

2-1-1951

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Recommended Citation

Olive Mae Bean, *The Doctrine of Election as Applied to Landlords' Remedies Against Delinquent Tenants*, 5 U. Miami L. Rev. 305 (1951)

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COMMENT

THE DOCTRINE OF ELECTION AS APPLIED TO LANDLORDS' REMEDIES AGAINST DELINQUENT TENANTS

Summary statutory proceedings¹ available to present day lessors afford a speedy, but not necessarily complete, remedy against delinquent tenants. At least one court has indicated that, while judgment for possession will be granted, there is no certainty as to the existence or nature of an additional remedy for past due rent.² Since summary eviction after default in payment of rent is a statutory remedy, the judgment is confined to the relief specifically provided, which varies from state to state.³

It is proposed to consider, first, the various remedies landlords may invoke against delinquent tenants; and, second, the possible applications of the doctrine of election should resort to other types of actions seem advisable after initial attempts have been made to enforce the lessors' rights. Whether or not the numerous lessors who have chosen summary proceedings to regain possession of their property have elected a remedy which prevents any further action to collect the back rent, they have benefited immensely from the use of these modern proceedings, at least in contrast to a fictitious John Doe, living in the thirteenth century.

When Lord John Doe's tenant failed to pay his rent, the landlord's remedy lay in an action upon a writ of customs and services,⁴ or in his power to distrain certain enumerated goods,⁵ which he held pending the receipt of the amount owed. The former remedy was extremely slow and cumbersome whereas, the latter, while easy to obtain, could be defeated whenever the tenant denied his liability.⁶ Nor were the now commonplace remedies of debt⁷ and indebitatus assumpsit⁸ available to Lord Doe to

1. See *Spillner v. Guenther*, 26 N.J. Misc. 159, 58 A.2d 540, 542 (Sup. Ct. 1948) (landlord's action to dispossess tenant of the leased premises in summary fashion); *Garrett v. Reid*, 244 Ala. 254, 257, 13 So.2d 97, 100 (1943).

2. See *Talley v. Mitchell*, 138 Ga. 392, 397, 74 S.E. 465, 468 (1912).

3. E.g., ALA. CODE ANN. tit. 7, §§ 967, 973 (1940) (restitution and costs); D.C. CODE § 11-735 (1940) (possession and incidentally rent); FLA. STAT. §§ 83.20, 83.25, 83.26 (1949) (possession and costs); IND. ANN. STAT. §§ 3-1613, 3-1619 (Burns 1933) (possession and damages for detention); MINN. STAT. §§ 566.03, 566.09 (Henderson 1949) (restitution and costs); MO. REV. STAT. ANN. § 2845 (1939) (verdict includes rent or damages); TENN. CODE ANN. § 9261 (Williams 1934) (judgment for rent, interest, and damages in addition to possession).

4. 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 125 (2d ed. 1898) (a writ of customs and services was similar to a proprietary action by writ of right).

5. 2 *id.* at 577.

6. 2 *id.* at 125.

7. 3 BL. COMM. *232 (debt was unavailable at common law for this purpose).

8. 11 GEO. 2, c. 19, § 14 (1738) (indebitatus assumpsit was not available for this purpose until the passage of the statute).

enforce his claim for rent. Having arisen from a reservation in the grant of an estate for years,⁹ the right to rent was not considered a contractual right in any sense of the term.

The relationships involved in the use of land belonging to another in exchange for a remuneration may not be strictly contractual in nature, but the language in many of the cases treats the rights and liabilities arising therefrom on the basis of contract law.¹⁰ And, although the landlord-tenant concepts of necessity remain closely connected with the history of real property law as it developed in England the trend in this country is toward considering the modern lease as a business contract.¹¹ Rather than resulting from any basic change in the law, this tendency to interpret leases as contracts may be the logical consequence of an attempt on the part of the courts to give effect to the intent of the parties, who have in most cases adopted leases contractual in form, which the courts proceed so to construe.

