

ROSE, J., in a written judgment, said that the lease was in writing, made according to the Short Forms of Leases Act. The demise was expressed to be in consideration of the rents reserved and of the lessee's covenants and agreements. A yearly rent of \$4,705.80 was reserved, and there was a covenant on the part of the lessee to pay all taxes charged upon the demised premises or upon the lessor on account thereof, including local improvements and other rates. At the time of the assignment for the benefit of creditors there was rent in arrear, and certain taxes which the tenant ought to have paid remained unpaid, and the plaintiff had been obliged to pay and had paid them. It was admitted that the plaintiff as landlord was entitled to a preferential lien for the rent. The point for determination was, whether he was entitled to a similar lien for the taxes which he had paid.

It was argued for the plaintiff, first, that the covenant to pay taxes was a covenant to pay rent, enforceable by distress, and so entitling the landlord to a preference for payment which he would not have had to make but for the tenant's breach of contract.

The learned Judge said that he could not detect any inconsistency between *East v. Clarke* (1915), 33 O.L.R. 624, and *Finch v. Gilray* (1889), 16 A.R. 484. In the latter case, where there were covenants to pay rent and to pay taxes, it was held that the payment of the taxes was not a payment of rent; and that was a decision of the point now raised adversely to the plaintiff's contention.

Secondly, it was argued that, since the tenant was primarily liable for the taxes, the landlord, paying the taxes to protect his own property, was entitled to stand in the position of the creditor, the municipality, and to recoup himself by distress upon the goods of the tenant upon the demised premises.

The learned Judge said that the preferential claim of the landlord, in respect of rent in arrear at the time of the assignment, arose out of the existence of distrainable assets: *Cassels's Ontario Assignments Act*, 4th ed., pp. 145-150; and, if the landlord, upon paying the taxes, became entitled to the benefit of the municipality's right to distrain for rent, the reasoning which leads to the ruling that there is a priority as regards the rent would lead equally to a ruling that there is a priority as regards the taxes.

The question was, therefore, whether the plaintiff did become entitled to the benefit of the municipality's right to distrain.

The landlord was not in the position of a surety for the tenant; but it is not only a surety who, upon paying the debt, becomes entitled to have an assignment of the creditor's securities and to stand in the place of the creditor; the same right is given by the *Mercantile Law Amendment Act*, R.S.O. 1914 ch. 183, sec. 3, to every person who, being liable with another for any debt or