Volume 59 | Issue 1 Article 10

December 1956

Landlord and Tenant--Assignment or Sublease

L. L. P.
West Virginia University College of Law

forced, to deny relief. Our courts may have to answer a similar argument due to a local statute which provides: "No person who has been convicted of feloniously killing another . . . shall take or acquire any money or property . . . from the one killed . . . either by descent and distribution or by will or by insurance . . . or otherwise." W. VA. CODE c. 42, art. 4, §2 (Michie 1955).

The dissent pointed out that there was no opportunity to convict due to the immediate suicide so that Indiana "has no statute applicable to [the] situation presented here." This gives the court the opportunity to rely upon general equitable principles to find a constructive trust without any legislative aid. *National City Bank v. Bledsoe, supra* at 895. See Colson, *Constructive Trusts in West Virginia,* 45 W. VA. L.Q. 357, 364 (1939). As Professor Landis suggests if the statute doesn't literally apply the court should ask the question: Does the policy behind the statute cover this situation? Once the basic purpose is discovered it is up to the court to expand and give effect to the statute beyond the express terms. Landis, *Statutes and the Sources of Law,* HARVARD LEGAL ESSAYS 213 (1934). See *Metropolitan Life Ins. Co. v. Hill,* 115 W. VA. 515, 177 S.E. 188 (1934). Using this approach to statutory interpretation it would not be difficult to find a constructive trust with or without a conviction.

M. J. P.

LANDLORD AND TENANT—ASSIGNMENT OR SUBLEASE.—By two leases executed on different dates, *A* leased to *B* all the coal in two seams underlying certain West Virginia and Virginia land for terms of twelve years with options to renew for like periods until the coal was exhausted. The lessee was given the right to remove all tipples, machinery and other personal property within six months after termination of the leases, otherwise than by forfeiture. *B* assigned all his rights under the leases to *C* who opened a mine on the premises. Subsequently, *C* transferred to *D* the right to operate the mine and also the right to use the tipple, machinery and equipment belonging to *C*. The agreement was to remain in effect until the coal was exhausted. Upon termination of the leases, *D* was to surrender the premises together with the equipment and machinery to *C*. After the tipple was destroyed by fire, all mining operations ceased and the equipment was removed. *D* attempted to exercise the option to renew one of the leases, but *A* denied his right to do so and brought suit for surrender of the premises and for an injunction to restrain *D* from mining coal from the property. *Held,* that *D* was

a sublessee and so could not exercise a right to renew given to the lessee. *National Shawmut Bank v. Correale Mining Corp.*, 140 F. Supp. 180 (S.D. W. Va. 1956).

The distinction between an assignment and a sublease is well settled by authority. If, by the transfer, the lessee divests himself of his entire interest in the demised premises, or a part thereof, for the unexpired term, it is an assignment of the lease. But should the lessee retain any interest in the premises, the transfer is a sublease. *Minor v. Pursglove Coal Mining Co.*, 111 W. Va. 28, 161 S.E. 425 (1931); 1 TIFFANY, REAL PROPERTY § 123 (3d ed. 1939); 32 AM. JUR., *Landlord & Tenant* § 314 (1941). It is this retained interest or reversion which is necessary for the existence of the landlord-tenant relationship.

Although the above distinction is simply stated, the courts have not found its application easy. The greatest difficulty is encountered in ascertaining the existence or nonexistence of the reversionary interest. The courts are sharply divided on what constitutes a reversionary interest.

The so-called Massachusetts doctrine, to which a minority of the courts adhere, rests upon the theory that for the transfer to be an assignment, the assignee must take precisely the same estate in whole or in part of the demised premises which his assignor had therein. He must take not just for the unexpired time, but the whole estate or term. *Dunlap v. Bullard*, 131 Mass. 161 (1881). In giving effect to the doctrine, the courts have seized upon a number of technicalities, such as the reservation of a new or different rent, a right of re-entry or a covenant to surrender upon expiration of the lease, and found them to be reversionary interests. A right of re-entry is said to be a contingent reversionary estate. *Dunlap v. Bullard, supra.* In *Davis v. Vidal*, 105 Tex. 444, 151 S.W. 290, 42 L.R.A. (N.S.) 1084 (1912), a different rent was found to constitute a reversion. Where the transfer is for the remainder of the term with a covenant to surrender at the end of the term, it is assumed that the surrender on the last day will leave a fragment of a day in the lessee. *Shumer v. Murwitz*, 96 N.Y. Supp. 1026 (1905).

The opposite view, held by a majority of the courts, is that if the instrument purports to transfer the whole of the unexpired term, a reservation of a right of re-entry, a different rent, or a covenant to surrender is immaterial. *Sexton v. Chicago Storage Co.*, 129 Ill. 318,

21 N.E. 920, 16 Am. St. Rep. 274 (1889); *Davidson v. Minnesota Loan & Trust Co.*, 158 Minn. 411, 197 N.W. 833, 32 A.L.R. 1418, 8 MINN. L. REV. 609 (1924).

Part of the disagreement over reversionary interests seems to stem from the interpretation of the word "term". This is pointed out in *St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. Ry.*, 135 Mo. 173, 190, 36 S.W. 602, 605 (1896). In the words of Blackstone "the word 'term' does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease. . . ." 1 BL. COMM. *144. Thus it appears that a lessee acquires more than just the right to the possession and use of the premises during the specified time.

