DICEY AND MORRIS ON THE CONFLICT OF LAWS. 8th Ed. By J. H. C. Morris and Specialist Editors. [London: Stevens & Sons Ltd. cxxv + 1289].

In Chapter I of this book the subject matter of conflict of laws is defined as "[cases] which contain some foreign element." "Foreign element" is treated on page 3, and throughout the book, as referring to non-English law. Questions of jurisdiction, choice of law, and so on are found to depend upon factors such as domicile, the rules of jurisdiction, etc.

The factor which struck me when giving this book an admittedly cursory reading was the fact of its somewhat limited use in Malaysia and Singapore. This is rather surprising when it is considered that there are at least three named systems of law in potential conflict in these two countries: Chinese law, Muslim law and Malay *Adat,* as well as large portions of common law.

While not denying the obvious value of this edition in the traditional conflict field I feel that its limitations in the local sphere should be pointed out. These

limitations may be found to depend upon two factors present in Malaysia and Singapore.

The first is that these countries have had a heritage of English law stretching back one hundred and fifty years. Throughout this period, and indeed at the present, much Court time has been spent in adapting and modifying the principles of common law and English statute.[1]

Secondly, and following from this process of adaptation, there have been conflicts of personal law which have in themselves necessitated compromise both in the inherited English law and in the local personal laws. The important point to note is that this compromise has taken place not only on the basis of English conflict of laws rules but also on other bases. It should also be noted that the "conflict" situation in many cases has not been decided on such principles as domicile, residence and jurisdiction but upon considerations of race and religion where English concepts are quite irrelevant.

The rest of this note will proceed as follows:

(i) On the modifications of English and local laws by means of English conflict principles.

(ii) On other bases of modifications.

(iii) On current Conflict of Laws problems.

PART I — *Modifications of English and Local Laws by means of English Conflict Principles*

The earliest statement on conflict principles is that given by Marshall C.J. in *Chulas* v. *Kolson*[2] where he said:

> . . . their own laws or usages must be applied to them [the Muslims] on the same principles and with the same limitations as foreign law is applied by our courts to foreigners and foreign transactions.

Not surprisingly, conflict modifications have been well illustrated in cases involving Chinese polygamous marriages and in adoptions and legitimations springing from these unions. Taking marriage first, the rule at English law is that capacity to marry is determined by the domicile of the parties at the time marriage takes place.[3] In the nineteenth century Straits Settlements, and indeed well into the twentieth century, many of the parties to marriages were immigrants. The conception of domicile was therefore often applied to determine essential validity (and often to determine formal validity as well). The cases are well known and need no restatement here.[4] The guiding principle to be drawn from these cases seems to be that the Chinese, according to the law of their domicile, are polygamous. The common law in Singapore was, however, clearly to the effect that marriage was a monogamous institution.

Second, in respect of a husband's rights over his wife's marital property the law in Singapore was the common law by virtue of the Married Women's Property Ordinance of 1902.[5] But the courts had held that in regard to a Chinese marriage the husband, who was domiciled in China at the time of the marriage, had no rights in respect of his wife's property.[6]

Third, English conflict rules have been applicable in the fields of legitimacy and legitimation by subsequent marriage. The results of the cases show variations

1. The first Charter of Justice was promulgated at Penang in 1807, the second in 1825 and the third in 1856.
2. Leicester's Reports (1877) 462; and see also Braddell, *The Law of the Straits Settlements* (2nd ed. 1931) at 62-94 when four circumstances in which modification took place are set out. Of these, (iii). on the modifications necessary because of the religious usages of the parties, is relevant.
3. Dicey, R. 31, and see the cases cited in support of this rule.
4. *Khoo Hooi Leong* v. *Khoo Chong Yeok,* [1930] A.C. 346 at p.352; *Khoo* Hoot *Leong* v. *Khoo Hean Kwee,* [1921] A.C. 529; *Cheang Thye Phin* v. *Tan Ah Loy,* [1920] A.C. 369.
5. See C.H. Withers Payne, *The Law of Administration of and Succession to Estates in the Straits Settlements,* (1932) 25 ft.
6. *Lim Chooi Hoon* v. *Chok Yoon Guan,* (1893) 1 S.S.L.R. 72; Withers Payne, *op. cit.* pp. 25-27.

