JAMES & ANOR.

v.

NESBITT

ORDER

Appeal dismissed with costs.

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10 September 1954

JAMES & ANOR.

v.

NESBITT.

JUDGMENT (ORAL)

DIXON C.J.
WEBB J.
FULLAGAR J.
KITTO J.
TAYLOR J.

JAMES & ANOR.

v.

NESBITT

This is an appeal from a decree made by the Chief Judge in Equity dismissing a suit. A motion for a decree was treated as the hearing of the suit. The suit was commenced on 24th November 1953 and its purpose was to enforce an oral agreement for a lease including an option for renewal. The premises were a cafe at Molong. At the commencement of the suit the only plaintiff joined was the lessee, a Greek, who carried on business under the name he had adopted of Harry James. The landlord was the defendant. The relief sought was comprised in a number of prayers but substantially it was for specific performance of the agreement for the lease and the option, certain injunctions which are not now material and alternatively damages in lieu of specific relief. The oral agreement for a lease was made sometime in October 1951 and the plaintiff as tenant appears to have entered into possession of the cafe about the 22nd October 1951 and thereafter to have carried on business upon the premises. There seems to be no doubt that the plaintiff established that an oral agreement was made for a lease and for a grant at the same time of an option. The first term was for three years and the option was in respect of another term of the same duration. After entering into possession the plaintiff, James, took his brother-in-law intopartnership in the cafe business. His name appears to have been Boletis. After a time the plaintiff, James, gave a bill of sale and a power of attorney to the Motor Finance and Guarantee Company Limited. Those documents were dated 10th February 1953. They were to secure an advance for the purpose of acquiring certain trade fixtures and chattels. The business at the cafe seems to have been conducted without much success and in April 1953 the plaintiff, James, opened some rather indefinite negotiations with his landlord, the defendant,

to sell the business to the latter. A price was offered, but it was plainly insufficient to cover the amount that was owing in respect of fixtures and chattels and for that reason presumably the proposal was rejected. The main issue, which has emerged in the course of the proceedings at the hearing of the suit and upon this appeal, is whether after that date the plaintiff, James, surrendered the lease to his landlord, the defendant, by operation of law. Roper C.J. in Eq. took the view that on the facts it had been established that a surrender by operation of law had taken place on or within a short time of the 5th September 1953. He treated that as inconsistent with a readiness and willingness on the part of the plaintiff to perform the agreement sued upon and on that substantial ground dismissed the suit.

The facts may be very briefly stated as follows. The plaintiff, James, dissolved partnership with his brother-in-law Boletis and, according to his own account of the facts, treated him as an employee. On the 4th June 1953 the landlord gave the plaintiff notice to quit expiring on the 8th July 1953. The notice to quit was placed on the ground of non-payment of rent accruing between 30th March and the date of the notice, 4th June 1953, and was also placed on certain breaches of obligation in respect of the premises on the part of the plaintiff as a tenant. On the 14th August 1953 the plaintiff, James, departed from Molong for Sydney. The reason he gave for leaving is deposed to by the defendant. The defendant said that on that day James sought an interview with him. The defendant asked him what was troubling him and he replied: "I am done.....I am broke and have no hope of getting any money anyway and I cannot pay anybody." The defendant asked what that had to do with him and James said: "You can't do anything. Nobody can do anything. It's too late." The defendant made some observation about James having been told that entering the business was a mistake and James went on:

"Yes, I can see that now", and in answer to the question what he was going to do, said: "I will just have to shut up shop and go to Sydney and get a job." He did go and left Boletis in charge. Boletis carried on for a time, but the premises apparently had got into a very filthy condition. There seems to have been a shop assistant and there was difficulty in paying her wages. Boletis dismissed her and saw the landlord, the defendant, on Friday, 2nd September 1953. Boletis said he was closing the business and leaving on Sunday night. That evidence was objected to. It is relevant only to explain the attitude the landlord adopted, because it does not appear that Boletis had authority to express the plaintiff's intention. However one Ramsay gave evidence of a conversation with James in which the latter said that Boletis had telephoned to him in Sydney and asked him to come back and take over the business because he (Boletis) had a job elsewhere and wished to leave. According to the evidence of Ramsay, the plaintiff told Boletis, in effect, that he did not care what happened to the shop. In fact he came back to Molong late on 4th September and left again in the early morning of 5th September 1953. He took with him some keys, one of which was for the side door of the shop, but that door was probably left open or unlocked, for the lock did not fasten. The plaintiff James did not again appear in Molong. The defendant re-entered as landlord but it is not admitted that he re-entered with the intention of resuming possession as owner and ending the tenancy. The facts, however, appear clearly enough to show that that was his intention. He took the old locks off and put new locks on the doors, secured the attendance of the Health Inspector and treated the premises really as having lapsed into his hands. On that evidence Roper C.J. in Eq. really founded his judgment. A question was raised as to whether when the plaintiff James finally left as he did in the early hours of the morning of the 5th September, he intended not only never to return but also

to cease to be a tenant. The suggestion in the evidence which he gave is that he intended to look for a buyer of the business and he, therefore, had what we may call a residual intention of exercising the rights of a tenant in dealing with the premises which he had in fact left if he should succeed in finding a purchaser. Roper C.J. in Eq. in his judgment says:-

> "I find that James in fact abandoned the premises on 4th September, and I think that the proper inference is that he then intended, and by his conduct appeared, to surrender his tenancy. The defendant clearly accepted the offer, and on his re-entry the legal tenancy in my opinion came to an end. James subsequently changed his mind as to the tenancy of the premises, induced to do so, no doubt, by the finance company, but it appears to me that this was after the defendant had re-entered with the intention of accepting a surrender of the tenancy, and therefore too late to prevent the surrender taking effect."

That finding has been attacked. Indeed it has been the subject of the chief attack on the part of the appellant. It is, we think, enough to say that the essential part of it is amply supported by evidence. The essential part of it is the inference that the tenant, James, intended, and appeared by his conduct to intend, to surrender his tenancy. The meaning of that we take to be that he intended to abandon the premises and exercise no rights over or in respect of the premises as a tenant and left them to the disposal of the landlord. The question whether he subsequently changed his mind and if so whether he was induced to do so by the finance company is a subsidiary one and does not, in our opinion, go to the essence of the finding. But his Honour's view on this matter has certain circumstantial evidence to support it. There is no real evidence to show that James ever did look for a buyer or that the person who was mentioned as a buyer in a letter written by solicitors on his behalf on 22nd September was a product of his research. All the circumstances tend to show that James had no intention whatever of exposing himself to further liability or responsibility in connection with the premises. The law relating to surrender by operation of law is clear enough. It is stated in Phene v. Popplewell, 12 C.B. (N.S.) 334, at pp. 340-1, by Willes J. His Lordship says:-

> "The common-law conveyance, before the Statute of Frauds, was a notorious act indicating a change of the possession. That statute requires the conveyance to be by writing in most cases, in the case of a surrender amongst others; but it expressly excepts surrenders by act and operation of law, which therefore remain as they were at common law. Now, one way in which there might be a surrender of a term by the common law, was by the tenant taking a new lease, even for a shorter term, and to commence in futuro, provided the new lease coincided with any part of the term created by the old one ..... There are many other ways in which a surrender by act and operation of law may take place: for instance, where the landlord and tenant have by mutual agreement consented that the term shall be put an end to, and the possession is changed in consequence, whether the landlord re-enters by himself or by a new tenant, that constitutes a surrender by operation of law. There is no difference in principle between that case and the taking of a new lease. The intention of the parties is to be made out by the circumstances."

In the present case the lease was the result of an oral agreement for a lease which had been acted on by the tenant entering into possession. There was of course a tenancy at law and as between the parties a term in equity, that is so long as the plaintiff tenant was entitled to specific performance. The principles relating to surrender which apply at common law to the legal term apply, we think, with no less force to the equitable term that resulted. Accordingly the finding of Roper C.J. in Eq. means that the legal and equitable terms ended at the time when the landlord re-entered, as he did not later than 18th September 1953. The question whether this defence was set up in its correct form was raised at the close of the hearing of the appeal by Mr. Rath in his very earnest reply. But the point does not seem to us to be one that could affect the conclusion upon which the decree depends. Roper C.J. in Eq. placed his judgment on the ground that the surrender was inconsistent with any readiness and willingness on the part of the plaintiff James to perform the agreement he seeks to enforce. No doubt his Honour so treated the defence because that is the form it took in the pleading. But even if this be a less direct use of the surrender of the term than if it is regarded as in itself a complete answer to the plaintiff's case, it is a clear enough basis for the judgment and the issue of fact on which it depends was clearly taken and fought. It is not material how the legal consequences are stated.

Besides the attack made upon the finding of surrender by operation of law, another ground was relied upon in support of the appeal. It is concerned with the power of attorney which was granted, as I have said, on the 10th February 1953. It is not necessary for the purpose of dealing with this defence to refer to the power of attorney contained in the power of sale. It is enough to refer to the second document which consisted in a fuller power from the plaintiff, James, to the finance company. The power of attorney was given by James and his partner, or former partner, Boletis, to the Motor Finance and Guarantee Company Limited. It was to strengthen the security over the goodwill and chattels of the mortgagors in connexion with James' business as described. The bill of sale was given over the chattels of the mortgagors used in connexion with the business of the cafe and "the goodwill of any trade or business carried on by the mortgagors on or in conjunction with the premises wherein such personal chattels now are or at any time hereafter during the continuance of this security may be". The separate power of attorney is expressed to be irrevocable and to enable the finance company in the event of the mortgagors making default, inter alia, to assign the lease or tenancy of the premises to such persons as they think fit, and to give notice of the determination of the lease and to surrender the same to the landlord with or without consideration. The effect of James granting such a power is said, when sec. 161 of the Conveyancing Act 1919 is applied, to preclude James from himself surrendering the lease during the currency of the power of attorney. It may be described as an argument that by granting a power of attorney for consideration, expressed to be irrevocable, James incapacitated himself from making a surrender; or it may be described as an argument that by granting the power he had alienated his power of disposition of the lease during the currency of the power. Sec. 161 of the Act provides that where a power of attorney given for valuable consideration is in the instrument creating the power expressed to be

irrevocable, then, in favour of a purchaser certain things shall follow. One is that the power shall not be revoked. Another and more material one is that any act done at any time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor without the concurrence of the donee, or the death, lunacy, unsoundness of mind, or bankruptcy of the donor, had not been done or had not happened. A third is that neither the donee of the power nor the purchaser shall be prejudicially affected by notice of anything done by the donor without the concurrence of the donee nor of his death etc. The contention is that these provisions operate to make it impossible for the donor of the power, in this case James, to do any of the acts covered by the power. With this construction of sec. 161 we find it impossible to agree. Sec. 161 gives an irrevocable authority to the donee of the power to do certain acts. It does not in itself strip the donor of his legal capacity, whatever it may be, by virtue of ownership or otherwise, to do the same acts. If there is any inconsistency between the manner in which the donee of the power acts and the manner in which the donor of the power acts in reference to something which is covered by the power, then sec. 161 will operate, according to the circumstances of the case, in favour of a purchaser.

In the present case the rights of a purchaser are not in question. What we are concerned with is the capacity of James to make a surrender of the tenancy. That capacity is not impaired by the section.

It is only necessary to add two things by way of explanation. Because the defence of insolvency of the plaintiff was raised at the trial an assignment was made and the assignee, the plaintiff Potts, was added as a plaintiff. The plaintiff Potts is not exposed to any suggestion that he is insolvent. It is for that reason that there are two plaintiffs in the suit. During the hearing of the appeal the trustee of the bankrupt estate of the appellant James was added as a party to the appeal.

In our opinion the appeal should be dismissed with costs.

ORIGINAL

Sydney 10th September
1954 – Oral Judgment