No. 33 of 1953.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA (IN THE COURT OF APPEAL AT PENANG).

BETWEEN

1. SALLY LEONG (M.W.)

2. LIM EANG HOONG (spinster) an infant by her next friend SALLY LEONG . . . *Appellants*

AND

LIM BENG CHYE . . . . . *Respondent.*

Case for the Appellants.

RECORD.

1. This is an Appeal from an Order of the Court of Appeal at Penang in the Supreme Court of the Federation of Malaya dated the 13th February 1953 (except so far as that Order provides for costs) in an Appeal in that Court (*Lim Beng Chye* v. *Sally Leong*, Civil Appeal No. 35 of 1952) in which the Respondent Lim Beng Chye (hereinafter called " the Respondent ") was the Appellant and the Appellants Sally Leong (hereinafter called " the Daughter-in-law ") and Lim Eang Hoong (hereinafter called " the Granddaughter ") were together with Lim Cheng Hooi and Lim Weng Hooi alias Lim Eng Hooi (hereinafter called " the Administrators ") the Respondents. The said Order of the Court of Appeal reversed (in part) the Order dated the 15th April 1952 of Mr. Justice Spencer Wilkinson in an action in the High Court at Penang in the Supreme Court of the Federation of Malaya (*In re Lim Kia Joo, Lim Cheng Hooi* v. *Lim Beng Chye*, Originating Summons No. 196 of 1951) in which the Administrators were Plaintiffs and the Respondent and the Appellants were Defendants. pp. 35–37. pp. 17–18.

2. The said action was begun by an Originating Summons taken out in the matter of the estate of Lim Kia Joo, deceased (hereinafter called " the Testator ") which asked (after being amended) :— pp. 1–3.

(A) (by paragraph 2 thereof) that it might be determined to whom upon the true construction of Clause 13 of the Will of the Testator and in the events which had happened, the share in the Testator's residuary estate bequeathed to Lim Beng Sai deceased

(who was a son of the Testator and is hereinafter called " the deceased Son ") provided that he survived the period of distribution would be payable ; and

(B) (by paragraph 2A thereof) whether the surplus income of the Testator was divisible and if so amongst whom or whether the same should be accumulated until the period of distribution.

3. There is no dispute as to the facts which were proved in the action and the only questions to be decided in this Appeal are :—

(A) whether the deceased Son's share of the Testator's residuary estate ought (as the Appellants contend) to be held in trust for the Appellants in equal shares or whether the Appellants have forfeited their shares (or the Daughter-in-law only has forfeited her share) by reason of the Daughter-in-law's marriage ; and

(B) whether the surplus income of the Testator's residuary estate accruing before the date fixed for the distribution of capital ought (as the Appellants contend) to be distributed or ought to be accumulated.

The first question is the important one in this case and depends upon the rules applicable in the case of personalty to conditions subsequent in restraint of marriage ; the second question depends upon the rules applicable to the distribution of income in the case of a vested gift of residuary personalty liable to be divested. Both questions arise on the provisions applicable to the Testator's residuary estate under Clause 13 of his Will.

pp. 6–9. 4. The Testator (late of No. 47 Northam Road, Penang) by his Will which was made in Penang on the 21st August 1936 (so far as material) provided as follows :—

p. 6. (A) (By Clause 7 thereof) the Testator gave (among other legacies) legacies to each of his daughters on marriage.

p. 7. (B) (By Clause 8 thereof) the Testator directed his trustees to pay a sum for marriage expenses on the marriage of each of his daughters.

p. 7. (C) (By Clause 9 thereof) the Testator directed his trustees to pay to each of his wives (he had two wives) a sum of $100 a month ceasing in each case on the wife dying, remarrying or not leading a chaste life.

p. 7. (D) (By Clause 10 thereof) the Testator gave a small monthly sum to each of his infant sons ceasing on the son's attaining the age of 21 years.

