GERTIE E. J. PORTER (DEFENDANT) . APPELLANT; 1909

AND *March 2. *April 5.

DANIEL J. PURDY (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Lessor and lessee—Lease for years—Covenant to renew—Option of lessor—Ejectment—Equitable plea.

A lease for years provided that on its termination the lessor, at his option, could renew or pay for improvements. When it expired the lessor notified the lessee that he would not renew and that he had appointed a valuator of the improvements requesting her to do the same, which she did. The valuation was made and the amount thereof tendered to the lessee which she refused on the ground that valuable improvements had not been appraised, and refusing to give up possession when demanded the lessor brought ejectment. By her plea to the action the lessee set up the invalid appraisement and claimed that as the lessor's option could not be exercised until a valid appraisement had been made he was not entitled to possession. By a plea on equitable grounds she again set up the invalid appraisement and asked that it be set aside and the lessor ordered to specifically perform the condition in the lease for renewal and for other and further relief.

Held, affirming the judgment appealed against (38 N.B. Rep. 465), Idington J. dissenting, that though the appraisement was a nullity that fact did not defeat the action of ejectment; that the acts of the lessor in giving notice of intention not to renew, demanding possession and bringing ejectment, constituted a valid exercise of his option under the lease, and that the lessor was entitled to possession.

Held, also, Idington J. dissenting, that sec. 289 of the "Supreme Court Act of New Brunswick" did not authorize that court to grant relief to the lessee under her equitable plea; that such a plea to an action of ejectment must state facts which would entitle the defendant to retain possession, which the plea in this did not do.

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

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APPEAL from a decision of the Supreme Court of New Brunswick(1), maintaining the verdict at the trial in favour of the plaintiff.

The material facts are stated in the above headnote.

Ewart K.C. and *W. B. Wallace K.C.* for the appellant.

McKeown K.C. for respondent.

THE CHIEF JUSTICE agreed with Duff J.

DAVIES J.—I concur with the opinions of Duff J. and Anglin J. dismissing this appeal.

IDINGTON J. (dissenting).—The appellant is the lessee of property described in a renewable lease which originally began to run in 1840 and of which the last renewal expired in May, 1907. This is an action of ejectment brought by the lessor since the expiration of the term to recover possession from the lessee whose only answer seems to be rested by the statement of defence upon the equity she claims to have arisen under the following agreement in the lease:

> And it is agreed by and between the parties to these presents, that *at the end of the said term*, the buildings or improvements heretofore erected, or which may hereafter be erected or made by the said Anne Cunard, her executors, administrators or assigns, on the demised premises, shall be valued *by two indifferent persons*, one to be chosen by each party, which two parties, in case of disagreement, shall choose a third, the appraisement of whom, or any two of whom, *shall be conclusive*, as to the value of such buildings and improvements; *at which time it shall be in the option* of the said Charles William K.

(1) 38 N.B. Rep. 465.

Cunard, his heirs and assigns, *to pay to the said Anne Cunard*, her executors, administrators and assigns, *such appraised value, or to continue the lease of the said premises to the said Anne Cunard*, her executors, administrators and assigns, for a further term of twenty-one years, at the same yearly rent, under the like covenants in all respects as herein contained and expressed.

I construe this as containing mutual covenants by the parties that there shall be "at the end of the term" a valuation in the manner prescribed of buildings and improvements and then and not before the lessor shall declare his election and at least until he has after such finding so declared the lessee is bound to hold herself ready to renew.

I think there is clearly an implied agreement that the lessee shall remain in possession pending the bringing about of what is expressly provided for as the basis of the further execution of what has been partly in express terms and partly by implication agreed to be done.

If ever there was a contract where the considerations "of the terms of the contract in a reasonable and business manner" as expressed in the very apposite words of Lord Esher in *Hamlyn & Co.* v. *Wood & Co.* (1), gave rise and vitality to an implication, when due regard is had to what the surrounding circumstances and the evident purposes of the parties were, this is that contract.

