

this sort of plea, it is bound to hamper his activities. It follows that as a rule this plea is only set up by people who are in some financial difficulty. At times of severe fluctuations in the market, little epidemics of this plea are quite usual. They start with a brave show of fight and generally one or two actions will go on to trial but after the first trial or two they almost invariably split upon the same rock namely that it is necessary to show that both sides are gambling, not only the merchant but the dealer also.

In Singapore Suit No. 167 of 1907—*The Mercantile Bank of India Limited v. A. R. M. M. Ramasamy Chitty* the Plaintiffs claimed against the Defendant for the price of foreign exchange sold by them to the Defendant. The Defendant pleaded gaming or wagering contract. In a short written judgment which is still in the record Fisher J. decided "I am clear that so far at any rate as the Plaintiff Bank is concerned such a contract as this is not one by way of gaming or wagering." Almost all the authorities on the law are referred to in the case of *Syn Thong & Co. v. Tong Joo (Hoo) & Co.* reported in 1929 S.S.L.R. at p. 39. That case concerned forward contracts for the purchase and sale of rubber. The matter was fully argued and it seems to have been generally agreed that most of the law on the subject is satisfactorily set out in the case of *The Universal Stock Exchange Limited v. David Strachan* 1896 A.C. p. 166. In the words of Cave J., approved by the House of Lords "to be a gambling transaction such as the law points at, it must be a gambling transaction in the intention of both the parties to it"; and it is almost always very difficult to prove that the other side were gambling. But it has to be borne in mind that the fact that the purchaser has the option of really taking delivery of the stock, shares, foreign exchange, or rubber as the case may be does not necessarily prevent the transaction being an agreement for gaming or wagering. (*In re Gieve* 1899 1 Q.B.794). Recently there has been another little epidemic of foreign exchange contract cases in Singapore in which the "gaming or wagering" plea has been advanced in defence; but exchange is always purchased from banks and it is very difficult to prove that a Bank has been gambling.

One has heard some expressions of opinion that it is unfortunate that all these cases have collapsed before Judgment, thereby preventing the delivery of an authoritative judgment which would be available as a precedent. The writer does not take that view. The law on this subject is already fairly completely reviewed in the local rubber case mentioned above (*Syn Thong & Co.*) and there is no difference in the law applicable which arises merely because the contracts concerned in one case rubber and in the other, foreign exchange. The question whether a contract is or is not a gaming or wagering contract is properly not a question of law at all but a question of fact which must be decided on the circumstances of each particular case.

J. L.



#### PROPOSED APPOINTMENT OF ONE CHIEF JUSTICE FOR MALAYA.

As a matter of general interest, the full text of a Memorandum read by Mr. E. D. Shearn on behalf of the F.M.S. Bar Committee at a conference of Delegates from Malayan public bodies on the proposed policy of decentralisation in the Federated Malay States is reproduced below.

The Federated Malay States Bar Committee as such has no political views but we conceive it to be our duty to make representations whenever any proposals are made which will or which may have far reaching effects involving among other things the administration of law and justice in the Federated Malay States. We have learnt that in the train of the political and administrative changes with which this meeting is primarily concerned there has followed a proposal for the centralization of the Courts by the appointment of one Chief Justice stationed in Singapore who shall be Chief Justice of the Colony and of the Federated Malay States.

As so often happens those intimately concerned have not been consulted in advance and the opinion of bodies well qualified to offer suggestions or warnings has not been sought; that is to say the proposals to which I refer have not been submitted to the Bar Committees of Singapore, Penang and the Federated Malay States for consideration and comment.

We are in the dark as to the exact limit to which the proposals extend. It is not known whether the suggestion is merely that which I



have already stated or whether in fact fusion of the Courts of the Straits Settlements and of the Federated Malay States is aimed at.

My Committee has considered both of these suggestions and after full deliberation we are unanimously of opinion that they are undesirable in the extreme and are open to the very strongest objection.

I will take first the matter of the fusion of the two Courts into one Supreme Court of Malaya under a single Chief Justice.

To understand the nature of the criticism from a juristic point of view I deal with the present Courts which it may be proposed to merge and I suggest that a perusal of the matters which I set out is sufficient to show the juristic impossibility of merging these Courts.

#### **The Supreme Court of the Straits Settlements.**

In the Colony the fount of justice is His Majesty the King and a Judge of the Supreme Court when sitting in his Court represents the person of His Majesty.

The Court is a Royal Court of Record established by Royal Charter of Justice though re-constituted by local Ordinance. It has practically all the powers of the Supreme Court of England; and has inherent in it those great powers and duties with which the constitutional and common law of England has endowed the Supreme Court of England. Thus, for instance, it can (and does when necessary) issue the prerogative writs of mandamus, prohibition and quo warranto. Its process runs in the name of His Majesty the King.

The basis of the law administered in the Colony is the common law of England as it stood in 1826 and as extended by the Civil Law Ordinance. The rules of equity are applied fully by the Court save in so far as their application is restricted by the rules of evidence contained in the Evidence Ordinance.

