PRIVATE INTERNATIONAL LAW AND PERSONAL LAWS:

A NOTE ON THE MALAYSIAN EXPERIENCE.[1]

That part of English law known as Private International Law comes into operation whenever a court is seised of a suit containing a foreign element. This foreign element may refer to one of two things: First, that a suit has a connection with principles of law belonging to a (territorial) foreign municipal legal system. Second, that a suit has a connection with differing principles of law, co-existing within the boundaries of a single territorial state. These laws, which apply to certain defined people only and to certain defined situations only, are generally known as personal laws. The most common example of personal law is religious law which claims exclusive temporal jurisdiction over its adherents in certain matters; Islam is an example of this. In Malaysia, though not in Singapore, there are two further systems of law which have been described as personal. There is first Chinese law or Chinese law and custom. This is taken to apply to all persons of Chinese race and to regulate matters of marriage and divorce, succession, and, to some extent, trusts made either orally or under some form of written instrument. The second is Malay *adat* which applies to certain defined Malays in the states of Negri Sembilan and Malacca and which is almost exclusively concerned with the ownership and inheritance of "customary land" in that state.[2] In addition, both Malaysia and Singapore have a heritage of common law which over the past one hundred and eighty years has itself undergone a process of adaptation and modification. This processs has largely been an accommodation of these various systems of personal law.

The aim of the present paper is to attempt a brief statement as to the means by which this accommodation has been effected, chief amongst which has been the application of Private International Law principles. Some attempt will also be made to point out current problems in this area.

I

THE ADAPTATION OF ENGLISH LAW TO ACCOMMODATE MALAYSIAN PERSONAL LAWS

Apart from Private International Law there seem to have been three bases upon which English law has been adapted in Malaysia and Singapore. We will deal with them briefly as they are incidental to the main

1. "Malaysia" here includes the present states of East and West Malaysia and Singapore. At various points throughout the text these states are referred to separately where this is necessary.
2. There is also a small group of cases relating to the personal law of the Hindu community. These are almost all confined to questions on the joint family ownership of commercial assets in relation to income tax and death duty legislation. The cases are referred to briefly below: see footnote 15.

body of this paper. They must receive some attention, however, because they often appear in the judgments as justifying adaptation either as alternatives to private international law principles or as supports to them, Because of this the *rationes decidendi* are in many cases difficult to state with any degree of certainty.

(a) *The Charters of Justice*

There were three Charters of Justice which governed the legal principles applicable in what later grew to be the colony of the Straits Settlements. The first was granted to the East India Company in March 1807 and set up the judicial administration in the Presidency of Penang. The second was granted to the East India Company in November 1826 and extended the jurisdiction of the Court to cover Singapore and Malacca. The third Charter was granted in August 1855.[3] All three Charters have been held to direct that English law was to be the only law in the various settlements but was to be exercised only in so far as the religions, manners and customs of the inhabitants would permit.[4] The effect of this provision has been to give effect to personal laws in, for example, the interpretation of instruments drawn in English form.

(b) *The Reasonableness of Custom*

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. The earliest case on this point is *Sahrip* v. *Mitchell & Endain*[5] where the indigenous forms of Malay land tenure ("customary land tenure") were left unaltered in Malacca. This system of land tenure, which provided for the payment of a tithe or one-tenth of the total produce, was expressly approved as being a "good and reasonable custom" *(Maxwell C.J.).* The Courts in Sarawak, however, have limited the use of this test by demanding that any custom must be recognised either expressly or impliedly by a Sarawak Ordinance.[6]

(c) *Natural Justice*

This test has been not infrequently used to justify the application of personal laws and, in some cases, to withhold this application. An example of the latter situation is to be found in the case of *Mong binte Haji Abdullah* v. *Daing Mokkah bin Daing Palemai*.[7] This case concerned a breach of promise to marry, both parties to which were Muslim. The

3. Ratified by 18 and 19 Vic. c. 93, s. 4.
4. See *R.* v. *Willans,* 3 Ky. 16; *Fatimah* v. *Logan,* 1 Ky. 259.
5. 1877 *Leicester's Reports* 466. *Journal of the Royal Asiatic Society — Straits Branch,* vol. 14 (1884) Appendix III.
6. See *e.g. Wong Teck Giak* v. *Ting Ni Moi,* 1950 S.C.R. 1 & 39. *Chan Bee Neo* v. *Ee Siok Choo,* 1947 S.C.R. 1.
7. (1935) S.S.L.R. 123; (1935) M.L.J. 147.

