Status: Positive or Neutral Judicial Treatment

ICLR

*31 Joyner v Weeks.

Court of Appeal

5 May 1891

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[1891] 2 Q.B. 31

Lord Esher, M.R., Fry, L.J.

Wills and Wright, JJ.,

1891 May 5.

1891 Jan, 20; April 17;

Landlord and Tenant—Lease—Breach of Covenant to deliver up Premises in Repair—Measure of Damages.

The general rule with regard to the measure of damages in an action for breach of a covenant by a lessee to deliver up the demised premises in repair is that such damages are the cost of putting the premises into the state of repair required by the covenant.

Such measure of damages is not affected by the fact that, by reason of the terms of a lease granted by the lessor to another lessee from the expiration of the defendant's term, the lessor is at the time of action brought no worse off than he would have been if the defendant's covenant had been performed.

ACTION for damages for breach of covenant by the lessee of a house to keep it in repair and deliver it up in repair.

The cause was referred for trial to an official referee, who was to direct judgment to be entered and otherwise to deal with the whole action, pursuant to Order XXXVI. The following statement of the facts is taken from the judgment of the official referee, and was adopted in the judgment of the Divisional Court.

"This is an action by the survivor of three lessors of a house No. 10, Holborn Bars, against the lessee for damages for breach of a covenant to surrender at the expiration of his lease (which was dated November 10, 1868, and expired March 25, 1889), well and sufficiently repaired in accordance with the terms of the lease. The cost of making good the dilapidations was proved before me to be 70l.; the plaintiff's counsel claimed as damages for the breach of covenant the whole amount of this cost. The defendant,

without admitting liability, had paid into court 45l.; but his counsel contended that under the circumstances which I am about to state I ought to give nominal damages only.

"On May 20, 1887, the plaintiff, together with several other persons beneficially interested in the reversion, executed a lease of the house No. 10, to Samuel Lewis, who was the tenant of Nos. 9 and 11, which were subject to the same trusts as No. 10; this lease was for a term of twenty-one years, to commence on March 25, 1889, when the defendant's lease of No. 10 would ***32** expire. The rent was 300l.[1], and Lewis covenanted to lay out 200l. in making alterations to No. 10 and the adjoining houses Nos. 9 and 11, for the purpose of establishing communication between them. He also covenanted to keep the premises in repair. The defendant had carried on a millinery business at No. 10, and Lewis a draper's business at Nos. 9 and 11, and the object was to throw the three ground floors into one shop for Lewis's business. Immediately after the expiration of the defendant's lease Lewis made the alterations, and in the course of them demolished some parts of No. 10, which were out of repair; other parts of No. 10 were also out of repair, and the cost of putting them into repair would have been 45l. Lewis had made no claim to be reimbursed the cost to which he was put in repairing, and on the terms of his lease it was clear that he had no right to make any such claim.

"For the defendant it was urged that the plaintiff had suffered no loss by the breach of the covenant, and therefore ought not to have more than nominal damages. As a matter of fact, the plaintiff had suffered no loss, and never could have suffered any loss except in the possible contingency of a failure by Lewis to perform the covenants in his lease, and a consequent determination thereof. Nothing of this kind in fact happened, and it was not suggested that even if Lewis had to be evicted there would be found still remaining any of the dilapidations which the defendant had left."

The official referee gave judgment for the plaintiff for one farthing, and ordered him to pay to the defendant the whole costs of the action. The plaintiff moved to set aside the judgment, and enter judgment for the plaintiff, or for a new trial, on the ground that it was wrong in law, in that it was based upon an agreement made between the plaintiff and a third party, which was improperly admitted as evidence in favour of defendant; and that the proper measure of damages was not one farthing, but such a sum as was reasonably necessary to put the premises in the state of repair in which the defendant ought to have left them.

***33**

Lumley Smith, Q.C. , and *Cecil Chapman* , for the plaintiff.

Jelf, Q.C. , and *W. H. Clay* , for the defendant.[2]

Cur. adv. vult.

April 17. The judgment of the Court (Wills and Wright, JJ.) was read by WRIGHT, J.

