# THE DEVELOPMENT OF THE LAW OF SUCCESSION IN WEST MALAYSIA

by

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A Project Paper submitted in partial fulfilment of the requirements for the Degree of Bachelor of Laws in the Faculty of Law



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September, 1976.

# PERAKUAN KEIZINAN

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September 1976.

## Preface

This project paper was written to satisfy one of the requirements for the degree of LL.B. awarded by the University of Malaya.

I was prompted to write on this topic because I felt that there was too little interest in a very important area of the law. Though it is primarily designed for the benefit of the students of the law of succession, I hope it may also be of use to those who are looking for a conspectus of the whole field of the law.

Since I am concerned only with the development of the law I have not included the present statutes in the appendix but only the repealed laws.

Special thanks are due to my supervisor, Mr. P. Balan, for his invaluable guidance in preparing this paper and also for his detailed criticisms which exposed many confusions of thought and infelicities of style. These I have tried to eliminate, but I have not always taken all the advice I have received and I fear that much is left of which he would disapprove. I am also grateful to the staff of the National Archives of Malaysia and to Encik Kamaruddin of the High Court of Malaya in Kuala Lumpur for their co-operation.

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# Introduction

## History of the law

The law of succession is an attempt to express the family in terms of property. To those studying the development of law in early societies this branch of law has always been of exceptional interest and importance, for it states in precise terms the structure of the most significant of early institutions. Other branches of law shares this characteristic in earlier times: thus our own civil and criminal procedure was once largely a matter between families rather than individuals. The reception of English law into the Straits Settlements and the Peninsular eventually withdrew these topics from family influences and placed them upon a strictly individual basis, but succession to property lay at the very heart of the problem, for families and their members derived that subsistence from land.

It was but natural, therefore, that property and succession should be the points at which the family sought most eagerly to preserve its stability and safety. As individuals or as members of other groups, men have filled our history with political turbulence, economic adventure and intellectual questionings. Wars, the clash of races, and the forces of economic change are the most obvious of the factors which shaped the later history of the family. Less violent, but not less powerful,

are the conflicts of ideas - the feudal view of life, the pressure of the state, the religious doctrine which derived the family itself from the sacrament of marriage. In Malaysia, the rival forces of local custom, and common law, the conflicts of Islam and statutes, law and equity, succeeded in dividing our law of succession into fragments which have only just been reunited.

General nature, scope and purpose of the research

However, the general purpose of this exercise is to trace the development of the law of succession in West Malaysia. It is intended to examine the development of this branch of the law and discuss the problems which arose as a result of the operation of the then existing law of succession.

It is expedient to trace the development of the law of succession in West Malaysia under two large headings; testate succession and intestate succession. Although this paper does not involve a deep study of the current substantive law on succession, the writer has thought it proper to make a few remarks concerning it.

In this exercise, it is proposed to deal with the principally through a discussion of the statutes governing this branch of the law. In our country, the existing materials this field cover only individual aspects and, even so, are either short very superficial. Hence, the writer has attempted to

adopt a midway course by dealing with the whole field in a length which admits of discussion without being too bulky.

# CHAPTER I

## THE RECEPTION OF ENGLISH LAW

### Introduction

Admittedly, this exercise is strictly concerned with the development of the law of succession but it is essential to lay down a generally sound foundation for such an exposition. The writer has attempted to do so under this chapter, by outlining the historical events leading to the reception of English Law. Some early differing influences have been outlined which may cast some light on differences in the present law between the component states discussed. For example, the timing of the reception of English Law has been affected by political events and the nature of the reception differs also to some extent. Again the applicable statutory provisions mentioned show a certain diversity in similarity: the diversity arising mainly from historical reasons and the similarity from the common English source from which provisions were in most cases desired. However, it is the writer's desire to begin the discussion on this topic with the founding of the Straits Settlement and concluding it with the passing of the

Civil Law Act, 1956 (Revised - 1972).

A. The Straits Settlements

Penang was the first territory in Malaysia to be acquired by the British. On behalf of the East India Company, Francis Light obtained a cession of the island from the Sultan of Kedah in 1786. In the historical circumstances, unlike Malacca, Penang has no pre-cession law to complicate the introduction of English Law. Singapore was founded in 1819 and complete sovereignty over it was established in 1824 by a treaty with the Sultan of Johore. In the same year, Malacca was acquired from the Dutch in exchange for Bencoolen under the Anglo-Dutch Treaty. By 1824, Penang, Singapore and Malacca were all under the control of the East India Company.

Statutory introduction of English Law

The period between British Settlement in 1786 and the issue of the First Royal Charter of Justice in 1807 was one of legal chaos.[1] It can be said that the main pre-occupation of the British administration during this period was the maintenance of some form of order and to this end, local customs and law

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[1] Norton Kyshe's reports provide detailed accounts of judicial administration in the Straits Settlements. These reports consist of four volumes with a judicial historical preface from 1786 to 1885 in Volume 1.

were allowed to continue but tempered by such portions of the English Law as were considered just and expedient. Some of the cases tried and judgements given may seem strange today but it should also be borne in mind that it merely reflected the pioneering society of that era. For instance, in a criminal case heard in 1797 before George Coulter, a magistrate, a Chinese male named Aphoe and a Chinese lady, Kehim, were found guilty of adultery and as punishment their heads were shaved and they were made to "stand twice in Pillony from the hour of 4 to 6 in the evening . . . " Furthermore, the man was also to be imprisoned until deportation.

However, after many requests and petitions, a Charter of Justice was granted in 1807. This Charter is a major event in Malaysian legal history as it marked the beginning of the statutory introduction of the Law of England, as at 25th March 1807, into this country. This Charter established "The Court of Judicature of Prince of Wales' Island"[2] to exercise jurisdiction in all civil, criminal and ecclesiastical matters. It has been interpreted by the courts as introducing to Penang the Law of England as it stood in 1807 insofar as it was suitable to local conditions and circumstances.[3]

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[2] As Penang was then known.

[3] This interpretation was given in the following cases appearing in Kyshe's Law Reports: Kamoo v. Bassett (1835) 1 Ky. 1, In the Goods of Abdullah (1835) 2 Ky. Ec. 8, R. v. Williams (1853) 3 Ky. 16, Fatimah v. Logan (1871) 1 Ky. 255, Scully v. Scully (1890) 4 Ky. 602, and R. v. Yeoh Boon Leng (1890) 4 Ky. 630.

Singapore was founded by Stamford Raffles in 1819.

In 1823 Raffles appointed twelve magistrates from among the British merchants to try petty civil and criminal cases. A set of laws based on English legal principles was promulgated but the magistrates were given wide discretionary powers especially in matters relating to local customs. The guiding principle is contained in a report by Raffles to the Government of India in 1823. He stated that they would "apply the general principles of British law to all, equally and alike, without distinction of tribe or nation, under such modifications only as local circumstances and peculiarities . . . may from time to time suggest. . ."[4] In theory, the position seemed settled but in practice, it was extremely difficult to administer. The problems encountered and the legal chaos that prevailed was no different from that in Penang before the 1807 Royal Charter. Most of the administrators were trained in English Law with little or no knowledge of Malay adat, Hindu, Chinese or Muslim Law.

The legal scene in Malacca was just as confused as that in Singapore until the grant of the Second Charter of Justice in 1826.[5]

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[4] "Report on the Administration of Justice 1823" - 10 Malaya Law Review, (1968), p. 281.

[5] At the time of its final cessation by treaty to the East India Company by the Dutch in 1824, Malacca had a settled population governed by Dutch Law. Ignoring constitutional principles the Second Charter of Justice introduced the English Law as at 24th November 1826 to Malacca, with no provision for any transition from the one legal system to the other.

A new court called "The Court of Judicature of Prince of Wales' Island, Singapore and Malacca" was created by this Charter. Its jurisdiction was similar to that granted by the 1807 Charter but English Law to be applied was as it stood in November 27, 1826, and subject to local conditions. This interpretation was also applied to Penang by Maxwell R. in Regina v. Willans[6] when he said:

> "I am therefore of opinion that whatever law the second Charter introduced into Malacca was introduced into every part of the Settlements; 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 became, by the same means, the law of Penang."

Thus Penang had a second statutory reception of English law although it was the first for Singapore and Malacca.

In spite of this, the administration of justice was far from satisfactory. There was only one professional judge called the Recorder assisted by lay judges. All the Recorders that came seemed to have made Penang their headquarters, visiting Singapore and Malacca only twice a year. In the meantime, the number of

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[6](1858) 3 Ky. 16.

cases litigated in the courts increased as a result of the growing population especially in Singapore. Therefore, in 1855 a third Charter of Justice was granted. This Charter of 12 August 1855, has been held[7] not to have effected yet another introduction of English Law of a later date but the provisions additional to those of the Second Charter would appear to have this effect. However, the Third Charter enabled the reorganisation of the Court.[8] An additional Recorder was appointed for Singapore and the jurisdiction of the Recorder in Penang was extended to Province Wellesley.

English Commercial Law was introduced into the Straits Settlements by section 6 of the Civil Law Ordinance, 1878. It states that:

> "In all questions or issues which arise or which have to be decided with respect to the law of partnerships, 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

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[7] Regina v. Willans, ibid., p. 37.

[8] See Wu Min Aun, An Introduction to the Malaysial Legal System, p. 7 for details on the reorganisation of courts.

> 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 statute."

This provision, as re-enacted in the Civil Law Act, 1956 (Revised 1972), is still applicable in Penang and Malacca. However, the whole section of this Ordinance was incorporated with the Civil Law Ordinance of 1909 and later enacted as section 5 of the Civil Law Ordinance (Cap. 42 of the 1936 Revised Edition). This was the position in the Straits Settlements until they were dissolved in 1946 with the formation of the Malayan Union comprising the nine Malay States, Penang and Malacca.

In addition, by virtue of section 3(1) of the Civil Law Ordinance, 1956, there is yet another reception accorded to "the common law of England and the rules of equity" as at 7th April 1956, subject to local circumstances and provisions made by any written law in force in the Federation of Malaya. Thus, in passing it may be noticed that by virtue of section 5(2) of the Civil Law Act, 1956 (Revised 1972 - Act 67), the reception of English provisions applicable to mercantile law in Penang and Malacca is on a continuous basis as opposed to the other states of the Federation of Malaya where by virtue of

section 5(1) there is a cut-off date of 7th April 1956.[9]

B. The Malay States

The British established their control over Perak and Selangor in 1874, Pahang in 1888 and Negri Sembilan between 1874 and 1887 by a system which is popularly referred to as the 'Residential System'. Under this system, each Sultan accepted a British Resident whose advice had to be asked and acted upon in all matters of administration and revenue, except Malay religion and customs. The Sultans were sovereign rulers but actual government was in the hands of the British Residents. In 1895, these four states were brought together in a federation called the Federated Malay States.

