'STARE DECISIS' AND ITS DEVELOPMENT IN MALAYSIA

Law, says the judge as he looks down his nose,
speaking clearly and severely,
Law is, as I have told you before,
Law is, as you know, I suppose,
Law is but let me explain it once more,
Law is the Law

W.H. Auden.

The subject matter of this paper is generally regarded as one of the most important elements in any judicial system – perhaps it requires a word of explanation. The object of this paper is to endeavour to ascertain the extent to which the English doctrine of 'precedent' is accepted in Malaysia. This paper does not attempt, let it be noted at the outset, to present a list of Malaysian cases, rather it is concerned with what judges do, or should do, giving due consideration to the policy of the past and the needs of the present in Malaysia. A precedent has been defined by the Oxford Dictionary as ". . .a previous judicial decision. . . which serves as an authoritative rule or pattern in similar or analogous cases".[1] Some jurists attach considerable weight to this technical expression. It is generally regarded that the English doctrine of 'precedent' reflects a policy of deciding like cases alike and that the presiding courts are bound by the previous decisions of the same courts, or co-ordinate courts, or superior courts although some possible inconvenience or undesirable results could result from a strict observance of it, or although a satisfactory reason is wanting, or although the principle behind the rule is questionable.[2]

It is hoped to show in this paper that the above conception of *'Stare Decisis'* is too narrow a construction compared to the meaning of the English and Malaysian doctrine of 'precedent' as evidenced by practice.[3]

[1] The Shorter Oxford English Dictionary reprinted in 1970, at p. 1564

[2] Cross, R., *"Precedent in English Law"* 2nd ed., 4 (1968), (Oxford University Press) A.L. Goodhart, *"Precedent in English and Continental Law"* (1934) 50 L.Q.R. 40.

[3] *Conway* v. *Rimmer* [1968] A.C. 910; *London Transport Executive* v. *Betts* [1959] A.C. 211; *Ostime* v. *Australian Mutual Provident Society* [1960] A.C. 459; *Scruttons Ltd.* v. *Midland Silicones Ltd.* [1962] 2 W.L.R., 186.

Nevertheless one often finds in decisions of the courts the statement that the decision of a particular court has a great and decisive weight with that court and all co-ordinate courts in the same jurisdiction and is absolutely binding on inferior courts. Such decisions make it desirable for the practising lawyer and academicians to devote some attention to the theory and fundamentals of this doctrine especially in its application to Malaysia.

THE APPLICATION OF PRECEDENTS IN THE STRAITS SETTLEMENTS DURING 19TH CENTURY

The origin of the doctrine of 'precedent' in Malaysia goes back to the year 1807. This was the year in which the Law of England was imported into the Colony by the first Charter of Justice, 1807.[4] Before the promulgation of the first Charter in 1807, "... for the first twenty years and upwards of its history, no body of known law was in fact recognised as the law of the place."[5] By virtue of the first Charter of 1807, a Court of Record, "The Court of Judicature of Prince of Wales Island" was established. The court was to have the powers of the Superior Courts in England so far as circumstances would admit and it was to exercise jurisdiction as an Ecclesiastical court.[6]

In the course of time more Charters (the Charter of 1826 and the Charter of 1855) were introduced in the Colony. By the Charter of 1826 English law was introduced in the Colony as it existed on 26th November 1826.[7] The scope of the Charter of 1855 has been discussed many times, but the answer to the question as to what was the effect of the Charter of 1855, is not clear.[8] The language of the Charters, and in the respect of

[4] A printed copy of this Charter may be found in Vol. 8 of the Straits Settlements Records at the India Office. The writer could not find a copy of this Charter in this country. But on the basis of authorities, it can be said that "the law of England was certainly imported in this settlement by the Chapter 1807, if not earlier..." See *Fatimah* and *Ors*, v. *D. Logan and Ors.* (1871) 1 Ky. 255; *Regina* v. *Willans* (1858) 3 Ky. 16, 36; *In the goods of Abdullah* (1835) 2 Ky. (Ec.) 8.

[5] *Regina* v. *Willans* (1858) 3 Ky. 16, 22.

[6] For the jurisdiction of this Court under the Charter of 1807 and the Charter of 1826, See *Sultan Omar* v. *Nakodah* (1841) 1 Ky. 37; *Re William Russel* (1813) 2 Ky., (Ec.) 6; *Wanchee Incheh Thyboo* v. *Golam Kader* (1883) 1 Ky. 611; and *Wee Nga Neo* v. *Yeo Kian Guan* (1889) 4 Ky. 558.

[7] *Jemalah* v. *Mohamed Ali* (1875) 1 Ky. 386; *In The Goods of Abdullah* (1835) 2 Ky. (Ecc.) 8, 9; *Moraiss* v. *De Souza* (1838) 1 Ky. 27, 29.

[8] See *Mahomed Ally* v. *Scully* (1871) 1 Ky. 254.

Judicature the subsequent Charter 1855, ". . . does not differ from prior ones, and its terms are still applicable to the court as since constituted."[8a] It is clear that by the Charters of 1826 and 1855, the position of the ". . . court of Judicature, which was to exercise all the juridiction of the English Courts of Law and Chancery", ". . . as far as circumstances will admit" and jurisdiction as an Ecclesiastical Court, "so far as the several religions, manners, customs of the inhabitanta will admit", remained the same. The Court of Judicature was abolished by Ordinance in 1868. In its place, the Supreme Court of the Straits Settlements was established. In 1873, this Supreme Court acquired appellate jurisdiction. The judicature consisted of the following courts.[9]

(1) The Supreme Court of the Straits Settlements.
(2) Court of Requests at each Settlement.
(3) Court of two Magistrates in each Settlement.
(4) Magistrate's Courts at each Settlement.
(5) Coroner's Courts at each Settlement.
(6) Justices of the Peace.

The foregoing discussion on the judicial system of the Straits Settlements, clearly points out that the hierarchy of the courts was well established. The Courts in the Colony were familiar with the application of 'precedents', but they were not conscious of any rule which dictated that precedents were binding, if and because they were set by the previous judges of the same court or by the superior courts. Generally, respect was paid to previous decisions of the same court or superior court, but such decisions could be disregarded by the subsequent judges. Although the importance of case law was asserted since 1807, the impact of prior decisions was not so strong as it is observed to be today. The English practice of relying on prior decisions in seeking just solutions, was extended to this country.

This section is mainly concerned with the practice of the Straits Settlements Courts in the 19th century. For it was in the Straits Settlements that English law, statutes and doctrines were tested on the scale of local customs and social interests and modified doctrines were developed in

[8a] *Kboo Tiang Bee & Anor.* v. *Tan Beng Gwat*, (1877) 1 Ky. 413, 414.

[9] Ord. III of 1878 S.1; For the Jurisdiction of these Courts, see *Tan Seng Qui* v. *Palmer* (1887) 4 Ky. 251; *Regina* v. *Willans* (1858) 3 Ky. 16, 37; In *Re Golam, Hussain* 1896) 4 S.S.L.R. 64; *Regina* v. *Khoo Ghee Boon* ,1872) 2 Ky. (Cr.) 81.

order to meet local needs. With regard to the application of English law, Sir Benson Maxwell, C.J. in *Choa Choon Neo* v. *Spottiswoode*,[10] said:—

> "In this Colony, so much of the law of England as was in existence when it was imported here, and as is of general (and not merely local) policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject, in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them."

This interpretation of the words in the Charters that the courts should administer the law of England "as far as circumstances will admit" to mean "so as to prevent it from acting unjustly and oppressively on the native races," was approved by the Privy Council in *Ong Cheng Neo* v. *Yeap Chee Neo*[11] in the following words:

> "It appears to them", [their Lordship of the Privy Council] that in that judgment the rules of English law, and the degree in which, in cases of this kind, regard should be had to the habits and usages of the the various people residing in the Colony, are correctly stated."

It seems that the court had a greater scope to decide the extent to which they should adhere to prior cases. The position assigned to the 'precedents' during the 19th Century was that of an aid to ascertain the solution in the case in question.[12] In *Khoo Tiang Bee* v. *Tan Beng Gwat*[13], in which the Court refused to recognise the right of an adopted son to share in an intestate's estate, Ford, Ag. C.J., rejected the authorities *In the Goods of Abdullah*,[14] decided by Sir Benjamin Malkin and *In Re Chu Siang Long's Estate*, decided by Sir William Norris.[15] Sir William Norris had held that an adopted son or daughter of an intestate Chinese was to be

[10](1869) 1 Ky. 216 at p. 221. Determining the effect of a gift by a Chinese for the performance of *Sinchew ceremonies*, Sir Benson Maxwell held that a direction by a testator, that the rents and profits of his land should be expended on *Sinchew ceremonies* is void as being in perpetuity and not a charity.

[11](1872) 1 Ky. 326 at p. 346. For the same principle see *Regina* v. *Willans* (1858) 3 Ky. 16, at 39. In this case Sir Benson Maxwell said: "I think that all I have to inquire is, whether the Act in question is applicable to the situation and condition of this Settlement, that is, whether or not it is exclusively local in its object and in its machinery, and whether or not injustice and inconvenience would arise from enforcing it."

[12]No clear reference has been found for the view that a decision of the same court or superior court was binding (in an authorative sense).

[13](1877) 1 Ky. 413.

[14](1835) 2 Ky. (Ec.) 8, 9.

