THE EAST INDIA COMPANY AND THE CROWN 1773-1858

INTRODUCTION

The issue of Charters containing legal provisions to the great trading companies, was the primary means of establishing the common law in the various colonies from the seventeenth to the mid-nineteenth centuries. As well as containing a statement of that portion of the common law felt suitable for "export" at that time, the background of the Charters also illustrates one of the most peculiar relationships in English legal history: that which existed between the Crown and the East India Company. It is the nature of this relationship which is the subject of this essay.

For present purposes, the legal history of this area, the East Indies including the Straits Settlements, may be roughly divided into two stages. The first comprises the period from Charles II's Charter of 1661 — the earliest one to provide for the exercise of judicial powers in the English settlements — to the grant of the *Diwani* of Bengal to the Company in 1765. The second stage runs from the Regulating Act of 1773 up until the third (Straits Settlements) Charter of Justice in 1855.

Specifically, the transfer of common law to alien soil appears to revolve around five main topics for consideration.

1. The basis of the Company's territorial sovereignty. This involves two separate questions:

   (a) The distinction between the role of the Company as a trading corporation s*impliciter,* and as a political and executive sovereign.

   (b) The actual transfer of English law into conquered or ceded territory.

2. The definition of "British subject".

3. The conflict between the Courts and the Company as to the former's jurisdiction in executive — mainly revenue — fields, and the territorial extension of this jurisdiction.

4. Conflict between the "Crown Courts" and the Company's "Adauiet Courts" as to their respective spheres of jurisdiction.

5. The extent of the powers of the Supreme Courts in the Presidencies as against the sovereignty of native rulers who were tied to the Company by treaty.

A brief historical review of the period 1600-1765 will commence then with some survey of the relevant constitutional history. This may be taken as beginning with the Charter of Charles II in 1661 (12 Car. 2. c. 4). Under this Charter, the Governor and Council of each factory had the power to "judge all persons belonging to the said Governor and Company or that shall be under them, in all causes, whether civil or criminal, according to the laws of this kingdom, and to execute judgment accordingly." [1] This was in addition to the power to raise revenues for purposes of naval and military defence. Nothing much was done at that time so far as any administration of the law was concerned except that in 1678 it was resolved at Madras that some trials should be held. In 1669, the port and island of Bombay were granted to the Company by Charter, to be held of the Crown in what can only be described as feudal terms; "as of the manor of Greenwich in free and common socage." [2] The provisions of the Charter of 1669 show clearly the transition of the Company from a trading association to a territorial sovereign, vested with powers of civil and military government and (in 1677) power to coin money. Legal administration at Bombay, like that at Madras was limited, and though it appears to have been of frequent exercise there are the allegations usual at this time (and for the next hundred years) of corruption and inefficiency.[3] Under the Charter of 1683, the Company could exercise martial law, it could raise forces and a Court of Admiralty was established. The King also authorised the Company to establish a court of judicature, to be held at such places as the Company might direct and to consist of "one person learned in the civil law, and two assistants," to be appointed by the Company. This court appeared to have civil and criminal jurisdiction within the limits of the Company's Charter. The setting up of this court was actually commenced with the appointment of a Dr. St. John. This man held his appointment under a commission from the King *and* under a commission from the Company

1. C.P. Ilbert. *Government of India* (1907) p. 16.

2. On the relationship between the Crown and Company expressed in feudal terms see also *R.* v. *Shaik Boodin* (1846) 4 Indian Decisions (Old Series) 397 and *Doe Dem. De Silveira* v. *Texeira* (1845) 4 Indian Decisions (Old Series) 529.

   "Indian Decisions" are hereafter cited as Ind.D. The first five volumes of the Old Series contain the following reports:

   Volume 1 — 1774-1846 (Calcutta)
   Morton (Montriou) 1774-1841; Bignell 1830-31; Montriou 1846; Fulton 1835-44; Morton 1774-1841.

   Volume 2 — 1847-1859 (Calcutta)
   Taylor 1847-48; Taylor & Bell, 3 vols. 1848-50, '51, '53; Gaspar's Small Causes 1850-59.

   Volume 3 — 1791-1860 (Calcutta)
   Bulnois, 2 vols. 1853-58, 1859; East's Notes 1791-1819; Caspar's Commercial Cases (Supreme Court) 1851-60; Gaspar's Commercial Cases (Small Causes) 1851-60.

   Volume 4 — 1826-1852 (Bombay)
   Perry's Oriental Cases 1842-1852; Perry's Notes 1826-1847.

   Volume 5 — 1798-1816 (Madras)
   Strange's Notes 1798-1816.

3. C. Fawcett, *The First Century of British Justice in India* (1934) Chapter VIII.

but he never appeared to have had much judicial effectiveness. An unimportant Charter of 1686 merely confirmed the powers and privileges already enjoyed by the Company.

However, in 1687, James II delegated to the Company, the power of establishing by Charter a municipality at Madras. It set up a municipality on the English pattern, complete with Mayor, Aldermen, and Burgesses, and established Mayor's courts having civil and criminal jurisdiction. This was the last of the Stuart Charters and the constitutional history of the Company up to 1688 shows the existence of a body ostensibly for trading and commercial purposes, incorporated and holding joint stock and yet possessing many of the trappings and powers of sovereignty. By a resolution of 1689[4] the Company expressed itself determined to preserve its commercial supremacy on the basis of territorial sovereignty.

In 1698 the old company was induced to surrender its Charter, its corporate capacity was terminated, and its members were admitted into another company which had been constituted not by the Crown alone but by act of Parliament and by letters patent issued in pursuance of the act. This act was 8 & 9, Will. III, c. 44 entitled "An act for raising a sum not exceeding two millions upon a fund for payment of annuities after a rate of eighty pounds *per* centum *per* annum, and for settling the trade to the East Indies."

This act was primarily a financial act and had as its aim the raising of two million pounds by subscription: and under s. 56 the King could incorporate any person or persons who so subscribed and this body corporate should be known as "The general society intitled to the advantages given by an act of Parliament for advancing a sum not exceeding two millions, for the service of the Crown of England and by that name shall have perpetual succession and a common seal." Section 67 of this enactment gave the company powers to make bye-laws for the government of the East Indies trade including powers of imprisonment, fine and impoundings; and these penalties applied not only to the members of the company but also to the use of "general society". Section 77 made provision for the imposition of a duty of five pounds *per* centum *per* annum on all East India lay goods imported, to be paid and used for the maintaining of any ambassadors, etc. which the King should think fit to appoint in the area whose trade was governed by the Company. This provision was continued by 10 Anne, c. 28. The act of 1698 was to be determined after three years' notice, in 1711, and the repayment of two million pounds, but this was restrained by 10 Anne, c. 28 to three years' notice after 1733, and under s. 81 the company had the sole right to trade in the East Indies. This act also provided for the financial organisation of the company, its basis of membership and government.

In 1707 a further act was passed, 6 Anne, c. 3, providing for "the better securing [of the] duties of East Indian goods." It confirmed 9 & 10 Will. III, c. 44, and by a further act, 6 Anne, c. 17, upon the advancement of a further twelve hundred thousand pounds, the company obtained

4. C.P. Ilbert, *op. cit.* pp. 23-24.

an enlargement of the term of their exclusive trade for a further fifteen years. This latter act is especially interesting as it provided for the uniting of two bodies, which were distinct though referred to above as "the company": *viz.* the English company trading to the East Indies, and the company of merchants of London trading to the East Indies. The later advance of £1,200,000 was made by the English company. Section 12 of c. 17 provided for a union of the two companies under the reference-ship of the Earl of Godolphin. The possessions of the old company were transferred to the new one for valuable consideration: and they were principally the island of Bombay, a town and fortress at Madras and another at Calcutta. These three places, of which the property was then in the United Company, were recognised by the Crown in 1726 in Letters Paent of that date, to be British Settlements and under the control of the King.[5]

In 1730 the company was declared in explicit terms, by the statute 3, Geo. II, c. 14, s. 12, to be a perpetual corporation and to be entitled to continue in trade in common with other British subjects if at any time their privilege to exclusive trade should cease. This same section also specifically defined the effect of 9 Will. 3, c. 44 and the Charter given under that act to determine the length and effectiveness of the Company's corporation. (A summary of the internal executive and judicial powers of the Company is given in 3 Geo. II, c. 14 (1730) especially in s. 10).

In 1757 the operation of recovering and protecting the settlement at Calcutta which was undertaken with the assistance of the United Kingdom Government resulted in the cession of Bengal, Behar and Orissa: at the same time the Company found itself involved in the appointment of a new ruler for these areas. By two Charters, 1757 and 1758, the Company, besides having rights to booty and prizes of war, was expressly empowered under the latter Charter to cede, restore or dispose of any territory by way of treaty which had been obtained by the Company during the late hostilities. This latter Charter has been relied upon as one of the foundations of the power of the Government of India to cede territory.[6] It was not until 1765, however, that the Governor and Council at Fort William, on behalf of the Company decided upon their position *vis-a-vis* political involvement in the districts conquered. In that year, mainly through the initiative of Clive, it was decided to assume *de facto* political and financial control of these provinces. This was accomplished by appointing servants of the Company to positions in the provinces where they could control all public affairs including revenue whilst leaving untouched, at least outwardly, the formality of native rule. The grant of *Diwani* of August 1765 left the responsibility for criminal jurisdiction in the hands of the puppet *Nawab.*

This last event had immediate consequences in England including questions as to the right of a trading company to acquire on its own account territorial sovereignty. A committee of enquiry set up by the

5 See Appendix to the *Report on the Affairs of the East India Company* V. Item 26, Enc. 4, p. 120. (1830 — House of Commons).

6. *Lachmi Narayan* v. *Raja Pratap Singh* (1878) I.L.R. 2 All. 1 and *Damodar Gordhan* v. *Deoram Kanji* (1876) I.L.R. 1, Bom. 367.

House of Commons in November 1766 led to the passing of a series of acts in 1767 with reference to Indian affairs; *viz.* 7 Geo. III, c. 48, 7 Geo. III, c. 49, 7 Geo. III, c. 56, 7 Geo. III, c. 57. This latter act was apparently the first direct recognition by Parliament of the territorial acquisitions of the Company.[7] The general tenor of these acts and those of 8 Geo. III, c. 1, and 9 Geo. III, c. 24 of 1768 was to guarantee the Company its territorial revenues on condition of the payment of annuities and taxes to the Exchequer. Up until 1768, it is probable that the exact nature of the relationship between the Company and the Crown was never of great moment to either party but in the period 1772 up until the Company's dissolution this became one of the main topics for both parties and of immediate concern to English legal history.

Three events all accruing at closely spaced intervals conspired to bring this about. The first were the reforms of Warren Hastings providing for the civil, criminal and financial government administration of the conquered districts which were adopted in August 1772. These provided for the setting up of Adalats in the Mofussil with rights of appeal in all cases to Sudder Diwani (Civil Appeals) and Nizamar Sudder (Criminal Appeals) Courts.[8] Second, in the south of India, Hyder Ali harried and defeated English forces in the Carnatic and dictated peace on his own terms, and in the north the great famine of 1770 swept away more than one-third of the population of Bengal. Finally, in June 1772 it was disclosed to Parliament that the Company was over one million pounds in deficit for current expenditure for the three months following. After a report on the Company by a Parliamentary committee in December 1772, the Company was forced to ask Parliament for assistance and Government took advantage of the situation to introduce extensive alterations into the system of governing the Company's Indian possessions. Under 13 Geo. III, c. 64, money was made available to the Company and severe restrictions were placed upon its future financial actions.

However, it is the passing of the Regulating Act of 1773, 13 Geo. III, c. 63 and the new Charter of the Company in 1774[9] which make it possible at this stage to attempt some answers to the five questions put at the beginning of this essay. For reasons which will appear below, the Regulating Act was in many respects unsatisfactory and it was amended in 1781 by 21 Geo. III, c. 70, and it was upon the interpretation of these two acts and the Charter that judicial attention focussed up until Pitt's Act of 1784.

I. The Basis of the Company's Territorial Sovereignty

In this and the following sections the relationship between the Crown and Company is traced through instruments of the legislature, charters and through judicial decisions.