Court decided that Muslim law should not be applicable on the ground that its strict provisions were contrary to natural justice and would result in oppression.

The earliest expression of private international law principles appeared in *Chulas* v. *Kolson* decided in 1867.[8] In this decision Maxwell C.J. said:

> . . . their own laws or usages must be applied to them [he 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, private international law 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.[9] 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.[10] The guiding principle to be drawn from these cases seems to be that the Chinese, according to the law of their domicile as understood by the Courts, 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.[11] But the Courts had held that ian regard to a Chinese marriage a husband, who was domiciled in China at the time of the marriage, had no rights in respect of his wife's property.[12]

Third, English conflict rules have been applicable in the fields of legitimacy and legitimation by subsequent marriage. The results of the cases show variations from the strict common law rules of the nineteenth and early twentieth centuries.[13] English conflict rules have also been

8. 1877 *Leicester's Reports* 462. Wood's Oriental Cases (1911) 30.
9. See *e.g.* Dicey and Morris, *The Conflict of Laws,* (8th ed.) 1966, Rule 31 and the cases there cited.
10. *Khoo Hooi Leong* v. *Khoo Chong Yeok* [1930] A.C. 346 at p. 352; *Khoo Hooi Leong* v. *Khoo Hean Kwee* [1921] A.C. 529; *Cheang Thye Phin* v. *Tan Ah Loy* [1920] A.C. 369.
11. See C.H. Withers Payne, *The Law of Administration of and Succession to Estates in the Straits Settlements* (1932) 25 ff.
12. *Lim Chooi Hoon* v. *Chok Yoon Guan* (1893) 1 S.S.L.R. 72; Withers Payne, *op. cit.,* pp. 25-27.
13. See *e.g. Re Choo Eng Choon* (1911) 12 S.S.L.R. 120 and the cases there cited.

applied in a large number of cases involving Muslims [14] and Hindus.[15]

The process of adaptation shows clearly the need for compromise which was forced upon the Courts in Malaysia and Singapore. However, with the post-war increase in the nature and activities of legislative institutions the field for compromise has been restricted and the scope for more open conflict has been increased. This has been paralleled by a diminution in the authority of the Charters which in any case never applied in the present states of Malaya with the exceptions of Malacca and Penang. Traditional private international law has now to operate not only on its own principles and criteria but has also to face the variety of personal laws in their extra-territorial and legislative aspects. With the recent separation of Malaysia and Singapore into two separate states these problems would seem to be aggravated. The outstanding example of these difficulties is to be found in respect of Islamic law, the personal law of all Muslims in Malaysia and Singapore. In both Singapore and in the states of Malaysia Islamic law is now administered in part by special *Shari'a* courts who found their jurisdiction solely upon a religious qualification. There is a clear possibility of a conflict as to jurisdiction between these Courts and the "secular" High Courts of both states in various fields, *e.g.* on the validity of a second marriage after genuine conversion to Islam whilst a first marriage is still in force. This is dealt with in more detail below. We should also note that the Chinese ("racial"?) personal law is also not without its problems. In the following part of this paper we will make some attempt to point out these difficulties and suggest some remedies.

II

CURRENT CONFLICT OF LAWS PROBLEMS

We may best approach these problems through a brief consideration of recent judicial decisions and statutory instruments. In both these cases there have been attempts by the Courts to apply traditional private international law principles. The results have not in all cases been desirable.

14. *Ghouse bin Haji Kader Mustan* v. *R.* [1941-42] S.S.L.R. 269 on the Muslim law of guardianship and puberty. *Re Hadjee 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 binti 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.

