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ROBERT C. AULD (DEFENDANT) .....APPELLANT; *Apr. 24, 25.
*Oct. 7.

AND

AUSTIN A. SCALES (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND (IN BANCO)

Landlord and tenant—Claim for possession of land—Lease—Construction of Covenants—Lease for term certain with proviso for continuation from year to year—Whether lessee entitled to perpetual renewal—Option to purchase contained in lease—Breach of covenant—Wartime Prices and Trade Board Order 108, sections 16 and 24 (2)—Notice to quit invalid—No statement as to circumstance in respect of which notice given—Whether notice effective to terminate option—Whether terms of lease offending rule against perpetuities—Perpetuities Act, 1940, P.E.I., c. 46.

A lease of certain lands for a term of ten years, dated August 1, 1926, "provided * * * that at the expiration of the * * * term * * * this demise * * * shall at the option of the * * * lessee continue as a demise * * * from year to year * * *." The lease also granted the lessee the privilege, after the expiration of the ten year term, of terminating the tenancy upon giving to the lessor notice in writing. The lease further prohibited assignments and sub-leases without leave, provided for re-entry by the lessor if rent in arrear for two years and also gave the tenant an option to purchase the premises "during the continuance of the (ten year) term

*PRESENT:—Rinfret C.J. and Taschereau, Rand, Kellock and Estey JJ.

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or the continuation thereof." In January, 1943, the respondent gave to the appellant notice to quit; and, in August, 1944, an action was instituted for possession on the ground that after the expiration of the period of ten years the appellant became a tenant from year to year, which tenancy could be determined by a simple notice of termination. At a later stage of the action, after the appellant had pleaded Order 108 of the Wartime Prices and Trade Board, the respondent further contended that the appellant had, prior to the giving of the notice, committed a breach of the covenant not to assign without leave and that such a breach had the effect of removing the case from the operation of the Order. By section 16 (4), no notice to vacate may be given except if "the tenant is * * * breaking the conditions of his lease." By section 24 (2), it is provided that "in case of default in payment * * * nothing in this Order contained shall be deemed to preclude a landlord * * * from giving any notice to vacate or demand for possession in accordance with the law of the province * * * ". Before trial, certain questions of law (19 M.P.R. 408) were by agreement between the parties submitted for adjudication; and Campbell C.J. (19 M.P.R. 429) determined these points of law in the main in favour of the respondent. This decision was affirmed by the appellate court.

Held: The defendant's appeal to this Court should be allowed.

Per The Chief Justice, Taschereau and Kellock JJ. The respondent contended that, while by section 16 default in payment of rent gives a landlord a right to terminate the tenancy only at its expiration by a specific form of notice, yet by section 24 (2) the same act of default takes the tenancy out of the operation of the regulation altogether. *Held*: The regulations are to be construed as a whole; and a rational interpretation may be given to section 24 (2) by construing it to mean that if, by provincial law, a right is given to the landlord *by reason of default in payment of rent,* that right is preserved to him, and it is the same where there is "a breach of a covenant other than a covenant to pay rent". If by provincial law there is afforded to the landlord a right to give a notice to vacate or demand possession on that ground or to take proceedings for recovery of possession founded thereon, then he is not limited by the provisions of section 16 in the exercise of that right.—In the present case it is not pretended that there is available to the respondent by the law of the province any right to recover possession because of the alleged breach of covenant. Accordingly, as the notice did not "state the circumstances in respect of which it was given", it did not comply with the provisions of section 16 and is nugatory.

Per The Chief Justice, Taschereau and Kellock JJ.:—The respondent also contended that, even if the notice to quit was ineffective to terminate the occupancy of the appellant, it none the less terminated the option to purchase because such option should be considered as entirely outside the scope of the regulations. *Held*: This contention cannot be accepted. The lease provides that the lessee "shall at all times during the continuance of the term or the continuation thereof" have the right to purchase and, the notice to quit being ineffective, it follows that the tenancy continued and the option was exercisable according to its plain terms.

Per The Chief Justice, Taschereau and Kellock JJ.:—The respondent further contended that a tenancy from year to year, unless terminated by notice, is capable of going on indefinitely and that, consequently, as the period of time for the operation of the option was entirely indefinite, it was void. *Held:* The option to purchase was valid and did not offend the rule against perpetuities. "The person for the time being entitled to the property subject to the future limitation", namely the respondent as owner, may destroy the option by terminating the lease by due notice in accordance with the relevant law without "the concurrence of the individual interested under that limitation", namely the appellant or those claiming under him,—*London and South Western Ry. Co.* v. *Gorman* (20 ch. D. 562, at 581).