[The learned judge stated the facts as above, and proceeded:-] The first question which arises on the judgment of the learned referee is whether he was right in awarding one farthing as damages, on the ground that the plaintiff had sustained no loss. We do not understand the finding to be to the effect that the house was at the end of the term substantially as valuable to occupy, sell, or let in its then actual state as it would have been if the covenant had been duly performed. What the effect of such a finding would have been must be considered later on. The finding appears to be at least consistent with the view that the house was substantially less valuable to occupy, sell, or let by reason of the non-repair; and in substance to amount to no more than this, that the plaintiff had before the end of the defendant's tenancy happened to find another tenant who for reasons of his own was content to give as much for the house as he would have given if it had been properly repaired. If this is the correct view of the judgment, we think that the finding that the plaintiff has sustained no loss is based upon an erroneous view of the law. The breach of contract and a consequent diminution of the value of the plaintiff's interest in the house, apart from any special circumstances connected with the new lease, being supposed, the suggested kind of ademption of loss appears to us to be too remote, uncertain, and accidental to be properly made the ground of decision.

Many cases may be put in which it is plainly immaterial that at the commencement of an action for a breach of contract the plaintiff is in fact no worse off than he would have been if the contract had been performed. Charity, insurance, an alteration of market values, may have recouped or nullified his loss. Or it ***34** may be proved that the plaintiff, if he acted as a prudent man in his own interest, would, at the end of the defendant's term, have pulled down the house, even though duly repaired, and built a different kind of structure, so that the repairs if done would have been of no value; but he chooses to relet the house in its existing state. In such a case it could hardly be contended that he might not recover substantial damages. The person whose breach of contract has caused damage is not the less liable because the damage has been made good, or its effect compensated by an extraneous event of such a kind that if it had operated the other way it would not have increased his legal liability. Nor does it seem to us that the relation between the plaintiff and the defendant is directly, if at all, affected by the terms of an agreement made by the plaintiff with a third person before the expiration of the defendant's term. That agreement might be rescinded, or might never be performed. When it was made the parties to it could not foresee, and did not contract on the basis, that there would at the end of the defendant's term be any breach of the contract to deliver up in repair. It must be not the making but the

performance of the new agreement to which the supposed effect would be attributable. But if so, then at the moment of the termination of the defendant's tenancy, and before the new agreement was performed, a cause of action vested in the plaintiff against the defendant, and this could not be taken away or affected by the subsequent res inter alios acta.

Such authorities as are to be found appear to be consistent with this view. Colley v. Streeton(1823) [3], Oldershaw v. Holt(1840) [4], and Davies v. Underwood(1857) [5], may be referred to; but they throw little, if any, light on the matter. In Rawlings v. Morgan (1865) [6]the point came near to being, but was not, decided. There, before the end of a lessee's term, his lessor had verbally agreed to give a building lease to a new tenant, who in fact entered on the expiration of the first term and pulled down the premises, and afterwards (but apparently before the action) obtained a building lease in conformity with the verbal agreement. The dilapidations were 22l.; but the ***35** terms of the building lease were not affected by the existence of the dilapidations. The lessor sued the first lessee for the 22l., and was allowed to recover the full amount. The argument was the same as in the present case, that the plaintiff had in fact sustained no loss. Erle, C.J., and Keating, J., declined to say what their opinion would have been if during the defendant's berm the plaintiff had made a binding agreement with the new tenant; Byles, J., relied exclusively on the fact that before any binding agreement had been made with a new tenant a cause of action for the 22l. had accrued. Montague Smith, J., doubted whether such a binding agreement would have in any way affected the plaintiff's right as against the defendant. In Inderwick v. Leech(1884) [7], the lessor, at the end of the term and before action, pulled down the house; but Lopes, J., at Nisi Prius, and Lord Coleridge, C.J., and Cave, J., in the Divisional Court, held him entitled to recover the sum which would have been the cost of repair. Lastly, in Morgan v. Hardy(1886) [8], which was reversed on appeal on another point, but not appealed on this point, Denman, J., came to a similar conclusion, although it appeared that, owing to a change in the character of the neighbourhood, the house was as valuable at the end of the term without some of the repairs as it would have been if they had been done. We think, therefore, that both on principle and on the authorities the ground on which the official referee limited the damages to a farthing is not tenable.