15. *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* (1895) 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.*

(a) *Judicial Decisions*

The first decision with which we are concerned is that given by the Singapore Court of Appeal in *Re Maria Huberdina Hertogh: Mansor Adabi* v. *A. P. Hertogh and another*.[16] The background to this decision is as follows: Maria Hertogh had been left in Indonesia during the Japanese advance in 1941. She was cared for and brought up as a Muslim girl by a servant of the respondent. The respondent had managed to trace her whereabouts after the war and attempted to regain custody of his daughter. This was resisted by the girl's foster parent and resulted in an action in the Singapore High Court where the respondent was successful. At the same time, however, the girl was married to the appellant in the present case. Her age at this time was fifteen years. The Court was asked to decide upon the validity of this marriage (which was valid at Muslim law) : the Court found as a fact that the girl was an adherent of the Muslim religion.

However, at Dutch law, the law of her father's domicile, she had no capacity to contract a valid marriage except with certain permissions which had not been obtained. The Court held that as the girl was a minor she had a domicile in Holland, following her father's domicile,[17] and the marriage was therefore declared a nullity. So far as Muslim law was concerned the marriage was valid, considerations of domicile being irrelevant.

Two points arise from this result. The first is that though technically correct it gave rise to undesirable and dangerous consequences. The publication of the decision resulted in several days of rioting in Singapore on the part of the Muslim community and the point of view of this community can readily be seen. The girl after all was Muslim. This leads us to the second point: the Court found that the girl was in fact a Muslim. It also found as a fact that she had a domicile in Holland though she had never been there: the imputing of this domicile to her was thus arbitrary or so it could be argued. The Court has a clear choice and it based its choice upon what it said were the best interests of the child though what these were is not immediately apparent from the report.

The point I wish to make here is that in cases of this sort of face-to-face conflict, the rules of private international law provide no criteria for any choice. In a recent article, Derrett[18] comes to the conclusion on the basis of Indian cases, that the law of the domicile should determine personal law and that this law will then govern capacity to marry. But this does not really solve the problem as the law of the domicile may very well not allow any choice in respect of personal *(e.g.* religious) law. On the other hand, the Muslim legislation in Malaysia and Singapore does not cover the situation of a Muslim who becomes converted to Christianity. If he already has two wives then the law of the church will regard him as married to his first only, and, if he is domiciled in

16. Full reports of this case which also involved issues of guardianship will be found in the following reports: (1950) M.L.J. 214; (1951) M.L.J. 12 and 164.
17. The Court relied upon *Ogden* v. *Ogden* (1908) P.D. 46 at this point.
18. J.D.M. Derrett, "Private International Law and Personal Laws", (1965) 14 *I.C.L.Q.* 1370 at p. 1374.

one of the states of Malaysia, there is no procedure by which he can divorce his second wife. The situation of conversion *from* Islam has not received any consideration.

For these reasons Derrett's solution cannot be effective in Malaysia and Singapore. The criterion suggested for Malaysia and Singapore is to replace in part the notion of domicile with that of the "proper law of the person." That is, the law governing capacity to contract a marriage must be the religion and law (thus the personal law) of the place with which the party to an action is most closely associated at all material times both before and at the time of commencement of the action. This is quite frankly a criterion of convenience. It answers the situation in the *Hertogh* case where the conflict took place within one territorial area with which both parties were connected. It does not answer the situation where one party has a foreign domicile.

This situation, again concerning Islam, is illustrated in *Martin* v. *Umi Kelsom*.[19] It presents the opposite situation to *Hertogh* in that the Muslim in this case was incapacitated by her personal law from entering into a valid marriage. The marriage was celebrated in Selangor (Malaysia) between a Muslim woman domiciled there and a man whose domicile was England. The marriage was celebrated under the Christian Marriage Enactment[20] before a Registrar of Marriages even though under Muslim law the woman had capacity to marry only 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 the problem of which law governed the valility of the marriage. The Court in Selangor assumed that principles of private international law would apply and proceeded to hold the marriage valid.

The question of validity was decided upon authority of *Sottomayor* v. *De Barros* (No. 2).[21] This case however has no application since the incapacity in the present situation is one recognised by the law of the domicile which is also the law of the place of celebration of the marriage. The judge in coming to the conclusion which he did seems to have reasoned as follows:

(i) The law governing capacity under English private international law 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.

