1964

Richard N. Peterson and Maxine H. Peterson v. J. Lowell Platt and Joseph W. Beesley : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

RICHARD N. PETERSON and
MAXINE H. PETERSON,

Plaintiffs-Respondents,

vs.

J. LOWELL PLATT and
JOSEPH W. BEESLEY,

Defendants-Appellants.

Case No.
~~13823~~
10096

BRIEF OF APPELLANTS

Appeal from the Judgment of the Third District Court
of Salt Lake County, Hon. Merrill C. Faux District Judge

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138239

BRIEF OF APPELLANTS

NATURE OF OF THE CASE

Essentially, this is is an action for conversion of personal property located in a drive-in food establishment, and for resulting damages. Defendant counterclaimed for unpaid lease rentals and damages for breach of lease.

DISPOSITION IN LOWER COURT

The lower court granted judgment for plaintiff on the complaint and denied defendant's counterclaim. The judgment granted consisted of:

(a) $ 181.48 lease rental pro-ration;

(b) $8,527.74 equitable interest in equipment;

(c) $ 654.19 interest in other equipment;

(d) $1,644.63 other items of personal property;

(e) $1,632.00 items of inventory;

(f) $ 10.00 mental anguish; and

(g) $1,000.00 punitive damages;

making a total judgment of $13,650.04, and costs.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the entire judgment of the lower court, and an award of jugment to defendant and against plaintiff in the amount of $1,250.00 on the counterclaim.

STATEMENT OF FACTS

Richard N. Peterson and Maxine H. Peterson, his wife, are the plaintiffs-respondents; and J. Lowell Platt and Joseph W. Beesley are the defendants. For practical purposes, Richard N. Peterson is referred to as the plaintiff in this brief and J. Lowell Platt is referred

to as the defendant, both references in the singular. When Maxine H. Peterson is referred to, she is mentioned as "plaintiff's wife," although in fact she is a party plaintiff; and and Joseph W. Beesley is not referred to at all in this brief. It is believed this designation will assist the court in identifying the parties in what is a rather involved fact situation.

The facts, rather than the law, will determine this appeal, although the trial judge committed error of both law and fact. To present the facts fully, defendant has elected to set forth a rather detailed, chronological report of the facts as they were stated by plaintiff and his witnesses, and this appears under Point I of the argument. Under the Statement of Facts as here presented, defendant will simply quote verbatim the Findings made and entered by the trial court. This is for the convenience of the Court on appeal, because defendant will later show the gross error in the court's findings as quoted below.

But before quoting the court's findings, defendant will make one simple observation of fact that is of critical importance on appeal because it entitles defendant to reversal of the judgment granted by the lower court. It is important to emphasize and remember this fact, because a considerable attempt will be made by plaintiff's counsel on appeal, as was made in the lower court, to confuse this fact. The critical fact

is this: The entire judgment was based upon a conversion and damages resulting therefrom, although plaintiff, if he ever had a right of action for conversion, elected not to consider it a conversion, but actually sold and assigned all of his right, title and interest in the property which he claimed was converted. This is fatally inconsistent with the theory of conversion, and, as the conversion falls, so falls all other segments of the judgment awarded. For this reason, considerable time has been spent, and space utilized, to frame the complete factual picture, so that the undisputed fact of plaintiff's continued claim of ownership after the conversion can be seen in the complete setting. In so doing, defendant does not abandon his other points on appeal, but simply suggests the other points are moot after the conversion finding is reversed, and defendant is entitled to judgment on his counterclaim.

Well, back to the trial court's findings, which defendant now quotes in full, but without approval:

FINDINGS OF FACT

1. Defendant, J. Lowell Platt is and at all times herein concerned was a resident of Salt Lake County, Utah.

2. On the 10th day of June, 1960, the plaintiffs entered into a Lease Agreement with defendants, with

plaintiffs as lessees and the defendants as lessors of land and a building to be constructed thereon by lessor which premises became known as "Arctic Circle Drive-In" at Highland Drive and Gunn Avenue, Salt Lake City, Utah. On the same day, the plaintiffs delivered to the defendant, J. Lowell Platt, a check in the amount of $1,250.00, representing advance payment of the last two months of the Lease.

3. The building was not ready for occupancy until August 23, 1960, at which time the plaintiffs entered into possession of the premises—the plaintiffs paying defendants $625.00 as rent for the period commencing August 23, 1960, and ending September 22, 1960.

4. Continuing from the aforesaid date of August 23, 1960, to and including August 10, 1962, the plaintiffs occupied, operated and possessed the premises, conducting thereon a public food distribution system known as "Arctic Circle Drive-In."

5. Concurrently with the payment by plaintiffs to defendants of the $625.00 on August 23, 1960, the parties agreed that the monthly rent period provided in the Lease be amended to, and thereafter should be, from the 23rd day of each month with the term of the Lease to commence August 23, 1960.

6. In December, 1961 and January, 1962, the plaintiffs paid only a one-half month's rent, and in April, 1962, the plaintiffs failed to pay the current rent for that month. Plaintiffs, however, subsequently paid the current rental for succeeding months, including the rental due and payable on May 23, 1962, and likewise rental due and payable on June 23rd and July 23, 1962. Thus, by August 14, 1962, plaintiffs had paid the rental on the premises to August 23, 1963, though there were two months' back rent unpaid resulting from the one-half payment made in December, 1961, and January, 1962, and the failure to pay any rental in April, 1962.

7. During the period of time that plaintiffs occupied the Drive-In property, the defendants never at any time made any demands on plaintiffs for the payment of delinquent rental, nor was any notice ever given to plaintiffs of any default on the part of plaintiffs in the performance of the Lease or of any intention on the part of defendants to terminate the plaintiff's occupancy of the premises.

8. During the nighttime or early morning of August 14, 1962, the defendant, Platt, without notice or warning to plaintiffs whatsoever and without authority of plaintiffs, went to the Drive-In premises, changed the lock on the building, parked his camper in front of the door, and denied plaintiffs access to the Drive-In and thus "took over" the premises. On being notified by the early

morning help of defendant's action, the plaintiff, Richard N. Peterson, went to the premises and requested Platt to open the doors, to get the business open, and then to sit down and iron out what differences there were, all of which Platt defiantly refused to do. Particularly did Peterson request that he be given the perishables and his bookkeeping and payroll records, all of which was again refused by Platt in an arrogant and defiant manner. Defendant, Platt, would not even let Peterson have access to the telephone in the premises to call the employees and advise them not to come to work.

9. The Court finds that the conduct of the defendant, Platt, was overt, uncalled for, colored with malice and amounted to an unlawful termination of the Lease and conversion of Peterson's property within the premises.

10. At the time of the lockout and take-over by the defendant, J. Lowell Platt, the following items and property were within the premises, all of which were converted by the defendant, Platt:

(a) Equipment being purchased by the Petersons, from Arctic Circle, Inc. under a conditional sales contract, (Exhibit No. 6, p. 1), the value of Peterson's equity converted being $8,527.74.

(b) Equipment (Exhibit No. 7, page 1) not covered by the conditional sales contract (Value: $2,366.19) less the amount of the Marvion Sign Obligation ($1,712.00). $654.19

(c) Other items of personal property (Exhibit No. 7, page 2), having a value of $1,644.63.

