Solicitor for the respondent: D. C. Donovan.

1935

* May 22.
* June 10.

WILLIAM STOTT AND SARAH STOTT (DEFENDANTS) ..... } APPELLANTS;

AND

ELLIS A. HENINGER (PLAINTIFF).... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Landlord and tenant—Distress Act, section 5—Right of distress as against chattel mortgage from "the tenant"—Mortgage given while mortgagor was not tenant of distraining landlord—The Distress Act, R.S.A., 1922, c. 97, s. 5.

One Beatrice A. Raby, some years prior to becoming the tenant of the appellants, had given the respondent a chattel mortgage on her household goods and furniture. During the tenancy, the appellants made a distress for overdue rent and seized the goods found on the premises. The respondent claimed the goods under the chattel mortgage and asserted that they were exempt from the appellants' distress for rent. An interpleader issue between the parties was directed to be tried. Section 5 of the Alberta *Distress Act*, R.S.A., which restricts a landlord's right of distress to the goods of the tenant contains the proviso that the "restriction shall not apply * * * in favour of

* PRESENT:—Duff C.J. and Cannon, Crocket and Davis JJ. and Dysart J. *ad hoc.*

(1) Ante, p. 378.

1935

STOTT v. HENINGER.

any person whose title is derived by purchase, * * * assignment from the tenant whether * * * by way of mortgage or otherwise" * * * The trial judge, Lunney, J., held in favour of the appellants (landlords); the Appellate Division (Clarke, J. dissenting) took the opposite view, and accordingly gave judgment in favour of the respondent (chattel mortgagee). The Appellate Division gave special leave to the appellants to appeal to this Court.

Held, reversing the judgment of the Appellate Division ([1934] 3 W.W.R. 332), that the goods and chattels covered by the mortgage were subject to the appellants' distress for rent.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Lunney J., and maintaining the respondent's action.

The appellants, having rented certain premises to one Beatrice A. Raby, made a distress for $365 overdue rent and seized certain chattels on the premises. The respondent claimed these chattels under a chattel mortgage for $1,500 made to him by Beatrice A. Raby before the tenancy commenced. An interpleader issue between the parties was directed to determine whether at the time of the seizure under the distress warrant the chattels distrained were the property of the respondent or of the landlords.

O. M. Biggar K.C. for the appellants.

J. A. Ritchie K.C. for the respondent.

The judgment of the Court was delivered by

DAVIS J.—This appeal raises a very narrow, though rather difficult, point. Beatrice A. Raby, some years prior to becoming the tenant of the appellants, had given the respondent a chattel mortgage on her household goods and furniture. During the tenancy, the appellants made a distress for overdue rent and seized the goods found on the premises. The respondent claimed the goods under the chattel mortgage and asserted that they were exempt from the appellants' distress for rent. An interpleader issue between the parties was directed to be tried. The parties reside and the premises are situate in the city of Lethbridge, Alta.

Section 5 of the Alberta *Distress Act,* R.S.A., ch. 97, is as follows:

(1) [1934] 3 W.W.R. 332.

1935

STOTT
v.
HENINGER.

Davis J.

5. 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 in favour of a person claiming title under or by virtue of an execution against the tenant or in favour of any person whose title is derived by purchase, gift, transfer or assignment from the tenant whether absolute or in trust or by way of mortgage or otherwise nor 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 performance of any condition nor where goods have been exchanged between two tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim of or the right of distress by the landlord nor shall the restriction apply where the property is claimed by the wife, husband, daughter, son, daughter-in-law, or son-in-law of the tenant or by any other relative of his in case such other relative lives on the premises as a member of the tenant's family.

The respondent's chattel mortgage having come into existence before Beatrice A. Raby became the tenant of the appellants, the sole question for decision is whether or not the goods and chattels covered by the mortgage were subject to the appellants' distress for rent. At common law, goods were liable to be distrained for rent in respect of their locality, that is by reason of their being on the demised premises, and not in respect of their ownership; and the goods of a stranger to the tenancy might be distrained on as well as the tenant's own goods. But the English law became so altered by the *Law of Distress Amendment Act,* 1908, that it may be said that the goods of any other person than the tenant cannot now be distrained on unless they are exempt from the protection given by that Act or otherwise by law. The Alberta statute provides 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, but certain exceptions are made to this general restriction. One of these exceptions is that the restriction shall not apply

in favour of any person whose title is derived by purchase, gift, transfer or assignment from the tenant whether absolute or in trust or by way of mortgage or otherwise.

The point in issue is whether in order to come within this exception the mortgage must have been made while the mortgagor was the tenant of the landlord or whether the exception applies irrespective of the time of the making of the mortgage. The exception is " of any person whose title is derived * * * from the tenant * * *." Is

it necessary that the mortgage be made during the term of the tenancy?

Lunney, J., of the Supreme Court of Alberta, on the trial of the issue held in favour of the appellants (landlords). Upon appeal, the Appellate Division of that Court (1) (Clarke, J. dissenting), took the opposite view and accordingly gave judgment in favour of the respondent (chattel mortgagee). The Appellate Division gave special leave to the appellants to appeal to this Court.

The English statute, the *Law of Distress Amendment Act*, 1908, 8 Edw. VII, c. 53, s. 4, provides that the Act shall not apply

to goods comprised in any bill of sale, hire-purchase agreement, or settlement made by such tenant.

There appears to be no case under the English statute that has raised the point with which we have to deal, but I find in the last edition of Woodfall's Landlord and Tenant (23rd ed., 1934) at p. 581, in discussing the exception in respect of "goods comprised in any bill of sale" the following comment in foot-note (*o*),

the exclusion of such goods was intended to prevent the tenant from giving the appearance of a financial position which he does not possess.

In my opinion it is too narrow a view of the statute to draw a distinction between a chattel mortgage made before and one made after the commencement of the tenancy. The words of the exception must be considered with relation to the principal matter. The intention of the legislature obviously was to protect the landlord from claims against the goods on the premises that might be made by the different classes of persons enumerated in the section, and to give to the landlord in respect of his rent a priority over such claims. I can find nothing in the language of the section to support the view that the only mortgage in contemplation of the legislature was a mortgage made after the commencement of the tenancy. It would have been easy to have so said if that had been in the mind of the legislature. In *Hackney Furnishing Co.* v. *Watts* (2), Bray, J., in considering whether the goods distrained on were comprised in a hire-purchase agreement within the meaning of s. 4 of the *Law of Distress Amendment Act*, 1908, said, at p. 232:

(1) [1934] 3 W.W.R. 332.
(2) [1912] 3 K.B. 225.

1935

STOTT
v.
HENINGER.

Davis J.

It must be remembered that the statute is one depriving the landlord of a part of his common law right to distrain. The words must not be strained so as to further restrict his rights.

It had been held in the Court of Appeal in *Rogers, Eungblut and Co.* v. *Martin* (1), that the words "made by such tenant" in s. 4 of the Act, refer not only to the word "settlement," which immediately precedes them, but also to the previous words "bill of sale" and "hire-purchase agreement."

I would allow the appeal and determine the issue in favour of the appellants with costs throughout.

Appeal allowed with costs.

Solicitors for the appellants: *G. Virtue.*

Solicitors for the respondent: *Johnstone, Ritchie & Huckvale.*