from the strict common law rules of the nineteenth and early twentieth centuries.[7] Oddly enough, the courts here had rejected legitimation by subsequent recognition.[8]

English conflict rules have also been applicable in a large number of cases on Muslim law [9] and also on the law relating to Hindus.[10]

However, these lists of cases, though not exhaustive, do not cover all available mechanisms which have been used to alter and compromise English law.

PART II — *Other Bases of Modification*

These seem to be three in number.

(a) Interpretation of the clause in the Charters of Justice which directs that English law is to be applicable in so far as the manners, customs and usages of the inhabitants will admit.[11]

(b) There is some evidence to show that the courts have applied a test of "reasonableness of custom" which is closely analogous to the reasonableness test used in validating English internal custom.[12]

(c) Finally, principles of "natural justice" have been invoked in several cases. This modifying principle seems to have been confined to cases on Muslim law[13] and Chinese law.[14]

Historically then, English conflict principles do not explain the many compromises which have taken place in the conflict of different laws. It is clear that in those cases where domicile and other notions of English conflict classifications are present then this branch of the law has some applicability. With the separation of Malaysia and Singapore this branch of the law would seem to become even more important than it has been. However, this importance may not be as immediate as could be supposed and the reasons for this are given below.

PART III — *Current Conflict of Laws Problems*

These problems may best be approached through a brief consideration of the following recent judicial decisions and statutory instruments.

(a) *Judicial Decisions*

The first decision with which we are concerned is that given by the Court of Appeal (Singapore) in *Re Maria Huberdina Hertogh; Inche Mansor Adabi* v. *A.P. Hertogh and another.*[15] Here the issue was the validity of a marriage between Maria Hertogh and the appellant Inche Mansor Adabi. The Court proceeded to

7. See *e.g. Re Choo Eng Choon,* (1911) 12 S.S.L.R. 120 and the cases there cited.
8. *Khoo Hooi Leong* v. *Khoo Chong Yeok,* [1930] A.C. 846.
9. *Ghouse bin Haji Kader Mustan* v. *R.,* [1941-42] S.S.L.R. 260 on the Muslim law of guardianship and puberty. *Re Hadjes Ismail bin Kassim,* (1911) 12 S.S.L.R. 74 on the law of India applicable to Muslim wills. *Re Haji Abdullah bin Haji Moosah,* (1911) 12 S.S.L.R. 46 as to the guardianship of an infant. *Re Hadji Daeing Tahira binte Daeing.* [1947] S.L.R. 78 as to a Muslim will. *Mohamed Nor* v. *Hadjee Abdullah,* (1893) 1 S.S.L.R. 58 on the rights of a Muslim married woman. *Mary de Silva* v. *J. M. Yussip,* (1925) 6 F.M.S.L.R. 29 on Muslim guardianship and adoption, *Meeram Lebbaik Maullim* v. *Mohd. Ismail Marican and another,* 2 M.C. (1958) 85 on a Muslim libel. *Re Meh Allang,* [1911] W.O.C. App. II, 2 on the administration of a Muslim estate. *Re M. Mohd. Haniffa,* [1940] S.S.L.R. 249 on succession to the estate of a deceased Muslim who died domiciled in India. *Re Shaik Abdullah bin Ahmad,* [1938] S.S.L.R. 101 on the construction of English and *Arabic* wills and the *lex situs* of immovable property. *Shaik Abdul Latiff* v. *Shaik Elias Bux,* (1922) 1 F.M.S.L.R. 204 esp. at pp. 221-223 on the validity of a Muslim will.
10. *Re Vengadasalem,* [1940] S.S.L.R. 52 on the Hindu joint family. *Hurbajan Singh* v. *P.P.,* [1952] M.L.J. 83 as to the validity of divorce among Selangor Sikhs. *Karpen Tandil* v. *Karpen* (189B) 3 S.S.L.R. 58 on Hindu marriage brokerage contracts. *Maniam* v. *R. Rajoo,* [1958] M.L.J. 145 on Hindu marriage. *Soundara Achi* v. *Kalyani Achi,* [1953] M.L.J. 147, on Hindu law as to separate property and the *lex domicili.*
11. See Braddell, *op. cit.* where he gives a summary of the cases on this point.
12. See *Re Haji Tamby decd.* [1932] M.L.J. 46; *Haleemah* v. *Katijah,* Leicester's Reports, (1877) 383; *Kutai* v. *Taensah,* [1933-34] F.M.S.L.R. 304; *Re Imah decd.* 21 J.M.B.R.A.S. (1948) Part II, 86. (The two latter cases concerned *adat perpateh* land).
13. See *Mong binte Haji Abdullah* v. *Daing Mokkah bin Daing Palemai* [1935] S.S.L.R. 123.
14. See *Carolis de Silva* v. *Tin Kim,* (1904) 9 S.S.L.R. 8.
15. [1951] M.L.J. 164 at pp. 166-167.

