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SUMMONS.

Filed May 19, 1930.

DISTRICT COURT SUMMONS.

ESSEX COUNTY, SS.

THE STATE OF NEW JERSEY.

10

To any Constable in said County
or to the Sergeant-at-Arms of The
(SEAL) Second District Court. SUMMON
Alexander J. Milmoë, Sr., 26 Stanley
Road, South Orange, N. J., to appear
before the Second District Court of the City of
Newark, to be held in the City Hall Annex,
Broad street (between Green and Franklin
streets), in the said City, on the 2nd day of
June, nineteen hundred and thirty, at ten o'clock 20
in the forenoon to answer unto James C.
Sapienza, Inc., in an action on contract to the
damage of the plaintiff five hundred dollars.

Hereof fail not.

WITNESS, LOUIS R. FREUND, Esq., Judge of said
Court at Newark, aforesaid, the 19th day of May
in the year one thousand nine hundred and
thirty.

JAMES E. GARRIGAN,
Clerk.

30

STATE OF DEMAND.

Filed May 19, 1930.

**SECOND DISTRICT COURT OF
THE CITY OF NEWARK.**

10

JAMES C. SAPIENZA, INC., a corporation,

Plaintiff,

vs.

ALEXANDER J. MILMOE, SR., 26
Stanley Road, South Orange,
N. J.,

Defendant.

On Contract.

*State of
Demand.*

20

The plaintiff demands of the defendant the sum of five hundred dollars for rent due for the months of April, 1930 and May, 1930, in the sum of one hundred dollars (\$100) for each month, making total due two hundred dollars, for premises occupied by the defendant, under a lease at 168 Coit street, Irvington, New Jersey, which said rent was due and payable on the first day of April, 1930 and the first of May, 1930, respectively, from the defendant to the plaintiff, and the defendant refused to pay same.

30

Judgement will be claimed for the sum of two hundred dollars (\$200) together with costs of suit.

(Sgd.) HARRY DAVIMOS,
Attorney for Plaintiff.

Dated May 19, 1930.

40

TRANSCRIPT OF CLERK'S DOCKET.

No. 93058

JAMES C. SAPIENZA, INC., a corporation,

Plaintiff,

vs.

ALEXANDER J. MILMOE, SR.,

Defendant.

On Contract.

Demand

\$500.

10

Harry T. Davimos.

Koehler & Augenblick.

Summons\$ 2.10

Mileage48

Listing 1.50

Attorney's Fee 10.00

20

 \$14.08

26 Stanley Road, So. Orange, N. J.

Summons issued May 19, 1930.

Returnable June 2, 1930; Summons returned as follows:

"The said defendant not being found, I served the within summons May 21, 1930 by leaving a copy thereof at his residence with a member of his family, above the age of fourteen years, who was informed of its contents."

30

Philip Newmark, Constable.

1930

June 2. This cause was adjourned by the plaintiff to June 9th and from time to time thereafter until November 28th.

Nov. 28. This cause was "Not Moved."

40

Transcript of Clerk's Docket.

1931

- Jan. 28. Stipulation filed listing cause for trial January 30th.
- Jan. 30. This cause was adjourned by the plaintiff to February 6th and from time to time thereafter until March 12th; trial before First District Court.
- 10 March 12. The plaintiff nor defendant not appearing, the Court entered a non-suit; whereupon judgment of non-suit is entered in favor of the defendant and against the plaintiff.
- March 18. Stipulation filed vacating judgment and listing cause for trial March 20th.
- March 20. Cause set for trial before Judge MacMahon, April 17, 1931.
- 20 April 17. The plaintiff and defendant appeared and the cause was tried and determined at this time.
- James Sapienza was sworn in behalf of the plaintiff and the plaintiff offered in evidence a lease, two orders and an assignment.
- The defendant and Alexander J. Mil-moe, Jr., and the defendant offered in evidence an assignment.
- 30 The evidence being closed, the Court reserved judgment.
- April 23. The Court rendered judgment in favor of the plaintiff and against the defendant in the sum of two hundred dollars damages and costs, whereupon judgment is entered in favor of the plaintiff and against the defendant in the sum of two hundred dollars damages and costs.
- 40

Transcript of Clerk's Docket.

This is a true copy of the Docket now on file
in the Second District Court of the City of New-
ark.

JAMES E. GARRIGAN,
Clerk.

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*Plaintiff's Testimony.***TESTIMONY.**FIRST DISTRICT COURT OF THE
CITY OF NEWARK, N. J.

10 JAMES C. SAPRIENZA, INC., a corporation,

Plaintiff,

vs.

ALEXANDER J. MILMOE, SR., 26
Stanley Road, South Orange,
N. J.,

Defendant.

April 17, 1931.

20

Before HONORABLE CECIL H. MACMAHON, J.

Appearances:

Harry T. Davimos, Esq., by Leonard J. Emmerglick, Esq., for plaintiff.

Koehler & Augenblick, Esqs., by Harry A. Augenblick, Esq., for defendant.

William E. Davenport, court stenographer.

30

Mr. Emmerglick: I offer lease in evidence.

(Lease received in evidence and marked Exhibit P. 1.)

Mr. Emmerglick: I offer in evidence order of the Court of Chancery appointing a Receiver, in the case of Walter V. Sullivan, complainant, *vs.* Alexander Milmoe, defendant, Docket No. 66, page 90.

40

(Order appointing Receiver in the case of Walter V. Sullivan, complainant, *vs.* Alexander Milmoe, defendant, received in evidence and marked Exhibit P. 2.)

Alexander J. Milmoe, Sr., direct.

Mr. Emmerglick: In the same case, I offer order confirming the sale of that Receiver of the lease in question to the present defendant, Alexander J. Milmoe, Sr.

(Order confirming the sale of Receiver of lease to Alexander J. Milmoe, Sr., received in evidence and marked Exhibit P. 3.)

10

Mr. Emmerglick: I now offer the assignment of that lease by the Receiver to the present defendant, Alexander J. Milmoe, Sr.

(Assignment of lease by the Receiver to Alexander J. Milmoe, Sr., received in evidence and marked Exhibit P. 4.)

Mr. Emmerglick: Counsel for the defendant agrees that the rent from April, 1930, to date, has not been paid. We are only suing for two months.

20

Plaintiff rests.

The Court: The intent is to show that the balance of the term mentioned in the lease was sold to the defendant in this case?

Mr. Emmerglick: Exactly.

The Court: Not on the part of the landlord, but on the part of the tenant, and in buying it he bought the covenants of the lease.

Mr. Emmerglick: Exactly.

30

ALEXANDER J. MILMOE, SR., defendant,
sworn.

Direct examination by Mr. Augenblick.

Q Mr. Milmoe, did you on the 15th day of March, 1930, execute an assignment of this lease to Alexander Milmoe, Jr.? A Yes, sir.

40

Alexander J. Milmoe, Sr., cross.

Mr. Augenblick: I offer the assignment in evidence.

Mr. Emmerglick: I object to the assignment on the ground it recites that the lease is hereby attached and made part hereof.

10 The Court: Attach the lease.

Mr. Augenblick: It was attached to the other paper.

The Court: We will attach the lease which is in evidence, and admit it in evidence as Exhibit D. 1.

(Assignment attached to the lease marked P. 1, received in evidence and marked Exhibit D. 1.)

Mr. Emmerglick: I pray an exception.

20 Q Did you after that date, Mr. Milmoe, retain any interest in this property at all? A No, sir.

Cross examination by Mr. Emmerglick.

Q Mr. Milmoe, what was your business at the time that lease was assigned? A In the contracting business.

30 Q What was your son's business at the time that lease was assigned? A Over in the yard selling material.

Q At what address? A He was always over there.

Q The property in question? Is that the place where he conducted his business? A Yes.

Q Is that where you conducted your business? A No, sir; my business was conducted at 92 and 96 South Sixth street.

40 Q When you bought this lease, didn't you conduct your business at this property? A No, sir.

Alexander J. Milmoe, Sr., cross.

Q You did not? A No.

Q I show you what purports to be an affidavit made by you in the proceeding in the Court of Chancery, brought by you to restrain the landlord from interfering with your possession of the property embraced within the lease and ask you if that is your signature (showing witness paper)? A Yes, that is my signature. 10

Q Did you not say in that affidavit: "I have a large business, and I have paid a large sum of money for the business. I have a number of trucks on hand that I must supply material to, and I cannot get in and out of my yard with these passageways blocked by the trucks of this defendant. If I am prevented from using these passageways, I will suffer irreparable loss and damage. Without these passageways I do not have the convenient or beneficial use of the lease granted and sold to me by the Receiver"? Did you say that in the affidavit? 20

The Court: What is the date of the affidavit?

Mr. Emmerglick: December 22, 1927.

The Court: Three years before this transaction. 30

Mr. Emmerglick: Three years before.

Q Did you not therefore continue to do business at that property? A When we had all of our cement used, we got through driving in and out of that alleyway.

Q When did you get through? A Pretty near a part of two months.

Q You mean about February, 1928? A I suppose so. 40

Alexander J. Milmoë, Jr., direct.

Q Then you assigned this lease in the month of March, 1930? A Yes, sir.

Q What use did you make of the property between February, 1928, and March, 1930? A I didn't make any use of it; my son used it.

10 Q You didn't assign the interest to him while he used it during those months? A No, sir.

Q You made no use of it? A No, sir.

Q Did he pay you any rent for the use of it?

A No, sir; I made him a present of it.

Q Is your son here today? A He is, yes.

Re-direct examination by Mr. Augenblick.

20 Q Did you ever use these premises after March 15, 1930? A Never; no, sir.

ALEXANDER J. MILMOE, JR., sworn on behalf of defendant.

Direct examination by Mr. Augenblick.

30 Q Mr. Milmoë, you are one of the defendants in the suit of Sullivan against Milmoë? A That's right.

Q After your father purchased the lease, did you use the premises? A I did.

Q Under what name? A The Mason Supply Company.

Q A trade name? A A trade name.

Q You were trading as Alexander J. Milmoë, Jr.? A Yes.

40 Q How long did you continue in possession? A Since the Receiver sold it to Mr. Milmoë, Sr., until May, 1930.

Alexander J. Milmoë, Jr., cross.

Q At the time when the assignment was executed to you by your father, March 15, 1930, did you do anything with the assignment? A Yes.

Q What did you do with the assignment? A I took it up and showed the assignment to Mr. Saprienza, and I told him I had taken over the lease now and it was up to me to take care of the rent, and he said he didn't care as long as I took care of the paying of the money. 10

Cross examination by Mr. Emmerglick.

Q Since you took over that assignment, did you pay any rent whatsoever? A No.

Q You tell us you had been doing business there? Isn't it a fact you have been doing business there? A I have. 20

Q How long is it since you last did business there? A May, 1930.

Q What business was your father in at the time he assigned that lease to you? A The contracting business.

Q Did he continue in that business after? A The contracting business? A Yes.

Mr. Emmerglick: We rest. 30

The Court: Is the case closed?

Mr. Augenblick: Closed and submitted.

Certificates of Stenographer and Judge.

I, WILLIAM E. DAVENPORT, a stenographer duly appointed and sworn to report stenographically the evidence given before the First District Court of the City of Newark, N. J., in the case of James C. Saprienza, Inc., a corporation, plaintiff, *vs.* Alexander J. Milmo, Sr., 26 Stanley Road, South Orange, New Jersey, defendant, do hereby
 10 certify that the foregoing is a true and correct transcript of the evidence given on the seventeenth day of April, 1931, before the Honorable Cecil H. MacMahon, Judge of the First District Court of Newark, in said matter.

WM. E. DAVENPORT.

I, CECIL H. MACMAHON, Judge of the First
 20 District Court of the City of Newark, N. J., do hereby certify that the foregoing is a transcript of the evidence given upon the trial of the case of James C. Saprienza, Inc., a corporation, plaintiff, *vs.* Alexander J. Milmo, Sr., 26 Stanley Road, South Orange, New Jersey, defendant, on the 17th day of April, 1931, as certified to by William E. Davenport, the stenographer appointed to report such evidence stenographically. The transcript was presented to me and signed
 30 May 6, 1931.

CECIL H. MACMAHON,
 Judge.

Exhibit P. 1.

EXHIBIT P. 1.

This agreement made this 3rd day of June 1926, between James C. Sapienza, known as the landlord, and A. J. Milmo, jr., Walter V. Sullivan, trading as Newark Mason Supply, known as tenant.

10

The tenant desires to lease from the landlord premises known as the rear vacant land of 168 to 172 Coit St., Irvington, N. J. Land 90-125, also the landlord agrees to let the tenant have advertising on both sides of building (168 to 172 Coit st., Irvington, N. J.)

It is agreed that the landlord hereby lets unto the tenant and the tenant hereby leases from the landlord the above mentioned land with the sheds thereon for the period of five (5) years payable at the rate of One Hundred Dollars (100) per month.

20

The purpose for which the premises are leased for the Mason Material.

The tenant agrees to deposit the sum of Two Hundred Dollars (200.00) for the fulfillment of the terms hereof; which Two Hundred Dollars is to be applied toward the last two months rental.

30

It is further agreed should the said Tenant become bankrupt during the term hereof, this lease shall be void at the option of the Landlord, who may re-take said possession and consider the lease void.

This lease shall be binding upon the parties hereto, their heirs, executors, administrators, successors or assigns.

40

Exhibit P. 2.

This lease shall not be assigned without the written consent first being obtained from the landlord.

JAMES C. SAPIENZA
A. J. MILMOE, JR.
WALTER V. SULLIVAN

10

EXHIBIT P. 2.

IN CHANCERY OF NEW JERSEY.

