Privy Council Appeal No. 2 *of* 1925.

Khoo Hooi Leong - - - - - - - *Appellant*

v.

Khoo Hean Kwee - - - - - - - *Respondent*

Privy Council Appeal No. 123 *of* 1925.

Khoo Hooi Leong - - - - - - - *Appellant*

v.

Khoo Hean Kwee - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS (PENANG).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 23RD MARCH, 1926.

Present at the Hearing:

VISCOUNT HALDANE.
LORD WRENBURY.
LORD PHILLIMORE.

[*Delivered by* LORD PHILLIMORE.]

These two appeals are from orders made in the course of the administration of the trusts of a settlement of real estate made by Khoo Thean Tek, a wealthy inhabitant of Chinese race, living in Penang.

The settlor executed three settlements of immovable property, all dated the 8th December, 1888, all of them creating a life estate in himself and then disposing of the property after his death, and he made a will on the following 29th April, devising such of his real estate as was not already settled, and bequeathing his personal estate.

One of the settlements was held to be wholly void as providing for superstitious uses or perpetuities not charitable, and in the second settlement called the Boon Eow Tong, one clause was held invalid for similar reasons.

This latter settlement is only important as illustrating some points in connection with the settlor's family and his mode of describing his various descendants.

The principal question raised concerning the construction of the third settlement was the number of shares into which the property, after the expiry of various life interests was to be divided.

The settlor died on the 8th April, 1890, and the summons in this case was taken out on the 5th October, 1923.

The settlor had a son by his first wife, named Kang, who predeceased him without male issue, but leaving two adopted sons, Tean and Tuan. After that wife's death he married again, and by his second wife he had two sons, one of them named Yeam, sometimes spelt Eam, who survived him, and another son, Chin, who predeceased him, also dying without male issue, but having adopted a son, Kwee, who at the date of the administration summons was trustee of the real estate settlement. He took out the summons and made the leading affidavit giving the general facts of the case.

The settlor had in addition to his principal wife two or more secondary wives or concubines, by one of whom he had a son, Yang or Yeang, and by the other a son, Eng. Whether he had a third concubine in a similar position, and whether by that concubine he had a son who was the appellant's father, and what title such a son would have to share in the proceeds of the settled real estate, are the questions now to be considered.

The position of a concubine or mistress—this latter phrase is used by the settlor—or secondary wife under Chinese law and custom is peculiar and a little difficult for a Christian and western mind to grasp. It is said that for a long time such a union was considered as carrying with it no legal consequences, and that the children were deemed frankly illegitimate throughout the Straits Settlements. But in the *Six Widows* case the Supreme Court of the Straits Settlements decided in the year 1888 that a " t'sip " or secondary wife is entitled to take a widow's share in the estate of her deceased husband she being equivalent for this purpose with a " t'sai " or principal wife ; and following this doctrine to its logical conclusion, the same Court held that the children of a " t'sip " were entitled to inherit equally with the children of a " t'sai." In a later case the same Court decided that no form of marriage ceremony was necessary for creating the position of a " t'sip," and an appeal having been taken to His Majesty in Council, this Board advised that the judgment should be affirmed, thereby also inferentially affirming the previous judgment. This case is reported as *Cheang Thye Phin* v. *Tan Ah Loy* (1920 A.C. 369).

When this administration summons came to be heard, advocates appeared for the trustee and for the various parties interested with one exception, that of the present appellant, who was the son of one, Tee. Now Tee was a son of the settlor, and though not mentioned by name in the deed was described by him in his will as "begotten of a Christian woman." The Judge before whom the case was heard, Sproule J., decided that the appellant ought to be represented, and there and then made an order that a Mr. de Buriatte—a professional man holding a position in the firm of Presgrave & Matthews, who were solicitors for the trustee, though not actually having the rank of a partner—should represent the appellant. It was not altogether a fortunate choice, as will appear when the second appeal has to be considered.

However, on this occasion Mr. de Buriatte had only the task of arguing upon the construction of the deed and the possibility of introducing the will as throwing light upon the deed, and he performed his task with such success as to obtain judgment from Sproule J. in his client's favour declaring him entitled to one-sixth of the proceeds of the real estate.

Sproule J. importing into the construction of the deed the language of the will decided that the appellant's father took a share as a son of the settlor, whether legitimate or not. He further directed an enquiry as to his legitimacy.

From the order of Sproule J. in so far as it decided that the appellant's father was entitled to be considered as a son whether legitimate or not, appeal was taken to the Supreme Court, which reversed this part of Sproule J.'s decision, and decided that the property should not be divided into six shares unless the appellant's father was a legitimate son. Otherwise it was to be divisible into five, and Tee, the appellant's father, was to be deemed excluded.

