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# Landlord and Tenant—Payment of Increased Taxes on Lessee's Improvements —Doctrine of Waste.—The Crew Corp. v. Feder.

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aggrieved employee, since the employee is unable to prosecute his own claim under the usual collective bargaining agreement.[5]

While no Alabama decisions have been found in direct conflict with that of the principal case, yet dictum in *Alabama Power Co. v. Haygood*,[6] not cited in the principal case, indicates that the Alabama courts would require exhaustion of the grievance procedure. It seems unfortunate that the federal court did not follow that decision. It is submitted that union security is promoted by requiring union members to process their grievances through the union, and that this security generally leads to better union-company relations. The danger of a union's arbitrarily refusing to process grievances is minimized by dispensing with the requirement when the union is hostile to the employee's claims.

CHARLES C. WINCHESTER, JR.

**Landlord and Tenant—Payment of Increased Taxes on Lessee's Improvements—Doctrine of Waste—*The Crew Corp. v. Feiler*.**[1]—The plaintiff leased premises for a term of fifteen years with an option to buy in the lessee. By the terms of the lease, the lessor agreed to pay municipal real estate taxes. There was no express provision authorizing the lessee to make alterations or improvements. Soon after the execution of the lease, the lessee made certain improvements to the building, changing its characteristics from an industrial to an office building, as a result of which the valuation of the property was increased, resulting in increased taxes in the amount of $2,700. The lessor brought suit against the lessee to recover the amount paid in increased taxes. The Trial Court granted summary judgment for the lessee. The Appellate Division of the Superior Court affirmed and on appeal the Supreme Court of New Jersey reversed and remanded. HELD: That while the parties are free to make whatever agreement they please, an unqualified covenant to pay real estate taxes means that the covenantor is required to make tax payments based on (1) the value of the leased premises as they existed at the time of the lease, and (2) such increases in value as reflect improvement made by the lessee under the authority of the lease or authority of law. Since as a matter of construction the improvements were not authorized by the lease, the question was whether they were authorized by law. In answering this question in the negative the court found that the lessee's acts constituted waste and, therefore, were not performed under authority of law.

In reaching its decision, the first problem with which the court was faced was to ascertain the intent of the parties through a construction of the covenant to pay taxes. In this respect where the lease is silent as to

[5] Alabama Power Co. v. Haygood, 266 Ala. 194, 95 So.2d 98 (1957); Jorgenson v. Pennsylvania R.R. Co., supra note 4; Pattenge v. Wagner Iron Works, 275 Wis. 495, 82 N.W.2d 172 (1957); United Protective Workers of America v. Ford Motor Co., 194 F.2d 997, 1002 (7th Cir., 1952).

[6] 266 Ala. 194, 95 So.2d 98 (1957).

[1] 28 N.J. 316, 146 A.2d 458 (1958).

the right of the lessee to make improvements, it is logical to conclude that it was not within the purview of a convenant to pay taxes, that the lessor-covenantor should pay increased taxes on the building's enhanced value which resulted from the lessee's alterations made in violation of the covenantor's rights. But, quaere, whether when improvements are made by the lessee which are not in violation of the lessor's rights, an unqualified covenant by the lessee to pay taxes should be read as a promise to pay increased taxes due to the increased value of the property resulting from improvements made by the lessee under the authority of law or to pay only such taxes as represent the value of the premises as of the time of the lease? It appears that the reading given to the covenant by the court is most reasonable and in keeping with the general rule of contract construction that the language of a covenant should be construed most strongly against the party who uses it.[2]

Once this construction has been given to the covenant to pay taxes, it then becomes necessary to apply the doctrine of waste in order to ascertain whether the improvements were made in violation of the lessor-covenantor's rights. Under the *Statute of Gloucester*[3] a person owning less than a freehold estate could not legally do any act which would result in a permanent injury to the freehold. An action of waste was maintainable under which the owner of the fee was entitled to terminate the lease and recover treble damages. In the United States most jurisdictions have enacted legislation modelled after this Statute.[4] However, neither the *Statute of Gloucester* nor its American counterparts define the acts which constitute waste.

