

SOME ASPECTS OF THE LAW RELATING TO TRUSTEES IN THE STATES OF MALAYA AND SINGAPORE

The law relating to trustees in the States of Malaya and Singapore consists entirely of English law as modified by local¹ legislation. The Second Charter of Justice 1826 introduced into the then Straits Settlements of which Singapore was a component part, the common law, equity and statute law prevailing in England in 1826. It has been held that the Third Charter of 1855 and the various court ordinances which followed perpetuated this intent.² Reliance is placed upon the Second Charter of Justice with respect to the recognition of the English law of trustees in Singapore, for though there was subsequently a Civil Law Ordinance which provides for the importation of English law where there are *lacunae* in the Singapore law on specific topics,³ there is no provision importing English law generally. In Malaya, reception of English law generally was a matter of mere judicial practice⁴ with no legislative sanction until 1937. The Civil Law Enactment⁵ of that year then formally endorsed this judicial practice by providing that the common law of England and rules of equity (expressly excepting statute law) as administered in England at that time were applicable in the Federated Malay States subject to any local legislation and such modifications as local circumstances render necessary.⁶ This 1937 Enactment was repealed and replaced by the Civil

1. In this article "local" refers to Malaya and Singapore. In Sabah and Sarawak the law relating to trustees consists of English law received under the Application of Laws Ordinance 1951 (cap. 6) and the Application of Laws Ordinance 1949 (cap. 2) of Sabah and Sarawak respectively, and of such modifications as are provided for by the Trustee Ordinance 1949 of the Federation of Malaya (extended to Sabah and Sarawak by section 2 of the Trustee Investment Act 1965 of Malaysia) and the Trustee Investment Act 1965 of Malaysia.
2. *Ong Cheng Neo v. Yeap Cheah Neo* (1875) L.R. 6 P.C. 381 at pp. 392-4.
3. S. 5(1) Civil Law Ordinance (Revised Laws of Singapore 1955, c. 24): "In all questions or issues which arise or which have to be decided in any Malay State with respect to the law of partnerships, corporations, banks and banking principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance and with respect to mercantile law generally. . . ."
4. *E.g. Kandasamy v. Suppiah* (1919) 1 F.M.S.L.R. 381; *Re Yap Kwan Seng's Will* (1924) F.M.S.L.R. 313.
5. No. 3 of 1937.
6. S. 2(i) Civil Law Enactment, 1937: "Save insofar as other provisions have been or may hereafter be made . . . in the Federated Malay States the common law of England the rules of equity as administered in England at the commencement of this Enactment other than modifications of such law or any such rules enacted by statute shall be in force in the Federated Malay States provided always that the said common law and rules of equity shall be in force in the Federated Malay States so far only as the circumstances of the Federated Malay States and its inhabitants permit and subject to such qualifications as local circumstances render necessary."

Law Ordinance of 1956 which is still in force today. Section 3⁷ of this Ordinance provides for the reception of the common law and rules of equity as administered in England in 1956. Controversy has arisen over the interpretation of this section, more specifically the problem is whether English statute law passed before 1956 has been imported. To date there has been no occasion for judicial opinion on this issue, but academics have argued very vehemently⁸ in favour of the application of pre-1956 English statutes.

Thus in regard to the law relating to trustees, English law as administered in 1956 (including statutes) is, by virtue of section 3 of the Civil Law Ordinance, applicable subject to the three limitations of local legislation, local circumstances⁹ and the non-applicability of English land law.¹⁰

Such local legislation that does exist have been patterned on English States; indeed the main trustees legislation *viz.* the Trustee Ordinance of Malaya¹¹ and the Trustees Act of Singapore¹² are faithful reproductions of the English Trustee Act, 1925. This close adherence to the English statute is perhaps natural as the background of trust and trustee law is English. However, in some instances a more critical attitude might have been more beneficial.

Apart from these pure trustee enactments, there are other local statutes which incidentally also affect trustees. Reference is made in this context specifically to the National Land Code 1965 of Malaysia and the Land Titles Ordinance 1956 of Singapore. These two enactments provide for the registration of titles to land commonly known as the Torrens system of land registration, a method of conveyancing which is alien to English common law. So in the process of applying these statutes to lands subject to a trust, in certain instances, particularly in regard to the vesting of trust lands in trustees, difficulties of a practical nature are raised.

