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David S.Y. Wong. Tenure and land dealings in the Malay states with a foreword by Tan Sri Mohamed Suffian. Singapore: Singapore University Press, 1975.

CHAPTER 12

CUSTOMARY LAND LAW IN NEGRI SEMBILAN

THE land law in Negri Sembilan requires separate treatment in connection with its local tribal custom. Under this custom, as will be noted, land held by the tribal people in this State is subject to restraints on alienation. While, in the other States, the introduction of the new land system after British rule has brought about the individualisation of private land ownership, the parallel development in Negri Sembilan has been affected by the existence of such custom concerning land held by the tribal people. The custom conflicts with the new land system in two ways. First, individualised ownership of land under the new system seems incompatible with the customary restrictions of ownership. Secondly, the system of registration of titles *prima facie* facilitates and gives effect to dealings by a land-holder on the assumption of his freedom of alienation, and may operate to undermine the observance of the custom. In order to resolve these apparent conflicts, special legislation has been introduced in Negri Sembilan to preserve the custom among the tribal people. This special legislation makes the custom applicable to lands which have been recorded and shown on the register to be subject thereto, but it has its limits. In consequence, problems may arise as regards the relationship of the custom with the special legislation and also with the general legislation relating to land tenure and registration.

I. A Brief Account of the Tribal Custom

The tribal people in Negri Sembilan came from Menangkabau in Sumatra[1] — the Menangkabau Malays as they are known. Their social system consists in grouping of individuals into separate matriarchal and exogamous tribes.[2] They have elaborate customs,

[1] See C.W.C. Parr and W.E. Mackery, "Rembau" 56 JSBRAS, (1910) 1; J.M. Gullick, "Sungei Ujong", 22 JMBRAS, (1949) Pt. II, 1; J.E. Nathan and R.O. Winstedt, "Johol, Inas, Ulu Muar, Jempul, Gunong Pasir and Terachi", in *Papers on Malay Subjects*, ed. by R.J. Wilkinson, 2nd Series, Calcutta, 1920; and A. Caldecott, "Jelebu", *ibid*, 2nd Series No. 1, Kuala Lumpur, 1912.

[2] For a general account of their tribal system, see R. Winstedt, *The Malays, A Cultural History*, 4th ed., London 1960, pp. 81-90.

adat perpateh, regulating various matters, including quite a complex body of rules relating to land.[3]

Land acquired and worked by an individual and his family is treated as belonging to his tribe and is to be kept within the tribe. This is the cardinal principle, as one may discern, which underlines the particular rules. Their custom classifies property into (a) *harta pesaka* — "ancestral property" and (b) *harta carian* — "acquired property." As regards land, "ancestral land" (*tanah pesaka*) includes all land which has been inherited along a matrilineal line. Such land is tied up in inheritance in favour of female heirs and cannot be alienated by its present holder except for certain customary purposes.[4] Where alienation is permitted, the heirs who are otherwise to succeed to the land are given an "option" to purchase the land at a fair price in an order of priority according to the closeness of matrilineal kinship. If the heirs choose not to exercise their privilege, this right of "option" is then extended to all members of the tribe. Only subject to this double check, may such land be alienated to an outsider.

"Acquired land" (*tanah carian*) may generally be taken to include all land which is acquired by a person otherwise than by way of inheritance, such as by purchase or appropriation of new land. "Acquired land" once devolved to female heirs becomes "ancestral". It would appear that under the custom the holder of "acquired land" could freely dispose of his land without restrictions, but he has no power to make testamentary disposition. On the death of its holder, whether male of female, the "acquired land" must devolve according to the custom. For this purpose, such land is further differentiated. Where its deceased holder was single, the land known as *carian bujang* is to devolve in the same way as "ancestral land", that is, inheritance by matrilineal descent. In the case of a married person, his *carian bujang* acquires the character of *pembawa kembalek*, and hers *dapatan tinggal*. Upon the dissolution of the marriage either by divorce or death of one of the spouses, the former is returned to the husband or devolves within his tribe as in the case of *carian bujang*, and the latter remains with the wife or likewise devolves within her tribe. Land jointly acquired by husband and wife during their marriage forms a different kind of property called *carian laki-bini* (joint property) which is subject to certain rules relating to its division

[3] For details, cf C.W.C. Parr and W.H. Mackery, "Rembau", *op. cit.*; R.J. Wilkinson, "Malay Law", in *Papers on Malay Subjects:* Law, Pt. 1, Kuala Lumpur, 1908; G.A. de C. de Moubray, *Matriarchy in the Malay Peninsula*, London, 1931; E.N. Taylor, "The Customary Law of Rembau", 7 JMBRAS, (1929) Pt. 1, 1-280; E.N. Taylor, "Aspects of Customary Inheritance in Negri Sembilan", 21 JMBRAS, (1948) Pt. 2, 3-130; E.N. Taylor, "Malay Family Law", 15 JMBRAS, (1937) Pt. 1, 1-78.

[4] E.g. for raising funds to enable pilgrimage to Mecca.

on divorce or devolution on the death of one of spouses.[5] In certain circumstances, male issue of the marriage could also claim and succeed to a share in such joint property. There is some uncertainty as to whether, where such land is inherited by a male, he may freely dispose of the land. In any case, on his death, the land will descend according to the general rule of matrilineal succession. Thus, in general, "acquired land" would in most cases ultimately become "ancestral land" and thereby become preserved within the tribe.

The foregoing is but a brief and general account of the tribal custom. It should be pointed out that there are variations between the different tribes and also between different localities with respect to their particular customary rules and practices.[6] Furthermore, their customs have not been static and have undergone certain changes in new social and economic conditions.

II. The Customary Tenure Legislation

In the early period of British rule prior to 1909, Negri Sembilan went along with the other States in introducing the same land legislation.[7] The 1887 Sungei Ujong Land Regulations provided for the registration of all lands in native occupation in anticipation of the issue of a lease in perpetuity for every such registered holding.[8] This direct conversion of native holdings into modern ownership of land under a lease did not get under way. The subsequent 1889 General Land Regulations recognised all native holdings as lawful by virtue of the local custom,[9] and at the same time required a register of these holdings to be compiled.[10] The next land legislation, namely the Negri Sembilan Land Enactment of 1897,[11] provided that any native "holding land under ancient customary tenure" was entitled to be registered as owner of such land, while "no claim to or interest in any land" should be valid unless it had been registered.[12] This position remained substantially the same under the Negri Sembilan Land Enactment of 1903, which was in force until 1911.

[5] Some such rules will be considered later at pp. 501-3, below. Briefly, (a) on divorce, *carian laki-bini* is divided equally subject to some exceptions; (b) on the death of either spouse without issue of the marriage, it remains to the survivor; (c) on the death of the husband leaving issue, it goes to the widow and issue; (d) on the death of the wife leaving issue, it is in certain ways divided between the widower and the issue. (See E.N. Taylor, "Customary Law of Rembau". *op. cit.*, p. 30)

[6] *Abas* v. *Hajjah Saelan* [1967] 1 M.L.J. 212, 213.

[7] See chapter 5.

[8] Sungei Ujong Order in Council of April 9, 1887. See chapter 5, p. 71, above.

[9] Order in Council (old Negri Sembilan) of December 9, 1889, s. 5.

[10] *Ibid.*, s. 21.

[11] No. XXII of 1897. See chapter 5, p. 78, above.

[12] *Ibid.*, ss. 26 (ii) and 35.

(a) The Place of the Custom prior to 1909

Under the 1903 Land Enactment (as also under the 1897 Land Enactment[13]), it was expressly provided that on the registration of a native holding, its holder became "deemed to have a permanent, transmissible and transferable right, interest and occupancy in his land."[14] This would appear to indicate that the legislation contemplated the transformation of customary holdings into statutory land-holdings on the basis of individual ownership. The fact, however. was that the administration in Negri Sembilan simply followed the land policy and measures carried out in the other States in disregard of the local tribal custom. And, as the crude legislation at that time hardly stated the law clearly, the mere description of the ownership of a registered land-holder as "transmissible and transferable" could not simply be taken to have the effect of conferring on the holder full ownership free from the customary limitations. Actually, the legislation itself made room for a great amount of flexibility in the administration of native holdings. It provided for summary procedural machinery for the Land Officers to entertain all claims to land either by way of succession or otherwise.[15] This obviously envisaged claims based on the custom; and a number of reported decisions made by the Land Officers, that is, the Collectors, in such cases in later years did show that the custom was upheld as applicable to registered holdings of the tribal people. For example, in *Bujok* v. *Tiamah*,[16] a registered owner of ancestral land (*tanah pesaka*) duly transferred it by way of registration to another person. The transfer was contrary to the custom. On the application of a person who claimed to be entitled to the land under the custom, the Collector set aside the transfer and registered the claimant as the owner of the land. It should be added that in this case, the transfer was registered at a date before 1909 and the application was made late in 1917.

It need further be noted that the early registration system governing lands held under the Mukim Register (practically including all registered customary holdings) was in a very crude form. The land legislation which required registration of dealings in such lands did not go further than treating registration as a formal requisite for carrying out dealings with land. In other words, registration did not confer "indefeasible title".[17] On the other hand, while among the tribal people (as in *Bujok* v. *Tiamah*), registered dealings contrary to the custom could simply be annulled in favour of a

[13] S. 35 of the 1897 Enactment, s. 27.

[14] S. 33 of the 1903 Enactment. See chapter 5, pp. 75, 78, above.

[15] See s. 35, *ibid.*

[16] Reported in E.N. Taylor, "Customary Law of Rembau", at p. 183. See also *re Munap and Salleh*, Rem. Cas. p. 133 and *Repah* v. *Siah and Taib*, Rem. Cas. p. 185 (noted at pp. 505-7, below.)

[17] See chapter 6, pp. 115-6, above.

rightful claimant under the custom, it would appear that if any such dealing had been registered in favour of an outsider, the administration policy might have been different. Any way, at least in the early years, dealings in favour of an outsider must have been very rare, with presumably the tribal people observing and following their own custom as before.[18]

However, subsequent economic changes and development in the State soon exposed native holdings to the world of commercial transactions. As observed by Taylor,[19] "towards 1909, however, rubber planting spread to small holders; land became more valuable and saleable on a wider market. Planters were extending their estates and sometimes wanted to purchase strips of *kampong* or even *sawah* for purposes of consolidation." This gave rise to two dangers. Owners of customary holdings might have been tempted to sell their lands in defiance of the custom and more land would have tended to pass out of the hands of the Malay peasantry. Under these circumstances, the existing general land legislation became inadequate both as regards the lack of definite protection for innocent land investors and as regards its deficiency in safeguarding the interests of the local tribal Malays against their vulnerability to expropriation of their lands by outsiders.

