PRECEDENTS THAT BIND —A GORDION KNOT: *STARE DECISIS* IN THE FEDERAL COURT OF MALAYSIA AND THE COURT OF APPEAL, SINGAPORE

"It is... necessary to reaffirm the doctrine of *stare detisis* which the Federal Court accepts unreservedly and which it expects the High Court and other inferior courts in a common law system such as ours, to follow similarly," *per* Chang Min Tat J. in *P.P.* v. *Datuk Tan Cheng Swee*[1] (Federal Court, 1980).

Despite this emphatic reassertion of the vitality of the doctrine of *stare decisis* by the highest local tribunal in Malaysia, its application in both Singapore and Malaysia is still fraught with difficulty. This article will examine the position with regard to *stare decisis* as practised in the Federal Court of Malaysia and in the Court of Appeal and Court of Criminal Appeal of Singapore (hereafter referred to as the "Court of Appeal" for the sake of brevity), and in the High Courts of the two countries.

In theory, the doctrine of binding precedent (*stare decisis*) is not difficult to understand. A court is bound to follow a decision of a court above it in the judicial hierarchy. This follows from the basic principle of the administration of justice that like cases should be decided alike. The feature that distinguishes the English system from other systems in this respect is the coercive nature of the English doctrine. In England, and countries that adopt the English system, a judge has no option but to follow a binding precedent if the case before him cannot be distinguished from the prior case. This is so even if he disagrees with the prior precedent, and, indeed, even if the application of the precedent would lead to injustice in the case before him.[2]

The rationale for this rule is two-fold. Firstly it is to provide certainty in the law.[3] Secondly, it is necessary that some body should have the final say as to what the law is, to ensure that an issue will not continue to be argued and re-argued *ad infinitum.*[4] In a hierarchical system of courts, it stands to reason that the decision of a higher court should take precedence over that of a lower court.

In order to understand the working of the doctrine of *stare decisis* locally, it is necessary to understand how it is applied in England,

1 [1980] 2 M.L.J. 277, 277F.

2 See *e.g.* the comments of Lord Halsbury L.C. in *London Street Tramwavs Co.* v. *London County Council* [1898] A.C. 375, 380.

3 See *e.g.* the dicta of Lord Pearson in *Jones* v. *Secretary of State for Social Services* [1972] 1 All E.R. 145, 175.

4 *Per* Lord Halsbury L.C., *London Street Tramways Co.* v. *London County Council, supra,* note 2.

where the rules evolved. What follows is of necessity a brief and simplified description of a doctrine that developed over many years, and which continues to develop.

THE ENGLISH SYSTEM

Stare decisis may be said to work both vertically and horizontally; that is, courts are bound by courts above them in the judicial hierarchy, as well as by courts on the same level (courts of co-ordinate jurisdiction). The vertical binding effect is central to the doctrine; the horizontal effect is not. The practice as regards the horizontal effect varies from jurisdiction to jurisdiction. In some jurisdictions decisions of courts of co-ordinate jurisdiction are binding; in others they are not. In all jurisdictions, as a general rule, decisions of higher courts are always binding.

Thus decisions of the House of Lords bind the Court of Appeal, decisions of which in turn bind the lower courts. There are no exceptions to this rule, as there are in relation to horizontal *stare deems.* Attempts by lower courts to stray beyond the line have met with emphatic denunciations from above.[5] This principle has been transplanted intact into the colonial systems based upon the English.

As far as horizontal *stare decisis* is concerned, the practice has not been quite as clear or as constant.

In 1898 the House of Lords unequivocally held itself bound by its own previous decisions.[6] This was by no means always the practice,[7] nor is it the practice now. In 1966 the Lord Chancellor, Lord Gardiner, read a Practice Statement on behalf of the Lords whereby it was proclaimed that their Lordships would:

> "modify their present practice and, while treating former decisions of this House as normally binding,... depart from a previous decision when it appears right to do so."[8]

The Court of Appeal is bound by its own previous decisions. This is the result of the celebrated (or infamous) decision in *Young* v. *Bristol Aeroplane Company Limited,*[9] decided in 1944 by a Full Bench of that court. Since then this rule has been religiously followed by all members of the Court of Appeal, with one notable exception.[10]

The rule in *Young's* case is subject to three qualifications, stated in the case itself:

First, the Court of Appeal is not bound by a decision of its own that cannot stand in the face of a subsequent House of Lords decision.

5 See *e.g. Miliangos* v. *George Frank (Textiles) Ltd.* [1975] 3 All E.R. 801, 817-820 (Lord Simon).
6 *London Street Tramways Co.* v. *London County Council, supra,* note 2.
7 See *e.g. Bright* v. *Hutton* (1852) 3 H.L.C. 343, 388, *per* Lord St. Leonards.
8 [1966] 3 All E.R. 77.
9 [1944] K.B. 718.
10 Lord Denning M.R. has been conducting a "one man crusade with the object of freeing the Court of Appeal from the shackles which the doctrine of *stare decisis* imposed on its liberty of decision", *per* Lord Diplock in *Davis* v. *Johnson* [1978] 1 All E.R. 1132, 1137. As the decision of the House of Lords in that case exemplifies, this crusade has thus far met with a singular lack of success.

The later decision may be taken to have overruled (implicitly, if not expressly) the earlier decision.

Secondly, if there are two or more conflicting but equally binding decisions, of necessity the Court of Appeal must choose to follow one and ignore the others.

Thirdly, the Court of Appeal is not bound by a decision given "per incuriam", that is, in ignorance of a binding authority — judicial or statutory — that would have affected the decision in the case. This exception, it must be emphasised, applies only when a court is faced with a decision of a court of co-ordinate jurisdiction. Lower courts do not have the same freedom to question the validity of binding decisions of courts higher in the judicial hierarchy.[11] The strict rule of binding precedent does not apply to the Court of Criminal Appeal [now the Court of Appeal (Criminal Division)]. In *Rex* v. *Taylor* (1950)[12] it was held that when the life and liberty of the subject is in the balance, the court will not be irretrievably bound by a prior decision of its own. The civil practice does not apply in such a case.

The Divisional Court (a part of the High Court) is bound by its own decisions when exercising appellate jurisdiction.[13] However, a High Court judge hearing a case at first instance is not bound to follow a decision of his brethren, though he would usually do so as a matter of courtesy.[14] As with the House of Lords, the practice in this respect has not always been the same.[15]

The rules of *stare decisis* that are applied in England today are creatures of this century. It would be a mistake to depend on earlier cases as indications of current judicial practice.

An examination of the development of the rules of *stare decisis* reveals that those rules are not immutable. They change over time with the changing practice of the courts. The best example of this phenomenon is the House of Lords, which in slightly over a century went from not being bound by its own decisions to being bound, then back to not being bound again.[16] The fact that these changes came about without legislative intervention suggests that the courts are free to regulate themselves on this matter; there seems no need, as some have suggested, for Parliament to enact a law to change a rule of *stare decisis.* The fact that the House of Lords employed a Practice Statement to effect a change in the application of the doctrine is significant. The implication is that *stare decisis* is essentially a matter of judicial practice which the courts themselves are at liberty to regulate, as Cross suggests.[17] This should be borne in mind when considering *stare decisis* in Singapore and Malaysia.

11 For instance, an attempt by the Court of Appeal to disregard a decision of the House of Lords by labelling it *per incuriam* was deplored by the House in *Cassell & Co. Ltd.* v. *Broome* [1972] 1 All E.R. 801.
12 [1950] 2 K.B. 368, [1950] 2 All E.R. 170.
13 *Police Authority for Huddersfield* v *Watson* [1947] K.B. 842.
14 *Per* Lord Goddard, *Watson's* case, *supra,* note 13 at p. 848.
15 See *e.g. Kruse* v. *Johnson* [1898] 2 Q.B. 91, 102 *per* Lord Russell of Killowen C.J.
16 *Supra,* notes 6 to 8.
17 Rupert Cross, *Precedent in English Law* (3rd Ed., 1977) at p. 110.

STARE DECISIS IN SINGAPORE AND MALAYSIA

It might seem to the uninitiated that the transplantation of the doctrine into local soil would pose few problems. All that would be required is to equate local courts with English courts; then by analogy the rules could be applied. This apparent simplicity is deceptive. Local courts do not correspond exactly to English courts, and there's the rub.

At the top of the judicial hierarchy in both Singapore and Malaysia is the Privy Council; to be precise, the Judicial Committee of that body The Privy Council occupies in relation to local courts a similar but not identical position to that occupied by the House of Lords in relation to English courts.

