

Wong Kai Woon alias Wong Kai Boon and Another v Wong Kong Hom alias Ng Kong Hom
and Others
[2000] SGHC 176

Case Number : OS 709/1989
Decision Date : 30 August 2000
Tribunal/Court : High Court
Coram : Chan Seng Onn JC
Counsel Name(s) : Michael Moey (Moey & Yuen) for the trustees; Kee Lay Lian with Adriana Tan (Rajah & Tann) for the 21st defendant; Simon Yuen (Tan & Lim) for the 4th defendant
Parties : Wong Kai Woon alias Wong Kai Boon; Wong Koy Hom — Wong Kong Hom alias Ng Kong Hom; Wong Phew Hom alias Ng Phew Hom; Wong Lee Hom alias Ng Ne Hom; Wong Chee Kean; Thio Seng Cheng (representing the Estate of Wong Fook Hin, deceased); Hwang Chen Ya; Wong Fook Kee; Wong Fook Fen

JUDGMENT:

Grounds of Judgment

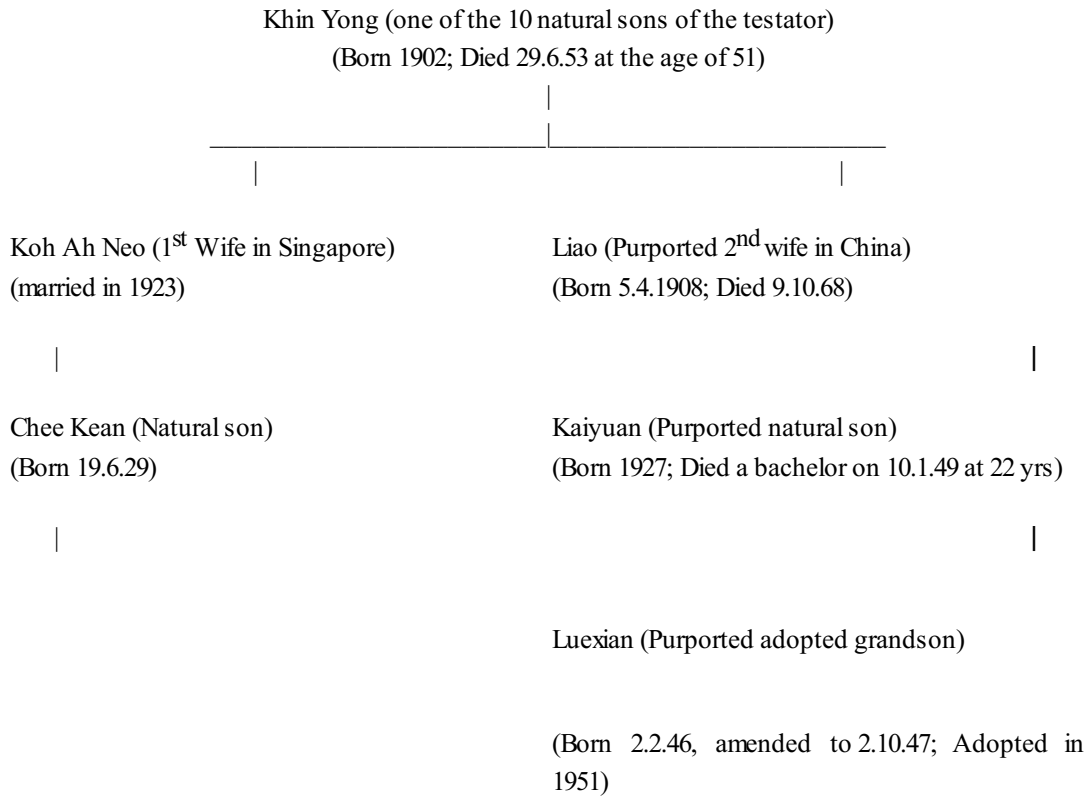
Background

1. The 21st defendant, Huang Luexian ('Luexian' or 'claimant'), is the personal representative acting for and on behalf of the estate of the deceased, Huang Kaiyuan (Kaiyuan), and the estate of the deceased, Liao Shunxiang ('Liao'). Wong Chee Kean ('Chee Kean'), the 4th defendant, opposes Luexian's claim on the estate of his grandfather, Wong Yoon Fee ('testator').
2. The testator died in 1926 leaving a will where he bequeathed and devised his residuary estate unto his trustees upon trust that his trustees shall at the expiration of twenty years after the death of his last surviving wife, divide his residuary estate among the lawful natural and/or adopted sons of his sons and adopted son, the lawful natural and/or adopted son or sons of each of his sons and his adopted son taking one share or one share between them in equal shares.
3. In *Wong Kai Woon & Anor v Wong Kong Hom & Ors* [2000] 1 SLR 546, I decided, *inter alia*, that all the lawful natural sons of the testator's ten sons and adopted son, Wong Siong Yóng, would acquire an interest in the residuary estate at birth, so long as they were not deceased prior to the testator's death or born after the date of distribution on 18 September 1974, but were either alive at the time of the testator's death on 24 May 1926, or were born before or on the date of distribution.
4. This dispute concerns only the stirpes of Wong Khin Yóng ('Khin Yóng'), who was one of the testator's sons. It is not disputed that Khin Yóng married a principal wife, Koh Ah Neo, in Singapore and they have a daughter, Wong Chok Chin, born on 10 January 1927 and a son, Chee Kean, born on 19 June 1929. Both children were born in Singapore. As the testator's lawful natural grandson, Chee Kean is thus entitled to a share of the testator's residuary estate under the stirpes of Khin Yóng.
5. The sole question before me is whether Khin Yóng had lawfully married a secondary wife, Liao, at Yun Han Lou in China sometime in 1926 or 1927 and whether by that marriage, they had a son, Kaiyuan. It was established that Kaiyuan was born sometime in 1927 and he died on 10 January 1949 prior to the date of distribution. Consequently, if the answers to both parts of the aforesaid question are in the affirmative, Kaiyuan would be entitled to a half share under the stirpes of Khin Yóng. The following diagram illustrates their relationship.

Wong Yoon Fee (testator)

Died 24.5.1926

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Chee Kean's case

6. Chee Kean's case is that his father, Khin Yong, was born in Singapore. He lived in Singapore all his life. He died and was buried in Singapore at the Bidadari Christian Cemetery. As such, Khin Yong could not have another wife in China nor a biological son, Kaiyuan, in China.

7. Chee Kean does not know who Luexian is and he has never heard of him. He does not recall that his father had ever left Singapore for any period of time. I note however that Chee Kean was only born in 1929. He would not be aware of events before his birth. It is also doubtful if he would have the capacity to understand and remember events until perhaps he was at least 4 or 5 years of age.

8. He testified that his father never mentioned of another wife or child. Being a close knit family, his father would have told him if indeed he had another wife or child.

9. However, Wong Yee Lin ('Yee Lin'), the sister of Khin Yong, expressed the sentiment (which is not an unreasonable one) that it would be absurd for Khin Yong to announce to their mother or anyone else of the existence of another wife in China.

Luexian's identification of Khin Yong as his grandfather

10. Sometime in November 1997, Huang Yan Shoong together with his co-trustee and their respective solicitors went to China to investigate the claims of the 16th and 17th defendants. They took the opportunity to find out whether there were any more beneficiaries. Their investigations took them to Yun Han Lou, where they met the village chief, Luexian.

11. Luexian told them that the 16th and 17th defendants were his uncles. It is not disputed that the 16th and 17th defendants are the sons of Wong Siong Yong, the adopted son of the testator. Luexian said that his father was Kaiyuan, the son of Huang Qingrong (i.e. Khin Yong) and Liao Shunxiang (i.e. Liao). If Luexian's father was Kaiyuan, and Kaiyuan was a son of Khin Yong of Singapore, then the 16th and 17th defendants would indeed be Luexian's uncles.

12. At the request of Huang Yan Shoong, Luexian drew his family tree. By that diagram, Luexian clearly identified that his father (or more precisely his adoptive father) was 'Huang Qingrong', i.e. Wong Khin Yong, the son of 'Huang Yunhui', the testator. Luexian also identified that his father had brothers 'Huang Guirong' (i.e. 'Wong Kwee Yong') and 'Huang Xiangrong' (i.e. Wong Siong Yong).

13. It is of significance that Luexian at that time expressed disinterest in claiming any share of the testator's estate, which was confirmed by Huang Yan Shoong. In evaluating the weight to be given to Luexian's previous self-serving statements made out of court, the fact that he was not interested in making any claims at the time of making those statements is a relevant factor for consideration.

14. I admitted into evidence the family tree diagram to corroborate and lend weight to Luexian's own evidence as to who he is and his relationship to Kaiyuan, Khin Yong and Liao. Former statements may be proved to corroborate the testimony of a witness under s 159 Evidence Act, which provides that:

In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

15. When asked why he changed his mind, Luexian testified that he came forward to make his claim because the Court in Singapore required him to renounce his right to the testator's estate. He feared that would affect his family's ability to continue to reside at Yun Han Lou, as only descendants of the testator reside there. It is not disputed that Yun Han Lou was built by the testator and is regarded by the descendants as their ancestral home. Renouncing his right would amount to proclaiming that he was not a descendant of the testator.

16. As counsel for Chee Kean, Mr Yuen, had contended that Luexian might not be referring to the 'Khin Yong of Singapore', I asked Ms Kee, Luexian's counsel, to obtain the assistance of the Court interpreter to study the Chinese characters for 'Khin Yong' and his other brothers and stepbrothers in the "Huang Family" genealogy book, and to compare them with the Chinese characters for 'Khin Yong' written by Luexian when he drew his family tree.

17. The court interpreter, Ms Woon, concluded that the Chinese characters 'Khin Yong' written by Luexian could not have referred to Khin Yong's other brothers by meaning. Neither could those characters be referring to Khin Yong's other brothers by sound and meaning. The 'Khin' in the original complex form is not the same as any of the Chinese characters of the other 10 brothers. The court interpreter confirmed that the Chinese characters 'Khin Yong' in the family tree drawn by Luexian are the same as that for 'Khin Yong of Singapore' in the genealogy book.

18. I therefore concluded that Luexian identified his grandfather to be none other than the Khin Yong of Singapore. He could not be identifying some other son of the testator as postulated by Mr Yuen.

Hu Yuxiang's evidence

19. Hu Yuxiang ('Hu') was called to give evidence on behalf of Luexian. She was born around 1919 or 1920. She used to live in the testator's old ancestral house at Hengkengzi, Chashan Village, Guangdong.

20. In her affidavit, she said that she was six or seven years old when Khin Yong returned to the old ancestral house to marry Liao. That would place the marriage around 1926 or 1927. On the wedding day, her adoptive mother, Xu Faxiang, the second wife of Wong Siong Yong, went to Yun Han Lou to help out with the wedding preparations. She followed her adoptive mother there. On the wedding day, the wedding band played away as it followed the wedding sedan chair which the bride Liao was in. The sedan chair was carried to Yun Han Lou. Aunt Guoling was the wedding organiser. She led the groom and the bride into Yun Han Lou where the couple prayed to the heaven and earth and paid respects to the ancestors.

21. I cite these details which are either the product of a very fertile imagination or her true recollection of the events. I am inclined to believe that the unusual features of her story and the details provided of the ceremony render it unlikely that her story is fabricated.

22. In her affidavit, she averred that:

After Aunt Guoling had said some auspicious phrases such as "May you soon be blessed with sons", the bride and groom went into the nuptial room. This was the wedding custom of that time.

