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Easements--Distinction Between Easement and Lease-- Easements Less Than Fee

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seem to have any other cases dealing with lotteries; but the rule that lottery contracts are unenforceable is well supported by modern authority.⁸ The only difficulty is to determine just when a given situation amounts to a lottery. The usual test is that there must be consideration, chance and prize.⁹ Chance is the thing that stands out most conspicuously. A contest wherein the success of the participants depends more on the exercise of skill and judgment than on chance does not violate the lottery statutes.¹⁰ But if the element of luck or chance is the dominant factor in electing the winner, the undertaking will usually fall within the statutory prohibition.¹¹ The fact that the tickets are given away with a sale of merchandise and the scheme is called something else does not save it from being a lottery.¹²

West Virginia has a constitutional provision against the authorization of lotteries¹³ and a statute¹⁴ almost identical with that of Virginia. No West Virginia case seems to have dealt with the question that arose in *Maughs v. Porter*; but since the doctrine of that case appears to be sound and to be rather well settled law in most jurisdictions, it is hardly probable that any other rule will be adopted when, if ever, the question does come up in West Virginia.

—GEORGE W. MCQUAIN.

EASEMENTS — DISTINCTION BETWEEN EASEMENT AND LEASE — EASEMENTS LESS THAN FEE. — Defendant conveyed a lot to plaintiffs in fee; on the same day by another writing it "leased" to plaintiffs a right of way for a pipe line across adjacent land of defendant to a railroad side track, and granted in addition the right of unloading gasoline and oil tank cars from that side track. Plaintiffs agreed to pay 1/2c a gallon for all gas and oil put

Lawrence v. Commonwealth, 86 Va. 573, 10 S. E. 840 (1890); Young v. Commonwealth, 101 Va. 853, 45 S. E. 327 (1903).

⁸ Featherstone v. Ind. Service Station Ass'n. of Texas, 10 S. W. (2d) 124 (Tex. 1928); Blair v. Lowham, 73 Utah 599, 276 Pac. 292 (1929); Whitley v. McConnell, 133 Ga. 738, 66 S. E. 933 (1910).

⁹ Glover v. Malloska, 238 Mich. 216, 213 N. W. 107 (1927).

¹⁰ Hoff v. Daily Graphic, 230 N. Y. Supp. 360, 132 Misc. Rep. 592 (1928); Boatwright v. State, 38 S. W. (2d) 87 (Tex. 1931).

¹¹ Brewer v. Woodham, 15 Ala. App. 678, 74 So. 763 (1917); People v. Hecht, 3 Pac. (2d) 399 (Cal. App. 1931).

¹² Standridge v. Williford-Burns-Rice Co., 148 Ga. 283, 96 S. E. 498 (1918); State v. Danz, 140 Wash. 546, 250 Pac. 37 (1926).

¹³ W. Va. Const., art. 6, § 36.

¹⁴ W. VA. REV. CODE (1931) c. 61, art. 10, § 11.

through the line, with a maximum charge therefor of \$50 a month and a minimum of \$25. Plaintiffs could terminate the agreement regarding the way by sixty days' notice. They erected a filling station on the lot, and paid the maximum charge for a few months. Thereafter they procured a part of their supply from tank wagons, and paid only the minimum charge for the next four years. Defendant demanded that they pay the maximum rate, claiming to be entitled to $\frac{1}{2}c$ a gallon on all gas and oil sold on the premises, whether it came through this pipe line or otherwise. Plaintiffs refused and defendant notified them it would terminate the pipe line contract after sixty days. Plaintiffs obtained an injunction against such termination, the court holding that an easement appurtenant to plaintiffs' lot was created, and this decision was affirmed by the Supreme Court of Appeals. *Ballengee v. Beckley Coal & Supply Co.*¹

"The defendant contends that, because (1) the term of the use is indefinite, (2) the defendant can terminate the contract upon default of the plaintiffs, and (3) Ballengee can terminate the contract at will on sixty days' notice, the right in question is not an easement but a lease, and is governed by the law of landlord and tenant, with the inherent right in defendant to also terminate the contract at will on sixty days' notice."