20	<i>Between</i> WALTER V. SULLIVAN, <i>Complainant,</i> <i>and</i> ALEXANDER J. MILMOE, JR., <i>Defendant.</i>	} <i>On Bill, &c.</i> <i>Order</i> <i>Appointing</i> <i>Receiver.</i>
----	--	--

30 This matter being opened to the Court by Louis R. Freund, Solicitor for the complainant, and upon reading the bill and affidavit thereunto annexed, and the Court being satisfied of the sufficiency of the application, and it appearing that defendant consents to the appointment of a receiver to take into his possession all the books of account, assets and effects of the co-partnership lately existing between the complainant and defendant under the firm name and style of the Newark Mason Supply Co., with a view to ultimate distribution amongst creditors and others entitled to participate therein;

40 It is on this 1st day of November, 1927
 ORDERED, that C. Wallace Vail be and he hereby

Exhibit P. 2.

is appointed Receiver of the co-partnership lately existing between Walter V. Sullivan and Alexander J. Milmoe, Jr., under the firm name and style of the Newark Mason Supply Co., and all of its assets and property of every character and description wheresoever situate, with full power and authority to demand, sue for, collect, receive and take into his possession all of the assets, property, effects, books, papers and records, notes and accounts receivable, lands, tenements, hereditaments, and all other property and effects belonging to said Walter V. Sullivan and Alexander J. Milmoe, Jr., trading as the Newark Mason Supply Co. or to which they may be entitled, of whatsoever nature, character and description wheresoever the same may be situate, and to hold the same subject to the order and decrees of this Court in the premises;

And it is further ORDERED that the said Receiver enter into a bond with the Chancellor of the State of New Jersey in the penal sum of Ten Thousand (\$10,000) Dollars, for the faithful performance of his duties, which said bond shall be approved as to the form and sufficiency thereof, by Jacob L. Newman, one of the Special Masters of this Court;

And it is further ORDERED that the said Receiver be and hereby is vested with full power and authority of equity receivers;

And it is further ORDERED that the said Walter V. Sullivan and Alexander J. Milmoe, Jr., their officers, attorneys and agents, and all other persons, associations, firms or corporations, be and they hereby are restrained and enjoined from interfering with the said Receiver in the discharge of his said office; and they are hereby

Exhibit P. 3.

enjoined to turn over and deliver unto the said Receiver all books, papers, documents, records, and all assets of every character and description belonging to the said co-partnership.

E. R. WALKER,
C.

10

Respectfully advised,

ALONZO V. CHURCH,
V.-C.

EXHIBIT P. 3.

IN CHANCERY OF NEW JERSEY.

20

Between

WALTER V. SULLIVAN,
Complainant,

and

ALEXANDER J. MILMOE, JR.,
Defendant.

*On Bill, &c.
Order
Confirming
Sale.*

30 This matter coming on to be heard in the presence of Louis R. Freund, Solicitor of Receiver, and it appearing to the Court that a petition was filed herein by the Receiver, praying that he be authorized to accept the offer of James Elder, in the sum of Thirty Thousand (\$30,000.00) Dollars, for the right, title and interest of said Receiver in and to the assets of Walter V. Sullivan and Alexander J. Milmoie, Jr., trading as the Newark Mason Supply Company,
40 such assets consisting of said Receiver's right,

Exhibit P. 3.

title and interest in and to one Clydesdale Truck, one baby Mack Truck, one Ford Truck, two Nash Cars, laths, bricks, hollow tile, finishing lime, common lime, office building, office fixtures, C. A. W. Corporation, book accounts and lease, and an Order to Show Cause on said petition having been made on the 7th day of December, 1927, and a copy of said Order to Show Cause having been mailed to the creditors of said Newark Mason Supply Company and to said Walter V. Sullivan and Alexander J. Mil-moe, Jr., individually, on the 8th day of December, 1927, as provided in said Order to Show Cause, it is on this 13th day of December, A. D., 1927, on motion of Louis R. Freund, solicitor of Receiver,

ORDERED, that said offer of Thirty Thousand (\$30,000.00) Dollars of James Elder for the right, title and interest of said Receiver in and to said assets be, and the same is hereby accepted, and that the sale of said property be and it hereby is ratified and confirmed to the said James Elder, and that the said Receiver be and he hereby is authorized and directed to execute a proper Bill of Sale for said property, so sold to said James Elder, or his assigns, and to deliver the said to him or his assigns upon being paid the amount of said purchase price.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

Exhibit P. 4.

EXHIBIT P. 4.

KNOW ALL MEN BY THESE PRESENTS, that, pursuant to an order of this court, dated December 13th, 1927, confirming the sale of all the undersigned receiver's right, title and interest in and
10 to the annexed lease, I, C. Wallace Vail, receiver for Walter V. Sullivan and Alexander J. Mil-
moe, Jr., trading as Newark Mason Supply Co., in consideration of the sum of Thirty Thousand Dollars (\$30,000), hereby assign, transfer and set over unto Alexander J. Milmoe, Sr. all my right, title and interest in the lease, dated June 3, 1926, between James C. Sapienza, landlord, and Alexander J. Milmoe, Jr. and Walter V. Sullivan, trading as Newark Mason Supply Co.,
20 tenant, a copy of which is hereto annexed, made a part hereof and expressly referred to.
Dated: December 19, 1927.

C. WALLACE VAIL

Receiver for Walter V. Sullivan
and Alexander J. Milmoe, Jr. trad-
ing as Newark Mason Supply Co.

30

40

Exhibit D. 1.

EXHIBIT D. 1.

Newark, N. J.

In consideration of the sum of One Dollar to me in hand paid and other good and valuable consideration, I have this day assigned and set over and do hereby assign and set over to Alexander J. Milmoe, Jr. and his assigns all my interest in and to a certain lease dated the third day of June, 1926 made between James C. Sapienza, Landlord and Alexander J. Milmoe, Jr. and Walter V. Sullivan, trading as the Newark Mason Supply Co. as Tenant, which lease was assigned to me by C. Wallace Vail, Receiver appointed by the Court of Chancery for Walter V. Sullivan and Alexander J. Milmoe, Jr., trading as the Newark Mason Supply Co. on December 19, 1927, which lease and assignment is hereby attached, made part hereof and expressly referred to, and every clause, article or thing therein contained, and I hereby authorize the said Alexander J. Milmoe, Jr. in his own name and for his own use to take all legal measures necessary and proper for the enjoyment of the property hereby assigned.

Witness my hand and seal this 15th day of March, Nineteen Hundred and Thirty.

ALEXANDER J MILMOE L. S.

Signed, Sealed and Delivered
in the presence of

HARRY O. G. FLINT.

Copy of lease annexed.

Judge's Decision.

JUDGE'S DECISION.

Filed April 23, 1931.

**SECOND DISTRICT COURT OF THE
CITY OF NEWARK.**

10

Apr. 23, 1931.

Sapienza, Inc. v. Milmo, Sr., 93058.

There were receivership proceedings in the Court of Chancery of this state. The Court of Chancery through its receiver, among other assets, sold to the defendant the **unexpired term** of a lease. The defendant took the lease with all its conditions and covenants. He took possession of the premises, and paid rent for many
20 months. This suit is by the owner of the premises for rent due under the lease. The defendant seeks to escape payment by putting in evidence an alleged assignment of the unexpired term to his son.

The lease contains a provision that it shall not be assigned without the written consent of the landlord first being obtained. No such consent was obtained by Milmo when he executed the alleged assignment to his son. In my opinion,
30 the transfer of the unexpired term by the Court of Chancery was not such a violation of the covenant against assignment as would render the covenant thereafter null and void, the defendant in this case took from the Court of Chancery the lease with the covenant against assignment in full force and effect; also the covenant to pay rent.

Judgment for plaintiff, \$200.

40

C. H. M. (Sgd.)
Acting Judge.

Judge's Decision.

This is a true copy of the Judge's Decision
now on file in the Second District Court of the
City of Newark.

JAMES E. GARRIGAN,
Clerk.

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SPECIFICATION OF DETERMINATIONS.

SECOND DISTRICT COURT OF THE CITY OF NEWARK.

10	JAMES C. SAPIENZA, INC., a corporation, <i>Plaintiff-Respondent,</i> <i>vs.</i> ALEXANDER J. MILMOE, SR., <i>Defendant-Appellant.</i>	<i>Specification of Deter- minations of the District Court with which Appel- lant is Dis- satisfied in Point of Law.</i>
----	--	---

20 The following is a specification of the determinations of the District Court, with which the appellant is dissatisfied in point of law:

1. The District Court erred in giving judgment in favor of the plaintiff in that it held that the assignment of the lease by the defendant did not relieve the defendant from the liability to pay rent.

30 2. The District Court erred in giving judgment for the plaintiff, in that it held in substance that the privity of estate, if any, between the plaintiff and the defendant, was not terminated by the assignment of March 15, 1930, thereafter terminating defendant's liability for accruing rent.

40 3. The District Court erred in giving judgment in favor of the plaintiff in that it held that the defendant purchased the leasehold with the covenant not to assign, and thereafter the said

Specification of Determinations.

defendant could not assign, unless with the written consent of the landlord.

4. The District Court erred in giving judgment for the plaintiff, in that it held that the defendant purchased the lease containing a covenant to pay rent, which imposed an obligation upon the defendant to continue to pay rent even though the privity of estate was terminated. 10

5. The District Court erred in giving judgment for the plaintiff, in that it held in substance that the assignment by the receiver to the defendant without the consent of the landlord did not vest the right in the defendant to assign.

6. The District Court erred in giving judgment in favor of the plaintiff, when it held in effect that the defendant did not possess the same rights in the leasehold as the receiver possessed, although the defendant purchased all the right, title and interest of the receiver. 20

7. The District Court erred in giving judgment in favor of the plaintiff and against the defendant in presuming a state of facts that is not substantiated by the testimony, to wit:

(a) That the defendant took the lease with all its conditions and covenants. 30

(b) That he took possession and paid rent for many months.

(c) That this suit is by the owner of the premises, for rent due under the lease.

KOEHLER & AUGENBLICK,
Attorneys of the Defendant-Appellant.

OPINION OF SUPREME COURT.

Filed January 20, 1932.

NEW JERSEY SUPREME COURT.

No. 445 October Term, 1931.

10

JAMES C. SAPIENZA, INC.,
Respondent,

vs.

ALEXANDER J. MILMOE, SR.,
Appellant.

20

Argued October Term, 1931. Decided January
, 1932.

On appeal from Second District Court of
Newark.

For appellant, Koehler & Augenblick.

For respondent, Milton M. Unger, Leonard J.
Emmerglick.

Before Justices Campbell, Lloyd and Bodine.

PER CURIAM:

30

On June 3, 1926, a lease was executed by James
C. Sapienza to Alexander J. Milmoe, Jr., and
Walter V. Sullivan for premises in Irvington;
on December 19, 1927, there was an assignment
of the lease by the receiver of the tenant to
Alexander J. Milmoe, Sr.; on March 15, 1930,
Milmoe, Sr., assigned to Milmoe, Jr., and ceased
to occupy the premises.

40

The action in the District Court was against
Milmoe Sr. for rents accruing in April and May,
1930, and the defence was that Milmoe Sr.

Opinion of Supreme Court.

ceased to occupy the premises when he assigned to Milmo Jr., and was thereafter not liable for the rents.

The trial judge gave judgment for the plaintiff and defendant appeals.

It is claimed by the appellant that while there was privity of estate between the plaintiff and defendant during the defendant's occupancy of the property, there was no privity of contract, no assumption by the latter of the lease itself, and that when defendant transferred the lease to his son the obligation to pay rent under the lease ceased in the absence of an assumption of its obligation by reason of the terms themselves or proof that the assignment to the son was not bona fide. 10

Respondent claims that the lease forbids assignment without the lessor's consent, and that having taken a valid assignment from the receiver, the defendant could not divest himself of the leased property without such consent. This, however, is disposed of by the case of *Meyer v. Alliance Investment Co.*, 84 N. J. L., 451 (affirmed 86 N. J. L., 694). See also *Linke v. Greenfield*, 104 N. J. L. 320. 20

Considering the other questions indicated, as to the first, the lease provided that it should be binding upon the parties thereto, "their heirs, executors, administrators, successors and assigns." Did this constitute an assumption of the lease and its obligations? In the *Meyer* case, *supra*, it was held that the clause, "subject to all the terms, conditions and covenants contained in said lease" constituted words of qualification and not of contract. While there is a difference in the language, we think its meaning is the 30 40

Opinion of Supreme Court.

same. It imposed liability during the period of actual holding, but not otherwise.

10 Finally could the judge justify his conclusion on the ground that the assignment was not in good faith? We think not. Both father and son testified to the assignment and that the father thereafter had no contact with or interest in the property. In the absence of any evidence to the contrary we do not see how their testimony could be disregarded.

The judgment is reversed.

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REMITTITUR.

NEW JERSEY SUPREME COURT.

JAMES C. SAPIENZA, INC., a corporation, <i>Plaintiff-Respondent,</i>	} <i>On Appeal to the Supreme Court.</i>	10
<i>vs.</i>		
ALEXANDER J. MILMOE, SR., <i>Defendant-Appellant.</i>	} <i>Judgment of Reversal.</i>	

This cause having been duly argued at the October 1931 term of this Court by Harry A. Augenblick of Koehler & Augenblick, counsel for the defendant-appellant, and Milton M. Unger, by Leonard J. Emmerglick, counsel for the plaintiff-respondent, and the Court having considered the same and finding error in the record of proceedings in the Second District Court of the City of Newark,

It is thereupon ORDERED and ADJUDGED that the judgment of the Second District Court of the City of Newark, removed by appeal to this Court, be reversed, and that the record be remitted to the First District Court of the City of Newark to be proceeded with, in accordance with this judgment and the practice of said Court.

Entered January 25, 1932.

On motion of

KOEHLER & AUGENBLICK,
Attorneys of the Defendant-Appellant.

NOTICE OF APPEAL.

Filed March 1, 1932.

NEW JERSEY SUPREME COURT.

10	JAMES C. SAPIENZA, <i>Plaintiff-Respondent,</i> <i>vs.</i> ALEXANDER J. MILMOE, SR., <i>Defendant-Appellant.</i>	} <i>Action at Law.</i> } <i>Notice of Appeal.</i>
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To Messrs. Koehler & Augenblick, attorneys for
and of counsel with defendant-appellant, No. 14
Mechanic street, Newark, New Jersey.

