ABRAHAM DEDRICK AND KENNETH M. DEDRICK (PLAINTIFFS)... } APPELLANTS;

AND

JAMES H. ASHDOWN AND CASPER KILLER (DEFENDANTS)..... } RESPONDENTS.

1887
*Nov. 22.

1888
*June 14.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH (MANITOBA).

Chattel mortgage—Possession of goods under—Right of mortgagor to sell—Proviso as to—Ordinary course of trade—Seizure of goods under execution—Justification for.

In a chattel mortgage containing no redemise clause there may be an implied contract that the mortgagor shall remain in possession until default, of equal efficacy with an express clause to that effect; and such an implied contract necessarily arises from the nature of the instrument, unless it be very expressly excluded by its terms. *Porter & Flintoff* (6 U. C. C. P. 335) distinguished.

In a chattel mortgage of the stock in trade and business effects of a trader there was a proviso to the effect that if the mortgagor should attempt to sell or dispose of the said goods the mortgagee might take possession of the same as in case of default of payment.

Held,—That this proviso only prohibited the sale of the goods other than in the ordinary course of business. Ritchie C.J. *contra.*

The mortgagee of the chattels seized the mortgaged goods under an execution in a suit for the debt secured by the mortgage. The execution was set aside as being against good faith. In an action for the wrongful seizure and conversion of the goods,—

Held—That the mortgagee could not justify the seizure under the mortgage.

APPEAL from a decision of the Court of Queen's Bench (Man.) (1), setting aside a verdict for the plaintiffs and ordering a judgment of non-suit to be entered

The facts, which are more fully set out in the judgment of Mr. Justice Gwynne, may be stated as follows:—

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*PRESENT—Sir W. J. Ritchie C.J., and Fournier, Taschereau and Gwynne JJ.

(Mr. Justice Henry was present at the argument of this appeal but died before judgment was delivered.)

(1) 4 Man. L. R. 139

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This was an action of trespass and trover against the defendants for entering the plaintiffs' shop and carrying away and converting to their own use the plaintiffs' goods and a continuance of such trespass for the space of ten days.

The plaintiffs being indebted to the defendants in the sum of $800 and upwards agreed to give security for their debt on the understanding that they be allowed to carry on their business and the time of payment be extended for six months. This was assented to and a chattel mortage was executed by the plaintiffs, the considera tion for which was the amount of the debt, and the time of payment the six months' extension agreed upon.

As soon as this mortgage was registered judgment was signed in the suit which the defendants had brought to recover their said debt and execution was issued under which the sheriff seized the plaintiffs' stock in trade and sold it, a bailiff being in possession of the same in plaintiffs' shop for about ten days. On application to a judge the writ of execution was set aside as being contrary to good faith, and this action was brought in which plaintiffs obtained a verdict with $1,484 damages, the jury, under the direction of the presiding judge, making a special assessment of damages for the goods taken by the sheriff which were not covered by the mortgage. This verdict was set aside by the Court of Queen's Bench, and a non-suit ordered on the ground that under a plea denying the plaintiffs' title to the goods the defendants could set up the title of Ashdown under the chattel mortgage, and that under that mortgage they were entitled to enter and take the goods. The plaintiffs then appealed to the Supreme Court of Canada.

Ewart Q.C. for the appellants.

The goods were seized under execution and when

the execution has been set aside the defendants cannot claim that they took possession under their mortgage. At all events evidence of the mortgage was not admissible under the counts for trespass. *Leake* v. *Loveday*, (1); *Corbett* v. *Shepard* (2); *Hatch* v. *Holland* (3).

The mortgage gave the mortgagee a license to enter and take possession on default and such license should be specially pleaded. *Kavanagh* v. *Gudge* (4); *Samuel* v. *Coulter* (5); *Young* v. *Smith* (6); *Bingham* v. *Bettinson* (7); *Closter* v. *Headly* (8); *Watson* v. *Waltham* (9).

The covenant in the mortgage was that the goods should not be sold without the written consent of the mortgagee. The defendants allege a breach of this covenant and must show that no written consent was given, of which there was no evidence. Moreover, selling the goods in the ordinary course of business would not be a breach of the covenant. *Walker* v. *Clay* (10).

A redemise clause is not necessary to entitle the mortgagor to remain in possession of the goods mortgaged. *Albert* v. *Grosvenor Investment Co.* (11); *Wheeler* v. *Montefiore* (12); *Bingham* v. *Bettinson* (7); *Moore* v. *Shelley* (13).

The defendant had an option to take the goods under the execution or under the mortgage, which option was never exercised. *Cadwell* v. *Pray* (14).

Clearly the court had no power to order a nonsuit. The plaintiffs had a right to retain their verdict, at all events, for $266 the amount assessed as damages for taking the goods not covered by the mortgage.

