Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Yeap Cheah Neo and others, v. Ong Cheng Neo and others, from the Supreme Court of the Straits Settlements, in its Division of Penang; delivered 28th July, 1875.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THIS is an Appeal from a Decree of the Supreme Court of the Straits Settlements (Division of Penang), in a suit in Equity, brought by the first Respondent, Ong Cheng Neo, against the Appellants, the executors of the will of Oh Yeo Neo. Some of the legatees under the will were also made Defendants in the suit. The first Respondent claimed to be entitled as the half-sister and one of the next of kin of the testatrix. She did not dispute the validity of the will, but contended that the bequest of the residue and some of the specific bequests were void.

The testatrix and the parties to the suit were Chinese, dwelling in Penang, and the real property devised by the will is situated in that island.

The first question raised in the Appeal related to the right of Ong Cheng Neo to maintain the suit. It was not disputed that she and the testatrix were daughters of the same mother, Cheah Tuan Neo; but it was contended that Ong Cheng Neo was not legitimate. It appears that the testatrix was the

only child of Cheah Tuan Neo, by her husband Oh Wee Kee, who died in 1806. It is said that in 1809 the widow, Cheah Tuan Neo, married Ong Sai, and that the Respondent, Ong Cheng Nao, and a deceased sister, were the offspring of that marriage. The Appellants do not deny that the widow and Ong Sai cohabited from 1809 until Ong Sai's death in 1811 or 1812, but they dispute the alleged marriage. A great deal of evidence was gone into upon the question, to which their Lordships do not think it necessary to advert in detail, since they are perfectly satisfied with the conclusion at which the learned Judge below has arrived, viz., that the marriage was established.

It was not disputed that Ong Sai and Cheah Tuan Neo lived together as man and wife, and were so treated by their family and friends, nor that the Plaintiff and her deceased sister were regarded and treated as legitimate children. So much was this the case that the testatrix herself had allowed her sister, Ong Cheng Neo, to take out administration to the mother's effects. In addition to strong and consistent evidence of reputation, witnesses were called who were present at the marriage festivities; and although some of the usual ceremonies, such as the giving away of the woman, were not distinctly proved to have taken place, there is ample evidence from which, at this distance of time, the performance of them may be presumed.

The principal opposing evidence came from some members of the family, who say they were not present at any marriage ceremony, and did not know that any had occurred, and of a witness who deposed that the testatrix had spoken of the connection of her mother with Ong Sai as a shameful one. But the Judge below has expressly found that this last witness was not worthy of credit, and the evidence of the other witnesses relates to facts of a negative or inconclusive character, which the Judge rightly thought was insufficient to countervail the positive evidence of the witnesses who were present at the marriage festivities, and the presumption arising from reputation.

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.

The will in question is drawn in the style of an English will, and attested according to English law; and the main question in the suit, viz., the effect of the bequest of the residuary estate to the executors, was discussed and argued at the Bar upon the principles which govern such a bequest in an English will.

The will commences as follows:—

"Know all men by these presents that I, Oh Yeo Neo, Chinese single woman, being of sound mind, do hereby make and publish this my last will and testament.

"I am now possessed of considerable property in money, houses, lands, and so forth, and of four shops or houses in Beach Street, numbered respectively 40, 41, 42, and 43, comprised in two bills of sale, registered respectively No. 313 and 1,930, and of two Government grants for land reclaimed from the sea, and forming part and parcel of the four shops or houses just mentioned, these four shops or houses having been left by my late husband, Lim Kong Wah, who died about twenty-six years ago.

"Having no children of my own, and having every confidence in Yeap Cheah Neo, the wife of one of the partners of my late husband, named Khoo Seck Chuan, with whom I have long lived, in Koo Kay Chan, her son, in Khoo Siew Jeong Neo, her daughter, and in Lim Cheng Keat, a nephew of Lim Kong Wah, her son-in-law, I do hereby appoint them the executors of this my last will and testament, and I do hereby make over to them as such all property and effects whatsoever that may belong to me at the time of my death, but in trust always for the purposes hereinafter to be mentioned.