p. 7. (E) (By Clause 11 thereof) the Testator gave a small monthly sum to each of his unmarried daughters ceasing on the daughter's marriage.

p. 7. (F) (By Clause 12 thereof) the Testator directed his trustees to permit his wives and his children together with their wives and

husbands and his grandchildren to occupy free of rent his house No. 47 Northam Road, Penang, until his youngest son living at his death should attain the age of 21 years or if he should die without having attained that age then until such time as he would if living have attained such age and to make payments to cover the outgoings in respect of the house and the maintenance thereof and to cover the wages of the servants therein and the cost of providing free board and maintenance for his wives and children and their wives and husbands and his grandchildren while living in the house. The Testator by this clause also provided that the right of either of his wives to reside in the house should be forfeited if either should not remain his widow or lead a chaste life.

(G) (By Clause 13 thereof) the Testator devised and bequeathed p. 8. all his property not otherwise disposed of (except his property in China) to his trustees upon trust to sell (with power to postpone sale) and after payment of his debts funeral and testamentary expenses and legacies to invest the residue of such moneys and to stand possessed of such investments and of all parts of his estate for the time being unconverted (hereinafter called " his residuary estate " or " the residuary estate ") Upon trust to pay out of the income of his residuary estate in the first place and out of the capital thereof if such income should be insufficient the sums directed to be paid under Clauses 9, 10, 11 and 12 of his Will and until his youngest son living at his death should attain the age of 21 years or if he should die without having attained that age then until such time as he would if living have attained such age Upon trust as to both the capital and income of his residuary estate to pay and divide the same equally among his two wives and seven sons therein named (who included the deceased Son and a son named Lim Chit Bah) and a nephew and any other sons that might thereafter be born to him by his said wives. The Testator then provided :—

(i) that if either of his wives should not remain his widow or lead a chaste life or should die before the period fixed for the division of his residuary estate her share should go equally to the said seven sons and nephew and any other sons that might thereafter be born to him by his said wives ;

(ii) that if any of them his said seven sons and the nephew and any other sons that might thereafter be born to him by his said wives should die before the period fixed for the division of his residuary estate leaving male issue his share should go to such male issue equally if more than one but if he should not leave male issue but should leave a lawful widow and female issue his share should go to such lawful widow and female issue equally if more than one provided such lawful widow should remain the widow of such deceased son or nephew and lead a chaste life.

5. The Testator died on 19th November 1936 and letters of admini- p. 4. stration *de bonis non* with the Will annexed of his estate were granted to the Administrators on the 7th May 1949 by the Supreme Court of the Federation of Malaya at Alor Star, Kedah.

p. 5. 6. The youngest son of the Testator living at the time of the Testator's death was the said Lim Chit Bah (otherwise known as Lim Beng Chit) who was born on the 8th March 1931. The residuary estate of the Testator accordingly fell to be distributed or divided on the 8th March 1952.

p. 5. 7. The deceased son died on the 22nd December 1942 leaving no male issue but a widow, namely, the Daughter-in-law and a daughter, namely, the Granddaughter who is now about 12 years of age.

p. 5. 8. The Daughter-in-law remarried on the 13th August 1949, that is to say before the date of distribution.

p. 5. 9. The Daughter-in-law through her solicitors informed the Administrators some time before the date of distribution that she was anxious to have the claim of the Granddaughter established under the terms of the Testator's Will and requested them to take action to have the Will construed. The Daughter-in-law was and is also anxious to have her own claim similarly established.

pp. 1–3. 10. In response to such request the Administrators as personal representatives of the Testator commenced these proceedings by Originating Summons on the 9th November 1951. The Summons was amended on the 6th December 1951 so as to raise the question numbered 2A relating to surplus income which has already been set out in paragraph 2 hereof.

p. 2. 11. Besides the two questions set out in paragraph 2 hereof the Summons also asked that the Respondent, or some other fit and proper person might be appointed for the purposes of this suit to represent all persons other than the Appellants claiming to be residuary legatees under the Will of the Testator and how the costs of the application were to be borne.

