[HIGH COURT OF AUSTRALIA.]

PURCELL AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

THE PUBLIC CURATOR OF QUEENSLAND . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1922.

BRISBANE, *June* 16.

SYDNEY, *Sept.* 6.

Knox C.J., Higgins and Gavan Duffy JJ.

Distress — Company — Debenture creating floating charge — Default of payment — Possession of company's assets taken by receiver appointed by debenture-holder — Distress for rent by landlord of premises leased to company — Rent in arrears for over two years — Company's property offered for sale by receiver — Interim injunction — Priority of claim — Companies Acts Amendment Act 1909 (*Qd.*) (9 *Edw. VII. No.* 13), *sec.* 18*—*Companies* (*Winding-up*) *Act* 1892 (*Qd.*) (56 *Vict. No.* 24), *sec.* 21—*Insolvency Act* 1874 (*Qd.*) (38 *Vict. No.* 5), *secs.* 143, 145.

Sec. 18 of the *Companies Acts Amendment Act of* 1909 (Qd.) does not adopt the scheme of distribution of assets appropriate to a winding up or an insolvency; nor has it any reference to the general rights of creditors *inter se*: the section does not take away any existing right or prescribe any new right, but merely fixes a special obligation on any person availing himself of it.

* Sec. 18 of the *Companies Acts Amendment Act of* 1909 (Qd.) provides:—"(1) Where either a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge, or possession is taken by or on behalf of those debenture-holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are under the provisions of the *Companies Acts*, 1863 to 1896, relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures. (2) The periods of time mentioned in the said provisions of the said Acts shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be. (3) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors."

Therefore, where a receiver appointed by the holders of a debenture creating a floating charge on the undertaking of a company took possession of the company's assets pursuant to the terms of the debenture, the right of the landlord of the company to distrain for rent due by the company was not affected by the section.

Per Higgins J. (and *semble per Knox* C.J. and *Gavan Duffy* J.): Sec. 21 of the *Companies (Winding-up) Act of* 1892 (Qd.) refers to sec. 143 of the *Insolvency Act of* 1874 (Qd.); sec. 145 of the latter Act does not contain rules "for determining the respective priorities of creditors," and is not imported into a winding up of a company, or into the case of the appointment of a receiver under sec. 18 of the *Companies Acts Amendment Act of* 1909 where the company is not being wound up.

Per Higgins J. :—The landlord's right to distrain is not affected by the fact that a receiver has been appointed by the debenture-holders and has taken possession of the property. A landlord with a right to distrain is not a secured creditor; and his privileges come to him by the common law, not by the Companies Acts.

Decision of the Supreme Court of Queensland (*Lukin* J.): *Purcell* v. *Public Curator of Queensland*, (1922) S.R. (Qd.), 25, affirmed.

APPEAL from the Supreme Court of Queensland.

Thomas Purcell, Sabyna Purcell and Mary Purcell were the holders of a debenture creating a floating charge on the undertaking of the Rockhampton Newspaper Co. Ltd.; and, the Company having made default in respect to payments due to them, they appointed a receiver, who took possession of the Company's assets on 2nd September 1921. On 19th September the Public Curator of Queensland caused the goods and chattels of the Company to be taken possession of under a warrant of distress for rent owing by the Company to him, as executor of Thomas Joseph Ryan deceased, such rent being due for a period of more than two years prior to 31st August 1921.

In an action brought by the above-named debenture-holders against the Public Curator as such executor, the plaintiffs claimed in their writ a declaration that the defendant was only entitled to be paid in priority to them rent for three months prior to 2nd September and rent payable since that date, and a declaration that the defendant was not entitled to proceed with his distress, the plaintiffs having offered and still offering payment of the three months' rent and the subsequent rent. They also claimed an

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injunction restraining the defendant, his servants, &c., from proceeding or further proceeding with the distress, and also damages.

On 27th September 1921 an interim injunction was granted *ex parte* by *Lukin* J., on the usual undertaking as to damages; and, subsequently, as the facts were not disputed, the parties, at the suggestion of his Honor, stated a special case raising the questions of law involved in the action.

On the hearing of the special case *Lukin* J. decided that the plaintiffs were not entitled to restrain the defendant from levying or proceeding with his distress, dissolved the interim injunction and entered judgment for the defendant in the action: *Purcell* v. *Public Curator of Queensland* (1).

From that decision the plaintiffs now appealed to the High Court.

