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inability of securing it. For example, the subpoena would be inadequate in ascertaining in advance that which an adverse party alone knew and which would be material and necessary in establishing a cause of action or defense. A notice to produce, on the other hand, is of value only when the moving party knows what he wants and can introduce secondary evidence, in case, after a notice to produce, the adverse party fails to produce the primary evidence.[27]

These shortcomings were fortunately averted when statute created the existing procedural form of "the examination before trial," a requisite for astute litigators.

V. J. M.

WHEN AN ASSIGNMENT MAY BE A SUB-LEASE—The familiar proposition that the transfer by lessee of the entire term of his lease, results in a so-called "assignment" rather than a "sub-lease," has been subjected to considerable reservation. There are three ways in which the question ordinarily comes before the court. It is submitted that the aim of the suit and the parties at the Bar create equities,[1] which affect the determination, so that we reach a result in which the terms "assignment" or "sub-lease" are merely convenient instruments, legal fictions perhaps, by which the Courts arrive at equitable results. The most convenient way of treating this subject, will be by discussing seriatim, the three ways in which the question usually arises. First, in an action by the landlord against the tenant in possession, the transferee of the term, the instrument is called an assignment and the tenant in possession held bound by the covenants in the original lease, Stewart *v.* Long Island Railroad Co.[2] emphasizes this proposition. Stewart leased certain property to the Central Railroad Co. for a period of fifty years. Later the lease was assigned to the Flushing, North Shore and Central Railroad Co. Then the latter company leased to the defendant the whole of the property covered by the Stewart lease for a term of ninety-nine years. The plaintiff brings this action for rent, and claims that the defendant is liable as assignee of the lease. The defendant contends it is not liable on the ground that it is a sub-lessee. The court said, "Where a lessee of land leases the same land to a third party, the question has often arisen whether the second lease is in legal effect an assignment of the original lease, or a mere sub-lease. The question has frequently and probably most generally, arisen between the lessee and his transferee, and much confu-

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[27] Carmody's N. Y. Prac. Sec. 342.

[1] Linden *v.* Hepburn, 3 Sandf. (N. Y.) 668; O'Connell *v.* Sugar Products Co., 114 Misc. 540 (1st Dept. 1921).

[2] 102 N. Y. 601, 8 N. E. 200 (1886); Sexton *v.* Chicago Storage Co., 129 Ill. 318, 21 N. E. 920 (1889).

sion will be avoided by observing the distinction between those cases and cases where the question has been between the original landlord and the transferee. In the latter class of cases, the rule is well settled that if the lessee parts with his whole term, or interest as lessee, or makes a lease for a period exceeding his whole term, it will as to the landlord amount to an assignment, and the essence of the instrument as an assignment, so far as the original lessor is concerned, will not be destroyed by its reserving a new rent to the assignor, with a power of reentry for non-payment, nor by its assuming, by the use of the word demise or otherwise, the character of a sub-lease; and the assignee so long as he continues to hold the estate, is liable directly to the original lessor on all covenants in the original lease which run with the land, including the covenant to pay rent." (As to the other class of cases, the law will be discussed under the second proposition.)

This is not what might at first appear a baseless distinction for in permitting the landlord to recover in actions on covenants in the original lease against the transferee of the lessee, the court is enabling the landlord to get satisfaction from the one who is in actual enjoyment of the property. This is, of course, as it should be and it was reasonable to suppose that the court would employ its legal terminology to effectuate this purpose. In no other way except by calling the instrument an assignment could this result be brought about. On the other hand, where the action is by the lessee against the transferee, as is usual in the second group of cases, to hold the instrument an assignment would prevent the lessee from enforcing an express contract with his transferee and would enable the transferee to elude his obligations under that contract. It therefore follows that in this second class of cases where the lessee is suing his transferee, the courts have wherever possible held the transferring instrument to be a sub-lease.

In Linden *v.* Hepburn,[3] one Roosevelt leased property to Roux for the term of May 1, 1845 to April 30, 1853. In March, 1848, Roux transferred the lease to Linden and Fritz. Immediately after, Linden and Fritz executed an instrument leasing to West a physical part of the original premises for the entire balance of the term, but agreed that Linden and Fritz should reserve a right of entry for any breach of the covenants contained in the original lease. Defendant was in possession under West. The covenants contained in the original lease were breached and Linden and Fritz sought to declare a forfeiture and to exercise their right of entry. The defendant claimed that the plaintiffs had no rights, as they had assigned their leasehold rights to West. It was held, "Whatever the effect of this lease might be as between West and the original lessor of the demised premises, we have no doubt as

[3] Linden *v.* Hepburn, supra, note 1.

between West and the plaintiffs (lessees), it is to be regarded as a sub-lease, and not an assignment of the original term."

