

water freezing. Why should he have anticipated that expedient would not be adopted?

Apart from these considerations, however, I am of opinion that on the 29th December, 1902, when the escape of the water and the damage to the plaintiff occurred, the defendant had not obtained possession from his vendors, the trust company, of that part of the property which the Caseys occupied, and that he did not obtain possession or control of it until after the injury was done to the plaintiff; and if that be the correct view of his position, he is not, of course, answerable for that injury.

The defendant had, no doubt, obtained permission from the trust company to collect the rents due by the occupants of the property, but no authority to dispossess any one who was in possession, certainly not any one who was in possession adversely to the company—and, even if the effect of his collecting rents from such of tenants as chose to pay him had the effect of creating the relation of landlord and tenant between him and them, how can what was done have the effect of casting upon him the obligation of an owner in possession of the part of building which was occupied by the Caseys?

According to the case made and the testimony adduced by the plaintiff, Donovan's tenancy expired at the end of October, 1902. The tenancies of the tenants who held under him also expired at the same time, and no doubt any of the under-tenants who afterwards paid rent to the defendant, became thereby tenants either of the defendant or of the trust company; but, as I have said, the Caseys neither paid rent nor gave up possession, but remained in as they had been before then; and it seems to me therefore to follow that they, and not the defendant, had the possession and control of the upper storey when the wrong of which the plaintiff complains was committed.

In my opinion, the plaintiff's case failed, and her action should have been dismissed, and I would allow the appeal with costs, reverse the judgment appealed from, and substitute for it a judgment dismissing the action with costs.

There is also a cross-appeal by the plaintiff against the amount at which the damages were assessed, but, as the action, in my view, entirely failed, it is unnecessary to say more as to it than that it should be dismissed with costs.