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LANDLORD AND TENANT - NECESSITY FOR CONSIDERATION FOR LEASE

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LANDLORD AND TENANT — NECESSITY FOR CONSIDERATION FOR LEASE — In an action to cancel a five-year lease, it appeared that the lessee had agreed to pay as rent an amount equal to one cent a gallon on each gallon of gasoline delivered, by it, on the leased premises. *Held*, that the lease was valid, as it created a bilateral contract supported by consideration on both sides, since according to the court's construction of the lease the lessee had impliedly promised to use the premises as an automobile filling and service station for the stipulated period and so would necessarily be required to deliver gasoline there. *Jackson v. Pepper Gasoline Co.*, 280 Ky. 226, 133 S. W. (2d) 91 (1939).

Inherent in this decision is the assumption that a lease must be supported by consideration, at least where the demise is not made by an instrument under seal. In the latter case the question of consideration for the grant becomes immaterial, where the common-law rule prevails, as the courts will not inquire into the lack of consideration in a sealed instrument.[1] However, where statutes exist [2] abolishing the sanctity of the sealed instrument, or where the lease is made by an instrument not under seal, the question may become acute. An examination of the case law reveals that few cases directly raise the point whether or not there must be consideration in order to have a valid lease. The explanation probably is that in almost all cases the consideration is obvious. In the case of the lessee's promises, if any, consideration for them can always be found in the conveyance of the land to him. Consideration for the conveyance can usually be found in the promise of the lessee to pay rent, or any other promise involving the possibility of detriment to himself or benefit to the lessor.[3] However, occasionally, as in the principal case, the promise or promises of the lessee may be in terms illusory [4] and so insufficient consideration if literally interpreted. In the instant case this result was avoided, since the court read into the instrument the additional promise of the lessee that he would occupy the premises for the stipulated period and maintain a gasoline filling station thereon.[5] Also where the lessor executes a lease upon premises which are already being occupied under a valid lease, upon the same conditions except at a higher rental, there may be lack of consideration for the lessee's promise.[6] Where the question has been dealt with, the modern

[1] 1 WILLISTON, CONTRACTS, rev. ed., § 109 (1936); JONES, LANDLORD AND TENANT, § 65 (1906); Thomason v. Bescher, 176 N. C. 622, 97 S. E. 654 (1918).

[2] See Ohio Gen. Code (Page, 1937), § 32; Ky. Stat. (Carroll, 1930), § 471; Minn. Stat. (Mason, 1927), § 6933; 1 WILLISTON, CONTRACTS, rev. ed., § 208 (1936).

[3] A lease is usually made in consideration of rent; however, a reservation of rent is not essential to the character of a lease. WOODFALL, LANDLORD AND TENANT, 24th ed., 191 (1939) (c. 5, § 1).

[4] An illusory promise is insufficient consideration to support a binding contract. 1 WILLISTON, CONTRACTS, rev. ed., § 104 (1936).

[5] The construction of the lease adopted in the principal case is similar to that given to the promise to "buy requirements" by a few courts, which have held that in such a contract the buyer impliedly promises to continue his business for the period of the contract. Hickey v. O'Brien, 123 Mich. 611, 82 N. W. 241 (1900); Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142 (1891); Loudenback Fertilizer Co. v. Tennessee Phosphate Co., (C. C. A. 6th, 1903) 121 F. 298.

[6] Hennessy Realty Co. v. Bernstein, 110 Misc. 331, 180 N. Y. S. 540 (1920).

decisions [7] and text writers [8] appear to hold that consideration is necessary for a valid lease. This means that courts are looking at a lease as essentially a contract, and demanding that, as such, it comply with the requisites of a contract. Since a lease transaction usually has two aspects, it would seem preferable to recognize this fact and to hold that in so far as it is a conveyance it needs no consideration, for it is clear that consideration is not normally held to be an essential to the legal effectiveness of a conveyance.[9] Of course, any promises made in connection with the conveyance and not put under seal would have to be supported by consideration, since consideration is a requisite to a binding informal contract.

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[7] Crim v. Nelms, 78 Ala. 604 (1885); Hinsdale v. McCune, 135 Iowa 682, 113 N. W. 478 (1907); Israelson v. Wollenberg, 63 Misc. 293, 116 N. Y. S. 626 (1909); Hennessy Realty Co. v. Bernstein, 110 Misc. 331, 180 N. Y. S. 540 (1920); Union Gas & Oil Co. v. Wiedeman Oil Co., 211 Ky. 361, 277 S. W. 323 (1925).

[8] 35 C. J. 1144 (1924); 16 R. C. L. 566 (1917); 1 UNDERHILL, LANDLORD AND TENANT, § 173 (1909); 1 TAYLOR, LANDLORD AND TENANT, 9th ed., § 152 (1904).

[9] Vale v. Stephens, 25 Ohio App. 523, 159 N. E. 114 (1927); Parkinson v. Guilloz, 250 Mich. 637, 231 N. W. 89 (1930); Lavely v. Nonemaker, 212 Cal. 380, 298 P. 976 (1931).