AN INTRODUCTION TO THE STUDY OF THE LAW ADMINISTERED IN THE COLONY OF THE STRAITS SETTLEMENTS

CHAPTER I.

HISTORICAL SKETCH.

The Colony of the Straits Settlements consists, as its name implies, of several Settlements formed in the Straits of Malacca, Their connection is historical rather than natural, and a knowledge of the outline at least of their history is necessary to any one who would study or practice the system of law administered in them. Starting from the North they include the Island of Penang and a portion of the mainland opposite to it known as Province Wellesley, a group of islands with a district of the adjacent mainland together called the Dindings, and the agricultural territory of Malacca; whilst South of these, and at almost the most southerly point of the Malay Peninsula and indeed of Asia, lies the island of Singapore, on which is situate the capital and the head quarters of the Government.

The earliest British occupation of any of these Settlements was in 1786, when Penang was acquired by treaty from a Native Sovereign, the King of Quedah. At the time of its acquisition the only European Power which had any foothold in the Straits of Malacca was Holland. Having captured the town of Malacca from the Portuguese in 1641, the Dutch entered into treaties with the native rulers and established factories in their territories, with a view to imposing their commercial policy upon the Peninsula. England seemed to have retired worsted from the mercantile struggle in the Far East. The successful rivalry of Holland marked by the massacre of our countrymen at Amboyna in 1623, and our expulsion from Java in 1684, caused us practically to abandon the commerce of the Malay Seas, retaining merely a trading station in Bencoolen on the West Coast of Sumatra. Successful at the time as this rivalry was, it resulted in our transferring our seat of Government from the Indian Seas to the Indian Continent, and has given us our Indian Empire.

When however the consolidation of the British power on the plains of Bengal and in the Carnatic had been successfully effected, the Government of British India began to look afield and sought a convenient position for establishing a port to shelter their trade in the further East. The result was the occupation of the island of Penang.

'In 1786, Penang, being then a desert and uncultivated island, uninhabited except by a few itinerant fishermen, and without any fixed institution, was ceded by the Rajah of Quedah to Captain Light an Officer of the E.I. Co., for and on behalf of the Company. On the occasion of taking possession of the Island, Captain Light, published the following proclamation.

PROCLAMATION.

These are to certify that, agreeable to my orders and instructions from the Hon'ble the Governor-General and Council of Bengal, I have this day taken possession of this Island called Pooloo Penang, now named the Prince of Wales' Island, and hoisted the British Colours in the name of His Majesty George the Third, and for the use of the Hon'ble English East India Company this 11th day of August, 1786, being the eve of the Prince of Wales' birthday.

In the presence of the underwritten,

FRANCIS LIGHT.

Immediately after the Island had been thus formally occupied, its settlement commenced, and the enterprise was so successful that in three years from the date of the original settlement, we find Captain Light stating that there was a population of 10,000 persons settled in the island, and that this number was being continually increased'.[1]

At first the New Colony had no regular form of Government, its administration being entrusted to Captain Light, who was styled Superintendent, as was also his immediate successor. In 1800 however it was constituted a Lieutenant-Governorship subordinate to the Bengal Administration. The first Lieutenant-Governor, Sir George Leith, Bart., soon after his arrival obtained the cession of Province Wellesley, an agricultural district populated by Malays; and since that time the island and the province have remained united for administrative purposes.[2]

For some time after the cession of the island of Penang doubts existed as to its legal position, and until the promulgation of the charter of 1807, it was in a state of legal chaos. Under section 36 of 13 Geo. III. c. 63, (the Statute which constituted the Supreme Court of Bengal with jurisdiction over Bengal, Behar and Orissa) the Governor-General and Council at Fort William in Bengal were empowered to make regulations for the good order and civil government of the United Company's Settlements at Fort William and other factories and places subordinate or to be subordinate thereto. But in 1793 Sir William Burroughs, then Advocate-General, on the ground apparently that this authority did not extend to Penang, advised that the Governor-General in Council was not invested with power to establish Courts of criminal and civil jurisdiction. Notwithstanding this opinion Lord Teignmouth the Governor-General in Council on the 1st August 1794 declared 'that he did not think himself authorised, to establish formal and regular Courts for

1. *Fatimah* v. *Logan*, 1 Ky. 255, *per* Hackett, J. 258.

2. The instructions given to Sir George Leith are interesting as shewing the good, though unfulfilled intentions of the Board of Directors. The 6th was as follows:— "The laws of the different peoples and tribes of which the inhabitants consist, tempered by such parts of the British law as are of universal application, being founded on the principles of natural justice, shall constitute the rules of decision in the Courts," see 1 Ky. xi; as to the effect of these instructions see *Fatimah* v. *Logan*, 1 Ky, 255, 260.

the trial and punishment of offenders, but*** passed certain regulations for preserving the peace of the island, and which in the shape of a letter from the Governor-General in Council were transmitted to Mr. Light, then the Superintendent of Prince of Wales' Island, and till this time, are the only laws there in force'.

The opinion of Sir W. Burroughs was not followed by his successor Mr. Strettell, for about the year 1800, he advised that the Governor-General was authorised to enact laws and regulations, civil, and criminal, for the Government of Prince of Wales' Island, in the same manner as he did for the Province of Bengal; but no regulations were made by the Governor-General in Council establishing civil or criminal Courts.[3]

The state of the island during the period from its cession until the promulgation of the first charter in 1807, has been described by Sir Benson Maxwell, then Recorder, in the case of *Regina* v. *Willans*.[4] After discussing the question as to what law should *de jure* have prevailed in the Settlement, he goes on:—

> 'But whatever ought, *de jure*, to have been the law of the land when the Colony was founded, it is clear beyond all doubt, that for the first twenty years and upwards of its history, no body of known law was in fact recognised as the law of the place. As to the law of England, so far was it from being regarded as the *lex loci,* that it was hardly recognised even as the personal law of its English inhabitants. This appears very clearly from the early records of the Local Government which were published a few years ago in the Journal of the Indian Archipelago, under the title of "Notices of Penang," by a gentleman holding a high office in the Settlement. In the first place, the law of England was not in force for the punishment of crime. Mr. Light was directed in 1788 "to preserve good order in the Settlement as well as he could," not by punishing those who offended against it, according to English or any other known body of law, but "by confinement or other common punishment," [4 J.I.A. 643]; and five years later he is found carrying out his instructions by "whipping and confining to the public works, or sending off the island, the thieves, housebreakers and other disorderly persons" who he complained then infested the Island [4 J.I.A. 656]. But this jurisdiction extended only to those inhabitants who were not British subjects [id. 643]. These, it appears, he was ordered, at least in cases of murder, to send to Calcutta for trial before the Supreme Court there [5 J.I.A. 2].[5] But when, in 1793, a man named Sudds was accordingly sent there on a charge of murder, Sir W. Burroughs, the Advocate-General, gave it as his opinion, that "there was not any law by which the well meant directions given to the Superintendent of Prince of Wales' Island*** could be supported, as far as they related to the trial or punishment of murder, or any other Crimes at that Island" [5 J.I.A. 5]; for the jurisdiction of the Supreme Court of Calcutta was then confined to Bengal, Behar and Orissa [13 Geo. III. c. 63. s. 14]. When it was extended by the 39 & 40 Geo. III. c. 79. s. 20, to all factories and places subject to the Bengal Presidency, fresh instructions were sent [25 March, 1800] to Sir George Leith, the Lieutenant-Governor of the Island, directing that "Europeans guilty of Murder or other Crimes of enormity should be sent to Fort William, [5 J.I.A. 158]; but for lesser offences they appear to have been left in total impunity.'

3. 5 J.I.A. 294.

4. 3 Ky. 16; the passages quoted *infra* are on p. 22 *et seq.*

5. British subjects would be amenable to the Supreme Court at Calcutta under 26 Geo. III. c. 57 s. 29.

Section 20 of 39 & 40 Geo. III. c. 79 does not appear to the writer to go to the extent stated by Sir Benson Maxwell. That Section (after reciting that the province or district of Benares had been ceded to the said United Company, and had been annexed to the said Presidency of Fort William in Bengal, since the Establishment of the Supreme Court of Justice at Fort William aforesaid, said that it was expedient that the same should be subject to the jurisdiction of the said Court, in like manner as the Kingdoms or Provinces of Bengal, Behar and Orissa; and that the said province or district and all other provinces or districts, which might thereafter be annexed and made subject to the said Presidency, should be subject to such regulations as the Governor-General and Council at Fort William aforesaid had framed or might frame for the better administration of Justice among the native inhabitants and others within the same respectively) enacted, that from and after the 1st March 1801, the power and authority of the said Supreme Court of Judicature in and for the said Presidency of Fort William aforesaid, as then and by virtue of that act established, and all such regulations as had been or might be thereafter, according to the powers and authorities, and subject to the provisions and restrictions before enacted, framed, and provided, should extend to and over the said province or district of Benares, and to and over all the factories, districts and places which then were or thereafter should be made subordinate thereto, and to and over all such provinces and districts as might at any time thereafter be annexed and made subject to the said Presidency of Fort William aforesaid. This section extended the jurisdiction of the Supreme Court to Benares and districts subordinate to it and to districts which might *thereafter* be annexed to the Presidency. Accordingly it does not appear that the Supreme Court at Calcutta ever had any jurisdiction in Penang except by virtue of 26 Geo. III. c. 57, s. 29. The learned Judge continues —

> 'As late as 1805, the Governor complains that while provision had been made for the punishment of native criminals, "the more turbulent European remains on the Island free from all restraint, with the power of committing every act of injustice and irregularity towards his neighbour and the most peaceable native, having set at defiance all authority as not legally established on the Island." [6 J.I.A. 93]. It may be said that this proves the want of legally constituted Courts, rather than the absence of law; but Criminal law can hardly be said to exist, when there are no tribunals to enforce it. However this may be, what Criminal law was in force was not English law. In 1794, a body of Regulations were passed by Lord Teignmouth, the Governor-General, for preserving the peace of the Island [5 J.I.A. 294]; and these appear to have continued in force, and indeed, to have been the only Criminal law in force, down to the time when the first Charter was granted.
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> Next, the law of England was as little recognised in Civil matters. Even the general rules of inheritance, which Blackstone considers to be among those portions of English law which are carried to their Settlements by English settlers [1 Bl. Com. 107], were wholly disregarded. Mr. Dickens, who was appointed in 1800, partly to act as judge or assessor to the Lieutenant-Governor [5 J.I.A. 167], and partly to frame a Code of laws for the Settlement [id. p. 195]; urged earnestly, in that year, that the Governor-General should enact a Regulation upon the subject [id. p. 119]; and even as late as 1823, we find Mr. Phillips, the Governor of the Settlement, mentioning that "the Rules which, according to British Law, govern the disposition and inheritance of real property have never been made applicable to our lands, &c." So, with respect to personal property. In 1804, Mr. Farquhar, the Lieutenant-Governor, in applying to the Supreme Government for instructions for the distribution of the effects of a person domiciled in the

Island, who had died intestate, stated, that there was here "no law nor any fixed custom," according to which it could be distributed, [5 J.I.A. 409]. Again, slaves were bought and sold, not only openly, but with the sanction of the local Government, one of whose early cares was to provide Registers for those transactions; and taxes were imposed by the sole authority of the Governor-General in Council, viz., a duty of two per cent on all sales of lands and on the estate and effects of deceased persons [4 J.I.A. 646, 9]. Thus, two of the principles of English law were completely disregarded — that which makes a slave free when he touches British soil, or in other words, comes within the jurisdiction of British law, and that which protects the subject from taxation except by his representatives. There were Courts and Judges here before the Charter, but the justice which they administered between man and man within their respective jurisdictions, was not in accordance with the rules of English law. In 1796, justice was administered in petty Civil cases among the various native populations, by the headmen or Captains, as they were called, of their own nation, nominated by the Superintendent, subject to an appeal to an European gentleman who acted as Magistrate, and who himself tried the more important Civil cases in the first instance [5 J.I.A. 106, 193]. By what law these headmen and the European Magistrate were guided, does not expressly appear; but there is no reason to suppose that Malay, Chinese and Chulia Captains were appointed to administer any other law than that with which they might be presumed to be acquainted — that of their own nation; while it is probable, from the representation of Mr. Dickens, that the Magistrate decided according to what is called natural justice, that is, according to his own notions of what was just. The following passage from Mr. Dickens' report addressed to the Governor-General in 1803, shows what was the actual legal condition of of the Island at that period:

"His Excellency in Council has been heretofore informed that Prince of Wales' Island, prior to its cession in 1785 [6] was under the dominion of a Chief who governed arbitrarily, and not by fixed laws. It is now become my painful duty to state that it has so continued to be governed without fixed laws; for upon the hour of my arrival on this Island, there were not any Civil or Criminal laws then in existence, and there are not even now any Municipal, Criminal, or Civil laws in force on this Island. 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; and as Judge, it is the only law which I can apply to the Criminal and Civil Suits brought in judgment before me. But as the law of nature gives me no precepts respecting the right of disposing of property by Wills and testaments, the rights of succession and inheritance, and the forms and precautions necessary to be observed in granting Probates of Wills and Letters of Administration to Intestates' effects, or respectings many things which are the subject of positive law. I have often been much embarassed in the execution of my duty as Judge in the Court of Justice in which I preside; and many cases there are, in which I am utterly unable to exercise jurisdiction." He adds:— "The cultivation of the Island, the increase of its commerce and of its population, has made it necessary that fixed laws of property, as well as laws declaring what acts are crimes, should be promulgated by due authority" [6 J.I.A. 22].

The result then, to be collected from the early records of the Settlement, is that for the first 20 years and odd of its history, the country had no territorial law. The task of maintaining order among the early Colonists was left to the Commandant of the garrison. Crime was repressed and punished by a kind of martial law, that is, by such punishments as a Court Martial pronounce, and the Chief local Executive Authority, or the Governor-General in Council considered appropriate to the offence. In matters of succession, personal status, contract, and perhaps tort also, as many systems of law were in force as there were nationalities in the Island; and all those laws, again, were probably tempered or modified by that law of nature, or that natural justice which appears to have been the chief guide of the European Magistrate who constituted the Court of Appeal. The State of Society

6. This is a mistake for 1786.

resembled in this respect that which existed in Europe after the destruction of the Roman Empire, as described by Savigny in the passage quoted by the Indian Law Commissioners:

> "The spirit of personal laws reigned equally among the individuals of the different Germanic tribes; and the Franks, the Burgundians and the Goths lived on the same soil, each according to their own law. Thus is explained the following passage in a letter from Agobardus to Louis le Débonnaire 'one frequently sees conversing together five people, of whom no two obey the same laws.'"

> In the midst of all this confusion, this much, and indeed this much only, seems to be clear, that so far from the law of England being in force as the law of the land, its most general and elementary principles were not recognised even by the English portion of the community, or enforced by the existing tribunals.'

