

# In the Privy Council.

## ON APPEAL

FROM THE COURT OF APPEAL IN THE COLONY OF SINGAPORE, ISLAND OF SINGAPORE.

33482

Appeal No. 21 of 1949.

Probate No. 119 of 1946.

IN THE ESTATE of ABRAHAM PENHAS, deceased.

UNIVERSITY OF LONDON  
W.C. 1  
- 9 FEB 1954  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

BETWEEN

10 ISAAC PENHAS (Defendant) . . . . . *Appellant*  
AND  
TAN SOO ENG (Plaintiff) . . . . . *Respondent.*

## Case for the Appellant

RECORD.

1. This is an Appeal from an Order dated the 8th day of February, 1950, of the Court of Appeal of the High Court of Singapore pursuant to Leave granted by the said Court on the 16th day of June, 1950, dismissing with costs the Appellant's Appeal from an Order dated the 13th day of September, 1949, of the High Court. p. 70.

2. By the said Order dated the 13th day of September, 1949, made in pursuance of issues directed to be tried it was adjudged that the Respondent was the lawful widow of one Abraham Penhas, deceased (hereinafter called "the deceased"), and had married him on or about the 22nd day of December, 1937. p. 66.

3. The basic question which arises for determination in this Appeal is whether the deceased and the Respondent were ever validly married.

4. The question arises out of a Petition dated by the Respondent on the 8th day of April, 1946, for a Grant of Letters of Administration in the estate of the deceased (who died on or about the 5th day of March, 1942) as his lawful widow. The Appellant, a lawful brother of the deceased, had entered a caveat and by Order of 3rd March, 1947, an issue was directed to be tried namely whether the Respondent was the lawful widow, and if she was, when she was married. The Respondent was the Plaintiff in the issue. pp. 4-5  
p. 1.  
p. 11

5. The facts pleaded on the issue briefly stated are as follows:—

p. 12, ll. 10-11.  
p. 12, ll. 13-14.  
p. 12, ll. 15-16.  
p. 12, ll. 19-20.

The Respondent alleged that she was Chinese and a British subject ; that the deceased was a Jew and a British subject ; that she had married him at 508 Sims Avenue, Singapore, according to Chinese rites on or about the 25th day of December, 1937. She further alleged cohabitation at the said address and that the deceased died on or after 10th day of March, 1942, leaving him surviving the Respondent, his lawful widow and two lawful children Lency born the 17th day of September, 1938, and Honglet born the 10th day of January, 1941.

p. 13.

6. The Appellant denied all the facts alleged save that the deceased 10 was a Jew by race and religion and that he had died on or after the 10th day of March, 1942.

pp. 55-63.

7. The issue was heard before Mr. Justice Gordon-Smith who delivered a written Judgment on the 13th day of September, 1949. The Respondent's evidence was challenged as to its veracity but could not be controverted since it was common ground that the ceremony of marriage and the association was secret in so far as the deceased's family were concerned. The following facts were in evidence and appear to have been accepted.

#### SUMMARY OF EVIDENCE OF MARRIAGE AND ASSOCIATION

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p. 41, l. 35.  
p. 42, l. 1.  
ll. 17-20.  
p. 42, ll. 4-6.  
p. 42, l. 15.  
p. 94, ll. 1-10.

8. The deceased was a practising Jew domiciled and resident in Singapore. He lived at his parental home with his father, brother and sister and in the late 1930's occupied a high position in the family business in Singapore in which community his father was a man of substance.

p. 42, ll. 43-47.

9. In 1936 whilst on a world tour the deceased was refused permission by his father to marry a girl of his own race and religion, and returned to Singapore.

p. 21, ll. 22-27.  
p. 28, ll. 5-8.

10. In or about September, 1937, the deceased asked a Eurasian woman to find a lady of good family for him for the purpose of marriage. 30 The Eurasian was known to the Respondent only by the name of " Mama " and was further described as not being a professional marriage broker. Although by occupation a hawker, she was " a respectable old lady."

p. 25, ll. 29-30.  
p. 24, l. 17.  
p. 21, ll. 29-31.

11. Mama arranged for and attended a meeting at The Botanical Gardens, Singapore. The deceased was there introduced to the Respondent who attended with her mother. At that time the Respondent was a non-Christian Chinese and the widow of one Ng Ah Heng. The deceased asked the Respondent's mother for permission to marry ; this was granted subject to the deceased agreeing to a proper wedding which he did.

p. 21, ll. 31-36.

