

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Khoo Sit Hoh and others v. Lim Thean
Tong, from the Supreme Court of the Straits
Settlements (Settlement of Penang); delivered
the 23rd January 1912.*

PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD MERSEY.

LORD ROBSON.

[DELIVERED BY LORD ROBSON.]

The Defendants are appealing from a judgment of the Court of Appeal of the Supreme Court of the Straits Settlements (Settlement of Penang) which (by a majority, the Chief Justice dissenting) reversed the judgment of Mr. Justice Thornton. The Court of Appeal has declared that the Respondent's mother, Khoo Toon Neoh, was the natural daughter, born in wedlock, of one Boon Peh (hereinafter called "the testator"), so that the Respondent is entitled, as one of the testator's next-of-kin, to maintain an action for the administration of the estate, and to share in the considerable property of which the testator died possessed, but which was not disposed of by his will. The contention of the Appellants is that Khoo Toon Neoh was only an adopted daughter of the testator and so not one of the next-of-kin.

The case was tried before the Judge alone ;
it turned entirely on questions of fact, and there

was plain perjury on one side or the other. Their Lordships' Board are therefore called upon, as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard, or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned Trial Judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the Courts who deal with later stages of the case. Moreover, in cases like the present, where those Courts have only his note of the evidence to work upon, there are many points which, owing to the brevity of the note, may appear to have been imperfectly or ambiguously dealt with in the evidence, and yet were elucidated to the Judge's satisfaction at the trial, either by his own questions or by the explanations of Counsel given in presence of the parties. Of course, it may be that in deciding between witnesses he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a Trial Judge based on verbal testimony.

Khoo Boon Peh, the testator, was a Chinaman who had come to Penang in or about the year 1888, and had since carried on an extensive business there as a money-lender and pawnbroker. While still in China he had twice been married, viz., in the year 1869 to Yeoh Quah

Neoh, who died within a year leaving no issue, and next, on the 26th March 1871, to Quah Sooi Neoh. By his second wife the testator had four sons, Sit Hup, Sit Hoh, Choon Hean, and Chin Tek. Sit Hup died about 1889, leaving a son Heng Kip. There were also at least three adopted sons, viz., Sit Cheang, Sit Hum, and Choon Soo. Sit Ham predeceased the testator about 1904, leaving a son, Sin Kee. As to the alleged daughter, Khoo Toon Neoh, the Respondent's case was that she was the testator's eldest child, while the Appellants say that she was the daughter of a nurse called in to attend on Quah Sooi Neoh upon the birth of her second son, Sit Hoh, in the year 1873 or 1874.

Quah Sooi Neoh, the wife of the testator, died at Penang on the 20th July 1906, and Khoo Toon Neoh, the alleged adopted daughter, died also at Penang in the year 1897 or 1898, leaving as her only child the present Plaintiff.

The testator duly made his will on the 27th November 1906, and at the same time had a partnership deed prepared, which was executed on the following day, whereby he declared that his said business was a partnership, whereof the capital belonged in the shares specified to his three surviving sons before mentioned; to an illegitimate son, Sean Leang (? or Tiang Liong), and to two of his adopted sons, Sit Cheang and Sit Hum, leaving shares amounting to \$30,000 belonging to himself. His will purported to deal only with that \$30,000, which he declared to be all the property he possessed. The partnership deed was retained by him until his death on the 7th April 1909. No dividends or interest were paid under it during his lifetime, and it seems to have been in truth a part of his testamentary arrangements. The will has an important bearing on the case. The three natural and legitimate sons are appointed exe-

cutors, and the testator goes on to make bequests of \$1,000 each to his seven named grandsons, \$700 dollars to a grandson in China, and \$300 to three granddaughters, including one whose name he cannot remember, with the whole residue to his four surviving natural sons. If the claim of the Plaintiff-Respondent is good, he was, of course, a grandson of the testator, but it is not without significance that the testator does not mention him in the will. No reason is suggested in the evidence as to why, if the Plaintiff were a natural grandson, he should have been wholly ignored in the will. A bequest is made to one grandson, Sin Kee, who was only a son of an adopted son, but his father, Sit Hum, was an active worker in the testator's business, whereas the Plaintiff's mother had been dead some years, and if he were only a grandson by adoption, the nominal tie of relationship might more easily have weakened. Anyhow, it cannot be said that the testator treated the Plaintiff quite as one would expect the son of a natural and only daughter would be treated.

