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Landlord and Tenant--Nature of Hold-Over Tenancy--Right of Distress as Against Intervening Chattel Mortgage

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counter to the fundamental necessity of contractual "privity", the third party beneficiary doctrine also raised a new kind of affirmative duty.[11] Likewise, an agent has been held subject to tort liability for his failure to act affirmatively in relation to property under his control which may become dangerous to third persons.[12] Even in maritime law, there appears to be an affirmative duty on the part of a ship-owner to make all reasonable efforts to rescue sailors who have fallen overboard.[13]

The result of the immediate case, seeks to give sanction to Bentham's ideal that, —

> "Every man is bound to assist those who have need of assistance, if he can do it without exposing himself to sensible inconvenience. This obligation is stronger in proportion as the danger is greater for the one and the trouble of preserving him, the less for the other".[14]

—JULIUS COHEN.

LANDLORD AND TENANT — NATURE OF HOLD-OVER TENANCY — RIGHT OF DISTRESS AS AGAINST INTERVENING CHATTEL MORTGAGE. — T during term of lease executed chattel mortgage, which was duly recorded, to secure a loan. At expiration of lease, T held over under terms of original lease and without executing a new written one. All the rent before the original lease was paid before the expiration thereof. Landlord brings action for rent accruing during hold-over term and claims priority over chattel mortgage. *Held*: Holding over created new tenancy under Code[1] and hence

[11] Corbin, *Contracts for the Benefit of Third Persons* (1918) 27 YALE L. J. 1008; also (1922) 31 YALE L. J. 489.

[12] Seavey, *The Liability of an Agent in Tort* (1916) 1 So. L. Q. 16, 26.

[13] BOHLEN, STUDIES IN THE LAW OF TORTS, p. 312. See also The G. W. Glenn, 4 F. Supp. 727 (1933) interpreting this liability under the Merchant's Marine Act § 33 (46 USCA) § 688.

[14] 1 BENTHAM, COMPLETE WORKS (1859) 164. See also Ames, *Law and Morals* (1908) 22 HARV. L. REV. (1908).

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[1] W. VA. REV. CODE (1931) c. 37, art. 6, § 5. It is submitted that this section of the code has nothing to do with the *creation* of estates and deals only with their *termination*. It reads as follows: "A tenancy from year to year may be terminated by either party giving notice in writing to the other, at least three months prior to the end of any year, of his intention to terminate the same." The rest of the section deals with notice to terminate and the requisite formalities.

It is further submitted that the case of Allen v. Bartlett, 20 W. Va. 46, 19 A. L. R. 10, 46 n. (1882) which is cited in the annotated code as construing this section did not do so in the manner stated by the court in the principal case or in the annotated code. The only mention of this section of the code

lien under trust deed, created and recorded during term of original lease was superior under West Virginia Code of 1931.[2] *People's Trust Company v. Oates.*[3]

In Virginia, where the statute is simlar in all respects to that of West Virginia, all liens by mortgage or otherwise created after the commencement of any tenancy are subject to a landlord's lien for rent. The termination or surrender of a lease, and the giving of a new lease after a chattel mortgage has been given, subordinates any lien or claims for rent which the landlord may have under the new lease to the lien of the mortgage, if the latter has been properly recorded,[4] as was done in the principal case.[5]

Under no circumstance where the chattel mortgage is duly recorded prior to beginning of lease, or before the chattels are brought on to the premises, may the landlord claim more than the tenant's interest in them.[6] Moreover, where a tenant holds over after the expiration of his lease, and the lessor receives rent accruing subsequently to the expiration of the term, or does any act

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in Allen v. Bartlett is on page 54 and is as follows: "To terminate a tenancy from year to year requires a notice in writing from the party wishing to terminate it to the other party for three months prior to the end of any year." The writer has been unable to find any case in West Virginia construing this section of the code as cited by the court in the principal case.

