Privy Council Appeal No. 36 *of* 1913.

Gan Ngoh Bee - - - - - - *Appellant,*

v.

The Assistant Official Assignee, Penang, and others - - - - - - - *Respondents.*

AND

The Assistant Official Assignee, Penang, and others - - - - - - - *Appellants,*

v.

Gan Ngoh Bee - - - - - - *Respondent.*

(*Consolidated Appeals.*)

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS.

REASONS FOR THE REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH DECEMBER 1913.

Present at the Hearing.

LORD MOULTON.
LORD PARKER OF WADDINGTON.
LORD SUMNER.

[*Delivered by* LORD PARKER OF WADDINGTON.]

The action in which this Appeal arises was an action instituted by the persons beneficially entitled to the estate of the late Gan Hong Kee against his executor for general administration, and also for relief in respect of certain property belonging to the estate which the Defendant had affected to purchase from himself. The Defendant relied as against the adult Plaintiffs on certain settled accounts and releases, but he in effect

admitted the infant Plaintiff's right to relief. The Plaintiffs in their reply set up a case for setting aside both the settled accounts and releases on the grouud of duress and undue influence.

The facts of the case may be stated as follows :—

The testator, Gan Hong Kee, by his will appointed his brother, the Defendant, to be his executor, but otherwise died intestate, and his property devolved on his widow and his four children, all of whom were then infants. The Defendant in due course proved the will and proceeded to administer the estate.

The testator was at his death entitled to an undivided third in a property known as No. 3, Light Street, Penang. Of the remaiuing undivided thirds, one belonged to the Defendant and the other to a cousin of the testator. The Defendant bought up the cousin's share on behalf of himself and the testator's estate, debiting the estate with one-half the purchase money and providing the other half himself. The result of this transaction, which nobody impeaches, was that the Defendant and the estate became entitled to the property in equal moieties.

Early in the year 1898 the Defendant affected to buy up that moiety of the property which belonged to the estate and credited the estate with the purchase money of $18,000. He has since expended money on, and improved, the property.

In June 1898 the estate of the testator was ready for distribution among the beneficiaries, and the Defendant thereupon (as found by the trial Judge) explained the estate accounts to the widow and rendered her an account purporting to show how her share was arrived at. He paid or accounted to her for the amount of her

share as shown by this account and she thereupon executed a release on the footing that this account was settled.

The eldest son, the second son, and the daughter attained their respective majorities in 1900, 1903, and 1905. Each of them on coming of age was supplied by the Defendant with an account showing the amount of his or her share, was paid the amount appearing to be due on such account and executed a release on the footing that such account was settled. The daughter had married while a minor and the release executed by her was also executed by her husband. The eldest son has since been adjudicated bankrupt and the first Plaintiff is his Official Assignee.

The action was commenced in the year 1910, and after the pleadings were closed and the Plaintiffs had had full discovery of the Defendant's documents including the books in which the estate accounts had been kept, the statement of claim was amended by alleging a large number of instances in which it was said that the Defendant had been guilty of wilful default and asking that the account might be taken on the footing of wilful default. The Defendant thereupon amended his defence, traversing all the allegations of wilful default and pleading the Limitation Ordinance as against the claims of the adult Plaintiffs.

The action in due course came on for trial and the trial Judge after going into the evidence on each of the allegations of wilful default came to the conclusion that no single one of them had been proved. Holding that the accounts had been settled so far as the adults were concerned and that no case had been made on the ground of duress, undue influence, or otherwise for setting aside or opening these accounts

and also that the action was in reality the action of the adult Plaintiff and not of the infant, he dismissed the same, except as to No. 3, Light Street. In respect of No. 3, Light Street he granted certain relief and he reserved the costs of the action.

The Plaintiffs appealed to the Supreme Court and such Court dismissed the appeal so far as the widow and first and second sons were concerned on the ground that their claim was barred by the Limitation Ordinance, but allowed the appeal so far as the daughter and third son were concerned, and at their instance decreed general administration with an account on the footing of wilful default; the Court also varied the relief given by the trial Judge in respect of No. 3, Light Street.

