

1933
 *Feb. 20, 21.
 *Feb. 27.

THE CAPITAL BREWING COMPANY, }
 LIMITED (DEFENDANT) } APPELLANT;

AND

HIS MAJESTY THE KING, ON THE IN- }
 FORMATION OF THE ATTORNEY-GENERAL }
 OF CANADA (PLAINTIFF) } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Lease—Clause giving right to increase rent on law being changed so as to facilitate sale of the products manufactured by the lessee—Construction of clause—Effect of change in the law by Liquor Control Act, Ont., 1927, c. 70—Sufficiency of notice by lessor (the Crown) as to increase of rent.

In 1912 the Crown (Dom.) expropriated land of appellant in Ottawa, Ontario, on which appellant carried on a brewing business. Appellant remained in occupation and a yearly rental of \$11,292.60 was fixed. At that time the law in Ontario permitted free sale of intoxicating liquors by licensed persons. After the *Ontario Temperance Act* (1916, c. 50) came into force, which prohibited sale for beverage purposes in Ontario of products such as appellant manufactured, a lease to appellant was made, and renewed in 1921, at rentals lower than the sum aforesaid. At expiry of the renewal lease in 1926, appellant continued in occupation, thereby becoming a yearly tenant on the terms in the lease. The lease contained a clause that, should the provincial legislature pass any Act amending or repealing the *Ontario Temperance Act*, "so as to allow or facilitate the manufacture or sale of the products manufactured by the said lessee," the Crown should have the right to increase the yearly rent to \$11,292.60, or to any figure which might be agreed upon, the increased rental to become due from the date of the repeal or amendment. On June 1, 1927, the *Liquor Control Act*, Ont. (1927, c. 70) came into force, and on June 13, 1927, a notice, signed by the Assistant Chief Architect of the Department of Public Works (Dom.), was sent to appellant, stating: "As the Ontario Temperance Act has been repealed, your company according to the above quoted clause [that above mentioned] is liable for rental from 1st June, 1927, at the annual rate of \$11,292.60." After unsuccessful negotiations by appellant to fix the rental at what it was paying or at less than the sum claimed, the Crown brought action for the balance due for rent on the basis set out in said notice, and recovered judgment in the Exchequer Court ([1932] Ex. C.R. 171). On appeal:

- Held:* (1) The words "products manufactured by the said lessee" in said clause in the lease, on proper construction, meant, not the actual products of appellant's brewery, but products of the kind manufactured by appellant.
- (2) The change effected in the law by the *Liquor Control Act* was such as to facilitate the "sale of the products manufactured by" appellant (construed as above) within the meaning of said clause in the lease, and justified the increase of rent.
- (3) The notice given was effective for the purpose of increasing the rent. Judgment of the Exchequer Court (*supra*) affirmed.

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

APPEAL by the defendant from the judgment of the Exchequer Court of Canada (Angers J.) (1), holding that the plaintiff was entitled to recover from the defendant the sum of \$13,478.56, and interest, the said sum being a balance alleged to be due to the plaintiff from the defendant for rent. The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

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J. Shirley Denison K.C. and *A. M. Latchford* for the appellant.

R. V. Sinclair K.C. for the respondent.

The judgment of the court was delivered by

SMITH J.—In 1912, the Crown expropriated certain lands and premises in the city of Ottawa belonging to the appellant, on which the appellant carried on a brewing business. The compensation allowed by the Exchequer Court in 1914 was \$233,852.83, and, the appellant having remained in occupation, the judgment fixed the yearly rental at the rate of five per cent. on this sum, less a reduction of \$400 for a small portion of the lands not occupied by the appellant, thus making the yearly rental \$11,292.60.

At that time there was in force in Ontario a statute known as *An Act respecting the Sale of Fermented or Spirituous Liquors* (R.S.O., 1914, ch. 215), which permitted free sale of intoxicating liquors by all persons licensed under the Act.

In the year 1916, the *Ontario Temperance Act* (6 Geo. V, ch. 50) came into force on the 20th of September, which prohibited the sale in the province of products such as were being manufactured by the appellant, for beverage purposes, thereby curtailing the output of appellant's products in Ontario.

On representation to the government to this effect, an Order in Council was passed on the 28th day of December, 1916, authorizing a lease to the appellant of the premises, for a term of five years, from the 10th August, 1916, at an annual rental of \$5,000. The lease contained the following clause:

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Should the Legislature of the Province of Ontario pass any act amending or repealing the Ontario Temperance Act, Chapter 50 of Provincial Statutes of Ontario, 1916, so as to allow or facilitate the manufacture or sale of the products manufactured by the said Lessee, the Lessor shall have the right to increase the rent hereby reserved to the sum of eleven thousand, two hundred and ninety-two dollars and sixty cents (\$11,292.60) per annum or to any such figure which may then be agreed upon by the parties to these presents, the increased rental to become due from the date the said act is repealed or the amending act is passed and goes into effect whichever first happens.