pp. 10–11. 12. By an Order made herein on the 14th December 1941 it was ordered that the Respondent be appointed for the purposes of this suit to represent all persons other than the Appellants claiming to be residuary legatees under the Testator's Will.

pp. 3–5. 13. The evidence on the said Summons consisted of an Affidavit sworn herein on the 6th November 1951 by the Administrators.

pp. 12–13. 14. The said Summons was heard on the 25th March 1952 by Mr. Justice Spencer Wilkinson and at the hearing the learned Judge was informed by Counsel that there was surplus income which had accrued before the date of distribution and that the residuary estate of the Testator consisted of personalty.

pp. 15–17. pp. 17–18. 15. The learned Judge delivered a reserved judgment on the 15th April 1952 and by his Order of that day ordered :—

p. 18. (1) that upon the true construction of the Testator's Will the share in his residuary estate bequeathed to the deceased Son was to be divided equally between the Appellants ;

(2) that the surplus income of the Testator's estate after paying the various annuities and legacies provided for in Clauses 9, 10, 11 and 12 of the Will should be accumulated until the date of distribution and divided as part of residue ; and p. 18.

(3) that the costs of all parties should be taxed as between solicitor and client and when taxed should be paid out of the Testator's estate. p. 18.

16. In his judgment Mr. Justice Spencer Wilkinson observed that it was common ground that under the Testator's Will the shares in his residuary estate vested in the beneficiaries subject to being divested in certain events and that it was agreed that if either or both of the Appellants' halves of the deceased Son's share ceased to be payable to them as a result of the Daughter-in-law's remarriage there would be a partial intestacy in respect of such half and that it would not fall into residue. p. 15.

17. In reaching his decision on the principal question the learned Judge was assisted by two passages from Theobald on Wills (10th Ed. 1947) at pp. 439–40 which are reproduced without change in the 11th Edition (1954) at pp. 535–6 and by the four authorities cited by Theobald in support of the second passage, namely *Marples* v. *Bainbridge* (1816), 1 Mad. 590 ; *Reynish* v. *Martin* (1746), 3 Atk. 330 ; *Wheeler* v. *Bingham* (1746), 1 Wils. 135 and 3 Atk. 364 and *W.* v. *B.* (1849), 11 Beav. 621. After considering these authorities the learned Judge came to the conclusion that the proviso against a son's widow remarrying in Clause 13 of the Testator's Will was one in partial restraint of marriage and that the subject matter of the gift being personalty and there being no gift over, the proviso was merely *in terrorem* and the widow's remarriage did not result in a forfeiture. As regards the second question the learned Judge said he had no doubt that the Testator's intention was that surplus income should be accumulated until the date of distribution and divided as part of residue, but did not deal further with this matter. p. 16. p. 17.

18. The Respondent appealed to the Court of Appeal at Penang against the whole of Mr. Justice Spencer Wilkinson's decision. The Appeal was heard on the 19th August 1952 by Chief Justice Mathew, Chief Justice Murray-Aynsley and Mr. Justice Pretheroe who delivered considered judgments at a later date. pp. 18–20. pp. 21–26. pp. 27–35.

19. By the Order of the Court of Appeal at Penang dated the 13th February 1953 the Court ordered :— pp. 35–37.

(A) that the Appeal be allowed ;

(B) that the Appellants were not entitled to a share of the residuary estate of the Testator bequeathed to the deceased Son ;

(C) that the appeal against that part of the judgment of the Court below in holding that the surplus income of the Testator's estate after paying the various annuities and legacies provided for

in Clauses 9, 10, 11 and 12 of the Will of the Testator should be accumulated until the date of distribution and divided as part of the residue should be dismissed ; and

(D) that the costs of all parties in the appeal be taxed as between solicitor and client and paid out of the Testator's estate and that a sum deposited in Court be paid out to the Appellant or his solicitor.

