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# Recordation of Leases

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## STUDENT NOTES

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## RECORDATION OF LEASES

The pertinent parts of the West Virginia recording statutes to be discussed herein, and which have been the subject of some controversy among practicing lawyers in this state are whether a lease of real estate for a term of five years or less need be recorded in order to take priority over a bona fide purchaser. These statutes read as follows:

“. . . any contract in writing made for the conveyance or sale of real estate, or an interest or term therein of more than five years, . . . shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid as if the contract were a deed conveying the estate or interest embraced in the contract.”

“Every such contract, every deed conveying any such estate or term, . . . shall be void as to creditors, and subsequent purchasers for valuable consideration without notice, until and except from the time it is duly admitted to record.”<sup>1</sup>

There being no West Virginia decisions on this specific issue, it will be necessary to look at a short historical analysis of these sections which originated in Virginia.

These same sections of our statute were in force in Virginia without alteration or amendment from the time they took effect until this state was admitted to the union in 1863, and continued in force in this state thereafter until the code of West Virginia took effect. These sections were carried into the code of this state without amendment so as to include contracts in writing for the conveyance or sale of real estate for a term greater than five years.<sup>2</sup>

In view of the aforementioned derivation of our recording acts, the Virginia case of *Great Atlantic & Pacific Tea Co. v. Cofer*,<sup>3</sup> would undoubtedly be very persuasive authority in our courts. In this case, the owner of certain property entered into a written agreement with the A. & P. to lease the premises for a term of two years and one month, the lessee to have the option of four successive renewals for a period of one year each. This lease was under seal but not recorded. The vendee of the owner brought an action of unlawful detainer against the A. & P. and the rights of the lessee depended upon the validity of the lease agreement. The court said that the applicable Virginia statutes provide that every contract in writing for the conveyance, or sale of real estate,

<sup>1</sup> W. VA. CODE ch. 40, art. 1, §§ 8, 9 (Michie 1955).

<sup>2</sup> *Delaplain v. Wilkinson & Co.*, 17 W. Va. 242 (1880).

<sup>3</sup> 129 Va. 640, 106 S.E. 695 (1921).

or term therein of more than five years shall be void as to purchasers for valuable consideration without notice until recorded.<sup>4</sup> Therefore, the lease for a period of two years and one month was valid. The Virginia court cited *Toupin v. Peabody*,<sup>5</sup> in which a similar fact situation and statute were involved.

In the *Toupin* case an unrecorded lease for a term of five years was said to be valid under a statute which made leases for a period of more than seven years invalid as against purchasers unless and until recorded.

However, in both the *A. & P.* and *Toupin* cases the courts were faced with an additional problem which could also arise under our recording acts, that is, whether the option to renew the lease extending the period of time beyond that allowed by the statute for unrecorded instruments would make the writing invalid as against bona fide purchasers if not recorded. In both cases the courts held the renewal option only was invalidated by the statute. The reasoning in the *A. & P.* case was that the lessor had definitely parted with the control of his property for the full period to which the instrument relates. Hence the paper is a single contract giving the lessee a demise of two years and one month and four options and is not four separate contracts. It was certainly a contract for more than five years pertaining to real estate. The original term of two years and one month was, however, valid since a covenant for renewal may be void without impairing the original term.

As before asserted, the West Virginia court has not rendered a decision on the exact issue presented. However, it is well to note a few cases which strongly indicate that a decision on this issue may result in a construction of the West Virginia statute similar to the construction given the Virginia statute.

In *Speidel Grocery Co. v. Stark & Co.*,<sup>6</sup> the lessee of real estate assigned a lease for a term of three years to her employee. The lease and assignment were in writing but not recorded. A creditor of the original lessee attempted to set aside the assignment as a fraudulent transfer. One of the badges of fraud set forth was that the assignment was not recorded. The court held, ". . . as the lease was for a term of only three years no recordation thereof was required. Sections 4 and 5 of Chapter 74 do not require it."<sup>7</sup> Their

<sup>4</sup> VA. CODE §§ 2463, 2465 (1904).

<sup>5</sup> 162 Mass. 473, 39 N.E. 280 (1895).

<sup>6</sup> 62 W. Va. 512, 59 S.E. 498 (1907).

<sup>7</sup> Sections 4 and 5 of chapter 74 is now W. VA. CODE ch. 40, art. 1, §§ 8, 9 (Michie 1955).

provisions do not apply to written contracts made in respect to real estate unless for a term of more than five years. A similar result was reached in *Page v. Westfield Pharmacy, Inc.*,<sup>8</sup> in which the purchaser of real estate was said to have had the duty to inquire into the terms by which a lessee was in possession; and a written lease of one year with an option to renew for three years was held valid even though not recorded.

The West Virginia court in *Pack v. Hansbarger*,<sup>9</sup> in construing our recording act, although not as to the present issue, stated that it was obvious that the language of the statute was carefully chosen and the omission to require the recordation of *every* contract was not accidental. The effect of the statute is to place such written unrecorded contracts upon the same footing as unrecorded deeds. This being so, every unrecorded contract in writing for the conveyance or sale of real estate for a term greater than five years is void until the same is recorded.

It is submitted that this statute, as it applies to leases for a term of less than five years, is a proverbial ambush for innocent purchasers. Presumably, if such lease was to commence in the future or the lessee was not in physical possession of the premises, a purchaser would have no possible way of obtaining notice of the lease. The purchaser would only have his remedy against the grantor, provided that the deed of conveyance contained a covenant of general warranty or some equivalent covenant, but would not have possession of the premises if the lessee asserted his rights under the recorded lease. The right of the purchaser to collect the rent payments in such situation may not always be the most desirable result.

So long as this pitfall in our recording statute exists there is an eminent possibility of inequitable results to innocent purchasers of real estate. Where the legislature has used words of plain and definite import, the courts cannot put upon them a construction which amounts to holding that the legislature did not mean what it has actually expressed.<sup>10</sup>

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<sup>8</sup> 98 W. Va. 558, 128 S.E. 94 (1925).

<sup>9</sup> 17 W. Va. 313 (1880).

<sup>10</sup> *Ibid.*