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NOTES

POSSESSION BY A TENANT UNDER A LEASE NOT COMPLYING WITH THE STATUTE OF FRAUDS

Where a person enters into the occupation of premises under a lease which fails to comply with the provisions of the statute of frauds, the problem as to his legal status arises. For example, L orally leases a store to T for a term of ten years at a stated rental. Such a lease violates the statute of frauds but despite that fact T goes into possession and pays rent. What relationship arises between L and T? If the relationship is that of landlord and tenant, what are the character and terms of the tenancy? The answers to these questions constitute the scope of this note.

The Pennsylvania Statute of Frauds relating to the transfer of interests in land, which statute is similar to the first section of the English Statute of Frauds and the statutes of many other states, provides, in effect, that leases created otherwise than in accordance with its requirements "shall have the force and effect of leases or estates at will."¹ An exception is made in the case of leases which do not exceed three years from the date of making thereof. Accordingly it has been held that a lease, which does not come within the exception and which is not in writing signed by the lessor or has been signed for the lessor by an agent who did not have the proper written and signed authority, gives rise to a landlord and tenant relationship which, in its inception, is a tenancy at will.²

However, the statutes of frauds of a large number of states merely provide that a lease which fails to comply with the provisions therein is invalid or unenforceable. Consequently, in these states the lease itself confers no legal status upon the parties, but it has been held that their acts, such as the entering into possession and the payment and acceptance of rent, create the relationship of landlord and tenant.³

"It would be unjust and fraudulent to permit the landlord, after agreeing that the tenant might enter and occupy his premises on condition of paying him rent, and the latter enters and complies therewith, to then treat the tenant as a trespasser. The statute . . . was not passed to enable land-owners to perpetrate frauds, or exercise bad faith."⁴

Since the tenant enters into possession with the permission of the landlord and the lease is ineffectual to vest any term, it has been said that the tenancy here is also, in its beginning, one at will.⁵

At common law a tenancy at will could be terminated at the pleasure of either party to the lease and the tenant had only an uncertain, defeasible interest in the premises.⁶ The courts, disliking such an elusive interest or estate in land, propounded the rule that if a periodic rent was paid by a tenant at will, the tenancy became a periodic one since the payment and acceptance of the rent at regular intervals manifested an intent by the parties to change it into a tenancy of that character.⁷

It seemed a natural tendency for the courts to carry over this rule and apply it to a tenancy at will which arose from a lease which did not comply

¹Act of March 21, 1772, 1 Sm. L. 389, 33 P.S. 1.

²McDowell v. Simpson, 3 Watts 129 (Pa. 1834); Dumn v. Rothermel, 112 Pa. 272, 3 A. 800 (1886).

³Falck v. Barlow, 110 Md. 159, 72 A. 678 (1909); Wineburgh v. Toledo Corp., 125 Ohio St. 219, 181 N.E. 20 (1932).

⁴Rosenblat v. Perkins, 18 Or. 156, 22 P. 598 (1889).

⁵Norton v. Overholtzer, 63 Cal. App. 388, 218 P. 637 (192); Siemers v. Heuchel, 109 Misc. Rep. 323, 178 N.Y.S. 649 (1919).

⁶Bl. Com. 285.

⁷1 TIFFANY, REAL PROPERTY, (3rd ed. 1939), sec. 169.

with the statute of frauds. This tendency was illustrated by an English case which held that the tenancy was one from year to year, the court saying, "The meaning of the statute was, that such an agreement should not operate as a term; but what was then considered as a tenancy at will, has since been properly construed to enure as a tenancy from year to year."⁸

The analogy is not without its faults, however. In the one situation the agreement of the parties contemplates a tenancy at will. It is a reasonable inference from the payment and acceptance of a periodic rent for a long time that they intend the existence of a more tangible interest. In the other situation the tenancy at will is imposed by the law. The sole intent of the parties is the creation of a definite term or estate and all of the covenants in the lease are made with reference to that term. Thus the payment of rent periodically is the result of such a stipulation in the agreement, and the fact that it is paid over a long period of time is due to the belief that the lease was effective to vest the term it purported to vest. That the rule is not the product of intention but is arbitrary or convenient rather, is aptly shown by cases which, under the statutes declaring the lease invalid, hold that a periodic tenancy arises in the first instance.⁹

In most of the jurisdictions in the United States it has been declared that the tenancy at will, resulting from a lease which fails to comply with the provisions of the statute of frauds, may be converted into a periodic tenancy under certain circumstances. But there is a split of authority as to the character of that tenancy.¹⁰ This split has resolved itself into three views: (1) a tenancy from year to year or (2) a periodic tenancy depending upon the periods of rental payments arises, or (3) the tenancy remains one at will.

