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## *Duty of Landlord to Put Tenant Into Possession*

*Loraine P. O'Keefe\**

**A**S PIONEERING JUDGES base their decisions more and more on fairness and practicality, timeliness becomes an important test for any rule of law. This test becomes particularly pertinent when there exist, side by side, in connection with a single point of law, two irreconcilable views, both of which can boast of proud precedents and a heavy "weight of authority."<sup>1</sup> Such are the two views in regard to the very old landlord-tenant problem with which we are here concerned: in the absence of an express provision, is there implied, in the lessor-lessee relationship itself, an obligation on the part of the landlord to put the tenant into actual possession of the demised premises? The practical effect of such an obligation would require the landlord "to oust trespassers and wrongdoers so as to have it [the premises] open for entry by the tenant at the beginning of the term."<sup>2</sup> Whether the landlord should be thus charged is indeed an old problem, and yet is brand new, a potential source of contention each time that a lease is signed or an oral agreement to let is entered into. Thus the logic, or lack of it, in the reasoning supporting either of the two views on this issue must be considered in the light of what is practical today.

One view, known as the English rule, in spite of the fact that "courts in a considerable number of states"<sup>3</sup> also adhere to it, holds that "there is an implied covenant in a lease, on the part of the landlord, that the premises shall be open to entry by the tenant at the time fixed by the lease for the beginning of the term."<sup>4</sup> The American rule is the exact antithesis: there is no such implication; rather, the ousting of trespassers and wrongdoers is the responsibility of the lessee, and he has no remedy against the lessor for any third party unlawfully holding the

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<sup>1</sup> *Hannan v. Dusch*, 154 Va. 356, 153 S. E. 824 (1930): "It is generally claimed that the weight of authority favors the particular view contended for. There are, however, no scales upon which we can weigh the authorities. In numbers and respectability they may be quite equally balanced."

<sup>2</sup> *Ibid.*

<sup>3</sup> *West v. Kitchell*, 109 Miss. 328, 68 So. 469 (1915).

<sup>4</sup> *Ibid.*

premises at the commencement of his lease term; his remedy is against the wrongdoer.

The terms "unlawfully" and "wrongdoers" point to what the problem is *not*. It is not, as some have thought,<sup>5</sup> a question of an implied covenant for quiet enjoyment, which refers only to lawful obstacles placed in the lessee's path through some fault of the lessor. This covenant guarantees that no one with paramount title or sanction from the landlord will disturb the lessee: "The covenant for quiet enjoyment, whether express or implied, only means that the lessor shall have such title to the premises as will enable him to give a good unencumbered lease for the term demised. . . . Such a covenant is understood to confer upon the lessee a right to enter upon the premises, but nothing more."<sup>6</sup>

Therefore, the lessee has the legal right to enter on the day set by the lease, and there would be no question to discuss here except that the lessee sometimes is not able to enter because a third party is occupying the premises. Usually he is a holdover tenant who refuses to vacate when his lease expires. At this point adherents of the English rule would imply a right of the lessee to take legal action against the lessor, but those who hold to the American rule discover an anomaly in this position which disturbs their sense of logic. Vaughan (1665-1674), rejecting what he referred to as "strained" and "improbable," was actually defining the "American rule" when he said: ". . . it is unreasonable a man should covenant against the tortious acts of strangers, impossible for him to prevent . . . the covenantor, who is innocent, shall be charged, when the lessee hath his natural remedy against the wrong doer: and the covenantor made to defend a man from that which the law defends every man, that is, from wrong."<sup>7</sup>

<sup>5</sup> A typical illustration: The lease "implies that the purchaser shall have possession; and without it, it would seem the covenant for quiet enjoyment is broken." *King v. Reynolds*, 67 Ala. 229 (1880).

<sup>6</sup> *Gazzola v. Chambers*, 73 Ill. 75 (1874).

<sup>7</sup> *Hayes v. Bickerstaff*, Vaugh. 118, 124 Eng. Rep. 997 (1670), echoed two and a half centuries later by *Snider v. Deban*, 249 Mass. 59, 144 N. E. 69 (1924).

An interesting speculation is why the English courts abandoned this approach. Up to 1790, Vaughan's arguments were the law. What happened between 1790 and 1829 to cause the English jurists to do an apparently sudden (and unexplainable?) about face in *Coe v. Clay*, 5 Bing. 440, 130 Eng. Rep. 1131 (1829), and cases following?

Referring to the holding in *Hayes v. Bickerstaff*, then abruptly rejecting  
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It is this "legal exception" which affronted the court's sense of justice in *Hannan v. Dusch*:<sup>8</sup>

It does not occur to us now that there is any other instance in which one clearly without fault is held responsible for the independent tort of another in which he has neither participated nor concurred and whose misdoings he cannot control. . . .