12. Thereupon the deceased gave the Respondent \$500, and asked 40 her to find a house to live in more suitable than her then abode. She found premises at 508 Sims Avenue and removed with her mother to that address. The deceased paid the rent and visited once or twice a week. The Respondent addressed him as Ah Phang.

22, l. 3.

13. On or about the 8th day of December, 1937, the deceased suggested a date for the marriage. The Respondent suggested a Church ceremony; but the deceased said that this was not possible in the Jewish synagogue. The Respondent then suggested a Chinese ceremony and explained what the deceased would have to do. The parties decided on a Chinese ceremony to take place at 508 Sims Avenue. p. 21, ll. 33-44.  
p. 22, ll. 10-12.
14. Shortly before the 25th day of December, 1937, a ceremony and feast took place at 508 Sims Avenue. The deceased arrived with two Jewish friends and an old Chinese gentleman. There were over a dozen guests but Mama the introducer was not there. The old Chinese gentleman solemnised the marriage asking the parties separately whether they were willing to be man and wife. Both said yes. The Respondent worshipped in the manner appropriate to her race whilst simultaneously the deceased covering his head (saying it was the custom) raised his right hand and murmured words which the Respondent could not understand. The parties then paid their respects to the Respondent's mother; a feast followed; the guests departed and the deceased remained until the next morning. Thereafter he cohabited with the Respondent until the date of his death shortly after the fall of Singapore in February, 1942. p. 22, ll. 15-37.  
p. 27, ll. 28-32.
15. The marriage was in fact kept secret from the deceased's family and circle of friends. The deceased born in Baghdad, told the Respondent that he was born in the Netherlands East Indies. The Respondent admitted that since the ceremony she had never met either the Chinese gentleman or the two Jewish friends. There is no evidence that the marriage was known by repute to exist in the deceased's community of business, custom or religion. Although according to the Respondent's evidence he spent a number of nights per week at 508 Sims Avenue when he was in Singapore, he also maintained his residential address at his father's house. p. 108.  
p. 25, l. 36.  
p. 22, ll. 15-16.  
p. 22, ll. 37-38.  
p. 31, ll. 38-39.  
p. 42, ll. 5-6.
16. On the 12th day of September, 1938, a daughter was born to the Respondent. The birth was registered on the 8th day of October, 1938, by one Tan Ah Bah, described by the Respondent as a neighbour but whose address is shown on the certificate as being the address of the Respondent and who is described in the report by the Assistant to the Custodian of Enemy Property as the mother's younger brother. The particulars give the surname of the child as Phang, the father's name Abbey Phang, his occupation Ship's Clerk, his race Chinese Hokien, his country of birth Singapore and his nationality British. p. 23, ll. 8-10.  
p. 103.  
p. 24, ll. 43-44.  
p. 130, ll. 25-26.  
p. 103.
17. On the 16th day of January, 1941, a son was born to the Respondent who registered his birth herself. The name of the child was registered as Honglet Phang, the father as Abbey Phang, Trader of Hokien race, a Dutch subject born in the Dutch East Indies. p. 23, l. 14.  
p. 111.
18. The Respondent produced a receipt from the doctor who attended her at this confinement wherein she is described as Mrs. A. B. Pang. She produced a number of envelopes addressed to her by the deceased on none of which is she described as Mrs. Penhas. p. 113.  
pp. 95-101.
19. During the Japanese occupation and after the death of the deceased on or about the 10th day of March, 1942, the Respondent found p. 23, l. 25.  
p. 23, ll. 29-31.

p. 41, ll. 36-37.  
pp. 128-130.

pp. 125-126.

p. 132.

herself in straitened circumstances. The deceased's family were then in India and in July, 1942, his property came under the control of the Custodian of Enemy Property. An Application was made by the Respondent that some part of this property be used wherewith to give her a livelihood. A letter was written on the 15th day of June, 1942, thumb-printed by the Respondent in which she described herself as the mistress but not as the wife of the deceased. A further letter was produced written by a solicitor acting on her behalf making the same admission. (It would not be right to assert these facts without adding that the learned trial Judge held that the Respondent could not understand English and that these facts had been put forward on her behalf without her agreement to the correctness of such facts. The Appellant whilst not seeking to set aside these findings nevertheless contends that these documents are important evidence as to the repute of the Respondent's relation with the deceased.) 10

#### EXPERT EVIDENCE.

p. 28, ll. 18-21.

p. 28, ll. 19-20.

p. 28, l. 41.

p. 28, l. 42.

p. 29, ll. 5-6.

