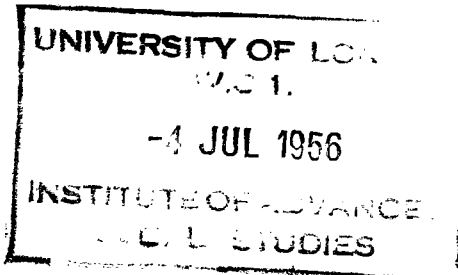


25, 1955

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43587

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 RESPONDENT.

1. This is an appeal by the above-named Appellants Sally Leong and Lim Eang Hoong by leave of the Court of Appeal Supreme Court of the Federation of Malaya in the High Court at Penang from the Judgment and Order of that Court (Mathew C.J. Federation of Malaya, Murray-Aynsley C.J. Singapore and Pretheroe J.) dated 13th February 1953 in the suit above specified. p. 39. p. 36.

2. This appeal relates to the true construction in the events that have happened of the Will dated 21st August 1936 of Lim Kia Joo a Chinese testator who died on 19th November 1936 and in particular Clause 13 thereof. The full terms of the Will are printed in the Record (pp. 6-9). Clause 13 of the Will provides as follows:— p. 4. p. 31, l. 7.

“ 13.—I devise and bequeath all my property of whatever nature and wheresoever situate of which I shall die possessed and which shall not be p. 8.

otherwise disposed of (except my property in China) unto my trustees Upon Trust to sell call in and convert the same into money (with power in their discretion to postpone such sale call in and conversion) and after payment thereof of my debts and funeral and testamentary expenses and the legacies hereinbefore directed to be paid to invest the residue of such moneys and to stand possessed of such investments and of all parts of my real and personal estate for the time being unconverted (hereinafter called my residuary estate) Upon Trust to pay out of the income of my residuary estate in the first place and out of the capital thereof if such income be insufficient the sums directed to be paid under clauses 9, 10, 11 and 12 10 hereof and until my youngest son living at my death shall attain the age of 21 years or if he shall die without having attained the age of 21 years then until such time as he would if living have attained such age Upon Trust as to both the capital and income of my residuary estate to pay and divide the same equally among my said wives Yeoh Ah Eong and Queh Ah Gaik and my sons Lim Beng Hong, Lim Beng Choong, Lim Beng Sai, Lim Cheng Hooi, Lim Weng Hooi, Lim Beng Chye and Lim Chit Bah and my nephew Lim Joo Huat the son of my elder brother Lim Niah Sah and my other sons that may hereafter be born to me by my said wives Yeoh Ah Eong and Queh Ah Gaik. Provided that if either of my said wives shall not 20 remain my widow or lead a chaste life or shall die before the period fixed for the division of my residuary estate her share shall go equally to my said sons Lim Beng Hong, Lim Beng Choon, Lim Beng Sai, Lim Cheng Hooi, Lim Weng Hooi, Lim Beng Chye and Lim Chit Bah my nephew Lim Joo Huat and any other sons that may hereafter be born to me by my said wives Yeoh Ah Eong and Gueh Ah Gaik. And Provided that if any of my said sons Lim Beng Hong, Lim Beng Choon, Lim Beng Sai, Lim Cheng Hooi, Lim Weng Hooi, Lim Beng Chye and Lim Chit Bah, my nephew Lim Joo Huat and any other sons that may hereafter be born to me by my said wives shall die before the period fixed for the division of my residuary 30 estate leaving male issue his share shall go to such male issue equally if more than one but if he shall not leave any male issue but shall leave a lawful widow and female issue his share shall go to such lawful widow and female issue equally if more than one provided such lawful widow shall remain the widow of such deceased son or nephew and leads a chaste life."

p. 5. 3. Lim Chit Bah the youngest son of the testator living at the testator's death was born on 8th March 1931 and the date upon which the residue of the testator's estate fell to be distributed was 8th March 1952.

p. 5. 4. Lim Beng Sai, a son of the testator and one of the residuary legatees named in Clause 13 of the Will died on 22nd December 1942 leaving a widow 40 Sally Leong and a daughter Lim Eang Hoong the Appellants in this appeal.

p. 5. The Appellant Sally Leong married again on 13th August 1949, that is to say before the date of distribution.

