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Notice of Appeal.

(Filed August 28, 1935.)

In Chancery of New Jersey

107/958.

Between:

VEZZETTI REALTY CO. INC., a corporation of the State of New Jersey,

Complainant,

and

MODEL GARAGE, INC., a corporation of the State of New Jersey,

Defendant.

On Bill, etc.
Notice of Appeal.

To:

BENEDICT A. BERONIO,
Receiver of the Model Garage, Inc.,
A Corporation of the State of New Jersey.

Sir:

The M. G. H. Realty Company hereby appeals from so much of the order made in the above entitled cause by his Honor LUTHER A. CAMPBELL, Chancellor of the State of New Jersey upon the advice of the Honorable JAMES F. FIELDER, one of the Vice Chancellors, on the 22nd day of July, 1935, overruling the allowance by the receiver of the whole claim of M. G. H. Realty Company as a preference and ordering the $1450.00 be allowed

as a general claim, to the Court of Errors and Appeals in the last resort in all causes.

Yours, etc.,

THOMAS J. McALEER,
Solicitor of M. G. H. Realty Co.

I conceive that there is good cause for the appeal in the above stated cause.

DOMINICK J. MARRONE,
Of Counsel with M. G. H. Realty Co.

Service of a true copy of the within Notice of Appeal, is hereby acknowledged, this 24th day of August, 1935.

B. A. BERONIO,
Receiver of the Model Garage, Inc.

Petition of Appeal.

(Filed Sept. 19, 1935.)

[SAME TITLE.]

To the Hon. the Court of Errors and Appeals, the Last Resort in All Causes:

The petition of the M. G. H. Realty Co., the appellant in the above-entitled cause, respectfully shows:

1. Petitioner finds itself aggrieved by an order made in the Court of Chancery by his Honor, LUTHER A. CAMPBELL, Chancellor of the State of New Jersey, on the advice of the Hon.

JAMES F. FIELDER, Vice Chancellor, bearing date the 22nd day of July, 1935, in a certain cause in said Court of Chancery wherein the said order adjudges that the said M. G. H. Realty Co. is only entitled to a preference in the amount of Fifty ($50.00) Dollars, and orders that the balance of Fourteen hundred fifty ($1450.00) Dollars be allowed as a general claim.

2. Petitioner appeals from the said order of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous in that the petitioner is entitled to a preference of Fifteen hundred ($1500.00) Dollars for rent due it from the Model Garage for five months prior to the appointment of the Receiver.

WHEREFORE, petitioner prays that the said order of the Chancellor may be in the particular aforesaid reversed, set aside and for nothing holden, and the petitioner may have such other relief in the premises as to this court may seem proper.

THOMAS J. MCALEER,
Solicitor for Appellant.

DOMINICK J. MARRONE,
of Counsel.

Stipulation.

(Filed June 10, 1935.)

[Same Title.]

Stipulation by Thomas J. McAleer, Solicitor for M. G. H. Realty Co; Harry J. Cafferatta, Solicitor for Jefferson Building & Loan Association, and John D. Pierson, Counsel; Cohen & Klein, appearing for Jefferson Trust Company, in reference to the claim filed by the M. G. H. Realty Co. with Benedict A. Beronio, Esq., Receiver of the Model Garage, Inc:—

1. That the Model Garage, Inc. occupied the premises 801 Washington Street, Hoboken, N. J. owned by the M. G. H. Realty Co., as a show-room since May, 1929, at a fixed rental of $300.00 per month;

2. That at the time the Receiver was appointed the Model Garage, Inc. used the said premises as a show-room, having there the following chattels: Office furniture valued at $50.00, and 3 Pontiac Automobiles which were the property of the General Motors Corp. and which were thereafter repossessed by the General Motors Corp.;

3. That at the time the Receiver was appointed he notified the M. G. H. Realty Co. (orally) that he did not intend to use the said premises and that he terminates the lease of the M. G. H. Realty Co. and the Model Garage;

4. On January 10th, 1935 the solicitor representing the M. G. H. Realty Co. notified (orally) the Receiver that he intended to file a proof of claim in behalf of the M. G. H. Realty Co. claiming a preference for five months rent;

5. On February 1st, 1935 the said M. G. H. Realty Co. filed a proof of claim with the Receiver claiming a preference for $1500.00 for rent due it from the Model Garage, Inc. for five months prior to the appointment of the Receiver, which claim was allowed by the Receiver as a preferred claim.

