HIS MAJESTY THE KING.....PLAINTIFF;

AND

CAPITAL BREWING COMPANY LIMITED ..... } DEFENDANT.

1932

Mar. 21, 22.
May 30.

Contract—Crown—Leasehold—Interpretation—Estoppel

After expropriation of its property by the Crown in 1912 the Capital Brewing Company remained in occupation at a yearly rental of $11,292.60 fixed by the judgment. In 1918 the rental was reduced to $5,000, at the request of the defendant, owing to the enactment of the Ontario Temperance Act, one of the conditions of the lease being that "Should the Legislature of the Province of Ontario pass any Act amending or repealing the Ontario Temperance Act . . . so as to allow or facilitate the manufacture or sale of the products manufactured by the said Lessee, the Lessor shall have the right to increase the rent hereby reserved to the sum of Eleven Thousand Two Hundred and Ninety-Two Dollars and Sixty Cents ($11,292.60) per annum," etc. At the expiry of this lease a new one was made at $8,000 a year rental, with the same condition. On the termination of this lease the company continued in occupation, becoming a yearly

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tenant. The next year the Ontario Liquor Control Act came into force and the Crown increased the rent under the above mentioned condition.

Held, that from a comparison of the provisions of the two Acts, and the Regulations, the sale of the company's products was "facilitated" by the repeal of the Ontario Temperance Act and the enactment of the Ontario Liquor Control Act within the meaning of the provisions of the lease, and the defendant having failed to establish the contrary, the Crown was entitled to the increased rent under the lease, from the date claimed.

2. That the letter of the Chief Architect of the 13th June, 1927, that the rent would be increased pursuant to provision in the lease, being on instruction of the Deputy Minister, was a sufficient and valid notice to defendant, more especially as the defendant did not at the time question his authority but claimed that the change in the law did not facilitate the sale of its goods, and by reason thereof and of the correspondence and parleys had, the defendant is now estopped from raising such objection, and the action must be decided on the meaning of the lease and the effect of the change in the liquor laws.
3. That even though the Crown had negotiated with the company, it could not be said to have abandoned its right to claim increased rent—negotiations being under reserve of all rights.
4. That the Crown is not estopped by any statement of facts or any opinions set out in any departmental report or letter by any of its officers or servants.

INFORMATION exhibited by the Attorney-General of Canada to recover from the defendant $13,478.56 balance of the rent of premises leased by the plaintiff to the defendant.

The action was tried before the Honourable Mr. Justice Angers at Ottawa.

R. V. Sinclair, K.C., for plaintiff.

J. Shirley Denison, K.C., and *A. M. Latchford* for defendant.

The facts are fully stated in the Reasons for Judgment.

ANGERS J., now (May 30, 1932), delivered the following judgment.

His Majesty the King, on the information of the Attorney-General of Canada, claims from the Capital Brewing Company Limited the sum of $13,478.56 with interest representing a balance allegedly due on the rental of certain lands and premises situate on Wellington street, in the city of Ottawa, for a period of four years and seventy-one days extending from the first day of June, 1927, to the tenth day of August, 1931. This sum is made up of the difference

between a rental at the rate of $11,292.60 per annum and a yearly rental of $8,000.

On the 9th day of March, 1912, the plaintiff, under the provisions of Section (3) of the Expropriation Act, Chapter 143 of the Revised Statutes of Canada, 1906, expropriated the right, title and interest of the defendant in certain lands and premises situate in the city of Ottawa, fronting on Wellington street, and described at length in the information, and in the plant used in connection with the brewing business carried on by the defendant upon the said lands and premises.

Thereafter proceedings were instituted before this Court for the purpose of determining the compensation which the defendant was entitled to receive for the said lands, premises and plant and, by a judgment rendered on the 10th day of August, 1914, the amount of said compensation was fixed at $233,852.83.

By the said judgment it was further adjudged that His Majesty the King was entitled to recover from the defendant a yearly rental for the said lands, premises and plant at the rate of five per cent on the said sum of $233,852.83 or the annual sum of $11,692.60 from the 9th day of March, 1912, to the date of the judgment.

The defendant occupied all the lands, premises and plant expropriated with the exception of lot number One (1) located on the east side of Bay street and the annual rental was accordingly reduced from $11,692.60 to $11,292.60.

