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Transcript of Record.

Copy of Clerk's Docket.

EAST ORANGE DISTRICT COURT.

PASQUALE IARUSSI, Plaintiff, v. EAGLE. BREWING COMPANY OF NEWARK, N. J., a corporation, Defendant.	Plaintiff's Costs.

Summons	$2.10
Mileage	.24
Listing Fee	1.50
Attorney's Fee	3.70
Total Costs	$7.54

A summons in the above stated cause was issued on the sixth day of February, 1918, returnable on the fourteenth day of February, 1918, wherein the plaintiff demands of the defendant the sum of five hundred dollars.

The plaintiff filed state of demand February 28th, 1918.

The summons was served and returned as follows:

I served the within summons February 8, 1918, on Louis Lang, he being the manager in charge

of said Eagle Brewing Co., by reading it to him and giving him a copy thereof.

(Signed) A. S. OVERMILLER,
Sergeant-at-arms East Orange
District Court.

February 14, 1918. This case adjourned various times to April 18th, 1918.

April 18, 1918. The plaintiff and the defendant appearing, the cause was tried and determined at this time. Pasqual Iarussi, sworn for the plaintiff. Lease marked P. 1. Letter of September 4, 1917, marked P. 2. Letter of October 19, marked P. 4

Pasqual DiRollo, Oscar Beleschefsky and Chas. A. Scheffmeyer sworn for the defendant. Letters and checks D. 1, 2, 3, 4.

The evidence being closed the Court rendered judgment in favor of plaintiff and against the defendant in the sum of seventy-four dollars damages with costs, whereupon is entered in favor of the plaintiff and against the defendant in the sum of $74.00 damages with costs.

April 27, 1918. Notice of appeal and bond filed.

State of Case by District Court Judge.

EAST ORANGE DISTRICT COURT.
Case No. 16179.

PASQUALE IARUSSI, Plaintiff, v. EAGLE. BREWING COMPANY OF NEWARK, NEW JERSEY, Defendant.	On Contract. On Appeal. State of Case Settled by Court.

J. Victor D'Aloia, attorney of plaintiff.

Lintott, Kahrs & Young, attorneys of defendant.

The parties hereto, or their attorneys, having been unable to agree upon a state of the case for appeal, having applied to me, Judge of said court, within the time limited by law, I do hereby settle the case as follows:

This was an action brought by plaintiff to recover the sum of $74 alleged to be due for rent of premises No. 230 Academy Street, Newark, New Jersey, for the months of January and February, 1918, at $37 per month, in accordance with the terms of a written lease made June 1, 1915, between plaintiff and one Pasquale DiRollo, whereby plaintiff leased said premises to said DiRollo for a term of five years from June 1, 1915, at $37 per month rent, said lease being introduced in evidence by consent and marked Exhibit P. 1.

Plaintiff testified that Mr. Oscar B. Lisiewski representing the defendant company, had made the assignment of the lease and had explained to him that what he had signed was an assignment

of the lease; that up to November, 1917, DiRollo had paid the rent and on December 1, 1917, he demanded the rent from the Eagle Brewing Company; that DiRollo had paid $34 per month and explained that the brewery was to pay the rest; that the place was rented from March 1, 1918.

Defendant moved for a non-suit, which motion was denied and exception granted.

By way of defense Pasquale DiRollo was produced as a witness for the defendant and testified that he stayed in the saloon until November, 1917, and paid the rent up to that time. that the saloon was closed December 15, 1917, and he continued to live in the rear room until March, 1918; that the leases were signed at the office of the brewery; that Mr. Lisiewski said to him, "Sign the lease" and he signed it.

Oscar Lisiewski testified on behalf of the defendant that he had drawn the leases; that the parties came to the office of the Eagle Brewing Company to get said Brewing Company to put in the license for them; that both papers were drawn at the same time and that Mr. Iarussi read the paper and that he, Lisiewski, did not tell him it was an assignment of the leases; under cross examination witness testified that he told DiRollo that he was to assign the lease to the brewery as security and that he, DiRollo, signed his name on the paper.