(*b*) *The Customary Tenure Enactment, 1909*

Thus, in 1909, the State Council in Negri Sembilan introduced special legislation to deal with customary holdings — the Customary Tenure Enactment, 1909.[20] This Enactment was intituled: "An Enactment to provide for the preservation of Customary Rights over certain lands." These "certain lands" referred to lands situate in specified districts[21] in the occupation of the members of specified tribes.[22]

The Enactment in its preamble alluded to the occupation of lands, whether registered or not, by the tribal members "lawfully" under their custom. Section 3 declared that, subject to the provisions of the Enactment, no land subject to the custom should be transferred, charged, transmitted, or otherwise dealt with except in accordance with the custom. Therefore, as a matter of general legal principle, the Enactment assumed and accordingly accorded statutory recognition to the force of the tribal custom. This certainly removed

[18] See E.N. Taylor, "Aspects of Customary Inheritance in Negri Sembilan", at p. 51.

[19] *Ibid.*

[20] No. 17 of 1909.

[21] Originally confined to the administrative districts of Kuala Pilah and Tamplin. See fn. 39, at p. 478, below.

[22] Enumerated in a schedule to the Enactment.

any doubt as to whether or not the custom could hitherto have continued in force *vis-a-vis* the individualisation of land ownership under the new system of land tenure.

Hence, under the Enactment, where a registered owner of land was a member of one of the tribes, his ownership clearly remained subject to the custom. To ensure that he would not carry out any dealing in contravention of the custom, the Enactment imposed certain requirements which had to be complied with in order that the dealing be validly effected. The dealing had to be assented to by the local headman of his tribe and the instrument of dealing was required to be executed in the presence of the headman and the Collector and to be duly certified by the latter as having complied with the requirements.[23] In addition, the Enactment expressly provided that no land subject to the customary restrictions should be transferred or charged to any person other than a member of the tribes without it first being offered to the members of the tribes by publishing in the Mukim in which the land was situate at least a month's notice of the owner's intention to sell or charge the land.[24] The same was required to be done where such land was to be sold for the enforcement of a charge.[25]

All this was aimed at preserving lands held by the tribal people among themselves. Nevertheless, the Enactment did not absolutely prohibit dealings in favour of an outsider.[26] On the failure of any member of the tribes exercising the option, land subject to the custom could be sold or charged to an outsider, and when, all the requirements having been complied with, the land was transferred to an outsider, it ceased to be subject to the custom.[27]

This specific Enactment was to be read and construed with the general land legislation and it was expressly declared that nothing in the general legislation was to prevail against the provisions of the Enactment.[28] It may be recalled that under the 1903 Land Enactment the registration of dealings in land did not make the title or any interest in land thereby acquired "indefeasible". Now the Customary Tenure Enactment seemed to imply generally that any registered dealing in compliance with the prescribed requirements would be taken as being in accordance with the custom and be protected against any adverse claim based on the custom. At least, such protection was expressly given to an outsider who so acquired

[23] S. 4 (ii) thereof.
[24] S. 4 (i) thereof.
[25] S. 6 thereof.
[26] Except where land subject to the custom was to be sold in execution of a decree. See s. 6 (i) of the Enactment.
[27] S. 7 thereof.
[28] S. 1 (ii) thereof.

a transfer of such land.[29] On the other hand, if any dealing was carried out without complying with the requirements and even if it had been registered, it would not be valid in the sense that such a dealing was simply not permitted under section 3 (noted earlier) of the Customary Tenure Enactment. Such an invalid or unlawful dealing could just be set aside on the application of the rightful owner under the 1903 Land Enactment.[30]

On the other hand, while the Customary Tenure Enactment, 1909, did safeguard the custom and customary land rights, it did very little for the protection of an innocent purchaser in that he might run the risk of making a deal in respect of land which was not known to him to be subject to the custom. Most probably, such a risk was unlikely at that time. Customary holdings being grouped in settlements, any outsider should have been able to know that land situate in certain localities might have been subject to the custom and he could certainly find out by making some inquiry. Perhaps, in order to prevent possible cases of hardship, the Enactment by its section (2)(i) empowered the Collector to make an endorsement of the words "Customary Land" on the register of any land which he had found to his satisfaction to be subject to the custom.[31] But it imposed no duty on the Collector to do so, and in fact no Collector carried out any systematic work under this provision.[32]

(*c*) *The Customary Tenure Enactment, Cap. 215.*

The Customary Tenure Enactment, 1909, was repealed and replaced by a new Enactment in 1926.[33] While the 1909 Enactment was by no means satisfactory, its replacement by the 1926 Enactment was owing mainly to two reasons. First, in 1913, the Federated Malay States saw the introduction of special policy legislation, namely the Malay Reservations Enactment,[34] which provided for the reservation of land to the Malays in these States as well as for the protection of their interests in land against non-Malay persons.[35] This Enactment strictly prohibited lands within designated areas from passing into the hands of non-Malays. Although, to a great extent, the 1909 Customary Tenure Enactment had served to preserve certain lands within the possession of the tribal Malays in Negri

[29] See s. 7 thereof.

[30] See p. 508, below.

[31] See also s. 2 (ii), under which land newly alienated by the State could also be made subject to the customary restrictions by way of such endorsement. This subsection was added to the Enactment by an amendment in 1919 (No. 1 of 1919).

[32] See Taylor, "Inheritance in Negri Sembilan", p. 52.

[33] No. 1 of 1926.

[34] No 13 of 1913.

[35] See chapter 13.

Sembilan,[36] it fell short of securing a total prevention of their lands from being sold to persons outside their tribes who might not be Malays. The 1909 Enactment therefore needed improvement for adopting the more stringent policy of the Malay Reservations Enactment.

Second, the introduction of the F.M.S. Land Code, 1926 (subsequently Cap. 138) also necessitated changes in the Customary Tenure legislation. As has been noted elsewhere,[37] this Land Code extended the Torrens system to lands held under the Mukim Register which included customary holdings of the tribal Malays. In consequence, the machinery for the protection of such customary holdings had to be re-adjusted to co-ordinate with the operation of the Torrens system.

The 1926 Enactment which made these changes has, as subsequently amended, remained in force and is now called the Customary Tenure Enactment, Cap. 215.[38]

(*i*) *The new scheme under the Enactment, Cap. 215*

The new Customary Tenure Enactment, like its predecessor, is only concerned with the custom of specified tribes relating to lands situate in specified districts.[39] However, unlike its predecessor, the new Enactment does not seek to ensure the observance of the custom in respect of all lands which are subject to the custom. It confines its application only to a statutorily defined class of land called "customary land", which means "land held by any entry in the Mukim Register which has been endorsed" with the words "Customary Land" under section 4 of the Enactment or section 2 of the previous Enactment. As regards this class of land, the Enactment provides that such land shall not be dealt with except in accordance with the custom.[40] It is not necessary to go into the detailed provisions of the Enactment, Cap. 215, which are much more elaborate than those in the previous Enactment. It suffices to note that it likewise imposes certain "safeguard" requirements to be complied with before any dealing in such land can be effected.[41] It contains more provisions relating to substantive law by way of partly codifying as well as replacing the custom.[42] Over and above

[36] See Dr. R. Winstedt's memorandum reproduced by Taylor in "Inheritance in Negri Sembilan", p. 68.

[37] See chapter 6, p. 119, above.

[38] Federated Malay States Revised Laws, 1935.

[39] I.e., the districts of Kuala Pilah, Tamplin, Rembau, and Jelebu. See the definition of "custom" under section 2 of Cap. 215.

[40] S. 5 of the Customary Tenure Enactment, Cap. 215.

[41] S. 7(iv) and (v) thereof.

[42] Ss. 7, 8, 11, 12 and 13 thereof.

this, the Enactment imposes an almost absolute prohibition on any dealing in such land in favour of an outsider.[43]

The reason for limiting the application of the Enactment only to "customary land" was obvious. In view of the fact that lands held under the Mukim Register were brought under the Torrens system, it became necessary that the subjection of any land to the customary restrictions had to be notified on the register. Otherwise, if, as was the position under the previous Enactment, customary land rights even though not revealed on the register could override registered dealings in favour of innocent purchasers, the application of the Torrens system to such lands would be seriously impeded. Thus, this subsequent Customary Tenure Enactment adopted the policy of giving its protection to customary rights only where their existence was indicated by an endorsement on the register.

(ii) "*Customary Land*"

Under section 4 of the Enactment, the Collector is empowered to make such endorsement in two kinds of circumstances. He may do so when, after an inquiry on his own initiative or at the instance of any interested party, he is satisfied that the land concerned is "occupied subject to the custom" and that it is registered in the name of a female person. He may also make such endorsement in respect of lands alienated by the State to the female members of the tribes with the consent of the alienees. In the latter case, it would appear that land can be brought under the operation of the Enactment on the application of its registered owner whether or not it is subject to the customary restrictions.[44]

In the former case, the land concerned must first have already become occupied "subject to the custom". There is some ambiguity as to what this expression means. Under the custom, not all lands are subject to the customary restrictions on the alienability of land. As a general rule, land newly acquired by an individual otherwise than by way of succession (i.e. *tanah carian*) may be freely disposed of or dealt with by its owner, and only land which has devolved according to the custom (i.e. *tanah pesaka*) becomes tied up by the restrictions. But there are other circumstances in which land which, strictly speaking, cannot be regarded as ancestral land, may also be subject to the restrictions. In *Re Haji Pais dec.*,[45] Burton J. expressed a

[43] See s. 7 (i) which provides that "No customary land or any interest therein shall be transferred or leased to any person other than a female member of one of the tribes included in Schedule B." S. 7 (ii) allows such land to be charged in favour of certain specified persons and bodies. S. 7 (vi) excludes tenancies for a period not exceeding 12 months from the prohibitive provisions.

[44] It may be noted that land newly acquired from the State is *tanah carian*. (See p. 472, above.)

