

**Russell Vs. Ely**

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**Court :** US Supreme Court

**Decided On :** 1862

**Appeal No. :** 67 U.S. 575

**Appellant :** Russell

**Respondent :** Ely

**Judgement :**

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**Russell v. Ely**

**67 U.S. (2 Black) 575**

*ERROR TO THE DISTRICT COURT OF THE UNITED*

*STATES FOR THE DISTRICT OF WISCONSIN*

## **SYLLABUS**

1. In Wisconsin, the fee of mortgaged premises rests in the mortgagee or assignee only after foreclosure and sale, not upon the mere default of the mortgagor.

2. A deed in fee executed by the mortgagor subsequent to the mortgage deed but prior to the foreclosure, passes the legal title.
3. But if the mortgagee is in lawful possession of the mortgaged premises after condition broken, he will not be turned out until the debt is paid.
4. Possession obtained by the mortgagee through an arrangement with the tenant of the mortgagor whose lease has expired, without the consent of the mortgagor, is not lawful possession.
5. It is not necessarily error for a court to instruct the jury

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that if the testimony of a certain witness is believed, it will establish a specified fact, leaving to the jury to believe or disbelieve the witness.

6. The propriety of such instruction depends upon the fullness, certainty, and clearness of the testimony of the witness upon the point in issue.
7. A bill of exceptions which alleges that the instructions of the court laid too large a stress upon the testimony of a particular witness should embody the testimony at length or so refer to it as to make it part of the record -- otherwise a court of error must presume that it justified the instruction.

MR. JUSTICE MILLER.

This was an action of ejectment in the District Court of the United States for the District of Wisconsin in which the defendants in error obtained a judgment against the plaintiff in error for the possession of block 70, of the school section of the City of Racine.

The legal title to this block was in David L. Barton on the 24th April, 1851, and on that day he made a mortgage deed conveying said block to Floyd P. Baker to secure the payment of a note for \$1,400, due one year after date, and on the next day, the 24th of the same month, he conveyed it in fee to Clifford A. Baker.

The plaintiffs on the trial exhibited a regular chain of title from Clifford A. Baker to themselves, and the defendant proved himself to be the owner and holder of the note and mortgage above recited, and being in possession of the block sued for, claimed the right to hold it until the debt was paid. It appears further by the bill of exceptions that plaintiffs traced their title through one Charles R. Dean, and testimony was given tending

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to show that Charles R. Dean was a fictitious person who never had any real existence. The only other fact shown by the bill of exceptions necessary to an understanding of the case is the statement of Thomas S. Baker that from the summer of 1853 until the spring of 1856, he held possession of the property under a lease from plaintiffs, and then surrendered it to the defendant without the knowledge or consent of plaintiffs.

The defendant on the trial excepted to the three propositions following, contained in the charge of the court to the jury:

"1. If the defendant procured the possession and occupies it in pursuance of an arrangement, in the spring of 1856, with T. S. Baker without the consent of the mortgagor or of these plaintiffs, then he is not lawfully in possession."

"2. If the testimony of Clifford A. Baker is believed, the deed [to Charles R. Dean] passed the title from him."

"3. The legal title, in the opinion of the court, on the face of the deeds, is in the plaintiffs."

In examining the questions arising on these exceptions, it will be convenient to take up first the one last mentioned. It is the province of the court in trials by jury to construe instruments of writing and determine their legal effect, and if it was apparent that on the face of the deeds the legal title was in plaintiffs, it was not only the right of the court but its duty to so instruct the jury. Is it true, then, that the deeds read in evidence showed the title in plaintiffs?

The plaintiff in error maintains, that by the mortgage deed of D. L. Barton of July 23, 1851, the legal title passed to Floyd P. Baker, and that by the deed made July 24, to Clifford A. Baker, nothing passed but the equity of redemption, and if he is correct in this, the instruction was error.

Numerous authorities from English and American decisions are cited by counsel on both sides in reference to this point, but in the view which we take of the matter, they become of little value except those of the Wisconsin court. These deeds were both made in Wisconsin in reference to land lying in that state, and in their construction must be governed by its laws. The Revised Statutes of Wisconsin, chap. 141, sec. 28, enact

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that

"No action of ejectment shall hereafter be brought by a mortgagee or his assigns or representatives for the recovery of the possession of the mortgage premises until the equity of redemption shall have expired."

Chap. 154, sec. 11, provides, that

"In every case, the mortgagor may retain full possession, in trust for the mortgagee or purchaser, of all premises mortgaged by him *until the title shall absolutely vest* in the purchaser of such mortgaged premises according to the provisions of this chapter."

The Supreme Court of Wisconsin, in the case of *Wood and Moon v. Trask*, 7 Wis. 512, speaking of these provisions and perhaps others *in pari materia*, says:

"Our statute has essentially changed the rule of the common law in relation to the position of the fee of the mortgaged premises after condition broken. The fee does not vest upon default of the mortgagor in the mortgagee or his assignee. The fee only vests upon sale and foreclosure."