[15](1858) S.L.R. 460.

preferred to the nephew. Ford Ag. C.J., however, relied more on *Regina* v. *Willans*[16] and gave his reasoning for that in a long judgment which need not be quoted here. However discussing the cases and considering them with the circumstances of the case at hand, he said:[17]

> "For these reasons... I am of opinion it is my duty to follow the decision of Sir Benson Maxwell rather than those of his predecessors. Neither do I see sufficient reason to depart from this view in this case, because the claim is to personal or moveable and not immoveable property."

The passage quoted above indicates the policy of Straits Settlements Courts during the 19th Century. Firstly, it shows that the Courts were not bound by the decisions of the same court or superior courts. They were not at liberty to follow or depart from any 'precedent' unless sufficient reason was given. The courts had to test every issue with its own jurisprudence, and ought to apply a precedent only when it could bring a 'just' solution and which would not result in injustice, oppression or be against social interests.[18] Secondly, it *points out* that the courts were not familar with the rule that a decision of a superior court was binding on the same or inferior courts.

The words "as far as circumstances will admit", necessarily left a greater scope for the discretion of a court in the application of English law to the ever varied circumstances of the Colony. The judges could apply their discretionary power to modify English statutes to bring them in line with local usages or would follow the statutes unmodified.[19]

[16] (1869) 1 Ky. 216.

[17] *Op. Cit.* n. 13 at p. 417.

[18] See for example, *Chulas & Kachee* v. *Kolson binte Seydoo Malim* (1867) *Leic.* 462; *Karpen Tandil* v. *Karpen* (1865) 3 S.S.L.R 58; *Regina* v. *Willans* (1858) 3 Ky. 16; *Choa Choon Neoh* v. *Spottiswoode* (1869) 1 Ky. 216; *Yeap Cheah Neo* v. *Ong Cheng Neo* (1872) 1 Ky, 326.

[19] The following decisions have been delivered by the Courts of the Colony on the general question of the applicability of English Statutes in this Colony. Norris R., held that the Statute of Enrolment 27 Hen: CIII c. 16 does not extend to the Colony, *Brown & Others* v. *Herriot* (1842) 1 Ky. 43; The same judge held, in *Syed Abbas* v. *Scott & Another* (1842) 1 Ky. 64, that the Statute 13 Eliz: C. 5 was law in the Colony; In *Revely & Co.* v. *Kam Kong Gay & Another* (1840) 1 Ky. 32, Norris, R. held that the Statute of Frauds, 29 Car: 11 c. 3 is law in the Colony; Maxwell C.J. held that the Statutes 1 Ed: VI v. 14 and 23 Hen: VIII c. 10, relating to superstitious uses, and the Mortmain Act 9 Geo: 11 c. 36 were not law in the Colony, *Choa Choon Neoh* v. *Spottiswoode* (1869) 1 Ky. 216; see also *Ong Cheng Neo* v. *Yeap Cheah Neo & Others* (1872) 1 Ky. 326; In *Tan Kiong v. Ou Phaik* (1898) 5 S.S. L.R. 77, 79, it was held that the Partition Acts of Henry VIII was law in the Colony; The Acts 31 Ed: 111 C. 11 and 21 Hen: VIII c. 5 were held to extend to the Colony, *In the Goods of Khoo Chow Sew* (1872) 2 Ky. (Ec.) 22; In *Syed Omar Alsagoff & Another* v. *Rosina etc* (1910) 12 S.S.L.R. 46, Hyndman Jones C.J held that the Statute 12

It is surprising to see that even English oriented judges have been less vigorous in the application to the principle of *Stare Decisis* in the Colony. They have found that a rigid adherence to the principle of *Stare Decisis* was inappropriate to the construction of the Charters which had to be applied to the changing conditions in the Colony. They were fully conscious that the application of certain words which would be reasonable and just at one time, might be wrong at another time.

In Re Sinyak Rayoon & Anors,[20] a case of the guardianship of a Mohamedan infant, further demonstrates the policy of the courts. In it Wood, J., rejecting the principle laid down in *Choa Choon Neo* v. *Spottiswoode*[21] which was approved by the Privy Council in *Ong Cheng Neo* v. *Yeap Cheah Neo*[22], observed:[23]

> "Whether, if the point were now material to be decided, the Court should consider itself bound by the interpretation of the words in the Charters that the Courts shall administer the law of England "as far as circumstances will admit", to be equivalent to "as to prevent it from acting unjustly and oppressively on the native races" as expressed by Sir Benson Maxwell ... which ... is apparently approved of by the Privy Council ..., but I do not consider myself bound to say (the same). It may be that those expressions being *obiter dicta* extend no further than the particular circumstances of each of those cases and that in their true sense it is a strain upon language to give them this exact meaning."

It seems to follow that, there was no question of any judge being bound to follow previous decisions. The judge could disregard even a decision of a superior court if he had good reason to disapprove of it. The necessity of having regard to the facts and reasoning of the previous case was stressed. A close scrutiny of the judicial decisions during the 19th Century has shown that the courts did not hold those decisions which overruled or distinguished an earlier decision of the same court or superior court as

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extended to the Colony, *Rex* v. *Till* (1809) 2 Ky. Cr. 1; Rice R. held that the Statute 43 Geo: 111 c. 58 does not extend to the Colony, *Rex* v. *Adam Sing* (1822) 2 Ky. Cr. 12;

[20](1887) 4 Ky. 329. In this case the court had to determine the fitness of a person to be appointed guardian of a native infant. The court held that they were not bound by any hard and fast rule of English law on that subject and agreed to consider the law, religion, practice or custom of the nationality or class to which such infant belonged, so far as circumstances admit it.

[21]*Op. Cit.* n. 10.

[22]*Op. Cit.* n. 20.

[23]*Op. Cit.* n. 20. at p. 334.

violating the Charter. The judges seemed to be at liberty to follow[24] or depart from[25] or overrule[26] a prior decision. In the act of overruling or departing from a prior decision the courts justified their action on the basis that they were not bound to follow decisions which were wrong or that what was said was merely *obiter dicta* and so not binding.[27] or that it was contrary to local customs.

In *Karpen Tandil* v. *Karpen*[28] the Court of Appeal held that a contract between Hindoos, which if it had been made between Europeans would have been void as being a marriage brokage contract, was valid. In *Regina* v. *Yeoh Boon Leng*,[29] a Chinese was prosecuted for bigamy under Section 404 of the Penal Code which rendered bigamy a crime. The accused was acquitted because the prosecution omitted to bring evidence that by Chinese law the second marriage was void by reason of its taking place during the lifetime of the first wife. Many cases, where the parties were Hin-

[24] For example, see *Moraiss & Others* v. *De Souza* (1838) 1 Ky. 27, in this case *Rodyk* v. *Williamson* (1834) 2 Ky. (Ec.) 9 (Sec. F.N.) and *In the Goods of Abdullah* (1835) 2 Ky. (Ec.) 8, were followed; *Sultan Omar Akamoden* v. *Nakodah Mohamed Cassim* (1841) 1 Ky. 37, in this case *The Columbian Govt.* v. *Rothschild*, 1 Simon 84, an American case was followed; *Salmah & Fatimah, Infants* v. *Soolong* (1878) 1 Ky. 421, in this case *Mohammed Ibrahim* v. *Gulam Ahmed*, 1 Bom. H.C. Rep. 239, was followed; *Wemyss* v. *Att. Gen.* (1885) 4 Ky. 10, in which *Lyon* v. *Fishmoyers*, 1 L.R. App. Cas. 662, was followed; *D'Almedia* v. *D'Menzies* (1806) 4 Ky. 126, in which *Quarrier* v. *Colston*, 1 Phil. 147 and *King* v. *Kemp*, 8 L.T. followed; *Fatimah & Anors.* v. *Armootah Pulley* (1887) 4 Ky. 225, in which *Abdul Rahim* v. *Drahman* (1867) 1 Ky. 171, followed; *Tiong Ang Boi* v. *Hianalai* (1887) 4 Ky. 230; in which *Ong How* v. *Abdul Rahman*, S.S.L.R. 354, and *Chooa Shary* v. *Cassim*, 3 Ky. 98, followed.

[25] See for example *Scott, Sinclair & Co.* v. *Brown & Co.* (1852) 1 Ky. 85, 1 Cowp., 109, 110 distinguished; *Rahman Chetty* v. *McIntyre & Others* (1879) 1 Ky. 476, in which *Doyle* v. *Kangman*, 3 L.R.Q.B. Div. 7 & 345 distinguished; *Abboba Karsab* v. *Ahmed Jellaloodin* (1881) 1 Ky. 513, in this case *Rolt* v. *Cox*, 2 Wilson 253 was considered as an old authority and not valid for the case before the court.

[26] See for example, *Regina* v. *Dorasamy* (1886) 4 Ky. 162, overruled *Regina* v. *Kadir (1881) 2 Ky. 105*; Opium Farmer v. *Chua Ah Tong* (1886) 4 S.S.L.R. 278, overruled *Regina* v. *Ooi Tim & Others* (1879) 3 Ky. 119 and *Cartan* v. *Meenachee* (1882) 3 Ky. 151; *Ismail bin Savoosah* v. *Madinaseh Marican & Anors.* (1887) 4 Ky. 311, overruled *Jemalah* v. *Mohamed & Others* (1875) 1 Ky. 386.

[27] In *Re Sinyak Rayoon & Anors* (1887) 4 Ky. 329, 334. For cases on local customs see footnotes, 10–11.

[28] (1895) 3 S.S.L.R. 58.