Charles A. Scheffmeyer produced on behalf of the defendant, testified that the defendant never paid any checks to Iarussi, the plaintiff, nor did have any account with him. Under cross examination witness testified that Mr. Lisiewski drew up the leases for the Eagle Brewing Company.

The lease contains the following clause on page 2: "And it is further agreed between both par-

ties hereto that party of the second part shall have the right to assign this lease to the Eagle Brewing Company of Newark, N. J." Attached to the lease is a paper containing the following: "I hereby consent to the within lease being assigned by the within named party of the second part to the Eagle Brewing Company of Newark, N. J. Witnesseth (Signed) P. Iarussi, P. DiRollo." Attached to same was an acknowledgment signed by Oscar B. Lisiewski dated April 14, 1915.

I held that the above writing was an assignment of the lease although it was not worded strictly as an assignment should be. I so held for the reason that all the papers were signed on the same day and the lease already contained a clause whereby the right to assign same to the Eagle Brewing Company was reserved and no further writing was necessary to accomplish this, and furthermore, said Oscar B. Lisiewski, according to his own testimony, told DiRollo that the Brewing Company wanted the lease assigned to it as security and that thereupon DiRollo signed his name to the paper; that there was no other paper produced in evidence except P. 1 bearing the signature of Pasquale DiRollo, and therefore I concluded that the signature made by DiRollo after Oscar B. Lisiewski had told him the Brewing Company wanted the lease assigned to it, was the one that appeared on the paper attached to the lease, which plaintiff contends is an assignment of the lease.

I, accordingly held that the lease had been duly assigned to the defendant and that they were liable for the payment of the rent due thereunder,

and gave judgment for the plaintiff for the sum of $74.

Case settled and signed by me this tenth day of July, nineteen hundred and eighteen.

CHAS. B. CLANCEY,
Judge of East Orange
District Court.

Attest:
Arthur G. Smith,
Clerk.

Reasons for Reversal.

NEW JERSEY SUPREME COURT,

PASQUALE IARUSSI, Plaintiff-Appellee, *v.* EAGLE. BREWING COMPANY OF NEWARK, NEW JERSEY, Defendant-Appellant.	On Appeal from District Court. Specification of Determination with which Appellant is Dissatisfied in Point of Law.

The following is a specification of the determination of the District Court with which appellant is dissatisfied in point of law.

1. Appellant made a motion for judgment of non-suit upon the ground that the plaintiff failed to show any privity of contract between plaintiff and defendant upon which a judgment for plaintiff could be based.

2. Appellant made a motion for judgment of

non-suit upon the further ground that plaintiff had failed to make out a cause of action against defendant.

The court denied the motion, which was error.

3. That the court erred in permitting evidence to be introduced by plaintiff in order to vary the terms of a written agreement.

4. There was no evidence adduced in the cause to show privity of contract between plaintiff and defendant. The lease in question was never assigned or transferred to defendant in such a manner as to create a privity of contract or estate between original lessor and the assignee.

5. That any assignment of lease to defendant was nullified by the fact that original lessee remained in possession and was recognized as the tenant of plaintiff for two years after the alleged assignment was made and defendant was never in possession of premises.

6. The alleged assignment was, if anything, merely security for the debt of the lessee to the defendant and as such the assignee was merely mortgagee and is not liable to the lessor for the rent of the demised premises unless he enters into possession.

7. The court awarded judgment for the plaintiff for the full amount of the rent sought to be recovered by him, although the admitted and uncontradicted evidence does not in point of law warrant such findings.

8. There is no evidence to support the award of judgment for the plaintiff for the full sum sought to be recovered by him.

The court erred in the aforesaid determinations and the appellant is dissatisfied with same in point of law.

LINTOTT, KAHRS & YOUNG,
Attorneys for Defendant-Appellant.

Lease.

(Exhibit P. 1.)

