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Can There Be A Sub-Lease for the Entire Term in Pennsylvania?

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continuing the lien of its debt. Having failed to avail itself of the statutory provision, the respondent has no authority to apply the rents from the real estate of the decedent to the payment of the alleged claim."

Some interesting questions may arise on this matter of application of rents accruing subsequent to the death of the lessor. For example, in the case last stated let it be assumed that within the year the claimant would proceed under the provisions of Section 15(a) of the Fiduciaries Act, supra, by bringing his action and thus continuing the lien beyond the year but no application would be made within the year. If in such a case the administrator was collecting the rents for the heirs at what point of time would the rents as collected become available or would the time of filing the application mark the line of cleavage between rents not available and rents available? Another situation would be where the land at the time of decedent's death was subject to the lien of a judgment, the rents are collected by the administrator as agent for the heirs during the year following the death of the owner and later the real estate is sold by order of the Orphans' Court for the payment of debts. Are the rents as collected subject to an accounting on the part of the administrator and if so who can participate in such distribution, all upon the assumption that no application has ever been made for the segregation of the rents although the estate is insolvent?

It has been held that before fiduciary can collect rents for purposes of paying debts of estate, he must obtain leave of Orphans' Court, and where rents were collected without leave of court, on presentation of proper petition, court will ratify collections. *Fullerton's Estate 13 Erie 50 (1931).*

In another recent case it was determined the Orphans' Court has no jurisdiction to determine ownership of rents which it is alleged, belonged to decedent under terms of oral agreement, where rights of living persons who do not claim title through estate are involved, nor may surcharge be imposed upon trustee in respect of such item. *Gandolfo's Estate, 17 D. & C. 701 (1932).*

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CAN THERE BE A SUB-LEASE FOR THE ENTIRE TERM IN PENNSYLVANIA?

It is settled beyond all doubt that the assignee of a leasehold is liable to the lessor for the rent reserved in the original lease.[1] It is equally well settled that this liability continues only so long as he continues as assignee, and

[1]Washington Natural Gas Co. v. Johnson, 123 Pa. 576, (1888); Ottman v. Nixon-Nirdlinger, 301 Pa. 234, (1930).

that it ceases on his assigning to another.[2] On the other hand, a sub-lessee is not liable to the original lessor for the rent,[3] and if an assignee of a lessee sub-lets, the assignee remains liable, and the sub-lessee does not become liable.[4]

To apply these rules it becomes necessary to differentiate between an assignment and a sub-lease. It is generally considered that a transfer by a lessee of an estate less than his own is a sub-lease,[5] while a transfer of his entire interest in the premises, leaving no reversion in him, is an assignment.[6] Suppose, however, a lessee transfers his interest for the entire remaining time of his lease, but reserves an additional rent and other covenants, and a right of re-entry for a breach of any of these. Does such transfer operate as an assignment or a sub-lease? The present inquiry is aimed at a solution of this question only in so far as it operates as a transfer of the liability of the rent reserved in the original lease.

This question, as to whether there can be a sub-lease of the entire term of a lessee's interest, has long perplexed the courts in the United States.[7] After considerable fluctuation[8] the Court of Appeals of New York State finally decided in *Stewart v. Long Island*[9] that a transfer for the remainder of the time constitutes an assignment and not a sub-lease. Shortly after the disposition of that case the Supreme Court of Illinois announced a similar rule in *Sexton v. Chicago Storage Co.*[10] Even before these cases, however, the Supreme Judicial Court of Massachusetts, in *Dunlap v. Bullard*,[11] decided that the fact that the entire remaining time had been transferred was not entirely controlling. They held that if the lessee retained a right of re-entry, he had a reversionary interest, and his transferee was a sub-lessee, and not an assignee. Both these contentions have been upheld in other states, with the

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[2]Borland's Appeal, 66 Pa. 472; Drake v. Lacoe, 157 Pa. 17, (1893).

[3]James v. Kurtz, 23 Pa. Super. Ct. 304, (1903); Ottman v. Nixon-Nirdlinger, 301 Pa. 234, (1930).

[4]2 Thompson on Real Property, Sec. 1389 (1924); 1 Tiffany on Real Property, p. 174, (1920).

