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OPTION OF THE LESSOR TO TERMINATE A LEASE BECAUSE OF INVOLUNTARY ASSIGNMENT

H. Williams Hanmer

We have heard it often said that present day lease forms are ironbound and leave no loopholes in favor of the lessee. Statements of this nature have undoubtedly been made by many who have chosen to lease premises of one description or another, and who in the course of negotiation have been tendered a lease form containing thousands of printed words. Many of these prospective lessees, due to the pressure of other duties which are to them seemingly more important, will sign the leases tendered by the lessor without reading the printed matter, pacifying themselves in their failure to take the necessary precautions which are essential for their best interests, with the thought that possibly many other prospective lessees have and are pursuing the same line of conduct. Still others, more cautious, conscientious, and with the thought uppermost in their minds of avoiding any portions of the lease which would be exceedingly detrimental to their future well-being, will scrutinize the matter set forth in the body of the lease in a most analytical manner.

This second group of individuals has encountered paragraphs the same as, or similar in substance to, the ones now set forth:

That the lessee will not assign this lease or any interest hereunder; and will not permit any assignment hereby by operation of law; and will not sublet said premises or any part thereof; and will not permit the use of said premises by any parties other than the lessee, and the agents and servants of the lessee. That if default shall be made in any of the other covenants

1 Member Illinois Bar.
herein contained, to be kept, observed, and performed by the lessee, or if the leasehold interest shall be levied on under execution, or if the lessee shall be declared bankrupt or insolvent according to the law, or if any assignment of his property shall be made for the benefit of his creditors, or if a receiver shall be appointed for the lessee, then, and in any of the said cases, the lessor may, at his option, at once, without notice of the lessee or to any other person, terminate this lease; and upon the termination of said lease at the option of the lessor as aforesaid, or at the expiration by lapse of time of the term hereby demised, the lessee will at once surrender possession of said premises, to the lessor, and remove all effects therefrom, and if such possession be not immediately surrendered, the lessor may forthwith re-enter said premises and repossess himself thereof as of his former estate and remove all persons and effects therefrom, using such force as may be necessary, without being guilty of any manner of trespass or forcible entry or detainer.

Undoubtedly a small portion of this second class has marveled at the detailed and thorough manner in which the above excerpts of a lease commonly known as the "Assignment Clause" are set forth. Possibly a few of these lessees have wondered how one individual or group of individuals could have the extreme intelligence and foresight to include in the "Assignment Clause" all the features that have been embodied in the preceding paragraph.

We cannot justifiably give one or even a group of men thoroughly versed in the law and legal phraseology, entire credit for the "Assignment" feature of a lease. We can at best, give them credit for being alert enough to include all those phases of assignment that have been handed down to them in the form of court decisions.

One of the fields embodied in the "Assignments," and which has been largely instrumental in the necessity of insertions of many of the angles of the "Assignment Clause" by present day lawyers and realtors, due to continued years of litigation regarding it, is that of Involuntary Assignment.
In the technical system of the feudal law the rule originated and is frequently announced in modern decisions that the relation of landlord and tenant requires the existence of a reversionary interest in the landlord. Consequently an instrument by which a lessee attempts to sublet the premises for the whole term operates not as a sublease, but as an assignment of the original lease.

The importance of the question involved will be noted by considering the distinction between a sublease and an assignment of a term. An assignee is in privity of estate with the lessor and consequently has the benefit of and is directly liable to the lessor on all covenants in the lease running with the land. He is not liable to the lessee unless the lessee has been held by the lessor to account for a breach of the covenants by the assignee. A sublessee, on the contrary, is liable only to the lessee according to the terms of the sublease and does not come in privity of estate with the lessor. The distinguishing feature is set forth in a practical manner in Sexton v. Chicago Storage Co., where it is stated that a grant or transfer by a lessee of his whole term, leaving no reversionary interest in himself, constitutes an assignment, and not a sublease of the demised premises. The case of Livingston v. Stickles et al. indirectly sets forth the essential element of an assignment in stating that a covenant restraining the sale or assignment of a leasehold estate is not broken by any act of the lessee which falls short of divesting his whole legal estate.

Though it is all important that our understanding of the nature and scope of an assignment be clear, it is equally important for the discussion of the subject at hand that the bounds of the word "involuntary" be clearly defined. Webster's dictionary defines the word

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2 Smith's Leading Cases (12th Ed.), Note p. 113.
3 Stewart v. Long Island R. Co. (1886), 102 N. Y. 601; Sexton v. Chicago Storage Co. et al., 129 Ill. 318.
5 Davis v. Vidal, 105 Texas 444.
6 129 Ill. 318.
7 7 Hill 253.
as: "not done willingly or by choice; unintentional. Designating, or concerned in bodily action which is independent of the will."

Involuntary assignment of a lease, then, is a grant or transfer by a lessee independent of his will, of a whole term of a lease, leaving no reversionary interest in himself. Such assignments can be classified into three major divisions: First, where the assignment is in insolvency or bankruptcy. Second, where a lease is taken in execution. Third, where the lessee assigns to one that has taken the land by right of eminent domain.