(1) Under this view it generally is said that a tenancy from year to year arises upon the taking of possession and the payment of rent by the tenant.¹¹ Usually payment of one or more installments is required, but some cases state that such a tenancy exists without making any reference to rental payments.¹² The possession ordinarily required is not for any definite time, and in some instances a mere entry is sufficient.¹³ In fact it has even been held that the tenancy arises though the tenant never went into possession.¹⁴

In most cases the courts ignored the question as to whether, if a monthly rent was paid, the tenancy would be one from month to month, but since the facts showed that the rent was an annual one they may have felt no duty to express an opinion on that problem. On the other hand, it has been held that

⁸Clayton v. Blakey, 8 T.R. 3 (1798).

⁹Coudert v. Cohn, 118 N.Y. 309, 23 N.E. 298 (1890); Scully v. Murray, 34 Mo. 421 (1864).

¹⁰1 TIFANY, REAL PROPERTY, (3rd ed. 1939), sec. 82.

¹¹Talamo v. Spitzmiller, 120 N.Y. 37, 23 N.E. 980 (1890); Falck v. Barlow, 110 Md. 159, 72 A. 678 (1909).

¹²Larkin v. Avery, 23 Conn. 304 (1854).

¹³Coudert v. Cohn and Scully v. Murray, both *supra*, note 9.

¹⁴Georgetti v. Steuber, 80 N.J. Law 482, 79 A. 257 (1911).

the tenancy is one from year to year though the rent was payable monthly.¹⁵ The state of Missouri makes a distinction, explained by the following quotation:

"A tenancy at will of farming land rented for agricultural purposes is a tenancy from year to year and not from month to month, as is the case where the property is a store or dwelling house situated in a town or city. The principle underlying the distinction, as was well said . . . 'had its origin in the strong desire of courts to protect tenants at will against being deprived of crops sown by the arbitrary termination of their estates, or, in other words, from the determination of the courts to uphold the just and equitable policy of allowing a tenant 'who sows to reap.'"¹⁶

A variation of view (1) is that a tenancy from year to year arises only after the tenant has been in possession for more than a year, and this rule prevails though a monthly rent has been reserved.¹⁷

(2) When a person enters into possession under a lease that is within the statute of frauds, with a periodic rent reserved, he becomes a tenant from period to period; if an annual rental is reserved, he is a tenant from year to year; if a monthly rental, he is one from month to month.¹⁸ This view has been said to be the better one because it is in accord with the rule that an ordinary tenancy at will becomes a periodic tenancy by reason of the payment and acceptance of a periodic rent.¹⁹

A modification of this view, corresponding to the one in the prior view, is that the tenant is one at will for the first year, but if he remains in possession and pays rent thereafter, he becomes a periodic tenant.²⁰

(3) In Maine and Massachusetts, it has been decided that the tenancy at will cannot be converted into a tenancy from year to year or any other periodic tenancy except by a lease which complies with the statute of frauds.²¹ The reason given is that the statutes in these states contain no exception in favor of short term leases but expressly provide that a lease which fails to comply therewith is a lease at will. The argument then goes on to state that if a periodic tenancy were implied from the defective lease, such a tenancy, being more than one at will and not having been created by a lease in writing, could be construed only as a tenancy at will, for to give it any other effect would be to contravene the legislative will as expressed by the statute.²²

¹⁵Boardman Realty Co. v. Carlin, 82 Conn. 413, 74 A. 682 (1909); Scully v. Murray, 34 Mo. 421 (1864).

¹⁶Womach v. Jenkins, 128 Mo. App. 408, 107 S.W. 423 (1908).

¹⁷Rosenblat v. Perkins, 18 Ore. 156, 22 P. 598 (1889).

¹⁸Mades v. Howalt, 46 Wash. 450, 90 P. 588 (1907); Wineburgh v. Toledo Corp., 125 Ohio St. 219, 181 N.E. 20 (1932); Prindle v. Anderson, 19 Wend. 391 (N.Y. 1838).

¹⁹1 TIFFANY, REAL PROPERTY, (3rd ed. 1939), sec. 82.

²⁰Rundle-Spence Mfg. Co. v. Badger-Packard Machinery Co., 169 Wis. 513, 173 N.W. 211 (1919); Botsford v. Darling, 47 N.Y. 666 (1872) (by implication).

²¹Ellis v. Paige, 1 Pick. 43 (Mass. 1882); Davis v. Thompson, 13 Me. 209 (1836).

