Notre Dame Law Review

Volume 8 | Issue 2 Article 8

1-1-1933

# Notes

F. X. Kopinski

Arthur Duffy

Herbert P. Giorgio

Elmer M. Crane

# NOTES

CHATTEL MORTGAGES—USE OF FORCE IN RETAKING CHATTEL.—In the recent case of *Bear v. Colonial Finance Company* [1] a problem was presented which, in times like the present, is of more than ordinary significance. John D. Bear bought an automobile from the Myers Motor Company, which automobile, unknown to the plaintiff, was mortgaged to the Colonial Finance Company. When the transaction between Bear and the Myers Motor Company was completed, the Colonial Finance Company claimed the chattel under the mortgage. It was brought out in the evidence that Bear strenuously objected to the seizure, and only consented to deliver the car to a garage designated by the defendant, after he had been threatened with arrest, and upon the promise that the car would be returned to him within a few days. Thereafter the company sold the car and Bear sued for conversion, claiming as damages the value of the car. The plaintiff based his right to maintain an action for conversion upon the method and manner adopted by the defendant in repossessing the car. The court decided that there was no question that a mortgagee after default had a right to possession of the mortgaged property, but that he was subject to the restriction that he must act in an orderly manner and without creating a breach of peace. It held that to threaten one with arrest was a breach of peace, and as equally reprehensible as if physical force had been employed to overcome resistance. The decision is decidedly in harmony with views expressed in the majority of cases dealing with this problem.

In the case of *McCarty-Green Motor Co. v. House* [2] the court held that under an express provision of the contract giving the vendor the right upon default to take possession of the property without resort to legal process, he may do so if he does not commit a breach of the peace or an unlawful trespass. Further, the court said, that although under a contract giving the vendor the right to repossess the property sold, upon default in payment therefor without any proceedings at law, the vendor had the right to retake possession, nevertheless it had no right to regain possession by force and arms, nor to employ fraud, deception, trick, or artifice to that end. The decision in *Stowers Co. v. Brake* [3] was to the same effect. In substance it was that the seller in a contract of conditional sale may take possession of the property. wherever it may be, after breach of condition, but the taking must be peaceable. A leading case on this subject in Indiana is *Singer Sewing*

1 182 N E. 521 (Ohio 1932).
2 216 Ala. 666, 114 So. 60 (1927).
3 158 Ala. 639, 48 So. 89 (1908).

*Machine Co. v. Phipps*,[4] in which a sewing machine sold under a conditional sales agreement was in controversy. The court's holding was that where the plaintiff's possession of the sewing machine was lawful in its inception, the forcible taking of possession thereof by defendant's agents, over the protest of the one in possession, and while the plaintiff was sitting thereon, constituted assault and battery where she was thrown and injured by reason of such act, even though such agents did not touch the plaintiff. Further, the cases of *Gilliland v. Martin* [5] and *Hawkins Furniture Co. v. Morris* [6] hold that the power given to a chattel mortgagee to take possession of the mortgaged property, even though it creates an irrevocable power coupled with an interest, does not authorize the mortgagee to take such possession when to do so any force whatever involving the slightest assault or breach of peace, is required.

From a perusal of the above cited cases we may draw the following general conclusions: That the existence of a privilege of forcible recaption is denied where:

1. Chattels are sold under a conditional sale, the right of possession having reverted to the vendor by the vendee's failure to fulfill the condition.
2. Chattels of which possession had been given under a lease under which title was to pass to the lessee upon the full payment of the rent, the right of possession having reverted to the lessor by reason of the lessee's failure to pay an instalment of rent.

*F. X. Kopinski.*

---

MORTGAGES—MORTGAGOR AS TENANT OF MORTGAGEE.—The question as to whether a mortgagor in possession is a tenant of the mortgagee is still the subject of the judiciary today.[1] In "lien" states this question can hardly arise,[2] because in such states "at law as in equity the mortgagee has only a right of security incident to the mortgage debt and the legal estate continues in the mortgagor." [3]

What the relation is that exists between the actual owner of land in "title" states who executes a mortgage on it and the one to whom the mortgage is so executed has been variously explained by courts and text-writers. Where a mortgagor, after execution of a first mortgage, retains possession of the mortgaged land, he has been said to

4 49 Ind. App. 116, 94 N. E. 793 (1911).

