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Real Property -- Landlord and Tenant -- Lessee's Liability For Sublessee's Negligence

David B. Sentelle

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The courts in North Carolina have been so jealous of such a claim that it is doubtful whether a degree of adverseness, sufficient in an adverse possession situation, would stand up in a prescription case. In any event it is quite clear that the claimant of a prescriptive easement in North Carolina today has a tremendous burden to overcome.

JOHN G. ALDRIDGE

Real Property—Landlord and Tenant—Lessee’s Liability
For Sublessee’s Negligence

In *Dixie Fire & Cas. Co. v. Esso Standard Oil Co.*, the fire insurer of a landlord sued insured's lessee, Esso, for injuries done the demised premises by a fire allegedly caused by the negligence of Esso’s sublessee. In the trial court, plaintiff had been ordered to elect tort or contract and had proceeded on a negligence theory, although the original complaint had been based upon a convenant of the lease. The Superior Court sustained defendant’s demurrer and plaintiff appealed. The Supreme Court reversed, holding that a lessee is liable in tort for waste resulting from the negligence of a sublessee, thereby expanding the basis of liability of the tenant for injuries to the demised premises.

At one time, the liability of the tenant was almost absolute, making him virtually the insurer of his landlord, liable for waste upon injury to or destruction of the premises, even if the injury was the result of unavoidable accident or the act of a stranger. Like most states, North Carolina reduced this liability by a statute providing that the “tenant...shall not be liable for damage occurring on the demised premises accidentally, and notwithstanding reasonable diligence on his part, unless he so contract.” While the

1 265 N.C. 121, 143 S.E.2d 279 (1965).
2 The reasons for plaintiff's choice are beyond the scope of this note. For discussion of the tort-contract borderline, see Prosser, *Torts* §§ 93-95 (3d ed. 1964).
3 Although the action of waste originally lay only against a guardian in chivalry, tenant in dower, or tenant by curtesy, the Statute of Marlborough, 1267, 52 Hen. 3, c. 23, created an action against all tenants for life or years.
tenant is thus absolved from the earlier absolute liability, liability
does fix upon him under an implied covenant, where his culpable
class conduct proximately causes the injury.

In every lease there is, unless excluded by some express cove-
nant, an implied obligation on the part of the lessee to use reason-
able diligence to treat the premises demised in such manner that
no injury be done to the property, but that the estate may revert
to the lessor undeteriorated by the willful or negligent act of the
lessee.8

The same or a similar rule applies in most jurisdictions.7 The
principal case could not, however, be decided solely on the basis of
the statute and the implied covenant since the lease contained an
express covenant to repair. "Lessor agrees at lessor's own cost and
expense . . . to make promptly any and all repairs to the demised
property."8 Defendant contended that the covenant shifted to the
lesser liability for all damage to the property. The court ruled that
North Carolina law was otherwise; that "contracts for exemption
from liability for negligence are not favored by the law, and are
strictly construed against the party asserting it. The contract will
never be so interpreted in the absence of clear and explicit words
that such was the intent of the parties."9 Since the lease contained
no such "clear and explicit words" the court held that lessor's duty
to repair would not absolve Esso if Esso was "otherwise responsible
for the fire damage."10 Having established that lessor's covenant
to repair did not absolve Esso, the court faced the prime question,
whether or not Esso was otherwise responsible.

The question of lessee's liability for harm negligently done the
premises by the sublessee was one of first impression in North

8 Winkler v. Appalachian Amusement Co., 238 N.C. 589, 594, 79 S.E.2d
185, 189 (1953). Earlier North Carolina cases were decided on a similar
basis, Holler v. Southern Bell Tel. & Tel. Co., 155 N.C. 229, 71 S.E. 316
(1911); Moore v. Parker, 91 N.C. 275 (1884).
9 E.g., United States v. Bostwick, 94 U.S. 53 (1876); Corona Coal Co.
v. Hendon, 213 Ala. 323, 104 So. 799 (1925); Roselip v. Raisch, 73 Cal.
App. 2d 125, 166 P.2d 340 (1946); Warlick v. Great Atl. & Pac. Tea Co.,
170 Ga. 538, 153 S.E. 420 (1930); Sparks v. Lead Belt Co., 337 S.W.2d
44 (Mo. 1960); Farr v. Wasatch Chem. Co., 105 Utah 272, 143 P.2d 281
(1943); United Mut. Sav. Bank v. Riebli, 55 Wash. 2d 816, 350 P.2d 651
10 265 N.C. at 121, 143 S.E.2d at 281.
11 Winkler v. Appalachian Amusement Co., 238 N.C. 589, 596, 79 S.E.2d
185, 190 (1953).
12 265 N.C. at 126, 143 S.E.2d at 283.
Carolina. In answering it, the court relied on cases from Texas, California, and Tennessee. In each of these cases, the lessee was held liable for the results of the sublessee's acts, but in the Texas and California decisions the liability rested on bases not found in the principal case. Of the three cases, and apparently among all reported cases, only the Tennessee decision finds a lessee liable for waste in a factual setting comparable to that in the principal case.

