RECEPTION OF ENGLISH LAW UNDER SECTIONS 3 AND 5 OF THE CIVIL LAW ACT 1956 (REVISED 1972)

An interesting question which has given rise to a certain amount of academic discussion[1] is the extent to which Malaysian courts can adopt English law. Sections 3 and 5 of the Civil Law Act (Revised 1972) allow the courts to apply English law in certain circumstances but the exact scope of the provisions is far from clear. It is regrettable that the Commissioner of Law Revision did not take the opportunity to express his intentions with a greater degree of certainty. Although the Act is subject to a number of ambiguities, the discussion in this note will be restricted to two issues: first, whether section 3(1)(a) of the Civil Law Act, 1956 envisages the importation of English statutes passed before the 7th April, 1956; and secondly, the related issue of whether there is any difference between section 3(1)(a) and section 5(1) of the Act.

Section 3(1)(a) provides that in the absence of any written provision in Malaysia the courts shall "in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956." Does this subsection purport to incorporate the whole of English law, including statutes which may have modified the common law, or does it have a more restricted application? Professor Bartholomew[2] writing on section 3(1) of the Civil Law Ordinance, 1956[3] which is in *pari materia* with section 3(1)(a) of the Revised Act, submits that English legislation is applicable under the Ordinance. He argues that the admissibility of English statutes is a matter of "sheer necessity" and that to interpret section 3(1) in such a way that

[1] See Sheridan, *Malaya and Singapore, The Borneo Territories. The Development of their Laws and Constitution* (1961) p. 19; G.W. Bartholomew, *The Commercial Law of Malaysia* (1965) p. 21-39.

[2] *Ibid.*

[3] "Save in so far as other provision has been made or may hereafter be made by any written law in force in the Federation or any part thereof the Court shall apply the common law of England and the rules of equity as administered in England at the date of the coming into force of this Ordinance [7 April 1956]: Provided always that the said common law and rules of equity shall be applied so far only as the circumstances of the States comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."

only the unreformed version of English law can be received would be to assimilate common law rules which have been found to be inadequate in England. He concludes that the expression 'common law' simply means the law administered by the Courts of Common Law – whatever its nature.

The term "common law" is admittedly an expression that is susceptible of more than one meaning. The definition which Prof. Bartholomew adopted to suit his argument is unquestionably wide enough to cover statutes.[4] But it is submitted that this is not the meaning commonly adhered to. The term "common law" is more frequently used in contra-distinction to statute law and is in fact a body of principles built up from the decision of judges in Common Law Courts. Blackstone[5] describes the common law in his commentaries:

> "This unwritten or common law is properly distinguishable into three kinds: 1) General customs; which are the universal rule of the whole kingdom, and form the common law in its stricter and more usual signification. 2) Particular customs; which for the most part affect only the inhabitants of particular districts. 3) Certain particular laws; which by custom are adapted and used by some particular courts, of pretty general and extensive jurisdiction."

He goes on to say, "all these doctrines . . . are not set down in any written statute or ordinance, but depend morely upon immemorial usage, that is, upon common law, for their support." A contemporary definition, entirely consistent with Blackstone's, has been offered by Glanville Williams. He states:

> "Originally this meant the law that was not local, that is, the law that was common to the whole of England. This may still be its meaning in a particular context, but it is not the usual meaning. More usually the phrase will signify the law that is not the result of legislation, that is the law created by the custom of the people and the decisions of the Judges."[6]

The definition accepted by Professor Bartholomew on the other hand, is at best of historical interest and has never gained currency. Moreover it is a general rule of construction that words in a statute must be construed not only in their popular sense but also in the sense they bore when the statute was passed.[7] In 1956 when the Civil Law

[4] E. Jowitt, *The Dictionary of English Law* (1959), which defines common law as ". . . that part of the law of England which, before the Judicature Acts, 1873-75, was administered by the common law courts. . . as opposed to equity (q.v.) or that part of the law administered by the Court of Chancery."

[5] 1 Comm. 67.

[6] *Learning the Law* (7th Ed.) (1963) p. 25.

Ordinance came into force, the term 'common law' was universally employed to distinguish case law from statutes and this, it is submitted, on principle must be the meaning intended by the Civil Law Ordinance 1956.

