J. MORTON CLINCH AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

MARGARET E. G. PERNETTE AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

1894
*Nov. 7.

1895
*May 6,

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Lease for lives—Renewal—Insertion of new life—Evidence of insertion—Counterpart of lease—Custody of—Duration of life—Presumption.

By indenture made in 1805 F. demised certain premises to C. to hold for the lives of the lessee, his brother and his wife "and renewable forever." The lessee covenanted that on the fall of any of said lives he would, within twelve months, insert a new life and pay a renewal fine, otherwise the right of renewal of the life fallen should be forfeited, and if any question should arise it would be incumbent on the one interested in the premises to prove the person on whose death the term was made terminable to be alive, or in default such person would be presumed to be dead. In 1884 a purchaser from the assignees of the reversion entered into possession, and in 1890 an action was brought by persons claiming through the lessee to recover possession and for an account of mesne profits. On the trial a counterpart of the lease, found among the papers of the devisee of the lessor, was received in evidence, upon which was an endorsement dated in 1852, and signed by such devisee, by which a new life was inserted in place of one of the original lives and receipt of the renewal fine was acknowledged.

Held, affirming the decision of the Supreme Court of Nova Scotia, that the words "renewable for ever" in the habendum, taken in conjunction with the lessee's covenant to pay a fine for inserting a new life in place of any that should fall, conferred a right to renewal in perpetuity notwithstanding there was no covenant by the lessor so to renew; that the endorsement was an operative instrument, though found in possession of the owner of the reversion, or at all events it was an admission by their predecessor in title binding on defendants and entitled plaintiffs to a renewal for a new life so inserted, but the right to further

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

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renewal was gone, exact compliance with the requirements of the lease in the payment of the fines being essential and the evidence having shown that the original lessee was dead, and the proper assumption being that his brother, the third life, who was a married man in 1805, was also dead in 1884, even if the lease itself had not provided that death would be presumed in default of proof to the contrary.

Held, per Gwynne J. dissenting, that the term granted was for the joint lives of the three persons named and ceased upon the falling of any one life without renewal as provided; and the fines not having been paid on the death of the lessee and his brother there was a forfeiture which entitled defendants to enter.

The person in possession pleaded that he was a purchaser for value without notice and entitled to the benefit of the Registry Act R. S. N. S. 5th Ser. ch. 84.

Held, that the memorandum endorsed on the lease was not a deed within sec. 18 of the Act, nor a lease within sec. 25; that if a speculative purchaser, having just such an estate as his conveyance gave him, the person in possession would not be within the protection of the Act; and that there was sufficient evidence of notice.

Semble, that section 25 of the Nova Scotia Act R. S. N. S. 5th Ser. c. 84 applies only to leases for years.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), varying the judgment in favour of the plaintiffs at the trial.

The facts are fully set out in the judgment of the Chief Justice.

Ross Q.C. for the appellants.

Borden Q.C. for the respondents.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Supreme Court of Nova Scotia sitting in banc which varied the judgment of Mr. Justice Ritchie, who tried the action without a jury. The judgment which prevailed in appeal was that of Mr. Justice Henry and was concurred in by Mr. Justice Weatherbe, who, however, was of opinion that the judgment of the learned judge at the trial was right, but assented to the

(1) 26 N. S. Rep. 410.

judgment of Mr. Justice Henry, as otherwise there would have been no judgment, the learned Chief Justice being of opinion that the action wholly failed and should be dismissed.

On the 16th of June, 1805, John Fraser, by indenture bearing that date, made between himself of the one part and one Preserved Coffil of the other part, granted and demised to Preserved Coffil the premises in question in this cause to have and to hold the same unto—

the said Preserved Coffil, his executors, administrators and assigns, from the day of the date hereof for and during the natural lives of him, the said Preserved Coffil, Patrick Coffil, brother of the said Preserved Coffil, and Elizabeth Coffil, wife of the said Preserved Coffil, and renewable for ever.

