

**THE DEVELOPMENT OF THE LAW OF SUCCESSION
IN WEST MALAYSIA**

by

SHANSLAH AHMAD

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

020224

**Faculty of Law
University of Malaya**

September, 1976.

PERAKUAN KEIZINAN

Dalam mengemukakan Kertas Projek ini bagi memenuhi sebahagian dari kehendak-kehendak Peraturan untuk mendapat ijazah Sarjana Muda Undang-Undang, Universiti Malaya, saya yang bertandatangan di bawah, dengan ini mengesahkan bahawa saya telah bersetuju supaya perpustakaan-perpustakaan di Universiti Malaya memberi kebenaran dengan bebasnya kepada sesiapa yang hendak membuat rujukkan dan kajian ataupun untuk rujukkan dan kajian terhad. Seterusnya, saya juga bersetuju bahawasanya kebenaran untuk menyalin, memadan, menyedut atau menggunakan bahan-bahan kajian dalam Kertas Projek ini untuk maksud-maksud akademik bolehlah dibenarkan oleh Dekan, Fakulti Undang-Undang mengikut budibicaranya. Adalah difahamkan bahawa penyalinan atau pencetakan Kertas Projek ini dalam apajua bentuk sekalipun untuk maksud-maksud keuntungan tidaklah dibenarkan, melainkan dengan kebenaran bertulis dari saya.

Fakulti Undang-Undang
Universiti Malaya.


.....
(SHAMSLAH AHMAD)

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concerned only with the development of the law I have not included the present statutes in the appendix but only the repealed laws.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

CONTENTS

	Page
Preface	ii
List of Cases	vi
List of Statutes	viii
INTRODUCTION	x
History of the Law	=
General Nature, Scope and Purpose of the Research	xi
CHAPTER I	
THE RECEPTION OF ENGLISH LAW	1
Introduction	1
A. The Straits Settlements	2
Statutory Introduction of English Law	2
B. The Malay States	8
The Introduction of English Law	10
C. The Civil Law Enactments	13
CHAPTER II	
THE WILLS ORDINANCE, 1959	15
Historical Background	15
The Wills Bill, 1959	16
Scope of the Wills Ordinance, 1959	18
Comparison of certain Provisions of the Laws	18

CHAPTER III

GRANT OF PROBATES AND LETTERS OF ADMINISTRATION 23

Introduction 23

Development of the Law 23

CHAPTER IV

ISLAMIC LAW OF SUCCESSION 32

Development of the Law in the Straits Settlements 32

Development of the Law in the Malay States 37

Testate Succession 38

CHAPTER V

NON-MUSLIM LAW OF INTESTATE DISTRIBUTION 43

Introduction 43

A. Distribution Ordinance, 1958 44

Historical Background 44

The Distribution Bill, 1957 45

The Report of the Select Committee 46

Comments 50

Scope of the Distribution Ordinance, 1958 51

B. The Inheritance (Family Provision) Act, 1971 52

Reasons for its Introduction 52

Scope of the Act 54

Comment 55

CHAPTER VI

DISTRIBUTION OF SMALL ESTATES	57
Why Small Estates	57
The Small Estates (Distribution) Bill, 1955	58
The Definition of Small Estates	62
CONCLUSION	70
APPENDIX	73
BIBLIOGRAPHY	84

LIST OF CASES

	Page
<u>Dato Ngiang Kulop Kidal, Re (E.M. Taylor, The Customary of Rembau) 92</u>	71
<u>Duff Development Co. Ltd. v. Government of Kelantan (1924) A.C. 797.</u>	9
<u>Fatimah v. Logan (1871) 1 Ky. 255.</u>	3
<u>Haji Abdul Rahman v. Mohamed Hassan (1917) A.C. 209</u>	12
<u>Haleemah v. Bradford (1876) Leic. 383</u>	32
<u>In The Goods of Abdullah (1835) 2 Ky. Ecc. 8</u>	41
<u>Kamoo v. Bassett (1835) 1 Ky. 1</u>	3
<u>Lee Joo Neo v. Lee Eng Swee 4 Ky. 325</u>	43
<u>Leonard v. Nachianea Chetty (1923) 4 F.M.S.L.R. 265</u>	11
<u>Mighell v. Sultan of Johore (1894) 1 Q.B. 147</u>	9
<u>Moraiss v. de Souza (1838) 1 Ky. 29</u>	32
<u>Motor Emporium v. Arumugan (1933) M.L.J. 276</u>	13
<u>Ong Cheng Neo v. Yap Kwan Seng (1897) 1 S.S.L.R. Supp. 1</u>	10
<u>Que Hong Lian Neo v. See Tiang Tin & Ons. (1927) 1 J.L.R. 9</u>	16
<u>R. v. Willans (1858) 3 Ky. 16</u>	3,5,6
<u>R. v. Yeoh Boon Leng (1890) 4 Ky. 630</u>	3

