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No. 21 of 1951.

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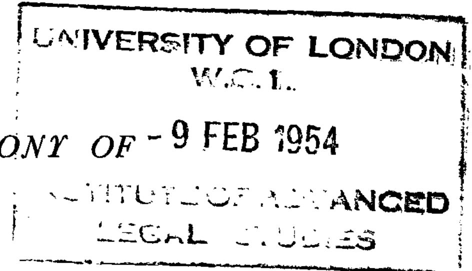
In the Privy Council.



ON APPEAL

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

Appeal No. 21 of 1949.

Probate of No. 119 of 1946.

IN THE ESTATE of ABRAHAM PENHAS deceased.

10 Between

ISAAC PENHAS (Defendant) - - - - - - - *Appellant*

and

TAN SOO ENG (Plaintiff) - - - - - - - - *Respondent.*

CASE FOR THE RESPONDENT.

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1. This is an appeal from a Judgment of the Court of Appeal of the Colony of Singapore dated the 24th March 1950 dismissing an appeal by the Appellant from a Judgment of Mr. Justice Gordon-Smith in the High Court of the Colony of Singapore dated the 13th September 1949 upon the trial of an issue ordered to be tried in a Petition by the Respondent for letters of 20 Administration of the estate of Abraham Penhas deceased against which the Appellant had entered a caveat. Record p. 70 Record p. 66

2. The said issue was in the following terms: " Whether the Petitioner Tan Soo Eng is or is not the lawful widow of Abraham Penhas and if the answer is in the affirmative when the said Tan Soo Eng married the said Abraham Penhas." Both the learned trial judge and the Court of Appeal decided the said issue in favour of the Respondent, determining that she had been lawfully married to the deceased on or about the 22nd December 1937. Record p. 17

3. The question to be determined upon this appeal is whether the learned trial Judge and the Court of Appeal were right in their conclusion that a marriage celebrated in Singapore between a Jew and a non-Christian Chinese in the customary Chinese form constituted a valid marriage according to the Laws of the Colony.

Record p. 4
Record p. 1
Record p. 6
Record p. 8

4. The Respondent Petitioned for Letters of Administration of the Estate of the deceased on the 8th April 1946. The Appellant's caveat had been filed on the 26th February 1946. He was duly served with a Citation dated the 3rd May 1946 and on the 25th June 1946 an issue was ordered to be tried, whether or not the said Abraham Penhas was or was not then dead and if so when he died and it was further ordered that the further hearing of the Respondent's Petition be adjourned until after the determination of the said issue. 10

Record p. 10

5. On the 30th January 1947 upon the trial of the said issue it was declared that Abraham Penhas was dead and that he died on or after the 10th March 1942.

Record p. 11

6. On the 3rd March 1947 an order was made for the trial of the said issue set out in paragraph 2 hereof, which is the subject matter of this Appeal.

Record p. 17

7. The issue came on for trial before Mr. Justice Gordon-Smith on the 31st May 1949 and the hearing occupied 8 days.

8. There was a conflict of evidence upon the facts at the hearing before the trial judge, but before the Court of Appeal the Appellant did not seek to challenge the findings of fact of Mr. Justice Gordon-Smith, for which there was ample evidence. 20

9. Both the deceased and the Respondent were British Subjects and were at all material times domiciled and resident in Singapore. Neither of them was married at the date of the marriage ceremony relied upon by the Respondent.

Record p. 55
l. 34

10. During the course of his judgment Mr. Justice Gordon-Smith said:—

"The story told by the Plaintiff and her mother is that in September 1937 an introduction was effected between the deceased and themselves with a view to marriage and this marriage was discussed at a meeting in the Botanical Gardens between them . . . Apparently satisfactory arrangements were made at this meeting and the deceased gave the Plaintiff an envelope containing $500/. suggesting that she and her mother looked out for a house as being more suitable than where they were living at that moment . . . . Shortly afterwards the Plaintiff and her mother found a suitable house at 508 Sims Avenue, and removed there. The 30