The court in Stewart *v.* Long Island Railroad Co.,[4] in discussing the distinction between an action by the landlord against the tenant in possession and an action by the lessee against the tenant in possession, said, as to the latter proposition, "But as between the original lessee and his lessee, even though the original lessee demises his whole term, if the parties intend a lease, the relation of landlord and tenant, as to all but strict reversionary rights will arise between them."

The necessity of distinguishing between an assignment and a sub-lease will also frequently arise as indicated in an action by a lessor against his lessee to declare a forfeiture for breach of the covenant not to assign or sublet, where there is a covenant either against sub-letting or assigning but not both. It is submitted that this third type of action represents more closely the second type than the first, on principle, and the decision of Mr. Justice Wagner in O'Connell *v.* Sugar Products Co.[4] would seem to indicate that authority has in this instance followed principle. Aside from the general aversion to forfeiture which has led courts to hold that a covenant against assignment is not violated by:

a. An assignment for the benefit of the creditors.[5]

b. A lease for less than the full period.[6]

c. A sale on execution caused by a judgment-creditor[7] of the lessee.

d. A mortgage of the lease and the sale in foreclosure;[8] and to further hold that a similar covenant which also included prohibitions against underletting is not violated by a change of the partners constituting the lessee firm;[9] nor by a sub-letting of part of the premises and to further hold that a covenant not to sub-let for more than a two year period is not breached where there is a contemporaneous agreement given to the sub-lessee for successive two year period renewals;[10] and that a covenant not to under-let is not violated by an assignment;[11] and that no forfeiture results from a sale of the lease by the lessee in

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[4] O'Connell *v.* Sugar Products Co., supra, note 1.

[5] 84 Misc. 212, 145 N. Y. Supp. 868 (1914).

[6] Jackson *v.* Silvernail, 15 Johns. 278 (1818); Jackson *v.* Harrison, 17 Johns. 66 (1819).

[7] Jackson *v.* Silvernail, supra, note 6.

[8] Riggs *v.* Purcell, 66 N. Y. 193 (1876); Dunlap *v.* Mulry, 85 A. D. 498 (1st Dept. 1903); Johnstone *v.* Flickinger, 97 Misc. 169 (1916).

[9] Roosevelt *v.* Hopkins, 33 N. Y. 81 (1865).

[10] Murdock *v.* Fishel, 67 Misc. 122 (1910).

[11] 27 Barb. 415 (1857).

bankruptcy contrary to express provisions of the lease,[12]—quite apart from this expressed abhorrence of forfeitures which the courts have so clearly enunciated, it would appear that an action by the lessor against his lessee is in every particular identical with an action against his transferee rather than with an action by the lessee against the transferee of the lessee in possession.

Mr. Justice Wagner in the case cited above,[13] definitely classifies this group of cases with the second group mentioned above and the outstanding similarity, of course, is that in both cases the action is by the immediate transferor against his immediate transferee and it is to enforce covenants between the parties themselves and not equities which result from privity of estate.

Where the landlord prefers to sue for damages rather than to enforce his supposed right to have the estate forfeited, or where he prefers to evict the transferee of the lessee, the situation very closely resembles that in the O'Connell case, Supra, and we have seen how the court reacted in that situation. It is not therefore unlikely that the courts will so extend that reasoning and in all of these cases where the landlord is seeking either to forfeit or enforce his lease, that the transferring instrument will be regarded as a sub-lease rather than an assignment. The situation then boils down to this: that in nearly every case very slight differences in content between the transferring instrument and the main lease will suffice to constitute the latter a sub-lease rather than an assignment, particularly when the result will help to avoid forfeiture but that in the sole instance where the lessor is suing the transferee of the lessee in possession to enforce covenants in the original lease, this rule will be considerably relaxed and the instrument will be regarded in nearly every case as an assignment in order to enable the landlord to obtain the benefits of his property. P. L.

"CORPORATE VOTING TRUSTS—VALIDITY—BANKS"—In a recent case [1] which involved the validity of a voting trust agreement (under statute [2]) the material facts were, that in December 1924, certain stockholders of a

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[12] Gazley *v.* Williams, 210 U. S. 41 (1907).

[13] O'Connell *v.* Sugar Products Co., supra, note 1.

[1] National Liberty Insurance Co. *v.* Bank of America, 214 N. Y. Supp. 643 (Sup. Ct. 1926) rev'd, 217 N. Y. Supp. 67 (App. Div. 1926) Tompers *v.* Bank of America, ibid.

The two cases are identical with a very slight exception and were considered at the same time.

[2] Sec. 50 Stock Corporation Law in part, "A stockholder, by agreement in writing, may transfer his stock to a voting trustee or trustees for the purpose of conferring the right to vote thereon for a period not exceeding ten years. Every other stockholder may transfer his stock to the same