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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

DEC 21 1964

Clerk, Supreme Court, Utah

RICHARD N. PETERSON and
MAXINE H. PETERSON,

Plaintiffs-Respondents,

vs.

J. LOWELL PLATT and
JOSEPH W. BEESLEY,

Defendants-Appellants.

Case No.

~~138239~~

10096

BRIEF OF RESPONDENTS

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

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and

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IN THE SUPREME COURT
of the
STATE OF UTAH

RICHARD N. PETERSON and
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Plaintiffs-Respondents,

vs.

J. LOWELL PLATT and
JOSEPH W. BEESLEY,

Defendants-Appellants.

Case No.
138239

BRIEF OF RESPONDENTS

RESPONDENTS' STATEMENT OF THE
NATURE OF THE CASE

As stated by the appellants, this is essentially an action for conversion of personal property located in a drive-in cafe and for resulting damages, which action

was brought by the plaintiffs as the operators and lessees of a drive-in cafe against the defendants as the owners of the cafe premises. The defendants counterclaimed for unpaid lease rentals and damages for breach of the lease.

DISPOSITION IN LOWER COURT

The case was tried to the court. From a verdict and judgment in favor of the plaintiffs the defendants have appealed.

RELIEF SOUGHT BY DEFENDANTS ON APPEAL

Defendants-Appellants seek reversal of the entire judgment of the lower court and an award to the defendants in the amount of \$1,250 on the defendants' counterclaim.

IDENTIFICATION OF THE PARTIES AND EXPLANATION OF ABBREVIATIONS

Richard N. Peterson and Maxine H. Peterson, his wife, are the plaintiffs and respondents. J. Lowell Platt and Joseph W. Beesley are the defendants and appellants. For practical purposes Richard N. Peterson is referred to by his own name or as the plaintiff and J. Lowell Platt is referred to by his own name or as the defendant, both references being 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. Joseph W. Beesley is not referred to at all in this brief. The foregoing is consistent with the appellant's identification of the parties.

"T." refers to a page reference in the transcript of the trial proceedings. "R." refers to a page reference in the record of the case.

RESPONDENTS' STATEMENT OF FACTS

The defendant-appellant's statement of facts purporting to be "an honest and fair extract of the record" hardly satisfies that expectation, and hence the plaintiffs-respondents have chosen to restate the facts as thought to be pertinent herein. No attempt will be made to delineate the misstatements and improper inferences contained in the defendant-appellant's statement. A glaring example of a misstatement of the record which could only be calculated to arouse some suspicion of collusion is counsel's statement on page 10 of the defendant-appellant's brief that "plaintiff's wife was related to members of the Edwards family that controls the closely-held Arctic Circle corporation." A glance at the record (T. 436, 457) reveals the true fact that the plaintiff's wife has no relationship whatsoever to members of the Edwards family. This fact seems unimportant, but the misstatement of the record is hardly consistent with the defendant-appellant's assertion that the factual presenta-

tion would be “honest and fair” and sets the tone of his entire statement.

During the month of August, 1960 the plaintiff, Peterson, entered into a lease with the defendants whereby Peterson and his wife undertook to lease a drive-in cafe and premises from the defendants (Exhibit 1). Occupancy was to have commenced August 10, 1960 (T. 11). Because of a delay in getting the building ready, the plaintiffs were not able to occupy the premises until August 23, 1960 (T. 14).

On June 10, 1960 the plaintiffs paid an advance rental of \$1,250 (Exhibit 1, T. 20). By reason of the delay to August 23, 1960, in getting in the property, the commencement of the monthly rental period was changed from the 10th day of each month to the 23rd (T. 18).

The business, not unlike other similar businesses, experienced some difficulty. The drive-in, however, by the summer of 1962 was making sufficient to pay the overhead, rental and utility payments (T. 36). Its working capital, however, was being depleted (T. 36). Nevertheless, by August 14, 1962, the business had reached the “break-even point” (T. 35, 248, 392). It was Peterson’s desire to eventually sell the business which was estimated to have a value at that time of \$36,000 (T. 445, 520).

On the 13th of August, 1962, Peterson and Platt had a conversation in regard to the drive-in operation (T. 35). By that time Peterson had missed a total of two months rent for prior months, but had paid the current monthly rental (T. 17-30, 229, Exhibit 2). Peterson told Platt that he understood that Platt was getting ready to build an office building and that Platt ought to know at what point the drive-in was (T. 35); that the drive-in was finally at the break-even point (T. 35); and that he was interested in selling the drive-in (T. 35). Peterson thought that Platt, as the owner of the property, might be interested in buying the drive-in (T. 36). Peterson assured Platt that in any event the rent would continue to be paid (T. 37, 238, 240).

That same night or early the next morning of August 14, 1962, defendant Platt, without any notice or warning to the plaintiffs whatsoever and without authority of the 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 (T. 38-44). On being notified of the defendant's action, the plaintiff, Richard N. Peterson, went to the premises and requested Platt to open the doors and get the business open and then sit down and iron out what differences there were (T. 39-44). This Platt defiantly refused to do (T. 40-45). 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 (T. 40-41). 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.

At the time of the lock-out and take-over by the defendant, J. Lowell Platt, the following items of property were within the premises (T. 93) :

(A) Equipment being purchased by the Petersons from Arctic Circle, Inc., under a conditional sales contract (Exhibit 6).

(B) Equipment (Exhibit 7) not covered by the conditional sales contract.

(C) Other items of personal property (Exhibit 7), and

(D) Inventory (Exhibit 7).