[45] (1928) reported in Taylor, "Inheritance in Negri Sembilan", at p. 57.

view to the effect that lands "occupied subject to the custom" need not necessarily be confined to lands so occupied "immemorially". He was there reversing the decision of a Collector who held the view that endorsement could only be made in respect of ancestral land which he mistakenly took to mean ancient customary holdings. In *Haji Hussin bin Haji Matsom* v. *Maheran binti Haji Mohammed*,[46] Horne J., realising that acquired land (*tanah carian*) may be converted into ancestral land (*tanah pesaka*) under the custom, expressed the view that "customary land" under the Enactment meant ancestral land as opposed to acquired land, thereby implying that only ancestral land is capable of becoming "customary land" by way of endorsement. If his view is correct, then those non-ancestral lands which may be subject to the customary restrictions would fall outside the Enactment. Moreover, the Enactment has added another precondition (not found in the previous Enactment) for the making of the endorsement in that the land concerned must be already registered in the name of a female person, while as a matter of fact, even ancestral land is quite often registered in the name of a male person. It would thus appear that not all lands which are subject to the customary restrictions are capable of being brought under the operation of the Enactment.

Lastly, it will be realised that the presence of the endorsement on the register is not just to prevent any dealing in "customary land" which is contrary to the custom and the provisions of the Enactment. It is actually a statutory criterion marking a special category of land which cannot be lawfully dealt with except as permitted by the Enactment. Any such land is thereby made subject to the custom as partly codified and varied by the Enactment which is in some aspects different from the original custom.

(d) The Customary Tenure (Lengkongan Lands) Enactment, 1960

In 1960, a separate Enactment was passed to deal with the custom of certain tribes other than those covered by the Customary Tenure Enactment, Cap. 215. This is the Customary Tenure (Lengkongan Lands) Enactment, 1960.[47] It is modelled on Cap. 215, and their provisions are almost identical except with some variations owing to the differences between the customs of the two groups of tribes.

III. The Place of the Custom as Unwritten Land Law

This calls for discussion because of certain confusions which have arisen mainly as a result of the introduction of the Customary Tenure Enactment, Cap. 125. There has been a controversy as to whether

[46] (1941) F.M.S.L.R. 18; (1946) 12 M.L.J. 116.
[47] No. 4 of 1960.

or not this Enactment purports to confine the operation of the custom only to "customary land." If so, it would mean that the custom would no longer have any legal force with respect to land which has not become "customary land", and this, in turn, may imply that any such non-"customary land" would be as freely transferable and transmissible as other land held under the Mukim Register by any person not belonging to the tribal people.

Furthermore, if the Customary Tenure legislation does not have such exclusive effect, it is also necessary to consider whether the existence and operation of the custom as general law has nontheless been ousted or otherwise affected by other legislation.

(*a*) *Is the Customary Tenure Legislation Exclusive?*

Cussen J. in *Re Haji Mansur dec.*,[48] after examining both the previous and existing Customary Tenure Enactments, expressed a view as follows:

> But a living body of customary law cannot be destroyed by a written law except by express declaration or by necessary implication... The analogy from English law of the effect of a statute on the common law is, I think, applicable, and there is clear authority that a statute does not override or displace the Common Law except by express declaration or necessary implication.
>
> The effect of the Customary Tenure Enactment reviewed and examined by these accepted canons of constructions is, in my opinion, in the case of "Customary Land" as defined, to replace in whole or in part the unwritten law of the custom by the written law of the Enactment; but this only applies to "Customary Land"...
>
> But as regards land subject to the custom in respect of which Mukim Registers have not been endorsed, the customary law still applies and should be given effect to.

His view was based on the recognition of the custom as unwritten general law. It has been noted earlier that the custom had been in force prior to 1909, and although it was subsequently accorded statutory recognition by the 1909 Customary Tenure Enactment, it really does not owe its continuing existence to the statutory recognition. Plainly, the mere fact that the subsequent Enactment confines its application only to "customary land" cannot by itself be taken to have deprived the custom of its place as general law. This Enactment, like its predecessor, is a statutory superstructure founded on the custom, and it indeed presupposes the existence of the custom. Of course, legislation based on and providing for the operation of the

[48] [1939] F.M.S.L.R. 73; (1940) 9 M.L.J. 110.

custom, can at the same time limit or do away with the original operative sphere of the custom. But, as Cussen J. has pointed out, no such intention can be ascribed to the Customary Tenure Enactment, which simply does not contain any provision that expressly or by necessary implication denies the existence and operation of the custom outside its ambit.

This position seems quite straight forward. However, the question is not free from different judicial opinions. The conflicting cases, as will be seen, relate to the application of the custom in matters of succession. Although they are also pertinent to the other aspects of the custom regulating land rights, it is necessary to treat the different aspects of the custom separately because, apart from the general issue, different problems are involved, particularly with reference to the effect of other legislation on the custom.

(*b*) *Custom as Personal Law of Succession*

There are two groups of judicial decisions which *prima facie* conflict in that one regards the custom as applicable whether or not the land concerned has become "customary land", while the other confines the application of the custom only to "customary land".

The former line of judicial authorities is led by *Re Haji Mansur dec.*. The latter line was initiated by Mudie J. in a 1934 case, *Kutai* v. *Taensah*,[49] in which he held that land held under the Mukim Register which had not been endorsed "Customary Land" was to descend according to Mohammadan law.[50] The land in question was admittedly *carian laki bini* which would, as may be inferred from his reasoning, devolve according to the custom had it been so endorsed. *Kutai's* case was followed by two other judges in 1936 — Pedlow J. in *Indun binti Mat Zin* v. *Haji Ismail bin Musa & Ors.*[51] and Raja Musa J. in *Re Teriah dec.*.[52] In both these subsequent cases, Mohammadan law was applied to the exclusion of the custom as the land involved happened not to have been endorsed. The reason for not applying the custom, as more explicitly stated by Pedlow J., was that "the only land which can now descend according to 'custom' is 'customary land'."[53]

[49] [1933-34] F.M.S.L.R. 304; (1934) 3 M.L.J. 251.

[50] Or, more properly, Islamic law. However, the expressions "Muhammadan law" and "Muhammadan" (more properly "Muslim") are used in the discussion for convenience in view of their appearance in the relevant statutory provisions and judgments.

[51] [1937] F.M.S.L.R. 89.

[52] Reported in Taylor's "Inheritance in Negri Sembilan", 21 (1948) JMBRAS, Pt. 2, p. 90.

[53] *Ibid.*, at p. 90.

All these three cases were reviewed by Cussen J. in *Re Haji Mansur dec.*, a case in 1939. This was a case stated which came before the court under s. 188 of the Probate and Administration Enactment, Cap. 8. The District Officer who so referred the case to the court disagreed with the decision in *Kutai* v. *Taensah* and apparently sought for a different judicial view from another judge.[54] He asked for the directions of the court as to whether he should follow the custom or Mohammadan law in distributing certain *carian-laki-bini* land which was not endorsed. Cussen J., came to the conclusion that, while the custom definitely governs succession in the case of "customary land", the converse of this is not true in the case of non-"customary land". He then took the view that non-"customary land" is nonetheless subject to the custom which, as a matter of law and fact, remains in force outside the Customary Tenure legislation.

His decision involved the consideration of the legislation relating to Probate and Administration. Such legislation was first introduced in 1900;[55] subsequently it was repealed and replaced by an Enactment in 1904[56] which in turn was replaced by the Probate and Administration Enactment of 1920 (subsequently Cap. 8). Originally all these Enactments contained a provision[57] which expressly declared that the Enactments should not "affect any rules of Mohammadan law, as varied by local custom, in respect of the distribution of" the estate of a deceased person. By an amendment in 1926,[58] the Enactment, Cap. 8, provided in addition under its section 184 (iii) that the distribution of estate was to be "according to the law or custom having the force of law applicable to the deceased." But, at the same time, the amendment also added (*inter alia*) another provision, i.e. section 176, which declared that "none of the provisions of this Enactment shall apply to Negri Sembilan customary land or to any estate or interest in such customary land." Four years later, the 1926 Customary Tenure Enactment (subsequently Cap. 215) was also amended[59] to include a provision, that is, section 25, to the effect that nothing contained in that Enactment "shall affect the distribution of the estate, not being customary estate, of any deceased person." All these statutory provisions were already in force at the time the judicial decisions now under consideration were made.

Although in none of these cases were all the above statutory provisions expressly referred to in their Lordships' respective

[54] See Taylor, *op. cit.*, at pp. 94-98.

[55] Negri Sembilan: Probate and Administration Enactment, No. IX of 1900.

[56] Negri Sembilan: Probate and Administration Enactment, No. 3 of 1904.

[57] I.e. s. 140 (f) of the 1900 Enactment; s. 140 (f) of the 1904 Enactment; s. 173 (f) of the Enactment, Cap. 8.

[58] Enactment No. 5 of 1926.

[59] Negri Sembilan: Enactment No. 1 of 1930.

judgments, those provisions were apparently at work in their minds. Mudie J. in his very brief judgment in *Kutai* v. *Taensah*[60] referred only to section 25 of the Customary Tenure Enactment, and gave what would appear to be a *non sequitur* decision that the exclusion of the land in question by this section rendered it subject to Mohammadan law. Most probably, he was influenced by the prominent reference to "Muhammadan law" under s. 173 (f)[61] of the Probate and Administration Enactment, Cap. 8, and, perhaps, also by the word "law" rather than "custom" in section 184 (iii) of the same Enactment. At any rate, Mudie J. obviously took the view that the Probate and Administration legislation contemplated the application of Mohammadan law to those lands excluded from the operation of the Customary Tenure Enactment.

In *Indun binti Mat Zin's case*,[62] Pedlow J. likewise dealt only with section 25, but he said something more. In his view, it was the intention of the legislature that land should be "either customary or non-customary." Although he alluded to the specific meaning of "customary land" under the Customary Tenure Enactment, the words "customary" and "non-customary", as he used them, meant respectively "subject to the custom" and "not subject to the custom." Accordingly, he found himself "unable to accept the proposition" that non-customary land in his sense could yet be subject to the custom, there being no place for a third category of land — "Rembau land" as he indifferently called it — in between "customary land" and "non-customary land". What is more important is to note that his reasons for applying Muhammadan law to non-customary land would appear to be: (a) the very meaning of "non-customary land" connotes its subjection to some law other than the custom, (b) following Mudie J.'s approach as noted, and (c) the Malays, being Muhammadans, are subject to Muhammadan law relating to distribution. Perhaps, to Pedlow J., (b) and (c) above were one identical ground, but, as will appear later, they are quite distinguishable.[63]

Then, in *Re Teriah dec.*,[64] Raja Musa J., while subscribing to Pedlow J's literal classification of "non-customary land" in opposition to "customary land," advanced his own account of what he regarded as the legal rationale of those two preceding cases. He stressed that devolution of customary land was governed by the Customary Tenure Enactment and that, in contrast, the devolution of non-customary land was governed by "the ordinary law of the land — in the case of the Muhammadans by the *hukum shara*." Thus, for

60 [1933-34] F.M.S.L.R. 304.
61 See fn. 57 above.
62 [1937] F.M.S.L.R. 89.
63 See pp. 487-8, below.
64 See fn. (51) above.