It does not however follow either that judgment can be entered for the 70l., or that on other grounds the official referee could not properly have given nominal damages only, and it is necessary to endeavour to ascertain what is the proper rule for ascertaining the measure of damages in cases of this kind, extraneous agreements or matters being put aside. Considering the frequency with which this question must arise, the absence of clear and decisive authority is not a little remarkable.

Where a tenant covenants to repair during the term, and the action is brought during the term, the lessor, if he has reserved to himself a sufficient power of entry and has

done the repairs, may of course recover the cost. If he has not reserved such ***36** power, and if no measure of damages is fixed by his own liability to a superior lessor, Lord Holt is said to have held, in Vivian v. Champion(1705) [9], that the lessor ought to recover the sum which the repairs would cost. Lord Cranworth on the other hand (when Baron Rolfe) held, in Marriott v. Cotton(1848) [10], that the damages should be only nominal. Marriott v. Cotton(1848) [11] is stated to have been reversed: see Bell v. Hayden(1859) [12]. Both these decisions have, been repeatedly questioned so far as they might be regarded as laying down any general rule; and it seems to be now settled that in such cases the jury on the one hand are not bound to give the cost of repairing, and on the other hand are not limited to nominal damages even where the length of the term unexpired is so great that no real damage can be proved or the accumulated proceeds of investment of a nominal sum would at the end of the term provide more than a sufficient fund: see Doe v. Rowlands(1841) [13]; Turner v. Lamb(1845) [14]; Macnamara v. Vincent(1852) [15]; Smith v. Peat(1853) [16]; Bell v. Hayden(1859) [17]; Mills v. East London Union(1872) [18]; Beattie v. Quirey(1876) [19]; Metge v. Kavanagh (1877) [20]. There is in these cases the less probability of injustice to the lessor in leaving the jury somewhat at large, because the lessor can bring repeated actions.

But where, as in the present case, the term has expired and damages must be recovered once for all, the necessity of a more certain rule is apparent. Two measures have been suggested, the first the amount of money which it will cost the lessor to do the repairs, with some allowance for loss of rent or occupation during the time of reparation and with some deduction where proper by reason of substitution of new for old; the second, the diminution of the value of the lessor's estate by reason of the non-repair. In general they will both come to the same thing, and it can seldom be the case that the diminution in value can be more than the cost of repair. It may, however ***37** often be the case that the diminution in value by reason of some or all of the tenant's defaults is much less than the cost of making them good. A part of the structure may have been designed for a purpose which has become obsolete, or a building may for many reasons be found at the end of a term to be as valuable, or nearly as valuable, in a partially as in a completely repaired state. In such cases, which measure is to be preferred? The former, the cost of repairing, is adopted with more or less positiveness in the following cases: Vivian v. Champion(1705) [21], an action during the term; Davies v. Underwood(1857) [22], *per* Watson, B.; Rawlings v. Morgan(1865) [23], *per* Montague Smith, J.; Woodhouse v. Walker(1880) [24], *per* Lush, J.; Morgan v. Hardy(1886) [25], not reversed on this point: Nixon v. Denham [26]; Metge v. Kavanagh(1877) [27]. The latter (the diminution in value) is supported in the following: Colley v. Streeton(1823) [28], an action during the term; Doe v. Rowlands(1841) [29], an action during the term; Turner v. Lamb(1845) [30], an action during the term; Smith v. Peat(1853) [31]; Davies v. Underwood(1857) [32], *per* Bramwell, B.; Rawlings v. Morgan(1865) [33], *per* Erle, C.J.; Mills v. East London Union(1872) [34], an action during the term; Beattie v. Quirey

(1876) [35]; Lombard v. Kennedy(1888) [36]. In Inderwick v. Leech(1884) [37], the two measures seem to be regarded as identical.

