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NORTH-WEST THEATRE COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

JAMES A. MACKINNON (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Construction of statute—Alberta "Assignments Act"—Assignment for benefit of creditors—Occupation of leased premises—Liability of official assignee.

The Alberta "Assignments Act," as amended by the Alberta statutes, ch. 4, sec. 14 of 1909 and ch. 2, sec. 12 of 1912, provides that assignments for the general benefit of creditors must be made to an official assignee appointed under the Act and that the assignment shall vest in such assignee all the assignor's real and personal property, credits and effects which may be seized and sold under execution. The lessee of premises held under a lease from the plaintiffs made an assignment to the defendant who took possession thereof and, on threat of distress, agreed that he would guarantee the rent so long as he remained in occupation. After three months, the defendant quitted the premises and notified the landlord that he would no longer be responsible for or pay the rent. In an action for breach of the covenants of the lease and to recover the rent accruing to the end of the term:

Held, reversing the judgment appealed from (8 Alta. L.R. 226). Idington and Brodeur JJ. dissenting, that by the effect of the assignment and entry into possession the term of the lease passed to the official assignee who, thereupon, became liable for the whole of the rent accruing for the remainder of the term.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta(1), reversing the judgment of Ives J., at the trial(2), and dismissing the plaintiffs' action with costs.

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

(1) 8 Alta. L.R. 226. (2) 8 West. W.R. 237.

The circumstances of the case are stated in the head-note.

O. M. Biggar K.C. for the appellants.

J. S. Scrimgeour for the respondent.

THE CHIEF JUSTICE. — This action is brought against the defendant as assignee of a lease to recover damages for alleged breach thereof. It is remarkable, therefore, to find that neither the agreement for the lease nor the assignment thereof is before the court.

I am of opinion that this appeal must be allowed. The respondent is the assignee of the lease. If this had been a profitable holding, he could have disposed of it for the benefit of the estate and I do not understand how, in the absence of statute, the rights of the lessors can be dependent on whether the lease is valuable in the hands of the official assignee or not. The fact that the English bankruptcy laws contain a provision enabling the trustee in bankruptcy to disclaim such a lease points, I apprehend, to the fact that without it the lessor's rights could not be dependent on its being of value to the bankrupt's estate in which case it would be retained by the trustee, or unprofitable when it would be disclaimed and the loss fall upon the lessor. It is, however, unnecessary to consider this, as the statute in the present case contains no such provision.

I am disposed to think that the appellant could have pleaded this quality as official assignee and that his liability would then have been limited to the extent of the assets coming to his hands. This, however, he has not done, but has denied the assignment of the

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lease to him and this issue has been decided against him.

He must, I am afraid, abide by the consequences of a possibly mistaken defence and be held to his liability as assignee of the lease.

The appeal must be allowed with costs.

IDINGTON J. (dissenting).—The question this appeal raises must in the last analysis be whether or not an official assignee who is a public officer obliged by law to accept an assignment under the Alberta "Assignments Act," is bound by the terms of that Act to accept an assignment vesting in him a leasehold of his assignor whereby he inevitably must in such case become personally bound to fulfil the obligations of his assignor the lessee, to pay rent and otherwise.

It is clear law as result of such a tenure that one accepting the assignment thereof is bound by the law governing privity of estate and privity of contract to pay the rent and observe all the covenants running with the land by which his assignor was bound.

It is no answer to the naked question as I put it to say that he is pre-supposed to indemnify himself out of the estate for there may be no other estate than the term or at least no adequate estate out of which he can be so indemnified. Indeed, it may be impossible for him by careful examination to determine the question of fact relative to the existence of the means of indemnification until long after he has discharged his public duty as such official assignee by accepting the assignment.

The question must be resolved by the construction of the Act. And thus presented I think the right interpretation and construction thereof must be that

it never was within the scope and purpose of the Act, which is the distribution equitably of the assignor's estate amongst the creditors, that such a consequence must follow the discharge of duty on the part of the officer as to involve him in undertaking such obligations.

From that must flow the right and often the duty owing to those whom the Act was designed to benefit and protect and give a remedy for obtaining their claims against the debtor who is the assignor, or so much thereof as realizable, to inquire and determine whether or not it is to the advantage of those so concerned to accept the term.