Raja Musa J., the custom is only operative by virtue of the Customary Tenure legislation which leaves intact outside its ambit the operation of the Muhammadan law which the judge regarded as "the ordinary law of the land". The case before him was one of a contested claim for the grant of letters of administration. Section 179 of the Probate and Administration Enactment, Cap. 8, stated that the persons entitled to apply for distribution were those persons who "according to the rules for the distribution of the estate of the intestate applicable in the case of the deceased" were entitled to the whole or part of the deceased's estate. These "rules", he held, were the rules of Muhammadan law. It would therefore appear that, if Raja Musa J. were construing section 184 (iii), he would have read the words "the law or custom having the force of law applicable to the deceased" to mean Muhammadan law where the deceased person was a Muhammadan.

In *Re Haji Mansur dec.*,[65] Cussen J. joined issue on two points. As he took the view that the Customary Tenure legislation is not exclusive of the custom, this could only mean his repudiation of Pedlow J.'s two mutually-opposed categories of land. For him, non-"customary land" (in its specific sense under that Enactment) may still be subject to the custom. He regarded Mudie J.'s interpretation of section 25 of the Enactment, Cap. 215, as deriving an unwarranted "positive proposition" from a "negative statutory provision". On the other point, he upheld the custom as the governing law also in the case of non- "customary land," pointing out that the custom had always been so applied except and until departed from in those three cases. In this connection, he referred to two early cases *Re Dato Ngiang Kulop Kidal dec.*[66] and *Re Haji Pais dec.*,[67] both being High Court decisions in the 1920's. In the former case, Acton J. refused a petition for grant of probate to a will executed by the deceased (the Dato of Rembau), saying that the local custom in Rembau, being "the personal law to which the deceased was subject", should govern the devolution of the deceased's estate to the exclusion of his will.[68] The latter case was concerned with the issue as to what law was applicable to the succession of certain lands (comprising both *pesaka* and *carian-laki-bini* lands) in respect of which the entries in the register were not endorsed. Burton J., following the former case, held the lands subject to the custom and reversed the decision of the Collector who had ordered distribution according to Muhammadan law. Burton J. clearly regarded the custom relating to matters of succession as operative in the nature of "personal law". In his words, "if then the custom

[65] [1939] F.M.S.L.R. 73. (1940) 9 M.L.J. 110.

[66] Rem. Cas. 92.

[67] Reported in Taylor's "Inheritance in Negri Sembilan", p. 61.

[68] See also fn. 73 below.

is personal and attaches to the person it follows that there is no place for inheritance according to Muhammadan law." "It is not possible with a personal custom that certain property descend according to the custom and some according to Muhammadan law." With this view regarding the nature and applicability of the custom, Cussen J. endorsed his full agreement.

Hence, the ultimate issue, as taken up by Cussen J., is: what is the personal law of the tribal people in Negri Sembilan? To him, this is merely a question of fact; and what else can be their personal law other than their own custom? On the other side, Pedlow and Raja Musa JJ. obviously committed themselves to holding Muhammadan law as the personal law in force, and they both seemed to take for granted that this was because the tribal Malays are Muhammadans. This reason undoubtedly cannot hold for there is no such thing as personal law by reference solely to religion.[69] However, these two judges could hardly have been ignorant of the custom which they knowingly ousted in favour of Muhammadan law. And, by no means, should their decisions be discredited as the result of lack of appreciation of the theory of personal law.[70] All the three cases (i.e. *Kutai* v. *Taensah*, *Indun* v. *Haji Ismail* and *Re Teriah dec.*) were in fact the product of their time when behind the judicial scene problems relating to succession matters had given rise to a policy controversy.

This controversy involved many cross issues.[71] At its root was the question as to what was to become of the custom under changing social and economic conditions. It was generally accepted that the custom was in a process of change and that the influence of Muhammadan law was increasing. But no one seemed well-informed on the actual situation. The top administrators and land officers were divided in their opinions, each following his own inclination based on personal experience and observation. Two successive British Residents, Messrs. Simmons and Caldecott, of that period seemed to share the same policy view that the tribal people should be allowed to "emancipate themselves" from their custom in the case of newly acquired land, and according to their impression, the tribal people themselves increasingly wished to change over to Muhammadan law. Mr. Caldecott eventually purported to implement his policy by way of legislation. The matter then became tangled up with the interpretation of the then existing Enactments. By then, side by side with the 1926 Customary Tenure Enactment with its provisions dealing with succession in respect of "customary

[69] This point was sufficiently dealt with by Taylor in his "Inheritance in Negri Sembilan", pp. 44-45.

[70] Such as suggested by Taylor, *ibid.*, at p. 46.

[71] Taylor's, *ibid.*, contains quite detailed informative materials (including several memoranda) relating to the controversy.

land", there was already in force the 1920 Probate and Administration Enactment (as amended in 1926) under which provisions were made for the distribution and administration of small estates in general.[72] There was thus a multiplicity of statutory procedure relating to matters of succession as regards land held by the tribal people: while land the entry of which in the Mukim Register had been endorsed "Customary Land" came under the former Enactment, land without such endorsement would fall under the latter Enactment. And while the former Enactment clearly contemplated the application of the custom, the latter seemed to be providing only for procedural matters without stating what substantive law was applicable. However, Mr. Caldecott, when he was earlier the Commissioner of Lands in 1927, had himself taken a judicial view in an appeal case from a Collector's decision to the effect that the substantive law to be applied under the Probate and Administration Enactment was Muhammadan law on the ground that "by embodying the custom in a special enactment, the legislature had outlawed the custom as the common law of the State or any part of it."[73] Presumably taking his own interpretation to be correct, the British Resident procured an amendment to the Customary Tenure Enactment in 1930, that is, the addition, *inter alia*,[74] of section 25 to this Enactment which has been several times referred to earlier. For him, this section was meant to say that nothing in this special Enactment which provided for the application of the custom was to affect the distribution of non-"customary land" under the Probate and Administration according to Muhammadan law.

Kutai v. *Taensah*[75] was the first case to come before the court after the 1930 amendment, and apparently Mudie J. in this case was judicially endorsing what he understood to have been the intention of the law makers as to the effect of section 25. So were Pedlow and Raja Musa J. who followed him, all of them making emphatic reference to that amendment in their judgments. Obviously, all

[72] See Chapter XIX of the Enactment.

[73] Anonymous (a case referred to by Taylor in "Inheritance in Negri Sembilan", p. 56). Contra: The British Resident, Mr. B.N. Elles, in 1927, decided in another case that *carian-laki-bini* land should devolve according to the custom "even if the land had not been endorsed 'Customary Land'." See also *Re Dato Ngiang Kulop Kidal dec.*, Rem. Cas. p. 89 (This case was related to the other case under same name discussed at p. 485, above.)

[74] The administrative move leading to the 1930 amendment was in response to Burton J's decision in *Re Haji Pais dec.* (noted at p. 485, above). One of the issues involved was whether the determination of land as being or not being subject to the custom, should be taken out of the jurisdiction of the Supreme Court and be left to the Land Officers. This resulted in the addition to the Enactment of the proviso to its section 4(i) which however only curbed the court's jurisdiction to a limited extent. See discussion of its effect by Cussen J. in *Re Haji Mansur*, [1939] F.M.S.L.R. 73, at p. 78.

[75] [1933-34] F.M.S.L.R. 304; (1934) 3 M.L.J. 251.

into existence, then the question would simply have been one of fact as to whether or not the local custom, which had always been in a state of change, had actually given place to or been varied by new practices. It is in this respect that *Shafi* v. *Lijah*[87] may serve to indicate a basic legal issue untackled in *Re Haji Mansur*[88] but already beginning to show in *Sali* v. *Achik*.[89]

The custom, in *Re Haji Mansur*, was upheld and applied to non-"customary land" as opposed to Muhammadan law. In *Sali* v. *Achik*, it having been taken as settled that Muhammadan law has never been imposed as such by legislation, judicial attention began to turn to the ascertainment of the custom itself.[90] The custom to be applied is what it has become at the time of its application. Theoretically, if in a particular place the people have in fact replaced their old custom with Muhammadan law, then Muhammadan law is to apply. This was most probably why Horne J. did not favour Cussen J.'s somewhat rigid view which tended to overstress the nature of the custom as personal law in opposition to Muhammadan law, and instead, Horne J. preferred the statutory description of the personal law[91] which the legislation recognises to be "in a state of flux and development." Then, *Shafi* v. *Lijah* shows, in the manner as has been explained, that where the tribal custom has undergone changes, the issue may involve opposition between the old and the new customs. It may then be further noted that, in *Shafi* v. *Lijah*, Callow J.'s judgment also brings out a contrast between the custom operative under the Customary Tenure Enactment and that outside the ambit of the Enactment. He took the view that while the former remained *adat perpateh*, the latter was to be *adat temenggong*. It would follow from such an approach that "customary land" and non-"customary land" may be subject to two different customs: one being the original tribal custom statutorily preserved by the Customary Tenure Enactment, and the other the current custom.

In conclusion, it is submitted that the correct view is that held in in *Re Haji Mansur* as subsequently elaborated in *Sali* v. *Achik*.[92]

87 (1948-49) M.L.J. Supp. 49.

88 [1939] F.M.S.L.R. 73; (1940) 9 M.L.J. 116.

89 [1940] F.M.S.L.R. 173; (1941) 10 M.L.J. 14.

90 "It [the personal law] is sometimes difficult to ascertain. It varies in different districts. It is compounded of Muhammaaan law and custom in different degrees when examined in relation to different subjects. Custom in turn is affected by Muhammadan law..." Per Horne J. in *Sali* v. *Achik*, *ibid.*, p. 276.

