HIS MAJESTY THE KING (RESPONDENT) ..... APPELLANT;

AND

THE ST. CATHARINES HYDRAULIC COMPANY (SUPPLIANTS) ... RESPONDENTS.

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*May 25.
*Nov. 2.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Lease—Covenant for renewal—Construction.

A lease for 21 years of mill-races and lands on the old Welland Canal contained the covenant that: "After the end of 21 years, as aforesaid, if the said (lessors) do not continue the lease of the said water and works" they would compensate the lessees for their improvements.

Held, Girouard and Duff JJ. dissenting, that at the end of the 21 years the lessees were entitled to a renewal of the term but not to a new lease containing a similar covenant for renewal or compensation. They had a right to renewal or compensation but not to both.

After the original term expired the lessees remained in possession, paying the same rental as before, for a further term of 21 years, no formal lease therefor having been executed and none demanded or tendered for execution. Ten years after the expiration of this second term they were dispossessed and claimed compensation for improvements by petition of right.

Held, that the rights of the lessees were the same as if the original term of 21 years had been formally continued, or renewed, for a further like term.

Held, per Idington J., Girouard J. contra, that the lessees having obtained a renewal their right to compensation was gone.

Per Davies and Anglin JJ.—The lease was probably not renewed within the meaning or the lessor's covenant, but there having been no proof of a demand for renewal and the lessees having remained in possession for the entire period for which they could have claimed a renewal, they can have no right to compensation for improvements. If they ever had such a right in default of obtaining a renewal it is barred by the Statute of Limitations.

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*PRESENT:—Girouard, Davies, Idington, Duff and Anglin JJ.

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APPEAL from a judgment of the Exchequer Court of Canada in favour of the suppliants.

The facts are sufficiently set out in the above headnote.

Dewart K.C. for the appellant. If the contention of the lessees as to the effect of the covenant for renewal is sound the lessees could claim renewal or compensation in perpetuity. This has always been discountenanced by the courts. See *Lewis* v. *Stephenson*(1); *Nudell* v. *Williams*(2); *Sears* v. *City of St. John*(3).

To provide for a perpetual right of renewal the covenant should contain such expressions as "renewal for ever," "renewable from time to time," or others equivalent to these terms. See *Furnival* v. *Crew*(4); *Clinch* v. *Pernette*(5).

Mowat K.C. for the respondents. The lease must be construed most strongly against the appellants.

The word "continue" has been held in covenants similar to that in question here to involve perpetuity. See *Furnival* v. *Crew*(4).

If the language is ambiguous evidence of surrounding circumstances can be relied on to explain it: *Clinch* v. *Pernette*(5); and such evidence shews that the parties intended a succession of renewals.

See also Taylor on Evidence (10 ed.), sec. 1198.

GIROUARD J. (dissenting).—I dissent for the reasons given in the court below.

(1) 67 L.J.Q.B. 296.
(2) 15 U.C.C.P. 348.
(3) 18 Can. S.C.R. 702.
(4) 3 Atk. 83.
(5) 24 Can. S.C.R. 385.

DAVIES J.—I concur in the opinion of Mr. Justice Anglin.

IDINGTON J.—In *Hyde* v. *Skinner*(1), (decided so long ago as A.D. 1723), which was the case of a claim by an executor of a lessee for a renewal of a lease, which the lessor had covenanted to renew at the same rent and on the same covenants upon the request of the lessee, who had laid out a considerable sum of money in improving the premises, and where the executor had within the term requested the lessor to make a new lease for fifty years, the court said

> the meaning of this covenant was to the end the lessee might be reimbursed the money which he had laid out in improvements of the premises for which reason it is immaterial whether the testator or the executors required the renewal.

And the court directed a renewal for the term of twenty-one years being a usual term, but held that though it had been covenanted that it was to contain the same covenants that could not extend to the inserting a covenant for another renewal.

From that time to this the holding has been almost uniformly against the insertion in the renewal lease of such a covenant unless the language used in the contract expressly or by very clear implication shewed such was the intention of the parties.

I have looked at all the cases upon which respondent relied in argument and a very great many more to see if there was authority for the contention of perpetuity or the more moderate claim, which I was inclined to think might appear, that the renewal lease if executed would likely if settled by a court have been

(1) 2 P. Wms. 196.