The issue to be decided by the Court is whether, as a matter of law, the M. G. H. Realty Co. is entitled to a preference, and if so, for how much.

THOMAS J. MCALEER,
Solicitor for M. G. H. Realty Co.

JOHN D. PIERSON,
Counsel for Jefferson B. & L. Ass'n

COHEN & KLEIN,
Solicitors for Jefferson Trust Co.

Vice Chancellor Fielder's Conclusions.

July 8, 1935

HON. BENEDICT A. BERONIO,
331 Grand St., Hoboken, N. J.

THOMAS J. MCALEER, JR., ESQ.,
65 Hudson St., Hoboken, N. J.

HARRY J. CAFFERATA, ESQ.,
105 Willow St., Hoboken, N. J.

Gentlemen:

When the receiver was appointed in Vezzetti Realty Co. *v.* Model Garage, Inc., the defendant owed M. G. H. Realty Co. $1500 for five

months rent of premises occupied by defendant. If the landlord is entitled to a preference for such rent it must be by virtue of the lien given by Section 4 of the landlord and tenant act (Comp. Stat. 3066), which provides in effect and as applicable to this case, that the receiver could not dispose of the goods in the demised premises without first paying the landlord the arrears of rent. The receiver might have surrendered the goods to the landlord and in that event the landlord could have seized them and applied their proceeds on account of his rent claim but for the balance of his claim he could have no lien or preference on goods belonging to the defendant elsewhere located. Instead, the receiver took possession of such goods and under an order of the court sold them with other personal property belonging to the defendant. It seems clear to me that the landlord's preference can extend only to the value of the goods in the leased premises, which is conceded to be $50. and for the balance of his claim he is a general creditor. An order should be entered overruling the receiver's allowance of the whole claim as a preference and giving it preference to the extent of $50 and allowing the balance as a general claim.

Very truly yours,

JAMES F. FIELDER

Order Disallowing Preference.

(Filed July 22, 1935.)

[Same Title.]

This matter being opened to the court by Benedict A. Beronio, Receiver of the above-named defendant corporation, in the presence of Thomas J. McAleer, Solicitor for M. G. H. Realty Co., and Harry J. Cafferatta, Solicitor for Jefferson Building & Loan Association;

And it appearing that at the time the Receiver was appointed the defendant company occupied premises located at 801 Washington Street, Hoboken, N. J., which were owned by the M. G. H. Realty Co. and that it owed the landlord $1500.00 for five months' rent for the said premises; that the said premises were used as a show-room by the defendant company, and that it had on the said premises office furniture valued at $50.00 belonging to the defendant corporation and three Pontiac automobiles which were the property of the General Motors Corp. and were thereafter repossessed by the said General Motors Corp.;

And it further appearing that on February 1st, 1935 the said M. G. H. Realty Co. filed a proof of claim with the Receiver claiming a preference of $1500.00 for the rent due it from the defendant corporation, and that the Receiver allowed the said claim as a preferred claim, and the court being of the opinion that the said M. G. H. Realty Co.'s preference can only extend to the value of the goods in the leased premises at the time the Receiver was appointed, which is conceded to be $50.00, and for the balance it should be considered a general creditor:

Order Disallowing Preference.

It is, on this 22nd day of July, 1935, Ordered that the Receiver's allowance of the whole claim as a preference be overruled, that the said M. G. H. Realty Co.'s claim be allowed as a preference to the extent of $50.00, and that the balance of $1450.00 be allowed as a general claim.

Respectfully advised:

Luther A. Campbell,
Chancellor.

James F. Fielder,
Vice Chancellor.

New Jersey Court of Errors and Appeals

Between

VEZZETTI REALTY CO. INC., a corporation of the State of New Jersey,

Complainant,

and

MODEL GARAGE, INC., a corporation of the State of New Jersey,

Defendant.

BENEDICT A. BERONIO, Receiver of Model Garage, Inc.,

Respondent.