pp. 33-35. 20. The judgment of Chief Justice Mathew in the Court of Appeal at Penang seems to have been based on the following propositions :—

(A) that conditions subsequent in restraint of marriage in the case of personalty with no gift over were not necessarily only *in terrorem* and therefore void ;

(B) that there was a presumption that they were void but there might be circumstances to rebut this presumption ;

(C) that the question really turned on whether the Testator intended to discourage marriage or not and that only if he did so intend the condition was void (the learned Chief Justice relied on *Jones* v. *Jones* (1876), 1 Q.B.D. 279 for this proposition) ;

(D) that in the present case the Testator's intention was clear, his intention being not to penalise widows who remarried but to insure that all members of his family should be provided for so long as they remained in the family ;

(E) that the failure of the bequests to widows and daughters of his sons who remarried had the effect of increasing the shares of those members of the family who remained within the family ;

(F) that in cases where remarriage was contrary to custom the strict application of the *in terrorem* rule making these conditions void need not be applied ;

(G) that, if a widow of a deceased son suffered forfeiture, the female issue should also forfeit, possibly because on the mother leaving the family the female issue would leave it too, the proviso being so worded that it could not be construed so as to apply only to the widow.

The learned Chief Justice did not deal with the question relating to surplus income.

pp. 31-33. 21. The judgment of Chief Justice Murray-Aynsley seems to have proceeded on the following propositions :—

(A) that what the Court had to do was to ascertain the Testator's intention by looking at Clause 13 as a whole and discover whether the Testator intended that a son's widow who remarried should forfeit her interest or not ;

(B) that the *in terrorem* rule making these conditions void was based on a presumption that in this class of case a testator did not intend that a widow who remarried should forfeit ;

(C) that it was not possible to justify the presumption on rational grounds and that it could only be explained on the footing that it was due to the prejudices of lawyers trained in the civil law ;

(D) that the Court had first to decide whether the rule was one of construction or of law, since if it were a rule of law the Court would be bound to follow it, absurd though it was ;

(E) that the rule was one of construction (for this proposition the learned Chief Justice relied on a statement by Willes, C.J., in *Harvey* v. *Aston* (1737), 1 Atk. 361, at p. 377) ;

(F) that among Chinese of the old-fashioned kind the remarriage of widows was contrary to custom and that a Chinese testator would not intend his son's widow to share the family property after she had remarried into another family ;

(G) that it would be wrong in applying English law in Penang to rely on English cases in order to make a presumption as to a testator's intentions ;

(H) that English Courts dealt with people whose customs were very different, especially as regards the remarriage of widows ;

(I) that the clause containing the condition taken by itself was clear and that there was no reason why it should not be applied ;

(J) that the interest of the Granddaughter could not be separated from that of the Daughter-in-law and that the remarriage of the mother defeated her daughter's interest.

The learned Chief Justice dismissed the appeal on the question as to surplus income without giving reasons.

22. The judgment of Mr. Justice Pretheroe seems to have been based on the following propositions :— pp. 27–30.

(A) that the first rule of construction in the case of a Will was to give effect to the intention of the testator at the time he made the Will ;

(B) that in the present case the Will did disclose the Testator's intention at the time he made it ;

(C) that Clauses 7 to 13 of the Will showed that the Testator did not expect or desire his own or his sons' widows to remarry but that he expected and encouraged his daughters to marry ;

(D) that the condition against a son's widow remarrying gave effect to the Testator's view and that the Testator did not intend the condition to be a " mere empty threat " ;

(E) that in the present case there was no necessity for a gift over as if a share were forfeited the only result would be that the other beneficiaries would get a larger share, there being no partial intestacy and consequently no necessity for a gift over.

p. 30. 23. As regards the Granddaughter's half of the deceased Son's share Mr. Justice Pretheroe differed from the two learned Chief Justices and took the view that the Granddaughter did not forfeit her half of this share by reason of the Daughter-in-law's remarriage, his judgment on this point being based on the following propositions :—

(A) that the Testator would regard his granddaughters (for the purposes of their marriages) in the same light as his own daughters ;

(B) that the forfeiture provision in clause 13 of the Will was directed at a son's widow but not at her daughter ;

(C) that there was no reason why the Granddaughter should lose her right merely because her mother had forfeited her own right ;

(D) that each derived her right from the same source (the deceased Son) but otherwise the gifts were distinct and separate.