After the wedding ceremony ended, Uncle Wong Khin Yong asked Aunt Guoling to send a lot of wedding candy and cakes to the girls' school [i.e. Yun Han Girls' School established by Granduncle Wong Yoon Fee] to be shared amongst the children. That was the first time I ate sweets and biscuits brought back from overseas. A few helpers were then sent to distribute glutinous rice balls contained in buckets to all the households in Chashan Village. This symbolises the unity, love and friendship between the elders and villagers in the village and a woman whose husband lives overseas.

The village elders and villagers began to arrive to wish the couple well at noon. Some relatives from outside the Chashan village also came to attend the wedding banquet, one of whom was sister-in-law Huang Yunmei of Suiche.

The various halls of Yun Han Lou were filled with tables of guests. Sumptuous dishes were served during the lunch. The most unforgettable were the foreign dishes such as the cuttlefish cooked with ginseng abalone. It was rare to see those dishes in China at that time, let alone eat them.

...

As far as I am aware, Uncle Wong Khin Yong and Aunt Liao lived at Wan Xing Chang in Swatow for a period of time. After she was pregnant with Kaiyuan, Aunt Liao frequently came back to Yun Han Lou.

Aunt Liao did not want to give birth in Swatow then. She wanted to give birth at Yun Han Lou but Uncle Wong Khin Yong disagreed and insisted that Aunt Liao gave birth in Swatow. Years later, Aunt Liao revealed to me that the reason Uncle Wong Kin Yong wanted her to give birth in Swatow was that the facilities for delivering babies in the villages and rural districts were poor. Moreover, there was nobody to take care of her and the baby. The facilities for delivering were better in the city of Swatow.Aunt Liao gave birth to a boy and he was named Huang Kaiyuan. Uncle Wong Khin Yong was very happy as the family name can be carried on.

Uncle Wong Khin Yong returned to Swatow the following year and brought Liao Shunxiang and Huang Kaiyuan back to the Chashan Village's Ancestral Hall of the Huang Family to light a lamp to signify that a son has been born into the family. The name of a child can only be added to the Genealogy Record of Huang Family if the child is male and after a lamp has been lit at the ancestral hall. Three lamps had to be lit then to signify that a son has been born into the family: one at the Ancestral Hall of the Huang Family, one at the Hall of the Wong Yoon Fee's old ancestral house and

one at the hall of Yun Han Lou. When we were at the hall of the old ancestral house, I carried Kaiyuan for a while because he was adorable. Uncle Wong Khin Yong was very happy and gave me a silver *haozi* (money).

23. At first, Yee Lin, the testator's daughter living in Singapore called by Chee Kean to testify on his behalf, affirmed in her affidavit that Khin Yong never went to China thereby suggesting that Khin Yong could not have married Liao. However, in her oral testimony she changed her position and testified, much to the surprise of Mr Yuen, that Khin Yong in fact did follow the testator's body to China for burial in 1926. This corroborated Hu's evidence on a material aspect that Khin Yong had been to China and it added to the reliability and credibility of Hu's testimony.

24. Mr Yuen submitted that Hu's inability to identify Khin Yong from the funeral wake photograph throws doubt as to whether the 'Khin Yong of China' was the same person as the 'Khin Yong of Singapore'. However, I have to consider that recognition of a person last seen some 75 years ago is not easy. It would I think be easier for a young girl of tender age to remember events, and more so a grand celebration, and than the face of a person.

25. Mr Yuen further submitted that they were not the same persons because the Khin Yong of Singapore had, according to Yee Lin, returned to Singapore for the birth of his daughter on 10 January 1927, and he was also present in Singapore on or about October 1928 for the conception of his son, Chee Kean, by Koh Ah Neo his principal wife. Yee Lin testified that Khin Yong never went back to China because he had no money to do so. Hence, based on the evidence of Yee Lin, Mr Yuen submitted that the Khin Yong of Singapore was in China for only a short period of 5 to 6 months in 1926.

26. Whereas the evidence of Hu seems to suggest that Khin Yong was in China from time to time over a period of at least 5 years. She had seen him two or three times at her house about a year before his alleged marriage to Liao. He married Liao about a year after the burial of the testator in China, which would place the marriage closer to 1927. Kaiyuan was born during the second year of the marriage. Hu saw Khin Yong again about 3 to 4 years after the birth of Kaiyuan when he brought back a woman from Guangdong. He was planning to take a third wife. Liao refused to consent to Khin Yong marrying again and she viciously scolded the woman. Having no choice, Khin Yong left with the woman and never returned.

27. Yee Lin is about 91 years of age. Having regard to (a) the abrupt change in her testimony concerning whether Khin Yong had been to China at all, and (b) her inability even to recall that she had sworn an affidavit of her evidence for this trial, I did not place much weight on her purported recollection that Khin Yong never returned to China after the testator's burial nor the effect of her evidence that Khin Yong could only have been in China for about 5 to 6 months. In fact, she admitted that it was only about the 1930s that Khin Yong and his family stayed with her and their mother at 45 Koek Road. Prior to that, Khin Yong and his family did not stay with them. Hence, I doubted that she could know all his movements or his travels out of Singapore.

28. Ms Kee quite rightly pointed out that Yee Lin's recollection was wrong when she stated affirmatively that Khin Yong was back for his daughter's birth on the 1st day of the Lunar New Year, when in fact she was born on the 7th day of the 12th Lunar month of 1927.

29. On the whole, I did not find Yee Lin's evidence to be reliable. I preferred the evidence of Hu over that of Yee Lin. I have to bear in mind that the purported marriage took place some 75 years ago and any witnesses to that marriage, if alive, could only have been of very tender age when they saw the ceremony. Hence, the reliability of the evidence of these witnesses must be tested against other evidence, much of which is going to be hearsay in nature because of the long passage of time. But any hearsay evidence can only be considered if it is admissible under the Evidence Act.

Mistaken Identity and Impersonation Theories

30. Mr Yuen submitted that all male offspring of Wong Yoon Fee have a generation name of 'Yong' being the last name. The male offspring of the testator's son, Wong Kin Yong, bear the generation name of 'Kai'. Those for Wong Fap Yong bear the

generation name of 'Fook'. In the case of Wong Khian Yong, 'Hom' is a part of their Chinese names. Counsel argued that the lack of a generation name leads to the inference that Kaiyuan was not the half-brother of Chee Kean.

31. I did not think that much can be inferred from the presence or absence of a 'generation name'. I observed that Wong Foo Yong and Wong Kim Yong (the other sons of the testator) did not adopt this practice.

32. Mr Yuen floated the possibility that the relatives in China could have mistaken another brother of similar sounding name to be the Khin Yong of Singapore. Alternatively, the person who married Liao and fathered Kaiyuan, had impersonated the Khin Yong of Singapore by calling himself Khin Yong.

33. Mr Yuen said that it was probable for 'Khin Yong of China' to be a member of the testator's family as otherwise neither he nor Liao would be allowed to reside in the testator's ancestral home in China in Yun Han Lou. As a member of the testator's family, he would be familiar with the Chinese characters for 'Wong Khin Yong' and the names of other members of the testator's family. Therefore, he would be able to write the Chinese names correctly to lend authenticity to his impersonation.

34. Since Khin Yong and his other brothers went back with the testator's body for burial in China, they would have stayed in the testator's ancestral home for a certain period of time before returning to Singapore. A small village in China in 1926 would not have the kind of distractions that we have today like television, internet, movies, shopping and other multifarious entertainment. Hence, family members, relatives, friends and neighbours would have more time on their hands to meet socially and interact. In the course of these interactions, they would probably learn of each other's personal affairs and relationships.

35. In such a setting, it is not so simple for a family member or anyone for that matter to masquerade as the Khin Yong from Singapore, marry Liao and then sneak in to stay at the ancestral home after the real Khin Yong had gone back to Singapore following the burial of the testator. If there was indeed a marriage ceremony attended by many friends and villagers as described by Hu, I doubt that the bridegroom could so readily succeed in impersonating Khin Yong. In any case, what incentive was there for an impersonator from China to waste his money throwing an expensive and lavish wedding feast just to make others think that he was a wealthy overseas Chinese from Singapore? I thus ruled out Mr Yuen's impersonation theory as a fanciful possibility.

36. This brings me to the second point that the villagers and relatives in China would likely have learnt from Khin Yong's other brothers when they returned to China for the burial of the testator, that Khin Yong was already a married man with a principal wife in Singapore. I hardly think that fact could be kept a secret by Khin Yong from his relatives at Yun Han Lou and the villagers even if he wanted to.

37. Consequently, it is more likely for Khin Yong to have taken Liao as his secondary wife and not his second principal wife. I do not think that he could have masqueraded as a 'bachelor boy' and taken Liao as his principal wife in a wedding ceremony which was rather public in nature, when in all probability his relatives would have known that it was his second marriage.

Huang Zhumei's evidence

38. Mr Yuen then relied on Huang Zhumei's evidence given before me on 7 March 2000 in another trial to prove that Khin Yong's relationship with Liao was that of a mere mistress.

39. Although she did give evidence on oath before me under the same OS 709, the parties were however different and it involved another stirpes. Her earlier testimony is thus not admissible before me in this trial without the witness being called and without the opportunity being given to the claimant's solicitors to cross-examine her.

40. If I am wrong in this, I would say that the evidence of Zhumei in fact assists the claimant more than the 4th defendant. Her evidence would first lay to rest Mr Yuen's theory that the 'Khin Yong of China' was not the 'Khin Yong of Singapore' because

Zhumei who was born in 1921 had lived in Singapore for some years before she went to China to stay. Hence, she could not possibly be mistaken as to who Khin Yong of Singapore might be. When she testified that Liao was a 2nd wife of Huang Qin Rong (i.e. Khin Yong), it must have been with the 'Khin Yong of Singapore' and not some unknown impersonator in China or another son of the testator with the same name or same sounding name as Khin Yong.

41. According to Zhumei, Liao was a '2nd wife taken secretly by Huang Qin Rong, who did not inform his brothers and sisters.' She knew of it because Qin Rong had informed her of it when he was in China. She had met this 2nd wife of Qin Rong before. She further testified that 'when Liao Shun Xian married Huang Qing Rong, she was already pregnant with Huang Kai Yuan.' If true, this suggested that it must have been a hurriedly arranged marriage. Khin Yong might have felt that he had a moral duty to marry Liao as a secondary wife if he had begotten a child by Liao before marriage. It would be shameful for a woman in China in those days to give birth to a child out of wedlock. Hence, it would be honourable for Khin Yong to accept her as his secondary wife and arrange for her to stay in the ancestral home.

42. In Zhumei's testimony, she differentiated a 2nd wife from a mistress. It is therefore of some significance that Zhumei referred to Liao as Khin Yong's 2nd wife and not a casual or mere mistress. My interpretation of her evidence is that Zhumei was referring to Liao as a secondary wife and certainly not a principal wife, which puts to rest the other postulation of Mr Yuen that Khin Yong married Liao as his second principal wife.

43. Even if it were true that Liao was pregnant before the marriage to Khin Yong, the child conceived out of 'wedlock' but born in 'wedlock', would have to be regarded as a legitimate child of Khin Yong. Section 114 of the Evidence Act states:

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

44. The fact that the child was conceived before but born after the celebration of taking a secondary wife under circumstances where the polygamous union is recognised as lawful under Chinese customary law would make no difference to the applicability of s 114 of the Evidence Act.

Essential and Formal Validity of a marriage

45. To establish whether the alleged marriage to Liao in China was lawful, it is important to consider (a) whether the parties had the capacity to marry by the law of their domicile, and (b) whether the formalities and the essential requirements for a valid marriage in the place of celebration of the marriage were adhered to.