"1st. As my long experience tells me that nothing tends so much to the prosperity, happiness, and respectability of a family as keeping its members as much as possible together, it is my wish that the four shops or houses left by my late husband should continue to be the family house and residence of the family of Khoo Seck Chuan referred to above, and also of any part of the family of Lim Kong Wah, my late husband, now residing in China, who may visit this island, and that they shall neither be mortgaged nor sold.

"2nd. With this object in view I direct my executors, as soon after my death as possible, to lease to two of their number, named Khoo Kay Chan and Lim Cheng Keat, their heirs and assigns, the lower story of the said four houses or shops, that is to say, the whole of the shops, warehouses, and all other places in the premises now used for such purposes, or that may be added

thereto, for a period of forty years from the day of my death, at the rent of 100 dollars per month for each and every month during the said period of forty years. The upper story of these same four houses or shops to be occupied by the several members and descendants of Khoo Seck Chuan and Lim Kong Wah, as already proposed."

The testatrix then in other Clauses (numbered 3 to 14), by way of directions to her executors, makes specific dispositions of portions of her property, principally for the benefit of members of the families of Khoo Seck Chuan, and of Lim Kong Wah, her late husband.

Some of these clauses raise questions apart from the gift of the residue, which have to be decided in this Appeal.

The concluding clauses of the will are as follows:—

"15th. As regards the remainder of my real and personal property, of what kind soever, not already disposed of, I direct that my executors shall receive and collect the same from all persons whatever, and in such manner as to them may seem proper, and I direct that they, their heirs, successors, representatives, or descendants, may apply and distribute the same, all circumstances duly considered, in such manner and to such parties as to them may appear just.

"16th. It is my wish that my executors may not be interfered with in the management of my affairs, and that any one of them accepting this trust shall be competent to manage it, and that in the management thereof the wish of the majority shall prevail. I direct that if any of my executors from absence, death, or any other cause, become incompetent to act, that the continuing executors appoint other executors or trustees in his or their place and stead. It is my wish also that each of my executors shall only be liable for his own acts and intromissions, and not for those of the others of them."

It will be seen from the will that the testatrix wished to benefit the relatives of her late husband, some of whom lived in China, and also the family of her husband's partner Khoo Seck Chuan, some of the latter being her executors and trustees.

It was contended on the part of the Appellants that the residuary clause contained an express bequest to the executors in terms which imported an absolute gift to them; and a recent decision of the House of Lords (Williams *v.* Arkle) was cited to establish that in the case of such a devise the Statute of the 11th Geo. IV, and 1st Wm. IV, c. 40, had no application. Their Lordships entirely

concur in that view of the Statute; but the question of the nature and character of the bequest remains, and it has to be decided, whether, according to the proper and natural construction of the language and provisions of the will in question, regarded as a whole, the intention was to create a trust in the residue, or to make a beneficial gift of it to the executors. This question, in all cases of the kind, must be determined, as Lord Cottenham said in Ellis *v.* Selby (1 Myl. and Cr., 298), upon the construction of the language of the instrument in each particular case.

In entire accordance with Lord Cottenham's view the present Lord Chancellor, in delivering his opinion to the House of Lords in Williams *v.* Arkle, said: "Where an express devise of the residue is found, the meaning of that residuary bequest must be ascertained by the ordinary rules of construction."

In the numerous decisions which are found in the books on this subject, various matters have been relied on as indicia of intention on the one side or the other, such as the use of the words "upon trust;" the gift of specific legacies to the executors or trustees; and the mention of the executors by their proper names. Indicia of this kind, on which eminent Judges have relied, may no doubt afford in some cases useful aids to construction, but after all, they may, and often must, be modified by the provisions and language of the particular instrument to be construed.

