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THE HIGH COURT'S INHERENT POWER TO GRANT DECLARATIONS OF MARITAL STATUS

This article asks whether the High Court can grant bare declarations of marital status. English courts had been wavering and the U.K. Parliament recently enacted express powers. The author argues that Singapore courts should not be hesitant. They originally possessed inherent power to grant such declarations and this was never relinquished.

IN 1972 the High Court of Singapore in *Lawrence Au Poh Weng & Anor* v. *Annie Tan Huay Lian*[1] decided that it had no jurisdiction to make any of the declarations of marital status sought by the parties. The first and second plaintiffs each sought a declaration that the first plaintiff was not married to the defendant and that the first plaintiff was married to the second plaintiff. They did not seek substantive relief against the defendant. The defendant, in reply, sought a declaration that it was she who was married to the first plaintiff. Winslow *J.* dismissed the three claims for lack of jurisdiction. There was no appeal from this decision. Recently, however, in Originating Summons No. 1273 of 1990 the High Court made a bare declaration that a purported marriage was invalid and the parties were not married to each other but this decision, in Judge's Chambers, will probably remain unreported.

In England, the law with regard to bare declarations in family matters received a boost fairly recently. In 1984 the Law Commission of England and Wales recognized the usefulness of such bare declarations and recommended that the existing power in the English courts to grant such declarations[2] be clarified by statute to put the matter beyond all doubt.[3] The U.K. Parliament acted upon the Law Commission's recommendation and, through the enactment of sections 55 and 56 of the (U.K.) Family Law Act 1986, has unequivocally provided English courts with authority to grant a variety of bare declarations of status within family matters. Section 55(1) reads:

> Subject to the following provisions of this section, any person may apply to the court for one or more of the following declarations in

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1 [1972] 2 M.L.J. 124.

2 English courts were empowered to grant bare declarations in family matters by two separate lines of authority, *viz.* its inherent power, and by a provision specifically creating a power to grant some types of bare declarations of status within family matters. This article focusses on the former but the statutory power will be mentioned.

3 *Declarations in Family Matters* (Law Commission Report, No. 132 of 1984).

> relation to a marriage specified in the application, that is to say - (a) a declaration that the marriage was at its inception a valid marriage; (b) a declaration that the marriage subsisted on a date specified in the application; (c) a declaration the marriage did not subsist on a date specified; (d) a declaration that the validity of a divorce, annulment or legal separation obtained in any country outside England and Wales in respect of the marriage is entitled to recognition in England and Wales; (e) a declaration that the validity of a divorce, annulment or legal separation so obtained in respect of the marriage is not entitled to recognition in England and Wales.[4]

Section 56 subsections(l) and (2) of the same Act (as amended by the (English) Family Law Reform Act 1987 *vide* section 22) read:

> Any person may apply to the court for a declaration - (a) that a person named in the application is or was his parent; or (b) that he is the legitimate child of his parents. Any person may apply to the court for one (or for one or, in the alternative, the other) of the following declarations, that is to say - (a) a declaration that he has become a legitimated person; (b) a declaration that he has not become a legitimated person.[5]

These recent statutory provisions allow English courts to grant bare declarations not just of marital status but also of a person's parentage, legitimate status or legitimation, as the case may be.

This article explores the granting of bare declarations of status in family matters by invoking the inherent powers of a superior court. It surveys the law in England, it traces developments in the structure of Singapore courts, it asks if *Lawrence Au* was correct and it will suggest that our law be clarified by legislation. The thesis is that the High Court of Singapore does possess inherent power to grant bare declarations of status[6] despite reported decisions to the contrary and problems caused

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4 The section continues: "(2) A court shall have jurisdiction to entertain an application under subsection (1) above if, and only if, either of the parties to the marriage to which the application relates - (a) is domiciled in England and Wales on the date of the application, or (b) has been habitually resident in England and Wales throughout the period of one year ending with that date, or (c) died before that date and either - (i) was at death domiciled in England and Wales, or (ii) had been habitually resident in England and Wales throughout the period of one year ending with the date of death." The provision came into force w.e.f. 4 April 1988.

5 The section continues: "(3) A court shall have jurisdiction to entertain an application under subsection (1) or (2) above if, and only if, the applicant - (a) is domiciled in England and Wales on the date of the application, or (b) has been habitually resident in England and Wales throughout the period of one year ending with that date...." The provision came into force w.e.f. 4 April 1988.

6 This has been canvassed by Stanley Yeo Meng Heong, "Bare Declarations on the Existence of a Marriage" [1982] 2 M.L.J. xviii in his critique *of Lawrence Au;* Stanley Yeo, however, did not raise many of the points that will be raised here.

by two legislation subsequent to *Lawrence Au.* The reported decisions will be argued to be wrong and the recent grant of a declaration by the High Court that the marriage was invalid will be cited in support. The two legislation, when read purposively, do not hinder the argument. It would be suggested, however, that legislation granting express powers be enacted.

I. INTRODUCTION

Declaratory judgments or bare declarations are different from executory judgments in that they only proclaim the existence of a legal relationship between the parties or only proclaim the particular legal status of one of the parties. They do not go on to order the losing party to act or not to act in a certain way towards the winning party as in executory judgments. Declaratory judgments are also different from constitutive judgments such as adoption orders, divorce decrees, nullity decrees in respect of voidable marriages, or dissolution of partnerships. Constitutive judgments do not just declare a legal relationship or a legal status; rather, they affect the relationship or status in a certain way. Nullity decrees in respect of marriages which are void *ab initio,* however, are in substance similar to declaratory judgments because these nullity decrees in effect declare these marriages not to have been validly celebrated.

That a declaratory judgment is non-coercive should not lead us to think that it is of little use. In the words of the Law Commission:

> A declaration affords a convenient method of seeking a judicial determination as to family status. A person's status may be in doubt and he may wish to know, for example, whether his foreign marriage or divorce will be recognised as valid in England; or the question may be whether he is legitimate or has been legitimated. The purpose of a declaration is to resolve such doubts once and for all by establishing a person's existing status, but without granting any further relief.[7]

It should be remembered that a declaratory judgment is, after all, a judgment of a court of law and possesses all the authority of such decision. Upon judgment, the issue is certainly *res judicata* as between the parties. What is not entirely clear, since decided cases appear to be divided on this point, is whether declaratory judgments ought really to operate as judgments *in rem* in which case they would not only bind

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7 Above, note 3.

the parties but the entire world![8] A declaratory judgment is indeed the answer for a person who requires definitive judicial determination of his or her status.

II. LAW IN ENGLAND

A. *Declarations in General*

Court of Chancery

Bare declarations are not a recent phenomenon. Zamir, I. said:

> The declaratory judgment is an old-established institution... Yet, though old, it was of minor importance until fairly recent times. It began to flourish only in the last century - in England not before the middle of it - and developed slowly to its present scope.[9]

The learned writer went on to suggest that the Court of Chancery always had the power to grant bare declarations as part of its inherent jurisdiction. He quoted Bankes L.J. in the Court of Appeal in *Guaranty Trust Company of New York* v. *Hannay & Company*, one of the more important decisions confirming the inherent power of English courts to grant bare declarations, as support for this view:

> I cannot doubt that had the Court of Chancery of those days thought it expedient to make mere declaratory judgments they would have claimed and exercised the right to do so.[10]

In that 1915 appeal, Bankes and Pickford LJJ. affirmed the decision of the lower court that the application seeking several declarations regarding the legal relationship of the parties and the commercial transactions between them was not to be struck out for lack of jurisdiction.

(English) Chancery Procedure Act 1852

While the Court of Chancery no doubt had the inherent power to make declaratory orders, it used to be wary of making bare declarations and

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8 The Law Commission said: "The purpose of a declaration regarding status is to still doubts once and for all; and unless the declaration is *in rem* it will largely fail in achieving this purpose."; see above, note 3 at p. 31. Accepting this, the U.K. Parliament in section 58(2) of the (U.K.) Family Law Act 1986 provided: "Any declaration made under this Part *[i.e.* Part III which provides for all the types of declarations in family matters included within sections 55 and 56 of the Act] shall be binding on her Majesty and all other persons."

9 Zamir I., *The Declaratory Judgment* (1962), p. 2.

10 *Ibid.*, p. 7; *Guaranty Trust Co. of New fork v. Hannay & Co.* [1915] 2 K.B. 536, 568.

was only truly comfortable with declarations which led to some substantive relief. The first change was by way of the (English) Chancery Act 1850 which allowed any person interested in any question regarding the construction of an Act of Parliament or any other written instrument or as to the title or evidence of title to any real or personal property to present such question to the Court of Chancery for its opinion. Later a broader provision was enacted as section 50 of the Chancery Procedure Act 1852:

> No suit in the said Court *[i.e.* the Court of Chancery] shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations of rights without granting consequential relief.

Zamir noted that this provision, unfortunately, was narrowly interpreted as providing only that there may be an application for declaration if the party who could have sought consequential relief chose not to do so. Thus, the Court was still unable to entertain an application where consequential relief was not available.[11]

The first statute to provide a specific process to enable English courts to grant bare declarations was, interestingly, on a family matter. The (English) Legitimacy Declaration Act of 1858 permitted the granting of declarations of legitimacy, validity of marriage and the right to be deemed a natural-born subject of Her Majesty. This statutory provision gave a specific power to the English courts and was, therefore, not a means to invoke the inherent powers of the courts.

(English) Supreme Court of Judicature Act 1873

The Supreme Court of Judicature Act 1873 consolidated the existing superior courts into one Supreme Court of Judicature consisting of the High Court of Justice and the Court of Appeal.[12] In assigning to the High Court the jurisdiction of all existing superior courts of first instance[13], the Act achieved two effects: firstly, it retained in the High Court all the inherent powers possessed by its predecessor courts, and, secondly, it extended the power to grant declarations, which had hitherto mostly been restricted to the Court of Chancery, to all Divisions of the High Court.

(English) Rules of the Supreme Court 1883

Under the (English) Supreme Court of Judicature Act 1875, the Rules of the Supreme Court 1883 were promulgated. There were several Rules

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[11] *Op.cit.,* above note 9, p. 10.
[12] The (English) Supreme Court of Judicature Act 1873, s. 4.
[13] *Ibid.,* ss. 16 & 17.

devoted to declarations of which the most significant was Order 25, rule 5 which read:

> No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not.

This procedural rule was an improvement over section 50 of the Chancery Procedure Act 1852 because it clearly permitted an application even where consequential relief was not available.

With these developments all Divisions of the High Court of England became able to use their inherent powers to grant bare declarations. This remains the position today even though the Court has undergone several reorganisations. Order 25, rule 5 of the 1883 Rules is, with its substance intact, the present Order 15, rule 16 of the (English) Rules of the Supreme Court 1965.

Pyx Granite Co. Ltd. v. *Ministry of Housing and Local Government & Ors.*

The 1959 case of *Pyx Granite Co. Ltd* v. *Ministry of Housing and Local Government & Ors.*[14] is instructive of the effect of these developments. The Pyx Granite Co. Ltd. was refused permission to quarry on several parcels of land by the Ministers of Town and Country Planning and of Housing and Local Government on separate occasions. The Company sought declarations that the quarrying came within a provision of law which assured them of unconditional planning permission and that the Ministers' decisions were invalid. The Ministers contended that, as the Town and Country Planning Act 1947 allowed the company to apply to the Ministers for planning permission, this was the only proper procedure available to them and that the court had no jurisdiction over the matter. It followed the court had no jurisdiction to grant the declarations sought. The High Court rejected the Ministers' contention and agreed with the company's interpretation of the relevant provisions of law and granted the declarations the company sought. The Court of Appeal by a majority reversed the lower court's decision. The House of Lords, in turn, allowed the appeal and unanimously decided that the lower court was right. In a representative judgment, Viscount Simonds said:

> It was urged that section 17 [of the Town and Country Planning Act 1947] supplied the only procedure by which the subject could ascertain whether permission is necessary for the development of his land.... The question is whether the statutory remedy is the only remedy and

[14] [1960] A.C. 260.

