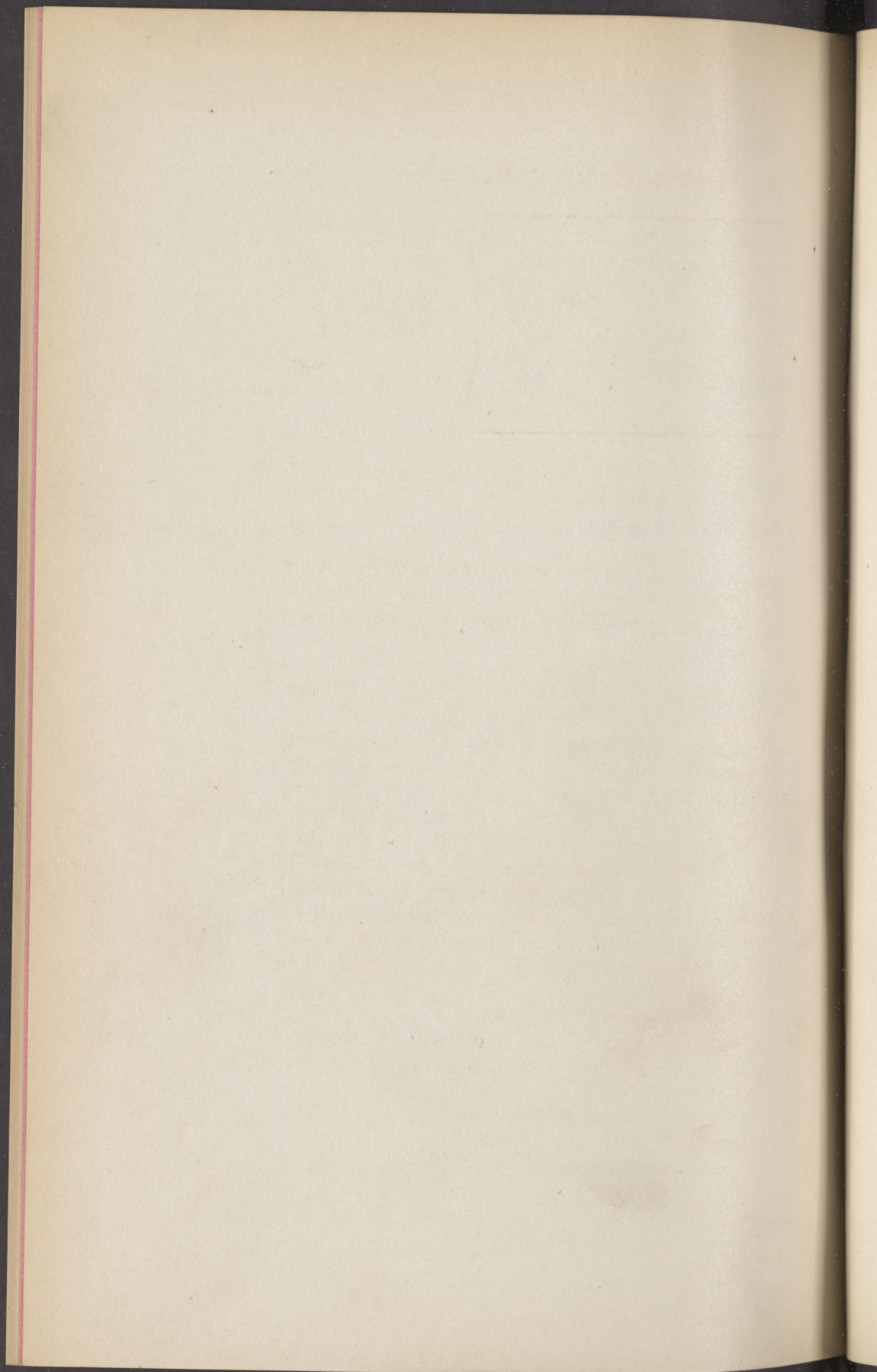


## INDEX

Statement of Case on Appeal .....	3
State of Demand .....	5
Lease .....	7
Consent to Assignment .....	12
Assignment of Lease by Cornelius De Jong.....	13
Assignment of Lease by Alliance Investment Company .....	14
<i>Wise</i> .....	<i>14A</i>
Stipulation .....	15
Opinion by Judge Charles L. Carrick .....	16
Opinion by Judge Swayze .....	18



First District Court of Jersey City

ISIDORA R. A. MEYER  
AND JOHN F. C. MEYER,  
*Plaintiffs,*  
*vs.*  
ALLIANCE INVESTMENT COM-  
PANY, A CORPORATION OF NEW  
JERSEY,  
*Defendant.*

STATE OF  
THE CASE

10

The parties hereto, by their respective Attorneys, submit the following as a state of the case for appeal.