The plaintiff later the same day contacted representatives of the Arctic Circle organization and consulted with their legal counsel regarding the situation (T. 411, 430, 431). Inasmuch as Peterson was indebted to Arctic Circle on an open account in addition to his indebtedness under the conditional sales contract covering certain equipment in the drive-in, a "security" arrangement was

entered into (Exhibit 5, T. 411, 430, 431), pursuant to which representatives of Arctic Circle made a demand on Platt the afternoon of August 14th to unlock the building so that they could get in, take inventory and remove their equipment (T. 50-53). Platt again refused to let anyone enter the drive-in stating that nobody was getting into that building without a court order (T. 53). Thereafter both Arctic Circle and the Petersons commenced separate actions against Platt for the conversion of their respective property interests and such damages as each had sustained by reason of Platt's conduct.

Arctic Circle eventually settled its claim against Platt and in so doing it was expressly agreed that the claim of the Petersons was not being affected (Exhibits 5-D and 12). Peterson, in his action, was seeking (a) damages for the conversion of his interest in the equipment being purchased under the conditional sales contract from Arctic Circle; (b) damages for the conversion of other personal property and inventory; (c) damages for the destruction of his business; (d) damages for mental anguish; and (e) punitive damages (R. 1-3, 79-80).

The trial court filed a Memorandum Decision (R. 84-85) and made Findings of Fact and Conclusions of

Law (R. 88-92). Counsel for the appellant, on pages 4 through 9 of his brief has quoted in full the Findings of Fact made by the trial court. The trial court entered judgment in favor of the plaintiffs (R. 97-98, also quoted on page 2 of appellant's brief), from which judgment the defendant Platt has appealed.

SCOPE OF REVIEW

Counsel for the defendant seems to have misconceived the scope of review. His argument on appeal is essentially the same argument that was made to the trial court. He states on page 3 of the appellant's brief, "The facts, rather than the law, will determine this appeal, although the trial judge committed error of both law and fact." This case, of course, is an action at law and, therefore, it follows that this appeal is upon questions of law alone. In other words, this court is not to now pass upon the weight of the evidence nor to determine conflicts therein, but to examine the evidence solely for the purpose of determining whether or not the judgment finds substantial support in the evidence. This principle is so well established that normally it would only receive passing comment, but in view of the approach taken by counsel for the appellant, the language of this court in the case of *Sine v. Salt Lake Transp. Co.*, 106 U. 289, 147 P.2d 875, 878 is cited:

"This is a case at law. It therefore follows that this appeal is upon questions of law alone. That being true the function of this court is not to pass upon the weight of the evidence, nor to

determine conflicts therein, but to examine it solely for the purposes of determining whether or not the judgment finds substantial support in the evidence. In so examining the evidence all reasonable presumptions are in favor of the trial court's findings and judgment, and the evidence must be considered in the light most favorable to them. If the findings and judgment are substantially supported by the evidence, then the court may not disturb them. When, however, the evidence is viewed in the light most favorable to the judgment of the trial court, the conclusion to be drawn therefrom is a matter of law, and the question which confronts this court is whether or not the court on the basis of such facts was correct in its conclusions of law."

ARGUMENT

POINT NO. I

THERE WAS A CONVERSION BY PLATT OF PETERSON'S PROPERTY AND THE FINDINGS OF THE TRIAL COURT IN REGARD THERETO ARE AMPLY SUPPORTED BY THE EVIDENCE.

Findings of Fact Nos. 6, 7, 8, 9 and 10 are the Findings that bear on the conversion. As will be shown, they are supported by substantial evidence.

(A) *The commencement of the monthly rental period was changed from the 10th to the 23rd of each month.*

There is no question that the trial court was justified in finding that the commencement of the monthly rental

period was changed from the 10th to the 23rd of the month (Finding No. 5, R. 89). Peterson so testified (T. 18, 19). Counsel for the defendant even admits the same on page 11 of his brief. The history of the handling of the rental payments is set forth on pages 17-31 of the transcript and evidenced by Peterson's cancelled checks and vouchers, Exhibit 2.

(B) *On August 14, 1962, the day of the lock-out and take-over by Platt, the rental was actually paid to August 23rd.*

The evidence clearly supports the finding (No. 6, R. 89) that on August 14, 1962, the day of the lock-out, the rental was actually paid to August 23, 1962 (Exhibit 2, T. 17-30). It is true that there were two prior months for which the rental had not been paid (Finding No. 6, R. 89), but, nevertheless, the current month's rental was paid. These facts find substantial support in the record (T. 25-31, Exhibit 2). Peterson's cancelled check of July 23, 1962 (see Exhibit 2) and Peterson's testimony (T. 25-31) evidence the fact that *the payment made to Platt on July 23, 1962 was for the period from July 23, 1962 to August 22, 1962*. Thus on August 14, 1962, the day of the "lock-out," the rental was in fact paid to August 23rd. Counsel for Platt in Point No. IV of his brief argues as he did to the trial court, that Peterson had not

paid the current month's rent at the time of the lock-out, but that payments were being credited to earlier months' rental. The trial court, however, chose to believe the testimony of Peterson, as supported by his cancelled checks, that while Peterson owed rental for two prior months, he was nevertheless making payments for current rental, and they were being received as such, at the time of the lock-out, and payments made for the months immediately prior thereto were made for the then current months (T. 25-31, Exhibit 2).

It isn't a question of whether the payments made by Peterson *had* to be applied to current months' rental rather than to the two prior months for which rental was still owing, but the issue was what the parties *were actually doing*.

As a matter of fact on August 13, 1962, the day before the lock-out and take-over, Peterson had assured Platt that the rent would continue to be paid (T. 37).

(C) *The defendant never made any demand for the payment of rent or gave notice of any default, etc.*

The court was justified in finding (Finding No. 7, R. 89) that during the period of time that the plaintiffs occupied the drive-in property, that the defendant never at any time made any demands on the plaintiffs for the payment of delinquent rental, nor was any notice ever given of any default on the part of the plaintiffs in the performance of the lease or of any intention on the part

of the defendant to terminate the plaintiffs' occupancy of the premises (T. 33, 683-684).

(D) *The lock-out, take-over and conversion by Platt.*

There is substantial evidence showing that on August 14, 1962, in the night time or early morning, the defendant Platt, without notice or warning to plaintiffs whatsoever, went to the drive-in premises, changed the locks on the building, and parked his camper in front of the door (T. 38-45, 50-52, 685).

