

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B.

JANUARY 26TH, 1914.

CORNISH v. BOLES.

Lease—Option of Purchase of Demised Premises—Covenant not to Assign without Leave—Proviso—Leave Wilfully and Arbitrarily Withheld—Evidence—Finding of Fact of Trial Judge—Declaration—Damages—Costs.

Action for a declaration of the plaintiffs' rights in respect of assignments of a lease and option and for damages and other relief.

R. R. Waddell, for the plaintiffs.

H. M. Mowat, K.C., for the defendant.

FALCONBRIDGE, C.J.K.B.:—By indenture of lease dated the 15th January, 1912, the defendant leased to the plaintiff McNeil for three years the lands in question, and it was "understood and agreed" in and by the said lease that the said lessee, McNeil, his heirs, executors, administrators, and assigns, should have the right to purchase the lands at any time during the said term, at a price per foot frontage on Murray street, in the city of Toronto.

And the lessee, McNeil, covenanted that he would "not assign or sublet without leave, but such leave shall not be wilfully or arbitrarily withheld."

After vainly endeavouring to get the defendant's consent to an assignment by the plaintiff McNeil to the plaintiff Cornish, the plaintiff McNeil, by indenture dated the 8th February, 1913, assigned the said lease and the said option to his co-plaintiff Cornish. And the plaintiff Cornish, after applying without success to the defendant for his consent to an assignment by him to a realty company, signed a memorandum agreeing to sell the said lease and option to the said company.

It is needless to say that both these assignments were at a profit to the vendors.

The plaintiffs now bring this action, claiming an order directing the defendant to execute such instruments as may be necessary to give consent to the above assignments and agreement.

Mr. Mowat announced that he offered no evidence to support par. 4 of the statement of defence (that the defendant signed