PHILIP JAMESON (PLAINTIFF).....APPELLANT; 1897

AND *Mar. 8, 9.
*May 1.

THE LONDON AND CANADIAN LOAN AND AGENCY COMPANY (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage—Leasehold premises—Terms of mortgage—Assignment or sub-lease.

A lease of real estate for twenty-one years with a covenant for a like term or terms was mortgaged by the lessee. The mortgage after reciting the terms of the lease proceeded to convey to the mortgagee the indenture and the benefit of all covenants and agreements therein, the leased property by description and "all and singular the engines and boilers which now are or shall at any time hereafter be brought and placed upon or affixed to the said premises, all of which said engines and boilers are hereby declared to be and form part of the said leasehold premises hereby granted and mortgaged or intended so to be and form part of the term hereby granted and mortgaged;" the habendum of the mortgage was: "To have and to hold unto the said mortgagee, their successors and assigns for the residue yet to come and unexpired of the term of years created by the said lease less one day thereof and all renewals, etc."

Held, reversing the judgment of the court of appeal, that the premises of the said mortgage above referred to contained an express assignment of the whole term, and the *habendum*, if intended to reserve a portion to the mortgagor, was repugnant to the said premises and therefore void; that the words "leasehold premises" were quite sufficient to carry the whole term, the word "premises" not meaning lands or property but referring to the recital which described the lease as one for a term of twenty-one years.

Held further, that the habendum did not reserve a reversion to the mortgagor; that the reversion of a day generally without stating it to be the last day of the term is insufficient to give the instrument the character of a sub-lease.

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*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Common Pleas Division in favour of the plaintiff.

The appellant Jameson having leased certain premises in Toronto to one Armstrong for a term of twenty-one years, with a covenant for renewal, Armstrong mortgaged the lease to the respondents and the sole question is whether such mortgage operated as an assignment of the whole term or a sub-lease. The material portions of the mortgage are set out in the judgment of the court.

The Divisional Court held the mortgage to be an assignment. The Court of Appeal reversed this judgment, being of opinion that there was a reversion of part of the term to the mortgagor.

Armour Q.C. and *Irving* for the appellant. The grant of the "leasehold premises" in the mortgage refers to the recital and is sufficient to pass the whole term. *Germaine* v. *Orchard* (2); *Goodtitle* v. *Gibbs* (3); *Roddington* v. *Robinson* (4.)

The habendum contains no reservation. Reserving a day generally is not sufficient. It should be the last day. *Doe Meyers* v. *Marsh* (5); *Smith* v. *Cooke* (6).

Arnoldi Q.C. for the respondent cited *Burton* v. *Barclay* (7); *Barthel* v. *Scotten* (8).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—On the 1st of January, 1889, the appellant executed an indenture of lease of certain land and buildings in the city of Toronto whereby he demised the same to one James Rogers Armstrong for a term of twenty-one years, reserving an annual rent

(1) 23 Ont. App. R. 602.
(2) Shower's Parl. Cas. 252.
(3) 5 B. & C. 709.
(4) L. R. 10 Ex. 270.
(5) 9 U. C. Q. B. 242.
(6) [1891] A. C. 297.
(7) 7 Bing. 745.
(8) 24 Can. S. C. R. 367.

of $1,400. The lease contained the usual covenants, a covenant on the part of the lessee not to assign or sublet without license, and a covenant for renewal. This latter covenant which is very material to the question raised by the appeal, was in the following words:

> The said lessor for himself, his heirs, executors, administrators and assigns, covenants and agrees with the said lessee, his executors, admintrators and assigns, in the manner following: That the said lessee, his executors, administrators or assigns, duly and regularly paying the said rent and performing all and every the covenants, provisoes and agreements herein contained on his part to be paid and performed, the said lessor, his heirs, executors, administrators or assigns, will at the expiration of the term hereby granted, or any renewal or renewals thereof, grant to the said lessee, his executors, administrators or assigns, a renewal lease of the said hereby demised premises for a further term of twenty-one years, such renewal lease to contain the same covenants, provisoes and conditions as are contained in these presents, and at a certain rent payable (except as to the amount thereof) as before provided, the amount of such rent on every renewal of the said term (if it cannot be agreed upon), to be ascertained by three arbitrators.