46. *In re Maria Huberdina Hertogh* (1951) 12 MLJ 165, Foster Sutton, CJ (F of M) said at p 167:

Under English law, which is applicable in the Colony [of Singapore], the essential validity of a marriage is governed by the *lex domicilii* of the parties, which is the determining factor in deciding whether, apart from form, the marriage is good. If by such *lex domicilii* it is void *ab initio*, not merely voidable, because prohibited, it will be equally void in the Colony. The marriage must be legal, according to the law of the domicil of the husband, with this exception that, where the domicil of one of the parties is the Colony, and the marriage is celebrated here, the Courts of the Colony will not regard the validity of that marriage as affected if the law of the domicil of the other party imposes an incapacity not recognised by the law of the Colony – *Sottomayer v De Barros* 3 P.D. 1; *Ogden v Ogden* (1908) P.D. 46; *In re Paine* (1940) 1 Ch 46.

47. Thus, it is fairly well settled that the capacity to marry, which goes to the essential validity of the marriage, is determined by the law of the ante-nuptial domicile of the parties. However, the formal validity of the marriage is governed by the *lex loci celebrationis*. A marriage formally valid by the *lex loci celebrationis* must be regarded as formally valid in Singapore. Formalities are matters such as registration, time of wedding, tea and religious ceremony, and offering of prayers to ancestors. Matters of essential validity for instance involve the minimum age for marriage, prohibited degrees of consanguinity and would encompass matters which do not fall into the marriage formalities.

48. What is not so clear is whether a foreign marriage would be regarded as valid in Singapore if the foreign marriage is invalid by the *lex loci celebrationis* because of the failure to comply with its essential requirements although by the respective parties' domicile, all the essential requirements are met. In my opinion, if the marriage is invalid in the place of celebration due to non-fulfilment of its essential requirements, it must be similarly regarded as invalid in Singapore although the parties' own domicile may impose no personal incapacity.

49. In other words, a purported marriage invalid in the foreign place of celebration for whatever reason, must be regarded as invalid in Singapore. However, a foreign marriage recognised as valid in the foreign place of celebration will not be regarded as valid in Singapore unless by either of the parties' respective domicile, the essential requirements are also met i.e. the *lex domicilii* imposes no personal incapacity on the parties.

Proof of Chinese Law and custom

50. Ms Kee objected to the admissibility of Mr Yuen's authorities on Chinese marriage law and custom because he called no expert to testify to them. Ms Kee submitted that foreign law is a fact to be proved by evidence acceptable to the court: *Tan Kui Lim & Anor v Lai Sin Fah* [1980] 1 MLJ 222. She referred me to Rule 18 at pg 221 Dicey and Morris on The Conflict of Laws 13th Edn. Vol 1 which states:

Rule 18—(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.

(2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case.

51. Generally, expert witnesses have to be called to prove foreign law and custom unless the parties agree to what they are and proof is dispensed with altogether, which is not the case here. That another Singapore court might have decided as a fact what the foreign law or custom is in a similar situation, does not mean that that decision is admissible as evidence to prove that foreign law or custom.

52. What books and publications are admissible, though not conclusive, to prove foreign law and custom are circumscribed by Sections 32 (d), 40 and 62(2) of the Evidence Act:

Section 32

Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:

.....

(d) when the statement gives the **opinion** of any such person as to the existence of any public right

or **custom** or matter of public of public interest, of the existence of which if it existed he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen;

Section 40

When the court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country, and to contain any such law, and any report of a ruling of the courts of such country contained in a book purporting to be a report of such rulings, is relevant.

Section 62 (2)

The opinions of experts expressed in any treatise commonly offered for sale **and the grounds on which such opinions are held** may be proved by the production of such treatise if the author is dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as reasonable. (Emphasis is mine.)

53. Since Dr Vermier Chiu and Robert T Bryan are dead, their books are admissible to prove their opinion on the marriage laws and customs prevailing in old China under s 32(d) and s 62(2) of the Evidence Act. The fact that their books are not published or printed under the authority of the Government of China does not preclude their admissibility for the purpose stated earlier. Where Chinese court decisions or Legal Codes having the effect of law are referred to as the grounds on which the authors have based their opinion, they are similarly admissible under s 62(2).

54. Foreign court decisions extracted from publications of law reports, translated into English, may also be cited as evidence of the foreign law. Similarly, books published under the authority of the foreign government stating authoritatively the foreign law or foreign statutory law may be tendered into court, together with the translation, as evidence of that foreign law.

55. But as a matter of prudence, it is still advisable to have an expert to assist the court in their interpretation and application because certain apparently simple words or phrases when translated may well bear special meaning under the foreign law. The foreign court decision relied on might have been overturned. The foreign statute may have been abrogated by subsequent legislation. The authors might not have been particularly clear in their exposition.

56. What Dicey & Morris states at para 9-013 13th Edn that textbook authorities cannot merely be placed before the court without the guidance of an expert to help interpret and apply them, makes much practical sense although strictly in Singapore, the Evidence Act allows them to be admitted as evidence under the circumstances provided in the sections mentioned above.

Capacity to marry

57. Under the law of the Straits Settlement which in the 1920s Singapore was a part of, concubinage was recognized as a legal institution which conferred upon the 't'sip', secondary or inferior wife, a legal status of a permanent nature: Braddell J at p 209 in the case of the *Six Widows* (1908) 12 SSLR 120. Children of secondary wives were legitimate.

58. It is not disputed that Khin Yong and Liao were domiciled in Singapore and China respectively prior to their alleged marriage. There was no evidence that they embraced a religion which prohibited polygamy.

59. Mr Yuen made no suggestion that Khin Yong's first marriage to Koh Ah Neo was a monogamous marriage that subsequently precluded Khin Yong from taking another wife. I presume that Khin Yong married his first wife (both presumably non-Christian Chinese) in Singapore in accordance with Chinese customary rites; and the law in Singapore recognised it as a

potentially polygamous marriage.

60. Thus, Khin Yong was not prohibited from marrying another woman as his secondary wife whether in Singapore or elsewhere. Liao, a spinster, would also have the capacity under Chinese law to enter into a polygamous marriage and become a secondary wife. Accordingly, by the law of Singapore (where Khin Yong was domiciled) and the law of China (the domicile of Liao and also the place of celebration), there was no prohibition or lack of capacity on the part of either party to contract a secondary marriage in China.

61. Further, I do not think that the absence of consent or worse an opposition from Koh Ah Neo, the principal wife, rendered Khin Yong incapable under his personal law of marrying a secondary wife because his marriage to Koh Ah Neo was already potentially polygamous in the first place. Her consent would already be implied by her agreement to enter into a potentially polygamous marriage. No authorities were shown to me that the absence or withholding of consent by the principal wife meant that Khin Yong had no capacity to marry a secondary wife in Singapore or anywhere else in the world. I also took cognisance of the fact that a first wife would in reality be in no position to refuse consent because the husband could well divorce her if she were to oppose her husband taking a 'T'sip', a concubine, or a secondary or inferior wife. It is doubtful that women in those days would have much say over what their husbands wanted to do.

62. I derived support from *Re Yeo Seng Whatt* (1949) 15 MLJ 241 where Callow J. referred to *Cheang Thye Phin v Tan Ah Loy* (1920) AC 369 and accepted that proof of the performance of a ceremony was not essential. The issue before the court was whether the plaintiff was the secondary wife of the deceased, Yeo Seng Whatt, and hence a lawful widow entitling her to a share of the estate. The defendants and the 'principal' widow denied knowledge of the plaintiff's existence, much less acknowledged her status. The learned judge said:

I do not think there can be the slightest doubt that Yeo Seng Whatt kept two establishments distinct and apart, one in Malacca in which resided his principal wife (the first defendant), and one in Alor Gajah where he lived with the plaintiff. It is of interest to observe that in *Tan Ah Bee's* case (1947) 13 MLJ 169 it would appear that the status of secondary wife is not affected by absence of knowledge by the principal wife of the existence of the secondary wife.

63. Hence, the absence of consent of the principal wife and a failure to perform an obeisance ceremony did not affect the legitimacy of the status of a secondary wife. The learned judge declared the plaintiff to be a secondary wife of the deceased although the consent of the principal wife was not obtained and no obeisance ceremony was performed.

Formalities for marriage in China

64. What then were the formalities and requirements necessary to constitute a valid Chinese customary marriage in China in the 1920s, and were they complied with? This was hotly contested at the trial. At the outset, it must be made clear that the formalities in Singapore for such a marriage are strictly irrelevant. It is apt to bear in mind what Mills J. had said in *Re Tay Geok Teat* [1934] MLJ 82 at p 89 of the danger of assuming that customs observed among Chinese families living in China in pre-republican days are applicable to Chinese families living in the Straits Settlements. What is relevant are the formalities that were required then in that particular province in China where the marriage in question took place. But there is a paucity of experts called to assist the court.

Ye Bo Ming's evidence

65. The claimant called only one expert on Chinese law and custom. He was Ye Bo Ming, a lawyer practising Chinese law in The People's Republic of China in the Centre of Legal Assistance of the Meizhou Municipality. Mr Yuen challenged his

expertise on Chinese customary marriage in the 1920s in China before the liberation. In my opinion, he only had superficial knowledge of what Chinese marriage customs were in the 1920s. He was not of much assistance to me.

66. All he could say was that prior to Liberation, one man could have more than one wife in China. For the creation of a valid customary marriage, two essential ceremonies need to be observed by the couple:

- i. praying to Heaven and Earth, and the ancestors; and
- ii. holding a wedding feast, or some other similar celebration, to inform all and sundry of the fact of the marriage.

67. Since these two essentials were fulfilled in this case as borne out by the evidence of Hu, he opined that there was a valid customary marriage. I placed little weight on his expert evidence.

Dr Vermier Y. Chiu

68. Mr Yuen did not arrange for an expert to testify but he relied heavily on the treatise by Dr. Vermier Y. Chiu (1890-1964) on the "Marriage Laws and Customs of China".

69. I read Dr Chiu's scholarly treatise with much interest. He had a highly distinguished career. He was formerly the Chief Justice of the Provincial High Court of Hupei, Attorney-General of the Provincial High Court of Hunan, Chief Justice of the District Courts of Amoy, Swatow, Nanchang, Attorney-at-law in Shanghai and Nanking and a professor of law. Having lived through that period, I have no doubt that he would have first hand knowledge of the marriage laws and customs in the 1920s in China. I therefore attach much weight to his learned writing.

The Six Rites

70. Dr Chiu quoted a passage from the Book of Rites for the marriage formalities:

A woman who marries according to marriage rites becomes a wife and a woman who marries without observing the marriage rites becomes a concubine. This bespeaks the importance of marriage rites, the observance of which is indispensable to giving legal effect to the marriage. ...

1. Na ts'ai : procedure of sending a messenger, usually a go-between ...to offer a present to the girl-elect in an attempt to find out whether or not she is marriageable. ...

2. Wen ming : the procedure of inquiring as to the name and the date of birth of the girl-elect.

3. Na chi : the procedure of finding out whether or not the match will be suitable and felicitous.

4. Na cheng : the procedure of paying money in settlement of the marriage.

5. Ch'ing ch'i : the procedure of requesting the fixing of the day of the wedding. ...

6. Ch'in ying : the procedure of the bride being welcomed by the bridegroom at his home.

71. In addition there are 2 more rites. The first is the 'Rite for becoming a wife' which is performed by consummation of the marriage. The second is the 'Rite for becoming a woman' which is performed by paying respects to the bridegroom's parents by

'kowtowing' and serving tea to them on the day after the wedding, if the parents are living; otherwise the bride has to wait three months after which she must proceed to the bridegroom's ancestral temple to pay respects to the husband's clansmen.

