1919
*Oct. 27,
1920
*Feb. 3.

THEATRE AMUSEMENT COMPANY (PLAINTIFF)..... APPELLANT;

AND

J. D. REID AND A. F. DRACKETT (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Landlord and tenant—Goods subject to lien-note—Distress for rent—Refusal to deliver to lien-holder—Conversion—Damages—"Act respecting Distress for Rent and Extra Judicial Seizure," R.S., Sask. (1909) *c.* 51, *s.* 4—*"An Act respecting Conditional Sales of Goods," R.S. Sask.* (1909), *c.* 145.

The appellant held an unpaid vendor's lien on certain chattel property in a theatre occupied by F. as tenant of the respondent R. The lien was invalid as against execution creditors of F. because of a defect in the affidavit of *bona fides*. These goods were first destrained under a distress warrant, issued out of the Police Magistrate's Court, to satisfy claims for wages. Later on the same day, the respondent R. issued a distress warrant for rent to the respondent D., who seized the same chattels. A few days later and before the first seizure was abandoned, the appellant asked the respondent D. to deliver up possession of the goods, which demand was refused. After the police seizure was abandoned, the appellant took this action in damages for conversion of its property, alleging that if it had been able to obtain possession prior to execution the defect in its lien would have been cured.

Held, Duff J. dissenting, that under the circumstances, the refusal of D. to surrender the goods did not amount to conversion.

Per Anglin, Brodeur and Mignault JJ.—The evidence does not establish that the respondents were in a position to give possession of the goods at the time the only demand for possession was made by the appellant.

Judgment of the Court of Appeal (12 Sask. L.R. 174) affirmed, Duff J. dissenting.

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*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

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APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) reversing the judgment of the trial judge (2) and dismissing the appellant's action.

The material facts of the case are fully stated in the above head-note and in the judgments now reported.

Schull, for the appellant.

Gregory K.C., for the respondent.

IDINGTON J.—The respondent Reid as landlord issued to his co-respondent a distress warrant most carefully worded so as to restrict him to the seizure only of what could be lawfully destrained for rent admittedly due and owing said landlord, and seizure was made thereunder accordingly.

Amongst other things taken thereunder were goods which the tenant had acquired from appellant under a conditional bargain and sale which was intended to secure appellant, the vendor, any unpaid balance of the price.

There had been very substantial payments made by said tenant on account of the price and thereby a very substantial interest in the goods had become vested in him before the seizure. Indeed enough to pay the rent.

The appellant claimed from said bailiff after said seizure possession of said goods and, because the goods were not delivered over to him, brings this action claiming there was a conversion thereof by virtue of the demand and refusal.

At common law he could not have a shadow of

(1) 12 Sask. L.R. 174; [1919] 2 W.W.R. 63; 46 D.L.R. 498.
(2) 12 Sask. L.R. 174; [1919] 1 W.W.R. 482.

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ground for making such claim. For not only were the goods of strangers liable to distress but the retention of the possession by the landlord when destrained was his only security and, so far as not modified by statute, is the law yet.

Needless to refer in detail to all the changes and modifications for none of them dispense with the necessity for continuation of possession by the landlord till his seizure has been prosecuted or abandoned or the goods replevied.

And under and by virtue of the statutory provision of the legislature of Saskatchewan, where all this took place, the respective rights of the landlord and such a vendor are expressly provided for by section 4 of the "act respecting distress for rent, &c.," as follows:—

> A landlord shall not distrain for rent on the goods and chattels the property of any person except the tenant, or person who is liable for the rent, although the same are found on the premises; but this restriction shall not apply * * * to the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase, or by which he may or is to become the owner thereof upon the performance of any condition * * *

As I understand this section, the landlord had a perfectly legal right to seize and enforce by sale all the interest the tenant had which is thus made answerable for the rent due and would have sufficed to pay same.

Unfortunately for appellant, its lien or rights of property in the goods was not such as protected it against other creditors because not verified by the necessary affidavit in its behalf when registering it. And the sheriff for other creditors seized the goods which were afterwards duly sold thereunder, and the respondent Reid as landlord was satisfied thereout as the law provides.

The appellant conceived the idea that in law the

landlord was bound to abandon the goods to it; and its assumption and claim is that if he had done so the creditors could not have succeeded.

Its duty, seeing there was enough in the tenant's interest in the goods to satisfy the rent, was to have tendered the rent and then got possession and it might have held as against the creditors for both rent and amount of lien or balance or price.

