1945

*Oct. 23, 24, 25

*Dec. 21

ALFRED W. EANSOR (PLAINTIFF).. APPELLANT;

AND

NORMAN D. EANSOR, LLOYD C. EANSOR AND T. J. EANSOR & SONS LIMITED (DEFENDANTS).... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Specific performance—Alleged contract for sale of shares in company—Borrowings by shareholders from company to purchase shares—Companies Act, R.S.O., 1937, c. 251, s. 96—Effect thereof in consideration of question of granting specific performance.

A.E., N.E. and L.E., brothers, were the directors of a company in which each of them held, in his own name, 176 shares. They were also entitled, as the residuary legatees named in the will of their deceased father (of which will they were the executors), to share equally in 176 shares of the company held by their father's estate. The said shares and three shares held, one each, by the wives of said brothers (all fully paid up) were all the issued shares of the company.

A.E. sued N.E. for specific performance of an alleged agreement for sale to A.E. by N.E. of his shares, including (so A.E. claimed) the 176 shares in N.E.'s name and also his one-third interest in the shares held by his father's estate, making in all 234⅔ shares. N.E. alleged

*PRESENT:—Kerwin, Hudson, Rand, Kellock and Estey JJ.

that, though a sale by him to the company of the 176 shares held in his name had been proposed before it was learned that the company could not purchase its own shares, no agreement such as alleged by A.E. had ever been made, and if any such agreement had been made it was for not more than 176 shares; and he contended that, in any event, it was not a case where specific performance should be ordered. L.E. and the company were (on application in the action) added as party defendants.

Payments had been made to N.E., extending over a period of more than three years, by cheques of the company, charged in its books against A.E. and L.E. as (according to heading of the account) loans to them jointly for the purpose of purchasing stock of the company from N.E. It was contended that this method of payment involved loans to shareholders contrary to s. 96 of *The Companies Act*, R.S.O. 1937, c. 251, and, therefore, specific performance of the alleged agreement should not be granted; also that (if, as contended, the loans had not been repaid) it would be inequitable to grant specific performance because that would compel N.E. to part with his shares and yet remain liable to the company (under said s. 96) for the purchase money so loaned.

The trial Judge found that there was a binding contract between A.E. and N.E. for the sale by N.E. to A.E. of 234⅔ shares, and ordered specific performance, and ordered that on conveyance of the shares to A.E., he should hold them as trustee for himself and L.E. in equal shares (in accordance with what the trial Judge found had been agreed) and should transfer to L.E. 117⅓ shares. He also, as expressed in clause 5 of the formal judgment, ordered that the sum of $798.20 (by which amount he found that N.E. had been overpaid for the shares) should be a personal debt of N.E. to the company and that in the company's books the indebtedness to it of A.E. and L.E. should be reduced by that amount.

The Court of Appeal for Ontario set aside the judgment at trial and dismissed the action, holding that by the evidence no binding contract was established for the sale of any shares from N.E. to A.E.

On appeal to this Court:

Held: On the evidence, and having regard to the trial Judge's findings, the judgment at trial should be restored; except clause 5 thereof (above mentioned), which should be deleted from the judgment.

It was proper (in view of findings at trial restored by this Court) that the order for specific performance should cover N.E.'s interest in the shares held by his father's estate. *Per* Kerwin J.: There was nothing to prevent a court of equity from acting *in personam* and directing N.E. to do whatever was necessary to carry out his contract, particularly when he had been paid for the shares. *Per* Hudson, Rand, Kellock and Estey JJ.: N.E. was in a position to deal with his interest in the estate's shares and no question arose in the action as to title or inability to convey.

Per Kerwin J.: It was unnecessary in the present appeal to consider the effect of s. 96 of the Ontario *Companies Act*. N.E. had been paid and it could make no difference to him whence the money came. A.E. did not rely upon any illegal act as part of his cause of action.

1945

EANSOR v. EANSOR

The contention against the granting of specific performance because of possible personal responsibility of N.E. under s. 96 should be given no effect as a bar to the judgment granted at trial, in view of the fact that N.E. was one of the prime movers; and in this view, it was unnecessary to consider whether or not the loans by the company had been repaid.

