

Fifth Supplement to Memorandum 88-64

Subject: Study H-111 - Commercial Lease Law (Assignment and Sublease--
rule in Dumpor's case)

Attached to this memorandum is a background study prepared by our consultant Professor Coskran on a subsidiary issue in the assignment and sublease study. The subsidiary study concerns the rule in Dumpor's case, a common law principle dating from 16th century England. The rule in Dumpor's case states that notwithstanding a lease provision requiring the landlord's consent to an assignment (as opposed to a sublease) of the tenant's interest, if the landlord does consent to an assignment, that initial consent effectively operates as a waiver of all future right the landlord may have to object to subsequent assignments by subsequent tenants.

The rule in Dumpor's case has been severely criticized judicially, and has been statutorily overruled in many jurisdictions. Professor Coskran summarizes the situation in California as follows:

There is language in early cases indicating, but not directly holding, that California follows Dumpor's Case with respect to successive assignments. There is language in later California cases criticizing, and at least one holding by a court of appeal rejecting, the rule. There is no California Supreme Court decision expressly involving the issue and adopting or rejecting the rule. The decisions make a distinction between a restriction which is expressly made binding on assignees, and one which is not so express. The former has been treated as a continuing covenant which binds successors. The latter has been treated as a single and personal covenant which binds only the original tenant. California appears to follow the consensus that Dumpor's Case does not apply to subleases.

The study indicates that the rule is illogical and serves no useful purpose; it serves only as a trap for the unwary. Professor Coskran notes that efforts to draft around the rule in the lease are generally ineffective since the rule has been held to apply notwithstanding the most clear and precise lease clauses to the contrary. Some statutory modification of the rule is necessary.

It is probable that most lease transfer restrictions are intended to apply continuously to any transfer and are not personal to the original tenant. The most logical statutory approach, therefore, is to reverse the rule in Dumpor's case and create a presumption that a restriction on assignment applies not only to the original tenant but also to subsequent assignees. This rule should be subject to an express provision in the lease to the contrary.

The tentative recommendation attached to Memorandum 88-64 is drawn on the assumption that a lease restriction applies to the tenant's successors. See Section 1995.020 (definitions of "landlord", "tenant", "lease", and "restriction on transfer"). However, it is better to state the rule expressly. A provision could be added to read:

§ 1995.090. Effect of landlord's consent or waiver

1995.090. (a) A restriction on transfer of a tenant's interest in a lease applies to an assignee or subtenant to the same extent as to the original tenant, notwithstanding the landlord's consent to a prior transfer or the landlord's waiver of a standard or condition for a prior transfer.

(b) Subdivision (a) does not apply if either of the following conditions is satisfied:

(1) The lease provides expressly that the restriction on transfer is limited to the original tenant.

(2) The landlord states expressly that the consent or waiver applies to a subsequent assignee or subtenant.

Comment. Section 1995.090 makes clear that the rule in Dumpor's case is not the law in California. This probably codifies existing law. Cf. Coskran, Enforcement of Leasehold Transfer Restriction Against Tenant's Successor: Should Dumpor's Be Dumped?, 19-25 (1988).

Respectfully submitted,

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ENFORCEMENT OF LEASEHOLD TRANSFER RESTRICTION
AGAINST TENANT'S SUCCESSOR: SHOULD DUMPOR'S BE DUMPED?*

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I. SCOPE OF STUDY.

This study is related to, and supplements, the principal study of restrictions on commercial lease assignments and subleases entitled "Restrictions on Lease Transfers: Validity and Related Remedies Issues" (#H-111).¹ That study deals with the validity of, and consent standard applied to, various types of leasehold transfer restrictions. The principal study also deals with the relationship between transfer restrictions and the "lock-in" remedy² which allows the lessor to continue enforcement of the lease after the tenant's breach and abandonment.

This study examines the enforceability of a transfer restriction, in a commercial lease of real property, against a tenant's successor. It examines the effect of the lessor's consent to a transfer by the tenant, or a waiver of the right to object to a transfer.

Assume that a lessor and tenant enter into a commercial lease of real property. A clause in the lease restricts the tenant's ability to transfer to a third party without the lessor's consent.³ The tenant subsequently assigns the lease to an assignee, either with the lessor's express consent or with the lessor's waiver by inaction. Later, the assignee proposes to reassign the leasehold.

Does the transfer restriction bind the assignee? Should the rule in California be clarified or modified?

II. DUMPOR'S CASE & ITS EFFECT.

Over 400 years ago, a case set forth a foolish rule. Almost as if it were necessary to prove that the law has a sense of humor in retaining old rules, the rule was imported from England before it could be extinguished, and it lives on in the United States today. That which was foolish in its origin, has not become sensible with time. "When the reason of a rule ceases, so should the rule itself."⁴ That maxim should have a corollary. When a rule is without a solid reason in the first place, its demise should not be prolonged.

