

Equity--Construction of Term "Sale" in Lease and Bond (Halsted v. Globe Indemnity Co., 258 N.Y. 176 (1932))

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business.¹⁴ To seek to sustain the statute, now seven years old, as emergency legislation against the depression¹⁵ would be to exaggerate the emergency and overestimate the remedy.¹⁶ It hardly goes to the root of the difficulty. At all events Lord Hale's phrase,¹⁷ "the worn touchstone of constitutionality," still serves to "prevent the making of social experiments * * * in the insulated chambers afforded by the several states,"¹⁸ when an unsympathetic court judicially reviews the exercise of legislative discretion.¹⁹

J. F. D., JR.

EQUITY—CONSTRUCTION OF TERM "SALE" IN LEASE AND BOND.—Plaintiffs deposited stocks and money as collateral security with the defendant indemnity company which was surety on a bond given by the plaintiffs to secure the faithful performance of a lease. The lease and bond contained provisions that if the lessor sold the leased property the bond should be cancelled, provided the plaintiffs had faithfully performed up to that time. The lessor died during the term of the lease, and the property passed under his will to his children, who formed a corporation of which they were the sole stockholders and to which they transferred the property, receiving in return the corporate stock and bonds in equal shares. No money consideration or price was involved. Plaintiffs had fully performed up to the time that the property was transferred to the corporation.

¹⁴ Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 45 Sup. Ct. 191 (1925); Frost v. Railroad Commission, 271 U. S. 583, 46 Sup. Ct. 605 (1926); see Producers Transportation Co. v. Railroad Commission, 251 U. S. 228, 230, 40 Sup. Ct. 131, 132 (1920). But see Adler, *Business Jurisprudence* (1914) 28 HARV. L. REV. 135, 146 *et seq.* for a discussion of the historical impossibility of "privacy" in a business.

¹⁵ As suggested by Mr. Justice Brandeis in his dissenting opinion.

¹⁶ The statute seems, too, to lack the temporary quality of the approved emergency statutes. Chastleton Corp. v. Sinclair, 264 U. S. 543, 44 Sup. Ct. 405 (1924); see Block v. Hirsh, 256 U. S. 135, 157, 41 Sup. Ct. 458, 460 (1921) ("The regulation is put and justified only as a temporary measure"); Wilson v. New, 243 U. S. 332, 345, 37 Sup. Ct. 298, 301 (1916).

¹⁷ See McAllister, *Lord Hale and Business Affected with a Public Interest* (1930) 43 HARV. L. REV. 759, for the origin of the phrase and much of its later history; and Hamilton, *Affection with Public Interest* (1930) 39 YALE L. J. 1089, 1095, for the manner of its adoption by Mr. Chief Justice Waite in *Munn v. Illinois*.

¹⁸ *Truax v. Corrigan*, 257 U. S. 312, 344, 42 Sup. Ct. 124, 134 (1921).

¹⁹ See McClain, *The Convenience of the Public Interest Concept* (1931) 15 MINN. L. REV. 546, 557, suggesting that if, as was said in *Wolff Packing Co. v. Court of Industrial Relations*, *supra* note 2 at 539, 43 Sup. Ct. at 634, kinds of public interest and degrees of regulation are admissible under the doctrine, then a finding of some public interest adds little to the solution of the problem and leaves the particular regulation still to be justified on the general principles governing exercise of the police power.

Plaintiffs sued to recover the collateral security deposited with the indemnity company on the ground that the transfer by the lessor's devisees to the corporation formed by them was a "sale" by the lessor. The indemnity company and the lessor's executors were joined as defendants. At Special Term judgment was directed for the plaintiffs, cancelling of record the surety bond and directing the return of the securities. The Appellate Division reversed the judgment of the Special Term and dismissed the complaint. On appeal by the defendant indemnity company which had asked the same relief as the plaintiffs, *held*, there had been no "sale" within the meaning of the provisions of the lease and bond, and the right of the grantee corporation to hold the security for the performance of the surety remained in force. *Halsted v. Globe Indemnity Co.*, 258 N. Y. 176, 179 N. E. 376 (1932).