determine this on the basis of the girl's capacity to contract, that is, on her domicile at the time of marriage. A problem arose, however, in that although the girl had a domicile in Holland, (*i.e.* following her father's domicile)[16] at the time of the marriage she was in fact a Muslim. Under Dutch law she could not consent to marriage though by Muslim law she was perfectly capable of so doing. The marriage was declared invalid because of lack of capacity at Dutch law.

Derrett in a recent article [17] comes to the conclusion on the basis of Indian cases that the law of the domicile will determine personal law and this law will govern capacity to marry. This seems a reasonable enough compromise. That is, provided that the legislation on Muslim matrimonial matters allows any sort of choice at all. In the respective Muslims' Ordinances and Administration of Islamic Law Enactments, jurisdiction is taken solely on the basis of religious affiliation. Domicile is irrelevant. But in the *Hertogh* case the Court appeared to want to have its cake and eat it too. The law of the domicile, while it was recognised as Dutch law, did not deal with the fact that the Court found Maria to be Muslim, that is a person governed by Muslim law as to capacity to marry. In this sort of situation, it is submitted that a choice must be made between the two conflicting systems of personal law. It is further suggested that English conflict rules do not provide any criteria for making such a decision.

The criteria suggested, at least for Malaysia and Singapore, must be those of the religion and law of the place with which any party to an action is most closely associated at all material times both before and at the time of the commencement of the action. This is quite frankly a pragmatic criterion but it is dictated by the special position which Islam holds in the constitutions of Malaysia and Singapore.

The second case to which I wish to draw attention is *Isaac Penhas* v. *Tan Soo Eng.*[18] The facts of this case are well known and it is cited in Dicey and Morris to support the following propositions:— as to formal validity of a common law marriage; [19] that it is not necessary to celebrate a common law marriage in a church or chapel; [20] that the validity of such a marriage depends upon common law; [21] and on the question of monogamous marriages where one party is a Christian.[22]

This case was concerned to apply the rules of common law marriage to a union which took place between persons having a different set of personal laws as to the validity of marriage. In regard to marriages between two Chinese, more notably in those where a "secondary" wife has been taken, the courts have applied the tests of intention, cohabitation and repute to determine the validity of any marriage.

However, in *Yeow Kian Kee decd., Er Gek Cheng* v. *Ho Ying Seng,*[23] a Chinese secondary marriage was held to exist solely on the basis of consensus, that is on the basis of the English common law marriage. In *Penhas* the Court also found that a common law marriage had taken place and that the evidence showed a "common law" monogamous marriage. How are these two cases to be reconciled? An essential element to any common law marriage is that it is monogamous. On *Penhas* then, where there is a marriage celebrated in Chinese form one of the parties to which is Chinese, its validity is determined by consensus. On earlier authority, if both parties are Chinese then three requirements are necessary.

