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## A LANDLORD'S LIEN FOR RENT ON BANKRUPTCY OF HIS TENANT.

By statute in many states a landlord is given a lien on such of his tenant's chattels as are found on the premises, for the payment of past due rent. While these statutes are not usually drawn with the contingency of bankruptcy in view, this lien or *quasi-lien* has frequently been asserted in such proceedings. It is also common to retain liens for rent, past due, and to accrue, in the instrument or lease itself, and in some cases these liens have been set up.

A claim for past due rent is a provable claim, but it has been almost universally held that a claim for future rent is contingent, and therefore not provable. It is said that since non-provable debts are not discharged, that the lessor has his remedy against the tenant for future rents, but in the case of bankrupt corporations, as well as in other cases, this duty to pay is, more often than not, absolutely worthless, and, since the courts do not vary the rule when the claim is made by way of damages for breach of the contract of lease, it is evident that the only safety for the lessor lies in a properly worded lien clause. Whenever a forfeiture is made under the terms of the lease, it is clear that the liability for future rents ceases immediately, but it is generally held both here and in England<sup>1</sup> that bankruptcy cannot of itself, terminate a lease, though it may possibly constitute a breach of a covenant not to assign.<sup>2</sup>

### *Statutory Liens.*

The statutory liens are generally for past due rent only, and cover rent for a short period, usually one year. By the New Jersey<sup>3</sup> and Pennsylvania statutes, a lien is given which covers all chattels lying on the premises, but which is incomplete until distress by warrant, made on the part of the landlord. This type of lien has been referred to<sup>4</sup> by the Supreme Court as incomplete or inchoate, but even if not perfected by distress warrant, is good to give the claim for accrued rent a priority<sup>5</sup> under Section 648, subject only to

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<sup>1</sup>In *re Sherwoods*, (C. C. A.) 210 Fed. 754. In *re Ells*, (D. C.) 98 Fed. 967. Ex parte Houghton, 1 Low. 544. A Claim for Trustee's rent is entitled to priority without lien. In *re Hersey*, 171 Fed. 1001.

<sup>2</sup>In *re Ells*, *Supra*.

<sup>3</sup>Comp. St. N. J. 1910. p. 3066.

<sup>4</sup>In *re Henderson vs. Mayer*, 225 U. S. 631, 56L. Ed. 1233.

<sup>5</sup>In *re Braus*, 233 Fed. 835.

the payment of that proportion of the total expenses, which the value of the chattels bore to the value of the gross estate. In such case, however, the claim should be proved.<sup>6</sup> Where, however, this lien is perfected, the fund derived from the sale of the chattels, after paying the expenses of the sale, goes to satisfy the landlord's claim.<sup>7</sup> In cases where the fund is insufficient to do this, it would seem that the landlord may prove up his claim for the remainder as a common claim. It has been held that the Pennsylvania statute applies in cases where the bankrupt was a subtenant, and although he was admitted to the premises without the landlord's consent.<sup>8</sup>

It has been properly said that such statutory liens add little to the common law right of distress.<sup>9</sup> Distress for rent in arrear is one of the most ancient, as well as one of the most effective, of the landlord's remedies for the collection of rent. It was, and is, in most states, a right *sui generis*, arising the moment the relation of landlord and tenant is established. It is a right in the nature of a lien, rather than a lien, until the goods are actually distrained, but before distraint all goods on the demised premises are considered as being under a *quasi-pledge*, which gives superiority to the specific lien established by the distraint. It follows from this, that the statutory liens are not objectionable as liens obtained through legal proceedings under section 67 f. of the Bankruptcy Act.

The only lien given the landlord under the Missouri statutes<sup>10</sup> is on crops grown on the demised premises. Attachment for rent will lie, however, in certain specified cases, though its operation as to sub-leases is restricted.

#### *Contract Liens.*

While it is doubtful how far a person can make contracts contingent on his bankruptcy and intended to effect, in such event, the distribution of his estate,<sup>11</sup> there is little doubt that a lien reserved and properly recorded, where necessary to give notice, will relieve the lessor of the necessity of proving his claim in the bankruptcy proceedings of his tenant. It has been said<sup>12</sup> that a lease may be

<sup>6</sup>In re Hayward, 130 Fed. 720.

<sup>7</sup>In re Spies Alper Co., 231 Fed. 535.

<sup>8</sup>In re West Side Paper Co., 162 Fed. 111. Miss. Austin vs. O'Reilly, 2 Woods, 670.

<sup>9</sup>In re Henderson, *Supra*.

<sup>10</sup>R. S. Mo. 1909 Sec. 7888. Sec. 7896 relates to attachments, which will lie for rent, in five specified cases.

<sup>11</sup>In re Leslie, etc., 230 Fed. 465.