Peterson's testimony was that on arriving at the drive-in he pleaded with Platt to get the business open and then sit down and work out the problem (T. 40). This Platt refused to do (T. 40). Peterson then requested that he be let in to save the "perishables" (T. 40). He was refused (T. 40). Peterson then asked to get his books and payroll and was again denied access to the property (T. 41, 42). Peterson was not even permitted to go inside to make a telephone call to advise "the help" not to come to work (T. 43). Platt testified on cross-examination that even if Peterson had made a demand for the equipment and property, it would not have been given to him (T. 686, 687). Platt stated that no one was going into that building (T. 40, 41). The evidence thus amply supports Finding of Fact No. 8 (R. 89-90) and justifies Conclusions of Law Nos. 1 and 2 (R. 91-92), which conclusions are as follows:

"1. Defendant, Platt, had no right to enter the drive-in premises and deny the Petersons access thereto. His conduct amounted to a forcible entry as defined by Chapter 36 of Title 78, Utah Code Annotated, 1953.

"2. By his conduct the defendant, Platt, unlawfully terminated the Lease, relieved the Petersons of any further obligation to pay rent, made himself obligated for damages reasonably flowing from his tortious act; converted Peterson's property within the premises, and made himself obligated for damages allowable as an action of trover for such conversion."

There is no question that this conduct on the part of Platt amounted to a conversion of the property in the premises. Neither is there any doubt that there was not only a conversion as to Peterson as a conditional vendee, but certainly if not before, then at least by the afternoon of August 14, 1962, by reason of the assignment to Arctic Circle (Exhibit 5-A), there was a conversion as to Arctic Circle.

The fact that the defendant called the plaintiff's residence at about 8:30 A.M. on the morning of the 14th and talked to the plaintiff's wife advising her that he had decided to "enforce clause 8 of our contract," to which the plaintiff's wife replied, "... that is wonderful" (T. 655, page 19 of defendant's brief), can be of little help to the defendant. It is obvious that rather than giving consent to a lock-out and termination of the plaintiff's

business, the expression of the plaintiff's wife — if she in fact said what the defendant claims she said — could have only been an expression arising from the contemplation that the defendant was willing to purchase the business for she then said, "Do you want me to call the help and have them come down so that you can continue to run?" (T. 655).

In considering the evidence of the existence of a conversion, it should be remembered that conversion is a tort concerned with the possession of property. See 89 C.J.S., "Trover & Conversion," Sec. 3, page 533:

"Conversion is a tort, a wrongful act, which in the nature of things cannot spring from the exercise of a legal right. The law of conversion, it has been said, is concerned with possession, not title, conversion being an offense against possession of property. It may be either direct or constructive, and may be proved directly or by inference. The essence of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner, although a temporary deprivation will be sufficient; and in consequence it is of no importance what subsequent application was made of the converted property, or that defendant derived no benefit from his act."

It is unimportant that on the morning of August 14, 1962, Peterson made no formal demand for the delivery

to him of the equipment and inventory, etc. Such a demand would have been futile in view of the fact that Platt had refused Peterson the perishables (T. 40), his books (T. 41) and access to the building for the making of a telephone call (T. 43). In addition, as noted, Platt testified on cross-examination that had such a request been made, it would have been denied at that time (T. 686-687).

“A demand and refusal are not essential to a conversion where it is clear that a demand would have been useless or unavailing, if it had been made.” See 89 C.J.S., “Trover & Conversion,” Sec. 57, page 561.

Numerous authorities are cited in support of the foregoing statement.

The right of a conditional vendee to bring a suit for the conversion of property has been considered. See the annotation in 116 A.L.R. 904. A general statement of the principle is found in 89 C.J.S., “Trover & Conversion,” Sec. 164, page 643:

“A plaintiff having only a special or qualified right or interest may recover the full value of the converted property, as against a stranger having neither title nor right of possession; but, as against a defendant having an interest or right in the property, recovery is limited to the value of plaintiff’s interest or right, and to the fair value of the property.”

A conditional vendee *may* well be entitled to recover the *full value* of the property converted rather than just the value of his equity. The reason and basis for such recovery being:

“... the fact that the party having the limited or qualified interest is liable over to the owner of the remaining interest, and in order to be adequately compensated must receive sufficient compensation not only to compensate himself for his own loss but to satisfy the demands of such owner.” *Goldberg v. List*, 79 P.2d 1087 (Cal. 1938)

The case of *Southern Arizona Bank & Trust Company v. Stigers*, 53 P.2d 422 (Arizona, 1936), involved the right of the conditional vendee to sue for the conversion of an automobile. In this case the court permitted the recovery which amounted to the difference between the balance of the car and what he owed on the purchase price, but noted that circumstances might exist where the measure of the damage might be the full value of the property:

“‘The legal title is not always necessary to an action for conversion, but any special valuable interest in the property accompanied with the right of possession is sufficient to form the basis of such an action.’ *Carvell v. Weaver*, 54 Cal. App. 734, 202 P. 897, 898.

“Where the converter of the property is in no way connected with its title, the buyer’s measure of damages is the full value of the property. *Burnett v. Edw. J. Dunnigan, Inc.*, 165 Wash. 164, 4 P.2d 829.”

It is apparent, therefore, that insofar as the equipment covered by the Conditional Sales Contract is concerned, Peterson had an interest that could be and was converted.