M. G. H. REALTY CO., a landlord creditor of Model Garage, Inc.,

Appellant.

On Appeal from Order Disallowing a Preference of Landlord's Claim.

Sat Below:
Campbell, C.
Fielder, V. C.

BRIEF ON BEHALF OF M. G. H. REALTY CO. INC., APPELLANT.

Preliminary Statement.

The undisputed facts, as they appear from the stipulation filed with the Vice Chancellor, are as follows (S. C., p. 4):

The Model Garage, Inc., was a tenant of the M. G. H. Realty Co., the appellant herein, at the time the Receiver of the tenant corporation was

appointed. It owed $1,500.00 to the appellant for five months' rent. At the time the Receiver was appointed the value of the chattels on the premises was $50.00.

On or about February 1st, 1935, the appellant filed a proof of claim with the Receiver claiming a preference of $1,500.00, which claim was allowed by the Receiver as a preferred claim. Thereafter, on objection of some of the creditors, Vice Chancellor Fielder overruled the Receiver's allowance and ordered that the appellant's claim for a preference be limited to $50.00, the value of the goods on the leased premises, and that the balance of $1,450.00 be allowed as a general claim (S. C., pp. 7-8).

It was from that determination that an appeal was taken to this Court.

POINT I.

The Vice Chancellor erred in limiting the appellant's right to a preference to the value of the goods on the leased premises.

Section 4 of the Landlord and Tenant Act (3 Comp. St. 3066) provides:

> "That no goods or chattels whatsoever, lying or being, or which shall lie or be in or upon any messuage, lands or tenements, which are, or shall be leased for term of life or lives, year or years, at will or otherwise, shall be liable to be taken, by virtue of any execution, attachment or other process, unless the party at whose suit the said execution or other process is sued out, shall, before the removal of such goods from off the said premises, by virtue of such process, pay to the landlord of the said premises, or his bailiff, all rent due for the said premises, at the time of the taking such goods or chattels

> by virtue of such process . . . provided, the said arrears of rent do not amount to more than one year's rent . . . ."

The term "other process" as used in the statute has been construed by the Court of Chancery and by this court to include the order of the Court of Chancery directing the Receiver of an insolvent corporation to take possession of the latter's goods and chattels then found upon the demised premises.

> *Wood* v. *McCardell, West & Farrell Carriage Company,* 49 N. J. Eq. 433;
> *Franz Realty Co.* v. *Welsh,* 86 N. J. Eq. 228 (C. E. & A.);
> *Glaser* v. *Achtel-Stetter's Restaurant,* 106 N. J. Eq. 150;
> *Albert & Davidson Pipe Corp.* v. *Gibney, &c. Co.,* 110 N. J. Eq. 285;
> *Greenspan & Greenberger Co.* v. *Goerke Co.,* 112 N. J. Eq. 391;
> *Whitehead* v. *Whitehead Pottery Co.,* 115 N. J. Eq. 257;
> *Electrol, Inc.* v. *Beatty, Marsh & Moyer,* 118 N. J. Eq. 537.

The statute is explicit that no goods or chattels whatsoever shall be taken unless the landlord is first paid the amount of rent that is due at the time of such removal. The appellant's rights to be paid for the rent that was due became fixed as soon as the Receiver took possession of the chattels by reason of the order of the Court of Chancery.

There is no mention in the statute that the landlord's right to be paid is limited to the value of the chattels that are taken. In fact, Section 5 of the Act (3 Comp. St. 3067) provides that in the event the goods are taken, they shall not be sold

unless before the sale the landlord is paid all the rent due at the time of the sale provided the amount does not exceed one year's rent. Had the intention of the legislature been to limit the landlord's claim to the value of the chattels, it would have provided that in the event the goods were taken the landlord would be entitled to the proceeds of such sale, and it would not prohibit the sale.

It has long been settled that the landlord's right to a preference under Section 4 does not emanate from his right to a lien.