20 PLEASE TAKE NOTICE that the plaintiff-respond-
ent appeals to the New Jersey Court of Errors
and Appeals in the last resort in all causes from
the whole of the judgment of the New Jersey
Supreme Court rendered in the above-entitled
cause upon the following grounds:

1. Because the New Jersey Supreme Court
erred in giving the judgment for the defendant-
appellant instead of for the plaintiff-respondent.

30
MILTON M. UNGER,
Attorney for and of Counsel with
James C. Sapienza.

Service acknowledged February 24, 1932.

New Jersey Court of Errors and Appeals

JAMES C. SAPIENZA, INC., a corporation, <i>Plaintiff-Appellant,</i> <i>(Respondent below),</i> <i>vs.</i> ALEXANDER J. MILMOE, SR., <i>Defendant-Respondent,</i> <i>(Appellant below).</i>	}	<i>On Appeal from Supreme Court.</i>
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(Sat below: Campbell, Lloyd and Bodine, J.J.)

BRIEF OF DEFENDANT-RESPONDENT.

History of the Cause.

The plaintiff-appellant, James C. Sapienza, Inc., a corporation, brought suit in the Second District Court of the City of Newark, for rent reserved in a written lease. The District Court entered judgment against the defendant-respondent. The latter appealed from said judgment to the New Jersey Supreme Court. That court reversed the judgment. An appeal is now taken by the plaintiff-appellant from the judgment of reversal entered in the Supreme Court.

Facts.

On the 3rd day of June, 1926, one *James C. Sapienza, landlord*, leased the premises commonly known as 168-172 Coit street, Irvington, N. J., to A. J. Milmo, Jr. and Walter V. Sullivan, co-partners trading under the firm name and style of Newark Mason Supply Co., a copy of which

lease is in evidence and marked Exhibit P. 1 (State of Case, page 13).

On November 1, 1927, one C. Wallace Vail, was appointed equity receiver for the co-partnership, on the application of Walter V. Sullivan, one of the partners, as more fully appears by an order made and entered by the Court of Chancery of New Jersey on November 1, 1927 and marked Exhibit P. 2 (State of Case, page 14).

The Receiver took possession of the assets of the co-partnership, including the right, title and interest of the co-partnership in the leasehold in question.

On December 7, 1927 a petition in the Chancery Court was filed by the Receiver, wherein the Receiver alleged that he received an offer from one James Elder of \$30,000 for the assets of the co-partnership, including his interest in the leasehold. An order to show cause was made by the Court of Chancery on said petition, and on December 13, 1927 an order was made and entered by the Chancery Court, directing the Receiver to accept said offer for the assets, including the interest in the leasehold, and authorized the Receiver to execute and deliver to the said Elder, or his assigns, a bill of sale for the said assets upon the receipt of the purchase price. This order is marked Exhibit P. 3 on the part of the respondent (State of Case, page 16).

On December 19, 1927, C. Wallace Vail, receiver, executed and delivered an assignment of all his right, title and interest in the lease dated June 3, 1926, made between James C. Sapienza, landlord, and Alexander J. Milmoe, Jr. and Walter V. Sullivan, co-partners trading as Newark Mason Supply Co., tenant, to Alexander J. Milmoe, Sr., the defendant-respondent, which as-

signment is marked Exhibit P. 4 on the part of the plaintiff (State of Case, page 18).

In addition to the exhibits mentioned above, the only other testimony on the part of the plaintiff-appellant, is a statement by counsel for the plaintiff-appellant that counsel for the defendant-respondent agrees that the rent from April 1930 to date (meaning the date of the trial) was not paid, and a further statement by him that they (meaning plaintiff-appellant) are suing for only two months (State of Case, page 7, line 20).

The defendant-respondent, Alexander J. Milmo, Sr., testified that on March 15, 1930 he executed and delivered a written assignment of the lease in question, to Alexander J. Milmo, Jr. (State of Case, page 7, line 40, and Exhibit D. 1, page 19), and that after that date he retained no interest in the property whatsoever (State of Case, page 8, line 20) and never used the property again, (State of Case, page 10, line 20).

Alexander J. Milmo, Jr., testified that after the defendant-respondent purchased the lease from the Receiver, he used the premises with the permission of the defendant-appellant, and that he continued in possession under such permission until March 15, 1930, and after that date he was in possession by virtue of the assignment (Exhibit D. 1) until May 1930, and then abandoned the premises; that upon the execution and delivery of the assignment (Exhibit D. 1) to him he took the assignment to Mr. Sapienza and told him that he took over the lease and it was up to himself to take care of the rent, and Mr. Sapienza said he didn't care so long as he (meaning Milmo, Jr.) would take care of the

paying of the money (State of Case, page 10, line 40).

On May 19, 1930, James C. Sapienza, Inc., a corporation (not the original landlord), instituted a suit in the Second District Court of the City of Newark against Alexander J. Milmo, Sr., defendant-respondent, in which suit the state of demand alleged that the plaintiff-appellant, James C. Sapienza, Inc., a corporation, demands from the respondent \$200 for rent due for the months of April 1930 and May 1930, in the sum of \$100 for each month, making a total of \$200 for the premises occupied by the respondent under a lease at No. 168 Coit street, Irvington, New Jersey, which rent was due payable on the first day of April, 1930, and on the first day of May, 1930, from the respondent to the appellant, and that the respondent refused to pay said rent.

On the state of demand and the proofs in the case as herein outlined, the trial judge gave a judgment in favor of James C. Sapienza, Inc., the plaintiff-appellant, against Alexander J. Milmo, Sr., the defendant-respondent, for the April and May rent of 1930.

Findings and Conclusions of Trial Judge.

The District Court Judge, in effect, found (State of Case, page 20):

1. That this was a suit by the owner of the premises for rent due under the lease.
2. That the Court of Chancery, through its receiver, sold to the defendant-respondent the unexpired term of the lease.
3. That the defendant-respondent purchased the lease from the Court of Chancery, with all its conditions and covenants

(meaning, we suppose, the covenant not to assign without the written consent of the landlord and the covenant to pay rent).

4. That defendant-respondent took possession and paid rent for many months.

5. That the transfer of the unexpired term by the Court of Chancery to the defendant-respondent did not render the covenant against assignment null and void.

The defendant-respondent filed seven specifications of determinations of the District Court, with which he was dissatisfied in point of law.

The Supreme Court found that there was privity of estate between the appellant and the respondent during the respondent's occupancy of the property; that there was no privity of contract and no assumption by the respondent of the lease itself; that when the respondent assigned the lease to his son the obligation to pay rent under the lease ceased in the absence of an assumption of its obligations, and in the absence of proof that the assignment to the son was not bona fide. The Supreme Court said that the appellant claimed that the terms of the lease prohibited an assignment thereof without the appellant's consent, and that having taken a valid assignment from the receiver, the respondent could not divest himself of the leased property without such consent. The Supreme Court further said, however, that the contention of the appellant was erroneous, the question having been disposed of by the cases of *Meyer v. Alliance Investment Co.* (84 N. J. Law 451, affirmed 86 N. J. Law 694) and *Linke v. Greenfield* (104 N. J. Law 320). The Supreme Court also said that when the respondent took an assignment of the lease containing the words:

"This lease shall be binding upon the parties here to, their heirs, executors, administrators and assigns," it did not constitute an assumption of the lease and its obligations, and only imposed a liability during the period of actual holding, and not otherwise. The Supreme Court also found that the record contained no facts which would justify the conclusion that the assignment from the respondent to his son was not in good faith.

Because of the foregoing conclusions, the Supreme Court reversed the judgment entered in the Second District Court of the City of Newark.

An appeal is now taken by the plaintiff-appellant to this court on the assumption that the conclusions reached by the Supreme Court were erroneous for three reasons, more particularly set forth in appellant's brief. The respondent contents that the conclusions reached by the Supreme Court are correct, for the following reasons:

POINT I.

Privity of contract never existed between defendant-respondent and plaintiff-appellant, and the assignment of the lease from the defendant-respondent to Milmoe, Jr., terminated the privity of estate and the liability of the defendant-respondent for accruing rents.

It may very well be that the defendant-respondent could not assign the unexpired term of the lease to a third party, and compel the landlord to accept the assignee as a tenant, *i.e.*, it may be that Milmoe, Sr., could not assign the term to Milmoe, Jr. and compel the landlord corporation to accept Milmoe, Jr. against its wishes as a

tenant, but the landlord corporation certainly could not prevent Milmoë, Sr. from assigning the unexpired term to Milmoë, Jr., Milmoë, Jr. taking the assignment for whatever it might be worth to him. Such an assignment on the part of Milmoë, Sr. is not a violation of the covenant in the lease. The covenant not to assign was made by the original co-partnership—that is, Alexander J. Milmoë, Jr. and Walter V. Sullivan, co-partners trading as the Newark Mason Supply Co.—and not by the defendant-respondent.

Specifications 1, 2, 3 and 5 of the Specifications of the Determinations of the District Court with which the defendant-respondent was dissatisfied in point of law, are based on the soundness of this principle, and the cases in this State are all in accord therewith.

The case of *Linke v. Greenfield* (104 N. J. Law, page 320) is on all four with this principle. In this case, the Ideal Music Co., a corporation, was adjudged insolvent by the Court of Chancery, and a receiver was appointed to wind up the affairs of the corporation. The receiver sold to the defendant, Greenfield, the unexpired term of a lease between Linke, the plaintiff landlord, and the Ideal Music Co., the insolvent tenant, which lease contained a covenant against assignment without the written consent of the landlord. The defendant, Greenfield, entered into possession, by virtue of the assignment to him by the Court of Chancery, on October 23rd. The next day he assigned the lease to one Fisher, without obtaining any written consent from Linke, and put Fisher in possession. Fisher thereafter abandoned the premises, and the landlord, Linke, was not able to lease the premises until February 15th of the following year.

Linke then brought a suit against Greenfield, the assignee, for the rent for the period from October 23rd, to February 15th, and the District Court gave him a judgment. On the trial of the case, Greenfield, the assignee, claimed that he was not liable for any rent accruing after the assignment to Fisher, and requested the Court to charge as follows:

1. That the assignment to Fisher terminated the privity of estate between the defendant and the plaintiff, and the liability of the defendant for rent accruing thereafter.

2. That if defendant assigned his interest in the lease, such assignment terminated defendant's privity of estate and liability for rent accruing thereafter.

The trial judge refused to charge these requests. The Court of Errors and Appeals said that the trial judge was in error. Justice Parker, speaking for the Court of Errors and Appeals in this case, said:

"We consider that this refusal was error. The case cannot be distinguished, in our estimation, from *Meyer v. Alliance Investment Co.*, 84 N. J. L. 450, affirmed in 86 *Id.* 694. In fact, the Meyer case is stronger, for in that the lessor consented to the assignment 'subject to all the terms, conditions and covenants contained in the lease,' and yet the assignee was held liable only while the privity of estate continued. In the case at bar, while the assignment to defendant was through the operation of law, it certainly was not with the consent of the landlord. *If defendant bona fide assigned to Fisher, the privity of estate terminated, and with it defendant's liability to rent accruing thereafter.*

"The judgment is reversed to the end that a venire de novo issue."

In *Gerli v. Washington Piece Dyeing and Finishing Co.* (7 Miscellaneous Reports, page 511) the Supreme Court clarified what the Court of Errors and Appeals meant by the words "*bona fide*" in the *Linke v. Greenfield* case (104 N. J. Law, page 320). In the *Gerli* case the question involved was the liability of the defendant as assignee of a lease for rent accrued. The defense was that the defendant re-assigned to a third party named Bertha Michelin before any rent accrued, and the issue was whether the assignment to Bertha Michelin was genuine or only pretended, for if genuine, defendant would be relieved of the liability under the cases of *Meyer v. Alliance Investment Co.* (84 N. J. Law, page 451, affirmed in 86 N. J. Law, page 694) and *Linke v. Greenfield* (104 N. J. Law, page 320).

The District Court Judge refused to non-suit or direct a verdict for the reason, as he viewed the case, that the testimony presented a disputed question of fact whether the assignment was genuine or was a mere sham and not intended to take effect as between the parties to it. The District Court Judge said to the jury that if the defendant actually assigned the lease and stripped itself of all right thereto, but did it for the purpose of evading responsibility for the rent, the defendant would still be liable. The Supreme Court (in 7 N. J. Misc. Reports, page 511) said that the District Court Judge was wrong; that if the assignment is actual and genuine, the purpose is immaterial. The Supreme Court in this case said:

"The trial judge properly refused to non-suit or to direct a verdict, as the testimony presented a disputed question of fact whether the assignment was genuine or was

a mere sham and not intended to take effect as between the parties to it. But he fell into error when he charged the jury that 'there was, so far as the language was concerned, an effective assignment of that lease. If that effective assignment from the standpoint of language was also an honest assignment and not one made for the purpose of evading an honest responsibility under the lease, then that terminated what we know in law as the privity of contract.'

"The obvious implication of this language as we read it is that if defendant actually assigned the lease and stripped itself of all right thereto, but did that for the purpose of evading responsibility for the rent, it would still be liable. *This, we think, is not the law. If the assignment be actual and genuine, the purpose is immaterial.* 36 C. J. 377. But aliter if it is a mere cover. Ibid. 378. The language in *Linke v. Greenfield*, supra, reading 'if defendant bona fide assigned to Fisher,' related to a genuine, as distinct from a pretended assignment."

The law seems to be settled that if there is an actual assignment of the lease, the purpose of the assignment is immaterial, even though it may appear that the defendant executed the assignment for the purpose of stripping himself of further liability to pay rent. The only qualification that seems to be necessary for the assignment to effectively terminate the privity of estate is that the assignment must be an actual assignment and not a pretended assignment, and certainly in the case at bar the assignment is actual, as appears by Exhibit D. 1.