The analogue of the English Court of Appeal in Malaysia is the Federal Court; in Singapore it is the Court of Appeal and the Court of Criminal Appeal. The present Malaysian Federal Court is the end product of a bewildering series of mergers and un-mergers among the courts of three distinct geographical entities: Malaya, Singapore and Borneo. The Singapore Court of Appeal shares that history, with additional wrinkles of its own. This will be dealt with in more detail in the next section.

The English High Court is equivalent to the High Courts of Singapore and of Malaysia. It should be noted that a single High Court judge exercises significant appellate jurisdiction in both Singapore[18] and Malaysia.[19] In England there exist Divisional Courts comprising two High Court judges.[20] There is no local equivalent of the Divisional Courts.

The problem is that the local judicial systems differ subtly but significantly from the English system. The Judicial Committee of Privy Council is not exactly equivalent to the House of Lords. It has never considered itself bound by its own decisions.[21] Nor does every decision of the Privy Council bind courts in Singapore (and presumably in Malaysia) at least in theory.[22] This is so because the Privy Council was (and still is, in some cases) the final court of appeal for the British colonies; since the law differed from colony to colony, it would have been impractical to consider a decision given on appeal from one colony as irrevocably binding on the courts of another. Thus the rules of *stare decisis* evolved in relation to the House of Lords must be applied with caution when dealing with Privy Council decisions.

The same problem is encountered when dealing with the High Court. Is a single High Court judge exercising appellate jurisdiction

18 Section 20, Supreme Court of Judicature Act, Cap. 15 Singapore Statutes 1970 (Rev.) Ed.

19 Chapter 11, Part C, Courts of Judicature Act, Act No. 7 of 1964.

20 S. 63, Supreme Court of Judicature (Consolidation) Act 1925, c. 49.

21 See *e.g. Att.-Gen. for Ontario* v. *Canada Temperance Federation* [1946] A.C. 193, 206 *per* Viscount Simon; *Att-Gen. of St. Christopher, Nevis and Anguilia* v. *Reynolds* [1979] 3 All E.R. 129, *per* Lord Salmon.

22 *Per* Wee C.J. in *Mah Kah Yew v. P.P.* [1971] 1 M.L.J. 1, 3. However, decisions of the Judicial Committee of the Privy Council on appeal from other jurisdictions may be binding if the law is *in pari materia* with the law here *Khalid Panjang* v. *P.P.* (No. 2) 30 M.L.J. 108 (1964, Federal Court).

equivalent to an English High Court judge exercising original jurisdiction? Or is the true analogue the Divisional Court? This ambiguity has given rise to confusion in the past. For instance, in *P.N. Mohamed Ibrahim* v. *Yap Chin Hock*[23] (High Court, Federation of Malaya, 1954) Wilson J. held himself bound by the decision of Buhagiar J. in *Low Yeo Foong* v. *Chop Thong Cheong,*[24] another High Court case. Wilson J. was exercising appellate jurisdiction; Buhagiar J. was hearing his case at first instance. The reason that Wilson J. gave for his holding was that the rule in *Young's* case[25] (an English Court of Appeal case, it will be recalled) applied, and "the decision of Mr. Justice Buhagiar given in [the previous case] is either a decision of the same Court or a Court of co-ordinate jurisdiction!"

In the case of the Court of Appeal of Singapore and the Federal Court of Malaysia, the problem is not so much one of equation as one of confusion. Eleven predecessors of the Federal Court can be counted,[26] each with some claim to be a court of co-ordinate jurisdiction. The Court of Appeal has twelve.[27] The impact of all these on the application of the doctrine of *stare decisis* is unclear, to put it mildly.

The state of affairs adverted to above makes it imperative that clear judicial guidance be given as to how the rules of precedent work in relation to local courts. Unfortunately, such guidance has been rare at best, and in some instance non-existent. An idea of the problems confronting the researcher may be had by considering the following statistics.

Between September 1963 and August 1981 a total of 2,600 Malaysian cases were reported in the Malayan Law Journal. In only 1,376 (52.9%) were local cases cited, let alone followed. The corresponding figures for Singapore are 711 decisions reported; in only 195 (27.4%) were any local cases cited. "Local cases" are defined as cases decided in Malaya, Singapore or Borneo (excluding Brunei). The numbers include many instances where a Singapore court quoted Malaysian authorities, and vice-versa. It will be appreciated that the incidence of citation of cases from the same jurisdiction as the deciding court is even lower. Of that dismal percentage of decisions in which local cases appeared, in only a small minority was the doctrine of *stare decisis* adverted to; and the instances where the application of the doctrine was actually discussed can be counted on the fingers of one hand. These figures are tabulated in Table 1.

23 (1954) 20 M.L.J. 127.
24 (1954) 20 M.L.J. 126.
25 *Supra,* note 9.
26 The Court of Appeal of the Federated Malay States; the Court of Appeal of the Straits Settlements; the Court of Appeal of Johore; the Court of Appeal of Kedah; the Court of Appeal of Trengganu; the Court of the Raja in Council in Perlis; the Sultan's Court in Kelantan; the Court of Appeal of the Malayan Union; the Court of Appeal of the Federation of Malaya; the Court of Appeal of Sarawak, North Borneo and Brunei; the Court of Appeal of Singapore.
27 To the above list is added the Federal Court of Malaysia.

TABLE 1: CITATION OF AUTHORITIES IN REPORTED CASES
September 1963 to August 1981

COURT	NO CASES CITED	NO LOCAL CASES CITED	LOCAL CASES CITED	TOTAL
MALAYA:				
HIGH COURT (Cases at 1st Instance)	166 (17.3%)	307 (31.9%)	488 (50.8%)	961 (100%)
HIGH COURT (On Appeal from Sub. Courts)	118 (24.5%)	87 (18.0%)	277 (57.5%)	482 (100%)
FEDERAL COURT	128 (14.7%)	286 (32.9%)	454 (52.3%)	868 (100%)
TOTAL	412 (17.8%)	680 (29.4%)	1,219 (52.7%)	2,311 (100%)
BORNEO:				
HIGH COURT (1st Instance)	16 (15.1%)	34 (32.1%)	56 (52.8%)	106 (100%)
HIGH COURT (On Appeal)	10 (19.2%)	7 (13.5%)	35 (67.3%)	52 (100%)
FEDERAL COURT	22 (16.8%)	43 (32.8%)	66 (50.4%)	131 (100%)
TOTAL	48 (16.6%)	84 (29.1%)	157 (54.3%)	289 (100%)
SINGAPORE:				
HIGH COURT (1st Instance)	74 (20.9%)	182 (51.5%)	98 (27.7%)	354 (100%)
HIGH COURT (On Appeal)	36 (36.4%)	27 (27.3%)	36 (36.4%)	99 (100%)
FEDERAL COURT/ COURT OF APPEAL/ COURT OF CRIMINAL APPEAL	74 (28.7%)	123 (47.7%)	61 (23.6%)	258 (100%)
TOTAL	184 (25.9%)	332 (46.7%)	195 (27.4%)	711 (100%)

The result of this dearth of judicial guidance is that it is often uncertain how *stare decisis* works in specific situations. Considering that the raison d'etre of the doctrine is certainty, this state of affairs is distressing, to say the least. The discussion that follows is based upon judicial dicta, upon judicial practice (where that can be discerned) and upon the few cases that have attempted to address the issue. Two things should be borne in mind: firstly, English practice is not a sure guide to local practice. Secondly, the practice in Singapore may not be the same as that in Malaysia. Though it is especially tempting to assume that the Singapore and Malaysian positions are identical, given their shared experiences, it would be a mistake to do so. In many areas the law in Singapore and Malaysia is growing apart; there is no reason to assume that it is otherwise in the realm of *stare decisis.*

A SUMMARY OF THE HISTORY OF THE COURTS IN SINGAPORE AND MALAYSIA

Prior to the Japanese invasion in 1941, the Malay Peninsula was divided into several separate political entities, all under British suzerainty to a greater or lesser extent. The Straits Settlements were a Crown Colony comprising Singapore, Malacca and Penang. The Federated Malay States (F.M.S.) comprised Perak, Pahang, Negri Sembilan and Selangor. In addition there were the unfederated Malay States of Johore, Kedah, Trengganu, Perlis and Kelantan. Borneo was divided between Kalimantan (part of the Dutch East Indies) and the British controlled states of Brunei, Sarawak and British North Borneo (now Sabah). The Straits Settlements and the F.M.S. each possessed a Court of Appeal, the decisions of which were regularly reported, in contrast to the decisions of the courts of the other states.