Per Rand J.:—The respondent has not brought himself within the Order for the reason that the notice to vacate did not, as required by sub. 5 of s. 16, state the reason for giving it.—Also, under section 24 (2), a breach of covenant *ipso facto* does not take the entire lease outside of the application of the Order. Otherwise there would not appear to be any purpose in providing sub. (4) (*a*) of s. 16, unless it is said that in all cases a notice must be given; and then the same objection would arise in this case, that a proper notice had not been given.—Further the respondent's contention, that the option to purchase was void because it might be exercised beyond the period of the rule against perpetuities, should not be assented to. A sufficient answer to such contention is that the option could be terminated by either party by the requisite notice. As the lease was in force when the tender of the money was made, the lessee has brought himself within the terms of the option.

Per Estey J.:—A lease would contain a right of perpetual renewal only if such an intention is clearly expressed; and the language used must import both renewal and perpetuity. But, in this case, the terms indicate a clear intention to create a tenancy from year to year. Also, its provisions show a similar intention that the lease shall continue until its termination rather than it should be renewed by the lessee in each year.—The notice to quit was invalid as a notice to vacate under the Order, because it did not contain the requirements of s. 16 (4).—Express language must be found in section 24 (2) so that the breach of a covenant not to assign, transfer or sublet would remove entirely the effect of the Order and restore provincial law for all purposes: it ought not to be implied.—Therefore, the lease is valid and subsisting and, by its express terms, the option to purchase was outstanding.—An option contained in a lease, where either by its express terms or by operation of law the right remains in the lessor or owner of the property to terminate both the lease and option, does not involve an infraction of the provisions of the provincial *Perpetuities Act.*

APPEAL from the judgment of the Supreme Court of Prince Edward Island (*in banco*) (1) affirming a judgment of Campbell C.J. (2), which had determined, in favour of

(1) (1946) 19 M.P.R. 406, at 419; [1947] 1 D.L.R. 760.
(2) (1946) 19 M.P.R. 406; [1946] 3 D.L.R. 613.

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the lessor (respondent), points of law and equity arising in an action by the lessor to recover possession of leased premises.

No trial of any issues of fact has taken place and no evidence has been adduced.

W. E. Bentley K.C. and *M. M. MacIntyre* for the appellant.

H. F. McPhee K.C. for the respondent.

The judgment of The Chief Justice and of Taschereau and Kellock JJ. was delivered by

KELLOCK J.:—By an indenture of lease dated August 1, 1926, the respondent leased to the appellant certain lands for a term of ten years at a rental of $12.00 per annum,

provided always that at the expiration of the ten year term hereby demised this demise and everything contained herein shall at the option of the said lessee continue as a demise of the said premises to the said lessee from year to year thereafter at the same yearly rent herein reserved and subject to the same terms and conditions contained herein. Provided, further, that after the expiration of the said ten year term hereby demised the said lessee shall have the privilege of terminating this lease upon giving to the lessor twelve months' notice in writing and upon conforming with the other conditions and stipulations contained herein.

The lease also contained a covenant against assigning or subletting without leave and further provided for re-entry by the lessor if the rent should be in arrear for two years. It also provided as follows:

And that the lessee shall at all times during the continuance of the said term or the continuation thereof have the right, privilege and option of purchasing the said premises from the lessor on payment from him, the lessee to the lessor, of the price or sum of three hundred dollars.

On January 12, 1943, the respondent gave to the appellant notice in writing to quit and deliver up possession of the demised premises on August 1st following. On August 7, 1944, this action was instituted for possession clearly on the theory, as shown by the statement of claim, that after the expiration of the period of ten years the appellant became a tenant from year to year, which tenancy could be determined by a simple notice of termination. It was not until a later stage of the action, after the appellant had pleaded Order 108 of the Wartime Prices and Trade Board, that the respondent took the position that the appellant

had, prior to the giving of the notice, committed a breach of the covenant not to assign without leave and that Order 108 therefore did not apply.

Section 16 (1) of that Order provides that if a landlord wishes to terminate a lease he may give

> due notice to vacate in writing in accordance with the provisions of this Part * * * and no notice to vacate shall be given except in accordance with the provisions of this Part.

