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*Oct. 5, 6.

*Oct. 24.

HER MAJESTY THE QUEEN (RESPONDENT)..... } APPELLANT;

AND

FERDINAND POIRIER AND EDWARD HART, EXECUTORS OF GEORGE J. NEVILLE (DECEASED) (SUPPLIANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, APPEAL SIDE.

Landlord and tenant—Conditions of lease—Construction of deed—Practice—Objections first taken on appeal.

Where the issues have been joined in a suit and judgment rendered upon pleadings admitting and relying upon a written instrument, an objection to the validity of the instrument taken for the first time on an appeal to the Supreme Court of Canada comes too late and cannot be entertained.

Where a written lease of lands provides for the payment of indemnity to the lessees in case they should be dispossessed by the lessor before the expiration of the term of the lease, the lessees are entitled to claim the indemnity upon being so dispossessed although the eviction may be for cause, inasmuch as the lessor could not, under the lease, dispossess the lessee except for breach of the conditions therein mentioned.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, appeal side, affirming, (to the extent of $6,942 and costs,) the judgment of the Superior Court, District of Quebec, which had awarded to the suppliants, upon their petition of right, the sum of $7,742 for damages and their costs.

A statement of the questions at issue on the appeal appears in the judgment reported.

Duffy Q.C. and *Cannon Q.C.* for the appellant.

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*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

Fitzpatrick Q.C. and *Maréchal* for the respondents.

The judgment of the court was delivered by:

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GWYNNE J.—This is a petition of right wherein the petitioner claims indemnity from the Government of the Province of Quebec under the terms and provisions of a clause in a lease set out in the petition of right and which the petitioner alleges was executed by the Provincial Government through the intervention of a Mr. Nantel, the Commissioner of Public Works in the Province of Quebec, upon and bearing date the second day of March, 1892. To this petition of right the Government of the province plead by way of defence.

1. The general issue.

2. That in the said lease upon which the petition of right is based it is expressly stipulated that the lessee shall not transfer his right to the lease or sublet the premises in whole or in part without the express consent in writing of the lessor, and that no such consent was ever given by the defendant or by any person for that purpose duly authorized.

3. That by the said lease the lessee is obliged to make certain repairs at the earliest possible time at his own expense, &c., &c.

5. That by the said lease the sole amount which the lessee could demand in case of dispossession before the expiration of the term was, &c., &c. (*not material to be now set forth.*)

6. That the petitioners cannot claim any such indemnity from the defendant because of their eviction, that indemnity being satisfied and extinguished by the value of the repairs which remained unexecuted by the lessees at the time of their eviction.

Issue being joined on these pleas the case was brought down for trial and the petitioners produced

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the lease under which they claimed and which was set out in the petition of right and it appeared to be in notarial form as between the Government of the Province of Quebec represented by William Alphonse Nantel in his capacity of Commissioner of Public Works, lessors, &c.

The defendants did not in the Superior Court, nor until the case was brought by appeal into this court, make any objection whatever to the validity of the lease, but the case was tried upon the issues joined on the other pleas upon all of which the defendants rested their contestation, and they produced a notarial instrument by which they contended that the government of the province had determined the lease by reason of a breach having been committed by the lessees having sublet divers parcels of the premises without consent in writing, contrary to the provisions of the lease in that behalf, and that therefore, as they have contended and still do contend, the lessees have lost all claim to the indemnity guaranteed by the lease in case of dispossession before the expiration of the lease. This instrument contained an express recognition of the lease as valid. The defendants now in this court, while insisting upon all their pleas upon the record, (which not only admit the due execution of the lease, but rely upon it as a good and valid lease, of the terms and provisions of which they claim the benefit,) nevertheless insist that the lease never had any validity whatever for the reason that it was not countersigned by the Commissioner's own secretary which they contend is a statutory prerequisite to the validity of a lease to be binding on the Government. Thus, while the validity of the lease was never questioned during any stage of the progress of the case to judgment in the Superior Court, nor at all as already observed until the judgment

pronounced in the case was brought into this court upon appeal, they ask this court to nullify the judgment rendered upon the issues joined on the pleas of the defendant admitting and relying upon the validity of the lease.