With regard to No. 3, Light Street, it was admitted before their Lordships' Board that the transaction could not stand against any of the beneficiaries, the only question was as to the proper form of order. At their Lordships' suggestion the parties by their Counsel agreed that the proper order was as follows: Direct (1) an inquiry as to what interest the Defendant ought to be allowed in respect of the $18,000 credited by him in the account as purchase-money of the moiety of No. 3, Light Street, belonging to the estate; (2) an inquiry how much the value of No. 3, Light Street, has been increased by any expenditure thereon made by the Defendant since such $18,000 was credited as aforesaid; (3) an inquiry what would be a proper occupation rent to be charged for No. 3, Light Street, for the period since such $18,000 was credited as aforesaid up to the expiration of two months from the date of the certificate, and the Chief Clerk is to add to the amount certified in answer to inquiry No. 1,

a moiety of the amount certified in answer to inquiry No. 2, and to deduct a moiety of the sum certified in answer to inquiry No. 3, and is to certify the result. Upon the Plaintiffs or any of them within two calendar months from the date of the certificate paying into Court a sum equal to the aggregate of $18,000, and the sum certified as last aforesaid declare that the estate and the Defendant will be entitled to No. 3, Light Street, in equal moieties. In default of such payment into Court, let the one moiety of No. 3, Light Street, purchased by the Defendant from the estate, be put up for sale by auction, subject to a reserve price equal to the aggregate of $18,000, and the sum certified as last aforesaid, the Plaintiffs to have the conduct of the sale, and all parties being at liberty to bid. In the event of such moiety being sold, let the proceeds be paid into Court with liberty to apply, but in the event of there being no bid at or over the reserve price, confirm the purchase of this moiety by the Defendant, and let the costs of all parties of the action so far as it claims relief in respect of No. 3, Light Street, be reserved to be dealt with by the Supreme Court.

With regard to the third son, who has come of age pending the Appeal, it was further arranged before their Lordships' Board that he should accept the accounts which have been delivered to him since he attained his majority, and which include his share of the $18,000, as *primâ facie* correct, but should be at liberty to apply in Chambers to surcharge or falsify such accounts.

It only remains therefore to deal with the action as an action for general administration with an account on the footing of wilful default at the suit of the widow, the first and second

sons, and the daughter. As to this, there are two appeals, one by the Defendant, who insists that the claims of the adult Plaintiffs are precluded by the fact that the accounts between them and the estate were long since settled and that no case has been made for setting aside or re-opening these accounts, and the other by the widow and the first and second sons against the order of the Supreme Court so far as it declared that this claim was barred by the Limitation Ordinance.

Their Lordships agree with the trial Judge that the accounts were settled accounts. The releases are admissions of this fact. Their Lordships further agree with the trial Judge that no case was made at the trial for setting these settled accounts aside as having been obtained by duress or undue influence. It may be and probably is true that the estate accounts were not in a form which made them easily intelligible, and that being in Chinese the beneficiaries had they wished to make a thorough investigation of them would have had to employ an accountant more perfectly acquainted than they were with the Chinese language. But the Defendant's accounts from the very first were open for investigation had the beneficiaries wished to investigate them. That all the beneficiaries had great confidence in the Defendant is undoubted, and that this confidence led them to settle the accounts with him without going to the expense of a very thorough investigation is more than probable. This, indeed, is usually the case when a *cestui que* trust has confidence in his trustee. It is true too that in the case of the children they settled the accounts shortly after they came of age. None of these circumstances, however, are enough to establish any case of duress or undue influence; nor, in their

Lordships' opinion, was there anything in the relations existing between the Defendant and the adult Plaintiffs as proved at the trial which precluded the Defendant from settling accounts with them unless and until they had been first independently advised. The fact that the settled account is between a trustee and a *cestui que* trust who has not made a thorough investigation of the accounts, or who has not been independently advised with reference thereto, may make it easier to open the account for all purposes if a case for opening it is proved at all, but does not of itself render the settled account invalid or obviate the necessity of making out some case for its being opened. Releases are according to ordinary principles construed to apply only to those matters which were in the contemplation of the parties when they were executed. The releases in the present case could not affect matters not included in the accounts; and, indeed, no one before their Lordships' Board contended that they had any further operation than by way of admission that the accounts were settled.