In the circumstances here relevant clause (*d*) provides for notice of at least three months. By subsection 4 no notice to vacate may be given except by reason of certain circumstances, one being

> that the tenant is in default in payment of rent or is breaking the conditions of his lease,

and the notice is required to state the circumstances in respect of which it is given.

On the assumption that he will be able to prove the alleged breach at the trial the respondent submits that the mere fact of such a breach removes the case from the operation of Order 108 and that therefore he was entitled to terminate the tenancy by the notice which he gave.

To consider the soundness of this contention it will be convenient to examine what would be its effect, if, instead of the particular breach of covenant here alleged, there had been default in payment of rent. Under the provisions of section 16 (1) the landlord could in such circumstances have given a notice in writing, which by ss. 2, "unless the lease provides for longer notice" would have had to be a three months' notice terminating at the end of the term, and the notice must have specified non-payment of rent as the reason for its having been given. This last requirement is emphasized by s.s. 5.

By section 24 (2) it is provided that

> in case of default in payment * * * nothing in this Order contained shall be deemed to preclude a landlord * * * from giving any notice to vacate or demand for possession in accordance with the law of the province * * * or from taking any proceedings available to a landlord under the law of any province to recover possession.

Under the construction contended for by the respondent, while by section 16 default in payment of rent gives a landlord a right to terminate the tenancy only at its

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expiration by a specific form of notice, yet by section 24 (2) the same act of default takes the tenancy out of the operation of the regulation altogether. The regulations are to be construed as a whole and, if possible, effect much be given to all the parts. Section 24 (2) operates by way of exception. To give effect to respondent's contention would make the exception "eat up the rule"; *Ferrand* v. *Hallas, Land and Building Company* (1). I think that a rational interpretation may be given to section 24 (2) which will not have that effect by construing it to mean that if, by provincial law a right is given to the landlord *by reason of default in payment of rent,* that right is preserved to him. It follows that the same is true where there is "a breach of a covenant other than a covenant to pay rent." If by provincial law there is afforded to the landlord a right to give a notice to vacate or demand possession *on that ground* or to take proceedings for recovery of possession founded thereon, then he is not limited by the provisions of section 16 in the exercise of that right.

In the case at bar it is not pretended that there is available to the respondent by the law of Prince Edward Island any right to recover possession because of the alleged breach of covenant. Accordingly, as the notice given does not comply with the provisions of section 16 it is nugatory. I have considered the question on the basis that the respondent's construction as to the nature of the tenancy as a tenancy from year to year is correct.

It is next contended that even although the notice given by the respondent was ineffective to terminate the occupancy of the appellant, it nonetheless terminated the option to purchase. It is said that the rental regulations do not purport to do more than control certain aspects of the relationship of landlords and tenants as such; that an option to purchase is collateral to that relationship and should therefore be considered as entirely outside the scope of the regulations. This contention found favour below but, with respect, I am unable to accept it. The lease provides that the lessee

shall at all times during the continuance of the said term or the continuation thereof

(1) [1893] 2 Q.B. 135, at 144-5.

have the right. The notice to quit was either effective to terminate the tenancy or it was not. Being ineffective, in my opinion, under the governing law, i.e., the law authorized by Parliament, it follows that the tenancy continued and the option was exercisable according to its plain terms.

It is next contended that the terms of the lease with respect to the option offend the rule against perpetuities as the option, like all other terms of the lease,

> shall respectively enure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators and assigns, respectively.

The rule in the province of Prince Edward Island is embodied in a statute known as *The Perpetuities Act,* 4 Geo. VI, cap. 46. I do not read it as differing from the rule as it is understood apart from statutory provisions.

It is said on behalf of the respondent that a tenancy from year to year, unless terminated by notice, is capable of going on indefinitely, and that consequently, as the period of time which was set for the operation of the option here in question was entirely indefinite it is void.

In *London and South Western Railway Company* v. *Gomm,* (1) Jessel M. R. approved of certain passages from Lewis on Perpetuities, one of which is as follows:

> In other words, a perpetuity is a future limitation whether executory or by way of remainder and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; *and which is not destructible by the persons for the time being entitled to the property subject to the future limitation,* except with the concurrence of the individual interested under that limitation.

Applying the above to the case at bar, it is clear in my opinion, that the option to purchase does not offend against the rule.

> The person for the time being entitled to the property subject to the future limitation,

namely the respondent as owner, may destroy the option by terminating the lease by due notice in accordance with the relevant law without

> the concurrence of the individual interested under that limitation,

namely the appellant or those claiming under him.

