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June 18.

GEORGE A. GRIER, OF THE CITY OF MONTREAL, IN HIS QUALITY OF CURATOR TO THE TATE ESTATE, HAVING BEEN DULY APPOINTED AS SUCH, ACCORDING TO LAW, TO WILLIAM WILBERFORCE TATE & GEORGE HENRY TATE, OF THE CITY OF MONTREAL, HEIRS AND REPRESENTATIVES OF THE LATE WILLIAM TATE AND GEORGE TATE, BOTH OF THE SAID CITY OF MONTREAL, IN THEIR LIFE TIME, NOW DECEASED..... PLAINTIFF;

AND

HER MAJESTY THE QUEEN.....DEFENDANT.

Lease by Crown—Proviso for compensation on cancellation—Building and Fixtures—Construction.

The Crown, represented by the Commissioners of Public Works for the Province of Quebec, in the year 1851, demised certain lands in the City of Montreal to the plaintiff's predecessors in title for the purpose of being used for the construction of a dock and ship-yard for the building, reception, and repair of vessels. The lease contained a proviso for its cancellation under certain circumstances, upon the lessors or their successors in office paying to the "lessees, their executors, administrators or assigns, *the then "value (with an addition of ten per cent thereon) of all the buildings "and fixtures that shall be thereon erected and belonging to the said "lessees.*"

Held, that the words "buildings and fixtures" in the proviso were large enough to include not only what were buildings, in the ordinary acceptation of the term, and the dock itself, but also whatever was accessory to, and necessary for the use of, such buildings and dock.

THIS was a claim for compensation arising out of a demise of lands and water-power.

The facts of the case are stated in the judgment.

On the 12th day of December, 1893, the case was sent to C. C. Gregory, Esq., as special referee for examina-

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tion and report. On the 4th January, 1894, he reported the value of the buildings and fixtures mentioned in the lease to be $80,474.56. From this report an appeal was taken to the court.

January, 29th, 1894.

A motion for judgment and a motion by way of appeal from the report of the Referee were now heard.

April, 9th, 1894.

It was ordered that further evidence be taken before the Registrar.

June, 4th, 1894.

Further evidence having been taken, the motion for judgment and that by way of appeal from the Referee's Report was now re-argued.

Hogg, Q.C., in support of motion, refers to *Woodfall on Landlord and Tenant* (1) and cases there cited.

Greenshields, contra, cites Arts. 379-380 and 567 to 582 *C. C. L. C.*; *Philion* v. *Bisson* (2); *Grand Trunk Railway Company* v. *Eastern Townships' Bank* (3); *Woofall on Landlord and Tenant* (4).

BURBIDGE, J. now (June 18th, 1894) delivered judgment.

The questions to be determined in this case have reference to the construction of the words "buildings and fixtures" occurring in a lease passed before notaries at the City of Montreal, in the Province of Quebec, on the 13th of March, 1851, between the Commissioners of Public Works, acting for Her Majesty, of the first part, and George Tate and William Tate of the said city, shipbuilders, of the second part. The main inquiry is: are the docks and other works accessory thereto, which the lessees constructed on the demised premises, within the meaning of the expression "build-

(1) P. 396.
(2) 23 L. C. J. 32.
(3) 10 L.C. J. 11.
(4) ed. 1889 pp. 646-649.

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ings and fixtures," and though these words are not perhaps the most apt or happy terms that could be chosen to describe a dock, the question must, it seems to me, be resolved in the affirmative.

By the lease in question the Commissioners of Public Works demised to the lessees, their executors, administrators and assigns a lot of land at Montreal, adjoining the Lachine Canal to be employed as a dock and shipyard for the building, reception and repair of vessels

"and other purposes with and forming part of the works of such "dock and shipyard, together with the use and enjoyment of so much "of the surplus water passing and to pass through the said canal as "should be sufficient for the working of the said docks, and also "to drive and propel four run of ordinary mill stones, for the purpose "of propelling saws and machines for dressing and preparing timber "for the use of the said dockyard, or for any other uses for which "that material may be applied."