It may be said, though the law denies the right of any one to vest in another against his will any estate tendered him, he usually is supposed to have allowed the vesting to take place by assenting to the grant thereof and that is so signified the moment he accepts an assignment under the Act.

All he in fact signifies is an acceptance of that which the statute contemplates should pass to him and which he is to receive in the way of real and personal estate belonging to the assignor out of which or by means of which the creditors may receive some benefit. The pre-supposition must be that he has vested in him and received only that which he reasonably can accept, no more and no less.

It is clearly the equitable distribution of the estate amongst the creditors, which is had in view, as the whole purpose of the Act.

It is surely not to be assumed that as a result thereof a lessor is to become entitled to receive at the expense of the other creditors full compensation for

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his claim as landlord and they go perhaps entirely bare.

Such a result would be in conflict with not only the purpose of this Act but also in conflict with the law governing what landlords may be entitled to receive in the case of executions against their lessees.

It must not be overlooked that this method of dealing with insolvent estates is, as it were, in substitution for the costly and wasteful system of recovery by executions, in all such cases as the debtor chose to signify his assent thereto.

I think this is one of the cases in which we must interpret and construe the statute by looking at the scope and purpose of the Act rather than at the letter of it which latter if strictly observed might frustrate the former.

Moreover, I think the case is covered by the authority of the cases of *Bourdillon* v. *Dalton*(1), which, it is true, was only a *nisi prius* ruling of Lord Kenyon, but followed in the cases of *Turner* v. *Richardson*(2), and *Copeland* v. *Stephens*(3), decided *en banc* with Lord Ellenborough as Chief Justice. The former of these cases was decided before the "Bankruptcy Act" was so amended as to provide expressly for disclaimer of a lease by the assignee.

The latter was decided after that amendment.

It is to be observed that, in each, Lord Ellenborough did not pretend to make much of the language of the enactments or found any distinction thereon.

The language he uses in the latter case, at pages

(1) 1 Peake N.P. 238; 1 Esp. 233. (2) 7 East 335.
(3) 1 B. & Ald. 593.

604 and 605, is singularly apposite to what we have in hand here.

His authority can never be lightly set aside and the principle upon which he proceeds would justify us in following his mode of treatment of what an assignment by the commissioners should be held to cover.

It occurred to me since the argument that the cases of the executors or administrators taking like assignment by operation of law might help to illustrate the principle applicable. A casual consideration of the reference thereto in Williams on Executors (10 ed.) page 1389, especially note (*m*), seems to indicate that the executor would not, unless entering and holding possession, incur personal liability.

This case having evidently received careful attention from counsel as well as the court below, and as the illustration I suggest was not put forward by any one, probably further investigation, which I have not time to make, would shew nothing is to be gained therefrom inasmuch as in the end the question must depend upon the construction of the statute with which I need not labour further.

I agree with the inferences drawn and conclusions reached by the court of appeal upon the facts presented in evidence and need not repeat because concurring in same reasoning as adopted there.

I may add that the case of *Linton* v. *Imperial Hotel Co.*(1), relied upon in argument in no way conflicts with the conclusion I reach.

I think the appeal should be dismissed with costs.

DUFF J.—It is difficult to state with precision the questions involved in this appeal without a rather full

(1) 16 Ont. App. R. 337.

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statement of the facts and some reference to the course of the proceedings in the Alberta courts. On the 31st of August, 1914, one C. R. McLachlan was the lessee of certain premises in Edmonton where he carried on a jeweller's business under lease from the owner, the appellant company. On the date mentioned McLachlan made an assignment for the benefit of his creditors, under the "Assignments Act" of Alberta, to the respondent. On the third of September the respondent was informed by the solicitor for the appellant company that if he would undertake as assignee to assure payment of the landlord's rental distress for rent could be avoided. On the 5th the respondent answered, as assignee, saying:—

> I will guarantee your client's claim for rent as long as I continue to occupy the building.