(1) 4 M. & G. 972.
(2) 4 U. C. C. P. 68.
(3) 28 U. C. Q. B. 213.
(4) 5 M. & G. 726.
(5) 28 U. C. C. P. 240.
(6) 29 U. C. C. P. 109.
(7) 30 U. C. C. P. 438.
(8) 12 U. C. Q. B. 364.
(9) 2 A. & E. 485.
(10) 49 L. J. C. L. 560.
(11) L. R. 3 Q. B. 123.
(12) 2 Q. B. 133.
(13) 8 App. Cas. 285.
(14) 41 Mich. 307.

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Robinson Q.C. for the respondents. The right of a mortgagor to maintain actions in respect to goods mortgaged by a deed like the present, where there is no redemise clause, is dealt with by a number of cases both in England and Ontario. *Porter* v. *Flintoff* (1); *Ruttan* v. *Beamish* (2); *McAulay* v. *Allen* (3); *Paterson* v. *Maughan* (4); and the following which are especially to be considered, *Bunker* v. *Emmany* (5); *Bingham* v. *Bettinson* (6); and *Whimsell* v. *Giffard* (7).

The English cases are dealt with in the judgment of the court below, delivered by Mr. Justice Taylor. *National Mercantile Bank* v. *Hampson* (8); *Walker* v. *Clay* (9); *Taylor* v. *McKeand* (10); *Payne* v. *Fern* (11).

It is clear that the verdict for the plaintiffs cannot stand as the evidence shows that the goods were worth much less than the damages allowed and the plaintiffs cannot recover more than their interest in the goods. *Clark* v. *Newsom* (12); *Brierly* v. *Kendall* (13); *Toms* v. *Wilson* (14).

Primâ facie the sale by the plaintiffs was unlawful and to justify it a written consent by the mortgagee must be shown.

Ewart Q.C. in reply. The jury have a right to take into consideration the loss of the business and give damages therefor, and the court will not cut down their verdict to mere inventory prices.

Sir W. J. RITCHIE C.J.—It is clear these executions so improperly issued did not justify the sheriff in disposing, on behalf of the defendants, of the goods in the manner in which they were disposed of.

(1) 6 U. C. C. P. 335.
(2) 10 U. C. C. P. 90.
(3) 20 U. C. C. P. 417.
(4) 39 U. C. Q. B. 371.
(5) 28 U. C. C. P. 438.
(6) 30 U. C. C. P. 438.
(7) 3 O. R. 1.
(8) 5 Q. B. D. 177.
(9) 49 L. J. C. L. 560.
(10) 49 L. J. C. L. 563.
(11) 6 Q. B. D. 620.
(12) 1 Ex. 131.
(13) 17 Q. B. 937.
(14) 32 L. J. Q. B. 382.

The sheriff had a writ; he entered under it, seized, sold the defendant's goods; and by such sale levied the judgment debt. These executions having been set aside as being improperly issued it is not now, in my opinion, open to the defendants to contend that they can ignore and repudiate such entry and dealing with the plaintiffs' goods and set up that they were taken under another authority and for a purpose different from that of levying the money supposed to be due on the executions to the judgment creditors. The sheriff's officers at the time had a warrant and, according to the directions in the writs, took the goods and disposed of them according to the exigencies of the writs; as execution creditors they could only justify taking possession for the purpose of levying the debt under the executions by the hands of the sheriff. The sheriff acted *bonâ fide* under the writs and had no authority, express or implied, to act for the defendants under the mortgage and did not profess so to act; he entered and seized and sold the goods by virtue of the writs to him directed and for no other cause.

The defendants cannot justify the acts of the sheriff. I do not think the cases of the dismissal of a servant for one cause and justifying for another, or distraining for one cause and justifying for another, are at all applicable to this case. The right of a man to do an act with regard to the property of another depends upon the authority or right which he really has to do the act. What right had the defendants to send the sheriff into the plaintiffs' premises to seize and sell the plaintiffs' goods under a writ which they had caused to be improperly issued and which was subsequently set aside?

The defendants cannot justify as mortgagees, inasmuch as they never acted, or claimed to act, in relation

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to the seizure and sale of these goods, under the mortgage or any forfeiture thereunder.

I think that construing this bill of sale as the mortgagor contends would, unquestionably, be to enable the mortgagor to effectually destroy the security. If the mortgagor is at liberty to sell and dispose of his whole stock in trade, and appropriate the proceeds for his own support and maintenance, or otherwise dispose of them for his own use, it is difficult to see in what consists the use or value of the security.

One can well understand that a man might mortgage a stock of merchandize and sell the goods in the usual course of trade if there was a provision that he should keep the stock up to its value at that time, or that he should apply the proceeds of the sales to the payment of the debt secured by the mortgage; but without any obligation to do one or the other, in the face of an express covenant not to sell without permission in writing, it is difficult to understand how there can be an implied covenant that he may carry on his trade and from time to time sell and dispose of his stock in the course of his business, without being bound to keep the stock up or account for the proceeds, and so utterly destroy the security of the mortgagee.

It may well be that the mortgagee might be willing that the mortgagor should continue his business, knowing that at any time he had it in his power to prevent further sales, if the selling of the goods was without his consent first had and obtained in writing, and he considered further sales would interfere with the value of his security.

