MARY A. MATHEWSON (PLAINTIFF) ..... APPELLANT;

AND

WILLIAM A. BURNS (DEFENDANT) ... RESPONDENT.

1914

*June 2.
*June 19.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Specific performance—Lease of land—Option for purchase—Acceptance of new lease—Waiver of option.

Where a lease for a term of years gives the lessee an option to purchase the land the latter's acceptance during the term of a new lease to begin on its expiration is not of itself a waiver or abandonment of the option. Anglin and Brodeur JJ. dissenting. Judgment of the Appellate Division (30 Ont. L.R. 186) reversed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), reversing the judgment at the trial in favour of the plaintiff.

The appellant was lessee of land for a term expiring on April 30th, 1913. The lease provided that she could purchase the property at any time during the term for a specified price. In March, 1913, she accepted and signed a new lease for a year from May 1st, 1913, and shortly after tendered the purchase money for the property and a conveyance for execution to the owner who refused to convey, and in an action by the lessee for specific performance claimed that the option was abandoned by the acceptance of

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

(1) 30 Ont. L.R. 186.

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the new lease. The Appellate Division upheld this contention, reversing the judgment at the trial in the appellant's favour.

Geo. F. Henderson K.C. for the appellant.

W. C. McCarthy for the respondent.

THE CHIEF JUSTICE.—This is an action for specific performance of an option agreement for the sale of certain property on Stewart Street, in the City of Ottawa. The option is contained in a lease dated April 30th, 1910, given to the appellant by the late Thomas A. Burns, under whose will the respondent is devisee of the property. The option is in these words:—

> The said Mary A. Mathewson to have the option of purchase at any time on or before the expiration of this lease for the sum of $2,800 (twenty-eight hundred dollars).

The lease was registered by the appellant on the 8th of February, 1911, after the death of the late Thomas A. Burns. Before the expiration of the lease, the appellant notified the respondent of her intention to exercise the option.

The learned Chancellor of Ontario, who tried the case, found that the appellant would not have taken the lease except upon the condition that she was given an option to purchase exercisable at any time during the period specified and holding that she acquired a vested right to purchase during the full term of her lease maintained the action. On appeal, the judgment was reversed on the ground that the appellant waived or abandoned her option to purchase by entering into an agreement on March 10, 1913, to rent the same

premises for a term of twelve months from the first day of May, 1913.

The abandonment or waiver of the option to purchase would require to be proved like any other agreement in clear and unequivocal terms, and with all respect, I am entirely unable to appreciate how that second lease which would only begin to run at the expiration of the option period can be construed as an agreement to waive the right to purchase which the appellant admittedly had at the time the agreement was made. I cannot find evidence of anything done or said by the appellant by reason of which the position of the landlord was in any way altered. In accepting the lease, in March, 1913, the appellant cannot be held, in view of the relations then existing between her and the respondent, to have admitted more than that, at that time, the landlord had power, as the fact was, to rent the property at the expiration of the then current lease if she did not exercise her option in the meantime. There is no evidence that in consideration of the new lease she agreed to abandon her option, and taking a new lease in anticipation of a possible failure to exercise an option to purchase is not conduct evidencing an intention to abandon the right to the option when, as in this case, the lease was to begin to run only at the expiration of the option period. If there is any ambiguity or doubt, it should be construed in favour of the appellant who without legal advice was dealing with the respondent's solicitor.

If this case arose in Quebec, I would be disposed to hold that, in the circumstances, the agreement to abandon the option before the expiration of the delay would require to be in writing.

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The Chief Justice.

The right to the option is not inconsistent with the right to a lease subject to the option which will only take effect if the option is not exercised. Both may run concurrently. It would be different if the appellant had taken a lease which began to run before the expiration of the option period. The taking of that new lease at that time might be said to be inconsistent with the intention to exercise the option, but I can see no reason why the intention to exercise the option should not continue to exist concurrently with the right to a lease of the premises if the option is not exercised in the meantime. I agree entirely with the Chancellor when he says:—

> There is no evidence of any waiver by the plaintiff of the option to purchase. The taking of a new lease to begin at the termination of the other was merely a provident act in case she did not think fit to purchase. Had she elected to purchase during the former lease that would *ipso facto* have determined the relation of landlord and tenant and a new relation of vendor and purchaser would have arisen. None other follows in regard to the second lease; it did not become operative on the plaintiff electing to purchase at the end of the first term.