The case of *Crutcher v. Scott Pub. Co.*, 253 P.2d 925 (Washington, 1953), involved an action by a buyer's trustee in bankruptcy against a seller's assignee for conversion of property. Suit was brought for the conversion of property and destruction of a going business. In regard to the right of one having a limited interest in property to sue for conversion thereof, the court held:

"We think respondent's point is well taken. A person who is entitled to bring an action for a conversion, although he has a limited interest in the property converted, may, as against a stranger, recover the full value of the property. *Hadley Warehouse Co. v. Broughton*, 1923, 126 Wash. 356, 218 P. 257; *Burnett v. Edw. J. Dunnigan, Inc.*, supra; *Anstine v. McWilliams*, 1945, 24 Wash. 2d 230, 162 P.2d 816; *Angell v. Lewiston State Bank*, 1925, 72 Mont. 345, 232 P. 90; 53 Am. Jur. 907, *Trover and Conversion*, Sec. 121.

"In *Corey v. Struve*, 1915, 170 Cal. 170, 149 P. 48, the Supreme Court of California said:

"The rule that the owners of a special interest in property may recover only to the extent of such interest applies only to cases where the

suit is brought against the owner of the remaining interest or his assignee.' ”

See also *Driver v. Acquisto*, 302 P.2d 387 (California, 1956).

Since in this case Peterson's obligation to Arctic Circle, Inc., was cancelled, his recovery was appropriately limited to his equity in the equipment covered by the Conditional Sales Contract.

On page 27 of the defendant's brief counsel, in support of his claim that there was no act of conversion on the morning of August 14, 1962, claims that the defendant "had a contractual right under the lease to resume possession if there was a default in the payment of rent" and the "defendant had a lien, pursuant to the lease, on all property of every kind which the plaintiff owned or had an ownership interest in, and which was located in the building (Exhibit 1)." This claim of counsel is most novel and is, of course, totally unsupported by any authority. It is true that the defendant claimed to be enforcing "Clause 8" of the lease in the lock-out and take-over of the drive-in. Nothing in the defendant's pleadings indicated, however, that the defendant was ever seeking to enforce any lien right. Counsel made this same feeble argument to the trial court. Judge Faux's comments, which unfortunately are not in the record of the case, were a classic commentary on the forcible entry

and detainer statutes of this and other states. It is so well established in this state as to require no comment or citation of authority, that one cannot forcibly enter property and oust the occupants thereof. He must resort to the orderly procedures established by law (see Chapter 36 of Title 78, Utah Code Annotated, 1953).

As for the claim that the defendant had a lien, suffice it to state that none was ever pleaded or asserted, nor was any effort ever made by the defendant to follow the procedure by which such a lien is to be perfected (see Chapter 3 of Title 38, Utah Code Annotated, 1953). In any event, as already pointed out, the trial court found, and justifiably so that on October 14, 1962, the plaintiff had paid the current rental to August 23, 1962.

(E) *The security arrangement between Peterson and Arctic Circle.*

Following the lockout, take-over and conversion by Platt, Peterson contacted representatives of Arctic Circle and consulted with Wilford M. Burton (T. 50). As a result of this consultation, documents were prepared by Wilford Burton whereby Peterson made an assignment of all that he had in the drive-in to Arctic Circle for the purpose of securing his open-account indebtedness to Arctic Circle (T. 56, 57, 151-153, 411, 430, 431). The arrangement between Arctic Circle and Peterson is evidenced by Exhibits 5 A, B, C.

The trial court reviewed Exhibit 5 in detail and discussed the same at length with counsel at the trial of the case (T. 64-69). Though no formal finding of fact or conclusion of law was made by the trial court in regard thereto, the court ruled (T. 67) that by Exhibit 5-A the plaintiff sold certain chattels, merchandise, inventory and equipment not covered by the conditional sales agreement to Arctic Circle, Inc. The trial court saw in Exhibit 5-B the background of the security arrangement (T. 68). To the trial court the third instrument (Exhibit 5-C) indicated that all title and ownership of the property covered thereby vested absolutely in Arctic Circle. Arctic Circle thereafter settled its claim against Platt with the understanding, however, that Platt would still have to settle with Peterson (Exhibit 12). The court interpreted Exhibit 5-D, the agreement of November 12, 1962, as an agreement between the Petersons and Platt, by which the Petersons were granted the right to proceed with the suit as though the action between Arctic Circle and Platt and the other elements and transactions had not intervened (T. 60).

The agreement of November 7, 1962 (Exhibit 12), the agreement of November 12, 1962 (Exhibit 5-D), and particularly the stipulation of the defendant through his attorney during the course of the trial (T. 453-456) are all consistent and make it clear that the Petersons are

properly prosecuting the action, and are the real parties in interest. Arctic Circle, having settled with Platt, now claims nothing from him (T. 383-385).

(F) *The conversion against Arctic Circle on the afternoon of August 14, 1962.*

The evidence further shows that at least by the afternoon of August 14, 1962, a conversion had been committed as to Arctic Circle. By reason of the assignment to Arctic Circle, the conditional vendor, it became entitled to the possession of the equipment and property in the drive-in. On that afternoon Ralph Edwards and Don Edwards of Arctic Circle went with Peterson to the drive-in premises (T. 50). They observed that the building was locked and Platt's camper backed up against the doorway (T. 50, 51). Platt was informed of the assignment to Arctic Circle and demand was made on Platt by Ralph Edwards of Arctic Circle that the building be unlocked in order that the inventory and equipment might be removed (T. 53). Platt flatly told them that "nobody is getting into that building" (T. 53). The conversion by this time, if not in the morning of the same day, was certainly complete as to Arctic Circle, the conditional vendor of the equipment and vendee of other property in the drive-in.

(G) *There was no failure on the part of Peterson to ignore or waive the conversion by Platt, and Platt's*

settlement with Arctic Circle left standing Peterson's case with all of its causes of action against Platt.