This indenture, made this fourteenth day of April in the year one thousand nine hundred and fifteen, between Pasquale Iarussi of the City of Newark, in the County of Essex and State of New Jersey, of the first part, and Pasquale DiRollo, of the City of Newark in the County of Essex, and State of New Jersey, of the second part: Witnesseth, that the said party of the first part do hereby demise and lease unto the said party of the second part, the entire first floor, and part of cellar of premises known and designated as No. 230 Academy Street, Newark, N. J.

And it is further agreed between both parties hereto, that in case no saloon license can be obtained for said premises, then this lease shall become null and void; otherwise, to remain in full force and effect.

And it is further agreed between both parties hereto that the party of the second part shall have the right to assign this lease to The Eagle Brewing Company, of Newark, N. J.

And it is further agreed that the party of the second part must have the front plate glass windows insured, and pay for the same, with the appurtenances, and the sole and uninterrupted use and occupation thereof (except as hereinafter

mentioned) for the term of five years from the first day of June, 1915, for the yearly rent of four hundred and forty-four dollars ($444.00) payable as follows: Thirty-seven dollars for each and every month during said term.

And the said party of the second part does hereby agree to pay the said party of the first part, heirs, assigns, agents or attorneys, the said yearly rent of four hundred and forty-four dollars ($444.00) at the time and in the manner aforesaid.

And the said party of the second part does further promise and agree that he will not re-let or underlet the whole or any part of said premises, nor assign this lease, nor use or permit any part thereof to be used for any other purpose than without the written consent of the said party of the first part, his heirs, assigns, agents or attorney, under the penalty of forfeiture and damages; that the said party of the first part, his heirs, assigns, agents or attorneys, may enter with agents or employees into and upon said premises at reasonable hours in the daytime, to examine the same, or to make such repairs, or alterations therein as shall be necessary for the preservation thereof; and to exhibit them at any time during the last three months of the said term, from ten o'clock in the morning to five o'clock in the afternoon (Sundays excepted), to any person or persons; and to put up notices, "To Let" or "For Sale" on the outside wall thereof. If the said premises shall become vacant, or be deserted, during said term, the said party of the second part do hereby authorize the said party of the first part, his heirs assigns, agents or attorney,

to re-enter the same, at his option, and re-let them and receive and apply the rent so received to the payment of the rent due by these presents.

And the said party of the second part does further agree to keep the premises in as good repair as the same shall be at the commencement of the said term (wear and tear arising from a reasonable use of the same, and damages by the elements excepted); and at the expiration of said term to yield up the peaceable possession thereof to the said party of the first part, his heirs, assigns, agents or attorney.

And the said party of the second part does further agree to pay the water tax assessed upon said property, additional to the rent aforesaid.

In witness whereof, the said parties have hereunto, in duplicate, set their hands and seals the day and year first above mentioned.

PASQUALE IARUSSI, (L. S.)
PASQUALE DIROLLO, (L. S.)

Sealed and delivered in
the presence of

Oscar B. Lisiewski.

I hereby consent to the within lease being assigned by the within named party of the second part, to the Eagle Brewing Company, of Newark, N. J. Witnesseth:

PASQUALE IARUSSI.
PASQUALE DIROLLO.

State of New Jersey, }
County of Essex, } ss.:

Be it remembered, that on this 14th day of April, one thousand nine hundred and fifteen, be-

fore me, O. B. Lisiewski, a Commissioner of Deeds of the State of New Jersey, personally appeared, Pasquale Iarussi, and Pasquale DiRollo, whom I am satisfied are the parties in the within indenture named. And I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

OSCAR B. LISIEWSKI,
Commissioner of Deeds
for New Jersey.

Opinion.

(Filed March 18, 1919.)

NEW JERSEY SUPREME COURT,

NOVEMBER TERM, 1918.

PASQUALE IARUSSI,
Plaintiff-Appellee,

v.

EAGLE BREWING COMPANY OF NEWARK, NEW JERSEY,
Defendant-Appellant.

On appeal from East Orange District Court.

Submitted November Term, 1918. Decided March , 1919.

Before Justices Bergen, Kalisch and Black.

For the appellant Lintott, Kahrs & Young.

For the appellee, J. Victor D'Aloia.

Opinion.

