DOMINION CREOSOTING COMPANY (DEFENDANT) ..... } APPELLANT;

AND

T. R. NICKSON COMPANY (PLAINTIFF) ..... } RESPONDENT.

1916
*Oct. 23.
1917
*Feb. 6.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Company law—Assignment of debt—Security—"Mortgage or charge"—Registration—"Companies Act," R.S.B.C. 1911, c. 39, s. 102.

A contract was entered into between the respondent company and the City of Vancouver for paving some of its streets; and it was provided that the city should retain ten per cent. of the contract price for twelve months after the completion of the work to insure the carrying out of the contract. The respondent, being indebted to the appellant for the purchase of the materials required for the work, assigned to the appellant, before the expiration of the twelve months, the monies so conditionally retained by the city. The respondent went afterwards into liquidation.

Held, Fitzpatrick C.J. and Anglin J. (dissenting), that such assignment, while in form absolute, constituted a "mortgage or charge," within the meaning of section 102, chapter 39, R.S.B.C. 1911, requiring registration as against the liquidator of the insolvent company.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of Clement J. at the trial, by which the plaintiff's action was dismissed with costs.

The material facts of the case are stated in the above head-note.

Armour K.C. for the appellant.

Stuart Livingston for the respondent.

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

(1) 23 B.C. Rep. 72.

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The Chief Justice.

THE CHIEF JUSTICE.—I am disposed to think that the judgment on the trial was right and that this appeal should be allowed. The assignments are absolute in form and must be held to be so in effect unless we can find some ground for supposing that they were only made as security to the appellant for payment on the goods sold by it to the respondent.

Counsel for the appellant endeavoured to show at the trial that the retention moneys under the respondent's contracts with the City of Vancouver which were assigned were payments in discharge of the balance due to the appellant on their accounts with the respondent. If the decision of the case depended on this question I should have no hesitation in finding for the respondent. Until the expiration of the period of retention it was impossible to say that monies would be payable to the respondent by the City of Vancouver. In the first case, the contract having been completed when the assignment was made and the amount of the retention money being known, this exact amount was assigned; the City, however, incurred expenses for maintenance in accordance with the terms of the contract and accordingly deducted the amount of these from the retention monies, paying only the balance into court. The amount of these deductions the appellant admits it cannot recover. I cannot think that the amounts of the retention monies which would eventually be payable by the City of Vancouver being thus uncertain, the appellant could have ever intended to accept the assignments of them in full discharge of the respondent's indebtedness to it. Again, the retention monies under the first contract were payable by the City after twelve months which expired on the 17th September, 1913. There is no explanation why the appellant after having stipulated

for a bonus equivalent to 10% interest should have allowed payment to stand over until the respondent went into liquidation more than a year after unless they were looking to a future general settlement of accounts with the respondent.

However, the amount of the retention monies eventually to become payable could not have exceeded the appellant's claim though it might have been less and I cannot under these circumstances see any reason why the appellant should not have accepted absolute assignments of the retention monies as payments *pro tanto* of the debts due to it.

The amount assigned was calculated to cover interest at 10% and the agreement was therefore equivalent to an undertaking not to pay off the debt until the expiration of the retention period. The appellant was entitled to this interest and it is not to be supposed that the respondent even if the assignment had been only a security would have paid it before it was due. It is absurd to suppose that the respondent would have had any object in paying a charge off at the expiration of the retention period for it would have been paying a sum in cash to obtain an exactly equal amount of cash.

The record is a very embarrassed one but so far as I can ascertain the facts, I think there is no reason why the assignments should be held to be other than absolute as they purport to be. I have, of course, less hesitation in so holding as the trial judge gave no reasons for judgment and the Chief Justice delivering the judgment of the Court of Appeal only says that he thinks there is sufficient evidence to shew that the assignments were given as security falling within section 102 of the statute.

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Davies J.

DAVIES J.—After much consideration and not without some doubts, I have reached the same conclusion as that reached by the Court of Appeal for British Columbia.

