Campbell Law Review

Volume 35
Issue 2 *North Carolina 2013*

Article 3

2013

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John V. Orth

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JOHN V. ORTH*

On July 12, 2012, Senate Bill 521 became law in North Carolina.[1] It amended Chapter 41 of the General Statutes by adding a new section:

§ 41-6.4. Rule in Dumpor's Case abolished.

(a) The rule of property known as the Rule in Dumpor's Case is abolished.

(b) This section shall become effective October 1, 2012, and applies to transfers of property that take effect on or after that date.[2]

The latest in a slow succession of statutes intended to eliminate ancient rules of property, the statute adds the Rule in Dumpor's Case to the pile of discarded doctrines that includes the Doctrine of Worthier Title,[3] the Rule in Shelley's Case,[4] and, in significant aspects, the Rule Against Perpetuities.[5]

By not defining the rule it abolishes, the new statute makes continued recourse to the common law necessary. The *fons et origo* of the Rule in Dumpor's Case is the 1603 English case that gave it its name.[6] Although some of the details are quaint, the four-hundred-year-old case can easily be restated in modern terms. A long-term lease executed during the reign of the first Queen Elizabeth included a "proviso that the lessee or his assigns

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* William Rand Kenan, Jr. Professor of Law, University of North Carolina School of Law. A.B. 1969, Oberlin College; J.D. 1974, M.A. 1975, Ph.D. 1977, Harvard University.

1. An Act Abolishing the Rule in Dumpor's Case and Concerning Broker Price Opinions, 2012 N.C. Sess. Laws 163 (codified at N.C. GEN. STAT. §§ 41-6.4, 93A-82 to -83, 93E-1-3 to -4, -12 (Supp. 2012)).

2. *Id.* (codified at N.C. GEN. STAT. § 41-6.4 (Supp. 2012)).

3. N.C. GEN. STAT. § 41-6.2; *see also* N.C. GEN. STAT. § 28A-1-2 (1974) (repealed and replaced in 1979).

4. N.C. GEN. STAT. § 41-6.3; *see* John V. Orth, *Requiem for the Rule in Shelley's Case*, 67 N.C. L. REV. 681 (1989) (discussing the abolition of the Rule in Shelley's Case in North Carolina); *see also* John V. Orth, *The Mystery of the Rule in Shelley's Case*, 7 GREEN BAG 2D 45 (2003), *reprinted in* JOHN V. ORTH, REAPPRAISALS IN THE LAW OF PROPERTY 15 (2010) (hereinafter "REAPPRAISALS").

5. N.C. GEN. STAT. §§ 41-15, -23; *see* John V. Orth, *Allowing Perpetuities in North Carolina*, 31 CAMPBELL L. REV. 399 (2009) (discussing North Carolina's abolition of the Rule Against Perpetuities as applied to trusts if the trustee has power of sale).

6. Dumpor's Case, (1603) 76 Eng. Rep. 1110 (K.B.); 4 Co. Rep. 119 b.

should not alien the premises to any person or persons, without the special licence [sic] of the lessors."[7] In other words, the lease included a covenant against transfer without permission. After a few years, the lessors granted the lessee permission "to alien or demise [i.e., lease] the land,"[8] and the lessee then "assigned the term" to a person who devised it to his son.[9] The son subsequently died intestate,[10] and the administrator of the son's estate assigned the lease to Symms.[11] The lessors, claiming that the reassignment without permission gave them a right to re-enter,[12] then executed a new lease to Dumpor.[13] Symms maintained his right to possession, and *Dumpor's Case* is Dumpor's suit against Symms for trespass.[14] On these facts, "judgment was given against the plaintiff"; that is, Dumpor lost.[15] The reassignment to Symms did not require permission, so it was valid.[16]

Dumpor's Case was assured its enduring place in property law by its inclusion in the influential law reports prepared by Sir Edward Coke, the

7. *Id.* at 1111, 4 Co. Rep. at 119 b.