²²See Hammon v. Douglas, 50 Mo. 434 (1872).

In Pennsylvania the cases have followed the variation of view (1). In the first case²³ to arise on the problem there was a written lease for seven years reserving an annual rent. The lease was executed by an agent who lacked written authority signed by the lessor. Possession was taken and rent was paid for more than a year. It was held that the tenancy was one from year to year, Kennedy, J. saying:

"Supposing he (the agent) made the lease without either written or verbal authority, and the plaintiff afterwards knowingly received the rents as they became due, and were paid under it by the tenants, it might very properly be considered an implied assent at least by parol to the lease on his part, and give to it the force and effect of a lease at will; and if the tenants were suffered to hold under it for upwards of a year, paying the rent as it became due, and the plaintiff receiving it without objection, the lease, instead of continuing to be a lease strictly at will, would thereby become a lease from year to year, so that the tenants would only be put out of possession at the end of a year, upon having received three months' previous notice to quit."²⁴

Although an annual rent was provided for in this case, the court did not stress that fact and gave no indication that the result would have been different if a monthly rent or a weekly one had been reserved. However, in a later case,²⁵ where it was held that the lease could be construed as one from year to year and whether it was so was a question of fact for the jury, the court said:

"But one of the incidents of an estate at will is its convertibility, upon the *annual* payments and acceptance of the rent, into a tenancy from year to year. A parol demise for more than three years, in the first instance, then, creates a tenancy at will only, and this satisfies the statute: but that tenancy at will, like any other, may be subsequently changed into a tenancy from year to year, by payment and acceptance of the rent *annually*, or other circumstance, indicating that intention of the parties."²⁶ (Italics supplied)

By placing so much emphasis upon the annual rent which appeared in the facts, the case implies that had the rent been a monthly one the effect might have been a tenancy from month to month, thus placing Pennsylvania in view (2). Moreover, the opinion cites *McDowell v. Simpson*²⁷ for the proposition that the tenancy at will there became one from year to year by reason of the payment and acceptance of the rent annually. The same stress was placed upon an annual rental in an earlier case²⁸ where it was held that under a parol lease

²³*McDowell v. Simpson*, 3 Watts 129 (Pa. 1834).

²⁴*Id.* at 135-136.

²⁵*Dunn v. Rothermel*, 112 Pa. 272, 3 A. 800 (1886).

²⁶*Id.* at 282, 3 A. at 802-803.

²⁷3 Watts 129 (Pa. 1834).

²⁸*Stover v. Cadwallader*, 2 Penny. 117 (Pa. 1882).

for four years with the rental rate of \$400 payable at the end of the term, the tenant was one at will though he had occupied the premises for three years. The court said, "Where an annual rent is reserved, such leases are now construed to be leases from year to year." The implication from this case is that the reservation of any but a periodic rent will result in a tenancy at will only.

However, the importance of an annual rent has been minimized, and more recent cases have left no doubt that Pennsylvania law is that a tenancy from year to year exists despite the time of rental payments. In the latest case decided,²⁹ it was held that where a person went into possession under a lease, executed by an agent without proper authority and providing for a term of five years at a total rent of \$17,100 payable in monthly installments, and remained for more than a year, he was a tenant from year to year. The idea that rental periods would control the character of the periodic tenancy was even more directly negated in a lower court case where it was held that a tenancy from year to year existed under an oral lease for ten years though it provided for a monthly rent.³⁰

The case of *Dunn v. Rothermel*³¹ is interesting, not only because it implies that payment of rent annually is necessary to give rise to a tenancy from year to year, but also because it states that such a tenancy may be created by "other circumstances, indicating that intention of the parties." Just what such other circumstances might consist of was not indicated by the court, but it has been said that an agreement to pay a periodic rent might show an intention to create a tenancy from year to year.³² It also has been suggested that reference should be had to the use to which the property is put.³³

Nearly all of the cases in Pennsylvania speak of an actual payment of rent, but whether that is absolutely necessary has never been decided. It is conceivable that a tenant might enter and occupy the premises for more than a year without paying any rent therefor. But suppose he gave the landlord his note for the amount due or contracted to perform personal services in the future as payment, would he remain a tenant at will or would he become one from year to year?

There is only one case in Pennsylvania which makes any reference to this problem, and it was said there:

"The entry under the parol lease for five years constituted a tenancy at will; that tenancy having continued for almost two years, and the parties having, during that period, recognized its existence as rightful, the defendant having claimed and the plaintiff having paid or *admitted liability for the rental*, the estate in-

²⁹*Ferri v. Liberatoscioli*, 338 Pa. 454, 13 A. (2d) 45 (1940).