7. *Damodar Gordhan* v. *Deoram Kanji* (1876) I.L.R. 1, Bom. 367,
8. See B.B. Misra, *The Judicial Administration of the East India Company in Bengal,* 1765-1782 (1947).
9. This Charter is described in some detail in Ilbert *op. cit.* pp. 50 ff. The Charter constituted the Supreme Court of Calcutta and remained the foundation of the jurisdiction exercised by the courts until 1861.

The opinions of Ryan C.J. and Grey J., Judges of the Supreme Court of Calcutta, given in 1830[10] provide a convenient starting point. The opinion outlines three possible grounds upon which the territorial sovereignty of the Company might rest. First, that the Company was filling, under the Mogul Emperor, the offices of *Diwani* and commander of the army in the conquered provinces. This apparently was considered a possibility because of the formal grant of *Diwani* in 1765; and as holding in perpetuity the conquered districts with such rights annexed as the former ruler had enjoyed. Second, that the Company had become in fact, the sovereign of the ceded districts. Thirdly, that as a British subject it had obtained them by conquest and treaty and held them on behalf of the Crown. The judges concluded that in the light of Hastings' regulations, and the peculiar reliance of the Company on the Crown and Parliament for its continuance in an exclusive trade, that the first two grounds must fail. They decided therefore in favour of the third.[11]

The judges then went on to conclude that 13 Geo. III, c. 63 seems to have assumed the last of the three possible grounds set out above. It put an end to all questions as to the dependence of the Company on Parliament, and as to the absolute right of the legislature to regulate the territorial powers of the Company. The title of the act itself implied only the establishment of dominion and law over the whole of the newly acquired territory. But there was no formal declaration of the sovereignty of the Crown and the already existing Company and Factory settlements are mentioned distinctly from the provinces at large. However, they went on to point out that the whole civil and military powers of government in the provinces had been in the Company's hands for some time. The Governors, newly mentioned and appointed by Parliament (13 Geo. III, c. 63, s. 7) were directed to exercise these same powers (s. 8). In the course of the debates which preceded the act, the House of Commons had resolved, with reference to the revenue and territorial acquisitions, that "all acquisitions made by treaty with foreign princes did of right belong to the state."[12] Under the powers given to the Company by 13 Geo. III, c. 63, s. 8 they thus remained in Company's hands by will and power of Parliament. In addition, there is nothing in the act which can be construed as conferring or even admitting the outright ownership of these assets by the Company.

On the other hand, four years subsequent to the grant of *Diwani* an agreement was made between the Crown and the Company, to run for a period of five years, and under which the Company was guaranteed the revenue of the conquered territories, upon the condition of paying an annuity. The act of 1773 did nothing to upset these arrangements. It has been suggested, however, that British sovereignty did not run over the provinces but that they were held by the Company as servants of the Moghul Emperor by virtue of *Diwani*.[13] This per-

10. In the Appendix to *The Report on the Affairs of the East India Company* pp. 117-138.

11. It is of course clear that the circumstances of 1765 were not such as had been contemplated by Act 8 & 9 Will. III, c. 44 and its dependent Charter.

12. *Hansard,* May 10, 1773.

13. M.P. Jain. *Outline of Indian Legal History* (1952) pp. 84 ff.

suasion is unsupported by authority and depends upon a literal interpretation of the grant of *Diwani* alone.

In support of the third alternative suggested and justified by Grey J. and Ryan C.J. there is overwhelming judicial authority, This authority not only establishes the fact that the Company was *in law* at all material times acting on behalf of the Crown but also illustrates the principles upon which English law was introduced into the Indies generally.

The general principle as to the introduction of English law by conquest into a foreign states was laid down in 1774 in *Campbell* v. *Hall*.[14],In this case the validity of letters patent under the great seal, purporting to impose an excise tax on the inhabitants of recently conquered Granada was considered. They were held invalid under later constitutional provisions but in the course of judgment the following principles were established. First, that conquered inhabitants once received under the King's protection become his subjects: and second, that a country conquered by British arms becomes a dominion of the King, and therefore necessarily subject to the legislature. Lord Mansfield cited in support *Calvins Case*,[15] the Statute of Wales, 12, Ed. I, and the statutes of Ed. III, relating to the conquest of parts of France.

Ryan C.J. and Grey J. had no difficulty in deciding that *Campbell* v. *Hall* was relevant authority in the present case on the ground that the three provinces were conquered and ceded through the Company for the Crown.[16] However, a summary of the relevant judicial decisions shows that the position was by no means as clear as the judges thought. This question arose directly in the case of *Commaul al Deen Ali Khan* v. *Goring* [17] decided in 1777. It was held that on the conquest of Calcutta in 1757 it became subject to the law of England, and that sovereignty of the territory lay in the King. However, Impey C.J. said that the Company was merely *Diwani* though he admitted that *de facto* territorial government lay in the Company. Hyde J. dissenting, said that the Company cannot be sovereign alone and was also prepared to ignore the formal effect of *Diwani.* Both judges apparently recognised a distinction in function in the Company as to its respective trading and political roles.

In 1793 in the case of *Nabob of Arcot* v. *East India Company*,[18] it was held that a bill could not be maintained by a sovereign prince of India against the Company to account for monies had and received since the subject was a matter of political treaty between the parties as independent sovereigns and was thus not amenable to municipal regulation. The report does not show what meaning the court here attached

14. 98 E.R. 1045.

15. Co. Rep. 17b.

16. This was despite the formal grant of *Diwan* in 1765. It seems clear from the general terms of 13 Geo. III, c. 63 that the Company was in fact close to being a "statutory corporation".

17. 1 Ind. D. 64.

18. 29 E.R. 841 and 544 (appeal).

to "sovereignty", but in any case the political functions of the Company were clearly distinguished. However, in this last case no mention was made of two earlier cases where the Company seems to have be invested with non-political sovereignty, *viz*., *Doe dem. Rajah Huzzoree Mull* v. *Gossinauth*[19] and *Dutturam Turrufdar* v. *The United Company and Watson*,[20] both decided in 1779. Here a grant of title from the Company was, in certain circumstances *(i.e.* with *pottah)* held to confer a valid title to land.

However, so far as land was concerned it was held in *Doe dem. Savage* v. *Bancharam Tagore*[21] decided in 1785, that land in Calcutta owned by a British subject is real property and its devise must be as required by the Statute of Frauds. In other words not only was the Statute presumed to apply in India, but matters of real property were made to depend upon it, and this assumption is further borne out in *Re Govindo Lalla*,[22] decided in 1801, where the property of a suicide was handed to the company for administration as "the Company here stood .... in the place of the King." Further in *Vencata Runga Pillay* v. *East India Company*,[23] decided in 1803, the Charter of the Company was held possible of construction only within the limits of the enabling act itself. Again in *Murray* v. *East India Company*,24 decided in 1821, the subjection of the Company to Parliament was apparent in that *assumpsit* was to lie upon a bill of exchange against the Company whose power of drawing and accepting such bills was regulated by statute.

However, there appeared to be a significant change of opinion on the part of the Court in the thirty-three years between the *Nabob of Arcot's Case* in 1793 and *Amerchund Burdeechund* v. *East India Company, Elphinstone & Robertson*,[25] decided in 1826, also known as the *Deccan Prize Money Case.* Here it was held (1) that a proclamation by the Company to a defeated enemy must be considered as stating binding terms between the Company and that enemy and that the Company must observe these terms in good faith. (2) That acts of the government, *i.e.* by the Governor-General in Council, are subject to the jurisdiction of the Court. In the following year, 1827, in *East India Company* v. *Syed Ally Habiboon*[26] a treaty between the Company and an independent native state was subjected to the scrutiny of the Court, but more importantly, the Court held that seizure of territory under such a treaty is not valid until confirmed by the Crown. This clear reliance of the Company as territorial sovereign upon the Crown is even more strikingly illustrated in *Bank of Bengal* v. *The United Company*,[27]

19. 1 Ind. D. 1035.
20. 1 Ind. D. 1037.
21. 1 Ind. D. 65.
22. 5 Ind. D. 34.
23. 5 Ind. D. 80.
24. 106 E.R. 1167.
25. 4 Ind. D. 547.
26. 7 M.I.A. 334.
27. 1 Ind. D. 439.

decided in 1831. This was an action brought against the Company as Government of India and not as a commercial concern. This decision finally turned in the Company's favour on the ground that it did not, under the relevant empowering statutes, have any power to do the purported revenue acts. It was also said that the Company had no sovereign character such as to prevent an action being brought against it. However, Ryan J. dissented from the majority and held the Company liable; but in 1830 it is clear that the Company's sovereignty was that of the Crown. Thus in 1836, in *Mayor of Lyons* v. East *India Company*[28] it was held that the extent to which English law is imported into conquered territories is directly dependent upon the acts of Crown and Parliament; these may also show that it was introduced not in all its branches but only *sub-modo,* (this is probably as good a way of describing the introduction of English law as any). Again, in 1843, in *Doe dem. East India Company* v. *Harabi*,[29] it was held that the Company was the proprietor of waste lands in Bombay.

In *Dhackjee Dadajee v. East India Company*,[30] decided in 1843, the question for the Court was the interpretation of 21 Geo. III, c. 70, s. 1; it was held that any action might lie against the Company as a corporation, if it is acting in its political capacity, the court citing in support *Mostyn* v. *Fabrigas.* The *Bank of Bengal* Case was distinguished on the ground that it was prior to act 3 & 4 Will. IV, c. 85. On appeal in *Dhackjee's* Case, it was held that after the passing of the Charter Act, 3 & 4 Will. IV, c. 85 in 1833, the Company no longer had the character of a trading company and acted solely as a public trustee vested with the powers of government, and it was therefore not liable for acts done by its servants. This distinction between the various functions of the Company was again adverted to in the following year in *Ramchund Ursamul* v. *Glass*,[31] where some of the difficulties of the legislature having treated the Company merely as a trading corporation were discussed. Again in *A.G.* v. *Richmond*,[32] decided in 1845, the Court treated the Company's interests and those of the legislature as identical especially in view of 3 & 4 Will. IV, c. 83 and it again drew a distinction between the sovereign powers and trading rights of the Company.

One of the most interesting decisions in this area is *R.* v. *Shaik Boodin*,[33] where the acts of (political and executive) sovereignty on the part of the Company were traced to the Charter of Charles II in 1661. These powers were essentially feudal, said the Court, and it was upon their authority that Clive and Hastings acted in 1769 and 1772. In view of the importance of the Regulations of 1772, this proposition needs to be more firmly based than the report in this case shows but at least the further statement that the Company was given legislative

28. 1 M.I.A. 108.

29. 4 Ind. D. 439.

30. 4 Ind. D. 587 and 313 (appeal).

31. 4 Ind. D. 329.

32. 4 Ind. D. 516.

33. 4 Ind. D. 397; decided in 1846. See also *Doe Dem. De Silveira* v. *Texeira,* 4 Ind. D. 529 (1845).

powers by the act 13 Geo. III, c. 63 of 1773 is probably true, especially taken in conjunction with the Charter of 1774. It was also decided that the judges of the Company's Courts in the Mofussil were subject to the judicial regulation of the Crown courts and that 21 Geo. III, c. 70 laid down the principles of judicial responsibility.