Under these circumstances we do not think the court is required to entertain an objection never made during the progress of the case to judgment in the courts below. We think we are therefore quite justified in holding that the objection now made for the first time in appeal before this court is for the reasons above given altogether too late and cannot be entertained.

Proceeding then to the contention that the clause in the lease prohibiting the execution of any sublease without the consent in writing specified in the lease, and without dealing with a question which was argued as to the sufficiency of the proof offered of such a consent having been given, which consisted of secondary evidence only, we find that the clause in the lease as to indemnity expressly provides that

if the lessor should dispossess the lessee before the expiration of this present lease, the lessee shall have the right to an indemnity equal:

1. To the cost of the improvements made as aforesaid to the said premises by the lessee, deducting an amount proportionate to the time that the lessee shall have occupied the said premises;

2. To the damages which the said lessees may suffer by eviction before the expiration of the lease.

Now in this guarantee clause the right to indemnity upon eviction before the expiration of the term is not qualified by any condition affecting the right to indemnify in case the eviction should be for a breach of any of the conditions or covenants in the lease on the lessees' part to be observed and kept. If the lessors evict the lessee the right to indemnity *eo instanti* arises. Now the lessors could not evict the lessees before the expiration of the lease except because

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of some breach by the lessees of some condition or covenant in the lease to be observed and performed by them; it cannot therefore be contended that the lessees lose their right to indemnity if the eviction should be for cause, since the eviction could not take place except for such cause, and it is upon the actual occurrence of dispossession by the lessor that the right to indemnity arises under the express terms of the lease.

Now as to the amount of such indemnity. I think we may take the evidence to establish that the lessees expended $2,500 of the $2,885 named in the lease upon the works required to be done by the estimate of Mr. Raza, and that they expended a much larger sum on other repairs than those required by Raza. This $2,500 had to be, and no doubt was, expended with promptitude, as the lessees' profits absolutely depended upon the premises (which were in a delapidated condition) being made tenantable. We may allow perhaps six months for the making of them, and during that period the lessees would have no profit; indeed calculating the utmost value per annum of the premises to the lessees after the completion of the improvements and deducting therefrom $2,500 expended in improvements, and $160 per annum for the taxes and the $500 per annum, we have the condition of the matter at the expiration of four years when the lessees were evicted, as follows:

Monies expended in improvements, by way of rent in advance.....		$2,500 00
Rent and taxes per annum $660 x 4...		2,640 00
Total disbursements		$5,140 00
Receipts, first *half* year. .....$	880 00	
Second, third and fourth years at $1,760.00 x 3.....	5,280 00	
	$6,160 00	

or receipts in excess of disbursements at the expiration of the fourth year amounting to $1,020 only. Until the fourth year therefore the lessees derived no profit whatever from the premises leased; for the remaining five years of the lease the profits of the lessees calculated on the above basis would be precisely $1,100 per annum x 5 years = $5,500.00 to which must I think reasonably be added a sum to cover interest upon the investment of those profits from time to time as they accrued, which may be, I think, stated at $700.00, or in the whole $6,200.00. I cannot see that the lessees can be entitled to any more. The outlay of the $2,500 was required to be expended to create the profits, and I cannot see any pretence of right that the lessees can have to any proportion of the balance of $385 which they covenanted to expend but did not expend upon the particular improvements required by Raza's estimate.

I would vary the judgment in favour of the respondents by reducing it to $6,200 for which judgment should be entered for them on the petition of right with interest from date of judgment in the Superior Court with costs, and then dismiss the appeal, and I see no reason why the dismissal should not be also with costs, for the defence insisted on was under the circumstances a very *unjust* one.

Appeal dismissed with costs.

Solicitor for the appellant: *H. Thos. Duffy.*

Solicitor for the respondents: *L. T. Maréchal.*