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*May 19, 20.
*Oct. 5.

THOMAS A. LOVELESS (DEFENDANT) ..... } APPELLANT;

AND

FREDERICK ARDIEL FITZGERALD AND OTHERS (PLAINTIFFS) .... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Lease—Covenant not to assign—Assignment to co-partner—Right to renewal—Notice.

Where partners are lessees of a term for years and have covenanted not to assign or sub-let without the consent in writing of the lessor an assignment by one of his interest in the lease to his co-partner without such consent is a breach of such covenant. *Varley* v. *Coppard* (L.R. 7 C.P. 505) followed.

The lease provided that, having performed all their covenants and agreements contained in the lease the lessees on giving six months' notice in writing to the lessor before the expiration of the term that they required it, would be entitled to a renewal.

Held, that a breach (after the said notice was given) of their covenant in the lease not to assign without leave caused a forfeiture of the right to renewal.

Judgment appealed from (17 Ont. L.R. 254) affirmed.

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the judgment at the trial in favour of the plaintiffs.

In 1904 the appellant Loveless and one Barbour, partners in business, became assignees of a lease for a term to expire in August, 1907, and signed an agree-

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

(1) 17 Ont. L.R. 254 *sub nom. Fitzgerald* v. *Barbour*.

ment to pay the rent and observe all the obligations, stipulations and agreements contained therein. The lease contained a covenant by the lessees not "to assign or sub-let without leave," and provided that the lessors, in case the lessees had kept and performed all their covenants and agreements and should give notice in writing to the lessors six months before the term expired that they required it, would grant a renewal of the lease for a further term of five years.

The six months' notice for renewal was given, but before the term expired the partnership between the lessees was dissolved and Barbour, without leave of the lessors, assigned all his interest in the lease to his co-lessee Loveless. When the term ended the lessors refused to renew and brought an action for possession of the premises.

The two questions raised for decision in the case were: 1. Was the assignment by Barbour to his co-partner a breach of the covenant not to assign without leave? 2. If it was, having been made after the notice was given did it work a forfeiture of the right to a renewal?

The trial judge and Court of Appeal held that there had been a breach of the covenant not to assign, which entitled the lessors to re-enter and take possession of the premises. The lessee Loveless appealed from the judgment of the Court of Appeal to the Supreme Court of Canada.

Gibbons K.C. and *Geo. S. Gibbons* for the appellant. As soon as the notice was given, no breach having occurred up to that time at all events, the term was

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extended. 24 Cyc., p. 1008; *Finch* v. *Underwood*(1); *Bastin* v. *Bidwell*(2).

The breach, if any, was waived by the subsequent acceptance of rent. Foa on Landlord and Tenant (4 ed.), pp. 263 *et seq.; Davenport* v. *The Queen*(3); *Croft* v. *Lumby*(4).

A transfer to a co-partner is not a breach of the covenant not to assign. *Grove* v. *Portal*(5); *Corporation of Bristol* v. *Westcott*(6).

Varley v. *Coppard*(7) is not an authority against the present appellant. In that case there was no privity of covenant between the lessor and the assignee of the term, while here the retiring partner, Barbour, still remains liable to the lessor on his covenants. Moreover, later cases have shaken its authority. See *Langton* v. *Henson*(8); *Horsey Estate, Limited* v. *Steiger*(9).

Shepley K.C. and *Judd K.C.* for the respondents. The lessees were tenants in common only. R.S.O. [1897] ch. 119, sec. 11.

No case of waiver is made out. The trial judge decided against appellant on the point and his decision was affirmed by the Court of Appeal.

Varley v. *Coppard*(7) is conclusive in our favour. It has been followed in England and was discussed in *Munro* v. *Waller*(10), where the distinction was made between parting with possession and assigning.

(1) 2 Ch. D. 310.
(2) 18 Ch. D. 238.
(3) 3 App. Cas. 115.
(4) 6 H.L. Cas. 672.
(5) [1902] 1 Ch. 727.
(6) 12 Ch. D. 461.
(7) L.R. 7 C.P. 505.
(8) 92 L.T. 805.
(9) [1898] 2 Q.B. 259; [1899] 2 Q.B. 79.
(10) 28 O.R. 29.

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THE CHIEF JUSTICE was of opinion that the appeal should be dismissed for the reasons given in the court below.

