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Landlord and Tenant-Release of Tenant

LANDLORD AND TENANT—RELEASE OF TENANT—Appellant, on September 21, 1921, leased the premises in question to appellee Niezer & Co., for a period of three years, with the right of renewal for two additional years. The lease provided that "at the expiration of this lease peaceable possession of the premises shall be given to said first party in as good condition as they now are." The original lease to Niezer & Co. provided that the lessee should have no right to sublet; but later by separate written contract this provision was abrogated. Thereafter the right of renewal was exercised and on the same day Niezer & Co. transferred the premises to appellee Frank E. Oddou for the remainder of the term covered by the company's lease and delivered to Oddou the written lease it then held, although there was no written assignment of the lease, and no written contract between them. The rent was paid to appellant by Niezer & Co., November, 1924, after which time and until the expiration of the lease, Sept. 21, 1926, the rent was paid by Oddou directly to appellant. Three months before the expiration of the lease, appellant notified Niezer & Co. to deliver possession to him upon the expiration, and at the latter time made demand of Niezer & Co. and Oddou for possession which was refused. Appellant began this suit for possession and damages against Oddou and later by amended complaint made Niezer & Co. a party defendant, setting up the latter's agreement to return the premises in good condition at the expiration of the lease, its failure, and the consequent damage to appellant. Both appellees answered the complaint by a denial and Niezer & Co. also set up that they were released by an implied contract, in November, 1924, by appellant, who agreed at that time to look solely to Oddou as lessee of the premises. In support of this defense Niezer & Co. testified that after the property had been transferred to Oddou, appellant came to them to collect the rent and while there stated that he wanted to collect the rent directly and relieve them of all transactions in that regard. The trial resulted in a finding and judgment for appellant against Oddou and a judgment in favor of Niezer & Co. This appeal followed. *Held*: Reversed, with instructions to grant a new trial. *Klein v. Niezer & Co. et al.*, App. Ct. Ind., January 29, 1930, 169 N. E. 688.

The transaction between Niezer & Co. and Oddou constituted an assignment, since the entire interest of Niezer & Co. was transferred, the latter having no reversion, and the rent payable remaining the same. The statute of frauds is not operative since the assignment, though oral, was of a term for two years only. Tiffany's Landlord and Tenant, Vol. 1, Par. 151, Burns' Ann. St. 1926, Sec. 8045. It is generally established that the lessee, who before his assignment of the lease to a third person is bound by both the express and the implied covenants of the lease, continues after the assignment to be liable upon his express covenants therein, as if no assignment had been made, and that the assignee is liable to the lessor upon all the covenants which run with the land, for non-performance thereof while the estate is in him, the liability of the lessee after his assignment resting in privity of contract, and that of the assignee resting in privity of estate and continuing only while such privity exists. *Heller v. Dailey et al.*, 28 Ind. App. 555; *Edmonds v. Mounsey*, 15 Ind. App. 399; *Breckenridge v. Parrott*, 15 Ind. App. 411; *Keith v. McGregor*, 259 S. W. 725, 163 Ark. 203; 5 Elliott Contract, Par. 4574. Upon such assignment, although the assignee

becomes liable upon the express covenants of the lessee which touch and concern the land, the lessee remains liable on such covenants as well as on others for the reason that one who has subjected himself to a contractual liability cannot divest himself thereof by his own act. *Jordan v. Indianapolis Water Co.*, 159 Ind. 337, 64 N. E. 680; *Rector v. Hartford Deposit Co.*, 191 Ill. 380, 60 N. E. 528; *Powell v. Jones*, 50 Ind. App. 493, 98 N. E. 646; *Wineman v. Phillips*, 93 Mich. 223, 53 N. W. 168; Tiffany, Landlord and Tenant, Par. 157. The covenant to give over possession of the premises at the expiration of the lease "in as good condition as they now are" being an express covenant, both lessee and assignee are therefore liable thereon, unless the lessees were relieved from liability by release as they claim. It is not controverted that there is no express contract of release, and it is well established that an implied contract grows out of the intention of the parties, and that there must be a meeting of the minds. *Western Oil Refining Co. v. Underwood*, 83 Ind. App. 488, 149 N. E. 85; *Boyd v. Chase*, 89 Ind. App. —, 166 N. E. 611; *Irwin v. Jones*, 46 Ind. App. 588, 92 N. E. 787. The evidence does not support the claim of an implied contract of release since no consideration for the alleged release is shown, and it appears that the appellant did not know of the assignment until November, approximately four months after Oddou had taken possession, when the conversation in reference to the payment of rent is said to have taken place. It was not necessary for appellant to give the notice to quit since where the time is definite and certain in a lease, it will expire by limitation, and no notice to quit is necessary; *Barrett v. Johnson*, 27 N. E. 983, 2 Ind. App. 25; *Mason v. Kempf*, 38 N. E. 230, 11 Ind. App. 311; *Millington v. O'Dell*, 73 N. E. 949, 35 Ind. App. 225; but the fact that said notice was sent, and sent to Niezer & Co., is another circumstance showing that there was no meeting of the minds of the parties on a contract to release Niezer & Co.

K. J. M.