This lease was expressed to be made in consideration of the yearly rents and covenants thereinafter reserved and contained. These covenants were to pay annually, on the first day of May, the sum of four pounds ten shillings, Nova Scotia currency. The lease also contained a clause entitling the lessor to re-enter and avoid the lease in case the rent should be in arrear for thirty days and no sufficient distress should be found on the premises, or "in case of failure on the part of the said Preserved Coffil, his executors, administrators or assigns in performing the covenants and agreements herein contained." Then followed covenants on the part of the lessee to pay the rent, to make certain improvements and repairs and to pay taxes. Next there was the clause upon which the decision of the case principally depends, which is as follows:—

And also shall and will at the fall of every life mentioned in this indenture, pay to him the said John Fraser, his heirs, executors, administrators or assigns, the sum of four pounds for inserting a new life in the place of the one so fallen, and if such new life be not inserted and the sum of four pounds so paid within twelve months after the fall of each life, the said Preserved Coffil, his executors, administrators or assigns shall forfeit and lose their rights of renewal of such life so fallen, anything herein to the contrary notwithstanding, provided

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always that when and as often as any question shall arise whether the person on whose death the term hereby granted is made determinable, it shall be incumbent on the person interested in the premises, by and under the demise, to prove such person to be living, or in default the person about whom such question shall arise shall be taken to be dead.

The lease also contained a covenant by the lessor for quiet enjoyment, and a penalty of one hundred pounds for the performance of the covenants was mutually stipulated for. The testatum clause was in these words:—

In witness whereof the said parties have hereunto interchangeably set their hands and seals.

This lease and the estate created by it was assigned by the lessee to one David Dill, and through certain mesne assignments it became, on or about the first of March, 1850, vested in Edward McLatchy, the father of the respondents other than Margaret Pernette. Edward McLatchy, by his will, devised the premises in question to his widow Eleanor Maria McLatchy, for life, with remainder to the respondents, other than Margaret Pernette. The widow died before this action was brought. The reversion became, upon the death of the lessor, vested in Elizabeth Fraser, his widow, and upon her death in the appellants, other than William B. Shaw. The appellant William B. Shaw claims as a purchaser from the other appellants.

The yearly rent was paid up to the first of May, 1884. In June, 1884, William B. Shaw, claiming as before mentioned took possession of the premises. From the date of the lease until the time Shaw took possession the possession was continuously in the parties from time to time claiming under the lease. In October, 1890, the present action was brought to recover possession and for an account of mesne profits, and the respondents also claimed a declaration that James Shand, junior, now James Shand, was inserted in the said lease as a new life in place of the life of Elizabeth Coffil, which

had fallen, and that the said lease was renewed for the life of James Shand, junior, now James Shand, or in the alternative that the appellants be ordered, decreed and adjudged to insert the said James Shand as a new life in said lease in the place of the life of Elizabeth Coffil, which had fallen, or to execute to the respondents a lease of the land and premises upon the terms and conditions contained in the lease for life of James Shand, renewable forever by the insertion of new lives as in the lease provided. The appellants by their defence deny the principal allegations of the respondent's statement of claim and in substance insist that there never had been any renewal of the lease; that all the original lives had dropped, and that the estate of the lessee had ceased and come to an end before the possession was taken as before mentioned. The defendant William B. Shaw pleaded the Nova Scotia Registry Act and also that he was a purchaser for valuable consideration without notice. In their reply the respondents, besides joining issue upon the defence, insist upon a waiver of any forfeitures by receipt of rent, and allege that the defendant William B. Shaw had notice.

The action came on for trial before Mr. Justice Ritchie without a jury. At the trial evidence was given that Patrick Coffil was dead, and it was proved that Preserved Coffil had left the province many years before and gone to live in the State of Maine, and that the witness (Edward McLatchy) had heard he was dead. A document purporting to be the original lease or a counterpart thereof was produced which had been found amongst the papers of Elizabeth Fraser the widow of the lessor. Upon this document was the following endorsement :—

Elizabeth Coffil, the wife of Preserved Coffil within named, having died and Edward McLatchy, of Windsor, assignee of the within estate, having paid to me the sum of four pounds, I do hereby, at his request

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and in consideration of the said payment and in order fully to carry out and effectuate the conditions and covenants to the within indenture of lease set forth, agree to insert and do by these insert and put James Shand, junior, son of James Shand, of Windsor, blacksmith, in the stead and place as a life or heir in the said lease according to the conditions thereof.

Dated at Halifax this sixth day of April, 1852.

(Sgd.) ELIZABETH FRASER,
Devisee of John Fraser within named.

