Supreme Court of Canada
McKay v. Douglas, (1918) 57 S.C.R. 453
Date: 1918-11-18

D. H. Mckay and Another (Defendants) Appellants;

and

John C. Douglas (Plaintiff) Respondent.

1918: November 7; 1918: November 18.

Present: Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Distress—Rent—Entry—Breaking—Entrance by other than usual mode.

D. was tenant of one part of a building and B. of the other. The parts were separated by a partition in which was a door at one time used in common, but B. had fastened it with a hook on his side and fitted into it the frame of a second door against which he placed a case of type. A bailiff with a distress warrant against D. for rent could not obtain entrance to his premises by the ordinary mode. He went on the premises occupied by B. and induced him to remove or allow to be removed the case of type and the extra door and then entered D.'s premises by lifting the hook on the door in the partition and opening that door. He levied the distress and in an action by D. claiming damages for illegal distress and trespass:—

Held, that B., having the right to remove the obstruction to entrance into the other part of the building, it was immaterial whether he did so himself or allowed the bailiff to do it; and that after such removal entrance to D.'s premises was made without a breaking, and the distress was legal. *Gould* v. *Bradstock* (4 Taun. 562) applied.

APPEAL from a decision of the Supreme Court of Nova Scotia[1], affirming the judgment at the trial in favour of the plaintiff.

The facts are sufficiently stated in the above head-note.

Burchell K.C. for the appellants referred to Long v. Clarke[2]; Miller v. Tebb[3]; Gould v. Bradstock[4].

Hall K.C. and McArthur for the respondent cited Nash v. Lucas[5]; Miller v. Curry[6].

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[1] 40 D.L.R. 314.
[2] [1894] 1 Q.B. 119.
[3] 9 Times L.R. 515.
[4] 4 Taun. 562.
[5] L.R. 2 Q.B. 590.
[6] 25 N.S. Rep. 537.

THE CHIEF JUSTICE.—This appeal is one from the judgment of the Supreme Court of Nova Scotia *en banc*[7], dismissing an appeal from a judgment of the trial judge but reducing the damages from $2,500 to $1,500.

The action was one brought by a tenant against his landlord for, as was alleged, an illegal distress upon his goods in his rented premises, the illegality consisting of a wrongful breaking into by the landlord of the premises.

A majority of the appeal court upheld the illegality of the distress upon the ground that there had been an illegal breaking into by the landlord of the demised premises in order to distrain for the overdue rent, and that, therefore, he was liable in the action for trespass brought.

The facts are not in dispute. The premises leased to the plaintiff were divided off from other premises leased to one Brody, by a wooden partition in which there was a swinging door which had at one time been used by the occupants of both premises to pass from one to the other.

Brody had put a simple latch on his side of the door which could be lifted with one's finger and had also placed, another loose or unfastened door up against the latched door, and a case of type against the loose or unfastened door. When the landlord came to distrain he asked Brody to move his case of type, take away the second door and unhook the latch on the first door,

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and it was held by the Chief Justice, Ritchie and Mellish JJ. that these things, having been done by Brody at the landlord's request, the latter was guilty of an illegal entry in pushing open the unlatched door and entering into the premises of the plaintiff tenant. It is right to say that Mr. Justice Ritchie, who was a party to the judgment, expressed himself as concurring with "some doubt" while Mr. Justice Chisholm, with whose judgment Mr. Justice Longley concurred, dissented in a very vigorous and, if I may be permitted to say so, a very luminous judgment.

The question before us being reduced down to the one question whether there was an illegal breaking into the premises by the landlord, I am of opinion, after looking into the authorities on the question of illegal entry, that there was none such in the present case.

[7] 40 D.L.R. 314.

