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*Oct. 30, 31.

*Nov. 16.

THE OTTAWA ELECTRIC COMPANY (PLAINTIFF)..... } APPELLANT;

AND

F. X. ST. JACQUES (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Duration—Right to cancel—Repugnant clauses.

A contract for supplying light to a hotel containing the following provisions. "This contract is to continue in force for not less than 36 consecutive calendar months from date of first burning, and thereafter until cancelled (in writing) by one of the parties hereto. * * * Special conditions if any. This contract to remain in force after the expiration of the said 36 months for the term that the party of the second part renews his lease for the Russell House." After the expiration of the 36 months the lease was renewed for five years longer.

Held, reversing the judgment of the Court of Appeal (1 Ont. L. R. 73) that neither of the parties to the contract had a right to cancel it against the will of the other during the renewed term.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial in favour of the defendant.

The question to be decided on this appeal was whether or not, under the above recited provisions of a contract for lighting the Russell House in Ottawa, the defendant, as lessor of the said hotel premises, had a right to cancel the contract during a renewed term of his lease. The Electric Company appealled from a judgment of the Court of Appeal deciding that the provision for cancellation after 36 months was in force after the renewal.

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*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, Girouard and Davies JJ.

(1) 1 Ont. L. R. 73.

G. F. Henderson for the appellant.

Hogg K. C. and *F. A. Magee* for the respondent.

The judgment of the majority of the court was delivered by:

SEDGEWICK J.—The Standard Electric Co. of Ottawa, to whose rights in the premises the appellant Company has succeeded, entered into a contract with the respondent on the 5th November, 1892, to supply the Russell House, of which the latter was lessee, with electric light. The period during which this supply was to, or might, continue, was fixed by two clauses, the interpretation of which is the question involved here. The first clause is as follows:

> This contract is to continue in force for not less than 36 consecutive calendar months from the date of first burning, and thereafter until cancelled in writing by one of the parties thereto.

There is no dispute about this clause. The light was furnished and paid for during the three years therein specified. It so happened that the lease under which Mr. St. Jacques held the Russell House had at the time of the agreement three years to run, and it is conceded thatt he period of supply fixed upon was mainly influenced by that consideration, and that the clause itself had reference only to then present conditions.

The second clause reads:

> Special conditions, if any, * * * This contract to remain in force after the expiration of the said 36 months for the term that the party of the second part renews his lease for the Russell House, and should he fail to renew his lease, the parties of the first part will not remove their wires from the Russell House, providing the new tenant does not wish to use electric incandescent lights, but if the new tenant does wish to use electric incandescent lights and not take them from the parties of the first part, they will expect to be paid for the wiring the sum of five hundred dollars, and if this contract is renewed for five years, the wiring is to belong to the Russell House.

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About the period of the expiration of the lease under which the property was held in 1892, a renewal lease was entered into at a higher rental and for additional property, the term therein specified being for a period of five years to be computed from the 1st November 1895. On the 1st December, 1897, the defendant, St. Jacques, gave notice of cancellation of the contract, to take effect from the date of notice, and required the company to disconnect the wires connecting the Russell House with the main line. The question is: Was this cancellation effective for the purposes of putting an end to the agreement between the parties? The learned Chancellor before whom the case was tried, in attempting to give effect to both clauses, and having stated that they were not repugnant or contradictory, thus interprets the contract:

> It is to be enforced for 36 months and thereafter for the term that St. Jacques renews his lease, until cancelled in writing by one of the parties;

and this construction was adopted by the Court of Appeal. In my view however, but with great deference, this is not the proper construction. Both of the learned judges who dealt with the case below admit the principle that effect must, if possible, be given to every stipulation of a contract, no one part being rejected unless absolutely repugnant to some other part. And they were apparently of opinion that there no repugnancy between the two clauses or any difficulty in giving them both a clear and definite meaning.

I agree with this, but the effect which they gave to the second clause had the effect of eliminating i altogether from the agreement. If, as the learned Chancellor says, it was to be in force for 36 months and thereafter for the term that St. Jacques renewed his lease until cancelled in writing by one of the parties, then he could have cancelled it immediately upon the expiration of the 36 months, independently of the fact whether

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he renewed or did not renew his lease, so that the insertion of the clause respecting the rights and obligations of the parties upon a renewal of the lease was rendered absolutely futile and unnecessary. The agreement, so far as its duration was concerned, had reference first to the existing term and secondly, in respect to a non-existing but contingent term to be determined by the parties subsequently. The second clause had relation to rights of the parties only upon and in the event of the contingency happening, in which case certain new rights and liabilities would arise. Mr. St. Jacques was under no obligation to renew the lease, but, (and we must assume that the provision was as much in his interest as in the interest of the appellants) he would seem to have been anxious to secure light for his hotel should he remain its tenant after its termination, and it was, I imagine, with that end in view that this special provision was inserted. It had no reference whatever to the condition of affairs during the first three years, but it was a definite and unambiguous arrangement securing his supply of light for a definite period of time thereafter should he in the future elect to renew his lease. In other words, the appellant company undertook to deliver to him and he undertook to pay for during the period of five years from the commencement of the term created by the new lease, all such light as he might require for the purposes of his hotel. I have not been able to appreciate any argument which justified the respondent in attempting behind the company's back and without their consent, to put an end to the agreement at the time and in the manner he did. The moment that Mr. St. Jacques became tenant for a renewed term of the Russell property then for the first time the second clause took effect, and in so far as the duration of that extended lease was concerned, the time was a part of

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the contract between the lighting company and the lessee of the hotel. It rendered certain the duration of the contract which up till then had been uncertain, as depending upon the contingency as to whether a renewed term would ever be created, and its effect was to give to the lessee an absolute right to five years' supply of light at contract prices, and to the company payment therefor for the same period. If the new lease had itself contained any provisions for the shortening of the term from five years to a lesser period, or had given an option to the lessee to terminate it at any time, or had stipulated for a forfeiture, of which there is nothing of the kind here, I am not prepared to say that such provisions would not have to be read into the contract, but I repudiate the idea that in circumstances like the present, any one party to a contract can annihilate or even prejudice the rights of another party by some secret or voluntary agreement which the former may make with a third party. *Lord Dynevor* v *Tennant* (1).

The respondent's counsel endeavoured to make a point under the Statute of Frauds. We disposed of that at the argument, it appearing that there was no change made in the agreement sued on either verbally or in writing, the alleged change in the method of computing the price being for convenience only, and legally subject either to alteration or to a return at any time to the original manner of ascertaining the monthly consumption.

The appeal, in my judgment, should be allowed with costs in all the courts, and judgment entered for the plaintiffs with the usual reference to the Master to ascertain the damages sustained by the plaintiffs between the 1st day of December, 1897 and the 31st day of October, 1900. Upon payment of these damages

(1) 13 App. Cas. 279.

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the Russell House will be entitled to retain possession of the electric fixtures in the pleadings mentioned, and the money paid into court either returned to the defendant or credited upon any judgment which may be recovered against him, as the Master may determine.

GIROUARD J. (dissenting)—I agree with the court below. I believe we should give effect to the two clauses and we do so by holding that during the first 36 months no cancellation of the lease can take place, but that it can be done after by either of the parties.

Appeal allowed with costs.

Solicitors for the appellant: *MacCracken, Henderson & McDougal.*

Solicitors for the respondent: *O'Connor, Hogg & Magee.*