, we would dismiss the appeal with costs."

Chan Bee Neo & Others* v. *Ee Siok Choo
[1947] S.C.R. 1

The Chinese are not indigenous to Sarawak and Chinese customary law is not "native custom" for the purposes of the Law of Sarawak Ordinance. Chinese customary law will be applied only where the custom in question is expressly regulated by, or is recognised in, a Sarawak Ordinance.

The issue before the Court concerns the validity of a will drawn up by a Chinese in Sarawak. In the course of delivering his judgment in which the will was held to be valid according to Chinese customary law, the learned Chief Justice explained the true meaning of "native custom" of Sarawak.

Hedges, C.J.

"It becomes necessary to examine the authority for the recognition of Chinese customary law in Sarawak and the extent to which it is applied in the Courts.

The effect of the Law of Sarawak Ordinance is that the law of England, in so far as it is not modified by Sarawak Ordinances, and in so far as it is applicable to Sarawak "having regard to native customs and local conditions", is the law of Sarawak. The Supreme Court has interpreted this Ordinance, if not expressly at all events by implication, as meaning that native law and custom will be respected and in a proper

case must be applied. But "native custom" means the custom of natives of Sarawak, and the natives of Sarawak must belong to one of the races considered indigenous to the Colony and enumerated in the Schedule to the Interpretation Ordinance.

The Chinese are not indigenous to this country and Chinese customary law is not "native law". The Law of Sarawak Ordinance uses the words "native customs and local conditions", but I am not prepared to believe that it is the intention of the words "and local conditions" to open the door wide for the Chinese (or for that matter Hindu) customary law. The Court will apply Chinese customary law:

(a) Where the custom in question is expressly regulated by a Sarawak Ordinance, or by rules made under an Ordinance; or

(b) Where the custom is recognised, either expressly or by necessary implication, in a Sarawak Ordinance.

As regards (a), the custom of ancestral worship is regulated by the Ancestral Worship Ordinance ... As regards (b), two important branches of Chinese family law seem to be affected – matrimonial law and the law of inheritance ... Reference may be made to section 2 of the Chinese Marriage Ordinance, which expressly recognizes marriages contracted according to Chinese law and custom and by implication recognizes the Chinese customary law relating to betrothals.

With regard to the law of inheritance, the Chinese customary law of succession on an intestacy has long been recognized by Sarawak Courts. Section 17 of the Administration of Estates Ordinance refers to the distribution of the estate among the heirs "in the shares to which they are entitled by recognized law or custom", and it is well established that this includes Chinese customary law ...

I have dealt with this matter at some length because the notion, still held by some Magistrates, that Chinese customary law is part of the law of Sarawak, must be exploded. The Courts cannot extend the field within which Chinese custom is recognized; that is the province of the legislature."

Kho Leng Guan* v. *Kho Eng Guan

[1936] S.C.R. 60

The law of Sarawak consists of local statutes, English law in so far as it is not modified by such local statutes and subject to native customs and local

conditions, and native customs of races indigenous to Sarawak.

The full facts of the case appeared in the judgment of the court. The main issue before the court was what law to apply to a contractual relationship between two Chinese brothers in respect of a joint family house.

The Judgment of the Court

"The facts are that the appellant and the respondent are brothers. They have lived together since childhood with their father and mother and when the father died in Sarawak in 1921 they continued to live together with their mother. The residence was for the most part in Sarawak, but in 1924 the appellant and his mother went to China, the respondent remaining in Sarawak. The appellant and his mother returned to Sarawak in about six months and the joint family residence continued. The fact that the appellant and his mother went to China and left the respondent does not appear to be relevant in the present case, but I mention it as part of the history of the case.

There appears to be no doubt that a joint family establishment was maintained, though at this distance of time it is difficult to ascertain any accurate details of the financial agreement. The respondent said that the household expenses were about $60–$70 per month, and that he paid the most of it. The appellant says that he also paid a share. The fact appears to be that the two brothers paid their wages to their mother who managed the house. If either brother required money he asked his mother for it. The mother died in 1930 and the two brothers continued to live together. Last October they had a quarrel and in these circumstances the action is brought. If the case is decided on the basis of Chinese custom there appears to be no doubt that the two brothers are entitled to a share of the property though what share is not so clear. The point, however, does not arise as I have come to the conclusion for reasons which I will now state that the contention of the respondent that this case should be decided by Chinese custom cannot succeed.

The problems involved are complicated but for the purposes of this case it may be said that the material legal sources of the law of Sarawak are threefold, viz.:

(1) Orders and other written laws enacted by or with the authority of His Highness the Rajah;

(2) English law in so far as it is not modified by the law comprised in (1) and in so far as it is applicable to Sarawak, having regard to native customs and local conditions;
(3) Certain laws and customs of the races indigenous to Sarawak, including Mohamedan law and other native law or custom in so far as it is reasonable.

The law comprised under the third heading includes Mohamedan and Dayak and other customs concerning marriage and inheritance and also certain customs by which criminal sanctions are imposed, e.g. for adultery and incestuous relation as understood by Malay and Dayak custom. The customs of certain other races are also to some extent followed, and the question at issue in this case is whether a certain custom of the Chinese is or is not to be admitted as part of the law of Sarawak. This question involves a much wider question which in the absence of any statutory authority must be dealt with by English law. I do not mean to imply that it follows directly that English law must be applied when a question of a choice of law arises but that by English law rules are laid down to determine what law must be applied.

The question appears to me to resolve itself into this. This relation between the parties is primarily a relation of contract and as such foreign law does not in my view apply to a case in which the contract was both made and performed in Sarawak where, moreover, the property in dispute is situated. The operation of local custom other than English law is limited first to customs of races indigenous to Sarawak and secondly to these personal and family relations such as marriage and inheritance of which by English law the test is the domicile of the individual. The test of domicile is, however, not exclusive, as in the case of marriage and inheritance the personal law of the individual must also be considered. For example, a Hindu may be domiciled in Sarawak but may still rely on the Hindu customs on these matters.

To my mind any other decision cannot be supported on principle and, if it were, it would lead to confusion. For example, suppose two Japanese make a contract in Kuching: If the contention of the respondent is upheld, this is governed by the law of Japan. How is the law to be proved? Again, an American, domiciled in Chicago, makes a contract in Miri with a native of Labuan. This amounts to a *reductio ad absurdum* as obviously the laws of Illinious and Labuan cannot both apply.

The result is that English law must apply to the facts in the present case, and I therefore allow the appeal with costs. In doing so, however, I should make it clear that I give no decision on the question whether a debt is owing by one party to the other. There may or may not be, and if either party thinks so he is not debarred from bringing a further action. In any such action, however, the rights of each side will be defined by English law."

S.M. Mahadar bin Datu Tuanku Mohamad* v. *Chee (f)
[1941] S.C.R. 96

The Malay Undang-Undang of Sarawak must be applied to settle disputes amongst Muslims of Sarawak concerning the status of a child. English law cannot be applied.

The full facts of the case are contained in the judgment of the court. The issue before the court is whether the civil court can disturb the finding of a Native Court in respect of the status of a child in accordance with the provisions of the Malay Undang-Undang of Sarawak.

The Judgment of the Judicial Commissioner

"In this case the appellant ... appeals against a decision given in a Native Court under the Malay Undang-Undang whereby he was declared to be the father of a child born to one Chee, a Chinese woman converted to Islam, respondent in this action. The appellant has carried his appeal through the Resident's Court at Simanggang up to the Supreme Court, where the relevant evidence has been carefully considered by myself assisted by Mr. Selous, acting as an assistant judge and by two Datus, the Datu Amar and the Datu Hakim.

At the beginning of this hearing I mentioned that this case would not be considered under the Malay Undang-Undang, but it has been represented to me that this is a matter which must be decided under, and judgment given upon the Malay Undang-Undang, and that in the judgment which I give in this Court must be bound by the terms of the accepted Code of Malay domestic registration. The material section upon which reliance is laid is number 36. The effect of this section is in direct conflict with the bastardy laws of Great Britain which would normally be the guiding principle in any decision given in this Court.

... In my view the Malay Undang-Undang on this point is in direct conflict with the principles of natural justice. To say, as it does, that the mere fact of pregnancy provides supporting evidence for the pregnant woman's statement that a particular man was the father of her child, is in my view wholly contrary to the most elementary principles of justice and indeed to the ordinary experience of men in every part of the world. Such a fantastic doctrine makes it possible for a pregnant woman to provide for herself and her child by the simple expedience of naming a man whom she believes to be in possession of means sufficient to meet an order under the Malay Undang-Undang.

Having made this observation I will say nothing more on this aspect of Malay customary law. I feel it my duty to add that had I been deciding this case in accordance with British law I should have been bound to find that there was no evidence in corroboration of the woman's statement, which was in any way insufficient to justify a court of law in giving a decision in her favour. In this view I am supported by my brother judge. I fully appreciate the position the two Datus have taken up and indeed I realise that they could come to no other decision holding the view they do. The result to my mind is unfortunate. Moreover this hearing has involved a complete waste of time for this court. As a result the appeal must be dismissed and the finding of the Native Court enforced."

Serujie & Hanipah* v. *Sanah binti Haji Amin

[1953] S.C.R. 40

The court will apply native customary law in cases involving inheritance and jointly acquired properties of indigenous natives of Sarawak.

The facts of the case are described in detail in the judgment of the court. The main issue before the court concerns the manner of disposing the jointly acquired property of the deceased.

Blagden Ag. J.

"This case concerns the inheritance to a half share of a 12 acre garden – Oya Dalat Land District Block 122 Lot 94. This garden was acquired by Zin bin Haji Tambi and his second wife Minah binti Karim as their *pencarian* property. Zin bin Haji Tambi and Minah binti Karim subsequently became divorced and the Personal Index Records

(Exhibits "B") showed Zin bin Haji Tambi as registered proprietor of 1/2 this garden and Minah binti Karim as registered proprietor of the other 1/2.

This case is concerned solely with Zin bin Haji Tambi's half share. Zin bin Haji Tambi died in February 1945 and this half share became part of his estate.

Zin bin Haji Tambi had married three times: first to Kisah binti Alek by whom he had Seruji bin Zin, a son, who is Plaintiff in this action; then to Minah binti Karim by whom he had Hanipah bin Zin, a son, who is in effect a co-plaintiff in this action since Seruji bin Zin is acting for him as well as himself; finally to Sanah binti Haji Amin by whom he had Mutil bin Zin, a son, who is now aged about seven.

The first two marriages were dissolved, Sanah binti Haji Amin, Zin's widow was granted Letters of Administration to Zin's estate and is now sued as Defendant in this action.

Plaintiff complains of two acts of Defendant's administration. First he says she disposed of 1/4 share of the garden to Goh Teok Yam to settle funeral expenses and debts. In my view she was justified in doing this but she must be prepared to account to the heirs for any balance of monies left over. In this case Defendant received $150 and the funeral expenses came to $84. There is therefore a balance of $66.

Secondly Plaintiff complains that Defendant transferred the remaining 1/4 share of the garden to Mutil bin Zin.

Under Melanau Islam law this *pencarian* 1/2 share in the 12 acre garden belonging to Zin's estate falls to be divided among Zin's heirs after allowance has been made to pay funeral expenses.

In this case Zin's heirs, all male, are the Plaintiff, Hanipah and Mutil. The funeral expenses have been paid and what remains over must be divided equally between them. I give judgment the following form:

(1) For $44.00 being Plaintiff and Hanipah's shares of the balance of monies in Defendant's hands after paying funeral expenses out of the sale of 1/4 share in the 12 acre garden to Goh Teok Yam.

(2) For rectification of the Land Register by the deletion therefrom of the name of Mutil bin Zin as proprietor of a 1/4 undivided share and the substitution therefor of the names of Plaintiff, Hanipah bin Zin and Mutil bin Zin as co-

proprietors each of 1/12 undivided share in the 11.91 acre Sago Garden comprised in Oya Dalat Land District Block No. 122 Lot 94.

The proprietors of Block No. 122 Lot 94 thus become:

Minah binti Karim	... 1/2 undivided share;
Goh Teok Yam	... 1/4 undivided share;
Seruji bin Zin	... 1/12 undivided share;
Hanipah bin Zin	... 1/12 undivided share;
Mutil bin Zin	... 1/12 undivided share.

I also order that a caveat be placed on this property in respect of Mutil's $\frac{1}{12}$ undivided share."

Liu Kui Tze* v. *Lee Shak Lian (f)
[1953] S.C.R. 85

Under the 1928 Order L-4 (Law of Sarawak), English law is to apply to Sarawak in so far as it is not modified by local statutes and subject to the native customs and local conditions prevailing in Sarawak.

The facts of the case are contained in full in the judgment of the court. The main issue before the court was what law was to be applied in respect of a divorce amongst a Chinese couple who had married according to Chinese custom.

Blagden Ag. J.

"In 1928 Order No. L-4 was passed "to provide for a general rule in the absence of specific legislation". Section 2 prescribed that "The Law of England in so far as it is not modified by Orders and other Enactments issued by His Highness the Rajah of Sarawak or with his authority, and in so far as it is applicable to Sarawak having regard to native customs and local conditions shall be the Law of Sarawak". Published along with this Order were a number of helpful notes "for the guidance of officers in interpreting Order No. L-4 (Law of Sarawak)".

The significance of this Order is that at the time it was passed and for some years thereafter there was no statutory definition of the term "native". In Section 2 of the Interpretation and General Clauses Ordinance, 1933 (Chapter 3) the term "native" was, and now is, limited

to the members of those races which are prescribed in the Schedule which does not include Chinese. But in 1928 there was no such limitation and it seems clear that Order L-4 (Law of Sarawak) recognised, and was authority to apply Chinese customary law in such matter as marriage and divorce, and in fact the Resident's Courts constituted under the Courts Order of 1922 (Order No. XXX of 1922) did grant divorces to persons married under Chinese custom.

We are not called upon to decide what are the grounds upon which Chinese customary divorces may be granted in Sarawak, but that divorce by mutual consent has long been recognised by Chinese custom seems undoubted. Robert T. Bryan's *An Outline of Chinese Civil Law* (1927 edition at page 18) gives "mutual agreement" as the very first ground recognised under "the ancient law", and in a publication entitled *An Outline of Chinese Family Law* compiled by the Secretariat for Chinese Affairs in 1929 there appears at page 14 the following sentence:

> "The outstanding feature of Chinese divorce law, both past and present, is that a divorce may be obtained by mutual consent."

When petitions are presented on other grounds and the High Court anticipates difficulty in deciding whether such grounds are recognised by Chinese custom or not it is always open to the Judge to call in the assistance of one or more suitable persons as assessors pursuant to section 9(1) of the Sarawak, North Borneo and Brunei (Court) Order in Council, 1951.

In the case before us, to save time and expense, the evidence of the two appellants has been taken. Their appeal is allowed and the marriage celebrated between them by Chinese custom on September 28, 1947 decreed dissolved ..."

PART II

Selected Materials

1

The Acquisition of Penang

L.A. Mills, *British Malaya 1824–67*
1966, Oxford University Press, pp. 30, 36–38, 42–44

The second important question in the early history of Penang was the dispute which arose as to the terms on which it was ceded by the Sultan of Kedah. Was the Company, or was it not, morally bound to defend the Sultan against his enemies, and above all Siam?

The matter was of more than academic interest, because in 1821 Siam conquered Kedah and expelled the Sultan, the Company refusing to assist him. In consequence a bitter controversy arose, which raged in the Straits Settlements until about 1845.

The Sultan contended that the Company had broken its word, and in this he was supported by the great majority of non-official Europeans in the Straits, and also by several important officials. Of these the most noteworthy were John Anderson, a man with a wide knowledge of Malayan affairs, Robert Fullerton, Governor of the Straits Settlements from 1826 to 1830, and above all, Sir Stamford Raffles.

On the other hand the consensus of official opinion in the Straits was that no promise of assistance had been given or implied. This view received additional weight from the adhesion of John Crawfurd, who after Raffles' death was the greatest English authority on Malaya. It was also held by Colonel Burney, who negotiated the Anglo-Siamese Treaty of 1826, and by Major Low, who was especially concerned with the affairs of Kedah and Siam during his official career at Penang, which extended from 1820 to 1840.

The most authoritative writer on the subject in later years, Sir

Frank Swettenham, investigated the question in great detail, and fully supported Anderson's position. He held that when the Company accepted Penang, it knew that the grant was made almost entirely with a view to obtaining its assistance against Burma and Siam. While the Directors (of the English East India Company) refused to bind themselves to give aid in the formal treaties ceding Penang, yet by continuing to hold it they were implicitly bound to render the assistance in consideration of which it was granted. The Company should either have assumed the moral obligation which the occupation entailed or else have evacuated the island. Swettenham stigmatised the Company's conduct as:

> "cowardice ... ending in a breach of faith which sullied the British name and weakened its influence with Malays for very many years." (Swettenham, *British Malaya*, page 37) ...

When the Company accepted the cession of Penang in 1786, it negotiated with Kedah as an independent state, although then or soon afterwards it knew that Kedah was in some vague way a Siamese tributary. Moreover the Government of India was well aware that the principal, and in fact the sole, reason for which the grant was made by the Sultan, was to obtain the armed assistance of the Company.

The demand for a defensive alliance was referred to the Directors, for this was contrary to Government policy, as promulgated by Pitt's India Act, which forbade the Company to enter into alliances, but an agreement was arrived at on the other demands made by the Sultan. In 1787 the Government of India decided not to make a defensive alliance with Kedah. The Directors issued similar orders in 1793, and the policy was steadfastly adhered to despite many despatches from Light urging that the Sultan's request should be granted. Light found his position exceedingly difficult and unpleasant: the Sultan continued to press for an alliance, and refused to accept a money-payment in lieu of it. But the Company, interested only in trade, refused to enter into any political commitment.

