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Cumulative Remedies in Bailment Leases

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Cumulative Remedies in Bailment Leases

The growth of "installment houses" and the popularity of doing business on the "time-payment plan" have made the contract under which such transactions are generally consummated a constant subject of litigation in our courts. Drawn as it is to protect the owner to the fullest extent, constant efforts have been made to curb the effect of the more stringent provisions.

The usual contract in Pennsylvania is the so-called "bailment lease", an instrument designed to create the relationship of bailor and bailee and providing for periodical "rental" payments. Title will not pass until all of the rentals have been paid and an option to purchase for a nominal consideration is exercised. The validity of the transaction, the relationship, and the general terms of the contract are now unquestioned, and it has definitely been decided that the instrument is not within the Conditional Sales Act of 1925, P. L. 603.[1]

In preserving the rights of the bailor there has always been an attempt made to provide for cumulative remedies upon default. The remedies of the bailor are (1) to repossess the bailed property; and (2) to collect the rentals contracted for. Provisions are always included to accelerate the rentals not yet due when default occurs and to authorize summary judgment as a guarantee of performance. But, although the bailor may have both of these remedies secured to him in the instrument, his right to pursue both of them to their full extent has often been denied.

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[1]Stern & Co. v. Paul, 96 Pa. Super. Ct. 112 (1929).

The author has attempted to exhibit this problem, outline the cases decided upon it, and to reach a solution both legally and logically sustainable and economically sound.

THE GENERAL RULE

Innumerable cases in this jurisdiction can be cited for the general proposition that a bailor who repossesses the bailed article as provided in his "lease" cannot thereafter proceed in any manner for the collection of the unpaid rentals. Reclamation is a disaffirmance or rescission of the lease agreement and terminates the bailment. The term having come to an end, future rent cannot be collected. The rule is well stated in *Ketcham v. Davis*:—[2]

> "The established rule of law governing the enforcement of such contracts is that the so-called lessor, on default, can adopt either remedy, but they are not to be deemed cumulative . . . When the bailor has elected his remedy, he is bound by that election."

The logic and precedents for this statement can hardly be questioned. Its true meaning, however, must be fathomed. When the bailor chooses to disaffirm and rescind the bailment the relationship ends; therefore the rent must also cease. So also when the bailor affirms the lease and is paid the balance due, he no doubt may not thereafter disaffirm and reclaim the property. And this is true even though the rentals must be collected by legal process.[3]

However the rule on these facts may be applied, let it be noted at once that it becomes fallacious to extend this same rule to cases involving other facts. In *every case* decided by our appellate courts this rule is qualified and enunciated to be effective *"unless it was plainly expressed in the contract or a necessary implication from its terms"* that the remedies be cumulative.[4]

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[2]31 Pa. Super. Ct. 583, 585 (1906).

[3]Wright & Co. v. Bier, 3 Wash. 170.

[4]Campbell Co. v. Hickok, 140 Pa. 290 (1891); Scott v. Hough, 151 Pa. 630 (1892); Seanor v. McLaughlin, 165 Pa. 150 (1895); Jacob v.

What is a necessary implication from the terms of the contract has not been decided. No case has granted cumulative remedies "by implication." It is definitely decided that to provide for reclamation "*and*" acceleration does not give both of these rights:-

> ". . . The fact that both remedies are mentioned, and connected by the copulative "and" instead of the disjunctive "or" is not conclusive of the question of his (bailor's) right to pursue both."[5]

What then is the state of the law where the agreement expressly provided for both remedies? Modern leases contain provision for cumulative remedies which cannot be questioned as to meaning. But the general impression is that they are invalid despite the general rule of law that: "The rights of the parties (are) fixed by the agreement which was the law to them."[6]

The proper solution of this problem is clouded by the loose language of the decision in *Durr v. Replogle*,[7] where the court states that:-

> "While the agreement is in the alternative, so that the so-called bailor may enter up judgement or reclaim the property, there is nothing to prevent him doing both. The two remedies given by the agreement are not inconsistent with each other and the partial pursuit of one does not, therefore, preclude resort to the other. The usual rule must prevail, that a party can *have any number of different remedies so long as he procures but one satisfaction.*"

The most assiduous fault-finder could discover no error in this language and so far does this case go on its merits. But the learned Judge in this matter was prone to philoso-

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Groff, 19 Pa. Super. Ct. 144 (1902); Durr v. Replogle, 167 Pa. 347 (1895); Kelly v. Schlimme, 220 Pa. 415 (1908).

