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 de­
linquent, 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, aff'd. 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 im­
posed 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. 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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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).