The local Government, during the Lieutenant-Governorship of Sir George Leith, passed certain rules which they styled 'Regulations.' These regulations were clearly *ultra vires*; the only bodies having at this time power to legislate being Parliament and the Governor-General in Council under 13 Geo. III. c. 63. s. 36. These regulations appear to have been at first enforced by Mr. Dickens in so far as they were not repugnant to the laws of the realm, but he subsequently refused to recognise the validity of one of them, "first because it had not been approved and confirmed by His Excellency in Council, and secondly because it appeared to me unjust, unreasonable and repugnant to the laws of the realm of England."[7]

In 1805 Penang was formed into a separate Presidency, and on the 25th March 1807 Letters Patent were granted by the Crown establishing a court of judicature therein. It is necessary to give the important parts of the Charter[8] at some length, as arguments have been founded upon it as to the *lex loci* of Penang. After several unimportant recitals, the early history of Penang is summarised as follows:— "Whereas the said United Company sometime since obtained by cession from a native prince in the East Indies an island heretofore called Pulo Penang and now Prince of Wales' Island situate in the Straits of Malacca and also a tract of country in the Peninsula of Malacca opposite to the said island in the East Indies within the limits aforesaid; and at the time when such cession was made the said island was wholly uncultivated and uninhabited and since such acquisition the said United Company have caused a Fort and a Town to be built on the said island and many of our subjects and many Chinese, Malays, Indians and other persons professing different religions and using and having different manners, habits, customs and persuasions have settled there."

The Charter then provides that there shall be within the factory of Prince of Wales' Island, and the places now and at any time to be subordinate or annexed thereto, a Court of Record, which shall be

7. See extract from a letter to Mr. Phillips 9th April, 1803, 1 Ky. Ixxvii, and also 1 Ky. xxviii.

8. A printed copy of this Charter is to be found in vol. 8 of the Straits Settlements Records at the India Office. The writer has been unable to find a copy in the Colony.

called 'The Court of Judicature of Prince of Wales' Island.' The Court was to consist of the Governor, three Counsellors and one other Judge, to be called the Recorder of Prince of Wales' Island. Then follow provisions as to the status of the members of the Court, as to the appointment of officers of the Court and as to other matters.

The Court is to have the powers of the Superior Courts in England 'so far as circumstances will admit' and it is to exercise jurisdiction as an Ecclesiastical Court 'so far as the several religions, manners and customs of the inhabitants will admit.' The jurisdiction[9] is limited as to non-residents by a declaration that it shall not have power to try any suit against any person who shall never have been resident in the Settlement, nor against any person then resident in Great Britain or Ireland, unless such suit or action against such person then so resident in Great Britain or Ireland shall be commenced within two years after the cause of action arose, and the sum to be recovered be not of greater value than $12,000.

The Court is then empowered to exercise authority over the persons and estates of infants and lunatics, and to grant probate and letters of administration. Regulations then follow with regard to the conduct of executors and administrators, and power is given to the Court to allow to those persons a commission for their trouble.[10]

The mode of procedure in the Court is then sketched out — Non-Christian or Quaker witnesses are to be sworn 'in such manner and form as the Court shall esteem most binding on their consciences.' The Court after hearing a case is 'to give and pass judgment and sentence according to justice and right.'

With regard to criminal matters the Court is to be 'a Court of Oyer and Terminer and to try and determine indictments and offences and to give judgment thereupon, and to award execution thereof, and in all respects to administer criminal justice in such or the like manner and form, or as nearly as the condition and circumstances of the place and persons will admit of, as Our Courts of Oyer and Terminer and Gaol delivery do or may do in,' England 'due attention being had to the several religions and manners and usages of the native inhabitants.'

Then follow provisions as to various matters, as to juries, Quarter Sessions, Appeals to the King in Council, Courts of Requests to determine suits not exceeding the value of $32, and for the proclamation of the Charter.

It will be noticed that this Charter contains no provision as to administering native law to the native races as is done in India, where a series of legislative enactments has ensured the recognition of native customs. Thus by Section 27 of the Regulation enacted by the Bengal

9. As to jurisdiction under Charter of 1826 see *Sultan Omar* v. *Nakodah* 1 Ky. 37.

10. As to this commission see *re William Russell,* 2 Ky. (Ec). 6, *Low Quie Sew* v. *Low Soong Wan Neo*, 2 S.L.J. 40, *Wanchee Incheh Thyboo* v. *Golam Kader*, 1 Ky. 611 and *Wee Nga Neo* v. *Yeo Kian Guan*, 4 Ky. 558, 2 S.L.J. 96.

Governmen t for the administration of justice passed 17th April 1780, it was provided 'that in all suits regarding inheritance, marriage and caste and other religious usages or institutions, the laws of the Koran with respect to Mahomedans and those of the Shaster with respect to Gentoos shall be invariably adhered to'[11] and it was provided that Moulavies and Brahmins should attend the Courts to expound the law, and assist in passing the decree.

Further 21 George III. c. 70 s. 17 contained a proviso that 'inheritance and succession to lands, rents and goods and all matters of contract and dealing between party and party, shall be determined, in the case of Mahomedans, by the laws and usages of Mahomedans, and in the case of Gentus, by the laws and usages of Gentus; and where only one of the parties shall be a Mahomedan or Gentu by the laws and usages of the defendant.'

The second of the three Settlements to come under British rule was Malacca, which was occupied by a military force in 1795, during the war of the French Revolution. It remained under the British flag until the year 1818, when it was given back to Holland under the provisions of the Convention of the 13th August 1814. It was however finally ceded to Great Britain under the general arrangement effected by the Treaty with Holland of the 17th March 1824. It is to be borne in mind that the legal position of Malacca, when we obtained it in 1795, and subsequently upon its retrocession under the Treaty of 1824, was very different to that of the other Settlements, in that on each occasion a European system of law was administered by European Courts. It is of interest to note that under the Dutch system, Malay customs were fully recognised as law.[12]

Having by the Convention of the 18th August 1814, undertaken to restore Malacca to the Dutch, it become necessary, if England were not to lose her trade with the Eastern Archipelago and China, that she should obtain a station which would command the Straits of Malacca or of Sunda, and it was for this end that Sir Stamford Raffles, then Lieutenant-Governor of Bencoolen, was despatched by Lord Hastings with instructions to secure a station beyond Malacca such as might command the southern entrance of the Straits of Malacca.[13] Singapore was the spot finally selected, and on the 29th January 1819, the Union Jack was hoisted there. On the following day Sir Stamford Raffles entered into a preliminary Agreement[14] with the Tumunggong (an official of the ancient Sultanate of Johore) and on the 6th of February 1819, the Sultan Hussain having arrived in the island, a definite treaty was signed. Under this treaty[15] permission was granted to the East

11. This sectios was re-enacted the following year in the Revised Code with the addition of the word 'succession.'

12. See *Sahrip* v. *Mitchell* S.L.R. 466, 469.

13. For isstructions see Boulger's Life of Raffles 298 *et. seq.*

14. This preliminary agreement has been lost.

15. Malay Treaties 19.

India Company to establish a factory or factories at Singapore, and provision was made for the management of the port by the British authorities, whilst article seven provided that 'the mode of Administering Justice to the native population, shall be subject to future discussion and arrangement between the contracting parties, as this will necessarily in a great measure depend on the laws and usages of the various tribes, who may be expected to settle in the vicinity of the English factory.'

'The condition of Singapore when occupied by Sir Stamford Raffles on the 6th of February 1819, was almost precisely similar to that of Penang 33 years before. The island was covered by dense primeval jungle and the only cultivated and inhabited portion consisted of a few acres, at the mouth of the Singapore River. At that place the Tumunggong, one of the Chiefs of the Johore Kingdom, had established himself with a few fishermen (accused of piratical habits), and there exercised a jurisdiction in accordance with the Malayan customs.'[16]

From the first the progress of Singapore was very rapid; at the end of 1822, Sir Stamford Raffles [17] writing from the Settlement says — 'Here all is life and activity; and it would be difficult to name a place on the face of the globe with brighter prospects or more present satisfaction. In little more than three years it has risen from an insignificant fishing village, to a large and prosperous town, containing at least 10,000 inhabitants of all nations, actively engaged in commercial pursuits, which afford to each and all a handsome livelihood and abundant profit.'

The Settlement was at first governed by a Resident subordinate to Sir Stamford Raffles, the Lieutenant-Governor of Bencoolen, which place was itself subordinate to the Presidency of Fort William. Justice was administered by the Resident with the assistance of the Sultan and Tumunggong. Sir Stamford Raffles left Singapore for the last time in June 1823; previous to his departure, he had framed and promulgated a number of Regulations conceived in a very liberal spirit, and these he forwarded to Calcutta for the confirmation requisite to comply with the provisions of 13 Geo. III. c. 63. s. 36. He likewise left a Memorandum[18] signed by him but undated with the intention of placing the relations between the British and Native authorities on a satisfactory footing. This Memorandum recites that the Sultan and Tumunggong had solicited that he would, previous to his departure, lay down such general rules for their guidance as might be most conducive to the general interests of Singapore, and at the same time serve to define the rights of all parties, and then proceeds to lay down certain rules 'to form the basis of the good understanding to be maintained in future.' By these rules, all land within the island of Singapore, and the islands immediately adjacent, with the exception of the land appropriated to their Highnesses for their respective establishments, were to be at the entire disposal of the British Government; the Sultan and Tumunggong were relieved from the personal attendance

16. *Penang Gazette* 24th October 1857 S.L.R. 106.

17. Life of Sir Stamford Raffles by Lady Raffles ii 241.

18. Malay Treaties 26.

at the Court, which they had found irksome, and the 6th Regulation expressly provided that 'in all cases regarding the ceremonies of religion, and marriages, and the rules of inheritance, the laws and customs of the Malays will be respected, where they shall not be contrary to reason, justice or humanity. In all other cases the laws of the British authority will be enforced with due consideration to the usages and habits of the people.'

On the 27th May 1823, Mr. Crawfurd arrived and took over charge as Resident, and the Government was placed directly under the Presidency of Fort William. The formal cession of the island was contained in a Treaty of the 2nd August 1824,[19] whereby the Sultan and Tumunggong ceded in full Sovereignty and property to the East India Company their heirs and successors for ever, the island of Singapore, situated in the Straits of Malacca together with the adjacent seas, straits and islets to the extent of ten geographical miles from the coast of the said main Island of Singapore. This treaty contained no provision as to the administration of justice, and prior to the Charter of 1826, the same legal chaos prevailed in Singapore, as had prior to the Charter of 1807 prevailed in Penang. It would appear that when in 1823, the Settlement was placed directly under Fort William, or possibly even earlier, it became subject to the jurisdiction of the Supreme Court at Fort William, as being a province or district annexed and made subject to that Presidency, within the meaning of 39 & 40 Geo. III. c. 79 s. 20 and it would also seem (though so far as the writer is aware, no contention to that effect has ever been raised), that the Bengal regulations became applicable to it *en masse*. Attention is drawn to the legal chaos by the Resident in a judicial report of January 1824;[29] after stating that he is engaged in administering Chinese and Malay law, he says, 'The case with respect to Europeans, is very different; there exists no means whatever in civil cases of affording the natives any redress against them nor in criminal ones any remedy short of sending them for trial before the Supreme Court at Calcutta. It is unnecessary to dwell on the great inconvenience of such a state of things.'

After the treaty with Holland of the 17th of March 1824 had been signed, it became necessary to provide for the Government of Singapore and Malacca, and accordingly 5 Geo. IV. c. 108 was passed, whereby it was provided that the Island of Singapore and also all the Colonies, Possessions and Establishments, ceded to His Majesty by the Treaty, should be transferred to the East India Company and held by them 'in such and the same manner to all intents, effects, constructions and purposes whatsoever and subject to the same authorities, restrictions and provisions as the Factory of Bencoolen, and the Possessions in the Island of Sumatra were vested in and holden by the said Company, immediately before the conclusion of the said Treaty.' Bencoolen, which had been ceded to Holland by the Treaty, had been held as a Lieutenant-Governorship under Bengal and the effect of the statute, was to place both Singapore and Malacca under that Presidency. This is made clear

19. Malay Treaties 29.

20. 9 J.I.A. 458.

by 6 Geo. IV. c. 85 s. 19, which after reciting that under 42 Geo. III. c. 29, and 5 Geo. IV. c. 108, the Island of Singapore and the Fort of Malacca had became factories subordinate to the Presidency of Bengal, and thereby by virtue of 39 & 40 Geo. III. c. 79 s. 20, subject to the jurisdiction of that Supreme Court, empowered the Crown to make provision for the administration of justice in Singapore and Malacca, and that thereupon the jurisdiction of the Supreme Court should cease, and by sec. 21 power was given to the Crown to sever the two places from the Presidency of Bengal and to annex them to the Settlement of Prince of Wales' Island. Under the provisions of this statute, Penang, Singapore and Malacca became united as one Presidency, and on the 26th November 1826, a new Charter was granted by the Crown which created the Court of Judicature of Prince of Wales' Island, Singapore and Malacca. The Court was to consist of the Governor, the Resident-Councillors and a Recorder. It is unnecessary to go through the provisions of this Charter as it was practically a repetition of the previous one.[21]

In the year 1826, the British Government acquired the Dindings, but it does not appear that for 50 years they occupied them. In 1874, the present boundaries of these territories were defined, and they now form a part of the Settlement of Penang for administrative purposes.

Extensions of territory in Province Wellesley and Malacca have been effected since their acquisition, but it is unnecessary to detail them here.

From time to time, further changes took place in the legal position of the Settlements. Thus in 1830, they ceased to form a separate Government, and became subordinate to Fort William.[22]

In 1833 was passed the important statute 3 & 4 Will. IV. c. 85. It was under Secs. 53 & 54 of that statute, that certain Commissioners, designated the Indian Law Commissioners, were appointed to enquire into the jurisdiction, powers and rules of the Courts of Justice in the Territories of India. Their report, dated the 8th of February 1842, contains a number of suggestions with regard to the Straits Settlements, but none of these suggestions were ever carried out and matters remained *in statu quo.*[23] More fruitful however were Sections 39 *et seq.* which constituted a local Government for the whole of India, consisting of a Governor-General and Counsellors to be styled 'The Governor-General of India in Council.' To this body was entrusted, among other functions, the power of legislation for India, on all except certain excepted subjects, and a number of enactments passed by it, are still law in the Colony.

Previous to this Act, the only provision for local legislation in the Settlements, had been under 13 Geo. III. c. 63 s. 36 and under 53 Geo. III. c. 155. With regard to the exercise by the Governor-General in

21. There is a copy of this Charter in the Registry of the Supreme Court in Singapore.

22. 1 Ky. Ixix.

23. 1 Ky. Ixxvi.

Council of their powers of legislation under the first mentioned statute, great irregularity seems to have taken place. Thus Penang Regulation I. of 1831 (providing a Land Registry for Penang) seems to have been passed by the Vice-President in Council, and approved by the Court of Directors and by the Board of Commissioners for the affairs of India, and it is treated by Lord Auckland as being invalid.[24] Other regulations were duly passed, as for example Regulation III. of 1833, for the Registration of Imports and Exports.[25]

Statute 53 Geo. III. c. 155 s.s. 98 & 99, empowered the Governor in Council of the Settlement of Penang to impose customs and other taxes, and to make laws and regulations with regard to such customs and taxes. Under this statute regulations were made by the local Government in respect of the different Settlements. Thus land regulations were passed for Singapore and Malacca.[26] But these were declared by Sir B. Malkin to be invalid, as being outside the legislative powers of the Council.[27] Other Regulations appear to have been enforced as within their powers, as for instance Regulation III of 1830, providing for the retail of Seree or Betel Leaf within the towns of Fort Cornwallis, Penang, Singapore and Malacca.[28]

It may be convenient here to refer to Ordinance VIII. of 1889, which was passed to remove doubts as to what enactments of the Legislative Council of India, were in force in the Colony. By Section 2 there was a sweeping repeal of 'all Laws Regulations and Ordinances made by the Government of India, or any local Government subordinate to the Government of India, or by any officer thereof, prior to the 22nd April 1834, so far as they affect the Colony' and a Commission was appointed to determine 'what enactments of the Legislative Council of India, and what portions of such enactments, are in force in the Colony and for the purpose of revising and preparing the same for publication.' The result of the labours of the Commission was that all the Indian Acts then in force are contained in one small volume of about 200 pages.