72. In the Sung Dynasty, the Six Rites were reduced to three according to Dr Chiu. *Na ts'ai* and *Wen ming* were combined to *ts'ai tse* or select. *Na chi*, *na cheng* and *ch'ing ch'i* were amalgamated and became *na pi* or payment of money. Only *ch'in ying* was left intact. Also, the two additional rites were no longer observed separately but were merged into the marriage ceremonies to be performed together with the other ceremonies on the wedding day.

73. Apparently, these formalities are for marriage of a principal wife or a first wife. However, it is not clear what the required formalities for 'marriage' or 'taking' of a secondary wife, inferior wife or concubine are, and in what respects they are different from the formalities of marriage of a principal wife.

74. Mr Yuen contended that the failure by Liao to make her obeisance before the principal wife in Singapore was fatal. Hence, Liao could only be a mere mistress and not a secondary wife. Alternatively, he contended that the wedding ceremony in China was so lavish that it could only mean a marriage of Liao as a principal wife and not a concubine.

Concubinage

75. According to Dr Chiu, there are three types of concubinage in China:

- (a) Concubinage resulting from 'pen' or running away from the Six Rites, i.e. when not all the six rites are performed. Prior possession of a first wife is not a prerequisite;
- (b) Concubinage by 'mai' or purchase, which is most common. Prior possession of a principal wife is a prerequisite;
- (c) Concubinage by 'ying', which has fallen into disuse.

76. I will also quote relevant extracts from Dr Chiu's treatise:

Children born by a concubine owe their filial duty to the wife and not to the concubine. They become the legitimate children of the wife whom they call 'mother', while the concubine (their own mother) is addressed by them as well as by the wife's children as 'chieh' or sister.

...

[In] **the case of concubinage by 'pen' there is no need for the concubine to observe any 'ju kung' ceremonies for the simple reason that there is no wife before whom such ceremonies are to be performed;** while in the case of concubinage by 'mai', because of the existence of a wife, the concubine must perform such ceremonies. In 'pen' the parties had intended to become man and wife but because they had failed to observe the Six Rites or had not completely conformed to the Six Rites, **the customary law would relegate the woman to the position of a concubine;** whereas in 'mai' the parties had no such intention and the woman was fully aware before hand that she was going to be a concubine and, being a concubine, she is obliged to perform the 'ju kung' ceremonies. (Emphasis here and subsequent emphasis are all mine.)

77. 'Ju kung' is the ceremony to initiate the concubine into the family and where the concubine would perform obeisance to the first wife by bowing respectfully to her and serving her tea. The Book of Rites says:

'pen' maketh concubinage.... 'pen' means the taking of a woman into the household by running away

from the Six Rites i.e. without observing the Six Rites. ... Examples of this class of concubinage are as follows:

(a) Where a man elopes with a woman and then cohabits with her in his house without performing or only partly performing, the Six Rites.

(b) **Where a man, after having illicit intercourse with a female, makes an honest woman of her by simply taking her into his household ...**

(d) Where a man, after having **observed a part of the Six Rites** (such as completion of all the procedures relative to betrothal) cohabits with the woman to whom he is betrothed **without observing the rest of the Six Rites** (such as performance of marriage ceremonies).

.....

In all the cases enumerated above, no valid marriage is contracted

and, the relation of the woman to the man being deemed to have arisen from cohabitation and not from legitimate marriage, **her position is thereby relegated to that of a concubine.**

.....

In **Appeal No. 1534 of the year 1916 the Supreme Court of China**, defined a concubine as 'one who, with intention to live permanently and continuously and to become a member of his family, has had or intends to have relationship that is akin to that of husband and wife with the paterfamilias, shall acquire the status of a concubine.'

In **Appeal No. 186 of the year 1918, the Supreme Court of China** laid down the following dictum pertaining to the requirement and status of concubinage:

The conditions requisite for the establishment of a relationship between the concubine and the paterfamilias are not expressly provided for by the law. According to juristic principles based on custom, however, it may be properly interpreted thus: there must be intention on the part of the paterfamilias to acknowledge the woman as his lifelong companion with a place in the family second only to that of his wife; on the part of the concubine, there must be intention to enter the family of the paterfamilias to become a member of the paterfamilias' family with a position subordinate to that of the wife. (This is 'ju kung'). These conditions must be present before the woman can become a legitimate concubine of the paterfamilias. If a man and woman merely have clandestine relationship of cohabitation, it can hardly be recognized as a relationship between paterfamilias and concubine and the woman in such cases will not acquire the status of a concubine.

78. Then in the concluding paragraph under the heading 'Ju Kung', Dr Chiu opined that:

In short, the validity of concubinage depends on the intention of the parties, i.e. the intention of the man to take the woman as his concubine and the intention of the woman to become the man's concubine; and this intention must be explicitly avowed and made known by deeds and not by tacit understanding between the parties, i.e. by making, on the part of the man, an open announcement of

the affair and an acknowledgment that the woman is his concubine and, on the part of the woman, by performing the 'ju kung' ceremonies.

79. At page 32 of his treatise, Dr Chiu thus explained the true meaning of concubinage in China:

Concubinage is not polygamy and the two are as different as 'chalk from cheese'. Polygamy is the custom or practice of having a plurality of wives at the same time, while concubinage is the custom or practice whereby a woman cohabits with a man **without a valid marriage**. ..It is clear that the custom or practice of having a plurality of wives – a practice whereby a husband is permitted by law to marry more than one wife during the latter's lifetime – has never been adopted in China. In fact the Chinese have always looked rather askance at polygamy and even in ancient China it was a crime to marry another woman during the lifetime of the wife. Under the Ch'ing Law it was bigamy, punishable with 90 strokes, for the husband to 'take another wife when his wife is still living'. The second or bigamous marriage would be annulled and the woman of the second marriage would be returned to her home unpunished.

80. As for the ceremonies required for taking a concubine, Dr Chiu said:

In ceremony there is a marked difference between marrying a wife and purchasing a concubine. In taking concubines, ..., neither the observance of the old-fashioned Six Rites is necessary nor the performance of modern marriage ceremonies is required. All that is required by custom in all cases of taking concubines is the performance of the 'ju kung' ceremonies by the concubine (i.e. by kowtowing to the wife and serving her tea).

81. Going by Hu's evidence, it would seem that only some but not all the elements of the six rites were fulfilled. If so, then Liao fell into the class of concubinage by 'pen'.

82. Alternatively, if I were to go by Zhumei's evidence which suggested that Khin Yong had illicit intercourse with Liao resulting in pregnancy, and she was subsequently taken into his household and allowed to stay at Yun Han Lou, it would again be concubinage by 'pen' according to the Book of Rites.

83. According to Dr Chiu, a 'pen' concubine did not have to observe any 'ju kung' ceremony.

84. Unfortunately, Dr Chiu seems to have contradicted himself in other parts of his treatise when he said that the performance of a 'ju kung' ceremony is required by custom in all cases of taking of concubines, which apparently would include concubinage by 'pen'. But he did not go so far as to say that the failure to perform a 'ju kung' ceremony would render that concubinage invalid or unlawful whereby the offspring would be regarded as illegitimate.

85. In the light of this uncertainty, and in the absence of any expert opinion to assist on this point, I am left with the task of finding an answer to the question of the legitimacy of the offspring of a concubine, secondary wife or inferior wife under Chinese law, when the ceremony of 'ju kung' has not been performed as part of the customary formalities in China. Another dimension to be considered is the impracticality of Liao going to Singapore just to 'kowitz' to Khin Yong's first wife, especially when one takes account of the difficulties of travel in those days. What would be the consequence? Are the customary requirements so rigid and inflexible when the circumstances do not realistically permit the performance of 'ju kung'?

Ju Kung: Obeisance ceremony and consent of principal wife

86. No direct evidence was presented whether Khin Yong managed to obtain the consent of his first wife. To obtain direct evidence would be near impossible for a marriage that took place some 75 years ago. Thus, consent of the first wife, if any, must

be inferred from circumstantial evidence and the circumstances of the case: *Chua Mui Nee v Palaniappan* [1967] 1 MLJ 270. In this case, the second marriage took place in Malacca in 1943 during the Japanese occupation when communications within Malaya were difficult and the court asked the rhetorical question how could the deceased contact his first wife in India to obtain her consent. The Federal Court was able to infer the existence of consent from the subsequent conduct of the deceased husband who returned to India three times after the war and told the first wife that he had taken a woman in Malaya and that there were two children by her.

87. Similarly, I think that travel and communications in 1926 would be very difficult between a remote village in China and Singapore. To expect Khin Yong to seek consent from his first wife in Singapore before his marriage to Liao might be expecting too much. In any event, having entered into a potentially polygamous marriage, I do not think that the principal wife is in a position legally to withhold consent. Also, it would not be reasonable to expect Liao to travel to Singapore just to perform obeisance or 'ju kung' before the first wife, when Liao would never "enter the household" of this principal wife in Singapore. One cannot infer a deliberate refusal on the part of Liao to make her obeisance from the mere absence of it under these circumstances. Further, the fact that the title deeds of the testator's properties in China were subsequently allowed to be left with Liao and the fact that Liao was allowed to stay in the ancestral house at Yun Han Lou and farm the testator's land in China demonstrated a consistency with a tacit consent rather than vehement opposition from Khin Yong's first wife and the immediate family members of the testator.

88. I conclude that the absence of an obeisance ceremony in the circumstances of this case would not reduce the status of Liao as a secondary wife to a mere mistress, whose offspring would be illegitimate. Thus, the status of Kaiyuan as a legitimate son of Khin Yong is unaffected.

89. I am fortified in this view by the local cases which suggest that a ceremony is not essential for a secondary marriage to be recognised under Chinese custom. It follows then that the absence of a formal obeisance ceremony as part of the overall ceremony is not going to be fatal to the validity of a secondary marriage since the whole ceremony is in any event not regarded as essential.

90. In *Cheang Thye Phin And Others v Tan Ah Loi* 14 S.S.L.R. 79, the Privy Council hearing an appeal from the decision of the Supreme Court of the Straits Settlements (Penang) in 1919 had this to say:

Their Lordships have carefully examined the decision in the Six Widows Case and can find no foundation for the statement made in the certificate that the Court there decided that a ceremony was necessary to constitute a "t'sip" (i.e. a secondary wife or subordinate wife). ...It is clear that a ceremony of marriage is necessary to constitute the relation of principal wife or "t'sai" and the ceremony is one in which both the bridegroom and the bride must take part. By Chinese law a man may have secondary wives or "t'sips" as they are sometimes called. The position of a secondary wife is superior to that of a mere concubine, though this term is sometimes applied to a "t'sip". It is usual that there should be some sort of ceremony when a "t'sip" is taken, but it is not a ceremony of marriage; indeed, the man is not usually present when it does take place. The "ceremony" varies in its details, but the principal features of it are the doing of obeisance to the "t'sai" [or principal wife] by the prospective secondary wife, and the offering of tea by the latter to the "t'sai" and the relations.

.....

There is nothing in the Six Widows Case justifying the proposition that the Court decided that a ceremony was essential.

91. Similarly, Caey J held in *Tan Ah Bee v Foo Koon Thye & anor* (1947) 13 MLJ 169 that:

It is established that a Chinese man may have as many wives as he may be disposed to. Usually he has a principal wife and may have several secondary wives as well. No precise ceremony of marriage

is requisite in the case of a secondary wife, but there must be some evidence of intention and some recognition of the status of wife in order that a secondary marriage may be established (*Cheang Thye Phin and Ors. V. Tan Ah Loy, Six Widows Case, In re Will of Tay Geok Teat, Sunny Tay v. Seow See Neo and another, In re Seow Im Swee (deceased), Seow Beng Hay v. Seow Soon Quee and another*). There is the general presumption in favour of marriage where parties have cohabited as man and wife over a period of years.