The following three cases all illustrate the hitherto hazily expressed effect of the Company's regulations in embodying English law, not only in the Presidencies but also in the Mofussil. In *Storm* v. *Homfrey*,[34] decided in 1850, it was held that the law of the Mofussil is the *lex loci* as modified by the Regulations of the East India Company, the only exception being that if real property is in litigation, even if situated in the Mofussil, then English law must apply insofar as it has been introduced. En *Doe dem. Sibchunder Doss* v. *Sibkissen Bonnerjee*,[35] decided in 1854, the Court specifically approved Regulations III, 1793, and II of 1805 as being in accordance with English law. Again, in *Varden Seth Sam* v. *Luckpathy Royajee*,[36] the same approval was given to Regulation II of 1802, which provided that where no local law applied then English law must apply (s. 17). In *Musleah* v. *Musleah*,[37] decided in 1856, it was held (1) that the law of England had been introduced into Calcutta with such modifications as attend its introduction into any settlement and in particular the modifications imposed by 21 Geo. III, c. 70, s. 21. (2) The descent of real property in Calcutta from any person other than a Hindu or Muslim is governed by the English law of of inheritance as the *lex loci situs* and (3) where English law is administered in the Mofussil in relation to land, it is subject to variations as to local law and custom. In *Ousley* v. *Plowden*,[38] decided in 1857, a general statement was made to the effect that the territory governed by the Company is, and has always been, subject to the legislature. In *Lachmi Narayan* v. *Raja Pratap Singh*,[39] it was held (1878) first, that the Court has power to cede territory in British India to a foreign prince and second, that an act of the Company to this effect is an act of the Crown, since it is from the Crown that the Company gets its authority.[40]

II. The Definition of "British Subject"

The case of *A.G. of Bengal* v. *R.S. Dossee*,[41] decided in 1863, provides a useful link between the history of the introduction of English law into India, and the territorial sovereignty of the Company on the one hand, and the closely related problem of who were in fact the subjects of common law. That is, was it confined to British subjects and if so,

34. 2 Ind. D. 466.

35. 3 Ind. D. 42.

36. 9 M.I.A. 185.

37. 3 Ind. D. 140.

38. 3 Ind. D. 87.

39. I.L.R. 2 All. 1.

40. See also, *Damodar Gordhan* v. *Deoram Kanji,* I.L.R. 1, Bom. 367.

41 9 M.I.A. 235.

how was this phrase to be interpreted? *Dossee's Case* gives a statement of general principle that English law travels with all colonists, and applies to all members of their own community. The history and refinements of this principle in India, as shown by the cases, runs as follows.

The first point to note, is that in the Charter of 1774 writs in the King's name were directed to be issued in every part of the provinces of Bengal, Behar and Orissa. In addition, the act of 1773, in conjunction with the Charter, created some difficulty between the Company and the Supreme Court, the main source of friction being the claim of the latter to exercise complete jurisdiction over the whole of the native population to the extent of making them plead jurisdiction if a writ was served on them. Section 14 of the statute provided for the extension of jurisdiction to "British subjects", and in defining this term the Courts of the King and the executive of the Company by no means always saw eye to eye. So far as writs were concerned, it was held in 1775, in *R.* v. *Warren Hastings*,[42] that the court had no general power to issue writs of *mandamus* though the court was evenly divided in this question. Hyde and Lemaistre JJ. thought that this power was conferred by Clause 38 of the Charter of 1774 and also by 13 Geo. III, c. 63, s. 13, but Impey C.J. and Chambers J. were of opposite opinion.

So far as the definition of "British subject" is concerned it is unnecessary and tiresome to consider in detail all the reported cases from 1774 up until 1850 on this topic as an adequate historical summary will be found in *Re Ameer Khan*,[43] decided in 1870. Before going on to consider this case however, the position of non-English Christians should be examined. This class of persons comprised mainly Armenian traders.[44] Under a deed poll, or rather a series of deed polls dated June 1688, Armenians were specifically given the same rights and privileges in trade and residence for India as any other [English] "freeman". In *The Goods of Phanus Johannes*,[45] decided in 1790, the court was called upon the administer an Armenian estate situated out of the jurisdiction, the late owner of which had also died out of jurisdiction. The court found itself able to order administration on three grounds. First, that the deceased Armenian belonged to a body of Christians who considered themselves "as residing under the protection of the British Government." Second, that this construction of the Charter of 1774 so as to include Armenians within the jurisdiction was one admitted in practice. Third, that these men must be considered British subjects under the terms of the deed poll alluded to above. In the following year, this decision was followed in *Re Cachick*,[46] and in 1796 in *Padre Stephanus Aratoon* v.

42. 1 Ind. D. 1005.

43. 6 Bengal L.R. 392 at 442 ff.

44. These people were independent traders separate from the Company. Their rights to trade and reside in India at this time provide the only example of non-Company activity.

45. 1 Ind. D. 10.

46. 1 Ind. D. 960.

Sarkies Johannes and the Cross Libel.[47] The court found itself able to exercise jurisdiction on the further ground of the necessity for ecclesiastical jurisdiction to be extended so far as possible even in relation to matters of jurisdiction not specifically mentioned in the enabling statutes or charters.

Ameer Khan's Case, in respect of "British subjects" turned upon s. 36 of 13 Geo. III, c. 63. The point at issue concerned the applicability of *habeas corpus* proceedings to a native of Calcutta, and the court said that within the area of the Presidency, Fort William, the provisions of the statute and the charter apply to native inhabitants as well as to Englishmen given the factor of residence.[48]

However, there appear to have been some limits to the scope of the term "British subject", the main one involving the status of foreigners, which did not include Armenians. In *Prinsep* v. *Fairie*.[49] decided in 1783, a French subject taken prisoner of war by the British was held not to be a "British subject"; similarly in *Mandeville* v. *Da Costa*,[50] decided in 1802, and *Walter* v. *Desanto*,[51] these persons, even though born in the territories of the Company, were held not to fall within 13 Geo. III, c. 63, s. 30. The courts also had some reservations as to inhabitancy alone constituting a "British subject" within the meaning of 13 Geo. III, c. 63 and 21 Geo. III, c. 70. In *Manickram Chattopadhia* v. *Meer Conjeer Ali Khan*,[52] decided in 1782, Impey C.J. was disposed to draw a distinction between two sorts of British subjects, those indictable for taking more than twelve per cent interest on loans and those not. It should also be noted that in 21 Geo. III, c. 70, s. 24 the terms "native" and "British subject" are expressly contrasted. In a later case, *De Rozio* v. *Chatgeer Gosain*[53] it was held that birth in Calcutta before

47. 1 Ind. D. 12.

48. See further: *Anonymous Case* (1777) 1 Ind. D. 947: *Killican* v. *Juggernauth Dutt* (1777) 1 Ind. D. 946 where jurisdiction arises *inter alia* (1) if a party is born in Calcutta, (2) is a settled inhabitant: *Bux* v. *Alley Gawny* (1782) 1 Ind. D. 64: *Manickchund Tagore* v. *Johnson* (1785) 1 Ind. D. 954: *Wyatt* v. *Grant* (1789) 1 Ind. D. 960: *Chalunnal* v. *Garrow.* 1 Ind. D. 20: *Punchanund Boise* v. *Davision* (1812), I Ind. D. 968: *Ramalingum* v. *Sashian* (1813) 5 Ind. D. 274 where it was held that inhabitancy in regard to natives subject to the jurisdiction is a question of law: *Ram Narrain Tauker* v. *Chederaula Nursiah* (1815) 5 Ind. D. 297 where inhabitaniy was equated with residence: *Madoo Wissenauth* v. *Baloo Gunnasett* (1818) 1 Ind. D. 968: *Jannokee Doss* v. *R.* (1837) 1 M.I.A. 42 where though residence was out of the jurisdiction, it was held that the commission of an act within the jurisdiction was sufficient to attract liability: *Akeenah Banoo* v. *Moonshee Boo Alley* (1840) 1 Ind. D. 1031: *Tucket Roy* (1858) 3 Ind. D. 217. The court approved Lord Brougham's *dictum* in *Warrender* v. *Warrender* 9 Bligh's N.S. 119 and the decisions in *Somerset* v. *Stewart,* Lofft's Rep. 1 and *Campbell* v. *Hall* 98 E.R. 1045. It is also interesting to note that the *Habeas Corpus* Act, 31 Car. II, c. 2, was extended, at least in its general part, to the Fort William presidency.

49. 1 Ind. D. 953.

50. 5 Ind. D. 73

51. 2 Ind. D. 870.

52. 1 Ind. D. 957.

53. 1 Ind. D. 958; decided in 1789.

1757 did not bring the person involved within the term "H.M. subjects" used in 13 Geo. III, c. 63, s. 16 and clause XIII of the Charter of 1774. Further, the son of a native woman and a British born father, born out of wedlock, is not a "British subject" in terms 13 Geo. III, c. 63.[54]

The question as to the extent of writs running, adverted to briefly above, is one of the keys to the definition of "British subject", especially in its relevance to executive acts of the Company in the provinces. Under 13 Geo. III, c. 63, s. 14 and clause XIII of the Charter the jurisdiction of the Court in civil cases is defined as extending to all British subjects residing in the provinces and persons employed in the service of the Company. Criminal jurisdiction extended to the same classes of persons.[55] Thus in *R.* v. *Clark*,[56] verbal evidence of being in the service or employ of the Company was sufficient to establish jurisdiction. There is some doubt as to whether a foreigner in the Company's service was also similarly affected. In *R.* v. *Francisco Jose* [57] it was held that such a person indicted for an offence committed beyond the provinces was not subject to the jurisdiction but Dunkin J. dissented, citing 13 Geo. III, c. 63, s. 14, and clause XIII of the Charter. However, in *Janardanah Roy* v. *East India Company and Munro* [58] it was held that the jurisdiction will run outside the provinces to compel a British subject, the servant of the Company, to answer a claim against him in his capacity as Company's servant.

Act 21, Geo. III, c. 70, s. 19 empowered the court to frame process against the natives of the provinces, and by s. 3 of this act, the court retained full and competent jurisdiction in its powers as a court of record, so notwithstanding the decision in *R.* v. *Warren Hastings*[59] which was a case in which the judges were equally divided, the right to issue writs, especially of *habeas corpus* remained in the court.[60] In addition, in clause IV of the Charter the judges were to have the powers of judges of the court of King's Bench.[61]

A final difficulty occurs however in the construction and effect of 21 Geo. III, c. 70, s. 1, which provides that the Governor-General and Council shall not be subject to the jurisdiction of the Supreme Court for acts done in their public capacity. This raises the question of the status of the Company itself, as a British subject, especially in view of the provisions of clauses XIII and XV of the Charter. Macnaughton J.

54. *Byenaut* v. *Reed,* 3 Ind. D. 792, decided in 1821.

55. Clause XIX of the Charter (1774) and 13 Geo. III, c. 63, s. 17.

56. 1 Ind. D. 1012, decided in 1791.

57. 1 Ind. D. 1013 decided in 1797.

58. 5 Ind. D. 336, decided in 1816.

59. 1 Ind. D. 1005.

60. See also *Re Ameer Khan,* 6 Bengal L.R. (1870) 392.

61. See also *Re Coza Zacharia Khan,* 1 Ind. D. 1043. It should be noted that so far as prerogative writs were concerned the term "British subject" included persons outside the categories of resident or British born, see *Rajah Mohinder Deb Rai* v. *Ramcanai Cur* (1794) Smoult's Orders 148.

in *Jacob Joseph* v. *Rowand Roland*[62] considered this question (at p. 83 of the report) and he came to the conclusion that the Company is distinguished from other British subjects in that it is open to much higher penalties in execution against its goods, and further, that from clause XXXIV of the Charter, this distinction is quite clear.

Finally, there was the *Cossijurah Incident* (1779-80) which shortly preceded the amending act 21 Geo. III, c. 70 in 1781. This case arose out of an attempt by a sheriff of Calcutta to arrest the Zemindar of Cossijurah for non-payment of a debt due for payment through the Calcutta Board of Revenue. The sheriff, who was acting under process of Court, was prevented from so doing by armed troops dispatched for this purpose to Cossijurah by the Governor-General and Council. Stephen suggests that the net result of the whole affair was that the jurisdiction of the Court outside Calcutta was destroyed by military force in the face of the Regulating Act (13 Geo. III, c. 63)[63] Whatever the motive, it is probably true to say that the exercise of a purported jurisdiction was made inapplicable by the Company's action. It should also be noted that in *R.* v. *Monisse*[64] a writ of *Habeas Corpus* was granted against the Nabob to release persons (natives) improperly imprisoned by him. Further, it was held in *Ousley* v. *Plowden*[65] that any person who at the time of committing a trespass was in the employ of the Company and who had been resident in Bengal was subject to the jurisdiction of the court.

