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HIGH COURT DIVISION.

LOGIE, J. MARCH 8TH, 1920.

*SCHMIDT v. WILSON & CANHAM LIMITED.

Sale of Goods—Contract—Goods to be Imported from New Zealand—Defendants (Vendors) Contracting as Principals—Breach by Vendors—Repudiation of Contract—Embargo upon Exportation from New Zealand—Effect of—Suspension of Contract during Total Embargo—Exportation with Consent of Minister of Customs—Absence of Endeavour to Obtain Consent—Damages—Measure of—Reference.

Action for breach by the defendants of a contract for the delivery by them of certain New Zealand pelts.

The action was tried without a jury at a Toronto sittings.

T. R. Ferguson, for the plaintiff.

R. McKay, K.C., and G. W. Adams, for the defendants.

LOGIE, J., in a written judgment, found, first, that the defendants entered into the contract as principals.

The defendants did business in Toronto; the plaintiff, in Buffalo, New York State. The terms of the contract were set out in a letter written by the defendants dated the 28th February, 1916, acknowledged as correct by the plaintiff's letter of the 24th March, 1916.

A credit of £10,500 was arranged for in New Zealand, and the plaintiff was on the 4th March, 1916, placed on the approved consignee list.

About two-thirds of the goods contracted for arrived; the remaining one-third, about 3,313¾ dozen pelts, did not; and, as

* This case and all others so marked to be reported in the Ontario Law Reports.

the plaintiff alleged, he had to go into the United States market and purchase similar pelts at a cost of $42,069.49, an advance of $25,090; and he claimed the latter amount as damages.

The defence was that there was an embargo upon the exportation of pelts from New Zealand.

Referring to Andrew Millar & Co. Limited v. Taylor & Co. Limited, [1916] 1 K.B. 402, 414, 415, as to the effect of an embargo upon exportation, the learned Judge said that the contract was not annulled but suspended, and the defendants should have waited a reasonable time before repudiating the contract. Between the 5th September, 1916, and the 3rd January, 1917, the defendants could have shipped the pelts if they had applied for the consent of the New Zealand Minister of Customs. They did not use their best endeavours to obtain the consent, as it was their duty to do: In re Anglo-Russian Merchant Traders Limited and John Batt & Co. (London) Limited, [1917] 2 K.B. 679, at p. 685. In that case, as in this, the contract was c. i. f. In H. O. Brandt & Co. v. H. N. Morris & Co., [1917] 2 K.B. 784, the contract was f.o.b. In the one case the seller must provide an effective ship—in the other, the buyer. With this consent, the defendants, except during the period of absolute refusal to grant it, could have fulfilled their contract. If they had made an application, it would not have been refused.

From the correspondence it was apparent that, while the plaintiff was insisting on the fulfilment of the contract, the defendants did not until the 3rd January, 1917, definitely repudiate it.

The defendants were liable in damages.

The measure of damages was the price which the plaintiff would have had to pay in New Zealand at the date of the repudiation of the contract by the defendants: Brenner v. Consumers Metal Co. (1917), 41 O.L.R. 534, 539.

There was no evidence that the plaintiff, if he had cabled to New Zealand, could not have bought pelts there after the defendants' default, much less that he could not have gone into that market and obtained the goods. This he made no effort to do.

There should be judgment for the plaintiff declaring him entitled to damages and directing a reference to the Master to determine the amount, with costs of the action and reference to be paid by the defendants to the plaintiff.

LOGIE, J. MARCH 9TH, 1920.

CLASSIC HOSIERY CO. LIMITED v. FILLIS.

Company—Purchase of "Business" of Firm—Going Concern—Assumption of Trade-liabilities—Agreement—Ratification by Shareholders—Informal Meeting—All Shareholders Present—Unanimity—Bill of Sale—Covenant—Mistake—Ratification—Amendment—Negligence of Solicitor—Failure to Prove—Secret Profits—Subscriptions for Shares—Paid-up Shares—Promissory Notes—Counterclaim—Bill of Costs.

Action by the company against A. W. Fillis and Adam Irving, trading under the firm name of Fillis Irving & McFadden, and against the firm and J. P. Eastwood and William Lorimer, for breach of a covenant in a bill of sale made by the defendants Fillis and Irving in favour of the company; for an accounting by the defendants other than Eastwood in respect of an alleged secret profit on the sale of the business of the firm to the company; for damages for the negligence of the defendant Eastwood as a solicitor; for payment of stock subscriptions of $100 each by the defendants Fillis, Irving, Eastwood, and Lorimer; and against the defendants other than Eastwood for the amount of a promissory note. Counterclaim by the defendant Eastwood for $119.16, the amount of a bill of costs, and by the defendant Lorimer on a promissory note of the plaintiff company to him for $45.