The respondent appears to have placed a man in possession who carried on the business for him until the beginning of December, towards the end of September an agreement having been entered into for a sale of the moveable assets *en bloc* to a firm of wholesale jewellers. About the same time the respondent had a conversation with Mr. Sherry, the president of the appellant company, in which Mr. Sherry was informed by the respondent that the rent would be paid as soon as the sale of the goods should be completed, Mr. Sherry, at the same time, informing the respondent that he intended to hold him as assignee of the lease for the rent during the residue of the term. In November, by arrangement between the respondent and the appellant company, the premises were rented at a rental of $110 a month to the purchaser of the goods, the understanding being that the rights of the appel-

lant company were not to be prejudiced by the lease. On the 6th of November the respondent paid the rent for September, October and November and, on the 4th of December, he notified the appellant that he would not be responsible for any further rent in connection with the McLachlan estate.

The appellant company's case at the trial was that the respondent, having gone into possession as assignee of the lease among other effects of McLachlan, was responsible for the rent as assignee of the lease so long as the lease should continue vested in him. The respondent met this by denying that he was the assignee of the lease or that he had entered into possession of the premises.

There is a suggestion in the statement of defence that the respondent's occupation of the premises consisted merely in putting a man in charge of the goods there belonging to the McLachlan estate and that he was there under some agreement with the appellant company. The evidence, however, seems to shew clearly enough that the object of the arrangement was limited to avoiding a distress; it amounted to nothing more than this, that the appellant company would not distrain on the goods on the undertaking of the respondent to pay the rent so long as he occupied the premises. The learned trial judge found as a fact that the respondent took possession of the estate and entered into possession of the premises on the first of September. In appeal it was held that the assignee was not bound until he had done some act signifying his acceptance of the debtor's interest, that the entry into possession was only for the purpose of taking care of the goods, that the payment for rent was under a

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special agreement made with the lessor and that, consequently, there was no liability.

The first question to determine is whether or not the trial judge was right in finding that what was done by the assignee was a taking possession under the lease. With great respect for the opinion of the court below, I am unable to feel any difficulty on that question. I think the position becomes clear when one looks at it from the point of view of the assignor, the original lessee. As between McLachlan and the respondent, would it be open to the respondent to aver that he had not taken possession of the premises under the lease? Nobody, of course, disputes the fact that the assignment was *primâ facie* sufficient to pass the term. Assuming that the respondent was entitled to disclaim or that something must be done by him to signify his acceptance of the lease, what is the proper interpretation of the respondent's conduct having regard to (let us assume it to have been) the offer by McLachlan, through the assignment, of the lease as one of his assets?

Assuming it to be open to the assignee to treat the instrument under which he took possession of the goods as making an offer as regards the lease which he was at liberty to accept or reject, was it open to him to say, at the end of November, after an occupation of the premises for three months, after payment of the rental during that period, I have not been in occupation under the lease, I have not accepted the lease, your grant of the goods in itself gave me by implication a licence to enter and to remain there until the goods were disposed of and the rental was only paid for the purpose of protecting the goods from distress? I must say, with great respect, that it

appears to me to be sufficient only to state the proposition. To my mind, at all events, it is very clear that if the assignee intended to occupy other than under the lease he should have so declared in explicit terms before taking possession.

The Appellate Division seems to have proceeded upon the ground that occupation is to be attributed not to the exercise by the assignee of his rights under an assignment of the lease, but to a special arrangement with the landlord. Here the fallacy, with great respect, appears to be this. The landlord could only deal with the right of occupation of the property after cancelling or after a surrender of the lease. There is not a suggestion that there was any cancellation or surrender. The assignee's possession or occupation was, therefore, either wrongful or was an occupation under rights derived from McLachlan. Being capable of an explanation which makes it a rightful possession the assignee could not be heard to say that the possession was intentionally wrongful and in fact wrongful.

But the truth is, as I have indicated above, that nothing which happened between the landlord and the assignee justifies an inference to which effect could be given in a court of law that the assignee's occupation was in fact an occupation having its origin in some special arrangement with the landlord. What may have passed in the mind of the assignee is quite immaterial. One may, if one choose, guess that the assignee had no sufficient knowledge of his position. The assignee's legal position must be determined by what he did and what he did was simply this. He took possession of McLachlan's estate under and by virtue of an instrument which gave him the right to enter upon the premises in question and to occupy them as as-

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signee of a subsisting lease; he did enter and contented himself with making an arrangement with the landlord that the landlord should not distrain if he undertook to pay the rent as long as he occupied the premises. He contented himself with this without a suggestion on his part that he was entering into possession in any other character than that of assignee of the lease. I find nothing here upon which to erect an agreement between the landlord and the assignee amounting to a new tenancy involving either a wrongful possession or a surrender of the term.