It is well to note here that these divisions may be termed assignments by operation of law, for the assignments take place as the result of legal process as well as by the involuntary act of the lessee. Many authors claim the terms "involuntary assignments" and "assignments by operation of law" are synonymous. Such is not the case, however, for practically speaking the latter term embraces a broader field, its scope necessarily including the case of a lease passing to personal representatives of a deceased. This instance cannot be termed one of involuntary assignment, for from its very nature, involuntary assignment presupposes the existence of the original lessee. Notwithstanding the fact that the terms are not synonymous it seems clear that for the purpose of this treatise they may be used interchangeably.

Prior to consideration of the individual cases both in England and the United States, it is important to know the reaction of courts to covenants in leases against assignment without the consent of the lessor under pain of forfeiture. Such covenants were restraints not favored by them and were consequently construed with the utmost jealousy, to the extent that at various times, very easy modes have been countenanced for defeating them. This attitude of disfavor, however, does not permit resort to sophistical reasoning to read out of such a covenant that which it really contains. It simply requires

that what is claimed to be within a covenant shall be clearly and manifestly so, and that, if there is felt a doubt as to its being within it, it be excluded therefrom. This reasoning seems sound inasmuch as the main purpose of a prohibition of the assignment of the term by the lessee is to prevent the landlord from having thrust upon him an insolvent or otherwise objectionable person as a tenant by the voluntary action of the lessee. To protect the lessor further would be giving him protection it was not his original intention to acquire.

Presuming a case exists where there has taken place an assignment which is clearly and undisputably a breach of the covenant against assignment contained in the governing lease, the question then arises as to what is necessary for an assignment to work a forfeiture. If the condition against assignment has been indubitably broken by the lessee, the subsequent tenancy is voidable. The landlord cannot, however, terminate the lease, unless he has made unmistakable provision for a forfeiture and has taken the proper steps to enforce it. This statement presupposes a direct, complete, and unquestionable lease provision in substance that the lessee will at once surrender possession and remove all effects therefrom and in the event the lessee fails to do this, the lessor may then re-enter and repossess himself of the premises as of his former estate, and remove the lessee's effects therefrom. We note that such a situation requires, as a proper step in enforcement, the lessor's re-entry. Assuming that the landlord does not elect to do this, he may still enjoy all the benefits which he would have if the status were regular, including the right to enforce the covenants which run, for example, the covenant to pay rent. This has been held to be true in "Sayles v. Kerr," on the ground of privity of estate, even though he has refused to accept the new tenant. It was formerly thought that the covenant not to assign did not run with the land. This impression existed as late as the case of

9 Randal v. Tatum, 98 Cal. 390.
10 38 N. Y. Supp. 880.
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Bally v. Wells;\textsuperscript{11} but the notion is now nonexistent since Weatherall v. Geering,\textsuperscript{12} decided in 1806, and subsequent cases, makes a distinction between a covenant and a condition.

It is also essential in order that an assignment work a forfeiture, that the instrument constituting the assignment must be valid and effectual in law. In Doe dem. Lloyd v. Powell,\textsuperscript{13} decided in 1826, there was a proviso in a lease for re-entry in case of an assignment without license, and the lessee by deed assigned all his property, real and personal, to trustees for the benefit of his creditors and was afterwards declared a bankrupt. The court held that the assignment was void as being an act of bankruptcy, and being such, the deed did not operate as a valid conveyance of the lessee's interest under the lease, and consequently a forfeiture was not effected.

Though the subject of involuntary assignments had probably been touched upon to a minor degree in early decisions in England, the case of Goring v. Warner,\textsuperscript{14} which was decided about 1730, is apparently the first in which our subject was the major issue before the court. The lease contained a proviso that the lessee, his executors or administrators, should not assign without the written consent of the lessor, a power of re-entry by the lessor, and a statement that the lease should be void in case of assignment. The executor of the deceased lessee becoming bankrupt, the commissioners under statutory authority assigned the lease to the assignees chosen by the creditors and they in turn assigned to one Goring who brought a bill to be relieved against this proviso and to stay proceedings in ejectment.

Lord Macclesfield rendered the opinion of the court and his exhaustive reasoning leaves no doubt as to the soundness of his decision. The assignment by the commissioners the court held to be clearly no breach of the

\textsuperscript{11} 3 Wils. K. B. 25.
\textsuperscript{12} 12 Ves. Jr. 504.
\textsuperscript{13} 5 B. & C. 308.
\textsuperscript{14} 7 Viner's Abridgement (2nd Ed.) 85.
proviso in the lease, for this was done by authority of a statute which superseded the private agreement between the partners inconsistent with it. The assignment over by the assignees was also no breach, for the first assignment by the commissioners being an imperfect and incomplete assignment within the meaning of the statute, passed only the legal interest subject to a trust to be sold and disposed of for the benefit of the rest of the creditors, and the disposition, therefore, was incomplete till sold by them for the benefit of the creditors. The first assignment, in the care of the commissioners being formal only, that is, for the purpose of effecting a sale for the benefit of the creditors, the assignees under this sale stood in the place of the bankrupt and were in effect his assignee. The court decided this case on the ground of the unjustness and unreasonableness which would result in upholding such a proviso against assignment, when to do so would frustrate and overthrow the intent of the statute made in favor of honest creditors, and deprive them of the advantage they may make of a beneficial lease. It is interesting to note that this decision is cited as authority for decisions in cases involving the same question, arising in England as late as the early part of the nineteenth century.