It is from this order that the first appeal is brought.

By the terms of the settlement the property was conveyed to trustees.

> "Upon trust to hold the same during the joint lives of Khoo Hun Yeang, Khoo Hun Eam, Khoo Hun Eng, Khoo Ngay Tuan, Khoo Ngay Tean, and Khoo Heng Quee now living and the life of the survivor of them and a term of twenty-one years (21) from the death of the survivor and during such period as hereinafter mentioned to manage and let the same . . . And upon trust in the first place to pay such rents and annual income to me the said Khoo Thean Tek during my life and after my decease upon trust thereout in the first place to defray the expenses of such management . . . . And then upon trust to pay and discharge the several bequests legacies and allowances made by my last will and testament (in case my personal estate shall prove insufficient for the purpose). And upon trust for the period of twenty-one (21) years from my decease to accumulate and invest the surplus income . . . with the trustees for the time being of the Boon San Tong Kongsee upon the promissory note of the said trustees of such Kongsee. . . . And upon trust as to the income of my said trust property on the expiration of the said period of twenty-one (21) years and until the final vesting of my trust estate itself (as part from the income) in the beneficiaries hereinafter provided for to pay the income of such property

and accumulations which shall remain after providing for the expenditure hereinbefore referred to equally yearly between my sons and grandsons including in such designation the adopted sons of my sons Khoo Hung Kang and Khoo Heng Chin, namely, Khoo Ngay Tuan, Khoo Ngay Tean and Khoo Heng Quee such division to be made per stirps (according to the number of my sons) and not per capita and upon further trust with regard to the corpus of the said trust estate the houses and premises aforesaid and the accumulations thereof and the investments of such accumulations at the expiration of the period of twenty-one (21) years hereinbefore created after the decease of the survivor of them the said Khoo Hun Yean, Khoo Hun Eam, Khoo Hun Eng, Khoo Ngay Tuan, Khoo Ngay Tean, and Khoo Heng Quee to sell and dispose of my said houses buildings and plantations in such manner as in their discretion they shall deem best . . . and to get in such accumulations and investments and to divide the proceeds of such realisation and calling in hereinafter called my trust fund amongst my sons and grandsons including among them the adopted children of my sons Khoo Hung Kang and Khoo Heng Chin now deceased named respectively : Khoo Ngay Tuan, Khoo Ngay Tean and Khoo Heng Quee equally and so that my sons and grandsons aforesaid shall take per stirps and not per capita being one share apiece to each of my sons . . . And I direct that if either of my said trustees shall die or be desirous of being discharged or become incapable to act in the trust of these presents it shall be lawful for the said trustees or if only one then for such one trustee to appoint any person or persons from amongst my sons namely Khoo Hung Yeang, Khoo Hun Eam and Khoo Hun Eng and grandsons namely Khoo Ngay Tuan, Khoo Ngay Tean, and Khoo Heng Quee to be a trustee or trustees. . . . . ."

In the Boon Eow Tong settlement the persons mentioned are "my sons, namely, Yang, Yean and Eng, and my grandsons, namely, Tuan, Tean and Kwee," Yang and Eng being his children by concubines, and the so-called grandsons being the adopted sons of sons.

In neither of these documents is there any mention of the appellant's father Tee, but in the will his name occurs. In the eighth clause direction is given for the sale of the testator's sugar-cane and coco-nut plantations and other landed property, excepting the tin mines. And the proceeds are to be applied as follows :—

" Firstly to pay the income and interest of a sum of ($20,000) to my wife, Ooee Keok Neoh, for the use and education of my adopted son, Khoo Hung Boh, during his minority and after the expiration of which period, to pay the said sum of twenty thousand dollars ($20,000) to him absolutely. Secondly to pay the income or interest of twenty thousand dollars ($20,000) to Khoo Hun Tee (a son begotten by a Christian woman) for the use and education of his son named Khoo Hooi Leong during his minority, and on the completion of which period to pay the said sum of twenty thousand dollars ($20,000) to the said Khoo Hooi Leong absolutely, subject expressly to my wish that he the said Khoo Hooi Leong be brought up in my own religion and upon attaining his majority shall himself declare that he adopts the same and, if otherwise, he shall not be entitled to receive such legacy, and in which event such legacy shall lapse into my residuary estate. Thirdly, to pay the income or interest of the rest and residue of the funds and moneys realised from my said mercantile firms and from the said sugar-cane and coco-nut plantations, and the lands and houses in Native States aforesaid

unto eighteen shares, namely, four (4) shares to my son Khoo Hun Yeang, four (4) shares to my son Khoo Hun Eam, four (4) shares to my son Khoo Hun Eng, two (2) shares to my grandson Khoo Ngay Tuan, two (2) shares to my grandson Khoo Ngay Tean and two (2) shares to my grandson Khoo Heng Quee."