That decision, Bishop v. Associated Transp. on which the North Carolina court relies heavily, is closely analogous to the principal case in most material respects. Plaintiff had leased certain property to defendant who sublet to one Wilson who intentionally burned the building thereon. Defendant had been bound by a covenant to "surrender the premises to the lessor in a reasonably good state of repair, ordinary wear and tear and damages by fire and the elements and structural repairs . . . excepted." The Tennessee court held that the fire exclusion clause did not cover fires caused by tortious conduct, and would not absolve the lessee if he was otherwise liable. The primary question before the Tennessee court was the same as was to face the North Carolina court: may the lessee be held liable for waste committed by the sublessee? The court held the lessee liable, and in so doing presented the rationale which the North Carolina court adopted in the principal case.

The reasoning of the Tennessee court, as followed in North Carolina, is based on the rule that "a subletting . . . does not in any way affect the liability of the original lessee on the covenants of the lease unless there is a surrender and substitution of tenants. . . .

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11 In McGaff v. Schrimshire, 155 S.W. 976 (Tex. Civ. App. 1913), tenant's liability was not dependant on the proximate cause of the damage, the sole question being whether or not the sublease released the defendant lessee from his obligation on a covenant broad enough to have held him even if the damage had been the result of a stranger's acts.

12 In Barkhaus v. Producer's Fruit Co., 192 Cal. 200, 219 Pac. 435 (1923), the California court held that the "so-called sublease" had not served to deprive the defendant tenant of effective control of the premises so that his liability was based on his own culpable negligence, while the principal case contains no such allegation.


14 Though the question was a new one in Tennessee, the court, relying on cases from other jurisdictions, Salina Coca-Cola Bottling Corp. v. Rogers, 171 Kan. 688, 237 P.2d 218 (1951); Carstens v. Western Pipe & Steel Co., 142 Wash. 259, 252 Pac. 939 (1927), applied a rule of construction similar to that employed by North Carolina in treating the landlord's covenant to repair.
The original lessee is responsible for any violation of the covenants of the lease by the sublessee, whether or not he knew of such violation. . . ."\(^{16}\) This is the universal rule\(^{16}\) generally employed to hold the lessee liable for breaches by his sublessee of various express covenants that events or states of affairs would or would not come about,\(^{17}\) with no showing of fault necessary to make out a breach. But in the principal case, by following the Bishop decision,\(^{18}\) the court is using this theory to hold the lessee under an implied covenant which had been imposed in earlier decisions to protect the landlord against deterioration of the premises by "the willful or negligent act of the lessee."\(^{19}\) (Emphasis added.) In order to hold Esso under an implied obligation to protect the premises against waste, and still be consistent with the statutory language that the tenant is not liable for accidental damage occurring "notwithstanding reasonable diligence on his (lessee's) part unless he so contracts,"\(^{20}\) the court must find that Esso either failed in some duty of care owed the lessor, or contracted to bear the risk of sublessee's negligence.

There was a covenant to save harmless in the lease\(^{21}\) which the court indicated was sufficient to support contractual obligation, but plaintiff's election of tort as his cause of action forced the court to depend primarily upon the alleged breach by the sublessee of the implied covenant against waste. However, in light of the statutory language requiring want of due care upon the lessee's part, and of

\(^{16}\) 265 N.C. at 126, 143 S.E.2d at 283.
\(^{17}\) E.g., Smith v. United Crude Oil Co., 179 Cal. 570, 178 Pac. 141 (1919); Garbut & Donovan v. Barksdale—Pruitt Junk Co., 37 Ga. App. 210, 139 S.E. 357 (1927); Rourke v. Bozarth, 103 Okla. 133, 229 Pac. 495 (1924); Burke v. Bryant 283 Pa. 114, 128 Atl 821 (1925). The absence of North Carolina authority is probably due to there being little occasion to restate the obvious.
\(^{18}\) E.g., Smith v. United States Crude Oil Co., 179 Cal. 570, 178 Pac. 141 (1919) (covenant that premises not be used for certain purposes); Scott v. Mullins, 211 Cal. App. 2d 51, 27 Cal. Rptr. 269 (1962) (covenant that rent would be paid); Meyerowitz v. Horowitz, 129 Misc. 215, 220 N.Y.S. 681 (Sup. Ct. 1927) (Covenant to vacate at expiration); Goenner v. Glumicich, 81 Pa. Super. 521 (1923) (covenant that premises would not be remodeled).
\(^{21}\) N.C. GEN. STAT. § 42-10 (1950).
the language previously employed in defining the implied covenant, the court was not simply holding the lessee for a breach of covenant by his sublessee, but was in fact finding that the lessee had personally failed in some duty toward the protection of the demised premises. Since the only allegations of negligence concern the conduct of the sublessee, with no suggestion that the defendant oil company failed to use due care either in the selection of the sublessee or otherwise, no duty was breached by the lessee unless the court implied a new covenant by the lessee that waste would not be committed by a sublessee. This is what the court did. This state became the first to join Tennessee in adding this new duty to the list of implied obligations imposed upon the lessee. An indication of this new state of the law is found in the court’s rephrasing of the covenant against waste. In stating the basis of Esso’s liability to the lessor, the court refers to a "breach of the implied covenant that waste would not be committed by negligence in the use of the property," making the negligence of the user of the land rather than only that of the principal tenant the element of tortious conduct required to make out an action for waste.