1. Plaintiffs gave a lease to Cornelius de Jung for the premises known as No. 134 River Street, in the City of Hoboken, New Jersey, dated September 22, 1911. 20

2. The said lease contained a clause as follows: "And the party of the second part further cove-  
nants and agrees not to assign this lease without  
the written consent of the party of the first part  
first had and obtained."

3. On September 22d, 1911, Plaintiffs gave their written consent to the assignment of the lease in following form: "We hereby consent to the assign- 30  
ment of the foregoing Lease to the Alliance In-  
vestment Company, a corporation, subject to all  
the terms, conditions and covenants contained in  
said lease.

"Dated September 22, 1911.

"Isidora R. A. Meyer,

"John F. C. Meyer.

"Witness:

"J. W. Rufus Besson."

40

*Statement of Case on Appeal*

4. On September 22, 1911, de Jong assigned the said lease to defendant by a general form of assignment, a copy of which assignment is below set forth.

5. The defendant's Attorney was present and knew of the form of the consent endorsed on said  
10 lease.

6. The said lease was assigned back to deJong by defendant before the rent sued for in this suit became due, without the written consent of the lessors.

7. On November 1, 1912, the sum of \$283.33 became due as rent under said lease for the month of  
20 November, 1912, and is still unpaid.

Judgment was entered for the plaintiffs and against the defendant for the sum of Two Hundred Eighty-Three Dollars and Thirty-Three cents (\$283.33).

30

40

# First District Court of Jersey City

Honorable Charles L. Carrick, Judge.

ISIDORA R. A. MEYER  
AND JOHN F. C. MEYER,  
*Plaintiffs,*

*vs.*

ALLIANCE INVESTMENT COM-  
PANY, A CORPORATION OF NEW  
JERSEY,  
*Defendant.*

STATE OF  
DEMAND. 10

1. On the twenty-second day of September, nine-  
teen hundred and eleven, plaintiffs and one Corne-  
lius de Jong, executed a lease under seal of the 20  
premises known as 134 River Street, Hoboken, New  
Jersey, of which a copy is annexed hereto.

2. By the terms of said lease, the said defendant,  
Cornelius de Jong, for himself, his heirs, executors,  
administrators and assigns, covenanted and agreed  
not to assign the said lease without the written con-  
sent of the plaintiffs, Isidora R. A. Meyer and John  
F. C. Meyer, first had and obtained.

30

3. On the twenty-second day of September, nine-  
teen hundred and eleven, the said Isidora R. A.  
Meyer and John F. C. Meyer, gave their written  
consent to the assignment of the said lease to the  
Alliance Investment Company, in the following  
form:

“We hereby consent to the Assignment of  
“the foregoing Lease to the Alliance Invest-  
“ment Company, a corporation, subject to all

40

*State of Demand*

“the terms, conditions and covenants contained  
“in said lease.

“Dated: September 22, 1911.

“Isidora R. A. Meyer,

“John F. C. Meyer.

“Witness:

“J. W. Rufus Besson.”

10

4. On the twenty-second day of September, nineteen hundred and eleven, Cornelius De Jong, assigned by written assignment to the Alliance Investment Company, a corporation, the said lease above referred to, which assignment was recorded in the Hudson County Register's Office on the twenty-seventh day of September, nineteen hundred and eleven.

20

5. On the first day of November, nineteen hundred and twelve, the monthly payment of two hundred and eighty-three dollars and thirty-three cents (\$283.33) became due and is still unpaid plaintiff demands as damages \$283.33 and interest from November first, nineteen hundred and twelve, together with costs of suit.

BESSON, ALEXANDER & STEVENS,

*Attorneys for Plaintiffs*

30

40

6

*Lease*

THIS INDENTURE, made the twenty-second day of September, one thousand nine hundred and eleven,

BETWEEN ISIDORA R. A. MEYER and JOHN F. C. MEYER, her husband, of the City of Hoboken, in the County of Hudson and State of New Jersey, party of the first part, 10

AND CORNELIUS DE JONG, of the City of Hoboken, in the County of Hudson and State of New Jersey, party of the second part,

WITNESSETH: That the said party of the first part, have let and by these Presents do grant, demise and to farm let, unto the said party of the second part:

20

ALL that a certain house and lot situate on the southwest corner of River and Second Streets, in the City of Hoboken, County of Hudson and State of New Jersey, known as No. 134 River Street, to be used as and for a hotel; for the term of five (5) years, from the first day of May, nineteen hundred and twelve, at the yearly rent or sum of Three thousand four hundred dollars (\$3,400.) to be paid in equal monthly payments in advance, that is to say, Two hundred and eighty-three dollars and thirty-three cents (\$283.33) on the first day of each month during said term. The party of the second part also to pay all water rents assessed and levied on the said premises during said term, at the several times when they become due and payable, and also to pay the insurance on the plate-glass in the store windows and all doors on ground floor, as a part of the rent for said premises in addition to the yearly rent above mentioned. 30

40

*Lease*

AND it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises, and to remove all persons therefrom.