deceased came and visited them there and they got better acquainted and an early marriage was suggested. The Plaintiff suggested a marriage ceremony but the deceased said that this was not possible in the Jewish Synagogue and on her suggesting a marriage according to Chinese rites and on being supplied with details the deceased agreed. A day was appointed and a ceremony took place just before Christmas 1937. Both the Plaintiff and her mother and another guest who were present have described this ceremony in detail. The deceased had already given the mother $500/. for the expenses of the wedding and wedding feast. On the appointed day the deceased arrived with two Jewish friends and an old Chinese gentleman. The ceremony consisted of the bride and bridegroom (the Plaintiff and the deceased) standing before the old Chinese gentleman who made some sort of speech referring to the auspicious occasion and then formally asked them separately whether they were willing to become man and wife and they both responded in the affirmative. During this procedure the Plaintiff was holding joss-sticks, bowing and worshipping. The deceased produced a handkerchief with which he covered his head, raised his right hand and was murmuring something in his own language. After this ceremony the happy couple then paid their respects to and offered the mother a cup of sweet tea in accordance with the Chinese custom. The two Jewish friends shook hands with the bride and kissed her. Following on this ceremony the usual wedding feast took place at which there were about 17 guests. The deceased remained the night there, going to business as usual the next morning. According to the evidence the deceased would spend three or four nights a week at 508 Sims Avenue regularly except when he was away on business trips and this continued right up to the fall of Singapore in February, 1942."

11. This evidence was accepted by the learned trial judge who also found that the Respondent bore two children by the deceased namely a girl born on the 12th September 1938 and a boy born on the 16th January 1941. Both these children are still alive and living with the Respondent. Later in his judgment Mr. Justice Gordon-Smith said:—

Record p. 58 l. 5

"There is also abundant evidence that the deceased introduced the Plaintiff as his wife, acknowledged her as his wife and treated her as such and never attempted to deny his paternity of the two children born to the Plaintiff."

12. The deceased was murdered by the Japanese shortly after the fall of Singapore in February 1942.

13. The Appellant is a brother of the deceased and was the executor of the last Will and Testament of the deceased which was executed on the 3rd April 1936. He has not applied for probate of the said Will.

Record p. 18

14. The Appellant called as an expert witness Wing Commander the Rev. S. M. Block, senior Jewish Chaplain in the Forces in Singapore, who gave evidence in regard to Jewish laws and customs.

The effect of his evidence was thus summarised by Mr. Justice Gordon-Smith: —

Record p. 59 l. 42

" He stated that a Jew might not marry a non-Jew under any circumstances and any such marriage was repugnant to Jewish Law. That such a marriage before a Marriage Registrar could not be prohibited but could not be recognised by Jewish Law. Jewish Law says that civil law must be adhered to and Jewish Law does not interfere with civil status, it is a matter of religion and conscience. Official consent of the family is not normally necessary for a Jewish wedding." 10

On re-examination he stated: —

Record p. 59 l. 49

" In deciding the status of a wife, consideration can only be taken of two possibilities, viz: the marriage either fulfills the civil marriage laws or the requirements of the Law and customs of the Jews. If there is no civil marriage, then one must look to Jewish laws and customs."

15. There was at the material time no Ordinance in force in Singapore governing marriage between Jews and non-Christian Chinese and no Statutory enactment specifying the form in which such a marriage should be celebrated. 20

Record p. 55

16. Mr. Justice Gordon-Smith delivered a reserved judgment on the 13th September 1949 deciding the said issue in favour of the Respondent, on the ground that a common law marriage *per verba de praesenti* had been proved.

Record p. 67

17. On the 1st October 1949 the Appellant gave nottice of Appeal to the Court of Appeal against the said judgment.

Record p. 70

18. The said appeal was heard by Murray Aynsley C.J. and Evans and Laville J.J. and on the 24th March 1950 the Court of Appeal delivered reserved judgments unanimously dismissing the Appeal with costs.

19. Two principal grounds of argument were adduced by the Appellant in support of his appeal to the Court of Appeal. 30

(*a*) That the acts performed did not constitute a Jewish marriage, and the deceased was capable of marrying by Jewish law alone.

(*b*) That the Judge was wrong in finding a common law marriage *per verba de praesenti*, for the English law always required the presence of a priest, where procurable, and the law laid down in *Reg v. Millis* 10 C & F 534 was applicable to the Colony.