The respondent relies upon the decision of Russell J., as he then was, in *Rider* v. *Ford* (2). That case was decided without any reference to the *Gomm* case (3) or the

(1) (1882) 20 Ch. D. 562, at 581
(2) [1923] 1 Ch. 541.
(3) (1882) 20 Ch. D. 562.

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principle set forth therein and as will be noted at p. 546 of the judgment, upon the admission of the defendant's counsel that the rule against perpetuities rendered the option to purchase void unless it could be read as giving only an option to the defendant personally or to an assignee of the defendant but exercisable only during the defendant's life.

Much as one hesitates not to follow any decision of Russell J., I do not think the decision is in accordance with principle. It was not followed in *McMahon* v. *Swan* (1). I think the reason why no question with regard to perpetuity can arise on limitations subject to an estate tail, provided they are such as must take effect during the existence of that estate, or immediately on its determination, equally applies in the circumstances here present. I refer to the judgment of Strong J. in *Ferguson* v. *Ferguson* (2).

I think, therefore, that the appeal must be allowed with costs here and below.

RAND J.:—This appeal has to do with a purported termination of a lease and the validity of an option to purchase contained in it.

The lease was subject to the Wartime Prices & Trade Board Order No. 108, the pertinent provisions of which are s. 16, ss. (2), (4), (5) and s. 24, ss. (2). These are as follows:

16 (2) Subject to the provisions of subsection (3) of section 17 and to the provisions of section 24 of this Order, every notice to vacate given by or on behalf of a landlord shall be in writing and, unless the lease provides for a longer notice, the length of the notice.

* * *

(4) Subject to the provisions of subsection (3) of section 17 of this Order, no notice to vacate any commercial accommodation shall be given except by reason of one or more of the following circumstances: (as amended by Order No. 211)

(*a*) that the tenant is in default in payment of rent or is breaking the conditions of his lease;

(5) Subject to the provisions of subsection (12) of this section, any form of notice to vacate shall be sufficient if it is in writing, requires vacation on the proper day and states the reason for the notice in accordance with this Order, and contains or is accompanied by the required undertaking. (As amended by Order No. 211).

* * *

(1) [1924] V.L.R. 397.

(2) (1878) 2 Can. S.C.R. 497, at 516.

24. (2) In the case of default in payment of rent or breach of a covenant other than a covenant to vacate, nothing in this Order contained shall be deemed to preclude a landlord or some authorized person on his behalf from giving any notice to vacate or demand for possession in accordance with the law of the province in which the commercial or housing accomodation is situated or from taking any proeedings available to a landlord under the law of any province to recover possession of any commercial or housing accommodation situated in such province. (As amended by Order No. 173).

Even if the word "conditions" in ss. (4) (*a*) is interpreted as meaning "provisions", a doubtful construction, so that the paragraph includes a violation of any of the terms of the lease, the respondent has not brought himself within the order for the reason that the notice to vacate which was one in the usual form did not as required by ss. (5) state the reason for giving it.

But it is argued that under s. 24 (2) a breach of covenant *ipso facto* takes the entire lease outside of the application of the order. The introductory language to 24 (1) is "Notwithstanding anything contained in this Order" and the subsection deals with the case of a lease which contains a provision for termination in the event of a sale. I doubt that those introductory words can be held to apply to ss. (2) but even if they do, what ss. (2) contemplates is a right given by the law of the province, including in that expression the valid terms of the lease, to repossession arising on a breach of a covenant and the subsection permits such proceedings to be taken on the basis of the breach as the law may allow.

If the mere non-payment of rent or breach of a covenant is to take the lease outside of the order, there would not appear to be any purpose in providing ss. (4) (*a*) unless it is said that in all cases a notice must be given; and then the same objection would arise here, that a proper notice had not been given.

The object of the order is to prevent trafficking in the possession of lands except for good cause. The general prohibition against terminating a lease by notice is qualified by the specific circumstances which by the order are considered sufficient justification for waiving the prohibition; but it leaves to the provincial law the determination of the circumstances under which a right of entry shall arise from the non-payment of rent or the breach of a

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covenant, except to vacate. In each case, what is contemplated is a right to possession. If this were not so, a breach of covenant, no matter how trivial and notwithstanding that it gave rise to no right to enter, would remove the lease from the order and enable the lessor to give the ordinary notice to quit, which would either conflict with ss. (4) (*a*) or give a much greater privilege for such a breach than for that of a condition in the true sense.