Apparently the same conclusion was reached in *Doe ex. dem. Cheere v. Smith*, where it was decided that the assignment of the term by a lessee, an involuntary bankrupt, to his assignee in bankruptcy, does not violate a covenant not to assign without the written consent of the lessor; the latter then, having no right to terminate the lease.

The influence and effect of the decision in *Goring v. Warner* must have been widespread for we find some enterprising lawyer inserting in a lease not only a proviso against assignment without the consent of the lessor, but also adding that the lease should terminate “on the tenant’s committing any act of bankruptcy whereon a commission shall issue.” The question then arose on the

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15 5 Taunt. 795.
bankruptcy of the lessee in the case of Roe d. Hunter v. Galliers\textsuperscript{16} whether the lessor could declare the lease, which had been assigned to the commission, forfeited. The court upheld the right of the lessor to declare a forfeiture on the general principle that the landlord, having the \textit{jus disponendi}, could annex whatever conditions he pleased to his grant, provided they were not illegal or unreasonable. It was stated that “the proviso was not against positive law, and no case had decided it to be illegal. Neither was it against reason or public policy, for it is equally reasonable for a landlord to guard against bankruptcy as it is for him to restrain the tenant from assigning, for the consequence of the bankruptcy is an assignment of the property into other hands.”

Further evidence of the widespread influence of Goring v. Warner and Roe v. Galliers is the case decided some twenty years following the latter, entitled Doe ex. dem. Lockwood v. Clarke.\textsuperscript{17} Here the leases contained a covenant “not to let, assign, set over or otherwise dispose of a lease, which was to continue for a fixed term provided the lessee, his executor, etc., should so long continue to inhabit, dwell in and actually occupy the demised premises.” It was held that the above covenant was violated by the sale of the leasehold by the lessee’s assignee in bankruptcy, as the lessee’s continued residence upon the demised premises was essential to the continuance of the lease for the full term. So again we find the lessor having the right to terminate the lease even though the assignment was of involuntary nature. We do not set forth the substance of the decision for not unexpectedly we find the reasoning of Roe v. Galliers controlling the finding of the court so completely that one might imagine the same judges repeating the words used in arriving at a conclusion in the case decided in 1787.

The case of Doe dem. Mitchinson v. Carter\textsuperscript{18} decided in England in the year of 1798, leads us to consideration

\textsuperscript{16} 2 T. R. 133.
\textsuperscript{17} 8 East 185.
\textsuperscript{18} 8 T. R. 57, 300.
of another branch of involuntary assignments—whether an action of ejectment can be maintained by a lessor where a lessee covenanted not to "let, set, assign, transfer, make over, barter, exchange or otherwise part with this indenture or the said messuage, lands, etc.," and afterwards gave a warrant of attorney to confess judgments, on which the lease was taken in execution and sold. Of necessity, if such a situation works a forfeiture of the lease in favor of the lessor, ejectment lies; conversely if it does not constitute a forfeiture, ejectment does not lie and the lessor cannot terminate the lease. This was held to be no forfeiture and the lease was not terminated, for all the words used in the lease point to some act to be done by the tenant himself, and there is a distinction between acts that the party does voluntarily and those that pass in invitum; and judgments in contemplation of law always pass in invitum. The point was brought out that no difference could be seen between a judgment that is obtained in consequence of an action resisted, and a judgment that is signed under a warrant of attorney, since the latter is merely to shorten the process, and to lessen the expense of the proceedings. Had the warrant of attorney itself been a specific lien on the estate, that perhaps would have breached the covenant; but it merely gave the creditors the power to enter up judgment against the tenant, and it did not appear that it would be followed up by the term being taken in execution under the judgment. But it appearing upon a second suit that the tenant had given the warrant of attorney for the express purpose of enabling the creditor to take the lease in execution, this was held to be in fraud of the covenant and therefore a forfeiture, so the landlord could terminate the lease and recover the premises in ejectment under the clause of re-entry. A colorable sale on execution resorted to for the purpose of transferring the term, would be a breach of a covenant against voluntary assignment. Though the second suit brought forth facts sufficient to change the opinion of the court, the law stands today as it was decided in the first
suit on the set of facts exclusive, of course, of evidence of a colorable sale, namely, that a lease taken in execution under a warranty of attorney given in good faith constitutes an involuntary assignment and is no breach of the covenant against assignment, so therefore no ground for termination of a lease at the lessor’s option.

The next division of our subject presents the question of whether a covenant denying a lessee the right to assign without lessor’s permission, a lessor may claim a breach of the covenant and forfeiture, where a lease is deposited by the lessee with another as security for a debt, and such deposit is followed by a sale under execution by the assignees under the direction of a chancellor.