7. S. 3(i) Civil Law Ordinance 1956: "Save insofar as other provisions has been or may hereafter be made by any written law in force in the Federation . . . the Court shall apply the common law of England and the rules of equity as administered in England at the date of the coming into force of this Ordinance. . . ."
8. See L.A. Sheridan, *Malaya and Singapore. The Borneo Territories* (1961) at p. 19; G.W. Bartholomew *The Commercial Law of Malaya* (1964) M.L.J. xvii at pp. xix-xx.
9. S. 3 Civil Law Ordinance 1956: ". . . provided always that the said common law and rules of equity shall be applied so far only as the circumstances of the States and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."
10. S. 6 Civil Law Ordinance, 1956: "Nothing in this part shall be taken to introduce into the Federation . . . any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein."
11. No. 66 of 1949.
12. No. 17 of 1967.

It is therefore proposed in this short article to consider a few of the inadequacies of the local legislation caused by indiscriminate adoption of English provisions and by the inter-relation of the trustee enactments with other local Acts.

II

ADOPTION OF ANACHRONISTIC ENGLISH LAW

The Trustee Ordinance of Malaya and the Trustees Act of Singapore like their English counterpart¹³ confer upon trustees statutory powers of maintenance and advancement. Indeed the local sections are in *pari materia* with those of the English Act, and it is proposed to consider in particular the section providing for the exercise of the power of maintenance to illustrate the point that unnecessary difficulties are heaped on local trustees by verbatim reproduction of English provisions.

Section 33 of the Malayan Ordinance and section 36 of the Trustees Act 1967 of Singapore which are in *pari materia* with section 31 of the English Trustee Act, 1925, provide for the statutory power of maintenance. Briefly the effect is to give trustees power to maintain infants, who have an interest, whether vested or contingent, in the trust, out of the income derived from the trust property. As the money for maintenance is to come out of the income, it follows that the infant in whose favour the power is to be exercised must be entitled to the income. This presents no difficulty where the trust instrument so specifies. But where the settlor did not express any view on this, and if the gift be contingent, the matter is open to interpretation. In England much complex case law has developed on this subject although section 175 of the Law of Property Act, 1925, does to a great extent simplify the position.

The question in regard to Malaya and Singapore is whether English law is applicable, and if so to what extent. In the case of Malaya, there is no doubt that English law as it stood in 1956 would be relevant to determine the matter where the contingent gifts were of personalty.¹⁴ In regard to contingent gifts of realty, however, there may be some doubt as to the availability of English law, which at first blush does appear to be excluded by section 6.¹⁵ There have been many Malayan cases which have held that certain principles of English land law *e.g.* the rule against perpetuities¹⁶ obtain here. However it must be noted that all such cases were decided before 1956 and there was then no legislation comparable to section 6 of the Civil Law Ordinance. To date there has been no authority on the interpretation of that section; but whilst there would be little doubt that in regard to questions of tenure, conveyance of, assurance or succession to any immovable property in Malaya

13. Trustee Act, 1925.

14. Under s. 3(i) Civil Law Ordinance, 1956.

15. S. 6 Civil Law Ordinance, 1956: "Nothing in this Part shall be taken to introduce into the Federation . . . any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein."

16. *Re Yap Kwan Seng's Will* (1924) 4 F.M.S.L.R. 313.

English law is absolutely precluded from being introduced, yet it would appear that on other questions concerning immovable property, English law is not necessarily excluded. Reception of such English law would then be under section 3 with the attendant limitations. It is therefore submitted that English cases (without the benefit of the clarification offered by section 175 of the English Law of Property Act, 1925),^{16a} on the issue of contingent gifts carrying intermediate income would be so admissible.

In Singapore, by virtue of the Second Charter of Justice 1826, English law (except for section 175 of the Law of Property Act, 1925) cover the issue of contingent gifts. Thus in both jurisdictions lawyers are abandoned to the intricacies of English authorities where such is not necessary. A more satisfactory result might have been arrived at had the local legislatures been more circumspect when importing the English statute as *e.g.* in New South Wales. The Trustee Act of 1925-42 of New South Wales cuts through the myriad English authorities by providing that the power of maintenance may be exercised in favour of an infant entitled to an interest (whether vested or contingent and whether or not the contingent interest carries with it the intermediate income) provided that such income is not expressly disposed of by the trust instrument.¹⁷

III

TRUSTEES AND THE TORRENS SYSTEM LEGISLATION

The discussion in this part concerns problems of a practical nature, which would face trustees of land governed by the Torrens system of land registration. Under the general law trustees have a duty to "get in" the trust property; this applies to all trustees whether they be original trustees or new trustees. In order to facilitate matters for new trustees, legislation¹⁸ has been passed providing for the vesting of trust property, including land by means of a simple vesting declaration in the deed of appointment.¹⁹ However, as it will be shown, due to the very nature of the Torrens system of land registration, unless other provisions have been made, such vesting declarations are not sufficient to transfer effectively Torrens system land. It is proposed therefore to consider whether such other necessary provisions exist and if they do, what form they assume and whether such is adequate.