III. Jurisdiction

The third question outlined at the beginning of this Note — the conflict between the Courts and the Company as to the latter's jurisdiction in executive — mainly revenue — fields and the territorial extension of this jurisdiction, has been mentioned at least by implication in the discussion of the two questions which have gone before. The main heads of difference were:

(i) The claim of the court to subject the native population to the jurisdiction of its writs (see above);

(ii) The claims to jurisdiction by the Court over English and native officers of the Company employed in the collection of revenues, for corrupt or oppressive acts done by them in their official capacity;

(iii) Claims by the Court to try judicial officers of the Company for acts done in the supposed execution of their duty.

As to (ii) above, the Company was compelled to admit the jurisdiction of the Court[66] but under the act of 1781, 21 Geo. III, c. 70, s. 8, the Court was to have no jurisdiction concerning matters of revenue or any

62. 1 Ind. D. 69, decided in 1818.

63. Sir James Stephen, *Nuncomer and Impey* (1885) ii, p. 217.

64. 5 Ind. D. 216.

65. 3 Ind. D. 87.

66. 13 Geo. III, c. 63, ss. 1-6.

act done in the collection thereof. Further, the Governor-General in Council was empowered "from time to time to frame regulations for the provincial courts and councils." These regulations might be disallowed by the King in Council but were otherwise to remain in force for two years.[67] The act of 1773 made such regulations registerable in the Supreme Court, and thus effective only with the consent and approbation of the Court, 13 Geo. III, c. 63, s. 36. The extent of the jurisdiction of the Court as to revenue matters remained for some considerable length of time uncertain. In *Doe Dem. Rada Govind Sing* v. *Juggessore Mustabee* [68] it was held that the act of 1781 clearly ousted the jurisdiction of the Court. The case involved an action by the lessor of the plaintiff who had been turned out of his land on the pretence of being in arrear in the payment of revenue to the Government. However, the Court was not always so compliant and in 1791, in *Ramcaunt Mundil* v. *Colebrook*,[69] the Court stated that in an action against the Collector of the Company, it would issue process as of course without inquiry as to whether the act done was in fact a revenue matter. In *Vencata Runga Pillay* v. East *India Company*[70] it was said that for jurisdiction to be excluded in revenue matters, the cause of action must relate immediately to revenue and not be consequent or argumentative. In *Budden Soorye* v. *D'Oyley*[71] the Court said that notwithstanding that 21 Geo. III, c. 70, s. 8 and 37 Geo. III, c. 142, s. 11 deny the Court jurisdiction in revenue matters, it could still look to the revenue laws of the presidency and inquire whether property was rightfully withheld from a plaintiff on the basis of those laws. However, in *Doe dem. Peareemony Dosse v. Bonnerjee*,[72] the Court refused to accept want of jurisdiction under s. 8 though, since in this case the land in question was not sold for arrears of revenue, the Court's action seems justified. However, a sale by the Collector of Revenue on a written authority from the Board of Revenue and a conveyance to the purchaser by the Collector was held to be no defence against the title of the lessors of the plaintiff in ejectment. Finally, in a later case in 1850, *Spooner* v. *Hurkissondass*[73] the Privy Council stated the effect of s. 8 to be exclusive, if the Collector had acted in good faith.

As to (iii) above, — the claim by the Court to try judicial officers of the Company for acts done in the supposed execution of their duty, — this may be considered together with the fourth question, the conflicting claims as to jurisdiction between the Crown Courts and the Company Courts, the latter being the results of Hastings' recommendations of 1772. The conflict here was almost immediate following the act of 1773,

67. 21 Geo. III, c. 70, s. 23.

68. 1 Ind. D. 950, decided in 1782.

69. 1 Ind. D. 961.

70. 5 Ind. D. 80.

71. 3 Ind. D. 889, decided in 1819.

72. 1 Ind. D. 403.

73. 4 Ind. D. 351, and 358 (appeal).

and appeared first in the celebrated *Patna Incident* (1777-1779).[74] Here the Court awarded damages to a native plaintiff in an action against the Patna Provincial Council acting in its judicial capacity. Impey's judgment in this case was one of the grounds of impeachment against him.[75]

The remarks of Impey C.J. in *Grand* v. *Philip Francis*,[76] decided in 1779, provide in a very summary form some idea of the relations between the Court and the Company at that time. This action arose to enforce the attendance of witnesses and Impey C.J., in stating the power to enforce attendance under the Charter, said that the powers he had were greater than those of a Court in England because in Bengal the patronage and influence of the Governor-General and members of the Council was of such a nature so as to necessitate these powers. The defendant in this case was a member of the Council. The *Cossijurah* and *Patna Incidents* already mentioned provide early illustrations of this conflict, and of the later cases, two only need be mentioned here. First, *Dhackjee Dadajee* v. *East India Company*,[77] decided in 1843. At first instance the Court held that, since the Charter Act of 1833, 3 & 4 Will. IV, c. 85, the Company existed only as a public trustee vested with powers of government and that therefore no liability would lie against it, for personal acts done by its servants. However, in the later proceedings which involved the interpretation of 21 Geo. III, c. 70, s. 1 conferring immunity from jurisdiction on the Governor-General and Council for any act done in their official capacity, including powers of appeal, the Court held that this immunity was not absolute, and that an unjustified act of trespass by these bodies would lay the Company open to proceedings. *Bank of Bengal v. United Company*[78] which had earlier decided that the Company was not liable as a corporation was distinguished on the ground that since the act 3 & 4 Will. IV, c. 85, a writ to levy execution on the Company's assets as a trading corporation would not run, since there was no trading corporation then in existence. This distinction appears however, not to be wholly satisfactory since in the *Bank of Bengal Case* the Court acquitted the Company of liability, citing as in *Dhackjee's Case,* the decision in *Fabrigas* v. *Mostyn.* This present decision can only be explained as an attempt by the Court, even at this late date, to impose its jurisdiction on the Company's government. However under the Regulations made by the Governor-General in Council, which the Court was bound to notice and act upon, its jurisdiction, especially in the exercise by the Company of prerogative rights in the judicial field, was successfully excluded.

In *Re Tuckut Roy*,[79] decided in 1858, it was held, that under Regulation III of 1818, the Governor-General in Council might issue his warrant to arrest and detain any British subject without trial within

74. See Ilbert, *op. cit.* pp. 54-55.

75. *Ibid.*

76. 1 Ind. D. 1043.

77. 4 Ind. D. 313 and 527.

78. 1 Ind. D. 439.

79. 3 Ind. D. 217.

and without the limits of territorial jurisdiction of the Court, and that such a warrant was a good answer to a writ of *Habeas Corpus.*

IV. The Respective Jurisdictions of the Supreme Court and the Mofussil Courts

As to the fourth question, that is the relevant spheres of jurisdiction of the Supreme Court and Mofussil Courts, the matter appeared not to have come up for decision since the *Patna Incident* of 1780 and the subsequent act of 1781, 21 Geo. III, c. 70, for a period of forty-five years. However, in 1825, the Court decided that under 21 Geo. III, c. 70, s. 24 it had no jurisdiction to entertain a civil action for false imprisonment against a provincial magistrate acting in his judicial capacity.[80] An action must be *bona fide,* but trespass will lie if the judge knew or had means of knowing of the defect of jurisdiction and the plaintiff must prove this. In *R. on the prosecution, Shaw* v. *Ogilvy*,[81] the Court held that it had jurisdiction on a criminal prosecution for false imprisonment against a provincial magistrate, and it appears that the magistrate's action was clearly illegal thus bringing it within the conditions set out above. In *Kerry* v. *Duff*,[82] decided in 1841, the Court allowed itself the luxury of a statement of principle in stating that a judgment of one of the Company's courts was on the same footing as those of the Supreme Court of Bengal.

However, the following cases show that this statement was not always adhered to. In *Khursetjee Manockjee* v. *Dadabhai Khursetjee*,[83] the Court found that it was discretionary for judges to endorse a Mofussil process and that they ought not to do so unless the parties were liable to the jurisdiction of the Mofussil Courts, *i.e.* that they were resident within that jursidiction.

Even more to the point is the decision in *Aga Mahomed Jaffer* v. *Mahomed Saduck*,[84] decided in 1847. It was held to be a contempt of the Supreme Court to arrest its officer while in execution of its process and the officers of the Mofussil Court who effected the arrest were themselves liable to be committed. The decision in *Calder* v. *Halkett* and *Shaw* v. *Oglivy,* were somewhat varied by the decision in *Fewson* v. *Phayre*,[85] in 1848. In considering the interpretation of 21 Geo. III, c. 70, s. 24, in an action for false imprisonment against a provincial judge, the Court held that the onus of proving jurisdiction lay upon the judge and not, as in the two earlier cases, upon the plaintiff. This clearly amounts to a grave weakening of *Calder* v. *Halkett.* In the case of the *Dharwar Process*,[86] in 1849, the judges of the Supreme Court took it

80. *Calder* v. *Halkett,* 1 Ind. D. 988. 13 E.R. 12. 18 E.R, 311.

81. 1 Ind. D. 989 (note only; decided in 1839).

82. 1 Ind. D. 711.

83. 4 Ind. D. 367.

84. 4 Ind. D. 363.

85. 2 Ind. D. 242.

86 4 Ind. D. 371.

upon themselves to decide upon the principles of endorsement of process and in 1850, the last blow was delivered at the independence of the Company's courts in *Re Samuel Valentine Roy*.[87] It was held (1) that the Supreme Court of Besgal had in general, no power to bring up by *certiorari* the proceedings of the Company's courts. (2) But the Court had however the power to interfere in criminal matters, and (3) as this involved a question of jurisdiction then the Supreme Court would issue *Habeas Corpus.* In the same year the Court decided in *Mohar Ranee* v. *East India Company*.[88] that the Company could not deny its (the Supreme Court's) ecclesiastical jurisdiction in demanding an account for the property of a deceased person which the Company had dealt with as sovereign.

V. The Sovereignty of the Native States

The fifth and final question, the sovereignty of the native states and their relationship with the Company and the Supreme Courts may be briefly illustrated in the following cases. The first case, *Nabob of Arcot* v. *East India Company*,[89] illustrates the restrictions placed upon the court process and its jurisdiction in relation to the political sovereignty of the Company. Here it was held that a sovereign of India could not maintain a bill against the Company for monies had and received since the subject was a matter of political treaty between the parties as independent sovereign powers and was thus not amenable to municipal regulation. However, in *Amerchund Burdeechund* v. *East India Company & two others*,[90] the Court took it upon itself to intepret a treaty between the Company and an independent sovereign. In the year following this case, 1827, the Court held that seizure of territory by the Company under treaty was subject to confirmation by the Crown as to its validity.[91] It is thus possible to notice a progression from the late seventeenth century up to the nineteenth century in the court's attitude from one of non-interference to one whereby the Court arrogated to itself the right to pronounce upon treaties made by the Company. This is perhaps further evidence that the Company was not regarded either as an independent sovereign or as a servant of the Moghul Emperor.

In one other field only is there any interest for the present purpose and that is the relation of the Court to the independent sovereign princes of India. Generally, the Court would not entertain any actions by or against these sovereigns, or members of their family or servants, on the ground of privilege.[92] However, two decisions both in 1799, are of some extra relevance to what has been discussed earlier. The first, in rela-

87. 2 Ind. D. 396.

88. 2 Ind. D. 441.

89. 29 E.R. 841 and 544.

90. 4 Ind. D. 547; decided in 1826.

91. *East India Company* v. *Syed Ally Habiboon,* 7 M.I.A. 334.

