1890
*Feb. 27.
*June 13.

CHARLES A. CLARK AND OTHERS (PLAINTIFFS) ... APPELLANTS;

AND

HANNAH CLARK AND OTHERS (DEFENDANTS) ... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will—Construction of—Devise—Joint tenancy or tenancy in common—Evidence to establish—Admissibility of.

A will devised certain property to the testator's two sons, their heirs, etc., and provided that the devisees should jointly and in equal shares pay testator's debts and the legacies in the will. There were six legacies of £50 each to other children of the testator, and these were to be paid by the devisees at the expiration of 2, 3, 4, 5, 6 and 7 years respectively. The estate vested before the statute abolishing joint tenancies in Nova Scotia came into operation.

Held, reversing the decision of the court below, Taschereau and Gwynne JJ. dissenting, that these provisions for payment of debts and legacies indicated an intention on the testator's part to effect a severance of the devise, and the devisees took as tenants in common and not as joint tenants. *Fisher* v. *Anderson* (4 Can. S. C. R. 406) followed.

On the trial of a suit between persons claiming through the respective devisees to partition the real estate so devised evidence of a conversation between the devisees, which plaintiff claimed would show that a severance was made after the estate vested, was tendered and rejected as being evidence to assist in construing the will.

Held, Gwynne J. dissenting, that it was properly rejected.

Held, per Gwynne and Patterson JJ. that the evidence might have been received as evidence of a severance between the devisees themselves, if a joint tenancy had existed.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial in favor of the defendants.

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*PRESENT: Sir W. J. Ritchie C.J., and Fournier, Taschereau, Gwynne and Patterson JJ.

(1) 21 N.S. Rep. 378.

The plaintiffs and defendants are the representatives respectively of Joseph and James Clark, devisees under the will of one Robert Clark. The estate under the will vested before the statute abolishing joint tenancies in Nova Scotia came into operation and that statute does not affect it."

The clauses of the will on which the contentions raised in this case are based are the following:—

"To my two sons, Joseph Clark and James Clark, their heirs, executors, and assigns, I give and bequeath the farm on which I now live, saving and excepting that portion of it which I shall hereinafter dispose of together with the western half of the lot of marsh on Belle Isle which I now own, and likewise the lot of land which I lately purchased, the same being formerly a part of the estate of the late Henry Ricketson, and which I now own, together with all my right, title and interest in all the said mentioned lands. I also give and bequeath to them, my two said sons, their heirs, executors, and assigns, all the live stock which I am or may be in possession of at my decease, saving and excepting the two cows before mentioned bequeathed to my wife, together with all my farming utensils, and monies which may be due to me by note or account, and all goods and chattels of whatsoever kind which is not hereinbefore disposed of, and which I shall or may be in possession of at my decease. And I further will and ordain that my two said sons, Joseph Clark and James Clark, their heirs, executors, and assigns, shall jointly and in equal shares pay all my just debts, and likewise such legacies, as I shall hereafter appoint, will, or ordain them to pay."

"To my son Charles Clark I give and bequeath the sum of fifty pounds, to be paid to him by my sons, Joseph Clark and James Clark, at the expiration of two years after my decease, one-half to be paid in cash

1890 CLARK v. CLARK.

and the remaining half to be paid in neat stock at the market price, the same to be delivered at the barn of the said Joseph and James Clark."

And similar legacies to five other children of the testator payable at the expiration of 3, 4, 5, 6 and 7 years respectively.

The plaintiffs, who claim as devisees of James Clark one of the two sons named in the first of the above clauses, contend that the estate created thereby was a tenancy in common, and they bring their action for a partition of the real estate and an account of the rents. The defendants, claiming through Joseph, contend that it was a joint tenancy and James having died before Joseph the latter took the real estate by right of survivorship. The court below give effect to this latter contention and have decided in favor of defendants.

In the minutes of the trial the following appears :—" Mr. Ritchie offers evidence of a conversation between James and Joseph in 1848 to assist in construction of Robert's will made in 1842. Objected to on several grounds and rejected." The full court, on appeal, held it was properly rejected.