10 AND the said party of the second part does covenant to pay to the said party of the first part, the said yearly rent as herein specified, to wit: Three thousand four hundred dollars (\$3,400.) per annum, in equal monthly payments of Two hundred and eighty-three dollars and thirty-three cents (\$283.33) in advance on the first day of each month during said term; and also to pay all water rents assessed and levied on said premises at the times when the same become due and payable, and also  
20 to pay the insurance premiums for insuring the plate-glass in the store windows and store and all doors on the ground floor against breakage; and in case of default in payment of such water rents and insurance premiums aforesaid, the party of the first part may pay the same and collect the amount or amounts so paid by distress or otherwise, as a part of the rent of said premises.

AND that the expiration of the said term, the  
30 said party of the second part will quit and surrender the premises hereby demised, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

AND the party of the second part agrees to keep said building (including the roof) erected on said premises in good repair during said term and to replace all windowpanes broken in said house at his own expense, except in case of fire as hereinafter  
40 mentioned.

*Lease*

AND it is agreed between the parties to these presents that in case the building erected on said premises should be injured by fire, but not destroyed, the party of the first part shall cause the same to be repaired as soon as conveniently may be; and in case the said building should be rendered entirely untenable by reason of fire, said rent shall abate until the same shall be repaired and restored 10  
tenable again.

AND the party of the second part further covenants and agrees not to assign this lease without the written consent of the party of the first part first had and obtained; and that the store shall not be used for any other purpose than as and for a wine and lager beer saloon; and that the floors above are only to be used for hotel purposes. 20

The party of the second part further covenants and agrees not to make any alterations without the consent of the party of the first part in writing, and if any alterations be made they shall remain the property of the party of the first part at the end of the term.

AND the party of the second part further covenants and agrees to keep the sidewalk and gutter in front of the premises clean and free from ice and snow, also to comply with all City Ordinances and other municipal rules and regulations; also to permit the party of the first part or his agent to show the premises to persons wishing to hire or lease or purchase, and on and after the first day of February next preceding the expiration of the term will permit the usual notices of "To Let" or "For Sale" to be placed upon the walls, doors or windows 40  
9

*Lease*

of said premises and remain thereon without hindrance or molestation.

10 THE party of the second part agrees to deposit with the party of the first part seven hundred and fifty dollars (\$750.) the receipt of which is hereby acknowledged, as security for the performance of the several above mentioned covenants on his part, the same to be returned to said party of the second part with interest at the rate of five (5) per cent. per annum, said interest to be paid on the first day of May of each year of said term, provided he has observed and performed all of said covenants on his part, otherwise to be absolutely forfeited.

20 AND it is further agreed that the party of the second part shall have the option of extending this lease for a further period of three (3) years, at an annual rent of three thousand six hundred dollars (\$3,600.), provided six months' notice in writing be given by the party of the second part to the party of the first part, on or before the first day of November, nineteen hundred and sixteen, of his intention so to do.

30 AND the said party of the first part does covenant that the said party of the second part, on paying the said yearly rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

40 IT is further agreed that the covenants and agreements herein contained shall apply to and bind the heirs, executors, administrators and assigns, of the respective parties thereto.

*Lease*

IN WITNESS WHEREOF, the said parties  
hereto have hereunto set their hands and seals the  
day and year above written.

Signed, sealed and delivered  
in the presence of  
J. W. RUFUS BESSON.

10

Isidora R. A. Meyer, (LS.)  
John F. C. Meyer, (LS.)  
Cornelius de Jong (LS.)

20

30

11

40

*Consent to Assignment*

STATE OF NEW JERSEY, }  
HUDSON COUNTY. } ss.

BE IT REMEMBERED, that on this 22nd day of September, A. D. one thousand nine hundred and eleven, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared 10 ISIDORA R. A. MEYER and JOHN F. C. MEYER, her husband, and CORNELIUS DE JONG, who I am satisfied are the persons named in and who executed the foregoing Instrument, and I having first made known to them the contents thereon, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

AND the said ISIDORA R. A. MEYER, being 20 by me privately examined, separate and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

J. W. RUFUS BESSON,  
*Master in Chancery*  
*New Jersey.*

WE HEREBY CONSENT, to the Assignment of 30 the foregoing lease to the ALLIANCE INVESTMENT COMPANY, a corporation, subject to all the terms, conditions and covenants contained in said lease.

Dated: September 22, 1911.

ISIDORA R. A. MEYER.  
JOHN F. C. MEYER.

Witness:

J. W. RUFUS BESSON.

*Assignment of Lease by Cornelius De Jong*

ASSIGNMENT OF LEASE by Cornelius De Jong to Alliance Investment Company.

