

*Privy Council Appeal No. 82 of 1929.*

Khoo Hooi Leong - - - - - *Appellant*

*v.*

Khoo Chong Yeok - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS (PENANG).

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 25TH FEBRUARY, 1930.

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*Present at the Hearing :*

LORD BLANESBURGH.

LORD WARRINGTON OF CLYFFE.

LORD RUSSELL OF KILLOWEN.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

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This appeal is brought from a decree of the Supreme Court of the Straits Settlements dated the 11th August, 1928, by which an appeal from a decree (dated the 22nd February, 1928) of Mr. Justice Sproule was dismissed. This last-mentioned decree was made upon the further consideration of an action and upon a summons to vary a certificate made therein by the Registrar in answer to an enquiry which had been ordered by the judgment in the action. The enquiry was framed in the following terms :—“ An enquiry whether the said Khoo Hun Tee was a legitimate son of the settlor.” The settlor was one Khoo Thean Tek, and he is referred to hereinafter as the settlor.

By his certificate the Registrar had found that Khoo Hun Tee was a legitimate son of the settlor. Mr. Justice Sproule reversed that finding and declared that Khoo Hun Tee was not a legitimate son of the settlor. The Court of Appeal affirmed the decision of Mr. Justice Sproule.

The effect of the decision of Mr. Justice Sproule and the Court of Appeal is to exclude Khoo Hun Tee from the class of

“ my sons and grandsons ” who are to take as beneficiaries under the trusts of a settlement of land in Penang executed by the settlor on the 8th December, 1888. Their Lordships however are not concerned with any question either as to construction or otherwise arising under this settlement. They have only to determine whether the decision under appeal is or is not correct.

Most of the relevant facts are not in dispute. The settlor was a Chinese domiciled in Penang, who had in addition to a t'sai or principal wife one or more t'sips or lawful secondary wives. During some period of time (the extreme limits of which are stated later) he was in sexual association with a woman named Petronella, who as a result of this association gave birth to Khoo Hun Tee on the 22nd January, 1854.

As to Petronella, she was born in Penang and was baptized on the 26th June, 1831, at the Catholic Church of the Assumption in the town of Penang. She was the daughter of Felix Baptist and Ann Jeremiah. On the 19th April, 1847, she was married at the same church to Richard Gaudoin. On the 25th August, 1848, a daughter was born of that marriage who was baptized at the same church on the 3rd September, 1848. The next two events established concerning Petronella are the birth of her son Khoo Hun Tee in 1854, and the birth of an illegitimate daughter on the 26th August, 1856. This daughter was baptized at the Catholic Church of the Immaculate Conception, Pulo Tikus, Penang, on the 15th September, 1856; and on the 13th March, 1857, Khoo Hun Tee was baptized at the same church, being described in the Register as “ Edward Baptist, illegitimate son of Petronella Baptist about 4 years old.” It is not known who was the father of the illegitimate daughter; but it is common ground that the settlor was the father of Khoo Hun Tee. On the 5th February, 1861, Petronella was married at the same church to one Henry Cornelius. In the marriage register she is described as “ Petronella Baptist, adult, legitimate daughter of Felix and Anna Baptist, and widow of Richard Gaudoin. Nothing is known as to where or when Richard Gaudoin died. Petronella died in 1886. There is no dispute as to any of the above facts.

The Registrar's certificate of Khoo Hun Tee's legitimacy was based upon alternative findings of facts. He found that Petronella was a t'sip or lawful secondary wife of the settlor; and that even if she were not, yet Khoo Hun Tee had been legitimated by subsequent recognition.

Before considering the correctness of these findings it is necessary to state that in their Lordships' view the enquiry is to be answered by ascertaining whether Khoo Hun Tee was the legitimate son of the settlor in accordance with the law operative in the Straits Settlements, the test being whether he would be entitled to enjoy the civil rights which according to that law would be enjoyed by a son of the settlor.

If Petronella had in fact been a t'sip or secondary wife of the settlor there would be no room for doubt upon the question whether in accordance with the law operative in the Straits Settlements Khoo Hun Tee was legitimate. He would be legitimate being a son by a lawful wife, for polygamy amongst the Chinese is recognized by the Courts of the Colony.

Their Lordships, however, agree with the views expressed by Mr. Justice Sproule that the evidence does not justify any finding that Petronella was a t'sip or lawful secondary wife of the settlor. Even if (contrary to the usual presumption) it were assumed that at the time when Khoo Hun Tee was conceived Richard Gaudoin was in fact dead, so that Petronella was soluta or free to marry, nevertheless the evidence establishes nothing that is inconsistent but much that is only consistent with the view that the association between Petronella and the settlor was merely of a temporary or casual character.