Original Trustees

Section 206 of the National Land Code 1965 of Malaysia and section 27 of the Singapore Land Titles Ordinance, 1956, require every dealing in land under the Ordinances to be in the prescribed form and to be duly

16a. The Law of Property Act, 1925, England being essentially concerned with tenures and interests in immovable property in England would, as a whole, be precluded from being applicable in Malaya by virtue of section 6 of the Civil Law Ordinance, 1956.

17. S. 3(3) Trustee Act New South Wales, 1925-42.

18. S. 40(1) of Trustee Act, 1925, England. S. 41(1) Trustee Ordinance, 1949, (F.M.), S. 44(1) Trustees Act, 1967, Singapore.

19. In the case of a retiring trustee a vesting declaration would be sufficient to divest him of all trust property. S. 41(2) Trustee Act, 1925, England, s. 41(2) Trustee Ordinance, 1949 (F.M.), s. 44(2) Trustees Act, 1967, Singapore.

registered. Thus original trustees must comply with such provisions so as to become registered owners and only on registration would the trust property vest in them.

It may be of interest to note in passing the different attitudes taken by the Malaysia and Singapore legislature with respect to the position of trusts in regard to Torrens system land.

It is a principle of most Torrens systems jurisdictions that "trusts" are kept off the register,²⁰ though such interests may be protected by means of *caveats*. This principle has been faithfully adhered to by the Singapore Land Titles Ordinance.²¹ Section 137 of that Ordinance does allow persons acquiring land in a fiduciary capacity, if they so desire, to be described in the instrument of dealing as such; but it is also clearly provided in the same section that the Registrar shall not enter on to the land register any particulars of the trusts. To further emphasise the point that "trusts" are not to affect the future freedom of dealing²² by the registered proprietor, subsection (2) of the same section²³ states that the description of the registered proprietors as trustees shall not affect the provision²⁴ exonerating purchasers from the effect of the equitable doctrine of notice.

In Malaysia, section 334 of the National Land Code makes it obligatory on the Registrar to describe a person or persons as trustees on the memorial of registration whenever the instrument of dealing so disclose. Further, subsection (3) of the same section permits particulars of the trust to be deposited with the Registrar whenever it has been stated in the memorial of registration that the registered owners are trustees. It may be thought from these provisions that the legislature intended to partially bring trusts upon the register and so to depart from the strict curtain principle.²⁵ However, it must be noted that the Registrar is not obliged to enter an official *caveat* whenever he has cognisance of the existence of a trust.²⁶ Therefore no protection is afforded to beneficiaries of a trust by section 344; they must if they wish to effectively protect their interests enter private *caveats* pursuant to section 322. Fears, that perforation of the curtain which screens off interests other than those which are registered will ensue, may well be unfounded in view of

20. The object is to ensure that the land register shall "not present a picture of legal ownership trammelled by all sorts of equitable rights in others which those who deal with the registered proprietor must take into account." *Per Starke and Evatt JJ. in Wolfson v. The Registrar General* (1934) 51 C.L.R. 300 at p. 308.

21. 1956.

22. Subject to *caveats*.

23. S. 137, Land Titles Ordinance, 1956, Singapore.

24. S. 29, Land Titles Ordinance, 1950, Singapore.

25. *E.g.* ss. 82(2) & (3), Real Property Act, 1900, New South Wales.

26. S. 320 National Land Code 1965.

the provision of section 340²⁷ to the effect that a registered interest shall be indefeasible subject only *inter alia* to fraud. It has been decided²⁸ that mere knowledge of the existence of an unregistered *uncaveated* interest is not evidence of such fraud as to defeat the registered interest. Nonetheless, it may still be asked what is the utility of section 344 especially subsection (3) ?

Vesting on appointment of new or additional trustees and on retirement of trustees out of court

Where a trustee retires leaving the remaining trustees to carry on the trust, or where new trustees are appointed on the retirement of a former trustee or in any other circumstances, it is necessary that the trust property should be vested in the trustees who are now carrying on the trust whether they be the continuing trustees, the newly appointed trustees or the continuing trustees together with the newly appointed trustees.

The methods in which new or additional trustees may be appointed and in which trustees may retire without application to court do not concern us here. It is intended to consider merely the ways in which land subject to a trust may be vested, on such occasions.

