WILLIAM H. COTTER (PLAINTIFF).....APPELLANT;

AND

GENERAL PETROLEUMS LIMITED and SUPERIOR OILS, LIMITED (DEFENDANTS) ..... RESPONDENTS.

1950

*May 17, 18
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ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION.

Contract—Conflicting Terms—Agreement providing option exercisable within specified time followed by covenant failure to exercise option rendered optionee liable—Rule of Construction—Measure of Damages for Breach of Covenant.

An option agreement on petroleum and natural gas in certain lands declared by clause one, that the optionor granted the optionees an option exercisable within the time and in the manner thereinafter set forth. Clause two provided that the option might be exercised within a specified time by the optionees erecting the necessary machinery on the said lands, commencing the drilling of a well, and delivering to the optionor notice in writing of the exercise of the option. In clause three the optionees covenanted to exercise the option within the period prescribed in clause two and it was provided that on their failure so to do the optionor, despite the lapse of the option, would be entitled to exercise any remedies legally available for breach of the covenant, which the parties agreed, was given and entered into by the optionees as the substantial consideration for the granting of the said option.

Held: (Locke J. dissenting), that there was no repugnancy between clauses one and three of the agreement. Clause three did not destroy clause one, the two were to be read together. *Forbes* v. *Git* [1922] A.C. 256 at 259.

*PRESENT: Rinfret C.J. and Kerwin, Locke, Cartwright and Fauteux JJ.

Held: also that the appellant was entitled to more than nominal damages —the proper measure was the sum necessary to place him in the same position he would have been in if the covenant had been performed. *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301 at 307. In this case, the payment of the $1,000 the appellant was compelled to pay for a further renewal of the head lease, resulted from the respondents' breach of the covenant. *Hadley* v. *Baxendale,* (1854) 156 E.R. 145, applied. *Cunningham* v. *Insinger,* [1924] S.C.R. 8, distinguished.

Per: Locke J., dissenting—The earlier clause, expressed in the terms of a grant to the optionees, gave them the option to acquire the sub-lease if they wished to do so, while the subsequent clauses purported to deprive them entirely of this right and render it obligatory upon them both to exercise the option and to execute the sub-lease. The right granted and the obligations imposed being totally inconsistent, the former should prevail and the latter be rejected. *Forbes* v. *Git,* [1922] 1 A.C. 256 at 259; *Git* v. *Forbes,* [1921] 62 Can. S.C.R. 1 at 9; *Bateson* v. *Gosling,* (1871) L.R. 7 C.P. 9 at 12.

Where the language employed in an agreement is free from ambiguity the Court must give effect to it even though the result may not be that which both parties contemplated. *Directors of Great Western Ry. Co.* v. *Rous,* (1870) L.R. 4 H.L.C., 650 at 660.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, (1), reversing the judgment of McLaurin J. (2), awarding damages to the appellant for breach of contract in the sum of $54,550.

H. G. Nolan K.C. for the appellant.

Geo. H. Steer K.C. and *D. Rae Fisher* for the respondents.

The judgment of the Chief Justice and Kerwin, J. was delivered by:

KERWIN J.:—On April 21, 1948, the appellant as optionor entered into an agreement with the respondents as optionees and it is upon the covenant contained in clause 3 of this agreement that the present action is brought by the former against the latter. The relevant parts of the agreement read as follows:

WHEREAS by Indenture of Lease dated the 6th day of February, 1948, John Konstantin Witiuk of Red Deer, in the Province of Alberta, granted and leased unto Albert Edward Silliker all petroleum and natural gas and related hydrocarbons (hereinafter called "the leased substances") within, upon or under the North East Quarter of Section Thirty-one (31), in Township Forty-nine (49), Range Twenty-six (26), West of the Fourth

(1) [1949] 2 W.W.R. 136; 1949 3 D.L.R. 634.

(2) [1949] 1 W.W.R. 193.

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Meridian, in the Province of Alberta, reserving unto Canadian Pacific Railway Company all coal (hereinafter called "the demised lands"), for a term of Twenty-one (21) years from the date of the said lease and so long thereafter as the leased substances are produced from the leased lands of the Lessee shall conduct operations thereon for the discovery and/or recovery of the leased substances;

AND WHEREAS by Assignment in writing dated the 23rd day of February, 1948, the said Albert Edward Silliker granted, assigned, conveyed and set over unto the Optionor the said Lease and all his rights and interests thereunder and in and to the leased substances and all benefits and advantages of him, the said Silliker, derived or to be derived from the said lease, together with the unexpired term of the said lease;

AND WHEREAS the Optionor has agreed to grant to the Optionees an option to acquire a sub-lease of the leased substances within, upon and under that part of the demised lands consisting of Legal Subdivisions Nine (9) and Ten (10) thereof upon the terms and conditions hereinafter set forth.

NOW THIS AGREEMENT WITNESSETH that in consideration of the premises and of the sum of One ($1.00) Dollar, now paid by the Optionees to the Optionor (receipt of which is hereby by the Optionor acknowledged) and of the covenants of the Optionees herein contained, IT IS HEREBY MUTUALLY COVENANTED AND AGREED by and between the parties hereto as follows:

1. THE Optionor hereby grants to the Optionees an option exercisable within the time and in the manner hereinafter set forth to acquire a sub-lease of the leased substances within, upon and under the following lands, namely:

Legal Subdivisions Nine (9) and Ten (10), of Section Thirty-one (31), in Township Forty-nine (49), Range Twenty-six (26), West of the Fourth Meridian, in the Province of Alberta, reserving unto Canadian Pacific Railway Company all coal (hereinafter called "the sub-demised lands").

