JUAL JANJI TRANSACTIONS — A QUESTION OF RECOGNITION AND EQUITABLE INTERVENTION

Setting the problem

Jual janji is a kind of Malay customary dealing with land. It is in nature a security transaction. The borrower "transfers" — to use the word in a loose sense — his land to the lender who thereby takes possession of it. Whatever profits the lender may make out of the land will be his to keep as a reward, akin to interest, for the loan. The borrower is entitled to resume the land upon discharging the debt except that, where a period was fixed for the repayment of the loan, default will turn the original arrangement into an absolute sale, *jual putus.*

Such form of security transaction was already well-developed in the Malay States at the time when some of them first became British Protected States in the last quarter of the nineteenth century. In the two earliest Protected Malay States, namely, Selangor and Perak, the British intervention soon brought about tremendous legislative efforts to establish a new legal structure and order for these States. Land law was one of the major subject matters of such law-making. After an initial period of piecemeal legislation, Selangor saw the introduction of a comprehensive statutory system governing dealings with land with the passing of its Registration of Titles Regulation, 1891. Identical legislation was later adopted by Perak, Negri Sembilan and Pahang.[1] This legislation provided only for two forms of security transaction in land: namely, (a) charges on land and (b) liens.[2] It made no provision for any other form of security dealings including the *jual janji* transactions.[3] Nevertheless, in practice, the Malays continued to carry out such customary security transactions. At the same time, as the new statutory system of dealings with land was introduced within the framework of the Torrens system which was borrowed from

1. Perak: Registration of Titles Enactment, 1897 (No. 18 of 1897); Pahang: Registration of Titles Enactment, 1897 (No. XXIX of 1897) and Negri Sembilan: Registration of Titles Enactment, 1898 (No. III of 1898).
2. The charges were cast in the Torrens type and the liens were akin to English equitable mortgages by deposit of title documents. See the Selangor Regulation, 1891, ss. 41-55 and 78.
3. It may be noted that, in Perak, prior to the introduction of its Registration of Titles Enactment, 1897, a form called "Memorandum of Malay Sub-lease or *Jual Janji"* was prescribed by the Government for effecting this kind of customary security transaction and for its registration under the Perak General Land Regulations of 1885. The prescribed form treated such transactions as in substance a lease of land by the borrower to the lender whereby the latter was entitled to "the usufruct of the said land during the said term or until the [loan] shall have been repaid". (Perak Government Gazette, dated February, 1891, Notification No. 85.).

Australia, the *jual janji* transactions more often than not assumed the form of an absolute transfer by way of registration of the borrower's land to his lender subject to an agreement that the land was to be transferred back to the borrower upon his repaying the debt within a stipulated period. Thus, outwardly, the transformed Malay customary transactions became assimilated to something very familiar to an English legal mind — *i.e.* a sort of mortgage by an absolute transfer of land subject to a deed of defeasance. As such, this form of security transaction also came to be used between non-Malays.[4]

It was only a matter of time before the legal effect of such *jual janji* transactions would require to be judicially considered, and, indeed, that was the very issue in the well-known case of *Haji Abdul Rahman* v. *Mohamed Hassen,*[5] a Privy Council decision in 1917 under the Selangor Registration of Titles Regulation, 1891.

In this case, the stipulated period for repayment of loan had long expired when the borrower claimed a right to have the land in question re-transferred to him on his repaying the loan. The F.M.S. Court of Appeal, as well as the Judge of first instance, treated the *jual janji* transaction as in essence a mortgage of land. By applying the English equitable principle "once a mortgage always a mortgage", they allowed the borrower to redeem the land. Their decision was however reversed by the Privy Council. Lord Dunedin, in delivering the Board's opinion, pointed out that the collateral agreement in question could not have the effect of turning the absolute transfer into a mortgage of the land by reason of section 4 of the Regulation which read:

> After the coining into operation of this Regulation, all land... shall not be capable of being transferred, transmitted, mortgaged, charged, or otherwise dealt with except in accordance with the provisions of this Regulation, and every attempt to transfer, transmit, mortgage, charge, or otherwise deal with the same, except as aforesaid, shall be *null and void and of no effect*....[6]

In their Lordships' opinion, this section meant that the statutory system of dealings with land did not allow a place for any form of security transaction in land other than the ones it expressly provided for. Thus, the *jual janji* arrangement in issue could not, in law, be recognised as a security transaction affecting the land. Their Lordships therefore held that the collateral agreement only had effect in contract, and that, when the contractual right to a re-transfer had expired, the borrower retained nothing in the land to warrant a further right in equity to redeem. The local Judges were criticised by their Lordships as having been swayed by English equity in disregard of local legislative intention.