The question to be determined is whether the assignments to the appellant company by the respondent company now in liquidation of certain moneys to become due under certain contingencies to them under contracts the latter company had with the City of Vancouver, for the paving of its streets, were absolute assignments of such moneys or were mortgages or charges on such moneys within the meaning of section 102, chapter 39, R.S.B.C. 1911, requiring registration as against the liquidator of the assignor company and others.

I have reached the conclusion that they were such mortgages or charges within the meaning of that section and therefore void as against the liquidator by reason of want of registration.

The assignments though in form absolute shew on their face that they were intended *as a security* to the assignee for the payment of its debt.

In determining whether they were absolute assignments or mortgages or charges merely regard must be had to the nature of the transaction and the real facts and intentions of the parties.

The broad facts were that the Nickson Company, respondent, having obtained from the Creosoting Company, the appellant, supplies to enable them to carry out their contracts with the City of Vancouver, for the laying of creosoted block pavement in the city "for the purpose of securing the payment" of the cost of such supplies gave the assignments in question.

The moneys proposed to be assigned were 10% of the contract price retained in its hands by the City

for twelve months after the contracts were severally completed in accordance with the specifications. If during that period the work was found to be defective the contract with the City provided that its officers might remedy and repair the defects and that the cost of doing so should be paid out of the moneys so retained.

The moneys so assigned were not payable till the period of 12 months from the completion of the contract had expired; they might never become payable at all as they might be used for the purposes for which they were retained or they might only be payable in part.

The stipulations of the appellants' several contracts with the city provided that the moneys so retained by the City might be used if necessary not only in making good defects in the work done under the particular contract under which it was retained but also defects or faults in the work of any other similar contract the party had at the time with the City.

At the time the assignments were lodged with the City by way of notice there was no fund in the hands of the City to which they or any of them attached but merely the retention moneys under the contracts which might be exhausted in whole or in part in maintenance and repairs on any or all of the respondents' contracts with the City.

Looking at the nature of these transactions as detailed in the evidence, the fact that the assignments though absolute in form profess to be taken as security for the moneys due the assignee, the further fact that no moneys were really payable under them until the period of maintenance had expired and then only such of these moneys as were not used in remedying defects

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or faults, which during that period had been found in the work done, I have reached the conclusion that the assignments while in form absolute were in reality and in substance equitable assignments only and constituted mortgages or charges within the meaning of the Act upon the disputed moneys which to be effective against the liquidator required registration.

In *Gorringe* v. *Irwell India Rubber Co.* (1), at p. 134, Cotton L.J. uses the following words which I think applicable to this case:

> When there is a contract for value between the owner of *a chose in action* and another person which shews that such person is to have the benefit of the *chose in action* that constitutes a good charge on the *chose in action*. The form of words is immaterial so long as they shew an intention that he is to have such benefit.

And Chitty L.J. in the case of *Durham Brothers* v. *Robertson* (2), at p. 772, says:

> "Where there is an absolute assignment of the debt but *by way of security* equity would *imply* a right to a reassignment on redemption.

Looking therefore at the purpose and object of the Act requiring registration and at all the facts and circumstances of the case, I have reached the conclusion that the appeal must be dismissed with costs.

Once this conclusion is reached, it becomes unnecessary to discuss whether any part of the 10% deposit had become exigible before the insolvency of the company now in liquidation.

The point was not referred to in the factums of either party on this appeal or in the argument at bar, nor does it appear to have been raised in the Court of Appeal.

The single question argued and determined was whether the assignments were or were not mortgages or charges requiring registration within the meaning of the statute.

(1) 34 Ch. D. 128.

(2) [1898] 1 Q.B. 765.

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I mention it because of the reference made to it by my brother Anglin in his reasons for the conclusion he has reached, which opinion I have had an opportunity of reading.

Idington J.

IDINGTON J.—The legislature of British Columbia enacted by the Revised Statutes of that province of 1911, ch. 39, sec. 102, as follows:—

102 (1) Every mortgage or charge created by a company after the first day of July, 1910, and being either—

(a) A mortgage or charge for the purpose of securing any issue of debentures: or

(b) A mortgage or charge on uncalled share capital by the company; or

(c) A mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or

(d) A mortgage or charge on any land, wherever situate, or any interest therein; or

(e) A mortgage or charge on any book debts of the company; or

(f) A floating charge on the undertaking or property of the company,—

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against *bonâ fide* purchasers and mortgagees for valuable consideration, and the liquidator and any creditor of the company, unless the instrument, or a true copy thereof, by which the mortgage or charge is created or evidenced, is delivered to and filed with the Registrar for registration within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured; and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable.