In the case of the unfederated Malay States - Johore, Kelantan, Trengganu, Kedah and Perlis - there was a greater degree of autonomy partly because they were brought under British protection much later than the others. Johore was unique in the sense that though independent, she had been under British influence for a considerable time because of her geographical proximity to Singapore. In 1895, the enlightened monarch, Sultan

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[9] Reception is of two kinds: the kind where there is a cut-off date and the kind where there is a continuous reception subject to specific local provision. In the case of the former kind there is the ascertainment of English law on a particular date; in the latter case there is a need to decide the effect of recent English law - common law, equity and case law vis-a-vis any relevant local provisions.

Abu Bakar, had already given the state a written constitution so that by the time a British Resident was formally accepted in 1914, the state was already administratively modernised.

As for the four northern states of Kedah, Perlis, Kelantan and Trengganu, they were under Siamese influence before the British took over. It was only after the Anglo-Siamese Treaty of 1909 that the British began to extend their hold over these territories by assigning a British Adviser to each of the states.[10] Unlike the Straits Settlements, these states were theoretically independent under their respective sovereign rulers. This had been upheld by the English courts in Mighell v. Sultan of Johore[11] where the Sultan was sued in England for breach of promise of marriage. After receiving a statement from the Colonial Office that he was a ruler of an independent state, the court held that he was immuned from legal process. Similarly, the status of the Sultan of Kelantan was taken up in Duff Development Co. Ltd. v. Government of Kelantan[12] and following a statement from the Colonial Office to the same effect, it was held that as a sovereign ruler of an independent

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[10] Kelantan and Trengganu in 1910, Kedah in 1923 and Perlis in 1930.

[11] (1894) 1 Q.B. 147.

[12] (1924) A.C. 797.

foreign country, he was immuned from the jurisdiction of the Court of England.

## The Introduction of English Law

There was no statutory introduction of English Law in the Federated Malay States until 1937 and the Unfederated Malay States until 1951 but this did not necessarily mean that there was no reception of English Law at all.[13] In theory, the law in force was Malay customary law and Muslim Law while the non-Malays were governed by their own personal laws. This situation can be summarised in the statement of the Judicial Commissioner in Ong Cheng Neo v. Yap Kwan Seng:[14]

> "It was argued that the States are virtually English and that the law administered here must be English because the judges and lawyers are English.
>
> I could not allow such a contention to pass uncorrected. English law as such does not prevail in these Courts except in so far as it has been adopted.
>
> As to the Muhamedan Law, the entire Muhamedan Law is a personal law. Founded on religion, it gives rights only to those who acknowledge Islamism.

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[13] Wu Min Ann, op. cit. n. 9, p. 10.

[14] (1897) 1 S.S.L.R. Suppl. This case was on the law of succession applicable to a Chinese who was born in China but died in Selangor.

> Only a Muslim has a right of succession regulated by the Laws of Islam . . .
>
> But as to the succession by non-Moslems to the inheritance of non-Moslems in a Muhamedan country, I am of the opinion that it is simply ignored by the Laws of Islam. Non-Muslims can have no right under these laws . . . Many of the Chinese in the Native States are British subjects and the property of these it would seem is subject to the English Law of distribution while that of Chinese subjects may be transmitted according to Chinese Law and Custom . . "[15]

However, in spite of this theoretical position English Law was informally received by direct legislation patterned on the English [illegible] that of British India.[16] Another significant method of introduction was the fact that members of the Bar and Bench were almost entirely trained and educated in English law so that a great deal of reliance was placed on English law. In Leonard v. Nachiappa Chetty,[17] Reay C.J. had to remind counsel that he should take local law into consideration and to ascertain

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[15] Ibid, p. 3.

[16] For instance, the Criminal Procedure Code and the Penal Code introduced in 1902 and 1905 respectively, were based on Indian models.

[17] (1923) 4 F.M.S. L.R. 265.

what it was before reliance could be placed on English decisions.[18]

What then is the position before the Civil Law Enactments? Wu Min Aun, in his book An Introduction to the Malaysian Legal System,[19] says that he does not think he can usefully add to what Sproule Ag. C.J.C. said in Re the Will of Yap Kim Seng[20] when he held that the rule of perpetuities was applicable to Selangor. Sproule Ag.C.J.C. stated:

> "It is submitted to me, therefore, that one prime cause for the adoption of the rule in the Colony is absent here, seeing that these States never were either ceded or newly settled territory, but States which by treaty invited a certain measure of British protection and control.
>
> The general law of England was never introduced or adopted here at any time. The most that can be said was that portion of that law were introduced by legislation which adopted, not English law, but English principles and models for local laws . . .

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[18] The Bench had also been reminded to do likewise by Lord Dunedin when he gave the opinion of the Privy Council in Haji Abdul Rahman v. Mohamed Hassan (1917) A.C. 209, He stated: "The learned judges . . . have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were dealing with a totally different land law .." (p.216).

[19] At pp. 11 and 12.

[20] (1924) 4 F.M.S.L.R. 313.

We have as a matter of fact adopted freely in these states a great mass of English rules of law and equity, civil and criminal laws and procedure, either directly or derivatively. The latter might be said to a certain extent of our land tenure and registration . . .

I do not think anyone can cavil at the proposition that these States have been consistantly fair to welcome and adopt English rules and principles of law, so far as they are applicable to local conditions . . ."[21]

C. The Civil Law Enactments

The Civil Law Enactment, 1937 gave statutory authority for the introduction of English common law and equity in the Federated Malay States. It did not effect any great change in the de facto situation but merely gave statutory authority to the courts to do what they had already been doing before the passing of this legislation.[22] This enactment was extended to the former unfederated Malay States in 1951 under the Civil Law (Extension) Ordinance after they had become part of the

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[21] Ibid, pp. 316 - 317.
See also Motor Emporium v. Arumugam (1933) M.L.J. 276 on whether English rules of equity are applicable in the Federated Malay States.

[22] For a discussion of this point see G.W. Bartholomew, "The Commercial Law of Malaysia - A Study in the Reception of English Law", (1965) M.L.J. pp. 12 - 15.

Federation of Malaya in 1948. These two enactments were replaced by the Civil Law Ordinance, 1956 which, in turn, has now been repealed by the Civil Law Act, 1956 (Revised 1972 - Act 67)[23] because with the formation of Malaysia in 1963, it became necessary to harmonise the law to include Sabah and Sarawak.

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[23] See appendix on p. 73 for the repealed laws.

# CHAPTER II

## THE WILLS ORDINANCE, 1959[1]

### Historical background

Prior to the introduction of the Wills Ordinance, 1959, the law relating to wills in the Straits Settlements was to be found in Wills Ordinance, Cap. 53, which replaced the Indian Wills Act XXV of 1838.[2] It was based upon, and closely follows the English Wills Act, 1837. With regard to the Federated Malay States, the law of wills was contained in the Wills Enactment which was passed on the 25th January of 1938[3] with the object of providing a code for the interpretation of wills other than those which were governed by the Islamic Law. Although there was no statutory introduction of law relating to wills in the Unfederated Malay States until 1959 there was, nevertheless, an informal reception of English Law of wills due to the fact that members of the Bar and Bench were almost

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[1] No. 38 of 1959.

[2] (7 Wm. IV and 1 Vic. c. 26).

[3] Proceedings of the Federal Council, F.M.S. 1937, p. B73. See also the Shorthand Report of the Proceedings of the Federal Council, Tuesday, 25th January, 1938, p. B8.

entirely trained and educated in English law. Thus, in Johore,[4] Perlis, Kedah, Kelantan and Trengganu judicial decisions on Wills were based on the common law which was contained in the English Wills Act of 1837.

Despite the fact that the law in the Straits Settlements and the Federated Malay States were embodied in different statutes, they were similar in material respects and were not substantially different from the common law which was applicable in the Unfederated Malay States. This situation prevailed until the introduction of the Wills Ordinance in 1959.

The Wills Bill, 1959[5]

The Wills Ordinance, 1959, first originated as the Wills Bill, 1959. It was introduced in the Legislative Council by the Honourable Minister of Interior and Justice, Encik Suleiman Datok Abdul Rahman, as a Bill intituled "an Ordinance to consolidate and amend the law relating to wills throughout the Federation of Malaya".

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[4] Qua Heng Lian Neo v. Seow Tiang Tin & Ors., (1927) 1 J.L.R. 9, is a Johore case which was decided in 1927. This case concerned a will and in coming to a decision the Judge applied English principles.

[5] Federal Legislative Council Debates, 1958, Official Report of the Second Legislative Council, (4th Session), December, 1958 to June, 1959.

On the second reading of the Bill, it was admitted by the Mover that the Bill was designed to consolidate the law relating to Wills which was at that time contained in the Wills Ordinance of the Straits Settlements and Wills Enactment of the Federated Malay States. The Bill followed closely the provisions of the former Ordinance. Then the Mover stated the additions made. Clause 30 of the Bill provided that any will made in the States of Selangor, Perak, Negri Sembilan, Pahang, Malacca and Penang, before this Ordinance came into force and which would have been construed in accordance with the present legislation would not be affected. The object of this Bill, therefore, was to provide a uniform law in regard to Wills throughout the country, but clause 2 provided that this measure would not apply to the Wills of persons professing the Muslim religion whose testamentary powers remained unaffected by anything which this present measure contained. Lastly, clause 26 enabled members of the Armed Forces on military service and mariners, seamen and members of Naval Forces of the Federation at sea to make privileged wills which need not be in such a formal manner as that set out in Clauses 4, 5 and 6 of the Bill.

The Council then resolved itself into a Committee and Clauses 1 to 31 were considered and agreed to without amendment.[6] Thus, it is apparent from the Report of the Select Committee

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[6] Fifteenth Meeting of the 4th Session of the Second Legislative Council, p. 6982.

which was chosen to deliberate on the Bill, that its main purpose was more to consolidate the existing law and make it uniform throughout the Federation of Malaya rather than to amend the law.

