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Landlord and Tenant -- Effect of Consent to One Assignment of Lease on Condition Not to Assign -- Dumpor's Case

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dence that plaintiff's stenographer, at her desk in adjoining room, saw a woman sitting in plaintiff's lap. Plaintiff offered as evidence an experiment to show that from where she was sitting the stenographer could not have seen him. *Held,* Inadmissible, since it was not proved that the furniture was in the same position as at the time of the event.[19] In an action for the wrongful death of a child in a railroad accident, plaintiff offered an experiment in evidence to show that defendant's engineer, when he saw an object upon the track, should have recognized it as a child from a point distant 1,200 feet. *Held,* Admissible, because, in the experiment, it was shown that the circumstances upon which the evidence was predicated could be substantially reproduced, since it was proved that the engineer actually saw the child on the track.[20]

In the principal case, the necessary foundation for the experiment could not be laid and, therefore, the ruling in the case was correct.

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Landlord and Tenant—Effect of Consent to One Assignment of Lease on Condition Not to Assign—Dumpor's Case.

A 1931 opinion[1] of the Supreme Court has ushered onto the North Carolina juristic stage the English case of *Dumpor v. Symms*[2] decided in 1603. In *Dumpor's Case* a condition that the lessee and his assigns would not convey the lease without special license from the lessor was held to have been extinguished, when one such license was given. This holding is obviously contrary to a common sense interpretation of the given transaction. The court based its decision on precedent, but it has been shown that the authorities were invoked by false analogy.[3] *Dumpor's Case* is no longer the law in England,[4] but its doctrine continues to prevail in several American jurisdictions.[5]

[19] Kuenk v. Klenk, *supra* note 16.
[20] Henderson v. R. R., *supra* note 4.
[1] Childs v. Warner Bros. Southern Theatres, Inc., 200 N. C. 333, 156 S. E. 923 (1931).
[2] 4 Coke 119 (1603).
[3] Dumpor's Case (1873) 7 AM. L. REV. 616, 623.
[4] The following statutes nullified the rule in Dumpor's case: 22 and 23 VICT. c. 35, §1 (1859) and 23 and 24 VICT. c. 38, 6 (1860).
[5] Reid v. Weissner & Sons Brewing Co., 88 Md. 234, 40 Atl. 877 (1898); Pennock v. Lyons, 118 Mass. 92 (1875); Aste v. Putnam Hotel Co., 247 Mass. 147, 141 N. E. 666 (1923); Murray v. Harvey, 56 N. Y. 337 (1874); see German Am. Savings Bank v. Gollmer, 155 Cal. 683, 102 Pac. 932, 934 (1909).

Judicial discussions[6] of the rule in *Dumpor's Case* have questioned its soundness; legal writers have vigorously criticised it;[7] no case has been found to approve it on principle; and its application has been narrowly restricted.[8] The following variations from the facts in *Dumpor's Case* have been held sufficient to prevent the operation of the doctrine it expresses: (1) a covenant instead of a condition,[9] (2) a waiver instead of a license,[10] or (3) a condition against subletting instead of a condition against assigning.[11] These distinctions, so far as their purpose is concerned, are without substance and the cases that rely on them, while not expressly contrary to *Dumpor's Case,* in effect repudiate it.[12]

Childs v. Warner Bros. Southern Theatres, Inc.,[13] suggests the question of whether *Dumpor's Case* will be followed in North Carolina. There the Berkley Co. leased a theatre building to Craver, the lease containing conditions that the lessee and his assigns[14] would pay the rent and would not assign without the consent[15] of the lessor.

[6] Doe v. Bliss, 4 Taunt, 735, 736 (1813) (Mansfield: "Certainly the profession have always wondered at Dumpor's case."); Moss v. Chappell, 126 Ga. 196, 54 S. E. 968, 973 (1900) ["The doctrine (in Dumpor's case) seems to us to be purely artificial and not founded on any sound reason."].

[7] 1 WASHBURN, REAL PROPERTY (4th ed. 1876) 472 n. ("Dumpor's case has always been, it is believed, a stumbling block in the way of the profession."); Dumpor's Case, *supra* note 3; Bronaugh, *Consent to Assignment of Lease—Dumpor's Case* (1924) 30 W. VA. L. Q. 277; Note (1925) 1 WASH. L. REV. 52.

[8] Dumpor's Case, *supra* note 3, at 632; North Chicago Street R. R. Co. v. Le Grand Co., 95 Ill. App. 435 (1900) (where a lease contains a renewal clause, if the rule in Dumpor's case dispenses with the condition, it does so only for the instant term).

[9] Paul v. Nurse, 8 Barn. & C. 486 (1828); Dakin v. Williams, 17 Wend. (N. Y.) 447 (1837). The difference between a covenant and a condition is that for breach of covenant the lessor can only bring an action for damages, while for breach of condition the lessor may reënter.

[10] Doe v. Bliss, *supra* note 6; Wertheimer v. Hosmer, 83 Mich. 56, 47 N. W. 47 (1890) (oral license amounted to a waiver). The difference between a license and a waiver is that license is consent before and waiver is consent after assignment.

[11] Fischer v. Ginzburg, 191 App. Div. 418, 181 N. Y. Supp. 516 (1920); see Doe v. Pritchard, 5 B. & Ad. 765, 781 (1833).

[12] A thorough elaboration of this point is contained in Investors' Guarantee Corporation v. Thompson, 31 Wyo. 264, 225 Pac. 590, 594 (1924).

[13] 200 N. C. 333, 156 S. E. 923 (1931).

[14] Where the lessee only is mentioned in the condition, he is bound personally and a license extinguishes the condition without the aid of the rule in Dumpor's case. Easley Coal Co. v. Brush Creek Coal Co., 91 W. Va. 291, 112 S. E. 512 (1922) (Dumpor's case recognized as the law, but held not to apply to "single" condition).