> the right of the subject to have recourse to the courts of law is excluded.... It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is ... a "fundamental rule" from which I would not for my part sanction any departure. It must be asked, then, what is there in the Act of 1947 which bars such recourse. The answer is that there is nothing except the fact that the Act provides him another remedy.... There is nothing in the Act to suggest that, while a new remedy, perhaps cheap and expeditious, is given, the old and, as we like to call it, the inalienable remedy of Her Majesty' s subjects to seek redress in her courts is taken away.[15]

By this unanimous decision the House of Lords unequivocally confirmed that the inherent power of the English courts to grant bare declarations is unlimited unless so limited by very clear words in a provision of law. The House of Lords was able to expound the existence of this power without having to point to a specific statutory provision providing such power. Indeed, the House of Lords found such inherent power still to be available despite the enactment of the provision within the Town and Country Planning Act 1947 which provided an alternative process to the aggrieved person.

B. *Declarations of Status in Family Matters*

What about declarations within family matters? Was this inherent power of the High Court of England broad enough to include the power to grant bare declarations over family matters as well?

Ecclesiastical Courts

All matrimonial causes and, generally, all family matters were for a long time in English legal history under the sole control of the ecclesiastical courts. Holdsworth records:

> The ecclesiastical courts had, certainly from the twelfth century, undisputed jurisdiction in matrimonial causes. Questions as to the celebration of marriage, as to the capacity of the parties to marry, as to the legitimacy of the issue, as to the dissolution of marriage, were decided by the ecclesiastical courts administering the canon law.... Over the law of divorce the ecclesiastical courts had complete control till 1857. This jurisdiction comprised suits for the restitution of

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[15] *Ibid.,* p. 285-286.

> conjugal rights, suits for nullity... and suits for divorce a mensa et thoro by reason of adultery or cruelty.[16]

Court for Divorce and Matrimonial Causes

The matrimonial jurisdiction of the ecclesiastical courts was abolished in 1857 and its jurisdiction was transferred to the newly-created Court for Divorce and Matrimonial Causes by the (English) Matrimonial Causes Act 1857. In exercising its jurisdiction the new Court for Divorce and Matrimonial Causes was to proceed on the same principles as the ecclesiastical courts. The new Court for Divorce and Matrimonial Causes was given power to grant one more type of decree than the ecclesiastical courts. Besides decrees of restitution of conjugal rights and decrees of divorce *a mensa et thoro* (from then onwards to be called judicial separation) the Court for Divorce and Matrimonial Causes was also invested with the power to grant decrees of divorce as we know them today. Up to then the only way in which a valid marriage could be terminated, before the death of either spouse, was by an Act of Parliament specifically passed for that purpose.

Denning L.J. in the 1953 English Court of Appeal decision in *Har-Shefi* v. *Har-Shefi*[17] *was* of the view that the ecclesiastical courts possessed inherent jurisdiction to grant bare declarations in matrimonial causes and that, since its establishment in 1857, the Court for Divorce and Matrimonial Causes inherited this inherent jurisdiction. His Lordship said:

> The ecclesiastical courts habitually entertained suits for declarations only.... The reason why the ecclesiastical courts exercised this declaratory jurisdiction was on the ground that it was material for the sake of the parties and that of the public that their status should be known; and the object of the proceedings was to have the status of the parties to the marriage defined by the sentence of a competent court... it follows that the Divorce Courts have inherited a like jurisdiction under... the Matrimonial Causes Act, 1857.[18]

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[16] Holdsworth, W., *A History of English Law* (7th ed., 1956), pp. 621-622. A suit for restitution of conjugal rights would be begun by a spouse who was unreasonably deprived of the companionship of the other through no fault of his or her own and the decree of restitution of conjugal rights ordered the deserting spouse to return and continue consortium; these suits have been abolished in England *(vide* section 20 of the (English) Matrimonial Proceedings and Property Act 1970) as well as in Singapore (by way of the deletion of the provision allowing such petitions in the Women's Charter (Amendment) Act 26 of 1980). A suit for divorce *a mensa et thoro* is the former equivalent of a suit for judicial separation. There used to be no divorce decree as we know it today until its introduction by the (English) Matrimonial Causes Act 1857.

[17] [1953] P. 161.

[18] *Ibid.,* pp. 168-169.

It should be noted, however, that the other two judges on the Court of Appeal, Singleton and Hodson L.JJ., chose not to say whether they agreed with this view as their Lordships were content to decide the case on existing law. The decision of the case will be discussed shortly.

Matrimonial Causes Rules

The next major development came in 1924 when the rules and regulations governing the practice of the Court for Divorce and Matrimonial Causes, by that time simply the Probate, Divorce and Admiralty Division of the High Court, incorporated the Rules of the Supreme Court. Since 1924, wherever there is any matter of practice or procedure not specifically covered by the Divorce rules, recourse is to be had to the Rules of the Supreme Court. These Rules of the Supreme Court included, of course, the earlier-mentioned Order 25, rule 5 which clearly permitted the granting of bare declarations. This position has remained till today despite some inconsequential changes: the High Court was reorganised pursuant to the (English) Administration of Justice Act 1970 when the present Family Division of the High Court was established with wide powers over family matters and, since the (English) Matrimonial Causes Act 1967 some county courts have been empowered to hear and determine undefended matrimonial causes. The current (English) Matrimonial Causes Rules 1977 still provide that, where the Rules fail, recourse may be had to the Rules of the Supreme Court or the County Court Rules depending on where the application is pending.[19] This means that both the old Rules of the Supreme Court Order 25, rule 5 and the present Rules of the Supreme Court Order 15, rule 16 was and is included within the Matrimonial Causes Rules.

Har-Shefi v. *Har-Shefi*

The inclusion of the old Order 25, rule 5 or the present Order 15, rule 16 within the Matrimonial Causes Rules was highly significant to the development of the power of the English courts to grant bare declarations of marital status according to the English Court of Appeal in *Har-Shefi* v. *Har-Shefi.*[20] The petitioner wife was an Englishwoman who had been married to her Jewish husband in Israel. They then came to live in England. The husband was subsequently deported from England but before he left he delivered a bill of divorcement, which would have divorced her under Jewish law, to the petitioner. The Jewish husband remained domiciled in Israel throughout the proceedings. The petitioner wife now sought a declaration that the marriage had been dissolved and

[19] (English) Matrimonial Causes Rules 1977, Rule 3.
[20] See above, note 17.

no longer subsisted. All three judges, including Singleton LJ. who dissented only on the result, agreed that through the inclusion of the then Rules of the Supreme Court Order 25, rule 5 into the then Matrimonial Causes Rules 1950 the court in charge of matrimonial causes, whether for the first time or not, was invested with power to grant bare declarations of marital status. Denning L.J. echoed the sentiment of Hodson and Singleton LJJ. when he said:

> ... even if the ecclesiastical courts had no such jurisdiction [to grant bare declarations], I am of opinion that the Divorce Courts have outgrown the disability. Since 1924 they have acquired under Ord. 25, r. 5, a jurisdiction to make declaratory orders just like the other Divisions of the High Court.[21]

Hodson L.J. agreed with Denning L.J. that, on the basis of the law as it stood then, the court of first instance was wrong to have dismissed the proceedings on the ground that only the court of the parties' domicile could entertain such proceedings. Singleton L.J., while agreeing that the court had power to make the declaration, nevertheless decided that on the particular facts the court of first instance was not wrong to dismiss the proceedings as the courts of the parties' domicile would be the more convenient court to decide the case. The result was that, by a majority, their Lordships held that English courts had inherent power to entertain this application by an Englishwoman resident in England to tell her whether under English law she was a single woman or a married woman. As such *Har-Shefi* v. *Har-Shefi* is an important decision confirming that by 1953 English courts possessed the inherent power to grant bare declarations of marital status. Denning L.J. had, in fact, suggested that this power had been vested in the ecclesiastical courts.[22]

(English) Rules of the Supreme Court Order 15, Rule 16

While the Law Commission in *Declarations in Family Matters* acknowledged the significance of *Har-Shefi v. Har-Shefi*, they did not emphasise as their Lordships had the inclusion of the Rules of the Supreme Court within the rules of the Divorce Court. Instead, the Law Commission took the view that the High Court of England, simply on the basis of the present Order 15, rule 16, has the requisite power:

> ... there has also developed a substantial body of case law in which ... the courts have granted declarations of matrimonial status. The basis of this case law is to be found in R.S.C., Order 15, rule 16...

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[21] *Ibid.*, p. 169; see also Singleton L.J.'s judgment at p. 166 and Hodson LJ.'s judgment at p. 172.

[22] See p. 20 above.

> The rule is, however, procedural and gives no indication as to the scope or extent of the power, which is part of the court's inherent jurisdiction.[23]

Although the Law Commission was content to report on the inherent jurisdiction of the High Court of England as it may be invoked using the Rules of the Supreme Court Order 15, rule 16, it is submitted that it follows from their view of the inherent nature of the jurisdiction that it had rested with the earliest High Court constituted by the Supreme Court of Judicature Act 1873 which came into operation in 1875. It would further follow that this inherent jurisdiction also rested with the old superior courts of England which were predecessors of the present High Court. It is submitted, therefore, that the Law Commission's view supports Denning L.J.'s that the ecclesiastical courts had the same inherent jurisdiction. The promulgation of the first Order 25, rule 5 in the Rules of the Supreme Court 1883 was useful only in providing the Chancery Division of the High Court with a clear procedure to invoke this inherent jurisdiction and the inclusion of the Rules of the Supreme Court within the Divorce Rules in 1924 was similarly useful only to provide the Probate, Divorce and Admiralty Division of the High Court with a clear procedure for invoking the same inherent jurisdiction.

English cases

Despite this legal position, though, there was much uncertainty in the decided cases as to the type of declarations of marital status which could be made under the inherent jurisdiction of the High Court of England as well as what the necessary connection between the parties and the court should be.[24] The following cases show the Court's hesitancy.

In *Kassim (orse. Widmann)* v. *Kassim (orse. Hassim) (Carl and Dickson cited)*[25], in the course of hearing the wife's petition for divorce, it became clear that her marriage might be void *ab initio* as her husband might already have been a validly married man on their purported marriage. She amended her petition to pray for a decree of nullity instead. Her husband, the respondent, sought a declaration under Order 15, rule 16 that their marriage was a nullity. Ormrod J. decided that, although it was clear he could grant the declaration, it would not be appropriate in the circumstances as granting a bare declaration would leave the petitioner unable to avail herself of the reliefs of maintenance and custody of the child of the marriage which were ancillary to the grant of a decree of nullity. He decided that the only appropriate remedy was a decree of nullity and so ordered.

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[23] See above, note 3 at p. 1.
[24] *Ibid.*, p. 12.
[25] [1962] P. 224.

In *Merker* v. *Merker*[26] the petitioner wife had been married in Germany. Subsequently the marriage was annulled by a decree of nullity pronounced by a German court for failure to comply with the requirements of form of the local law. The petitioner wife then came to reside in England while her husband's whereabouts were never known during the proceedings. The petitioner sought, *inter alia*, a declaration that her marriage had been validly annulled by the German decree. Sir Jocelyn Simon P. had no difficulty in granting her the declaration she sought.

