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Leases--Renewals and Extensions--Notice

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III, § 1405 says, "If a witness has disappeared from observation, he is in effect unavailable for the purpose of compelling his attendance" and later "Such a disappearance is shown by the party's inability to find him after a diligent search." Although in the principal case the evidence was excluded because the court did not deem the mere issuance of writs to the sheriffs of two counties a sufficiently diligent search, yet the dictum is so strong as to leave little doubt as to the attitude of the court in this matter.

The chief difficulty with this form of unavailability is the possibility of collusion, but our court specifically guards against such a thing when it says that the disappearance must have been through no fault of the parties. So that the matter of collusion and the question of the sufficiency of the search are quite properly left to the discretion of the trial court.

It is to be noted that our court in taking this stand with the better authorities expresses surprise in discovering that this proposition had never been established by judicial decision in this jurisdiction. —H. J. P.

LEASES—RENEWALS AND EXTENSIONS—NOTICE.—D leased certain property to P for five years with the right and privilege of renewing said lease for an additional period of five years; subject to the terms of the lease, except in event that if said lease being renewed and continued for the additional period the monthly rental shall be increased. *Held,* the lessee's failure to give the lessor direct notice before expiration of first term of his intention to continue the tenancy under the agreement will not deprive the former of his right to continue the tenancy. *Ammar* v. *Cohen,* 123 S. E. 582, (W. Va. 1924).

In this case D brought an action of unlawful detainer. P asks for an injunction restraining D from prosecuting the action and further decreeing P's right to continue the possession thereof as a tenant of D. The court granted the injunction and extended the lease for the additional period, stating that direct notice of renewal was unnecessary. This holding was based upon the fact that D had knowledge prior to the expiration of the lease, of P's intention to continue the tenancy. Whether or not the mere holding over by the lessee after the expiration of the term is sufficient, or whether direct notice or an affirmative act on the part of the

lessee is necessary to continue the tenancy depends upon the question whether the provision in the lease operated as an option to renew or to extend. *Whalen* v. *Manly,* 68 W. Va. 328, 69 S. E. 843. In West Virginia a distinction has been made between a right of renewal and a right of extension. The courts that agree with the view taken by the West Virginia court base their arguments and reasoning in the main on the pure grammatical meanings of the words "renewal" and "extension". The very fact that a word like "renew" is used, necessarily forces one to the conclusion that the parties intended some new and further agreement similar to the first entered into between them before the *renewal* if effective. While on the other hand the word "extension" is considered as a present demise of the whole term with the option in the hands of the tenant to take or not to take the *extension.* It is not a new agreement but a prolongation of the original lease and hence merely holding over on part of the tenant is sufficient to exercise the option. 7 VA. L. REV. 237; *Whalen* v. *Manley,* 68 W. Va. 328, 69 S. E. 843. In the course of the opinion the court in interpreting the covenant, interpreted the priviso and disregarded the covenant. The covenant stated that the lessee had the *right and privilege of renewing* the lease. The words of the proviso are that, "if the lease is renewed and continued". The court said that since the words *renew* and *continue* were used synonymously, it was uncertain whether a new lease or a continuation of the old was contemplated. But *quaere,* are the words used synonymously? It is submitted that a *continuation,* as expressed by the article in the 7 VA. L. REV. 237, implies that the lease shall continue for an additional period of time on the same terms of the old lease, otherwise it would not be a *continuation*;—that a *renewal* would imply that new terms were to be added if the option were exercised. Hence, a continuation or a prolongation of the lease in question would be impossible as there was to be an increased rental beginning with the new term. The general rule for interpretation of covenants in a lease is to expound them so as to give effect to actual intention of the parties as collected from the entire context, *Clark* v. *Devoe,* 124 N. Y. 120, 26 N. E. 275, 21 Am. St. 652; *Szulerecki* v. *Oppenheimer,* 204 Ill. App. 359, 119 N. E. 643. "And the words of an indenture are the words of either party and albeit they be spoken as the words of the one party only, yet they are not his words alone, but may be applied to the other party if they do more properly belong to him; for every word that is doubtful and expounded to be spoken by him

to whom they will best agree accordingly to the intent of the parties, and they shall not be taken most strongly against one or beneficially for the other, as the words of a deed poll shall." SHEPPARD'S TOUCHSTONE, 52. The word "renew" as used in a lease means to execute a new lease, and indicates that the lessee must give notice to the lessor of his election to renew. *Whalen* v. *Manley,* 68 W. Va. 328, 69 S. E. 843; 7 VA. L. REV. 237. In case of a lease with a privilege of renewal it is incumbent upon the lessee desiring to exercise his option, to give notice of his election before the expiration of the original term and the mere act of holding over is not sufficient to show an election to renew the lease for the additional term. *Renound* v. *Daskam,* 34 Conn. 512; *Delashman* v. *Berry,* 20 Mich. 292, 4 Am. Rep. 392; *Shamp* v. *White,* 106 Cal. 220, 39 Pac. 537; *Vincent* v. *Laurent,* 168 Ill. App. 397. In the present case, it was held that evidence tending to show that D had knowledge of P's intention to renew, without any act on part of P, in regard to the matter, was sufficient notice to constitute an election of the option, thereby binding D. To sustain this proposition, the case of *Dickinson* v. *Robinson,* (*C. C. A.*), 272 Fed. 77, 80 was cited, wherein it is stated that notice need not be a formal written or even an oral communication. Any single act or expression or any course of conduct, of the lessee, indicating to the lessor or other party interested his election to renew, is sufficient. This case has gone farther that the majority of cases in laying down the rule as to the limitations of notice. Notice of election to renew a lease must be unequivocal and unqualified. *Goldberg et al.* v. *Himlyn et al.,* 201 N. Y. S. 837. An agreement for an option of renewal would seem to imply that the parties contemplated some "*affirmative*" act by way of creation of an additional term. *Andrews* v. *Marshal Creamery Co.,* 118 Iowa 598, 60 L. R. A. 399, 96 Am. St. Rep. 412; *Thurston* v. *F. W. Woolworth Co.,* 117 N. E. 686, 687. According to well recognized rules of contract law, before a unilateral contract is binding upon the offeror there must be an equivocal act of acceptance on the part of the offeree, otherwise the offeror is not bound. Therefore, it is submitted that if the knowledge of a mere desire to accept the option without any affirmative act or expression on the part of the lessee is sufficient to bind the lessor then the latter is placed in a very hazardous position and contract law is reduced to such a degree of uncertainty that it would be practically impossible for the offeror in a contract to know when his offer was accepted. —F. L. W.