A. The Case.

The rule in Dumpor's Case arose in this manner.⁵ An Oxford College⁶ leased land to a tenant with the "proviso that the lessee or his assigns should not alien the premises to any person or persons, without the special licence of the lessors." Subsequently, the lessor "licensed the lessee to alien or demise the land...to any person or persons..." The tenant assigned to a man who, at his death, willed the leasehold to his son. When the son died intestate, his administrator assigned the leasehold to the defendant without the lessor's consent. The lessor, based on the unconsented assignment, recovered possession and leased to

Dumpor. The defendant assignee re-entered and Dumpor brought a trespass action against him. Poor Dumpor not only lost, but also suffered the ignominy of a foolish rule being named after him.

According to the case, the ultimate assignee was entitled to possession under the leasehold. The lessor had no power to terminate the lease based on the unconsented transfer. This in turn prevented the lessor from validly leasing to Dumpor.

The rule stated to produce this result was that the first assignment with the lessor's consent "had determined (ended) the condition, so that no alienation which (the assignee) might afterwards make could break the proviso or give cause of entry to the lessors, for the lessors could not dispense with an alienation for one time, and that the same estate should remain subject to the proviso after."⁷ In other words, once the first consented assignment occurs, the restriction against unconsented assignment is no longer enforceable to prevent successive assignments. This treatment of the power to prevent an assignment is perhaps the origin of the phrase "use it or lose it."

It is difficult to find a reasonable rationale for the rule. The reasons given are more in the nature of conclusions which need further support. The court said that since the consent to the first assignment was "absolute," it was not possible for the assignee to be subject to the restriction. Perhaps it could be argued that the lessor's consent to an assignment "to any person or persons"⁸ was so unrestricted as to indicate an intent to

abandon the restriction. This interpretation would focus on the nature of the consent as a waiver of the restriction, rather than on the nature of the restriction itself. The Dumpor's court did not limit its rule based on the nature of the consent. Subsequent cases have not done so either.

The court stated that a condition against assignment cannot be "apportioned."⁹ Perhaps this could be limited to refer to a lease to two or more tenants, and support a rule that the lessor cannot consent to a transfer by one tenant but refuse consent to the other cotenants. A case referred to by the court involved such a situation.¹⁰ However, the Dumpor's court did not limit the rule to a cotenant situation.

The transfer restriction is stated to be an "entire" or single condition, as distinguished from a continuing condition.¹¹ This appellation generally indicates an obligation which, by its nature or the intent of the parties, is subject to a single performance or a single breach. It is not one which is subject to successive performances or breaches. A covenant to complete a building by a specific date is an example of an "entire" obligation.¹² A covenant to pay rent is an example of a "continuing" obligation. There is nothing in the nature of a transfer restriction that would mandate treatment as "entire" regardless of the parties contra intent. To the contrary, a leasehold is by nature subject to successive assignments. A requirement of consent is capable of the same successive

occurrences. The intent of the parties can produce an entire or a continuing obligation. The transfer restriction in the lease from the college expressly applied to the tenant "or his assigns."¹³ Since the court treated the restriction as "entire," it must have concluded that the restriction by its nature could not be made "continuous." This lacks common sense and logic. It only supports the belief in mystical origins sometimes encountered in ancient property law.

B. Variations.

1. General v. Specific Consent. In Dumpor's Case, the lessor gave a general consent for assignment to anyone. Subsequent statements of the rule have not limited it to such a broad consent. It seems taken for granted that consent to a transfer to a specific assignee will have the same effect of permanent removal of the consent requirement.¹⁴

2. Consent v. Waiver. The lessor in Dumpor's Case expressly consented to the initial assignment. Subsequent applications of the rule have not distinguished an express consent to an assignment from a waiver of the right to object to a transfer.¹⁵

3. Condition v. Covenant. The court in Dumpor's Case refers to the transfer restriction as a condition. The word "condition" is most likely used in the case to indicate an obligation for which termination of the leasehold, and reentry into possession, are provided as remedies. This conclusion is supported by the court's comment that the lessor "entered for the condition broken."¹⁶ A broken "covenant" on the other hand generally leads to a remedy of damages. Later cases have not distinguished between a condition and a covenant for purposes of the rule.

4. Assumption. It does not appear that the assignee in Dumpor's Case contractually assumed the lease, so there was no privity of contract between the lessor and the tenant with

respect to provisions in the lease. Later cases have not found this to be an important factor in application of the rule.¹⁷ The lack of privity of contract does not isolate the assignee from the obligations of the prime lease. There is privity of estate and the covenants that run with the estate bind the assignee.¹⁸

5. Lease clause variations. The restriction against transfer without the lessor's consent usually comes with the variations below. A strict application of the Dunpor's Case rule makes the restriction unenforceable against an assignee in all of the variations. There is authority, discussed below, that the rule will not be applied when there is an express intent to have the restriction control subsequent transfers. This approach allows the restriction to be enforceable against assignees if there is an express provision that it binds successors, or that consent does not waive the restriction on future transfers.

a. There is no mention of successors, and there is no non-waiver clause.

b. Successors are expressly mentioned in the restriction clause.

c. Successors are not mentioned in the restriction clause itself, but there is a general clause to the effect that the lease provisions are binding upon successors.

d. There is a non-waiver provision in the restriction clause.

e. There is no non-waiver provision in the restriction clause itself, but there is a general clause to the effect that a waiver does not excuse future performance of the obligation waived or performance of other obligations.