At the expiry of this lease, the appellant applied for a renewal for another term of five years from the 10th of August, 1921, and a renewal lease for this term was made accordingly, but at a rental of \$8,000 instead of \$5,000 per year. This lease also contains the clause set out above, and expired on the 10th of August, 1926. The lessee continued to occupy the lands, and thereby became a yearly tenant on the same terms.

On the 1st day of June, 1927, the *Liquor Control Act* (Statutes of Ontario, 1927, Ch. 70) came into force, and on the 13th day of June, 1927, a notice, signed by the Assistant Chief Architect of the Department of Public Works, was sent to the appellant, setting out the fact that the appellant was a yearly tenant of the premises, and that the lease contained the clause already quoted. The notice then proceeds:

As the Ontario Temperance Act has been repealed, your Company according to the above quoted clause is liable for rental from 1st June, 1927, at the annual rate of \$11,292.60.

This notice was followed by negotiations by the appellant for the fixing of the rental at either the same amount then being paid, or at a lesser amount than the amount claimed. These negotiations were not successful, and the present action is to recover \$13,478.56, with interest, representing the balance due for rent on the basis set out in this notice of the 13th of June, 1927. The appellant contends that it is not liable for any rent beyond the \$8,000 per year mentioned in the lease.

The first contention is that the notice of the 13th of June, 1927, was not a sufficient notice under the terms of the clause of the lease quoted above, because not signed with the formalities required by law to bind the Department, and because the language of the last clause of the notice, quoted above, is not a definite statement that the

rental will be increased, but merely that it is liable to be increased. We were all of opinion, on the argument, that this objection could not prevail.

The appellant's further contention is that the clause quoted refers only to products actually manufactured by the appellant, and that it was therefore incumbent upon the respondent to establish as a fact that the change in the law had actually allowed or facilitated the manufacture or sale of the appellant's own products, and that no evidence had been offered to establish this fact.

In my view, the appeal turns upon the construction to be placed upon the language of the clause of the lease in question. I was much impressed by the argument that the words "products manufactured by the said lessee" must mean the precise products manufactured by the lessees themselves, but on fuller consideration I have concluded that this language refers to products of the kind manufactured by the lessee. On behalf of the appellant it was argued that, to arrive at the true meaning of this language as used in the lease, the surrounding circumstances, under which the lease was made, ought to be taken into consideration, and that these circumstances would point to the conclusion that the language of the clause deals only with the actual products of appellant's brewery, particularly as the lease should be regarded as dealing only with the rights and interests of the parties to it.

It was further argued that what was contemplated by the parties by the introduction of this clause was a change in the law of Ontario such as would permit a free sale of these products for beverage purposes to the public under conditions similar to those that prevailed prior to the *Ontario Temperance Act*, whereas the *Liquor Control Act*, that came into force on the repeal of the *Ontario Temperance Act*, permits a sale only to a single customer, namely, the government, represented by the Liquor Sale Commission, and therefore does not facilitate a sale of these products to the general public.

In my view, the parties had not in mind, in placing this clause in the lease, any particular kind of change in the law of Ontario that might take place, and were not in a position to foresee what change, if any, might take place; and therefore undertook to define, by the terms of the lease,

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the nature of the legislation that they had in view; and we must be guided by the description that the parties have adopted. Looking at the surrounding circumstances we have, at the time the lease was made, an Act of the Ontario Legislature in force, which absolutely prohibited the sale in Ontario for beverage purposes of products of the kind manufactured by the lessee. That Act, in the language of the clause of the lease, has been repealed, and a new law has been substituted, which expressly permits a practically unlimited sale of these products in Ontario for beverage purposes. This change necessarily opens in Ontario a general market for these products that did not exist at all under the *Ontario Temperance Act*. I am of opinion, therefore, that the Act itself, as compared with the *Ontario Temperance Act*, discloses that the sale of such products in Ontario has been facilitated. The appellant argues that the change of law does not allow or facilitate the manufacture of the products referred to, but it is sufficient, by the language of the clause, if the sale alone is facilitated.

For these reasons I have concluded that the judgment appealed from is right, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. M. Latchford.*

Solicitor for the respondent: *R. V. Sinclair.*