The twentieth clause, relating to the settlor's tin mines, contains this paragraph :—

"In the event of a sale being effected of the said property I will and direct further that the proceeds thereof shall be divided and apportioned into eighteen (18) equal shares between my sons and grandsons, namely, my son Khoo Hun Tee (begotten by a Christian woman), six (6) shares, Khoo Hun Yang (2) two shares, Khoo Hun Eam (2) two shares, Khoo Hun Eng (2) two shares, Khoo Ngay Tuan (2) two shares, Khoo Ngay Tean (2) two shares, and Khoo Heng Quee (2) two shares. And I declare that the money so realised shall not be paid to the above-named beneficiaries or their respective heirs till the expiration of twenty-one (21) years after my death."

By the twenty-first clause the trustees are:

"To divide and apportion the rest of such residuary estate on my son Khoo Hun Eng attaining his majority between my sons and grandsons, namely, Khoo Hun Yeang, Khoo Hun Eam, Khoo Hun Eng, Khoo Ngay Tuan, Khoo Ngay Tean and Khoo Heng Quee in six (6) equal shares, and in the meantime to invest the same in manner hereinbefore provided."

All the parties to the proceedings except the present appellant asserted that Tee's mother had not the rank of a concubine, and that Tee was not legitimate in the sense in which children in the *Six Widows* case were declared to be legitimate, and that consequently Tee was not included in the expression "my sons and grandsons" used by the settlor to designate the objects of his bounty.

On the other hand it occurred to Sproule J. that in the will Tee was described as a son, though with the curious qualification occurring twice over "begotten by a Christian woman"; and as a result of the argument he held that he could consider the will which referred to the previous deeds and the three deeds as all constituting one transaction by which the settlor dispersed of his property after his death, and that the will showed that Tek (to use a phrase which has been adopted in several of the decided cases), "had made his own dictionary," and when he used the word son meant to include any natural son, legitimate or illegitimate; and he decided as already stated.

The answer to this argument is that the will, dated three months or more after the deed, cannot be used as a dictionary for the deed; that there is no ambiguity in the deed; that when the settlor intended to treat adopted grandsons as grandsons or the sons of concubines as sons, he has always added their names —the language of the clauses running "my sons and grandsons including . . . ." Then follow the names. Or, "amongst my sons, namely," so and so "and grandsons namely," so and so.

Their Lordships think that the view of the Court of Appeal was right, and that the will could not be used to construe the deed.

But then it is said that if the will be put aside still it would be possible for the appellant to use the dictionary argument by showing that the settlor constantly referred to Tee as his son, and that if the appellant had been properly served with a summons and had had the opportunity of instructing his own advocate he might have been able to bring materials before the Court which would have shown that when the settlor used the word " son " he must have meant to include the appellant's father.

The possible prejudice to the appellant owing to his not having the chance of properly instructing counsel will be dealt with when the second appeal comes under consideration. But for the reasons which are about to be given it does not enter into this stage of the case.

It is right in construing such a document as a settlement or a will that the Court should put itself into the position of the settlor or the testator and construe his language according to his knowledge. But this does not mean that the Court is to look anywhere for the intentions of a settlor except to the terms of the document itself. In these matters the caution administered by Kay LJ. in the case of *re Fish* (1894 2 Ch. p. 83) must always be borne in mind, and the Court must be on its guard against letting in extrinsic evidence of what the settlor intended under the guise of evidence as to the circumstances existing when he made the settlement.

Among the number of cases which deal with this question the most striking authorities are *Hill* v. *Crook* (L.R. 6 H. of L., p. 265), *Dorin* v. *Dorin* (L.R. 7 H.L., p. 560), *re Fish* (which has just been cited), and *re Pearce* (1914, 1 Ch., p. 254).

According to the principles laid down in these cases where there is a gift to a class there is a *prima facie* interpretation of words denoting descent or relationship which holds the field until it is displaced. So says Lord Cairns. Children as such means legitimate children as if the word legitimate were put before it, says Lord Hatherley; and any evidence *de hors* the instrument itself to show that the settlor must have meant to use ordinary words of the English language otherwise than in their usual meaning, cannot be admitted.