[5]1 Tiffany on Real Property, p. 171 (1920). "The test is whether the grant leaves a reversionary interest in the original lessee or operates to transfer his entire term.", 2 Thompson on Real Property, Sec. 1372, (1924).

[6]1Tiffany on Real Property, p. 171, (1920).

[7]See Ferrier, "Can there be a Sub-Lease for the Entire Unexpired Portion of a Term?", 18 Cal. L. Rev. 1, (1929).

[8]Pigott v. Mason, 1 Paige (N. Y.) 412, (1829); Post v. Kearney, 2 N. Y. 394, (1849); Collins v. Hasbrouck, 56 N. Y. 157, (1874); Ganson v. Tifft, 71 N. Y. 48, (1877).

[9]102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844, (1886), followed notably by Gillette Bros. v. Aristocrat Restaurant, 239 N. Y. 87, 145 N. E. 748, (1924).

[10]129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274, (1899).

[11]131 Mass. 161, (1881), followed in Essex Lunch, Inc. v. Boston Lunch Co., 229 Mass. 557, 118 N. E. 899, (1918).

numerical weight favoring the New York and Illinois rule.[12]

In recent years the distressing business conditions have brought insolvency and financial troubles in unexpected places. Lessors have in many cases found the expected source of their rents failing. They have cast about to find on whom, among the transferees of the leasehold, liability might be imposed. This has brought a reexamination of the question involved. The result of this reconsideration has been disappointing. It has added nothing toward bringing a more uniform rule, and leaves both camps with new adherents.[13] It has failed to change the mode of approach to the problem. The old and technical concepts, surviving from the day when a 'reversion' was an incident of feudal service, are still being used.[14]

While this point has been definitely settled one way or the other in many states, the attitude on it in Pennsylvania remains in doubt. Before the decisions of the New York, Illinois, and Massachusetts courts, mentioned above, Judge King in the Common Pleas Court of Philadelphia County, in the case of *Lloyd v. Cozens*,[15] held, adopting the language of Lord Bacon; "when the whole term is made over by the lessee, although in the deed in which that is done, the rent and a power of entry for non-payment is reserved . . . . there is an assignment and not an underlease." That case has been cited con-

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[12]*New York Rule*: Craig v. Summers, 49 Minn. 189, 49 N. W. 742, 15 L. R. A. 236, (1891); St. Jo. & St. L. R. R. v. St. I. M. & So. Ry., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607, (1896); Weander v. Claussen Brewing Co., 42 Wash. 226, 84 Pac. 734, 114 Am. St. Rep. 110, 7 Ann. Cas. 536, (1906); Thompson v. Potts, 135 Ga. 451, 69 S. E. 734, (1910); Davidson v. Minn. Loan & Trust Co., 158 Minn. 411, 197 N. W. 833, 32 A. L. R. 1418, (1924).

Massachusetts Rule: Davis v. Vidal, 105 Tex. 444, 151 S. W. 290, 42 L. R. A. (N. S.) 1084, (1912); Collamer v. Kelly, 12 Ia. 319, (1861); Barkhaus v. Producer's Fruit Co., 192 Cal. 200, 219 Pac. 435, (1923).

For further collections of cases see Ferrier, Supra note 7; 26 Harv. Law Rev. 459, Indian Refining Co. v. Roberts, (Ind. App., 1932), 181 N. E. 283; and notes in 7 Ann. Cas. 536, 14 L. R. A. 151, 52 L. R. A. (N. S.) 968, and especially 42 L. R. A. (N. S.) 1087.

[13]*New York Rule*: Hobbs v. Cawley, 35 N. M. 413, 299 Pac. 1073, (1931); Indian Refining Co. v. Roberts, (Ind. App. 1932), 181 N. E. 283; Barnes v. Standard Oil Co., 167 Wash. 607, 9 Pac. (2nd) 1095, (1932); Waller v. Collector of Internal Rev., 40 Fed. (2nd) 892, (U. S. Dist. of La., 1930).

Massachusetts Rule: Wilson v. Cornbrooks, 5 N. J. Misc. 614, 137 Atl. 819, (1927); Saling v. Flesch, 85 Mont. 106, 277 Pac. 612, (1929); Backus v. Duffy, 103 Cal. App. 775, 284 Pac. 954, (1930); City of Waterville v. Kelker, 127 Me. 32, 141 Atl. 70, (1928).