On the 16th day of September, 1916, the Ontario Temperance Act (S.O. 1916, chapter 50) came into force.

The defendant having represented to the Government that the Ontario Temperance Act considerably curtailed the output of its products and that $5,000 a year was the outside limit it could in the future afford to pay as rental, an Order in Council (exhibit A) was passed and approved by His Excellency the Governor General on the 28th day of December, 1916, giving authority to the Minister of Public Works, under Section 34 of the Expropriation Act (R.S.C., 1906, ch. 143), to lease to the defendant for a term of five years from the 10th day of August, 1916, at an annual rental of $5,000 all the lands and premises expropriated, with the exception of lot number One (1) aforesaid.

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The lease made pursuant to this Order in Council, a duplicate whereof was filed as exhibit B, was signed on the 18th day of January, 1918; it contains the following clause:

3. Should the Legislature of the Province of Ontario pass any act amending or repealing the Ontario Temperance Act, Chapter 50 of Provincial Statutes of Ontario, 1916, so as to allow or facilitate the manufacture or sale of the products manufactured by the said Lessee, the Lessor shall have the right to increase the rent hereby reserved to the sum of eleven thousand, two hundred and ninety-two dollars and sixty cents ($11,292.60) per annum or to any such figure which may then be agreed upon by the parties to these presents, the increased rental to become due from the date the said act is repealed or the amending act is passed and goes into effect whichever first happens.

The defendant having, at the expiry of this lease, applied for a renewal thereof for another term of five years from the 10th day of August, 1921, and having offered to pay a rental of $8,000 a year, an Order in Council was passed and approved by His Excellency the Governor General on the 29th day of June, 1922, authorizing the renewal of the lease for the said term at the annual rental aforementioned; a certified copy of the Order in Council was filed as exhibit 1.

A new lease was accordingly executed on the 27th day of July, 1922 (exhibit 2); it contains the same clause as the previous lease concerning the right for the lessor to increase the rent to $11,292.60 in the event of the passing of an act repealing or amending the Ontario Temperance Act so as to allow or facilitate the manufacture or sale of the defendant's products.

This second lease expired on the 10th day of August, 1926. The lessee was allowed to continue to occupy and it did occupy the said lands, premises and plant after the said date, as a yearly tenant, at the annual rental of $8,000.

On the first day of June, 1927, the Liquor Control Act came into force and the Ontario Temperance Act and the Amendments thereto were repealed as from that date.

On the 13th day of June, 1927, one T. W. Fuller, assistant chief architect in the Department of Public Works, acting under the authority of the Minister of Public Works (See memorandum exhibit 7), wrote to the defendant the following letter (exhibit 3):

Your Company leases from the Crown land and premises at the corner of Wellington and Bay streets, Ottawa, for use as a brewery. The lease covered a five year period from 10th August, 1921, to 10th August,

1926, and since the latter date you have been a yearly tenant on same terms. The lease contains the following clause:—

"Should the Legislature of the Province of Ontario pass any act amending or repealing the Ontario Temperance Act, Chapter 50 of Provincial Statutes of Ontario, 1916, so as to allow or facilitate the manufacture or sale of the products manufactured by the said Lessee, the Lessor shall have the right to increase the rent hereby reserved to the sum of eleven thousand two hundred and ninety-two dollars and sixty cents ($11,292.60) per annum or to any such figure which may then be agreed upon by the parties to these presents, the increased rental to become due from the date the said act is repealed or the amending act is passed and goes into effect whichever first happens."

As the Ontario Temperance Act has been repealed, your Company according to the above quoted clause is liable for rental from 1st June, 1927, at the annual rate of $11,292.60.

The following day the defendant replied to Fuller as follows (exhibit J):

With reference to yours of the 13th inst. we beg to say that the new enactment by the Legislature of the Province of Ontario by no means allows or facilitates the manufacture or sale of our products as before the passing of the Ontario Temperance Act in 1916.

On the other hand it curtails our production at least seventy-five per cent of the output in the Province as at that date.

Hence, in all fairness the rental should not be increased on those grounds.

