

**Pollard Vs. Shaffer**

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**Court :** US Supreme Court

**Decided On :** 1787

**Appeal No. :** 1 U.S. 210

**Appellant :** Pollard

**Respondent :** Shaffer

**Judgement :**

POLLARD v. SHAFFER - 1 U.S. 210 (1787)

U.S. Supreme Court POLLARD v. SHAFFER, 1 U.S. 210 (1787)

1 U.S. 210 (Dall.)

Pollard

v.

Shaaffer

Supreme Court of Pennsylvania

September Term, 1787

Covenant. The Plaintiff, and one Martha Green (now deceased) made a lease by indenture, dated the 1st of March 1773, of a Sugar House &c.; to John William Hoffman and his assigns for five years at L. 70. per ann. payable quarterly. The Lessee covenanted for himself, his executors, administrators, and assigns, to keep

the demised premisses in good repair, and to deliver them up to the Plaintiff, at the end of the term, in such good repair &c.; John William Hoffman assigned the lease to the Defendant, who entered into the premisses. The breach alledged in this action was, that the Defendant had not paid L. 35. rent in arrear for the last half year, nor delivered up the premisses at the end of the term, to wit, the 1st of March 1778, in good order and repair; but that the roof, window- shutters, floors &c.; of the Sugar house were in decay, destroyed &c.;

The Defendant pleaded performance of covenants, payment, and that an alien enemy, to wit, the British army, commanded by general, Sir William Howe, on the 1st of September 1777, had invaded the city of Philadelphia, had take possession of the premisses, and held the same until the end of the term, and afterwards; and that during the period they held possession, they had committed the waste and destruction &c.;

To the last plea, the Plaintiff demurred generally; the Defendant joined in demurrer, and issue &c.;

The Demurrer was twice argued, on the 27th of June 1786, and on the 15th of April 1787, by Coxe, Lewis, and Wilson for the Plaintiff; and Ingersol, Wilcocks, and Sergeant for the Defendant: And, on the 6th of October, The Chief Justice pronounced the

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judgment of the Court; Mr. Justice Rush having declined to give any opinion, as he had been of counsel with the Plaintiff in this cause before he took his seat upon the bench.

M'Kean, Chief Justice. Two questions were made in this cause: 1st, Whether the Defendant as assignee of the lease, is bound by the covenant to repair, as well as the lessee? And 2ndly, Whether the special matter pleaded, is sufficient in law to bar the Plaintiff? With respect to the first question, we are clear in our opinion, that the covenant to repair, and to deliver up the demised premisses in good order and repair, runs with the land, being annexed and appurtenant to the thing demised,

and shall bind the assignee as much as the lessee, even if the assignee were not named by express words, on account of the privity; but in the case at bar the assignee is bound by express words, and, a fortiori, is answerable as well as the lessee. This point has been fully settled in Spencer's case, 5 Co. 16. b. and 1 Salk. 199. 2 Levinz. 206. 1 Rolls Abr. title, (covenant) letter M pl. 1, and N. pl. 2. Vin. Abr. 6 vol. pa. 411. letter M. pl. 1. 2. 1 Bacon's Abr. 534. c. 5. and the books cited in these abridgements. The second question is of great difficulty, and of very great importance in its consequence. We cannot find, that it has come directly before any court in England, or in Europe. We wish, that it had come before abler judges than we pretend to be. However, we must give our judgment; but we do it with more diffidence than has occurred in any case since we have had the honor to sit here. As there is no positive law, no adjudged case, nor established rule, or order, to direct the court in this point, we must be guided by the principles of the law; by conscience, that infallible monitor within every judge's breast, and the original and eternal rules of justice. For, equity is part of the law of Pennsylvania. 1 Chan. Ca. 141. Grounds and Rudiments of law and equity. pa. 74. ca. 104. Doct. and Stud. lib. 1. cap. 16. It is agreed, that if a house be destroyed by lightning, floods, tempests, or enemies, without any concurrence of the lessee, or possibility of his preventing the same, this is no waste in the lessee: For, it is not done by the lessee's negligence, or any wilful act of his; and he cannot be charged with using it improperly, and it would thus have perished, even in the reversioner's possession. 1 Inst. 53. b. Brook, Waste, 69. 4 Co. 63 b. Herlakenden's case. Lanlord's Law pc. 158. 278. 286. Fitzherbert's Natura Brevium, Waste, 132. 1st Edition. Kelw. 87. It is also agreed, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there he shall be excused. As in the cases of waste against tenants in dower, by the curtesy, for life, or years, of common carriers, innkeepers &c.; of lessees by parol &c.; or of a

