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*Feb'y. 5.

June 4.

THOMAS WALLACE.....APPELLANT;

AND

WILLIAM FRASER AND THOMAS FRASER, .....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Distress, exemption from—Replevin.*

*W.* let an unfurnished house to one Mrs. *M.* to be used as a boarding-house. Mrs. *M.* applied to *F. & Son* for furniture, which they refused to supply unless *W.* would guarantee that it would not be distrained for rent. *W.* thereupon signed the following mem. which was delivered to *F. & Son* by Mrs. *M.*: "The bearer, Mrs. M., being about to purchase some furniture from *Wm. F. & Son*, and my rent being guaranteed, I hereby agree not to take the furniture so to be furnished by *Wm. F. & Son* for any rent that may become due." *F. & Son* then delivered the furniture to Mrs. *M.*, the said furniture to be paid for by monthly payments, and "to remain the property of *F. & Son* till paid for in full." *W.* levied upon the furniture, *F. & Son* replevied and obtained a verdict which the Court below refused to set aside.

*Held*,—That the mem. signed by *W.* constituted a binding contract or arrangement with *F. & Son* not to distrain, and that the judgment of the Court below should be affirmed.

APPEAL from a judgment of the Supreme Court of *Nova Scotia*, discharging a rule *nisi* to set aside a verdict in favor of the Respondents.

This was an action of replevin, brought by the Respondents against the Appellant, to recover certain household furniture, set out and described in the pleadings and belonging to the Respondents, and which had been seized by the Appellant for rent alleged to be due to him, in respect of the house occupied by one Mrs. *C.*

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*PRESENT:—Sir William Buell Richards, Knight, Chief Justice, and Ritchie, Strong, Taschereau, Fournier and Henry, J. J.

*Maurice*, in whose possession, in said house, the said furniture was at the time of the seizure.

The declaration is in the ordinary form in cases of replevin under the *Nova Scotia* law and system of pleading, and the pleas are five in number.

The Defendant pleaded:—

"First, that he never detained the goods mentioned in the Plaintiffs writ.

Second, that the said goods were not the goods of the Plaintiffs, but were the goods of one *Emily Maurice*.

Thirdly, that the said goods were not the goods of the Plaintiffs, but were the goods of one *Creighton*, as Assignee of the said *Emily Maurice*.

Fourthly, that the said goods were not the goods of the Plaintiffs.

Fifthly, that one *Emily Maurice* occupied a part of a building or house as tenant to the said Defendant, at a yearly rent of $500, payable quarterly—that previously to the time of the alleged detention of the said goods there was due and owing to the Defendant, from the said *Emily Maurice*, $203, being a balance due on two quarters rent, which fell due respectively on the first day of November and February, then last past, in respect of the said building or house so occupied and leased by the said *Emily Maurice* from the said Defendant—that the said goods were in that part of said dwelling house so occupied by the said *Emily Maurice*, and the said rent being so due and in arrear, the said Defendant distrained among other goods the said goods, being then in the said dwelling house, for the said rent, as he had a right to do, and the Defendant was justly detaining them as and for such distress for the said rent so due and in arrear at the time of the issuing of said writ, which rent was at the time of the issuing of said writ still due and unpaid, which is the detention complained of in said writ."

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The Respondents joined issue on the first four pleas, and replied to the fifth plea on equitable grounds, that the Appellant, by fraud and misrepresentation, by a certain paper writing directed to the Respondents, induced the Respondents to furnish the said furniture to the said Mrs. *Maurice*, who was then a tenant of the Appellant, agreeing in said paper writing, that he, the said Appellant, would not distrain upon any furniture that the Respondents might so supply to the said Mrs. *Maurice*, in consequence, as stated in said paper writing, of his, the said Appellant's, rent for said house and premises having been secured to him, but that in violation of his said agreement and representation, he, the said Appellant, had seized and levied upon the furniture supplied to the said Mrs. *Maurice* by the Respondent, in consequence of said agreement, which was the seizure relied upon in the Appellant's fifth plea.