It appears to us that the better measure is the amount of the diminution of value, but not exceeding the cost of doing the repairs (with the addition or deduction as above suggested), and that in the cases which appear to adopt the other test it was not intended to decide that the cost of repairing ought to be or can properly be given so far as it exceeds the diminution of value. To give that excess might in effect be to give an unfair kind of ***38** specific performance to the great detriment of the lessee without any advantage to the lessor as such; whereas the proper function of a right of action for damages for breach of contract seems to be to make good to the aggrieved party the damages which he has actually sustained: see Robinson v. Harman(1848) [38], and Rawlings v. Morgan(1865) [39], *per* Erle, C.J. A similar rule has been applied in an action for wrongfully pulling down a house, *Hosking v. Phillips*(1850) [40], except where the value was personal and exceptional, Duke of Newcastle v. Hundred of Broxtowe(1832) [41]; in an action for breach of covenant to build a wall, Wigsell v. Corporation of the School for the Indigent Blind(1882) [42]; in an action for waste by removing soil, Whitham v. Kershaw(1885) [43], with which may be compared Pell v. Shearman(1855) [44], as to breach of covenant to sink a coal pit. It may be urged that such a rule will admit expert evidence to an inconvenient extent; but this is not a sufficient reason for acting upon a wrong principle, nor is this objection in fact obviated by the apparently more simple rule of taking the cost of repairs. It is matter of common experience that the cost of repairs is the subject of oppressive litigation.

Applying these conclusions to the present case, we think that the judgment of the official referee must be set aside, but that judgment cannot be entered for the 70l. or the 45l., or any other sum, and a new trial must take place (unless the parties can agree) in which the question will be how much, if at all, the value of the plaintiff's estate and interest in the premises was diminished by the non-repair, regard being had to the situation and other circumstances, including the consideration that a tenant of the adjoining houses might be willing to give as much for the plaintiff's house in its unrepaired state as he would have given if the covenant had been performed. In this inquiry, the suggested doctrine (if in any case correct), that in actions brought during the term the jury are never bound to give more than ***39** nominal damages, appears to us to be inapplicable, notwithstanding the dictum attributed to Byles, J., in Rawlings v. Morgan(1865) .[45] When the action is brought after the end of the term, and the damages assessed according to legal principle are shewn to be of any particular amount, we see no justification for reducing them on the mere ground that the plaintiff has by reason of some matter not legally relevant been saved from being out of pocket or been recouped. Further, even if the referee should come to the conclusion that the damages sustained are small, we think that if a substantial breach of the covenant has been committed he would not be justified in dismissing the action, as he has practically

done. The Divisional Court cannot interfere with his legal discretion as to costs; but in an action of this kind, where the defendant has made a substantial default, the circumstances must, in our opinion, be very peculiar which could make it right not merely to deprive the plaintiff of costs, but to make him pay the costs of the action. There must be an order for a new trial, and the costs of this motion will be reserved.

(W. J. B.)

Against this decision the defendant appealed; and the plaintiff gave a cross-notice of intention to apply for variation of the order by asking that the judgment might be entered for him for 70l.

Jelf, Q.C. , and *W. H. Clay* , for the defendant. The plaintiff is only entitled to nominal damages, and therefore the decision of the referee was right. The general rule with regard to damages in contract is that, subject to the doctrine of remoteness, the plaintiff is to be put as far as possible into the same position pecuniarily as if the contract had been performed. The case of a breach of a covenant to deliver up demised premises in repair is no exception to this rule. It is true that, where there is damage, the cost of the repairs generally correctly measures the amount of such damage, and therefore as a general rule the cost of the repairs may in such cases be recovered. But it is submitted that there is no hard and fast rule to that effect. In this case ***40** the plaintiff sustained no real damage. In order to ascertain the difference between the plaintiff's position if the covenant had been performed and his position upon its being broken, all the circumstances must be regarded. In this case, the plaintiff relet the premises to another tenant under such circumstances and on such terms that he sustained no substantial damage, and is in no worse position by reason of the defendant's breach of covenant. It is not just that the plaintiff should recover the amount of the cost of repairs which he has not got to do, and so put into his pocket damages which he has not, in fact, sustained. In Wigsell v. School for the Indigent Blind [46], where the grantees of land had covenanted with the grantor to erect a boundary wall, it was held that the cost of erecting the wall was not the measure of damages for not erecting it. Rawlings v. Morgan [47] is not an anthority against the defendant's contention, for the agreement with the new tenant there was verbal only, and therefore not binding. If the damages are not nominal, then the proper measure of damages is that indicated by the Court below, and this Court cannot enter judgment for the plaintiff. It has been said, no doubt, in many cases, that the measure of damages in an action for breach of a covenant to give up the premises in repair is the cost of the repairs; but it is submitted that the diminution in value of the reversion not exceeding the cost of repair is really, in all cases, the true test. It generally happens that both tests would bring out the same pecuniary result, and therefore, roughly speaking, as a general rule it may be right to give the cost of repair. In this case, however, the plaintiff had conveyed away a portion of his reversionary estate, viz., twenty-one years

