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Landlord and Tenant

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LANDLORD AND TENANT

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Interesting constructional questions involving statutes and clauses in leases were answered in the cases decided during the survey period.

Adams v. Willis[1] involved a suit by the assignee of a lessee against the grantee of the lessor for the specific performance of an option in the lease to purchase the demised premises for a specified sum. Construing the terms of the lease, the court found that the purchase option survived a previous refusal by the lessee to purchase under a separate "purchase refusal" clause giving the lessee the right of preemption should the lessor decide upon a sale to a third party. The plaintiff was held entitled to specific performance of the purchase option despite the fact that the land had increased in value since the execution of the lease.

One dictum in the *Adams* case seems worthy of comment. Since the lease containing the purchase option had been recorded, defendant grantee of the lessor was held to have record notice thereof. The opinion then continues, "Indeed, the presence on the lot of a [filling station] was sufficient to put him [defendant] on inquiry." The quoted statement would seem to mean that a purchaser of land is not entitled to the protection of the recording act if an investigation of the possession of the land would have disclosed the existence of an interest created by an unrecorded instrument required to be recorded. If this is the intended meaning, the validity of the statement is most doubtful in view of the Act of 1888,[2] providing, in effect, that posses-

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1. 225 S.C. 518, 83 S.E. 2d 171 (1954).

2. The Act of 1888 (20 STAT. 15), as contained in CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-109, reads as follows:

"What constitutes notice of unrecorded instrument.

No possession of real property described in any instrument of writing required by law to be recorded shall operate as notice of such instrument. Actual notice shall be deemed and held sufficient to supply the place of registration only when such notice is of the instrument itself or of its nature and purport."

The construction which has been placed upon the statute is that mere possession of land under an unrecorded instrument in writing required by law to be recorded is not sufficient notice of the interest created by such instrument. Foster v. Bailey, 82 S.C. 378, 64 S.E. 423 (1909) (possession under unrecorded deed); Richardson v. Ellis, 112 S.C. 108, 98 S.E. 846 (1919) (possession under unrecorded deed); Epps v. McCallum Realty Co., 139 S.C. 481, 138 S.E. 297 (1927) (possession under unrecorded contract of sale); Van Ness v. Schachte, 143 S.C. 429, 141 S.E. 721 (1928) (possession under unrecorded contract of sale). See Savannah Timber Co. v. Deer Island Lumber Co., 258 F. 777 (E.D. S.C. 1918), *aff'd sub nom.* Deer Island Lumber Co. v. Savannah River Lumber Co., 258 F. 785 (4th Cir. 1919). Of course, circumstances other than the possession of land by the claimant under an unrecorded instrument may be sufficient to charge a subsequent purchaser with notice of the outstanding interest. See Oliver v. McWhirter, 112 S.C. 555, 100 S.E. 533 (1919).

sion under an unrecorded instrument required to be recorded is not notice to a subsequent purchaser. The authority[3] cited by the court in support of the dictum likewise is subject to the same criticism.

In *Seaber v. Kohn*[4] the court was called upon by way of declaratory judgment to construe a clause in a lease for ten years providing for an acceleration of rent for a period of one year should the lessees remove their effects from the leased premises, and that lessor should be vested with the same rights as though the entire term had expired.[5] The point in issue was lessees' contention that under this clause they might terminate their liability for future rent beyond the one year period without the acquiescence of the lessor. The court construed the clause to be a condition subsequent for the benefit of the lessor rather than a conditional limitation (determinable limitation) which would *ipso facto* terminate the lease. Without the assent of the lessor, therefore, the lessees were unable thus to terminate their liability under the lease.

3. Barksdale v. Hinson, 212 S.C. 1, 46 S.E. 2d 170 (1948). In this case a tenant in possession under a parol lease for one year was protected against a subsequent purchaser of the premises without actual notice of the lease. Two opinions are reported. The rationale of the first opinion is that an oral lease for not to exceed one year is not required to be recorded, the Landlord and Tenant Act of 1946 [44 STAT. 2584 (1946); CODE OF LAWS OF SOUTH CAROLINA, 1952 Title 41] not having altered the prior law, and, therefore, a subsequent purchaser without notice takes subject to such lease. (In other words, at common law a prior legal interest prevails over a subsequent one, irrespective of the want of notice to the subsequent purchaser of the legal title.) The second opinion questions the rationale of the first opinion, and justifies the decision for the tenant solely on the ground that the subsequent purchaser would be charged with notice of the lease from the fact of the tenant's possession, and, therefore, that he could not qualify as a bona fide purchaser without notice. Since two of the justices concurred in the second opinion and only one in the first, the second is actually the opinion of the court.

The reasoning of the second opinion seems demonstrably erroneous. If the recording act does not require a lease for not to exceed one year to be recorded, the common law rule as to priorities is in effect, and the lessee as holder of a prior created legal interest will prevail over any subsequent purchaser, regardless of whether he purchased with or without notice of such prior legal interest. On the other hand, if the recording act, construed in conjunction with the Landlord and Tenant Act of 1946, requires the recordation of a lease creating a term for not to exceed one year, very clearly the Act of 1888 providing that possession under a written instrument required to be recorded is not notice to a subsequent purchaser, is applicable. Thus it seems that the decision of the court properly may be justified only on the grounds adopted in the first opinion.