It was so ill advised, as to imagine it could get the goods despite the above quoted statute, and perhaps defeat the landlord's claim. It has thereby lost its only chance.

The action is one only for conversion based only on said demand and refusal.

In my opinion, the judgment appealed from should stand and this appeal be dismissed with costs.

DUFF J. (dissenting).—The questions raised by this appeal are accurately stated in Mr. Gregory's factum filed on behalf of the respondent; they are:—(a). Had the defendant Reid a right to seize Findlay's interest in the chattels for rent? (b). If he had that right, was he bound to deliver up possession to the plaintiff, assuming the plaintiff's interest was greater than, or paramount to his interest? (c). If he had the right to seize, is he liable to damages?

Before proceeding to discuss these questions it is desirable to point out that a point somewhat discussed upon the argument, namely, whether the defendant's dealings with the goods amounted to conversion is entirely disposed of by the concession made at the trial and the findings of the learned trail judge and that no such point could properly be raised either in this court or in the Court of Appeal for Saskatchewan.

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Mr. Gregory, at the trial, states the issues as follows:—

> I think, perhaps, my Lord, if Mr. Schull and I discuss the issue before your Lordship it will save a little time. I understand the only issue that is raised in the case is whether when we had an interest in those goods, when we went in there and seized, whether we were guilty of conversion or trespass which will entitle them to damages simply because they also had an interest in the goods; that is the whole issue of the case. It may be so or not that their interest may be paramount to ours; the full bench has decided we have an interest in these goods and having that interest, the whole question for you to decide is whether that interest—whether their interest being larger than ours, we are bound to give up at their demand our possession in the goods, and having not done so, whether we are liable for damages.

And the finding of the learned trial judge (1) is as follows:

> I find from the evidence, that the defendant Drackett was in possession under defendant Reid's warrant, of the goods and chattels in question therein at the time Bourdon, the plaintiff's bailiff, demanded possession thereof, and that Drackett refused to give up possession or surrender the said goods to Bourdon, and I also find from the evidence that the defendant Reid approved of and confirmed the action of his bailiff and agent, Drackett.

The subsidiary question as to possession under a police warrant was raised at the trial as affecting the amount of damages. That point I will discuss when dealing with the third point.

Coming then to question A as stated above, in my judgment, the Saskatchewan statute is clear upon that and that the respondent had undoubtedly the right to seize Findlay's interest. The point of substance in the case arises upon question B. With great respect, I am unable to agree with the view of the courts below as to the construction of sec. 4 of ch. 51, R.S. Sask. (1909). I think the interest which may be seized and held or sold under that section is only the interest of the tenant and that the purchaser of the

(1) [1919] 1 W.W.R. 482, at p. 483.

interest takes it subject to all its infirmities and if the interest is of such a character as to enable the owner of some paramount interest to take possession of the chattel out of his hands in given circumstances then the purchaser takes subject to that infirmity as well as others. This, it appears to me, must equally apply where the landlord, instead of selling, exercises his right to hold the goods distrained as his pledge for rent. He is of course not obliged to sell. If the landlord sees fit to hold, that which he is entitled to hold is the interest of the tenant subject, as in the case of the purchase, to all the infirmities of that interest, subject that is to say, to any paramount interest or right of possession.

It is not a very convincing suggestion that the landlord who has initiated proceedings looking towards a sale is entitled to retain possession until the sale takes place. The landlord is pledgee with a statutory right of sale. His right to retain possession of the goods can be no greater and no less after he has decided to sell than during the period, which may be an indefinite one, when he is handling the goods as pledgee merely.

This brings us to question C, the question of damages. The first point to consider is the point argued in the appellant's factum; that at the time of the demand the goods were under seizure under police court warrant. The evidence upon this point is extremely meagre and I think it is much open to question whether the possession of the respondent was ever interrupted. However that may be, the learned trial judge finds, and the evidence amply supports his finding, that the police seizure was abandoned before the 1st Oct., 1917, the day on which the appellant's

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action was commenced. There can be no doubt that at the time the action was commenced the respondents were holding possession under a claim of right and denying the appellant's right of possession. That is amply proved by the letter written by the respondent's solicitor on the 29th Sept., and by the concession made at the trial by Mr. Gregory in the passage already quoted.

The next point, on the question of damages, arises in this way. The sheriff having taken possession of the goods on the 3rd of Oct. under a writ of execution and the right of the execution creditor under that writ having been held to be paramount to that of the appellant company under their unregistered lien note, the appellant now contends that this result is owing to the fact that by resisting them in the exercise of their rights the respondent prevented them getting possession of the goods and thus curing the defect in their security arising from the non-registration of the lien note.