19. (1963) M.L.J. 1: see also (1963) 5 *Malaya L.R.* pp. 388-392.
20. Chapter 109: revised laws of the Federated Malay States (1935).
21. (1879) L.R. 5, P.D. 94.

(ii) The High Court of Malaya will not recognise an incapacity of a person domiciled within its 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.[22]

It is submitted that the correct thing to have done in this case would be to have given effect to Sir Jocelyn Simon's statement in *Cheni* v. *Cheni*[23] though this would still not have obviated the clash between the two systems of law. There seems to be no solution to this sort of situation. The points of departure between the two systems of law being so far apart: domicile and secularism on the one hand and religious adherence on the other.

The position, however, in respect of the so-called "conversion" cases is a little clearer. These are cases in which a person who is a party to a valid monogamous marriage becomes converted to *e.g.* Islam and then enters into a second marriage during the existence of the first.

An interesting example of this is *A.G. for Ceylon* v. *Reid*.[24] This decision is cited in Dicey and Morris as an authority for the proposition that a Christian may contract a valid polygamous marriage if converted to the Muslim faith before that marriage, even though he is already monogamously married.[25]

The respondent, who was domiciled in Ceylon at all material times, was previously married under the Marriage Registration Ordinance of Ceylon which does not apply to Muslim marriages. The Privy Council, in dismissing the appeal by the Attorney-General, grounded its decision on prior Indian cases[26] and also on the fact that since both polygamy and monogamy are recognised in Ceylon then any person domiciled there had a right, by changing his religion, to enter any one of these two forms of marriage. The Court also pointed out that this right was not expressly prohibited by statute. Such a situation, however, is right outside the contemplation of the ordinance.

22. These two points are as summarised by Mr. David Jackson in a casenote on this decision: see (1963) 5 *Malaya L.R.* pp. 388-392 at p. 390.

23. [1963] 2 W.L.R. 17 at p. 29. "I believe the true rule to be that the Courts of this country will exceptionally refuse to recognise and give effect to a capacity or incapacity to marry by the law of the domicile on the ground that to give it recognition and effect would be unconscienable."

24. [1965] 2 W.L.R. 671, [1965] A.C. 720 (P.C.). This decision cannot be an authority in Singapore because of statute but may be in Malaysia.

25. Dicey and Morris, *op. cit.,* at p. 284.

26. See (1965) 7 *Malaya L.R.* pp. 181-184.

Two points seem to arise from the situation approved of in the *Reid* case. The first is a technical one as to the registration of marriages. If *Reid* is correct then a person may appear as married on two separate registers, a secular and a Muslim one. In Malaysia this would immediately raise the question as to whether the High Court or the *Shari'a* Court has jurisdiction over any matrimonial proceedings. Thus, for example if both wives wished to bring proceedings against their husband to obtain payment for the support of themselves and their children this would seem to make necessary two separate actions in two courts.

The second point, apart from these practical consequences, goes directly to the fundamental question as to the status of a married person. This was raised in *Public Prosecutor* v. *White alias Abdul Rahman.*[27] This case had substantially similar facts to the *Reid* case and it turned upon the question of the status of a prior monogamous marriage. The Court held that a person who enters into a monogamous marriage relationship acquires by law the status of "husband" and he cannot go through a legally recognised form of marriage with another woman. As in Ceylon, the Courts in Malaysia and Singapore recognise both monogamous and polygamous marriages. In *White's* case the judge relied upon a passage from *R.* v. *Hammersmith Superintendent Registrar of Marriages*[28] to the effect that the *lex loci celebrationis* will determine the character of a marriage.[29] The first marriage in *White's* case was in no sense potentially polygamous. Even if it be argued, as Cheshire does, that the law determining the nature of a marriage is that of the intended matrimonial domicile the decision in *White* remains unaffected.

However, there can be no doubt that Islam in Malaysia does contemplate conversion and provision is made for the registration of conversion in the various state enactments on this. *Prima facie,* therefore, a *White* situation could arise. As was said in *Cheni* v. *Cheni*[30] there are no marriages which are not potentially polygamous in the sense that they may become so by a change of domicile and religion on the part of the spouse. The exact effect then of these two decisions in Malaysia remains doubtful but with the legislative provisions on conversion now in effect some conflict appears inevitable.