The question to be determined in this appeal is whether or not three several assignments made by the respondent to appellant, the Dominion Creosoting Company, fall within the provisions of the said enactment.

The respondent company, which admittedly was a company within the meaning of the section, was engaged under a contract it had with the City of Vancouver to pave parts of streets in said city with

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creosoted blocks manufactured by the appellant, and sold by it to the respondent company for the execution of that work.

The work of paving was supposed to be completed in the end of August, 1912, and the respondent company then owed the appellant on account of creosoted blocks purchased by it from appellant and used in connection with said contract.

One of the assignments now in question was made on the 3rd of September, 1912. It recited the foregoing facts and then as follows:—

> And whereas for the purpose of securing to the said Assignee payment for the cost of the said creosoted blocks, the Assignor has agreed with the Assignee in manner hereinafter appearing.

Then follows the operative part of it assigning to appellant in consideration of the premises and the sum of one dollar, the final payment of $2,084.75 to become payable by the City to the assignor on the 3rd of Sept., 1913. That also provides a power of attorney as follows:—

> To settle and adjust any or all accounts in connection with the said contract or work which may be necessary to enable the moneys hereby assigned to be paid to the said Assignee and to give perpetual receipts for the moneys hereby assigned which said receipts shall discharge the person paying the same from all liability in respect thereto and the person paying the same shall not be concerned to see to the application thereof, and also, if necessary, to sue for or take such other steps as the Assignee may think advisable for enforcing payment of the moneys hereby assigned or any part thereof and to compromise and settle any such proceedings on such terms as the Assignee may see fit, it being clearly understood that all costs and expenses of recovering the moneys hereby assigned are to be paid by the said Assignor and the said Assignor doth hereby covenant that it will at the request of the said Assignee and at the cost and expense of the said Assignee execute and do all such further acts, deeds, matters and things as the Assignee may reasonably require for giving full effect to the assignment of the said moneys, and it is hereby expressly understood and agreed that the said Assignor shall only receive credit on account of the moneys owing by the Assignor to the Assignee as aforesaid for the sum of one thousand eight hundred and seventy-six dollars and twenty-eight cents ($1,876.28) part of the said sum of

two thousand and eighty-four dollars and seventy-five cents ($2,084.75) hereby assigned, the difference of two hundred and eight dollars and forty-seven cents ($208.47) being a bonus or discount charged by the said Assignee for the deferred payment of the said sum of two thousand and eighty-four dollars and seventy-five cents ($2,084.75).

It is to be observed that the assignment clearly professes on its face to be a security, and that all costs of recovering the moneys are to be paid by the assignor.

At the trial it appeared in evidence that the respondent company continued to give notes for the amount to the appellant company.

Clearly the respondent never was discharged.

A leading question by its counsel suggests these notes were accommodation notes and an assenting reply is apparently got.

The evidence of the secretary-treasurer of the appellant clearly shews that he had the impression that the respondent was not discharged. And again when asked if the City by reason of the contract with it had made and been found entitled to claim further deduction from the amount he thought then that the respondent would be liable.

It is absolutely clear I think from the terms of the instrument itself and this evidence and the absence of any release or receipt and the continuation of the notes that neither party considered the transaction closed and this assignment accepted as full satisfaction for the balance of the amount due or any definite sum.

It is said the respondent's books shew a credit taken therefor, but Mr. Nickson evidently thought this was conditional as it were, and that another account was kept of the transaction.

The character of the instrument itself is against the appellant's contention.

Much stress is laid upon the absolute form of its operative part.

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Any one conversant with the mode of thought and manner of transacting such like dealings amongst business men, I imagine, would attach little importance to such an argument.

And if we would do justice we must try and apprehend and correctly appreciate what men are about.

If the assignment had been intended finally to close up between those parties to it all it related to, there would have been no doubt left existent in the minds of any one. There would not have been used eiher the word "security" instead of "payment" or the provision for the assignor bearing the expenses of recovery of the money.