The evidence showed that Mrs. *Maurice*, desiring to purchase some furniture, applied to the Respondents, who were furniture dealers in the City of *Halifax*, for that purpose. The Respondents refused to supply the furniture without a guarantee or agreement by the Appellant, that the furniture, if supplied to Mrs. *Maurice*, would not be seized or taken for the rent of the premises occupied, or to be occupied, by the said Mrs. *Maurice*. Thereupon the following paper was signed by the Appellant, and delivered to Respondents:

"The bearer, Mrs. *Maurice*, being about to purchase some furniture from *William Fraser & Son*, and my rent being guaranteed, I hereby agree not to take the furniture so to be furnished by *William Fraser & Son* for any rent that may become due.

"T. J. WALLACE."

23rd June, 1874."

The articles were then given to Mrs. *Maurice* upon

the terms mentioned in the following paper, signed by her :—

" *Halifax, N. S.*, June 23rd, 1874.

Received from *W. Fraser & Son* the following articles of furniture, for which I am to pay $220.25, or more, in monthly payments of twenty dollars each month from date ; the said furniture to remain the property of *W. Fraser & Son* till paid for in full, and in the event of non-payment monthly, the said *W. Fraser & Son* can take the furniture back.

(Sgd.) " EMILY MAURICE."

The goods were specified.

The evidence further showed that Mrs. *Maurice* made some payments, but that a large sum was still due at the time Appellant seized the furniture for his rent.

The Appellant offered no evidence, but moved for a non suit, which was refused.

The jury found a verdict for the Respondents, and to set aside this verdict a rule *nisi* was obtained by the Appellant, which, after argument, was discharged. The grounds of the Appellant's motion for the rule were :—

First, because the said verdict was against law. Secondly, because it was against evidence. Thirdly, because the Jury were misdirected by the Judge who tried the cause, the pleading not having been brought to their notice, nor the fact that the replication admitted the Defendant's plea of justification or avowry. Also, in their not being told that there was not evidence to sustain the replication, or that there was no consideration for the agreement signed, or no sale of goods to Mrs. *Maurice*, as contemplated by the agreement, and also for other causes of misdirection. Fourthly, for the improper reception of testimony on the part of the Plaintiffs. Fifthly, because there was no evidence to support the replication of the Plaintiffs. Sixthly, because the issue was not a correct issue, but contained a repli-

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cation pleaded improperly and without authority. Seventhly, because the Judge accepted an issue and went into the trial, which issue did not agree with the record, and although protested against and objected to by the Defendant. Eighthly, because the issue contained a replication, pleaded after the lapse of more than thirty days from the filing and serving of the pleas without the consent of the Court, or a judge, or of the Defendant.

A judgment was pronounced by the Supreme Court of *Nova Scotia* on the 6th March, A.D., 1877, discharging the rule for a new trial. Against the latter judgment the Appellant appealed to the Supreme Court of *Canada*.

Mr. *Wallace*, Appellant, in person:—

The Plaintiffs did not perform their part of the agreement, which was an agreement contemplating an unconditional sale of furniture to Mrs. *Maurice*. The agreement between *Fraser & Son* and Mrs. *Maurice* is indefinite as to price—it says $220.25, *or more*.

The agreement signed by Appellant was in the nature of a guarantee and should be construed strictly. A notice of acceptance of the agreement was necessary, and notice of the terms upon which goods were furnished should have been given. If Respondents sold goods as was contemplated by paper signed by Appellant, their remedy, if any, would be in the nature of an action on the case and not in replevin, as they would, in the event of a sale, have in right of property or of possession. And if they did not sell absolutely, they did not do what they were obliged to do to obtain any rights under that paper, and could not sustain any action. *Benjamin* on sales (1); *Parsons* on contracts (2); *Addison* on contracts (3). There was misdirection

(1) Pp. 227, 626, 630, 658, 660, 667, 685, 727.

(2) Vol. 1, 439 et seq.

(3) 7th Ed. pp. 226, 235.

on the part of the learned judge, who, in his charge, gave a positive direction to find a verdict against Appellant. *Hilliard* on new trials (1). The replication being pleaded after 30 days should have been pleaded by leave of the Court or a Judge. *Rev. Stats. Nova Scotia*, ch. 94, sec. 142.