If Tee, the father of the appellant. Leong, was not a legitimate son, even in the extended sense in which legitimacy can be predicated of the son of a concubine, evidence that his father treated him as legitimate or called him legitimate, will not be admissible to introduce him into the class of sons and grandsons mentioned in the deed.

The decree of the Court of Appeal therefore, which varied the judgment of Sproule J. was right. Leong will not be entitled to a sixth share of the settled property unless his father was in the sense already mentioned legitimate (for which purpose the enquiry was properly directed) and the first appeal fails.

The second appeal is governed by different considerations. After the case had been argued before Sproule J., Messrs. Presgrave & Matthews wrote to the appellant stating what had taken place, promising to write and inform him of the result, but adding: "We wish you to appreciate that from your point of view the issue is a very doubtful one by reason of the fact that your late father's name is nowhere mentioned in the real estate settlement which is the case with the other sons."

Later on Messrs. Presgrave & Matthews seemed to have requested the appellant to call at their offices, which he did on the 11th January, 1924, when they told him of the expected hearing of the appeal from the first decree and suggested that their partner, Mr. Terrell, should be briefed as an additional counsel for him with Mr. de Buriatte. To this the appellant, after he had endeavoured to get an independent counsel, consented.

Though it is not quite certain in which capacity Messrs. Presgrave & Matthews wrote the letter of the 13th November, it would appear that at this and subsequent interviews they considered themselves as acting for the appellant or for Mr. de Buriatte, who was representing the interests of the appellant.

But the appellant says that this did not occur to him, and, moreover, that he did not know that the whole of these proceedings had been launched by an affidavit of his opponent Kwee, which purported to exclude him from any share, and that this had been filed by Messrs. Presgrave & Matthews, who had taken out the summons. He says that if he had known of this affidavit, he would never have consented to Messrs. Presgrave & Matthews acting for him.

The appellant agrees that on the 29th May, 1924, after the first decision of the Court of Appeal, he did receive a letter from Messrs. Presgrave & Matthews informing him of the unfavourable result, and saying that the enquiry was proceeding before the Registrar, and requesting him to say whether he was prepared to bring forward any evidence that his father was legitimate, and another letter informing him that the 5th June, 1924, had been fixed for the enquiry.

The appellant says that before the adjourned hearing he suggested to Mr. Terrell that the records of the family kept in the ancestral temple should be put in evidence. It appears that the gentleman he saw on this occasion was not Mr. Terrell but another partner, Mr. Palgrave Simpson. There is some conflict as to the exact information that the appellant gave to Mr. Palgrave Simpson, and as to the further information which he gave Mr. Terrell on the day of the hearing of the enquiry. But it is clear that on one or other or both occasions he mentioned two records on which he wished to reply, one being the inscription on Tek's tomb, and the other being something which Mr. Terrell calls a "genealogical tree." It is also clear that Mr. Terrell had told him—if Mr. Simpson had not told him—already that these

records would be useless, Mr. Terrell's point of view being that as the grandmother was Christian she could not be " t'sip " or confer rights of quasi-legitimacy upon her son. The firm of Messrs. Presgrave & Matthews seemed to have been obsessed by this idea, which accounts for their action or inaction.

When the enquiry came on Mr. Terrell either pressed upon the appellant to offer no evidence, or told him that it was useless for him to offer evidence, and eventually got a permission to state that he proposed to offer none.

The result was that all the Registrar had before him was the original affidavit of Kwee and a second affidavit of Kwee's dated the 13th February, 1924, in which he professed to have consulted the family tree kept at the estate office, and the Sin Chu tablet also kept there, and to give the contents, and in which he omits all mention of the appellant or of the documents or parts of documents on which the appellant relies.

Not unnaturally the Registrar with these materials took the view that if the appellant offered no evidence his duty was to find that the appellant's father was not a legitimate son, and he so certified on the 6th June, 1924.

On the 13th June, upon an application by way of summons made by Mr. de Buriatte, the appellant was substituted for him to represent the estate of his father and his own.

Thereupon he employed another solicitor, who prepared for him a petition for leave to appeal to His Majesty in Council, and who, as it is said for the first time, became aware in the month of October, 1924, of the Registrar's certificate of the 6th June, and thereupon took out on the 21st October a summons to discharge or vary the Registrar's certificate so far as it dealt with the legitimacy of the appellant's father.

This was heard by Whitney J., who dismissed the application. It then came by way of appeal to the Supreme Court, who confirmed this decision; and it is from this confirmation that the present second appeal has been brought.