I conclude it was exactly what the statute describes as a mortgage or charge on the book debt due by the City to the company.

This assignment I have taken up first for consideration because if any of the ingenious suggestions of counsel as to the test to be applied could be given any weight there are some features of that transaction and its surrounding circumstances which might lend a slight colour of reason to the argument.

The other two assignments were each made before the delivery of any goods for which they were to secure the price before anything was done to entitle the appellant to look to the City for payment of a dollar. Yet they are given expressly for securing the goods and the moneys are collectable at the expense of the assignor as in the first assignment.

If an assignment (framed in that way) of a claim over the future liability of any third party to a contractor when the goods to be delivered pursuant to it and work done therewith under the contractor's agreement with the third party only relates to a part of the total sum to accrue due to the contractor, is

not a mortgage or charge, I do not know what could be so.

That mortgage or charge, it might have been argued, and I am surprised it was not, was not of the book debts but what led up to same.

The result has been the creation of a book debt and it is that which was intended to stand charged.

In my opinion any such assignment falls within the mischief which the Act is intended to render harmless.

I think, therefore, the appeal should be dismissed with costs.

DUFF J.—I proceed upon the assumption that the instruments all came into operation effectively under the statute relating to assignments of choses in action as regards all the debts and sums they profess to transfer to the appellant subject only to the consequences of the imperfection, if it be an imperfection, due to non-registration. I reject Mr. Armour's argument that the statute requiring registration is limited in its application to mortgages and charges for securing the repayment of loans for the reason that such is not the necessary or the more natural construction and that the intention to exclude from the operation of an enactment such as this securities given for debts incurred otherwise than by way of loan, for example, in the purchase of goods or other property, ought not to be attributed to the legislature in the absence of something in the statute pointing to such an intention.

The real question is: Are the instruments before us within the words "mortgage or charge?" The decisive point is, were the assignments given as security or were they absolute assignments in the sense that the

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respondent would not be entitled as of right by paying the debt and costs to require a retransfer ?

I think the point must be decided against the appellant. It is evident that the purpose of the arrangements as practical business was to buy and sell blocks and pay and get paid for them. The appellant had no possible interest in the contracts with the municipality except as a cause or occasion for the sale of its blocks and as a source of supply for the respondent of means of paying for them. Whether they were paid by the means made available by the assignments or by any other means was a point which could possess no interest for the appellant. The phrase "for securing * * * payment" must be read, I think, when all the circumstances are considered just as if the words were "as security for the payment;" and it is almost a universal rule that a transfer of property as security implies a right of redemption.

It would not be profitable to consider whether the assignments fall within the category of "mortgage" or within that of "charge;" or partly in one category and partly in the other; it is enough that they are embraced within the scope of the expression "mortgage or charge."

Some energy was devoted at the trial to the endeavour to establish by the evidence of Nickson and Company's bookkeeper that the assignment of the deferred residue of 10% under the instrument of the 3rd September, 1912, was actually treated by Nickson and Company as payment. Now it is very difficult when the facts are considered to entertain the suggestion that this assignment was regarded by anybody as in itself, regardless of its fruits, amounting to payment. The respondent company were under an

obligation to maintain the street for a year and deliver it up in a condition satisfactory to the municipal engineer. At the expiration of the year the provisional progress certificates were subject to readjustment and the whole of the deferred payments of 10% might conceivably be eaten up by deductions required on various grounds by that official. This, the appellants, of course, knew, and the suggestion lacks plausibility that, with their eyes open to these possibilities, they would release the respondent company before the year of probation had expired.

The appeal should be dismissed with costs.

ANGLIN J.—By three instruments in the form of absolute assignments the T.R. Nickson Company for valuable consideration purported to transfer to the Dominion Creosoting Company moneys due and to become due from the corporation of the City of Vancouver to the assignors under certain paving contracts between them, existing and prospective.

The purpose of the parties was as clear as it was honest. In order to obtain from the Dominion Creosoting Company materials necessary for the performance of these contracts, the Nickson Company agreed to vest in the Creosoting Company its entire right to defined portions of the moneys earned and to be earned under them. The matter for our consideration is whether any legal obstacles exist which prevent that purpose being carried out.