Per Curiam:

The plaintiff's action against the defendant in the court below was based upon a written lease made by the plaintiff to one Pasquale DiRollo, on April 14, 1915, for a term of five years, at a monthly rent of $37. The plaintiff succeeded in obtaining judgment for his claim upon the theory that the lessee, with the consent of the plaintiff, lessor, had assigned his interest in the lease to the defendant. From that judgment the defendant appeals to this Court.

The lease contained the usual covenants found in leases, and this provision: "And it is further agreed between both parties hereto that the party of the second part shall have the right to assign this lease to The Eagle Brewing Company, of Newark, N. .J" This clause was apparently put in the lease as an exception to the general provision of the lease that the party of the second part will not re-let, etc., nor assign the lease, etc., without the written consent of the lessor, The lease had attached to it a sheet of paper which contained the following: "I hereby consent to the within lease being assigned by the within named party of the second part, to the Eagle Brewing Company of Newark, N. J. Witnesseth:

"(Signed) PASQUALE IARRISI,
"PASQUALE DIROLLO."

The real question presented is whether there was an assignment of the tenant's interest in the lease to the defendant company and accepted by it?

The transaction relating to the making of the lease and the assignment thereof took place on April 14, 1915, and it appears that DiRollo re-

mained in possession of the leased premises from that time on and paid rent therefor to the plaintiff up to November, 1917, and continued to live in the rear room of the same until March, 1918. There was no proof that the defendant had ever paid any rent for the premises to plaintiff or had ever taken possession of the same or exercised any control over the same.

The court found that the "writing was an assignment of the lease although it was not worded strictly as an assignment should be."

There was no warrant for such a finding under the competent evidence in the case. There was an utter absence of competent proof that the defendant company had accepted the assignment. The farthest extent to which the testimony in the case goes is that an agent of the brewing company told DiRollo that the defendant company wanted the lease assigned to it as security. But this is far from constituting the transaction an assignment of the lease, and an acceptance thereof by the defendant company, and an assumption by it of the obligations of the tenant to his landlord.

The judgment is reversed, and a new trial ordered.

Notice of Appeal.

(Filed April 4th, 1919.)

NEW JERSEY SUPREME COURT,

PASQUALE IARUSSI, Plaintiff-Appellant, *v.* EAGLE. BREWING COMPANY OF NEWARK, NEW JERSEY, Defendant-Appellee.	On Appeal from District Court. Notice of Appeal to Court of Errors and Appeals.

To

Lintott, Kahrs & Young, attorneys for defendant-Appellee:

Take notice that the plaintiff appeals from the whole of the judgment in this cause on the following grounds:

1. There being legal evidence to support the determination of the District Court, that the lease was assigned to the Eagle Brewing Company, such finding was final between the parties.

2. The decision of the Supreme Court that there was no warrant for such a finding, was improper and without authority in law.

Yours respectfully,

J. VICTOR DALOIA,
Attorney for Plaintiff-Appellant.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

PASQUALE IARUSSI,
Plaintiff-Appellant,

vs.

EAGLE BREWING COMPANY OF NEWARK, N. J., a corporation,
Defendant-Respondent.

On Appeal from Supreme Court.

BRIEF OF PLAINTIFF-APPELLANT.

Statement of Facts.

This is an appeal from a judgment of the Supreme Court, reversing a judgment for plaintiff, rendered by the East Orange District Court, in a suit brought by plaintiff-appellant to recover two months' rent from defendant, as assignee of a lease made by plaintiff to one Di Rollo, and claimed by plaintiff to have been assigned to defendant brewing company.

