

ASSIGNMENT OF A PAROLE TENANCY

The nature of the interest created by a parole yearly or monthly tenancy came in issue in the Selangor case of *Kam Soon Mooi v. Shin Hiong Long*.¹ In this too-often litigated field of the relationship of landlord and tenant, the doctrine of binding precedent appears to have been ignored to find an answer to the facts of the above case. The facts were rather deceptively simple.

One Goh, who was a monthly tenant, assigned his tenancy to the appellant. It was found as a fact that no agreement had ever been made with Goh by the landlord (respondent) prohibiting him from assigning his parole tenancy. On discovering this assignment, the respondent sent a letter of warning to the tenant that she would not recognise any one other than Goh as tenant. Following this, the appellant-assignee in her own name tendered rent by letter, but it was returned, and the respondent gave due notice to the appellant to vacate the premises. On failure to conform to this notice the present action was brought in trespass against the appellant who was in possession.

Mr. Justice Ong gave judgment for the appellant holding “that appellant having taken a valid assignment of the tenancy from Goh, the former tenant, who was not prohibited from doing so, was in lawful occupation of the premises.”² He based his decision essentially on the dissenting judgment of Murray Aynsley C.J. (Singapore, sitting as an appeal judge in *Loke Yung Hong v. Shanghai Furniture Co.*³). “I take it to be indisputable that tenants other than tenants at will and tenants at sufferance can assign their interests unless restrained by the terms of the agreement from which such interest is derived.”⁴ In following this, Ong J. refused to be bound by the

5. A.I.R. (1956) E.P. 228.

1. (1959) 25 M.L.J. 249.

2. *Ibid.* at page 251.

3. (1948) 14 M.L.J. 136.

4. (1959) 25 M.L.J. 250.

majority decision of the Court of Appeal (Pretheroe Ag. C.J. and Evans J.) in *Loke Yung Hong's* case. He deprived this decision of the authority of the Court of Appeal, pointing out that the agreement of Pretheroe Ag. C.J. with the judgment of Evans J. did not extend to the latter's statement "that a parole tenancy is not assignable without the consent of the landlord."⁵ Evans J. had based this proposition on the English case of *Elliot v. Johnson*.⁶ Ong J. refuted this authority showing that this case was never an authority for Mr. Justice Evans' proposition, but construed the judgment of Mellor J. in *Elliot v. Johnson* as being authority for the proposition that an assignment of a lease for a term of years did not carry with it liability on part of the landlord on a covenant in the lease between him and the original tenant. This construction appears justifiable. The necessity for this construction could have been obviated if the following submissions are acceptable.

This question of the assignability of a parole monthly or yearly tenancy without the concurrence of the landlord where there is no understanding or any restraint on assignment between them should be considered in respect to the land law prevailing in the territory concerned. In the Malay States the nature of this interest which is created by such a tenancy should be considered under the Land Code of the Federated Malay States.⁷ In any of these states a person who comes within s.42(v) or the corresponding sections in the Land Codes of the other States, i.e. any person "in possession of land under an unregistered lease or agreement" (which may be written or parole) "for letting for a period not exceeding one year" has a "title." Although this abstract concept is not defined by the provisions in the Land Codes, yet the word cannot possibly connote a merely contractual interest. The interest conferred by such a lease has to be proprietary in nature. "*Prima facie*, a proprietary interest, however small in extent, should, one would think, be assignable." Such is the opinion of Briggs J. in *Eusof Ali & Anor. v. Nyonya Lee Gaik Hooi*.⁸ Thus such an interest in the absence of any understanding to the contrary is assignable by the tenant in possession. Following this line of thought Briggs J. in the above case, a case in Kedah under the Land Enactment,⁹ held that a parole tenancy could be legally assigned. This was followed by Wilson J. in *Ayyar v. Parameswera Iyer*.¹⁰ These two cases were so decided after the learned judges refused to be bound by the majority decision in *Loke Yung Hong v. Shanghai Furniture Co.*¹¹

The decision of Evans J. in this case appears to be founded on a fallacy. He says¹² after observing the judgments of Mellor and Lush JJ. in *Elliot v. Johnson*, "Yet what the court is saying, as I understand it, is that in such a case the relationship between the original parties is contractual rather than by tenure, and that the tenancy is a matter of agreement rather than of grant subject to certain conditions and covenants." In so deciding, Evans J. has ignored the provisions of the Federated Malay States Land Code, s.42(v). This provision was neither cited by counsel nor referred to by any of the judges in this case. The tenant's interest under the Land Code would have made what Mellor and Lush JJ. said in *Elliot v. Johnson* irrelevant.

Following the above submissions, Ong J. in *Kam Soon Mooi v. Shin Hiong Long* could have refused to follow the decision of the Court of Appeal in *Loke Yung Hong v. Shanghai Furniture Co.* on the ground that it was given *per incuriam*.

A. WILSON.

5. *Ibid.* at page 250.

6. (1866) L.R. 2 Q.B. 120.

7. Cap. 138, Laws of the Federated Malay States, 1935 Edition; and the respective Land Codes of the other Malay States.

8. (1953) 19 M.L.J. 98.

9. Kedah Enactments, No. 56.

10. (1953) 19 M.L.J. 102.

11. (1948) 14 M.L.J. 136.

12. *Ibid.* at page 142.