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Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol65/iss1/5

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The Uniform Commercial Code—Secured Transactions and the West Virginia Landlord’s Lien

One of the goals of the Uniform Commercial Code has been the affording of some element of order and stability to the increasingly complex field of secured financing transactions.\(^1\) For, as the supplying of credit has become accepted as one of the keys to prosperity, safeguards which help to insure that credit will be self-liquidating become more important if the extension of credit is to continue in a sound basis.\(^2\) Article 9 of the Uniform Commercial Code has provided those safeguards through an orderly arrangement and simplification of the law of secured transactions.

\(^1\) Uniform Commercial Code § 9-101, Comment.
However, the order and simplification offered by the Uniform Commercial Code would be threatened in West Virginia by rights which are given to landlords. The West Virginia Code\(^3\) gives a landlord a lien on the property of the tenant which takes precedence over any other lien obtained on the tenant's goods after the commencement of the tenancy. Since Article 9 does not apply to a landlord's lien\(^4\) a problem of priority would exist between a landlord's lien and a security interest created under Article 9 of the Uniform Commercial Code. Article 9 provides that a security interest attaches when three events occur: (1) there is an agreement that it attach; (2) value is given; and (3) the debtor has rights in the collateral.\(^5\) The landlord's lien does not always meet these requirements.

The aim of this paper is to analyze the threat posed by the landlord's rights under existing West Virginia law to a contractual security device available under Article 9 of the Uniform Commercial Code.

The landlord's lien is an outgrowth of one of the oldest common law remedies for the collection of rent—the landlord's right of distress. This is a means by which the landlord may take goods and chattels which are on the demised premises and sell them, applying the proceeds upon the arrears of rent.\(^6\) The basis of the right of distress is the landlord-tenant relationship since a distress for rent reserved on a lease can be made only by one having the reversion, that is, the landlord.\(^7\) It follows that the right to rents to accrue follows the reversion as an incident thereto and upon an assignment or transfer by the landlord of his reversionary interest, he loses his remedy of distress.\(^8\) Further, by common-law distress the landlord must take direct, affirmative action in order for his "right" to become a lien, for no fixed lien exists until the property is actually seized or levied upon.\(^9\)

West Virginia's basic distress provisions\(^10\) provide that "rent may be distrained for within one year after the time it becomes

\(^3\) W. Va. Code ch. 37, art. 6, § 18 (Michie 1961).
\(^4\) Uniform Commercial Code § 9-104(b).
\(^5\) Uniform Commercial Code § 9-104.
\(^6\) 2 Tiffany, Landlord and Tenant § 325 (1910).
\(^7\) Id. § 326.
\(^9\) 1 Jones Liens § 540 (3d ed. 1914).
due . . . .” It is further provided that if the lessee's goods are subject to a lien when brought on the premises, only the lessee's interest is liable for distress. The “right” to distress thus arises when goods owned by the lessee are brought on, or remain on, the leased premises after the establishment of the landlord-tenant relationship. Note that no lien is created by either section 12 or section 13, but that section 12 says “rent may be distrained” and section 13 that “such goods shall be liable to such distress.” For a landlord's lien to attach under either of these sections, distraint must be made.

Because of the opportunity afforded for injustice and oppression, the common law form of self-help as represented by the right of distress has not been favored in this country. Where the right of distress does remain, it has generally been modified to vest the enforcement in a public official. However, it is more common in this country to find the action of distress replaced by a statutory lien.

The right of distress, while it may in some sense be termed a lien, differs from the landlord's lien created by statute in that a statutory lien ordinarily attaches from the beginning of the tenancy. The landlord's lien thus emphasizes the relationship between the landlord and creditors of the tenant. The lien requires no affirmative act on the part of the landlord against the property of the tenant but attaches automatically when the relation of landlord-tenant is entered and when property is brought on the leased premises.

In addition to the modified common law right of distress, West Virginia statutes also grant the landlord a statutory lien. The West Virginia Code provides that if a lien be created on any goods on the leased premises, the lessee can remove such encumbered goods only by paying the lessor so much of the rent as is in arrears and securing so much as is to become due to the total extent of one year's rent. The West Virginia Supreme Court has held that this section gives the landlord a lien which attaches immediately when the property of the tenant reaches the premises even though

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111 AMERICAN LAW OF PROPERTY § 3.72 (1952). Note, in particular, West Virginia's distress provision: W. VA. CODE ch. 37, art. 6, § 12 (Michie 1961): “The distress shall be made by any sheriff or constable . . . .”
121 JONES, op. cit. supra note 9 § 540.
131 AMERICAN LAW OF PROPERTY § 3.72 (1952).
14W. VA. CODE ch. 37, art. 6, § 18 (Michie 1961).
no distress warrant has been issued for such rent. (Emphasis added.) As late as 1929 the West Virginia Supreme Court reaffirmed its position\(^{16}\) that the lien "contemplated" by the predecessor to section 18 attaches at the moment of the tenancy or at the moment the chattels are brought on the leased premises.

