

LAW AND LAW REPORTING IN MALAYA

There is no record of judge-made law in Malaya before it came under the effective control or protection of the British. The only laws known to the Malays were their *Adat* and *Hukum Shara'*: the Muslim law,¹ as expounded by Arabian jurists. In its long voyage from Arabia through India and Sumatra, the *Hukum Shara'* gathered in its train the Menangkabau exogamous matriarchal system called the *Adat Perpateh* applicable to the Malays of Negri Sembilan and the Palembang tradition, called the *Adat Temenggong*, which took the place of the *Adat Perpateh* on the breakdown of the tribal system during centuries of Hindu, and monarchical influence.² The composite law is the Muslim law intermingled with ancient Malay custom. Some sporadic attempts were made at codification before the advent of the British: we can glean some information of the *lex scripta*, mainly dealing with family law, ancient Malay customary land tenure and religious offences, from the Malacca Digest, 1523 A.D., the Pahang and Kedah Digests, *circ.* 1650 A.D., the Ninety-nine Laws of Perak, 1765 A.D., the Johore Digest, 1789 A.D. and the Menangkabau Code. The customary laws of the Chinese and Hindu residents do not appear to have been interfered with, for the policy of Muslim law was one of *laisser faire*, non-interference with the personal laws of other inhabitants.

Law reporting necessarily follows in the wake of a settled judicial system and a reasonably qualified judiciary. The administration of justice under the Malay rulers however at the close of the 18th century followed no definite pattern and inevitably rested on the individual equity for lack of a settled jurisprudential system. From the time the four States of Perak, Selangor, Negri Sembilan and Pahang first came under British protection between 1874 to 1888 until at any rate, 1895, when they joined the Federation, or 1906, when the Court of Appeal first came into existence, there was manifest abuse of judicial process. The Residents' Courts were manned by "*unprofessional judges*" and the protected states refused to allow litigants to be represented by counsel in either civil or criminal cases, "no matter how large the interests involved or how great the gravity of the offence."³ Mr. Arnot Reid at the general meeting of the members of the Singapore Branch of the Straits Settlements Association in 1891⁴ referred to specific instances of executive interference with the judiciary, of harsh sentences passed and denial of right to appeal from the Magistrate's decisions. Mr. Donaldson was of the opinion, and rightly so, that an appeal to the so-called Council of

1. See "The Theory of Muslim Law" (1946) 12 M.L.J. xl.
2. Taylor, "Malay Family Law" (1937) 15/1 JMBRAS 3.
3. Petition of the Chamber of Commerce of Singapore and of the Singapore Branch of the Straits Settlements Association sent to H.E. the Governor, dated October 27, 1891: 5 S.L.J. 30.
4. (1891) 5 S.L.J. 12.

State, composed of the Resident, certain Magistrates and certain Malay Rajahs, "was no more satisfactory than the Magistrates themselves." The system of law was uncertain; Mr. A. H. Drew quoted Mr. Justice Wood as having remarked, "Judging not only from the form in which the proceedings came to us, but also from the nature of the order made, one might well doubt whether there exists, in the State of Selangor, any Supreme Court at all in the sense in which it is understood to exist by the comity of civilized nations, a Court formally constituted and presided over by Judges with no political bias." On October 27, 1891, a petition was presented to the Right Honourable the Lord Knutsford, then Her Majesty's Principal Secretary of State for the Colonies⁵ urging that "the true remedy might be found by giving to British subjects a right of appeal to the Supreme Court of the Straits Settlements in cases both civil and criminal." In the unfederated Malay States (except in the State of Johore) the administration of justice for a considerable time after 1909, when they came formally under British protection, remained equally unsatisfactory.

When in 1786 Captain Francis Light on behalf of the East India Company occupied Penang, then inhabited by half a dozen or a dozen Malay families of fishermen along the sea coast, he found it necessary to establish a police force for the protection of people who were migrating to the island.⁶ Light and his immediate successors appear to have administered justice according to the dictates of their conscience. Thus Mr. George Caunter, a Magistrate, in 1797, punished a Chinese man and woman for adultery by ordering them to have their heads shaved and to stand twice in the pillory from four to six in the evening and the man to be imprisoned until he could be sent off the island.⁷ The inhabitants expressed a desire that they should be tried and governed under their own laws with the result that in 1792 Light decided upon and carried into effect the committing of the administration of justice in each class to a headman.⁸ As a result of Light's various addresses to the Board of Directors of the East India Company, Lord Teignmouth in 1794 sent him some *written* proclamations and regulations to act upon and these regulations appear to have continued in force "and indeed to have been the only criminal law in force down to the time when the First Charter was granted."⁹ Sir George Leith, who came to Penang as first Lieutenant-Governor in 1800, was given instructions for the administration of civil and criminal justice and was directed to proceed to frame Regulations for the administration of justice in the island upon the following principles:¹⁰

5. *ibid.* 30.

6. 1 Ky. iii.

7. *ibid.*, viii.

8. 1 B.L.S.S. 7; 1 Ky. iv.

9. *R. v. Willans* (1858) 3 Ky. 16.

10. 1 B.L.S.S. 8; 1 Ky. xi.