8. *Id.* at 1112, 4 Co. Rep. at 119 b. Leaseholds may be transferred by assignment (transfer of all the remaining term), or by sublease (transfer of less than all the remaining term). ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 8:10 (1980). According to another report of *Dumpor's Case*, the permission was "to alien the premises, or any part, for the entire term, or for part thereof . . . ." Dumper v. Syms, (1603) 78 Eng. Rep. 1042 (K.B.) 1042; Cro. Eliz. 815, 815.

9. *Dumpor's Case*, 76 Eng. Rep. at 1112, 4 Co. Rep. at 119 b. According to *Dumper v. Syms*, counsel argued that if the covenant not to transfer without permission continued to bind the assignee, then it was breached by the devise, but the court did not find it necessary to decide this point since it held that the covenant did not continue. *Dumpor*, 78 Eng. Rep. at 1043, Cro. Eliz. at 816.

10. Property passing by intestate succession passes by operation of law, and such involuntary assignments do not violate a covenant against transfer. *See* 7 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 282 & n.4 (2d ed. 1937) (noting that covenants against transfer "do[] not apply when the property passes by operation of law," such as in cases of death).

11. *Dumpor's Case*, 76 Eng. Rep. at 1112, 4 Co. Rep. at 119 b.

12. Coke's report does not indicate whether the lessors claimed their right to re-enter pursuant to a power reserved in the lease or whether they claimed that the breach of a condition caused a forfeiture.

13. *Id.* The yearly rent reserved in the lease to Dumpor was 22 shillings, compared with 33 shillings and 4 pence reserved in the original lease, which Symms was eager to preserve. *Id.* It is tempting to think that Dumpor got the lease at a discount because of the legal uncertainty.

14. *Id.* at 1112–13, 4 Co. Rep. at 119 b.

15. *Id.*

16. *Id.*

greatest authority on the common law of property.[17] Unlike modern law reports—factual statements of cases and their results—Coke's reports include extended discussions of legal issues, whether actually decided by the court or not.[18] Like a case annotated in *American Law Reports* today, a case in Coke's reports may be no more than "a peg on which to hang his disquisition," although Coke's editorial additions are not clearly labeled.[19] In his report of *Dumpor's Case*, Coke noted that "divers points were debated and resolved,"[20] although for purposes of the eponymous Rule, the resolution that mattered—the actual holding in the case—was that "if the lessors dispense with one alienation, they thereby dispense with all alienations . . . ."[21] In other words, a covenant against transfer without permission is terminated by permission to make the first transfer, and the leasehold is thereafter transferable without further permission.

Perhaps the most difficult point that was debated and resolved in *Dumpor's Case* concerned the fact that the covenant against transfer in that case applied by its terms not just to the lessee but also to the lessee's assigns. The court's resolution of this point was that

> although the proviso be, that the lessee or his assigns shall not alien, yet when the lessors license the lessee to alien, they shall never defeat, by force of the said proviso, the term which is absolutely aliened by their licence [sic], inasmuch as the assignee has the same term which was assigned by their assent.[22]

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17. The eleven volumes of Coke's Reports published during his lifetime enjoyed an enormous prestige. John William Wallace, who reported decisions of the U.S. Supreme Court from 1863 to 1874 (United States Reports, volumes 68 to 79), noted that Coke's Reports "are cited not in the way in which Reports are commonly cited, that is to say, by the name of the reporter," but simply as "The Reports." JOHN WILLIAM WALLACE, THE REPORTERS, ARRANGED AND CHARACTERIZED WITH INCIDENTAL REMARKS 166 & n.3, 193 (Phila., Soule and Bugbee 4th ed. 1882).

18. 5 HOLDSWORTH, *supra* note 10, at 462–65 (3d ed. 1945).

19. *Id.* at 464.