20. The Respondent adduced the evidence of Yu Huan Tsan Advocate and Solicitor, Barrister-at-Law of the Inner Temple who had practised law in Singapore since 1940. He expressed the opinion that this was a valid marriage according to Chinese law. None of the learned Judges has acted on this Opinion and it is contended that the facts which he admits to be customary with regard to Chinese marriages in Singapore establish that this marriage was not in accordance with such custom since among other things this marriage lacked a sponsoring by someone vouchsafing the identity of the parties, and the desirability of the marriage; nor was the ceremony attended by a relative of the husband nor was it in any way reduced into writing. 20

p. 18, ll. 12-13.

p. 18, ll. 30-41.

p. 18, ll. 41-42.

21. The Appellant called as a witness Wing Commander Rev. S. M. Block Senior Jewish Chaplain The Armed Forces in the Far East. His evidence which appears to have been accepted throughout is that so far as formalities were concerned this particular marriage was invalid by Jewish marriage law. Quite apart from the invalidity of the ceremony as such he stated that a Jew may not marry a non-Jew in any circumstances. 30

#### SUBSTANCE OF THE DECISIONS.

22. The Courts below have decided that the parties were married, without any finding on the essential character of the marriage, and without any differentiation of the characteristics of Christian or non-Christian marriage. The ceremony has been held valid under the provisions of the Common law of England as found and as imported into the Colony with modifications such that the requisites of form have been held to be nil and those of capacity undefined. 40

#### QUESTIONS ARISING OUT OF THE ISSUE.

23. In Singapore monogamy and varying forms of polygamy exist side by side; the issue therefore raises questions which could not arise in England. England is a monogamous country and the High Court in respect

of monogamous marriages exercises a jurisdiction in rem ; the " res " being the marriage. This jurisdiction is only exercised when the " res " is the union of one man and one woman for life to the exclusion of all others. (Hereinafter such union is called a Christian marriage.) Thus such jurisdiction could be invoked by two Moslems domiciled in England who were married before a Registrar in England or married elsewhere, if the " res " were a Christian marriage. But it could not be invoked by persons domiciled in England in respect of a Moslem marriage in India or elsewhere, the " res " being different.

10 24. It is contended that marriage in the sense in which the term is used in Christendom and marriage in the sense in which the term is used by peoples of polygamous habit are different " things ".

" To talk of the union of a Chinaman with his first or principal wife (as I will call her) as a marriage, and to talk of the ordinary marriage in Christendom as a marriage, appears to me to be really giving the same name to two different things, see Sir Benson Maxwell in *Hawah v. David*." Per Law A.G.C.J. p. 146, 147. The Six Widows Case, 12 S.S.L.R. pp. 120-125.

20 25. Notwithstanding the above, it was held in the Six Widows Case that the secondary wife of a Chinese was entitled to a widow's rights by virtue of her status flowing from such union. It is not contended that this decision is wrong or that the principle does not apply to other unions which are not Christian marriages, but the consequence of the decision is that the Issue here involves investigating more than one possible legal effect of the facts as found. The Appellant not only contends that the " res," " chose " or " thing " of a Christian marriage is different from a non-Christian marriage, but also that these non-Christian unions differ from each other and the status flowing from each is different.

30 26. Thus, when the enquiry is, as here, whether two parties were lawfully married and one party is Chinese by race and religion and the other party is Jewish by race and religion and the rites performed at the alleged celebration of the union appear to be mixed Chinese and Jewish rites, the first step is to ascertain whether the evidence indicates that there was between the parties mutual consent to the " res " of the same union and, if so, what was the " res " ; for the essential requirements of capacity and form governing the validity of the " res " of a Christian marriage, a Jewish marriage and a Chinese marriage are all different. The Appellant contends that having regard to the facts the enquiry must be pursued as regards consent, capacity and form to ascertain :—

40 (A) Whether or not the thing of a Christian marriage was proved.

(B) Whether or not the thing of a Jewish marriage was proved.

(C) Whether or not the thing of a Chinese marriage was proved.