The main object, apparently, of the lease was the construction of the docks, to which the mills for the sawing or dressing of timber were to be subsidiary. At the time the parties to the lease had in contemplation the construction of two docks and a basin. One dock was intended for the accommodation of sea-going vessels, and was to be constructed of a sufficient depth to admit of the largest class of vessels that might be expected to come to Montreal after Lake St. Peter should have been deepened. The second dock was to be of sufficient capacity to accommodate vessels of the largest class navigating the St. Lawrence canals. Connected with dock number two, as the latter was designated, it was proposed to construct a basin about two hundred feet square, and excavated to the same depth. Dock number two was to be commenced immediately and to be completed and ready for use by the first of September, 1851. If it should appear necessary to the Commissioners, dock number one should be built and be

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ready for use by September 1st, 1852, and the basin connected with dock number two not later than a year from the latter date. The general arrangement and disposition of the docks and basin should, it was agreed, be in accordance with a general plan annexed to the lease. The admission or entrance gates of the docks were to be forty-five feet in width, and were to be constructed in the same substantial and permanent manner as those of the canal locks, and in accordance with detailed plans to be approved of by the Commissioners, and under the superintendence of their engineer. The walls of the recess, for a distance of twelve feet at each end, were to be built of solid masonry of the same character as that of the locks of the canal. And the head gates, head and tail races, the conduits for discharging water from the docks and basin, and all other works mentioned in the lease were to be constructed by the lessees, at their own cost and expense, under the sanction and approval of the Commissioners and their engineer. The lease was made for a term of twenty-one years from the first day of January, 1851, renewable for ever by like terms of twenty-one years, subject on each renewal to the determination, in the manner prescribed, of the amount of the annual rent, and subject to the following proviso :—

Provided always that if at any time hereafter it shall be determined by the said Commissioners of Public Works, or their successors in office, that the said lot and flow of surplus water, or any part thereof are or is required for the use of the said canal, or for any public purpose whatever, thereupon, on reasonable notice (of not less than three calendar months) being given to the said lessees their executors, administrators, or assigns, by the said Commissioners or their successors, to that effect, this lease or the lease for the term then current, and all matters herein or therein contained, shall cease and be void and the said Commissioners, or their successors in office, shall pay, or cause to be paid unto the said lessees their executors, administrators or assigns the then value (with an addition of ten per cent thereon) of all the buildings and fixtures that shall be thereon erected and belonging

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to the said lessees their executors, administrators or assigns according to a valuation thereof, to be made by arbitrators, one of whom to be chosen by the said Commissioners or their successors as aforesaid, another by the said lessees their executors, administrators or assigns, and the third by the said arbitrators so nominated as aforesaid before entering on the said arbitration, and the decision of the said arbitrators, or a majority of them, shall be final.

On the 6th of June, 1892, an order in council was passed giving authority to the Minister of Railways and Canals, the successor in office of the Commissioners of Public Works, to determine the lease under an arrangement made with the plaintiffs, the person entitled to the term, that a new lease of a portion of the property should be granted to them, and that with respect to the assessment of the compensation to be paid to them, this court should be substituted for the arbitrators contemplated by the lease. The claim arising on that state of facts was, on the 9th September following, referred by the Minister to the court. On the 29th November, 1892, the lease was determined accordingly, and on the 1st of April, 1893, the plaintiffs filed their claim. The case came on for trial on the 27th of November, 1893, but as it appeared that the terms of the new lease to be made to the plaintiffs had not been settled, and as it was thought that such terms might be an element to be taken into account in determining the amount of compensation to which the plaintiffs were entitled, the hearing was enlarged to give the parties an opportunity to agree upon such terms. In the end they agreed that the Crown should resume possession of the whole property, the court to determine the value of the buildings and fixtures thereon in accordance with the terms of the lease of March 13th, 1851. That, it will be observed, is not in all respects the claim that was referred to the court, and some doubt might perhaps be entertained as to how far and in what capacity the court is seized of the

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matter. It is clear, however, that the claim arises out of a contract entered into on behalf of the Crown (1), and no doubt it is open to the parties to forego the award of arbitrators for which the lease made provision. As the parties are agreed, there is not, I think, any grave objection to the court exercising the jurisdiction it is invited to exercise, and resolving as best it can the questions now submitted for its determination.