Again, if *Penhas* is accepted it would seem that the doctrine of common law marriage ought to apply to Chinese secondary marriages. This is absurd. It is not Chinese law and it is certainly not English law.

These two cases show that though English conflict rules are in theory applicable in this sort of situation, they are in fact totally unsuitable.

16. The *Court* relied upon *Ogden* v. *Ogden* (1908) P.D. 46.
17. J.D.M. Derrett, "Private International Law and Personal Laws," 14 *International and Comparative Law Quarterly* (1965) 1370-1375 at p. 1374.
18. [1953] A.C. 304.
19. Dicey and Morris, *op. cit.* at p.233; the facts are given at p.253.
20. *ibid.* at p.240.
21. *ibid.* at p.241.
22. *ibid.* at p.279.
23. [1949] S.L.R. 78; [1949] M.L.J. 171.

The cases which now follow and which involve conflict of (personal) laws situations show where English conflict rules are totally inapplicable.

In *Re Loh Met decd., Kong Lai Fong* v. *Loh Peng Heng,*[24] the Court had to decide how the Chinese law as to marriage could be accommodated to the common law and to local statute. The deceased died possessed of three wives and eleven children (of whom four were ostensibly adopted). He had been brought up a Roman Catholic though he was sporadic in his religious observances. On the evidence of this the trial judge held that the deceased was a person professing the Christian religion under the Christian Marriage Ordinance.[25] On appeal the Court held that he was not a Christian and that being a man of "Chinese race" the provisions of his "customary law" should apply to him. The justification for his assumption (apart from questions of statutory interpretation) presumably being that as there is no such thing as "Christian law" in the same sense as Islamic law, then Chinese law is essentially a racial matter.[26]

It is clear that this is a conflict situation where English rules are irrelevant. Other examples which come to mind are *Roberts* v. *Ummi Kalthom*[27] and *Re Ding Do Ca* [28] on the Christian Chinese and the law of marriage in East Malaysia.

A rather interesting decision is that given by the High Court of Malaya in *Martin* v. *Ummi Kelsom.*[29] This case produced the curious result of a marriage celebrated in Selangor between a woman domiciled there and between a man domiciled in England being held valid even though by her personal law the woman had no capacity to contract. The marriage was celebrated under the Christian Marriage Enactment[30] before a Registrar of Marriages even though under Islamic law the woman could only marry a Muslim. The Court took jurisdiction in the later divorce proceedings on the grounds that at the time of the suit the parties were domiciled in Selangor, that the marriage was celebrated there, and that one party was resident there and one domiciled there at the date of the marriage.

The only question for decision was thus the question of choice of law. The Court in this case seems to have assumed that English conflict principles would apply but it did not specifically decide on the interpretation of ss. 3 and 15(f) of the enactment. The Court decided the question of validity on authority of *Sottomayor* v. *De Barros* (No. 2).[31] This case is totally inapplicable since the incapacity in the present case is one recognised by the law of the domicile. The learned judge's reasoning may be stated shortly as:

(1) The law governing capacity under English conflict of laws rules is the law which the parties choose, or the law which governs the question of formality. There is no authority for this and it cannot be justified in principle.

(2) The High Court of Malaya will not recognise an incapacity of a person domiciled within its jurisdiction, in relation to a marriage within that jurisdiction, provided the marriage would have been valid if celebrated in England. This once again cannot be supported because the reason for the refusal to recognise such an incapacity is based upon considerations of *English* public policy. Section 3 of the Divorce Ordinance 1952 does not direct Malayan Courts to decide an issue as an English Court would decide the issue.[32]

Finally, some mention may be made of *A.G. for Ceylon* v. *Reid.*[33] This case is cited in Dicey and Morris as authority for the proposition that a Christian may contract a valid polygamous marriage if converted to the Muslim faith before that