	Page
<u>Rodyk v. Williamson</u> (1834) unreported case	32
<u>Scully v. Scully</u> (1890) 4 Ky. 602	3
<u>Shaik Abdul Latif v. Shaik Elias Bux</u> (1916) 1 F.M.S.L.R. 204	41
<u>Siti binte Yatin v. Mohamed For bin Buyai</u> (1928) 6 F.M.S.L.R.	135
<u>The Will of Yap Kwan Seng, Re</u> (1924) 4 F.M.S.L.R. 313	12

LIST OF STATUTES

	Page
tion of Estates Ordinance, (S.S.), 1906	24
tion of Muslim Law Enactment, (Malacca), of 1959	37
tion of Muslim Law Enactment, (Penang), of 1959	37
ority Act, Act 21	31, 40
Ordinance, 1878	6
Ordinance, 1909	7
Ordinance, Cap. 42 of 1936 Revised Edition	7
Enactment, No. 3 of 1937	13
(Extension) Ordinance, No. 49 of 1951	13
Ordinance, No. 5 of 1956	17, 14
Act, Act 67	2, 7, 14
inance, No. 43 of 1948	29
ion Ordinance, No. 1 of 1958	43, 44, 45, 47, 51, 52
al Charter of Justice, 1807	2, 3, 4, 5, 23, 32
ce (Family Provision) Act, 1 and 2 e. 45	53
ce (Family Provision) Act, Act 39	43, 52, 54, 55
arriage Ordinance, (S.S.), No. V of	32, 33

LIST OF STATUTES

	Page
Administration of Estates Ordinance, (S.S.), 1906	24
Administration of Muslim Law Enactment, (Malacca), No. 1 of 1959	37
Administration of Muslim Law Enactment, (Penang), No. 3 of 1959	37
Age of Majority Act, Act 21	31, 40
Civil Law Ordinance, 1878	6
Civil Law Ordinance, 1909	7
Civil Law Ordinance, Cap. 42 of 1936 Revised Edition	7
Civil Law Enactment, No. 3 of 1937	13
Civil Law (Extension) Ordinance, No. 49 of 1951	13
Civil Law Ordinance, No. 5 of 1956	17, 14
Civil Law Act, Act 67	2, 7, 14
Court Ordinance, No. 43 of 1948	29
Distribution Ordinance, No. 1 of 1958	43, 44, 45, 47, 51, 52
First Royal Charter of Justice, 1807	2, 3, 4, 5, 23, 32
Inheritance (Family Provision) Act, 1 and 2 Geo. 6 c. 45	53
Inheritance (Family Provision) Act, Act 39	43, 52, 54, 55
Muslims Marriage Ordinance, (S.S.), No. V of 1880	32, 33

	Page
Muslims Ordinance, (S.S.), No. 26 of 1924	36
Muslims Ordinance, (S.S.), 1936 (Cap. 57)	36
Parsee Intestate Succession Ordinance, (S.S.), No. 10 of 1865	51
Probate and Administration Enactment, (F.M.S.), No. 4 of 1920	23, 24, 25, 27
Probate and Administration Ordinance, (S.S.), No.24 of 1935	24, 27, 28
Probate and Administration Ordinance No. 35 of 1959	23, 24, 27, 28, 30, 31, 39
Probate and Administration Act, Act 67	23, 24, 28, 29, 30, 31
Second Royal Charter of Justice, 1826	4, 23
Small Estates (Distribution) Ordinance, No. 34 of 1955	27, 29, 61, 62, 64, 66, 67, 68
Small Estates (Distribution)(Amendment) Ordinance, 1959	62, 66, 68
Small Estates (Distribution) Act, Act 98	58, 62, 67
Statute of Distribution, 1670 (22 and 23 Charles II, c. 10)	32, 44
Third Royal Charter of Justice, 1855	6
Wills Act, 1837 (7 Will. 4 and 1 Viet., c. 26)	15, 16, 18, 19, 22
Wills Enactment, (F.M.S.), No. 5 of 1938	15, 18, 19, 20, 21
Wills Ordinance, (S.S.), Cap. 53	15, 18, 19, 20, 21
Wills Ordinance, No. 38 of 1959	15, 16, 18, 19, 20, 21, 22

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 matter principally through a discussion of the statutes governing this branch of the law. In our country, the existing materials in this field cover only individual aspects and, even so, are either short and 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

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 Gaunter, a magistrate, a Chinese male named Aphoe and a Chinese lady, Kehin, were found guilty of adultery and as punishment their heads were shaved and they were made to "stand twice in Pillory 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 stood in 1807 insofar as it was suitable to local conditions and circumstances.³

²As Penang was then known.

³This interpretation was given in the following cases appearing in Kyshe's Law Reports: Karoo 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

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.