The Sultan became more and more distrustful and hostile, and finally in 1791 made an abortive attempt to expel the English from Penang. Warlike measures having failed, the Sultan agreed to make a formal treaty ceding the island in return for an annual moneypayment and without the promise of protection for which he had so long contended.

Swettenham's contention is that after the Indian Government decided in 1787 not to give assistance in case of invasion, the retention of Penang was a breach of an implied, though not a written, obligation. Logically, the refusal to form a defensive alliance should have been followed by the evacuation of the territory which had been ceded in the hope of obtaining protection. He stigmatises the conduct of the Company as follows:

> "... Penang had been secured; seven years of occupation had proved its value, and shown that it could be held, without difficulty, by a small garrison against Asiatics; ... a treaty, which said nothing about offensive or defensive alliances, had been concluded; the promises of 1785 and 1786 were forgotten or ignored; and the Sultan of Kedah might be left to settle accounts with his northern foes as soon as the conclusion of their mutual quarrels should give them time to turn attention to him ..."

The next important event in the relations of Penang and Kedah was the acquisition in 1800 of Province Wellesley, the tract on the Kedah mainland opposite the island. The principal reason for obtaining it was to obtain complete control of the harbour of Penang, which was merely the strait separating the island from the Malay Peninsula ... It was ... hoped that the acquisition would make Penang independent of Kedah for its food ...

The Treaty ceding Province Wellesley was negotiated in 1800 by Sir George Leith, the Lieutenant-Governor of Penang. As in the Treaty of 1791 it was stipulated that provisions required for Penang could be bought in Kedah without impediment or paying duty. All previous treaties were cancelled, and there was no mention of a defensive alliance. All that the Company bound itself to do was to refuse shelter to rebels or traitors from Kedah (Article VII); and "to protect this coast from all enemies, robbers, and pirates that may attack it by sea, from North to South" (Article II). Province Wellesley was ceded to Great Britain in perpetuity and the Company was to pay the Sultan $10 000 a year so long as it should occupy Penang and Province Wellesley.

The omission from the Treaties of 1791 and 1800 of any reference to a defensive alliance might be regarded as the abandonment by the Sultan of an untenable claim. Burney and most of the Company's officials did look upon it in this light. Swettenham, however, explains that the Sultan's consent to the treaties did not mean that he was giving

up what he regarded as his right. It was merely a manifestation of Malay psychology ...

No sketch of the early history of Penang would be complete if it did not refer to the very serious problem that arose owing to the absence until 1807 of any legally established courts or code of law. In 1788 and 1794 the Supreme Government drew up a few general rules as to the mode of trial and character of punishments to be inflicted at Penang, but did not feel itself at liberty to do more wihout the authorization of the Directors. These regulations remained the law of the island until 1807, and owing to their defects actually impeded the administration of justice. They were very vague as to the code of law to be administered and the sentences to be imposed, they left far too much to the discretion of the Superintendent of Penang, and they made British subjects practically independent of his jurisdiction.

Petty civil cases were tried by the Captains of Chinese, Malays, and Chulias (i.e. Tamils). These were prominent natives appointed by the Penang Government to assist it in maintaining law and order amongst their own countrymen. More important civil and criminal cases were tried by the Assistant of the Superintendent or, to give him the title introduced about 1800, the Lieutenant-Governor of Penang.

The most serious charges, civil and criminal, were tried by the Superintendent, who had also a right to revise any sentence passed by his subordinates. Until the arrival of Dickens, a Calcutta barrister (and an uncle of the famous novelist) who was sent as magistrate in 1800, the judges were not trained lawyers.

Neither English Civil or Criminal Law was in force. In criminal cases the magistrates punished crime in a rough and ready fashion by acting in accordance with the dictates of their own common-sense, assisted by the very vague Regulations of 1794. The usual penalties were imprisonment, moderate flogging, and banishment from the island. Convicted native murderers were imprisoned pending the decision of the Bengal Government as to their sentences.

In civil cases "as many systems of law were in force as there were nationalities in the Island; and all those laws again were probably tempered or modified by that law of nature, or that natural justice which appears to have been the chief guide of the European magistrate who constituted the Court of Appeal ..." (judgment delivered in 1858 by Sir P.B. Maxwell, Chief Justice of the Straits Settlements, in *Regina* v. *Willans*).

The most serious defects of the Regulations of 1794 however were that all serious cases had to be referred to Bengal, and that it left Europeans almost exempt from any jurisdiction, except for murder and "other crimes of enormity". In these cases they were sent to be tried in the Bengal courts. The result of this immunity, as Lieutenant-Governor Leith pointed out in 1804, was that they took advantange of it to commit many nefarious actions, principally against the natives, who had no legal redress against them. (Leith, *Prince of Wales Island*, 35–6) ...

Finally in 1807 the Directors obtained Parliamentary authorisation for the establishment of a Recorder's Court in Penang. The law which was thus introduced was for both civil and criminal cases the law of England as it existed in 1807. The Charter of Justice directed that especially in the form of procedure of the Court, native religions and usages should be consulted so far as these were compatible with the spirit of English law.

M.B. Hooker, The Law of the Straits Settlements: A Commentary

1982, Oxford University Press, pp. 3–14

In 1786 negotiations were opened with the King of Kedah for the cession of the island: these proved successful and Captain Light with a body of Marines landed at Penang on July 15, 1786, and hoisted the British flag on August 11, 1786, the eve of the birthday of the Prince of Wales in whose honour the Island was re-named "Prince of Wales Island" ...

The occupation had taken place by virtue of the agreement entered into between the King of Kedah and Captain Light for the cession of the island, and on May 1, 1791, a Treaty was concluded by Captain Light which provided for the mutual surrender of runaway slaves, debtors, forgerers and murderers; for the necessary supply of provisions, duty free, from the mainland to the residents on the island and shipping in the harbour, and for the annual payment to the King of 6000 Spanish dollars.

The King was also bound not to allow Europeans of other nations to settle in his country. The Treaty was expressed to continue "as long as the Sun and Moon give light" and it appears to have been negotiated under the impression that the King of Kedah was an independent sovereign, whereas he was in reality a tributary of Siam. The British Government authority over Penang was, however, expressly acknowledged by the Siamese under the Treaty of Bangkok, June 20, 1826.

When Penang was first occupied, it was practically uninhabited; the (First) Charter (of Justice) 1807 says "wholly uninhabited" but the better opinion seems to be that adopted by Sir Benson Maxwell, R., in his historic judgment in *Regina* v. *Willans*, viz., that it was inhabited by four Malay families ...

Such being the state of affairs at the time of the acquisition, what was the *lex loci*? Did the settlers bring with them the law of England then in being, on the ground that the Settlement was acquired by occupancy? Or was the Malay law of the Kingdom of Kedah to be enforced, on the ground that it was a ceded country and had formed a part of that Kingdom? The Privy Council has decided that the former is the correct answer.

In *Regina* v. *Willans* (1858) Sir Benson Maxwell, R., ... held ... that the law of Kedah could not apply (to Penang) because at the time when Penang became a British possession it was without inhabitants to claim the right of being governed by any existing laws, and without tribunals to enforce any. Sir Benson Maxwell held that though four malay families were found on the island, yet it could not be said to be inhabited, and he described it as a "desert island". But whatever the law of the land ought to have been *de jure*, Sir Benson Maxwell considered it clear that for 20 and more years after the founding of the Settlement no known body of laws was in fact recognised as the law of the place ...

In *Fatimah* v. *Logan and others* (1871) Sir William Hackett, J., disagreed with Sir Benson Maxwell. He held ... that as the island was virtually uninhabited the case fell under the general rule that when Englishmen establish themselves in any uninhabited or barbarous country they carry with them the laws and the sovereignty of their own country. He agreed that whatever the law ought to have been *de jure* the fact was that for 20 years no body of known law was recognised as the law of the place.

In *Ong Cheng Neo* v. *Yeap Cheah Neo and others* (1872), the matter was finally settled by the Privy Council as follows:

> "With reference to this history [i.e. the history of the Settlement of Penang], it is really immaterial to consider whether Prince of Wales's Island or, as it is called, Penang should be regarded as ceded or newly settled territory, for there is no trace of any laws having been established there before it was acquired by the East India Company. In either view the law of England must be taken to be the governing

law, so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances."

Captain Light and his immediate successors seem to have administered justice according to the dictates of their consciences. Thus, Mr. George Caunter, a Magistrate, in 1797 punished a Chinese man and woman for adultery by ordering them to have their heads shaved and to stand twice in the pillory from four to six o'clock in the evening and the man to be imprisoned until he could be sent off the island.

The native inhabitants expressed a desire that they should be tried and governed under their own laws with the result that in 1792 Captain Light decided upon and carried into effect the committing of the administration of justice in each class to a headman ...

On June 6, 1800, Sir George Leith concluded a new Treaty with the King of Kedah which annulled the agreement of 1786 and the Treaty of 1791. By this new Treaty, the British obtained the cession of the district, known as Province Wellesley on the mainland opposite Penang, and it became and has always remained part of the Settlement of Penang ...

On August 7, 1801, the first professional Judge arrived in Penang, Mr. Dickens, an English barrister ... Soon after his arrival, he reported that ... there was nothing upon which to administer justice save the Regulations of 1794 which gave him no authority over British subjects, of whose conduct he complained bitterly and frequently...

On March 25, 1807, the Crown granted the first Charter of Justice and by it established a Court of Judicature in Penang.

The Charter provides that there shall be within the factory of Prince of Wales's Island ... a Court of Record, to be called "The Court of Judicature of Prince of Wales's Island". The Court consisted of the Governor, three Councillors, and one other Judge, to be called the Recorder of Prince of Wale's Island ...

The Court is to have the jurisdiction and powers of the Superior Courts in England and the several Justices, Judges and Barons thereof "so far as circumstances will admit" and it is to exercise jurisdiction as an Ecclesiastical Court "so far as the several religions, manners and customs of the inhabitants will admit."

The jurisdiction is limited as to non-residents by a declaration that the Court shall not have power to try any suit against any person who shall never have been resident in the Settlement ...

The Court is then empowered to exercise authority over the persons and estates of infants and lunatics, and to grant probate and letters of administration ... With regard to criminal matters the Court is to be "A Court of Oyer and Terminer and to try and determine indictments and offences and to give judgment thereupon, and to award execution thereof, and in all respects to administer criminal justice in such or the like manner and form, or as nearly as the condition and circumstances of the place and persons will admit of, as Our Courts of Oyer and Terminer and Gaol Delivery do or may do in England due attention being had to the several religions and manners and usages of the native inhabitants ..."

There was no Court of Appeal in the Settlement; the appellant had to go to the King in Council. In civil matters he had first to petition the Court and give such security as the Court directed, if it grated his petition; the petition to appeal had to be lodged within six months and the value of the matter in dispute had to be above the sum of $1600. In criminal matters, an appeal lay in all indictments, information and criminal suits and cases whatsoever upon such terms as the Court might order. Appeal to the King was further allowed in all cases from a refusal by the Court to grant leave to appeal.

Permission was given to the East India Company to establish Courts of Request for the recovery of small debts, limited in amount to 32 Spanish dollars. Power was given to allow the jurisdiction of such courts to be local and personal, with respect to any particular class or tribe of the population ...

Such were the provisions of the Charter; the principal point for notice as to the Court itself is that the Executive and the Judiciary were mixed, a policy which lasted until 1868 and was the cause of endless friction.

R.O. Winstedt, *A History of Malaya*

1986, Marican & Sons, pp. 163–170

In 1771 Francis Light ... wrote to his firm, Jourdain Sullivan and De Souza of Madras, that the Sultan of Kedah would give his sea-port and fort and even his whole coast up to Pinang in return for assistance against the Bugis of Selangor. The Sultan had a monopoly of all the Kedah trade and this monopoly he was prepared to share equally with the British; the cost of the factory and of the force required to deal with

the Bugis being similarly divided. The Danes had already offered the Sultan 3000 sepoys to assist in recovering the ships and guns carried off by the Bugis, if His Highness would allow them a factory, but the Sultan had answered that he had given port and coast to the English.

Light stressed the value of a concession, which would exclude the Dutch, Danes, French and Tamils, and engaged that, if sepoys and a few Europeans were sent with leave to assist the King against Selangor, "not a slab of tin, a grain of pepper, betel-nut or damar" should be exported to any but the British.

The East India Company now sent from Madras the Honourable Edward Monckton to suggest to the Sultan that "in consideration of the support of the Company proposed to give" him, he should grant it all the Kedah port dues for the payment of military expenses, grant ground for a fort and agency, and sign a contract to buy every year at fixed prices certain quantities of articles enumerated and supply in return tin, wax, pepper and elephants' teeth or other staple articles for the China market.

But when the Sultan discovered that the Company's support did not include aid against Selangor, he dismissed Monckton as a "stuttering boy" and declared that "the King of Siam had strictly forbidden him ever to let any Europeans settle in his kingdom ..."

Again Captain Light ... opened negotiations with Kedah and persuaded its new ruler to give him on August 27, 1785 an oft-quoted document, agreeing to let the Company make a settlement and a harbour of the Island of Pinang on certain conditions and in return for an annual payment of $30 000 to compensate Kedah for the consequent loss of her monopoly of trade in tin, rattans and canes.

Salient clauses were "whenever any hostile power comes from the eastern or western sea, it shall be considered by the Company to be its enemies and the expense of the war shall fall on the Company ... And whenever any enemy from the interior shall attack us, he shall be considered as an enemy to the Company and on such an occasion we request assistance from the Company of men, powder and shot and arms large and small and also of money for the expense of such a war, and whenever it is finished we promise to repay what has been advanced."

The Bengal authorities aware that trade must flow to the more convenient and civilised British settlement, accepted that ships, junks and "prows" be allowed to trade at Kedah or Pinang as they liked. They resolved to inform the Sultan *by letter* that the Company would "always

keep an armed vessel stationed to guard the Island of Pinang and the coast adjacent, belonging to the King of Quedah ..."

The article (in the document) referring to English assistance in the events of attacks from the interior would "*be referred for the orders of the East India Company, together with such parts of the King of Quedah's request as cannot be complied with previous to their consent being obtained.*"

Light had pointed out that "the principal and almost only reason why the King wishes an alliance with the Honourable Company" is to get assistance against his enemies "and the treaty must be worded with caution, so as to distinguish between an enemy endeavouring or aiming at destruction of the kingdom, and one who may simply fall into displeasure with either the King or the Minister". The Supreme Government in India bestowed its blessing on the project and recommended Light to be Superintendent of Pinang. The Court of Directors in London at once gave sanction ...

In July 1786 Light reached Kedah to find that there were fears lest the State might be embroiled in the war then being waged between Siam and Burma, and that the English were expected to intervene. On July 8, he had an audience with the Sultan, which is described in his Journal:

> "Went up myself; arrived in the morning; found the Laksamana with the King. He appeared satisfied with the passage *in the letter*. He read the translation to me and obliged me to sign it. He then read *the letter* over again and remarked *that the Governor-General had deferred entering into a treaty with him until an answer arrived from Europe* ... The Laksamana then desired to know if the Honourable Company would pay the King 30 000 Spanish dollars a year for the trade, and if not how much they would pay. I told him I could not take it upon myself to declare what the Honourable Company would pay ... *He then desired to know if in case the Honourable Company's letter should not be agreeable to the King, whether I would return to Bengal quietly and without enmity.* To this I made no answer ..."

On July 17, 1786, Light landed on Pinang and on August 11, in the presence of officers from the *Vansittart* and *Valentine*, two of the Company's ships which had brought letters from Madras, he hoisted the British flag and formally took possession of the island in the name of His Britannic Majesty, christening it "Prince of Wales Island". With the knowledge and connivance of the Company, the sailor – empire-builder was sailing very near the wind. An indefinite letter, instead of a treaty

of final cession! A letter inconsistent and vague on defence, the only point that swayed the ruler of Kedah! ...

Not more than a month after Pinang was occupied, Light was writing "The King of Kedah has reason to be afraid of such a Tyrant (the King of Siam) and hopes to secure himself by an Alliance with the Honourable Company".

... On May 17, 1787 Light wrote to the Indian Government ... that it would be easier and less expensive for the Company to declare Kedah under its protection. In January 1788 the decision of the Indian Government was communicated to Light:

> "With respect to protecting the King of Quedah against the Siamese, the Governor-General in Council has already decided against any measures that may involve the Company in Military operations against any of the Eastern princes."

Light, sanguine and eager, had staked his honour and lost; the honour of his indifferent employers stood now rooted in dishonour. If it had not quite broken its word, the Company had stood by and let Light jump Pinang by an implied assurance. As Anderson has remarked, there is no doubt that Light had led Kedah to expect more than he could fulfil ...

Early in 1790 His Highness assembled forces at Prai to retake the island. Light collecting a body of 400 men took the offensive and defeated his quondam friend and on April 20, 1791 made a treaty with His Highness, promising him $6000 a year so long as the English occupied Pinang and stipulating for the mutual rendition of fugitive slaves, debtors, murderers and forgers, the exclusion of Europeans of any other nation from Kedah, free trade with Kedah in provisions, and that the English would not harbour traitors and rebels from Kedah or the Sultan would supply provisions to enemies of the English. The Supreme Government confirmed this engagement, *which at last gave legal sanction to the acquisition of Pinang.*

Force had succeeded where evasive diplomacy had failed and force had cost a mere trifle. Swettenham, apparently ignorant of the battle of 1791, ascribes the conclusion of the 1791 treaty to the Sultan's reliance on Light's word, but after 1788 the Sultan had ceased to believe that an Englishman's word is his bond ...