The respondent then was bound in giving such notice as he gave to bring himself within 16 (4) (*a*) which he did not or proceed to a recovery of possession under a right arising from the default alleged which the provincial law did not give him. He was, in the action taken, outside what both the order and the provincial law deemed necessary, and the notice was therefore a nullity.

Then there is the question of the term of the lease on which the validity of the option to purchase may depend. The language of limitation is this:

> The Lessor doth hereby demise and lease unto the Lessee * * * To have and to hold the said lands and premises hereby demised for the term of ten years to be computed from the day of the date of these presents. Yielding and paying therefor yearly and every year in advance during the term hereby demised or any continuance thereof the sum of Twelve Dollars ($12.00), the first yearly payment to be due and payable on the First day of August, A.D. 1926. Provided always at the expiration of the ten-year term hereby demised, this demise and everything contained herein shall at the option of the said Lessor continue as a demise of the said premises to the said Lessee from year to year thereafter at the same yearly rent herein reserved to, subject to the same terms and conditions contained herein. Provided, further, that after the expiration of the said ten-year term hereby demised, the said Lessee shall have the privilege of terminating this lease upon giving the Lessor twelve months' notice in writing and upon conforming with the other conditions and stipulations contained herein.

It is then covenanted that

> if at any time the aforesaid rent is in arrears for a space of two years, the Lessor may re-enter, and that the Lessee shall at all times during the continuance of the said term or the continuation thereof have the right, privilege and option of purchasing the said demised premises from the said Lessor on payment from him, the Lessee, to the Lessor of the sum or price of $300.

I agree with the contention of the respondent that the term is for ten years absolutely and thereafter in a "continuation" of that term as a year to year tenancy, terminable

by the Lessee on a twelve months' notice in writing. Whether that length of notice is obligatory on the lessor, I do not find it necessary to determine. On this branch of the argument, the objection to the option was that as it might be exercised beyond the period of the rule against perpetuities it was void, but to this I cannot assent. The rule is aimed against the tying up of real property pending the vesting of an estate upon a happening which is contingent. But that consideration in policy is absent when the owner of the estate over which the contingent power hovers is able himself at any time to terminate that power. In the classical presentation of the rule by the late Professor Gray the point is suggested that although the lessor in such a case is at liberty, by a proper notice, to destroy the option, it nevertheless involves an onerous condition upon him, namely, that he give up what may be a profitable lease. But if he desires to continue the lease and therefore has no wish either to occupy the land himself or to dispose of it, his only object would be to get rid of an obligation into which he had freely entered, an object which I cannot think can make action to achieve it onerous. With any other object in view, the termination of the lease is a necessary part of its accomplishment.

The point was dealt with in *McMahon* v. *Swan* (1), where the terms of the lease presented an identical question, and it was there held that it was a sufficient answer to the contention of perpetuity that the option could be terminated by either party by the requisite notice.

As the lease then was in force when the tender of the money was made, the lessee has brought himself within the terms of the option. I would, therefore, allow the appeal, and direct a decree of specific performance in accordance with the practice of the court below. The appellant should have his costs throughout.

ESTEY J.:—The appellant contends that the agreement dated the 1st day of August, 1926, and made between the parties hereto is a lease with a perpetual right of renewal after the expiration of the first ten years, rather than a lease from year to year as contended by the respondent,

(1) [1924] V.L.R. 397.

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and as held by the Appellate Court of Prince Edward Island in affirming a judgment of the learned Chief Justice of that province.

After providing for a term of ten years from the date thereof, the lease continues:

* * * provided always at the expiration of (the) ten year term hereby demised this demise and everything contained herein shall at the option of the said lessee continue as a demise of the said premises to the said lessee from year to year thereafter at the same yearly rent herein reserved and subject to the same terms and conditions contained herein: provided further that after the expiration of the said ten year term hereby demised the said lessee shall have the privilege of terminating this lease upon giving to the lessor twelve months' notice in writing and upon conforming with the other conditions and stipulations contained herein * * *

At the conclusion of the ten year term the tenancy continued by tacit agreement, and in fact the appellant is still in possession.

On January 12, 1943, the respondent, through his attorney, served the following notice:

I hereby as agent and attorney for and on behalf of Austin A. Scales, your landlord, give you notice to quit and deliver up to him on the 1st day of August, 1943, possession of the premises situate at Freetown, P.E.I., which you hold off him as tenant under a lease in writing bearing date the 1st day of August, 1926.