91 See p. 488, above.

92 These two cases were followed by Ismail Khan J. in *Maani* v. *Mohamed* (1961) 27 M.L.J. 88, in which the judge said: "...in the case of non-customary lands the legal position is, in my view, correctly set out by Cussen J. in *Re Haji Mansur bin Duseh* and followed by Horne J. in *Sali binti Haji Salleh* v. *Achik*. The

The Customary Tenure Enactment, Cap. 215, does not by itself preclude the operation of the custom outside its ambit. Nor does the other legislation relating to distribution and succession oust the custom. To put it in a positive way, while the custom operates by virtue of the former legislation in the case of "customary land," the latter legislation also contemplates the application of the custom as the personal law or "the law or custom applicable to the deceased" in the case of non-"customary land". And it would appear that in the former case, the custom in so far as it has been embodied or modified by the legislation is not capable of changes, whereas, in the latter case, the legislation envisages and makes room for new changes which may take place in the custom from time to time so that it is the current custom which is to be applied.

(*c*) *Is Non-"Customary Land" subject to the Customary Restrictions?*

As has been noted, apart from the matter of succession, another important aspect of the tribal custom is its restrictions on alienability of land. The Customary Tenure Enactment, Cap. 215, statutorily imposes such restrictions on "customary land", that is, land which has been endorsed. Does this mean that non-"customary land" held by the tribal people is not subject to the customary restrictions? The judicial decisions discussed in the above are concerned with the applicability of the custom in matters of succession, but the basic issue seems similar. If one accepts the view of Cussen J. in *Re Haji Mansur*, and regards the custom as a whole as a living body of unwritten law which has not been ousted by the Customary Tenure legislation, it should *prima facie* follow that, unless displaced by other legislation, the customary restrictions are also operative with respect to non- "customary land".

(*i*) *Tenure, personal law and restraint of alienability*

Taylor, in his article "Inheritance in Negri Sembilan",[93] while favouring Cussen J's view in general, seemed inclined towards the opinion that, whereas the custom relating to succession has remained in force in the nature of personal law, the customary restrictions on land ownership, being an integral part of the indigenous system of land tenure, have been replaced by the new system of land tenure under the general land legislation except in so far as saved by the Customary Tenure legislation. Writing in 1948, he raised this point

general effect of these two judgments is that the distribution of such lands is governed by the personal law of the deceased, and *if it is proved* in a particular case or if it is generally accepted in the district that the Muslim Law of descent is varied by local custom (adat), effect should be given to such custom (adat) as the personal law of the deceased." (Emphasis added.)

[93] See fn. 3, at p. 472, above.

in his criticism of two official memoranda submitted to the Secretary of State by Mr. Caldecott (then British Resident in Negri Sembilan) in 1930.[94] This British Resident, as may be recalled, was of the view that the Customary Tenure legislation exclusively "outlawed" the custom.[95] In his memorandum, Mr. Caldecott presented in support of his view a version of the legal development of the custom since British rule. Taylor rightly pointed out that Mr. Caldecott's version confused tenure with inheritance, because by showing that the local land tenure system was no longer in existence, it did not follow that the custom could not continue to operate as personal law in the sphere of inheritance under the new system. Taylor proceeded further to observe that prior to the introduction of the Customary Tenure Enactment, 1909, any person including a tribal Malay who held land under the statutory system of land tenure could freely sell (obviously also otherwise deal with) his land. Only after 1909, "the sole exception was that a tribal Malay could not sell outside the tribe without first offering the land to the tribe at a fair price."[96] And, since under that Customary Tenure Enactment such land might still be sold to a person outside the tribe should the tribe fail to exercise the option, he concluded that the restrictions imposed by the Enactment could not properly be described as a modification of the statutory tenure but were rather "an application of personal law."

It is obvious that Taylor used the words "personal law" in a very loose way. These words as he used them in reference to the customary law of succession take on their techincal meaning in law, but what exactly he meant by the same expression with reference to the customary restrictions of alienability of land is hard to ascertain. He stressed that these restrictions attached not to the land but to the persons who were members of the tribes, in the sense that under the 1909 Enactment when the land had been sold to an outsider it was no longer subject to those restrictions. If taken in this specific sense, his distinction could not remain valid under the later Customary Tenure Enactment, Cap. 215, which imposes absolute prohibition against the alienation of "customary land" to an outsider. On the other hand, if he was using this expression merely to emphasise that only the tribal people were subject to their tribal custom, then, of course, it would follow that in whatever sphere the custom is operative, it is "an application of personal law". The point is that while he described the customary law of succession as "personal law" thereby stating the legal basis in support of its general applicability in matters of inheritance, his like description of the

[94] Dated respectively 8th January and 15th July, 1930, N.S. 1179/29. The second memorandum was summarized with extracts and comments in Taylor's article.

[95] See p. 487, above.

[96] *Op. cit.*, p. 83.

customary restrictions on the alienability of land could serve no useful purpose. Indeed, it would be ridiculous to infer that by virtue of it being "personal law", the custom should equally be in force in all matters other than succession; on the contrary, this was just what Taylor sought to repudiate.

In substance, Taylor's view was that the legislation which introduced the new system of land-holding conferred on every land-holder the freedom of alienation in respect of his land, and that such freedom was only restrained in the case of the land-holder being a tribal Malay according to his custom by virtue of the special Customary Tenure legislation and not otherwise. The validity of his view would therefore turn on the question whether the land legislation had such effect as he ascribed to it.

(*ii*) *Under the F.M.S. Land Code, Cap. 138, and earlier Land Enactments*

Prior to the passing of the present Customary Tenure Enactment (Cap. 215) in 1926, the land legislation in force was the Land Enactment 1911, and earlier the Land Enactment 1903.[97] The 1909 Customary Tenure Enactment, as has been discussed before, made it clear that land held by a tribal Malay under these two Land Enactments remained subject to the customary limitations of ownership.[98] Therefore, as regards these two Land Enactments, Taylor's opinion was apparently mistaken.

The subsequent F.M.S. Land Code (Cap. 138), which came into force in 1928, would appear to have changed the position by equating ownership of land held under the Mukim Register with that held under a title of grant from the State.[99] On the other hand, this Land Code, like the previous Land Enactments, did not contain any express provision conferring full rights of dealing with land on all land-holders, although such rights appeared to be inferable from its provisions which provided for various kinds of dealings which could be carried out in respect of their land. In fact, there can be no doubt that in the case of a land-holder who did not belong to the tribal community, his ownership under the statutory system of land tenure was regarded as comprising those rights of dealing with his land. But this had always been his position under the earlier Land Enactments, while nonetheless the position of a tribal land-holder had certainly not been so, at least, before 1928. There was a short period of about two years during which the 1911 Land Enactment continued in force after the introduction of the 1926 Customary Tenure Enactment (Cap. 215). If this 1926 Enactment did not by

[97] See chapter 5, p. 80; above.
[98] See p. 476, above.
[99] See chapter 5, p. 81, above.

itself preclude the operation of the custom outside its ambit, it should follow that during that period non-"customary land" held by a tribal Malay under Mukim Register was still subject to the customary restrictions. Then, as a matter of legal interpretation, the real question is whether the subsequent F.M.S. Land Code could have by way of implication brought about a radical change in removing the customary restrictions on the ownership of land held by a tribal Malay.

It should be realised that, outside the ambit of the 1926 Customary Tenure Enactment and prior to 1928, the unwritten customary rules restricting alienability had been operative as part of the land law in the State of Negri Sembilan, side by side with the land legislation. The fact that this customary law only affected a certain class of land-holders did not in any way detract from its force as part of the law relating to land ownership or tenure. It did not owe its place to and, indeed, had no relation to the theory of personal law. In other words, it is improper to treat the land legislation as the only general land law and assumingly leave the custom to justify its place on the theory of personal law, which, if to be understood according to English legal conception, would obviously mean the negation of the applicability of the custom as personal law in matters of land tenure. If the custom is properly regarded as forming part of the land law in this State, then it is submitted that the F.M.S. Land Code, too, cannot be taken to have ousted the unwritten customary land law for it contained nothing to compel a different conclusion.

(*iii*) *Customary restraint of alienability and registration*

Taylor would appear to have missed the point clarified above. Apart from his excursion into the irrelevant discussion of "personal law", he laboured under another more serious misconception in his interpretation of the land legislation. He mixed up two different things: ownership and registration. He talked about the "sanctity" of registration under the F.M.S. Land Code (and mistakenly also under the earlier Land Enactments[1]) as if since a purchaser could acquire an "indefeasible" title by way of registration, the original registered holder of land could not be regarded otherwise than as having the right to sell the land. Accordingly, in Taylor's view, as a tribal land-holder could by virtue of registration pass a good title to his purchaser even if the sale was in contravention of the custom, it should follow that he could not be subject to the custom which therefore must be taken to be no longer in force in the case of non-"customary land". The fallacy of such deduction is not hard to

[1] It may be recalled that the Land Enactments prior to the F.M.S. Land Code, Cap. 138, which governed land held under the Mukim Register, did not provide for indefeasible titles. See chapter 6, p. 116, above.

see. The statutory protection given to the purchaser would operate to defeat the rights of other persons under the custom had these rights not been protected on the register, but this "sanctity" of registration is simply not concerned with unprotected land rights whatever they may be, nor least of all concerned with whatever laws there may be under which such rights may arise or exist. In other words, it means that the purchaser is protected as against any unprotected land right but does not go further to deny, except for the very purpose of protecting the purchaser, the existence of such right for other purposes. On the other hand, the working of the registration system must necessarily mean conferring upon the original land-holder a statutory power to carry out any registered dealing in his land freed from the unprotected rights of other persons therein. This statutory power is nevertheless distinguishable from his own substantive right in the land which may be limited and be subject to the rights of other persons. Thus, despite what Taylor called the "sanctity" of registration, a tribal holder of non-"customary land" may still hold the land subject to the customary restrictions of ownership.

(*iv*) *Under the National Land Code, 1965*

The National Land Code, 1965, completes the assimilation of the ownership of land held under the Mukim Register to that held under the Registry Title in the sense that between them there is now no basic difference.[2] Under its section 92, after providing in subsection (1) that the title of a registered land-holder in both cases shall be "indefeasibile", it spells out in sub-section (2) the rights exercisable by the land-holder which include *inter alia*, the right "to effect transfers, leases, charges, surrenders, and any other dealings" permitted under the Code subject to its provisions. This express provision as to the right to effect dealings is not found in any of the previous land legislation. Then, does the presence of this provision have the effect of conferring on a tribal land-holder the right of dealings in his land to the exclusion of the customary restrictions except in the case of "customary land"?

