Privy Council Appeal No. 133 *of* 1927.

Tan Chew Hoe Neo - - - - - - - - *Appellant*

v.

Chee Swee Cheng and others - - - - - - *Respondents*

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH DECEMBER, 1928.

Present at the Hearing:

VISCOUNT SUMNER.
LORD BLANESBURGH.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* LORD WARRINGTON OF CLYFFE.]

The appellant, as the executrix of Eng, the last survivor of four persons, Hoon, Lim, Quee and Eng himself, claims to be entitled to certain property on the grounds that such property was conveyed to them as joint tenants and that the jointure has not been severed.

The respondents, the executors of Hoon, Lim and Quee respectively, claim that Hoon, Lim, Quee and Eng himself were entitled to the property in equal shares as tenants in common, either because, as they contended in the Courts below, they were originally tenants in common, or because they all pursued a course of conduct from which an agreement should be inferred on the part of them all to sever the jointure.

In the Courts of the Colony there was a remarkable difference of judicial opinion. Murison, C.J., before whom the action was tried, decided in favour of the appellant. In the Court of Appeal, Brown, J., agreed with the Chief Justice, but the majority (Deane, J., and McCabe Reay, J.) took the opposite view, though

for different reasons, and judgment was accordingly entered for the respondents. Hence this appeal.

The three persons shortly referred to as Hoon, Lim and Quee were brothers, and Eng was their nephew, being the son of another brother.

Under the will of their father Yam (hereinafter referred to as the testator), who died in the year 1862, his four sons, Hoon, Lim, Quee and Peck, became entitled to shares in his residuary estate. His estate was administered under a decree of the Court in an administration action.

Peck had mortgaged his share. In 1891 it was sold by the mortgagee and was subsequently bought from the purchaser by the four persons above named.

By an indenture dated the 28th June, 1892, in consideration of $18,000 stated to have been paid by the purchasers out of money belonging to them on a joint account, the share of Peck was conveyed to Hoon, Lim, Quee and Eng as joint tenants absolutely. Each of the purchasers was in the deed described as a " merchant."

The purchase money was raised by a mortgage of the purchased share and of certain other shares in the original testator's estate, which mortgage is dated the 29th June, 1892.

It was assumed on both sides in the argument before this Board that the principles of law applicable to joint tenancy, and the means whereby a severance of the jointure may be effected, are the same in this country and in the Colony, except only that the appellant contended that under Section 92 of Ordinance No. 53, parol evidence leading to an inference of an agreement to sever the jointure is not admissible.

The effect of the conveyance of the 28th June, 1892, is, in their Lordships' opinion, beyond dispute. It created in terms a joint tenancy between the four purchasers. In fact, this was tacitly conceded by Counsel in the argument before this Board. It is true that one of the Judges in the Court of Appeal was of opinion that the maxim, " *Inter mercatores jus accrescendi locum non habet,*" applied to the case and accordingly held that the tenancy created by the deed was a tenancy in common. This view was not supported before this Board, and in their Lordships' opinion could not successfully be supported. The purchasers are, indeed, described in the deed as " merchants," but there is no evidence at all that the purchase was in any way connected with their trade or indeed that they were jointly concerned in any trade.

The tenancy then was originally a joint tenancy. The remaining question is, has the jointure been severed and the joint tenancy converted into a tenancy in common ?

The law on this subject is stated as follows by Wood, V.C., in *Williams* v. *Hensman*, 1 J. & H. 546, p. 557 :—

> " A joint tenancy may be severed in three ways : In the first place, an act of any one of the persons interested operating upon his own share may

> create a severance as to that share. . . . Secondly, a joint tenancy may be severed by mutual agreement. And in the third place there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention with respect to the particular share, declared only behind the backs of the other parties interested. You must find, in this class of cases, a course of dealing by which the shares of all the parties to the contest have been affected."

Their Lordships accept this as an accurate statement of the law.

In this country such a course of dealing may be proved in the same way as any other relevant fact may be proved. But it has been contended, and the contention was accepted by some of the Judges in the Colony, that under the Clause 92 of the Ordinance 53 (Evidence) parol evidence is not admissible to prove the fact in question. As will be seen hereafter, it is in strictness unnecessary to decide this point, but having regard to the difference of judicial opinion in the Courts below, their Lordships think it right to express their view on the subject. Clause 92 is as follows :—

> " When the terms of any such contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document have been proved according to Section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms."