In *Garthwaite* v. *Garthwaite*[27] the parties had been married in England after which the husband settled in New York U.S.A. and acquired a domicile of choice there. He then obtained a decree of divorce from Nevada U.S.A. The wife who was resident in England petitioned for a declaration that her marriage remained valid and subsisting despite this Nevada decree. Ormrod J., at first instance, had no difficulty deciding that he had the power to make a declaration that a marriage remained valid and subsisting but he had more difficulty with the question of whether it was proper to accept jurisdiction in this particular case. Under English law at the time a married woman's domicile was dependent upon her husband's,[28] and an English court could only accept jurisdiction in a matrimonial cause where both parties were domiciled within England and Wales.[29] It appeared to have been accepted by both sides that this petition for a declaration was of the nature of a matrimonial cause and

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26 [1963] P. 283

27 [1964] P. 356.

28 At common law, flowing from the doctrine of unity of personality of the spouses upon marriage, a married woman's legal capacity was suspended for the most part because of the fiction that it was fused with her husband's. One of her disabilities was to acquire or to abandon her own domicile; her domicile during the course of her marriage would be exactly the same as her husband's and would change as and when he chose to change his. The married woman's domicile of dependency was abolished by the (U.K.) Domicile and Matrimonial Proceedings Act 1973, w.e.f. 1 January 1974. Singapore, which inherited the common law doctrine of unity of personality be way of the reception of English law *vide* the Second Charter of Justice 1826, similarly abolished the married woman's domicile of dependency by the present section 46 of the Women's Charter (Cap. 353, 1985 Rev. Ed.) which came into operation by way of the Women's Charter (Amendment) Act 26 of 1980, w.e.f. 1 June 1981.

29 There were limited exceptions to this which were not relevant to this case. The English courts' jurisdiction in matrimonial causes was expanded by way of the (U.K.) Domicile and Matrimonial Proceedings Act 1973, w.e.f. 1 January 1974 to give the court jurisdiction *inter alia* where either party is habitually resident for 1 year within England and Wales; if the case were brought today, there would be no difficulty with jurisdiction. The equivalent provision in Singapore is more complicated. The present section section 86 of the Women's Charter which was first enacted *vide* Women's Charter (Amendment) Act 86 of 1980 w.e.f. 1 June 1981 requires not only that either of the parties be domiciled or habitually resident for 3 years within Singapore but also that "the marriage has been registered under this Act, or is deemed to be registered under this Act, or was solemnized under a law which expressly or impliedly provides that the marriage shall be monogamous." The reasons for this other requirement for attracting our court's jurisdiction is partly historical, and its analysis is beyond this article. For a fuller discussion see, Leong Wai Kum, *Family Law in Singapore* (1990), pp. 225-232.

was bound by the same limits of jurisdiction. Thus, the petitioner's dilemma was that if her claim that her marriage was still subsisting was established this would also establish that the court has no jurisdiction to hear her petition as both she and her husband would be domiciled in New York. Ormrod J. found an ingenious way to circumvent this difficulty: his Lordship held that when the subsistence of a marriage is put in issue by a woman petitioner the jurisdiction of the court ought to be based on her own *de facto* domicile, which was accepted to be in England, instead of a hypothetical *de jure* domicile, which was New York. It was, perhaps, too much to expect this novel view to be upheld on appeal. The English Court of Appeal unanimously decided that there can be no such concept as *de facto* domicile in this case or any other. Their Lordships decided, quite rightly it is submitted, that domicile is a legal consequence of a state of facts and there can only be one conclusion of the domicile on one set of facts. Ormrod J.'s approach, it is further submitted, amounts to circumventing the law to allow the court to accept jurisdiction over the very sort of case that the rules of jurisdiction were designed to keep out. In the result the Court of Appeal decided that, as the roots of the power to grant declarations of marital status lay with matrimonial causes, the limits of the jurisdiction over a particular case should be the same as those with regard to matrimonial causes. The petitioner's prayer should not have been heard since the parties were not domiciled in England. It is further of note that in the course of his judgment, Diplock L.J. offered this definition of "jurisdiction" which is often quoted:

> In its narrow and strict sense, the "jurisdiction" of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (1) to the subject-matter of the issue or (2) to the persons between whom the issue is joined or (3) to the kind of relief sought, or to any combination of these factors. In its wider sense it embraces also the settled practice of the courts as to the way in which it will exercise its power to hear and determine issues which fall within its "jurisdiction" (in the strict sense) or as to the circumstances in which it will grant a particular kind of relief which it has "jurisdiction" (in the strict sense) to grant, including its settled practice to refuse to exercise such powers, or to grant such relief in particular circumstances.[30]

In *Collett* v. *Collett*[31] the petitioner wife was a British subject domiciled in England at the time of the commencement of the proceedings. She prayed, in the alternative, a decree of nullity or, under Order 15, rule 16, a declaration that her marriage solemnized in the British Consulate

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[30] See above, note 27 at p. 387.
[31] [1968] P. 482.

in Prague was valid. Ormrod J. decided that as there was a specific provision of law, section 39 of the Matrimonial Causes Act 1965, which allowed a person seeking to be deemed a British subject like her to petition to court for a declaration that her marriage was valid that provision and the procedure it required must be followed. It is submitted that his Lordship's approach was consistent with *Kassim (orse. Widmann)* v. *Kassim (orse. Hassim) (Carl and Dickson cited)* [32] and it suggests that, where there is a specific procedure made available by statutory provision, that procedure, with all its limits, should be used instead of an application under the inherent power.

In *Aldrich* v. *Attorney-General (Rogers Intervening)*[33] the petitioner husband sought two declarations, *viz.* that he had been validly married to the mother of the child whose status was at issue and that the child was his legitimate daughter. The child's mother had died and her surviving brothers were served with notice of the proceedings but they decided to take no part in it. The Attorney-General was subsequently made respondent and *amicus curiae.* The Attorney-General had no objection to the first declaration but opposed the second on the ground of the court's lack of jurisdiction. Ormrod J. agreed that, as there was a specific provision of law to allow a person to obtain a declaration of his legitimate status, *viz.* section 39 of the (English) Matrimonial Causes Act 1965, he had no jurisdiction to grant a declaration of legitimacy under the inherent power of the High Court. In the result, the court granted the declaration that he had been validly married to the child's mother but refused to grant him the declaration that the child was his legitimate child. It is submitted that in *Kassim, Collett* and now *Aldrich* his Lordship had consistently decided that, where a specific procedure exists, an applicant for a declaration must use that procedure.

In *re Meyer*™ the German Jewish husband had married his non-Jewish wife in Germany. In 1938 the husband escaped to England. In 1939 a German court, on the wife's application, pronounced the marriage dissolved. The wife joined her husband in England in 1948 and the parties resumed cohabitation until the husband's death. The wife then petitioned the court for declarations that the German pronouncement of dissolution of her marriage was invalid for duress and that she had remained lawfully married to her husband until his death. Bagnall J. found the allegation to be proven and had no difficulty granting the declarations sought.

In *Corbett* v. *Corbet?*[5] the petitioner prayed for a declaration that the marriage between him and the respondent was null and void because the respondent was still a person of the male sex despite his having

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[32] See p. 23 above.
[33] [1968] P. 281.
[34] [1971] P. 298.
[35] [1971] P. 83.

undergone an operation to change his sex organs superficially into female sex organs and thus both parties were of the same sex at the time of the marriage. The petitioner, in the alternative, prayed for a decree of nullity on the ground the marriage was not consummated for wilful refusal to consummate. Ormrod J. found the allegation as to the respondent being also of male sex at the time of the marriage to be proven but decided that the proper order was a decree of nullity instead of a declaration that the marriage was null and void.[36]

In *Qureshi* v. *Qureshi*[37] the parties who were Muslims were married at the English Registry of marriages. The husband subsequently divorced his wife following the Muslim form of "talaq". The wife petitioned the court for a declaration that her marriage was valid and subsisting and asked for maintenance. The husband cross-prayed for a declaration that the talaq was valid. Sir Jocelyn Simon P. held that it was proper to accept jurisdiction in this case because the parties were resident in England at the commencement of the proceedings and, since this would have been sufficient to attract jurisdiction in matrimonial causes, it also sufficed for a petition for declaration. His Lordship granted the declaration that the talaq was recognised as valid in England as the husband was domiciled in Pakistan which allowed him to use such means to terminate his marriage, and also granted the wife an order for maintenance.

Summary

The Law Commission had found the High Court of England to possess inherent jurisdiction to grant bare declarations including declarations of marital status.[38] The cases show, however, that the court was never entirely clear about just how broadly it could or should use this inherent power or what should be the proper jurisdictional limits. The court appeared to have granted declarations that the applicant's marriage was valid and subsisting or that it had been annulled or dissolved by a foreign decree of nullity or divorce. It appeared not to have allowed the use of this process where the more specific processes either of a petition for a decree of nullity or a petition under section 39 of the (English) Matrimonial Causes Act 1965 (later, section 45 of the (English) Matrimonial Causes Act 1973) were available to the applicant. As for the proper jurisdictional requirements, the court appeared to equate an application

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[36] Subsequent to this case, the law of nullity in England was revamped *vide* the (English) Nullity of Marriage Act 1971, w.e.f. 31 July 1971 one of the provisions of which clearly allowed a decree of nullity to be granted where the parties are not respectively male and female. The Nullity of Marriage Act 1971 has been replaced by the (English) Matrimonial Causes Act 1973 without any change to this. In contrast, it is not entirely clear whether a decree of nullity may be granted by Singapore courts in a similar situation; for a fuller discussion see Leong Wai Kum, *Family Law in Singapore*, above, note 29 at pp. 70-73.

[37] [1972] Fam. 173.

[38] See pp. 22-23 above.

for a declaration with matrimonial causes. It would also be fair to say that the court became increasingly prepared to grant bare declarations of marital status under its inherent power. With the enactment of the (U.K.) Family Law Act 1986[39], however, there will no longer be any reason to invoke the inherent jurisdiction.

Declarations under statutory power

The (English) Legitimacy Declaration Act 1858 provided specific power to grant declarations of legitimacy, of validity of marriages and of the right to be deemed a natural-born subject of Her Majesty. The greater part of the Act was replaced in 1925[40] and the provision was changed again in 1950,[41] in 1967,[42] and in 1973.[43] In its latest form before its replacement by section 56 of the (U.K.) Family Law Act 1986,[44] as section 45 of the (English) Matrimonial Causes Act 1973, the provision allowed any person who was a British subject or whose right to be deemed a British subject depended wholly or in part on his legitimacy or the validity of any marriage and who was domiciled in England and Wales or Northern Ireland or claims any real or personal estate in England and Wales to apply for a declaration that he was the legitimate child of his parents or that his marriage or that of his parents or that of his grandparents was a valid marriage. It also permitted any person to apply for a declaration that he or his parent or remoter ancestor had been legitimated, or any person who was domiciled in England and Wales or Northern Ireland or claimed any real or personal estate in England and Wales to apply for a declaration that he was to be deemed a British subject. This statutory power was more limited in scope than the inherent power of the High Court of England but, being more specific, it must be used whenever it is available. This statutory power does not form the focus of this article.

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39 See pp. 13-14 above.
40 By the (English) Supreme Court of Judicature (Consolidation) Act 1925.
41 By the (English) Matrimonial Causes Act 1950.
42 By the (English) Matrimonial Causes Act 1967.
43 By the (English) Matrimonial Causes Act 1973.
44 See p. 14 above.