The English cases of analogous import seem to be generally of a converse character giving the lessee the option, and hence in part the difficulty of finding authority.

But we have the American cases of *VanRensse-*

(1) (1891) 2 Q.B. 488.

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laer's Heirs v. *Penniman*(1), followed in *Holsman* v. *Abrams*(2), which seem very much in point, though I cannot assent to what is suggested there as to a tenancy from year to year resulting unless supplemented by payment of rent in the way which usually implies that. *Nudell* v. *Williams*(3) is in the same direction.

The observations by eminent judges in *Hamlyn & Co.* v. *Wood & Co.*(4) to the effect that cases upon other contracts are of little service stand good, yet the authorities largely got together in the argument of that case, and on the same subject of necessary implication under review from a different point of view in the case of *Butterfly Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*(5), in the current volume, exhibit the maintenance of numerous implications much less obvious than what I find here.

Having regard to the express covenants and necessary implications here, just as clear to my mind, I think a court of equity could in such a case restrain the lessor from proceeding in violation of his obligations in the premises. In view of the nullity of the award as made; of the ambiguous character of the lessor's election; of the possibility that there is no power to compel the appraisers to act and rectify their omission or the lessor to nominate another, or in any way do what obviously must be done to enable the lessee to obtain what by the findings of the learned trial judge is her right, I think it needless to elaborate how or why a court of equity could and should holding my view of the agreement find its way to restrain the respondent. Without extending the equit-

(1) 6 Wend. 571.
(2) 2 Duer. 435, at p. 446.
(3) 15 U.C.C.P. 348.
(4) (1891) 2 Q.B. 488.
(5) 99 L.T. 818.

able jurisdiction given by the statute further than was in the somewhat analogous legislation of the "Common Law Procedure Act" done as applied to other cases than ejectment suits when the test was whether restraint could properly be applied unconditionally to the claim set up I think such an equity exists here.

Whether in the case of a full explicit repudiation of all his obligations by the lessor which would clearly entitle the lessee to an action for damages the court, seeing he is a man of substance, might or not leave her to her action may not be clear, but he has created a most embarrassing situation I need not dwell on merely to make more so.

But in the case presented and holding the view I do of the nature of the obligations binding the parties and possible want of other remedy there should be no doubt of what course to adopt.

The defence, however, is maintainable at law and the pleading is amendable and we are bound to amend if need be to do justice. The respondent's right to eject could only arise when the lessee's holding became wrongful by virtue of the lessor's express election and demand of possession after a valid award. I see, however, no necessary implication that the appellant should be entitled to hold longer than until the lessee's election after such an award. To hold for an ulterior purpose of securing payment seems an extension of the term not fairly within the reasonable implications of the agreement.

I would declare award void, allow the appeal with costs and dismiss the action.

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DUFF J.—The respondent is the owner of the reversion in certain premises in the City of St. John which, by a lease dated the 1st of May, 1886, were demised for a term of twenty-one years from that date to the appellant's predecessor in title. The lease contained a provision in the following words:

> And it is agreed by and between the parties to these presents that at the end of the said term the buildings or improvements heretofore erected, or which may hereafter be erected or made by the said Anne Cunard, her executors, administrators or assigns on the demised premises, shall be valued by two indifferent persons, one to be chosen by each party, which two parties, in case of disagreement, shall choose a third, the appraisement of whom, or any two of them, shall be conclusive as to the value of such buildings and improvements; at which time it shall be in the option of the said Charles William K. Cunard, his heirs and assigns, to pay to the said Anne Cunard, her executors, administrators and assigns, such appraised value, or to continue the lease of the said premises to the said Anne Cunard, her executors, administrators and assigns, for a further term of twenty-one years, at the same yearly rent, under the like covenants in all respects as herein contained and expressed.