Davies J.

DAVIES J.—During the argument I was inclined to the opinion that Mr. Gibbons has successfully distinguished *Varley* v. *Coppard*(1). Subsequent reflection and consultation with my colleagues however convinced me that I was wrong, and that in this appeal that case should be treated as correctly stating the law applicable to the facts before us. I have read the opinion of Mr. Justice Anglin and concur in his reasoning and conclusion.

IDINGTON J. and DUFF J. agreed with Anglin J.

ANGLIN J.—The defendant Loveless appeals from the judgment of the Court of Appeal for Ontario affirming the judgment of Meredith C.J. awarding to his landlords possession of certain leasehold premises in the City of London.

The original lease of these premises, made for a term of five years to N. F. Yeo and A. P. Yeo, was assigned by them with the approval of the lessor to the defendants Barbour and Loveless, who were partners in trade. It contained a provision for extension for a further term of five years upon the tenants observing all their covenants and giving written notice six months before the expiration of the original term of their desire for such extension. The lessees had covenanted not to assign without leave. The tenants, Barbour and Loveless, gave due notice of their desire for an extension. After the notice had been given and before the expiry of the original term they dissolved

(1) L.R. 7 C.P. 505.

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partnership and thereupon Barbour, without the leave of the landlords, assigned his interest in the lease to Loveless. This, the plaintiffs maintain, was a breach of the covenant not to assign without leave, and entitled them to refuse the extension demanded. The tenant Loveless refusing to quit the premises on the expiry of the original term, this action was brought to recover possession from him.

The defendant rests his appeal upon two grounds: (1) that the transfer without leave, upon dissolution of the partnership, of the interest of his erst-while partner in the leasehold premises, which had been occupied by the partnership, did not constitute a breach of the covenant against assignment without leave; (2) that if it were such a breach of covenant it would not disentitle him to the benefit of the extended term because it occurred after he and his former partner had given to the landlords notice of their intention to exercise their option for an extension of their term; that an assignment thereafter could operate only—if at all—as a ground of forfeiture, and that as a ground of forfeiture it had not only not been taken advantage of, but had been waived by the landlords' acceptance of two gales of rent.

The first point is, in my opinion, concluded against the appellant by *Varley* v. *Coppard*(1). The only differences between that case and this are, first, that there the lease was made originally to a single tenant and was afterwards assigned to two partners in trade, while in the present case there were two original lessees, who, with the landlords' consent, assigned to the appellant and his partner; and, second, that in

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Varley v. *Coppard*(1) there was merely privity of estate between the landlord and the assignees of the lease, whereas here the appellant and his partner had covenanted directly with the landlord for payment of rent, etc.

The rights and obligations of assignees of a lease, who hold subject to a covenant against assignment without leave, must in my view be the same, whether the lease was originally made to a single lessee or to several lessees. I find nothing in the slight difference in this respect distinguishing the present case in principle from *Varley* v. *Coppard*(1).

That there is privity of covenant between the landlord and the assignees in the present case and that the assignor therefore remained liable to the landlord for the rent of the premises for the remainder of the term, notwithstanding the assignment, whereas in *Varley* v. *Coppard*(1) there being no such privity of covenant but only privity of estate, the assignor's liability to the landlord for rent ceased upon the assignment, seems at first blush a difference of substance. But the covenant not to assign without leave cannot mean one thing where the liability of the assigning tenant to pay rent depends merely upon privity of estate and quite another where that liability rests also upon covenant. What amounts to a breach in the one case must likewise constitute a breach in the other. The adventitious circumstance that the out-going partner remained liable for rent because of his covenant to pay rent during the term cannot affect the construction of the entirely independent covenant not to assign without leave. The transfer may be less palpably

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injurious to the landlord—indeed, it may be that it does not injure or prejudice him at all—yet, if *Varley* v. *Coppard*(1) is rightly decided, it is none the less a breach of the covenant and entitles the landlord to exercise whatever rights accrue to him upon such a breach.