(D) Whether the thing of some other non-Christian marriage was proved.

## MAIN CONTENTIONS OF THE APPELLANT

(A) ON THE FIRST ASSUMPTION that the Respondent is setting up the thing of a Christian marriage ;

THE FIRST QUESTION is :—

Was there consent to a Christian marriage ?

27. It has been held that “in questions of marriage and divorce it would be impossible to apply our law to Mahommedans Hindus and Buddhists without the most absurd and intolerable consequences and it is therefore held inapplicable to them.” The application of this doctrine to questions of capacity and form is merely secondary. The primary application of the doctrine is to prevent the Courts from inferring from the union of two non-Christians consent to that type of union recognised as a Christian marriage, and thereby imprinting on that union the characteristics and status of a Christian marriage. 10

28. The Appellant contends that the word “husband” and the word “wife” vary in meaning according to the context in which the words are used. If a Chinese were to say “I take you to be my wife” he would not normally mean what a Christian would mean. The Appellant contends that the evidence does not establish that the parties ever consented to or contracted the union of a Christian marriage ; for the evidence is that the Respondent said that it was to be a Chinese wedding. Furthermore the ceremony was conducted by a Chinese gentleman who invoked Chinese rites ; furthermore neither party was Christian by religion. 20

29. If the Appellant be wrong, it would follow that if the parties became domiciled in England either could invoke the jurisdiction of the High Court to dissolve the marriage. If either party attempted to do this, the Appellant contends that the High Court would decline jurisdiction, holding, as is argued herein, that the evidence does not establish that there was consent to a Christian marriage, and in so doing would be following the line of reasoning which met with approval in the cases of *Bethell v. Hildyard* (1888) 38 Ch. D. 220 and *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130. 30

THE SECOND QUESTION is :—

Did both parties have the capacity to enter into the thing of a Christian marriage ?

30. The Appellant concedes that each party did have such capacity. Nevertheless, the concession is limited to capacity to contract a Christian marriage. The Appellant will subsequently contend that the Respondent lacked the capacity to enter into a Jewish marriage (see paragraph 39 hereof) and that the deceased lacked the capacity to enter into a Chinese marriage (see paragraphs 42 to 46 inclusive hereof). 40

THE THIRD QUESTION is :—

Did the alleged ceremony have the form necessary for the validity of a Christian marriage ?

31. The Appellant contends that at the material date in the Colony of Singapore the Christian Marriage Ordinance, 1936, c. 82, exclusively governed the validity of all Christian marriages. The provisions of such Ordinance are similar in character to the provisions of the Marriage Act, 1836, and there was no compliance with the provisions of the said Ordinance.

10 32. If the Appellant be wrong in the above contention on the scope of the said Ordinance, it becomes necessary to examine the Common Law of England to ascertain whether or not under such law as imported into the Colony there may still exist some unrepealed residuum upon which the alleged marriage can found its validity.

20 33. The Appellant contends there is no such residuum. If the alleged marriage had taken place in England prior to Lord Hardwicke's Act, 1753, it would have amounted to no more than a contract of marriage per verba de præsentī commonly called pre-contract, which has been established as not a marriage. (*Reg. v. Millis* (1844), 10 Cl. & F. 534.) The Appellant contends that this authority establishes that under the law of England which was different from the Canon Law the parties to a marriage never had the right to marry themselves but had to be married by a third person and such third person had to be a priest episcopally ordained.

30 34. It has been argued against the Appellant, however, that the rule in *Reg. v. Millis* does not apply to British Colonies and that this ceremony can be held valid on the authority of a line of cases of which *MacLean v. Christall*, 7 Notes of Cases Supplement, p. xvii, is a leading example. The Appellant concedes that these authorities establish that in certain circumstances in the Colonies parties may be validly married by a person who is not a " priest " within the meaning of the rule in *Reg. v. Millis*. Nevertheless, the Appellant contends that these authorities do not support the proposition that the parties can " marry themselves " by a contract of marriage per verba de præsentī. In the above case Sir Erskine Perry, C.J., observes :—

" The rule in such cases is that although Colonists take the law of England with them, they only take so much as is applicable to their situation and condition (pp. xxiv–xxv) . . . This being the state of facts\* the practice which has existed as far back as any trace can be discovered has been to celebrate marriages in the absence of a clergyman in as solemn a manner as the nature of the case permitted (p. xxviii)."

