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LANDLORD AND TENANT-LESSEE'S COVENANT TO PAY TAXES-LIABILITY OF ASSIGNEE WHO HAS REASSIGNED

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LANDLORD AND TENANT—LESSEE'S COVENANT TO PAY TAXES—LIABILITY OF ASSIGNEE WHO HAS REASSIGNED—A 100-year lease contained the following covenant, ". . . lessee further agrees that he will, as additional rent, pay . . . all taxes and assessments . . . which shall, during said term, be levied,

assessed, or otherwise imposed. . . . The lessee agrees that he will pay such taxes . . . before any fine . . . may be added thereto for non-payment thereof." Defendant, assignee of the lessee, had reassigned on December 16, 1936. Plaintiff, lessor, sought to recover from him unpaid taxes for the calendar year 1936. In Minnesota, property taxes are assessed on property valued as of May 1 each year, and a lien attaches to the land as of that date, although the taxes are not payable until the following January 1, and are not delinquent until June 1, thereafter. All steps in the assessment procedure relate back to the May 1 date.[1] *Held*, defendant is liable. *Whitney v. Leighton*, (Minn. 1948) 30 N.W. (2d) 329.

It has often been decided that where a lease contains a covenant to pay all taxes assessed during the term, the tenant in possession at termination of the lease is liable for taxes assessed before, but not payable until after, that date.[2] The principal case involves the liability of an assignee to pay taxes assessed before, but not payable until after, his reassignment.[3] The dissenting justice thought a distinction should be drawn between the two cases. Nonpayment at termination is clearly a breach of the covenant to pay all taxes assessed during the term, and liability for the breach must of necessity attach to the tenant holding at that date; but liability in the principal case could not attach until there had been a breach of the covenant, and there was no breach until the taxes became delinquent, after the assignee had severed his privity of estate. This is a dubious explanation of the cases imposing liability on the tenant holding at termination. If, in the principal case, there is no binding obligation until taxes have gone unpaid to delinquency, the same reasoning should apply to the assignee who is tenant at termination. He, too, on the basis of privity of estate, is liable only for "breaches," or rather for obligations which mature, during his tenure. It would be more consistent to say that, with respect to taxes assessed before but not payable until after termination, the covenant is enforceable only against the original lessee, whose liability is predicated on privity of contract. But the approach of the majority has more merit. One who is bound by a contract to

[1] Minn. Stat. (1945) 272.31; Merle-Smith v. Minn. Iron Co., 195 Minn. 313, 262 N.W. 865 (1935).

[2] Cases collected in annotation at 97 A.L.R. 931 (1935). For example, Baker v. Horan, 227 Mass. 415, 116 N.E. 808 (1917); Merrimac Mining Co. v. Gross, 216 Minn. 244, 12 N.W. (2d) 506 (1943); Walker v. Stein, 222 App. Div. 22, 225 N.Y.S. 209 (1927). In the latter two cases the presence of an added stipulation that the taxes be paid before delinquency did not change the result. However, the cases are not unanimous on this point; see Morris v. Suerken, 88 Misc. 262, 151 N.Y.S. 817 (1914), and R. A. Manning Realty Corp. v. Topping Bros., 120 Misc. 592, 199 N.Y.S. 241, affd. without opinion, 207 App. Div. 852, 201 N.Y.S. 939 (1923). In these cases wherein the lease contained a covenant, substantially, to pay all taxes imposed during the term when they become due, it was held that the last part of the clause was essential to liability, and the covenant required only payment of taxes which became due and payable during the term. In Huyler v. Huyler's, (N.Y. Co. Sup. Ct. 1943) 44 N.Y.S. (2d) 255, the court followed Walker v. Stein, explaining away the Manning case as having been based on a practical construction by the parties.

[3] There is very little direct authority on this point. The reassigning assignee was held liable in Kirby v. Goldman, 270 Mass. 444, 170 N.E. 414 (1930).

do an affirmative act is no less bound because he has been given a period of time within which to perform, and cannot be sued before the expiration of that time. That is, after all, what is called for by the covenant in the principal case. The lessee agrees to pay all taxes assessed, and further agrees to pay them before they become delinquent.[4] He becomes bound to pay them when they are assessed, but is given a period of time within which to fulfill his obligation. True, the assignee could have spared himself liability for the 1936 taxes by reassigning on April 30, 1936. But it is not reasonable to suppose the parties contemplated that he could hold the premises until May 31, 1937, and *then* avoid liability for the 1936 taxes by reassigning.

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[4] The stipulation that the taxes be paid before delinquency is probably included for the purpose of making the tenant liable for any penalties imposed because of his failure to pay the taxes on time. Where the lessee covenants simply to pay taxes, the measure of damages for breach of the covenant is the amount of the unpaid taxes, with interest, not including the amount of a penalty imposed for nonpayment. 1 TIFFANY, LANDLORD AND TENANT 856 (1912).