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Ex parte BROOK. *In re* ROBERTS.

1878

C. J. B.

July 29.

Leasehold Interest of Bankrupt—Disclaimer by Trustee—Previous Severance of Tenant's Fixtures—Rights of Landlord—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 23, 125.

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Dec. 5, 12.

The effect of a disclaimer by the trustee in a liquidation of a lease vested in the debtor is to place the trustee in the position of never having had any estate in the leasehold property.

Consequently, any severance by the trustee of the fixtures attached to the property after the date at which the term is put an end to by the disclaimer, *i.e.*, the date of the trustee's appointment, is necessarily a wrongful act, and gives the landlord a right to recover the value of the fixtures from the trustee.

Decision of *Bacon*, C.J., reversed.

Whether, after severing the fixtures, the trustee has any right to disclaim the lease, *quære*.

But at any rate he cannot as against the landlord assert the invalidity of his own disclaimer.

Statement.

ON the 10th of June, 1874, an agreement in writing was entered into between *James Brook & Sons* and *James Roberts*, a card maker, by which they agreed to let and he agreed to take a room in their premises called *Providence Mill*, in *Southgate, Elland*, as their tenant for one year from the date thereof, and so on from year to year until the tenancy should be determined on either side by a six months' notice to quit. The rent was to be £40 per annum. The lessors were to supply steam power to the room, to enable the lessee to run a steam engine turning the card setting machines attached thereto from 6 A.M. to 9 P.M. daily. And it was agreed that *Roberts*, his executors, administrators, and assigns, should and would, from time to time during the period that he or they should continue to occupy the room under the agreement, keep repaired at his or their own expense all the windows, doors, locks, fastenings, and all other fixtures in, upon, or belonging to the room, and leave the same in as good repair and condition as they were then in, reasonable wear and tear and accidents by fire only excepted. *Roberts* entered into possession under this agreement, and continued tenant of the room until the 24th of January, 1878, when he filed a liquidation petition in the *Halifax* County Court.

The same day *Frederick Foster* was appointed receiver of the debtor's property and manager of his business, and he carried on the business until the first meeting of the creditors on the 11th of February, 1878, when a liquidation by arrangement was resolved upon, and *Foster* was appointed trustee. *Foster* continued to carry on the business up to the 19th of February, 1878, up to which time *Brook & Sons* continued to supply steam power under their agreement. The debtor had erected various trade fixtures in the room, and on the 9th of March, 1878, the trustee advertised these fixtures for sale by auction on the 13th of March. On the 11th of March *Brook & Sons* served a notice in writing on the trustee, requiring him to decide within twenty-eight days whether he would disclaim the demised premises or not. On the 13th of March the fixtures were sold by auction. *Brook & Sons* attended at the sale and bought some of the property. The proceeds of the sale were afterwards received by the trustee, and the fixtures, with the exception of those which *Brook & Sons* had bought, were severed and removed by the respective purchasers. On the 27th of March, 1878, the trustee executed a written disclaimer of the demised premises, and sent it to *Brook & Sons*, with the key of the premises. The trustee had not previously obtained the leave of the Court to disclaim, in accordance with rule 28 of the Bankruptcy Rules, 1871, but *Brook & Sons* accepted the disclaimer and the key. On the 18th of June they applied to the Court for an order that the trustee should pay over to them the proceeds of the sale of the fixtures, and the Judge ordered this to be done. His Honour was of opinion that the case was governed by the decision of the Court of Appeal in *Ex parte Stephens* (1), and that, as the disclaimer, when executed, determined the lease as from the date of the trustee's appointment, the fixtures became the property of the lessors, and the trustee had no right to remove them. The trustee appealed to the Chief Judge.

The appeal was heard on the 29th of July, 1878.

Winslow, Q.C., and *Beaumont*, for the Appellant :—

Ex parte Stephens does not apply to the present case. There the trustee severed the fixtures after he had executed a disclaimer.

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In the present case the severance was before the execution of the disclaimer. No doubt the disclaimer, when executed, operates as a surrender of the lease at the date of the appointment of the trustee, but the period between that date and the execution of the disclaimer is an "excrescence" on the term during which the trustee had still a right to consider himself in possession as tenant: *Minshall v. Lloyd* (1); *Mackintosh v. Trotter* (2); *Weeton v. Woodcock* (3).

The disclaimer does not invalidate what the trustee has rightly done while he was in possession. If the decision is right, a trustee could never execute a disclaimer of leasehold property in which there was valuable machinery, for he would be simply making a present of it to the landlord.

[They were stopped by the Court.]