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directed to have inserted therein the same as that in the lease in question and which I am about to quote.

I can find no authority to support herein any such proposition as either I suggest.

The case of *Swinburne* v. *Milburn*(1), is illustrative of the modern way of looking at such a covenant and contains references to the leading authorities on the subject and indicates no material change of view from the old one I have referred to.

The lease in question herein was for twenty-one years "renewable as hereinafter provided."

The only provision making any further reference to the subject is the following:

> And, it is further agreed by and between the parties to these presents, that after the end and term of twenty-one years as aforesaid, if the said Commissioners or their successors in office shall or do not continue the lease of the said water and works to the said parties of the second part or their assigns that they the said Commissioners or their successors in office shall pay the said parties of the second part, or their assigns or any person or persons making erections under them with their consent, the full amount of their expenditure, or the value of the same, for the construction of any race or water course, lands, mills and mill houses, or any other tenement with their machinery and appurtenances thereto in any wise belonging, the same to be determined by arbitrators mutually approved of by the parties to these presents, each choosing one man and they the third, when the said parties of the second part and the parties making erections under them as aforesaid, or their assigns, shall upon receiving payment in full for the erections and appurtenances so arbitrated for as above, assign and surrender to Her Majesty the Queen, or her heirs and successors, all their right, title and interest thereto, whether in lands, buildings or other erections.

It seems to me the utmost that can be made of this covenant illuminated if possible by the preceding phrase is a covenant for a single renewal and no more.

The authorities would not have carried the parties or committed them further.

(1) 9 App. Cas. 844.

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Such a renewal lease, I repeat, could not, against the will of the lessors, have the renewal of this covenant inserted therein.

There is thus no right to any relief by way of compensation for improvements made during the second term (if we are to hold there was in fact a second term as I think we may on the principle that equity looks on that as done which ought to have been done), or for the years since its expiry.

The lessees in short had a right to expect compensation if they did not enjoy a second term. If the lessors did not permit the enjoyment of the second term by way of compensation for the improvements theretofore made by the lessees they were to be compensated therefor.

The lessees continued in undisturbed possession of the property and paid the same rent which relatively speaking and having regard to lessor's expenditure on the premises was almost nominal.

The lessees or one of them says in a letter written the Department in charge, and put in without objection I infer, that he had some years previously asked orally for a renewal lease, but was told it could not be granted until the new canal line "was definitely settled" and would like some modification if and when made out. That was replied to as follows:

June 12th, 1880.

Sir,—In reply to your letter of the 8th ult. wherein you apply on behalf of the St. Catharines Hydraulic Company for a renewal of their lease bearing date 14th of May, 1851 (and numbered 1420), as modified by certain changes which you desire to make in the wording thereof, I am directed to inform you that before the terms of the present lease can be altered in any way, the proposed changes must first be submitted for the approval of and be settled by this Department; and if material in character may even require the sanction of an Order in Council. However, nothing can be done

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with reference to the matter until you have furnished for the information of the Department a statement of the changes required and the names of those at present entitled to hold under the said lease.

I am, Sir,

Your obedient servant,

(Sgd.) F. BRAUN,
Secretary.

Every one seemed to assume the lessees not only had a right to renewal but were enjoying it.

That changes incidental to the projected changes in the canal which were referred to might have required modification is all that was said. No one ever refused them a renewal. They made no tender of a renewal lease. And wherein is there a breach of the covenant above quoted ?

On what principle can the lessees receive anything ?

The covenant was that if the lessors did "not continue the lease of the said water and works," the lessors should pay for something described of which the value was to be fixed by and in the method specified and upon the terms specified.

It does not say how the lease was to continue. It does not say it shall be in writing so continued or how. It does not say whose duty it was to prepare or settle the said lease if presumed to have been intended to be in writing.

Are damages for breach of this covenant to be awarded though the covenant never was broken ?

It seems to me a singular sort of claim. The enjoyment of the lease for another term was the compensation the parties intended to be given. It is just as clear to my mind as the court found and expressed a hundred and eighty years ago in the case I first cited, though the idea of compensation being basis of

claim to remuneration was not there reduced to such explicit terms as used here.

