

Privy Council Appeal No. 81 of 1930.

Aveline Scott Ditcham - - - - - *Appellant*

v.

James J. Miller - - - - - *Respondent*

FROM

THE SUPREME COURT OF NEWFOUNDLAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 4TH MAY, 1931.

Present at the Hearing :

LORD BLANESBURGH.

LORD ATKIN.

LORD MACMILLAN.

[*Delivered by* LORD BLANESBURGH.]

This is an appeal from an order of the Full Bench of the Supreme Court of Newfoundland and it raises the broad question whether within the meaning of the St. John's Municipal Acts, 1921 and 1926, the respondent in relation to certain hereditaments in that city demised by a lease of the 16th May, 1848, had on the expiration of the term on the 1st May, 1929, become the "assign" of the original lessees so as to be entitled in terms of these statutes to claim compensation for unexhausted improvements from the appellant, the reversioner and freeholder.

The hereditaments comprised in the lease lie admittedly within the local area of the statute of 1921, which, by section 94, provides that every "building lease" theretofore made shall, irrespective of its actual provisions, be read as subject to a condition that "the lessee or his assigns" shall, amongst other detailed privileges, be entitled at the expiration of the lease "to compensation for the unexhausted value of the improvements made by him or his assigns upon the said land during the term of the lease, including, in the case of business premises, any

goodwill which may have been created by him or his assigns during the currency of the lease." The supplementary statute of 1926 requires that the amount to be paid, *inter alia*, in respect of such compensation, shall, in default of agreement, be determined by three arbitrators, one appointed by each of the contestant parties, and the third by the Supreme Court or a Judge thereof. The order of the Supreme Court, dated the 5th March, 1930, and now appealed from, purported to appoint, at the instance of the respondent, claiming to be the "assign" of the lease, the third of these arbitrators.

It has throughout been the appellant's contention that as between herself and the respondent there was nothing to arbitrate about. She has based that contention on several grounds, one of which has always been—and it is the only ground she now puts forward—that the respondent was not a person entitled under the statute to claim compensation, for that he never was within its meaning an assign of the lessees. The appellant accordingly, when applied to by the respondent, refused to make an appointment of a second arbitrator. And just as she then refused to assist in constituting the arbitration tribunal, so now she objects to the appointment to that end made by the Supreme Court. The respondent, she says, was no "assign" in the necessary sense, and the Supreme Court had no power or authority at his instance to make any such appointment as it did by its order now challenged. And she is now content to stake everything upon her ability to obtain a negative answer to the question, "Was the respondent in relation to this lease an 'assign' within the meaning of the statute?"

And true it is that if that question is answered in the negative, the order appealed from cannot stand.

The Supreme Court, in reaching the conclusion that the respondent might properly be so described, proceeded upon a view of the statute which he has not appeared before the Board to contest: namely, that the assign entitled thereunder to compensation must, at the least, be the legal assign of the term at the expiration of the lease.

From that view of the statute their Lordships, although they have not had the benefit of any argument to the contrary, see no reason to differ. Indeed, they think it is correct.

Much more difficult is it for them to agree with the further conclusion of the Supreme Court that the respondent here was in fact such an assign. And that is now the real issue decisive, when it is determined, of the appeal.

The parties to the lease of 1848 were William E. Taylor as lessor and Smith Mackay and Daniel McKenzie as lessees. The lease was for a term of 40 years from the 1st of May, 1849, with a right in the lessees, on terms prescribed, to have it renewed for a further term of 40 years. That right was duly exercised, and it was the lease so renewed which expired by effluxion of time on the 1st of May, 1929.

The devolution of the freehold reversion in the demised premises has not been traced in evidence. This omission, however, creates no difficulty. The appellant does not dispute that before the expiration of the lease she had become entitled in reversion to the demised hereditaments and that she is now seised thereof in fee simple. In other words, the liability under the statute, if any there be, is hers.

It is less satisfactory, in view of the nature of the final issue between the parties, that the devolution of the leasehold interest from the original lessees is also left untraced in evidence. But this omission is also less serious than it might have been, because it is accepted by the appellant without requiring proof that, prior to the year 1912, the term had become vested as assigns of these lessees in A. Frederick Goodridge, John Richard Goodridge, Richard F. Goodridge and Alfred J. Goodridge, trading in partnership on the demised premises under the firm name of Alan Goodridge and Sons, and the only task set the respondent by the appellant has been to trace his title as assignee from the partners in that firm. And the respondent begins by producing a deed of the 12th December, 1912, by which, following the incorporation of a private company limited by shares to acquire and carry on the firm's business, the partners assigned to the company certain of their partnership assets, including specifically the lease of the 16th May, 1848. This deed of assignment was duly registered, and, the appellant's admission of the assignors' title being accepted, was undoubtedly effective to make the company the legal assign of Mackay and McKenzie, the original lessees. That deed of assignment, not followed by any subsequent disposition, assignment or other dealing by the company with the lease, remained so registered until the lease expired. According to the registered title, therefore, the company alone and not the respondent or anyone else remained at that date the legal assign of the lessees.

