JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 4 of 1972

BEFORE: The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

BETWEEN EYRE VERNE PLAINTIFF/APPELLANT

AND CHARLES EMANUEL CLOUGH
(as Co-Executor Estate
Mariebel Henry-Clough)

and

CHARLES EMANUEL CLOUGH

and

FAY PATRICIA CHUNG DEFENDANTS/RESPONDENTS

Mr. Ronald Williams Q.C., for Appellant

Dr. Lloyd Barnett for Respondents.

Heard 21st February, 1974
24th April, 1974

FOX, J.A.:

The construction of a will is very much like the exploration of a difficult and unknown country. If others have gone before, the sign posts which they may leave at critical corners, could prove helpful guides to those who follow after. But each will describes its own individual terrain. Consequently, any one who embarks upon the unique task of construing a particular will, could very well be led astray if obedience to the sign posts left by his predecessors is blind or too strict. This is the metaphorical image projected by Harman, L.J. in Re Henderson [1969] 1 W.L.R. 651, 652 when he likened the technical rules of law developed by the courts for the construction of wills to the sign posts left behind by earlier generations, and asserted the growing supremacy in the mind of modern judges of the search for a nicer justice above the certainty which observance of the rules supplies.

This search for a nicer justice is the keynote to the new liberal approach to the interpretation of wills which Lord Denning described in the earlier case of Re Jebb [1966] Ch. 666. At p. 672 Lord Denning stated:

> "In construing the will, we have to look at it as the testator did, sitting in his arm-chair, with all the circumstances known to him at the time. Then we have to ask ourselves: 'What did he intend?' We ought not to answer this question by reference to any technical rules of law. Those technical rules of law have only too often led the courts astray in the construction of wills. Eschewing technical rules, we look to see simply what the testator intended ..... The only legitimate purpose (of previous cases) is to use them as a guide towards the meaning of words, so as to help in the search for the testator's intention. They should never be used so as to defeat his intention."

Subsequently, in words equally emphatic, Lord Denning affirmed the object of a court in construing a will as the discovery of the testator's intention, unobstructed by technical rules, unimpeded by literal interpretations which give rise to capricious results contrary to common sense, and allowing to the testator's words the meaning required by their context, and by such relevant surrounding circumstances as are known. In Re Allsop [1968] 1 Ch. 39, 47.

The dangers in a too liberal approach to the construction of wills are, of course, obvious. Unrestrained by a sense of proportion, and ignoring altogether the great body of authority to be found in the cases, the new attitude could very well reduce the construction of wills to the level of guesswork. This fear has been graphically described by Dr. J.H.C. Morris in his criticism of the thinking in Re Jebb. (Palm Tree Justice in the Court of

Appeal (1966) 82 L.Q.R. 196). But dangers can be overemphasised. Their risks have not diminished the determination of the modern judicial mind to be freed of the fetters fashioned by narrow and technical distinctions which so often obscure rather than elucidate the reasonable meaning of language used. (Cf. Re Gulbenkian's Settlement Trusts (1970) A.C., Lord Reid at 519-520, Lord Upjohn at 522. The developing trend towards a more flexible and more realistic approach may suffer the occasional regression, but there is no sign of its being checked. (See Lately J. Re Morris (1970) 2 W.L.R. 865, 870.

The problem in this case is caused by the wording of the fourth paragraph of the will dated 11th December, 1959 of Mariebel Henry-Clough, late postmistress of Lawrence Tavern, Saint Andrew, who died on 3rd September, 1962. That paragraph of the will reads:

> "I give and bequeath unto my nephew Eyre Henry now called Eyre Verne and my adopted daughter Fay Patricia Chung all my property at Mt. Ogle Lawrence Tavern in shares as herein-after described, but no shares shall be made, nor shall anyone of them come into possession until after the death or second marriage of my beloved husband Charles Emanuel Clough, who shall enjoy a residence in my home and occupy the said property without molestation or disturbance till his death."