In *Tallman v. Ely*, 6 Wis. 257, the same court said:

"Our statute provides that the mortgagee shall not bring his action of ejectment before foreclosing the equity of redemption, sec. 53, chap. 106, or in other words he must complete his title before he shall be permitted to recover at law upon the strength of it."

These expositions of the statutes of Wisconsin are to be followed by the federal courts as rules of construction, and from them it results that the legal title did not pass to Floyd P. Baker by the mortgage deed of July 23, but did pass to Clifford A. Baker by the deed in fee made the day after.

The instruction was therefore correct.

The next error alleged is based upon that part of the court's charge embraced in the following sentence:

"If the defendant procured the possession and occupies it in pursuance of an arrangement in the spring of 1856 with T. S. Baker, without the consent of the mortgagor or of these plaintiffs, then he is not lawfully in possession."

The truth of this proposition would seem to be a necessary corollary from the one just discussed. Indeed it would seem to be a clearer deduction from the statutes cited than that made by the Supreme Court of Wisconsin, in

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reference to the position of the fee; for if the mortgagee has no right to recover the possession by legal proceedings, it would seem that he should not be permitted in any other manner to obtain that possession against the consent of the mortgagee or the person holding under him. We are, however, referred by counsel for plaintiff in error to the cases of *Gillett v. Eaton*, 6 Wis. 30, and *Tallman v. Ely*, Wis. 257, as establishing a contrary doctrine. A careful examination of these cases does not sustain the proposition in favor of which they are cited to an extent which will conflict with the instruction of the court under consideration.

It is true, that in both of these cases, it is held that the mortgagee lawfully in possession cannot be turned out by ejectment brought by the mortgagor. In both

the cases, the decision turned upon the fact that the mortgagees were lawfully in possession, and in both it is evident that the defendants originally entered with the consent of the mortgagor, either express or implied.

The language used in the second of the cases cited -- namely *Tallman v. Ely*, a part of which has already been quoted in regard to the position of the fee -- shows very clearly the distinction which was in the mind of the court as to the lawfulness of the mortgagee's possession. The court said:

"Our statute provides that the mortgagee shall not bring his action of ejectment before foreclosing the equity of redemption, sec. 53, chap. 106, or, in other words, he must complete his title before he shall be permitted to recover at law upon the strength of it. Still, if he is lawfully in possession after condition broken, he will not be turned out until his debt is paid."

This leaves still undecided the question as to what is lawful possession, and we concur with the district court that if the defendant in this case, although he may have been the holder of the mortgage and the debt secured by it, obtained the possession of the block in controversy by an arrangement with the tenant of the plaintiffs after said lease had expired, and without their consent, he was not lawfully in possession.

The remaining exception is to the charge of the court, "that

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if the testimony of Clifford A. Baker is believed, the deed" to Charles R. Dean "passed the title from him" (Baker). In that part of the charge which immediately precedes the words objected to, the court said:

"The deed of Clifford A. Baker to Charles R. Dean is alleged to be fraudulently executed by Floyd P. Baker in the name of Clifford A. Baker. That he used Clifford's name without authority, and that Charles R. Dean was a fictitious person. The evidence of Botsford shows these facts *prima facie*. "

It is manifest that if Charles R. Dean was a fictitious person, plaintiffs had no title, for they claimed under a deed from him. It is equally clear that if the testimony of Botsford showed that fact *prima facie*, the testimony of any witness who proved the existence of Dean as a real person was very important, and required careful scrutiny, and the comments of the judge on any such witness, or his evidence, should have been given with great caution and should have left to the jury all that properly belonged to it. But we are unable to see from anything in this record that the court exceeded its functions in the charge. It was certainly proper that it should call attention to Baker's testimony, as it had done to that of Botsford. Baker may have testified to facts which if true or if believed by the jury made it so clear that the title passed from him to Dean as to justify the court in saying so. And if he did so testify, we cannot say that the conclusion thus stated by the court, leaving as it did the right to believe or disbelieve the witness to the jury, was error.

It is true that this Court does not see anything in that part of Baker's testimony embodied in the bill of exceptions which justifies such an inference. But the bill of exceptions does not purport to give all that he said, and according to a well known rule, this Court, under such a condition of the record, is bound to presume that there was that in Baker's testimony which justified the instruction. What purports to be the entire deposition of Baker is sent up by the clerk of the district court and is printed in the record before us, and if properly before us, might sustain the exception. But this deposition is not incorporated into the bill of exceptions nor so referred to in it as to be made

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a part of the record of the case. It is only a useless encumbrance of the transcript and an expense to the litigating parties. Clerks who certify transcripts to this Court should know what does properly constitute the record they are to send up, as it is a matter which has been often decided and which may be readily learned with a little attention.

*The judgment of the District court is therefore affirmed.*

