

THE NEW REGINA TRADING }
COMPANY (PLAINTIFF)

APPELLANT;

1933

* Oct. 13.
* Dec. 22.

AND

THE CANADIAN CREDIT MEN'S }
TRUST ASSOCIATION (DEFEND- }
ANT)

RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Bankruptcy—Bankruptcy of tenant—Right of landlord to priority for three months' rent—Bankruptcy Act, R.S.C., 1927, c. 11, s. 126—Landlord and Tenant Act, R.S. Sask., 1930, c. 199, ss. 42 to 48.

The effect of section 126, of the *Bankruptcy Act*, R.S.C. 1927, c. 11, is that in Saskatchewan the rights of a landlord on the bankruptcy of a tenant are governed by sections 42 to 48 of the *Landlord and Tenant Act*, R.S.S., 1930, c. 199.

Under the circumstances of this case the appellant, as landlord, was not entitled on the distribution of the property of his tenant, bankrupt, to a prior claim for money equal to three months' rent at the rate prescribed in the lease under the provisions of the above provincial Act.

* PRESENT:—Duff C.J. and Rinfret, Lamont, Crocket and Hughes JJ.

1933
 NEW REGINA
 TRADING CO.
 v.
 CAN. CREDIT
 MEN'S
 TRUST ASS.

APPEAL from the decision of the Court of Appeal for Saskatchewan (1) reversing the judgment of the trial judge (2), Taylor J., and dismissing the appellant's action. The trial judge awarded the appellant the sum of \$5,250 for three months' rent out of the assets of the Regina Trading Company, Limited, bankrupt, in the hands of the respondent as trustee, in priority to the claims of all other creditors.

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

E. K. Williams K.C. for the appellant.

F. L. Bastedo K.C. for the respondent.

The judgment of the court was delivered by

LAMONT J.—As the appellant has abandoned its claim for damages the only question left for determination in this appeal is whether the appellant, as landlord, is entitled to enforce against the respondents a claim for money equal to three months' rent at the rate prescribed in the lease under the provisions of the *Landlord and Tenant Act* of Saskatchewan, being chapter 199, R.S.S. 1930.

The relevant facts are as follows:—

The appellant is the owner of a four-storey store building in the city of Regina. On the 22nd day of December, 1927, it leased its building and premises (except a small portion not material here) to the Regina Trading Company, Limited, for five years and two months, at a rental of \$25,000 for the first year, and increasing each year. By a subsequent agreement the rent for the year commencing December 1st, 1931, was fixed at \$21,000. On April 10th, 1931, the Regina Trading Company made a voluntary assignment for the benefit of its creditors and the respondent was appointed trustee in bankruptcy. The respondent (hereinafter called the trustee) took possession and proceeded to dispose of the assets. As the Regina Trading Company had known that an assignment for the benefit of its creditors was imminent and had decided to assign to the said trustee, the trustee, prior to April 10th, had been seeking to find a purchaser. It found a Mr. Cohen who was willing to buy both stock and fixtures at a price and on terms acceptable

to the trustee. The Trading Company then assigned, the trustee was duly appointed and the goods sold to Cohen who took possession, under the trustee, on April 14th, and commenced, on the 16th, to conduct a sale of the bankrupt stock on the premises.

1933
NEW REGINA
TRADING Co.
v.
CAN. CREDIT
MEN'S
TRUST ASS.
Lamont J.

At the time the stock and fixtures were sold to Cohen he was informed by the trustee that he might occupy the appellant's premises free of rent until April 30th, 1931, as the rent to that date had been paid in advance. In addition there was a further verbal agreement between them to the effect that if the trustee was obliged to retain possession of the premises for the months of May, June and July, Cohen would take over the premises and pay the rent for that period.

On learning that Cohen was about to conduct a sale of bankrupt stock on its premises, the appellant, by letter, notified the trustee that it objected to this being done and stated that it would hold the trustee liable for any loss which it might sustain as a result of Cohen's occupation. To this the trustee, on April 17th, replied, and its letter in part reads as follows:—

With regard to the present occupation of the premises, we think you will readily understand that unless the purchaser of the stock could dispose of at least a considerable portion of it in the premises it would be impossible for us, as trustees, to get rid of the stock at all, so that from a practical standpoint if a reasonable offer could be expected for the assets the disposition of a considerable portion of them in the building itself was requisite.

On April 22nd the trustee gave the appellant the following notice:—

We beg to give you statutory notice of our intention to vacate the premises on 31st July, 1931.

On April 24th the appellant's solicitor wrote the trustee saying:—

We have plans under way now for the converting the Trading Company building, so that we can get it in shape to rent in sufficient time to protect ourselves against loss. Under these circumstances, we shall require possession the first of next month.