The company, however, had long before 1929 ceased to have any active existence. On the 14th June, 1915, it went into voluntary liquidation, a Mr. Ernest R. Watson becoming liquidator on the 26th November, 1915, and the description of the liquidation, so far as it affected the leasehold premises now in question, may be conveniently taken from the recitals in a deed poll of the 15th February, 1930, executed by the liquidator himself in circumstances later to be stated.

"As a result of the liquidation of the company," the liquidator there recites, "certain of its assets remaining after distribution of 75 cents in the dollar to the creditors, including the said leasehold premises and interest, were on the 1st day of April, 1919, distributed among the shareholders of the company, but no deed of assignment formally vesting the said leasehold interest in the said shareholders was ever executed."

Their Lordships, before they have finished, will have further criticisms of this statement to make. For the moment all that

they need say with reference to it is that the so-called "distribution" without the execution by the company of any instrument of assignment did not make the so-called "shareholders," whatever else it may have achieved, the legal assigns of the original lessees, nor enable them to confer on any assignee a title which they did not themselves possess.

There is no evidence who these "shareholders" were, nor what their respective interests in the company as contributories may have been. It seems to have been assumed without any proof that they were Richard F. Goodridge and Alfred J. Goodridge, with Richard F. Goodridge, Alfred J. Goodridge and William P. Goodridge, executors of Augustus F. Goodridge, then deceased (being or representing, as will be seen, some but not all of the members of the original firm of Alan Goodridge and Sons), who in 1921 are found to be carrying on business on the demised premises under the same firm name.

On the 14th January, 1921, these persons executed in favour of the same Ernest R. Watson, as trustee, a trust deed for the benefit of their creditors. By that deed the debtors assigned to Mr. Watson "All the real and personal estate whatsoever and wheresoever situate of or belonging or due or owing to the debtors and each of them"—no specific mention being made in these parcels, as will be seen, either of the lease of 1848, or of the hereditaments thereby demised—a circumstance not without importance in view of the fact that there is no evidence to show that the debtors were, in fact, the "shareholders" amongst whom the liquidator had distributed the company's surplus assets, or how, if they were not, they had become interested in the property and in what shares. It is not, however, necessary to probe this difficulty further. Treating the question merely as one of construction of that deed as executed, their Lordships think it not doubtful that, in relation to the leasehold hereditaments now in question, it did not pass to Mr. Watson, as trustee, any title or estate therein which was not then a title or estate of the debtors. In these circumstances the next deed in the respondent's chain of title has less importance than he has attributed to it. It is a deed of the 23rd September, 1921, whereby the trustee, Ernest R. Watson, after a recital of more than doubtful accuracy that the debtors by the indenture of 14th January, 1921, had conveyed to him "All their leasehold interest in and to the lands, tenements and premises hereinafter described," assigned in consideration of \$10,000 to Florence Goodridge, the respondent, and Angus Macdonald, *inter alia*, all the premises comprised in the lease of 1848 for all the residue of the term thereby granted, a form of assignment which, it must be agreed, would be apt to make the assignees legal assigns of the original lessees, if the conveying party, the trustee, were himself such an assign.

But not otherwise. And the trustee was not such an assign for the reason that the title was not in the debtors at the date of the

deed of trust, and that deed did not even purport specifically to assign it to the trustee.

In this view of the trustee's want of title it becomes unnecessary to trace the respondent's later title. If he, for lack of title in the trustee, did not by the deed of the 23rd of September, 1921, become a legal assign of the original lessees, he has not become one as the result of subsequent agreements for the acquisition by himself of the interests taken by his co-assignees under the same deed.

So far, therefore, the respondent, in their Lordships' judgment, has failed to establish his claim to be a legal assign, and during the course of the proceedings in the Supreme Court this must have seemed so to his advisers, for they, very near the close of the case, obtained from the liquidator of the company and produced to the Court in support of the respondent's title the deed poll of the 15th February, 1930, to which reference has already been made. By that deed, under the seal of the company, affixed thereto by Mr. Watson as liquidator, after recitals in the terms and to the effect already stated, and after a further recital that the company and the liquidator desired to set at rest any doubts that might arise as to the title of the second firm of Alan Goodridge and Sons and their assigns by reason of the absence of any formal assignment to them by the company and that they desired to confirm their title to the leasehold property, it was witnessed that the company and the liquidator thereby confirmed and ratified—not, be it observed, the title of the firm, but—the right, title and interest of the said Florence Goodridge, the respondent, and The Eastern Trust Company as administrators of the estate of the said Angus Macdonald, then deceased, in and to the said leasehold property and interest and that they thereby transferred, assigned and set over unto these three parties as from the 1st of April, 1919, all such right, title and interest in and to the said leasehold property, and interest and all such rights and interests appurtenant thereto or arising thereout as might still be valid and subsisting and vested in them at the date of the said deed poll, the 15th February, 1930.