Per Hudson, Rand, Kellock and Estey JJ.: While s. 96 of the Ontario *Companies Act* prohibits loans to shareholders, it provides its own penalty for disobedience and produces no other result. In any event, there is nothing in s. 96 which affected the contract here in question, to which the company was not a party. N.E. would have no responsibility under s. 96 for loans made up to the time he knew they were being made; if he chose to assent to further loans thereafter and thus incurred liability, that was not a consideration which would make it inequitable to decree specific performance against him. But taking the matter on the basis of the trial Judge's finding, that N.E. knew the facts from the time of the first loan, it might be that N.E. would have a right to be indemnified by A.E. and L.E. in respect of any liability he might have to the company in respect of the purchase price of the shares, but that was a matter which should be left to be determined when the point arose and the issue was properly defined.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario, which, reversing the judgment of the trial Judge, Urquhart J., dismissed the plaintiff's action, which was brought for specific performance of an alleged agreement for sale to the plaintiff by the defendant Norman D. Eansor of shares in the defendant company. The trial Judge found that there was a binding contract between the plaintiff and the said defendant for the sale by the latter to the plaintiff of 234⅔ shares, and ordered specific performance thereof; and ordered that, on conveyance of the shares to the plaintiff, he should hold them as trustee for himself and the defendant Lloyd C. Eansor in equal shares (in accordance with what the trial Judge found had been agreed) and should transfer to the said Lloyd C. Eansor 117⅓ shares. He also, as expressed in clause 5 of the formal judgment, declared that the defendant Norman D. Eansor was personally indebted to the defendant company in the sum of $798.20 (by which amount the trial Judge found that the said Norman D. Eansor had been overpaid for the shares) and ordered that the records of the defendant company be altered to make the said Norman D. Eansor a debtor of the company in that sum and be further altered to reduce the indebtedness

of the plaintiff and the defendant Lloyd C. Eansor to the company by the said amount. The trial Judge's judgment was set aside by the Court of Appeal for Ontario (Robertson C.J.O., Henderson and Gillanders JJ.A.), which held that by the evidence no binding contract was established for the sale of any shares from the defendant Norman D. Eansor to the plaintiff, and the action should be dismissed. The plaintiff appealed to this Court.

The material facts of the case and the questions in issue in this appeal are fully discussed in the reasons for judgment in this Court now reported.

S. L. Springsteen K.C. and *J. E. McKeon K.C.* for the appellant.

J. R. Cartwright K.C. and *R. S. Riddell K.C.* for the respondents Norman D. Eansor and Lloyd C. Eansor.

K. Laird for the respondent T. J. Eansor & Sons Ltd.

KERWIN J.—This is an appeal by the plaintiff, Alfred W. Eansor, against the judgment of the Court of Appeal for Ontario reversing the judgment at the trial and dismissing the action. The appellant and his brothers, Norman D. Eansor and Lloyd C. Eansor, two of the respondents, were shareholders and directors of the third respondent, T. J. Eansor and Sons, Limited, which carries on, in the City of Windsor, a business of fabricators of structural steel and ornamental iron. This business had been commenced by the father of the three brothers, T. J. Eansor, who took the sons into business with him and, in 1928, had the respondent company incorporated. The father died in 1931, and at the time of the events giving rise to the present action there were 707 issued shares of the capital stock of the company, all fully paid-up. Each of the sons held 176 shares, the estate of the father, under whose will the three sons are executors, held the same number and, of the remaining three shares, one was held by each of the respective wives of the sons.

In June, 1939, the bankers of the company insisted that something should be done to remedy the latter's unsatisfactory financial position. The local bank manager im-

1945

EANSOR v. EANSOR

Kerwin J.

posed two conditions before the bank would continue to carry the company's account. As stated by the Chief Justice of Ontario, one of these conditions was that one of the brothers should retire from the company's employ, but the other, not mentioned by the Chief Justice, was that the one who retired should dispose of his holdings in the company. This is of particular significance in connection with a consideration of the balance of the evidence given at the trial and of the exhibits.

A meeting was held in June, 1939, at which Norman D. Eansor volunteered to be the one to retire and at that time, according to his evidence, he offered to sell to the company the 176 shares standing in his name. On the other hand, the plaintiff says that what Norman offered to sell to him was his entire interest in the capital stock of the company and, no matter what expression was used, the trial judge has found on conflicting evidence, therein preferring the testimony of the plaintiff to that of Norman and Lloyd, that that was the bargain. This finding should not be disturbed and, for the reasons assigned by the trial judge, the evidence of Mr. Scarff, the company's auditor, and the form of a draft agreement prepared by Mr. Riddell do not militate against it. Mr. Riddell was not a witness.

While the pleadings appear to have been disregarded at the trial, the statement of claim alleges that "the purchase price of the said shares was to be based on the book value per share outstanding." At the trial the plaintiff testified that this was the book value as of January 31, 1939, the company's financial year ending on the 31st of January. While Lloyd Eansor stated that Norman had offered to sell only 176 shares, and those to the company itself, he testified that the purchase price was to be based on the book value at the end of each of the company's financial years. On this latter point alone, the trial judge accepted the evidence of Lloyd, and while we were pressed at the argument with the contention that a court could not direct specific performance of a contract one of whose terms was not only not testified to by the plaintiff but which was negatived by him, there is nothing to prevent a trial judge accepting some of the evidence of a party and rejecting a part.