III. LAW IN SINGAPORE

A. *From Origins to 1907*

Court of Judicature of Prince of Wales' Island, Singapore and Malacca

The Letters Patent of 27 November 1826,[45] more commonly called the Second Charter of Justice, proclaimed that King George the Third was graciously pleased to grant the United Company "our Royal Letters Patent" and "for the Purpose of making further Provision for the Administration of Justice" it directed "That there shall be within the Settlement of Prince of Wales' Island, Singapore, and Malacca ... a Court of Record, which shall be called "The Court of Judicature of Prince of Wales' Island, Singapore and Malacca." The said Court of Judicature was further directed:

> ... *to have such Jurisdiction and Authority* as Our Court of King's Bench and Our Justices thereof; and also as *Our High Court of Chancery* and Our Courts of Common Pleas and Exchequer ...*and ...shall have and exercise Jurisdiction as an Ecclesiastical Court, so far as the several Religions, Manners, and Customs of the Inhabitants of the said Settlement and Places will admit.* And That the said Court shall have full Power, and is hereby authorized to hear, examine, try, and determine ... all Actions and Suits which shall or may arise ... upon or concerning any Trespasses or Injuries, of what Nature or Kind soever, or any Debts, Duties, Demands, Interests, or Concerns, of what Nature or Kind soever, or any Rights, Titles, Claims, or Demands, of ... Things, real or personal, within the said Settlement ... or touching the Possession, or any Interest or Lien in or upon the same; and all Pleas, real, personal, or mixed, the Causes, of which shall... arise ... against any Persons who shall be resident within the said Settlement ... or who shall have any Debts, Effects, or Estate, real or personal, within the same ... And We do hereby authorize the said Court of Judicature to appoint Guardians and Keepers for Infants and their Estates ... and also Guardians and Keepers of the Persons and Estates of natural Fools ... And... the said Court of Judicature... shall

[45] There was an earlier grant in 1815, more commonly called the First Charter of Justice, but it only concerned the settlement at Penang.

> be a Court of Ecclesiastical Jurisdiction, with full Power to grant Probates ... and to commit Letters of Administration ...." (Emphasis added.)[46]

It may be significant that the Court of Judicature of Prince of Wales' Island, Singapore and Malacca was constituted to have all the powers possessed by, *inter alia,* "Our Court of Chancery" but was to "have and exercise Jurisdiction as an Ecclesiastical Court, so far as the several Religions, Manners, and Customs of the Inhabitants ... will admit." There was, thus, a difference in these two powers: it was to have the power possessed by the English Court of Chancery but, in relation to the English ecclesiastical courts, the local court was designated as an ecclesiastical court. Could the Court of Judicature of Prince of Wales' Island, Singapore and Malacca in its ecclesiastical duties possibly have been designed to be free of the limits the English ecclesiastical courts imposed upon themselves arising from the homogeneously Christian character of English society? Put another way, should the Court of Judicature of Prince of Wales' Island, Singapore and Malacca in its ecclesiastical duties be limited twice; first, by the limits operative in England and, second, by the limits due to the religions, manners and customs of the local inhabitants? It is submitted that it is theoretically possible, on the basis of the language of the Second Charter of Justice, to take the view that the Court of Judicature of Prince of Wales' Island, Singapore and Malacca was, *inter alia,* an ecclesiastical court capable of performing all the functions that English ecclesiastical courts performed minus their limits arising from the Christian character of their society. The local court's limits as an ecclesiastical court, if any, would arise only from local circumstances. The drafters of the Second Charter of Justice may well have been sensitive to the differences in the character of the two societies and have recognised that these differences require that the powers of the courts in family matters[47] have to be different.

This view did not find favour, however, with the Straits Settlements Court of Appeal in Singapore. In *Florence Mozelle Meyer* v. *Issac Manasseh*

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[46] It is beyond question now that the Second Charter of Justice imported English common law and equity, subject to local circumstances and customs, as well as existing English legislation, which can possibly apply here, into the colonies. Dr. Andrew Phang Boon Leong canvassed all possible arguments for and against this proposition in "English law in Singapore: Precedent, Construction and Reality or 'The Reception That Had To Be'" [1986] 2 M.L.J. civ and concluded, convincingly it is submitted, "the arguments for the reception of English law are highly persuasive .... Many of the contrary arguments are ... either mistaken or may be met by more plausible explanations." See also Andrew Phang Boon Leong, *The Development of Singapore Law* (1990), pp. 37-42. For a more particular discussion of the reception of English family law, see Leong Wai Kum, *Family Law in Singapore,* above.note 29 at pp. 3-8.

[47] Legal control of family matters formed one of the main duties of the English ecclesiastical courts: see pp. 19-20 above.

*Meyer*** Reay and Deane L.JJ. regarded the powers of the Supreme Court as an ecclesiastical court to be exactly as broad or as limited as the ecclesiastical courts' in England. As a result their Lordships decided that the Supreme Court could not hear this case which had been brought by a woman domiciled in the Straits Settlements who had been married here under Jewish law against her Jewish husband as the English ecclesiastical courts would not hear any matrimonial suit unless it concerned two Christians. There was, however, the dissent of Brown J. who held that the Supreme Court was not "debarred, if the occasion had arisen, from exercising some jurisdiction in matrimonial cases affecting persons of the Jewish religion"[49] although his Lordship also had not read any significance into the particular mode of expression used in the Second Charter of Justice in its reference to the local court's ecclesiastical duties. It is submitted that the point made above is, nevertheless, theoretically valid. The refusal of their Lordships in the majority to hear an application for a declaration by a locally-domiciled woman married here under a local marriage law[50] underscores the deficiency of the view that the local courts should only act where the English ecclesiastical courts, operating within a homogeneously Christian society, would.

The subsequent Letters Patent of 10 August 1855, commonly called the Third Charter of Justice, proclaimed that "Whereas since the granting of [the Second Charter of Justice] the population and commerce of the island of Singapore have greatly increased ... and ... it is desirable that there should be a Judge of competent professional acquirements ordinarily resident at Singapore" reorganised the Court of Judicature accordingly. This Third Charter of Justice was substantively *inpari materia* the Second Charter of Justice as far as the powers and jurisdiction of the Court of Judicature was concerned. As far as the reception of English common law and equity and relevant English statutes is concerned, this Third Charter of Justice was irrelevant and the "cut-off date for such reception remained 27 November 1826.[51]

Supreme Court of the Straits Settlements

After the formation of the Straits Settlements, comprising Penang (the erstwhile Prince of Wales' Island), Singapore and Malacca, in 1866[52] the (Straits Settlements) Courts Ordinance (hereafter, all references to "Ordinance" in the text will be "Ord.") No. V of 1868 abolished the

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48 [1927] S.S.L.R. 1.

49 *Ibid.*, at p. 6.

50 See Leong Wai Kum, *Family Law in Singapore*, above, note 29 at p. 101 and at pp. 138-140.

51 See Andrew Phang Boon Leong, "'Cut-Off Dates and Domination: Some Problematic Aspects of the General Reception of English Law in Singapore" (1986) 28 Mai. L. R. 242, and see also Andrew Phang Boon Leong, *The Development of Singapore Law*, above, note 46 at pp. 39-42.

52 By way of the Straits Settlements Act 1866.

Court of Judicature of Prince of Wales' Island, Singapore and Malacca and established "The Supreme Court of the Straits Settlements" in its place with three Divisions at Singapore, at Penang, and at Malacca.[53] Section 23 provided:

> *The Court shall have such jurisdiction and authority* as the Court of Queen's Bench and the Justices thereof, and also *as the Court of Chancery and* the Courts of Common Pie as and Exchequer respectively ... and the Court *shall have and exercise the jurisdiction vested,* under the Letters Patent of the 10th of August 1855, *in the Court of Judicature of Prince of Wales' Island, Singapore and Malacca in Matrimonial cases so far as the several religions, manners and customs of the Inhabitants of the Colony will admit.* (Emphasis added.)

Sections 24, 25, 26, and 27 spelt out the powers of the Supreme Court of the Straits Settlements over criminal matters, insolvency and bankruptcy, infants and lunatics, and probate and administration respectively. It is significant that the Supreme Court of the Straits Settlements had the same powers and authority as the Court of Judicature of Prince of Wales' Island, Singapore and Malacca and this included the power and authority of "Our Court of Chancery" and "the jurisdiction vested, under the Letters Patent of the 10th of August 1855 ... in Matrimonial cases so far as the several religions, manners and customs of the Inhabitants of the Colony will admit." It is submitted that this change in expression was inconsequential and does not affect the point that our courts could possibly not be saddled by the limits of the English ecclesiastical courts, *Florence Mozelle Meyer* notwithstanding. The change may indeed demonstrate that the Straits Settlements Legislative Council, just as the drafters of the Second Charter of Justice before, also recognised that the Supreme Court of the Straits Settlements, as an ecclesiastical court, had to be different from the ecclesiastical courts of England because of the differences in the characters of the two societies. In any case the inherent power of the Supreme Court of the Straits Settlements to make bare declarations in family matters was unaffected by this reorganisation of the courts.

It is further of note that after spelling out the "Powers of the court"[54] the Courts Ord. of 1868 continued, in section 29, to define the "Jurisdiction of Court" thus:

> The Court ... may receive, try and determine actions, suits, and proceedings of every description by and against all persons and bodies corporate in all cases where the persons who are Defendants are present in the Colony, or the Corporate Body which is the Defendant has its only or chief establishment or place of business in

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[53] S.S. Ord. V of 1868 ss. 1, 2 & 10.

[54] The marginal note to s. 23 of the Ord. used this phrase.

> the Colony, and also in the following cases ... if the property which is the subject of the proceeding is situate in the Colony, or if the cause of action arose in the Colony, or if the subject of the proceeding otherwise falls, on general principles of international law or comity, to be determined by the law of the Colony.[55]

Section 29, it is submitted, took the relevant part of the Second Charter of Justice[56] and expanded upon it. The concept of the "jurisdiction" of the Supreme Court was, thus, not a new concept. It is worth repeating that both the Court of Judicature of Prince of Wales' Island, Singapore and Malacca and the Supreme Court of the Straits Settlements had been constituted in terms of their power and authority, on the one hand, and their jurisdiction to hear a particular case, on the other.

(Straits Settlements) Courts Ordinance No. HI of 1878

The next re-organisation of the courts of the Straits Settlements came in 1878. The Courts Ord. of 1878 did, as its long title said, "amend the law relating to the Constitution of the Courts of Justice." From then on there would be a hierarchy of courts; at the time this consisted of "The Supreme Court of the Straits Settlements, Courts of Requests ... Courts of two Magistrates ... Magistrates Courts ... Coroners Courts ... [and]Justices of the Peace."[57] From then on, also, there would be appeal from a decision of the court of first instance to the Supreme Court of the Straits Settlements,[58] and this was not to prejudice the right of appeal to Her Majesty in Council.[59]

As far as the Supreme Court in its original jurisdiction was concerned, this Ordinance retained the substance of the Courts Ord. of 1868 while accommodating developments in England. Section 10 of the Ord., which marginal note read "General Powers of the Court", provided "The Supreme

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[55] We saw in the definition of "jurisdiction" offered by Diplock LJ. in *Garthwaite* v. *Garthwaite* , quoted at p. 25 above, which has for the most part been accepted as authoritative, that the English understanding of this term includes and does not distinguish between "powers" and "jurisdiction." The early legislation creating and reorganising our courts, however, used the term "powers and authority" differently from "jurisdiction": see S.S. Courts Ord. No. V of 1868 and S.S. Courts Ord. No. Ill of 1878. "Power and authority" meant what the Supreme Court could do while "jurisdiction" meant the necessary connection between the parties or the cause of action or the subject matter of the suit and the court before the court could hear the suit. Subsequent legislation, unfortunately, failed to keep these terms well differentiated. The author suggests that the meanings given to these terms in these earlier statutes were the clearest and that it would be better if we maintained these meanings as we interpret the present Supreme Court of Judicature Act, Cap. 322, 1985 Rev. Ed..