In *Corporation of Bristol* v. *Westcott*(2) Jessel M.R., referring to *Varley* v. *Coppard*(1), said:

> I do not know that I should have decided even that case in the same way for the deed was not in point of law an assignment,

a remark which is relied upon as casting some doubt upon the earlier case. But in *Langton* v. *Henson*(3), Buckley J. points out that this was said "by way of dictum," and he adds:

> Where one of two joint tenants assigns to another, or, as Sir George Jessel prefers to call it, releases to the other, he does most effectually deal with the estate; he destroys the privity of estate between himself and his lessor; the estate is affected; something has been parted with. The case of *Corporation of Bristol* v. *Westcott*(2), in my opinion, leaves *Varley* v. *Coppard*(1) altogether unaffected.

Hawkins J. expresses the same view in *Horsey Estate, Limited* v. *Steiger*(4).

As partners, the appellant and his former partner were not joint tenants, but tenants in common of the leasehold premises which were partnership property, and therefore a conveyance of the interest of one to the other must be by assignment and not by release.

Varley v. *Coppard*(1), decided in 1872, has been accepted by leading text-writers as authority for the proposition that an assignment without leave by one of two lessee-partners to the other is a breach of a covenant not to assign without leave. Woodfall (18

(1) L.R. 7 C.P. 505.
(2) 12 Ch. D. 461, at p. 465.
(3) 92 L.T. 805.
(4) [1898] 2 Q.B. 259, at p. 264.

ed.), p. 755; Foa (4 ed.), p. 278. It has been followed since the *Bristol Case*(1) in what appears to be a carefully considered case by a Divisional Court in Ontario, *Munro* v. *Waller*(2), and should, I think, be now regarded as an accepted authority.

The right of the lessees to the further term is made to depend upon the fulfilment of two conditions precedent—one, their giving six months before the expiration of the term originally created written notice that they require a further term; and the other, performance by them of all covenants in the lease. No question arises as to the first condition; the requisite notice was duly given at a time when there had been no breach of covenant by the tenants.

The appellant maintains that the second condition means not that the lessees must as a condition precedent fulfil their covenants throughout the entire original term, but that observance of them shall be required as a condition precedent only up to the time when notice requiring a further term is given and that a breach thereafter is not of a condition precedent, but merely of an ordinary covenant giving to the landlord a right of forfeiture of the further term vested in the tenants by their notice. It is obvious that if this contention should prevail, the lessees, by giving the requisite notice for extension immediately after taking their lease, would entirely eliminate observance of their covenants as a condition precedent to their right to have such extension.

This certainly was not the intention of the parties, and I find nothing in the agreement to warrant such a construction. The agreement is that the lessor "will

(1) 12 Ch. D. 461. (2) 28 O.R. 29.

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allow the lessees to occupy the said premises for a further term of five years commencing at the expiration of the term hereby created," "if the lessees have duly kept and performed all the covenants, provisos, and agreements in these presents contained." These words clearly import observance of covenants, etc., up to the time at which the lessor agrees to permit occupation for the further term to begin, which is at "the expiration of the term hereby created."

The appellant relies upon a statement of Mellish L.J. in *Finch* v. *Underwood*(1), to the effect that such a condition is satisfied if the covenants "have been so observed and performed that there is no existing right of action under them at the time when the lease is applied for." Kay J., quoting this language in *Bastin* v. *Bidwell*(2), at p. 250, says: "That must mean, I suppose, at the time when the notice was given."

In neither of these cases was it necessary to determine this point. In both the lessees had broken their covenants to repair before the notice for renewal was given, and the state of disrepair actually subsisted at the date of the notice. I must respectfully decline to follow this mere *obiter dictum* of Mellish L.J., as interpreted by Kay J.

The cases of *Hersey* v. *Giblett*(3), and *Nicholson* v. *Smith*(4), cited by the appellant upon this point do not appear to be at all relevant.

The assignment by Barbour to Loveless constituting a breach of a covenant at a time when its observance was still a condition precedent to the right of extension, the landlord was justified in refusing the extension demanded. The appellant is therefore an

(1) 2 Ch. D. 310, at p. 315.
(2) 18 Ch. D. 238.
(3) 18 Beav. 174.
(4) 22 Ch. D. 640.

overholding tenant and is subject to ejectment at the suit of his landlord.

The appeal fails, and must be dismissed with costs.

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Appeal dismissed with costs.

Solicitors for the appellant: *Gibbons, Harper & Gibbons.*

Solicitors for the respondents: *Meredith, Judd & Meredith.*