Perhaps because he had had his gruel, perhaps because he welcomed a barrier that must have seemed even to him a bulwark

against aggression, perhaps because he was in need of money, in 1800 the Sultan ceded the English Company a tract on the Kedah mainland opposite Pinang .... The Company wanted complete control of both shores of a harbour still frequented by pirates, and it wanted a hinterland that would render Pinang independent of foreign supplies of food, especially cattle and rice.

There was still no mention of a defensive alliance. But the tract to be called Province Wellesley (in honour of the then Governor-General) was ceded to the British in perpetuity, and the Company was to pay the Sultan of Kedah $10 000 a year so long as it should occupy Pinang and Province Wellesley ...

In 1810 when Lord Minto called at Pinang on his way to conquer Java, the Sultan addressed to him a long letter setting forth his version of the conditions under which Pinang was given to the British. Anderson's comment on this is that "it was quite inconsistent with reason to suppose, that Pinang was ceded without some very powerful inducements in the way of promises by Mr. Light, which no doubt, in his eagerness to obtain the grant, were liberal and almost unlimited, and that his inability to perform them was the occasion of much mental suffering to him."

Shahrom Ahmat, *Tradition and Change in a Malay State: A Study of the Economicand Political Development of Kedah 1878–1923*

1984, MBRAS, pp. 12–16

Of the various foreign powers with whom Kedah came into contact, that with Siam and the British proved to be the most significant to the future of the state. The nature of the Siamese overlordship over Kedah, and the significance of the *Bunga Mas* (The Golden Flowers) which was periodically sent to Bangkok have been differently interpreted by different people ...

Thus, there were times during this relationship when Siamese suzerainty was irrelevant. ... When the Sultan of Kedah became a Muslim, he had gone to Malacca to obtain the royal insignia from a Malay sovereign rather than seek recognition from Siam. Likewise, the Siamese could do nothing when the Portuguese attacked Kedah in 1611, or when Sultan Iskandar Muda of Acheh conquered the state in 1619, and took its ruler into captivity. Neither did Siamese suzerainty make

any difference during the period when the Dutch signed a commercial agreement with Kedah, or when the Bugis were brought in to play the role of king-maker in the country's politics.

Finally, when the Sultan of Kedah ceded the island of Penang to the East India Company in 1786, he made no reference to Siam, and acted as a fully independent monarch. On the other hand, whenever Siam did make demands on Kedah such as for contributions in men, money and supplies for her war efforts, these demands were met in full. Thus the subjection of Kedah was effective so long as the suzerain had the power to enforce it; once this power waned, so too did submission on the part of the dependency ...

Kedah's relations with the British during the resurgence of Siamese control over the state was an unhappy one for the Malays. Ever since the Siamese started demanding material help from Kedah, the Sultan had appealed to Penang for aid. But each time Penang gave the same reply; that the Supreme Government had forbidden all interference in the political affairs of neighbouring Malay states, and hence their hands were tied.

Unable to get any favourable response from Penang, the Sultan on December 24, 1810 wrote to Lord Minto, the Governor-General of India, seeking a military alliance with the British. This appeal brought no different result from the Sultan's earlier ones to Penang. Lord Minto merely repeated the decision of the Supreme Government not to involve the Company in "military operations against any of the Eastern Princes".

Alfred P. Rubin, *The International Personality of the Malay Peninsula*

1974, Penerbit Universiti Malaya, Kuala Lumpur, pp. 137–149

It is hard to see how any meeting of minds can be inferred from the facts of the Penang transaction. The development of attitudes by which the British felt it justifiable to authorize the occupation and defence of this piece of foreign territory, while reserving to themselves the right to determine the extent of the obligations undertaken in return, seems noteworthy. It may be doubted that a similar transaction occurring in Europe would have been considered legally justifiable. But it can be suggested that the assumed right of the greater power to determine the extent of its obligations to the weaker was part of a growth which made

the concept of a concert of European great powers, with legal rights conceived to come from the fact of political power alone, possible in the next generation. It appears that whatever the British notion of the respective obligations under the Penang transactions, the Malay notion was entirely different ...

The inability of the British to classify their acquisition of Penang in terms of European concepts of international law resulted immediately in difficulties in making provision for the application of any recognized system of laws within the territory of Penang, by depriving the Supreme Government's legal advisers of the resort to principles of reception of law which are usually held applicable to cases of "cession", "conquest" or "occupation of *territorium nullius*". There was, of course, no dispute as to the extent of Penang. There was also no dispute that the British intended to exercise authority over the whole island although establishing only a single settlement at first. The question concerned what law applied in the territory of Penang taken as a whole. Was that law different from the law applying to the British settlers within the fortified settlement? That is, were the people in Penang who were not British subjects to be treated as bound by all the terms of British law; were British subjects to be considered bound by any foreign law?

It had been the established British practice that territory ceded to the Crown retained its own laws except insofar as modified by the Crown; territory conquered by the Crown also retained its existing laws except so far as contrary to the Christian religion; but territory which was uninhabited received the English law of its colonists (even if the colonists were Scots!), as modified by local circumstances rendering parts of it inapplicable.

Upon Light's first establishing a British authority in Penang, the Governor-General of India in Council, on June 21, 1787, recorded his view that he was "not ... at liberty to make any permanent regulation for the Police of Prince of Wales' Island without express authority from Europe", and that Light's delegated authority therefore extended only over non-English persons ....

The assertion of a legal right to apply laws to the non-British portion of the inhabitants of Penang implies clearly a territorial jurisdiction in that island either as a delegation of authority from the Sultan of Kedah or as a perquisite of British sovereignty. Had Light's authority derived from the Sultan, however, there would seem to have been no need to derive the same authority from the Supreme

Government. But if Light were acting as an agent of the Supreme Government, then it would appear that the British were asserting a right to govern foreigners in foreign territory, because had Penang been regarded as British territory no question could have arisen over the extent to which jurisdiction could be exercised by delegation in the name of the Supreme Government. The irregular acquisition of Penang had, therefore, anomalous legal ramifications ...

It appears that as time passed the British began to assume a right to exercise the attributes of sovereignty in Penang, although clearly recognizing that this effective acquisition was unsupported by the normal legal underpinning. Yet it was felt necessary to be able to classify the British presence in Penang as "sovereignty" in order to justify the exercise of jurisdiction in Penang according to British municipal law, which insisted upon legislative and judicial competence over British subjects being delegated to the local British authorities according to constitutional principles which tied the effect of legislation to some specific territory, and in order to exclude the exercise of jurisdiction in the island by the Sultan of Kedah. In the absence of a cession or conquest the British seem to have had no clear basis in the international law of Europe of this time for the exclusion of Kedah's authority from Penang, at least until sufficient time had passed for the British to be able to claim that they had displaced his sovereignty by prescription.

The desire of the British to construe the earlier transactions into the basis of a British claim to sovereignty in Penang took the interesting turn of encouraging the British to classify their occupation of that island as having effect under a Kedah cession. In 1800, Sir George Leith in taking up the duties of Lieutenant-General of Prince of Wales' Island was instructed by the Supreme Government that no time should be lost in liquidating the arrears of the sum which the Company "are bound" to pay to Kedah's Sultan annually "as a consideration for the cession of the Island ..."

It may thus be concluded that the attributes of sovereignty over Penang were achieved by mere assumption, best considered a conquest made in violation of the normal rules of belligerency of the time, and the sovereignty itself passed by prescription when the British intention of permanent possession became fixed and the situation stabilized in conformity with the terms of the 1800 treaty. The doubts and confusions arose out of the unwillingness of the British to admit to themselves their original violation of European norms of international behaviour, coupled with the strongly felt need to comply with British municipal law

in establishing a civil authority with territorial jurisdiction in Penang.

The slow but steady growth of the British conviction of their possession of full sovereignty in Penang is graphically illustrated in the correspondence regarding slavery in Penang, among other institutions; the letters of Mr. Dickens, a lawyer sent to Penang as judicial officer who found he had no delegated judicial authority, and found also that the very right of the Supreme Government to delegate that authority was subject to some doubt, are of great interest.

By first construing the situation of Penang into a position in which an analogy between Penang and deserted or unpopulated land could be drawn, Dickens arrived generally at the conclusion that Light's garrison brought with it English law to the area of the settlement but that the rest of Penang was a sort of jurisdictional no-man's land. However, on learning that Penang had not been unpopulated in 1786, Dickens wrote another minute, in which he denied the force of his earlier line of argument and contrued the earlier transaction into a cession to the East India Company of full sovereignty in Penang as of 1786. By 1805, after four years in Penang, Dicken's view was that whatever the doubt surrounding the earlier transactions may have been, the fact was that the East India Company possessed "sovereignty" (presumably intending to mean "political power") in Penang, and therefore ought to possess the legal rights of the sovereign. It is certain that by 1805 the British regarded themselves as possessing those rights; in that year Penang was made a Presidency of India, and Philip Dundas was appointed Governor. A judicial charter establishing the authority of the new Presidency's courts over all persons in Penang was issued by London in 1807.

The question of classifying the reception of British judicial and legislative authority into Penang was not definitely resolved until 1858, when Sir R. Benson Maxwell in Penang delivered a judgment in the case of *Regina* v. *Willans*. While purporting to abstain on the question on whether the Governor-General in Council actually had sovereignty over Penang before 1807 when such sovereignty was actually fully exercised by the issuance of the judicial charter, the decision avers that Light's troops constituted only a garrison, and brought British law to Penang only *intra vires* the settlement although it is explicit in regarding the 1786 transaction as a cession of Penang as a whole to the Company in trust for the Crown, and classifies Light's authority as "quasi-sovereign".... Since Light's garrison could only carry British law *intra*

vires, and the non-British settlers in early Penang could not establish Malay or Chinese law as the *lex loci* of a "British possession", Sir Benson found no *lex loci*, either in fact or in law, to have bound the territory of Penang. The law applicable to Penang before 1807, therefore, he found to have been the personal law of the people living there, and cases of conflicting laws he felt should have been handled by the principles of natural law and equity which, he said, "in the case of English sovereigns and judges is English law".

While there is much that is doubtful in point of logic and history in the decision, it seems to have been part of the later British "retroactive rationale" of the acquisition by occupation of Penang, and was therefore accepted as an accurate statement of the facts and their legal implications. It was an embarrassing fact, and therefore ignored by Sir Benson, that between 1786 and 1800 British jurisdiction in Penang was assumed to involve judicial authority only over non-Europeans. Although the 20 years of British occupation of Penang had given the British authorities the feeling that Penang was rightly under British authority in all matters, when the judicial charter of 1807 was issued it was that charter that was conceived by contemporary officials to give local courts for the first time jurisdiction over British subjects who did not voluntarily submit to it in Penang and who were not otherwise subject to British control by virtue of military or other status.

2

The Acquisition of Malacca

The Treaty of Holland 1824

His Majesty the King of the United Kingdom of Great Britain and Ireland, and His Majesty the King of the Netherlands, desiring to place a footing, mutually beneficial, upon their respective possessions and the commerce of their subjects in the East Indies, so that the welfare and prosperity of both nations may be promoted, in all times to come, without those differences and jealousies which have, in former times, interrupted the harmony which ought always to subsist between them; and being anxious that all occasions of misunderstanding between their respective Agents may be, as much as possible, prevented; and in order to determine certain questions which have occurred in the execution of the Convention made at London on the 13th day of August, 1814, in so far as it respects the Possessions of His Netherland Majesty in the East, have nominated Their Plenipotentiaries, that is to say –

(For) His Majesty the King of United Kingdom of Great Britain and Ireland, the Right Honourable George Canning, a Member of His said Majesty's Most Honourable Privy Council, a Member of Parliament and His said Majesty's Principal Secretary of State for Foreign Affairs; and the Right Honourable Charles Watkin Williams Wynn, a Member of His said Majesty's Most Honourable Privy Council, a Member of Parliament, Lieutenant-Colonel Commandant of the Montgomerryshire Regiment of Yeomanry Cavalry, and President of His said Majesty's Board of Commissioners for the Affairs of India;

And (For) His Majesty the King of Netherlands, Baron Henry

Fagel, Member of the Equestrian Corps of the Province of Holland, Counsellor of State, Knight Grand Cross of the Royal Order of the Belgic Lion, and of the Royal Guelphic Order, and Ambassador Extraordinary and Plenipotentiary of His said Majesty the King of Netherlands; and Anton Reinhard Falck, Commander of the Royal Order of the Belgic Lion, and His said Majesty's Minister of the Department of Public Instruction, National Industry, and Colonies;

Who, after having mutually communicated their Full Powers, found in good and due form, have agreed on the following Articles ... (Articles 1 to 7 are ommitted).

Article 8

His Netherland Majesty cedes to His Britannic Majesty all His Establishments on the Continent of India; and renounces all privileges and exemptions enjoyed or claimed in virtue of those Establishments.

Article 9

The Factory of Fort Marlborough and all the English Possessions on the Island of Sumatra are hereby ceded to His Netherland Majesty; and His Britannic Majesty further engages that no British Settlement shall be formed on that island, nor any treaty concluded by British authority, with any native prince, chief or state therein.

Article 10

The Town and Fort of Malacca, and its dependencies, are hereby ceded to His Britannic Majesty; and His Netherland Majesty engages, for Himself and His subjects, never to form any Establishment on any part of the Peninsula of Malacca, or to conclude any treaty with any native prince, chief or state therein.

Article 11

His Britannic Majesty withdraws the objections which have been made to the occupation of the Island of Billiton and its dependencies, by the Agents of the Netherland Government.

Article 12

His Netherland Majesty withdraws the objections which have been made to the occupation of the Island of Singapore, by the subjects of His Britannic Majesty.

His Britannic Majesty, however, engages that no British Establishment shall be made on the Carimon Isles, or on the Islands of Battam, Bintang, Lingin, or on any of the other Islands south of the Straits of Singapore, nor any treaty concluded by British authority with the chiefs of those islands.

Article 13

All the Colonies, Possessions and Establishments which are ceded by the preceding Articles shall be delivered up to the Officers of the respective Sovereigns on the 1st of March 1825. The Fortifications shall remain in the state in which they shall be at the period of the notification of this Treaty in India; but no claim shall be made, on either side, for ordnance, or stores of any description, either left or removed by the ceding power, nor for any arrears of revenue or any charge of administration whatsoever.

Article 14

All the inhabitants of the Territories hereby ceded shall enjoy for a period of six years from the date of the ratification of the present Treaty the liberty of disposing as they please, of their property, and of transporting themselves, without let or hinderance, to any country to which they may wish to remove.

Article 15

The High Contracting Parties agree that none of the Territories or Establishments mentioned in Articles 8, 9, 10, 11 and 12 shall be at any time transferred to any other Power. In case of any of the said Possessions being abandoned by one of the present Contracting Parties, the rights of occupation thereof shall immediately pass to the other.

Article 16

It is agreed that all accounts and reclamations arising out of the restorations of Java and other Possessions to the Officers of His Netherland Majesty in the East Indies, as well as those which were the subject of a Convention made at Java on the 24th day of June 1817 between the Commissioners of the Two Nations, as all others shall be finally and completely closed and satisfied, on the payment of the sum of one hundred thousand pounds, sterling money, to be made in London on the part of the Netherlands, before the expiration of the year 1825.

Article 17

The present Treaty shall be ratified and the Ratifications exchanged at London within three months from the date hereof, or sooner if possible.

In witness whereof, the respective Plenipotentiaries have signed the same, and affixed hereunto the Seals of their Arms.

Done at London, the seventeenth day of March, in the year of Our Lord One Thousand Eight Hundred and Twenty-Four.

3

British Intervention in the Malay States

Roland Braddell, *The Legal Status of the Malay States*
1931, M.P.H., Singapore, p. 6

The expression "Malaya" includes (1) the Straits Settlements, a Crown Colony belonging to Great Britain; (2) the Federated Malay States of Perak, Selangor, the Negeri Sembilan and Pahang, under the protection of Great Britain; (3) the State of Johore, under the protection of Great Britain; and (4) the States of Kedah, Kelantan, Trengganu and Perlis, under the suzerainty of Great Britain.

The constitutional position of the Colony and the basis of the law applicable thereto present no problems, since they are well settled by judicial decision; but the position is otherwise with regard to the Malay States ... The most commonly expressed view ... is that the country belongs to the Malays, that the British are merely trustees, and that the key to the whole position is to be found in the various treaties with the several States. The actual juristic position, however, is much more complex than that ...

Neither "protectorate" nor "suzerainty" can be said to be a term of any juristic precision. They can only be described and not defined; their meanings differ with different cases. But it can be said definitely that both are kinds of international guardianship fully recognized by the Law of Nations. It can further be said definitely that the status of both a protected state and a vassal state is semi-sovereign, since each, though in differing degree, has internal independence. But, though semi-sovereign by international law, each is regarded as sovereign for the purposes of exemption from the municipal law – see the cases of *Mighell*

v. *the Sultan of Johore* (1894) and *The Duff Development Co.* v. *the State of Kelantan* (1924) ...

This protectorate (over the Federated Malay States and Johore) is based on agreement and differs very materially from a type of protectorate to be found in Africa ... Great Britain's protectorate over the Federated Malay States and Johore does not amount to full rights of property or sovereignty but is good against the other civilised states so as to prevent occupation or conquest by them and so as to debar them from maintaining relations with the protected states. It differs from a colony in that the protected do not form an integral portion of the territory of Great Britain.

