JACK PONG (DEFENDANT).....APPELLANT; 1927

AND *Feb. 23, 24.

LUM QUONG AND LUM CHONG (PLAINTIFFS).....} RESPONDENTS;

AND

MRS. W. J. THOMSON (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Trust—Procuring of new lease by former partner—Assignment thereof to those continuing the business on the premises—Covenants in assignment—Rights between the parties as to acquisition of further lease—Implied trust—Question of estoppel by res judicata—Effect of judgment in overholding tenants proceedings—Jurisdiction of judge in such proceedings—The Landlord and Tenant Act, R.S.O., 1914, c. 155.

P. and others had, as partners, conducted a laundry business on leased premises. The partnership was dissolved, the others continuing the business on the premises. P. procured from the landlord a new lease dating from the expiry of the existing one. As a result of litigation, P., for a certain sum, assigned to the others the new lease, covenanting that the assignees might "hold and enjoy the said premises for the residue of the term granted by the said lease and every renewal thereof (if any) for their own use and benefit, without any interruption of the assignor." The lease had no provision for renewal. Before its expiry P. procured from the landlord a further lease dated from the expiry of the existing one. Plaintiffs, the aforesaid assignees or their successors in interest, sued for a declaration that P., the defendant, was a trustee of the lease for them, and for other relief.

Held, affirming judgment of the Appellate Division, Ont. (56 Ont. L.R. 616) that P. held the lease as trustee for plaintiffs; his obtaining it was a breach of good faith and contravened an implied obligation with regard to renewals; the allusion to renewal in the assignment must be taken to refer to the reasonable expectation of the tenants in possession to obtain a renewal; *Griffith* v. *Owen* ([1907] 1 Ch. 195) applied.

Held further, that plaintiffs were not estopped by *res judicata* by reason of certain overholding tenants proceedings (under *The Landlord and Tenant Act,* R.S.O., 1914, c. 155) and judgment therein; in such proceedings the judge had no jurisdiction to adjudicate as to the relations between Pong and plaintiffs.

APPEAL by the defendant Pong from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which (reversing order of Mowat J.) declared that said

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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defendant was trustee for the plaintiffs of a certain lease, and ordered that he assign it to the plaintiffs.

The plaintiff Quong and the defendant Pong were members of a firm carrying on a laundry business on premises leased from the defendant Mrs. Thomson. Mrs. Thomson had leased the premises to Pong in his own name for a term of three years from 1st March, 1916. Before the expiry of this lease, the partnership was dissolved (in November, 1917). Pong, in June, 1918, acquired a lease of the property in his own name for a period of five years, commencing on 1st March, 1919 (at the expiry of the first term). Litigation followed. A judgment of Winchester Co. C.J. contained an alternative direction that Pong should assign the lease to Quong and his co-partner in consideration of $600 to be paid to him. The lease was accordingly assigned, and in the assignment it was provided that the assignees might

> hold and enjoy the said premises for the residue of the term granted by the said lease and every renewal thereof (if any) for their own use and benefit, without any interruption of the assignor.

The lease did not contain any provision for renewal. Before the expiry of the lease, Pong procured from Mrs. Thomson a further lease of the premises for six years from 1st March, 1924 (the date of expiry of the existing lease). The plaintiffs, Quong and his co-partner Chong (who was the successor in interest of Quong's former co-partner Lum Lin), remained in possession after 1st March, 1924, being willing to assume the burden of the new lease (which was at an increased rental), and claiming the right to the benefit of it. They continued to pay rent which was taken by Mrs. Thomson without prejudice. The latter took proceedings under the overholding tenants provisions of *The Landlord and Tenant Act,* R.S.O., 1914, c. 155. The proceedings came on before His Honour, Judge Denton, of the County Court of the County of York. It was apparently agreed that the hearing should proceed on the basis of the assumption that rent from the plaintiffs had not been accepted by Mrs. Thomson; in other words, that, if Quong and Chong were not entitled to the benefit of the lease made to Pong, she should not be prejudiced in the proceedings by having taken rent from Quong and Chong. It appeared that the real dispute was between Pong on the one hand, and Quong

and Chong on the other, as to the right to the lease. There was some discussion, and, apparently, misunderstanding, as to the question of jurisdiction, and consent in regard thereto, which is referred to in the judgment now reported.

His Honour, Judge Denton, held that the lease acquired by Pong was not a renewal, in any sense, of the former lease, and made an order for possession against the present plaintiffs. The latter appealed to the Appellate Division of the Supreme Court of Ontario, which dismissed the appeal without written reasons. See the reference to this appeal in the judgment now reported.