This situation arose in Doe, on the Demise of Goodbehere, v. Bevan in the lease of a public house for a term of years, the lease containing a proviso that the lessee, his executors, administrators or assigns, would not assign the indenture or his or their interest therein, or assign the premises to any person whatsoever, without the consent in writing of the lessor, but if the lessee did assign the lessor might re-enter. The lessee deposited the lease as security for the money borrowed, and became bankrupt and the lease was sold by direction of the chancellor to pay that debt. In an action of ejectment brought by the lessor it was held that the assignees under the bankruptcy commission might dispose of the lease without incurring a forfeiture. Citing Doe v. Carter as authority for the rule that the lessee’s becoming bankrupt was not an avoiding of the lease within this proviso, the court reasoned that as the bankruptcy was not a breach, it could see no act done by the lessee that would avoid it, since all that followed upon the bankruptcy was not by the lessee’s act, but by the operation of law, transferring his property to his assignee. It appearing valid for the assignees to take, it is unreasonable to believe that they would be obliged to retain it for their benefit or be obliged to hold it in their hands to the prejudice of the creditors, for whose benefit the law originally

19 3 Mau. & Sel. 353.
cast it upon them. The chancellor directed this lease to be sold, and that so far from being volunteers, they acted under compulsion of the law. The term "assigns" in the covenant, as held in this case, related therefore to voluntary assigns and not assignees in law. It might be mentioned here that under the authority of Roe v. Galliers and Doe v. Clarke, the lessor might have provided against the assignment under the commission by an express proviso.

This doctrine was again emphasized in the case of Doe d. Pitt v. Hogg in which the lease having been deposited as security was sold. The lease containing a covenant "not to let, set, assign, transfer, set over or otherwise part with the premises demised." The holding was that the covenant was not violated, for the effect of the covenant was only to restrain the lessee from completely alienating the legal interest in the premises to the prejudice of the landlord without his consent in writing; and such was clearly not the case here.

Closely analogous to the preceding case is Ex parte Drake in which a lease deposited by a bankrupt by way of an equitable mortgage contained a covenant on the part of the lessee not to assign without license. The court referred to Doe d. Pitt v. Hogg in deciding that the covenant was not breached. The rule that the covenant against assignment by the lessee is not breached by the sale of a lease under execution was so well settled by 1824 that it is not surprising that we hear of a proviso being inserted in a lease, providing that the lessor might re-enter as of his former estate in the event of an alienation of the lease by a sale of it under execution against the lessee. Such was the case in Davis v. Eyton where the court held the proviso valid on the ground that the lessee incurred a forfeiture by his own act, as the legal

20 T. R. 133.
21 8 East 185.
22 4 Dowl. & Ry. N. P. 226.
23 1 Mont. D. & DeG. 539.
24 7 Bing. 154.
consequences only qualify the act of the lessee, because that act pervaded all the subsequent proceedings; for the commission could not issue unless there had been an act of bankruptcy, nor the execution unless there had been a previous debt; and since the lessee submitted to the insertion of such a provision, his own act constituting the breach, he should be made to stand by it. This case was corroborated on the same principle by *Doe d. Bridgman v. David*.25

*Doe d. Lloyd v. Powell*26 arose for consideration at a most appropriate time since it followed *Doe d. Goodbehere v. Bevan*27 and the earlier case of *Goring v. Warner,*28 these cases being the foundation on which the instant case was decided. The lessee made a general assignment for the benefit of creditors and shortly thereafter went into bankruptcy, whereby the lease was assigned to his trustee in bankruptcy. It was held that the subsequent bankruptcy invalidated the previous general assignment, and the vesting of all the goods of the assignor in his trustee in bankruptcy did not under the authority of *Goring v. Warner* constitute a breach of the covenant not to assign. Then too, under the ruling in *Doe d. Goodbehere v. Bevan,* the mere execution of the deed of assignment was not the breach, and as the assignment became absolutely void on the assignor’s involuntary bankruptcy, the lease was an asset in the hands of the trustee in bankruptcy.

The same conclusion was reached in a case involving a receiver instead of a trustee in bankruptcy, though the facts in this case of *Rogers v. Bateman*29 were entirely different. Here, an order appointing a receiver for a leasehold, the lessee having absconded, was held not to violate a covenant against “the alienation, sale, mortgage, assignment, grant, conveyance, release, disposal of,

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25 1 Cr. M. & R. 405.
26 5 B. & C. 308.
27 3 Mau. & Sel. 353.
28 7 Viner’s Abridgement (2nd Ed.) 85.
29 Flan. & K. 432.
or underletting or parting with, the premises or any part thereof," it not being a voluntary alienation by the lessee. The doctrine that an assignment of an involuntary nature does not violate a general assignment clause, was apparently accepted in a most matter of fact manner in the case, for the court confined its consideration to whether the assignment could be classed as voluntary; presenting an implication that there would be no breach under an involuntary one.