In 1836, Singapore, having become the most important of the Settlements, became the seat of the Government, and in 1857 the Settlements ceased to be subordinate to Fort William.[29] With its increasing commerce and population, came the necessity of having a professional judge permanently stationed in Singapore, and this led to the

24. See Minute of 9th Feb. 1837, is Papers on Land Revenue 106.

25. 1 Ky. lxxvii.

26. Regulations I & IX of 1830.

27. *Sally Sassoon* v. *Wingrove*, S.L.R. 388 and Minute of Lord Auckland of 9th Feb. 1837, Papers on Land Revenue 119.

28. *Inche Karrim* v. *Quay Peng*, S.L.R. 448 and *Mahomed Meera Lebby* v. *Pernembelam*, S.L.R. 23.

29. Kyshe's Index. Part II, 2.

grant of the 3rd and last Charter dated the 12th August 1855.[30] By the combined effect of the Charter and of an order of the local Government of the 9th May 1856 [31] the Court was composed of two divisions, the one having jurisdiction over Singapore and Malacca, consisting of the Governor or Resident Counsellor and the Recorder of Singapore, and the other having jurisdiction over Penang and Province Wellesley, consisting of the Governor or Resident Counsellor and the Recorder of the Prince of Wales' Island.

Great inconvenience having been felt by the want of a Court exercising civil jurisdicton in Admiralty, a Vice-Admiralty Court was established by 6 and 7 Will. IV. c. 53 and Letters Patent 25th February 1837.[32]

The East India Company was abolished by 21 & 22 Viet. c. 106.

In 1866 the Act 29 and 30 Vict. c. 115 was passed, under which, and under Order in Council of the 28th December 1866, the Settlements were separated from India, as from the 1st April 1867, and were provided with a Government as a Colony. By that Act, Her Majesty was authorised to make laws 'for the peace, order, and good government of Her Majesty's subjects and others within the said Settlements,' and also by Letters Patent to delegate the power of making laws for the Colony to any three or more persons sitting as a local legislature.[33]

By Letters Patent of the 4th February 1867 the Crown delegated to the Legislative Council the power of making laws.[34]

No collection has been made of the Orders in Council made under the legislative power conferred upon the Crown by 29 and 30 Vict. c. 115, but it may be of practical importance to note that provision has been made by them for extradition in cases where the Extradition Act 1870 [35] does not apply. The present orders in Council on this subject are those of the 19th August 1889 and the 26th October 1896.[36]

Subsequently to the Charter of 1855, the Constitution of the Court was altered, the Governor and the Resident Councillors ceasing to be judges thereof,[37] and by Ordinance V. of 1868 it was reconstituted, under the name of the Supreme Court of the Straits Settlements.

30. This Charter which was ratified by 18 & 19 Vict. c. 93 s, 4, is printed *in extenso* in Harwood 1. It is practically a repetition of the earlier Charters, except that by it, the Court is constituted a Court of Admiralty with regard to Crimes maritime.

31. 1 Ky. xciv.

32. 1 Ky. lxxix.

33. The Act was brought into operation by Order in Council of the 28th Dec., 1866 (Harwood 49). The authority of an Order in Council made under the Act was questioned but upheld in *Regina* v. *Sirdar Khan* 2 Ky. (H.C.C.) 43.

34. S.L.R. 600.

35. 33 & 34 Vict. c. 52.

36. These are printed in 'The Manual of Extradition' published at the Government Printing Office, 1898.

37. Ord. III of 1867 s. 1, Ord. XXX of 1867 & Ord. V of 1868.

CHAPTER II.

INSTITUTIONS OF GOVERNMENT.

The Executive is vested in the Governor, assisted by his Executive Council, consisting of the General Officer Commanding the Troops, the Colonial Secretary, the Resident Councillors of Penang and Malacca, the Attorney General, the Colonial Treasurer, the Auditor General, and the Colonial Engineer.

The local power of legislature is vested in the Legislative Council, consisting of the members of the Executive Council reinforced by certain unofficial members, at present seven in number. These unofficial members are appointed by the Governor, in pursuance of instructions received through the Secretary of State for the Colonies. In accordance with such instructions, the Governor invites the Chambers of Commerce at Singapore, and at Penang, to nominate each a member, but it has been held that such invitation does not confer any legal right or franchise upon the Chamber.[38]

The provisions at present regulating the Executive and the Legislature, are as follows:—

(1) Letters Patent, passed under the Great Seal of the United Kingdom, constituting the office of Governor and Commander-in-Chief of the Straits Settlements and their Dependencies, of the 30th December 1891.

(2) Instructions, passed under the Royal Seal Manual and Signet, to the Governor of the 17th June 1885, and the 7th December 1887.

(3) Standing Rules and Orders of the Legislative Council of the 2nd December 1895.[39]

In considering the power of the Legislative Council, it is necessary to bear in mind the provisions of 28 and 29 Vict. c. 63. 'an Act to remove doubts as to the validity of Colonial Laws.' The result of that Act is clearly put by Sir E. O'Malley, C.J. in *In re Lu Thien*[40] in the following passage.

> 'I think it is quite clear from this *(i.e.* the Act in question) that the Local Legislature may pass any law for the Colony, no matter whether or not it conflicts with the Acts which formed part of the law of the Colony on its settlement, provided it does not conflict with the provisions of any Act of Parliament which by express words or by necessary intendment from express words of an Act of Parliament is made applicable to the Colony. So that the local legislature might pass a law overriding the provisions of any of the great statutes, such as the Magna Charta or the *habeas corpus* Act, which were in force in the Colony when first occupied.'

38. *Huttenbach* v. *Wright 2* S.S.L.R. 50.

39. A collection of these documents was published under the title 'Laws Instructions and Standing Rules and Orders relating to the Legislative Council of the Straits Settlements' by the Government Printing Office in 1896.

40. S.L.R. (N.S.) 10, 16.

In the case of *In re Lu Thien*[41] it was contended that one of the local ordinances was *ultra vires,* but its validity was upheld by the Court of Appeal.

The Legislative Council has passed numerous Ordinances. A collection of those in force on the 1st June 1886, was made by Mr. J.A. Harwood, and published by the Government in two volumes; and there is at the present time in the press, a collection brought up to a recent date by Mr. C.C. Garrard. A Chronological Table and Index of the Indian Acts and Ordinances in force at the end of 1892, was prepared by Mr. J.W. Kyshe, and published by the Government.

It would be beyond the scope of this work to give any details with regard to this legislation; but it may be useful to note, that the Indian Penal Code and the Indian Evidence Act are in force in the Colony, with but slight alterations.

The Judicature consists of the following Courts:—[42]

(i) The Supreme Court of the Straits Settlements.

(ii) Courts of Requests at each Settlement.

(iii) Courts of two Magistrates at each Settlement.

(iv) Magistrates Courts at each Settlement,

(v) Coroners Courts at each Settlement.

(vi) Justices of the Peace.

The Supreme Court consists of a Chief Justice and of three Puisne judges, and its constitution is regulated by the Charter of 1855 and the Courts Ordinance, III. of 1878.

The jurisdiction of the Court is both civil and criminal, and it is provided generally by Section 10 of the Courts Ordinance that it 'shall have such jurisdiction and authority as Her Majesty's High Court of Justice in England, and the several judges thereof, respectively, have and may lawfully exercise in England, in all civil and criminal actions and suits, other than Admiralty actions and suits; and the said Court shall also have and exercise jurisdiction in all matters concerning the revenue, and in the control of all inferior Courts and jurisdictions, subject in all the above cases to the laws of the Colony.'

41. S.L.R. (N.S.) 10 and 21.

42. Ord. III of 1878 s. 1.

43. Under this section it has been held that the Court has the same power to award damages in lieu of specific performance, as the Chancery Division has under 21 & 22 Vict. c. 27, *Tan Seng Qui* v. *Palmer* 4 Ky. 251. It was held by Leach J. in *Tunku Mahmoud* v. *Tunku Ali* (not yet reported) that this section did not give the Court the extended power conferred upon the Court of Chancery under 15 & 16 Vict. c. 86 (The Chancery Procedure Act 1852). As to whether the 3rd Charter conferred on the Court jurisdiction created by statute passed between the 2nd & 3rd Charters see *Reg.* v. *Willans,* 3 Ky. 16, 37.

It s general civil jurisdiction is set forth in Section 19 of the last mentioned Ordinance. By that section it is empowered to try actions, etc., 'in all cases where the persons who are defendants are present in the Colony, or the Corporate Body which is defendant has an establishment or place of business in the Colony; and also in the following cases although the defendant is not present, or has not its establishment as aforesaid in the Colony, that is to say, if the defendant has property in the Colony, or if the whole or any part of the subject matter of the suit is land or stock or other property, situate within the Colony; or any act, deed, will or thing affecting such land, stock or property was done executed or made within the Colony; and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled or otherwise affected in any such suit, or for the breach whereof damages or other relief are or is demanded in such suit, was made or entered into, or was to be performed or partly performed, within the Colony; and whenever there has been a breach within the Colony of any contract wherever made; and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate, within the Colony, or if the cause of action arose in the Colony, or if the subject of the proceeding otherwise falls, on general principles of international law or comity, to be determined by the law of the Colony.'

The jurisdiction of the Supreme Court with regard to matrimonial causes, is set out in Section 13 of the same Ordinance as follows:— 'The Supreme Court shall have and exercise the jurisdiction vested, under the Letters Patent of the 10th of August 1855 in the Court of Judicature of Prince of Wales' Island, Singapore and Malacca, in matrimonial cases, so far as the several religions, manners and customs of the inhabitants of the Colony will admit.' The jurisdiction under the Charter of 1855 is contained in the following passage:— 'And further that the said Court of Judicature shall have and exercise jurisdiction as an Ecclesiastical Court, so far as several religions, manners and customs of the inhabitants of the said Settlement and places will admit.'

It has been held that the Supreme Court has no jurisdiction which the Ecclesiastical Courts in England had not in 1855,[44] and accordingly that although the Court may make a declaration of nullity of marriage, it has not the jurisdiction of the High Court in England in divorce.[45] Its jurisdiction in matrimonial cases has been further limited by decisions that it has no jurisdiction to entertain a suit for the restitution of conjugal rights among non-Christians, either on its civil or ecclesiastical side.

The Court's power to grant Probate and Administration is that 'vested in Her Majesty's High Court of Justice in England, subject to such modifications, to suit the several religions and customs of the native inhabitants, as have hitherto been recognised by the Court.'[46]

44 . *Scully* v. *Scully* 4 Ky. 602 & S.L.R. (N.S.) 27.

45. *Ross* v. *Rees* S.L.R. (N.S.) 29, *Scully* v. *Scully v. s.*

46. Ord. III of 1878 s. 14.

The Supreme Court is a Colonial Court of Admiralty, under the Colonial Courts of Admiralty Act 1890,[47] and its powers are those set forth in that Act.

The jurisdiction of the Supreme Court is either original or appellate, the latter being exercised by the Judges other than the one whose decision is under appeal.

Under the civil procedure of the Supreme Court all cases are heard by a Judge sitting without a jury.

The Supreme Court has on its criminal side the jurisdiction of 'Her Majesty's High Court of Justice and the several Judges thereof.'[48] It has also, in common with the other Criminal Courts of the Colony, jurisdiction under 37 and 38 Vict. c. 38 with respect to crimes and offences committed out of the Colony, at any place in the Malayan Peninsula extending southward from the 9° of N.L., or in any island lying within 20 miles from the coast thereof, by any of Her Majesty's subjects, or any person being a subject of any of the Native States in the said Peninsula south of the said 9° of N.L., but who is at the time of his committing such crime or offence resident in the Colony, or who has been so resident within six months before the commission of such crime or offence.[49]

Criminal trials are held before a Judge, sitting with a jury of seven. Such jurors need not be British subjects.[50]

The Supreme Court has also certain jurisdiction with regard to Siam. This jurisdiction is derived from the Siamese Order in Council 1889,[51] which owes its validity to 20 and 21 Vict. c. 75, and 33 and 34 Vict. c. 55. It is either appellate or original. Its jurisdiction as Court of Appeal from the Consular Courts is exercised by the full Supreme Court sitting in the Straits Settlements, and is regulated by articles 63-66 of the Order in Council. Its Criminal or Civil original jurisdiction may be exercised by the Supreme Court sitting in the Colony, the former when a person accused of a crime is sent there for trial, the latter by consent of parties and of the Consul-General. Criminal and civil jurisdiction may also be exercised by the Supreme Court sitting in Siam, at the request of the Consul-General, and with the consent of the Government of the King of Siam.

With regard to the other Courts it must suffice here to say that the jurisdiction of the Courts of Requests is limited to suits involving not more than $50, that the Magistrates Courts have cognisance of the less serious crimes, whilst those of a graver nature, but not grave enough to be heard at the Assizes, are taken by the Court of two Magistrates.

47. 53 & 54 Vict. c. 27.

48. Ord. III of 1878. s.s. 26 & 27.

49. Notwithstanding the provisions of this Statute, British subjects accused of having committed a Crime in one of the Federated Malay States may be surrendered under the provisions of the Queen's Order in Council relating to extradition of the 9th August 1889. *In re Golam Hussain* 4 S.S.L.R. 64.

50. *Reg.* v. *Khoo Ghee Boon*, 2 Ky. (C.R.) 81.

51. S.S.G.G. 1890, 185.

CHAPTER III.

THE LEX LOCI.

PART 1. — GENERAL PRINCIPLES.

We are now in a position to consider the question, so often considered in the Courts of the Colony, as to what is the *lex loci* to be administered by them. The principles of law are clearly laid down, the difficulty has been in applying them.

Colonies are divided by Blackstone into two classes —

(1) those which are gained from other States by conquest or cession;

(2) those which are acquired by the right of occupancy only; that is by finding them desert and uncultivated and peopling them from the mother country.

It would appear however that the true distinction is between —

(1) those having at the date of their acquisition existing civil institutions; and

(2) those having at such date no existing civil institutions.[52]

It may be convenient to lay down the following rules with regard to both classes of Colonies.—[53]

I. — As to a Colony of the First Class.

(a) The laws already in force remain so, except in so far as they are contrary to the fundamental principles of the British constitution, until they are changed by competent authority.

(b) The Colony is subject to such laws as the Crown in Council may impose, or to such as may be imposed by any Legislative Council established therein under the royal authority. The Crown may direct the Governor to summon a representative assembly from among the inhabitants themselves, for the purpose of interior legislation, and, when once the Crown has granted a representative legislature, its right of legislation ceases.

(c) Acts of Parliament passed before its acquisition do not, as a rule, affect a Colony of this class, yet those manifestly of universal policy and intended to affect all our transmarine possessions, at whatever period they shall be acquired — *e.g.,* navigation laws and Acts for abolishing slavery and the slave trade — come into force independently of posterior legislation.