[14]"Of course that useful result (of imposing the service of fealty due from a tenant by virtue of his tenure) has gone out of the doctrine, and it remains with us simply as a rule of logic, much less deserving the power to override and pervert the discovered intention of the parties," Finch, J., dissenting in Stewart v. Long Island R. R., 102 N. Y. 601, 617-618. Typical of this technical approach is the exhaustive opinion in Indian Refining Co. v. Roberts, (Ind. App. 1932), 181 N. E. 283.

[15]2 Ashm. (Pa.) 131, 137, (1830). In accord with this is a later dictum in Adams v. Beach, 1 Philadelphia, 99, (1850).

sistently as placing Pennsylvania in line with the majority rule.[16] Although the facts of that case were peculiar, the purpose of proving an assignment was to bring the transferee in privity with the lessor, and hence answerable on the covenants of the original lease.

Since the time of that case there have been a series of cases where an asignee of a leasehold has been sued on original covenants, and where the defense was that the lease had been reassigned, and hence the defendant was not liable. In the first of these cases, *Negley v. Morgan*,[17] the assignee had remained in possession after transferring his interest, and it was held that he was liable for the rent, despite the fact that he had made a technical assignment of the remainder of his term. This case was followed by *Drake v. Lacoe*,[18] where it was stated:

> "But an assignment for an increased consideration, with wholly new stipulations, with right of re-entry for condition broken, with an express assumption of continuing liability of the assignors to the owners under the original lease, and a manifest intention to sub-let, is not only evidence of an intention not to end privity, but is a positive reaffirmance of it."

Despite the broadness of the language in these two cases they both have facts (the staying in possession, and the express assumption of continuing liability) which weaken them as authority for the proposition that Pennsylvania has adopted a rule different from that established by *Lloyd v. Cozens*.[19] In neither case, however, did the Supreme Court state that these facts were controlling to limit their language.[20] Any thought that these cases might be so limited seems to be negatived by the Superior Court's adoption of them in *McClaren v. Citizen's Gas & Oil Co.*[21] There the assignee of a lease, transfered it to another, reserving an additional rent, and a right of re-entry to enforce it, and it was stated:[22]

> "When an assignee of a leasehold executes a lease, reserving a larger rent or containing covenants more advantageous to the lessor than those

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[16]1 Washburn on Real Property (6th), Sec. 694, (1902); 1 Tiffany on Real Property (2nd), Sec. 55, (1920); Stewart v. Long Island R. R., Supra note 9, (8 N. E.) at p. 202, 204; Sexton v. Chicago Co., Supra note 10, (21 N. E.) at p. 921.

[17]46 Pa. 281, (1863).

[18]157 Pa. 17, 38, (1893).

[19]2 Ashm. (Pa.) 131, (1830).

[20]Ferrier, Supra note 7, states that Drake v. Lacoe was based on the "express assumption of continuing liability of the assignee." Doubtless the court could have made that the basis of the decision had they desired, but they chose to consider that as only one of the elements of intention. In the light of the McClaren case (Infra note 21), Ferrier's criticism seems hard to justify.

[21]14 Pa. Super. Ct. 167 (1900).

[22]14 Pa. Super. Ct., at p. 174.

found in the original leasehold, he reserves to himself a benefit derived original lease, but creates a new estate, to which he assumes the char- under the original lease and his privity of estate is thus continued. He does not convey the estate which he had accepted as assignee of the acter of landlord. The second agreement did not end the defendant's privity of estate."

This is one of the few cases where courts have looked through feudal technicalities and have placed liability on those deriving benefits from leasehold estates. Although the *Drake* and *McClaren* cases have been cited as showing that Pennsylvania has adopted the Massachusetts rule,[23] it is doubtful whether they go so far as to establish the rule that a right of re-entry alone is fatal to an assignment.

