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Assignment or Subletting?

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ASSIGNMENT OR SUBLETTING?

In an article of this short length it would be futile to attempt a reconciliation of the decisions relating to the question posed by the title in transactions whereby a lessee has transferred his interest in a lease. The writer will in the main discuss a few of the decisions dealing with the question in Georgia. Furthermore, as a necessary incident to the problem of assignments and sublettings, some mention will be made of the effect Code§§ 61-101 *et seq.* and 85-801 *et seq.* have on transactions involving assignments and sublettings, and the importance of determining which section is applicable to a particular situation. However, at the outset, a brief summary of the general law might prove heplful.

The general principle as held by all the authorities is that, where the lessee transfers his whole interest in his lease, without reserving to himself a reversion therein, a privity of estate is at once established between the transferee and the original landlord, and the latter then has a right of action directly against the assignee on the covenants running with the land; but if the lessee transfers the premises reserving or retaining any reversion, however small, the privity of estate between the transferee and the original lessor is not established and the latter has no right of action against the former, there being neither privity of estate nor privity of contract between them.[1] Reading the decisions on this particular phase of the law emphasizes the fact that a great deal of confusion can arise in the application of principles so apparently clear and unambiguous on their face. "Unfortunately, these basic principles, so firmly entrenched, so unfailingly reiterated in our law, are applied only to the most obvious and simple situations."[2] Although the authorities are in harmony over *what* amounts to an assignment or subletting, that harmony is less evident where the question is: *when* does the transaction amount to an assignment and *when* does it amount to a subletting? The distinc-

1. Sexton v. Chicago Storage Co., 129 Ill. 318, 21 N.E. 920, 16 Am. St. Rep. 274 (1889).
2. Wallace, *Assignment and Sublease*, 8 IND L.J. 359, 360 (1933).

tion is important due to the various rights, duties, and liabilities the original lessor, lessee or transferee has respectively. The liability of the assignee rests in the privity of estate with the lessor, and, as a result thereof, he reaps the benefts of and is directly liable on the covenants that run with the land.[3] On the other hand, the sublessee is only responsible to the original lessee in so far as his contractual obligations go, and is in no way in privity of estate with the original landlord.[4]

The decisions are fairly clear and consistent whenever the lease contains a provision whereby the sublessee is to surrender the premises to the original lessee before the expiration date of the lease. The major conflict arises in transactions where the lessee transfers his whole term away but reserves the right to re-enter and gain possesion of the premises after the breach of a condition subsequent.

According to one line of cases, represented perhaps best by *Davis v. Vidal*,[5] the courts hold that such a reservation for re-entry on the breach of a condition subsequent amounts to such a reversionary interest remaining in the sublessor as to take the transaction out of the category of an assignment and instead, declare it to be a subletting. The *Davis* case dealt with an action by a lessor against his lessee's transferee to recover rent. The original lessor, Davis, had leased the lot to the Dallas Brewing Company for a term of three years at a monthly rental of $100.00. The lease contained a provision allowing sublettings without the lessor's consent. The Brewing Company then excuted an agreement whereby it did "sublet, assign and transfer" the original lease to one Vidal, the defendant. The latter transaction contained the usual clause for re-entry in case of default on the rental obligation. Thus, the question was squarely presented as to whether the transaction was an assignment or a subletting. If such amounted to an assign-

3. Stewart v. Long Island Railroad Co., 102 N.Y. 601, 8 N.E. 200, 55 Am. Rep. 844 (1886).
4. Davis v. Vidal, 105 Tex. 444, 151 S.W. 290, 42 L.R.A., N.S. 1084 (1912).
5. *Ibid.*

ment, then Vidal would be liable. On the other hand, if it was only a subletting, there was no privity of estate as would be necessary for the maintenance of the action. As mentioned before, the court interpreted the instrument as a subletting and entered judgment for the defendant. The theory of the cases in accord with the *Davis* case is that the right of re-entry is in the nature of a contingent reversionary interest and amounts to such a reversionary interest in the property as to prevent the subtenant from getting the whole term.[6]

