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Landlord and Tenant--Holding Over--Implied Tenancy

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reversed their former decisions. In two West Virginia cases, prior to 1872[9] the court laid down the rule stated in the principal case, which cases, however, apparently were overlooked in these later cases which blindly followed one after another with little regard to the principle involved.

The West Virginia court in the principal case has adopted the majority rule,[10] and, it is submitted, the better rule. This rule is supported by the principle of waiver, that is, the disqualification of witnesses, found in the rules of evidence, is primarily for the protection of litigants, of which they may or may not avail themselves; consequently, if they fail to object in the trial court they waive the right to do so.[11] Further it is fairer to compel such objections to be raised in the lower court, because it gives the opposing party opportunity to substitute other testimony in the event that the objection is sustained.[12]

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LANDLORD AND TENANT — HOLDING OVER — IMPLIED TENANCY. — Before the expiration date of a three year lease, *T*, lessee, notified *L*, that he would be unable to continue as lessee at the stipulated rental, but suggested a reduction of rent on a monthly basis, without a yearly lease. *L*, the landlord bank, through its conservator, wrote *T*: "We have discussed this matter in person several times and on yesterday we agreed that the rental should be $60.00 per month for a period of six months, with an option to you to extend it for another six months at the same rate per month." *T* agreed to this arrangement to become effective July 1, 1933. *T* tendered and *L* accepted the rents for twenty-two months until May 1, 1935. On April 29, 1935, *L* gave *T* written notice to vacate June 1, 1935, and thereafter refused the monthly rentals tendered by *T*. *T*, contending he was a tenant for six months and thereby entitled to three months notice,[1] held over. *L* brought an action of unlawful detainer. Judgment for *L*. *Held*, that *T* by holding over

[9] Detwiler v. Green, 1 W. Va. 109 (1865); Cunningham v. Porterfield, 2 W. Va. 447 (1868).
[10] (1915) 3 C. J. § 740 and cases cited thereunder; 1 WIGMORE, EVIDENCE (2d ed. 1923) §§ 18, 586.
[11] *Id.* § 18.
[12] Simmons v. Simmons' Adm'r, 33 Gratt. 451, 460 (Va. 1880).

[1] W. VA. REV. CODE (1931) c. 37, art. 6, § 5.

after the expiration of the initial term and the option period holds as a tenant from month to month. *Elkins National Bank v. Nefflen.*[2]

By an overwhelming weight of authority, where a tenant holds over after the expiration of a lease for a term of years, and the lessor accepts rent accruing after the expiration of the term, the tenant thereby becomes a tenant from year to year upon the conditions of the original lease.[3] West Virginia, however, has made a distinction between cases where the prior lease reserves a yearly rental, though it may be paid in installments, and where it merely stipulates a monthly or other periodic rent of less than a year.[4] In the first situation, the general rule is followed.[5] In the latter the terms of the prior lease as to rent or rental period is the criterion used to determine the length of the holdover term.[6] But in the case of farm lands it would appear that the general rule would be applied, regardless of the length of the rent period, to avert possible hardship to the tenant.[7]

Consistently with its stand in regard to holding over after a lease for a year or years, our court has extended this peculiar rule with its nebulous distinction to a holding over after leases of less than a year. Again it would seem that to do so is to breast the current of American authority.[8] The criterion of the rental period as determining the length of the term of the implied tenancy does

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[2] 188 S. E. 750 (W. Va. 1936).

[3] Allen v. Bartlett, 20 W. Va. 46 (1882); Voss v. King, 38 W. Va. 607, 18 S. E. 762 (1893); Arbenz v. Exley, Watkins & Co., 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957 (1903); Emerick v. Tavener, 9 Gratt. 220 (Va. 1852); Stoppelkamp v. Mangeot, 42 Cal. 316, 323 (1871); Providence Co. Savings Bank v. Hall, 16 R. I. 154, 13 Atl. 122 (1888).

[4] Kaufman v. Mastin, 66 W. Va. 99, 66 S. E. 92 (1909), 25 L. R. A. (N. S.) 855 (1910); Hans Watts Realty Co. v. Nash Huntington Sales Co., 107 W. Va. 80, 147 S. E. 282 (1929).