In *Meyer v. the Alliance Investment Co.* (84 N. J. Law, page 451, affirmed in 86 N. J. Law, page 694), we find the following state of facts:

Meyer, the plaintiff, leased the property to one Jong. The lease contained a covenant not to

assign without the written consent of the landlord. The landlord consented in writing to an assignment by Jong to the Alliance Investment Co. Subsequently, the Alliance Investment Co. re-assigned to Jong without obtaining the written consent of the landlord. Meyer, the plaintiff landlord, brought an action against the Alliance Investment Co. for rent that accrued after the re-assignment to Jong. The Alliance Investment Co. defended the action and maintained that there was no privity of contract between Meyer, the plaintiff landlord, and the defendant; that the privity of estate terminated by the re-assignment to Jong, and with it the liability to pay future rent. The trial judge gave judgment against the Alliance Investment Co. for rent that accrued after the assignment to Jong. The landlord maintained that inasmuch as the lease contained a covenant not to assign without his written consent, the Alliance Investment Co. took subject to that covenant, and it was not possible for the Alliance Investment Co. to terminate the privity of estate, nor could it terminate its own liability arising therefrom by the assignment without consent, since that would enable the Alliance Investment Co. to take advantage of its own wrong. But the Supreme Court said that the Alliance Investment Co. could assign the lease so as to terminate the privity of estate, notwithstanding, the covenant not to assign. Justice Swayze, speaking for the Court, said:

“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; Tayl. L. & T. No. 680; 24 Cyc. 984, note 45.*"

The case at bar is on all fours with the case of *Linke v. Greenfield* (104 N. J. Law, page 320), as well as the other cases cited above.

POINT II.

The plaintiff-appellant and defendant-respondent did not mutually adopt the lease so as to obligate the respondent to pay the rental reserved for the full period of the lease.

The plaintiff-appellant claims, under Point I in its brief, that when the Statutory Receiver under the Partnership Act was appointed, he took no title to the lease, therefore the assignment of the lease by the said receiver was null and void and passed no interest to the respondent; that the legal effect of the assignment from the receiver to the respondent merely gave the respondent possession of the premises, that the act of the respondent in paying the rent stipu-

lated in the lease and the acceptance thereof by the appellant were tantamount to an adoption of the lease and imposed an obligation on the respondent to pay the rental reserved for the full period of the lease, even though there was no agreement to that effect and in the absence of a covenant of assumption.

We maintain that the plaintiff-appellant is in error in reaching this conclusion. In the first place, the statutory receiver appointed under the 1919 Partnership Act, Pamphlet Laws of 1919, Chapter 206, page 450, acquired title to the leasehold, and the assignment by the receiver to the respondent did not require the consent of the appellant because the lease passed by operation of law, under an order of sale made by the Court of Chancery.

In the second place, if the statutory receiver did not pass title to the leasehold under the assignment (Exhibit P. 4, State of the Case, page 18), after receiving the \$30,000 consideration, the mere taking of possession of the premises by the respondent, and the payment of the rent stipulated in the lease, and the acceptance thereof by the appellant, did not create a relationship of landlord and tenant, nor did it create privity of contract, nor did it impose an obligation on the respondent to pay the rental reserved for the full period of the lease.

The respondent maintains, however, that the statutory partnership receiver did acquire title to the leasehold, and that when he accepted respondent's \$30,000, he passed good title to the leasehold under the assignment (Exhibit P. 4, State of the Case, page 18); that this had the effect of creating a privity of estate between the plaintiff-appellant and defendant-respondent, and

that the said privity of estate was terminated by the assignment of the leasehold from the respondent to his son (Exhibit D. 1, State of Case, page 19); and that this terminated all relationship between the plaintiff-appellant and defendant-respondent. Our reason for this position is based on the following:

In the case of *Pappas v. the Broad and East Jersey Realty Co.* (103 N. J. Law, page 704), this court held that the attempted assignment by the Federal Equity receiver of the leasehold to the Broad and East Jersey Realty Co. was tantamount to an assignment by the original lessee and constituted a breach of the covenant against assignment which entitled the landlords, Pappas and Tutulis, to possession of the premises. The appellant evidently reasons as follows: Vail was an equity receiver, the assignment by Vail to the respondent was a breach of the covenant against assignment, and the landlord appellant could have obtained possession of the premises by reason of such a breach. The landlord, however, did not obtain possession, but accepted rent from the defendant-respondent, and the payment of such rent by the defendant-respondent, under the assignment from Vail, constituted an assumption of the covenant to pay rent for the remainder of the term.

There are a number of fallacies in this theory. In the first place, the assignment from Vail, the statutory co-partnership receiver, to the defendant-respondent, did not violate the covenant against assignment. This was decided by the Court of Chancery in the case of *Alexander J. Milmoie, Sr.*, complainant, and *James C. Sapienza and Irvington Mason Supply Co., a corporation, et als.*, defendants (103 N. J. Law, page 101).

In this case, Vice-Chancellor Church said as follows, on page :

“The third point advanced is that the lease is at an end because of a provision therein that it can not be assigned without the consent of the landlord. It seems quite clear to me that the landlord’s consent was not necessary, because this lease passed by operation of law under an order of sale made by this court. I do not think it essential to quote any authorities for this proposition.”

The authority for this proposition is the case of *Fleming v. Fleming Hotel Company* (69 N. J. Equity, page 715). In this case, Vice-Chancellor Bergen said as follows:

“As to the second point, I take it to be well settled that a covenant not to sell or assign the lease is not broken where the assignment is by operation of law, and that an assignment of this lease by the receiver, as the agent of the law, to a purchaser of the leasehold interest, would not work a forfeiture. That the covenant under consideration only applies to voluntary sales, and is not subject to forfeiture unless the proceedings at law under which the leasehold interest is disposed of were voluntary and collusive with a view to defraud the landlord of his rights, is well supported by the authorities. *Jackson v. Corliss*, 7 Johns. 531; *Jackson v. Silvernail*, 15 Johns. 278, 280; 1 Mc. Ad. Land & T. (Ed. 1900) Sec. 235; *Allen v. Bennett*, 1 Fed. Cas. 214; *Riggs v. Pursell*, 66 N. Y. 193; *Farnum v. Hefner*, 79 Cal. 575; 12 Am. St. Rep. 174; *Bemis v. Wilder*, 100 Mass. 446; and also *Stockton v. Mechanics and Laborers Savings Bank*, 32 N. J. Eq. (5 Stew.) 163, 169, where the Court said: ‘The liability of the receiver in insolvency in such case is precisely the same as that of an assignee in insolvency or bankrupt who may retain or surrender the

lease according as it may seem most advantageous for the estate of the debtor.' ”

It was the contention of former Vice-Chancellor Lane, in the case between the same parties and decided by Vice-Chancellor Church *supra* that under the case of *Pappas and Tutulis v. the Broad & East Jersey Realty Co.*, decided by Common Pleas Judge Alfred A. Stein and affirmed by the Court of Errors and Appeals in 5 N. J. Adv. Reports, Pamphlet 24, page 942, that the assignment by the receiver, C. Wallace Vail, was a voluntary assignment and not an assignment by act and operation of law, and therefore the assignment by Vail to Milmoë, Sr., was the same as if the co-partnership assigned and therefore constituted a breach of the covenant against assignment and entitled the landlord to possession. We disagreed with Merritt Lane in his contention, for the reason that the receiver in the Pappas and Tutulis case was a pure equity receiver, and the receiver in our case, to wit, C. Wallace Vail, was a receiver on dissolution of a partnership, to wit, a statutory receiver appointed under the Act of 1919, Chapter 206, page 450, and we distinguish the two as follows:

The facts in the case of *Pappas v. Broad & East Jersey Realty Company* were as follows:

On August 1, 1919, the Merchants Land and Improvement Company made a lease of its lands and premises to the National Drug Stores Corporation, and Pappas and Tutulis succeeded to the ownership of the fee. The lease contained the following provision, “and it is further agreed between the parties hereto that the party of the second part will not assign this lease without the written consent of the party of the first part, its successors or assigns under penalty of forfeiture and damages.”

Judge Stein held that there was a breach of this clause of the lease which forfeited the lease because of the following situation:

On December 19, 1924, a receiver was appointed by the United States District Court for the Southern District of New York of the National Drug Stores Corporation, lessee. The proceedings were solely in equity. They were neither in insolvency, nor bankruptcy nor dissolution. A pure custodial receiver was appointed. On the same day the New York receiver was appointed ancillary receiver in the District of New Jersey.

On January 30, 1925, the United States District Court for the District of New Jersey made an order directing the custodial receiver in equity to accept an offer of the Broad & East Jersey Realty Company to sell and assign the lease to it.

On February 4, 1925, an assignment was executed by the receiver of the National Drug Stores Corporation and BY THE CORPORATION ITSELF. The said assignment was signed by George W. Burleigh receiver in equity, and National Drug Stores Corporation, by Austin C. Rothwell, Vice-President.

Thereafter the landlords Pappas and Tutulis served their notice on the Broad & East Jersey Realty Company demanding possession claiming that the lease for the premises came to an end because of the violation of the provisions in said lease by the lessee against assignability, and immediately instituted a suit in ejectment.

The proceedings in this case were *not involuntary or for dissolution*. The corporation, National Drug Stores Corporation, consented to the re-

ceivership. It merely transferred the operation of its business to the United States District Court. *It was conceded that the corporation was solvent and the receivership was voluntary.* The receiver took the property of the corporation with all the equity and subject to all the disabilities under which the corporation labored, and it was beyond the power of the court to transfer that which the corporation itself could not transfer. If it were otherwise, corporations by coming into court for the purpose of having these moratoriums established could create property rights in themselves.

Judge Stein among other things in his opinion said as follows:

"The bill of complaint by David D. Vincent, a stockholder, in the United States District Court for the Southern District of New York, against the National Drug Stores Corporation, the lessee, alleged that the corporation was *SOLVENT*, but that suits were threatened against it in various jurisdictions which might result in the sale of the corporation's property at much less than the fair value thereof, and TO PROTECT STOCKHOLDERS HE SOUGHT THE INTERVENTION OF THE EQUITY powers of the court, by the appointment of a CUSTODIAL RECEIVER. THE COMPANY APPEARED, ADMITTED THE STATEMENTS CONTAINED IN THE BILL, AND CONSENTED TO THE RECEIVERSHIP. George W. Burleigh was appointed ancillary receiver of the corporation for the district of New Jersey." * * *

"THE APPLICATION FOR A RECEIVER IN THIS INSTANCE WAS MADE BY A STOCKHOLDER, AND CONSENTED TO BY THE CORPORATION IN ORDER TO PROTECT ITS ASSETS, AND WAS IN THE NATURE OF AN APPLICATION FOR A CUSTODIAL RE-

CEIVER, DIRECTED TO THE EQUITY
SIDE OF THE COURT."

In the 1919 Partnership Act, Pamphlet Laws of 1919, Chapter 206, page 450, the dissolution of partnerships and the distribution of assets was made statutory, a statutory receiver is provided for and the act among other things, on page 452, says:

"And the proceedings upon the winding up of such partnerships shall be as near as may be similar to the procedure for the winding up of corporations under the Act concerning corporations."

The act further provides:

"That the assets shall be held by the receiver with a view to ultimate distribution among creditors, and others entitled to participate therein."

And on page 452 of the said Partnership Act, it is provided as follows:

"This Act is remedial and is to be liberally construed. Its purpose is to permit the Court of Chancery to dispose of cases involving dissolution of partnerships and the distribution of assets, and to prevent the acquiring of liens and preferences after the filing of an application looking towards the distribution of the assets of the partnership amongst the creditors."

When the receiver was appointed by this court, and the defendant Alexander J. Milmo, Jr., had no defense to the application because it was a partnership at will, that was the end of the partnership. That amounted to a dissolution of the partnership and from that time on the receiver held the assets to be distributed amongst the creditors. Under the order of the court the receiver did distribute the assets amongst the creditors.

In *Wimpfheimer v. Perrine*, 67 N. J. Eq., page 598, Justice Van Syckel, in the Court of Errors and Appeals said as follows:

"In *Graham Button Co. v. Spielmann*, 50 N. J. Eq. (5 Dick.) 120, Vice-Chancellor Van Fleet HELD THAT THE RECEIVER OF AN INSOLVENT CORPORATION IS THE REPRESENTATIVE OF ITS CREDITORS, AND AS SUCH MAY, BY SUIT OR DEFENCE, AVOID ANY INSTRUMENT WHICH IS VOID AS AGAINST THEM. This case was affirmed in this court, and we see no reason to question the correctness of that decision.

In an involuntary proceeding, as in case of a receivership, or assignee appointed by the court, THE PROCEEDING IS ADVERSE TO THE DEBTOR. The law takes the property in the position in which it is with reference to the rights of creditors and appropriates it exclusively and irrevocably to the payment of debts. Anyone claiming a superior right must show his title *Stricti Juris*.

The receiver is the embodiment of creditors; he stands as and for them; when he challenges the validity of the mortgage, he does so in the character of creditor, having in virtue of his receivership debts fastened upon the mortgagor's property. It is then a question strictly between creditors and the mortgagee, and the statute, declaring the mortgage void as to creditors for want of recording, applies as fully as if it was a suit between a single judgment creditor and the mortgagee.

IN VOLUNTARY ASSIGNMENTS THE ASSIGNEE DOES NOT IN THE SAME SENSE REPRESENT CREDITORS; he stands in the place of his assignor, with all the property which his assignor can pass to him, with a duty to divide it between creditors who may elect to come in.

When he challenges the validity of a mortgage, he must do so as the representative of the assignor.

Where the previous liens are honest, although by force of the statute they may be avoided by subsequent judgment creditors, 'SUCH ASSIGNEE TAKES THE ESTATE ASSIGNED IN THE SAME PLIGHT AND CONDITION IN WHICH HIS ASSIGNOR HELD IT.' THERE IS NOTHING IN THE PROCEDURE OF A VOLUNTARY ASSIGNMENT WHICH ELEVATES THE ASSIGNEE TO A HIGHER PLANE THAN THE ASSIGNOR HIMSELF OCCUPIED."

