THOMAS v. SYLVESTER AND OTHERS. (1873) L.R. 8 Q.B. 368

[QUEEN'S BENCH DIVISION]

BLACKBURN, QUAIN and ARCHIBALD, JJ.

1873 June 3.

Action — Debt — Rent-charge in Fee — Real Action — 3 & 4 Wm, 4, c. 27, s. 36.

Since the abolition of real actions by 3 & 4 Wm. 4, c. 27, s. 36, an action of debt will lie for the recovery of a rent-charge in fee.

Declaration, that the plaintiff, being seised in fee of certain messuages, granted them by indenture to C., subject to the payment to the plaintiff, his heirs and assigns, of a rent-change, and C. covenanted to pay the rent change; that afterwards all the estate of C. vested in the defendant, who did not pay the rent-change:-

Held, on demurrer, that the declaration was good: for that the reason why an action of debt would not formerly lie for a rent-change in fee was, that there was a higher remedy by real action; but that higher remedy having been abolished by 3 & 4 Wm. 4, c. 27, s. 36, the present remedy by action of debt was maintainable.

DECLARATION: That the plaintiff, being seised in fee of certain messuages and hereditaments situate, &c., by indenture bearing date the 15th of January, 1870, made by and between the plaintiff of the one part, and one David Cotter of the other part, granted and conveyed the messuages and hereditaments (subject to and charged and chargeable with the payment for ever to the plaintiff, his heirs and assigns, of a certain yearly rent-charge of 2*l.* 8*s.* 6*d.* payable out of each of the said messuages and hereditaments on the 24th of June and the 21st of December in each year), unto and to the use of Cotter, his heirs and assigns; and Cotter in the indenture covenanted for himself, his heirs, executors, and administrators, that he, his heirs, executors, administrators, or assigns, would pay unto the plaintiff, his heirs or assigns, the yearly rent-charge on the days aforesaid. That afterwards all the estate of Cotter in the premises became vested in the defendants; and while the estate was so vested in the defendants, to wit, on the 24th of June, 1871, the rent-charge accrued due and became and was payable from the defendants to the plaintiff; yet the defendants did not pay the same, and the same remains wholly due and unpaid.

Demurrer and joinder in demurrer.

H. T. Cole, Q.C., in support of the demurrer, argued that the

covenant was personal, and did not run with the land. It is unnecessary to state the argument on this point owing to the view the Court took of the case.

C. Bowen, contrà. The question is, whether an action of debt will lie for a rent-charge in fee created by deed. The point was raised, but not decided in *Varley v. Leigh*. (1) In that case the defendant was the grantee of a piece of land charged with the payment of a chief rent to the overseers of the poor; the conveyance was made pursuant to certain Acts of Parliament, and contained a covenant by the defendant to pay the chief rent. The Court of Exchequer gave judgment for the plaintiff in an action of debt, on the ground that the defendant was bound by his covenant to pay the chief rent; it was further argued that debt lay, inasmuch as 3 & 4 Wm. 4, c. 27, s. 36, had abolished real actions, and Pollock, C.B., said, "I should be prepared to adopt, if necessary, the reason that, now there is no remedy by action real for the recovery of a rent in fee, there ought to be a remedy by action of debt." Rolfe, B., did not assent to this; but Erle, C.J., in *Dodds v. Thompson* (2) appears to have held the same view as Pollock, C.B. Formerly the law would not suffer a real injury to be remedied by an action that was merely personal: 3 Bl. Com. 232. In *Webb v. Jiggs* (3) it was admitted that at common law an action of debt would not lie for a rent or annuity in fee, in tail, or for life while it continued a freehold interest: for this, Com. Dig. Debt (A. 6, 7), id. (B.) and 1 Rol. Abr. 594, G., pl. 1, were cited. To recover a freehold rent a person entitled thereto must have availed himself of his real action; but when the freehold ceased to exist, for instance, where a life estate terminated, any arrears might be recovered by an action of debt. Thus "a man makes a lease for life rendering rent; the rent is arrear; the lessor dies; the executors during, the life of the tenant for life shall not have an action of debt, but after the estate for life determined the action shall be maintainable": *Ognel's Case*. (4) This proposition is supported by *Sharp's Case* cited in *Ognel's Case*. (5) The facts in that case were, that a rent-charge was

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(1) 2 Ex. 446; 17 L. J. (Ex.) 289.

(2) Law Rep. 1 C. P., at p. 137.

(3) 4 M. & S. 113.

(4) 4 Co. Rep. 49 b.

(5) 4 Co. Rep., at p. 51 a.

granted by deed to a feme sole for life; the rent was arrear; the woman took Sharp to husband; the rent was again arrear; the wife died. Sharp brought an action of debt against the defendant heir of the grantor (tenant of the land charged) for all the arrearages as well before as after marriage, and it was resolved that for the arrearages incurred before the marriage the husband had no remedy by the common law; but for the arrears incurred during the marriage he might have an action of debt at the common law. These authorities shew that where the remedy by real action was no longer enforceable, that is, when the freehold interest ceased, the personal remedy, that is, an action of debt, was maintainable. By analogy to this rule of the common law, now that real actions are abolished, an action of debt is maintainable even when the freehold interest exists.

[BLACKBURN, J. In *Ognel's Case* (1) a reference is made to Fitzherbert, Natura Brevium, p. 121. In note (d) to that passage *Sir. W. Leving's Case* is mentioned, 26 Ed. 3, 64, and given as follows: "A. grants a rent to B. for life out of the manor of C., and afterwards enfeoffs D. of the manor, who takes G. to husband, and then B. dies, and his executors bring debt against G., and adjudged 1. That for all arrears incurred after the coverture debt lies against the husband, or if he were dead against his executors; but - 2. For all arrears incurred before the coverture the action shall be brought against the husband and wife. See 10 Hen. 6, 11, 12, accordant."]