Harrington Q.C. for the appellants. The courts in modern times lean against joint tenancies, and will lay hold of the slightest expressions as evidencing an intent to sever. See *Kew* v. *Rouse* (1), *Milward* v. *Milward* cited in *Beauclerk* v. *Dormer* (2).

This court has dealt with the matter in *Fisher* v. *Anderson* (3), where the authorities are fully considered.

As to the use of the word "jointly" and its effect on the construction of the will, see *Booth* v. *Arlington* (4), *Miller* v. *Miller* (5).

(1) 1 Vern. 353.
(2) 2 Atk. 309.
(3) 4 Can. S. C. R. 406.
(4) 3 Jur. N. S. 49.
(5) 16 Mass. 60.

The learned counsel also cited the following cases on this point: *Oakley* v. *Wood* (1), *Ettricke* v. *Ettricke* (2), *Joliffe* v. *East* (3), *Fleming* v. *Fleming* (4).

There should, at all events, be a new trial for improper rejection of evidence to show how they treated their tenancy, and that they agreed to regard themselves as joint tenants. *Harrison* v. *Barton* (5), *Williams* v. *Hensman* (6).

Borden for the respondents cited *Cooke v. De Vandes* (7), *Boughton* v. *Boughton* (8).

Sir W. J. RITCHIE C.J.—I think the evidence offered of a conversation between James and Joseph to assist in the construction of Robert's Will made in 1842 was properly rejected.

The question whether James and Joseph took the estate devised to them as joint tenants or as tenants in common turns on the last clause of the devise which is as follows (9).

It does not appear what amount of debts, if any, the testator owed at the time of his death; judging from the whole tenor of the will one might fairly infer that they could not have been to a very large amount.

The legacies of £50 each amounted to £350 payable half in cash in 2, 3, 4, 5, 6 and 7 years; half in cash and half in neat stock at the market price to be delivered at the barn of Joseph and James Clark. The bequests are in this form respectively (10).

It is difficult to understand that the testator could have intended the estate to be used by Joseph and James as joint tenants, whereby the one brother on the death of the other before the expiration of the respec-

(1) 37 L. J. (Ch.) 28.
(2) 2 Amb. 656.
(3) 3 Brown C. C. 25.
(4) 5 Ir. Ch. 129.
(5) 1 J. & H. 287.
(6) 1 J. & H. 546.
(7) 9 Ves. 197.
(8) 1 H. L. Cas. 406 at p. 437.
(9) See p. 377.
(10) See p. 377.

1890
CLARK
v.
CLARK.
Ritchie C.J.

tive times fixed for the payment of the legacies would take all the property devised and the estate of the deceased brother be trusted with the burthen of the payment of his equal share of the debts or legacies unpaid at the time of his decease, or having paid the debts and legacies the property, on his death, should survive to his brother. These provisions for the payment of debts and legacies appear to me to indicate an intention of severance sufficient to justify the conclusion that a tenancy in common and not a joint tenancy was created. Having discussed the question at length in the case of *Fisher* v. *Anderson* (1) I do not feel it necessary now to discuss the matter at greater length as I have no reason to doubt the accuracy of the conclusion at which the court arrived in that case.

FOURNIER J.—Concurred.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed with costs.

GWYNNE J.—One Robert Clark departed this life on the 21st of October, 1842, having first duly made and published his last will and testament, whereby amongst things he devised as follows (2).

The testator then devised and bequeathed as follows:

To my son Charles Clark I give and bequeath the sum of fifty pounds, to be paid to him by my sons Joseph Clark and James Clark at the expiration of two years after my decease, one-half to be paid in cash, and the remaining half to be paid in neat stock at the market price, the same to be delivered at the barn of the said Joseph and James Clark.

The testator then bequeathed like sums of fifty pounds to be paid to five others of his children respectively, in precisely similar terms as in the bequest to his son Charles, save only that the bequests to these

(1) 4 Can. S.C.R. 406. (2) See p. 377.

five others were made payable respectively at the expiration of three, four, five, six and seven years after the testator's decease.

