1920

*Nov. 5.
*Nov. 23.

ABRAHAM LAVIN (DEFENDANT).... APPELLANT;

AND

MORRES GEFFEN (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Partnership—Sale of interest by one partner to the other—Oral agreement—Evidence—Statute of Frauds—"The Partnership Ordinance" N.W.T. Ord. (1905) *c.* 94, *s.* 24.

Held, Duff J. dissenting, that, though the assets of a partnership include an interest in land, an oral agreement by one partner to buy out the other partner's interest in the partnership is enforceable and the Statute of Frauds is inapplicable in such a case, unless it be shown that there appears a "contrary intention" to the rule enacted by s. 24 of "The Partnership Ordinance" that "land" which has "become partnership property * * * shall * * "be treated as between the partners * * * as personal or "movable and not real estate."

Judgment of the Appellate Division (15 Alta. L.R. 556) affirmed, Duff J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge and maintaining the respondent's action.

The appellant and the respondent were carrying on business in partnership as farmers, ranchers and general dealers in cattle. The respondent alleged that the appellant orally agreed to buy out the respon-

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) [1920] 15 Alta. L.R. 556; [1920] 1 W.W.R. 666.

dent's interest in the partnership on certain terms and sued for the price agreed. The appellant denied this, pleaded the Statute of Frauds and counterclaimed for an order dissolving the partnership and for an accounting. Upon the case coming on for a first trial, without the terms of the partnership agreement or of the lease being put in evidence, the respondent admitted that among the assets of the partnership was a leasehold interest in some real estate. The trial judge then dismissed the respondent's action, following *Gray* v. *Smith* (1). On appeal to the Appellate Division, this judgment was reversed and a new trial ordered (2). On the second trial, both the partnership agreement and the lease were produced and the respondent's action was then maintained.

A. McL. Sinclair K.C. for the appellant.

J. B. Barron for the respondent.

THE CHIEF JUSTICE.—The reasons stated by Mr. Justice Stuart in delivering the judgment of the Appellate Division in this case are quite satisfactory to me. I agree with them and would dismiss this appeal with costs.

IDINGTON J.—The parties hereto by articles of partnership agreed to become partners in the business of mixed farming and cattle buyers.

The respondent had, two days before, obtained a lease of four hundred acres of land in Alberta for the term of five years.

(1) [1889] 43 Ch. D. 208; 59 L.J. Ch. 145; 62 L.T. 335.

(2) [1919] 15 Alta. L.R. 59; [1919] 3 W.W.R. 498, 584.

1920

LAVIN v. GEFFEN.

Idington J.

By said articles of partnership it was

agreed and distinctly understood

that the said lease should

be the property of and belong to the partnership

and the respondent agreed

to hold the said lease for the sole use and benefit and in trust for the said partnership

and that he would execute such documents as required to insure the benefit for the partnership which was to become bound by the provisions and covenants contained in said lease and save respondent harmless.

A month later these parties were negotiating for a dissolution of said partnership and as the result thereof orally agreed that the appellant should buy out all the respondent's interests therein, including the interest he had so acquired in said lease.

The learned trial judge decided in favour of the respondent seeking to enforce the terms of said oral agreement.

The appellant, amongst other things he contended for, set up the provision of the Statute of Frauds, and another statute requiring the contract to be in writing.

Section 4 of the Statute of Frauds is the only one that seems to raise any difficulty.

The question raised thereunder is whether or not the contract in question was one for

the sale of lands tenements or hereditaments or any interest in or concerning them.

The authorities are collected in Leake on Contracts, 4th ed., pages 164 et seq., so far as bearing upon the necessity for an assignment of a lease for a term of years being reduced to writing. Of these the cases

Buttemere v. *Hayes* (1), and *Smart* v. *Harding* (2), followed as they have been by many others, seem to establish the proposition that a contract for the transfer of a lease for a term of years or even a less interest in the possession of land, requires to be in writing.

The question raised herein is whether or not that is applicable to a bargain involving the transfer of the whole of the assets of a partnership when made between two partners.

The Partnership Ordinance in Alberta C.O. 1915, ch. 94 by section 24 thereof, enacts as follows:—

> Section 24:—Where land or any interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the parties (including the representatives of the deceased partner) as personal or movable and not real estate.