H. T. Cole, Q.C., in reply. In *Sir W. Leving's Case* and also in *Ognel's Case* (2), and in the other cases cited in that

case, the freehold estate had ceased to exist; in the present case the freehold estate is not destroyed. Debt will not lie for a rent-charge in fee; if there is any remedy at all against the assignee of the grantor it is by distress.

BLACKBURN, J. I think the only question which it is necessary to decide is, whether the plaintiff, the grantee of the rent-charge, is entitled to compel the terre-tenants to pay it by a personal action. I may remark that the indenture may be regarded as containing a grant in fee of a rent-charge under the Statute of Uses,

(1) 4 Co. Rep. at p. 51 a. See post, p. 372, n. (1).

(2) 4 Co. Rep. 48, b.

and that a rent having been duly created, debt will lie. Under the old law the remedy to recover a freehold rent was by real action, and as long as the freehold continued debt could not be maintained; but when the freehold estate came to an end, then, inasmuch as a real action could no longer be brought, debt would lie at the suit of the person entitled to the rent-charge. Thus where a rent was granted for life the only remedy was by real action, but when the life had dropped debt was maintainable. *Leving's Case*, cited in a note to Fitzherbert, Natura Brevium, p. 121, is a distinct authority that where a rent-charge for life had been created, issuing out of a manor which was afterwards conveyed to an assignee, and the rent-charge became in arrear, an action of debt would lie against the assignee of the manor upon the expiration of the life estate, when, according to the old law, a real action could no longer be brought to recover the arrears. *Leving's Case* is important, as shewing that the action of debt is maintainable against an assignee, as it is precisely in point in the present case, where the plaintiff seeks to recover the rent-charge against the assignees of the land. If the present case had occurred before the passing of 3 & 4 Wm. 4, c. 27, the rent-charge being in fee, the plaintiff would have been driven to a real action to recover it. But the legislature having by that Act abolished real actions, we have to consider the question, whether we must not apply the principle of the common law to the present case. The principle was, that, when the estate for life had terminated, an action of debt for arrearages would lie. It seems to me to follow, upon a similar principle, that when the real action has been abolished the grantee of a rent-charge in fee may maintain an action of debt against the terre-tenant; and this was the opinion of Pollock, C.B., in *Varley v. Leigh* (1), though that opinion was not necessary to the decision, and Rolfe, B., did not concur. The authorities brought before us, however, were not cited. I think that real actions being now abolished, debt will lie; and that the authorities shew that it will lie against the assignee of the land as well as against the original grantor.

This is not a question of a covenant running with the land, but

(1) 2 Ex. 446; 17 L. J. (Ex.) 289.

whether, where there is a rent in fee issuing out of land, the owner of the rent may not sue the terre-tenant in debt, although the terre-tenant was not the original grantor. It seems to me that, according to authority, reason, and justice, he may maintain the action.

QUAIN, J. I am of the same opinion. The distinction in the old books appears to be this: If a rent were granted for years debt would lie, but if it were granted in tail, or for life, debt would not lie for arrears until after the freehold had determined; but when the freehold had determined then debt would lie, and the reason assigned was that the freehold remedy must be pursued, because the law did not suffer a real injury to be remedied by an action merely personal. Putting aside the remedy by real action, would debt have lain against an assignee who is in possession of the same estate in the land as the grantor of the rent? That appears to be decided in *Sir W. Loringe's Case*, cited in

Ognel's Case (1) thus: "A man was grantee for life of a rent out of a moiety of a manor, of which moiety a man was seised in right of his wife; the rent was in arrear when the grantee died, and the executors brought an action of debt against the husband only for the arrears. It was resolved: 1. That by the death of the grantee for life, the grant for life was turned into nature of debt. 2. Forasmuch as the husband took the profits of the land charged with the rent when it was arrear, he only, without his wife, should be charged with an action of debt." The action was against the person who is called the pernor of the land, provided he had the same estate as the grantor. I apprehend that the reason is that the kind is the debtor, as is stated by Wilson, J., in *Mills v. Auriol*. (2) If a man comes into possession of land as tenant in fee, he is the pernor of the profits of the land, and was liable to a real action for the nonpayment of a rent-charge created by a former tenant in fee; if this be so, since real actions are abolished, an action of debt will lie.

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(1) 4 Co. Rep at f. 49 b. This is the case cited by Hale in his note to Fitzherbert as *Leving's Case:* see ante, p. 370. It is reported in 26 Ed. 3, T. T. pl. 5, for. 64; fol. 10 of Maynard's edition of the Year Books, which differs here in the paging from the older editions.

(2) 1 H. Bl. at p. 445.

I agree it is not necessary to go into the question whether the covenant runs with the land.

ARCHIBALD, J. I also agree in thinking there is no necessity to consider the question in what cases covenants run with the land. It seems to me to be a question of remedy. When we enter into the reasons why debt would not lie for the recovery of the arrears of a freehold rent-change, it is clear that there was no oversight in abolishing real actions without providing for cases of this Lind. The reason why debt did not lie was that the law did not suffer the right injured to be amended by an action merely personal. It is clear from *Leving's Case* (1) that where no real action could be brought debt would lie; and inasmuch as the abolishing of real actions has removed that remedy, I quite agree with my Brothers Blackburn and Quain that in the present case the action of debt is maintainable, and therefore our judgment must be for the plaintiff.

Judgment for the plaintiff.

Attorneys for plaintiff: *Woollacott & Leonard*.

Attorneys for defendants: *Rickards & Walker*.

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(1) Fitzherbert, Natura Brevium, 121, note (d).