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REAL PROPERTY-LANDLORD AND TENANT-TRANSFER BY LESSEE AS SUBLEASE, NOT ASSIGNMENT

John S. Slavens
University of Michigan Law School

REAL PROPERTY—LANDLORD AND TENANT—TRANSFER BY LESSEE AS SUBLEASE, NOT ASSIGNMENT—X leased lands to plaintiff for a term of years, with a provision that if property taxes were assessed against the property in excess of

a certain amount, plaintiff would pay X a certain proportion of the excess amount as additional rent. Plaintiff then transferred his remaining term to defendant "subject to the terms" of the overlying lease. In addition, the sublease provided for a right to cancel the sublease if defendant failed to restore in case of fire or in the event of taking by eminent domain. Subsequent to the sublease, the tax assessments exceeded the amount stipulated in the overlying lease. Plaintiff sued defendant to recover the taxes as additional rent. The district court found that defendant did not assume the payment of any excess tax and denied recovery. On appeal, *held,* affirmed; the transfer does not constitute an assignment of the overlying lease, and, therefore, the sublessee is not liable on the covenants of the overlying lease. *Coles Trading Co. v. Spiegel, Inc.,* (9th Cir. 1951) 187 F. (2d) 984.

The basic distinction between an assignment of a lease and a sublease seems clear. If the original lessee (sublessor) conveys his entire term, retaining no reversionary interest in the property, the transaction constitutes an assignment. But, if the sublessor retains any reversionary interest, however small, the conveyance amounts to a sublease.[1] The importance of the distinction is that since no privity exists between the original lessor and sublessee, covenants entered into between the original lessor and original lessee, even though covenants running with the land, cannot affect the sublessee personally. The courts are agreed that an assignment establishes privity between lessor and sublessee, whereas a sublease does not.[2] There is a conflict of authority, however, on the question of what facts are necessary to establish a reversionary interest. Some courts have adopted the position that a retention of a right of re-entry for condition broken by the lessee-sublessor is not a sufficient reversionary interest to make the transfer an assignment. This view is founded on the argument that a right of re-entry in a lease is a mere chose in action and not an estate in land; hence, it cannot be a reversionary interest.[3] Other courts, however, following the so-called Massachusetts rule, take a contrary view, holding that a right of re-entry for breach of covenant prevents the transfer by the lessee to his sublessee from being an assignment.[4] The reason usually given to support this rule is that a right of re-entry for condition broken is an interest in land reversionary in nature which may be transferred by deed.[5] The former view, that a right to re-enter for breach of condition subsequent does not amount to a reversionary

[1] 32 AM. JUR., Landlord and Tenant 314 (1941).

[2] WOOD, LAW OF LANDLORD AND TENANT §131 (1881). The principal case is somewhat unusual in that the sublessor sued his transferee and attempted to hold the latter to the terms of the overlying lease by proving an assignment of the lease. More often the original lessor, the owner, sues the sublessee for breach of covenant, often non-payment of rent. In either case the court must decide whether a right of re-entry for condition broken, retained by the sublessor, amounts to a reversion.

[3] Sexton v. Chicago Storage Co., 129 Ill. 318, 21 N.E. 920 (1889).

[4] Dunlap v. Bullard, 131 Mass. 161 (1881) is a leading case taking this view.

[5] Davis v. Vidal, 105 Tex. 444, 151 S.W. 290 (1912). And see 2 PLATT, LEASES 218 (1847).

interest, seems to be in accord with the early common law.[6] It should be noted, however, that the common law rule was founded on certain concepts of the feudal system which have no place in modern law. Under that system, the tenant owed the lord a service of fealty, but a conveyance of his interest in the land transferred this duty to the transferee enabling the lord to proceed against the transferee directly. The retention of a right of re-entry by the transferor did not change this result. Since these feudal duties were attached to the land, and as the primary duty after the transfer was on the new tenant, it was felt that the transferor did not have a reversionary interest, despite his right of re-entry. In view of the fact that the reason for the common law rule is no longer operative, a better approach to the problem would seem to be that implicit in the Massachusetts rule, which resolves the question, whether the transfer is an assignment or sublease, on the basis of the intent of the parties. If the parties' intent clearly was to make a sublease, this intent should not be thwarted by the court except in a case where it is impossible to find a reversionary interest "under the logic of the law."[7] The principal case exemplifies this approach. Many courts, however, in holding that such a transfer is a sublease and not an assignment, have placed their decisions on grounds other than that of intent.[8] Nevertheless, it seems not unlikely that the intent of the parties is one of the most important factors considered by a court, if only subjectively, in deciding whether a transaction amounts to an assignment or a sublease; and that this is the proper approach, under modern conditions, seems unquestionable.

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[6] See 2 WASHBURN, REAL PROPERTY, 6th ed., §954 (1902); 1 TAYLOR, LANDLORD AND TENANT, 9th ed., 356 (1904).

[7] See the dissent of Finch, J., in Stewart v. Long Island R. Co., 102 N.Y. 601, 8 N.E. 200 at 213 (1886).

[8] For a collection of cases see Wallace, "Assignment and Sublease," 8 IND. L.J. 359 at 366-374, n. 38-45 (1932).