5 149 Ala. 672, 42 So. 7 (1906).

6 143 Ky. 738, 137 S. W. 527 (1911).

1 In re Aville Realty Corporation, 57 Fed. (2d) 882 (N. Y. 1932).

2 Tiffany, Landlord and Tenant, § 45a.

3 William F. Walsh, Development of the Title and Lien Theories of Mortgages, 9 N. Y. L. Rev. 280, 300.

be: (1) "The tenant at the sufferance of the mortgagee, who may at his pleasure enter and thereby put an end to such tenancy;" [4] and (2) "Tenant at will to the mortgagee".[5] These views concerning the relation existing between a mortgagor and mortgagee have been based upon the reason that the "seizin, or possession, as well as the title, passes to the mortgagee immediately upon the execution of the mortgage, even though the mortgagor retains the possession in fact." [6]

A tenancy at sufferance arises when a person comes into possession of land lawfully, but holds over wrongfully after the determination of his interest, differing in this respect from a tenancy at will, where the holding is by the landlord's permission. That is to say, such a tenancy is created when one enters into possession under a lawful demise, and his retention of possession after the expiration of his term is by the mere laches or neglect of the owner to take possession of the premises—the entry is lawful, but the holding over is wrongful.[7] But a mortgagor is in possession either by the express or implied consent of the mortgagee, or merely because the mortgagee does not care to take possession and thereby incur liability for rents and profits.[8] "In the former case the mortgagor is, it seems, a tenant of the mortgagee as having permissive possession under him. In the latter case he is not a tenant of the mortgagee, it is submitted, since he does not hold under him." [9] A tenant at sufferance at common law is not liable for rent, if the tenant is occupying originally by the permission of the landlord; but he is liable on an implied contract in *assumpsit* for use and occupation of the premises.[10] But an action of quasi contract will not lie against a mortgagor for use and occupation, while he is in possession, for he is not obligated to account for rents and profits to the mortgagee.[11]

A tenancy at will is a tenancy of indefinite duration expressly made at the will of the landlord and held at the will of the tenant; it is not a tenancy for life or in fee, but is one of no fixed period which may be terminated by either the landlord or the tenant at any time.[12] Such a tenant is not liable for "permissive" waste, that is, waste resulting from a failure on the part of the tenant in possession to make repairs and to maintain the property in a reasonable manner,[13] because

4 Brown v. Cram, 1 N. H. 169, 171 (1818).

5 Judd v. Woodruff, 2 Root 298, 299 (1795).

6 Brown v. Cram, *op. cit. supra* note 4, at p. 171.

7 Sharpe v. Mathews, 51 S. E. 706, 708 (Ga. 1905); Jackson v. Parkhurst, 5 Johns. 128 (1809).

8 Tiffany, *op. cit. supra* note 2.

9 Tiffany, *op. cit. supra* note 2.

10 Burke v. Williard, 249 Mass. 313, 132 N. E. 223 (Mass. 1923).

11 Jones on Mortgages, 7th ed., at § 671.

12 Walsh, The Law of Property, at § 160.

13 Walsh, *op. cit. supra* note 12, at § 66.

a tenant at will was held not to come with the Statutes of Marlbridge,[14] and of Gloucester,[15] since his interest was slight compared to a tenant for life, or for years.[16] Accordingly it has been held in Massachusetts that a tenant at will was not liable for his negligent burning of a building on the premises.[17] For an act of voluntary waste, that is, when the waste itself results from acts of commission by the tenant,[18] a tenant at will has been held liable. It has also been held in Massachusetts that a tenant at will was liable for placing too great weight in a barn, as a result of which the floor of the barn gave way.[19] The holding in the latter case is explained by the negligence or wilful wrong of the tenant, since negligence or wilful wrong on a tenant's part renders him liable. It is difficult to reconcile this decision with the case referred to of the tenant's negligent burning of the buildings, but it seems in the barn case the waste was of the "voluntary" type, and being an act of hostility to the landlord which terminated the tenancy at will, rendering such tenant liable to his landlord in trespass.[20] A mortgagor in possession is the owner of the estate, and may exercise all rights of ownership, and even commit waste, provided he does not diminish the security or render it insufficient.[21]