40 (\* The Chief Justice in reviewing the conditions in India and elsewhere pointed out that it was frequently impossible to obtain the intervention of a clergyman.)

35. In the Colony of Singapore in 1937 there was every facility for parties who wished to enter into a Christian marriage. These facilities included a lay ceremony before a marriage officer appointed under The Christian Marriage Ordinance, 1936, c. 82.

36. There was, therefore, as the Appellant contends no room for the application of the doctrine of adaptation of the English Common Law supported by the above authorities. In any event, the Appellant contends that no adaptation is permissible which would have the effect of resuscitating the formless marriage which was discarded by the Council of Trent, 1545, and which has never been part of the English Common Law. Further, the Appellant contends that on the principle of adaptation, the rites of the Chinese religion conducted by a Chinese gentleman could not be sufficient or proper to effect a valid Christian marriage and to be an effective substitute for a ceremony conducted by a priest episcopally 10 ordained.

(B) ON THE SECOND ASSUMPTION that the Respondent is setting up the thing of a Jewish marriage :

THE FIRST QUESTION is :—

Was there consent to a Jewish marriage ?

37. The Appellant contends that the proper inference to be drawn from the fact that the deceased was speaking his own language and observing Jewish customs indicates that he was giving his consent to this union. The Appellant will (if necessary) concede that the Respondent was consenting ad idem in spite of the Chinese rites which she performed. 20 This concession may not be warranted by the facts but it is supported by the following considerations : the deceased was a practising Jew and this is clear from his conduct before, during and after the alleged marriage. It is the duty of a husband to receive the wife into his home and support her. Therefore, the offer of marriage which he made and she accepted should be construed as an offer to be received into a Jewish home and to receive the status of a Jewish wife. If that were the substance of the offer and acceptance there may be justification for saying that what she did at the ceremony was intended to indicate her consent thereto before witnesses.

38. There is no evidence in the case whether or not the Jews in 30 Singapore were by custom polygamous. Even on the assumption that they were monogamous and the union of two monogamous Jews would conform to the definition of a Christian marriage as set in in paragraph 23 hereof, such union is nevertheless in the Colony of Singapore a different thing from a Christian marriage within the meaning of The Christian Marriage Ordinance, 1936, c. 82. Not only does it differ in the requirements of form and capacity in its creation, but the rights, obligations and duties of the spouses during its subsistence and the means and the method of its dissolution all differ.

THE SECOND QUESTION is :—

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Did the parties have the capacity to enter into the thing of a Jewish marriage ?

39. The Appellant contends that this question must be treated as a question of foreign law and that the Respondent had no such capacity. The evidence of Wing Commander The Rev. Block to the effect that a



Jew may not marry a non-Jew is merely another way of saying that the Respondent had not the capacity to enter into a Jewish marriage according to Jewish custom ; and the law of Singapore in relation to the validity of unions contracted otherwise than under the Christian Marriage Ordinance looks for proof of validity to the customary religious or " foreign " law governing the creation of the union.

THE THIRD QUESTION is :—

Did the alleged ceremony have the form necessary for its validity as a Jewish marriage ?

- 10 40. The Appellant contends that this question must be treated as a question of foreign law and that on the evidence of Wing Commander The Rev. Block it was invalid for want of form because (a) there was no ketubah, i.e., marriage contract in writing, and (b) there was no ring.

(c) ON THE THIRD ASSUMPTION that the Respondent is setting up the thing of a Chinese marriage.

THE FIRST QUESTION is :— .

Was there consent to a Chinese marriage ?

41. The Appellant contends that there is no evidence that the deceased consented to the thing of a Chinese marriage. The consent on  
20 his part to be implied from his religion and actions is that he consented to the thing of a Jewish marriage. (See paragraph 37 above.)

THE SECOND QUESTION is :—

Did the parties have the capacity to enter into the thing of a Chinese marriage ?

42. The Appellant contends that this is a question of foreign law and concedes that the Respondent had such capacity but contends that the deceased had not.

43. It is clear from the evidence that the deceased had no such capacity by Jewish law but the Appellant is content to assume that he had  
30 such capacity by Chinese law. The question for decision is whether if the deceased was entering into the thing of a Chinese marriage his lack of capacity by Jewish law was by Singapore law a fatal incapacity to the validity of the marriage.