2. THE said option may be exercised on or before the 1st day of August, 1948, and may be exercised within the said time by the Optionees erecting upon the sub-demised lands the necessary derrick complete with rig irons, boiler and engine, and installing all drilling machinery, and actually spudding in and commencing the work of drilling a well for the discovery of petroleum on the sub-demised lands, and delivering or mailing to the optionor notice in writing of such exercise of the said option.

3. THE Optionees covenant to exercise the option within the said period, in the manner aforesaid, and in the event of their neglect or failure so to do, the Optionor shall, despite the lapse of the said option, be entitled to exercise any remedies which may be legally available to him for the breach by the Optionees of this covenant, which the parties hereto agree is given and entered into by the Optionees as the substantial consideration for the granting of the said option.

4. IN the event of the exercise of the said option, the Optionor shall grant to the Optionees a sub-lease of the sub-demised lands in the form set forth in Schedule "A" hereto attached, and each of the parties shall forthwith after the exercise of the option execute and deliver the said sub-lease.

The head lease from Witiuk to Silliker, referred to in the first recital, was really taken by the latter as agent and trustee for the appellant and associates, and the consideration therefor was the sum of $70,000 paid in cash, the reservation of certain royalties, and the covenant on behalf of the lessee to commence within six months from February 7, 1948, the drilling of a well for the leased substances and the carrying on of such drilling operations until such well should have reached the depth of 5,500 feet or the limestone should have been penetrated to a reasonable depth having regard to the geological situation, whichever should first occur, unless commercial production be sooner obtained; with a provision that upon payment of another $1,000 the time for drilling should be extended for another six months. As stated in the second recital, Silliker assigned the head lease to the appellant on February 23, 1948, and the record shows that this assignment was consented to by the original lessor. The third recital is of importance as it is there stated that the appellant has agreed to grant the respondents "an option to acquire a sub-lease of the leased substances within, upon and under" the described part of the lands "upon the terms and conditions hereinafter set forth." The next paragraph gives the consideration as not merely the sum of $1.00 but also "the covenants of the optionees herein contained."

By clause numbered 1, the option is granted to acquire the sublease within the time and in the manner thereinafter in the agreement set forth. Clause 2 fixes the time as on or before August 1, 1948, and the manner is "by the optionees erecting upon the subdemised lands the necessary derrick complete with rig irons, boiler and engine, and installing all drilling machinery, and actually spudding in and commencing the work of drilling a well." It will be noted that the optionees are merely to erect the derrick, etc., spud in, and *commence* the work of drilling a well. That is, so far as the exercise of the option is concerned, there is no obligation to continue drilling. Notice in writing of such exercise of the option is to be given. Clause 3 contains the covenant sued upon, which is stated to be the substantial consideration for the granting of the option.

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The covenant is by the optionees to exercise the option within the period and in the manner aforesaid, and "in the event of their neglect or failure so to do, the optionor shall, despite the lapse of the said option, be entitled to exercise any remedies which may be legally available to him for the breach by the optionees of this covenant." It is to be noted that by clause 4 it is only in the event of the exercise of the option that the sublease according to Schedule "A" is to be executed and delivered by the parties.

Much was made on the argument of the use of the terms "optionor" and "optionee" in the agreement but this is but one circumstance bearing upon the proper construction of the document. The Appellate Division concluded that the case fell to be decided upon the principle of repugnancy, which was not raised until the oral argument of the appeal before the Appellate Division. The late Chief Justice Harvey, on behalf of the Court, adopted as binding the following statement of the principle by Lord Wrenbury for the Judicial Committee in *Forbes* v. *Git* (1).

> If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. * * * But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole.

The foundation of the rule is explained in the dissenting judgment of Duff J. (concurred in by Sir Louis Davies) in this Court (2), and a number of the decided cases are referred to. Applying the statement of the principle by the Judicial Committee to the case at bar, in my opinion there is no repugnancy between clauses 1 and 3 of the agreement. Nothing is to be gained by comparing the provisions of the agreement before us with other documents in other cases. and the respondents' case could not be put higher than Mr. Steer's argument that clause 3 deprived the optionees of the choice previously given by clause 1. Now, not only was there no obligation previously imposed, but the promise of the optionees was explicit and it was further provided that the optionor should be entitled to his remedies although the option had lapsed. Clause 3 does

(1) [1922] 1 A.C. 256 at 259. (2) [1921] 62 Can. S.C.R. 1.

not destroy clause 1, and the two are to be read together. It is apparent from the evidence that, holding a lease of the leased substances in the northeast quarter of section 31, comprising 160 acres, for which, on February 6, 1948, the sum of $70,000 had been paid, the optionor, while willing to give the optionees six months to exercise the option with relation to 80 acres by commencing the work of drilling and giving the specified notice, had included in the agreement a term whereby the optionees covenanted to do these very things.