In *Kirkpatrick v. McElroy*, 41 N. J. Eq., page 539, the Court of Errors and Appeals held that a partnership receiver is a necessary party to suits affecting partnership property, and in proceeding in Chancery by a creditor, for the payment of a firm debt out of partnership assets in the receiver's hands, a judgment at law against the surviving partner recovered after a receiver was appointed, is a nullity. The receiver of a partnership being for the benefit of all firm creditors, in analogy with a creditor's bill, suspends the running of the statute of limitations in equity against claims by firm creditors for the payment of partnership debts out of the firm assets in the receiver's hands. This would not be true if the receiver of a copartnership were a mere equity receiver and a judgment of this kind against the remaining copartner would *not* be a nullity. This case clearly indicates that the receiver of a copartnership is different than a mere ordinary equity receiver:

"Unless the running of the statute was suspended by the proceeding in the court of chancery for the settlement of the partnership affairs. As a general rule, the mere appointment of a receiver to take charge of

property in dispute will not suspend the operation of the statute (Anon., 2 Atk. 15), nor will it interrupt the possession of a stranger so as to prevent the statute conferring title on him, or suspend the running of the statute against a stranger. *Harrison v. Duigan*, 2 Dru. & War. 295; *Kerr on Receivers* 172. BUT WHERE THE RECEIVER IS APPOINTED TO TAKE CHARGE OF AN ESTATE FOR THE PURPOSE OF ADMINISTERING IT, AS, FOR INSTANCE, THE SETTLEMENT OF THE AFFAIRS OF A PARTNERSHIP AND THE PAYMENT OF FIRM DEBTS, THE SUIT BEING SUBSTANTIALLY FOR THE BENEFIT OF ALL THE CREDITORS, IN ANALOGY WITH AN ORDINARY CREDITOR'S BILL, THE APPOINTMENT OF A RECEIVER WITH SUCH POWERS WILL SUSPEND THE RUNNING OF THE STATUTE."

In *Manzo v. Manzo*, 4 N. J. Advance Reports, Pamphlet No. 19, page 769, Vice-Chancellor Griffin said in this late case:

"THE APPOINTMENT OF A RECEIVER FOR A CO-PARTNERSHIP PRIOR TO DISSOLUTION DOES NOT VEST THE TITLE TO THE PERSONAL PROPERTY IN THE RECEIVER. In the case of *Brockhurst v. Cox*, 71 N. J. Eq. 703 (at p. 708); affirmed, 72 N. J. Eq. 950, the receiver of a partnership rejected the claim of Elizabeth A. Brockhurst on a chattel mortgage. One of the questions determined was the power of the receiver before and after the decree of dissolution. Vice-Chancellor Garrison said (at p. 708): 'From the proofs in this suit it appears that the partnership is insolvent. Before a decree of dissolution, the receiver appointed pending the suit is nothing more than a custodian of the property, and represents nobody excepting the court, and represents it solely for the purpose of conserving the property until

the further order of the court. The court having taken the property in charge solely for the purpose of conversation, has not, by that act, attempted to adjudicate any claims nor to settle any rights. The suit may be discontinued, or in any one of a number of ways it may result in some disposition other than a final decree, the effect of which would be to revest the partnership with its property. After a decree of dissolution, however, the situation is entirely changed. The court, by such decree, determines that the partnership is dissolved; that its property must first go to pay the creditors of the partnership, and that such creditors will be ascertained by the court, their rights passed upon, and their debts, to the extent that the property will go toward that end, paid.' He then held that from the time of the dissolution the debts were fastened upon the assets of the partnership as a lien in favor of subsisting creditors, and the receiver becomes their representative, with power, by suit or defense, to avoid any instrument which is void as against them. See, also, *Ross v. Titsworth*, 37 N. J. Eq. 333; *Pennsylvania Steel Co. v. New York City Railway Co.*, 198 Fed. Rep. 721, 728; *Atlantic Trust Co. v. Chapman*, 208 U. S. 360; 52 L. Ed. 528, 533 col. 1; 28 Sup. Ct. 406; *Booth v. Clark*, 17 How. 322; 15 L. Ed. 164, 168 col. 1; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82; 12 Sup. Ct. 787; 36 L. Ed. 632, 637 col. 2; *Union National Bank of Chicago v. Bank of Kansas City*, 136 U. S. 223; 10 Sup. Ct. 1013; 34 L. Ed. 341, 346 col. 1; *Gaither v. Stockbridge, Receiver*, 67 Md. 222; 9 Atl. Rep. 632; 10 Atl. Rep. 309; 1 Clark Rec. 513 par. 441."

In *West Shore Railroad Company v. Wenner*, 70 N. J. Law, 233, this court held that a sale under a mortgage foreclosure voided a lease

which contained a covenant against assignment. In this case the court said:

“In our judgment a mortgage of the lease or estate carried out by an entry of the mortgagee or by the sale under the mortgage is an assignment and transfer within both the words and the intent of the covenant.”

The reason for this conclusion is because when a tenant mortgages a lease and the mortgage is foreclosed it is a voluntary assignment.

In *Gazley v. Williams*, 210 United States, page 41, the Supreme Court of the United States held that a sale by a trustee in bankruptcy under order of Court of his bankrupt's interest as lessee in a lease of real property is not a breach of condition causing a forfeiture. The Supreme Court in this case said:

“all that has followed upon his bankruptcy is not by his act but by operation of law transferring his property to his assignees.”

The theory of this case is that it was not a voluntary assignment.

In *Medinah Temple Co. v. Currey*, 162 Ill. 441, the court said:

“But it is claimed the transfer in the case of a voluntary assignment is by operation of law, and therefore, under the well-established rule of law, no breach of the assignor's condition. This position we regard as untenable. The act by which the title to the assigned estate is transferred from the assignor to the assignee is purely voluntary on the part of the former. Voluntary assignments for the benefit of creditors are transfers without compulsion of law. They are termed ‘voluntary’ to distinguish them from such as are made by compulsion of law, as under statutes of bankruptcy and insolvency * * * Therefore, these authorities which hold that if the lessee makes

an involuntary assignment the leasehold will pass by operation of law have no application here."

In *Quincy etc. R. R. Co. v. Humphreys*, 145 U. S. 682, the court said:

"It is not asserted that these receivers became the assignees of the unexpired term of the leasehold estate, with the right to dispose of it, but it is claimed that because they took possession of the railroad of the Quincy Company and held and operated it until August 1, 1885, they became liable to the extent of the rental up to that time. But the receivers were not statutory receivers, nor did they occupy identically the same position as assignee in bankruptcy or *insolvency and the like*."

Prior to the 1919 partnership act suits could have been brought against the co-partners after the appointment of the receiver. The partnership did not cease to exist on the appointment of the receiver. Its entity as a partnership continued until its affairs were wound up and its assets distributed. Under the 1919 partnership act, this is not so. Upon the appointment of the receiver with a view to distributing the assets of the creditors, the receivership is wound up and the effect of the appointment of the receiver is not voluntary but involuntary.

In *Farnum v. Hefner*, 79 California 375, the court said:

"If the landlord desires to void such involuntary transfer of the leasehold interest of the tenant, he may provide expressly in his lease that such transfer of the property shall work a forfeiture and the same will be effectual." * * *

But there is a forfeiture when as the California case says:

“It appears that the judgment and sale has been submitted to in bad faith on the part of the lessee or where he voluntarily places himself in such a position that a transfer must result as for example, where he deposits the lease as security or gives a warrant of attorney whereby he may be dispossessed by the creditors (*Doe v. Hawke*, 2 Eastern 553). But this is placed upon the ground that the assignment in such case must be regarded as vountary.”

In ordinary equity receivership the court acts as the agent of the corporation or individual. The only right which the court has in cases of this kind which the corporation has not is to, while it conducts the business of the corporation enjoin the enforcements of legal remedies against the corporation or in other words it has a right to establish a moratorium, and that is the reason why resort is had to the court.

In the case of a perfectly solvent corporation or co-partnership, if the receiver can be permitted to disregard the covenant in the lease against assignment, the results will be that a corporation holding such a lease perfectly solvent but in a condition where it is temporarily embarrassed may have a receiver appointed for it, not for the purpose of dissolution but for the purpose of conserving the assets until they can be turned back to the corporation when the emergency has passed away, for the purpose of establishing a moratorium. In effect, these receivers may then transfer the lease to a third party, disregarding the contract between the parties and the covenant against assignment, the emergency may pass and the receivers may be discharged and the corporation become re-

possessed of its property. But where a receiver is appointed with a view of dissolution of the corporation or co-partnership this cannot happen. There can be no fraud.

The essential difference between the two classes of receiverships is that receiver in insolvency for dissolution of co-partners is for the benefit of creditors, and whereas a receivership as in the Pappas and Tutulis case is for the ultimate benefit of stockholders. One is involuntary and the other is voluntary.

McAdam—Landlord and Tenant—501:

“A covenant not to assign is broken by a voluntary assignment for the benefit of creditors, but is not infringed by an assignment by operation of law, as, for instance, under the bankrupt laws in case of the tenant’s bankruptcy, or under the insolvent laws in case of his insolvency or by means of an execution sale, for in such cases the assignment is not the act of the tenant but of the law, unless that be made the subject of an express stipulation. Thus, with the lessee as a trader and subject to the bankrupt laws, proviso may be introduced for re-entry in case the tenant shall commit an act of bankruptcy whereon a fiat shall issue; and such a proviso is good in law, although it has the effect of preventing the interest in the term from passing to the assignees. And a provision for re-entry in case the term be taken on execution is also good.

These cases demonstrate that the landlord may protect himself against assignment by operation of law, by inserting after the usual covenant against assigning and underletting a clause to the effect that the tenancy shall be determined upon the lease being taken upon an execution, or upon its passing out of the tenant’s hands, either by his own acts or by operation of law.”

In the case of *Bemis v. Wilder*, 100 Mass. 446, the court says:

"It is well settled that an assignment by operation of law passes the estate discharged of the covenant to the assignee; and this would seem to be so where the transfer arises from voluntary proceedings in insolvency as distinguished from proceedings in *invitum* and where there is no indication that the proceedings are colorable merely for the purpose of effecting the transfer in fraud of the lessor."

In the case of *Smith v. Putnam*, 3 Pick. 220 at 223, the Court, per Parker, C. J. (Supreme Court Mass.) says:

"Covenants not to assign, transfer, etc., are broken only by a voluntary assignment by the lessee."

Clark in his work on "Receivers," section 601, says:

"Upon a judicial sale of a leasehold, even though the lease was not assignable by the lessee, it becomes assignable by operation of law even without the lessor's consent."

Zweitusch v. Luehrig, 156 Wis. 96.

Burrill in his work on "Assignments," at page 4, discussing assignments for benefit of creditors, which are voluntarily made by a debtor, says:

"Such assignments (assignments for benefit of creditors) are terms voluntary to distinguish them from such as are made by compulsion of law as under statutes of bankruptcy and insolvency (the latter sometimes being termed statutory assignments), OR BY ORDER OF SOME COMPETENT COURT."

It is the general rule at law that restrictions upon alienation by the lessee are not favored and are considered strictly and a particular mode of alienation is not to be regarded as prohibited

unless it is by words which have no other meaning. See *Tiffany Landlord and Tenant*, page 921.

In 20 Ruling Case Law, page 963, we find the following:

"A receiver of a partnership is an officer of the court making the appointment invested with the whole equitable title to the firm assets without an assignment, and represents, in any suit affecting the partnership property, the interests therein of all parties to the suit in which he was appointed; and therefore he has such an interest in such property, legal and equitable, as to make him a necessary party in an action to foreclose a lien thereon. The appointment operates as an assignment of the firm assets and securities for the benefit of the firm creditors."

On page 962 we find the following:

"As a general rule the court will not appoint a receiver to carry on the business of a partnership and will not make such appointment except in connection with the dissolution of the partnership, hence if a dissolution is inadvisable no receiver will be appointed."

In 23 Ruling Case Law, page 54, we find the following:

"In the case of a receiver for a partnership there is also respectable authority holding that he takes, by virtue of his appointment both the legal and equitable title."

Denny v. Cole, et al., 61 Pac. 38 (1900).

Before the Supreme Court of Washington. This case cites the Supreme Court of Minnesota, in *Henning v. Raymond*, 29 N. W. 132, as saying:

"When a court has taken property into its own charge and custody for the purpose of administration and disposition in accordance with the rights of the parties in litigation, IT IS IN CUSTODIA LEGIS. The

title of the property for the time being and for the purpose of such administration may, in a sense, be said to be in the court. The receiver is appointed for the benefit of all concerned. He is the right arm of the court in exercising the jurisdiction invoked in such case of administering the property."

In this Minnesota case it was held that the receiver had a special interest in the property as to make him a real party in interest, within the meaning of a statute which provided that every action should be prosecuted in the name of the real party in interest. The court now cited the case of *Kirkpatrick v. McElroy*, 41 N. J. E. 539, in support of this doctrine.

The court then goes on to say that:

"it is generally held, that the court in the absence of a statute, may order a sale of the property in the hands of a receiver whenever it deems a sale necessary or advisable in order to protect the rights and interests of all parties, and that A PURCHASER AT SUCH SALE WILL TAKE THE LEGAL TITLE to the property purchased. It would seem to be hard to reconcile these principles with the doctrine that a receiver is ONLY THE CUSTODIAN of the property involved in the receivership."

In the case of *Lamier, et al. v. Wallace, et al.* (1888), 17 N. E. 923, before the Supreme Court of Indiana, one I. F. and A. E. F. were indebted to a partnership of which they were members. They transferred their individual property to the partnership as security for such debts. Later they became individual endorsers on a promissory note which came into the complainant's hands. The latter sought to set aside the transfer of the individual estate to the partnership, setting up a preference in themselves as individ-

ual creditors. The Court, in declining the decree says:

“the partnership having become insolvent and having in effect assigned their partnership effects for the benefit of their creditors, the receiver representing an equal equity and, leaving the legal title in dispute, cannot be postponed to the claims of an individual creditor. Where the equities are equal, he is in the situation of advantage who holds the prior legal right.”

The court having appointed a receiver for any purpose and the receiver having taken possession of the property under the court's order, the court has power to deal with the property as it, within its discretion, may deem for the best interest of the estate. *Waring v. Van Slyck*, Hop. Ch. 114; *Forsaith v. Hope*, 139 Southeastern 869.