Mr. Hemming, for the Appellants, cited what he described to be two representative cases on the subject: Morice *v.* Bishop of Durham, 10 Ves. 335, and Gibbs *v.* Rumsey, 2 Ves. and Beames 394.

He did not deny the principle laid down by Lord Eldon in Morice *v.* Bishop of Durham, that "if the testator meant to create a trust, and not to make an absolute gift; but the trust is ineffectually created, or is not expressed at all, or fails, the next of kin take." Indeed, he cited that case as a leading authority, but he contended that the present one fell within the decision of Sir W. Grant in Gibbs *v.* Rumsey, who there held that the words of a residuary clause giving the residue to the trustees and executors "to be disposed of unto such person and persons and in such manner and form, and in

such sum and sums of money as they in their discretion shall think proper and expedient" did not in the particular will before him import a trust, but an absolute gift to the trustees.

This case of Gibbs *v.* Rumsey is the authority on which the Appellant's Counsel most strongly relied, but it is to be observed with regard to it that even if the present will were not distinguishable (a question to be presently considered), Lord Cottenham certainly expressed no approval of the case in Ellis *v.* Selby, and Wood V. C., in Buckle *v.* Bristow (10 Jurist, 1,095) spoke of it as going to the verge of the law.

Coming to the will in question, it will be seen that, in the commencement, the testatrix, after appointing four executors, makes over to them "as such" all her property and effects, "but in trust always for the purposes hereinafter mentioned," words which, taken alone, indisputably impress a trust upon the whole property.

The 1st and 2nd clauses show the desire of the testatrix to keep the family together, and for this purpose she directs the executors to preserve certain houses as a family house, for the residence of the family of Khoo Seck Chuan, and of any members of her late husband's family living in China who might visit Penang; and she directs what appears to be a beneficial lease of some shops in the lower part of the houses to be granted to two of the executors for forty years.

By a further clause the testatrix directs 50,000 dollars to be given on loan to the same two executors for forty years, at 5 per cent. interest, but directs that the rents of the shops and their interest shall become part of her trust estate.

There are numerous other specific bequests, but it appears that they are far from exhausting the estate, and that a large residue will be left.

The clause disposing of this residue has been before set out at length. In trying to reach its meaning, it is to be observed that it contains no words of gift, but directions to the executors, and that they are mentioned by that title, and not by name. The first direction is to collect and receive the residue; the next, "that they, their heirs, successors, representatives, or descendants, may apply and distribute the same (all circumstances duly considered) in such

manner and to such parties as to them may appear just." These are neither usual nor apt words of absolute gift; on the contrary, they indicate an intention to impose a trust to distribute the fund among persons other than, or at all events, in addition to, themselves.

It may be inferred from the rest of the Will that the persons intended to be benefitted were the members of the families she desired to keep together. It was said that the words give an indefinite and unlimited power of disposition, and, therefore, amount to an absolute gift. But it is evident from the whole Will that this was not the intention of the testatrix, and that, on the contrary, she had in her mind throughout the desire to benefit two families, although she has failed to define her object with the requisite certainty.

That this was her real purpose, and that it was her intention to create a trust to carry it into effect, seems to be apparent both from the general frame of the Will, and its particular provisions.

Looking only to the bequests to the executors, what appears? The first bequest vests all the property in the executors "as such" and "in trust always" for the purposes thereafter mentioned. Then turning to the residuary clause, the use of words of injunction instead of those of gift or bequest, the directions given to the executors, not by name, but by the description of "my executors," the nature of these injunctions, viz., to collect the residue and distribute it, after duly considering all circumstances, to such parties as to them, their heirs, successors, &c., may seem just, and the mention of successors in relation to this duty, all negative the supposition that the testatrix intended to sever the residue from the trust with which she had clothed all her property in the hands of her executors, and to make an absolute gift of it to them as individuals.

