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PORTER v. ARMSTRONG.

*Feb. 3.
*Mar. 13.

ROBERT PORTER & SONS LIMITED (PLAINTIFFS) ..... } APPELLANTS;

AND

J. H. ARMSTRONG AND ANOTHER (DEFENDANTS) ..... } RESPONDENTS.

AND

WILLIAM WASHBROUGH FOSTER (DEFENDANT).

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Sale of land—Agreement—Co-purchasers—Covenant to pay—Joint or several—Intent to re-sale at a profit—Partnership

K., whose rights have been acquired by P., sold to F. and W.M. a piece of land for $10,000 payable $3,000 cash, $5,500 by assuming a mortgage to P. and $1,500 at a later date. The agreement for sale contained the following covenant: "The purchasers covenant with the vendor that they will pay to the vendor the said sum * * *." The agreement also contained the following clause: "The terms 'vendor' and 'purchasers' in this agreement shall include the executors, administrators and assigns of each of them." P. sued F. with A. and W. A. M., W. M's. executors, for the balance of the purchase price, alleging that the covenant was a joint and several covenant, or, alternatively, that F. and W. M. were partners in the purchase of the land and therefore jointly and severally liable.

Held that the covenant was in form joint and not several and that W.M's. executors were not liable. *White* v. *Tyndall* (13 App. Cas. 263) foll.

Held, also, that although the property was bought by F. and W.M. with the intention of turning it over at a profit, there was no evidence from which to infer an agreement in the juridical sense that the property was to be held as partnership property.

APPEAL from a decision of the Court of Appeal for British Columbia reversing the judgment of the trial court and dismissing the plaintiff's action as against the respondents.

The material facts of the case and the questions at issue are fully stated in the judgment now reported.

D. Donaghy and *J. F. Smellie* for the appellant.

Geo. F. Henderson K.C. for the respondents.

The judgment of the court was delivered by

DUFF J.—I see no reason to differ from the conclusion of the majority of the Court of Appeal founded on

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

the authority of *White* v. *Tyndall* (1), that the covenant in question, assuming there was no partnership, is a joint covenant. The argument based upon the stipulation in the agreement that "vendor" and "purchasers" in the agreement shall include the executors, administrators and assigns of each of them, is conclusively answered by the observations of Lord Herschell at pp. 276 and 277.

The question raised by the allegation of the appellants that the debt sued upon is a partnership debt, presents more room for controversy. Foster and Miller unquestionably intended to buy the property, to sell it again at an enhanced price, and thereby to make profit. Indeed, the sole object of purchasing the land was to dispose of it profitably. No doubt they intended to share the outlay equally between them. As regards the purchase money, the law would, of course, give to either of them a right of contribution against the other for any payment on the joint debt in excess of his own proper share, and on a sale, each would be entitled to share in the price according to his interest. The inevitable result, if the property was held in common and sold, would be that, as between Foster and Miller themselves, the right to share in the profits and the legal responsibility for losses would be equally distributed. But these consequences all flow from the fact that these two persons were jointly responsible for the purchase money, and that each was entitled to an undivided moiety in the equitable estate vested in them, as the result of the contract of purchase.

Partnership, it is needless to say, does not arise from ownership in common, or from joint ownership. Partnership arises from contract, evidenced either by express declaration or by conduct signifying the same thing. It is not sufficient there should be community of interest; there must be contract. In the first chapter of Story's book on Partnership, there is this passage:—

> In short, every partnership is founded on a community of interest; but every community of interest does not constitute a partnership; or, as Duranton expresses it: "*La société aussi produit une communauté; en un mot, toute société est bien une communauté; mais toute communauté n'est point une société. Il faut pour cela la volonté des parties.*"
>
> The Roman law has recognized the same distinction: "*Ut sit pro socio actio, societatem intercedere oportet: nec enim sufficit rem esse*

(1) 13 A.C. 263.

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communem, nisi societas intercedit. Communiter autem res agi potest etiam citra societatem; ut puta, cum non affectione societatis incidimus in communionem, ut evenit in re duobus legata; item si a duobus simul empta res sit; aut si hereditas vel donatio communiter nobis obvenit; aut si a duobus separatim emimus partes eorum, non socii futuri. Nam cum tractatu habito societas coita est, pro socio actio est; cum sine tractatu in re ipsa et negotio, communiter gestum videtur." And again: "Qui nolunt inter se contendere, solent per nuntium rem emere in commune, quod a societate longe remotum est!"

Pothier's comment on the words "*si a duobus simul empta res sit*" is this: "*Scilicet non animo contrahendae societatis*" 17 Pand. II. 30 n.

The real question is whether, from the evidence before us, one ought to infer an agreement in the juridical sense that the property these two persons intended dealing with was to be held jointly as partnership property, and sold as such. Is this what they contemplated? Had they in their minds a binding agreement which would disable either of them from dealing with his share—that is to say, with his share in the land itself—as his own separate property? A common intention that each should be at liberty to deal with his undivided interest in the land as his own would obviously be incompatible with an intention that both should be bound to treat the corpus as the joint property, the property of a partnership. English law does not regard a partnership as a *persona* in the legal sense. Nevertheless, the property of the partnership is not divisible among the partners in specie. The partner's right is a right to a division of profits according to the special arrangement, and as regards the *corpus*, to a sale and division of the proceeds on dissolution after the discharge of liabilities. This right, a partner may assign, but he cannot transfer to another an undivided interest in the partnership property in specie.

Now Foster's arrangement with MacDonald was obviously not a transfer of a partner's right to his share of the profits, nor did it involve the introduction of MacDonald by agreement with Miller, as a partner in Miller's place. Nothing in the correspondence points to this. And I cannot accept Mr. Donaghy's contention that the transfer to MacDonald was a transfer resulting from an understanding between Foster and Miller. Miller's letters indicate very clearly, and in Foster's evidence there is nothing inconsistent with this, that both Miller and Foster as-

sumed that Foster was entitled to assign his interest in the property. It is true, no doubt, that in the special circumstances under which Miller advanced the funds for the first payment, Miller had, as between himself and Foster, a lien on Foster's undivided interest for the amount of the advance; a lien which, it may be (the evidence is not sufficiently explicit to enable one to form an opinion upon the point), was, as against MacDonald and his creditors, displaced by the operation of the Land Registry Act, although I think it quite probable that it was not. But this lien was not a partner's lien. It was a lien in the nature of salvage, which the law vests in one co-owner, who advances money at the request of the other to make a payment to save or protect the common property. The fair conclusion from all the facts appears to be that the learned trial judge and the majority of the Court of Appeal were right in their view, that a partnership was not constituted.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *Sydney Child.*
Solicitor for the respondents: *E. A. Boyle.*
Solicitor for the defendant: *E. A. Dickie.*