The Court of Chancery appointed a receiver of the co-partnership in dissolution and having the power to sell, and exercising that power, the question arises “is the exercise of such power by a court and the sale of the leasehold interest by the receiver under the order of the court, a sale by the co-partnership or sale by operation of law?” “Is the sale by the receiver a judicial sale?” A judicial sale has been defined as one made by the court having jurisdiction over the proceedings and having the property in its control made by its clearly authorized officers on the order of the court and approved by it. (See Brown on Jurisdiction, Sec. 65; Clark on Receivers, Sec. 601.)

Suppose a judgment creditor would have obtained a judgment against the co-partnership, and the sheriff should levy on the lease, and sell the lease on the execution sale. Is there

any doubt but that the purchaser would get good title to the lease discharged of the burden of the covenant? The sheriff transfers the title although it is not devolved upon him. The law fixes the liability in these cases, and the law fixed the right to have title passed out of the debtor. The law says that title shall pass. In a receivership for a co-partnership on dissolution the law causes title to pass on the sale. The title passes by act and operation of law. If a creditor gets a judgment against a co-partnership and the sheriff sells under the *fi fa*, the title passes by act and operation of law.

In the case of *Brockhurst v. Cox*, 71 Equity, page 703, Vice-Chancellor Garrison held that a receiver of an insolvent partnership appointed for the purpose of winding up the affairs of the partnership and distributing its assets to its creditors, is the representative of the partnership creditors and as such he may by suit or defense avoid a chattel mortgage given by the partnership which is void as against the creditors. In this case the court said:

“A creditor whose debt was subsisting at the time of the giving of a chattel mortgage may, by subsequently obtaining judgment and levying upon the property, place himself in a position to attack the chattel mortgage or to resist its enforcement. But this is not the only way in which the right of a creditor to attack the validity of the chattel mortgage or to resist its enforcement may be asserted. It has been held that SUCH RIGHT MAY BE ASSERTED BY A RECEIVER APPOINTED IN PURSUANCE OF THE GENERAL CORPORATION ACT. *Graham Button Co. v. Spielmann*, 50 N. J. Eq. (5 Dick.), 120 (Vice-Chancellor Van Fleet, 1892); affirmed, 50 N. J. Eq. (5 Dick.) 796.

On the other hand, it has been held that a general assignee by a voluntary assignment is not such a representative of creditors as to enable him to assert, on their behalf, this right of attacking THE VALIDITY OF AN OTHERWISE VALID CHATTEL MORTGAGE. *Wimpfheimer v. Perrine*, 67 N. J. Eq. (1 Robb.) 597 (Court of Errors and Appeals, 1904).

The real question for decision in this case, therefore, is Does A RECEIVER OF A PARTNERSHIP WHO IS APPOINTED AFTER A DECREE OF DISSOLUTION FOR THE PURPOSE OF WINDING UP ITS AFFAIRS AND DISTRIBUTING THE MONEY TO ITS CREDITORS, SO FAR REPRESENT SUCH CREDITORS AS TO BE INVESTED WITH POWER IN THEIR BEHALF TO ATTACK THE VALIDITY OR TO RESIST THE ENFORCEMENT OF A CHATTEL MORTGAGE GIVEN BY THE PARTNERS?" "AFTER THE DECREE OF DISSOLUTION THE DISTRIBUTION OF THE PROPERTY OF THE PARTNERSHIP AMONG THE CREDITORS IS AN INVOLUNTARY PROCEEDING."

If it is true that the receiver represents creditors and can step in and do what a creditor can do, and if it is true that a judgment creditor can obtain the title to the lease containing a covenant against assignment under an execution against the partnership relieved of the covenant, then it naturally must follow that the receiver of a co-partnership appointed for the purpose of dissolution and representing the creditors can also give title to the lease relieved of the covenant against assignability.

In *Hammer v. Israel*, 89 Equity, page 481, decided by Vice-Chancellor Lane, in 1909, and upon which decision no doubt the partnership act of 1919 was based and which was probably

prepared by Mr. Merritt Lane, he held that *Ross v. Titsworth*, 37 N. J. E. 303, was not an authority for the rule he laid down in that case, which held that if a receiver is appointed for a co-partnership in a dissolution the creditors cannot proceed to obtain judgments against the co-partnership and fasten their liens on the assets in the hands of the receiver.

On page 485 of his opinion he said as follows:

"The evil feared by the California court and by the chancellor which might result of the adoption of the New York rule was that the cause being one, up to the point of a decree of dissolution, strictly between the parties, it might at any time be discontinued without leave of court, and the partners would be enabled by such a proceeding, if the hands of creditors in the MEANTIME were stayed, to secure what would be tantamount to a MORATORIUM—a very real evil as I attempted to point out in *Hitchcock v. American Pipe and Construction Co.*, 89 N. J. Eq. 440, in CONSIDERING THE PRACTICE OF CERTAIN OF THE FEDERAL COURTS IN PERMITTING SOLVENT CORPORATIONS TO SEEK THE AID OF THE FEDERAL COURTS FOR A LIKE PURPOSE. (And in this connection my criticism of the federal practice was not so much directed to a taking over by the court of a solvent but embarrassed corporation with the view of ultimately liquidating all debts, but rather to the procedure which made no provision for notice to creditors, deprived them of their remedy at law, gave them no substitute remedy and which might result in preferences. I have NO QUARREL WITH THE THEORY THAT ASSETS OF AN INSOLVENT CORPORATION, PARTNERSHIP OR INDIVIDUAL SHOULD BE TREATED AS A TRUST FUND FOR THE PROTECTION OF CREDITORS PRO RATA, nor do I ques-

tion but that equitably the theory can be extended over assets of a solvent person, natural or artificial."

What Vice-Chancellor Lane condemns above was attempted in the case of *Pappas and Tutulis v. Broad & East Jersey Realty Company*, decided by Judge Stein and approved by the Court of Errors and Appeals, he quotes the case of *Schloss v. Schloss*, 43 N. Y. Supplements 788, in which the court said:

"It appears by reported cases that this is not the first time that such a ruse has been resorted to to hold creditors at arm's length until it becomes convenient for debtors to pay, and we agree with what was said by the courts in this case that it had appeared that the intention was not to wind up the affairs of the debtor with the greatest possible speed but to continue the business for his benefit; there is no reason for forbidding a creditor to levy precisely as though no receiver had been appointed."

In the case of *Hammer v. Israel*, Vice-Chancellor Lane also said as follows:

"I FIND NO ENGLISH AUTHORITY DRAWING A DISTINCTION BETWEEN THE RIGHTS OF CREDITORS AS AGAINST PROPERTY IN THE POSSESSION OF A RECEIVER APPOINTED BEFORE DISSOLUTION AND ONE APPOINTED AFTER. In *Helmores v. Smith*, 35 Ch. Div. 449, it was held in a case where the court of appeals had ordered the appointment of a temporary receiver pending appeal from an order of dissolution AND APPOINTING A RECEIVER THAT A LIBEL ON THE BUSINESS CONDUCTED BY THE RECEIVER AND MANAGER WAS A CONTEMPT OF COURT AND MIGHT BE PUNISHED BY COMMITTAL INDICATING QUITE CLEARLY THAT THE RECEIVER WAS

SOMETHING MORE THAN A MERE
AGENT OF THE PARTIES."

Mr. Lane expressly says that the receiver for the co-partnership in dissolution WAS SOMETHING MORE THAN A MERE AGENT OF THE PARTIES. This clearly indicates that such a receiver is different than an ordinary equity receiver appointed by the Court of Chancery. Mr. Lane also quotes Judge Relstaff in the matter of the *Capitol City Cap Company*, United States District Court, District of New Jersey, 41 A. B. R. 604, in which Judge Relstaff said:

"IS IT NOT THE PASSING OF THE TITLE TO THE BANKRUPT'S PROPERTY UNDER SECTION 70a, BUT THE PASSING OF SUCH PROPERTY GREMIO LEGIS FOR PURPOSES OF LIQUIDATION WHICH FIXES THE TIME WHEN THE TRUSTEE IS REGARDED AS HAVING ACQUIRED THE STATUS OF A LIEN HOLDER UNDER SECTION 47."

And Mr. Lane in *Hammer v. Israel* further says:

"THE RIGHT OF THE RECEIVER APPOINTED AFTER DISSOLUTION TO AVOID LIEN CLAIMS CLAIMED TO BE ACQUIRED BY JUDGMENT CREDITORS BY JUDICIAL PROCESS UPON THE PARTNERSHIP PROPERTY MAY BE HELD TO RELATE BACK TO THE TIME THAT THE COURT FIRST TOOK THE PROPERTY INTO ITS POSSESSION THROUGH THE MEDIUM OF A TEMPORARY RESTRAINT." * * *

"IT SEEMS to me that the rights of creditors to an equitable distribution of the assets of an insolvent partnership arises, at least, upon the property being taken over by a temporary receiver with a view to ultimate distribution, and that after such a tak-

ing over, liens cannot be obtained through legal proceedings and that this is so notwithstanding the fact that the suit may be discontinued; that creditors, however, will be permitted to make levies, so that in case of discontinuance their legal rights will be protected, and that if it appears that the partnership is solvent, or that the proceedings are not being taken in good faith, the court may permit judgment creditors to proceed with their legal remedies. I think this view is supported by the great weight of authority. 30 Cyc. tit. 'Partnership,' Par. 2-8 (at pp. 730-731); see also Lind. Part. (7th ed.) (at p. 585)."

"AFTER THE AWARD OF AN ORDER TO SHOW CAUSE, AND THE APPOINTMENT OF A TEMPORARY EQUITY RECEIVER IN A CORPORATION CASE, BEFORE ADJUDICATION, THERE ARE MANY CONTINGENCIES WHICH MAY RESULT IN THE TURNING BACK OF THE PROPERTY TO THE CORPORATION JUST AS IN A PARTNERSHIP CASE, AFTER THE APPOINTMENT OF THE RECEIVER, BUT BEFORE DECREE OF DISSOLUTION, THERE ARE MANY CONTINGENCIES WHICH MAY RESULT IN THE TURNING BACK OF THE PROPERTY TO THE PARTNERSHIP. In each case I think it must be considered that the rights of creditors at large attach from the time the court first puts its hands upon the property, if, in fact, the property never leaves the possession of the court, except through a decree of distribution amongst creditors. See the remarks of Vice-Chancellor Leaming in *Trustees of Sea Isle Realty Co. v. First National Bank*, 99 Atl. Rep. 929; 87 N. J. Eq. 84, in dealing with the situation of a dissolved corporation in the hands of trustees. He held that after dissolution no preferential liens could be acquired. IT WOULD SEEM THAT IN THESE PARTNERSHIP CASES A PROCEDURE SHOULD BE ADOPTED SOME-

WHAT SIMILAR TO THE PROCEDURE
IN CORPORATION CASES." * * *

From all the above authorities, it is clear that a receiver for a co-partnership, appointed for the purpose of dissolution, is different from the ordinary equity receiver. The title to the assets pass by act and operation of law. The partnership is at an end by the appointment of a receiver in dissolution. The receiver represents the partnership and the creditors, and everybody concerned. Such a receiver is different from the receiver in the case of *Pappas and Tutulis v. The Broad & East Jersey Realty Company*. Such a receiver is not a custodial receiver. The proceedings wherein one partner filed a bill to dissolve the co-partnership where the co-partnership was a co-partnership at will, is not a voluntary proceeding. The receiver, therefore, representing creditors and the dissolved co-partnership, gives a good title to a lease and may assign such a lease in the face of the covenant against assignability.

When C. Wallace Vail was appointed receiver by the Chancery Court, a bill for dissolution was filed by Walter V. Sullivan, and when Vail took hold of the assets and the lease, he represented all the creditors; he was not a mere agent of the co-partnership; he gave a good title to the lease to Alexander J. Milmo, Sr., and the covenant against assignment was not violated.

As we stated above, our adversary contends that Vail could not assign to Milmo, Sr., the defendant-respondent. If he is correct in this assertion, then Milmo, Sr., the defendant-respondent, never became a tenant under the lease. If our adversary's theory is correct there is no telling what status Milmo, Sr. assumed when he took an assignment of the lease from

Vail and continued to pay rent up until April 1, 1930, and the rent was accepted by the landlord. Certainly he could not have become a tenant who assumed a covenant to pay rent.

How can you, from all the circumstances in this case, spell out an assumption to pay the rent or conclude that privity of contract was created between Milmo, Sr. and the landlord, plaintiff-appellant.

POINT III.

The provision in the lease: "This lease shall be binding upon the parties hereto, their heirs, executors, administrators, successors or assigns," does not constitute an assumption of the lease and its obligations.

In the case of *Meyer v. The Alliance Investment Co.*, 84 N. J. Law, page 451 (affirmed 86 N. J. Law 694) it was held that the clause "Subject to all the terms, conditions and covenants contained in the lease" constituted words of qualification and not of contract. While there is a difference in the language, the meaning is the same. These words imposed a liability during the period of actual holding and not otherwise. The incorporation of these words in the lease does not have the effect of creating a personal liability. The same condition existed in the cases of *Meyer v. The Alliance Investment Co.* and *Linke v. Greenfield*. In both of these cases the leases were made with the original tenants, their heirs and assigns.

In addition to this, we can not understand the position of the plaintiff-appellant. In one breath it claims that Vail, the receiver, acquired no legal title to the leasehold, and therefore he

passed no legal title to the respondent. This is its position under Point I in its brief. Under Point II it claims that the receiver did pass legal title to the defendant-respondent, his heirs, executors, administrators and assigns. Surely it is inconsistent in these positions.