On the other hand, the truth might well have been that the Judges in the Malay States, being inclined to protect the helpless borrower, did not want to take so stringent a view of the exclusiveness of the statutory system and had therefore looked to English jurisprudence for a more

4. For some advantages of this form of security over a charge, see Terrell J.'s observation in *Murugappa Chetty* v. *Seenivasagam* [1936] F.M.S.L.R. 33, 65-66.

5. [1917] A.C. 209.

6. My own emphasis.

desirable solution. The sort of hardships that apparently befell the borrower in the instant case in consequence of the Privy Council decision was exactly the primary reason why equity had come to the aid of a mortgagor at common law in England. However, the Privy Council, in simply sticking to the letter of the law, choked the policy issue. Its decision may therefore be said to have turned solely on that section 4 of the Selangor Regulation.

Subsequently, in the Federated Malay States, the Land Code (Cap. 138) which was passed in 1926, contained a corresponding but much watered-down provision which read:[7]

> All land... shall be subject to the provisions of this Enactment, and shall not be capable of being transferred, transmitted, charged or otherwise dealt with except in accordance with the provisions of this Enactment.

In contrast with section 4 of the 1891 Selangor Regulation, the above provision no longer declared "null and void and of no effect" any attempt to deal with land otherwise than in accordance with the statutory provisions.

Now the nearest corresponding provision in the National Land Code, 1965, is even more constrained in wording. Section 205(1) reads:

> The dealings capable of being affected *under this Act*[8] with respect to alienated lands and interests therein shall be those specified in Parts Fourteen to Seventeen, and no others.

This present provision does not say that land is not capable of any other sort of dealing outside the Act. It seems to be merely stating that dealings of which land is capable under the Act are those provided for by the Act.

A comparison of these present and past provisions thus indicates a notable change: the withdrawal of express statutory prohibition on dealings with land outside the statutory system. What, then, should become of the ruling in *Haji Abdul Rahman's* case ? In raising this question, it must be added that the Privy Council decision in that case did not kill the customary practice. Even today, *jual janji* transactions, as is known, are still not uncommon in the Malay States; but, rather, their continuing existence reflects the unrealistic legalism and harshness of the Privy Council decision.

Review of cases

The Privy Council decision being nonetheless a high judicial authority, an appraisal of its present standing necessarily calls for an inquiry as to how the Judges in the Malay States have subsequently responded to the decision.

7. S. 55 thereof.
8. My own emphasis.

In *Murugappa Chetty* v. *Seenivasagam,*[9] a Court of Appeal decision in 1936 under the F.M.S. Land Code (Cap. 138) *A* purchased land partly with his own money and partly with a loan from *B.* The land was transferred to and registered in *B's* name. It was orally agreed between them that *A* was to have possession of the land and that the land would be re-transferred to him upon repayment of the loan. Later, on *A* defaulting to pay interest on the loan, *B* took possession. In an action by *B* on several promissory notes and for account against *A, A* counter-claimed, *inter alia, for* damages for mismanagement and negligence and also for trespass on the grounds (a) that *B* was a mortgagee in possession and, alternatively, (b) that *B* was merely a trustee of the land who had no right to possession for his own benefit. The trial Judge held *B* liable for trespass for the very ambiguous reason that he was a trustee of the land "subject to a debt". On appeal, only the issue of *B's* liability for trespass was before the Court of Appeal.

Thomas C.J. in the higher Court followed *Haji Abdul Rahman's* case and refused to treat the dealing between the parties as a security transaction in land, but he went on to hold that, in the circumstances of the case, *B* was a trustee of the land to which *A* was beneficially entitled. He therefore upheld the trial Judge's decision.