On August 30, 1943, the appellant tendered and respondent refused $12 as rent for the year ending August 1, 1944.

The respondent, as landlord, on August 7, 1944, brought this action for recovery of possession of the leased premises. Questions of law were raised upon the pleadings and these were submitted for decision prior to trial. The judgment of the learned Chief Justice in favour of the respondent upon these points was affirmed in the Appellate Division and from this judgment this appeal is taken.

The appellant's submission that this lease contains a right of perpetual renewal can only be supported if such an intention is clearly expressed: *Swinburne* v. *Milburn* (1); 20 Halsbury, 2nd ed., p. 154, para. 167. The language used must import both renewal and perpetuity, e.g. "renewable forever", *Clinch* v. *Pernette* (2); "thereafter forever", *Consumers Cordage Co. Ltd.* v. *St. Gabriel Land & Hydraulic Co. Ltd.* (3); "including the covenant for

(1) (1884) 9 App. Cas. 844.
(2) (1895) 24 Can. S.C.R. 385.
(3) [1945] S.C.R. 158.

renewal", *Re Jackson and Imperial Bank of Canada* (1). The lease in question contains no such words. On the contrary, the words

> shall at the option of the said lessee continue as a demise of the said premises to the said lessee from year to year thereafter

contained in the first proviso quoted above indicate a clear intention to create a tenancy from year to year: 20 Halsbury, 2nd ed., p. 123, para. 136. A lease from year to year differs from that with a perpetual right of renewal in that the former continues until terminated by notice, while the latter terminates at the end of the term unless renewed. This distinction is emphasized in *Gray* v. *Spyer,* (2), where the lease was construed to contain the right of perpetual renewal notwithstanding the use of the words "from year to year". There, however, the tenant was required to give one month's notice of his intention to continue his tenancy in each year. It was this obligation to give the notice that was emphasized by the learned judges in the Appellate Court. Warrington L.J. at p. 33:

> If the tenant failed to give the notice exercising his option, the tenancy would, in my opinion, determine at the expiration of the then current year * * *

Scrutton L.J. at p. 39:

> If I am simply to construe the words of the agreement, it seems to me to contemplate a year's tenancy, continuing from year to year, at the tenant's will expressed one month before the end of each year. But the continuation depends, not on a grant, but on an agreement to grant if the tenant so requires. In other words, the agreement is to continue at tenant's option the tenancy from year to year.

The same observations distinguish the case of *Northchurch Estates Ltd.* v. *Daniels* (3), where the lease was for a period of one year certain with an option in the tenant to

> renew the tenancy from year to year on identical terms and conditions as hereinafter stated, notice of such intention to renew the tenancy to be given in writing on or before December 25 in each year.

Evershed J. held this to create the right of a perpetual renewal. At p. 526 he stated:

> The language used includes the phrase "the option to renew the tenancy from year to year", and it says further that notice of that intention is to be given on or before Dec. 25 *"in each year"*. Those words seem to me to be very strong indications indeed that what was in the

(1) (1917) 36 D.L.R. 589.
(2) [1922] 2 Ch. 22.
(3) [1946] 2 All. E.R. 524.

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minds of the parties was that, so long as the tenant exercised his option within the time stated, he could go on from year to year *ad infinitum* renewing his tenancy.

The lease in this litigation specifically provides at the option of the lessee for its continuation as a demise from year to year, for termination thereof on the part of the lessee, and in the event of non-payment of rent, on the part of the lessor (what notice for other reasons might be given by the lessor we are not here called upon to determine). These provisions show a clear intention that the lease shall continue until its termination rather than that it should be renewed by the lessee in each year.

The appellant stressed the presence of the words "continue", "continuance" or "continuation" as evidencing perpetuity. The word "continue" as used in the above quoted proviso does not import perpetuity but merely that upon the termination of a ten year period the lease shall continue as one from year to year. The words "continuance" and "continuation" as used are in accord with that view and contemplate that the option given to the lessee may be exercised but once. The phrase "any continuation", which appears once, while it ordinarily would import the idea of more than one exercise of the option, as here used and construed in relation to the other provisions, cannot be so regarded and even if so, it cannot outweigh the other specific provisions of the lease.