...

When one appreciates that a secondary wife may be acquired with so little formality and when acquired, she and her children, if any, in the event of an intestacy, share in the estate of the late husband, there is, if marriage is to remain a recognised honourable estate, an urgent necessity to ensure that a mistress or kept woman and her children, if any, should not step in to minimize the shares on distribution of the legal wives and children of the deceased.

The parties appear to accept what was propounded in the case of *In re Lee Choon Guan Deceased, Lew Ah Lui v Choa Eng Wan and others*, viz. That in order to prove a Chinese secondary marriage (a) long continued cohabitation, (b) an intention to form a permanent union and (c) repute of marriage must be established.

....

No ceremony is necessary for a secondary marriage, but if certain formalities are observed they lend weight to support an alleged marriage. To illustrate his, when Boon Tean married the 1st defendant (as secondary wife), she performed the custom of combing of the hair and he took her to the temple to pray and then to his mother's house, his mother being then the head of his family and there she paid her respects to Boon Tean's mother by kneeling and serving tea to her and calling her "mother-in-law" and received from her a red packet.

92. Terril J's judgment in *Re Lee Choon Guan (deceased)* 1935 MLJ 78, a Singapore High Court decision, is most instructive. He said:

In a recent case, *In the matter of the Trusts of the will of Tay Geok Teat, deceased; Sunny Tay v Seow See Neo and anor.*, 3 Mal.L.J. 83, (hereinafter referred to as Sunny Tay's Case) I reviewed the authorities and extracted from them an indication that in cases such as the present the evidence must establish an intention to effect a permanent union, and that there must be satisfactory evidence of the recognition to effect a permanent union, and that there must be satisfactory evidence of the recognition of the marriage. If the intention and recognition are satisfactorily established the proof of ceremonies is superfluous, and the Privy Council has held that a ceremony is not essential (see *Tan Ah Loy's Case*, (1920) A.C. 376). In the course of my judgment in *Sunny Tay's Case* I stated "Proof of a marriage ceremony would no doubt be conclusive" but this statement must be read in connection with a later sentence where I stated "At the most such ceremonies are only evidence of an intention to effect a permanent union." It would perhaps have been more correct to say that a proof of certain marriage ceremonies would be conclusive. It has never been decided in any of the reported cases what marriage ceremonies are essential even for a first wife marriage though a great deal of evidence on the point is recorded in the *Six Widows' Case*, 12 S.S.L.R. 120. As **in the case of a secondary marriage ceremonies of any kind are unnecessary, such ceremonies as are proved to have been performed are only valuable as far as they go as proof of intention and of recognition.** If, for instance, it could be proved that the husband paid respect to the wife's parents and that the wife paid respect to the husband's parents and in particular to the husband's principal wife and that she was introduced to the male members of the husband's family such proof might well be conclusive, as there

could be no better evidence of an intention to effect a permanent union and the ceremonies themselves would provide evidence of recognition. That would be the natural inference without any proof of what ceremonies were or were not necessary or usual according to Chinese custom. Ceremonies which are only partial and particularly ceremonies which are only on the wife's part are inconclusive and, particularly so far as the husband and his family are concerned, provide no evidence either of an intention that the union should be permanent or of recognition. It must I think, be conceded that the intention to contract a permanent union must be a common intention, and that the requirements of a secondary marriage will not have been met if one of the parties merely intended a casual connection....

93. The Court of Appeal in Singapore in *Re Estate of Liu Sinn Minn, Decd* [1975] 1 MLJ 145 said:

...it is settled law that no ceremony is essential for a man and a woman to enter into a permanent conjugal relationship as husband and secondary wife. All that is necessary for there to be a Chinese secondary marriage is a common intention to form a permanent union as husband and secondary wife and the formation of the union by the man taking the woman as his secondary wife and the woman taking the man as her husband (see *Tay Geok Yap & ors. v. Tan Lian Cheow* [1965] 1 MLJ 102).

94. Thus, no ceremony, formal contract or customary rites need necessarily be proved to establish a Chinese secondary marriage. All that is needed is proof of a common intention to form a permanent union of husband and secondary wife, and the actual formation of that union.

95. This local position is echoed in China as shown by the two Chinese Court decisions cited in Dr Chiu's treatise which I have referred to earlier: Appeal No. 1534 of the year 1916 the Supreme Court of China; Appeal No. 186 of the year 1918, the Supreme Court of China. These Chinese decisions are particularly relevant as they were decided in 1916 and 1918, and hence, were fairly close in time to the year of marriage of Khin Yong and Liao.

96. If indeed, the only essential condition for a legitimate concubinage in China was a common intention of a permanent union and the actual formation of the union, my finding is that it has been amply proved on the evidence (which I have in the course of this judgment set out with some detail), despite the absence of a 'ju kung' ceremony before the first wife in Singapore.

Marriage during mourning and Bigamy

97. The alternative issues of bigamy and marriage during mourning raised by Mr Yuen however caused me considerable difficulty.

98. Basically, Mr Yuen contended that marrying a second wife as a principal wife when the principal wife is still alive is unlawful. He submitted that the lavishness of the marriage celebration as described by Hu was befitting of a principal wife. Accordingly, it must be inferred that Khin Yong married Liao as his second principal wife and not as a secondary wife, which meant that the marriage was bigamous under Chinese custom and therefore, null and void.

99. Secondly, the purported marriage to Liao took place during the period of mourning, which Mr Yuen submitted is three years in the case of the death of a father. Since the marriage was, according to Hu, about a year after the death and burial of Khin Yong's father (i.e. the testator) in 1926, it necessarily fell within the period of Khin Yong's mourning. Such a union was prohibited and unlawful in China as Khin Yong would be liable to 100 strokes if he was marrying Liao as his wife, or 80 strokes if he was taking Liao as his concubine.

100. Mr Yuen referred me to "An Outline of Chinese Civil Law" by Robert T. Bryan, a practitioner of law in China. This book was published in 1925. The author stated in the preface that the matters contained in his book were compiled and taken from

recognized Chinese authorities, and the works of foreign authors which may be considered authentic.

101. He said:

A qualified form of polygamy has always existed in China. The first or principal wife is usually chosen for the husband by his parents or senior relations from a family equal in rank and finances to his own, and is espoused with as much splendor and ceremony as the parties can afford. The bride, when she is received at the house of the bridegroom, acquires all the rights and privileges which under Chinese custom belong to a lawful wife. **A man who marries more than one first wife may be prosecuted for bigamy.** After the espousal of a first wife, a Chinese citizen may lawfully espouse as many secondary wives as he desires and can afford. Such wives are acquired with fewer ceremonies and without any regard to equality from the standpoint of family. Secondary wives are subordinate to the first wife, but equal in rank among themselves.

.....

It would seem that the following marriages are voidable, but not void:

.....

(3) marriages consummated during a period of mourning for the parents, grandparents, or other senior agnates

. (Emphasis mine.)

102. I turn now to consider Dr Chiu's treatise on these two rather difficult issues. It was stated that the draft of the 'Civil Code of the Great Ch'ing' was completed during the reign of Emperor Hsuan T'ung (1911). It was to reform the laws of the Ch'ing Dynasty. Before the Code could be implemented, the Ch'ing Dynasty was overthrown and a Republic was established in 1911. In 1915 and 1925, further revisions were made. Due to the ensuing civil wars, the 'Civil Code of the Republic of China' was **not promulgated until 1929.**

103. From this brief historical summary extracted from Dr Vermier Chiu's treatise (which under s 59(2) of the Evidence Act I can have resort to as an aid on matters of Chinese history), it seems that in 1926 or 1927, the year of the purported marriage, the laws then governing would be those carried over from the Ch'ing Dynasty. I can safely say that such historical facts are of sufficient notoriety to enable me to treat them as correct without further formal proof.

104. Dr Chiu in his treatise gives a translation of the marriage laws of the Ch'ing Dynasty direct from the original Chinese text. At page 82 and 83, it states:

Treatment of wife and concubine contrary to their respective positions:

17. He who degrades his wife to the position of a concubine shall be liable to 100 strokes. He who raises his concubine to the position of wife while the wife is alive shall be liable to 90 strokes.

18. He who marries a second time while the first wife is alive shall be liable to 90 strokes. The second marriage shall be annulled and the woman of the second marriage shall be returned to her family.

(This is clearly a law against bigamy. As far back as the T'ang Dynasty (A.D. 618-907) there is always a law against bigamous marriages. Non-Chinese have been led to believe that the Chinese are polygamous. This is wrong. The Chinese were—it is no longer true now—neither polygamous nor monogamous. Theirs was a system of one wife among many concubines.

)

Marriage during mourning:

21. A son or daughter who marries during the mourning period for a parent, or a wife or concubine who remarries during the mourning period for a husband shall be liable to 100 strokes.

22. A son who takes a concubine or a daughter or wife or concubine who is given away as a concubine during the period of mourning shall be liable to 80 strokes.

23. One who marries or is given in marriage as a wife during the period of mourning for a grandparent, or for a paternal uncle or aunt, or for an elder brother or sister shall be liable to 80 strokes, but the marriage shall be valid. No punishment shall be imposed on anyone who takes a concubine or is given away as a concubine during the period of mourning for a grandparent, paternal uncle or aunt, or elder brother or sister.

24. He who knowingly marries a person in mourning shall be liable to 50 strokes. No punishment shall be imposed on anyone who is not aware of the mourning. (Emphasis is mine.)

105. At p 22 of the book, it states that when the wife dies, the children and the concubine's children are obliged to mourn for three years. I presume that Mr Yuen inferred from this that the mourning period is similarly three years in the case of the death of a father.

Is marriage during mourning void or voidable?

106. In my opinion, the validity of a marriage celebrated during the mourning period is a question of formal validity to be determined by the *lex loci celebrationis* i.e. the law in China.

107. From both treatise cited by Mr Yuen, it would appear that marriage during mourning, although punishable by law in China at that time, was merely voidable and not void i.e. it remained valid until avoided by either party.

108. Voidable marriages can only be avoided when the parties are alive. Since both Khin Yong and Liao are now dead, and there is no evidence that either Khin Yong nor Liao had voided their marriage in any way, their union must remain valid even though it might have been celebrated when Khin Yong was still in mourning.

109. On the whole, I do not think it is right on the ground of mourning, to invalidate a marriage that was celebrated some 75 years ago, and which had been officially recognised in China and also apparently by a number of the villagers and the relatives in particular those staying at Yun Han Lou. The legitimacy of Kaiyuan as the lawful son of Khin Yong and Liao had not been questioned until this dispute arose.

Was Liao a principal wife?

110. Mr Yuen argued that the marriage ceremony was befitting of a principal wife from which it could be inferred that Khin Yong had married Liao as his second principal wife, which was bigamous and illegal under Chinese law. It is for Mr Yuen's client to prove that allegation. The claimant simply contends that it was a secondary marriage. He accepts that Koh Ah Neo was the principal wife and not Liao.

111. Before I analyse Mr Yuen's contention, I will quote what Dr Chiu said at p 177 of his treatise regarding the formalities for a

valid marriage of a principal wife. He said:

..since all marriages (i.e. of a principal wife or first wife) under the Ch'ing Law and custom are brought about by the 'command of the parents and the unctuous words of the go-betweens', **a marriage contracted by the parties to the marriage themselves instead of being effected by their parents (or senior members of the family if the parents are deceased) is null and void and of no legal effect.**

.....

