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Landlord and Tenant -- Set-Offs Against Lease Deposits

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defendant would not be allowed to set up his personal property exemption since it applies only within the state.[9] Where a resident debtor has brought action against his debtor and reduced his claim to a judgment in this state, a non-resident creditor cannot reach the amount due on such judgment by attachment and garnishment in another state.[10] While this will protect the exemption of the debtor in this state, the reason for such ruling is to preserve the control of the court over the judgment rendered, since this would be interfered with by the garnishment of the judgment debtor.

From this discussion the following conclusions may be drawn: (1) The resident debtor's personal property exemption is afforded complete protection from execution (a) where the creditor is a resident of this state, and (b) where the creditor, although a non-resident, brings action within this state; (2) the debtor cannot protect his exemption where the creditor, a non-resident, brings his action in a state foreign to the debtor.

J. CARLYLE RUTLEDGE.

Landlord and Tenant—Set-Offs Against Lease Deposits.

A deposited $3,000 with *B* as a binder to insure *A's* taking possession of a store under a build and lease contract.[1] *A* later became indebted to *B* on a collateral agreement for construction extras. *A* then assigned the deposit to *C* and later went bankrupt. *Held, B* is entitled to a set-off for the extras against *C*.[2] As the assignee can take no more than the assignor had,[3] the real question at issue is what were *B's* rights against *A*, the assignor.

Such deposits are generally held not to create a debtor-creditor relationship. Two cases especially may be pointed out. In one, the

[9] Harris v. Balk, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. ed. 1023 (1904); Sexton v. Phoenix Insurance Co., 132 N. C. 1, 43 S. E. 479 (1903); Balk v. Harris, 132 N. C. 10, 43 S. E. 477 (1903); Watson v. Seaboard R. Co., 198 N. C. 471, 152 S. E. 408 (1930); Penn. R. Co. v. Rogers, *supra* note 7.

[10] Manufacturing Co. v. Freeman, 175 N. C. 212, 95 S. E. 367 (1918); Wabash R. Co. v. Tourville, 179 U. S. 322, 21 Sup. Ct. 113, 45 L. ed. 210 (1900); Shinn v. Zimmerman, 3 Zabriskie (N. J.) 150 (1851); McIntosh, *op. cit. supra* note 6 §819.

[1] Receipt for the deposit read: "Received of *A*, check for Three Thousand Dollars ($3,000.00) to be held by us as a binder to guarantee your carrying out lease made between yourselves and *B*, said lease being on store located at . . . , same to be returned when satisfactory bond is furnished or when you begin occupying store. Signed, *B*."

[2] Commercial National Bank v. Cutter Realty Co., 205 N. C. 99, 170 S. E. 139 (1933).

[3] Bank v. Bynum, 84 N. C. 24 (1881); N. C. CODE ANN. (Michie, 1931) §446.

deposit was expressly held to be a pledge.[4] In another, the lessee was allowed damages for conversion of the sum by the lessor.[5] Accordingly, it is the usual view that these deposits are subject to set-offs and counterclaims only in connection with the express purposes for which the deposits were made.[6] For instance, in a New York case,[7] a deposit was made to secure payment of rent and taxes. Lessee, evicted for non-payment of rent, was held entitled to the deposit minus only the rent due and not the depreciation in rental value or costs of the dispossess action. The reasoning advanced in these cases is that the deposit is still the property of the lessee and the lessor has merely a right to hold it until the conditions for which it was given are fulfilled or made impossible of fulfillment. In every case, the deposit receipt or the deposit clause in the lease or contract determined the extent of these conditions.

In view of these decisions, it seems that the holding of the principal case was erroneous. *B's* interest in the $3,000 consisted of a right to retain it if *A* did not go into possession. But *A* went into possession, thereby cutting off this claim. To allow *B* to set-off an unsecured claim for extra construction costs is not only to go outside of the express conditions limiting *B's* interest in the deposit, but to allow an unjustified preference to a creditor of a bankrupt as well.

PETER HAIRSTON, JR.

Real Property—Registration—Mortgage of Wife Without Privy Examination.

A man and his wife borrowed money to purchase realty, giving a note secured by a deed of trust on the property purchased. No acknowledgment or privy examination of the wife was actually had, though the notary's certificate stated the contrary and the registration was apparently regular. Subsequently a valid deed of trust was executed and recorded. In an action by the wife to restrain a fore-

[4] Kaufman v. Williams, 92 N. J. L. 182, 104 Atl. 202 (1918).

[5] Atlas v. Moritz, 217 App. Div. 38, 216 N. Y. S. 490 (1926). But note that in Goodman v. Scharched, 144 Misc. Rep. 905, 260 N. Y. S. 883 (1932), the holding was limited to cases where the deposit was expressly given as security.

[6] Set-off allowed: Burke v. Norton, 42 Cal. App. 705, 184 Pac. 45 (1919); Lieberman v. Lavene, 253 Mass. 579, 149 N. E. 625 (1925); Sockloff v. Burnstein, 177 App. Div. 471, 164 N. Y. S. 262 (1917). Set-off denied: Rez v. Summers, 34 Cal. App. 527, 168 Pac. 156 (1917); Shanklin v. Kamin, 197 Ill. App. 630 (1916); see Knight v. Marks, 183 Cal. 354, 191 Pac. 531, 532 (1920).

[7] Crausman v. Graham Const. Co., 95 Misc. Rep. 608, 159 N. Y. S. 709 (1916).