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*June 5.

*Nov. 16.

WARREN Y. SOPER (DEFENDANT).....APPELLANT;

AND

JAMES E. B. LITTLEJOHN AND JOSEPH CRAWFORD VAUGHAN (PLAINTIFFS)..... } RESPONDENTS.

AND

THOMAS FANE AND CHARLES F. LAVENDER..... } DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Lease—Covenant—Forfeiture—Company—Shareholder—Personal liability—Waiver.

A lease to a joint stock company provided that in case the lessee should assign for the benefit of creditors six months rent should immediately become due and the lease should be forfeited and void. The two lessors were principal shareholders in the company and while the lease was in force one of them, at a meeting of the directors moved, and the other seconded, that a by-law be passed authorizing the company to make an assignment which was afterwards done the lessors executing the assignment as creditors assenting thereto.

Held, reversing the judgment of the Court of Appeal (1 Ont. L.R. 172) that the lessors and the company were distinct legal persons and the individual interests of the former were not affected by the above action. *Salomon* v. *Salomon & Co.* ([1897] A. C. 22) followed.

The assignee of the company held possession of the leased premises for three months and the lessees accepted rent from him for that time and from sub-lessees for the month following.

Held, also reversing the judgment appealed from, that as the lessors had claimed the six months accelerated rent under the forfeiture clause in the lease and testified at the trial that they had elected to forfeit; as the assignee had a statutory right to remain in possession for the three months and collect the rents; as the

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

evidence showed that the receipt by the lessors off the three months rent was in pursuance of a compromise with the assignee in respect to the acceleration ; and as the months rent from the sub-tenants was only for compensation by the latter for being permitted to use and occupy the premises and for their accomodation ; the lessors could not be said to have waived their right to claim a forfeiture of the lease.

Mortgagees of the premises having notified the sub-tenants to pay rent to them the assignee paid them a sum in satisfaction of their claim with the assent of the lessors against whose demand it was charged.

Held, that this also was no waiver of the lessors' right to claim a forfeiture.

Quœre. Was a covenant by the company to supply steam and power to its sub-tenants anything more than a personal covenant by the company or would it, on surrender of the orriginal lease have bound the lessor and a purchaser from him of the fee ?

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment at the trial in favour of the defendant.

The questions to be decided on the appeal sufficiently appear from the above head-note and are fully stated in the judgment of the Court.

Ritchie K.C. and *Ryckman* for the appellant. The findings of fact by the trial judge should not have been disturbed by the Court of Appeal. *Village of Granby* v. *Ménard* (2).

There was clearly a forfeiture of the term which the lessors elected to claim. Their subsequent acts cannot be held a waiver. *Griffith* v. *Brown* (3); *Baker* v. *Atkinson* (4) ; *Linton* v. *Imperial Hotel Co.* (5).

Thomson K C. and *Tilley* for the respondents. The original lessor was bound by the covenant in the sublease to supply power. Woodfall on Landlord and Tenant (16 ed.) sec. 324.

(1) 1 Ont. L.R. 172.
(2) 31 Can. S. C. R. 14.
(3) 21 U.C.C. P. 12.
(4) 11 O.R. 735.
(5) 16 Ont. App. R. 337.

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The forfeiture clause is divisible, *Graham* v. *Lang* (1) and the case is governed by the principle of the decision in *Linton* v. *Imperial Hotel Co.* (2).

The judgment of the court was delivered by :—

THE CHIEF JUSTICE.—Up to January, 1898, Fane and Lavender, two of the defendants in this action, had carried on business for the manufacture of bicycles in partnership. On the tenth of January, 1898, a joint stock company was formed under the provincial statutes of Ontario in which Fane and Lavender became shareholders. The name adopted as the designation of this company was that of "The Comet Cycle Company."

On the eleventh of January, 1898, Fane and Lavender made a lease of the premises on which they had previously carried on their partnership business, to the company. This lease was made by indenture and was for a term of five years to be computed from the first of October, 1897, at a yearly rental of three thousand dollars, and it contained the following clause :

> If the term hereby granted shall at any time be seized or taken in execution of an attachment by any creditor of the said lessee, or if the said lessee shall make any assigment for the benefit of creditors, or becoming bankrupt or insolvent, shall take the benefit of any Act which may be in force for bankrupt or insolvent debtors, six months rent shall immediately become due and payable and the said term shall immediately become forfeited and void.