The laws of the different peoples and tribes of which the inhabitants consist, tempered by such parts of the British law, as are of universal application being founded on the principles of natural justice, shall constitute the rules of decisions in the Courts.

But Sir George Leith does not seem to have framed any regulations under these instructions nor were such ever framed by anyone else. This directive inherent in the subsequent Charter of Justice of 1807 formed the basis of the principles formulated by the Courts of justice in later years: that the religion and custom of all inhabitants irrespective of their nationality, race or creed are to be respected and that common law must fill the legal vacuum if found applicable to the circumstances of the case with such variations as may be necessary in the interests of justice.

The first professional judge, Mr. John Dickens, an English barrister who had gained a considerable reputation during his practice in India, arrived in Penang in 1801. Dickens encountered various difficulties because there was nothing upon which to administer justice save the 1794 Regulations and these did not give him authority over British subjects, of whose conduct he complained bitterly and frequently. He kept up a correspondence with the authorities upon the subject of the administration of justice; he entered into an altercation with the Lieutenant-Governor who over-rode his decisions in a way which shocked his legal conscience; and generally by his stubborn conduct and untiring perseverance brought about or hastened the Indian government into making the arrangements of 1805 for the better administration of Penang, and the East India Company into petitioning the King in 1805 for a Charter of Justice for the Settlement. Accordingly in the same year Penang became a separate Presidency, and Mr. Philip Dundas was appointed Governor. In December 1805 the Governor-in-Council passed a Regulation creating and establishing an Ordinary and Mr. Dickens thenceforth exercised jurisdiction accordingly.

The first Charter of Justice was granted on March 25, 1807, and by it was established a Court of Judicature in Penang. The court consisted of the Governor, three Councillors, and a Judge, to be called the Recorder, and Sir Edmund Stanley was appointed the first Recorder.¹¹ The court was to have the jurisdiction and powers of the Superior Courts in England and the several Justices, Judges and Barons thereof "so far as circumstances will admit"; it was to exercise jurisdiction as an Ecclesiastical Court "so far as the several religions, manners and customs of the inhabitants will admit" and the jurisdiction was limited as to non-residents by a declaration that the court shall not have power to try any suit against any person who shall never have been resident in the Settlement, nor against any person then resident in Great Britain or Ireland, unless such suit or action against such person then so resident in Great Britain or Ireland shall have been commenced within two years

11. *ibid.* 11.

after the cause of action arose, and the sum to be recovered be not of greater value than \$12,000. The court was then empowered to exercise authority over the persons and estates of infants and lunatics, and to grant probate and letters of administration. The mode of procedure provided for the administration of oaths “in such manner and form as the court shall esteem most binding on their conscience.” The court after hearing a case was “to give and pass judgment and sentence according to justice and right.” On the criminal side the court was to be “a Court of Oyer and Terminer and to try and determine indictments and offences and to give judgment thereupon, and to award execution thereof, and in all respects to administer criminal justice in such or the like manner and form, or as nearly as the condition and circumstances of the place and persons will admit of, ... due attention being had to the several religions, manners and usages of the native inhabitants.”

Malacca, first occupied by the British in 1795, was retroceded to the Dutch, and was again restored to the British in March 1825. In 1819 Sir Stamford Raffles obtained a foothold in Singapore from the Dato Temenggong for the maintenance of a factory and as a result of further arrangements the island was formally ceded to the British in 1824 by the Sultan of Johore and Dato Temenggong. Those events led to the granting of the second Charter of Justice of 1826. Raffles’ Memorandum of 1823 clearly indicates that Malay law and custom were enforced;¹² but the same state of legal chaos as had prevailed in Penang up to 1807 persisted in Singapore until 1826. As to Malacca, Sir Benson Maxwell C.J. said:¹³ “The Portuguese while they held Malacca and after them the Dutch left the Malay custom or *lex non scripta* in force. That it was in force when this Settlement was ceded to the Crown appears to be beyond dispute and that the cession left the law unaltered is equally plain on general principles.” The Charter of 1826 extended the court’s jurisdiction to cover Singapore and Malacca without altering its constitution. Penang became its headquarters. The effect of the 1826 Charter was that it introduced into the Colony the English law as it existed on November 26, 1826. The intention of the Charter was that the professional judge should go on circuit, but Sir John Claridge, Recorder, at first refused to do so, though he subsequently relented.¹⁴

In 1832 the seat of government of the Straits Settlements was transferred from Penang to Singapore. In 1855 the third Charter of Justice was granted and by the combined effect of this Charter and an order of the local government of May 9, 1856,¹⁵ the court was composed of two divisions, the one having jurisdiction over Singapore and Malacca, consisting of the Governor or Resident Councillor and the Recorder of

12. *ibid.* 160.

13. *Sharip v. Mitchell* (1870) S.L.R. Leic. 466, 469.

14. 1 B.L.S.S. 28.

15. 1 Ky. xciv.

Singapore, and the other having jurisdiction over Penang and Province Wellesley, consisting of the Governor or Resident Councillor and the Recorder of Penang.