In this view it is unnecessary to consider the general rule governing the position of the assignee with reference to the lease at the date when the assignment took effect. I may observe, however, that I am not by any means satisfied that the assignee was entitled to sever the assignment of the lease from the assignment of the stock of goods and treat the assignment of the stock of goods as giving him an implied right to enter upon the premises for the purpose of realizing upon them. It is not by any means to my mind an obvious proposition assuming that in general an assignee under the Alberta "Assignments Act" may elect whether or not he will accept leaseholds included in the estate. It is not by any means an obvious result from that, that where the trader who carries on business in premises occupied under a leasehold makes an assignment, the assignee can be allowed to say, when entering into possession for the purpose of realizing upon the goods, that he is entering under some other right than the right to which he is entitled by the express assignment of the lease. It is, however, not necessary to pass upon that point. I must add further that it is not entirely clear to me that the assignee

under the Alberta "Assignments Act" is entitled to accept part of the property comprised in the assignment and to reject the remainder. It is not necessary to decide the point and I do not pass any opinion upon it, but there is one consideration which I think has, perhaps, been lost sight of. The "Assignments Act" of Alberta is substantially a reproduction of the Ontario statute, as is well known. On being attacked as infringing the exclusive Dominion jurisdiction respecting bankruptcy and insolvency that Act was construed as providing for assignments which are purely voluntary. I think it might be argued not without force that under an assignment by a debtor, which takes effect only as a voluntary assignment and which is an assignment of the whole of the debtor's property, it is not open to the assignee to defeat the debtor's intention by accepting the property in part and rejecting it in part. It may further be observed that there are several respects in which the analogy of the bankruptcy law may be misleading where the system in operation is not a true bankruptcy system.

I think the appeal should be allowed.

ANGLIN J.—By his plea the defendant admits the lease to his assignor sued upon and an assignment to him by the lessee for the benefit of creditors, pursuant to the Alberta "Assignments Act," 1907, ch. 6, as amended by 1909, ch. 4, and 1913 (2nd sess.), ch. 2, sec. 12, of "all the estate and effects," in the words of the Act, "of the (assignor) which might be seized or taken in execution." Under sections 6 and 7 of the "Assignments Act," such an assignment "vests the estate * * * thereby assigned in the assignee therein named," if he be, as he was in this instance, an

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official assignee (section 5). Under this legislation the vesting of the assigned property takes place without any act of acceptance by the assignee. *Titterton* v. *Cooper*(1), at pp. 483, 487, 490. He becomes and, in the absence of a provision for disclaimer such as is found in the English "Bankruptcy Act" of 1869 and in the "Bankrupt Law Consolidation Act" of 1849, he remains liable to the landlord, because of privity of estate with him, for the rent which accrues after the assignment under a lease so vested in him. Of that liability he can relieve himself either by obtaining a release from the landlord, or, as to the future, by putting an end to the privity of estate. *White* v. *Hunt* (2); *Hopkinson* v. *Lovering*(3).

In the present instance the defendant has made no attempt to assign the lease and, although the privity of estate was terminated, *pendente lite,* by the landlord's making a lease to one Logan, that lease was made for the purpose of minimizing any claim that the plaintiffs might have against the defendant, and upon a distinct understanding, assented to by the defendant, that his liability, if any, should not be thereby affected except to the extent of reducing it by crediting him with rent payable by Logan. The case must, therefore, be dealt with on the footing that whatever privity of estate had been established between the assignee and the landlord continued until the expiration of the term.

