

WALSH v. LONSDALE.

[1882 W. 1127.]

Executory Agreement for Lease—Right of Distress—Minimum Rent—Rent payable in advance.

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FRY, J.

March 20.

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March 29.

The Defendant on the 29th of May, 1879, agreed to grant and the Plaintiff to accept a lease of a mill for seven years at the rent of 30s. a year for each loom run, the Plaintiff not to run less than 540 looms. The lease to contain such stipulations as were inserted in a certain lease of the 1st of May, which was a lease at a fixed rent made payable in advance, and contained a stipulation that there should at all times be payable in advance on demand one whole year's rent in addition to the proportion, if any, of the yearly rent due and unpaid for the period previous to such demand. The Plaintiff was let into possession and paid rent quarterly, not in advance, down to the 1st of January, 1882, inclusive, having run in 1881 560 looms. In March, 1882, the Defendant demanded payment of £1005 14s. (£840 as one whole year's rent for 560 looms at 30s., and £165 14s. as the proportionate part of the rent from the 1st of January last), and put in a distress. The Plaintiff thereupon commenced his action for damages for illegal distress, for an injunction, and for specific performance, and moved for an injunction. *Fry, J.*, granted the injunction on the terms of the Plaintiff paying the £1005 14s. into Court. The Plaintiff appealed.

Held, that since the *Judicature Acts* the rule no longer holds that a person occupying under an executory agreement for a lease is only made tenant from year to year at law by the payment of rent, but that he is to be treated in every Court as holding on the terms of the agreement:—

Held, therefore, that the Plaintiff holding under the agreement was subject to the same right of distress as if a lease had been granted, and that if under the terms of the lease a year's rent would have been payable in advance on demand a distress for that was lawful.

Seemle, that such lease ought to reserve a minimum rent of £810 (30s. a piece on 540 looms), and that the stipulation in the lease of the 1st of May as to payment in advance would be applicable to such minimum rent though not to the whole rent. And the Defendant being willing to submit to the injunction on having £810 paid into Court, order varied accordingly, the Court being inclined to the view that there was a right of distress for that amount though the time had not arrived for finally determining the question.

BY an agreement dated the 29th of May, 1879, between the Plaintiff and Defendant it was agreed that the Defendant and all necessary parties should grant and the Plaintiff accept a lease of a weaving-shed known as *Providence Mill* with the engine-house and other buildings belonging thereto (except cottages) and

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the steam-engine and other machinery thereon for a term of seven years from the time when the shed should be put in working order by the Defendant; the lessor at his own expense to find sufficient steam power for driving the looms and other machinery. "The rent to be £2 10s. per loom per annum for so many looms as the lessee shall run. The lessee shall not run less than 300 looms during the said first year, and he shall in every year afterwards run not less than 540 looms. The lessee to have the power whenever he shall think fit to find steam and steam power for running the said weaving shed machinery, looms, and premises, in which case the rent shall be reduced to £1 10s. per loom per annum. Until the lessee shall find steam and steam power the engine-house, boiler-house, mechanics' shop, stable, and yard adjoining thereto shall be excluded from the demise." There was a provision for the lessee to pay the premiums for insurance against fire and the following clause: "The lease to be prepared by the solicitor to the lessor and approved by the solicitor to the lessee, and to contain such covenants, provisoes, powers, and conditions as are usually inserted in leases of a similar nature, and particularly those inserted in a lease of the *Newfield Mills, Darwen*, dated the 1st of May instant, made between *T. A. Aspden* of the one part, and *Robert Bradley* of the other part, or such of them as can be made applicable to the tenancy hereby agreed to be created."

The lease of the *Newfield Mills* referred to in the above agreement was a lease for a term of four years from the 1st of May, 1879, "Yielding and paying therefor yearly in advance on the day of the date of these presents, and on the 1st day of May in every year during the continuance of the said term, unto the said *T. A. Aspden*, his executors, administrators, and assigns, the clear yearly rent of £876: Provided nevertheless, and it is hereby expressly agreed and declared, that there shall at all times during the continuance of this demise (except in the last year of the said term) be due and payable in advance on demand one whole year's rent of the premises hereby demised in addition to the proportion (if any) of the said yearly rent due and unpaid for the period previous to such demand."

The Plaintiff was let into possession on the 1st of July, 1879,

and subsequently gave notice to the Defendant that he would provide his own steam and steam power from the 1st of July, 1880, which he accordingly did. The Plaintiff paid rent to a mortgagee of the Defendant quarterly, and not in advance, down to the 1st of January, 1882. In the year 1881 the Plaintiff worked 560 looms.

