Denver Law Review

Volume 25 | Issue 4 Article 3

January 1948

Ancient and Modern Leases

Edwin J. Wittelshofer

Ancient and Modern Leases

tional case and does not present a serious qualification to the general statement that life insurance has been frozen in the insured's taxable estate. In the ordinary case the only way that life insurance can be made the subject of an inter vivos gift is by accepting its cash surrender value and making a gift of the proceeds. Notwithstanding significant estate tax savings, surrender normally involves a net loss so substantial that the plan is not entitled to serious consideration.

The fact is that Congress has placed a restraint upon the disposition of life insurance which is not applicable to property generally. In so doing it has precluded the use of life insurance for purposes which appear to deserve the support of intelligent legislation. The doctrine must be of most serious concern to those whose principal or sole asset is life insurance, for they are very likely to be in a position where they cannot seize the tax advantages to be obtained from making gifts because they have no other property which can be disposed of by gift. But to all who seek to cushion the impact of federal taxation and to whom the disposition of large amounts of property by gift appears to be the most practicable escape from confiscatory estate taxes, the "freezing" of life insurance in the insured's estate must present a fatal objection to its purchase in substantial amounts.

Ancient and Modern Leases

By EDWIN J. WITTELSHOFER

On the Denver bar, chairman of the Committees on Real Estate Standards of the Denver and the Colorado Bar Associations, to whom we are indebted for much of the progress which has been made in the adoption of real estate title standards, and the resulting uniformity in real estate practice in both Denver and the entire state. An address before the Denver Bar Association, March 1, 1948.

The method of leasing lands and tenements under written memoranda is one of the earliest legal practices of history. Its precise origin is shrouded in antiquity and it seems to have had early birth in all recognized legal systems.

The form and method of leasing in this country is easily traced to England where such practice was well implanted even before William, the Conqueror. While in these early days leases were not regarded with too much sanctity and were easily voided by the landlord, during the reign of Henry the VIII acts were passed which permitted tenants to maintain their rights to possession of leased property even against the landlord. These acts seem to be not only the last but almost the only benefit established by statute law for aid to the tenant.

The limitation in long term leases of 99 years is easily traced to English influence. Mathew Bacon, an English legal writer in a book published in 1798, recites that 99 years is the longest term possible because it represents three lives. Why this should be so, he does not state. Other authors contend that the Common Law of England prevents leasing beyond 100 years. Possibly lawyers in their endeavor to keep well within the law adopted 99 years as the ultimate. This Common Law rule, however, does not seem to be evidenced by any legal decisions.

Among the earliest written leases is one translated for us by Mr. John Wigmore in his work on the Greek Legal System. It is dated 350 B.C. and is in form, text and content astonishingly like the leases of the present day. It contains no direct obligation to be performed by the landlord, but has seventeen specific obligations to be undertaken by the tenant.

Following this translation Mr. Wigmore continues with this statement: "Who can doubt that this instrument represents a long accumulation of experience in technical draftsmanship and legal maneuvers?" Comparing this lease with that of the present day we must concede that there has been some considerable accumulation of experience and legal maneuvering since that date, but principally in the direction of creating a lease "of the landlord, by the landlord and for the landlord." For the general and customary lease of today while it still contains no obligations for performance by the landlord, has added enumerable additional obligations for compliance by the tenant.

In Denver, there are two general forms of leases in use for business property. The older form, known as No. 864, sets forth in bold type the term and rental provisions; and then, in such small type that I defy any one over forty years of age to read it without a magnifying glass, a multitude of obligations to be assumed by the tenant. There is no obligation undertaken by the landlord except, if so filled in, to furnish heat and light. Some years ago, in going through some of the archives of the old firm of Benedict & Phelps, I ran across the original draft of this lease prepared by the late A. C. Phelps for the real estate exchange. It bore the date as I now recollect of 1887.

The other form is of much more recent vintage, at least as to format, and bears the imprint of approval of the Real Estate Exchange and Building Owners Association. It contains eighteen sections and twelve rules and regulations quite entirely devoted to imposing duties upon the tenant, but does contain one paragraph (the last one) in which the landlord warrants the tenant peaceful possession of the demised premises.

Under present day conditions of supply and demand with reference to locations, the great tendency is constantly to increase the burdens of the tenant.

Sometime ago a lease of Denver property, prepared however in New York, was presented to the speaker for inspection and consideration. It contained two covenants which illustrate this tendency. The first condition sets forth that in the event the tenant should institute a court action under

the lease and not succeed in obtaining judgment, the landlord might recover, as costs, all his expenses in defending the suit, including attorney fees. The other covenant was similar to the cognovit condition appearing in some promissory notes; that is, permitting any attorney of record to appear for the tenant in any court and confess judgment, etc. Now it sometimes occurs that the tenant, falling out with his landlord, will bring a purely vexatious action; and also occasionally the tenant makes it difficult in F.E.D. actions for the landlord to get service upon him. But vexatious suits and difficulties in obtaining service are at least equally annoying to the tenant as they are to the landlord, and fairness and equity require such provisions to be reciprocal.