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

J. S. Duggan and James Bicknell, for the plaintiff company.

H. J. Scott, K.C., for the defendants.

LOGIE, J., in a written judgment, after setting out the facts, said that, in anticipation of the purchase of the business of the firm, the shareholders of the company met on the 4th June, 1918, and passed a resolution "that the company take over by purchase the hosiery manufacturing business, plant, and goodwill thereof lately carried on under the partnership name of Fillis Irving & McFadden." That meant the purchase of the firm's business as a going concern, and not the purchase of the assets alone, ignoring the liabilities.

Nothing further was done towards completing the purchase and sale till the 5th July, 1918, when one McMurchy, having had some previous negotiations with Lorimer, vice-president of the plaintiff company, went to Eastwood's office with the intention of buying out Fillis and Irving's interest in the partner-

ship and in a certain agreement of the 7th January, 1918. With McMurchy went Fillis, Irving, and Lorimer, and at Eastwood's office a discussion arose as to the manner in which the transaction should be carried out.

The learned Judge found as a fact that before the 5th July, 1918, McMurchy had thoroughly satisfied himself as to the details of the business, the assets and liabilities of the partnership, and had had a statement of the latter laid before him on a previous day.

An agreement was made on that day, to which the plaintiff company, Fillis and Irving, and McMurchy were parties. This agreement was ratified by the shareholders of the company, all of them being then present in Eastwood's office. No entry of the transactions was made in the minute-book of the company. Minutes of meetings are not, however, the only admissible evidence of what took place at them: a transaction may be established as against a company, although there is no record of it in the minutes: In re Pyle Works, [1891] 1 Ch. 173, 184. By the agreement then made, the company assumed the trade-liabilities of the firm.

There was no evidence that the meeting was irregularly held. The shareholders of a company, assembled in general meeting, constitute the supreme forum of the company in everything that relates to internal matters; and if, by unanimous resolution, the shareholders choose to ignore the company's by-laws or waive the provisions contained in them, they may do so, and the acquiescing shareholders cannot afterwards complain of an irregularity to which they consented.

The bill of sale was executed by Fillis and Irving on the same day. It contained no exception as to trade-liabilities, and contained the usual covenant against hindrance, interruption, molestation, and indemnity against former sales, charges, and incumbrances. The trade-debts of the partnership did not come within this covenant.

Eastwood said that a provision as to the debts of the partnership being assumed by the company was omitted from the bill of sale by error and mutual mistake. He was corroborated in this by Fillis, Irving, and Lorimer. The pleadings should be amended by inserting a claim for rectification of the covenant.

All the claims against the defendants other than Lorimer, with the exception of the claim for payment of stock subscriptions and the claim against Eastwood for negligence and that in respect of secret profits, were trade-debts, which the plaintiff company agreed to assume and pay. These claims were paid in the first instance by McMurchy and were subsequently reimbursed by the plaintiff company.

The action in respect of trade-liabilities therefore failed.

There was no evidence to establish the negligence of Eastwood nor to shew secret profits made by any of the other defendants. These claims failed.

The shares allotted to the defendants on organisation were issued by the plaintiff company as fully paid-up. No call had been made upon them; and this claim failed also.

The action should be dismissed as against all the defendants with costs; and there should be judgment for Lorimer for $45 and for Eastwood for $119.16 with costs of the counterclaim.

MIDDLETON, J. MARCH 11TH, 1920.

RE SINCLAIR AND HILL.

Trusts and Trustees—Trustee under Syndicate Agreement—Distribution of Fund in Hands of Trustee—Failure of Syndicate Project—Claims of Members of Syndicate who had not Paid their Shares in Full—Equity Arising from Initial Fraud—Money in Hand Insufficient to Produce Equality—Partnership Rule—Shortages Chargeable against those who had not Paid in Full.

Motion by the trustee under a syndicate agreement for the advice and direction of the Court as to the persons entitled to share in the moneys available for distribution.

The motion was heard in the Weekly Court, Toronto.

J. J. Maclennan, for the applicant.

C. B. Nasmith, for Rebecca Piper.

MIDDLETON, J., in a written judgment, said that the question arose under the terms of a trust agreement, constituting what was called the "Weyburn Syndicate."