On the twenty-fifth of February, 1899, the company made by indenture a sub-lease to the respondents, Littlejohn and Vaughan, (the plaintiffs in the action and respondents in this appeal,) of a portion of the premises contained in the first mentioned lease, for a term of two years from the fifteenth of March, 1899, with an option to the lessees of renewal for a further

(1) 10 O. R. 248 (2) 16 Ont. App. R. 337.

term of three years at a rental of thirty dollars per month. This sub-lease contained the usual covenant for quiet enjoyment and also a covenant in the following words:

> The said lessors agree to supply the said lessees with heating and sufficient live steam for heating water, wax tables and pots and steam drying tables, and the said lessors for this agree to supply the said lessees whenever required with power up to ten horse at and for the sum of twenty-five dollars per month, payable in advance, the said live steam and power to be furnished between the hours of seven o'clock in the morning and six o'clock in the evening.

On the twenty-ninth of April, 1899, the company made an assignment pursuant to the statute to James Langley as assignee for the benefit of creditors.

Fane and Lavender, as creditors, assented to and executed the deed of assignment in the character of creditors of the company.

The assignee took possession of that part of the premises comprised in the original lease to the company which were not included in the sub-lease to Littlejohn and Vaughan and remained in such possession until the twenty-sixth of April, 1899.

The assignee gave no notice to the lessors within one month of the assignment, or at any time, declaring his election to retain the premises as provided by R. S. O. (1897), ch. 170, sec. 34, sub-section 2. On the 30th of May, 1899, Fane and Lavender filed with the assignee a claim verified by the affidavit of Fane for rent, including six months rent in advance amounting to $1,500, from the date of the assignment under the provisions in that behalf contained in the lease and before set forth.

From the evidence contained in the depositions of witnesses examined at the trial it appears to me to be plain that immediately after the assignment Fane and Lavender in addition to the claim for rent gave verbal notice to the assignee that they would insist on the

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forfeiture under the terms of the lease. The finding of the trial judge is to this effect and I adopt his finding as being a proper conclusion from the evidence.

Certain mortgagees of the premises having given notice to Littlejohn and Vaughan to pay the rent reserved by the sub-lease to them, an arrangement was made by which, on the twenty-sixth of June, 1899, the assignee paid over to the mortgagees a sum of seven hundred and fifty dollars in satisfaction of their demand and thereupon the latter withdrew their claim to rent. This payment was charged against the claim of Fane and Lavender and was paid with their assent.

On the twenty-seventh of July, 1899, the assignee gave up possession of the company's part of the premises to Fane and Lavender and made no further claim to rent from Littlejohn and Vaughan who had, whilst the assignee remained in possession, paid the rent under the sub-lease, including that for the power, to him. This payment was insisted upon by the assignee. It is not found that Fane and Lavender assented to these payments.

On the fifteenth of August, 1899, Fane and Lavender sold the premises to the appellant Soper, and a written agreement having been entered into, it was registered on the sixteenth of August. On the twenty-second of August, 1899, a deed was executed by Fane and Lavender conveying the premises to the appellant. Fane and Lavender supplied steam and power in accordance with the terms of the sub-lease and were paid by the respondents rent therefor up to the first of September, 1899.

On the thirty-first of August the appellant demanded possession of the respondents, which was refused.

On November, 1899, the respondents brought this action against the present appellant and Fane and

Lavender for breach of the covenant for quiet enjoyment, and for refusing to supply steam and power. The defendants insisted on the forfeiture of the respondent's lease, and the present appellant counter-claimed for the delivery of possession.

The action was tried before Mr. Justice Meredith who gave judgment dismissing the plaintiff's action with costs, and directing that upon the counter-claims, the appellant Soper should recover possession and mesne profits up to the first of January, 1900, and that Fane and Lavender should recover $72.50 for mesne profits and services up to the thirtieth of October, 1899.

This judgment was reversed by the Court of Appeal, the ground of reversal being that the forfeiture was waived and that there was, by operation of law, a surrender of the original term to Fane and Lavender which under the statute made them liable upon the covenants of the company contained in the sub-lease; that the appellant Soper, as assignee of the reversion was also bound by these covenants, which together with the sub-lease were valid and subsisting against him; and that the respondents were entitled to recover certain damages to be ascertained by a reference

I may say at once that I have great doubts as to whether the covenant to supply steam and power to the respondents was anything more than a personal covenant by the company. I doubt if it would, on the assumption of a surrender by operation of law, have bound Fane and Lavender under the statute and whether the burthen of it would have run with the reversion so as to bind the appellant Soper. I assume, however, for the purposes of the judgment, that Fane and Lavender as well as Soper would have been so bound.

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Then it is as well to point out here that there is nothing in the pretence that Fane and Lavender having been shareholders in the company, they must, as regards their individual interests as lessors, be affected by the acts of the company. Fane and Lavender and the company were undoubtedly distinct legal persons, and the acts and conduct of one cannot have any effect on the other. This appears from the case of *Salomon* v. *Salomon & Co.* (1). Any objection founded on the connection of Fane and Lavender with the company resolves into a criticism of the law which permits the establishment of companies with such consequences and is not a ground for any judicial action.