Apparently the Court of Appeal of the Straits Settlements did not consider itself irrevocably bound by its own decisions. In the 1925 case of *Khoo Keat Lock* v. *Haji Yusop*[28] the Court of Appeal refused to follow its own previous decision in *Tan Joo Kwang v. Chop Sin Hup Kiat.*[29] Shaw C.J. said:

> "We ... being a court of co-ordinate jurisdiction, are not so bound it we are satisfied that the decision is erroneous."

He was echoing a sentiment expressed by the Court of Appeal in the 1909 case of *Rex* v. *Chia Kuek Chin.*[30] Subsequently, in *Meyer v. Meyer*[31] (1926) Brown J. expressed exactly the same opinion as in *Khoo's* case.[32]

In contrast, the Court of Appeal of the F.M.S. decided in *Raphiah* v. *Haji Arshad*[33] (1926) that it was bound by its own decisions. This case was referred to in *Meyer* v. *Meyer* by Brown J. to point out the differing positions taken by the Courts of Appeal of the Straits Settlements and the F.M.S. These cases all antedated *Young v. Bristol Aeroplane Co. Ltd.*[34]

After the war, in 1946, Malaya was united into a political entity called the Malayan Union. Singapore was detached from the Straits Settlements and became a Crown Colony. Malacca and Penang became part of the Union. The Malayan Union had its own High Court and Court of Appeal.[35] The Court of Appeal of the Union was deemed to have replaced seven sets of courts:[36] the Court of Appeal and Court of Criminal Appeal of the Straits Settlements in Malacca and Penang; the Court of Appeal of the F.M.S.; the Court of Appeal of Johore; the Court of Appeal of Kedah; the Court of Appeal of Trengganu; the Court of the Raja in Council of Perlis; and the Sultan's Court in Kelantan. The rump of the Straits Settlements Court of

28 [1929] S.S.L.R. 210, 214.
29 14 S.S.L.R. 176.
30 13 S.S.L.R. 1, 5.
31 [1927] S.S.L.R. 1.
32 *Supra,* note 28.
33 6 F.M.S.L.R. 64.
34 *Supra,* note 9.
35 See the Malayan Union Courts Ordinance, No. 3 of 1946.
36 S. 14 of the Ordinance, and the Third Schedule.

Appeal and Court of Criminal Appeal became the Court of Appeal and Court of Criminal Appeal of Singapore.

The Malayan Union lasted only two years. In 1948 the Federation of Malaya was formed, with the same constituent states as the Union. A new Courts Ordinance was enacted establishing the High Court and Court of Appeal of the Federation of Malaya.[37] This Ordinance contained no equivalent of section 14 of the Union Ordinance, which had deemed the Union Court of Appeal to have taken the place of its predecessors. Whether this omission was deliberate, intended to mark a clean break with the past, is now impossible to say.

The Court of Appeal of the Federation unhesitatingly accepted the then-recent case of *Young* v. *Bristol Aeroplane Co. Ltd.*[38] in *Hendry* v. *De Cruz,*[39] decided on 2nd December 1948. The reason given by Willan C.J. for the adoption of the English rule was that section 16(ii) of the F.M.S. Courts Enactment[40] provided that where local legislation was silent "the practice and procedure for the time being of the Court of Appeal in England shall be followed as nearly as may be." Curiously he made no reference to the Malayan Union Courts Ordinance,[41] which had come into effect on 1st April 1946, more than two years previously. The Union Ordinance contained no equivalent of section 16(ii) of the F.M.S. Enactment, merely providing (in section 34) that "the practice and procedure to be observed in the courts... shall accord with the provisions of the existing laws of the Federated Malay States regulating the practice and procedure of the courts...." Having thus deviously got its foot in the door, the rule in *Young's* case thereafter never ceased to plague the courts of Malaya. In adopting the rule in *Young* v. *Bristol Aeroplane Co. Ltd.*[42] the Federation Court of Appeal followed in the footsteps of the F.M.S. Court of Appeal rather than those of the Straits Settlements Couit of Appeal.

The Court of Appeal of Singapore did not do likewise. The years after 1946 are barren of cases dealing with *stare decisis.* There seems to be no Singapore case that accepted the rule in *Young's* case. Presumably, since nothing was said to discredit *Khoo Keat Lock* v. *Haji Yusop,*[43] the old pre-war practice still prevailed.

In Borneo the Court of Appeal of Sarawak, North Borneo and Brunei was established in 1951 by an Order in Council.[44]

The year 1963 saw the formation of Malaysia from a merger of the Federation of Malaya and the colonies of Singapore, Sarawak

37 Federation of Malaya Courts Ordinance, No. 43 of 1948.
38 *Supra,* note 9.
39 [1949] M.L.J. Supp. 25.
40 Cap. 2, Laws of the Federated Malay States 1935 (rev.) Ed.
41 The Federation Courts Ordinance did not come into operation until 1st January 1949.
42 *Supra,* note 9.
43 *Supra,* note 28.
44 The Sarawak, North Borneo and Brunei (Courts) Order in Council, No. 1948 of 1951.

and North Borneo. Brunei declined to join. The Malaysia Act[45] established the High Court of Malaysia and the Federal Court.

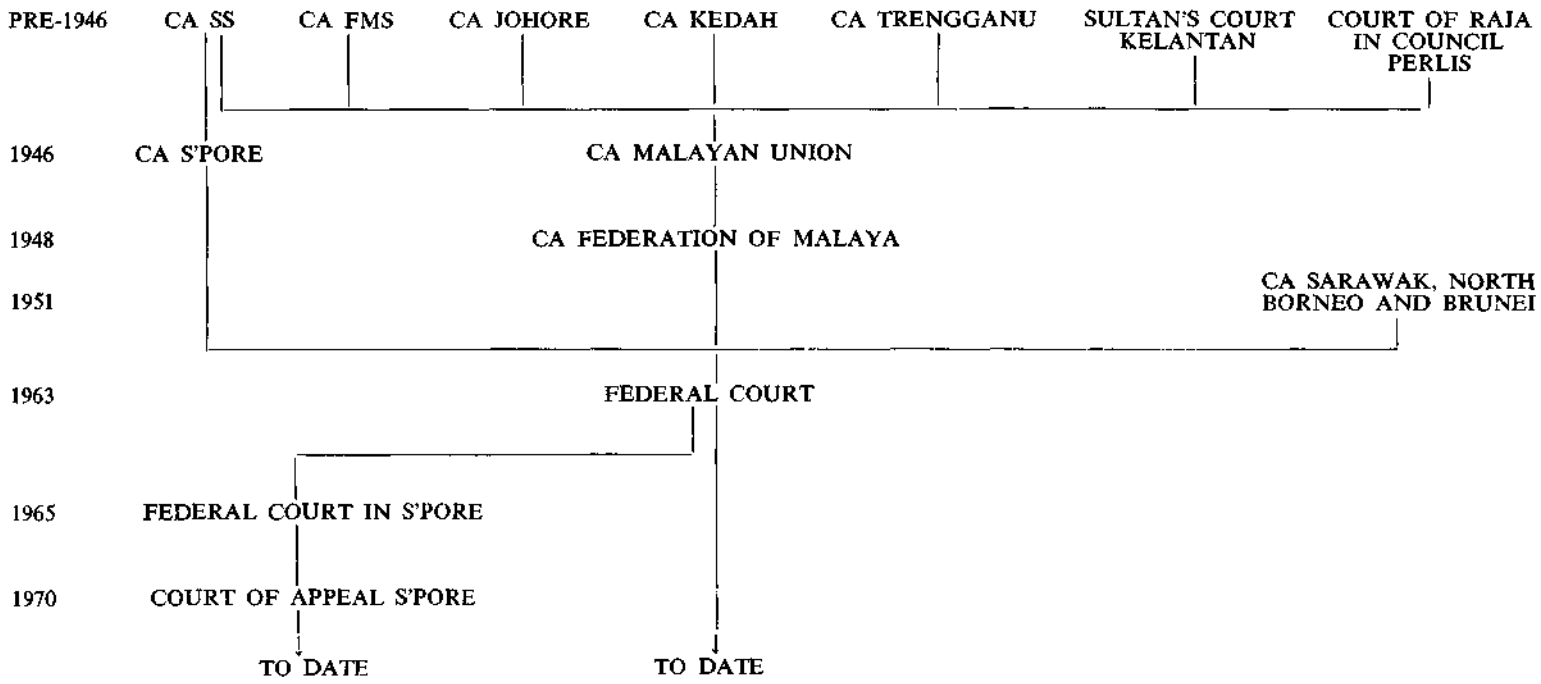
The Federal Court regarded itself as bound by its own decisions, as well as those of some at least of its predecessors. This is apparent from the cases of *China Insurance* v. *Loong Moh*[46] and *In re Lee Gee Chong (Deceased).*[47] In *Re Lee Gee Chong* the Federal Court [comprising Wee C.J. (Singapore), Wylie C.J. (Borneo) and Tan Ah Tah F.J.] specifically referred to the rule in *Young* v. *Bristol Aeroplane Co. Ltd.*[48] as being applicable in Malaysia. *Re Lee Gee Chong* is also noteworthy as being the first reported decision from Singapore that approbated *Young's* case.