6. Conditional Consent. Sometimes the lessor will provide in the written consent itself that the consent is not a waiver of the restriction on future transfers. A strict application of the Dunpor's Case rule would disregard this non-waiver provision. However, there is authority, discussed below, that the rule will not be applied when the consent is conditioned in this manner.

C. Subleases.

It is generally agreed that the rule does not apply to successive subleases by the tenant.¹⁹ In other words, when the lessor consents to the first sublease by a tenant, he can still force the tenant to obtain consent to a subsequent sublease. This distinction between subleases and assignments in application of the rule has been criticized as without logic.²⁰ It is hard to be enthusiastic about justifying distinctions in the application of a rule which lacks a solid reason for its existence. However, it could be justified on the basis that the lessor maintains the same privity of estate and privity of contract relationship with the tenant after a sublease. There has not been a transfer of the whole leasehold. A sublease merely creates a tenancy relationship between the tenant/sublessor and the subtenant.²¹ It does not change the relationship nor obligations between the tenant and lessor.

D. Expressly Binding On Successors.

Some cases have focused on the intent of the lessor and tenant at the time they enter into the lease and transfer restriction. If they intend to have the transfer restriction bind a succession of assignees, that intent is honored.²² This intent is typically expressed in one or both of the following ways. A "non-waiver" clause can provide that "a consent to one assignment, subletting, occupation, or use by another person shall not be deemed to be a consent to any subsequent assignment, subletting, occupation, or use by another person."²³ Another way of expressing the continuous nature of the obligation is to state that it binds not only the tenant, but also the successors and assigns.²⁴

Note that the lease in Dumpor's Case did express the intent that the restriction bind assigns, but the court disregarded this in developing its rule. If the lease had not expressed this intent, the decision could have been rationalized on the basis that intent to bind successive parties was not clear.

III. THE COVENANT "RUNNING" APPROACH.

A. In General.

The doctrine of covenants running with the land (and equitable servitudes) has traditionally been used to deal with the binding effect of a promise on the promisor's successor.²⁵ This is the approach adopted by the Restatement for dealing with the burden of lease promises passing to a leasehold transferee.²⁶ Is the burden of the tenant's promise to refrain from assignment without the lessor's consent binding on a successor to the tenant promisor, without a contractual relationship between the lessor and the assignee? This is the basic question raised by the facts in Dumpor's Case.

There is no reason why the answer should not be determined by the doctrine of covenants running with the land. A privity of estate relationship exists between the lessor and the assignee.²⁷ The assignee has received the entire estate of the tenant.²⁸ The burden of the obligation to refrain from unconsented transfers of the leasehold estate certainly "touches and concerns" that estate. In other words, it is related to the leasehold in a most direct way. The assignee of the leasehold would reasonably be held to notice of the provisions in the lease which created and sustains that leasehold.

The principal factual issue is whether the lessor and original tenant intended that the burden of the transfer restriction bind successive parties.²⁹ An express statement or phrase to that effect should be honored. In certain situations, it is necessary for the intent to bind assigns to be express.³⁰ However, there is no intrinsic reason why that intent cannot be implied with regard to the transfer restriction. If the intent is not expressed, the most likely intent should govern. This is just a way of looking at, and following, the reasonable expectations of the parties.

Suppose that the clause states that "the tenant shall not assign or sublet without the lessor's prior written consent, which consent shall not be unreasonably withheld." There is no express language of the binding effect on assignees. The clause restricts transfer without the lessor's consent. Is it likely that the parties intend and reasonably expect that it only bind the original tenant, and that subsequent parties are free to transfer without any limitation? Or, is it likely that the parties intend and reasonably expect that any and all transfers be subject to review and consent by the lessor? It is asking much of a credulous person to expect that a one-shot restriction is intended.

The lessor's motives for wishing to evaluate and control transfers are no less significant after the first assignment.³¹ There is nothing in the language to contradict the logic of an

implied intent that the covenant be continuous. A reference to "the tenant" (or "the lessee") does not indicate a covenant that is personal to the original tenant. After an assignment takes place, "the tenant" is the assignee. For example, a covenant that "the tenant" shall pay rent is binding upon an assignee without express language of "successors and assigns."³²

In the unusual situation where the parties intend the restriction to govern only the first transfer, they can expressly state that limitation. A lessor and tenant can agree, and expressly provide, that the transfer restriction is personal to, and only binds, the original tenant.

B. Tenant Motivation.

It might appear that tenants would welcome the limit on the effectiveness of a leasehold transfer restriction. The freedom to re-assign without the lessor's consent certainly makes the transaction more attractive to the proposed initial assignee. This should make it easier for the tenant to make a deal with the third party. However, tenants, as well as lessors, have a reason to adopt a more rational and practical approach to the survival of the restriction. The lessor who knows that there is just one chance at controlling a transfer is more likely to deny consent in order to preserve that control. This increases the difficulty a tenant will have making a successful assignment.