There followed an exchange of letters between Mr. Edward J. Daly, then solicitor for the Capital Brewing Company, and said Fuller (exhibits K (1), K (2) and K (3)) regarding the proposed increase of the rental and following an interview between Mr. Daly and the Deputy Minister of Public Works, the assistant chief architect wrote to Mr. Daly on the 6th day of October, 1927, a letter which reads as follows (exhibit K (4)):

With reference to your interview on the 3rd instant with Mr. J. B. Hunter, Deputy Minister of the Public Works regarding the rental of the above mentioned premises, I am directed to advise you that the present annual rental of $8,000 is to remain in force until June 1, 1928, on which date you will furnish the Department with certain facts and figures pertaining to the business of the Company. The adjustment of the rental and proposed increase to $11,292.60 will then be taken up, it being understood, *that any change or increase in the rental is to be retroactive to June 1, 1927, upon which date the Ontario Temperance Act was repealed.*

The defendant failed to furnish the Department of Public Works with the facts and figures pertaining to its business in compliance with the request contained in the letter exhibit K (4).

The matter was apparently left in abeyance until the 4th of July, 1929, when the chief architect of the Depart-

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ment of Public Works wrote to the defendant a letter, the second paragraph whereof reads as follows (exhibit L):

> You will note that your Company was to furnish this Department with certain facts and figures pertaining to the business of the Company. These have never been received and I would request that you give this matter your immediate attention in order that the adjustment of rental from June 1, 1927, can be arrived at. Unless this is done the Department will understand that you acquiesce to the rental being $11,292.60 as from June 1, 1927.

Naismith, managing director of the Capital Brewing Company Limited, heard as a witness on behalf of defendant, suggested an interview; this was agreed to but, for a reason or another not disclosed in the evidence, the interview did not take place until the 4th of November, 1929. On that date Naismith called at the Department of Public Works with certain statements, but no decision was reached. The memorandum for the chief architect from one Rogers in charge of leases for the Department of Public Works, filed as exhibit O, states that the defendant company was to advise the Department of its intention. The deposition of Naismith on this point is to the same effect (page 10):

> Then it appears from Exhibit "O" that on November 4, 1929, the Manager of the Company called at the Department with statements, etc., but no decision regarding the increased rental was arrived at. The memorandum states that the company are to advise as to what they intend to do. Have you any recollection of this interview on the 4th November and if so please say what was done about the matter?
>
> A. That would be the occasion on which Mr. Fuller said "make us an offer."
>
> Q. You were evidently discussing facts and figures?
>
> A. Yes, and when parting he said make us an offer.

No offer was made, notwithstanding Naismith's statement to the contrary (page 13):

> Q. And you told us that at your final interview Mr. Fuller said "make us an offer?"
>
> A. Yes.
>
> Q. Did you?
>
> A. Yes.
>
> Q. Where is it?
>
> A. It is Exhibit "J."

Exhibit J is a letter from defendant to Fuller; it contains no offer; it merely says that the rental should not be increased. Surely this cannot be construed as an offer. Moreover the letter is dated the 14th of June, 1927. The interview at which Naismith was asked to make an offer took place on the 4th day of November following.

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On December 11, 1929, the defendant wrote a long letter to the chief architect: it sets forth at length the reasons why, in the writer's opinion, the rental should not be increased. These reasons I shall examine later on.

There seems to have been nothing further done in the matter until November 17, 1930, when the chief architect wrote to the defendant saying that the latter had not made out a case, in its letter of December 11, 1929 (exhibit P), "why the terms of the Court Order should not be insisted upon" and calling upon the defendant to pay the arrears of rental in accordance with the letter of June 13, 1927. As far as the evidence shows, this letter was not acted upon and the matter was allowed to remain in abeyance until March 4, 1931. I am not overlooking a letter dated January 13, 1931 (on a printed form) from the chief accountant of the Department of Public Works to the defendant, filed as exhibit R, stating that the rent was paid up to the 10th of November, 1930, and omitting to mention any arrears. This letter, in my opinion, cannot be construed as a waiver on the part of the Crown to claim from the defendant the increased rental as from the 1st day of June, 1927, in accordance with the terms of the letter of June 13, 1927. *Genelle* v. *The King* (1).

On the 4th day of March, 1931, the solicitor for the defendant wrote to the Deputy Minister of Public Works enclosing a memorandum setting out the reasons why the rental should not be increased: the letter and memorandum were filed as exhibit S. This letter brought a reply from the Deputy Minister, dated the 10th of March, 1931 (exhibit T), stating that this memorandum was but a rearrangement of the argument set out in a previous letter (evidently the letter exhibit P) and that the matter being in the hands of the Department of Justice, he was sending them the letter and memorandum with a copy of his reply.

