Reid's case or alternatively, it substantially changes the definition of adultery. Though this case is not binding on Malaysian courts, it exercises persuasive authority and is especially important because so many similar cases arise here. Adultery is a ground under all the ordinances in force in Malaysia relating to divorce (see s. 7, The Divorce Ordinance, 1952; Ordinance No. 74 of 1952, States of Malaya; s. 6, The Matrimonial Causes Ordinance, 1932, Chap. 94, Laws of Sarawak; s. 7, The Divorce Ordinance, 1963, Ordinance No. 7 of 1963, North Borneo (Sabah). In Sabah adultery is the only ground available to a wife in circumstances comparable to that in *Drammeh's* case and as such *Drammeh's* case would be most significant there. In Sarawak, a wife has the alternative of proceeding under s. 6(2) of The Matrimonial Causes Ordinance which gives the court a discretion to grant a decree of dissolution of marriage where circumstances have arisen which make it reasonable and just that the marriage should be dissolved. However, it is difficult to say whether a *Drammeh*-type situation would move the court to exercise its discretion in favour of the petitioner. In the States of Malaya, it is submitted, adultery need not be relied on as a ground because s. 7(2)(a) of the Divorce Ordinance entitles a wife to petition for a divorce when her husband contracts a marriage with another during the subsistence of the prior marriage. As such the doubtful decision in *Drammeh's* case need not be resorted to

Mehrun Siraj

CALLING A SPADE A PICKAXE

Government of Malaysia v. *Lionel*[1]

The respondent, Lionel, was appointed a temporary clerk interpreter in 1953 with the Police Clerical Service on a contract of employment which incorporated the right of either party to terminate the contract. In 1962 disciplinary action was instituted against him for alleged breaches of discipline. His attempt to exculpate himself made no impression on the Chief Police Officer who proceeded to terminate his services. The Privy Council set aside the order of the Federal Court and ruled that the trial judge was correct in deciding that the respondent's employment was terminated in accordance with the terms of his appointment. As such a

[1] [1974] 1 M.L.J. 3.

termination did not constitute dismissal, there was no merit in the respondent's argument that his dismissal was void for failing to comply with Article 135 of the Malaysian Constitution. The relevant provisions of that Article provide:

> "(1) No member of any of the [public] services. . . shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank. (2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard."

As a preliminary observation, it may be stated that the Privy Council has happily corrected the erroneous impression created by H.T. Ong, C.J. (as he then was) in the court below that Article 135 guaranteed public servants a security of tenure ([1971] 2 M.L.J. 172, Federal Court). It is difficult to perceive the basis on which Ong C.J. concluded that the protection was anything more than procedural. Article 135 of the Constitution makes it clear that a dismissal can be effected by an authority with power to appoint a member of that service of equal rank, provided he first affords the public servant concerned an opportunity of being heard. The Privy Council by emphasing that the constitutional safeguards gave a "degree of security of tenure" was in fact restating a proposition of law already enunciated by Winslow J. in *Amalgated Union of Public Employees* v. *Permanent Secretary of Health* ([1965] 2 M.L.J. 209) and by Suffian F.J. (as he then was) in *Haji Ariffin* v. *Government of Pahang* ([1969] 1 M.L.J. 6).

Of more fundamental interest is the Privy Council's ruling which appears to establish the primacy of contract over constitutional safeguards. If the Government has the option of either terminating the service in accordance with the terms of the contract or dismissing for misconduct, and it chooses the former course of action, Article 135, according to the Privy Council, is not attracted. This is apparently so "even though misconduct is also present and even though that is a real reason for the action taken" (dictum of Bose J. in *Parshotam Lal Dhingra* v. *Union of India* A.I.R. 1958 S.C. 36, cited approvingly by Suffian F.J. in *Haji Ariffin's* case, *supra*). Whilst *Haji Ariffin's* case envisaged a situation where the Government had to decide which course of action to take *before* any disciplinary proceedings were undertaken, *Lionel's* case has clearly steered our law into more dangerous waters by ruling that even *after* the institution of disciplinary proceedings, the Government still has the final choice of dismissing or terminating in accordance with the terms of engagement. The Government has thus been given blanket-authority to raise the banner of contract to side-step constitutional safeguards. In *Lionel's* case, for example, a deft manoeuvre at the eleventh hour successfully ousted the applicability of Article 135.

