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Can There be a Sublease for the Entire Unexpired Portion of a Term?

IN THE absence of restrictions in the lease, a tenant for a term of years may assign his interest to another.¹ Similarly, he may sublease the property for a period less than his own term.² It is a matter of common legal knowledge that these are two quite distinct methods of dealing with a tenant's interest. An important practical difference between them is that the sublessee is not considered the legal equivalent of an assignee and therefore is neither bound by, nor entitled to enforce, the covenants in the head lease.³ Holdsworth in his *History of English*

¹ WILLIAMS, REAL PROPERTY (21st ed. 1910) 503; TIFFANY, LANDLORD AND TENANT (1910) § 152.

² Authorities cited *supra* n. 1. The provisions of the FRENCH CIVIL CODE, § 1717, are to similar effect, permitting both assignment and sublease; *cf.* GERMAN CIVIL CODE, § 549, *contra*. A simple covenant against assigning is not usually regarded as being broken by a subletting, nor one against subletting by assigning. TIFFANY, *op. cit.* *supra* n. 1, 922; *The Rights of Assignment and Underlease* (1872) 7 AMER. L. REV. 240, 248.

³ WILLIAMS, *op. cit.* *supra* n. 1, 524-5; TIFFANY, REAL PROPERTY (2d ed. 1920) § 55(b). The subtenant may not hold the head landlord on the landlord's covenants in the head lease, *e.g.* on a covenant to repair or to furnish water to the demised premises, for there is neither privity of contract nor privity of estate between the head landlord and the subtenant. *South of England Dairies, Ltd. v. Baker* [1906] 2 Ch. 631. Nor will a sublease by a tenant's assignee terminate the assignee's further liability to the landlord under the head lease, as would have been the case had the transfer been by way of assignment to another assignee. *Barkhaus v. Producers Fruit Co.* (1923) 192 Cal. 200, 219 Pac. 435.

Similarly the landlord may not hold the subtenant personally for the rent reserved in the head lease, since there is neither privity of contract nor privity of estate between the landlord and the subtenant. *Ericksen v. Rhee* (1919) 181 Cal. 562, 185 Pac. 847; *McFarlan v. Watson* (1850) 3 N. Y. 286. Nor may the landlord enforce against the subtenant personally other covenants entered into by the original tenant in the original lease, *e.g.* a covenant to repair or to insure the premises. *Mayhew v. Hardesty* (1855) 8 Md. 479, 495; *Field v. Mills* (1869) 33 N. J. L. 254, 257-8; *Crowe v. Riley* (1900) 63 Ohio St. 1, 57 N. E. 956. The breach of the original tenant's covenant may of course be a ground for forfeiture of the head lease and may thus terminate the rights of the subtenant in the premises but there is no personal liability on the part of the subtenant to the head landlord. *Hand v. Blow* [1901] 2 Ch. 721; *Eten v. Luyster* (1875) 60 N. Y. 252, 258. A subtenant is not even liable to the head landlord in an action for the use and occupation of the premises, which may be maintained only where the relation of landlord and tenant exists. *Buttner v. Kasser* (1912) 19 Cal. App. 755, 127 Pac. 811; *Krider v. Ramsay* (1878) 79 N. C. 354, 357; *Ames, Assumpsit for Use and*

*Law*⁴ calls attention to the fact that Coke's pronouncement that "there is a diversitie between the whole of the estate in part, and part of the estate in the whole,"⁵ seems to have been applied from the first without question to the situation of the underlessee, with the effect mentioned with regard to the benefit and the burden of the covenants in the original lease.

Suppose, however, the tenant purports to sublease for the entire unexpired portion of the term. Is the transaction still a sublease, or is it in legal effect an assignment, with the consequences attendant thereon? For several centuries there has been considerable difference of opinion on the question. Support for both views can be found in the decisions of the courts of even the same state.⁶

Occupation (1889) 2 HARV. L. REV. 377, 380; TIFFANY, REAL PROPERTY (2d ed. 1920) 1514-15. The covenants by the subtenant in the sublease also may not ordinarily be enforced by the head landlord because of the absence both of privity of contract and privity of estate between the parties. *Martin v. O'Conner* (1865) 43 Barb. (N. Y.) 514; *Ashley v. Young* (1901) 79 Miss. 129, 29 So. 822. In certain American jurisdictions, however, it would seem possible by reason of the third party beneficiary doctrine, for the head landlord to enforce a covenant made by the subtenant to the original tenant, the former's landlord, where the latter had made the same covenant with the head landlord in the original lease. See, however, *Martin v. O'Conner*, *supra*, *contra*. Furthermore, where the original tenant becomes insolvent equity will compel the subtenant to make future payments of rent to the head lessor according to the terms of the sublease. *City Investment Co. v. Pringle* (1924) 69 Cal. App. 416, 231 Pac. 355; 73 Cal. App. 782, 239 Pac. 302. STORY, EQUITY JURISPRUDENCE (14th ed. 1918) § 926g. Notwithstanding the fact that the lessee's covenants are not binding against the subtenant in law, equity will enforce agreements restricting the user of land against subtenants who take with notice thereof. MAITLAND, EQUITY (1909) 168; *Hall v. Ewin* (1887) 37 Ch. D. 74.

⁴ (1926) vol. 7, 291, n. 6.

⁵ Co. Litt. 38a. Coke, of course, made no application of this principle to the question whether a transferee of a portion of a term could be held liable on the covenants in the lease. Coke's illustration was as follows: "As if a man hath a warrantie to him, his heires, and assignees, and he make a lease for life, or a gift in taile, the lessee or donee shall not vouch as assignee, because he hath not the estate in fee simple whereinto the warranty was annexed." But as he had previously pointed out, an assignee in fee of part of the land could vouch as assignee.

⁶ See California cases discussed, pp. 14-16, *infra*.

⁷ 45 EDW. III, 8.

⁸ The action of debt, it will be recalled, could only be maintained for an entire sum, after it all had become due, although it was expressly made payable in installments. *Slade's Case* (1602) 4 Co. 92b, 76 Eng. Reprint 1074; *Rudder v. Price* (1791) 1 H. Bl. 547, 126 Eng. Reprint 314. Rent, however, was an exception to this rule and debt would lie for any installment as it accrued. Subsequent decisions, similar to *Finchden's*, have held that for certain procedural purposes a payment denominated rent and reserved upon a transfer of all the transferor's interest in a term is to be treated as rent rather than as a sum in gross. *Newcomb v. Harvey* (1690) Carth. 161, 90 Eng. Reprint 699; *Baker v. Gostling* (1834) 1 Bing. (N. C.) 19, 131 Eng. Reprint 1024; *Williams v. Hayward* (1859) 1 El. & El. 1040, 120 Eng. Reprint 1200.

THE ENGLISH AUTHORITIES

The earliest mention of the subject seems to have been by way of *dictum*, or question, in a case in the Year Books in 1371.⁷ The action was one of debt for rent brought by a guardian in chivalry (who had only a chattel interest) against one to whom he had executed a lease for the entire period of the ward's minority. It was contended on behalf of the lessee that no action would lie until the expiration of the term. Finchden, C. J., ruled to the contrary, holding that an action of debt could be maintained for each year's rent as it accrued.⁸ He went on to state by way of *dictum*, however, that where (as in that case) the lease was for the entire term of the lessor, the latter could not distrain. He qualified the *dictum*, however, by introducing it with an "I believe" and by concluding with a "But query."

