ADA L. GILMOUR AND ROBERT P. GILMOUR (DEFENDANTS)..... } APPELLANTS;

AND

CHARLES MAGEE (PLAINTIFF).....RESPONDENT.

1890

*June 6.

*Dec. 11.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Landlord and tenant—Verbal lease—Expiration of—Notice to quit—Sub-tenancy—Possession by sub-tenant after expiry of original lease.

M. by verbal agreement leased certain premises to McC. who sublet a portion thereof. After the original tenancy expired, on November 15th, 1887, the sub-tenant remained in possession and in March, 1888, received a notice to quit from M. In June, 1888, M. issued a distress warrant to recover rent due for said premises from McC. and the sub-tenant paid the amount claimed as rent due from McC., but not from herself to McC. More than six months after the notice to quit was given proceedings were taken by M. to recover possession of the premises from the sub-tenant.

Held, that the notice to quit given to the sub-tenant, and the distress during the latter's possession on sufferance, did not work estoppel against the landlord as the tenancy had always been repudiated. (Fournier J. dissenting.)

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) by which the verdict for the defendants at the hearing was set aside.

An action was brought to recover possession of a cellar on the corner of Queen and Canal streets in the city of Ottawa, by Charles Magee, the owner of the property and the respondent in this case who, in September, 1882, verbally leased to one William McCaffrey, the premises in question, for a term to expire on November 15th, 1887, at $150 per annum. Subsequently McCaffrey to the knowledge of the respondent, in May, 1885, sublet the

PRESENT.—Sir W. J. Ritchie C. J. and Strong, Fournier, Gwynne and Patterson JJ.

(1) 17 Ont. App. R. 27.

(2) 17 O. R. 620.

1890

McGEE.
v.
GILMOUR

front part of the cellar known as " beer vaults " to one John Gilmour, who afterwards with the consent of McCaffrey transferred his interest in the premises to Ada L. Gilmour, one of the appellants, and McCaffrey accepted her as his tenant on the same terms as those under which John Gilmour held the place.

The last payment of rent was made to McCaffrey on the 1st September, 1887. On the 1st December, 1887, A. L. Gilmour sent a cheque for rent to McCaffrey who declined to receive it and returned the cheque, his tenancy having expired on 15th November 1887.

In the latter part of November the plaintiff attempted without success to recover possession under the Overholding Tenants Act. Subsequently, on the 6th March, 1888, he gave the defendants notice " to quit and deliver up the possession of the premises (describing them) which you now hold of me as tenants thereof on the 15th September next or at the expiration of the year of your tenancy which shall expire next after the end of one half year from the service of this notice." Both the defendants, however, disclaimed the plaintiff as their landlord, the defendant Ada Gilmour, whose agent the other defendant was, expressly saying when served with the notice that she did not know the plaintiff in the matter, that it was McCaffrey she dealt with.

On the 21st June plaintiff issued a distress warrant to distrain " the goods liable to be distrained for rent " upon the premises in question which were described as " now or latterly in the tenure or occupation of William McCaffrey for the sum of $93.25 being rent due to me for the same on the 15th June, 1888, and for the purpose aforesaid distrain all such goods of the said William McCaffrey wheresoever they shall be found as have been carried off said premises but are liable by law to be distrained," etc.

Upon this distress warrant a seizure was made and the defendants paid the rent demanded to the bailiff.

In November, 1888, the present action was brought and the defendants in answer thereto claimed that the lease being for more than three years and not in writing McCaffrey was a tenant from year to year of the plaintiff and having received no notice to quit his tenancy had not expired in November, 1888, when the action was brought. Further, that the issue of the distress warrant was an admission by the plaintiff of McCaffrey's tenancy.

The cause was heard before Mr. Justice Ferguson who held that plaintiff had no cause of action. This decision was reversed by the Divisional Court and the reversal affirmed by the Court of Appeal. In the proceedings in the latter courts another ground of defence was argued, namely, that defendants were themselves yearly tenants of the plaintiff, who was estopped from denying such tenancy by his notice to quit and distress warrant.

