

*Privy Council Appeal No. 93 of 1912.*

Chuah Hooi Gnoh Neoh - - - - - *Appellant,*

*v.*

Khaw Sim Bee, since deceased - - - - - *Respondent,*

FROM

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

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 9TH MARCH 1915.

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*Present at the Hearing.*

LORD DUNEDIN.

SIR GEORGE FARWELL.

SIR ARTHUR CHANNELL.

[*Delivered by* SIR ARTHUR CHANNELL.]

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This is an Appeal from an Order of the Court of Appeal of the Supreme Court of the Straits Settlements, dated 21st August 1911, whereby it was ordered that an action brought by the Appellant in the Supreme Court should be dismissed with Costs. This Order in substance, although on different grounds, affirmed the Judgment of Mr. Justice Thornton before whom the cause had been tried so far as that Judgment related to the matters in dispute in the Court of Appeal and here, one matter dealt with in the Judgment below having been disposed of by a Cross Appeal allowed by consent.

The action was brought by the Appellant, a married woman, for the administration of the estate of one Khaw Soo Chang, her great grandfather (hereinafter called the Testator), who had died possessed of considerable property at Penang in the Straits Settlements and also at Renong in the Kingdom of Siam. By his will he directed that his business should be carried on for 16 years after his death (which took place on the 25th May 1882) and that there should then be a distribution, and he gave to one of his sons Khaw Sim Chuan the grandfather of the Appellant five-sixtieths of the residue. The will contained a clause to the effect that if any son should die in the Testator's lifetime or before the period of distribution such son's share was to go to his issue. The Appellant's grandfather did so die, and she claims through him five-sixtieths of the residue. The will is in several respects far from clear, and amongst other things the translation of the clause under which the Appellant claims her grandfather's share was in doubt, but proceedings in court were taken by originating summons before the present action, which resulted in a decision in the Appellant's favour on the construction of this clause, and it is not now disputed that she did become entitled to the five-sixtieths, of the residuary estate. This makes it unnecessary to consider further the family pedigree.

The estate of the Testator was not wound up at the end of 16 years, and so far as appears the estate at Renong has not been wound up yet, but the Penang property was in fact distributed in 1904.

The Appellant, who had been married to her present husband in December 1901, executed on the 15th January 1904 a power of attorney

whereby amongst other things she authorised her husband to represent her in all matters connected with the estate of the Testator and to execute deeds in her name. Her husband to some extent, at any rate, investigated the accounts, and ultimately on the 18th May 1904 executed a release to the executors. The estate had been divided into portions, and it had been arranged that the beneficiaries should draw lots for the order of choice of the portions.

The Appellant was fortunate enough to get first choice, and she, or her husband for her, chose a lot including a valuable hotel which she afterwards sold for considerably more than it had been valued at in the apportionment. No complaint was made by or on behalf of the Appellant as to this distribution until the 1st September 1910 (after the sale of the hotel), but the Appellant had on the 25th April 1908 commenced the present action for administration of the Testator's estate. She however then complained only of the Renong estate not having been distributed, and in her first statement of claim she alleged that the executors had duly distributed the Penang property and that a release had been executed.

On the 1st September 1910 she delivered an amended statement of claim alleging for the first time that she was under 21 years of age at the time of the execution by her of the power of attorney, and that by reason of her infancy she was not bound by it, or by the release executed on her behalf under it. She and her husband alleged that although they knew her age, they had only just discovered the legal effect of it, as there was a Chinese custom to treat a married woman who had borne a child, as the Appellant had, as being of full legal capacity whatever her

actual age. They also alleged that the husband had been induced to execute the release by misrepresentations made to him by one of the executors, and that there had been wilful misconduct and breaches of trust in the administration.

These allegations were denied by the Respondents, and the case went to trial before Thornton, J. The trial lasted nine days, and there was a large body of evidence, the effect of which, so far as now material, can be stated quite shortly. On the question of infancy the principal witness was the Appellant's grandmother, who stated that the Appellant was born on the 19th December 1885. She was present at the birth, and gave as the reason for remembering the date that it was her first and only grandchild. She seemed not very accurate in her estimates of the periods which elapsed between various events of which she spoke. In particular she spoke of one period as "several months," when if all her other statements of periods and the date of her grandchild's birth were correct, the period described as several months must have been about four years. Two so-called birthday books were produced, each of which contained an entry of the Appellant's birth at the date spoken to by the witness. The evidence showed a practice to make entries of dates of births in books more or less of this character, in order to obtain the opinion of astrologers as to good or ill fortune, but one at least of the two books was of a somewhat suspicious character, and neither seems of very great weight.