The question now is whether the estate in the land devised to Joseph and James Clark was an estate in joint tenancy or a tenancy in common, the defendants insisting that it was the former, and the plaintiffs, who are the appellants, that it was the latter. The Supreme Court of Nova Scotia, in which the land devised lies, have maintained the contention of the defendants.

Apart from the provision in the will as to the payment of the testator's debts and legacies by his two sons, Joseph and James, there can be no doubt that the devise to Joseph and James of the chattel property as well as of the land, was in joint tenancy. The only question, therefore, is whether or not the clause as to the payment of the debts and legacies has the effect of converting a devise otherwise in joint tenancy into a tenancy in common. It cannot be doubted that the court will lay hold of any, even a very slight, expression in a devise as indicative of a testator's intention to create a tenancy in common rather than a joint tenancy. Sir Richard Pepper Arden, in *Morley* v. *Bird* (1), lays down the rule as it is still applied. He says there :—

> Uuless there are some words to sever the interest taken it is at this moment a joint tenancy, notwithstanding the leaning of the courts lately in favor of a tenancy in common. A legacy of a specific chattle, a grant of an estate, is a joint tenancy. It is true, the courts seeing the inconvenience of that, have been desirous wherever they could find any intention of severance to avail themselves of it, and their successive determinations have laid hold of any words for that purpose: "Equally o tbe divided," "equally," "among," "between," even in law, I believe, certainly in equity, create a tenancy in common, but without those words it is a joint tenancy.

And Lord Hatherly, in *Robertson* v. *Fraser* (2), says :

> Anything which in the slightest degree indicates an intention to

(1) 3 Ves. 628. (2) 6 Ch. App. 696.

1890
CLARK
v.
CLARK.
Gwynne J.

divide the property must be held to abrogate the idea of a joint tenancy and to create a tenancy in common.

Kew v. *Rouse* (1), is strongly relied upon by the appellants. There Elizabeth Wise devised a term of years of which she was possessed to her two daughters, " they paying yearly to her son £25 by quartly payments, viz., each of them £12.10*s* yearly out of the rents of the premises during his life if the term so long continued " but by this devise each was to pay £12 10*s* yearly, and out of the rents accruing from the term devised, and such payments would be out of the share of each in the rents and, therefore, it was held to be a tenancy in common ; but in the will under consideration the devise is that the testator's two sons, Joseph and James, to whom the real and personal property of the testator had just been devised, in language which standing alone clearly was a joint tenancy, " shall jointly and in equal shares pay all the testator's debts and legacies, the latter in manner following, that is to say—at the expiration of two years from testator's death to one son the sum of £50 one half in cash and the remaining half in neat stock, at the market price, to be delivered at the barn of the said Joseph and James, and a like legacy to be paid in like manner to other children, respectively, of the testator, at the expiration of three, four, five, six and seven years after the testator's death. I cannot say that the language used in giving these bequests, so to be paid by the testator's sons, Joseph and James, indicates an intention upon the part of the testator that the previous devise of the personalty to his said sons, Joseph and James, in language which constituted a joint tenancy, should be, nevertheless, taken as a tenancy in common, and as to the realty which was devised in joint tenancy, and with which alone we are concerned, the

(1) 1 Vern. 352.

1890
CLARK
v.
CLARK.
Gwynne J.

language in which those bequests are given has, in my judgment, no effect. Indeed, the language, to my mind, seems rather to imply that the testator contemplated that his two sons, Joseph and James, would work the farm, and enjoy the benefit of the stock thereon, devised to them, in partnership together for, at least, the period of seven years after his death. But although this intention may not sufficiently appear upon the testator's will it was quite competent for the devisees to have entered into an agreement to that effect, and if they had and continued working the farm in partnership together until the death of James in 1848, then would arise a question, which is made and insisted on by the appellants, that a severance had taken place in the lifetime of James upon the authority of *Jackson* v. *Jackson* (1) and *Williams* v. *Henseman* (2). In this latter case it was laid down by W. P. Wood, V.-C., as well recognized law, that a joint tenancy may be severed by mutual agreement, or by any course of dealing sufficient to intimate that the interests were mutually treated as constituting a tenancy in common, and that this was so in the present case was expressly pleaded by the plaintiffs' eleventh replication. The evidence which was offered upon this point should have been received. It was, I am satisfied, a mistake to treat it as having been offered for the purpose of construing the testator's will; from its nature it could not have had that effect, but might have been abundantly sufficient to establish the fact of severance of the joint tenancy by the joint tenants themselves The eleventh replication above referred to further pleaded that the life estate devised by James in his realty, to his brother Joseph in 1848, was so devised at the express request of Joseph. If this should be