It also differs from a colony and from protectorates of the type existing in the Indian Empire in that the Malay States retain as of right all powers of internal sovereignty which have not been expressly surrendered by treaty or which are not needed for the due fulfilment of the external obligations which Great Britain as the protecting power has directly or implicitly undertaken by the act of assuming the protectorate ... As is forcibly and correctly pointed out in *Wheatley's International Law*, 1929:

> "the Sultans of the Malay States, such as Johore and still more of the Federated Malay States, are in form independent rulers in matters internal, but in reality their Governments are essentially under British guidance and control ..."

British intervention in the affairs of the Malay Peninsula began in Perak after the Perak War of 1874. As a result of that war Great Britain chose deliberately to protect and not to annex; she entered into the Treaty of Pangkor, the sixth article of which provided for the reception by the Sultan of a British Officer to be called the Resident "whose advice must be asked and acted upon on all questions other than those touching Malay religion and custom".

Selangor was next to be protected; a Resident was sent there in 1875. With her there was no treaty but an interchange of letters, a proclamation, and the reception of two officers, one of whom was the Resident, to assist the Sultan "to open up and govern his country" and to protect the lives and property of dwellers in, and traders to, Selangor.

Negeri Sembilan is a confederation of the nine States of Sungei Ujong, Jelebu, Johol, Rembau, Ulu Muar, Jempul, Terachi, Gunong

Pasir and Inas. These States came under British protection at various dates; but by agreement of July 13, 1889, they confederated and "in confirmation of various previous written and unwritten agreements" placed themselves under the protection of the British Government, and desired "the assistance of a British Resident in the administration" of the government of the confederation. On August 8, 1895, they entered into a further agreement and desired "the assistance of a British Resident in the administration of the Government of the said confederation and they undertake to follow his advice in all matters of administration other than those touching the Mohamedan religion."

After the creation of the Federated Malay States there was a further treaty with Negeri Sembilan whereby the Yang di Pertuan agreed that every matter that arises in each State of the confederation is to be settled in consultation with the British Resident of Negeri Sembilan and is not subject to the commands of the Yang di Pertuan.

In 1887 by treaty of that year British protection was extended to Pahang, and in 1888 the Sultan of Pahang received a British officer "in order that he may assist us in matters relating to the Government of our country on a similar system to that existing in the Malay States under English protection."

Taking, then, the engagements prior to the creation of the Federated Malay States, it is submitted that there is nothing in them to enable the Residents to rule the countries to which they were appointed, though it is obvious that the engagements can be so literally construed and their words so inverted as to make the Resident the ruler instead of the Sultan, and, since the Resident is the servant of the British Crown, so as to make Singapore and Downing Street the ultimate rulers.

There are no specific and settled rules for the construction of a treaty such as there are for that of a contract, the general principle as stated in *Wheatley's International Law*, 1929, being that:

> "treaties, being compacts between nations, are not to be subject to the minute interpretation which in private law may result in defeating through technical construction the real purpose of the negotiators."

Bearing these rules in mind, we look first to the substance of what the parties were providing for in the engagements between Great Britain and the Federated Malay States, and we find that it was for protection and assistance in government. The engagements all pre-suppose that it

is the Sultan who is to rule, the Resident to advise; not that it is the Resident who is to rule and the Sultan who is to fiat that rule ...

If the engagements are read literally so as to mean that on *every* question (except Malay custom and religion) the Sultan must ask and follow the Resident's advice, then the treaty provides not for protection but *subjection*. The jurist therefore rejects the literal construction and substitutes for it a construction which will meet the intention of the parties. He would say, it is submitted, that the engagements must be read for the protection and benefit of both parties and, translating that into effect, he would say that the Sultans must rule and that the advice of the Resident must be asked and acted upon in the following matters:

(a) all questions necessary to the carrying out of the obligations of the protecting power to other civilised states;
(b) all questions necessary to the carrying out of the obligations of the protecting power to the protected states;
(c) all such questions of general administration as affect the best interests of the nationals of the protected state and those of the protecting and other civilised powers commorant within the protected states;

but he should hasten to add that, wherever there is a conflict between the interest of the nationals of the protected states and those of the commorant nationals, the interests of the former must always prevail.

Finally the jurist would say that the duties of the protecting power must always be exercised in the best interests of the protected states and not those of the protecting power ...

These submissions accord with the declarations of Great Britain made shortly after her first intervention in the Peninsula. Thus in 1876 the Residents were instructed:

> "The Residents are not to interfere more frequently or to greater extent that is necessary with the minor details of government; but their special objects should be the maintenance of peace and law, the initiation of a sound system of taxation, with the consequent development of the resources of the country ..."

Again, two years later:

> "The Residents have been placed in the Native States *as advisers, not as rulers*, and if they take upon themselves to disregard this principle,

> they will most assuredly be held responsible if trouble springs out of their neglect of it."

This policy and these instructions were loyally followed up to the close of the first period of the history of the Federated Malay States, namely 1895, the year of the federation ... With federation there gradually came about an absolute absorption of authority by British officers throughout the Federated Malay States. Discounting exaggeration and looking fairly at the position today, the jurist can only say that the protecting power is *de facto* ruling the Federated Malay States and the Malay Rulers are merely registering that rule ...

The strange and, indeed, unique thing, however, about this position is that it has not been created deliberately by Great Britain; on the contrary, it is very clear that it has arisen in face of the definite intentions to the contrary of Great Britain, as declared by her local agents the High Commissioners ...

We now come to the position of Johore and its Sultan. Great Britain had various engagements with Johore from 1818 to 1885 but it was not until the latter year that Johore can be said to have come fully under British protection. It was not until 1914 that the British obtained any right to advise in the internal affairs of Johore.

In considering the case of Johore, it must be remembered that her condition and the circumstances under which she came under British protection were entirely different from those of any of the Federated Malay States. In 1885 she was ruled by an enlightened monarch of whose assistance the British Government in Singapore had often been glad to avail itself. By 1914 she was a fully organised state with a written constitution, a constitutional sovereign and the complete machinery of administration. Whatever excuses there might have been in the federated states for an assumption of authority by British officers beyond what was proper, there were and are none in Johore ...

The Treaty with Great Britain of 1885 recognised the independence of Johore and referred to her as the "Independent State of Johore". It bound Her Majesty's Government and the Johore Government to co-operate cordially in the settlement of a peaceful population in their respective territories and "in the *joint defence*" of those territories "from external hostile attacks etc". Johore placed her external political relations in the hands of Her Majesty's government but the latter obtained no right of advice in the internal affairs of Johore

as to which Johore remained fully independent ... The Treaty, therefore, was one of mutual defence and is of quite a different type from that which Great Britain makes with states of less civilised degree.

In 1895, the year when the federation of Perak, Selangor, Pahang and Negeri Sembilan took place, there occurred in Johore the act of state which gives to her a position quite unique amongst the Malay States. On April 14, 1895, a written Constitution was given to the State of Johore by Sultan Abu Bakar ...

The position of the States of Kedah, Kelantan, Trengganu and Perlis would seem to have been somewhat confused in the engagements made with them after they passed under the suzerainty of Great Britain.

At the date of the Treaty with Siam of 1909 it is perfectly clear that the four States were *de jure* under Siamese suzerainty and clearly so recognized by international law ... Juristically the status of the four States was equal, however the *de facto* control of Siam over them may have differed in degree. This fact seems to have been overlooked in two of the Agreements made with them by the High Commissioner on behalf of Great Britain.

In 1821 Siam conquered Kedah, of which at that time Perlis was part. In 1826 the British clearly recognized the rights of Siam and the Treaty of that year between Great Britain and Siam provides that "the Siamese engage to the English that the Siamese shall remain in Quedah, and take proper care of that country and of its people." In 1841 Siam separated Perlis from Kedah and erected it into a separate State under the rule of a Sultan. In 1843 Siam created Kedah into a separate State under the rule of a Sultan. In both cases, Siam, however, held the States in suzerainty and under her protection.

The Treaty of 1826 also recognizes the suzerainty of Siam over Kelantan and Trengganu, since Article XI provides that Siam shall not interfere with commercial intercourse in those States.

The Treaty with Siam of 1869 further recognizes the suzerainty of Siam over Kedah since it provides as between Great Britain and Siam only for the performance of obligations by Great Britain to Kedah. The Proclamation and Draft Agreement of 1902 between Great Britain and Siam relative to Kelantan and Trengganu again recognize the suzerainty of Siam over these States.

By the Loan Agreement of 1905 with Kedah, Siam obtained the right to appoint a financial adviser to the former State; so also to Perlis by Loan Agreements of 1905 and 1907 with that State.

It would seem, then, that the four States were *de jure* dependencies of Siam in 1909 and had been so treated; and that accordingly by the Treaty of 1909 they became dependencies of Great Britain which makes their legal status very different from that of Johore, Perak, Selangor, Pahang or the Negeri Sembilan ...

[The writer then examined the treaties between Great Britain and Trengganu (April 22, 1910), Kelantan (October 22, 1910), Kedah (November 1, 1923) and Perlis (April 28, 1930).]

In all the four States (Kedah, Perlis, Kelantan and Trengganu), the British are, by the various engagements, only Advisers. The right to administer these States which Great Britain undoubtedly possesses as suzerain has been exchanged by her for the right to advise and she has thus conferred a degree of internal independence upon the four states, which is an indulgence by a suzerain power that is quite familiar to the jurist.

4

Treaties and Engagements between the Malay Rulers and Foreign Powers

(a) Perak

Perak Treaty with the English East India Company
of 6th September 1825

Translation of an Engagement of His Majesty Paduka Sri Sultan Abdullah Ma-Alum Shah, who is seated on the Royal Throne of the Perak Country, given to Mr. John Anderson, Agent to the Honourable Robert Fullerton, Governor of Pulo Penang, on behalf of the Honourable English East India Company, as a token of lasting alliance and friendship which can never be changed *so long as the Sun and Moon shall endure*, in order that friendship and union be prolonged, and continue from this day forth for ever.

Article 1

His Majesty the King of Perak hereby agrees to fix the boundary between the States of Perak and Selangor at the River Bernam, and there shall be no encroachment on either side; and His Majesty engages not to interfere in the Government of Selangor, nor will he send any armament into that country; and the subjects of Perak, however, being permitted to proceed thither for commercial purposes, conforming to the established rules and customs of other traders there frequenting.

Article 2

With respect to the Agreement entered into between His Majesty the King of Selangor and Mr. John Anderson, Agent to the Honourable

Robert Fullerton, Governor of Pulo Penang, providing for the removal of Rajah Hassan from the Perak Country and its dependencies, the King of Perak is well pleased with this Agreement, and he engages not to receive Rajah Hassan, nor permit him to return to any part of the Perak territory. His Majesty the King of Perak also engages that he will not grant a monopoly or entrust the collection of the revenues in future to any other, in order that there may be no further disturbances in the country, and he has thereby fixed the Duty on the tin exported from the Perak Country, at 6 dollars per bahr, in order that the commerce of the kingdom may be thrown open and extended; that population may be increased; that all traders may be encouraged to resort to Perak, such as the subjects of the English Government, the Siamese, Selangor, and other, and that they may be enabled to carry on an intercourse with ease and satisfaction, and be at liberty to resort to all the ports, settlements, and rivers within the State, to trade without any interruption for ever.

This Engagement is hereby made, and to it affixed, as a token of its validity, the chop of His Majesty the King of Perak, and it is delivered to Mr. John Anderson, Agent to the Honourable Robert Fullerton, Governor of Pulo Penang.

THIS DEED, written on the 6th day of September, 1825, of the English year, and on the 20th day of Muharam, Monday in the year of Hegira, 1241.

The Cession of Dinding 1826

Engagement of Paduka Sri Sultan Abdullah Ma-Alum Shah, son of the deceased Jamalullah, and Supreme Ruler over the Perak Country, made and delivered to Captain James Low, Agent of the Honourable Robert Fullerton, Governor in Council of Prince of Wales' Island, Singapore and Malacca, and which is *to be everlasting as the revolutions and endurance of the Sun and the Moon.*

The Sultan, who governs the whole of the Perak Country and its dependencies, has this day, in the month and year herein specified, given over and ceded to the Honourable the East India Company of England, to be under its government henceforward and for ever, the Pulo Dinding and the Islands of Pangkor, together with all and every one of the islands which belonged of old and until this period to the Kings of Perak, and which have been hitherto included within the Perak State, because the said islands afford safe abodes to the pirates and robbers, who plunder

and molest the traders on the coast and the inhabitants on the mainland, and effectually deprive them of the means of seeking subsistance, and as the King of Perak has not the power or means singly to drive out those pirates. For these reasons the King of Perak, has, of his own free will and pleasure, ceded and given over as aforesaid, the islands as aforesaid, to the Honourable the East India Company, to be kept and governed by them, and to be placed under any one of their governments, as they may think fit. To this deed, as tokens of its validity, have this day been put the great seal or chop of the ruler of the Perak Country, Paduka Sri Sultan Abdullah Ma-Alum Shah, together with the chops of the Chief Ministers of His Majesty's government.

THIS DEED is made and written this sixteenth day of Rabiulawal, Wednesday, 1242, or the eighteenth day of October, in the year 1826.

Perak Treaty With The English East India Company

of 18 October, 1826

Engagement entered into between His Majesty Paduka Sri Sultan Abdullah Ma-Alum Shah bin Almarhum Jamalullah, Supreme and Rightful Ruler all over and every part of the Perak Country, and Captain James Low, Agent to the Honourable Robert Fullerton, Governor of Pulo Penang, Singapore and Malacca, on behalf of the Honourable the East India Company, whereof copies have been interchanged, and which is to be *everlasting as the Sun and the Moon.* Moreover, it is a token of lasting friendship and alliance to exist between the Honourable the East India Company and the King of Perak, and between the King and the Honourable Robert Fullerton.

Article 1

His Majesty the King of Perak, of his own free will and pleasure, hereby engages, that he will adhere to the stipulations respecting the boundaries of Perak and the settlement of other points which were made with the Rajah of Selangor by Mr. John Anderson, Agent to the Honourable Robert Fullerton, Governor of Pulo Penang, &c., and also to all the stipulations contained in the Engagement which His Majesty made with the said Mr. John Anderson, dated the 20th day of Muharam, Monday, in the year of the Hegira 1241, all of which deeds are here declared to be fixed and unalterable. Moreover, His Majesty

now engages that he will not hold any communication or intercourse with the Rajah of Siam, or with any of his chiefs or vassals, or with the Rajah of Selangor, or any of his chiefs or vassals, which may or can have reference to political subjects, or to the administration of his government and the management of the country of Perak. His Majesty will not countenance any of his subjects who may connect themselves with, or league or intrigue with, the Siamese King, or with any of his chiefs or vassals, or with the Rajah of Selangor, or any of his chiefs or vassals, or with any other Siamese or Malayan people, by which the country of Perak can in any degree or manner be disturbed, and the Government of His Majesty interfered with.

Article 2

His Majesty the King of Perak will not give or present the *bunga mas* or any other specie of tribute whatsoever to the Rajah or King of Siam or to any of his governors or vassals, nor will he give or present such to the Rajah of Selangor, or to any other Siamese or Malayan people henceforward and for ever. Moreover, His Majesty will not receive or permit to enter into his country of Perak, from the Rajah or King of Siam, or from any of his governors or chiefs, any ambassadors or armaments arriving at Perak for the purpose of arranging political matters, or interfering in any way in the affairs and administration of the country of Perak. In like manner he will not receive into his country embassies or armaments sent by the Rajah of Selangor, or by any other Siamese or Malayan people; nor will he receive any party from any of the people, Rajahs, or countries here specified into his country, should its strength even consist of no more than thirty men, nor will he allow the least number to enter his country. But all persons of every country will, as heretofore, have free permission to trade unmolested to any port in the Perak Country, provided they do not interfere in its affairs. Should parties or armaments of the description above stated arrive in the Perak Country from any one of the countries, or Rajahs, Governors, or Chiefs, or people above specified, or should any of the said Rajahs, Governors, or Chiefs league with subjects of the King of Perak, in order to disturb his country and interfere in any way in his government, then, in any such case or cases, His Majesty will rely, as he now relies, and in all future times will rely, on the friendly aid and protection of the Honourable the East India Company, and of the Honourable the

Governor in Council of Pulo Penang, &c. to be manifested in such a manner and by such means as may to them seem most expedient.

Article 3

Captain James Low, as Agent for the Honourable the Governor in Council of Prince of Wales' Island, &c. engages that if His Majesty the King of Perak will faithfully adhere to and perform all and each of the stipulations contained in this Engagement as above specified, then His Majesty shall receive the assistance of the British in expelling from his country any Siamese or Malays as above stated, who as also above specified, may at any time, enter the Perak Country with political views or for the purpose of interfering in any way with the government of His Majesty. But if His Majesty shall fail to perform all and every Article of this Engagement, binding on him, then the obligation on the British to protect him and to assist him against his enemies will cease, and he will lose the confidence and friendship of the Honourable the Governor in Council of Pulo Penang, &c. for ever.

This Engagement, which His Majesty has voluntarily and with great satisfaction entered into has received as marks of its validity the chop or seal of His Majesty, and the seal and signature of the Agent, Captain James Low, together with the chops of the Ministers of Perak, who are also parties in this Engagement with the Agent, and it is delivered to the said Agent to remain as an ever-enduring memorial of alliance and friendship between the King of Perak and the British.

THIS DEED, written on the eighteenth day of October, 1826 of the English year, and on the sixteenth day of Rabiulawal, Wednesday, in the year of the Hegira, 1242.