There was, therefore, in my opinion, a forfeiture which the defendants might have acted on but did not, but instead thereof relied on the executions which have failed to sustain their acts, and the plaintiff is, therefore, entitled to recover the value of the goods

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seized, less the amount of the mortgage, and also damages for the sheriff's unlawful entry, seizure and sale. I think there should be a new trial to ascertain these damages, the amount awarded being entirely too high and not justified by the evidence, unless the parties consent to a reduction of the damages as suggested by Mr. Justice Gwynne.

FOURNIER J.—I have read the judgment prepared by Mr. Justice Gwynne in this case, and I entirely agree with the views he has expressed therein. I think the appeal should be allowed.

TASCHEREAU J.—I am of opinion that this appeal should be allowed with costs, and concur with my brother Gwynne in the conclusion which he has reached.

GWYNNE J.—(After setting out the pleadings in the case, the order setting aside the execution and the pertinent facts established by the evidence, His Lordship proceeded as follows):—

By the chattel mortgage the plaintiffs, who were described therein as hardware merchants, sold and assigned to the defendant Ashdown, therein called the mortgagee, all and singular the entire stock of hardware, tinware, paints and oils and all other the goods, wares and merchandise of every description whatsoever belonging to the plaintiffs in and about the store occupied by them in the town of Pilot Mound, &c., to have and to hold to the said mortgagee, his executors, administrators and assigns, to his and their own use, provided always, and the said mortgage was declared to be made upon the express condition, that the said mortgage and everything therein contained should cease, determine and be utterly void to all intents and purposes, anything therein contained to the contrary

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notwithstanding, if the plaintiffs, their executors or administrators, should pay or cause to be paid to the mortgagee on the 1st March, 1884, the sum of $847.80 with interest from the 1st of August, 1883. This sum included the whole of the amount which was due by the plaintiff to the defendants jointly and to the mortgagee himself alone. The mortgage contained no redimise clause, that is to say, no clause providing in express terms that until default the mortgagors should continue in possession of the goods assigned, but it contained a clause that:

In case default shall be made in the payment of the said sum of money in the said proviso mentioned or of the interest thereon or any part thereof, or in case the mortgagors shall attempt to sell or dispose of or in any way part with the possession of the said goods and chattels or any of them, or to remove the same or any part thereof out of the said store and premises, or suffer or permit the same to be seized or taken in execution without the consent of the mortgagee, his executors, &c., to such sale, removal or disposal thereof first had and obtained in writing, then and in such case it shall and may be lawful for the mortgagee, his executors, &c., with his or their servant or servants and with such other assistants as he or they may require, at any time during the day to enter into and upon any lands, &c,. where the said goods and chattels or any part thereof may be and to break and force open any doors, locks, bars, &c., for the purpose of taking possession of and removing the said goods and chattels, and upon, from and after taking possession of such goods and chattels aforesaid, it shall and may be lawful, and the mortgagee, his executors, &c., and each or any of them is and are hereby authorized and empowered, to sell the said goods and chattels or any of them or any part thereof at public auction or private sale as to them or any of them may seem meet; and from and out of the proceeds of such sale in the first place to pay and reimburse himself or themselves all such sums of money as may then be due by virtue of these presents and all such expenses as may have been incurred by the mortgagee, his executors, &c., in consequence of the default, neglect or failure of the mortgagors, &c., in payment of the said sum of money with interest thereon as above mentioned, or in consequence of such sale or removal as above mentioned, and in the next place to pay unto the mortgagors any surplus.

The clause empowering the mortgagee to sell would,

I apprehend, if a case should arise requiring adjudication upon this point, be construed as empowering him to act only in such a manner as a mortgagee in possession with a power of sale is required by equity to do; that is to say, to sell the goods in such a manner as should be reasonably conceived to be best calculated, in the interest of the mortgagors as well as of the mortgagee, to obtain the best price that possibly could be obtained for them; not to sacrifice the property by a wanton, careless, vexatious sale, at a ruinously inadequate price, but to take all prudent measures calculated to secure as good a sale as possible.

For the present I shall assume that the mortgage authorized the mortgagee to take immediate possession of the goods upon the execution of the mortgage and to sell them under the power of sale contained therein in such a manner as a mortgagee in possession might do, deferring the consideration of the question whether it did or not to the last.

It is apparent from the evidence that, whatever the chattel mortgage may have authorized to be done, the defendants, in authorizing and causing to be done the acts which were done, did not, in point of fact, act or intend to act under and in pursuance of the powers vested in them by the chattel mortgage. But that, on the contrary, they acted and at the time intended to act in defiance of, and in repudiation of, the power of sale vested in them by the mortgage and in a manner quite inconsistent with such power; for on the very day that, in adoption of the mortgage on the real estate, they caused that mortgage to be registered, within, it may be, two or three days from the date of their acceptance of the chattel mortgage and their causing it to be registered, without any complaint whatever that, and before they had, so far as appears, any reason whatever to believe or suspect that, the mortgagors