of it, to a third person by the second lease, and that must be a circumstance to be taken into account in estimating the amount of the damage which he sustained by the breach of the covenant. In Davies v. Underwood [48] the language of the judges seems to shew that the cost of repairs is not the sole test under all circumstances.

[They also cited Clow v. Brogden [49], and Inderwick v. Leech. [50]]

***41**

Lumley Smith, Q.C. , and *Cecil Chapman* , for the plaintiff. If the lessor is entitled by the covenant to have the possession of the premises in a particular state of repair at any given moment, and they are not so, the covenant is then broken, and the measure of damages for that breach of it is what it would cost to put them into that state. Anything which takes place afterwards between the lessor and a third person, and to which the lessee is a stranger, cannot affect the-right to those damages which has already vested in the lessor. Assuming that there might be in some cases a change in the condition of the premises affecting the relation between the landlord and tenant in respect to them, which might be taken into consideration in assessing damages, as in a case where premises were destroyed by vis major or the act of God, there is nothing of that sort here. The lease to Lewis is a matter to which the defendant is an entire stranger, and is not a circumstance which can be taken into consideration. It conveyed no estate, but only an interesse termini, until possession was taken under it. Therefore the plaintiff, as between himself and the defendant, at the moment the defendant's term ended, was entitled to possession of the premises in a state of repair, and the measure of damages must be regarded with relation to that moment. The fact that an agreement was made between the plaintiff and Lewis before the end of the defendant's term could not reduce the damages, for it might never be performed; and the fact that, after the term had ended, and the plaintiff's right of action had vested, another tenant came in and executed alterations and repairs is equally immaterial. They are accidents with which the defendant has nothing to do: see Beattie v. Quirey [51], Lombard v. Kennedy [52], Rawlings v. Morgan [53], Inderwick v. Leech [54], Rodocanachi v. Milburn [55], Woodhouse v. Walker [56], and Morgan v. Hardy. [57] There are a series of cases in which it has been said that the measure of damages in an action for not delivering up the premises in repair on the expiration of the term is the cost of the repairs. ***42** It is only in actions for non-repair during the currency of the term that the diminution in value of the reversion is the test: Vivian v. Champion [58]; Yates v. Dunster [59]; Duke of Newcastle v. Hundred of Broxstowe [60]; Davies v. Underwood. [61]

Jelf, Q.C. , in reply.

LORD ESHER, M.R.

In this case the plaintiff as lessor sues upon a covenant contained in a lease by which

