1929
*Oct. 1.
1930
*Feb. 4.

CANADA MORNING NEWS COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

W. G. B. THOMPSON AND F. E. BINNINGTON, LOW YEE QUAN AND WAI HON (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Landlord and tenant—Lease by unincorporated society—Distress—Right to levy—Action for illegal distress—Relationship by estoppel.

The members of the Chinese National League of Canada, scattered throughout the Dominion (hereinafter called the League) subscribed money for the purchase of a site and the erection of a building in Vancouver for "headquarters" purposes. As the League was an unincorporated and unregistered society, the conveyance of the property was taken in the name of a branch of the League, called "The Chinese Nationalist League," which was incorporated under the *Benevolent Societies Act*, with headquarters at Victoria. After the erection of the building the then president and secretary of the League leased a portion of the premises to the appellant company, first in July, 1922, under a verbal arrangement and later in September, 1924, under the same arrangement put in writing. The appellant paid rents to the League for some time but falling in arrears, in April, 1927, the then president and secretary of the League, the respondents Low and Wai, issued a distress warrant, and the respondents Thompson and Binnington, bailiffs, distained the goods, chattels and fixtures of the appellant. In an action for illegal distress, the appellant recovered $500 damages; but that judgment was reversed in the appellate court.

Held that, upon the evidence, the relationship of landlord and tenant never existed between the appellant company and the League, on whose behalf the distress was made; therefore the distress was illegal and the appellant was entitled to recover the damages awarded by the trial judge.

Held, also, that an unincorporated society such as the League (although not within the prohibition of section 8 of the *Companies Act*, R.S.B.C. 1924, c. 38, inasmuch as it has not "for its object the acquisition of gain") is incapable of making a lease. *Jarrott* v. *Ackerley* (85 L.J. Ch. 135) and *Henderson* v. *Toronto General Trusts Corporation* (62 O.L.R. 303) followed.

Held, further, that the appellate court erred in holding that the appellant was estopped from setting up incapacity of the alleged landlords on the ground that to do so would be tantamount to impeaching the title to the premises of the persons by whom it was let into possession of them as tenant. To extend the estoppel, which exists where

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Lamont and Smith JJ.

the relationship of landlord and tenant is admitted or established and which prevents the tenant questioning the landlord's title, so as to make it apply to a case in which the real question is as to the existence of that relationship, seems to be wrong in principle and is quite unwarranted by the authorities. *Rennie* v. *Robinson* (1 Bing. 147) and *Morton* v. *Woods* (L.R. 4 Q.B. 293) discussed. The courts, at the instance of a person claimed to be a tenant, ought to determine the status of an alleged landlord for the purpose of ascertaining whether or not the relationship of landlord and tenant exists between them, and the consequent legality of a distress. *Farwell & Glendon* v. *Jameson* (26 Can. S.C.R. 588) followed.

Judgment of the Court of Appeal (41 B.C. Rep. ~~230~~) reversed.

APPEAL from the decision of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Murphy J. (2), and dismissing the appellant company's action in damages for illegal distress.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

G. R. Nicholson for the appellant.

Glyn Osler K.C. for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The record discloses the following material and relevant facts necessary to be considered on the present appeal.

The action is for damages for illegal distress. The learned trial judge held the distress to be illegal and awarded $500 as damages. The Court of Appeal, reversing, upheld the legality of the distress and dismissed the action. The present appeal is by the plaintiff, the Canada Morning News Company Limited, a company incorporated under the laws of British Columbia in October, 1924.

The defendants are W. G. B. Thompson and Francis Edward Binnington, carrying on business as bailiffs, who effected the distress in question, and Low Yee Quan and Wai Hon, who signed the distress warrant. The actual form of the signature is as follows:—

The Chinese Nationalist League,
(Per Low Yee Quan, Pres.)
(Per Wai Hon, Secy.)

(1) (1929) 41 B.C. Rep. 24; [1929] 1 W.W.R. 548.
(2) (1928) 40 B.C. Rep. 230; [1928] 3 W.W.R. 35.