## Scope of the Wills Ordinance, 1959

This Ordinance is only applicable in West Malaya and does not extend to Sabah and Sarawak. Further more, persons who profess the Muslim religion have testamentary powers only under Muslim Law and thus, the provisions in the Ordinance do not apply to them.[7] Persons under the age of twenty-one years also cannot make a valid will;[8] but with the above exceptions every person of sound mind may make a will. Persons having testamentary capacity may dispose any or all property by a will. The definition of property disposable by a will is very wide indeed and includes property at death to which he became entitled subsequently.[9]

## Comparison of certain provisions of the Laws[10]

Although the Wills Ordinance, 1959 follows closely the

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[7] Section 2(2) of the Wills Ordinance, 1959.

[8] Ibid., sec. 4.

[9] Ibid., sec. 3.

[10] With reference only to Wills Ordinance of the Straits Settlements, Cap. 53, the Wills Enactment of 1938, Wills Ordinance of 1959 and the English Wills Act, 1837.

the provisions of the Wills Ordinance of the Straits Settlements, the sections on the interpretation of words[11] and privileged wills[12] have been completely overhauled. Under section 2 of Cap. 53, a " 'will' includes a testament and an appointment by will or by writing in the nature of a will in exercise of a power and also a disposition by will and testament or devise of the custody and tuition of any child by virtue of an Act passed in the twelfth year of the reign of King Charles the Second,[13] intituled 'An Act for taking away the Court of Wards and Liveries and tenures in capite and by Knight's service and purveyance and for settling a revenue upon His Majesty in lieu thereof,' and any other testamentary disposition." It is apparent, thereby, that the definition of a will under Cap. 53 is directly in line with that under the English Wills Act, 1837.[14] On the contrary, section 2(i) of the 1938 Enactment defined a "will" as "the legal declaration of the intention of a testator with respect oto his property which he desires to be carried into effect after his death and includes a testament and an

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[11]Wills Ordinance, 1959, s. 2(1).

[12]Ibid., sec. 26.

[13]12 Car. 11 c. 24.

[14](7 Will. 4 and 1 Vict., c. 26).

appointment by will or by writing in the nature of a will in exercise of a power". The present definition of a "will" is more in the nature of an extension of the definition under the 1938 Enactment. It is "a declaration intended to have legal effect of the intentions of a testator with respect to his property or other matters which he desires to be carried into effect after his death and includes a testament, a codicil and an appointment by will or by writing in the nature of a will in exercise of a power and also a disposition by will or testament of the guardianship, custody and tuition of any child". The only other definition found under the 1959 Ordinance is that on the word "property". Whereas, under the 1938 Enactment there were also definitions for "bequest", "codicil", "devise", "property" and "lands which are unnecessary and space-consuming.

However, it should be noted that the 1938 Enactment, far from being concise, contained twenty parts and hundred and thirty-eight sections. Its lengthiness exposed poor drafting and the phraseology of its words could be quite misleading to laymen. As a result, the present law has chosen to follow the Will Ordinance of the Straits Settlements in its brevity, conciseness and style.[15] The provisions on the invalidity of

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[15] For instance, the Wills Ordinance of the Straits Settlements had only twenty-eight sections and the Wills Ordinance of 1959 has only thirty-one sections.

wills made by married women[16] and the non-lapsing of devises of estates tail,[17] both found under Cap. 53, have not been included in the 1959 Ordinance and the only other difference apparent under the present law is the addition of five new provisions.[18]

The provision for privileged wills had not been exhaustively dealt with by section 23 of the Wills Ordinance of the Straits Settlement. The words "Notwithstanding anything in this Ordinance contained any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Ordinance" reflected a great degree of vagueness and uncertainty. On the other hand, the 1938 Enactment had an extremely lengthy provision of about four hundred and ten words on this aspect.[19] There was unnecessary repetition of words with the possible effect of misleading layman. Hence, the Wills Ordinance of 1959 had adopted a mid-way course providing for conciseness and at the same time certainty.[20]

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[16] Wills Ordinance, Cap. 53, s. 5.

[17] Ibid., sec. 26.

[18] Op. cit., n.11, sec. 27 on Wills executed abroad, s. 28 on Wills executed by citizens in Federation, s. 29 on validity of will on change of domicile, s. 30 on construction of wills and s. 31 on repeal.

[19] Wills Enactment, 1938, ss. 137 and 138.

[20] Op. cit., n. 11, sec. 26.

It should be noted that there is one significant difference between the provision in the English Wills Act and our Wills Ordinance, 1959; that is, concerning the effectiveness of the privileged will. In Malaysia, by virtue of section 26(5) a privileged will is null and void at the expiration of one month after the testator, who is still alive, has ceased to be entitled to make a privileged will. In England, a privileged will remains fully effective until it is revoked or until the testator dies. It is submitted the Malaysian provision is a better one. It is highly probable that a person will, by that time (that is, the time prescribed by section 26(5)), have ample opportunity to make a formal will, and so avoid the difficulties attaching to an informal one.

# CHAPTER III

## GRANT OF PROBATES AND LETTERS OF ADMINISTRATION

### Introduction

On this aspect the writer desires to trace five major developments; beginning with the law in the Straits Settlements and then followed by the situation in the Federated Malay States before the introduction of the Probate and Administration Enactment of 1920.[1] The 1920 Enactment will be touched on briefly continuing with a discussion on the passing of the Probate and Administration Ordinance, 1959[2] and concluding with the revision made in 1972 on the 1959 Ordinance.[3]

### Development of the Law

The first Charter of Justice in 1807 and the second Charter of Justice in 1826 gave the local courts power to grant probate and letters of administration in Penang and Malacca,

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[1] Enactment No. 4 of 1920 (Cap. 8).

[2] No. 35 of 1959 w.e.f. 1.2.1960.

[3] Probate and Administration Act, 1959 (Revised - 1972).

respectively. However, in the years between 1807 and 1906 the Straits Settlements saw many legislative changes which ultimately resulted in the passing of the Administration of Estates Ordinance 1906. This was soon replaced by the Probate and Administration Ordinance (Cap. 51)[4] which in turn was repealed and replaced by the Probate and Administration Ordinance, 1959. This last Ordinance, as we will see, was a unifying Ordinance for the whole of Malaya. Due to the revision made on the existing law in 1972, the present statute applicable to Penang and Malacca and the rest of Malaysia is the Probate and Administration Act, 1959 (Revised - 1972).

Enactment No. 4 of 1920 was passed "to consolidate and amend the law relating to the grant of Probate of Wills and Letters of Administration to the estates of deceased persons and the appointment and powers of Official Administrators" in the Federated Malay States.[5] Prior to the introduction of the above Enactment the law was contained in the various enactments of the individual Federated Malay States. Thus, the Probate and Administration Enactment of Perak,[6] of Selangor,[7] of Negri

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[4]Ordinance No. 24 of 1935.

[5]Short title of the Probate and Administration Enactment of the Federated Malay States.

[6]No. 4 of 1904.

[7]No. 4 of 1904.

Sembilan[8] and finally, of Pahang[9] were each wholly superceded in 1920 by an Enactment which provided for uniformity in all the four states. However, it should be noted that, even though each of the States had its own Enactment before 1920, the laws contained in them were substantially the same in material respects.

On the first reading of the Bill in the Federal Council the objects and reasons for the proposal of an Enactment incorporating the individual laws of the four states were laid down.[10] During that time, by Enactment No. 14 of 1918, one Supreme Court had been constituted for the Federation and so it was thought desireble that the state laws of 1904 providing for grant of probate and of letters of administration should be replaced by a Federal measure. Hence, the Enactment of 1920, besides reproducing the then existing Enacements in a Federal and in terms rendering probate and letters of administration operative throughout the Federation, also contained the following additional features:

Section 27 of the Enactment contained provisions allowing to executors and administrators a commission which might

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[8] No. 3 of 1904.

[9] No. 3 of 1904.

[10] The Federated Malay States Government Gazette, Sixth Supplement, Friday, 30th of January, 1920.

perhaps tend to overcome a real unwillingness to assume the burden of the office.

Sections 28 to 36 of Chapter III supersede the enactments relating to official Administrators in Perak,[11] Selangor,[12] Negri Sembilan[13] and Pahang[14] as the duties incidental to the position of Official Administrator were combined with those of another Department.

Section 38 excluded Official Administrators and Trustees from the obligation to give security. That was a matter which had often created difficulty in the past.

Sections 191 to 196[15] provided for re-sealing probate or letters of administration granted under a Share Law so as to render them operative throughout the Federation.

Finally, sections 197 to 171[16] provided for re-sealing probate or letters of administration granted in the Straits

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[11] The Official Administrator's Enactment, No. 3 of 1935.

[12] Ibid., No. 7 of 1935.

[13] Ibid., No. 6 of 1935.

[14] Ibid., No. 6 of 1935.

[15] Chapter XV.

[16] Chapter XVI.

Settlements or (subjected to reciprocity being assured) in the United Kingdom or any British Possession.

Prior to the introduction of the Probate and Administration Ordinance of 1959, the law relating to probate and letters of administration in West Malaysia was contained in the various Enactments of each of the Unfederated Malay States,[17] the 1920 Enactment of the Federated Malay States and the 1935 Ordinance of the Straits Settlements. Thus, the object of the above measure was to amend and consolidate the law relating to probate and letters of administration, at that time contained in the seven separate Enactments,[18] and in Part IV of the Small Estates (Distribution) Ordinance, 1955,[19] which provided a method of summary administration in the case of movable property of an intestate, not exceeding two thousand dollars in value. Besides overhauling the various laws for the sake of uniformity throughout the Federation of Malaya, the Ordinance also incorporated significant changes. One of them is the re-enactment of Part IV of the Ordinance of 1955 with a slight modification under section 83. The modification made was to increase the relevant figure from

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[17] The Probate and Administration Enactment of Johore, No. 22; Enactment No. 1 (Administration of Estates) of Kedah; The Probate and Administration Enactment, No. 22/1356 of Trengganu; The Administration Enactment, No. 2 of 1930 of Kelantan; and The Administration of Estates Enactment, No. 1 of 1338 of Perlis.

[18] See appendix pp. 75-76 for laws repealed by the 1959 Ordinance.

[19] No. 34 of 1955.

two to five thousand dollars. Subject to the above major amendment, the 1959 Ordinance followed in general the provisions of the Probate and Administration Ordinance (Cap. 51) of the Straits Settlements, in force at that time in Malacca and Penang. However, those provisions had been adapted to the needs of the other states of the Federation, and also amended by the inclusion of certain provisions contained in parallel legislation in force at that time in the United Kingdom.[20] Another major amendment was the incorporation of the provision on constructive renunciation, which originally existed only in the Probate and Administration Ordinance, 1935, of the Straits Settlements, as section 9 of the 1959 Ordinance.