The whole project had resulted most disastrously, and there was only a small fund for division.

Some subscribers paid in full—others, on finding they had been defrauded, paid only parts of their contemplated shares. The question was, whether the money in hand should be divided among those who had put money into the venture in proportion to the money put in, as contended by counsel for Rebecca Piper, or should be first used to recoup pro tanto those who had paid in full, as counsel for the trustee contended.

The learned Judge said that, as he understood the rule in partnership cases and in all cases of joint ventures, before there could be any division, there must be a charging against those who had not paid in full, of the amount by which they were short. This could be accomplished in various ways, but in all cases the same result would be arrived at. As between those who were the "victims" in this venture, there was no equity arising from the initial fraud, and Rebecca Piper ought to congratulate herself upon having escaped in time. Had the amount in hand been larger, all would have been permitted to share after the equalisation had been effected. On the facts, the money in hand was not enough to produce equality.

The scheme of distribution should be as suggested by the applicant. Costs should be allowed out of the fund.

LOGIE, J. MARCH 11TH, 1920.

LANE v. JAVAN.

Mortgage—Action for Foreclosure—Judgment for Sale—Execution against Lands of Mortgagor—Payment by Purchaser to Execution Creditor—Deduction from Purchase-money—Deduction from Claim under Mortgage—Addition to Amount of Personal Judgment against Mortgagor—Interest—Rate of—Date of Confirmation of Master's Report—Rule 502—Costs.

An appeal by the plaintiff from the report of the Assistant Master in Ordinary in a mortgage action.

The appeal was heard in the Weekly Court, Toronto.

Helen Beatrice Palen, for the appellant.

No one appeared for the defendant Egbert H. Javan or for William A. Heron, made a party in the Master's office.

E. C. Cattanach, for the Official Guardian, representing the infant defendants.

LOGIE, J., in a written judgment, said that the plaintiff sued for foreclosure in respect of two mortgages, the one made by Rose Ellen Javan, the owner of the mortgaged premises, then the wife of the defendant Egbert H. Javan, but since deceased, to one George Beggs, and by him assigned to the plaintiff, and the other by the said Egbert H. Javan and Florence Javan, his second wife, to the plaintiff.

Rose Ellen Javan died intestate in March, 1911, seised in fee

of the lands in question, which descended to her husband, the adult defendant, and their children, the infant defendants.

Upon the intervention of the Official Guardian, judgment was, on the 21st May, 1919, pronounced for the immediate sale of the mortgaged premises.

In the Master's Office a private purchaser was found. On closing with him, an execution appeared in the sheriff's office against Egbert H. Javan and Florence Javan, amounting in all to $254.46. This execution did not bind the interest of the infants in the land in question, they, as stated, taking under their mother, Rose Ellen Javan.

It was alleged and the Assistant Master found that the purchaser was authorised by the plaintiff to pay this execution. He did so; and, instead of paying the whole of his purchase-money into Court, he paid only the difference after deducting the amount so paid on Heron's execution.

Because of the plaintiff's authorisation, and no proof being offered by the plaintiff of an assignment to him of the judgment upon which the execution was founded, the Assistant Master deducted the amount of the execution from the plaintiff's claim under his first mortgage.

The Assistant Master should have insisted upon the purchaser paying the whole purchase-money into Court—the purchaser in turn relying upon the Court's protection in giving him a clear title.

The plaintiff had, however, waived his priority as to this sum, and asked and should now have the amount so deducted added to the amount of his personal judgment against the adult defendant Egbert H. Javan.

The second ground of the plaintiff's appeal was as to the rate of interest allowed by the Assistant Master on the plaintiff's mortgages.

The Master allowed interest at the rate reserved in the mortgages up to the 23rd October, 1919, the date when the purchaser paid his money into Court. The plaintiff claimed interest at the rate reserved until confirmation of the Master's report. In this the plaintiff was right.

With respect to interest on specialty debts no question can usually arise as to its computation—the rate at which it is to be allowed appearing in the instrument by which the debt is created.

The covenants in the mortgages provided for payment of interest at the rates therein reserved "until the principal be fully paid." This cannot be until confirmation of the report under Rule 502.

On debts carrying interest the practice in the Court of Chancery was that the Master should compute interest up to the date of his

report, i.e., the confirmation thereof. Interest after confirmation could only be obtained upon the hearing on further directions: Tudor & Venables' Chancery Practice, p. 368.

The mortgagee never took judgment for the amount of his debt against the mortgagor or waived the covenants in his mortgages. Interest therefore at the rates reserved in the mortgages should be allowed him until confirmation of the report.