[2] W. VA. REV. CODE (1931) c. 37, art. 6, § 13. Property subject to distress. — "The distress may be levied . . . . If any lien be created thereon while they are upon the leased premises, they shall be liable to distress, but for not more than one year's rent, whether it shall have accrued before or after the creation of the lien." "No goods shall be liable to distress other than such as are declared to be so liable in this section." This statutory language was construed in *Hawley v. Levey,* 99 W. Va. 335, 128 S. E. 735 (1925) c. 37, art. 6, § 18: "If, after the commencement of any tenancy, a lien be obtained or created by trust deed, mortgage, or otherwise, upon the interest or property in goods on premises leased or rented, of any person liable for the rent, the party having such lien may remove (with certain conditions).

[3] *People's Trust Co. v. Oates,* 68 F. (2d) 353 (1934).

[4] 2 UNDERHILL, LANDLORD AND TENANT, 1436 (1909); Upper Appomatox Co. v. Hamilton, (leading case) 83 Va. 319, 2 S. E. 195 (1887); Wades v. Figgatt, 75 Va. 575, (1881); City of Richmond v. Dueseberry, (accord with principal case) 27 Gratt. (Va.) 210 (1876); so, also, in Iowa, 2 TIFFANY, LANDLORD AND TENANT, 1935 (1910); Gassnick v. Steffensen, 112 Iowa 688, 84 N. W. 945 (1901); Lyons v. Deppen, 90 Ky. 305, 14 S. W. 279 (1890); Thorpe Bros. v. Fowler, 57 Iowa 541, 11 N. W. 3 (1881); the case of Rollins v. Proctor, 56 Iowa 326, 9 N. W. 235 (1881) which is often cited by the authorities as being contra to the doctrine of the principle case, is clearly distinguishable on its facts. There the second lease and lien claimed under it was for the balance of the original term, and the court stated that the mortgagee executed the mortgage in contemplation of the landlord's lien for that period. The court stated "There can be no question that when the mortgage was executed, it was accepted by the intervenor (mortgagee) subject to the right of the plaintiff (landlord) to enforce a landlord's lien for the rent accruing during this term."

[5] At p. 354.

[6] W. VA. REV. CODE (1931) c. 37, art. 6, § 13, *supra* n. 2.

from which it may be inferred that he intends to recognize him still as such tenant, he becomes thereby tenant from year to year, upon the conditions of the original lease. Where moreover, the lessor does not act recognizing the continuing tenacy, the tennant holding over is but a tenant at sufferance.[7]

It is submitted that the chattel mortgagee should have priority over a lease subsequently created by holding over, unless the landlord can show that the mortgagee lent the money in contemplation not only of the then existing lease but also of a probable hold-over tenancy.[8]

—MORRIS S. FUNT.

MINES AND MINERALS — CONVEYANCING OF COAL BY SALE OR LEASE. — The Commissioner of Internal Revenue sought to collect taxes on annual minimum royalty payments made by the taxpayer under a certain coal lease. The lease was simply whether the payments made by the taxpayer, the "lessee", were on capital account or were ordinary business expenses. Both parties petitioned the Circuit Court of Appeals to review the orders of the Board of Tax Appeals. 24 B. T. A. 554. The lease here considered was for a term of forty years, and provided for royalties at a certain rate per ton. Royalty was to be paid on a minimum tonnage of 250,000 tons per year, whether or not that amount were mined. It was to continue in force until all coal had been removed, if the initial term of forty years expired before the depletion of the mine. If the minimum production were not mined for any year, the difference between that and the quantity mined would be applied in any subsequent year, when actual production exceeded the minimum tonnage required. During two years of the lease, the taxpayer

[7] Emerick v. Tavenner, 9 Gratt. (Va.) 220 (1852).

[8] The citation in the principal case purporting to come from Allen v. Bartlett, 20 W. Va. 46 (1882) is in reality taken from Emerick v. Tavenner, *supra* n. 5 at 236. The writer believes that there are two leases involved in every hold-over tenancy. In the first place, there has been a preceding term for years, — a definite type of estate in land at common law. Secondly, upon the termination of the original, there arises either a tenancy by the sufferance, or one from year to year. Either of these two latter types is a different estate in real property from the lease for years. Thus, there are in fact, two separate and distinct leases. It is simply as if two successive terms for years had been given; each would be a distinct common law estate. A running lease, from year to year, (or any other period), on the other hand, would be one continuous tenancy throughout its duration, and not a series of terms, one following on the heels of its predecessor.