The need for law reports was first expressed by Sir Peter Benson Maxwell¹⁶ R. in 1858 when he lamented:¹⁷

...Upon a question on which the cases decided by the Superior Courts at home, cannot give much assistance, since its determination depends in great measure on local circumstances, I think it is to be regretted that Recorders did not preserve their judgments by publishing them... This absence of published judgment is, as I have just said, to be regretted, because much uncertainty will continue to hang over the Administration of Justice in the Settlement. Each Recorder must begin *de novo*, and solve for himself, as best he may, the question whether this or that Statute is in force here; and the law will fluctuate according as he unconsciously departs from the views of his predecessors, and as his views, again are, in similar unconsciousness, departed from by his successors.

The distinctive feature of British jurisprudence is certainty and the binding nature of judicial precedents and this can only be achieved by dissemination of knowledge through the medium of authorised reports. Local newspapers, The Pinang Gazette, The Straits Observer, The Singapore Daily Times and The Straits Times had on occasions published in their columns some of the early cases decided in the Courts of the Colony. In 1869 for the first time a volume of the principal Straits Settlements law cases was published by Mr. Robert Carr Woods Jr., a barrister-at-law and an advocate and attorney of the Supreme Court of the Colony, under the title "A Selection of Oriental Cases decided in the Supreme Courts of the Straits Settlements," being a reprint of judgments "that are to be found widely scattered throughout the local journals, and to which access cannot be had but with great difficulty."¹⁸ Woods had hoped that his "Manual" might be the harbinger of an "authorised" edition of law reports, revised and authenticated by the judges.

Woods paved the path for others to follow, but for a variety of reasons, the publication of law reports in Malaya has been spasmodic, and has depended very largely upon the keenness and industry displayed by members of the profession from time to time.¹⁹ In 1877 a larger work than Woods' was published by Mr. Stephen Leicester, Chief Clerk to the Magistrate of Police at Penang, under the style of "Straits Law Reports," being a report of cases decided in the Supreme Court of the Straits Settlements, Penang, Singapore and Malacca: also a few judgments of the Indian and English Cases. Leicester's reports contain also Sir John Thomas Claridge's charge to the Grand Jury on opening the first Session of Oyer and Terminer of the Court of Judicature of the Prince of Wales' Island, Singapore and Malacca on November 19, 1827.

16. Author of the legal classic, Maxwell on Interpretation of Statutes.

17. 3 J.I.A. 59.

18. W.O.C. Preface.

19. Thome Ag.C.J., F.M.S., in (1932) 1 M.L.J. 1.

Both Woods' and Leicester's reports were of considerable help to the profession but as the years passed reliance had to be placed on irregular and unauthenticated newspaper reports, mostly sketchy and unreliable. The drawback and inconvenience owing to the want of a complete, and above all, reliable report of the important and authoritative decisions prompted Mr. James William Norton Kyshe, Acting Registrar of the Supreme Court of the Straits Settlements at Malacca, to collect, for the first time, a large number of cases that had not seen the light of day, and which had been extracted from a voluminous mass of varied Court Records, and Note Books of the different Recorders and Judges of the Colony, and to publish his series of "Cases Heard and Determined in Her Majesty's Supreme Court of the Straits Settlements, 1808-1884," volume one of which, published in 1885, contains Civil Cases; and in the following year he published volume two, comprising Criminal Rulings, Admiralty, Bankruptcy, Ecclesiastical and *Habeas Corpus* Cases, and volume three, containing Magistrates' Appeal Cases. Kyshe had unlimited access to the available records, and the favourable reception accorded to those three volumes from the judicial and executive authorities, the profession and the public encouraged him to collect further materials for volume four, containing a general intermingling of the cases in 1890.

Kyshe's Reports are in their arrangement modelled on the system of the Law Reports series. His preface to volume I contains a highly useful historical sketch of the judicial institutions of the Colony from the time when Penang was taken over by Captain Francis Light in 1786 to 1885 and this was continued in volume IV bringing it up to 1890. Volumes I and IV are, in particular, a veritable mine of information and indeed indispensable to a student of Malayan legal history. In addition Kyshe also includes lists of Recorders and Judges as well as lists of Law Agents and Advocates and Attorneys from the earliest time to the date of his work. Volume IV also contains Rules and Orders of Court in force in 1890.

In June 1888, for the first time in Malaya, a monthly legal newspaper was published under the style of "The Straits Law Journal" the object of which was to "summarise legal proceedings in the Supreme Court, Small Cases Court, Criminal Sessions and Police Courts" with the avowed intention to "report fully only cases of exceptional interest to the public or to the profession."²⁰ The Journal was published by Mr. Walter Makepeace at Singapore, and it opened its columns for the discussion of questions connected with the Bench and Bar. Many useful cases, legal notes and articles appeared in the Straits Law Journal. The general scheme of each number was to lead off with Court Notices such as Fixtures and Bankruptcy, then there follow Notes on matters in England and of local interest to the profession, interspersed by articles

20. (1888) 1 S.L.J. 1.

or reprints of articles on some legal subject, then were reported the cases of the month or other cases and correspondence. Sometimes, presumably where there had been no recent decisions worth reporting, a deviation was made and some older decisions and arguments were recorded to preserve them for posterity, some of them stretching as far back as 1839. The Pinang Gazette in its comment on the services of the Straits Law Journal said:²¹

...The Editor of the Straits Law Journal has allowed very few decisions worth reporting to escape his notice, and the labour he has devoted to the work is most praiseworthy, more particularly so when we remember that, owing to its necessarily limited circulation, it is impossible that it can be a financial success, for beyond the lawyers, who hardly muster over forty, there are few sufficiently interested in legal matters to subscribe.....

