

June 1958

Landlord and Tenant--Condemnation--Termination of Lease

J. E. J.

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

J. E. J., *Landlord and Tenant--Condemnation--Termination of Lease*, 60 W. Va. L. Rev. (1958).

Available at: <https://researchrepository.wvu.edu/wvlr/vol60/iss4/15>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

flicting decisions. However, it is suggested that an analysis of the individual cases in light of all their individual facts may serve to clarify and perhaps resolve many of the apparent conflicts. See Hardman, *Spontaneous Declarations (Res Gestae)*, 54 W. VA. L. REV. 93 (1952), 56 W. VA. L. REV. 1 (1954).

It is submitted that our court, on the facts here present, would reach the same decision as did the Virginia court in the principal case.

J. D. McD.

LANDLORD AND TENANT — CONDEMNATION — TERMINATION OF LEASE.—*P*, the owner of a lot with a store building thereon, leased the premises to *D* for a two year term for the purpose of operating a business. The state highway department, desiring to widen the highway, condemned a major portion of the leased premises, including the part on which the store building was located. Both *P* and *D* were made parties to condemnation proceedings and were awarded damages for their respective interests. *P* offered to relocate the store building and continue the lease. Upon *D*'s refusal to continue the lease *P* brought this action for nonpayment of the rent. *Held*, that condemnation of the major portion of the leased premises terminated the lease, and with it reciprocal rights and obligations of the parties under such lease, including the landlord's right to rent. Affirmed. *Farr v. Williams*, 101 S.E.2d 483 (S.C. 1957).

It is surprising that a question of such practical importance as whether the appropriation of leased premises through eminent domain abates the payment of rent, should not have been definitely settled.

According to a majority of decisions, the taking of the entire premises by condemnation proceedings operates to release the tenant from liability to pay rent. See, *e.g.*, *Chrysoverges v. General Cigar Co.*, 163 La. 364, 111 So. 787 (1927); *Newark v. Cook*, 99 N.J. Eq. 527, 133 Atl. 875 (1926). There are perhaps only two decisions to the effect that it is no defense to the claim for rent that the whole premises have been taken for public use, it being considered that the covenant to pay rent remains operative in spite of the fact that the lessee no longer has any interest in the land. *Foote v. Cincinnati*, 11 Ohio 408 (1842); *Foltz v. Huntley*, 7 Wend. 210 (N.Y. 1831).

A more controversial problem arises when only a part of the leased premises is taken for public use. A condemnation of part of the premises according to the majority rule does not affect the tenant's liability to pay the rent. See, e.g., *Leonard v. Autocar Sales & Service Co.*, 392 Ill. 182, 64 N.E.2d 477 (1945); *Parks v. City of Boston*, 32 Mass. 198 (1834). In *Parks v. City of Boston*, *supra*, the court explained that the lessee takes his term, just as every other owner of real estate takes title, subject to the right and power of the public to take it or a part of it for public use. Such a right is no encumbrance; such a taking is no breach of covenant of quiet enjoyment. The lessee then holds and enjoys exactly what was granted him, as a consideration for the reserved rent; which is the whole use and beneficial enjoyment of the estate leased, subject to the right of eminent domain on the part of the public. If he has suffered any loss, it is not by the act or sufferance of the landlord, but by an act of the public, against whom the law has provided an ample remedy.

The practical objection to the majority view that a partial taking does not affect the liability for rent is that, while it results in giving the tenant a part of the damages for the taking of the premises, on the theory that he will continue to pay the rent to the landlord, it furnishes no security that he will do so. The result may be that if the tenant is pecuniarily irresponsible the landlord is without any possible remedy. 1 TIFFANY, LANDLORD & TENANT § 182 (1910).

In some jurisdictions, including West Virginia, a taking of part of the leased premises by condemnation discharges the tenant's liability for rent pro tanto. See, e.g., *Milburn By-Products Coal Co. v. Eagle Land Co.*, 93 S.E.2d 231 (W. Va. 1956); *Uhler v. Cowen*, 192 Pa. 443, 44 Atl. 42 (1899); *Biddle v. Hussman*, 23 Mo. 597 (1856).