The Supreme Court of Virginia, in construing an identical section of the Virginia Code stated that this section gives the landlord "... a lien which is fixed and specific, and not one which is merely inchoate, and that such a lien exists independent of the right of distress or attachment, which are merely remedies for enforcing it."\(^{17}\) The court stated further that such a lien "relates back to the beginning of the tenancy."\(^{18}\) West Virginia is in full accord with this, and it appears to be established law that section 18 provides for a landlord's lien\(^{19}\) and that such a lien would give rise to a "security interest"\(^{20}\) as defined by Uniform Commercial Code section 1-201 at the moment the tenancy began.

The coverage afforded by the landlord's lien is not so well established and varies from state to state according to the particular statutory provision. Section 13 provides that "distress may be levied on any goods of the lessee, or his assignee or under tenant found on the premises, or which may have been removed therefrom not more than thirty days."\(^{21}\) Whether this can be construed to extend to choses in action is a subject of considerable question. At common law a debt due the tenant was not liable for distress even though evidence of the debt was on the premises.\(^{22}\) Two cases which arose in the latter part of the nineteenth century have extended this rule...

\(^{16}\) Dingess-Rumm Coal Co. v. Draper Eagle Coal Co., 108 W. Va. 37, 150 S.E. 228 (1929).

\(^{17}\) United States v. Waddill, 182 Va. 351, 28 S.E.2d 741 (1944).

\(^{18}\) The United States Supreme Court, in construing this same statute stated that as a proposition of state law, this (the holding of the Waddill case above) interpretation is binding. United States v. Waddill, 323 U.S. 353 (1945). The Court went on, however, to hold that whether such a lien is sufficiently specific and perfected to displace a claim of the United States is a matter of Federal law. A similar statute in New Jersey (N.J. REV. STAT. 2A: 42-1. No goods or chattel upon the leased premises shall be taken by any execution, attachment, or other process unless the party utilizing such process shall pay the landlord all rent due at the time of taking the goods or chattels under such process.) was held not to be true lien, though framed in terms of a lien, but merely a preference or priority among creditors other than lienholders. Franz Realty Co. v. Welsh, 86 N.J. Eq. 228, 98 Atl. 387 (1916). Thus in New Jersey, a chattel mortgagee has the ability to acquire a prior interest before levy under this statute.

\(^{19}\) W. VA. CODE ch. 37, art. 6, § 13 (Michie 1961).

\(^{20}\) "... an interest in personal property or fixtures which secures payment or performance of an obligation."

\(^{21}\) W. VA. CODE ch. 37, art. 6, § 13 (Michie 1961).

\(^{22}\) 2 TIFFANY, LANDLORD AND TENANT § 328 (1910).
to statutory liens, *McKleroy v. Cantey* and *Marks v. Leonard.* These cases were, however, merely construing the landlord's liens of their particular states. There are no West Virginia cases on this problem, but it seems reasonable to assume that, with West Virginia's landlord's lien being an extension of common law distraint, and in view of the two cases cited above, the common law rule would be followed in West Virginia.

The problem involved is that of relating the Uniform Commercial Code concept of a security interest to the landlord's lien. The Code is adamant on one point—Article 9 does not apply to a landlord's lien. This provision has settled at least one case that has arisen concerning this problem. In that case lender and borrower consummated an agreement whereby lender obtained a security interest in borrower's inventories. Landlord then levied a distraint for rent against borrower's property. Borrower went bankrupt. The court, noting that before the Uniform Commercial Code a landlord's lien for rent was given priority over other liens in Pennsylvania, held that existing law had not been changed on this point in view of the provision that Article 9 does not apply to a landlord's lien. The landlord's lien was held to be superior to that of the lender. It is to be noted that in Pennsylvania a lien is not given by statute. Thus in order that the landlord's rights in the tenant's property may ripen into a lien, distraint must be made. Or, as the court stated in *In re West Side Paper Co.*, the right of the landlord is "... in the nature of a lien rather than a lien, until the goods are actually distrained under a landlord's warrant."