The Treaty of Pangkor 1874

Whereas, a state of anarchy exists in the Kingdom of Perak owing to the want of settled government in the Country, and no efficient power exists for the protection of the people and for securing to them the fruits of their industry, and,

Whereas, large numbers of Chinese are employed and large sums of money invested in tin mining in Perak by British subjects and others residing in Her Majesty's Possessions, and the said mines and property are not adequately protected, and piracy, murder and arson are rife in

the said country, whereby British trade and interests greatly suffer, and the peace and good order of the neighbouring British Settlements are sometimes menaced, and,

Whereas, certain Chiefs for the time being of the said Kingdom of Perak have stated their inability to cope with the present difficulties, and together with those interested in the industry of the country have requested assistance, and,

Whereas, Her Majesty's Government is bound by Treaty Stipulations to protect the said Kingdom and to assist its rulers, now,

His Excellency Sir Andrew Clarke, K.C.M.G., C.B., Governor of the Colony of the Straits Settlements, in compliance with the said request, and with a view of assisting the said rulers and of effecting a permanent settlement of affairs in Perak, has proposed the following Articles of arrangements as mutually beneficial to the Independent Rulers of Perak, their subjects, the subjects of Her Majesty, and others residing in or trading with Perak, that is to say:

1. That the Rajah Muda Abdullah be recognised as the Sultan of Perak.
2. That the Rajah Bendahara Ismail, now Acting Sultan, be allowed to retain the title of Sultan Muda with a pension and a certain small Territory assigned to him.
3. That all the other nominations of great Officers made at the time the Rajah Bandahara Ismail received the regalia be confirmed.
4. That the power given to the Orang Kayah Mantri over Larut by the late Sultan be confirmed.
5. That all Revenues be collected and all appointments made in the name of the Sultan.
6. That the Sultan receive and provide a suitable residence for a British Officer to be called Resident, who shall be accredited to his Court, and whose advice must be asked and acted upon all questions other than those touching Malay Religion and Custom.
7. That the Governor of Larut shall have attached to him as Assistant Resident, a British Officer acting under the Resident of Perak, with similar power and subordinate only to the said Resident.
8. That the cost of these Residents with their Establishments be determined by the Government of the Straits Settlements and be a first charge on the Revenues of Perak.
9. That a Civil List regulating the income to be received by the

Sultan, by the Bandahara, by the Mantri, and by the other Officers be the next charge on the said Revenue.

10. That the collection and control of all Revenues and the general administration of the country be regulated under the advice of these Residents.

11. That the Treaty under which the Pulo Dinding and the islands of Pangkor were ceded to Great Britain having been misunderstood and it being desirable to readjust the same, so as to carry into effect the intention of the Framers thereof, it is hereby declared that the Boundaries of the said Territory so ceded shall be rectified as follows, that is to say – From Bukit Sigari, as laid down in the Chart Sheet No.1 Straits of Malacca, a tracing of which is annexed, and marked A, in a straight line to the sea, thence along the sea coast to the South, to Pulo Katta on the West, and from Pulo Katta a line running North East about five miles, and thence North to Bukit Sigari.

12. That the Southern watershed of the Krean River, that is to say, the portion of land draining into that River from the South be declared British Territory, as a rectification of the Southern Boundary of Province Wellesley. Such Boundary to be marked out by Commisioners; one named by the Government of the Straits Settlements, and the other by the Sultan of Perak.

13. That on the cessation of the present disturbances in Perak and the re-establishment of peace and amity among the contending factions in that Country, immediate measures under the control and supervision of one or more British Officers shall be taken for restoring as far as practicable the occupation of the Mines, and the possesion of Machinery, &c., as held previous to the commencement of these disturbances, and for the payment of compensation for damages, the decision of such officer or officers shall be final in such case.

14. The Mantri of Larut engages to acknowledge as a debt due by him to the Government of the Straits Settlements, the charges and expenses incurred by this investigation, as well as the charges and expenses to which the Colony of the Straits Settlements and Great Britain have been put or may be put by their efforts to secure the tranquility of Perak and the safety of trade.

The above Articles having been severally read and explained to the undersigned who having understood the same, have severally agreed to and accepted them as binding on them and their Heirs and Successors.

This done and concluded at Pulo Pangkor in the British Possessions, this Twentieth day of January, in the year of the Christian Era, one thousand eight hundred and seventy four.

Executed before me,
Andrew Clarke,
Governor, Commander-in-Chief, and
Vice-Admiral of the Straits Settlements.

Chop of the Sultan of Perak.
.. .. Bandahara of Perak.
.. .. Tumongong of Perak.
.. .. Mantri of Perak.
.. .. Shahbandar of Perak.
.. .. Rajah Mahkota of Perak.
.. .. Laxamana of Perak.
.. .. Datoh Sagor.

(b) Negeri Sembilan

Negeri Sembilan Treaty of July 13, 1889
(First Confederation Agreement)

Agreement between the Governor of the Straits Settlements acting on behalf of Her Majesty's Government and the Rulers of certain Malay States hereinafter called Negeri Sembilan.

1. In confirmation of various written and unwritten Agreements the Yam Tuan Besar of Sri Menanti together with the Rulers of the following States under his jurisdiction, namely, Johol (including Gemencheh), Inas, Ulu Muar, Jempol, Gunong Pasir and Terachi, the Ruler of Tampin and the Ruler of Rembau hereby place themselves under the protection of the British Government.
2. The above-mentioned Rulers of the respective States hereby agree to constitute their countries into a Confederation of States to be known as Negeri Sembilan, and they desire that they may have the

assistance of a British Resident in the administration of the Government of the said Confederation.

3. It is to be understood that such arrangement as is now agreed upon does not imply that any one Ruler should exercise any other power or authority in respect of any State than that which he now possesses.

IN WITNESS whereof ... (the parties) have signed this Agreement the 13th day of July ... one thousand eight hundred and eighty-nine, answering to the 15th day of Zulkaedah the year of the Hedjira one thousand three hundred and six.

Notes

1. On August 8, 1985 a second Agreement was signed in which the terms were almost identical with the first Agreement above-mentioned, except for the closing words of Clause 2 as given in italics below:

> "The above-mentioned Rulers ... desire that they may have the assistance of a British Resident in the administration of the Government of the said confederation *and they undertake to follow his advice in all matters of administration other than those touching the Mohamadan religion.*"

2. On April 29, 1898, a third (and final) treaty was executed between the Yang di Pertuan and the "Four Lawgivers" (comprised of the Dato Kalana Petra and Dato Bandar of Sungei Ujong, the Dato Mendika Mentri Akhir Zaman Sultan of Jelebu, the Dato Johan Pahlawan Lela Perkasa Setiawan of Johol and the Dato Sedia Raja of Rembau), the principal terms of which were as follows:

> "1. Where We and the Four Lawgivers and the British Resident have bound together the Constitution and Customs of the Country and the heritage of our ancestors of old time as is related hereunder:
> 2. Now the Four Lawgivers return to elect Us to be Raja of Negeri Sembilan in accordance with our ancient constitution.
> 3. Now that We have been installed as Raja of Negeri Sembilan. We, according to the old Constitution, cannot interfere in the Customs of the Country or in Mohamedan Law and every matter that arises in each State is to be settled in consultation with the British Resident of the Negeri Sembilan and is not to be subject to Our Commands ..."

(c) Kedah

First (Unsigned) Treaty of 1786

(So-called cession of Penang)

Article 1

That the Honourable Company shall be guardian of the seas; and whatever may come to attack the King, shall be an enemy to the

Honourable Company, and the expense shall be borne by the Honourable Company.

This Government will always keep an armed vessel stationed to guard the Island of Penang, and the coast adjacent, belonging to the King of Quedah.

Article 2

All vessels, junks, prows, small and large, coming from either east or west, and bound to the port of Quedah, shall not be stopped or hindered by the Honourable Company's Agent, but left to their own wills, either to buy and sell with us, or with the Company at Pulo Penang, as they shall think proper.

All vessels, under every denomination, bound to the port of Quedah, shall not be interrupted by the Honourable Company's Agent, or any person acting for the Company, or under their authority, but left entirely to their own free will, either to trade with the King of Quedah, or with the agents or subagents of the Honourable Company.

Article 3

The articles opium, tin, and rattans, being part of our revenue, are prohibited, and Kuala Muda, Prai and Krian, places where these articles are produced, being so near to Penang, that when the Honourable Company's Resident remains there, this prohibition will be consistently broken through, therefore it should end, and the Governor-General allow us our profits on these articles, *viz.*, 30 000 Spanish dollars every year.

The Governor-General in Council, on the part of the English East India Company, will *take care that the King of Quedah shall not be a sufferer by an English settlement being formed on the Island of Penang.*

Article 4

In case the Honourable Company's Agent gives credit to any of the King's relations, ministers, officers, or *rakyat*, the Agent shall make no claim upon the King.

The Agent of the Honourable Company, or any person residing on

the Island of Penang, under the Company's protection, shall not make claims upon the King of Quedah for debts incurred by the King's relations, ministers, officers, or *rakyat*, but the person having demands upon any of the King's subjects, shall have power to seize the person and property of those indebted to them, according to the customs and usages of that country.

Article 5

Any man in this country, without exception, be it our son or brother, who shall become an enemy to us shall then become an enemy to the Honourable Company; nor shall the Honourable Company's Agent protect them, without breach of this Treaty, which is to remain while the Sun and Moon endure.

All persons residing in the country belonging to the King of Quedah, who shall become his enemies, or commit capital offences against the State, shall not be protected by the English.

Article 6

If any enemy come to attack us by land, and we require assistance from the Honourable Company, of men, arms or ammunition, the Honourable Company will supply us at our expense.

This Article will be referred for the orders of the English East India Company, together with such parts of the King of Quedah's requests as cannot be complied with previous to their consent being obtained.

Second Treaty of 20th April 1791

In the Hegira of our Prophet, 1205 year Dalakir, on the 16th of the month of Syaaban, on the day Ahad.

Whereas on this date this writing showeth that the Governor of Pulo Penang, vakeel of the English Company, concluded peace and friendship with His Highness, Yang di Pertuan of Quedah, and all his great officers and *rakyat* of the two countries, to live in peace by sea and land, to continue as long as the Sun and Moon give light;

The Articles of Agreement are:

Article 1

The English Company will give to His Highness the Yang di Pertuan of Quedah, six thousand Spanish dollars every year for as long as the English shall continue in possession of Pulo Penang.

Article 2

His Highness the Yang di Pertuan agrees that all kinds of provisions wanted for Pulo Penang, the ships of war, and the Company's ships, may be bought at Quedah without impediment or being subject to any duty.

Article 3

All slaves running from Quedah to Pulo Penang or from Pulo Penang to Quedah shall be returned to their owners.

Article 4

All persons in debt running from their creditors, from Quedah to Pulo Penang or from Pulo Penang to Quedah, if they do not pay their debts, their persons shall be delivered over to their creditors.

Article 5

The Yang di Pertuan will not allow Europeans of any other nation to settle in any part of his country.

Article 6

The Company shall not receive any persons committing high rebellion against the Yang di Pertuan.

Article 7

All persons committing murder, running from Quedah to Pulo Penang or from Pulo Penang to Quedah, shall be apprehended and returned in bonds.

Article 8

All persons stealing chops (forgery) to be given up likewise.

Article 9

All persons, enemies to the English Company, the Yang di Pertuan shall not supply them with provisions.

These nine Articles are settled and concluded, and peace is made between the Yang di Pertuan and the English Company; Quedah and Pulo Penang shall be as one Country.

This done and completed by Tunku Shariff Muhammad, the Tunku Alang Ibrahim and Dato Penggawa Tilebone, vakeels, on the part of the Yang di Pertuan, and given to the Governor of Pulo Penang, vakeel for the English Company.

In this Agreement, whoever departs from any part herein written, God will punish and destroy; to him there shall be no health.

The seals of Shariff Muhamad and Tunku Alang Ibrahim, and Datuk Penggawa Tilebone, are put to this writing, with each person's hand-writing.

Transcribed by Hakim Bunder, Pulo Penang.

Signed, sealed and executed, in Fort Cornwallis, on Prince of Wales' Island, this 1st day of May, in the year of Our Lord 1791.

Third Treaty of 6th June 1800

In the year of the Hegira of the Prophet (the peace of the Most High God be upon him) 1215, the year Hun, on the twelfth day of the month of Muharam, on the day of Rabu (Wednesday);

Whereas this day, this writing showeth that Sir George Leith, Baronet, Lieutenant-Governor of Pulo Penang, on the part of the English Company, has agreed on and concluded a Treaty of Friendship and alliance with His Highness the Yang di Pertuan Raja Muda of Perlis and Quedah, and all his Officers of State and Chiefs of the two countries, to continue on sea and land, *as long as the Sun and Moon retain their motion and splendour*;

The Articles of which Treaty are as follows:

Article 1

The English Company are to pay annually to His Highness the Yang di Pertuan of Perlis and Quedah, ten thousand dollars, as long as the English shall continue in possession of Pulo Penang, and the country on the opposite coast hereafter mentioned.

Article 2

His Highness the Yang di Pertuan agrees to give to the English Company, for ever, all that part of the sea coast that is between Kuala Krian and the river side of Kuala Muda, and measuring inland from the sea side sixty *relongs*, the whole length above-mentioned to be measured by people appointed by the Yang di Pertuan and the Company's people. The English Company are to protect this coast from all enemies, robbers and pirates that may attack it by sea, from north to south.

Article 3

His Highness the Yang di Pertuan agrees, that all kinds of provisions wanted for Pulo Penang, the ships of war and the Company's ships, may be bought at Perlis and Quedah, without impediment or being subject to any duty or custom; and all boats going from Pulo Penang to Perlis and Quedah for the purpose of purchasing provisions are to be furnished with proper passports for that purpose, to prevent impositions.

Article 4

All slaves running away from Perlis and Quedah to Pulo Penang and from Pulo Penang to Perlis and Quedah shall be returned to their owners.

Article 5

All debtors running from their creditors from Perlis and Quedah to Pulo Penang or from Pulo Penang to Perlis and Quedah, if they do not pay their debts, their persons shall be delivered up to their creditors.

Article 6

His Highness the Yang di Pertuan shall not permit Europeans of any other nation to settle in any part of his dominions.

Article 7

The Company shall not receive any such people as may be proved to have committed rebellion or high treason against the Yang di Pertuan.

Article 8

All persons guilty of murder, running from Perlis and Quedah to Pulo Penang or from Pulo Penang to Perlis and Quedah shall be apprehended and returned in bonds.

Article 9

All persons stealing chops (forgery) to be given up likewise.

Article 10

All those who are, or may become, enemies to the Company, the Yang di Pertuan shall not assist with provisions.

Article 11

All persons belonging to the Yang di Pertuan, bringing the produce of the country down the river, are not to be molested or impeded by the Company's people.

Article 12

Such articles as the Yang di Pertuan may stand in need of from Pulo Penang are to be procured by the Company's Agents, and the amount to be deducted from the gratuity.

Article 13

As soon as possible, after the ratification of this Treaty, the arrears of gratuity now due, agreeable to the former Treaty and Agreement, to

His Highness the Yang di Pertuan of Perlis and Quedah, are to be paid off.

Article 14

On the ratification of this Treaty, all former Treaties and Agreements between the two Governments (shall) be null and void.

These fourteen Articles being settled and concluded between His Highness the Yang di Pertuan and the English Company, the countries of Perlis and Quedah and Pulo Penang shall be as one country; and whoever shall depart or deviate from any part of this Agreement, God will punish and destroy him; he shall not prosper.

This done and completed, and two Treaties, of the same tenor and date, interchangeably given between His Highness the Yang di Pertuan and the Governor of Pulo Penang, and sealed with the seals of the State Officers immediately officiating under His Highness the Yang di Pertuan, in order to prevent disputes hereafter.

Written by Hakim Ibrahim ibni Sri Raja Muda, by order of His Highness the Yang di Pertuan, of exalted dignity.

Loan Agreement between Kedah and Siam

16th June 1905

Between the undersigned, His Royal Highness Prince Mahisra Rachaharuthai, Minister of Finance to His Majesty The King of Siam, acting in the name of and for account of His Siamese Majesty's Government, as lender, of the one part, and Phya Seni Marong Kiti (Tengku Abdul Aziz) Raja Muda of Kedah, acting in the name of and for account of His Highness Chao Phya Kiti Songkram Rama Bhakdi Chao Phya Saiburi, (Tengku Abdul Hamid) Sultan of Kedah, as borrower, of the other part.

It is agreed as follows:

Article 1

The lender agrees to grant to the borrower a loan of Two Million Six Hundred Thousand Dollars at the rate of six per centum interest per annum.

Article 2

The borrower undertakes on behalf of himself as Sultan of Kedah his successors and assigns to pay to His Siamese Majesty's Government on the first day of June of year interest at the rate of six per centum per annum on the capital sum outstanding on the last day of the previous month, viz., the thirty-first day of May it being understood that interest for the first year will be reckoned from the dates on which the several sums making up the full amount of the loan are placed at the disposal of the borrower or are utilised in paying off the debts for the liquidation of which the loan is mainly granted.

Article 3

The borrower also undertakes on behalf of himself as Sultan of Kedah his successors and assigns to repay the amount of the loan mentioned in Article 1 with interest at the rate provided for in the same Article to His Siamese Majesty's Government from the revenues of the State of Kedah, and the amount of the instalments and the times at which the instalments of the loan are to be repaid by the borrower to the lender, will be incorporated in a subsidiary agreement to be signed hereafter.

Article 4

In consideration of the loan herein referred to the borrower undertakes on behalf of himself as Sultan of Kedah his successors and assigns to accept, until the loan (Capital and Interest) shall have been entirely repaid, the services of an Adviser to be appointed by His Siamese Majesty's Government to assist him in the financial administration of his State, and the borrower further undertakes on behalf of himself as Sultan of Kedah, his successors and assigns to follow the advice of such Adviser in all matters relating to finance. The salary of the Adviser appointed by His Siamese Majesty's Government shall be paid out of the revenues of the State of Kedah.