There should be no order as to the costs taxed by the Master—no principle being in question.

The report should go back to the Master for amendment in accordance with the above.

The plaintiff and the Official Guardian were entitled to their costs of the appeal.

LATCHFORD, J., IN CHAMBERS. MARCH 12TH, 1920.

LAWRASON v. TOWN OF DUNDAS.

Municipal Corporations—By-law Authorising Execution of Contract—By-law Acted upon by Execution of Contract by Proper Officers—Attempted Repeal of By-law by By-law Passed in Following Year—Illegality or Ineffectiveness of Repealing By-law—Action to Set aside Repealing By-law, and for declaration of Validity of Original By-law—Municipal Act, sec. 283—Change in Personnel of Council—Corporation Bound by Contract—Reasonable Cause of Action Disclosed by Statement of Claim.

Motion by the defendants for an order striking out the statement of claim, on the ground that it disclosed no reasonable cause of action and was frivolous or vexatious.

H. M. Mowat, K.C., for the defendants.
M. H. Ludwig, K.C., for the plaintiff.

LATCHFORD, J., in a written judgment, said that the grounds of the motion were: (1) that the procedure for setting aside a by-law is restricted to that provided by sec. 283 of the Municipal Act, R.S.O. 1914 ch. 192; (2) that the municipal council for one year is not bound by the action of the municipal council for another year; (3) that the plaintiff's remedy, if any, is not by action but under the arbitration clauses of the Municipal Act.

On the 13th August, 1918, the defendants' municipal council passed a by-law, No. 828, empowering the mayor and clerk to

execute, and declaring valid, two agreements, one dated the 3rd June, 1918, and the other the 12th August, 1918, whereby, in consideration of mutual covenants, the plaintiff, as the owner of a parcel of land on the west side of a park of the defendants, bound himself to subdivide his land and restrict the erection of buildings upon it, in such a manner as to enhance the natural beauty of the park. The defendants bound themselves to lay down certain sidewalks, to extend their sewer system when installed so as to serve any houses erected on the plaintiff's property, to remove a fence, and to allow access from the park to the plaintiff's land. Other mutual obligations were expressed.

The by-law was acted upon by the mayor and clerk; both agreements were executed and delivered; and it was not suggested that the defendants exceeded their powers in making either contract.

In the following year, on the 7th July, the municipal council, then differently constituted, passed a by-law, No. 845, which, after reciting that the two agreements were entered into and made part of by-law 828, that nothing had been done under the agreements, that the ratepayers did not favour but opposed them, and that the council considered them detrimental to the best interests of the townspeople, purported to repeal by-law 828.

In this action the plaintiff asked that by-law 845 should be set aside and quashed, that an injunction be issued restraining the defendants from acting under it, and that by-law 828 be declared valid and binding on it.

By sec. 283 of the Municipal Act, the Court, upon application of a person interested, is empowered to quash a by-law for illegality.

Reference to Connor v. Middagh (1889), 16 A.R. 356, 368.

By-law 845 was not illegal, in the learned Judge's opinion: it purported merely to repeal a by-law which the plaintiff relied on as validly passed. The council has power, without acting illegally, to repeal a by-law which it has power to pass.

What was intended to be alleged by the plaintiff was, that by-law 845 was ineffective; and what he sought was in effect a declaration that in 1919 the council could not and did not derogate from the contracts made by the council, though differently constituted, in the previous year.

That a municipal council of one year is not bound by the contract of the same council in a previous year is a proposition which has no merit but that of novelty. A corporation is as fully bound by a contract which it has power to make as an individual: Halsbury's Laws of England, vol. 8, p. 379; and the corporation in 1919, though the council was differently composed, was the identical corporation which contracted with the plaintiff.

Motion dismissed with costs.

LENNOX, J. MARCH 12TH, 1920.

GOWANS v. PILLSBURY.

Vendor and Purchaser—Agreement for Sale of Land—Purchase-money Payable in Instalments—Purchaser Taking Possession—Large Payments Made by Purchaser—Inability to Complete Payments—Default—Refusal to Decree Specific Performance—Claim by Purchaser to Recover Payments Made—Claim by Vendor to Retain Payments—Equitable Decree—Accounting—Charges against Purchaser to be Deducted from Sums Paid and Balance to be Refunded to Purchaser—Interest—Costs.