— a comment as true today as it was seven decades ago!

In July 1891 the first part of a New Series of the Straits Law Journal appeared. The New Series detached the notes from the Reports, and one volume of the report was published under the style of “Straits Law Reports, New Series”; unfortunately this publication ceased the following year. In urging the members of the legal profession to co-operate with the editor “to successfully accomplish ends that the Journal has in view” the Straits Law Journal²² indulged in a happy metaphor

...As in a Mutual Insurance Society each insurer benefits himself as well as his co-insurers, so in giving his personal aid to further the objects of the Editor of such a publication, each contributor would be adding to a fund of information from which he and all other contributors could in future derive benefit.

The next year, 1893, saw the first official law reports published in Malaya, the Straits Settlements Law Reports, under the general editorship of Mr. W. J. Napier, assisted by Penang Editor, Mr. F. J. C. Cross and Malacca Editor, Mr. S. R. Groom. These reports were published under the direction of the Committee of the Singapore Bar with the approval of the judges. Volume I of these contains cases decided as early as 1867 and ends with an 1893 case. This series ended with volume 15 published in 1931 containing reports of cases up to 1923. The new series of the Straits Settlements Law Reports cited by the year of the volume commenced with the volume for 1926 published in 1927 under the editorship of Mr. F. G. Stevens and was published by Authority. This series continued to be published under various editors and ended with the volume for 1941-42.

The administration of justice in the Malay Peninsula was in a gravely chaotic position.²³ Before the year 1896 appeals in each of the Federated Malay States lay to the Resident’s Court with a final appeal to the

21. (1891) 5 S.L.J. 36.

22. *ibid.*, 40.

23. *ibid.*, 12, 29 and 30. See also Jackson J.C., *Report to the Resident-General for the Year 1896*, McCabe Reay, *F.M.S. Digest*, Appendix II, 131-4.

Sultan in Council.²⁴ Magistrates followed the Indian law and procedure as far as possible. Selangor Regulation 11 of 1893 provided that subject to local law and established custom all questions arising in any of the courts of the State were to be dealt with and determined according to the principles, procedure and practice, so far as applicable, of the Straits Settlements Penal Code and Evidence Ordinance and the Indian Civil Procedure Code, Specific Relief Act and the Court Fees Act. The Judicial Commissioner's Regulations and Orders in Council came into force in 1896 soon after the Federated Malay States was formed: the Courts of the Residents and Sultans in Council were abolished and a Judicial Commissioner as the final Court of Appeal for the Federation was appointed by the Sultans with the consent of the Residents, the qualification being that of a barrister, etc., of at least ten years' standing. He heard appeals from the Senior Magistrates (who had unlimited jurisdiction), but it was provided that in capital cases the depositions were to be forwarded to him in the first instance and he could order trial before himself instead of before the Senior Magistrate, reporting all death sentences to the Sultan in Council. In practice he heard almost all, if not all, murder trials.²⁵

The Senior Magistrate system was introduced at different times in the four States of the Federated Malay States. They were civil servants appointed and transferred from and to other civil service posts in the ordinary way. The Judicial Commissioner's and Senior Magistrates' Courts were abolished by the Courts Enactment of 1905, which came into force on January 1, 1906. The 1905 Courts Enactment created a Supreme Court consisting of the Chief Judicial Commissioner and two Judicial Commissioners appointed by the Resident-General with the approval of the High Commissioner. The Court of Appeal consisted of any two or more of the Judges, and by the Federated Malay States Appeals Order in Council of 1906 provision was made for appeal in civil matters from the new Supreme Court to the Judicial Committee of the Privy Council. The first Chief Judicial Commissioner appointed under the new Enactment was Mr. Justice W. H. Hyndman-Jones, a man of great erudition. In 1921, by reciprocal legislation in all three jurisdictions, the Judicial Commissioners were made *ex-officio* Judges of the Colony and Johore, and the Judges of the Colony and Johore *ex-officio* Judicial Commissioners. In 1923 it was provided that the Federated Malay States Court of Appeal should consist of not less than three Judges and in 1925 the titles were altered from "Chief Judicial Commissioner"

24. The Perak State Council Minute dated January 18, 1907, records that the Sultan, in giving a statement of Muslim law and Malay custom relating to ownership of property of Muslims as affected by marriage, divorce and intestacy, cited cases which have been decided before him: *Perak Gazette*, April 5, 1907 p. 241; (1937) 15/1 JMBRAS 70.
25. McCabe Reay, F.M.S. *Digest*, Preface.

and "Judicial Commissioner" to "Chief Justice" and "Judge" with the style "The Honourable Mr. Justice."²⁶