On the 13th of March, 1882, the Defendant served the Plaintiff with the following notice:—

“I hereby demand immediate payment of £1013 14s., being as to £840 part thereof one whole year’s rent in advance from this day of the mill and premises you now occupy as my tenant, and as to £165 14s. part thereof, the balance of the rent of such mill and premises from the 1st day of January last up to this day, and as to £8, the remainder thereof, for insurance paid by me to the *Imperial Fire Insurance Company* for insuring the said mill and premises.”

On the 15th of March the Defendant put in a distress for rent.

The Plaintiff thereupon commenced this action claiming damages for improperly distraining, an injunction to restrain the Defendant from selling under the distress and from continuing in possession, and specific performance of the agreement for a lease. The Plaintiff moved for an injunction. The motion was heard before Mr. Justice *Fry* on the 20th of March, 1882.

Cozens-Hardy, Q.C., and *Farwell*, for the Plaintiff:—

The Plaintiff paid his rent quarterly to the Defendant’s mortgagee till October, 1880; he never paid rent in advance to him. The payment to the mortgagee created a new tenancy, and he only consented to the Plaintiff’s paying the rent to the mortgagor in the same way. If the Plaintiff pays a whole year’s rent to the mortgagor he will still be liable to the mortgagee. But the distress cannot in any view be proper. There is nothing but an agreement, no lease has been executed. The agreement is only evidence of the terms of a legal tenancy from year to year. To justify a distress there must be a legal tenancy and a fixed rent. Here the rent is not fixed, it is at the rate of so much per loom

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run by the tenant. The provisions of the other lease which is referred to are not in this respect applicable to an uncertain rent of this nature. At any rate they cannot apply until the end of the year, when it will be known how many looms have been run. And, on any construction, a whole year's rent in advance cannot be demanded at any broken period of the year. There is no rent in arrear, and the payments of rent already made afford evidence of a tenancy under which rent is payable quarterly.

Glasse, Q.C., and Levett, for the Defendant:—

If the rent can be rendered certain it will support a distress. All the authorities shew that this is so. The lease was granted after the date of the mortgage. The Plaintiff was let in as tenant to the mortgagor. Payment of the rent to the mortgagee was not an attornment to him: *Trent v. Hunt* (1); *Woodfall's Landlord and Tenant* (2). When a distress has been once issued the Court will not restrain further proceedings under it except on the terms of payment of the rent into Court. In *Shaw v. Earl of Jersey* (3) the distress had not been levied. Even where an excessive distress has been levied the Court will not turn the landlord out of possession, but will impose terms on him. An action can be brought for an excessive distress. If there is a tenancy there is a right to distrain. In the present case there is a sufficient constitution of a tenancy; payment of rent for a year is enough to do that. The year's rent which we claim is the minimum rent, independent of the number of looms run. That is sufficiently certain to support a distress. Under s. 25 (sub-sect. 5) of the *Judicature Act, 1873*, a mortgagor in possession is entitled to sue for rent in his own name.

Cozens-Hardy, in reply.

FRY, J.:—

The first question in controversy between the parties is this. The lease of the 1st of May, 1879, referred to in the agreement, contained a stipulation to the effect that the rent should be pay-

(1) 9 Ex. 14.

(2) 11th Ed. p. 387.

(3) 4 C. P. D. 120.

able in advance, and this further stipulation, that on any given day the lessor might require the lessee to pay a year's rent and also the arrears of rent which were then due. So that the rent was made payable a year in advance *de anno in annum*, and also made payable on demand *de die in diem*. The question is whether that clause is to be introduced with regard to the rent payable under the agreement of the 29th of May, 1879. The Plaintiff says that it cannot be applied to this rent, which cannot be ascertained at the beginning of the year, the Defendant contends that it can be applied to the minimum rent. [His Lordship then adverted to another question, viz., whether the draft of a lease making a rent of £840 payable in advance had not been so approved by the Plaintiff as to make it binding on him.]

Both these questions are of a very serious description, and upon both of them the present inclination of my mind is in favour of the Defendant rather than the Plaintiff. In that state of circumstances I think that I ought either to refuse this motion or to grant it only on the terms of the Plaintiff paying the whole amount claimed into Court, and as the Defendant does not object to an injunction on those terms it will be granted accordingly.