[5]Ketcham v. Davis, 31 Pa. Super. Ct. 583, 585 (1906).

[6]Campbell v. Hickok, 140 Pa. 290 (1891); Walsh v. B. L. P. Motor Co., Inc., 71 Pa. Super. Ct. 319 (1919).

[7]167 Pa. 347 (1895).

phize in some dicta that cannot be satisfactorily explained by any logician. He says:

> "Having retaken the goods into his own possession, no doubt (the bailor) could not now collect the judgment, and if he undertook to enforce it, this court would very quickly interfere."

If this exceptional statement of the law be true, where lies the logic of the rule that the bailor is entitled to one (if only one) satisfaction? It is foolhardy to believe that our courts will judicially note the fact (untrue as it necessarily is) that repossession of a used leased article is a satisfaction to the bailor. A statement of this conclusion of itself proves its absurdity. In discussing then the *Durr case* let it suffice to say that nothing in the facts before the court merited the last statement though many will rise to defend it on the ground that the lease involved did not specifically give the bailor cumulative remedies to satisfaction. In the most recent work on Bailments the author attempts to explain away this statement by the adoption of an excerpt from *Ratchford v. Cayuga Cold Storage Co.*[8] The explanation is entirely faulty, the cited case being far from the author's point, and the *Durr case* incapable of affirmation from the viewpoint of the more recent decisions.[9]

EXPRESS PROVISION IN THE CONTRACT

It can be truly said that there is no case in the reports of the decisions of our appellate courts in which the rights of the bailor were definitely *cumulative* and in which the court *refused* to allow the pursuance of both remedies to satisfaction.[10]

Campbell v. Hickok,[11] contained a specific provision for rescission on repossession of the leased machinery.

Scott v. Hough,[12] does not involve a bailment lease

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[8]217 N. Y. 569.

[9]Scott on Bailments, page 121.

[10]Kelly v. Schlimme, 220 Pa. 413 (1908).

[11]140 Pa. 290 (1891).

[12]151 Pa. 630 (1892).

at all but is based on principles peculiar to the law of mortgages.

Seanor v. McLaughlin,[13] contained an agreement clearly negativing the cumulative remedy theory.

In re Fitzpatrick,[14] is to the same effect.

Wheeling v. Phillips,[15] clearly is based upon the theory that the remedies of the lessor were alternative and the lease involved was one of real estate.

Jacob v. Groff,[16] did not present a new question; it conceived a bailment in which no provision for cumulative remedies appeared.

Wilson v. Weaver,[17] was another case in which the bailor had only the option to proceed.

Star Drilling Mach. Co. v. Richards,[18] clearly states that the bailor had to choose between two *inconsistent* remedies which were not made cumulative.

Similarly most of our lower court decisions are based upon leases having no provision for cumulative remedies.[19]

The case of *Shaylor v. Parsons*,[20] appears first to have recognized the right of the bailor to recover rentals due even after repossession of the bailed article. The case is peculiar because decided under a satisfaction statute and not directly on the question but the tendency of the law can be clearly ascertained behind the decision of the court.

Smith v. Case Machine Co.,[21] is another case which involves the general rule rather by implication than by de-

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[13]165 Pa. 150 (1895).

[14]1 Fed. (2d) 445 (Pa. 1923).

[15]10 Pa. Super. Ct. 634 (1899).

[16]19 Pa. Super. Ct. 144 (1902).

[17]66 Pa. Super. Ct. 599 (1917).

[18]272 Pa. 383 (1922).