For value received I, Cornelius De Jong, do hereby assign, transfer and set over unto Alliance Investment Company, a corporation of New Jersey, this lease made by Isidora R. A. Meyer and husband to me, and all my estate and term of years yet to come in the premises therein described, also any and all right of renewal therein and thereof to have and to hold the same unto the said Alliance Investment Company, a corporation of New Jersey, its successors or assigns for the residue of the term therein mentioned, and I acknowledge that from this date I hold and possess said premises as the monthly tenant of the said assignee at the monthly rent of two hundred and eighty-three 33-100 dollars, and water charges which I am to pay to the said lessor in the said assigned lease until requested by the said assignee to pay it to said assignee and thereafter I am to pay the same to the said assignee also that my tenancy of said premises is terminable by said assignee at any time on thirty days notice.

WITNESS my hand and seal,

Dated September 22, 1911.

CORNELIUS DE JONG, (LS.)

Witness:

JOHN A. MILLER.

30

*Assignment of Lease by Alliance Investment  
Company*

ASSIGNMENT OF LEASE by Alliance Invest-  
ment Company to Cornelius De Jong.

For value received, we hereby assign, transfer  
and set over unto Cornelius De Jong, of the City of  
Hoboken, County of Hudson and State of New Jer-  
sey, a certain lease made by Isidora R. A. Meyer  
10 and John F. C. Meyer, of the City of Hoboken,  
County of Hudson and State of New Jersey, to Cor-  
nelius De Jong, dated the twenty-second day of Sep-  
tember, A. D., 1911, running term of five (5) years,  
from first day of 1912, covering all the (description  
of property), and recorded in book 1106 of deeds  
for the said County of Hudson on page 270 which  
lease was assigned to us on the twenty-second day  
of September, 1911, also all our estate, term of  
20 years yet to come in the premises therein described,  
to have and to hold the same unto the said Corne-  
lius De Jong, his executors, administrators or as-  
signs for the residue of the term therein mentioned.

WITNESS our hands and seals, etc.

30

40

14

# New Jersey Supreme Court

ISIDORA R. A. MEYER, ET AL., <i>Plaintiffs,</i>	} On Appeal from the First Dis- trict Court of Jer- sey City.
<i>vs.</i>	
ALLIANCE INVESTMENT COM- PANY, <i>Defendant.</i>	} NOTICE. 10

To JOHN A. MILLER,  
*Attorney for Defendant.*

TAKE NOTICE, that the plaintiffs appeal to the Court of Errors and Appeals, from the judgment of the Supreme Court entered in this cause and every part thereof, on the following grounds: 20

1. That the Supreme Court reversed the judgment of the First District Court of Jersey City, whereas it should have affirmed the same.

2. That the said Supreme Court held that the plaintiffs were not entitled to a recovery against the defendant.

BESSON, ALEXANDER & STEVENS, 30  
*Attorneys of Plaintiffs.*

THE GREAT BRITISH EMERALD

THE GREAT BRITISH EMERALD

THE GREAT BRITISH EMERALD

THE GREAT BRITISH EMERALD

THE GREAT BRITISH EMERALD

THE GREAT BRITISH EMERALD

THE GREAT BRITISH EMERALD

THE GREAT BRITISH EMERALD

THE GREAT BRITISH EMERALD

THE GREAT BRITISH EMERALD

The following documents were admitted by the plaintiffs and defendant:

**First District Court of Jersey City**

ISIDORA R. A. MEYER AND JOHN F. C. MEYER, <i>Plaintiffs,</i>	}	STIPULATION	
<i>vs.</i> ALLIANCE INVESTMENT COM- PANY, A CORPORATION OF NEW JERSEY, <i>Defendant.</i>		On Contract.	10

It is admitted by the plaintiff and defendant:—

1. The lease as annexed to the State of Demand.
  2. Consent as endorsed on the lease.
  3. Assignment by lessee to defendant (marked 3).
  4. Assignment by defendant to lessee, De Jong, (marked 4).
  5. The rent sued for accrued after the re-assignment.
- 20

BESSON, ALEXANDER & STEVENS,  
*Attorneys for Plaintiffs,*

JOHN A. MILLER,  
*Attorney for Defendant.* 30

It was further admitted at the trial that the above documents marked 1, 2 and 3 above set out were signed and delivered at the same time.

OPINION of Honorable Charles L. Carrick,  
Judge, First District Court of Jersey City.

ISIDORA R. A. MEYER  
AND JOHN F. C. MEYER,  
*Plaintiffs,*

*vs.*

ALLIANCE INVESTMENT COM-  
PANY, A CORPORATION OF NEW  
JERSEY,  
*Defendant.*

Case No. 83492.  
MEMORANDUM

10

The question here is whether the defendant's only relation to the plaintiffs was by privity of estate, in which case the re-assignment of the lease to De Jong released it from further liability; or whether the transactions at the time when the lease was signed by De Jong to the defendant constituted a contract between the defendant and the plaintiffs, whereby the defendants became liable for the rent thereafter accruing under the lease.

