

the bankruptcy. "If the plaintiff can recover at all in this form of action against one man for use and occupation by another (as to which we give no opinion), it must be upon the ground of that occupation having been permitted at his request, and that request must be proved," *per* Eyre C. J. *ibid.*

The Statute expressly mentions an occupation by the defendant, and an actual occupation or taking possession as tenant is required. Therefore it is held that a lessee is not liable in this form of action, if he has not entered to take possession, *Lowe v. Ross*, 5 Exch. 553. So it was held in *Nation v. Tozer*, 1 Cr. M. & R. 172, that, though one executor had entered and taken possession, his co-executor was not liable in an action for use and occupation, no occupation in fact being proved against him, and the act of one executor not being for this purpose the act of both. And **753** *see *Stoddert v. Newman supra*, where the plaintiff failed to prove the executorship. Nor is the trustee of an insolvent under an assignment of all his estate for the benefit of creditors, in respect of premises in the tenancy of the insolvent, unless the trustee enters and occupies them, as by using them for the sale of the property assigned to him, *Horwitz v. Davis*, 16 Md. 313,²⁶ or unless he otherwise acts so as to induce the landlord to believe, and he does in consequence believe that the trustee means to become his tenant, see *How v. Kennett*, 3 A. & E. 659. Nor is a husband in respect of his wife's occupation *dum sola*, *Richardson v. Hall*, 1 Brod. & Bing. 50. And it appears to be doubtful whether, while premises are let to two parties, one of whom desires to give up possession and notifies the other of his wish, who nevertheless holds on, the co-tenant out of possession is liable to an action for use and occupation, *Tancred v. Christy*, 9 M. & W. 438; S. C. in error, 12 M. & W. 316, and see 7 M. & W. 127. But there may be a *constructive* occupation, of which the instance usually given is *Smith v. Twoart*, 2 Man. & G. 841, where a party, who had agreed to rent a house, sent in a woman to clean it and workmen to paper one of the rooms, and this was considered sufficient evidence of occupation to go to the jury. And of course the occupation of another under the defendant is an occupation by the defendant, *Bull v. Sibbs*, 8 T. R. 327, and see the observations of Parke B. in *Tancred v. Christy supra*. The defendant is bound for the whole term, though he abandon the possession, nor can he get rid of it by under-letting to another, *Adreon v. Hawkins*, 4 H. & J. 319. And as the words of the Statute are, "held or occupied," rent accruing after the premises are destroyed by fire may be recovered from the tenant, for he may be taken still to hold the land, and the landlord would be a trespasser if he entered to rebuild, *Baker v. Holtzapfel*, 4 Taunt. 45,²⁷ and see *Packer v. Gibbins*, 1 Q. B. 421; and on the other hand, it has been determined that, if it be stipulated in a lease that the rent shall cease if the demised premises are burned down, the lessee is bound to surrender the premises on the happening of that event, *Buschman's lessee v. Wilson*, 29 Md. 553.²⁸ But if a tenancy from

²⁶ Cf. *Gaither v. Stockbridge*, 67 Md. 237; *Glenn v. Howard*, 65 Md. 40; *Parlett v. Dugan*, 85 Md. 413; note 4 to 8 Anne, c. 14.

²⁷ *Gluck v. Baltimore*, 81 Md. 326. Cf. *Clark v. Gerke*, 104 Md. 504; *Kirby v. Wylie*, 108 Md. 501.

²⁸ See now Code 1911, Art. 53, sec. 27. Cf. also sec. 29.