Considering the arguments of defendant in their order: (1) Can there be an easement for an indefinite period? Few cases involving the point have been decided, but they are uniform in holding that there can be such an easement,² and the courts passing on the validity of such easements consistently upheld them.³

(2) This provision gave the defendant the right to forfeit for default by plaintiff and constituted a condition, and was valid whether the writing was a lease or a grant of an easement. A

¹ 161 S. E. 562 (W. Va. 1931).

² Easements for the following terms have been granted: *Whitney v. Richardson*, 59 Hun 601, 13 N. Y. Supp. 861 (1891) ("to have the use of said water so long as the same shall be used for the purpose of running a cheese factory"); *City of Ft. Wayne v. Lake Shore, etc., Ry.*, 132 Ind. 558, 32 N. E. 215 (1892) (easement reserved to take effect whenever the city should lay off an addition); *Hall v. Turner*, 110 N. C. 180, 15 S. E. 1037 (1892) ("so long as the said Turner keeps up his mill"); *Estabrooks v. Estabrooks*, 91 Vt. 515, 101 Atl. 584 (1917) ("so long as either of them shall live and occupy the premises"); *Novinger v. Shoop*, 201 S. W. 64 (Mo. 1918) ("as long as the parties shall own and be in possession of said real estate"); *Tefft v. Reynolds*, 43 R. I. 538, 113 Atl. 787 (1921) (easement to cease "whenever a road shall be laid out").

³ *Hall v. Turner*, *supra* n. 2; *Everett Water Co. v. Powers*, 37 Wash. 151, 79 Pac. 617 (1905); *Eastman v. Piper*, 68 Cal. App. 554, 229 Pac. 1002 (1924).

grant of any interest in land may be made on condition, and this applies equally to estates for life, years, easements, and profits.⁴

(3) Defendant seemingly contended there was an analogy to a tenancy at will, and consequently he claimed that since plaintiff had an option to terminate on sixty days' notice, the defendant by implication had a like option to terminate. Why there should arise any such implication is difficult to see. The present case is clearly distinguishable from one involving a lease at will. An option to end the relation at will is very different from an option to end it upon sixty days' notice. Indeed, the fact that defendant was forced to contend that the estate is "at will upon sixty days' notice" seems in itself an answer to his objection.

Even if this were held to be a lease, defendant's contention should fail. While by the law of landlord and tenant an estate at will is terminable at the option of either party,⁵ it is far from settled law that a lease for an indefinite period is a lease at will. There are cases in this country apparently so holding,⁶ but such cases would not necessarily be applicable here inasmuch as there was no lease. However, these cases are erroneous and the rule they purport to adopt unsound, for at common law a lease for an indefinite period created a life estate if accompanied by livery of seisin, and the abolition of the necessity for livery of seisin should not cause such a lease to have a lesser effect.⁷ The rule that such a lease creates a freehold estate rather than a tenancy at will is in accord with the settled rule that a conveyance of doubtful meaning is to be construed in favor of the grantee and against the grantor.

Furthermore, a lease terminable at the will of the lessee is not thereby rendered terminable at the will of the lessor.⁸ Coke said: "When the lease is made to have and to hold at the will of

⁴ CHALLIS'S REAL PROPERTY (3d ed. 1911) p. 253; 3 THOMPSON ON REAL PROPERTY (1924) §§ 1955, 1956, 1957; 1 TIFFANY, REAL PROPERTY (2d ed. 1920) § 74 *et seq.*

⁵ 2 THOMPSON, *op. cit. supra* n. 4, § 960; 1 TIFFANY, *op. cit. supra* n. 4, § 60; 1 UNDERHILL, LANDLORD AND TENANT (1909) § 133.

