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# CONSENT TO ASSIGNMENT OF LEASE—DUMPOR'S CASE*

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In 1603 there was handed down by the King's Bench Division a decision, which, though often characterized as a "venerable error" and "a stumbling block in the way of the profession," has lived to plague the succeeding generations of jurists even down to the present day. By that decision it was declared that a condition in a lease that the lessee or his assigns shall not alien without the special license of the lessor is determined by an alienation by license, so that no subsequent alienation is a breach of the condition. In other words, an assignment by a lessee with his lessor's unrestricted consent operates as an abrogation of the condition against assigning without consent. This is known to lawyers as the rule in Dumpor's Case, and as such it has attained all the weight and authority usually accorded a legal precedent. It is with the origin and history of this rule, the blind subservience of the courts thereto as a general principle, the limitations, qualifications and exceptions which have been engrafted thereon in the attempts to escape its force and effect, that this article is concerned. Indeed it might be entitled the Rule in Dumpor's Case. The uniform adherence to the general principle announced in that case furnishes one of the most striking examples to be found in the law reports of the unwilling obedience by the courts to a precedent which they not only do not indorse but almost uniformly disapprove.

That case as reported by Lord Coke[1] was decided 45 Eliz. 1603 on the following facts: A lease for years by the President and Scholars of Corpus Christi College, Oxford, was made upon the proviso that the lessee or his assigns should not alien "without the special license of the lessors." Such a license was granted by the lessors to the lessee to alien *quibuscunque*. Under this license the lessee aliened to one Tubbe, who in turn assigned it to others,

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[1] 4 Coke 119 b, 1 Smith's Leading Cases, 11th ed. 32, 76 Eng. Rep. Reprint 1110 (1603).

whereupon the lessors re-entered for condition broken by the assignment by the assignee of Tubbe. The court declared that "although the proviso be, that the lessee or his assigns shall not alien, yet when the lessors license the lessee to alien, they shall never defeat, by force of the said proviso, the term which is absolutely aliened by their license, inasmuch as the assignee has the same term which was assigned by their assent: so if the lessors dispense with one alienation, they thereby dispense with all alienations after, for inasmuch as by force of lessor's license, and of the lessee's assignment, the state and interest of Tubbe [the first assignee] was absolute, it is not possible that his assignee, who has his estate and interest, shall be subject to the first conditions." And thus was established the rule that the courts have followed blindly though unwillingly ever since, unless relieved from the necessity of so doing by legislative action.

That a decision does not have to be reiterated constantly in order to become a sacred precedent in the law is evidenced by the fact that not until 1807, more than two centuries after its first pronouncement, did the English courts have occasion again to affirm the doctrine. It was then followed and applied in *Brummell* v. *Macpherson*,[2] and in that case the Lord Chancellor took occasion to say that "though Dumpor's Case always struck me as extraordinary it is the law of the land at this day." Again in 1812 the English court recognized the rule in Dumpor's Case to be the law though holding it to be inapplicable to the case under determination.[3] And again the court took occasion to criticise the rule, Lord Mansfield saying: "Certainly the profession have always wondered at Dumpor's Case, but it has been law so many centuries, that we cannot now reverse it." The following year in the case of *Macher* v. *Foundling Hospital*[4] the existence of the rule was recognized by Lord Eldon, who said that it had been settled law since Dumpor's Case that a covenant not to assign without license being once dispensed with, the condition was gone. He took occasion, however, to add: "I should not have thought that a very good decision originally."