In *Wood* v. *McCardell, supra,* Vice Chancellor BIRD considered a petition of a landlord asking for an order that the Receiver of an insolvent corporation pay the amount of rent due at the time of the filing of the bill for the appointment of a Receiver. The court held that the words "other process" as used in the Landlord and Tenant Act apply to an order of a Court of Chancery directing a Receiver to take possession of the goods and chattels of a defendant corporation, the court saying at page 435:

> "Upon the argument it was considered important that the landlord had not secured a lien or taken any steps to that end. This, I think, is not essential to his protection in cases where the tenant has not disposed of his goods, or, as between himself and another, created a valid lien. While the statute leaves the tenant at perfect liberty to dispose of his goods and chattels absolutely, or to create liens thereupon, yet as between landlord and tenant and other creditors of the tenant, when such creditors come with any process whatsoever, the statute is his shield. It absolutely forbids the removal of his goods until the rent then due, not exceeding one year, is paid. Although the landlord has no lien by which he can enforce the payment of rent, but must institute proceedings in his own behalf in order to accomplish that, the law preserves

> to him, as against every other process, the retention of the goods upon the premises until his rent be paid."

In *Greenspan & Greenberger Co.* v. *Goerke Co., supra,* Vice Chancellor BACKES stated at page 396:

> "The priority (of the landlord) does not rest in lien; it is a statutory preference."

The above case was also followed in *Whitehead* v. *Whitehead Pottery Co., supra,* where the court, at page 258, said:

> "It was determined by the court of errors and appeals in Franz Realty Co. *v.* Welsh, 86 N. J. Eq. 228; 98 Atl. Rep. 387, that in cases of this kind the landlord has no lien on the assets, if he has issued no distraint prior to the insolvent receivership; that he has nevertheless a preferential right or claim, ahead of the claims of general creditors, against the assets in the hands of the receiver; but that such preferred claim is subordinate to the claims of employes for wages under sections 83 and 84 of the Corporation act."

That case was also followed in *Electrol, Inc. v. Beatty, Marsh & Moyer, supra* (decided Sept. 4th, 1935), where Vice-Chancellor LEWIS, at page 538, said:

> "The right to a preference and priority here sought by and allowed to the landlord does not, as appellant has obviously misconceived, emanate from any lien upon the tenant's goods and chattels effected by their distraint for non-payment of rent pursuant to the provisions of an act concerning distresses (Comp. St., p. 1939), nor from the giving of the notice prescribed by Section 5 (Comp. St., p. 3067), which is only applicable to and required in cases where, as not here, the goods and chattels have been taken and removed from off the demised premises * * *."

> "It is the foregoing statutory enactment—and not the acquisition of a lien upon the defendant company's goods and chattels pursuant to provisions of the act concerning distresses, *supra,* as appellant erroneously insists—that constitutes the basis of the right to a preference or priority which the landlord here sought and the Receiver properly allowed (Franz Realty Co. *v.* Welsh, 86 N. J. Eq. 228), and which right, in cases such as the one at bar, exists quite independent of and even in the absence of the landlord's acquisition of any lien upon his tenants' goods and chattels. Wood *v.* McCardell, West & Farrell Carriage Co., *supra.*"

Respondent will very likely stress the fact that in *Franz Realty Co.* v. *Welsh, supra,* the court, in discussing the *Wood* v. *McCardell* case, stated at page 229 that the holding in that case was that "the landlord of an insolvent corporation-tenant was entitled to be paid by the Receiver rent in arrear not exceeding one year out of the proceeds of the sale of the goods and chattels on the demised premises, as a preferred claim." However, a reading of the *Wood* v. *McCardell* case fails to disclose that the landlord's right to a preference was in any way limited by the Vice-Chancellor to the proceeds of the sale of the goods and chattels on the demised premises.

It seems clear that as long as the landlord's right does not emanate from his right to a lien that it does not matter what the value of the chattels on the premises are.

The mere fact that the appellant could not have claimed a preference had the Receiver abandoned the goods should in no way change the appellant's rights given him by the statute. That right is fixed irrespective of the value of the chattels seized.

It is well settled that if a sheriff or an officer ignores the statute and removes the goods from

the leased premises, and sells it, he is liable to the landlord for the rent and not merely for the value of the merchandise.