52. *Freeman* v. *Fairleigh,* 1 Moo. I.A. 305, 324, and *Ong Cheng Neo* v. *Yeap Cheah Neo,* 1 Ky. 326, L.R. 6 P.C. 381.

53. See Blackstone's Commentaries i. 107, Stephen's Commentaries i. 101, and the 1st Chapter of Tarring's Law relating to the Colonies.

II. — As to a Colony of the Second Class.

(a) All the English laws then in being, including Acts of Parliament passed before its acquisition, come immediately into force. But this general rule must be limited, as our English law is only received in so far as it is applicable to the circumstances of the place and modified in its application to those circumstances. As Sir William Blackstone says [54]— 'This rule must be understood with very many and very great restrictions. Such Colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant Colony; such for instance, as the general rules of inheritance and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of Spiritual Courts and a multitude of other provisions, are neither necessary nor convenient for them and therefore are not in force.'

(b) The Crown may constitute Courts of Justice to proceed according to the common law, but it cannot create any new Court to administer any other law.[55]

(c) The Crown may create a local Legislative Assembly, with authority, subordinate indeed to that of Parliament, but supreme within the limits of the Colony, for the government of its inhabitants.[56]

III. — With Regard to both Classes of Colonies.

(a) The Crown exercises the right of appointing Governors and of issuing warrants for the appointment of officers, whether judicial, administrative or ecclesiastical.

(b) They are subject to the legislative control of the British Parliament, but a Colony is not considered as affected by Acts of Parliament passed after its acquisition, and while it is subject to other legislative authority, (whether that of the Crown in Council or of a local Council in assembly), unless it be referred to in the Act by name, or by general description, such as "the Colonies," or unless the Act be, in its nature, obviously intended to affect all our possessions, wherever situate.

In considering the effect of the various Charters of 1807, 1826 and 1855, in introducing English law into the Straits Settlements, it is necessary to bear in mind the result of the decisions of the Indian Courts, with regard to the effect of the Indian Charters.

It has been decided in the Supreme Courts of India, that no Act of Parliament passed since the 13th Year of George I. (1726) extends to India unless specially so provided. The date thus fixed, relates to the passing of the Charter authorising the establishment of the Mayor's Courts, with common law jurisdiction in the three Presidency towns,

54. Blackstone's Commentaries i. 107.

55. *Kielley* v. *Carson,* 4 Moo. P.C. 63, 85, *In re The Lord Bishop of Natal,* 3 Moo. P.C. (N.S.) 115, 152, and *Phillips* v. *Eyre,* L.R. 4 Q.B. 225, and 6 Q.B. 1.

56. *Kielley v. Carson, v. s.*

in the year 1726. Since that date, several charters have been passed, altering, amending and enlarging the jurisdiction of these Courts; but it has not been held in a single case that the introduction of these new charters has brought with them a fresh access of Acts of Parliament or has affected the Common law as it stood in 1726.

As pointed out above, it is necessary to bear in mind that in applying the English law to a Colony, it is only received in so far as it is applicable to the circumstances of the place and modified in its application to these circumstances. The first question arises —

Is the law of England, and if so the law of what date, the governing law of the Colony ?

And, it having been shewn that English law is the *lex loci,* the further question remains — What parts of that law are inapplicable and what parts require modification to suit the circumstances of the place ?

PART 2. — IS THE LAW OF ENGLAND, AND IF SO THE LAW OF WHAT DATE, THE GOVERNING LAW OF THE COLONY ?

In dealing with this question, the expression 'English law' is used to signify such part of the English law as is applicable to the circumstances of the place, and modified in its application to those circumstances.

Before discussing the cases *seriatim,* it will be convenient to indicate generally the principles laid down, as also the questions which have been, or may be, raised, and the answers which have been, or ought to be given to them.

(i) When Penang was acquired in 1786, did the settlers bring with them the law of England then in being, on the ground that the Settlement was acquired by occupancy ? Or was the Malay law of the Kingdom of Quedah to be enforced, on the ground that it was a ceded country and had formed a part of that Kingdom ? The Privy Council has decided that the former is the correct answer.

(ii) It was unsuccessfully argued in *Fatimah* v. *Logan,*[57] that in Penang, Mahomedan law should be applied to Malays, on the ground that the Island being from the outset a dependency of Fort William, 21 Geo. III. c. 70 s.s. 17 and 18, applied to the native inhabitants.

(iii) The Judges of the Colony have, without exception, held that the Charter of 1807, introduced the English law, as it then existed, into Penang. The Privy Council, in the only case involving this question which has come before them, based their judgment upon the ground that the English law became the *lex loci* upon the occupation of the Island, and expressed no opinion as to the effect of the Charter.

(iv) What was the *lex loci* of Malacca, after it was occupied by England in 1795, and subsequently after it was retroceded in pursuance of the Treaty of 1824 ? There is no reported

57. 1 Ky. 255.

case dealing with this question, but there can be no doubt, that, on principle, the English Courts should have administered the Dutch law previously administered by the Dutch Courts.[58]

(v) The question as to the law to be administered in Singapore before the Charter of 1826, has never, so far as the writer is aware, been discussed. Although at the time of the original Treaty of 1819, the island was practically uninhabited, yet, at the time of the Treaty of 2nd August 1824, when the island was formally ceded, it was a flourishing settlement, and it would appear clear from the Memorandum of 1823, that Malay law and custom was respected and enforced.

(vi) Had 5 Geo. IV. c. 108, and 39 and 40 Geo. III. c. 79. s. 20, any effect upon the law to be administered in Singapore and Malacca ? The former statute provided that the Settlements should be subject to Fort William, and the latter, that the Bengal regulations should apply to all places thereafter made subject to Fort William. This question is one of legal interest, but has been deprived of its practical importance by the decisions next referred to.

(vii) What was the effect of the Charter of 1826 ? This question has not been answered by the Privy Council, but the judges of the Colony have, (with one doubting exception), in a series of decisions dating from 1835, held that this Charter introduced into the Colony the English law as it existed on the 26th November 1826. The practical value of these decisions, involving, as they do, uniformity of law throughout the whole Colony, is obvious.

(viii) It was decided, as we shall see in the case of *Jemalah* v. *Mahomed Ali,*[59] that English statute law, from 1826 to the passing of 3 and 4 Will. IV. c. 85, became law in the Colony. The ground of the decision was that the effect of the Charter of 1826, and of the rules of law regulating the rights of settlers in an unoccupied country, was to carry there the benefit of all English laws subsequently enacted, up to the date, at least, of the creation of a special legislative body having authority there. The decision was overruled in a subsequent case,[60] on the ground, apparently, that an Indian Act passed under 3 and 4 Will. IV. c. 85, was applicable. The principle of law upon which *Jemalah* v. *Mahomed Ali* was decided appears, even

58. See *Sahrip* v. *Mitchell* S.L.R. 466, 469. The decision of Goldney J., in *Ee Hoon Soon* v. *Chin Chay Sam* 1 S.L.J. 147, is opposed to this view but the question does not seem to have been argued. It appears from the pleadings in the last mentioned case, though not from the report, that the testator died about 1818.

59. 1 Ky. 386.

60. *Ismail bin Savoosah* v. *Madinasah Merican,* 4 Ky. 311. It was decided by *Municipal Commissioners* v. *Tolson,* 1 Ky. 277, that the Prescription Act (2 and 3 Will IV. c. 74) was not law in the Colony.

if sound, to be inapplicable, as at the date when the Act in question (3 and 4 Will. IV. c. 27) was passed, the Governor-General in Council had power to legislate by virtue of 13 Geo. III. c. 63. s. 36.

(ix) Did the Charter of 1855 introduce English statute law passed from 1826 to that date ? This question has been discussed, without being answered, on several occasions, but to answer it in the affirmative would be to differ from the decisions of the Indian Courts, the effect of which has been given above; and there is a Colonial decision, in which, however, the argument is not reported, negativing it.[61]

It now remains to analyse the cases bearing on the question of the applicability of English law, in chronological order.

In *Rodyk* v. *Williamson,*[62] the rights of a Dutch widow were held to be those of a widow according to the English law, not according to the Dutch law formerly received at Malacca, the *ratio decidendi* being that the judge was —

> 'Bound by the uniform course of authority to hold that the introduction of the King's Charter into these Settlements, had introduced the existing law of England also, except in some cases where it was modified by express provision, and had abrogated any law previously existing.'

The case of *In the goods of Abdullah,*[63] decided that the law of England was introduced into Penang by the Charter of 1807, and that a Mahomedan might, by will, alienate the whole of his property, although such alienation would be contrary to Mahomedan law.

In *Moraiss* v. *De Souza,*[64] the two foregoing cases were followed, and it was held that lands, belonging to a tenant in fee simple, descended to his eldest son as heir at law.

The next case is that of *Regina* v. *Willans,*[65] and in it the applicability of English law is very elaborately discussed. Sir Benson Maxwell commences by an enquiry, as to what was the *lex loci* in Penang prior to the Charter of 1807. After stating the general rules of law, and the circumstances under which the settlement was effected, he says[66]:—

> 'Mr. Light, the first Superintendent, was instructed to admit into the Island only such Colonists as he thought it safe and advisable to admit [5 J.I.A. 114]; and it can hardly be contended that the handful of Englishmen who were allowed to establish themselves here under such circumstances, and whose right to reside without the express license of the Company, was more than once disputed, were such Colonists as carry their laws as their birthright, to their new homes.'

61. *Mahomed Ally v. Scully,* 1 Ky. 254.
62. Sir B. Malkin, R. (Malacca, 1934) unreported, but noticed in the following cases, *In the goods of Abdullah, 2* Ky. (Ec.) 8, 9, *Moraiss* v. *De Souza,* 1 Ky. 27, 29.
63. Sir B. Malkin, R. (Penang, 1835), 2 Ky. (Ec.) 8.
64. Norris, R. (Malacca, 1838), 1 Ky. 27.
65. Maxwell, R. (Penang, 1858), 3 Ky. 16.
66. 3 Ky. 21.

'Again, Penang being at the time when it became a British possession, without inhabitants to claim the right of being governed by any existing laws, and without tribunals to enforce any, it would be difficult to assert that the law of Quedah continued to be the territorial law after its cession.'

Then after describing the objections to receive Mahomedan law, the learned Recorder continues:—

'It seems to me impossible to hold that any Christian country could be presumed to adopt or tolerate such a system as its *lex loci.* In such a case, according to Coke, "until certain laws are established, the king by himself, and such Judges as he should appoint, should judge the inhabitants and their causes according to natural equity, in such sort as Kings in ancient times did with their Kingdoms before any certain Municipal laws were given, as before hath been said," [*Calvin's Case,* 7 Rep. 10.], or, more probably, according to the third resolution of the Privy Council [2 P. Wms. 75], English law would at once come in force — the only natural equity known to English Sovereigns and English Judges.'

The judgment then describes the state of society in the island prior to the promulgation of the 1st Charter, as set out *ante* p.p. 3 to 6 and continues[67]:—

'It must be presumed that the Charter of 1807, was granted with a full knowledge of this state of things, and was intentionally adapted to it. No law was introduced *aliunde,* contemporaneously with the Charter. It was competent to the Crown to introduce the law of England into the Settlement by such an instrument as a Charter, *Campbell* v. *Hall,* 1 Cowp. 204; and if that law was not previously in force, and the language of the Charter directed that it should be administered here, it follows that the Charter did introduce the law of England into the Settlement; and the question, to what extent English law became the law of the land is, then, a question of construction rather than of general legal principle, or at least of the one as well as of the other.

Now, the Charter does not declare, *totidem verbis,* that that law shall be the territorial law of the Island; but all its leading provisions manifestly require, that justice shall be administered according to it, and it alone. As to Criminal law, its language is too explicit to admit of doubt. It requires that the Court shall hear and determine indictments and offences, and give judgment thereupon, and award execution thereof, and shall in all respects, administer Criminal Justice in such or the like manner and form, or as nearly as the condition and circumstances of the place and the persons will admit of, as in England. And I think it equally plain that English law was intended to be applied in Civil Cases also. The Charter directs that the Court shall, in those Cases, "give and pass judgment and sentence according to Justice and Right." The "Justice and Right" intended, are clearly not those abstract notions respecting that vague thing called natural equity, or the law of nature, which the Judge, or even the Sovereign may have formed in his own mind, but the justice and right of which the Sovereign is the source or dispenser. The words are obviously used in the same sense as in the well known chapter of Magna Charta from which they were probably borrowed: *"nulli rendemus, nulli negabimus aut differemus justitiam vel rectum."* They are, in jurisprudence, mere synonyms for law, or at least only measurable by it; and a direction in an English Charter to decide according to justice and right, without expressly stating by what body of known law they shall be dispensed, and so to decide in a Country which has not already an established body of law, is plainly a direction to decide according to the law of England.

The whole of the Charter appears to me to support this view. It gives the Court the powers of the Superior Courts of Law and Equity at Westminister, to be exercised as far as circumstances admit, without stating or

67. 3 Ky. 25.

leaving any room for presuming that it was intended that those powers should be exercised otherwise than in the same manner and under the same rules and principles as they are exercised in England. The classification of property into "real and personal," of actions or "pleas," into "real, personal, and mixed," and the power given to grant Probates and Letters of Administrations, shew that the law of England was alone in contemplation. In the clause which directs that parties interested in administration bonds may sue in the name of the East India Company, to whom the bonds are executed, it incidentally implies that the rule peculiar to the Common law, that *choses is action* are not assignable, is to be in force. The clause which provides for the discharge of prisoners under writs of *Habeas Corpus,* refers to a right which no other law gives to the subject, and which was not previously in existence here.

The negative evidence on this subject, is at least as strong as the positive. In no part of the Straits' Charters is mention made of any other law than that of England; and the silence is perhaps nowhere more remarkable than in those passages which purport to adapt the administration of justice by an European Court to the peculiar institutions of Asiatic races. Where Ecclesiastical jurisdiction is conferred on the Court, it is to be exercised only so far as the religions, manners and customs of the inhabitants admit. In the administration of oaths and of Criminal Justice, also, and in framing process for carrying out the orders of the Court, attention is to be had to the religions, manners and usages of the native inhabitants; but nowhere is it said that their laws are to be attended to, not even in matters of contract and succession, as in India. Indeed, the provision respecting the framing of process is expressly guarded by the provision that the prescribed adaptation to native opinions and usages shall go only "as far as the same can consist with the due execution of the law and the attainment of substantial justice."

The exclusion of native law is also remarkable in the Clause empowering the establishment of Small debts' Courts. Athough it is provided that the jurisdiction of those Courts may be ethnical instead of local, if thought advisable, nothing is said about applying native law to native Cases, but it is merely required that the "administration of justice" shall be adopted, so far as circumstances permit, to "the Religions, Manners and Customs," of the native inhabitants, while the Rules of Practice are to conform, as nearly as may be to the Rules of the English Courts of Request.

It may be said that with respect to at least two classes of Orientals, Mahomedans and Hindoos, their laws are part of their religions, and that the Charter includes the former when it mentions the latter. This might be so, if the Charter were a Mahomedan or Hindoo instrument, but law and religion are too distinct in their nature and to English apprehension, to be treated otherwise than as distinct in the construction of an English Charter.'