[19]See Republic Mtge. Co. v. Simons, 69 Pitts. L. J. 595; Ottenheimer v. National C. R. Co., 3 Som. 133; Coraopolis Nat. Bank v. Gross Co., 56 Pitts. 121; In re Kirkwood's Asgt., 2 Pearson 257; White Co. v. Cerutti, 16 Westm. 196; Frick Co. v. Nickler, 23 Dist. 44; Wright Co. v. Bier, 3 Wash. 170; Jacobs Bros. v. Walsh, 43 C. C. 602; Case Threshing v. Evans, 17 Dist. 817; and Geiser Mfg. Co. v. Crissinger, 17 C. C. 46.

[20]1 Pa. Super. Ct. 281 (1896).

[21]50 Pa. Super. Ct. 92 (1912).

cision. Here the lease specifically provided that on default the bailor could retake the article and collect the rent therefor to the date of repossession. Recaption took place when there was no default so that our question is not passed upon. The court held that this did not give the bailor the right to collect the rent to date and *then* repossess, but the right to exercise the cumulative remedies given by the agreement is unquestioned.

THE CASE ON POINT IN PENNSYLVANIA

Walsh v. B. L. P. Motor Co.,Inc.,[22] is on point. In this case defendant leased an automobile to the plaintiff for a certain rental. Plaintiff "traded in" an old car which defendant agreed to return if there was a default and the leased car was repossessed. Plaintiff defaulted. Defendant obtained judgment under the stipulation for accelerated rent, then replevied the leased vehicle, and then refused to return the "trade in" and defendant set off in counterclaim its judgment on the lease. The Court held:

> "(1) The right to set-off a judgment is undoubted. *Knoller v. Everett Realty Co., 65 Pa. Super. Ct. 169, 176.*"
>
> "(2) The remedies (of defendant) are plainly *cumulative*, and the plaintiff is estopped by his agreement from questioning defendant's right to exercise them."

In this case the lease read "lessor may at option, by collection, suit, or otherwise, enforce payment of said notes (rental installments) and no suits or legal proceedings with respect thereto shall, however, be deemed any waiver of said right of lessor to take possession on default or breach as aforesaid."

Most up-to-date agreements are much stronger and far more definite as to the remedies of the lessor and that it is the express provision of the agreement that his remedies be cumulative is so clearly expressed that it cannot admit of argument.

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[22]71 Pa. Super. Ct. 319 (1919).

It is to be noted that our lower courts have recognized the right to cumulative remedies where expressly provided for.[23]

THE RULE IN THE LAMSON CASES

Probably the most interesting line of decisions on the question involved concerns the so-called "Lamson Lease" used by the Lamson Company in the installation of "cash and parcel carrier" systems in mercantile establishments. The earliest form of this lease provided for an acceleration of rental upon default or determination of tenancy of the bailee, and in a separate clause that the lessor might repossess without terminating the lease. This provision was first adjudicated in *Lamson etc. v. Bowland,* [24] where bankruptcy of the bailee took place. The bailor repossessed and its claim for accelerated rentals was not allowed on the ground that the lease only provided for "default" or "termination", not including bankruptcy; the court holding, it is true, that every possible doubt should be resolved against a construction giving the cumulative remedy to the bailor.

The Lamson Company then altered its lease to include "bankruptcy or breach of the lease" and provided for cumulative remedy "after such a breach." This slight ambiguity of language gave the courts a nail on which to hang a decision disallowing the claim for accelerated rent. *In re Quaker Drug Co.*[25] But the anomalous case of *In re Merwin & Co.,*[26] was then decided, not citing the *Quaker case.* There although a breach occurred before the bankruptcy the court held the provision invalid as providing a penalty and since no testimony showed the property to be of less value to the bailor when repossessed than when leased, no damage was shown which could liquidate the

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[23]White Co. v. Anthracite Iron & Steel Co., 30 Lack. 113 (1929); Brosius v. Nield, 10 Del. 65 (1906); Dunham Inc. v. Pursel, 12 D. & C. 425.