An obligation to pay rent is not a necessary incident of a tenancy at will,[22] yet an action in quasi contract will lie against a tenant at will for use and occupation.[23] But a mortgagor of real estate is not, as a general rule, liable for rent while in possession.[24] In *Anderson v. Robbins* [25] it was said: "On account of the peculiar relation subsisting between the parties to a mortgage, the mortgagor, though the title be in the mortgagee, cannot be required to pay rent to the latter so long as he is allowed to remain in possession, since his contract is to pay interest and not rent.[26]

---

14 52 Henry III c. 23.

15 6 Edw. 1, c. 5. See Walsh, *op. cit. supra* note 12, at § 61.

16 Phillips v. Covert and Covert, 7 Johns. 1 (1810); Moore ads. Townshend, 33 N. J. Law 284 (1869).

17 Lathrop v. Thayer, 138 Mass. 466 (1885).

18 Walsh, *op. cit. supra* note 12, at § 60.

19 Chalmers v. Smith, 152 Mass. 561 (1891).

20 Chalmers v. Smith, *op. cit. supra* note 19.

21 Fidelity Trust Co. v. Hoboken & M. R. Co., 63 Atl. 273, 278 (Ct. of Ch. of N. J. 1906), citing Kerr on Injunctions, § 262; Field v. Tate, 42 Atl. 742, 743 (N. J. 1899).

22 Harris v. Frink, 49 N. Y. 24 (1872).

23 Christy v. Tancred, 7 M. & W. 127; Bayley v. Bradley, 5 C. B. 396. But see Chamberlain v. Donahue, 45 Vt. 50 (1872).

24 Gilman v. Ill. & Miss. Tel. Co., 23 L. Ed. 405, 410 (1875); Jones on Mortgages, 7th ed., § 671.

25 19 Atl. 910, 911 (Me. 1890).

26 Accord: Chase v. Palmer, 25 Me. 341, 346 (1845).

The courts in some "title" states have expressly repudiated the view that any relation of landlord and tenant exists between a mortgagee and a mortgagor in possession of the mortgaged property.[27] The court in *Morse v. Stafford* [28] said: "The relation of landlord and tenant may exist between the mortgagee and mortgagor, or one claiming under the latter; but this relation is not presumed to exist between such parties, and does not grow out of the relations of mortgagee and mortgagor." In "title" states the mortgagor is not a tenant within the statutes relating to forcible entry and detainer,[29] so that the summary process provided by these statutes is not applicable to the case of a mortgagor in possession, who has prevented the mortgagee from taking possession, or excluded him after possession taken.[30] In an early New York case [31] it was said: "It has been repeatedly decided in this court, that as between the mortgagor and mortgagee, the former is to be regarded as a tenant at will by implication, and is entitled to notice (by which is meant six months notice) to quit." But the weight of authority is *contra;* no notice to quit, or previous demand, is necessary to entitle a mortgagee to maintain ejectment against a mortgagor in a "title" state.[32]

It is only in a general sense that a mortgagor in possession in a "title" state may be regarded as a tenant at will of the mortgagee. Where it has been contended that the relational rights and duties of a landlord and tenant apply to the mortgagor and mortgagee relationship, the courts in the "title" states have generally considered that there is no relation of landlord and tenant existing. At an early date Lord Mansfield said: "Now a mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is so only *quodam modo.* Nothing is more apt to confound than a simile. When the court, or counsel call a mortgagor a tenant at will, it is barely a comparison. He is like a tenant at will." [33]

*Arthur Duffy.*

---

27 Morse v. Stafford, 49 Atl. 45 (Me. 1901).

28 *Op. cit. supra* note 27, at p. 46.