In 1965 Singapore left the Federation to become the Republic of Singapore. However, though fully independent, Singapore still sent appeal to the Federal Court of Malaysia, albeit sitting in Singapore.[49] This state of affairs continued until January 1970, when the Supreme Court of Judicature Act[50] came into force. This act established the Court of Appeal and Court of Criminal Appeal of Singapore.

The evolution of the Federal Court and Court of Appeal is shown graphically in Table 2.

45 Federation of Malaya Act No. 26 of 1963.
46 (1964) 30 M.L.J. 307.
47 (1965) 31 M.L.J. 102.
48 *Supra,* note 9.
49 S. 11, Republic of Singapore Independence Act, Act No. 9 of 1965.
50 No. 24 of 1969. Now Cap. 15, Singapore Statutes, 1970 Rev. Ed.

TABLE 2: EVOLUTION OF THE MALAYSIAN FEDERAL COURT AND SINGAPORE COURT OF APPEAL.



KEY: CA = COURT OF APPEAL
SS = STRAITS SETTLEMENTS
FMS = FEDERATION MALAY STRAITS
S'PORE = SINGAPORE

THE FEDERAL COURT OF MALAYSIA

The Federal Court of Malaysia has accepted that it is bound by its own decisions,[51] following the rule in *Young* v. *Bristol Aeroplane Co. Ltd.* The latest reaffirmation of this came in *Central Securities (Holdings) Bhd. v. Haron*[52] a 1980 decision of the Federal Court sitting in Kuala Lumpur. So strong was the influence of the rule of English *stare dedsis* that Chang Min Tat F.J. (delivering the judgment of the Court) said:[53]

> "[E]ven if we believe that they [i.e. the previous binding Federal Court decisions] have been wrongly decided and not merely *per incuriam*... we would heed the admonition given by the House of Lords in *Davis v. Johnson* [54] that in such a case we should follow our previous decisions and leave the matter to be corrected on appeal as being the quickest way of having the law determined."

With respect, this ignores the fact that the Privy Council is not as proximate or as accessible to local litigants as the House of Lords is to English litigants seeking to overturn a previous binding decision. In practice this means that a mistake will remain uncorrected until some litigant who is persistent and wealthy enough gets his case before the Privy Council. This is not a common occurrence by any means. Between 1st September 1957 and 31st August 1977, 176 civil cases went to the Privy Council from Malaysia (including 29 that were pending on 31st August 1977).[55] Of these, 80 were either withdrawn, abandoned or dismissed for non-prosecution. The Privy Council actually decided only 67 cases over the 20-year period, an average of slightly over three cases a year. Under the circumstances, one might query whether leaving a decision to be corrected on appeal is indeed "the quickest way of having the law determined".

The Federal Court has not held itself irretrievably bound by prior decisions in criminal matters. In *Ooi Hee Koi* v. *P.P.*[56] Ong Hock Thye F.J. with the concurrence of Barakbah L.P. and Ismail Khan J., felt free to dissent from the Federal Court judgment in *Lee Hoon Boon* v. *P.P.*,[57] delivered a matter of days before. The learned judge said:

> "In arriving at this decision we are not unaware that it runs counter to the previous decision of this court. Nevertheless we do so without qualms. As Sir Carlton Allen says at p. 245 of *Law in the Making* (6th Ed.) 'the case of *Gideon Nkambule* v. *Rex*[58] makes it clear that in criminal matters at least, where life and liberty are at stake, the Privy Council will not hesitate to reject even a recent decision of its own, if it is satisfied that all relevant considerations and historical circumstances were not before the court in the earlier case.' We would not hesitate to follow the same principle."

In *P.P.* v. *Ismail bin Yusof*[59] Suffian L.P. held that the Federal Court in *P.P.* v. *Lee Chin Chai*[60] was in error. This was done, not

51 *Supra,* notes 46 and 47.
52 [1980] 1 M.L.J. 304.
53 *Supra,* note 52, at p. 377.
54 *Supra,* note 10.
55 From a list prepared by the Federal Court Registry at the request of the Lord President. [1977] 2 M.L.J. xcvii.
56 [1966] 2 M.L.J. 183, 187.
57 [1966] 2 M.L.J. 167.
58 [1950] A.C. 379.
59 [1979] 2 M.L.J. 119.
60 [1974] 2 M.L.J. 714.

because "all the relevant consideration and historical circumstances were not before the court in the earlier case",[60a] but because the learned Lord President adopted a different line of reasoning from that followed in the earlier case. The court seems to have exercised a wider power than that referred to in *Ooi Hee Koi v. P.P.*[61] Indeed, it might be wider than the powers of the English Court of Appeal that appear from *Rex v. Taylor.*[62] In the case, the departure from previous authority favoured the accused. The reason for allowing the departure from precedent was that the liberty of the subject was at issue and

> "if, on reconsideration, in the opinion of a full court the law has either been mis-applied or misunderstood and a man has been sentenced for an offence, it will be the duty of the court to consider whether he has been properly convicted. The practice in civil cases ought not to be applied in such a case... ."[63]

In *Ismail's* case the reference was answered in favour of the Public Prosecutor; had this been an appeal, the power to depart from its previous decisions would have been exercised by the Federal Court to the prejudice of the accused. It is perhaps significant that this was not an appeal, but a reference from the High Court on a point of law. This enabled the Federal Court to decide as it did without prejudicing the accused, since it did not affect the judgment already given; the effect of the decision was to overrule the earlier case prospectively.[64]

The Federal Court is now the final court of appeal in criminal and constitutional cases.[65] This has been so since 1st January 1978. In view of this, the course of action advocated by Chang Min Tat F.J. in *Central Securities (Holdings) Bhd.* v. *Haron*[66] is no longer possible where a criminal or constitutional issue is involved. In criminal cases, as discussed above, the Federal Court has already reserved to itself a power to depart from its own prior decisions. It would seem that a similar power is necessary in constitutional cases. The Federal Court has yet to make a ruling on this.

THE HIGH COURT OF MALAYSIA

After some initial confusion (referred to above),[67] it was decided in the 1967 case of *Sundralingam* v. *Ramanathan Chettiar*[68] that a High Court judge is not bound by the decision of another High Court judge. Azmi C.J. (Malaya) reached this conclusion based on his knowledge of the practice in England, as well as the practice in Malaya. Ong Hock Thye FJ. supported this, pointing out that "judges in Malaya have, on several occasions, respectfully agreed to differ, as may be seen from the reports in the Malayan Law Journal."[69]

60a *Supra,* note 57.
61 *Supra,* note 56.
62 *Supra,* note 12.
63 *Per* Lord Goddard C.J. in *Rex* v. *Taylor, loc. cit. supra,* note 12, at p. 172.
64 See *P.P.* v. *Sai* [1980] 2 M.L.J. 153, 157 *per* Salleh Abbas F.J. (High Court).
65 S. 13, Courts of Judicature (Amendment) Act 1976, Act A328. Noted at [1977] 2 M.L.J. lxxxix.
66 *Supra,* note 53.
67 *Supra,* notes 23 to 24.
68 [1967] 2 M.L.J. 211.
69 *Loc. cit., supra,* note 68, at p. 213.

No distinction was made between a High Court judge exercising appellate jurisdiction and one exercising original jurisdiction. Nor did the Federal Court comment on the fact that the Divisional Court in England has held itself bound by its own previous decisions.[70]

Be that as it may, Malaysian judges have acted on the assumption that they are not so bound. In *Ng Hoi Cheu v. P.P.*,[71] for instance, Chang Min Tat J. (exercising appellate jurisdiction) disagreed with the decision of Smith J. (also exercising appellate jurisdiction) in *Wong Heng Fatt* v. *P.P.*[72] Subsequently, Sharma J. (exercising original jurisdiction) in *P.P.* v. *Sanassi*[73] declined to follow *Ng Hoi Cheu's* case and instead followed *Wong Heng Fatt's* case!

