FADES ET AL. V. GIBBS ET AL.

Case No. 4,621.

{5 Mason, 4.62.}[1]

Circuit Court D. Massachusetts. May Term, 1830.

FORECLOSURE OF MORTGAGE—WRIT OF ENTRY AGAINST TENANT IN POSSESSION.

A writ of entry, to foreclose a mortgage, may be well maintained against a tenant in possession, who is only lessee at will to the mortgagor.

{Cited in Fiedler v. Carpenter, Case No. 4,759.}

This was a writ of entry to foreclose a mortgage, brought on the 18th day of March last past. It counted upon the seisin of one David Greenough, who, on the first day of September, 1820, mortgaged the same to Martha, the wife of the demandant {Joseph J. Fales}, and another person since deceased, and alleged an ouster by the defendants. The defendant Mrs. {Ellen M.} Gibbs made no defence. The defendant {William R.} Kelly pleaded a special plea in abatement, that Mrs. Gibbs was tenant of the freehold, and on the 3d of November, 1828, leased the same to him for one year, and that he had continued tenant at will under her, paying rent from quarter to quarter, ever since the expiration of the same year, and that he had nothing in the premises, and that the fee and freehold were at the commencement of the suit, and ever since, in Mrs. Gibbs. The prayer of the plea was, that the writ might be quashed as to him, Kelly, and for his costs. To this plea, the demandant demurred, and there was a joinder in demurrer.

Mr. Aylwin, for demandant.

Mr. Osgood, for defendant Kelly.

STORY, Circuit Justice. I give no opinion upon the exactness or regularity of the pleadings in this case, though they might be open to observation, because the parties have at the argument put the case upon the single point, whether Kelly, as tenant at will, is liable to be sued in the present action. It is true, that the defendant has suggested, that he has principally in view the question, whether he is liable to pay rent to the demandant since the commencement of the suit, he having paid it up to the 19th of April last. But that point cannot arise in this case, for no rent is recoverable in the present form of action. Where the rent has been paid to the mortgagor, or any person claiming under him, without objection by the mortgagee, the doctrine of Lord Mansfield, in Keech v. Hall, 1 Doug. 21, might be deemed applicable. But that is the less necessary to consider, because in Wilder v. Houghton, 1 Pick. 87, the supreme court of Massachusetts have held, that a mortgagee cannot maintain an action for mesne profits for the time elapsed after the commencement of his suit, and before his obtaining possession in an action to foreclose the mortgage. This was thought by the court, to be a necessary result from our statutable provisions on the subject of mortgages. See Bigelow, Dig. (2d Ed.) note of the editor, page 526.

It is well known, that writs of entry to foreclose mortgages according to our local practice are not governed by the strict doctrines of the common law, applicable to writs of entry. Our statutes have necessarily introduced some modifications of the principles and practice under the writ, when brought to enforce a mortgage. The judgment is not a general judgment for possession, but is a conditional judgment, that the demandant shall have a writ of possession, unless the tenant shall pay the amount of the mortgage money with interest, within two months after judgment.

The present point appears to me closed in by authority. I do not advert to the doctrine in ejectment that a tenant under the mortgagor may be at any time displaced, and his estate ended by the mortgagee at his will, and without any prior notice to quit. That is sufficiently established in Keech v. Hall, 1 Doug. 21; Thunder v. Belcher, 3 East, 449. Here the point raised by the pleadings is, whether a tenant in possession, not seised of the freehold, but holding as lessee under the tenant of the freehold, can be sued in this action. Now, it was expressly decided in Keith v. Swan, 11 Mass. 216, that any person in possession of the mortgaged premises is liable to the action of the mortgagee. In that case, the defendant who raised the question, asserted himself in his plea, to be tenant at will to the tenant of the freehold. It is, therefore, directly in point. It is true, that the case as to another point, viz., that nontenure cannot be pleaded except in abatement, has been since overruled (Otis v. Warren, 14 Mass. 239), whether for reasons entirely satisfactory it is unnecessary for ma now to say, though the supreme court of the United States have adhered to it, as will be seen in Green v. Liter, 8 Cranch {12 U. S.} 229. But as to the main point, it has not only not been overruled, but expressly affirmed in the later case

of Penniman v. Hollis, 13 Mass. 429, 430. See, also, Fitchburg C. M. Co. v. Melvin, 15 Mass. 268. The point then is entirely at rest upon the authorities under our local law. But upon principle, I should have arrived at the same result, and I concur entirely in the reasoning, upon which those authorities have proceeded. The plea must therefore be overruled, and a respondeas ouster awarded.

[1] {Reported by William P. Mason, Esq.}