The plaintiffs then brought the present action in the Supreme Court of Ontario, claiming a declaration that the defendant Pong was a trustee for the plaintiffs of the lease, and that it should be assigned to them, and for an injunction restraining him from assigning the lease to any person other than the plaintiffs, and for an injunction restraining the defendant Mrs. Thomson from evicting them.

The plaintiffs' motion for an interlocutory injunction was dismissed by Mowat J. The plaintiffs appealed to the Appellate Division of the Supreme Court of Ontario. By consent of counsel, the motion was turned into a motion for judgment and the case was heard upon the merits. The Appellate Division allowed the appeal, holding that the defendant Pong was a trustee of the lease for the plaintiffs, and that the lease should be assigned by Pong to the plaintiffs, who should covenant to indemnify him against the lessee's covenants contained therein (1).

The defendant Pong appealed to the Supreme Court of Canada. His two main grounds of appeal were: (1) That plaintiffs were estopped by *res judicata* by reason of the overholding tenants proceedings above mentioned and the judgment of Denton Co. C.J. therein, sustained by the Appellate Division; and (2) That, on the merits, the Appellate Division was wrong in holding that Pong should be deemed a trustee of the lease for the plaintiffs.

Norman Sommerville K.C. for the appellant.

Fraser Raney for the plaintiffs, respondents.

No one appeared for the defendant (respondent) Mrs. Thomson.

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At the conclusion of the argument for the appellant, the Chief Justice orally delivered the judgment of the court as follows:

"It is not necessary to call on you, Mr. Raney.

"We have all had an opportunity of considering this case over night, and the position seems to us quite clear.

"The first ground of appeal is that the respondent is estopped from bringing this action by reason of the judgment given in the overholding tenancy proceedings by His Honour, Judge Denton, nominally affirmed on appeal. I say "nominally" for reasons presently to appear.

"Judge Denton's only jurisdiction under the overholding tenants provisions was to determine the right of the landlord to possession. He himself states that in order that he should proceed it was necessary that there must be an admission before him that the rent had not been paid. His jurisdiction was to determine whether or not the landlord was entitled to possession. It was apparently desired that he should deal with issues as to the relationship of Pong and Quong, and determine the rights between them. Mr. Raney consented in some sort of form to that being done, but it would appear that his consent was given on the understanding and basis that the judge should deal with the matter as one within his jurisdiction under the overholding tenants provisions. It is perfectly manifest that he had no jurisdiction to do so—no jurisdiction subject to appeal; that he could entertain such collateral matter only either as *persona designata* or as arbitrator. That being so, the Appellate Division, when the case came before it on appeal from Judge Denton, must have taken the view, as Mr. Raney states, and as the subsequent proceedings bear out, that the judge had assumed a jurisdiction he did not possess under the overholding tenants provisions, and that as to the relations between Pong and Quong the matter was *coram non judice*. Mr. Raney's consent had been given subject to a condition which could not be fulfilled; in other words, he consented upon the condition that he would retain an effective right of appeal. On the appeal in the present action, the Appellate Division must have taken the view that the former proceeding was not binding as to the obligations of Pong; that the only thing judici-

ally determined by it was the landlord's right to possession, the order in this respect, assuming non-payment of rent, being within the jurisdiction of the judge who made it. Taking that view,—and they of course knew what had been their appreciation of the former proceeding—it was open to the Appellate Division to deal with the appeal from the judgment of Mowat J. in this action, as they did.

" The other branch of the appeal is directed to the merits. It is claimed by the plaintiffs that the lease obtained by Pong is held by him as trustee for them. The Appellate Division gave effect to that contention, and, in our opinion, upon the whole case, rightly gave effect to it. It is manifest to us that the transaction carried out by Pong was in breach of good faith and contravened his obligation with regard to renewals, which was implied in the whole arrangement between him and Quong. While there is no express right of renewal in the lease, the assignment of it does deal with renewal, and the allusion must be taken to refer to the reasonable expectation of the tenant in possession to obtain a renewal. The case is fairly within the principle stated by Mr. Justice Parker in *Griffith* v. *Owen* (1). That principle was properly applied in the judgment now appealed from. That judgment is affirmed, and the appeal is dismissed with costs."

Appeal dismissed with costs.

Solicitors for the appellant: *Norman Sommerville & Co.*
Solicitors for the respondents, plaintiffs: *Raney & Raney.*
Solicitors for the respondent, Mrs. Thomson: *Grant & Grant.*