The other side of the question, as regards re-entry, is clearly illustrated by the case of *Sexton v. Chicago Storage Company*,[7] considered to represent the majority view. This case dealt with a lease given by the complainant to one Cole for a period of three years. Later Cole leased the same premises to the defendant for the balance of the term reserving a different rental and also the right of forfeiture and re-entry for nonpayment of rent or other breaches of its conditions. The lessee covenanted to surrender the premises to the lessor at the expiration of the lease or sooner if determined by forfeiture. The lessor sued the transferee on the theory that the transaction amounted to an assignment. The trial court held that it was a subletting and an appellate court affirmed. The supreme court reversed the holding stating that the reservation of a right of re-entry for a condition broken did not amount to an estate in land and the reservation of a new and different rental was immaterial. The court in the *Sexton* case disposed of the theory that such right of re-entry was an estate in land by saying that the right to re-enter for such breach could not be alienated as is the case with an estate in land. The right of re-entry for a breach of condition subsequent is still but a remedy for enforcing performance of a contract which may be defeated by tender.[8]

6. Dunlap v. Bullard, 131 Mass. 161 (1881), wherein a subletting of the whole unexpired term of a lease with covenants whereby sublessee agreed to pay taxes and also increased rental was held to be a subletting only. This is the so-called Massachusetts rule.
7. Sexton v. Chicago Storage Co., *supra* note 1.
8. TAYLOR, LANDLORD AND TENANT 302 (8th Ed.); Sexton v. Chicago Storage Co., *supra* note 1.

"Such a right (*i. e.*, to enter for breach of condition subsequent) is not a reversion, nor is it an estate in land. It is a mere chose in action and when enforced, the grantor is in by the forfeiture of the condition and not by the reverter."[9]

The decisions holding the re-entry provision to be an estate sufficient to preclude an assignment seem plainly contrary to the principles of the common law.[10] Coke gave as his reason for such inalienability of rights of re-entry for breaches of conditions subsequent the fact that such was for "avoiding of maintenance, supression of right, and stirring up of suits; and therefore nothing in action, entry or re-entry can be granted over."[11]

From this brief summary of some of the decisions it is obvious that harmony is lacking in the courts whenever they deal directly with the question of rights of re-entry. Respectable authority can be found to support either view mentioned above.[12] The situation in Georgia on this phase of the law seems to be somewhat of a combination of both widely divergent views.[13] The view followed in Georgia has been mentioned in several of the authorities cited and was

9. 1 WASHBURN, REAL PROPERTY 451, 474 (2nd Ed.).
10. In Sexton v. Chicago Storage Co., *supra* note 1, the court concluded that the rule as applied in the Dunlap case, *supra* note 6, and which was relied on in the Sexton case was plainly contrary to common law whether predicated on a local statute or not as was suggested by the defendant.
11. Co. Litt. § 347 (214a).
12. In support of the Massachusetts rule that a reservation of a right to re-enter amounts to an estate in land therefore making transactions wherein it is contained a subletting and not an assignment, see Roberson v. Pioneer Gas Co., 173 La. 313, 137 So. 46, 82 A.L.R. 1264 (1931); Webb v. Jones, 88 Cal. App. 20, 263 Pac. 538 (1928); Collins v. Hasbrouck, 56 N.Y. 157, 15 Am. Rep. 407 (1874); Saling v. Flesch, 85 Mont. 106, 277 Pac. 612 (1929); *contra* C.N.H.F. Inc. v. Eagle Crest Development Co., 99 Fla. 1238, 128 So. 844 (1930); Indian Refining Co. v. Roberts, 97 Ind. App. 615, 181 N.E. 283 (1932); Gillette Bros., Inc. v. Aristocrat Restaurant, Inc., 239 N.Y. 87, 145 N.E. 748 (1924), wherein the court distinguishes some earlier New York cases to the contrary; Moskin Stores, Inc. v. Nichols, 163 Va. 702, 177 S.E. 109 (1934); Brummitt Tire Co. v. Sinclair Refining Co., 18 Tenn. App. 270, 75 S.W.2d 1022 (1934).
13. Potts-Thompson Liquor Co. v. Potts, 135 Ga. 451, 69 S.E. 734 (1910).