(d) Inventory (Exhibit No. 7), having a value of $1,632.00.

11. The equipment covered by the aforesaid Conditional Sales Contract, Exhibit No. 6, which equipment was being purchased by the Petersons from Arctic Circle, Inc., was a special type of equipment manufactured for the particular type of business operated by plaintiffs. The equipment was of a peculiar and special nature and had no ready market value, and as a practical matter could only be replaced by the purchase of new equipment.

12. At the time of the "lockout" and "take-over" by Platt, the Petersons had only a break-even business. Income equaled the operating expenses but developed no interest on capital invested.

13. The conduct on the part of Platt in terminating the Lease was very upsetting to Peterson and the cause of considerable embarrassment and mental suffering.

14. The plaintiffs at no time entered into collusion with or cooperated with any third party from whom they were puchasing any equipment or fixtures in an attempt to harass the defendants or cause them to suffer any financial expense or loss. The plaintiffs at all times pertinent herein acted in good faith.

15. The eivdence fails to show that the defendant, J. Lowell Platt, advanced any payments for sewer and building taxes which should have been paid by the plaintiffs. No sums whatsoever remained due and owing to the defendant, J. Lowell Platt, by the plaintiffs, Peterson.

16. The evidence fails to show that the plaintiffs maliciously or without just cause, excuse or reason, caused the water to the premises to be disconnected without prior notice to the defendants prior to the time of the property being vacated by the plaintiffs and occupied by the defendants.

ARGUMENT

POINT NO. I.

THERE WAS NO CONVERSION

Since the trial court found the factual issues generally in favor of the plaintiff, it is realized that it is difficult on appeal to upset the trial court's findings. However, the critical aspects of this case depend upon the facts, and it is necessary to show that the trial court's findings are inaccurate, unsupported by the evidence,

or directly contrary to the evidence. The trial was rather long, beginning on October 10 and continuing until October 22, 1963, and the record, including the transcript and depositions, substantially exceeds 1,000 pages in length. The following presentation of the evidence is an honest and fair extract of the record, viewed, as it must be, in the light most favorable to plaintiff. If conflicting testimony from defendant is used, such will be clearly stated, and the opposing testimony from plaintiff or plaintiff's witnesses will be cited.

(a) Background events leading to "lockout" of August 14, 1962.

Plaintiff operated an Arctic Circle franchised drive-in located on 20th East and 33rd South, Salt Lake City, from 1954 until 1961 (T. 9). Plaintiff's wife was related to members of the Edwards family that controls the closely held Arctic Circle corporation (T. 457). In the spring of 1960 plaintiff decided to acquire a drive-in operation on 3068 Highland Drive, at the intersection with Gunn Avenue, Salt Lake City, and he executed a lease for a ten year term, whereby he leased from defendant the ground with the building to be constructed (T. 11). The lease was dated June 10, 1960, but defendant was obligated to build the building to Arctic Circle specifications, and it was anticipated that the building would be completed August 10, 1960 (T. 11). The monthly rental payments were to be $625.00 per month, and plaintiff

made an initial payment of $1,250.00, which was to pay the rent for the last two months under the lease (Ex. 1-P, T. 20). The regular monthly payments were to begin on August 10, 1960, which was the anticipated date of occupancy (Ex. 1-P).

The building was completed nearly two weeks later than anticipated, and plaintiff did not actually take occupancy until August 23, 1960 (T. 14-18). At this time defendant had obligated or invested $105,000.00 in the building and the land (T. 664). When defendant asked plaintiff for the rent on August 23, plaintiff suggested that the rent be pro-rated from then until the 10th of September, because plaintiff had been unable to take possession on the anticipated date of August 10 (T. 18-20). Defendant said that he needed the entire $625.00 to make an installment payment on the property, and that he would prefer that plaintiff pay the full monthly rental, and then simply pay succeeding rental payments on the 23rd of each month, and plaintiff agreed (T. 18-20).

Plaintiff's business proved to be unsuccessful. He never showed a profit on his tax returns (T. 539). He fell $1,250.00 behind in his lease rentals to defendant (T. 229-30). He had bought substantial equipment from Arctic Circle, and couldn't keep current in the payments. In fact, the conditional sales contract required payments only during eight months of the year, and required no payments during four months of winter when business

ordinarily was slow (Ex. 10-P). Despite this, plaintiff in 1961 and 1962 succeeded in getting these payments temporarily reduced from $1,011.79 to $550.00, and he was still having trouble (T. 473, 483-85). By August of 1962 plaintiff had missed two of the reduced monthly payments (T. 483-84). Perhaps Arctic Circle's reluctance to allow further arrearage on equipment payments was the fact that plaintiff had accumulated an open account debt of about $15,000.00, and this debt was unsecured (T. 143). Further, plaintiff received a $1,000.00 personal loan from an officer in the Arctic Circle organization, and did not pay it back (T. 494-95).

Plaintiff's business was so bad that one of plaintiff's witnesses at the trial said it was "unique" in that respect (T. 439). This same winess, Don J. Edwards of Arctic Circle, said he thought the business finally was about to a "break-even" basis on August 14, 1962 (T. 440). On cross-examination Don Edwards explained what he meant by "break-even," saying that it simply meant that gross income equalled operating expenses, but was not sufficient to pay installments or interest on equipment purchases (T. 474-80). Plaintiff also classified his own business as near the "break-even" point, and also admitted a rather unusual view of that term:

> Question: (By Mr. McMurray) . . . would you explain to the court what you mean by the concept "breaking-even"; or what you meant by the concept "break-even".

Answer: Well, that is where you—my concept or way I figure it is where your income and your outgo of your—your outgo or funds provided for absolute necessities of carrying on that business, equal. In other words, it is where your purchases and expenses and payrolls amount to the same as your income, or figuring the break-even, I have never—I have never entered into my own personal withdrawals, back payments or equipment, which is, to me, capitalization, and of course the payments also included any break-down of interest on the contract.

Question: Do I understand they are excluded?

Answer: Those are excluded; nor have I ever figured depreciation in figuring my break-even point. (T. 502-03; See T. 505).

Plaintiff thus claimed that his business had reached a break-even point, but that it could not pay any part of equipment purchases, no part of his salary or "personal draws," no interest expense, and no depreciation. So, to an investor, this break even business would lose at least $10,000.00 per year. Why? Because it would be necessary to hire someone to do what plaintiff was doing, and plaintiff was managing a business that was open more than 84 hours a week (T. 464). Further, a reasonable allowance for depreciation would have to be made, because the equipment would have to be replaced when

worn out. These two items alone, not considered an "expense" by plaintiff on his break even theory, would exceed $10,000.00 per year. Such an assured loss wouldn't be too appealing to a reasonable investor.

In this financial condition, plaintiff was finally told by Arctic Circle that he would have to do something to bring current the delinquent payments on the conditional sales contract or they would have to take steps to protect themselves (T. 35). Arctic Circle had actually assigned the proceeds receivable under the contract to the bank, and the bank was pressing for payment or it might exercise the "recourse" provision of the assignment and make Arctic Circle buy back the contract (T. 470-72). But plaintiff couldn't do anything, since he would have to make such payments out of capital rather than drive-in receipts, and he testified that he had no operating capital:

> ". . . I have testified that I was out of operating capital, and any payments made to the bank would have to come out of operating capital." (T. 520)

To make matters worse, plaintiff on August 13 was heading into the fall and winter months, when business would be even worse.