The case on appeal, as settled by the Judge of the District Court, is found on pp. 3 to 6 of the State of the Case. That is the only record in the case, and we find therein that plaintiff testified on the trial that one Lisiewski, who, it was undisputed, was the agent of the defendant, had made the assignment of the lease, and had explained to plaintiff that what he had signed was an assignment of the lease (Case pp. 3-4). On cross examination (p. 4) Lisiewski, defendant's agent, testified that he had told Di Rollo, the original lessee, that he was to assign the lease

to the brewing company as security, and that he, Di Rollo, signed his name on the paper. Also (p. 5), it appears that Lisiewski, the brewery's agent, told Di Rollo that the brewing company wanted the lease assigned to it as security. The document so signed by plaintiff and Di Rollo, the original tenant, and which the trial judge found was an assignment, appears on page 10 of the printed case, as follows:

> "I hereby consent to the within lease being assigned by the within named party of the second part, to the Eagle Brewing Company, of Newark, N. J. Witnesseth:
>
> PASQUALE IARUSSI
> PASQUALE DI ROLLO."

The lease was signed, and the transactions which constituted an assignment, as plaintiff contends, took place, on April 14, 1915, in the office of the brewing company. The documents were all drawn up by the agent of the brewing company, and he, in his capacity of Commissioner of Deeds, took the acknowledgments of both parties. (Case, pp. 10-11.)

Di Rollo remained in possession of the entire premises up to November, 1917, and lived in the rear of the saloon part of the premises until March, 1918.

ARGUMENT.

The record discloses facts constituting an assignment.

In the first place, no reason is shown in the record why the transaction took place at the office of the brewery, unless that place was selected, and the agent of the company took charge of the negotiations, for the purpose of immediately consummating an assignment to the brewery. If that were not so, why go to the brewery at all? It would certainly have been more convenient for both parties to have closed the transaction at the place of business of either one of them.

Secondly, the lease itself contained a specific consent to the assignment thereof to the brewing company (Case, p. 8); why draw a separate consent on a different piece of paper, if the intent of so doing was only to make a consent. A consent already existed; the additional document would have been a superfluity. Again (Case, pp. 3-4) plaintiff testified that Lisiewski, the defendant's agent, told him that what he had signed was an assignment of the lease, and the agent (Case, p. 5) testified that he told Di Rollo that the brewing company wanted an assignment of the lease. Also (p. 4) the agent told Di Rollo he was to assign the lease to the brewery.

The learned Supreme Court errs in its reading of the record when it says the "farthest extent to which the testimony in the case goes is that the agent of the company told Di Rollo that the defendant company wanted the lease assigned to it as security." (Case, p. 13.) The Court entirely overlooks the plaintiff's testimony that the agent of the company told him that what he

signed was an assignment of the lease (Case, pp. 3-4) and that the brewery wanted an assignment (Case, p. 5).

It was admitted by the defendant's witness Scheffmeyer (Case p. 4) that Lisiewski **drew up the lease for the Eagle Brewing Company.**

Furthermore, Lisiewski took the acknowledgments (Case, pp. 10-11) and certifies that plaintiff and Di Rollo acknowledged that they "delivered" the instrument. To whom did they deliver it if not to the defendant?

The Court well knows that no particular form of words is required to make an assignment, nor is any writing necessary. An assignment may be by delivery of the thing assigned. This is too well established to need citation of authority.

We say there was an assignment of this lease by delivery, if in no other manner. If the Court believe that the separate document appended to the lease is not an assignment then the lease itself was assigned by delivery. Both parties solemnly acknowledged that they delivered it. The record is otherwise silent on the point of delivery, and we have a right to argue from the record that there would have been no point in going to the office of the brewery to draw up and assign this lease if it were not left with the brewery, and the Court has a right to conclude from the record that the brewery had manual possession of the lease and the assignment thereof from the time it was made.

The probabilities in the case all support this theory. Why did the brewing company want this lease assigned to them as security? This

Court knows, from cases that have been before it, that the practice of the brewers is to sell their beer to saloon keepers, taking an assignment of the lease of the premises, besides a chattel mortgage, and the liquor license, to make sure that the saloon keeper shall buy from no one but them. That was why there was an assignment in this case. That was why the brewing company took the trouble to have the parties come to its office; that was why the brewing company, by the agent whom they deputed for that work (Case, p. 4) drew up these leases. And that was why the landlord was willing to lease to Di Rollo. Because he knew that he had a solvent party behind the lease, a party who had by consent of himself and his tenant taken an assignment of the lease, and a party who would be obliged to and would pay the rent if Di Rollo could not. He knew that the brewing company would leave Di Rollo in possession so long as he bought its beer, and when he did not, they would take up the burden of paying the rent, in the meantime seeking a new occupant for the saloon. This is the general practice, and there is every reason to believe that the general practice was followed in this case.