20

The facts are conceded! The consent by the landlords to the assignment by their tenant was expressly subject to all the terms, condition and covenants contained in the lease. The defendant by its agents was present at the time, knew of the necessity for the landlords' consent and the terms upon which it was given, and took the assignment with that knowledge. The assignment was made at the same time. It was essentially one transaction. The defendant might have disclaimed the assignment on the terms prescribed by the landlord, and have elected to hold possession, without the landlords' consent. In such case there would have been no privity except that of estate. I think, however, that by taking part in the transaction in which the landlords made known their intention to hold

30

40

*Opinion by Judge Carrick*

the assignee to the terms, conditions and covenants of the lease (which is the plain meaning of the language used), the assignee must be held to have assented to those terms and to have established a contractual relation with the landlord. The situation is, I think, analogous to that of a grantee of real property who is bound by the covenants and restrictions of a deed accepted by him, although he 10 does not sign the deed.

Let judgment be entered for \$283.33.

CHARLES L. CARRICK,  
*Judge.*

20

30

17

40

## New Jersey Supreme Court

---

ISIDORA R. A. MEYER  
AND JOHN F. C. MEYER,

*vs.*

ALLIANCE INVESTMENT COM-  
PANY,

---

10

Argued February 19, 1913. Decided June 19, 1913.

Appeal from First District Court of Jersey City

Before Justices Garrison, Swayze and Minturn

J. W. Rufus Besson for Plaintiffs.

20

John A. Miller for Defendants.

The opinion of the Court was delivered by Swayze, Judge.

The plaintiffs leased property to De Jong by a written lease which contained a covenant to pay the rent and a covenant not to assign without the written consent of the lessors. The lessors did consent in writing to an assignment by De Jong to the defendant. This consent was subject to all the terms, conditions and covenants contained in the lease. Subsequently the defendant reassigned to De Jong, but to this assignment there was no written consent. This action is for rent that accrued after the attempted reassignment. The defense is that there was no privity of contract between plaintiffs and the defendant, and that as the privity of estate terminated by the reassignment, the defendant is no longer liable to pay the rent, but the plaintiffs must

40

*Opinion by Judge Swayze*

look to De Jong. The plaintiffs had judgment for one month's rent which accrued after the reassignment to De Jong.

The claim of the plaintiffs to recover rent of the defendant rests upon the words of the consent "subject to all the terms, conditions and covenants contained in said lease." As Lord Denman said in a similar case: "these are words of qualification and not of contract." *Wolveridge v. Steward*, 1 Crompt. & M. 644. The case is similar to a conveyance of land subject to a mortgage. The grantee is not personally bound unless there are words equivalent to an assumption of the mortgage. There is nothing to add to the argument by which the result in *Wolveridge v. Steward* was vindicated in the Exchequer Chamber. The only suggestion that can be made to the contrary is that inasmuch as the lease contained a covenant not to assign without consent and the present defendant took subject to that covenant, it was not possible for it to terminate the privity of estate and its own liability arising therefrom by an assignment without consent since that would enable it to take advantage of its own wrong. But the law is settled that a lease may be so assigned as to terminate the privity of estate notwithstanding the covenant not to assign. *Paul v. Nurse*, 8 B. & C. 486. *Taylor on Landlord and Tenants* 680, 24 Cyc. 984, note 45.

We think the trial judge erred in giving the plaintiffs judgment for rent that accrued after the reassignment and the judgment must be reversed and the record remitted for further proceedings.

C  
:  
I  
a  
C  
I  
I  
c  
M  
c  
a  
V  
6

C  
T

# New Jersey Court of Errors and Appeals

ISIDORA R. A. MEYER, ET. AL.,  
*Plaintiffs,*

*vs.*

ALLIANCE INVESTMENT COM-  
PANY, A CORPORATION  
*Defendant.*

ON  
CONTRACT

10

## BRIEF FOR PLAINTIFFS.

The question to be determined is whether the acceptance by the defendant of the consent to the assignment of the lease created a privity of contract between the plaintiffs and defendant. 20

The Judge of the District Court found that such a privity of contract existed. (Pages 16 and 17 of case).

The Supreme Court reversed the judgment of the District Court on the ground that there was no privity of contract, and based its opinion upon the case of *Wolveridge vs. Steward*, 1 Crompton and Meeson, 644. (Pages 18 and 19 of case). In that opinion the learned Justice on line 9, page 19, said, 30  
"as Lord Denman said *in a similar case*" quoting *Wolveridge vs. Steward*, 1 Crompton and Meeson, 644.

### I.

THE SUPREME COURT ERRED IN DECLARING THE CASE AT BAR SIMILAR TO THE CASE OF *WOLVERIDGE vs. STEWARD*.

This case is not a similar case. In *Wolveridge* 40

vs. Steward, the words referred to were part of the *habendum* clause of an assignment of lease and the action ~~and~~ was brought by the lessee against the assignee. In order that the Court may have clear understanding of what were the facts, we hereby submit the full opinion in *Wolveridge vs. Steward*.