The soundness of implying the new obligation is open to question. While it is true that the lessee could not by contract avoid liability for his own negligence unless the parties made this intent clear, it is equally true that the lessee could avoid liability for the acts of others simply by not contracting to assume it. In the principal case, there was evidence, in the form of the covenant to save harmless, that the parties intended the lessee to assume this liability for the acts of his sublessee. The court was obviously impressed by this covenant, and was reluctant to allow plaintiff’s election of tort to absolve defendant in the face of this expression of the intent of the parties. It reached the desired result by pronouncing a new implied covenant imposing possible liability upon all who sublet whether or not their leases indicate any such intent to be bound.

The importance of the new obligation is obvious; the justice of it is a matter of viewpoint. From the landlord’s standpoint, the

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22 Ibid.
25 The opinion dwells on this covenant at some length. 265 N.C. at 128-29, 143 S.E.2d at 285.
reversion is now well protected against the negligence of a sublessee. The landlord may sue the sublessee for damages in action for waste, with his recovery including treble damages at the discretion of the court, and force the defendant to vacate the premises if such judgment is not paid by a date fixed by the court. In cases where the acts of waste are known and continuing, he may enjoin their commission. Or, if he prefers a broad cause of action and is uninterested in the special remedies afforded by statute, he may go against the sublessee on an ordinary negligence theory. And now, he has added to these remedies a choice of defendants, since he may sue the lessee on the new implied covenant of the lease.

On the other hand, the lessee's position is not so enviable. He is faced, if he contemplates subletting, with the new risk that his sublessee may subject him to liability for injuries to the premises demised, despite reasonable care on the lessee's part. In the case of tenants who, like Esso, conduct extensive business through sublease arrangements the new risk is an impressive one. In future subleases, the lessee may protect himself by insuring against the risk and raising rent to compensate, but lessees who have already sublet face the dilemma of reducing profits by insuring, or of maintaining the status quo with the risk that the sublessee will commit waste.

The extent to which the court will be willing to invoke the new covenant is uncertain. Indeed, there are portions of the opinion which indicate that the application may be severely limited. In the first place, the court speaks only of negligence in describing the lessee's liability for acts of his sublessee, while earlier statements of the covenant against waste done by the tenant's own acts have mentioned both negligence and willfulness. While this may have been omitted because willfulness had no direct relevance to the particular facts of the case, further indication of the court's unwillingness to give general application to this new covenant may be found in the

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28 N.C. Gen. Stat. § 1-534 (1953). Makes the action to lie "against all persons committing the waste."


29 The right to sue for waste includes the right to restrain its commission. Morrison v. Morrison, 122 N.C. 598, 29 S.E. 901 (1898); Hinson v. Hinson, 120 N.C. 400, 27 S.E. 80 (1897).

30 Through a theory of sic utere tuo ut alienum non laedas, the duty imposed on every person to use property so as not to injure that of another.

court's statement that the alleged negligence occurred "in the course of use of the premises for the purpose for which it was leased." This seems to indicate that the defendant would not have been found liable had the sublessee's negligence occurred in some use of the premises not contemplated by the parties to the sublease. Also, there is an implication that a tenant's liability for his sublessee's willful injury of the premises would depend upon some principle analogous to the scope and course of employment doctrines of agency law. At any rate, due to the existence of a formidable new risk on the lessee, and the possible limitations on its application in protection of the landlord, both parties would be prudent to see that leases made in North Carolina deal specifically with the question of waste by the sublessee.

David B. Sentelle

Securities Regulations—An Antitrust Challenge to the Minimum Commission Rates of the New York Stock Exchange

When the New York Stock Exchange was organized in 1792, one of the avowed purposes of its founders was the establishment of minimum commission rates to be charged to customers. Such minimum commission schedules have remained in effect since that date with only the methods of computation undergoing any alterations.

In the recent case of Kaplan v. Lehman Bros. an antitrust challenge was posed to these rates for the first time since their inception. The plaintiffs, shareholders in five mutual funds, brought the action as a shareholders derivative suit and at the same time as a representative class action alleging that the minimum commission rates imposed by the defendant New York Stock Exchange and

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3 Article XV, § 2 of the constitution of the New York Stock Exchange provides for the following minimum commissions to be charged to non-members on round lots: