

S. F. Washington, K.C., for the plaintiffs.

G. Lynch-Staunton, K.C., and E. F. Lazier, for the defendants.

MIDDLETON, J.:—In this action, unfortunately, the bitterness of the dispute and the difficulty of the solution are quite out of proportion to the subject-matter involved.

The late John Sullivan carried on a livery business in the premises in question at the corner of Cannon and McNab streets, Hamilton. On the 15th January, 1912, he sold the business to the defendant Doré for \$3,500, agreeing to lease to him the premises for five years, with the privilege of extending the term for a further period of five years. In pursuance of this arrangement, the lease in question, dated the 15th January, 1913, was executed. This lease contains statutory covenants to repair, reasonable wear and tear and damage by lightning, fire, and tempest only excepted, and that the lessor may enter and view the state of repair, and that the lessee will repair according to notice in writing, reasonable wear and tear, etc., only excepted. Sullivan died on the 6th February following. The plaintiffs in this action are his executors.

The building was old and in bad repair. Doré desired to make in it alterations enabling him, in his view, the better to conduct the business carried on. No doubt, he spoke to Mrs. Sullivan with reference thereto, but I find against his contention that she assented to the making of the changes. Nevertheless, he made the changes, acting, I think, in good faith in regarding them as matters of little importance, and thinking that no objection would be taken on the part of the lessors.

The insurance premium upon the premises has been raised \$5 per annum. The lessors attribute this to the structural changes. The evidence of the agent shews that the change was really by reason of the change of occupancy, the risk being regarded as greater when a tenant is in occupation than when the owner is in occupation. Restoration of the wall by the closing of the opening complained of would not bring about a restoration of the former insurance rate. Nevertheless, this, I think, is the real cause of the whole trouble; and this action has been brought for the forfeiture of the lease and for damages.

I do not think that there has been a proper notice under the statute to enable the landlord to enforce the forfeiture, if forfeiture there has been; and upon this ground I think the action would fail.