

GAME AND FISH DEPARTMENT:

Right to forfeit lease on or
recover possession of Big
Spring Park, lease to Don B.
Bales dated April 18, 1933.

3-26

March 22, 1934



Honorable J. B. Funkhouser
Chief Clerk Game and Fish Department
Jefferson City, Missouri

Dear Mr. Funkhouser:

This Department acknowledges receipt of
your letter dated March 16, 1934 as follows:

"I am writing you relative to a
contract at Big Spring State Park
with Don B. Bales, who has the con-
cession there.

There is a CCC camp in the park and
we wish to tear down the present
concession building and the two
cabins that Mr. Bales is now using
and build new ones. His contract
says that he has the right to renew
same for another year, but we do
not want to renew same. Would his
failure to pay his installment on
the date specified be a good cause
for cancellation? You can see by
the contract that these payments
should have been made on the first
of the month from May 1st to
October 1st and on the back of this
contract you will notice that he did
not pay anything from August 4th
until January 30th, 1934. We also
had to allow him \$100.00 for damage
he claimed the water did.

Kindly look this contract over and
write us a letter on it so we will
have a record for our files."

March 22, 1934

Attached to your letter is contract referred to, also notice signed by Don B. Bales to the Missouri Game and Fish Commission dated February 27, 1934, purporting to give notice of the writer's desire to continue the operation of the inclosed lease according to the terms thereof.

The yearly rental provided for in the lease is \$500.00 to be paid as follows:

"Fifty dollars (\$50.00) on May 1, 1933.
Fifty dollars (\$50.00) on June 1, 1933.
One hundred dollars (\$100.00) on July 1, 1933.
One hundred dollars (\$100.00) on August 1, 1933.
One hundred dollars (\$100.00) on September 1, 1933.
One hundred dollars (\$100.00) on October 1, 1933."

The payments on the rental as the same appear on the back of the lease are as follows:

"May 3	\$50.00
June 30	150.00
August 4	100.00
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	\$300.00
Jan.30	100.00
	<hr/>
	400.00
	\$100.00 deducted for damages by water as per contract."

The last paragraph on the second page of the contract in part reads:

"It is further agreed that in the event that the second party fails * * * to comply with any of the terms or conditions of this permit, * * * the Game and Fish Commissioner may revoke this permit, and all rights and privileges thereunder* * *. Provided, however, no such revocation shall be had except upon the specific approval of the Governor of Missouri, after arbitration as above provided for, is had."

The second paragraph on the third page of the contract provides:

"It is understood and agreed that upon the expiration of this contract, the party of the second part may renew the same upon the same terms and conditions as herein contained, for a further period of one year, by giving written notice at least 30 days prior to the expiration of the present term to the State Game and Fish Commissioner of his intention and desire to so renew the same, and upon the receipt of such notice, the Game and Fish Commissioner will thereupon renew said lease as hereinabove set forth, provided that the rental for the second year shall not exceed the amount herein specified."

The letter of Don B. Bales to the Missouri Game and Fish Commission, dated February 27, 1934, above referred to, reads:

"Under the terms of our contract I hereby give notice that I desire to continue the operation of the Big Spring Merchandising, Cabin and Boating concession for a period of a year, beginning 'on the 1st day of May, 1934, and ending on the 30th day of April 1935,' under the same terms and conditions as set out in said contract entered into on the 18th day of April, 1933."

The right to revoke the permit, as that right is contained within the contract itself is known as a forfeiture under the common law. With reference to forfeitures of contracts at common law the St. Louis Court of Appeals in *Carbonetti v. Elms* 261 S. W. 748, 750, said: (citing a great number of cases)

"It is the well-established rule of the common law that to authorize a forfeiture of a leasehold estate for nonpayment of rent demand must be

made for the payment of the rent precisely on the day when the rent becomes due, and for the precise amount due, and the adjudicated cases show that the common-law rule is in all respects fully recognized by the American courts with much unanimity."

In view of the conclusion we have reached in this matter, the foregoing quotation is not material to the question now at hand but we present the same to you for your future guidance should you at any time be entitled to revoke the contract.

In *Carbonetti v. Elms*, supra, at page 750 the court further said:

"It is also held that, where under a covenant in the lease the lessor has the right of forfeiture for nonpayment of rent, he may elect to avoid or not avoid the lease, and may do so by word or deed, and, if he does any act inconsistent with avoiding it, such as distraining for rent, or demanding rent subsequently due, he waives the forfeiture. *Camp v. Scott*, 47 Conn. 366; *Sauer v. Meyer*, 87 Cal. 34, 25 Pac. 153."

It appears from the notations on the back of the contract that \$400.00 in cash has been paid on the above rental, and while not paid on the due dates, the payments were nevertheless accepted and credited as payments on the rental.

The eighth paragraph on the first page of the contract reads as follows:

"It is understood and agreed that should the party of the second part be partially prevented from operating the concessions herein leased, because of an extensive and continued high water stage of the river, or because of destruction of cabins or concession buildings, that upon application to the Governor of Missouri, the consideration of this contract shall be proportionately reduced in proportion to the time or the amount of such inability on the part of the party of the second part to carry on his concessions."

March 22, 1934

It appears from the notation on the back of the contract \$100.00 was credited on the rental as for damages from water. The last quoted provision of the contract justified such credit on the contract, if proper facts were present, which we assume they were. Anyway the credit was given on the rental which amount completed satisfaction of the rental for the entire year covered by the contract. Under the decision last quoted from you waived any right to forfeit the contract by acceptance of the rent at times later than the due dates thereof, and the payment of the rental was completed by the credit on account of damage by water.

We are of the opinion you are not in a position to revoke the contract and that the notice given by Don B. Sales dated February 27, 1934, is sufficient to extend the operation of the lease for one year beyond the 30th day of April, 1934, according to the terms thereof.

We are returning you your inclosures herewith.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

Inclosures