Article 5

The borrower also undertakes on behalf of himself as Sultan of Kedah, his successors and assigns of refrain from contracting any fresh loan or incurring any financial liabilities until the loan herein referred to

(Capital and Interest) is entirely repaid.

Given and signed in two identical copies of which one shall be kept by the lender and the other by the borrower.

(d) Kelantan

The Duff Concession of 10th October 1900

The document below written, made in the town of Kota Bharu, on the 15th day of the month of Jamadilakhir, in the year 1318, by the reigning Rajah of Kelantan, who is in good health, and who has sufficiently considered the undermentioned details, and consulted with the Rajah Muda, with all the Princes of the Royal Blood, and with members of his Council.

Whereas the above-mentioned parties have (as the result of their consultation) one and all decided to sign an Agreement with an Englishman named Robert William Duff, by which we, the reigning Rajah of Kelantan, grant to the said Robert William Duff two portions of land in the State of Kelantan in order that he shall work such land in partnership with us and with others; and in these two districts granted for this purpose the said Robert William Duff has the right to work minerals and timber and every other kind of work in whatever manner he pleases, and in no case whatsoever may anyone else undertake any work in those two districts except with the permission of the reigning Rajah of Kelantan, together with the said Robert William Duff. And the following are the particulars of the above undertaking:

Article 1

The first district: The northern boundary – from Kuala Kusial, following that stream to its source, then straight to the Legeh boundary. And on the east the boundary is the main river from Kuala Kusial, following the river upstream to Kuala Sitom, and the boundary from the south is from Kuala Sitom, following that river to its source, thence straight to the boundary of Perak and Kelantan. And on the west the boundary is the boundary between State of Kelantan and the State of Perak and Legeh.

And the second district is as follows: On the east include the main

river from Kuala Lebir upstream to Kuala Ampul, to its source where it reaches the Pahang boundary, and the boundary of the west includes the river from Kuala Lebir upstream to Kuala Bong, thence up that stream to the boundary of Pahang, and the boundary on the south is the boundary between Kelantan and Pahang.

And the reigning Rajah of Kelantan hereby empowers the said Robert William Duff to work the above described land for the space of forty years, and moreover the said Rajah of Kelantan grants to the said Robert William Duff the right to form Companies for the purpose of working minerals and other things in these two districts in such manner as he pleases; but all such Companies will be bound by the terms of this Agreement. And the said Robert William Duff agrees to fulfil the several conditions imposed hereunder.

Article 2

On entering the State to commence work the said Robert William Duff undertakes and promises to pay 20 000 dollars to the Government of Kelantan.

Article 3

The said Robert William Duff undertakes as regards the share of the Rajah of Kelantan, who is a partner in this concern, that in every twenty-five shares in the concern one share shall be given to the Kelantan Government. But the said Robert William Duff agrees that the Rajah of Kelantan is not to pay any money, either principal or interest; such monies are to be paid by the said Robert William Duff himself.

Article 4

In the event of any mineral being found such as gold, tin, silver or diamonds, or other precious stones, or any timber worked in these two districts, the said Robert William Duff agrees and undertakes to pay duty at the rate of one in twenty (5 per cent), either in money or in kind, to the Kelantan Government. But elephants' tusks and rubber and rattans in these two districts are not included in this Agreement, and the said Robert William Duff or his representative may not work these

products, but he may work such rattans as he chooses for use on the property.

Article 5

If the said Robert William Duff or his substitute undertakes planting operations or other work the said Robert William Duff undertakes to pay export duty on the produce of one in twenty, *ad valorem*, to the Kelantan Government.

Article 6

The said Robert William Duff agrees, in respect of any persons within the two districts, that any action that 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 evil-doer within the two aforesaid districts.

Article 7

From the date of this document, if the said Robert William Duff or his representative does not enter Kelantan to work within fifteen months this document shall become null and void, and the said Robert William Duff or his representative may not sell or sub-let or give away the land, except with the consent of the Rajah of Kelantan.

Article 8

In the event of the said Robert William Duff or his representative commencing work as aforesaid, and, after working, ceasing to continue doing so, he is allowed twenty-four months. At the expiration of the twenty-four months the reigning Rajah of Kelantan may resume the land and give it to whosoever he pleases. And the said Robert Duff or any shareholders in any company which may have provided capital may not take action for the recovery of any loss which may have been suffered. But any goods or chattels of value may be sold by the said Robert William Duff or his representative to whomsoever is willing to buy. And if any stone houses have been built, the owners may not sell

them except to persons who are under the rule of Kelantan, but the land in which they are built may only be sold with the consent of the Kelantan Government.

Article 9

If the said Robert William Duff wishes to appoint any substitute in this work he must bring such substitute before the Kelantan Government and register his name in the State. And such substitute shall be bound by all the conditions of this Agreement.

Sealed by the Sultan with both his seals and signed by R. W. Duff in the presence of Saiyid Hussain and Neh Hassan.

Kelantan Treaty with Siam 1902

Whereas the State of Kelantan has been recognised to be a dependency of Siam, and whereas it is desirable to define the principles under which the Government of that State is in future to be conducted, it is hereby agreeed between Phya Sri Sabadheb, representating His Majesty the King of Siam, and Muhammad, the Rajah of Kelantan, as follows:

Article 1

The Rajah of Kelantan engages to have no political relations or political dealings with any foreign Power or Chiefs of States, except through the medium of the Government of His Majesty the King of Siam.

Article 2

His Majesty the King of Siam reserves the right to nominate officers to be the Adviser and Assistant Adviser in the State of Kelantan to act as the Representative (or Agent) of His Majesty. The Rajah of Kelantan engages to pay the Adviser and Assistant Adviser such salaries as may be required by His Siamese Majesty's Government. The Rajah also undertakes to provide them with suitable residences, and to follow the advice of the Adviser, and, in his absence, of the Assistant Adviser, in all matters of administration other than those touching the Mohamedan religion and Malay custom.

Article 3

The Rajah of Kelantan engages not to enter into any agreement with, or to give any concession to, or to allow any transfer to or by, any individual or Company other than a native or natives of the States of Kelantan, and not to employ in an official position, with a fixed salary of more than 400 pounds per annum, any individual other than a native of Kelantan, without having previously obtained the consent in writing of His Siamese Majesty's Government. Provided that, should the area of the Grant or Concession not exceed 5000 acres of agricultural land or 1,000 acres of mining land, the written consent of the Adviser shall be sufficient. Such written consent shall also be sufficient for the employment of officials of a lower rank, who are not natives of Kelantan.

Article 4

As soon as, and whenever, the gross revenue of Kelantan amounts to 100 000 dollars, one-tenth of the gross revenue shall be annually paid into His Siamese Majesty's Treasury. Provided that the maximum amount thus payable on account of any one year shall not exceed the sum of 100 000 dollars. So long as, and whenever, the gross annual revenue of Kelantan is less than 100 000 dollars, the usual Bunga Mas shall continue to be sent to His Majesty the King of Siam.

Article 5

His Siamese Majesty's Government undertakes not to interfere with the internal administration of the State of Kelantan, otherwise than as provided for in this Agreement, so long as nothing is done in that State contrary to the Treaty rights and obligations that His Majesty has with foreign Governments, and so long as peace and order are maintained within the State, and it is governed for the benefit of its inhabitants with moderation, justice and humanity.

Article 6

The Departments of Posts, Telegraphs and Railways, as being part of the internal administration of the State of Kelantan, will be under the control of the Rajah of Kelantan, but the Rajah of Kelantan engages

to co-operate with the Government of His Siamese Majesty in the construction and management of any section of a trunk line of railway or telegraph which may come within the confines of Kelantan. The conditions of such co-operation shall in each case be the subject of special arrangement. Should any stamps be used, they shall be procured from Bangkok, and shall bear the effigy of the King of Siam, but they shall be issued solely by the Rajah of Kelantan and the revenue derived from them shall accrue solely to the State of Kelantan. The Rajah further undertakes not to grant to any Company or private individual any privilege for the construction of railways in Kelantan without the written consent of His Siamese Majesty's Government. This stipulation, however, shall not apply to private lines of railway constructed by the owners of concessions which have been granted under Article 3, and intended for the conveyance of minerals or other natural products.

Article 7

Nothing in this Agreement is intended to curtail any of the powers or authority now held by the Rajah of Kelantan, nor does it alter, otherwise than as provided for in this Agreement, the relations now existing between the Rajah and His Siamese Majesty's Government.

Kelantan Treaty with Great Britain
of 22nd October 1910

Whereas the State of Kelantan has been recognised to be under the protection of Great Britain, and whereas it is desirable to define the principles on which the Government of that State shall be conducted in future, it is hereby agreed between His Excellency the High Commissioner for the Protected Malay States representing the Government of Great Britain and His Highness Tungku Long Senik, the Rajah of Kelantan, for himself his heirs and successors, as follows:

Article 1

The Rajah of Kelantan engages to have no political relations or political dealings with any foreign power or potentate, except through the medium of His Majesty the King of England.

Article 2

His Majesty the King of England reserves the right to appoint officers to be the Adviser and the Assistant Adviser in the State of Kelantan to act as the representative (or agent) of His Majesty the King of England. The Rajah of Kelantan engages to pay the Adviser and Assistant Adviser such salaries as His Majesty's Government shall determine, and to provide them with suitable residences; and the Rajah of Kelantan further undertakes to follow and give effect to the advice of the Adviser, or in his absence, of the Assistant Adviser, in all matters of administration other than those touching the Mohamedan religion and Malay custom.

Article 3

The Rajah of Kelantan engages not to enter into any agreement concerning land, or to grant any concession to, or to allow any transfer to, or by, any individual or company other than a native or natives of the State of Kelantan, and not to appoint any official, other than a native of Kelantan, with a salary of more than $400 per annum, without previously obtaining the consent in writing of His Majesty's Government; provided that, should the area of the grant or concession not exceed 5000 acres of agricultural land or 1000 acres of mining land, the written consent of the Adviser thereto shall suffice; and such written consent shall suffice for the appointment of subordinate officials who are not natives of Kelantan.

Article 4

As soon as and whenever the gross revenues of the State of Kelantan shall amount to $100 000.00 the King of England may require the Rajah of Kelantan to establish and maintain at the cost of Kelantan a body of Malay or Indian troops for the purpose of assisting in the defence of His Majesty's Territories and Protectorates in the Malay Peninsula.

Article 5

His Majesty's Government undertake not to interfere with the internal administration of the State of Kelantan otherwise than as provided for

in this Agreement, so long as nothing is done in that State contrary to the Treaty rights and obligations that His Majesty's Government have with foreign Governments, and so long as peace and order are maintained in the State of Kelantan, and it is governed for the benefit of its inhabitants with moderation, justice and humanity.

Article 6

Matters relating to Posts and Telegraphs, and Railways being matters concerned with the administration of the State of Kelantan, shall be under the control of the Rajah of Kelantan; but the Raja of Kelantan engages to co-operate with His Majesty's Government in the construction and management of any section of a trunk line of railway or telegraph which may come within the confines of the State of Kelantan. The condition of such co-operation shall, in each case, be the subject of special arrangement.

Article 7

Further the Rajah of Kelantan undertakes not to grant to any Company, Syndicate, or individual, any privileges for the construction of a railway in the State of Kelantan, without the written consent of His Majesty's Government. This stipulation, however, shall not apply to short railway lines constructed by the owners of concessions which have been granted under Article 3, within the confines of such concessions and intended for the conveyance of minerals and other natural products.

Article 8

Nothing in this Agreement shall affect the administrative authority now held by the Rajah of Kelantan. Except as provided for this Agreement, the relations between the Rajah of Kelantan and His Majesty's Government shall be the same as those which previously existed between the Rajah of Kelantan and His Siamese Majesty's Government.

Two copies shall be made of this Agreement, one in English and one in Malay bearing the same interpretation.

Done in Kelantan on the twenty-second day of October, 1910.

(e) Johore

Johore Treaty of December 11, 1885

Agreement on certain points touching the relations of Her Majesty's Government of the Straits Settlements with the Government of the Independent State of Johore ...

Article 1

The two Governments will at all times cordially co-operate in the settlement of a peaceful population in their respective neighbouring territories, and in the joint defence of those territories from external hostile attacks, and in the mutual surrender of persons accused or convicted of any crime of offence, under such conditions as may be arranged between the two Governments.

Article 2

His Highness the Mahajarah of Johore undertakes, if requested by the Government of the Straits Settlements, to co-operate in making arrangements for facilitating trade and transit communication overland through the State of Johore with the State of Pahang.

Article 3

If the Government of the Straits Settlements shall at any time desire to appoint a British Officer as Agent to live within the State of Johore, having functions similar to those of a Consular officer, His Highness the Mahajarah will be prepared to provide, free of cost, a suitable site within his territory whereon a residence may be erected for occupation by such officer.

Article 4

Any coinage in the currency of the Straits Settlements, which may be required for the use of the Government of Johore, shall be supplied to it by the Government of the Straits Settlements, at rates not higher than

those at which similar coinage is supplied to Governments of the Malay Protected States, and under the same limitations as to amount ...

Article 5

The Governor of the Straits Settlements, in the spirit of former treaties, will at all times to the utmost of his power take whatever steps may be necessary to protect the Government and territory of Johore from any external hostile attacks; and for these or for similar purposes Her Majesty's Officers shall at all times have free access to the waters of the State of Johore; and it is agreed that those waters extend to three miles from the shore of the State, or in any waters less than six miles in width, to an imaginary line midway between the shores of the two countries.

Article 6

The Maharajah of Johore, in the spirit of former treaties, undertakes on his part that he will not without the knowledge and consent of Her Majesty's Government negotiate any Treaty, or enter in any engagement with any foreign State, or interfere in the politics of administration of any native State, or make any grant or concession to other than British subjects or British companies or persons of the Chinese, Malay, or other Oriental Race, or enter into any political correspondence with any foreign State.

It is further agreed that if occasion should arise for political correspondence between His Highness the Mahajarah and any foreign State, such correspondence shall be concluded through Her Majesty's Government, to whom His Highness makes over the guidance and control of his foreign relations.

Article 7

Whereas His Highness the Mahajarah of Johore has made known to the Governor of the Straits Settlements that is the desire of his chiefs and people that he should assume the title of Sultan, it is further agreed that, in consideration of the loyal friendship and constant affection His Highness has shown to the Government of Her Majesty the Queen and Empress, and of the stipulations contained in this Memorandum, he and his heirs and successors, lawfully succeeding according to Malay custom,

shall in future be acknowledged as His Highness the Sultan of the State and territory of Johore, and shall be so addressed.

In witness whereof the said Right Honourable Frederick Arthur Stanley, and his said Highness the Mahajarah of Johore, have signed this Agreement at the Colonial Office, London, the eleventh day of December, one thousand eight hundred and eighty-five.

Johore Treaty of May 12, 1914

(Amendment to the 1885 Treaty)

Whereas it is considered desirable that Article 3 of the Agreement of the 11th December, 1885 ... should be repealed and another Article substituted therefor:

Now it is hereby agreed ... that the above Article be repealed and the following Article substituted therefor:

Article 3

The Sultan of the State and territory of Johore will receive and provide a suitable residence for a British Officer to be called the General Adviser, who shall be accredited to his Court and live within the State and territory of Johore, and whose advice must be asked and acted upon on all matters affecting the general administration of the country and on all questions other than those touching Malay Religion and Custom.

The cost of the General Adviser with his establishment shall be determined by the Government of the Straits Settlements and be a charge on the Revenue of Johore.

The collection and control of all revenues of the country shall be regulated under the advice of the General Adviser.

In witness whereof the said Sir Arthur Henderson Young and His said Highness the Sultan of the State and Territory of Johore have signed this agreement this twelfth day of May, one thousand nine hundred and fourteen.

Johore Treaty of October 20, 1945

(MacMichael Treaty)

Agreement between His Majesty's Government within the United Kingdom of Great Britain and Northern Ireland and the State of Johore.

Whereas mutual agreements subsist between His Britannic Majesty and His Highness the Sultan of the State and territory of Johore.

And whereas it is expedient to provide for the constitutional development of the Malay States under the protection of His Majesty and for the future government of the State and territory of Johore.

It is hereby agreed between Sir Harold MacMichael, the Special Representative of His Majesty's Government ... on behalf of His Majesty and His Highness Sir Ibrahim, the Sultan of the State and territory of Johore for himself, his heirs and successors:

1. His Highness the Sultan agrees that His Majesty shall have full power and jurisdiction within the State and territory of Johore.
2. Save in so far as the subsisting agreements are inconsistent with this Agreement or with such future constitutional arrangements for Malaya as may be approved by His Majesty, the said agreements shall remain in full force and effect.

Signed this 20th day of October, 1945.

Johore Treaty of January 21, 1948

(Agreement revoking the MacMichael Treaty)

Agreement made the twenty-first day of January, 1948 between Sir Gerard Edward James Gent ... on behalf of His Majesty and His Highness Ibrahim ibni Almarhum Sultan Abu Bakar ... Sultan of the State and Territory of Johore for himself and his successors:

Whereas mutual agreements subsist between His Majesty and High Highness;

And whereas it has been represented to His Majesty that fresh arrangements should be made for the peace, order and good government of the State of Johore ...;

And whereas it is expedient to provide for the constitutional development of the State of Johore under protection of His Majesty and for its future government;

Now therefore it is agreed and declared as follows:

1. This Agreement may be cited as the Johore Agreement, 1948, and shall come into operation on the appointed day ...
2. (omitted)
3. (1) His Majesty shall have complete control of the defence and of all the external affairs of the State of Johore ...