If the substantive "building" had, in ordinary use and acceptation, as large a meaning as the verb "to build" the question raised would not be debatable. One may speak with equal propriety of building a dock, and a house. We build walls and fences. Nor is the use of wood or stone, or any like material, of necessity involved in the conception of building. We build dykes of earth to recover or defend lands from the sea, and earth works for many purposes. But the term "building" has commonly a more limited signification. *Worcester* defines it as "a structure or edifice"; *Webster*, as "a fabric or edifice constructed; a thing "built, as a house, a church, &c."; and the *Century Dictionary*, as "a fabric built or constructed; a struc- "ture; an edifice; as commonly understood, a house "for residence, business or public use, or for shelter for "animals or storage of goods. In law anything erected "by art, and fixed upon or in the soil, composed of dif- "ferent pieces connected together and designed for per- "manent use in the position in which it is so fixed. Thus "a pole fixed in the earth is not a building but a fence or "a wall is." The latter definition finds some support in *Rogers on Elections* (2) where it is stated on the authority of *Powell* v. *Boraston* (3) that though the words "other buildings" in the 27th section of *The Reform Act* 1832 (4), are not to be extended to their limits,

(1) *See* 50-51 Vict., c. 16, s. 15.
(2) P. 112.
(3) 34 L. J. C. P. 73; 18 C. B. N. S. 175; H. & P. 179.
(4) 2 & 3 Wm. IV. c. 45.

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which would include bridges, garden walls, and the like, yet if the building is adapted for the industry which the voter carries on, and has that degree of durability which is included in the idea of a building, it is sufficient. But it will be observed that the view that the word "buildings" would, unless restrained by the context, include "bridges, garden walls, and the like" must be taken to be that of the author, for there is, I think, nothing to that effect in the judgment of the court. In the *Lyme Regis* case (1), it was held that a limekiln excavated in a cliff to the depth of twelve or fifteen feet, the interior of which was lined with masonry, and which had no roof, but was open to the sky, was a building within the meaning of the section of the Act mentioned. Mr. Talbot in support of the challenged vote, argued that a roof is an essential part of a building only where it is necessary for the purposes to which the building is applied, and not where from the nature of the trade carried on within it, no such covering is required, or even possible; and he added that such a limitation of the word "building" as was contended for in that case would exclude no less an edifice than the Colosseum.

By the 33rd section of the Act of the United Kingdom, 3 & 4 Wm. IV, chapter 90, it was provided that owners and occupiers of houses and buildings and property (other than land) ratable to the relief of the poor, should be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land were rated. The class of property thus subjected to the higher rate was considered in *Peto* v. *West Ham* (2). The question to be determined in that case was whether of the 165 acres on which the Victoria London Docks were built, the 95 acres which formed the wet-dock, tidal basin and canal,

(1) Bar. & Aust. 486. (2) 2 El. & El. 144.

were "property other than land" within the meaning of the section. The court were agreed that the word "property" should, in accordance with the general rule as to the construction of specific words followed by general terms, be limited to property of the same sort as houses and buildings, and that the locks, jetties and warehouses were of that class of property. There was however a difference of opinion as to the dock and basin, the majority of the court (Lord Campbell, C. J., Wightman and Crompton, JJ.—Erle, J. dissenting) holding that the latter also were within the statute. In a later case arising on the same section of the Act, it was held that a canal and towing path was not "property other than land" (*The Queen* v. *The Neath Canal Navigation Company*) (1). The canal, said Mr. Justice Blackburn in that case,

> cannot with any propriety be held to be part of the drydock. It is no more a building than a high road is a building. Would any one contend that a private road for which the owner might be licensed to collect rates from persons passing over it, was ratable as anything but land? The masonry on the sides of the canal is not sufficient to constitute it a "building;" this must always be a question of degree. Thus a London street, if it could in any way be rated, though paved and faced with stone work would yet be "land" whilst the Holborn Viaduct would be held to be a building.

In *Stevens* v. *Gourlay* (2), the meaning of the word "building" was discussed at some length. There the question was whether a structure of wood, sixteen feet by thirteen feet in size, laid upon timbers upon the surface of the ground and intended to be permanently used as a shop, was a building within the Act, 18 & 19 Vict. c. 122. This is what Mr. Justice Byles said:—

> And that brings us to the very difficult inquiry, what is a "building"? Now the verb "to build" is often used in a wider sense than the substantive "building." Thus, a ship or a barge builder is said to build a ship or a barge, a coach-builder to build a carriage; so birds

(1) 40 L. J. (N. S.) M. C. 197. (2) 7 C.B.N.S. 99.