Then the first proposition of the appellants is that there was a forfeiture of the lease. As concluding this point, I cannot do better than quote from the judgment of Meredith J. who says:

> It is contended that there was no forfeiture, because the assignee did not go out of possession until three months after the making of the assignment, and because, after that the lessors accepted from him and from the sub-lessees the amount of the rent under the lease and the sub-lease, the former for the three months during which the assignee was in possession, and the latter for the month of August, that is, the month following the going out of possession by the assignee.
>
> That the term ended is not denied. There is no contention, no suggestion on either side, that it still subsists in either the company or the assignee. For the defendants, it is said, it ceased by forfeiture. For the plaintiffs, it is said to have ceased by surrender.
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> Now, there was the forfeiture clause contained in the lease, coupled with the provision for payment of the six months' unearned rent. There is the probability that the lessors would avail themselves of the provisions of this clause. Why would they not? It was altogether in their interests to do so. There was a claim made for the six months' rent unearned, showing a determination to have the benefit of this clause, to act under it; and there is the positive testimony of the lessor, Fane, in support of the election to forfeit, not denied by the

(1) [1897] A. C. 22.

assignee, but rather supported, I think, by his testimony, and without contradiction by any one. The acts relied upon by the plaintiff as indicating an intention not to forfeit are all, I think, entirely consistent with the assignee's right to possession under the statute, notwithstanding the landlord's election in favour of the forfeiture, and so consistent with the testimony in proof of that election.

Then the learned judge further finds that on the conflicting testimony as to the acquiescence of Fane and Lavender in the assignee's claim to hold possession under the statute and to keep the sub-lease subsisting there was no acquiescence on the part of the lessors.

Upon the evidence and upon the findings of the trial judge, who was in a better position than an appellate court to determine, upon the credit of witnesses, and the weight of evidence, that there was a forfeiture which the lessors Fane and Lavender declared their election to insist upon immediately after the assignment was executed, we are bound to hold that the forfeiture took effect. I think too little weight has been attached to the statutory rights of the assignee and the line of conduct pursued by him in exercise of those rights. Had the assignee not had a paramount right under the statute to retain possession, including therein the receipt of rent from the sub-lessee and, notwithstanding the forfeiture clause, for the three months following the assignment, the case would have been very different Then, it might have been difficult to account for the omission to enforce delivery up of possession and the receipt of rent, upon any hypothesis consistent with an election to forfeit. The effect of the statute, however, was to compel the lessors to await the termination of the statutory three months during which the assignee thought fit to keep things in uncertainty.

I am of opinion, therefore, that there was a completed forfeiture communicated to the parties. How

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anything *ex post facto* could do away with the effect of this forfeiture I am at a loss to see; therefore, on this point of law, the appellant's case is conclusively established. But, even if the evidence and the finding of the learned judge had been different, I should have difficulty in attributing waiver to any of the acts relied on as proving it.

The payment to the mortgagee has no bearing; he had a right over-riding that of the parties and all the lessors did was to let the assignee pay him off, charging the amount paid against the rent coming to them.

The receipt of the three months rent from the assignee is obviously no waiver sufficient to do away with a forfeiture already consummated, and is explained moreover as having been based on a compromise with the assignee and was the only payment in full which the assignee was bound to make, whatever rights the lessors may have had to prove against the insolvent estate for the balance of six months rent.

The receipt of the August rent from the respondents was manifestly by way of compensation for use and occupation permitted, for the accommodation of the sub-tenants and which they did not treat in any other way. It is impossible to say that by this the lessors intended to renounce the absolute title they had acquired under their election to forfeit, even if in law it could have had that effect. The receipt of this August rent, moreover, could not have effected the appellant since his equitable title under the agreement preceded the receipt by the lessors.

On the whole the judgment of Mr. Justice Meredith appears to be right and should be restored. It may be a very hard case but that cannot affect the decision. It is much to be regretted that the fair and liberal offer of the appellant, Soper, was rejected.

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The judgment of the Court of Appeal must be reversed and that of the Divisional Court restored. The record must be remitted to the High Court with directions to carry on the account of mesne profits up to the time the appellant shall recover possession and to enforce payment of the same.

The appellant Soper and the defendants Fane and Lavender must have their costs in all the courts below as well as in this court.

Appeal allowed with costs.

Solicitors for the appellant: *Ryckman, Kirkpatrick & Kerr.*

Solicitors for the respondents: *Thomson, Henderson & Bell.*