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Although the status of the signatories as such officers has been challenged, for the purpose of the disposition of this appeal it may be assumed to be established.

It is clear law that in order to justify a distress for rent the relationship of landlord and tenant must subsist between the person on whose behalf it is made and the person against whom it is directed. It is also certain that this relationship can only arise out of contract, express or implied.

The learned trial judge took the view that no tenancy existed in this case because the Chinese Nationalist League of Canada (hereinafter called "The League"), which purported to be the landlord, was an unincorporated and unregistered society and, as such, an entity unknown to the law, and, therefore, incapable of making a lease. He further held that there was no evidence to support the contention that a lease existed between the plaintiff company and some member or members of the "headquarters" of The League, inasmuch as there was nothing to show who those individuals were, or that the distress warrant was issued on their behalf, or had since been ratified by them, although there is abundant evidence of such attempted ratification by the "headquarters" itself.

The Court of Appeal, on the other hand, relying on such authorities as *Rennie* v. *Robinson* (1), and *Morton* v. *Woods* (2), held the plaintiff estopped from setting up incapacity of the alleged landlord or landlords on the ground that to do so would be tantamount to impeaching the title to the premises of the persons by whom it was let into possession of them as tenant, or of their assignees or representatives.

To what has already been said, it may be added that the evidence is entirely silent as to whether the membership of The League is to-day the same as it was when the alleged lease was made. Indeed, the fact is, no doubt otherwise.

Originally, the publishers of the Canada Morning News then unincorporated, were given possession of the premises in question under a verbal arrangement made with persons who were then officers of The League. This occurred

(1) (1823) 1 Bing. 147. (2) (1869) L.R. 4 Q.B. 293.

about 1922. In September, 1924, about a month before the plaintiff company was incorporated, at the request of one of its officers, the arrangement between these parties was put in writing. This document, in the nature of a lease, purports to be made by Louis Man Har and Mah Kaing Chee, as lessors; whereas the distress warrant is signed by Low Yee Quan and Wai Hon. The evidence shows that Louis Man Har had been both President of The League and editor of the Canada Morning News up to some time in 1924. It also appears from the evidence that the property in question was acquired about 1920 for the "headquarters" purposes of The League and was paid for by subscriptions of its members scattered throughout Canada. The agreement for its purchase was made in the name of two of such members; and the deed was originally drawn in favour of The Chinese Nationalist League of Canada, the unincorporated body in question. Difficulty having arisen as to registration of the title, however, it was decided to take the deed in the name of an incorporated branch of The League, viz., "The Chinese Nationalist League" (of Victoria, B.C.). This body had been incorporated under the *Benevolent Societies Act* of British Columbia in 1916. The legal title, thus vested in the incorporated branch, may have been held by it in trust for those members of The League who had contributed to the purchase of the property. The precise situation in this respect is not very clear in the record, but there probably arose a resulting trust in favour of such members of The League. If the distress had been made on behalf of these *cestui que trustent,* an interesting question might have arisen on such authorities as *Vallance* v. *Savage* (1); but it was not so made. Nor is there evidence of authority having been given by such members to the men who purport to be the lessors to enter into a lease binding upon them. On the whole evidence, it is impossible to say that the members of The League intended to become lessors and if the lease should be regarded as having been made personally by the individuals who purported to make it on behalf of The League, it is equally impossible to hold

(1) (1831) 7 Bing. 595.

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that the two gentlemen who signed the distress warrant in any wise represented them.

To extend the estoppel, which exists where the relationship of landlord and tenant is admitted or established and which prevents the tenant questioning the landlord's title, so as to make it apply to a case in which the real question is as to the existence of that relationship, seems to be wrong in principle and, with respect, is quite unwarranted by the authorities.