³⁰*Lipschutz v. Lipschutz*, 18 D. & C. 146 (1932).

³¹112 Pa. 272, 3 A. 800 (1886).

³²*Lyons v. Phila. Reading Ry. Co.*, 209 Pa. 550, 58 A. 924 (1904); *Siemers v. Heuchel*, 109 Misc. Rep. 323, 178 N.Y.S. 649 (1919).

³³*Hammon v. Douglas*, 50 Mo. 434 (1872).

stead of continuing to be a lease strictly at will would thereby become a lease from year to year."³⁴ (Italics supplied).

Therefore the state of the law in Pennsylvania is that a person entering into possession under a lease that does not comply with the statute of frauds is a tenant at will. If he continues in possession for more than a year and pays rent or admits his liability for it, he becomes a tenant from year to year regardless of rental periods.

There are two cases which have failed to apply this rule. The case of *Stover v. Cadwallader*,³⁵ already mentioned, stated the rule but limited it to the situation where an annual rent was reserved. That this limitation does not apply has been shown. The other case, *Jennings v. McComb*,³⁶ ignored the rule. There the tenant, under a lease executed by an agent without proper authority, occupied the premises for the entire term and paid rent annually. Nevertheless, the court held that the tenant had an estate at will only. There seems to be no justification for this decision, and although it has never been over-ruled expressly, it should carry no authority in the face of the other cases in Pennsylvania.

TERMS OF THE TENANCY

A tenant who has occupied premises under a lease which violates the statute of frauds incurs liability for the use and occupation enjoyed, but there is disagreement as to what such liability is and how it is to be measured.

In an English case it was said, "Though the agreement be void by the Statute of Frauds as to the duration of the lease, it must regulate the terms on which the tenancy subsists in other respects, as to the rent, the time of the year when the tenant is to quit, etc."³⁷ A similar statement has been made by many courts in the United States.³⁸ The theory on which this view is based is that it is a reasonable inference that the parties intended a tenancy on the terms of the original lease, and since the statute of frauds is directed mainly against the length of the term, the provisions of the lease, other than the duration, should control.³⁹

Under this view it has been held that a tenant is bound to pay the rent prescribed in the defective lease for the length of time he has occupied the premises.⁴⁰ And if he has become a periodic tenant and abandons the premises without giving the required notice, he is liable for the remainder of the

³⁴Walter v. Transue, 22 Pa. Super. 617, 621 (1903).

³⁵2 Penny, 117 (Pa. 1882).

³⁶112 Pa. 518, 4 A. 812 (1886).

³⁷Doe ex. dem. Rigge v. Bell, 5 T.R. 471, 472 (1793).

³⁸Nash v. Berkheimer, 83 Ind. 536 (1882); Talamo v. Spitzmiller, 120 N.Y. 37, 23 N.E. 980 (1890); Arbenz v. Exley, Watkins & Co., 52 W. Va. 476, 44 S.E. 149 (1903).

³⁹Arbenz v. Exley, Watkins & Co., 52 W. Va. 476, 44 S.E. 149 (1903).

⁴⁰Steele v. Anheuser-Busch Brewing Ass'n, 57 Minn. 18, 58 N.W. 685 (1894); Marr v. Ray, 151 Ill. 340, 37 N.E. 1029 (1894).

period at the amount expressed in the agreement.⁴¹ Also, it has been said that the lease would control the time of payment of the rent,⁴² the tenant's right to take the away-going crop,⁴³ and his duty to repair.⁴⁴

Then, there is a line of cases holding that, though the rent provided for in the lease is not the exclusive criterion, the lease itself is admissible as evidence on the question of reasonable rental value in a suit against the tenant for use and occupation.⁴⁵

Finally, it has been held that the reasonable value of the use and occupation was a question for the jury and was not to be determined by the lease. The court said, "And as the contract was non-enforceable, by reason of the statute of frauds, the contract price was also non-enforceable; for to allow recovery of the price agreed upon by the contract, but deny an action upon the contract itself, would be equivalent to granting and denying the remedy in the same action."⁴⁶

In Pennsylvania one case decided that the defective lease was admissible in determining the reasonable value of the use and occupation.⁴⁷ A more recent case has held that a judgment in ejectment would not be opened where it was entered under a confession of judgment clause in a lease which did not comply with the statute of frauds.⁴⁸ The latest authority decided that the tenant was liable for the amount of the rent expressed in the lease, Stern, J. saying, "When a tenant enters and occupies premises under a lease which is within the statute of frauds the lease agreement regulates the terms of the tenancy in all respects other than the duration of the term."⁴⁹ This language is very sweeping in scope and definitely includes such things as the time of payment of rent, payment in advance, duty to repair under covenants in the lease, etc.