As regards the question relating to surplus income the learned Judge expressed complete agreement with Mr. Justice Spencer Wilkinson in the Court below.

pp. 37-38. 24. The Appellants were granted conditional leave to appeal to Her Majesty in Council from the said judgment of the Court of Appeal at Penang by an Order of that Court made on the 24th April 1953 one of the conditions being that the Daughter-in-law should deposit into Court or give security for the sum of $5,000·00.

pp. 39-40. 25. The Appellants were granted final leave to appeal to Her Majesty in Council from the said judgment of the Court of Appeal at Penang by an Order of that Court made on the 29th June 1953. The said Order was served on the Respondent's solicitor and also on Messrs. Huck Aik & Cheng Hock of Penang the solicitors of the Administrators. When the Record was received in England it was found that the Administrators were not named as Respondents : the Appellants in the first instance attempted to have the Record amended by having the Administrators added as Respondents, but on the 4th June 1954 the said solicitors of the Administrators wrote to the Appellants' solicitors in Penang to say that they acted for the Administrators and that their clients agreed to abide by any order the Privy Council might make in this Appeal. On receiving this notification of the Administrators' agreement the Appellants did not proceed further with their attempt to have the Record amended.

26. The Appellants respectfully submit that the Judgments of the learned Judges in the Court of Appeal are erroneous (save that the Granddaughter is naturally content with the view of Mr. Justice Pretheroe that she should not be deprived of her half of the deceased Son's share) and that the principal question raised in this Appeal (whether or not the Appellants should be deprived of the deceased Son's share by reason of the Daughter's remarriage) should be determined in accordance with the views expressed by Mr. Justice Spencer Wilkinson and the propositions contained in paragraph 27 hereof and that the other question (the destination of surplus income) should be determined in accordance with the propositions contained in paragraph 28 hereof.

27. As regards the principal question the Appellants respectfully submit as follows :—

(A) that the law applicable to the interpretation of the Testator's Will in relation to his personalty is the law of Penang, in particular in view of the fact that the Testator's Will was made in Penang, was witnessed by a Penang solicitor (at the hearing in the Court of Appeal the Will was stated to have been made by a Penang lawyer) and was expressed in the terms of the law of that country and that the Testator had his permanent home there when he made his Will and when he died and intended that permanent home to be maintained for his family (as it was) after his death. p. 9. p. 26. p. 6. p. 7. pp. 1–3.

(B) that the law of Penang applicable to the interpretation of wills is the law of England as administered in the Court of Chancery before the 1st November 1875 and in the Chancery Division of the High Court of Justice since then. The case of *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L.R. 6 P.C. 381, shows that that law was introduced into Penang "as far as circumstances will admit," but this saving clause while excluding from the law of Penang statutes relating to matters peculiar to England did not exclude rules existing independently of statute such as the rule against perpetuities : nor, it is submitted, did it exclude the rules applicable to conditions subsequent in restraint of marriage. Section 11 of the Courts Ordinance and Section 3 of the Civil Law Ordinance of the Laws of the Straits Settlements and the Courts Ordinance 1948 of the Federation of Malaya all support the view that the law applicable to the interpretation of Wills is the same in Penang as it is in England.