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are said to build nests; but neither of these when constructed can be called a "building." It is a well-established rule, that the words of an Act of Parliament, like those of any other instrument, must if possible be construed to their ordinary grammatical sense. The imperfection of human language renders it not only difficult, but absolutely impossible, to define the word "building" with any approach to accuracy. One may say of this or that structure, this or that is not a building; but no general definition can be given; and our lexicographers do not attempt it. Without, therefore, presuming to do what others have failed to do, I may venture to suggest, that, by a "building" is usually understood a structure of considerable size, and intended to be permanent, or at least to endure for a considerable time. A church, whether constructed of iron or wood, undoubtedly is a building. So, a "cow-house" or "stable" has been held to be a building, the occupation of which as a tenant entitles the parties to be registered as a voter under the 27th section of *The Reform Act*, 2 W. 4, c. 45. On the other hand, it is equally clear that a bird-cage is not a building, neither is a wig-box, or a dog-kennel, or a hen-coop—the very value of these things being their portability. It seems to me that the structure in question, which was erected for a shop, and is of considerable dimensions, and intended for the use of human creatures, is clearly a "building" in the common and ordinary understanding of the word.

In *Thompson* v. *The Sunderland Gas Company* (1) it was held by the Court of Appeal that certain arches occupied by the plaintiff as cellars over which the road abutting his premises passed, were "buildings" within the meaning of 10 Vict. c. 15, s. 7, which provided that nothing in the Act should authorize the defendants to lay down or place any pipe or other works into, through or against, any building, or in any land not dedicated to the public use, without the consent of the owners and occupiers thereof. In another case, in *re Broadwater Estate* (2) the question was mooted as to whether a "silo" was a building within the meaning of the words "farmhouses, offices and outbuildings and other buildings for farm purposes" occurring in *The Settled Land Act*, 1882 (s. 25 (XI)). It was not necessary to decide the question, but Lord Justice Cotton said that

(1) L.R. 2 Ex. Div. 429. (2) 54 L.J. Ch. 1105.

possibly a "silo" might be a building within the meaning of the Act.

Of American cases, *Truesdell* v. *Gay* (1), in the Supreme Court of Massachusetts, is an instance of a more limited meaning being given to the word, and *Wright* v. *Evans* (2), in the New York Court of Common Pleas, of a wide construction of the term. In the former case it was held that a stone wall built near and around a furnace to protect it was not a building within the Massachusetts statute of 1851, c. 343, s. 1, which gave a lien for labour performed in erecting or repairing any building. "Taken in its broadest sense" it was said in that case (3), "the word building can only mean an erection intended for use and occupation as an habitation, or for some purpose of trade, manufacture, ornament or use constituting a fabric, or edifice, such as a house, a store, a church, a shed." In *Wright* v. *Evans* (2) in view of the intention of the parties "gathered from the whole instrument and subject matter" it was thought that a wooden fence twenty feet high was a building within the meaning of the covenant on which the plaintiff relied. "The law," says Bacon in a passage cited in support of the decision in the case, "will rather do violence to the words than break through the intention of the parties (4)."

The cases have been referred to at this length not because they assist us to a definition of the word "building" but because they show, I think, that the term is not one that by reason of any absolute or well-defined meaning attaching to it can be taken of itself to determine the intention of the parties to the coyenant in question in this case. I shall have occasion to refer again to what that intention appears to have been, as

(1) 13 Gray, 311.
(2) Abb. P.R. (N.S.) 308.
(3) 13 Gray at p. 312.
(4) Bacon's Abr. *Leases* (K.)

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collected from the lease as a whole, but at present, and before leaving the discussion of the word itself, it will be convenient to notice a circumstance, on which Mr. Hogg for the Crown relied, that the term "building" occurs elsewhere in the lease, and in each case, I think, in the more restricted sense that we have seen sometimes attaches to it. In one paragraph of the lease there was a covenant against erecting any building within ten feet of the dock, wall or towing-path, to which there was an exception in case the building projected over the passage way in such a manner as to leave the latter free. Then in the sixth paragraph of the lease there was a covenant that the buildings which the lessees might erect upon the lot of land leased to them should be commenced within twelve calendar months and completed within a reasonable time thereafter; other provision being made for the commencement and completion of the docks and basin. It was also provided that every such building should be subject in all respects to the municipal by-laws and regulations of the locality in which it should be situated, and should be made fireproof, built of brick or stone, and covered with metal with the exception of the sheds necessary to be built thereon. There can be no doubt that in these cases the word "building" was used in the common and narrower signification of the term, and, so far, I agree this affords an argument in favour of the defendant's contention.