Finlay Knight, for the landlord:—

The principle of *Ex parte Stephens* (4) applies, and it concludes this case. The surrender operates as a surrender of every interest which the tenant takes under the lease. The right to remove fixtures is connected with the term, and must be exercised during its continuance or within a reasonable time afterwards. The words of the Act are plain. The trustee need not sever the fixtures until he has made up his mind about disclaiming.

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BACON, C.J.:—

There never has been—at least of late years—any doubt about the law on this subject; it was settled, I think, even before the case of *Minshall v. Lloyd* (5). As between lessor and lessee, the latter has a certain time after the expiration of his term within which he may remove the fixtures. It has been held that it must be a reasonable time, and what is a reasonable time must be decided with reference to the circumstances of each particular case. In this case, before there was any talk about a disclaimer, the trustee exercised his clear legal right of advertising the fixtures for sale. Two days afterwards the landlord gave him notice to decide within

(1) 2 M. & W. 450.

(2) 3 M. & W. 184.

(3) 7 M. & W. 14.

(4) 7 Ch. D. 127.

(5) 2 M. & W. 450.

twenty-eight days whether he would disclaim the lease or not. Within that period of twenty-eight days, if he did not previously disclaim, the trustee had a perfect right to sever the fixtures. Till the end of that time, or until a prior disclaimer, it could not be said whether there would be any determination of the lease. Within the twenty-eight days the trustee exercised his right of selling the fixtures, and afterwards he complied with the request of the landlord and executed a disclaimer of the lease. He sent the key of the premises to the landlord, and the landlord accepted it. What has *Ex parte Stephens* (1) to do with a case like this? There the severance of the fixtures was an unlawful act, for the disclaimer had been previously executed. Here the lease had not come to an end till the disclaimer had been executed, though when it was executed it related back to an earlier period. The notice to disclaim within twenty-eight days operated as a license by the lessor to the trustee to retain possession of the premises for that period, and of course it carried with it a right to exercise all the rights of a lessee. The trustee had a right to sell the fixtures within the twenty-eight days, unless he disclaimed before, and he cannot afterwards undo what he has done. It would be an utter perversion of the language of the statute to hold that, because the disclaimer, when executed, relates back by operation of law to the time of the appointment of the trustee, everything done between its execution and the appointment of the trustee is to be overhauled. The order of the County Court must be discharged, with costs.

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From this decision *Brook & Sons* appealed. The appeal was heard on the 5th of December, 1878.

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De Gea, Q.C., and *Finlay Knight*, for the Appellants:—

Argument.

The *ratio decidendi* of *Ex parte Stephens* exactly applies to this case. The trustee was not, during the period between his own appointment and the execution of the disclaimer, in possession of the property, “under a right still to consider himself as tenant,” within the meaning of *Weeton v. Woodcock* (2). That period cannot be called an “excrescence” on the term, to use the

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(2) 7 M. & W. 14.

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language of *Parke*, B., in *Mackintosh v. Trotter* (1). By virtue of sects. 23 and 125 of the Act, the effect of the disclaimer is the same as if an actual surrender of the lease had been executed at the date of the trustee's appointment. Here the fixtures were removed a month after the appointment of the trustee; that cannot even be called a reasonable time. The right to remove fixtures is the right of a tenant; when the trustee declines to be tenant he loses that right. He remained in possession of the property for the purpose of making up his mind whether he would be tenant or not.

[JAMES, L.J.:—I should be glad to see in the Act a provision that, if the trustee chose to remove the fixtures in this way, he should be estopped from afterwards disclaiming.]

In *Saint v. Pilley* (2) *Amphlett*, B., intimated an opinion that the trustee in a liquidation, after selling the fixtures, could not disclaim the lease. But that was only a *dictum*; the case only decides that a trustee who sells fixtures cannot, by a subsequent surrender of the lease, defeat the title of the purchaser. In the present case the question is as to the trustee's own right, and if the term is gone there can be no rights springing out of it.

[They were stopped by the Court.]

Winslow, Q.C., and *Beaumont*, for the trustee:—

The consequences of allowing this appeal would be very serious. The object of sect. 23 was to enable the trustee to get rid of a burdensome lease; if the Appellants are right, he cannot do this without in many cases sacrificing very valuable machinery. *Ex parte Stephens* (3) does not apply, for there the disclaimer had been executed before the trustee removed the fixtures. A trustee may, by virtue of sect. 23, disclaim at any time, even if he has paid rent for the property, which would make him tenant under the lease.

[JAMES, L.J.:—Suppose an action is brought against him by the landlord, and he disclaims afterwards?]

The disclaimer could not affect a vested right of action for

(1) 3 M. & W. 184.