the defendant as lessee covenanted to leave the demised premises in repair. The lease came to an end; and it is not denied that the premises were left out of repair. Therefore, there was a breach of the covenant as between the lessor and the lessee. The plaintiff has proved that to put the premises into the state of repair in which the defendant was bound to leave them would cost 70l.; but the defendant says that he is not liable to pay 70l. to the plaintiff, because the plaintiff has not suffered any real loss, and therefore is only entitled to nominal damages; and he further says that, if the plaintiff has suffered any substantial damage, it is only to the amount of 45l.; and he pleads payment of that amount into court alternatively. The ground on which the defendant seeks to establish his case is this: he says that, while the term was running and he was in possession of the premises, the plaintiff made a demise of the premises to a third person, to commence from the determination of his lease, which demise was at an advanced rental and contained a covenant that the new lessee should pull down and alter part of the premises, and a covenant to repair; that under the circumstances the breach of his covenant did the plaintiff no harm, inasmuch as the plaintiff had re-demised the premises on terms that were not affected by the want of repair; and that, at any rate, with regard to the part of the premises that was pulled down, the want of repair did no harm. The case was sent for trial to the official referee, who gave the plaintiff a farthing damages and made him pay all the costs of the action. The plaintiff appealed to the Divisional Court, asking that the judgment might be entered for him for the amount of the dilapidations, viz., 70l., or that there might be ***43*** a new trial. The Divisional Court decided that there must be a new trial, and laid down a rule as to the measure of damages for the guidance of the official referee when the case should come before him again. From that decision the defendant has appealed to us, and there is a cross-appeal by the plaintiff. The plaintiff contends that, the facts of the case being all before us, and there being no dispute as to them, but the only question being as to the application of the law to these facts, we ought to give judgment for him for the amount of the dilapidations without putting the parties to the expense of a new trial; he contends, further, that, at any rate, we ought not to send the case back to the referee with the rule as to the measure of damages that the Divisional Court has laid down, because that rule is one which has never been heard of before in such cases, and is not the law. A great many cases have been cited, of which one only was directly in point, though another was as nearly as possible in point; and a series of dicta of learned judges have been referred to, which seem to me to shew that for a very long time there has been a constant practice as to the measure of damages in such cases. Such an inveterate practice amounts, in my opinion, to a rule of law. That rule is that, when there is a lease with a covenant to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to have been left. It is not necessary in this case to say that that is an absolute rule applicable under all circumstances; but I confess that I strongly incline to

think that it is so. It is a highly convenient rule. It avoids all the subtle refinements with which we have been indulged to-day, and the extensive and costly inquiries which they would involve. It appears to me to be a simple and businesslike rule; and, if I were obliged to decide that point, I am very much inclined to think that I should come to the conclusion that it is an absolute rule. But it is not necessary to determine that point in the present case. The rule that the measure of damages in such cases is the cost of repair, is, I think, at all events, the ordinary rule, which must apply, unless there be something which affects the condition of the property ***44** in such a manner as to affect the relation between the lessor and the lessee in respect to it. The question is whether there is any such circumstance in the present case. I think that there clearly is not. The circumstances relied upon by the defendant did not affect the property as regards the relation between the lessor and the lessee in respect to it. They arose from a relation, the result of a contract between the plaintiff and a third person, to which the defendant was no party, and with which he had nothing to do. It was said that this contract passed an estate in the premises to such third person. If it had done so, I think it would have made no difference; but it did not; it only gave an interesse termini during the continuance of the defendant's term, and could not take effect to give an estate as between the plaintiff and the third person until the relation between the plaintiff and the defendant was at an end. At the moment of the determination of the lease between the plaintiff and the defendant, the premises were out of repair. And, if we cannot look at the contract between the plaintiff and the third person, or anything that took place under it, there was nothing but the ordinary case of the breach of a covenant to leave the premises in repair. In my opinion the contract between the plaintiff and the third person cannot be taken into account; it is something to which the defendant is a stranger. So, also, anything that may happen between the plaintiff and the third person under that contract after the breach of covenant is equally matter with which the defendant has nothing to do, and which cannot be taken into account. These are matters which might or might not have happened, and, so far as the defendant is concerned, are mere accidents. The result is that there is nothing to prevent the application of the ordinary rule as to the measure of damages in such a case. There is no decision to the contrary of what we are now deciding. In all the period of time during which leases containing such covenants have been common, there is no case in which such a contention as that of the defendant has been allowed to prevail. There are cases in which arguments as nearly as possible analogous to that of the defendant have not been assented to; for example, the case where the plaintiff had entered into a verbal agreement with a third person for the ***45** pulling down of the premises at the expiration of the term. The case of Morgan v. Hardy [62] appears to be in point. In that case Denman, J., gave an elaborate considered judgment to the effect that the measure of damages in an action upon a covenant to leave in repair was the amount that it would cost to put the premises into such repair as was contemplated by the covenant, and that the existence of such a contract as there is here with a third person,