This very tentative *dictum* next appears in 1514 and 1568 in Fitzherbert's⁹ and Brooke's¹⁰ *Abridgments*, respectively, shorn of the words of qualification and doubt which originally accompanied it. It seems probable that it was these passages from the abridgments which in 1734 induced counsel for the successful party in *Poultney v. Holmes*¹¹ to concede in the course of his argument that distress would not lie on a lease for the entire remainder of the landlord's own term. The actual point decided, however, was that a lease by parol for the entire remainder of a term (one and three-quarters years) was valid as a sublease, since the rent was reserved to the original lessee and not his lessor, and was not to be construed as an assignment void under the Statute of Frauds.¹²

In 1768 we find Finchden's suggestion relied upon apparently for the first time by a court in deciding a case. ———— *v. Cooper*¹³ was an action in replevin. The defendant avowed under a distress for rent due from the plaintiff upon an assignment of a lease for a term of years, in which assignment there was no clause of distress. Finchden's

⁹ FITZ. ABR. DETT. pl. 129.

¹⁰ BROOKE, ABR. DETT. pl. 39.

¹¹ (1734) 1 Strange 405, 93 Eng. Reprint 596.

¹² Section II of the STATUTE OF FRAUDS (29 CAR. II, c. 3 (1677)) permits leases for not more than three years to be created by parol. Section III, requiring the assignment and surrender of interests in land to be in writing, however, contains no express reservation in favor of leases for three years or less. The English courts seem uniformly to have held that although a parol lease for not more than three years was valid, it could not be assigned or surrendered without a writing. See BROWNE, STATUTE OF FRAUDS (5th ed. 1895) § 45. Cf. CAL. CODE CIV. PROC. § 1971, where the reservation in favor of oral leases for a term not exceeding one year is made with regard to their assignment and surrender as well as with regard to their creation.

¹³ (1768) 2 Wils. K. B. 375, 95 Eng. Reprint 870.

dictum, as mentioned by Brooke,¹⁴ was held to be decisive of the case. The court went considerably further, however, and also held that the statute of 4 GEO. II, which purported to give the remedy of distress in all cases of rent seck,¹⁵ did not apply since there was no such thing as a rent seck, rent service or rent charge issuing out of a term for years. No authority is cited for this latter assertion, which seems contrary to Serjeant Manwood's argument in *Welcden v. Elkington*,¹⁶ apparently cited by Coke with approval,¹⁷ and to the decision of *Lamb v. West*.¹⁸ Apart from its application of the statute of 4 GEO. II, the decision in *Cooper's* case would seem to be unquestionably correct, inasmuch as the transfer in connection with which the rent was reserved did not purport to be a sublease but an assignment of the term without any provision for distress.

In all of these earlier cases, it will be noted, classification of the transfer as an assignment or sublease was deemed necessary to a determination as to the existence of the right of distress between the immediate parties to the transfer. In a case decided in 1783, however, classification was required in order to determine whether the transferee was entitled to the benefit of a covenant by the landlord in the original lease.¹⁹ The tenant had "assigned" his entire interest in the term to plaintiff's assignor, exacting from him covenants different from those in the original lease and reserving rent and the right of reëntry. The plaintiff sought to hold the assignee of the original landlord on the latter's covenant to furnish timber for repairing, and the court decided that the action was maintainable since the assignment by the tenant to plaintiff's assignor left no reversion in the former and was therefore not a sublease. No point seems to have been made of the fact, which alone might well have been held decisive of the case, that the transaction was called an assignment, not a lease, and that therefore the parties to it did not purport to create a tenancy between themselves.

Early in the nineteenth century, however, the possibility that all of the judicial pronouncements that a sublease for the entire remainder of the term amounted to an assignment could be explained as being either *dicta* or at least holdings unnecessary to the particular results, was precluded by the decisions in two cases. Finchden's tentative *dictum*,

¹⁴ BROOKE, *loc. cit. supra* n. 10 (erroneously referred to by the court as citing 43 Ed. 3, 4 instead of 45 Ed. 3, 8).

¹⁵ 4 GEO. II, c. 28, § 5 (1731).

¹⁶ (1578) 2 Plowden 519, 524-5, 75 Eng. Reprint 766, 774-6.

¹⁷ CO. LITT. 147b.

¹⁸ (1633) Hutton 114, 123 Eng. Reprint 1139. See also reporter's note following the case of *Floyd v. Langfield* in (1676) 1 Freeman 218, 219, 89 Eng. Reprint 155, 156.

¹⁹ *Palmer v. Edwards* (1783) 1 Doug. 187n, 99 Eng. Reprint 122.

which the abridgments had repeated in less uncertain terms, now became the precise point decided. In *Parmenter v. Webber*²⁰ the defendant who was himself a lessee had sublet to the plaintiff for the balance of his term, reserving rent and with the express understanding that the plaintiff was to remain the defendant's tenant. In an action of replevin for wrongful distress the court held for the plaintiff, citing Brooke's *Abridgment*,²¹ and disagreeing with the contention of defendant's counsel that the intention of the parties determined the question whether the transfer operated as an assignment or a sublease. *Preece v. Corrie*,²² decided ten years later, was a similar case with like result, except that although the court admitted that the transfer, which was oral, constituted a sublease rather than an assignment (citing *Poultney v. Holmes*²³), they nevertheless held that the landlord could not distrain since he had no reversion.²⁴

It is somewhat surprising that up to this time no suggestion seems to have been made of the existence of any analogy between assignment and sublease by a termor and the two species of transfers of estates in fee prior to the statute of *Quia Emptores*. In a note in Smith's *Leading Cases*²⁵ it is said:

"The distinction between conveyances by way of subinfeudation and by way of assignment, of estates in fee (see Wright's *Tenures* 156) does not appear to have existed in the case of lesser estates, or to have been acted upon after the statute of *Quia Emptores* for any purpose relating to lands of socage tenure, until it was brought back to light in *Poultney v. Holmes*, to meet the supposed hardship of a particular case."

It does not appear, however, that even in the decision of *Poultney v. Holmes*²⁶ was there any conscious adoption of this analogy. About 1830, however, Serjeant Manning in a note to his report of the case of *King v. Wilson*, wrote:

"As the statute of *Quia Emptores* does not affect chattel interests, it seems to be not unreasonable to contend that a termor may create a subtenancy equal, in duration, to his own term, and that, as in the case of a subtenure in fee, the sublessor has such a reversion as will enable him to

²⁰ (1818) 8 Taunt. 593, 129 Eng. Reprint 515.

²¹ BROOKE, *loc. cit. supra* n. 10.

²² (1828) 5 Bing. 24, 130 Eng. Reprint 968.

²³ *Supra* n. 11.

²⁴ In *Lewis v. Baker* [1905] 1 Ch. 46, the privilege of distress was again denied a lessor who had sublet for the entire remainder of his term, the court relying on Brooke's reference to Finchden's *dictum* and the decisions in *Parmenter v. Webber* and *Preece v. Corrie*.

²⁵ (9th ed. 1888) 112.