For the defendant, it is urged, however, that an arrangement was come to between him and the plaintiffs by which they took him as tenant under a new

(1) 9 Q.B.D. 473. (2) L.R. 6 Ex. 32.
(3) 11 Q.B.D. 92.

lease for such period as he should require to occupy the premises in order to dispose of the assets of his assignor, and that they thereby accepted a surrender of, and avoided the lease now sued upon, and released him from liability under it. The judgment in appeal, however, is based on the view that, because of his official position and his inability to refuse the assignment, the defendant had an option to accept or to decline to take the lease in question; and what took place between the parties has been examined by the Appellate Division, not with a view to ascertaining whether it amounted to the making of a new lease involving a surrender of the existing term, but whether it established an election by the defendant to accept the existing lease. The cases relied upon by the learned judge who delivered the opinion of the court appear to have been decided upon the "Bankruptcy Law" as it existed in England under the statute 13 Eliz., ch. 7, which gave the commissioners

power and authority to take by their discretions such order and direction with the property of the bankrupt, etc.

Bourdillon v. *Dalton*(1); *Turner* v. *Richardson*(2), and *Copeland* v. *Stephens*(3), are perhaps the best examples of these authorities. As is pointed out in *Cartwright* v. *Glover*(4), at pp. 626-7, under that legislation "nothing vested until the power was exercised," and cases decided upon it do not apply to an assignment made under a statute which explicitly enacts that such assignment shall vest the property assigned in the assignee, even though he

(1) 1 Peake N.P. 312; 1 Esp. 233.
(2) 7 East 335.
(3) 1 B. & Ald. 593.
(4) 2 Giff. 620.

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should have no discretion to refuse the assignment. *Crofts* v. *Pick*(1); *Doe d. Palmer* v. *Andrews*(2), at p. 355; *Bishop* v. *Trustees of Bedford*(3), at p. 716.

Although the question as to the surrender of the existing lease and the acceptance by the landlord of the defendant as a tenant under a new lease was not as fully dealt with at the trial as could be desired—probably because of the fact, as Mr. Biggar pointed out, that this defence is not explicitly pleaded—I think the proper conclusion from the whole evidence—especially from Mr. Sherry's explicit statement that every time he spoke to the defendant in connection with the rent, he told him that he intended to hold him for the full balance of the lease—is that no such surrender took place, but that the defendant entered and took and held possession under the existing lease. It follows that he became liable for the rent sued for.

The appeal should, therefore, be allowed with costs here and in the Appellate Division, and the judgment of the learned trial judge should be restored.

BRODEUR J. (dissenting).—This is an action by a landlord against an official assignee for rent of premises leased to the insolvent.

The lease was made on the 12th November, 1913, and was for a term of two years. On the 31st of August, 1914, the lessee assigned his estate for the benefit of his creditors under the provisions of the "Assignments Act" of Alberta (ch. 6 (1907)).

The assignee (the respondent) took possession of the premises and on the representations of the less that they were going to distrain for rent due by Mc-

(1) 1 Bing. 354. (2) 4 Bing. 348.
(3) 1 El. & El. 714.

Laughlin unless he undertook, as an assignee, to secure payment of that rent, he answered that he would guarantee to pay the rent so long as he continued to occupy the premises.

Later on, on the 2nd December, 1914, he informed the lessor that he would no longer be responsible because he was leaving the premises.

If it was an assignment under the common law, the case would not offer serious difficulties, because it seems to be well settled that where the assignee enters into possession of the premises without clearly disclaiming the lease he is supposed to accept the lease and to become bound by its covenant.

But it is a proceeding under the "Assignments Act." By the provisions of that Act, the assignee is not a voluntary assignee, but insolvents are bound to make assignments to him of whatever estates they have. If these assignments could be made to anybody else, it may be that the provisions of the common law would still apply and that the assignee could be bound. But the acceptance of the assignment is not voluntary on his part. He has to receive the estate from the hands of the insolvents and everything is vested in him.

He must then proceed to the distribution of the estate according to the best interest of the creditors generally and the fact of claiming against him personally the rent seems to me contrary to the principles of that legislation.

Besides, in this case, the lessor knew very well that he took the property and agreed to pay the rent only so long as he would be in possession. This seems to have been accepted by the appellants, the lessors, be-

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cause they did not carry out their intention of distraining. Then the liability ceased when the possession ceased.

For these reasons I think that the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Woods, Sherry, Collisson & Field.*

Solicitors for the respondent: *Lymburn & Scrimgeour.*