Then, in 1972, a revision was made on the 1959 Ordinance. It was introduced in the Dewan Rakyat as a Bill intituled "An Act to amend the Probate and Administration Ordinance, 1959, and to extend the operation of the Ordinance, as amended to all parts of Malaysia". Thus, that Bill seeked to amend the Probate and Administration Ordinance, 1959, and to extend its operation to East Malaysia;[21] thereby, repealing the whole of the

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[20] Refer to the Comparative Table set out in the appendix, pp. 77 to 80.

[21] See clause 2 of the Bill.

Probate Administration Ordinance of Sabah[22] and the whole of The Administration of Estates Ordinance of Sarawak.[23] The new provisions and amendments adopted by the Probate and Administration Act, 1959 (Revised - 1972) are:

Section 1 empowers the Minister to appoint different dates for the coming into force of the Act in different States and to make such modifications to the Act as he may deem necessary in consequence of any modifications that may be made to the Small Estates (Distribution) Act, 1955, under section 1(2) of that Act.

Sub-section (3) has been added to section 9 providing that a person who fails to appear at the hearing of a petition after having been served personally, shall be deemed to have renounced his rights to representation.

A totally new and significant addition made is section 77A. It transfers to the Act the provisions of section 105 of the Courts Ordinance, 1948,[24] which empowers Registrars to hear and determine applications for probate and letters of

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[22] Cap. 109.

[23] Cap. 80, 1948 revised edition.

[24] No. 43 of 1948.

administrative relief ranging from five thousand to twenty-five thousand dollars, the limit of estates that may be dealt with by them.

Another important change is found under section 83(1)(a) which raises from five thousand to twenty-five thousand dollars the limit of estates which may be administered summarily by the Official Administrator and sub-section 2(a) provides for a procedure for the disposal of property of a value not exceeding two hundred and fifty dollars which may come into his possession.

The final amendment adopted by the Act is laid down under section 83(2) which is virtually a continuation of the previous section. This section raises from five to twenty-five thousand dollars the value of property in respect of which the Official Administrator is exempted from giving notice of distribution.

However, it should be noted that one significant item present in the Probate and Administration Ordinance, 1953, has been dropped from the Act without it being mentioned in the Bill; it is the provision on the definition of a minor. Presumably, the 1959 Act intends to bring the definition of a minor under the 1959 Ordinance in line with that of the Age of

Majority Act, 1971.[25] Moreover, the fact that there is no provision in the 1959 Act which fixes its own age of majority[26] and that the 1971 Act is a statute of general application means section 2 of the 1971 Act applies. Section 2 of the Probate and Administration Ordinance, 1959, provided that a ' "minor" means any person who has not attained the age of twenty-one years' but under the Age of Majority Act, 1971, a minor is any person who has not attained the age of eighteen years.[27]

Thus, an Act with the primary purpose of attaining a smoother administration of the law relating to grant of probates and letters of administration by applying a uniform law throughout the whole of Malaysia has been passed and adopted in 1972 superceding the whole of the Probate and Administration Ordinance, 1959.

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[25] Act 21.

[26] Section 4 reads: "Nothing in this Act shall affect -

(a) . . .
(b) . . .
(c) any provision in any other written law contained fixing the age of majority for the purposes of that written law."

[27] The exact wordings of section 2 of the 1971 Act are:
"2. Subject to the provisions of section 4, the minority of all males and females shall cease and determine within Malaya at the age of eighteen years and every such male and female attaining that age shallbe of the age of majority."

# CHAPTER IV

## ISLAMIC LAW OF SUCCESSION

### Development of the Law in the Straits Settlements

The law of succession to the estate of a Muslim intestate has changed four times in the Straits Settlements. From the First Charter of 1807 until the passing of the Muslims Marriage Ordinance in 1880[1] his estate was distributed according to English Law[2] with this exception, that, where the deceased left more than one widow, they took the share of a widow under the Statute of Distributions in equal shares. Further, on the intestate death of a married Muslim woman her husband took no interest in her property by virtue of the coverture.[3]

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[1] Ordinance V of 1880.

[2] Rodyk v. Williamson (1834) cited in Moraiss v. de Souza (1838) 1 Ky. 29; Reg. v. Willans (1858) 3 Ky. 16, 36.

[3] Haleemah v. Bradford (1876) Leic. 383 C.A.

On the 27th August, 1900[4] statutory provision was made as to succession to the estates of deceased Muslims dying intestate on or after that date, and it enacted that, in the absence of special contract between the parties, Muslim law should be recognised only as expressly stated in the section of the Ordinance.[5]

On the death intestate of a Muslim wife, her husband was entitled to one fourth share, if she left children or their descendants of her own by the same or any other husband, the remaining three fourths share being divided between the children or otheir descendants in equal shares according to English Law, per capita as to children, per stirpes as to their descendants.[6] If she died leaving no children or their descendants by the same or any other husband, but left other next of kin according to English Law, her husband was entitled to one third share and her next of kin to the remainder of her estate to be distributed according to English Law.[7] In default of children, descendants and next of kin the whole of

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[4] Op. cit., n. 1, sec. 33.

[5] Ibid., s. 27(ii).

[6] Ibid., s. 27 cl. vi.

[7] Ibid.

her estate went to her husband.[8] It is important to remember that on her death intestate all her own lawful children by all her husbands were entitled to the distributive shares in her estate, movable and immovable; but the children, by other wives, or any person to whom such married woman might have been married were not entitled to any such distributive share.[9]

Where a Muslim died intestate, leaving a widow, she was entitled to the share in his estate, movable and immovable, which by the English law a widow was entitled to under the rules for the distribution of intestate's estate in force in the Colony.[10] In other words, she was entitled to a share according to the general rules of succession. Where, therefore, the deceased left children or their descendants she received a one third share, and, where he left no children or their descendants, one half of the estate. If more than one widow survived the intestate then what should have been the share of one widow was divided equally among all the widows, provided no more persons were recognised as widows than by Muslim law, i.e., no more than

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[8] Ibid.

[9] Ibid., s. 27 cl. vii.

[10] Ibid., s. 27 cl. iv.

four widows could share.[11] All the children of a Muslim intestate by all or any of his lawful wives were entitled to divide equally between them the estate or, where there was a widow left, a two-thirds share of the estate, movable and immovable, but the children of any of his wives by other husbands, were not entitled to any distributive share.[12] No right to share was given by the Ordinance to the descendants of the deceased's children or to his next of kin, although no children survived the intestate; but express provision was made for his widow only to receive a share according to the general rules of distribution.[13] It seems that in such cases the general rules were followed and the descendants of children were entitled to share the estate per stirpes in priority to the next of kin. In the event of these being no such descendants, the estate, subject to the one half of the widow, if any, was divided amongst the next of kin in accordance with the general rules of distribution.

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[11] Ibid., s. 27 cl. v. See Baillie, Digest of Mahomedan Law, p. 27. A marriage with five wives at once is null and void as regards all of them, but if married one after the other, the fifth alone is void (Minhaj-et-Talibin, p. 292). In the former there is no widow entitled to a share of the estate, but in the latter the first four wives will be entitled to a widow's share. This rule applies to all Muslims.

[12] Op. cit., n. 9.

[13] Op. cit., n. 10.

In the case of any Muslim who died intestate after the 1st January, 1924, Muslims Ordinance No. 26 applied and it was there enacted that the estate and effects[14] of a Muslim intestate should be administered according to Muslim Law except in so far as such law was opposed to any local custom which, prior to 1st January, 1924, had the force of law:[15] provided that any of the next of kin who was not a Muslim should be entitled to share in the distribution as though he was a Muslim.[16] In deciding questions of the Muslim Law of Succession and Inheritance the Court was at liberty to accept as proof of the Muslim Law any definite statement on such law made in all or any of the following books: any English translation of the Quran, Mahomedan Law by Syed Ameer Ali, Minhaj-et-Talibin by Nawawi and a Digest of Mahomedan Law by Neil B.E. Baillie. The Muslim Law of Succession to be applied by the Court was the Law of Succession of that school (Madzhab) to which the deceased belonged.[17] However, in the Straits Settlements the Shafii Law of Succession was by far the most important as a great majority of the Muslim there belonged to that school.

Then there was the Muslims Ordinance of 1936 and finally the Straits Settlements enacted separate laws: the Penang

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[14] In the Muslim Law of Inheritance there is no distinction made between real and personal property.

[15] Ordinance No. 26, s. 27.

[16] Ibid.

[17] There are four Schools of Thought in the Islamic Law, i.e. Hanafi, Maliki, Shafii and Hambali.

Administration of Muslim Law Enactment, No. 3 of 1959 and the Malacca Administration of Muslim Law Enactment, No. 1 of 1959. Both these laws, except for minor amendments, incorporated the exact provisions of the 1936 Ordinance.

Development of the Law in the Malay States

Originally, the law of the Malays relating to succession was based on the adat or tribal custom which was brought by the Malays from Sumatra where the Minangkabau tribal organisation was matrilineal. In Minangkabau, the exogamous matrilineal pattern was developed into an elaborate system of unwritten law called the adat perpatch. The Malays of Negri Sembilan came from this region; they brought their tribal organisation with them and in some districts they have preserved it intact up to the present day. In Palembang, however, during the centuries of Hindu and monarchical influence, the tribal organisation broke down and with the disintegration of tribes as such, the rule of exogamy necessarily perished, though the matrilineal law of property survived. The other Malay States in the Federation followed the Palembang tradition called adat temenggong, which is much the same as adat perpatch in so far as inheritance is concerned, but the absence of any tribal organisation has obscured the fact that their law of property was originally the same as that of Negri Sembilan.[13]

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[13] Taylor, Lyan Mutsell, Malay Family Law, (1937), p.1f.