The reduction to writing of what the parties really were about should not alter the thing itself.

It is said this compensation is to be made for what was done nearly forty years ago and possibly sixty years ago.

And why? Because the lessees relying on the honour of the lessors did not bother their heads to get a writing made out; and never specified the changes wanted, but doubtless enjoyed them all the same.

They have got what they contracted for and if for an instant they had supposed themselves in the slightest degree put in peril I do not think we would have found the files so barren of complaint as they seem when emptied into this case indiscriminately as it seems to have been done.

But why if there was a refusal and semblance of a foundation for what is now set up was there nothing done to bring about an arbitration? It was by means of an arbitration the amount to be paid was to have been fixed. It was only on the payment of that so arbitrated about that the lessees' possession could have been disturbed.

The chances are that if such a thing had ever been dreamed of as disturbing these lessees we would have some evidence of it.

There is not a shadow of such a thing. On the contrary after nearly sixteen years of this renewal term had run, the Government wanting to anticipate for some reason its expiry sent its officer to negotiate for the surrender of the term.

It is thus plainly written that no one thought of disturbing the lessees for a moment.

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It might pay to be rid of them for it turned out they were making a surplus of rents every year and by reason of the changes in the canal were getting a better bargain than they had anticipated, but as nothing was said when second term began could not be asked now for increased rent. See letter of Mr. Fissieault of 26th August, 1887.

It is urged that by reason of the term not having been fixed definitely the lessees have suffered. I find nothing to prove such a claim and have no doubt every one knew the term was as certain as if in writing.

Provisionally $21,000 was fixed upon by the negotiations, but evidently either such a price was more than worth while giving or that the proposal could not stand fire in the House of Commons and had to be dropped.

Now this incident is put forward as giving some sort of confidence in support of the claim made.

To my mind that story shews clearly enough all concerned knew the lease must run until the 1st January, 1893.

The utmost a renewal lease could have given bearing on the point of compensation would have been the insertion which I have shewn to be against authority of a covenant identical with the above. Assume it done, how could any action on such a covenant relate back to and indemnify for what had been done during a prior term?

Are the lessees to be better off than if they had got a formally executed lease with such a covenant ? Yet such is the effect of the judgment.

Not only do they thereby get what such a second lease would have given, but after enjoying it they are to have added thereto the compensation they were to have got if they had not enjoyed it.

And subject to what in such a case should go into the lease the rights of the parties should be so treated accordingly.

It is clear that the issue of specific performance at the time could have been foiled by relying upon the covenant which left only one escape and that was arbitration and compensation or specific performance.

How can those who omitted that, now claim on flimsy evidence relied on here, that there was a breach of the covenant ?

The Statute of Limitations it seems to me ought to have been pleaded against such a stale claim.

For some good reason possibly, though not disclosed, it was not.

If for greater safety it is desired now to plead the Statute of Limitations, I think it ought to be permitted but on payment however of all costs since the filing of defence.

But for the reasons I have set forth I have failed to find that breach of covenant that alone can lay any foundation for any assessment of damages and the appeal should be allowed and action dismissed with costs.

DUFF J.—Upon my construction of the original lease — if the landlord elected not to pay compensation for improvements at the end of the term — the lessee thereupon became entitled to a renewed lease containing the covenants of the old lease including that respecting compensation for improvements. I am not at all in agreement with the assumption that the covenant now under consideration is (for the purpose of ascertaining what were to be the covenants of the renewed lease) to be treated as that of a simple

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covenant for renewal. The rule that such a covenant for renewal is not reproduced in the subsequent lease (under a general covenant that the subsequent lease shall contain all of the covenants of the original lease) has been put on various grounds. In *Harnett* v. *Yielding*(1) such a covenant (for renewal) was held by Lord Redesdale not to be a covenant incidental to the enjoyment which was said to be the test to be applied for determining whether a particular covenant was to be inserted in the renewed lease. In *Iggulden* v. *May*(2), the rule was put by Lord Ellenborough on the ground that if so extraordinary a thing as a right of perpetual renewal was to be granted the intention would have been marked by some unequivocal words as "from time to time." In *Lewis* v. *Stephenson*(3) [Bruce J.] it is said that the rule may be put upon the ground that "the renewal of a lease," in its strict literal terms, means the renewal of the same term for the same period. In *Swinburne* v. *Milburn*(4) the rule is put by Lord Blackburn on the ground that the perpetual right of renewal is so unusual that a heavy burden rests upon him who asserts a right to it; and much to the same effect are the views expressed by Lord Fitzgerald.