In any event, the breach of a properly drawn lease-contract by a tenant permits the landlord to bring an action for damages at law or to seek rescission in equity in accordance with usual contractual principles. In addition to these purely contractual remedies there may be open to him, as methods of collection, an action in debt to collect a fixed amount due,¹² an action of covenant to collect what is owed on a sealed lease,¹³ a remedy in the form of quasi-contract for the reasonable value of the use and occupation of the premises if the compensation is not fixed,¹⁴ or a statutory distress proceedings.¹⁵ If these remedies are not satisfactory, the landlord may, in some jurisdictions or under a specially worded lease, re-enter and take possession in a peaceable manner.¹⁶ In case the lessor wishes to regain possession and cannot do so without the aid of the courts, he may resort to ejectment¹⁷ or summary proceedings.¹⁸ Since he usually cannot be certain

9. AMES, *Assumpsit for Use and Occupation* in LECTURES ON LEGAL HISTORY 167 (1913); 2 POLLOCK AND MAITLAND, *op. cit. supra* note 4, at 131; Williams, *The Incidence of Rent*, 11 HARV. L. REV. 1 (1897).

10. See, e.g., *Butler v. Maney*, 146 Fla. 33, 36, 200 So. 226, 228 (1941) (contract or agreement creates the relationship); *Hinsdale v. McCune*, 135 Iowa 682, 684, 113 N.W. 478 (1907) (lease governed by same rules as other contracts); *Dutton v. Dutton*, 122 Kan. 640, 253 (Pac. 553, 554 (1927) (relation existing is contractual); *Jackson v. Pepper Gas. Co.*, 280 Ky. 226, 133 S.W.2d 91, 93 (1939) (lease a bilateral contract with mutual promises); *Israelson v. Wollenbert*, 63 Misc. 293, 116 N.Y. Supp. 626, 627 (Sup. Ct. 1909) (essentials of contract—offer and acceptance—must be present); *McCready v. Lindenborn*, 172 N.Y. 400, 65 N.E. 208, 210 (1902) (contract to pay money in installments). *But see* *De Vore v. Lee*, 158 Fla. 608, 610, 30 So.2d 924, 925 (1947) (lease a conveyance of a portion of an estate).

11. See *Bennett*, *The Modern Lease*, 16 TEXAS L. REV. 47 (1937); 6 U. OF CHI. L. REV. 505 (1939). *But see* Note, 19 NOTRE DAME LAW. 370 (1944).

12. 3 BL. COMM. *154.

13. 2 McADAM, LANDLORD AND TENANT 1191 (5th ed., Ambert, 1934).

14. 2 *id.* at 1193.

15. See *Benedict v. Gress Mfg. Co.*, 101 Fla. 1359, 1360, 134 So. 66 (1931) (attachment and sale of tenant's goods).

16. *Markley v. Smith*, 301 Mass. 64, 16 N.E.2d 20 (1938).

17. See *Davis v. Robinson*, 374 Ill. 553, 555, 30 N.E.2d 52, 54 (1940) (ejectment is an action at law to try title as well as to gain possession).

18. See note 1 *supra*.

of the outcome of his action, he naturally is concerned as to whether he is making a final election of remedy at the outset.

If an individual desires to enforce a right and has at a given time two or more possible remedies dependent on inconsistent positions, he must make a choice between them.¹⁹ As has been stated in a much cited Florida case:²⁰ "Either remedy could have been adopted, but not both, for the reason that to do so would assert inconsistent relations between the parties with reference to the property." Whether notice to the other party, the institution of a suit or the prosecution to judgment is the point of final election is not entirely settled.²¹ It is generally agreed, however, that the choice of an inappropriate remedy does not create an estoppel so as to prevent the later pursuance of a usable remedy.²²

The doctrine of election is referred to in similarly broad terms no matter what the factual situation, but difficulties arise in treating specific remedies, and especially in the application of the doctrine to actual controversies. The inconsistency between the rescission of a lease and the affirmance of it has been considered to be the basis of a general rule necessitating a choice between the two positions.²³ Although the election between an action for damages based on the existence of a lease and one for cancellation of the instrument is usually irrevocable, the position of the lessor who follows another course may be less clear.