As has been pointed out, under the F.M.S. Land Code, the right of a land-holder to effect dealings prescribed by that Code must have been implied and yet it is not inconsistent that if the land-holder was a tribal Malay he would still be subject to his custom. That such right is now expressly conferred by the National Land Code should make no difference. The same conceptual analysis in drawing the distinction between the power to pass a good title by virtue of registration and the actual substantive right of the land-holder still validly applies even in the presence of that express provision in the present National Land Code. That is to say, this

[2] See chapter 6, p. 121, above.

provision may be construed to be merely stating the land-holder's right of dealings in terms of the effect of the registration of any such dealings. Perhaps, this is the reason why it describes the right as "the right *to effect*" dealings under the Code. As against the land-holder himself, such "right" to pass the ownership of the land or an interest therein to a purchaser should not be confused with his own right to the ownership or such interest in the land. For example, the registered land-holder may be a bare trustee of the land for another person, and if that person's beneficial ownership is not protected on the register, the trustee could (in exercise of such "right") effect a transfer of the land to a third person in breach of the trust, but the existence of his power to do so certainly does not negative the existence of the trust or the existence of the law of trusts. So, too, the existence of such statutory power exercisable by a tribal land-holder does not necessarily mean the absence of the customary restrictions on his ownership or the exclusion of the custom. It may be added by the same analogy that the law of trusts is left outside the Code and so is the custom.

(*d*) *Custom Relating to Property Rights between Husband and Wife*

The custom also regulates property rights between husband and wife. This aspect of the custom partly overlaps with certain rules relating to succession which govern the division of property on the dissolution of a marriage by the death of either spouse. Apart from this, the custom also deals with the rights of the husband and wife to land or other property which they acquire during their marriage and the division of such property on divorce. Whether or not the operation of the custom in this sphere other than in cases of succession may also be regarded as the application of the custom as personal law, the court has always recognised and applied this branch of the custom.[3]

(*e*) *Conclusion*

The tribal custom relating to land rights is part of the general land law in Negri Sembilan, and as such, it is still operative with legal force except where it has been ousted or replaced by legislation. The Customary Tenure legislation statutorily makes applicable such custom to "customary land", but it does not preclude the operation of the custom in the case of non-"customary land". In some spheres, such as in the matter of succession, its operation may be regarded as the application of personal law. This however does not mean that,

[3] See *Hasmah binti Omar* v. *Abdul Jalil* (1958) 24 M.L.J.; and also the following cases reported in Taylor's "Customary Law of Rembau": *Napsiah* v. *Samat* (p. 83); *Abdullah* v. *Awa* (p. 118); *Peah* v. *Pekih* (p. 117); *Limah* v. *Lateh* (p. 88).

except applicable as personal law, the custom has been overridden by the land legislation. As has been submitted, the customary restrictions of ownership are not incompatible with the system of land tenure under the land legislation or with the Torrens principles of registration of dealings. Therefore, where land is held by a tribal Malay, even though it has not been endorsed and made "customary land", it should nonetheless be subject to his custom outside the Customary Tenure legislation.

The above discussion only deals with the tribal custom in Negri Sembilan. It may be recalled that, in the other Malay States, there was in existence prior to British protection local Malay custom governing private acquisition and holding of land.[4] In so far as matters of land tenure are concerned, their custom has long since been displaced by the statutory system of land tenure. However, broadly speaking, in the field of family law and matters of succession, the local custom as varied or replaced by Muhammadan or Islamic law has always been applied by the court in these other States without such complications as have arisen in Negri Sembilan.[5]

IV. Protection of Customary Land Rights outside the Customary Tenure Legislation

The Customary Tenure Enactment, Cap. 215 and the Customary Tenure (Lengkongan Lands) Enactment, 1960, both provide special means for recording on the register the subjection of particular holdings to the customary restrictions of ownership, thereby securing all the rights existing under the custom against the otherwise overriding effect of the registration of any dealings in such lands. But not all lands which are subject to the customary restrictions have in fact been so protected. Taylor J. in *Anyam* v. *Intan*[6] observed that "it is well known that the inscription [i.e. the endorsement of "Customary Land" on the register] was omitted from titles which were in truth ancestral." This may be due to administrative omission or lack of initiative on the part of Land Officers.[7]

[4] See chapter 2, above.

[5] See Taylor, "Malay Family Law" 15 (1937) JMBRAS, Pt. 1, and the following cases reported therein: *Teh Rasim* v. *Neman* (a Perak case, p. 18); *Wan Mahatan* v. *Haji Abdual Samat* (a Perak case, p. 25); *Re Elang dec.* (a Perak case, p. 48); *Haji Ramah* v. *Aipha* (a Selangor case, p. 22); *Wan Nab* v. *Jasib* (a Selangor case, p. 20) and *Rasinah* v. *Said* (a Perlis case, p. 29). See also, *Hujah Lijah binti Jamal* v. *Fatimah binti Mat Diah* (a Kelantan case) (1950) M.L.J. 63; *Habsah binti Mat* v. *Abdullah bin Jusoh* (a Kedah case) (1950) M.L.J. 60; *Roberts* v. *Ummi Kalthom* (a Selangor case) [1966] 1 M.L.J. 163; *Lijah binte Mahmud* v. *Commissioner of Lands and Mines* (a Trengganu case) [1967] 1 M.L.J. 76 (High Court decision); [1968] 1 M.L.J. 227 (Federal Court decision).

[6] (1948-49) M.L.J. Supp. 13

[7] The Customary Tenure legislation empowers the Collector on his own initiative to make the endorsement on the register (see s. 4 of both Enactments), but there is no obligation for him to do so.

And it may still be true that in certain localities where the custom remains strongly adhered to by the people, very few would care to procure statutory protection in respect of lands which are indisputably ancestral, for it is extremely rare that the holder of any such land would try to deal with his land in defiance of the custom. There are, however, other reasons. Newly acquired lands may in the course of time become ancestral or in other circumstances become subject to the customary restrictions.[8] Perhaps, today, it is mainly in respect of these lands that many titles have not been endorsed while there is apparently a need to do so.[9] Moreover, under the Enactment, Cap. 215, not all lands subject to the custom, even in the case of indisputable ancestral land, are capable of being protected by an endorsement, for the Enactment excludes lands registered in the name of a male person.[10] In such a case, the protection of customary land rights will have to be procured under the general land legislation. Even where the means of protection under the Customary Tenure Enactments is available, there may be circumstances which necessitate resort to the general legislation.[11]

In addition, the Customary Tenure legislation is not concerned with the protection of all kinds of customary land rights. Rights of property as between husband and wife fall outside its concern, but these rights obviously also require protection under the registration system.

Thus, if, as has been discussed, non-"customary land" held by a tribal Malay may still be subject to the custom, it is necessary to see in what ways and how effectively the customary land rights delimiting

[8] The question as to when newly acquired land should subsequently be treated as subject to the customary restrictions is itself a difficult issue. Cf. Taylor, "Inheritance in Negri Sembilan", *op. cit.*

[9] There has always been an inclination among the tribal people to move away from their custom towards more freedom of dealing with newly acquired lands especially those used for the planting of commercial crops (e.g. rubber). Such inclination was already strongly manifested in the 1920's and was the main driving cause behind the administrative policy that prompted the 1930 Amendment to the Customary Tenure Enactment, 1926 (see pp. 486-7, above). It is natural that holders of such lands want a free hand to carry out commercial transactions in respect of the lands, even though they may have acquired the lands by way of succession which may have under the custom operated to make the lands ancestral or subject to the customary restrictions. *Haji Hussain* v. *Maheran* [1941] F.M.S.L.R. 18, gives an example of the dilemma faced by a person who claimed to inherit rubber lands according to the custom but did not want the lands to be treated as ancestral so as to become subject to the customary restrictions.

[10] S. 4 (i) o the Enactment. For some judicial discussion, see *Anyam* v. *Intan* (1948-49) M.L.J. Supp. 13; *Re Haji Mansur* (1940) 9 M.L.J. 110.

[11] For example, it may become known that the holder of an ancestral land intends to effect a quick sale in defeat of the rights of other persons under the custom. An interested party, e.g. the closest heir, may wish to lodge a caveat just to stop the sale instead of invoking the proceeding under the Customary Tenure Enactment to procure the endorsement.

the registered holder's ownership can be protected outside the Customary Tenure legislation under the land legislation, that is, presently the National Land Code, 1965.

(a) Protection by Way of "Registrar's Caveat"

In *Anyam* v. *Intan*,[12] the land involved in a dispute over succession was registered in the name of a deceased male person but was admittedly ancestral land which happened to have been transferred to the deceased by and from his mother. Taylor J., after holding that the land should devolve according to the custom to the female heirs in the deceased's tribe, directed the Collector to enter a caveat "to prevent improper dealings" in the meantime before the land was distributed by registered transmission to the heirs. The judge also ordered that, on completing such transmission (whereby the land should have been registered in the names of female persons), the Collector should endorse the title with the words "Customary Land" and the caveat be withdrawn. Whether or not the caveat was necessary in this particular case,[13] the judge certainly regarded it as proper and desirable that land (clearly so in the case of ancestral land) which was subject to the customary restrictions could be brought under protection in the way he directed.

Under section 230 (f) of the previous F.M.S. Land Code, Cap. 138, the Collector was empowered to present a caveat "to prohibit dealings with any land...for the prevention of fraud or improper dealing". This provision also appeared in earlier Land Enactments,[14] before the Customary Tenure Enactment, 1909, was introduced. It is not known whether, before or during the operative period of that 1909 Enactment, the Collector had made use of this power to prevent dealings in contravention of the customary restrictions. According to Taylor J., it seems that this sort of caveat could be used to serve the same protective purpose as that of the endorsement "Customary Land", especially in the case of land the title of which is not capable of such endorsement.[15]

Section 320 of the National Land Code which confers like power on the Registrar (including the Collector) is quite differently worded. As has been noted in chapter 11,[16] this present provision

[12] (1948-49) M.L.J. Supp. 13.

[13] There seemed to be no necessity for the Collector to lodge the caveat as the court's order of distribution would be registered with the effect of prohibiting other dealings in the meantime.

[14] S. 48 (xii) of the Land Enactment, 1904; s. 50 (xii) of the Land Enactment, 1911.

[15] Although Taylor J.'s direction to the Collector in the above case need not necessarily mean that the Collector could so make use of that power on his own in view of section 240 of the F.M.S. Land Code which gave the court power to give the Collector such a kind of specific direction — so does section 417 of the National Land Code. (Set out in chapter 10, p. 401, above.)