When I sit myself in the armchair of the testatrix, and ask what did she intend, certain answers are unequivocal and immediate. She intended all her property at Mt. Ogle to go to her nephew Eyre and her adopted daughter Fay. Paragraph five of the will directed that they should "share and share alike." These are words of severance sufficient to create a tenancy in common. The testatrix, therefore, intended that after her death, Eyre and Fay should own Mt. Ogle as tenants in common. But the testatrix did not intend that they should become the unfettered

owners of the property at her death. She said, "but no shares shall be made nor shall any one of them come into possession until after the death or second marriage of my beloved husband." If the directions had stopped at that point, there would have been a gap in the will. To fill that gap it might have been necessary to invoke the law of intestacy. The husband would then have only such rights as that law accords a surviving spouse. Or to remedy the situation, the principle of a determinable life interest arising by implication in favour of the husband, would perhaps be applicable. But the testatrix intended no hiatus in her will. Neither did she intend a gift by implication of law. Her directions did not stop at the point indicated. They continued, and upon her "beloved husband Charles Emanuel Clough." the testatrix expressly conferred the right to "enjoy a residence in my home and occupy the said property without molestation or disturbance till his death." He that runs may read. It is as plain as the proverbial pikestaff that by going on to give these directions, the testatrix expressly intended her husband to have a life interest in Mount Ogle determinable at his death. These directions also have this prima facie effect. They negative a determinable life interest, that is, an interest though capable of enduring for the life of the tenant, is determinable on the happening or non-happening of a specified event.

These conclusions are of the utmost importance in construing the words "but no shares shall be made, nor shall any one of them come into possession until after the death or second marriage of my beloved husband." "No shares shall be made." What do these words mean? "Nor shall any one of them come into possession until after the death or second marriage of my beloved husband." Did the testatrix have in mind two separate procedures; - two distinct developments? Did she envisage a "sharing" of the property between Eyre and Fay by an agreement to a physical division or otherwise, without actual possession; as well as, and also as distinct from the actual 'coming into possession' by Eyre and

Fay as tenants in common, or consequent upon any "sharing" previously made, as owners of separate parts, or as owners of the whole of the property by one or the other of them. Or, as Mr. Coore argued before the Chief Justice, and as that learned and experienced judge held, did the testatrix intend that Eyre and Fay should become entitled to a vested interest in the property as remainder-men only upon the death or the second marriage of her beloved husband? Did the testatrix intend that the two events, death or second marriage should have separate and distinct consequences, and that the consequence of the second marriage should not conflict with, or wittle down the life interest given to her husband till his death?

Mr. Williams submitted that the words of paragraph four effected a gift over of the property to Eyre and Fay upon the death or second marriage of the husband, whichever event occurred first, and the provision thereafter that he was to occupy the property 'till his death' was due to careless drafting or inadvertence, resulting in the ommission of concluding words "or remarriage." This approach involves a literal interpretation of words which does not accord with the meaning suggested by their context. The testatrix did not commence the expression of her intentions by creating in the first place a life interest, and go on expressly to provide for its determination during the lifetime of the tenant for life. I repeat for emphasis. She deliberately refraimed from creating expressly a determinable life interest. The testatrix commenced the expression of her intentions by indicating that she wished Eyre and Fay to own the property as tenants in common. She went on immediately to proscribe expressly, essential incidents of ownership, namely a 'sharing', a division of the property, and the 'coming into possession' by them, until after the death or second marriage of her husband. The words 'but no shares shall be made nor shall anyone of them come into possession until after," directly qualify the devise to Eyre and Fay. They lay down the conditions under which that devise was to take place. The words occur in a context which

suggest "sharing" and "coming into possession," were in the mind of the testatrix, two separate and distinct concepts which she visualized and intended to be the relative concomitants to two events, also separate and distinct, namely death and second marriage.

In the light of these considerations it seems to me that the testatrix intended to create a contingent remainder in favour of Eyre and Fay which would become vested in interest, upon the second marriage of her husband, and vested in interest and possession eo instanti the determination of the husband's life interest at his death, if he should have remained a widower. Unlike the learned Chief Justice I do not find this construction strained. The description of a mere possibility of acquiring an estate until one or the other of the contingent events upon which it depends has occurred, is not unknown to the common law. In this case, the description of such a possibility is entirely consistent with the particular life estate to the husband which the concluding words of the paragraph create. In my view therefore, properly construed, the apparent inconsistencies in paragraph 4 of the will are reconcilable. To give effect to the concluding words there is no need to have recourse to the rule of dispair which stipulates that of two irreconcilable provisions it is the latter that prevails (vide Lord Greene, M.R. in Potters Will Trusts [1944] 1 Ch. 70 at 77) - Re Hammond [1938] 3 All. E.R. 308.