Action for specific performance of an agreement by the defendant, dated the 10th August, 1916, to sell a tract of land in the township of Rochester to the plaintiff for $27,000, payable in instalments, the plaintiff assuming and agreeing to pay off a mortgage thereon and to indemnify the defendant in respect thereof. In the alternative, the plaintiff claimed repayment of the moneys paid by him, including taxes and interest.

The action was tried without a jury at Sandwich.

R. L. Brackin and A. J. Gordon, for the plaintiff.

A. R. Bartlet and G. A. Urquhart, for the defendant.

LENNOX, J., in a written judgment, said that a payment of $1,000 was made upon the execution of the agreement and the plaintiff was let into possession. The plaintiff became in default in respect of the payment of instalments, though he in fact made large payments, and there was correspondence between the parties, and notices were given by the defendant of the cancellation or termination of the agreement.

On the 28th August, 1919, the plaintiff made an informal tender, by cheque, of $12,050.43, and commenced this action on the following day.

The defendant asked to have the action dismissed, which meant forfeiture of all the money paid.

For several reasons, stated by the learned Judge, with ample references to authorities, the plaintiff was not entitled to a conveyance of the land.

As to the alternative relief, the learned Judge said that he could not adopt either of the extremes—that a purchaser who had paid nine-tenths of his purchase-money was to lose it all or get it all back.

The plaintiff should be charged with such taxes as he had not paid and such portion thereof as the defendant had paid, with

interest at 5 per cent. per annum. He should also be charged with interest upon the consideration-money from time to time outstanding, at 6½ per cent., from the date of the agreement until the 7th February, 1919, and thereafter, until the entry of judgment or surrender of the land in the meantime, at 5 per cent. The plaintiff should be credited with such interest payments as he had made to the mortgagees, not exceeding the amounts payable to the mortgagees for interest before renewal, and with all sums paid to the defendant on account of principal and interest under the agreement. The total of the debits should be set off against the total of the credits, and the plaintiff should have judgment for the excess, less the defendant's costs, payable upon delivery of possession. If the solicitors cannot adjust the amount, there should be a reference to the Local Master at Sandwich to make the computation and subsequent incidental adjustments; costs of the reference to be disposed of by the Master; and judgment to be entered for the amount found. If the defendant desired to amend by claiming possession, she should have leave to do so, and, after amendment, should have judgment for possession. Costs to the defendant.

MIDDLETON, J. MARCH 12TH, 1920.

DIAMOND v. WESTERN REALTY LIMITED.

RE WESTERN REALTY LIMITED.

Vendor and Purchaser—Agreement for Sale of Land—Declaration of Court that Agreement Valid and Subsisting—Subdivision of Land by Purchaser and Sales of Lots—Moneys Received by Vendor in Respect of Proceeds of Sales of Lots in Subdivision—Reference to Ascertain Amount—Vendor Company ordered to be Wound up—Reference for Winding-up—Receiving Order—When Terminated—Accounting by Receiver—Mortgagees—Leave to Proceed upon Mortgage notwithstanding Liquidation—Proceeding by Action to Enforce Mortgage.

Appeals by Davidson, receiver, and Davidson and Hunter, mortgagees, from rulings of a Referee, upon a reference directed by a judgment of the Supreme Court of Canada, as to accounting by the receiver, and as to the mortgagees' right to proceed to realise upon their mortgage. The defendant company was in course of liquidation under a winding-up order; and the winding-up reference proceeded concurrently with the reference under the judgment, before the same Referee.

The appeals were heard in the Weekly Court, Toronto.
G. E. Newman, for the appellants.
A. C. McMaster, for the liquidator of the company.
I. F. Hellmuth, K.C., and A. Cohen, for the plaintiff.

MIDDLETON, J., in a written judgment, said, after setting out the facts, that the action was brought to restrain the company from collecting from persons (subpurchasers) with whom the plaintiff had made agreements for the sale of lots, and for damages. The company brought a cross-action to have it declared that an agreement between Diamond and the company was at an end by reason of Diamond having failed to sell 50 lots in each six months. A motion was made for an interim injunction and consolidation of the actions; and an order thereon was made on the 7th September, 1916, by which Davidson was appointed receiver to get in all money payable by subpurchasers. The order as issued contained no limitation. At the hearing the action was dismissed (12 O.W.N. 226), and this was affirmed on appeal to a Divisional Court (14 O.W.N. 94). On the 17th February, 1919, the Supreme Court of Canada reversed the judgment of the Divisional Court, and gave judgment for the plaintiff, declaring the agreement valid and subsisting, and directed a reference to ascertain what sum was payable by the defendants to the plaintiff in respect of moneys received on account of any of the lots in the subdivision.