Suppose a landlord decides to sue for past-due rent and brings an action in debt or a suit to recover under quasi-contract for use and occupation. If the suit results in a satisfied judgment, the lessor's remedy is complete. If not, in order to decide what further course he may pursue, it is necessary to analyze the position he has taken thus far. If he has brought an action based on the existence of a contract, he cannot bring an action to cancel the instrument. The action he brought was one based on a contract, either express or implied; therefore, he probably could not now bring an action in equity for rescission. But, the acquisition of a money judgment in such a proceeding does not preclude remedy by distress to collect the amount owed.²⁴

19. *Wake Development Co. v. Auburn-Fuller Co.*, 71 F.2d 702 (9th Cir.), *cert. denied sub nom. Cord v. McFie*, 293 U.S. 592 (1934); *Williams v. Pennsylvania Mut. Life Ins. Co.*, 6 F.2d 322 (S.D. Fla. 1925); *American Process Co. v. Florida White Pressed Brick Co.*, 56 Fla. 116, 47 So. 942 (1908); *Kearney Milling & Elevator Co. v. Union Pac. Ry.*, 97 Iowa 719, 66 N.W. 1059 (1896).

20. *American Process Co. v. Florida White Pressed Brick Co.*, *supra* note 19 at 123, 47 So. at 944.

21. *Reade v. Brooks*, 174 F.2d 624 (8th Cir. 1949) (notice); *Karapetian v. Carolan*, 83 Cal. App.2d 344, 188 P.2d 809 (1948) (not notice); *Kent v. Sutker*, 40 So.2d 145 (Fla. 1949) (institution of suit not conclusive); *Pennsylvania Co. v. Harr*, 320 Pa. 523, 183 Atl. 37 (1936) (mater of reliance and estoppel).

22. *Dickinson v. Electric Corp.*, 10 Cal.App.2d 207, 51 P.2d 205 (1935); *Zimmerman v. Robinson & Co.*, 128 Iowa 72, 102 N.W. 814 (1905); *Snow v. Alley*, 156 Mass. 193, 30 N.E. 691 (1892).

23. See *Karapetian v. Carolan*, 83 Cal.App.2d 344, 347, 188 P.2d 809, 811 (1948).

24. *In re Barnhart*, 4 F.2d 269 (M.D. Pa. 1925).

One of Lord John Doe's remedies lay in his right to seize and hold property found on the premises until the delinquent tenant paid his rent and redeemed the goods.²⁵ This remedy by distraint has been described as a proceeding in rem in a recent case denying the existence of the remedy to a present day landlord.²⁶ The common law remedy of distress has been considered to be abolished in some jurisdictions by the institution of statutory proceedings in unlawful detainer.²⁷ Other states,²⁸ including Florida,²⁹ have an additional provision for distress, which amounts to the enforcement of a lien against the tenant's goods by a sheriff's sale.³⁰ The only issue involved is the amount of rent owing,³¹ and the foreclosure of the lien in this fashion is not inconsistent with securing an execution based on a money judgment. Of course, satisfaction of either would prevent pursuance of the other.³²

Instead of any of the actions thus far discussed the landlord may wish to consider unlawful detainer,³³ a possessory remedy.³⁴ It is purely a statutory remedy, summary in nature and unknown to the common law.³⁵ While possession is universally given, the various legislative enactments differ as to whether rent, damages, or costs may be gained in addition.³⁶ This summary proceeding has been variously described as an action based on contract,³⁷ one arising from the breach of a contract,³⁸ an action sounding in tort,³⁹ and as a statutory substitute for ejectment.⁴⁰ While not primarily a remedy for the collection of rent, it has been referred to in that sense since the tenant is apt to pay the arrears to protect his possession upon the bringing of summary proceedings.⁴¹ In that way it may prove to be a useful method of enforcing payment of rent due.⁴²

Aside from the effectiveness of pressure on the tenant to pay rent, consideration should be given to the nature of the remedy of unlawful detainer to determine whether it is inconsistent with the other possible remedies of