(b) Discussion of August 13, 1962:

Financially depressed and embarrassed and concerned because Arctic Circle had announced it was going to take steps to protect itself, plaintiff called defendant on the telephone at about 1 p.m. on August 13, 1962 and said that he wanted to talk to defendant (T. 34). Defendant drove from his home down to the drive-in, where plaintiff discussed his financial condition. Plaintiff said that he had been put on notice by Arctic Circle that it would have to take steps to protect itself, although he had not been given any direct notice of repossession (T. 35-38, 532). Plaintiff did say that he could not do anything about it, and that the matter was out of his hands (T. 234-38). Plaintiff tried to get defendant to take back the business and run it himself, since then defendant would not have to pay rent to himself and he might be able to make it; although shortly thereafter plaintiff contradicted his very own testimony and said that absolutely nothing was said about defendant taking over the business:

> ". . . I thought, possibly, the fact that he owned the property, that he would be interested for the fact that he could take over and possibly have a more successful operation because of the rent that he wouldn't have to pay. He let me know immediately, that he absolutely wasn't interested in taking over any operation of any type of food business, whatsoever. I explored the—I explored the possibility that he had somebody in mind, possibly a relative or somebody that he would possibly be interested in setting up in business, and, of

> course, he wasn't. I then talked or tried to approach and discuss the possibilities of re-writing a new lease with Mr. Platt (defendant) based on a percentage of sales . . . Mr. Platt told me that he couldn't re-write the lease; that, if he didn't get that $625 right exactly when it was due, he would go broke; he would go 'down the drain.' " (T. 36)

Despite this testimony, a few minutes later plaintiff testified in shocking contradiction of himself:

> Question: (By Mr. McMurray) Was there anything in this conversation relative to your terminating the business at that point and Mr. Platt taking it over; that is, your surrendering the property and Mr. Platt taking it over?
>
> Answer: Absolutely not. (T. 38)

Another aspect of this conversation which is difficult to understand, strictly in light of plaintiff's testimony, is his claim that his primary reason for calling defendant was to tell defendant not to rely on receiving the lease rental payments:

> Question: (By Mr. McMurray) Would you tell the court the substance of that conversation?
>
> Answer: Yes, sir ;Mr. Platt arrived at the drive-in, and I told him that I understood that he was getting ready to build an office building, and that I only thought he should know at

> what point the drive-in was at, because I thought that I had an obligation to him of not letting him stick out his neck on an office building if he was to do any part of the financing from the success of the drive-in. (T. 35)

Despite this avowed primary purpose of warning defendant not to do anything in reliance on receiving the lease rental payments from the drive-in, plaintiff then testified only two pages later in the record that he wanted to assure defendant that, whatever happened, the lease rental payments would be made:

> ". . . at this point I assured Mr. Platt one of the reasons I called him down was that I did not—I told him didn't want anything to happen that would get him excited and have him take moves that were not called for, that might possibly force me into bankruptcy against my will; and assured him that, regardless of what happened in relation to Edwards, his rent would be paid; his rent would be paid, regardless." (T.37)

Defendant was understandably confused and concerned after this conversation. If plaintiff's testimony can be believed, and we assume throughout this brief that every word plaintiff said in his testimony is true (however contradictory one part may be with another), then the purpose of the conversation was for plaintiff to tell defendant (1) not to stick his neck out in reliance on the lease payments, because Arctic Circle was going

"to take some type of steps to protect themselves" (T. 35), and (2) not to get excited, because everything would be fine and, come what may, defendant could always rely on the rental payments (T. 37).

(c) The "lockout" on the morning of August 14, 1962.

After defendant and plaintiff finished their conversation of August 13, defendant talked with his attorney (George Searle) and expressed a fear that Arctic Circle might re-possess from plaintiff equipment which had been built-in at the drive-in and damage the building, and his attorney advised him of his right under "Clause 8" of the lease, and said that defendant would have to take steps to protect himself (T. 654, 49). Defendant worried about this, and at about 7 a.m. on August 14 he and his wife went down to the drive-in (T. 654). She drove a passenger car and he drove a "camper" so that he could park it close to the door of the drive-in to prevent removal of equipment, and he or his children could stay day and night in the camper to prevent a midnight repossession by Arctic Circle (T. 658). Defendant called plaintiff on the telephone shortly after 7 a.m., and plaintiff's daughter answered, saying that her father had left for the University of Utah and that her mother was still asleep (T. 654). Defendant then went down Highland Drive a short distance to Mulholland's Lumber (when they opened about 8 a.m.) and bought three locks

and put them on the three doors of the drive-in to secure the premises (T. 655). (Compare this uncontroverted testimony with the court's finding that the lock-out was "*during the nighttime* or early morning" — Finding No. 8, *supra*. Plaintiff had alleged it was during the night, but not one iota of evidence supported that allegation. It is highly questionable as to why the phrase of "during the nighttime" appeared in the finding.) He then called plaintiff's residence again (about 8:30 a.m.) and talked to plaintiff's wife, advising her of what he had done (T. 655). She said that closing the drive-in was "wonderful," she would call the employees of the drive-in and tell them about it, and that she would also call plaintiff and tell him (T. 655). She did call plaintiff and told him of her conversation with defendant (T. 39). Compare this with the court's wholly erroneous finding that the "help" from the drive-in called plaintiff (Finding No. 8, quoted in full, *supra*.)

Plaintiff thereupon drove to the drive-in, arriving there some time around 10:00 a.m. (T. 38). Plaintiff inquired as to what had happened, and defendant advised him that the place had been closed to prevent removal of equipment or supplies from the drive-in (T. 40, 656). Plaintiff suggested that defendant open the place for business, and they could attempt to work out adjustments later (T. 40). Defendant said no, because the rental payments due him were delinquent and he was afraid Arctic Circle would re-possess equipment from plaintiff and damage the building, and that he had talked to his at-

torney about the matter, and that no one was going into the building (not even defendant, himself) until the court determined who was entitled to what (T. 40-41). Defendant said he was enforcing "Clause 8" of the lease agreement (T. 49). Clause 8 of the lease reads as follows:

> It is further agreed between the parties hereto that if default be made in the payment of the rent above reserved, or any part thereof, or if any of the covenants and agreements herein contained to be kept by the Lessee, it shall be lawful for the Lessor, his heirs or assigns, at any time thereafter at their election, and without notice to declare said term ended, and to re-enter said demised premises or any part thereof, either with or without process of law, and to expel or remove or put out the Lessee or any person or persons occupying the said premises, using such force as may be necessary to do so, the same to be without prejudice as to remedies which might otherwise be available for arrears of rent or any breach of covenant, or agreement, and Lessor shall at all times have a valid first lien for rent due upon all property of Lessee, whether exempt by law or not, as security for the payment of the rent herein reserved. (Exhibit P-1)

Plaintiff asked if he could go in the building and get his payroll records, and defendant said no, because no one was going into the building (T. 41). Plaintiff asked if he could remove the perishable items, and defendant said no, because no one was going in the building until the court decided the matter (T. 40). Plaintiff then

asked if he could go in the building and use the phone to call the "help" and tell them not to come to work, and defendant said no, because no one at all was going into the building until things were straightened out, but that if plaintiff wanted to make a call there was a pay phone and defendant offered plaintiff a dime to make a call (T. 43-44). Plaintiff took this as an insult, and left (T. 44).