24. [1961] M.L.J. 234 and see also (1963) 5 *Malaya, L.R.,* pp. 383-387.
25. Cap. 82, Straits Settlements Laws 1936.
26. See further on this, (1963) 5 *Malaya L.R.* pp. 386-387.
27. [1966] 1 M.L.J. 163.
28. [1966] 2 M.L.J. 220 and see also (1967) 9 *Malaya L.R.* pp. 147-152.
29. [1963] M.L.J. 1: see also (1963) 5 *Malaya L.R.,* pp. 388-392.
30. Cap. 109 revised laws of the Federated Malay States 193B.
31. (1879) L.R., 5 P.D. 94.
32. See further (1963) 5 *Malaya L.R.,* pp. 388-392 at p. 390.
33. [1965] 2 W.L.R. 671; [1966] A.C. 720 (P.C.) and see also (1965) 7 *Malaya L.R.* pp. 181-184.

marriage even though he is already monogamously married.[34] The respondent, who was domiciled in Ceylon at all material times, was previously married under the Marriage Registration Ordinance of Ceylon. This Ordinance did not apply to Muslim marriage. The Privy Council in dismissing the appeal grounded their decision on prior Indian cases[35] and also on the fact that since both polygamy and monogamy were recognised in Ceylon then any person domiciled there had the right, by changing his religion, to enter into any one of these two forms of marriage. The Court pointed out that this right was not expressly prohibited by statute. However, this does not deal with the problem of the registration of the earlier marriage and such a situation is right outside the contemplation of the Marriage Registration Ordinance of Ceylon. In an earlier Malayan case having similar facts the respondent was held guilty of bigamy in like circunistances.[36] The Court here, while not denying the the legal recognition of polygamy and monogamy, held that once a monogamous marriage had been concluded then no subsequent polygamous marriage on the basis of conversion was valid during the subsistence of the prior marriage. In this the judge relied upon a *dictum* in *R.* v. *Hammersmith Superintendent Registrar of Marriages*[37] stating in effect that the prohibition against a subsequent polygamous marriage is derived from the status of monogamy conferred by the earlier marriage.

In the context of this note the point is that English conflict rules do not have the necessary machinery for deciding as a matter of principle the position in regard to such "conversion" marriages. Further this is not just a matter of principle alone, since a decision which is valid according to English conflict rules as in *Hertogh's* case may be followed by undesirable practical consequences. Thus the decision in *Hertogh* was followed by several days of rioting in Singapore.

(b) *Statutes*

The position outlined above is not alleviated by the relevant statutes in Malaysia and Singapore. Both countries have civil marriage ordinances under various titles. These ordinances provide for monogamous marriages and specifically exclude Muslims from their scope. Both countries also have ordinances regulating Muslim marriage. The "monogamous" enactments proceed upon the assumption that the parties to a marriage are not Muslim and the legislation has no machinery to cope with conversion. In a similar fashion the Muslim enactmens do not cover conversion to Islam and take as their sole criterion adherence to Islam. Further, in Malaysia, the operation of marriages under Chinese law is still lawful and this adds a third category to possible conflict situations.[38]

Generally the civil marriage ordinances are based on similar English legislation and proceed upon assumptions of domicile, residence and so on. These considerations are irrelevant to Islam but this is complicated by the fact that Muslims may be domiciled or resident in either Malaysia or Singapore. Even more confusing is the possibility of a person converted to Islam and who is already a party to a prior monogamous marriage which took place in (say) Singapore, obtaining a domicile in Malaysia.

Some illustrative sections from The Women's Charter (Ordinance 18 of 1961) Singapore as amended by No. 9 of 1967 will show some of these difficulties. With the exceptions of the restrictions upon polygamy *(i.e.* Chinese polygamous marriages) and extra-judicial divorce, this ordinance is a re-enactment with some amendments of earlier legislative provisions themselves originally taken from English legislation.

The original act of 1961 contained some curious provisions such as s. 3(1) which might have been read to show the Penal provisions of Part X of the Ordinance could be inapplicable to a man neither domiciled nor resident in Singapore who has appeared to commit an offence *(i.e.* not being a Muslim he has married polygamously in Singapore) under the Ordinance. This however has now been amended by s. 3(b) of No. 9 of 1967. Similarly, Part III of the Ordinance on celebration of marriages does not state that (non-Muslim) polygamous marriages cannot be celebrated in Singapore. This also has now been amended in s. 4(b) of No. 9 of 1967.

