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*Oct. 15.
*Nov. 2.

THE VANCOUVER BREWERIES, LIMITED (DEFENDANTS) ..... APPELLANTS;

AND

A. J. DANA AND J. A. FULLERTON (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Landlord and tenant—Lease—Licensed hotel — Accommodation required by regulations—Covenant by lessor—Repairs and improvements—Loss of liquor licence—Determination of lease—Implied condition.

In a lease of property, upon which was situated a hotel licensed to sell liquors, the lessor covenanted to repair and improve the premises in compliance with municipal regulations which might be made from time to time in respect to hotels for which liquor licences should be granted. During the term of the lease a regulation was made, requiring licensed hotel premises to be enlarged and improved in certain respects, with which the lessor did not comply and, in consequence, the renewal of the liquor licence was refused at the end of the licence year then current.

Held, that neither the circumstances in which the lease was entered into nor the lessor's covenant to make repairs and improvements gave rise to an implied condition to the effect that the obligation of the tenant to pay the rent reserved should terminate upon the hotel, through no fault attributable to the lessee, ceasing to be licensed premises. *Grimsdick* v. *Sweetman* ([1909] 2 K.B. 740) followed.

Judgment appealed from (21 B.C. Rep. 19) affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming the judgment of

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Auglin and Brodeur JJ.

(1) 21 B.C. Rep. 19.

Morrison J., at the trial(1), by which the plaintiffs' action was maintained with costs.

In the circumstances mentioned in the head-note, the defendants refused to pay the rent reserved in the lease of the premises and the plaintiffs brought the action to recover the rent claimed by them. The defendants counterclaimed for damages alleged to have been sustained in consequence of the loss of the licence for want of compliance by the plaintiffs with the requirements of the municipal regulations. At the trial, Morrison J. held that the parties had not contracted on the basis of the continued existence of a liquor licence for the premises in question and maintained the plaintiffs' action with costs. This judgment was affirmed by the judgment now appealed from.

Lafleur K.C. and *Harvey K.C.* for the appellants.

Wallace Nesbitt K.C. for the respondents.

THE CHIEF JUSTICE.—This is an action by the respondents (plaintiffs) to recover the rent of certain hotel property. The defence was that by certain covenants in the lease the plaintiffs or their assigns undertook to enlarge the premises so as to comply with the by-laws and regulations of the city governing places for which liquor licenses were granted. Their defence alleges that by those regulations an enlargement of the premises and certain structural changes with respect to heating, lighting, etc., were required. The plaintiffs refused to make the necessary improvements and as a result the appellants lost their licence. They

(1) 21 B.C. Rep. at p. 20.

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thereupon gave up possession and refused to pay rent and counterclaimed for damages. The trial judge gave judgment for the plaintiffs (respondents) and dismissed the counterclaim. The appellants (defendants) thereupon appealed to the full court and their appeal was dismissed.

I am of opinion that the judgment below should be confirmed on the very short ground that the land and house, and not the licence, were the subject matter of the lease and the right of the tenant to occupy the house for any other purpose continued after the cancellation of the licence.

The appeal should be dismissed with costs.

DAVIES J.—I think this appeal must fail, being concluded by the decisions in the case of *Hart's Trustees* v. *Arrol*(1), and *Grimsdick* v. *Sweetman*(2). In the latter of these cases it was expressly held that in the case of premises leased and described

as a beer house and premises with bakehouse in the rear

with covenants on tenants' part to continue the premises as a beer house at all times during the term of the lease, the non-renewal of the licence has not the effect of putting an end to the lease and the defendant was, therefore, liable for the rent.

In the former (a Scotch case) the same principle was affirmed. That was the case of the lease of a shop for ten and one-half years for the purpose of the tenants

carrying on therein the business of wine and spirit merchants.

It was held that the lease was not brought to an end

(1) [1903] 6 Sess. Cas. 36. (2) [1909] 2 K.B. 740.

by the loss of the licence and the consequent failure of the purpose for which the shop was let.

The reasoning upon which the conclusions of the courts were reached in both cases was that it could not be said there was a total failure of consideration for the tenants' covenant to pay the rent or that the leases had come to an end by the non-renewal or cancellation of the licences. The tenant's obligation to pay rent stands unless it can be shewn against the landlord that he has failed to do something that he has undertaken and so disabled himself from enforcing the obligation.

In the case at bar it seems clear that the landlord has undertaken no obligation whatever as to the continuance of the licence. He therefore has not disabled himself from enforcing the obligation of the tenant to pay the rent.

The lease continues and the premises may be used by the tenant for other and different purposes than those evidently intended when the lease was entered upon.

Mr. Lafleur's contention was that if the licence was cancelled, for any cause except the lessee's fault, the lease ended and the lessee ceased to be liable for rent under it, but that contention is at variance with the principle on which the cases above referred to were decided and which commends itself to me as sound.

Appeal should be dismissed with costs.