The problems raised by Chinese law are different to the extent that no religious question is involved. In addition these problems are now almost certainly confined to Malaysia alone. Legislation in Singapore[31] has effectively prevented the continuance of Chinese customary law.

Before considering recent Malaysian decisions it is useful to have a brief look at the wellknown case of *Isaac Penhas* v. *Tan Soo Eng*[32] in the light of later cases on Chinese consensual marriages. The facts of

27. (1940) M.L.J. 214.
28. [1917] 1 K.B. 641.
29. See also: *Chetti* v. *Chetti* [1909] P. 67. *Maher* v. *Maher* [1951] 2 All E.R. 37.
30. [1963] 2 W.L.R. 17.
31. The Women's Charter (Ordinance 18 of 1961 as amended by Ordinance 9 of 1967).
32. [1953] A.C. 304.

Penhas are wellknown and need no repetition here.[33] This case was concerned to apply the private international law rules relating to common law marriages to a union between a Jewish man and a Chinese woman, celebrated in Singapore by Jewish and Chinese rites. The Privy Council held that as there was consensus to enter into a marriage then the parties had in fact contracted a valid marriage at common law. In respect of marriages between two Chinese on the other hand the Courts have found that the elements of intention, cohabitation and repute are necessary to establish a valid marriage.[34]

There are thus two sets of requirements: where one party only is Chinese then the common law marriage doctrine of consensus applies. An essential element to this is that the marriage is monogamous. On earlier authority, if both parties are Chinese then three requirements are necessary.

However, in *Yeow Kian Kee decd*: *Er Gek Cheng* v. *Ho Ying Seng*[35] a Chinese *secondary* marriage was found to exist solely on the basis of consensus. How is this to be reconciled with *Penhas*? If *Penhas* is accepted then the doctrine of consensus should apply to Chinese secondary marriages. But this is not possible. On the other hand if *Penhas* is rejected then it is not possible to have a valid common law marriage except where one of the parties is racially non-Chinese. This is quite unacceptable.

These two decisions should be read in the light of *Yee Yeng Nam* v. *Lee Fah Kooi*.[36] This decision makes clear that in Malaysia it is possible for Chinese to contract marriages which may be either monogamous or polygamous at inception. It seems from the tenor of the decision that the type of marriage actually existing between the parties is a matter of fact to be proved to the Court's satisfaction. In this case the marriage was held to be monogamous because the parties were married under the Straits Settlements Christian Marriage Ordinance, 1940 which, though it does not provide that a marriage under its provisions is monogamous, enables persons married under it to enter into a monogamous marriage.

The introduction of the adjective "Christian" in respect of Chinese marriages brings us to two recent cases which involve a conflict between two sets of municipal laws. In this situation principles of private international law appear to be almost totally inapplicable.

The first of these is *Re Loh Toh Met: Kong Lai Fong* v. *Loh Heng Peng*.[37] In this case the Court had to decide what law governed the validity of various marriages entered into by a Christian Chinese now deceased. 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

33. It is cited in Dicey and Morris, *op. cit.* as authority on the following points: on the formal validity of common law marriage (at p. 233); on the question of monogamous marriages where one party is Christian (at p. 279).
34. See *e.g. Re Yeo Seng What* (1949) M.L.J. 60 and 241.
35. [1949] S.L.R. 78, (1949) M.L.J. 171.
36. (1956) M.L.J. 257.
37. (1961) M.L.J. 234.

the evidence of this the trial judge held that the deceased was a person professing the Christian religion under the Christian Marriage Ordinance[38] From this the judge concluded that the deceased had been obliged to marry under the Ordinance and in that all his marriages were entered into by Chinese ceremony, none of them was valid.