²⁶ *Supra* n. 11.

distrain for the rent or other services reserved upon the creation of the subtenure."²⁷

Serjeant Manning's suggestion as to the statute of *Quia Emptores* not applying to other than freehold interests was cited by counsel a few years later in *Wollaston v. Hakewill*.²⁸ The action was in covenant for rent and non-repair, by the landlord against one to whom an assignee of the original tenant had demised a portion of the premises for a period slightly longer than the unexpired portion of the term, reserving rent. It was contended on behalf of defendant that the transfer to him was a sublease and not an assignment. His counsel admitted that *Parmenter v. Webber*²⁹ was a strong case against their contention but sought to distinguish it on the ground that there the question was

²⁷ (1829) 5 Man. & R. 140, 157. A similar argument seems to have been advanced a year or two earlier by counsel in two Irish cases where the ultimate question involved was whether the Irish statute 25 Geo. II, c. 13 (1753) which permitted a landlord who had distrained for rent to avow generally, when sued in replevin, without setting forth his title, applied in the case of a sublease for the entire residue of a term. *Rankin v. Newsam* (1827) 1 Hud. & B. 70; *Pluck v. Digges* (1828) 2 Hud. & B. 1 (s. c. in House of Lords (1831) 5 Bligh N. S. 31, 5 Eng. Reprint 219). The argument did not seem to meet with judicial approval, however, the view of most of the judges who referred to the point apparently being that before the statute of *Quia Emptores* subinfeudation could exist only in fee simple estates, and that in the case of lesser estates, in which most of the incidents of feudal tenure were not present, the existence of tenure between grantor and grantee depended upon there being a reversionary interest in the grantor and not simply upon the intention of the parties. See also a memorandum by Justice Burton appended by the reporter to the case of *Fawcett v. Hall* (1833) Alc. & N. 248, 258-261, and the decision in a later Irish case, *Porter v. French* (1844) 9 Ir. L. R. 514. In the two cases last mentioned the question concerned the construction of the Irish ejectment statutes providing for the maintenance of ejectment for non-payment of rent. It was held that for an action of ejectment to be brought under these statutes the relationship of landlord and tenant must exist, and that a lessee for lives who had himself demised for the entire unexpired portion of the term had no reversion, notwithstanding his reservation of rent and the right of reentry, and, therefore, could not maintain the action under the statutes. In the opinion of Brady, C. B. in the latter case, quotation is made from the Year Book (1420) 8 Hen. 5, fol. 10, case 16, note (erroneously referred to as 9 Hen. 5 etc.) where there was evidently a difference of opinion between two of the early judges as to a related question: "... Cochrane [Cokaine] demanded: 'If I lease lands to one for term of life, who by deed indented leases over his estate to another, reserving to himself a rent and an entry for default of payment, then I grant the reversion, and the first lessee attorns; by this attornment the reversion passes.' Hull—'No; for when he leased over his estate no reversion was reserved to him, unless an entry for the condition, and his lessee was tenant to him in reversion.'" 9 Ir. L. R. at 526. The abolition by the statute of Anne [4 & 5 ANNE, c. 16, § 9 (1705)] of the necessity of attornment to the validity of a grant of a reversion, of course prevented the point in controversy between Cochrane and Hull from arising on transfers of the reversion made after the date of the statute.

²⁸ (1841) 3 Man. & G. 297, 133 Eng. Reprint 1157.

²⁹ *Supra* n. 20.

between the immediate parties to the instrument.³⁰ The court ruled, however, that the transaction was an assignment.³¹

Some support for Serjeant Manning's view was afforded in 1847 by the decision in *Pollock v. Stacy*.³² The action was in assumpsit for use and occupation of premises of which plaintiff was the lessee for approximately six months and which he had let by parol to defendant to the end of the term, reserving a weekly rent. The court found that the parties intended to create the relation of landlord and tenant. The defendant had quit before the end of the term and his counsel contended that he was only liable for his actual occupancy, since the transaction was intended as an assignment and could not take effect as such because of the Statute of Frauds.³³ In holding that the plaintiff was entitled to recover for the entire term on the basis of the transaction having amounted to a sublease and not an assignment, the court said:

³⁰ This, it must be admitted, was a distinction of doubtful validity, since a situation where only the immediate parties to the transfer are concerned would seem to present a stronger case for giving effect to the intention to create a landlord and tenant relationship than where the head landlord, a stranger to the transaction, is involved. In fact, the American cases (see *infra* n. 39) seem generally to agree that except as to the privilege of distress, as between the immediate parties to the transfer, a lease for the entire residue of the term is to be treated as a sublease rather than as an assignment. See also the statement of the California court in *Jordan v. Scott*, quoted on page 16, *infra*.

The decision rendered in 1832 in the case of *Thorn v. Woolcombe*, 3 B. & Ad. 586, 110 Eng. Reprint 213, which was apparently not cited by either court or counsel in *Wollaston v. Hakewill*, *supra* n. 28, was also an instance of the application of the rule to a controversy not confined to the immediate parties to the transfer. In that case a tenant had purported to sublease for a period in excess of his own term. This sublease and the reversion in fee subsequently became united in a third party purchaser and the question arose whether such purchaser was entitled to be indemnified by his vendor, the sublessee, pursuant to the latter's covenant, against the rent reserved in the sublease. The court held that the sublease operated as an assignment "whatever be the form of words used in it" since it left no reversion in the lessor, that the original term had therefore merged with the reversion, and that the rent reserved in the "sublease" had accordingly become extinguished as a charge on the land.

³¹ The authority which seems to have most moved the court was *Hicks v. Downing* (1696) 1 Ld. Raym. 99, 91 Eng. Reprint 962, a case which, it is submitted, is very far from being decisive of the question. The action there was on the case for the negligent burning of a house, by an assignee of the landlord against an assignee of the tenant. The court very properly held that if the lessor were himself a termor and the lease in question were for a period equal to or exceeding his own term, there could be no recovery. No doubt an action will not lie for injury to the reversion where there is no substantial reversionary interest. That is probably all that the court had in mind in making the statement, quoted in *Wollaston v. Hakewill*, *supra* n. 28, "So if lessee for three years assigns his term for four years, or demises the lease for four years, he does not by this gain any tortious reversion and it does but amount to an assignment of his interest."

³² (1847) 9 Q. B. 1033, 115 Eng. Reprint 1570.

³³ See *supra* n. 12.

" . . . we see no inconvenience in supporting as a lease that which was intended to be so, although it may pass all the lessor's interest."