Brody, the occupier of the adjoining tenement divided from the one in question by the wooden partition with the swinging door latched on Brodie's side, had, in my opinion, a perfect right to remove the case of type he had placed against the loose door, then to remove the door itself which was not fastened, and finally to lift the latch on the partition door. It does not matter in the least whether he did each and all of these acts of his own mere motion or at the instance and request of McKay the landlord. He had a perfect right to do what he did. When these obstructions were removed the way was open and clear for the landlord to push the door open, enter and distrain.

I am quite unable to follow the Chief Justice's reasoning that, assuming Brody to have the right to remove his own case of type in his own tenement, and his own loose and unfastened door, and then to lift his own latch, which he himself had placed on the swinging

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door on his own side, because he did so at McKay's request,

> it must all be regarded as of the landlord,

and was, he thinks,

> clearly such an entry as could not be justified for the purpose of distress.

On the contrary, I think that Brody only did what he had an absolute right to do whether spontaneously or at McKay's instance and which, when done, enabled the landlord to enter by pushing open the swinging unfastened door and execute his distress.

Any other person than the landlord who entered to distrain would have committed a trespass, not the landlord who entered without breaking any latch or fastening, simply pushing the swinging door open for the lawful purpose of levying a distress.

I think the modern case of *Long* v. *Clarke*[8], directly in point in this case.

There the plaintiff, being unable to get into the house by the front entrance, went into the next house; from there he went into the yard at the back, and then got over a wall (said to vary in height from 5 to over 10 feet) into the yard at the back of the plaintiff's house, and entered the house by means of a window (the report does not say whether it was closed or

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[8] [1894] 1 Q.B. 119.

not, but the inference from the judgment is that it was open) and distrained on the goods. Held by the Court of Appeal to be a lawful distress. Lord Esher M.R. says, at page 121:—

> In this case we are dealing with a landlord's bailiff distraining for rent. What is the ordinary law applicable to such a case? It gives a right to the landlord to do that which, if any other person did it, would be a trespass, and the question is whether what has been done in the present case is within what is permitted by the law of distress. When a landlord goes into a house to distrain, whether the door be open or shut, he does that which, in any other person, would be a trespass, and

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> it is just the same if he merely walks across the land to the front door. The sole question is what limitations on the right of the landlord to go on the premises and distrain the law imposes on him. He cannot go into any building or into any house if he can only do so by breaking into it. He can go in at the door, which is the most obvious way of entering; but further, he can get in by a window if it is left open. There is no trespass in doing either of these acts, because he does not break in. So it is incorrect to say, as has been suggested, that the landlord cannot go into the house if he finds a hole in the side of it, and for the same reason, that in so entering he is not breaking in. This law is applicable to any building into which the landlord wants to get for the purpose of distraining, such as a warehouse, a stable, or a barn. Thus, supposing he enters a curtilage without breaking anything, still he cannot break into any stable or building within the curtilage which is locked.

It is unnecessary for me to make further quotations from the judgments of the learned judges in that case. They are all to the same effect as that from Lord Esher and are, to my mind, conclusive on the point now before us.

I would, however, cite the case of *Ryan* v. *Shilcock*[9], where it was held the breaking must be such a breaking as is also equivalent to a forcible entry; and that of *Gould* v. *Bradstock*[10], where the landlord himself occupied a room over that of his tenant beneath him, divided by a flooring of boards nailed on rafters, in which Sir James Mansfield justified the entry of a landlord to distrain on his tenant below him in taking up a portion of the flooring between the apartments, and entering to distrain through this aperture so made.

I think the appeal must be allowed with costs throughout and the action dismissed.

IDINGTON J.—I am, in one respect, in the same frame of mind as the learned trial judge that I have some doubt as to the legality of this act complained of, but, with the greatest respect, I submit that such frame of mind properly directed should, in this case,

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[9] 7 Ex. 72.

[10] 4 Taun. 562.

have resulted in a dismissal of the plaintiff's (now respondent's) action with costs.

I, therefore, am of the opinion that the court below which, on a careful analysis of what is expressed, seems to have been in the like predicament, should have come to the conclusion that no court has a right to find a man guilty of wrongdoing unless the law clearly declares him to be so when regard is had to the relevant facts.