[29] (1890) 4 Ky. 630.

doos[30] or Muslims[31] or Chinese[32], were decided according to their customs and laws contrary to English law. The Straits Settlements Courts treated the English law and Indian authorities equally. There were many decisions which did turn upon the English and Indian case law, but the view that the 'precedents' were absolutely binding (in an authoritative sense) was unknown to Malayan courts.[33] If there was any conflict between two precedents of the same jurisdictions or different jurisdictions the judges were at liberty to choose one of them while rejecting another.[34] The English decisions or the decisions of other jurisdictions had created no obligation on the judges to follow those decisions, if it appeared to them contrary to reason and justice. The writer has been unable to find a reference to the doctrine of *Stare Decisis* in the cases during the 19th Century. It is accordingly submitted that there was probably no such view that a decision given in the same court or in the superior courts had a binding authority.

To sum up the policy of the Straits Settlements courts in the last century, it seems clear that a prior decision was overruled or not followed because it had become obsolete or unfit in the circumstances of the case in question. It was obvious that a 'precedent' by that fact alone was not sufficient to bless and sanctify its application in a particular case. The applicability of any 'precedent' was determined by its intrinsic quality. It seems that the English orientated Malayan judges of the 19th Century strongly held the principle that ". . .justice may be done as the case shall require".[35]

[30] For Hindoos, see *Pootoo* v. *Valee Uta Taven* (1883) 1 Ky. 622; *Karpen Tandil* v. *Karpen* (1895), 3 S.S.L.R. 58; *In re Armoogum* (1887) 4 Ky. 327.

[31] For Muslims, see *Salwath Haneem* v. *Hajee Abdullah* (1893) 2 S.S.L.R. 57; *Fatimah* v. *Armootah* (1887) 4 Ky 225, 228; *In the Good of Lao Leong Ang* (1867) 1 S.S.L.R. 1., *Khoo Tiang Bee* v. *Tan Beng Gwat* (1877) 1 Ky. 413; 416; *Regina* v. *Willans* (1858) 3 Ky. 16, 19; *Regina* v. *Ojir & Anor.* (1886) 4 Ky. 122; *Tijah* v. *Mat Alli* (1886) 4 Ky. 124; *Inche Mohamed Nor* v. *Hadjee Abdullah* (1892) 1 S.S.L.R. 58.

[32] *Lim Chooi Hoon* v. *Chok Yoon Guan;* (1892) 1 S.S.L.R. 72; *Lee Joo Neo* v. *Lee Eng Swee* (1887) 4 Ky. 325; As to general characteristics of a Chinese marriage see, *Lim Chooi Hoon* v. *Chok Yoon Guan* (1892) 1 S.S.L.R. 72; *Ngai Lau Shia* v. *Low Chee Neo* (1921) 14 S.S.L.R. 35; *Khoo Tiang Bee* v. *Tan Beng Gwat* (1877) 1 Ky. 413.

[33] In many cases, Indian decision were accepted as relevant authorities. But it was clearly stated that the cases ". . . decided in India . . . (were) no authority here (in Malaya), See *Shaik Lebby* v. *Fateemah* (1872) 1 Ky. 324, 325; *Ismail Bin Savoosah* v. *Madinasah Merican Anors,* (1887) 4 Ky. 311.

[34] *Koh Seong Thye* v. *Chung Ah Wray* (1886) 4 Kv. 136; *Lim Seng Ee* v. *Wray & Anors* (1887) 4 Ky. 240.

[35] *Mungootee Meera Nina* v. *Athean* (1873) 1 Ky. 355.

THE DOCTRINE OF PRECEDENT IN 20TH CENTURY ENGLAND AND MALAYSIA:– (ESPECIALLY WITH REGARD TO SUPERIOR COURTS AND THE PRIVY COUNCIL):–

The view, that a court is bound by its own prior decisions or by the decisions of the Superior courts perhaps appeared in Malayan courts for the first time in 1906.[36] Just 18 years before, the decision in *London Street Tramways Co.* v. *London County Council*[37] had given birth to this view in England. In that case the Law Lords declared that they had no authority to overrule the prior decisions of themselves or to overrule the prior decisions of their predeccessors, for the reason that such a practice might result in ". . . the inconvenience – the disastrous inconvenience – of having each question subject to being re-argued and the dealings of mankind rendered doubtful by reason of different decisions. . ."[38]

With all due respect to their Lordships, it is submitted that this was the most undesirable statement in English judicial history and it was contrary to the English sense of justice.[39] It is the function of a judge to see that justice is done. A strict adherence to prior decisions may result in unjust decisions, if the circumstances of the cases are disregarded.[40] The dominant purpose of all 'precedents' is the establishment of some principle which the judge can follow in deciding the case before him. "When precedents do not help, enlightment must be found. . . (in the) principles of reason, morality and social utility, which are the fountain head. . . of all law".[41] The misuse of this doctrine can become an obstruction in the way of justice. The courts should be very cautious in the application of this doctrine. We should recall the warning of the great English Judge, Lord Mansfield, who said a century before the evolution of this doctrine that:[42]

> "The law of England would be a strange science if indeed it were decided upon precedents only. Precedents only serve to illustrate principles and to give them a fixed authority. But the Law of England exclusive of positive law enacted by statutes, depends upon

[36] *Salleb And Hussain* v. *Rex* (1908) S.S.L.R. 27.

[37] [1898] A.C. 375, ; For a similar view, see *Beamish* v. *Beamish* [1859] 9 H.L. Cas. 274.

[38] *Ibid.*, at p. 380.

[39] "The great virtue of the common law is that it sets out to solve legal problems by the application to them of principles which the ordinary man is expected to recognize as sensible and just. The true spirit of common law isto override theoretical distinctions when they stand in the way of doing practical Per Devlin justice L.J., in *Ingram* v. *Little* [1961] 1 Q.B. 31 at p. 73.

[40] See Ong Hock Thye in *Navaradnam* v. *Suppiah* [1973] 1 M.L.J. 173.

[41] Sir Carleton Allen, *Law in the Making*, 6th ed., (1958).

[42] Lord Mansfield in *Jones* v. *Randell* (1774) 1 Cowp. 37, at p. 38.

principles, and these principles run through all cases according as the particular circumstances of each case have been found to fall within one or the other of them".

He further emphasized in *Corbett* v. *Polenitz*,[43]

"As times alter, new customs and new manners arise, and these exceptions and justice and convenience require different application of the exception within the general rule."

PRESENT POSITION OF THE HOUSE OF LORDS AND THE COURT OF APPEAL:–

Before examining the position of the decisions of the House of Lords and the Privy Council under the Malaysian judicial system, it is desirable to ascertain the existing judicial policies of the Common Law in England. The scope of this paper does not allow a detailed discussion of these policies, but it nevertheless attempts to ascertain the direction which the legal system has taken over the last 110 years.

Since the evolution of the doctrine of 'precedent' in 1889, for sixty years the view that the House of Lords should adhere strictly to its previous decisions, prevailed in England. Blackstone in his most honoured and valued work propounded the "declaratory" function of the courts and held the view that the court is not to ". . .pronounce a new law but to maintain and expound the old one"[44]. But a group of contemporary jurists and judges have recognised and demonstrated the importance of the lawmaking functions of the courts. By the 1930's there had been an important change in English judicial thinking. English judges began to appreciate the threat to justice of rigidly adhering to the doctrine as proposed by Lord Halsbury,[45] and Lord Justice McCardie pointed out, "This slavery of case law which exists today is doing infinite harm to English law. . . principles and decisions should change with time."[46]

Since the 1930's many attempts have been made to suggest that it would be desirable for the House of Lords to review its own previous decisions. Lord Wright suggested in 1943 that the House of Lords should have the power to overrule their own previous decisions. Rejecting Lord Halsbury's argument[47] for "Stare Decisis", Lord Wright said that:[48]

"There is a greater public inconvenience in perpetuating an

[43] (1785) 1 Term Rep. 75.

[44] Blackstone, Commentaries on the Laws of England, 15th ed., at p. 69 (1808)

[45] *Op. Cit.* n. 37. Lord's Halsbury's view has been a subject to constant criticism. But for healthy criticism, see London. "Precedents in the House of Lords, 63 Juridical Review, 233 (1951).

[46] A Note on "Case Law and Judicial Notice" (1931) 4 A.L.J. 137.

[47] *Op. Cit.* n. 38.

[48] Lord Wright, a note in (1943) 8 Camb. L.J. 144.

erroneous judicial opinion, than the inconvenience to the court of having a question, disposed of in an earlier case, reopened".

Lord Evershed M.R.,[49] in speaking on the application of the doctrine in the House of Lords said in his public lecture that at present "the principle of 'Stare Decisis' has no "rigid application" in the House of Lords.

At that time judicial acquiescence in the introduction of this theory against 'Stare Decisis' was a tendency only. The courts were not agreed. Some courts were hesitant and some were willing to give up their love and respect for English tradition and fiction, which has been the main source of the survival of this doctrine. The tendency, however, was well marked. But in 1951, Lord Jowitt re-asserted the importance of the doctrine of 'Stare Decisis' at the Australian Law Convention of 1951, in the following words:

> "Please do not get yourself into the frame of mind of entrusting to the judges the working out of a whole set of principles which does accord with the requirements of modern conditions. Leave that to legislature, and leave us to confine ourselves to trying to find out what the law is."