On page 29 of his brief counsel for the defendant contends that even if Platt's conduct in locking the building and taking over on the morning of August 14th amounted to a conversion of the plaintiff's property that Peterson's subsequent assignment to Arctic Circle extinguished any cause of action Peterson might have had. Counsel for the appellant argues that Peterson still claimed ownership and dominion over the property and grasps at "election of remedies," "estoppel" or "whatever" and claims that any cause of action Peterson might have had was extinguished (page 30 of appellant's brief). It is obviously true that Peterson could have made an arrangement with Platt whereby the conversion might have been disregarded, forgotten, or ignored. However, there is not one iota of testimony to indicate that as between Peterson and Platt there was any intention to ignore, waive or disregard the conversion of Platt. On the contrary the evidence is clear that Peterson and Arctic Circle stood firmly on the conversion (T. 50, 56, 57, 151, 153, 411, 430, Exhibit 5).

We, of course, have no quarrel with the general statement of the law as set forth in 89 C.J.S., "Trover & Conversion," §88. Such a general statement, however, only begs the question. The cases cited by counsel on page 30

of the appellant's brief, however, are simply not in point. *Johnston v. Cincinnati Ry. Co.*, 240 S.W. 429 (Tenn. 1922), involved a fact situation having no comparison to the instant case. In that case, the plaintiff waived the claim of conversion by alleging an ownership of the property and asking for its return and for rental or hire for its use. As a matter of fact, that election was more definitely exercised when shortly thereafter the receiver accepted back the property from the defendant and proceeded to dispose of it. *Stout v. Fultz*, 93 S.W. 919 (Mo. 1906) again involves a completely dissimilar fact situation. In that case, the plaintiff's cow got into the defendant's field over a division fence. The defendant looked her up and refused to turn her out until the plaintiff paid damages, but afterward made settlement with plaintiff and turned the cow out on his written order. The court held, of course, that the defendant was not liable to the plaintiff for the value of the cow. In *Weakley v. Evans*, 46 S.W. 1070 (Tenn. 1897) the court concluded that there was not even a conversion. It is true, however, in *Weakley v. Evans*, supra, that the court did indicate that if there had been a conversion involving the same, it had been waived by the dealings between the plaintiffs and defendants, inasmuch as the plaintiffs negotiated with the defendants to sell them the goods involved and at all times in their dealings with the defendant treated the property as their own.

As already pointed out in the instant case, there is not one iota of evidence indicating that Peterson in his dealings with Platt ever intended to waive the conversion. The assignment to Arctic Circle was for security purposes only and was simply to place Arctic Circle in a position to likewise demand the possession of the equipment and property.

The testimony of Wilford Burton makes it clear that there was no intention whatsoever of waiving Platt's conversion. His counsel and the action taken pursuant thereto were for the sole purpose of protecting both the interests of Peterson and Arctic Circle (T. 736-744).

It must be remembered that in the drive-in cafe there were inventory items and items of personal property belonging to Peterson and particularly the equipment of which Peterson was the conditional vendee and Arctic Circle the conditional vendor (Exhibits 6, 7). As already shown, the conduct of Platt was such as to amount to a conversion of the interests of both Peterson and Arctic Circle. Exhibit No. 5, coupled with the testimony of Peterson (T. 56, 151, 153), Ralph Edwards (T. 411-430), and Wilford Burton (T. 730-744), makes it clear that the only intention of Peterson and Arctic Circle was to preserve all causes of action against Platt, and at the same time give some security to Arctic Circle for the open-account indebtedness of Peterson to that company.

Subsequently, on August 20, 1962, two actions were filed against Platt, one by Peterson in the instant case and one by Arctic Circle (T. 453, 455). Thereafter, on November 7, 1962, Arctic Circle settled its claim against Platt; nevertheless, with the explicit provision that the cause of action of Peterson would remain (Exhibit 12). The November 7th Settlement Agreement between the defendant Platt and Arctic Circle expressly provided that "all rights of Richard N. Peterson and wife pertaining to the action in the District Court on any settlement contract with Lowell Platt are unaffected."

On November 12, 1962, the Petersons and Platt entered into an agreement, whereby it was specifically provided that a prior settlement agreement of October 8, 1962, was rescinded as between the Petersons and Platt by reason of a breach on the part of Platt of that agreement.

Counsel for the defendant seems to want this court to believe that there was some collusion and misdealing with Platt as to whose property and causes of action were being dealt with in the settlement with Arctic Circle (see page 35 of appellant's brief).

Counsel even chose to indulge in the facetious analogy of "button, button, whose got the button." Such

a statement is nothing but misleading to this court in view of the above mentioned agreements of November 7 and November 12, 1962, to which Platt was a party.

Particularly is the court's attention invited to the following language of the agreement of November 12, 1962 (Exhibit 5-D) :

“ . . . Platt does hereby agree that the Settlement Agreement of October 8, 1962, is rescinded as between the Petersons and Platt by reason of the breach of Platt, and Arctic Circle, Inc., may proceed to deal separately and settle its cause of action with Platt, in aid of which the Petersons have executed and delivered a Subrogation (subordination) Agreement as far as the judgment lien of the Petersons in Cause No. 138239, with the express understanding and agreement that as between Action No. 138239 all parties interested and concerned with this action are restored to their original position prior to the October 8, 1962 Settlement Agreement, and particularly said Action No. 128239 (138239) and all rights concerned therewith are reserved and are unaffected and available to the parties concerned.”

and particularly is the court's attention invited to the express stipulation of counsel (T. 453-456) :

“MR. HANSEN: We will stipulate, further, he was aware of two causes of action.

* * *

“MR. HANSEN: We will stipulate that he knew that there was a cause of action from the Petersons toward himself, and there was a second

cause of action from Arctic Circle to himself.

“THE COURT: I don’t think that would satisfy Mr. McMurray. They have two causes of action.

“MR. HANSEN: Oh — well, you mean two causes of action within this lawsuit. We will so stipulate; I thought they meant two different lawsuits.

“We will stipulate he knew there were two different lawsuits, one from Peterson and Arctic.

“Further stipulate, he knew there were two causes of action in the lawsuit before the court.

* * *

“THE COURT: The court will accept that stipulation and as to those two matters; so, you have in the record, now, stipulation that he knew there were two lawsuits, and, in this Peterson lawsuit, he knew there were two separate causes of action.