The appeal should be allowed with costs.

IDINGTON J.—I think this appeal should be allowed with costs for the reasons assigned by the learned Chancellor in which I entirely concur.

In the almost infinite variety of rights and interests which a man may acquire in or over real estate and enjoy concurrently there is nothing more common than an option to acquire either the whole estate or some new interest therein.

It is a novel doctrine that by the acquisition of some new interest his option must be presumed to have been waived unless there is some necessary in-

consistency between what he has newly acquired and the continuation of the option.

There is no more inconsistency between the continued existence of an option for the time it has to run and a renewal or extension of a lease, than there was between the option to purchase during the currency of the lease in which the option to purchase was expressed, and that lease itself.

There might have been embodied in the renewal lease a term or condition that its acceptance ended the option, but there was not. Or there might have been in the negotiations between the parties leading to such renewal something agreed upon that would have rendered the exercise of the option so inequitable that a court would not enforce its specific performance, but there was nothing of the kind.

It might as well be argued that the renewal of the lease interfered with the appellant's right to enforce her mortgage when falling due during either term, as that the renewal in question extinguished the right to exercise her option as she did before the term thereof had expired.

The respondent never changed his position in such a way as to entitle him to claim that appellant had surrendered her right.

The learned Chancellor has so fully covered the ground that I can add nothing useful, and only add these remarks suggested by the course of the argument addressed to us for respondent.

DUFF J.—I concur in the conclusion and the reasoning of the learned Chancellor of Ontario who tried the action. I think the appeal should be allowed and the judgment of the learned Chancellor be restored.

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Anglin J.

ANGLIN J. (dissenting). — In taking in March, 1913, an unqualified lease for one year from the 1st of May, 1913, the appellant, in my opinion, entered into a contract wholly inconsistent with her right to exercise the option, expiring on the 30th April, 1913, contained in the three years' lease of the 30th April, 1910, of which she asserts in this action the right to avail herself. If that option should be exercised, the lease of March, 1913, could never become operative. In accepting the lease the appellant recognized the absolute title of the respondents to make it. She either meant, in consideration of the new lease, to forego all claim to exercise her option (it may be because she thought it unenforceable, or of such doubtful efficacy that a compromise on the basis of a new lease was advisable) and in that case waiver of it would seem to be clear; or she proceeded under the mistaken belief that her acceptance of the new lease without any reservation of her option to purchase the property would not affect her right to exercise that option, and in that case she would appear to be seeking relief against the effect of taking the new lease on a ground of mistake in law. That she cannot have.

With deference to those who take the contrary view, I am unable to read into the absolute and unqualified lease of March, 1913, the condition or qualification that it shall be of no effect if the lessee should exercise an option to purchase, the existence or efficacy of which was in dispute between the parties. That seems to me to be introducing by some sort of inference into a written contract a term so inconsistent with its express provisions that it is destructive of them. There is not even an attempt to adduce parol

evidence (which in my opinion would have been inadmissible) that the appellant intended to make the new lease subject to the option. But if that term, not expressed in the document, may not be imported into it by explicit oral evidence that it was intended that the lease should be subject to it, I cannot see my way to import it as a matter of inference from extrinsic facts which, as I read the evidence, are quite as consistent with the intention that the option should be abandoned, as that it should be preserved. For my part I prefer to determine the rights of the parties by interpretation of the writing in which they have undertaken to express them.

In any event I do not consider this a proper case for the extraordinary and discretionary remedy of specific performance.

I would dismiss the appeal.

BRODEUR J. (dissenting).—I would dismiss this appeal for the reasons given by my brother Anglin.

Appeal allowed with costs.

Solicitors for the appellant: *MacCracken, Henderson, Greene & Herridge.*

Solicitor for the respondent: *Napoleon Champagne.*