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 \*Oct. 18, 19. THOMAS E. NUGENT, ADA H. DOLAN }  
 \*Oct. 31. AND CHARLES P. NUGENT (PLAIN- APPELLANTS;  
 TIFFS) ..... )

AND

HUGH H. McLELLAN, JOHN A. WAR- }  
 NOCK, GILBERT G. MURDOCH, } RESPONDENTS.  
 AND CHARLES A. OWENS (DEFEND- }  
 ANTS) ..... )

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK,  
 APPEAL DIVISION

*Landlord and Tenant—Covenant in lease—Construction—Option of re-  
 newal—Appeal to Supreme Court of Canada—Jurisdiction—Value of  
 matter in controversy.*

A lease of land for a term of 10 years contained a covenant by the lessor  
 that he "shall if requested by [the lessee, his executors, administrat-  
 ors or assigns] at least three months before the expiration of the

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\*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Lamont and  
 Smith JJ.

term hereby demised, pay to [the lessee, etc.] a sum of not more than \$500 for the buildings now upon the said property and any further buildings that may be erected or built upon the said property during the term hereby created if being thereon at the expiration of the said term, or else grant a new lease of the aforesaid premises to [the lessee, etc.] for the further term or time of 10 years \* \* \* and also a further renewal \* \* \* for a further term of 10 years \* \* \* at and under the same yearly rent."

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*Held*, that under this covenant the lessor had the option of paying for the buildings at the expiration of the term of the lease or renewing the lease; it did not give the lessee an option to require a renewal.

*Held* further, that this Court had jurisdiction to hear the appeal; the matter in controversy was defendants' right to a lease for 10 years at \$50 a year; the evidence showed that the property had an annual rental value of at least \$400; if defendants' contention (that they had a right of renewal) was correct, plaintiffs would receive a rental of \$50 a year, or a sum of \$500 for the next 10 years; if plaintiffs' contention was correct they would receive a rental for the next 10 years of probably not less than \$4,000; the difference between these two sums was the value of the matter in controversy, and it was more than sufficient to clothe the Court with jurisdiction.

APPEAL by the plaintiffs from the judgment of the Supreme Court of New Brunswick, Appeal Division, which, affirming the judgment of Grimmer J., held that the defendants had a right of renewal of the lease in question. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed with costs.

*F. R. Taylor K.C.* for the appellants.

*Harold Fisher K.C.* and *G. H. V. Belyea K.C.* for the respondents.

The judgment of the court was delivered by

LAMONT J.—In their statement of claim the plaintiffs allege that they are the owners of certain lands described therein (which border upon a portion of Wood lake) together with all the fishing privileges and other rights in or to the said lake. They also allege that the defendants trespassed upon their said property, broke down the fences, and broke and destroyed the locks on the buildings situated thereon, and they claim an injunction restraining the defendants from further trespassing upon the property and damages for the trespass already committed.

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In their statement of defence the defendants, who are members of the Wood Lake Fishing Club, set up that at the time of the alleged trespass they had possession of the said property and had the right of possession thereto under and by virtue of a lease thereof, dated the first day of June, 1916, from Patrick H. Nugent, the then owner, to Martin R. Dolan, who, they alleged, took the lease as trustee for the members of the Wood Lake Fishing Club. The lease was for a term of ten years and the rent reserved \$50 per year. Both Patrick H. Nugent and Martin R. Dolan died before the expiration of the term granted, and it is not disputed that the plaintiffs are the present owners of the property or that the defendants entered upon the property and committed acts thereon which would constitute trespass if not done under legal right.

The defendants justify their entrance upon the property under a clause in the lease which reads as follows:—

And the said Patrick H. Nugent for himself, his heirs, executors and assigns covenants, promises and agrees to and with the said Martin R. Dolan, his executors, administrators and assigns that he the said Patrick H. Nugent, his heirs, executors and assigns shall if requested by the said Martin R. Dolan, his executors, administrators or assigns at least three months before the expiration of the term hereby demised, pay to the said Martin R. Dolan, his executors, administrators or assigns a sum of not more than five hundred dollars for the buildings now upon the said property and any further buildings that may be erected or built upon the said property during the term hereby created if being thereon at the expiration of the said term, or else grant a new lease of the aforesaid premises to the said Martin R. Dolan, his executors, administrators or assigns for the further term or time of ten years to commence from the expiration of the said term hereby granted and also a further renewal of the said lease for a further term of ten years after the expiration of the said preceding terms at and under the same yearly rent, payable half-yearly as aforesaid.