There is no doubt that at this first meeting the time for payment by the plaintiff was not specified and this for the very good reason that the plaintiff went to the meeting with the idea of selling out his own interest in the company and retiring from its activities. When Norman volunteered to retire and sell, the plaintiff was not in a position to say how he could finance the matter, but my conclusion upon the evidence, agreeing therein with that of the trial judge, is that the method of payment was agreed upon at a subsequent meeting. The testimony as to the date of this later meeting was conflicting but I have come to the conclusion that it was, as the plaintiff testified and the trial judge found, in July, 1939, and not in the following year. The Chief Justice of Ontario, while not determining the matter, apparently leaned to the other conclusion but, if the view I have expressed be correct, it becomes of particular significance, as I am compelled to disagree with the learned Chief Justice that the evidence of the plaintiff as to what occurred at the two meetings did not establish any contract. I agree with the trial judge that there was a bargain whereby the plaintiff agreed to buy and Norman agreed to sell all the latter's shares in the company, including those to which he was entitled as his distributive share of the residue of his father's estate, and that such bargain was for an amount per share to be figured according to each annual statement of the company. The shares were to be paid for at the rate of thirty-five to sixty dollars per week.

Payments were made to Norman in accordance with this arrangement by cheques of the company, signed by Norman and the plaintiff. They were charged in the books of the company as loans to the plaintiff and Lloyd and over a period of more than three years Norman received in this manner the sum of $13,088.92. According to the terms of the contract which I find was entered into, it is evident that Norman was over-paid for the 176 shares held in his own name and one-third of the shares held in his father's estate to the extent of $798.20.

The first of these cheques is dated July 7, 1939—Norman having ceased his connection with the company on June 30 of that year in accordance with the arrangement. On the

1945

EANSOR v. EANSOR

Kerwin J.

back of this and all the other cheques, down to and including the last one dated October 30, 1942, is a printed endorsement "This cheque is in settlement of the following." Following this on the back of the first cheque is the typewritten notation "Payment from A. W. Eansor and L. C. Eansor in accordance with agreement—$178.52". The notation on the back of the cheque of July 28, 1939, is "Charge to A. W. Eansor and L. C. Eansor re: Purchase of stock from N. D. Eansor." In January, 1941, Norman approached the plaintiff, who was ill at his home, and suggested that he, Norman, be taken back in his old position, which request was refused. It was agreed, however, that Norman might go back as a mechanic, which he did, but in the plaintiff's absence he soon worked himself into a position of managerial authority. The significance to be attached to his return to the company is that the cheques continued to be issued and the entries made in the company's ledger under the heading "Loans to A. W. Eansor and L. C. Eansor jointly for the purpose of purchasing T. J. Eansor & Sons Limited stock from N. D. Eansor". The typewritten notation on the back of each cheque, in most cases and almost invariably from January, 1941, to the end, read:—"Payment on account re purchase of T. J. Eansor & Sons Ltd. stock."

It is inconceivable that Norman ever really thought that he was selling only 176 shares and these to the company. Unless, therefore, he is able to escape from his bargain there is no reason why a judgment for specific performance should not go against him in favour of the plaintiff and that he be ordered to convey the 234¾ shares in the capital stock in the company to the plaintiff and be enjoined from otherwise transferring them.

The position of the estate of T. J. Eansor was examined and while it appeared from the will that the three brothers were entitled to the residuary estate, it was said that in July, 1939, all the pecuniary bequests had not been paid; that the 176 shares held by the estate stood in the name of the executors and that, therefore, Norman never owned nor was he possessed of his one-third of those shares. Hence it followed, according to the argument, that the Court could not make an order that these shares, or any part of them,

should be transferred by Norman to the plaintiff. The executors as such are not, of course, parties to the action but there is nothing to prevent a court of equity from acting *in personam* and directing Norman to do whatever is necessary to carry out his contract to sell his one-third of the estate's shares to the plaintiff, particularly when, as has been shown above, he has been paid for them.

It was then said that the loans made by the company to the appellant and Lloyd were illegal as being in contravention of section 96 of the Ontario *Companies Act*, R.S.O. 1937, c. 251:—

> 96. No loan shall be made by the company to any shareholder, and if such a loan is made all directors and other officers of the company making the same and in any wise assenting thereto shall be jointly and severally liable to the company for the amount thereof, and also to third parties to the extent of such loan with interest, for all debts of the company contracted from the time of the making of the loan to that of the repayment thereof.