The latest expression on this point is contained in the case of *Ottman v. Nixon-Nirdlinger*,[24] decided by the Supreme Court in 1930. There the lessor sued the undisclosed principal of the lessee's transferee for the rent reserved in the original lease. In the opinion it is stated[25] that the transfer was described as an assignment, and treated as such by the parties, but regardless of that statement the defendants did rely on the defense that it was a sub-lease, and hence the transferee was not in privity of estate with the lessor. The defendants claimed that since an additional rent had been reserved and a right of re-entry was given to enforce it, the transfer operated as a sub-lease, and they cited the cases of *Drake v. Lacoe*, and *McClaren v. Citizen's Oil Co.*[26] The court cited these cases for the proposition that if it was a sub-lease, the action could not be maintained,[27] but in determining whether it was a sub-lease or an assignment, they passed over those cases, cited *Lloyd v. Cozens, Stewart v. Long Island, Gillette Bros. v. Aristocrat Restaurant*, and *Sexton Co. v. Chicago*,[28] and held the transferee liable for the rent despite the lessee's reservation of an additional rent with a right of re-entry to enforce it. The action of the court in citing the *Drake* and *McClaren* cases for one proposition, and *in the same paragraph*, making an apparently contrary holding is at

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[23]1 Tiffany on Real Property, (1st), p. 115, (1912); 1 Tiffany on Real Property (2nd), sec. 55, (1920), where the author disapproves of these cases, but recognizes their departure from orthodox views; 2 Thompson on Real Property, Sec. 1372, (1924); 42 L. R. A. (N. S.) 1084, 1091.

[24]301 Pa. 234, (1930).

[25](301 Pa.) at p. 242, "We need not decide in the present case whether the transactions between the parties were assignments, but the papers so designated them, and the pleadings so aver." Regardless of this statement, they did consider the nature of the transaction, and decided that it constituted an assignment.

[26]Supra notes 18 and 21.

[27]301 Pa. at p. 242.

[28]Supra notes 15, 9, and 10.

least creative of doubt as to their position on the question. There are three possible conclusions to be drawn from their action:

FIRST: That Pennsylvania has adopted out and out the New York-Illinois rule that a transfer for the remainder of the time constitutes an assignment. This is extremely unlikely for it would amount to a repudiation of the prior cases discussed.[29] and it seems impossible that the court would cite cases, and then immediately impliedly overrule them without even mentioning them.

SECOND: That there is a different rule applied depending upon whether the transfer is sought to be considered as an assignment or a re-assignment. Nowhere has there been found authority for the contention that the elements of these two assignments differ; that one can incur liability on taking a certain amount of interest, but cannot relieve himself of that liability without parting with a greater interest. It is submitted that there is no reason why such a distinction should not be made. Although this distinction is not made in language, it is the most striking distinction in the factual set-ups of the cases involved.[30]

THIRD: That the doctrine of privity of estate, on which the enforcement of such covenants depends, is being disassociated from legal title and made to follow beneficial interest. It is very possible that the courts are looking behind the technical concepts and looking at the actual position of the parties (a procedure, incidentally, contested for by Justice Finch in his dissent in the *Stewart v. Long Island* case[31]). The thought behind all of these cases seems to be that the one who enjoys the benefits of a leasehold, shall be under a duty to perform the covenants running with the estate. In the *Negley, Drake,* and *McClaren* cases the assignee kept no reversion, but he did keep a benefit, and liability was imposed on him by refusing to give the transfer the effect of an assignment. In *Ottman v. Nixon-Nirdlinger* the court gave such a transfer the effect of an assignment in order to impose liability on those who "received the beneficial enjoyment of the property."[32] It is submitted that this is the true explanation of the *Ottman v. Nixon-Nirdlinger* decision, and that thenceforth Pennsylvania cannot be considered as accepting in their entirety either of the prevailing views as to whether there can be a sub-lease of an entire term.

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[29]Negley v. Morgan, Drake v. Lacoe, and McClaren v. Citizen's Oil Co., Supra notes 17, 18, and 21.

[30]Negley v. Morgan, Drake v. Lacoe, and McClaren v. Citizen's Oil Co., Supra notes 17, 18, and 21 were actions by the lessor against an assignee who had transferred, while Lloyd v. Cozens and Ottman v. Nixon-Nirdlinger, supra notes 15 and 24, were actions against a transferee who alleged that he was but a sub-lessee.

[31]102 N. Y. 601, 617-631, 8 N. E. 200, 55 Am. Rep. 844, (1866).

[32]301 Pa. at p. 242.