It should be noted that this remark was made in criticism of the attempt by Lord Denning (as he then was) in his dissenting judgment, in *Candler* v. *Crane Christmas & Co.*[50], to introduce the principle of liability for negligently made financial statements. It is further interesting to note that this view has been accepted by the House of Lords in *Hedley Byrne* v. *Heller.*[51] Recently many decisions in the House of Lords turned on the question as to how far the appeal courts should seek their answers in previous decisions. Lord Denning, in *London Transport Executive* v. *Betts*, in his dissenting judgment refused to follow a previous decision of the House of Lords. He said:[52]

> "It seems to me that when a particular precedent – even of your Lordships' House – comes into conflict with a fundamental principle, also of your Lordships' House, then the fundamental principle must prevail. This must be at least be true when, on the one hand, the particular precedent leads to absurdity or injustice and, on the other hand, the fundamental principle leads to consistency and fairness. It would, I think, be a great mistake to cling too closely to particular precedents at the expense of fundamental principle."

[49] Lord Evershed M.R., *The Court of Appeal in England* (University of London, Athlone Press), 17 (1950).

[50] [1951] 2 K.B. 164.

[51] [1964] A.C. 465.

[52] [1959] A.C. 312, 247 (1958) 3 W.L.R. 239, 264.

The analysis presented helps us to lay down one exception to the general rule of binding precedent – that is a decision of the House of Lords is not binding if it is against the fundamental principle of English Law. What is the fundamental principle which can force a court to override its own previous decisions? This question is well answered by Lord Denning himself in his dissenting opinion in *Ostime* v. *Australian Mutual Provident Society*. Giving his opinion on a previous 'decision' of the House of Lords in 1947, he said:[53]

> "What authority is to be given in these circumstances to the decision of this House in 1947? Is it to be followed from step to step regardless of consequences? I think not. The doctrine of precedent does not compel your Lordship to follow the wrong path until you fall over the edge of the cliff. As soon as you find that you are going in the wrong direction, you must at least be permitted to strike off in the right direction, even if you are not allowed to retrace your steps."

It should be noted that the above two opinions are dissenting opinions, but these are manifestations of a strong tendency to do away with the policy of unnecessary adherence to the doctrine of precedents. It appears from the above two dissenting opinions that the fundamental principle of English law is to follow a right path that is of course the path of justice which is built with due consideration to the circumstances of the case, and the social interest of the community.

Perhaps of more fundamental interest, and in the instant case of practical interest, it would be interesting to explore the possible exceptions to the rule of binding precedent besides the exception which is expressed by Lord Denning.[54] Lord Reid, who has always been against the strict adherence to 'precedents' laid down three exceptions to the rule of binding precedents

> "I would certainly not lightly disregard or depart from any ratio decidendi of this House. But there are at least three classes of case where I think we are entitled to question or limit it: first, where it is obscure, secondly, where the decision itself is out of line with other authorities or established principles, and thirdly, where it is much wider than was necessary for the decision so that it becomes a question of how far it is proper to distinguish the earlier decision."

It also appeared from the same case that the House of Lords can choose to follow any opinion amongst its own conflicting opinions.[57] To summarise

[53] [1969] A.C. 459 at p. 489

[54] *Ibid.*

[55] [1962] 1 All E.R. 1.

[56] *Ibid.*, at p. 12.

[57] *Ibid.*, 7, 13, 14.

the main points and results, the general rule that the House of Lords is bound by its own decisions is subject to the following exceptions:

(1) If the ratio decidendi of the previous case is obscure.

(2) If the precedent is in conflict with the fundamental principles of the House of Lords.

(3) If the principle laid down in the precedent under consideration, is too wide.

(4) If the two 'precedents' of the House are in conflict with each other.

It is not difficult to see the soundness of the proposition that a rigid adherence to the doctrine of "precedents" is an obstruction to justice. This view has received the approval and strong support of some of the greatest of British judges from Holt, Mansfield and Blackburn to Wright Atkin, Reid and Denning. But technically speaking, the House of Lords was still in the clutches of the doctrine of 'precedent' before 1966, but a trend was established in three consecutive decisions, *Shaw* v. *D.P.P.*,[58] *Hedley Byrne* v. *Heller*[59] and *Rookes* v. *Barnard*.[60]

On July 26, 1966, the Lord Chancellor, Lord Gardiner felt it necessary to free the House of Lords even from the chains of the above exceptions. He made the following statement in the House of Lords on behalf of himself and the Lords of Appeal in Ordinary.[61]

> "Their Lordships regard the use of precedent as an indispensible foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as basis for orderly development of legal rules. Their Lordship's nevertheless recognize that too rigid adherence to precedent may lead to an injustice in a particular case and unduly restrict the proper development of the law. They propose therefore to modify their present practice or, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."

In this connection it is settled now in England that the House of Lords would not be bound by its own decisions. The Court of Appeal is bound by its own prior decisions but this principle is subject to three exceptions given in *Young* v. *Bristol Aeroplane Co.*[62] The effect and impact of these exceptions is very wide. For practical purpose, the latter judges of the

[58] [1962] A.C. 220.

[59] [1964] A.C. 465.

[60] [1964] A.C. 1129.

[61] [1966] 1 W.L.R. 1234.

[62] [1944] 1 K.B. 718. *Fisher* v. *Ruislip Northwood U.D.C.* [1945] K.B. 589; Cross, R R., *"Precedent in English Law"*, 2nd ed., 130, 135 (1968).

court of Appeal can refuse to follow their own previous decisions, when it appears right to do in order to secure justice.

POSITION OF THE *STARE DECISIS* IN MALAYSIA

The discussion of the 19th century position of 'Precedent' in Malaya in the historical section of this paper has shown that Malayan judges were holding a view similar to Lord Mansfield's and were seeking for a policy which is similar to the present trend of the English Courts, during the 19th century. Although precedents were frequently applied, no judge was found to admit that he was absolutely bound by his predecessors. Probably the first time a 'precedent' set by a superior court was admitted to be binding was in *Salleh and Hussain* v. *Rex*[63] Considering the decision of the Privy Council in *Subrahmania Ayyar* v. *King Emperor,*[64] Hyndman Jones then C.J. said: "This was a . . . case decided by the Privy Council; and if I thought it applied to the case before us I should of course, be bound by it."[65] He also asserted that in considering the application of a precedent, ". . . the circumstances of the case and the conduct of the parties must be considered. . ."[66] besides the principle which is referred to as an authority. The principle thus enunciated in the above case was that a decision given by a superior court is absolutely binding on all subsequent decisions, subject to its being applicable to the circumstances of the case. In other words the solution offered by a superior court should not be contrary to reason and justice, if the facts of the case before the court are considered. However, it has been considered convenient and reasonable that the decision of the superior courts should be regarded as correct and binding.[67] The policy of Malaysian courts in the application of 'precedents' (in a hierachy of the courts) is similar to that stated in In Re *House Property & Investment Co. Ltd.*, Roxburgh J.,[68] answering the question "What is the duty of a judge when he is confronted with a series of decisions which are difficult to reconcile?" said, ". . . if it is a decision of the .,. . (superior courts), he ought to apply it – expressing may be his doubts whether it is still good law, but leaving the superior tribunal to decide it."

[63] (1908) S.S.L.R. 27.

[64] I.L.R. 25 Mad. Rep. 61.

[65] *Op. Cit.* n. 58 at p. 31.

[66] *Ibid.*

[67] *Henry* v. *Decruz* (1949) M.L.J. Supp. 25; *Mesenor* v. *Cheteh* (1953) 2 M.L.J. 208; *China Insurance* v. *Loong Moh* (1964) M.L.J. 307; *Success Enterprises Ltd.* v. *Eng Ah Boon* [1968] 1 M.L.J. 75; *Sundralingam* v. *Ramanathan Chettiar* [1967] 2 M.L.J. 211; *Mah Kah Yew* v. *Public Prosecutor* [1970]; *Public Prosecutor* v. *Mills* [1971] 1 M.L.J. 4.

[68] [1953] 2 W.L.R. 1037, 1058.

When it is said that an inferior court is bound by the decision of the superior court, it is intended by this writer, to treat the Federal Court as the highest court in Malaysia. This attempt suggests a fixed hierarchy of courts within Malaysia, where the lower court would be allowed to refer to decisions within this hierachy.

The above step, as it will be made clear later, is an attempt to suggest that the Privy Council decisions should not be binding on our courts.

PRIVY COUNCIL DECISIONS AND THEIR BINDING AUTHORITY IN MALAYSIA:—

Recently the question whether Privy Council decisions are binding in Malaysia has been debated widely and has not yet been resolved. In legal circles, this issue has been constantly under review for the last 10 years. It can by no means be regarded as certain even now whether this question should be answered in the affirmative or the negative.

The rule that Privy Council decisions bind the courts in this country was probably first clearly laid down in *Khoo Sit Hob* v. *Lim Thean Tong*[69] in 1912, and this case has been followed by the Board many times.[70] But the question, how far it is open to the courts of this country to question any principle enunciated by the Privy Council, or whether it is open to them to question its decision on any particular issue of fact, has not yet been resolved completely.

However, Professor Ahmad Ibrahim, performed the difficult task of clarifying some doubts on this issue in his article "*Privy Council Decisions On Wakaf. Are They Binding In Malaysia*"[71]. Discussing the Malaysian cases, *The Commissioner of Religious Affairs* v. *Tengku Mariam*[72] and *Khalid Panjang* v. *Public Prosecutor*[73] and comparing them with the decisions of other jurisdictions, he laid down two conditions to make a Privy Council decision binding in Malaysia.

