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Property—Breach of Covenant of Quiet Enjoyment—Payment of Rent Condition Precedent to Suit by Tenant

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majority reasoned that if the tenant were not liable to the landlord for the landlord's losses caused by a stay pending appeal, then the language of section 1443 of the Civil Practice Act, insofar as it requires the posting of a bond to cover damages where such a stay is obtained, would be meaningless. The majority pointed out that if the tenant were liable only for the statutory rental and not the fair rental value during the period in which a stay was granted pending appeal, a tenant, merely by appealing and obtaining such a stay of the warrant, would be able to "elevate himself by lifting his own bootstraps."

Judge Burke, in a vigorous dissenting opinion, contended that the statutory tenancy continues until the issuance of the dispossess warrant, and that in any event, a tenant in possession by permission of the Court does not incur the liability of a trespasser. He argued that the majority decision, in allowing this cause of action, inhibits the process of appeal in these cases, and is therefore against the spirit of the Legislature's intentions. He suggested that the landlord's proper recourse was to have the statutory rental increased as prescribed by the statute.

There are three possible alternative solutions to this situation. First, the tenant could be evicted after the entry of the dispossess order though appeal is pending, but this is so impractical that neither litigant would suggest it. Second, the tenant could be allowed to stay in possession after the entry of the dispossess order, being liable only for the artificially low statutory rental. Third, the tenant could be allowed to stay in possession, by permission of the Court, after entry of the dispossess order pending appeal, but liable in damages as a trespasser should he lose on appeal. This third approach forces the tenant to appeal at his own risk, and not at the risk of the landlord. Therefore it not only precludes a disgruntled tenant from utilizing an appeal to perpetuate the statutory rental after the trial court has held him liable for the higher fair rental value, but also, by allowing the tenant to appeal only at his own risk, inhibits the encumbering of the courts with bad-faith appeals.

Breach of Covenant of Quiet Enjoyment—Payment of Rent Condition Precedent to Suit by Tenant

In *Herstein Co. v. Columbia Pictures Corp.*,²⁰ the tenant brought an action for damages against his landlord for breach of covenant of quiet enjoyment. Under the lease, the covenant of quiet enjoyment was predicated upon the payment of rent. In November 1955, the tenant was in default in his rent; the landlord in the same month began alterations which the tenant alleged constituted a partial actual eviction. The Court held that the action could not be maintained.

20. 4 N.Y.2d 117, 17 N.Y.S.2d 808 (1958).

It is well settled that where the covenant of quiet enjoyment is expressly conditioned upon the tenant's payment of rent and his performance of the obligations of the lease, his failure to pay such rent or perform such obligations is a bar to the maintenance of any action upon the covenant for interference with the quiet enjoyment of the premises; this is true whether the tenant's claim of a breach of the covenant is based on an actual²¹ or a constructive eviction.²² The Court also pointed out that section 234 of the Real Property Law²³ was not only not retroactive,²⁴ but also that the plain meaning of the statute does not suggest that the covenant of quiet enjoyment may not be conditioned upon the performance by the tenant of his covenants in the lease.

Tax Sale—Statute of Limitations for Setting Aside

The statute of limitations for tax deed conveyances is presently but temporarily found in Tax Law sections 131 and 132.²⁵ They provide in pertinent part that after two years from the date of the record of a tax sale conveyance, the presumption of regularity of the sale and all proceedings prior thereto shall become conclusive. Section 132 further provides all such conveyances and proceedings shall be subject to cancellation within five years from the last date of redemption by reason of three situational defects, one of which is any defect in the proceedings affecting the jurisdiction upon constitutional grounds.

In *Kiamesha Dev. Corp. v. Guild Properties, Inc.*,²⁶ the plaintiff owner brought this action to cancel a tax deed conveyance to the defendant purchaser, by reason of a jurisdictional defect, two years after the deed recording but before five years from the last date of redemption. The Appellate Division decided that the two year provision of these statutes barred the instant action even if the defects shown here were jurisdictional. The court relied on a statement in *Werking v. Amity Estates*,²⁷ which was construed as meaning that jurisdictional defects as well as mere irregularities were bound by the two year period. The Court of Appeals reversed, holding that their statement in *Werking* was misinterpreted and so construed would completely nullify the intention of section 132 which explicitly allows for cancellation within five years by reason of jurisdictional defects.

21. *Silken v. Farrel*, 306 N.Y. 585, 115 N.E. 827 (1953).

22. *Baitzel v. Rhineland*, 179 App.Div. 735, 167 N.Y. Supp. 343 (1st Dep't 1917); *Meyer v. Schulte*, 160 App.Div. 236, 144 N.Y. Supp. 1023 (1st Dep't 1913).

23. N. Y. REAL PROPERTY LAW §234 provides:

Every covenant, agreement . . . exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor . . . shall be deemed to be void as against public policy.

24. *Weiler v. Dry Dock Sav. Inst.*, 284 N.Y. 630, 29 N.E.2d 938 (1940).

25. N. Y. TAX LAW §§131 and 132 have been repealed. Now see §§1018 and 1020 of the REAL PROPERTY TAX LAW, effective October 1, 1959.

26. 4 N.Y.2d 373, 175 N.Y.S.2d 63 (1958).

27. 2 N.Y.2d 43, 155 N.Y.S.2d 633 (1956).