At the date borne by this endorsed memorandum the reversion was vested in Elizabeth Fraser, and Edward McLatchy was then the assignee of the lease. James Shand therein named was still living and was called and examined as a witness at the trial. No counterpart of the lease was found among the papers of Edward McLatchy, although due search was proved to have been made therefor. The learned judge considered that the lease was renewable for ever; that there had been a good renewal for the life of James Shand; that any forfeiture of the right to renew had been waived by the receipt of rent; and that the respondents were entitled to have a renewal lease executed for two new lives to be named by them in addition to the subsisting life of James Shand. By the judgment entered it was declared that the respondents, other than Mrs. Pernette, were entitled to the possession and that the possession of the appellant Shaw was wrongful. An account of mesne profits was directed and it was ordered that the defendants, upon payment of $182.95, should execute a new lease to the plaintiff Edward McLatchy (upon proof by him that his co-plaintiffs, other than Mrs. Pernette, had assigned their interest to him) for the life of James Shand and two other persons to be named, renewable for ever. Upon an appeal to the Supreme Court in banc, this judgment was varied by striking out the third paragraph directing the execution of a new lease. Of the

two judges who formed the court *in banc* Mr. Justice Weatherbe agreed with the trial judge. The Chief Justice wholly dissented and was of opinion that the action should be dismissed, whilst Mr. Justice Henry, whose judgment prevailed inasmuch as Mr. Justice Weatherbe formally concurred in it, was of opinion that the respondents were entitled to the possession and enjoyment of the estate during the life of James Shand, but were not entitled to name new lives nor to have a renewal lease containing a clause for perpetual renewal executed.

From this judgment the present appeal has been brought, and the respondents have also instituted a cross appeal.

The first consideration which presents itself relates to the proper construction of the lease. Does it confer a right to a renewal in perpetuity? This must depend on the words "renewable for ever" in the habendum, taken in conjunction with the covenant on the part of the lessee to pay a fine on the dropping of a life which has been already set forth, for the lease contains no formal covenant or agreement by the lessor to renew. The learned Chief Justice was of opinion that the expression in the habendum, read together with the lessee's covenant, was not sufficient to make out a covenant on the part of the lessor to renew, and he relied upon the case of *Sheppard* v. *Doolan* (1). In that case the Irish Master of the Rolls certainly did hold that words like those in the habendum of this case without any other covenant by the lessor, did not amount to a covenant to renew. But on appeal to the Lord Chancellor (Sir Edward Sugden) (2), that decision was not approved of, but on the contrary a previous decision of Lord Manners, in the case of *Taylor* v. *Pollard* (3), where a covenant had been implied under

(1) 4 Ir. Eq. R. 654. (2) 5 Ir. Eq. R. 6; 3 Dr. & War. 1.
(3) Lyne on Leases App. p. 62.

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still stronger circumstances, was considered to have been well decided. The Lord Chancellor did not, it is true, decide the point but offered to send a case to a court of law according to the practice of those days; this, however, was declined by the party who contended there was no covenant and who subsequently abandoned the objection.

In *Chambers* v. *Gaussen* (1), a case which much resembles this, the same point again arose before Sir Edward Sugden. There it was also expressed in the habendum that there should be a perpetual renewal, but reference was made in the habendum to "covenants for that purpose hereinafter expressed." As in the present case no covenants to renew by the lessor were contained in the lease but there was such a covenant on the part of the lessee. The Lord Chancellor there said:—

> The demise is for certain lives named in the lease and for "the life and lives of such other person or persons as shall be nominated by the said James Boyle upon the death of any of the persons for whose lives the premises are hereby granted and upon the death of any such person or persons as shall at any time hereafter be nominated and appointed for ever according to the covenants and agreements for that purpose hereinafter expressed." Now supposing these words "according to the covenants and agreements for that purpose hereinafter expressed" had not been here, this would have been in this court a lease for lives renewable for ever. There is no magic in words to express a covenant. This would amount both to a legal demise for three lives and an equitable demise for such lives as thereafter the lessee should nominate. But then it is "according to the covenants and agreements for that purpose hereinafter expressed." For what purpose? For the purpose of the renewal of the lives. There is no covenant by the lessor to renew but there is one by the lessee. The lessee, if he names the lives, is to hold during those lives according to the covenant thereinafter expressed, and the lessee afterwards covenants that "he will within six calendar months after the decease of each of the persons whose lives are hereinbefore mentioned and of each person who shall hereafter be nominated and appointed" pay in the nature of a fine for each person so dying one peppercorn if demanded.