On appeal, however, the Court held that the deceased was not in fact a Christian and that being a man of "Chinese race" the provisions of his customary law should apply to him. The introduction of "Christian" into this decision is unfortunate and, because of the provisions of the Ordinance, unnecessary.[39] It is the law that a Chinese even if professing the Christian religion can enter into a polygamous marriage by Chinese customary rites. Christianity by itself is no qualification for a state of monogamy. Similarly, the introduction of "race" is also unfortunate. I should guess that anthropologists would not generally classify the Chinese as a race. If the Court makes this a criteria in any decision then it runs the risk in the future of having to determine whether a person of mixed ancestry is a member of the "Chinese race". The Court instead must concentrate upon establishing the personal law of any litigant

One further point arises from this decision. The four adopted children of the deceased failed in their claim for a share in the estate. This was because the Distribution Ordinance 1958, of Malaya, restricts the status of adoption to those persons formally adopted under the Adoption Ordinance of 1952.The Courts have consistently refused to recognise adoptions at customary law among the Chinese in Malaya and this has caused not inconsiderable hardship. The Chinese themselves feel a sense of injustice at this state of affairs.[40]

The second example of this situation is *Re Ding Do Ca.*[41] The issue in this case was whether or not a Chinese who had married under the Christian Marriage Enactment[42] could subsequently contract a marriage under Chinese custom whilst the first marriage was still subsisting. The Court held that he could as there was nothing in the Enactment which corresponded to s. 4 of the Civil Marriage Ordinance[43] which would prohibit such a union *(Thomson L.P.).* In effect the judge refused to equate Christianity with monogamy but instead equated "Chinese" with polygamy.

It is submitted that both equations are wrong and subject to the difficulties of proof outlined in respect of *Loh Toh Met.* The solution appears to force a return to a factual ascertainment of personal law leaving aside as irrelevant race or Christianity. In the case of a Chinese Muslim the position is different. He is subject to Islamic law: the faith includes a legal system. A Chinese Christian, however, is not subject

38. Cap. 82 revised laws of the Straits Settlements (1936).

39. See a note on this case by Mr. David C. Buxbaum in (1963) 5 *Malaya L.R.* 383-387.

40. See Maurice Freedman, "Colonial Law and Chinese Society", *Journal of the Royal Anthropological Institute* (1950) lxxx, 97 at p. 112.

41. [1966] 2 M.L.J. 220.

42. Christian Marriage Ordinance 1956 (Malaya). This is a substantial re-enactment of cap. 109, revised laws of the Federated Malay States (1935).

43. Ordinance No. 44 of 1952.

to "Christian Law": there is no such thing. He is governed by his personal law insofar as this remains effective under statute.

The cases which we have considered show three sorts of conflict situations in Malaysia and, to some limited extent, in Singapore. First, there are conflicts of laws between two territorial states in which principles of private international law have some use. Second, these principles may also be relevant in conflicts within one territorial state, but where their use is in opposition to some system of personal law. Finally, there are situations within one territorial state where they have no applicability.

(b) *Statutes*

The position outlined above has not been alleviated by relevant statutory instruments in Singapore and Malaysia. Both states have ordinances regulating Muslim marriages and in Malaysia, though not in Singapore, Chinese customary law is still a valid system of personal law. In both states there are civil marriage ordinances which proceed upon the assumption of monogamy. However, neither these ordinances nor the respective Muslim's ordinances have machinery to cope with the conversion problems illustrated in *Reid's* case. A glance at the Women's Charter (Singapore, Ordinance 18 of 1961) will illustrate the difficulties which have arisen, specifically in respect of Chinese polygamous marriages.

Muslims were excluded from the operation of this Ordinance and with the exception of the restriction upon polygamy *(i.e.* Chinese polygamous marriage) and extra-judicial divorce, this ordinance is a re-enactment, with some amendment, of earlier legislation originally English. The ordinance was amended in 1967 (9 of 1967) and the amendments were designed to cover some of the awkward gaps in the original legislation.

The original Act of 1961 contained some curious provisions. Thus Part III of the ordinance relating to the celebration of marriages did not state that (non-Muslim) polygamous marriage could not be celebrated in Singapore. When this was read with the original section 3(1) on the application of the ordinance to persons domiciled or resident in Singapore the following situation arose. If "residence" means more than mere physical presence then a man who was careful to keep his domicile and residence in Malaysia could marry polygamously in Singapore. Any children of such a marriage however, would unfortunately be illegitimate. This state of affairs has now been remedied by the amendment of 1967, sections 3(b) and 4(b). Non-Muslim polygamous marriages are now not possible in Singapore.