Years later, the courts considered the effect of a voluntary petition in bankruptcy, on a general covenant against assignment; holding in *In re Riggs* that the fact that a receiving order is made against a debtor and that he is adjudicated bankrupt, even though it be on his own petition does not constitute in either case a breach of a covenant not to assign, or underlet without the lessor's written consent, and also giving the latter a right of entry in the event of the lessee's becoming bankrupt or filing any petition under the bankruptcy laws, where, under the act of 1883, the filing of a debtor's petition in bankruptcy did not, *ipso facto*, effect the assignment of his property for the benefit of his creditors; and in order to work a forfeiture by reason of the condition relating to bankruptcy, the notice required by the conveyancing act must first be given. The court said that the words "assign" and "underletting" were used in their ordinary and popular sense, and referred only to such assignments as are directly made by the lessee, as distinguished from assignment by operation of law.

The last case of consequence arising under the first and second division of involuntary assignments, is that of *In re Farrow's Bank, Ltd.* The appellant had leased premises in question to Farrow's Bank in 1910 for a term of twenty-one years. The lease contained a covenant by "the lessees, their successors and assigns" not to assign the demised premises without previous written consent of the lessor. The company was ordered to be

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30 [1901] 2 K. B. 16.
31 [1921] 2 Ch. 164.
wound up compulsorily in January, 1921. A dispute having arisen as to the powers and duties of the liquidator with respect to the lease, the court of equity was called upon to declare, inter alia, whether or not the liquidator was bound by the covenant restricting assignment. The holding was that the liquidator was bound by the covenant.

The decision in this case is interesting not so much because of its holding as to the powers of the liquidator under the Companies Act of 1908, but because of the reasoning upon which the court proceeded. Under the Companies Act, the liquidator, who is appointed by the court, and resembles the American Receiver, takes over full control of the company, and does all necessary acts on its behalf. None of the property is vested in the liquidator, however, in which respect he differs from a trustee in bankruptcy. A trustee in bankruptcy has generally been held not to be bound by such a covenant restricting assignment, and the same is held in the United States as will be shown later in the case of Gazlay v. Williams, even though the proceedings were begun upon the lessee's own petition. The reason seems to be that the property has vested in the trustee by operation of law, and that then, either because he is under a duty imposed by law to dispose of it for the benefit of creditors, or because he is not a voluntary assignee, he is not bound by the covenants. But the court in the principal case appeared not entirely in sympathy with the rule or reason. Younger, L. J., referred to these bankruptcy cases as "somewhat anomalous" and said they were based on "no intelligible principle." The court therefore refused to apply the rule of the bankruptcy cases, basing the decision upon the narrow technical distinction that the property did not vest in the liquidator. It is worthy of note that of two American decisions with reference to

33 210 U. S. 41.
34 In re Riggs, [1901] 2 K. B. 16; Bemis & another v. Wilder, 100 Mass. 446.
transfers by receiver, one court held that the receiver was bound,\textsuperscript{35} and the other that he was not bound.\textsuperscript{36}

The reasons given why a trustee in bankruptcy may assign, are that, not being an assignee, the trustee is not bound by the covenant; or that such a transfer is necessary to protect the rights of the creditors.\textsuperscript{37} Under the statute in the principal case the liquidator does not get title and the court distinguishes the bankruptcy cases on this ground. Where the liquidator does get title, the bankruptcy cases are followed, as was held in the American case of \textit{In re Citizens' Savings and Trust Co.} \textsuperscript{38}

The third major division of involuntary assignments involves the taking of the leasehold interest from the lessee by one under the proper exercise of the right of eminent domain. No one will doubt the authenticity of certain corporations exercising this power which is inherent in them. Consequently, it is not surprising that few cases have arisen where the lessor has insisted that the general assignment clause in the lease has been violated by this type of involuntary assignment. The writer has found no American cases involving the point. It is reasonable to believe from this, that the only two English cases of record, had established and settled the law for all time in the United States as well as in England.

The first of these two cases is \textit{Slipper v. Tottenham and Hampstead Junction Railway Company},\textsuperscript{39} which arose for consideration in Equity before the Master of the Rolls in 1864. The railway company served a notice under the Lands Clause Act, on a lessee to take land under a lease containing a proviso against assignment without the license of the lessor. The railway company paid into the bank certain money for payment of such purchase money for the land as might be determined under the Act. The lessor having refused to consent to the assignment

\textsuperscript{35} Spencer v. Darlington, 74 Pa. St. 286.

\textsuperscript{36} Fleming v. Fleming Hotel Co., 69 N. J. Eq. 715.

\textsuperscript{37} Doe d. Goodbehere v. Bevan, 3 Mau. & Sel. 353; Gazlay v. Williams, 210 U. S. 41.

\textsuperscript{38} 171 Wis. 601.

\textsuperscript{39} L. R. 4 Eq. 112.
was sued for specific performance. Note that this case does not raise the question whether the lessor could consider the lease terminated. Nevertheless the decision is of importance, for the reasoning of the court, of necessity, involves the extent of power in the lessor under the assignment clause. The court decreed specific performance on the ground that as soon as the land was required for the purposes of the railway, and notice was given to take it under the Act, the license to assign was no longer required, being virtually taken away by the clause of the Act of Parliament; in other words by the operation of the statute. The lessor could neither refuse the license to assign, nor assent to the assignment, for he had nothing more to do with it.