The T. R. Nickson Company went into liquidation on the 26th October, 1914. The Court of Appeal for British Columbia has held the instruments in question to be mortgages or charges within sec. 102 of ch. 39 of the R.S.B.C., 1911, and therefore void as against the liquidator because not registered. The respondent

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supports this view, and also contends that, as against the liquidator, the assignments, although they should be deemed absolute, passed nothing to the assignees, because the debts which they purported to assign did not exist when they were executed and, becoming exigible only after the liquidation began, they were then payable to the liquidator.

The utmost amount that could become payable to the assignees under the transfers in question would not exceed the indebtedness to them, present and contemplated, of the assignors in respect of which the assignments were made. Of course the absolute form of the assignments is not conclusive as to their true nature and effect. Upon proof that the real purpose was merely to create a security, equity would imply a right to a re-assignment on redemption, and the instruments would in that case operate only as mortgages or charges. *Durham Bros.* v. *Robertson* (1); *Saunderson & Co.* v. *Clark* (2). Evidence given on discovery, however, by the secretary of the T. R. Nickson Company and by witnesses called by the respondent with a view of shewing that these instruments, notwithstanding their absolute form, were meant to operate only as mortgages or charges makes it abundantly clear that after the execution of them the assignors regarded themselves as having no further interest in, or claim to, or upon the moneys dealt with, and that it was intended that on payment to the assignees (whose right to receive them was meant to be absolute and unqualified) of whatever sums should eventually be payable in respect of the interests assigned, the indebtedness of the assignors to them would be *pro tanto* discharged. In the moneys so dealt with

(1) [1898] 1 Q.B. 765, 772. (2) 29 Times L.R. 579.

the assignors intended to retain no right, interest or claim of any nature or kind whatsoever. That they should ever thereafter under any circumstances again have any such right, claim or interest was quite contrary to the purpose of the parties. They meant to transfer the title to the moneys dealt with, and not merely to undertake that their debt to the assignees would be partly discharged out of a particular designated fund. They did not mean to confer on the appellants merely a right to have their claim in respect to the moneys enforced by assignment. They meant to give to the assignees a direct right of action against the debtor municipality, not merely a right to institute proceedings against the assignors. *Burlinson* v. *Hall* (1). The purpose was to confer on the appellants complete control of the part of the debt transferred to them and to put them for all purposes in the position of the T. R. Nickson Company with regard to it. These are the essential features of absolute assignments. *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (2); *Comfort* v. *Betts* (3); *Hughes* v. *Pumphouse Hotel Co.* (4). That these cases deal with the construction of s.s. 6 of s. 25 of the "Judicature Act," under which the form and terms of the instrument are of greater moment than under the provision invoked by the respondent, has not been overlooked.

Although such a dealing with part of a larger indebtedness has sometimes in a different sense been spoken of as charging, or giving a charge upon, that indebtedness, and there may be serious difficulties even since the "Judicature Act," in the way of vesting in the assignee of part of a debt a right to sue the debtor without joining the owner of the other part of

(1) 12 Q.B.D. 347, 350.
(2) [1905] A.C. 454.
(3) [1891] 1 Q.B. 737.
(4) [1902] 2 K.B. 190.

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the debt, *Forster* v. *Baker* (1), I confess my inability to understand how instruments such as those here in question designed to effect a complete divestment of property and of every interest therein, legal or equitable, can be regarded as "mortgages or charges" within the purview of the statute invoked by the respondents either because they do not deal with the whole amounts to be earned under the several contracts, or because some of the moneys covered by them would only accrue due at a future date and their amount was subject to future ascertainment owing to the fact that certain deductions, contingent, but for defined purposes, might be made therefrom after they had become debts due to the contractors, though not presently exigible. Moreover, we are now dealing with the entire unpaid balance of the debt, *Yates* v. *Terry* (2), and all the persons interested in the debt are before the Court. *Conlan* v. *Carlow County Council* (3).