Having notified the appellant that they would not fulfil their covenant, the respondents have breached it and are liable in damages. The trial judge awarded the sum of $54,550, being $53,550, the admitted cost of drilling a well to a depth of 5,500 feet (although the form of lease attached as Schedule "A" to the agreement required a depth of 6,000 feet), and an additional $1,000, being the sum paid by the appellant to the head lessor for an extension of six months in accordance with the provisions of the head lease. In addition to paying $1,000, the appellant negotiated with others to drill but, according to him, he had to deal with the 160 acres and not merely the 80 acres referred to in the agreement sued on. The evidence does not disclose the result of these negotiations or what else, if anything, the appellant did. The allowance by the trial judge was made on the basis of reading together the head lease, the agreement in question, and the form of lease attached thereto and construing the covenant sued upon as one to dig a well. I am unable to agree that this is the proper way of approaching the matter. Clause 4 of the agreement provides that the optionor shall grant to the optionees the sublease "in the event of the exercise of the said option" and I cannot read the document as equivalent to a simple agreement for a lease. Such a result could follow only if the option had in fact been exercised. It appears to me that clause 3 was drawn having in mind that the option might not be exercised and provided that, if the optionees neglected or failed to exercise it, certain results should follow. It was only if the option was exercised that the lease was to be entered into.

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Notwithstanding that the appellant's case was put as if the respondents' covenant was to dig a well, which as I have indicated is not in my view its proper construction, the appellant is entitled to more than nominal damages. The proper measure is not the cost of performance to the respondents but the value of performance to the appellant: *Erie County Natural Gas and Fuel Co.* v. *Carroll* (1). Adapting Lord Atkinson's language at the foot of page 118, it was the appellant's business to show the damages and he cannot be permitted to recover damages on guesswork or surmise. The evidence discloses, and the trial judge finds, that the chance of obtaining oil on drilling is remote although it cannot be completely ruled out. However, it was on the basis of the covenant being to drill a well that the trial judge assessed the damages, and the substratum for that allowance being absent, there is nothing in the record to warrant fixing the damages at more than the $1,000 paid by the appellant. It is true that this payment kept in force the head lease for another six months and, the respondents having no further rights, the entire benefit of that payment enured to the advantage only of the appellant, but it was a reasonable step for the latter to take, and it should be held that the amount of that payment is the sum necessary to place the appellant in the same position as he would have been in if the covenant had been performed: *Wertheim* v. *Chicoutimi Pulp Co.* (2).

The special circumstance of the appellant being compelled to pay $1,000 for a further renewal of six months of the head lease was known to the respondents. That payment naturally resulted from the respondents' breach of their covenant and since they contemplated, or ought to have contemplated, the consequences which proximately followed the breach, they are liable to pay damages according to the rule in *Hadley* v. *Baxendale* (3). To put the matter in another way, the $1,000 damages are such as are the natural and probable result of the breach. In view of the breach found to have been committed in this

(1) [1911] A.C. 105.
(2) [1911] A.C. 301 at 307.
(3) (1854) 9 Ex. 341; 156 E.R. 145.

case, *Cunningham* v. *Insinger* (1) and the decisions referred to in *Kinkel* v. *Hyman* (2) are quite distinguishable.

The appeal should, therefore, be allowed and judgment directed to be entered for the appellant for the sum of $1,000. He is entitled to his costs of the action and of the appeal to this Court but the respondents should have their costs in the Appellate Division of the Supreme Court of Alberta.

LOCKE J. (dissenting):—By the agreement of April 21, 1948, made between the parties to this action wherein the appellant is described as the optionor and the respondents the optionees, after reciting the grant of the head lease by Witiuk to Silliker and its subsequent assignment by the latter to the appellant, it is said that:

> The optionor has agreed to grant to the optionees an option to acquire a sublease of the leased substances

under part of the lands referred to in that lease. This is followed by a statement that in consideration "of the premises and of the sum of $1.00 now paid by the optionees to the optionor and of the covenants of the optionees herein contained, it is hereby mutually covenanted and agreed by and between the parties hereto as follows:

> 1. The optionor hereby grants to the Optionees an option exercisable within the time and in the manner hereinafter set forth to acquire a sub-lease of the leased substances within, upon and under.

the lands referred to and by paragraph 2 it is provided that:

> 2. The said option may be exercised on or before the 1st day of August, 1948, and may be exercised within the said time by the optionees erecting upon the sub-demised lands.

the necessary drilling equipment and commencing the drilling of a well for the discovery of petroleum:

> and delivering or mailing to the optionor notice in writing of such exercise of the said option.

As a schedule to this agreement there is the form of the sub-lease to be granted by the appellant to the respondents in the event of the exercise by them of the option, and in this document it is said that the appellant has granted to the respondents "an option to acquire a sub-lease of the sub-demised lands" and that the respondents have

(1) [1924] S.C.R. 8.
(2) [1939] S.C.R. 364.

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exercised the said option by, *inter alia,* the spudding in and commencing the work of drilling a well for the discovery of petroleum upon the said sub-demised lands and are entitled to the grant of the sub-lease aforesaid.

Having granted to the respondents the right to acquire a sub-lease of the premises which might be exercised at any time between the date of the instrument and August 1, 1948, in the prescribed manner at their will, the agreement further provided:

> 3. The Optionees covenant to exercise the option within the said period, in the manner aforesaid, and in the event of their neglect or failure so to do, the optionor shall, despite the lapse of the said option, be entitled to exercise any remedies which may be legally available to him for the breach by the optionees of this covenant, which the parties hereto agree is given and entered into by the optionees as the substantial consideration for the granting of the said option.
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> 4. In the event of the exercise of the said option, the optionor shall grant to the optionees a sub-lease of the sub-demised lands in the form set forth in Schedule "A" hereto attached, and each of the parties shall forthwith after the exercise of the option execute and deliver the said sub-lease.