92. See *Doe Dem. Lautour,* 5 Ind. D. 38 (1801), *Zeib un Nissa Begum* v. *Nabob Azeem,* 5 Ind. D. 220 (1810).

tion to "British subject", *Frank* v. *Barrett*,[93] decided that an Englishman in the service of the Nabob is entitled to privilege in respect of an action of covenant, as being a public minister of a foreign prince. The second, *Johnston v. East India Company*,[94] in relation to the Court's purported lack of revenue jurisdiction under 21 Geo. III, c. 70, s. 8, decided that grain delivered by the Nabob of the Carnatic in discharge of a war subsidy was not revenue in the hands of the government so as to exclude the jurisdiction of the Court. Finally, it must be noted that the generality of privilege was held not to apply to the issue of a writ of *Habeas Corpus* to run so as to release persons (natives) improperly imprisoned by the Nabob.[95]

VI. Later Constitutional History of the Company and the Straits Settlements

In this survey of cases and statutes, some of the important constitutional history of the Company has been omitted and this must now be supplied. Even as late as 1780 the relation between the Crown and Legislature, and the Company, was by no means stabilised and this led, in 1783, to be introduction of the East India Bill of Fox and the act of that name of 1794 passed during the Pitt ministry, 24 Geo. III, session 2, c. 25. This act provided for a board of six commissioners, popularly known as the Board of Control, one to be the Chancellor of the Exchequer, one a Secretary of State, and the other four, Privy Councillors. They were unpaid and had no patronage but had the complete control of civil and military government and revenues both in England and in India. The Governor-General, Governors, Commander-in-Chief and Council might be removed by the Board of Control. This enactment though later repealed, was substantially reproduced in 33 Geo. III, c. 52, s. 42. All British subjects were deemed to be subject to all courts of competent jurisdiction in India or England for acts done in native states.

That all was not well between the Company and the Crown was evidenced by the investigations of a Committe of the House of Commons into the affairs of the Company which began its sittings in 1808. These finally resulted in the Charter Act of 1813, 55 Geo. III, c. 155, the language to the preamble of which is significant: it recites the expediency of continuing the Company for a further term in the possession of territories and revenues in the East Indies, "without prejudice to the undoubted sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and over the same."

This claim of sovereignty was demonstrated in fact, in regard to the Anglo-Dutch Treaty of 1824 and the subsequent (Straits Settlements) Charter of Justice in 1826. Under this treaty Malacca was ceded to the British Government (Art. X) and the Dutch withdrew their objections to the British possession and settlement of Singapore Island (Art. XII). This treaty was followed in 1824 by act 5 Geo. IV, c. 108 which trans-

93. 5 Ind. D. 6.

94. 5 Ind. D. 10.

95. *R.* v. *Monisse,* 5 Ind. D. 216 (1810).

ferred Singapore and Malacca to the Company to be held by it subject to the restrictions and rights already set out. By act 6 Geo. IV, c. 85 the act pronounced that it would be lawful for the Crown under letters patent to provide for the administration of justice in Singapore and Malacca, s. 19, and under s. 21 Singapore and Malacca were annexed to the settlement of Prince of Wales' Island and subject to such government as the Company might think fit to establish. After 1830, the three Settlements ceased to form a separate Presidency and became subordinate to Fort William in Bengal. This action was prompted by the fact that the Company's charter was due to come up for renewal in 1833, and the Company's Indian administration was already the target for considerable adverse criticism in England. Lord Ellenborough, the President of the Board of Control, had warned the Directors at the end of 1828 that the Government would not renew the Company's privileges unless their expenses were considerably reduced. Retrenchment was thus an urgent political necessity. The offices of Governor (then held by Fullerton) and Resident ceased, and the Court, sitting in 1830, declared itself *functus officio* and adjourned *sine die*. However, as a result of dispatch to the Court of Directors in July 1831 the original position was restored and the Court re-opened in June 1832. It was later held that the legality of this adjoinment was questionable; see *Caunter* v. *East India Co*.[96] There it was said that this suspension was wrongful, for under the Charter of 1826 the principal officer of the Company, by whatever name he is called, is impliedly at liberty to act as head of the Court. Thus the abolition of the government of the Straits Settlements was an act, and a wrongful act, of the local authorities only.[97]

The final legislation of which note has to be taken is the Charter Act of 1833, 3 & 4 Will. IV, c. 85 which came into operation in April 1834 (s. 117). The territorial possessions of the Company were allowed to remain in its possession for another twenty years but were to be held "in trust for" the Crown. The Company was required to close its commercial business and wind up all its affairs, and its debts were charged upon the revenues of India. However, the Company retained some administrative and political powers especially that of patronage.

The last Straits Settlements Charter, that of 1855, was concerned mainly with a re-organisation of the courts into two divisions and by the addition of a second Recorder. Its substantive law content is much the same as that contained in the Charter of 1826. The latter Charter was granted by letters patent issued under the authority of 18 & 19 Vic. c. 93. The East India Company was finally abolished by 21 & 22 Vic. c. 106 in 1858 and the Straits Settlements came under the government of The India Office.

VII. Company and Common Law in the Straits Settlements — Bases of Sovereignty

This section is concerned with the expansion of common law into Penang and its later extension to Malacca and Singapore. The period under consideration runs from 1786 when Penang was taken possession

96. 1 Kyshe's Reports 12 — hereafter cited as Ky.

97. See also the Judicial History reprinted below.

if[98] up until 1856 when the Company was dissolved. Some of the important grounds of conflict between the Company and the judicial administration which had bedeviled India for a hundred and thirty odd years were no longer in existence. There is no series of revenue cases to be found in the Straits Settlements and, in general, disputes about finance were mainly of a personal nature, involving salary and emoluments due to various judical functionaries in Company employ.

Two questions, similar to those in India did, however, arise and these were:

1. The date upon which the common law became applicable in Penang. The exact date itself is not of great moment, but the implications arising out of the dating are of some importance and may be summaried as follows:

(a) Did the common law become applicable in 1807 by virtue of the first Charter;

(b) Did it become applicable earlier, either because Penang was an "English settlement" or because Penang was under the legal, political and executive suzerainty of the Bengal presidency?

In other words what were the relations between the Company and the Crown in respect of the three settlements, Penang, Malacca and Singapore.

2. The scope of the term "British subject."

Proposition 1(a) is the generally accepted one but an analysis of the Company — Crown relationship does show the possibility of making a case to support proposition 1(b). This is our present concern and each of the three settlements will be examined in turn.

(a) **Penang**

Captain Light took possession of Penang on 12 August 1786.[99] Occupation was established by virtue of an "agreement" with the King of Kedah for the use of the land. This agreement is set out in the form of a series of conditions on the part of the King of Kedah together with the appropriate replies on the part of the Company. The agreement provided for trading conditions and some protection for the King of Kedah by the Company. There was however, no formal recital of cession and this cannot even be inferred from the terms of the agreement. The most that could be inferred is a right to occupation subject to certain conditions.

98. ...."in the name of His Britannic Majesty, and for the use of the Honourable East India Company."

99. The island at this time was inhabited though sparsely: see T. Braddell, Notices of Pinang, 4 *Journal of the Indian Archipelago and East Asia* (1850) pp. 629-663 at p. 630 (hereafter cited as *J.I.A.E.A.*). There was certainly no large scale political or executive organisation in Penang as there was in India.

The subsequent treaty with the King of Kedah, 1 May 1791, again makes no formal recital of cession though Art. 1 makes provision for Company possession of Penang upon condition of payment of six thousand Spanish dollars *per annum.* Arts. 2-8 make provision for respective trading rights and for the apprehension and return of slaves, forgers and insurgents to the King of Kedah if they happen to fall into Company hands. Art. 9 has a statement that "Quedah and Pulo Penang shall be as one country," but whether or not this has more meaning that symbolic is doubtful. From the terms of the treaty itself, there do not seem to be any grounds for implying the cession of the island.[100]

There is however one difficulty arising out of the use of the term "cession" in the sense of transfer of sovereignty from one state to another; and this is, that it is by no means clear that Kedah was at this time an independent sovereign state. The question of the Company's relations with Kedah from 1786-1821 provided much controversy in the later Straits Settlements, revolving around the interpretation of the agreement of 1786 and the treaty of 1791, and Kedah's claim for protection by the Company against Siam. It is clear that there was some dependence by Kedah upon Siam and that the latter regularly extorted money, men, and tribute, from Kedah. All the writers on the subject however seem to concur that the treaty and agreement acted so as to cede Penang to the Company though the clear evidence of vassalage on the part of Kedah which they produce seems to involve them in some contradiction.[101] However, British sovereignty over Penang was expressly recognised by the Siamese in the Treaty of Bangkok, 20th June 1826.[102]

Whatever might be the correct answer to the question of cession it is clear that from 1786 the island was in the occupation of the Company and from 1791 in its possession. The Company certainly regarded itself as having sovereign rights in the area as did the King of Kedah and the Siamese government.[103] The early journals are full of references to the fact that no provision had been made on the subject of laws for Penang for several years after its acquisition; the Regulations of 1794 (Lord Teignmouth's Regulations) being the only ones in existence and even these were considered not able to be delegated from the Governor of the island to the Judge and Magistrate.[104]

100. See further R. St. J. Braddell, *The Law of the Straits Settlements* (1931) i pp. 2-4.

101. On this point see the following sources: Sir Frank Swettenham, *British* Malaya (1948) pp. 36-54. John Crawfurd, *History of the Indian Archipelago* (1820) ii, p. 404. P.J. Begbie, *The Malayan Peninsula* (1843) pp. 24-29.

102. W.G. Maxwell & W.S. Gibson. *Treaties and Engagements affecting the Malay States and Borneo* (1924) p. 77.

103. L.A. Mills, A History of British Malaya. 33 *Journal of the Royal Asiatic Society — Malayan Branch* (1960) Part III at p. 49 and p. 155: see also the *Straits Settlements Records,* December 1821. p. 83.

104. See the complaints of Mr. Dickens, Judge and Magistrate of Prince of Wales' Island in the Judicial History reprinted below.

Within four years Light was complaining of the difficulties which he encountered in keeping a rapidly rising population in some semblance of order. He evidenced the claims of certain Malays, members of the Sayid family of Perak, who wished for a written declaration of their own personal law and for a licence to govern themselves, their families, slaves and dependents. He also mentions crimes among the natives. In 1793 two further matters took place supporting his representations for the establishment of some sort of judicial regulation. First, there was the possibility of a civil action against Light in the matter of the administration of the estate of one Wright deceased. The matter was eventually dropped but not before the Company's Advocate-General had been instructed, with the approval of the Court of Directors, to defend Light in the Supreme Court of Calcutta. The second matter involved the murder of one European by another which took place in the Nicobar Islands. Light held a Court of Enquiry in June 1793 and forwarded the offender to Calcutta. In the event nothing was done with the offender as the Advocate-General was of opinion that 26 Geo. III, c. 57, s. 29 did not authorise the trial of offences committed at sea. [?] The only ground of jurisdiction which the courts might possess was the fact that the offender was a subject of the King in terms of 26 Geo. III, c. 57. Light died in October 1794.

Light was succeeded in 1796 as Superintendent by Macdonald, and during this time (1796) a request was made by him to the European inhabitants to show their authority or permission to reside in the island, which, (still being part of the Presidency of Fort William) it was necessary to obtain or have obtained from the East India Company. A sample of the replies for this information discloses the following "authorities".[105]

(a) "under the protection of Mr. Light";

(b) "Covenant as Free Merchant for Prince of Wales' Island";

(c) "my Commanding Officer was induced to recommend me to Lord Cornwallis, who was pleased not only to give me my discharge, (from one of His Majesty's Regiments) but to permit me to reside in any part of India . . . . ";

(d) ". . . . from His Majesty King George the Third . . . . also from Superintendent Francis Light, Esq., ... the public faith being pledged for that purpose continued, ... "

This last class (d), was queried by Macdonald and elicited the further information; that the resident, one Nason, came to the island in 1786 at the request of T.H. Davis, Advocate-General to the Company at that time and lived with Light, assisting him on the island. Further, Nason had cultivated and finally sold the first estate to the Company.

From the two judicial matters mentioned above, and from the replies to the respective licenses to reside on the island, it is clear that relations between the Company and the Crown at this time were by no means clear. Respective spheres of authority, especially in day to day administration still remained obscure.

105. T. Braddell, Notices of Penang. 5 *J.I.A.E.A.* (1851) pp. 114-117.

Sir George Leith was appointed Lt.-Governor in 1800 and his instructions included some vague provisions for the administration of civil and criminal law:[106] these regulations provided for the setting up of a court, appeal from which should be to the Lt.-Governor in the first instance, and to the Governor-General in Council. It was to apply native law and usage to the inhabitants of the island, and the Europeans "should be required to render themselves amenable to the same courts as the natives." The Governor-General in Council had of course power to make such regulation.[107] It is clear that the content of these regulations was not English law strictly so-called, but was rather a set of instructions allowing full play to martial law and the individual propensities of the authorities so far as the English inhabitants were concerned. It was the early history of the Company in India repeated.