a direct holding in the case of *Stewart v. Long Island Railroad Company*,[14] that is, whenever the lessee parts with his whole term, reserving a right of re-entry for a breach of condition subsequent, the transaction, as between the original lessor and the transferee, amounts to an assignment, thus establishing privity of estate; but as between the original lessee and the transferee, the transaction is treated as a subletting, *if the parties so intended.*[15] The *Potts-Thompson* case involved a situation in which one Potts leased from another certain premises for a term of five years at a monthly rental of $500.00. Potts, the lessee, had the privilege of subletting the whole or part of the premises. The Potts-Thompson Liquor Co. desired to sublet the premises and an agreement to this effect was drawn between Potts and the company. The company agreed to pay the $500.00 to the original lessor and in addition agreed to pay to Potts individually an additional amount of $250.00 monthly. This sublease reserved the right to re-enter for condition broken. In holding that the transaction, as between the original lessor and the transferee, amounted to an assignment, but as between the original lessee and his transferee such amounted to a subletting, the court adopted as it views the reasoning of the *Stewart* case, *supra.*

The *Stewart* case proceeded on the theory that it is immaterial whether the assignor reserves to himself a different or greater rental or whether the transaction is coupled with a power of re-entry for non-payment of rent. There seems to be no doubt that the effect of the transaction between the original lessor and the transferee amounts to an assignment. However, in spite of this, the *Potts-Thompson* case, in following the *Stewart* case, determines the effect between the lessee and his sublessee by examining and respecting the intention of the parties. By following the *Stewart* case Georgia seems to have settled the question of the effect of re-entry rights when incorporated into a lease. "A right of re-entry is not a reversion or estate in land. Nor is a mere possibility of reverter for condition broken, which may or

14. Stewart v. Long Island Railroad Co., *supra* note 3.
15. Potts-Thompson Liquor Co. v. Potts, *supra* note 13.

may not happen, an estate in reversion."[16] Furthermore, if the Georgia courts accept fully the reasoning of the *Stewart* case, as apparently has been done, they have acquiesced in the view that it is immaterial whether a new and different rental is reserved or whether technical words of demise or the like appropriate to strict leases are used.[17] Similar to this reasoning some courts have held that it makes no difference if the transaction is in the form of a sublease; if the effect of the transfer is to convey all the interest of the original lessee, it still amounts to an assignment.[18]

Even in view of the peculiar situation in Georgia there still seems to be no question of double liability on the part of the sublessee. It is very doubtful that the courts could, in a situation where neither the original lessor nor the sublessor had been paid, hold the transferee liable for both the rent due the original landlord by virtue of the privity of estate and the rent due the sublessor by reason of the privity of contract.[19]

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16. MITCHELL, REAL PROPERTY IN GEORGIA 155 (1945). See also Doe d. Freeman v. Bateman, 2 B. & Ald. 167, 106 Eng. Rep. 328 (1818); C.N.H.F., Inc. v. Eagle Crest Development Co., *supra* note 12; Lawrence v. Mayor of Savannah, 71 Ga. 392 (1883), which seems to hold that the right of re-entry is merely a security for the payment of rent.

17. See further, Craig v. Summers, 47 Minn. 189, 49 N.W. 742, 15 L.R.A. 236 (1891), which follows the Sexton and Stewart cases, notes 1 and 3 respectively, and further holds that a mere reservation of rent or right of re-entry for a breach of any of the conditions of the lease will not change the legal relations of the parties, and the introduction of covenants into the instrument, whatever may be their effect between the immediate parties thereto, does not change the legal effect of giving up the reversion.

18. Johnson v. Moxley, 216 Ala. 466, 113 So. 656 (1927). Also cited in Johnson v. First National Bank, 53 Ga. App. 643, 187 S.E. 300 (1936), for the general proposition that the privity of estate existing between the lessor and the transferee can be extinguished by a mere naked assignment.

19. In Wallace, *supra* note 2, at 374, the writer, dealing with the proposition of possible double liability on the part of the transferee in cases where neither the lessor nor the original lessee had been paid, cites Potts-Thompson Liquor Co. v. Potts, *supra* note 13, as authority for the proposition that any amount paid to the head lessor could be apparently deducted from any sum due the lessee.