It was said that the learned Judge of the Supreme Court laid too great stress on the inference arising from the clause relating to the management of the estate, and the appointment of new executors and trustees. Undoubtedly, in any view of this case, there were trusts to be performed, which would make such a clause pertinent; and if there had been plain words of gift to the executors, as in Williams *v.* Arkle, little weight could be attached to this

clause. It is enough for their Lordships to say of it, agreeing so far with the learned Judge below, that in their opinion, its provisions and language are more consistent with the construction they have put on this Will, than with the opposite view of it.

It will be seen from the above analysis of the Will in question, that it differs in material respects from that in Gibbs *v.* Rumsey. There, property was devised to the executors upon trust to sell and to pay certain legacies, and this was followed by a clear gift of the residue, introduced by the apt words, "I give and bequeath," to the trustees and executors, whose names were given in a parenthesis, with absolute power of disposition, and without any indication of the families or persons whom the testatrix desired to benefit. This Will, both in its frame and provisions, materially differs from that now in question.

Several cases were cited in the argument, in which various forms of expression, conferring unlimited and unconditional powers of disposition, were held to amount to absolute gifts. It is unnecessary, however, to discuss these decisions, or to consider what would be the proper construction of the discretionary power in this Will if it had been coupled with plain words of gift, uncontrolled by other parts of the Will. Their Lordships' decision, founded on the whole Will, is, that a trust was intended to be created, which has failed for want of adequate expression of it.

The Decree below has declared several of the specific bequests to be void ; and as regards three of them, the Decree is complained of in this Appeal.

These are (1) the devise of the upper story of the four shops in trust for a family residence of the families of Lim Kong Wah and Khoo Seck Chuan, which is declared to be void " for uncertainty and as infringing the rules against perpetuities ;" (2) the devise in the 11th Clause of two plantations, in trust to be reserved as a family burying place, with a prohibition against mortgaging or selling the same, which is declared void, " as infringing the rule against perpetuities ;" and (3) the devise in the 14th Clause, directing that a house, termed Sow Chong, for performing religious ceremonies to the testatrix's deceased husband and herself, should be erected, as to which the Decree declares, " that the

said trust not referring to a charitable object, is void, as infringing the rule against perpetuities."

In considering what is the law applicable to bequests of the above nature in the Straits Settlements, it is necessary to refer shortly to their history.

The first Charter relating to Penang was granted by George III, in 1807, to the East India Company. It recited that the Company had "obtained by cession from a native prince," Prince of Wales's Island, and a tract of country in the peninsula of Malacca, opposite to that Island," that when such cession was made, the Island was wholly uninhabited, but that the Company had since built a fort and a town, and that "many of our subjects and many Chinese, Malays, Indians, and other persons professing different religions, and using and having different manners, habits, customs, and persuasions, had settled there." The Charter made provision for the government of the Island, and the administration of justice there. It established a Court of Judicature, which was to exercise all the jurisdiction of the English Courts of Law and Chancery, "as far as circumstances will admit." The Court was also to exercise jurisdiction as an Ecclesiastical Court, "so far as the several religions, manners, and customs of the inhabitants will admit."

A new Charter was granted by George IV in 1826, when the Island of Singapore and the town and fort of Malacca were annexed to Prince of Wales' Island, which conferred in substance the same jurisdiction on the Court of Judicature as the former Charter had done.

The last Charter granted to the East India Company, in the year 1855, again conferred the like powers on the Court; and this jurisdiction was not altered in its fundamental conditions by the Act of the 29th and 30th Vict., c. 95, and the Order of the Queen in Council made in pursuance of it, by which the Straits Settlements were placed under the government of Her Majesty as part of the Colonial Possessions of the Crown, nor by Ordinance No. 5 of 1868, constituting the present Supreme Court.

