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Landlord and Tenant

Carl F. Zeidler

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and a part payment of a partnership debt by one partner will have the same effect against the others as against the one who makes it.[8]

COSMAS B. YOUNG

Landlord and Tenant.

Lincoln Fireproof Warehouse Co. v. *Gruesel, et. al.*,[1] was an action by the Lincoln Fireproof Warehouse Company against Sylvester C. Gruesel and others, trustees of the Home Wiring Company. The facts are stated thus: on March 1, 1924, the plaintiff, a corporation, as lessor, leased to a corporation known as the Home Wiring Company premises in the City of Milwaukee known as No. 330-332 Third Street, for a term of three years, in consideration of certain stipulated rentals per annum, payable in monthly installments, in advance. After having occupied the premises up to February 6, 1925, the Home Wiring Company executed an assignment in writing to the defendants, as trustees, for the benefit of its creditors, of all its property, including its interest in the said lease. The defendants paid the rentals becoming due monthly, up to December 1, 1925; and some time between December 1 and December 11, 1925, the defendants abandoned and vacated the demised premises, and refused to abide by the provisions of the lease. Thereafter, the plaintiff took possession of the leased premises, and attempted to relet them in mitigation of damages, but without success.

Reargument was ordered in this case, because the appellant asserted that the rule adopted in *Selts Investment Co.* v. *Promoters*,[2] and *Strauss* v. *Lynch*[3] demanded a reconsideration of the facts presented. Those cases declared it to be the duty of the landlord to take possession of the premises abandoned by the tenant, and to use reasonable diligence in reletting the same, in order to minimize damages. The former rule set forth in a previous Wisconsin case[4] held that by resuming possession in order to perform his duty to the tenant, the landlord accepted surrender of the premises by the assignees, releasing them from further liability to pay rent.

Justice Stevens in his opinion said the court concluded that this result presented no ground for a modification of the former decision. While the assignees were in privity of estate, they were obligated to pay the rent as set forth in the lease. The original lessee was also liable, because he had contracted to pay to the end of the term. The assignees

[8] *Harding* v. *Butler*, 156 Mass., 34, 30 N.E. 168.
[1] 227 N. W. 6; — Wis. —.
[2] 197 Wis. 476, 485; 222 N.W. 812.
[3] 197 Wis. 586; 222 N.W. 811.
[4] 224 N.W. 98; — Wis. —.

made no such contract. Their liability ended when their privity of estate was terminated.

The assignees, however, had tendered possession by abandoning the premises, and consequently such conduct constituted a surrender of all the estate or interest which the assignees had in the lease-hold, "by act of operation of law," as declared in section 240.06, Stats. 1927, *Burnham* v. *O'Grady*.[5]

But where there is no privity of contract on the part of the assignees, the landlord cannot create such liability by giving notice as he did in this case, that he is taking possession for the single purpose of mitigating damages.

The rule that the landlord owes the duty to mitigate damages is not an innovation in law. If this rule has been heretofore applied to other forms of contract, there is no reason why it should not be applicable to leases in real estate. In *Poposkey* v. *Munkwitz*,[6] where the court was determing the measure of damages sustained because of a breach of a lease, the court aptly stated the rule in this manner: "Another rule having its foundation in natural justice should here be stated. In any case of a breach of contract, the party injured should use reasonable diligence, and make all reasonable effort, to reduce to a minimum the damages resulting from such breach."

The landlord made his contract with a tenant of his own selection. Hence the tenant remained liable for the rent on the lease contract to the end of the term, notwithstanding abandonment of the premises by the assignees under an assignment for the benefit of creditors. In fact, the assignees had given the landlord the benefit of having the rent paid for some months after the tenant was in financial difficulties.

Note, however, the fact that the court has not determined whether assignees to whom property is voluntarily transferred for the purpose of liquidating the financial affairs of the tenant, which is stated in the case of *Liquidation of Citizens Trust Co.*[7]

Other cases have held that in the event the landlord resumed possession of the abandoned premises and relets, or attempts to relet, them on his own account, under such circumstances that it is fair to assume that he does not intend to look to the tenant for the future rent or any part thereof, he thus accepts the surrender and relieves the tenant from his obligation.[8]

But according to the better view, the reletting must be done by the

[5] 90 Wis. 461, 463; 63 N.W. 1049.
[6] 68 Wis. 322; 32 N.W. 35, 39; 60 Am. Rep. 858.
[7] 171 Wis. 601.
[8] *Haycock* v. *Johnston*, 97 Minn. 289, 106 N.W. 304.
Gray v. *Kaufman Dairy, etc., Co.*, 162, N.Y. 388; 56 N.E. 903.

landlord upon notice to the tenant that that it is for he latter's benefit and to minimize the damages, and that the landlord does not relinquish his claim to the rent.[9]

CARL F. ZEIDLER

Pleading: Joinder of Parties.

Ernest v. *Schmidt,* 227 N.W., Vol. 1, page 26 (advanced sheets).

The decision of the Wisconsin Supreme Court on the rehearing of *Ernest* v. *Schmidt* implies an interesting analysis of Sec. 263.04 of the Wisconsin Statutes of 1927 which provides that all causes of action stated in a complaint must effect all of the parties to the action. The court reverses their edict on the first hearing of the same case, *Ernest* v. *Schmidt,* 223 N.W. 558; but before dwelling on the reversal it would be well to review the facts brought out in the first hearing.

The defendants were stockholders in The Elmwood Company, engaged in the development of certain land in Texas. The corporation ran short of funds, and the defendants besought the plaintiff to lend them money in order that they might continue the project. The agreement stated among other things that in consideration for such loan the defendants would become individually liable for the amount of $11,500, and that each of them would pay his pro rata share of $11,500 plus interest if the plaintiff was forced to buy up the land to protect his loan.

The defendants issued a trust deed on all their real estate to secure $30,000 in notes. When these notes fell due, the defendants being unable to pay, the trustees foreclosed on their deeds and put the land up for public sale. The plaintiff forced to bid in at the sale to protect his loan, to which effect he notified the defendants. Receiving no reply he organized a corporation to buy up the land, the plaintiff himself becoming the owner of 233 ½ of 500 shares of no par value capital stock which represented an ownership in the land sufficient to cover the loan made to the defendants. When the plaintiff offered the stock certificates to the defendants, they refused to take them, and he sued on the written agreement joining the subscribers as defendants. The defendants demurred on the ground of sec. 263.04 "that the causes of action in a complaint must effect all the parties," and that as the agreement created a several obligation, the plaintiff would have to proceed against them separately. The Supreme Court at this time decided to sustain the demurrer, explaining that due to the indefiniteness of the complaint and the doubtful intent of the agreement, to allow a joinder of parties would mean the emasculation of Sec. 263.04.

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[9] *Welcome* v. *Hess,* 90 Cal. 507, 27 Pac. 369.
Higgins v. *Street,* 19 Okla. 45, 92 Pac. 153, 14 Ann. Cas. 1086.