A study of the problem of assignments and sublettings in Georgia raises the interesting question of the effect of the Code sections dealing with the landlord and tenant relationship and those dealing with the creation of an estate for years.[20] Although this question is different from the narrow proposition of what amounts to an assignment and what amounts to a subletting, the writer believes that the correct determination of the applicable Code section is a necessary incident to the problem under discussion. It is most important to determine under which Code section the lease is drawn because an assignment or subletting of a lease for less than five years under Code § 61-101 would be void unless given with the consent of the landlord, whereas an assignment or subletting under Code § 85-801 is valid whether given with the lessor's consent or not. Thus, an assignment or subletting of a lease of less than five years without the landlord's consent, would, under Code § 61-101 render the transferee a mere intruder subject to summary eviction.[21]

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20. GA. CODE § 61-101 (1933). "When the owner of real estate grants to another simply the right to possess and enjoy the use of such real estate, either for a fixed time or at the will of the grantor, and the tenant accepts the grant, the relation of landlord and tenant exists between them. In such case no estate passes out of the landlord, and the tenant has only a usufruct, which he may not convey except by the landlord's consent and which is not subject to levy and sale; and all renting or leasing or such real estate for a period of time less than five years shall be held to convey only the right to possess and enjoy such real estate, and to pass no estate out of the landlord, and to give only the usufruct, unless the contrary shall be agreed upon by the parties to the contract and so stated therein."

    GA. CODE § 85-801 (1933). "An estate for years is one which is limited in its duration to a period fixed or which may be made fixed and certain. If it is in lands it passes as realty. It may be for any number of years, provided the limitation is within the rule against perpetuities."

21. McBurney v. McIntyre, 38 Ga. 262 (1868), wherein the court held that the landlord could refuse to accept the subtenant as his tenant and was authorized in any manner prescribd by law for the expulsion of trespassers or intruders to oust the subtenant. See also Stultz v. Fleming, 83 Ga. 14, 9 S.E. 1067 (1889), where the court said that "where the tenancy of the storehouse occupied by the assignors was by the year, they could not sublet the same without the consent of their landlord. They had no estate in it."

However if such conveyance between the original lessor and his lessee created in the latter an estate for years, the holder of that estate can assign or sublet as he see fit, subject of course to the limited estate he has.[22] Hence, once it is determined that an assignment or subletting has taken place, the validity of that transaction depends, in certain circumstances, under which Code section the original lease was drawn. A brief discussion of a few of the Georgia cases will point to the need of some sort of legislative clarification of the question.

The intention of the parties seems to be the governing factor in determining the applicability of Code § 61-101 or Code § 85-801.

> "Whether under a contract providing for the rent of land an estate in the land passes to the tenant, or he obtains merely the usufruct, and no estate in the land depends upon the intention of the parties; and this is true without regard to the length of the term. While under the Code, contracts of rental for terms less than five years will generally be construted to give only the usufruct and to pass no estate, still such contracts may have the effect to pass an estate to the tenant where it is manifest from the instrument containing the contract that such was the intention of the parties.
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> "An estate for years is a contract for the possession of lands or tenements for some determinable period, and this period may be less than a year, as a certain number of months, or even weeks."[23]

In the case quoted from, the court refused to declare that all leases for five years or longer created an estate for years or that all leases for less than five years created only a mere usufruct. Some light is cast on the question by the case of

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To the same effect is Hudson v. Stewart, 110 Ga. 37, 35 S.E. 178 (1899); Bass v. West, 110 Ga. 698, 36 S.E. 244 (1900); Lawson v. Haygood, 202 Ga. 501, 43 S.E.2d 649 (1947).

22. See Garner v. Byrd, 23 Ga. 289 (1857), wherein the court held that a tenant has the right to assign his lease but he cannot substitute another paymaster in his stead without the consent and acceptance of the landlord. See further, Robinson v. Perry, 21 Ga. 183, 68 Am. Dec. 455 (1857).

23. Hutcheson v. Hodnett, 115 Ga. 990, 993, 994, 42 S.E. 422, 424 (1902).

Dunlap v. George,[24] which involved a lease for fifty years. The court, by way of dictum, after stating the general rule that privity of estate existed between the original lessor and the last transferee, mentioned that the rule was to the *contrary* where property is leased for less than five years in which case no leasehold estate is created. The hesitancy of the courts to hold flatly one way or another is explained to some extent in a recent case[25] wherein the court said:

In disposing of the above quoted case, the court placed particular emphasis on the lease provision whereby the lessor assumed the responsibility of the upkeep of the premises, the payment of taxes, insurance, etc. Under Code § 61-101 *et seq.* such obligations are imposed by law upon the landlord, and the court evidently concluded that if the parties intended to create in the lessee a mere usufruct, it would have been unnecessary to mention them in the lease.