29 Clement v. Bennett, 70 Me. 207, 209 (1879).

30 Reed v. Elwell, 46 Me. 270, 279 (1858).

31 Jackson v. Hopkins, 18 Johns. 487, 488 (1821).

32 Rockwell v. Bradley, 2 Conn. 1 (1816); Lackey v. Holbrook, 11 Met. 458 (1846).

33 Moss. v. Gallimore, 1 Doug. 279 (1779).

NEGLIGENCE—PLEADING OF SPECIFIC ACTS OF NEGLIGENCE, THEN RELYING ON RES IPSA LOQUITUR.—In *Barger v. Chelpan* [1] it was decided that the pleading of the specific acts of negligence did not affect the plaintiff's right to rely on the doctrine of *res ipsa loquitur*. It is probable that when an accident happens which would not occur ordinarily if the required degree of care were exercised, that such care was not exercised by the person in control of the situation.[2] When the facts attendant upon the accident give rise to an inference of negligence the maxim applies. This doctrine, when applicable, raises an inference of negligence on the part of the one in control of the device causing the injury merely from the accident itself.[3] The logical reason for adopting the maxim, *res ipsa loquitur*, and having it favor the plaintiff, is because the course of the injury can be more easily apprehended by the defendant while it is quite improbable that the plaintiff would know the cause.[4] As a result of the adoption of the rule, the plaintiff merely has to allege the accident and attendant circumstances and the resultant injury to himself.[5] A question of the applicability of the doctrine arises when the plaintiff goes further than alleging general negligence and alleges specific acts of negligence. (a) Some courts have held that the doctrine does not apply.[6] If the plaintiff alleges specific acts it becomes incumbent upon him to prove them as he manifests by his allegation that he is acquainted with the negligent condition.[7] (b) Other courts have held that there is no presumption in favor of the plaintiff, but merely an inference of negligence on the part of the defendant which he can overcome by competent explanation.[8] (c) The better view as to the application of the doctrine is that it can be relied upon by the plaintiff.[9] The plaintiff's case does not stand or fall upon proof of the specific act; and, according to the weight of authority, if the case is a proper one for the application of the doctrine, the plaintiff by pleading the particular cause of the accident in no way loses his right to rely thereon.[10] In the majority of cases a general form of allegation is sufficient against a demurrer interposed by the defendant that the petition does not state a cause of action, and specific acts of negligence may be incor-

1 243 N. W. 97 (S. D. 1932).

2 5 Wigmore on Evidence (2nd ed. 1923) §§ 2490, 2509.

3 Griffin v. Manice, 166 N. Y. 188, 59 N. E. 925 (1901); Wigmore, *op. cit. supra* note 2, at § 2509.

4 Wigmore, *op. cit. supra* note 2, at § 2509.

5 Kaemmerling v. Athletic Mining and Smelting Company, 2 Fed. (2d) 574 (1924).

6 Roscoe v. Metropolitan St. Ry Co., 101 S. W. 32 (Mo. 1907).

7 Clark on Code Pleading (1st ed. 1928) 208.

8 Palmer Brick Co. v. Chevall, 47 S. E. 329 (Ga. 1904).

9 Firszt v. Capital Park Realty Co., 120 Atl. 300 (Conn. 1923).

10 Negligence, 20 R. C. L., p. 187.

porated, not as explanations of general negligence, but as further specified acts of which the general allegation is only the first.[11] By establishing the fact that the defendant was managing, operating and controlling the thing which caused the injury, the plaintiff has made out a *prima facie* case and will win if the defendant is unable to explain by sufficient evidence.[12] *Res ipsa liquitur* does not relieve the plaintiff from proving negligence nor does it raise any presumtion in his favor, but it only changes the mode of the proof of negligence. There is a difference between an inference and a presumption in that an inference may persuade the jury to return a verdict upon the evidence as they see it, whereas a technical presumption, as an unexplained absence for seven years gives rise to the presumption of death, demands a verdict subject to the court's direction.[13] The principal case follows the better view, which holds that where the plaintiff has asserted specific acts of negligence on part of the defendant he may rely on the general presumption of negligence wherein the doctrine of *res ipsa loquitur* applies.[14] The principal case seems to adopt the third view and represents the modern trend of authority.