That the instruments in question were mortgages was scarcely argued. Indeed they lack the essential feature of a mortgage—the right of redemption. The respondent relied rather on the word "charge" in the statute. The use of the terms "mortgage or charge" in collocation, however, indicates that the word "charge" is used in a sense somewhat akin or analogous to that of mortgage, (see authorities collected in Maxwell on Statutes (5 ed.), pp. 529 et seq.,) and was not meant to include anything so utterly foreign to the nature of a mortgage as an out and out transfer. *In re Old Bushmills Distillery Co.* (4), at pages 504-5, 508. The net amounts earned by the T. R. Nickson Company

(1) [1910] 2 K.B. 636.
(2) [1902] 1 K.B. 527.
(3) [1912] 2 Ir. R. 535.
(4) [1897] 1 Ir. R. 488.

and ultimately to become due from the municipal corporation, whatever they might be, were intended to be assigned absolutely and irrevocably to the appellant. I am, therefore, with respect, of the opinion that the assignments in question were not mortgages or charges within the statutory provision invoked on behalf of the liquidator.

But it is also urged that the appellants cannot recover, not because there cannot be a valid equitable assignment of a defined portion of a future debt, the amount of which has not been precisely ascertained, to arise out of a contemplated contract which is a mere expectancy (see *Skipper* v. *Holloway* (1); *Forster* v. *Baker* (2), and cases there referred to), but on the ground that at the date when the T. R. Nickson Company went into liquidation the fund claimed was not in existence as a debt which had accrued due; and the principle underlying such cases as *Wilmot* v. *Alton* (3), *Ex parte Hall* (4), and *Ex parte Nicholls* (5), is invoked. In support of the applicability of that principle to a company in liquidation counsel for the respondent cited *Bank of Scotland* v. *MacLeod* (6), at page 317. Without assenting thereto I shall for the purposes of this case assume that a company in liquidation is governed by these authorities. Attention should, however, be directed to the facts that the bankruptcy rules as to reputed ownership do not apply to the winding-up of companies, *Gorringe* v. *Irwell India Rubber & Gutta Percha Works* (7), and that in liquidation the company's property remains vested in it and does not pass to the liquidator (who is a mere

(1) [1910] 2 K.B. 630.
(2) [1910] 2 K.B. 636.
(3) [1896] 2 Q.B. 254; [1897] 1 Q.B. 17.
(4) 10 Ch. D. 615.
(5) 22 Ch. D. 782.
(6) [1914] A.C. 311.
(7) 34 Ch. D. 128.

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administrator) as the property of the bankrupt passes to his trustee in bankruptcy.

Under the terms of each of the contracts in question the municipal corporation retained 10% of the total amount earned by the contracting company for twelve months after its completion as a guarantee that the company would during that period, known as "the term of maintenance," keep the pavements in good repair at its own expense, replacing any defective materials and remedying all ruts, hollows, depressions, cracks, settlements, unevenness or other defects. Should the contractor make default in fulfilling this obligation the engineer of the municipal corporation had the right, on giving forty-eight hours' notice, to execute all repairs which he should deem necessary and the corporation was entitled to charge the costs of repairs so executed against the moneys retained or any other moneys of the contractor in its hands.

By the first assignment—that of the Pender Street contract—nothing but the 10% "retention money" was assigned. The two other assignments deal with other moneys to be earned under the contracts as well as the 10% retention moneys. But payment of all except the 10% had been made in respect of them to the assignees before the Nickson Company went into liquidation and the only sums now in question in respect of these contracts are likewise the 10% retention moneys held under them.

In the case of the Pender Street contract the construction work had been finished and the retention moneys, ascertained to amount to $2,084.75, were held by the municipal corporation under the guarantee clause before the assignment of them was executed. Before the Nickson Company went into liquidation the "term of maintenance" had expired, $1,500 on

account of the retention moneys had been paid to the assignees on the 3rd December, 1913, by the municipal corporation (which had full notice of all the assignments), the final certificate had issued on the 15th September, 1914, and after deducting $131.37 expended by it for repairs, the corporation had in hand $458.38 which had become actually payable under the contract. On the 23rd September, 1914, more than a month before the liquidation began, the Nickson Company wrote to the municipal corporation approving of the deduction of the $131.37 and requesting that payment of the balance of the retention moneys held on the Pender Street contract should be made to the appellants. There can therefore be no difficulty either as to the assignability or the absolute assignment of this money. The appeal as to it should be allowed.