(1) 9 Ves. 591. (2) 1 J. & H. 557; 7 Jur. N.S. 773.

established, as perhaps it might have been by the evidence which was rejected, then a further question might arise, quite independently of any severance having previously taken place by agreement and conduct of the parties, whether under such circumstances persons claiming under Joseph would not be estopped from disputing the estate in remainder devised by James in the real estate which he had so devised to Joseph for life.

I am of opinion that the appeal should be allowed with costs, but that the case should be sent down for a new trial to have the above points dealt with.

PATTERSON J.—I concur with his Lordship the Chief Justice in construing the will of Robert Clark as making his sons Joseph and James tenants in common of the real and personal property devised and bequeathed to them.

The general terms of the direct gift would, it is true, create a joint tenancy if uncontrolled by any other indication of the intention of the testator, but we have, in my opinion, a reasonably clear indication of his understanding that he was giving separate interests to the devisees. The debts and legacies are clearly charged upon the property by the direction that they shall be paid by the devisees, and when it is added that the two devisees shall pay them in equal shares we have in effect the charge imposed half on the interest of Joseph and half on the interest of James, or an expression of the testator's intention and understanding that the two brothers were to take the property in equal shares.

There would be no difficulty in the way of this construction were it not for the word "jointly." Joseph and James, their heirs, executors and assigns, are to pay the debts and legacies "jointly and in equal shares."

I think more stress was laid on this word "jointly" in the court below than can have been contemplated by the testator. He evidently had in his mind that the two sons would, for a time at all events, occupy and work the farm together. This appears not only by the use of the word "jointly," but by the directions in respect of the six legacies of £50 each, payable respectively in two, three, four, five, six and seven years after his decease, that one-half should be payable in neat stock delivered at the barn of the said Joseph and James Clark. But if we credit the testator with having in view the technical effect of the language he was using, which is not very likely, he must have known that a joint tenancy could be severed at any time, and that he was not providing for a continued joint occupation, while at the same time a joint occupation was not inconsistent with a tenancy in common; and these very provisions for payment out of the produce of the farm recognise separate interest in the profits, interests "in equal shares," which comes very close to an express recognition of interest in equal shares in the farm itself. The use of the words "jointly" is thus explained without weakening the force of the expression "in equal shares."

Nor must we overlook the fact that the payments, jointly and in equal shares, are to be made, not only by James and Joseph, but by "their heirs, executors and assigns." Operation for these words might perhaps be found even if the estate were a joint tenancy in the first place and were afterwards severed by the tenants, but they do not seem to be used in that view by the testator. They rather go to negative the contemplation of either devisee taking the whole estate by survivorship.

On the point as to the rejection of evidence I shall merely say that while it cannot be for a moment main-

1890
CLARK
v.
CLARK.
Patterson J.

tained that conversations between the devisees could be used to aid in construing the will, which is noted as the ostensible object in offering the evidence, it may be regretted that the evidence was not received. It might have been evidence of a severance if a joint tenancy had existed, and it strikes one as possible that the short note that the evidence was offered to assist in the construction of the will may not fully express the object in offering the evidence which is said to have been "objected to on several grounds and rejected," the grounds not being specified.

The point is, however, unimportant in view of the construction of the will on which our judgment proceeds.

I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitor for appellants : *C. Sidney Harrington.*

Solicitors for respondents : *T. D. Ruggles & Sons.*