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had done anything in violation of the terms of the mortgage, and without any inquiry whether they had or not, in apparent disregard of the mortgage they put a writ of *fieri facias* issued at their suit, and the mortgagee put a writ of *fieri facias* issued at his suit, in the hands of the sheriff to be executed upon the goods in question as the goods and chattels of the plaintiffs, liable to the satisfaction of the moneys directed to be levied under the said writs, and they caused the goods to be sold under these writs and another shortly afterwards issued by the mortgagee the defendant Ashdown, and so caused them to be sold at the sacrifice usually attending sales by sheriffs under executions; and upon their right to issue such writs of execution and to cause them to be executed being contested in court, upon the ground that the plaintiffs had executed the said two mortgages on realty and on their stock in trade upon an arrangement that they should be permitted to carry on their business until the 1st March, 1884, they resisted the plaintiffs' application to set aside the said writs of *fieri facias* and persistently insisted upon their right to issue them and to have caused the goods to be sold thereunder and to retain the moneys realized by the sale thereof; and to the very last, by their pleadings on the record, insisted that the sale under the said writs of *fieri facias* was good, denying the plaintiffs' pleading that they and all proceedings had thereunder had been vacated and set aside; and, that contention failing them, they insisted that, notwithstanding the writs and all proceedings had thereunder had been set aside, still the seizure and sale of which the plaintiffs complained having been completed, and the moneys arising from such sale realized, before the order setting aside the said writs was made they have a right to retain the benefit of their seizure and sale under the executions as good and

valid in law.

Now there having been but one continuous act of trespass of which the plaintiffs complained, and those being the circumstances under which it was committed, it is impossible for the defendants to get over the facts proved and their consequences, namely, that the defendants acted not in virtue of any authority vested in them by the chattel mortgage but in defiance and repudiation of it; and their claim now to avail themselves of any benefit the chattel mortgage might have given them simply amounts to this: that admitting they did not act under the power of sale contained in the chattel mortgage but under an authority quite inconsistent therewith, namely, writs of execution issued upon judgments obtained regularly as they contend against the plaintiffs, still they ask that as the defendant Ashdown might have, as they contend he might have, taken the goods and have sold them under the power of sale contained in the mortgage, the jury in estimating the amount of the damages to which the defendants have exposed themselves by acting in defiance of the chattel mortgage, should take into their consideration by way of reduction of damages what the defendant Ashdown might have done but did not. To this the jury might well say, that what the defendants in fact did exposed the plaintiffs to the vexatious, unnecessary and wrongful expense of the sheriff's fees, possession money and poundage, &c., amounting to $103.25, and to an injurious sacrifice of their goods at a sheriff's sale under execution, which could not reasonably have been suffered if the mortgagee had sold the goods under the power in that behalf contained in the mortgage; so that whatever protection the chattel mortgage might have given the defendants if they had acted under it, they cannot get over the indisputably established fact that they did not

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act under it but in defiance of it, and the plaintiffs under the issues joined by them upon the defendant's fourth plea are entitled to such substantial damages as a jury under all the circumstances, including this last, may find to be reasonable.

Now as to the construction of the chattel mortgage. There can be doubt that the courts of Upper Canada have held, but not without dissent, that *Porter* v. *Flintoff* (1) is an authority that in the case of a chattel mortgage, in form precisely similar to the present, being executed without an express redemise clause the mortgagor is not entitled to possession of the chattels mortgaged until default, and that therefore the mortgagor cannot maintain any action against the mortgagee for taking possession of the chattels, even though such possession should be taken before any default committed. In *McAulay* v. *Allen* (2) ; and *Samuel* v. *Coulter* (3), the majority of the Court of Common Pleas at Toronto held themselves to be bound by *Porter* v. *Flintoff* as so deciding and by *Ruttan* v. *Beamish* (4), as affirming it. In *Samuel* v. *Coulter* (3), however, Hagarty C. J. suggested that the plaintiff should seek his remedy in appeal when *Porter* v. *Flintoff* (1) might be reviewed. The point comes up now for the first time, so far as I am aware, in appeal. In *Porter* v. *Flintoff* (1) the question whether there might not be gathered from the terms of the mortgage an implied contract that the mortgagor should remain in possession until default, which would be as effectual as an express clause to that effect, does not appear to have been very much, if at all, discussed. I remain of the opinion which was expressed by me in *McAulay* v. *Allen* (2) and *Samuel* v. *Coulter* (3), that the point so assumed to have been decided by *Porter* v. *Flintoff* (1) was not at all neces-

(1) 6 U. C. C. P. 335.
(2) 20. U.C.C.P. 417.
(3) 28 U. C. C. P. 240.
(4) 10 U. C. C. P 90.