#### **The Supreme Court of the Federated Malay States.**

In a Malay State the fount of justice is the Ruler. The Supreme Court of the Federated Malay States is the creature of the joint enactment of the Rulers of the four States in Council, It has no powers save such as are by Enactments

conferred upon it and only such inherent powers as are necessary to the proper administration of such justice as it is empowered to administer.

Its process runs in the name of the Judge under his hand and the Seal of the Court.

The basis of the law administered in the Federated Malay States is Mahomedan law tempered by Malayan custom, that is to say, the Hukum Shara, the Kanun and the Malayan Hukum Adat. All other laws are (or should be) statutory.

How two such entirely different Courts and jurisdictions are to be merged into a hybrid I respectfully fail to see.

It is obviously anomalous that there should be one Court for several countries politically distinct and with different laws. Imagine a single court for England, Scotland and Northern Ireland.

It is to be remembered that if the proposal goes through it must follow that there will be one Bar with advocates and solicitors who will practise up and down the country without being separately admitted in the Federated Malay States and the Straits Settlements.

This will save the pocket of members of the United Bar of Malaya but I seriously doubt whether it will be in the interests of the public for a practitioner trained, for instance, in the Straits Settlements to follow his profession in the Federated Malay States, with the laws of which he may be only slightly acquainted.

In the Federated Malay States the Bar and the public, in my humble opinion, today suffer from a lack of specialists and any policy is to be deprecated which will tend to cause practitioners to be to an even greater degree than now, jacks of all trades and masters of none.

The Singapore Bar Committee discussed this suggestion at a meeting on the 30th January 1932 and were unanimously of the opinion that the proposal to have one Supreme Court for Malaya was unfeasible and open to the strongest criticism on both juristic and political grounds.

I come now to the other proposal namely that there should be centralization by the appointment of one Chief Justice of the Colony and of the Federated Malay States.



This is a change but it is no reform.

There is at present in existence a measure of inter changeability of the Judges and this proposal will give no remedy for whatever shortage of Judges there is nor is it to be anticipated that it can make the work of the Judges, the Bar or litigants any the more convenient. At present discussions take place between the Chief Justice of the Straits Settlements and the Chief Justice of the Federated Malay States about judges going away from their fixed station to give assistance elsewhere or to make up a Court of Appeal and each Chief Justice frequently considers the objections of the other unnecessary, but in my view the Chief Justice on the spot is in a better position to judge of the calls upon the time of his Puisne Judge or Judges than the other Chief Justice. If there is a Chief Justice for Malaya stationed in Singapore I see the requirements of the Federated Malay States as regards allocation of judicial time being disregarded. The absence of judges and in consequence the impossibility of proceeding with litigation directly affects the public. I remember a time when Seremban had no judge but the Court work was done spasmodically from Kuala Lumpur.

I doubt if any one who remembers the period will advocate its repetition.

Supervision could not properly be had at the hands of a Single Chief Justice stationed in the Colony. It is of the greatest importance that the Judicial Officer in prime control of the Courts of the Federated Malay States should have a knowledge of local laws and court procedure of the manners and customs of the litigants peculiar to the Courts of the Federated Malay States. There is no security that a Chief Justice stationed in Singapore will have that knowledge and if he primarily resides in Singapore he will not acquire it. The qualification and experience which are necessary for the Chief Justice of the Colony do not of themselves fit him to be Chief Justice of the Federated Malay States.

For the successful allocation of judicial time in the Federated Malay States a knowledge of the geographical conditions is at times essential. For

the encouragement and development of our system of law and practice it is highly desirable that the Chief Judicial Officer of the Federated Malay States should be easily accessible to the other Judges in the Federated Malay States and to the Bar. The fact that our system of law and practice is not well settled and well established makes it all the more essential that there should be personal and particular attention to the problems from day to day arising. With one Chief Justice stationed in Singapore his personal and particular attention is not to be expected to the same degree as with a Chief Justice of the Federated Malay States stationed in the Federated Malay States and concerned only with the affairs of the Federated Malay States.

As a measure of economy the suggestion is negligible. There would be any way a Puisne Judge in Kuala Lumpur in place of the Chief Justice and the economy effected in money would be of a few hundred dollars a month. In the result there would be no economy. An ill organized assize or Court of Appeal would beyond all question effectually nullify the small saving effected by the abolition of the post of Chief Justice of the Federated Malay States. While the lack of proper supervision to be anticipated if the suggested change were given effect to would be dearly bought if in fact some three hundred dollars a month were saved. If the prime consideration is economy I would quote the words of Professor Sir W. S. Holdsworth when dealing recently with the question of Judges' salaries.

"But a good thing is never cheap and to pay sufficient to get a good thing is often the truest economy for thereby expensive disasters are avoided."

Those of us who are well acquainted with the administration of law and justice in this country can not urge too strongly upon those responsible for the destinies of these Federated Malay States to be at pains to safeguard the vital work performed in our Courts and we warn them as clearly as we can against ill considered and doubtful experiments which have not been submitted to bodies well able to judge of them and which when considered are condemned by them.