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 marriage *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 on 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.[44]

Turning now to Malaysian statutes we find a conflict of personal laws situation in one state, Negri Sembilan. In this state there exists a system of land tenure, *adat perpateh,* which is at variance both with Islamic law and with the provisions of the Federal National Land Code of 1965. This land, customary land, is governed by two enactments: the Customary Tenure Enactment[45] and the Small Estates (Distribution) Ordinance,[46] Part III of which applies specifically to *adat* land tenure.

The interpretation of these enactments, especially the Customary Tenure Enactment, has resulted in a series of decisions which indicate not only conflicts of laws but also conflicts of political principles in this state.[47] Apart from political considerations the situation in this state has yet another conflict aspect. This arises from the provisions of section 24(c) of the Small Estate (Distribution) Ordinance. This section makes reference to the *adat* of a district *(luak)* in the ascertainment of particular rules which should govern the devolution of property. This is analogous to the private international law principle that immovables are governed by the *lex situs.*

However, the qualification to succeed to immovables *(e.g.* by adoption) rests upon principles of *adat* which vary from district to district and in which considerations of domicile are irrelevant. Thus, for example, an adoption which is formally valid at *adat* and performed in say, Sungei Ujong will confer a title to succeed to any customary land in Negri Sembilan state except in the district of Rembau. It is not possible to succeed to customary land in this district unless one is the natural daughter of the proprietor.[48] At Islamic law, however, adoption confers no rights of inheritance to any property.

44. See *Hendry* v. *de Cruz* (1948) M.L.J. 62, *Mohamed Ibrahim* v. *Yap Chin Hook* (1954) M.L.J. 127.

45. Cap. 215 revised laws of the Federated Malay States (1936).

46. No. 34 of 1955.

47. See M.B. Hooker, "Precedent, Statutory Interpretation and *Adat* in Negri Sembilan (Malaysia)." *American Journal of Comparative Law,* vol. 16, No. 2 (to appear in June 1968).

48. As is wellknown sons have no right to succeed to such land at all.

III

CONCLUSIONS

The outline presented above has sketched the range and complexity of possible conflicts of laws situations in Malaysia and Singapore. In some of these conflicts, principles of private international law are sufficient to resolve the legal problems which arise. In others these principles are not relevant.

We may summarise the alternatives as follows:

(a) First, there are the "traditional" private international law situations where there is a conflict between two systems of municipal territorial law, either statute or case law. This includes not only conflicts between say, the municipal systems of Singapore and Malaysia, but also conflicts between the laws of the various states within the Federation. For example, consent is a possible ground of divorce in Sarawak though in no other part of the Federation. These conflicts are of course inevitable in a federal system and the rules of private international law provide possible solutions.

(b) Second, the opposite situation arises where there is a conflict between two systems of personal law within one territorial entity: *adat* and Islam or Islam and civil law or (in Malaysia) Chinese law and civil law. Here, private international law is totally inapplicable. Its premises and methods, of domicile, *renvoi* and so on have no place in the determination of any suit. This must be resolved on the premises of the personal law itself or, where statute is involved, on principles of statutory interpretation.

(c) Third, and most difficult, there is the intermediate situation where private international law and personal laws conflict. *Reid's* case, *White's* case and *Hertogh's* case are examples of this. Similarly, a Chinese who has contracted valid polygamous marriages in Malaysia and who gains a domicile of choice in Singapore may enter into a suit giving rise to a similar conflict.

In this situation private international law is of limited use since it provides no criteria for resolving this conflict. It pre-supposes that the foreign legal system with which it is in conflict is one not affected by such factors as religion or race. It also pre-supposes that a foreign system possesses its own body of conflict rules to which reference may be made. Neither of these suppositions is necessarily valid in Malaysia or Singapore.

It is submitted therefore that in such a case of conflict, the rules of the personal law, where these can be ascertained, are to be preferred. This quite frankly is a choice based on convenience though there is some case for its justification on grounds of public policy and natural justice. These can be summed up in the proposition that, in this area, where matters of race and religion are explosive issues the courts should not allow the technical rules of a foreign legal system[49] to withhold the operation of personal laws.

M. B. HOOKER*

49. The law applied in the secular courts of Malaysia and Singapore *is* largely foreign to the bulk of the population.

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