sary to a decision upon the precise point adjudged in that case, and that as it was not, the judgment in *Porter* v. *Flintoff* (1) was not binding upon the point when it should be, as it was in those cases, especially raised. The judgment in *Porter* v. *Flintoff* (1) is supportable upon the authority of the principle upon which *Watson* v. *MacQuire* (2) proceeded, namely, that the constructive possession which follows the property in personal chattels is sufficient to enable a mortgagee of chattels which still are in the actual possession of the mortgagor to maintain an action of trespass *de bonis asportatis* against a stranger who in such form of action cannot set up the *jus tertii* ; and that a sheriff who seizes the chattels in the possession of a mortgagor is, as to the true owner, the mortgagee, such stranger, unless he shall make it appear that the writ of *fieri facias* under which he seized the goods issued upon a judgment obtained against the mortgagor at the suit of a creditor against whom the mortgage was fraudulent and void under the statute as conveyances fraudulent against creditors. In *Ruttan* v. *Beamish* (3) the point did not arise at all ; that was an action of detinue and trover brought by a mortgagor of chattels against the mortgagee after default, which, of course, could not be maintained unless after the default the mortgage had been discharged by payment in full. In neither of those cases was it necessary to decide what was the right of the mortgagor to the possession of the goods as against the mortgagee before default.

The authorities in England, are to my mind, conclusive that in a mortgage of personal chattels there may be an implied contract that the mortgagor shall remain in possession until default of equal efficacy as an express clause to that effect (4) ; and

(1) 6 U. C. C. P. 335.
(2) 5 C. B. 836.
(3) 10 U. C. C. P. 90.
(4) *Brierly* v. *Kendall* 17 Q. B. 937.

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that such an implied contract necessarily arises from the nature of the instrument unless it be very expressly excluded by its terms. In *Wheeler* v. *Montefiore* (1) there was a proviso in the mortgage that on non-payment of the mortgage debt on the 24th June following it should be lawful for the mortgagee to enter upon the premises where the chattels mortgaged were and to sell them; there was no provision that the mortgagor should retain possession until default. Lord Denman in giving judgment says (2)—

There is no covenant that Franks (the mortgagor) shall continue in possession until the 24th June, but looking at the whole deed we are of opinion that the plaintiff's right to take possession did not attach until the 24th June.

Hereby clearly determining that a right to retain possession may by implication arise from the terms of the deed as effectually as if there were in it an express redemise clause. So in *Albert* v. *Grosvenor Investment Company* (3) Cockburn C.J. says (4) :—

This is the case of a mortgage whereby the mortgagor transfers the property in certain goods to the mortgagees, but subject to the mortgagor's right of redemption, and there are certain clauses in the deed, the result of which is that the mortgagees cannot seize and sell the goods unless the mortgagor makes default in paying the instalments of £2, which he is bound to do each successive Monday.

And Lush J. (5) says :—

It is also true the property in the goods passed by the deed to the mortgagees, but though it is not specially said so in the deed the mortgagor had clearly reserved to him a special property in the goods until he had made default, and he had, therefore, a right of action for seizing and selling the goods without default.

In *ex parte Allard* (6), Lord Justice James referring to the deed then before the court which was a composition deed says :—

It appears to me that we must decide this case upon a consideration of what was the real and true bargain between the parties at the time when the arrangement for a composition was made. What

(1) 2 Q. B. 133.
(2) P. 142.
(3) L. R. 3 Q. B. 123.
(4) P. 127.
(5) P. 129.
(6) 16 Ch. D. 511.

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was it they meant to do and did do in substance and intention? It appears to me that what they intended was this, that in consideration of the composition the business was to be carried on by the son alone (not by the mother) in the usual way in which such business is carried on, and that in carrying it on he was to exercise such a control over the assets as would enable him to raise money for the purpose of paying the composition. It would be utterly inconsistent with this intention that the debtors should have no power to deal with the trade debts which were then outstanding. An implied authority was given to deal with them to that extent. All that it is necessary for us to say is that the implied authority given to the debtors goes to the extent of authorizing any dealing with the assets in the ordinary course of business or for the purpose of raising money to carry on the business or to pay the composition.

The learned Chief Justice in the court below holds this language to be applicable to a composition deed only and not to apply to a chattel mortgage of his stock in trade executed by a trader, but this distinction, as it appears to me, rests upon no foundation, for the ordinary object and intent of a trader in executing a chattel mortgage upon his stock in trade, upon getting an extension of time for the payment of his debt to the wholesale trader with whom he deals, is to enable him to continue carrying on his trade in the ordinary course of business until the day named in the mortgage for payment of his debt equally as such is the object and intent in the case of a composition deed. I can see no distinction whatever in substance between the two cases and the language of the learned judges in the Court of Appeal in *ex parte Allard* (1) is, in my opinion, equally applicable to the present case.

So in *National Mercantile Bank* v. *Hampson* (2), in which the point came up on the pleadings the defence having been specially pleaded, the mortgagee of chattels brought an action of trover against a purchaser of some of the goods from the mortgagor and the defendant pleaded that he bought the goods in the ordinary course of business and without notice that they were

(1) 16 Ch. D. 511.

(2) 5 Q. B. D. 177

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not the property of the vendor. Lush J. held the defence good, saying:—

> Having regard to the terms of the bill of sale there was an implied license for the grantor to carry on his business * * * and any *bonâ fide* purchaser from him would have a good title.

