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Mines and Minerals--Conveyancing of Coal by Sale or Lease

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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.

failed to mine the minimum tonnage, but paid royalties on the basis of 250,000 as required. In its income tax return for the two years, the taxpayer deducted the amount of the royalties as an ordinary and necessary expense of the business. The Commissioner disallowed the part of the royalties representing unmined coal, which he regarded as capital expenditure in advance. The Board of Tax Appeals determined that the payments were necessary operating expenses. On review being sought, the Circuit Court of Appeals affirmed the decision of the Board of Tax Appeals. *Commissioner of Internal Revenue v. Jamison Coal and Coke Company.*[1]

Whether or not these payments are necessary operating expenses or capital investments depends on whether the instrument of conveyance established a sale or a lease of the coal.[2] If the instrument created a sale of the coal, then the taxpayer should pay as on a capital investment.[3] On the other hand, the payment was a necessary operating expense, if the instrument were a lease.[4] There is a great diversity of opinion as to what constitutes a coal lease or sale. It has been held that there is a sale where the vendee has (a) the exclusive right to mine (b) all the coal land (c) where the vendee must pay for all the coal whether mined or unmined.[5] This test was adopted in at least one case in West Virginia.[6] But the authority of this case is disregarded in a later case of substantially similar facts[7] and explained away in another.[8] Where the instrument stipulates a certain total payment, without regard to the quantity of coal mined, nor to the expiration of the term, it is generally construed as a sale.[9] The lessee is obliged to

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[1] 67 F. (2d) 342 (C. C. A. 3rd, 1933).

[2] Jefferson Gas Coal Co. v. Com'r of Internal Revenue, 52 F. (2d) 120 (C. C. A. 3rd, 1931).

[3] W. S. Bogle & Co. v. Com'r of Internal Revenue, 26 F. (2d) 771 (C. C. A. 7th, 1928).

[4] Burnet v. Hutchinson Coal Co., 64 F. (2d) 275 (C. C. A. 4th, 1933).

[5] Delaware L. & W. R. Co. v. Sanderson, 109 Pa. 583, 585, 1 Atl. 394 (1885); Robinson v. Pierce, 278 Pa. 372, 123 Atl. 324 (1924); Sturdevant v. Thomson, 280 Pa. 233, 124 Atl. 434 (1924).

[6] National Coal Co. v. Overholt, 81 W. Va. 427, 94 S. E. 738 (1917).

[7] Minor v. Pursglove Coal Mining Co., 111 W. Va. 28, 161 S. E. 738 (1917). In this case, under a similar instrument, the West Virginia Supreme Court of Appeals held that such instrument was a lease because the parties termed it such and dealt with each other as lessee and lessor. Seemingly, this reasoning is not sound.

[8] Bankers' Pocahontas Coal Co. v. Central P. Coal Co., 166 S. E. 491 (W. Va. 1932).

[9] Jefferson Gas Coal Co. v. Com'r of Internal Revenue, *supra* n. 2; Rosenberger v. McCaughn, Collector, 25 F. (2d) 699 (C. C. A. 3rd, 1928); Delaware L. & W. R. Co. v. Sanderson, *supra* n. 5.

pay an ascertainable sum for all the coal in the tract. There is no surrender clause in the instrument, hence whether or not the taxpayer mines all of the coal, he will incur liability.[10]

The "lessee" here was privileged to mine all of the coal, but by the contract had to pay for what was not mined. Accordingly, all of the elements of a sale were present. The decision in the principal case may, therefore, be doubtful.

—JOHN L. DETCH.

TAXATION — FUTURE INTERESTS — PRESUMPTION OF CAPACITY TO BEAR CHILDREN. — The trustee of the testator's estate, the income from which was given to his daughter for life, with remainder to certain charitable institutions, if she should die without issue, brought suit for refund of an alleged overpayment of taxes. Under the statute[1] the amount given to charities was to be deducted from the gross estate in computing the federal estate tax. Evidence was offered that prior to the testator's death, the daughter had undergone an operation rendering her incapable of issue. *Held*: The evidence was admissible to show the vesting of the remainder in the charity. *United States v. Provident Trust Company.*[2]

In applying the presumption that possibility of issue is not extinguished until death, the English courts claim to distinguish between those cases in which property rights will be affected and those in which they will not.[3] In the former class the presumption is treated as being conclusive,[4] while in the latter it is considered

[10] It is the established rule in tax collection cases, which are brought at the instance of the Government, that all doubts are resolved against the Government. Gould v. Gould, 245 U. S. 151, 38 S. Ct. 53 (1917). Possibly this rule of law was an unmentioned factor in the decision of the principal case.

[1] Revenue Act of 1918, § 403 (a) (3), 40 STAT. 1098. Since present value of contingent bequest to charity is not deductible from gross estate, Humes v. U. S., 276 U. S. 487, 48 S. Ct. 347 (1928), it is important that the possibility of issue be extinct and the remainder to charity be vested at death of testator. The deduction is determined from the data available at that time.

[2] —— U. S. ——, 54 S. Ct. 389 (1934).

[3] "If property is given to A in the event of B having no children, can A claim that property before the death of B? My answer is, 'No'; neither at law, nor in equity, unless B's possible child is the only person who can deprive A of the property." *Re* Hocking, 79 L. T. N. S. 164, 169 (1898),— the limitation here was: to unborn son of A in fee, but if no issue of A, then to B in fee.

[4] In applying the rule against perpetuities, to suppose it impossible for persons of advanced years to have children "is a very dangerous experiment, and introductive of the greatest inconvenience, to give latitude to such sort of conjecture." Jee v. Audley, 1 Cox 324 (1787); Leake v. Robinson, 2