Upon the expiry of the term valuators were appointed who professed to make an appraisement pursuant to this provision. The respondent then notified the appellant that he would pay to her the sum found by the appraisement as the value of the improvements, and at the same time tendered that sum. This tender the appellant refused to accept; and the appellant having further refused to give up possession, in compliance with the respondent's subsequent demand, the action out of which this appeal arises was brought. On the argument before us the respondent's claim to recover possession was put upon two grounds: 1st, that the term vested in the appellant having expired, she was left without any right of possession; and 2ndly, that assuming some right of possession to have remained vested in her after the expiry of the term and

pending the exercise by the respondent of the option conferred by the clause quoted above, that right has lapsed because the respondent has pursuant to that clause elected to pay the value of the improvements and to resume the premises demised.

The question raised by the first of these contentions need not in my view of the case be considered. To come to the second—the plaintiff, upon the expiry of the term became entitled to elect whether he would "continue the lease" for a further term of twenty-one years, or pay the lessee for her improvements. It is not perfectly plain on the face of this clause at what point of time or in what manner the election is to be exercised. The clause is susceptible of several constructions; and of these both parties seem to have accepted the view according to which the lessor was bound only to make his election within a reasonable time after the expiry of the term, and might do so by any unequivocal expression of his intention.

Has the lessor then exercised his election to pay for the improvements? In form he has admittedly done so. He has tendered the amount found by the valuators to be the value of the improvements; has expressly declared his intention not to renew the lease; has demanded possession; has brought ejectment. It is argued, however, that this *ex facie* valid exercise of his option to determine the possession of the lessee is vitiated by the circumstance that everything so done was done on the footing that there had been a valid appraisement of the improvements. It is not and cannot be seriously disputed that the valuators in making the appraisement left out of account improvements for which they ought to have allowed; or that this omission had the effect of invalidating the ap-

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praisement. Does this circumstance—the invalidity of the appraisement—affect the validity of the respondent's election?

The alternatives between which he was to decide, be it observed, were, in the words of the clause, on the one hand, "to pay * * * such appraised value" and on the other hand "to continue the lease * * * for a further term of twenty-one years." His election might be effected either by evincing an intention "to pay" or by evincing an intention not "to continue the lease." If we limit ourselves to evidence positively manifesting an intention to pay there is something to be said in support of the view that the respondent's acts indicated an intention to pay only the specific sum awarded by the valuators—rather than the true value of the improvements as determined by a proper proceeding under the provisions of the lease. But, whatever may be said upon that point, the notice of the 22nd of June, 1907, was in explicit terms a communication of the respondent's intention not to renew the lease. In the light of that communication the effect of the respondent's conduct appears to have been simply this; that he had decided to resume possession and that he was proffering a sum of money which was as much as he admitted he was liable to pay as the value of the improvements. That, subject to the effect of any mistaken belief under which he may appear to have acted, was an irrevocable election to pay whatever the appellant might be entitled to.

Did the respondent then proceed under any mistake which can be held to have deprived his acts of their normal legal effect? Had it appeared that both parties were proceeding under the belief that the valuators had made a complete valuation within the mean-

ing of the lease, and that the respondent had exercised his option under that belief, when in truth the exercise of the option exposed him to a liability to pay a very much larger sum than that awarded by the valuators, it may be that (no equity intervening to prevent it, and the appellant insisting upon a valuation pursuant to the lease), the respondent would have been entitled to revoke his election. It would, nevertheless, even in that case, be revocable only at his option. I do not know upon what principle the appellant could insist on treating it as void so long as the respondent should be willing to stand by it. Here, however, evidence is wanting to support the contention that it was open to the respondent—at all events at any time after the commencement of the action—to recall his election. It is quite impossible I think to escape the inference that, at least as early as the time when the appellant refused the respondent's tender, the respondent became aware that she disputed the validity of the valuation. In these circumstances whatever might have been his rights up to that time, he must be taken by bringing ejectment to have concluded himself from setting up his mistake as a ground for withdrawing from the position he had assumed.