According to the Ch'ing law and custom, a marriage is invalid and without legal effect (1) if it is not brought about by the parents or grandparents or by senior member of the family who invariably becomes master of matrimony; (2) if it is not negotiated by a go-between (or go-betweens) who verbally settles the marriage contract between the two families; (3) if it is not preceded by a betrothal which is a condition precedent to marriage; (4) if the betrothal is incomplete by not being evidenced by payment of money and/or by a formal contract of betrothal; (5) if it is not celebrated publicly by bringing home the bride with a bride's sedan and music; and (6) if the bride and bridegroom fail to kowtow to the bridegroom's ancestral tablets and to his parents and senior members of the family.

112. I note that there is no evidence that Khin Yong's marriage to Liao was contracted by Khin Yong's mother or senior members of his family. The evidence of Yee Lin appears to be that Khin Yong's mother was unaware that Khin Yong had taken any wife or concubine in China. In my mind, it was more likely that Khin Yong contracted that union for himself, which makes the 'marriage' of Liao, if it was intended to be a marriage of a principal wife, 'invalid and without legal effect' (i.e under (1) in the preceding paragraph) because an important formality was not observed.

113. Since there is no valid marriage of Liao as a 'principal wife' as such under Ch'ing marriage law and custom, logically Liao could no longer be regarded as a second principal wife and hence, no bigamy would ever arise. Liao's status would therefore be relegated to a lower status of a concubine.

114. However if I am wrong on this, what then is the consequence of bigamy in China, and in particular, what is the status of the offspring?

Is a bigamous union under Chinese law void or voidable?

115. The notion of a void and voidable marriage in English Law has been succinctly stated in *De Reneville v De Reneville* [1948] P 100 as follows:

A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it; a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction.

116. As a preliminary point, I think it is material to observe the distinction made by Dr Chiu between 'marrying' a wife and 'taking' a concubine throughout his book. The author deliberately avoided using the words 'marrying a concubine', 'marrying a secondary wife' or 'marrying a T'sip' as there could never be a 'marriage' to a concubine, except a mere **taking** of a concubine. One only marries a wife, i.e. a principal wife. Marrying a second 'principal' wife is regarded as bigamous in China. Taking a T'sip, secondary wife or inferior wife is not.

117. Hence, under Chinese marriage customs, Khin Yong could not marry a second principal wife in Singapore or elsewhere

whilst his first principal wife was alive. He was only capable of taking a 'T'sip', secondary wife or inferior wife. Apparently, this was the position adopted in Singapore in the Six Widows case. The Registrar in his certificate found *inter alia* that the marriage ceremony of one of the widows, Neo Soo Neo, was that of a marriage of a "first wife" and that as it was performed in the lifetime of Tan Kit Neo, the first wife of the intestate Choo Eng Choon, **it was void** as being bigamous following the ruling in *Rex. v. Sim Boon Lip* (1901) 7 S.S.L.R. 4.

118. Mr Suen Sze Ting, Acting Counsel-General for China, stated before the Registrar that it was laid down in the "Ta Cheng Leu Lee" or fundamental laws of China that any person having a wife living who marries another wife shall be punished with 90 blows and the marriage being considered **null and void**, the parties shall be separated and the woman returned to her parents. Neo Soo Neo was amongst the other widows who appealed against the decision of the Registrar and sought a declaration that she was an "inferior wife". Her counsel, Mr L.E. Gaunt, argued at the appeal that his client was only a secondary wife.

119. Law Ag. C.J. commented that the Acting Chinese Counsel-General was asked to prove too much that a Chinaman can lawfully only have one wife (i.e. without concubines) whom the law here would recognise. He said:

...I think the authorities I have quoted show clearly that marriage China, whatever else it means, does not at any rate mean "the voluntary union for life of one man and one woman to the exclusion of all others." 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 Daud*.

....

On the whole, ..., that in the case of secondary wives, as I will call them, some sort of ceremony is usually required, and they were regarded as belonging to the family of the man they lived with, in view of the law that these secondary wives cannot be divorced except for the same reasons as a first wife, in view of their right to maintenance on the death of the man they lived with out of his estate, just like a first wife, in view of their right to apply to the Court to secure such maintenance, and in view of the other points affecting their rights and position already referred to above, I think that in regard to these secondary or inferior wives (or concubines as they have been called), though socially their position is no doubt very inferior to that of a first wife, yet legally their position more nearly resembles that of a wife where polygamy is allowed that it resembles anything else; and I think myself, though I do not think the matter is free from doubt, that Chinese marriages must be regarded as polygamous as SIR BENSON MAXWELL held and as SIR THEODOR FORD and other Judges have taken to be the case.

120. The learned judge then dealt with the Malacca case of *The King v Sim Boon Lip* as follows:

...I do not think it is at any rate clear that it was really necessary in the Malacca case to decide the question of whether a Chinaman could or could not lawfully have more than one wife. ...If what the accused in the Malacca case did was, when he had a first or principal wife living, to **go through the ceremony requisite for marrying a first wife, with another woman**, then by Chinese law the accused committed an offence and **the second marriage was void** (see the Chinese Penal Code s. 103 *Staunton* p. 111 to which I have already referred) and therefore the accused, I think, committed an offence which exactly comes within the terms of s. 494 of our Penal Code, and the accused could I think rightly be punished, quite independently of the question whether a Chinaman can or cannot lawfully have more than one wife.

.....

Finally, it does not seem to me that it is clear that in the Malacca case, to which I have referred, the jury found or the case did really decide anything more than that the second particular marriage ceremony which the accused went through, was **void** because he had gone through a ceremony of a similar nature before when marrying a wife or principal wife (whichever she is to be called) who was then living at the time of the second ceremony. If what I have just referred to is all that was decided in the Malacca case, and I think the charge in the case should be referred to, I should not doubt for a moment that the decision was correct, but it seems to me not really to bear on the question of whether a Chinaman can or cannot lawfully have more than one wife.

121. Finally the court held that Chinese marriages are polygamous and would be recognised when celebrated in accordance with Chinese customs regarded as valid according to the religions and usages of the married parties. The learned judge upheld the Registrar's certificate on all points, which included the holding that Neo Soo Neo's marriage was that of a "first wife" and that as it was performed in the lifetime of the first wife of Choo Eng Choon, it was bigamous and therefore void. The Registrar's holding that the Lim Cheok Neo was not a wife as no ceremony was gone through was also not disturbed. However, three secondary wives, inferior wives or concubines viz. Neo Chan Neo, Cheang Cheng Kim, and Mah Imm Neo were found legally married to the intestate Choo Eng Choon, who was domiciled in Singapore. The last, Tan Seok Yang, was a principal wife whom I assumed Choo Eng Choon married after the death of the principal wife, Tan Kit Neo, and hence was not bigamous. Otherwise, her fate would be the same as that suffered by Neo Soo Neo. Altogether, the court recognised four lawful widows and as such their children born in wedlock were legitimate issue.

122. Since Neo Soo Neo did not appeal, the appellate court did not deal specifically with the finding that a bigamous Chinese customary marriage is not voidable but void (for convenience I will refer to it as a 'void bigamy'). There being no appellate decision, I am not bound by the Six Widows' case in so far as this issue of a 'void bigamy' is concerned and the consequent illegitimacy of the offspring.

123. Determining the Chinese marriage customs in China or in Singapore in the 1920s is not an easy task. I do not regard the High Court ruling that a bigamous Chinese customary marriage is void and not voidable as a finding of fact on an aspect of Chinese custom which has been long recognised in our courts, where judicial notice may be taken of it without the need for independent proof of that fact. If numerous case authorities deciding along the same lines were cited to me, I might perhaps then take judicial notice that marriage of a second principal wife is null and void under Chinese custom.

124. In fact, Dr Chiu's treatise cited by Mr Yuen himself establishes to the contrary that **a bigamous Chinese marriage is not null and void, but only voidable** ('voidable bigamy' for convenient reference only), which is diametrically opposite to that taken by the expert, Mr Suen Sze Ting, who gave evidence in the Six Widows' Case and probably influenced the court's decision there.

125. I accept Dr Chiu's position as correct although it does not fit with the English law notion that a bigamous marriage is null and void, and will never be rendered valid by the subsequent death or divorce of the first wife. If we are to recognise Chinese traditional customs and give legal effect to them, then we have to realise and accept that we cannot force them into traditional English legal concepts and moulds which simply do not fit.

126. Dr Chiu said at pg 227 of his treatise said that:

A bigamous marriage, despite its criminal culpability, is nevertheless not null and void but only voidable depending upon whether or not the first marriage is dissolved by divorce or by death of the wife of the first marriage.

If the first marriage is dissolved by divorce or by death of the wife of the first marriage, the second or bigamous marriage **becomes valid** and the woman of the second or bigamous marriage shall be recognized as having acquired the full status of a wife. So, prior to annulment of the second or bigamous marriage by the Court...., the marriage relations between the man and woman of the second

or bigamous marriage still exist even though the parties thereto are convicted of bigamy and such marriage relations continue to exist until the second or bigamous marriage is annulled by the Court or until the dissolution of the first marriage by divorce or death of the wife of the first marriage in which case the second or bigamous marriage becomes valid.

127. Dr Vermier explained that the marriage relations can continue to exist despite the bigamous relationship until annulment by the Chinese court or until dissolution of the 1st marriage or death of the first wife in which case the bigamous marriage becomes valid because she is now allowed to take the place of the first wife. If the union were to be regarded as totally void in all respects, conceptually it cannot become valid again upon the subsequent death or divorce of the first wife. But if the union were to be regarded as being temporarily reduced to a sort of concubine relationship which permits the marriage relations to continue in the meantime (subject to annulment by the Courts), the status of the so called concubine can then be elevated to a legitimate 'first wife' upon the divorce or death of the first wife. Of course, if the union is annulled by the Court before that and she is returned to her family, no question of automatic elevation will arise. For these reasons, I think Dr Chiu is correct in his conclusion that a union regarded as bigamous under Chinese custom is not void but only voidable.

128. What then is the status of the children born during the period when that bigamous relationship remains in that voidable state? What if the 1st principal wife walks out of the marriage and never returns (which was in fact the case here)? In such a situation, will the '2nd principal wife' in the bigamous relationship assume the position of 1st principal wife? I cannot find ready answers. The assistance of an expert is all the more necessary having regard to what Dr Vermier Chiu had said of the marriage laws of the Ch'ing Dynasty:

In the latter days of the Ch'ing Dynasty the people in China felt that the Ch'ing Law was too severe and far behind the times. Besides, no distinction was made between civil and criminal matters, and the *Ta Ch'ing Lu Li*, in which all laws of the Ch'ing Dynasty were found, was **clumsily worded, vague and full of contradictions.**

129. If the 4th defendant wishes to establish his interpretation of the prevailing Ch'ing Dynasty laws in China in 1926 (although the Ch'ing Dynasty had been overthrown by then) that a bigamous Chinese marriage is not merely voidable but void, with the consequence that the resulting offspring are illegitimate, it is incumbent on him to call expert evidence to assist the court on this. Since Mr Yuen relied on Dr Chiu who expounded an opposite position instead, Mr Yuen now has to persuade me why his own authority on Chinese customary marriages was wrong in his scholarly treatise.

130. In my opinion, bigamy is not a mere matter of formality as it affects the capacity of Khin Yong to take Liao as his second principal wife, if indeed such could be inferred from the facts. Being a matter of essential validity, I need to consider the laws and Chinese customs both in China and in Singapore. If Singapore law per se would have regarded that union as bigamous and void *ab initio* and not merely voidable, then Khin Yong would have no capacity by the law of his domicile to marry Liao, and that union in China would have to be regarded by me as void and invalid because matters of essential validity are at the same time governed by Khin Yong's own domicile, irrespective whether the bigamy may have been regarded as merely voidable in China.