10      **WOLVERIDGE vs. STEWARD, 1 CROMPTON AND MEESON, 644-655—DENMAN, C. J.**

This case comes before the Court on a writ of error from the Court of Common Pleas. It is an action of covenant brought by the defendant in error on an indenture of assignment of a term of years. The declaration states the original lease from the lessor to the defendant in error, for twenty-one years from March, 1820, containing a covenant to pay rent quarterly and that, by indenture executed by the plaintiff and defendant the defendant in error assigned to the plaintiff in error, his executors, etc., the said indenture of lease and the demised premises and all the estate, right, title, and interest, term of years, then to come and unexpired, property, claim and demand of the defendant in error, by virtue of the said indenture of lease, etc., therein to have and to hold the said lease together with the said premises by the same demised and by the said assignment assigned to the plaintiff in error his executors, administrators and assigns during all the rest and remainder of the said term of twenty-one years granted by the said indenture of lease then to come and unexpired. "Subject nevertheless to the payment of the yearly rent, and the performance of the covenants and agreements reserved and contained in the said indenture of lease"; and that the plaintiff in error accepted the said assignment and entered. The declaration then assigns as a breach, the non-pay;

20

30

40

ment of rent due after the assignment, by reason whereof the defendant in error was obliged to pay the amount.

The plaintiff in error pleaded several pleas on which issue was joined and found against him, and one plea, viz: that before the rent became due he assigned over, to which plea there was a demurrer and joinder on which judgment was given by the Court of Common Pleas for the defendant in error. The question in this case is, whether the plaintiff in error is liable to the defendant in error for non-payment of rent due after he had assigned over; and that depends upon the further question, whether the words "Subject nevertheless to the payment of the yearly rent, etc.", amount to a covenant to pay the rent during the whole residue of the unexpired term. If they do the judgment of the Court below ought to be affirmed; if they do not, it ought to be reversed. We are of the opinion that they do not.

It is fully established that no precise form of words is necessary to constitute a covenant. "Any words in a deed which *show an agreement* to do a thing make a covenant" [(a) Com. Dig. Covenant A. 2.); *but it must be clear that they are meant to operate AS AN AGREEMENT* and not merely as words of condition or qualification (b) Com. Dig. Covenant A. 3.)] Are then the words in question meant to be used as words of agreement between the assignor and assignee, or words of qualification to modify and restrain the generality of the words which precede, and to express clearly the intention of the assignor, not to assign an absolute term, but a term subject to all the obligations toward the lessee, to which it was originally liable?

To determine this we must look at the indenture

as stated on record and observe in what part the words occur; they come after the *habendum* and constitute part of it; though the indenture contains the language of both parties, in the granting part, the words are those of the grantor which are to be taken most strongly against himself and therefore it was material for him to qualify the grant, that he might not be considered as conveying any greater estate than he really intended; this is properly done *in the habendum*. Its office is to limit the certainty of the estate (c) Co. (Litt. 6 A.) "it doth qualify the general intendment of the premises; and the reason for this is, for that it is a maxim of law that every man's grant shall be taken by construction of law most forcible against himself" [(d) Co. Litt. 183 a, see also Hale 171; Stukley vs. Butler, Com. Dig. Fait E. 9]. *As these expressions, therefore occur in that part of the deed in which they ought to be if their object was merely to qualify and abridge the generality of the granting part it is highly probable that they were intended for that effect only; and some instances were adduced by the learned counsel for the plaintiff in error, where similar words occurring in the same part of the deed could not possibly have any other signification. For example, the assignment of a lease by way of mortgage, and the conveyance of an estate subject to a mortgage or, an incumbrance, to a second mortgagee, or of a purchaser, where it is impossible that these words could constitute a covenant by the mortgagee to pay the rent in the one case, or by the second mortgagee or purchaser to pay off the mortgage or incumbrance in the order.*

It may be said, however, that in these instances, the context and subject matter of the instrument lead to the inference that no covenant was intended

by these words, but that in the present case no such inference arises; and the same words, in different instruments, may have different meanings. This may be true, but it lies upon the defendant in error to show affirmatively that the words amount to an agreement with him to pay the rent and perform the covenants; and is there anything in this indenture which tends to prove that they were meant to be used in any other sense than that which would naturally be attributed to them *in the place in which they occur*; on the contrary, if the assignor really intended that the assignee should covenant with him to pay the rent and perform every covenant during the term, and thus become liable, not only for his own defaults, but for those of subsequent assignees and the assignee really intended also to bind himself to that extent is it not to be expected that they would have expressed themselves in distinct unambiguous language? Especially as it is the usual practice in cases of this kind, where such liability is intended, for the assignee to enter into bond or an express covenant of indemnity with the assignor against the covenant in the original lease. It was a very just remark made by counsel for the plaintiff in error, that it is the duty of a party who intends to bind another by a covenant in a former formal instrument, to insert it in that instrument, in distinct and intelligible terms by which the party to be bound cannot be deceived and not to call upon the Court to infer such a covenant from words which are at least equivocal, and which one party may never have meant to use in the sense ascribed to them by the other. For these reasons, we think that the proper construction of this indenture is, that these are words of qualification and not of contract; and if the question were entirely new, we should adopt that con-