The learned Recorder then discusses certain English cases, in which variations from English law had been allowed on account of the nationality of the person affected, and goes on[68]:—

'The Charter of 1807 having introduced the law of England into this Island, that law, as it existed at that date, would have been the law of this country, if another Charter had not been subsequently issued. This second Charter was granted in 1826, when Singapore and Malacca were first united to Prince of Wales' Island. The question then arises, did it import the later law into this Station ? The case of *Rodyk* v. *Williamson*[69] was a Malacca case, and when Sir Benjamin Malkin decided in it that the law of England had been introduced there by the Charter so as to supersede the law of Holland, he must have held that the law introduced was the law of England as it stood in 1826, since the Charter of that date was the only Charter extending to Malacca. If so, the same law must, upon the same grounds,

68. 3 Ky. 36.

69. 2 Ky. (Ec.) 8.

have been introduced into Singapore by the same instrument. Can it then have had a different effect in Penang? If it had not extended beyond this place "the justice and right" according to which it directs the Court to decide, might well have been understood to mean, as was suggested by Sir Benjamin Malkin, "the just and rightful administration of the law which actually existed," [Rep. Ind. Law Comers. 87], that is, the law of the land as it had been already established and in force for the preceding eighteen or twenty years. But to adopt such a construction here after the decision in *Rodyk* v. *Williamson,* would be open to great objection. To treat the Charter *quo ad* one station, as merely reorganising a Court, while *quo ad* the other two it was treated as introducing new law, would be to give to the same instrument different meanings in different localities; a construction which would have neither convenience nor good sense to recommend it. I am therefore of opinion that whatever law the second Charter introduced into Malacca, was introduced into every part of the Settlement; and as it has been decided that the law of England, as it stood in 1826 was brought by it into Malacca, I am of opinion that the same law became, by the same means, the law of Penang.

Whether a similar construction should be put upon the Charter of 1855, it is not now necessary to consider because the Act upon which the present motion was founded, was passed before the date of the second Charter. But if that question should ever arise, it will perhaps be material to consider whether the circumstances of the Settlement, or the language of the Charter, require such a construction, or rather do not require that it should be treated, like all the Indian Charters granted subsequently to 1726, merely as an instrument reconstructing the Court. As the new Charter, confirmed in all respects by Parliament, (18 and 19 Vict. c. 93 s. 4) gives the Judges of the Court "such jurisdiction and authority" as the Common Law and Equity Judges "have or lawfully exercise" in England, there would seem to be some ground for holding that any powers conferred on the latter by Statutes passed at any time before the date of the Charter, would vest in the former also. So, when it directs the Court to "hear," "give judgment and award execution" "on indictments and offences," "and in all respects to administer criminal justice in such or the like manner and form, as nearly as circumstances admit, as the Courts of Oyer and Terminer and Jail Delivery" in England, it might be contended that the English Criminal Law, as it stood in 1855, was thereby made the law here. On the other hand, it may be material to observe that the new Charter does not, like the preceding one, abolish the old Court, and introduce the law of England for the first time into new possessions, but only reorganises the existing tribunal by dividing it into two divisions and adding a second Recorder. It may also be important to bear in mind that since the date of the second Charter, a legislative body has been established in India, which legislates for the Straits, and that difficulties might arise in attempting to give effect at the same time to recent Acts of Parliament and Acts of the Legislative Council bearing on the same branch of law.'

In the case of *Choa Choon Neoh* v. *Spottiswoode,*[70] Maxwell, C.J., held that the English rules against perpetuities are law in the Colony.

In the case of *Mahomed Ally* v. *Scully*[71] Hackett, J., decided that Geo. IV. c. 31, (a general Act passed after the Charter of 1826), did not extend to the Colony, but the grounds of his decision are not reported.

In *Fatimah* v. *Logan,*[72] the whole question was re-opened. The propositions sought to be established were; (1) that previous to the Charter of 1807, Mahomedan law was in force in Penang, and (2) that

70. (Singapore, 1869), 1 Ky. 216.

71. (Penang, 1871), 1 Ky. 254.

72. (Penang, 1871), 1 Ky. 255.

the Charter had made no difference in this respect. The arguments in support of the first proposition were two:—

(a) That Penang, being part of the territories of the Rajah of Quedah, a Mahomedan prince, the Mahomedan law continued in force after the cession, until it should be altered by competent authority. With regard to this contention, Hackett, J., after setting out the circumstances under which the Island was settled, as stated on p. 2 continued[73]:—

> 'Here we have the fact that an island virtually uninhabited, is occupied and settled by British subjects in the name of the King of England. The case therefore would seem to fall within the general rule laid down in our law books and which Lord Kingsdon thus expresses in a recent case: "When Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own state; and those who live amongst them and become members of their community, become also partakers of and subject to the same laws."' [2 Moo. P.C., N.S. 59].

(b) That Penang was a dependency of Fort William in Bengal, and therefore subject to the same laws as that Presidency; and as, by the laws in force in Bengal, Mahomedans were entitled in all matters of contract, inheritance or succession, to the benefit of their own law, Mahomedans in Penang must be held entitled to the same privilege. In support of this proposition, Hackett, J., said[74] that the Attorney-General

> cited 13 Geo. III. c. 63. s. 36, which empowers the Governor-General and Council at Fort William to make Rules and Ordinances for government of places subordinate thereto, and 21 Geo. III c. 70. s.s. 17 and 18. But with regard to the first mentioned Act, it is sufficient to observe that no laws or regulations ever were made in pursuance thereof which affected the Settlement of Penang; indeed it is not a little remarkable that for many years, the Indian Government was of opinion that it had no power to legislate for the island, and it is only about the year 1800, that we find the Advocate-General of the Indian Government expressing his opinion that the Governor-General was authorised to enact laws, civil and criminal, for the government of Prince of Wales' Island in the same manner as he did for the Province of Bengal. As to the Act 21 Geo. III. c. 70. s.s. 17 and 18, they in terms apply, only to the jurisdiction of the Supreme Court at Fort William, over the inhabitants of Calcutta, and therefore do not affect the question.'

As to the second proposition, that the Charter of 1807 made no alteration in the law, the learned judge remarked[75]:—

> 'The Charter of Justice of 1807 seems to have set at rest this vexed question of the *lex loci* of Penang. In India, the Judges have in a long series of judgments, which have not been dissented from by the Privy Council, held that the first introduction of English law into Calcutta was effected by the Charter of George I, by which, in the year 1726, the Mayor's Court was established, and the Judges of this Settlement have felt themselves bound by the uniform course of authority, to hold that the introduction of the King's Charter had a similar effect here. The question has been re-opened by the Attorney-General, and he has maintained, in opposition to the views I have mentioned, that the King's Charter of 1807 had no effect upon the law of the place, being a mere machine through whose instrumentality the

73. 1 Ky. 259.
74. 1 Ky. 260.
75. 1 Ky. 261.

law is enforced. He also relied on the circumstances that the Court is directed in civil matters, to give judgment, not according to the law of England, but according to justice and right. But, as Sir Barnes Peacock observed in the case of *The Advocate-General of Bengal* v. *Ranee Samonoye Dorse* [9 Moo. Ind. App. 398], speaking of the Charter of George I. (and his remarks are equally applicable to the Penang Charter of 1807), "there can be no doubt that it was intended that the English law should be administered as nearly as the circumstances of the place and of the inhabitants should admit. The words 'give judgment according to justice and right,' in suits and pleas between party and party, could have no other reasonable meaning than justice and right according to the laws of England, so far as they regulated private rights between party and party." But if the current of authority which has flowed so long in one direction, is to be disturbed, it cannot be in this Court, I am therefore of opinion that *quâcunque viâ* either on the settlement of the island, or if not then, by the Charter of 1807, the law of England was introduced into Penang, and became the law of the land, and that all who settled here became subject to that law. It is scarcely necessary to add, that our Charters contain no provisions corresponding to those of the Indian Charter, which confers certain privileges on Mohamedans and Gentoos, and therefore that there is no ground to hold them exempt from subjection to the law of the place.'

The next decision is one of the Privy Council,[76] *Ong Cheng Neo* v. *Yeap Cheah Neo.* The question there was, whether the English rules against perpetuities applied to the will of a Chinaman. The judgment of the Privy Council, which decided the question in the affirmative, sets out shortly the history of Penang and continues[77]:—

'With reference to this history, it is really immaterial to consider whether Prince of Wales' Island, or, as it is called, Penang, should be regarded as ceded or newly settled territory, for there is no trace of any laws having been established there before it was acquired by the East India Company. In either view the law of England must be taken to be the governing law, so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances. This would be the case in a country newly settled by subjects of the British Crown; and, in their Lordships' view, the Charters referred to, if they are to be regarded as having introduced the law of England into the Colony, contain the words "as far as circumstances will admit," the same qualification.'

In *Jemalah* v. *Mahomed Ali,*[78] Ford, J., held, that the English Statute 3 and 4 Will. IV. c. 27 (1833) was law in the Colony. In the course of his judgment, he said[79]:—

'Sir Benson Maxwell, one of the ablest and most painstaking judges that have sat in this Court, many years ago, decided in the case of *Regina* v. *Willans,* that the English law (subject to certain modifications carefully generalised in that judgment) was introduced into these Settlements by the Court Charter of 1826; and, I am of opinion, that not only was that so, but that the effect of that Charter and of the rules of law regulating the rights of settlers in an unoccupied country, was to carry here the benefit of all English laws subsequently enacted, up to the date, at least, of the creation of a special legislative body having legislative authority in these Settlements. There may, indeed, be a question, as pointed out by Sir Benson Maxwell in the judgment alluded to, whether the Charter of 1855 did not carry with it the law of England, modified, indeed, by subsequent Indian legislation, up to this latter date. But that question there is no need to

76. (Penang, 1872), 1 Ky. 326, L.R. 6, P.C. 381.

77. 1 Ky. 343.

78. (Penang, 1875), 1 Ky. 386.

79. 1 Ky. 387.

determine, for, by a reference to the authorities, I find that the Legislative Council of India was established by an act later than the 3 and 4 Will. IV. c. 27, viz., that of the 3 and 4 Will. IV. c. 85, and no laws were made under it until April of the ensuing year.'

The same question, *i.e.* whether 3 and 4 Will. IV. c. 27 was law in the Colony, came before the Court of Appeal in *Ismail bin Savoosah* v. *Madinasah Marican,*[80] when the last cited case was overruled, it being held that the Statute of Limitations, in force in the Colony, was Indian Act XIV. of 1859. Wood, J., in the course of his judgment said[81]:—

'The law of the Colony, I take to be the law of England as imported into this Colony by the Charter of 1826, (though even as to this date some doubts may not unreasonably be entertained) modified by the Indian Acts passed since the period of the introduction of the English law, and having reference to this Colony, and by the Ordinances of the Colony of the Straits Settlements, and by English Statute Law in terms, or by reasonable inference, applicable to this Colony, and that the expressions in the various Charters and Ordinances which make it incumbent upon the Court to administer the law so as to secure justice and right, give us no power either to apply new English or any other law to any case which occurs in our Courts or to decide in analogy with it.'

The matter was again discussed by Wood, J.,[82] and Pellereau, J., sitting as a Court of first instance, in the case *In re Sinyak Rayoon.* There, Pellereau, J., said[83]:—

'It has been constantly ruled by the Courts of this Colony that the law of England such as it was in 1826 is the law of the Colony subject to any amendment passed by the Legislative authority of the Colony. The law of England was held to have been introduced into the Colony of the Straits Settlements in 1826 by Letters Patent, &c.'

Wood, J., having in mind the doubt which he had expressed in *Ismail bin Savoosah* v. *Madinasah Merican,* as to whether the Charter of 1826 introduced English legislation between 1807 and 1826, expressed himself thus[84]:—

'We hold it to be law now established in the Colony that the Charter of 1807 granted to this Settlement (Penang) English law, subject to the modifications, if any, which that Charter contains, and that this Charter (the language of which is for all the purposes of this suit repeated in the Charters of 1826 and 1855) must be taken into consideration in applying English law.'

In the case of *Scully* v. *Scully*[85] Sir E. O'Malley, C.J., said:—

'The law of England as it stood at the date of the Charter of 1826 was introduced by that Charter. Then came the Charter of 1855. Whether that reintroduced English law up to that date, and made the common and statute law of England as at that date, the law of this Colony, was a point on which Sir Benson Maxwell came to no conclusion, and it is one which it is not necessary to decide now.'[86]

80. C.A. (Singapore, 1887), 4 Ky. 311.
81. 4 Ky. 315.
82. C.A. (Penang, 1888), 4 Ky. 329.
83. 4 Ky. 331.
84. 4 Ky. 334.
85. (Singapore, 1890), 4 Ky. 602, 603, S.L.R. (N.S.) 27, 28.
86. As to the same Judge's view of the introduction of English law, see *In re Lu Thien,* (Singapore, 1891), S.L.R. (N.S.) 10, 15.

To sum up — the law which obtains in the Colony may be classed under the following heads:—

(1) The common law, equity, civil and statute law prevailing in England on the 26th November 1826, so far as they are applicable to the circumstances of the Colony, and modified in their application to those circumstances, and so far as they have not been altered —

(a) by statutes passed prior to the 1st of April 1867, extending[87] to India or passed after that date extending[87] to the Colony;

(b) by Indian Acts passed prior to the 1st of April 1867;

(c) by Orders of the Crown in Council made under the provisions of 29 and 30 Vict. c. 115; or

(d) by Ordinances of the Colonial legislature.

(2) The Statute law extending[87] to India, passed prior to the 1st of April 1867, and the Statute law extending[87] to the Colony passed since that date.

(3) Such of the Indian Acts published under Ord. VIII. of 1889, as have not been repealed by the Colonial legislature.

(4) Orders by the Crown in Council made under the provisions of 29 and 30 Vict. c. 115.

(5) Ordinances passed by the Colonial legislature.

(6) The law as administered for the time being in the Admiralty Division of the High Court of Justice in England.

(7) Mercantile law as administered in England, except when special provision is made by statute in force in the Colony.[88]

87. Whether applicable by express words or necessary intendment.

88. This is the result of Ord. IV of 1878 s. 6 which runs as follows:— 'In all questions or issues which may hereafter arise or which may have to be decided in this Colony, with respect to the law of partnerships, joint stock companies, corporations, banks and banking, principals and agents, carriers by land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any *Statute* now in force in this Colony or hereafter to be enacted.

Provided that nothing herein continued shall be taken to introduce into this Colony any part of the law of England relating to the tenure or conveyance, or assurance of, or succession to, any land or other immovable property, or any estate, right or interest thereon.'

It is assumed that the word 'statute' includes an ordinance of the Colonial legislature, *e.g.,* The Companies Ordinance 1889 (Ord. V. of 1889).

It has been held that by virtue of this section, 9 Geo. IV. c. 14 s. 7, was formerly law in the Colony, (*Penang Foundry Co.* v. *Cheah Tek Soon* 1 Ky. 559, but now see 56 and 57 Vict. c. 71) but that the Registration of Trade Marks Acts 38 and 39 Vict. c. 91; (*Vulcan Match Co.* v. *Herm Jebsen & Co.* 1 Ky. 650) and 46 and 47 Vict. c. 57, (*Fraser* v. *Nethersole,* 4 Ky. 269) are not incorporated.

PART 3. — WHAT PARTS OF THE ENGLISH LAW ARE INAPPLICABLE, AND WHAT PARTS REQUIRE MODIFICATION TO SUIT THE CIRCUMSTANCES OF THE PLACE ?