An order was accordingly made directing that on payment by the Plaintiff into Court of £1005 14s. (the £8 for insurance having been paid) the Defendant should withdraw from possession under the distress.

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The Plaintiff appealed. The appeal was heard on the 29th of March, 1882.

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Cozens-Hardy, Q.C., *Henn Collins*, and *Farwell*, for the Plaintiff:—

We are in possession under an agreement which does not operate as a present demise. Our position at law therefore is that of tenant from year to year. Now to justify a distress there must be a legal tenancy and rent in arrear. There can be no such thing as an equitable distress. Distress is a legal remedy, and here the payment of rent is evidence of a legal tenancy with a rent not payable by anticipation. The provision as to rent being

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paid beforehand is not "applicable to the tenancy hereby created," since the rent is at so much per loom run, and it cannot be told till the end of the year what is the number of looms run.

[COTTON, L.J.:—Ought not the lease to reserve a minimum rent as there is a covenant to run not less than a certain number of looms? There would be no absurdity in making a minimum rent payable in advance.]

It is not so payable at law, and distress cannot arise from a mere contract.

[JESSEL, M.R.:—A tenant holding under an agreement for a lease of which specific performance would be decreed, stands in the same position as to liability as if the lease had been executed. He is not since the *Judicature Act* a tenant from year to year, he holds under the agreement, and every branch of the Court must now give him the same rights.]

Glasse, Q.C., and *Levett*, *contra*, were asked whether they wished to contend that the Defendant was entitled to have more than £810 (30s. on 540 looms) brought into Court, and having replied that they should be content with that security, were not called upon.

JESSEL, M.R.:—

It is not necessary on the present occasion to decide finally what the rights of the parties are. If the Court sees that there is a fair question to be decided it will take security so that the party who ultimately succeeds may be in the right position. The question is one of some nicety. There is an agreement for a lease under which possession has been given. Now since the *Judicature Act* the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by

specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year. He has a right to say, "I have a lease in equity, and you can only re-enter if I have committed such a breach of covenant as would if a lease had been granted have entitled you to re-enter according to the terms of a proper proviso for re-entry." That being so, it appears to me that being a lessee in equity he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed.

The next question is, how ought the lease to be drawn? And that is a question of some nicety. I do not wish now finally to decide it, and on an application of this kind it is not necessary to do so, but I think the Court is bound to say what its present opinion is, because that is material on the question of what ought to be done until the trial. The whole difficulty arises from a single clause. Instead of taking the trouble to state in detail what covenants the lease was to contain they have adopted this short form:—[His Lordship read the clause which is given verbatim above.]

When we look at the lease of the *Newfield Mills* we find that it is a lease at a rent certain payable beforehand, and the question is how far that provision can be made applicable to the present very peculiar agreement. That agreement provides that the lessor at his own expense is to find steam power for driving and running the machinery, and that the rent is to be £2 10s. for every loom run, but for the first year the lessee is not to run less than 300, and afterwards not less than 540 looms. Then there is a proviso that the lessee is to have the right, whenever he shall think fit, to find the steam power for himself, and in that case his rent is to be 30s. per loom. There is a further proviso that until the lessee shall find the steam power the engine-house, boiler-house, mechanics' shop, stables, and yard adjoining thereto shall be excluded from the demise. As I read that it means that when the lessee once elects to provide his own steam power, the excepted particulars, are included in the demise, and then the lessor is no

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longer bound to find the steam power because he has demised the very thing that produces the steam power, and the lessee is now the lessee of the engine-house, and the rest, and has to find steam power for himself. The lessee has exercised the option to find his own steam power, and the result is that now he is only liable to pay 30s. per loom.

Now the lessee agrees to run not less than 540 looms, and the next question is, whether in drawing the lease a dead or minimum rent ought to be reserved for 540 looms, or is it to be left on covenant. My present opinion is that there ought to be a dead rent. There is no longer any obligation on the lessor to find the steam power; and it appears to me, therefore, that it would be a right thing to reserve in the lease a dead rent of £810, being at the rate of 30s. a loom for 540 looms. If that is so, the stipulation as to paying rent beforehand can apply to that £810 a year, and the covenants and provisions in the lease of the *Newfield Mills, Darwen*, could be made applicable to this minimum rent. Therefore it is my present opinion, though I do not give it as a final opinion, that the rent is payable beforehand to the extent of £810.