The arrival of Mr. Dickens, Judge and Magistrate on the island, in 1801, underlined the state of affairs referred to above. He was of opinion and said so repeatedly, that he had no authority to deal with offences committed by Europeans on the island, and further that the powers given to Light in 1794 by the Governor-General in Council, and which were now vested in the present Lt.-Governor as to the summoning of British subjects, were not such that could be delegated to the Judge and Magistrate.[108] Even as late as 1823 Mr. Phillips, the Governor of the settlement said, "the rules which, according to British law, govern the disposition and inheritance of real property have never been applicable to our lands".[109] Again, slaves were bought and sold with the sanction of the local government who registered these transactions. Further, taxes were imposed by the sole authority of the Governor-General in Council, *viz.*, *a* two per cent duty on all sales of land, and on the estate and effects of deceased persons. As a final comment a statement of Dickens may be quoted; this runs as follows: "The law of nature is the only law declaring crimes and respecting property, which, to my knowledge, at this day exists at Prince of Wales' Island. . . ." [110]

This then was the situation up to the grant of the First Charter of Justice on 25 March 1807. The Charter was the result of a petition by the Company in March 1805 to the King. The Company was not applying the law of England to its own subjects, and it was in fact, a *quasi*-sovereign power in regard to Prince of Wales' Island. In the political and financial spheres it was clearly under the control of the home legislature, but so far as the law was concerned the relation was in general, not one of principal and agent. It must be presumed that the Charter was granted with some knowledge at least of this state of affairs, and was adapted to it. It was competent for the Crown to introduce the law

106. T. Braddell, *op. cit.* pp. 157-158.

107. 13 Geo. III, c. 63, *s.* 36 and 39 & 40 Geo. III, c. 79, s. 20.

108. T. Braddell, *op. cit.* pp. 191 ff.

109. *Minute on the Landed Tenures of Prince of Wales' Island* (1823) p. 8.

110. Quoted by Sir Peter Benson Maxwell in "The Law of England in Penang, Malacca and Singapore." 3 *J.I.A.E.A.* (1859) N.S. p. 33.

of England into this settlement by such an instrument,[111] and the provisions of the Charter may be usefully compared to the provisions of 13 Geo. III, c. 63 and its subsequent Charter.

However, the possibilities of act 13 Geo. III, c. 63 (1773) which established the Supreme Court of Judicature in Bengal, Behar and Orissa, having applicability to Penang were never seriously considered. Section 36 of this act gave the Governor-General in Council powers to make laws for the good order and civil government of the settlements at Fort William and the factories and places subordinate thereto. Act 21 Geo. III, c. 70 (1781) which confirmed and added to the act of 1773 made no alteration to this provision. It is of course admitted that Penang was well outside the territorial areas of Bengal, Behar and Orissa. Maxwell [112] seems to have approved of the opinion of Sir W. Burrows, the Advocate-General of Bengal, who interpreted 13 Geo. III, c. 63, s. 14 so as to confine jurisdiction to the provinces of Bengal, Behar and Orissa. The Supreme Court in some circumstances however, recognised its jurisdiction as running outside of these areas. This occurred in two cases, the first being the extent to which the prerogative writs ran, and the second, for the determination of jurisdiction in revenue cases. Only the first is relevant here. Under s. 14 of the act of 1773 and clause XIII of the Charter of 1774 the jurisdiction of the Court in civil cases is defined as extending to all British subjects residing in the provinces *and persons employed in the service of the Company.* Criminal jurisdiction extends to the same two classes of persons, the second of which at least is applicable to the garrison of Penang in 1786-1800.[113] The relevance of this act to the situation in Penang is made even more striking by a consideration of the answers given to Superintendent Macdonald in 1796 by the inhabitants of Penang in answer to the question as to what authority they could show for being in the island. In essence, the various licences to remain in the island depended upon the goodwill and permission of the Company's authorities in India. If these propositions are regarded as tenable then the decision of the A.G. of Calcutta regarding the case of Sudds who was arrested and indicated for murder committed in the Nicobar Islands shows a want of consideration of the terms of the statute of 1773.

In 1800, act 39 and 40 Geo. III, c. 79 was passed, s. 20 of which extended, in general terms, the jurisdiction of the Supreme Court. Under s. 2, the act specifically makes provision for the applicability of 13 Geo. III, c. 63 and "divers subsequent statutes" *i.e.* 21 Geo. III, c. 70. There can be little doubt of the intention of the legislature to include Penang within the scope of 39 & 40 Geo. III, c. 79. If this is admitted, then the argument basing the introduction of English law upon cession, which is, as has been seen, not a wholly satisfactory ground, may be dispensed with, and instead that line of Indian cases dealing with the interpretation of the scope and jurisdiction of the acts of 1773 and 1781 and the Charter of 1774 becomes germane.

111. *Campbell* v. *Hall,* 98 E.R. 1045.

112. Sir Peter Benson Maxwell, *op. cit. R.* v. *Willans,* 3 Ky. (1858) 16.

113. 13 Geo. III, c. 63, s. 17 Clause XIX of the Charter of 1774: see also *R.* v. *Clark* (1791) 1 Ind. D. 1012 and *Janardanah Roy* v. *East India Conmpany and Munro* (1816) 5 Ind. D. 336.

More important however, is the case of *Freeman* v. *Fairlie*,[114] which in approving *Gardiner* v. *Fell*,[115] laid down that English law may be assumed to exist by virtue of English settlement only, that is, its introduction does not have to be specifically located in point of time. This is especially relevant in view of 21 Geo. III, c. 70, ss. 19-23. There is thus the possibility of a case to show that the legal chaos of 1786-1807 in Penang was not due so much to want of jurisdiction as to lack of administration to exercise the jurisdiction.

(b) **Singapore**

What of the position in Singapore? The condition of Singapore when occupied by Raffles in February 1819 seems almost precisely similar to that of Penang thirty odd years earlier. The island was inhabited by a very small number of people and its areas of cultivation amounted to a few acres only. The island was actually under the control of the Temenggong of Johore and some of his followers. The Temenggong was nominally subject to the Sultan of Johore who was himself supposedly subject to the governors of Rhio.

Raffles entered into a series of agreements and treaties with the local rulers, *viz*:

(i) "Preliminary Agreement with the Date Temenggong of Johore", January 1819;

(ii) "Treaty of Friendship and Alliance between the East India Company and the Sultan of Johore", February 1819;

(iii) "Arrangements made for the Government of Singapore" between Raffles and Farquhar, and the Sultan of Johore, June 1819;

(iv) "A Treaty of Friendship and Alliance between the Company and the Sultan and Temenggong of Johore", November 1824;

(v) There was also a "Memorandum" by Raffles on sovereignty of the Company over Singapore, (presumed June 1823).[116]

Numbers (i) and (ii) above show nothing in the way of a transference of sovereignty except perhaps Art. 6 of (ii) which recites that all persons belonging to the English factory "or who shall desire to place themselves under the protection of its flag shall be duly registered and considered as subject to the British authority." What effect if any, this Article had is unknown. The rest of the provisions of instruments (i) and (ii) deal mainly with trade and payments to be made to the Sultan

114. 1 M.I.A. 306, 18 E.R. 117, decided in 1828.

115. 18 E.R. 113.

116. See R. St. J. Braddell, *op. cit.* i, pp. 150-167.

and Temenggong of Johore. Instrument (iii) makes provision for residence and control of the population, Chinese and Malay. This instrument was sealed by both Sultan and Temenggong, and signed by Raffles and Farquhar and is interesting as illustrating a state of joint government on analogy to a *condominium.* It was not until the issue of instrument (iv) that the island was actually ceded to the Company (Art. 2) but instrument (v) which was issued over a year before instrument (iv) is interesting for the following reasons. First, that the rules forming the subject matter of the instrument, although laid down by Raffles, are concurred in by their Highnesses and are intended to define the rights of all the parties. Second, Singapore and the islands immediately adjacent, are stated to be at the "entire disposal of the British Government." Third, the memorandum refers to their Highnesses sitting on the bench, (Art. 5) and that the laws of the Malays shall be respected where not contrary to reason, justice or humanity, but in other cases English law will be applied with "due consideration to the habits and usages of the people" (Art. 6).

In 1823, under Regulations III and IV of that year, *(i.e.* one year before formal cession under (iv) above) Raffles had appointed twelve magistrates to be nominated yearly by the Residents from among the principal British merchants. They were to try minor civil and criminal cases under the general supervision of the Resident. Raffles drew up a set of laws based to a large extent on the forms and principles of English law but directing that regard be had to native customs especially in matters of marriage, inheritance and religion. These regulations were very general and left large powers of discretion to the magistrates.[117]

Raffles' "Memorandum" (v above) did not give an absolute cession of the right of sovereignty though in the opinion of the Attorney-General of Bengal it was a "near approach to it". The Attorney-General went on to say that henceforth English law could ". , . . operate with effect and without injustice." However, the Treaty of 1824 (iv) above was not ratified by Parliament until 1826 and it was thus that the Directors were unable to establish Courts in the Settlement.

From the time of the first agreement with the Temenggong of Johore, (i) above, until Raffles departure in June 1823, Singapore was under the control of the government of Bencoolen. During this period, Bencoolen, if not a separate Presidency as provided by 42 Geo. III, c. 29 was at least a Lt.-Governorship under powers given to Raffles, though it was subject to the general control of the Governor-General in Council. Raffles was succeeded in Singapore by Crawfurd and the island was removed from the control of Bencoolen and made a dependency of the Indian Government in 1823. Crawfurd continued Raffles' judicial scheme, with some alterations until the arrival of the Charter in March 1827, which extended the jurisdiction of the Penang Recorder's Court to Malacca and Singapore.

117. H.A. O'Brien (ed.). An Old Minute by Sir Stamford Raffles, 24 *Journal of the Royal Asiatic Society — Straits Branch* (1891) pp. 1-12. See also 10 *Malaya Law Review* (1968) pp. 248-291.

Thus from the date of the ratification of the treaty with the Sultan and Temenggong of Johore, Singapore must be considered a place acquired by cession and on the same footing as Malacca though varying in its antecedents. It should also be noted that under 13 Geo. III, c. 63, s. 9, Bencoolen was subject to the jurisdiction of the Supreme Court in Calcutta. Singapore may therefore be considered as being a recipient of common law before its formal cession.

(c) **Malacca**

Malacca was ceded to the Crown in 1824 under the terms of the Anglo-Dutch Treaty of that date. This treaty and the peaceful occupation of Singapore were ratified by 5 Geo. IV, c. 108. In 1825, by virtue of 6 Geo. IV, c. 85, s. 19, Malacca was transferred to the control of the East India Company. The same Act made arrangement for reducing Bencoolen from the rank of Presidency to that of a factory subordinate to Fort William in Bengal and so by virtue of 39 & 40 Geo. III. c. 79 the places ceded, Malacca and Singapore, became subject to the jurisdiction of Fort William (s. 20). The act of 1825 (6 Geo. IV, c. 85) also gave power to the Crown to make arrangements by letters patent for the administration of the law in Singapore and Malacca. Section 21 authorized the Company to annex Singapore and Malacca to Penang, and in October 1825 the Company issued an order to this effect, and at the same time presented a petition to the Crown for a new Charter of Justice. This Charter for the incorporated settlements was issued in 1826. Malacca, unlike Penang and Singapore was before its cession a province under the control of the Dutch authorities and had been so from 1641. There is thus no doubt as to the effect of the cession on its laws. Those laws must continue as before until altered by competent authority — in this case Crown and Parliament. These laws were so altered in the absence of any stipulation to the contrary by the treaty of March 1824 and from that date Malacca is placed on a par with Penang and Singapore. As has been noted above, Penang become subject to the jurisdiction of the Supreme Court at Fort William by virtue of 39 & 40 Geo. III, c. 79, s. 20 in 1800, and the same act was also applicable to Malacca and Singapore from at least 17 March 1824 by virtue of 6 Geo. IV, c. 85, ss. 19-20. It therefore appears that the law of the Supreme Court of Calcutta might have been in force in each of the three stations before the publication of their respective first Charters.