(1) 7 Ir. Eq. R. 575.

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This case I think is a sufficient authority for holding, as the court below have done, that the lease before us was renewable in perpetuity according to the terms of the lessee's covenant to pay the fines. It is true that there was not here, as in *Chambers* v. *Gaussen*, to be found in the habendum any reference to the nomination of new lives and therefore if we had nothing but the words "renewable for ever" it might have been difficult to say how a renewal was to be carried out; and again there is not here any express reference as there was in the case cited to subsequent covenants. We are however to construe the instrument as a whole and this entitles us, notwithstanding the omission of any express reference to the lessee's covenant in the habendum, to read that covenant in connection with the habendum, and when that is done the mode of renewal by the appointment of a new life on the death of each of the original nominees becomes apparent. I hold, therefore, that the lease originally conferred an estate for the lives of the three persons named with a covenant by the lessor to renew from time to time upon the dropping of any of those lives and so on for ever.

I also refer to the case of *Swinburne* v. *Milburn* (1), as to the effect of the words "renewable for ever." Lord Fitzgerald in his opinion in that case says:

> In the numerous cases which arose in Ireland on the construction of covenants alleged to be for perpetual renewal, I have not been able to call to mind a single one in which the covenant was interpreted to be of that character, unless it contained sufficient evidence of intention by the use of words importing perpetuity such as "for ever," or "from time to time forever hereafter" or some other expression of a like or equivalent character.

The lessee had then a legal estate for the term of the original lives, at least I assume he had, though for a technical reason he may have had only an equitable

(1) 9 App. Cas. 844.

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estate; this technical point, however, makes no difference and need not be dwelt upon or further adverted to. He had also a good equitable right to insist on a renewal in perpetuity provided he complied with the conditions as to terms and payment of the fines specified in his covenant. The proper mode of carrying this out would have been by executing a renewal lease in identical terms with the original lease on the occasion of the dropping of each life inserting the name of the new nominee in the place of the dead person, with the habendum and lessee's covenant in the very words of the first lease.

Then what was the effect of the indorsement on the lease or counterpart found amongst the papers of Mrs. Fraser?

I have no doubt whatever that this lease was, as Mr. Justice Henry holds it to have been, a counterpart. The testatum clause shows that there was such a counterpart executed by the use of the word "interchangeably" found therein. That it was found in the possession of the owner of the reversion makes no difference. It has been held in many cases that conveyances, even deeds of gift, so found, are to be taken as operative instruments sufficient to pass an estate (1). I do not think therefore that we can conclude, from the mere fact that this indorsement was upon the part of the original lease retained by the lessor, that it was a mere undelivered agreement withheld because the fine had not been paid. It is at least an admission by their predecessor in title binding on the appellants. The non-production of the part of the lease which the lessee had is accounted for by the evidence of Robie McLatchy who proves a sufficient search for it among his father's papers.

(1) Doe d. Garnons *v.* Knight 5 B. & C. 671. Exton *v.* Scott 6 Sim. 31. Fletcher *v.* Fletcher 4 Hare 67.

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I think we must assume that the life of Elizabeth Coffil was the first life which dropped, and that at the date of the indorsement in April, 1852, the other two lives, those of Preserved Coffil and Patrick Coffil, were existing. We ought not as against the lessor to presume that it was intended by the receipt of the fine and by the indorsement of the memorandum to waive a forfeiture or to alter the terms of the original lease which would have been the case if the lives, other than that of Elizabeth Coffil, had then fallen in.

I am also of opinion that we must presume that at the date of the purchase by the defendant Shaw both Preserved Coffil and Patrick Coffil were dead. As to Patrick Coffil there is evidence of his death, and as to Preserved Coffil, the great age he would have attained if alive in 1884 (assuming him to have been of age in 1805, and he was then a married man) alone warrants this conclusion. The lease, moreover, contains an express clause requiring us to make this presumption since it is provided that whenever any question shall arise as to the life or death of any of the nominees such person shall in the absence of proof to the contrary by the lessee or those claiming under him "be taken to be dead." This is, it seems to me, conclusive. The clause of the lease already referred to making provision for the presumption of death also applies in favour of the appellants to establish, in the absence of proof by the respondents of the exact date of the death of Preserved Coffil and Patrick Coffil, that they both died more than twelve months before the respondents were evicted. In that case the right to any further renewal in substitution for those lives was forfeited according to the express terms of the lease. This clause of forfeiture it will be observed is in express terms confined to a forfeiture of the right to a renewal and does not extend to any subsisting estate for a life then in existence.