I am unable to find one among these grounds applicable to the covenant under consideration. If we take the reasoning of Lord Redesdale, which perhaps is the true foundation of the rule, can it be fairly said that the payment of compensation is not incidental to the enjoyment as much as, let us say, the covenant to leave in good repair ? Or that of Lord Blackburn or of Lord Ellenborough — what unusual thing is there

(1) 2 Sch. & Lef. 549, at p. 556.
(2) 7 East 237, at p. 242.
(3) 67 L.J.Q.B. 296.
(4) 9 App. Cas. 844.

about such a covenant as that which we have before us? There is in this covenant nothing necessarily importing perpetuity: there is nothing remarkable, nothing out of keeping with the ordinary provisions of ordinary leases. And if the observation of Mr. Justice Bruce has any force as applied to a covenant to pay compensation, it seems equally applicable to many other covenants admittedly falling within the contemplation of such a covenant as that before us.

There remain some subsidiary points. It is too late — the Crown having with the lessees acted on the assumption of the existence of a second term — to raise the question of want of authority. The Statute of Limitations cannot, I think, avail because it seems to me we must treat the situation as if a lease had actually been executed; and, moreover, I do not agree that it is a proper case for an amendment at this stage, no application having been made even on the hearing of the appeal. The Crown stands, therefore, in the same position as if at the end of a second term there had been improvements executed under a covenant in a lease for that term. Such a covenant in the same form as that in the original lease would not apply to improvements made during the first term; and the right of recovery must therefore be limited to compensation for improvements during the second term.

There should, I think, be judgment for the value of such improvements to be ascertained in the usual way if the plaintiff chooses to take the reference — costs to be reserved.

ANGLIN J.—Having regard to the facts that the term demised to the respondents was for twenty-one years "renewable as hereinafter provided," and that

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the only other reference to renewal in the lease is in the words, "if the said Commissioners or their successors do not continue the lease of the said water and works," found in the clause respecting compensation, I am of opinion that the word "continue" was used as the equivalent of "renew" and must be given that meaning. The continuance contemplated was not indefinite, but was in the nature of a renewal and, in the absence of a designation of any other period, for a further term of the same duration as that originally created — 21 years. *Price* v. *Assheton* (1).

I am further of opinion that the lessees would not have been entitled to the insertion in a renewal lease for such further term of an agreement for payment of compensation for improvements in default of a further renewal. The agreement in the original lease is that such compensation will be paid by the lessors, if they "do not continue the lease" — "after the end and term of twenty-one years as aforesaid." That means that the lessees shall have either a renewal or compensation — not both, but one or the other. Upon a renewal being granted the right to compensation would be extinguished. It follows that if the lessees have had a renewal for a term of 21 years they have had all that they are entitled to and cannot have any valid claim for compensation.

If, on the other hand, the proper conclusion upon the evidence is that there was no renewal of the lease, two questions arise: The first, had the lessees, without a demand for renewal and refusal or neglect by the lessors to comply therewith, an enforceable claim for compensation for improvements; the second, if they

(1) 1 Y. & C. (Ex.) 82.

had such a right of action, has it been barred by the Statute of Limitations ?

The original term expired in 1872. In 1880 the lessees, having had no renewal lease, made application to the Crown for renewal, but with some modifications which they spoke of as "trifling changes" in the description of the leasehold property. No definite reply was made to their request for renewal; but they were informed that

> before the terms of the present lease can be altered in any way the proposed changes must first be submitted for the approval of and be settled by this Department; and if material in character may even require the sanction of an Order in Council. However, nothing can be done with reference to the matter until you have furnished for the information of the Department a statement of the changes required and the names of those at present entitled to hold under the said lease.

So far as appears by the correspondence in evidence, the lessees did not, otherwise than by the letter of 10th November, 1880, which was apparently not answered, specify "the changes required." They were perhaps not called upon to prove tender of a formal lease for execution (*Cantley* v. *Powell*, 1876(1)); but, having asked for a renewal with modifications, they should not only have proved that they had complied with the lessors' request for a statement of the changes required — but they should also have established that these changes were such as they were entitled to ask for. In the absence of such evidence no proper demand for a renewal lease is shewn.