When the landlord went away after signing a paper in the office of the brewery, under the direction of the agent of the brewery, leaving that document there, and which document that agent told him was an assignment of the lease, he had a right to hold them as the responsible party under the lease, and so long as the rent was forthcoming, even though actually delivered to him by Di Rollo, he was justified in believing either that the brewery paid it or caused it to

be paid by Di Rollo as its agent. Naturally when the rent stopped, he turned to the assignee of the lease, the defendant in this case.

Defendant is estopped to deny that there was an assignment.

When the agent of the defendant invited or ordered the plaintiff and Di Rollo to come to defendant's office for the purpose of drawing up the lease and assigning it, he led plaintiff to believe that there was an assignment. In fact plaintiff testifies (Case, pp. 3-4) and was not shaken on cross examination, nor anywhere substantially contradicted, that Lisiewski, defendant's agent, told him he had signed an assignment.

It certainly does not lie in the mouth of the defendant to now deny that an assignment was made and delivered, when representations had been made by its authorized agent, especially, as the plaintiff is an Italian, and not conversant with English and legal documents, and was not represented by counsel or assisted by friends. The plaintiff was induced to take his course of action by the representations so made. And to now repudiate those representations, and deny the making and delivery of the assignment would result in a gross injustice. Every element of an estoppel is here, as outlined in *Central R. R. Co.* v. *MacCartney,* 68 N. J. L. at 175, viz.

1. Defendant, by its agent, made representations of fact inconsistent with its present claim, *i. e.,* defendant represented that there was an assignment.

2. Defendant, if there were no assignment, knew that its representations were untrue.

3. Such representations were made to influence plaintiff's conduct.

4. Plaintiff was ignorant that it was not true.

5. Plaintiff relied upon defendant's representations that there was an assignment, and will be damaged to the extent of his lost rent, if this Court shall now permit defendant to deny that there was an assignment.

The record shows that the evidence supports the finding of the District Court.

We contend, as set forth in the foregoing points of this brief that the facts shown in the record demonstrate the sufficiency of the evidence offered to support the judgment of the District Court.

The judgment of the Supreme Court was without authority in law, that there was no warrant for the finding of the District Court.

For the reasons heretofore set forth, we insist that the Supreme Court has not properly construed the evidence, as contained in the printed record, and having so misconstrued the evidence, its judgment is improper and without warrant in law.

For all these reasons we respectfully urge upon the Court that the judgment of the Supreme Court should be reversed and for nothing holden, and the judgment of the District Court should be affirmed.

Respectfully submitted,

J. VICTOR D'ALOIA,
Attorney for and of Counsel
with Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

PASQUALE IARUSSI, *Plaintiff-Appellant,* *vs.* EAGLE BREWING COMPANY OF NEWARK, NEW JERSEY, *Defendant-Respondent.*	*On Appeal from Supreme Court.*

BRIEF OF DEFENDANT-RESPONDENT

This is an appeal from the decision of the Supreme Court, which reversed the East Orange District Court, in an action by Pasquale Iarussi against Eagle Brewing Company.

STATEMENT OF THE CASE

This suit was brought for the recovery of rent for the months of January and February, 1918, upon a lease for the entire first floor and part of cellar of certain premises, executed by the plaintiff, Pasquale Iarussi to one Pasquale DiRollo, on April 14th, 1915, for the term of five years, subject to a monthly rent of $37.00.

The lease is in usual form, except it contains the following provision:

> "And it is further agreed between both parties hereto that the party of the second part shall have the right to assign this lease, to THE EAGLE BREWING CO. OF NEWARK, N. J."