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The actual estate for the life of James Shand would therefore be unaffected by it, but the right of renewal on the death of James Shand would be gone. The forfeiture of that right of renewal would be worked by the general clause of forfeiture contained in the lease though that general clause would not extend to the subsisting equitable estate for Shand's life depending on the renewal effected by the indorsement, for the reason that the receipt of rent down to the 1st of May, 1884, kept it alive.

It was, however, held by Mr. Justice Ritchie, proceeding upon the Irish cases, that the plaintiffs are entitled to relief against the consequences of their failure to renew. I cannot assent to this. In the absence of any special equitable ground for interference to reinstate the respondents in their rights of renewal, I am of opinion that we must apply the law as settled by the cases determined in England. Exact compliance with the requirements of the lease in the payment of the fines was therefore essential. That this is the law is I think clearly established by cases cited in the judgments of the Chief Justice and Mr. Justice Henry. I particularly rely on *Murray* v. *Bateman* (1); *Baynham* v. *Guy's Hospital* (2); *Harries* v. *Bryant* (3); and *Maxwell* v. *Ward* (4). The right to any further renewal even on the dropping of the life of James Shand, the present *cestui que vie*, is I think absolutely extinguished. As I have already said the receipt of rent applies so far as the present equitable interest for Shand's life is concerned to keep it alive but no further.

Some provision should be made in the judgment for the payment by the respondents of the rent accrued since 1st of May, 1884, and it should be credited to the appellants in taking that account.

(1) 1 Ridgway, P. C. 187.
(2) 3 Ves. 295.
(3) 4 Russ. 89.
(4) 13 Price 674.

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There remains to be considered the special defences of Shaw which are: First, that he is entitled to the benefit of the registry laws. Secondly, that he is a purchaser for value without notice, and as such entitled to the protection afforded by the general doctrines of the courts of equity to such purchasers. As regards the registry laws, the sections of the Nova Scotia Registry Act (Revised Statutes Nova Scotia cap. 84) which are relied on are the 18th and 25th. The lease itself was duly registered many years ago. The 18th section provides that deeds of land not registered shall be void against subsequent purchasers who shall first register. The memorandum indorsed on the lease was not a deed and does not come within this provision (1). The 25th section provides that leases of lands for a term exceeding three years shall be void against any subsequent purchaser for valuable consideration, unless such lease shall have been previously registered. This section also appears to me to be inapplicable. First it seems only to apply to leases for years. But without insisting on this I am of opinion that the memorandum of the 6th of April, 1852, indorsed on the lease was not itself a lease coming within this clause. Further, I agree with both Mr. Justice Ritchie and Mr. Justice Henry that there is sufficient evidence of actual (not merely constructive) notice to be found in the admission of Shaw and the evidence of Robie McLatchy to disentitle him to the benefit of the registry laws. He admits he knew of the dispute when he took his deed, and Robie McLatchy, one of the respondents, swears that he gave him notice. Further, he appears to me to have been a speculative purchaser who bargained for and bought, not the fee simple estate in possession or any precise interest, but just such an estate as the conveyances he took—a mere quit claim deed in one

(1) See *Rodger* v. *Harrison* [1893] 1 Q. B. 161.

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instance—would confer on him. If so (and I do not decide this fact positively) he cannot take advantage of the Registry Act. Such purchasers, it has been decided both in Ireland (1) and Ontario (2), are not within the statutory protection conferred by such acts. Lastly, the defence of purchase for value without notice also fails for the reason already stated under the other head, that Shaw had notice.

The result is that I agree in all respects with Mr. Justice Henry in both his reasons and conclusion. Subject to the slight variation as to setting off the accrued rents payable under the lease against mesne profits, both the appeal and cross appeal must be dismissed with costs.

TASCHEREAU, SEDGEWICK and KING JJ. concurred.