The receivership order was not recited in the judgment of the Supreme Court of Canada, and was not part of the case on the appeal to that Court.

Davidson contended that the receivership came to an end at the trial, and that he could not be held liable beyond that date; and, second, that he was liable only for moneys received or receivable under the Diamond contracts, and not for moneys received under the contracts made by the company with subpurchasers.

The Referee directed Davidson as receiver to bring in: (1) an account of all agreements made by the defendants with purchasers of any of the lots; and (2) an account of all moneys paid by all subpurchasers from the 7th September, 1916, to the present time.

The first direction should be vacated and the second affirmed; costs in the reference.

The learned Judge was of opinion that the receivership did not come to an end at the hearing.

The appeal by the mortgagees, Davidson and Hunter, was from the refusal of the Referee to give them leave to proceed upon their mortgage.

The learned Judge was of opinion that the mortgagees should

be allowed to enforce their mortgage, notwithstanding the liquidation, by an action upon the mortgage in this Court. Any attempt to exercise the power of sale would result in litigation, and the right of the mortgages should be determined in an action brought by them.

The appeal of the mortgagees should be allowed, with costs here and below, to be added to their claim.

ORDE, J. MARCH 12TH, 1920.

TRICKEY v. ROSS.

Appeal—Report of Mining Commissioner pursuant to Reference in Action—Questions of Fact—Conflicting Evidence—Demeanour of Witnesses—Agreement—Refusal to Disturb Report—Partnership—Interests in Mining Property—Motion to Confirm Report—Necessity for—Practice—Judgment on Further Directions—Costs—Counsel Fee.

Appeal by the defendant from a report of the Mining Commissioner, and motion by the plaintiffs for judgment thereon.

The report was made pursuant to a reference to the Commissioner in an action.

The appeal and motion were heard in the Weekly Court, Toronto.

J. Cowan, for the defendant.

W. R. Smyth, K.C., for the plaintiffs.

ORDE, J., in a written judgment, said that he had come to the conclusion that the Commissioner was right. There was a direct conflict of evidence on many points between the plaintiff Montagu and the defendant and his witnesses. The Commissioner, having seen the witnesses, believed Montagu in preference to the defendant. After a careful perusal of the evidence, the learned Judge saw no reason for disturbing the Commissioner's findings. It was significant that wherever there was any written evidence it supported Montagu's story and discredited the defendant's.

The defendant rested his case substantially upon the contention that he and the plaintiff Montagu were partners, and that consequently he was entitled to share with Montagu, and that the plaintiff Trickey entered into his agreement with Montagu with notice of the defendant's interest and took subject to it. The plaintiff Kinney was a trustee for Montagu, and Kinney's rights (it was alleged that he had a small interest) were necessarily subject to those of the others.

In the learned Judge's opinion, there was nothing in the agreement between Montagu and the defendant to constitute them partners. Most of the incidents of partnership were lacking. They were to become, if anything, merely co-owners. It was absurd to suggest that the agreement, whatever its exact terms may have been, which these two men, made in September, 1919, carried with it all the ingredients of a partnership, with the power to incur obligations binding upon each other, with no right in either to transfer his interest to a stranger, etc.: see Lindley on Partnership, 7th ed., pp. 26, 27. If partnership were involved in the arrangement at all, it was only a contemplated partnership, conditional upon each party performing his part of the bargain. The defendant failed to perform his part, and the agreement came to an end.

The defendant's counsel contended that there was no necessity for any motion to confirm the report. The conclusions of the Commissioner were, however, of such a nature that a motion for confirmation or for judgment upon the report by way of further direction was proper.

The appeal should be dismissed and the report confirmed; and, so far as necessary, there should be judgment for the plaintiffs against the defendant in the terms of the conclusions of the report. The plaintiffs should have the costs of the appeal and motion, but only one counsel fee.

ROSE, J. MARCH 12TH, 1920.

*BOONE v. MARTIN.

Landlord and Tenant—Assignment by Tenant for Benefit of Creditors —Covenant by Tenant to Pay Rent and to Pay Municipal Taxes—Failure to Pay—Payment by Landlord—Claim to Preferential Lien for Amount Paid—Payment of Taxes not a Payment of Rent—Claim of Landlord to be Subrogated to Municipality's Right of Distress—Mercantile Law Amendment Act, sec. 3—Right to Priority in Respect of Rent in Arrear —Costs of Action.