131. In the absence of contrary evidence, I have to regard the Chinese marriage custom in China at that time to be similar to that among the Chinese in Singapore, who being migrants from China would generally adopt the traditional customs and usages in China. If marrying a second principal wife in China is regarded as bigamous in China, I would regard that to be bigamous in Singapore. If it is regarded as merely voidable in China, then it must similarly be regarded as merely voidable under the customary law in Singapore.

132. Being merely voidable, the bigamous Chinese marriage is valid until it is 'annulled' and hence, the marriage relations can legitimately continue. If it is a void bigamy, then obviously Khin Yong would not have legal capacity to contract that second marriage. But if it is a voidable bigamy, I cannot say that he would *ab initio* have no capacity to marry Liao as his second principal wife. He could do so subject to the parties avoiding it later if they wished.

133. Consequently, even if what Mr Yuen alleges is true, that Khin Yong had not taken Liao as a concubine, a 'T'sip', a secondary or an inferior wife but had instead married Liao as a second principal wife when his first principal wife in Singapore was still alive, my finding is that the bigamous marriage to Liao was voidable and not void. Not having been voided during their lifetimes, the child of their marriage namely Kaiyuan must be regarded as legitimate. It does not seem right that if Liao had been a concubine or secondary wife, Kaiyuan would have been legitimate because that fitted into the Chinese system of one wife with many concubines, which I would regard as 'polygamous in substance'; but if Liao acquired a status of a second principal wife, which was 'higher' than a concubine, Kaiyuan's status would unfortunately be demoted to that of an illegitimate child because that marriage arrangement fell outside the Chinese concubine system.

134. In any event, Mr Yuen failed to establish on the evidence that Khin Yong had married Liao as his second principal wife. Further, Mr Yuen did not show clearly to me what formalities or rituals if done or not done during the ceremony intended for taking of a secondary wife, would turn it into a ceremony for marrying a second principal wife, thereby making that intended permanent union a prohibited bigamous union.

135. When Khin Yong returned to China for the testator's burial, I would not be surprised that his relatives in China would learn that he was already married. These are things that relatives would naturally talk about and ask of each other when they have not seen each other for some time. When Khin Yong married Liao in China about a year later, I do not believe that Khin Yong could so easily fob the relatives off by pretending that he was a bachelor marrying for the first time or a widow marrying again. Obviously, they would regard Liao as his secondary wife, inferior wife or concubine. Under the circumstances, I infer that Khin Yong and Liao, and the relatives could have no illusions that Liao was taken as his secondary wife and not married as a 'second principal wife' in defiance of their accepted Chinese customs. The common intention of Khin Yong and Liao must have been that she was to be his secondary wife.

Other Corroborative Evidence

136. Before I deal with the other corroborative evidence (much of which is hearsay in nature), I will set out Section 32 (e) and (f) of the Evidence Act which states:

Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:

.....

(e) when the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the **person making the statement had special means of knowledge**, and when the statement was made before the question in dispute was raised;

(f) **when the statement** relates to the existence of any relationship by blood, marriage or adoption **between persons deceased**, and **is made** in any will or deed relating to the affairs of the family to which any such deceased person belonged, or **in any family pedigree or upon any tombstone, family portrait or other thing on which such statements are usually made**, and when such statement was made before the question in dispute was raised;

Genealogical Record

137. The Genealogy Book on the "Huang Family" was written by a third party, Huang Zhenghuan, with no interest in the matter. It was written long before the dispute arose between the parties. It states that "Qingrong" (i.e. Khin Yong) married Mdm Gu (i.e. Koh Ah Neo) and she bore him one son "Kaicheng" (i.e. Chee Kean), and that he also married Mdm Liao who bore him one son "Kaiyuan". This is admissible under s 32 (f) of the Evidence Act to prove the existence of a blood relationship.

138. The Genealogy Book also traces "Qingrong" and his brothers back to their father "Wong Yunhui", the testator, and their grandfather "Shaoxun".

139. According to Luexian in his affidavit affirmed on 1 March 1999 and this was not challenged, two versions of the genealogy record exist: one was handwritten in China before the Liberation and one was printed in Taiwan after the Liberation. Copies of the relevant pages of the new and old genealogy records are attached at pages 27 to 32 of his affidavit. Both versions recorded the fact that his grandfather, Khin Yong, was married to his grandmother, Liao. The claimant asserted that if his grandmother was a mistress of his grandfather, it would not be possible to record her name as the second wife of his grandfather in the Genealogy Record which is kept as a record of their family tree. I accepted this.

Inscription on testator's tombstone

140. The testator's tombstone was first erected in 1929. As the burial ground was acquired by the State during the Land Reform Movement, the testator's body had to be reburied in 1957. The reburial of the testator was arranged by Huang Zhumei when Luexian was only 10 years old. Luexian said that he represented his grandmother, Liao, and accompanied the pall bearers for 3 days to transport the coffin back to Chashan Hamlet although he was merely 10 years old. He was also present at the time of the reburial with the 16th and 17th defendants. Luexian explained that there would be no reason for his grandmother to send him as her representative (as she was ill) for the ritual if she was not a recognised wife of Khin Yong.

141. Both Kaiyuan's and Luexian's names were inscribed on the tombstone as the testator's grandson and great-grandson respectively. Again, these inscriptions are admissible under S 32 (f) of the Evidence Act as evidence to prove a family relationship.

142. Luexian explained and I accepted his explanation that due to the cut off of communication between the relatives in China and Singapore for a few decades, the descendants of the testator in China similarly did not know about the descendants of the testator in Singapore and the names of the descendants in Singapore were not inscribed thereto. This however does not mean that what was inscribed is necessarily false. It simply means that the inscriptions might not represent a complete record of the testator's descendants.

143. In my view, the inscriptions done in 1957 on the tombstone were unlikely to be influenced by any dispute over the distribution of the residuary estate under the will of the testator. Those inscriptions stood unchallenged for so many years. It would appear that Zhumei and all other family members in China did not dispute that Kaiyuan was a legitimate grandson of the testator. Otherwise, his name would not likely appear on the tombstone of the testator under 'Grandsons' in the first place. It might also be disgraceful to allow the names of illegitimate children to be inscribed alongside the others.

144. A strong inference therefore arises that the relatives in China did recognise Liao as Khin Yong's legitimate secondary wife. On this I will refer to *Sunny Tay's Case*, 3 MLJ 83 where Mills J. did not entirely agree with the decision of the Privy Council in *Khoo Thean Tek Case* (1930) A.C. 346 and he held that recognition of the children is a factor which when taken into consideration with other factors may help to raise a presumption of the marriage of the parents. Further, it is a settled principle of law to refer an alliance between Chinese rather to a legitimate than an illegitimate connection: *Seow Beng Hay v Seow Soon Quee* (1933) 2 MLJ 111.

Notarial Certificates

145. The claimant tendered his member's registration form and a number of notarial certificates to prove that Kaiyuan was the legitimate natural son of Khin Yong and Liao.

146. China's notary system is best explained in the translation of "The Judicial Ministry's Reply with regards to our Country's Notary System and the Effectiveness of the Notarial Deed" dated 2 March 1994.

(i) Our country's notary system is an incorporated part of the country's judicial system. The notary office is the government body which exercises the country's right to certify. The second provision of the <THE PEOPLE'S REPUBLIC OF CHINA INTERIM NOTARY REGULATIONS> ..stipulates: "Pursuant to a party's application, notarization is a document by the country's notary body which is a legal act that has been certified according to law and possesses the factuality and legality of documents and facts with legal meaning...";...

(ii) The notarial deed according to law possesses the effectiveness of evidence, the effectiveness of enforced execution and the effectiveness of key documents for the establishment of a legal act and is the basis for the court's determination of facts.

147. The notarial certificates and member's registration form were admitted into evidence by virtue of s 37 of the Evidence Act which states that:

An entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public officer in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

148. The member's registration form of Huang Luexian recorded in 1971 states inter alia under "NAMES, OCCUPATIONS AND POLITICAL BACKGROUND OF MEMBERS IN THE THREE GENERATIONS AND PRESENT FAMILY":

Grandfather Huang Qingrong (i.e. Khin Yong)	: Passed away before the liberation
Grandmother Liao Shunziang	: A farmer all along. Passed away in 1968
Father Huang Kaiyu	: Succumbed to illness at the age of adolescence before liberation.
Wife Yang Bixiang	: Engaged in farming at home

149. The Dengta Management Office of Shuiche Town, Mei County also issued a notarial certificate dated 20 September 1998 stating that:

According to our historic records of census registration, Liao Shunziang, the wife of Huang Qingrong [i.e. Khin Yong] of Yun Han Lou, Chashan Village, adopted Huang Kaiyuan as her son. After Huang Kaiyuan died of illness in 1949, she adopted Huang Luexian as her grandson in 1951, i.e. the son of Huang Kaiyuan. Except for Huang Qingrong who lived in Singapore, the other members of this family have been living at Yun Han Lou.

150. In a later certificate issued by the Office of Dengta Administrative District, Shuiche Town, Mei County dated 12 October 1998, it was certified that the above certification was wrong that Kaiyuan was the adopted son. It stated that:

Investigations conducted jointly by our Cadre Section and the Legal Services Centre of Shuiche Town confirmed that Wang Kaiyuan is the biological son of Liao Shunziang, Huang Luexian is the

grandson bought by Liao Shunziang and he became the son of Huang Kaiyuan.

151. It would appear from the certificates and registration form that Liao was referred to as a 'wife' and not a secondary or inferior wife. If the Chinese characters used in the documents referred to a secondary or inferior wife, or a concubine, I would have thought that the English translation of the certificates and registration form would have reflected that.

152. The effect of these documents in my view clearly renders untenable any contention of mistaken identity, impersonation or lack of permanent union or relationship. But it does support Mr Yuen's submission that Liao was taken by Khin Yöng as his principal wife thereby adding weight to the bigamy argument raised by him. However, Mr Yuen made no submission on this point before me.

Certificate of the Chinese Court

153. The claimant obtained a certificate from the Mei Nan People's Court, Mei County issued on the 16 October 1998 that:

Liao Shunxiang of Yun Han Lou, Chashan Hamlet, Dengta, Shui Che Town, Mei County, wife of Huang Qingrong, had a son named Huang Kaiyuan. After his death in 1949, Liao Shunxiang adopted Huang Luexian as Huang Kaiyuan's son in 1951 (Huang Luexian was only 5 years old at that time). After adoption, Liao Shunxiang had fulfilled her duty of care and education, and Huang Luexian has also performed his obligations to support, attend upon and make arrangements for the funeral of his grandmother. After the grandmother's death, the adopted grandson Huang Luexian continued to live in Yun Han Lou, got married there and carved out his career, and carried on their family name. It has been over forty years. The adoptive relationship is lawful.

154. This is admissible under Section 43 of the Evidence Act which provides that:

Relevancy of certain judgments in probate, etc. jurisdiction

(1) A final judgment, order or **decree of a competent court**, in the exercise of **probate, matrimonial**, admiralty or bankruptcy jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character or the title of any such person to any such thing is relevant.

(2) Such judgment, order or decree is **conclusive proof**—

(a) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

(b) that any legal character to which it declares any such person to be entitled accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;

(c) that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease; and

(d) that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property. (Emphasis is mine.)

155. If this certificate is conclusive proof that Liao was the 'wife' of Khin Yöng, it would mean that the issue of bigamy under

Chinese custom becomes a very serious issue because 'wife' (which I presume was in the sense of a 'principal wife') was used in the Court certificate and not 'secondary or inferior wife or concubine'. Whether the court would have certified the legitimacy of the relationships and the adoption of Luexian had the Court been apprised of the marriage of Liao during the lifetime of Khin Yong's first wife, is an open question. This specific point was not raised by Mr Yuen in argument but I felt the need to consider it nonetheless.