So in *Walker* v. *Clay* (1), Grove J. says:

> The object of the bill of sale is to permit the grantor to carry on his business of an inn-keeper and horse-dealer, and it must therefore be taken to have contemplated this sale. In his character of publican the grantor would of course be entitled, and the bill of sale must be taken to have intended him to be entitled, to sell wine and beer to his customers.

And Lindley J. says:

> The object of the bill of sale is obviously not to paralyze the trade of the grantor, but to enable him to carry on his trade, and the bill of sale would be worthless if we were to construe it otherwise.

And he concludes by saying that the title of the defendant who was a purchaser from the grantor of the bill of some of the chattels covered thereby is, to his mind, an extension of the doctrine that a *bonâ fide* purchaser for value without notice is to be protected. This observation was simply an enunciation of the principle upon which a purchase of personal chattels from one who has the possession of them only, the property in them being in another, can be maintained against the true owner, and he says in substance that one who purchases *bonâ fide* from a trader goods in the ordinary course of the trader's business stands in the position well known in equity of a *bonâ fide* purchaser for value without notice. But this exposition of the principle upon which a purchase of chattels from a mortgagor in possession is maintained against the true owner does not at all detract from the weight of the decisions which hold that an implied right for a mortgagor of chattels to continue in the exercise of his business, and to sell the chattels mortgaged in the ordinary course of business, may be gathered from the terms of the instrument, nor can it be construed as qualifying the

(1) 49 L. J. C. L. 560.

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judgment of Lindley J. himself in that very case that the grantor of the bill of sale then before him had such an implied right, and that the court could not hold otherwise without making the bill of sale worthless. It was the fact of the sale having been made in the ordinary course of the grantor's business that, although there was no express proviso in the instrument that he might continue to carry on his business, made the purchaser's title good although the vendor had not the property in the thing sold. Upon this principle it was also held in *Taylor* v. *McKeand* (1) that a purchase from a trader, a mortgagor of goods, which the jury found to have been sold with a fraudulent intent by the mortgagor and not in the ordinary course of business, could not maintain title against the mortgagee although the purchaser was ignorant of the fraud and bought *bonâ fide*—thus showing that the title of the purchaser depends on the fact of the sale to him being made in the ordinary course of the vendor's business. A trader, mortgagor in possession of chattels, has no right whatever to sell otherwise than in the ordinary course of his business, but to sell in the ordinary course of his business he has, from the very nature of a chattel mortgage and the purpose for which it has come into use among traders. So that on a sale made in the former case a purchaser cannot acquire title but in the latter he can. *Payne* v. *Fern* (2) is precisely to the same effect.

These authorities abundantly establish that a right of the mortgagor to retain possession of the mortgaged property until default may be gathered by implication from the terms of the instrument as well as from an express proviso contained therein.

In construing the mortgage before us we must bear in mind that the usual intent and common

(1) 5 C. P. D. 358. (2) 6 Q. B. D. 620.

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object of the mortgage of the stock in trade of a trader being executed by him is not to effect a winding up of his business, or as Lindley J. expresses it in *Walker* v. *Clay* "to paralyse his trade," but to enable him to carry on his business in the ordinary course of his trade until default in payment of his debt on the day named in the mortgage for that purpose. In the present case the evidence expressly states that to have been the object and intent of the mortgagors, but apart from this evidence we must regard them as having executed the mortgage with that object and intent which is the usual and natural object and intent of traders in such cases. It was because these instruments had come into use among traders without a transfer of the possession to the mortgagee, the mortgagor still continuing to carry on his trade disposing of his stock in trade as before, that the Legislature of Canada, as far back as the year 1849, passed an act which, with certain amendments made thereto, is still in force, prescribing the contents and mode for the execution and registration of those instruments—that is to say—mortgages of chattels not accompanied with an actual and continued change of possession, to make them valid as against creditors of the mortgagors or subsequent purchasers or mortgagees in good faith. It was because of the common use of those instruments by traders as security to their creditors while the mortgagor traders continued in possession of the chattels mortgaged, carrying on their trade, disposing of their stock mortgaged as before, that the Legislature interposed to regulate the instruments as to their contents, their mode of execution and their registration, and ever since they have become a common assurance in use between traders, and recognized by the Legislature for the express purpose of enabling the trader debtor to continue carrying on his business,

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disposing of his stock in trade in the ordinary course of his business until default, while vesting the property in the stock in trade in the mortgage creditor, giving him a security in preference to other creditors. A similar statute, apparently copied in great measure from the Canada Statute, was passed by the Legislature of Manitoba in 1875. It is, however, contended that by reason of the clause as to the mortgagee taking possession not being limited to the case of default in payment of the mortgage debt, but in the same sentence providing also that "in case of default in the payment of the said sum of money in the proviso mentioned or of interest thereon or in case the mortgagor shall attempt to sell or dispose of or in any way part with the possession of the said goods and chattels or any of them or to remove the same or any part thereof out of the said store (or) suffer or permit the same to be seized or taken in execution without the consent of the mortgagee, his executors, &c., to such sale, removal or disposal thereof first had and obtained in writing," &c., that the effect of this proviso is that although the mortgagor is entitled to retain possession of the goods until the time specified for payment of the mortgage debt; if he should do nothing whatever with them and in fact ceases carrying on his business, he loses all right to possession of the goods if he presumes to continue his business and attempts to sell a single article in the ordinary course of his trade without such consent in writing of the mortgagee. So to hold would be to defeat the intent and object of the mortgagors in executing the mortgage, and would not only have the effect of utterly paralysing their trade but would leave them completely at the mercy of the mortgagee, and would convert the instrument from its well known character of a security intended to enable the mortgagors to continue carrying on their