20. *Dumpor's Case*, 76 Eng. Rep. at 1113, 4 Co. Rep. at 119 b. Other resolutions—not part of the holding but nevertheless considered to be covered by the Rule in Dumpor's Case—were (1) where there are multiple tenants subject to a covenant against transfer, a permission given to one tenant to transfer also terminates the covenant as to the other tenants, and (2) where permission is given to transfer a part of the leasehold, the permission also terminates the covenant as to the remaining part. *Id.* The second question may have been discussed if, as reported in *Dumper v. Syms*, the permission by the lessors in that case was "to alien the premises, or any part . . . ." *Dumper*, 78 Eng. Rep. at 1042, Cro. Eliz. at 815.

21. *Dumpor's Case*, 76 Eng. Rep. at 1113, 4 Co. Rep. at 120 a.

22. *Id.*

Judges and scholars have struggled for centuries to make sense of this holding. Chief Justice Samuel Nelson of New York's Supreme Court in 1837 explained that "the license gave to the lessee the power to convey an absolute interest, free from the restraint of the condition," although he admitted that this is "assuming the point in question."[23] Sir William Holdsworth, in his monumental twentieth century *History of English Law*, while also finding it "difficult to understand the principle upon which *Dumpor's Case* is based," thought that "[t]he covenant against assignment was considered to be attached to the lessee's estate in the land" and that "the assignee, as a result of the licence [sic], got an estate free from the covenant, which he could therefore assign or not as he pleased . . . ."[24]

In historical context, the Rule in Dumpor's Case marks a stage in the common law's struggle to determine the extent to which interests in property are alienable.[25] If a grant in fee simple cannot be subject to a restraint on alienation, can a lease—also a conveyance of an estate in land—be subject to a covenant against transfer? To this day, of course, leases are, in general, freely alienable.[26] And even a dozen years after *Dumpor's Case*, an English judge could still doubt whether a covenant against transfer would be repugnant to the grant, and therefore void, in a lease expressly granted to a lessee "and his assigns."[27] Viewed in this light, the Rule in Dumpor's Case is actually a grudging acceptance of the validity of restraints on alienation in leases; they are valid, but subject to strict construction. While the Rule is an extreme example, courts to this day continue to interpret restrictions in leases against the landlord.[28]

The force of stare decisis, aided in this case by the immense prestige of Sir Edward Coke, maintained the Rule for centuries, even as English judges began to criticize it. Lord Chancellor Eldon in 1807 admitted that

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23. Dakin v. Williams, 17 Wend. 447, 457–58 (N.Y. Sup. Ct. 1837). Chief Justice Nelson was subsequently a United States Supreme Court justice. Frank Otto Gatell, *Samuel Nelson*, *in* 2 JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 407, 407–20 (Leon Friedman & Fred L. Israel eds., 1997).

24. 7 HOLDSWORTH, *supra* note 10, at 283.

25. *See* JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY §§ 101, 278 (Bos., Bos. Book Co. 2d ed. 1895) (analyzing the implications of conditions upon assignments and how conditions affect the alienability of property).

26. SCHOSHINSKI, *supra* note 8, § 8:10 ("In most instances the interest, or any part thereof, of a tenant for years or a periodic tenant is freely alienable.").

27. Stukeley v. Butler, (1615) 80 Eng. Rep. 316 (K.B.) 317; Hob. 168, 170.

28. *See* Ann Peldo Cargile & Michael B. Noble, *Assignments and Subleases: The Basics*, PROBATE & PROP., Sept.–Oct. 2003, at 40, 42 ("Many courts perceive restrictions against assignment or sublease as restraints on alienation. As a result, courts often interpret restrictive language against the landlord.").