As Sir Benson Maxwell puts it in *Choa Choon Neo* v. *Spottiswoode,*[89] and the statement has been approved by the Privy Council:—

> 'In this Colony, so much of the law of England as was in existence when it was imported here, and is of general (and not merely local) policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject, in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them.'

The division here indicated is a convenient one and it is accordingly necessary to consider:—

1. What part of the English law is of general, and not of merely local policy ?

2. What modifications of English law are necessary, on account of the religions and usages of the Oriental races living in the Colony ?

1. What part of the English law is of general, and not of merely local policy ?

The question is put rather more definitely by Sir Benson Maxwell, in *Regina* v. *Willans,*[90] in considering whether 4 Geo. IV. c. 34, was law in the Colony. He said:—

> 'I think that all I have to inquire is, whether the Act in question is applicable to the situation and condition of this Settlement, that is, whether or not it is exclusively local in its object and in its machinery, and whether or not injustice and inconvenience would arise from enforcing it.'

And he points out that it was upon the former ground that Sir W. Grant held that the statute of Mortmain (9 Geo. II. c. 36) was not in force in the island of Grenada;[91] and that it was partly on the ground of the inconvenience and injustice which would ensue from the enforcement of the English law which incapacitates aliens from holding land, that the Privy Council held,[92] that that portion of our law was not in force in India. To all or some of the reasons above mentioned, may also be referred the different classes of cases mentioned by Blackstone as inapplicable to Colonies, viz., 'police and revenue laws, the mode of maintenance for the established clergy, the jurisdiction of the Spiritual Courts and a multitude of other provisions.'

As an example of the rules of the English Common law, which have been introduced into the Colony, may be mentioned those of descent to real property,[93] noting at the same time, that they have now been

89. 1 Ky. 216, 221.

90. 3 Ky. 16, 39.

91. *A.G.* v. *Stewart* 2 Mer. 143.

92. *Mayor of Lyons* v. *East India Co.,* 1 Moo. P.C. 176.

93. *Moraiss* v. *De Souza,* 1 Ky. 27, *Chia Keng Siew* v. *Chia Ann Siew,* 1 S.L.J. 146, and see also *Gardiner* v. *Fell,* J. and W. 22.

superseded, the English rules of succession to personal property having, by Indian Act XX. of 1837, been equally extended to real property.[94] It has also been held, that the rules against perpetuities,[95] and as to charitable uses,[96] are law in the Colony.

On the other hand it has been held that a conveyance of an incorporeal hereditament did not, prior to Ord. VI. of 1886, require to be under seal.[97]

The question whether a particular statute has been introduced into the Colony, or not, has been frequently before the Courts. In the Appendix will be found references to most of these decisions, but the list is not exhaustive, for as a general rule, a statute, even if judicially considered, has not been included, if it has been subsequently repealed in the Colony.

2. What modifications of English law are necessary on account of the religions and usages of the Oriental races living in the Colony ?

The rule as laid down by Sir Lionel Cox, in the most recent of the cases on this subject is, that 'native customs will be recognised, unless they be contrary to justice and general public policy.' Whether the law was formerly administered in so liberal a spirit may be doubted, and it is therefore necessary to go through the cases somewhat in detail. It will be seen that whilst two of the earlier judges acted upon the broad principle just stated, and treated adopted sons of Chinese as legitimate sons for the purposes of succession, Sir Benson Maxwell and Sir Theodore Ford refused the rights of succession to an adopted child, and this refusal is now recognised as law, so far as the Courts of the Colony are concerned. Sir Benson Maxwell, at one time, sought to lay down a hard and fast line, limiting the modifications of English law by the rules of Private International Law, or by rules strictly analogous to those of that system. As was subsequently pointed out by Sir Theodore Ford, the principle of Comity is an insufficient guide for all the various cases likely to arise in a Colony with conditions so different from those of Europe; and Sir Benson Maxwell himself subsequently laid down a principle (which afterwards received the approval of the Privy Council) that the law of England is subject in its application to the various alien races established here, to such modifications as are necessary to prevent it operating unjustly or oppressively on them.

It was early contended before Malkin R., in the case of *In the goods of Abdullah,*[98] that the passage in the Charters 'the said Court of Judicature shall have and exercise jurisdiction as an Ecclesiastical Court,

94. This act has been repealed but re-enacted in substance by Ord. VI of 1886, s. 33.

95. *Choa Choon Neo* v. *Spottiswoode,* 1 Ky. 216 and *Ong Cheng Neo* v. *Yeap Cheah Neo,* 1 Ky. 326, L.R. 6 P.C. 381.

96. *Attorney-General* v. *Thirpooree,* 1 Ky. 377, and cases in preceding note.

97. *Sherifa Fatima* v. *Fleury* 1 S.S.L.R. 49.

98. (1839), 2 Ky. (Ec.) 8.

so far as the several religions, manners and customs of the inhabitants will admit' and other passages differing in words, but intended to give the same kind of protection, warranted the Courts in giving to the inhabitants the full benefit of their own laws, religions and customs. The learned Recorder after pointing out that the effect contended for would go far beyond the state of the law at Calcutta, Madras or Bombay, where the benefit, if it is one, is confined to Mahomedans and Hindoos, and is limited to certain classes of rights and privileges said[99]:—

> 'It would be a very dangerous way of construing a document so loose in its expression as the Charter, to attribute all casual variations of phrase to a definite intention of affixing a different meaning. But in the general expression, the Charter seems to have intended to give a certain degree of protection and indulgence to the various nations resorting here; not very clearly defined, yet perhaps, easily enough applied in particular cases, but not generally, to sanction or recognise their law.'

And he held that a Mahomedan might by will alienate the whole of his property, although such alienation would be contrary to Mahomedan law.

But in a letter addressed to the Secretary of Government, dated July 1837, the same Judge went further[1]:—

> 'With respect to the law, whereby rights are constituted and established, I understood the Governor-General to consider, that it at present is, and ought in general for the present to continue, the law of England, modified indeed by considerations how far some of its particular provisions and enactments are suitable to the circumstances of the Colony, and administered in all cases with a large and liberal regard to the Manners, Usages and Religions of the different nations subject to its operation, but containing no provisions or principles which cannot be based upon that law so modified and construed.*** If I am right in these views, it follows that all land held by tenures, amounting, by the terms of the Grant, to a freehold interest, passes, not to the executor for the benefit of the next of kin, but to the heir-at-law.[2] Who this heir may be may occasionally depend on considerations of native usage and religion. These probably, ought to be more liberally regarded in questions of legitimacy and relationship than almost in any other. It would seem very difficult, for instance, to refuse to treat a Hindoo son by adoption, as a son, and consequently as an heir, in the absence of other sons; or to declare the eldest son of a Mahomedan not to be the heir, because his father had two wives at once, and he was the son of the second marriage. But whatever degree of accommodation might, in such cases, be given to the usages of different classes, the foundation of the law remains the English law of inheritance.'

In 1848, Sir William Norris held that the adopted son and the natural and adopted daughters of a Chinaman domiciled in Malacca, were entitled to administration and to the assets of the intestate, to the exclusion of his nephew, resting his decision expressly upon the opinion of Sir Benjamin Malkin, as stated in the above passages. He said[3]:—

> 'The ground of my decision, is, that I take the same view of the Charter as Sir Benjamin Malkin did, with regard to the law to be administered in

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99. *id.* p. 11.

1. 3 Ky. 29.

2. This was written before Indian Act XX of 1837 was passed.

3. 3 Ky. 30.

these Settlements under that instrument, and which cannot be better expresed than in his own words.'

After citing the two passages above quoted from the judgment and letter, he adds:—

'In the 5th paragraph of the report made on the 8th February, 1842 by the Law Commissioners, on the Judicial Establishment of the Straits, they express their concurrence in Sir Benjamin Malkin's view of the spirit in which the law of England should be administered in these Settlements; and I have myself adhered in practice to the same principles, frequently directing the two or three widows of a Mahomedan intestate to rank as one widow, and their several children as one family, in the distribution of the estate.'

In *Regina* v. *Willans*[4] Sir Benson Maxwell, after stating the views of Sir Benjamin Malkin and Sir William Norris, goes on:—

'I was ignorant of these views when a similar question came before me for decision some months ago, and I then held that the adopted son of a Chinaman domiciled here, was not entitled, in that character, to administration, or to distributive share of his adoptive father's land. On being made acquainted with the case before Sir William Norris, I anxiously reconsidered my own decision, but found no reason for holding it wrong in principle; and as Sir Benjamin Malkin's opinion, although entitled to the highest respect, was extra-judicial, while Sir W. Norris,' seemed to have been adopted from his predecessor, rather than to have been the result of any independent consideration of the subject, I thought myself at liberty to abide by my own decision. I must add that I felt less hesitation in doing so, when I referred to the paragraph of the Indian Law Commissioners' Report, cited by Sir William Norris, for I gathered from it that they rather dissented from Sir B. Malkin's views, than concurred with them, if the latter was to be understood, as Sir W. Norris clearly understood him, as holding that the law of England, was to be modified by the Court, in the extensive manner in which he thought it should be modified in the case of the adopted child. "We concur with the late Sir Benjamin Malkin and the Governor-General," the Commissioners say, "in thinking that it (the law of England) ought not to be changed substantially, but modified by *express enactment,* in the spirit in which Sir Benjamin Malkin thought it should be administered, under a large and liberal regard to the different manners, usages and religions of the various nations of which the population is composed" [Rep. Ind. Law Comers, 135]; clearly intimating that though they approved of the suggested modifications, they considered that they should be made by the Legislature, and not by the Judges. I can see nothing in the Charter to admit of such a departure as that in question from the English rules of inheritance and nothing in the widest principles of Comity recognised by our law to admit of it. In truth, if the several passages referred to by Sir Benjamin Malkin in his judgment, be examined, they will be found, I think, to effect nothing more than would have been implied, if the Charter had merely ordained, in general terms, that justice should be administered according to the law of England, without more. The law of England, wheresoever administered, respects, either *ex comitate,* or *ex debito justitice,* the religions and usages of strange sects and nations, to the extent to which the Charter requires that they shall be respected. Thus, if the Charter of 1807 had not expressly provided that witnesses should be sworn "in such manner as the Court should esteem most binding on their consciences," or, in the words of the last Charter, "regard being always had to their religions belief," the law of England would have permitted that our Mahomedans, Hindoos and Chinese should be sworn according to the ceremonies of their respective religions, (*Omichund* v. *Barker,* Willes 538) and assuredly the law of England would not have compelled those who were appointed to act as Constables, to do anything contrary to their religions, customs and manners, even if the Charter had omitted to provide that natives should be compelled

4. (1858), 3 Ky. 16, 30.

to serve in that capacity only so far as their religions, customs and manners admitted. So, if the Court does not entertain proceedings *pro salute anima* against Hindoos, Mahomedans and Buddhists, it is not entirely owing to the limits imposed upon its Ecclesiastical jurisdiction by the express terms of the Charter; for they would be equally free in England, from any such molestation by the Ecclesiastical Courts. Again, a Mahomedan who marries a second wife of his own religion and according to the rites of that religion, it not indictable for bigamy here; but it would be difficult to assert that if he were to contract such a marriage in England, he would be indictable at the Old Bailey. The offence was originally of Ecclesiastical cognisance only, and would seem to contemplate only the marriages of those people among whom Monogamy is an institution.'

'It does not seem to me, then, that the Charter has in any respect modified the law of England by any exceptional adaptation of it to the religions and usages of the East. With the exception of the perhaps superfluous instructions respecting the framing of process, it might have remained silent on the subject of religion and usage without affecting the administration of justice. In other matters of greater importance, respecting which the Charter makes no provision, native religions and usages are equally respected. Thus, if a Mahomedan, or Hindoo, or Chinese marriage, celebrated here according to the religious ceremonies of the parties, be valid, it is not because the Charter makes it so — for, as I have already observed, it makes no exception in favour of native contracts of any kind — but because the law of England recognises it. The general rule of that law is, that the validity of a marriage is to be determined by the law of the place where it is celebrated. "The only principle," says Lord Stowell, "applicable to such a case by the law of England is, that the validity of the marriage rites must be tried by reference to the law of the Country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of the place where the marriage was celebrated." (*Dalrymple* v. *Dalrymple,* 2 Hagg. 59).

But where the law of the place is inapplicable to the parties, by reason of peculiarities of religious opinions and usages, then from a sort of moral necessity, the validity of the marriage depends on whether it was performed according to the rites of their religion.'

'How far the general law should circumscribe its own authority in the matter, it may, as the same Judge (Lord Stowell) observes, be difficult to say *a priori;* and unquestionably it is not easy to extend to Mahomedan marriages that principle of Comity which the law of England has applied to Jewish marriages, without involving it in a recognition of polygamy, which has been always put by jurists beyond the pale of the Comity of Christian Nations. (Story Confl. L. s.s. 113a, 114; 2 Kent Com. 81; 1 Burge Col. & For. Law, 188). The question has never yet been decided by any Court in England; but Lord Brougham, while declaring in *Warrender* v. *Warrender,* [9 Bligh N.S. 89] that an English Court would never recognise a plurality of wives, seems to have been of opinion that in dealing with a Turkish marriage "there may be some room for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptation in the country where" — or, (in the case of Mahomedan marriage in an English possession), in the religion in which.— "the obligation was contracted." (1 Cl. & F. 531, 2). In this place, where the law of England has been for the first time brought to bear upon races among whom polygamy has been established from the remotest antiquity, the Court has had to consider the question, and has always held polygamous marriages valid. Whether the Local Judicature erred, or not, in coming to this decision, I do not stop to consider. It is enough to say that if it decided rightly, it is not because our Charter demands an exceptionally indulgent treatment of the question, but simply because the principle which makes the validity of a marriage to depend upon the religions of the parties, extends to polygamous marriages; while, if the Court has been wrong, it has erred, not in adopting a principle foreign to, and at variance with the law of England, but in stretching, beyond its legitimate limits, a perfectly well established one.

Again, if a Mahomedan divorce be valid here — and its validity has never been disputed, I believe — it must be, not because there is anything in the Charter to make it valid, but because the law of England recognises the right of a Mahomedan husband to dissolve the marriage contracted by him according to the Mahomedan law with a Mahomedan wife; upon the same principle that it recognises a Jewish divorce effected according to the custom of the Jews, without reference to the laws of the State where it was pronounced.' (*Ganer* v. *Lady Lanesborough,* Peake 18).

'In the same way, if the adopted or natural child of a Chinese or a Hindoo, is to be regarded as his heir, it must be, not by virtue of any provision in the Charter, but solely because the law of England recognises him in that character. But if there be any subject on which the Courts of all Countries, and especially the Courts of England and America, where the Common law prevails, are agreed in disregarding foreign law, and therefore foreign religions and usages also, it is that of heirship or succession to immovable property. Even as to contracts entered into, and instruments executed respecting immovable property within its jurisdiction, it suffers no other law to prevail. It denies, *in limine,* all Comity to foreign laws in matters relating to realty, and declares that the law of the *situs* shall exclusively govern in regard to all rights, interests and titles in and to such property (Story Confl. L. s. 463). So far, indeed, has this doctrine been carried, that in *Doe d. Birthwhistle* v. *Vardill, (5* B. & C. 438, 2 Cl. & P. 517, 7 Cl. & F. 895) it was decided by the King's Bench, and afterwards by the House of Lords, in accordance with the unanimous opinion of the Judges, that a Scotchman born a bastard, but made, by the subsequent marriage of his parents, legitimate, under the law of Scotland, and legitimate therefore everywhere, even in England, for every other purpose, could not inherit real estate in England, because our law required that an heir should not only be legitimate, but should be born after the marriage of his mother.'