(1) "... a decision of the Judicial Committee on a question of the English Common law is not binding on the Courts of Malaysia unless it is given on an appeal from Malaysia."

[69] [1912] A.C. 323.

[70] *Sitalakshmi Ammal* v. *Venkata Subratimaniam* (1930) A.I.R. 170 (P.C.); *Mersey Docks and Harbour Board* v. *Procter* [1923] A.C. 253; *Ramanathan Chetty* v. *Wong Ah Sam* (1924) 4 F.M.S.L.R. 229. For the contrary see *Mata Prasad and Another* v. *Nagesbar Sahai and Ors.* (1925) L.R. 52. I.A. 398 at 417.

[71] [1971] 2 M.L.J. vii.

[72] [1970] 1 M.L.J. 222.

[73] [1964] M.L.J. 108.

(2) "The decision of the Judicial Committee on the interpretation of a statute given on an appeal from a country other than Malaysia, would only be binding in Malaysia, if the statute was in *pari materia* with a statute in Malaysia."[74]

The analysis so far made will at once suggest another and more difficult question: to what extent are the above two conditions essential and helpful to maintain the administration of justice? This question can be well answered by the treatment of *Khalid Panjang* v. *Public Prosecutor*.[75] In this case the construction of s.10 of the Malaysian Evidence Act 1950 was in question,[76] which was in *pari materia* with a statute in India. The section reads as follows:[77]

> "Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or any actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact. . . for the purpose of proving the existence of the conspiracy."

The trial judge in the *Khalid Panjang case*[78] refused to follow the interpretation of this statute given by the Privy Council, which was accepted in *Liew Kaling & Ors.* v. *Publis Prosecutor*[79] by the Federal Court of Malaya. The Judical Committee of the Privy Council in *Mirza Akbar* v. *Emperor*[80] relaying on *Reg.* v. *Blake*[81] which was decided in 1844, held that the words of this section are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed.

Even though the trial judge was referred to these two decisions, he found himself bound by the circumstances of the case and held that the Privy Council decision was wrongly decided or alternatively

> "that even if the words of Lord Wright were a correct statement of the law in this country as opposed to the law in England, they were not applicable to the facts of the present case."[82]

[74] *Op. Cit. n.* 71 at pp. VII–IX.

[75] *Op. Cit.* n. 73.

[76] Malaysian Evidence Act 1950 (Revised 1971).

[77] *Ibid* s. 10.

[78] *Op. Cit.*, n. 73

[79] [1960] M.L.J. 306.

[80] (1940) 43 Bom. L.R. 20 (P.C.); (1940) 27 A.I.R., 176.

[81] (1844) 6 Q.B. 126.

[82] *Op. Cit.* n. 75. See also *Sundralingam* v. *Ramanathan Chettiar* [1967] 2 M L.J. 211.

The Federal Court of Malaysia (sitting in Kuala Lumpur) reversed the decision of the trial judge and held that the Privy Council was "... discussing a section in an Indian statute which was word for word the same as the corresponding section of a local statute. In these circumstances a decision of their Lordships is binding on every High Court in Malaysia and no judge is at liberty, whatever his private opinion may be, to disregard it."[83]

The above decision offers a principle by which the interpretation of a statute which is given by the Privy Council on an appeal from a foreign jurisdiction, being in *pari materia* is no longer one which may be be used merely as a guide; but is one which is to be followed in the subsequent decisions, irrespective of the circumstances of the case at hand. In the light of this decision, in the cases where the statute is in *pari materia* its interpretation is more than an aid – it becomes a binding rule.

It is submitted, with all due respect to the Privy Council decisions and the Federal Court's decision, that most questions of law and interpretation of statutes are highly debatable. It has been the practice of Malayan courts, with regard to decision of the Courts in India, even where the Indian Act was in *pari materia* not to regard them as binding. The same policy has been followed for English cases and the cases decided by the Supreme Court of the Federated Malay States.[84] The rigid adherence of the doctrine of 'precedent' becomes undesirable especially in criminal cases. If the courts are restricted to decisions of the Privy Council which were based on the cases decided in foreign jurisdictions (a century before), and if they are obliged to reject the circumstances of the case and local interests – and above all the interests of justice in the case at hand, we shall find that such a system is entirely inapplicable to present conditions. Justice Holmes said that "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV".[85] Such a system becomes more inconvenient when judges speak with different voices on the same subject. It becomes questionable whether anything that has been said on the matter amounts to more than *dicta*. Professor Ahmad

[83] *Ibid.*, at p. 109.

[84] See Roland Braddell, *The Law of the Straits Settlements.* A commentary, 2nd ed. 3–4 (1932), see also *Tan Hoon Swee* v. *Public Prosecutor* (1927) 6 F.M.S.L.R. 191; For the general policy, see unreported Singapore Suit no. 264 of 1921.

[85] Justice Holmes, *The Path of the Law* in *Collected Legal Papers*, 187 (1920).

Ibrahim[86] analyzing the opinions of Azmi L.P.[87] and Suffian F.J.[88] *in the Commissioners for Religious Affair* v. *Tengku Mariam*[89] said that views expressed by them "were obiter . . ." and " . not correct in view of the difference in the law applicable in Trengganu on the one hand and in India and East Africa on the other".

In this case the validity of a *wakaf* for the benefit of the settlor's family and descendants was in question. The Federal Court relying on the Privy Council decision in *Abdul Fata Mahomed* v. *Rasamaya*[90] held it void. There is no doubt that there was a difference between Indian Law of *Wakaf* and the law of Trengganu which is based on the Shafi' school of thought. By virtue of this law, a *wakaf* exclusively for the benefit of settler's family and descendants is valid. But the decision in the *Commissioners for Religious Affairs* case, that a *wakaf* exclusively, for the benefit of settlor's family, is void, cannot be treated as *obiter* on the grounds of its inconsistency with the law of Trengganu. It can be said that the *ratio decidendi* in *Abdul Fata Mahomed's* case and *The Religious Commissioners* case was wrong and bad law. As far as the question of its binding Malaysian Courts is concerned, it can be claimed that it is not binding, irrespective of its consistency or inconsistency with the local law.

It is true that these principles are still arguable, but the present writer claims to be justified in treating it in this way on two grounds. Firstly, Privy Council decisions given on foreign codified law, whether the statute is in *pari materia* with the local law or whether it deals with the same matter, which is under consideration on any appeal from Malaysia, is not binding, for the reason that it is neither a part of the Malaysian law, nor a part of the common law. By virtue of s. 3(a), (b), and (c), it could be said, a decision of the House of Lords, being a decision of the highest court in England, and it being a part of the common law is binding on Malaysian courts subject to the exceptions and dates referred to in the said section.[91]

[86] *Op. cit.*, n. 74.

[87] Azmi L.P., in the *Commissioner for Religious Affairs* v. *Tengku Mariam* [1970] 1 M.L.J. 222 expressing his opinion about Privy Council decisions said that ". . . Malaysian courts would also be bound by the judgment of the Privy Council. . ."

[88] *Ibid.*, at p. 223 to 225.

[89] *Ibid.*

[90] (1894) 22 Cal. 619, 22 I.A. 76.

[91] See The Civil Law Act 1956 (Revised – 1972). The exceptions can be summarised as follows' (1) If any statutory provision has been made on that issue in Malaysia. (2) If the circumstances of the states of Malaysia and their respective inhabitants do not permit. (3) If the local circumstances do not render the law necessary. (4) If it is contrary to the express provision of the Civil Law Act, 1956, or any written law in force in Malaysia. (5) In the event of conflict or variance between the common law

It should be noted that even the House of Lords decision is not binding in Malaysia after 1956, even if the point at issue is English law. But if there is a conflict between the decision of the House of Lords on an issue of English law and the decision of the Privy Council, given on a foreign codified law, before 1956, the decision of the House of Lords will prevail. Br virtue of s. 74 of the Courts of Judicature Act, 1964, the Privy Council gets the status of an advisory Board to Yang Di Pertuan Agung. As the highest judicial powers are vested in the Yang Di Pertuan Agung, if he accepts the advice of the Privy Council, then such an advice becomes a binding authority on all lower courts. It should be remembered that a decision of the Privy Council on an appeal from another country, does not change Malaysian law and does not bind our courts, and does not have the force of a binding authority.

It is not intended in this article to enter into a debate in detail, on the constitutional position of Privy Council decisions as a binding authority in Malaysia. To the practitioner, the question of the authority of a 'precedent' presents itself largely as a question of its enforceability A 'precedent' has an authority if it is applicable, and normally will be applied. Otherwise it has comparatively little authority or no authority.

At this point it is necessary to draw attention to an important distinction which is frequently overlooked – between two types of precedents, namely that of the binding nature of a 'precedent' and that of its persuasive nature. It appears sometimes to be supposed that Privy Council decisions are binding if, and because they are decided by that tribunal. This view appears to be incorrect in the light of s.3 of the Civil Law Act, 1956, and ss. 64 and 74 of the Judicature Act, 1964. It seems that the binding authority of Privy Council decisions or the binding authority of decisions of any other country depends mainly on their intrinsic merits and their suitability to the circumstances of the case. They are persuasive but not authoritative.

It can be concluded therefore that a Privy Council decision is not binding in Malaysia unless it is given on an appeal from Malaysia. It would appear from the foregoing discussion, that the judges in the *Khalid Panjang* case and *the Commissioner for Religious Affairs Case* were wrong on the issue of binding for the reason that in both the cases the judges had relied on decisions of the Privy Council given on an appeal from foreign jurisdictions.