The tenant's liability to the lessor continues even after the assignment and re-assignments are made, but the assignee's liability to the lessor ceases upon re-assignment.³³ Thus, breaches of the lease after re-assignment, such as non-payment of rent, can be enforced against the original tenant, but not the assignee.³⁴ The tenant has no control over the selection of a re-assignee, and the assignee has little motive to be picky. The tenant should hope that the lessor has, and exercises, the right to assure a reliable re-assignee.

IV. MODERN STATUS.

A. England.

There was a grumbling acceptance of the rule by the English judiciary. Lord Chancellor Eldon observed "Though Dumpor's case always struck me as extraordinary, it is the law of the land today. When a man demises to A,...with an agreement that if he, his executors, administrators or assigns, assign without license, the lessor shall be at liberty to re-enter, it would have been perfectly reasonable originally to say, a license granted was not a dispensation with the condition; the assignee being by the very terms of the original contract restrained as much as the original lessee."³⁵ Sir James Mansfield commented: "The profession have (sic) always wondered at Dumpor's Case, but it has been law for so many centuries we cannot reverse it."³⁶ This lack of enthusiasm is reflected in legislation in England which abolished the rule in the middle of the 19th century.³⁷

B. United States.

The rule in Dumpor's Case has been followed in many states, but it has been soundly criticized and rejected in others.³⁸ The rule has a "history of frequent and protracted criticism in the very decisions upholding the rule as well as in legal writings."³⁹ It has been referred to as a stumbling block in the way of the profession, and as an artificial rule without sound reason.⁴⁰ A 1924 Wyoming decision gave an excellent review of the rule and determined that it was not supported by logic, reason, or common sense.⁴¹ The court referred to the rule as a "venerable error" and an example of the "pertinacity" of the errors of the law, and rejected it.

"The Restatement disapproves of the so-called Rule in Dumpor's Case..." and it provides that "the assignee who comes into privity of estate with the landlord is bound by the prohibition against assignment without the landlord's consent."⁴²

It seems that any following the rule has today in the United States is due to precedential inertia, not to a belief that it logically solves any problem. It is like a partially submerged log in a river. It can be found, but the unwary suffer damage.

V. CALIFORNIA.

The cases in California indicate that the rule is discredited, and probably no longer followed, at least where there is an express intent that successors be bound. However, the California Supreme Court has not expressly rejected the rule, and some of the courts of appeal have not been as emphatic as one would wish.

The Kendis case in 1928 contains the most complete judicial discussion of the rule in California.⁴³ The court referred to the fact that restrictions on leasehold assignment are regarded as fair and reasonable, and that the restrictions allow the lessor to limit the right of another to select his tenant. The court pointed out that the Dumpor's Case rule contravenes these rules and prevents the lessor from selecting his own tenants and protecting his reversion.⁴⁴ It rejected Dumpor's Case in situations where the intent that it be binding on assignees is express.⁴⁵ Also, the Kendis case recognized that it is well settled in other jurisdictions that the rule does not apply to a sublease.⁴⁶ The California Supreme Court denied a hearing in the case.

Early California cases have been cited for the proposition that California follows Dumpor's Case and treats the obligation as personal to the original tenant.⁴⁷ The Chipman case held that

the restriction against assignment without consent was abrogated by the first assignment.⁴⁸ However, the lease clause did not expressly state that it was intended to bind assignees. Since the court did not specifically mention Dumpor's Case, the Chipman decision could be interpreted to mean that a restraint against alienation will not be enforceable against a successor unless clear intent is expressed.⁴⁹ The McGlynn case contains a statement that covenants against assignment are not continuing covenants.⁵⁰ This statement is dictum. The case involved a covenant to build a building within a certain time limit, which the court properly held to be single and capable of but one performance and breach. In the Randol case, the Dumpor's Case issue was raised but was not dispositive.⁵¹ The lessor, by conduct, waived the right to enforce the restriction. Two treatises on California law cite the Baker case⁵² for the proposition that a transfer restriction is personal and does not run with the land.⁵³ There is no holding to that effect in Baker.

The German-American Savings Bank case stated: "The assignee of a leasehold estate takes it subject to all the obligations imposed by the lease, except that, where there is a condition against assignment without consent (which is necessarily single in its nature), such condition is wholly discharged by the consent or waiver."⁵⁴ The court did not explain why the covenant must by nature be single. The statement is dictum because the clause itself was not drafted in a manner that would show an intent to bind successors.

A conditional consent apparently saved the restriction from lapsing in the Rothrock case.⁵⁵ The lessor's written consent to the initial assignment expressly provided that the consent requirement was not waived and that the lease could not be assigned again without consent. The court enforced the transfer restriction against the assignee, and did not even mention the rule in Dumpor's Case.

In the Miller case, the lease provided that "the lessee shall not assign...without the written consent of the lessor..." A separate clause provided that all the lease provisions were binding on "the successor or assigns of the lessee..."⁵⁶ The lessor consented to an assignment by the tenant to a first assignee and a re-assignment to a second assignee. The lessor sought to terminate the lease for breach based on an unconsented re-assignment to a third assignee.⁵⁷ The court stated that the transfer restriction which only mentioned "the lessee" was "personal, binding upon the lessee only, and not one running with the land." The separate general clause about lease provisions binding the "assigns of the lessee" did not, according to the court, extend the covenant to include the re-assignment from the second assignee to the third assignee.⁵⁸

It seems that this linguistic alchemy would require that the clause expressly state that it binds the tenant, the tenant's assignees, the assignee's re-assignee, etc. The court commented that the restriction could be made binding upon subsequent

assignees "by appropriate language in the lease itself or by a qualified consent to each assignment."⁵⁹ Probably the lawyer who drafted the lease thought that the lease contained appropriate language to assure continuing covenants.

The language in Miller regarding the Dumpor's Case issue is dictum. The lessor had waived any right to terminate by accepting rent with knowledge of the protested transfer. The lessor's petition for hearing was denied by the California Supreme Court based on the waiver by conduct. The court commented: "We are not to be understood as approving or disapproving what is said elsewhere in the opinion concerning the covenant against assignment contained in the lease."⁶⁰ The Taylor case also involved a waiver by the lessor's conduct, but the court volunteered dictum that "a restriction against assignment is a personal covenant made for the benefit of the lessor and does not run with the land."⁶¹

The criticism of the rule by the Kendis court was discussed and approved in the Crowell case.⁶² Crowell makes a clear distinction between a single restriction obligation and a continuous one. If the clause does not state the restriction to be binding on the tenant's assigns, it is single and does not bind the assignee. If the clause states that it binds the tenant and his assigns, it is continuous and enforceable against the assignee. However, the case involved a sublease rather than an assignment. The court recognized the distinction "assumed" to

exist between restrictions on successive assignments and on successive subleases, but did not decide whether that distinction was the law in California.⁶³

In the 1980s, two cases mentioned the rule in Dumpor's Case, but neither of them directly involved multiple assignments of a leasehold. The Laguna Royale case basically involved a "time-sharing" enterprise by a unit owner in a condominium project. The project was developed on land held under a long term ground lease. Each of the unit "owners" received a Subassignment and Occupancy Agreement which contained restrictions against assignment and subleasing by the unit holder. The condominium association brought an action to enforce the clause against a successor to the original unit holder. The successor argued that their interest was in essence a fee and that restraints against fee transfers were void. The court commented: "It would appear that defendant's argument more appropriately ought to be that once consent was given (to the first transfer), the rule in Dumpor's Case...became applicable and that thereafter no consent to any further assignment was required."⁶⁴ There was no further discussion of the rule.

In the Boston Properties case, the lease contained a restriction against assignment or subleasing without the lessor's consent, and the clause contained an express non-waiver provision to the effect that consent given would not excuse getting it for further transactions.⁶⁵ The original tenant, sublet to a

subtenant with the consent of the lessor.⁶⁶ The subtenant later sub-sublet to a sub-subtenant. The second sublease was without the lessor's consent. The lessor brought an unlawful detainer action against the original tenant, seeking termination of the lease and recovery of possession. Note that the lessor brought action against the original tenant with whom it continued to have privity of estate and privity of contract. The leasehold was not transferred to an assignee and there was no issue of the binding nature of the covenant against a successor to the tenant.

The court in Boston Properties held that the restriction against subleasing without consent continued in effect and bound the original tenant, the original tenant could not give the subtenant any greater rights or freedom than it had, and the subtenant was subordinate to the terms of the prime lease. The sub-sublease without the lessor's consent, and without any effort to obtain consent, and with the original tenant's knowledge and consent, was a breach of the master lease and the lessor was entitled to terminate the lease.⁶⁷ The court commented that the Kendis case "makes clear that the rule in Dumpor's case is not the law in California."⁶⁸ This was dictum since the court was dealing with subleases.

Here is a summary of the California situation. There is language in early cases indicating, but not directly holding, that California follows Dumpor's Case with respect to successive assignments. There is language in later California cases

criticizing, and at least one holding by a court of appeal rejecting, the rule. There is no California Supreme Court decision expressly involving the issue and adopting or rejecting the rule. The decisions make a distinction between a restriction which is expressly made binding on assignees, and one which is not so express. The former has been treated as a continuing covenant which binds successors. The latter has been treated as a single and personal covenant which binds only the original tenant. California appears to follow the consensus that Dunpor's Case does not apply to subleases.

VI. DRAFTING SOLUTIONS.

Various drafting solutions have been suggested to avoid application of the rule in Dumpor's Case.⁶⁹ The effectiveness of most of these solutions depends on at least some modification of the rule. The solutions are based on expressing intent that the obligation continue to bind successors. The rule is based on the perceived nature of the obligation, not the intent of the parties. See Section II.A above.

The following are suggestions that have been made.

1. An express clause in the lease making the transfer restriction binding on assignees should be given effect.⁷⁰ This is clearly contrary to the facts in Dumpor's Case. It may be necessary to expressly state that it binds not only "assigns", but also all re-assignees. See the Miller case discussed in Section V above.⁷¹ Since this suggestion is based on expressing the intent of the parties, it should not make any difference whether this intent is expressed in a specific provision in the transfer restriction clause or in a general clause applicable to all lease obligations.