Pollock v. Stacy and Serjeant Manning's thesis were both relied upon but with little success in 1857 before Vice-Chancellor Sir W. Page Wood in the case of *Langford v. Selmes*.³⁴ This was an application by a purchaser under decree of court to be relieved of his purchase on the ground of defect in title and misdescription. In the particulars of sale the property had been described as a freehold ground-rent issuing out of two dwellings let on a lease expiring at a certain named date in the future. The lease in which the rent had been reserved exceeded the term which the lessor at that time had, although he had subsequently acquired the reversion in fee pursuant to an option contained in the lease. It was contended on behalf of the purchaser, and held by the court, that the right to distrain for the nonpayment of the rent did not exist since there was no reversion in the lessor at the date of the lease and that the purchaser should therefore be relieved. In answer to Serjeant Manning's suggestion that tenure could exist merely by reason of the agreement between the grantor and grantee, since the statute of *Quia Emptores* did not apply to terms of years, the Vice-Chancellor said:

"At the time of that statute it would have caused much astonishment if it had been suggested that it was necessary to include terms of years therein, or that a mere termor could create a tenure between himself and his grantee by the grant of the term of years; he might by feoffment have acquired a tortious fee, and then a tenure might be created; but it never before was suggested that there could be any tenure between a lessee for years and a person to whom he granted the whole of his term. The reason that a termor is a reversioner, where he has sub-let for a part only of his term, is that he has the interest of the reversioner, that is of the freeholder, still in him during the rest of his term."³⁵

A few years later in *Beardman v. Wilson*,³⁶ the present English rule seems to have been settled in accordance with the trend of the previous decisions. This was an action by an assignee of the reversion for breach of a covenant to repair. Although the facts are not clearly stated, the defense apparently was that defendant's testator, who was himself an assignee of the lease, had reassigned it to a third party and thereby terminated his liability for subsequent breaches. In upholding this defense the court said that that which was in form an underlease for a term expiring on the same day as the original term (the defendant's testator evidently having made such an "underlease") was in law an assignment.

³⁴ (1857) 3 K. & J. 220, 69 Eng. Reprint 1089.

³⁵ 3 K. & J. at 228, 69 Eng. Reprint at 1092.

³⁶ (1868) L. R. 4 C. P. 57.

The court distinguished *Pollock v. Stacy*³⁷ (in addition to raising some doubt as to its validity) on the ground that the only question there involved was whether a party in occupation was liable to pay rent in an action for use and occupation, and pointed out that the case did not establish the general proposition that the relation of landlord and tenant may be created by a lease of all the lessor's interest, or even that where no valid assignment could have been made, the landlord and tenant relation exists for all purposes.³⁸

THE MAJORITY AMERICAN VIEW AND THE NEW YORK CASES

The majority of the American decisions are in accord with the present English rule, denying the right of distress to a tenant who has sublet for the entire remainder of his term, and holding the subtenant to be an assignee, between whom and the head landlord the covenants in the original lease are operative.³⁹ Although Serjeant Manning's thesis

³⁷ *Supra* n. 32.

³⁸ The *ratio decidendi* in *Beardman v. Wilson*, *supra* n. 36, was subsequently approved by *dictum* in *South of England Dairies Ltd. v. Baker* [1906] 2 Ch. 631, although without reference to the previous decision. The point actually decided was that a sublessee for a term three days less than that of the original lease could not hold the reversioner on the covenants in the head lease. In support of this decision the court remarked that "An assignment of a term differs from an underlease in that the former means parting with the whole and the latter with only a portion of the lessee's interest." [1906] 2 Ch. at 638. This was of course unnecessary to the decision. The transfer in question did not purport to be an assignment in whole or in part of the original term but a sublease. The court need only have said that there could be no assignment where the entire interest of the tenant did not pass and where the parties did not intend the transfer to operate as an assignment. No decision was necessary as to whether the passing of the entire interest made a transfer an assignment in spite of the intention that it should be a sublease, or whether the passing of a portion only of the assignor's interest made a transfer a sublease in spite of the intention that it should be an assignment *pro tanto*.

Beardman v. Wilson was also cited and approved by the House of Lords in 1923. *Hallen v. Spaeth* [1923] A. C. 684. Here again, the approval may properly be termed *dictum*. The action was one by a tenant against his landlord for compensation for improvements pursuant to a provision in the lease. The lease prohibited assignment by the tenant without the landlord's consent and the tenant had in fact "sublet" for the entire unexpired portion of the term without consent. The court held that since there was no provision for reentry in case of breach, no forfeiture of the right to compensation resulted from the breach of the agreement not to assign without consent. However, it denied plaintiff's contention that the alleged assignment was only a sublease, citing *Beardman v. Wilson* and saying, "No doubt the sub-lessor may contract with his sub-lessee in a fashion which is analogous to that of a demise. But so far as the property in his term is concerned he has none left after he has made what is really a transfer." [1923] A. C. at 687.

³⁹ *Mulligan v. Hollingsworth* (C. C. Mo. 1900) 99 Fed. 216; *In re Bayley* (W. D. Pa. 1909) 177 Fed. 522; *Johnson v. Thompson* (1914) 185 Ala. 666, 64 So. 554; *Smiley v. Van Winkle* (1856) 6 Cal. 605; *Blumenberg v. Myres* (1867) 32 Cal. 93, 91 Am. Dec. 560; *Jordan v. Scott* (1918) 38 Cal. App. 739, 177 Pac. 504;

to the contrary seems never even to have been discussed by our courts, a very similar result to that for which he contended has been reached on a somewhat different theory in a few carefully considered cases in this country. This minority view will be discussed in more detail in a subsequent portion of this article.

One of the earliest American reported decisions on the general question was rendered in New York in 1819 in the case of *Prescott v. De Forest*.⁴⁰ It was there held that the right of distress was incident to and inseparable from the reversion and that a tenant who had subleased for the remainder of his term could not distrain. The English cases of ———— *v. Cooper*⁴¹ and *Smith v. Mapleback*⁴² were relied upon by the New York court in support of its decision. The holding in the former English case and also that in *Hicks v. Downing*⁴³ and *Palmer v. Edwards*⁴⁴ appear in Dane's *Abridgment* published at Boston about 1824.⁴⁵ Thus the technical point of view, which subsequently developed into the present day English and majority American rule, seems to have obtained an early foothold in this country.

Within a relatively few years after the decision in *Prescott v. De Forest*,⁴⁶ however, the New York cases manifested a decided swinging away from the point of view of that earlier decision. The first of these cases evidencing a desire to give legal effect to the intention of the parties to the sublease seems to have been *Piggot v. Mason*.⁴⁷ In an

Potts-Thompson Liquor Co. v. Potts (1910) 135 Ga. 451, 69 S. E. 734; *Sexton v. Chicago Storage Co.* (1889) 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274; *Taylor v. Marshall* (1912) 255 Ill. 545, 99 N. E. 638; *Liebschutz v. Moore* (1880) 70 Ind. 142; *Cook v. Jones* (1894) 96 Ky. 283, 28 S. W. 960; *Craig v. Summers* (1891) 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236; *St. Joseph etc. Ry. Co. v. St. Louis etc. Ry. Co.* (1896) 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607; *Wilson v. Cornbrooks* (1928) — N. J. L. —, 140 Atl. 292; *Prescott v. De Forest* (1819) 16 Johns. (N. Y.) 159; *Stewart v. Long Island R. R. Co.* (1886) 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; *Gillette Bros v. Aristocratic Restaurant* (1924) 239 N. Y. 87, 145 N. E. 748; *Holden v. Tidwell* (1913) 37 Okla. 553, 133 Pac. 54; see, however, *Key v. Swanson* (1925) 113 Okla. 287, 241 Pac. 490; *Weander v. Claussen Brewing Ass'n* (1906) 42 Wash. 226, 84 Pac. 735; *Sheridan v. Doherty* (1919) 106 Wash. 561, 181 Pac. 16; *Easley Coal Co. v. Brush Creek Coal Co.* (1922) 91 W. Va. 291, 112 S. E. 512.

⁴⁰ (1819) 16 Johns. (N. Y.) 159.