⁶ Cheever v. Pearson, 16 Pick. 266 (Mass. 1834); Doe d. Pidgeon v. Richards, 4 Ind. 374 (1853); Western Transp. Co. v. Lansing, 49 N. Y. 499 (1872); Knight v. Indiana Coal & Iron Co., 47 Ind. 105, 17 Am. Rep. 692 (1874); Corby v. McSpadden, 63 Mo. App. 648 (1895); Beauchamp v. Runnells, 35 Tex. Civ. App. 212, 79 S. W. 1105 (1904); 2 THOMPSON, *op. cit. supra* n. 4, §§ 1116, 1119; 1 Underhill, *op. cit. supra* n. 5, § 138.

⁷ 1 TIFFANY, *op. cit. supra* n. 4, § 61(b). But see Hinton Foundry, *etc.*, Co. v. Lilly Lumber Co., 73 W. Va. 481, 80 S. E. 773 (1914) (dictum holding lease for indefinite period creates mere tenancy at will).

⁸ 1 TIFFANY, *op. cit. supra* n. 4, § 61(c).

the lessee, this must be also at the will of the lessor." Some courts in this country have at times accepted this statement literally, and have held that a lease giving the lessee a right to terminate at will inevitably confers a similar right upon the lessor. Such a rule is unsound. At common law, a fee owner conveying to another by livery of seisin and without words of inheritance or limitation created a life estate in the grantee and the mere fact that the lessee was given an option to terminate his estate at any time should not reduce his freehold estate to a mere tenancy at will, but by manifest logic gives him a life estate subject to a right in him to terminate it. The principle contended for by defendant is contrary to numerous decisions holding such leases valid; it is also inconsistent with those sustaining a conveyance to a man and his heirs for so long as the grantee may choose to occupy the premises for certain purposes, since the effect of such a grant is to create an estate terminable at the will of the grantee, but not of the grantor.⁹ And it is settled in West Virginia that the rule contended for by defendant applies only to gratuitous and unilateral leases — those in which only a nominal consideration or rent was to be paid by the lessee.¹⁰

The instrument involved here could not have been a lease in any event, for several essentials of such a conveyance were wanting. Plaintiff had no right to exclusive possession of the premises;¹¹ there was no delivery by defendant of the absolute possession, occupation, and enjoyment of the land for all purposes;¹² nor was plaintiff entitled to profits arising from the land.¹³ The fact that rent was paid was not referable solely to a lease, for rent may and frequently does exist where no lease is involved.¹⁴

—KINGSLEY R. SMITH.

⁹ 1 TIFFANY, *op. cit. supra* n. 4, § 93 and cases there cited.

¹⁰ Harness v. Eastern Oil Co., 49 W. Va. 250, 38 S. E. 670 (1901); Friend v. Mallory, 52 W. Va. 60, 43 S. E. 114 (1903); Lowther Oil Co. v. Guffey, 52 W. Va. 91, 43 S. E. 101 (1903); Lovett v. Eastern Oil Co., 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B, 360 (1911); South Penn Oil Co. v. Snodgrass, 71 W. Va. 440, 76 S. E. 961, 43 L. R. A. (N. S.) 848 (1912); Johnson v. Armstrong, 81 W. Va. 404, 94 S. E. 753 (1917); McCary v. Traction Co., 97 W. Va. 308, 125 S. E. 92 (1924); Newsom v. Meade, 102 W. Va. 492, 135 S. E. 604 (1926).

¹¹ 1 TIFFANY, LANDLORD AND TENANT (1910) § 3(1).

¹² 1 TIFFANY, *op. cit. supra* n. 11, § 84; 1 UNDERHILL, *op. cit. supra* n. 5, § 173.

¹³ 2 TIFFANY, *op. cit. supra* n. 11, § 249.

¹⁴ 1 TIFFANY, *op. cit. supra* n. 11, § 7(b).