On the 23rd day of March, 1931, the Deputy Minister of Justice wrote to the defendant claiming immediate payment of the balance due on account of rental at the rate of $11,292.60 a year as from the 1st day of June, 1927, and adding that, unless compliance was made with this request, it would become necessary to institute an action to recover the amount owing: see exhibit U.

(1) (1907) 10 Ex. C.R. 427 at p. 442.

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On the 5th day of June, 1931, a notice was served on the defendant, signed by the Deputy Minister of Public Works, notifying the defendant that the lessor increased the rent reserved by the lease to the sum of $11,292.60 from the 1st day of June, 1927, as in the said lease provided. The notice in question and an affidavit of service of the same upon the defendant were filed as exhibit 4. This notice was apparently a sequel to a letter (exhibit 6) sent by defendant to the Minister of Public Works the previous day notifying him that it intended to vacate the lands, premises and plant leased and to give possession thereof to the lessor as of the 10th day of August, 1931.

On June 12, 1931, the solicitor for the defendant wrote to the Deputy Minister of Public Works acknowledging receipt of the notice and setting forth that it was late and that the defendant had been prejudiced by the delay.

On the following day, the Deputy Minister of Public Works replied that the notice had been signed by him at the request of the Agent of the Department of Justice and that he was forwarding a copy of the letter to the Deputy Minister of Justice together with a copy of his reply.

This completes the review of the letters, memoranda and notices of record and the recital of the facts revealed by the documentary evidence, which may have some bearing on the issues. The letters which I omitted to mention are, in my opinion, either immaterial or irrelevant or both.

Proceedings were commenced on the 30th day of June, 1931. The defendant gave up possession of the lands, premises and plant leased on or about the 10th day of August, 1931.

Plaintiff submits that by the repeal of the Ontario Temperance Act and the enactment of the Liquor Control Act the manufacture or sale of the defendant's products are facilitated and, relying on clause 3 of the lease, contends that he is entitled to claim rental at the rate of $11,292.60 a year as from the first day of June, 1927.

The defendant, on the other hand, submits:

(*a*) that, when the judgment fixing the rental of the lands, premises and plant expropriated at $11,292.60 a year was rendered, there was in force in Ontario an Act respecting the sale of Fermented or Spirituous Liquors, which in 1914 became part of the Revised Statutes of Ontario, 1914,

as chapter 215, and that under the said act the sale of intoxicating liquors was permitted throughout the province of Ontario by all persons licensed for that purpose; that the premises then and since occupied by the defendant consisted of a brewery in operation and that the sales which the defendant made within the province of Ontario from 1912 to 1916 resulted in considerable profit to it;

(*b*) that as a consequence of the enactment of the Ontario Temperance Act in 1916 the defendant's previously profitable business in Ontario was brought to an end and on that account the rental was reduced by agreement to $5,000 a year and a lease was passed on the 18th day of January, 1918, by which the property was demised to the defendant for a period of five years from the 10th day of August, 1916, at that figure; that the lease having terminated on the 10th day of August, 1921, another lease was executed on the 27th day of July, 1922, whereby the property was demised to the defendant for a further period of five years from the 10th day of August, 1921, at an annual rental of $8,000;

(*c*) that by the repeal of the Ontario Temperance Act the manufacture or sale of the defendant's products, upon a true interpretation of the Liquor Control Act and according to the actual results obtained, were not allowed or facilitated in the ordinary meaning of the words, nor in the sense in which the terms had been employed between the parties when the lease was executed, but that such manufacture and sale were still prohibited;

(*d*) that the letter of the assistant chief architect of the Department of Public Works to the defendant of the 13th of June, 1927, did not constitute a notice in the terms of the clause contained in the lease and that it could not have any effect in increasing the rental from the sum of $8,000 agreed upon to the sum of $11,292.60 and that from the time of proclamation of the Liquor Control Act in 1927 until the 4th day of June, 1931, the plaintiff never exercised any right, if such right existed, to increase the rental;

(*e*) that, instead of electing to claim $11,292.60 prior to the 4th day of June, 1921, the plaintiff elected to negotiate with the defendant with a view to endeavouring to agree upon a different rental, and that, the parties having failed to reach an agreement, the only rent exigible is the one fixed by the lease;

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(*f*) that the notice of the 4th of June, 1931, was given at a time when the parties had arranged to terminate the tenancy existing between them and that the plaintiff had no right by virtue of any notice then given to increase the rental because he had already elected not to do so except by mutual agreement and also because the time for giving such notice had elapsed.