Thus, while for a valuable consideration vesting in the respondents the right of acquiring a sub-lease within a limited time if they desired to do so, the agreement purported to impose upon them an absolute obligation to exercise that right within the defined period, declared that they would be liable to the appellant for any failure to do so and obligated them to execute and deliver the form of sub-lease forthwith after the exercise of the option. The last mentioned covenant was not merely an agreement to enter into an agreement any of the material terms of which remained to be negotiated, but an obligation to execute and deliver an agreement, all the terms of which were settled, as to which in the event of default the appellant might resort to the remedy of specific performance or claim damages.

The question as to whether in construing the agreement paragraphs 3 and 4 are to be rejected as repugnant to the clauses granting the option which precede them was not raised before the learned trial judge and, accordingly, not considered by him. The judgment at the trial awarded damages against the respondents for their failure to exercise the option as required by paragraph 3 and to drill the well,

which they would have been obligated to do under the terms of the sub-lease which they had covenanted to execute and deliver. By the unanimous judgment of the Court of Appeal delivered by the late Chief Justice of the Appellate Division this judgment has been set aside on the ground that paragraphs 3 and 4, being repugnant to the clause granting the option within the principle stated in *Forbes* v. *Git* (1), were to be rejected.

There is no ambiguity to be found in the terms of this agreement, in my opinion. Among the meanings assigned to the word "option" in the Oxford English Dictionary is "the privilege (acquired on some consideration) of executing or relinquishing, as one may choose, within a specified period a commercial transaction on terms now fixed" and it is in that sense that the word is used in transactions of the nature in question here. The language of the instrument is that in common use in granting such a right and is incapable of any meaning other than that the optionee may contract or refrain from doing so at will. The language of paragraphs 3 and 4 is equally clear that the optionees were bound to exercise the option within the defined period and in the prescribed manner and, having done so, to execute and deliver the sub-lease. In *Forbes* v. *Git, supra* at 259, Lord Wrenbury states the rule of construction as being that if in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. Mr. Nolan, in his able argument for the appellant, contended that the rule so stated was inapplicable unless the repugnancy was to be found in covenants by the same person or persons and that accordingly in the present case where the inconsistency, if there is such, is between the grant by the optionor of the option and the covenant of the optionees to exercise it, it did not apply. The authorities do not, in my opinion, support this contention, nor do I think it was intended in the passage referred to in *Forbes* v. *Git* to state the rule in a manner inconsistent with the earlier authorities, but rather merely to state its application to the facts

(1) [1922] 1 A.C. 256 at 259.

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of that case. In the passage from Sheppard's Touchstone, 7th Ed. p. 88, referred to by Duff J. (as he then was) in *Git* v. *Forbes* (1), the rule is stated thus:

> That in a deed if there be two clauses so totally repugnant to each other that they cannot stand together, the first shall be received and the latter rejected: wherein it differs from a will; for there of two such repugnant clauses the latter shall stand.

A marginal note to this statement refers to Hardres' Reports at p. 94, where in the action of *Cother* v. *Merrick* (1657) Baron Nicholas is reported as saying:

> Where there are two clauses in a deed of which the latter is contradictory to the former there the former shall stand.

In Blackstone's Commentaries (Lewis' Ed.) Book 2 p. 841, the law is stated in the terms employed in Sheppard's Touchstone. In *Doe dem. Leicester* v. *Biggs* (2), Mansfield C.J. states the rule as being that if there be a repugnancy, the first words in a deed, and the last words in a will, shall prevail.

In *Bateson* v. *Gosling* (3), Willes J. said:

> The rule of law is clear, that, if there be two clauses or parts of a deed repugnant the one to the other, the first shall be received and the latter rejected, except there be some special reason for the contrary.

Here the earlier clause which is expressed in the terms of a grant to the optionees gives them the option to acquire the sub-lease if they wish to do so, while the subsequent clauses purport to deprive them entirely of this right and render it obligatory upon them both to exercise the option and to execute the sub-lease. The right granted and the obligations imposed appear to me to be totally inconsistent and, in my view, the former must prevail and the latter be rejected.

It is said for the appellant that despite the language employed the dominant intention of the parties is apparent, this being to obligate the respondents to commence to drill the well within the prescribed period and to execute and deliver the sub-lease forthwith thereafter and to discharge their obligations under that document. To so interpret the agreement, however, involves rejecting the language of the preamble and of paragraph 1 above quoted and for

(1) (1921) 62 Can. S.C.R. 1 at 9.
(2) (1809) 2 Taunt. 109 at 112; 127 E.R. 1017 at 1019.
(3) (1871) L.R. 7 C.P. 9 at 12.

this there is, in my opinion, no warrant. I am by no means satisfied that the interpretation which I think should be placed upon this agreement is in accordance with what was intended by the parties. Where, however, the language employed is free from ambiguity, we must give effect to it even though the result may not be that which both parties contemplated (*Directors of Great Western Railway Co.* v. *Rous* (1), per Lord Westbury at 660).

I would dismiss this appeal with costs.