[16] See p. 449, above.

empowers the Collector to enter a Registrar's caveat in respect of any land "wherever such appears to [him] to be necessary or desirable... for the prevention of fraud or improper dealing." In addition, its sub-section (2) states that knowledge of the fact of any land being held by a person "in a fiduciary capacity shall not of itself constitute a ground for entering a Registrar's caveat in respect of that land." Thus although this section also gives very wide power to the Registrar or Collector, it has in a way circumscribed the extent of the power. The interpretation of this section is not easy regarding whether or not Taylor J's opinion may still hold. First, there is the question as to the meaning of "fiduciary capacity": is the holder of land subject to the customary restrictions to be regarded as holding the land in such a capacity as between himself and those who have rights in respect of the land under the custom? If so, it will be clear from the above sub-section (2) that the mere fact of any land being subject to the custom will not justify the entering of the caveat. Then, even if the negative answer is taken, it may still be asked whether the Collector could only enter the caveat when he has reason to apprehend that "fraud or improper dealing" is likely to take place, or whether such apprehension is not required. Such questions could also have been raised under section 230 (f) of the F.M.S. Land Code, Cap. 138, on the ground that one of the basic working principles of the registration system is to keep off the register trusts and other kinds of rights or claims which are in general incapable of registration and to leave the protection of these rights or claims to the private concern of the interested individuals themselves. Nevertheless, this is no more than a general principle which has no absolute application in all cases. There is no reason why section 320 of the National Land Code may not be so construed as to empower the Collector to act on his own to give protection to customary land rights, especially where such rights are incapable of protection under the Customary Tenure Enactment Cap. 215.

On the other hand, it is more desirable that land subject to the customary restrictions should be protected under the Customary Tenure Enactment where possible. However, a Registrar's caveat may in certain circumstances be "necessary and desirable" in the absence of or prior to the making of the endorsement "Customary Land" to bring the land under that Enactment. Before the Collector can make such an endorsement he has to hold an inquiry and thereafter to decide whether or not the land concerned is subject to the custom, whereas he can lodge a Registrar's caveat where the land appears to him to be *prima facie* affected by the custom. Thus, for example, where there is a dispute between the land-holder and other members of his tribe relating to the nature of his ownership, a Registrar's caveat is at once useful. Moreover, as will be seen, although the holders of certain customary rights may resort to private caveats for protection, not all kinds of customary rights may be the

proper subject matter for lodging a private caveat. If this is so, a Registrar's caveat is in some cases the only means of protection available.

(*b*) *Protection by Way of "Private Caveat"*

In chapter 11, the nature and functions of private caveats under the National Land Code have been discussed. Presently, it is only necessary to consider what kinds of customary rights relating to land may be protected by way of a private caveat.

(*i*) *Property rights between husband and wife*

Under the custom, *carian-laki-bini* land belongs equally to the husband and wife.[17] Neither of them can alienate such land without the consent of the other and moreover they together cannot alienate without the consent of their children (if any) who have become adults, but otherwise such land is not subject to the customary restrictions of alienability. In *Minah* v. *Mat Dahan*,[18] several lots of land which were *carian-laki-bini* were registered in the name of the husband who purported to sell these lands and in fact absconded with the purchase money. The wife applied (presumably under section 37 of the Land Enactment, 1911, as amended in 1918) to the Collector to be registered as a co-owner of each of these lots of land. After referring the case to the Commissioner of Lands for his judicial opinion, the Collector accordingly transferred a half share in each lot to the wife. He observed that "if an undivorced woman cannot claim her half share of *tanah carian* then it would seem that unscrupulous husbands can reduce the *adat* of *carian* [i.e. the custom relating to *carian-laki-bini*] to a farce by selling whenever and to whomever they please without reference to wives." If *Minah* v. *Mat Dahan* is good, then a wife obviously has a registrable interest in *carian-laki-bini* land, in respect of which she is expressly allowed by section 323 (1) of the National Land Code to lodge a private caveat.[19] It is not clear whether in *Minah* v. *Mat Dahan* the lands had been transferred by registration to the purchasers. If the lands had become registered in the names of the purchasers, then the wife would only recover her half share while the other half was regarded as having been validly sold by the husband without the wife's consent. Or, it would appear that the Collector would only allow the wife to retain her own share and would suffer the sale in respect of the other half to be effected. In either case it would be in contravention of the custom and would adversely affect the wife's customary rights, because under the custom should the husband die

[17] See pp. 472-3, above.
[18] Rem. Cas., p. 99.
[19] See p. 432, above.

the whole of the lands would go to the wife and the children of the marriage. Therefore, it seems that a wife's customary rights will be better protected if she may lodge a caveat which has the effect of prohibiting any dealing in respect of the whole land rather than her registrable undivided half share. However, there may be some doubt as to her right to lodge such a caveat. It is unlikey that her expectancy of acquiring the whole land on her husband's death would suffice. However, it may be submitted that since her consent is required for the alienation of the whole or any part of the land, her right of this nature may be regarded as providing a sufficient basis to support the lodging of a caveat. Moreover, such a right is enhanced by her right to the beneficial use of the land during the marriage.[20]

On the other hand, it seems that if the land is registered in the wife's name, the husband may not be successful in a claim to be registered as co-owner.[21] Any way, his customary rights should also be regarded as sufficient to entitle him to lodge a caveat, his position being substantially the same as that of his wife during the subsistance of their marriage.[22] Likewise, perhaps, any adult issue of the marriage may also be entitled to prohibit the disposition of such land by their parents by way of entering a caveat to that effect, although they may not have as strong a right to the land as their parents.

Whether the above submission is correct or not would depend on how one interpretes section 323 (1) of the National Land Code. Under this provision, a person who claims "any right" to the title or any registrable interest in land (as distinguished from claiming the title or the registrable interest itself[23]) may enter a private caveat. The question is whether those customary rights mentioned above may come within the meaning of the words "any right". A strict

[20] It would appear that the wife is on divorce entitled to the house built on the *carian-laki-bini* land apart from the equal division of the land between them. See Taylor, "Customary Law of Rembau", *op. cit.*, pp. 21-2.

[21] In *Ujang* v. *Bujok* (reported in Taylor's article, *ibid.*, p. 116), a husband, desiring to divorce his wife, claimed half share in a lot of *carian-laki-bini* land. The Collector held that the husband could only do so on the divorce becoming absolute. It is not clear from the brief report whether the husband merely asked to be registered as co-owner or applied for a partition of the land. Taylor in his comment on this case (also at p. 116) seemed to confuse registration as co-owner with partition when he attempted to justify the less favourable position of the husband. There is no reason why husband and wife should not be registered as co-owners. In fact, this is more desirable than having such land registered merely in the name of either of them. After all whoever is registered as the owner, he or she still holds the land subject to the custom.

[22] The husband is equally entitled to the beneficial use of the land during the marriage. On divorce he is entitled to one half share. If his wife dies without leaving issue, the whole land will go to him.

[23] See p. 432, above.

interpretation may exclude them. But it should be borne in mind that the custom is part of the land law in force, and that the customary land rights are real legal rights. These rights are usually incapable of precise legal definition, particularly when it is sought to describe them in terms of or by analogy with the conceptions of English law. Thus, while the rights between husband and wife in respect of *carian-laki-bini* land may in a way be likened to co-ownership of land in undivided equal shares, this notion of co-ownership (more or less analogous to joint tenancy under English law) is far from giving a satisfactory description of the customary rights and may well be very misleading. It is therefore submitted that a realistic approach should be adopted in the interpretation of the statutory provisions relating to registration so as to allow the customary rights a proper place under the registration system for their protection.

(*ii*) *Customary rights correlative to the customary restrictions of alienability*

When land is subject to the restrictions of alienability under the custom, it means first that it is tied up in inheritance and secondly that it is tied up within the tribe. The rights of the heirs may be considered separately from the rights of the tribe. The ownership of such land as delimited by the heritable rights in favour of the heirs has been likened by analogy to that of an entailed estate under English law and the rights of the heirs as rights in reversion.[24] The present owner of the land may be said to be like a life tenant with very limited rights of disposition, and the heirs as having a "vested" interest in the land and not just a mere expectancy of inheritance. But apart from helping to give a general impression of what the custom is like, this sort of analogy really cannot serve as the basis of legal analysis. The customary rights are just what they are, only to be conceived according to what the detailed customary rules say about them. Thus, again, the question is simply one of interpretation of section 323 (1) of the National Land Code as to whether a person in the position of an heir to the land under the custom may be allowed to lodge a private caveat to protect his right of inheritance. For the reason earlier stated, it is submitted that he should be entitled to do so.[25]

[24] See Taylor, "Customary Law of Rembau", p. 9.

[25] The custom places the nearest heir in a stronger position. For example, in *Ijah* v. *Sa-Elah*, Rem. Cas. p. 179, a mother wanted to sell ancestral land for the purpose of pilgrimage (one of the purposes for which sale of ancestral land would be allowed under the custom), her daughter objected on the ground that she would lose her inheritance. The Collector prohibited the purported transfer on the ground that even in the case of sale sanctioned by the custom the consent of a direct heir was required. It would appear that if the direct heir consented, the more remote heirs would have no right to object to the sale. But all heirs certainly have the right to see that ancestral land is not sold for other than those purposes sanctioned by the custom.

The custom sets a limit to the class of persons who may succeed to the land as heirs. It is likely that, on failure of heirs under the custom, non-"customary land" may also be treated in the same manner as provided by the Customary Tenure legislation in the case of "customary land."[26] This customary limitation of the class of heirs is here mentioned for the purpose of distinguishing the heritable rights as such from the rights of all eligible members[27] of the tribe to purchase the land when it may be sold. This right of option given or offered to the members of the tribe is *sui generis*. And it does not appear that such a right may be treated as sufficient to entitle any such member of the tribe to lodge a private caveat under section 323(1) which seems to contemplate the protection of rights which could be regarded as individualised.