To apply the English rule you must imply a covenant on the part of the landlord to protect the tenant from the tort of another, though he has entered into no such covenant. This seems to be a unique exception, an exception which stands alone in implying a contract of insurance on the part of the lessor to save his tenant from all the consequences of the flagrant wrong of another person. Such an obligation is so unusual and the prevention of such a tort so impossible as to make it certain, we think, that it should always rest upon an express contract.

Defenders of the English rule are willing to make this "unique exception" and place this "unusual obligation" on the landlord apparently (in part) for two historical reasons which no longer seem applicable:

1. The tenant at one time needed extra protection from the law; he had neither the education nor the material means to deal on an equal basis with the landlord. Might it not have been such consideration which led the learned judge in *Herpolsheimer v. Christopher*<sup>9</sup> to argue:

Can it be supposed that the plaintiff in this case would have entered into the lease if he had known at the time that he could not obtain possession on the first of March, but that he would be compelled to begin a lawsuit, await the law's delays, and follow the case through its devious turnings to an end before he could hope to obtain possession of the land he had leased? Most assuredly not. It is unreasonable to suppose that a man would knowingly contract for a lawsuit or take the chance of one.

This appears to be a one-sided appeal on behalf of the tenant. A modern court, looking for equal justice for landlord and tenant, might well ask just what led the Nebraska court to think

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it, *Coe v. Clay* became the basis for the English rule. *King v. Reynolds* (1880) *supra* n. 5, the leading American case affirming the English rule, relies heavily on *Coe v. Clay*.

<sup>8</sup> *Supra* n. 1.

<sup>9</sup> 76 Neb. 352, 107 N. W. 382 (1906).

the landlord would know any more about the tortious plans of the former tenant than the new lessee did. Of course, "the tenant will suffer delay in obtaining possession if he is forced to sue for it, but so would the landlord under the same circumstances." Are we willing, then, in the light of present-day conditions, to continue making the "unique exception"? Mr. Freeman, in his notes to *Sloan v. Hart*,<sup>10</sup> urges upon us the rule which would be "in accordance with the general course of business dealings in respect to insurance against the chances of a lawsuit":

It is not, we believe, customary for a person who contracts in respect to any subject to insure the other party against lawsuits. Indeed, both the landlord and tenant have a right to presume that a former tenant will vacate at the end of his term, and that no one will unlawfully prevent the new tenant from going into possession. To sue or be sued is a privilege or misfortune which may occur to anyone.

Needless to say, the "misfortune" of having to take legal action can be easily averted by including in the lease an express guaranty of possession, a safeguard which most tenants today (literate, even affluent, possibly with attorneys of their own) can easily provide for.

2. The land must be actually delivered to the tenant: "When realty is the subject, still there must be livery of seisin."<sup>11</sup> Since possession is not transferred until the lessee enters and begins occupancy, the right remains in the landlord to eject any holdover. Under the American rule, however, the right to possession passes when the lease is executed:

Indeed, as to the remedy by ejectment, the suit must be brought by the lessee, the right of entry being in him alone at the time.

When the defendant leased the land to the plaintiff, the contract of leasing transferred to the plaintiff all the possession the defendant had; and if a trespasser afterwards went into possession, his acts were a trespass against the lessee and not against the landlord.<sup>12</sup>

<sup>10</sup> 150 N. C. 269, 63 S. E. 723 (1909).

<sup>11</sup> *King v. Reynolds*, *supra* n. 5.

<sup>12</sup> *Gardner v. Keteltas*, 3 Hill. (N. Y.) 330 (1842), generally considered the origin of the American or New York rule.

In accord: *McGhee v. Cox*, 116 Va. 718, 82 S. E. 701 (1914): "The general rule is that a lease becomes complete and takes effect upon its execution, unless otherwise specifically provided, and entry by the lessee is not necessary to give it effect."

Weighing these two viewpoints on the passing of possession against a background of air mailed communications, trans-oceanic telephone calls, and other current commercial practices, the requirement of livery of seisin appears incongruous and, indeed, actually impracticable. If a businessman now in Paris were to arrange through his attorney for a long-term lease on a store in San Francisco, would he have to begin occupancy before we would admit the right to possession had passed to him? Suppose he were a month late moving in. Since the English rule applies only to the first day of the lease, does this mean his late arrival would absolve the landlord of his responsibility to have the premises open for him? <sup>13</sup> To avoid such difficulties, jurisdictions which follow the American rule now have statutes which provide that the signing of a lease is as effective as livery of seisin and statutes conferring on the lessee the right to take action against any wrongful tenant.

Comparison, then, of the bases for the two rules reveals some outmoded concepts behind the English rule which cause it to fail the test of timeliness. The American rule, on the other hand, recognizes a change in the landlord-tenant relation which puts the tenant on equal footing with his landlord. No longer need courts allow that illogical exception which holds a man responsible for the tort of another whose misdoings he cannot control. The law helps those who help themselves, it has been said, and tenants nowadays are for the most part capable of helping themselves.

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<sup>13</sup> "But what," asks the court in *Hannan v. Dusch*, *supra* n. 1, "is the substantial difference between invading the lessee's right of possession on the first or a later day?"