Further material facts are set out in the judgments hereunder.

Stumm K.C. and *Walsh*, for the appellants. The joint effect of the *Companies Acts Amendment Act* 1909, sec. 18, the *Companies (Winding Up) Act of* 1892, sec. 21, and the *Insolvency Act*, secs. 143 and 145, is that a receiver appointed by debenture-holders who takes possession of assets pursuant to the terms of the debenture has a right to dispose of those assets in accordance with the terms of the debenture, subject to an obligation to make preferential payments. The right of a landlord to distrain for rent is taken away, but he is protected as to three months' rent by the obligation placed upon the debenture-holder to pay that rent. Sec. 18 expressly provides what claims have priority over a debenture; and a receiver making any priority payment is entitled to be recouped out of the assets (sec. 18 (3)). The section prescribes the method of administration to be followed, which is analogous to that under sec. 145 of the *Insolvency Act of* 1874.

[HIGGINS J. We must consider the respective rights of the parties in September 1921, when the Company was not in course of winding up.]

English cases afford little assistance, for the English statutes are different. [Counsel referred to *Preferential Payments in Bankruptcy Amendment Act* 1897 (60 Vict. c. 19), sec. 3; *Preferential*

(1) (1922) S.R. (Qd.), 25.

Payments in Bankruptcy Act 1888 (51 & 52 Vict. c. 62), sec. 1; *Companies (Consolidation) Act* 1908 (8 Edw. VII. c. 69), sec. 209; *In re Henry Pound, Son, & Hutchins* (1); *Woods* v. *Winskill* (2); *In re Barnby's Ltd.* (3); *In re Debenture-Holders' Actions* (4).] An affirmative statute giving a new right does not necessarily destroy an existing right created by another statute (*O'Flaherty* v. *M'Dowell* (5); *Craies on Statute Law*, 2nd ed., p. 317).

Douglas (with him *Salkeld*), for the respondent. Sec. 18 of the *Companies Acts Amendment Act* 1909 does not expressly interfere with a landlord's right to distrain for rent: the section merely gives a power to persons desiring to take advantage of its provisions. Subject, however, to performance of specified obligations, it extinguishes no right possessed by any other person against the debtor. Express language is necessary to take away common law rights (*Potter* v. *Minahan* (6); *Hocking* v. *Western Australian Bank* (7)). No intention to do so is shown by sec. 18; but rather it operates to restrict the rights of debenture-holders. It is doubtful whether sec. 145 of the *Insolvency Act* has any application; for, when possession is taken, the assets pass to the receiver subject to the equity of redemption (*Railton* v. *Wood* (8); *In re Browning* (9)). The rights of the parties must be determined as they existed before the resolution for winding up; the proceeding by a debenture-holder—not under order of a Court—of taking possession cannot have the effect of extinguishing the right of distress. [Counsel also referred to *Distress Replevin and Ejectment Act of* 1867 (Qd.) (31 Vict. No. 16), sec. 34; *In re Marriage, Neave & Co.* (10); *In re New City Constitutional Club Co.*; *Ex parte Pursell* (11); *Official Assignee of Guthrie* v. *Brown* (12).]

Cur. adv. vult.

Sept. 6.

The following written judgments were delivered:—

KNOX C.J. AND GAVAN DUFFY J. This is an appeal from a judgment of *Lukin* J., in which the question in issue is succinctly stated

(1) (1889) 42 Ch. D., 402, at p. 418.
(2) (1913) 2 Ch., 303.
(3) (1899) W.N., 103.
(4) (1900) W.N., 58.
(5) (1857) 6 H.L.C., 142.
(6) (1908) 7 C.L.R., 277.
(7) (1909) 9 C.L.R., 738.
(8) (1890) 15 A.C., 363.
(9) (1893) 19 V.L.R., 509; 15 A.L.T., 72.
(10) (1896) 2 Ch., 663.
(11) (1887) 34 Ch. D., 646.
(12) (1884) 3 N.Z.S.C.R., 152.

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as follows: "This is a special case stated under sec. 6 of the *Judicature Act*, and raises the question whether a receiver, who is appointed on behalf of the holders of a debenture of a company duly secured by a floating charge, and who has lawfully entered under such charge into the possession of the assets of such company on certain demised premises, is entitled to restrain the landlord of such premises from levying or proceeding with a distraint for overdue rent against the goods of such company, on paying three months' rent prior to the levying of such distress—an amount considerably less than that due."