[24]114 Fed. 639 (1902).

[25]In re Quaker Drug Co., 204 Fed. 689 (1912).

[26]206 Fed. 116 (1913).

real penal sum due.[27] To the same effect is *In re Miller Bros., 219 Fed. 851 (1915).*

But we find the rule being relaxed in *In re Caswell-Massey Co.*[28] in which the court held that if the value of the leased system was less on repossession than the total rental less rentals paid, the contract could validly stipulate for acceleration and the cumulative remedies.

In 1928 the question was placed squarely before the U. S. Circuit Court of Appeals in *Lamson Company v. Elliott, etc.,*[29] wherein the new Lamson lease containing a provision that the accelerative clause was a right "in addition to" the right of repossession, is construed. The district court confirmed a master's report rejecting the claim for rentals. This the Circuit Court of Appeals *reversed.* The *Miller Bros. case* is differentiated because of the change in the lease. The otherwise consequent loss to the bailor is considered and the court realized that "it may work hardship to the user and excess profit to the owner in some cases, but *that does not make it so generally arbitrary and in the nature of a mere forfeiture as to destroy its validity.*" The court, however, goes further than its decision in discussing the problem and, dealing with it from an economic standpoint similar to that upon which we hereafter touch, suggests that were the bailor to realize an unjust profit by retaking and resale or reletting, the bailee might

> "make out a case for equitable protection, or an aspect of forfeiture would then arise, even at law; but here in the claim filed the owner had given full credit for everything which it had been able to resell in this way."

This decision clearly considered and logically decided may well be considered the exact state of the law and an exact statement of the equities herein considered.

Admittedly the decisions of courts other than our own are only persuasive precedent for the latter. Their authority may be said to rest only upon principles of comity.

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[27]To the same effect is In re Miller Bros., 219 Fed. 851 (1915).
[28]208 Fed. 571 (1913).
[29]25 Fed. (2d) 4 (1928).

When equitable principles would seem to require a different rule these decisions will be disregarded. It must therefore be pointed out that the rule laid down is not only precedent but is equitable; and in so treating the subject we note three important phases; (1) the economic principles involved, (2) the rule of conditional sales, and (3) the lease of realty analogy.

THE ECONOMIC PRINCIPLES INVOLVED

To hastily differentiate and pass over a decision such as that of *Durr v. Replogle*[30] is a simple method of solving a difficult problem. But the question of "What is a satisfaction to the bailor?" is so important and so basic as to require more thought and consideration. Practically, from the lawyer's standpoint, the question has been discussed and probably decided by the cases hereinbefore referred to. But behind the reasons for these decisions lies the theory upon which they are based.

That principles of equity applied in our courts of law will not permit the bailor to obtain more than he bargained for, is a foregone conclusion. He is "entitled to but one satisfaction" and no wording of his lease will allow him more. But is he not entitled to that one *satisfaction?* Our decisions say that he is. A practical view of the transaction lends to a better understanding of the logic behind our law.

The lease contemplates a rental for a period of time. The leased article is perishable, its span of useful existence is limited. An economic survey tells us that the rentals must not stretch over a greater period than the life of the leased article.[31] A horse, an automobile, a piece of furniture, is worth X dollars. But what is its fair rental price? If rented for the entire period of its usefulness, it must appear that the total rentals must also be X dollars; that is to say, if all rentals are paid regularly to the bailor, the bailed article should last through ordinary wear and tear for the period of its rental. But another principle must be borne in

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[30] 167 Pa. 347 (1895).

[31] See Kelley v. Schlimme, 220 Pa. 413.

mind; an article whose probability of usefulness is one year and whose rental is therefore one-twelfth of X dollars per month, is not worth eleven-twelfths of X dollars at the end of the first month. Experience shows that it is worth only two-thirds, one-half or even one-tenth of X dollars after the first month, for it has then become "second hand." Its *"initial depreciation"*, as it is called, will of course depend on the type of article; for instance, clothing and the like may have a recognizable depreciation of 80% where steel instruments of non-varying types may depreciate only 10%. This fact of "initial depreciation" therefore must in 99 cases out of every 100 so alter the value of an article as to render its repossession far less than satisfaction to the bailor. Specifically:—an automobile is leased for $1,000 for 10 months. After two months it is repossessed. Its value less depreciation of course, can only be ascertained by sale or by another lease. It brings only $500 when it goes under the hammer at public sale. The bailee has paid only $200 and the bailor stands to lose $300 on the transaction, not through any fault of his own but through the default of the purchaser.