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cesser during a war. Aleyn. 27. 4. Co. 84. b. Southcote's case, 2 Leon. 109. and other books. But, it is contended for the Plaintiff, that the Defendant is obliged to

pay the rent, and yield up the tenements in good order and repair, because of the express covenant: and in support of this doctrine have been cited, Doctor and Student. Dialogue 2. chap. 4. pa. 124. Alleyn 27. Stiles 47. S. C. 1 Rolls Abr. 939. S. C. Comyns Rep. 631. 632. 2 Stra. 763. 1 Vent. 185. Plowd. 290. Perkins 738. Brook. title (Covenant) pl. 4. title, Waste, pl. 19. 31. 2 Leon. 189. Dyer. 33. pl. 10. Saunders 420. 2 Vern. 280. On the part of the Defendant, it is insisted, that the express covenant in this case does not bind against acts of God or Enemies, but only against all other events; because such acts were not in the contemplation of either party at the time of the lease executed. A risque known and insured ought to be complied with, agreeably to the bargain, but not otherwise. Every contract ought to be construed according to the intention of the parties; and, in the present case, the Defendant had only covenanted to keep the premisses in repair &c.; against ordinary accidents, and not against a case, which he could by no possibility prevent. That if the law were otherwise, yet in England relief would be had in a court of chancery; and that as no such action had ever been brought, in a case circumstanced as this is, an argument is furnished, that no such action will lie. In maintenance of this opinion were cited: Ld. Raym. 909. 4 Bac. Abr. 369. 370. 1 Rolls Abr. 236. Dyer 56. pl. 15. 1 Blackst. 252. 268. 2 Blackft. 379. 3 Blackgt. 153. 157. Cowper 9.600. Douglass 190. 1 Comyns Digest. 150. Co. Lit. 206. 1 Brown's Parl. cases 526. 528. 15 Vin. Abr. 474. pl. 1. 3 Chan. Rep. 44. 79. 3 Burr. 1240. 1637. Dyer 33. 10. Sir Tho. Raymond 464. 1 Co. 98. Shelly's case. 6 Vin. pa. 407. ca. 1. 3. 1 Cha. Ca. 72. 83. 84. 190. The books have been thoroughly searched on this head, and the question discussed with great ability on both sides. In shore, little more could be done or said for either party than what has been said and done. In deciding this intricate and difficult case, it will be of use to state the different powers of the common law courts, and the court of chancery, in England, at the time of the revolution. The courts of law there are governed by general and established rules, from which they never deviate in any case, be the injustice arising from them ever so apparent; for, they are bound by their oaths to observe the strict rules of law. A court of chancery judges of every case according to the peculiar circumstances attending it, and is bound not to suffer an act of injustice to prevail; and in doing this, it conforms to the spirit and intent of the general rule of every positive law, which always admits of particular exceptions tacitly understood.

The jurisdiction and bounds of these two courts are fixed.