(C) It is a rule of law in England that a bequest of personalty to a widow subject to a condition subsequent in restraint of remarriage is treated as an absolute gift free from the condition if there is no gift over on breach of the condition, although the condition is effective and determines the enjoyment of the bequest if there is a gift over on breach of the condition. There are many authorities in support of this view of which *Marples* v. *Bainbridge* (1816), 1 Mad. 590 and passages in Jarman on Wills (8th Ed. 1951), Vol. II at pp. 1521 and 1530, and Theobald on Wills (11th Ed. 1954) at p. 536 may be mentioned.

(D) The rule was admittedly one of those imported from the Roman Civil Law into the law administered by the English Ecclesiastical Courts when those courts were dealing with suits for legacies and the distribution of residuary personalty, but the jurisdiction of those courts in these matters (according to Holdsworth's History of English Law (2nd Ed. 1937), Vol. VI, Chapter VIII, p. 431 at p. 652) had to all intents and purposes been taken over by the Court of Chancery by the end of the latter half of the sixteenth century. The Court of Chancery took over these rules when it took over this jurisdiction and from then on these rules formed part of the law administered by the Court of Chancery and as part of that law were exported to Penang.

pp. 29 and 35.

(E) Two of the Judges in the Court of Appeal (Chief Justice Mathew and Mr. Justice Pretheroe) seem to have considered that if the condition against remarriage were enforced the forfeited share would accrue to the other beneficiaries and that there was therefore no need for a gift over to support the condition, but it is submitted that in the absence of an express gift over the forfeited share would have to devolve as on an intestacy as a forfeited share of residue does not fall into residue.

(F) If the question turned on the Testator's intention, then the Testator must be regarded as having intended to treat his own widows and his sons' widows differently since there is a gift over in the event of his own widows remarrying whereas there is no gift over in the event of his sons' widows remarrying : if intention is the test, the Testator's intention must have been to penalise his own widows effectively on remarrying but to have discouraged his sons' widows without penalising them on their remarrying.

p. 8.

(G) Further, if intention is the test, it has to be the intention which a testator expresses in his Will. Chief Justice Murray-Aynsley relied on a statement of Willes, C.J., in *Harvey* v. *Aston* (1737), 1 Atk. 361 at p. 377, for the proposition that a testator's intention might be ascertained by reference to Chinese custom and in this report of *Harvey* v. *Aston*, Willes, C.J., does appear to suggest that a testator's intent might be known in other ways, but the opinion on the point of Willes, C.J. (he was assisting Lord Chancellor Hardwicke who had to decide the case) is, it is submitted, better reported in Willes' reports under the name *Hervey* v. *Aston*, Willes 83 at p. 96, from which it appears that he was speaking of intention expressed in the Will. The case is not directly in point as it related to portions charged on land which were regarded as realty : in deciding it the Lord Chancellor said that he understood the rule about a condition being *in terrorem* only did not apply to such portions, but did apply to legacies.

p. 32.

(H) Intention, it is submitted, is not, however, the test in a case of personalty given to a widow subject to a condition subsequent in restraint of marriage without a gift over. Chief Justice Mathew relied on an observation of Blackburn, J., in *Jones* v. *Jones* (1876), 1 Q.B.D. 279 at p. 281 for the view that intention was the test, but that was a different case : there there was a gift of realty to a spinster subject to a condition in complete restraint of marriage followed by a gift over, and the testator's intention was used to overcome the normal invalidity of a condition in complete restraint of marriage and to give effect to the gift over. The cases where intention was considered appear to have been cases where there was a gift over.

p. 34.

(I) In any event it is not legitimate in this case to seek to ascertain the Testator's intention by reference to Chinese custom. First, there has been no proof of any custom in this case and secondly even though the law administered by the English Ecclesiastical Courts was exported to Penang so far as the customs of the local inhabitants would admit there is no reference to local

custom in relation to the export of the law administered by the Court of Chancery (*Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L.R. 6 P.C. 381 at p. 393) and the interpretation of Wills had become a matter for the Court of Chancery long before the introduction of English law into Penang. Accordingly the rule now applied by the Chancery Division in England should be applied in this case.