Barry for the appellants cited the following cases : *Pleasant* v. *Benson* (1) ; *Graham* v. *Allsopp* (2) ; *Doe d. Clark* v. *Smaridge* (3).

McDonald Q.C. for the respondents referred to *Pain* v. *Coombs* (4) ; *Parker* v. *Taswell* (5) ; *Walsh* v. *Lonsdale* (6), *Doe d. Tilt* v. *Stratton* (7).

Sir W. J. RITCHIE C.J.—I think McCaffrey's tenancy expired at the end of 5 years and 2 months, viz., on the 15th of September, 1887, without any notice to quit or demand of possession, and that the tenancy of his sub-tenant, who only held for the residue of his term, expired at the same time.

(1) 14 East 234.
(2) 3 Ex. 186.
(3) 7 Q. B. 957.
(4) 1 DeG. & J. 34.
(5) 2 DeG. & J. 559.
(6) 21 Ch. D. 9.
(7) 4 Bing. 446.

1890

McGEE.
v.
GILMOUR

Ritchie C.J.

McCaffrey was allowed by Magee to continue in possession until 15th November, 1887, when he abandoned the premises. His continuance in possession after the termination of his lease was merely on sufferance. The defendants' rights ended with the termination of McCaffrey's tenancy on the 15th September, 1887, unless they can show that they subsequently acquired a right to continue in possession under Magee, for it is clear the defendants never became tenants of McCaffrey after the termination of his and their tenancy. They, no doubt, wished to do so, but he never in any way entered into any new arrangement with them. He refused to and did not accept any rent from them even for the broken period between the 1st of September and the 15th of November.

I am inclined to think that the distress and payment of rent and notice to quit was a recognition of a tenancy from year to year after the expiration of the five years and two months, or on the 15th November, had defendants elected so to treat it and so to claim that their possession was lawful under Magee; if such had been the case they might, and I think would, have been entitled to a notice to quit, but instead of relying on any such tenancy they expressly disclaimed being Magee's tenants and repudiated him as their landlord, and, therefore, could not set up a want of notice to quit. Notwithstanding this disclaimer and repudiation, which would have rendered notice wholly unnecessary, they actually received due notice to quit from Magee on the 6th March, 1888, as he expresses it describing the property "which you hold of me as tenant thereof on the 15th day of September next, or at the expiration of the year of your tenancy which shall expire next after the end of one-half year from the service of this notice." This action was not brought till the 30th November, 1888, so that whether the term commenced the 15th

Sep ember or 15th November they received clear notice to quit.

I think, taking the most favorable view of the appellants' case, this was all to which they were entitled and they have now no right to withhold from the owner the possession of this property.

STRONG J.—I am of opinion that this appeal must be dismissed. It is clear that the appellants' sub-tenancy must have come to an end when the tenancy of their immediate landlord, McCaffrey, terminated, on the 15th of November, 1887. Therefore, the appellants in order to succeed must be able to show that something was done by the respondent to create a new tenancy subsequent to the expiration of McCaffrey's term. Two acts of the respondent are relied upon as creating a new tenancy by estoppel. First, it is said that on the 6th of March, 1888, the respondent gave the appellants a notice to quit in which he recognized them as being his tenants. It is clear that this was nothing more than an admission, which it is quite open to the respondent now to show that he made under the influence of error and mistake in the absence of any proof that the appellants adopted and acted upon it. So far from acting upon it the appellants repudiated it, Mrs. Gilmour expressly declaring, when served with the notice, that she had nothing to do with the appellant but held under McCaffrey.

Then on the 21st June, 1888, the respondent issued a distress warrant against McCaffrey. This, as is pointed out by Mr. Osler in his judgment, may have been a wrongful act as regards McCaffrey, and I will add would possibly have been tortious as regards appellants also if their goods had been seized and sold under it. It is, however, out of the question to say that it raised an estoppel as between the respondent and the

1890
McGEE.
v.
GILMOUR
Strong J.

appellants, So far from adopting the act of the respondents as indicating a tenancy to the benefit of which they were entitled, they repudiated it and have all along insisted it waswrongful.