The need for published reports of the important cases decided by the Supreme Court of the Federated Malay States was increasingly felt.²⁷ A few of the cases determined in the years 1897 to 1899 by the Court of the Judicial Commissioner were published in 1900 in a small volume entitled "Supplement No. 1 to the Straits Settlements Law Reports" under the editorship of Messrs. C. I. Carver and Song Ong Siang, and in 1906 included as an Appendix to volume 9 of the Straits Settlements Law Reports was published "F.M.S. Reports Vol. I" incorporating cases from the Federated Malay States from 1899 to 1905. It frequently happened that when a reference was made in court to a judgment it was found necessary to verify it by obtaining from the Registry the file containing the original judgment.²⁸ Such a state of affairs was highly inconvenient and undesirable. In 1913 Mr. J. R. Innes of Lincoln's Inn, Barrister-at-Law, Acting Chief Judicial Commissioner of the Federated Malay States, published a "Treatise on Registration of Title in the Federated Malay States" and included in the same volume "Reports of Land and Mining Cases decided in the Supreme Court, F.M.S., from 1907 to 1913." Innes' collection are all cases material to his treatise, but he had also encouraged Mr. McLean, the Registrar of Courts, to collect other cases, and they both devoted much time and labour to the selection and revision of other judgments, which in 1922 were included in the first volume of the Law Reports of the Federated Malay States. Sir Lionel Mabott Woodward C.J.C., in his Preface to the volume, after acknowledging Mr. Justice Innes' and Mr. McLean's devotion to the work, said:

...the work they commenced was carried on by Mr. Burton [later Burton J.], who till recently was acting Registrar. The cases selected are chiefly the more important decisions bearing on our local laws... It has not been considered necessary to include cases decided mainly on the strength of English authorities. Thanks are due to members of the Bar, for kindly supplying revised copies of judgments, and writing some of the head-notes... A second volume is in the course of preparation, and will shortly be in the printers' hands. It will be observed that the present volume contains mostly Selangor and Negri Sembilan cases. The judgments in the second volume have been selected principally by Mr. Burton, and Seenivasagam, the Deputy Registrar at Ipoh. That volume will include a number of Perak judgments, and will bring reported cases practically up to date. Whether the work of systematically reporting future judgments will be continued, must depend on the energy and industry of those now connected with the Courts, and of those who will succeed us.

In 1924 a Committee was formed with Sir Lionel Mabott Woodward C.J.C. as chairman to arrange for the reporting of cases. The government undertook to print and publish the reports free of charge. Judges'

26. *ibid.*, iv.

27. Jackson J.C., *Report to the Resident-General for the Year 1896*, McCabe Reay, *op. cit.* n. 23, *ante*, p. 132.

28. Innes, *A Short Treatise on Registration of Title in the Federated Malay States*, Preface.

secretaries were directed to send to the Committee copies of all written judgments delivered by the judges; and Registrars, Deputy Public Prosecutors, and Members of the Bar were invited to send reports and notes of oral decisions.²⁹

The series of the Law Reports of the Federated Malay States began in 1922 with volume 1 and ended with volume 7 published in 1933. A new series of the reports commenced in 1931 under the editorship of Mr. H. C. Willan (as he then was). The first volume was published in 1932 and it also contained cases decided in the courts of Kedah and Johore. The new series cited by the year of the volume ended with the volume for 1941 published in 1947.

Both series of the official reports were published annually and in such circumstances more than a year or two elapsed before the reports of cases decided in the preceding years emerged from the press. During the interval, the practitioners were compelled to search their memories for reference to such cases. An attempt was made in 1926 to publish notes of cases decided in the Supreme Court of the Straits Settlements "designed to enable practitioners to keep abreast of the current decisions" and to bring the attention of the profession as promptly as was practicable to cases which were likely to be of interest when the first number of the "Quarterly Notes" was published under the editorship of Mr. F. G. Stevens. But this useful publication ceased with its fifth number in 1927. A few hitherto unreported cases on specialised subjects are also to be found in de Mello's *Manual of the Law of Extradition and Fugitive Offenders* (2nd ed., 1933) and Dato Sir Roland Braddell's *Common Gaming Houses* (2nd ed., 1932). Sir Roland also reproduces a number of decisions of the Judicial Committee of the Privy Council in *The Law of the Straits Settlements* (2nd ed., 1932) vol. II Appendix, some of which have since been reported. The state of affairs was far from satisfactory. It occurred to the writer sometime in May 1932 that the cause of due administration of justice can best be served by a system of law reporting on a pan-Malayan basis and reports readily (and more frequently) made available to the judiciary and the legal profession with the least possible delay. That would necessitate publication of reports monthly. The idea received considerable and indeed enthusiastic support from the Bench and the Bar alike.

Sir James Williams Murison, the Chief Justice of the Straits Settlements, in welcoming such a publication commented:³⁰

I congratulate you on your enterprise. It will be the first Law newspaper in Malaya and will have the great advantage of presenting to the public full and really accurate reports of law cases heard in the Colony, the F.M.S. and Johore. Accurate reports have hitherto been the exception rather than the rule in Singapore newspapers

29. McCabe Reay, *op cit.*, v.

30. (1932) 1 M.L.J. 1.

for it is not to be expected that any reporter, however competent, can without legal training grasp the technical details which civil cases so often involve.