The notice to quit dated January 12, 1943, as above quoted, did not "state the circumstance or circumstances in respect of which it is given" as required by Order 108, s. 16 (4) of The Wartime Prices and Trade Board, and is, therefore, invalid as a notice to vacate under that order. Indeed, the respondent does not contend otherwise. His submission is, assuming a breach of covenant to assign, that by virtue thereof under the provisions of section 24 (2) of Order 108 the lease is no longer subject to that order, but is subject to provincial law only. Section 24 (2) reads as follows:

24. (2) In the case of default in payment of rent or breach of a covenant other than a covenant to vacate, nothing in this Order contained shall be deemed to preclude a landlord or some authorized person on his behalf from giving any notice to vacate or demand for possession in accordance with the law of the province in which the

commercial or housing accommodation is situated or from taking any proceedings available to a landlord under the law of any province to recover possession of any commercial or housing accommodation situated in such province.

The respondent, to use his own language,

claims his right of possession not because a right of re-entry accrued to him by virtue of the breach of covenant, but because the lease was terminated by virtue of the notice to quit given in conformity with provincial law.

This submission recognizes that a breach of the covenant not to assign, transfer or sublet does not provide under provincial law a basis for the giving of a notice "to vacate or demand for possession" unless the lease contains an express provision therefor or such a provision is found in the statute law of the province. *Crawley* v. *Price* (1); Foa, The Law of Landlord and Tenant, 6th ed., 367; Woodfall's Landlord and Tenant, 22nd ed., 189. There is no such provision in the lease nor is there any such provision in the statutory law of Prince Edward Island. Apart from one or other of these provisions a breach of covenant may give the landlord a right to damages or an injunction, but not a notice "to vacate or demand for possession" nor for proceedings to recover possession.

The effect, therefore, of respondent's contention would mean that though a breach of this covenant for which provincial law provides no right for the giving of a

notice to vacate or demand for possession * * * or * * * taking proceedings * * * to recover possession,

nevertheless, under the provisions of section 24 (2) the breach of that covenant would make the lease subject to provincial law and therefore the right to terminate the lease by the notice to vacate effective under provincial law as if Order 108 did not exist. That such a determination of the lease should not obtain under the circumstances of war was one of the purposes and objects of Order 108. That this purpose should now be defeated by such a breach must be found in clear and explicit language. Such is not to be found in section 24 (2). This subsection is an exception to the general terms of the order and neither its provisions nor its collocation indicate any such intention. On the other hand, such an intention could have been expressed easily and clearly. In the absence of express

(1) (1875) L.R. 10 Q.B. 302.

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language that the breach of such a covenant should remove entirely the effect of Order 108 and restore provincial law for all purposes, it ought not to be implied. The respondent referred to *Toronto General Trusts Corporation* v. *Sidney I. Robinson Fur Co.* (1), a decison under Order 315 where the language is quite different, and *Ogilvie* v. *Westergaard* (2), a decision under Order 294 which repealed Order 108, where the language is somewhat different.

It therefore follows that the lease is valid and subsisting, and therefore by its express terms the option to purchase was outstanding. The option reads as follows:

> And that the lessee shall at all times during the continuance of the said term or the continuation thereof have the right, privilege and option of purchasing the said demised premises from the lessor on payment from him to the lessor of the sum or price of three hundred dollars.

The lease also contains:

> And it is hereby declared and agreed that these presents and everything contained herein shall respectively enure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators and assigns, respectively.

It is, however, contended by the respondent that this option is invalid under the *Perpetuities Act,* 4 Geo. VI, statutes of Prince Edward Island, c. 46. Section 2 reads as follows:

> 2. Notwithstanding any existing law or statute in force in this Province, the period during which the existence of a future estate or interest in any hereditament, right, profit, easement or other property, real or personal, may be suspended, and during which the rents, revenues, fruits, profits or income of any such real or personal property may be allowed to accumulate, either in whole or in part, may extend to, but must not exceed the life of a person or of the survivor of several persons born or en ventre sa mère at the time of the creation of such future estate or interest and ascertained for that purpose by the instrument creating the same, and sixty years to be computed from the dropping of such life or the minority of some person en ventre sa mère at the dropping of such life and ascertained for that purpose by such instrument.

This statutory provision embodies the principle that the "absolute power of alienation" should not be suspended beyond the period therein specified. It is designed to prevent the creation of executory interests, as Lord Macnaghten explains:

> * * * to arise at some future and indefinite period on a contingency which might or might not happen, and to impose on the land a fetter or

(1) [1946] 1 W.W.R. 137. (2) [1944] 2 W.W.R. 106.

burthen of indefinite duration which the owners for the time being * * * could not get rid of without the consent and concurrence of the persons entitled to such executory interest. *Edwards* v. *Edwards*, (1).