'If the law of England, then, refuses the right and character of heir to one who, though by the law of his own Country legitimate, is not born before the marriage of his mother, how can it give them to one who is not legitimate by any law, or not a son at all of the person whose inheritance he claims ? It is obvious that to hold that the natural son of the Hindoo, and the adopted son of the Chinaman is heir to his natural and adopted father here, would not be, as in the case of Mahomedan marriage, to give an extreme application to an established principle of law, but to adopt one at variance with the law.

Both the learned Judges who expressed themselves in favour of recognising an adopted son as heir, appear to have treated the question whether one person was the son of another, as depending upon the same class of consideration as the question whether one person was the wife of another. But the two relations are radically different. The relation of husband and wife is one of contract, and the question whether it exists or not is a question of law. The relation between father and son is founded in nature. The question whether it exists between two persons is a question of fact. The relation between father and legitimate son, who is also his heir, is the same, with this addition, under English law, that the mother was legally married to the father before the child was born. The relation involves a contract, it is true, but it is a contract with a third person, the mother, antecedent to the origin of the relation between father and heir. The question, then, whether that relation subsists, is a complex one of fact and law. If the widow, or the two or three widows of a Mahomedan, are held entitled in this country to a share of their husband's undisposed estate and effects, it is because the law holds that their marriage, celebrated according to the rites of their religion, is valid, and created the relation of husband and wife. But a stranger decorated with the title of adopted son, or a natural son, whatever may be his rights under Hindoo or Chinese law, cannot succeed to real estate, as heir of his adoptive or natural father in a Country governed by English law, simply because not his offspring born after his marriage with the mother.'

The same principle of comity was invoked by Sir Benson Maxwell in the next case before him, *Chulas* v. *Kolson*[5] where he said:—

> 'If the criminal law may be made to bend in this manner to the exigencies of natural justice, the civil law must be at least as flexible, and where our law is wholly unsuited to the condition of the alien races living under it, their own laws or usages must be applied to them on the same principles and with the same limitations, as foreign law is applied by our Courts to foreigners and foreign transactions. They must be regarded as persons having foreign domicils, and governed for many purposes by this law, and as if they were residing among us temporarily.'

In the case of *Choa Choon Neo* v. *Spottiswoode*[6] Maxwell, C.J., held that a direction by a testator, that the rents and profits of his land should be expended on certain ceremonies called Sinchew,[7] is void as being in perpetuity and not a charity, and in the course of his judgment he said[8]:—

> 'I do not doubt that the validity of a bequest for the maintenance or propagation of any Oriental creed, or for building a temple or mosque, or for setting up or adorning an idol, as in an Indian case mentioned by Mr. Woods, would be determined in this Court on the same principle, and with the widest regard to the religious opinions and feeling of the various Eastern races established here.'

and later on[9]:—

> 'In this Colony, so much of the law of England as was in existence when it was imported here, and as is of general (and not merely local) policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject, in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them. Thus in questions of marriage and divorce, it would be impossible to apply our law to Mahomedans, Hindoos, and Buddhists, without the most absurd and intolerable consequences, and it is therefore held inapplicable to them. Tested by these principles, is the rule of English law which prohibits perpetuities either of local policy, unsuited to an infant Settlement, or inapplicable by reason of the harshness of its operation, to people of oriental races and creeds ?'

And the learned judge held that it was not.

Adverting to this judgment the Privy Council in *Ong Cheng Neo* v. *Yeap Cheah Neo* says[10]:—

> 'It appears to them that, in that judgment, the rules of English law, and the degree in which, in cases of this kind, regard should be had to the habits and usages of the various people residing in the Colony, are correctly stated.'

In *Khoo Tiang Bee* v. *Tan Beng Gwat,*[11] in which the Court refused to recognise the right of an adopted son to share in an intestate's estate, Ford, Ag. C.J., said, with regard to the case of *Choa Choon Neo* v. *Spottiswoode*[12]*:*—

> 'So much of his (Sir Benson Maxwell's) decision, as pronounced the law of England to be in force in this Colony, and declared the degree in which

5. (1867), S.L.R. 462.
6. 1 Ky. 216.
7. For a description of Sinchew see *Id.* 217.
8. 1 Ky. 219.
9. 1 Ky. 221.
10. 1 Ky. 326, 346, L.R. 6 P.C. 381, 396.
11. 1 Ky. 413.
12. 1 Ky. 415.

in cases of the kind, regard should be bad to the habits and usages of the various people residing in it, to be correctly stated, has been expressly confirmed by the Privy Council in the case of *Ong Cheng Neo* v. *Yeap Cheah Neo,* but whether modifications in favour of the habits and usages of foreign races dwelling here are to flow from the express provisions to that end in the Charter itself, or to follow as the sequence of the introduction of English law under the principle of comity, as laid down in *Regina* v. *Willans,* was not a question directly before their Lordships, and I gather from the language of their judgment that their Lordships considered such modifications might not only flow from the language of the Charter, but even a third source, *viz.,* that principle of law which attached to subjects of the British Crown settling in a new country such modifications in the law of their original domicile as the circumstances of the place required. The application of this latter principle would certainly meet with some difficulties having regard to the actual circumstances under which our present population has found its way here.'

'It is to be observed that from whatever source the modifications of English Law in favour of native usages and customs come, they do not reach us in a compact body of very well ascertained rules and decisions. The words "as far as circumstances will admit," necessarily leave some scope for the discretion of a Court in the application of English law to the ever varied circumstances of new Settlements, and even the application of the principle of comity fails as a guide, immediately we have to travel off a few well beaten tracks. The fabric of International Comity, or private international law, seems to me to have but comparatively few stones of its foundation yet laid, and in the absence of Statute law on the subject — which, until greater exigencies arise from the intercourse of nations and the mixture of races, than any now existing we can hardly expect — must, it seems to me, even with this available source as a guide, be left to the discretion of the various Courts, who may have to determine the extent of modifications in favour of the customs and usages of natives settling within their jurisdiction. Modifications made in the case of a numerous race inhabiting Settlements such as these, might well be refused to two or three of their number domiciled in London, Sir Robert Phillimore in his work upon International law (Vol. IV. p. 11) even says of it:— "It is a matter for rejoicing that it has escaped the procrustean treatment of positive legislation, and has been allowed to grow to its fair proportions under the influence of that science, which works out of conscience, reason and experience, the great problem of Law in Civil justice."

The temptation to adopt the more clearly defined principle of jurisprudence, applied by Sir B. Maxwell in *Regina* v. *Willans,* is a natural one, but, attentively as I have considered that very able judgment, I am yet not satisfied that under the principle of Comity, it is possible to range all the modifications that might be required to meet the circumstances of these Settlements. The principle, however, of attentively regarding what modifications the law of England has refused to make in favour of the foreigner, seems to me to be of the soundest and the best of all restraints upon a really irregular application of that discretion which Sir Benson Maxwell condemned. By common consent, independent nations have determined that Comity disregards all Foreign law, whether in the garb of religion, usage, or otherwise, in respect of heirship or succession to immoveable property, and although the peculiar circumstances of these Settlements have let in the case of other than the 1st wife of Mahomedans to a departure from this principle, or, to quote the language of Sir Benson Maxwell in *Regina* v. *Willans* — to, perhaps, the "stretching beyond its legitimate limits a well established principle," — I think that principle so sound a one, and well settled that a strong case of injustice or oppression should be shown, before a Court should decline to have its discretion guided by it. But whether or not injustice or oppression of sufficient gravity to lead to this exception in favour of a Mahomedan's second or other wives, has been made out, the practice of allowing them to share in the husband's estate, is too well established to be now shaken. But that a case of such injustice, or oppression, can be made out in the case of the custom of adoption, which would counterbalance the weight and soundness of that policy, which is embodied in the

rule of English law which would exclude such a custom amongst its laws of inheritance, I do not think. The introduction of the custom would be to add one more to the many conflicts of laws which in Settlements composed of so many diverse races, are continually arising; to introduce a principle, still further foreign to those general laws of succession which prevail in them; and, as far as I can see, without any patent counterbalancing advantage. The custom is also one of Chinese law, in respect of which, we are imperfectly acquainted with, and have not the means of more perfectly ascertaining. It is in itself highly undesirable to multiply laws of inheritance in any country, but, perhaps, more especially over small Settlements such as these. That uniformity in such a matter, contributes to the diffusion of a knowledge of, and certainty in, the law itself, is also of the greatest advantage.

For these reasons and fortified by those decisions which have determined that laws affecting succession to immovable property, are of general, and not merely local policy, and are not unadapted to the conditions and wants of races similarly placed to those here, I am of opinion it is my duty to follow the decision of Sir Benson Maxwell rather than those of his predecessors. Neither do I see sufficient reason to depart from this view in this case, because the claim is to personal or moveable and not immoveable property. I should have some difficulty, perhaps, were I to limit myself only by the somewhat unsettled obligations of Comity as to the rights of foreigners commorant in purely personal estate, but calling to the aid of the Court that discretionary power which, it seems to me, it must sometimes exercise upon grounds of policy, and which is fully accorded to it, both under the words of the Charters introducing English Law into these Settlements and under the general principle of English Law by which its provisions have effect in these Settlements, "as far as circumstances admit," I think, I am correct in coming to a similar conclusion in the matter of personal estate. The circumstances of inconvenience or injustice in declining to recognise this practice of adoption, do not seem to me sufficiently grave to call for the modification of English Law, as sought. Indeed with an absolute testamentary power, and that full knowledge of the terms under which Chinese settle in this Colony, which this and previous decisions may be supposed to give, it will be hard to make out much semblance of their existence.'

In re Sinyak Rayoon [13] was a case of the guardianship of a Mahomedan infant. In it Wood, J., used the following language:—

'Whether, if the point where now material to be decided, the Court should consider itself bound by the interpretation of the words in the Charters that the Court shall administer the law of England "as far as circumstances will admit," to be equivalent to "so as to prevent it from acting unjustly and oppressively on the native races" as expressed by Sir Benson Maxwell in *Choa Choon Neo* v. *Spottiswoode,* which language is apparently approved of by the Privy Council in *Ong Cheng Neo* v. *Yeap Cheah Neo,* I do not consider myself bound to say. It may be that those expressions being *obiter dicta* extend no further than the particular circumstances of each of those cases and that in their true sense it is a strain upon language to give them this exact meaning.'

In *Karpen Tandil* v. *Karpen*[14] the Court of Appeal held that a contract between Hindoos, which if it had been made between Europeans would have been void as being a marriage brokage contract, is not void, Sir Lionel Cox, C.J., said:—

'Native customs will therefore be recognised unless they be contrary to justice and general public policy; to hold otherwise, would be intolerable for them.'

13. 4 Ky. 329, 334.

14. 3 S.S.L.R. 58.

CHAPTER IV.

DIGEST OF STATUTE AND CASE LAW SHEWING VARIATIONS FROM ENGLISH LAW ON ACCOUNT OF RELIGION OR NATIONALITY.

Chinese.

BIGAMY.

A Chinaman was prosecuted for bigamy under Section 404 of the Penal Code which renders bigamy a crime 'if the second marriage is void by reason of its taking place during the lifetime of the first wife.' It was held that the *onus* of shewing that the second marriage was void lay upon the prosecution and they having failed to discharge that *onus* the prisoner must be acquited.

Reg v. *Yeoh Boon Leng,* 4 Ky. 630.

DISTRIBUTION OF INTESTATE'S ESTATE.

A. ADOPTED CHILD —

An adopted child has no right to share in an intestate's estate.

In the goods of Meh Allang, cited 1 Ky. 414.

Khoo Tiang Bee v. *Tan Beng Gwat,* 1 Ky. 413.

B. FEMALES —

The Statutes of Distribution will not be modified so as to exclude females from sharing in an intestate's estate in the mode in which they are excluded by Chinese law and custom.

Lee Joo Neo v. *Lee Eng Swee,* 4 Ky. 325.

C. WIDOWS —

Upon an intestacy two widows are entitled to share equally among themselves the share which is allotted by English Law to the widow of a deceased person.

In the goods of Lao Leong An, S.L.R. 418.

In the goods of Ing Ah Mit, 4 Ky. 380.

MARRIAGE.

A. STATUS —

The necessity of the consent of the guardian of a female, which is required by the law of China to be given to a marriage, is not required to constitute a valid marriage in the Colony, if in other respects the marriage is a valid one.

Nonia Cheah Yew v. *Othmansaw Merican,* S.L.R. 167, 1 Ky. 160.

As to the general characteristics of a Chinese marriage see *per* Collyer, J., in *Lim Chooi Hoon* v. *Chok Yoon Guan,* 1 S.S.L.R. 72.

B. EFFECT ON PROPERTY OF WIFE —

A marriage contracted between British born Chinese, according to Chinese rites, in the Colony, confers no marital rights on the husband as regards the wife's property.

Lim Chooi Hoon v. *Chok Yoon Guan,* 1 S.S.L.R. 72.

RESTITUTION OF CONJUGAL RIGHTS.

The Supreme Court has no jurisdiction, on its ecclesiastical or civil side, to entertain a suit for the restitution of conjugal rights.

Lim Chye Peow v. *Wee Boon Tek,* S.L.R. 282, 1 Ky. 236.

WILL — CONSTRUCTION OF WORD CHILDREN.

See *Quaik Kee Hock* v. *Wee Geok Neo,* 2 S.L.J. 41, and *Seah Liang Seah v. Seah Eng Kiat,* 4 S.S.L.R. 22.

Hindoo.

CONTRACT.

A contract between Hindoos, which, had it been made between Europeans would be void as a marriage brokage contract, is not void in the Colony.

Karpen Tandil v. *Karpen,* 3 S.S.L.R, 58.

MARRIAGE — EFFECT ON PROPERTY OF WIFE.

Where a marriage takes place between Hindoos, according to Hindoo law and custom, all property belonging to the woman, whether acquired before or after marriage, is her separate property, and the husband acquires no interest in it, except as trustee for the wife.

Pootoo v. *Valee Uta Taven,* 1 Ky. 622.

RESTITUTION OF CONJUGAL RIGHTS.

The Court has no jurisdiction on its ecclesiastical side to entertain suits for the restitution of conjugal rights.

Veeramah v. Sawmy, S.L.R. 421.

Nor on its civil side.

Vadamalia Pillay v. *Shetthay Amah,* S.L.R. 270.

SEPARATION OF HUSBAND AND WIFE.

The terms upon which a Hindoo husband and wife should separate may be the subject of reference to arbitration; and the Supreme Court has jurisdiction to order an award (which directs the wife to return to her husband, or in default that she or her parents and relatives who joined in the reference, should restore to the husband certain jewelry which was given by the husband to the wife at the time of marriage) to be filed in Court, with a view to execution in so far as it orders the restoration of the jewelry.

In re Armoogun, 4 Ky. 327.

Mahomedan.

