1930
April 19.
May 12.

MARY J. TORMEY........................SUPPLIANT;

VS.

HIS MAJESTY THE KING.............RESPONDENT.

Crown—Lease—Perpetuities—Option to purchase—Tenancy—Interpretation of Contract

On the 11th March, 1845, the Crown leased certain ordinance lands to one McL. for a term of 30 years, it being provided that upon the expiration of the said term "upon the reasonable request, and at the proper cost and charges of the said John McLaurin by Indenture similar to this present lease, renew the same for the like term of thirty years, upon the like conditions and rents hereinbefore contained and reserved, to the said John McLaurin, his executors, administrators and assigns forever." The lessee failed to avail himself of this right and the lease was not renewed, but the assigns of McL. continued to occupy the said lands to the present, paying the yearly rent stipulated in the lease. The lease also provided that the lessee upon paying a certain stated sum would be entitled to a conveyance of the lands in fee simple. In 1927, the present occupants sent the Crown a cheque for the amount mentioned in the lease and requested a deed to the lands in question. The Crown returned the cheque and refused to convey the land for the sum offered, hence the present Petition of Right.

Held, that the option to purchase contained in the lease in question herein, being unlimited as to time, was therefore inoperative and void because of the rule against perpetuities, and is not now exercisable, and that the suppliant is not entitled to the relief sought.

2. That the tenant who holds over with the consent of the landlord becomes a tenant from year to year and holds upon the terms created by the lease, so far as they are applicable to a tenancy from year to year. An option contained in a lease to purchase the reversion and so destroy the tenancy is not one of the terms of the tenancy; it is a provision outside of the terms which regulate the relations between the landlord as landlord, and the tenant as tenant, and is not one of the terms of the original tenancy which will be incorporated into the terms of the yearly tenancy created by the tenant holding over after the expiration of the lease.

PETITION OF RIGHT by the suppliant herein to have it declared that the suppliant is entitled to exercise the option to purchase the property occupied by it under a lease made and passed on the 11th March, 1845.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

A. E. Fripp, K.C., and *A. F. Burrett*, for suppliant.

F. P. Varcoe, K.C., for respondent.

The facts herein and the questions of law raised are stated in the Reasons for Judgment.

THE PRESIDENT, now (May 12, 1930), delivered judgment.

By Indenture of Lease made the 11th day of March, 1845, certain lands belonging to the Crown and known as "Ordinance Property," situated in what is now known as the city of Ottawa, were leased unto one John McLaurin, his executors, administrators and assigns, for and during the term of thirty years. The lease provided that upon the expiration of the term of thirty years,

upon the reasonable request, and at the proper cost and charges of the said John McLaurin by Indenture similar to this present lease, renew the same for the like term of thirty years, upon the like conditions and rents hereinbefore contained and reserved, to the said John McLaurin, his executors, administrators and assigns forever.

The lease was not renewed upon the expiration of the term, but assigns of McLaurin continued, and now are, in occupation of the lands. The yearly rent stipulated in the lease was paid down to 1927 by those in occupation of the lands; payments were made irregularly, the rent not having been paid for a period of years at a time, but eventually any balance overdue was paid and accepted; nothing, however, I think turns upon that point.

The lease also provided that the lessors, their successors in office and assigns

shall and will at any time or times hereafter, on payment of the full sum of eighteen pounds ten shillings and four pence of lawful money of Canada aforesaid and of the rents hereinbefore reserved, and performance of the conditions and agreements hereinbefore contained, on the part of the said John McLaurin his . . . assigns, to be paid, done, and performed, which payment and performance is a condition precedent, execute and deliver to the said John McLaurin his . . . assigns, a conveyance in fee simple, without covenants, of the said parcel or lot of land and premises herein mentioned and described.

In January, 1927, the suppliant, requested in writing from the proper authorities a conveyance in fee simple of the land in question, then and now occupied by her, and this request was accompanied by a certified cheque for the amount of the consideration mentioned in the clause of the lease just referred to. The Crown returned the cheque to the suppliant by letter in July, 1927, and she was advised that she would later be informed as to any decision reached regarding the purchase of the land. In March, 1928, there was served upon the suppliant a notice to quit and deliver up possession of the land and premises in question. I should perhaps state, though I think it is not of import-

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ance, that buildings had in the meanwhile been erected upon the land by some one holding under the lease or in occupation as a yearly tenant; the Crown agreed to convey the fee simple to the suppliant or any other persons similarly situated—and there are I understand many other cases similar to this—at a price equivalent to the municipal assessment upon the land alone.

The suppliant contends that she is an occupant of the lands under the terms of the lease to McLaurin, and that the option to purchase is still subsisting, and she asks for a declaration that she is entitled to a grant of the land in question upon payment of the principal sum mentioned in the lease to McLaurin, or in the alternative, to a declaration that she is entitled to remain in possession of the premises so long as she performs the terms and conditions contained in the lease to McLaurin. The respondent's case is that upon the construction of the lease, the covenant to convey the fee simple upon payment of the stipulated purchase price, only subsisted during the currency of the lease, which expired in March, 1875; that since that date occupants of the lands have been yearly tenants only; and that in any event the option to purchase the fee simple is void because it infringes the rule against perpetuities.

It may, I think, be taken as settled law, that the tenant who holds over with the consent of the landlord becomes a tenant from year to year and holds upon the terms created by the lease, so far as they are applicable to a tenancy from year to year. This does not, however, mean that the tenant has the benefit of all the provisions of the expired lease whether they were terms of the tenancy or not. An option contained in a lease to purchase the reversion and so destroy the tenancy is not one of the terms of the tenancy; it is a provision outside of the terms which regulate the relations between the landlord as landlord, and tenant as tenant, and is not one of the terms of the original tenancy which will be incorporated into the terms of the yearly tenancy created by the tenant holding over after the expiration of the lease: *In re Leeds and Batley Breweries Limited, and Bradbury's Lease* (1); *Rider* v. *Ford* (2); *Woodall* v. *Clifton* (3). In the case before me, it is clear I

(1) (1920) 2 Ch. D. 548. (2) (1923) 1 Ch. D. 541.
(3) (1905) 2 Ch. D. 257, at p. 279.

think that since 1875, the assigns of McLaurin have occupied the lands in question as yearly tenants, and it follows, I think, that the relationship of landlord and tenant continues at least down to the time when notice to quit was served upon the suppliant. It would appear from the authorities, as stated by Russell J. in *Rider* v. *Ford,* that an option to purchase, unlimited in time, exists so long as the relationship of landlord and tenant continues, providing the rule against perpetuities is not infringed. In the case just mentioned, it was held, that the option to purchase, being unlimited as to time, was void under the rule against perpetuities; it was also held that a covenant for a renewal of a lease was outside the rule against perpetuities, and for this reason, some of the authorities cited to me by suppliants counsel are inapplicable, because they relate to covenants to renew leases while the relationship of landlord and tenant existed. In the case before me, the option to purchase seems to me to be unlimited as to time, and is therefore inoperative and void because of the rule against perpetuities and is not now exercisable, and upon that ground the suppliant must fail.

In view of all the circumstances of the case, and it being a test case, there will be no order as to costs.

Judgment accordingly.