*Baily v. De Crespigny*\(^40\) involved an action on a covenant contained in a lease of premises for a term of eighty-nine years, whereby the defendant covenanted that neither he nor his assigns would during the term permit to be built any messuage on a paddock fronting the demised premises. The defendant assigned the paddock to the London, Brighton and South Coast Railway Company, which paddock was land which the railway was empowered to take compulsorily, under powers given them by Act of Parliament in 1862. The railway afterwards built on the paddock, occasioning the suit by the lessor against the original lessee.

The plaintiff contended the covenant declared upon was absolute, while the defendant contended the company was not an assign of the defendant within the covenant. The word "assigns" in the covenant meaning assigns by the defendant’s voluntary act; not assigns by compulsion of law. Therefore performance by him of the covenant was excused by operation of law.

The court could draw no distinction between the case of an owner of lands who does that which it is his duty to do, namely convey to the company; and one who, by refusing to convey, obliges the company to obtain a title

\(^40\) *L. R. 4 Q. B. 180.*
to the lands by the execution of a deed poll. In either case the railway company must be regarded as the assignee of the land, not by the voluntary act of the former owner but by compulsion of law. The decision discharged the defendant from his covenant. The court concluded that the legislature, by compelling the lessor to part with his land to a railway company whom he could not bind by any stipulation as he could an assignee chosen by himself, had created a new kind of assignee such as was not in the contemplation of the parties when the contract was entered into.

The contention may be made that the two preceding cases do not help us in our discussion of the rights of lessors under assignment clauses. It may be granted that they are not directly in point, but there can be no doubt that their respective decisions have enlightened us with respect to the effect that an assignment by right of eminent domain has upon a general assignment clause in a lease.

We next pass to consideration of the leading American cases. *Jackson, ex dem. Schuyler v. Corliss*\(^{41}\) involved a sale of a lease under execution; the tenant holding under the lease confessed a judgment, on which an execution issued, and the lease was sold by the sheriff. In an ejectment suit brought by the lessor, this was held not to be a breach of the covenant in the lease; the judgment not having been confessed fraudulently. Here the court said “the tenant did not sell the premises nor was there an offer made to him to purchase. Such a sale as this is a compulsory one, therefore not a sale by the party but by act of law.” This decision is clearly in accord with the English rule laid down in *Doe d. Goodbehere v. Bevan*.

So well settled was the law held to be on this situation that it is interesting to note the words of the court in *Jackson, Ex Dem. Stevens, et al. v. Silvernail*.\(^{42}\) Here the

\(^{41}\) 7 Johns. 531.
\(^{42}\) 15 Johns. 278.
lease contained a general assignment provision and a further proviso for forfeiture for the non-performance of covenants. The property was bid in at a sheriff’s sale on a judgment and execution, and the property was turned over to the defendant. Platt, J., in passing on the effect of the judgment, execution and sheriff’s sale says: "In regard to the sale under the judgment and *fieri facias*, it is well settled that such a sale does not work a forfeiture, unless it appears that the proceedings were voluntary and collusive on the part of the tenant, with a view to defraud his landlord of his rights."

Again we have the rule corroborated in the case of *Farnum v. Hefner*\(^43\) which arose more than seventy years later in 1889. The lease contained a covenant that the lessee would not assign without the written permission of the lessor. A judgment was recovered against the lessee and an execution was issued upon the leasehold interest, and it was sold. The court was of the opinion that it was firmly settled by authority that under such a covenant an involuntary assignment by sale under execution, bankruptcy and the like, is not a violation of the covenant, and does not work a forfeiture. It was stated in the opinion, however, that "if the landlord desires to avoid such involuntary transfer of the leasehold interest, he may provide expressly in his lease that such transfer of the property shall work a forfeiture, and the same will be effectual."

*Riggs, et al. v. Pursell, et al.*\(^44\) involved the same major consideration as the two preceding cases, though upon a somewhat modified set of facts. An action was brought to foreclose a mortgage. The mortgage was on leasehold premises which lease contained a covenant on the part of the lessee that he would not, during the term, "assign, transfer, or set over the lease." The purchaser at the sale upon foreclosure of the mortgage given by the lessee upon the leasehold interest claimed that this covenant had been violated by giving the mortgage, and the

\(^{43}\) 79 Cal. 575.

\(^{44}\) 66 N. Y. 193.
lease thereby forfeited. It was held that the giving of the mortgage was not a violation of the covenant, for a mortgage of land in New York is not a transfer of the legal title or the possession but a mere security. Nor was it forfeited by the sale under the decree, for this was a judicial sale in a hostile proceeding, and such sales are held not to violate a general covenant against assignment.

The reasoning used and the decisions laid down in the preceding case of Riggs v. Pursell was the entire authority for a similar holding in the case of Dunlop v. Mulry, et al.,\textsuperscript{45} which involved similar facts.

