THE DESCHENES ELECTRIC COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

THE ROYAL TRUST COMPANY, ADMINISTRATORS OF THE LATE F. X. ST. JACQUES, DECEASED, (DEFENDANTS) ..... } RESPONDENTS.

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*Nov. 13.
*Dec. 13.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Supply of electric light—Cancellation of contract—Condition for terminating service—Interest in premises ceasing—"Heirs"—"Assigns."

The electric company and S. entered into an agreement for the supply of electric lighting in a hotel for ten years from 1st May, 1902, and it was provided that either party might cancel the agreement by notice in writing, if, after the expiration of five years, neither S. nor his heirs, executors, administrators or assigns should be owner, tenant or occupier of the hotel, alone or with other persons. The lease to S. extended only until 1st May, 1907; it gave him no right to a renewal, and he had no other interest in the building. He sold a half interest in the lease to two persons with whom he formed a partnership in the hotel business, which was carried on till 1904, when the partnership terminated by his death, and the defendants were appointed administrators of his intestate estate. The affairs of the partnership were settled between the defendants and the surviving partners who became transferees of the business, exclusive owners of the lease and sole occupants of the hotel for the unexpired term. The defendants gave notice to the plaintiffs to cancel the agreement on 1st May, 1907, and, on that date, the surviving partners obtained a new lease of the premises from the owners of the building under which they continued in occupation and possession.

Held, that, after 1st May, 1907, the new tenants of the hotel were not assigns of S. and, consequently, the defendants were entitled to cancel the agreement for electric lighting by notice according to the proviso.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

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APPEAL from the judgment of the Court of Appeal for Ontario which, in the result, affirmed the judgment by Anglin J., at the trial, dismissing the plaintiffs' action with costs.

The action was for damages for anticipatory breach of a contract entered into between the plaintiffs and the late F. X. St. Jacques, (in his lifetime the lessee of the "Russell House" in the City of Ottawa), providing for the supply of electric light and power to that hotel, the respondents being sued as his administrators. The agreement in question is dated May 10th, 1902, and provides for a supply of electrical energy for ten years. A clause of the agreement was as follows:—

"Provided that if after the expiration of five years from the first day of May, 1902, the said party of the second part (St. Jacques) his heirs, executors, administrators or assigns is neither owner nor tenant nor occupier of the said hotel whether by himself or together with another or others, then either party shall be at liberty to cancel this contract by giving notice in writing to the other party."

On 1st March, 1904, St. Jacques entered into partnership with two persons named Mulligan, under the firm name of "St. Jacques & Mulligan," and assigned to his two co-partners a one-half interest in his lease of the hotel, his liquor license, and the furniture, supplies and tenant's fixtures in the hotel. No assignment of the lighting contract was made to the partnership, but the electric company continued to supply electricity to the "Russell House," and the rental therefor was paid by the partnership until St. Jacques's death, and for some time afterwards by the Mulligans. On 21st December, 1904, St. Jacques died,

and the respondents were appointed administrators of his estate. The partnership between St. Jacques and the Mulligans terminated with St. Jacques's death, and the winding up of the partnership affairs resulted in litigation and an arbitration between his administrators and the Mulligans; but all matters in dispute between them were settled by an agreement dated the 16th May, 1906.

On the 5th June, 1906, respondents, as administrators, gave notice to the electric company, in accordance with the proviso for cancellation contained in the lighting contract, to cancel the contract at the expiration of the five years from the 1st May, 1902, (*i.e.*, on the 1st May, 1907).

The lease of the hotel expired on 1st May, 1907, and the Mulligans obtained a new lease to themselves from the owners of the building.

The result of the appeal depended upon whether or not the Mulligans were "assigns" within the meaning of the clause quoted, as the respondents, claiming that they were not, assumed to cancel the agreement at the expiration of the five years. The appellants claimed that they were entitled to have the agreement run on for its full period of ten years, or to have damages equivalent to their loss of profit for the latter five years.

Geo. F. Henderson for the appellants. The word "assigns" must have one of three meanings:—(*a*) Assigns of the business generally; (*b*) or of the lease; (*c*) or of the lighting agreement. The appellants contend that the Mulligans were and are "assigns" of the agreement. It was a business asset of St. Jacques, and a very important one, and when

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the Mulligans paid him for a half interest in his business, they clearly purchased one-half of all his business assets.

The word "assigns" comprehends all those who take either immediately or remotely from or under the assignor in whatever manner. It includes the assignee of an assignee *in perpetuum,* the heir of an assignee or the assignee of an heir. It also includes executors and administrators. Am. and Eng. Ency. (2 ed.) vol. 3, tit. "Assigns." It follows, therefore, that even if St. Jacques did not himself assign an interest in the agreement to the Mulligans, the assignment to them by his administrators made them his "assigns."

The attempted partial assignment by the administrators is ineffective to cut down the rights of the appellants for two reasons. In the first place the contract is not a separable one, and in the second place, the intention being frankly to endeavour to evade the lighting agreement, it was in fraud of the rights of the appellants and to that extent ineffective. *De Mattos* v. *Gibson*(1).