If unilateral provisions such as these shall continue to be added to leases, I venture the suggestion that the courts in seeking to do justice will interpret the text of these conditions in the light of what fair men should agree upon without too much concern as to the precise language used, in the same manner as was resorted to in the interpretation of insurance policies before such provisions were made futile under legislative requirements.

Because there may be present here today members of the bench, perhaps I had better add the observation that the last previous statement is pure dictum—should I ever be engaged in defense of the landlord concerning such unilateral conditions.

Without attempting to enter into a detailed discussion of the obligations of tenant in the forms of leases currently in use in this community, I am constrained, for the purpose of illustration, to direct attention to a few, viz:

(a) The limitation upon the obligation of the landlord in those leases in which he is required to furnish heat—to do so only beginning October 1 and ending April 30. It not infrequently occurs that we have late springs and early falls and days when, without heat furnished by the landlord, the tenant is greatly disturbed in the operation of his business and has no convenient way to relieve against such conditions.

(b) The provision that the tenant must act as an insurer of the landlord for any damage or injury arising through breakage or leakage of water or gas pipes, etc., even though such breakage is the result of ordinary wear and tear, while at the same time he, the tenant, waives all claims against the landlord for any injury accruing from the acts of owners or occupants of adjoining property, even when such occupants hold under the same landlord.

(c) The requirement that the tenant return the property in as good order and condition as when received, ordinary wear and tear excepted. This in itself is probably a fair and proper provision but attached to it is the obligation not to call upon the landlord for any outlay for maintenance—this without limit as to maintenance of roofs, walls, exterior surfaces, etc.

(d) The condition attempting to create a chattel mortgage or lien upon the personal property of the tenant as security for rent—a provision of more than doubtful enforceability but at least a threat to the free exercise of the

tenant in relation to his property. No question is here raised as to the fairness on the part of the landlord to require security, but only to the method.

(e) The provision in regard to requiring written consent by the landlord to an assignment of the lease. This provision might well be qualified with the condition that such consent be not unreasonably withheld.

Fairness prompts me to say that most provisions in the lease have definite equitable purposes and doubtlessly have been based upon the landlord's experiences. And it must be said that by and large, landlords, notwithstanding the specific terms of the lease, have attempted to deal fairly with the tenant. But the tenant as a matter of right should have his protection and not be dependent upon the equitable action of the landlord.

Notwithstanding that the current form of lease as used in Denver attempts to afford the fullest protection to the landlord, there are some suggestions and comments for his betterment which I would like to offer.

1. It is becoming more and more commonplace for landlords to require security for the performance by the tenant of the terms of the lease. The provision for this guaranty as frequently inserted, namely: the payment of the month or months' rent—all too often leads to difficulties in case of forfeiture or surrender. The best method is to add the amount of the guaranty to the amount of the monthly rental and include the total as the amount of the first month's rent, the last monthly rental being stated as the nominal rental of one dollar. No question can then arise as to the intent or extent of the guaranty in case of default.

2. In cases where the tenant undertakes to pay taxes, heat, light, water, and the like, the provision in connection therewith should require these payments to be collected by the landlord as rent so that the payment may be enforced in a summary manner.

3. Another provision which present conditions make important is that which relieves the landlord from liability in case he is unable to deliver possession on the date stated in the lease without fault on his part, such as the refusal of a prior tenant to surrender at the expiration of his term.

4. In these days of financial uncertainties many landlords are seeking protection against greatly increased property and other taxes and possible inflation. Proper provisions against these conditions require technical skill in legal draftsmanship. To some extent the percentage lease is a safeguard against inflation.

In view of what has previously been said, I believe it has become important that the realtor who negotiates the lease and the lawyer who sometimes, but not too often, is called upon to render an opinion in reference thereto, should review these forms now in use, and, if felt proper, reform them in the light of modern business uncertainties and the modern concept of fairness and justice. If we do not regard this as our duty, we cannot take pride in our respective profession and business and shall have failed in our basic obligations.

True it may be that the landlord-owner of the premises may have a legal and equitable right to require such conditions as he may desire, however burdensome, for the tenant has a corresponding right to accept or reject them. But when the Real Estate Exchange prepares, adopts and offers to the public as fair and proper an established form of lease and the lawyer commonly accepts and uses such form, a duty is imposed upon both realtor and lawyer that the form so used meets the standard of fairness and equity.

Beside attention to the printed forms of lease, we should also give better attention to the execution of them as well as to seeing that they are properly filled out. All too often leases are executed by someone other than the legal owner as by way of illustration, the husband for the wife and even the agent for the owner, perhaps with verbal authority but seldom with the written authority necessary for proof if required.

Again, those portions of the printed form of leases not pertinent to the particular one being prepared should be deleted and additional provisions, if required, not in the printed form should be prepared with proper draftsmanship and not made doubtful of meaning for lack of wordage in order to be inserted in the small spaces allowed in the printed form. The description especially should be fully, accurately and completely set forth. Rcently a landlord lost the right of considerable income from the basement of a business block because of the indefinite description of portions of that basement allotted to the several tenants under their respective leases.