2. An express clause in the lease stating that a consent to, or waiver of, one assignment is not a waiver of the consent requirement for future assignments should be given effect.⁷² Since this suggestion is based on expressing the intent

of the parties, it should not make any difference whether this intent is expressed in a specific provision in the transfer restriction clause or in a general clause applicable to a waiver of any lease obligation.

3. An express statement in the writing granting the lessor's consent that consent is to the particular assignment, and is not a waiver of the duty to get consent for subsequent assignments should be given effect.⁷³

There is a drafting solution which would not require a modification of Dumpor's Case. The lessor could require, as a condition of consent, that each assignee execute an independent agreement not to make a further transfer without the lessor's consent.

It is unfortunate to have a rule that is illogical and impractical, and that requires specific drafting to avoid. This unnecessarily perpetuates a trap. It makes more sense to take an approach which is consistent with the intent and reasonable expectations of the parties. See Sections II.D and III above.

VII. SUMMARY OF CONCLUSIONS.

1. The rule in Dumpor's Case, taken from an English case in 1578, states that once the lessor consents to an assignment of the leasehold by the original tenant, the obligation to obtain the lessor's consent to an assignment is not enforceable against assignees.

2. The rule has been interpreted to apply:

a. even if the lease expressly provides that the transfer restriction is intended to bind assignees;

b. whether the lessor's consent was general (assignment permitted to any party) or specific (assignment permitted to specific party);

c. whether the initial assignment is permitted by express consent or by a waiver implied from conduct;

d. whether the transfer restriction is worded as a condition or a covenant; and,

e. whether the initial assignee contractually assumed the lease or not.

3. Subleases have generally been considered exempt from the rule. That is, consent is required for subsequent subleases.

4. The rule has been criticized and repealed in England. Although the rule has been uniformly criticized in the United States, some states continue to follow it. It has been rejected by the Restatement.

5. It appears that California does not follow the rule. However, there is dictum to the contrary in early cases, and there is no clear holding by the California Supreme Court rejecting the rule.

6. There are drafting solutions for avoiding the rule, but most solutions require a modification of the rule.

7. The rule is illogical and serves no useful purpose. It serves only as a trap for the unwary.

8. A leasehold transfer restriction may be intended to be binding only on the original tenant (i.e. single or personal). On the other hand, the restriction may be intended to apply to all successors from the tenant and to all subsequent transfers (i.e. continuous). Intent should control. There is nothing in the nature of the obligation that would prevent its treatment as a continuous obligation.

9. Intent that the obligation be continuous may be expressed by language to the effect that it is binding on successors. Although "assigns" or "successors" are the words typically used to express this intent, no specific word or words should be required. Either a provision in the transfer restriction clause, or a separate general clause applicable to all lease obligations, should be sufficient.

10. The intent of a continuous obligation may also be expressed by language to the effect that a consent or waiver does not excuse the requirement to obtain consent in the future.

Either a provision in the transfer restriction clause, or a separate general clause applicable to all lease obligations should be sufficient.

11. It is most probable that, absent language to the contrary, the obligation is intended to be continuous and that the parties reasonably expect it to be continuous. Thus, the easiest and most logical approach would be to presume that the restriction is continuous, absent express intent to the contrary.

- 1 This study is also related to separate studies on assignment and sublease topics entitled: *Tenant Remedies For Wrongful Enforcement of Assignment & Sublease Restrictions*; *Lessor Remedies For Breach Of Assignment & Sublease Restrictions*; *Involuntary Leasehold Transfers: Effect of Restrictions Against Assignment & Sublease*; and, *Use Restrictions In Leases: Relationship to Restrictions Against Assignment & Sublease*.
- 2 Cal. Civ. Code Sec. 1951.4 (West 1985).
- 3 For a discussion of the types of restriction clauses, see Sec. IV of the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.
- 4 Cal. Civ. Code Sec. 3510 (West 1970).
- 5 *Dumpor's Case*, 4 Coke 119B, 76 Eng. Rep. 1110 (K.B. 1578).
- 6 By its President and Scholars.
- 7 *Dumpor's Case*, 4 Coke 119B, 76 Eng. Rep. 1110, 1113 (K.B. 1578).
- 8 *Dumpor's Case*, 4 Coke 119B, 76 Eng. Rep. 1110, 1113 (K.B. 1578).
- 9 *Dumpor's Case*, 4 Coke 119B, 76 Eng. Rep. 1110, 1113 (K.B. 1578).
- 10 Trin. 28 Eliz. Rot. 256.
- 11 *Dumpor's Case*, 4 Coke 119B, 76 Eng. Rep. 1110, 1113 (K.B. 1578). For a discussion of the distinction in the context of a transfer restriction, see *Crowell v. City of Riverside*, 26 Cal. App. 2d 566, 572-573, 80 P.2d 120 (1938).
- 12 *McGlynn v. Moore*, 25 Cal. 384.
- 13 *Dumpor's Case*, 4 Coke 119B, 76 Eng. Rep. 1110, 1111 (K.B. 1578).
- 14 31 A.L.R. 153, 154 (1924) (*Landlord's Consent to One Assignment or Sublease as Obviating Necessity of Consent to Subsequent Assignment or Sublease.*); M. Friedman, *Friedman on Leases*, Sec. 7.304e, p.279 (2d ed. 1983).
- 15 31 A.L.R. 153 (1924) (*Landlord's Consent to One Assignment or Sublease as Obviating Necessity of Consent to Subsequent Assignment or Sublease.*); Restatement Second Property (*Landlord and Tenant*) Sec. 16.1, Reporter's note 7, p.136 (1977); M. Friedman, *Friedman on Leases*, Sec. 7.304e, p.279 (2d ed. 1983). For a discussion of waiver by failure to terminate, see Sec. III of the related study: Coskran, *Lessor Remedies For Breach Of Assignment & Sublease Restrictions*.
- 16 *Dumpor's Case*, 4 Coke 119B, 76 Eng. Rep. 1110, 1112 (K.B. 1578).
- 17 31 A.L.R. 153, 155 (1924) (*Landlord's Consent to One Assignment or Sublease as Obviating Necessity of Consent to Subsequent Assignment or Sublease.*)

