Privy Council Appeal No. 35 of 1919.

Scottish Australian Mining Company, Limited - - - *Appellants*

v.

New Redhead Estate and Coal Company, Limited - - - *Respondents*

FROM

THE SUPREME COURT OF THE STATE OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH NOVEMBER, 1919.

Present at the Hearing:

VISCOUNT FINLAY.
LORD SUMNER.
LORD PARMOOR.
THE LORD JUSTICE CLERK.

[*Delivered by* LORD SUMNER.]

This was a case in which the respondents, as owners of a railway, sued for money payable by the appellants as wayleave for transporting over it coal got from the appellants' colliery. An equitable plea was filed, the object of which was to claim the transport at lower rates on the ground that the appellants were entitled to the benefit of a certain "Wayleave Agreement" made many years before between companies, of which the plaintiffs and the defendants were respectively the successors. To this plea the plaintiffs successfully demurred. In addition they had purported to put an end to the "Wayleave Agreement," if still binding upon them, by a notice, the effect of which will be matter for future determination, for they admit that this cannot be determined on the present appeal, which is confined within the narrow limits appropriate to proceedings in demurrer.

Their equitable plea, as voluminous as it was obscure, was relied on by the appellants as raising a defence in three ways: (1) By an assignment to them of the benefit of the "Wayleave Agreement"; (2) by a novation, by conduct as between the parties to this appeal, of the agreement so made between their

predecessors, nothing new being inferred except this change of parties; (3) by conduct raising the inference of a new contract, in which the terms of the old "Wayleave Agreement" were embodied with a modification which would, in effect, get rid of the argument really raised on this appeal. The plea was severely criticised on the third head and much may be said for the view that it does not really raise the point, but their Lordships desire to confine themselves entirely to the decision of the actual question, on which the appeal turns. The appellants may not need to raise this point. If they do and if they rely for the purpose on the plea as it stands, they, of course, do so at their peril.

That the benefit of the original "Wayleave Agreement" was in law assignable is not in dispute. All the judgments in the Court below so hold. The contract is in itself not of the class, to which assignability is denied according to the authorities, and the respondents were content to argue that the benefit of the contract was assignable only during a specially limited period, which had long expired. This is a pure question of construction. The material words are in clauses 2 and 3.

> "Secondly, the said Company, of the third part" (predecessors of the appellants) "shall pay unto the said Company" (predecessors of the respondents) "the yearly minimum rent of £250 . . . during the time the said railway shall be used for the purposes hereinafter provided by the said Company of the third part.
>
> "Thirdly, the said Company of the third part shall have the right to carry over the said line all coal . . . got from the lands, which are now or may hereafter be held, leased or occupied by the said Company of the third part, subject to the said Company of the third part paying to the said Company of the second part, as royalty, the sum of 3d. per ton,"

credit being given for the above-mentioned annual royalty rent.

The respondents argued, and rightly, that the doctrine of the assignability of the benefit of a contract does not require that wherever the names of the parties or either of them can be found in the contract the words "or assigns" must inevitably be conceived to follow them, for the true construction of the contract itself may involve some limitation in a particular clause or connection. Accordingly they contended that the words "during the time the said railway shall be used for the purposes hereinafter provided by the said Company of the third part" meant and only meant exactly what was expressed. From this it would follow that user by the Company in question, now long since dissolved, was in effect the condition both of the payment of the rent and of the enjoyment of the right to carry over the line on the agreed terms, to which that payment was correlative. To put the matter shortly, the respondents contended that, truly construed, this agreement was for the life of "the Company of the third part" itself, and the appellants, that it was for the life of the pit then being worked by the said Company no matter into whose hands it should be assigned with the benefit of the agreement.

The objection and, as their Lordships think the fatal objection, to the respondents' argument is, that it would cause a subordinate

and adjectival clause to take away substantially all the assignability which it is admitted that the rest of the instrument imports. No business effect can be suggested for the assignment of the benefit of the contract, which consists in being allowed to transport the coal gotten by the assignee on payment of the agreed sums, if that benefit is to be enjoyed only while the assignor is using the railway for that purpose. A concurrent getting of coal from the pit by assignor and assignee, so as to render possible a concurrent user of the railway for the transport of coal got out of that pit, is not a practicable arrangement. On the other hand, the words "used by the said Company of the third part" naturally refer to the Company as previously mentioned, and that is the Company and its assigns. Their Lordships therefore think that the dissentient view of Cullen C.J. should have prevailed in the Court below, and they will humbly advise His Majesty that the appeal should be allowed with costs here and below, and that the Rule, ordering that judgment on the demurrer should be entered for the plaintiffs, should be discharged.

In the Privy Council.

SCOTTISH AUSTRALIAN MINING COMPANY, LIMITED,

v.

NEW REDHEAD ESTATE AND COAL COMPANY, LIMITED.

DELIVERED BY LORD SUMNER.

Printed by Harrison & Sons, St. Martin's Lane, W.C.

1919.