It would be unfair to base our conclusions on these two decisions alone. It needs but little effort to see that many other judicial decisions turned in Malaysia in precisely the same way. The purpose of the doctrine of

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and rules of equity with reference to the same matter the rules of equity prevail. (6) By virtue of s. 5 – if the issue involved is with regard to the tenure of conveyance or assurance of or succession to any immovable property or any estate. . ."

'precedent' as evidenced by the recent decision of the House of Lords,[92] is to advance justice. The community of Malaysia requires a law which takes into account its own administration and its own resources. In order to command respect the law must take into account the mores of the times and the social interest of the community, to which it must conform. A system of 'precedents' built-on obsolete and foreign principles cannot help in fulfilling the function of law as the judicial expression of the welfare of the society. Even in English law, the rule that a 'precedent' should be ignored, if it is in conflict with principle,[93] or with the circumstances of the case,[94] has been in practice from a long time.

To maintain the real spirit of the common law, it has become necessary to protect the Malaysian Courts from the slavery of case law. In following a 'precedent' especially in the case of interpretation of statutes the judge should give priority to the intention of the legislator, keeping in view the circumstances of the case, present local conditions and social interest, rather than similarity of the words in statutes. This view, seems to be in accordance to the Civil Law Act, 1956.

Secondly, in the case of Appeals from Malaysia, the Privy Council decisions have to be tested and examined afresh with the utmost consideration of the circumstances of the case at hand. It does not mean that the 'precedent' of foreign jurisdictions should be rejected without consideration. Instead it will be helpful in achieving 'justice' if Malaysian lawyers and judges keep themselves in touch with the decisions of foreign courts. But this reliance should not be abused by unnecessary adherence to Privy Council decisions. It is the primary duty of a court of justice to dispense justice to litigants, it is the traditional role to do so by means of an exposition of the relevant law. Such a duty requires flexibility, with the result that the judges will have the courage definitely to say that a decision of the Privy Council is 'wrong'. In so far as the application of Privy Council decisions, even on an appeal from Malaysia, are concerned, it is suggested that our judges should not be bound by such precedents.

[92] See *supra* p. 71

[93] *De Nicols* v. *Curlier* [1900] A.C. 21 at p. 27: "My Lords, I should think that in order to be binding on your Lordships a previous decision must be in principle, and as applicable to the same circumstances identical." It is further said at p. 30, "It follows therefore, if I am right, that the case is not binding on your Lordships, and that we are at liberty to decide the question now in dispute in accordance with reason and common sense".

[94] *Leigh* v. *Taylor* [1902] A.C. 157 at p. 159 (fixtures). ". . . it is manifest that you can lay down no rule which will in itself solve the question, you must apply yourself to the facts of each particular case."

The merit of this suggestion may be well appreciated in the light of two recent decisions by the Privy Council. In *Lim Yam Tek & Anor.* v. *Public Prosecutor,*[95] an appeal was made against the decision of the Federal Court[96] dismissing an appeal against the conviction of the appellant on a charge of murder. The main ground of appeal was concerned with the adequacy of the summing up. It was alleged that the presiding judge had failed to make clear to the jury the place where the deceased had died, it being a crucial matter in estimating the credibility of the eye witness to the crime who gave evidence for the prosecution. It was held that the Privy Council could not go into the question of the adequacy of the direction and the appeal was dismissed. Ong C.J. sitting in the Federal Court in his s, 1975, s . . . . . dissenting opinion said that, in this case,

> ". . . from first to last, the minds of the jury had been closed to the very question which the defence had required them to consider. In my view this is a fatal defect in the summing up".

Without necessarily subscribing fully to Ong C.J.'s views, it can fairly be said that the adequacy of summing up is necessarily a crucial matter. The claim by the appellants that the trial judge failed to make clear to the jury the place where the deceased died, was too crucial to be ignored. After all it was the function of the appellate court where an appeal lies to re-examine the facts and to re-assess the conclusions of the trial judge and the Federal Court.

But the Judicial Committee of Privy Council declined to interfere on this issue. Appreciating the dissenting opinion of Ong, C.J., and relying on the authority of *Muhammed Nawaz* v. *The King Emperor*[98], it was said:[99]

> "While it was no doubt necessary for the jury to make up their minds as to the place of death in order that they might come to a conclusion on the credibility of the witness. . . But their Lordships do not think it proper to go into this question of the adequacy of the direction. This was a matter for the Federal Court."

This decision may raise a doubt in the readers mind whether an injustice has been done in order to preserve the technicalities and 'precedents' of the courts. After all we are battering against a boundary of

[95] [1972] 2 M.L.J. 41.

[96] [1971] 2 M.L.J. 17.

[97] *Ibid.*

[98] "The Judicial Committee is not a revising court of criminal appeal: that is to say, it is not prepared or required, to re-try a criminal case, and does not concern itself with the weight of evidence. . . The Judicial Committee cannot be asked to review the facts of a criminal case, or set aside conclusions of fact at which the tribunal has arrived." (1941) 86 I.A. at p. 126.

[99] *Op. Cit.* n. 95 at p. 43.

possible human assessment of facts. These are not mathematical problems in which we can find the solution on a set of reducible formulas. The point of re-assessment of facts by a court where the appeal lies is in a sense, elementary – yet it is so important to the advancement of justice that it must be insisted upon.

Still further doubts may arise when it is seen that the same tribunal has allowed appeals on many occasions in the past.[1] on the point that the summing up of the facts was not adequate or satisfactory. As in *Chung Kum Moey* v. *Public Prosecutor,*[2] their Lordships held that there was a misdirection by the trial judge of such a character that the conviction could not be allowed to stand, notwithstanding that the Federal Court had found no fault whatsoever with the summing up.

The significance of the above cases, and others which follow it, is that we should no longer support the policy which dictates a blind adherence to the Privy Council decisions. The law should not be rigid and inflexible. It should move in response to the larger and fuller development of the Malaysian community. What we need is not formulae based on foreign conditions, but a scientific development of local 'precedents'. This can only be achieved if our courts are not restricted to the decisions of Privy Council.

To hold at one and the same time that Malaysian courts are bound to respect Privy Council decisions, and yet free to ignore them (if the circumstances of the case demands it) is a sound rule. It has been observed recently that this tribunal is not fully competent to assess Malaysian conditions. *Pegang Mining Co. Ltd.* v. *Chong Sam & Ors,*[3] demonstrates a situation in which the Judicial Committee of the Privy Council failed to appreciate the merits of the case. This case was dependent on the interpretation of an agreement made in 1931. The question in dispute was whether clause 4 of the agreement allowed the company to sublease land, near Papan town in the State of Perak, and in particular what was part of the Railway reserve. The land in question contained tin ore. The High Court held that no such term could be implied. On appeal the Federal Court held that it could and they ordered the company to execute a sub-lease and the sub-lessor to execute a sub-sub-lease in favour of the miner.

[1] See *Sambasivam* v. *Public Prosecutor* (1950) M.L.J. 145; *Subramaniam* v. *Public*

[2] [1967] 1 M.L.J. 205.

[3] [1973] 1 M.L.J. 135.

On appeal, the Judicial Committee of the Privy Council held that no such term as contended for by the respondent could be implied in the sublease. For the reason,

> "... that the covenant on the part of the miner which is sought to be implied would entitle the company to force upon him an obligation to extract ore from vicinal land and to pay tribute for doing so, notwithstanding that in his opinion and in actual fact the ore could only be extracted at a loss which he would have to bear himself. In their Lordship's view, no rational man could be expected to accept any ligation so hazardous and so onerous".[4]

With the utmost respect to their Lordship's views, this writer completely agrees with the views of Ong Hock Thye, which he expressed in his speech. He said:

> "I feel that, in considering what term may or may not be implied in the construction of a written contract recourse should not be had to arguments based on false and hypothetical premises in order to produce a decision quite the opposite of what the contracting parties ... intended."

He further condemned this decision in the following words.

> "This case affords a striking example of one which was not decided according to the merits, purely because legal arguments were so seductive that facts were wholly ignored. . ."[5]

It is to be noticed that courts often face a situation where the 'precedent' is in conflict with the social forces. There is certainly ample scope for construction and interpretation of the terms, but it is the duty of the courts to determine an interpretation which will promote best the of the courts to determine an interpretation which will promote best the ends of justice. It is found in some Privy Council decisions that their Lordships have avoided entering into the merits of the case, but have tediously dwelt upon the circumstances of the case and legal arguments which are not to the purpose. The reason for such decisions may be their ignorance of the conditions and social demands in this country. An illustration of the imperfect interpretation of law can be witnessed in another mining case, *Sungai Biak Tin Mines Ltd.* v. *San Choo Theng & Ors.*[6] In this case, the sublessees of 188 acres of mining land were carrying on mining operations on one part of the land, while on another portion of land which was not connected with the land reserved for mining operations, they planted tapioca over an area of 60 acres without the

[4] [1973] 1 M.L.J. 135, Per Lord Diplock at p. 138.

[5] Ong Hock Thye, *"Law and Justice through the cases"*, [1973] M.L.J. xxxv at p. xi.