THE COURT OF APPEAL AND COURT OF CRIMINAL APPEAL OF SINGAPORE

In 1964, while Singapore was still part of Malaysia, the Federal Court sitting in Singapore held that the rule in *Young* v. *Bristol Aeroplane Co. Ltd.*[74] applied to itself: *Re Lee Gee Chong.*[75] In so doing the Federal Court departed from (he practice of the Straits Settlements Court of Appeal, which did not feel itself irrevocably bound by its own prior decisions.[76]

In 1970 the High Court of the Republic of Singapore confirmed that the rule in *Young's* case represented the practice of the Court of Appeal of Singapore. In *Mah Kah Yew* v. *P.P.*[77] Wee Chong Jin C.J., delivering the judgment of the Full Bench of the High Court, said:[78]

> "[H]aving stated earlier that the doctrine [i.e. *stare decisis]* is a necessary and well-established doctrine in our system of jurisprudence and of our judicial system, we are of the view the Court of Appeal would consider itself bound by its own decisions, subject to the ... limitations in *Young* v. *Bristol Aeroplane Co. Ltd."*[79]

He continued,

> "It is our opinion, also, and for the same reasons as expressed in *Rex* v. *Taylor,*[80] that the present Court of Criminal Appeal would not consider itself irretrievably bound by its own decisions or by those of a court of co-ordinate jurisdiction."

The *Mah Kah Yew* decision is a curious one. The High Court purported to lay down the rules of *stare decisis* as practised in the Court of Appeal. In practice of course the Court of Appeal would have followed the dicta in *Mah's* case, considering that the same judges sit in both High Court and Court of Appeal.[81] Whether a future

70 *Watson's* case, *supra* note 13.
71 [1968] 1 M.LJ. 53.
72 (1959) 25 M.L.J. 20.
73 [1970] 2 M.L.J. 198.
74 *Supra,* note 9.
75 *Supra,* note 47.
76 *Supra,* notes 28 to 31.
77 [1971] 1 M.L.J. 1.
78 *Loc. cit., supra,* note 76, at p. 3.
79 *Supra,* note 9.
80 *Supra,* note 12.
81 See the Supreme Court of Judicature Act, Cap. 15 Singapore Statutes, 1970 Rev. Ed.

Court of Appeal will feel itself bound to give effect to the High Court's dicta is another question.

THE SINGAPORE HIGH COURT

No case has decided explicitly whether the High Court is bound by a decision of its own. It has been suggested by Harbajan Singh [82] that the Malaysian Federal Court decision in *Sundralingam* v. *Remanathan Chettlar*[83] is binding upon Singapore courts, since it was decided at a time when appeals from Singapore still went to the Federal Court. Whether or not this is correct, it appears that in practice High Court judges in Singapore no more regard themselves as bound by decisions of their brethren than do their counterparts in Malaysia. In *Mah Kah Yew.,*[84] for instance, the High Court clearly did not consider *Woo Sing* v. *Regina*[85] to be a binding authority. *Woo Sing's* case was a 1954 decision of the Full Bench of the High Court of Singapore and directly covered the point at issue. Another instance is the case of *Khoo Hin Hiong,*[86] where D'Cotta J. took an entirely different approach to the granting of bail pending appeal from that taken by Winslow J. in *Ralph v. P.P.*[87]

THE PROBLEM OF PREDECESSORS

Mah Kah Yew v. *P.P.*[88] brought into the limelight a problem that has plagued the courts of Singapore and Malaysia since the formation of the Malayan Union in 1946: what is the status of decisions of the predecessors of the Federal Court and the Court of Appeal?

The appellant in *Mah Kah Yew's* case was charged under section 304A of the Penal Code[89] with causing death by a negligent act. Thirty years previously the F.M.S. Court of Appeal had held (in *Cheow Keok v. P.P.*[90]) that section 304A was a codification of the English offence of manslaughter by negligence, and that the same high degree of negligence had to be proved to sustain a conviction under section 304A. However, in 1955 the Court of Appeal of Sarawak, North Borneo and Brunei decided in *P.P.* v. *P.G. Mills*[91] that section 304A did not require such a high degree of negligence as the English offence of manslaughter by negligence required. Which decision was the High Court of Singapore to follow?

In the event all the judicial contortions that followed were unnecessary since the High Court found that the evidence of the only prosecution witness was untrustworthy and consequently quashed the conviction. Be that as it may, Wee C.J. nevertheless continued on to

82 Harbajan Singh "*Stare Decisis* in Singapore and Malaysia — A Review" [1971] 1 M.L.J. xvi, xx.
83 *Supra,* note 68.
84 *Supra,* note 77.
85 (1954) 20 M.L.J. 200.
86 Unreported, Straits Times 2nd September 1978.
87 [1972] 1 M.L.J. 242.
88 *Supra,* note 77.
89 Cap. 103, Singapore Statutes, 1970 Rev. Ed. This section is common to the Singapore, Malaya and Borneo Penal Codes.
90 (1940) 9 M.L.J. 103.
91 [1971] 1 M.L.J. 4.

decide that the decision of the Court of Appeal of Sarawak, North Borneo and Brunei was binding upon the Singapore High Court, and that the decision of the F.M.S. Court of Appeal was not.

His Lordship reached that conclusion by referring to the case of *Re Lee Gee Chong,*[92] a 1965 decision of the Federal Court of Malaysia sitting in Singapore. In that case, Wee C.J. himself had said:

> "Counsel.. . has conceded, and in my view rightly so, that by virtue of s. 88(3) of the Malaysia Act the Federal Court must be regarded as being one and the same as the former Singapore Court of Appeal and that the decision in the *Lee Siew Kow* case[93] is binding on this court.. .."

Section 88(3) of the Malaysia Act reads:

> "Anything done before Malaysia Day in or in connection with or with a view to any proceedings in the Court of Appeal of the Federation, or of Sarawak, North Borneo and Brunei, or of Singapore, or the Court of Criminal Appeal in Singapore, shall on and after that day be of the like effect as if that Court were one and the same court with the Federal Court."

According to Wee C.J. section 13 of the Republic Independence Act[94] preserved the operation of section 88(3) of the Malaysia Act, and in any case the High Court was bound by *Re Lee Gee Chong.* Since the Court of Appeal of Sarawak, North Borneo and Brunei was one of the courts mentioned explicitly in section 88(3) of the Malaysia Act, its decisions were binding upon Singapore courts. Contrariwise, the F.M.S. Court of Appeal was not mentioned, and therefore its decisions were not binding, though highly persuasive. It was not made clear whether the Court of Appeal of Sarawak, North Borneo and Brunei was to be treated as one and the same with the Court of Appeal of Singapore, or whether it was one and the same as the Federal Court, whose decisions were to be treated as binding.

Mah Kah Yew's case did not settle whether the Court of Appeal of Singapore would be bound by such a decision. The fact that the High Court is bound by the decisions of a particular court does not necessarily imply that the Court of Appeal is similarly bound. However, the reasoning in *Mah Kah Yew's* case could apply equally to the Court of Appeal, and was probably meant to.

Several criticisms may be made of *Mah Kah Yew's* case.

Firstly, section 88(3) of the Malaysia Act says nothing about *stare decisis.* As pointed out by Max Friedman[95] it seems to be addressed more to the problem of the "pending case", *i.e.,* cases pending before the three courts which had not been heard on Malaysia Day. The section seems to make provision for such cases to be heard by the Federal Court after Malaysia Day. This interpretation is supported by the fact that section 88(3) is included in Part IV of the Malaysia Act, which is titled "Transitional and Temporary".

92 *Supra,* note 47, at p. 1101.

93 *Re Lee Siew Kow (Deceased)* (1952) 18 M.L.J. 184, a decision of the Court of Appeal of Singapore.

94 Republic of Singapore Independence Act, Act No. 9 of 1965.

95 Max Friedman, "Unscrambling the Judicial Egg: Some Observations on *Stare Decisis* in Singapore and Malaysia" (1980) 22 Mal. L.R. 227.

A second and more serious criticism[96] is that the 1964 Federal Court decision in *China Insurance* v. *Loong Moh*[97] was ignored. In that case Thomson L.P. held clearly and explicitly that he was bound by the decision of the Court of Appeal of the Straits Settlements in *K.E. Mohamed Sultan Maricar* v. *Prudential Assurance Co. Ltd.*[98] even though he considered its application on the facts to be unreasonable and unjust. Unfortunately, his Lordship gave no reasons as to why he thought that case to be binding. Be that as it may, here was a decision of the same court as that which decided *Re Lee Gee Chong;* and this same court clearly held a decision of the Straits Settlements Court of Appeal to be binding. The Straits Settlements Court of Appeal is not mentioned in section 88(3) of the Malaysia Act, just like its contemporary the F.M.S. Court of Appeal. Following the reasoning in *Mah Kah Yew's* case, its decisions should not have been binding, just like decisions of the F.M.S. Court of Appeal.[99] This anomaly has never been explained.

