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Landlord and Tenant--Covenant Running with the Land--Rule in Dumpor's Case

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deed, it should not have been necessary to resort to any of the foregoing somewhat arbitrary rules of construction not predicated upon having a knowledge of the intent of the parties.

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LANDLORD AND TENANT—COVENANT RUNNING WITH THE LAND —RULE IN DUMPOR'S CASE.—*P* leased the right to mine all the coal under certain lands to *X* who covenanted that he would not assign or encumber the lease without consent. Later an "Amendatory and Supplemental Lease Agreement" was made by the parties, in which *P* gave permission to *X* to mortgage the leasehold to *D*. Eventually *X* abandoned the operation. *P* then filed a bill asking that the leasehold and equipment "be sold as a whole and as a mining unit, subject to the terms and conditions of said original lease and amendatory and supplemental lease." The court so decreed, and *D*, the mortgagee, appealed contending that the order to sell the leasehold should have provided for future assignment without the necessity of *P's* consent. *Held*, that the purchaser can not assign or encumber without the lessor's consent. Rule in *Dumpor's* case does not apply. *Reconstruction Finance Corp. v. Kentucky River Coal Corp.*[1]

The rule in *Dumpor's* case[2] provides that if a lease be given with a condition against assignment by the lessee or his assigns without the consent of the lessor, and such consent be given to even one assignment without restraint as to future assignments, no subsequent alienation can be a breach of the condition—the doctrine being founded on the traditional hostility of the law toward conditions for forfeiture. By holding that the purchaser could not assign further without the lessor's consent, the court refused to apply the ancient rule to the facts in the instant case.[3] It should be noted, incidentally, that in *Dumpor's* case the condition expressly applied both to the lessee *and his assigns*. The leading West Virginia decision on the issue[4] involved a condition against assign-

[1] 114 F. (2d) 942 (C. C. A. 6th, 1940).

[2] Dumpor v. Symms, 4 Coke 119, 76 Eng. Rep. R. 1110 (1603).

[3] The court said, at page 945: "The trend of recent cases, however, is to limit strictly or even repudiate the rule in Dumpor's case. . . . It would be inequitable to apply it here. . . ."

[4] Easley Coal Co. v. Brush Creek Coal Co., 91 W. Va. 291, 302, 112 S. E. 512 (1922): "Notwithstanding the fault found with it, [*i. e.*, the rule in Dumpor's case] . . . . it seems to be recognized as unimpeachable common law in all jurisdictions and applied, in the absence of a statutory repeal or modification thereof. . . . However much there might be an inclination to dissent from it, as an original proposition, if any at all, it is so well fortified in precedents

ment which did not purport to bind the assigns. There the Supreme Court of Appeals expressly stated that if the covenant not to assign had been by the lessee for himself *and his assigns, Dumpor's* case would not have controlled: otherwise, it was binding authority.[5] Such an approach, however, seems historically unsound, both as to covenants and as to conditions running with the land.

The effect of the rule in *Dumpor's* case is to transform a multiple-party condition into a single-party condition, and the restraint on alienation is thus strictly construed.[7] Those who oppose this result go to great lengths to show that the theory is founded on a falsity and that it is not supported by the cases used to sustain it.[8] Advocates of the theory cite Professor Gray for the view that the law has for years favored removal of restraints on alienation;[9] believing the rule thus achieves a socially desirable result. Yet surely the law should protect the landlord to the extent of permitting him to choose who is to be his tenant; especially (as here) in mineral leases, where the method of exploration and severance must always prove of great pecuniary importance to the owner. In view of this very real objection to *Dumpor's* case, any mineral jurisdiction would be justified in limiting the doctrine and might even repudiate it altogether. No doubt the present case has reached a solution that works well in practice, but on its facts the decision is squarely opposed to the limited West Virginia interpretation of the rule.

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and judicial opinion that its genuineness cannot be judicially denied nor its consequences avoided."

[5] The West Virginia court appears to have confused *covenants* and *condition* (the one type of provision giving rise to an action for damages, while the latter simply causes the land to be forfeited). Perhaps the confusion occurred through a misunderstanding of Spencer's Case, 5 Coke 16a, 77 Eng. Rep. R. 72 (1583), to the effect that when a covenant concerned something not in existence at the time of the lease, "assigns" had to be expressly bound if the promise were to run with the land. (As to that holding, Spencer's Case has today only a "nuisance" value.)

[6] Childs v. Warner Bros. Southern Theatres, Inc., 200 N. C. 333, 156 S. E. 923 (1931).

[7] Wainwright v. Bankers' Loan & Investment Co., 112 Va. 630, 72 S. E. 129 (1911).

[8] *Dumpor's Case* (1873) 7 AM. L. REV. 616; Bronaugh, *Consent to Assignment of Lease—Dumpor's Case* (1924) 30 W. VA. L. Q. 277; Comment (1931) 9 N. C. L. REV. 445; Bordwell, *English Property Reform and Its American Aspects* (1927) 37 YALE L. J. 179.

[9] GRAY, RESTRAINTS ON ALIENATION (2d ed. 1895) § 4.