34. Dicey and Morris, *op.cit.* p.284 and see at p.286 on bigamy.
35. *John Jibban Datta* v. *Abinash Chandra Sen,* 1939 I.L.R. 2, Cal. 12; *Farool Leivers* v. *Adelaide Bridget,* P.L.D. 1958 (W.P.) Lahore 431.
36. *Public Prosecutor* v. *White* [1940] M.L.J. 214.
37. [1917] 1 K.B. 641. See also (1965) 7 *Malaya L.R.,* pp. 95-112.
38. See *Re Ding Do Ca* and *Re Loh Toh Met, supra.*

A more serious consideration however is that concerning the purported exclusion of Muslim marriages from the scope of the Ordinance. In the Ordinance of 1961 s. 3(3) provided that no mariage *one* of the parties to which is a Muslim could be celebrated under the Ordinance. It followed therefore, that such a marriage must be celebrated according to *Shari'a.* But the only form of marriage valid under this law is that between a Muslim male and a *kita biyya* (a Jewess or a Christian female). What then where one of the parties is a Muslim female, or a Chinese "pagan" female?

This has been amended by s. 3(e) of No. 9 of 1967 by substituting the words "both of the parties to which are Muslim." But this does not deal with the situation in the *Reid* case, *supra,* where there is a case of genuine conversion after a prior monogamous marriage. There is thus a strong possibility of a conflict of jurisdiction between the High Court and the *Shari'a* Court. The introduction of the new section 166a (under s. 41 of No. 9 of 1967) providing for registration does not help matters. The position now is that it is possible for a man to appear as married at two different registers. If he gets a domicile of choice in Malaysia, where the *Shari'a* is the same as in Singapore, what law governs *e.g.* questions of nullity or divorce? In this sort of situation is *P.P.* v. *White (supra)* a binding authority? The rules of precedent would suggest that this is so.[39]

CONCLUSION

I hope that it has been shown that English conflict rules are not sufficient alone to explain the following matters:

(1) The historical adaptation of common law in Malaysia and Singapore.

(2) Current problems in conflicts of legal systems in these two countries.

English conflict rules presuppose a situation in which domicile is settled or at least ascertainable. They also presuppose that the foreign legal system is one not unduly affected by such extraneous factors as religion. In addition, the application of conflict rules within the framework of the Charters of Justice of the Straits Settlements seems to have been unnecessary in many cases.

I therefore suggest that the learned editors make provision in the next edition to point out the difficulties in this sort of situation. The passing reference to personal law on page 284 (under Rule 35) is quite inadequate.

Perhaps the editors would like to consider the following suggestions for the solution of this problem.

(i) If the domicile of the parties will determine the personal law applicable *(i.e.* religious law or, in the case of the Chinese, "racial law") and if no hardship or injustice will result from its application, then considerations of domicile are relevant.

(ii) Where the law of the domicile and the personal law conflict, then the latter is to be preferred.

(iii) When the personal law is found to be relevant law, then it should be noted that a further choice between two systems of personal law may be necessary. This further choice may very well be decided on the basis of domicile.

An example of this situation may be found in Negri Sembilan, a State in Malaysia. For certain purposes Malay *adat* is preferred to Islamic law though the party to proceedings is a Muslim and Islamic law has specific provisions on the topic, *e.g.* on the rights of adopted children to inherit. The validity of this adoption may be decided upon domicile of the parties at the time of the adoption. Its formal validity is also a matter for domicile.[40]

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39. See *e.g. Hendry* v. *de Cruz* [1948] M.L.J. 62; *Mohamed Ibrahim* v. *Yap Chin Hock* [1954] M.L.J.

40. See *e.g.* E.N. Taylor, 7 *Journal of the Royal Asiatic Society — Malayan Branch* (1929) Part I, Ch. IV.