- 18 See discussion of the relationship between the parties in Sec. III of the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.
- 19 *German-American Sav. Bank v. Gollmer*, 155 Cal. 683, 102 P. 932 (1909); 31 A.L.R. 153, 157-159 (1924) (*Landlord's Consent to One Assignment or Sublease as Obviating Necessity of Consent to Subsequent Assignment or Sublease.*); M. Friedman, *Friedman on Leases*, Sec. 7.304e, p.280 (2d ed. 1983).
- 20 Restatement Second Property (*Landlord and Tenant*) Sec. 16.1, Reporter's note 7, p.136 (1977).
- 21 For a discussion of the distinctions between an assignment and sublease, and the privity relationships, see Sec. III of the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.
- 22 *Kendis v. Cohn*, 90 Cal. App. 41, 58 & 60, 265 P. 844 (1928); *Crowell v. City of Riverside*, 26 Cal. App. 2d 566, 572-573, 80 P.2d 120 (1938); 42 Cal. Jur. 3d, *Landlord and Tenant*, Sec. 196 (1978); 4 Witkin, *Summary of California Law, Real Property*, Sec. 645 (9th edition, 1988); 49 Am. Jur. 2d, *Landlord and Tenant*, §§ 391-512 (1970); Miller & Starr, 4 *Current Law of California Real Estate*, Sec. 27:92, p. 416 (1977).
- 23 *Karbelnig v. Brothwell*, 244 Cal. App. 2d 333, 335, 53 Cal. Rptr. 335 (1966).
- 24 49 Am. Jur. 2d, *Landlord and Tenant*, Sec. 408, p. 423 (1970)
- 25 2 *Powell on Real Property*, Sec. 246[2], especially pages 372.124-372.125 & 372.114-372.118 (Patrick J. Rohan rev'n. ed. 1986)
- 26 Restatement Second Property (*Landlord and Tenant*) Sec. 16.1(2) (1977).
- 27 See Sec. III of the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.
- 28 See Sec. III of the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.
- 29 *Crowell v. City of Riverside*, 26 Cal. App. 2d 566, 80 P.2d 120 (1938).
- 30 See e.g. Cal. Civ. Code Secs. 1464 and 1468 (West 1982).
- 31 See Sec. V.B of the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.
- 32 See Sec. III of the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.
- 33 See discussion in Sec. III of the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.
- 34 If, however, the assignee contractually assumes the obligations of the lease, this creates a contractual privity with the lessor which continues after re-assignment.