The agreement in question makes no attempt to discriminate between assigns of the whole agreement and assigns of a part of it. The Mulligans are certainly assigns of the agreement, whether in whole or in part. They became entitled to all its benefits, and incurred all its liabilities, though they protected themselves as to the disputed five years by taking an indemnity from the respondents. It seems obvious that if the parties had contemplated the possibility of St. Jacques being able to cancel the contract by executing a partial assignment of it, their purpose might have been set out in much more simple language. All that would

(1) 4 DeG. & J. 276.

have been necessary would be a contract between the appellants and St. Jacques personally, without reference to his personal representatives or his assigns.

J. F. Orde and *Powell* for the respondents. There are only two possible constructions to be placed on the word "assigns" in the clause in question; either (*a*) "assigns" of the lighting contract and of St. Jacques's rights thereunder; or (*b*) of the term granted by the lease to St. Jacques of the "Russell House." The judges of the courts below all agree that, in either case, the respondents were entitled to cancel the lighting agreement at the expiration of five years from 1st May, 1902.

The Mulligans are not and never were "assigns" of the lighting contract within the strict meaning of the term. *Friary Holroyd and Healey's Breweries* v. *Singleton*(1); *Grove* v. *Portal*(2); *Bryant* v. *Hancock*(3); *South of England Dairies* v. *Baker*(4); *Leys* v. *Fiskin*(5).

Even if, prior to the 1st May, 1907, they might be regarded as "assigns," the assignment to them was only of a partial interest, and after that date they ceased to be "assigns," having no further interest whatever in the contract. If the word "assigns" refers to the lease, then, since the 1st May, 1907, no "assigns" of St. Jacques are tenants of the hotel. His lease expired on the 1st May, 1907, and the Mulligans occupy the hotel under a new lease.

The judgment of the court was delivered by

(1) (1899) 1 Ch. 86; 2 Ch. 261.
(2) (1902) 1 Ch. 727.
(3) (1898) 1 Q.B. 716; (1899) A.C. 442.
(4) (1906) 2 Ch. 631.
(5) 12 U.C.Q.B. 604.

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MACLENNAN J.—I am of opinion that this appeal should be dismissed.

I think the reasons for judgment of Mr. Justice Osler admit of no answer.

The appellants had an agreement with St. Jacques, lessee of the "Russell House," to supply him with electric lighting and power for use by him in the "Russell House," for ten years from the 1st of May, 1902.

St. Jacques's lease extended only to the first of May, 1907, and he had no right of renewal, or any interest in the hotel beyond that period. And unless he, or his heirs, executors, administrators or assigns, acquired some further interest in the hotel, either in fee or for a term subsequent to the 1st of May, 1907, the lighting agreement would, after that date, be a burden, instead of a benefit, to him or his estate.

To meet that contingency, a proviso was inserted in the agreement, that if, after the expiration of five years from the first of May, 1902, that is after the expiration of the St. Jacques lease, which was to expire on that day, St. Jacques, his heirs, executors, administrators or assigns, is neither owner nor tenant nor occupier of the hotel, by himself or together with another or others, then either party might cancel the agreement by a notice in writing.

St. Jacques might have purchased the hotel in fee, or he might have got a new term; and, in either case, might have held it or might have sold or assigned it, or in the event of his death, his heirs or executors or administrators might have taken possession of the hotel or have assigned it. In any one of these cases, St. Jacques, or his heirs, executors, administrators or assigns, might have been owner, tenant or occupier after the expiration of five years.

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None of those things happened. St. Jacques sold a half interest in his lease, and the whole, with a small exception, of the hotel furniture, to two persons named Mulligan, and formed a partnership with them in the hotel business, which was carried on until 1904, when St. Jacques died intestate, and the respondents were appointed administrators of his estate.

The death of St. Jacques terminated the partnership, and its affairs were all settled between the Messrs. Mulligan and the defendants, the Messrs. Mulligan becoming the exclusive owners of the lease and the sole occupants of the hotel, for the remainder of St. Jacques's term.

The St. Jacques lease expired on the 1st day of May, 1907, when the Messrs. Mulligan, in their own names, and for their own sole benefit, obtained a new lease from the owners of the hotel, and have continued the occupation and possession thereof ever since.

The argument for the appellant is that the Messrs. Mulligan are in possession since the 1st of May, 1907, as the *assigns* of St. Jacques, within the meaning of the proviso.

To me it seems too clear for any argument that this is not so.

They are tenants and occupiers after the 1st of May, 1907, but by a title entirely independent of St. Jacques, or his heirs, executors, administrators or assigns, and not otherwise.

Some observations were made upon the use of the word *heirs* in the proviso, as being useless or inappropriate. But I think the word was neither useless nor inappropriate. St. Jacques might have purchased the hotel absolutely, before the expiration of his term, and in that case he or his *heirs* or executors, admin-

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istrators or assigns might have been in possession at the expiration of five years from the first of May, 1902, in which case the notice terminating the agreement could not have been given.

I think the use of the word *heirs* makes the meaning of the proviso absolutely clear, in the sense which I have attributed to it.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *MacCraken, Henderson, McDougal & Greene.*

Solicitors for the respondents: *Gormully, Orde & Powell.*