As submitted by the defendant, when the judgment of the 10th of August, 1914, was rendered, there was in force in Ontario an act respecting the sale of Fermented or Spirituous Liquors. Under that Act the sale of intoxicating liquors was permitted by persons duly licensed for that purpose. The defendant operated a brewery and according to the testimony of Naismith, its managing director, the business was a profitable one; Naismith's evidence being uncontradicted, I must assume this to be true.

The defendant submits that, as a consequence of the enactment of the Ontario Temperance Act in 1916, its business, hitherto profitable in Ontario, was brought to an end and that on account of this the rental was reduced to $5,000 a year. To say that the defendant's business in Ontario was annihilated is perhaps somewhat of an exaggeration but there is no doubt that the business was very considerably curtailed. For this reason the Crown agreed to give the defendant a lease for a period of five years at a reduced rental of $5,000 a year; see Order in Council exhibit A.

I may note here that counsel for plaintiff objected to the filing of documents prior to the lease of the 27th of July, 1922; I allowed the production subject to the objection. I may say that after due consideration the objection appears to me unfounded. In the first place, the information itself refers to the proceedings in expropriation dating back to 1912 and to the judgment of the 10th of August, 1914, fixing the amount of the compensation as well as the yearly rental. Then the Order in Council (exhibit 1), on the strength of which the second lease was made, recites at some length the circumstances and conditions in which the expropriation was carried on and a first lease given to the defendant; this alone would warrant the admission of the evidence objected to. In addition to this, there is the long continued relationship between the parties as lessor and

lessee dating back to the time of the expropriation which cannot be overlooked. The facts disclosed by the documentary evidence adduced in this connection constitute surrounding circumstances apt to help in interpreting the clause dealing with the increase of the rental; for this additional reason I would feel justified in dismissing the objection and allowing the proof to remain in the record: see *Lamb* v. *Evans* (1); *The King* v. *Peat Fuels Limited* (2).

As already mentioned, the lease of the 18th of January, 1918, was followed by another one bearing date the 27th of July, 1922, for a further term of five years reckoning from the 10th day of August, 1921, at an increased rental of $8,000 per annum. When this second lease expired, the defendant was allowed to continue to occupy the premises as a yearly tenant at the same annual rental of $8,000.

During the occupancy of the premises by defendant as a yearly tenant, to wit on the first day of June, 1927, the Ontario Temperance Act was repealed and the Liquor Control Act came into force.

The defendant contends that the repeal of the Ontario Temperance Act and the enactment of the Liquor Control Act did not allow or facilitate the manufacture or sale of its products in the ordinary meaning of the words nor in the sense in which the terms had been used between the parties when the lease was executed, but that such manufacture and sale were still prohibited. This is the main, not to say the only, question to which narrows down the whole case. Before trying to solve this question however, I shall deal briefly with a few points of minor importance raised by the defence.

The defendant claims that the letter sent by the assistant chief architect of the Department of Public Works dated the 13th of June, 1927, does not constitute a proper notice to increase the rental from $8,000 to $11,292.60 a year and that, if the plaintiff had the right to so increase the rental, which is denied, the latter never exercised such right until the 4th day of June, 1931, when he caused a notice to be served upon the defendant; this is the notice exhibit 4. I must say that I cannot adopt this view. The assistant chief architect in writing to the defendant on the 13th of June, 1927, the letter filed as exhibit 3, did so on

(1) (1893) 1 Ch. D. 218, at p. 230. (2) (1930) Ex. C.R. 188, at p. 192.

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the instructions of the Deputy Minister of Public Works: see exhibit 7. The defendant did not challenge the authority of the assistant chief architect when it received the letter, exhibit 3, but merely averred that the new enactment did not by any means allow or facilitate the manufacture or sale of the defendant's products. And in the correspondence and interviews that followed, the defendant never invoked the lack of authority of the assistant chief architect to write the letter in question. The argument raised against the validity of the letter of the 13th of June, 1927, as a notice is the result of an afterthought brought about by the notice of the 4th of June, 1931, (exhibit 4), which, in my opinion, was unnecessary and even useless, except perhaps in so far as it put an end to the negotiations carried on between the parties with the object of agreeing, if possible, upon a different rental. The letter of the 13th of June, 1927, constituted a sufficient and valid notice of the plaintiff's decision to raise the rental to $11,292.60, taking for granted that the plaintiff had the right to do it. I shall examine this question in a moment.