10  
20  
30  
40

struction. We have, however, the authority of the Court of King's Bench, in a case which is not reported, the particulars of which have been furnished by my brother, James Parke, who was counsel in it—*Mills vs. Harris*, Michaelmas Term, 1820. It was an action of *assumpsit* by the assignor against the assignee of a lease, who had accepted but not executed the assignment, for not repaying to the assignor the rent which he had been obliged to pay, after the assignee had assigned over. The deed contained similar words to those in this instrument. Lord Tenterden non-suited the plaintiff on the trial at the sittings before Michaelmas Term, 1820. On a motion for a new trial the Court confirmed his Lordship's decision by refusing a rule, on the ground that these were not words of agreement but were merely descriptive of the obligations to which the assignee would be liable *as between him and the lessor*. It remains only to make some observations on the cases relied upon by the defendant in error. That of *Burnett vs. Lynch* [(a) 5 B. and C. 589,] proceeds upon the ground that, during *the continuance of the interest of the assignee*, there is a duty to pay the rent and perform the covenants. Bayley, J., in giving judgment, states, that the duty is commensurate with the time during which the assignee has an interest in the premises. This duty, we think, would arise from the mere relation between the parties, without any such words as those now under consideration; for the effect of the assignment is, that the lessee becomes surety to the lessor for the assignee, who, as between himself and the lessor is the principal, bound whilst he is assignee, to pay the rent and perform the covenant running with the estate; and the surety after paying the debt, or discharging the obligation to which he is liable, has his remedy over against the princi-

pal, and he would also in all probability, have the same remedy over against each subsequent assignee, in respect of breaches committed during the continuance of the interest of each, for the lessee is, in effect, a surety for each of them to the lessor. The case of Chancellor vs. Poole [(a) Dong. 767], was also mentioned in which Lord Mansfield said "that there was a covenant by the defendant for paying the rent in the deed poll, but it was with the *lessee*. There, however, the words of the instrument were very different, they were these, "the assignee paying the rent and performing the covenants and indemnifying the lessee against the same," which last words were incapable of being construed as qualifying the generality of the granting part and could have no other effect than an agreement on the part of the assignee with the assignor. For these reasons we think that the judgment of the Court of Common Pleas ought to be reversed.

10

20

Judgment reversed.

By this opinion it is clearly shown that the question to be determined is whether the words as used in the place in which they occur create an agreement.

## II.

30

The defendant by accepting the consent of the plaintiffs covenanted with the plaintiffs that it would comply with "all the terms, conditions and covenants contained in said lease," including the payment of the rent by the defendant to the plaintiffs.

BURNETT vs. LYNCH—5 B. & C. 589—Abbott, C. J.—"A lease had been granted to Sir Robert 40

Burnett whereby he had covenanted to pay rent and perform other covenants in the lease. The plaintiffs (his executors) afterwards assigned that lease to Lynch the defendant and by the terms of that assignment, Lynch was to hold, subject not only to the payment of the rent but to the performance of the covenants. It is true he entered into no express  
 10 covenant or contract that he would pay the rent and perform the covenants. *But he accepted the assignment* subject to the performance of the covenants and we are first to consider whether any action will lie against him. If we should hold that no action will lie, this consequence will follow, that a man having taken an estate from another, subject to the payment of rent, and the performance of the covenants and having thereby induced an understanding in that other, that he would pay the rent  
 20 and perform the covenants will be allowed to cast that burden upon another person. Reason and common sense show that never could have been intended; and if the law of England allowed any such consequence to follow, in that case it would cease to be a rule of reason.

“Then will an action of *assumpsit* lie? I think it would.”

30

## III.

By accepting this consent the defendant became the actual lessee as shown by the covenants contained in the assignment of lease by Cornelius De Jong to Alliance Investment Company (page 13 of case).

## IV.

40 The consent was a conditional consent and the

consideration for it was the agreement by the defendant to comply with "all the terms, conditions and covenants contained in said lease" when said consent was accepted and acted upon.

## V.

The wording of the consent clearly means that the plaintiffs will accept the defendant as its tenant under the lease, provided the defendant assumes "all the terms, conditions and covenants contained in said lease", and which the defendant by accepting said consent did assume. 10

## VI.

The lease contains the following clause (line 36 page 10 of case) ; "It is further agreed that the covenants and agreements herein contained shall apply to and bind the heirs, executors, administrators and assigns, of the respective parties hereto." 20

This clause under the decision cited by the Supreme Court Justice and by the counsel for the defendant would indicate that the action would lie under the lease itself.