This constitutes the history of the rule in the English courts where it would doubtless be followed today, with the added condemnation found in the early cases, but for the fact that Parliament stepped in and did for the courts what they did not have

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[2] 14 Ves. Jr. 173, 33 Eng. Rep. Reprint 487 (1807).
[3] Doe *v.* Bliss, 4 Taunt. 735, 128 Eng. Rep. Reprint 519 (1813).
[4] 1 Ves. & B. 188, 35 Eng. Rep. Reprint 74 (1813).

the courage to do for themselves. By 22 & 23 Vict., Ch. 38, § 6, it is provided that a license to do anything which would be otherwise a breach of a condition or covenant in a lease will extend only to the specific act licensed to be done. A similar statute exists in the province of Ontario.[5] Thus is eliminated from the body of the English law a legal precedent which, as we shall see, still serves as a guide for most of our American courts.

Though no longer the law of England, the rule in Dumpor's Case is very much alive in America, where it has been frequently recognized, and may be regarded as settled law, except where varied by statute. By an unbroken line of decisions it is declared that where there is a condition in a lease against the assignment of the term without the consent of the lessor, and such consent is given without restriction as to future assignment, the condition is waived altogether and the assignee may assign the term without the further consent of the lessor.[6] The American courts thus find themselves in the rather odd position of perpetuating by their decisions a ruling long ago discarded by the mother country as erroneous. This hoary old precedent as a part of the great body of common law was brought with them by the founders of the republic when they settled at Jamestown, and later accompanied their cousins when they landed at Plymouth Rock. In fact it must have acquired an exceedingly firm foothold on that famous old rock, for we find in a recent decision of the Commonwealth in which it is situated the latest and perhaps the most complete adoption of the rule. In that case the ruling of the lower court that where consent had been given to one assignment of a lease, no other consent was necessary, and that there was no necessity to get written consent thereafter, was excepted to as being an erroneous statement of the law. Not so, said the Supreme Court:

> "This ruling was right.[8] The rule in its origin rested upon quite technical reasoning concerning the nonapportionability of conditions.[9] Although the license to assign given the lessee

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[5] Baldwin *v.* Wanzer, 22 Ont. 612. ( ).

[6] Chipman *v.* Emeric, 5 Cal. 49, 63 Am. Dec. 80 (1855); German-American Sav. Bank *v.* Gollmer, 155 Cal. 683, 102 Pac. 932, 24 L. R. A. (N. S.) 1066 (1909); Reid *v.* John Weissener Brewing Co., 88 Md. 234, 40 Atl. 877 (1898); Pennock *v.* Lyons, 118 Mass. 92 (1875); Aste *v.* Putnam's Hotel Co., —— Mass. ——, 141 N. E. 666 (1923); Siefke *v.* Koch, 31 How. Pr. 383 (N. Y. 1866); Heeter *v.* Eckstein, 50 How. Pr. 445 (1874); Murray *v.* Harway, 56 N. Y. 337 (1874); Conger *v.* Duryee, 90 N. Y. 594 (1882); Fischer *v.* Ginsburg, 191 App. Dov. 418, 181 N. Y. S. 516 (1920); Easley Coal Co. *v.* Brush Creek Coal Co., 91 W. Va. 291, 112 S. E. 512 (1922).

[7] Aste *v.* Putnam's Hotel Co., —— Mass. ——, 141 N. E. 666 (1923).

[8] Dumpor's Case, 4 Coke 119 (1603); Brummell *v.* Macpherson, 14 Ves. Jr. 173 (1807); Pennock *v.* Lyons, 118 Mass. 92 (1875); Murray *v.* Harway, 56 N. Y. 337 (1874); Reid *v.* John F. Weissener Brewing Co., 88 Md. 234, 40 Atl. 877 (1898).

[9] Dumpor's Case, *supra;* and see Gannett *v.* Albree, 103 Mass. 372, 374.

in Dumper's Case was a general permission to assign to any person, in both *Brummell* v. *Macpherson* and *Pennock* v. *Lyons* the lessor's consent was to assign to specified persons; and the rule was nevertheless applied that the consent discharged the condition. It is argued in the present case that it makes a difference that the covenant purports to bind the successors in title of the lessee, while that in *Pennock* v. *Lyons* was not broad enough to cover assigns. But in Dumpor's Case and *Brummell* v. *Macpherson,* the covenants expressly bound the lessee's assigns. The further possibility that the covenant might run with the land against assigns even though not named[10] precluded any feasibility of placing *Pennock* v. *Lyons* on any other than its obvious ground, that Dumpor's Case is fully accepted law in this Commonwealth."

