

LATCHFORD, J.

DECEMBER 29TH, 1916.

LOUDON v. SMALL.

Contract—Sale of Hotel Business—Action for Balance of Purchase-money—Terms of Contract not Fully Carried out by Vendor—Failure to Procure Lease of Premises Freed from Option to Purchase Business—Possession Given and Rent Paid—Liquor License Transferred and Business Carried on—Part Failure of Consideration—Damages Offset pro Tanto against Balance of Price—Implication of Term as to Prohibitory Liquor Law.

Action to recover the purchase-money of an hotel business sold by the plaintiff to the defendant in July, 1914, for \$40,000.

The agreement provided that possession was to be given as soon as the lease of the hotel premises and the license to sell intoxicating liquors could be transferred to the defendant; that the agreement was to be null and void in case the transfer of the lease or license was refused; and that the lease was to be free of any right of purchase by Hollwey, the lessor. The sale was to be completed by the 1st August, 1914, "if possible."

At the time of the agreement, as the defendant knew, the plaintiff held no demise of the term; Hollwey had a right, under his agreement with one Tremble, who had transferred his rights to the plaintiff, for a 10-year lease, to acquire the business, at any time during the 10 years, for \$37,500.

The defendant took possession on the 1st August, 1914, and paid \$10,000 on account of the purchase-money; the license was transferred to him; but Hollwey refused to execute a lease unless it contained an option for him to purchase the business for \$37,500.

No lease was then executed; but the defendant continued in possession, paid rent monthly to Hollwey, and made payments to the plaintiff; and, in April, 1915, and again in April, 1916, obtained a renewal of the liquor license. In June, 1916—after the passing of the Ontario Temperance Act, 6 Geo. V. ch. 50—Hollwey made a lease to the plaintiff, freed from the option to purchase; and in July, 1916, the plaintiff executed an assignment of the lease to the defendant, which he refused to accept.

The defendant counterclaimed for damages for breach of the agreement.

The action and counterclaim were tried without a jury at Toronto.