If anything, the anomaly has been compounded. In 1973, Wee C.J. delivering the judgment of the Court of Appeal of Singapore in the case of *Maria Chia Sook Lan v. Bank of China* [100] stated that, "it has been conceded, and rightly so, by counsel for the Bank that this court is bound by the decision in *Kasmeerah's* (*sic*) case".[1] *Kasmerah's* case was decided by the Court of Appeal of the Straits Settlements sitting in Singapore. If counsel's concession were correct, it would appear that the Court of Appeal is bound by a decision of the Straits Settlements Court of Appeal while the High Court (following the logic of *Mah Kah Yew*) is not!

Slightly under a year after *Mah Kah Yew's* case a Malaysian judge tried to resolve the problem. In *PP.* v. *Joseph Chin Saiko*[2] the same issue that confronted the Singapore High Court in *Mah Kah Yew's* case confronted Lee Hun Hoe J. sitting in the High Court of Malaysia at Kota Kinabalu. Lee Hun Hoe J. pointed out the inconsistency referred to above with regard to *China Insurance* v. *Loong Moh*[3] Tracing the history of the courts, he concluded that the jurisdiction of the F.M.S. Court of Appeal was absorbed by the Court of Appeal of the Malayan Union. The successor of that court, the Court of Appeal of the Federation of Malaya, had held itself bound by decisions of the Union Court of Appeal in *Hendry* v. *De Cruz.*[4] Therefore, reasoned the learned judge, the Federation Court of Appeal must have been bound by the F.M.S. Court of Appeal. And since the Federation Court of Appeal bound the Federal Court, which in

96 First pointed out by Harbajan Singh in his article on *stare decisis,* referred to above, *supra,* note 82.

97 *Supra,* note 46.

98 (1941) 10 M.L.J. 20.

99 By pure coincidence the cases of *Cheow Keok* v. *P.P. supra,* note 90, and *K.E. Mohamed Sultan Maricar* v. *Prudential Assurance Co. Ltd., supra,* note 98, are almost exactly contemporary. Moreover, two of the three judges who decided *Cheow Keok's* case (Poyser C.J. and Gordon-Smith J.A.) were also parties to the later decision.

100 [1976] 1 M.L.J. 49, 58.

1 *Kasmerah* v. *Hadjee Mohamed Taib* (1904) 8 S.S.L.R. 113.

2 [1972] 2 M.L.J. 129.

3 *Supra,* note 46.

4 *Supra,* note 39.

turn bound him, Lee Hun Hoe J. held that he was bound by *Cheow Keok* v. *P.P.*[5] However, he also felt himself bound by the decision of the Court of Appeal of Sarawak, North Borneo and Brunei in *P.P.* v. *P.G. Mills.*[6] Being faced with two equally binding but conflicting decisions, the learned judge opted to follow *Mills'* case.

The decision in *Saiko's* case was appealed to the Federal Court. No written judgment was ever given.[7] In May 1972, six months after the *Saiko* case, the Federal Court had the opportunity to reconsider section 304A in *Adnan b. Khamis* v. *P.P.*[8] This case was reported earlier in the Malayan Law Journal than was *Saiko's* case, even though it was decided later. *Saiko's* case was not mentioned in the judgment.

The Federal Court decided once and for all that section 304A did not codify the English law on manslaughter by negligence. Ong C.J. (delivering the judgment of the court) observed that the court in *Cheow Keok's* case[9] was mistaken in suggesting that section 304A had not been construed either locally or in India. He cited two Indian decisions that he considered to be relevant. He went on further to postulate a hypothetical situation to demonstrate that the decision in *Cheow Keok's* case could not be supported. He then noted that the court in that case had not borne in mind Lord Herschell's dicta from *Bank of England* v. *Vagliano Brothers*[10] to the effect that a statute should be construed according to its natural meaning, uninfluenced by any considerations derived from the previous state of the law. For these reasons, he concluded, the Federal Court was "unanimously of the opinion that the judgment delivered in *Cheow Keok* must be regarded as *per incuriam*"![10a] This rout of *Cheow Keok* meant that *Mills'* case held the field. Unfortunately, the Federal Court did not say anything regarding how a court might determine which decisions of which predecessor courts were to be treated as binding. Not a word was said about the reasoning of Lee Hun Hoe J. in *Saiko's* case, either in approbation or disapproval.

THE PRESENT POSITION

It will be appreciated from the foregoing discussion that the courts have thus far failed to enunciate a single comprehensive test to determine which predecessor courts bind the existing courts. One is therefore driven to an empirical examination of cases to find the judicial practice in this matter.

The Federal Court has treated itself as bound by decisions of the Court of Appeal of The Federation of Malaya,[11] its immediate pre-

5 *Supra,* note 90.
6 *Supra,* note 91.
7 See Editorial Note, [1973] 2 M.L.J. 177.
8 [1972] 1 M.L.J. 274.
9 *Supra,* note 90.
10 [1891] A.C. 107.
10a See discussion at p. 25, *infra.*
11 *E.g.,* in *Yong Chin Lang* v. *Tan Chong & Sons Motor Co. Ltd.* [1968] 2 M.L.J. 8, 11. See also the High Court decisions in *De Silva* v. *P.P.* (1964) 30 M.L.J. 81, 83; *Soo Seng Huat* v. *P.P.* [1968] 1 M.L.J. 80; *Allan bin Abdul Gani* v. *P.P.* [1970] 2 M.L.J. 143; *Chean See Loo Bros.* v. *Kong Yoon Choy* [1973] 2 M.L.J. 13, 14; *Lim Cheng Chiat* v. *Lim Imm* [1977] 1 M.L.J. 257, 259; *P.P.* v. *Yong Thiam Fatt* [1980] 2 M.L.J. 145, 146.

decessor in the Peninsula. Indeed, on several occasions judges sitting in the Federal Court have spoken of the Federation of Malaya Court of Appeal as though it were one and the same court. For instance, Thomson L.P. in *Khoo Mean Kee* v. *Chop. Wong Soon Co.*[12] (Federal Court 3rd December 1963) said that "Mr. Justice Neal decided the matter as he did [because] he took the view that the case of *Lee Lee Cheng* v. *Seow Peng Kwang*13 was wrongly decided by *this court"* (emphasis mine). The case referred to was decided by the Federation of Malaya Court of Appeal in 1960. In fact the Lord President when sitting in the Federal Court persistently referred to the Federation Court of Appeal as "this court".[14] So have other judges,[15] some on occasions as late as in February 1968.[16] Neither the Court of Appeal of Singapore nor that of Sarawak, North Borneo and Brunei has been referred to in quite the same way.

The Federal Court has also held itself bound by a decision of the Straits Settlements Court of Appeal, in *China Insurance* v. *Loong Moh.*[17] It has also been bound by a decision of the Court of Appeal of Singapore, in *Re Lee Gee Chong.*[18] Both these cases were decisions of the Federal Court sitting in Singapore.

Finally, the High Court sitting in Borneo has held that a decision of the Court of Appeal of the Federated Malay States and a decision of the Court of Appeal of Sarawak, North Borneo and Brunei are both binding on Malaysian courts (*P.P.* v. *Joseph Chin Saiko*[19]).

Is it coincidence that courts in Peninsular Malaysia held themselves bound by the decisions of the Federation Court of Appeal, while courts in Singapore and Borneo held themselves bound by decisions of the former courts of appeal in their respective territories? Although in theory the formation of Malaysia united the courts of Singapore, Malaysia and Borneo into one system, in practice it seems that the sense of separateness of the systems persisted for some time after merger.

After independence, the Singapore Court of Appeal has held itself bound by a decision of the Straits Settlements Court of Appeal, in *Maria Chia Sook Lan* v. *Bank of China.*[20] In addition, the High Court has accepted the notion that decisions of courts mentioned in section 88(3) of the Malaysia Act are binding on Singapore courts: *Mah Kah Yew* v. *P.P.*[21]

12 (1964) 30 M.L.J. 19.
13 (1960) 26 M.L.J. 1.
14 *E.g.,* in *U.M.B.C. Ltd.* v. *Ipoh Mining Co. (M) Ltd.* (1964) 30 M.L.J. 69, 70; in *Ravamanickan* v. *P.P.* [1966] 1 M.L.J. 60, 61; in *Chang Kok Sing* v. *Koo Lan* [1966] 1 M.L.J. 170, 171; in *Chai Sou Yin* v. *Kok Seng Fatt* [1966] 2 M.L.J. 54, 58.
15 *E.g.,* Azmi C.J. in *Abdullah* v. *P.P.* [1967] 2 M.L.J. 95.
16 Raja Azlan Shah J. in *Natesan* v. *Goh Gok Hoon* [1968] 2 M.L.J. 3, 8.
17 *Supra.,* note 46.
18 *Supra,* note 47.
19 *Supra,* note 102.
20 *Supra,* note 100.
21 *Supra,* note 77.

