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*Oct. 24.

*Dec. 9.

FARWELL & GLENDON (PLAINTIFFS)..... } APPELLANTS;

AND

PHILIP JAMESON (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Landlord and tenant—R. S. O. [1887] *c.* 143, *s.* 28—*Construction of statute—Distress—Goods of person holding "under" tenant.*

The Ontario Landlord and Tenant Act (R. S. O. [1887] c. 143, s. 28) exempts from distress for rent the property of all persons except the tenant or person liable. The word "tenant" includes a sub-tenant, assignees of the tenant and any person in actual occupation under or with consent of the tenant.

Held, reversing the judgment of the Court of Appeal, that persons let into possession by a house agent appointed by assignees of a tenant for the sole purpose of exhibiting the premises to prospective lessees, and without authority to let or grant possession of them, were not in occupation "under" the said assignees, and their goods were not liable to distress.

*PRESENT :—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1), affirming by an equal division, the judgment of the Divisional Court (2).

The defendant is the owner of certain premises on Queen Street, Toronto, leased by him to one Armstrong. Armstrong assigned the lease to the London and Canadian Loan Co. and the plaintiffs on the 17th of April, 1895, had certain pianos, organs, etc., therein. For rent due under the lease the defendant distrained on the pianos on the 17th of April and sold them.

It appears that the London and Canadian Loan Co. were in possession of the premises as mortgagees, or as assignees; that they had sanctioned the putting up in the premises a notice that the premises were to let and to apply to William Parsons, agent. They had also entrusted Parsons with the key for the purpose of showing the premises to proposing lessees.

Parsons, it appears from the evidence, had authority to use the keys for such purpose, but he had no authority to make a lease; he had only authority to procure proposing lessees and to bring them to the London and Canadian who would determine whether in point of fact they would grant them a lease or not.

These being the circumstances the plaintiffs went to Parsons for the purpose of seeing the premises and of procuring a lease from him as the agent of the Loan Company, and a lease was entered into in April professing to be made between Parsons and the plaintiffs. It, however, seems clear that the plaintiff knew that Parsons was acting merely as agent for the London and Canadian Loan Co., and they took the premises from him as agent, although the lease is in the name of Parsons. After they moved their pianos and organs into the premises and were occupying it, the defendant, Jameson, the supreme landlord, came and distrained.

(1) 23 Ont. App. R. 517. (2) 27 O. R. 141.

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The question to be decided was whether or not the goods were liable to distress for rent, under section 28 of the Landlord and Tenant Act, which provides as follows in s.s. (1): "A landlord shall not distrain for rent on the goods and chattels of any person except the tenant or person who is liable for the rent, although the same are found upon the premises." By s.s. (3) "the word 'tenant' shall extend to and include the sub-tenant and assigns of the tenant, and any person in actual occupation of the premises under or with the assent of the tenant during the currency of the lease, or while the rent is due or in arrear, whether he has or has not attorned to or become the tenant of the landlord."

The Divisional Court held that the goods were liable to distress and the Court of Appeal was equally divided on the question.

Laidlaw Q.C. for the appellants.

Kilmer for the respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is an appeal from an order of the Court of Appeal affirming the judgment of the Queen's Bench Division in an action brought by the appellants against the respondent to recover damages for wrongful seizure of the appellants' goods, under colour of a distress for rent. The action was tried before the learned Chief Justice of the Queen's Bench, who dismissed the action, and this judgment was sustained by the Divisional Court. In the Court of Appeal the judges were equally divided in opinion, the Chief Justice and Mr. Justice Osler holding that the appeal should be dismissed, whilst Mr. Justice Burton and Mr. Justice Maclennan were of opinion that the appellants were entitled to recover and that the appeal should be allowed.

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The respondent, being the owner of certain buildings and premises, made a lease to one Armstrong who assigned or sub-let to the London and Canadian Loan Co. as mortgagees. The mortgagees took possession and being so in possession entrusted the key of the premises to one Parsons, in order that he might show the premises to persons desiring to inspect them with the view of becoming lessees. The company did not, however, confer any authority on Parsons to let the premises or to put any person in possession of them. Parsons, however, without the authority or knowledge of his principals, executed an instrument purporting to be a lease, or an agreement for a lease, by himself to the appellants as monthly tenants, at the rental of $5 per month, for the purpose of storing pianos. The appellants took possession and placed their pianos on the premises. The head rent reserved by the original lease being in arrear the respondent distrained upon and sold the appellants' goods found upon the premises. The appellants then brought this action.

A single question of law is involved in the case, depending on the construction of section 28 of the Landlord and Tenant Act, R. S. O. ch. 143. By the 28th section of that Act (sub-section 1) it is enacted that:

> 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.