There are many facts in the case which render it most improbable that Petronella occupied the status of a t'sip or that her association with the settlor was intended to be of a permanent nature. She was a Catholic, who never definitely abandoned her religion. So far as the evidence goes no association with the settlor is proved before the date when Khoo Hun Tee was conceived, viz., somewhere about May, 1853. Her illegitimate daughter was born in August, 1856, and baptized within three weeks of birth. Her association with the settlor must have ceased by that time, and in all probability had ceased before the daughter was conceived, *i.e.*, before November, 1855. The period of association between these two persons may, upon the evidence, have only lasted between May, 1853, and November, 1855. But even taking the outside limits of its possible duration, viz., between 1848 (when the legitimate daughter was born) and 1861 (when Petronella married Cornelius), their Lordships are of opinion that there is no evidence that the parties intended their union to be permanent in its nature. Moreover, the fact that the association between the parties was in fact severed affords strong evidence that Petronella was never a t'sip, for according to the evidence of Mr. Beatty (the only expert on Chinese custom who was called) a t'sip cannot be put away who has borne a son and "in the Straits Settlements there is no divorce provided for by the laws for the Chinese."

In the opinion of their Lordships it is impossible to find upon the evidence that Petronella was a t'sip or lawful secondary wife of the settlor.

Unless Khoo Hun Tee was legitimate upon some other ground the appeal must fail.

An alternative argument was presented on behalf of the appellant, based upon the Registrar's finding that Khoo Hun Tee had been legitimated by subsequent recognition.

It is unnecessary to refer in detail to the evidence adduced on this head, because the respondent concedes (and in their Lordships' opinion rightly concedes) that the evidence of recognition would be sufficient to establish legitimation by recognition according to Chinese custom.

The crucial question then arises, viz., was he a legitimate son of the settlor according to the law operative in the Straits Settlements? In other words, is the Chinese custom of legitimation by recognition part of the law operative in the Colony?

That the law operative in the Straits Settlements recognises as legitimate the children of a t'sip is clear from the decision of this Board when the present litigation came under its consideration in 1926. In delivering the judgment of the Board Lord Phillimore uses the following language in considering the status of a t'sip and her children:—

“ It is said that for a long time such a union was considered as carrying with it no legal consequences, and 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 the 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).”

On the other hand, daughters are admitted to share on an intestacy, in other words, the Chinese custom which excludes females from sharing in the estate of a Chinese intestate does not apply in the Straits Settlements. (*Lee Joo Neo v. Lee Eng Swee* (4 Kyshe 325): or to state the position in other language, the English law of succession is not modified in its application to Chinese residents in the Colony by incorporating the Chinese custom of excluding females.

Furthermore, by the law operative in the Colony the adopted son of a Chinese intestate has no right to share in the intestate's estate. This is stated by Mr. Justice Sproule to have been settled law ever since the judgment (in 1858) of Sir Peter Maxwell in *Regina v. Willans* (3 Kyshe 16). In 1877 Sir Theodore Ford adopted that view after reviewing the earlier decisions (see *Khoo Tiang Bee v. Tan Seng Gnat*, 1 Kyshe 413).

The case of a natural son alleged to have been legitimated by subsequent recognition under Chinese custom does not appear to have arisen for consideration until the present case.

Mr. Justice Sproule (and Mr. Justice Stevens in the Court of Appeal) held that the Chinese custom of legitimation of a natural son by subsequent recognition was not part of the law operative in the Colony. Their Lordships agree with that view.

The modifications of the law of England which obtain in the Colony in the application of that law to the various alien races established there, arise from the necessity of preventing the injustice or oppression which would ensue if that law were applied to alien races unmodified. That was the view expressed by Sir Peter Maxwell, C.J., in *Choa Choon Neo v. Spottiswoode* (1 Kyshe 216 at p. 221); and this Board, in the case of *Yeap Cheah Neo v. Ong Ching Neo* (L.R. 6, P.C. 381, at p. 396), stated that in Sir Peter Maxwell's 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."

From the above-mentioned necessity arises the recognition by the Courts of the Colony of polygamous marriages among the Chinese, and, as a logical consequence, the recognition of the legitimacy of the offspring (whether male or female) of such marriages.

Their Lordships, however, are unable to find any grounds which would justify such a modification of English law as to treat an illegitimate natural son as legitimated by the mere fact of subsequent recognition. Legitimation of a child, whose parents are not husband and wife, is unknown and repugnant to the common law of England, and no hardship (much less injustice or oppression) need result from a refusal to admit a modification in this respect of the English law in its application to Chinese.

Their Lordships are of opinion accordingly that the appellant's alternative contention also fails.

There remains for consideration an additional argument urged on his behalf. It was said that the fact of recognition, established as it was by the evidence, raised a presumption in favour of the view that the mother of Khoo Hun Tee was a t'sip, that such presumption had not been rebutted, and that Khoo Hun Tee should therefore be held to be legitimate.

In their Lordship's opinion this argument is destroyed by the evidence of Mr. Beatty, from which it would appear that, according to Chinese custom, "a mistress may not be recognized and yet her son may"—or, as he phrases it in another passage, "legitimation of the son does not necessarily imply legitimisation of the mother." In the face of this statement as to Chinese custom the mere fact of recognition of a person as a son cannot, in their Lordships' view, raise any presumption of marriage between the parents.

For these reasons their Lordships will humbly advise his Majesty that the appeal fails and should be dismissed with costs.

In the Privy Council.

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KHOO HOOI LEONG

*v.*

KHOO CHONG YEOK.

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DELIVERED BY LORD RUSSELL OF KILLOWEN.

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