In Perlis in the Malay Penisula, before the British period, the law relating to succession in Negri Sembilan, adat perpatih and in the other Malay states, adat temenggong in force. The Malay rulers were Muslims but it was doubtful whether they introduced any pure Muslim law into the other Malay states that was inconsistent in Negri Sembilan. About 1886, the Perak State Council ordained the land of a major Chief, Tengku Long Jaafar, to be transmitted in the female line. Since then, however, Muslim law has been more extensively adopted and the customary laws in the Malay States (other than Negri Sembilan and Melaka) have only survived in relation to the rights of widows and divorcees. Among the country people many estates are still divided according to adat temong, but this can only take place by consent. The Muslim Law has been applied so frequently by the Collectors of Land Revenue and the Courts that the law of inheritance is now, except as to the special right of spouses, the Muslim Law.[19]

Testate Succession

Touching on the Islamic Law on Testate Succession the writer chooses to deal with it briefly. Majority of the Muslims in our country follow the Shafii law of wills and since the time it was adopted till the present day, except for three years,

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[19]Ibid. p. 4.

there has been practically no change whatsoever made to the law.

One of the changes made is on the duties of executors. Formerly, where the testator had named two executors, neither can do anything without the other's concurrence, unless the power had been formally given to him.[20] This rule is superceded in the Malay States by the provisions of the Probate and Administration Ordinance, 1959.[21] Section 6 of the Ordinance provides that where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the others or other to prove, all the powers which are by law conferred on the personal representative may be exercised by the proving executor or executors for the time being and shall be as effectual as if all the persons named as executors had concurred therein.

The second change concerns the age of majority. The capacity to make a will is not extended to a madman, a person in faint or a minor[22] and under the Muslim Law a person attains majority at puberty. However, on this point (i.e. attaining

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[20] Nawawi, Minhaj-et-Talibin, p. 268.

[21] Probate and Administration Ordinance No. 35 of 1959.

[22] Ahmad Ibrahim, Islamic Law in Malaya, (1965), p. 263.

majority at puberty) the opinions of leading Islamic jurists are not unanimous[23] and most countries have settled this question by legislation.[24] In Malaysia, by virtue of section 2 of the Age of Majority Act, 1971,[25] the relevant age at present is 18 years for both sexes.

Besides having to satisfy the requirements of testamentary capacity,[26] a Muslim will have have to consider two other primary rules of the Muslim Law on wills before he can make a valid will. The rules are as follows:-

(a) A atestmentary disposition is invalid if it purports to dispose of more than a third[27] of the deceased person's estate, and

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[23] See Tyabji, Muslim Law, (1968), 4th ed., pp. 756 - 757 and Mulla, Principles of Mohamedan Law, (1968), 16th ed., pp. 122 - 123. According to Minhaj-et-Talibin one jurist maintains that incapacity does not extend to a minor who has attained the age of discernment.

[24] See for instance The Indian Majority Act of 1875.

[25] Act 21.

[26] Professor Ahmad Ibrahim's Islamic Law in Malaya at p. 263 reads: "The capacity to make a will is accorded by law to everyone without distinction of sex, who is adult, same and free . . . "

[27] The bequeathable third has been defined by Tyabji as "one-third of the estate after payment of the funeral expenses and the debts of the deceased and also such property as does not pass under the Muslim Law of succession but a special law".

(b) A testamentary disposition is invalid if it purports to benefit any of the testator's heirs above his share as prescribed by the Muslim Law of Distribution.

The first of the two rules was litigated in Penang in 1835 in the unsatisfactory case of In The Goods of Abdullah.[28] This was an application by some of the deceased beneficiaries to set aside the grant of administration to the deceased's widow on the ground that his will professed to deal with his entire estate and not with the bequeathable one-third. As the basic law in the Straits Settlements at that time was the English Law, the Court applied the English Law of Succession and ruled that a Muslim may by will alienate his entire property and that "such alienation will be good although contrary to Muslim Law". Apart from its historical interest In The Goods of Abdullah is of little value today.[29] The above decision is reversed in the Malay States in 1915 where it was established in Shaik Abdul Latif v. Shaik Ellias Bux[30] that a Muslim who has the required testamentary capacity has the power to dispose by will one-third and not more of property belonging to him at the time of

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[28](1835) 2 Ky. Ecc. 8.

[29]Ahmad Ibrahim, op. cit., n. 22, p. 268.

[30](1916) 1 F.M.S.L.R. 204.

his death.

The second principle was first accepted in the Seremban case of Siti binte Yatim v. Mohamed Nor bin Buyai in 1928.[31] In this case, one Buyai bin Dato Rajah died in 1924 leaving a will in which he devised the major part of his property to his son, Mohamed Nor bin Buyai. The plaintiff, the deceased's wife, was completely deprived of the share due to her under the Muslim Law of Succession, Burton J., after referring to several Indian authorities said,

> "The inference from these cases is clear that a will which attempts to prefer one heir to another by giving him a larger share of the estate than (sic) he is entitled to by Mohamedan Law is wholly invalid as to such bequest. The will of Buyai attempted to prefer his son at the expense of his widow and is consequently invalid."[32]

Hence, beginning with the two latter cases the law on Muslim rules of testamentary disposition has been constant throughout as is also the case on the other aspects of the Muslim Law of Wills. Besides the few mentioned above, there have never been any significant changes made.

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[31](1928) 6 F.M.S.L.R. 135.

[32]Ibid., p. 137.

## CHAPTER V

## NON-MUSLIM LAW OF INTESTATE DISTRIBUTION

### Introduction

The two main areas to consider under this heading are those before the passing of the Distribution Ordinance, 1958[1] and the Inheritance (Family Provision) Act, 1971.[2] The position of non-Muslims is governed only by statute, customary law playing no part in the distribution of the intestate estates of non-Muslims. Where the Chinese are concerned there is case law to indicate that the Chinese customary law of inheritance is of no application, at least, in the Federated Malay States. It was decided in the case of Lee Joo Hee v. Lee Eng Swee[3] that in distributing the estate of an intestate domiciled here and leaving property here, the Statute of Distribution is the only rule; and the exclusion of females in sharing in such estate according to Chinese law and custom will not be recognised. From this, it can be deduced that the Chinese customary law of inheritance

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[1] No. 1 of 1958 w.e.f. 1.5.1958.

[2] Act 39.

[3] 4 Ky. 325.

is accorded no recognition.

A. Distribution Ordinance, 1958

Historical Background

Prior to the introduction of the Distribution Ordinance, 1958, the law relating to the manner of distributing the estates of those who died without having made a will was contained in the Distribution Enactments of the Federated Malay States and in similar Enactments in the other Malay States, except Trengganu and Perlis. In these latter states and in the states of Malacca and Penang, the distribution of estates is governed by the common law which was embodied in the ancient Statute of Distributions in the United Kingdom.[4]

Although the law on the distribution of intestate estates was contained in these different sources of legislation, there was in fact very little difference in substance between them. The various Distribution Enactments are virtually identical and the law in those Enactments does not depart seriously from the principle of the common law which was applicable in the Straits Settlements, Perlis and Trengganu. This situation prevailed until it was proposed, without making any substantial departure from the law then in force in any State, to frame a single

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[4]Statute of Distribution, 1670, (22 and 23 Charles II, c. 10). See also Plucknett, Theodore F.T., A Concise History of The Common Law, 5th Edition, (1956), pp. 730 - 731.

Ordinance which would be applicable throughout the Federation.

The Distribution Bill, 1957[5]

The Distribution Ordinance, 1958, first originated as the Distribution Bill, 1957. It was introduced in the Legislative Council by the Honourable Minister of Interior and Justice, as a Bill intituled 'an Ordinance to consolidate and amend the law relating to the distribution of intestate estate!. However, it was a measure intended solely to consolidate and to make uniform the existing law, but not to make any substantial changes. It is apparent from the Report of the Select Committee which was chosen to deliberate on the Bill, that amendment of the law was only of secondary importance. The primary purpose of initiating the Bill was to attain smoother administration of the law relating to intestate distribution by applying a uniform law throughout the Federation of Malaya.

On the second reading of the Bill, it was admitted by the Mover that no attempt had been made to update the existing law or to make it correspond to recent development in England. The tendency there during the last 25 years had been to give a much larger share in the estate of an intestate to the widow and a lesser share to more remote relatives of a deceased. Another development

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[5]Council Paper No. 12 of 1958.

had been to provide that the shares of children should not pass to them absolutely until they have reached the age of 21; and if they die before that age such shares pass automatically to increase the shares of the other children. The latter provision had clearly some advantages in simplifying legislation dealing with shares of children, for under the existing law it was necessary to apply in each of such cases for letters of administration and to distribute the share of the deceased child among the other relatives in accordance with the rules of distribution. Changes of that sort, however, were clearly controversial and would need to be studied carefully to see whether they were suitable to conditions in this country. Nevertheless, since certain amendments had been moved, it was decided to refer the Bill to a Select Committee made up of thirteen members to consider the many viewpoints pertaining to each proposal to amend.[6]

## The Report of the Select Committee[7]

The Select Committee deliberated and presented their Report to the Legislative Council on the 17th March, 1958. Mr. S.M. Yong

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[6] The principal object of the proposed amendments was the avoidance of the liability to pay estate duty a second time where someone who has never had the opportunity of disposing of his share in the intestate estate dies a minor and unmarried by setting up statutory trusts.

[7] Federal Legislative Council Proceedings, 17th March, 1958.

(as he then was) presenting the Report informed the Council that all aspects of the Bill had been examined, and recognised that the Bill was dealing more with the interests of the living than the dead. Then he added that those recommendations as set out in the Report, if adopted, would greatly improve the existing law on the distribution of the estate of an intestate person. Further, he outlined four features which the Committee thought were outstanding in the new Bill.

Firstly, it was considered that the amended Bill would simplify the administrations of intestate estates, and the interpretation of its rules. It was thought that owing to the good draftsmanship, the law was now laid out in terms simple enough for a layman to understand them without the assistance of a lawyer.[8] With respect, it is doubtful whether this claim is justified. For example, section 7 of the Distribution Ordinance is particularly confusing. Its construction is involved and certainly not in the style that a layman is accustomed to.

Secondly, the other outstanding feature of the Distribution Bill which was tendered in the Report was the prevention of the payment of death duties in case of deaths of infant beneficiaries. In other words, the Bill was a legal device to prevent those infant

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[8] It was contended that the same compliment could not be paid to the existing law. See Federal Legislative Council Proceedings, 17th March, 1958.

beneficiaries who died having to pay estate duty a second time. Under the existing law at the time, the shares that were due to the children of the deceased intestate vested in them absolutely even though they were infants. Should the infants die, estate duty is again payable in respect of the infants' estate, although their share in their father's estate has not yet been distributed to them. To prevent this unfairness it was provided in the Bill that the infants' share would not vest in them unless and until they attain the age of 21 years or marry under that age.[9] It is submitted that this was an important departure from the law existing at that time, and in so preventing the payment of estate duty on undistributed property, it served somewhat to relieve the burden of the people affected.

