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ESTATE OF L. COATES STOCKTON.

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complied June 6, 1864. He subsequently died; and upon the settlement of the administrator's account, Mr. Twibill claimed, "for use and occupation of the premises from the date of the sheriff's sale, October 5th, 1863, to the day of the removal, June 6th, 1864." The auditor disallowed the demand, the claimant excepted, and the sole question, therefore, for our consideration is whether a sheriff's vendee, who notifies the tenant to quit, can thereafter claim for the occupation of the land up to the date of the removal?

Ordinarily it would seem to be strange that a man should be permitted to occupy land admitted to be the property of another without making the owner some compensation. It would also appear to be remarkable if the owner of land could not—as can many other parties—waive the tort and sue in assumpsit. It must be conceded that Mr. Twibill could have maintained ejectment and recovered mesne profits. And if so, why should he not be permitted to abandon the fiction of force, and sue upon the implication to pay for what was taken, which would prevail against him who spoiled the freehold of a load of coal or a bushel of apples? It is familiar law, that the tort may be waived and assumpsit brought for the value of goods obtained by fraud. *Hill v. Perrott*, 3 Taunt. 273; *Edwards v. Newman*, 1 B. & C. 418; 2 D. & R. 568. For goods tortiously taken, *Brewer v. Sparrow*, 7 B. & C. 310. For tolls improperly exacted, *Waterhouse v. Keen*, 4 B. & C. 211. For moneys obtained by detention of deeds, *Pratt v. Vizard*, 5 Barn. & Ad. 808. For moneys obtained by fraud or duress, *Buller's Nisi Prius*, 132. And by illegal seizure and distress, see cases cited 1 Stephens' Nisi Prius, 343.

The difficulty of applying these principles to the action for use and occupation is that this remedy seems to have been unknown to the common law. Assumpsit for use and occupation is the creature of the statute, 2 Geo. II. c. 19, sec. 14, by which it is enacted that "it shall and may be lawful to and for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands * * held * * by the defendant in an action on the case for use and occupation."

As the act of Parliament speaks of "agreement not by deed," it has been held that assignees of a bankrupt tenant, entering upon their own motion, were not liable for the balance of the year's rent. *Naish v. Tatlock*, 2 H. B. 320. Other cases to the same effect are cited by Gibson, C. J., in *Mackey v. Robinson*, 2 Jones, 172.

From these authorities it would seem to be very clear that the statute only gives the remedy where there is an agreement. But this agreement need not be express—it may be implied. Thus use and occupation lies where the tenant holds over. 3 Stephens' N. P. 2718. And we are told that to support the action the plaintiff must prove,

1st. An occupation by the defendant.

2nd. That such occupation was by permission; *Ibid*, 2718; and that "the action only lies where there is an actual contract, either express or implied."

As to this implication of contract Mr. Stephens further tells us that "The terms of the statute may seem in strictness only to include the cases in which the relation of landlord and tenant exists. But the Courts have given a wide and liberal construction to it; and it now appears to be settled that wherever one party occupies by the permission of another, although no agreement for such occupation was in contemplation between the parties, the fact of the one having occupied by the sufferance of the other is sufficient to raise an implied assumpsit by the other to pay for his occupation." *Ibid* 2721.

In the case before us the sheriff's vendee could have brought his ejectment the day after he received his deed. He permitted the tenant to occupy the premises for three months. This, in the language of the authority quoted, raised an implied assumpsit by the tenant to pay for the occupation; and the exception is therefore sustained, unless there is something to be found in the Pennsylvania cases to which we have been referred requiring us to rule otherwise.

In *Potts v. Lescher*, 1 Yeates 576, it was simply held that a "contract, express or implied, must be proved." The Court intimates that proof of coming into possession by permission of the plaintiff would raise the implication.

Bank v. Ege, 9 Watts, 436, is also relied on as decisive against the claim. The plaintiff there, after giving the three months' notice, (and thus disaffirming the lease,) claimed rent under the lease. The Supreme Court simply decided, that as the landlord had repudiated the agreement, he could claim nothing under it. So, too, in *Hemphill v. Tevis*, 4 W. & S. 535, the sheriff's vendee gave the notice to quit, and yet claimed rent under the lease which he had thus formally disaffirmed. I say under the lease, for, although the reporter states that it was "assumpsit for use and occupation," the Court put the case, in their opinion, upon the distinction between such an action—which they decided could be brought—and a suit upon the lease, which they declared could not be maintained. Judge Sergeant, referring to *Bank v. Ege*, (already cited,) and to the notice given by Mr. Tevis, says:

"The tie thus broken could not be knit together again by the defendant's remaining in possession, or any act short of a mutual contract between the parties for a new lease. The defendant's not surrendering the possession (if such were the case), did not have that effect, however it might operate as to the claim for use and occupation founded on possession. We think the lease was at an end by the notice, and that the purchaser could not afterwards sustain an action founded upon the contract to recover rent. If the defendants are liable at all it can only be for use and occupation, or on some other ground than the contract."

Mackey v. Robinson, 1 Jones, 170, simply decided that an owner could not maintain an action on a lease to which he was not a party. Chief Justice Gibson admits, that use and occupation will lie where the defendant has held by the plaintiff's permission.

It will thus be seen, that no one of the cases relied on by the accountant, is at all conclusion against this claim. On the contrary, they all