(d) Plaintiff's assignment of all his interest near noon of August 14, 1962.

After plaintiff left the drive-in, he talked with his attorney (Howard Jones) about his legal position, and then went to Arctic Circle and told Ralph D. Edwards, an officer in the corporation, about the events of the morning and about his discussion with his attorney (T. 411-12, 572-74). Ralph Edwards said that he didn't like the legal advice that Mr. Jones had given to plaintiff, and suggested that plaintiff go with him to the law office of Wilford M. Burton, which they did (T. 412). Mr. Burton was the attorney for Arctic Circle on a regular retainer basis, and the primary concern of Arctic Circle was to work out something to secure the presently unsecured open account debt of $15,000.00 which plaintiff owed (T. 143, 430).

Mr. Burton advised plaintiff and Edwards that he thought perhaps defendant had made a conversion of

plaintiff's property, but that to make sure there was a conversion, he would prepare some papers and they could go back to the drive-in that day and make a clear demand in the name of Arctic for the equipment and supplies, and if they were delivered it would be alright because they would have what they wanted, and if they were not delivered, then the defendant would have converted them (T. 736-38). Mr. Burton thus proceeded to prepare three documents to accomplish this, all of which are in evidence as part of Exhibit 5-P.

The first document, entitled "Assignment", is executed by plaintiff and his wife for acknowledged consideration, and it purports to:

> ". . . assign, convey and sell to ARCTIC CIRCLE, INC. all of the merchandise and inventory and all equipment *not* covered by conditional sales contracts located in the premises on Highland Drive and Gunn Avenue . . ." (emphasis added)

The second document, entitled "Agreement," is executed by Ralph D. Edwards for Arctic Circle, Inc., and by plaintiff and his wife. This document was made for the purpose of expressing "the understanding of the parties as to the manner in which said assignment shall operate." So the second document was to explain the first, and said second document provides generally that "the assignment vests title and ownership absolutely in

Arctic of all items coming within the terms of the assignment" and that Arctic would proceed to bring an action to recover such items from defendant and then dispose of them and credit the proceeds to the account plaintiff owed to Arctic. Arctic could do this in its sole discretion, and without notice to plaintiff, and Arctic, itself, could be the buyer of such items if it so desired. This document did not cover the equipment sold under conditional sales contract to plaintiff by Arctic, but it does recite that:

> "It is understood that Arctic will be recovering and taking possession of the equipment at said location which has been sold to Peterson (plaintiff) by Arctic on conditional sales contract." (Ex. 5-P(B)).

The third document prepared by Mr. Burton is also executed between Arctic Circle and plaintiff and his wife, and after reciting acknowledged consideration, says that plaintiff:

> ". . . has hereby conveyed and assigned to Arctic all claims, rights, causes of action of every kind and desription which Peterson (plaintiff) has now or may hereafter have against J. Lowell Platt (defendant) . . ." (Ex. 5-P (C).

(e) Conversation on afternoon of August 14, 1962.

Having made the assignment of plaintiff's interest, plaintiff in the company of Don C. Edwards and Ralph

Edwards (Arctic Circle officers) went to the drive-in (T. 52). Defendant was not there, but there were two boys in the camper which was parked near the building, and, upon request, one of the boys called defendant, and defendant arrived about twenty minutes later (T. 51-52). Plaintiff introduced defendant to the two Edwards, and then announced that he had sold and assigned everything to Arctic Circle (T. 52-55, 80-81). Defendant told him that he couldn't do that because he didn't have a right to do it (T. 53). At this point Ralph Edwards, for Arctic Circle, made the formal demand suggested by Attorney Burton, and that demand is quoted by plaintiff as follows:

> ". . . Ralph Edwards turned to Mr. Platt (defendant) and says, 'I am Ralph Edwards of Arctic Circle, and I make demand of you to unlock this building so we can get in, take inventory, and remove our equipment.' "(T. 53)

Defendant responded that "Nobody is getting into that building without a court order until a lot of questions are answered." (T. 53). Don Edwards then suggested that they weren't getting anywhere, and said "Let's get away from here," and they left (T. 53). Even though plaintiff and the Edwards advised defendant that everything plaintiff owned had been assigned to Arctic Circle, they did not show defendant any documents and did not have any with them; in fact, Attorney Burton testified that the documents probably were signed on August 15 even though he dated them August 14 (T. 721).

(f) Arctic Circle as assignee sought repossession.

Shortly after August 15 Arctic Circle, through Attorney Burton, brought suit for repossession of the equipment in the drive-in, took a default judgment agaist defendant, and during the first week in October were out at the drive-in with Sheriff Harry Holley trying to get in the building when defendant happened to drive by and see them (T. 665-66). Defendant asked what they were doing and Mr. Holley told him they had a court order for the equipment, and defendant asked for time to call Attorney Phil Hansen to see what could be done (T. 666-68). To summarize subsequent events, part of the equipment was later removed by Arctic Circle and then re-installed when defendant agreed to buy, and did buy, it from that corporation for $25,000.00 (T. 668-69). He was then told that he could buy the inventory for $3,000.00 and if he did, this would help out plaintiff's financial position:

> Platt: ". . . they were putting the equipment back into the building, and Mr. Burton and Mr. Don Edwards and Ralph Edwards had discussed Mr. Peterson's (plaintiff) problems in front of me, and wanted to know if I would buy the inventory that was in there. They had now sold me their equipment there, but not their inventory. And they said, 'Will you buy the inventory in there? And I said 'What is it worth? And Mr. Burton told me that there was $3,000 inventory in the building: and I said 'How do you know that?' And he said, 'Well, Mr. Peterson had records; there is $3,000

> worth of inventory in there.' And I said, 'Well, I'm not going to fight with you guys any longer; I will buy the inventory.' (T. 671)

Defendant then testified that he made a careful inventory of the items, with the assistance of his secretary (a former employee of plaintiff who was familiar with the items) and the actual value was only $1169.00 (T. 672). Defendant then told Mr. Burton and plaintiff that:

> ". . . I wasn't going to pay $3,000.00 for a $1,000.00 inventory, that I had agreed to buy the inventory from them, but I wasn't going to pay $3,000 when it was a $1,000 inventory." (T. 672).

Defendant then asked plaintiff why he had said it was a $3,000 inventory, and plaintiff said he estimated what it was (T. 672), and defendant then asked plaintiff to please go over the inventory "piece by piece" and plaintiff said "I can't; I got to be in school." (T. 672). Defendant then simply refused to buy the inventory for $3,000 (T. 672). Attorney Burton then prepared a paper for defendant to sign, which was signed by defendant as well as plaintiff and his wife, and which was introduced into evidence as Exhibt 5-P (D). Mr. Burton recited in the document that the inventory settlement was "rescinded as between the Petersons and Platt by reason of the breach of Platt" and that "all parties interested and concerned with this action are restored to their original position prior to the October 8, 1962, Settlement Agree-

ment . . . and all rights concerned therewith are reserved and are unaffected and available to the parties concerned." (Exhibit 5-P(D)). As a result of this agreement, plaintiff and defendant were restored to whatever position they were in prior to October 8, 1962, and the negotiation for the purchase of the inventory supplies for $3,000.00 had absolutely no legal force or effect.