In *Reid v. Weissner & Sons Brewing Co. of Baltimore* (40 Atlantic Reporter, page 877), the Court of Appeals of the State of Maryland held that the following words of assignment in a lease: "I hereby assign and set over this lease with all its covenants, terms and conditions," were merely descriptive and not words of contract expressing a covenant by assignee to pay rent. In this case, the Court said:

"There is certainly no undertaking, promise or agreement, in express terms, on the part of the brewing company, to pay the rent which Miller specifically covenanted to pay; and unless the assignment of the lease, 'with all its covenants, terms and conditions,' has a wider scope than a bare assignment unaccompanied by the words quoted would have had, there is no independent agreement binding the company at all. The words 'with all its covenants, terms and conditions,' add nothing to the legal effect of the assignment. They certainly are not contractual words of the assignee. They embody no promise by the brewing company to the lessor. They are simply words of description, and not words of contract, and they impose no greater obligation on the brewing company than would have existed had they been entirely omitted from the assignment. *Wahl v. Barroll*, 8 Gill 288; *Wolveridge v. Steward*, 30 E. C. L. 561. In *Bixler's Case* there was a distinct agreement on the part of the assignee to perform all the covenants of the lease which the lessee had undertaken to perform; and the suit was brought on that agreement, and the liability was not

made to rest solely and exclusively upon the privity of estate, as it is in this case."

In 38 L. R. A. 624, 46 N. E. 1105 (*Consolidated Coal Co. v. Peers*), it is said that a provision in an assignment that the assignee take the lease "subject to the agreement called for in the lease" does not impose a personal contractual obligation on the assignee to pay the rent to the lessor, after abandoning the premises. In the case of *Meyer v. Alliance Investment Co.* (84 N. J. Law, page 451, affirmed in 86 N. J. Law, page 694), the landlord consented to the assignment "subject to all the terms, conditions and covenants contained in the lease" and yet the assignee was held liable only while the privity of estate continued. This quotation will be found in the case of *Linke v. Greenfield* (104 N. J. Law, page 321).

It is obvious that the statement of the trial judge in the last sentence of his opinion: "Also the covenant to pay rent," means that the assignment from the Court of Chancery to the defendant-respondent imposed an obligation on the assignee to pay rent for the unexpired term, namely, a covenant of assumption. This, in our opinion, is not so. The defendant-respondent (assignee) can not be personally bound unless there are words in the assignment equivalent to a covenant of assumption, and there are none.

POINT IV.

The assignment from the defendant-respondent to his son was a genuine assignment and effectively terminated the privity of estate between himself and the plaintiff-appellant.

The Supreme Court found that the District Court Judge could not justify his conclusions in rendering judgment against the defendant-

respondent on the ground that the assignment was not in good faith. Both father and son testified to the assignment, and that the father thereafter had no contact with or interest in the property. The assignment is Exhibit D. 1, State of the Case, page 19. It is an actual written assignment executed by the respondent, delivered to Milmoë, Jr. and accepted by him. No attack was made upon the bona fideness or genuineness of the assignment. During the period covered from February, 1928 to April, 1930, the defendant-appellant paid the rent, but permitted his son, Milmoë, Jr., to use the property. His expression in the testimony: "I made him a present of it," simply means that he permitted his son to remain in possession without paying rent to him. This was to the entire satisfaction of the plaintiff-appellant from February, 1928 to April, 1930.

POINT V.

Plaintiff-appellant consented to the assignment by the defendant-respondent.

On page 16 of the State of Case, line 12, Alexander J. Milmoë, Jr. testified as follows:

"Q At the time when the assignment was executed to you by your father, March 15, 1930, did you do anything with the assignment? A Yes.

Q What did you do with the assignment? A I took it up and showed the assignment to Mr. Sapienza, and told him I had taken over the lease now and it was up to me to take care of the rent, and he said he didn't care, as long as I took care of the paying of the rent."

To be sure, this is not a consent in writing to the assignment of the lease. Nevertheless, the

effect of this testimony, which was not denied, is, that Milmoë, Jr., defendant-respondent's assignee, took possession under the assignment (Exhibit D. 1) and continued in possession, evidently acceptable to the plaintiff-appellant. It seems to us that such conduct on the part of the plaintiff-appellant, coupled with an actual written assignment from Milmoë, Sr., is tantamount to a written consent to the assignment—at least, it is a waiver of the requirement of written consent.

There are certain facts in this case which the trial judge assumed to be true, but are not supported by testimony. For example, he said in his opinion, that this is a suit by the owner of the premises for rent due under the lease. There is no proof whatsoever that James C. Sapienza, Inc., a corporation, is the owner of the premises, or is entitled to the rent. The original lease was made by James C. Sapienza, individually, as landlord, and no assignment of the lease or other proof of the right to collect the rents is found in the testimony. The trial judge also found as a fact that the defendant-respondent paid the rent for many months. This, too, is not borne out by any testimony in the case. However, counsel for the defendant-respondent did not call these things to the attention of the trial judge, and we suppose that no advantage can be taken of the lack of this proof at this time, and for this reason the defendant-respondent is willing to admit that the plaintiff corporation is the landlord and that Milmoë, Sr. took possession and paid the rent up until April 1, 1930.

CONCLUSION.

In conclusion, we respectfully submit, and it clearly appears in this case, that the defendant-respondent took an assignment of the lease from the Court of Chancery without a covenant of assumption on his part that he had a legal right to assign the unexpired term to Milmoë, Jr., that such assignment did not render the covenant against assignment null and void, that the written assignment (Exhibit D. 1, State of the Case, page 19) terminated the privity of estate between the defendant-respondent and the plaintiff-appellant, and with it the liability for future rent.

We respectfully submit that the judgment of reversal entered in the Supreme Court should be affirmed.

Respectfully submitted,

KOEHLER & AUGENBLICK,
Attorneys for and of Counsel with
Defendant-Respondent.

New Jersey Court of Errors and Appeals

JAMES C. SAPIENZA, INC., a corporation, <i>Plaintiff-Appellant,</i> (Respondent below), <i>vs.</i> ALEXANDER J. MILMOE, SR., <i>Defendant-Respondent,</i> (Appellant below). 	}	<i>On Appeal from Supreme Court.</i> <i>(Sat below: CAMPBELL, LLOYD and BODINE, JJ.)</i>
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(Italics ours except as otherwise indicated.)

BRIEF OF APPELLANT.**History of the Cause.**

The appellant brought suit in the Second District Court of the City of Newark for rent reserved by a written lease. Judgment was entered against the respondent. The latter appealed therefrom to the Supreme Court. That court reversed the judgment. This appeal is directed to the judgment of reversal entered in the Supreme Court.

Statement of Facts.

The appellant James C. Sapienza, erroneously referred to in the initial pleadings as James C. Sapienza, Inc., a corporation, was the owner of premises located in Irvington, N. J., in 1926. He leased them to Alexander J. Milmoie, Jr., and Walter V. Sullivan, trading as Newark Mason Supply (Co.), by a written agreement dated June 3, 1926 (Exhibit P. 1, page 13). The letting was for a period of five years at the rental of

One Hundred (\$100) Dollars per month. The lease included two provisions upon which the present controversy largely rests. They are as follows:

“This lease shall be binding upon the parties hereto, their heirs, executors, administrators, successors or assigns.”

“This lease shall not be assigned without the written consent first being obtained from the landlord.”

The parties agreed in the court below to make no point of the erroneous designation of the party plaintiff in the District Court, and that stipulation, expressed in the briefs filed in the Supreme Court, is reiterated here.

By an order of the Court of Chancery made on November 1, 1927, a receiver was appointed for the co-partnership known as Newark Mason Supply Co. The bill for the appointment of the receiver was filed by Walter V. Sullivan. The order appointing the receiver (Exhibit P. 2, page 14) recited that the defendant (Alexander J. Milmoë, Jr.) consented to the appointment of the receiver. It also provided that the receiver should hold the property of the partnership subject to the order and decrees of the court. It provided further that the receiver be vested with full power and authority of equity receivers.

By an assignment dated December 19, 1927, the receiver assigned to the respondent all of his right, title and interest in the lease (Exhibit P. 4, page 18). This assignment recites that it was executed pursuant to an order of the court confirming the sale of the partnership assets to James Elder for \$30,000.00 (Exhibit P. 3, page 16). The recitals contained in this last mentioned order indicate that the receiver applied to the

court by petition for permission to accept the offer indicated upon which an order to show cause was made by the court.

The testimony of Alexander J. Milmoe, Jr. (page 10), indicates that he occupied the premises from the time the receiver sold the lease to the respondent. Alexander J. Milmoe, Sr., testified (page 9) that he made some use of the property after the assignment by the receiver for a short period of time.

The respondent failed to pay the rents which became due on April 1st and May 1, 1930. The appellant's action to recover such rents was defended upon the ground that on March 15, 1930, the respondent assigned the lease by written assignment to his son, Alexander J. Milmoe, Jr., and that thereafter he was not liable for the rental reserved. The written assignment was received in evidence (Exhibit D. 1, page 19).

It is the contention of the appellant that the proofs require a judgment in his favor and reversal of the judgment below. The essence of the controversy is this: Was the relationship between the parties merely a privity of estate or was it conventional? The appellants claim that a privity of contract existed between the parties to this appeal; and further, that assuming the presence of only a privity of estate, the respondent did not terminate that privity. In discussing these contentions the following points will be made:

1. *The parties adopted the lease and thereby the respondent became bound by all of its terms and is obligated to pay the rental reserved for the full period of the lease.*

2. *The respondent assumed the obligations of the lease and is obligated to pay the rental reserved for the full period of the lease.*

3. *The respondent failed to effectively terminate the privity between himself and the appellant and is obligated to pay the rental reserved for the full period of the lease.*

POINT ONE.

The parties adopted the lease and thereby the respondent became bound by all of its terms and is obligated to pay the rental reserved for the full period of the lease.

The claim that the lease in question was adopted by the parties is predicated upon the proposition that the receiver took no title to it and hence passed no interest in it to the respondent; and upon the further proposition that in this posture of affairs the respondent entered into possession, and the appellant accepted rent, each pursuant to the provisions of the lease, their minds meeting in the common purpose of resting their rights and obligations upon that instrument, which resulted in an adoption of the lease.

The receiver was not vested with *title* to the partnership assets. He was a mere custodian, possessing them. He served for the court, as the "arm" of the court. The order by which he was appointed merely authorized him to "hold" the assets subject to the order and decrees of the court. So that there should be no doubt about his estate, the court specifically provided in that order that he should have the full power and authority of equity receivers.

The appointment of an equity receiver does not effect any change in the title to the assets involved. The general rule in this respect is stated as follows in 53 *C. J.* 93.

“The effect of the appointment of a receiver by a court of equity under its general chancery powers is to place the property from time to time in the custody of the receiver as an officer of the court for the benefit of the parties ultimately proved to be entitled, and insofar to confer upon him a right to possession, except as the order may otherwise indicate, and to remove the parties to the suit from possession; *but it does not in itself change the title, or even the right of possession in the property, nor determine or even affect the rights of the parties except so far as it preserves and retains control of the property to answer the final judgment.*”

And at page 96 of the said volume it is said:

“An ordinary receiver, appointed under the general powers of the court, does not by the mere fact of his appointment become vested with any title or estate in the property involved, he being a mere custodian thereof for the court, and for the benefit of the party ultimately proved to be entitled.”

Such a receiver, in disposing of assets which come into his hands, merely passes on whatever interest the defendant in the equity proceedings actually had in the property. He is a mere means for physically transmitting the assets or evidence of them, in furtherance of the administration of the cause by the court. Those assets do not in any sense pass *through* him, for no law operates upon them to produce that situation. The exercise of the court's inherent jurisdiction does not cause the purchaser's title to flow through the receiver for the court merely takes custody. Title moves from the defendant to the purchaser.

In the instant case the court exercised jurisdiction for the purpose of bringing about the dissolution of a partnership. There is no suggestion in the record that this proceeding was instituted *solely* in the interest of creditors. The fact that it was brought by one of the co-partners is an indication to the contrary. The receiver appointed in such a suit is necessary only for the purpose of collecting and preserving the partnership assets. This necessity springs from the obvious fact that the court cannot itself do so nor can it rely upon the litigating partners to fully bring about the result indicated.

These being the attributes of the receivership, the disposition of the lease amounted to nothing more than an attempt to pass whatever interest the partners had, subject to all limitations and qualifications upon the estate. The receiver did not assign in the ordinary sense for he had nothing to assign. Where the receiver of a corporation appointed under the provisions of the Corporation Act, undertakes to assign a lease, he in fact accomplishes an assignment. This is because he is vested by statute with title to the lease. The object of the proceedings in which he is appointed requires that result. If such a receiver obtains a lease with a covenant against assignment, his act in disposing of the tenant's estate results from the operation of the law upon the tenant's property, and hence the landlord cannot defeat the assignment. But in the instant case the law did not operate upon the property of the partners. The Court of Chancery merely took that property into its custody in order that it might administer the affairs of individuals *whose relationship created the equitable jurisdiction*. Hence the respondent took nothing by

the assignment which the partnership did not have.

This court has reached a similar conclusion in a case where for all *essential* purposes the situation was the same as exists here. In *Pappas v. Broad and East Jersey Realty Company*, 103 N. J. L. 704, the plaintiff sued in ejectment and secured a judgment for possession and mesne profits. This judgment was affirmed upon the opinion of the trial judge which was printed as part of the opinion of this court. It appeared that the plaintiff had leased property to National Drug Stores Corporation, a corporation. A bill was filed against the latter by one of its stockholders on the equity side of the United States District Court for the Southern District of New York. The plaintiff alleged that the corporation was solvent but that suits were threatened against it which might result in the sale of its property at much less than its fair value. The corporation admitted these allegations and consented to the receivership. An ancillary receiver was appointed for the District of New Jersey. That receiver, acting pursuant to an order of the court, accepted an offer of the defendant to purchase the lease and executed an assignment thereof. The lease provided that the tenant should not assign it without the consent of the landlord, under penalty of forfeiture and damages.

The sole question in the ejectment suit was whether the assignment by the receiver was a breach of this covenant which would entitle the plaintiff to declare the lease at an end and demand possession.