That deed poll, remarkable as it is, and it is a notable example of salvage conveyancing, was not, in their Lordships' judgment, effective for its purpose. The Supreme Court took the view that as between the company and the three persons whose title it purported to confirm, it amounted to a legal assignment in writing of the leasehold interest in the property with all rights appurtenant thereto which included the right to obtain payment of compensation under the Act of 1921. It certainly did not purport to be more than this. But so regarded it was at law quite inoperative, inasmuch as the estate or interest which it purported to assign had at the date of the deed no existence, and it is well settled that neither at law nor in equity can the assignment of such an interest operate according to its tenor. See *Sweet v. Shaw*, 3 Jur. 217; *Collyer v. Isaacs*, 19 Ch. D. 342, 351; *Performing Rights Society v. London Theatre of Varieties, Limited* [1922],

2 K.B. 433 : [1924] A.C. 1. In equity such a transfer may in certain circumstances create equitable rights, but at law it is useless. The deed poll accordingly was for this reason alone of no effective service to the respondent. And there are other objections to its efficacy. If it may be assumed, as it seems to have been, that the "shareholders" already referred to and the "debtors" were the same persons, then it was the title of these shareholders as contributories of the company, and that title only, which the company in 1930 had by its liquidator any right to confirm. No assignment of this interest of theirs now for the first time emanating from the company was, as has been seen, made by the trust deed of the 14th January, 1921, and accordingly they, as contributories, were alone entitled to have their title perfected. Putting it in another way, without their concurrence in the deed poll as assignors, that deed, even if otherwise unobjectionable, was inoperative to assign any interest to the respondent and his two co-assignees.

The Supreme Court were undoubtedly mainly influenced in their decision in favour of the respondent by the effect in law which they attributed to the deed poll of the 15th February, 1930. It would appear that the difficulties in the way of their conclusion in that matter already pointed out were not brought to the notice of the Court. But the Supreme Court was apparently also of opinion that by the transaction of distribution as it was recited in the deed poll, the company, in the words of Kent J., intended to "and did in fact transfer and deliver to its shareholders not a mere equitable title, but the entire legal interest then vested in it as assignee of the lease, and that the fact that no written assignment was made at the time was due to the neglect or oversight of the parties to the transaction." The learned Judge is, in other words, apparently of the opinion that the "shareholders" amongst whom the leasehold hereditaments were "distributed" became in effect legal assigns of the original lessees.

Their Lordships consider that it would be unfortunate if judicially any such a result were to be held to flow from a transaction which, as stated by the liquidator himself, was in almost every respect irregular. His statement, which is qualified by no explanation, seems to be indicative of a view too widely current, and not only in Newfoundland, that a private company need not be regarded as a corporation distinct from the persons composing it, and that irregularities in connection with its liquidation, which in the case of a public company would be most serious, are venial and perhaps even permissible. It is necessary, in their Lordships' opinion, that this view should be once for all dispelled. The duties and responsibilities of the liquidator are as serious in the liquidation of a private Company as of any other. It is, of course, possible that in the case even of a public company, its surplus assets may, in specie, and without realisation, be distributed amongst its contributories. But only under proper authority.

It is possible, again, that even in the case of a company not altogether insolvent as regards its contributories, its creditors may be required to accept a composition on their debts. Again, however, only under proper authority. But that it should be regarded as a normal course of liquidation justifiable without explanation, that a liquidator should pay the creditors merely a dividend on their debts, when surplus assets large in amount remain in hand, and should then allow the contributories without definition of their interests therein to take possession for themselves of these surplus assets, seems to the Board to be a serious matter, and it is necessary their Lordships think, to call attention to its impropriety, so that for the future in Newfoundland at all events such irregularities shall be without judicial countenance, and obedience to the statute law in these matters shall be definitely insisted upon.

The present case, in its result, at least, shows, and properly shows, that if it be of importance that legal interests in property should be duly assigned, it is perilous to ignore statutory requirements of procedure.

Their Lordships accordingly are not able to accept the view of the Supreme Court in this matter. This appeal should, they think, be allowed and the order appealed from discharged. The appellant should have her costs of the appeal and also the costs incurred by her in the Supreme Court.

And their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

AVELINE SCOTT DITCHAM

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JAMES J. MILLER.

DELIVERED BY LORD BLANESBURGH.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.
1931.