In Singapore section 44 of the Trustees Act, 1967, provides for the vesting of all trust property in continuing trustees or new or additional trustees by means of a simple vesting declaration. Where trust property includes land governed by the Land Titles Ordinance, 1956, however, the continuing or new or additional trustees would have to register such vesting declaration. There is no specific provision in the Ordinance for the registration of such vesting declarations, but it would appear that there is provision, *albeit* in a general manner, for this contingency. Section 117 reads:

Whenever by the operation of any Ordinance, either directly or by reason of anything done in pursuance thereof registered land shall become vested on some person other than the proprietors . . . the Registrar shall upon application by that person and upon such evidence as the Registrar considers sufficient, enter in the land register a memorial of registration of the vesting.

In Malaya, section 41 of the 1949 Trustee Ordinance provides for the vesting of trust property excluding land in the then Federated Malay States in continuing, new or additional trustees by a vesting declaration. This exclusion of land in the Federated Malay States is a recognition by the legislature that all dealings with land being then under the Land Code,

27. S.340(1) National Land Code: "The title or interest of any person . . . for the time being registered as proprietors of any land . . . shall subject to the following provisions of this section be indefeasible. (2) The title or interest of any such person . . . shall not be indefeasible —

(a) in any case of fraud or misrepresentation to which the person . . . or any agent of the person . . . was a party or privy; or

(b) . . .

(c) . . .

(Cf. S. 69(3) National Land Code (Penang and Malacca Titles 1963).

28. *Ong Tin v. Seremban Motor Garage* 1 F.M.S.L.R. 308.

1926²⁹ must be executed in the prescribed form and must be registered.³⁰ In the normal sequence of events therefore the retiring trustee must execute a transfer of his share which must then be registered by the new or continuing trustees. Should the outgoing trustee be out of jurisdiction, or for any other reason be unable to execute the instrument of transfer, inconvenience would result. For on such occasion, it may be necessary to obtain a vesting order under section 45 of the Trustee Ordinance, 1949. This vesting order would then have to be registered pursuant to section 420 of the National Land Code.³¹

The method of vesting trust land in continuing, new or additional trustees described above is cumbersome, and where a vesting order is necessary, expensive. Much of this inconvenience and expense can be circumvented by amending section 41 of the Trustee Ordinance so as to render land in Malaya capable of vesting by a vesting declaration and to have a provision in the National Land Code for the registration or entry of such vesting.

It may be pertinent to note that in New South Wales, section 9(3) of the Trustee Act³² provides for the vesting of trust property in continuing, new or additional trustees either by way of the execution and registration of a proper instrument of transfer³³ or by an entry of the vesting by the Registrar-General.³⁴ Section 12 of the same Act then states that any instrument by which a new trustee is appointed or by which a trustee retires or disclaims may itself be registered in the office of the Registrar-General; where such instrument has been so registered and where the land is subject to the Real Property Act, 1900,³⁵ the Registrar-General on the written request of the persons in whom the land is to be vested shall make an entry of such vesting. The advantages of such provisions are obvious.

It should be noted that section 41 of the Malayan Trustee Ordinance of 1949 mentions lands in Penang and Malacca as being capable of being vested in new or additional or continuing trustees by means of a vesting declaration. Whilst this was perfectly in order in 1949, it is submitted that this method of vesting would not be conformity with the mechanism of the Torrens system which is now in force in these two states.³⁶ Section 78 of the National Land Code (Penang and Malacca Titles) Act³⁷ provides:

29. Superseded in 1965 by the National Land Code.

30. S. 55 Land Code 1926, now s. 206 of National Land Code, 1965.

31. See *post* p. 120.

32. 1925-42, N.S.W.

33. S.9(3)(a).

34. S.9(3)(b).

35. The statute introducing the Torrens system of registration in New South Wales.

36. Until 1966 dealings in land in Penang and Malacca were governed by the common law system of conveyancing. But the National Land Code (Penang and Malacca Titles) Act, 1963, which came into operation on 1st January 1966, introduced into these two states the Torrens system of land registration.

37. No. 2 of 1963, Malaysia.

No deed or other instrument creating, vesting or transferring or purporting to create, vest or transfer any holding or interest therein executed on or after the appointed day and not being in a form prescribed by Act or the National Land Code shall be registered under the Act, nor shall any deed or instrument be effectual to create, vest or transfer any such holding or interest.