With reference to this history, it is really immaterial to consider whether Prince of Wales' Island, or, as it is now called, Penang, should be regarded as ceded or newly settled territory, for there is no trace of any laws having been established there before it

was acquired by the East India Company. In either view the law of England must be taken to be the governing law, so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances. This would be the case in a country newly settled by subjects of the British Crown; and, in their Lordships' view, the Charters referred to, if they are to be regarded as having introduced the law of England into the Colony, contain in the words "as far as circumstances will admit," the same qualification. In applying this general principle, it has been held that statutes relating to matters and exigencies peculiar to the local condition of England, and which are not adapted to the circumstances of a particular Colony, do not become a part of its law, although the general law of England may be introduced into it. Thus it was held by Sir W. Grant that the statute of mortmain was not of force in the Island of Grenada (Attorney-General *v.* Stewart, 2 Mer. 142). The subject is discussed at large in Mayor of Lyons *v.* East India Company, 1 Moore, P. C. 175.

The learned Judge below has not, however, held the gifts in question to be void on the ground that they infringed any statute, but because they were opposed to the rule of the English law against creating perpetuities.

Their Lordships think it was rightly held by Sir P. Maxwell Benson, Chief Justice, in the case of Choah Choon Nioh *v.* Spottiswoode, reported in Wood's Oriental Cases, that whilst the English statutes relating to superstitious uses and to mortmain ought not to be imported into the law of the Colony, the rule against perpetuities was to be considered a part of it. This rule, which certainly has been recognized as existing in the law of England independently of any statute, is founded upon considerations of public policy, which seem to be as applicable to the condition of such a place as Penang as to England; viz., to prevent the mischief of making property inalienable, unless for objects which are in some way useful or beneficial to the community. It would obviously be injurious to the interests of the Island if land convenient for the purposes of trade or for the enlargement of a town or port could be dedicated to a purpose which would for ever prevent such a beneficial use of it. The law of

England has, however, made an exception, also on grounds of public policy, in favour of gifts for purposes useful and beneficial to the public, and which, in a wide sense of the term, are called charitable uses; and this exception may properly be assumed to have passed with the rule into the law of the Colony. (See Thompson *v.* Shakspear, 1 De Gex., F. and I., 399; Carne *v.* Long, 2 De Gex., F. and I., 75.)

The question then is, whether the Judge below is right in holding that the bequests in question infringed the rule, and did not fall within the exception.

The first of them, which relates to the upper story of the houses the testatrix desired to make a family house, appears to their Lordships to be void on both the grounds mentioned in the Decree. The context shows that, in using the word "family," the testatrix meant at least two families, and that she intended to include not only descendants, but other members. From other parts of the Will and from the evidence, it would seem that children had been adopted by members of the family, and, having regard to Chinese family usages, which may be properly taken into consideration in construing the Will, it is probable the testatrix meant to include some, at least, of these adopted children, but what natural and adopted members of the family she really intended to benefit is left wholly obscure and uncertain. The devise is, therefore, for that reason void. Then the expression of her desire to perpetuate the family and to keep the house for their residence, and the direction that the houses should neither be mortgaged nor sold, clearly denote an intention to create a perpetuity. Their Lordships, therefore, see no ground to disturb the Decree with regard to this devise.

The devise of the two plantations in which the graves of the family are placed, to be reserved as the family burying-place, and not to be mortgaged or sold, is plainly a devise in perpetuity. The only question is whether it can be regarded as a gift for a charitable use. The weight of authority is against a devise of this nature being so held in the case of an English Will; and the only point therefore requiring consideration can be, whether there is anything in Chinese usages with regard to the burial

of their dead, and in the arrangements for that purpose in Penang, which would render such an appropriation of land beneficial or useful to the public. It is to be observed that the extent of the plantations nowhere appears, and it may be they contain more land than would be required for the purpose of a family burial ground. In the absence of any information respecting usages of the kind adverted to, and of the extent of these plantations, their Lordships feel unable to say that the Decree on this point is wrong.