And equally encouraging was the support the Malayan Law Journal received from Mr. Justice William Huxtable Thorne, the Acting Chief Justice of the Federated Malay States:³¹

The publication of Law Reports in this peninsula in the past has been, for a variety of reasons spasmodic, and has depended very largely upon the keenness and industry displayed by members of the profession from time to time. The development of the peninsula has been of extraordinarily rapid growth resulting in the constant change in the life, both commercial and social, of many of the communities which form its cosmopolitan population. The law has attempted to keep abreast of this growth and change — hence the introduction of a large volume of statute law...In my view the publication of accurate reports of cases in the Courts is of great value to any country, not only as a matter of history but also as an aid to what I regard as the most important part of its good Government, namely, the administration of justice, in that it tends to uniformity. ...I, therefore, welcome the publication of 'The Malayan Law Journal' which should supply a long felt want, and I wish the enterprise all possible success.

In the first number of the Malayan Law Journal in July 1932 the writer set out the objects and reasons of the publication:³²

Almost half a century has passed since the publication of the Straits Law Journal and Reporter was discontinued. Many considerations have made it desirable to revive the issue of a monthly reporter which, it is hoped, will serve to remove the difficulties experienced by the legal practitioners of Malaya. The rapid increase in the number of important judicial decisions during the recent years has necessitated a corresponding increase in the output of legal literature. Under the existing conditions, it will take more than a year before the reports of cases decided in the preceding year emerge from the Press. During the interval, the practitioners will be compelled to search their memories for reference to such cases. Although we have no intention of disparaging in any way the excellent services of the current Law Reports, we feel the inconvenience occasioned by the delay in the production of the same. It is the primary object of this journal to obviate the difficulty just described. Elsewhere in this journal we propose to reserve a separate section for the insertion of articles by specialists on various aspects of the law, which will help to solve intricate points... The scheme of this publication would appear somewhat ambitious, but the support and co-operation proffered by the Bench and the leading practitioners justify the risk we have taken in embarking upon an enterprise of such enormity. Nevertheless, we also count upon the patronage and collaboration of others concerned in the administration of law.

Much assistance was given by the Registrars of the Supreme Courts in affording facilities for collection of materials and by the Private Secretaries to the Judges of the various Courts in supplying copies of written judgments. Valuable assistance was also rendered by an Advisory Editorial Board, the first of which consisted of Messrs. R. Williamson, John Laycock and N. A. Mallal of the Straits Settlements Bar, and the Honourable Mr. S. Veerasamy and Mr. S. Seenivasagam of the Federated Malay States Bar.

31. *ibid.*

32. Editorial, (1932) 1 M.L.J. 1.

During 1933 arrangements were made between the government of the Straits Settlements, the editors of the Straits Settlements Law Reports and the writer for publication of Straits Settlements cases in advance in the Malayan Law Journal in addition to those selected by himself. Under that arrangement those reports were prepared in conjunction with the editors of the official law reports, and such reports were included in the Malayan Law Journal under the heading "Straits Settlements Reports. Published by Authority." This arrangement continued till the fall of Singapore in 1942.

In 1939 the first volume of the Law Reports of the State of Johore was published under the editorship of Mr. J. B. Weiss. That volume contains reports of cases decided in Johore, in both its Supreme Court's original and appellate jurisdictions for the years 1915 to 1937. Cases hitherto unreported are reported in that volume as fully as available material permitted, but where a case had already been reported either in the Federated Malay States Law Reports or in the Malayan Law Journal only a reprint of the headnote with a reference to the existing report is given. It was intended that the series should be continued, but only volume two was published in the following year: then the war years intervened.

The war years also affected the publication of the other series of law reports then existing. In 1942 only the January number of the Malayan Law Journal could be published, at a time when the enemy forces were knocking at the gates of Singapore. When the Japanese surrendered in September 1945 steps were immediately taken to continue publication. The editorial note to the first issue published after the liberation commented:³³

The Malayan Law Journal appears again after four years of suppression. The Editor regrets that the Journal could not be published at a time when perhaps it was most needed; when the rule of law was being replaced by the rule of the Gestapo and of the Police; when the Prisons were becoming death dungeons; when in the Courts the concepts of British Justice were tottering in the balance; and when the tenets of an honourable profession were in grave danger of collapsing... We return again to a world not yet entirely free from war and rumours of war—but to a world in which any individual can breathe freely and meet his accusers without fear. The rule of law has returned and with it the Malayan Law Journal has returned to carry on its work of upholding, explaining and expounding the law and maintaining its high traditions.

The immediate problem the Malayan Law Journal (a private enterprise) encountered on resuming publication was first the increase in the cost of production, and secondly the acquisition of a sufficient stock of good quality paper for printing. To solve the difficulty bi-monthly issues had to be brought out on a number of occasions and only cases of immediate importance were selected for publication, and with hesitation and

33. (1946) 12 M.L.J. i.

reluctance the rate of subscription had to be increased from time to time, inevitable in the circumstances.

The Singapore Law Reports, replacing the Straits Settlements Law Reports, commenced publication post-war, and in 1950 the Malayan Law Reports, by agreement between the Chief Justices of the Federation and Singapore and the Chairman of the Bar Council with the concurrence of the Government Printer of the Federation, came into existence. The plan was to publish monthly the reports of cases decided in the Federation and in Singapore on the lines of the Law Times Reports with yearly index.