There was a sheet of paper affixed to said lease upon which was the following:

> "I hereby consent to the within lease being assigned by the within named Party of the Second Part, to the Eagle Brewing Company of Newark, N. J. WITNESSETH:
>
> (Signed) PASQUALE IARUSSI,
> PASQUALE DiROLLO."

It was admitted that the rent for the months of January and February, 1918, had not been paid.

DiRollo remained in possession of all the leased premises from the beginning of the term until November, 1917, a period of two and a half years, paying however, only the sum of $34 each month, instead of a monthly rental of $37 called for in said lease, and closed the saloon (store) on December 13th, 1917, but continued in possession of the rooms in the rear up to and including the time for which plaintiff seeks to recover the rent in this suit from the Eagle Brewing Co.

Eagle Brewing Company never had possession of said premises; never paid rent; never held the lease; was never asked for the rent by the plaintiff until December, 1917, and then only after his tenant ceased paying rent.

Plaintiff instituted suit for the purpose of holding Eagle Brewing Company for the rent under the lease, basing his claim upon an alleged assignment of said lease to said Eagle Brewing Campany and charging that by virtue of said alleged assignment the Eagle Brewing Company assumed the payment of rent under the lease.

The district court held that the above writing was an assignment of the lease, thus making the defendant liable for the rent thereunder, and according to the language employed by the court in settling the

case "no further writing was necessary to accomplish this."

From the judgment so entered the defendant appealed to the Supreme Court, which court reversed the judgment of the District Court and ordered a new trial.

The plaintiff now appeals from the order of the Supreme Court.

Question in the Case

Was this an Assignment of the Lease?

The state of case on appeal was settled by the court, and relates testimony of different witnesses which can not be considered by this court, as we are merely interested in the fact established, so we have to deal with only the question as to whether this lease was assigned to the Eagle Brewing Company.

The finding as to this fact is stated by the court (page 14, State of Case):

> "I held that the above writing was an assignment of the lease although it was not worded strictly as an assignment should be. I so held for the reason that all the papers were signed on the same day and the lease already contained a clause whereby the right to assign same to the Eagle Brewing Company was reserved and no further writing was necessary to accomplish this, and furthermore, said Oscar B. Lisiewski, according to his own testimony, told DiRollo that the Brewing Company wanted the lease assigned to it as security and that thereupon DiRollo signed his name to the paper; that there was no other paper produced in evidence except P. 1 bearing the signature of Pasquale DiRollo, and therefore I concluded that the signature made by DiRollo after Oscar

B. Lisiewski had told him the Brewing Company wanted the lease assigned to it, was the one that appeared on the paper attached to the lease, which plaintiff contends is an assignment of the lease.

I accordingly held that the lease had been duly assigned to the defendant and that they were liable for the payment of the rent due thereunder, and gave judgment for the plaintiff for the sum of $74."

If this is not an assignment of the lease, the judgment must be reversed because the entire finding of the court is based on the conclusion that the above was an assignment "although it was not worded strictly as an assignment should be." It is true that no particular words are necessary to make an assignment, but the intention of the parties must be sufficiently expressed.

The general rule is too well established to need repetition, that parole evidence is not admissible to explain, add to, or vary the meaning of the express terms employed in a written instrument. Here the words are free from ambiguity, and external circumstances do not create any doubt or difficulty as to the proper application of these words, so we must look to the writing itself to determine its real meaning.

Giving the words their usual and ordinary meaning, the paper must be construed merely to be a consent to do something; to do otherwise would be to ignore the plain meaning of the language employed.

An assignment is the making over to another the whole of any property, or to make over a right to another, and the language used in this lease means the giving of the landlord's consent to a transfer of the lessee's interest to Eagle Brewing Company.

but in order for the transfer to take place the tenant must follow it up with an assignment to the defendant. This was never done.

There can be no liability for rent without privity either of contract or of estate.

> "Until a lease is assigned or so transferred that a privity is created between the original lessor and the assignee, such assignee is not liable to the lessor for rent."
>
> *Bartlett* vs. *Amberg*, 92 Ill. App., 377.