Practically, of course, the solution to this problem is to require a "down payment" in renting merchandise large enough to cover the initial depreciation. But in the light of the law thrown upon the facts in these cases can it in any justice be said that repossession effects a statisfaction? *It may.* This must be determined by the appraisal of the value of the article at the time of repossession—and this can only be done by a re-sale or re-lease of the article repossessed. If it brings sufficient to liquidate the balance of the indebtedness there is reason to argue that in equity the bailor has had satisfaction and his further remedies are cut off; this is the suggestion of the *Lamson case.* But to urge that satisfaction of a $800 debt has been obtained by repossession of a vehicle worth only $500 on resale is absurd in both law and fact. It is certainly then within the power of the contracting parties to stipulate that the bailor shall have "satisfaction" of the indebtedness. This would then require him to ascertain the value of the

repossessed article by resale. If the resale is made at public auction after due notice there can be no question that the price brought must in law represent the value of the article at the time of repossession.

Having deducted this ascertained amount from the balance due on the account, there remains a further sum due the bailor before it can be said that he has received "satisfaction". As to this he should certainly have the right to proceed on his judgment or to set-off against any claim of the bailee arising from the contract of bailment.

This view of the law has evidently found substantiation in the better considered cases where the question was directly before the court, as we have pointed out.

THE RULE OF CONDITIONAL SALES

Attention must be called to the line of well-considered cases involving contracts of conditional sale in which it is *stipulated* that repossession shall *not* bar action for the deficit should one appear upon resale of the repossessed article. Every jurisdiction passing upon these facts has upheld the terms of the contract.[32]

It will be noted that the express provisions of the Conditional Sales Act of 1925, P. L. 603, provide for the recovery of a deficiency after resale by the repossessing seller and therefore legislatively set forth the precise measure of damage outlined in this discussion.

THE LEASE OF REALTY ANALOGY

Striking similarities exist between the type of bailment we are discussing and the lease of real estate for a term of years. Story's definition of a bailment is:

> "Delivery of a thing in trust for some specific object or purpose, and upon a contract, express or implied,

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[32]See the cases collected in 37 A. L. R. 91, 94; In re Bettman v. Johnson Co., 250 Fed. 657 (1918); Keller v. Goodman, 296 Fed. 909 (1924).

to conform to the object or purpose of the trust."[33]

The more confining definition by Kent is:

"A delivery of goods in trust upon a contract, express or implied, that the trust shall be duly executed and the goods restored to the bailee as soon as the purpose of the bailment shall be answered."[34]

Substitute as the subject matter of the transaction a parcel of real estate or the improvements thereon and the incidents of a lease are apparent. Of course the practical reason for any difference in treatment of the subject is two-fold: (1) the history of their development, the bailment coming to us from the Roman Law and the lease from the Common Law of England, and (2) the intrinsic difference arising from the perishable character of the bailed article in contrast with the indestructibility of real estate.

The similarity of these relationships is generally considered sufficient reason for drawing analogies between them. But in turn their dissimilarities have led our courts to limit those analogies to only those situations which tend toward a practical solution of bailment problems. So where a lessor after default in the rent retakes possession, it is the general rule of law that the lease is terminated and no rental thereafter can be collected from the tenant. An accelerated rental is denied because the term has ceased to exist; "the continuing possession is the consideration for the continuing rent." And therefore should the lessor on retaking possession dispose of the real estate, his claim for rentals must cease.