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business as before until the time specified for payment of the mortage debt, into an instrument designed to enable the mortgagee, at his own sole will and pleasure to wind up the trader's business, for the mortgagee might altogether refuse his consent to the business being carried on, or might withhold it unless the mortgagors should consent not to purchase any new goods, not to replenish their stock, and to pay over daily to the mortgagee every cent to be realized from the sale of the mortgaged stock, and thus compel the mortgagors to submit to wholly new terms, quite different from the arrangement, contained not only in the chattel mortgage but also in the mortgage on realty, that the mortgagors should have until the 1st March, 1884, to pay their debt. There is no more efficacy in the word "sell" in the clause under consideration than in the words "dispose of," and "removal" is but a mode of "disposing of." Having regard, therefore, to the character of the instrument, and to the fact that its well known and recognized use among traders is to enable the trader, mortgagor, to continue carrying on his trade, these words "sell or "dispose of" in the connection in which they are used in the clause under consideration, which is the ordinary form that has always been in use, must be construed in the same sense as the words coupled with them, viz; "or remove them or any of them out of the said store, or part with the possession of them or any of them, or permit or suffer them to be seized in execution," and to be intended to prohibit only any sale or disposition of the goods other than in the ordinary course of business, and the doing of any thing which might prejudice the mortgagees' right to take possession upon default in payment at the time specified as by removal to another place which would defeat the mortgage altogether unless some new provision

should be made; for the description of the goods mortgaged, and the only mode of identification of them provided by the mortgage is in the store of the mortgagors where they were when the mortgage was executed; or by suffering the goods to be taken in execution which might expose the mortgagee to litigation, but to permit the mortgagors to carry on their business and to sell the stock in trade in the ordinary course, as is usual among traders executing such instruments; any other construction would defeat the plain object of the mortgagors in executing the instrument and the very purpose for which the instrument has come into use as a commercial security; it would be also contrary to the plain intention of the mortgagee in the present case, for the defendant, Ashdown, while his legal agent McDonald was in treaty with the plaintiffs for security for their debt, writes a letter to them in answer to one received from them wherein he says:—

I note what you say *re* goods but as the amount now owing by you to this firm and to Ashdown & Co. is so much in excess of what I intended, I will simply hold your order in hand and be prepared to ship immediately that I hear you have came to satisfactory arrangements with McDonald *re* the past.

Trusting this will be satisfactory and that your utmost expectations *re* the fall trade may be realized, I remain, &c.

Just consider to what extent the defendants' contention now goes—that although they had taken as part of the security which constituted one transaction a mortgage upon real estate which had cost the plaintiffs $1,040, and upon which there remained due upon a prior mortgage only the sum of $120 with some interest thereon, and had taken a mortgage upon the whole of the plaintiffs' stock in trade of about the value of the whole of the mortgage debt, viz., $847, still if the plaintiff should, after executing these mortgages, proceed to sell a single thing in the ordinary course of their trade the mortgagee might instantly enter the

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plaintiffs' shop and take and sell the whole of their stock in trade and receive the proceeds on account of the debt which by the terms of the mortgage on the real estate as well as of the chattel mortgage was not payable until the 1st March, 1884. In fact that by giving these two mortgages the traders had only acquired the right of keeping their stock in trade insured upon the shelves in their shop, unsold unless, in order to obtain permission to sell in the ordinary course of their trade, they should submit to such other terms, however extravagant, the mortgagee should insist upon. Can it be supposed that any persons in their senses could have executed those instruments which the plaintiffs' executed with that intent or that the defendants could have received them as executed with that intent ?

The only construction that the clause under consideration can, in my judgment, receive, is that the qualification as to the mortgagors' right to "sell and dispose of" the goods mortgaged is that if sold otherwise than in the ordinary course of business the mortgagee might enter, &c., and that they had a perfect right to sell in the ordinary course of their trade.

There is but one other point in the judgment of the court below requiring to be noticed. The case of the defendants now attempting to set up rights which they claim to have under the chattel mortgage in justification of the acts committed by them, after having failed on their justification under the writs of *fieri facias* upon the sufficiency of which they rested to the last moment, is compared to the case of a master having said that he dismissed his servant for one cause which would have been insufficient, resting upon a different cause on an action being brought for a wrongful dismissal. But there is no analogy whatever between the two cases.