Thirdly, the third benefit which this Bill conferred on the people of this country was the prevention of payment of double estate duty in cases where a husband and wife died in the same accident. Thus, it was provided that in cases where there was a dispute as to whether the husband or wife died first, the law would presume that neither survived the other.[10] Under the then existing law, there was always the uncertainty as to who died first - the husband or the wife. The Government would usually claim that the

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[9]Sections 6 and 7 of the Bill.

[10]Ibid., Sec. 6 sub-section (3).

wife died first because, that way, they would get more estate duty. After levying an estate duty on the wife's estate the Government would then turn to the husband's estate saying that since his wife died before him, therefore, his wife's estate vested in him. Thus, when he died, his estate would have to pay on the property which vested in him in addition to his own estate. Consequently, in order to meet this unfairness the new law was introduced. Most people would have thought that since the husband is usually older than the wife, he must be presumed to have died before the wife. But, even then, the husband would still have to pay double estate duty on his estate although on a lesser extent. Hence, the new Bill had devised a means to get round this difficulty. This amendment was on the same line as the one above.

Fourthly, the new Bill had given the surviving wife a better chance of getting a larger share in her late husband's estate where she had no issue. Under the old law, a surviving wife with no issue was only entitled to one-half of her husband's estate; she would not get the other half unless her husband died without leaving any next-of-kin which would possibly extend to his great, great grand-parents thereby preventing her from taking the remaining half-share. As an attempt to improve the unfair situation it was thought that she should come in after the grandparents.[11] In other words, if a man died without issue, the wife would get her one-half share of the

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[11] Ibid., sec. 6 sub-section (1)(iv).

estate and the remaining half if the husband leaves no parents, brothers and sisters or grandparents. This constituted a definite improvement in the surviving wife's position and afforded some recognition of the wife's relative importance compared to the remoter relatives.

Hence, in view of all the above benefits the Report was adopted by the Honourable Members of the Council and the Bill was passed on the 17th day of March, 1958 repealing the state laws on the matter.[12]

Comment

Although it has to be admitted that some improvements were made to the law of intestate distribution as a result of the Distribution Bill 1957, it is a matter of disappointment that no extensive research was conducted to discover whether the common law, applied without any substantial modification, could serve to accommodate the existing conditions in Malaya. Moreover, the suitability of the law introduced has never been considered and while England has updated its law several times, the law here stands almost exactly as it stood in England decades ago. No attempt has been made to accommodate the social and economic changes that have occured in our dynamic society in recent times. It appears as if the law will remain stagnant while society undergoes numerous changes.

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[12] See the appendix p.81 for details of the repealed state laws.

Scope of the Distribution Ordinance, 1958.

Although this paper is solely concerned with development it is thought that the discussion will end on a more harmonious note if a few remarks are also made on the present law.

This Ordinance is not extended to the East Malaysian states of Sabah and Sarawak. In addition, it expressly excludes the estate of those professing the Muslim religion[13] and thereby, bearing no effect on the rules of Muslim Law regarding the distribution of intestate estates. It has also no application to any estate, the distribution of which, is governed by the Parsee Intestate Succession Ordinance of the Straits Settlement.[14]

"Intestate" is defined in s. 3 of the Ordinance as including 'any person who leaves a will but dies intestate as to some beneficial interest in his property'. It has been respectfully submitted that 'will' referred to in the definition could have been more accurately described as a 'valid will'.[15] Then only will it clearly appear that the purpose of this

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[13] Distribution Ordinance, 1958, s. 2.

[14] The Parsee Intestate Succession Ordinance of the Straits Settlements is an Ordinance which is in force in Penang and Malacca and which, as its name indicates, applies to those professing the Parsee faith.

[15] Ho Kooi Ching, "A Critical Study of the Non-Muslim Law of Intestate Distribution in West Malaysia", Faculty of Law, University of Malaya, Unpublished Project Paper, (1975), p.8.

definition is to include a person who dies partly intestate or wholly intestate, i.e. where he merely leaves a 'will' and not a 'valid one'.

The distribution of both movable and immovable property is regulated by this Ordinance. In the case of movable property, its distribution shall be regulated by the law of the country in which the deceased was domiciled.[16] In the case of immovable property, s. 4(2) provides that the distribution of such property shall be regulated by the Ordinance regardless of the domicile of the deceased.

B. The Inheritance (Family Provision) Act, 1971

Reasons for its introduction

The law of intestacy gives fixed shares of the deceased's estate to certain classes of beneficiaries specified in the Distribution Ordinance, 1958. The provisions of the Ordinance do not operate justly under all circumstances, since the law confers a fixed right which may not be appropriate in certain cases (even assuming that the law does generally operate fairly). A situation may arise where a person disposes of all or a substantial part of his property by will. For example, if A gives the major proportion

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[16] Op. cit., n. 12, s.4(1).

of his estate to one child by will, and dies intestate as to the remainder, a further share of the estate will devolve upon that child by the rules of intestate distribution, even though he may have been adequately provided for by will while the other children are not.[17]

As a result, a Bill[18] intituled "An Act to amend the law relating to the dispositions of estates of deceased persons and for other purposes connected therewith" was presented and read the first time in the Dewan Rakyat on the 9th March, 1971. This Bill seeked to provide a procedure based on the provisions of the Inheritance (Family Provision) Act, 1938[19] of England, as amended by the Intestates' Estates Act, 1952. The purpose of the Bill, as is apparent from the proposed procedure specified, was to allow dependants of a deceased person to move the High Court to make an order if the disposition of a deceased's estate was such that no reasonable provision was made for the maintenance of those dependants.

The English Inheritance (Family Provision) Act, 1938 was initially applicable in cases of testacy but was extended to apply to cases of intestacy. Section 3(1) of the Malaysian Act

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[17] Assuming that the provisions relating to hotch-pot do not apply in West Malaysia.

[18] The Inheritance (Family Provision) Bill, 1971.

[19] (1 and 2 Geo. 6. c. 45).

provides that if on the application by a dependant within the meaning of the Act, the Court is of the opinion that the will or the law relating to intestacy or the combination of the will and the law is not such as to make reasonable provision for the maintenance of that dependant, the Court may order reasonable provision as it thinks fit to be made out of the deceased's net estate for the maintenance of the dependant. In determining whether the disposition of the deceased's estate by the law relating to intestacy or the combination of the deceased's will and that law makes reasonable provision for the maintenance of the applicant, the Court shall not be bound to assume that the law relating to intestacy makes reasonable provision in all cases.[20] Therefore, even in Malaysia an applicant may apply in cases of testacy, partial intestacy or total intestacy.

Scope of the Act

This Act will apply throughout Malaysia to testate as well as to intestate successions but will not apply to the estates of deceased Muslims or natives of any of the States in East Malaysia.[21]

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[20]The Inheritance (Family Provision) Act, 1971, s. 3(8).

[21]Ibid., sec. 1(2).

Section 3 of the Act empowers the High Court to vary by an order dispositions of property if the court considers that reasonable provision has not been made for the maintenance of certain dependants of the deceased, namely, a wife or husband, unmarried daughters, infant son or any child of deceased incapable through physical or mental incapacity of providing for his or her own maintenance. In making such order the court may impose conditions and restrictions as it may deem fit.

On deciding whether to make an order or not the court has to take into consideration, inter alia, the nature of the property representing the deceased's estate, the interests of those entitled under the will or on intestacy, the circumstances of the dependants, the reasons why no provisions was made by the deceased and the provisions of the will or the law relating to intestacy.[22]

Comment

While it can generally be said that the above Act has served to mitigate some of the hardships caused by the law of intestacy, this is only possible under limited circumstances found under its provisions. It should be noted that under the Act, reasonable provision is not granted as of right, but as of discretion.

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[22]Ibid., sec. 3(5), (6), (7) and (8).

In attempting to prove his case, the dependant may have to reveal personal details which he would prefer to keep to himself. For example, a widow in making an application to the Court may have to reveal details of her married life in order to show that she was not given reasonable provision. This may involve a lot of embarrassment and distress to her and other parties involved. Further, since a full inquiry has to be conducted, heavy costs may be incurred, thereby effectively reducing the size of her share in the estate.

While considerable case law has evolved on the basis of the similar English Act, there has been no reported Malaysian case involving this Act, since it came into force in 1972. This startling fact may be attributed to a number of reasons. The most principal reason may be ignorance of the existence or the effect of the Act. This ignorance is not confined only to laymen but extends also to some lawyers, who are therefore unable to advise their clients competently. Many are under the misconception that the Act only applies in cases of testacy. It may be that if parties who are in a position to resort to the Act know of its existence, they will litigate to enforce the right of application to the Court granted by the provisions of the Act.

# CHAPTER VI

## DISTRIBUTION OF SMALL ESTATES

### Why Small Estates

For many years previous to 1955, it had been recognised in the territories then comprised in the Federation that it was desirable to make a special provision whereby estates of comparatively small value could be distributed amongst the heirs or successors with a minimum of expense, delay and formality. The ordinary procedure then for the administration of estates was intended primarily to ensure the correct administration of estates of substantial value, and to provide more or less elaborate safeguards against any impropriety. Such safeguards which must necessarily be borne by the estate, made a serious inroad into the assets. Accordingly, provision was formerly made, in various ways, in the Malay States and the Straits Settlements, for the summary administration of small estates without much formality or expense. Eventually a special provision with the object of consolidating and unifying the law throughout the Federation was deemed necessary.

The Small Estates (Distribution) Bill, 1955

The Small Estates (Distribution) Act, 1955,[1] first originated as the Small Estates (Distribution), Ordinance, 1955. It was introduced in the Legislative Council as a Bill intituled "an Ordinance to consolidate and amend the law relating to the distribution of small estates of deceased persons and to provide for matters incidental thereto and to prevent the excessive multiplication of interests in land arising from inheritance."[2] However, the primary aim of the Bill was to enable small estates to be dealt with speedily.

At the time when the Bill was introduced, a lot of safeguards contained in the law dealing with the administration of estates of deceased persons were designed primarily for estates of substantial value and tend to become cumbersome when applied to small estates. Therefore, this Bill accordingly proposed that there should be a more summary procedure for dealing with estates of less than five thousand dollars in value where the deceased had not left a will.[3] If the deceased had left a will, then the estate would be dealt with in the ordinary way.[4] Where

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[1] Act 98 (Revised - 1972).