In earlier decisions, the courts held that the freeholder was entitled to receive his property back in substantially the same condition as when leased and, therefore, any act which resulted in a material change in the nature or character of the premises constituted waste. It was immaterial whether the property was improved or its value enhanced.[5] Under modern law, however, there exists a tendency to modify the traditional concept, especially where the lessee makes a material change in the condition of the property but does not diminish its value. An example of this is found in New York where, by statute, a tenant may improve the property under designated conditions, without the consent of the owner.[6] However, some

[2] Indiana Natural Gas & Oil Co. v. Hinton, 159 Ind. 398, 64 N.E. 224 (1902).

[3] 1278, 6 Edw. 1, c. 8, § 3. The predecessor of the Statute of Gloucester was the Statute of Marlbridge, 1267, 52 Hen. 3, c. 23.

[4] See, N.J.S.A. Tit. 2A: 65-2 for the New Jersey statute. In about twenty-one states the statutes permit the recovery of multiple damages by the owner of the fee. In about eighteen states there are provisions for forfeiture of the estate. Many statutes omit elements of the *Statute of Gloucester* and others combine various elements so that one must look to the statutes of the particular jurisdiction in order to determine the state of the law. For example, Mass. G.L. (Ter. Ed.) c. 202, §§ 1 & 4 provide for the recovery of damages and forfeiture of the estate, but do not permit the recovery of multiple damages except if waste is committed by a joint tenant or tenant in common.

[5] Tiffany, Real Property § 636 (2d ed. 1939).

[6] N.Y. Real Property Law, § 537 provides that a tenant for a term of five years or more, may make those alterations that a reasonably prudent owner in fee simple would make provided he posts a bond and does not decrease the market value of the remainderman's interest.

courts have difficulty in formulating a clear concept of waste, and as a result, they leave the question to the fact finder to decide as a matter of fact whether the acts complained of constitute waste in the light of all the attendant circumstances.[7] The fact finder is required to take into consideration obsolescence, change in conditions, increase or decrease in market value, injury to freehold, prejudice to remainderman and any other circumstance which might have a bearing on the decision.

In *The Crew Corporation v. Feiler*, the court adopted the view that to constitute waste it is necessary that an act be done to the property which is prejudicial to the interest of the remainderman. This is in keeping with the liberalized view, yet it has an advantage over that approach which leaves the determination to the fact finder in that it furnishes a definite standard to apply to the facts.[8] In employing this test in the *Feiler* case, the court found that the alterations which resulted in an increased tax burden on the lessor, considered together with the option to buy in the lessee prejudiced the lessor's interest in the premises because, if the lessor wanted to sell his interest, its present value would be depressed by the lessening of his rental income as a result of the increased taxes.

RICHARD H. JENSEN

**Restraint of Trade—Robinson-Patman Act—Indirect Price Discrimination.**—***Ludwig v. American Greetings Corporation.***[1]—An anti-trust action to recover treble damages was brought under § 4 of the Clayton Act[2] by a competitor against a greeting card manufacturer and distributor for an alleged violation of § 2 of the Clayton Act as amended by the Robinson-Patman Act.[3] The District Court (N. D. Ohio E. D.) sustained defendant's motion for judgment, and the plaintiff appealed. The Court of Appeals for the Sixth Circuit, Miller, J., reversed, holding the allegations of plaintiff's complaint sufficient in that the action of the defendant in placing former retail customers of the plaintiff on a consignment basis in order to induce such customers to transfer their business to defendant constituted a prima facie case of indirect price discrimination.[4]

The problem which seemed to cause the greatest difficulty in the District Court was whether the plaintiff, as a competitor, had standing to sue under the treble damages provision of the Clayton Act as amended by the Robinson-Patman Act. The judge decided that the remedies were available only to consumers, and not to competitors. This position was rejected

[7] See, Melms v. Pabst Co., 100 Wis. 7, 79 N.W. 738, 46 L.R.A. 478 (1899).

[8] This view has found favor in other jurisdictions also. For example, see Pynchon v. Stearns, 52 Mass. (11 Metc.) 304 (1846).

[1] 264 F.2d 286 (6th Cir. 1959).

[2] 15 U.S.C. § 15.

[3] 15 U.S.C. § 13.

[4] It should be noted that this case does not hold that selling on consignment to a competitor's customers is indirect price discrimination; it merely holds that it is a prima facie case of such discrimination.