“MR. McMURRAY: Well, there were more than two separate causes of action.

“I take it, it would be all the causes of action recited in each of the lawsuits.

“He would know that, and was put on notice of that. Knew about it at the time he filed his lawsuit.

“THE COURT: He has stipulated to that.

“MR. McMURRAY: He says two causes of action; we have three in this lawsuit.

“MR. HANSEN: I will stipulate Mr. Platt was well aware — had full knowledge — his head was bulging with facts pertaining to court records.

“THE COURT: All right. It was the court’s error; stipulate he knew there were four causes of action.

“MR. HANSEN: We will stipulate he knew of both lawsuits and all causes of action included in them.

“THE COURT: All right; you have that stipulation. The court recognizes that stipulation. You may go from there.”

Before signing the agreement of November 7, 1962, Don Edwards told Platt “it would have to be clearly understood, to protect Arctic Circle, Inc., that our settlement of action with Mr. Platt did not relieve him of any responsibility of the action that him and Mr. Peterson had pending; that we had to have this — I had to protect Arctic Circle, Inc., both from Mr. Platt and also Mr. Peterson” (T. 299-300). The defendant stated that he had no objection whatsoever to signing the agreement (T. 300).

Thus not only was the defendant aware of the plaintiff’s case and all causes of action contained therein, but he agreed that such would remain (T. 453-456). These were the very causes of action pursuant to which the trial court gave Peterson judgment. How can the defendant now in good conscience complain that there was something that he didn’t know about the arrangement?

What the defendant Platt is actually doing is resorting to a technical and specious argument to keep from paying Peterson for the property he had converted. The inequity of Platt's position is at once apparent. Platt made a settlement with Arctic Circle as the conditional vendor of the equipment (Exhibit 12). Having satisfied the claim of the conditional vendor, Platt, by the argument he has resorted to, is now seeking to avoid payment to the conditional vendee. In other words, Platt, having converted the equipment, inventory and other property, and having satisfied the claim of the conditional vendor, now seeks to leave Peterson "standing out in the cold" without anything. In short, the defendant is arguing that he should now have the equipment covered by the conditional sale contract for simply the value of the *vendor's* interest therein. He would thus take over Peterson's business and even deprive him of his equity in the equipment. The same malicious attitude that prompted the defendant to lock the plaintiff out of the business now prompts him to seek, without compensation, to even deprive Peterson of his equity and interest in the equipment, inventory and property.

The justness of the judgment of the trial court is made even more significant when it is remembered that the defendant has such a little respect for the law that he considers it "90 per cent bluff" (T. 383).

On pages 30 and 31 of the defendant's brief, counsel states that "Arctic never purported to make any re-assignment or re-conveyance to plaintiff" and that the agreement between the plaintiff and defendant "restored them to their respective legal positions as of October 8, 1962 (Exhibit 5-D)." This, of course, is completely erroneous. Implicit in the agreements of November 7 and November 12, 1962 (Exhibits 12 and 5-D) is a re-assignment to the plaintiff, and the parties by the agreement of November 12, 1962 (Exhibit 5-D) were not restored to their respective legal positions *as of* October 8, 1962, but were restored to their "*original position prior to . . . October 8, 1962 . . .*," and it was particularly agreed that the action of the plaintiffs "and all rights concerned therewith are reserved and are unaffected and available to the parties concerned."

Mr. Hansen's examination of Wilford Burton referred to on page 33 of the defendant's brief is cited by counsel in an apparent effort to have the court believe that there was some secret plan and arrangement between the Petersons and Arctic Circle. Not one iota of evidence was produced by the defendant, during a trial that lasted several days, to support such a contention. The questions propounded to Mr. Burton, to which objection was made and sustained by the court, were manifestly objectionable for lack of any materiality and as an apparent attempt to go behind the written documents and prolong the trial, which, as it was, took nearly a week.

POINT NO. II

THE AWARD OF DAMAGES FOR MENTAL ANGUISH AND SUFFERING AND THE AWARD OF PUNITIVE DAMAGES WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Findings of Fact Nos. 9 and 13 are supported by substantial evidence and support the conclusion of the trial court that the plaintiff should have judgment by reason of mental anguish and suffering (\$10.00), as well as an award for punitive damages (\$1,000.00) (R. 90, 91). The record is clear that the defendant's attitude and conduct in locking Peterson out of the drive-in and taking the same over was defiant, high-handed and unconscionable (T. 39-45, 80-81, 296-297).

In 17 A.L.R.2d 936 is found an annotation dealing with the precise subject: "Recovery By Tenant Of Damages Is Sufficient Injury Or Mental Anguish Occasioned By Wrongful Eviction." On page 938 of the annotation, the annotator notes the following:

"Even though there is no allegation of physical injury, and a claim is made for damages due to mental anguish or humiliation alone, the courts generally permit the tenant to recover.

"It has been held that the landlord is liable in damages for the mental suffering occasioned by the wrongful eviction, especially where the circumstances surrounding the eviction are such that it may be regarded as malicious, or constituting a reckless disregard of the sensibilities of the tenant."

In support of this statement the annotator cites various decisions from various jurisdictions including a decision of the Supreme Court of the State of Utah in *Hargrave v. Leigh*, 73 Utah 178, 273 P. 298.

Peterson's testimony as to the mental anguish, humiliation, embarrassment and anxiety suffered by him is uncontested and is certainly sufficient to justify an award for such (T. 506-507).