In his affidavit in support of the summons to vary, the appellant relied upon certain other matters and records as supporting his claim, and these seem at any rate worthy of some consideration.

The Registrar's certificate had become binding on the 21st June; but section 1004 of the Civil Procedure Code enables the Court to discharge or vary it if the special circumstances of the case require.

It was urged on behalf of the respondent that this power was a discretionary one, and that this Board will be very unwilling to interfere on a question of discretion. This is certainly so. But the Courts below have explained the reasons on which they proceeded; and upon the whole their Lordships think that they are not adequate.

The delay in taking out the summons was explained. Owing to the unfortunate double position in which Messrs. Presgrave & Matthews, and the various people in their office were placed,

the appellant was for some purposes *inops consilii*. He resided at Kuala Lumpur, some hundreds of miles away on the mainland in one of the protected Malay States.

Then the Courts went on the absence of evidence. But the appellant asked for an opportunity to collect and give that evidence, and he made the point that his opponent had given an incomplete extract of the documents on which he relied. The Judges said that the appellant had all the evidence before him when he instructed his counsel on his enquiry before the Registrar. But if he had (which is not certain), his counsel had brushed it aside; and, though there are occasions when a litigant must suffer for the mistakes of his advocate, considering the way in which this advocate was selected for him and not by him, and the other interests which he represented, the appellant ought to be allowed if he has a genuine case still to make it.

Lastly, just as the legal advisers were obsessed with the opinion that the appellant's grandmother was said to be a Christian, as conclusive that she could not be a "t'sip," so the judges in the Court of Appeal seem to express themselves as if this was either an absolute or nearly an absolute bar to the appellant's claim.

Their Lordships think that this view requires reconsideration. To begin with, as counsel for the appellant pointed out, the fact that the woman was a Christian at the date of the deed does not make it certain that she was one when the child was procreated. But there are other considerations. The learned judges seem to have taken the view that as the lady was a Christian the Chinese law of marriage would not apply, and that as the union was polygamous the Christian Marriage Act would not apply.

But it is to be remembered that this is a special kind of union. As the Supreme Court decided, and as this Board decided in the case already mentioned, there need be no ceremony. If consent is enough it is not easy to see why a Christian woman should be held incapable of consent. True her religion forbids a polygamous union, but it also prohibits illicit co-habitation. No question of the law of the Straits Settlements as to Christian marriages arises.

If the woman be free to contract marriage, *soluta*, and the man according to his personal law is also free, *solutus*, and the particular class of marriage or union is in the abstract recognised by the law of the land, it may well be that the religious obstacle is no bar.

There are further considerations. In deciding upon a case where the customs and the laws are so different from British ideas a court may do well to recollect that it is a possible jural conception that a child may be legitimate though its parents were not and could not be legitimately married.

This principle was admitted by the canon law which governed Western Continental Europe till about a century ago and governed still later, if it does not govern still, the countries of Spanish America (*see* Esmein, "Le Mariage en Droit Canonique," tit. 3 Ch. 1, Sect. 2).

It is also a possible jural conception that a father may legitimate or procure the legitimation of his natural child by a *soluta*, even if he were himself not *solutus*. Legitimation *per rescriptum principis* became at one time almost a matter of routine in Mediterranean countries. An example may be found in the Maltese case of *Gera* v. *Ciantar* (12 A.C. 557 ; decided in 1887).

Their Lordships are conscious that the appellant will, notwithstanding these considerations find grave difficulties in establishing his case. It is doubtful whether he knows the name of his father's mother. The person apparently suggested may have been mother only by adoption and not by procreation.

But their Lordships think that he has not yet had a proper chance of laying his case before the Courts and should have that opportunity.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed : that the Registrar's certificate should be discharged, and that the enquiry as to the legitimacy of Khoo Hun Tee should proceed.

As to costs, the order of the Judge of first instance need not be disturbed, but the order of the Court of Appeal with regard to costs must be discharged, and the sum of $250 which was paid out of Court to Messrs. Presgrave & Matthews must be re-deposited, and the respondent in lieu will be allowed to take his costs of the appeal as between party and party out of the estate.

The costs of both sides in the two present appeals to His Majesty in Council (other than those already provided for by His Majesty's Order in Council of the 24th of June, 1925, and the Board's order of the 22nd October, 1925) should, in their Lordships' opinion, come out of the estate, but should be taxed as between party and party and not as between solicitor and client. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

KHOO HOOI LEONG

v.

KHOO HEAN KWEE

DELIVERED BY LORD PHILLIMORE.

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