Coming then to the word "fixtures" it will be noticed that it is a term that is used with diverse and contrary meanings. As used in law it is defined in the *Century Dictionary* as "a personal chattel annexed or fastened "to real property. In regard to the right of sever- "ance and removal the term is used in two directly "contradictory senses: (*a*) A chattel so annexed, "which has thereby become in law part of the real

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"property and cannot legally be severed and removed "without the consent of the owner of the real property. "This was the original use. (*b*) A personal chattel so "annexed but which remains in law a chattel, and "may be severed and removed at will by the person "who has annexed it, or his representative." The ambiguity of this word is of course the subject of comment by the text-writers [see *Brown's Law of Fixtures* (1); *Amos & Ferard on Fixtures* (2)]. Parke, B. in *Sheen* v. *Rickie* (3), discussing the term, said that it did not necessarily follow that the word "fixtures" must import things affixed to the freehold. It had not necessarily acquired that sense. It was a very modern word, and was generally understood to comprehend any article which a tenant had a power of removing; but even that was not its necessary meaning. It only meant something fixed to another. In *ex parte* Barclay (4), Lord Chancellor Cranworth, speaking for himself and the Lords Justices, Knight Bruce and Turner, said in that case the question was as to fixtures, trade fixtures, or, what he might call domestic fixtures, and that by the term "fixtures" they understood such things as are ordinarily affixed to the freehold for the convenience of the occupier, and which may be removed without material injury to the freehold, such as machinery, using a generic term, and, in a house, grates, cupboards and other like things. In other cases, and it is not necessary to refer to them, we find the word used with the meaning that first attached to it, *i.e.* things so affixed to the realty as to be deemed part of it. We speak of the landlord's "fixtures" and mean one thing; of the tenant's "fixtures" and mean another. Even when we use the word in its modern sense of things that may legally be severed from the freehold and removed, we

(1) Chapter 1.
(2) Pp. 1 & 2.
(3) 5 M. & W. 175.
(4) 5 De G. M. & G. 403.

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have to inquire in what relation the parties whose rights are in dispute stand to each other; and apply one rule to the landlord and his tenant, and another to the executor and heir at law, or to the vendor and vendee.

In the lease under discussion the word "fixtures" was not, it seems to me, used in the sense of the things which the lessees on the determination of the term might sever and remove, but rather in the earlier sense of things affixed to the freehold, and actually or constructively annexed thereto. The Commissioners of Public Works and their successors in office had it in their power at any time to put an end to a going concern or business of a kind that could not readily be removed to any other site; and it was intended, I have no doubt, that in such an event the Crown should take the docks and mills and their accessories in the condition in which they then were, making compensation therefor as provided in the lease. It was agreed that the Crown should pay for "the buildings and fixtures that should be thereon erected." Erected on what? Clearly, on the lot of land demised. What was to be erected thereon? As clearly, both buildings and fixtures It makes no difference, it seems to me, that fixtures would, as a matter of course, be found in the mills. Other works which the term "fixtures" is large enough to cover were to be constructed or erected on other parts of the premises. The main object of the lease was, as we have seen, to secure the construction of the docks and the basin. That would, to the knowledge of all parties, demand a large expenditure of money. Would it be reasonable under such circumstances to conclude that parties who were at great pains to provide for an indemnity, in the event that has happened, for the value of the buildings which it was proposed to erect as subsidiary to the principal

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undertaking, and omit to make like provision for compensation for the moneys to be expended on the latter? Whatever may be the conclusion as to the term "buildings," the word "fixtures" is large enough to include the docks and other works accessory to it, and taking the words "buildings and fixtures erected on" the land demised and construing them by the provisions of the instrument as a whole in which they occur, I am of opinion that they were intended to, and do, include the dock and its accessories.