44. The Appellant contends that in cases of customary marriages in Singapore, English law does not apply and since the laws and usages applicable are considered as matters of foreign law the parties to such unions are to be regarded as persons having foreign domiciles and as if residing temporarily in Singapore.

45. The Appellant contends that the Singapore law will answer the  
40 question in (43) above in the same way as it would answer the question if the fact had been (A) that the marriage took place in China (B) the

Respondent was domiciled in China (c) the deceased was domiciled in a country where the Jewish marriage law prevailed. The Appellant contends that in accordance with the decision in *Brook v. Brook*, 9 H.L.C., which requires both parties to any marriage to have capacity by the laws of their respective domiciles before admitting its recognition, this marriage would be declared invalid for want of capacity on the part of the deceased. This is the attitude which the Courts of Singapore ought to adopt *ex comitate*. Moreover, it would be impinging on the marriage customs of the Jews (part of the Law of the Colony of Singapore) to hold that a marriage to which a Jew was party was valid by the customary law of the Chinese if such marriage were offensive to the religious scruples of the Jews and therefore invalid according to the custom of that section of the community. 10

ALTERNATIVELY :—

46. The Appellant contends that Singapore law will follow Jewish customary law in preference to Chinese law because it is the law of the husband which must prevail over that of the wife. The prevailing effect of the husband's law is recognized by English law in the case of mixed marriages. In consequence thereof the wife acquires her husband's domicile and nationality and his proper law prevails over hers. Apart from statutory exceptions, dissolution of the marriage is governed by the law of his domicile which she acquires by the marriage. The above principle is tacitly acknowledged under English law even when the marriage is not a mixed one. 20

For certain purposes of law husband and wife are treated as one person and it is the wife who takes the husband's name and becomes identified with him. Under the Common Law her property becomes his property, but he must receive her into his house and maintain her.

THE THIRD QUESTION is :—

Did the alleged ceremony have the form necessary to its validity as a Chinese marriage? 30

47. The Appellant contends that the evidence does not justify any such finding. Moreover, the Appellant observes that none of the Judges accepted the evidence of the Chinese expert that all that was necessary was the verbal consent of the parties in the presence of two or more witnesses. Moreover, the witness stated that at marriages at which he had presided and conducted the form of marriage had usually included a middleman or go-between who introduced the parties to the celebrant, a relative of either side and a marriage document, nor does the evidence in this case approximate to the requirements of Chinese law as referred to in *The Six Widows Case*, 12 S.S.L.R. 120. 40

(D) ON THE FOURTH ASSUMPTION that the Respondent is setting up the thing of a marriage other than a Christian, Jewish or Chinese.

48. In the absence of any suggestion—and there is none—that the parties created the thing of a Moslem marriage or some other recognised

thing of marriage, the Appellant contends that there is no thing known to the law of Singapore to which the tests of consent, capacity and form can be applied. However, in order to emphasise the unreality of the conclusion that parties can be married without relating that marriage to some system of law which defines the status created by the union, the Appellant proposes to propound the problems that would arise in regard to consent, capacity and form if the contrary be asserted.

#### CONSENT

49. It is impossible to assert that two parties have consented to  
10 anything unless the nature of the thing to which they have consented is capable of definition. In relation to the undefined marriage, the Appellant contends that the following questions arise for consideration, but are incapable of being answered :—

To what obligations, rights and duties on the part of the Respondent did the deceased consent and vice versa ?

Would the deceased have broken any obligation of the union if he had taken a second wife or a mistress ? If he had done so what rights would they or their issue have obtained ?

20 What provisions attach to the marriage regulating the right of one or the other to dissolve it either because of some breach or at will ? What system regulated its dissolution ?

Unless the answers to these questions can be ascertained, there can be no consent to the essentials of the marriage ; the Appellant contends that these questions can only be answered by reference to some system of law either customary or otherwise ; ex hypothesi, this marriage is unrelated to any such system.

#### CAPACITY

50. In the absence of the relation of the marriage to any known system of law, the requirements as to capacity cannot be defined. It is  
30 contended that rules of capacity for age and affinity cannot be made ad hoc.

#### FORM

51. In the absence of the relation of the marriage to any known system of law, the requirements as to form cannot be defined. The marriage must derive its validity merely from consent regardless of form.