(2) Law Rep. 10 Ex. 137.

(3) 7 Ch. D. 127.

breach of covenant: *Saint v. Pilley* (1). The lease is vested in the trustee until he disclaims.

[JAMES, L.J.:—I think it is *in græmio legis*.]

It is part of the bankrupt's property which vests in the trustee on his appointment, and vests in him as from the date of the act of bankruptcy to which the adjudication relates back: sect. 11. For the period between the act of bankruptcy and the adjudication or the appointment of the trustee the lease must be vested in the trustee. The trustee is liable to pay rent until he disclaims. The tenant's right to remove fixtures is illustrated by *Minshall v. Lloyd* (2); *Mackintosh v. Trotter* (3); *Weeton v. Woodcock* (4).

[JAMES, L.J.:—Is there any decided case applying to a voluntary surrender by the tenant?]

No. Under the Bankruptcy Act of 1849 a lease of the bankrupt did not vest in the assignee until he had done some act to accept it; after he had done such an act he could only get rid of his liability by assigning the lease to a pauper. Under the present Bankruptcy Act the lease vests in the trustee on his appointment, without any act of his own; and he is in the same position as if under the old law he had accepted the lease, that is, he takes it as an assign. If by his subsequent disclaimer the term is gone for all purposes as from the date of his appointment, he could sue the landlord for rent which he had himself paid. If there had been an actual voluntary surrender, and the landlord had afterwards allowed the tenant to remain in possession, surely he would have had a right to remove the fixtures. The fixtures were by relation the property of the trustee up to the date of his own appointment, and after that he is entitled to a reasonable time within which to remove them. A month is not an unreasonable time: *Stansfeld v. Mayor, &c., of Portsmouth* (5). For some purpose or other the trustee had a right to remain in possession till he disclaimed.

[BAGGALLAY, L.J.:—Does not a surrender deprive the landlord of his right to accruing rent?]

If so, sect. 24 gives him a right to prove for damages in the

(1) Law Rep. 10 Ex. 137.

(3) 3 M. & W. 184.

(2) 2 M. & W. 450.

(4) 7 M. & W. 14.

(5) 4 C. B. (N.S.) 120.

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bankruptcy. The disclaimer cannot, however, relieve the trustee from liability in respect of rent accrued due down to the date of the disclaimer. It does not divest a vested right of action: *Smyth v. North* (1).

[THESIGER, L.J.:—That case only decided that the original lessee remained liable on his covenant.]

But *Bramwell*, B., says (2), “The words are, no doubt, that the lease is to be deemed to have been surrendered from the date of the order of adjudication; but this must, perhaps, be taken to mean, so as not to give rise to any fresh rights or liabilities as between the landlord and the bankrupt, not for all purposes.”

[THESIGER, L.J.:—*Martin*, B., said (3) that sect. 23 did not apply to the case at all.]

In the present case the trustee tendered the rent due up to the time of the disclaimer. A voluntary surrender of a lease does not affect the rights of a third party, *e.g.*, an equitable mortgagee of the lessee: *Saint v. Pilley* (4); therefore the lease remains in existence for some purposes. *Penton v. Robart* (5) shews that a tenant who is in possession after the expiration of his lease may remove trade fixtures. Such fixtures are really chattels, and are not affected by a surrender: *Parsons v. Hind* (6).

[THESIGER, L.J.:—If so, they ought not to be called fixtures. But it was admitted in the County Court that the articles in dispute were tenants’ fixtures.]

When the trustee removed the fixtures he was acting lawfully.

[JAMES, L.J.:—It was his own subsequent act which made the removal unlawful.]

The disclaimer cannot override what had been previously lawfully done. And in this case the landlords were consenting parties, for they bought part of the fixtures at the sale without raising any objection. At any rate, they cannot recover the money which they themselves paid. The rightful nature of the act must be determined once for all at the time when it is done.

(1) Law Rep. 7 Ex. 242.

(2) *Ibid.* 246.

(3) *Ibid.* 244.

(4) Law Rep. 10 Ex. 137.

(5) 2 East, 88.

(6) 14 W. R. 860.

De Gea, in reply:—

Sect. 23 says that the Court may order possession of the disclaimed property to be delivered up. By removing the fixtures the trustee has put it out of his power to deliver up the disclaimed property, *i.e.*, the lease and all belonging to it; and it is right, therefore, that he should pay the value of what he has removed. It is said that a tenancy is to be implied between the date of the trustee's appointment and the disclaimer, but there was no new contract between the landlord and the trustee.

[THESIGER, L.J.:—In *Saint v. Pilley* (1) it was held that the purchaser of fixtures from the trustee was entitled to them as against the landlord.]