In *Hand* v. *Howell,* 61 N. J. L. 142 (affirmed by C. E. & A. 61 N. J. L. 694), the Court says at page 143:

> "Liability of the sheriff in this case must rest on the 'Act concerning landlords and tenants.' Gen. Stat. p. 1915. Section 4 of that act is the descendant of the statute of 8 Anne, c. 14, which forbade the removal from leased premises of the tenant's goods taken in execution, unless rent to the time of the levy (but not exceeding for one year) should be first paid. Our act carries the claim for rent down to the time of removal, and extends to other process. If a sheriff or other officer ignors this statute he is liable for such rent; but in order to hold him it is necessary that he shall have notice that rent is due."

In the instant case, when the respondent, as Receiver, took possession of the chattels belonging to the insolvent corporation, he became liable for the amount of rent that was due the appellant and that liability was not limited by the value of the chattels.

If it were not for the fact that the appellant would have subjected himself to a contempt proceeding by the Court of Chancery, there is no doubt that he would have been justified in preventing the respondent, as Receiver, from taking possession of or removing the goods on the premises until the rent due was paid. The appellant depends upon his right to the rent not by reason of the Distress Act, but by reason of the preference and protection given him by Sections 4 and 5 of the Landlord and Tenant Act.

It is respectfully submitted that the learned Vice-Chancellor fell into error when he limited the appellant's right to the actual value of the

chattels on the premises at the time the Receiver was appointed. That view is contrary to the explicit language of the statute. Furthermore, in *Phila. Dairy &c. Inc.* v. *Summit, &c. Inc.,* 113 N. J. Eq. 458, the Court, setting forth the order of claims that are entitled to priority and preference over unsecured claims, lists the claims of landlords against the corporation not exceeding one year's rent as prior to the claims of unsecured creditors without in any way limiting that claim to the value of the chattels on the leased premises at the time the Receiver was appointed.

To adopt the view of the learned Vice-Chancellor would mean to rewrite the statute and limit the landlord's rights for rent to the value of the chattels so removed. There is no doubt that the legislature could easily have so provided had that been its intention. There is no mention, either in Section 4 or Section 5, of the Landlord and Tenant Act that the landlord's right to prevent the removal of the chattels can in any way be defeated by paying him the value of the chattels so removed. The statute clearly prohibits the removal or the sale of any chattels on the leased premises unless the rent is first paid.

It is, therefore, respectfully submitted that the order of the learned Vice-Chancellor limiting the appellant's claim to the value of the chattels should be reversed.

THOMAS J. MCALEER,
Solicitor for M. G. H. Realty Co.,
Appellant.

DOMINICK J. MARRONE,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

(4171)

New Jersey Court of Errors and Appeals

Between

VEZZETTI REALTY CO., INC., a corporation of the State of New Jersey,
Complainant,

and

MODEL GARAGE, INC., a corporation of the State of New Jersey,
Defendant.

BENEDICT A. BERONIO, Receiver of Model Garage, Inc.,
Respondent.

M. G. H. REALTY CO., a landlord creditor of Model Garage, Inc.,
Appellant.

On Appeal from Order Disallowing a Preference of Landlord's Claim.

BRIEF OF BENEDICT A. BERONIO, RECEIVER OF MODEL GARAGE, INC., SOLICITOR *PRO SE* (JOHN D. PIERSON, OF COUNSEL), IN BEHALF OF RESPONDENT.

Preliminary Statement.

The facts on which the order appealed from was based are found in the case, pages 4 and 5. They are also stated, commencing with page one, in the brief of appellant. Reduced to a single proposition, the point of law at issue may be expressed by the following question: If an insolvent tenant-corporation occupies leased premises at the time of its insolvency, and has therein $50. worth of

chattels, and owes the landlord $1500. in rent, does the landlord, on filing a proper proof of claim, have a preferred claim to the extent of $50. or $1500?

The respondent claims that the preference should be allowed only to the extent of $50., and the court below so held.

It is admitted that under sections 4 and 5 of the Landlord and Tenant Act there may be a preferred claim in a proper case, and that "other process" in that act includes an order of the court of Chancery appointing a receiver of an insolvent corporation. This makes the issue at law a very narrow one.