5. On 9th November 1951 Lim Cheng Hooi and Lim Weng Hooi alias Lim Eng Hooi, two of the testator's sons and administrators with the Will annexed of the testator's estate *de bonis non* took out an Originating Summons in the Supreme Court of the Federation of Malaya in the High Court at Penang for the determination of certain questions including in particular the question to whom, upon the true construction of the Will and in the events which had happened, the share in the residuary estate of the testator bequeathed to Lim Beng Sai deceased provided that he survived the period of distribution, would be payable. That share is hereinafter for convenience called "the disputed share."
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6. On 6th December 1951 the Originating Summons was, pursuant to an Order of the Court dated 23rd November 1951, amended by adding a further question, namely, whether the surplus income of the testator's estate was divisible and if so amongst whom or whether the same should be accumulated until the period of distribution.
7. By Order of the Court dated 14th December 1951 the Respondent Lim Beng Chye was appointed for the purpose of the Suit to represent all persons, other than the Appellants, claiming to be residuary legatees under the Will of the testator. No person was appointed to represent specifically the testator's next of kin at his death, who in fact consisted of the testator's two widows and seven sons (including the said Lim Beng Sai) named among the residuary legatees in the said Clause 13 of the Will and a number of daughters. The said administrators were however parties as Plaintiffs in the suit and were themselves two of the next of kin. Moreover it was to the interest of those residuary legatees ordered to be represented by the Respondent who were also among the next of kin to contend that the disputed share, or alternatively the moiety thereof claimed by the Appellant Sally Leong, was undisposed of by the testator's Will and devolved to the next of kin. In the Court of first instance it was treated as common ground that, if and so far as the respective claims of the Appellants were to fail, the disputed share devolved to the testator's next of kin; and the Respondent will so contend in the present appeal.
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8. On 25th March 1952 the Originating Summons came on for hearing in the Supreme Court of the Federation of Malaya in the High Court at Penang before Spenser-Wilkinson J. who on 15th April 1952 gave Judgment and ordered and adjudged (1) that on the true construction of the testator's Will the disputed share was to be divided equally between the Appellants Sally Leong and Lim Eang Hoong widow and daughter respectively of Lim Beng Sai deceased and (2) that the surplus income of the testator's estate should be accumulated until the date of distribution and divided as part of the residue.
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- In his Judgment the learned Judge said that it was not disputed that the Suit concerned personalty. He said that as there was no gift over the proviso

pp. 1 & 2.

pp. 9 & 10.

pp. 10 & 11.

p. 12, l. 26.
p. 13, ll. 4, 5,
12, 24, 25.
p. 15, ll. 27,
28, 29.

pp. 15-17.

p. 15.

at the end of Clause 13 was merely *in terrorem* and that the remarriage of the [deceased son's] widow did not result in a forfeiture. He further expressed the view that had the proviso resulted in a forfeiture that forfeiture would have related only to the share [meaning a moiety of the disputed share] of the Appellant Sally Leong and not to the share [meaning the other moiety of the disputed share] of the Appellant Lim Eang Hoong.

A transcript of the Judgment of the learned Judge is printed in the Record (pp. 15-17).

9. On 23rd April 1952 the Respondent gave Notice of Appeal to the Court of Appeal at Penang against the Judgment and Order of Spenser-Wilkinson J. and the appeal was heard on 19th August 1952 by Mathew C.J. Federation of Malaya, Murray-Aynsley C.J. Singapore and Pretheroe J. On 13th February 1953 the Court of Appeal gave Judgment allowing the appeal in so far as it related to the entitlement of the Appellants Sally Leong and Lim Eang Hoong to the disputed share and ordered that they were not so entitled. The Court dismissed the appeal in so far as it related to the surplus income of the testator's estate and upheld the Judgment of Spenser Wilkinson J. in the Court below in holding that the surplus income should be accumulated until the date of distribution and divided as part of the residue. So far as it relates to the surplus income of the testator's estate it is not to the interest of the Respondent or of those residuary legatees whom he was ordered to represent to seek to displace the Order of the Court of Appeal.

The learned Chief Justice of Malaya in his Judgment said that in his view the intention of the testator was clear. He provided in his Will for the maintenance of the members of his family while they remained in the family and, apart from certain provisions for payments to his daughters on their marriage, the estate was to be applied for the benefit of members of the family. His intention was not to penalise widows who remarried but to ensure that all members of the family should be provided for so long as they remained within the family. He said that the failure of the bequests to the widows and daughters of his sons had the effect of increasing the shares of those members of the family who remained within the family, and a failure of a bequest did not create a partial intestacy. He further said that he did not consider himself compelled to hold that the testator meant something which he did not and give effect to the exact contrary of his intention and that he would be very loath to hold that in cases where remarriage is contrary to custom, the strict application of the *in terrorem* rule must be applied. As regards the Appellant Lim Eang Hoong he took the view that the testator intended, if any widow of his deceased sons suffered forfeiture, the female issue of such widow should also forfeit on the ground, possibly, that if the mother left the family so also would her female issue.

A transcript of Judgment of the learned Chief Justice of Malaya is printed pp. 33-35. in the Record (pp. 33 to 35).