This clause, the defendants contend, gave them an option, at the expiration of the term demised upon giving the required notice, either to demand payment for the buildings they had placed upon the lands or to have a renewal of the lease—whichever they might desire. They also contend that they duly requested a renewal of the lease from the present owners but failed to obtain it, and in their counterclaim they ask that specific performance of the covenant be decreed and that the plaintiffs be ordered to execute a renewal lease of the premises.

The plaintiffs, on the other hand, contend that the above clause, on a true construction thereof, gives an option to the lessor either to pay for the buildings or grant a renewal of the lease—whichever he may choose.

The evidence shews that prior to the expiration of the lease the plaintiffs offered to pay to the Fishing Club \$500 for the buildings on the property. The learned trial judge upheld the defendants' contention and construed the clause as follows:—

I am of the opinion that the meaning of the condition of the lease relating to the renewal is that if the lessee so requested the lessor at least three months before the expiration of the lease, he, the lessor, would pay him \$500 for the buildings upon the demised premises and the lease would expire and the term of the demise end. Should the lessee not wish to take this course but desire a renewal of the term he must request the lessor to grant a new lease which would be granted upon the same terms as to rental that prevailed with the original lease.

Upon appeal the majority of the Appellate Division upheld this construction, while Hazen C.J. construed the clause as giving to the lessor the option of renewing the lease or paying for the buildings.

From the judgment of the Appellate Division the plaintiffs now appeal to this Court.

The first question we have to determine is, has this Court jurisdiction to hear the appeal? We are of opinion that it has. The matter in controversy is the right of the defendants to a lease of the property in question for ten years at a rental of \$50 a year. The evidence shews that the property has an annual rental value of at least \$400. If the defendants' contention be correct the plaintiffs will receive a rental of \$50 a year, or a sum of \$500 for the next ten years. If the plaintiffs' contention be correct the rental received by them for the next ten years would probably amount to not less than \$4,000. The difference between these two sums is, in our opinion, the value of the matter in controversy in this action and it is more than sufficient to clothe the court with jurisdiction.

The next question is as to the construction to be placed upon the clause above quoted. We are of the opinion that the construction placed upon it in the dissenting judgment of Hazen C.J., is the correct one. The material words of the clause are “. . . Patrick H. Nugent \* \* \* shall if requested by the said Martin R. Dolan \* \* \* three

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months before the expiration of the term \* \* \* pay  
 \* \* \* a sum of not more than five hundred dollars for  
 the buildings \* \* \* or else grant a new lease of the  
 aforesaid premises \* \* \*.”

We find no ambiguity in this language. Nugent here was agreeing to do one of two things; he would, upon request, at the expiration of the ten years either pay for the buildings or renew the lease. The natural and ordinary meaning of the language used is that he had the choice, that the option was his, not Dolan's. The words “or else grant a new lease” imply an alternative, and the renewing of the lease was the alternative of paying for the buildings. To give the clause the construction placed upon it in the courts below would require, as pointed out by Hazen C.J., the insertion of the words “if not so requested” between “else” and “grant,” so as to make it read “or else, if not so requested, grant a new lease.” This, in our opinion, would be altering the meaning of the unambiguous language of the clause and making a new contract for the parties.

As the defendants have failed to justify the acts of trespass alleged against them the appeal must be allowed with costs both here and in the courts below. As the actual damage resulting from the trespass was slight and was not of the real substance of the action the plaintiffs will have nominal damages only. They are, however, entitled to an order restraining the defendants from further trespassing upon the premises.

*Appeal allowed with costs.*

Solicitor for the appellants: *Fred. R. Taylor.*

Solicitor for the respondents: *George H. V. Belyea.*

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