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25. See *Standish v. Moldawan*, 93 N.H. 204, 37 A.2d 788, 789 (1944).
 26. *Ibid.*
 27. See *Welch v. Ashby*, 88 Mo. App. 400, 404 (1901).
 28. GA. CODE ANN. §§ 61.401-61.407 (1933); TEX. STAT., REV. CIV. art. 5227 (1948).
 29. FLA. STAT. §§ 83.11-83.19 (1949).
 30. See *Benedict v. Gress Mfg. Co.*, 101 Fla. 1359, 1360, 134 So. 66 (1931).
 31. *Ibid.*
 32. Cf. *Pickler v. Lanphere*, 209 Iowa 910, 227 N.W. 526 (1929).
 33. See note 1 *supra*.
 34. See *D'Amico v. Riedel*, 212 P.2d 52, 54 (Cal. 1950); *Shingley v. Major*, 44 A.2d 540, 541 (D.C. Munic. Ct. 1945); *Reckard v. Ryan*, 133 Ore. 108, 288 Pac. 1053, 1054 (1930); *Hart v. Ferguson*, 73 Okla. 293, 294, 176 Pac. 396 (1918).
 35. See *Farnow v. Eighth Judicial Dist. Ct.*, 64 Nev. 109, 121, 178 P.2d 371, 377 (1947); *Yori v. Phenix*, 38 Nev. 277, 281, 149 Pac. 180 (1915).
 36. See note 3 *supra*.
 37. See *Cline v. Smith*, 205 Ark. 136, 167 S.W.2d 872, 873 (1943).
 38. See *Crawford v. Alexander*, 5 Ind. T. 161, 82 S.W. 707, 708 (1904).
 39. See *Greenberg v. Koppelow*, 76 Cal.App.2d 631, 634, 173 P.2d 821, 822 (1946).
 40. See *Shingley v. Major*, 44 A.2d 540, 541 (D.C. Munic. Ct. 1945).
 41. 2 McADAM, LANDLORD AND TENANT, *op. cit. supra* note 13, at 1171.
 42. Langdell, *A Brief Survey of Equity Jurisdiction*, 10 HARV. L. REV. 71, 87 (1896).

the landlord. The landlord-tenant relationship from which arise the actions of distress or debt, for instance, is also prerequisite to an unlawful detainer action. The difference in the effect of the judgment perhaps distinguishes the actions most clearly, the judgment in the detainer action having the effect of terminating the lessor-lessee relationship.⁴³ Previous pursuance by the landlord of a suit in assumpsit,⁴⁴ an action for rent,⁴⁵ an action to enforce his lien,⁴⁶ or the taking of security for rent⁴⁷ has been held not to bar a subsequent summary proceeding for possession. Of course, if the landlord has been successful in his collection of the rent due, he cannot bring a detainer action, the gist of which is non-payment.⁴⁸ And, in the absence of special provisions in the lease, courts will generally permit the tenant to pay the rent, interest and costs and dismiss the landlord's action.⁴⁹ If the lessor brings his suit to a successful conclusion and receives a judgment for possession, he generally is concluded from bringing any further action for subsequently accruing rent. However, under a statute which does not provide for recovery of rent in the same proceeding, it is not entirely settled whether he has elected a remedy which will prevent a subsequent recovery of the rent accrued prior to the termination of the lease.

There would be no inconsistency in the regaining of possession and the subsequent recovery of accrued rent if the lease were treated as a divisible contract, each month's rent being the consideration for the lessee's use for that period. Recovery of rent was permitted on that theory in an Illinois case⁵⁰ after a lease had been cancelled by court order, and it would seem equally applicable to a situation in which the lease is terminated by bringing of summary proceedings. Nor would it appear to be essential to treat the lease strictly as a contract to reach this result. A Florida case, speaking in terms of a lease as a conveyance, nevertheless said of the rent that the debt becomes fixed from time to time as the lessee uses the property.⁵¹ Under such an interpretation the termination of the relationship should not wipe out a fixed liability. Although there would seem to be no legal justification for holding that bringing an action in unlawful detainer precludes a later action to collect the unpaid rent through the doctrine of election of remedies, it is possible for specific factual situations to create a binding estoppel against further action by a landlord.

Upon the bringing of his action in unlawful detainer, a landlord is

43. See *St. Louis Billposting Co. v. Stanton*, 172 Mo. App. 40, 46, 154 S.W. 821, 825 (1913).

44. *Schumann Piano Co. v. Mark*, 208 Ill. 282, 70 N.E. 226 (1904).

45. *Crittenden v. St. Hill*, 34 Cal. App. 107, 166 Pac. 1016 (1917).

46. *Swanson v. Olsen*, 38 Idaho 24, 220 Pac. 407 (1923).