[2] Supplement to Federation of Malaya Government Gazette, Vol. VII, No. 27 (December 21, 1954).

[3] Clause 4(1) of the Small Estates (Distribution) Bill, 1955.

[4] Ibid., cl. 5.

he had not left a will, under this Bill, it was proposed that the Collector of Land Revenue in the place where the deceased normally resided should be enabled to deal summarily with the administration of the estate.[5] The Collector would work under the direction of the Commissioner of Lands who would have the authority to decide under which Collector the matter should fall if any question arose as to whether one or the different Collectors should deal with it.[6]

When a deceased died, it was open to any beneficiary, creditor or purchaser or the Penghulu of the area, or the Official Administrator to apply to the Collector to administer the estate.[7] When this was done, the Collector would give notice of a public hearing, and the intention was that the hearing should be held in the district in which the deceased lived and in the presence of his family and his neighbours.[8] At that hearing the Collector would try to ascertain what were the funeral expenses involved, what were the liabilities of the estate and who was entitled to the balance, and he would endeavour on that basis to distribute the estate as rapidly as possible.[9] But it might of course

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[5]Ibid., cl. 4.

[6]Ibid., cl. 4(2).

[7]Ibid., cl. 8.

[8]Ibid., cl. 9.

[9]Ibid., cl. 12.

occur that there were disputes as to the liabilities or as to other interests in the estate and it was proposed under this Bill to give the Collector power to deal with such disputes. However, some limitations had also been placed on him. If it was a question of land, then he was given unlimited jurisdiction, but if it was not a question of land, if it referred to moveable property, then he was given the jurisdiction of a First Class Magistrate's Court. However, if the property was outside that jurisdiction the claimants were given the opportunity to have the matters decided by the ordinary Courts; but if they failed to do so then the Collector would have jurisdiction to decide them and so obviate further delay.[10]

It was proposed to provide that the Collector might, if he wished, obtained directions on any matter affecting law and custom from the Commissioner of Lands, and the Commissioner of Lands might seek the direction of Courts on matters of law and he might seek the directions of the Ruler in Council on matter relating to the Muslim Law or Malay custom[11] and it was also provided that there should be an appeal to the High Court against decisions of the Collector, apart from any reference to the High Court against decisions of the Collector, apart from any reference to the High Court by the Commissioner on particular points of law.[12]

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[10]Ibid., cl. 14.

[11]Ibid., cl. 19.

[12]Ibid., cl. 20.

Then, towards the end of the Bill in clause 21 an even more summary procedure for dealing with estates of less than two thousand dollars in value. In order to keep down the expenses and to reduce delays and formalities, clause 23 restricted the rights of the parties to be represented by lawyers.

Thus, from the brief outline of the procedures provided by the Bill, it is clear that the aim and intention behind it was to speed up the distribution of small estates, to save money and to enable people to enjoy their property as rapidly as possible.

On the second reading of the Bill, it was admitted by the Mover[13] that although the Bill dealt only with small estates, it was a matter of considerable importance because it affected a large number of people and although he was sure that there would be general agreement as to the main objects of this Bill, he was not equally confident that the methods adopted to carry out those objects would command the same universal measure of support. Then the Bill was referred to a very representative Select Committee[14] comprising of nineteen members to examine

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[13] The then Attorney-General.

[14] It was appointed on the 20th January, 1955, to examine and report to the Legislative Council on the Bill, the short title of which is "The Small Estates (Distribution) Ordinance, 1955," laid on the table of the Council as Council Paper No. 55 of 1955.

closely every item of the Bill before giving it a final reading. On the 2nd June, 1955, the Report of the Select Committee was adopted by the Council making four major changes to the Bill. This was followed by the passing of the Small Estates (Distribution) Ordinance, 1955[15] which consequently, repealed certain parts of the various state laws on this matter.[16] However, in 1972, the whole of the above Ordinance was superceded by the Small Estates (Distribution) Act, 1955 (Revised - 1972) which extended the operation of the Ordinance to the East Malaysian states of Sabah and Sarawak and also increased the value for the distribution of small estates to twenty-five thousand dollars.[17]

The Definition of Small Estates[18]

In connection with clause 3 of the Small Estates (Distribution) Bill, 1955, the Select Committee, first of all,

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[15] No. 34 of 1955.

[16] See the appendix on p.83 as to the extent of the repeal.

[17] Originally, under the Small Estates (Distribution) Ordinance, 1955, the administration of small estates was only applicable to the Malay States and the value for the distribution of small estates was only five thousand dollars.

[18] Besides going into the question of "what is small estates" and tracing the effect of section 3 on various parts of Malaysia, the writer wishes to concentrate on the changes made to the value of small estates in three significant years: beginning with the Small Estates (Distribution) Ordinance, No. 34 of 1955, followed by the Small Estates (Distribution) (Amendment) Ordinance, 1959 and ending in the passing of The Small Estates (Distribution) Act, 1955 (Revised - 1972).

considered the question of whether it was appropriate to give the Collectors of Land Revenue the duty of administering the small estates which consist exclusively of movable property. It has been agreed upon that since one of the principal objects of the Bill was to clear up arrears in Land Offices, it was essential that the Collector should have jurisdiction whenever land formed part of the small estate. On the other hand it was noted that Collectors have little or no experience in valuing such forms of movable property as shares or partnership assets. Thus, there was a danger that if Collectors had to devote much time to clearing up the estates of such persons as small shopkeepers work in the Land Offices might become congested.

Hence, as a solution to the above problem it was decided that clause 3 of the Bill should exclude any estate consisting solely of moveable property.

The next point considered by the Select Committee was the date at which the estate should be valued. The choice laid between the date of death of the intestate and the date of application for grant of letters of administration. It was pointed out that the advantage of choosing the date of death was first that the date was certain and secondly that the land values could easily be established by reference to other land transactions at the date of death. On the other hand it was not uncommon for distribution to be delayed until as much as thirty

years after death. The intention of the Bill was that Collectors should deal with estates not exceeding five thousand dollars in value. An estate which was worth four thousand dollars at the date of death might have become four times as much, or more at the date of distribution. Valuation at the date of application would ensure that the Collector would not be called upon to deal with an estate which was far outside his jurisdiction when valued at the current rates. Therefore the recommendation of the Select Committee was that the valuation should be as at the date of application as porposed in the original Bill.

When the Report of the Select Committee was adopted[19] by the Legislative Council, the Small Estates (Distribution) Ordinance, 1955 was then passed incorporating clause 3 of the Bill as section 3 of the Ordinance with the following words:

> "s. 3(1) This Part[20] shall have effect only in the Malay States.
>
> (2) For the purposes of this Part a small estate means an estate of a deceased person consisting wholly or partly of immovable property situated in the Malay States and not exceeding five thousand dollars in total value.

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[19] On the 2nd of June 1955.

[20] That is, Part II.

(3) For the purposes of this section the value of the property comprised in an estate shall be deemed to be its value at the date of the filing of a petition for probate or letters of administration or lodging of a petition for distribution under this Ordinance in respect of the same estate, at the date of the filing or lodging of the earliest petition.

(4) In ascertaining the value of the property comprised in an estate no deduction shall be made on account of the debts of the deceased but there shall not be included in the estate for such purposes any property which the deceased held or was entitled to as trustee and not beneficially:

Provided that any land held in the name of the deceased by any form of registered title shall be deemed to be part of his estate whether subject to caveat or not unless such land is expressly registered in his name as representative or as trustee or as guardian."

It is significant to note that section 3 sub-section (1) of the Ordinance did not provide for the extension of Part II to Penang and Malacca and sub-section (2) of the same section only enabled the distribution of estates which did not exceed five thousand dollars in total value.

However, sub-section (2) of section 3 of the Small Estates (Distribution) Ordinance, 1955, was amended by the Small Estates (Distribution) (Amendment) Ordinance, 1959.[21] It was substituted by the following new sub-section:

> "(2) For the purposes of this Part a small estate means an estate of a deceased person consisting wholly or partly of immovable property situated in any state in which this Part has effect and not exceeding ten thousand dollars in total value, but does not include an estate where the total value of the movable comprised therein exceeds five thousand dollars."

Thus, the amendment made in 1959 enabled a Collector of Land Revenue to deal with the distribution of estates up to ten thousand dollars in value and consisting wholly or partly of immovable property; exceeding the limit set in the old sub-section by five thousand dollars. The limit was increased because it was considered that it would be a relief to the poorer section of the community, many of whom live at some distance from the Registries of the Supreme Court.[22] However, the amended sub-section went

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[21] The other sub-sections of section 3 remained intact through except for sub-section (1) which was made to extend to Sabah and Sarawak in 1972.

[22] The Small Estates (Distribution)(Amendment) Bill, 1959.

further by stating that estates consisting of movable property of more than five thousand dollars were excluded from the new definition of small estates. It should also be noted that the above addition was dropped from the definition section in the Small Estate (Distribution) Act, 1955 (Revised - 1972).

Last but not least, a Bill intituled "An Act to amend the Small Estates (Distribution) Ordinance, 1955, and to extend the operation of that Ordinance, as amended to all parts of Malaysia" was introduced in the Dewan Rakyat in 1972, proposing several significant changes to the existing law.[23] Two major proposals were the extension of the operation of the Act to East Malaysia and the increase in the value of a small estate from ten thousand dollars to twenty-five thousand dollars.[24] No reason was expressly given as to the need to increase the value of a small estate but it is submitted that may be due to the rise in the economic status of the people. On an examination of a random selection of probate files[25] whereby

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[23] Presented and read for the first time in the Dewan Rakyat and ordered to be printed, 10th May, 1972. See Malaysia Government Gazette Bills, 1972.

[24] Clauses 2 and 3 of the Small Estates (Distribution) Bill, 1955 (Revised - 1972).

[25] At the Penang Registry, High Court of Malaya.

it was found that the average value of the estates was twenty-four thousand dollars in value. Thus, this finding is indicative of the fact that the majority of people own estates more than ten thousand dollars in value. Those who own small estates very often do not make provision by will without realising that, although the sums are small, they may be vitally important to their survivors.

For the purpose of comparison with the original section 3 sub-sections (1) and (2)[26] the wordings of the present law[27] are as follows:

"s.3(1) This Part shall have effect throughout Malaysia.