Mr. *Ferguson*, for Respondents:—

Plaintiffs were in a position to bring replevin. This is shown by the mem. of sale. It is proved that it was on the faith of the representation given by Mr. *Wallace* that the goods were sold; and that the sale was not an absolute one makes no difference. The facts constitute an estoppel in *pais*. *Addison* on contracts, last *American* ed (2); *Packard* v. *Sears* (3); *McCance* v. *L. & N. W. Ry. Co.* (4); *Freeman* v. *Cooke* (5); *Walker* v. *Hyman* (6); *Erie Ry. Co.* v. *Delaware Ry. Co.* (7); *Trowbridge* v. *Matthews* (8); *Gregg* v. *Wells* (9); *Regnell* v. *Lewis* (10).

It is not necessary to plead an estoppel in *pais*. Evidence of it may be given under the general issue: *Taylor* on evidence, 4th Eng. ed. (11); *Bullen & Leake's* Precedents of Pleadings under title of "Estoppel." There is nothing to show that any exceptions were taken to judge's charge: *Gibbs* v. *Pike* (12); *Green* v. *Bateman* (13); *Cotterell* v. *Hindle* (14). As to waiving right to distance *Horsford* v. *Webster* (15).

Mr. *Wallace*, in reply.

(1) Pp. 274 et seq.
(2) Sec. 249.
(3) 6 Ad. & E. 474.
(4) 13 H. & C. 343.
(5) 2 Ex. 654.
(6) 1 Ont. Ap. Rep. 345.
(7) 21 N. J. Equity 283.
(8) 28 Wis. 628.
(9) 10 Ad. & E. 90.
(10) 15 M. & W. 517.
(11) Pp. 104, 105.
(12) 1 Dow. N. S. 409.
(13) L. R. 4 H. L. 591.
(14) L. R. 2 C. P. 470.
(15) 1 C. M. & R. 696.

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RITCHIE, J.:—

This was an action of replevin. The circumstances were very simple indeed. The Defendant owned property in the City of *Halifax*, and he was about to lease it to a Mrs. *Maurice*, she intending to keep a boarding house and restaurant, and it became necessary, of course, in the occupation of a house under any circumstances, but more particularly one of that character, to have furniture, and a quantity more than would be otherwise necessary. She had not that furniture, and was about making an arrangement with *Fraser & Son*, the Plaintiffs in the present action; and *Fraser & Son*, fearing that if they gave her the furniture it might be distrained for rent, as it was not to be paid for immediately, insisted that the property should remain in them, and required before delivery that they should have a guarantee from the Defendant, the landlord, that the property should not be liable to be distrained for rent. Mrs. *Maurice* procured from Mr. *Wallace*, the landlord, and delivered to the Plaintiffs, the following written undertaking:—

The bearer, Mrs. *Maurice*, being about to purchase some furniture from *William Fraser & Son*, and my rent being guaranteed, I hereby agree not to take the furniture so to be furnished by *William Fraser & Son* for any rent that may become due.

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Before acting on this guarantee, Mr. *James Fraser*, on behalf of the Plaintiffs, called upon Mr. *Wallace* with the order or authority signed by him, and he recognized it as his own, and stated that it was in his handwriting, and in no way repudiated, either its existence as an instrument from him, or its binding effect as indicated upon its face. The Plaintiffs, after getting the paper, delivered the furniture on the faith of it to Mrs.

* The Chief Justice was absent when judgment was delivered.

*Maurice*, and it was put into the house leased by the Defendant, their agreement with Mrs. *Maurice* being in these words:—

Received from *W. Fraser & Son* the following articles of furniture, for which I am to pay $220.25, or more, in monthly payments of twenty dollars each month from date; the said furniture to remain the property of *W. Fraser & Son* till paid for in full, and in the event of non-payment monthly, the said *W. Fraser & Son* can take the furniture back.

EMILY MAURICE.

The goods were specified and the receipt was dated Halifax, N.S., June 23, 1874.

The rent being in arrear, the Defendant subsequently distrained, and the goods not having been paid for, Plaintiffs replevied them as their property, and as having been distrained in defiance of Defendant's undertaking to the contrary.