In West Virginia the problem of the lessee's liability for rent after condemnation proceedings is handled by statute. W. VA. CODE c. 37, art. 6, § 29 (Michie 1955), states: "Whenever the whole of any tract of land is taken under the power of eminent domain, the liability of any tenant of such land to pay rent thereon terminates If any part . . . is taken the rent shall be reduced in the proportion which the value of the land or interest taken bears to the total value of the land." A similar New York statute has been held to require an apportionment according to value and not by area of land. *Gillespie v. Thomas*, 15 Wend. 464 (N.Y. 1832).

The West Virginia statute was applied in the recent case of *Milburn By-Products Coal Co. v. Eagle Land Co.*, *supra*. In that case the lessor and lessee entered into an agreement to sell a portion of the premises to the West Virginia Turnpike Commission in lieu of proceedings in eminent domain. The court said, although neither party had objected to the decree of the lower court allowing abatement of the rent for the remainder of the term, that W. VA. CODE c. 37, art. 6, § 29 (Michie 1955), was applicable to this situation and there was a pro tanto termination of the lease as to the acreage sold to the turnpike commission. See also, *United States v. Alderson*, 49 F. Supp. 673 (S.D.W. Va. 1943).

Although the court in the principal case may have opened up a wide road by saying that condemnation of a major part of the leased premises terminated the lease, it is submitted that the correct result was reached because condemnation of a major part of the premises in this situation did render the leasehold untenable. The rule followed by the court in this case is consistent with the prevailing view in this country in regard to destruction of the leased premises; that is, the tenant's liability to pay rent ceases when damage to the leased premises makes them untenable. 1 TIFFANY, LANDLORD & TENANT § 182 (1910). It is also submitted that condemnation of the entire fee of leased property is a stronger case in favor of termination of the rent, because in such case there is no possibility of restoring the property to the tenant in its original status. In the case of destruction of the tenantable portion of the premises by an act of nature or fire the damage can be repaired.

In *Yellow Cab Co. v. Stafford-Smith Co.*, 320 Ill. 294, 150 N.E. 670 (1926), the court held with the majority view that taking of only a part of the premises does not release the tenant from liability to pay the rent, but the court went on to say that the remaining part in such case must be tenantable in order to hold the tenant liable for the rent. The *Yellow Cab* case, although one of the leading cases on condemnation for public use, was not cited by the principal case despite the court's lack of authority to support its holding. The principal case, however, chose to follow another Illinois case, *Corrigan v. Chicago*, 144 Ill. 573, 33 N.E. 746 (1893). This case held that when the whole of the premises is taken, liability for rent ceases and the lease is terminated. This seems to indicate that the court in the principal case considers that the taking of the whole premises and rendering the premises

untenable are in effect synonymous, thereby actually only reiterating the already overwhelming view in this country that taking of the whole of leased property terminates the lease and absolves the tenant from further payment of rent.

It is further submitted that the West Virginia court may reach the same result in a similar situation by our statute, W. VA. CODE c. 37, art. 6, § 29 (Michie 1955), if the words "whole of any tract of land" are construed to encompass untenable property, as was evidently done in the principal case. Once property is determined to be untenable it is for all practical purposes completely useless to the lessee and should be considered destroyed whether the act which renders it untenable is from natural or unforeseen causes or by eminent domain.

It should be noted however, that a taking under eminent domain proceedings which absolves the tenant from his liability of paying rent is not effected by the mere vesting of title in the condemnor, but requires surrender of possession by the tenant. Annot., 163 A.L.R. 679 (1946).

J. E. J.

NEGLIGENCE—CAR OWNER'S LIABILITY FOR NEGLIGENCE OF THIEF AFTER LEAVING IGNITION KEYS IN CAR.—*D* parked his car, turning the engine off and leaving the key in the ignition. A thief stole *D*'s car and negligently collided with *P*'s car. *P* brings action against *D* for damages. Nonsuit; *P* appeals. *Held*, that failure to remove switch key does not render owner of automobile liable for negligent operation thereof by thief who steals it, especially where there is no ordinance or state law against leaving key in ignition switch. Affirmed. *Williams v. Mickens*, 100 S.E.2d 511 (N.C. 1957).

The instant case is only another of a rash of similar cases which have appeared in the past two decades throughout the United States. More than two dozen law review articles have been written on the subject. See, e.g., *Comments*, 12 U. MIAMI L. REV. 120 (1957), 9 ALA. L. REV. 380 (1957). Therefore, this comment will be confined to a brief review of the cases and the possible outcome of a similar case in West Virginia.

In cases determining liability of an automobile owner to a third party when an unauthorized driver is at fault, there is a dichotomy