[5] Allen v. Bartlett; Voss v. King; Arbenz v. Exley, Watkins & Co., all *supra* n. 3.

[6] Kaufman v. Mastin, 66 W. Va. 99, 66 S. E. 92 (1909); Salem Pythias Lodge v. Smith, 94 W. Va. 718, 120 S. E. 895 (1923); Hans Watts Realty Co. v. Nash Huntington Sales Co., 107 W. Va. 80, 147 S. E. 282 (1929).

[7] Kaufman v. Mastin, 66 W. Va. 99, 103, 66 S. E. 92 (1909); Elkins Nat. Bank v. Nefflen, 188 S. E. 750, 752 (W. Va. 1936).

[8] Hurd v. Whitsett, 4 Colo. 77 (1878); Bright v. McOuat, 40 Ind. 521 (1872); Farbman v. Meyers, 29 Pa. Dist. R. 713 (1920); Carr v. Johns-Manville Co., 60 Pa. Super. Ct. 500 (1915); Stoppelkamp v. Mangeot, 42 Cal. 316 (1871); Providence Co. Savings Bank v. Hall, 16 R. I. 154, 13 Atl. 122 (1888); Blumenberg v. Myres, 32 Cal. 93, 96 (1867); Prickett v. Ritter, 16 Ill. 96, 97 (1854); Bollenbacker v. Fritts, 98 Ind. 50 (1884); Rothschild v. Williamson, 83 Ind. 387 (1882); Wood v. Gordon, 18 N. Y. S. 109 (1893); Ketcham v. Ochs, 34 Misc. 470, 70 N. Y. S. 268 (1901), *aff'd* 74 App. Div. 626, 77 N. Y. S. 1130 (1902).

not appear to have been generally observed where the prior lease was for a designated term.[9]

Aside from the consideration of authority,[10] it would appear that there is no serious objection to such a rule except in the case of farm lands, to which it would probably not be applied. In favor of such a rule there is the belief on many sides[11] that a tenancy from year to year is too lengthy a term to impose by implication of law. Moreover, it is possible that our court thought it undesirable in the principal case to encourage the raising of an odd term tenancy by mere implication.

J. G. McC.

MINES AND MINERALS — MINING BY MORTGAGOR IN POSSESSION — RENTS AND PROFITS UNDER MINERAL LEASE. — *A* conveyed land on which coal was being mined to *T* under a deed of trust to secure notes held by *B*. *A* then leased the land to *X* for mining purposes, subject to the deed of trust, and gave *X* the option to pay royalties to *T* on the debt. *A* and *B* joined in an action to recover royalties. *B* now sues to recover a portion of the royalties collected from *X*, claiming that the beneficiaries under the trust deed had an interest in such money as a matter of law, and that *X*'s option to apply the royalty payments to the trust debt constituted an assignment to *B* of such royalties. *Held*, that where coal land is conveyed to secure a debt, the grantor may continue mining operations and keep the proceeds until the trust has been enforced, the mining enjoined, or the royalties sequestered. *Minor v. Pursglove Coal Mining Co.*[1]

This holding is important only in so far as it involves the right of the trustee to rents and profits already collected by the grantor in possession of the trust property. It is well settled that as to prospective income from the trust property the trustee may protect the security for the debt by any one of several remedies:

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[9] Bright v. McOuat; Rothschild v. Williamson; Bollenbacker v. Fritts, all *supra* n. 8. The facts of few of the cases show whether an entire rent for the term has been reserved, or whether a monthly or other periodic rent for less than the term has been reserved. Some of the cases hold that in the absence of a fixed term in the prior lease, the rental period would be used to determine the length of the holdover tenancy. Steffens v. Earl, 40 N. J. L. 128 (1878).

[10] The concurring opinion of Judge Litz frankly admits that this rule is contrary to the weight of authority, but justifies the court's holding in the principal case on the fact that the rule has become settled law in West Virginia.

[11] Ellis v. Paige, 18 Mass. 43, 46 (1822).

[1] 189 S. E. 297 (W. Va. 1937).