The objections to the interpretation for which the appellant contends, are not confined to a distortion of the language of the devise to Eyre and Fay, and to a repudiation of the meaning and effect of the language employed by the testatrix whereby a life interest to her husband was expressly created. That interpretation goes further. It requires the application of technical rules of law enounced in cases on wills, the wordings of which are substantially different to the wording of paragraph four of the will in this case. Thus in Bainbridge v. Cream (1852) 16 Beaver 25 (51 E.R. 685) a testator made bequest to his wife during widowhood and immediately

after her death or second marriage whichever event should first happen over. This, the limitation of lands to a woman during widowhood is a common example of a determinable life interest. Co. Litt 42a. Stanford v. Stanford (1886) 34 Ch. Div. 362 is also a case of determinable life interest which came to an end on the second marriage of the testator's widow. The problem in that case was not concerned with that issue. The testator had gone on to give his estate in equal shares among all his brothers and sisters "who shall be living at the death of my said wife." The question which the court was required to answer was whether the gift over took immediate effect, or was postponed until the widow's death. It was held that the brothers and sisters of the testator living when the widow's interest ceased by her second marriage, were absolutely entitled. Re Dear (1889) 58 L.J. Ch. 659 answered the same question. The gift over of residue to the testators children "at my wife's death" was held to take effect upon her remarriage so as to vest the residue at once in the children of the testator living at the time of the remarriage. In Warner [1918] 1 Ch. 368 was also a case of a determinable life interest brought to an end by the widow's remarriage. The gift over was to children of the testator and the grandchildren of a deceased child or children living at the time of the wife's death. It was held that the children living at the date of the remarriage took immediate vested interests to the exclusion of all grandchildren. Sargeant J. admitted the rationalization whereby a court entitled itself to give effect to either of two relevant events where there had been express mention of one event only. He said the court treated the omission to refer to the other corresponding event as being "due to slovenliness or carelessness." In Re Main [1947] 1 All. E.R. 255. the court was faced with a similar ambiguity. In the will only the death of the last surviving daughter was mentioned with regard to the ascertainment of the beneficiaries. It was possible to spell out of the express gift on the happening of that event, a corresponding gift by way of implication on the happening of another relevant event, namely the marriage of the last surviving

daughter. Roxburgh J. held that the inconsistency in the will was due to 'slovenliness or carelessness' in drafting, and the children living at the time of the marriage of the last surviving daughter, took under the will.

Sufficient has been said, I hope, to show that any attempt to apply the rule in Bainbridge v. Cream in the construction of paragraph four of the will would result in the Court being led hopelessly astray. The other four cases are really concerned with the application of rules which the courts have found convenient for the purpose of ascertaining the class to take under a gift the limitations of which are imperfect. The principle is "that the class is to be ascertained as soon as possible in order that beneficiaries may know what their shares are, and the executor or trustee may begin to distribute the fund." Theobald, Wills 13th Edition 931. But there is no principle, and no considerations of reason on policy, which would justify the application of these rules of expediency so as to divest a life tenant or that interest expressly given to him by a will. These rules are relevant when a determinable life interest comes to an end. They would not help in the search for the testators intention where a life interest terminable on death is extant. To the contrary, they would surely defeat his intention. They must be eschewed.

In the result, I agree substantially with the reasoning of the learned Chief Justice. I would uphold his decision that the "beloved husband" of the testatrix, Charles Emanuel Clough was given a life interest in Mount Ogle determinable only upon his death. I would dismiss the appeal.

EDUN, J.A.:

The provisions of the will, the construction of which we are called upon to determine, provide as follows:-

Clause 4: "I give and bequeath unto my nephew Eyre Henry now called Eyre Verne and my adopted daughter Fay Patricia Chung all my property at Mt. Ogle, Lawrence Tavern in shares as hereinafter described, but no shares shall be made, nor shall anyone of them come into possession until after the death or second marriage of my beloved husband Charled Emanuel Clough who shall enjoy a residence in my home and occupy the said property without molestation or disturbance till his death."

Clause 5: "My nephew, Eyre Henry and my adopted daughter, Fay Patricia Chung will share and share alike with equal privileges and in equal shares."

In my view, the words "in shares hereinafter described" refer to Clause 5 which states that the shares of Henry and Chung will be "share and share alike with equal privileges and in equal shares". Clause 4 goes on to state that "no shares shall be made, nor shall anyone of them (Henry or Chung) come into possession until after the death or second marriage ... of Charles Emanuel Clough." It is definitely stated in Clause 4 that Charles Emanuel Clough "shall enjoy a residence in my home and occupy the said property without molestation or disturbance till his death."