The judgment of Cartwright and Fauteux JJ. was delivered by:

CARTWRIGHT J.:—By lease dated February 6, 1948, one Witiuk granted and leased to an agent of the appellant, who duly assigned the lease to the appellant,

> All the petroleum and natural gas and related hydrocarbons the exclusive right and privilege of prospecting and drilling for, taking, removing and selling the leased substances within, upon or under the said lands and of laying pipelines and building tanks, stations and structures necessary and convenient to take care of the said products or any of them, within, upon or under the following lands, namely:
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> The North East quarter of Section Thirty-one (31), Township Forty-nine (49), Range Twenty-Six (26), West of the Fourth Meridian, in the Province of Alberta, containing One Hundred and Sixty (160) acres more or less, reserving unto the Canadian Pacific Railway Company all coal.
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> TO HAVE AND ENJOY the same for the term of twenty-one years from the date of acceptance hereof, and so long thereafter as the leased substances are produced from the leased lands or the Lessee shall conduct operations thereon for the discovery and/or recovery of such leased substances.

This lease contains a covenant on the part of the lessee to commence the drilling of a well for the leased substances on the said lands within six months from the date of the lease and to diligently carry on such drilling operations until such well shall have reached a depth of 5,500 feet, or the limestone has been penetrated to a reasonable depth having regard to the geological situation, whichever should first occur, unless commercial production should be sooner obtained. There is a proviso permitting the lessee to obtain a six months' extension on payment to the lessor of $1000. The lease contains a right of re-entry for breach of the

(1) (1870) L.R. 4 H.L. App. 650.

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above convenant, subject to the provisions of paragraph 14 which reads as follows:

PROVIDED HOWEVER and notwithstanding anything herein contained, the Lessee shall not be deemed to be in default on account of any delays in the commencement or interruption of drilling operations as provided under the terms of this agreement in the event such delay is caused directly or indirectly by reason of acts of King's enemies, acts of God, inclement weather, shortage of materials and labor due to military exigencies, Governmental priorities, inability of manufacturers to deliver materials, regulations or any other cause beyond the reasonable control of the Lessee.

The lease contains a covenant by the lessee to pay a royalty of 12½% of the current market value of the leased substances produced and marketed and other covenants which are not relevant to the questions raised on this appeal. It appears that the sum of $70,000 was paid to Witiuk for the lease and a further $2,500 was paid by the appellant to his agent for the assignment of the lease. The appellant also agreed to observe all the lessee's covenants.

The document on which this action is brought is dated April 21, 1948. It is called a "Memorandum of Agreement" and is made between the appellant, called "the optionor" of the first part, and the respondents, called "the optionees" of the second part. It recites the lease of February 6, 1948 and the assignment thereof to the appellant and continues:

AND WHEREAS the Optionor has agreed to grant to the Optionees an option to acquire a sub-lease of the leased substances within, upon and under that part of the demised lands consisting of Legal Subdivisions Nine (9) and Ten (10) thereof upon the terms and conditions hereinafter set forth.

NOW THIS AGREEMENT WITNESSETH that in consideration of the premises and of the sum of One ($1.00) Dollar, now paid by the Optionees to the Optionor (receipt of which is hereby by the Optionor acknowledged) and of the covenants of the Optionees herein contained, IT IS HEREBY MUTUALLY COVENANTED AND AGREED by and between the parties hereto as follows:

1. THE Optionor hereby grants to the Optionees an option exercisable within the time and in the manner hereinafter set forth to acquire a sub-lease of the leased substances within, upon and under the following lands, namely:

Legal Subdivisions Nine (9) and Ten (10), of Section Thirty-one (31), in Township Forty-nine (49), Range Twenty-six (26), West of the Fourth Meridian, in the Province of Alberta, reserving unto Canadian Pacific Railway Company all coal (hereinafter called "the sub-demised lands").

2. THE said option may be exercised on or before the 1st day of August, 1948, and may be exercised within the said time by the Optionees erecting upon the sub-demised lands the necessary derrick complete with rig irons, boiler and engine, and installing all drilling machinery, and actually spudding in and commencing the work of drilling a well for the discovery of petroleum on the sub-demised lands, and delivering or mailing to the Optionor notice in writing of such exercise of the said option.

3. THE Optionees covenant to exercise the option within the said period, in the manner aforesaid, and in the event of their neglect or failure so to do, the Optionor shall, despite the lapse of the said option, be entitled to exercise any remedies which may be legally available to him for the breach by the Optionees of this covenant, which the parties hereto agree is given and entered into by the Optionees as the substantial consideration for the granting of the said option.

4. IN the event of the exercise of the said option, the Optionor shall grant to the Optionees a sub-lease of the sub-demised lands in the form set forth in Schedule "A" hereto attached, and each of the parties shall forthwith after the exercise of the option execute and deliver the said sub-lease.

5. ANY notice required to be delivered by the Optionees to the Optionor pursuant to the provisions hereof may be delivered by mailing the same in a prepaid envelope addressed to "W. H. Cotter, Esq., c/o Messrs. A. L. Smith, Egbert & Smith, 500 Lancaster Building, Calgary, Alberta," and shall be deemed to have been received by the Optionor on the day next following the date of mailing thereof.

6. TIME shall be of the essence hereof.

THIS AGREEMENT shall enure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF the Optionor has hereunto his hand and seal subscribed and set and the Optionees have caused these presents to be executed and their corporate seals to be hereunto affixed witnessed by the hands of their proper officers duly authorized in that behalf, the day and year first hereinbefore written.