From the above brief summary it may be seen that the law on this point is unsettled. Even within individual states opinion is divided. See Ferris, *Can there be a Sublease for the Unexpired Portion of a Term?*, 18 CALIF. L. REV. 1 (1929). Generally speaking, the manner of testing these transfers is arbitrary and often leads to inequitable results. See *Jordan v. Scott*, 38 Cal. App. 739, 177 Pac. 504 (1918). There the court, in holding a purported sublease to be an assignment, made the assignee liable to the original lessor, notwithstanding the fact that he had already paid rent to the lessee.

Outside of the principal case, a federal court decision, the West Virginia law on the subject appears to be almost nonexistent. Only two cases touching on the point were found. *Minor v. Pursglove Coal Mining Co., supra,* cited in the principal case, involved the construction of an instrument conveying an interest in coal mining rights, and the question for the court was whether it was a lease or a sale of the coal in place. After denominating the instrument a lease, the court went on to determine that the transfer of the lessee's rights under the lease was an assignment because it conveyed all the lessee's interest in the term. The other case, *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W. Va. 291, 112 S.E. 512 (1922), was cited in the principal case as authority for another point. The case involved a suit for specific performance of an agreement to assign. There the court held the proposed transfer to be an assignment because no reversion was retained and cited as authority *Smiley v. Van Winkle*, 6 Cal. 605 (1856); *Craig v. Summers*, 47 Minn. 189, 49 N.W. 742, 15 L.R.A. 236 (1891); *Stewart v. Long Island R. Co.*, 102 N.Y. 601, 8 N.E. 200, 55 Am. St. Rep. 844 (1886). It is interesting to note that these are cases which adhere to the majority view, but as they were

merely cited and not discussed in the opinion, it is not clear that the court considered the rule of these cases to be the law of West Virginia, except insofar as they are authority for the general rule as applied by the West Virginia courts.

In neither of the above West Virginia cases was there a reservation of any interest in the premises. In the principal case, that situation is directly presented. Under the instrument of transfer *D* acquired the right to operate the mine and the additional right to use the tipple, equipment and machinery *belonging to C*. This indicates that *C* retained ownership of the equipment. By the terms of the original lease, he had the right to remove it within six months after termination of the lease, otherwise than by forfeiture. Thus, by the clear language of the instrument is expressed the intention of the parties that the fixtures were not to become a permanent addition to the premises, but were to remain the personal property of the lessee. *Coal & Coke Co. v. By-Products Co.*, 112 W. Va. 390, 164 S.E. 504 (1932).

But query: could this not be an assignment whereby the assignee also rents his assignor's equipment? The lessee has transferred all his right to the coal, and as owner of the equipment, he may rent it to the transferee. But the question assumes the very point in dispute, that is, whether it is or is not an assignment. Has the lessee, by conveying away his right to the coal, transferred all the interest which he acquired under the lease? Put in another way, had the lessee transferred the right to operate the mine and at the same time denied his transferee the right to use the equipment, would he have thereby divested himself of his entire interest in the term? It is difficult to see how he would. As long as the equipment and machinery remain on the premises it is essential to the owner that he have the right to remove them. Otherwise, when he quits the premises, the presumption is that he intends to abandon them. *Childs v. Hurd*, 32 W. Va. 66, 9 S.E. 362 (1889). The fact that *D* is given the right to use the personal property does not terminate *C*'s right to remove it, but merely postpones the exercise of that right until *D*'s right of use is terminated by expiration of the lease. *C*'s rights do not terminate on that date since he has an additional six months in which to remove his property from the premises.

When construed in connection with the lessee's rights under the original lease, the provision of the transfer agreement requiring *D*

to surrender the premises and equipment to *C* was entirely consistent with the interest which *C* still had in the term. True, the equipment and machinery had been removed long before the lease expired, but construing the instrument as of the time when the lease was made, it appears that the court was correct in holding it to be a sublease.

L. L. P.

MUNICIPAL CORPORATIONS—DUTY TO REMOVE SNOW AND ICE FROM SIDEWALKS—LIABILITY OF ABUTTING OWNERS AND OCCUPANTS.—Action by a pedestrian against a city, the owner of a building, and a tenant of the building for personal injuries suffered in a fall on an icy sidewalk along the side of the building. The defendants demurred to the declaration separately. The tenant's demurrer was sustained while the demurrers of the owner and city were overruled. *Held,* that under a valid ordinance requiring the owner and occupant to remove snow and ice from the sidewalks fronting the premises, the owner who occupied a part of the upper floor as an office to which people using the sidewalk along the side of the building had access, was liable for failure to remove snow and ice as required. The tenant was not liable for failure to comply with the ordinance. The city was liable under W. VA. CODE c. 17, art. 10, § 17 (Michie 1955), for permitting the sidewalks to remain in a state of disrepair. Rulings affirmed. *Barniak v. Grossman,* 93 S.E.2d 49 (W. Va. 1956).

Under common law, generally a municipality was liable for injuries resulting from disrepair of streets and sidewalks. COOLEY, HANDBOOK OF THE LAW OF MUNICIPAL CORPORATIONS 387 (1914). See, *e.g., Childers v. Deschamps,* 87 Mont. 505, 290 Pac. 261 (1930). This rule remains unchanged, unless the state has relieved the municipal corporation of such responsibility. *Wilson v. City of Wheeling,* 19 W. Va. 323, 42 Am. Rep. 780 (1882). The West Virginia legislature has reaffirmed the common law liability in cases where the municipal corporation, by its own charter, is required to keep streets and sidewalks in repair. W. VA. CODE c. 17, art. 10, § 17, *supra.* For further comment on the liability of municipal corporations in West Virginia, see Note, 53 W. VA. L. REV. 89 (1951).

The heart of this case, and a highly controversial point, concerns the civil liability of the property owners and occupants for failure to remove free fallen snow from sidewalks as required by an ordi-