There must be a consenting assignee before an assignment of the lease is complete. An assignment stands in no other light than any other contract; it could not be made by the assignor alone without the consent of the assignee. The acceptance of the assignment, either express or implied, is certainly requisite to its validity.

Even an executory contract to assign does not have the effect of an assignment. The assignment, like any other conveyance, must be delivered in order to be effective. Until the assignee has in some way accepted or adopted the lease, he can not be held responsible.

Why should the signing of the lease and the consent by Iarussi give it the effect of an assignment signed by the Eagle Brewing Company?

The consent to the making of the assignment is to be carefully distinguished from an assignment. The distinction is similar to that which exists between an offer to make a conveyance and the conveyance itself. The rights of the vendor and of the proposed vendee under such an offer are entirely dif-

ferent from what they become after the conveyance itself has been made.

The consent to an assignment by lessor gives the proposed assignee no right of possession which he can assert against the lessee or against third persons.

Under the writing in question the Eagle Brewing Company could not bring an action against Iarussi for specific performance, nor could the Eagle Brewing Company bring an action under this instrument against the lessor for a breach of any of the covenants of the lease.

In order that one be liable on the covenants as assignee to a leasehold there must be a legal assignment to him. Even the equitable assignee cannot be compelled by the landlord to take a legal assignment, so as to impose liability on him.

We therefore contend that the court erred in concluding that the writing in question constituted an assignment.

IF THIS IS AN ASSIGNMENT, IT WAS GIVEN MERELY AS SECURITY FOR ANY INDEBTEDNESS OF DIROLLO TO EAGLE BREWING COMPANY.

If the court was correct in construing the writing in question to be an assignment, it follows, in view of all circumstances, that it was given as security for any debt of DiRollo to Eagle Brewing Company (see State of Case, p. 14):

> "The lease already contained a clause whereby the right to assign same to the Eagle Brewing Company was reserved and no further

writing was necessary to accomplish this, and furthermore, said Oscar B. Lisiewski, according to his own testimony, told DiRollo that the Brewing Company wanted the lease assigned to it as security and that thereupon DiRollo signed his name to the paper; that there was no other paper produced in evidence except P. 1 bearing the signature of Pasquale DiRollo, and therefore I concluded that the signature made by DiRollo after Oscar B. Lisiewski had told him the Brewing Company wanted the lease assigned to it, was the one that appeared on the paper attached to the lease, which plaintiff contends is an assignment of the lease."

Eaton vs. *Jaques*, Doug., 438, is authority for the rule that the mortgagee of a lease can not in any event be held liable until he takes possession under the mortgage, and while that decision has been questioned in England, in the case of *Williams* vs. *Bosanquet*, 1 B. & B., 238, 58 English Reprints, 793, in this country the rule for which *Eaton* vs. *Jaques* stands has been universally followed and that rule must prevail in this state, because we hold the mortgagor to be the true owner, and the mortgagee as having nothing but a chattel interest while out of possession.

"A mortgagee of a term not in possession can not be considered as an assignee; but if he takes possession of the mortgaged premises, he has the estate *cum oncre*."

Astor vs. *Hoyt*, 5 Wend., 605.

"A mortgagee of a term who has not taken possession of the demised premises, is not liable for rent."

Walton vs. *Cronley*, 14 Wend., 64.

For a further complete discussion of the law on this point that the assignee of a lease by way of

mortgage is not liable to the lessor for rent, unless he enters into possession (see *McKee* vs. *Angelrodt*, 16 Mo. 283). The opinion in this case reviews the authorities on this subject, beginning with *Eaton* vs. *Jaques* and shows that the leading authorities in this country uphold the doctrine that the assignee of a lease by way of mortgage out of possession is not liable for rent to grantor.

There is a dearth of authorities in this state, but the cases are again reviewed in *Levy* vs. *Long Island Brewery*, 56 N. Y. Supp., 242, which in some respects is quite similar to the case now under consideration and in the opinion written by Leventritt, *J.*, the cases in this country are again referred to, in effect that a mortgagee of the lessee of a term never having taken possession under the mortgage, is not liable as assignee for the rent in arrear.

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