Terrell J., with the concurrence of another Judge, took a different approach. He raised the basic issue as to whether such a kind of security dealing as was in question was at all prohibited by the F.M.S. Land Code (Cap. 138) then in force. He observed that *Haji Abdul Rahman's* case was decided under the Selangor Registration of Titles Regulation, 1891, which contained a sweeping prohibitive provision that, in his words, was "far more stringent than" the corresponding provision in the Land Code. However, instead of going a step further to distinguish the Privy Council decision, Terrell J. fell back on an effort of reconciliation. He sought to say that even in *Haji Abdul Rahman's* case, the Privy Council did not regard such a purported security transaction outside the statutory system as "illegal" but did recognise its effect in contract. He then ventured to put forth the view that such recognition of its contractual effect would under the Land Code (Cap. 138) mean *"a fortiori"* that "by virtue of the collateral agreement" *A* had "some equitable rights" which were binding on *B "in personam".* After much elaborate discussion to show that as the parties intended and actually carried out a security transaction *B* could not be regarded as a bare trustee of the land, the Judge quite abruptly came to a conclusion that *B* who "went into possession of [the land] in which [A] had an equitable interest" was in a position analogous to that of a mortgagee taking possession under English law.

Thus, while all the Judges in the above case were apparently endeavouring to evade the harshness of *Haji Abdul Rahman's* case, Terrel J. was, indeed, very close to breaking away from the Privy Council ruling in favour of recognising the kind of security transaction in question as a valid dealing in equity. However, in so far as he purported to rely on the Privy Council decision, his legal reasoning and conclusion seems to have been misplaced.

9. [1936] F.M.S.L.R. 33; (1940) 9 M.L.J. 217.

In *Yaacob bin Lebai Jusoh* v. *Hamisah binti Saad,*[10] another Court of Appeal decision in 1950, the appellant transferred by way of an absolute sale his land to the respondent who, by a separate written agreement, undertook to re-sell the land to the appellant at the same price. The appellant was to "re-purchase" the land within a stipulated period of about three years, after which if he failed to do so the agreement would become "null and void". The stipulated period having expired and on the respondent refusing to return the land, the appellant asked the Court for an order to direct a re-transfer by the respondent upon repayment of the loan.

All three Judges in the Court of Appeal unanimously held in favour of the appellant. Jobling J. delivered the following judgment:

> For the defence it was submitted that in any case the agreement... was void as the plaintiff had not repurchased the land within the stipulated period of three years. But in *Haji Abdul Rahman* v. *Mohamed Hassan,* the Privy Council laid down that where an agreement is in the nature of a mortgage, the right to redeem remains irrespective of whether or not the period within which it is specified the loan shall be repaid has expired. The stipulation that the land shall be repurchased within three years does not therefore affect the plaintiff's right to redeem, [11]

Briggs J., who expressed his full agreement with Jobling J., added:

> I am satisfied that the transaction was the familiar one of *jual janji....* Once that is established, it matters not whether the agreement was in form an agreement of purchase and sale or an option. The case of *Haji Abdul Rahman Hassan* shows that in either event time is not of the essence of the contract, since the latter transaction [*i.e.* the "re-purchase"] will be in effect a redemption.[12]

The third Judge, Pretheroe Ag. C.J. expressed his unreserved concurrence.

Clearly this subsequent Court of Appeal decision also favoured equitable intervention in protection of the borrower in the way English equity protects a mortgagor at common law: to allow the borrower a right in equity to redeem when his contractual right to do so has expired. However, *Haji Abdul Rahman's* case which the Judges so bluntly cited in support of their view was really an authority to the contrary.

In 1953, *Yaacob bin Lebai Jusoh* v. *Hamisah binti Saad*[13] was followed by Thomson J. in *Nawab* v. *Mohamed Shariff & Ors.*[14] Hence, the judicial trend so far had been one of moving away from the ruling in *Haji Abdul Rahman's* case. If the two Court of Appeal decisions could in effect be taken to mean that the F.M.S. Land Code (Cap. 138) had come to allow the recognition of *jual janji* transactions as valid

10. (1950) 16 M.L.J. 254.
11. *Ibid.,* at p. 257.
12. *Ibid.,* at p. 257.
13. (1950) 16 M.L.J. 254.
14. (1953) 19 M.L.J. 12.

security transactions in equity outside the statutory system, then the Privy Council decision could neatly be distinguished. However, this was not how the Judges had presented the position. Instead, in trying to reconcile their decisions with the high authority, the Judges' reasoning revealed a missing gap between regarding such a security transaction as merely operative in contract and going beyond contract in according to the borrower an equitable right of redemption. Not surprisingly, therefore, when some other Judges later applied the acid test of legal logic, the policy spirit of the earlier decisions was dissipated.