and suchlike circumstances, could not be considered. That case is, of course, not an authority binding upon us; but it is one to which we should pay regard in deciding this case. Besides that, there is the case of Inderwick v. Leech. 63 Though that case is not exactly in point, all the reasoning of the judgment of Lopes, L.J., which was affirmed in the Divisional Court by Lord Coleridge, C.J., and Cave, J., and afterwards on appeal by this Court upon the authority of Rawlings v. Morgan 64, points in the direction of the conclusion at which we are arriving, viz., that, if anything could prevent the application of the ordinary rule that the measure of damages is the cost of such repairs as were contemplated by the covenant, it could only be something in the condition of the premises which affected the relation between the lessor and lessee in respect of them, and that contracts made between the lessor and a third person must be disregarded. The rule I have mentioned is a good working rule, and I believe it to be the legal rule. Therefore, I think that we must, with all deference to the learned judgment of the Divisional Court, allow the appeal of the plaintiff and give judgment in his favour for 70l.

FRY, L.J.

I have come to the same conclusion. We are not now dealing with the case of an action brought during the currency of the term for non-repair, or that of an action in respect of non-performance of a covenant to build a boundary wall, or an action by a person who has granted premises at a fee farm rent, taking a covenant from the grantee to keep such premises in repair as a security for the rent, nor are we dealing with the effect of vis major, or of the act of God, upon the relation ***46*** of lessor and lessee. These cases have been adverted to and discussed during the argument; but we have nothing to do with them, except so far as they may throw any light upon the present case. The inquiry with which we are concerned in the present case is as to the measure of damages in an action by a lessor against a lessee for breach of a covenant to yield up the demised premises in repair upon the determination of the term. The considerations which apply to such a case are, as it seems to me, very different from those applicable to the other cases to which I have alluded. I have no hesitation in holding that the ordinary rule as to the measure of damages in such cases as this is that laid down in Mayne on Damages, and adopted by Denman, J., in Morgan v. Hardy. 65 He said in that case: "When the reversion has actually fallen in, I can see no reason to doubt that the proper rule is that laid down in the 4th edition of Mayne on Damages, p. 253: 'Where the action is brought upon the covenant to repair at the end of the term, the damages are such a sum as will put the premises into the state of repair in which the tenant was bound to leave them.'" That is a rule of law and practice which appears to me to have the sanction of many cases. It is supported by the language used in the case of Davies v. Underwood. 66 Watson, B., said in that case: "The damages recovered are usually such as are sufficient to put the premises in repair. As a matter of fact, it is never proved in evidence to what extent the reversion is damaged."

I cannot help observing that the rule so laid down is one of great practical convenience. It is more simple than the inquiry to what extent the reversion is damaged, which appears to me to involve many matters in respect to which the lessor has nothing to say to the lessee. It is much more simple than the rule suggested by the judgment of the Court below, viz., that the measure of damages is the amount of the diminution in value of the reversion not exceeding the cost of the repairs. That involves the ascertainment of two amounts in order to take the smaller of the two. However exact such a measure of damages may be, there is, as it seems to me, a complexity about it which unfits it for determining affairs as between man and man in a court of ***47** law. I think the ordinary primâ facie rule is what I have mentioned. Then, is there anything in the present case which renders it inapplicable? What is relied upon by the defendant is the execution of a lease by the plaintiff to a third person to take effect on the determination of the defendant's lease. That lease was granted in 1887, the defendant's lease coming to an end in 1889. In what way can that lease affect the question between the plaintiff and the defendant? It may be regarded in three points of view. The first involves the question whether any estate passed by it. It was contended for the defendant that, the lessor having parted with his reversionary estate for a term of twenty-one years, his right was confined to the right to such damages as the owner of a reversion expectant upon the determination of that second lease would have sustained by reason of a breach of the covenant in the first lease. I see no ground for that contention. The second lease passed no estate until possession was taken under it. It only gave an interesse termini which would, on possession being taken, become an estate. The lessor had a right of entry on the determination of the first lease. Directly that happened a right of action for damages accrued in respect of the breach of the covenant to yield up in repair. Therefore the lessor's right of action for these damages vested before any estate vested in the grantee of the subsequent lease. Consequently that lease cannot affect the case so far as the passing of any estate under it is concerned. Then, secondly, with regard to the covenants as to alterations, &c., contained in that lease, how can such covenants, which are unperformed at the date of the vesting of the plaintiff's right of action, take away or modify the right of action which so vested? I will assume that there is a covenant in the second lease to put the premises into the same state of repair as was required by the first lease. But, even so, how can it affect the case any more than an agreement with a builder to do the repairs? It appears to me that it is res inter alios acta, with which the lessee has nothing to do and which he is not entitled to set up. Then, thirdly, how can subsequent performance by the second lessee of the covenants which he has entered into abridge or take away the cause of action that vested in the lessor before the second lease took effect? I can see no ***48** ground for thinking that it can do so. As a general rule, I conceive that, where a cause of action exists, the damages must be estimated with regard to the time when the cause of action comes into existence. I can find nothing in the existence of this reversionary lease, whether I regard its operation before or after