On the 22nd of March, 1889, James Rogers Armstrong, the lessee in the before mentioned lease, executed a mortgage in favour of the respondents of the lease and leasehold premises to secure the payment of the sum of $4,000 lent and advanced by the respondents to the mortgagor. This mortgage (as well as a subsequent mortgage by way of further charge identical in terms with the first and to which further reference need not be made) was by indenture made between Armstrong and the respondents. The respondents contend that according to the proper construction, it took effect by way of sub-lease reserving a reversion to the mortgagor. On the other hand the appellant, the lessor, contends that it operated as an assignment of the whole term, and that the respondents as assignees are consequently liable upon the covenants to pay rent. Mr. Justice Robertson, before

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whom the action was tried, was of the opinion that the instrument operated by way of assignment, and pronounced judgment for the appellant accordingly. The Court of Appeal reversed the judgment, the learned Chief Justice of Ontario doubting but not dissenting.

The solution of the question raised depends entirely on the construction of the mortgage deed already referred to.

The material parts of this deed to be considered, for the purpose of determining its character as a sub-lease or an assignment, are the recital, the part of the deed called by conveyancers the premises, and the *habendum*. I, therefore, set forth these several clauses *in extenso*. The recital is as follows:

Whereas by indenture of lease bearing date the first day of January, 1889, and made between Philip Jameson, of the said city of Toronto, merchant, as lessor, and the said mortgagor as lessee, the said Philip Jameson demised unto the said mortgagor, his executors, administrators and assigns, the lands hereinafter mentioned for the term of twenty-one years from the first day of January, 1889, subject to the rents, covenants and conditions therein reserved and contained and with the rights of renewal therein contained.

The premises are in these words:

Now, therefore, this indenture witnesseth that in consideration of four thousand dollars of lawful money of Canada now paid by the said mortgagees to the said mortgagor (the receipt of which is hereby acknowledged), the said mortgagor doth grant and mortgage unto the said mortgagees, their successors and assigns for ever, all and singular the said indenture of lease and the benefit of all covenants and agreements therein contained, and all that certain parcel or tract of land and premises situate lying and being in the city of Toronto, in the county of York, being composed of lots numbers five and six on the south side of Queen street according to registered plan 14, together with all and singular the engines and boilers which now are or shall at any time hereafter be brought upon and placed upon or affixed to the said premises, all of which said engines and boilers are hereby declared to be and form part of the said leasehold premises hereby granted and mortgaged or intended so to be and be and form part of the term hereby granted and mortgaged.

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The *habendum* which immediately follows the premises, is thus expressed:

> To have and to hold unto the said mortgagees, their successors and assigns for the residue yet to come and unexpired of the term of years created by the said lease, less one day thereof, and all renewals and substituted estates and rights of renewal and other interest of him the said mortgagor or which he may hereafter acquire therein. Together with all the outhouses, outbuildings, easements and appurtenances thereto belonging or now in anywise used or enjoyed in connection with the said premises by the said mortgagor.

I am of opinion that the first judgment was right, and that the decision of the Court of Appeal cannot be supported. The contention of the respondent was that the premises did not contain an express assignment, but merely an assignment by implication, and that therefore there was no repugnancy between the premises and the *habendum*, that consequently the latter clause governed, and that by its terms there was a clear reservation of a reversion to the mortgagor, the result being that the instrument operated as a mortgage by way of sub-lease, and not as an assignment. There can be no doubt that if the premises of the deed did contain an express assignment of the whole term, the *habendum*, construing it as reserving a reversion to the mortgagor, would be repugnant and void. In order, however, to arrive at this conclusion we must find that there is in the premises an explicitly declared intention to assign the whole term. The Court of Appeal considered that the words were to be construed as an assignment in the first place of the indenture, by which the lease was effected as a document of title merely, and of some certain and undefined interest in the parcels described, and that there was no assignment of the term. I cannot agree in this conclusion. The words "leasehold premises," in my opinion, are quite sufficient to carry the whole term. We must attribute to the word "premises,"

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in this formal instrument its proper, legal and technical signification, and not read it as synonomous with "lands" or "property," as it is, I admit, commonly used in popular language. Then what do these words mean? The word "premises" clearly has reference to the recital in which the lease is described as a lease for a term of 21 years. The words "leasehold premises," must, therefore, be read as referring to and including this term, and this part of the deed must be held to contain an express assignment of the whole term with which an *habendum* so limited as to leave a reversion in the mortgagor would be inconsistent, and, therefore, void for repugnancy. The case of *Germaine* v. *Orchard*, in the House of Lords, reported in the 3rd (p. 222) vol. of Salkeld, and in Showers Parliamentary Cases (p. 252), is an express authority directly in point and undistinguishable from the present case. It is true *Germaine* v. *Orchard* is an old case, but it has, so far as I can find, never been called in question, but has been recognized in modern decisions, and also very lately by such authoritative writers on conveyancing as Mr. Challis (1), and Sir Howard Elphinstone (2). It is also cited by Preston (3), as a governing authority. Therefore, assuming the construction that the respondent asks us to place upon the *habendum* to be correct, it would be void for the reasons stated.