In 1954 the delayed and irregular publication of the Malayan Law Reports was the subject of much dissatisfaction and discussion in the Federation Bar Council and the Council decided to explore the possibility of one set of law reports under the editorship of the writer assisted by two small sub-committees in the Federation and in Singapore.³⁴ At the annual General Meeting of the Federation Bar held on February 5, 1955, it was decided that subject to the concurrence of the Chief Justice, the publication of reports should be exclusively in the hands of the Malayan Law Journal; thus a new arrangement came into being, with the assent of the Chief Justice of the Federation, Sir Charles Mathew, who decided that the Malayan Law Reports need no longer be published. The Singapore Bar Committee, after discussing the matter with the Attorney-General and the Chief Justice, felt that separate reporting was more desirable.

The Singapore Law Reports which began in 1946 under the writer's managing editorship ended with the volume for 1949; thereafter it was amalgamated with the Malayan Law Reports; in 1954 the volume for 1953 appeared separately again and the Singapore Law Reports continued till the 1956 volume was published in 1957. In December 1957 it was decided to discontinue the publication of the Singapore Law Reports.³⁵

Diversity of population in Malaya is equally matched by the diversity of laws applicable—Muslim law with its local variations, English statutes, the common law permeating through every system, Indian statutes, Hindu law and custom applicable to a migrant Hindu (even the impact of Hindu law on the right to levy estate duty on the death of a *Karta* or coparcener on Hindu joint family property!), English land law side by side with the modified Torrens system from Australia and the customary land tenures, the law of the *sawalamai* for Ceylon Hindus, customary laws of the Chinese, the applicability of conflict of laws where the legal system within the same territory *viz.* the Malay States and the former Settlements of Penang and Malacca is dissimilar. From the legal practitioner's or student's point of view it is a rich heritage and a cursory glance at a few local reports reveals how wide the scope for legal research

34. Bar Council P.M. Annual Report, 1954.

35. Sir John Whyatt's New Year Message, (1958) 24 M.L.J. iii.

can be and how complicated a character some problems are likely to assume.

The number of reportable cases decided in the Courts in Malaya have grown steadily and it has been found necessary to issue supplements to the Malayan Law Journal to include the cases which have not for one reason or another been reported. Two such supplements have been issued, the Malayan Law Journal 1949 Supplement in 1951 and the Malayan Law Journal 1948-49 Supplement in 1957. In order to meet the need for readily accessible reports of old cases which are still law, the writer has issued two volumes of Malayan Cases, Volume 1 in 1939 and Volume 2 last year. Finally in order to help in the search for and the use of the Malayan case law, the writer produced in 1940 the first edition of the *Digest of Malayan Case Law*. This publication covered all Malayan case law from 1808 to 1939. After the war, he found it necessary to revise the Digest and in 1953 a second edition was published bringing Malayan case law up to 1951. A supplement to this was published last year bringing Malayan case law up to 1957 and in addition the Supplement also contains Malay customary law cases and cases on Muslim law reported in the *Journal of the Malayan Branch of the Royal Asiatic Society* and also cases reported in the Sarawak Supreme Court Reports from 1928 to 1951 and the Sarawak, North Borneo and Brunei Supreme Court Reports for 1952 to 1956.

The Malayan Law Journal now stands alone in the field of law reporting in Malaya and undertakes a grave responsibility particularly after independence was achieved in the Federation of Malaya. To quote Dato Sir James Thomson C.J., "in the year of growth and development a heavy responsibility will lie on the Courts as guardians of the Constitution which is the outward form of the free spirit of the nation. In discharging that responsibility there is need for an accurate and reliable series of reports without which no system of law can be a living thing."³⁶ Sir John Whyatt, the Chief Justice of Singapore, likewise remarked that the discontinuance of other publications will necessitate the assuming of a new and wider responsibility.³⁷ It is difficult to lay down any principle as to law reporting but the writer is content to accept Professor Sheridan's view, "The criterion of a law report must be the likely assistance a case will be to a lawyer giving advice, arguing a case, or giving judgment. ...Waste of paper is better than waste of law"³⁸ "half a crust is better than no bread." Equally one must bear in mind the observations of Lord Justice MacKinnon in *O'Grady v. M. Saper, Ltd.*:³⁹

36. Thomson C.J.'s New Year Message, (1958) 24 M.L.J. ii.

37. Sir John Whyatt, (1958) 24 M.L.J. iii.

38. Foreword to volume 2 of Malayan Cases.

39. [1940] 2 K.B. 469, 472.

This is an appeal from Bow County Court. In my view it is a disastrous example of the results of the misapplied industry of compilers of law reports. A decided case is only worthy of report if it decides some principle of law and it is only deserving of citation in a later case if the same principle of law is involved. Unhappily very many cases are reported unnecessarily, and the practice has arisen, in a case involving no principle of law but purely a question of fact, of saying: "Here is a report of another case rather like this, so please decide it in the same way."