The action was originally brought by the present Plaintiff, the surviving adopted sons of the testator, viz., Sit Cheang and Choon Soo together with Sin Kee (son of Sit Hum deceased), and Heng Kip. The statement of claim alleged that Sit Cheang and Sit Hum were natural sons of the testator by his first wife. The evidence on both sides shows clearly that this was untrue. The claim also alleged that Choon Soo was a natural son of the testator and his second wife. That allegation also seems to have been false. The action having been begun on the 27th August 1909 and entered for trial on the 22nd November 1909, all the Plaintiffs, other than the Respondent, settled with the Appellants and on the 12th January 1910 discontinued the action

so far as they were concerned. None of the Plaintiffs who thus discontinued gave evidence at the trial for either side.

The witnesses were not numerous. The first witness for the Plaintiff was Lim Kim Yong, the Plaintiff's father and next friend, who had married Khoo Toon Neoh in or about the year 1887, when he was 18 years old. He was a nephew of the testator and had known Khoo Toon Neoh since she was five or six years old, and he was six or seven. He had lived about a mile from her house and they had been playmates together. The wedding is described by him and also by one of the Appellants' witnesses as a "grand ceremony." About 100 persons were present at the feast in the bridegroom's house. Some stress is laid by the Court of Appeal on this and on the fact that the bridegroom's mother was present, the suggestion being that had the bride been the daughter of a nurse the husband's mother would probably have discountenanced the marriage, but that seems to be scarcely a strong enough ground for any inference one way or another. It is, however, of great importance that the husband swears that he never heard of his wife being an adopted daughter until the statement of defence. Considering that his mother was the testator's sister and must have been well acquainted with the testator's wife it is practically certain that the adoption could not take place without her, the testator's sister, hearing of it, and it is difficult to believe she would not pass the information on to her son. The learned Trial Judge, however, says that "having regard to the way in which " adopted children in China are received into the " family and treated in practically all respects as " other members of the family, it seems to me " quite possible that at the time of his marriage " and subsequently, Lim Kim Yong may never

"have known that his wife was not a natural "daughter of Khoo Boon Peh." The learned Judge is careful not to reflect adversely on the veracity of Lim Kim Yong, and this makes a strong point, and is indeed the main point, in the Respondent's favour. In 1891 or 1892 Lim Kim Yong left for Penang, and his wife followed him two or three years later. In Penang, Lim Kim Yong and the testator had business relations, and on the testator's death the executors brought an action against him for \$5,000, which he met by a counter-claim for \$8,000.

The next witness, Tian Chong, was an old man of 70 who had been a near neighbour of the testator in China. He said the testator's first child was a daughter. He saw it as a little baby two or three times, but about six months after its birth he left for Siam, where he stayed for 18 years, and then returned to China. This cannot be called very weighty evidence. The witness is not quite accurate about his dates, but putting that aside as being common to nearly all the witnesses in the case, one may be permitted to treat with some reserve the recollection of a man as to the sex of a neighbour's baby which he saw two or three times about 40 years ago.

Then comes Lim Kim Tuan, 51 years old, the elder brother of Lim Kim Yong. He remembers the testator marrying Quah Sooi Neoh, and says the first child was a girl. According to his account his mother was sent for to the confinement, and he, being then 10 years old, followed her to the house. He remembers the child's name, and saw her many times before he left for Penang, which he did when he was 19 years old.