And Dumpor's Case "is fully accepted law" in many other American Commonwealths. The West Virginia Supreme Court put the stamp of its approval on the rule as late as 1922.[11] It was said in that case that notwithstanding the fault found with the rule laid down in Dumpor's Case it seems to be recognized as unimpeachable common law in all jurisdictions, and applied in the absence of statutory repeal or modification thereof, when the condition and the terms and provisions of the assignment and consent are such as to make it applicable. "However much," said the court, "there might be an inclination to dissent from it as an original proposition, if any at all, it is so well fortified in precedents and judicial opinion that its genuineness cannot be judicially denied not its consequences avoided. Being a part of the common law, it is made effective here by the Constitution, and there being no repugnance between it and the constitutional provision, it must 'Continue the law of the State, until altered or repealed by the Legislature.' " It was further held in that case that the assumption and agreement faithfully to fulfill, on the part of an assignee, all of the terms and conditions of a lease containing a condition or covenant against assignment thereof by the lessee, in a deed of assignment thereof, to which the lessee and assignee only are formal parties, in which the lessor joins only for the purpose of assenting to the assignment made by it, and in which there is not, anywhere or in any form, a specific inhibition of further assignment, nor one arising by necessary implication, do not save in the lessor the benefit of such condition or covenant; nor do they, together with a stipulation that the lease is to be a part of the deed, and recitals

[10] See Spencer's Case, 5 Coke 16a; WOODFALL, LANDLORD & TENANT (16th ed.) 175; 1 TIFFANY, LANDLORD & TENANT, § 152i.
[11] Easley Coal Co. *v.* Brush Creek Co., 91 W. Va. 291, 112 S. E. 512 (1922).

of the condition or covenant, and of purpose in the making of the lease to have it assigned to a person of the character of the assignee, effect such saving; and the assignee may assign the term, in whole or in part, without the consent of the lessor.

This principle, however, does not meet with the entire approval of other courts, and the courts have more than once seized upon the provision in a lease prohibiting the assignment of the premises by the lessee, "his heirs and assigns," as an avenue of escape from the recognized but much criticised rule in Dumpor's Case, and hold that an assignee taking from the lessee is bound by the provisions of the original lease, and the fact that the agreement giving consent to the assignment by the lessee does not contain a stipulation against further assignments without the consent of the lessor does not entitle the lessee's assignee to assign without consent, he being bound by the provisions of the original lease. A good illustration of this interpretation of such a lease in order to avoid the force of Dumpor's Case is found in *Hartford Deposit Co.* v. *Rosenthal*[12] wherein it was said:

> "We do not think that this case is within the rule in Dumpor's Case. In that case the provision of the lease was that the lessee or his assigns should not alien the premises to any person or persons without the special license of the lessors. During the term the lessors by deed licensed the lessee 'to alien or demise the land, or any part of it, to any person or persons whatsoever.' Afterwards the lessee assigned his lease to Tubbe, and it was held that the alienation to Tubbe had determined the condition against alienation, and no alienation which Tubbe might thereafter make could break the condition. In Dumpor's Case the condition was single and not susceptible of more than one breach. The proviso was that the lessee or his assigns should not alien to any person or persons without the special license of the lessors, and the lessors afterwards licensed the lessee to alien the land to any person or persons. Here the license was expressly limited to Stillson's Restaurant and Buffet Company and on the condition that, 'no further assignment of said lease and no subletting of the premises or any part thereof shall be made without the written consent of said Hartford Deposit Company."[13] The second clause of the head lease contains a definite agreement that neither 'lessees nor others having the lessees' estate in the premises' shall assign, sublet or use or permit the premises to be used for any purpose than as specified in the lease without the written consent of the lessor. An assignee or subtenant is bound by any restrictions in the chain of title above him relating

[12] 192 Ill. App. 211 (1915).
[13] Kew v. Trainor, 150 Ill. 150, 37 N. E. 223; KALES' FUTURE INTERESTS, § 63, p. 81.

to assignments of subleasing, and the landlord has the same remedy in equity against the subtenant as against any other purchaser with notice."