47. *Toplitz v. Standard Co.*, 25 Cal. App. 575, 143 Pac. 52 (1914).

48. See *Veal v. Jenkins*, 58 Ga. App. 4, 197 S.E. 328 (1938).

49. *Trans-Lux Radio City Corp. v. Service Parking Corp.*, 54 A.2d 144 (D.C. Munic. Ct. 1947); accord, *Davis & O'Connor Co. v. Shell Oil Co.*, 311 Mass. 401, 41 N.E. 2d 287 (1942).

50. *Metropolitan Trust Co. v. Fishman*, 323 Ill. App. 413, 55 N.E.2d 837 (1944).

51. See *De Vore v. Lee*, 158 Fla. 608, 610, 30 So.2d 924, 926 (1947).

choosing to terminate the lease as of that time and will be unable to pursue a further remedy based on the continued existence of the lease, in the absence, of course, of special provisions in the document itself. From the time of the termination of the lease, the further holding of the property is considered to be tortious,⁵² and, if the statute so provides, double rent may be receivable for the period following the formal demand.⁵³ Where allowed, this double rent is generally deemed to be in the nature of a penalty for intentionally withholding the premises from the person rightfully entitled to it. As the bringing of summary proceedings is primarily to regain possession, it is generally conceded that such an action is in no way inconsistent with an action in ejectment to settle the title to the property.⁵⁴

In conclusion, a present day lessor has numerous possible remedies to enforce his rights. These actions are dependent on the existence of a landlord-tenant relationship, which frequently arises from a lease in the form of a contract between the parties. A landlord may seek damages at law for the breach of contract or bring debt or distress to collect on the obligation, all of which are in affirmance of the existing relationship and would be inconsistent with an action to rescind the instrument. Most of the remedies are not inconsistent with each other, however, and it would be entirely possible to get to the stage of judgment in unlawful detainer, distress, debt and ejectment without adopting inconsistent positions. Satisfaction of the judgment in distress or debt would bar satisfaction of the unlawful detainer decree in which possession is granted based on the failure to pay the rent, now collected by suit, but would not necessarily bar the ejectment action in which title as well as possession is in issue. The satisfaction of the judgment in unlawful detainer should not bar the collection by distress or debt of the amount already owing or the settling of questions of title in the ejectment action. Nor should execution of the judgment in ejectment bar the satisfaction of the judgments in distress or debt although there would be no further need for carrying out the decree in unlawful detainer to gain possession already granted by the ejectment decree.

Most of the distinctions just drawn are technical and impractical in nature since debt and ejectment are regular law actions and take a long time for completion, while distress and unlawful detainer, although actions in law, are provided by statute to furnish speedy remedies to the landlord. Resort to distress, if satisfied, would wipe out any basis for bringing unlawful detainer. If a landlord could collect the rent easily by bringing distress in this fashion, in those jurisdictions where permitted, and instead of so doing brought unlawful detainer to gain possession, he might under the facts be

52. See *Willis v. Harrell*, 118 Ga. 906, 909, 45 S.E. 794, 795 (1903); *O'Day v. Hanes*, 111 Ind. App. 617, 40 N.E.2d 366, 370 (1942).

53. *Talley v. Mitchell*, 138 Ga. 392, 74 S.E. 465 (1912); *Willis v. Harrell*, *supra* note 52.

54. *Hanover Estates v. Finkelstein*, 194 Misc. 755, 86 N.Y.S.2d 316 (N.Y. Munic. Ct. 1949); *Warren v. Startsty*, 199 Okla. 683, 189 P.2d 948 (1948); *Testa v. Lally*, 161 Pa. Super. 478, 55 A.2d 552 (1947).

considered to be estopped from bringing an additional statutory remedy to regain the amount owed. Except where the facts of the case create such an estoppel, there should be no legal justification for denying a subsequent law action for the accrued rent to a landlord who has regained possession by means of unlawful detainer. Since a landlord has a right to the accrued rent under the lease and a right given him by terms of the lease or by statute to regain possession of the land if the rent is not paid when due, there would seem to be no inconsistency in the enforcement of these separate rights in the same or different actions. Thus, in contrast to the fictitious John Doe of the thirteenth century, a lessor of the present time has available numerous remedies, most of which are cumulative.

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