The Supreme Court of *Nova Scotia* sustained the Respondents' contention in this case, and the Defendant has now appealed to this Court, and desires that this Court should hold that that furniture was distrainable while on the premises. I think there is not the slightest pretence for any such contention. It is clear that the landlord had a substantial interest in getting Plaintiffs to furnish his tenant with furniture to enable her beneficially to occupy the premises and carry on her business as a restaurant and boarding house keeper, for which a certain amount of furniture was indispensable, and so enable her to pay her rent; and having taken the precaution to get his rent guaranteed, he appears to have been willing to rely on this guarantee, and to waive his right of distress so far as Plaintiffs' goods were concerned. If that guarantee has proved valueless, surely that can be no reason why his undertaking not to distrain should be likewise of no avail to protect the furniture of Plaintiffs from seizure. This instrument given by Defendant is not a contract between Mrs.

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*Maurice* and Mr. *Wallace*, but evidently a contract or arrangement entered into between Mr. *Wallace* and Messrs. *Fraser & Son*, because he does not say: "I agree with Mrs. *Maurice* that this property shall be free from distress;" and so make a contract between Mrs. *Maurice* and himself, but he says: "The bearer, Mrs. *Maurice*, being about to purchase furniture, &c.," showing he gave it to her only as a carrier or bearer. To whom then did he intend it to be delivered, and with whom did he intend to stipulate? Evidently, the Respondents, because he goes on to mention their names, and agrees not to take the furniture so to be supplied by them. This Defendant sends by Mrs. *Maurice* to *Fraser & Son*, and thus agrees with them, that, if they put their furniture on the leased premises, it shall not be distrainable for rent.

A number of points were raised. One chiefly relied on was, that this guarantee only protected furniture which was to be sold, and in which the property passed from Messrs. *Fraser & Son* to Mrs. *Maurice;* but the whole scope of the arrangement is, in my opinion, inconsistent with that contention; for, if the property was to pass out of *William Fraser & Son* and into Mrs. *Maurice*, and so *W. Fraser & Son* were to be denuded of all interest in the property, what possible benefit could it be to Plaintiffs that it should not be distrained, because it would be Mrs. *Maurice's* and no longer their property. Then, it is contended, that this is not a sale at all—not such a sale as was contemplated. I think it is just what was contemplated, by which the tenant was to obtain furniture on certain terms, but the property was to remain subject to the vendor's right to resume possession of it on certain conditions, and the form they adopted amounted to this: "I retain the property in these goods solely as a security for the payment of the money." I think that Mr. *Wallace*, having stated

that his rent was guaranteed, and having agreed, if the Respondents' supplied this property, that he would not distrain, and they, the Respondents, having, on the faith of that, supplied the furniture, *Wallace* had no right to interfere with the property; his allegation that the guarantee for his rent became worthless, is neither a justification nor excuse for distraining in direct opposition to his agreement, and affords no reason why the guarantee he gave Messrs. *Fraser & Son* should not be valid and binding. I think, if Mr. *Wallace* could be allowed to get property under such circumstances on his premises, and then subsequently to distrain on it, it would, as Mr. Baron *Gurney* said in the case of *Horsford* v. *Webster* (1), "just be a trap in which to catch the man's property." There are many authorities in reference to this matter.

In *William's* notes to *Saunders* (2), *Poole* v. *Longueville* and others, we find:—

It was held, that cattle going to *London*, and put into a close with the consent of the landlord, and leave of the tenant to graze for a night, might be distrained for rent; *Fowkes* v. *Joyce*, 2 *Vent.* 50, but the owner of the cattle was afterwards relieved in equity on the ground of fraud in the landlord, who had consented to the cattle being put into the close, and afterwards distrained them for rent, and he was decreed to pay all the costs both of law and equity. And it should seem that at this day a Court of law would be of opinion, that cattle belonging to a drover being put into a ground with the consent of the occupier to graze only one night, on their way to a fair or market, were not liable to the distress of the landlord for rent.

In *re Giles* v. *Spencer* (3), *Willes*, J., delivering the judgment of the Court, says:—

In *Horsford* v. *Webster* (4), no difficulty was suggested on the Bench or at the bar as to the specific effect of an agreement by a landlord not to distrain the goods of a stranger upon the land.

*Bullen* on Distress (5), says:—

(1) 1 Cr. M. & R. 702.
(2) 2 Vol. p. 675.
(3) 3 C.B. N.S. 244; 3 Jur. N.S. 820.
(4) 1 C. M. & R. 699.
(5) P. 171.