The section is subject to a proviso (No. 4), which has been referred to, but in their Lordships' opinion has no bearing on the present question, inasmuch as in their view, the section itself does not apply.

In the present case evidence is tendered, not for the purpose of contradicting or varying the terms of the conveyance, but of proving facts from which it may be inferred that, accepting the conveyance as creating a joint tenancy, the purchasers have subsequently so dealt with their respective interests thereunder that the joint tenancy has become a tenancy in common.

It remains then to determine whether on the whole of the evidence as tendered the respondents have established facts from which an agreement to sever should be inferred.

On this point it is necessary to state a few facts and dates :— On the 26th January, 1894, by a deed of that date, the property comprised in the mortgage of the 29th June, 1892, was re-conveyed by the mortgagee discharged from the mortgage. Nothing turns upon the terms of this deed.

In the year 1895, in pursuance of a liberty reserved in the decree for the administration of the estate of the original testator, certain members of the family carried in proposals for the purchase by them of certain items of the testator's estate, the purchase money or part of it being provided out of their respective shares in the estate.

Among these proposals was one on behalf of Hoon, Lim, Quee and Eng to purchase five houses as tenants in common for $4,600.

These houses were on the 3rd June, 1895, conveyed to the four persons as tenants in common in equal shares, the conveyance reciting the deed of the 28th June, 1892, with its limitation to them as joint tenants.

One of the witnesses, Swee, says that when they were going to partition the testator's property, by which expression he obviously refers to the transaction just mentioned, he first heard that the words "joint tenancy" were in the deed of 1892 and that on their effect being explained to him by the solicitors he was surprised and called a meeting of the four persons concerned, and that they told him to go to the solicitors and get the proposals for sale of the property altered. "Instead of joint tenancy, I was to get them put on the basis of a tenancy in common." As mentioned above the proposal for the purchase of the five houses and the conveyance thereof to the purchasers were "put on the basis" of a tenancy in common, viz., the houses were so conveyed, the instructions deposed to being confined to the particular case. Their Lordships cannot find so far anything from which a general intention or agreement to sever can be inferred.

The next event was the death of Hoon on the 28th September, 1903.

In 1905 Hoon's executors and the remaining three persons interested in the share in question were desirous of creating a trust of the share in favour of Peck and his children, if any. This was carried into effect by a deed poll dated the 1st May, 1905, to which Hoon's executors were parties and concurred in the declaration. It took the form of a covenant by them all that they and the survivor of them would stand seised and possessed of the property assigned to them by the deed of the 28th June, 1892, upon certain trusts. It is said that Hoon's executors had no interest in this property except on the footing of a tenancy in common, and that the form of the deed therefore supports the theory of a severance. But this ignores the fact that the houses purchased in 1895 represented a part of the share assigned by the deed of 1892 and the concurrence of Hoon's executors was necessary in regard to these houses. In this deed also the limitation to the four as joint tenants is referred to and no suggestion of a severance is made.

On the 24th November, 1906, Quee died, and on the 18th December, 1907, Lim died, Eng becoming thus the survivor of the four joint tenants.

By a deed poll dated the 19th October, 1908, new trustees of the deed of 1905 were appointed, and by this it is made clear that the three houses remaining unsold of the five purchased in 1895 were included in the trust.

Their Lordships can see nothing in these last-mentioned transactions from which a severance can be inferred.

The remainder of the evidence consists of certain statements made by individual members of the quartette, including Eng, which it is said indicate that they respectively thought that there was no right of survivorship, together with certain accounts which it is said prove a division of income after the deaths of those who died before Eng. Their Lordships cannot accept the evidence afforded by these statements and accounts as sufficient of themselves to justify an inference of an agreement to sever.

The result is that, in the opinion of their Lordships, this appeal ought to be allowed, the order on appeal reversed, and that of Murison, C.J., restored, with costs to be paid by the respondents. The costs in the Court of Appeal were made payable out of Peck's share in the testators' estate, and their Lordships see no reason for interfering with that order. They will humbly advise His Majesty accordingly.

In the Privy Council.

TAN CHEW HOE NEO

v.

CHEE SWEE CHENG AND OTHERS.

DELIVERED BY LORD WARRINGTON OF CLYFFE.

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