It is submitted by counsel for appellant that this refers to the law as administered in the courts of equity for many years prior to the passing of the Ordinance.

Assuming that to be the case, had either of the parties any more, after the execution of the articles of partnership, than an equitable interest in the lease to dispose of?

And is that on going a step further anything more than the interest either had in the ultimate result of what value there would be left for either after winding up? And I can conceive of a possible case of a joint adventure in the acquisition of real estate or any interest therein which might, in the last analysis, leave nothing but that real estate to be bargained about, and where there might be room for the application of the *obiter dicta* in the case of *Gray* v. *Smith* (3).

(1) [1839] 5 M. & W. 456. (2) [1855] 15 C.B. 652.
(3) 43 Ch. D. 208.

1920

LAVIN v. GEFFEN.

Idington J.

But under such articles of partnership as above referred to, I am unable to see any escape from the authorities cited by the court below, and many others, reducing the interest sold to a mere chose in action, and hence that the appeal should fail.

I do not think it necessary in the view I take to consider the motion to quash further than to say that it is what the court expresses by its formal judgment, and not the opinions leading up thereto, that must govern, and the record shews that all the court decided was for a new trial.

I think the appeal fails and should be dismissed with costs.

DUFF J. (dissenting).—I am not satisfied that the Appellate Division considered that the judgment on the previous appeal had determined the point of the applicability of the Statute of Frauds. An opinion to that effect was expressed but the actual determination of the question in its relation to the rights of the parties in the action seems to have been left for the judgment on the new trial. For that reason I think the point is open on the present appeal.

On the merits of the point, as the majority of the court take a different view there is perhaps not much object in entering upon a detailed discussion. The fallacy, if I may say so with great respect, which appears to have prevailed with the majority of the judges in this litigation is that the provision of "The Partnership Act" declaring the interest of a partner in partnership land to be (as between partners) personalty—a provision declaratory of the law as it existed at the time the Act was passed—concludes the point; in other words, that because for certain purposes the

partner's interest is personalty it follows necessarily that it is something to which the fourth section of the Statute of Frauds can have no application.

The point of course is: Is such an interest an interest in land within the meaning of the fourth section? The judgments of Lord Cairns in *Brook* v. *Badley* (1), and of the Lords Justices James and Cotton in *Ashworth* v. *Munn* (2), appear to me to furnish the reasoning governing the determination of the point.

Lord Cairns' expression in the first mentioned case,

> a person who has a direct and a distinct interest in the land,

is—if anything—more clearly applicable to the case of a partner than to the case with which he was dealing; and all the judges who took part in the judgment in *Ashworth* v. *Munn* (2) in the Court of Appeal treated the judgment of Lord Cairns as governing the case of a partner. Lord Justice Cotton said, speaking of a partner's interest, at p. 374:

> It is, in my opinion, independently of any decision, an interest in land;

and at pp. 376-7 he says it is quite impossible, in his opinion, to distinguish for the relevant purpose the case of partnership property from that of the interest of a person in land which is to be sold and the proceeds of which are to be divided among beneficiaries of whom he is one. The interest in every such case, of course, is, before any sale takes place, by reason of the doctrine of notional conversion, in contemplation of law personalty; but it is very clearly, I think, (as all the eminent judges held) none the less an interest in land. In *Gray* v. *Smith* (3), Lord Justice Cotton expressed the opinion that an agreement for

(1) [1868] 3 Ch. App. 672. (2) [1880] 15 Ch. D. 363 at p. 369.
(3) 43 Ch. D. 208.

1920

LAVIN v. GEFFEN.

Duff J.

the dissolution of a partnership and a transfer of one partner's share in the assets (including leaseholds) is an agreement within the fourth section concurring in this with Kekewich J.; and nobody after reading the judgment of the Lords Justices in *Ashworth* v. *Munn* (1) could be surprised at this expression of opinion.

ANGLIN J.—The judgment of the Appellate Division delivered by Mr. Justice Stuart disposed of the question at issue in this Court so satisfactorily that I feel I cannot usefully add to it.

MIGNAULT J.—For the reasons given by Mr. Justice Stuart in the Appellate Division, I would dismiss this appeal.

Appeal dismissed with costs.

Solicitor for the appellant: *B. Ginsberg.*

Solicitors for the respondent: *Barron, Barron & Helman.*

(1) 15 Ch. D. 363 at p. 369.