In other words, the context of Clauses 4 and 5 makes it abundantly clear what the intentions of the testatrix were. They were that:-

1. Charles Emanuel Clough must have a life interest in Mt. Ogle, Lawrence Tavern upon the death of the testatrix;
2. the words "who shall enjoy a residence in my home and occupy the said property without molestation or disturbance until his death," convey not merely a personal right of occupation but the gift of an estate;

3. the devise and bequest to Henry and Chung were vested gifts upon the second marriage of Charles Emanuel Clough, but as remarriage must come before death.
4. the vested gifts in Henry and Chung were not to "come into possession" until the death of Charles Emanuel Clough.

It may well be contended that the devise and bequest to Henry and Chung come at the beginning of Clause 4 of the will but from a reading of the will as a whole it is not the position of the words that is so important as the ascertainment of the wishes of the testatrix and the clear meaning of the words used in the will. For my part, I can see no reason why the words "until after the death of my beloved husband" should not receive their ordinary and natural meaning. And that is, that the vested interests of Henry and Chung shall not take effect "in possession" until after the death of Charles Emanuel Clough. If the vested interests of Henry and Chung were to take effect "in possession" on the second marriage of Charles Emanuel Clough, then the words "shall enjoy a residence in my home and occupy the said property without molestation or disturbance till his death" would have no meaning. These later words in Clause 4 constitute the condition upon which any interests in Henry and Chung, whether vested or in possession, must depend.

One can often find great assistance in reported cases but the construction of any will must ultimately depend upon the ordinary and natural meaning of the words used in the will. Previous decisions may disclose a consistent method of approach to a problem, where the particular wording is susceptible of more than one meaning. In this case, I have no doubt of the clear meaning of the words used from which the intentions of the testatrix can be ascertained; that is primarily to give Charles Emanuel Clough a life interest in the property and thereafter the vested interests in possession to Henry and Chung after the death of Charles Emanuel Clough, to take effect.

For the reasons, I have stated, I would dismiss the appeal and affirm the decision of the learned Chief Justice.

GRAHAM-PERKINS, J.A.:

Mariebel Henry-Clough died on September 3, 1962 leaving a will in which the following bequest, inter alia, appears.

> "I give and bequeath unto my nephew Eyre Henry now called Eyre Verne and my adopted daughter Fay Patricia Chung all my property at Mt. Ogle Lawrence Tavern in shares as hereinafter described, but no shares shall be made, nor shall anyone of them come into possession until after the death or second marriage of my beloved husband Charles Emanuel Clough, who shall enjoy a residence in my home and occupy the said property without molestation or disturbance till his death."

In the paragraph following the shares in which Eyre and Fay were to take were described thus: "share and share alike with equal privileges and in equal shares."

Charles Emanuel Clough (hereinafter called 'the husband') remarried in or about November 1965. He nevertheless claimed to be beneficially entitled to a life interest in the Mt. Ogle property under the terms of the devise quoted above. In the result Eyre Verne, who claimed that he and Fay Chung became entitled to possession of the property immediately upon the remarriage of the husband, caused an originating summons to issue. By this summons he sought an answer to the question whether the interest in the property devised to the husband terminated on his remarriage or continues in him as long as he lives. The learned Chief Justice before whom the summons came on for hearing, answered that question in favour of the husband. Hence this appeal by Eyre.

In his reserved judgment the Chief Justice said:

> "After full consideration of the submissions and arguments advanced before me I have decided that those put forward by Mr. Coore for the husband are more likely to represent the true wishes of the testatrix, as expressed in her will. The only gift to her 'beloved husband' is the life interest in Mount Ogle and this gift is clearly expressed in the words 'who shall enjoy residence in my house and occupy the said property without molestation or disturbance till his death.'
>
> I see no valid reason to vary the testatrix's plain and unambiguous meaning indicated by these words.

> The words 'nor shall anyone of them come into possession until after the death or second marriage' used in the earlier portion of paragraph 4 will not require any alteration or excision if these words are construed to mean the event for fixing the date for vesting of the devise to Eyre and Chung and the words 'come into possession' are to be related to the shares and not to the actual physical possession of the land itself. I admit that this construction may appear to be somewhat strained but it seems to me to be the only one possible, once it is clear that the husband was to have an unfettered life interest irrespective of remarriage."