As the Canadian Credit Men's Trust Association has disposed of the stock some time ago, we take the position that you are no longer entitled to remain in possession, and having disclaimed the lease you are not entitled to sublet to Cohen or any any other person. The real intention of the Act is to give the landlord a chance to make such changes as might be necessary and get new tenants, so that the landlord might as far as possible protect himself from loss by reason of the tenant having gone into liquidation.

1933
 ~~~~~  
 NEW REGINA  
 TRADING CO.  
 v.  
 CAN. CREDIT  
 MEN'S  
 TRUST ASS.  
 Lamont J.

We wish to notify you, therefore, that if the premises are not vacated and made available for the workmen to start in on the first of next month, we shall hold you liable.

On April 28th the trustee notified Cohen that he must vacate the premises not later than midnight April 30th, and, on the following day, he wrote the appellant saying:—

With reference to your letter of the 24th April containing notice to quit the Regina Trading Company premises as of the end of this month, we beg to confirm the fact, of which we believe you are already aware, that pursuant thereto we are having possession of the premises delivered up at that time.

The under-tenants have been notified according and we are not responsible for any over-holding on their part.

To put the matter in another way and to assure you of our intention as above, we hereby disclaim the lease.

On April 28th, after Cohen had received notice to vacate the premises on April 30th, he wrote to the appellant's solicitor that it would inconvenience him somewhat to vacate the premises on April 30th and he made an offer to pay \$150 for the use of the premises for an additional two days (that is May 1st, and 2nd) in which to carry on business, and the right, until May 9th, to enter and remove his fixtures. This offer was accepted in writing and the money paid over. The appellant then demanded from the trustee the sum of \$5,250, being three months' rent for the building at the rate due under the lease and agreement. This being refused the appellant brought this action.

At the trial judgment was given in favour of the appellant for the amount sued for. On appeal that judgment was set aside (Haultain C.J. dissenting) and the action dismissed with costs. Against that dismissal this appeal is brought.

Section 126 of the *Bankruptcy Act* (R.S.C. 1927, c. 11) provides that when a receiving order or an assignment is made against or by any lessee, under that Act the same consequences shall ensue as to the rights and priorities of his landlord as would have ensued under the laws of the province in which the demised premises are situated, if the lessee, at the time of such receiving order or assignment, had been a person entitled to make, and had made, a voluntary assignment of his property for the benefit of his creditors pursuant to the laws of the province. It is, therefore, to the *Landlord and Tenant Act*, as enacted by the Saskatchewan legislature, that we must look for the rights and priorities of a landlord in that province.

The provisions of the Act applicable in case of the bankruptcy of a tenant are sections 42 to 48 inclusive. The scheme of these provisions is to afford the landlord whose tenant has become bankrupt some protection in respect of unpaid rent and, at the same time, secure to the other creditors an equitable distribution of the bankrupt's property. This the legislature provides for by enacting that when a receiving order or an assignment is made by or against a lessee under the *Bankruptcy Act* and there is at the date of the order or assignment rent in arrear, and the lessee has goods and chattels on which the landlord has distrained, or is entitled to distrain, the landlord's right to realize his rent by distress ceases and the trustee in bankruptcy is entitled to take possession of all the lessee's property, but, in the distribution of that property, the trustee shall pay to the landlord, in priority to all other debts, an amount not exceeding the value of the distrainable assets and not exceeding three months' rent *accrued due prior to the date of the receiving order or assignment* and the costs of the distress, if any (s. 42). If there is, at the date of the order or assignment, more than three months' rent due, the landlord may prove as a creditor for the excess (s. 43). Section 44 and section 45 (1) and (2), read as follows:—

44. The landlord shall not be entitled to prove as a creditor for rent for any portion of the unexpired term of the lease, but the trustee shall pay to the landlord for the period during which he actually occupies the leased premises from and after the date of the receiving order or assignment, a rental calculated on the basis of said lease.

45. (1) The trustee shall be entitled to continue in occupation of the leased premises for so long as he shall require the premises for the purposes of the trust estate.

(2) The trustee may surrender possession at any time, but the landlord shall be entitled to receive three months' notice in writing of the trustee's intention to surrender possession or three months' rent in lieu thereof, such three months to end with the last day of a calendar month. After the trustee surrenders possession, such of the landlord's rights as are based upon the actual occupation by the trustee shall cease.

Section 46 deals with the right of the trustee to retain the leased premises for the unexpired part of the term and his right, upon the observance of certain conditions, to assign the lease.

Section 47, in part, reads:—