On the other hand, in the cases of the contract for Hastings Street and that for Fourth Avenue, the "terms of maintenance" did not expire until August or September, 1915—nearly a year after the liquidation began. All the moneys to become payable under these two contracts had been earned, however, in August or September, 1914, when the works were completed. The contracts expressly recognize this fact in providing that

> a certificate, marked "completion certificate for payment," at the rate of 90% on the whole amount *due* under the contract

should be issued payable to the contractors on completion of the works. These certificates had been duly issued in respect of both contracts before the liquidation. The construction of the pavement was the whole consideration for all the moneys to be paid under each contract. The consideration for the supplementary obligation to repair was the giving of the paving contract. No doubt the right to payment

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of the 10% retention moneys only arose twelve months afterwards, *i.e.*, on the expiry of the "term of maintenance." These moneys in the interval, however, were (subject to the assignments) the property of the T. R. Nickson Company. They were held for that company by the municipality as *debita in presenti, solvenda in futuro,* subject only to the fulfilment of the guarantee of maintenance, and to the right on the part of the corporation to deduct therefrom any expense to which it should be put for such maintenance or for maintenance under similar provisions of other contracts of that company. They were precisely in the same position as moneys of the T. R. Nickson Company deposited by it with the municipal corporation as a guarantee for the fulfilment of any contractual obligation would have been. Moneys so deposited remain the property of the depositor subject to the lien or charge in favour of the depositee defined by the terms of the guarantee. There was at that time nothing to prevent the assignment of these moneys by the T. R. Nickson Company to the appellants becoming effective. The assignments as to them had, no doubt, operated at the time they were made only as contracts to give them to the assignees when they should be earned, *Thompson* v. *Cohen* (1); *Cole* v. *Kernot* (2), because

> a man cannot in equity any more than at law assign what has no existence. But a man can contract to assign property which is to come into existence in the future and when it has come into existence equity, treating that as done which ought to be done, fastens upon that property and the contract to assign thus becomes a complete assignment. *Collyer* v. *Isaacs,* (3); *Holroyd* v. *Marshall* (4).

On the completion of the works the right to the "retention moneys," which were part of "the whole

(1) L.R. 7 Q.B. 527, 533.
(2) L.R. 7 Q.B. 534.
(3) 19 Ch. D. 342, 351, 353.
(4) 10 H.L Cas. 191.

amount due under the contract," passed to the assignees, subject to the lien or charge thereon of the municipal corporation. The case in respect of these moneys, I think, falls within the principle on which *In re Davis* (1), *Ex parte Moss* (2), and *Pipe's Case* (3), were decided. The moneys assigned had not, it is true, been earned when the assignments were made and could not, therefore, be the subject of common law assignments. But although the contracts themselves should be regarded as having been then mere expectancies and the moneys to arise under them as mere possibilities—future book debts, *Tailby* v. *Official Receiver* (4)—in equity, when they had been earned and were "due," the assignment of them for valuable consideration became operative and could no longer be defeated even in bankruptcy. This was the situation when the T. R. Nickson Company went into liquidation. Had the liquidation occurred before the completion of the works, *i.e.*, before the moneys had been earned, the position might have been different, and the principle of the decisions in *Wilmot* v. *Alton* (5), and *Ex parte Nicholls* (6), might have governed, if these bankruptcy decisions are applicable in the liquidation of a company.

I am for these reasons of the opinion that the appeal as to the retention moneys held in respect of the Hastings Street and Fourth Avenue contracts should also be allowed.

The appellant is entitled to its costs throughout.

Appeal dismissed with costs.

Solicitors for the appellant: *Senkler & Van Horne.*
Solicitors for the respondent: *Livingston & O'Dell.*

(1) 22 Q.B.D. 193.
(2) 14 Q.B.D. 310.
(3) W.N. 1888, 225.
(4) 13 App. Cas. 523, 542-8.
(5) [1896] 2 Q.B. 254.
(6) 22 Ch. D. 782.