(g) There was no act of conversion on the morning August 14, 1962

Defendant's conduct in locking the building on the morning of August 14, or his subsequent conversation that forenoon with plaintiff, did not constitute a conversion. First of all, defendant had a contractual right under the lease to resume possession if there was a default in the payment of rent, and plaintiff admittedly was $1,250.00 in arrears. (T. 536). Secondly, defendant had a lien, pursuant to the lease, on all property of every kind which plaintiff owned or had an ownership interest in, and which was located in the building (Ex. 1-P, T. 536). Defendant therefore had a legal right to do what he did. Perhaps the situation would have been different if defendant had attempted to enforce the lease provision and plaintiff had forcefully resisted, in which event defendant might have been compelled to exercise Clause 8 through court proceedings. But that was not the situation, since the lockout was aimed primarily at Arctic, and plaintiff was in fact relieved of the burden of continuing to operate a losing business. Even if it could

be contended that in some circumstances defendant's conduct would have amounted to a conversion, plaintiff's execution of the lease giving defendant the express right to do exactly what he did would be an effective estoppel against plaintiff's claim that the exercise of a contractual right was a conversion. Also, plaintiff at no time tendered to defendant the $1,250.00 in delinquent rentals, perhaps because he simply had no money with which to do so (T. 520).

(h) There was no act of conversion on the afternoon of August 14, 1962.

There could have been no conversion on the afternoon of August 14 when plaintiff and the Edwards from Arctic Circle visited the drive-in premises. Arctic, as assignee of plaintiff, did not tender plaintiff's delinquent lease payments. All of the reasons set forth above would apply to Arctic as well as to plaintiff, since Arctic as the assignee of plaintiff stood in the same position as plaintiff. But, more basic still, any conversion, if one existed, on the afternoon of August 14 of necessity would have been against Arctic Circle, since it was then the sole claimant of the equipment and inventory. Since Arctic Circle is not a party and since it in fact has fully settled its claims with defendant, it is entirely moot to speculate whether Arctic might have had a cause of action for conversion. Certainly plaintiff, having assigned and sold everything, and having stated the same to defendant, on the after-

noon of August 14, and the Edwards having represented the same, and having demanded delivery, could have no remote claim for a conversion of something to which he claimed no right, possessory or otherwise. It will be remembered that Attorney Burton planned to establish a conversion in favor of Arctic by the visit in the afternoon of August 14, and he apparently thought that he had, but that matter has been fully settled.

(i) Even if there had been a conversion against plaintiff on the morning of August 14, plaintiff did not treat it as such.

Let us assume, *arguendo*, that defendant's conduct in locking the building on the morning of August 14, coupled with his discussion with plaintiff on that morning, amounted to a conversion of plaintiff's personal property. If so, plaintiff could have asserted his cause of action for damages based on the conversion. Did he do that? Certainly not. He still claimed ownership, as demonstrated by his assignment and sale of his ownership and rights to Arctic Circle, under an agreement that Arctic Circle would assert such ownership and would bring "action as may be necessary to recover possession of said assigned property" and with the clear cut pronouncement that the assignment "vests title and ownership absolutely in Arctic of all items coming within the terms of the assignment." (Ex. 5-P(B). At this point Arctic owned everything that plaintiff had owned earlier

that morning, plus the additional position as vendor under the condition sales contract on certain of the equipment. What did Arctic do on the afternoon of August 14, after receiving the assignment? It went directly to the drive-in and asserted ownership of the items in question, demanded possession, and was refused. This conduct certainly shows that plaintiff never elected to treat defendant's conduct during the morning of August 14 as a conversion, but he sold his ownership by an assignment, and the assignee (Arctic) then proceeded in October to take possession and remove much of the equipment, subsequently selling it to defendant and re-installing it (T. 668-69). Whether one wishes to characterize plaintiff's conduct as an election of remedies, or estoppel, or whatever, it is clear that if he ever had a cause of action for conversion, his subsequent and conveyances effectively extinguished such cause of action. A continued claim of ownership, after a conversion, always defeats a cause of action based on conversion. See 89 *Corpus Juris Secundum,* Trover & Conversion, Section 88; *Johnston v. Cincinnati Ry. Co.,* 146 Tenn. 135, 240 S.W. 429; *Stout v. Fultz,* 117 Mo. App. 573, 93 S.W. 919; *Bell v. Cummings,* 3 Tenn. 275; *Weakley v. Evans,* 46 S.W. 1070 (Tenn.); *Scott v. Patterson,* 1 Dom. L. R. 783 (Sask. 1923).

It is important to note that Arctic never purported to make any re-assignment or re-conveyance to plaintiff. The agreement between plaintiff and defendant which

restored them to their respective legal positions as of October 8, 1962 (Ex. 5-P(D)) certainly did nothing more than exactly what it said, *i.e.*, put them in their respective positions as of that date. But, as of that date plaintiff had already assigned everything to Arctic under his claim ownership in making such assignment, and plaintiff continued in this position right down to, during, and after October 8, 1962.

Under some nebulous circuity, plaintiff's counsel seems to think that the present action can be founded on some mystical right that plaintiff somehow retained, despite the assignment and despite his claim of ownership as a basis for the assignment, and without any re-assignment from Arctic to plaintiff. (Of course any such purported re-assignment, even if one had existed, would be wholly meaningless, because Arctic fully settled all of its claims against defendant and certainly had nothing to re-assign.) Plaintiff's counsel seems to believe that the agreement between Arctic and plaintiff, dated August 14, and part of the package of three instruments (including the assignment) carrying the same date, is of some help to plaintiff's cause. That instrument does say that:

> ". . . Peterson has hereby conveyed and assigned Arctic all claims, rights, causes of action of every kind and description which Peterson (plaintiff) has now or may hereafter have against J. Lowell Platt (defendant) . . . in any manner pertaining to, connected with or arising out of the Lease Agreement entered into . . . and particularly concerned with the forcible entry and

> the eviction of Peterson from said premises by said Plat . . . on or about August 14 ,1962 . . . Arctic is permitted to cause the action, if any is brought, to be brought in the name of Peterson, or may bring such cause in the name of Arctic as it in its sole discretion may determine . . . It is further understood and agreed that Arctic will diligently proceed to effect a settlement of said cause of action against Platt . . . or will cause legal action to be brought and diligently prosecute the same to judgment, said action to be commenced within sixty days . . ." (Ex. 5-P(C)).

Plaintiff's reasoning, as close as we can get it, goes something like this: Plaintiff may assign everything he has to Arctic on August 14, including his ownership in any and every item, and including any cause of action he might have, with the right in Arctic to bring suit either in the name of Arctic or plaintiff; then, both plaintiff and Arctic may tell defendant that Arctic has succeeded to everything plaintiff had; then, Arctic may sell the items to defendant, and fully settle all of its claims, all the while defendant believing that Arctic has succeeded to everything plaintiff had claimed; then, an agreement may be executed (Ex. 5-P(D)), saying that plaintiff and defendant still have their rights against each other as of just prior to October 8, 1962 (when plaintiff had no rights, for they had been assigned); then Arctic can sue defendant again (this action), in the name of Peterson, by virtue of the agreement dated Aug. 14 (Ex. 5-P(C)) and can claim a cause of action by virtue

of the agreement dated November 12, 1962 (Ex. 5-P(D)) which restores rights as of just prior to October 8.