[56] See the part of the Second Charter quoted on pp. 29-30 above.

[57] S.S. Ord. Ill of 1878, s. 1.

[58] *Ibid.,* ss. 66-71.

[59] *Ibid.,* s. 74.

Court shall have such jurisdiction and authority as Her Majesty's High Court of Justice in England"[60] and in section 13, which marginal note read, "Powers in Matrimonial cases", provided:

> The Supreme Court shall have and exercise the jurisdiction vested, under the Royal Letters Patent of the 10th of August, 1855, in the Court of Judicature of Prince of Wales' Island, Singapore and Malacca, in Matrimonial cases, so far as the several religions, manners and customs of the inhabitants of the Colony will admit.

These two sections, in effect, maintained the *status quo* as far as the powers of the court were concerned. The new Supreme Court of the Straits Settlements had all the power and authority of the Court of Chancery including its inherent power to make bare declarations and, as an ecclesiastical court, it could use this inherent power in relation to family matters subject to the peculiar needs, if any, of local religions, manners and customs in this matter.

Another provision worthy of note was section 19, which marginal note read, "Jurisdiction of Court", which provided:

> The Supreme Court... may ... try ... suits ... of every description, by and against all persons and bodies corporate, in all cases where the persons who are Defendants are present in the Colony, or the Corporate Body which is Defendant has an establishment or place of business in the Colony; and also... if the Defendant has property in the Colony, or if the whole or any part of the subject matter of the suit is land or stock or other property, situate within the Colony; or any act, deed, will or thing affecting such land, stock or property was done executed or made within the Colony; and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled or otherwise affected in any such suit, or for the breach whereof damages or other relief are or is demanded in such suit, was made or entered into, or was to be performed or partly performed, within the Colony; and whenever there has been a breach, within the Colony of any contract wherever made; and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate, within the Colony, or if the cause of action arose in the Colony, or if the subject of the proceeding otherwise falls, on general principles of international law or comity, to be determined by the law of the Colony.

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[60] It was noted at p. 17, above, that the High Court of England was constituted, *vide* the (English) Supreme Court of Judicature Act 1873 from a consolidation of all existing superior courts of first instance.

This is an extension of section 29 of the Courts Ord. of 1868. The extensions underscore the commercial purpose of the British colonisation of Singapore. Section 19 spelt out the "jurisdiction" of local courts in the most detail. It was subsequently omitted from the legislation, without explanation, only to surface again in 1964, as will be demonstrated.

Singapore cases

The proposition that the Supreme Court of the Straits Settlements possessed inherent power to grant bare declarations is, unfortunately, contradicted by the reported local decisions. In *Tunku Mahmoud bin Sultan Ali and Ors.* v. *Tunku Ali bin Tunku Allum and Ors.*[M] the plaintiffs applied to the Supreme Court of the Straits Settlements at Singapore for a declaration that certain property was vested in one of the plaintiffs as administrator of the estate of Sultan Ali. On the defendants' preliminary objection, Leach J. said:

> In opening the case for the defendants an objection ... was raised ... that the Court had no jurisdiction.... I think that there can be no doubt that formerly in England it was not the practice of the Courts in ordinary suits to make a declaration of right except as introductory to relief, but [by section 50 of the Chancery Procedure Act and the Rules of the Supreme Court Order 25, rule 5] ... [t]he old rule of practice ... was abolished .... If therefore [Order 25, rule 5]] ... is in force here it appears from the cases on the subject that it would be a matter of judicial discretion whether the declaration should be made or not. If these provisions do not apply I am of opinion that I am bound to follow the old practice .... Neither ... provisions ... have been adopted in this Colony but it was contended that one or other of them is in force by virtue of s. 10 of the Courts Ordinance 1878, and s. 3 of the Civil Procedure Ordinance 1878.1 regret that I cannot yield to that contention....[62]

The plaintiffs amended their pleadings to ask for consequential relief and Leach J. proceeded to hear their application on its merits.

This decision merits two comments. Firstly, it was unfortunate that his Lordship chose to use the term "jurisdiction" when speaking of the power of the court. It is evident that the drafters of Courts Ord. of 1878, as well as the Courts Ord. of 1868,[63] had used the terms "jurisdiction" and "power" in different senses. Sections 10 to 17 within Chapter IV entitled "Powers of the Supreme Court" set out what the Supreme Court had power to do as equal to the powers of the High Court of England,

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[61] (1897) S.S.L.R. 96.
[62] *Ibid.*, p. 104.
[63] See above, notes 53 & 54.

as well as in the areas of insolvency and bankruptcy, infants and lunatics, matrimonial cases and probate and administration. In contrast, section 19 within Chapter V entitled "Civil Jurisdiction of the Supreme Court" set out the type of connection that had to exist between the parties or the cause of action or the subject matter of the suit and the Supreme Court before the court could hear any particular suit. It would have been better if Leach J. had used the terms in the same way as in the statutes.

It may be understandable, though, that an English expatriate judge would use these terms interchangeably because these terms were and still are used interchangeably in England: Diplock LJ.'s definition of "jurisdiction" in *Garthwaite v. Garthwaite* is instructive.[64] The superior courts of England evolved slowly and their powers have never been limited in a broad manner. The House of Lords reiterated this in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government & Ors.*[65] when they decided that judicial review is never excluded except by very clear words in legislation. Our situation is different. Our courts were created instantly by the Second Charter of Justice. The drafters of this document had to pay some thought to the extent of the powers of our courts quite separately from the matter of the necessary connection between the parties or the cause of action or the subject matter of the suit and the courts before the courts should hear the particular suit. It is little wonder that the earlier constitutive documents and legislation contained both "powers" provisions as well as "jurisdiction" provisions. It is thus unfortunate that Leach J. had used "jurisdiction" when he meant "powers."

The second comment is that Leach J. was wrong about the power of the Court of Chancery and, thus, of the Supreme Court of the Straits Settlements to grant bare declarations. It was not true that the Court of Chancery only received the power to grant bare declarations from the enactment of section 50 of the (English) Chancery Procedure Act 1852. The power was inherent within the Court of Chancery and the enactment of section 50 only served to allow a process to invoke such inherent power. This inherent power was inherited by the High Court of England when it was formed in 1873. As such, when the Supreme Court of the Straits Settlements was constituted and assigned all the powers of the High Court of England this included the inherent power to grant bare declarations. This mistake is as understandable as the first. It was, after all, only in 1915 that the English Court of Appeal suggested that the Court of Chancery possessed such inherent power[66], and confirmation came only in 1959 from the House of Lords[67] and in 1984 from the Law Commission of England and Wales.[68]

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[64] See pp. 24-25 above.
[65] See pp. 18-19 above.
[66] See p. 16 above.
[67] *Op. cit.*.
[68] See pp. 22-23 above.

The 1925 decision of the Straits Settlements Court of Appeal at Singapore in *Then Kang Chu* v. *Tan Kim Hoe*[69] was also wrong about the powers of the local courts. This decision was given after the reorganizations of the local courts discussed below but the case is more appropriately raised here because the subsequent reorganisations were not material to the court's decision. The Supreme Court had given a declaration that the woman was a secondary wife of the man and thus entitled to maintenance from him. On his appeal, the Court of Appeal unanimously decided that it could not grant a bare declaration. The Court of Appeal's reasoning proceeded thus: there was no power in English courts to grant bare declarations except under their Legitimacy Declaration Act 1858; this Act could not have been received into the Singapore by the Second Charter of Justice 1826; therefore the Supreme Court had no such power. Brown J.'s judgment was representative of Deane and Acton L.JJ.:

> ... in England ...the only jurisdiction possessed by the High Court of Justice to declare a marriage valid is that conferred by the Legitimacy Declaration Act 1858 .... there is no such jurisdiction at common law ... it has long ago been decided that... the only English statute law having effect here is the law prevailing in England on the 26th November 1826.™

There was an alternative source of power and authority to the (English) Legitimacy Declaration Act 1858, viz. the inherent power of the High Court of England. Indeed, the inherent power was broader than that under the statute.[71] In not asking if the local court may inherently have been empowered to grant a bare declaration, the court had not considered the alternative to an express statutory power.

The mistake of the Court of Appeal is as understandable as Leach J.'s for the same reason, *viz.* the inherent power of the English High Court was not confirmed by the House of Lords until 1959[72] and by the Law Commission of England and Wales in 1984.[73] Nevertheless, the decision was no less wrong. Further, since the celebration of Chinese customary marriages had long been decided to be valid in Singapore[74] the court could have declared the woman validly married to the man in question. In *Florence Mozelle Meyer*[1]* the Court of Appeal held itself bound by *Then Kang Chu* similarly to dismiss an application for a bare

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69 [1926] S.S.L.R. 1.
70 *Ibid.*, at p. 3.
71 See pp. 27-28 above.
72 See *Pyx Granite Co, Ltd.* v. *Ministry of Housing and Local Government & Ors.* [1960] A.C. 260 and pp. 18-19 above.
73 See *Declarations in Family Matters* , above, note 3, and see pp. 22-23 above.
74 See generally Leong Wai Kum, *Family Law in Singapore*, above, note 29 at pp. 94-101.
75 See above, note 48, and also see the discussion of another aspect of the case at pp. 30-31 above.

declaration of marital status. It is submitted that the decisions of all three cases were wrong.

(Straits Settlements) Civil Procedure Ordinance No. V of 1878

In 1878 the Civil Procedure Ord. was also enacted, according to its long title, "to amend the law relating to civil procedure" and because, according to its preamble, "it is expedient to extend to this Colony certain of the Rules and Orders, for the improvement of the Law of Civil Procedure, contained in the Schedules to the Imperial Judicature Act, 1875...." This statute was the forerunner of the Civil Procedure Code and the Rules of the Supreme Court. An interesting provision within it was section 3 which provided:

> Where no other provision is made by this Ordinance... the Court shall make such special orders and directions, as near as may be in accordance with the procedure in use in the High Court of Judicature in England, as may seem fit to meet the justice of the case.

It is submitted that, had it been necessary, this savings clause would have allowed the adaptation of the (English) Rules of the Supreme Court 1883 Order 25, rule 5 to permit applications to the Supreme Court of the Straits Settlements for bare declarations. This never became necessary, though, as we would soon enact our own equivalent of Order 25, rule 5.

B. *From 1907 to Formation of Malaysia*

(Straits Settlements) Courts Ordinance No. XXX of 1907

The next reorganisation of the courts took place by way of the enactment of the Courts Ord. of 1907. The long title, rather innocuously, called this "An Ordinance to re-enact with amendments 'The Courts Ordinance 1878'."A comparison of the two statutes suggests that the main amendments were with regard to the structure and powers of the inferior courts, from now on to consist of District Courts, Police Courts and Coroners' Courts[76] and with regard to Advocates and Solicitors and Conveyancers.[77] It would appear that the powers of the Supreme Court of the Straits Settlements were not intended to be changed. This would leave the Supreme Court still possessing inherent power to grant bare declarations. There were, however, two amendments which must be noted.

First, the former "powers" provisions (sections 10 to 17) were consolidated into one provision - section 9. This would not be a problem if section 9 had continued to call these the "powers" of the Supreme Court. Inexplicably,

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[76] See s. 2 of the Ord.
[77] See Part II of the Ord.

though, these were no longer called "powers"; rather they were called the court's "jurisdiction". Section 9(1) was representative:

> The original Civil Jurisdiction of the Supreme Court shall consist of:- The same jurisdiction and authority within the Colony as was formerly exercised in England by
> (a) The High Court of Chancery (including therein the Jurisdiction to appoint and control guardians of infants);
> (b) the Court of Queen's Bench;
> (c) the Court of Common Pleas at Westminister and
> (d) the Court of Exchequer as a Court of Revenue as well as a Common Law Court, and is now exercised therein by His Majesty's High Court of Justice.