It seems to me that the case of *Gould* v. *Bradstock*[11], which seems to go a great deal further than needed to maintain a dismissal of this respondent's action, stands yet as good law, though I find it was not decided by the great Chief Justice Mansfield, as counsel inadvertently assured me it was, when I felt puzzled by the expressions quoted, and hence prompted to inquire.

Everything Mr. Brody did to facilitate the landlord's entry was perfectly legal up to and including the lifting of the hook he had placed there for his own reasons and to serve his own uses. How doing that which a man had an absolute right to do, if he saw fit, can be made in law to demonstrate illegality in someone else's act beyond that, is what I am unable to understand. With the very greatest respect I submit that to so hold only confuses two things, one legal and the other of an undecided quality now to be passed upon, on its merits, and tends to further confusion of thought in trying to solve, or solving, the actual problem when reached.

The problem is, when otherwise approached, reduced to the question of the legality of a landlord entering by a door he presumably had placed there for common use by his tenants, or by himself and the

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tenant in question, as an easy mode of ingress and egress and requiring no force to open it and enter.

In the situation thus created that door was as much an outer door of the premises in question as any other door. To use the illustration I presented to counsel for consideration in the course of the argument, suppose the part of the appellant's premises occupied by Brody had been dedicated by him as a public street, would it be contended such a door was not an outer door? I submit not.

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[11] 4 Taun. 562.

It clearly was a door in the outer wall of the premises leased by the landlord to the tenant, and it might well have happened that the landlord himself, instead of Brody, might have become the occupant either actively using it or merely as landlord or owner of vacant premises.

Can it be said that in such an event he could not have used the door in question, never fastened or locked in any way by the tenant in question, as a means of entry to distrain?

I think it would be much easier to support as legal such an entry, than the raising of a window partly open as in *Crabtree* v. *Robinson*[12], or the coming down through a skylight as in *Miller* v. *Tebb*[13], after crossing another person's premises, or analogous cases, for which ample authority is shewn hardly consistent with the judgment appealed from.

The trap-door in the roof in question in the Ontario case relied upon could not in principle be called a door in an outer wall.

I should be averse to refining away the law as already established by many decisions, even if that law is the result of over-refinement, to help a plaintiff

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with no better case than respondent happens to have here.

And if any doubt, I repeat it should have been resolved at the trial as against him and hence so decided here.

The further ground was taken in argument that there was no tenancy. If so then I fail to see what ground respondent has to stand upon unless and until he established a better title to the goods in question than he did.

But it seems idle to contend in face of all that transpired and is expressed in the correspondence between the parties, that he had not become a tenant of the appellant at the old well-known rental.

It seems rather late, after seemingly abandoning such a ground below, to start it here.

I think the appeal should be allowed with costs throughout and the action be dismissed.

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[12] 15 Q.B.D. 312.

[13] 9 Times L.R. 515.

ANGLIN J.—More than a century ago a landlord occupied an apartment over a mill demised to his tenant from which it was divided only by a flooring of boards nailed on rafters. In order to distrain for rent the landlord took up a portion of this flooring in his own apartment and entered through the aperture thus made. Sir James Mansfield held that his interest in the floor entitled him to raise it without incurring liability for trespass, and that the entry into his tenant's premises through the opening so made was lawful. *Gould* v. *Bradstock*[14].

Although I do not find that this decision has been followed in any subsequent reported case in the English courts, it has never been questioned and its authority is recognised by such eminent writers on the Law of

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Landlord and Tenant as Foa, 5th ed., page 525, and Bullen (on Distress), 2nd ed., p. 154. See, too, 11 Hals. Laws of England 163. Mr. Foa points out that a perpendicular partition between the demised premises and another tenement in the same building formed by boards nailed upon studding would stand in the same position. The boards, if removable without injury to the demised premises, may be likewise taken off without trespass by the lawful occupant of the adjoining tenement.