I think this contention is well founded. In my judgment, the "Act respecting Conditional Sale of Goods," (R.S. Sask. [1909] ch. 145) would not have operated to prejudice the common law right of the appellant company if the respondent had given up possession of the goods before or at the time of the issue of the appellant company's writ. The legal position then is this: The respondent, having wrongfully converted the appellant's goods is *prima facie* responsible for the value of those goods at the time of the conversion. Moreover, the seizure by the sheriff was, in the circumstances actually existing, the direct and immediate consequence of the respondent's wrong.

ANGLIN J.—Under a registered agreement in writing

the plaintiff held an unpaid vendor's lien on certain chattel property in a theatre occupied by one Findlay (the purchaser of the chattels) as tenant of the defendant Reid. It is *res judicata* that the plaintiff's lien was invalid as against execution creditors of Findlay because of a defect in the affidavit of *bona fides* required by section 2 (3) of ch. 145 R.S. Sask. The plaintiff alleges that if it had been able to obtain possession of the chattels by seizure prior to their being taken in execution the defect in its lien note would have been cured and its title perfected and that such possession was wrongfully withheld from it by the defendants and an execution creditor was thus enabled to seize and defeat its claim to the goods *pro tanto*. It accordingly sues for damages for conversion of its property by the defendants, the landlord and his bailiff.

Assuming, but without so deciding, that the plaintiff, under its lien note had a paramount right which, notwithstanding the exception in favour of landlords made by the proviso to section 4 of the "Act respecting Distress for Rent and Extra-judicial Seizures" (R.S. Sask. c. 51), would have entitled it to possession of the goods although held by the defendants under a lawful distress for rent due by Findlay, that the bailiff Drackett was in error in refusing to recognize such paramount right of the plaintiff, and that actual possession, if obtained when the plaintiff's bailiff demanded it, would have enabled it to hold the goods against creditors of Findlay who might subsequently obtain judgments (but see *Grand Trunk Pacific Ry. Co.* v. *Dearborn*) (1), I am nevertheless of the opinion that the plaintiff cannot succeed in its claim for damages for conversion of them by the defendants,

(1) 58 Can. S.C.R. 315.

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because the evidence does not establish that at the time of the only demand for possession made on its behalf the defendants were in possession of the goods, or that a withdrawal of the landlord's claim would have enabled the plaintiff to obtain possession.

The facts on this aspect of the case are in a narrow compass. On the 24th or 25th of September a constable acting under a distress warrant issued out of the Police Magistrate's Court of the city of Moosejaw distrained the chattels in question to satisfy claims for wages prosecuted in that court. An inventory of the goods was made and signed by the distraining constable and by one Lucien Plisson, who was the caretaker of the theatre. The police, I infer from Plisson's evidence, did not think it necessary to shut down the theatre and therefore allowed Plisson to keep the keys and left him in charge, apparently without taking from him anything (except his signature to the inventory) in the nature of an attornment or formally appointing him their representative in possession. Later on the same day the landlord's bailiff came to distrain. He found Plisson in apparent possession and upon being informed by him of the earlier police seizure and being shewn the notice of seizure and inventory, he told Plisson that the priority of the police claim would be considered later. He did not ask for the keys of the theatre. He made an inventory however, prepared a notice of distress addressed to Findlay, and took from Plisson an undertaking in writing to "look after" and "conduct" the premises "as heretofore * * * at the usual rate of pay." On the 27th of September Plisson locked up the theatre, held the keys for a short time and then handed them over the police—he says "as a matter of

protection." After the police had been given the keys the plaintiff's bailiff, Burdon, on the 29th of September demanded them from Plisson, but of course he did not obtain them. Burdon then saw the landlord's bailiff, Drackett, not at the theatre but at his office, informed him that he had a warrant and lien and demanded possession of the goods in the theatre. Drackett said "We don't recognize your claim." Burdon made no further effort to secure possession of the goods. The police held the keys until the second of October when the solicitor for the wage-earners appears to have concluded, for reasons not stated, that the Police Court distress could not be maintained against the plaintiff's lien and he instructed the police to abandon the seizure. They thereupon notified Drackett that he could have the keys and he then got them for the first time. On the following day he handed them over to the sheriff on his demand for possession under a writ of execution obtained in the meantime by the wage-earners in a civil action. For what it may be worth Plisson deposes that

> Drackett never got possession (of the theatre) as far as I can see;

and Drackett says that when Burdon was demanding possession of the goods from him

> they were under seizure by both the police and myself.