52. The Appellant concedes that form is not an essential requirement to a system of law for marriage. Formless marriages were known to the Canon Law. But to hold a formless marriage valid in Singapore would—  
40 the Appellant contends—be to destroy the customary laws of form, devised by the inhabitants of Singapore for the safeguarding of their own institutions of marriage and which ex comitate ought to be upheld.

53. The effect of the introduction of a formless marriage into the law of Singapore would be to reintroduce the type of marriage which was cast out of the Canon Law in 1545 by the Council of Trent and which

English law never recognised as constituting a full and complete marriage. The development of all systems of marriage law is characterised by an insistence upon form designed to protect primarily the security of a marriage and, to a lesser degree, to safeguard those who might otherwise have contracted hasty or ill-advised marriages.

54. The Appellant further contends that the effect of holding the marriage between the Respondent and the deceased valid as a formless marriage or contract per verba de præsenti is to introduce into Singapore the system of clandestine marriages which never amounted to more than a precontract under the English Common Law. The Appellant contends that it is recognised not only in Christendom but the whole world over that clandestine marriages are odious for they are a constant source of danger to the security of marriages entered into regularly by parties who have no knowledge of the prior transaction. If the decision under Appeal is correct a prior declaration per verba de præsenti by the deceased at the age of 16 or possibly earlier to a Eurasian mistress would suffice to defeat the claim of any wife whom the deceased subsequently married by a ceremony regularly performed in recognised form and prima facie valid. The Appellant contends that it would be deplorable if this were the law in a community such as Singapore. There would be no security against genuine or bogus claims being made to overthrow marriages and the institution of marriage and the legitimacy of issue would be placed in jeopardy. 10 20

(E) ON ANY OF THE ASSUMPTIONS.

THE FIRST QUESTION is :—

Was there evidence of habit and repute from which the Court might infer a valid marriage in the absence of rebutting evidence and if so did the evidence in this case rebut the presumption ?

55. The Appellant contends that the full facts of the association between the Respondent and the deceased do not establish that there was the habit and repute of marriage between them. Even if this contention be wrong and the presumption of marriage might arise, this presumption is negated by the evidence in the case. The full facts of the association between the Respondent and the deceased have been given in evidence by the Respondent herself and if the celebration on or about the 22nd day of December, 1937, did not create a valid marriage the parties were never married. 30

CONCLUSION OF THE JUDGES.

A. The Trial Judge, Gordon-Smith, J., held :—

56. That the provisions of the Christian Marriage Ordinance 1936 c. 82 were wholly inapplicable to the facts of the case. 40

The Appellant agrees that this is so because there was no evidence to suggest that the parties were consenting to the thing of a Christian marriage. But if the parties were intending to contract this union, then the Appellant contends that the alleged marriage must comply with the requirements of the Ordinance.

57. That the law of Singapore did not recognise the religious incapacity imposed on the deceased by his religion. The Appellant concedes, and it was conceded in the Courts below that the deceased had capacity to marry under The Christian Marriage Ordinance but contends that he did not have capacity to enter into a customary marriage which was invalid under his customary law for want of capacity of the parties thereto. p. 61, ll. 45-47.  
p. 63, l. 28.

58. That the consensual conception was originally that of the Common Law of England. p. 62, ll. 24-25.  
p. 63, ll. 26-27.

10 The Appellant contends that this is contrary to the decision in *Reg. v. Millis* (see paragraph 33 hereof).

59. That there was ample evidence of consent. The Appellant contends that there was no evidence of consent to the thing of a Christian marriage. In the absence of any such consent the provisions of the Common Law are immaterial. p. 63, ll. 29-31.

B. On Appeal Murray Aynsley, C.J., held :—

60. That the parties could not have been married under any of the statutory methods (i.e., The Christian Marriage Ordinance). p. 71, ll. 28-29.

20 The Appellant contends that this is not so. The Ordinance made provisions for lay marriage before Registrars.

61. That the law to be applied was the English law unless the application of that law would inflict injustice. The Appellant contends that it is contrary to authority to apply the English law to customary unions in the nature of marriage entered into by people who are not Christian. p. 71, ll. 32-34.  
p. 72, ll. 1-4.

62. That the English law to be applied was the law prior to Lord Hardwicke's Act and that on the authority of *Wolfenden v. Wolfenden* [1945] P. 61 an agreement per verba de præsenti is sufficient to constitute a valid marriage. The Appellant contends that this is not so. p. 71, ll. 34-36.