Whatever may be the effect of that section in a properly constituted action, I think it unnecessary to consider it in the present appeal. So far as Norman is concerned, he has been paid and it can make no difference to him whence the money came. The plaintiff does not rely upon any illegal act as part of his cause of action.

It was then urged that as a director Norman might in the future be held personally responsible under the section and that a court of equity under those circumstances should not decree specific performance. In view of the fact that Norman was one of the prime movers, I am unable to attach any weight to that argument or to consider it a bar to the judgment granted at the trial. In this view of the matter, it is unnecessary to consider what was argued with great force by Mr. Cartwright that the loans were not repaid by the declaration of a dividend. In my opinion, it makes no difference whether they were repaid or not.

As pointed out by the Chief Justice of Ontario, the action was originally brought by the plaintiff against Norman only. It was on the application of Lloyd C. Eansor and the company, and that of Norman, that the first two named were added as parties defendants to enable the Court to effectually and completely adjudicate upon the matters involved in the action. The company submitted its rights

1945

EANSOR v. EANSOR

Kerwin J.

to the Court and Lloyd adopted as his defence that already entered by Norman. That formal defence alleged that it was agreed among the three directors that he, Norman, would sell his stock to the company to the extent of 176 shares. Notwithstanding Lloyd's acceptance of this defence, he had acquiesced from the time he first learned of it, in the charging on the books of the company as a loan to himself as well as to the plaintiff, the various amounts paid from time to time by the company to Norman. While counsel for the appellant before us did not agree that the appellant should hold as trustee for Lloyd in equal shares with the appellant, clause 4 of the formal judgment at the trial so declaring was the proper order to make. It is difficult, however, to justify clause 5 whereby the amount of the overpayment to Norman, $798.20, is ordered to be a personal debt of Norman to the company, and the company's books are directed to be altered so as to reduce the liability of the plaintiff and Lloyd to the company by that sum.

I would allow the appeal and restore the judgment at the trial with the exception of clause 5. Norman should pay the company its costs of the appeal to the Court of Appeal and to this Court and Norman and Lloyd should pay the appellant his costs in each of those Courts.

The judgment of Hudson, Rand, Kellock and Estey JJ. was delivered by

KELLOCK J.—This is an appeal by the plaintiff from an order of the Court of Appeal for Ontario, dated the 21st day of November, 1944, allowing an appeal by the respondent Norman D. Eansor from the judgment at trial in favour of the appellant. The action as originally brought was between the two above named parties only, and the claim was for specific performance of an alleged contract for the purchase by the appellant from the said respondent of 234⅔ shares of the capital stock of the respondent company, the price as put in the statement of claim "to be based on the book value per share outstanding." The statement of claim further alleged that on the basis of the respective book values of the company's shares in each of the fiscal years 1939 to 1942 as set out in the pleading, a

certain number of shares each year amounting in all to the above total of $234\frac{2}{3}$ shares had been paid for by the appellant.

The statement of defence of the respondent Norman Eansor, subsequently adopted by the respondent Lloyd Eansor, alleged that in the year 1939, it was agreed by and between the directors of the respondent company (the appellant and the two individual respondents) that the respondent Norman Eansor would sell 176 shares to the respondent company at "book value" and further that certain monies were paid by the respondent company to the respondent Norman Eansor on account of this purchase. It was then alleged that during the early part of the following year, the directors learned that the company could not purchase its own stock and "the plaintiff thereupon instructed the company's auditors to set up the monies already paid to the defendant on account of the sale of the said stock, as a loan made by the company to the plaintiff and his brother and co-director, Lloyd C. Eansor." The pleading alleged that the defendant, Norman Eansor, "is agreeable to transferring the said 176 shares of the capital stock of the company to the person or persons entitled thereto and doth hereby bring into Court, duly endorsed, the said 176 shares to abide the decision of this Honourable Court." It is further alleged that at the time the respondent Norman Eansor agreed to sell the said stock, only 176 shares had been issued to him and "he was not in a position to sell or to agree to sell any more than the said 176 shares."

It will be noticed that no question is raised in the statement of defence with regard to the price alleged in the statement of claim, but rather it is agreed that the price was the "book value." It is inconceivable that, had there been any variance between the parties in their understanding as to "book value", the statement of defence would not have raised that issue. Far from doing so, the defence brings the 176 shares into Court for delivery to the person or persons determined by the Court to be the purchaser or purchasers. Moreover, if there could be said to be any ambiguity on the point, the evidence of the respondent Norman Eansor makes it clear that the only book value he dis-

1945

EANSOR v. EANSOR

Kellock J.

cussed at any time was as set out in the statement of claim, although he says it was "talked of" but not agreed to. His plea says, however, says it was agreed to, and his co-defendant, Lloyd Eansor, who adopted this statement of defence, says this was the price agreed upon.