Counsel for defendant was interested in finding out from Mr. Burton whether the package of instruments dated August 14 really meant what they said, or whether Mr. Burton had told the clients that these documents had some hidden meaning contrary to what they said. The trial court did not require Mr. Burton to answer many of these questions, but he (Mr. Burton) did make it clear that Arctic is the real party in interest in this action:

> Question: (by Mr. Hansen) Did you tell them that that first document, which is referred to "A" of 5-P assigned everything they had in and to everything except the equipment noted in the conditional sales contract marked Exhibit 6-P?
>
> MR. McMURRAY: Objection as immaterial.
>
> THE COURT: Sustained.
>
> QUESTION: Did you tell them that the second Entry "B" or the remaining Entry "C" covered equipment that wasn't covered in Entry A, or the remaining Entry in B or C, whichever the case might be.
>
> MR. McMURRAY: Objection as immaterial.
>
> THE COURT: Objection is sustained.
>
> QUESTION: It is a fact, isn't it, Mr. Burton, that you told the Petersons that the docu-

ments in "5-P" marked A,B, and C, respectively, being the first three entries therein, did not mean what the written word said?

MR. McMURRAY: Objection, immaterial; attempt to vary the instrument by parol evidence.

THE COURT: You may answer that one.

ANSWER: The conversation concerning these instruments on the 15th with Mr. Jones present was that *there would be the action filed in behalf of Petersons for their rights under the forcible entry and the conversion; that there would be the separate action filed for Arctic Circle for the recovery of the property.* That, to protect me and to protect Arctic Circle and the Petersons, it was to be understood that, whatever was recovered in these two actions, I would be in the position of applying and settling the debtor creditor relationship between Peterson and Arctic Circle, and the balance would come over to the Petersons.

QUESTION: And wasn't the balance, after the theoretical came over to the Petersons, didn't you discuss, at this time, that this would be credited to the Petersons, but actually paid to Arctic Circle because of the open account that the Petersons had with Arctic Circle?

ANSWER: No, I was to be in a position of taking whatever recovery I was to achieve for the Petersons on their cause of action, and

> apply it on any indebtedness that there was with Arctic Circle. After that was satisfied, any balance I would be in a position to pay over to the Petersons.
>
> QUESTION: And, when you say the 'balance the Peterson's owed Arctic Circle,' do you limit it to the conditional sales contract balance?
>
> ANSWER: Any open account — any indebtedness. (T. 742-43)

But, whatever Mr. Burton's secret plan was to maintain multiple and duplicitous actions against defendant by a variety of plaintiffs (or at least plaintiffs' names), all for the benefit of Arctic Circle, the fact remains that such plan was abortive. The law does not permit false and misleading statements to be made to defendant as to who has the property, claims and causes of action, thus inducing defendant to buy, compromise and settle on that basis, and then to have a surprise announcement that Arctic really didn't have the claim after all, but plaintiff had it, and yet plaintiff had to pay any proceeds received to Arctic. This could be more confusing than trying to play "button, button, who's got the button," because you are playing it with thousands of settlement dollars, as "cause of action, cause of action, who's got the cause of action."

It is also interesting to note that the foregoing explanation of Mr. Burton (that he intended Peterson-plaintiff—to bring the conversion action) really doesn't square at all with his testimony given a few pages earlier in the record, wherein he said that at the time the package of documents were being prepared he advised that *Arctic* should make the demand for delivery and, if refused, *Arctic would have the claim for conversion and it would be the cause of action of Arctic, and not Peterson.* Mr. Burton made it clear that with the assignment he had devised, that Arctic could make a demand as to everything, including all of the property and inventory, and a refusal would give Arctic a very comprehensive claim for conversion arising and accruing directly to the corporation. Difficult as it is to believe, at least so far as it is diamentrically opposed to the above testimony of Mr. Burton, and equally opposed to the actual procedure followed by Arctic in this action through using the thin facade of plaintiff's name as the apparent party in interest, we submit the following extract from the transcript of evidence:

> QUESTION: (By Mr. Hansen) Isn't it a fact, Mr. Burton, that, during your conversation in this instance on the 14th of August, 1962 in your office, with the presence of yourself and, at least, Mr. Peterson and Mr. Ralph Edwards, that you told them—the Edwards—Ralph Edwards in this case—to say that Arctic Circle owned all of the equipment and inventory—fixtures in the building on the premises?

ANSWER: No, I told him to make a demand, as the owner of all of the equipment and the inventory.

QUESTION: You did not tell them to make a demand on Mr. Platt for what interest they might have had in equipment they were selling under a conditional sales contract, only, did you?

ANSWER: I have given you the conversation that I gave to the Edwards.

QUESTION: You didn't tell them to tell Mr. Platt that there was any security arrangement made between the Petersons and the Edwards did you?

ANSWER: I have given you the conversation.

QUESTION: Isn't it a fact, Mr. Burton, that it was the conversation and plan in your office that day, to have the Petersons and the Edwards go down and represent to the Platts that the Edwards owned everything, when in truth and fact, you, the Edwards, and Petersons knew very well the arrangement was merely one of security and not total transfer of interests?

ANSWER: No, the conversation, Mr. Hansen, was that there had been—there was existing the problem of a seller and purchaser between Platt and Peterson—or, pardon me—

between Arctic Circle and Peterson; that there would be problems concerning the rights under the title-retaining contract where no notice for any default, if any existed, had been given by Arctic to the Petersons. I didn't want to be concerned with that, that we weren't taking any steps to affect Mr. Peterson's causes of action, but that, *when Arctic Circle made a demand*—and I wanted them to make the demand for the return of *all of the equipment and the property, inventory*—from Mr. Platt—that they were to go down and make a demand from Mr. Platt for the return of all of the equipment—*all of the property including the inventory.*

QUESTION: And this was the plan that you advised because of the relationship that existed between the Petersons and the Arctic Circle on their conditional sales contract, isn't it?

ANSWER: No—there is no plan—nothing different than I have indicated in my conversation.

QUESTION: Well, by the "plan," or the contents of your conversation—the reason was, wasn't it, Mr. Burton, because of the relationship between Arctic Circle and the Petersons under the terms of the conditional sales contract?

ANSWER: The reason was that I wanted to have a clear demand made, first, to determine if there was any way—any basis upon which a

settlement could be effected when he saw the people entitled to the equipment were there demanding it, *and then to have a clear conversion if the demand wasn't met.*

QUESTION: You didn't advise them, did you, Mr. Burton, that the Arctic Circle had to proceed through court to enforce their rights under the sales contract, Exhibit 6-P, in this case as it pertained to the Petersons, did you?

ANSWER: I told Mr. Edwards, for the Arctic Circle, that the acts of Mr. Platt, in my opinion, already evidenced an exercise of dominion over the property, *that would constitute a conversion as far as Arctic Circle; but, so there could be no doubt,* and if there was any opportunity to get this place opened, two things could be accomplished—*the demand should be made;* and, if that didn't give rights to the opportunity to get this place opened and the problem solved, *then they would have their conversion established.*

QUESTION: And this was the demand you are talking about—the demand that you thought was necessary from Arctic Circle to Mr. Platt, wasn't it?

