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The Invalidity of Unrecorded Leases Containing an Automatic Renewal Clause, Where Lease and Renewals May Extend Beyond Seven Years - Schultz v. Kaplan

THE INVALIDITY OF UNRECORDED LEASES CONTAINING AN AUTOMATIC RENEWAL CLAUSE, WHERE LEASE AND RENEWALS MAY EXTEND BEYOND SEVEN YEARS

Schultz v. Kaplan[1]

This case concerned an unrecorded five year lease renewable from term to term at the option of the tenant and providing for automatic renewal unless notice of termination was given. Suit was brought to have the lease declared void under the statute which provides that, "No estate of inheritance or freehold . . . or any estate above seven years, shall pass or take effect unless the deed conveying the same shall be executed, acknowledged and recorded as herein provided".[2] The Court held that the renewal periods

[1] 56 A. (2d) 16 (Md. 1947).
[2] Md. Code (1939), Art. 21, Sec. 1.

should be tacked together, so that there was a lease for longer than seven years, and the lease was void since not recorded. The Court based its decision largely on the fact that the renewal did not require the execution of a new lease. "The Maryland cases hold that where leases contain covenants for renewal and a new lease must be executed in order for the tenant to remain in possession of the property, that the newly executed lease does not tack the term of rental in the former lease to the term in the new lease."[3] Also, "Where no new lease, however, is required for the tenant to hold over under the old lease a different rule exists."[4]

Prior to this decision, the decisions of the Maryland Court of Appeals seem to follow a consistent pattern in determining whether a renewal period in a lease will join onto a previous period so as to make the lease one for a continuous term of a longer period than limited in statutes. The question has arisen in situations of two types: one type of situation is that of the *Schultz* case, concerning the avoidance of leases because of failure to comply with formalities required by the statute[5] for leases longer than seven years; and the second type of situation concerns the redemption statutes[6] and arises when there is a lease for less than fifteen years renewable for a term which brings the total to more than fifteen years, and the lessee asks the right to redeem the property at a capitalization of six percent (6%). In general, the Maryland Court of Appeals has held that in cases involving the redemption statutes, renewal periods tack so as to make the property redeemable. In cases involving avoidance of leases, the Court has generally held that the renewal periods do not tack, thus maintaining the validity of the leases. The *Schultz* case is *contra* on this point.

As stated above, the Court in the *Schultz* case distinguishes between leases automatically renewed and leases requiring the execution of a new lease for renewal. It is true that some previous Maryland cases do contain a similar language. However, there are at least two Maryland cases[7] which hold that the periods of renewal do not tack

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[3] *Supra*, n. 1, 21.
[4] *Ibid*, 22.
[5] *Supra*, n. 2.
[6] Md. Code (1939), Art. 21, Sec. 110 and 111.
[7] King v. Kaiser, 126 Md. 213, 94 A. 780 (1915), in which the lease provided "for a period of five years renewable for an additional period of twenty years", and Sweeney v. Trust Co., 144 Md. 612, 125 A. 522 (1924), in which the lease was for five years, "with the privilege of re-rental."

despite the fact that the renewal provisions seem not to require the execution of a new lease, bearing in mind the passage from Underhill[8] quoted with approval by the Court in the *Schultz* case. It is not argued here that there is no basis for the decision of the Court. It is contended that previous Maryland cases support the Court to a large extent but that the same cases also support another and perhaps more desirable view. This view is based on the idea that the application should be different depending on whether the statute involved is the fifteen year redemption statute or the seven year recordation statute.

Considering the cases involving redemption, first, the case of *Stewart v. Gorter*[9] seems to be the earliest Maryland case directly on point. The lease was for fourteen years with a covenant on the part of the lessor for the renewal of the lease for the further term of fourteen years with the same covenants. It was held in this case that the periods tack. The next redemption case involving the point in question is *Silberstein v. Epstein.*[10] The lease was for a term of ten years renewable for another ten year term. The second (renewal) lease was not executed until some three weeks after the first lease had expired and was made effective as of the day after the date of the expiration of the previous lease. Suit for redemption was brought while the second lease was in effect. The Court refused to allow redemption. However, the facts of this case may be considered to distinguish it so as to make the general rule inapplicable. Suit was brought under the second lease. The second lease had not become operative until after the first lease had expired. Therefore, there was a gap of time between the two leases and the period could not be considered as one continuous period. A later case of *Maryland Theatrical Corporation v. Manayunk Trust Co.*[11] refers to the *Silberstein* case and the Court says, ". . . there was an interval between the first and second periods . . . considering the lease then in effect and before the Court, it was clearly apparent that the lease was for a term less than fifteen years, and therefore irredeemable."[12] In this *Maryland Theatrical Corporation* case the redemption statutes were involved. The lease was for six years with rights of re-

[8] 2 UNDERHILL, LANDLORD AND TENANT, Sec. 803: "In the absence of an express provision that a new lease is intended to be executed, the presumption is that no new lease is intended, but that the lessee is to continue to hold under the original lease."

[9] 70 Md. 242, 16 A. 644 (1889).

[10] 146 Md. 254, 126 A. 74 (1924).