We claim that the landlord has a preferred claim only to the extent of the chattels subject to distress in the leased premises, and rely on three points to establish this contention:

First.—The cases and the inferences to be drawn from the cases construing this statute so hold;

Second.—No case has been cited that on close examination holds to the contrary;

Third.—It is the only reasonable and logical construction of the sections in question.

I.

The cases and the inferences to be drawn from the cases construing this statute so hold.

Attention is first called to the following language of the Court of Errors and Appeals in *Franz Realty Co.* v. *Welsh,* 86 N. J. E., p. 228, at page 229, where the court says (italics ours):

> "In *Wood* v. *McCardell, et al.,* 49 N. J. Eq. 433, decided in 1892, Vice-Chancellor Bird

> held that an order of the court of chancery appointing a receiver and directing him to take possession of the goods and chattels of an insolvent corporation-tenant and to convert them into money, fell within the term "other process," as used in the above section, and that in consequence the landlord of the insolvent corporation-tenant was entitled to be paid by the receiver rent in arrear not exceeding one year *out of the proceeds of the sale of the goods and chattels on the demised premises, as a preferred claim.*"

The court in this case says further on page 230:

> "The right of the landlord, under section 4 of the Landlords and Tenants Act, is, in the absence of an actual distress, not a lien at all. *Woodside* v. *Adams,* 40 N. J. Law 417. It is a statutory right arising under certain conditions. It might, prior to the institution of the insolvency proceedings, have been defeated by the tenant himself by a *bona fide* sale or chattel mortgage of the goods and chattels in question, or by their consumption. At most it was but a statutory right, possibly in the nature of an inchoate lien, maturing, in effect, into an actual lien only under certain conditions prescribed by the statute."

This case has been cited a number of times for varying purposes, where the point now in issue was not involved; but it should be remembered that what was said in that case as to a preference includes the language "out of the proceeds of the sale of the goods and chattels on the demised premises."

While the question at issue was not raised in the case of *The Central Bank of New Jersey* v. *Peterson,* 24 N. J. L. 668, we think that our contention can be inferred from that case. Towards the bottom of page 669, the court said referring to the statute in question. "It was intended to

give the landlord a specific lien on the property, against all executions, to the extent of a year's rent, co-extensive, with his right of distress." The landlord only had the right of lien where he had a right of distress, and then only to the extent of what he could get by distress. In other words the act was designed to hold the tenant's distrainable goods for the landlord, but not to give him any rights beyond that. About the middle of page 670, the court uses this language: "The remedy of the landlord is by action against the sheriff, or, if he thinks proper, he may apply to the court, as has been done in this case, to have his rent paid over to him out of the proceeds of the sale in the sheriff's hands." He was not to apply to the court for the whole amount of the rent, but only out of the proceeds of the sale in the sheriff's hands to the extent of the rent.

To exactly the same effect is the following language in reference to a landlord's priority in a bankruptcy case, involving the New Jersey Statute:

> "Now, it is true, that the priority given is limited to the value of the New Jersey chattels lying on the demised premises, and such priority is made by section 64 b (5) subject to payment of expenses. (The court then discusses the expenses.) If the claimant had prior to bankruptcy perfected his lien by a distress warrant, he would have been able to have the chattels on the leased premises applied to his claim so far as these chattels had any value. He should be in as good position now, subject only to his obligation to pay his share of the general expense of the estate to which his claim is made subordinate by section 64th *supra.*"

In re Braus, 233 Fed. 835, So. Dist. of N. Y., by Augustus N. Hand, D. C. J.

In re Braus is cited by the Supreme Court in *Bryson* v. *Miller Realty Co.,* 108 N. J. L. 434, at page 438 but not on the precise point in issue.

Our statute is modelled after the English statute of 8 Anne, Ch. 14., but has in it therein some additions which have no bearing on the question being discussed. See references to this in *The Central Bank of New Jersey* v. *Peterson,* 24 N. J. L. 668, 669, and *Hand* v. *Howell,* 61 N. J. L. 142, 144.