It is implicit also in the statement of defence that on discovery that the respondent company could not purchase its own shares, it was arranged that the loan should be made by the company to the appellant and the respondent Lloyd Eansor and they became substituted as purchasers. In my opinion, therefore, the issues raised by the statement of defence upon which the parties went down to trial were two; namely, (1) whether the contract was as alleged by the appellant, one covering the sale of 234⅔ shares, or as alleged by the individual respondents, for the sale of 176 shares only, and (2) whether, as alleged by the appellant, he alone was the purchaser, or, as alleged by the respondents Norman and Lloyd Eansor, they were the purchasers.

At all material times, each of the three individual parties to the action had 176 shares registered in their respective names, and the estate of their father, the late T. J. Eansor, held another block of the same number. The father had died in the year 1931, appointing the three sons to be executors and trustees of his estate. They were also residuary beneficiaries. The shares were not specifically bequeathed.

It appears that, as the result of pressure from the respondent company's bank in June, 1939, it became necessary that one of the brothers, all of whom were in the employ of the company, should retire from the business in order to decrease expense. It is also suggested on the part of the appellant that there was another object, namely, to eliminate friction. In any event, at a meeting on June 15, 1939, between the three brothers and two bank representatives, the respondent Norman Eansor offered to be the one to retire. As stated in evidence by the appellant, Norman "offered his stock for sale with no conditions except that the price to be paid for it was the book value of the stock as of the close of the fiscal year just preceding, which was January 31, 1939." The appellant, whose evidence,

with one exception, is accepted by the trial judge, says that he immediately accepted this offer, and that the terms of payment were left to be agreed upon at a subsequent meeting, which, according to him, took place on the 4th of July, 1939. The respondent Norman Eansor says that the terms of payment were agreed upon; namely, a minimum of $35 per week, with an additional amount monthly which he required in order to meet certain obligations of his in connection with insurance and real estate. Counsel for the individual respondents does not contest this point but expressly admits that these terms of payment were agreed upon. Commencing on the 7th of July, 1939, the respondent Norman Eansor received company cheques for these instalments approximately weekly between that date and the 30th of October, 1942, signed by himself and the appellant as officers of the respondent company and which he endorsed. These endorsements were couched in varying language, such as, "Payment from A. W. Eansor and Lloyd C. Eansor in accordance with agreement," "Charge A. W. Eansor and L. C. Eansor as per agreement—$35 re stock purchase.", and "Charge account of A. W. Eansor and L. C. Eansor, re purchase of stock as per agreement." On the same date as the first of these cheques, namely, July 7, 1939, an account was opened on the books of the respondent company in which this and all succeeding cheques were charged to the appellant and the respondent Lloyd Eansor, the heading of the account reading, "Loans to A. W. Eansor and L. C. Eansor jointly for the purpose of purchasing T. J. Eansor & Sons Limited stock from N. D. Eansor."

The point upon which the learned trial judge prefers the evidence of the respondent Lloyd C. Eansor to that of the appellant is that the basis of the price was not the book value as of the 31st of January, 1939, as stated by the appellant in his evidence, but the book value of the shares at the end of each year while the payments continued, as alleged in the statement of claim. It is, to say the least, unusual that a plaintiff should come into court alleging in his pleading a contract embodying certain terms and in his evidence state that one of the important terms was not as pleaded, and it is not surprising that counsel

1945

EANSOR v. EANSOR

Kellock J.

for the respondents made much of this, although, as already pointed out, the statement of defence of the individual respondents accepts on this point the statement of claim. While the appellant in his evidence stated more than once that the original agreement was on the basis of the book value as at the 31st of January, 1939, he also stated, and this evidence is not mentioned by the trial judge, that "as we went along we used the increased value as the company came back. For instance, in the year following January 31, 1940, the book value of the shares at that time would be used for the stock that was purchased in the calendar year 1940 or in the fiscal year—". The appellant thus agrees that the price as stated by Lloyd Eansor was adopted by the parties. When it is considered that the only other suggested price is $80 per share put forward by the respondent Norman Eansor, which the trial judge rejects, I do not think the discrepancy as to the time when the basis of the price was agreed upon prevents effect being given to it. I come back to the pleadings where no issue is raised as to that being the basis of the price. In my opinion, therefore, the respondents fail in the contention that no contract at all resulted because the basis of the price was not agreed upon. Such a contention formed no part of the instructions given by the individual respondents to their solicitor for the defence of the action and a passage between counsel for the individual respondents and the learned trial judge at an early stage of the trial is significant:

His LORDSHIP: Is there any question about 176 shares Norman has not got and has not conveyed—

Mr. RIDDELL: I do not just understand your Lordship. Each of the brothers have 176 shares.