It is duly signed and sealed by all the parties. Attached as Schedule "A" is the form of sub-lease referred to in paragraph 4. This form is complete in the sense that it leaves no material term to be agreed upon between the parties. It is made between the Appellant as sub-lessor and the Respondents as sub-lessees. It recites the lease of February 6, 1948, referred to as the head lease (a copy whereof is attached as a schedule to the sub-lease) and the assignment thereof to the appellant and contains the following recitals:

AND WHEREAS by Agreement in writing dated the day of April, 1948, the Sub-Lessor granted to the Sub-Lessees an option to acquire a sub-lease of the sub-demised lands hereinafter described upon the terms and conditions in the said Agreement set forth;

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AND WHEREAS the Sub-Lessees have exercised the said Option by, *inter alia* the spudding in and commencing the work of drilling a well for the discovery of petroleum upon the said sub-demised lands, and are entitled to the grant of the sub-lease aforesaid;

The sub-lessor grants and sub-leases to the sub-lessees all the leased substances within, upon or under the lands described in paragraph 1 of the Agreement of April 21, 1948, for the term of the head-lease and any renewals thereof. The sub-lessees assume payment of the 12½% royalty to the head-lessor and agree to pay a royalty of 2½% to the sub-lessor. There are elaborate provisions for the division of the proceeds of the sale of the products produced. Briefly summarized these provide that the net proceeds after payment of taxes, costs of production and costs of marketing shall be divided proportionately between the sub-lessor and sub-lessees until the former has received $75,000 and the latter have received the proper cost of drilling the well, and that thereafter the proceeds of net production shall be divided equally between the sub-lessor and sub-lessees. The form contains the following paragraph:

THE Sub-Lessees shall hereafter diligently and continuously carry on the drilling operations at the said well heretofore commenced by them until such well shall have reached a depth of Six Thousand (6,000') feet, or the limestone has been penetrated to a reasonable depth having regard to the geological situation, whichever shall first occur, unless commercial production is sooner obtained.

It also contains a provision similar to paragraph 14 of the lease of February 6, 1948 quoted above. It should be mentioned that the area of the lands described in the lease of February 6, 1948 is 160 acres and that of the lands described in the form of sub-lease is 80 acres.

On May 12, 1948 a well lying about three-quarters of a mile north east of the lands with which we are concerned was abandoned after reaching a depth of 5,424 feet and on June 3, 1948 a well lying about a mile and a quarter west by south of such lands was abandoned at a depth of 5,601 feet. These failures led the respondents to believe that it would be useless to drill on the lands described, and in the month of June, 1948 they decided that they would not commence the drilling of a well and so advised the appellant. Some correspondence ensued. The appellant

through his solicitors took the position that the respondents were bound to drill a well and that he would seek damages if they failed to do so. The respondents took the position that, in view of the location of the lands in question between the two wells referred to above which had proved failures, it would be a needless waste of money to drill. The respondents persisted in their refusal and on August 31, 1948 the appellant commenced this action claiming $100,000 damages.

The action was tried by McLaurin J. on December 3, 1948. That learned judge held (1), that the agreement of April 21, 1948, the sub-lease attached thereto and the head lease must be read together, that on their proper construction the respondents were obliged to commence drilling by August 1, 1948 and to drill a well to completion as provided in the sub-lease, that in breach of the contract they had refused to do so and were accordingly liable to pay damages. After a full and careful review of a number of decisions some in our own courts and some in the courts of the United States he concluded that the proper measure of damages was the amount which it would have cost to drill the well, which was admitted to be $53,500, plus $1,000 which the appellant had paid to Witiuk for a six months' extension of the time set for commencing to drill. In the result judgment was given for the appellant for $54,500 and costs. Three geologists gave evidence as to the chance of obtaining production by drilling on the lands in question and the learned judge finds as a fact that such chances are far from favourable but that the possibility of production cannot be completely ruled out. This finding is supported by the evidence.

The Court of Appeal in a unanimous judgment allowed the appeal and dismissed the action with costs (2). In the judgment of the Court written by the late Chief Justice Harvey it is held that the case falls to be decided on the principle of repugnancy, which, it is stated, was not raised until the oral argument in the Court of Appeal, and that paragraph 3 of the agreement of April 21, 1948 is void for repugnancy and must be rejected as "destructive of

(1) [1949] 1 W.W.R. 194. (2) [1949] 3 D.L.R. 634.

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the object of the instrument". The ratio of the decision of the Court of Appeal is summed up in the following paragraphs:

> The agreement sued on herein is clearly an option agreement. It recites the agreement to grant an option and then expressly grants the option and the statement of claim alleges that an option was granted. Clearly the object of the agreement was to grant an option. What could be, in the words of Duff J. above quoted, (*Git* v. *Forbes* (1)) more "destructive of the object of the instrument" than a covenant completely nullifying the choice given by the instrument,—a covenant that he will exercise the option,—in other words, will have no choice?
>
> As the *Forbes* case decides this covenant is "repugnant and void" and as the action is founded on it, the action fails.