The meaning of this section would appear to be sufficiently clear to warrant the conclusion that section 41 of the Trustee Ordinance is to this limited extent incompatible with it. There would thus necessarily be a case for an implied repeal³⁸ of the inconsistent provision of the earlier ordinance. However, it would appear that the 1963 Act³⁹ has provided a more convenient and quicker method of resolving the situation. Section 119(1) (a) of the Act enables the Minister to "make such modifications in any pre-existing law in force in the state and relating to land which is not repealed under section 118 as appear to him necessary or expedient for the purpose of bringing such law into accord with the provisions of the Act." It may be said of the trustee Ordinance 1949 as a whole — that it is not a "law relating to land"; nevertheless it is submitted that section 41 of the Ordinance by providing for a method of conveying land in Penang and Malacca, is within the meaning of the phrase "law relating to land" for the purposes of section 119(1) (a).

Vesting Orders

Where a trustee has been removed or where new trustees have been appointed by the High Court under section 45 of the Malayan Trustee Ordinance, 1949, or under section 48 of the Trustee Act, 1967, Singapore may make a vesting order as to the trust lands involved. In regard to all land in Malaya and those lands in Singapore subject to the Land Titles Ordinance, 1956, some entry must be made of such vesting order before the land can vest on the continuing, new or additional trustees. Provision has been made for such entries in the two enactments but different procedures obtain in the two jurisdictions.

Whereas section 420 of the Malaysia National Land Code provides simply for the registration of the vesting order, in Singapore, a more circuitous method has been prescribed. Section 109 of the Land Titles Ordinance obliges the court to adopt the machinery of section 54⁴⁰ of the Trustee Act, 1967, whenever it may decree a vesting order. Thus on such occasion the court must appoint someone to execute a transfer. The order of appointment having been entered on the register⁴¹ the person so appointed may execute the required transfer which must then be registered by the transferee.

38. It should be noted by way of comparison that s.118(2) of the National Land Code (Penang and Malacca Titles) Act, 1963, repeals and substitutes for s. 72(3) of the Probate and Administration Ordinance, 1959, a provision requiring assents by personal representatives to be made in the form prescribed by the Act.
39. National Land Code (Penang and Malacca Titles) Act, 1963.
40. S. 109 Land Titles Ordinance, 1956, mentions s. 51 Trustees Ordinance, 1955, (Revised Laws of Singapore Cap. 34), which was repealed by the Trustee Act, 1967. However as s. 54 of the 1967 Act is, *in pari materia* with s. 51 of the repealed Act, references to the repealed section shall be construed as references to the re-enacted provision: s.15(2) Interpretation Act, 1965.
41. S.103(1) Land Titles Ordinance. 1956.

Death of one of several trustees

Under the general law trustees hold trust property as joint owners. This principle is explicitly recognised by section 345 of the National Land Code, and is not inconsistent with the various provisions of the Land Titles Ordinance.

Thus where one of several trustees dies his interest is destroyed and is absorbed by the surviving trustees, if more than one, equally. Despite the fact that this is not *strictu sensu*, a transmission, and consequently the surviving trustees have nothing to register, yet as “the Register is everything” some notification must be made. In Singapore, section 92 of the Land Titles Ordinance permits the surviving tenant or tenants to apply to have such death notified and “upon proof to his satisfaction of such death the Registrar shall make such entries in the land register as may be necessary. . . .”

In Malaya, however, no provision has been made by the National Land Code for such notification. The question thus arises as to how a similar result might be otherwise achieved. As there are no provisions for positive measures to be taken by the surviving trustees, resort must be made to provisions relating to the powers of the Registrar to cancel matters and entries on the register. Chapter 6 of the National Land Code which deals with cancellation of registration refers expressly to the cancellation of leases, easements and charges only. However it is provided in section 381(1) (b) that

- (1) Where the Registrar is satisfied
 - (a) . . .
 - (b) that any memorial or entry on any document of title or other instrument relating to land relates to a matter which has ceased to be effective,

he may . . . cancel the said memorial or entry.

Like section 117 of the Singapore Land Titles Ordinance, 1956⁴² this section is to be exercised only in the absence of any other provisions. It would appear that one of the occasions when this residual power of the Registrar could be exercised is the cancellation of the name of the deceased joint tenant.

Death of Sole or Surviving Trustee

Under the general law, on the happening of such event, the trust property devolves upon the personal representatives of the deceased trustee until new trustees are appointed.

Thus in regard to Torrens system land, the personal representatives are required to register the transmission. This is provided for in Singapore by section 95 of the Land Titles Ordinance. In Malaya the matter is taken care of by section 346 of the National Land Code.

42. See *ante*, p. 118.

CONCLUSION

In the foregoing only a few aspects of the law of trustees were considered, but they are perhaps sufficient to show that much of the difficulties that do exist result from the lack of appreciation of the exact nature of English law being adopted and of the inter-relation of relevant local legislation.

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