His Honor then says:—"The relevant facts may be shortly stated:—The late T. J. Ryan was the landlord, and the Rockhampton Newspaper Co. Ltd. was the tenant of the premises in question. The rent reserved was £378 per annum. On 14th September 1921 there was overdue for rent £819. On 26th February 1918 the plaintiff advanced the Company £3,000, and received a debenture duly executed and duly registered as a floating charge on the undertaking and property of the Company. At the time of the taking possession and the levying of distraint hereafter mentioned, the Company had assets, apart from the possibly unrealizable asset of goodwill, approximating £9,500, as against £8,782, claims of creditors; so that apparently there was more than sufficient to pay the indebtedness, not only on this debenture and on all preferential claims, but the whole of the indebtedness of the Company to their creditors. On 2nd September 1921, default having been made by the Company, a receiver was, in accordance with the terms of such debenture, duly appointed by the debenture-holders; and such receiver entered into possession of all the assets on the demised premises, and caused an advertisement of a proposed sale of such assets for 21st September 1921. On 19th September 1921 defendant distrained for the sum of £850, an amount in excess of that actually due, £819; but no point is made, and no question turns, on the excessive amount claimed. At the date of distress there were, besides the moneys due under such debenture, for the rent mentioned and to other general creditors, sums of money due for wages and for local rates. . . . On 21st September 1921 the property was submitted to public auction, but as no bid was forthcoming the

receiver bought in the said property for the sum of £4,000. On the same day the plaintiffs tendered to the defendant, and the defendant refused to accept, the sum of £126 for three months' rent prior to 2nd September 1921, and " further " rent to 30th September 1921." The plaintiffs admitted that the defendant was entitled in priority to such three months' rent, with the ordinary remedies of an unsecured creditor against the Company for the balance; but claimed that he was not entitled to proceed with the distress. " Plaintiffs thereupon on the same day issued their writ, asking for a declaration of their rights and for an injunction to restrain the defendant from further proceeding on such distress, and on an *ex parte* application an interim injunction was obtained on the usual undertaking as to damages restraining the defendant from further proceeding with such distress until further order, with leave to the defendant to move on twenty-four hours' notice to dissolve such injunction. On 8th October the defendant gave notice of intention to move for a dissolution of such injunction, and the hearing of the motion was, by consent, adjourned from time to time. On 22nd November 1921 a resolution was duly passed authorizing the voluntary winding up of the Company." As no facts were in dispute and the defendant had been secured by the plaintiffs' undertaking as to damages, the parties, at the suggestion of *Lukin* J., stated this special case, raising the questions of law for the opinion of the Court.

Sec. 18 of the *Companies Acts Amendment Act of* 1909 is as follows:—" (1) Where either a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge, or possession is taken by or on behalf of those debenture-holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are under the provisions of the *Companies Acts*, 1863 to 1896, relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures. (2) The periods of time mentioned in the said provisions of the said Acts shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case

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may be. (3) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors." Sec. 21 of the *Companies (Winding-up) Act of* 1892 runs thus: "In the winding up of a company the same rules shall prevail and be observed for determining the respective priorities of creditors, and for determining what creditors are entitled to take or retain the property of the company as security, and for determining the validity of any such security, as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent." Sec. 143 of the *Insolvency Act of* 1874 runs thus: "The debts hereinafter mentioned shall be paid in priority to all other debts excepting rent as hereinafter provided Between themselves such debts shall rank equally and shall be paid in full unless the property of the insolvent is insufficient to meet them in which case they shall abate in equal proportions between themselves that is to say—(1) All local rates due from him at the date of the order of adjudication and having become due and payable within twelve months next before such date (2) All rates and assessments assessed on him up to the first day of January or first day of July next before the date of the order of adjudication and not exceeding in the whole one year's assessment (3) All wages or salary of any clerk servant labourer or workman in the employment of the insolvent not exceeding three months' wages or salary and not exceeding fifty pounds Provided that such wages or salary shall be claimed in respect of the three months next before the date of the order of adjudication Save as aforesaid all debts provable under the insolvency shall be paid *pari passu*." Sec. 145 of the *Insolvency Act of* 1874 is as follows: "No distress for rent shall be made or levied or proceeded in against the property of a debtor after an order of adjudication has been made against him or after a petition has been presented by him under Part III. of this Act but the landlord or person to whom the rent is payable shall be entitled to receive out of the estate in priority to all other creditors so much rent as shall be then due together with a sum in lieu of rent proportioned to the period (if any) that has elapsed between the last date at which rent became due, and the date of the order of adjudication but so that the whole sum so received shall not exceed the

amount of three months' rent But the landlord or person entitled to rent may prove for any surplus that may be due above such sum."