the vesting of the plaintiff's cause of action, to interfere with the application of the general rule as to the measure of damages in such cases. I therefore think that the plaintiff is entitled to judgment for 70l., the cost of putting the premises into the state of repair required by the covenant.

Representation

Solicitors for plaintiff: Baker &Nairne. Solicitors for defendant: Paul E. Vanderpump & Eve.

Judgment accordingly. (E. L.)

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1. It appeared in the course of the argument in the Court of Appeal that this was a larger rent than that reserved in the lease to the defendant.

2. It has not been thought necessary to report the arguments both in the Divisional Court and the Court of Appeal.

3. *2 B. & C. 273*.

4. 12 A. & E. 590.

5. *2 H. & N. 570*.

6. *18 C. B. (N.S.) 776*.

7. 1 Times L. R. 95, 484.

8. *17 Q.B.D. 770*.

9. 2 Ld. Raym. 1125; 1 Salk. 141.

10. 2 C. & K. 553.

11. 2 C. & K. 553.

12. 9 Ir. C. L. Rep. 301.

13. *9 C. & P. 734*.

14. *14 M. & W. 412*.

15. 2 Ir. Ch. Rep. 481.

16. *9 Ex. 161*.

17. 9 Ir. C. L. Rep. 301.

18. Law Rep. *8 C. P. 79*.

19. Ir. Rep. 10 C. L. 516.

20. Ir. Rep. 11 C. L. 431.

21. 2 Ld. Raym. 1125; 1 Salk. 141.

22. *2 H. & N. 570*.

23. *18 C. B. (N.S.) 776*.

24. *5 Q.B.D. 404*.

25. *17 Q.B.D. 770*.

26. 1 Ir. L. R. 100.

27. 11 Ir. Rep. C. L. 431.

28. *2 B. & C. 273*.

29. *9 C. & P. 734*.

30. *14 M. & W. 412*.

31. *9 Ex. 161*.

32. *2 H. & N. 570*.

33. *18 C. B. (N.S.) 776*.

34. Law Rep. *8 C. P. 79*.

35. Ir. Rep. 10 C. L. 516.

36. 23 Law Rep. (Ir.) Ch. 1.

37. 1 Times L. R. 95, 484.

38. *1 Ex. 850*.

39. *18 C. B. (N.S.) 776*.

40. *3 Ex. 168*, at p. 182.

41. *4 B. & Ad. 273*.

42. *8 Q.B.D. 357*.

43. *16 Q.B.D. 613* in C.A.

44. *10 Ex. 766*.

45. *18 C. B. (N.S.) 776*.

46. *8 Q.B.D. 357*.

47. *18 C. B. (N.S.) 776*.

48. *2 H. & N. 570*.

49. 2 M. & G. 39.

50. 1 Times L. R. 95, 484.

51. Ir. Rep. 10 C. L. 516.

52. 23 L. R. (Ir.) (Ch.) 1.

53. *18 C. B. (N.S.) 776*.

54. 1 Times L. R. 95, 484.

55. *18 Q.B.D. 67*.

56. *5 Q.B.D. 404*.

57. 17 Q.B.D. 778.

58. *2 Ld. Raym. 1125*.

59. *11 Ex. 15*.

60. *4 B. & Ad. 273*.

61. *2 H. & N. 570*.

62. *17 Q.B.D. 770*.

63. 1 Times L. R. 95, 484.

64. *18 C. B. (N.S.) 776*.

65. *17 Q.B.D. 770*.

66. *2 H. & N. 570*.