[6] [1970] 1 M.L.J. 199; [1971] 2 M.L.J. 83 (P.C.)

consent of the sub-lessor or collector. Their total profit from this illegal user was $24,000 and $72,000 and from tin ore nearly $200,000 (15% of the value ore). It seems from the facts of the case that the sub-lessors intended to win the complete ore instead of taking tribute of 15% on it. So they involved themselves in illegal planting of 'tapioca' as a pretext to recover the possession of the mine. They succeeded in the High Court. The Federal Court reversed the decision by holding that for the illegal planting a fine was the proper prescribed penalty – but not the cancellation. The decision of the High Court and the Federal Court turned upon the proper interpretation of a clause in the sub-lease. The Privy Council reversed the decision of the Federal Court and held that "... working in the land" in the clause (4) (B) was not limited to mining operations' Their Lordships gave three reasons, (quoted below)[7] for doing so.

After analyzing their Lordship's opinion in the above case, and the arguments put forward by the Federal Court, this writer holds the same view as former C.J. Ong Hock Thye,[8] which is as follows:–

> "With respect, it was clear that none of their Lordships had even seen a Malayan tin mine. Nor was it appreciated that our Mining Enactment and regulations were drawn, not for tin miners in Cornwall, but for this country. Had they been aware of the true facts, they could not have given their reasons, none of which would have carried weight, even with the learned trial judge."

Inadequate assessment of the judicial problem, faulty evaluation of the facts, failure to appreciate local conditions and failure to keep pace with the social and economic changes in the country, may result in a precedent

[7] "In the first place, it seems clear, even on the respondents' argument, i.e. on the basis that 'working the land' relates only to the conduct of mining operations, that these must include not merely the extraction of ore, but such operations as clearing the surface of the land preparatory to the process of extraction. But it would seem illogical and arbitrary that such acts as cutting down rubber trees should or should not amount to a breach of Clause 4 (b). . . There are good reasons for this: first, the sublessor's have an interest in ensuring that the sub-lessees concentrate their effort and their labour force on the operations of mining rather than disperse them on other activities: secondly, if the rubber trees were to be cleared prematurely, before the sub-lessees were ready to commence mining in the area cleared, fresh vegetation would grow up, necessitating fresh clearing operations, thus adding to the time and expense required before minerals could be won: thirdly, under clause 15 of the sub-lease the sub-lessors retain an interest in the preservation of the rubber trees on the land until such time as they are required for mining. All of these considerations point, in Their Lordship's opinion, towards a construction of 'work the land' more extended than that for which the respondent contended. . ."

[8] *Op. cit.*, n. 5 at p. xi For academic discussion of dissatisfaction in the Privy Council decisions in the mining cases, see Choong Yee Wah, *Claims Arising from Mining Disasters, Hiap Lee Brickmakers Ltd. v. Weng Lock Mining Co. Ltd.* [1974], J.M.C.L. 257.

which lacks the intrinsic quality to guide future law. The decisions, which are based on faulty analysis, may create a bad law or a bad precedent. If this is the position, then it is asked, why have we been so slow in refusing to follow decisions of the Privy Council in the light of local conditions, as is required by the Civil Law Act, 1956?[9] If we ask why we have been so ineffective in devising better ways of doing justice we shall be told by our courts that we are bound by the Privy Council decisions, although they may create evil consequences. This contention seems to be against the spirit of the Civil Law Act, 1956. Precedent itself, is a blessing only in so far as it is applicable. But when it obstructs justice and ignores social and economic needs, then the problem of binding takes on a sinister hue. Courts must always be concerned with the quality of the precedent rather than quantity to establish the status of a good precedent.

Evidently, the problem of good precedent becomes most important and most precious. In the case of a bad precedent, those who are favoured by it, will always try to come under its umbrella of protection, and those adversely affected will seek to direct the court to escape from it. At this point, what our courts need is a right to differ from a decision of the Privy Council. One need not insist that a decision must be followed merely because it had been decided by the Privy Council. Obviously, a doctrine so out of harmony with modern Malaysian needs is not to be encouraged. Our great need today for a better future is to localize judicial technique and improve our sense of justice so that these forces may operate successfully and make their constructive contribution to our needs. The majority of the Commonwealth countries such as India, Ceylon, Australia, South Africa and Canada have removed the 'chains of slavery'. The point need no longer be laboured that being bound by a precedent is an important factor in the administration of justice. It is high time, in these circumstances, that we begin to weigh that which we are doing against what we ought to be doing.

'STARE DECISIS' IN THE COURTS OF EQUAL JURISDICTION IN MALAYSIA:—

The factors and forces which influence a Malaysian judge to adhere to or to depart from a prior decision are evidenced in *Sundralingam* v. *Ramanathan Chettiar*[10]

In this case the construction of s.27 of the Moneylenders Ordinance, 1951 was in question. The trial Magistrate placed reliance on the judgment of Storr J. in *K.R. Narayanan* v. *AL. Alagappa*.[11] This was affirmed by

[9] See *Supra*. 91

[10] [1967] 2 M.L.J. 211.

[11] (1956) M.L.J. 23, 24.

Court at Ipoh on appeal. MacIntyre, J. expressed his opinion about the judgment of Storr, J. as follows: "Although the decision of Storr J. has stood unchallenged for 10 years with respect, I am unable to agree with his interpretation of the section".[12] Despite the view which he expressed above, MacIntyre J. found himself bound to follow the decision of Storr, J. being a decision of a court of co-ordinate jurisdiction. On appeal, the Federal Court reversed the decision, on the question of the proper interpretation of s.27 of the Moneylenders Ordinance, 1951. Ong Hock Thye, F.J. highlighting the practice of the Malaysian courts, said:[13]

> "Each court is bound by the decisions above it, but individual judges are not bound by each other's decisions, although judicial courtesy naturally requires that they do not lightly dissent from the considered opinion of their brethren. . ."

He also added that,

> ". . . within the past decade, even the last lustrum judges in Malaya have on several occasions agreed to differ as may be seen from the reports in the Malayan Law Journal."[14]

The passage above suggests a few reflections for which no originality is claimed but which may be helpful to the practising lawyer in knowing the trends in this country. The doctrine of *Stare Decisis* in Malaysia adheres to a policy by which a court may reject a previous decision on the ground that it is unreasonable, or unjust. A decision is to be treated as a 'precedent' to be followed only on the assumption that the principle it enunciates is applicable to the present circumstances of the case.

The determination of the applicability of a precedent involves two stages. Firstly, a subsequent judge has to determine the principle given in an earlier decision. Secondly, it has to be determined whether the applicable principle is correct. But who should decide this question? Of course, ". . .it is for a subsequent judge to say whether or not it is a right principle, and, if not, he may himself lay down the true principle. In that case the prior decision ceases to be a guide for any subsequent judge. . .[15]

In the case of the Court of Appeal and the Federal Court Malaysian courts have accepted the formal devices which were invoked in *Young* v. *Bristol Aeroplane, Company,*[16] to control the harmful effect to the

[12] *Op. Cit.*, n. 8 at p. 211.

[13] Sir Carleton Allen, *Law in The Making*, 6th ed., 231, cited in *Sundralingam* v. *Ramanathan Chettiar op. cit.*, n. 10 at p. 213.

[14] *Op. Cit* n. 10 at p. 213

[15] *Osborne* v. *Rowlett* (1880) 13 ch. D., 774, 785.

[16] [1944] 2 All E.R., 293.

doctrine of precedent. A careful study of these exceptions[12] will make it clear that a subsequent court will have a reasonable liberty to reject any previous decision on any one of three conditions. Firstly, when a court is confronted with two conflicting decisions, of its own, it may choose any one of them.[18] Secondly, the court is not bound to follow any of its prior decisions, when a higher court (in the case of Malaysia) or the House of Lords (in the case of Court of Appeal) has declared such a decision to be wrong.[19] Thirdly, the court is not bound by a previous decision where such a decision is given *per incuriam*.[20]

The decision in *Young* v. *Bristol Aeroplane Co.* has been accepted and followed in many cases in Malaysia.[120] As it provides considerable liberty for a subsequent court to decide the applicability and correctness of the principles of the first case, it also demands that a later court must investigate and re-examine the reasoning on which the earlier court arrived at the decision. And if he finds a gap in the prior decision, as Sir Wilfred Greene M.R. found in *Gerald* v. *Worth of Paris*,[22] and in *Lancaster Motor Co. (London) Ltd.* v. *Bremith*,[23] he must refuse to follow that decision.

[17] "On a careful examination . . . We have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. . . The only exceptions to this rule. . . are

(1) The Court is entitled and bound to decide which of two conflicting decisions of its own it will follow.

(2) The Court is bound to refuse to follow a decision of its own, which though not expressly over-ruled cannot in its opinion stand with a decision of the House of Lords.

(3) The Court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*" *Ibid* at p. 300.

[18] *Mesenor* v. *Che Teh and Ors.* (1953) 2 M.C. 208.

[19] *Khoo Hooi Leong* v. *Khoo Chong Teck* [1930] A.C. 346; *Ng Kay Thong* v. *Chan Shou Shing* [1966] 1 M.L.J. 305.

[20] *Ibid.*

[21] *Hendry* v. *de Cruz* (1949) M.L.J. Supp. 25; *China Insurance* v. *Loong Moh & Co.*,

[22] [1936] 2 All E.R. 905.

[23] [1941] 2 All. E.R. 11 Sir Wilfred analyzing the prior decision said at p.