Such repercussion was soon seen in a 1954 case, *Wong See Leng* v. *C. Saraswathy Ammal,*[15] which is also a Court of Appeal decision. This case also concerned a purported security transaction by way of a sale of land coupled with an agreement for re-purchase. It was contended by the borrower that although the contractual period for the re-purchase had expired, he was nonetheless entitled to a re-transfer of the land on the ground that the equitable principle "once a mortgage always a mortgage" should apply. The Court, consisting of Pretheroe C.J., Murray-Aynsley and Buhagiar JJ., rejected the contention. As Murray-Aynsley J. pointed out:

> The contention of the plaintiff was that on the basis of these facts the transaction was an informal mortgage, and that the English doctrines concerning mortgages, in particular those dealings with clogs on an equity of redemption, should be applied. In my opinion, since the case of *Haji Abdul Rahman* v. *Mohamed,* it is an impossible position. That case decided, as clearly as any case can decide anything, that a transaction of this kind can in territories subject to the Land Code [i.e. Cap. 138] amount only to a contract between the parties and nothing more. If it is a contract it is subject to the Contract Ordinance and there is nothing there or anywhere else that gives the Courts power to substitute something else for what was agreed between the parties. The contract alleged was an option with time the essence of the contract. This is a contract which parties are free to make if they choose, and people very frequently do make contracts of this kind. The Court have no power to extend the time for exercising the option.[16]

And Buhagiar J. said:

> Counsel for the respondent relied on the decision of this Court in *Yaacob bin Leabi Jusoh* v. *Hamisah binti Saad* and submitted that the Court was bound by this decision. In my opinion that case was decided against the authority of the decision of the Privy Council in *Haji Abdul Rahman* v. *Mohamed Hassan....*[17]

Pretheroe C.J., who was one of the Judges in *Yaacob bin Lebai Jusoh's* case, shifted his attitude and expressed his concurrence with Murray-Aynsley J.

This decision was thus a reverter to the strict ruling of *Haji Abdul Rahman's* case. The efforts of Terrell J. in *Murugappa Chetty* v. *Seenivasagam*[18] in trying to construe the Privy Council decision as

15. (1954) 20 M.L.J. 141.

16. *Ibid.,* at p. 142.

17. *Ibid.*

18. [1936] F.M.S.L.R. 33; (1940) 9 M.L.J. 217.

turning on the stringent prohibitive provision in section 4 of the 1891 Selangor Regulation seemed to have been ignored altogether.[19]

The same reversed trend would appear to have been again reflected in a 1964 Federal Court decision, *Ibrahim v. Abdullah.*[20] The appellant and the respondent in this case had entered into two simultaneous agreements. Under one of the agreements the appellant agreed to sell the land in question to the respondent fixing the date of completion at three years later; and by the other agreement the respondent undertook to re-sell the land to the appellant at the same price within three years. After the lapse of the three years' period, the respondent obtained an order of specific performance in pursuance of which the land was transferred to him. In that action, the appellant did not disclose the other agreement. It was about two years later when the appellant brought the present action that both the agreements were produced in support of his claim that, as what had transpired between them under the agreements was actually a security transaction, he had a right to redeem the land on repayment of the loan. His claim failed both in the High Court and the Federal Court. Wee Chong Jin C.J. (Singapore) in the higher Court expressed the view:

> the transaction... amounted to no more than a contract on the one hand by the appellant to sell the land to the respondent and on the other hand by the respondent to resell the land to the appellant.... He has, so the learned trial Judge on this action has found, failed to pay or to be able to pay $1,000 — the agreed purchase price — to the respondent within the contract period and in my opinion there is no equity in his favour for this Court to allow him after the period of 3 years to ask for specific performance of that particular contract in his favour.[21]

Thomson L.P. (Malaya) also said:

> Such rights as accrued to the parties by reason of the transaction were, in my view, contractual and personal.[22]

This Federal Court decision is susceptible of two interpretations. On its face, it would appear to be a decision to the effect that the two agreements in question were not established in the circumstances of the case to have been intended to be a security transaction, and therefore, the Judges treated the appellant's action to be no more than a claim for specific performance solely founded on the agreement for re-sale which by the lapse of time was no longer so enforceable. However, one would be inclined to feel that the decision rather showed the reluct-

19. It may be noted that in *Wong See Leng's* case, Buhagiar J., probably making an attempt to discredit Terrell J's reasoning, went to the extent of observing that *Haji Abdul Rahman's* case was not based on any peculiarities of the local law but was good for all Torrens jurisdictions. Such observation was evidently ill-founded. In Australia, for example, where mortgage by way of an absolute transfer subject to an collateral agreement for re-transfer is not uncommon in some of its States, it has been judicially settled that the mortgagor has an equity of redemption which is a caveatable equitable interest in land. See *Abigail* v. *Lapin* [1934] A.C. 491; and also c.f. Baalman, *The Singapore Torrens System,* pp. 108, 129.

20. (1964) 30 M.L.J. 139.

21. *Ibid.,* at pp. 130-140.

22. *Ibid.,* at p. 140.

ance of the Court to take the two agreements together as forming really one arrangement of the nature of a security transaction. What the Court did was to isolate the agreement for re-sale and thereby to treat it as having effect only in contract. This is like separating a collateral agreement for re-transfer from the absolute transfer in a *jual janji* transaction. In this sense, the decision may be said to in line with *Wong See Leng's* case.

It would therefore appear that, despite the conflicting local authorities subsequent to the Privy Council decision in *Haji Abdul Rahman's* case, *Wong See Leng's* case may well have put to rest the controversy in the mind of a practical legal adviser. At the same time, the harshness of the Privy Council decision must have remained as disquieting as before.

Thus, in a 1970 case, *Ismail bin Haji Embong* v. *Lau Kong Han,*[23] which concerned a typical *jual janji* transaction, it would appear that a renewed effort was made by Ibrahim J. to do equity in favour of the borrower. In this case, after the expiration of the contractual period for re-transfer, the lender had several times assured the borrower that "it was all right as long as" the latter continued paying the monthly interest on the loan and the borrower did continue to do so. On this finding of fact, the Judge held that even if time was originally of the essence in respect of the stipulated period for re-transfer, the conduct of the parties clearly showed that it was subsequently not so regarded by them. He therefore in effect allowed the borrower to redeem the land after the contractual period. However, probably in view of *Wong See Leng's* case, the Judge tactfully confined his revolt within the ambits of contract law as if he were merely sorting out the intention of the parties with reference to the agreement for re-transfer alone in the same way as the Court may in certain circumstances find time not to be of the essence in an ordinary contract of sale of land. On the other hand, the Judge in his judgment seemed to be basically inclined towards regarding time not to be of the essence in such kind of collateral agreement before him. This would leave open the question whether or not, once such an agreement is established as being in fact part of a security transaction, a Judge who would favour protecting the borrower may readily go a step further to infer that the intention of the parties in the light of the security nature of their dealing must have been not to regard time as of the essence. As a technical device, this can indeed be another way of allowing the borrower to get back his land after the expiry of the stipulated period, but such a solution would seem desirable only if it is at all necessary to avoid a direct confrontation with the strict ruling in *Haji Abdul Rahman's* case.

A recent decision

It is, however, urged that the problem as regards the place of *jual janji* transactions really calls for a fundamental policy decision. The very authority of *Haji Abdul Rahman's* case should be put in issue: whether such transactions should be recognised as a kind of valid security dealing with land in the Malay States. This issue is now

23. [1970] 2 M.L.J. 213.

again pressed to the forefront by a recent Federal Court decision in *Halijah* v. *Morad.*[24]