4. 86 S.E. 2d 872 (S.C. 1955).

5. The exact language of the clause was as follows:

"And, lastly, it is agreed, that should said Lessee assign, transfer, sell, remove or in any manner dispose of the goods and chattels within the above leased premises, then the entire amount of rent that would accrue for . . . one year . . . shall be considered as due and payable, and the Lessor shall be vested with the same rights as though the entire leased term had expired; but payment for the same shall entitle said Lessee, . . . their heirs . . . and assigns, to all Lessee's rights of possession to transfer (as provided in this Lease) for the additional term."

In *Thompson v. Rutland*[6] the statute[7] providing that the magistrate shall issue a warrant of ejectment if the tenant fails to show cause why he should not be ejected was construed to require a written rather than an oral warrant. The defendant landlord had oral judgment for ejectment on 16 November, but a written warrant was not issued until 27 November. Before the expiration of five days after the issuance of the written warrant the tenant's possession of certain of his chattels was disturbed under purported authority of the oral judgment. In affirming a judgment for the tenant for the conversion of his chattels, the court said that the tenant could not have been legally evicted within five days after an effective judgment of eviction.

In *U. S. v. Scovil*[8] the Supreme Court of the United States reversed a judgment of the South Carolina Supreme Court[9] in a case involving the relative priority of a landlord's distress for rent under the laws of South Carolina and a lien for unpaid taxes due the United States.

One day before the appointment of a receiver for an insolvent corporate debtor the landlord distressed upon assets of the debtor for unpaid rent. Claim for this unpaid rent was filed with the receiver, as was a claim of the United States for payroll taxes owed by the insolvent corporation. The assessment list for the unpaid payroll tax was received by the Collector prior to the levy of the landlord's distress, but notice of the tax lien was not filed in the office of the Register of Mesne Conveyances until after levy of the distress.

The South Carolina Supreme Court held that since the landlord's lien had been perfected by the distress prior to the appointment of the receiver, under Section 3466 of the Revised Statutes,[10] the United States could have no greater interest in the property in the

6. 225 S.C. 485, 83 S.E. 2d 163 (1954).

7. CODE OF LAWS OF SOUTH CAROLINA, 1952:
"§ 41-104. Tenant ejected on failure to show cause.
If the tenant fails to appear and show cause within the aforesaid ten days then the magistrate shall issue a warrant of ejectment and the tenant shall be ejected by his regular or special constable or by the sheriff of the county."

8. 75 S. Ct. 244 (1955).

9. U. S. v. Scovil, 224 S.C. 233, 78 S.E. 2d 277 (1953), discussed in last year's Survey of Landlord and Tenant, 7 S.C.L.Q. 121 (1954).

10. REV. STAT. § 3466 (1946), 31 U.S.C. § 191 (1946) reads as follows:
"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

hands of the receiver than had the insolvent. Regarding the contention that the provisions of Sections 3670 through 3672[11] of the Internal Revenue Code created a prior lien in favor of the United States, the State Court held such lien not to take precedence over a landlord's lien for rent which had been perfected by the levy of a distress prior to the required filing[12] of notice of the tax lien in the office of the Register of Mesne Conveyances.

Reversing the judgment of the State Court, the United States Supreme Court found the United States to have priority under Section 3670,[13] Internal Revenue Code. The landlord had a lien other than a mortgage, pledge or judgment lien, nor was he a purchaser within the meaning of Section 3672[14] of the Revenue Code. Moreover, the five day period within which, under Section 41-160[15] of the South Carolina Code, the tenant might have posted bond and freed the property from the lien of the distraint had not expired prior to the filing with the Register of Mesne Conveyances of notice of the Government lien. Therefore, in the language of Mr. Justice Minton, "the distress lien was not perfected in the federal sense at the time the Government's liens were filed."

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11. INT. REV. CODE § 3670, 26 U.S.C. § 3670 (1946). PROPERTY SUBJECT TO LIEN.
"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." INT. REV. CODE § 3671, 26 U.S.C. § 3671 (1946). PERIOD OF LIEN.
"Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time." INT. REV. CODE § 3672, 26 U.S.C. § 3672 (1946). [As amended by § 401, Revenue Act of 1939, c. 247, 53 STAT. 862, and § 505, Revenue Act of 1942, c. 619, 56 STAT. 798.] VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.
"(a) *Invalidity of Lien Without Notice.* — Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector —
"(1) *Under state or territorial laws.* — In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or"

12. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 65-2722. *Place of filing liens and discharges thereof.* Notices of liens for taxes payable to the United States of America and certificates discharging such liens shall be filed in the office of the register of mesne conveyances (or clerk of court in those counties in which the office of register of mesne conveyances has been abolished) of the county in this State within which the property subject to such lien is situated.

13. See note 11 *supra.*

14. See note 11 *supra.*

15. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 41-160.

Legislation

By act[16] approved 28 January 1955, South Carolina Code Section 41-61,[17] providing for the termination of farm tenancies in certain counties on the first day of December in each year, was amended to add Florence County to the list of counties included therein.

16. 49 STAT. 2 (1955).
17. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 41-61.