Hence, it seems that protection by way of private caveat is not sufficient to prevent dealings of land in contravention of the customary restrictions. And only a Registrar's caveat (discussed above) can effectively achieve this purpose outside the Customary Tenure legislation. In practice, however, if an heir cares to and is allowed to lodge a private caveat, it is most unlikely that fraudulent (in a general sense) dealings in respect of the land is possible. A private caveat contrasts favourably with a Registrar's caveat in that the former may be entered at the instance of a private individual, while, although any person may approach the Registrar with a view to asking him to enter a Registrar's caveat, it is wholly within his discretion to decide not to do so.[28]

(*iii*) *The notion of "trust" and "trust caveat"*

"Trust caveats" may at first sight appear to be another possible means for protecting customary rights. There is a common tendency to regard the holder of land subject to the custom as holding the land in trust for those who are entitled to the customary rights which delimit his ownership. This is again just another attempt to describe his position by way of a broad analogy. It amounts to saying no more than that, although on the face of the register he is the owner of the land, he is actually not the absolute owner, there being other persons who have some sorts of rights or interests in the land as well. It hardly needs to be pointed out that the customary rights therefore

[26] S. 13 of the Customary Tenure Enactment, Cap. 215; s. 12 of the Customary Tenure (Lengkongan Lands) Enactment, 1960.

[27] Under the Customary Tenure Enactment, Cap. 215, only female members of the specified tribes enjoy such right of option. This may be in accord with the custom.

[28] See p. 449, above. It would appear that only where the Registrar has actually entered a Registrar's caveat, can his decision be challenged. The holder of the land affected may appeal to the court, or, he may apply to the Registrar for the cancellation of the caveat and may appeal against his refusal of the application. (Ss. 321 and 418 of the National Land Code.)

should not be treated as rights arising or existing under a "trust" in the technical sense of the word. Accordingly, it will be a misconception if one should contend that a person entitled to any customary right could be allowed to lodge a "private caveat" by relying on the existence of a trust, that is, under section 323 (1) (b) of the National Land Code.[29] And it also appears obvious that "trust caveats" under sections 332 and 333 of the Code are likewise of no avail for the protection of customary rights.

However, the notion of trust may have proper application in certain situations. For example, in *Bedah* v. *Neman*[30] on the death of a woman, all her lands were transmitted and registered in the name of one of her two daughters, the other being at the time absent from the State. After a period of over twelve years, the other daughter returned and claimed that she was entitled to be registered as co-owner of a half share in all the lands. Her sister objected on the ground of statutory limitation against recovery of land. The Collector (whose decision was upheld by the British Resident and the Undang of Rembau) held that the claim was not barred by the statutory limitation which had no application to the case because the lands were held in trust for the claimant as regards her half share. The notion of trust was obviously used in that case to evade the operation of statutory limitation. What is more important is to note that the claimant there was already entitled to the half share under the custom which ought to have been transmitted to her at the distribution of her deceased mother's estate. In other words, the notion of trust can be properly applied to state the relationship between (a) the registered owner of a piece of land who does not hold it in her own right and (b) the person who under the custom is entitled to the present ownership of the land which ought to have been registered in her name as the real owner. This is merely the application of the usual meaning of trust in regarding a nominal owner as trustee for the real owner. It is clearly distinguishable from the relationship between a real owner under the custom and other persons holding certain customary rights delimiting his owership.

In some circumstances, land may be judicially ordered to be transferred to a person in trust for others. For example, in *Re Tiamin dec.*,[31] where there were many heirs entitled to succeed in shares to a piece of land, the Collector ordered transmission of the land to two of them as trustees for all of them. Where there is an express judicial order to create a trust, the rights of the beneficiaries can certainly be protected either by a trust caveat or a private caveat.[32]

[29] See p. 423, above.
[30] Rem. Cas. p. 173. See also, *Re Munap and Salleh*, Rem. Cas. p. 133.
[31] Rem. Cas. p. 206. See also *Pesah* v. *Dollah*, Rem. Cas. p. 119; *Re Si-Ambok dec.*, Rem.Cas., p. 207; *Re Munap and Salleh*, Rem Cas., p. 133.
[32] See ss. 323 (1) (b), 332 and 344 of the National Land Code.

(c) *The Operation of the "Indefeasibility" Principle among the Tribal People*

The foregoing discussion is concerned with the protection of customary rights against the overriding effect of registration, viz., its effect of conferring an indefeasible title or interest on a purchaser. The subject of "indefeasibility of title" has been considered in chapter 10, and will here be futher considered with specific reference to the position of a purchaser who is a member of a tribe.

In *Re Munap & Salleh*,[33] a land case decided in 1927, three lots of *carian-laki-bini* land were all registered in the husband's name, one having been transmitted to him after the death of his wife and the other two being all the while registered in his name. There were two children of the marriage, and therefore the children were entitled to a share in those lands according to the custom. The husband remarried and later transferred the lands to his own mother. His deceased previous wife's sister claimed to be entitled to be registered as a co-owner of a half share in each lot of the lands as trustee for her nephews. The Collector allowed the claim, observing that "if the transferee were a stranger or a person not subject to the *adat* [i.e. the custom]...her registered title would be absolute." In his view, as the transferee was a very close relative, being in fact the grandmother of the children "in fraud of whom the transfer was made", she held the lands as "a trustee within the equitable meaning of that word" for her grandchildren. From the brief report of this case, it is not clear whether the transfer to the grandmother was for "valuable consideration" or not, nor is it clear whether or not she was a party or privy to "fraud" in procuring the transfer. However, it would appear that the Collector held that she did not acquire an indefeasible title primarily on the ground that she herself was subject to the custom. This raises a very important question: can a purchaser who is a member of a tribe claim the protection of "indefeasibility" when the transfer of the title or any interest in land to him has been effected in contravention of the custom?

Re Munap & Salleh was a Collector's decision made under the Land Enactment, 1911. First of all, it may be recalled that under that Enactment there was no statutory provision conferring an indefeasible title on a purchaser in the case of land held under the Mukim Register.[34] It was a mere assumption on the part of the Collector that if the transferee were a "stranger" he would have an "absolute" title. In fact, under the early Land Enactments, the registration system introduced in the case of land held under the Mukim Register was a crude one. Under section 37 of the 1911 Enactment (as amended in 1918), any person could apply to the

[33] Rem. Cas. p. 133.

[34] See chapter 6, pp. 116-7, above.

Collector to be registered (otherwise than by right of succession to a deceased owner) as the owner of any land[35] on the ground of his right under the custom, whether or not such land had been transferred to any other person. Presumably, the case under consideration was one of such application under this section. In another case,[36] also decided under the 1911 Enactment, ancestral land was wrongfully charged by way of registration in favour of a male member of the tribe, who had advanced a loan to its registered owner. The Collector set aside the charge which he held to have been effected contrary to the custom. Again, like *Re Munap & Salleh*, this case merely shows another example of the situation at a time when the principle of "indefeasibility" had not been introduced in its full rigour under the registration system governing land held under the Mukim Register.

However, the question which has been raised in the light of the Collector's observation in *Re Munap & Salleh* still deserves some consideration under the present National Land Code, 1965.[37] Its significance can best be shown by indicating the issue involved which concerns the interpretation of the word "fraud" under section 340 of the National Land Code. It seems that the difference between a purchaser who is a tribal Malay and other purchasers in general lies in the former's status as a member of a tribe subject to the custom. This alone can hardly be sufficient for imputing "fraud" to him. On the other hand, if he has actual knowledge of the fact that the land was subject to the custom and was transferred to him contrary to the custom, would the position be different? It may be said that mere knowledge, too, would not be sufficient.[38] But here again legal interpretation is faced with a choice for policy reasons. Although the court has subscribed to the view that the word "fraud" means "actual fraud", it remains a mixed question of fact and law as to what amounts to "actual fraud" in the circumstances of each particular case. Among the tribal people a violation of the custom may be regarded as a serious fraud with which both the parties to the wrongful dealing in land are equally impeachable. In *Repah* v. *Siah & Taib*,[39]

[35] "The value thereof does not exceed one thousand dollars". At that time, practically all holdings (generally small) which were subject to the custom were below this specified value.

[36] *Repah* v. *Siah and Taib*, Rem. Cas., p. 185. See also *Bujok* v. *Tiamah*, Rem. Cas., p. 183 (noted at p. 474, above).

[37] The F.M.S. Land Code, Cap. 138, which extended the application of indefeasibility of title to land held under the Mukim Register, still contained a provision (i.e. section 107) similar to section 37 of the 1911 Land Enactment, but it was no longer expressly stated that a person could be registered as owner irrespective of "whether or not the land had been alienated to any other person". No similar provision is found in the National Land Code.

[38] See chapter 10, p. 349, above.

[39] Rem. Cas., p. 185.

where a charge on land executed between two members of a tribe contrary to the custom was ordered by the Collector to be set aside, what actually took place subsequently would appear to be that the chargee and chargor submitted to the sanction of the custom by the former surrendering his charge and the latter paying back the loan. Thus, in view of the force of the custom or the value-judgment of the people subject to the custom, it is open to the court to adopt an interpretation of section 340 to reinforce it.

The above discussion would appear to be relevant only in the case of non-"customary land". The position in the case of "customary land" is different. Under the Customary Tenure legislation,[40] no "customary land" (or "lengkongan land", as the case may be) can be transferred or otherwise dealt with except in accordance with the custom. And there is an express provision,[41] substantially identical with section 37 of the 1911 Land Enactment noted earlier, which provides that:

> Any person asserting that he is entitled otherwise than by right of succession to a deceased owner, to be registered as the owner of any customary land may, whether such land shall have been alienated to any other person or not, apply to the Collector to record him as such in the register...

It is submitted that should any dealing in "customary land" be effected by registration contrary to the custom, it should be regarded as simply void as being in contravention of statutory prohibition. That is to say, even where the dealing has been registered in favour of a *bona fide* purchaser, the purchaser does not acquire an indefeasible title or interest. The National Land Code, 1965, being subject to the Customary Tenure legislation,[42] will not operate by its section 340 to confer an indefeasible title or interest in such a case.[43] Thus, if an application is made under the above quoted section of the Customary Tenure legislation, it is submitted that the Collector may and should remove the purchaser's name from the register and substitute therefor the name of the person entitled to the land under the custom. It should make no difference if there has been a subsequent transfer to another person or a number of subsequent transfers in succession, even though all these transferees may be purchasers in good faith and for valuable consideration. In practice, it is most unlikely that in the presence of the endorsement "Customary Land", the Collector would fail to see that any dealing in the land affected should only be carried out in accordance with the custom.

[40] S. 5 of both the Customary Tenure Enactment, Cap. 215, and the Customary Tenure (Lengkongan Land) Enactment, 1960.

[41] S. 9, *ibid.*

[42] S. 4 (2) (a) of the National Land Code, 1965.

[43] See p. 321, above.