On the foregoing facts I am of the opinion that it has not been shewn that the defendants had possession of the goods when Burdon made his demand on the 29th of September or that they could then have given him actual possession such as the plaintiff claims would have cured the defect in its title under its lien note and that therefore, however mistaken or even wrongful may have been Drackett's refusal to recognize the plaintiff's claim, it cannot be held either that

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it amounted to a conversion of the goods or that it was the cause of the plaintiff's failing to obtain such possession as it now asserts would have enabled it to defeat the execution under which the sheriff obtained possession.

Solely on this ground, the appeal, in my opinion, fails and should be dismissed with costs.

BRODEUR J.—This is an action in damages by the appellant against the respondent for conversion.

A man named Findlay was the lessee of a theatre in Moosejaw and Reid, the respondent, was the lessor. The theatre furnishings had been purchased from the appellant by Findlay who had given the latter a lien note.

On or previous to the 24th of September, 1917, a police constable, acting under distress warrant issued out of the Police Magistrate's Court, seized and took possession of those furnishings.

On the same day, Reid, the lessor, issued a distress warrant to his co-respondent Drackett who went on the premises and apparently seized and took possession of the same chattels. A few days later, the appellant company, the holder of the lien on the goods, asked the respondent, the lessor, to deliver up possession to him of the goods. This was refused and the present action in damages for conversion was instituted.

Under ordinary circumstances, when a person detains goods so as to deprive the person entitled to the possession of them of his dominion over them, it is a conversion. *Burroughes* v. *Bayne* (1). But in this case the claim is made by the respondent that as lessor he had

(1) 157 English Rep. 1196; 5 H. & N. 296.

the right to seize the interest of Findlay in those chattels. The evidence shows that the goods had been sold to Findlay for $3,450 by the appellant, that a sum of $1,650 cash had been paid and that the lien note had been given for the balance $1,800. By a judicial sale of this equitable interest of Findlay there might be realized a sum sufficient to cover the rent due, about $900.

According to the provisions of the common law a landlord could distrain for arrears of rent upon all goods found upon the premises. By statutory provisions, ch. 51 R.S. Sask., section 4, it was provided that the landlord could not distrain on goods which did not belong to the lessee, though they were found on the premises; but the statute declared that this restriction should not apply to

> the interest of the tenant in any goods on the premises in the possession of the tenant, under contract for purchase or by which he may or is to become the owner thereof upon performance.

There is no doubt that under the provisions of this statute, Reid, as landlord, could seize the interest of his tenant, Findlay, in the chattels in question and have it sold. This is not a case of taking a person's goods wrongfully in execution. Under the statute he could exercise some rights in regard to those goods. If the landlord had the right to seize and sell Findlay's interest in the goods, he could take possession of them to exercise his right of restraint. How could he sell the equitable interest of Findlay without shewing the goods at the judicial sale?

Besides, in order to make a demand and refusal sufficient evidence of conversion, the party who refuses must, at the time of the demand, have it in his power to deliver up the article demanded in the

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condition in which the delivery is demanded. *Latter* v. *White* (1).

The previous seizure had been made by a wage earner and, in execution of a judgment of the Police Magistrate's Court, the fact that a police constable had possession of these same goods by virtue of the writ of execution of this latter court would not have given Reid the absolute right of handing over the chattels to the appellant. Suppose Reid had handed possession as far as he was concerned, that would not have given the possession to the appellant company and prevent it from suffering the damages they claim having suffered. These wage earners had a superior right to the one which the appellant seeks to exercise as it was decided in a former trial.

For all these reasons I am of the opinion that the appellant is not entitled to recover damages from the respondent. His appeal should be dismissed with cost.

MIGNAULT J.—In my opinion, this appeal fails because it has not been shewn that Drackett, Reid's bailiff, had possession of, and could have delivered to the appellant, the goods covered by the latter's lien note when the appellant demanded possession of the same. I do not think it necessary to express any opinion on the question whether, under the Saskatchewan Statute, R.S. Sask. ch. 51, section 4, the respondents could have withheld possession of the goods as against the appellant, in order to distrain and sell the interest of the tenant therein.

Appeal dismissed with costs.

Solicitors for the appellant: *Schull & Schull.*

Solicitors for the respondent: *Seaborn, Pope & Gregory.*

(1) L.R. 5 H.L. 578.