FORFEITURE BY PLEADING

Besides the interesting points relating to forfeiture of leases raised in *Warner* v. *Sampson* [1959] 2 W.L.R. 109, [1959] 1 All E.R. 120, there are one or two important points of practice in this appeal. The case serves as a reminder to pleaders that the inadvertent use of even well-worn pleas may land their clients in some difficulty. However, the Court of Appeal's judgment in England has to some extent removed the possibility of such dire results eventuating.

The appellants in this case were the legal representatives of a lessee who was sued in April 1955 for breaches of covenants contained in the lease. The breaches of covenant alleged in the plaintiff's statement of claim did in fact take place, but the second defendant's solicitors nevertheless instructed counsel to draft a defence, if only to stay the landlord's hand while efforts were made to remedy the breaches of covenant.

Accordingly on 15th June, 1955, a defence was delivered to the plaintiff in which the second defendant admitted being appointed executrix of the lessee and denied the alleged breaches of covenant. Then in paragraph 3 of the defence the defendant concluded his pleading by the general traverse which was in the usual form as follows: — "Save and except for the admission herein contained this defendant denies each and every allegation in the statement of claim as if the same were specifically set out and traversed seriatim."

In her reply the plaintiff alleged that by her defence the second defendant had disclaimed and disputed her title as landlord and that she was therefore entitled to forfeit the term.

Realising the consequences which might follow as a result of the plaintiff's contention as to the effect of the plea in paragraph 3 of her defence the defendant

applied to have her defence amended, and in this amended defence she admitted the plaintiff's title and counterclaimed for relief under section 146 of the Law of Property Act, 1925. In her reply thereto the plaintiff maintained her right to forfeiture, and claimed possession of the premises; alleging that the denial of title contained in the defendant's general traverse was irrevocable, and purported to exercise this right. Section 146 Law of Property Act, 1925, had no application in the circumstances.

Ashworth J. at first instance upheld these contentions and in doing so applied *Kisch* v. *Hawes Bros., Ltd.* [1935] Ch. 102, 104 L.J. Ch. 86, 152 L.T. 235. There the defendants in a similar case had pleaded that they were "in possession," and were held by Farwell J. to have thereby denied the plaintiff's title.

Although it was agreed that counsel who drafted the defence had made a lapse in inserting the general traverse contained in paragraph 3 it was nevertheless held by Ashworth J. that it could not be argued that his mind did not go along with his signature; and it was held that the defendant was accordingly bound.

The defendants appealed mainly on the grounds that the general traverse could not be regarded as a disclaimer setting up a title adverse to the plaintiff as landlord and that even if that were the true position the plaintiff had not taken any step prior to the amendment of the defence to terminate the term, thereby exercising her right of forfeiture effectively in law.

The Court of Appeal upheld these arguments, reversing the decision of Ashworth J. The effect of the general denial, like all manner of traverse, was to throw the onus of proof on the other side and could not be regarded in such cases as setting up an adverse title to that of the plaintiff qua landlord. There was nothing affirmative in such a denial, nor could any distinction be made if the words "do not admit" had been used in place of the word "deny." As had been agreed in the court below, the former phrase would not be regarded as disputing the plaintiff's title. The Court of Appeal would not have such attempts at distinguishing the indistinguishable — the effect in both would be merely to shift the onus of proof back to the other party. Again, the argument that the disclaimer of title (assuming the general traverse could be so regarded) in the pleadings must be regarded as irrevocable was also rejected. There was nothing in the general traverse which placed it above all other pleadings, which could always be amended, and if amended in accordance with the rules no matter what they contained, duly rectified whatever errors that might be in the original pleadings. Furthermore such a rectification was retroactive in operation and the original pleadings so amended might be regarded as struck out and as never having existed. That being so, even if the original defence had worked a forfeiture, the landlord had failed to exercise her rights, which she could have done only by re-entry or by issue of a writ for possession founded upon such forfeiture. When she did in fact counterclaim in her final reply the original defence had already been amended effectively, and the plaintiff's right to forfeiture had been extinguished.

Ormerod L.J. was inclined to the view that the position might have been different if a writ for possession had been issued before the amendment.

In coming to the conclusion that the general traverse could not be regarded as setting up an affirmative title adverse to the landlord, Lord Denning went into the history of disclaimer by record, and with his usual clarity pointed out that such disclaimers could only be effective, creating a right of forfeiture, if they in fact did affirmatively set up titles in the defendant himself or a stranger. And after shewing that the law relating to disclaimers had its origin in the oath of fealty taken by all tenants in the old feudal system he went further and held that as the reasons giving rise to a landlord's right to claim forfeiture where there had been a disclaimer by record no longer obtain today, having disappeared with the feudal system of land tenure, there would be no justification in applying them today.

The three judges of the Court of Appeal were unanimous in overruling *Kisch* v. *Hawes Bros., Ltd.*

It is perhaps unfortunate that the arguments regarding the extent to which lapses or mistakes on the part of counsel were binding on their clients were not raised again in the Court of Appeal. In coming to the conclusion that the defendant in this case was bound, the learned trial judge had drawn a distinction between lapses and mistakes, equating lapses with mistakes, and then applying the test in *Barrow* v. *Isaacs & Son* [1891] 1 Q.B. 417, 60 L.J.Q.B. 179, 64 L.T. 686, 55 J.P. 517, 39 W.R. 338, 7 T.L.R. 175.

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