

[Eng. Rep.]

MAKIN V. WATKINSON—COLMER V. EDE.

[Eng. Rep.]

It seems to me to be clear that these two persons cannot say that they have entered into such an unreasonable covenant as this—that, although the one party is in possession of the premises, and the other party cannot enter to view the state of repairs, yet that the latter is to be bound at its peril to keep the premises in repair, though he have no notice of, and no means of knowing, the repairs that are wanted; and it is worth while remembering that this is an action to recover damages that have been caused by reason of the non-repair, and not merely to recover such amount of damages as would suffice to put the buildings in repair. In my opinion the parties did contemplate that the lessor should not be bound to repair until he had received notice from the lessee that repairs were necessary, and my opinion as to the necessity of such a notice is much strengthened by the *obiter dicta* of the two learned judges in the case of *Moore v. Clark*, 5 Taunt. 96.

The cases are by no means clear; some seem to incline one way and some the other. The case of *Fletcher v. Pynsett*, Cro. Jac. 102, was an action on a covenant to assure a copyhold to the plaintiff if he married the defendant's daughter; and in that case it was held that the plaintiff need not allege that he had given the father notice of the marriage having taken place, for the defendant was bound, at his peril, to take notice thereof. The true rule may be that where the happening of the particular event is in the exclusive knowledge of the plaintiff, the defendant being only able to guess or speculate as to what has happened, there the plaintiff is bound to give notice thereof. One always must have some doubt as to whether it is right to introduce words which the parties have not themselves made use of; but, for the reasons I have given, I think notice was required in this case.

MARTIN, B.—In my opinion this plea is bad; it seems to me that we differ very much as to what is good sense, and that to introduce words in order to give effect to what we suppose may be the meaning of the parties would give rise to great uncertainty. This is an action upon a covenant in a lease whereby the defendant undertook to maintain and keep the roof and the main walls and timbers of the demised premises in good repair at all times during the term. The only defence the defendant sets up in his plea is that he had no notice of the need of any such repairs, but as the lease is silent as to the necessity of any notice, the plea is, in my opinion, a bad one.

The case of *Vyse v. Wakefield*, 6 M. & W. 442, has been relied on by the defendant; but to apply that decision to the present case it is necessary to assume that the defendant could not ascertain what repairs were wanted—an assumption which I am not prepared to make. Mr. Cowling, in arguing that case, stated the general rule of law correctly when he said that the general rule of law is that a party is not bound to do more than the terms of his contract oblige him to do; and if the different judgments be looked at it will be seen that they all confirm that rule, for Lord Abinger says that the rule to be collected from the cases seems to be this—that where a party stipulates to do a certain

thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the particular knowledge of the opposite party, then notice ought to be given him. So Baron Parke lays it down as a general rule that a party is not entitled to notice unless he has stipulated for it, but says that there are certain cases in which, from the very nature of the transaction, the law requires notice to be given, though not expressly stipulated for; and Baron Rolfe says, where the law casts an obligation upon a man it says that it shall be reasonable, but that is not so where a party contracts to do a particular act. For then it is his own fault for entering into such a contract. In my opinion, then, this is not a case in which notice is required, and I think the plaintiff is entitled to judgment.

Judgment for the defendant.

CHANCERY.

COLMER V. EDE.

Lien—Solicitor and client—Deeds delivered for a special purpose—General lien on—Mortgage—Foreclosure.

Deeds delivered to a solicitor for a specific purpose only are subject to a general lien for costs incurred previous to such delivery, unless such lien be limited by a special agreement.

Ex parte Sterling, 16 Ves. 258, followed.

[Dec. 19, 1870.—19 W. R. 318.]

This was a suit for foreclosure, which involved the question whether deeds which had been delivered to a solicitor for a specific purpose only (but without any special agreement), were subject to a general lien for costs which had been incurred previously to such delivery.

In January, 1868, Mr. Phelps mortgaged certain leaseholds and all the machinery, plant, carts, waggons, and everything upon the premises, to the plaintiff, but the deed was not registered under the Bills of Sale Act. In November, 1868, Mr. Phelps became a bankrupt, and the defendant Ede was appointed assignee. Mr. Phelps had effected the mortgage through his solicitor, the defendant Stretton, and had delivered to him the deeds relating to the property, for the purpose of preparing the mortgage deed. Mr. Stretton claimed a general lien upon the title deeds for costs incurred while acting as Mr. Phelps's solicitor, and previous to the deeds being delivered to him as above mentioned, but admitted the priority of the plaintiff.

Dickinson, Q. C., and Begg, for the plaintiff.

Greene, Q. C., and J. T. Prior, for the defendant Ede, contended that as the deeds had been delivered to the defendant Stretton for a specific purpose only, there could be no lien beyond that purpose. They cited *Young v. English*, 7 Beav. 10; *Colyer v. Clay*, 7 Beav. 188; 1 Fisher's Law of Mortgages, 168, 2nd ed.; *Balch v. Symes*, Turn. & Russ. 87; *Ex parte Sterling*, 16 Ves. 257; *Ex parte Pemberton*, 18 Ves. 282; *Re Broomhead*, 5 Dowl. & L. 52. They also contended that as the mortgage deed was not registered under the Bills of Sale Act, it was void as against the assignee in bankruptcy as to the