<sup>12</sup>In re Ells, *Supra*.

so worded as to require the lessee to pay damages for the entire breach, on re-entry for non-payment of past due rent,—damages which might be estimated as the difference between the rental value at that time and the rent stipulated in the contract,—but such a provision would doubtless be attacked, and a lien clause would present fewer difficulties.

*For Past Due Rents.*

Since a claim for past due rent is a provable claim, there can be little complaint against liens making such claims secure. It may possibly be urged as in a Missouri case,<sup>13</sup> that the lien should be recorded both as a chattel mortgage and in the land records, but the decision in the case referred to, that registration in the records for real estate is sufficient, seems reasonable.

*For Future Rents.*

The bankruptcy cases dealing with liens for future rents are few in number and not always as clear as it might be hoped. In an Alabama case,<sup>14</sup> the bankrupt was lessee of a coal mine, the lease reserving a lien on the property of the lessee on the premises for the payment of royalties. Immediately upon the filing of the petition against the bankrupt a receiver of the bankrupt was put in charge of the premises, and shortly thereafter the receiver notified the lessor that it would cease pumping and would abandon the premises. As might be expected, the lessor entered, and took possession. Apparently the lease was so drawn that this re-entry to preserve his property constituted a forfeiture. Nevertheless the court said: "The minimum royalty for the six months following bankruptcy is a non-provable claim against the general assets of the bankrupt estate, being contingent upon the continuance of the lease, and ceasing to be due in the event of strikes \* \* \* ." The lien created by the lease, however, secures all amounts due or to become due under the lease contract. It would therefore, operate as a security for future accruing royalties during the unexpired term of the lease, unless the term has been ended by the act of the lessor."

It has also been held<sup>15</sup> that where the lessee, within four months

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<sup>13</sup>Faxon vs. Ridge, 87 Mo. App. 306. See also Saunders vs. Ohlmausen, 127 Mo. App. 546. In re Gallacher, *Infra*, the lease was not required to be recorded because it did not transfer any title or possession. See cases cited therein. The decisions differ as to when liens should be considered as mortgages.

<sup>14</sup>In re Gallacher, 205 Fed. 183.

<sup>15</sup>In re Sherwoods, *Supra*.

of the filing of his petition in bankruptcy, had deposited with the lessor a sum of money; to be held as security for the faithful performance of the covenants of the lease, it being provided that in case the premises became vacant during the term, or in the event of a violation of any of the covenants, the sum deposited should be retained by the lessor as, and for, liquidated damages, and not as a penalty; the deposit was good and should be construed as one for indemnity. In such case the right of the lessee in the money deposited is, to receive back with interest, on the termination of the lease, so much of the deposit as is not needed to make good the defaults upon the covenants. On bankruptcy of the tenant, this right, of course, passes to the trustee.

The decisions in two other cases tend to strengthen and explain the principles set forth *supra*. In each of these cases there was a lien reserved in the lease, and in addition a statutory lien. In the first of these cases, *Martin vs. Orgain*,<sup>16</sup> decided by the Circuit Court of Appeals, Fifth District, the lien was expressly for "rent due or to become due," and the Texas Statute<sup>17</sup> was to the same effect, but in the second case, which follows *Martin vs. Orgain*, the statute simply provided that "the landlord shall have a lien on the goods, etc., for the rent, which shall be superior to all other liens, except those for taxes."<sup>18</sup> In the latter case<sup>19</sup> the court said:

"Whether the claim involved in this case, being a claim for rent accruing after the adjudication in bankruptcy, is or is not provable in bankruptcy, my opinion is that it is not provable against and allowable out of the general estate of the bankrupt being administered by the bankrupt court, but that it is provable against the particular property on which a lien is claimed under the contract of lease and the statute of the state. It is essential that the claim be proved in order to establish the lien on which the claim should be allowed, unless it be admitted or agreed to. The court finds no error in the judgment of the referee, and the same is affirmed."

#### *Taxes and Water Rates as Rents.*

It would appear that where the tenant agrees to pay taxes and water rates, and possibly, other similar items, and the covenant

<sup>16</sup>174 Fed. 772, 98 C. C. A. 246.

<sup>17</sup>Civ. Stat. 1897, Art. 3251.

<sup>18</sup>Code Ala. Sec. 4747.

<sup>19</sup>In re Scruggs, 205 Fed. 673. (D. C.)

to pay them is not a mere personal one, independent of the covenant to pay rent, that since their amounts are bound to become definite before the time of payment arrives,—the principles above discussed may apply<sup>20</sup> to such claims. The applicability of the principles must depend however, on the law of the various states, as to what constitutes rent.

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<sup>20</sup>In re Spies Alper, and In re Sherwoods, *Supra*.