The defendant's contention that the plaintiff in electing to negotiate with the defendant abandoned his right to claim an increased rental appears to me entirely unfounded. The negotiations which took place between the plaintiff and the defendant were carried on under reserve of the parties' respective rights just as the rental at the rate of $8,000 a year was paid and accepted without prejudice: see exhibit K, letter dated October 6, 1927. The cases of *Scarf* v. *Jardine* (1); *The King* v. *Paulson* (2), and *Hutchison* v. *Paxton* (3), cited by counsel for defendant, do not apply.

I may add here that the Crown is not estopped by any statement of facts or any opinions set out in any departmental report or letter by any of its officers or servants: *Robert* v. *The King* (4); *The King* v. *Dominion Building Corporation,* Supreme Court of Canada, March 15, 1932, unreported.

As to the last argument set forth by the defendant that the notice of the 4th of June, 1931, was tardy and that the

(1) (1882) 7 App. Cas. 345, at p. 361.
(2) (1915) 52 S.C.R. 317 and 1921 L.R. App. Cas. 271.
(3) (1928) 62 O.L.R. 65.
(4) (1904) 9 Ex. C.R. 22.

plaintiff had no right in virtue of a notice then given to increase the rental because he had already elected not to do so and because the time to give such notice had elapsed, I have already disposed of it in dealing with the letter of the 13th of June, 1927. If no notice had been given of the plaintiff's intention to increase the rental, previous to the 4th of June, 1931, I doubt very much whether a notice given on that date could have had a retroactive effect; I rather feel inclined to say that it could not. But, as I have already said, the letter of the 13th of June, 1927, sent by the assistant chief architect, acting on the instructions of the Deputy Minister, was a formal and valid notification of the plaintiff's intention to claim the rental as from the first of June, 1927, at the rate of $11,292.60.

The notice of the 13th of June, 1927, always remained in full force and, by the correspondence, interviews and parleys which followed, no rights were abandoned or waived either by the plaintiff or by the defendant.

Having reached this conclusion, there only remains for me to consider the question as to whether the manufacture or sale of the defendant's products was facilitated or not by the repeal of the Ontario Temperance Act and its replacement by the Liquor Control Act. I am purposely leaving out the word "allowed," inasmuch as the sale of the defendant's products was never entirely prohibited in the province of Ontario, if on the other hand it was noticeably restricted.

The case even narrows down to a finer point: I am only concerned with the facilitation of the sale, seeing that the Ontario Temperance Act and the Liquor Control Act never prohibited the manufacture of the defendant's products.

The whole case hinges on the interpretation of the clause hereinabove cited. It is clear and precise; it offers no ambiguity. It must be interpreted according to the ordinary meaning of the words. If the sale of the defendant's products was facilitated by the repeal of the Ontario Temperance Act and the enactment of the Liquor Control Act, the plaintiff is entitled to claim the additional rental which he seeks to recover by his action. "Facilitate" is a common word, frequently used and whose meaning is well known; it is hardly necessary to insist, but I may note the following definitions:

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In Murray's Oxford Dictionary, vol. 4, p. 10, Facilitate: To render easier the performance of an action, the attainment of a result; to afford facilities for, promote, help forward an action or process;

In the Imperial Dictionary, vol. 2, p. 236, Facilitate: To make easy or less difficult; to free from difficulty or impediment or to diminish it.

If I reach the conclusion that the sale of defendant's products has been rendered easier or less difficult or that the difficulties or impediments surrounding it have been removed or even diminished, I must find that the clause under dispute is applicable and hold that the claim for the increased rental as from the first day of June, 1927, is justified.