Except for another witness, whose evidence was unimportant, this was the whole of the Plaintiff's case. Lim Kim Tuan's evidence was

direct, and, of course, if true, was conclusive, but even in his case there was, perhaps, room for mistake or confusion of memory as to the sex of an infant born so long ago, especially if a little later on, and while he was still a young boy, he became acquainted with the baby girl said to have been introduced into the family. However, this evidence, meagre though it may be, is, when considered along with Lim Kim Yong's statement that he married and lived with his wife as being the testator's natural daughter, quite sufficient to establish the Plaintiff's case, unless rebutted by clear and credible testimony.

The Defendants' case rested partly on verbal testimony and partly on documents. It is convenient first to deal with the story told by the witnesses, and then to consider the documents which are a crucial element in the case.

The Defendants, Sit Hoh and Choon Hean, said they had heard their father tell people which of the children were adopted, and that he included Khoo Toon Neoh among them.

Khoo Boon Chye (51 years old) described himself as a younger brother of the testator, though he was described in the pedigree book as an adopted son of the testator's father. He was one of six brothers and they all lived in the family house, some of them apparently with wives and children. He remembered the birth of Sit Hup, who, he says, was the first child. He also remembered the birth of Sit Hoh, and said that a nurse named Kwek attended the child. She had two sons and a daughter with her, and Quah Sooi Neoh, having no daughter of her own, asked her to let her adopt the female child. The nurse agreed, and thus Khoo Toon Neoh is said to have entered the family, being known as "Teo."

A widow named Khoo Chin Neoh (57 years

old), who was a sister-in-law of Quah Sooi Neoh, was next called. She tells the same story about the nurse and "Teo," and says that she was consulted as to the adoption and advised it. She differs from Boon Chye in describing the nurse as having two daughters and one son instead of two sons and one daughter. When these two witnesses were cross-examined as to how old they were on the various occasions of which they spoke, their recorded answers as to ages and dates did not always appear to fit in with the probable date of Sit Hoh's birth. The two learned Judges who formed the majority of the Court of Appeal animadverted very strongly on this circumstance and find in it a reason for treating these witnesses as wholly fraudulent. The Chief Justice, however, points out that the discrepancies, such as they were, were not incapable of explanation, and he draws attention to the words of the Trial Judge, who says: "There was nothing elicited in the course of the examination of the four witnesses for the defence to raise a doubt in my mind that they were speaking the truth or to suggest that they had been induced by the Defendants to come to the Court and deliberately give false evidence."

It is worthy of note that a similar discrepancy occurs in the evidence of Lim Kim Tuan, who was the mainstay of the Plaintiff's case. He says he was nine years old when the testator married again, which would put the date of his visit to her on the occasion of Khoo Toon Neoh's birth in 1869, whereas the marriage did not take place till 1871. Probably very little reliance was placed by either side at the trial on these conjectures as to dates, though their discrepancies could not fail to be observed.

The next witness was a trader, an old neighbour and friend of the testator's family. He

says Sit Hup was the eldest child and gives in detail an interview with the testator on the proposed adoption of Khoo Toon Neoh who was about three or four years old.

Then came Khoo Heng Poh who was trustee and headman of the testator's clan. His evidence is, at least, explicit and precise. He had known the testator from his youth; they were near neighbours and, like the testator, this witness had also moved from China to Penang. He remembered the birth of Sit Hup who he says was the first child; he remembered also the birth of Sit Hoh and the adoption of "Teo," and recounted what the testator told him about that event.

The learned trial Judge heard and believed this evidence as to the adoption. The Court of Appeal rejected it on the ground that the Defendants were proved to be guilty of falsehood in relation to certain documents so as to raise a reasonable suspicion that their case was wholly dishonest, and that being so, their witnesses were probably suborned, and the alleged discrepancies as to dates sufficed under such circumstances to discredit them altogether.

