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## THE INDIGENT ASSIGNEE

By WILLIAM R. SWEENEY

Oft-times a legal oak petrified by age and revered by reiteration stands accepted by all as sufficient in itself without the slightest reflection about the roots from which it sprung or the inconsistency between it and its surroundings. In California such a legal landmark is the rule: *The lessee's obligation to pay rent, which arises from the occupancy of premises as a tenant, is not terminated by the assignment of his estate.* To be relieved of further obligation the lessee must, in addition, secure the lessor's consent to the assignment.<sup>1</sup>

The courts and textwriters have accepted this rule as so well settled, that neither of them has considered it necessary to trace the origin or reason from which the rule stems. Nor does an occasion frequently arise which would encourage the court or counsel to seek the reason of the rule in order to guide its application to the facts presented. To be applicable, the rule requires a factual situation in which a lessee (1) is obligated to pay rent only by privity of estate; (2) has assigned his estate without the express or implied consent of the lessor, and; (3) is claiming that the assignment has released him from further obligation.

A brief consideration of the first two necessary components will illustrate the reasons why the requisite pattern of facts so seldom occurs.

If the lessee is bound by privity of contract as well as privity of estate, he remains bound to the lessor by his contractual obligations notwithstanding the lessor's consent to the assignment,<sup>2</sup> and the quoted rule is immaterial to the determination of the case. Since the Statute of Frauds, as adopted in California,<sup>3</sup> requires a lease for more than a single year to be in writing, a contractual obligation usually results. In fact, the California courts have uniformly implied a contractual obligation either from the words "reserving a rent," or from the general tenor of the writing required by the Statute of Frauds.<sup>4</sup> Thus, as a practical matter, a lessee bound only by privity of estate is rare.

Further, the courts are prone to imply the lessor's consent to the assignment; the usual case being the acceptance of rent from the assignee. A striking illustration of the extension of this tendency is the case of *Guarantee*

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<sup>1</sup>Samuels v. Ottinger, 169 Cal. 209, 146 Pac. 638 (1915), quoting Tiffany on "Real Property" and citing Consumers Ice Company v. Bixler, 84 Md. 437, 35 Atl. 1086 (1896), which contains a good statement of the rule.

<sup>2</sup>See De Hart v. Allen, 26 Cal. 2d 829, 161 P. 2d 453 (1945), and the citation of authority therein.

<sup>3</sup>Code Civ. Proc., § 1973.

<sup>4</sup>Samuels v. Ottinger, *supra*, contains a discussion of typical cases. See, also, Timm v. Brown, 78 Cal. App. 2d 609, 178 P. 2d 10 (1947).

*Trust and Savings Bank v. Marsh*,<sup>5</sup> wherein the court found service by the lessor upon the assignee of the statutory three-day notice to pay rent or surrender<sup>6</sup> constituted recognition of the assignees as tenants. Thus, the propensity of the courts to imply a contractual obligation and to find consent to the assignment prevents a sharp contest which would encourage discussion of the reason and justice of the rule stated *supra*.

Before dismissing as unimportant the rule being considered in this discussion a comparison with the rule applicable to a similar situation should be made. The situation referred to is that of an assignee who does not assume the contractual obligation of his lessee-assignor.

The relationship between a lessor and a lessee bound only by privity of estate, and that between a lessor and an assignee who does not assume a contractual obligation is identical. The obligations of both the lessee and his assignee spring from privity of estate and differ only in that one preceded the other in point of time. This identity would seem to require that a uniform rule be applicable to both relationships. But such is not the case!

In contrast to the lessee, the assignee may relieve himself from further liability to pay rent by assignment alone; in fact, the California courts have held him to be released by abandoning possession without assignment.<sup>7</sup>

The light of judicial opinion does not shine upon the reason which begot the inconsistency between these two rules applicable to persons whose relationship to a lessor is identical. But if the cases fail to disclose the reason, they serve to illustrate the effects of the rule—effects as contradictory as the rules themselves.

Under these rules the lessee remains bound notwithstanding the assignment until the lessor consents to accept a substitute; whereas, the assignee may free himself without consent, and without regard to the irresponsibility of his assignee. Thus, while the lessee guarantees the assignee's performance until the lessor accepts him, the assignee can with impunity pay an indigent beggar to accept his estate and its attendant burdens.

But why, it may be asked, should the hue and cry of injustice be raised now when in 1860 Chief Justice Field in *Johnson v. Sherman*<sup>8</sup> foisted upon the California law a rule which has since become well settled? The reason is that upon critical reexamination of the problem, the attitude which

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<sup>5</sup>40 Cal. App. 292, 180 Pac. 622 (1919).

<sup>6</sup>Code Civ. Proc., § 1161.

<sup>7</sup>4 So. Cal. L. Rev. 343, at 350, wherein the authorities are discussed, and subjected to proper criticism. Hence, this aspect of the problem need not be considered here.

<sup>8</sup>15 Cal. 287 (1860), the leading case. Affirmed: *Dengler v. Michelson*, 76 Cal. 125, 18 Pac. 138 (1888), and followed thereafter.

prompted Chief Justice Field to commend assignment to an indigent beggar<sup>9</sup> might well be changed.

The case of *Shea et al. v. Leonis et al.*<sup>10</sup> is the first indication that the rule of *Johnson v. Sherman* might be modified. In the *Shea* case the California Supreme Court held, in determining a demurrer to be insufficient, that a corporate assignee of a lease could not escape its obligation to pay rent by assigning the lease to a corporation without other assets, and which was specially formed for the purpose of taking the assignment by the assignor who beneficially owned all of its stock. The court said to recognize the separate entity of the specially formed corporation would promote fraud and injustice. Hence the purported assignment was held to be ineffective and the liability of the old corporation to be unchanged.

The case of *Johnson v. Sherman* was held not to be controlling under these facts as the defendant urged, and thus in this limited situation the court has refused to permit assignment to one without assets and against whom the recovery of compensation for the occupation of premises withheld is practically impossible.

It is true the scope of this case is narrow. It is likewise true that the theory relied on is that the corporate entity will not be recognized where the recognition will sanction fraud and injustice. But with all, it is a basis from which may spring the contention that if it would sanction fraud and promote injustice to recognize the entity of a corporate assignee which is without assets, it would likewise sanction fraud and promote injustice to recognize the validity of an assignment to an insolvent natural person. The injustice which usually results from the assignment to an indigent natural person is that possession is withheld from the lessor by one from whom no compensation therefor can be secured and during the withholding his property is subjected to the risk of harm by irresponsible persons who cannot be made to respond in damages. To bring an end to this injustice the lessor must bring a legal action for recovery of possession with its consequent loss of time and expenditure of money.

Thus, perhaps the rule requiring consent of the lessor has survived, though its reason be lost in antiquity, because it works justice; and perhaps its application should and will be extended to include those cases in which an assignee assigns to an insolvent.

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<sup>9</sup>In reference to the defendant Justice Fields said, "his conduct was the dictate of common prudence, such as any man in his senses would have pursued."

<sup>10</sup>14 Cal. 2d 666, 96 P. 2d 332 (1939), prior opinion 92 P. 2d 400 (1939).