For the appellants it was argued that by reason of these enactments the taking possession under sec. 18 of the *Companies Acts Amendment Act of* 1909 of property of a company comprised in or subject to a charge puts the Company's landlord in a position analogous to that of a landlord after an order of adjudication has been made against his tenant, and that while he is entitled to payment of three months' rent, if so much is due, he is precluded from distraining for any further rent in arrear. The judgment under appeal and the argument before us proceeded on the hypothesis that sec. 21 of the *Companies* (*Winding-up*) *Act of* 1892 refers to sec. 145 as well as to sec. 143 of the *Insolvency Act of* 1874. We are disposed to agree with our brother *Higgins* in thinking that this assumption is unwarrantable ; but in any case sec. 18 does not adopt the scheme of distribution of assets appropriate to a winding up or an insolvency, nor has it any reference to the general rights of creditors *inter se* : its object is not to increase but to limit the rights of debenture-holders, and with that object it identifies certain debts as debts which would be paid as preferential debts in a winding up, and imposes on the person taking possession under that section the obligation of paying such debts, with a right to recoup himself out of assets available for payment of general creditors. In an insolvency the right to distress is taken away, and the right to prove for the amount due is substituted as part of the general scheme of distribution of assets ; but sec. 18 neither takes away any existing remedy against the debtor nor prescribes any new one ; it fixes a specific obligation on a person availing himself of the privileges which it confers. That obligation is the price paid for the privilege, not part of the general adjustment of the rights of parties.

In our opinion the appeal should be dismissed.

HIGGINS J. The material facts and dates are as follows :—

26th Feb. 1921, debenture creating floating charge on the undertaking of a newspaper company became due and was not paid.

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2nd Sept., receiver appointed by the debenture-holders took possession of the Company's assets. The receiver had power to carry on the business of the Company.

19th Sept., the landlord of the premises occupied by the Company distrained for rent due for more than two years—£819 due up to 31st August. The rent was £378 per annum.

21st Sept., the receiver tendered to the landlord £126 for rent due for three months before 2nd September and £31 10s. for one month's rent to 30th September. The tender was refused. The receiver, in pursuance of advertisement, put up for sale by auction the plant, machinery, stock-in-trade and book debts; but there was no bid.

27th Sept., the debenture-holders issued a writ against the landlord claiming a declaration that the defendant was entitled (under the *Companies Act Amendment Act of* 1909) to only three months' rent to 2nd September, and rent since that date, and that he was not entitled to proceed with the distress; and for an injunction. An *ex parte* order for injunction was made by *Lukin* J. "until further order."

22nd Nov., an extraordinary resolution was passed by the Company for voluntary winding up, and appointing a liquidator.

29th Dec., on special case stated in the action the Supreme Court (*Lukin* J.) decided that the plaintiffs were not entitled to the declaration sought, or (as on 27th September, the date of the writ) to the injunction; that the injunction should be dissolved; and the Court gave judgment for the defendant with costs.

This appeal is from the whole judgment.

The question therefore is, was the defendant at the date of the writ, 27th September, entitled to proceed with his distress? It is clear that he could proceed with the distress if the receiver had not been appointed and taken possession of the property. Did the right of the landlord to distress cease on the appointment of the receiver, and on the receiver taking possession?

The nature of a floating charge is now well established; it puts the holders of the charge "in a position superior to that of the

general creditors, who can touch nothing until they are paid" (*In re Panama, New Zealand and Australian Royal Mail Co.* (1)). It is an equitable charge on the assets for the time being of a going concern; it attaches to the subject charged in the varying condition in which it happens to be from time to time (per Lord *Macnaghten* in *Governments Stock and other Securities Investment Co.* v. *Manila Railway Co.* (2)). It does not in itself affect the rights of secured creditors, or the common law right of the landlord to distrain for rent due. The question is, does any Queensland statute affect the landlord's right?

Under sec. 164 of the Queensland *Companies Act* of 1863 (following the English *Companies Act* of 1862, sec. 163) any distress put in force when a company is being wound up by the Court is "void to all intents"; but in this case there was no winding up, either by the Court or voluntary, at the date of the writ. Where, then, is any prohibition of this distress to be found? I am unable to find it in the sections to which learned counsel for the appellants has referred us; and I have to assume that if there were any other sections favouring his argument counsel would not have omitted to mention them.

