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Landlord and Tenant-Estoppel of Tenant to Deny Landlord's Title

LANDLORD AND TENANT—ESTOPPEL OF TENANT TO DENY LANDLORD'S TITLE—On April 15, 1927, the plaintiff leased certain real estate to the

[8] *Schlesinger v. Wisconsin,* 270 U. S. 230.
[9] *Corliss v. Bowers,* 281 U. S. 276.
[10] *Ibid.*
[11] Wisconsin Statutes, 1929, No. 246.01-.05.
[12] *Knowlton v. Moore,* 178 U. S. 41, 77.

defendant for a term of five years to commence on March 1, 1928. On September 22, 1927, the defendant filed a suit for condemnation of the fee-simple title of the same real estate. An interlocutory order of condemnation was entered and appraisers were appointed who, on November 29, 1927, appraised the fee-simple title at $23,578. On March 1, 1928, the defendant took possession under the lease and paid rent according to the terms of the lease. On September 18, 1929, the defendant, who was in undisturbed possession under the lease, paid into court the amount of the appraiser's award in the condemnation suit, without the knowledge or consent of the plaintiff and without surrendering possession. The plaintiff brought an action to enjoin the defendant from asserting the fee-simple title to the real estate and from doing any act inconsistent with the plaintiff's title and to quiet title to the real estate. *Held,* the defendant has not waived its rights under the condemnation proceedings and is not estopped from asserting the fee simple title to the real estate.[1]

An implied waiver, or waiver by conduct, is usually very difficult to distinguish from estoppel.[2] Only the contention of the plaintiff based upon the principle of the estopped of the tenant to deny the landlord's title will be commented upon here.

The general rule is that a party who entered into possession under a lease is estopped, before he shall have surrendered possession, to deny that, at the time the lease was executed, his lessor had title to the leased land and every part of it.[3] While the general rule is well settled, it is subject to an established exception that the tenant may always show that the title of his landlord has expired or has become extinguished since the period of tenancy commenced, for the tenant impliedly admits that the landlord has such a title as authorizes him thus to dispose of the premises, yet he cannot be held to affirm anything in respect to its continuance.[4] If subsequent to the letting of the premises the tenant purchases his landlord's title, the tenancy is thereby extinguished or destroyed and the tenant may plead his purchase in bar of an action to recover the demised premises.[5] A tenant may show that he has become a purchaser at a judicial or execution sale during the period of the tenancy,[6] but it has been held that a tenant cannot acquire title to premises under an execution sale held to satisfy his own claim as creditor.[7]

While the lessee may show that he has acquired his landlord's title during the period of the tenancy, he is precluded from showing that there is an outstanding paramount title in himself.[8] Where the tenant has

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[1] *Russell v. Trustees of Purdue University,* Appellate Court of Indiana, 178 N. E. 180 (October 28, 1931).

[2] 40 Cyc. 255.

[3] *Riverside Coal Co. v. No. Indianapolis Cradle Works* (1923), 194 Ind. 176, 139 N. E. 674; *Reese v. Coffee* (1892), 133 Ind. 14, 32 N. E. 720; *Pence v. Williams* (1895), 14 Ind. App. 86, 42 N. E. 494.

[4] *England v. Slade* (1792), 4 T. R. 682, 2 Rev. Rep. 498; *Kinney v. Doe ex dem. Laman* (1847), 8 Blackf. 350; *Jackson v. Rowland* (1831), 6 Wend. 666, 22 Am. Dec. 557; *Walker v. Fisher* (1898), 117 Mich. 72, 75 N. W. 144.

[5] *Higgins v. Turner* (1875), 61 Mo. 249.

[6] *Reed v. Munn* (1906), 148 Fed. 737, 207 U. S. 588; *Carson v. Crigler* (1881), 9 Ill. App. 83; *Elliott v. Smith* (1854), 23 Pa. 131.

[7] *Matthew's Appeal* (1883), 104 Pa. 444.

[8] *Peyton v. Smith* (1831), 30 U. S. 485; *Barson v. Mulligan* (1908), 191 N. Y. 306, 84 N. E. 75; *Newall v. Wright* (1807), 3 Mass. 138, 3 Am. Dec. 98.

acquired title from a stranger or has acquired the landlord's title before entering into possession under the lease, he is held to have a paramount title.[9] It has been argued that when the tenant acquires the lessor's title on a charge existing prior to the time of the lease, the tenant acquires a paramount title and should be estopped to assert it; but if he acquires the lessor's title on a charge arising after the lease, he does not, by asserting it, deny his landlord's title.[10] The cases, however, do not recognize the distinction, but distinguish only between acquisition of the landlord's title before or after the tenancy commenced.[11]

The question presented by this case is rather novel in that it does not fall clearly within any well-defined class of cases to which the general rule is applied or to which an exception to the general rule is recognized. In the principal case, the landlord, at the time the tenant entered into possession under the lease, held a title which was defeasible only by the tenant. While it would seem that the tenant, in exercising or enforcing the defeasance, is not denying his landlord's title or asserting a paramount title but is rather affirming and asserting his landlord's title, there is some conflict among the authorities as to the right of the tenant to acquire and assert against the landlord a title or interest based on the enforcement of such a defeasance.[12] Some of these cases have been reconciled on the ground that the tenant is estopped only in actions based on the lease or the right of possession, but is not estopped in actions in which title is directly involved.[13] Under this view, it is apparent that the principal case was correctly decided, for the landlord himself has put his title in issue by bringing an action to quiet title. While all the cases cannot be rationalized in this manner, it would seem that the court in this case chose the better view if the reason for the general rule is to prevent the tenant from making use of the possession under his lease in asserting a title adverse to or paramount to that of his landlord.[14] O. M. B.

NEGLIGENCE—RES IPSA LOQUITUR—APPLICATION OF THE DOCTRINE—Action to recover for the death of James Wilkins who had been employed by the appellant railroad company as a car inspector. The complaint alleges that the appellant was assembling two trains on the same track, that were bound in opposite directions, and that the cabooses of sand trains were coupled together. It was the duty of the said Wilkins, as car inspector, to inspect the brakes of all outgoing trains. While so engaged in testing the brakes of the east-bound train, and pursuant and under the direction of the proper signal from the engineer, the deceased stepped between the cabooses for the purpose of releasing the angle cock, preparatory to the brake test. While the deceased was engaged in the performance of this

[9] *Bowser v. Bowser* (1847), 27 Tenn. 23; *Smith v. Crosland* (1884), 106 Pa. 413.

[10] Tiffany on Landlord and Tenant, p. 496.

[11] *Bowser v. Bowser, supra,* note 9; *Smith v. Crosland, supra,* note 9.

[12] *Pierce v. Brown* (1852), 24 Vt. 165; *Mattis v. Robinson* (1871), 1 Neb. 3, in which the court cites and disapproves *Pierce v. Brown, supra; Niles v. Ransford* (1849), 1 Mich. 338, 51 Am. Dec. 95; *Stout v. Merrill* (1872), 35 Iowa 47. But see *McLeod v. Sharp* (1893), 53 Ill. App. 406; *Howard v. Jones* (1899), 123 Ala. 488, 26 So. 129.

[13] 35 Corpus Juris 1232, sec. 575.

[14] *Houston v. Farris* (1882), 71 Ala. 570.