This phase of the English statute was construed in the case of *Thomas* v. *Mirehouse,* 19 Q. B. D. 563; 56 L. J. Q. B. 653; 36 W. R. 104, 3 T. L. R. 804 D. C. This case held that judgment was proper against the sheriff who had wrongfully taken away goods for a year's rent; but that the sheriff could offer in mitigation of damages, the value of the chattels removed. If he did not show the value of the chattels removed, then a judgment for a whole year's rent would stand. This is precisely similar to our contention; namely, that when it appears that the value of the chattels is less than the rent, then the damage is only the value of the chattels.

In this case Lord Esher, M. R., said among other things, referring to the sheriff who was defendant in the suit:

> "If he commits a breach of duty by a wrongful sale, *i. e.,* a sale which takes place before the rent is paid, the statute appears to me to state by implication that he will be liable to compensate the landlord by paying the amount of rent which is due. This is the consequence of the enactment which makes the removal without payment of rent illegal. It is only upon payment of the rent that the sheriff is entitled to remove the goods. The cases, however, show that though the amount of rent is, *prima facie,* the measure of damages, it is open to the sheriff, after the land-

> lord has proved his case by giving evidence of the tenancy, the amount of rent due, and notice to show in mitigation of damages that the value of the goods removed was not sufficient to pay the rent. In such case the loss to the landlord, by the removal of the goods, or, in other words, their value to him at the time of the removal, becomes the measure of damages."

This case seems to have followed the settled practice. See *Henchett* v. *Kimpson,* 2 Wils. 140, 95 Reprint 731. In this case, after certain deductions, the court directed that the balance of the money be paid to the landlord, which was less than the rent.

See also *Calvert* v. *Joliffe*, 2 B. & Ad. 418, 109 Reprint p. 1198, where it is clearly held that the landlord is entitled to the damages which he suffered by the loss of the goods, and not the fixed amount of the rent.

In *re Mackenzie,* 1899, 2 Q. B. 566, 575, the case of *Thomas* v. *Mirehouse* was referred to as fixing the damages recoverable.

II.

No adjudicated case has held contrary to our contention.

Several cases used the word preferred claim, but there can and must be read within them the words of *Franz Realty Co.* vs. *Welsh* to be made "out of the proceeds of the sale of the goods and chattels on the demised premises."

If this is read in *Whitehead* v. *Whitehead Pottery Co.,* 115 N. J. E. 257, referred to on page 5 of opponent's brief, as it must be, as that case purports to follow the *Franz Realty Co.* case, then the *Whitehead* case would read that he (the land-

lord) has nevertheless a preferential right or claim ahead of the claims of general creditors, against the assets in the hands of the receiver "to be made out of the sale of the goods and chattels on the demised premises." To hold otherwise would be to misconstrue the *Franz Realty Co.* case as well as to put a ridiculous construction on the statute as is shown hereafter. As a matter of fact the question did not arise and was not decided in the *Whitehead* case. The only point decided was between wage claims and the value of goods distrained. It is true in that case that the receiver allowed a claim for rent of $3,200 over judgments at law. It does not appear, however, that the money on hand did not arise out of the sale of goods on the leased premises. If it did not, then we think the receiver erred. His position, however, was not affirmed by the court.

The case of *Hand* vs. *Howell,* 61 N. J. L. 142, is referred to at page 7 of appellant's brief. An examination of this case will show that the point in issue was not in any way discussed or considered. The case merely refers to the language of the act. In the statement of the case it appears that the sheriff sold goods of the tenant and paid to the plaintiffs in execution the proceeds of the sale, and that the landlord sued for 8 months rent due at the time. The case does not show either the value of the goods or the amount of the rent.

So in the case of *Philadelphia Dairy &c Inc.* v. *Summit Sweets Shoppe Incorporated,* 113 E. 458, there is no adjudication of the question now in issue. It does not appear what the assets were or how they were derived.

III.

Our contention is the only reasonable and logical construction of Section 4.

The act under construction merely states what shall not be done. Section 4 says in effect that no goods shall be liable to be taken by virtue of any execution, attachment or other process, unless rent be paid at the time up to the amount of one year's rent.

Section 5 provides in effect that if goods are taken, they shall not be sold unless the landlord is paid all the rent due, not to exceed one year's rent. While it is true as stated on page 4 of appellant's brief, the Legislature did not in explicit language, limit the landlord's claims to the value of the chattels, neither does the Legislature say that if the sheriff sold the goods in violation of the act, he should be penalized to the extent of the whole rent, independent of the value of the goods. It is evident that the damages are to be determined by the usual method of determining damages. At law one does not have the right to take the goods of another and convert them to his own use. If he does, he must respond in damages, but the measure of damages is the value of goods.