- 35 *Brummell v. M'Pherson*, 14 Ves. 173, 33 Eng. Rep. 487 (Ch. 1807); *Dumpor's Case*, 4 Coke 119B, 76 Eng. Rep. 1110, note (A), p.1111 (K.B. 1578); *Kendis v. Cohn*, 90 Cal. App. 41, 52, 265 P. 844 (1928).
- 36 *Doe v. Bliss*, 4 Taunt. 736, 128 Eng. Rep. 519 (C.P. 1813). For additional comments, see sources cited in M. Friedman, *Friedman on Leases*, Sec. 704e, fn.14, p.279 (2d ed. 1983).
- 37 22 & 23 Vict., chap. 35, Secs. 1-3 (1859); 23 & 24 Vict., chap. 38, Sec. 6 (1860).
- 38 M. Friedman, *Friedman on Leases*, Sec. 7.304e, p.279-280 (2d ed. 1983); 51C C.J.S., *Landlord and Tenant*, Sec. 33, p.77 (1968); 49 Am. Jur. 2d, *Landlord and Tenant*, Sec. 408, p.423 (1970); Moynihan, *Introduction to the Law of Real Property*, p. 93 (2d ed. 1988); 2 *Powell on Real Property*, Sec. 246[1], fn. 60, p. 372.106 (Patrick J. Rohan rev'n. ed. 1986).
- 39 Restatement Second Property (*Landlord and Tenant*) Sec. 16.1, Reporter's note 7, p.136 (1977).
- 40 *Kendis v. Cohn*, 90 Cal. App. 41, 53, 265 P. 844 (1928).
- 41 *Investor's Guarantee Corp. v. Thomson*, 31 Wyo. 264, 225 P. 590, 32 A.L.R. 1071 (1924).
- 42 Restatement Second Property (*Landlord and Tenant*) Sec. 16.1, comment g. (1977).
- 43 *Kendis v. Cohn*, 90 Cal. App. 41, 265 P. 844 (1928).
- 44 *Kendis v. Cohn*, 90 Cal. App. 41, 54, 265 P. 844 (1928).
- 45 *Kendis v. Cohn*, 90 Cal. App. 41, 58 & 60, 265 P. 844 (1928).
- 46 *Kendis v. Cohn*, 90 Cal. App. 41, 54, 265 P. 844 (1928).
- 47 31 A.L.R. 153, 153-155 (1924) (*Landlord's Consent to One Assignment or Sublease as Obviating Necessity of Consent to Subsequent Assignment or Sublease.*); 42 Cal. Jur. 3d, *Landlord and Tenant*, Sec. 195, fns. 37 & 38, p. 229 (1978); 51C C.J.S., *Landlord and Tenant*, Sec. 33, fn. 29, p. 77 (1968).
- 48 *Chipman v. Emeric*, 5 Cal. 49 (1855).
- 49 *Kendis v. Cohn*, 90 Cal. App. 41, 265 P. 844 (1928).
- 50 *McGlynn v. Moore*, 25 Cal. 384.
- 51 *Randol v. Tatum*, 98 Cal. 390, 33 P. 433 (1893).
- 52 *Baker v. Maier etc. Brewery* 140 Cal. 530, 74 P. 22 (1903).
- 53 42 Cal. Jur. 3d, *Landlord and Tenant*, Sec. 195 (1978); Miller & Starr, 4 *Current Law of California Real Estate*, Sec. 27:92 p. 416 (1977).
- 54 *German-American Sav. Bank v. Gollmer*, 155 Cal. 683, 688, 102 P. 932 (1909).

- 55 *Rothrock v. Sanborn*, 178 Cal. 693, 174 P. 314 (1918).
- 56 *Miller v. Reidy*, 85 Cal. App. 757, 759 & 761, 260 P. 358 (1927).
- 57 The court refers to a notice from the lessor protesting the "subletting" in this last transaction. However, the court treated it as an assignment. *Miller v. Reidy*, 85 Cal. App. 757, 760, 260 P. 358 (1927)
- 58 *Miller v. Reidy*, 85 Cal. App. 757, 761, 260 P. 358 (1927)
- 59 *Miller v. Reidy*, 85 Cal. App. 757, 761, 260 P. 358 (1927)
- 60 *Miller v. Reidy*, 85 Cal. App. 757, 763, 260 P. 358 (1927)
- 61 *Taylor v. Odell*, 50 Cal. App. 2d 115, 120-121, 122 P.2d 919 (1942).
- 62 *Crowell v. City of Riverside*, 26 Cal. App. 2d 566, 572-573, 80 P.2d 120 (1938).
- 63 *Crowell v. City of Riverside*, 26 Cal. App. 2d 566, 576, 80 P.2d 120 (1938).
- 64 *Laguna Royale Owners Assn. v. Darger*, 119 Cal. App. 3d 670, fn. 7, p. 142-143, 174 Cal. Rptr. 136 (1981).
- 65 *Boston Properties v. Pirelli Tire Corp*, 134 Cal. App. 3d 985, fn. 1, p. 990, 185 Cal. Rptr. 56 (1982).
- 66 Actually, it was a successor to the original lessor. This was not a material factor in the case.
- 67 *Boston Properties v. Pirelli Tire Corp*, 134 Cal. App. 3d 990, 992-994, 185 Cal. Rptr. 56 (1982).
- 68 *Boston Properties v. Pirelli Tire Corp*, 134 Cal. App. 3d 990, 993, 185 Cal. Rptr. 56 (1982).
- 69 M. Friedman, *Friedman on Leases*, Sec. 7.304e, p. 280 (2d ed. 1983).
- 70 42 Cal. Jur. 3d, Landlord and Tenant, Sec. 195 (1978); Miller & Starr, 4 *Current Law of California Real Estate*, Sec. 27:92, p. 416 (1977).
- 71 *Miller v. Reidy*, 85 Cal. App. 757, 761, 260 P. 358 (1927)
- 72 M. Friedman, *Friedman on Leases*, Sec. 7.304e, p.280 (2d ed. 1983).
- 73 Restatement Second Property (*Landlord and Tenant*) Sec. 16.1, Reporter's note 7, p.136 (1977). See *Rothrock v. Sanborn*, 178 Cal. 693, 174 P. 314 (1918). See also, 31 A.L.R. 153, 155 (1924) (*Landlord's Consent to One Assignment or Sublease as Obviating Necessity of Consent to Subsequent Assignment or Sublease.*)