The learned Chief Justice Singapore in his Judgment said that he thought pp. 30-33. the case of *Harvey v. Aston* 1 Atkyns 361 made it clear that *in terrorem* rule is p. 32. a mere rule of construction and he considered that since *Perrin v. Morgan* (1943) A.C. 399 the Court was not bound to hold that the testator meant something p. 32. which the Court was quite certain he did not. He said that among Chinese old-fashioned kind the remarriage of widows is contrary to custom and it was perfectly well known to anyone with the slightest acquaintance with the Chinese custom that a Chinese testator would not intend the widow of a son to share the 10 family property after she had remarried into another family. He thought p. 33. therefore it would be wrong, in applying English Law in Malaya to rely on English cases in order to make a presumption as to the intentions of a testator. He said that taken by itself the clause was quite clear and unambiguous and p. 33. that he saw no reason why it should not be applied. He did not think that the Appellant Lim Eang Hoong could be separated from that of her mother the p. 33. Appellant Sally Leong, and he considered that the remarriage of the mother defeated the interest of her daughter.

A transcript of the Judgment of the learned Chief Justice, Singapore, is 20 printed in the Record (pp. 30 to 33).

Pretheroe J. in his Judgment said that the first rule of construction in the pp. 27-30. case of a will was to give effect to the intention of the testator. He did not for p. 28. one moment consider that the testator intended the condition that "such p. 29. lawful widow shall remain the widow of such deceased son" to be a mere empty threat; he thought that the testator meant exactly what he said and was giving p. 29. effect to his view on the remarriage of widows. He further said that there was no partial intestacy and no necessity for a devise over; the widow was to receive a fractional part of the residue and the forfeiture of her right merely resulted in the other beneficiaries getting a larger share of the residue. With p. 30. regard to the Appellant Lim Eang Hoong he thought the testator would regard 30 his granddaughters (for the purpose of their marriages) in the same light as his daughters, a view which was supported by the fact that the forfeiture provision in Clause 13 of the Will was directed at the widow and not at her daughter and he saw no reason why the daughter should lose her right merely because her mother had forfeited her own right. He considered the Appellant Lim Eang Hoong to be entitled to one-half of the disputed share.

A transcript of the Judgment of the learned Judge is printed in the Record (pp. 27 to 30).

10. By Order dated 24th April 1953 the Court of Appeal at Penang 40 granted the Appellants conditional leave and by Order dated 29th June 1953 pp. 37 & 38. final leave to appeal to Her Majesty in Council. pp. 39 & 40.

11. The Respondent humbly submits that the Judgment of the Court of Appeal at Penang is right and that the present appeal should be dismissed for the following among other

REASONS.

(1) BECAUSE it was right and necessary in construing the testator's Will to have regard to the following (among other) surrounding circumstances, viz. :

(a) that the testator was Chinese and domiciled and resident in Malaya

(b) that among Chinese the remarriage of widows 10 is contrary to custom and that it would be contrary to custom for a Chinese testator, in making provision by his will for his family, to provide out of his estate benefits to ensure for the widow and female offspring (or alternatively for the widow) of a deceased son after she should, by remarrying into another family, place herself and such female offspring (or alternatively herself) outside the circle of the testator's family.

(2) BECAUSE the testator in his Will, and particularly in Clause 13 thereof, manifested a clear intention that the 20 widow and female offspring (or alternatively the widow) of a son dying before the date of distribution should not participate by substitution or otherwise in any part of his residuary estate from the moment and in the event (which happened) of such widow ceasing before the date of distribution to remain the widow of the son so dying.

(3) BECAUSE the disputed share, even if on the death of the said Lim Beng Sai on the 22nd December 1942 it became vested in interest in equal shares in the Appellants, remained liable under Clause 13 to be divested from them 30 upon the Appellant Sally Leong ceasing before the date of distribution to be the lawful widow of the said Lim Beng Sai and was so divested upon her remarriage on the 13th August 1949. Alternatively the moiety of the disputed share claimed by the Appellant Sally Leong remained similarly liable to be divested from her and was so divested.

(4) BECAUSE the provision for divesting mentioned in Reason (3) was in the premises (a) not in any way contrary

to public policy and (b) not merely *in terrorem*, but was valid and effective notwithstanding the absence of any express gift over; so that the disputed share (or alternatively the moiety thereof claimed by the Appellant Sally Leong) was or became undisposed of by the testator's Will.

(5) BECAUSE the doctrine of conditions *in terrorem* is not a rule of law but a rule of construction only and the condition at the end of Clause 13 of the Will was not on the true construction of the testator's Will and in the surrounding circumstances aforesaid to be taken as merely *in terrorem* and ineffectual despite its tenour.

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HENRY SALT.

WILLIAM LINDSAY.

In the Privy Council.

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2. LIM EANG HOONG (Spinster an
infant by her next friend Sally Leong *Appellants*

AND

LIM BENG CHYE - - - *Respondent*

Case for the Respondent.

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