It may be fairly observed, I think, that on two occasions in the foregoing passages the Chief Justice appears to beg the very question he was required to resolve. Mr. Coore had submitted that the effect of the devise was to make "a gift to a class of two persons but to provide that that gift did not vest until either the husband died or remarried, so that if either of these two persons had died before the husband remarried the share of the one dying would lapse. But as the husband has remarried the share of one of them dying could not have lapsed as it vested on the remarriage of the husband. Both now have a vested interest in the remainder which is subject to the life interest of the husband." These submissions found favour with the learned Chief Justice. Regrettably, however, they were predicated on the basis of at least two demonstrable fallacies. Before us Dr. Barnett attempted to support the conclusion reached by the Chief Justice. For the most part he adopted the submissions advanced by Mr. Coore in Chambers. He argued that this Court had to reconcile the inconsistent provisions in the will even if it were driven to place a strained interpretation on the language in which the disputed devise was framed. I am not quite clear why it is felt that the approach to the answer to the question posed in the originating summons necessarily involves placing a strained interpretation on the relevant words of the will. As Dr. Barnett sees it, and as, indeed, Mr. Coore saw it, the gift to the husband is expressed in precise and clear language admitting of not the least doubt as to the intention of the testatrix. It is the gift over, couched as it is in imprecise and inelegant language, that poses the problem, if any. If Dr. Barnett

is right, and the devise to the husband is so expressed as to vest in him an unfettered life interest, then no problem of interpretation can be said to arise at all. With great respect to the learned Chief Justice and, indeed, to Messrs. Coore and Barnett I am constrained to say that I am totally unable to share their views.

Let me say at once that in my view not a little confusion appears to have crept into the submissions advanced on behalf of the husband in this Court and before the Chief Justice. It is desirable, therefore, to restate certain principles which, I would have thought, are now well beyond debate. Firstly, an estate is vested in possession when its owner is entitled to present possession; it is vested in interest when there is a present unqualified right to take possession as soon as it becomes vacant. See Hawkins and Ryder, Construction of Wills, pp. 282 et seq. Secondly, a person has a vested remainder in land if he or his representatives are continually entitled and ready to take actual possession of that land whenever the particular estate ends. Thirdly, although a vested remainder is traditionally classified as a future interest because the right to possessory enjoyment is postponed, it is, nevertheless, a very real present interest in the sense that its owner is absolutely entitled to dispose of it as freely as in the case of an estate to which is attached a right to immediate possession. See, e.g., Hawkins on Wills, 3rd edn. p. 263. Fourthly, an estate vested in interest is always a present right; there is nothing conditional about it. There is nothing that is required to occur before the owner can establish his title as distinct from his right to immediate possession. See Cheshire's Modern Law of Real Property, 11th edn., p. 241. Fifthly, it is, perhaps, trite law that where a will contains an express direction as to the time at which an interest is to vest there can be no vesting until the time so stipulated. But it is of the most critical importance to appreciate that a direction involving a mere reference to the time at which a devisee is to come into possession does not, and cannot, affect the question of vesting. See Russel v Buchanan (1834) 2 Cr. & M. 561. And it must be noted, further, that whenever there is or has been in existence someone in respect of whom it can be said that his share has vested in interest the courts have,

at any rate in the case of real estate, invariably been in favour of early vesting. See Duffield v Duffield (1829) 3 Bl (M.S.) 260.

Proceeding from these fundamental propositions it becomes perfectly clear that the devise to Verne and Chung created in them an estate vested in interest in the fee simple absolute in the Mt. Ogle property. It is somewhat difficult, therefore, to understand exactly what the learned Chief Justice meant when he said:

> "The words 'nor shall anyone of them come into possession until after the death or second marriage' used in the earlier portion of paragraph 4 will not require any alteration or excision if these words are construed to mean the event for fixing the date for vesting of the devise to Eyre and Chung."

This was no mere question of applying a strained interpretation; this was flying in the face of established principle and, indeed, would seem to be obscurum per obscurius. Nor do I understand what the Chief Justice meant when he said:

> ".... the words 'come into possession' are to be related to the shares and not to the actual physical possession of the land."

There can be no doubt, I think, that the effect of the language used in the devise to Eyre and Chung is to pass to them the fee simple as tenants in common. They would, therefore, each have an equal right to the possession of the whole property. True it is that each has a share, but it is an undivided share in the whole.

> "A tenancy in common, though it is an ownership only of a divided share, is, for all practical purposes, a sole and several tenancy or ownership; and each tenant in common stands, towards his own undivided share, in the same relation that, if he were sole owner of the whole, he would bear towards the whole." Challis, Law of Real Property, 3rd edn. p. 368.