While unable to bring themselves deliberately to overturn such a venerable precedent as Dumpor's Case the courts are quick to seize on any loophole whereby they can deny its application to the facts at hand. By thus limiting and qualifying the rule and creating exceptions thereto, they have gradually whittled it down to cover only a consent absolutely without restriction. Where the lessor desires to save the condition against assignments without his consent he can do so by inserting in the agreement permitting the first assignment a stipulation that no further assignment shall be made without his consent. Such provisions are uniformly held to apply to the assignee.[14]

The distinction between such a restricted consent and that on which the rule in Dumpor's Case was based was well stated in *Kew* v. *Trainor*[15] as follows:

"In the Dumpor Case it was held that a condition not to alien without license is determined by the first license granted. But the provision against the assignment, in that case, was entirely different from the clause in the contract under consideration. There the proviso was that the lessee or his assigns should not alien to any person or persons without the special license of the lessors, and the lessors afterward licensed the lessee to alien the land to any person or persons. Here the license to assign was expressly limited to a particular person, O. G. F. Russell, and on the condition that no further assignment of the lease should be made without the written assent of the lessor, and in addition, Russell, the assignee, covenanted that on consideration of the license he would perform all the covenants and conditions of the original lease to be kept and performed by the lessee. There is such a wide difference between the case cited and the case under consideration that we do not regard the former case one which should control here, even if we were inclined to follow the Dumpor Case. We perceive no reason why the rule that a license once granted removes the condition, may not be controlled by the contract of the parties. The stipulations in the first assignment are plain, and we see no reason why they did not carry with them the provision for re-entry contained in the lease for a violation of its provisions."

Perhaps the most important exception grafted on the rule is that relating to underletting or subleasing as contradistinguished

[14] Rothrock *v.* Sanborn, 178 Cal. 693, 174 Pac. 314 (1918).
[15] 150 Ill. 150, 37 N. E. 223 (1894).

from an assignment of the term. In the latter instance Dumpor's Case is supreme, but owing to the difference between an assignment and an underletting it is generally held that the rule is inapplicable to a sublease.[16]

As was said in *Miller* v. *Newton-Humphreville Co.*[17]

> "A distinction has almost uniformly been drawn by the courts in the application of this rule between an assignment of the lease and a subletting, and that the unsatisfactory rule of the Dumpor Case has been limited to assignments of the lease, and has not been extended to a subletting of the premises, regarding such subletting as a continuing condition of the lease, which is not extinguished by a single consent. Gear, L. & T. p. 285; Taylor, L. & T. par 501. The true rule applicable to the present situation is stated in 18 A. & E. Ency. of Law, at page 681, as follows: 'If the lessor consents to a subletting the sublease is, of course, valid, though the lease expressly forbids all subletting, but the consent of the lessor to one subletting, or the waiver of one breach of the covenant against subletting, is no defense to a breach of the covenant by another and distinct sublease.' And this I think must be the rule to be followed in a case where, as here, the parties have expressly agreed that all the terms of the lease, including the provision against subletting, is made a condition of the consent to the present subletting, for by this provision of the agreement the original lease became a part of contract to sublet."