The first point that arises for determination is whether or not there was a binding contract between the parties and if so the extent of the obligation imposed upon the respondents. The appellant supports the view of the learned trial judge and contends that the respondents were bound on or before August 1, 1948, to erect upon the lands in question the necessary derrick and other equipment and machinery and to actually spud in and commence to drill a well and to diligently and continuously carry on such drilling until the depth prescribed in the form of sub-lease was reached. The respondents contend, first, that the decision of the Court of Appeal is right; secondly, that, if this is not so, the only obligation which fell upon them was to commence to drill a well and that for a breach of such obligation the appellant could not recover more than nominal damages; thirdly, that if the learned trial judge was right in holding that they were bound by the contract to drill a well he assessed the damages on a wrong principle and that the damages are excessive.

The extent of the respondents' obligation, if any, depends upon the construction of the written contract. There appeared to be no disagreement between counsel as to the principles to be applied, but in their application to the terms of a particular document considerable difference of opinion may arise.

It is settled that, "If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be

rejected and the earlier clause prevails." *Forbes* v. *Git* (1). But as was said by Duff J., as he then was, in the same case "The rule as to repugnancy, therefore, is obviously a rule to be applied only in the last resort and when there is no reasonable way of reconciling the two passages and bringing them into harmony with some intention to be collected from the deed as a whole." *Git* v. *Forbes* (2).

A rule of universal application in the construction of deeds was stated in *Mill* v. *Hill* (3), as follows: "The general rule of construction is, that the Courts, in construing the deeds of parties, look much more to the intent to be collected from the whole deed, than from the language of any particular portion of it."

In *Hillas and Co. Ltd.* v. *Arcos Ltd.* (4), Lord Tomlin, in whose judgment Lord Warrington and Lord MacMillan concurred, said: "The problem for a court of construction must always be so to balance matters, that without violation of essential principle the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains."

In my view there is no such repugnancy between the provisions of the contract here in question as requires the rejection of any of them. In paragraphs 1 and 2 the optionor grants an option and prescribes the time within which and the manner in which it may be accepted. I am unable to agree with the view of the Court of Appeal that paragraph 3 nullifies the choice given in paragraph 1, except in the sense that every right to choose by its nature ends with the making of a choice. Paragraph 3 is, I think, not the destruction of the right to choose but rather its exercise. Had paragraph 3 been omitted from the instrument altogether, it would have been open to the parties immediately after the execution of such instrument to enter into a further contract having the effect of paragraph 3 and I do not think that the whole transaction is destroyed by reason of the fact that what might have been more artistically accomplished by the use of two documents was

(1) [1922] 1 A.C. 256 at 259.
(2) (1921) 62 Can. S.C.R. 1 at 10.
(3) (1852) 3 H.L. Cas. 828 at 847; 10 E.R. 330.
(4) (1932) 147 L.T. 503 at 512.

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sought to be effected in one. The method employed by the draftsman is new to me and we were not referred to any reported case in which a similar means of expression has been adopted, but in principle I can see no reason why parties may not combine in one instrument an offer open for some months and an immediate acceptance of that offer.

I think that, read as a whole, the agreement of April 21, 1948 with its schedules discloses the intention of the parties to agree that on or before August 1, 1948 the respondents would commence to drill a well in the manner set out in paragraph 2 of the agreement, that forthwith on such commencement the parties would execute the sub-lease and that the respondents would carry on the drilling of the well to completion in the manner set out in the sub-lease. I think that the respondents were bound in contract not only to commence but to complete the drilling of the well within the time and in the manner prescribed, and that such obligations bound them from the moment that the agreement of April 21, 1948 was executed.

I think that the principle applicable is accurately expressed in the following passage from Pollock on Contracts 13th Ed. (1950) at page 35. "It has been said that 'there cannot be a contract to make a contract' but this is a misleading epigram, for it is inaccurate in so far as it goes beyond the rule that, if parties to an agreement leave essential terms in it undetermined and therefore to be settled by subsequent contract, their agreement is not an enforceable contract. On the other hand, as Lord Wright said in *Hillas and Co., Ltd.* v. *Arcos, Ltd.* (*Supra*) at 515, 'A contract *de præsenti* to enter into what, in law, is an enforceable contract is simply that enforceable contract, and no more and no less; and if what may not very accurately be called the second contract is not to take effect till some future date but is otherwise an enforceable contract, the position is as in the preceding illustration, save that the operation of the contract is postponed. But in each case there is *eo instanti* a complete obligation.' "

What I have said as to my view of the proper construction of the contract will indicate that I cannot accede to the respondents' argument that their only obligation

was to commence to drill a well. It may be observed in passing that it would have been of no advantage to the appellant to have the respondents merely commence the drilling of a well on or before August 1, 1948. The terms of the head lease required that once having been commenced such drilling operation must be diligently carried on to the prescribed depth. Commencement of drilling coupled with failure to carry on (unless such failure were excused under paragraph 14 quoted above) would result not in any benefit to the appellant but in forfeiture of the head lease.

There is no suggestion that the appellant was not at all times ready and willing to perform his side of the bargain. Before the time arrived at which the first act of performance was due from the respondents they definitely repudiated the agreement and the appellant became entitled to bring this action for damages for breach of the contract.