The defendant claimed that the assignment was by act and operation of law and could not be defeated. He supported this contention by the

citation of *Fleming v. Fleming Hotel Co.*, 69 N. J. Eq. 715; *Gazely v. Williams*, 219 U. S. 41, and *Bemis v. Wilder*, 100 Mass. 446, decisions relied upon by the respondent herein in the court below. This view was not accepted however, the court saying:

“It is well settled that in the case of a receiver where the petitioner is insolvent, or of a trustee for a bankrupt that the title to the property of the insolvent or bankrupt passes to the receiver, and that, in such cases, the sale by the receiver of leasehold property, even in the face of a restrictive covenant such as we find here, would not be in violation of the covenant, since it would be an assignment by act and operation of law.

“If this were the case of a receiver in insolvency, or that of a trustee in bankruptcy, title would undoubtedly pass by operation of law, for in such cases the receiver would take the title. For, as was held by the Supreme Court of the United States, in the case of *Gazely v. Williams*, that which follows in the case of bankruptcy is not by the act of the bankrupt, but by operation of law, transferring the bankrupt's property to the assignee. But in this case, which is purely an equity receivership, the receiver was a mere custodian and, therefore, could not dispose of this lease in the face of the covenant contained therein or give a greater title than the corporation itself possessed; but could only convey such right, title and interest as the corporation had in the *res* itself. Moreover, it appears that the plaintiffs were not parties to the federal proceedings in which the order to sell the lease was made, and it seems to me that the court was without power to make an order which would conclude their rights.

“The proceeding in which the receiver was appointed was not one in the interest of creditors, as is the case in statutory receiverships in insolvency and trustees in bank-

ruptcy, but one where the corporation alleged that it had sufficient money to pay its debts, but that its property was subject to execution and would be dissipated, and perhaps creditors would not be paid, and stockholders would suffer; whereas, if it were given time and could do its business under the protection of the court, its debts could be paid and its property handed back to its stockholders. If, under such circumstances, it could go into a court to obtain a moratorium, as it were, and then dispose of its property without regard to restrictive covenants such as contained in this lease and later have its property turned back to its stockholders free and discharged of the covenant, and thus receive the benefit of the breach thereof, it would open the door to much fraud and wrongdoing.

"It seems to me that in this case the court, in effect, substituted itself, through the appointment of its receiver as its agent, for the officers and managers of the corporation. It did not take the property of the company for distribution among its creditors, as in the case of receiverships in insolvency and trustees in bankruptcy, and that therefore the rights of the receiver rose no higher than the rights of the corporation itself, and so, what the corporation could not do with its property, the court, through its receiver, could not do."

The receivership in the present case was of the same nature as that presented in the Pappas decision. Applying the rule stated therein it follows that the receiver of the partnership passed only such an interest in the lease as the latter actually had. That interest was burdened with the requirement that any assignment thereof be conditioned upon procuring the written consent of the landlord in advance. No such consent was secured and it follows that the receiver's assignee took nothing. The covenant against assignment

was notice to the respondent that he might procure nothing by his purchase.

The situation which existed when the respondent went into possession was this, therefore: The respondent had no interest under the lease and he and the appellant were both charged with knowledge of the law which rendered the receiver's assignment ineffective. The respondent however, went into possession under the lease. He paid the rental reserved under the lease and the appellant accepted it. The respondent instituted a suit in the Court of Chancery against the appellant to restrain the latter from interfering with his possession under the lease, as appears from the former's testimony (page 9).

The relationship between the parties therefore became conventional—they adopted the lease as the instrument which would fix their mutual rights and obligations. Their minds met on a common basis of operation, viz., that the respondent should become a tenant *under the lease*. This carried with it the legal result of making the relationship of the parties contractual. Part of that contract was a covenant to pay rent. Another part was a covenant against assignment. In attempting to assign the lease to his son the respondent made an empty gesture. He could not do so without the consent of the landlord. Hence, independent of the covenant to pay rent, his obligation to do so continued. Independent of the covenant against assignment the *contract* to pay the rent carried with it a liability to do so even after an effective assignment.

In his argument in the court below the respondent referred to the decision of *Milmoe v. Sapienza*, 103 N. J. Eq. 101 (reply brief, page 2) as indicating that the assignment by the receiver did

not violate the provisions of the lease. That decision is not part of the record and of course is only to be considered upon this appeal to the extent that it may be a precedent helpful in the determination of this controversy. The learned Vice-Chancellor before whom the cause was heard very briefly decided that the lease passed by operation of law. It is submitted that this decision is not binding upon this court, and with due respect to the learned Vice-Chancellor, that the conclusion indicated was not warranted by the proofs.

The opinion discloses that the court found the bill was filed under the statute relating to the dissolution of partnerships and the distribution of their assets (P. L. 1919, Chapter 206, page 450). Such was the contention of the respondent here in the court below. The record does not indicate that to be the fact. The receiver was vested with general equity powers. The statute by its terms expressly preserves to the Court of Chancery its existing jurisdiction and recites that the remedies provided for are in addition to any in existence.

But even if the receiver here was appointed under that Act no different result from that hereinabove contended for can follow. A reading of the statute discloses that it was designed to promote the speedy administration of partnership dissolution proceedings. It provides for a short day for the filing of an answer and for a short day for a hearing. It empowers the court to appoint a receiver or to charge the persons in actual control of the partnership assets as trustees. It recites that upon the exercise of either of these powers the partnership property shall be considered as in *custodia legis*. This provi-

sion is not an innovation for such assets are in *custodia legis* when the court undertakes to appoint a receiver under its general powers. This recital in the statute does not operate upon the property of the partnership so as to bring about a change of title.

The further statement that the property shall be considered as in *custodia legis*, with a view to ultimate distribution among creditors and others entitled to participate therein, adds nothing to the substantive powers of the court. The marshalling of assets which attends the ordinary partnership dissolution carried on under the general jurisdiction of equity is designed to provide for due distribution to creditors. That feature of such proceedings has never been held to impart to the cause attributes which effect a *vesting of title* in the receiver.

The true nature of the statute is indicated by recitals set forth therein. In paragraph 6 it is said that the act is remedial. Its purpose is announced in plain terms, and is stated to be "to permit the Court of Chancery to speedily dispose of cases involving dissolution of partnerships and the distribution of assets, and to prevent the acquiring of liens and preferences after the filing of an application looking toward the distribution of assets of a partnership amongst creditors." This indicates that the statute was designed to eliminate the evil pointed out in *Hammer v. Israel*, 89 N. J. Eq. 481, whereby liens and preferences might be acquired during the interval which previously existed between the initiation of the proceedings and the final hearing. These provisions, together with the preservation of the existing jurisdiction of the court already referred to, clearly manifest a

purpose to provide a remedial addition and not a substantive change. Hence the contentions advanced herein are equally pertinent even if the receiver's appointment was in a cause in which the court proceeded under the statute. Hence the cited decision cannot support the decision of the court below.

In all of the cases where the sale of a lease by a receiver has been held to result from the operation of law the receiver was vested with title by the statute under which he was appointed. In *Fleming v. Fleming Hotel Co.*, *supra*, the receiver's appointment was derived from the Corporation Act, as was the case in *Linke v. Greenfield*, 104 N. J. L. 320. That act, like the federal Bankruptcy Act, by its express terms operates upon the property involved and produces a change of title. The change may be likened to that which is brought about by a sheriff's sale under a writ of *fieri facias* issued upon a judgment. In such a case title passes to the purchaser in the sale, not by the deed of the sheriff, but by the force of the statute. The sheriff's deed is merely the evidence of that title.

In answer to the claim that the parties adopted the lease, it may be urged that the appellant interfered with the respondent's possession immediately upon the entry of the latter upon the premises, and that the payment and acceptance of rent was upon the strength of the decision in *Milmoe v. Sapienza*, *supra*, and therefore an adoption of the status indicated therein.

While these facts do not appear in the record, the appellant has no objection to their consideration. But the conclusion suggested above cannot logically be drawn from them. If, as is here contended, that decision was erroneous, the pay-

ment and acceptance of rent produced an adoption of the lease. Such was their legal effect. If in fact and in truth the respondent took no interest in the lease by the receiver's assignment, the acts of the parties could have but one effect—adoption of the lease, whatever the specific intention which accompanied those acts might have been. As stated by Chief Justice Beasley in *Campbell v. Nichols*, 33 N. J. L. 31:

“If a man does one thing, intending to do quite a different thing, I cannot perceive how it can be correctly argued that on account of the intention, the thing which was done is, in legal intendment, to be considered to be the thing which was not done.”

The logical result of these observations is that

(a) the receiver was a custodian with the right and power of a general equity receiver, and

(b) he secured no title to the lease, and

(c) the respondent acquired no interest in the lease, for appellant did not consent to the assignment, but

(d) the parties hereto mutually adopted the lease, thereby rendering their relationship conventional, and

(e) the respondent is obliged to pay the rent for the full period of the letting by force of the covenant to pay rent, and independently, because the assignment to his son was abortive, no consent having been obtained from the landlord.

POINT TWO.

The respondent assumed the obligations of the lease and is obligated to pay the rental reserved for the full period of the lease.

The argument of the appellant's second point is predicated upon the assumption that title to the lease vested in the receiver and passed to the respondent by operation of law. It is submitted that even under such a state of facts the respondent is obliged to pay the rental reserved in the lease for the full period of the letting.

The provision of the lease that it shall be binding upon the heirs, executors, administrators, successors or assigns of the parties, renders the situation quite different from that presented in *Meyer v. Alliance Investment Co.*, 84 N. J. L. 451, aff. 86 N. J. L. 694. There the lease was assigned "subject to" all of its terms, conditions and covenants. These were words of qualification and not of contract. In the instant case, however, it is provided that the lease "shall be binding upon" assigns and others who succeed to it. The difference is not merely one of words but of legal effect. Having indicated the terms of the letting in earlier provisions in the lease, the parties then proceeded to provide that these various obligations should be binding upon those who might succeed to their respective interests. It was of course competent for the appellant to provide that any person acquiring the instrument and the estate thereby created could only do so by rendering himself personally liable to perform the covenants. It was just as competent for the landlord to do this as it would have been to include a provision that upon the appointment of a receiver of the tenant's property the lease should come to an end.

Having taken the lease with this provision, of which he is charged with notice, the respondent consented to be bound by its terms. One of these was the covenant to pay rent.

This conclusion finds support in a statement made by Justice Swayze in the opinion of the Supreme Court in *Meyer v. Alliance Investment Co.*, *supra*. He said:

“The case is similar to a conveyance of land subject to a mortgage.”

The provision here would be sufficient if inserted in a deed of conveyance referring to a mortgage, to render the purchaser personally liable to pay the mortgage. If a grantee undertakes that a mortgage encumbering the lands shall be “binding upon” him he does something more than take the property subject to the mortgage. These words are not necessary to produce the latter result. If he is merely to take the property subject to the mortgage he would do so without the inclusion of such a provision. Its incorporation in the agreement obviously has the effect of creating a personal liability. But however this may be, its inclusion in a lease is of stronger import. This is so because the parties apply the phrase, not to an existing encumbrance, but to a future contingency as to which protection is desired.

The decision in *Linke v. Greenfield*, *supra*, is distinguishable on this branch of the inquiry. The opinion recites that the lease contained “a clause in the usual form, forbidding an assignment of the lease without the written consent of plaintiff.” It was asserted by the respondent here, in the court below, that the state of the case on the appeal to this court in *Linke v. Greenfield*, discloses that the lease was made with the

tenant, his heirs and assigns. It was also stated that the same is true of *Meyer v. Alliance Investment Co.*, *supra*. The opinions in each of these cases do not seem to adjudicate upon such a state of facts. The conclusion is therefore warranted that whatever might have been the particular phraseology in each of these cases, it was not equal to a provision that the indenture be "binding upon" those who might succeed to it. The court obviously found the language in each case to be nothing more than a *limitation*.

Independent of the obligation to pay rent resulting from the assumption as contended for, is the inability of the respondent, also assumed, to assign the lease without the appellant's written consent. The written assignment to Alexander J. Milmoë, Jr., not being accomplished with such consent, was nugatory. It cannot be said that it was effective and lodged in the appellant a right of action for damages. The respondent's assignee is surely chargeable with notice of that which the lease on its face discloses. He cannot claim an estate which the instrument plainly indicates the holder cannot give. It therefore follows that the respondent is liable for the rental reserved.

POINT THREE.

The respondent failed to effectively terminate the privity between himself and the appellant and is obligated to pay the rental reserved for the full period of the lease.

If the only relationship between the parties to this appeal was a privity of estate the appellant is nevertheless entitled to judgment. That privity was never effectively terminated. The es-

sence of the decisions on this subject is that the assignment must be genuine, as distinguished from pretended; actual, as distinguished from colorable. *Linke v. Greenfield, supra; Gerli v. Washington Piece Dyeing and Finishing Company*, 7 N. J. Misc. 511.

The assignment here is disclosed to have been merely colorable, by the testimony of the respondent himself. He said (page 10):

“Q What use did you make of the property between February, 1928, and March, 1930? A I didn't make any use of it; my son used it.

Q You didn't assign the interest to him while he used it during those months? A No, sir.

Q You made no use of it? A No, sir.

Q Did he pay you any rent for the use of it? A No, sir; I made him a present of it.”

Having made a present to his son more than two years before the assignment, it was necessary to assign to him in writing. It was not deemed necessary to execute a written assignment during that long period of time over which the *respondent* paid the rent. A present having been made and substantially executed by the respondent by the payment of the rent, the assignment was not genuine. The respondent's son acted as though the assignment produced no change, for he paid no rent whatever after it was executed (page 11). This assignment was unaccompanied by a written consent by the landlord “first obtained” and was therefore without effect upon the respondent's obligation to pay rent.

It is therefore respectfully submitted that the judgment of the Supreme Court should be reversed.

MILTON M. UNGER,
Attorney for and of Counsel
with Appellant.

LEONARD J. EMMERGLICK,
On the Brief.

It is therefore respectfully submitted that the
judgment of the Supreme Court should be re-
versed.

WILLIAM M. LINDEN

Attorney for and of Plaintiff
and Appellant.

LEWIS & CLARK
OF THE BAR.