If, therefore, Eyre and Chung had, as they undoubtedly did have, an estate vested in interest which would, as a matter of law, become vested in possession upon the death or remarriage of the husband, it is by no means easy to grasp the conceptual difference, the existence of which the learned Chief Justice appears to contemplate, between coming into possession of an undivided share and coming into possession of the

land itself. The Chief Justice seems to suggest, further, that the interest limited to Eyre and Chung was contingent upon some uncertain event, and that, in accordance with the rules governing the conversion of contingent remainders into vested remainders, that interest would become vested upon the death or second marriage of the husband. Hence, no doubt, his view that the death or remarriage of the husband was the event by reference to which the vesting of the devise to Eyre and Chung fell to be determined. Such a view, in my opinion, reflected a very fundamental error. There was nothing conditional or contingent about the interest limited to Eyre and Chung. There was nothing that was required to take place before Eyre and Chung could establish their title. That title accrued from the very terms of the devise to them. There was, therefore, nothing to preclude the vesting of their interest in them upon the death of the testatrix. The death or second marriage of the husband was the event, not "for fixing the date for vesting", but upon the happening of which (i) the interest of the husband was to determine, and (ii) Eyre and Chung would become entitled to immediate possession.

Having now removed, I hope, the several misconceptions that arose during argument both here and in the court below, I proceed to examine the devise which is said to be so difficult to construe. The testatrix begins by giving to her nephew and adopted daughter all her property at Mount Ogle in equal shares. For myself I have not the least doubt that the clear intention of the testatrix was that her property at Mount Ogle should ultimately pass to Eyre and Chung as tenants in common for an estate in fee simple absolute in possession. The use of the words "share and share alike with equal privileges and in equal shares" does not, in my view, pose any problem whatever. Those words do no more than indicate that Eyre and Chung are to take the fee simple as tenants in common. If there were nothing more to this devise it is manifest that Eyre and Chung would have been entitled to enter into possession of the property following upon the death of the testatrix. The fact, however, is that the right to possessory enjoyment of the property by them was postponed. This the testatrix sought to achieve by a clause by which she gave to her husband a

particular estate determinable on the happening of one or other of two events, i.e. his death or second marriage. If the husband chose not to contract a second marriage it is clear that his interest would have continued up to his death. But he chose to marry again. Can his interest in that circumstance nevertheless continue? If it were to be held that his interest did continue it is clear, I think, that the words "nor shall any one of them come into possession until after the death or second marriage of my beloved husband" must be held to mean precisely nothing. If one were to read the words just quoted on the assumption that the words "or second marriage" were omitted they would be quite meaningless in the context of an unfettered life interest in the husband. Are the words "or second marriage" to be treated as equally meaningless? I think not. Up to this point I think it can be said with a great measure of confidence that the intention of the testatrix was that her husband should have a particular estate in her property but only for so long as he did not marry another woman. It is the closing words of the devise that appear to create some difficulty. Ex facie they contemplate that the husband will reside in the home of the testatrix and occupy her property until his death. The testatrix was sufficiently careful to postpone the right of Eyre and Chung to the possession of her property until the husband died or remarried. Must she, in the same sentence and in the same breath, be taken to have denied to them that same right to possession notwithstanding the remarriage of her husband? So to hold would in my view be to play fast and loose with the unmistakably clear intention of the testatrix to give to her husband an estate determinable on his remarriage or death.

In the result I hold that the true effect of the devise herein disputed was to vest in the husband a particular estate which determined on his second marriage. Thereafter the gift over to Eyre and Chung took effect in possession. I would order that the husband account, as from the date of his remarriage, for all the rents

collected, and income, if any, derived, and all monies, if any, expended, by him in respect of the property. I would order, too, that the costs of this appeal and of the hearing of the originating summons be paid out of the estate.

J A M A I C A

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FAY PATRICIA CHUNG DEFENDANTS/RESPONDENTS

Mr. Derrick Jones, Arthuro Stewart appear for the Appellant

No representation or appearances by or on behalf of the Defendants/ Respondents.

24th April, 1974

FOX: J.A.,

By a majority (Graham Perkins J.A. dessenting) this appeal is dismissed. The judgment of the Chief Justice is affirmed. Costs of the appeal are to be paid out of the Estate. Liberty to apply.

Written judgments have been prepared and will be filed in the registry when typed.