GWYNNE J.—The action in this case was brought by the respondents as plaintiffs claiming under an indenture of lease for lives executed by one John Fraser since deceased, under whom the defendants claim, to one Preserved Coffil, under whom the plaintiffs claim, to be entitled to possession of the land in the lease mentioned, from which they had been evicted by the entry of the defendants thereon in the month of June 1884. The plaintiffs in their statement of claim, after setting out the original indenture of lease and tracing title to the possession of the land therein mentioned by mesne assignments of the indenture of lease from the lessee and an indorsement alleged to have been made thereon in 1852 by Elizabeth Fraser devisee of the lessor John Fraser, and the entry and eviction by the defendants in 1884, claimed among other things as follows:—

(1) *Rice* v. *O'Connor* 12 Ir. ch. 424. (2) *Goff* v. *Lister* 14 Gr. 451.

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1. A declaration that they are entitled to the possession of and the receipt of the rents and profits of the said tract or parcel of land.

2. A declaration that James Shand junior, now James Shand, was inserted in the said lease as a new life in the place of the life of Elizabeth Coffil which had fallen, and that the said lease was renewed for the life of James Shand junior, now James Shand, or in the alternative that the defendants be ordered, decreed and adjudged to insert the said James Shand as a new life in the said lease in the place of the life of Elizabeth Coffil which has fallen; or to execute to the plaintiffs a lease of the said tract or parcel of land upon the terms and conditions contained in the said lease for the life of the said James Shand renewable for ever by the insertion of new lives as in said lease provided.

3. An account of the rents and profits of said tract or parcel of land received by the defendants or any or either of them since June, 1884, or which without the wilful default of the defendants might have been received, and payment of that amount to the plaintiffs.

The learned judge who tried the case, Mr. Justice Ritchie, made a decree in favour of the plaintiffs, whereby it was adjudged that the entry by the defendants in 1884 was wrongful, and that the plaintiffs are entitled to the possession of the said piece of land.

2. An account in favour of the plaintiffs was directed and decreed to be taken of the rents and profits received, or which but for the wilful default of the defendants might have been received by them, from the date of such their entry in June, 1884, up to the time of the bringing of the action.

3. It was thereby further decreed that the defendants do execute to the plaintiff Edward McLatchy, upon proof by him of conveyance to him by the other plaintiffs other than the plaintiff Margaret E. G. Pernette of

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all their right, title and interest in said tract or parcel of land and upon payment of the sum of $182.95 a lease for the life of James Shand of Halifax in the county of Halifax auctioneer and two other persons to be named by said Edward McLatchy, renewable for ever, of said tract or parcel of land in the terms of the decree set out in plaintiffs' statement of claim, in so far as the same are now applicable, the form of such lease to be settled by a judge.

Upon appeal by the defendants to the Supreme Court of Nova Scotia the judgment of Mr. Justice Ritchie was varied by striking out of the decree the said third paragraph above extracted providing for the execution of a lease to the plaintiff Edward McLatchy and affirming in other respects the said judgment and decree.

The Chief Justice of the Supreme Court dissented from this judgment for the reason that in his opinion there had been a complete forfeiture of the lease for which the plaintiffs had shown no equity to be relieved, and that judgment in the action should have been rendered for the defendants.

From the judgment of the Supreme Court of Nova Scotia both parties appeal, the defendants contending that judgment should have been rendered for them, and the plaintiffs, on the contrary, insisting that the paragraph expunged from the decree made by Mr. Justice Ritchie should be restored.

There is, in my opinion, no foundation whatever for the contention urged before us, that the indorsement made in 1852 upon the lease by Mrs. Fraser, the devisee of the lessor, can be construed to operate, either as a new lease for the life of James Shand alone therein mentioned, renewable for ever by the substitution of another life in his place upon his death, and so on for ever by the substitution of a new life from time to time as each substituted life falls, or as an agree-

ment for such a lease of which specific performance can be decreed by this court.

The true construction of the lease of the 16th June, 1805, in my opinion, is that it was a lease of the premises therein mentioned to the lessee, his executors, administrators and assigns, for and during the term of the joint lives of the lessee and of his wife and his brother named in the lease, subject to payment of the rent reserved and to renewal by the substitution of another life in the place of each of such lives, as each should fall, and the payment of a renewal fine of four pounds within twelve months after the falling in of each life. The words of the habendum are:

> To have and to hold, &c., &c., for and during the natural lives of him the said Preserved Coffil, Patrick Coffil, brother of the said Preserved Coffil, and Elizabeth Coffil, wife of the said Preserved Coffil, and renewable for ever.