If therefore the adult Plaintiffs can succeed in their claim for general administration, it can only be by making a proper case for opening the settled accounts. Further, according to well-known principles no account can be directed on the footing of wilful default without proving at least one case of such default. Moreover, any proved case of wilful default would, in their Lordships' opinion, be sufficient to justify the accounts being re-opened to the extent at any rate of giving the adult Plaintiffs an opportunity to surcharge and falsify generally.

The trial Judge held that no instance of wilful default had been proved. The Supreme

Court relied on two instances. First it held that the Defendant had omitted to allow interest on the profits of a farm belonging to the estate known as Ban Cheng Bee, although he was charging the estate with interest on the amount on which the estate was indebted to him on current account. No case in this respect was ever suggested in the pleadings or made at the trial, and the Defendant was not even cross-examined on this point. It is, in their Lordships' opinion, open to grave doubt whether a Court of Appeal ought ever, in an action of this nature, to attach any importance at all to a case of wilful default or breach of trust, not raised in the pleadings or at the trial, and which the Defendant therefore has had no opportunity of disproving. If there be any circumstances under which this is permissible, it can only be when the wilful default is established by overwhelming evidence. In the present case their Lordships are by no means satisfied that the profits of the farm in question did not form part of the monies invested by the Defendant from time to time on account of the estate.

The second instance of wilful default on which reliance was placed by the Supreme Court was the omission to account for a sum of $5,000, being item (*h*) in paragraph 4 of the amended statement of claim. As a matter of fact this item appears to have been brought into the account (*see* Record, page 244). The Supreme Court does not find, as a fact, that it was not brought into account, but that there appears to be good reason to doubt whether it has been brought into account, and that if the Plaintiffs have not proved wilful default in this respect they have certainly established a case for inquiry. In their Lordships' opinion, in order to open a settled account or to obtain an account on the

footing of wilful default, some case must be proved. It is not enough to make out a case for inquiry.

It does not appear to have been suggested in the Supreme Court, and it certainly was not suggested before their Lordships that the trial Judge was wrong in holding that the Plaintiffs had failed to prove each and every of the numerous other instances of wilful default alleged in the statement of claim. It follows therefore that, in their Lordships' opinion, no case has been made out by the widow, the first or second son, or the daughter, either for opening the settled accounts, or for directing an account on the footing of wilful default. It is therefore unnecessary to consider the questions which arise on the second appeal.

Under these circumstances their Lordships will on the first appeal humbly advise His Majesty; (1) to discharge the order of the Supreme Court; (2) to grant to the Plaintiffs in respect of No. 3, Light Street, the relief already stated; (3) to dismiss the action so far as it is an action for general administration with an account on the footing of wilful default with costs to be paid by the Plaintiffs (other than the youngest son); and (4) the youngest son accepting the accounts delivered to him since his attaining his majority as *primâ facie* correct to give him liberty to apply in Chambers to surcharge and falsify the same. Their Lordships also will humbly advise His Majesty that the costs of the appeal to the Supreme Court and of the first appeal before their Lordships' Board, ought to be paid by the Plaintiffs, other than the youngest son, and that the second appeal ought to be dismissed with costs.

In the Privy Council.

GAN NGOH BEE

v.

THE ASSISTANT OFFICIAL ASSIGNEE, PENANG, AND OTHERS

AND

THE ASSISTANT OFFICIAL ASSIGNEE, PENANG, AND OTHERS

v.

GAN NGOH BEE.

DELIVERED BY LORD PARKER OF WADDINGTON.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1913.