(2) For this purpose of this Act a small estate means an estate of a deceased person consisting wholly or partly of immovable property situated in any state and not exceeding twenty-five thousand dollars in total value:

Provided that, until the Minister otherwise orders, this sub-section shall have effect in the states of West Malaysia with the substitution of

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[26] Small Estates (Distribution) Ordinance, No. 34 of 1955. For the exact wordings of section 3 sub-sections (1) and (2) of this Ordinance refer to the earlier part of the sub-heading.

[27] The whole of the 1955 Ordinance is superceded by the Small Estates (Distribution) Act, 1955 (Revised - 1972) w.e.f. 1.11.1972.

the words "ten thousand dollars" for the words "twenty-five thousand dollars".

Thus, in its short history of seven years (1955 to 1972) the definition of what is a small estate has changed no less than three times.

## CONCLUSION

The law relating to grant of probates and letters of administration and the law on distribution of small estates have shown a considerable amount of progress. The constant amendments and substitution for new and better provisions have led to the current laws being consonant with the existing social and economic conditions. Thus, the development of these areas of the law of succession is relatively satisfactory as more attention has been given to them than to the other areas of the same field.

A major criticism that can be directed against the non-Muslim law of intestate distribution and the law of wills, is that they have remained static. Every good law must be a reflection of the values of the society in which it operates and must of necessity be dynamic. While it is clear that the law need not reflect every changing whim and fancy of society, the major changes in its attitudes should be accordingly accommodated. However, since their introduction in 1958 and 1959, the Distribution Ordinance and the Wills Ordinance, respectively, have not been affected by any substantial amendment, while society has undeniably undergone much change.

The Inheritance (Family Provision) Act, 1971 which came into effect in 1972 has served to mitigate some of the

hardships caused by the rigid rules of the Distribution Ordinance. But this is only within the restrictions imposed by the Act, still leaving quite a number of grievances unremedied. Amendments should be made adapting it to local conditions because the 1971 Act is based entirely on a similar English legislation. Moreover, the absence of any reported cases involving this Act, indicates that it has not been taken advantage of.

The area where evidence of development is least is that on the Muslim Law of Succession. The only major form of change imposed on it is the modifications made by customary law. Under Islamic Law, a Muslim is allowed to dispose of one-third of his property by will subject to certain conditions. But there is authority to show that this rule does not extend to the Minangkabaus in Rembau and that the rule of adat (custom) is stricter than that of the Islamic Law.

In the case of Re Dato Ngiang Kulop Kidal, deod.,[1] the Lembaga of the Mungkal tribe in Rembau executed a will by which he purported to dispose the whole of his property to his widow, niece and great-nephew in equal shares. On an application by the great-nephew for the grant of probate, it was decided that the will was duly executed but was nevertheless inoperative because the personal law of the deceased was the Adat Rembau, and this law governs the devolution of estates of deceased persons subject to the adat to the exclusion of wills. Therefore, a person subject

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[1] Taylor, E.M., The Customary Law of Rembau, p. 92.

to recognised matriarchal law i.e. the Adat Rembau in this case, cannot execute a valid will.

On the whole, the development experienced by our law of succession remains unsatisfactory. In order to remedy this situation there should be an equal distribution of attention on the various areas of the law. Undoubtedly, partial progress is not practical. The neglected areas should be taken care of as soon as possible in order to meet the demands of the people. Though the period between 1786 to 1975 saw a lot of changes, it is inappropriate to consider more incorporation of English provisions as sufficient.

APPENDIX

## CIVIL LAW ACT, 1956 (Revised - 1972)

Act 67

First Schedule

(Section 89)

Repeal

| | | |
|---|---|---|
| S.S. Cap. 42 | Civil Law Ordinance | The whole |
| S.S. Cap. 118 | Conveyancing and Law of Property Ordinance | S. 73 |
| F.M.S. No. 3 of 1937. | Civil Law Enactment | The whole |
| F.M.S. Cap. 8 | Probate and Administration Enactment | S. 93(ii) |
| F.M.S. Cap. 19 | Executors (Powers) and Fatal Accidents Enactment | The whole |
| Johore Enactment No. 22 | Probate and Administration Enactment | S. 82 |
| Johore Enactment No. 99 | Fatal Accidents Enactment | The whole |
| Kelantan Enactment No. 15 of 1931 | Executors (Powers) and Fatal Accidents Enactment | The whole |

| | | |
|---|---|---|
| Kedah Enactment No. 2 of 1360 | Fatal Accidents Enactment 1360 | The whole |
| Trengganu Enactment No. 22 of 1356 | Probate and Administration Enactment | S. 44(ii) |
| Federation of Malaya No. 49 of 1951 | Civil Law (Extension) Ordinance, 1951 | The whole |

Section 29 reads:

"The Ordinances and Enactments set out in the First Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule."

APPENDIX

## PROBATE AND ADMINISTRATION ORDINANCE, 1959

No. 35 of 1959

Second Schedule

(Section 89)

| Reference | Short title | Extent of repeal |
|---|---|---|
| S.S. Cap. 51 | The Probate and Administration Ordinance | The whole |
| F.M.S. Cap. 8 | The Probate and Administration Enactment | The whole |
| Johore Enactment No. 22 | The Probate and Administration Enactment | The whole |
| Kedah Enactment No. 1 | Enactment No. 1 (Administration of Estates) | The whole |
| Trengganu Enactment No. 22/1356 | The Probate and Administration Enactment | The whole |
| Kelantan Enactment No. 2 of 1930 | The Administration Enactment, 1930 | The whole |
| Perlis No. 1 of 1338 | The Administration of Estates Enactment, 1338 | The whole |
| Federation of Malaya Ordinance 34 of 1955 | The Small Estates (Distribution) Ordinance, 1955 | Part IV thereof |

Section 89 reads:

"The Ordinances and Enactments specified in the Second Schedule hereto are hereby repealed to the extent therein specified."

## APPENDIX

## PROBATE AND ADMINISTRATION ORDINANCE, 1959

No. 35 of 1959

## COMPARATIVE TABLE

Abbreviations

A = Administration of Estates Act, 1925, of the United Kingdom.

E = Probate and Administration Enactment (Cap. 8) of the Federated Malay States.

O = Probate and Administration Ordinance (Cap. 51) of the Straits Settlements.

S = Supreme Court of Judicature (Consolidation) Act, 1925 of the United Kingdom.

SE = Small Estates (Distribution) Ordinance, 1955 (Federation of Malaya 34 of 1955).

| Section | Source |
|---|---|
| 1 | Common Form |
| 2 | O2 |
| 3 | S8 |
| 4 | O6 |
| 5 | A15 |

| Section | Source |
|---|---|
| 6 | A8 |
| 7 | A5 |
| 8 | 03 |
| 9 | 04 |
| 10 | 05 |
| 11 | A6 |
| 12 | A7 |
| 13 | A14 |
| 14 | 024 |
| 15 | 011 |
| 16 | 012 |
| 17 | 015, A19 |
| 18 | 016 |
| 19 | 019, S163 |
| 20 | 020 |
| 21 | 021 |
| 22 | 022 |
| 23 | 023 |
| 24 | 025 |
| 25 | 08 |
| 26 | 09 |
| 27 | 010 |
| 28 | 026 |
| 29 | 013, 14 |
| 30 | S162 |
| 31 | A21 |

| Section | Source |
|---|---|
| 32 | A17 |
| 33 | 032 |
| 34 | 031 |
| 35 | 028, 35 |
| 36 | 029 |
| 37 | 030 |
| 38 | E81 |
| 39 | A9 |
| 40 | S159 |
| 41 | 053 |
| 42 | 055 |
| 43 | 057 |
| 44 | 058 |
| 45 | 036 |
| 46 | E35 |
| 47 | 038 |
| 48 | 039 |
| 49 | 040 |
| 50 | 041 |
| 51 | 043 |
| 52 | 045 |
| 53 | 046 |
| 54 | 047 |
| 55 | 048 |
| 56 | 049 |

| Section | Source |
|---|---|
| 57 | 050 |
| 58 | 051 |
| 59 | E93 |
| 60 | E94 |
| 61 | E95 |
| 62 | A25 |
| 63 | E148 |
| 64 | A27, 37 |
| 65 | A28 |
| 66 | A29 |
| 67 | A32 |
| 68 | A33 |
| 69 | A34 |
| 70 | A35 |
| 71 | A39 |
| 72 | A36 |

## APPENDIX

## DISTRIBUTION ORDINANCE, 1958

No. 1 of 1958

Schedule

(Section 10)

The Enactments are hereby repealed

| | |
|---|---|
| F.M.S. Cap. 71 | The Distribution Enactment |
| Johore Enactment No. 13 of 1935 | The Distribution Enactment 1935 |
| Kelantan Enactment No. 15 of 1930 | The Distribution Enactment 1930 |
| Kedah Enactment No. 22 of 1354 | The Distribution Enactment |

Section 10 reads:

"The Enactments set out in the Schedule to this Ordinance are hereby repealed."

APPENDIX

SMALL ESTATES (DISTRIBUTION) ORDINANCE, 1955

No. 34 of 1955

Second Schedule

(Section 32)

Repeal

| (1) | (2) | (3) |
|---|---|---|
| | Short title | Extent of repeal |
| F.M.S. Cap. 8 | The Probate and Administration Enactment | Chapter XIX |
| Johore No. 6 of 1936 | The Small Intestates Enactment, 1936 | The whole |
| Kedah No. 56 | Enactment No. 56 (Land) | Section 65 |
| Kedah No. 1 | Enactment No. 1 (Administration of Estates) | Sections 19, 20, 21 and the words "or Tuntutan" in section 22 |
| Kelantan No. 2 of 1930 | The Administration Enactment, 1930 | Section 23 |
| Perlis No. 11 of 1356 | The Land Enactment, 1356 | Section 98 |

| (1) | (2) Short title | (3) Extent of repeal |
|---|---|---|
| Perlis No. 1 of 1338 | The Administration of Estates Enactment, 1338 | Sections 17 and 18 and the words "or Magistrate" in sections 19, 20, 22, 70 respectively and the words "or the Magistrate" whenever occuring in section 30 |
| Sabah Cap. 1 | The Administration of Native and Small Estates Ordinance | The whole |
| Trengganu Enactment No. 22 of 1356 | The Probate and Administration Enactment | Section 19(ii) (c) and (d) |
| Trengganu Enactment No. 3 of 1357 | The Land Enactment | Section 46 |

Section 32(1) reads:

"The Enactments mentioned in the first and second columns of the Second Schedule are repealed to the extent specified in the third column thereof."

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