The Malaysian Courts seem to confirm the view that sections 3(1) does not admit of statutes. In *Mokhtar* v. *Arumugam,*[8] Thompson C.J., Smith J. and Ong J. refused to entertain any arguments based on an English statute. Smith J., delivering the judgement of the court, said: "It is quite clear that in England the power of the court to award damages in the nature of interest for delay in returning specific goods is a remedy conferred by statute and not one available at common law. This relief, being a creature of English statute, is not available here. See section 3(1) of the Civil Law Ordinance, 1956."[9] In *Ong Guan Hua* v. *Chong,*[10] which raises the question of the validity of securities given in respect of gaming contracts, Thompson C.J. reiterated his views. It was implicit in his Lordship's judgement that unless the English Gaming Acts of 1710 and 1835, which provided that every security given in respect of games shall be deemed to have been given for an illegal consideration, were enacted locally, as the English Gaming Acts of 1845 and 1892 were in the Civil Law Ordinance, 1956, they will not be applicable here.

A recent Privy Council decision, *Leong Bee & Co.* v. *Ling Nam Rubber Works,*[11] makes some interesting observations on this point, but unfortunately the Board did not spell out its position exactly. Sir Frank Kitto agreed that counsel for the appellants was right in conceding that in Malaysia the common law presumption that,

> "a fire which began on a man's property arose from some act or default for which he was answerable has no application in Malaysia and has no application there at least since the coming into force of the Civil Law Ordinance 1956, s. 3. The reason is that having been displaced by statute, first by 6 Anne, C. 31, s. 6 and later by the Fires Prevention (Metropolis) Act 1774, 14 Geo. 3. C. 78, 2. 86, the presumption formed no part of the common law of England as administered in England at that date. Upon the appellants lay the burden of proof as to both negligence and nuisance. . . ."[12]

An immediate difficulty arises: if the common law has been repealed

[7] *Maxwell on Interpretation of Statutes* (11th Ed. by Wilson and Galpin) (1962), p. 54, 58.

[8] [1959] 2 M.L.J. 232.

[9] Prof. Bartholomew dismisses this case as untenable. See Bartholomew, *op. cit.* n. 1 at p. 32.

[10] [1963] 29 M.L.J. 6, 7.

[11] [1970] 2 M.L.J. 45.

[12] *Ibid.*, p. 46.

by a statute before 1956, then what law is applicable in Malaysia? It cannot be the pre-1774 common law for that law formed no part of the common law on the 7th day of April 1956. If the Privy Council did not apply the common law, then what law did it invoke to impose the burden of proof on the plaintiff as to both negligence and nuisance? By imposing the burden of proof on the plaintiff, it is submitted, all the court did was simply invoke the pervasive principle that a plaintiff must always prove his case. "[I]t is of the nature of things that the burden of proving negligence should be the plaintiff's."[13] But in the absence of such a general common law principle, what rule applies in Malaysia when the common law has been abrogated in England by a statute? If it does not fall within section 5(1) or any other sections,[14] then there appears to be a *lacuna* in the law. This is not a unique situation in the Malaysian context. It may be suggested that the Law Revision Commissioner, whose terms of reference are not limited to English models, form a committee to investigate ways of closing such gaps, possibly by drawing on examples from other legal systems.[15]

Under the terms of the Revised Act (1972), Professor Bartholomew's view becomes even more difficult to justify. Section 3(1)(a) deals with West Malaysia only and it refers to ". . . the common law of England and the rules of equity. . . " as being applicable there; whereas section 3(1)(b) and (c) which apply to Sabah and Sarawak respectively, refer to ". . ..the common law of England and the rules of equity, *together with statutes of general application*. . . ."[16] The conclusion appears inescapable that the legislature, by deliberately including the word "statutes" in sections 3(1)(b) and 3(1)(c) while retaining the words "common law . . . and rules of equity" in 3(1)(a), perceived a distinction between the two heads.

An alternative argument in support of this position is that to admit English statutes under section 3(1)(a) would be to render many of the provisions in the Civil Law Act 1956 redundant. The Act incorporates a number of English statutory provisions[17] which would have been unnecessary if s. 3(1)(a) had been intended to admit of statutes. Most importantly, section 5(1) of the Act would also be made redundant.

[13] Per Mackenna J. in *Mason* v. *Levy Auto Parts* [1967] 2 All E.R. 62, 67.