*Herbert P. Giorgio.*

---

TRIAL—OPINION OR BELIEF OF JUDGE AS TO FACTS.—A growing tendency of recent years in Pennsylvania allowing the trial judge to invade the province of the jury has reached such elastic bounds that the production of justice is in danger. Following the English practice, Pennsylvania allows a judge to express his opinion upon the facts in his charge to the jury if he warns the jury they are not to be bound by his opinion. The Supreme Court of Pennsylvania, in *Commonwealth v. Orr*,[1] speaking through Chief Justice Paxson, stated: "We have said in repeated instances that it is not error for a judge to express his opinion upon the facts if done fairly; nay, more that it may be his duty to do so in some cases, provided he does not give a binding direction, or interfere with the province of the jury." This doctrine has been upheld almost without exception and when a principle of this type has become so well rooted the courts seem unable to resist the temptation of abusing it by going beyond the widest latitude of comment or expression of opinion on the evidence permitted to a trial judge.

---

11 Clark, *op. cit. supra* note 7, at p. 208 *et seq.*

12 Edgerton v. New York & H. R. Co., 39 N. Y. 227 (1868).

13 Wigmore, *op. cit. supra* note 2, at §§ 2509, 2490.

14 Clark, *op. cit. supra* note 7, at p. 213; Kleinman v. Banner Laundry Co., 186 N. W. 123 (Minn. 1921).

1 138 Pa. St. 276, 20 Atl. 866 (1890).

The early Courts of Pennsylvania were reluctant to uphold this liberal view, as is evidenced by the statement of Thompson, J., in delivering the opinion of the Supreme Court in *Ditmars et al. v. The Commonwealth:*[2] "Care must always be taken, however, not to infringe the province of the jury, so as to relieve them from the full responsibility of pronouncing an intelligent judgment . . ." This opinion was in keeping with the view of the courts at that time, but since, the pendulum has swung in the opposite direction.

Two comparatively recent Pennsylvania cases are typical of the modern view, *Commonwealth v. Gross,*[3] and *Commonwealth v. Bloom.*[4] In the *Gross* case the court said, in its charge to the jury: "I say to you frankly, members of the jury, that in the light of all the testimony in this case it seems to us that you ought to have no difficulty in arriving at a verdict of guilty on both counts of the indictment," but followed it with the statement that they were entirely free to determine the defendant's guilt or innocence, and were not bound by his opinion, and the judgment was affirmed. In the *Bloom* case, the Superior Court approved the charge of Stevens, J., in which, the latter, upon concluding a review of the defendant's testimony and inferences drawn therefrom, states: "To the court this seems plainly unbelievable," but continued to warn the jury that it was not the purpose of this expression to withdraw the evidence from their consideration and decision. (Bloom had testified that palatable alcoholics in his possession were for "rubbing purposes" and "automobile radiators.")

It might be argued, with more or less reasonableness, that the adoption of the present theory may be attributed to the difficulty of prosecuting attorneys obtaining convictions in the trial of the common run of defendants in late criminal cases. We cannot escape this viewpoint, particularly in reference to those cases involving the imposition of a sentence of imprisonment brought about by laws which the jury approach with an unsympathetic attitude accompanied with a reluctance to find the accused guilty. However, the unconscious collusion of the court with the prosecuting attorney is not justified to overcome this probable prejudice of the jury. If this practice is persisted in by the trial courts, the resulting dangers are obvious. The defendant is entitled to a trial by jury and the court's expression is an usurpation of the functions of the jury. It is true that the judge warns the jury that they are not to be influenced by his opinion but the damage is done, the moral restraint has already been imposed. It may readily be seen that this practice will eventually, and within a short time at the present rate of development, do away entirely with the jury system.

*Elmer M. Crane.*

2 47 Pa. St. 335, 337 (1864).
3 89 Pa. Superior Ct. 387 (1926).
4 89 Pa. Superior Ct. 308 (1926).