In the *Einhorn* case, the landlord had actually levied a distraint against the borrower's property before the borrower's bankruptcy. In a later case, *In re Uni-Lab, Inc.*, the court made particular notice of this distinction. In that case the court held that a bankrupt's landlord who had not distrained prior to bankruptcy was not entitled to lien status with respect to his claim for rent. In *In re George Townsend Co.*, a case involving similar facts, the

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23 95 Ala 295, 11 So. 258 (1892).
24 55 Iowa 520, 8 N.W. 334 (1881).
25 Uniform Commercial Code § 9-104(b).
26 *In re Einhorn Bros.*, 272 F.2d 434 (3d Cir. 1959).
27 Uniform Commercial Code § 9-104(b).
29 Shalet v. Klauder, 34 F.2d 594 (3d Cir. 1929).
30 162 Fed. 110 (3d Cir. 1908).
31 282 F.2d 123 (3d Cir. 1960).
court stated that “since the landlord has not distrained, his claim is an unsecured claim . . . .” There can be no question but that the landlord's lien would have prevailed in each of these cases had Pennsylvania had a statutory lien provision similar to West Virginia.

Under West Virginia's statutory lien it is possible for a security interest to have attached without satisfying the requirements of Article 9 of the Uniform Commercial Code. To illustrate this, assume, in the following situations, that West Virginia has adopted the Uniform Commercial Code.

(A) On January 1, A leases Blackacre, located in West Virginia, to B with rent payable monthly in advance. On February 1, B buys a television set and brings it on the leased premises. The set is completely paid for. On March 1, B gives C a chattel mortgage on the television set in return for which C gives B 100 dollars. On March 2, C records the security interest. On May 1, B defaults in his rent. On June 1, C demands payment on the security interest. Who will prevail, A or C? A will prevail even though the Uniform Commercial Code requirement that there be an agreement before a security interest attaches has not been satisfied. The landlord's lien is superior here because C's security interest was obtained and perfected after the television was brought on the leased premises. Under the West Virginia Code the landlord's lien attaches at the moment the television was brought on the premises.

(B) The result would be the same if B had been in arrears of rent when the security interest was created on the television set. In this case, there would be even stronger basis for the landlord's right to priority.

(C) On January 1, A leases Blackacre, located in West Virginia, to B with rent payable monthly in advance. On February 1, B buys a television set from C subject to a conditional sales contract and brings it onto Blackacre. On February 2, C records the conditional sales contract. On May 1, B defaults in his rent. On June 1, C demands the return of the television set under the conditional sales contract. Who will prevail, A or C? C will prevail. Where the tenant brings property onto the leased premises that is subject to a security interest, only the interest of the tenant is

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33 The chattel mortgage would be termed a "security interest" since the Uniform Commercial Code is in effect in this state.
34 W. VA. CODE ch. 37, art. 6, § 18 (Michie 1961).
subject to distress.\textsuperscript{35} Here, C's security interest, having attached before B brought the television set on the leased premises, C's security interest will prevail over A's right of distress.

\textbf{(D)} On January 1, A leases Blackacre, located in West Virginia, to B with rent payable monthly in advance. On March 1, B plants potatoes on the leased premises. On May 1, B borrows $100 from C, giving him a lien on the crops then growing on the premises.\textsuperscript{36} The lien agreement is recorded on May 2. On June 1, B becomes in arrears in his rent. On August 1, C demands payment under the lien. Who will prevail, A or C? A will prevail. Under both the Uniform Commercial Code and the West Virginia Code a security interest in crops is valid. The West Virginia Code contains provisions which grant priority to landlord's liens in this situation as well as in other instances of personal property security.

The West Virginia landlord's lien remains as a possible source of conflict should West Virginia adopt the Uniform Commercial Code. Obviously, there is no simple solution to this problem. However, a few possibilities do suggest themselves. The most obvious possibility is that of merely repealing section 18 and leaving the landlord to his remedy of distress under sections 12 and 13. The difficulty here is that of overlooking the fact that security for rent due a landlord is no less desirable than security for any other type of creditor. However, were this section repealed, the landlord would still have the right to obtain a lien through the distress provisions of sections 12 and 13. The landlord’s position would be comparable to the Pennsylvania landlords discussed previously in this paper.

Another possibility is that suggested by the West Virginia Code,\textsuperscript{37} a contractual waiver. A third solution is that of having the secured creditors purchase an assignment of the landlord's lien.

\textsuperscript{35} W. Va. Code ch. 37, art. 6, § 13 (Michie 1961).
\textsuperscript{36} West Virginia has two sets of statutes providing for the creation and perfection of security interests in farm products. One series of statutes was a product of federal legislation in the depression era and was designed to make credit for the farming community more available. W. Va. Code ch. 38, art. 10A, §§ 1-14 (Michie 1961). The other series of statutes was an attempt to provide a means for establishing security interests in crops for private rather than federal credit. W. Va. Code ch. 38, art. 11, §§ 18-21 (Michie 1961).
Both of these suggestions have the disadvantage of adding to the cost of credit for a tenant. It seems unfair, especially in a mobile population such as ours, to make the cost of obtaining credit higher for a tenant than for one who owns his land. Yet, sentiment aside, these are means by which a secured creditor could become in fact "secure."

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