The Appellant's husband also gave evidence as to his wife's age, which obviously was in the nature of hearsay, and there was produced, and received in evidence, subject to an objection to

its admission, which does not appear to have been afterwards argued or dealt with, an affidavit by the husband sworn on the 16th August 1902, in which he stated that his wife, the Appellant, was then a minor of the age of 17 years only, which of course corresponded with the date spoken to of her birth.

There was no evidence on the other side on this point of date of the Appellant's birth, and on this Thornton, J., found that the Appellant had proved that she was an infant in 1904. He found on the evidence before him that the alleged misrepresentation was not proved, and he held that notwithstanding her infancy, no ground was shown for disturbing the distribution of the Penang property which had been made in 1904. He, however, made an Order as to the Renong property. The Appellant appealed to the Court of Appeal, and the Respondents gave notice of a Cross Appeal as to the Renong property, on the ground that the property was out of the jurisdiction of the Court and also on the merits, and the Appellant consented to the Cross Appeal being allowed.

The Court of Appeal differed from the finding of Thornton, J., as to the infancy, holding that it was not satisfactorily proved. There is no contemporaneous note of the reasons for the Judgment of the Court of Appeal, but there is a note made by one of the Judges from his recollection about a year after the Judgment was delivered. The Judges seem to have considered that the Judgment below was open to review on the question of fact on the ground, first, of wrong admission of evidence, and, secondly, because the learned Judge stated his conclusion without giving reasons in detail.

The Board have a difficulty in holding these grounds to be sufficient for setting aside the finding of the Judge who had heard the witnesses. There does not seem to have been any evidence wrongly received. The objections go rather to the weight of the evidence than to its admissibility, and the learned Judge had expressly stated that he relied little on the documents in question. The Straits Settlements Ordinance No. 3 of 1893 is identical so far at any rate as the sections material in the present case are concerned with the Indian Evidence Act, and under it the birthday books, if the parol evidence concerning them was accepted, appear clearly admissible.

The parol evidence of the Appellant's husband was also admissible under that code. The affidavit could not have been admissible as a material document if the deponent had not been called or if his parol evidence had not been admissible, but as he was called and his statement as to his wife's age was admissible for what it was worth (which, of course, was very little) he could not have been prevented from saying that he had sworn to the same date before the question now in issue arose, and that, of course, was the materiality of the affidavit. The Board have not heard Counsel for the Respondents on the question of the admissibility of evidence or on the proof of infancy generally, but if it had not been for the view they entertain on the remaining questions they must have done so, as they are not satisfied that the Court of Appeal was right in the reasons given for dismissing the Appeal to them.

Their Lordships, however, are of opinion, that assuming the fact of infancy to be proved, the Appellant failed to show sufficient ground for re-opening the settlement of the Penang

property, and in substance they agree with the Judgment of Thornton, J., on this point, which was not gone into in the Court of Appeal. There can, of course, be no ratification by the infant after coming of age of the invalid power of attorney, but the infant may have, and in their Lordships' opinion has, after coming of age, adopted the division of the property which was in fact made, and made by independent arbitrators. She had valuable property allotted to her under it, which she sold at a profit some time after she came of age, and it was only when the greater part of what she had received had been dissipated that she complained. She has been acting throughout with her husband and has not complained of his acts, and as pointed out by Thornton, J., if the infancy had been known, the husband would no doubt have been appointed guardian of his wife instead of attorney, and as guardian would have acted exactly as he did as attorney.

It is impossible now for the Appellant to restore the property she has received, and a general redistribution of the property divided could not possibly be ordered. In fact the Appellant's Counsel did not argue strongly for a general administration, but pressed this Board to make an Order that the executors should account for profits they had made by carrying on the Testator's business under the name of a company, or that they should be charged with some sum which in fact they had never received, for the goodwill of the business taken over by the company. Taking the translation which is on the record of the will of the Testator, a doubt arises as to whether the strict carrying out of the Testator's directions in the 4th clause to "stop" the Penang business, and specifically divide the assets,