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In this State, the Judges are sworn 'to do equal right and justice to all men, to the best of their judgment and abilities, according to law.' There is no court of chancery. The Judges here are, therefore, to determine causes according to equity as well as the positive law; equity being a part of the law. Doctor and Student iib. 1. cha. 16. 1 Chan. Cases 141. Grounds of law and equity 74. ca. 104. Indeed the common law is common right, common reason, or common justice. Woods Inst. 4. Were this point brought before a court of common law in England at this day, I have doubts with respect to what would be the determination. For, it is laid down as law, 'that if a lessee covenanteth to leave a wood in as good plight as the wood was at the time of the lease, and afterwards the trees are overturned by tempest, he is discharged of his covenant, quia impotentia excusat legem.' 1 Co. 98. b. In that case, there was an express covenant; and altho' it was impossible to restore the trees in the same plight they were, yet he might plant new ones, or render damages in lieu of them. The same law in Brook. covenant. pl. 4. Now, was it not equally impossible for the Defendant to deliver the possession of the premisses in good repair to the Plaintiffs on the 1st. of March 1778, when they were held by an hostile army? In Vaughan's reports, in the case of Hayes v. Bickerstass, pa. 122. it is held, 'that a man's covenant shall not be strained so as to be unreasonable, or that it was improbable to be so intended, without necessary words to make it such; for it is unreasonable to suppose a man should covenant against the tortious acts of strangers, impossible for him to prevent, or probably to attempt preventing.' This was an action brought by the lessee against the lessor, on his covenant for quiet enjoyment. In pa. 119. it is said, that if the lessor covenants that the lessee shall hold and enjoy his term, without the entry or interruption of any, whether such entry or interruption be lawful or tortious, there the lessor should be charged, because no other meaning can be given to his covenant. In the case before the court, if the lessee had covenanted for himself and his assigns, to deliver up the tenements in good order and repair, notwithstanding they should be destroyed by act of God or of an Enemy, then this

action would certainly lie, because of the special express words; but when there are no such words, but only generally to repair &c.; would it be reasonable to construe these words so as to extend to the cases put? Cannot the covenant in this case have another meaning? Can it not be so construed, that the tenements should be kept in good repair, and in such order delivered up at the end of the term, without any act or default in him, or act of any person, who could be prosecuted as a wrongdoer, to prevent it; and notwithstanding common and ordinary accidents might happen? Perhaps, however, the common law courts in England might think, that they were bound by the strict rules of law, on account of the general express covenant, to determine against the Defendant, and

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that his relief must be in chancery, if any where, because of the established rules and boundaries of the jurisdiction of these courts. We must then consider the equity of this case, and determine upon all the circumstances thereof; for altho' we have not the chancery forms or methods of carrying several equitable cases into execution, yet we are to determine, where we may, according to equity, as making a part of the law, to prevent a failure or justice. And here we have no precedents in chancery in point, but the case of the Office, which was taken away by the usurpers in the civil war in England, reported in 1 Ch. Cas. 72. that of the rent of a house, which was seized by the Parliament, during the said war, for an Hospital for soldiers, Ibid. 84, which appears to have been taken under advisement by the Chancellor, with a declaration, that, if he could, he would relieve the tenant; but it was afterwards probably compromised, as we can find no more of it; that of the recognizance for payment of L 10,000. to legatees by an executor, where the testator's estate was so lessened by the fire of London that it became insufficient to make up the sum, Ibid 190; And that of the fee given with an Apprentice; where L. 120. was given, and it was provided by articles expressly, that if the master died within a year, L.60. were to be returned; he died in three weeks after the execution of the articles; and tho' the parties themselves had provided against accidents, and tho' the maxim, 'modus et conventio vincunt legem' was urged, yet an hundred guineas were decreed to be paid back. 1 Vern 460. I say these cases, and the

uncontradicted assertion of Dunning, that the case of Paradine versus Jane, and the other cases which went upon the like principles, had been lately over-ruled in chancery, fee 3 Burr. 1639. and also some others, which have been quoted by the Defendant's counsel, hold a doctrine that is strongly in favor of the Defendant.