As for punitive damages, the observation of the Supreme Court of the State of California in *San Francisco & Suburban Home Building Society v. Leonard*, 119 P. 405, 411, is right in point:

“It was not necessary in our opinion for the plaintiff to plead more than the alleged forcible detainer to entitle it to prove facts which would have justified the court in awarding exemplary or punitive damages. The charge of forcible detainer of real property necessarily carries with it the implication that such detainer is from a bad motive, and what the precise nature of that motive is — whether it be founded in malice or fraud or oppression of any sort — may properly be shown under the general averment that the detainer is forcible. It may be that the defendant in such a case can show that the force used was only in furtherance of the maintenance of his

rights; yet, the statute having said that such detainer is in violation of law, the mere charging of the act presupposes the existence therein of all the elements essential to the consummation of the charge as it is defined by the statute, and whether, as a matter of fact, elements justifying the imposition of punitive damages are present in the act must, of course, depend upon what the proof discloses."

Punitive damages have frequently been awarded incident to conditions of conversions. Numerous cases are cited in the annotation appearing in 54 A.L.R. 2d, 1862. Additional cases are noted in 101 A.L.R. at page 480. In this annotation, the annotator considers the matter of dispossession without legal process by one entitled to possession of real property as ground of action, other than for recovery of possession or damage to his person, by person dispossessed. On page 480 the annotator states the following:

"The humiliation suffered by the occupant of premises through his forcible dispossession without legal process by one entitled to possession is occasionally considered grounds for recovery of damages."

Particularly are cases noted beginning with page 1388 of the annotation in point. The evidence on this part support the finding that Platt was guilty of an overt act in evicting Peterson and in converting the property. The

malicious, high-handed attitude of Platt was clearly evidenced on the morning of August 14, 1962, when Peterson pleaded with him to get the business open for business that day (T. 36-45). To this plea Platt officiously and defiantly stated that no one was going in the building (T. 40-45). There was no justification for the termination of the business in the abrupt manner employed by Platt. He had available to him all of the legal processes by which he could attempt to terminate the lease and regain possession of the property. He had available to him legal counsel with whom he could consult.

Instead of resorting to a peaceful, amicable approach to this problem, the testimony of Peterson (T. 38-45) and Edwards (T. 294) give substantial support to Finding No. 9 of the trial court (R. 90) 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.”

The award of damages for mental anguish and the award of punitive damages should stand.

POINT NO. III

PLAINTIFF’S EVIDENCE OF DAMAGES WAS PROPER AND SUPPORTED THE AWARD MADE BY THE TRIAL COURT.

In connection with this issue the trial court in Findings of Fact Nos. 10 and 11 found as follows :

“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.”

In regard to the nature and value of the equipment converted, the unrefuted testimony of Peterson and Ralph Edwards was to the effect that the equipment was of a special type peculiar to the plaintiff's business; that much of the equipment had been manufactured especially for the plaintiff's business; that it was practically new; that it did not have a ready market value; that its actual market value would be far below its real or intrinsic value; and that the equipment could only be replaced by the purchase of new equipment (T. 124, 304-308, 330, 374).

In this connection the court's attention is invited to the annotation in 12 A.L.R. 2d at page 902 entitled "Measure of Damages For Conversion Or Loss Of, Or Damage To, Personal Property Having No Market Value." A summary of the general rule is stated in 89 C.J.S., "Trover & Conversion," Sec. 165, page 643:

Generally, if the property has such a value, the value to be taken is its fair market value, rather than the price paid for the property by plaintiff, a price lower than the market value at which the plaintiff could purchase property of like species, quantity, and quality, under a contract he has with a third person, the price at which it was sold, or contracted to be sold, the fair retail price of the property, the 'reasonable value' of the property, the par value, or its fair value to the owner. *If the property has little or no market value, and is of a special or higher value to plaintiff, the value to be taken as the measure of recovery is the actual and fair value to plaintiff, provided it is not merely fanciful or*

sentimental. Where there is no market value for the goods in controversy, other standards, including the replacement value, may be used to determine the value of the goods. Moreover, the market value will never be adhered to as the absolute measure of recovery where to do so would be a departure from the more fundamental principle of just compensation for the injury or loss sustained by reason of the conversion.” (Emphasis ours)

Numerous cases are cited by the annotator holding that when property such as was converted by Platt is involved, proper elements to consider in determining the amount of damages are the following: value to the owner, original cost, reproduction or replacement costs, etc. The annotator further points out that a deduction for depreciation is proper.

Both Peterson and Ralph Edwards testified that the value of the equipment in the drive-in was determined by taking the original cost and allowing an appropriate depreciation based on the anticipated “life” of the property (T. 117, 122, 123, 304, 306, 321-322). The authorities cited by the annotator in the above mentioned annotation clearly support the proposition that for the kind of equipment involved, the cost less depreciation method followed by the plaintiffs and those who testified on his behalf was entirely proper.

The testimony of Ralph Edwards and Peterson in regard to the value of the equipment covered by the

Conditional Sales Contract and other property items was as set forth on Exhibit No. 7 (see also T. 117-129).

The testimony of Peterson alone was sufficient to support the finding of the trial court as to the value of the equipment and property converted and the amount of Peterson's claim (R. 90-91; T. 117, 118, 133, 138, 139-142).

There can be no question that both the plaintiff and Ralph Edwards were competent to testify as to the value of the equipment and property converted by the defendant (T. 113-116, 118-119, 132).

We further invite the court's attention to the fact that insofar as damages are concerned and the value of the equipment, the defendant offered not one iota of evidence to rebut the testimony proffered by the plaintiffs in this regard.

POINT NO. IV

WHEN THE DEFENDANT PLATT, BROKE THE LEASE ON AUGUST 14, 1962, THE RENT WAS ACTUALLY PAID TO AUGUST 23, 1962 AND PETERSON BECAME ENTITLED TO CREDIT FOR TWO MONTHS ADVANCE RENTAL. ACCORDINGLY, THERE WAS NO DELINQUENT RENTAL OWING TO PLATT FOR WHICH PLATT WAS ENTITLED TO JUDGMENT.

As pointed out under Point No. I, substantial evidence was presented from which the trial court could find, as it did, that the commencement of the monthly rental period was changed from the 10th day of each month to the 23rd day of each month; and as already

pointed out under Point No. I, on the morning of August 14, 1962, the date of the lock-out, Peterson's rent was actually paid to August 23, 1962, though one-half of the rent for December, 1961, and January, 1962, and the full amount of rent for April, 1962 was unpaid (Exhibit 2, T. 17-30).