The appellant's defence consequently fails. But an important question arises respecting the cross relief claimed by the defendant. The facts do, I think, establish her contention as I have already intimated that the the appraisement so called was wholly invalid; and it is, moreover, I think, sufficiently calculated to becloud her rights in regard to compensation and to embarrass her in the prosecution of her claim to give her a title to relief in a court of equity. The difficulty in the defendant's way is one which arises

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solely out of rules of procedure. The Supreme Court of New Brunswick has held that under the "Supreme Court Act" it is not within the power of the court to grant the appellant any relief in this action. One cannot help feeling that in the circumstances of this case it is regrettable that such relief cannot be given at once; but I cannot bring myself to entertain any doubt that this court would not be justified in reversing the decision of the court below on that point. The question is, as I have said, a question of procedure—whether the Supreme Court of New Brunswick on its common law side has power in this action to grant the relief claimed or whether on the other hand substantive proceedings must be instituted in the equity branch of the court. The course of this court—and if I may say so the rule seems to me to be a wise one—is that we do not interfere with the deliberate decisions of provincial courts upon matters which are matters of procedure only unless the determination impeached involve something like a departure from the requirements of substantial justice. It is impossible to say that there is any such departure in this case. I venture, moreover, to say that I have just as little doubt that on the merits of the question the decision of the Supreme Court of New Brunswick is right. The statutory provisions material for consideration to the point are these:

Section 134. For the purpose of carrying into effect the objects of the two last preceding sections and of the provisions of this chapter relating to ejectment, respecting equitable defences, and for causing complete and final justice to be done in all matters in question in any action on the common law side of the court, the court or a judge thereof, according to the circumstances of the case, may at the trial or at any other stage of the action or other proceeding, pronounce such judgment or make such order as the equitable rights of the parties respectively require, and may make such rule or order as to

adding third parties, or treating parties named plaintiffs as defendants, or parties named defendants as plaintiffs and as to costs and may direct such inquiries to be made and accounts to be taken as seems reasonable and just and may as fully dispose of the rights and matters in question as a court of equity could.

Section 287. In case the defendant, or any other person not named in the writ who has obtained leave to appear and defend, has a defence to the action on equitable grounds, he may in addition to the notice denying the plaintiff's title, and asserting title in himself, state by way of defence the facts which entitle him on equitable grounds to retain possession; and such statement shall begin with the words, "For a defence on equitable grounds."

Section 289. The defendant may in such statement, as in a bill in equity or in answer asking gross relief, attack the title of the plaintiff on any ground whatever, and in all such cases he may pray and ask for relief against the plaintiff; and it shall be competent for the court on the hearing or trial of the cause in all such cases to grant or withhold the relief prayed for as law and justice shall demand, and generally to do justice and to determine all questions between the parties arising in the action according to law.

Section 289 is the enactment mainly relied upon. The relief which the courts thereby authorized to grant the defendant in an action of ejectment would seem to be relief which is based upon a state of facts affording a ground for impeaching the plaintiff's title to which the court can give effect and does give effect as a defence to the action. In other words before the power conferred upon the court by this section can come into operation you must have facts sufficient to support an attack on the plaintiff's title and thereby constituting a defence to the action; then and then only, if on that state of facts the defendant would in a substantive proceeding be entitled to claim affirmative relief against the plaintiff the statute empowers the court (in order to give complete effect to the rights arising out of that state of facts), to grant that relief at once, without the necessity of further proceedings. My view of the section may be exemplified by supposing the case of a plaintiff in ejectment who bases his