Action by a landlord against the assignee for the benefit of the creditors of his tenant, for a declaration that the plaintiff was entitled to a preferential lien upon the assets of the tenant in the hands of the defendant for rent and for taxes paid by the plaintiff.

The action was tried without a jury at a Toronto sittings.

J. W. McCullough, for the plaintiff.

Gordon N. Shaver, for the defendant.

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

duty, pays the debt or performs the duty; and the question is, whether the right of distress is a remedy of the municipality which the Mercantile Law Amendment Act entitles the plaintiff to use. That question appeared to be decided in In re Russell (1885), 29 Ch.D. 254: the Act did not confer upon the plaintiff, the landlord, the right to distrain for the taxes; and, in so far as the right to subrogation depended upon the Act, the plaintiff's claim failed.

The right to priority in respect of the rent was admitted; and it was also admitted that the amount of the rent was $702.90.

There should be judgment declaring the plaintiff entitled to a preference for that amount; and there should be no order as to costs.

ROSE, J. MARCH 13TH, 1920.

GERVAIS v. GERVAIS.

Deed—Conveyance of Interest in Farm by Father to Son—Consideration—Maintenance of Father and Payment of Mortgage—Covenant of Son—Failure to Fulfill—Action to Set aside Deed—Lack of Confirmation by Father—Delay in Bringing Action—Confidential Relationship—Reliance of Father upon Son—Solicitation of Son—Lack of Independent Advice—Improvidence.

An action by a father against his son to set aside a deed of conveyance of the father's farm to his wife and the defendant and another son, in 1908.

The action was tried without a jury at Chatham.

J. M. Pike, K.C., and J. C. Stewart, for the plaintiff.

F. C. Kerby, for the defendant.

ROSE, J., in a written judgment, said that the plaintiff's other son had given a quit-claim deed of all the interest which he took under the deed attacked to the plaintiff and his wife. The plaintiff was quite content that his wife should retain the interest which she took—what he sought was to get back to himself and his wife the interest conveyed to the defendant.

The plaintiff said that the suggestion was that the farm should be conveyed to the two sons, the defendant and Jerry; that he, the plaintiff, was willing to convey to his wife, but that the defendant insisted that he and Jerry should be given an interest. The learned Judge credited this; he thought that the plaintiff's idea

was to convey to his wife, but that he was persuaded by the defendant to convey to his wife and the two sons. The plaintiff said that he intended, when he was persuaded to convey as he did, that the two sons should be merely trustees; but this statement was not to be accepted.

The arrangement that was made was that, the farm being conveyed to the plaintiff's wife and sons, they three should work it and pay off a mortgage upon it and maintain the plaintiff. The evidence led to the conclusion that the mortgagee was content to give time if there was a change of title.

The deed was prepared and executed. The consideration was that the wife and sons should pay off the mortgage and support the plaintiff. The deed recited such an agreement, and the habendum was to the grantees "to and for the maintenance and support according to his station in life on said premises of the" plaintiff, "and from and after the death of the" plaintiff "to and for the sole and only use of" the wife and sons. There was also a covenant by the grantee to support and maintain the plaintiff and to pay the mortgage. The defendant had not supported or helped to support the plaintiff; nor had he paid anything on account of the mortgage.

The plaintiff, his wife, the son Jerry, and others of the family continued to live on the farm and work it, the plaintiff working as hard as any of the others. The plaintiff's wife received and disbursed the income; the mortgage had been considerably reduced.

The plaintiff had recognised the defendant as having an interest in the farm; but it was not established that, with any knowledge of his rights, the plaintiff had done anything to confirm the transaction of 1908. The delay in attacking the transaction was not important; certainly, that delay had not led the defendant to alter his position in the slightest degree.

The transaction could not be supported as being a performance of a promise previously made by the father that he would give the defendant some interest in the farm if he stayed at home and worked upon it.

The deed could not stand; for the reasons that, even if the plaintiff understood that he was conveying an interest to his sons, and even if it was necessary in order to satisfy the mortgagee that there should be a conveyance to somebody, the defendant stood in a confidential relation to the plaintiff, and the plaintiff relied upon him; that the plaintiff's action was induced by the defendant's solicitation; and that the plaintiff needed independent advice, and had none. Moreover, the transaction appeared to have been improvident. When the plaintiff was divesting himself of all his property in consideration of a promise of support, there should have been some means provided of bringing the property

back to him in case the grantees failed—as the defendant certainly had failed—to perform the promise of maintaining the plaintiff.