Further support for proposition 1(b) may be adduced from a consideration of the effect of the charters on pre-existing laws. It is clear that if the Charters operate *ipso facto* on existing law then the validity of 1(b) will be very doubtful. Conversely, if the Charters can alter existing law only by virtue of a specific discretion contained within a Charter, then the propostion will gain in probability. This question may be answered, in part by analogy with the practice of the Indian Supreme Courts, and in part by the later practice in the Straits Settlements.

(i) **Indian Practice**

Many of the Indian cases having a bearing on this topic have already been considered.[118]

There is however, one Indian opinion and four cases which must be considered in a little more detail. The opinion, which was given in 1818-23 by Mr. Serjeant Bosanquet, Mr. Spankie, A.-G. of Calcutta, and Mr. Mallin, A.-G. of Bombay,[119] concerns the extent of the Court's jurisdiction, in respect of executive acts, and arose out of the decision in *Madow Wissenatth* v. *Balloo Gunnasett* [120] judgment in which was delivered by Sir Alexander Anstruther. All the opinions given assumed that the Charters: (i) Define the outer limits of jurisdiction; (ii) Define the depth of jurisdiction and in this sense they are analogous to legislation. There is therefore an assumption as to an existing body of law dealing with matters outside the scope and jurisdiction of the Charters proper.

In *Jebb* v. *Lefevre* [121] the judge considered the effect of the Charters commencing with the letters patent of Charles II and James II. The Charters under these two monarchs make quite plain the extent of the Court's jurisdiction, and where causes are specified, then matters not falling within the specification do not admit of jurisdiction. This, and the effect of the Charters on matters of real and personal tenure in this case appear as follows. The Charters of Charles II and James II gave no jurisdiction though it appears, both in theory and in fact, that the law of England was introduced into India, at least from the cession of Bombay in 1669. The problem which arose for determination was the nature of tenure in India, more specifically the rights of an executor or administrator as against an heir in relation to real property. The practice had grown up of vesting land in the former, the only authority for which, and this was but partial, being found in 29 Car. III, c. 3 and 14 Geo. II, c. 20, both relating to estates *per autre vie.* Grey C.J., who gave a dissenting judgment in this case, held that in the absence of express provisions the law relating to real property in India must remain that of England. In other words Grey C.J. regarded the Charters as

118. But see especially the following: *Freeman* v. *Fairlie* (1828) 18 E.R. 117, *Vencata Runga Pillay* v. *E.I. Company* (1803) 5 Ind. D. 80 *Doe dem. Rada Govind Singh* v. *Juggessore Mustabee* (1782) 1 Ind. D. 950, *Budden Soorye* v. *D'Oyley* (1819) 3 Ind. D. 889, *Doe dem. Peareemony Dosse* v. *Bissonauth Bonnerjee* (1830) 1 Ind. D. 403, *Spooner* v. *Hurkissondass* (1850) 4 Ind. D. 351, 358, *R.* v. *Cock* (1791) 3 Ind. D. 925, *Maclean* v. *Christall* (1849) 4 Ind. D. 69, *A.G. of Bengal* v. *R.S. Dossee* (1863) 9 M.I.A. 235, *Dutturam Turrufdar* v. *The United Company & Watson* (1779) 1 Ind. D. 1037, *Doe dem. Savage* v. *Bancharam Tagore* (1785) 1 Ind. D. 65, *Re Govindo Lalla* (1801) 5 Ind. D. 34, *Murray* v. *E.I. Company* (1821) 106 E.R. 1167, *Doe dem. Sibchunder Doss* v. *Sibkissen Bonnerjee* (1854) 3 Ind. D. 42, *Mayor of Lyons* v. *E.I. Company* (1836) 1 M.I.A. 108, *Varden Seth Sam* v. *Luckpathy Royajee* (1862) 9 M.I.A. 185. *Musleah* v. *Musleah* (1856) 3 Ind. D. 140, *Padre Stephanus Aratoon* v. *Sarkies Johannes* (1796) 1 Ind. D. 12, *Re Cachik* (1791) 1 Ind. D. 960, *Re Phanus Johannes* (1790) 1 Ind. D. 10, *R.* v. *Eduljee Byramjee* (1846) 3 M.I.A. 294.

119. 1 Ind. D. pp. 1119-1132.

120. 1 Ind. D. 968, decided in 1818.

121. 1 Ind. D. 92 at pp. 101 ff. decided in 1824.

containing within themselves the exact content of English law and he presupposes no existing body of law. In this respect the assumptions given in the opinion earlier differ from those of this judge.

However, Lord Lyndhurst in 1828, had decided in *Freeman* v. *Fairlie*,[122] that English law had been the law of Calcutta from the earliest period of settlement and that therefore variations of it were matters for the Charters. Further, Buller J. in *Joseph* v. *Ronald*,[123] whilst admitting the possibility of the English law of inheritance being in force before either act or Charter specifically mentioned it, held that there were in fact variations of English law which appeared to have arisen out of practice and which he was not prepared to upset. Franks J. in *Jebb's Case* found no difficulty in deciding that matters of tenure were matters, in India at least, which were established by imported English law, Charter and Act of Parliament. He also held that the rules established by the previous Charters stood until expressly altered by the new Charter, in this case that of 1774.[124]

The other three cases may be shortly dealt with as they all establish that each successive Charter does not of itself alter the pre-existing law unless specifically so directed. In *Perozeboye* v. *Ardaseer Cursetjee*,[125] where, in defining "British subjects", the effect of the successive Charters from Charles II in 1661 was held to be restricted to the actual terms of the Charters themselves. Similarly in *Doe dem. De Silveira* v. *Texeira*[126] and *R.* v. *Sheik Boodin.*[127]

(ii) **Straits Settlements Practice**

Turning now to the practice in the Straits Settlements the position is slightly different. It has been noted above, that a case may be made out to show that English law was in existence in each of the three settlements before the date of their respective first Charters. In all three cases this was the law as practised in Fort William, that is, as administered by the Supreme Court of Bengal. The cases which follow are closely analogous to the general tenor of Indian decisions on the point and show that the Carters subsequent to the first do not necessarily abrogate all existing law except where this is specifically mentioned. In the only case on this question involving the first Charter of 1807, the Privy Council based their judgment upon the ground that English law became the *lex loci* upon occupation of the island but expressed no opinion on the effect of the Charter, *Ong Cheng Neo* v. *Yeap Cheah Neo.*[128]

122. 1 M.I.A. 306.

123. 1 Ind. D. 68.

124. 1 Ind. D. at pp. 108 ff.

125. 4 Ind. D. 53 and 614.

126. 4 Ind. D. 529.

127. 4 Ind. D. 397.

128. L.R. 6 P.D. 381.

There are, however, local cases on the point. *Kamoo* v. *Thomas T. Bassett*[129] extended English criminal law to Penang and this extension was applicable to offences committed before the coming into force of the Charter. However, in *Rodyk v. Williamson*[130] Sir Benjamin Malkin regarded the Charter as abrogating any previously existing law. Further cases do not throw much light on this question since they are mainly concerned with repeating the statement that English law became the *lex loci* in Penang in 1807, and of Malacca and Singapore in 1824.[131]

However, cases arising out of the Indian Acts provide some grounds for supposing that the Charters did not alter an existing law. Act 3 & 4 Will. IV, c. 85 (1833), which was passed to provide for the "better government of His Majesty's *Indian* Territories", set up an Indian Legislature (s. 39) which included Penang, Malacca and Singapore, ss. 1-2. Acts made by the Indian Legislature therefore applied to the territories of Penang, Malacca and Singapore, and the question arose as to the effect of the Charters of 1826 and 1855 as importing English statute law into these territories, *i.e.* did the Charters introduce statutes abrogating local law? (It should be noted at this stage that the Imperial Parliament reserved the right to legislate on certain matters for itself; see 16 & 17 Vic. c. 95).

The first Straits Settlements case on the point would seem to suggest that this was so. In *Jemalah* v. *Mohd. Ali*,[132] decided in 1875, Ford J. held that English statute law from 1826 up until the passing of 3 & 4 Will. IV, c 85 (1833) became law in the Colony. The ground for this proposition was that the Charter of 1826 had the effect of carrying into the Colony all English statutes subsequent to 1826. This was the case at least up until the creation of a special legislative body having authority in the Colony. However, this decision was overruled by a full bench on appeal in *Ismail bin Savoosah* v. *Madinasah Merican*,[133] decided in 1887. The law of the Colony was given by Wood J. as being (a) the law of England as at 1826; (b) Indian Acts having reference to the Colony; (c) Ordinances of the Colony and (d) English statutes in terms applicable to the Colony. As to (d) it is clear from the judgment that these statutes were not automatically applicable to the Colony. Braddell[134] remarks that the decision in *Jemalah's Case* is quite inapplicable to the Straits Settlements as the Governor-General in Council had power to legislate for the Colony by virtue of 13 Geo. III, c. 63, s. 36. Presumably he is referring to the effect of 39 & 40 Geo. III, c. 79, s. 20 (1800) which extended the former statute. However, if this is so, the applicability of that act should have run from 1800-1805 when Penang became a separate Presidency though neither Braddell nor any of the judiciary had proceeded upon this assumption.

129. (1808) 1 Ky. 1, see also 13 Geo. III. c. 63, s. 34.

130. Unreported but mentioned in R. St. J. Braddell, *op. cit.* i, p. 14.

131. See: *In the goods of Abdullah, 2* Ky. Ecc. Rs. 8. *Moraiss* v. *De Sonza,* 1 Ky. 27. *Ismail bin Saroosah* v. *Madinasah Marican,* 4 Ky. 311.

132. 1 Ky. 386.

133. 4 Ky. 311.

134. R. St. J. Braddell, *op. cit.* i, 30.

The applicability of Indian Acts to the Settlements was confirmed in *R* v. *Rodriguez*[135] and in *Mahomed Meera Nachair* v. *Inche Khatijah.*[136] The latter case is interesting because it points out, first of all, that land in the colony is not on the same footing as land in England so far as heirs-at-law are concerned because the English rules have been replaced by Indian acts — at this date by Act XX of 1837. On the other hand the point is made that the law relating to wills in the Colony is the same as English law the reason being that the English (Statutes — 7 Will. IV & I, Vic. c. 26) rules are embodied in an Indian act, *i.e.* Act XXV 1830.

Further evidence relating to Charters and the introduction of English statutes may be gathered from the following cases. In *R.* v. *Till*[137] it was held that the "Black Act", 9 Geo. I, c. 22 was applicable in India and Penang because of its general applicability. In *R.* v. *Adam Singh*[138] it was held that statute 43 Geo. III, c. 58 did not extend to the Colony. Far from having the Charter of 1807 introduce this automatically, a letter from the Court of Directors of the Company quoted in the report directs the Court in Penang to establish the applicability of an Imperial Act either by an appeal to His Majesty in Council against a conviction or by considering the clause of the Charter 1807 by which the judge may recommend a reprieve to the Court of Directors. *Moraiss v. De Souza*,[139] decided in 1838 showed that from 1807 to Indian Act XX of 1837 the English law of inheritance was the law in Penang. In *Mohammed Ally* v. *Scully*,[140] it was decided that the Charter of 1826 did not introduce English statute law into the settlements between 1826-1855. The full judgment in this case is unfortunately not reported. In *Re Khoo Chow Sew*,[141] it was held (a) that the statutes 31 Ed. III, c, 2 and 21 Hen. VIII, c. 5 extend to the Colony; (b) the words "next-of-kin" in the Charters of 1807, 1826, 1855 must be construed liberally in connection with these acts. In other words the provisions of the Charters were apparently taken as providing standards of applicability for the introduction of English acts. Finally, in *Tengah Chee Nachiar* v. *Nacodah Merican*[142] it was decided that the Statute of Distributions was applicable only when its provisions were taken in conjunction with Indian Wills Act, XXV of 1838, and the Mohammedan Marriage Ordinance V of 1880. To the question, did the Charters introduce English statutes abrogating local law? — an answer firmly in the negative may be returned.