And in *McKildoe* v. *Darracott,*[18] the difference was stated as follows:

> "The only difference between an assignment and underlease in this respect is, that the doctrine of Dumpor's Case, 4 Coke (Eng.) 119, in regard to assignments, has not been extended to underleases. It was held in that case that a license to assign any part in a dispensation of the whole condition, and the lessee or his assigns may assign all the residue without license. Whereas it has been since held that a lessor who has a right of re-entry on a breach of covenant not to underlet, does not, by waiving his entry on one underletting waive his right to re-enter on a subsequent underletting. *Doe* v. *Bliss,* 4 Taunt. (Eng) 735; Archbold 97. In the former case the waiver is of the condition itself. In the latter only of the forfeiture for a particular

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[16] Seaver *v.* Coburn, 10 Cush. 324 (Mass. 1852); Miller *v.* Newton-Humphreville Co., 116 Atl. 325 (N. J. 1920); Heeter *v.* Eckstein, 50 How. Pr. 445 (1874); Conger *v.* Duryee, 90 N. Y. 594 (1882); Fidelity Trust Co. *v.* Kohn, 27 Pa. Super. Ct. 374 (1904); Albig *v.* Morton, 33 Pa. Co. Ct. 93 (1905); Farr *v.* Kenyon, 20 R. I. 376, 39 Atl. 241 (1898); McKildoe *v.* Darracott, 13 Gratt. 278. (Va. 1856); Doe *v.* Pritchard, 5 Barn & Ad. 781, 2 N. & M. 489, 3 L. J. K. B. N. S. 11 (Eng. 1833).

[17] — —N. J. ——, 116 Atl. 325 (1920).

[18] 13 Gratt. 278 (Va. 1856).

breach. But in the latter each breach is a complete, and not a continuing act of forfeiture."

While it cannot be denied that the doctrine of stare decisis is essential to a well ordered and lasting system of jurisprudence, the extent to which the blind adherence to precedent is carried in some instances, as witnessed by the rule in Dumpor's Case, gives rise to no little impatience with the courts, to say the least. We may have to submit to the doctrine as thus stated in *Lonstorf* v. *Lonstorf*:[19]

"Courts should ordinarily bow to the considerations that certainty of the law is more essential to justice than absolute correctness; that a rule of law adopted and long adhered to may have reasons to warrant it which were apprehended by the judges who declared it, and are approved by the people who, having authority to change, have abided by it, although no such reasons are discovered by those later considering it."

But nevertheless we are in hearty sympathy with the Texas judge who thus expressed himself as to a wornout precedent:

"From the foregoing opinion, it is easy to infer what the writer would do to the rule if he had a chance, and his purpose in prolonging this opinion is to show the bench and bar of Texas how utterly unreasonable and unjust to contracting parties the rule is become, and how like a fetich the courts of this country have bowed down and worshiped around the old dictum out of idolatrous reverence for precedents and because it smells old and musty, though it has long enough retarded the progressive young genius of American commerce, and, in fact, it never should have been born. It is a rule now more honored in the breach than the observance, and the writer hopes that when our Supreme Court gets even as good an opportunity as this, it will bury its skeleton so deep that no lawyer will ever scent it out and offer it as authority in Texas again, as he would have done in this instance if he had had the power.[20]

The rule in Dumpor's Case would seem to fall within that class so feelingly condemned by the Texas judge and we wonder that some American court has not found the courage so to treat it. But though poor old Dumpor is dead and gone this many a year, his case goes on forever, at least in this great country. So beware how you too freely consent to the assignment by your lessee of his lease. He may bring forward a highly reputable and de-

[19] 118 Wis. 159, 95 N. W. 961 (1906).
[20] Shelton v. Jackson, 20 Tex. Civ. App. 443, 49 S. W. 415.

sirable applicant, both financially and socially, whom you willingly accept in his stead, but unless you hedge that consent about with paper restrictions you may find as a later tenant a newly arrived immigrant with neither money to pay the rent, nor culture to share with you, but with a large supply of poverty, dirt and children, and your hands effectually tied by Dumpor's Case.