PAUL vs. NURSE—1828. 8 BARNEWALL & CRESSWELL, 486; Bayly, J. 30

This action being founded on privity of estate, the obligation of the defendants to perform the covenant arose only from their filling the particular character of assignee of the estate, which the lessee had under the lease. As soon therefore as they ceased to be assignees, their obligation to perform the covenant was at an end. The plaintiff's remedy is by an action on the covenant not to assign. Besides it may admit of some doubt whether the defendant is within the covenant, for the lessee only 40

covenants that he, his executors or administrators, will not assign. The judgment of the Court must be for the defendant.

Judgment for the defendant.

We therefore respectfully submit that the judgment of the Supreme Court be reversed and the  
10 judgment of the First District Court of Jersey City be affirmed.

J. W. RUFUS BESSON,  
*of Counsel.*

BESSON, ALEXANDER & STEVENS,  
*Attorneys for Plaintiffs.*

20

30

40

## New Jersey Court of Errors and Appeals

ISADORA R. A. MEYER, <i>et al</i> ,	}	<i>Plaintiffs,</i>
vs.		
ALLIANCE INVESTMENT COMPANY,	}	<i>On Contract.</i>
a corporation,		
		<i>Defendant.</i>

### Brief for Defendant.

The question in the case is whether under the terms of the lease, the words of the consent, the assignment to the defendant, and the defendant's assignment back to De Jong, we are liable for the payment of the rent accruing after the assignment back to De Jong.

All the facts are admitted by both sides; including knowledge on the part of the defendant of the wording of the consent.

#### I.

An assignee of a lease is only liable for rent as long as he remains assignee, and he may discharge himself from liability by assigning the term.

*Wood on Landlord and Tenant* (1881), page 552, Section 340.

*Armstrong vs. Wheeler*, 9 Cowan, 86.

*Child vs. Clarke*, 3 Barb. Chy., 52.

*Wood on Landlord and Tenant*, Section 349, page 557.

*Amer. Eng. Ency. of Law*, Vol. 32, Column 267.

*Johnson vs. Shermann*, 15 California, 287.

76 American Decisions, 481.

*Tiffany on Landlord and Tenant*, page 969, Section 158.

Same Section, page 987.

*Donaldson vs. Strong*, 195 Mass., 429, 81 N. E., 267.

*Paul vs. Nurse*, 8 Barn. & C., 486.

*McCormack vs. Stowell*, 138 Mass., 431.

*Mason vs. Smith*, 131 Mass., 510.

## II.

He may do this, that is re-assign, without the consent of the lessor, notwithstanding the lease contains a covenant not to assign without consent.

*Wood on Landlord and Tenant*, Section 349, 557.

## III.

When consent is once given, no further consent for further assignments is necessary.

*West Shore vs. Winner*, 70 N. J. Law, 233.

## IV.

In the assignment by De Jong to the Alliance Investment Company, there is no covenant or contract to pay rent. It is a plain assignment of the term of the lease.

In the consent to the assignment endorsed on the lease, there is an attempt to make the assignee liable for the rent, where it says, "subject to all the terms, conditions and covenants contained in said lease."

Now, if that clause had been put into the assignment by De Jong to the Alliance Company, there might have been some ground for the argument, but it was not put there. The failure to put that into the assignment may place the assignment in the position of having been made without consent, for the terms of the consent were not complied with by the lessee.

It might make the assignment voidable, but no action was taken by the lessor to make the assignment void, and the lease is now back in the hands of the original lessee, so that the fault of the assignment is cured.

But the endorsement of the consent on the lease, not incorporated into the assignment, does not establish any privity of contract between the assignee and the lessor. For the assignee made no contract—made no promise in that assignment to pay the rent, he, the assignee, simply took the term without any promise. The lessor might annul the assignment, but he could not hold the assignee for the rent after the re-assignment.

The rent in this case, if it is to be collected from the defendant, must be either on the theory of privity of contract, or privity of estate.

Privity of contract cannot be assumed or implied by words in other instruments or verbal statements at the time.

Privity of estate has ceased by re-assignment of the lease; and no privity of contract exists.

In the event of it being considered that privity of contract might exist, we urge another point in this respect; namely—"The words 'subject to payment of rent reserved' in an assignment does not amount to a covenant, being words of qualification rather than contract."

*Amer.-Eng. Ency. of Law*, Volume 12, page 1033, Section 7. And Notes.

The consent in this case "subject to all, etc.," does not make a contract to pay, if only qualifies the consent to assign.

### V

The lease by re-assignment is now back in the hands of the original lessee. The lease was made to him by

the lessor; it is presumed that he trusted the lessor and was satisfied of his responsibility; no injury has been done the plaintiff.

JOHN A. MILLER,  
*Counsel for Defendant.*

807  
as