It frequently happens that under leases of considerable term and at present rental value, the aggregate rental is greatly in excess of the present actual value of the property itself, and in many cases tenants invest large sums in remodelling the property leased. In such cases, some tenants and especially chain store tenants are requiring an examination and opinion of the title of the real estate, not only to be assured of record ownership but to make certain that their lease is not junior to an encumbrance, the foreclosure of which might cut it out. Certainly such requirement is in many cases prudent and desirable.

All too often the landlord does not even know the contents of the lease he has signed, nor has he much idea of his responsibility beyond the term which for his property is let and the rental to be received until, like the landlord as related in *Colo. Mortgage Co. v. Giacomini* (55 Colo. 540), he is confronted with a judgment of $10,000.00 notwithstanding that the injury upon which the judgment was based resulted in a large part to the negligence of the tenant; while the tenant, seemingly even less informed, has not the least idea of the difficulties which may be in store for him until, as related in *Thum Bros. v. Rhodes* (12 Colo. App. 245), a part of the wall of the premises falls down and he finds that under the usual and customary lease in use there is no obligation upon the part of his landlord to repair or replace the same.

In relation to these difficulties, the question arises what is the duty of the agent and what is the duty of the lawyer.

The decisions of our courts have established that a landlord and tenant deal at arm's length; that the doctrine of *caveat emptor* applies in leasing transactions and that there are no implied warranties, at least as to the important matter of fitness and condition of the demised premises. The agent is a financially interested party to the transaction, his services being rewarded only in case the lease is finally executed; he is, in a sense, an agent for both parties and has a duty to both. Under such circumstances has he a right to prepare the lease with all its pitfalls or to advise either or both the landlord and tenant as to the sufficiency of the lease or the obligations under it. I think he has no more right to do these things than has the lawyer to attempt to negotiate the terms of the lease in the first instance. The agent is not a good lawyer just as the lawyer is not a good agent. The parties to such an intricate instrument as a lease can be sufficiently and best served only when they have the advice of both agent and lawyer.

A type of leasing coming more and more into use not only in larger communities, but also in smaller, is known as the percentage lease. The main idea underlying this lease is by no means new or novel—it was used in the earliest days and is the usual form in relation to farm leases.

While there are several commonly accepted types of this sort of lease, the two mostly in vogue are the lease with a definitely indicated rental to which is added a stated percentage of gross sales over and above a given amount, and the lease calling for a stated percentage of gross sales as rental with a guaranteed minimum.

In these days of inflated rental values and uncertain business conditions the percentage lease would appear to have many advantages. It gives a scientific basis for the establishment of rental value and often offers a compromise between the tenant's and landlord's differences regarding those values. Again, it tends to establish better relationship between both tenant and landlord. A tenant will cheerfully pay large rental when his volume of business warrants such payment but often feels aggrieved when the result of most of his time, effort and endeavor are absorbed in rents. It also affords a sort of hedge against inflation.

There are some factors, however, which have militated against extensive use of such leases. Principally these are:

1. The lack of real estate agents in informing themselves of and studying this type of lease. To negotiate a percentage lease calls for knowledge and ability of the agent which he can only acquire by diligent study and preparation.

2. The difficultiy of ascertaining a basis for the establishment of the commission earned by the agent. In view of the benefits to both landlord and tenant, the agent is entitled to a commensurate compensation.

3. The position of the landlord, in many cases, of demanding full rental

value, in addition to the percentage, which attitude negatives the purpose of such leases.

4. The difficulty of the small merchant in estimating properly the amount of percentage he can reasonably pay.

It is quite likely that not only in Denver, but throughout the metropolitan area, percentage leases will come more and more into use, particularly with the expansion of chain stores. Both the real estate agent and lawyer will do well in giving study and attention to this type of leasing. It must be understood, however, that such leasing can apply successfully only with a limited class of tenants.

What has here been presented is not to be taken as a critical review of the present leasing methods, but rather as a means of implementing in our minds the vast changes in commercial life and the steady progress toward a business relationship built upon fairness and equity—a relationship not based on the doctrine of *caveat emptor* but seeking only mutual and common benefits.

Has The Doctrine of Stare Decisis Been Abandoned in Colorado?

By GEORGE T. EVANS
of the Denver Bar

In the British-American system of jurisprudence, precedent is important. History discloses that since the days of the Year Books (1290-1535) lawyers and judges have been assiduously engaged not only in making the law consistent within itself but even in developing the "mechanical" means requisite to insure and facilitate that consistency. Lord Coke, who died in 1634, said that "Out of the old fields must spring the new corn," [1] and it is a known fact that much of his writing was devoted to collecting, classifying and reconciling old cases from the Year Books and other sources, so that the bench and bar of his day could have at hand the ancient authorities in point in their own cases. By Blackstone's time (1728-1780) this adherence to precedent seems to have developed into the doctrine, modernly called *stare decisis,* for he is reported [2] to have said:

> "For it is an established rule to abide former precedents where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also the law in that case being solemnly declared and determined, what was before uncertain and perhaps indifferent is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments; he being sworn to determine not according to his own private judgment but according to the known laws

1. Co. Rep. (Pref.)
2. Cooleys Blackstone, 4 Ed., Vol. 1, pp. 70-71.