(2) His Highness undertakes that, without the knowledge and consent of His Majesty's Government, he will not make any treaty, enter into any engagement, deal in or correspond on political matters with, or send envoys to, any foreign State.

4. His Highness undertakes to receive and provide a suitable residence for a British Adviser to advise on all matters connected with the government of the State other than matters relating to Muslim Religion and the Custom of the Malays, and undertakes to accept such advice ...

5. The cost of the British Adviser with his establishment shall be determined by the High Commissioner and shall be a charge on the revenues of the State of Johore.

6. His Highness shall be consulted before any officer whom it is proposed to send as British Adviser is actually appointed.

7 – 13. (Omitted)

14. (1) The Agreement made on the 20th day of October, 1945, ... is hereby revoked.

(2) All Treaties and Agreements subsisting immediately prior to the making of the aforesaid Agreement of 20th day of October, 1945, shall continue in force save in so far as they are inconsistent with this Agreement or the Federation Agreement.

15. The prerogatives, power and jurisdiction of His Highness within the State of Johore shall be those which His Highness the Sultan of Johore possessed on the first day of December, 1941, subject nevertheless to the provisions of the Federation Agreement and this Agreement.

5

Position of Muslim Law in the Malay States

Prof. Ahmad Ibrahim, "Privy Council Decisions on *Wakaf*: Are They Binding in Malaysia?"

[1971] 2 MLJ vii

In the case of *Commissioner for Religious Affairs* v. *Tengku Mariam* [1970] 1 MLJ 222, two of the Judges in the Federal Court expressed the view that the courts in Malaysia are bound by the judgment of the Privy Council in the case of *Abdul Fata Muhamad Ishak* v. *Russomoy Dhar Chowdhry* [1894] 22 I.A. 76 a decision of the Judicial Committee on an appeal from India on the question of the validity of a family *wakaf*. The Lord President, Azmi L.P. referred to the judgment of Lord Simonds in *Fatuma binti Mohamed bin Salim* [1952] AC 1 ... (and) then went on to say "The effect of the above would be that Malaysian courts would also be bound by the judgment of the Privy Council in *Abdul Fata's* case".

Suffian F.J. said:

> "I have examined the *wakaf* instrument and the authorities mentioned in the learned judge's judgment and those sited before us and I am satisfied that the *wakaf* here was eventually for the benefit of Tengku Chik's family and that the gifts to charity were illusory and that on the authority of the Privy Council decisions cited to us the learned judge was bound and we are bound to hold that the *wakaf* was therefore void, notwithstanding the Mufti's ruling to the contrary".

It may be noted that the views expressed by Azmi L.P. and Suffian F.J. were *obiter* as the Federal Court decided on other grounds that the

validity of the *wakaf* in the case could not be challenged. It is submitted with respect that the views are not correct in view of the difference in the law applicable in Terengganu on the one hand and in India and East Africa on the other ...

The Judicial Committee of the Privy Council can only be regarded as a Malaysian court, if at all, if it is hearing an appeal from Malaysia. If it is hearing an appeal from another Commonwealth country, it is a court of that part of the Commonwealth and not a Malaysian Court. It is submitted that a decision of the Judicial Committee on a question of the English Common Law is not binding on the Courts of Malaysia unless it is given on an appeal from Malaysia.

The Civil Law Ordinance, 1956 provides in effect that in the absence of any written law, the courts in West Malaysia shall apply the common law of England and the rules of equity as administered in England at April 7, 1956, the date of coming into force of the Ordinance. As regards the common law as it existed on April 7, 1956 therefore the Courts in Malaysia are bound by the decisions of the House of Lords, which is the Supreme tribunal to settle the English law ...

The decisions of the Judicial Committee are not binding in England. Thus in *Fenton* v. *Danville* [1932] 2 KB 333 the English Court of Appeal refused to follow the decision of the Judicial Committee in *Toronto Power Co. Ltd.* v. *Paskawan* [1915] AC 734 on the ground that it was "inconsistent with the whole trend of English decisions". In so far as the courts in West Malaysia are under a statutory obligation to apply English law as it stood on April 7, 1956 decisions of the Judicial Committee given before that date cannot be binding on them.

The decision of the Judicial Committee on the interpretation of a statute given on an appeal from a country other than Malaysia would only be binding in Malaysia, if the statute was in *pari materia* with in a statute in Malaysia. In *Khalid Panjang* v. *Public Prosecutor* [1964] MLJ 108, Thompson L.P. said:

> "(The Privy Council) were discussing a section in an Indian Statute which is word for word the same as the corresponding section of a local Statute. In these circumstances a decision of their Lordships is binding on this Court *a fortiori* it is binding on every High Court in Malaysia and a Judge is not at liberty, whatever his private opinion may be, to disregard it."

There is a fundamental difference between the position of Muslim law

in India and in Malaysia ... The Muslim law is administered in India in the ordinary courts and there are no separate *Syariah* courts. In Malaysia on the other hand the Muslim law is the law of the land. In *Ramah* v. *Laton* [1927] 6 FMSLR 128 the court of appeal held that Muslim law is not foreign law but local law and the law of the land. The Muslim law of the Shafii School is applicable and it is administered mainly in the *Syariah* courts. Questions of Muslim law are the concern of the State legislature and the Muslim law applicable in a State can be expounded or modified through *fatwa* issued under the relevant State legislation.

In Terengganu for example it provided that the *Majlis* shall take notice and act upon all written law in force in the State, the provisions of the *hukum syarak* and the ancient custom of the State or Malay customary law. Rulings on Muslim law can be given by the *Mufti*. Any ruling, shall if the *Majlis* so determines or if His Highness the Sultan so directs be published by notification in the *Gazette* and shall thereupon be binding on all Muslims resident in the State.

There are special provisions for *wakaf* in the Administration of Islamic Law Enactment, 1955 of Terengganu. Both *wakaf 'am* and *wakaf khas* are mentioned in the Enactment ...

The Muslim law applicable in Terengganu is the *Hukum Syarak*, as modified by the laws of the State or Malay customary law. There can be little doubt that according to the *Hukum Syarak*, a family *wakaf* is valid. According to all schools of Muslim law, a *wakaf* may be created for the benefit of any person or class of persons, or for any object of piety or charity ...

In the High Court in the case of *Tengku Mariam* v. *Commissioner for Religious Affairs, Trengganu* [1969] 1 MLJ 110 Wan Suleiman J. referred to the provisions of section 4(1) and 25(4) of the Administration of Islamic Law Enactment, 1955. Section 3(1) reads as follows:

> "Save as expressly provided in this Enactment nothing contained herein shall derogate from or affect the rights and powers of a civil court."

Section 25(4) reads as follows:

> "Nothing in this Enactment contained shall effect the jurisdiction of any Civil Court and in the event of any difference or conflict arising between the decision of a court of the Chief Kadi or kadi and the

decision of a civil court within its jurisdiction, the decision of the civil court shall prevail."

These sections only deal with the jurisdiction and powers of the civil courts. The jurisdiction and powers of the civil courts to deal with matters within their jurisdiction are not affected but this does not mean that the High Court can ignore the provisions of the Enactment, which is part of the law of Terengganu, and follow a law laid down by a foreign court for a foreign country.

6

Position of English Law in the Malay States

Prof. Ahmad Ibrahim, "Legislation in the Malay States"
[1977] 2 MLJ lxiii

Prior to British intervention in the Malay States it may be stated that whatever legislative powers there were in the States lay with the Malay Sultans. The law followed was basically the Islamic law and such parts of the customary law as had been accepted or existed side by side with the Islamic law. Lord Tomlin in giving the opinion of the Privy Council in *The Pahang Consolidated Company Ltd.* v. *The State of Pahang* [1933] MLJ 247 summarised the position as follows:

> "The Sultan of Pahang is an absolute ruler in whom resides all legislative and executive power, subject only to the limitations which he has from time to time imposed upon himself."

In the case of *Anchom binte Lampong* v. *Public Prosecutor* [1940] MLJ 22 Gordon-Smith Ah. J.A. said:

> "it must be conceded that prior to 1895 the Sultan was an absolute monarch and whatever Council of Edens, Ministers or Chiefs there may have been, such acted in an advisory capacity only and that full sovereign power rested and remained with the sovereign. The earlier Treaties with the United Kingdom fully support this view, as does the Privy Council judgment in the *Pahang Consolidated Company Ltd.* v. *State of Pahang*."

Under the Engagement entered into by the Chiefs at Pulau Pangkor on January 20, 1874 it was agreed that, "the Sultan receive

and provide residence for a British officer to be called Resident, who shall be accredited to the Court and whose advice must be asked and acted upon all questions other than those touching Malay religion and custom."

In 1875 a British Resident was sent to Selangor ... In Negeri Sembilan a Resident had been requested by the Dato Kelana of Sungei Ujong in 1874 and in 1889 when the Rulers of the respective States agreed to constitute their countries into a Confederation they expressed their desire "that they may have the assistance of a British Resident in the administration of the government of the said Confederation and they undertake to follow his advice in all matters of administration other than those touching the Mohamedan religion". (Maxwell and Gibson 1924. *Treaties and Engagements affecting the Malay States and Borneo*, p. 63).

In Pahang in 1887 the Sultan was induced to accept a joint defence treaty and a British Agent having functions similar to those of a consular officer but in 1888 the murder of a British subject provided the excuse for the appointment of a British Resident "in order that he may assist in matters relating to the Government of our country on a similar system to that existing in the Malay States under the British protection". The Sultan also stated – "In asking this we trust that the British Government will assure to us and our successors all or proper privileges and powers according to our system of government and will undertake that they will not interfere with the old customs of our country which have good and proper reasons and also with all matters relating to our religion."

In practice the Malay Sultans were persuaded to leave the administration of the country to the Resident and the Governor. So far as the general machinery of government was concerned the function of the Ruler was to validate State documents by the addition of his seal, to advise as to the feelings among the Malays, to endorse reforms by his personal example and to provide a ceremonial focus for the government of the State. The documents presented for his seal included State bonds, leases, commissions for members of the Council, *penghulus* and *Kadhis* and various notices and proclamations. But care was taken that the Ruler's seal was used only on documents which were authorised by the Resident. Regulations and Orders in Council were issued in the name of the Ruler but in fact the Ruler had little control over the contents of the documents he sealed. They were drawn up in the Resident's office and presented to him for formal ratification.

Under Malay rule the power of the Sultan had been limited by the

obligation to consult the Chiefs and *waris negeri* on important matters of State; they met in assembly on ceremonial occasions, to attend on the Sultan; successions to the Sultanate and treaties with foreign persons required their assent and witness. Thus the engagement at Pangkor in 1874 was signed by the three chiefs of the first rank and four of the second as well as by the Sultan.

Under the Residential system the Chiefs and *waris negeri* ceased to have importance except in ceremonial and succession matters and their place was taken by the State Council.

The State Councils were set up to assist the Resident in the running of the government. The Council was the legislative body of the State; it was the final court of appeal and reviewed all capital sentences; it also decided on matters relating to current administration ... The Council was dominated by the Resident. He nominated its members, drew up its agenda, guided its deliberations and influenced its decision ...

Within the Council the initiative lay with the British Resident, though the Sultan or Regent formally presided. The British Resident under the orders of the Governor as a rule conducted or at any rate prepared the business of each meeting, carried the measures and then advised the Sultan to assent to the minutes as a matter of form ...

At first the codes and procedures for the Malay States were borrowed wholesale from India and the Straits Settlements ... It was natural that the Residents should look to the Straits Settlements for models for their legislation. Thus we get the adoption of the Straits Settlements Penal Code, the Evidence Ordinance and the Summary Criminal Jurisdiction Ordinance and other Ordinances were adopted from time to time voluntarily by the Residents or under instructions from the Governor ...

By the Treaty of the Federation, 1895 the Rulers and Chiefs of the respective States agreed to constitute their countries into a Federation to be known as the Protected Malay States, to be administered under the advice of the British Government ... The Rulers agreed to accept a British Officer to be styled as the Resident-General, whose advice they undertook to follow in all matters of administration other than those touching the Mohamedan religion. The appointment of the Resident-General was not to affect the obligations of the Malay Rulers towards the British Residents in the States ...

In 1909 an agreement was made for the constitution of a Federal Council ... In 1927 a further change was made by the agreement for the

Reconstitution of the Federal Council. The Sultans were removed from the Council in order to enhance their prestige and dignity and the Council itself was reconstituted. While in the past the enacting clause ran "It is hereby enacted by the Rulers of the Federated Malay States in Council" the new enactment clause followed the model of the Imperial Parliament and read "It is hereby enacted by the Rulers of the Federated Malay States by and with the advice and consent of the Federal Council ..."

It was also provided that any law passed or which may thereafter be passed by a State Council shall continue to have full force and effect in such State except in so far as it may be repugnant to the provisions of any law passed by the Federal Council ... Questions connected with the Mohamedan religion, mosques, political pensions, native chiefs and *penghulus* and any other questions which in the opinion of the High Commissioner affect the rights and prerogatives of any of the Rulers or which for other reasons he considers should properly be dealt with by the State Councils shall be exclusively reserved to the State Councils ...

Prof. Ahmad Ibrahim, "The Civil Law Ordinance in Malaysia"
[1971] 2 MLJ viii

It is sometimes forgotten that the basic law in the Malay States is the Malay-Muslim law. In the case of *Ramah* v. *Laton* [1927] 6 FMSLR 128, the Court of Appeal held that Muslim law is not foreign but local law and it is the law of the land. This authority was cited with approval in the case of *Fatimah binte Hanis* v. *Haji Ismail bin Tamin* [1939] MLJ 134 where Mills J. held that Muslim law is a part of the law of Johore.

English law was introduced into the Malay States by legislation and by the decision of the British judges. There had been a great deal of reception of the English law even before the enactment of the Civil Law Enactment of 1937. As Terrel Ag. C.J. (S.S.) said in *Yong Joo Lin* v. *Fung Poi Fong* [1941] MLJ 63, 64:

> "Principles of English law have for many years been accepted in the Federated Malay States were no other provision has been made by Statute. Section 2(i) of the Civil Law Enactment therefore merely gave statutory reception to a practice which the courts had previously followed."

The Enactment and the Civil Law Ordinance of 1956 (which was

applied to the whole of the Malay States including Penang and Malacca) formalised the practice, which had already been adopted ...

It has been assumed that the Civil Law Enactment, 1937 and the Civil Law Ordinance, 1956 did not affect the application of Muslim law and Malay custom in the Malay States. There is no statutory provision providing in terms for the application of Muslim law in the Malay States although various enactments provide from the administration of Muslim law in the various States in Malaysia. Section 25 of the Civil Law Ordinance, 1956 provides that nothing in Part VII of the Ordinance which makes provisions relating to the disposal and devolution of property, shall affect the disposal of any property according to the Muslim law ...

Recently it has been decided to extend the provisions of the Civil Law Ordinance, 1956 to the States of Sabah and Sarawak. The Civil Law Ordinance (Extension) Order 1971 provides that with effect from 1st April 1972 the Civil Law Ordinance 1956 shall have effect with the modifications made by the Order and as so modified shall extend to the States of Sabah and Sarawak ...

It is a pity that the opportunity was not taken to repeal section 3(1) of the Civil Law Ordinance 1956 and the corresponding provisions of the enactments in the Borneo States ...

(As) the law is (being) developed in Malaysia through legislation and judicial decisions, there will be less and less need to rely on the English law to fill (any) *lacunae* in the law. Perhaps the time has come to consider whether another method of filling in (the) *lacunae* in the law should not be adopted to recognise the fact that Muslim law is the law of the land in Malaysia. Perhaps a provision can be made in the lines of the Egyptian Civil Code of 1948 which states:

> "In the absence of an express provision, the judge shall follow the rules of custom; if they do not exist, the principles of Islamic law and if they in turn do not exist he shall follow the principles of natural law and equity."

Perhaps the provision in the earlier Egyptian Code on the Organisation of Native Courts 1883 might be added, that is, "and in commercial matters he shall follow commercial usage".

The lack of a civil law enactment did not prevent the filling of (any) *lacunae* in the law before 1937 and there is no reason why (any such) *lacunae* cannot be filled even if the provisions of the Civil Law Ordinance

were repealed. The repeal would remove the monopoly in legal development which the English law holds in Malaysia and would enable the judges in Malaysia to consider the provisions of other systems of law. In particular the position of Muslim law as the law of the land can be re-emphasised and adequately recognised.

Note

See also Mohan Gopal, "English Law in Singapore: The Reception That Never Was" [1983] 1 *MLJ* xxv.

Joseph Chia, "Reception of English Law under Section 3 and 5 of the Civil Law Act 1956 (Revised 1972)"

[1974] JMCL 42

An interesting question has given rise to a certain amount of academic discussion is the extent to which Malaysian courts can adopt English law. Sections 3 and 5 of the Civil Law Act (Revised 1972) allow the courts to apply English law in certain circumstances but the exact scope of the provisions is far from clear ...

Section 3(1)(*a*) provides that in the absence of any written provision in Malaysia the courts shall "in West Malaysia or any part thereof, apply the common law of England and rules of equity as administered in England on the 7th day of April, 1956". Does this subsection purport to incorporate the whole of English law, including statutes which may have modified the common law, or does it have a more restricted application?