In Doctor and Student, Dialogue 2. ch. 4. pa 126. Mr. St. German is puzzled to give a satisfactory reason to the question put by the Doctor, to wit, 'If a man under age marries, and lands afterwards descend to the wife, and waste is committed therein after her death without the concurrence or default of the husband, shall he be charged with it?' The case, thus stated, shews, that he could not refuse taking such estate, and, therefore, the charge or condition annexed to it by law is unreasonable and unjust. He makes the Student answer it in this manner: 'That there is a great default in him as in him in the reversion; and that there is as great reason why he should be charged with the waste, as that he in reversion should be desherited, and have no manner of remedy, nor yet no profit of the land, as the other hath.' But I conceive that as there was no default in either of them, nor remedy over for either of them, that there is more reason that each of them should bear his own share of the loss, according to the duration of his estate, than that the one should be responsible to the other. The maxims, 'Lex non cogit impossibilia.' 'in potentia excusat legem.' 'Constructions are to be with equity

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and moderation, to moderate the rigor of the law.' Grounds &c.; 38. ca. 49. apply to the present case. If a lessor covenants that the lessee shall quietly enjoy against all men, yet in case he is ousted by an Enemy, or tortiously entered upon by strangers, no action of covenant can be maintained against the lessor, notwithstanding the express general covenant. For the enemy he could not oppose, and against strangers he had a remedy over. Vaughan 119. &c.; This the counsel for the Plaintiff agree to be the law. Why then should the law make the lessee answerable on such a general express covenant to surrender the demised premisses in good repair, when they were destroyed by an hostile army? Ought not the two covenants to receive the like favorable and reasonable construction? 'Remedies are to be reciprocal.' 'When the construction of any thing is left to the

law, the law, which abhorreth injury and wrong, will never so construe it, as it shall work a wrong.' Grounds &c.; 368. To conclude: Our opinion is, that the Defendant ought to pay the rent; 1st Because of the express covenant to pay it. 2ndly, Because it is a sum certain, and the extent of the loss known; and as he was to have the advantage of casual profits, he ought to run the hazard of casual losses during the term, and not lay the whole burden of them upon the lessors; as resolved in Aleyn 27. And 3rdly, because if a tenant by elegis be interrupted to take the profits of the land, by reason of war, he shall not hold over, but shall sustain the disadvantage, as resolved in 4 Co. 81. b. Sir Andrew Corbit's case. But, I am of opinion, that the Defendant is excused from his covenant to deliver up the premisses in good repair on the 1st of March 1778; 1st, Because a covenant to do this, against an act of God or an enemy, ought to be special and express, and so clear that no other meaning could be put upon it. 2ndly, Because the Defendant had no consideration, no premium for this risque, and it was not in the contemplation of either party. And, lastly, because equality is equity, and the loss should be divided; he who had the term will loose the temporary profits of the premisses, and he, who hath the reversion, will bear the loss done to the permanent buildings. Neither party has been guilty of any default; the injury has been done by a common enemy, whom both together could not possibly resist or prevent, and the premisses would have been thus damnified in the possession of the Plaintiff himself. Suppose, when the lease was executed, that the lessee had been asked, Is it your meaning, that, in case the buildings shall be destroyed by an act of God, or public enemies, you are to rebuild or repair them? His answer would have been unquestionably, 'No; I never entertained such an idea.' Should the like question have been put to the lessor, his answer would certainly have been, 'No, I do not expect any thing so unreasonable.' If there is no case in point in favor of this determination, there is none against it; and since no action of this kind has hitherto

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been brought, a presumption arises, that the sense of mankind is against it. If, however, we should be thought to be mistaken, another hearing may be had

before the High Court of Errors and Appeals, on a writ of error, where this new case may be finally settled.\* Footnotes

[ [Footnote \\*](#) ] The parties, acquiescing in the decision of the Court, no writ of error has been sued out.

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