The law as regards persons professing this religion has been modified by Ordinance V. of 1880, entitled 'An Ordinance to provide for the registration of Marriages and Divorces among Mahomedans, for the appointment of Kalis and to define the modifications of the Laws of Property to be recognised in the case of Mahomedan Marriages.' The most important part of the Ordinance from a legal point of view is Part III. headed, 'Effect of marriage on property.' It consists of one section, viz., 27, divided into 19 subsections. The general part of the section (Sub-sec. II) provides that 'Mahomedan law, in the absence of special contract between parties, shall be recognised by the Courts of the Colony, only so far as is expressly enacted in this section. Provided that nothing herein continued shall be held to prevent any Mahomedan person directing, by his or her will, that his or her estate and effects shall be administered according to Mahomedan law.'

The word 'English law' is used on several occasions in the section, and is defined (Sub-sec. XIX) to be 'the English law, as in force in the Colony for the time being.'

The section, it is to be noted, is limited to the law of property (*Jamaludin* v. *Hajee Abdullah,* 1 Ky. 503).

The sub-sections, referred to below, are those constituting Section 27 of Ord. V. of 1880.

ACTIONS.

A married woman may sue, or be sued, as if she were unmarried (Sub-sec. XII).

For former law, see *infra* CONTRACTS OF WIFE.

ADMINISTRATION.

A. HUSBAND'S ESTATE —

In case of a husband dying intestate, the Court may grant administration to any other next of kin, either to the exclusion of, or jointly with the widow or widows, or any one or more of them (Sub-sec. VIII).

B. WIFE'S ESTATE —

Administration will be granted to the following persons and in the following order, viz. —

(*a*) Sons, (*b*) husband, (*c*) daughters, (*d*) father, (*e*) mother, (*f*) brothers, (*g*) sisters, (*h*) uncles, (*i*) aunts, (*j*) nephews, (*k*) nieces, (*l*) failing the above, the nearest next of kin according to English law, preference being given to males over females of the same degree (Sub-sec. IX).

CONTRACTS OF WIFE.

A. POSTNUPTIAL CONTRACTS —

A married woman is liable, to the extent of her property, on contracts entered into with reference to such property, or on the faith

that her obligations arising out of such contracts will be satisfied out of her own property, and the husband is not liable, in default of express stipulation, on such contracts; the liability of the husband for debts, incurred by his wife's agency, express or implied, is to be measured by English law (Sub-sec. XIII).

Before Ord. V. of 1880, a Mahomedan married woman might have contracted and been sued as if she were a *feme sole,* and coverture was no defence to her bond.

> 'The incapacity to contract which affects a married woman at common law is founded on the fiction that she and her husband are one person; but I think that fiction may well be confined to that kind of marriage for which it was intended, the Christian and indissoluble marriage. To extend it to the Mahomedan marriage would be to apply it to something different and to establish but a weak foundation for a law absurdly unjust and intolerably oppressive.'
>
> 'It must be borne in mind that in applying foreign law to particular cases, Courts must be governed more by considerations of public policy and convenience than of strict logical consistency.'

Chulas v. Kolson, Maxwell R., S.L.R. 462.

B. ANTFNUPTIAL CONTRACTS —

A husband is not liable for the antenuptial debts of his wife, but the latter is liable to the same, to the extent of her separate property (Sub-sec. XIV).

CONVEYANCE.

A. FORMALITIFS —

A wife may dispose of her property, by deed or otherwise, without the concurrence of her husband and without acknowledgment (Sub-secs. X & XI. *In re Solayappa Chitty* 3 S.S.L.R. 36).

It was otherwise before Ord. V. of 1880; then a conveyance by a married woman was not valid unless acknowledged as required by the Indian Act of 1855, corresponding to the Act for the abolition of fines and recoveries.

Per Maxwell, R., *Chulas* v. *Kolson,* S.L.R. 462, 465.

Kader Meydin v. *Shatomah,* S.L.R. 260.

The last decision was followed by Pellereau, J., in *Fatimah* v. *Armootah,* 4 Ky. 225 in which p. 228 the Judge said:—

> 'I do not know what I might have decided had the question came before me for the first time.'

And the same Judge in *Armootah Pillay* v. *Fatimah Bee* 4 Ky. 416, 427 said:—

> 'I am not sure if the point was argued over again in the Court of Appeal what the decision of that Court would be.'

B. CONVEYANCE OF LAND TO MARRIED WOMAN BY HER HUSBAND —

There is no rule of law in the Colony which prevents a husband conveying land to his wife, and a conveyance by a husband to his wife passes the legal estate in the property conveyed.

Salwath Haneem v. *Hajee Abdullah, 2* S.S.L.R. 57 see also *per* Pellereau, J., in *Fatimah* v. *Armootah,* 4 Ky. 225, 228.

DISTRIBUTION OF INTESTATES ESTATE.

A. HUSBAND'S ESTATE —

A widow, or, if more than one, the widows, equally between them, take the share in the estate which by English law a widow is entitled to in an intestate's estate, 'so that no more persons be recognised as widows of such Mahomedan than by Mahomedan law he might have had as lawful wives, living at a time, during his lifetime.' (Sub-sec. IV. & V).

Prior to the passing of Ord. V. of 1880, it had been held that two or more widows were entitled to divide equally between them the share which the Statutes of Distribution allot to the widow of a deceased person.

Per Norris, R., *in re Chu Siang Long's estate,* S.L.R. 460, 462. *Per* Maxwell, R., *in the goods of Lao Leong An,* S.L.R. 418, 1 S.S.L.R. 1. *Per* Ford, Ag. C.J., *Khoo Tiang Bee* v. *Tan Beng Gwat,* 1 Ky. 413, 416.

Subject to the right of the widow, the estate is divisible among his children by all or any of his lawful wives, according to English law (Sub-sec. VII).

B. WIFE'S ESTATE —

The husband takes, if wife has left

(a) descendants of her own, one quarter

(b) no descendants, but next of kin according to English law, one third

(c) no descendants, or next of kin according to English law, the whole.

Subject to the rights of the husband, the estate is divisible

(1) Among the children or their descendants in equal shares according to English law; *per capita* as to children, *per stirpes* as to their descendants.

(2) In default of descendants, among her next of kin according to English law (Sub-sec. VI. & VII).

DIVORCE.

A divorce valid according to Mahomedan law is valid in the Colony.

Per Maxwell, R., in *Reg* v. *Willans* 3 Ky. 16, 33, and in *Chulas* v. *Kolson,* S.L.R. 462, 463.

Provision is made by Ord. V of 1880 for the registration of divorces but such registration is voluntary.

EARNINGS OF WIFE.

The earnings of a Mahomedan married woman are her separate property (Sub-sec. XI).

EVIDENCE OF WIFE AGAINST HER HUSBAND.

By Section 120 of the Evidence Ordinance 1893 as amended by Ord. XII. of 1895 a wife, of whatever nationality she may be, is a competent witness against her husband.

Formerly a wife could not give evidence against a Mahomedan husband when he was charged with theft of property which was her separate property under Ord. V. of 1880.

Reg v. *Ojir,* 4 Ky. 122.

GUARDIAN OF INFANT.

The Court, in deciding who is a fit and proper person to be appointed guardian of a native infant, is not bound by any hard and fast rule of the law of England on the subject, but will, under the words 'so far as circumstances will admit' in the Charter of 1855, take into consideration the law, religion, practice or custom of the nationality or class to which such infant belongs, on the subject of such guardianship.

In re Sinyak Rayoon, 4 Ky. 329.

HABEAS CORPUS.

The Supreme Court has no jurisdiction on *habeas corpus* to order a married woman to return to her husband when she herself is unwilling to do so.

In re Sittee Mariam, 2 Ky. (H.C.C.) 38, and see *Reg* v. *Loon,* W.O.C. 39.

HOUSEHOLD PROPERTY.

All household property in or about a house occupied by a Mahomedan husband and his wife or wives, except the paraphernalia of the wife or wives, *prima facie* belongs to the husband in any question between him and his creditors (Sub-sec. XVII).

JOINT EARNINGS OF HUSBAND AND WIFE.

Joint earnings are the property of the husband.

Tijah v. *Mat Alii,* 4 Ky. 124.

KALI.

By Sec. 24 of Ord. V. of 1880, provision is made for the recognition of Kalis, in all matters relating to the law of marriage and divorce, but their powers are limited, it being laid down that 'No Kali recognised under this section shall be held to have any judicial authority other than is necessary to decide upon questions relating to the existence, or non-existence, of the status of marriage or divorce, between person voluntarily appearing before him; and no such Kali shall have any authority to impose fines, nor to adjudicate in matters of property, unless the parties affected voluntarily agree to accept such Kali's adjudication after the adjudication has been made.'

MARRIAGE,

A. STATUS OF MARRIAGE —

A marriage valid according to Mahomedan law is valid in the Colony. Provision is made by Ord. V. of 1880 for the registration of such marriages, but such registration is voluntary.

B. EFFECT ON PROPERTY OF WIFE —

All property, whether acquired by the wife before or after marriage, is her separate property, (Sub-sec. X. & XI), and the husband acquires no marital rights in it (Sub-sec. XV).

As Sir Benson Maxwell said, in *Hawah* v. *Daud,* S.L.R. 253, 254:—

> 'It seemed to him that it might be that the Mahomedan marriage was a good marriage as regarded its essential character, sanctioning and legalising the union of the man and woman, and legitimising their offspring, and yet not be that species of marriage to which the legal incidents as to property, rights and disability attached.'

Again the Court of Appeal in *Haleemah* v. *Bradford,* S.L.R. 383, 384 said:—

> 'We have no difficulty in deciding that the English law based entirely upon the Christian marriage is wholly inapplicable to the relation existing between the sexes by virtue of a Mahomedan marriage. For some purposes a Mahomedan marriage is recognised as a valid marriage by our Courts but the nature of the contract is essentially different from that entered into by Christians, and in accordance with the cases already decided that a husband who contracts a marriage which he is at liberty to dissolve at pleasure, takes no interest in his wife's estate, we hold that under a Mahomedan marriage the husband takes no interest in her freehold property during the lifetime of the wife or after her decease by virtue of the coverture.'

NEXT FRIEND.

A married woman can be the next friend of an infant plaintiff. *Inche Mahomed Nor* v. *Hadjee Abdullah,* 1 S.S.L.R. 58.

PLEDGE OF CHILD.

The pledging of a child, as security for a debt, is invalid as being against public policy, although valid in the country where made.

In re Halemah, S.L.R. 308.

RESTITUTION OF CONJUGAL RIGHTS.

The Supreme Court has no jurisdiction, on its civil side, to entertain a suit for restitution of conjugal rights.

Shaik Madar v. *Jaharrah,* 1 Ky. 385.

VOLUNTARY SETTLEMENTS.

Settlements and dealings with property between a Mahomedan husband and wife are governed by the rules of English law (Sub-sec. XVI, which see and consider).

WILL.

A. GENERALLY —

A Mahomedan may dispose by Will of all his property, although such disposition would be contrary to Mahomedan law.

In the goods of Abdullah, 2 Ky. (Ec.) 8.

B. OF MARRIED WOMAN —

Mahomedan married women may dispose of their property by will (Sub-sec. III).

Parsee.

Indian Acts XV and XXI of 1865, define the law relating to marriage and divorce among Parsees, and lay down the rules relating to intestate succession among them, but owing to the small number of Parsees in the Colony, these Acts are of but little practical importance.

APPENDIX.

TITLE AND SUBJECT MATTER OF STATUTE.	WHETHER LAW OR NOT.	REFERENCE.
Statutes of Distribution	law	4 Ky. 325.
Statutes against Gaming	not law	3 Ky. 94.
Statutes against Superstitious Uses ..	not law	1 Ky. 216 & 344,
Statutes of Merton, Westminster I, Westminster II & Gloucester	law	3 Ky. 39.
31 Ed. III st. 1 c. 11 21 Hen. VIII c. 5, Administration	law	2 Ky. (Ec.) 22.
27 Hen. VIII c. 16, Enrolment of Bargains and Sales	not law	1 Ky. 44.
32 Hen. VIII c. 34, Conditions of re-entry.	law	1 Ky. 364.
13 Eliz. c. 5, Defrauding creditors ..	law	1 Ky. 64, 3 Ky. 39.
27 Eliz. c. 4, Voluntary conveyances ..	law	3 Ky. 39.
21 Jac. I c. 16, Limitations	formerly but not now law	4 Ky. 136, Ord. VI of 1896.
29 Car. II c. 3, Statute of Frauds, s. 4	law	1 Ky. 32.
s. 7	law	4 Ky. 325.
s. 17	formerly but not now law	1 Ky. 32, Ord. IV of 1878, s. 6, 56 & 57 Viet. c. 71.
29 Car. II c. 7, Lord's Day	law in part	1 Ky. 314.
31 Car. II c. 2, Habeas Corpus ..	law	3 Ky. 39.
4 & 5 Anne c. 3, (or as it is commonly printed c. 16,) Law Amendment Act, sections relating to Limitations	not now law	4 Ky. 136, Ord. VI of 1896.
9 Geo. II c. 36, Mortmain	not law	1 Ky. 216, 344, 3 Ky. 38.
11 Geo. II c. 19, Rent.	not law	S.L.R. 48.
20 Geo. II c. 19, Servants	formerly law but now superseded by Labour Legislation	3 Ky. 39.
39 & 40 Geo. III c. 98, Thellusson's Act	law	4 S.S.L.R. 141.
9 Geo. IV c. 14, Lord Tenterden's Act s. 1.	not now law	1 Ky. 214, 392, Ord. VI of 1896 s. 19.
,, s. 7.	not now law	1 Ky. 559, Ord. IV of 1878, s. 6, 56 & 57 Viet. c. 71.
9 Geo. IV c. 31, Act to consolidate law of offences against the person ..	not law	1 Ky. 254.
9 Geo. IV c. 74, Administration of Criminal Justice in the East Indies ..	law	2 Ky. (C.R.) 15, 81 & 106.
2 & 3 Will. IV c. 74, Prescription Act	not law	1 Ky. 272.
3 & 4 Will. IV c. 27, Limitations Act	not law	4 Ky. 311, Ord. VI of 1896.

APPENDIX.—*Contd.*

TITLE AND SUBJECT MATTER OF STATUTE.	WHETHER LAW OR NOT.	REFERENCE.
8 & 9 Vict. c. 106, Act amending the law of real property	not law	1 Ky. 242.
12 & 13 Vict. c. 96, Jurisdiction on High Seas.	law	3 Ky. 152.
15 & 16 Vict. 86, Chancery Procedure Act 1852.	not law	*Supre,* p. 16(n.).
17 & 18 Vict. c. 125 s. 11, Common Law Procedure Act 1854.	law	4 Ky. 596, but see Ord. XIII of 1890, s. 6.
19 & 20 Vict. c. 97, s. 31, Mercantile Law Amendment Act.	law	S.L.R. (N.S.) 26.
20 & 21 Vict. c. 77, Court of Probate	not law	1 Ky. 480, 4 Ky. 187.
20 & 21 Vict. c. 85, Divorce	not law	4 Ky. 602, S.L.R. (N. S.) 27.
21 & 22 Vict. c. 27, Lord Cairns ..	law	4 Ky. 251.
33 & 34 Vict. c. 52, Extradition ..	law	a series of cases the last of which is reported in 4 S.S.L.R. 74.
38 & 39 Vict. c. 91, Registration of Trade Marks.	not law	1 Ky. 650.
46 & 47 Vict. c. 57, Trade Marks . .	not law	4 Ky. 269.