The facts in the case at bar fully appear in the judgments rendered in the provincial appellate court. Assuming any controverted facts—and there are practically none—in the plaintiff's favour, I am unable to distinguish this case from *Gould* v. *Bradstock*[15]. On its authority it would appear that his interest in them entitled Brody, the tenant of the adjoining premises, to remove the board covering, to raise the hook and to push open the door, which it is not pretended would do any injury to the plaintiff's premises. Whether those acts were all done by Brody at the instance of the landlord or by the bailiff with Brody's concurrence or authority, is, in my opinion, quite immaterial. I see no reason why Brody could not authorise the landlord or his bailiff to do all or any of them as his agent, and it seems to be a fair inference from the evidence that some of these acts were done by Brody himself, and the others with his authority by the landlord's bailiff.

If an aperture was thus lawfully made the landlord could certainly enter through it to make his distress just as he might enter through an open window or a hole in an outer wall. The one thing that a distraining landlord must not do is to break into the premises.

[14] 4 Taun. 562.
[15] 4 Taun. 562.

Long v. *Clarke*[16]. The case of *Nash* v. *Lucas*[17], relied upon by the learned Chief Justice of Nova Scotia is, I think, with respect, clearly distinguishable. As Mr. Justice Chisholm points out the opening of the window, the entry into the house through it, and the unfastening of the locked door, all done in that case by the landlord's direction, were acts of trespass.

Applying the principle of the decision in *Gould* v. *Bradstock*[18], there was no breaking in in this case. Apart from that authority, however, I confess I should have been inclined to the contrary view. I cannot regard the raising of the hook on the partition door in this case as in any sense equivalent to the raising of a latch on the front door of demised premises (the usual mode of entry) permitted because the fair inference is that it was thus secured in order to keep it closed and not for the purpose of keeping persons out. *Ryan* v. *Shilcock*[19]. The partition door had long ceased to be a usual mode of entry into the demised premises. It was, in my opinion, indistinguishable from a closed window. The landlord can justify having opened it only as an act done by Brody or by his authority.

The appeal should be allowed and the action dismissed with costs throughout.

BRODEUR J.—I cannot see how we can distinguish the present case from the case of *Gould* v. *Bradstock*[18].

For the reasons given by my brother Anglin I would allow this appeal with costs of this court and of the courts below and would dismiss plaintiff's action with costs.

MIGNAULT J.—I am of opinion that this appeal should be allowed.

The respondent occupied as a tenant a store belonging to the appellant, which was separated from another store in the same building, rented to one Brody, by a partition in which a door had been placed, and this door had, for a while, served as a means of communication between the two stores. Some time before the distress of which the respondent complains, Brody had placed a hook in this door on his side whereby the door could be fastened, and had also put up an outer door, on his side, which had been closed by means of nails or screws. These nails or screws had been removed by Brody on a

[16] [1894] 1 Q.B. 119, 124.
[17] L.R. 2 Q.B. 590.
[18] 4 Taun. 562.
[19] 7 Ex. 72.
[18] 4 Taun. 562.

previous occasion, when it was necessary to enter the respondent's store to close an opening through which the snow came in, and the outer door had been merely placed against the other door without being fastened. At the time of the distress, Brody removed, at the request of the appellant, the outer door, and the hook on the inner door was lifted either by himself or with his permission. In my opinion Brody had a perfect right to unhook the door or to allow it to be unhooked and consequently the appellant, in entering the respondent's premises by this door, was not guilty of trespass, and the distress for rent due by the respondent was not illegally made. Under the authorities cited by my brother Anglin, I am clearly of opinion that the action of the respondent is unfounded.

The appeal should, therefore, be allowed and the action dismissed with costs in this court and in the courts below.

Appeal allowed with costs.

Solicitor for the appellants: A. A. McIntyre.

Solicitor for the respondent: Neil R. McArthur.