IDINGTON J.—The respondents, as lessors, recovered judgment against appellant upon the covenant to pay rent, contained in a lease dated 15th November, 1905, whereby the lessors demised certain

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lands, described by metes and bounds, in Vancouver, for a term of years.

The premises so demised had then a building thereon used as a hotel duly licensed, until 1st July, 1913, from year to year, to sell intoxicating liquors therein. At the expiration of the year ending upon said date the duly constituted authorities in that behalf refused to grant any such licence thereafter for said hotel. The appellant contends that thereby the lease was terminated and it as lessee was not to be further liable upon the covenant to pay rent. It insists that the original parties to said lease, in contracting therefor, contemplated that the premises so demised should be used only as a hotel so licensed. Counsel for it points out that in beginning the description of the land demised, the words, "all and singular the hotel and building situate," etc., and after giving the metes and bounds of the property, uses the words, "which premises are now known as 'The Royal Hotel,' and formerly known as the 'Gambrinus Hotel,' together with the appurtenances thereto belonging," and that, coupling those and other like expressions with the covenants which follow relative to the licence and the possible requirements which the retention of this house on the list of licensed hotels might involve, there is clearly implied a condition that upon the lessee's failure to obtain a licence the lease should end.

It was easy to have expressed that intention, if existent, relative to its termination and quite as obviously a necessary thing to have expressed as was the possibility of destruction by fire and what was to happen in that event.

This express provision for the contingency of de-

struction by fire and absence of a like provision relative to the contingency of loss of licence, seems to exclude the possibility of finding in the instrument any implied condition such as contended for.

It is further to be observed that the law never recognized the lessor as entitled to obtain a licence. It is only the lessee who can be licensed. He is licensed to sell intoxicating liquors in the building in which he is the lessee. And as a condition precedent to his obtaining such a licence he must be the lessee or owner of a property whereon are buildings which conform with the requirements of the law in that regard.

There was no lease of the licence at all possible and none such existed, though mutual covenants were framed and entered into whereby the lessor might possibly assert a claim to the licence at the expiration of the term or forfeiture of the lease, or prevent a transfer of the licence against his will. The like devices have long been resorted to by those who unhappily are proprietors of hotel property, but, whether effective or not, they neither expressly nor impliedly have any relation to the determination of the term of the demise unless expressly made so.

The licence only issues for a year. It may be lost —as has happened—one year and be renewed the following. The hotel business proper can go on without a licence. It might be argued that a tenant under a lease worded as this, must continue to carry on a hotel whether it paid to do so or not. Without an obligation relative thereto, I should think there was no such condition or covenant implied by mere words of description such as these parties have used. In

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this case words are used binding the lessee to obtain if he can, a licence to be paid for by the lessor.

It is the land which is demised and in absence of stipulation to the contrary, it would be competent for the tenant to use it for a residence or for the purpose of carrying on any business neither expressly nor impliedly prohibited.

As to cases cited they are for the most part entirely inapplicable to the question raised.

The expression of Blackburn J. in *Taylor* v. *Caldwell*(1), at page 832, relied upon by Mr. Harvey, of counsel for the appellant, as intimating that the words "letting" and "rent" were of no consequence, must be read in connection with the whole of what he says and in light of what he concludes. It is, as was usual with him, the very substance of the thing he looked at and into, as it were, and he concluded there was in that case no demise.

The broad distinction in our law between a demise and a mere licence has to be borne in mind in looking at many such like authorities and the point of view taken by Lord Blackburn cannot be safely discarded in doing so.

I think the appeal should be dismissed with costs.

DUFF J.—The appellants' contention, reduced to its simplest terms, is that the covenant to pay rent was subject to an implied condition having the effect of putting an end to the obligation to pay rent on the premises ceasing to be licensed premises owing to causes not arising from the fault of the lessor or lessee. It is not disputed that such a condition, if it

(1) 3 B. & S. 826.

can be implied, must be a condition affecting the existence of the term itself, that is to say, extinguishing the term upon the lapse of the licence. There might have been a good deal of force in the appellants' contention if the lease had expressly or impliedly required the lessee to use the demised property only as a licensed hotel; but no such restriction is expressed in the lease and there is nothing, I think, from which such a restriction can be implied.

It may be assumed that the parties did contract, both of them, in the expectation that the premises would continue to be licensed to the end of the term, but that is not a sufficient ground upon which to rest the implication of a condition such as that suggested. I find it impossible myself to say that the lessor and the lessee if they had contemplated the possibility of the licence being cancelled during the term, must necessarily, as reasonable business men, have made such a condition a part of their contract. Having regard to the decisions in analogous questions as between lessor and lessee, I think I cannot say that judicially; *e.g.*, *Paradine* v. *Jane*(1).