There there was an actual surrender by the trustee. He had previously sold his right to disannex the fixtures, and he could not convey to the landlord more than he himself had. The landlord could not call on the trustee to pay rent for the period between his appointment and the disclaimer: *Ex parte Dressler* (2). The trustee was in possession of the property solely for the purpose of exercising his judgment whether he would disclaim or not: *Ex parte Stephens* (3). Sect. 35 gives the landlord a right to prove for the rent due up to the date of the adjudication; that tends to shew that the trustee never became tenant. The words of sect. 23 are clear. *Weeton v. Woodcock* (4) shews that what has been called an “excrescence” on the term only arises when the term has not been put an end to by the tenant's own act.

[JAMES, L.J.:—The word “excrescence” *ex vi termini* means something growing out of the original term, such as a tenancy at will after its expiration.]

Smyth v. North (5) has no application; the question there was, whether sect. 23 applied to strangers to the bankruptcy.

Winslow, in reply:—

The decision in *Ex parte Dressler* was founded on this, that the trustee had not disclaimed the lease, but had surrendered it. If

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(1) Law Rep. 10 Ex. 137.

(2) 9 Ch. D. 252.

(3) 7 Ch. D. 127, 131.

(4) 7 M. & W. 14.

(5) Law Rep. 7 Ex. 242.

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he had disclaimed, he could not then recover from the landlord rent which he had paid him. But that must be the result, if the effect of a disclaimer is to put an end to the lease for all purposes.

Dec. 12. The judgment of the Court (*James, Baggallay*, and *Thesiger*, L.JJ.), was delivered by

THESIGER, L.J., who, after stating the facts, continued :—

The question in dispute turns upon the effect to be given to sect. 23 of the *Bankruptcy Act*, 1869. In the recent case of *Ex parte Stephens* (1), before this Court, the effect of the disclaimer of a lease, in respect of tenant's fixtures severed by the trustee subsequently to the disclaimer, was considered, and it was decided that the landlord was entitled to them as against the trustee. The Chief Judge has held that the circumstance in the present case of the severance having occurred before disclaimer constitutes such a distinction between it and *Ex parte Stephens* as to render the latter no authority upon the point now to be decided. We, however, are of opinion that the *ratio decidendi* in that case is wide enough to govern the decision of the present. The premiss upon which our judgment was founded was, that where the trustee in a liquidation disclaims, there, by the joint operation of the disclaimer and the provisions of sects. 23 and 125 of the Act, the term is to be deemed for all purposes to have come to an end on the day of the appointment of the trustee. In other words, the trustee is placed in the position of never having had any estate at all. But, from this premiss, the logical and legal conclusion is, not merely that a severance by the trustee of fixtures after the disclaimer is wrongful, although that is included, and was all that was necessary to be decided in *Ex parte Stephens*, but that any severance which has taken place after the date when the term is put an end to for all purposes, and by a person who, like a trustee, is in the position of never having had any interest in the term, must necessarily be wrongful.

Apart, however, from the authority of *Ex parte Stephens*, we arrive at the conclusion that the landlords' claim in the present

(1) 7 Ch. D. 127.

case is a well-founded one. The general presumption of law with reference to tenants' fixtures remaining affixed to the freehold when a term comes to an end is, that "they become a gift in law to him in reversion," and are, therefore, not removable (per Lord *Holt* in *Poole's Case* (1)). That general presumption has, however, been made subject to a qualification which is expressed in the proposition laid down by the Court of Exchequer in *Weeton v. Woodcock* (2) in these terms—viz., "that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant," or, in the language of Baron *Parke* in *Mackintosh v. Trotter* (3), "that the tenant has the right to remove fixtures of this nature during his term, or during what may for this purpose be considered as an excrescence on the term." Much reliance has been placed in argument on the part of the Respondent upon this qualification of the general presumption of law, and it has been urged upon us that in this case the period between the appointment of the trustee and the disclaimer was such an "excrescence" on the term, and that the Respondent had during that period a right to consider himself as tenant. We cannot accede to that argument. It is not easy to define precisely what was meant by the propositions to which we have just referred, and we observe, that as regards the rule laid down in *Weeton v. Woodcock*, the difficulty which we feel in understanding its exact meaning was shared in by the Court of Common Pleas, as stated by Mr. Justice *Willes* in delivering the judgment of that Court in *Leader v. Homewood* (4). It may be that in cases where a tenant holds over after the expiration of a term certain under a reasonable supposition of consent on the part of his landlord, or in the case where an interest of uncertain duration comes suddenly to an end, and the tenant keeps possession for such reasonable time only as would enable him to sever his fixtures and to remove them with his goods and chattels off the demised premises, or even in cases where the landlord exercises a right of forfeiture, and the tenant remains on the premises for such reasonable time as last referred

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(1) 1 Salk. 368.