One further issue arises in relation to Singapore. It will be recalled that after independence appeals from Singapore courts still went to the Federal Court of Malaysia.[22] Does a decision of the Federal Court given after independence but before the coming into effect of the Supreme Court of Judicature Act[23] bind Singapore courts? That issue faced Winslow J. sitting in the High Court in *Success Enterprises Ltd.* v. *Eng Ah Boon.*[24] Unfortunately the learned judge decided the case without resolving the issue.

Harbajan Singh[25] has contended that all decisions of the Malaysian Federal Court are binding on Singapore courts, since appeals went to the Federal court from Singapore. With respect, this is *non sequitur.* A distinction must be made between the Federal Court in Singapore and the Federal Court sitting elsewhere. It is suggested that only the Federal Court in Singapore was part of Singapore's judicial system after 9th August 1965, and consequently only decisions of the Federal Court in Singapore should be binding. Other Federal Court decisions will be persuasive only.

Some support for this view may be found in the fact that the Transitional Provisions of the Supreme Court of Judicature Act[26] refer only to the Federal Court in Singapore. More decisive, it is submitted, is the actual practice of the courts between 9th August 1965 and 9th January 1970, In that period 83 decisions of the Federal Court on appeal from Singapore were reported in the Malayan Law Journal. In only five[27] were non-Singapore judges present; the last reported case in which a non-Singapore judge was part of the Federal Court when hearing an appeal from Singapore was *Syed Ahmad Al-Junied* v. *Reshty,*[28] which was heard on 6th April 1966. In the remaining 78 cases the Federal Court was composed exclusively of Singapore judges. This seems to show a definite separation of the two judicial systems. The Federal Court in Singapore seems to have been distinct from the Malaysian Federal Court in practice; there is no reason why they should not be treated as distinct in theory also. It is submitted in view of this that only the Federal Court in Singapore should be treated as part of Singapore's judicial hierarchy at this time, and not the whole Federal Court wherever sitting.

SUMMARY

A tentative summary of the rules of *stare decisis* in Singapore and Malaysia may perhaps be made. A discussion of the effect of Privy

22 *Supra,* note 49.

23 That is, between 9th August 1965 and 9th January 1970. See Gazette Notification S. 15/1970.

24 [1968] 1 M.L.J. 75.

25 *Op. cit., supra,* note 82.

26 Ss. 82 to 84.

27 *Eastern Oceanic Corporation Ltd.* v. *Orchard Furnishing House Building Co.* [1966] 1 M.L.J. 15 (Wee C.J., Barakbah C.J., Wylie C.J., 24th August 1965); *Tan Tien Choy* v. *Kiaw Aik Hong Co. Ltd.* [1966] 1 M.L.J. 102 (Barakbah C.J., Wylie C.J., Winslow J., 24th August 1965); *Lam Soon Cannery Co.* v. *Hooper & Company* [1966] 1 M.L.J. 198 (Wee C.J., Tan Ah Tan F.J., Ong Hock Thye F.J., 21st December 1965); *People's Insurance Co. Ltd.* v. *Khoo Tiang Seng* [1966] 1 M.L.J. 281 (Thomson L.P., Wee C.J., Tan Ah Tah F.J., 10th February 1966); *Syed Ahmed Al-Junied v. Reshty* [1966] 2 M.L.J. 124 (Thomson LP., Wee C.J., Tan Ah Tah F.J., 6th April 1966).

28 *Supra,* note 127.

Council decisions has been deliberately avoided, as this raises other issues that have not been discussed in this article.[28a] The following propositions are advanced diffidently. Some support, even if only dicta, can be found for each:

A. Malaysia

1. The Federal Court is bound by its own decisions in civil matters.[29]
2. The Federal Court is not bound by its own decisions in criminal matters.[30]
3. The Federal Court has treated itself as bound by decisions of the following courts on at least one reported occasion:
   a. The Court of Appeal of the Federation of Malaya.[31]
   b. The Court of Appeal of the Straits Settlements.[32]
   c. The Court of Appeal of Singapore (pre-Malaysia).[33]
4. The Federal Court has suggested that Malaysian courts are bound by decisions of the courts mentioned in section 88(3) of the Malaysia Act,[34] *viz.*
   a. The Court of Appeal of the Federation of Malaya.
   b. The Court of Appeal and Court of Criminal Appeal of Singapore.
   c. The Court of Appeal of Sarawak, North Borneo and Brunei.
5. Although not explicitly held, it was implied by the Federal Court that it was bound by a decision of the Court of Appeal of the Federated Malaya States:[35]
6. It has not been decided whether decisions of the Court of Appeal of the Malayan Union bind Malaysian courts, though support for that view can be found in *P.P.* v. *Joseph Chin Saiko.*[36]
7. The High Court is not bound by its own decisions.[37]

B. Singapore[38]

1. The Court of Appeal is bound by its own decisions.
2. The Court of Criminal Appeal is not strictly bound by its own decisions, and may depart from them if the justice of the case requires.

[28a] *E.g.,* the problem of the binding effect of J.C.P.C. decisions from other jurisdictions. *Khalid Panjang* v. *P.P., supra,* note 22.
[29] *Supra,* p. 11.
[30] *Supra,* p. 11.
[31] *Supra,* p. 17.
[32] *Supra,* p. 18.
[33] *Supra,* p. 18.
[34] *Supra,* p. 15.
[35] *Adrian b. Khamis* v. *P.P., supra,* note 108.
[36] *Supra,* note 102.
[37] *Sundralingam* v. *Ramanathan Chettiar, supra,* note 68.
[38] All the following propositions are derived from *Mah Kah Yew* v. *P.P., supra,* note 77, unless otherwise indicated.

3. Singapore courts are bound by decisions of the courts expressly mentioned in section 88(3) of the Malaysia Act.
4. The Court of Appeal has held itself bound by a decision of the Court of Appeal of the Straits Settlements.[39]
5. A decision of the Court of Appeal of the Federated Malay States is not binding on Singapore courts.
6. It has yet to be decided whether a decision of the Court of Appeal of the Malayan Union is binding on Singapore courts.
7. The High Court is not bound by its own decisions.[40]

SUGGESTIONS FOR REFORM

It will be apparent from the discussion thus far that the rules of *stare decisis* in Singapore and Malaysia are not as clear as they should be, especially in respect of decisions of predecessor courts. Where in this tangled web of confusing decisions can a golden thread of consistency be found? It is suggested that there are three options that the courts may adopt to put *stare decisis* on a firm, consistent and logical basis.

The first option is to take the reasoning in *P.P.* v. *Joseph Chin Saiko*[41] to its logical conclusion. It was reasoned in that case that the Malayan Union Court of Appeal was bound by the F.M.S. Court of Appeal, because it had absorbed its jurisdiction. The Malayan Union Court of Appeal also absorbed the jurisdiction of the Court of Appeal of the Straits Settlements, the Courts of Appeal of Johore, Kedah and Trengganu, the Sultan's Court in Kelantan and the Court of the Raja in Perils. By a parity of reasoning, the Malayan Union Court of Appeal should also be bound by those courts; and so would the present courts. The result would be that the Federal Court will be bound by decisions of all eleven of its predecessors, and the Court of Appeal by the decisions of its twelve predecessors.

There are several serious objections to this course of action. Firstly, decisions of many of the predecessor courts were not regularly reported and are consequently not accessible. Secondly, decisions of several of those courts were never treated as binding either in Malaysia or Singapore, and it would require a drastic change in practice to make them so. Thirdly, it is suggested that to allow the law in Singapore in the 1980s to be governed by, say, a 1920 Perils decision is too ludicrous to contemplate. Finally, a plethora of binding and possibly conflicting decisions is more apt to create confusion rather than certainty, and may have the effect of stultifying the law.

A better option involves treating decisions of only some predecessor courts as binding. Possibly only decisions of courts in the country's "traditional hierarchy" should be treated as binding. This would be a recognition of the fact that lawyers and judges tend to consider some courts and not others to be ancestors of the present courts. For instance, decisions of the Court of Appeal of the Federa-

39 *Supra,* p. 19.
40 *Supra,* p. 14.
41 *Supra,* note 102.

lion of Malaya are treated as fully equivalent to decisions of the Federal Court.[42] Malaysia's traditional hierarchy would probably consist of the Federation of Malaya Court of Appeal, and possibly the Courts of Appeal of the Malayan Union and F.M.S. as well. Likewise, in Singapore it is generally felt that the Courts of Appeal of Singapore and the Straits Settlements are the immediate ancestors of the Court of Appeal.