Though these cases lay down the rule that the covenant against assignment in a lease is not breached by a mortgage of a lease and its subsequent sale under foreclosure, there is authority to the contrary in West Shore R. Co. v. Wenner.\textsuperscript{46} The decision that a mortgage and sale did not violate the covenant is based on the reasoning that a transfer resulting from operation of law is not prohibited by a general covenant against assignment. While the doctrine of Riggs v. Pursell is probably that which the majority of American Courts will apply, and while it is, evidently, as stated before, the result of the reasoning expressed in the early English cases, the latter did not lay down the broad rule that an equitable mortgage of a lease and a subsequent foreclosure sale under the lease did not breach a covenant against assignment. In Doe v. Carter, cited previously, where the lessee confessed a judgment and lost the lease upon execution by the sheriff, the court in deciding that the execution and sale by the sheriff not only violated the covenant, did so on the ground that the expressed object of the covenant was to prevent the lessee from wilfully alienating the demise, and emphasized the point that no act of the lessee had caused the alienation. Likewise in Doe d. Goodbehere v. Bevan, cited before, the court in holding that the covenant not to assign had not been breached, stressed the fact that

\textsuperscript{45} 83 N. Y. Supp. 1104.
\textsuperscript{46} 70 N. J. L. 233.
the bankruptcy of the lessee was an involuntary act. In *Croft v. Lumley*,\(^4^7\) *Doe v. Carter* was cited with approval, and it was pointed out again that if the intent of the lessee was to invest his creditor with the lease, a confession of judgment on the part of the lessee or even the contracting of the debt (with intent thereby to enable the creditor to obtain the lease by execution) would breach the covenant not to assign.

According to this reasoning, the intent or the motive of the lessee in creating debts and confessing judgment or in mortgaging the lease and allowing it to be sold under foreclosure proceedings, would determine, whether or not the execution or foreclosure sale would breach a covenant against assignment. In this regard, neither the New York nor the New Jersey doctrine is wholly in harmony with the English rule. The New York rule as laid down in *Riggs v. Pursell* permits the lessee to assign indirectly by mortgaging the lease and not paying off the encumbrance. The New Jersey rule, if carried to its logical conclusion, would make a transfer by execution and sheriff’s sale a breach of the covenant not to assign, which, being a transfer by operation of law, is held by the weight of authority not to breach such a covenant.

In those jurisdictions where the legal title to the lease passes to the mortgagee, the mortgaging of the lease alone breaches the covenant against assignment, as was held in *Becker v. Werner*\(^4^8\) in 1881, which also held the foreclosure sale, being an operation of law, was therefore regarded as not violating the covenant. It has also been held that a transfer of a lease by a sale in conjunction with the dissolution of a partnership, was a transfer by operation of law and did not breach the covenant.\(^4^9\)

Next we pass to cases dealing with the question whether a voluntary assignment by a lessee under insolvency laws does or does not violate a general assignment clause. It

\(^{4^7}\) 6 H. L. C. 672.

\(^{4^8}\) 98 Pa. St. 555.

\(^{4^9}\) *Sinclair v. Sinclair*, 224 Ill. App. 130.
was held in *Bemis & Another v. Wilder*\(^50\) that the sale of a leasehold by the lessee’s assignee in a voluntary insolvency proceeding did not violate the covenant against assigning without the lessor’s written consent. The court observed that “it is well settled law that an assignment by operation of law passes the estate discharged of the covenant to the assignee;” and the court presumed the holding to be the same where the transfer arose 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. The same was held in *Smith v. Putnam*.\(^51\) There is of course no doubt that a sale by an assignee of an insolvent as the result of involuntary bankruptcy proceedings does not violate a covenant against assignment, for the rule was well established by a line of decisions.\(^52\)

The effect that a general assignment for benefit of creditors, followed by bankruptcy proceedings under the Federal Statute, would have on a general assignment clause, was discussed in *In re Busch*.\(^53\) The lease contained a covenant against assignment and a further proviso that the lessor could terminate in case any covenants were breached. The lessee upon making a general assignment for the benefit of creditors was notified by the lessor that such action terminated the lease. However, this assignment was invalidated by bankruptcy proceedings commenced against the lessee within four months thereafter as provided by statute. Nevertheless, the lessor sued for trespass and ejectment. The court in holding the assignment clause was not breached based its decision on the ground that the title to the lease which the creditors sought to preserve was not a title arising under the voluntary act of the bankrupt—the general assignment—but a title which, by operation of law, vested

\(^{50}\) 100 Mass. 446.
\(^{51}\) 20 Mass. 221.
\(^{52}\) *Allen v. Bennett*, Fed. Cas. 214; *Ex parte Cocks*, 2 Deacon Bankr. 14; *Ex parte Sherman*, Buck, Bankr. Cas. 462.
\(^{53}\) 128 Fed. 878.
in the trustee despite the general assignment. As previously stated, to constitute a breach of covenant not to assign, a valid assignment carrying the legal estate is required. Here the assignment was void as an act of bankruptcy. The lessee then, was an involuntary bankrupt, and it is well settled by a line of decisions previously discussed that bankruptcy of the lessee does not breach a general assignment proviso as existed in this case.