The deed must be set aside. There should be judgment accordingly with costs.

ORDE, J. MARCH 13TH, 1920.

PELLEGRINO v. MULHERN.

Vendor and Purchaser—Agreement for Sale of Land—Deficiency in Quantity of Land—Condition as to Objection to Title—Right of Vendor to Rescind—Right of Purchasers to Specific Performance with Compensation—Amount of Compensation Fixed by Court—Protection of Purchasers against Mortgage.

Action for specific performance of an agreement for the sale by the defendant and the purchase by the plaintiffs of land in the town of Thorold, or for damages.

The action was tried without a jury at St. Catharines.

A. W. Marquis, for the plaintiffs.

F. E. Hetherington, for the defendant.

ORDE, J., in a written judgment, said that the only question for determination was the nature and extent of the plaintiffs' remedy against the defendant. The defendant admittedly made a contract with the plaintiffs to sell them a certain parcel of land, and was not in a position wholly to perform his contract. He offered to rescind the agreement, to refund so much of the purchase-money as had been paid, and to pay for the improvements made by the plaintiffs. The latter declined to accept a rescission, and desired a conveyance of so much land as the defendant was able to convey, with compensation for the deficiency.

The agreement was dated the 1st February, 1919, and contained a clause to the effect that the purchasers should be allowed 10 days to investigate the title, and if, within that time, they should furnish the vendor in writing with any valid objection to the title which the vendor should be unable or unwilling to remove, the agreement should be null and void and the deposit-money returned to the purchasers without interest.

The plaintiffs were clearly entitled to a conveyance from the defendant of all that he could convey and to compensation for the deficiency, unless the defendant was entitled to rescind under the conditions referred to: Fry on Specific Performance, 5th ed., p. 599 et seq; Rawlins on Specific Performance, p. 57 et seq.

The fact that the 10 days fixed by the agreement for making objections to the title had elapsed was of no consequence here. If the defendant could have been entitled to rescind, had objection to the want of title to the 6-foot strip (the deficiency) been made within the 10 days, he could hardly be deprived of that right now that the objection was taken after the time had elapsed—that would be giving the plaintiffs an advantage as a result of their own delay. The question should therefore be considered as if the objection had been made in time and the defendant had attempted to rescind under the agreement.

Bowes v. Vaux (1918), 43 O.L.R. 521, which was relied on as establishing the defendant's right to rescind, was not applicable to the present case.

In In re Jackson and Haden's Contract, [1906] 1 Ch. 412, it was held that a condition giving the vendor the right to rescind in the event of his inability or unwillingness to comply with the objection to the title must not be considered as giving him an arbitrary power to annul the contract. See the judgment of Collins, M. R., at p. 419. That case was exactly in point. The defendant here had placed himself in his present position by his own conduct. A very little forethought and care might have prevented all the trouble.

The learned Judge was, therefore, of opinion that the defendant was not entitled to rescind, and that the plaintiffs were entitled, upon completion of the payments required by the agreement, less $250, the amount fixed by the learned Judge as compensation, to a conveyance of the 59 feet to which the defendant could give title.

There should be judgment accordingly; the plaintiffs' costs on the Supreme Court scale to be paid by the defendant.

Before judgment is entered, the learned Judge will hear counsel upon the question whether the plaintiffs should be in some way protected against an existing mortgage upon the property.

DAVIDSON v. GOODWILL—ORDE, J.—MARCH 12.

Solicitor—Action against, for Negligence in Giving Bad Advice —Evidence—Retainer or Employment not Shewn—Finding of Fact of Trial Judge—Dismissal of Action.]—An action for damages alleged to have been sustained by the plaintiff as the result of the alleged negligence of the defendant in advising the plaintiff as his solicitor. The action was tried without a jury at Peterborough. ORDE, J., in a written judgment, said, after making a full statement of the evidence, that he had come to the conclusion that the plaintiff never employed the defendant as his solicitor, and that there was nothing in the course of the negotiations to justify the inference that the defendant was employed or retained by the plaintiff either as a solicitor or in any other capacity. The plaintiff said that the defendant advised him to take cash for certain shares in an industrial company. It was that advice which the plaintiff pointed to as being negligently given. The defendant denied that he gave the advice. The learned Judge said that, upon all the evidence, it was not clear that the advice, if it ever was given, was not, in all the circumstances, quite proper and sound. Action dismissed with costs. R. R. Hall and C. R. Widdifield, for the plaintiff. J. F. Strickland and V. J. McElderry, for the defendant.