His LORDSHIP: Norman has this money. Surely in justice he has to convey the shares.

Mr. RIDDELL: We bring them into Court endorsed to turn them over to the plaintiff to the extent of 176 shares.

His LORDSHIP: So the fight is only about the extra 58⅔ shares?

Mr. RIDDELL: Yes, the fight is only about the extra 58⅔ shares.

Immediately following the above, there follows:

His LORDSHIP: This money pays for a lot more than 176 shares.

Mr. RIDDELL: If the selling price is as stated by the plaintiff.

The last comment was, no doubt, prompted by the appellant's evidence with regard to this term, but, so far

as the pleadings are concerned, it was new. If counsel had in mind the $80 figure later put forward by the respondent Norman Eansor, this had formed no part of the instructions he had received when he prepared the defence.

Turning to the other issue; namely, as to whether or not there was a contract for the sale of 234⅔ shares as alleged by the appellant and as found by the learned trial judge, it is important to bear in mind the circumstances existing in June, 1939, at the time of the matters here in question. At that time, as already pointed out, the late T. J. Eansor had been dead approximately eight years. His will provided for a total of $5,300 in pecuniary legacies, the balance of his estate being directed to be divided equally among the three sons. The position of the estate is not shown as of 1939, but as of the 31st of December, 1942, the assets are shown as in excess of $70,000, the liabilities, apart from mortgages on two parcels of real estate, being negligible. At that time, it would appear that all the pecuniary bequests had been paid. The three brothers, as already mentioned, were employed by and participating in the direction of the business. The company had been incorporated in 1928, but the business had existed as a partnership as far back as the year 1917. According to the evidence of the appellant, the company was treated as a "family corporation" for income tax purposes and continued to be run after incorporation as though it were a partnership. This, of course, does not affect the fact that the company was not a partnership, but it is significant when considered with all the evidence as to what the parties had in mind at the time the negotiations with respect to the sale of the stock took place. The appellant stated in evidence that the estate stock was always considered as being the "personal stock" of the brothers ever since the death of the father. Norman Eansor says that in the discussion as to the sale of the shares, he does not know whether he mentioned 176 or not, but he says that he does know that what he said he was selling was "whatever he possessed" and he agreed to retire from the company. It would be very natural for these three brothers, the father having been dead for eight years, they having operated and been employed in the business all that time, to have considered as

1945

EANSOR v. EANSOR

Kellock J.

their own an aliquot number of the estate shares, when there were assets apart from the shares with which to pay the pecuniary legacies. I should think the trial judge was quite justified in coming to the conclusion that when Norman agreed to sell "whatever he possessed" there was no misunderstanding between him and the appellant as to the number of shares under consideration. It is significant that, following the meeting of June 30, 1939, when the bargain was made, subject to arranging the terms of payment, the following day Norman Eansor came to the appellant and said that for certain reasons he would like it not to be known that he had left the employ of the company and he therefore asked that his resignation as director or officer of the company should not be asked for. The learned trial judge is of the opinion that both the individual respondents, in alleging that the bargain was as to 176 shares only, are now reasoning back from the fact that that was all they each had respectively registered in their own names.

The meeting, which the appellant says took place on the 4th of July, 1939, but which the respondents Norman and Lloyd Eansor say did not take place until the following year, was held in the office of Mr. Riddell, solicitor in these proceedings for the individual respondents, but who was then acting for the appellant as well. Mr. Riddell at the meeting was instructed by the appellant to "draw up an agreement and send it to me and if it were satisfactory we would go through it and sign it and put it into execution." Mr. Riddell did prepare such a document. This is Exhibit 1 and bears date "—day of May, 1940." The document as drawn by Mr. Riddell provides for a sale by the respondent Norman Eansor of 176 shares, of which he is the registered owner, at prices established by the annual balance sheets so that shares purchased during the year 1939 would be paid for on the basis of the value established by the balance sheet of January 31, 1939, and so on from year to year. This is the basis alleged in the statement of claim. Mr. Riddell was not called as witness, but Mr. Scarff, as member of the firm of auditors of the respondent company, was called.