[11] 157 Md. 602, 146 A. 805 (1929).

[12] 157 Md. 602, 615, 146 A. 805, 810 (1929).

newal for additional terms of eight years and ten years. The Court allowed redemption. The language in this case seems especially to support the theory that the rule as to tacking should be different in cases involving redemption from the rule involving the avoidance of a lease. The cases of *King v. Kaiser*[13] and *Sweeny v. Hagerstown Trust Co.*[14] are distinguished because, ". . . in neither of these cases was the application of the redemption statute involved."[15] Also, the Court quotes a passage from the *Stewart* case as follows: "The Act of 1888 was the result of well-rounded belief that these long leases, with their covenants of renewal, were injurious to the prosperity of the City of Baltimore, and that sound public policy demanded that all leases hereafter made if for more than fifteen years might be ended at the option of the tenant or lessee, upon paying the capitalization of his ground rent at six per centum." In further reference to this the Court says, "The effect of the ruling of the Court in the case of *Stewart v. Gorter, supra,* is that the legislation in question shall be construed to carry out its policy. . . ."[16]

The language quoted above seems ample to support the contention that, as a matter of public policy, all leases for longer than fifteen years, including all renewal periods specified therein (except commercial leases)[17] shall give rise to a right of redemption, whether the renewal arises automatically or whether execution of a new lease is necessary and obligatory on the landlord at the option of the tenant. Further support for this contention is provided by the language of Article 21, Sec. 115, which provides that the provisions of the redemption statutes, ". . . do not apply to leases or sub-leases of property leased exclusively for business, commercial, manufacturing, mercantile or industrial purposes, as distinguished from residence purposes, where the term of such lease or sub-leases, *including all renewals provided for therein,*[18] shall not exceed ninety-nine years." No reason can be perceived why the legislature should intend to include all renewals in this statute and not in the other redemption statutes. The omission can best be explained by the fact that Sections 110 and 111 were passed long before Section 115 and it was never found necessary to amend, because the Court of Appeals uni-

[13] *Supra,* n. 7.
[14] *Ibid.*
[15] *Supra,* n. 12.
[16] 157 Md. 602, 611, 146 A. 805, 809 (1929).
[17] Md. Code (1939), Art. 21, Sec. 115.
[18] Italics supplied.

formly held in all cases construing this point as to the redemption statutes (with the exception of the *Silberstein* case which is distinguishable on the facts) that renewal periods were to be included in computing the term of the lease. It seems clear that public policy demands that long leases, or leases renewable for long periods, be made redeemable. It should not matter whether the lease is renewed automatically or whether a new lease must be executed, which the landlord is forced to execute by covenants of the previous lease. The property is as effectively tied up in one situation as in the other.

The cases of *King v. Kaiser*[19] and *Sweeny v. Hagerstown Trust Co.*[20] seem to be the only cases prior to the *Schultz* case which involve the question of tacking of renewal periods in order to render void a lease under Article 21, Section 1. Each of these cases involves a lease for five years renewable for an additional term and in each it is sought to have the lease declared void under this statute, and in each the Court refused to tack the renewal period to the original term so as to render the lease void. In the *King* case the Court refers to the *Stewart* case and says, ". . . a reading of that opinion cannot fail to disclose the fact that what has been attempted in that case was a deliberate evasion of the Acts of 1884, Chapter 485, and 1888, Chapter 395, intended to put an end to irredeemable leases. Thus that case is wholly inapplicable to a case like the present."[21] In the *Sweeny* case the Court quotes this language with approval. If the hypothesis is accepted that cases involving application of the redemption statutes are inapplicable to cases involving the avoidance of leases under Article 21, Section 1, it must be concluded that the Court of Appeals in the *Schultz* case should have based its decision on the authority of these two cases, both of which reach a different conclusion than the Court reached. All the cases cited in the *Schultz* case as authority for the position of the Court on the question of tacking involve the redemption statutes, except the *King* case and the *Sweeny* case, both of which hold that the renewal period in the leases concerned did not tack so as to cause the leases to be void.

Briefly stated, the rule of the *Schultz* case is that renewal periods in a lease tack if the renewal is automatic, not requiring the execution of a new lease. To the writer

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[19] *Supra*, n. 7.
[20] *Ibid.*
[21] 126 Md. 213, 221, 94 A. 780, 783 (1915).

there does not seem to be any imperative difference between a renewal which occurs automatically unless notice of termination is given by someone who has the option to terminate, and a renewal which is the result of an election to renew by someone who has the option. It seems to the writer that no distinction should be made between leases renewed unless terminated and leases terminated unless renewed. Both types of leases should be held to be either valid or void under the same conditions. It may be suggested that leases for a term less than seven years, with renewal periods which extend the total life of the lease to more than seven years and not executed and recorded with the proper formalities for a lease longer than seven years, might be held valid for the original term and those renewal periods which, when added to the original term, do not extend the life of the lease beyond seven years. Perhaps such a compromise would carry out the legislative intent of requiring certain formalities for the execution of leases over seven years, and yet would leave the parties to a contract as nearly as possible in the positions in which they voluntarily placed themselves.