[14] See *infra*, p.46.

[15] See, for example, Ahmad Ibrahim, "The Civil Law Ordinance in Malaysia" [1971] 2 M.L.J. lviii.

[16] Emphasis added.

[17] For example: s. 26(2) and s. 26(4) of the Civil Law Act, 1956 enacts s. 18 of the English Gaming Act 1845 and s. 1 of the English Gaming Act 1892, respectively; ss. 15 and 16 enact the English Law Reform (Frustrated Contracts) Act 1943; s. 12 enacts the English Law Reform (Contributory Negligence) Act 1945.

Section 5(1) provides:

> "In all questions or issues which arise or which have to be decided in the States of West Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea marine insurance, average, life insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law."

Professor Bartholomew, having submitted that section 3(1) of the Ordinance should admit of statutes was then obliged to stretch his view to its inevitable conclusion, that section 5(1) is redundant. He concluded "... that in the Malay States section 5(1) of the Civil Law Ordinance is redundant on the ground that the law applicable under that section is the same as would be applicable under section 3(1), namely, the law of England as it stood on 7th April 1956 subject to local legislation and a local circumstances proviso."[18] It is submitted that this contention is untenable. Surely, a more reasonable construction of the statute would be to read it as a whole and to avoid redundancy as far as possible. As Lord Greene remarked,[19]

> "I need not cite authority for the proposition that prima facie every word in an Act of Parliament must be given an effective meaning of its own. Whether or not the legislature in any given case has condescended to tautology is a question the answer to which depends on the language used, but, in the absence of an appropriate context, one statutory provision which is expressed in entirely different language from another, whether in the same or a different section, is not to be interpreted as repetitive or unnecessary."

The wordings of section 3(1)(a) and section 5(1) are quite distinct. In section 3(1)(a) the law applicable is "... the common law of England and the rules of equity...". Section 5(1) maintains "... the law to be administered shall be the same as would be administered in England in the like case...". The fact that the legislature employed different terminology in each section clearly indicates that the meaning of each one is different. It is apparent that section 5(1) allows the importation of statutes,[20] and equally apparent that section 3(1)(a) was not intended to have such an effect.

[18] *Op. cit.* n. 1, p. 32.

[19] *Hill* v. *William (Park Lane) Ltd.* [1949] 2 All E.R. 452, 464-5;

[20] *Re Low Nai Brothers* [1969] 1 M.L.J. 171. Gill J. (as he then was) held that s.

Finally, under the Civil Law Ordinance, 1956 section 5(1) allows the reception of English statutes passed at the date of coming into force of the Ordinance, i.e. the 6th of April, 1956. When the Ordinance was revised and became the Civil Law Act 1972, the date appointed for coming in force was 1st April 1972. Section 10(2) of the Revision of Laws Act, 1968 provides:

> "On and after the date from which a revised law comes into force, such revised law shall be deemed to be and shall be without any question whatsoever in all courts and for all purposes whatsoever the sole and only proper law in respect of matters included therein and in force on that date."

Whereas section 3(1) of the Revised Act specifically mentions the "... 7th day of April, 1956", section 5(1) continues to provide that "... the law to be administered shall be the same as would be administered in England in the like case *at the date of the coming into force of this Act*, if such question or issue had arisen or had to be decided in England..."[21] Could it be taken to mean that the new dateline under sections 5(1) of the Revised Act is 1st April 1972, with the result that English statutes passed after 7th April 1956 are now law in West Malaysia? The answer is uncertain for immediately following the preamble to the Act two dates are mentioned in square brackets: "[West Malaysia – 7th April 1956; East Malaysia – 1st April 1972]" The preferable view is that the new date applies only to East Malaysia and the position in West Malaysia remains unchanged.[22]

Joseph Chia*

115(2) of the English Companies Act 1947 was applicable in West Malaysia as being part of the mercantile law. See also *Ngo Bee Chan* v. *Chia Teck Kim* [1912] 2 M.C. 25, which subsequently has been criticised on another ground.

[21] Emphasis added.

[22] Section 5(1) specifically excludes Malacca and Penang from its ambit.

*Assistant Lecturer, Faculty of Law, University of Malaya. The writer wishes to thank Mr. Visu Sinnadurai, LL.M.(S'pore), for some useful suggestions.