On the whole, for the reasons given by Mr. Justice Osler in the court below, the judgment of the Court of Appeal should be affirmed and the appeal dismissed with costs.

FOURNIER J.—Was of opinion that the appeal should be allowed.

GWYNNE J.—This appeal must be, in my opinion, dismissed with costs. I cannot see why the proceedings which were instituted after the expiration of McCaffrey's lease in November, 1887, under the Overholding Tenant Act should not have prevailed, for as McCaffrey's term and right to possession terminated on the 15th November, 1887, it was his duty to surrender possession of the demised premises to his landlord freed from all let or hindrance of any person claiming under him, and if a sub-tenant of his refused to give up possession such conduct of the sub-tenant was surely an overholding by McCaffrey entitling the landlord to judgment in his proceedings under the Overholding Tenant Act. The defendants' right of possession, whatever may have been the terms of the subtenancy existing between them and McCaffrey, terminated on the 15th November, 1887, when McCaffrey's lease expired. This, too, was well known to the defendants, for McCaffrey upon the 1st December, 1887, refused to receive any rent from them because his lease had expired, and he no longer claimed any right of possession. The defendants' occupation then after the expiry of McCaffrey's lease was of their own wrong and as trespassers upon the plaintiff's property, and has so

continued to be ever since. The plaintiff by issuing the distress warrant against McCaffrey in June, 1888, to obtain payment of rent as accrued subsequently to November, 1887, no doubt, if McCaffrey was the person in possession of the premises claiming title thereto, would have had the effect of giving to him by estoppel a new interest in the premises at least unto the end of the then current year, but McCaffrey claims no such interest; in point of fact he never has been in possession nor has he claimed to have had any right to the possession since the 15th November, 1887, and the defendants cannot, in the present action, claim any benefit from the estoppel which McCaffrey might have claimed had he been in possession. The defendants' possession at the time of the execution of the distress warrant in June, 1888, against McCaffrey was in no privity whatever with McCaffrey the privity which had existed between them and McCaffrey ceased, as they well knew or ought to have known, on the 15th November, 1887, when McCaffrey's lease terminated, and this subsequent possession was without a shadow of right, a trespass on the plaintiff's property. It was not a possession then under McCaffrey at all or in privity with him. Such a wrongful possession could give to the defendants no right to set up as annexed thereto the title by estoppel which McCaffrey might have relied upon if he had been claiming title to the possession in virtue of the execution of the distress warrant in June, 1888.

The conduct of the defendants, in my opinion, can not only not be justified by any principle of law, but has been vexatious in the extreme. The plaintiff seems to have been willing to regard them as his tenants subsequently to the expiration of McCaffrey's lease, and so regarding them in March, 1888, he gave them notice to quit at the expiration of the then cur-

1890

McGEE. v. GILMOUR

Gwynne J.

rent year. This notice they repudiated, insisting that they were not tenants of the plaintiff at all; they utterly deny having ever recognized him as their landlord. Well then they have placed themselves in this dilemma. They were either tenants of the plaintiff or they were not. If they were, their tenancy was duly determined by sufficient notice before the commencement of the present action. If they were not the plaintiff's tenants they continued to be what they were ever since the expiration of McCaffrey's lease on the 15th November, 1887, mere trespassers on the plaintiff's property without shadow of right, and so in June, 1888, when the distress warrant against McCaffrey was executed, not in a position to claim any privity with McCaffrey, whose interest had terminated in November, 1887, and who has not since claimed to have any interest in the premises. They cannot, therefore, insist by any defence to the present action that a new tenancy by estoppel had been created between McCaffrey and the plaintiff by the execution of the distress warrant against McCaffrey in June, 1888, and that such new tenancy had not been determined by any notice to quit given to McCaffrey.

PATTERSON J.—Concurred.

Appeal dismissed with costs.

Solicitor for appellants : *W. H. Barry.*

Solicitors for respondent : *Christie & Christie.*