

REMINGTON V. LINTHICUM ET AL.

{5 Cranch, C. C. 345.}¹

Circuit Court, District of Columbia. Nov. Term, 1837.

REPLEVIN—RETURN OF PROPERTY—DISTRESS FOR RENT—EXECUTION.

1. If the marshal takes the goods of a tenant in execution, and before he removes them, the landlord distrains them for rent; and the marshal then removes them from the premises, without paying a year's rent to the landlord who then replevies them, the court will, on motion of the defendant, at the return of the writ, order the goods to be returned to the defendant, upon giving a sufficient bond to return them, &c.
2. The return, in such case, is a matter of course, unless the court should be satisfied that the defendant obtained possession of the property by force or fraud; or that the possession being first in the plaintiff, was got or retained by the defendant, without proper authority or right derived from the plaintiff.

Replevin, returnable at the present term.

Mr. Marbury, for defendants, moved for a return of the property upon giving the usual retorno habendo bond.

The circumstances of the case were these: The defendant, Hunter, the marshal, levied an execution in favor of Otho M. Linthicum, the other defendant, upon the goods of one Offutt, who was tenant, and owed rent to the plaintiff, Remington. After the goods were seized in execution by the marshal, the plaintiff, William Remington, the landlord, distrained the same goods for his rent. The marshal, without paying the rent, removed the goods to the house of the defendant, Linthicum, where Remington, the plaintiff in the present suit, replevied them. At the return of the writ, Mr. Marbury moved for a return of the property, upon giving the usual bond; and contended that by the levy of the goods under the fieri facials, they were in the

custody of the law, and the plaintiff could not lawfully distrain or replevy them (Comyn, Landl. & Ten. 386, 387); his only remedy being an action or a motion against the marshal for removing the goods, without paying one year's rent (Id. 395. 396).

But the question now is, not whether the marshal had a right to levy the execution upon the goods of the tenant, and to remove them without paying the rent, but whether the defendant has not the common right to a return of the property upon giving the usual bond. The act of Maryland of 1785 (chapter 80, § 14) authorizes the court to refuse a return only in cases where the defendant has obtained the possession by fraud or force; or where the possession, being first in the plaintiff, was got or retained by the defendant, without proper authority or right derived from the plaintiff. In the present case, the defendant did not obtain the possession by force or fraud, and the plaintiff was not first in possession. The court, therefore, is not, by that statute, authorized to refuse a return of the property upon the usual bond. Before the statute of 8 Anne, c. 14, the landlord could not distrain goods taken in execution, because they were in custodia legis; and that statute does not give him any such right; it only forbids the sheriff to remove the goods before the rent is paid; and authorizes him to levy the money paid for rent, as well as the execution money.

Messrs. Brent & Brent, contra, cited *Arnitt v. Garnett*, 3 Barn. & Aid. 440, and contended that the landlord is not confined to his action on the case against the marshal for removing the goods without paying the rent. He had a right to distrain them before they were removed. The statute expressly declares that the goods shall not be liable to be taken by virtue of an execution, on any pretence what 529 soever, unless the party, at whose suit the execution is sued out, shall pay the rent before removal of the goods

from the premises. The goods therefore could not be taken by the marshal, and were not in custodia legis, when the plaintiff levied his distress. By that distress he had a qualified property in the goods, which will maintain his replevin. *Henchett v. Kimpson*, 2 Wils. 140; Comyn, Landl. & Ten. 396.

THE COURT (THRUSTON, Circuit Judge, absent), ordered a return of the property upon the usual bond being given.

¹ [Reported by Hon. William Cranch, Chief Judge.]

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