The result, therefore, will be to vary the order of the Court below by making the sum to be paid into Court £810 instead of £1005 14s. The Plaintiff will pay the costs of the appeal.

COTTON, L.J.:—

I am of the same opinion. The question as to whether the Defendant was right in putting in this distress must depend upon questions which have to be decided at the hearing of the cause, and the only question we have now to consider is what is right to be done between the parties for the purpose of keeping things *in statu quo*, and preserving their rights until the questions between them can be decided.

This landlord has put in a distress. He is right if the lease under which the tenant must be taken to be holding this land or premises would give him rent beforehand. This is not the time for finally deciding whether he is entitled to any and to what rent payable beforehand, but the question before us is whether we are now at once to deprive the landlord of any security which he has

in his hands for the payment of his rent? In my opinion we ought not. Of course, before allowing the landlord to retain the security given by the distress we must be satisfied that there is a *primâ facie* case in his favour, and in my opinion there is. It would be wrong for us absolutely to decide now how this lease should be framed, for there are many matters which would require consideration, one clause may depend on another, and the question how one clause is to be dealt with may affect the other provisions in the lease. But it is my present opinion that there ought to be reserved as dead-rent a rent which will correspond to the minimum number of looms which the Plaintiff is to run in any particular year, and after the first year it is to be always 540.

If, then, there is to be a dead-rent, the provision in the lease of the 1st of May that the rent thereby reserved shall be beforehand rent can be made applicable to the present tenancy by making it apply to the dead or fixed rent of £810 a year, leaving the payment of the remaining sum, if any, which is to be paid by the tenant to be enforced by the landlord under the covenants when it is ascertained how many looms the tenant has run.

In my opinion, therefore, there is at least such a *primâ facie* case in favour of the Defendant that we ought not to deprive him of the security which the distress gives him without the Plaintiff paying into Court that which will be a sufficient security for the Defendant if he is right in his contention, reducing the amount to £810 as the Master of the Rolls has already said.

LINDLEY, L.J.:—

I also think that the rights of the parties in this case turn upon the lease as it ought to be framed in pursuance of the contract into which these parties have entered. I do not agree with the contention of Mr. *Cozens-Hardy* and Mr. *Collins* that, according to the true construction of the agreement, the whole of the rent would depend simply upon covenant, and be an unascertained sum till the end of the year; in other words I think, as at present advised, that the lease should be so worded that there would be a minimum rent reserved. If so the provisions in the lease of the 1st of May which relate to the payment of rent in advance and the power of distress accordingly would be let in so far as regards

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the minimum rent. I think Mr. Justice *Fry* has inserted too large a sum in his order, because he has treated the whole rent as payable in advance. I do not think that correct; but to the extent of the minimum rent, which comes to £810, it appears to me we ought not to compel the landlord to withdraw unless on the terms of the tenant paying that money into Court, and of course the proper form of lease will be settled hereafter if the action goes on in the regular course.

Solicitors for Plaintiff: *Pritchard, Englefield, & Co.*

Solicitors for Defendant: *Bower & Cotton.*

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TUCKER v. LINGER.

[1876 T. 41.]

Agricultural Tenant—Waste—Selling Flints—Reservation of Mines and Minerals—Custom of Country—Repairs—Finding Materials—Damage.

By an agreement for a lease the tenant agreed to cultivate the land according to the most approved system of husbandry and to use it for agricultural purposes only, and to commit no waste. The lessor reserved "all mines and minerals, sand, quarries of stone, brickearth, and gravel pits." The farm was in a district where large numbers of flints came to the surface in the ordinary course of ploughing, and it was necessary to remove them in order to cultivate the land effectually. The tenant removed the flints which came to the surface in the ordinary course of agricultural operations and sold them, and there was evidence that it was the custom of the country for tenants to do so, when not prohibited by their leases:—

Held, by *Kay, J.*, and by the Court of Appeal, that such a custom was reasonable and good.

In ascertaining the nature of an agricultural custom regard is to be had not so much to what the witnesses state to be their opinion as to the extent of the custom, as to what they prove to have been publicly done throughout the district.

Held, further, that the reservation of minerals in the agreement did not indicate an intention to exclude the custom so as to deprive the tenant of this right.

The tenant agreed to keep the buildings in good repair. The landlord, by a subsequent clause, agreed, on notice from the tenant, to find materials for repairs, the tenant doing the drawing and labour. A barn requiring repair the tenant gave the landlord notice to find materials, which he failed to do for more than the allowed period. The barn remained out of repair, in con-