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There is no question here as to the right in which the defendants merely said that they acted—the question is not as to what the defendants may have said at different times, different from the defence now set up, but as to what they did in point of fact, which they have also pleaded by way of justification upon the record and as to which there is no dispute or contradiction whatever. The fact is undisputed that the goods in question were seized and taken from the plaintiffs' possession and sold only under one authority, namely, the writs of *fieri facias* under which the defendants justified; that is an act of the defendants, not an assertion merely; it is an act which now that it has been established in evidence cannot be got over or laid aside and the sole question is: Was that act justified? It was a seizure in plain disregard of the chattel mortgage and inconsistent with it. There is no pretence that the goods were ever seized or taken under the powers contained in the chattel mortgage. If they had been taken under it they would have been taken as the property of the mortgagee, the defendant Ashdown alone, the plaintiffs' right to retain possession of which had been forfeited for violation of the terms upon which they were left in their possession. If that had been the ground of defence it must have been specially pleaded as justifying under a forfeiture insisted upon as having been incurred by the misconduct of the plaintiffs, and Ashdown alone as mortgagee could have set up that justification, and the other defendant as his servant which also would have required a special plea. But, it is useless to refer to the mode in which such a defence could be set up, as the act which is complained of, namely, the seizure which has been proved to have been authorized only by the writs of *fieri facias* and was in point of fact only made under them was not authorized by the chattel mort-

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gage. Seizure under the writs was in violation of the chattel mortgage, and was in fact a repudiation of it, for being taken under executions issued upon judgments obtained by the defendants the goods were by the defendants themselves authorized to be seized as the property of the plaintiffs to satisfy the execution which the defendant Ashdown swore issued in the ordinary course, and so for the purpose of thereby realizing satisfaction of judgment debts by sale of property thus admitted to be the property of the plaintiffs, a position quite at variance with the defendants or either of them having title to, and property in, the goods under the mortgage. In fact the act of seizure and sale under the writ of *fieri facias* is now as much unauthorized by and in violation of the chattel mortgage as it was when the Court of Queen's Bench in Manitoba (which now by its judgment holds that act to have been authorized by the chattel mortgage) set aside the writs as in violation of the mortgages executed by the plaintiffs and in breach of the agreement contained therein.

The appeal must be allowed with costs. But as to the damages. The jury have found the value of the goods to have been at the time of the seizure $986. This may be a large estimate, but I do not think we could interfere with the finding of the jury upon that point. The only amount realized by the sheriff's sale has been $256. Upon the above estimate of the value of the goods seized and wrongfully sold, the plaintiffs would be entitled to $730, but the jury by their verdict have given to the plaintiffs $1,484 as for damages which by their answers to the questions put to them is plainly intended to be in excess of the whole of the plaintiffs' debt to the defendants jointly and to Ashdown alone of $852. I do not see how it is to be made to appear upon the record in this case that the amount of $1,484 for which alone

judgment could be entered upon their verdict against the defendants jointly, is in excess of the judgment debts due to the defendants jointly, and to the defendant Ashdown alone, so as to give to the plaintiffs the benefit intended by the jury—which would entitle them to have satisfaction entered on all the judgments and a release also of the real estate mortgage. These judgment debts have in fact, so far as we know, been satisfied only to the extent of $256 realized by the sheriff's sale. If the defendants have realized anything out of the real estate mortgaged, the amount, if any, so realized should not be deducted from the amount to be recovered in this action. I think, therefore, the better way to deal with the case will be to render a verdict for the plaintiffs for the difference between the sum of $256 realized by the sheriff's sale and the true value as found by the jury of the goods so sold and for such further amount as may be reasonable for the wrongful act of the defendants, leaving them to apply for a remedy by way of set off or otherwise to have allowed to them so much of the said several judgment debts as may really remain due after giving credit to the plaintiffs for the said sum of $256 realized by the sheriff's sale, and such other sums, if any, as may have been realized out of the mortgaged real estate or any other estate of the plaintiffs. The equities between the parties as to entering satisfaction of the judgments and the release of the mortgage of the real estate can thus at the least possible expense be effectually disposed of.

The damages of $1,350 awarded by the jury cannot, I think, be sustained—that sum does not seem to be warranted by any just and rational view of the evidence. Ample justice would I think be done by a verdict for the plaintiffs for $1,000, and if the plaintiffs will consent to a rule to be drawn up upon

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their consent, for the verdict being reduced to that amount upon the footing above stated as to the defendants setting off against that verdict the balance remaining due in respect of the three above named debts of the plaintiffs to the defendants jointly and to the defendant Ashdown alone, after giving credit to the plaintiffs as above mentioned, then the rule for a new trial in the Court of Queen's Bench, in Manitoba, to be discharged with costs, but if the plaintiffs will not so consent then that rule to be made absolute for a new trial for excessive damages upon payment of costs.

In setting off the mortgage debt it is to cease to carry interest upon and from the day upon which the verdict was rendered.

The reduction of the judgment by such set-off will, of course, not prejudice the plaintiffs' right to full costs in the action.

Appeal allowed with costs.

Solicitors for appellants: *Ewart, Fisher & Wilson.*

Solicitors for respondents: *Biggs & Dawson.*