⁴¹ *Supra* n. 13.

⁴² (1786) 1 T. R. 441, 99 Eng. Reprint 1186. The decision in this case is scarcely in point, as there was no evidence that the transfer of the term, which was to the original landlord and hence operated as a surrender, was made with the intention of creating a subtenancy between the parties, or that the consideration to be paid to the transferor was reserved as rent.

⁴³ *Supra* n. 31.

⁴⁴ *Supra* n. 19.

⁴⁵ Vol. V, c. 151, art. 5, § 3; Vol. III, c. 73, art. 1, § 9; Vol. IV, c. 106, art. 6, §§ 2, 3.

⁴⁶ *Supra* n. 40.

⁴⁷ (1829) 1 Paige (N. Y.) 412.

action by the tenant's assignee against the reversioner for specific performance of a covenant of renewal in the lease, a defense was made that the plaintiff's predecessor had assigned his interest in a portion of the premises by making transfers which, although purporting to be subleases, were in reality assignments of his interest, since they were for the entire unexpired portion of the term. In holding these transfers to be in legal effect what they purported to be, *viz.* subleases, and not assignments, the court gave as one of its reasons, *inter alia*, that the sublessors retained an interest in the subdemised premises by the new rent reserved to themselves. Twenty years later in *Post v. Kearney*⁴⁸ the court relied upon *Piggot v. Mason* to support its holding that covenants for payment of rent to the sublandlord and for the surrender of possession to him on the last day of the term kept the transfer, which was for the entire remainder of the term of the original lease, from amounting to an assignment. As to the reservation of rent to the sublandlord having that effect, these earlier cases seem to have been subsequently overruled.⁴⁹ Furthermore, how a covenant to surrender possession to the sublandlord on the last day of the term is sufficient to create a reversionary interest in him and turn what would otherwise be an assignment into a sublease, is difficult to understand. Nevertheless this feature of the decision in *Post v. Kearney* met with approval in subsequent cases⁵⁰ and there seems to be at least some doubt as to whether it is not the law of New York today.⁵¹ The explanation in certain of the decisions that the covenant to surrender possession on the last day of the term entitled the sublessor to possession for some fraction of that day is, however, unconvincing and has been justly criticized by an able text writer.⁵² The commendable feature of the decisions lies in their effort to find some basis for construing the transfers in question as subleases as the parties to them manifestly intended.

⁴⁸ (1849) 2 N. Y. 394.

⁴⁹ *Stewart v. Long Island R. Co.* (1886) 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; *Gillette Bros. v. The Aristocratic Restaurant* (1924) 239 N. Y. 87, 145 N. E. 748.

⁵⁰ *Martin v. O'Connor* (1865) 43 Barb. (N. Y.) 514; *Collins v. Hasbrouck* (1874) 56 N. Y. 157; *Ganson v. Tift* (1877) 71 N. Y. 48; *Post v. Kearney*, *supra* n. 48 was also approved and followed in *Collamer v. Kelley* (1861) 12 Iowa 319. See also *Hicks v. Martin* (1887) 25 Mo. App. 359.

⁵¹ "Even if the authority of *Ganson v. Tift* (71 N. Y. 48) has not been shaken by later decisions, there is here no express covenant that the premises shall be surrendered to the plaintiff at the end of the term." *Gillette Bros. v. Aristocratic Restaurant* (1924) 239 N. Y. 87, 90, 145 N. E. 748, 750. "The effect of this latter decision [*Stewart v. Long Island R. Co.*, *supra* n. 49] is to cast doubt upon, if it does not destroy the rule announced in the earlier decisions of the same court . . ." *Behr v. Hurwitz* (1918) 90 N. J. Eq. 110, 115, 105 Atl. 486, 488.

⁵² *TIFFANY, LANDLORD AND TENANT* (1910) 911.

THE MINORITY OR MASSACHUSETTS DOCTRINE

The American minority doctrine seems to have had its beginning in a decision by the Massachusetts Supreme Court in 1854 in the case of *Patten v. Deshon*,⁵³ and to have been definitely formulated by the same court about a quarter of a century later in *Dunlap v. Bullard*.⁵⁴ The earlier case was an action for rent, by the assignee of a tenant against the latter's subtenant. The sublease covered a portion of the premises embraced in the head lease and was for the entire residue of the term. The court seemed to assume as too clear for argument that the purported sublease was merely a sublease in point of law and not an assignment, and was apparently concerned only with the question whether the right to the rent reserved by the sublease passed to the assignee of the tenant's interest in the head lease, as an incident of the assignment (which question it decided in the affirmative). Chief Justice Shaw, who rendered the opinion in *Patten v. Deshon*, did not refer to any particular provisions of the sublease other than to say that the rent was reserved to the sublessor, with usual covenants. It is not clear, therefore, whether the basis for the court's view that the transfer was a sublease rather than an assignment was the same as that advanced by Serjeant Manning. The latter, it will be remembered, had contended that following the analogy of the two species of transfers in fee in use prior to the statute of *Quia Emptores*, i.e. transfer by substitution and transfer by subinfeudation, the same two species of transfers were possible in the case of leasehold interests, and that a transfer by a tenant for the entire remainder of his term could be a sublease notwithstanding the fact that the tenant retained no independent reversionary interest in the premises, since the tenure agreed upon by the parties automatically gave rise to a sufficient legal reversion to sustain the transfer as a sublease. In its later decision in *Dunlap v. Bullard*, however, there can be no doubt that the Massachusetts courts did not go to the length of dispensing with the necessity of a more definite reversion than this to preserve for a transfer the character of a sublease. In the later case the court seemed to agree with the existing English and American decisions that it was necessary to find a reversionary interest in the lessor *before* the transfer could be held to be a lease and that it was not enough that the transfer itself purported to be made on a landlord and tenant basis.

⁵³ (1854) 1 Gray (Mass.) 325. See also *McNeil v. Kendall* (1877) 128 Mass. 245.

⁵⁴ (1881) 131 Mass. 161. *Dunlap v. Bullard* was followed in *Essex Lunch, Inc. v. Boston Lunch Co.* (1918) 229 Mass. 557, 118 N. E. 999, where the assignee of the sublessor, who had sublet for the entire remainder of his own term, was given an injunction against waste by the subtenant, although the latter had secured the head landlord's consent to its commission.

It found such reversionary interest, however, by reason of the imposition of new conditions in the sublease, such as that for payment of rent to the sublandlord,⁵⁵ and the reservation to the sublandlord of a right of entry for condition broken. That it is not the orthodox view to describe a right of entry as a reversionary interest must be admitted,⁵⁶ but that there is any fundamental reason against so classifying it seems at least open to doubt.⁵⁷ Inasmuch as subleases generally

⁵⁵ It is not entirely clear whether or not the court in *Dunlap v. Bullard* intended to make the imposition of new conditions in the sublease essential to the existence of the sublessor's reversionary interest based on his right of reentry. The portion of the Massachusetts court's opinion quoted by the California supreme court in the *Barkhaus* case and set forth on page 16 *infra*, would seem to indicate that it did so intend. Practically, the problem would seldom arise, as it would be unusual for parties to make what purported to be a sublease and not provide either for payment of rent to the sublessor or for some other new condition as to the tenure. Should a case be presented, however, where all of the conditions of the sublease were identical with those of the head lease, it might well be claimed that the mere reservation to the sublessor of the right of reentry for condition broken was sufficient to constitute a reversionary interest in him. Although the head landlord might have the privilege of reentering for breach of the same condition, unless and until he did so the similar right of the sublandlord would not be affected. As the Massachusetts court recognized, the reversionary interest of the sublessor is in any event a contingent one, since a breach of any condition by the subtenant may never occur. That the head landlord himself might reenter first and thus prevent the sublandlord from doing so would simply amount to the addition of a second contingency to the one already existing by reason of the uncertainty as to there ever being any breach.