As to the date of meeting in Mr. Riddell's office, Mr. Scarff says that he did remember being present in Mr. Riddell's office with the three brothers and the solicitor and he fixes the date as towards the end of April or early in May, 1940. He has no recollection or record of being present at such a meeting in 1939. He bases his recollection upon the fact that it was during the course of his firm's audit of the company's accounts when he received some information from a member of his staff conducting this audit. Following this conversation, he met the appellant who explained the difficulties which had been experienced with the bank and that, following discussions with the bank, it had been considered advisable for one of the brothers to retire from the business and that it had been agreed that the company would buy his stock. Mr. Scarff says that he pointed out to the appellant that a company could not purchase its own stock without reducing its capital and that the appellant's reply was that they had to satisfy the bank and so would have to make other arrangements. He then says there was a discussion as to the means of bringing about the desired result by purchase of the stock by the other shareholders, and that as the three brothers, although shareholders, had been in receipt of loans from the company, if they were all agreeable that might be a means of arranging the purchase. He told the appellant that they should see the company's solicitor. The appellant thereupon informed him that an appointment would be made with the solicitor to discuss the matter and this led up to the meeting in Mr. Riddell's office. It is plain from the evidence of the bank manager and his assistant and from the correspondence that the pressure from the bank had come to a head in June, 1939, and had taken the form of an ultimatum. The discussion as to the purchase of the respondent Norman Eansor's shares by the company also took place in June, 1939, and the instalment payments were arranged before the 7th of July of that year and the loan was set up on the books of the company as a loan to the two brothers as purchasers. The respondent Norman Eansor said in his evidence that it was "shortly after" the meeting of the 30th of June, 1939, that the instalment payments were agreed upon and

1945

EANSOR v. EANSOR

Kellock J.

the respondent Lloyd Eansor says that he remembers being present in the solicitor's office in 1939 with the appellant and Scarff It seems reasonably clear, therefore, that Mr. Scarff must have been speaking of the period following the audit for the year ending January 31, 1939, and that his recollection is defective to that extent. The learned trial judge does not fix the date of this meeting and does not rely upon the recollection of Mr. Scarff as to the conversation at that meeting having been limited to the sale of 176 shares.

With regard to the meeting itself, the appellant stated that Mr. Riddell at the beginning of the meeting had enquired as to the number of shares issued and the persons to whom they had been issued and that he, the appellant, had described how the outstanding shares were held. The learned trial judge finds that the explanation as to the mention of the 176 shares in the draft document as given by the appellant is correct, namely, that Mr. Riddell had assumed from the fact that the respondent Norman Eansor was the registered holder of 176 only, that that was all he was selling. I think, therefore, that the learned trial judge was justified on all the evidence in the conclusion to which he came, that the sale was a sale of all the shares in which the respondent Norman Eansor was interested.

Counsel for the respondents, other than the respondent company, contends that, on the evidence of the appellant himself when instructing Mr. Riddell with regard to the document, it is clear there was at that time no concluded agreement at all and that the verbal communications were subject to the settlement and execution of a document. The appellant says that it was almost a year between the meeting of July 4, 1939, and the actual drafting of the agreement by Mr. Riddell. The other evidence to which I have referred indicates this also. In the meantime, Norman Eansor was being paid in the neighbourhood of $350 monthly and the terms of the contract already pointed out had in fact been agreed upon. The appellant, whose evidence the learned trial judge accepts, says that they never operated under the draft document at all but under the earlier verbal agreement. I do not think, therefore,

that the appellant's reference to the draft agreement to be drawn by the solicitor should be construed as indicating that no agreement had in fact been entered into, nor that it was a term of the verbal agreement that the putting of the agreement into writing was itself a condition or term of the bargain.

It is contended on behalf of the respondents that it is an objection to the contract alleged by the appellant that as the estate's shares had not been distributed, the respondent Norman Eansor was not in a position to sell or offer for sale $\frac{1}{3}$ of the shares in the estate. I think it is a sufficient answer to this contention that this respondent was in a position to deal with his interest in the estate's shares and that no question arises in this action as to title or inability to convey. It has been found that the parties were *ad idem* as to the number of shares under consideration.

With regard to the question as to whether the appellant alone, or the appellant and the respondent Lloyd Eansor, were the purchasers, the trial judge adopted the view that the contract originally was one in which the appellant alone was purchaser, but that there was a subsequent agreement in which the appellant was to give one-half of the purchased shares to Lloyd.