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rights to possession upon a conveyance by the defendant which the latter alleges was obtained by undue influence. Under the "Common Law Procedure Act" that circumstance could not have been set up by the defendant as a defence in an action of ejectment. Chitty's Archbold (12 ed.) 1038. In an action in the King's Bench Division for the recovery of possession of land the defence might be set up and if established the deed treated as set aside for the purposes of the action only; but no order directing the cancellation of the instrument could be granted. To use the language of Brett J. in *Mostyn* v. *West Mostyn Coal Co.*(1), at page 150, the deed could not be "set aside with regard to its effect in the future." The provisions in question here go a step further. Not only is the court authorized to give effect to the defence for the purposes of the action but any affirmative relief to which the defendant would be entitled in substantive proceedings in equity may be given in the ejectment action. It is a vastly different thing, however, to say that the court is empowered to grant such relief upon a state of facts which it has held to be wholly irrelevant to the plaintiff's claim. Such a case is, I think, plainly outside the purview of the section. And this is such a case; for here it has been held both in the court below and in this court that the invalidity of the so-called appraisement has no relevancy whatever to the respondent's claim for the recovery of the land.

I concur in the declaration proposed by my brother Anglin and subject to that would dismiss the appeal with costs.

(1) 1 C.P.D. 145.

ANGLIN J.—The appellant (tenant) appeals from the judgment of the Supreme Court of New Brunswick awarding to the respondent (landlord) possession of certain wharf property on the River St. John in the City of St. John. The lease under which the appellant held this property expired on the 1st May, 1907. It contains the following provision:

> And it is agreed by and between the parties to these presents, that, at the end of the said term, the buildings or improvements heretofore erected or which may hereafter be erected or made by the said Anne Cunard, her executors, administrators or assigns on the demised premises shall be valued by two indifferent persons, one to be chosen by each party, which two parties in case of disagreement shall choose a third, the appraisement of whom or any two of whom shall be conclusive as to the value of such buildings and improvements, at which time it shall be in the option of the said Charles William K. Cunard, his heirs or assigns to pay to the said Anne Cunard, her executors, administrators and assigns such appraised value or to continue the lease of the said premises to the said Anne Cunard, her executors, administrators and assigns for a further term of twenty-one years at the same yearly rent, under the like covenants in all respects, as herein contained and expressed.

On the 2nd May, 1907, the landlord notified the tenant that, under this covenant, he had chosen and appointed one Holder as his appraiser and that he required the tenant to appoint her appraiser. On the 21st May the tenant formally notified the landlord that she had appointed as her appraiser one Belyea. The two appraisers so appointed met and, being unable to agree, chose, as third appraiser, one Edgett.

In the course of the trial some exception appears to have been taken by counsel for the tenant to the right of the two appraisers, named by the parties, themselves to select the third appraiser. The trial judge overruled this objection and it was not renewed on appeal to the Supreme Court of New Brunswick, nor has it been raised in this court.

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The appraisers proceeded to make a valuation, and eventually two of them—Holder and Edgett—concurred in an appraisement, dated the 15th of June, 1907, in which they valued the tenant's improvements at $2,550. There was some conflict of evidence as to whether proper steps had been taken to render the appraisement sufficient and binding without the concurrence of the appraiser named by the tenant. No objection, however, on this ground appears to have been urged in the Supreme Court of New Brunswick, and the point is not raised in this court. But the appraisers, as found by the trial judge—this finding being affirmed in the Supreme Court of New Brunswick—omitted to include in the improvements for which they made allowance, a portion of the wharf property which had been constructed of crib work and filled in, and which appears to be of substantial value. The courts below have expressed the opinion that upon this ground the appraisement is invalid. On the 22nd June the landlord notified the tenant that he had "decided not to renew the lease" and that he would pay "the amount of said award and terminate the said lease." The tenant did not relinquish possession, and on the 23rd July the landlord served upon her a formal notice to quit. The notice of the 22nd June was accompanied by a tender of the amount of the award, and a similar tender was made to the tenant at or about the time when the notice of the 23rd July was given. The tenant still continuing in possession, the landlord brought the present action of ejectment.