The appellants rely upon the principle of *Taylor* v. *Caldwell*(2) and *Appleby* v. *Meyers*(3) which principle was applied a few years ago in a number of cases; *Krell* v. *Henry*(4); *Chandler* v. *Webster*(5); *Herne Bay Steam Boat Co.* v. *Hutton*(6); and the effect of these cases has been stated in a book which has a high reputation for accuracy, in the following words:—

(1) Aleyn 26.
(2) 3 B. & S. 826.
(3) L.R. 2 C.P. 651.
(4) [1903] 2 K.B. 740.
(5) [1904] 1 K.B. 493.
(6) [1903] 2 K.B. 683.

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(*n*) Where from the nature of the contract it is clear that the contract is based upon the assumption by both parties to it that the subject matter will, when the time for the fulfilment of the contract arrives, still exist, or that some condition or state of things going to the root of the contract and essential to its performance will be in existence, the non-existence of such subject matter or of such condition or state of things when the time for the fulfilment of the contract has arrived, affords, in general, an answer to the claim for any further fulfilment of the contract, and also to one for damages for the failure to further carry out the contract.

Bullen & Leake's Precedents of Pleadings, at page 494,

This principle is not sufficient for the appellants because it cannot be contended that the continuance of the licence is essential to the performance of the contract.

The principle has not hitherto, moreover, been applied in the case of a demise of land under which possession has been taken and a term has become vested in the tenant.

ANGLIN J.—If, as is undoubtedly the case, under English law, *Belfour* v. *Weston*(1); *Holtzapffel* v. *Baker*(2); *Counter* v. *MacPherson*(3), the destruction by fire or tempest of property demised does not terminate the lease or afford a defence to the tenant in an action for rent, I cannot understand how the mere refusal of the authorities to renew a licence to sell liquor upon premises leased for the purposes of a hotel can, in the absence of an express condition in the lease, have that effect. *Krell* v. *Henry*(4), and cases like it are distinguishable on the ground that in them the right of the tenants to possession of the premises was conditional upon the existence of a state of

(1) 1 T.R. 310.
(2) 18 Ves. 115.
(3) 5 Moo. P.C. 83, at pp. 104-5.
(4) [1903] 2 K.B. 740.

things which became impossible. Although, no doubt, different in some of its circumstances, the case of *Grimsdick* v. *Sweetman*(1), relied upon in the Court of Appeal, appears to be in point, and the Scotch case of *Hart's Trustees* v. *Arrol*(2), there cited and specially referred to by Mr. Nesbitt, is, I think, indistinguishable. There has not been a total destruction of the subject-matter of the lease—the land and the house upon it remain—and the authorities do not warrant the implication of a condition that if the licence should be taken away the lease should terminate. I agree in the view of Jelf J. (*Grimsdick* v. *Sweetman* (1), at page 747), that:—

> It would to my mind be a most extraordinary thing to say that because the licence has been taken away the tenant has no right to continue to live in the house.

Yet that would be the result if the cancellation of the licence were to terminate the lease. I prefer not to rest the disposition of this case upon the ground that because the non-renewal of the licence was something which the tenant should have anticipated and provided against, he cannot treat it as entitling him to cancellation of the lease. This test, formulated in *Baily* v. *De Crespigny*(3), and referred to in *Krell* v. *Henry*(4), seems to me unsatisfactory—at least I am unable to understand why it should not have been applied in such a case as *Nickoll & Knight* v. *Ashton Edridge & Co.*(5), if it is decisive.

The appeal, in my opinion, fails and should be dismissed with costs.

(1) [1909] 2 K.B. 740.
(2) [1903] 6 Sess. Cas. 36.
(3) L.R. 4 Q.B. 180.
(4) [1903] 2 K.B. 740.
(5) [1901] 2 K.B. 126.

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Brodeur J.

BRODEUR J.—The relations of the parties are those of lessor and lessee.

The question is whether the non-renewal of the licence of the hotel entitled the appellants to repudiate the lease and refuse to pay rent.

It had been stated in the defence that the non-renewal of the licence has been caused by the fault of the lessor. But the case remains now to be considered only upon the construction of the contract.

It seems to me clear that the parties had not contracted on the basis of the existence of a liquor licence.

If a warranty had been stipulated on the part of the lessor against the non-renewal of the licence, then he might be liable, but the parties did not so stipulate and no such covenant could be implied; for in the case of damage by fire a suspension of rent was stipulated. If the contracting parties had also desired that in the case where the licence would not be granted the rent should not be paid, then they would have mentioned it.

I am unable to distinguish this case from the *Grimsdick* v. *Sweetman*(1) case decided in 1909 in England.

By an indenture of lease, certain premises described as "all that beer house and premises" were demised. The house had been licensed as a beer house for a great number of years. But the renewal of the licence was refused under the "Licensing Act." In an action to recover rent due, it was held that the non-renewal of the licence had not the effect of putting an

(1) [1909] 2 K.B. 740.

end to the lease and that the defendant was, therefore, liable for the rent.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Taylor, Harvey, Grant, Stockton & Smith.*

Solicitors for the respondents: *Davis, Marshall, MacNeill & Pugh.*