It is clear that in his talk with Scarff between the two meetings of June 15 and July 4, 1939, the appellant had determined to make the purchase for himself and his brother Lloyd. Scarff says that at the conclusion of that discussion the appellant said the purchase "would have to be by himself and his brother Lloyd." The very first cheque of July 7, 1939, bears the endorsement "Payment from A. W. Eansor and L. C. Eansor in accordance with agreement." The respondent Lloyd Eansor says, however, that he did not know of the loan to himself and the appellant until he was going over the books in the fall of 1941 or 1942 and he then agreed to it. His co-respondent, Norman, says he did not know of the loan until January, 1941. This statement is not accepted by the learned trial judge, who finds that this respondent was fully aware at all times of the borrowing and that the money borrowed from the company was being used to pay him. Whether Lloyd Eansor also knew at the same time, the learned

1945

EANSOR v. EANSOR

Kellock J.

trial judge does not say. However, the finding of the trial judge is that the bargain for the purchase and sale was one made between the appellant and the respondent Norman Eansor alone, and the arrangement to give Lloyd Eansor a share in the purchase, of which the loan to him and the appellant was a part, was subsequent to the agreement of purchase and sale. The trial judge apparently believes that the appellant, whom he describes as "a clean-cut business man", made up his mind to finance the purchase by a loan from the company after he had accepted the respondent Norman's offer to sell on June 30 and before the settling of the terms of payment on July 4, but that he did not communicate to either of the brothers his intention with respect to the loan to himself and Lloyd until sometime before the first payment was actually made on July 7. I think, therefore, that the true view is that taken by the learned trial judge and that the appellant constituted himself a trustee as to one-half the benefits of the contract and that the respondent Lloyd Easnor assented thereto, with the full knowledge of the respondent Norman. The respondent Lloyd Eansor took the position in this Court, which he also took in the Court of Appeal, that although he opposed the appellant's claim, nevertheless, if a contract for the purchase were established, he was entitled to one-half of the shares.

The individual respondents further contend that as the method of payment for the shares involved loans to shareholders contrary to the provisions of section 96 of the Ontario *Companies Act,* R.S.O. 1937, Chap. 251, the result is that the contract now in question cannot be enforced.

The section provides:

> No loan shall be made by the company to any shareholder, and if such a loan is made all directors and other officers of the company making the same and in any wise assenting thereto shall be jointly and severally liable to the company for the amount thereof, and also to third parties to the extent of such loan with interest, for all debts of the company contracted from the time of the making of the loan to that of the repayment thereof.

In my opinion, while the section prohibits loans to shareholders, it provides its own penalty for disobedience and produces no other result. The section expressly recognizes the continued existence of the debt, as the liability

of the directors and officers imposed by the section continues only until the "repayment" of the loan. The loan then continues until it is repaid. It would be absurd, in my opinion, to suggest that the result of the section is that the transaction is void and that there is no debt to be recovered by the company. The whole object of the section, in my opinion, is to safeguard the assets of the company which would be defeated if the monies lent could not be recovered from the borrowers, and the directors and officers, as might well be the case, were insolvent. I see nothing, in any event, in the section which affects the contract here in question to which the company was not a party. The situation is not unlike that dealt with in *Spink (Bournemouth) Limited* v. *Spink* (1), although that case arose under quite different statutory provisions.

Mr. Cartwright finally argued that it would be inequitable to grant specific performance in this case, because to do so would compel the respondent Norman Eansor to part with his shares and yet remain liable to the respondent company for the purchase money advanced contrary to the provisions of section 96. If the respondent Norman Eansor did not know of the advances until January, 1941, he would have no responsibility for the advances up to that time, as it is not every director who is, by the section, made responsible but only "all directors * * * making the same and in any wise assenting thereto." If he chose to assent to further advances thereafter and thus incurred liability, I do not think that is a consideration which would make it inequitable to decree specific performance against him. Taking the matter, however, on the basis of the finding of the learned trial judge, namely, that this respondent knew the facts from the time of the first advance, it may be that this respondent would have a right to be indemnified by the appellant and the respondent Lloyd Eansor in respect of any liability he may have to the respondent company in respect of the purchase price of the shares, but that is a matter which should be left to be determined when the point arises and the issue is properly defined.

(1) [1936] 1 Ch. 544.

1945

EANSOR v. EANSOR

Kellock J.

I would allow the appeal and restore, with the exception of paragraph 5, the judgment of the learned trial judge. I would delete paragraph 5 altogether and leave the parties to deal with its subject matter as they may be advised. The appellant should have his costs in the Court of Appeal and in this Court against the respondents, other than the respondent company, as the respondent Lloyd Eansor, although he recovers shares, nevertheless made common cause against the appellant. I see no reason for the respondent company having been added as a party and I would give to that respondent its costs throughout against the respondent Norman Eansor.

Appeal allowed with costs.

Solicitors for the appellant: *McTague, Springsteen & McKeon.*

Solicitor for the respondents Norman D. Eansor and Lloyd C. Eansor: *R. S. Riddell.*

Solicitors for the respondent T. J. Eansor & Sons Ltd.: *Martin & Laird.*