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The right of distress for rent, of whatever kind, may be taken away or suspended by an express or implied agreement not to distrain. Thus, where certain eatage, amongst other things, belonging to the tenant of a farm, was about to be sold by a creditor under a bill of sale, but before the sale took place the landlord put in a distress for rent; whereupon it was agreed that the sale by the creditor should proceed, and the landlord be paid his arrears out of the proceeds of the eatage and other things; the Court held that a contract by the landlord might be inferred not to distrain the cattle of a purchaser put on the land to consume the eatage. *Horsford* v. *Webster*, 1 C. M. & R. 699.

So in the case of *Cairncross* v. *Lorimer* (1), The Lord Chancellor says:—

The doctrine will apply which is to be found, I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they might otherwise have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct.

I had not any doubt, individually, upon the case when it was argued, and I have had no doubt since upon it. I am satisfied that that instrument was given to the Respondents for the purpose of inducing them to put that property on the premises under the assurance and undertaking of Mr. *Wallace* that his rent was guaranteed to him, and he would not distrain upon it. I do not propose to refer to all the cases in point, because they are familiar to all of us. Law and justice are both so unquestionably with the Respondents, that I am astonished the case should ever have been brought here.

I have, therefore, no hesitation in expressing the opinion that the judgment ought to be affirmed and the appeal dismissed with costs.

(1) 3 Macqueen H. L. C. 829.

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STRONG, J.:—

The only point on which I had any doubt was as to the sufficiency of the defence set up by the equitable plea and whether the Plaintiff's remedy was not a cross action. It occurred to me that, the property in question being chattels, a Court of Equity might have refused to take jurisdiction. I think, however, on consideration, that it is clear there was jurisdiction in the present case. Equity will not interfere to restrain a sale of chattels, unless they are of peculiar value, or some fiduciary relationship exists between the parties. In the present case, however, the last reason applies, for by the agreement between the Plaintiffs and Mrs. *Maurice*, a trust was constituted of these chattels, and the Defendant was a party bound by that trust. That a Court of Equity will always interfere to protect fiduciary ownership of chattels of any kind, is a proposition for which many authorities may be cited. I need only refer to two: *Wood* v. *Rowecliffe* (1); *Pooley* v. *Budd* (2).

Lord *Cottenham* says, in *Wood* v. *Rowecliffe*:—

> When a fiduciary relationship subsists between the parties, whether it be the case of an agent, or trustee, or a broker, or whether the subject matter be stocks, or cargoes, or chattels of whatever description, the Court will interfere to prevent a sale, either by the party interested in the goods, or by a person claiming under him through an alleged abuse of power.

These authorities are conclusive, and it is most satisfactory to me to be able to concur in the judgment of the Court dismissing this appeal with costs.

TASCHEREAU and FOURNIER, J. J., concurred.

HENRY, J.:—

I concur in the judgment. I think the reason given by

(1) 3 Hare 304; 2 Phillips 382. (2) 14 Beav. 34.

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the Defendant for avoiding the effect of the document he signed---that the sale was a semi-conditional one—cannot be maintained, because his document was a general one. It had an object—to keep property sold by *Fraser* on conditions to that woman free from his right to distrain under any circumstances. I consider with my brother *Ritchie*, that this bargain was virtually made with *Fraser & Son*. Their names are mentioned in the body of it as the persons who were to see it, and be governed by it, and I think it is just the same as if directed to them at the top or bottom of the letter. The substance is exactly the same. He agrees---and it appears to me it must be with *Fraser* he agrees. Therefore, I think the party, by what he did, induced *Fraser & Son* to sell this furniture and place it in possession of this woman in the house of the Defendant, and, therefore, having induced them to place it in that position, and having agreed that he would not interfere with it when so placed, I think he is estopped from doing that which he himself undertook he would not do. I think, in regard to all the points that were raised on the part of the Plaintiffs and of the Defendant, the judgment should be in behalf of the Plaintiffs.

*Appeal dismissed with costs.*

Solicitor for Appellant: *Thomas J. Wallace.*

Solicitor for Respondents: *C. J. McDonald.*