Thus, on August 14, 1962, the rent was actually paid until August 23, 1962, though one-half of the rent for December, 1961 and January, 1962, and the full amount of rent for April, 1962, was unpaid. However, as already noted, Platt, on June 10, 1960 had already received two months' rent (\$1,250.00) in advance. (See Check No. 1, Exhibit 1.)

Now, when Platt evicted Peterson on the 14th day of August, he thereby terminated the lease.

"On the other hand, it is the well-settled general rule that where the eviction by a landlord is of the whole premises, this will relieve the tenant from liability for future accruing rents. Succinctly stated, the eviction suspends the rent during the period of the eviction. This rule results from the meaning of the term 'rent,' and from the obligations between landlord and tenant. Rent is compensation for the use of land, and what the tenant pays rent for is quiet possession or beneficial enjoyment. When, therefore, the use or possession ceases by reason of an act of the landlord, the consideration for the payment ceases or fails." 32 Am. Jur., "Landlord and Tenant," Sec. 478, p. 391.

Automobile Supply Co. v. Scene-in-Action Corp., 172

“The eviction of a tenant from the possession or enjoyment of the demised premises, or any part thereof, by the landlord releases the tenant from the further payment of rent. Rent is the return made to the lessor by the lessee for his use of the land, and the landlord’s claim for rent therefore depends upon the tenant’s enjoyment of the land for the term of his contract. It follows that if the tenant is deprived of the premises by any agency of the landlord the obligation to pay rent ceases, because such obligation has force only from the consideration of the enjoyment of the premises. The eviction which will discharge the liability of the tenant to pay rent is not necessarily an actual physical expulsion from the premises or some part of them, but any act of the landlord which renders the lease unavailing to the tenant or deprives him of the beneficial enjoyment of the premises constitutes a constructive eviction of the tenant, which exonerates him from the terms and conditions of the lease and he may abandon it. Taylor on Landlord and Tenant, Secs. 379, 380; *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108; *Anderson v. Chicago Marine & Fire Ins. Co.*, 21 Ill. 601; *Leadbeater v. Roth*, 25 Ill. 587; *Bentley v. Sill*, 35 Ill. 414; *Wright v. Lattich*, 38 Ill. 293; *Smith v. Wise & Co.*, 58 Ill. 141; *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124.”

Upon the termination of the lease by reason of the eviction, Peterson was entitled to credit for the two months advance rental which equaled the two months rental that had been missed.

Where a tenant has been wrongfully evicted:

“In a number of cases, it has been held that where the rent has been paid in advance, the tenant may recover back the rent paid, or at least a proportionate part thereof.” 32 Am. Jur., “Landlord and Tenant,” Sec. 268, page 250. See also 52 C.J.S., “Landlord and Tenant,” Sec. 545, page 355.

Platt, in unlawfully evicting the Petersons from the premises before the expiration of the rental period from July 23, 1962 to August 22, 1962, was entitled to no rent for that period and, therefore, the Petersons had a valid claim to recover against Platt the month’s rental from July 23, 1962 to August 22, 1962 in the amount of \$625. See 52 C.J.S., “Landlord and Tenant,” Sec. 531, page 344:

“At common law, and in the absence of statute otherwise providing, rent is not apportionable in respect of time, and the owner of the premises at the time of accrual is entitled to the rent for the entire period, unless the lease expressly provides that there shall be apportionment. *Thus a landlord who is responsible for termination of the tenancy between rent days will not be entitled to any part of the rent for that period; . . .*” (Emphasis added)

See also *Moskow v. Fine*, 198 N.E. 150 (Mass., 1935):

“It was said in *Highland Trust Co. v. Slotnick* (Mass.) 193 N.E. 831, 832: ‘The entry by the mortgagee under a title paramount to that of the

landlord with the demand that the tenant thereafter pay rent to the mortgagee was, in its effect upon the tenant's liability under the lease to pay rent to the landlord, equivalent to an eviction and terminated the tenancy created by the lease. *International Paper Co. v. Priscilla Co.*, 281 Mass. 22, 29, 34, 183 N.E. 58, and cases cited; *Smith v. Shepard*, 15 Pick. 147, 25 Am. Dec. 432. The rent payable monthly in advance under the lease was indivisible and not subject to apportionment and the termination of the lease put an end to the right which the landlord, prior to the entry, had under the terms of the lease to require the payment of rent for the month of April. *Smith v. Shepard*, *supra*; *Fillebrown v. Hoar*, 124 Mass. 580, 583; *Sutton v. Goodman*, 194 Mass. 389, 395, 80 N.E. 608; *Hall v. Middleby*, 197 Mass. 485, 489, 83 N.E. 1114. See also, *Hammond v. Thompson*, 168 Mass. 531, 47 N.E. 137; *Caruso v. Shelit*, 282 Mass. 196, 199, 184 N.E. 460; *Welch v. Gordon*, 284 Mass. 485, 188 N.E. 239' "

See also *Gorin v. Stroum*, 192 N.E. 90, 93 (Mass. 1934).

Consistent with the foregoing the plaintiffs contended at the conclusion of the trial that they were entitled to recover against Platt a month's rental from July 23, 1962 to August 22, 1962 in the amount of \$625. The trial court, nevertheless, chose to apportion the rental and only allowed the plaintiffs the sum of \$181.48, the same being the prorated portion of the rental from August 14, 1962 to August 23, 1962. Plaintiffs, however, have not chosen to cross-appeal on this matter and have contented themselves with the award of \$181.48.

SUMMARY

In summary, the plaintiffs contend that the Findings of Fact of the trial court finds substantial evidence in the record and the Conclusions of Law made and judgment entered should be affirmed.

Respectfully submitted,

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and
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By.....


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