ANSWER: *The demand for the return of the equipment was for the assertion of the rights of Arctic Circle so Platt knew for sure that he was going to be accountable to Arctic Circle.*

QUESTION: You never instructed Mr. Peterson to make such a demand as to any possible conversion up, or from that time on, from Mr. Platt toward the Petersons, did you?

ANSWER: *From the facts—well, the answer to that is, I did not ask Peterson to make any further demands.*

QUESTION: And isn't it a fact that the reason you didn't is because, as of the time Arctic Circle was to make the demand, it was your advice, wasn't it, that the Petersons represent to Mr. Platt, that, as of that time, they owned nothing as to inventory and equipment in the premises . . .

ANSWER: I don't know how to answer your question. I have given you the conversation.

QUESTION: Excuse me—let me complete the question if I may—because they had assigned all of their interest to Arctic Circle?

ANSWER: I can't answer that question, your Honor. I don't understand it. (T. 736-38).

It is clear from the above testimony what the "plan" was, and it was absolutely and completely inconsistent with the prior excerpt quoted from the testimony of Mr. Burton at T. 742-3, where he said, that the plan was to have *Peterson sue for the conversion* and *Arctic sue simply for return of equipment* on the title-retaining con-

ditional sales contract. In any event, and despite the above confusion, *Peterson and Edwards carried out the plan whereby they represented to defendant that Arctic owned everything*, including the equipment and the inventory, and *Arctic made the demand* in an attempt to establish a conversion as had been discussed in Mr. Burton's office, all of which is detailed above. It is important, too, to remember that, after defendant was told that plaintiff had assigned everything; no one ever suggested or hinted to defendant anything to the contrary (T. 369).

(j) Summary of Point I.

The actual facts upon which judgment was awarded to plaintiff are absolutely shocking. This is true despite the finding drafted by plaintiff's counsel and signed by the judge to the effect that:

> "The plaintiffs at no time entered into collusion with or cooperated with any third party from whom they were purchasing any equipment or fixtures in an attempt to harass the defendants or cause them to suffer any financial expense or loss. The plaintiffs at all times pertinent herein acted in good faith. (Finding No. 14, R. 91).

The guilty runneth? The above finding cannot whitewash what really happened. The true facts, as detailed heretofore and summarized below, clear and uncontro-

verted, as established essentially by plaintiff's own testimony and that of Arctic Circle officers testifying for plaintiff (and themselves), are as follows:

(1) Plaintiff, heavily indebted to Arctic Circle, was was locked out by defendant from certain drive-in premises being operated under a lease, because he was $1,250.00 in arrears in lease rentals, and because defendant feared damage from repossession by Arctic and, further, did not want to lose his lessor's lien until rights were judicially determined.

(2) Plaintiff immediately talked to Howard Jones, his attorney, and then to officers of Arctic Circle, who advised him that the advice from his attorney didn't make sense, and that he should talk to Wilford M. Burton, the regularly retained attorney for Arctic Circle.

(3) The admitted purpose in contacting Attorney Burton was to fully protect Arctic Circle, and only incidentally to protect plaintiff, if anything happened to be left over after Arctic was satisfied.

(4) Mr. Burton prepared papers on August 14, 1962, and they were executed, whereby plaintiff assigned everything to Arctic, even including all causes of action which he then had or ever would have.

(5) Defendant was told of this complete assignment, by plaintiff as well as by officers of Arctic Circle and upon advice from Attorney Burton. While both plaintiff and Arctic expected plaintiff to get something if enough were recovered against defendant to more than pay plaintiff's debts to Arctic, defendant was never told of this. In fact, at all pertinent times, defendant was told that plaintiff had assigned everything to Arctic.

(6) Ralph D. Edwards, officer of Arctic, testified that defendant was never told the truth, but in fact was mislead, about plaintiff having assigned his complete interest (T. 369). But this conduct was as recommended by Attorney Burton.

(7) Attorney Burton testified, in contradiction to himself, as follows:

(a) That he told Arctic officials and plaintiff to tell defendant that all of plaintiff's rights had been assigned to Arctic;

(b) That all of plaintiff's rights hadn't really been assigned to Arctic, but it was sort of a security arrangement, and he (Burton) had authority to sue for Arctic in plaintiff's name and give the money to Arctic;

(c) That when he prepared the assignment papers on August 14, he advised his clients that any action for conversion would strictly be a cause of action in favor of Arctic; and

(d) That when he prepared the assignment papers on August 14 he advised his clients that any action for conversion would strictly be cause of action in favor of plaintiff;

(8) Arctic claimed ownership of everything plaintiff had owned, and even re-possessed and physically removed much of the equipment; and then sold the same to defendant for $25,000.00, reserving only Peterson's (plaintiff's) rights, which were explained to defendant to mean only that they did not want it to appear that Arctic was selling to defendant the franchise owned by plaintiff, although that instrument specifically reserved *plaintiff's* (not Arctic's) rights in the instant litigation;

(9) In this action the real property in interest is Arctic, since it will receive the money from any judgment collected. In this regard, please note that:

(a) Arctic claims that its *substantive* right arises under the assignment from plaintiff dated August 14, 1962;

(b) Arctic claims its *procedural* right to sue in plaintiff's name arises from the agreement also dated Aug. 14, 1962;

(c) Arctic claims that its complete settlement with defendant subsequent to the August 14 assignment is immaterial, because a reservation of plaintiff's rights caused the instanct cause of action to survive. This, says

Arctic, is so because even though Arctic owned the cause of action, it had secretly reserved the right to sue in Peterson's (plaintiff's) name, and this gimmick coupled with the reservation of Peterson's rights, is sufficient to maintain the present action;

(d) Arctic says it it doesn't really matter that Arctic officials and plaintiff told defendant that plaintiff had reserved nothing in the assignment, but had assigned everything to Arctic; and

(e) Arctic claims that its determined claim of ownership, and the right to possession, as the assignee of plaintiff, from August 14 forward, even resulting in a partial repossession and a partial sale by Arctic, in no way affects the prior alleged conversion by defendant against plaintiff.

NEED ANYTHING MORE BE SAID?

POINT NO. II

THERE IS NO BASIS FOR PUNITIVE OR MENTAL DISTURBANCE DAMAGES.

The trial court awarded $1,000.00 as puntive damages and $10.00 for mental disturbance. This is incredible! The uncontroverted evidence, which the trial court thought justified these awards, viewed in the light most favorable to plaintiff, is as follows:

Defendant didn't press and harrass plaintiff for the delinquent rental payments, even though they had been in arrears for some time (T. 33). When plaintiff told defendant on August 13 that he should not rely on the lease payments, and asked if defendant would please take back the place and operate it himself, defendant was not abusive, belligerent, threatening, offensive or menacing in any way (T. 34-38.) In the early morning of August 14 (7 a.m.) when defendant decided to do something to protect his building from equipment repossessions by Arctic Circle, defendant called plaintiff before anything was done, but plaintiff had left and plaintiff's wife was asleep, and defendant could only talk to plaintiff's daughter (T. 654). Immediately after placing the locks on the building (at about 8:30 a.m.) defendant again called plaintiff's residence and this time talked to plaintiff's wife, requesting to get in touch with plaintiff, and she said that she would notify the help before they came to work at 11 a.m. (T. 655). Before defendant took any of this action, he had consulted with George Searle, an attorney (T. 654). When plaintiff came to the building after 9 a.m., defendant was not rude, threatening or impolite, but he was firm in declaring that he had invoked Clause 8 of the lease and that no one would go in the building, not even the defendant, himself, until the court decided what the rights of the parties were (T. 38-44). When plaintiff wanted to make a telephone call and defendant offered him a dime, plaintiff interpreted this as an insult, got mad, and left (T. 44). This was the most damaging evidence adduced against defendant. That

afternoon, however, when plaintiff returned with the Edwards (and when plaintiff no longer had any claim and was not involved), defendant did appear to turn a little white when he heard plaintiff had assigned everything to Arctic Circle and they were there to demand delivery, and defendant even used the word "damn" rather than darn." (T. 366).