156. Another certificate dated 12 January 2000 issued by the People's Court of Mei County makes the following declaration:

Having checked the Meizhou Municipality Notarial Office [Family Relationship Notarial Certificate] [(98) 1320], Mei County Notarial Office [Grandchild Adoption Notarial Certificate] [(98) Meizheng No. 70], Notarial Certificate of Declaration [(98) Meizheng No. 27] and Notarial Certificate of Inheritance [(99) Meizheng No. 806] and the Household Registration Book file submitted by Huang Luexian, villager of [Yunhan Lou], Dengta Chashan Village, Shui Town, Mei County, it is found that these are all effective documents of the laws of China.

Based on the material content of documents such as the above notarial certificates, this Court verifies the legal adoption relationship whereby Liao Shunxiang, wife of deceased Overseas Chinese Huang Qingrong of [Yunhan Lou], Dengta Chashan Village, Shuiche Town, Mei County, adopted a grandson Huang Luexian, as a son for her deceased son Huang Kaiyuan.

As Liao Shunxiang and Huang Kaiyuan have passed away, this Court affirms that Huang Luexian is qualified to travel to Singapore to apply to inherit the estates of Liao Shunxiang and Huang Kaiyuan in accordance with the relevant laws of China.

157. Based on the various notarial certificates and the Household Registration Book of Luexian, the Chinese court recognised that Liao was the lawful 'wife' of Khin Yong and out of that marriage, they had a son Kaiyuan. This again suggested that 'Liao' was recognised as a 'principal wife' and not a 'secondary or inferior wife or concubine'. Mr Yuen made no submission that these certificates were obtained by fraud or concealment of important facts both from the notary office and the Court, that Khin Yong already had a first wife in Singapore when he contracted a second marriage to Liao. On the other hand, I would not know if the Court or notary office would still have regarded the union as valid in China under their own customary law and certify instead that Liao was a 'legitimate secondary or inferior wife or concubine' were all the facts made known to them.

158. Thus, the issue whether a union regarded as bigamous under Chinese custom is void or voidable must be resolved. In my judgment, a bigamous marriage under Chinese custom both in China and Singapore is only voidable and not void. Just as with marriage during mourning, the fact that an act is punishable by caning does not automatically render that act void under Chinese custom. Not having being avoided, the offspring of that voidable bigamy must remain legitimate. Consequently, whether or not Liao was the principal wife, a concubine, or a secondary or inferior wife of Khin Yong, it made no difference to the legitimacy of Kaiyuan.

Liao's statements to Luexian and the items purportedly used at Liao's wedding

159. Luexian stated in his affidavit that Liao told him that she married his grandfather Khin Yong sometime in the 1920s after he had married his first wife. They went through matchmaking. Luexian described the photographs at 21 DBD 212 to 219 which he said showed the items used at the wedding (e.g. sedan chair, 'quigjiaoyan bed', gift carriers). These items are in his possession at Yun Han Lou. The ancestral worship for the wedding took place in the old ancestral house where there was a tea ceremony before the elders. The wedding feast was in Cha Shan Hamlet. After the marriage, his grandfather went to live in Shan Tou to manage the testator's business there. It would appear from this evidence that Liao knew of the existence of Khin Yong's first wife and had accepted that she was only a secondary wife.

160. Whatever Liao had told Luexian concerning her marriage to Khin Yong and his relationship to them would be hearsay evidence admissible under s 32 (e) of the Evidence Act.

Title deeds

161. Luexian said that he lived with his grandmother in Yun Han Lou and she was farming the ancestral land owned by the testator until the State acquired the land during the Land Reform Policy in the 1950s. Liao kept the original title deeds (21 DBD 152 to 205) to some 16 properties including land owned by the testator and the testator's father, Huang Shao Zun. She refused to surrender them to the State Authorities. Presumably, the title deeds were entrusted by the testator to his grandfather, Khin Yong, who in turn entrusted them to his grandmother, Liao. Before she died, Liao then passed them to Luexian for safekeeping.

162. By itself the deposit of title deeds with Liao is not significant, but it forms another piece in the jigsaw puzzle which points to the fact that the union between Khin Yong and Liao was intended to be a permanent legitimate union by both parties. Otherwise, she would not be given the title deeds and be allowed to farm the land.

Sale of part of ancestral home

163. Luexian said that he had sold part of the ancestral house, which he purportedly inherited from Liao, to the 18th and 19th defendants who are the grandsons of the testator and sons of Wong Siong Yong (the adopted son of the testator).

164. In a document dated 11 March 1972 bearing the seal of the Revolutionary Committee, Dengta Production Brigade, Shuiche People's Commune, Mei County and made by Shang Wan Yun, Yuan Qin, Yuan Zhong and Luexian prior to the date of distribution and prior to this dispute, it was stated that Luexian together with Zhang Wan Yun, Yuan Qin, and Yuan Zhong were given a "pengdi" (shaded) house at Heng Keng Zi, which they sold to the 'Jun Yuan' brothers at the agreed price of 120 yuan. The "Jun Yuan" brothers are the 18th and 19th defendants. This property was apparently inherited from the testator.

165. Thus the parties to the 'Permanent Sale Agreement' acknowledged that Luexian had a share of that property of the testator. As Luexian was adopted by Liao as her grandson and son of Kaiyuan, this acknowledgement of Luexian's interest is an indirect acknowledgement of the fact that Liao had become a member of Khin Yong's family by virtue of some marriage. Otherwise, I can see no good reason why Luexian would have any share of the inheritance if he were to be regarded as illegitimate.

Stay at Yun Han Lou

166. Only descendants of the testator live in Yun Han Lou. As Liao and Kaiyuan lived in Yun Han Lou, the implication is very strong that they were similarly descendants of the testator.

167. I inferred that Wong Siong Yong who died in 1972 in Yun Han Lou would likely have objected to Liao living in Yun Han Lou with Kaiyuan and later Luexian, if Liao's union with Khin Yong was not recognised as legitimate by him. Siong Yong was the adopted son of the testator. The other one third of Yun Han Lou was occupied by Wong Kwee Yong's wife and her children. Similarly, Kwee Yong who was another of the testator's son, would probably have chased Liao out if she was a mere casual mistress of Khin Yong. Furthermore, I would have thought that after Khin Yong left for Singapore, and Liao had to fend for herself, it would not be that difficult for them to drive her out of the ancestral home if they had wanted to as I think she would be quite defenceless without Khin Yong.

168. What is more telling is that the relatives in China accepted the fact that Liao was entitled to and was therefore given a share in the old ancestral house which Luexian inherited and later sold to the 18th and the 19th defendants.

169. The deposit of title deeds, sale by Luexian of his share of the ancestral property, Liao's stay at Yun Han Lou and her farming of the testator's land together form part of the overall evidence of conduct from which an opinion on the relationship of Luexian, Kaiyuan, Liao and Khin Yong could be inferred. Section 52 of the Evidence Act provides:

Opinion on relationship when relevant

S52(1) When the court has to form an opinion as to the relationship of one person to another, the opinion expressed by conduct as to the existence of such relationship of any person who as a member of the family or otherwise has special means of knowledge on the subject is a relevant fact.

Illustration

(a) The question is whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife is relevant.

(b) The question is whether A was a legitimate son of B.

The fact that A was always treated as such by members of the family is relevant.

(Emphasis mine.)

Presumption of legitimate union

170. The final hurdle in the way of the 4th defendant is the existence of a legal presumption in favour of a legitimate union. The head notes found in *Seow Beng Hay v Seow Soon Quee* (1933) 2 MLJ 111 read as follows:

In the absence of proof of a marriage ceremony the Court can upon proper circumstantial evidence presume a secondary marriage between a Chinese man and woman. In cases of pedigree even remote and slight evidence must be allowed effect.

171. In *Yeap Cheah Neo v Ong Cheng Neo* L.R. P.C. 381, Sir Montagu Smith in delivering the judgment of the Privy Council said:

It is said that, with the Chinese, the difference between the social status of a wife and that of a concubine, and in the position and treatment of legitimate and illegitimate children is so slight, that what is termed reputation affords no satisfactory ground for presuming a marriage. But if this be so, which, however, is not very clearly established, their Lordships see no reason, in the absence of satisfactory evidence to the contrary, why the ostensible relations of the parties should not be referred to a legitimate and correct connection, rather than to an illegitimate and, to say the least, a less correct one.

172. Further, the recognition of a person as a son is a factor, which when taken into consideration with other factors may help to raise a presumption of a valid marriage between his biological parents: per Mills J in *Re Tay Geok Teat* at p 91.

173. In my opinion, the totality of the admissible evidence which the claimant managed to collate is more than sufficient to raise a presumption of a valid secondary marriage between Liao and Khin Yong.

174. In the face of the presumption and in absence of sufficient reliable evidence to the contrary to rebut it, I am not able to find that Khin Yong intended to or had taken Liao as his second principal wife with the same status as Koh Ah Neo in Singapore. I presume that Khin Yong would have done what the Chinese custom would have allowed him to do i.e. to take a secondary wife and not another principal wife as he had a first wife already in Singapore. Being a fairly well known custom, I doubt that Khin Yong would be unaware of it. I can see no good reason for him to violate that custom and render himself punishable for bigamy. Further, in a bigamous marriage, he would risk having Liao sent back to her village and the marriage declared void. Why would he get himself into an intolerable situation by marrying Liao as a principal wife?

175. It is for the 21st defendant to displace the presumption of a legitimate union which has additionally arisen on the facts in this case. He failed to discharge that burden.

176. Accordingly, I presumed an intention on both parties to form a legitimate and permanent union of a secondary marriage recognised by Chinese customs in China at that time and Khin Yong would necessarily have taken Liao as his secondary wife and not a second principal wife. The union was not bigamous. The failure to have an obeisance ceremony and the absence of knowledge and consent of the principal wife in Singapore, even if true, did not invalidate that customary union. Accordingly, I found as a fact that the union with Liao and the offspring of that union were both legitimate.

177. Even if I am wrong in my finding and Khin Yong did marry Liao as his second principal wife, only a voidable bigamy would result. Since the voidable bigamy was never avoided during their lifetime, the offspring of that voidable bigamy would remain legitimate for the reasons I have given.

Conclusion and Orders made

178. Accordingly, I declared that Kaiyuan was a lawful natural son of Khin Yong. Kaiyuan's estate is thus entitled to a share of the testator's estate pursuant to the testator's will. Necessary consequential orders followed.

179. To avoid satellite litigation and out of prudence, I imposed conditions for the release of monies due to the estate of Kaiyuan (i.e. arising out of the distribution of the estate of the testator). I ordered that there is to be no distribution to the beneficiaries of the estate of Kaiyuan by the personal representative of the estate without a Chinese court order sanctioning the release of the monies to the persons specified as the proper beneficiaries according to Chinese law. That will then complete the proper administration of the estate of Wong Yoon Fee by the trustees of Wong Yoon Fee's estate in so far as this stirpes is concerned.

180. I do not think it is proper for me to declare that the adoption of Luexian by Liao as her grandson and son of Kaiyuan is valid under Chinese law. First, this is not an issue before me. Second, these are matters under the jurisdiction of the courts in China since Kaiyuan died in China and the subsequent alleged adoption of Luexian as son of Kaiyuan took place in China. Any other persons intending to claim under the estate of Kaiyuan would have to do so in China as that estate should more appropriately be administered in China under Chinese law and should not be administered by the trustees of the estate of Wong Yoon Fee, the testator.

181. As such, it is not for me to make any declaration whether Luexian is entitled as the sole beneficiary to the entire estate of Kaiyuan, deceased.

Chan Seng Onn

Judicial Commissioner

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