⁵⁶ "The right of the feoffor to enter and substitute himself for the feoffee is not a reversionary right. . . . By entry for breach of condition, he avoided the substitution, and placed himself in the same position to the lord which he had formerly occupied. The right to enter was not a reversionary right coming into effect on the termination of an estate, but was the right to substitute the estate of the grantor for the estate of the grantee. A possibility of reverter, on the other hand, did not work the substitution of one estate for another, but was essentially a reversionary interest,—a returning of the land to the lord of whom it was held, because the tenant's estate had determined." GRAY, *RULE AGAINST PERPETUITIES* (3d ed. 1915) §§ 30, 31. In *Doe v. Bateman* (1818) 2 B. & Ald. 168, 106 Eng. Reprint 328, it was held that a right of reentry for condition broken could be reserved on an assignment of a term of years. However, it would seem that this is simply a holding that no independent reversionary interest is necessary to support a right of reentry, and is not determinative of the question whether or not a right of reentry is itself a reversionary interest.

⁵⁷ " . . . rights of entry are not less reversionary in nature than possibilities of reverter. Both are contingent reversionary interests. More specifically, the former are powers reserved by the feoffor, by the exercise of which, upon the happening of the contingency stated (breach of condition) the feoffor extinguishes the legal relations of the defaulting tenant, and creates in himself the right of possession as well as the other legal relations that go to make up the aggregate we call a fee. See *Elliott v. Boynton* [1924] 1 Ch. 236. In the case of the possibility of reverter, the feoffor reserves a contingent right of possession which will 'vest,' if ever, only on the happening of the contingency specified in the special limitation upon which the estate is conveyed. In the one case the feoffor's reserved right may be said to be contingent upon two events, viz., breach of condition and entry, while

reserve a right of reëntury to the sublandlord in the event of default in the payment of rent or the performance of other conditions, here is substantially the same result contended for by Serjeant Manning but on a slightly different ground. Serjeant Manning would apparently dispense with the necessity of any particular provision in the sublease as essential to the creation of a reversion, while the Massachusetts⁵⁸ view makes the existence of the reversionary interest depend upon the presence of the usual clause of reëntury for condition broken.

THE CALIFORNIA CASES

The orthodox view as to the necessity of a reversion to support a sublease found early expression in California. In *Smiley v. Van Winkle*,⁵⁹ decided in 1856, it was held that where tenants subleased for the entire remainder of their term and the sublessee's interest subsequently became united with the reversion, a merger which operated to extinguish the original leasehold interest took place, since the purported sublease was legally an assignment. The court there said:

in the other that right is contingent upon one event only, the falling in of the special limitation. The holding of the English courts that rights of entry are subject to the rule of perpetuities (*In re Hollis's Hospital* [1899] 2 Ch. 540) is a sufficient acknowledgment that the grantor retains an expectant interest in land." Vance, *Rights of Reverter and the Statute Quia Emptores* (1927) 36 YALE L. J. 593, 607, n. 54.

⁵⁸ California, Montana, and Texas have followed the Massachusetts rule. *Saling v. Flesch* (1929) — Mont. —, 277 Pac. 612; *Davis v. Vidal* (1912) 105 Tex. 444, 151 S. W. 290; for California decisions, see *infra* n. 65. See also *Key v. Swanson* (1925) 113 Okla. 287, 241 Pac. 490. In *Wray-Austin Machinery Co. v. Flower* (1905) 140 Mich. 452, 103 N. W. 873, the court held that one who had taken a sublease for the remainder of his lessor's own term was not in privity with the head landlord and therefore not entitled to equitable relief against summary proceedings brought by the head landlord against the tenant. No authorities were cited by the court nor did it give any particular reason for its holding. In *United States v. Hickey* (1872) 84 U. S. (17 Wall.) 9, the court, in a statement which it admitted to be unnecessary to its decision, said that the transfer in question was a sublease rather than an assignment, since the terms [*i.e.* conditions] of the two leases were different. In *Drake v. Lacoe* (1893) 157 Pa. 17, 38, 27 Atl. 538, 542, it was held that "an assignment for an increased consideration, with wholly new stipulations, with right of re-entry for conditions broken, *with an express assumption of continuing liability of the assignors to the owners under the original lease*, and a manifest intention to sublet, not only is not evidence of intention to end the privity of estate, but is a positive reaffirmance of it." (Italics ours.) The action was by the head landlord against the assignee of the original tenant (which assignee had himself made the "assignment" above referred to), for an accounting as to the royalties under the original lease. It would seem that the reason given in the italicized portion of the above quotation from the opinion was the principal ground for the decision. A *dictum* in a later Pennsylvania case apparently approves the majority doctrine that a transfer for the entire unexpired portion of a term operates as an assignment although called a sublease. *Girard Trust Co. v. Cosgrove* (1921) 270 Pa. 570, 113 Atl. 741.

⁵⁹ (1856) 6 Cal. 605, 606.

"The conveyance by Smiley *et al.*, although it employs words ordinarily used in a demise, and contains a reservation of rent and the right of re-entry upon covenants broken, is not an under-letting or sub-lease, but is considered in law as an assignment of their whole interest, as there remains in them no reversion of the estate; for it is one of the essentials of a lease, that it should contain a reversion in favor of the party from whom the grant or assurance proceeds."

A similar view seems to have been taken a few years later in *Blumenberg v. Myres*.⁶⁰ The controversy there before the court seems hardly to have required any decision on this particular question but the idea is very plainly expressed that a purported lease for the entire unexpired portion of the landlord's own term as tenant amounts in law to an assignment.

Smiley v. Van Winkle seems to have been cited but twice in later California cases. In *Jeffers v. Easton etc. Co.*⁶¹ the court relied upon it to sustain its holding that an assignment by a tenant left no interest in the assignor and was not an underletting, and therefore constituted a sale of a chattel real giving rise to an implied warranty of title. The case did not present the problem here under consideration, inasmuch as the transfer was, by its own terms, an assignment and did not purport to create any landlord and tenant relationship between the parties to it.

In *Jordan v. Scott*,⁶² however, the problem here under consideration was squarely presented to the district court of appeal, and *Smiley v. Van Winkle* made the basis of the decision. The action was by the landlord's assignee against an assignee of a subtenant, to whom the original tenant had sublet a portion of the premises for a period one day longer than his own term, to recover a proportionate share of the rent. The defendant had paid his rent to his own landlord, the original tenant. The opinion does not refer to the particular provisions of the sublease but simply says that the agreement was in form and terms of that character. The record shows that it reserved to the sublessor a right of entry for condition broken, and contained a covenant for the payment of the rent to the sublessor and a provision that the premises should not be used as a butcher shop, neither of which were present in the original lease. In affirming the judgment for the plaintiff and holding the transfer, though purporting to be a sublease, to constitute an assignment and the subtenant therefore liable to the head landlord for the rent notwithstanding he had paid his immediate landlord the rent reserved in the sublease, the court said:

⁶⁰ (1867) 32 Cal. 93.