135. 4 Ky. 323.

136. 4 Ky. 608.

137. 2 Ky. Crim. Rs. 1, decided in 1809.

138. 2 Ky. Crim. Rs. 12. decided in 1822.

139. 1 Ky. 27.

140. 1 Ky. 254, discussed in R, St. J. Braddell, *op. cit.* i, 33.

141. 2 Ky. Ecc. Rs. 22.

142. 4 Ky. 265: see also *Re Native Witnesses,* 2 Ky. Crim. Rs. 15 on the extension of Indian Acts and *R.* v. *Overee,* 2 Ky. Crim. Rs. 88 on the limitation of Indian Acts in the Colony.

It seems, in conclusion, that a case may be made out to support proposition 1(b) outlined at the beginning of this Note. Although it is doubtful if Penang was a "settlement" in the sense demanded by *Campbell's* case, its European inhabitants were either Company servants or resided on the island with Company permission. Although *Campbell's* case does not contemplate the peculiar situation in Penang, where, as has already been suggested, cession may not in fact have taken place, there seems to be no reason why the principles of *Campbell's* case should not be extended; and this extension may plausibly be based upon residence and licence to reside. It also seems that the mechanics of the introduction especially in regard to the agreements and treaties with Kedah and Johore are a good deal more complex that was imagined at the time; a cautionary word must be said about the value and effect of treaties entered into with native rulers at that period. There is no doubt that these documents were treated at the time as setting out binding conditions as between contracting parties. However, this should not be allowed to obscure the fact that these treaties and agreements are not the same documents which *mutatis mutandis* bear these names today. Given that the treaties and engagements do not show a formal cession the alternative grounds for the introduction of common law may be summarised as follows:

(1) An extension of the principle in *Campbell* v. *Hall* to include residence and residence by licence.

(2) The competency of the Supreme Court at Fort William in issuing writs out of the jurisdiction in respect of servants of the Company, and possibly also licencees of the Company;

(3) The jurisdiction of the Court under 13 Geo. III, c. 63, 21 Geo. III, c. 70, 39 & 40 Geo. III, c. 79.

(4 The fact that the Charters all assumed a pre-existing body of law, and did not affect this law unless specific provisions were contained in the Charter.

(5) Following from (4) Straits Settlements and Indian practice in respect of Charters and Statutes;

(6) The political and commercial *de facto* control of the Company in the Straits Settlements at least up until the Charter Act of 1833, 3 & 4 Will. IV, c. 85.

VIII. Company and Common Law in the Straits Settlements — "British Subject"

A full consideration of this topic involves questions as to the modifications of substantive common law. This is outside the scope of this essay.[143] In general the courts in the three settlements were more con-

143. For a brief summary see M.B. Hooker, Private International Law and Personal Laws: The Malaysian Experience, 10 *Malaya Law Review* (1968) pp. 55-67.

cerned with applying common law to all the inhabitants [144] rather than with discussing whether or not it should be applied.

Problems as to residence and the validity of writs issued out of Court, which were the forms in which "British subject" was considered in India, never arose to any great extent in the Straits Settlements. The reasons for this appear to be four in number.

First, the terms of the initial Charter of 1807 were quite clear in purporting to apply common law to all people in the territories under the Company's control. Though the substance of the law to be administered might be subject to dispute, the subjection of all the inhabitants, whatever their race and religion, to the formal processes of the Court was not in question. At the same time, the native inhabitants had no legal structure or system comparable in its formal organisation to that possessed by some sections of the population in India. Written codes and *pandits* on the Indian model were conspicuous by their absence.

Second, the areas in the Straits Settlements under the political control of the Company, and those under its trading and financial control, were for the most part identical. There was not the Indian situation of a Company controlled town or factory together with the financial control of large outside areas. At the same time there were no great territorial expansions at the expense of local governments tending to raise questions of the Company's status as sovereign.

Third, from the period of the Charter Act of 1813, 55 Geo. III, c. 155, the competency of the Company in political, executive and financial fields was steadily reduced. The Crown was by now the *de facto* as well as *de jure* sovereign so far as the administration of law was concerned. The act of 1813 contained special provisions relating to civil, military and judicial government, the Company was required to keep accounts in such a way as to distinguish between territorial and political revenue and commercial revenue. The language to the preamble recites "the undoubted sovereignty of the Crown . . . ." Between 1813 and 1833 there were a series of rather unimportant acts, noteworthy only because the Company's power to resist the exercise of control by parliament either by lobbying or outright defiance was now almost at an end: these acts were; 54 Geo. III, c. 105; 55 Geo. III, c. 84; 58 Geo. III, c. 84 which act related to the validity of certain Indian marriages and is important in the history of Indian marriage regulation; 4 Geo. IV, c. 71 which authorised a grant of Charter for a supreme court at Bombay in substitution for the recorder's court, and made some revenue provisions relating to the payment of troops in India; restrictions on the Indian trade were gradually reduced, 4 Geo. IV, c. 80; an act of 1828, 9 Geo. IV, c. 33 declared the real estates of British subjects dying within the jurisdiction of the Supreme Court to be liable for payment of debts.

This unity of legal administration was further consolidated in the period 1830 onwards when the settlements came under the administration of Fort William (1830-1851) and Government of India (1851-67).

144. With due regard to local customs, religions, etc.

In any case, 1833 saw the passing of the Charter Act 3 & 4 Will. IV, c. 85 which removed all commercial activity and privilege from the Company and stated that the Company held all its territories "in trust for" the Crown. In addition it should be noted that acts 13 Geo. III, c. 63 and 39 & 40 Geo. III, c. 70 tend to emphasise this unity of government.

Finally, there did not appear to have been very much confusion between the executive and commercial functions of the Company. This is probably due to the fact that the volume of trade through Penang, though quite considerable was not of first importance compared with the intention of making full use of the strategic importance of Penang as a naval base to control the Eastern seas.

However, some difficulty did arise as to the relevant spheres of jurisdiction between the executive and the judiciary in the early years in Penang. Though these were not on such a scale as to repeat the *Patna* or *Cossijurah* incidents, there was confusion especially in the period 1801-1805. This was the period of Mr. Dicken's appointment as judge and magistrate and the disputes arose because of the supposed lack of any law applicable and the subsequent impossibility of controlling a turbulent European population. This position was thought remedied by the Charter of 1807 and subsequent Charters. It is noteworthy that the cases requiring the interpretation of the Charter, never repeated those lines of cases dealing with conflicts of jurisdiction which were so characteristic of India in 1773-1820. A constitutional distinction seems to have been assumed by both sides after the initial five-year period of difficulty.

IX — SUMMARY

It is now time to attempt some sort of summary of the part played by the Company as a propogator or agent of the common law.

In the first place it may be said that the place of law in the Company's scheme of things was incidental rather than purposeful. Its main ambitions were financial, and only territorial insofar as the commerce of the Company remained unimpaired and in good order. Politically, the Company had found itself *de facto* master of extensive territories containing a large number of people, and its handling of this situation was dictated by the attempted steering of a course between the effect of restrictive financial regulations on the one hand, and by the avoidance of outright and probably costly executive control of native states on the other. In course of time, however, acquisition did take place but always in opposition to the views of many M.P.'s in England and always with power struggles between the Court of Directors and the later Boards of Control.

So far as any of the courts were concerned, it is evident that the legislature also was not confident of its abilities in these territorial acquisitions, and for many years avoided important questions of constitutional law and procedure. This avoidance is mirrored in the vague and woolly language of many enactments, and more especially in many of the Charters especially that of 1807 (Penang Charter).

Common to all facets of this narrative is the obscurity which has hung about the relations between the Indian territories on the one hand, and Crown and Parliament on the other. By 1830, or at least by the slightly earlier statute of 9 Geo. IV, c. 74 (ss. 7, 8, 57, 70) the bulk of the Indian territories were considered as having been annexed by conquest or cession to the Crown of the United Kingdom: 9 Geo. IV, c. 74, s. 7 etc. provided for trial by the Supreme Courts of offences committed by native or British persons without distinction, whether or not the offence was was committed outside the jurisdiction. Further, 26 Geo. III, c. 57 contemplated cases in which the Court would have to enforce in any part of the Presidency, by exchequer process, the execution of judgments obtained in England. Similarly, there are other statutes which have created occasion for the exercise of powers of the Court in the provinces, as for example, in taking evidence on divorce bills in the House of Lords.

If the sovereignty of the Crown is held to have been established throughout the provinces, as it must be, especially in view of the right of the King in Council to decide appeals in the period under discussion, then it must also be admitted that the Company, mainly from the force of historical circumstances, was the only depository and organ of the powers which it was necessary to exercise *in situ.* It had the functions of government and replaced in part the old native governments, especially in the administration of justice. However, its functions in regard to the judicial administration were not derived wholly from the Crown, but in part from local law, at least as to its rules and content, if not to its formal procedure. This latter position, was perhaps overstated on behalf of the Company, subsequent to Clive's conquests, when it was suggested that the Company had some sort of delegated sovereignty from the Mogul Emperor, who himself retained a formal and nominal sovereignty. This contention was however disposed of by *Campbell* v. *Hall.* This question is especially important in determining the validity of treaties entered into by the Company with foreign states in India which involved both judicial administration and the presence or action of the Crown. This is illustrated in the case of *The Sec. of States in Council of India* v. *Kamachee Boye Sahaba.*[145] Here a Rajah had entered into three treaties with the Company, the most important of which was the third treaty of October 1799; by Art. 4 of that treaty the Company was to set up a system of civil and criminal judicial administration, the laws for which were to be framed by the Company. Officials in this administration were the Company's officials and the laws were to apply to all the inhabitants of the state, having due regard to existing laws and customs. The Rajah was to have no control whatsoever over this administration. Upon the death of the Rajah, leaving no male heirs, the Company seized the whole of the state as an escheat on the ground that the dignity of the *Raj* lapsed for want of a male heir and that the property passed to the British Government for whom the Company was acting as a delegated authority. This act was ratified and adopted by the Crown, though the

145. 7 M.I.A. (1859) 287.

act of seizure was in itself *ultra vires* the Company. This decision was approved in *In Re Ameer Khan.*[146] It should be noted that no question was raised as to the validity of the Company's power to enter into treaties, including provisions to set up a judicial administration.

Arising out of the question of sovereignty there was uncertainty as to the meaning of the term "British subjects" in those areas not being settlements or factories of the Company. It seems clear that the term included whose who were either British born or descendants of British born on the one hand and those who were inhabitants of British settlements or factories. But the activities of the Company involved people not in these two classes and therefore the applicability of the Company's regulations to them by statute and charter might very well have been *ultra vires* their competency. Despite *Campbell* v. *Hall* and the cases cited earlier, this question remained unsettled. The legislative and judicial powers of government were never under one control: thus the regulations for government in the provinces, and certain civil cases tried in the provincial courts, were nominally subject to the control of the King in Council, as much as were the regulations registered in the Supreme Court of any Presidency. But this was effective more in name than in fact, and the legislative and judicial functions of the Indian governments in the provinces were exercised under no other control than that of the Directors and Commissioners for the Affairs of India, whilst the administration of law for British persons was, in theory, independent of both the Indian Governments, and the Directors and the Board of Control. Those who resided within the areas of any Presidency were subject only to "judicial legislation" or to regulation registered in the Supreme Courts.

This state of affairs is probably traceable to the imperfections of the statutes and letters patent under which judicial administration was established Thus, nothing could be more vague in some respects that 21 Geo. III, c. 70 which did nothing to settle the argument as to who were the subjects of His Majesty. It left to the Supreme Court the determination of suits respecting land, but forbade it to deal with revenue. But these topics were so closely related that it was not possible to separate them.

In the Straits Settlements, on the other hand, the position was relatively clearer through the relation between the executive and the judiciary was characterised by a conflict as to their respective spheres of authority. As in India, much of the difficulty was caused by the *ad hoc* approach to judicial regulation adopted by the Company.

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146. 6 Bengal L.R. (1870) 392.

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