[15] An ingenious distinction is made between an oral and a written license in order to avoid the rule in Dumpor's case in Wertheimer v. Hosmer, *supra* note 10.

The Berkley Co. conveyed the reversion[16] to the plaintiff who consented to an assignment to the defendant. The defendant reassigned the lease to Carolina Theatres, and in response to a notice of the reassignment the plaintiff wrote the defendant, "I shall continue to recognize you as lessee of the property . . . and expect you to see that the payments (of rent) are made promptly and in accordance with the lease." A default in the payment of rent was made by Carolina Theatres for which the plaintiff sued the defendant. Judgment for the plaintiff below was affirmed on appeal.

The opinion of the court is largely devoted to a review of *Dumpor's Case,* but it does not clearly appear whether the rule in *Dumpor's Case* was involved in the decision. The lessor in the *Childs Case* was held entitled to recover from an assignee rent which accrued subsequent to a reassignment. The liability of an assignee to pay rent is generally said to be based on privity of estate and to cease when he transfers the lease.[17] The liability of a lessee to pay rent, however, is based also on privity of contract, which is not affected by an assignment.[18] It follows that the conclusion reached in the *Childs Case* must rest on one of two theories: either (1) that the defendant was under some contractual liability to pay rent, or (2) that there was no valid reassignment.

An assignee becomes contractually liable for rent only on some undertaking over and above the act of assignment.[19] The facts in the *Childs Case* disclose no such undertaking by the defendant, but the plaintiff writes, "I shall continue to recognize you (the defend-

[16] A grantee of the reversion may enforce the conditions in a lease. Investors' Guarantee Corporation v. Thompson, *supra* note 12.

[17] Paul v. Nurse, *supra* note 9 (reassignment in violation of covenant); Voigt v. Resor, 80 Ill. 331 (1875); Consolidated Coal Co. v. Peers, 166 Ill. 361, 40 N. E. 1105 (1896); Reid v. Weissner & Sons Brewing Co., *supra* note 5 (facts similar to those in the instant case); Mason v. Smith, 131 Mass. 510 (1881) (reassignment without knowledge of the lessor); Durand v. Curtis, 57 N. Y. 7 (1874); Tibbals v. Iffland, 10 Wash. 451, 39 Pac. 102 (1895) (reassignment without notice to the lessor). But see Krider v. Ramsay, 79 N. C. 354, 357 (1878).

[18] Keith v. McGregor, 163 Ark. 203, 259 S. W. 725 (1924) (lessor's acceptance of note from assignee for rent past due relieved lessor of his responsibility for that amount); McKeon v. Wendelken, 25 Misc. 711, 55 N. Y. Supp. 625 (1899) (lessee recovered from assignee amount of rent the lessee paid the lessor); Gusman v. Mathews, 29 Ohio App. 402, 163 N. E. 636 (1928) (99 year lease); Spitz v. Nunn, 34 Ohio App. 379, 171 N. E. 117 (1930) (sureties for lessee's payment of the rent not discharged by an assignment); see Alexander v. Harkins, 120 N. C. 452, 454, 27 S. E. 120, 121 (1897).

[19] Consumers Ice Co. v. Bixler, 84 Md. 437, 35 Atl. 1086 (1896) (assignee agreed that all the covenants of the lease should be binding between himself and the lessor).

ant) as lessee." The court intimates[20] that it considered the defendant under a contractual duty to pay rent and cites an early North Carolina case[21] embodying a dictum[22] to the effect that an assignee is ordinarily bound contractually for rent. If the decision is based on this theory, there was no occasion for the court to pass on the rule in *Dumpor's Case,* for the defendant was liable for the rent regardless of the reassignment.

If the defendant was under no contractual duty to pay rent, he would have been bound to do so only in case the reassignment was invalid.[23] No grounds of invalidity appear, except a violation of the condition not to assign without the lessor's consent. The application of the rule in *Dumpor's Case* in the *Childs Case* situation would have "wiped out" the condition before the reassignment. The judgment for the plaintiff, therefore, would entail the existence of the condition and a repudiation of the rule in *Dumpor's Case.*

If the defendant was under no contractual liability to pay rent, the North Carolina court has refused to perpetuate a "venerable error," and has placed a "reasonable construction" on a condition that the lessee and his assigns will not assign the lease. If the defendant was under contractual liability to pay rent, the language[24] of the court is strongly prophetic that the court will refuse to follow *Dumpor's Case* when a proper case is presented.

W. T. COVINGTON, JR.

Master and Servant—Ratification of Tort by Failure to Discharge.

Plaintiff passenger sues defendant railroad for alleged assault on her by a Pullman porter while she was reclining in her berth. *Held,*

[20] ". . . the lessee and his assigns agreed to pay the rent. . . . The covenant to pay rent is continuous in its nature, and such covenant is binding by express provision upon the assigns of the lessee. . . ." This view, however, is in conflict with the authorities cited in note 17 *supra,* and would make every assignee of the lease, for whatever length of time, responsible for the rent for the rest of the term.

[21] Krider v. Ramsay, *supra* note 17, at 357.

[22] "The privity of estate and privity of contract still subsist between the lessor and the assignee, as it did between the lessor and lessee."

[23] Cases cited in note 17 *supra.*

[24] Brogden, J.: ". . . a reasonable construction of the lease . . . leads to the conclusion that the restriction against assigning . . . operated upon . . . the assigns of the lessee as well as himself" and "one assignment did not waive the conditions of the lease" so that "thereafter any subsequent assignee could turn the (lessor's) property over to the use and occupancy of any undesirable and irresponsible person without his approval."