Another case along these lines which presents an interesting question and also a lengthy discussion of the effect of long term leases is *Georgia v. Davison*.[27] On the question of whether every renting or leasing of real estate for a period of five years or more creates an estate for years

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24. 48 Ga. App. 341, 172 S.E. 657 (1933).

25. Warehouses, Inc. v. Wetherbee, 203 Ga. 483, 46 S.E.2d 894 (1948). "That this court has never intended to hold that a lease for 5 years or more is ipso facto and as a matter of law an estate for years, is conclusively shown by numerous cases in which this court has construed the terms of such a lease for the purpose of determining whether or not the instrument by its express terms or by the necessary implication of its terms did or did not limit the interest passed to a mere usufruct."[26]

26. As to the applicability of Code § 61-101 to leases of five years or more, the court in Warehouses, Inc. v. Wetherbee, *supra* note 25, at page 485 said, "As to leases for as much or more than five years, the amendment to the Code, § 61-101, has no application, and the rule of the common law would prevail so as to pass an estate for years unless the agreement by its own terms, as is authorized by the above-quoted Code section, cuts down the interest passed to a mere usufruct. Thus, if the express terms or necessary implication of the words used in the agreement should in fact so provide, the Code section requires that they be given effect despite the rule of the common law to the contrary."

27. 198 Ga. 27, 31 S.E.2d 225 (1944).

under Code § 61-101, the court mentioned that there had been several statements to that effect in the cases[28] of the Supreme Court and the Court of Appeals. Although there may be a presumption that a lease for five years or more conveys an estate for years, this fact alone does not conclusively show that an estate for years was created, however, some of the decided cases[29] seem to have so held.[30]

From this brief summary of a few of the Georgia cases on the question of whether a transaction amounts to an assignment or a subletting it is apparant that Georgia is in accord with the general proposition that it is immaterial whether a right of re-entry is reserved, or whether a new and different rent is contracted for. Furthermore, it is immaterial whether technical words or demise are used. The conclusion is that once the lessee parts with his whole term, an assignment has taken place. However, the Georgia courts have added a new angle to the transaction whereby the lessee and the assignee are in privity of contract by virtue of the landlord and tenant relationship existing between them, if they so desire and intend it. Whether this construction of the transaction is more beneficial than would be otherwise is not to be decided here. The fact remains that with the power residing in the parties to a lease contract to bind themselves as they see fit, it is apparently well grounded.

The other aspect of this problem, viz., effect of leases for more than five years, is decidedly confused as evidenced by

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28. Schofield v. Jones, 85 Ga. 816, 11 S.E. 1032 (1890); Anderson v. Kokomo Rubber Co., 161 Ga. 842, 132 S.E. 76 (1926); Harms v. Entelman, *supra* note 29; Jones v. Fuller, 27 Ga. App. 84, 107 S.E. 544 (1921); Dunlap v. George, *supra* note 24; Shell Petroleum Corp. v. Stallings, 51 Ga. App. 351, 180 S.E. 654 (1935).

29. Collier v. Hyatt, 110 Ga. 317, 35 S.E. 271 (1899), wherein the court in construing a particular lease contract for five years, held that under the terms of such contract the tenant had the mere use of the premises. See also Griffith v. Smith, 155 Ga. 717, 118 S.E. 194 (1923); Johnson v. Brice, 151 Ga. 472, 107 S.E. 338 (1921), wherein the court held a lease for 15 years did not create an estate for years.

30. Midtown Chain Hotel Co. v. Bender, 77 Ga. App. 723, 49 S.E.2d 779 (1948).

the cases. Some leases for more than five years create landlord and tenant relationships, whereas, other leases for less than five years create estates for years. This uncertainty in the law conclusively shows the need for some sort of legislative clarification. As readily seen the amendment to Code § 61-101 as regards the five year limitation and the portion thereof giving the intention of the parties controlling weight has led to unlimited confusion. Possibly the legislature could remedy such a confused situation, which in one way or another affects everyday transactions, by providing that *all* leases for five years or more shall be construed as conveying an estate for years unless it is *specifically* provided otherwise. That would make it perfectly clear which Code section was applicable. As regards Code § 61-101, the legislature could eliminate most of the confusion by providing that all leases for less than five years shall be construed as coming under Code § 61-101 *et seq.* and thereby granting only a usufruct, unless it is *specifically* provided within the lease itself that such lease was to be construed according to the rules of the common law.

"Under our system, the law of property should be fixed and certain."[31]

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31. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 155.