Under the Queensland *Companies Acts Amendment Act of* 1909 (sec. 18 (1)), the receiver having been appointed and having taken possession, and the company not being in course of being wound up, "the debts which in every winding up are *under the provisions of the Companies Acts*, 1863 *to* 1896, *relating to preferential payments* to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the receiver . . . in priority to any claim for principal or interest in respect of the debentures"; and (sub-sec. 3) "any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors." There is nothing in this section as to landlords or rent; but we have to find what are the debts which under the *Companies Acts* 1863 *to* 1896 are to be paid in priority to all other debts in every winding up.

Now, looking at sec. 21 of the *Companies (Winding-Up) Act of* 1892 we find: "In the winding up of a company the same rules shall prevail"

(1) (1870) L.R. 5 Ch., 318, at p. 323. (2) (1897) A.C., 81, at p. 86.

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(*a*) " for determining the respective priorities of creditors,"

(*b*) " and for determining what creditors are entitled to take or retain the property of the company as security,"

(*c*) " and for determining the validity of any such security, as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent." For priorities of creditors under the *Companies Acts*, we are therefore referred (*a*) to the *Insolvency Acts*. We need not consider (*b*) or (*c*), for a landlord with a right of distress is not a secured creditor (*In re Coal Consumers Association* (1), and other cases).

Then, looking at the *Insolvency Act*, the only debts which are given priority by sec. 143 are certain local rates, " rates and assessments," wages or salaries (all within limits of time or amount). Rent is not one of the debts " which . . . are under the provisions of the *Companies Acts*, 1863 *to* 1896, relating to preferential payments to be paid in priority to all other debts." Whatever privileges the landlord has, they do not come to him under the provisions of the *Companies Acts*, but by the common law. It is true that the priority given to rates and wages is not given over rent—the priority is given over all other debts " *excepting* rent as hereinafter provided." That is to say, sec. 143 of the *Insolvency Act* gives no priority to rates and wages over " rent as hereinafter provided," but it provides that " save as aforesaid all debts provable under the insolvency shall be paid *pari passu*," and these words include rent *so far as provable*—that is, any deficiency in the rent, which is not satisfied by the exercise of the landlord's special power of distress.

The point is that rent is not given any priority by sec. 143 of the *Insolvency Act*, over other debts ; it is not in the same category as rates and wages ; it is not a debt " which *under the provisions of the Companies Acts* is to be paid in priority to all other debts." But there is not, so far, the slightest indication of any intention to interfere with the landlord's right of distress at common law. He stands, as to his right of distress, aloof from the other creditors, in a position similar to that of a mortgagee who holds a specific security.

Sec. 145 of the *Insolvency Act*, however, does interfere with the landlord's right of distress where there has been an adjudication

(1) (1876) 4 Ch. D., 625, at p. 629.

of insolvency (or presentation of a petition for voluntary sequestration). It takes away his right of distress, substituting therefore a special right to three months' rent. But sec. 145 does not contain rules "for determining the respective priorities of creditors"; and therefore it is not, in my opinion, imported into the case of the winding up of a company, or (under sec. 18 of the *Companies Acts Amendment Act of* 1909) into the case of the appointment of a receiver for debenture-holders, where the company is not in course of being wound up. In short, sec. 145 is not a section for "determining the respective priorities of creditors" within the meaning of sec. 21 of the Winding-up Act of 1892, and therefore is not a provision of the sort contemplated by sec. 18 of the *Companies Acts Amendment Act of* 1909—it is not a provision of the *Companies Acts* making rent payable in priority to all other debts. Sec. 18 does not import into its provisions all the sections of the *Companies Acts*, or of the *Insolvency Act*, but imports only the sections for determining the respective priorities of creditors—that is to say, for the present purpose, sec. 143. So far as sec. 143 is concerned, all other debts than rates and wages, and including rent so far as provable, are to be paid *pari passu*. We have no right to give to sec. 18 a construction which would impair the common law right of a landlord to distress if a consistent meaning can be given to the section by limiting it to sec. 143 as the only section "relating to preferential payments," and giving a right to priority.

In my opinion, the decision of *Lukin* J. was right, and the appeal ought to be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Boyce & Hunter.*

Solicitors for the respondents, *R. J. Barnett*, Official Solicitor to the Public Curator.

J. L. W.