It must not be forgotten that Article 135 is directed towards regulating

dismissal procedures in an area where arbitrary action could undermine the image and ultimately the durability of the public service. Whilst an arrangement by contract, entered into by the free will of the contracting parties, ought to be given effect in law, it ought not to be allowed currency as a contrivance for setting aside an important constitutional right. It is well to keep foremost in one's mind that when a critical constitutional right is under review an interpretation least restrictive of that right ought to be adopted. Ong C.J.'s view in the Federal Court that "calling a spade a pickaxe does not alter the character of that agricultural implement" provides the clue to an alternative interpretation, which would give efficacy to constitutional protections. It is respectfully submitted that a statement that the termination of service rests on a right flowing from contract should be no more than *prima facie* evidence that this is in fact so. The courts should undertake a vigorous scrutiny of every purported termination to ensure that the constitutional safeguards are not abrogated by allowing what is really a dismissal to be clothed in contractual garb. The penalty test, that is, 'whether evil consequences such as forfeiture of pay or allowances, loss of security. . . follow," (*Lord Hodson J.* in *Munusamy* v. *P.S.C.* [1967] 1 M.L.J. 199 P.C.), would be a useful criterion in this determination, provided it is recognised that losing a livelihood is as much a penalty as is forfeiture of pay or loss of seniority. The need for such an approach is made all the more imperative when it is realised that most Government servants are subject, or can be readily made subject, to the kind of contract under which Lionel was engaged. Following the Privy Council approach, this constitutional safeguard will soon be relegated to a capacity so marginal as to be undeserving of constitutional status.

Unfortunately the emphatic ruling by the Privy Council may have already placed our Courts in a straight-jacket and constrained them from ever correcting this injustice. The necessary return to basal principle may only be possible by a short amendment of Article 135 bringing terminations which presuppose disciplinary proceedings within the purview of its protection. Amendments of the Constitution have never been taboo to our legislators. At least this once it would be in protection of a fundamental personal right.

Gurdial Singh Nijar

A LESSEE AND A REGISTERED PROPRIETOR UNDER THE NATIONAL LAND CODE

Lee Chuan Tuan v. *Commissioner of Lands and Mines, Johore Bahru*[1]

The registered proprietor of a piece of land, in excess of twenty-nine acres in area, granted a lease to the applicant for seventy-five years. The lease in the statutory form was registered at the Land Office. The lessee was entitled to subdivide the land for the purposes of developing it into a residential area. He applied to the Collector of Land Revenue for approval to subdivide the land. This application was refused as was a subsequent one by the Commissioner of Lands and Mines. The two questions for determination in this originating summons were firstly, whether a lessee in the circumstances of this case is a registered proprietor within the meaning of the National Land Code. The Court answered this in the negative. Secondly, if he is not, whether the lease gives power to the lessee to apply to the Commissioner of Lands and Mines for subdivision of the leased land. This too, the Court answered in the negative.

In support of the first ground, the applicant relied on the definition of "proprietor" in Francis *Torrens Title in Australia* (Vol. 1 at pages 49 and 50) as being "any person seized or possessed of any estate or interest in land, at law or in equity, in possession or expectancy." On the lessee's view this definition was persuasive authority in Malaysia because of its connection with Australia – the cradle of the Torrens system. He claimed it extended the meaning of "proprietor" to include a lessee. Syed Othman J. quite rightly rejected this contention, noting that the "provisions of Australian laws have no force in this country. . . unless Parliament so enacts." (p. 189). In the alternative the lessee claimed the wording of section 227, which reads:

> "(1) The interest of any lessee, . . . shall, whether or not it takes effect in possession, vest in him on the registration of the lease. . .
>
> (2) The said interest shall include the benefit of all registered interests then enjoyed with the land to which it relates,"

entitled him on registration of the lease to claim the rights of the proprietor of the land. His argument was that the registration which created his interest as proprietor of the lease extended this proprietorship to that of ownership of land. This contention was also rejected: "the

[1] [1973] 2 M.L.J. 188.