In truth and fact the wrong party was awarded punitive damages, for if any were justified, defendant should have been awarded such damages against plaintiff.

POINT III.

PLAINTIFF'S EVIDENCE ON DAMAGES WAS IMPROPER.

Brief mention should be made of the evidence presented by plaintiff to show the damages which resulted from the conversion. Plaintiff's witnesses did not use the market value test because they said that the second-hand market for the equipment in question was very poor. and that the equipment had its highest value when it was left where it was installed and used until it wore out (T. 124-29, 160, 185, 304, 321-22, 329). In this regard, the witnesses testified that they reached this value by the cost less depreciation method, and since the equipment was only two years old, it practically had full value (T. 124-29, 160, 185, 304, 321-22, 329). It was readily admitted, that. if the equipment were to have been removed

and placed on the market, it would have brought less than one half of the amount actually testified to as the value, and which higher amount was accepted by the lower court (T. 329-30).

Three observations are noteworthy in this regard:

(a) Plaintiff's witnesses completely disregarded market value, simply because it was too low, without showing any unique or personal value;

(b) Plaintiff claimed this high value placed on Arctic Circle equipment could be realized only if the equipment were to be left in the drive-in and utilized (in face of the fact that the business was losing money, had impoverished plaintiff to the point where he had no capital left, and offered the same prospects for the future). Thus, if plaintiff's successor in interest were to realize this same "unique value," as plaintiff had, in using the equipment in the premises for the remainder of its depreciable life, such successor certainly would have followed plaintiff's path to insolvency; and

(c) Plaintiff's theory of conversion was based upon a demand for return and delivery of his equipment, and the failure to so deliver allegedly constituted a conversion. How consistent it is to argue that you are damaged by not having your equipment returned and delivered to you, but that your measure of damages is what the equipment would be worth if installed and kept in a

hypothetically profitable drive-in business, rather than what the equipment would have been worth if delivered to you as demanded and sold on the current market at the best price available?

There was no evidence, therefore, that could have justified the court's award, even if a conversion could have been found. The measure of damage was contrary to law, and was diametrically opposed to plaintiff's theory of conversion resulting from a demand for delivery of the equipment. See *McCormick, Damages*, Sections 45, 123-25.

POINT IV.

DEFENDANT IS ENTITLED TO JUDGMENT AGAINST PLAINTIFF FOR UNPAID LEASE RENTALS.

Plaintiff clearly admitted that he was delinquent in the sum of $1,250.00 under the lease (T. 229-30). Plaintiff had paid $1,250.00 when the lease was executed on June 10, 1960, representing a prepayment of the rental for the last two months of the ten year term (T. 20). It just so happened that plaintiff had become delinquent in an equivalent amount, but he admitted that there had never been any discussion with defendant, or anyone else, about receiving credit for the $1,250.00 prepayment to cure the $1,250.00 delinquency (T. 241). Plaintiff knew he had to catch that rent up, and intended to do so as soon as he could, admitting that if defendant sought judgment for the $1,250.00 arrearage, it would be justified, and plaintiff would not contest it (T. 240).

The trial judge reasoned, strangely enough, that rentals paid after the delinquency could not be credited to the unpaid rentals for earlier months, but legally could be credited only to current rentals (despite the fact that the lessor had never consented to such a credit of the rentals). The judge thus determined that plaintiff on August 14, 1962 had actually pre-paid his rent to August 23, and had nine days left before he was obligated to make any further payments. Anomalous though it is, the court found as a *fact* that a delinquency for prior rentals could in no way result in a current delinquency if the rent for the current month had been paid. (See, generally, Finding No. 6, R. 89).

Under the trial court's ruling, it is clear that a tenant could fail to pay the required monthly rentals for three years, and then pay only one month's rental, and this payment would have to be credited to the current month (regardless of the wishes of the lessor), and the tenant would thus be absolutely current in his rent—even though he still owed unpaid rentals for three years. Whether the trial judge's rationale is uncomprehendingly perceptive, imperceptively incisive, or sophisticatedly obtuse, the plain fact is that there is on legal authority to support it. On the contrary, legal authority is diametrically opposed: 32 *Am. Jur.,* Landlord & Tenant, Section 853; 52 *Corpus Juris Secundum,* Landlord & Tenant, Section 473 (f); *Borlaw v. Hoffman,* 103 Colo. 286, 86 Pac. 2d 239 (1938); and *Wellbrock v. Duffy,* 158 Atl. 377 (N.J.

1932). The judge not only ignored the law; he ignored the plain wording of the contract (Ex. 1-P).

The court's award of $181.48 for the pro-rata refund of rent from Aug. 14 to Aug. 23 should be reversed, and defendant should be awarded judgment on his counterclaim for the uncontroverted arrearage of $1,250.00.

CONCLUSION

If defendant were to emphasize one critical fact, above all others, which would clearly entitle defendant to a complete reversal of the judgment of the lower court, it would be this: Plaintiff, after the alleged conversion, continued to claim ownership of the property by assigning the same and purporting to pass title to the assignee; and the assignee, standing in the shoes of the assignor, continued to assert title and ownership based upon the assignment, actually repossessing and selling the property. This fact necessarily raises this query: How could plaintiff claim that defendant's conduct constituted a conversion and thereby give plaintiff a right to sue for the market value of the goods, when subsequent to the conversion plaintiff sold his interest in the goods to someone else? Does plaintiff believe that he can have his cake and eat it to? Can he sell these good to a third party, and still make defendant buy the same goods on a conversion theory? Can he? Particularly when defendant has bought the very same goods from the third party, relying on plaintiff's representation that the third party also

owned all of plaintiff's interest? Has plaintiff elected his remedy when he decides to sell the goods to another, rather than claim a conversion against defendant? Or, has plaintiff become estopped to claim conversion, after he tells defendant face-to-face, even in front of the assignee, that he has sold everything to the assignee, and that the defendant should immediately deliver it to the assignee? If not an estoppel or election, is it a waiver?

Yes, however, viewed, the uncontroverted and uncontrovertible fact of plaintiff's continued claim and conduct asserting ownership, after the conversion, culminating in the assignment, effectively destroyed whatever cause of action that plaintiff might have had for conversion. This fact, in and of itself ,makes it unnecessary for this Court to decide the case on any other legal or factual issues.

Defendant is entitled to a reversal of the judgment of the lower court, in its entirety, and an award of judgment to defendant and against plaintiff in the amount of $1,250.00 as delinquent lease payments as prayed for in the counterclaim, and costs of this action, including the appeal.

Respectfully submitted,

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