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Landlord and Tenant: Surrender: Mitigation of damages

Lewis A. Stocking

that this case was not an attempt to tax a debt, but rather the transfer of a debt and that the court should leave the decision of the correctness of double taxation to be decided as each case presents itself and should not lay down any positive prohibition against this form of double taxation.

Justice Holmes wrote a dissenting opinion in which Justice Brandeis concurred.

THOMAS W. HAYDEN

Landlord and Tenant: Surrender: Mitigation of damages.

In *Weinsklar Realty Co.* v. *Dooley et al,* 228 N.W. 515 (Wis.); our Supreme Court has, at last, outlined the two alternatives open to a landlord upon abandonment of premises by a lessee.

In this case the plaintiff lessor had entered into an executed lease for a term of five years from December 1, 1926, with the defendant lessee. Clarke, one of the defendants, was the guarantor for the lessees. Until July 1, 1927, the lessees conducted a drugstore on the premises. On this date they organized a corporation to which the lessees assigned all of their rights under the lease. Although there was a provision in the lease which specified that that lease was not to be assigned without the consent of the lessor, the lessor accepted rent under the lease from the assignee corporation. The action against Clarke was predicated upon his guaranty. On the 28th of July, 1928, the assignee corporation made an assignment for the benefit of creditors, a trustee was appointed, the stock removed, and the key turned over to the plaintiff lessor. The rent for July was not paid. The plaintiff accepted the key and entered the house and put up "For Rent" signs. By September, 1928, he had succeeded in reletting the premises, and at this time brought this action to recover the rent for July and August.

The court held that there had been no proof which could be construed as evidence of the plaintiff's intention to accept a surrender of the premises, and that those liable under the lease were not relieved. In arriving at this conclusion the court very helpfully construed *Lincoln Fireproof Warehouse Co.* v. *Greusel,* 227 N.W. 6, (Wis.); in which in turn, the court had made an unsuccessful attempt to construe *Selts Investment Co.* v. *Promoters,* 197 Wis. 476, 485; 222 N.W. 812, and *Strauss* v. *Turck,* 197 Wis. 586; 222 N.W. 811. This helpful, because definite, construction was given as follows: the landlord can either enter and take possession for the purpose of mitigating damages with the intention of relying on the liability of the lessees, in which case he must evidence his intention to do only this and not seem to accept a surrender of the premises, releasing the lessees, or: he can accept a surrender and thereby release the parties liable under the lease. The

court explains the method of exercising choice by stating that the election to enter and mitigate damages must be manifested by an unequivocal act. If the act is equivocal, it will be presumed that a surrender has been accepted. The case points out that mere entering would be an equivocal act and would lead to a surrender, but, as was done in this case, entering and placing "For Rent" signs in the windows was such a manifestation of intent to mitigate that no surrender could be presumed.

Other issues in the case were decided on what is settled law in Wisconsin except one defence offered by Clarke, the guarantor. He contended that he was not liable under the lease because the contract of guaranty was executed on Sunday in contravention of *351.46, Stats.* The court pointed out that although the contract of guaranty *was* actually executed on Sunday, it was dated as of the following Monday and was not delivered until then, and the lessor, there being no disclosure of this fact, could not be defeated in his cause. The court established the rule that a party acting in good faith, not having participated in the execution of the Sunday contract, can rely on the contract for a cause of action.[1] Many cases were considered to determine the sagacity of such a rule and practically all Wisconsin cases[2] on Sunday contracts were considered in an attempt to find a reason for the barring of such a rule in Wisconsin. None was found.

LEWIS A. STOCKING

Vendor and Vendee: *Real Property*: *Risk of Loss*: *Insurance.*

R., defendant and vendor, agreed, by written contract, to sell certain real estate to A., plaintiff and vendee. A deposit was made. The balance of the purchase price was to be paid upon delivery of the deed. Meanwhile, before the completion of the sale, a portion of the property was, without the negligence of the vendor, materially damaged by fire. R. had insured the property for his own benefit for a sum far in excess of his sale price.

No provision was made in the contract of sale on the subject of insurance. Because of the damage, such performance as was contem-

[1] *Diamond Glass Co.* v. *Gould,* (N.J. Sup.), 61 Atl. 2; *Collins* v. *Collins,* 139 Iowa, 703, 117 N.W. 1089; *Hall* v. *Parker,* 37 Mich. 590, 26 Am. Rep. 540; *King* v. *Fleming,* 72 Ill. 21, 22 Am. Rep. 131; *Evansville* v. *Morris,* 87 Ind. 269, 44 Am. Rep. 763; *Gibbs & Sterrett Mfg. Co.* v. *Brucker,* 111 U.S. 597, 28 L. ed. 534.

[2] *Moore* v. *Kendall,* 2 Pin. 99, 52 Am. Dec. 145; *Hill* v. *Sherwood,* 3 Wis. 343; *Melchior* v. *McCarty,* 31 Wis. 252, 11 Am. Rep. 605; *Knox* v. *Clifford,* 38 Wis. 651, 20 Am. Rep 28; *Troewert* v. *Decker,* 51 Wis. 46, 8 N.W. 26, 3 Am. Rep. 808; *DeForth* v. *Wisconsin & M. R. Co.,* 52 Wis. 320, 9 N.W. 17, 38 Am. Rep. 737.