⁶¹ (1896) 113 Cal. 345, 45 Pac. 680.

⁶² (1918) 38 Cal. App. 739, 177 Pac. 504.

"Questions similar to this have frequently arisen in the courts and there is an apparent conflict in the decisions which can be in the main resolved by separating those cases wherein the controversy arose between the original tenant and his lessee or assignee, from those wherein the controversy was between the original landlord and the lessee or assignee of his tenant. In the latter class of cases (and the case at bar comes within that class) the clear preponderance of authority is to the effect that where a tenant transfers his entire interest in either the whole or a part of the demised premises, the legal effect thereof is an assignment and not a subletting, and that it is immaterial by what kind of an instrument or conveyance the term is so disposed of."⁶³ (Citing, *inter alia*, *Smiley v. Van Winkle*).

In view both of this decision and of the clear pronouncement in *Smiley v. Van Winkle* as to the insufficiency of a right of entry to constitute the reversion deemed necessary for a sublease, it is quite surprising to find a decision by the supreme court only five years after that by the district court of appeal in *Jordan v. Scott* written by the same justice who while sitting on the district court of appeal was himself the author of the opinion in the earlier case, which makes no mention of either *Smiley v. Van Winkle*, *Jordan v. Scott* or the English or majority American rule, but specifically approves the Massachusetts doctrine and the case of *Dunlap v. Bullard*,⁶⁴ from which it quotes as follows:

"To constitute an assignment of a leasehold interest, the assignee must take precisely the same estate in the whole or in a part of the leased premises which his assignor had therein. He must not only take for the whole of the unexpired time, but he must take the whole estate, or, in other words, the whole of the term; for in the language of Blackstone, 'the word 'term' does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease . . . ' If by the terms of the conveyance, be it in the form of a lease or an assignment, new conditions with a right of entry, or new causes of forfeiture are created, then the tenant holds by different tenure, and a new leasehold interest arises, which cannot be treated as an assignment or a continuation to him of the original term."⁶⁵

⁶³ 38 Cal. App. at 744, 177 Pac. at 506.

⁶⁴ *Supra* n. 54.

⁶⁵ *Barkhaus v. Producers Fruit Co.* (1923) 192 Cal. 200, 206, 219 Pac. 435, 438. This case was an action by the landlord against the assignee of the tenant for damages resulting from the latter's failure to perform the covenants of the lease. One of the defenses set up on behalf of the assignee was that it had made a sublease for the remainder of the original term and that this sublease was therefore in legal effect an assignment. An assignment, of course, would have relieved the assignor, itself an assignee of the original tenant, of liability for any subsequent breaches of the covenants of the lease. The court was of the opinion that the so-called sublease did not operate to vest the so-called sublessee with any interest in the land, but amounted to a mere cropping contract. It said, however, that it was unnecessary to go that far in order to sustain the judgment of the trial court in favor of plaintiff, and held that by reason of the provisions of the so-called

Although the foregoing doctrine appeals to the writer of this article as decidedly the preferable one, for reasons which will shortly be set forth, it must be admitted that in view of the possibly inadvertent overthrow of the previously recognized English and majority American doctrine, it is still a matter of considerable uncertainty as to which rule actually obtains in California today.

CONCLUSION

Which is the preferable view? Aside from the particular basis for the Massachusetts rule,⁶⁶ should the character of a sublease be preserved for the transfer by so denominating it, or must some slight reversion in point of time be kept by the original tenant if his subtenant is not to acquire, willy-nilly, the status of an assignee?

It may aid in answering this question to endeavor to determine why the distinction between the two species of dispositions by a tenant of his leasehold interest, *i.e.* transfer by assignment and transfer by sublease, met with such ready and apparently universal acceptance in situations where the rights and duties of the head landlord and subtenant, *inter se*, are involved.

As an original proposition it might on first consideration seem fairly arguable that any sublease should be treated, *pro tanto*, as an assignment, bringing the would-be subtenant into privity with the head landlord and subjecting him to the burdens, and giving him the benefits, of the covenants in the head lease. A transfer by either landlord or tenant of his entire interest *in part* of the premises is nevertheless an assignment.⁶⁷ A transfer by the landlord of his reversionary interest *for a particular period of time less than the duration of his interest* is nevertheless an assignment.⁶⁸ But a transfer by the tenant of his interest in the lease

sublease for the cultivation, harvesting, etc., under the control of the sublessor, it did not operate to transfer all of the estate and interest of the tenant in the demised premises to the sublessee and was therefore not in legal effect an assignment.

The doctrine of *Dunlap v. Bullard*, as approved in the *Barkhaus* case, that the imposition of new conditions in the sublease and the reservation to the sublandlord of a right of reentry in the event of their breach creates a reversionary interest sufficient to prevent the transfer from amounting to an assignment, has been followed by the district court of appeal in two subsequent cases. *Webb v. Jones* (1927) 88 Cal. App. 20, 263 Pac. 538; *Kendis v. Cohn* (1928) 55 Cal. App. Dec. 1047, 265 Pac. 844. *Cf.*, however, *Weintraub v. Weingart* (1929) 59 Cal. App. Dec. 198, 277 Pac. 752, in which the contrary view is expressed, although without reference to the *Barkhaus* case.

⁶⁶ *Supra* pp. 12, 13.

⁶⁷ *Ellis v. Bradbury* (1888) 75 Cal. 234, 17 Pac. 3; *Congham v. King* (1631) Cro. Car. 221, 79 Eng. Reprint 794; *Twynam v. Pickard* (1818) 2 B. & Ald. 105, 106 Eng. Reprint 305; *SIMS, REAL COVENANTS* (1901) 98, 99.

⁶⁸ *Attoe v. Hemmings* (1612) 2 Bulst. 281, 80 Eng. Reprint 1123; *SIMS, op. cit. supra* n. 67, 99.

for a period of time less than the unexpired portion of the term cannot be an assignment but is necessarily a sublease⁶⁹

Equity, as it has been noted,⁷⁰ in enforcing restrictive agreements against leaseholds has paid no attention to the distinction between assignment and sublease. The subtenant cannot escape the effect of the restrictive agreement made by his sublandlord with the head landlord, although he is not a transferee for the whole of the former's term. Equity, however, is dealing with negative obligations, only.⁷¹ Practically speaking, the land, not the tenant, bears the burden of the agreement. Where affirmative obligations on the part of the tenant are involved the situation becomes obviously different. The reason why there has been so little inclination to treat a sublessee as an assignee *pro tanto*, is, it is submitted, the obvious hardship to the subtenant which would necessarily be involved in such a doctrine. To construe the transfer as an assignment would be to render the subtenant liable to pay rent and perform other obligations to two parties, in spite of the fact that he had purported to obligate himself to one, only. As an assignee he would be bound by all of the covenants in the head lease, and the fact that he had additionally obligated himself to the sublandlord, and even performed such obligations, would be no defense to an action by the head landlord.⁷²

It should be apparent that this hardship to the subtenant does not in the least depend upon whether the sublease is for a part, only, or for the whole, of the unexpired portion of the sublessor's own term.

