Privy Council Appeal No. 57 of 1922.

Choa Eng Wan and others - - - - - - *Appellants*

v.

Choa Giang Tee - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT OF SINGAPORE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH APRIL, 1923.

Present at the Hearing:

VISCOUNT HALDANE.
LORD DUNEDIN.
LORD PARMOOR.

[*Delivered by* VISCOUNT HALDANE.]

The appellants are the grandsons of the testator in the suit. It was brought for the administration of his estate by the respondent, the plaintiff, as a trustee and a beneficiary, against the appellant, Choa Eng Wan, as a trustee under the testator's will, and also as an individual entitled, along with the other appellants, who were also made defendants, to be beneficially a claimant. The testator died in 1900 leaving the will under which the questions raised arise, and a considerable amount of landed and house property in Rangoon and Singapore, in the latter of which he was resident. He was of Chinese origin.

The testator left surviving him Choo Bin Lee, a Chinese wife, and by her one son and two daughters. This son is living and is the respondent. He also left two other sons and a daughter by a Chinese wife who had predeceased him. These sons died before the period of distribution fixed by the will, but the grandson, the appellant, Choa Eng Wan, is the son of one of them, and the

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[29]

grandsons, the other two appellants, are the sons of the other. The testator also left a Burmese wife and a son and two daughters by her, and a concubine and a daughter by her, but as to these no question arises.

As has been observed, Choo Bin Lee, the Chinese wife, who survived him, had only one son, the respondent.

The testator made his will in 1897. After making a number of pecuniary bequests, he left a house at Rangoon on trust for his Burmese wife for life and after her death for her son. There was also provision by pecuniary legacies on trust for her son and her daughters. He made bequests of other houses for his daughters and their children after them. The house where he lived at Rangoon he left in trust during a period of twenty-one years, for the benefit of his surviving Chinese wife for life and his sons and their families. At the end of the period of twenty-one years this house was to go into his residuary estate. He then, and subject to these provisions, by Clause 28 and subsequent clauses of his will, left all his houses and lands on trust to take the rents and accumulate a fifth part of them, and as to the other four-fifths parts, to divide these into sixths and apply them for the benefit of his sons whom he named and their sons and daughters and the wife and sons of another son for whom he made no provision in his will excepting one that was nominal. By Clause 32 he directed that at the termination of this period of twenty-one years the property so given on trust was to be converted into money and the net proceeds divided

> . . . "into the same number of shares as the number of my sons by the said Choo Bin Lee who shall be then living or shall have died leaving sons then living. I direct that one of the said shares shall be given to each of my sons by the said Choo Bin Lee (other than Choa Giang Wee) then living and to the sons then living of any such other then deceased son of mine by the said Choo Bin Lee, but so that the sons of any such then deceased son shall take equally between them only the share which their parent would have taken had he then been living."

It has been argued before their Lordships that this will, which was drawn up by an English solicitor in Singapore, indicates a serious misapprehension by the draftsman of the testator's family relationships, and it is said that on the face of the will it is evident that the testator must have thought that he was signing a will giving an interest to several of his sons, instead of solely to the respondent, the only son of Choo Bin Lee. It is pointed out that the draftsman appears to have thought that Choa Giang Wee, the son who is excluded from benefit, was the son of that wife, instead of, as was the case, the son of the other Chinese wife, who had predeceased the testator. It is said that the testator presumably did not know English sufficiently well to be able to check the descriptions of his beneficiaries in the draft, and that the mistakes in its expressions indicate sufficiently clearly that the testator intended to include all his sons (other

than the one excluded by name), whether they were the sons of Choo Bin Lee or not. But their Lordships consider that, even if a plausible argument could be maintained in support of this contention, its basis is swept away by a codicil to his will which the testator executed in 1900. The English solicitor, who prepared both, may have misapprehended his instructions in 1897 when the will was made. But it cannot be presumed that on the second occasion when there was an elaborate revision there was a second misapprehension. In the codicil which he drew up for him in 1900 there is no ambiguity. In this codicil, after modifying and amplifying various provisions made in the original will, the testator says :

> " I hereby revoke the 28th, 29th, 30th, 31st and 32nd clauses of my said will, and declare that my said will shall be read and construed as if the words in the clauses hereinafter set out and numbered or distinguished as A, B, C, D and E, had been substituted therefor."

By Clause E of the codicil the testator directs that at the termination of the period of twenty-one years the net proceeds of the lands and houses and furniture which he has directed to be converted shall be divided

> . . . " into the same number of shares as is the number at the period appointed for such distribution of my sons by the said Choo Bin Lee who shall then be living or shall have died leaving sons then living. I direct that one of the said shares shall be given to each of my sons by the said Choo Bin Lee then living and to the son then living of any such other deceased son of mine by the said Choo Bin Lee."

but only *per stirpes*.

Their Lordships cannot discover any ambiguity in the direction just quoted, which is substituted for the revoked Clause 32 of the original will. Nor do they think that even if the old Clause 32 was shown to have been adopted under a misapprehension it would be admissible to read it in conjunction with the new Clause E substituted for it by the codicil as modifying the literal language of the testator in the latter. When a provision in a will has been clearly revoked it has ceased to be indicative by the law of England, which applies here, of the testator's intention. Probate is sometimes granted of a series of documents the later ones of which may alter or revoke the earlier ; that is in order that the mutual implications and the sequence of the set of testamentary documents may be complete. But when a provision has once been clearly revoked it cannot, even when admitted to probate, be resorted to as expressing the testator's intention for any purpose. In the codicil before them their Lordships find a complete revocation distinctly made. It was argued that there is an ambiguity in the codicil occasioned by the reference to Choo Bin Lee as the mother of the testator's sons, whereas he had only one by her ; but the answer is that he might have been thinking of a possible posthumous son. About the ideas that may have entered his mind their Lordships

are not at liberty to speculate. There is no ambiguity in the words he has used. They are quite distinct. It is only by referring back to the language of the original will that any foundation could be laid for suggesting that he did not understand what he was saying when for the second time he made an elaborate disposition of his property among the members of his family. Such a mode of approach is not legitimate. The ambiguity must be apparent on the face of the will before evidence can be resorted to for its explanation, and here there is no mistake or ambiguity excepting that suggested, if it be suggested, by a document which is no longer admissible as evidence of the testator's intention.

Mr. Justice Barrett-Lennard, who tried the case in the Supreme Court at Singapore, thought that he could look at Clause 32 of the original will as indicating that the testator used the words " sons by Choo Bin Lee " in an unnatural sense, and that this was due to his English solicitor not having understood his instructions if he gave them in Malay or imperfect English. He therefore decided in favour of the appellants. For the reasons they have indicated there Lordships think that this was a wrong decision. The Court of Appeal at Singapore reversed it for reasons with which their Lordships agree.

Their Lordships will humbly advise His Majesty that this appeal should accordingly be dismissed, and they think that the dismissal must be with costs.

In the Privy Council.

CHOA ENG WAN AND OTHERS

v.

CHOA GIANG TEE.

DELIVERED BY VISCOUNT HALDANE.

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