This, however, is not the only reason why I find it impossible to uphold the judgment under appeal. The *habendum* itself does not reserve a reversion to the mortgagor. If we read it as doing so, we make it inconsistent with itself and therefore void. See per Robinson C. J., *Doe Meyers* v. *Marsh* (4); *Touchstone* (5).

(1) Real Property 2 ed. p. 377.
(2) Interpretation of Deeds, p. 220
(3) Conveyancing, vol. 2, p. 125.
(4) 9 U. C. Q. B. 242.
(5) P. 114.

If we are to construe the words "less one day thereof," as meaning the last day of the term, as we necessarily must do if we are to give effect to the respondent's proposition that there was a reservation of a reversion, we bring these words into direct conflict with other terms of the *habendum* and thus introduce that repugnancy which must be fatal to it. This is apparent in two respects. The *habendum* expressly includes "all renewals and substituted estates and rights of renewal, and other interests of him the said mortgagor, which he may hereafter acquire therein."

Now in the first place, if we turn to the renewal clause in the lease above set forth, we find that no right of renewal is to arise until the expiration of the lease, so that if we are to consider the last day of the term as reserved to the mortgagor the right of renewal, as between the lessor and the lessee and those claiming under the latter, would be in the lessee himself and not in his mortgagees. This shows conclusively, in my opinion, that it was intended by this part of the *habendum* that the mortgagees should have the whole term in them including the last day, an interpretation essential to qualify them to exercise the right of renewal. This is strengthened by the second and other argument drawn from the words "and other interests of him the said mortgagor" which are utterly inconsistent with the retention by the latter of a reversion. In order to avoid this repugnancy we must, therefore, construe the reservation of a day generally (without saying the last day of the term), as meaning the first day after the execution of the mortgage. Preston (1), as high an authority as any which could be quoted on such a point, has this passage:

In order that an instrument may operate as an under-lease, a reversion must be retained by the former owner and consequently the

(1) 2 Conv. p. 125.

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under-lease must be for a period less in point of time than the term or estate of the lessor, or when the grant is for the residue of the term of the grantor, there must be an exception of the last day or the last hour, or of some other period of the term. This exception as well as a grant made for part only of the period during which the estate of the grantor is to continue, will leave a reversion in the grantor. It is material that the instrument shall reserve the last portion of the estate for an instrument may, it should seem, operate as an assignment notwithstanding it reserves a portion of the estate, being the first part of it as in the case of an assignment to hold from a day to come or from an event to happen unless it is to happen after the death of a person by express limitation.

Thus it will be seen that even as regards an *habendum* which contains no terms inconsistent with a day generally reserved being construed as the last day of the term Preston considers such a general reservation insufficient to give the character of a sub-lease. Then *a fortiori* must this be so if to construe such a general reservation would make the *habendum* itself irreconcilable with the express provisions to be found (as in the present case) in the *habendum* clause itself.

Again the same writer (Preston) says (1):

> After the under-lease is made by a term for years the grantor has in point of estate not merely and simply the residue of the time of his original term; he has the same measure of time, duration of interest and estate as he had prior to the under-lease subject only to that lease. The sole effect of the under-lease is to confer a right to the possession or other beneficial enjoyment during the term granted by the under-lease; and the lessor in the under-lease retains by way of seigniory or reversion his original ownership, subject only to the right conferred by the under-lease.

This is undoubtedly a correct definition of the estates and relative rights in the term of a lessee and under-lessee. Then how can it possibly be said that an *habendum* which grants, as the present *habendum* does, all the interests of the lessee as well as those he may subsequently acquire, is susceptible, consistently

(1) Conv. vol. 2, p. 125.

with Preston's definition, of being construed as creating not an assignment, but a mere under-lease.

The appeal must be allowed with costs and the judgment of Mr. Justice Robertson restored.

Appeal allowed with costs.

Solicitors for the appellant: *Kilmer & Irving.*

Solicitors for the respondent: *Howland, Arnoldi & Bristol.*

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