20. The Court of Appeal rejected these arguments and held that a valid common law marriage had been proved.

21. The following submissions are made in support of the Respondent's contention that the decisions of the learned trial judge and the Court of Appeal that she had proved a valid marriage between herself and the deceased were well founded in fact and law.

(i) There is no foundation in authority or principle for the Appellant's contention that under the laws of the Colony of Singapore the deceased could contract a valid marriage in accordance with the forms of Jewish law alone. The validity of a marriage in Singapore does not depend upon any "personal law" of bridegroom or bride. The celebration of a marriage in accordance
10 with the customs of one or other or both of them merely provides strong (and perhaps irrebutable) evidence of that consensus which is essential to the validity of a marriage at common law. It is submitted that even two members of the Jewish faith could lawfully marry in Singapore otherwise than in accordance with Jewish forms and customs and that it is an *a fortiori* case when one party to the marriage is not Jewish.

(ii) That if the Court is to have regard to the marriage laws and customs of the bride and bridegroom as determining the validity of the marriage and not merely as evidence of their intention to marry, there is no foundation in authority or principle for the application of the personal law of the bridegroom
20 rather than that of the bride.

(iii) That in so far as reliance is placed upon the alleged rule of Jewish law that the deceased could not contract a valid marriage with a non-Jewish woman, the Courts will not give effect to this alleged rule (cf *Chetti v. Chetti* (1908) P, p. 67).

(iv) That the expert evidence of Jewish law adduced on behalf of the Appellant did not support the contentions put forward by him, in that it was to the effect that if the marriage fulfilled the requirements of the civil marriage laws it was recognised as valid. Accordingly if the marriage of the deceased and the Respondent was valid under the general law of the Colony it would be
30 recognised under Jewish law despite the fact that it did not comply with Jewish forms.

(v) That the authorities and in particular *Catterall v. Catterall* (1 Rob. 580), *Maclean v. Cristall* (7 Notes of Cases, Supp. XVII), and *Wolfenden v. Wolfenden* (1946) P, p. 61 (approved by the Court of Appeal in *Apt v. Apt* 1948 P at page 86) show that the doctrine enunciated in *Reg. v. Millis* has no application to the Colony of Singapore and that the agreement *per verba de praesenti* was sufficient to constitute a valid common law marriage notwithstanding the absence of an episcopally ordained priest.

(vi) That in any event even if the Common law as a whole must be regarded as applicable to the Colony of Singapore, the decision in *Reg v. Millis*

(which is not binding upon the Privy Council) which is inconsistent with earlier authorities (and also with the later decision of the Supreme Court of the United States of America in *Meister v. Moore* 96 U.S. 76) was wrongly decided and ought not to be followed.

22. The Respondent humbly submits that this Appeal should be dismissed for the following among other,

REASONS.

(I) BECAUSE the evidence established that a marriage *per verba de praesenti* was celebrated between the deceased and the Respondent. 10

(II) BECAUSE the Common Law of England as modified to suit the conditions applicable in a Colony where people of different races, customs, and religions are domiciled and inter-marry did not and does not require the presence of an episcopally ordained priest to validate a marriage *per verba de praesenti.*

(III) BECAUSE the validity of marriages in Singapore Colony between persons who are neither Christian nor Mohammedan depends upon their complying with the Common Law requirements of a marriage *per verba de praesenti* 20 and a decision throwing doubt upon their validity might lead to grave social consequences.

(IV) BECAUSE at the relevant date there was no local law dealing with marriage between persons who were neither Christian nor Mohammedan nor for registration of such marriages.

(V) BECAUSE the case of *Regina v. Millis* (if rightly decided) has no application to the Colony of Singapore.

(VI) BECAUSE the validity of the marriage of the deceased and the Respondent did not depend upon Jewish 30 religious law.

(VII) BECAUSE the marriage of the deceased and the Respondent was valid according to Jewish religious law although not celebrated in Jewish form.

(VIII) BECAUSE the judgments of Mr. Justice Gordon-Smith and the Court of Appeal of the Colony of Singapore were right and ought to be upheld.

P. COLIN DUNCAN.

No. 21 of 1951.

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and

TAN SOO ENG (Plaintiff) *Respondent.*

CASE FOR THE RESPONDENT.

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5242