Whether, after bankruptcy proceedings were instituted, a sale of the lease by a trustee appointed for the bankrupt, would violate an assignment proviso was considered in Gazlay v. Williams.\textsuperscript{54} The lessee’s interest under the lease was purchased by one Brown at a judicial sale instituted by the lessor. Sometime later bankruptcy proceedings were instituted against Brown, and one Williams was appointed receiver and later elected trustee. The controversy arose over the lease, which contained the clause, “If said lessee shall assign this lease or underlet said leased premises or any part thereof, or if said lessee’s interest therein shall be sold under execution or other legal process without the written consent of said lessors, . . . it shall be lawful for said lessors, into said premises to re-enter and the same to have again, repossess and enjoy as in their first and former estate.” The lessors did not contend that said proviso effected the passage of the leasehold estate from the original lessee to Brown under the judicial sale or from Brown to the trustee Williams, but it was contended that a sale by Williams, the trustee, of the leasehold estate for the benefit of creditors of said Brown would, because of said proviso, operate as a forfeiture thereof, and they would be entitled to enter and repossess themselves of the premises. The reasoning of the court in holding no violation of the assignment clause is interesting:

The sole purpose of the acquisition by the trustee in bankruptcy of the assets of the bankrupt is to reduce them to money and distribute the proceeds amongst the creditors; and he has no right to hold them for any other purpose, except temporarily.\textsuperscript{54} 147 Fed. 678, aff’d 210 U. S. 41.
And a consideration of the language of the condition [in the lease forbidding assignment by the lessee, or the sale of the lessee's interest under execution or legal process] shows that a sale by the appellee [trustee in bankruptcy] of the leasehold estate is not within its terms. It is not within the voluntary branch thereof, because, if it may be said to be a voluntary assignment, it is not an assignment by "said lessee." It is not within the involuntary branch thereof, for, though it may be said to be an involuntary assignment, and, possibly also (though hardly so) a sale under legal process, it is not a sale of "said lessee's interest." It is a sale of the appellee's interest held by it for the benefit of creditors and which passed to it notwithstanding the condition, by virtue of the bankruptcy proceedings.

It is interesting to note that the lessor did not question the transfer of the lease by the lessee to the trustee, nor the sale of the lease under execution against the lessee. Apparently, the lessor had efficient counsel on the point, for the lack of action was proper in view of the many decisions holding that such was no breach of the assignment clause.

As to whether the sale or transfer of a leasehold by a receiver violated the general assignment clause in a lease, there is authority to the effect that the proviso is not violated and also that it is violated. The majority opinion seems to follow the ruling laid down in the case of Fleming v. Fleming Hotel Co., which held that the sale would not work a forfeiture. First, to understand the basis of the decision it is well to understand the position of a receiver. He is merely a ministerial officer of the court, or as he is sometimes called, the hand of the court. The title of the property does not change upon an appointment of a receiver; and if he is required to take property into his custody, such custody is that of the court. The court in the Fleming case reasoned:

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

55 69 N. J. Eq. 715.
of law, and that an assignment of this lease by the receiver [of a lessee] 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.

This case, no doubt would have been decided differently in New York due to the presence of a statute through which a receiver of an insolvent corporation has vested in him the title of the insolvent. So in New York we find cases\textsuperscript{57} in which it is asserted that there is no difference between an assignee and a receiver who takes possession of the leasehold premises.

Contrary to Fleming v. Fleming Hotel Co. is Spencer v. Darlington\textsuperscript{58} which held that the receiver of an insolvent lessee could not transfer the leasehold without violating a covenant against its transfer without written consent of the lessor.

\textit{Durand & Co. v. Howard & Co.}\textsuperscript{59} passed upon the question whether chancery receivers appointed by the court violated the assignment clause, "that the tenant will not assign, transfer, or make over this lease, or any of its covenants, terms or conditions thereof, without the written consent of the landlord, under penalty of damages and forfeiture." The court in holding there was no violation of the covenant and consequently no forfeiture reasoned that "such a covenant is not broken where an assignment is not voluntary, but is done by operation of law and that in this case there is no voluntary assignment." The court even ventured to hold that this was not even an involuntary assignment because the chancery receivers were not assignees of the term but by their ap-

\textsuperscript{58} 74 Pa. St. 286.
\textsuperscript{59} 216 Fed. 585.
pointment acquired no title but only attained a right of possession of the property as the officers of the court. Two cases\textsuperscript{60} were cited in substantiation of its last statement.

That it is competent for the lessor to restrain an assignment to receivers by an express provision clearly prohibiting it, is the substance of the decision in \textit{Parks v. Union Manufacturing Co.}\textsuperscript{61} where it was held that the delivery of possession of premises to the receiver violated a condition of a lease providing that it should be forfeited if the premises should be "underlet, or the term, in whole or in part, assigned, transferred, or set over by the act of the lessee by process or operation of law, or in any other manner whatever, without the written consent of the lessor."

There have been remarkably few cases in recent years both in America and England that have refused to adopt the well reasoned law established on the subject of Involuntary Assignments in the early part of the eighteenth century. There is no doubt that the law on all the phases of assignments of an involuntary nature is well settled at the present time.

\textsuperscript{60} Keeney v. Home Insurance Co., 71 N. Y. 396; Stokes v. Hoffman House, 167 N. Y. 554.

\textsuperscript{61} 14 Ky. L. Rep. 206.