

Memorandum 89-9

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 Commission's recommendation on assignment and sublease is drawn on the assumption that a lease restriction applies to the tenant's successors. See Section 1995.020(e) (definition of "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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