Professor Bartholomew (*The Commercial Law of Malaysia* (1965) p. 21–39) writing on section 3(1)(*a*) of the Revised Act, submits that English legislation is applicable under the Ordinance. He argues that the admissibility of the English statutes is a matter of "sheer necessity" and that to interpret section 3(1) in such a way that only the unreformed version of English law can be received would be to assimilate common law rules which have been found to be inadequate in England. He concludes that the expression "common law" simply means the law administered by the Courts of Common Law – whatever in nature.

The term "common law" is admittedly an expression that is susceptible of more than one meaning. The definition which Prof.

Bartholomew adopted to suit his argument is unquestionably wide enough to cover statutes. But it is submitted that this is not the meaning commonly adhered to. The term "common law" is more frequently used in contra-distinction to statute law and is in fact a body of principles built up from the decision of judges in Common Law Courts ...

The definition ... by Prof. Bartholomew ... is at best of historical interest and has never gained currency. Moreover it is a general rule of construction that words in a statute must be construed not only in their popular sense but also in the sense they bore when the statute was passed. In 1956 when the Civil Law Ordinance came into force, the term "common law" was universally employed to distinguish case law from statutes and this, it is submitted, on principle must be the meaning intended by the Civil Law Ordinance 1956.

The Malaysian Courts seem to confirm the view that section 3(1) does not admit of statutes. In *Mokhtar* v. *Arumugam* [1959] 2 MLJ 232... (the court) refused to entertain any arguments based on an English statute. In *Ong Guan Hua* v. *Chong* [1963] MLJ 6 which raises the question of the validity of securities given in respect of gaming contracts, Thompson C.J. reiterated his views ...

A recent Privy Council decision, *Leong Bee & Co* v. *Ling Nam Rubber Works* [1970] 2 MLJ 45 makes some interesting observations on this point, but unfortunately the Board did not spell out its position exactly ...

Under the terms of the Revised Act (1972), Prof. Bartholomew's view becomes even more difficult to justify. Section 3(1)(*a*) deals with West Malaysia only and it refers to "the common law of England and the rules of equity" as being applicable there; whereas section 3(1)(*b*) and (*c*) which apply to Sabah and Sarawak respectively, refer to "the common law of England and the rules of equity, *together with statutes of general application*". The conclusion appears inescapable that the legislature, by deliberately including the word "statutes" in section 3(1)(*b*) and 3(1)(*c*) while retaining the words "common law ... and rules of equity" in section 3(1)(*a*), perceived a distinction between the two heads.

7

History of Native Law in Sabah and Sarawak

M.B. Hooker, *Native Law in Sabah and Sarawak*
1980, MLJ, Singapore, pp. 1 – 22

Sabah

The legal history of Sabah begins on November 1, 1881 when North Borneo, as it then was, came under the administration of the British North Borneo Company. The grant of the Charter was preceeded by the transfer of the territories making up North Borneo from the Sultans of Brunei and Sulu to Baron Overbeck and Alfred Dent, Esq in 1877 – 88 ...

In its terms, the Charter gave the Company wide powers to conduct the whole government of North Borneo although the Crown reserved to itself the right of extra-territorial jurisdiction in Borneo. The Company also was not permitted to maintain a monopoly of trade. In 1888 British North Borneo became a Protectorate under the terms of an agreement of May 12, between the Company and (The British Government) ...

Insofar as the administration of Native law was concerned, the Charter specifically provided as follows:

> "In the administration of justice by the Company to the people of Borneo, or to any of the inhabitants thereof, careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially with respect to the holding, possession, transfer and disposition of lands and goods, and testate or intestate succession thereto, and marriage, divorce and legitimacy, and other rights of property and personal rights."

The formality of the legal system established under the Charter is strongly reflected in the provisions of article 9, especially when they are contrasted with the informality of the early administration in Sarawak. This formality was further reinforced by the practice in North Borneo of adopting the Acts of British possessions or protectorates by way of local ordinance. The laws adopted included Indian acts, and ordinances of the Straits Settlements and Federated Malay States.

The first law directed specifically to Native affairs was the Native Rights to Land Proclamation of 1889, subtitled "for the protection of Native Rights to Land". The Proclamation was administrative in tone and concerned itself with establishing a system of land registration ...

The next major law, while similarly administrative in character, was unique in the British Borneo territories. The Village Administration Proclamation was concerned to establish and maintain public order in North Borneo ...

The third piece of legislation directly affecting Natives in the late 19th and early 20th centuries is the innocently named Abolition of Poll-Tax Proclamation of 1902 which in fact did a great deal more than merely abolish the poll-tax. This Proclamation should be read with the earlier Native Rights to Land Proclamation of 1889 because the 1902 legislation is in addition to the earlier law ....

The Abolition of Poll-Tax Proclamation was in fact a code of native land tenure. It made land rights dependent upon registration and directed (through the accompanying rules) the practice of cultivation. Many of its substantial provisions remain in contemporary legislation.

With these three pieces of legislation the foundations were laid of native law administration in North Borneo. Subsequent legislation added refinements and elaborated the initial rules with the exception of the Poll-Tax legislation. Under the Poll-Tax Ordinance of 1902 the liability for tax was confined to those who did not fall under the exemptions already described above (i.e. payment of quit rent etc.) and the Ordinance made no mention of the detailed rules as to planting paddy and so on, just described. These later became the subject of separate legislation ...

Legislative activity in the field of native law was minimal for the first three decades of the 20th century ...

It is in the thirties that substantial change occurred and even now the current law is little more than an amendment of principles established at that time. Perhaps the most striking single example of

change in the formal legal system is the Civil Law Ordinance of 1938 which imported the common law of England and the doctrines of equity subject to local custom and circumstance (section 3).

The increasing formalization of law exemplified in the Civil Law Ordinance has been continued in the application of laws legislation of the 1950s. Thus, the Application of Laws Ordinance of 1951 imported common law, equity and statutes of general application as existing at the date of the coming into force of the ordinance, subject to the usual limitations of local custom and circumstances ...

In the same period it was felt necessary to define "native" and the Interpretation (Definition of Native) Ordinance came into force in 1952. The definition adopted referred to two classes of "natives": firstly to "persons indigenous to the colony", secondly to persons "ordinarily resident", one of whose parents was an indigenous person or one of whose parents was an indigenous person from Brunei, Sarawak, the Straits Settlements, the Federated Malay States, Indonesia or Sulu. "Parent" was any person recognized as such according to any native law or custom. The Ordinance also dealt with the right of any person claiming to be a native to apply to the Native Court. This Ordinance was substantially amended in 1958, the references to Brunei, Sarawak, Indonesia, etc., were deleted and replaced by a new section 2(1)(*b*)–(*d*) which, in addition to requiring descent from a parent as defined above, also laid it down that any claimant to the status of "native" must have been a recognized member of a native community for a set period (3–5 years), to be of good character and, most important, a person whose stay is not limited under any of the provisions of the Immigration Ordinance. The whole effect of the legislation is thus to confine the definition of native to persons with some North Borneo links. A racial definition alone is not now sufficient ...

Sarawak

In 1846, Sultan Omar Ali of Brunei granted the province of Sarawak to Brooke "to be ruled in accordance with the wishes of the *Tuan Besar* ..."

The earlier legal example of the exercise of sovereign powers is the Code of Law which Brooke promulgated on February 2, 1842. It reads as follows:

"James Brooke, Esq, Governor (Rajah) of the country of Sarawak,

makes known to all men of the following regulations:

1. That murder, robbery, and other heinous crimes, will be punished according to the *ondong-ondong* (i.e. the written law of Borneo); and no person committing such offences will escape if, after fair enquiry, he be proved guilty.
2. In order to ensure the good of the country, all men, whether Malays, Chinese, or Dayaks, are permitted to trade or labour according to their pleasure and to enjoy their gains.
3. All roads will be open, that the inhabitants at large may seek profit both by sea and land; and all boats coming from other parts are free to enter the river and depart, without let or hindrance ...
4. Trade, in all its branches, will be free with the exception of antimony-ore, which the Government holds in his own hands ...
5. It is ordered, that no person going amongst the Dayaks shall disturb them, or gain their goods under false pretences ...
6. The Governor will shortly inquire into the revenue, and fix it at a proper rate; so that every one may know certainly how much he has to contribute yearly to support the government.
7. It will be necessary, likewise, to settle the weights, measures, and money current in the country, and to introduce *doits* (money) that the poor may purchase food cheaply.
8. The Governor issues these commands, and will enforce obedience to them; and whilst he gives all protection and assistance to the persons who act rightly, he will not fail to punish those who seek to disturb the public peace, or commit crimes. ..."

In the following years of his reign, Brooke was largely concerned with making good the provisions of section 8. The use of force was constantly necessary to maintain his position but at the same time he did not neglect the gentler art of judicial administration ...

The informality and personal nature of the Rajah's rule were reflected in the laws (called "Orders") promulgated in H.H. The Rajah's Order Books, the source of the present laws of Sarawak, which began in 1863. Although no clear legal policy was ever promulgated, it is apparent from the Orders that the Rajahs were concerned to establish a distinct system of law for each racial and religious group. The personal nature and informality of government is again reflected in the Orders, especially in respect of the Native communities.

... The laws affecting the Native communities of Sarawak were few in number, limited in scope and probably only partially effective. The real administration of the Native law was carried on in the Resident's Offices throughout the state and the law applied was the local customary law (*adat*). In other words, Native law implementation was an administrative rather than a strictly judicial matter.

Under the Courts Orders from 1870 onwards, the term "Native Court" referred to a Muslim court rather than to the "Natives" in the sense used in the other enactments. This remained true for the Courts Order of 1922 as subsequently amended and also for the Courts Order of 1933. Under the latter, Native laws were dealt with in the Magistrates' and Residents' Courts with a right of appeal to the Supreme Court. Thus, while the odd Native case appears in the Supreme Court Reports, the substantive body of Native case law is to be found in the Residents' Court Books from each division ...

(The year 1940) saw the passing of the Native Courts Order which constituted a series of Native Courts and defined their powers. The classes of Native Court were (a) the District Court constituted by a Magistrate of the Second Class, a Native Officer and two assessors; (b) the Court of a Native Officer or Chief constituted by those officials, and (c) a Headman's Court consisting of a Headman and two assessors. Jurisdiction consisted of power to adjudicate breaches of native law and customs and the first two classes of court could impose both fine and imprisonment whilst the latter could impose a fine only. Rights of appeal went from the most junior to the most senior of the Native Courts and from thence to the court of a Magistrate of the First Class and eventually to the Supreme Court ...

In 1949 a new Application of Laws Ordinance was ... promulgated importing the common law, doctrines of equity and statutes of general application, the extent of which, however, is limited by local circumstances and native custom. Thus, for example, the Guardianship of Infants Ordinance No. 23 of 1953, while introducing principles drawn from English statute, contains special provisions as to Native infants. These take the form of allowing the court to invoke the aid of Native assessors. The definition of "Native" had already been decided as "a race declared to be indigenous to Sarawak" in the Constitution Ordinance of 1948, the first time that this was thought necessary.

In 1955 the formal structure of Native law administration reached its definitive form with the promulgation of the Native Courts

Ordinance (and accompanying regulations) and the Native Customary Laws Ordinance. The former is a substantial enlargement of the earlier Native Courts legislation; its most important feature is the creation of a Native Court of Appeal presided over by a judge. At the same time, the Native Customary Laws Ordinance not only made provision for the keeping of records but gave power to the Governor-in-Council to amend any native system of personal law ...

The increasing formality of Native law adjudication has made it necessary to settle the form and content of Native law. The judicial process proceeds by way of the creation of general principle, derived from precedent and applied in the specific instance ...

The judicial system is formulated in such a way as to make Native law a distinct part of an English-derived legal system. Such was not the position under the first two Rajahs, where a localized and highly fact-specific administration was the norm ...

Appendix

Civil Law Ordinance No. IV of 1878

An Ordinance to improve the Civil Law.

[1st January 1879]

Whereas it is expedient to extend to this Colony the recent improvement in the law in England, whereby Law and Equity are to be concurrently administered, and otherwise to improve the Civil Law.

It is hereby enacted by the Governor of the Straits Settlements, with the advice and consent of the Legislative Council thereof, as follows:

1. In every civil cause or matter, commenced in the Supreme Court, Law and Equity shall be administered by the Court, in its original and appellate jurisdiction ...

6. In all questions or issues which may hereafter arise or which may have to be decided in this Colony, with respect to the law of partnerships, joint stock companies, corporations, banks and banking, principals and agents, carriers by land and sea, average marine insurance, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any *Statute* now in force in this Colony or hereafter to be enacted:

Provided that nothing herein contained shall be taken to introduce into this Colony any part of the law of England relating to the tenure or conveyance, or assurance of, or succession to, any land or other immovable property, or any estate, right or interest thereon.

Civil Law Enactment No. 3 of 1937

An Enactment relating to the Civil Law to be administered in the Federated Malay States.

[12th March, 1937]

1. This Enactment may be cited as the Civil Law Enactment, 1937.

2. (i) Save in so far as other provision has been or may hereafter be made by any written law in force in the Federated Malay States the common law of England, and the rules of equity, as administered in England at the commencement of this Enactment, other than any modification of such law or any such rules enacted by statute, shall be in force in the Federated Malay States; provided always that the said common law and rules of equity shall be in force in the Federated Malay States so far only as the circumstances of the Federated Malay States and its inhabitants permit and subject to such qualifications as local circumstances render necessary ...

(ii) Subject to such express provision of any other Enactment, in the event of conflict or variance between such common law and such rules of equity with reference to the same matter, such rules of equity shall prevail in all courts in the Federated Malay States so far as the matters to which those rules relate are cognizable by those courts ...

The Civil Law (Extension) Ordinance No. 49/1951

An Ordinance to extend the application of section 2 of the Civil Law Enactment 1937 of the Federated Malay States to all the Malay States.

[31st December, 1951]

1. This Ordinance may be cited as the Civil Law (Extension) Ordinance, 1951.

2. Section 2 of the Civil Law Enactment, 1937, of the Federated Malay States is hereby extended to apply to the States of Johore, Kedah, Kelantan, Perlis and Terengganu and, with the modifications set out in the Schedule to this Ordinance shall have effect in all the Malay States.

Civil Law Act 1956 (Revised 1972)

An Act relating to the civil law to be administered in Malaya.

[West Malaysia – April 7, 1956]
[Sabah & Sarawak – April 1, 1972]

1. This Act may be cited as the Civil Law Act 1956.

2. (Omitted)

3. (i) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaya, the Court shall:
   (a) in Malaya or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956;
   (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December, 1951;
   (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December, 1948, subject however to subsection (3)(ii):

   Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaya and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

(ii) Subject to the express provisions of this Act or any other written law in force in Malaya or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail.

(iii) (Omitted)

4. (Omitted)

5. (i) In all questions or issues which arise or which have to be decided in the States of Malaya other than Malacca and Penang with respect to the law of partnership, corporations, banks and banking, principals and agents, carriers by air, land and sea, average, marine insurance, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

(ii) In all questions of issues which arise or which have to be decided in the States of Malacca, Penang, Sabah and Sarawak with respect to the law concerning any of the matters referred to in subsection (1), the law to be administered shall be the same as would be administered in England, in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

6. Nothing in this Part shall be taken to introduce into Malaya or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein.

7–28. (Omitted)

29. The Ordinances and Enactments set out in the First Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

Note

By virtue of this 1956 Act, the Civil Law Ordinance (S.S. Cap. 42), the Civil Law Enactment (F.M.S. No. 3 of 1937) and the Civil Law (Extension) Ordinance 949 (F. of M. No. 49 of 1951) were repealed.

Bibliography

Andaya, B.W. 1979. *Perak, The Abode of Grace.* OUP.

Braddell, R. 1931. *The Legal Status of the Malay States.* MPH.

Cant, R.G. 1972. *An Historical Geography of Pahang* in MBRAS Monograph.

Gullick, J. 1901. *Malaysia: Economic Expansion and National Unity.*

Harrison, B. 1985. *Holding the Fort: Melaka Under Two Flags* in MBRAS Monograph.

Hooker, M.B. 1982. *The Law of the Straits Settlements: A Commentary.* OUP.

Kessler, C.S. 1978. *Islam and Politics in a Malay State: Kelantan 1838–1969.* Cornell University Press.

Leong, C. 1982. *Sabah: The First 100 Years.*

Low, H. 1988. *Sarawak.* Singapore: OUP.

Majid, Z. (ed.) 1985. *Masyarakat Malaysia.* USM Publication.

Mills, L.A. 1966. *British Malaya 1824–67.* OUP.

Milne R.S. & Mauzy D.K. 1986. *Malaysia: Tradition, Modernity and Islam.* London: Westview Press.

Roft, W.R. 1974. *Kelantan: Religion, Society and Politics in a Malay State.* OUP.

Rozdi, M. & Salim, S. 1984. *Sejarah Malaysia Moden.* Adabi.

Rubin, A.P. 1974. *The International Personality of the Malay Peninsula.* Kuala Lumpur: Penerbitan Universiti Malaya.

Shahrom Ahmat 1984. *Tradition and Change in Malay State: A Story of the Economic and Political Development of Kedah 1878–1923* in MBRAS Monograph.

Sheppard, M. 1983. *A Short History of Trengganu* in MBRAS Reprint.

Skinner, C. 1966. *The Civil War in Kelantan in 1839* in MBRAS Monograph.

Stenson, M. 1980. *Class, Race & Colonialism in West Malaysia.* Univ. of Queensland Press.

Winstedt, R.O. 1947. *The Malays: A Cultural History.*

Winstedt, R.O. 1979. *A History of Johore 1365–1895* in MBRAS Reprint No. 6.

Winstedt, R.O. 1986. *A History of Malaya.* Marican.

Winzeler, R.L. 1985. *Ethnic Relations in Kelantan.* OUP.

Index