In this case, the Federal Court had to consider the nature of an agreement made in 1948. To simplify the facts, the agreement was to the effect that *A* agreed to hand over the possession of his land to *B* in consideration of a sum of money he had received from *B*. *B* in turn agreed that she would hand back the possession of the land on payment of the same amount of money and any expenses incurred by her in the development of the land. It was further stipulated that if such payment was not made within three years, *A* would execute a transfer of the land to *B* at a sale price equal to the amount of the agreed repayment. *B* had remained in possession since the agreement, and in this action instituted for recovery of possession against her, she counterclaimed for an order that the land be duly transferred to her in pursuance of the agreement. The reply was that her claim was statute-barred. It was then contended for *B* that after the lapse of the three years' period she became a purchaser of the land under a valid contract of sale and hence the equitable owner of the land. The Court was urged to hold, in the light of the English case *Williams* v. *Greatex,*[25] that the right of an equitable owner to perfect his title could never be statuted-barred.

Before turning to the decision in the present case, it is significant to note that the Federal Court had in an earlier case applied the principle in *Williams* v. *Greatex.* In that case, namely, *Othman & Anor.* v. *Mek,*[26] the Federal Court held that where a purchaser under a contract of sale had paid the full purchase price and had entered into possession of the land, he had become the equitable owner of the land whose rights as against the vendor to have the full title to the land formally transferred to him could not be lost by reason of delay or laches. The purchaser and vendor in the case were in fact the borrower and lender respectively to a *jual janji* agreement which was the contract of sale in question. The agreement was to the effect that the borrower had sold the land to the lender at a stated price and that the lender would transfer the land back if the borrower paid him the same price within five years. Within this stipulated period, the borrower did repay the full amount of the price for the re-sale. Moreover, the borrower had thereby recovered the title documents in respect of the land and had also taken possession of the land. As far as the case is relevant to our present discussion, it may be pointed that the security nature of the agreement there in question had no bearing on the Federal Court decision. As the borrower had performed his undertaking under the agreement with respect to the re-sale, the Court simply (and rightly so) treated him as a purchaser under a contract of sale, whether or not it was in fact an agreement for re-sale. Thus, on the principle upheld by the Court, this borrower-purchaser succeeded to have the land transferred back to him though had his action been one of merely enforcing his contractual right it might well have been statute-barred.

24. [1972] 2 M.L.J. 166.
25. [1957] 1 W.L.R. 31.
26. [1972] 2 M.L.J. 158.

Coming back to *Halijah* v. *Morad,*[27] it may at once be noted that, in this case, it was the lender in a *jual janji* transaction who claimed that he had become the equitable owner of the land. The logic of his contention, though not fully set out in the report, is pretty clear. According to the agreement in question, the borrower had a contractual right to regain possession of the land if he repaid the loan and recouped the lender for certain expenses within five years, and if he failed to make such payment within the time limit, he would formally transfer the land to the lender. As the borrower, in fact, had not repaid the loan within the period, the agreement, now unqualified by the condition precedent, became one of an absolute sale of land to the lender. It would therefore follow that the lender could then be regarded as a purchaser under a binding contract of sale who had paid the purchase price and had entered into possession.

However, the contention was rejected by the Federal Court. After noting the principle in *Williams* v. *Greatex,* Azmi L.P., with the concurrence of Gill and Ali F.JJ., stated his view as follows:

> With respect to counsel, the defendant [the lender] in this case was not given possession of the land as a purchaser but as a creditor in order to give her security for the loan and also to enable her to collect the profit from the land in place of interest for the loan. In the circumstances the principle in my view stated above will not apply.[28]

The defendant's counter-claim was therefore held to have been statute-barred.

Although, in Azmi L.P.'s judgment, no reference was made to *Othman & Anor.* v, *Mek,* this earlier case which was decided only about a month before the present case must have been present to the minds of their Lordships,[29] and the Federal Court evidently took the view that the present case was entirely distinguishable.

What, then, is the basis on which the Court in the present case rejected a *prima facie* valid contention in favour of applying *Williams v. Greatex* or its own earlier decision ? Azmi L.P.'s brief reasoning might on its face seem to suggest that it was because the defendant had not originally entered into possession as a purchaser but as a creditor under the agreement. However, the contention on behalf of the defendant was that he had subsequently became a purchaser of the land who was already in possession. It is submitted that Azmi L.P.'s statement clearly could not have been intended to mean that the principle in *Williams* v. *Greatex* would only apply if a purchaser had in the first instance entered into possession as a purchaser. One could take the example of a purchaser who happens to be a lessee of the land before he buys it. There is no reason why if he has paid the purchase price and continues in possession now as a purchaser, his position should be any different from that of a purchaser who first enters into possession under a contract of sale.

