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Leases: Construed as Contracts

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of law relating to gaming and gaming devices¹⁵ a forfeiture has been had of money seized in a gambling raid.

The effects of the decision reached by the California court are myriad. The punishment for gambling has been set down in the code.¹⁶ These plaintiffs have been "fined" in excess of \$6,000. How far may the broad rule laid down by the majority of the court be extended? Could it apply to a car which has been towed away under city ordinances allowing such action when cars are parked illegally? The same rule could easily apply to a horse run in an illegal race.

The statutes of California seem to be unequivocal in their application to such matters. They provide there shall be no forfeiture except as provided by statute, and in the absence of statute this court has invoked a forfeiture. Such an undertaking should be left to the Legislature. If public policy demands that money so seized should not be returned to those participating in the illegal transaction, the Legislature should so provide. Even if the court here believed that the Legislature intended such a policy, the decision should have been limited to the facts at hand and should not have laid out such a broad and general rule.

Robert Moore.

LEASES: CONSTRUED AS CONTRACTS.—It is a truism to state that the present-day law of real property is permeated with feudalistic principles. In the field of leaseholds, however, we find prime examples of old ideas giving way to new ones. The modern layman who is tenant for a term of years is surprised at the thought that he has acquired an "estate in the land" by hiring a house for a fixed period of time.¹ Shock will be added to surprise on his discovery that under the traditional rules of real property he must continue his rental payments to the end of the term despite the fact that the house has burned down through no fault of his,² or that the purpose for which he rented the premises and which is stipulated in the lease has become an illegal purpose due to statutory enactment not contemplated by the parties at the time of entering into the contract of lease.³ Due to holdings of this nature, the courts in many cases have strained to pull away from applying the classical real property principles, and have endeavored to solve such problems by utilizing principles of contract law. It would seem more reasonable and realistic to determine that a failure of consideration exists in such circumstances, and such has been the result in many states through legislative⁴ and court⁵ action.

An excellent example of the above noted tendency to regard a lease as something

¹⁵Ex parte Williams, 7 Cal.Unrep. 301, 87 Pac. 565 (1906); In re Clark, 54 Cal.App. 507, 202 Pac. 50 (1921); People v. Carroll, 80 Cal. 153, 22 Pac. 129 (1889); In re Capanna, 45 Cal.App. 501, 187 Pac. 1077 (1920); People v. Sam Lung, 70 Cal. 515, 11 Pac. 673 (1886); People v. Ah Own, 85 Cal. 580, 24 Pac. 780 (1890).

¹⁶Calif. Pen. Code, § 330, *supra* note 2.

¹1 TIFFANY, REAL PROPERTY, 25, 72, 73 (3d ed., 1939).

²Gibson v. Perry, 29 Mo. 245 (1860).

³Imbeschied v. Lerner, 241 Mass. 199, 135 N.E. 219 (1922).

⁴Calif. Civ. Code, § 1932: The hirer of a thing may terminate the hiring before the end of the term agreed upon: (2) When the greater part of the thing hired, or that part which was and which the letter had at the time of the hiring reason to believe was the material inducement to the hirer to enter into the contract, perishes from any other cause than the want of ordinary care for the hirer.

⁵Brunswick-Balke-Collender Co. v. Seattle Brewing & Malting Co., 78 Wash. 12, 167 Pac. 58 (1917).

more in the nature of a contract than an estate in the land is presented in a recent Ohio decision⁶ in which this reasoning is carried to its logical extreme. Briefly, the facts are these: A leases premises to B for a term of five years. At a time when the first lease has nearly expired, A leases the premises to C for a term of five years. The term is to commence about three weeks after the termination of the first lease. A informs B of the new lease. B holds over for a period of four months, and the question of determining C's rights against B is thus placed before the court.

Under the traditional real property solution there is a conflict of authority as to whether the landlord has the responsibility for putting his lessee in possession of the premises.⁷ Some states, by statutory enactment, require this of the landlord,⁸ while others reach the same result by judicial decision saying that a failure to do so constitutes a breach of covenant of quiet enjoyment.⁹ These states allow the lessee who is kept out of possession to recover damages from the lessor.¹⁰ Other jurisdictions put the burden of obtaining possession on the lessee as owner of the term.¹¹ Under the early rules of property a lessee faced with this situation had to pursue his rights in two actions: one in ejectment in order to get possession of the land, and the other in trespass for mesne profits.¹² Under modern statutes he may have both remedies in one action.¹³

The Ohio court, however, gives full sweep to the doctrine which regards a lease as being contractual in nature. In the fact situation above stated, the court held that the first lessee was liable in tort to the second lessee for interfering with the beneficial contractual relations between the lessor and the second lessee. The court cited the Restatement of the Law of Torts¹⁴ and American Jurisprudence¹⁵ as authorities for its holding. The rule, as there stated, is declaratory of the doctrine expressed in the leading case of *Lumly v. Gye*,¹⁶ wherein it was held that the defendant was liable in tort for procuring the breach of contract of hire of a concert singer by the plaintiff. Subsequent authority has extended this formula to contracts in other fields such as contracts for the construction of railroads,¹⁷ contracts between laundry agents and laundries,¹⁸ contracts with agencies for the sale of goods,¹⁹ and generally contracts for the sale, purchase, or transportation of goods.²⁰ In passing, it may be noted that California was reluctant to adopt this concept, and in an early case it was given an

⁶Reichman v. Drake, 100 N.E.2d 533 (Ohio, 1951).

⁷1 TIFFANY, REAL PROPERTY, 95 (3d ed., 1939).

⁸Calif. Civ. Code, § 1927: An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same.

⁹See note 7 *supra*; Berrington v. Casey, 78 Ill. 317 (1875).

¹⁰1 TIFFANY, REAL PROPERTY, 98 (3d ed., 1939); Allan v. Guaranty Oil Co., 176 Cal. 421, 168 Pac. 884 (1917).

¹¹Ward v. Edesheimer, 17 N.Y.Supp. 173 (1892); 1 TIFFANY, REAL PROPERTY, 98, etc.

¹²Gill v. Patten, 20 Fed.Cas. 376, No. 5428 (C.C., D.C., 1807).

¹³Calif. Code Civ. Proc., § 427: The plaintiff may unite several causes of action in the same complaint, where they all arise out of: (2) Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same.

¹⁴RESTATEMENT, TORTS, § 766 (1939).

¹⁵30 AM. JUR., Interference, § 19.

¹⁶2 E. & B. 216 (1853).

¹⁷Angle v. Chicago St. P. M. & O. R. Co., 151 U.S. 1 (1894).

¹⁸Doremus v. Hennessy, 176 Ill. 608, 52 N.E. 924 (1898).

¹⁹Raymond v. Yarrington, 96 Tex. 443, 73 S.W. 800 (1903).

²⁰30 AM. JUR., Interference.