And by sub-section three of the same section it is provided that:

> The word "tenant" in this section shall extend to and include the sub-tenant and the assigns of the tenant and any person in actual occupation of the premises under or with the consent of the tenant during the currency of the lease, or while rent is due, or in arrear, whether he has attorned to or become the tenant of the landlord or not.

It is clear that there is no pretence for saying that the appellants were, under the circumstances stated, either

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the tenants or assigns of the original tenant, Armstrong, or of his assignees the London and Canadian Loan Company. Nor can it be said that the appellants were in possession with the consent of the head tenant or of his assigns, the company. The question then is confined to this: Can it be said that within the proper meaning and construction of the Act the appellants were in "under" the assignees of the lease, the London and Canadian Loan Company? It is well observed by Mr. Justice Burton in his judgment that the statute was a remedial law and as such is entitled to a liberal interpretation. It appears, however, to me, that it is not necessary to invoke this rule in the present case inasmuch as it cannot possibly be predicated of the appellants that they were in possession under the London and Canadian Loan Company, who had neither originally authorized their taking possession, nor adopted the unauthorized act of Parker, their agent, in letting them into possession. It cannot be disputed that, as regards the company, the appellants were neither lessees nor licensees, but were mere trespassers, and as such were liable to be ejected at any time.

It is said, however, on behalf of the respondent, that the appellants must be considered as persons in under the London and Canadian Loan Company, for the reason that, in an action of ejectment or trespass brought against them by the company, they would be estopped from disputing the company's title and would be precluded from setting up any title paramount which they might acquire, and the case of *Doe Johnson* v. *Baytup* (1), was relied on as an authority for this proposition. I am not prepared to go as far as Mr. Justice Burton and Mr. Justice Maclennan, who were of opinion that in an action of ejectment or trespass against the appellants the company would have been obliged to prove title.

(1) 3 A. & E. 189.

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On the contrary I concede that in such a case the appellants would have been estopped from denying the title of the company whose agent, Parker, had without their authority, knowledge, or privity, let the appellants into possession. The well known case before cited, which the respondent relies on, is a clear authority for this. There the keys of the premises, consisting of a house and garden, had been entrusted to a caretaker for the same purpose as the key had been left with Parker in the present case, in order that persons desiring to view the premises, which were advertised to be let, might inspect them. This agent handed over the keys to the defendant, who obtained them for the pretended purpose of taking vegetables from the garden, and the defendant, having thus got into possession, attempted to set up an adverse title against the lessor of the plaintiff, which, as might have been expected, he was held to be estopped from doing. I see no distinction between *Doe Johnson* v. *Baytup* (1) and the present case, and in an action of trespass or ejectment brought against the appellants by the London and Canadian Trust Co., I have no doubt it would be conclusive authority against the appellants.

That conclusion is, however, in my opinion, in no way decisive of the question we are called upon to determine in this appeal.

In *Doe Johnson* v. *Baytup* (1) the lessor of the plaintiff was held entitled to succeed, not because the defendant in fact went in under him, but for the reason that, having obtained possession from an agent of the plaintiff, who would herself have been estopped from setting up title against the plaintiff, the defendant was estopped from saying that he did not go in under the plaintiff, although this was at variance with the truth, inasmuch as the agent or caretaker had no authority from the lessor of the plaintiff to let the defendant into possession.

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As I have said, the same reason would have applied if an action of trespass or ejectment had been brought by the company against the respondents; they would have been debarred from setting up title, not because in fact they went in under the company, but for the reason that the circumstances under which they acquired possession were such as to estop them from showing the real facts.

With this estoppel between the company and the appellants we have nothing to do in the present case. We are here to pronounce upon the real facts, and to say whether in truth the appellants went in under the company within the meaning of the statute. The respondent cannot in this action, on any principle I am aware of, claim the benefit of an estoppel which would have operated in favour of the company and against the appellants.

The benefit of the doctrine of estoppel is confined to parties and privies, and for the present purpose the respondent, who is of course not a party, is in no way in privity with the company.

Were we to give effect to the argument based on this principle of estoppel, by shutting out evidence of the real state of the case, we should be doing nothing less than adding words to the statute by extending its plain terms, which only include those who in point of fact went in under the tenant, to those who might be estopped from denying that they so took possession, although such denial was in accord with the facts. In no case ought such a construction of the plain words of an Act of the legislature to prevail, much less in the case of a beneficial enactment where reason and justice and the plain object of the statute all call for a contrary construction.

The appeal must be allowed, the judgment for the respondent vacated, and judgment entered for the

appellants for $550 the amount of damages agreed on by the parties.

The appellants must have their costs here, in the Court of Appeal and in the Divisional Court.

Appeal allowed with costs.

Solicitors for the appellants: *Laidlaw, Kappele & Bicknell.*

Solicitors for the respondent: *Kilmer & Irving.*