⁶⁹ As Holdsworth has said, the applicability of the distinction which Coke made (with reference to a somewhat different problem) seems to have been accepted without question. HOLDSWORTH, *loc. cit. supra* n. 4. Some doubt was entertained by certain of the judges in 1779 in the case of *Holford v. Hatch*, 1 Doug. 183, 99 Eng. Reprint 119, but the court ultimately was unanimously of the opinion that it was well settled that the head landlord could not hold the underlessee on a covenant in the head lease, where the underlease was to expire one or more days before the head lease. The doctrine was evidently a settled one nearly a century before the date of the decision in *Holford v. Hatch*, for as early as 1692 an opinion of the Court of Chancery called attention to the fact that it was a mortgagee's own folly to have taken an assignment of the whole term and subjected himself to the covenants of the original lease and not to have taken a derivative lease of all of the term except a month, week, or day, as he might have done. *Sparkes v. Smith* (1692) 2 Vern. 275, 23 Eng. Reprint 778. See also *Goddard v. Keate* (1682) 1 Vern. 88, 23 Eng. Reprint 330.

⁷⁰ *Supra* n. 3.

⁷¹ *Haywood v. Brunswick etc. Society* (1881) 8 Q. B. D. 403. Although the equitable doctrine has perhaps not been definitely restricted to negative agreements by the American courts, the obligation in question is almost invariably of that character. See TIFFANY, *REAL PROPERTY* (2d ed. 1920) § 395.

⁷² For an excellent discussion of this problem of double liability, see Darling, *Is a Sublease for the Residue of a Lessee's Term in Effect an Assignment?* (1882) 16 AMER. L. REV. 16 and Note (1924) 8 MINN. L. REV. 609.

The majority of subleases perhaps are for less than the duration of the sublessor's own holding, but as numerous decisions show, this is frequently not the case. A rule requiring the retention of a slight fractional interest of the original term in point of time to preserve for the transfer the characteristics of a sublease serves no social purpose. It is simply a technical trap to the unsuspecting tenant who does not obtain legal advice before taking his lease.⁷³ Even the technical basis for the rule has been so obscure that it required approximately five hundred years after its first pronouncement for it to become firmly fixed in English law. In the opinion of an eminent authority on jurisprudence, there is nothing in legal theory to justify the requirement that a lease should be of less duration than the right which is subject to it.⁷⁴ If the fundamental distinction between assignment and sublease is to be recognized, as it seems desirable that it should be, the category into which a particular transfer is to be placed should depend not upon the existence of a technical reversion in point of time but upon the intention of the parties to the transfer.⁷⁵ It is to be hoped that the doctrine

⁷³ As it is not always the custom to examine the landlord's title before taking a lease, even employment of an attorney by the prospective tenant might not result in the ascertainment of the fact that the prospective landlord's interest was limited, and that he was leasing for the entire remainder of his own term.

⁷⁴ SALMOND, JURISPRUDENCE (6th ed. 1920) 399-400.

⁷⁵ It seems at least reasonably arguable that the converse of the liberal rule permitting a sublease for the entire residue of a term should also obtain, *i.e.* where the parties so intend, an *assignment* for less than the entire residue should be permitted. From the apparent scarcity of cases involving such an attempted "partial assignment," however, the question is evidently of much less practical importance than the one presented with regard to the making of a sublease for the balance of a term. Where a tenant disposes of his interest for a portion of the term only, he seems almost always to do it in the form of a sublease, not that of a partial assignment. In *Earl of Derby v. Taylor* (1801) 1 East 502, 102 Eng. Reprint 193, however, the court denied a landlord a right of action for breach of covenant to repair against an alleged assignee of the tenant because the original lease was for three lives, while the "assignment" was for 99 years only, and therefore not a transfer of the whole estate of the tenant in the premises. *Dicta* in numerous decisions are in accord with this result, though the point actually decided in these cases was simply that a sublease for the balance of the term amounts to an assignment. Even the more liberal attitude of the Massachusetts court seems to be lacking in liberality when this "converse" question is considered. See the extract from the opinion in *Dunlap v. Bullard*, quoted by the California supreme court with approval in the *Barkhaus* case (quoted *supra* p. 16), where it is said that to constitute an assignment the assignee must take for the whole of the unexpired term. It is of course possible that it was not intended to imply by this generalization that where the parties so desired they could not make a partial assignment, but only that a transfer would never be held to amount to an assignment, contrary to the intention of the parties, unless it was for the whole of the unexpired term.

In the *Earl of Derby's* case, *supra*, no great hardship apparently resulted from denying the landlord the right to hold the "partial assignee" on the tenant's covenant to repair. But suppose a transferee of a portion of a term expects to be

of *Barkhaus v. Producers Fruit Co.*⁷⁶ will be followed⁷⁷ in California in spite of its possibly inadvertent overruling of the previously established orthodox view. In at least one common law jurisdiction, adoption of the more rational rule has been effected by statute.⁷⁸

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able to look to the landlord on the latter's covenants in the original lease, and for this reason does not secure a similar covenant from his transferor, the original tenant. He will be in a position of considerable hardship if the right to hold the head landlord is denied him because his "assignment" was not of the whole of the tenant's interest. Such hardship seems to have resulted in the case of *South of England Dairies Co. v. Baker*, (*supra* n. 38), though it should be noted that the transfer there did not purport to be a "partial assignment" of a term, but a sublease for three days less than the original term. The head landlord had covenanted in the original lease to pay two-thirds of the water rate. The sublease contained no covenant by the sublandlord in this regard. The subtenant sought to hold the head landlord's assignee on this covenant in the head lease, but was denied the right to do so on the well recognized ground that there is no privity of estate or contract between head landlord and subtenant. Here the hardship was perhaps the inevitable one resulting from a mistake of law, *i.e.* belief that the benefit of a covenant in a head lease would run to a sublessee. But if the parties had attempted to make a "partial assignment" rather than a sublease, in order that the benefit of the covenant might run, why should not the law have permitted their intention to be given effect? The fact that the possibility of hardship due to mistakes of law cannot always be avoided is no justification for adherence to an extremely technical rule which increases the possibility of such mistakes.

⁷⁶ *Supra* n. 65.

⁷⁷ It would seem preferable, also, that the doctrine of the case be extended so as to make it unnecessary to reserve either a right of reentry or any other specific interest in order to maintain a reversionary interest in the original term, and the simple intention of the parties held alone sufficient to give to the transfer the character of a sublease.

⁷⁸ 23 & 24 Vict., c. 154, § 3 (1860) (applicable to Ireland only). "The Relation of Landlord and Tenant shall be deemed to be founded on the express or implied Contract of the Parties, and not upon Tenure or Service, and a Reversion shall not be necessary to such Relation, which shall be deemed to subsist in all Cases in which there shall be an Agreement by One Party to hold Land from or under another in consideration of any Rent." It is, of course, not entirely clear that the provisions of this statute might not be confined to questions arising between the immediate parties to a sublease, and that it might possibly be construed as insufficient to prevent a subtenant for the entire remainder of his own landlord's term from being treated as an assignee where rights and duties of the head landlord are involved.