The provision for renewal or compensation in the alternative was for the benefit of the lessees. While the lessors had the right to elect either to renew or to compensate, the lessees, on the other hand, were not

(1) Ir. R. 10 C.L. 200.

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bound to take a renewal: rather than do so they might forego their claim to compensation. I am, therefore, of the opinion that, as a first step towards establishing a right to compensation from the lessors for improvements, the lessees should have shewn that they had demanded such a renewal lease as the lessors had agreed to give them if unwilling to pay compensation for improvements. Not only does the evidence not prove such a demand, it shews a request for a renewal with changes, which, *primâ facie,* the lessees had not the right to ask, and, if anything, an unwillingness on their part to accept such a renewal as the lease provided for. I assume that in 1880 they were still entitled to demand a renewal lease for the remaining 13 years of the second term of 21 years. *Buckland* v. *Papillon*(1); *Moss* v. *Barton*(2).

The correspondence indicates that the lessees dealt with their sub-lessees as if they had not obtained a renewal. In 1883 the assistant engineer of the Department of Railways and Canals reported against giving a renewal of the lease. A similar report was made by him in 1887. Inquiry being then made by the Department of its legal officer whether, if the lease were renewed, the rental could be increased, a reply was given that if a renewal should be sought after the 1st Jany., 1893 — when the second term of 21 years would expire — an increased rental and other conditions might be imposed by the Crown. Whereupon, on the 15th Oct., 1887, the officers of the Department appear to have reached the conclusion, stated in a departmental memorandum, that "the lease may continue to the end of the second 21 years * * * the lessees to

(1) 2 Ch. App. 67. (2) 35 Beav. 197.

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be notified one year before the 1st Jany., 1893, that their lease will then mature and will cease after 1st Jany., 1893." There is no evidence that this conclusion was ever communicated to the lessees. They were, however, written on the 11th June, 1892, that their lease had been

> granted for a term of 21 years renewable for a second term of 21 years which term will expire upon the 1st Jany., 1893. You are, therefore, hereby notified that this Department will not continue the said lease beyond the expiration of said term ending upon the 1st Jany., 1893.

In acknowledging this letter the lessees asked for the appointment of some suitable person to confer with them with a view of arranging compensation for improvements. The Department appointed Mr. Douglas for this purpose. As a result of negotiations which ensued a provisional agreement was arrived at — but, though recommended to Council for approval and apparently approved, that agreement was never carried out and, like an earlier similar agreement of 1888, seems to be unenforceable.

The lessees retained possession, paying rent according to the terms of the original lease of 1851, until dispossessed by the Crown on the 1st Jany., 1903.

Upon the whole evidence I incline to the view that, as alleged by the petitioners in the 10th paragraph of their petition, "the said lease * * * was never renewed or continued" within the meaning of the phrase "continue the lease" in the compensation clause. They further allege that "those under whom your suppliants claim thereupon became entitled to * * * the compensation provided for in the said lease." At bar in this court Mr. Mowat maintained that this was in fact the position. The compensation clause in the original lease had no application to the tenancy from

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year to year which probably subsisted after the 1st Jany., 1872. If without demand for a renewal a right to compensation could arise, it would have accrued at, or within a reasonable time after the expiry of the first term; the right of action, if any, accrued at the same time. In this aspect of the case the right of the respondents to compensation has long since become barred by the Statute of Limitations, the mere fact that they retained possession not preventing its running; and the Crown should not be precluded from setting up this meritorious defence.

But, for the reasons I have already indicated, I am, with respect, of the opinion that, in the absence of evidence of a demand for a renewal pursuant to the terms of the lease, the petitioners have failed to establish an enforceable claim.

This appeal should therefore be allowed and the petition should be dismissed with costs; but if the appellant desires to amend by setting up the Statute of Limitations, that may be done only on payment of all costs subsequent to delivery of the statement of defence.

Appeal allowed with costs.

Solicitor for the appellant: *H. H. Dewart.*

Solicitor for the respondents: *H. M. Mowat.*