(2) 7 M. & W. 14, 19.

(3) 3 M. & W. 184.

(4) 5 C. B. (N.S.) 546, 553.

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to, the law would presume a right to remove tenant's fixtures after the expiration or determination of the tenancy. But, however that may be, we are clearly of opinion that the case of a surrender of a lease by a tenant, while tenant's fixtures remain affixed to the freehold, does not, either upon principle or the authority of decided cases, give any right to the tenant subsequently to remove such fixtures. At the date of the surrender they form part of the freehold, and the law has no right to limit the effect of the surrender by excluding from it that which legally passes by it, and which has not been excluded from it by the bargain of the parties. If that be so, then when the Legislature, by sect. 23 of the *Bankruptcy Act*, 1869, says that a lease disclaimed shall be deemed to be surrendered, are we justified in attributing to the language used any meaning other than that which is its natural meaning—viz., that the ordinary consequences of a surrender shall follow the disclaimer? No doubt difficulties will always arise when Courts are called upon to treat a thing as being in law that which in fact it is not: and if in this case the strict carrying out in all points of the analogy of an ordinary surrender were to lead to consequences manifestly absurd or unjust, it would be the duty of the Court to find, if possible, some construction of the section in question which would not entail such consequences. In the present instance no such consequences are the result of the construction which the language of the section naturally requires. Extreme cases may, it is true, be put in which it would work a hardship upon the creditors, and the present case is, perhaps, an example; for, if the trustee had kept the property on for a year, he might, at the expense of the small payment of £40, have obtained the fixtures in dispute. But in a vastly greater number of cases any different construction would work a considerable hardship upon the landlord. Indeed, in *Saint v. Pilley* (1), Baron *Amphlett* appears to have considered the dismantling of a house by severance of tenant's fixtures inconsistent with the exercise of the right of disclaimer, and to have been disposed, as stated by him (2), to agree with the view taken in *Amos on Fixtures* (3), that after the sale of fixtures a trustee

(1) Law Rep. 10 Ex. 137.

(2) Law Rep. 10 Ex. 141.

(3) 2nd Ed. p. 239.

could not disclaim. When, too, it is remembered that the section under consideration is one which, upon any construction of it, favours the interests of the creditors at the expense of the landlord, we think that it would be unreasonable to allow possible cases of hardship upon the creditors to weigh against an interpretation of it which gives to the analogy of a surrender its natural and proper effect. A suggestion was made in argument, although not much pressed, that even though the Appellants may be entitled to recover the proceeds of fixtures sold to third parties, they cannot recover moneys paid by themselves under no mistake of fact. But we think that a distinction ought not to be made between those moneys and the remainder of the moneys arising from the sale. At the time when the sale took place no disclaimer had been made; the trustee was acting, apparently, within the scope of his powers; and the landlords could do no more than give him notice that he was required to exercise his election as to whether he would disclaim or not; and, looking to the fact that the time limited by the 24th section of the *Bankruptcy Act*, 1869 (twenty-eight days), for the exercise of his election had not expired when the sale took place, it would be contrary to justice to hold that the landlords, under such circumstances, endeavouring to prevent the complete dismantling of their property, and having no other means of doing so than by themselves purchasing and paying for the fixtures, are, when, by the subsequent conduct of the trustee, the fixtures purchased by them turn out to be their own, precluded from recovering the money which they had paid for them. Whether a sale of fixtures by a trustee has or has not in ordinary cases the effect attributed to it by Baron *Amphlett*, it is unnecessary in this case to decide, for we are of opinion that it does not lie in the mouth of the trustee, as between him and the Appellants, to assert the invalidity of the disclaimer. The effect, therefore, of a disclaimer generally being such as we have laid down, and there being in the agreement between the debtor and his landlords no special stipulations as regards fixtures which make this case in any way exceptional, the necessary conclusion must be that the Respondent, by disclaiming the property to which the fixtures were attached after his sale of those fixtures, constituted himself by relation a wrong-doer in respect of that sale, and

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C. A. is liable to pay over to the Appellants the whole of the moneys
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Ex parte allowed, the judgment of the Chief Judge reversed, and the order
BROOK. of the County Court Judge restored, with costs here and in the
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Solicitors for Appellants: *Williamson, Hill, & Co.*, agents for
Foster & England, Halifax.

Solicitors for Trustee: *Learoyd, Learoyd, & Peace*, agents for
J. W. Longbottom, Halifax.