The Supreme Court of New Brunswick, affirming Hanington J., has held that there is no agreement, express or implied, in the lease entitling the tenant to retain possession of the demised premises after the

expiration of the term of the lease, and that the landlord upon his demand was entitled to possession thereof before exercising his option to take the property over and pay for the improvements. The tenant, appealing to this court, contends that it is a necessary implication from the provision of the lease as to renewal that she should have the right to retain possession until the landlord has exercised, in a manner binding upon him, his option, not to renew but to pay for improvements.

The tenant alleges that the landlord, in giving the notice of the 22nd June that he had decided not to renew the lease, proceeded upon the assumption that the award of the appraisers was valid, and that, in giving the notice of the 23rd July, he proceeded upon the like assumption; that, under the terms of the provision above quoted from the lease, the landlord is not bound to elect until there has been a valid appraisement of improvements; and that his election, in the mistaken belief that there had been such an appraisement, is not binding upon him. Therefore, the tenant claims, the landlord has not yet irrevocably elected not to renew and until he has so elected she insists upon her right to retain possession.

Counsel for the landlord supported the judgment in appeal upon two grounds: (1) that under the terms of the lease the landlord is entitled to possession although he has not exercised his option against renewal; and (2) that he is entitled to possession, whatever the proper construction of the lease, because he has in fact irrevocably elected against renewal; and he took the position that his client has exercised his option against renewal in a manner binding upon him, and that he is prepared to abide by the consequences

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of having so exercised such option, including the chance of there being a larger appraisement of the value of improvements for which the tenant is entitled to compensation, should the award already made be set aside and a new appraisement had.

By her pleadings and at bar in the courts below, as well as in this court, the tenant has asked that, in any event, upon the finding that the appraisement is invalid, she should be given judgment for consequential relief in the form of an order setting aside the award and directing a re-appraisement.

If, upon its proper construction, the provision above quoted from the lease allows the landlord to postpone the exercise of his option until an appraisement or valuation of the improvements has been duly made, that is a term inserted for his benefit and, upon the maxim *quisque potest renunciare juri pro se introducto,* he may waive his right to await the appraisement of the valuators and may exercise his option immediately upon the expiration of the lease. If, doing so, he elects not to renew, he takes his chances as to the outcome of the appraisement of improvements. I see no reason why, when the landlord asks that the decision in his favour be upheld because he has elected not to renew and declares that he has so exercised his option under the lease, he should not be taken at his word, and given judgment upon that ground. *Gandy* v. *Gandy*(1), at pp. 81 *et seq.*

It seems to me unnecessary to determine the somewhat nice question whether, if he had not exercised his option, the landlord would be entitled to recover possession of the demised premises. If he should be so entitled, it would follow that, pending the appraise-

(1) 30 Ch.D. 57.

ment, he could eject his tenant, thereby seriously injuring, if not destroying, the business carried on by her on the premises, and yet, after the lapse of whatever time should be consumed in the making of a proper appraisement, he might notify the tenant that he elected to renew, when she would be confronted with the alternative of incurring the expense of moving back into the premises, and paying rent for the period during which she had been deprived of possession, or of forfeiting her right to compensation for her improvements. This not improbable situation affords a plausible argument against a construction which would give to the landlord the right to eject the tenant before he had irrevocably elected not to renew and also affords some support to the contention that the words "at which time" in the provision of the lease conferring his option upon the landlord were intended to relate not to the date at which the appraisement of the value of buildings and improvements should be completed, but to the date at which the term of the lease should expire.

But, inasmuch as the tenant's right eventually to recover the duly appraised value of her improvements will be protected by the estoppel of a judgment based upon a declaration, to which the landlord is willing to submit, that he has already made a binding election not to renew, I think that, varied by the insertion of such a declaration, the judgment for possession in favour of the respondent should be affirmed.