The concessions granted to the lessees by the lease in question were purchased at public auction, one of the terms and conditions of the sale being that the Crown should have "the power of assuming the property at any time upon paying for all erections thereon at ten per cent. added to their actual value." If the word erections had been used in the lease when it was drawn up and executed it is not likely that any question would have arisen. It would, it is probable, have been conceded that the term included the dock as well as the mills. There is nothing to suggest any reason for the change in language. No hint that there was any new negotiation or that the Crown wished in any way to limit or narrow the condition that it had itself prescribed. Much less is there anything to suggest any reason for the lessees, having made what may be taken to have been a prudent and fair contract, voluntarily surrendering the advantages they had stipulated for and binding themselves to a bargain that would certainly be improvident, and perhaps ruinous. Of course if the words "buildings and fixtures" used in the lease had a certain and well defined meaning they would themselves best disclose the intention of the parties, and there would be no occasion or warrant for going outside of the provisions of the lease itself; and probably effect would have

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to be given to these words according to such meaning although one might be at a loss to see why they had been used. But we have seen that they are words, the meaning of which it is difficult, perhaps impossible, to define with accuracy. And there is not, I think, any ground in the present case for believing that they were used in any narrower or more limited sense than would have attached to the word "erections" had it been used in the lease in their stead.

The other questions debated present, it seems to me, no considerable difficulty. If the covenant to make compensation included the buildings proper and the dock it included whatever was accessory and necessary for their use. I agree with Mr. Gregory, the special referee, that the water wheels, shafting and machinery were fixtures. With regard to the excavation, it was necessary to the construction of the dock or other works for which it was made, and was represented in their value. The cost of any excavation for the cellars or vaults of a warehouse forms part of the value thereof, and there is in this respect no distinction between a building and a dock. As to this I also agree with the referee. As to the floating bridge, it was one of the things which the lessees bound themselves to construct, and for which they are entitled to be compensated. There is more room for doubt in respect to the wire sign-board. But Mr. Gregory had an opportunity to view the premises, to see in what manner this sign-board was put up, how it was annexed to the premises, and the use to which it could be put. I do not understand that it was anything that could be removed to another place for use there, or that if severed it would have been of any value to the plaintiffs. It was, as Mr. Gregory says, an adjunct or accessory of the property and a convenience and aid in the prosecution of the business contemplated by the parties to the lease, and

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so he finds that within the meaning of the latter it was a fixture, and I am not inclined to differ with the view that he has taken.

There is one other objection to the report to be considered. For the Crown it is argued that as several of the buildings have not been in use for a number of years for any purpose contemplated by the lease, their value should not be taken into account. While for many years, the referee reports, such buildings have been used as a nail factory, they were originally built for the purpose of constructing and repairing ships in connection with the dry-dock and were used for that purpose for several years prior to their use as a nail factory. There is no objection that such buildings were not constructed in conformity with the terms of the lease, and I assume that in that respect its conditions have been complied with. Otherwise it is possible that they would not have been within the covenant for compensation. But the objection in the form in which it is presented cannot, it seems to me, prevail. It does not propose the proper remedy for the act complained of, and it comes too late. During the time the buildings were being used for a nail factory, it was open to the Crown, if it had not waived its strict legal rights, to pursue the appropriate remedy for any breach of the condition to use the property for a given purpose. But this it did not do. On the contrary without any suggestion that the plaintiffs had forfeited any of their rights under the lease, it was agreed with them that the Crown should resume possession of a portion of the property, and afterwards of all the property, and the manner in which the value of the buildings and fixtures should be determined was made the subject of a new arrangement, applicable to all the buildings erected on the premises.

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The appeal against the report of the special referee will be dismissed and the motion for judgment allowed. The value of the "buildings and fixtures" mentioned in the lease was found by the referee to be $80,474.56. To that amount is to be added ten per centum thereon according to the terms of the lease, or $8,047.45, making in all $88,522.01. From this sum is to be deducted $5,500 admitted to be due to the Crown for rent. If that is not all the arrears of rent, proof of any additional sum may be made before the Registrar when the minutes of judgment come to be settled. Otherwise there will be judgment for the plaintiffs for $83,022.01 and costs.

Judgment accordingly.

Solicitors for plaintiffs: *Greenshields, Greenshields & Mallette.*

Solicitors for defendant: *O'Connor & Hogg.*