Two essential differences exist between the lease of realty and the bailment under discussion. They must be deemed sufficient in law to differentiate the resultant rights of the parties although when considering the equities of a given situation, as will hereinafter be pointed out, the same equitable principles may be applied.

(1) "It is not characteristic of a real estate lease that

[33]Krause v. Commonwealth, 93 Pa. 418.

[34]Siter v. Morris, 13 Pa. 218.

> the lessor at the making distinctly parts with a consideration separate from possession and which is to be repaid to him only gradually by rent installments spread over the whole period."[35]

When the term ends the leased property is returned to the lessor, its condition generally being unchanged, its value unimpaired and the possibilities of its re-rental or sale unaffected. During the term there is left in the lessor a valuable right of property separate and distinct from the right to collect rentals, capable of sale; a reversionary interest of material value, generally far in excess of the value of the lease. The bailor, on the other hand, technically retains a title in the bailed article which, as we have pointed out, from the very nature of things must be valueless and useless at the end of the term, not capable of sale or further bailment or, if it should be, then of such greatly depreciated value as to be trifling compared to that of the original article bailed. This loss must then be sustained by the bailor upon repossession and termination of the lease before the end of the term. And "it is certain that a provision for precipitating future payments, even after reclamation, is necessary for the protection of the owner."

> (2) "In another respect the anology to a lease of real estate fails. The lessor has a single piece of real estate. He cannot multiply it. With reference to a manufactured article, he may make as many as he can find customers for. If on retaking an article once placed he sells it to another, (presuming he *can* sell it) he thereby destroys his outlet for a new sale with full profit."[36]

The equitable phases of the comparison are even more favorable to the lessor. It has generally been considered the practical rule of law that "when competent parties, dealing as strangers, have provided for stated damages on default, and the damages are made proportion-

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[35]Lamson Co. v. Elliott etc., 25 Fed. (2d) 4, 58 A. L. R. 295.
[36]Lamson Co. v. Elliott etc., 25 Fed. (2d) 4.

ate to the extent of the default, and probably approximate the actual damage, no reason is seen for defeating that contract." That said provisions for liquidated damages are held valid and equitable in our jurisdiction needs no citation of authority, and that the approximation of the damage in the manner provided for in the up-to-date bailment contract is entirely equitable and mutually considerate to the parties is evident from the practical results worked by the lessor's proceeding in strict accordance with his agreement.

We have, in effect, noted the equitable rule of minimazation of damages applied by our courts in cases of real estate. Where the tenant quits possession and becomes thereby liable for the balance of the term, the law will not permit the landlord to sit idly by and collect his rent as it comes due. He must use reasonable efforts to re-let the premises and so reduce the loss occasioned to the tenant.[37]

Similarly the bailee, upon return of the bailed article or reclamation by the bailor, should be given the benefit of reasonable efforts on the part of the latter to again dispose of the property by bailment or sale. Once having done so however, the equities of the situation require that the bailee be chargeable for the difference between the rent due accelerated to the end of the term and the re-sale value of the property so determined.

The following clause used in the up-to-date lease the author considers to be sufficiently specific to guarantee to the bailor the cumulative rights to which he is entitled.

> "It is agreed and understood by and between the parties hereto that the Lessor's remedies herein provided or any remedies to which the Lessor may be entitled by law are cumulative rights and not alternative and the Lessor may pursue any and all of them at the same time or at different times for the same breach, and that the repossession of the leased property as provided in this lease, shall not bar an action for the

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[37]Hochman v. Kuebler, 53 Pa. Super. Ct. 481 (1912); Auer v. Penn, 99 Pa. 370 (1882).

recovery of the rental provided for in this lease and conversely an action for the recovery of the rentals as provided herein shall not bar the lessor's right to the repossession of the leased property as provided for herein and any attempt to enforce any one of the said remedies shall not be a bar to the subsequent pursuit of any other; and no acquiescence by the Lessor in any breach or breaches by the Lessee of any of the covenants herein contained and no failure by the Lessor to exercise any of the remedies, to which it is entitled shall operate as a waiver to its or their rights to pursue any or all of said remedies."

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