27. [1972] 2 M.L.J. 158.

28. *Ibid.,* at p. 168.

29. It may be noted that one of the Judges in the earlier case was also sitting in the present case.

This thus bears out the significance of his Lordship's characterisation of the defendant as a creditor. One would be justified in reading deeper into his reasoning to realise that the Court in effect declined to treat the defendant as a purchaser even after the plaintiff's contractual right to regain possession had been lost by lapse of time. In other words, the Court did not confine itself to considering the agreement only as regards its effect in contract but chose to go behind the mere terms of the agreement in recognition of the security transaction between the parties. Only by having taken such an attitude could the Court have been able logically to arrive at its decision. Hence, as the Court regarded the defendant as having been only a creditor in so far as his rights over the land were concerned, there could obviously be no room for the application of the principle in *Williams* v. *Greatex.*

In the light of the above analysis, although, as may be noted, the Judges did not at all allude to any of the existing decisions relating to *jual janji* transactions, this recent Federal Court decision cannot otherwise be taken than as a revived judicial recognition of such transactions. It has now, despite the disruption by *Wong Seng Leng's* case, reinforced the earlier Court of Appeal authorities.

A resolute policy decision needed

The above review of cases has shown that the problem as regards the place of *jual janji* transactions still remains unresolved. It is hoped that, should opportunities arise, the Judges would thoroughly appraise the existing authorities and clearly enunciate where the law now stands.

It is submitted that what is needed is a resolute policy decision. As has been pointed out, technically the early Privy Council decision may be distinguished on the ground that it turned on section 4 of the 1891 Selangor Regulation. Furthermore, as the present National Land Code no longer contains any like provision (whether or not the same could definitely be said of the former F.M.S. Land Code) it is now clearly open to the Judges legally to recognise such security dealings outside the statutory system. Nonetheless, the final decision can only be derived from policy considerations.

The primary policy issue is simply this: should the law come forth to protect the borrower in a *jual janji* transaction ? Presumably no fair mind could react otherwise than positively. To a similar challenge, English law has long provided a legal solution which has been enshrined in the principle "once a mortgage always a mortgage". Stripped of its legal technicalities, the English solution boils down to this: a borrower who has used his property as a security for a loan should be allowed to recover it whenever he can repay the loan and that he should by no means be deprived of his property simply because of his failure to repay within the agreed period. The moral principle of such a solution seems equally appropriate and fair for application to *jual janji* transactions in the Malay States.

It is further submitted that, in these States, that solution may suitably take the form of recognition of *jual janji* transactions as

effective security dealings in equity outside the statutory system. The early 1891 Selangor Regulation and the like legislation in some other States did prohibit such transactions, but such legislative policy should be understood with reference to the circumstances of the time. At that period, understandably, in setting up for the first time one general law to govern dealings with land in the Malay States, relative simplicity and exclusiveness of the super-imposed Jaw could have been desirable for better ensuring its workability. But, today, the efficiency and adequacy of the system should not be made to suffer for historical reasons which are no longer operative. When the Torrens system was first put to work in Australia, there was also strong contention in favour of simplicity and hence heated controversy as to whether the Torrens system should allow equitable interests in land to be capable of creation and existence outside the system.[30] Subsequent growth of the system in Australia as well as in other Commonwealth countries has proved the need for its supplementation by equitable intervention and refinement. There is no reason why the system in the Malay States should drift along in uncertainties.[31] It is therefore urged that the recent Federal Court decision in *Halijah* v. *Morad*[32] should enjoy a positive and constructive acceptance and serve as the turning point for restoring *jual janji* transactions to a lawful place both in the face of reality and in the name of equity.

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30. See Hogg, *The Australian Torrens System,* chapter II, and also Douglas Pike, "Introduction of the Real Property Act in South Australia", 1 Adelaide L.R. 170.

31. See my article "Equitable Interests and the Malaysian Torrens System", (1967) 9 Malaya L.R. 20.

32. [1972] 2 M.L.J. 166.

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