The problem with this option lies in defining the traditional hierarchy. If this course is to be adopted, it is imperative that the Federal Court and the Court of Appeal resolve the question of definition. Otherwise the situation that exists now will still exist. What is required is an authoritative, definitive statement or ruling spelling out explicitly which courts are to be regarded as binding and which are not. Provided that this is done, it is suggested that this is the best option to adopt with respect to the binding effect of predecessor courts on the High Courts.

A third way exists in the case of the Federal Court and Court of Appeal. Why not cut the Gordion Knot cleanly and hold that these two courts are not bound by their own decisions, or those of predecessor courts?

This is not as radical as it sounds. In the case of Singapore, it will merely represent a reversion to the former practice, a practice that was departed from without clear explanation after merger with Malaya. Moreover, the rule in *Young's* case is not a universal natural law that admits of no exceptions. Not every Common Law jurisdiction subscribes to such a strict rule. For instance the High Court of Australia (equivalent to the Court of Appeal and Federal Court) refused as early as 1952 to be held in bondage by it.[43]

The defenders of the strict rule of precedent usually make two arguments. Firstly, the Court of Appeal (and Federal Court) occupy an intermediate position in the judicial hierarchy. Any mistakes it makes may be corrected on appeal to the Privy Council.[44] The second argument is that to allow the Court of Appeal to depart from its own decisions is subversive of certainty. Since the power to depart is required only to strike a balance between justice and certainty, it is unnecessary when there can be recourse to a higher tribunal.[45]

Taking the first argument first, it ignores the fact that the Judicial Committee of the Privy Council is a foreign court in a distant land. The Privy Council does not exercise such a close supervision over local courts as does the House of Lords over English courts. The Privy Council is not concerned exclusively or even primarily with the evolution and development of the law in Singapore and Malaysia. The Privy Council is not as accessible to a local litigant as the House of Lords is to an English litigant.

42 *Supra,* p. 18.
43 See *e.g., Att-Gen. for New South Wales* v. *Perpetual Trustee Co. Ltd.* (1952) 85 C.L.R. 237 *per* Dixon J. at p. 244.
44 See the dicta of Chang Min Tat J. in *Central Securities (Holdings) Bhd.* v. *Haron, supra,* note 53.
45 *Cf.* Lord Diplock's comments in *Davis* v. *Johnson, supra,* note 10, at p. 1137.

The statistics bear this out. In 20 years from 1957 to 1977 the Privy Council heard and determined 67 cases from Malaysia.[46] This averages out to a little more than three per year. No precise figures are available for Singapore. However a survey of the Malayan Law Journal from January 1965 to December 1979 reveals that 28 Privy Council decisions on appeal from Singapore were reported, an average of less than two a year. It is suggested that these figures hardly support the contention that the interests of justice and flexibility and development of the law are best served by allowing the Privy Council to decide.

What this relative inaccessibility means in practice is that a mistaken decision will stand to vex the law until some wealthy litigant is persistent enough to pursue the matter up to the Privy Council. This is something that is beyond the power of the courts to control. A decision that is universally condemned may never get reversed. The local courts will be powerless to change a rule of law that is unanimously declared to be impeding the development of the law. The observations of Lord Reid on the consequences of such a situation are pertinent:[47]

> "My understanding of the position when this resolution [ie the Practice Statement of 1966] was adopted was and is that there were a comparatively small number of reported decisions of this House which were generally thought to be impeding the proper development of the law or to have led to results which were unjust or contrary to public policy and that such decisions should be reconsidered as opportunities arose. But this practice was not to be used to weaken existing certainty in the law. The old view was that any departure from rigid adherence to precedent would weaken that certainty. I did not and do not accept that view. It is notorious that where an existing decision is disapproved but cannot be overruled courts tend to distinguish it on inadequate grounds. I do not think that they act wrongfully in so doing; they are adopting the less bad of the only alternatives open to them. But this is bound to lead to uncertainty for no one can say in advance whether in a particular case the court will or will not feel bound to follow the old unsatisfactory decision. On balance it seems to me that overruling such a decision will promote and not impair the certainty of the law."

Alternatively, courts may get around such a decision by misusing the label "per incuriam". A notorious instance is the case of *Adnan b. Khamis* v. *P.P.*[48] In that case the Federal Court got around *Cheow Keok* v. *P.P.*[49] by calling it *per incuriam.* It is difficult to see why it should be so. Lord Simon explained what *per incuriam* means in *Miliangos* v. *George Frank (Textiles) Ltd*:[50]

> "A previous decision of the same appellate court is not binding if it is given *per incuriam* .... But this exception to the rule of *stare deems* is one which must be most modestly invoked. It is not applicable merely because the authority in question does not mention some relevant rule (judge-made or statutory or regulatory); still less merely because that authority appears to be open to practical or policy objections...; and least of all because the judge otherwise bound merely considers the otherwise binding judgment to be wrong. A court should only hold a judgment to have been given *per incuriam* if it is satisfied, first, that such judgment was given in inadvertence to some authority... apparently binding on the court giving such judgment, and secondly, that if the

46 *Supra,* note 55.
47 *Jones* v. *Secretary of State for Social Services, supra,* note 3, at p. 149.
48 *Supra,* note 108.
49 *Supra,* note 90.
50 *Supra,* note 5, at p. 821.

> court giving such judgment had been advertent to such authority, it would have decided otherwise than it did — would, in fact, have applied the authority. Neither of these conditions was satisfied in the instant case."

The same might be said of the decision in *Adrian's* case.

All these subterfuges, as pointed out by Lord Reid, are detrimental to the very certainty of the law that the rigid adherence to precedent is supposed to protect.

A further reason for allowing the Federal Court the power to depart from its own decisions can be advanced. Since 1st January 1978 the Federal Court has been the final court of appeal in criminal and constitutional matters.[51] In cases where such issues arise there can be no glib passing on of the responsibility of making a decision. It is imperative in these matters at least that the Federal Court be at liberty to reconsider a decision of its own that is unjust or that might impede the proper development of the law. If the Federal Court is to be given such a power in some cases, why not in all?

In view of the above considerations, it is suggested that the hoary old argument that any departure from precedent will diminish certainty in the law is an insufficient objection. The words of Brown J. uttered in 1925 in the Court of Appeal of the Straits Settlements still bear quoting:[52]

> "I think that the evil of uncertainty is to be preferred to the evil of adhering to a mistaken decision until such time as a persistent litigant is prepared to incur the great expenses of an appeal to the Privy Council."

As for the "evil of uncertainty", the power contended for is not a carte blanche to ignore prior precedent and decide arbitrarily. It is a mistake to assume that if the strict rules of *stare decisis* are relaxed the law will become uncertain. The logic of judicial reasoning impels a judge to follow an established precedent, including precedents in related jurisdictions, unless a cogent reason can be shown for departing from it. Therein lies the difference between the proposed practice and the existing practice; in the latter case a judge must perforce follow a prior decision even if there is good reason not to do so.

The evil of uncertainty can be minimized if the courts use the power to depart from precedent sparingly.[53] Like in the case of the House of Lords, a precedent should be treated as normally binding unless good reason can be shown why it should not be. The power of the House of Lords to depart from its own decisions has not noticeably diminished the certainty of English law. Nor has the decision of the Australian High Court not to be held in thrall by the rule in *Young's* case detracted from the certainty of the law in Australia.[54] A relaxation of the strict rules of precedent will not lead to a general loosing of wild spirits, as some apologists for the strict rules seem to fear. Rather it will inject a much needed degree of flexibility into

51 *Supra,* note 65.
52 *Khoo Keat Lock* v. *Haji Yusop, supra,* note 28, at p. 222.
53 See *e.g.,* the observations of Lord Reid in *Jones* v. *Secretary of State, supra.* note 3, at p. 149.
54 *Supra,* note 143.

the power of the Court of Appeal and the Federal Court to decide what is best for the development of Singapore and Malaysian law.

When both countries were colonies of England it made sense to let an English court have the final say as to how the law would evolve locally. But Britannia has long since waived the rule. In many situations, only local courts can weigh the local factors that must shape the common law. The Privy Council itself has recognised this.[55] The Court of Appeal of Singapore and Federal Court of Malaysia have the responsibility of developing a local stream of the common law. This they cannot do if they are irrevocably tied to precedents that may become increasingly obsolete with the years. To opt to retain the old strict rules of precedent is to abdicate the power to mould the law to meet the needs of two dynamic developing nations. This is not, it is submitted, a consummation to be wished at all.

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[55] See *e.g. Geelong Harbour Trust Commissioners* v. *Gibbs Bright & Co.* (1974) 2 A.L.R. 362.

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