For the above reasons, I respectfully agree with the learned trial judge that the respondents are liable in damages to the appellant for failure to drill a well to the prescribed depth. It is to be observed that this conclusion appears to be in harmony with the view the parties themselves entertained as disclosed in the correspondence at the time of, and following, the repudiation of the contract by the respondents. Quite apart from this correspondence and proceeding only upon a consideration of the terms of the written instrument I find myself in agreement with the view of the learned trial judge; but the view expressed in the correspondence is entitled, I think, to some weight in reaching a decision. In *Foley* v. *Classique Coaches Ltd* (1), Lord Hewart C.J. is reported to have said: "There is no doubt that the parties intended to make a binding contract and thought that they had done so, and that is a circumstance which, according to the judgments of Lord Tomlin, Lord Thankerton and Lord Wright in *Hillas & Co.* v. *Arcos* (2), ought to be taken into consideration in deciding whether there is a concluded contract or not." The Court of Appeal affirmed Lord Hewart's judgment and Maugham L.J. said, at page 13: "In the later case, *Hillas and Co.* v. *Arcos* (1), some weight, although not too much, is to be

(1) [1934] 2 K.B. 1 at 5. (2) 147 L.T. 503.

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attached to the fact that the parties conceived that they were entering into a binding contract, and the old maxim applies that the document should, if possible, be so interpreted *ut res magis valeat quam pereat.*"

It remains to be considered on what principle and at what amount the damages should be assessed.

The underlying principle is expressed by Lord Atkinson in *Wertheim* v. *Chicoutimi Pulp Co.* (1): "And it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed * * * That is a ruling principle. It is a just principle." In the case at bar if the respondents had carried out the contract the appellant would not have had to pay the $1,000 for a six months' extension which he did in fact pay to the head-lessor. The circumstances as to the necessity of making such payment were known to the parties and I agree with the learned trial judge that that sum is recoverable. What further benefits would have resulted to the appellant from the performance of the contract? If the respondents had drilled the well to the prescribed depth and it had proved a producer, the appellant would have received, (*a*) his share of the proceeds and, (*b*) the benefit of having the head lease validated, by the performance of the lessee's covenant to drill, not only as to the 80 acres described in the sub-lease but as to the whole 160 acres described in the head lease. If on the other hand, as, from the evidence of the geologists, would seem much more probable, the well had proved a failure the appellant would not have received benefit (*a*) but would have received benefit (*b*). It must be remembered however that as a result of the respondents' breach the appellant holds the whole 160 acres free from any claim of the respondents. No part of the consideration which under the contract would have passed to the respondents has passed, except that from April 21, 1948 until some time in June 1948, when they repudiated the agreement, the respondents had rights in the 80 acres and the appellant was not free to deal therewith. Under these circum-

(1) [1911] A.C. 301 at 3097.

stances, I do not think that the cost of drilling is the proper measure of damages. Suppose that instead of the consideration set out in the contract the appellant had agreed to pay the respondents $53,500 to drill the well and the respondents had repudiated the contract before the date set for the commencement of the work and before any moneys had been paid to them. In such a case by analogy to the rule in the case of building contracts the measure of damages would seem to be the difference (if any) between the price of the work agreed upon and the cost to which the appellant was actually put in its completion. I think it will be found that those cases in which it has been held that the cost of drilling is the proper measure of damages are cases where the consideration to be given for the drilling had actually passed to the defendant. Examples of such cases are *Cunningham* v. *Insinger* (1), and *Pell* v. *Shearman* (2) (a contract to sink a shaft).

The appellant did not seek to put his case on the ground that by reason of the breach he stood to lose the head lease, but rather that he intended to make and was in process of making other arrangements to have a well drilled. In my view, the proper measure of his damages under the circumstances of this case is the difference between the value to him of the consideration for which the respondents agreed to drill the well and the value to him of the consideration which, acting reasonably, he should find it necessary to give to have the well drilled by others. I am unable to find in the record evidence on which the damages can be assessed on this basis. It is well settled that the mere fact that damages are difficult to estimate and cannot be assessed with certainty does not relieve the party in default of the necessity of paying damages and is no ground for awarding only nominal damages, but the onus of proving his damages still rests upon the plaintiff. The evidence of the appellant given at the trial on December 3, 1948 was to the effect that he and his associates had been and still were in negotiation with an oil company but that they had found themselves forced to deal with the whole 160 acres instead of 80 acres. As Mr. Steer pointed out there is no evidence as to the terms offered by such com-

(1) [1924] S.C.R. 8.
156 E.R. 650.

(2) (1855) 10 Ex 766;

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pany and such terms may have been more or less advantageous to the appellant than those contained in the contract sued on. It would have been open to the appellant to have delayed bringing his action until the completion of his arrangements to have the well drilled by which time the damages, if any, would have been more easily ascertained. But the appellant, as he had a right to do, brought his action to trial before that date. There is no complaint that any evidence he wished to tender in support of his claim for damages was rejected, nor was there any request made for a reference to fix the damages and the case must be decided upon the evidence in the record. In my view, there is no evidence to support an award of damages other than the $1,000 paid for the extension of the time for drilling. If the evidence shewed that the appellant had suffered or must of necessity suffer substantial damages, over and above the $1,000 already mentioned, by reason of the respondents' breach, the Court should, I think, seek some means of arriving at a proper assessment, but in my view the most that the evidence can be said to indicate is a probability of some loss. It is possible that there has been no loss at all.

For the above reasons, I would dispose of the appeal in the manner proposed by my brother Kerwin.

Appeal allowed.

Solicitors for the appellant: *Nolan, Chambers, Might, Saucier, & Peacock.*

Solicitors for the respondents: *Fisher, McDonald & Fisher.*