To compound the confusion, the former "jurisdiction" provision (section 19) was deleted. Instead, a truncated version of it appeared as section 52 on the "Civil jurisdiction of District Courts" as follows:

> ... a District Court shall when presided over by a District Judge have jurisdiction to try all original actions and proceedings of a civil nature of which the amount in dispute or value of the subject matter does not exceed five hundred dollars, and, when presided over by an Assistant District Judge, all such actions and proceedings of which the amount in dispute or value of the subject matter does not exceed one hundred dollars, provided in each case:-
> (a) the cause of action has arisen either wholly or in part within the local jurisdiction
> of the District Court; or
> (b) the defendant, or any one of the defendants, at the time of institution of the action
> or suit actually and voluntarily resides or carries on business or personally works
> for gain within such local limits.

This Ord. thus used the term "jurisdiction" as "powers" in its section 9 and as "jurisdiction" in its section 52.

It is not known what the drafters of the Courts Ord. of 1907 intended by these changes. Two interpretations are possible. The first would ignore section 52 and read the deletion of the former "jurisdiction" provision literally to mean that there is no longer the notion of jurisdiction of the Supreme Court in the sense of the necessary connection between the parties or the cause of action or the subject matter of the suit and the court. It is submitted that this literal reading would be undesirable simply because the jurisdiction of the court would still naturally flow from the rules of civil procedure regarding what constitutes proper service upon the defendant. The substantive content of the jurisdiction may now

be slightly different but the notion of jurisdiction of the court cannot be discarded unless the rules of service were dramatically altered, which never happened.[78] It is submitted that there can be a better interpretation. The deletion of the "jurisdiction" provision cannot be taken to have abolished the notion of jurisdiction altogether; it only left it to the rules of civil procedure. And, the renaming of the "powers" provisions as "jurisdiction" must then be regarded as somewhat unfortunate but without legal effect; section 9 should still be recognised as the consolidation of the "powers" provisions and continue to be read as spelling out the powers of the Supreme Court. Not only is this reading less harmful, it would also be consistent with the introduction of the jurisdiction provision with regard to the District Courts. Perhaps the Legislative Council believed that it was only with regard to these inferior courts that it was crucial to spell out in detail the necessary connection that must exist between them and the parties or the cause of action or the subject matter of the suit because there were no rules of civil procedure of the inferior courts in existence as yet.

The second change made to the powers of the Supreme Court came about when section 9 (5) referred to the power of the court as an ecclesiastical court in this way instead of as before:

> The original Civil Jurisdiction of the Supreme Court shall consist of:- The jurisdiction within the Colony which was vested in an Ecclesiastical Court in England prior to the passing of "The Divorce and Matrimonial Causes Act 1857" so far as regards marriages between persons one or more of whom profess the Christian religion.

This expression is somewhat inelegant. What was "the jurisdiction within the Colony which was vested in an Ecclesiastical Court in England"? If we must read something into this change, though, it would appear to impose upon the Supreme Court the limits which the ecclesiastical courts of England imposed upon themselves due to the nature of the English society. The suggestion made earlier that the drafters of the Second Charter of Justice may have intended the Straits Settlements courts not to be constrainted by the limits which apply in England may no longer be possible. The Straits Settlements Court of Appeal's decision in *Florence Mozelle Meyer*[19] would be statutorily vindicated. On the other hand, this effect may not have been intended. This change was, thus, as undesirable as the first.

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[78] It is instructive that in England there has never been a provision like our "jurisdiction" provision and yet there is a well developed notion of the necessary connections between the parties or the cause of action or the subject matter of the suit and the court; see Rules 23-31 in Collins, L. (ed.), *Dicey and Morris on the Conflict of Laws* (11th ed., 1987).

[79] See above, note 48, and pp. 30-31 above.

These changes are traced only because they show that the Courts Ords. of 1868 and 1878 had been the clearest in the way the terms "powers" and "jurisdiction" were used. Subsequent legislation have never been as clear again and this is regrettable. Perhaps we ought to revert to the meanings of these terms as they were used in our earlier legislation. These changes, though, have no effect on the continuing inherent power of the Supreme Court of the Straits Settlements to grant bare declarations. It is useful also to note that the new section 56 of the Courts Ord. of 1907 provided that the inferior District Courts shall have no jurisdiction in actions, *inter alia*, "for declaratory decrees"; this implied that the power to do this lay with the superior Supreme Court.

(Straits Settlements) Civil Procedure Code 1907

The Civil Procedure Ord. No. XXXI of 1907 was enacted "to consolidate and amend the law relating to the procedure [of the Supreme Court]". The Ord. would from now on be the "Civil Procedure Code". A significant addition was section 330 which marginal note read "Declaratory judgment" which provided:

> No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.

This provision is *in pari materia* the (English) Rules of the Supreme Court 1883 Order 25, rule 5.[80] It had been said of the English rule that its enactment was important in clearly providing a means for invoking the inherent power of the High Court of England. It is submitted that the same would be true here as well; the enactment of section 330 provided a process for invoking the inherent power of the Supreme Court of the Straits Settlements and is, therefore, confirmation of the court possessing such inherent power. It is worthy of note that ever since its introduction into our law of civil procedure in 1907, we have always had an equivalent of section 330.

(Straits Settlements) Courts Ordinance as amended by Ordinance XI of 1910

The first (Straits Settlements) Divorce Ord. No. XXV of 1910 was enacted "to confer upon the Supreme Court jurisdiction in divorce and matrimonial causes." As such, the Supreme Court of the Straits Settlements was divested of its function as an ecclesiastical court. Section 9 of the

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[80] See p. 18 above.

Courts Ord. (spelling out the powers of the court even though it was called its "jurisdiction")[81] no longer included a reference to its function in matrimonial cases. This development had no effect on the powers of the Supreme Court. The sum of its powers under the Courts Ord. of 1907, as amended in 1910, and the Divorce Ord. of 1910 was exactly as it used to be including the inherent power to grant bare declarations. The only noteworthy point is that the "jurisdiction" of the Supreme Court in terms of the necessary connection between the parties or the cause of action or the subject matter of the suit in relation to matrimonial causes was now regulated by the Divorce Ord. If one were to view an application for a bare declaration of marital status as a matrimonial cause,[82] then the jurisdiction requirements within the Divorce Ord. should be adapted for use in the case of applications for declarations. Adaptation was necessary since there was no express provision in the Divorce Ord. devoted to applications to invoke the inherent power of the court and one would not expect such express provision because this involves an inherent power. Section 5(3) of the Divorce Ord. could well be adapted; it read:

> Nothing herein contained shall authorize the Court to make any decree of judicial separation or of restitution of conjugal rights except -
> (a) where the petitioner professes the Christian religion; and
> (b) where both the parties to the marriage reside in the Colony at the time of the commencement of proceedings.

It had been suggested above that since 1907, when the "jurisdiction" provision was deleted from the Courts Ord., the jurisdiction of the Supreme Court had been left to be regulated by the rules of civil procedure, in particular the rules of service upon the defendant. While compliance with the rules of service would ensure some connection between the parties and the court they do not demand the residence of both parties within the Colony nor would they demand of the petitioner that he or she profess the Christian religion. It is arguable, therefore, that the enactment of the Divorce Ord. tightened up the jurisdictional requirements of applications for bare declarations of marital status. This is, however, not a matter for regret if we wish to follow the approach of the High Court of England.

The enactment of the Divorce Ord. led to the Divorce Procedure Rules which were first promulgated in 1912. Rule 1 read: "These rules shall be read as supplementary to the Civil Procedure Code." Rules 20, 47

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[81] See the point made at pp. 39-40 above about why this "jurisdiction" provision should be understood as the "powers" provision.

[82] English courts had not been consistent on whether this should be so but *Garthwaite* v. *Garthwaite,* see above, note 27, and pp. 24-25, suggested that the same jurisdictional requirements as for matrimonial causes should be followed.

and 55, the substance of which are not material, further affirmed the incorporation of the Civil Procedure Code into the Divorce Procedure Rules. It had been said that, in England, the Rules of the Supreme Court were also incorporated into the Matrimonial Causes Rules (only in 1924, it may be noted), thus providing the procedure for applying for declarations in family matters.[83] It is submitted that Rule 1 of the Divorce Procedure Rules had the same effect here. Section 330 of the Civil Procedure Code, permitting as it did a way of invoking the inherent power of the Supreme Court of the Straits Settlements, when incorporated into the Divorce Procedure Rules permitted the same invocation of the inherent power with regard to matrimonial causes and applications for declarations of marital status. This really means that the enactment of the Divorce Ord. and the promulgation of the Divorce Procedure Rules had no effect on the continuing inherent powers of the Supreme Court, except, perhaps, that its jurisdictional requirements in matrimonial causes and applications for declarations of marital status were tighter. It is of note that we have always had an equivalent of Rule 1.

No change in 1926, 1935 and 1955 Revisions of the Laws

The position of the powers and of the jurisdiction of the Supreme Court of the Straits Settlements remained unchanged through the 1926, the 1935 and the 1955 revisions of the laws.

In the 1926 Laws of the Straits Settlements, the Courts Ord. was Ord. No. 101. Section 8 re-enacted the former section 9, the "powers" provision. There was still no "jurisdiction" provision. Section 38 in spelling out the jurisdiction of the inferior District Courts still contained a truncated version of the former "jurisdiction" provision. Section 42 continued to provide that the inferior District Courts shall not be able to grant declaratory decrees. The Civil Procedure Code was Ord. No. 102. It continued to retain the possibility of using English rules of procedure, in section 3, and to provide that an action shall not be open to objection just because it sought only a declaratory judgment, in section 330. The Divorce Ord. was Ord. No. 123 and its provisions mentioned above remained unchanged. The Divorce Procedure Rules were not involved in the revision. New Divorce Rules were promulgated in 1934 but Rule 82 thereof continued to incorporate the Civil Procedure Code.

The same was true of the 1935 revision. In the 1935 Laws of the Straits Settlements, the Courts Ord. was Cap. 10. By its section 7 the Supreme Court of the Straits Settlements now consisted of the High Court and the Court of Appeal. This change was inconsequential as the High Court was exactly the same as the former Supreme Court: the "powers" provision became section 11, the truncated "jurisdiction" provision

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[83] See p. 21 above.

continued to apply only to the inferior District Courts which were still not permitted to grant declaratory judgments. Cap. 10 was tangentially raised by the Straits Settlements Court of Appeal of Singapore in *In re Maria Huberdina Hertogh; Inche Mansor Adabi v. Adrianus Petrus Hertogh and Anor.*[M] The High Court, on the application of the parents of the 13-year old Maria Hertogh, had granted a declaration, *inter alia*, that the purported marriage of Maria Hertogh with Mansor Adabi was "illegal and void and of no effect." On appeal the Court of Appeal unanimously decided that this part of the order had to be deleted, not because the marriage was anything but void, but because the High Court could not grant a declaration that a marriage was void. This would be consistent with the approach of the High Court of England which would also not grant a bare declaration when there exists the more specific process leading to a decree of nullity.[85] The Divorce Procedure Rules were not involved in the revision. New Divorce Procedure Rules were promulgated in 1950 but Rule 64 continued to incorporate the Civil Procedure Code, now the Rules of the Supreme Court 1934, within them.

