

MULOCK, C.J.Ex.

DECEMBER 14TH, 1916.

MUNDEY v. REID.

Distress — Rent — Goods of Sub-tenant — Excessive Distress — Sale of Goods Distrained—Amount Realised more than Sufficient to Pay Rent—Finding of Fact of Trial Judge—Distress for Taxes—Payment by Head Tenant—Right to Distrain Goods of Sub-tenant—Right of Sub-tenant to Surplus Proceeds of Sale —Leave to Amend—Refusal.

Action for excessive distress.

The defendant, the lessee of a shop, sublet it to one Vise, who covenanted to pay rent and taxes. Vise sublet to the plaintiff, who covenanted with Vise to pay rent and taxes. In each lease the covenants were in the statutory form.

The plaintiff made default in payment of taxes; on the 16th March, 1915, there was owing for taxes \$1,093.98, for which the municipality distrained on the plaintiff's goods in the demised premises. The defendant on the 16th March, 1915, paid these taxes.

There was owing to the defendant for arrears of rent \$500; and on the 17th March, 1915, the defendant distrained for \$1,593.-98, being the amount of the taxes paid by him and the \$500. The goods seized were sold, but realised only the gross sum of \$855.05.

The action was tried without a jury at Toronto.

L. Davis, for the plaintiff.

H. C. Macdonald, for the defendant.

MULOCK, C.J.Ex., set out the facts in a written judgment, and said that from the sum of \$855.05 the bailiff deducted \$95.46 for his charges, and there remained \$759.59 applicable towards payment of whatever the defendant was entitled to distrain for. It was admitted that he was entitled to distrain for \$500 rent, his counsel abandoning any right to distrain for taxes. The balance, \$259.59, was paid to the defendant by his bailiff.

In his statement of claim the plaintiff alleged that the distress for taxes was wholly illegal and unjustifiable, and that the defendant distrained and sold goods worth \$2,000 to satisfy arrears of rent of only \$500.

The plaintiff seemed to rest his whole case on the charge of excessive distress. That is a question of fact. There is much