30 63. That a polygamous marriage was the same thing as a monogamous marriage and that the doctrine outlined in *Hyde v. Hyde* 1 P. & M. 130 to the contrary effect was no longer law. p. 72, ll. 8-18.

The Appellant contends that this is not so and that the authority of *Nachimson v. Nachimson* [1930] P. 137 on which he relies establishes the contrary.

64. That the religious prohibition imposed on the deceased did not deprive him of the capacity to marry. p. 72, ll. 35-48.  
p. 73, ll. 7-9.

The Appellant's contentions on capacity are set out in paragraph 30 hereof.

40 C. On Appeal Evans, J., held :—

65. That it was observable that the Trial Judge did not find that any Chinese custom had been proved nor that the marriage was in accordance with any such custom nor that such custom was applicable to the deceased. p. 74, l. 42.

p. 75, ll. 25-27.

66. That the religious prohibition imposed on the deceased did not deprive him of capacity to marry.

The Appellant's contentions on capacity are set out in paragraph 30 hereof.

p. 78, ll. 14-16.

67. That the transaction must first be considered at Common Law which was applicable where the parties belonged to different communities.

The Appellant contends that there is no authority for imprinting on a union between non-Christians the characteristics of a Christian union. If, however, that be done there must be compliance with the form of a Christian marriage.

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p. 80, ll. 1-4.

68. That on the authority of *MacLean v. Christall* and other cases a marriage *per verba de presenti* was valid. The Appellant's contentions are set out in paragraphs 34 to 36 inclusive hereof.

D. On Appeal *Laville, J.*, held :—

p. 82, ll. 14-17.

69. That in the case of mixed marriages the Christian Marriage Ordinance provided a means of making a valid marriage where one party was a Christian and one was not. The Appellant contends that it is equally available to parties if they intend to create the thing of a Christian marriage in spite of the fact that neither party be a Christian. The Ordinance which renders invalid any marriage to which one party is a Christian unless there is compliance with the terms of the Ordinance, does not disentitle two non-Christians from availing themselves of its provisions.

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p. 83, ll. 19-25.

70. That no ceremony, religious or otherwise, was needed for the validity of a marriage between persons of different religion and customs ; that all that was required was consent expressed or made apparent to witnesses ; that this was the effect of the Common Law as modified to meet the conditions of Singapore. The Appellant's contentions thereon are set out in paragraphs 33 to 36 inclusive hereof. It is observed, however, that this learned Judge requires the consent to be expressed in the presence of witnesses. This does not appear to be an essential to a contract of marriage *per verba de presenti* commonly called pre-contract under the Common Law of England.

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The Appellant humbly submits that this Appeal should be allowed with costs for the following among other

## REASONS

- (1) THAT considered as a Christian marriage, there is no evidence that the parties consented to such a union.
- (2) THAT considered as a Christian marriage, it was void for want of form since it did not comply with the Christian Marriage Ordinance, 1936, c. 82.
- (3) THAT considered as a Christian marriage, it was void for want of form since it did not comply with the common law of England.

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- (4) THAT considered as a Jewish marriage it was void for want of form.
  - (5) THAT considered as a Jewish marriage it was void for want of capacity on the part of the Respondent.
  - (6) THAT considered as a Chinese marriage, there is no evidence that both parties consented to such union.
  - (7) THAT considered as a Chinese marriage, it was void for want of capacity on the part of the deceased.
  - (8) THAT considered as a Chinese marriage it was void for want of form.
  - (9) BECAUSE considered otherwise than as a Christian, a Jewish or a Chinese marriage the said alleged marriage was avoid for want of form, lack of capacity and want of consent, there being no evidence on any of these matters directed to any relationship recognised as constituting a marriage under any system of law apart from which marriage cannot exist.
  - 20 (10) BECAUSE by reason of the foregoing the doctrine of habit and repute of marriage is irrelevant, and the habit and repute of marriage was not established.

R. J. A. TEMPLE.

IAN BAILLIEU.

In the Privy Council.

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**ON APPEAL**

*from the Court of Appeal of the Colony of  
Singapore, Island of Singapore.*

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In the Estate of ABRAHAM PENHAS,  
deceased

BETWEEN

ISAAC PENHAS (Defendant) *Appellant*

AND

TAN SOO ENG (Plaintiff) - *Respondent.*

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**Case for the Appellant.**

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