The remaining devise to be considered is the dedication by the testatrix of the Sow Chong House for the performance of religious ceremonies to her late husband and to herself. It appears to be the usage in China to erect a monumental tablet to the dead in a house of this kind, and for the family at certain periods in every year to place, with certain ceremomies, food before the tablet, the savour of which is supposed to gratify the spirits of their deceased relatives. This usage, with the accompanying ceremonies, is minutely described by Sir P. Benson Maxwell, in his judgment in the case of Choa Choon Nioh *v.* Spottiswoode.

Although it certainly appears that the performance of these ceremonies is considered by the Chinese to be a pious duty, it is one which does not seem to fall within any definition of a charitable duty or use. The observance of it can lead to no public advantage, and can benefit or solace only the family itself. The dedication of this Sow Chong House bears a close analogy to gifts to priests for masses for the dead. Such a gift by a Roman Catholic widow of property for masses for the repose of her deceased husband's soul and her own, was held, in West *v.* Shuttleworth, 2 Myl., and Keene, 684, not to be a charitable use, and although not coming within the statute relating to superstitious uses, to be void. The learned Judge was therefore right in holding that the devise, being in perpetuity, was not protected by its being for a charitable use. It is to be observed that in this respect a pious Chinese is in precisely the same condition as a Roman Catholic who has devised property for masses for the dead, or as the Christian of any church who may have devised property to maintain the tombs of deceased relatives. (See Richard *v.* Robson, 31 L. J. Ch. 896,

and Hoare *v.* Osborne, L. R. 1 Eq. 585.) All are alike forbidden on grounds of public policy to dedicate lands in perpetuity to such objects.

Their Lordships' decision on the bequest they have last considered accords with the Judgment of Sir P. Benson Maxwell in the case already referred to. It appears to them that in that Judgment the rules of English law, and the degree in which, in cases of this kind, regard should be had to the habits and usages of the various people residing in the Colony are correctly stated.

It remains to be observed that this Appeal has been heard upon special leave granted by their Lordships after leave to appeal had been refused by the Supreme Court of the Colony. This refusal proceeded upon the opinion of the Court that the power of appeal to Her Majesty and the authority of the Court to grant leave to do so contained in the Letters Patent of the Queen of the 10th August, 1855, were abrogated by Ordinance No. 5 of 1868, establishing the present Supreme Court.

It was admitted by the learned Counsel for the Respondents that they could not uphold this decision; and upon referring to the Ordinance, their Lordships think the Supreme Court misconceived its effect. It is true that the Ordinance enacts, in the 1st section, that the Court of Judicature established under the Letters-Patent above referred to, is thereby abolished; and that the Letters-Patent shall cease to have any operation in the Colony. But the 4th section enacts, that all provisions of Acts of the Imperial Parliament, Orders of Her Majesty in Council, Letters-Patent, &c., in force in the Colony when the Ordinance came into operation, and which are applicable to the Court of Judicature (*i.e.*, the Court abolished by the Ordinance), or to the Judges thereof, shall be taken to be applicable to the Supreme Court (*i.e.*, the Court established by the Ordinance), and to the Judges thereof. The effect of these enactments, taken together, is that whilst the repealed Letters-Patent ceased to have any operation of their own, all the provisions contained in them applicable to the old Court were virtually re-enacted and made applicable to the new Court which was put in its place, as effectually as if they had been repeated at length in the Ordinance.

The other parts of section 4 and section 30 are entirely consistent with this interpretation.

In the result, their Lordships will humbly advise Her Majesty to dismiss the Appeal, and affirm the Decree of the Supreme Court. But, considering that the questions involved in the suit are novel, and in some respects of the first impression, that the litigation has arisen mainly in consequence of the obscure and uncertain manner in which the testatrix has expressed her wishes, and that the executors were thereby placed in difficulty with respect to many of the bequests of her Will, they will make no order as to costs.

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