The following is a list of Malayan legal publications and law reports with their abbreviations:

- B.C.G.H. BRADDELL'S COMMON GAMING HOUSES—a commentary on Ordinance No. 45 (Common Gaming Houses) by Dato Sir Roland St. John Braddell, K.B., D.P.M.J., M.A., 1932 published in Singapore.
- B.L.S.S. BRADDELL'S LAW OF THE STRAITS SETTLEMENTS—a commentary by the Honourable Dato Sir Roland St. John Braddell, K.B., D.P.M.J., M.A., in 2 volumes, published in Singapore in 1931-1932.
- De Mello DE MELLO'S MANUAL OF THE LAW OF EXTRADITION AND FUGITIVE OFFENDERS by A. de Mello, 2nd Edn., 1933 printed at the Government Printing Office, Singapore.
- F.M.S.L.R. FEDERATED MALAY STATES LAW REPORTS—published by authority in Kuala Lumpur. These reports were commenced in 1922 and have reached the 7th Volume in the old series and are cited by the volume. The new series began in 1931 and ended with the volume for 1941 and are cited by the year.
- Innes INNES' REGISTRATION OF TITLE—a short treatise on Registration of Title in the Federated Malay States with reports of Cases decided in the Supreme Court under the Land and Mining Laws from 1907-1913, by J. R. Innes, printed at Kuala Lumpur.
- J.L.R. JOHORE LAW REPORTS—published by authority and edited by J. Bernard Weiss, in two volumes.
- JMBRAS JOURNAL OF THE MALAYAN BRANCH ROYAL ASIATIC SOCIETY—published by the Malayan Branch, Royal Asiatic Society. Cited by the year, volume and part. Current publication.
- Ky. KYSHE'S REPORTS—Cases Heard and Determined in Her Majesty's Supreme Court of the Straits Settlements 1808-1890, edited and reported by J. W. Norton Kyshe, printed at Singapore in four volumes.
- Leic. (or S.L.R. Leic.) LEICESTER'S STRAITS LAW REPORTS—being a Report of cases decided in the Supreme Court of the Straits Settlements, Penang, Singapore and Malacca, by Stephen Leicester, printed at Penang, 1877.
- M.A.C. MAGISTRATE'S APPEAL CASES—1884-1893 1 Vol. (Penang).
- M.C. MALAYAN CASES—published by the Malayan Law Journal Office, Singapore. Vol. I, edited by Bashir A. Mallal and Nazir A. Mallal, published in 1939. Vol. II, edited by Bashir A. Mallal and published in 1958.
- MLJ. MALAYAN LAW JOURNAL—a monthly Journal edited by Bashir A. Mallal and published by The Malayan Law Journal Office, Singapore, commencing from 1932; cited by year of Volume. Current publication.
- (1948-49) MLJ. MALAYAN LAW JOURNAL 1948-49 SUPPLEMENT—containing full reports of cases noted in (1949) M.L.J. under *Notes of Cases* and a few hitherto unreported cases. Published in 1957.

- (1949) M.L.J. Supp. MALAYAN LAW JOURNAL 1949 SUPPLEMENT—containing full reports of a few of the cases noted in (1949) M.L.J. under *Notes of Cases*. Published in 1951.
- M.L.R. MALAYAN LAW REPORTS—containing Reports of cases decided in the Federation of Malaya and the Colony of Singapore; published by authority at Kuala Lumpur; commenced in 1950 and ceased publication with Vol. V, 1954. Cited by number of Volume.
- M.U.L.R. MALAYAN UNION LAW REPORTS—published by authority in Kuala Lumpur. These reports comprise of cases decided in the Malayan Union for the years 1946 to 1947, published in two volumes.
- Q.N. QUARTERLY NOTES of cases decided in the Supreme Court of the Straits Settlements published in Singapore by authority; from January 1, 1926 to September 30, 1927; 5 parts in all cited by number of part.
- S.L.J. STRAITS LAW JOURNAL AND REPORTER for the Straits Settlements and Siam, printed in Singapore in four volumes, 1888-1891.
- S.L.R. SINGAPORE LAW REPORTS—published by authority 1946 to 1949 and 1953 to 1956. Ceased publication with the volume for 1956. Cited by year of Volume.
- S.L.R. Leic. See Leic.
- S.L.R. N.S. STRAITS LAW REPORTS, New Series—from July 1891 to April 1892, being the reports issued in connection with Volume V of the Straits Law Journal and Reporter.
- S.S.L.R. STRAITS SETTLEMENTS LAW REPORTS—old series published under the direction of the Singapore Bar Committee, with the approval of the Judges of the Supreme Court; printed at Singapore by Kelly & Walsh Ltd.; commenced in 1893 and ended with Vol. 15. Vol. 9 has an appendix containing Federated Malay States Reports Vol. 1 with separate pagination and Index, but a common title. Cited by the Volume number. *New Series*, published by authority began in 1926 and ended with volume for 1941-42. Cited by year of Volume.
- S.S.L.R. Supp. STRAITS SETTLEMENTS LAW REPORTS, Supplement No. 1—being cases determined in the years 1897 to 1899 by the Court of the Judicial Commissioner of the Federated Malay States; published under the direction of the Committee of the Singapore Bar with the approval of the Judicial Commissioner,
- S.C.R. SUPREME COURT REPORTS—being the Law Reports for the State of Sarawak: pre-war 1928-41 and post-war 1946 to 1951; and Law Reports for the States of Sarawak, North Borneo and Brunei from 1952. Cited by year of Volume. Current publication.
- W.O.C. WOODS' ORIENTAL CASES—a selection of Oriental cases decided in the Supreme Courts of the Straits Settlements collected and arranged by R. C. Woods Jr., printed at Penang 1869 (re-printed by Sweet & Maxwell, Ltd., London, 1911).

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