Suppose that L leases premises at a stated rental for a term of 30 years to T through A who did not have authority in writing signed by the lessor. The lease contained a clause providing that T was to erect a building worth \$25,000. Since A did not have proper authority, T, under Pennsylvania law, would become a tenant from year to year after he had occupied the premises for more than a year. Would T be bound by the provision for building in the lease? The words of Mr. Justice Stern⁵⁰ indicate that he would, but such a result unquestionably would be unfair. Certainly the court never intended to go so far, but a literal interpretation of the rule could lead to no other result.

⁴¹Arbentz v. Exley, Watkins & Co., 52 W.Va. 476, 44 S.E. 149 (1903); Barlow v. Wainwright, 22 Vt. 88 (1849).

⁴²Anderson v. Robbins, 82 Me. 422, 19 A. 910 (1890).

⁴³See Reeder v. Sayre, 70 N.Y. 180 (1877).

⁴⁴Martin v. Smith, L.R. 9 Exch. 50 (1874).

⁴⁵Crawford v. Jones, 54 Ala. 459 (1875); Walker v. Shackelford, 49 Ark. 503, 5 S.W. 887 (1887).

⁴⁶Ragsdale v. Lander, 80 Ky. 61 (1882).

⁴⁷Jennings v. McComb, 112 Pa. 518, 4 A. 812 (1886).

⁴⁸Goldstein v. Nichols, 273 Pa. 107, 116 A. 670 (1922).

⁴⁹Ferri v. Liberatoscioli, 338 Pa. 454, 13 A. (2d) 45 (1940).

⁵⁰*Ibid.*

TERMINATION OF THE TENANCY

The tenancy which arises under a lease not complying with the statute of frauds may be terminated by giving notice as required for the character of the periodic tenancy which results. Thus, in Pennsylvania where three months' notice is necessary to terminate a tenancy from year to year,⁵¹ it has been held that such tenancy may be terminated at the end of any year if three months' previous notice had been given by the landlord.⁵² However, a periodic tenant may quit at the end of any period without giving previous notice whether the tenancy was created expressly or by the tenant's holding over after the expiration of his lease.⁵³ There is no reason why this rule should not be applied to a tenant from year to year, under a lease violating the statute of frauds.

If the defective lease provides for a term of several years and a fraction of a year, the ending of each year is to be determined from the time of entry by the tenant and not from the date the lease is to expire.⁵⁴ For example, if the term was for five and one-half years, the tenancy could be terminated at the end of any year, by proper notice, but not at the middle of any year.

In England the principle has been expressed that though the tenancy, under a defective lease, is one from year to year with reference to the time of the original entry, yet the tenant might quit at the expiration of the period contemplated in the agreement, without notice, even though it end in the middle of a year.⁵⁵ There are several cases in this country which are in accord and which extend the rule to the landlord, thus making it reciprocal.⁵⁶

It is uncertain whether Pennsylvania would follow this view since no case has been found in which the question was raised. The broad language used by Mr. Justice Stern⁵⁷ implies that it would be followed, for the termination of the tenancy without notice at the time agreed upon in the lease is not within the limitation of the rule—duration of the term—as construed by courts applying this view.⁵⁸

P. J. DESANTIS

⁵¹Act of Dec. 14, 1863, P.L. 1125, sec. 1, 68 P.S. 364.

⁵²Walter v. Transue, 22 Pa. Super. 617 (1903); Loran's Est., 20 Phila. 174, 10 Pa. C.C. 554 (1890).

⁵³Cook v. Neilson, 10 Pa. 41 (1848); Hollis v. Burns, 100 Pa. 206 (1882); Thompson v. School Dist. of Pa., 48 Pa. Super. 607 (1912).

⁵⁴Coudert v. Cohn, 118 N.Y. 309, 23 N.E. 298 (1890). *Contra*; Doe ex. dem. Rigge v. Bell, 5 T.R. 471 (1793).

⁵⁵See Berrey v. Lindley, 3 Man. & G. 498 (1841); Martin v. Smith, L.R. 9 Exch. 50 (1874).

⁵⁶Butts v. Fox, 96 Mo. App. 437, 70 S.W. 515 (1902); Hollis v. Pool, 44 Mass. 350 (1841).

⁵⁷Ferri v. Liberatoscioli, 338 Pa. 454, 13 A. (2d) 45 (1940).

⁵⁸See Coudert v. Cohn, 118 N.Y. 309, 23 N.E. 298 (1890).