47. The trustee shall have the further right, at any time before giving notice of intention to surrender possession, to disclaim any such lease, and his entry into possession of the leased premises and their occupation by him while required for the purposes of the trust estate shall not be

1933

NEW REGINA  
TRADING Co.v.  
CAN. CREDIT  
MEN'S  
TRUST ASS.

Lamont J.

1933  
 NEW REGINA  
 TRADING CO.  
 v.  
 CAN. CREDIT  
 MEN'S  
 TRUST ASS.  
 Lamont J.

deemed to be evidence of an intention on his part to elect to retain the premises nor affect his right to disclaim or to surrender possession pursuant to the provisions of this and the preceding sections.

In the case before us the rent was paid in advance until April 30th, sections 42 and 43 have, therefore, no application. The appellant, while relying chiefly on section 45 (2), makes the following contentions:—

1. That when the bankrupt stock was sold to Cohen the premises were no longer required for the purposes of the trust estate and the trustee had, therefore, no right to continue in possession or to give the possession to Cohen.

2. That when the trustee surrendered possession of the premises on April 30th, the appellant was entitled to three months' notice of its intention to surrender, or three months' rent in lieu thereof, and, as the notice was not given, the appellant was entitled to three months' rent.

3. That, in any event, the trustee was liable on the covenant in the lease to pay the rent by reason of the privity of estate between the trustee and the landlord and the case of the *North-west Theatre Company v. MacKinnon*, (1) was cited in support thereof.

In our opinion these contentions cannot be maintained. As to the first it may well be that if, upon the sale of the goods of the bankrupt, there is no agreement express or implied that the purchaser, as part of the bargain, is to be entitled to sell a portion of the goods of the bankrupt on the premises, the trustee would have no authority to put the purchaser in possession. With that question we are not concerned here. Where, however, the trustee in order to induce an offer of a higher price for the goods does agree that the purchaser shall be allowed a limited time to sell the stock or a portion thereof on the bankrupt tenant's premises, such agreement, we think, may reasonably be considered as being for the benefit of the trust estate. Under section 45 (1), therefore, the trustee was entitled to continue in possession and permit the purchaser to sell the bankrupt stock for the time agreed upon.

The second and third contentions must fail because the facts necessary to support them are wanting. Under section 45 (2) the landlord is to have three months' notice of surrender of possession, or three months' rent in lieu thereof.

(1) (1915) 52 Can. S.C.R. 588.

The object of this provision is to give the landlord, on the bankruptcy of his tenant, three months to secure another tenant without loss of rent. If the notice is given the trustee remains in occupation and pays rent. If the notice is not given, three months' rent is paid out of the bankrupt's estate in lieu thereof. Liability for this rent, however, is predicated on the fact that the notice has not been given.

1933  
 NEW REGINA  
 TRADING Co.  
 v.  
 CAN. CREDIT  
 MEN'S  
 TRUST ASS.  
 ———  
 Lamont J.  
 ———

Now the fact is that on April 22nd, 1931, the trustee did give notice of its intention to vacate on July 31st, but the appellant refused to permit the trustee to remain in possession, and demanded that possession be given up on April 30th. The trustee acquiesced and surrendered possession on that day. This surrender of possession, therefore, resulted from a notice by the landlord to vacate and a compliance therewith by the trustee, and was followed by the landlord not only itself taking possession of the premises but of re-leasing them to Cohen. It is true that the trustee did not give three months' notice of an intention to surrender possession on April 30th. That was impossible when it obtained possession only on April 14th. In our opinion the provision for the payment of three months' rent in lieu of a notice of intention to surrender, provided for by section 45 (2), has no application when possession is surrendered pursuant to a notice to quit on the part of the landlord, or by reason of an agreement between the parties.

The privity of estate which, it is argued, arose between the trustee and the landlord on the acceptance by the trustee of the assignment and rendered the trustee liable for the rent for the unexpired portion of the lease, can have no effect, even assuming the privity to exist, where the trustee disclaims the lease as provided by the statute or the landlord, expressly or by some unequivocal act, accepts a surrender thereof. It is established law that delivery of possession by the tenant to the landlord and the landlord's acceptance of possession, effects a surrender of the lease by operation of law. Here we think that the demand for possession by the landlord, and his putting Cohen in possession for two days for a monetary consideration, after the trustee had not only agreed to vacate but had actually vacated, is a sufficiently unequivocal act to constitute an acceptance of the surrender of the lease. *Phené*

1933  
NEW REGINA  
TRADING CO.  
v.  
CAN. CREDIT  
MEN'S  
TRUST ASS.  
Lamont J.

v. *Popplewell and Another (1), Oastler v. Henderson (2)*.  
It might further be pointed out that by its letter of April 24th the appellant acknowledges that the trustee had disclaimed the lease. The formal disclaimer appears in the trustee's letter of April 29th, but, evidently, the appellant had received notice thereof by April 24th.

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Barr, Stewart & Cumming.*

Solicitors for the respondent: *MacKenzie, Thom, Bastedo & Jackson.*

---