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LANDLORD AND TENANT-LEASE COVENANT AGAINST UNLAWFUL BUSINESS

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LANDLORD AND TENANT—LEASE COVENANT AGAINST UNLAWFUL BUSINESS—In an action to dispossess defendants of certain leased property, plaintiff alleged that defendants breached an express covenant in the lease by which defendants covenanted that they would use the premises for a store, and would not use the premises “for any unlawful business or purpose whatever.” Defendants used the premises for a general mercantile store, operating under the trade name “Stop ’N Shop.” In so doing, defendants failed to comply with a statute which provided that “It shall be unlawful for any person to engage in a business . . . under any name which does not plainly show the true surname of each person interested in the business” unless there shall first be filed a statement showing the name, address, etc., of the persons interested in the business.¹ *Held*, defendants have violated the covenant. *American Legion Holding Corporation v. Hurowitz*, (S.D. 1947) 30 N.W. (2d) 9.

The meaning here given to the words “unlawful business” in the lessee’s covenant is, in all probability, one not contemplated by the parties when they

¹ S.D. Code (1939) § 49.0801. The wording of this statute is unusual. The usual fictitious name statute merely requires filing of a certificate giving names of those running the business and the penalty imposed for failure to comply is usually a fine and, often, prohibition against bringing suits in the courts of the state, with nothing said about the business being unlawful. See, for example, Mich. Stat. Ann. (1937) § 20.111; Ill. Ann. Stat. (Smith-Hurd, Supp. 1947) c. 96, §§ 4 and 8. For contract problems arising under such statutes, see annotation in 45 A.L.R. 198 (1926).

drew up the lease; and one may well inquire whether the meaning of the phrase is so clear as to require the construction given it.² It is, of course, entirely within the power of the owner of property to restrict a tenant's use of his premises,³ but before evicting a tenant, should not inquiry be made as to the type of restriction probably intended? The general rule for construing restrictive covenants in a lease is to construe them so as to carry out the intent of the parties as ascertained from the whole lease,⁴ and, if no intent is ascertainable, it is often said that doubts as to restrictions are resolved in favor of the tenant.⁵ Covenants against use of premises for unlawful businesses or purposes are common provisions in leases of this type. Are they not more intended to prevent the use of premises for gambling, houses of prostitution, sale of liquor where forbidden, and other uses of this sort rather than violations of statutory provisions dealing with filing of papers or registration of names? ⁶ In a day when there are so many statutory restrictions and regulations governing the conduct of business, particularly by corporations, does not an uninquiring construction of the term "unlawful business" lead to hardship and instability of leases?

Bruce L. Moore, S.Ed.

² After all, a well-known jurist has said, "Words are symbols, and we must compare them with persons and things and events." Cardozo, J., in *Matter of Fowles*, 222 N.Y. 222 at 232, 118 N.E. 611 (1918). In *Lane v. Maine Mutual Fire Ins. Co.*, 12 Me. 44 at 46 (1835), the court said that in the construction of language "... we should have regard to the circumstances under which it was used, and the situation and object of the parties using it." For interesting discussions of the legal meaning of word symbols, see Levin, "The Varying Meaning and Legal Effect of the Word 'Void,'" 32 MICH. L. REV. 1089 (1934); Shartel, "Meanings of Possession," 16 MINN. L. REV. 611 (1932).

³ *Lyon v. Bethlehem Engineering Corp.*, 253 N.Y. 111, 170 N.E. 512 (1930); *Lamont Bldg. Co. v. Court*, 147 Ohio St. 183, 70 N.E. (2d) 447 (1946), in which the court upheld a lease agreement that only adults were to occupy an apartment and evicted defendant couple who brought their newly born child to live in the apartment; 32 AM. JUR., *Landlord and Tenant*, § 205.

⁴ *Bovin v. Galitzka*, 250 N.Y. 228, 165 N.E. 273 (1929); *Mutual Paper Co. v. Hoague-Sprague Corp.*, 297 Mass. 294, 8 N.E. (2d) 802 (1937); *Brugman v. Noyes*, 6 Wis. 1 (1857); 1 McADAM, *LANDLORD AND TENANT*, 5th ed., § 141 (1934).

⁵ *Murphy v. Traynor*, 110 Colo. 466, 135 P. (2d) 230 (1943); *Mutual Paper Co. v. Hoague-Sprague Corp.*, 297 Mass. 294, 8 N.E. (2d) 802 (1937); *Grassham v. Robertson*, 277 Ky. 605, 126 S.W. (2d) 1063 (1939); 1 McADAM, *LANDLORD AND TENANT*, 5th ed., § 141 (1934).

⁶ In the case of sales of liquor or gambling, a penalty may be imposed against the landlord as well as the tenant, or the landlord may be unable to recover rent, and it would seem that covenants against unlawful businesses are often inserted to protect the landlord. But no penalty is imposed upon the landlord for tenant's failure to comply with registration statutes.