That an unincorporated society such as the League (although not within the prohibition of section 8 of the *Companies Act*, R.S.B.C., 1924, c. 38, inasmuch as it has not "for its object the acquisition of gain") cannot become a lessee is established by several judgments, of which it is only necessary to refer to two,—*Jarrott* v. *Ackerley* (1), and *Henderson* v. *Toronto General Trusts Corporation* (2). These decisions rest upon the incapacity of an unincorporated and unregistered society to assert any position which is maintainable in law only by a legal entity. In principle, therefore, they are equally applicable whether the position so asserted be that of landlord or tenant.

That the courts will, at the instance of a person claimed to be a tenant, determine the status of the alleged landlord for the purpose of ascertaining whether or not the relationship of landlord and tenant exists between them, and the consequent legality of a distress, seems to be settled by the decision of this court in *Farwell & Glendon* v. *Jameson* (3). Indeed, the very cases cited by the learned judges of the Court of Appeal proceed on this footing, because in both of them the court first determined that the relationship of landlord and tenant existed. Thus, in the *Rennie* case (4), the question was whether the admitted rights of the original lessor extended to his assignee of the reversion, i.e., whether the latter might be regarded as landlord of the tenant let in by the former and, as such, entitled to distrain. It was so held upon the express ground that "Rennie (the assignee) only stands in the shoes of Williams" (the lessor);

as the defendant was not competent to impeach the title of Williams, neither is he competent to impeach that of Rennie.

(1) (1915) 85 L.J. Ch. 135.
(2) 62 O.L.R. 303.
(3) (1896) 26 Can. S.C.R. 588.
(4) 1 Bing. 147.

In *Morton* v. *Woods* (1), the court, having stated (p. 303) that the second objection went to the existence of the relationship of landlord and tenant between the parties, said of it:—

> These objections are all of a technical nature; but we are bound to give effect to them if they turn out to be sustained in point of law;

and the decision proceeded upon the ground that the objections were not sustainable in fact, and that, therefore, the relationship of landlord and tenant subsisted between the parties. See too *Baldwin* v. *Burd* (2).

The evidence entirely supports the findings of the learned trial judge that the alleged lease purported to be made on behalf of the unincorporated body, The League; that "The Chinese Nationalist League" (of Victoria) had no connection with it at any time prior to the distress; and that any ratification of the acts of the defendants, Low Yee Quan and Wai Hon, by the Victoria society was impossible and wholly ineffective, inasmuch as the acts of these defendants did not purport in any way to be done on behalf of that society (Bowstead on Agency, 7th ed., p. 49), but, on the contrary, *ex facie* of the distress warrant itself and according to all the evidence, had been done on behalf of The League. That the alleged lease purported to be made on behalf of The League is also clear *ex facie* of the document of September, 1924, " the makers " thereof appearing to be Louie Man Har, President, and Mah Kaing Chee, Secretary of the Chinese Nationalist League Headquarters of Canada.
This alleged lease is also signed by " Wong Ko, Treasurer of The Chinese Nationalist League " (of Canada) and, " Wong Kong Doo, Director of Canada Morning News."

The evidence clearly discloses payment of rent as such by the Canada Morning News Company Limited, both before and after its incorporation, to the alleged landlord, in cash and by way of set off of amounts due for rent against amounts due to the Canada Morning News Company for printing. If the alleged landlord, The League, had been an entity capable of granting a lease, there might well be enough in these payments to found an estoppel against the alleged tenant denying that the relationship of landlord and tenant subsisted between it and the alleged landlord. But, in order that there should be such an

(1) L.R. 4 Q.B. 293. (2) (1861) 10 U.C.C.P. 511.

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estoppel, the body invoking it must itself be an entity known to the law,—in other words, must be capable of assuming the position of landlord. Estoppels in pais are mutual.

On the short ground, therefore, that the relationship of landlord and tenant never existed between the appellant and the Chinese Nationalist League of Canada, on whose behalf the distress in question was made, that distress in our opinion was illegal. The appeal must, accordingly, be allowed with costs here and in the Court of Appeal and the judgment of the trial judge restored.

Appeal allowed with costs.

Solicitors for the appellant: *Russell, Nicholson & Co.*

Solicitor for the respondents: *W. F. Brougham.*