Under the lessor's will title passed to his devisees but no "sale" was made. In passing on whether or not the transfer from the lessor's devisees to the corporation formed by them was a "sale," the corporation must be viewed as an entity separate and distinct from its stockholders as no adequate reason to the contrary appears.¹ The leased premises were transferred to a third party,² but the words "sale" and "transfer" are not synonymous. "Sale" is a technical term which has been defined as the transfer of property from one man to another in consideration of a sum of money as opposed to barter, exchange, or gift,³ although in its broadest sense a sale comprehends any transfer of property from one person to another for a valuable consideration.⁴ The intention of the parties must govern and there is no necessity here for widening the meaning of the term "sale" for "what the parties obviously intended by the word 'sale' in the lease and bond, was a transaction whereby the lessor would dispose of the property for value to a stranger and cease to have any further interest in it. A transfer to a corporation in which the lessor owns all the stock is not such a transaction."⁵ The transfer to the corporation was an exchange as distinguished from a sale within the contemplation of the parties. The benefit of a covenant of a surety for the rent runs with the land, and, in the absence of a stipulation to the contrary, the grantee who takes subject to a lease obtains the benefit of the security deposited for the due performance of the lease.⁶

¹ *Werner v. Hearst*, 177 N. Y. 63, 69 N. E. 221 (1903); *Brock v. Poor*, 216 N. Y. 387, 111 N. E. 221 (1915); *Berkey v. Third Ave. Ry. Co.*, 244 N. Y. 84, 155 N. E. 58, 50 A. L. R. 599 (1926); *Jenkins v. Moyse*, 254 N. Y. 319, 172 N. E. 521, 74 A. L. R. 205 (1930).

² *Matter of Gates Estate*, 243 N. Y. 193, 153 N. E. 45 (1926); *Marr v. Tumulty*, 256 N. Y. 15, 175 N. E. 356 (1931).

³ *Matter of Grand Union Co.*, 219 Fed. 353 (C. C. A. 2d, 1915).

⁴ *Hudson Iron Co. v. Alger*, 54 N. Y. 173 (1873).

⁵ Cited with approval in instant case from opinion of *McAvoy, J.*, in the Appellate Division, 232 App. Div. 576, 251 N. Y. Supp. 181 (1st Dept. 1931).

⁶ *Lehman, J.*, in *Mauro v. Alvino*, 90 Misc. 328, 152 N. Y. Supp. 963 (1915) cited with approval in *Kottler v. New York Bargain House, Inc.*, 242

There having been no "sale" of the leased property, the right of the grantee corporation to hold the security given by the bond has not terminated and the obligation of the surety remains in force.

T. J. M.

HIGHWAY LAW AS AFFECTING COMMON LAW LIABILITY OF OWNER OF MOTOR VEHICLE.—Defendant owner loaned his car to his nephew for his nephew's personal use. Contrary to the defendant's express instructions the nephew permitted a friend to drive the defendant's car and, while that friend was driving negligently, the car collided with a car occupied by the plaintiffs. The nephew was in the defendant's car at the time of the collision. *Held*, There was "negligence in the operation" of the defendant's car committed by a "person legally using" it with "the permission" of the defendant so that under §282-e he became liable for damages. *Arcara v. Moresse*, 258 N. Y. 211, 179 N. E. 389 (1932).

Section 282-e of the HIGHWAY LAW (now §59 of the VEHICLE AND TRAFFIC LAW, Consol. Laws c. 71) imposes liability upon the owner of every motor vehicle "for death or injuries to person or property resulting from negligence in the operation of such motor vehicle * * * by any person legally using or operating the same with the permission, express or implied, of such owner." An owner who loans his car may reasonably restrict the use to which it may be put and its use for a proscribed purpose is not a use with "the permission" of the owner.¹ However, if the limiting instructions relate to the manner of operation rather than to the use of the car, the use is with "the permission" of the owner, though the limiting instructions be disobeyed.² To bind the owner there must be "negligence in the operation" of the motor vehicle but the negligent act may be performed "by any person legally using" the motor vehicle, or by any person "operating the same." Thus the legal user if present in the car, not having abandoned it or its use but merely having surrendered the wheel to another, may be guilty of negligence in "operation" although not "operating" the car in the sense that he is actually driving it. The common law rule is that in general a bailor is not liable to third parties injured by the negligence of his bailee with respect to the article bailed.³ Prior to the enactment of §282-e an

N. Y. 28, 150 N. E. 591 (1926) and *Rosenfeld v. Aaron*, 248 N. Y. 437, 162 N. E. 478 (1928).

¹ *Poota v. Long Island R. R. Co.*, 246 N. Y. 388, 159 N. E. 180, 62 A. L. R. 1163 (1927); *Chaika v. Vandenberg*, 252 N. Y. 101, 169 N. E. 103 (1929).

² *Grant v. Knepper*, 245 N. Y. 158, 156 N. E. 650, 54 A. L. R. 845 (1927).

³ *Bailments*, 6 C. J. 1151; *Negligence*, 45 C. J. 849; *Motor Vehicles*, 42 C. J. 1078.