The respondent has also been awarded the sum of $250 for mesne profits since the termination of the lease. Of this the appellant complains. In view of the disposition of the main appeal, this portion of the judgment cannot well be interfered with.

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The right of the tenant to the cross relief which she asks, in the nature of an order setting aside the appraisement and remitting the matter of valuation of the appraisers for further consideration, depends upon the provisions of the statute law of New Brunswick applicable to actions of ejectment.

The Supreme Court Act (C.S.N.B. [1903], ch. III.) contains provisions with regard to equitable pleas similar to those of the "Common Law Procedure Act" (C.S. U.C. [1859], ch. 52), held not to apply to actions of ejectment (*Neave* v. *Avery et al.*(1)) and the "Administration of Justice Act" (Ont. 36 Vict. ch. 8). Amongst the latter are found, in sections 287 to 289, the provisions permitting defences upon equitable grounds in actions of ejectment. By section 287 the defendant is permitted to

> state by way of defence the facts which entitle him on equitable grounds to retain possession.

By section 289 he is permitted to

> attack the title of the plaintiff on any ground whatever and in all such cases he may pray and ask for relief against a plaintiff.

As pointed out by Barker C.J. section 289 can "only have reference to matters which would amount to a defence to the action, or which, in the language of section 287, would entitle the defendant to retain possession." The landlord having elected against renewal, it is obvious that the equitable plea of the tenant alleging the invalidity of the appraisement cannot constitute a defence to the action on equitable grounds. Neither does it amount to an attack upon the title of the plaintiff and, although by section 289 the court is empowered

(1) 16 C.B. 328.

to grant or withhold the relief prayed for as law and justice shall demand and generally to do justice and to determine all questions between the parties arising in the action according to law,

this jurisdiction is conferred only in "such cases," that is, in cases where the defendant puts upon the record by way of equitable defence a plea alleging matters which constitute a defence to the plaintiff's claim for possession—which entitle the defendant on equitable grounds to retain possession. If, upon such a plea, the defendant is entitled to relief, the court is empowered to give it to him. But the foundation of the jurisdiction is a plea by the defendant stating facts which entitle him on equitable grounds to retain possession. The plea in the present instance does not fall within this description. It alleges matter wholly irrelevant to the plaintiff's claim for possession based upon his having elected against renewal and it does not, therefore, present a case in which the court is empowered to exercise the jurisdiction conferred by section 289.

Counsel for the appellant directed attention to sections 133 and 134 of the "Supreme Court Act." These sections embody provisions of the "Administration of Justice Act." (See 36 Vict. (Ont.) ch. 8, secs. 3 and 8.) Section 134 enables the court to

pronounce such judgment or make such order as the equitable rights of the parties respectively require,

and

for the purpose of carrying into effect the objects of the two last preceding sections and the provisions of this chapter relating to ejectment, respecting equitable defences and for causing complete and final justice to be done in all matters in question in any action on the common law side of the court, * * * as fully dispose of the rights and matters in question as a court of equity could.

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This section, so far as it relates to an action for ejectment, for which a separate and distinct code is provided by secs. 275 to 385 of the "Supreme Court Act," appears to be limited in its purpose by the words above quoted. It is only for the purpose of carrying into effect the object of the provisions of sections 287-8 and 9 that the jurisdiction conferred by section 134 may be exercised in actions of ejectment. These provisions, as already indicated, do not extend to the pleading of equitable matters or equitable rights otherwise than by way of defence to the plaintiff's claim and it is only where they are properly so pleaded that relief can be given to the defendant in respect to them.

Having regard to these statutory provisions the proper conclusion seems to be that the appellant cannot in this action obtain the cross relief which she seeks in respect to the appraisement and which was refused her by the Supreme Court of New Brunswick.

For these reasons, with the variation in the judgment above indicated, I would dismiss this appeal with costs.

Appeal dismissed with costs.

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

Solicitor for the respondent: *Joseph J. Porter.*