Then in Lewis on Perpetuity, p. 164, the definition of a perpetuity concludes with the words

which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation.

In dealing with this definition, Farwell J. in *In re Ashforth* (2), (1905 1 ch. 535, at p. 544, explains the word "destructible" as used in the above definition as follows:

The rule, however, was only to be applied to cases where it was really necessary in order to defeat remoteness, and, accordingly, Lord St. Leonards in *Cole* v. *Sewell* (3), points out that it has no application to remainders limited to arise after an estate tail, because they are destructible by barring such estate tail, and are no more open to objection than the estate tail itself; and this is the meaning of the reference to destructibility in the passage that I read above from Lewis on Perpetuity.

In Gray on The Rule Against Perpetuities, 4th ed., s. 203;

Thus a future interest if destructible at the mere pleasure of the present owner of the property is not regarded as an interest at all and the rule does not concern itself with it.

and s. 568, note 2:

When the owner of the present estate can destroy the future interest at his pleasure such future interest is not too remote.

In *McMahon* v. *Swan* (4), a lease for a period of five years which should continue thereafter until terminated by notice by either party contained an option to purchase. The option to purchase was held not to offend the rule against perpetuities because the tenant's interest could be terminated by the owner and therefore the option did "not restrain the free disposal of property beyond the period allowed by law."

The respondent relied upon *Rider* v. *Ford* (5), where, after the expiration of the specified term and while the tenancy continued as one from year to year, the lessee sought to exercise his option to purchase. The main point discussed was whether the option continued so long as the relationship of landlord and tenant continued, or whether

(1) [1909] A.C. 275, at 277.
(2) [1905] 1 Ch. 535, at 544.
(3) (1842) 4 D. & War. 1; S.C.
(4) [1924] V.L.R. 397.
(5) [1923] 1 Ch. 541.

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it expired at the end of the specified term. The rule against perpetuities was dealt with as follows at p. 546:

> Defendant's counsel admits that the rule against perpetuities must render invalid the option to purchase the freehold unless the agreement is read as giving only an option to the defendant personally, or to an assignee of the defendant, but only exercisable during the defendant's life.

The learned judge refused to so construe the agreement and therefore held the option to be inoperative and invalid because it offended the rule against perpetuities. It therefore appears that the specific point that we are considering was not raised as a matter for decision.

In *Tormey* v. *The King* (1), the lease was for a term of 30 years and continued thereafter as a tenancy from year to year. During the latter period the tenant sought to exercise the option to purchase and it was held, following *Rider* v. *Ford* (2), that the option was invalid as infringing upon the rule against perpetuities. Here again there does not appear to have been consideration given to the specific point we are discussing.

The respondent, Scales, as lessor and owner of the property, might in any year, after the expiration of the first ten years, under the provisions of this lease (apart from the emergency legislation imposed by the circumstances of war and which overrule the *Perpetuities Act*), by exercising his right to terminate the lease, effect a disposition of the property. It was within his power to make himself the sole owner and to dispose of all his rights without the concurrence of anyone. Therefore, there was never a time when, within the meaning of the statute, there existed a

> period during which the existence of a future estate or interest in any * * * property, real or personal, may be suspended

because the lessor as owner of the property might determine that suspension at his pleasure, and therefore he possessed the unfettered right to deal with the property at any time.

The fact that after the period of ten years this was a lease from year to year with the consequent right in the lessor to terminate it, distinguishes this case from many

(1) [1930] Ex. C.R. 178. (2) [1923] 1 Ch. 541.

of those cited by counsel for the respondent, including *Woodall* v. *Clifton* (1), where the lease was for a specified period of 99 years and the option exercisable at any time during that term. So in *London & South Western Rly. Co.* v. *Gomm* (2), the time in which the right to request a reconveyance was unlimited; likewise in *Worthing Corporation* v. *Heather* (3), and *United Fuel Supply Co.* v. *Volcanic Oil & Gas Co.* (4).

An option contained in a lease, where either by its express terms or by operation of law the right remains in the lessor or owner of the property to terminate both the lease and option, does not involve an infraction of the foregoing statutory provision of the *Perpetuities Act* and therefore is valid.

The appeal should be allowed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *W. E. Bentley.*

Solicitor for the respondent: *W. Henry Noonan.*