One must not overlook the fact that the rent had been fixed by the judgment at $11,292.60 ($11,692.60 including lot no. 1) per annum and the plaintiff could have claimed that amount during the whole period of the occupation by the defendant of the lands, premises and plant leased, had he chosen so to do. The rent was reduced to $5,000 a year from the 10th day of August, 1916, to the 10th day of August, 1921, and then fixed at $8,000 a year for the following five years by the Crown of its own free will and accord, at the request of the defendant. The Crown was in no way bound to grant a reduction of the rental as it did. It is true, on the other hand, that the defendant was under no obligation to remain in the expropriated premises and it is quite possible that, if the Crown had insisted upon keeping the rental at the figure fixed by the judgment, the defendant would have elected to move out. However the Crown consented to set the rental at $5,000 per annum for a term of five years and at $8,000 per annum for an additional similar term and it became bound by the leases entered into with the defendant. The Court must therefore be governed by clause 3 of the lease.

It has been argued on behalf of plaintiff that the lease and particularly the clause with respect to the legislation must be interpreted in accordance with the law in force at the time the lease was made and that accordingly, when this clause provides, as it does, that, if there should be legislation repealing or amending the Ontario Temperance Act so as to facilitate the sale of the lessee's products, it must

be construed as meaning the sale of the lessee's products which the lessee, at the time of the lease, could lawfully sell and that it has no relation to the products which the lessee had the right to sell under the Liquor License Act; I quite agree with this proposition. Counsel for plaintiff cited in support of his contention several decisions, among which I may note the following: *Newington Local Board* v. *Cottingham Local Board* (1).

To determine whether the sale of the defendant's products was facilitated by the repeal of the Ontario Temperance Act and the enactment of the Liquor Control Act, I must primarily be guided by the provisions of the two Acts and the rules and regulations pursuant thereto and secondarily by the evidence adduced at trial.

Under the Ontario Temperance Act, a brewer could only sell his products, in the province of Ontario, to a licensed vendor. He could sell his products to any person in another province or in a foreign country.

The licensed vendor could only sell to persons holding a prescription from a duly qualified medical practitioner, in quantities not exceeding one dozen bottles containing not more than three half pints each at any one time for strictly medicinal purposes. Taking for granted that the law was applied and that prescriptions were only issued for medicinal purposes, the sale of beer—I shall use the word beer to mean all the products of a brewery, including ale and porter as well as beer—was very rigidly controlled and restricted in the province of Ontario under the Ontario Temperance Act.

See 6 Geo. V, chap. 50, section 51, subsection (*a*).

The patient, if I may so call the purchaser, was entitled to only one dozen bottles at any one time. When his supply was exhausted, if he still needed another dozen for medicinal purposes, he was compelled to obtain another prescription.

There was no tariff for prescriptions; prices ranged from $1 up, varying probably with the degree of seriousness of the ailment of the client. Besides constituting an inconvenience, the necessity of a prescription for every dozen of bottles of beer increased the price of the beverage or medicine considerably.

(1) (1879) L.R. 12 Ch. Div. 725.

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Under the Liquor Control Act, the brewer, who has a licence, is authorized to keep for sale and to sell beer, either personally or through a duly appointed agent, to the Liquor Control Board of Ontario or to deliver beer, on the order of the Board or of a vendor, to any person who is the holder of a permit to purchase beer under the Act: 17 Geo. V, chap. 70, section 45.

Any person who is the holder of a permit may buy from one of the stores of the Board or from a brewery or brewery warehouse on the order of the Board or of a vendor, under the supervision of an inspector of the Board, the quantity of beer he may desire, not exceeding however ten dozen quarts or one-half barrel at a time: 17 Geo. V, chap. 70, section 37; instructions to inspectors, exhibit Z2; circular letter to vendors and inspectors No. 333 included in exhibit Z4.

The fee for a permit for the purchase of liquor, including beer and wine, was fixed at $2 a year (Regulation 31, 1927). Under the regulations of 1931, the fee for a permit for liquor was still $2 a year, but a special permit for the purchase of beer and wine was issued for a fee of $1. (Regulation 12, 1931.) See exhibits Z and Z1.

It is obvious that the purchase of beer is much less difficult under the Liquor Control Act than it was under the Ontario Temperance Act. The facilitation of the sale to the public cannot but be profitable to the brewer.