In a suit for conversion the normal measure of damages is the value of goods at the time the conversion occurs.

Schomer v. *Hoffman,* 102 N. J. L., 347, 348;
26 R. C. L. 1148, section 763;
65 C. J., p. 174, section 334.

The same rule would seem to hold if the sheriff took and sold that which he had not a right at law to sell. This would be in accordance with

the usual method of measuring damages for a wrongful act that arose out of a breach of contract or out of a tort.

> "The wrong done and the injury sustained must bear to each other the relation of cause and effect; and the damages, whether they arise from withholding a legal right or the breach of a legal duty, to be recoverable, must be the natural and proximate consequence of the act complained of."
>
> *Warwick* v. *Hutchinson,* 45 N. J. L. 61, 65, citing a number of cases.

The foregoing is similar to the rule laid down in the well known case of *Hadley* v. *Baxendale,* 9 Exch. 341, referred to in *Crater* v. *Binninger,* 33 N. J. L. 513, 517; *Wolcott, Johnson & Co.* v. *Mount,* 36 N. J. L. 262, 270, affirmed in 38 N. J. L. 496, in which at page 501 the case of *Hadley* v. *Baxendale* is again cited with approval.

To the same effect see *Feldmesser* v. *Lemberger,* 101 N. J. L. 184, 186, and also *Bonard* v. *Gindin,* 104 N. J. L. 599, 604, where the case of *Hadley* v. *Baxendale* is again referred to.

What would be the reasonable and proximate damages which the parties would expect if $50 worth of goods, upon which the landlord had a right of distress, were taken and sold? It certainly would be $50 and not $500 or $5000 or whatever sum a year's rent might chance to be. He would still have all the rights of an ordinary creditor to collect the balance.

The fact that the statute prevents the execution or other creditor from taking away the goods and chattels until the rent is paid, merely means that the landlord is first entitled to the goods to the extent of a year's rent before the creditors can take anything. If there isn't that much, the landlord only takes what there is; if there is more,

his rent is paid and the creditor takes what he has paid the landlord and the balance of his goods until the creditor is satisfied. If there are no goods, then neither gets anything. The contention that if $50 worth of goods are taken by a receiver, he is responsible for the whole of a $1,500 claim of rent, as a preferred claim, would work out quite disastrously, particularly, if applied to an execution creditor. There is no contention, that we see, that the law puts a landlord in a better position against a receiver of an insolvent corporation than against an execution creditor. In fact, the right of a landlord against a receiver is conferred by the same provision as his rights against a judgment creditor. Suppose in the situation at issue, instead of insolvency, a constable of a District Court with an execution for $100 had levied on and sold the $50 worth of chattels, would the constable or judgment creditor immediately become liable to pay the rent of $1,500? His liability would be, as shown above, that of a defendant in trover for the value of the goods taken. The landlord could certainly get no more than that.

Another situation might arise showing how unfair such a construction as the landlord contends for could be. Suppose in the case at issue, the landlord had been diligent and issued a valid distress and sold all the goods on the premises immediately before the receivership. He would only have received the value of the goods. In that case, there would have been no goods on the premises and no preference. On what reasoning can it be said that a landlord, who is diligent, should lose rights which he might have had if he had slept on his privileges?

Where in the Landlord and Tenant act is there anything to indicate that in any case a landlord can get money from chattels not on the leased

premises or from outstanding accounts in preference to other preferred creditors or general creditors? Yet if the contention of the landlord prevails, that is just what would happen.

Manifestly from all viewpoints, the basis of a landlord's claim for a preference depends upon there being goods in the demised premises at the time of the insolvency, and the extent of his preference is limited to the value of those goods.

The order below should be affirmed.

Respectfully submitted,

BENEDICT A. BERONIO,
Receiver of Model Garage,
Solicitor *pro se,*
331 Grand St.,
Hoboken, N. J.

JOHN D. PIERSON,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.
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