(J) There is an alternative ground on which the condition can be attacked, namely that it offends the rule against perpetuities and is void on this account apart from being void on any other ground. There is nothing to limit the operation of the condition (if it has any operation) to the period before the distribution date. The seven sons and the nephew might before the distribution date have married wives born after the Testator's death and those wives might be widowed before the distribution date and remarry thereafter. A forfeiture to take effect on remarriage in these circumstances would be too remote and the gift would have effect free from the condition (*In re Talbot* [1933] Ch. 895 and *In re Engels* (1943), 168 L.T. 311).

(K) In any event and by way of further alternative the Granddaughter's half of the deceased Son's share ought not to be forfeited by reason of her mother's remarriage for the reasons given by Mr. Justice Pretheroe.

28. As regards the other question (surplus income) the Appellants respectfully submit that the two wives, the seven sons and the nephew were given present vested interests in the residuary estate and a present vested residuary gift of personalty carries the intermediate income even though the gift (as here) is liable to be divested. Further, Clause 13 of the Will contains a provision for the payment and division of income which, it is submitted, on the true construction of the clause is sufficient to give surplus income pending the date for division of capital to the residuary legatees until that date or until the divesting of their interests.

29. The Appellants accordingly submit that the Order of the Court of Appeal herein ought to be reversed (save as regards costs) and that an Order ought to be made Ordering (1) that upon the true construction of the said Will of the Testator the share in his residuary estate bequeathed to the deceased Son ought to be divided equally between the Appellants (2) that the surplus income of the Testator's estate accruing before the 8th March 1952 ought to be divided equally among the ten residuary legatees but so that in the case of a legatee whose interest is divested before that date income accruing after the divesting of the legatee's interest which but for the divesting would have been paid to the legatee ought to be paid to the person or persons interested under the divesting provision and if more than one in the shares directed by that provision and (3) that the costs of all parties in this Appeal be taxed as between solicitor and client and paid out of the Testator's estate and that the security for the

sum of $5,000.00 given by the Daughter-in-law pursuant to the said Order of the Court of Appeal at Penang dated the 24th April 1953 may be discharged for the following (among other)

REASONS

(1) BECAUSE (as regards the principal question) the law governing the operation of the proviso at the end of Clause 13 of the Testator s Will is the law of Penang which is the same as the law of England and under that law (A) a bequest of personalty to a widow subject to a condition subsequent in restraint of remarriage is treated as an absolute gift free from the condition if there is no gift over on breach and (B) the condition is treated as being *in terrorem* only.

(2) BECAUSE it is wrong to vary that law by reference to an unproved Chinese custom.

(3) ALTERNATIVELY (as regards the principal question) because the proviso at the end of clause 13 of the Testator's Will (if not rendered inoperative for the first given reason) is void as infringing the rule against perpetuities and for this reason also the trust in favour of the Daughter-in-law and the Granddaughter takes effect as an absolute trust for them free from any condition.

(4) BECAUSE in any event (as regards the principal question) the remarriage of the Daughter-in-law cannot affect the Granddaughter's interest and the Granddaughter's interest is held free from any condition in restraint of her mother's remarriage which may affect her mother's interest.

(5) BECAUSE (as regards the other question) clause 13 of the Will on its true construction provides for the payment and division among the beneficiaries of income accruing before the distribution date and the interests of the original residuary legatees were interests which vested presently in possession at the Testator's death subject only to being liable to be divested and such interests carry intermediate income.

(6) BECAUSE the judgment herein on the principal question of Mr. Justice Spencer-Wilkinson was right and the judgments herein on that question of the three Judges in the Court of Appeal were wrong (save as regards the judgment of Mr. Justice Pretheroe as to the Granddaughter's interest).

(7) BECAUSE the judgments herein on the other question of all the Judges in the Courts below were wrong.

W. S. WIGGLESWORTH.

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from the Supreme Court of the Federation of Malaya (in the Court of Appeal at Penang).

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