It has been argued on behalf of defendant that the enactment of the Liquor Control Act has not brought back the conditions prevailing under the Liquor Licence Act. That is most likely, but it is quite immaterial. The clause in the lease does not say that the plaintiff shall be entitled to raise the rental in case the Ontario Temperance Act is repealed or amended so as to revive the conditions prevailing under the Liquor Licence Act but merely so as to facilitate the sale of beer. As I have said, I have reached the conclusion that the sale of beer has been facilitated to a large extent by the repeal of the Ontario Temperance Act and the enactment of the Liquor Control Act. The Ontario Temperance Act was a prohibitive law in the full sense of the word; liquor, beer and wine could only be bought for strictly medicinal purposes, in small quantities, at a high cost. The Liquor Control Act, although its main

object is to control the sale of liquor, beer and wine, is a permissive act. It allows the sale of liquor, wine and beer to holders of permits costing a trifle, in sufficiently large quantities, without the necessity of a prescription; it aims only at restraining abuses. Any holder of a permit is able under the new act to obtain as much liquor, wine or beer as he may need, without having to go to a physician for a prescription. Under the Liquor Control Act, beer is considered rightly as a beverage, not as a medicinal preparation. The purchase of beer under the new act is undoubtedly easier than under the old one. There is no need to say that what facilitates the purchase facilitates the sale *ipso facto.*

I said that in deciding the question as to whether the sale of the defendant's products has been facilitated by the new legislation, I would be guided primarily by the comparison of the two acts and secondarily by the proof of record. I must say that the evidence adduced on the part of defendant is not very convincing. I am only concerned with the sales within the limits of the province of Ontario; neither the Ontario Temperance nor the Liquor Control Acts interfered with the export—and by export I mean the sales for consumption outside of the province of Ontario—of the defendant's products. As to the sales in Ontario, I expected the defendant would produce witnesses from other breweries in Ontario to show how their sales in the years posterior to the repeal of the Ontario Temperance Act compared with their sales in the years prior thereto. I expected that at least the defendant would exhibit its books to show what the amounts of its sales were in the two or three years preceding the repeal of the Ontario Temperance Act and in the years posterior to said repeal. Naismith contented himself with saying that the business of his company was curtailed under the new act to the same extent as under the old act; the curtailment he fixes at 75 per cent in both cases. On the other hand, he himself contradicted this statement when he mentioned figures concerning the output of his company's products before and after the repeal of the Ontario Temperance Act; I find in his deposition the following statements:

A. For two or three years previous to 1916 our output was something like 400,000 gallons.

Q. That is, the output in Ontario?—A. Yes.

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Q. And then after 1916 and between that and 1927, can you give us any idea of what your output in Ontario would be; say in 1925 for instance, in order to get a general idea?

A. As far as my memory serves me—from 70,000 to 80,000 gallons.

Q. In 1925 before the Liquor Control Act?—A. Yes.

Q. After 1927 what has been about your output?

A. From 73,000 to 84,000 gallons.

According to the witness' own admission, the output of the defendant's products in Ontario were from 3,000 to 4,000 gallons more a year after the repeal of the Ontario Temperance Act.

This evidence is absolutely unsatisfactory. The only conclusion I can draw from Naismith's testimony is that the output of beer in Ontario was increased after the repeal of the Ontario Temperance Act, though perhaps not to a considerable extent.

Even if the defendant had succeeded in establishing that the profits derived from its business were not larger after the repeal of the Ontario Temperance Act, I would not feel inclined to attach much importance to this fact: there are so many causes apart from the legislation, which could curtail profits, as for instance bad or indifferent management, lack of advertising, inferior quality of products, depression, etc., that it would be difficult to arrive at the conclusion that the law was alone to blame for the curtailment of one's business.

I must take the evidence as it is, and as I have already stated, it does not convince me that the sale of beer was not facilitated by the change in the law. I must therefore rest my decision on the dispositions of the two acts regulating the sale of beer. The comparison of the clauses in the Ontario Temperance Act and the Liquor Control Act on this point has led me to conclude that the sale of beer has been facilitated by the replacement of the former Act by the latter in the usual and common sense of the word, the only one I can adopt, seeing that there is no proof that the parties intended to give the word a special or particular meaning.

Having reached the conclusion that the sale of beer has been facilitated by the repeal of the Ontario Temperance Act and the enactment of the Liquor Control Act, it follows that plaintiff is entitled to recover from the defendant the rent at the rate of $11,292.60 a year for the period from the first day of June, 1927, to the 10th day of August, 1931.

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There will be judgment in favour of plaintiff against defendant for $13,478.56 with interest as prayed for and costs.

Judgment accordingly.