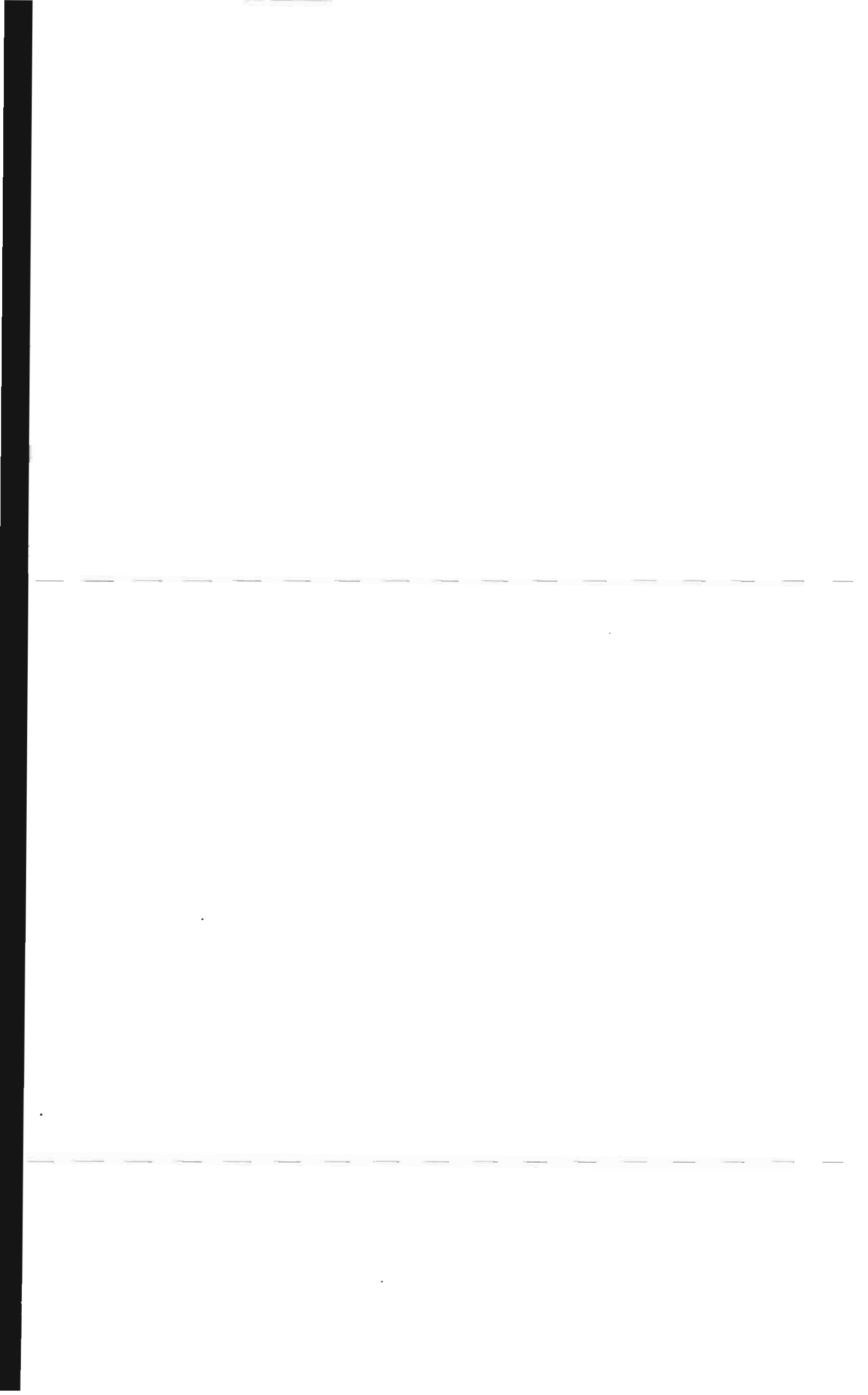
would not destroy any goodwill, but it would not be right to decide against the Appellant's contention on that ground, without some inquiry as to the exact effect of the Chinese words used. The answer to the Appellant's contention is that the transaction under which the company was formed, without making any specific payment for goodwill, was not concealed in any way, and was part of the settlement by which the Appellant must be held bound. It does not appear how the goodwill of the hotel which the Appellant took was dealt with, but it is stated that the valuation of the hotel was a low one, and there is nothing to show that the distribution as a whole was an unfair one.

It appears to their Lordships that there is no more ground for re-opening the part of the arrangement now complained of than there is for re-opening the settlement generally.

Their Lordships will therefore humbly advise His Majesty that the Appeal should be dismissed with costs.

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In the Privy Council.

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CHUAH HOOI GNOR NEOH

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KHAW SIM BEE, SINCE DECEASED.

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DELIVERED BY SIR ARTHUR  
CHANNELL.

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