In the 1955 Laws of the Colony of Singapore the (Straits Settlements) Courts Ord. became the (Singapore) Courts Ord., Cap. 3, with no material change. Section 11 was renumbered section 17 and the truncated "jurisdiction" provision was still reserved for the inferior District Courts which were still unable to grant declaratory judgments. The (Straits Settlements) Civil Procedure Code became the (Singapore) Rules of the Supreme Court with no material change relevant to us as well: section 330 became Order 25 rule 5. The revision did not involve the Divorce Procedure Rules 1950 which in fact continued to apply until the present Matrimonial Proceedings Rules 1981 were promulgated. In short there was *status quo* from 1910 until Singapore joined the Federation of Malaysia on 16 September 1964.

Declarations under statutory power

The (English) Legitimacy Declaration Act 1858 provided a specific power to the English courts to hear and grant some types of bare declarations of status. The Straits Settlements had a modified equivalent provision in section 4(1) of the Legitimacy Ord. No. 20 of 1934 which read:

> A person claiming that he or his parent or any remoter ancestor became or has become a legitimated person may, whether domiciled in the Colony or elsewhere, and whether a natural-born British subject or not, apply by petition to the Supreme Court praying the Court for a decree declaring that the petitioner is the legitimate child

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[84] [1951] M.L.J. 164.

[85] See *Kassim (orse. Widmann)* v. *Kassim (orse. Hassim) (Carl and Dickson cited)* , above, note 25, and p. 23.

> of his parents; or that his parent or remoter ancestor was legitimate and the Supreme Court shall have jurisdiction to hear and determine such application and to make such decree declaratory of the legitimacy or illegitimacy of such person as to the Court may seem just; and such decree shall be binding to all intents and purposes on His Majesty and on all persons whomsoever.

This provision has survived, with its substance intact, the amendments to the Ord. and is, today, still section 4(1) of the Legitimacy Act.[86] Any person can still apply to the High Court for a bare declaration that he is the legitimate child of his parents or that his parent or remoter ancestor was legitimate and such a declaration, when given, still binds the Government and all persons. This provision is narrower than its counterpart in England - it only permits the granting of bare declarations of legitimacy and legitimation.[87] Not much more is known of this provision except that there has been a declaration of legitimation made under it in Originating Petition No. 40 of 1990.[88] This was a successful petition by the mother of the infant praying the High Court to declare that the infant, who was illegitimate at birth, was subsequently legitimated by the lawful marriage of her natural parents. Since section 4(1) creates a specific statutory power it does not invoke the inherent power of the High Court and is, thus, of marginal interest in this article. It is only necessary to note that the power created by this provision is different from the inherent power of the High Court and that this power is more narrow than the inherent power and, thus, there should not be any suggestion that the existence of this statutory power in some way ousts the wider inherent power.

C. *Position on Joining Malaysia*

(Malaysian) Courts of Judicature Act 1964

On 16 September 1963 the Federation of Malaya, Singapore, Sabah and Sarawak joined to form the Federation of Malaysia. One consequence was the fusion of the structure of the superior courts. The (Malaysian) Courts of Judicature Act 1964[89] created the courts structure of the Federation

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[86] Cap. 162, 1985 Rev. Ed..

[87] A child is legitimate if his natural parents are lawfully married to each other at the time of his conception or by the time of his birth. An illegitimate child may be legitimated by way of the marriage of his natural parents subsequent to his birth if the conditions laid down in the Legitimacy Act are met. See Leong Wai Kum, *Family Law in Singapore*, above, note 29 at pp. 309-312.

[88] I am very grateful to Mr. Foo Kim Boon of the Attorney-General's Chambers for bringing this case to my attention and to Mr. Foo Cheow Ming of the Registry of the Supreme Court for helping me locate its record. As this case was heard in Judge's Chambers, it would not have been reported in the Malayan Law Journal.

[89] Act 7 of 1964.

of Malaysia and repealed, *inter alia* , the (Singapore) Courts Ord., Cap. 3 Laws of the Colony of Singapore 1955. The judicial power was vested in the appellate Federal Court of Malaysia, the High Court in Malaya, the High Court in Borneo and the High Court in Singapore.[90]

The relevant provisions on the powers of the High Court in Singapore as well as its jurisdiction to hear a particular case need to be set out rather in full. Section 25(l)(d), which marginal note read, "Powers of the High Court", provided:

> the High Court in Singapore shall have all the powers which were vested in the High Court of Singapore immediately prior to Malaysia Day [16 September 1963] by any written law until the same is repealed.

Section 24, which marginal note read, "Civil jurisdiction - specific", provided:

> ... the civil jurisdiction of every High Court shall include:
> (a) jurisdiction under any written law relating to divorce and matrimonial causes;
> (b) the same jurisdiction and authority in relation to matters of admiralty as ... the High Court of Justice in England ...;
> (c) jurisdiction under any written law relating to bankruptcy or to companies;
> (d) jurisdiction to appoint and control guardians of infants ...;
> (e) jurisdiction to appoint and control guardians and keepers of the persons and estates of ... persons of unsound mind;
> (f) jurisdiction to grant probates of wills and... letters of administration ....

Section 23(1), which marginal note read "Civil jurisdiction - general" provided:

> ... every High Court shall have jurisdiction to try all civil proceedings where -
> (a) the cause of action arose, or
> (b) the defendant or one of several defendants resides or has his place of business, or
> (c) the facts on which the proceedings are based exist or are alleged to have occurred,

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[90] It was still possible to for a person aggrieved with the decision of the Federal Court to appeal further to the Judicial Committee of Her Britannic Majesty's Privy Council.

or

(d) any land the ownership of which is disputed is situated, within the local jurisdiction
of the Court and... in any case where all parties consent in writing within the local
jurisdiction of any other High Court.

"Local jurisdiction" was defined in section 3 simply as the territories within the component states forming the Federation of Malaysia; in the case of the High Court in Singapore its local jurisdiction was "the territory (including territorial waters) comprised in the State of Singapore".

This Act is critically different from the (Singapore) Courts Ord. The most evident difference is that section 23(1) of the Act restored, with inconsequential differences, the "jurisdiction" provision of the Courts Ords. of 1868 and 1878 which had been deleted since 1907. Then, section 24 of the Act is largely a re-enactment of the old section 17, the "powers" provision[91], with one inexplicable deletion. It deleted subsection(a) of section 17; this particular subsection had retained in the High Court of Singapore the "jurisdiction and authority of a like nature and extent as are exercised by the Chancery and Queen's Bench Divisions of the High Court of Justice in England". This deletion has the potential to cause serious problems since much of the High Court's powers had sprung from this section 17(a) and its predecessor provisions. In particular this deletion could be said to have divested the High Court of its inherent powers as well. One would, then, turn to section 25(1)(d) to argue that it maintained the *status quo.* Unfortunately, section 25(l)(d) concluded with the caveat "until the [written law on the powers of the High Court] is repealed." The written law on the powers of the High Court was, of course, the (Singapore) Courts Ord., Cap. 3. which the (Malaysian) Courts of Judicature Act, in its Second Schedule, expressly repealed.

Lingering question: what effect?

Did the (Malaysian) Courts of Judicature Act, in failing to retain section 17(a) of the (Singapore) Courts Ord., shrink the powers of the High Court of Singapore such that it would no longer have the same powers as the High Court of England including its inherent power to grant bare declarations? There can be two answers. The less desirable answer would be "yes, the powers the High Court of Singapore inherited from the High Court of England except its admiralty jurisdiction and any power which has been specifically re-enacted in local legislation have been deleted". This answer is reached by taking a literal view of the deletion

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[91] The old section 17 of the Courts Ord., Cap 3, 1955 Laws of the Colony of Singapore was entitled the "Original Civil Jurisdiction of the High Court" but it was suggested that it is better regarded as the "powers" provision instead: see pp. 38-40 above.

of section 17(a). It is submitted that the literal view should not be advocated because its consequences are nothing short of absurd. The powers the High Court of Singapore inherited from the High Court of England were wide-ranging including, as a learned writer has pointed out,[92] the power to award common law damages. How can we possibly take the view that the High Court of Singapore had, since 16 September 1963, lost its power to award common law damages? It is worth noting that this power has never been specifically provided for by local statute. As undesirable as a literal reading in this context may be, it has been suggested by another learned writer to be the correct way to read the provisions[93] and it appears to have been taken by the High Court of Singapore in 1987 in *Shiffon Creations (Singapore) Pte. Ltd. v. Tong Lee Co. Pte. Ltd.*[94]

In *Shiffon Creations (Singapore) Pte. Ltd.* Thean J., in deciding that the power to award equitable damages which was inherited under section 17(a) was now no longer available because of its deletion, said:

> Unfortunately, the Courts Ordinance (Cap. 3), including section 17, was repealed by the Courts of Judicature Act 1964 of Malaysia, and the latter had no provision similar to that of section 17(a) of the Courts Ordinance, Nor did the repealing Act contain any provision saving the jurisdiction conferred by the Courts Ordinance. Astonishing as it may seem, the repealing Act, intentionally or unintentionally, took away the jurisdiction which the High Court had under the Courts Ordinance to award [equitable] damages ,...[95]

The actual decision reached by his Lordship has already been the subject of detail comment[96] and is of marginal interest here. It is sufficient to repeat that, if his Lordship's view of the effect of the deletion of section 17(a) is correct, it will mean that the power of the High Court to grant bare declarations has also been taken away.

The better answer to the lingering question takes its cue from the realisation that a literal reading of the deletion of section 17(a) leads to absurd consequences. We ought, then, to take a more reasonable

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92 Soh Kee Bun, "Jurisdiction to Award Equitable Damages in Singapore" (1988) 30 Mai. L.R. 79 at p. 98.

93 Mohan Gopal, "The Original Civil Jurisdiction of the Singapore High Court: Some Issues" [1983] 2 M.L.J. Ixiv. He suggested this change could be necessary because of Singapore's membership in the Federal system of Malaysia. The author is unconvinced. Membership in a Federal system might well demand a clear separation of the powers of the state courts, on the one hand, and the Federal courts with original jurisdiction, on the other, as is true in the United States. It does not require that the powers of the state courts be shrunk. There were no Federal courts with original jurisdiction created under the Act.

94 [1988] 1 M.L.J. 363.

95 *{bid.,* at p. 370.

96 Soh Kee Bun, "Jurisdiction to Award Equitable Damages in Singapore", see above, note 92.

purposive reading instead. It has been suggested before that we could choose to read the provision in section 24 as not having exhausted all the powers of the High Court of Singapore, or that we could read section 23, in allowing the High Court of Singapore "to try all civil proceedings" which meet the connections stated therein, as including within it all necessary powers as well.[97] The author would endorse both suggestions. It is further suggested that greater reliance can, perhaps, be placed upon section 25(l)(d) of the Act which saved the existing powers of the High Court of Singapore. This savings clause was clearly enacted for this particular occasion effusion of the structure of the courts of the component states of Malaysia; it could not have been a re-enactment of a provision in the previous statute. Given that this is a newly enacted provision, we might take a more lenient view of its concluding caveat which, when read literally with the Second Schedule, totally denies the provision any effect. It is submitted that a purposive reading could condone ignoring the concluding caveat simply because not to do so would undermine the provision entirely. Why, it may legitimately be asked, would the Legislature insert a savings clause into the Act only to completely deny it of any effect?

There are, then, two deficiencies with the literal reading of sections 24 and 25(l)(d) of the (Malaysian) Courts of Judicature Act. Section 24 would divest the High Court of Singapore of some of its vital powers, and section 25(1)(d) would be devoid of all effect. It is submitted that these deficencies are enough reason to take a more purposive reading of the provisions. A purposive reading would recognise that the Malaysian Parliament had given no indication that it had desired to shrink the powers of the High Court of Singapore; indeed the insertion of the savings clause in section 25(1)(d) suggests to the contrary. It would then be possible, relying on section 24 not being exhaustive since it provided that the powers of the High Court "shall include ... ", and the intention to retain the High Court's existing powers in section 25(l)(d), to suggest that these sections made no change to the existing powers of the High Court of Singapore. It may also be said that the history of the "powers" provision suggests that a purposive reading may almost always be a better alternative to a literal reading. The decision in *Shiffon Creations (Singapore) Pte. Ltd.* remains, however, an obstacle to a purposive reading of sections 24 and 25(1)(a) and it is hoped that this part of the decision will be reviewed soon.[98] It is submitted that the only reasonable reading of the Act is that it maintained the *status quo,* simply because the alternative is untenable. This would mean the High Court of Singapore retained its inherent powers including the power to grant bare declarations of status.