The term thus granted is a term, renewable it is true as specified in the lease, but still the term granted is only for the duration of the joint lives of the three persons named. Then the words of the reddendum are "yielding and paying therefor during the term hereby granted, &c., &c.," and it was expressly provided by the lease that in case of failure on the part of the said Preserved Coffil, his executors, administrators or assigns, in performing the covenants and agreements therein contained, then and from thenceforth it should and might be lawful for the said John Fraser, his heirs, executors, administrators and assigns, into the said premises to re-enter, and the said lessee, his executors, administrators and assigns, to evict, put out, and remove, notwithstanding anything contained in the indenture of lease to the contrary. The lessee then, among other covenants contained in the indenture, covenanted with the lessor his heirs, &c., &c., that he the lessee, his executors, administrators and assigns

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should and would, " at the fall of every life mentioned in this indenture " pay to the said lessor his heirs, &c., &c., the sum of four pounds for inserting a new life in place of the one so fallen, and that, if such new life should not be inserted and the sum of four pounds so paid within twelve months after the fall of each life, the said lessee, his executors, &c., &c., should forfeit and lose their rights of renewal of such fallen life. The term thus granted, being for the joint lives of the three named, ceased upon the falling of any one life, and the effect of this latter clause was to give to the lessee, his executors &c. &c. twelve months within which they could procure a renewal by payment of the fine of four pounds for each life fallen and the substitution of a new life in the place of each life so fallen, and during such year the lessee, his executors &c., could not be disturbed in their possession. The lease then provided that, whenever any question should arise as to the continuance in life of any of the persons for whose lives the term was granted, the onus should lie upon the lessee, his executors &c., to prove such person to be living, or in default that the person about whom such question should arise should be taken to be dead. Now the utmost operation which upon the proper construction of this lease can be given to the indorsement upon it made by Mrs. Fraser in 1852 is—that such indorsement operated as an acknowledgment then made by her that Mrs. Coffil one of the lives named in the lease had fallen, the other two lives being then still in existence, and as an acceptance of James Shand in the place and stead of Mrs. Coffil, and as an acknowledgment that, the fine for a renewal having been paid, McLatchy the plaintiffs' assignee was entitled to have a renewal lease for the term of the joint lives of Preserved Coffil, Patrick Coffil and James Shand, under and subject to the conditions contained in the lease

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for further renewal; and upon the principle that equity deems that to be done which ought to be done, it may perhaps be construed to have amounted in equity to a renewal of the lease for such further term. To give the indorsement on the lease such operation there can be no objection, but no greater or other operation can be given to it. The defendants, as heirs at law of the devisee of the lessor, entered into possession of the demised premises in June, 1884, claiming that the term granted by the lease had expired and that the lessees' representatives had forfeited all right of renewal. The question now has arisen in this action whether that entry was rightful or wrongful. Under the terms of the lease the onus was cast upon the plaintiffs to prove it to have been wrongful. In order to do so it was necessary for them, treating the indorsement on the lease in 1852 to be a renewal lease under the terms of the indenture of 1805, to have proved either that Preserved Coffil, Patrick Coffil and James Shand were all living in June, 1884, or, if any of them was dead, that when the defendants entered the year after the death within which the plaintiff had a right to obtain a renewal by payment of the fine of four pounds for each fallen life had not expired. They showed James Shand to be still living, but they failed to show that in June, 1884, when the defendants entered, Preserved Coffil and his brother Patrick Coffil were living. They must therefore in the terms of the lease be taken to have been then dead. The lease therefore, giving to the plaintiffs the full benefit of their contention that the indorsement on the lease in 1852 operated as a renewal of the lease, such renewal being of a renewal for a new term, namely, for the term of the joint lives of Preserved Coffil, his brother Patrick and James Shand, had expired and not having been renewed within the provision in

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that behalf in the lease, the entry by the defendants in June, 1884, was rightful.

The plaintiffs' case therefore is resolved into a claim for relief in equity against a plain forfeiture of their right to renewal, for which relief no case whatever that can be entertained has been made.

The appeal therefore of the defendants must, in my opinion, be allowed with costs and that of the plaintiffs dismissed, and judgment be ordered to be entered for the defendants in the action, with costs in all the courts below.

Appeal and Cross-appeal dismissed with costs.

Solicitors for appellants: *W. & J. A. McDonald.*

Solicitors for respondents: *Borden, Ritchie, Parker & Chisholm.*