The Court in *Young* v. *Bristol Aeroplane Co.*[24] relied on the principle which was enunciated in *Lancaster Motor Co. (London) Ltd.* v. *Bremith.*[25] In the light of these two decisions it is not difficult to conclude that the courts in England and courts in Malaysia can always differ from a previous decision on the grounds of non-applicability of the case, or incorrectness of the principle[26]

In the case of judges of the High Court Azmi, J., clarified the policy of accepting a precedent in Malaysia clearly in *Sundralingam* v. *Ramanathan Chettiar,*[27] in the following words:—

> "On this question (the question of binding precedent) my view is that, we may properly follow the practice in England where a High Court Judge, though he cannot overrule one of his brethen, could disapprove his decision and decline to follow him. This to my own knowledge has been the practice in Malaya for several years now."

In the past there were a small group, perhaps a minority one, which held the view that even a High court is bound by its own decisions. In *Re Chop Nam Ching Liong,*[28] Murison C.J., the learned Chief Justice (as he was then) referred to an unreported judgement of Barrett-Lennard J.,[29] in a case similar to the one before him. In following the decision, he said:[30]

> "As the decision of Barret Leonard J., is a decision of the same court, I follow by courtesy not by conviction".

P.N. Mohamed Ibrahim v. *Yap Chin Hock & Anors.*[31] also demonstrates the same policy. In this case, the question was whether the learned President should have extended time to allow the defendant to file a defence and whether the High Court could determine a question again, which had already been determined by the Rent Assessment Board. The Court first held that.[32]

> ". . . these was not mere that the learned President should have extended time for filing the defense and secondly the court could not interfere with the certificate of the Rent Assessment Board on the

[24] *Op. Cit.* n. 16.

[25] *Op. Cit.* n. 23.

[26] *Ng. Kay Thong* v. *Chan Shon Shong* [1966] 2 M.L.J. 305.

[27] *Op. Cit.* n. 14 at p. 213.

[28] (1927) S.S.L.R. 27.

[29] *Re Chop Ghee Lee* (Bankruptcy No. 362 of 1923)

[30] *Op. Cit.* n. 28 at p. 28.

[31] (1954) M.L.J. 127.

[32] *Ibid.* at p. 128.

authority of *Low Yeo Foong & Ors.* v. *Chop Thong Cheong*[33] which being a decision of . . . the same court of co-ordinate jurisdiction was binding on that court".[34]

The writer, here, is not concerned with the merits or demerits of this decision. What we are concerned with is the manner in which a precedent of the court is treated by the latter courts. Wilson J. in *P.N. Mohammed Ibrahim's case,*[35] accepting Buhagiar, J.'s decision in *Low Yeo Fong & Ors.* v. *Chop Thong Cheong.*[36] said:

"...I am bound by the decision of Mr. Justice Buhagiar and I have not considered whether or not I would myself come to the same conclusion".

The echo of the same policy is also heard in *Olympia Oil & Cake Ltd.* v. *Produce Bakers Ltd.* in which Buckley J., said:[37]

"I am unable to adduce any reason to show that the decision which I am about to pronounce is right. . . . But I am bound by authority which of course, it is my duty to follow".

It is the submission of this writer that such expressions are to be treated as worthless. It is the function of a court to examine every case afresh and draw its own conclusions. Every judgment must be read as applicable to particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the particular facts of the case in which such expression are found.[38]

No doubt the life of law is experience, but experience does not allow any judge to ignore logic,reason and the purposes of justice. The 'precedents' in any judicial system are not mathematical formulae having their essence in their forms. They are the conclusions of human evaluations of certain facts which were before them.

Lord Morris in *Conway* v. *Rimmer,* said[39]

"though precedent is an indispensable foundation upon which to decide what is the law there may be times when a departure from precedent is in the interests of justice and the proper development of law."

In the interests of justice and the proper development of law, in any judicial system, the significance of a 'precedent' is to be determined on the

[33](1954) M.L.J. 126.

[34]Op. Cit., n. 32.

[35]*Ibid.*

[36]*Op. Cit.*, n. 33.

[37](1915) 112 L.T. 744 at p. 750.

[38]See *Quinn* v. *Leatham* [1901] A.C. 495 at p. 506.

[39][1968] A.C. 910 at p. 958.

basis of its intrinsic value. Although Malaysian courts generally follow a policy, by which they do not like to dissent from the opinion of their brethren easily,[40] this is not to say that a decision or a number of decisions upon a point of law command a compulsory following. The judges in Malaysia may distinguish between various precedents or may ignore them, if they are not relevant to the case before the Court.

The Court of Appeal in the Federated Malay States has held in the case of the interpretation of statutes which are in *pari materia* with previous statutes, that the court should take them as evidence of past law. The proper course, either in following an interpretation of a statute or a precedent, is to begin by asking what is the natural meaning uninfluenced by an consideration from previous state of the law.[41]

IS CERTAINTY AT STAKE?:–

It is suggested here that where there is a conflict between the court's present opinion and any former opinion of the same court, the court must hold its present opinion as law without regard to its former ruling. But this view has given rise to one curious and perhaps important problem – it is that the elements of certainty and stability, which are the backbones of every judicial system are at stake. The advocates of this group feel that the 'precedent' however crude, unsatisfactory or wrong in principle should be followed in subsequent decisions in order to achieve certainty in law.[42]

In some cases the courts have treated 'certainty' as the dominating and material point. In such cases, the court concerns itself more with such points than the facts of the case. *China Insurance Co. Ltd.* v. *Loong Moh Co. Ltd.*[43] is perhaps a good example. Thomson C.J. in spite of his doubts of the decision in *K.E. Mohamed Sultan Marican* v. *Prudential Assurance Co. Ltd.*[44] said:[45]

> "As to whether that case was rightly or wrongfully decided I express no opinion. That point will have to be decided, if at all, elsewhere. But it is a decision which affects a type of litigation that is common

[40] *Khoo Keat Lock* v. *Haji Yusop* (1929) S.S.L.R. 210, Reay J. "I think it must be admitted that this court may in exceptional circumstances differ from its own decisions. . . this very extreme step should be taken with great reluctance and only when it cannot be avoided."

[41] *Panicker* v. *The Public Prosecutor* (1915) 1 F.M.S.L.R. 169.

[42] "When there has been a decision of this court upon a question of principle it is not right for this court, whatever its own views may be, to depart from that decision. There would otherwise be no finality in the law." See *Velazquez Ltd.* v. *Inland Revenue Commissioners* [1914] 3 K.B. 448 at p. 461.

[43] (1964) M.L.J. 307.

[44] (1941) M.L.J. 20.

[45] *Op. Cit.* n. 43.

here. It has now stood for over 23 years. There can be little doubt that during these 23 years it has frequently been considered by practitioners as a guide in the course of litigation. In my view it would be wrong, for us not to accept it."

This view, however is not necessarily true and may not be healthy. A rigid adherence in following a past decision, even though it does not satisfy reason and justice leads not only to an artificial certainty but it also fails to keep pace with the rapid change of times. The doctrine of precedent with its persuasive character must be approached carefully; for in dealing with it we are in peril of committing the sin of over emphasizing. There is a difference between what is meant by 'certainty' and what we want it to mean.

A blind adherence to past decisions would produce many evils. Although such a practice might preserve certainty, it would fail to deal adequately with the new requirements of society. Do we want such 'certainty' at the expense of justice and development of law? It is perhaps not too rash to say that this kind of certainty and stability is not desirable and not required in Malaysia at the present time. After all ". . . no more unpleasant duty has to be performed by a judge than that of giving, in accordance with binding authority, a decision which upon the facts before him he considers both unreasonable and unjust" [46]

The law becomes defective if it does not act as a better means of ascertaining and advancing social interests and justice. The doctrine of precedent exercised within the reasonable limits of flexibility and adaptability would be well able to protect the changing mores and standards of our community. The court, as Lord Denning said should not be bound by the self imposed fetter of its own prior decisions.

A SUGGESTION FOR FUTURE LAW:–

It will not be fruitless to ascertain a formula in the light of the suggestions made by Lord Denning for the fruitful and constructive administration of justice. It has been said that the common law has developed at least half a dozen "fundamental principles", to facilitate the smooth running of justice. No one can deny the fact that English judges have always given priority to these fundamental principles rather than to precedent in the past. Recently they have become more conscious of these rules. A reader often finds free and clear references in their decisions to such principles.

"Logic and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall

[46] *Lean & Ors. v. Casey* [1932] 2 K.B. 576, cited in *China Insurance Co. Ltd. v. Loong Mob Co. Ltd.* (1964) M.L.J. 307.

dominate in any case, must depend on the comparative importance or value of the social interests that will thereby be promoted or impaired."[47]

In Malaysia, the present writer suggests that the rule of adherence to precedents should be relaxed, if not abandoned completely. If certain decisions of the Privy Council only could be ignored, it would lead to a system which would be able to meet the demands of the changing conditions in Malaysia. It is possible to give the Federal Court of Malaysia a discretionary power to accept or reject any decision of the Privy Council even if it is given on an appeal from Malaysia.

This problem can be solved simply by retaining the doctrine of binding precedent, while empowering our courts to ignore the Privy Council decision if the circumstances of the case, social interest, or local needs so require. A fine expression of this suggestion is contained in the words of Chamberlin.[48]

"A deliberate or solemn decision of a court or judge, made after argument on a question of law fairly arising in the case, and necessary to its determination, is an authority or binding precedent, in the same court or in other courts of equal or lower rank, in a subsequent case, where 'the very point' is again in controversy, but the degree of authority belonging to such a precedent depends, of necessity, on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral or intellectual, rather than arbitrary or inflexible".

*Mohd. Naseemuddin Ahmed

[47] Cardozo, *The Nature of the Judicial Process*, 141.

[48] Chamberlin, *Stare Decisis*, 19.

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