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[97] *Ibid.,* at p. 98.

[98] There has been an appeal reported in [1991] 1 M.LJ. 65 but this particular part of Thean J.'s judgment was not material to its outcome and, although it was quoted by Lai J., it was not directly commented upon.

D. *Present Position*

Supreme Court of Judicature Act 1969

Singapore left the Federation of Malaysia abruptly on 9 August 1965 with nothing done about the existing courts structure. In 1966 a Reprint of the (Malaysian) Courts of Judicature Act Act 1964 was issued in Singapore with the remark "This Act has been modified only where absolutely necessary." Sections 25(l)(d), 24 and 23(1) were retained unchanged.

It was only in 1969 that Parliament enacted the Supreme Court of Judicature Act which has continued, without change to the matters which interest us, until today." The Act, in creating the Supreme Court of Singapore consisting of the High Court and the Court of Appeal, in effect re-created the judicial system of the colony of Singapore prior to joining the Federation of Malaysia. The passage of the Bill was uneventful and the only indication of its intended effect was given by the then Minister for Law and National Development, Mr. E. W. Barker, who, in moving its second reading, said:

> Sir, the Supreme Court of Judicature Bill... should really have been introduced soon after we left Malaysia. Unfortunately, the many and varied problems which we had to deal with upon leaving Malaysia forced us to continue with the existing system of administration of justice until the present day. All that the Bill purports to do is to set out logically the consequences that flow from our becoming independent ... with an independent system of administration of justice.... *The Bill generally does no more than to revert to the position obtaining before we joined Malaysia. The powers... of the Supreme Court are the same as heretofore, before we joined Malaysia and after we left Malaysia.*[100] (Emphasis added.)

The present Supreme Court of Judicature Act, Cap. 322 remains substantively similar. Section 24 of the (Malaysian) Act is, with inconsequential differences, section 17 of the Act which marginal note still reads "Civil Jurisdiction - specific". Section 25(l)(d) of the (Malaysian) Act is deleted. Section 23 of the (Malaysian) Act is now section 16 which marginal note still reads "Civil Jurisdiction - General".

The statement of the Minister for Law and National Development indicates that he believed, firstly, the powers of the Supreme Court (in its original jurisdiction, the High Court) remained as it was when Singapore was a part of the Federation of Malaysia and, secondly, that the powers

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[99] The Act was Cap. 15, 1970 Rev. Ed. and is, today, Cap. 322, 1985 Rev. Ed.

[100] *Official Reports of Parliament of Singapore,* Vol. 29, 12 June 1969 at pp. 74-75.

then were exactly as they were before Singapore joined the Federation. The latter provides support for the submission made above as to the better way to interpret sections 25(1)(d), 24 and 23(1) of the (Malaysian) Act. It may be suggested that when Thean J.'s view of the effect of the deletion of section 17(a) in *Shiffon Creations (Singapore) Pte. Ltd.* is reviewed, his Lordship's view may have to be weighed against this statement. It is submitted that, where there was little debate in Parliament before a particular Bill became law, as here, such statement of its intended effect by the Minister ought to be carefully considered.[101]

The statement of the Minister also indicates that he believed that the Act did not materially affect the powers of the High Court as these powers had been under the (Malaysian) Act. This part of the statement of the Minister would also help in arguing for the retention of the *status quo.* The Act had, unfortunately, deleted the savings provision of section 25(1)(d) of the (Malaysian) Act which was argued above as capable, in spite of its caveat, of retaining the *status quo* upon the formation of Malaysia . It is submitted that, if we accept that the (Malaysian) Act maintained the *status quo,* it would be possible to rely upon the statement by the Minister as well as the need to avoid absurd consequences to suggest that the deletion of section 25(l)(d) also did not affect the *status quo.*

Summary

The language of the (Malaysian) Courts of Judicature Act and of the (Singapore) Supreme Court of Judicature Act in defining the powers of the High Court of Singapore was somewhat unfortunate. A literal reading of the relevant provisions in these two Acts leads to results which cannot possibly be accepted. It is submitted that the situation demands that we abandon the literal reading and adopt a purposive reading instead. A reasonable purposive reading would maintain the *status quo* and allow the High Court of Singapore to continue to have all the powers it always had. Such *status quo* would allow us to claim

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[101] Mohan Gopal who advocated a literal reading of the effect of sections 25(l)(a), 24 and 23(1) of the (Malaysian) Courts of Judicature Act in "The Original Civil Jurisdiction of the Singapore High Court: Some Issues", see above, note 93, suggested on the basis of the "plain language of the [(Singapore)] Act" that the Minister was mistaken. Mohan Gopal saw the (Malaysian) Act to have introduced a limited specific jurisdiction in place of the pre-Malaysia unlimited general jurisdiction and he saw the (Singapore) Act to have gone even further - in deleting the savings clause of section 25(1)(d) of the (Malaysian) Act and in introducing section 16(3) which extended the High Court's jurisdiction to that conferred by any written law which is in force in Singapore. The author disagrees; the language of the sections is not such as to be amenable to plain reading. A plain reading of them leads to absurd consequences. Why should we not pay heed to the sentiment expressed by the Minister and avoid absurd consequences by a purposive reading?

that the High Court of Singapore still possesses inherent power to grant bare declarations.[102]

IV. *LAWRENCE Au*

In *Lawrence Au Poh Weng*[103] the first plaintiff cohabited with the defendant for about 20 years beginning their cohabitation before the death of the defendant's husband and continuing it after. There was a child from this cohabitation. The defendant had been introduced as the first plaintiff's wife during their cohabitation. The first plaintiff then severed the relationship and married the second plaintiff in Indonesia. As the second plaintiff was to reside in Singapore with the first plaintiff, the immigration authorities required a declaration of her marital status. The defendant had made allegations to the authorities that it was she who was the first plaintiff's wife. The first and second plaintiff sought declarations that the first plaintiff was not married to the defendant and that the first plaintiff was married to the second plaintiff. The defendant sought a declaration that she was married to the first plaintiff. Winslow J. decided he had no power to make any of the declarations.

Winslow J. looked hard for a statutory provision which gave him express power to grant bare declarations. His efforts were futile. There was nothing in the Supreme Court of Judicature Act nor the Women's Charter nor the Legitimacy Act which was useful. This is to be expected as such power originated inherently in the predecessor courts of the present High Court. His Lordship was also not well served by the cases of *Then Kang Chu* and *Florence Mozelle Meyer* and made the same mistake as the courts there of looking only for an express statutory power missing altogether the possibility that the power may already rest inherently with it.

It is submitted that Winslow J.'s decision was wrong because, with respect, his Lordship asked the wrong questions. His Lordship should have asked: "Did the Second Charter of Justice invest in our courts the same inherent power? If yes, did we maintain this through the various revisions of our courts structure, in particular by way of the enactment

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[102] It is of note that the present Rules of the Supreme Court Order 92 rule 4 reads: "For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court." Although this is not directly useful to the granting of declarations, it does indicate that the Rules are premised upon the belief that the High Court continues to possess inherent powers. It is also interesting that, on fairly similar provisions on powers, the High Court of Malaya has been able to entertain applications for bare declarations: *Eeswari Visuvalingam* v. *Government of Malaysia* [1990] 1 M.L.J. 86 and *Pedley* v. *Majlis Ugama Islam Pulau Pinang & Anor*. [1990] 2 M.L.J. 307. Can we take some guidance from their approach?

[103] The case has been earlier criticised by Stanley Yeo Meng Heong, "Bare Declarations on the Existence of a Marriage", see above, note *6*.

of the Courts Ord. of 1907 and of the (Malaysian) Courts of Judicature Act 1964 and of the (Singapore) Supreme Court of Judicature Act 1969?" It has been argued that the answers his Lordship could then have given are: "Yes, the Second Charter of Justice did constitute the local superior courts to possess the same inherent power as the English superior courts. And yes, we did maintain the *status quo* (up to *Lawrence Au Poh Weng* and even today). This has to be the answer despite the problems created by the language of the (Malaysian) Act and the Supreme Court of Judicature Act 1969 because the alternative is untenable."

V. CONCLUSION: NEED FOR STATUTORY CLARIFICATION

There remain ambiguities as to whether the High Court of Singapore can grant bare declarations under its inherent jurisdiction. Precedents consistently denied this power although they can all be argued to have been wrong. Up to the enactment of the (Malaysian) Courts of Judicature Act 1964, there can be any doubt that the High Court possessed inherent power to grant bare declarations of marital status. The (Malaysian) Act, and the Supreme Court of Judicature Act 1969 in turn, can be purposively read to maintain the *status quo.*

It is fortunate that very recently the High Court of Singapore in Originating Summons No. 1273 of 1990[104] may have reversed the trend of the reported cases. In this matter, heard in Judge's Chambers and thus unlikely to be reported, the High Court granted a declaration that the purported marriage solemnized between two Muslim parties[105] under the Women's Charter was null and void. The Act, while disallowing such a marriage, does not, however, permit these parties to petition the High Court of Singapore for a decree of nullity.[106] This grant of the declaration is, thus, consistent with the practice of the High Court of England only to grant a declaration of marital status where no more appropriate remedy is available to the parties.[107] It is not clear whether the question of the power of the court to grant such a declaration was canvassed. It is suggested, on the basis of the arguments made above, that the High Court does possess the power to do as it did and that this grant was proper in the circumstances of the case.

This situation, however, is too unclear to be left as it is. It is arguably more confused than that prevailing in England in 1984 when the Law Commission of England and Wales called for statutory clarification of

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[104] I am very grateful to Mr. Foo Kim Boon of the Attorney-General's Chambers for bringing this case, too, to my attention.

[105] Section 3(3) of the Women's Charter, Cap. 353,1985 Rev. Ed. reads: "No marriage both of the parties to which are Muslims shall be solemnized or registered under this Act."

[106] See section 99 of the Women's Charter which purports to exhaustively lay down all the grounds for petitioning for a decree of nullity but does not include section 3(3).

[107] See pp. 27-28 above.

the power of the High Court of England to grant bare declarations in family matters. It is suggested we also need express statutory power to make bare declarations in family matters. We need to be certain of the types of bare declarations we can make, of what is the necessary connection between the parties and the court before the court should hear the particular application for declaration[108], of the proper procedure to make such application, and of whether such a declaration operates *in personam* or *in rem.* This is especially crucial as the provisions on the proper formation of marriage within the Women's Charter may be said to be equivocal in some ways particularly in the case of marriages which involve contact with some other legal system. It is further suggested that any review of our law should incorporate the statutory power in section 4 of the Legitimacy Act and, now that procreative technology is a part of our lives, should include declarations of parentage. The relevant provisions in the (U.K.) Family Law Act 1986 would obviously be good starting points in any review of our law.

LEONG WAI KUM*

[108] Another lingering problem is that the Supreme Court of Judicature Act is ambiguous as to the proper meaning of the "powers" of the High Court, on one hand, and its "jurisdiction", on the other. The earlier Courts Ords. of 1868 and 1878 had, in contrast, been unambiguous in this regard, see pp. 38-40 above. We may choose to revert to that clarity.

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