The Defendants at the trial produced two important documents (1) a pedigree book containing an entry of the purchase and adoption of Khoo Toon Neoh, and (2) a partnership deed in which the testator disposed of the shares in his business which constituted the greater part of his wealth.

The pedigree was said to be in the testator's handwriting, though the evidence as to this was conflicting. It contained an account of his marriages and children, distinguishing between natural children and those that were adopted. The page in dispute is headed "17th generation, "Boon Peh," and after mentioning the first marriage goes on: "Subsequently on the sixth

“ day of the second moon in the Sin Bi year
 “ (26th March 1871) re-married maiden Kua
 “ begot four sons, Sit Hap, Sit Ho, Choon
 “ Hien, and Choon Tiat: bought and adopted
 “ three sons, Sit Cheang, Sit Ham, and Choon
 “ Su; also bought one daughter who was mar-
 “ ried to the Lim family; servant girl, Mui Ah,
 “ begot one son, Tiang Liong.”

The reference to the daughter who was bought and afterwards married to the Lim family, was said by the Plaintiff's witnesses to be an interpolation after the succeeding line about the servant girl had been written. The Trial Judge himself was disposed to adopt that view. The “ interpolation ” is not an interlineation and it is not easy, on inspection, to be sure that it was inserted out of due order. The point, however, does not seem to be of great importance when it is remembered that apart from the disputed entry, the book itself is not found to be a forgery. Indeed the finding that there was a forged interpolation, impliedly affirms the pre-existence of the book as an otherwise genuine document. Mr Justice Fisher even appeals to it for corroboration on one point, and says it “ is not shown to have been tampered with here.” In this view, the silence of the pedigree book as to the birth of any daughter seems to be almost as significant as its disputed utterance about the adoption.

The main ground, however, on which the majority of the Court of Appeal have acted in rejecting the whole of the evidence given for Appellants is their conduct in the early stages of the case in regard to the disclosure of the partnership deed. That document was found with the will a few days after the testator's death, but the Appellants put forward an unsigned draft of the document as all they possessed, and it is found by the Trial Judge

that, for some time (until after they had settled with the Plaintiffs who have discontinued), acting on some fraudulent motive, they withheld the original document although they disclosed it before the trial. So far as the claim of the present Plaintiff is concerned, the partnership deed did the Defendants no harm. On the contrary, it was to some extent in their favour, as it showed a certain discrimination between the adopted and the natural sons, but the conduct of the Defendants argued strongly that they were not honest men and were presumably capable of suborning the witnesses they had called. The Trial Judge fully considered these circumstances, but nevertheless believed the Defendants' independent witnesses in preference to the witnesses called for the Plaintiff. Their Lordships, after carefully reviewing all the probabilities of the case, are not prepared to say he was wrong. Although the Plaintiff began with a *prima facie* case, he did not meet the case against him. He called no witnesses from the large family group (six brothers and their families) who lived in the family house with the testator when the eldest child of the latter was born; although in China a record of births is said to be kept by the head of the district, no attempt was made to meet the case set up by the pedigree book by showing whether there was any official record of the alleged daughter's birth, and, finally, there was the significant action of the testator himself in relation to his will and business arrangements, which were certainly not consistent with his recognition of the Plaintiff as his natural grandson.

Even without taking the pedigree book into account, these circumstances are of great cumulative effect. They go far to support the impression the Trial Judge formed as to the comparative credibility of the respective groups

of witnesses and to justify him in the conclusion at which he arrived.

Their Lordships will, therefore, humbly advise His Majesty that the judgment appealed from should be reversed and the judgment of Mr. Justice Thornton restored; each party paying their own costs of the Appeal to the Court of Appeal and no order being made as to the costs of this Appeal.

In the Privy Council.

KHOO SIT HOH AND OTHERS

v.

LIM THEAN TONG.

DELIVERED BY LORD ROBSON.

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