"*Dumpor's Case* always struck me as extraordinary," but recognized that "it is the law of the land at this day"—and actually extended its reach.[29] And Chief Justice Sir James Mansfield in 1813 observed that "[c]ertainly the profession have always wondered at *Dumpor's case*, but it has been law so many centuries, that we cannot now reverse it," although he was able to distinguish it.[30]

In the nineteenth century, English courts increasingly deferred to Parliament to reform the common law,[31] and a century-long series of statutes remade traditional land law[32]—among them, a statute adopted in 1859 during the reign of Queen Victoria that abolished the Rule in Dumpor's Case:

> Where any Licence [sic] to do any Act which without such Licence [sic] would create a Forfeiture, or give a Right to re-enter, under a Condition or Power reserved in any Lease heretofor [sic] granted or to be hereafter granted, shall at any Time after the passing of this Act be given to any Lessee or his Assigns, every such License shall, unless otherwise expressed, extend only to the Permission actually given, or to any specific Breach of any Proviso or Covenant made or to be made, or to the actual Assignment, Under-lease, or other Matter thereby specifically authorised

29. Brummell v. Macpherson, (1807) 33 Eng. Rep. 487 (Ch.) 488; 14 Ves. Jr. 173, 175–76 (holding that even permission to assign limited to a particular assignee terminated the covenant and permitted reassignment without further permission).

30. Doe v. Bliss, (1813) 128 Eng. Rep. 519 (C.P.D.) 520; 4 Taunt. 735, 736 (holding that a lessor's failure to object to a transfer in violation of a covenant did not have the same effect as actual permission). The action of ejectment, used to try title to land, involved the allegation of a fictitious demise or lease to a fictitious plaintiff, Doe. REAPPRAISALS, *supra* note 4, at 105. The form continued in use in North Carolina after the Revolution, where the fictitious lessee was renamed Den. *See id.* On this and other legal fictions, see *id.* Sir James Mansfield, Chief Justice of Common Pleas (1804–1814), is not to be confused with William Murray, Lord Mansfield, the famous Chief Justice of King's Bench (1756–1788). *See generally* C.H.S. FIFOOT, LORD MANSFIELD (1936).

31. *See* BRIAN ABEL-SMITH & ROBERT STEVENS, LAWYERS AND THE COURTS: A SOCIOLOGICAL STUDY OF THE ENGLISH LEGAL SYSTEM 46–47 (1967). The authors state:

> the Victorian appeal courts were increasingly careful to avoid the impression that they were making law—an attitude no doubt influenced by the increasingly democratic composition of Parliament . . . . [T]he main responsibility for changing the law had now passed to Parliament. Moreover this was true not only for major changes of direction, but even for relatively minor ones.

Id.

32. *See generally* J. STUART ANDERSON, LAWYERS AND THE MAKING OF ENGLISH LAND LAW, 1832–1940 (1992).

> [sic] to be done, but not so as to prevent any Proceeding for any subsequent Breach (unless otherwise specified in such License [sic]) . . . .[33]

Unlike the recent North Carolina statute, the English statute does not mention the famous case by name, but rather rejects its holding by providing that permission for one transfer does not "prevent any Proceeding for any subsequent Breach . . . ."[34] The statute applies equally to conditions that would cause a forfeiture and to powers that would give a right to re-enter.[35] It applies to all transfers, subleases as well as assignments.[36] It creates a default rule; that is, one that applies "unless otherwise expressed."[37] And it governs the construction of provisions in existing leases as well as to those in leases executed after adoption of the act.[38]

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Still part of the common law in 1776, the Rule in Dumpor's Case was presumptively received as law in American states.[39] In North Carolina, the 1778 reception statute—still in effect today—expressly adopts "[a]ll such parts of the common law as were heretofore in force and use within this State" unless "abrogated, repealed, or become obsolete,"[40] and in 1860—the year after the repeal of the Rule in England—the North Carolina Supreme Court alluded to *Dumpor's Case* without questioning its

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33. An Act to Further Amend the Law of Property, and to Relieve Trustees, 1859, 22 & 23 Vict., c. 35, § 1 (Eng.); *see also* An Act to Further Amend the Law of Property, 1860, 23 & 24 Vict., c. 38, § 6 (Eng.) (concerning that aspect of the Rule in Dumpor's Case that applied to permission implied by failure to object).

34. An Act to Further Amend the Law of Property, and to Relieve Trustees, 1859, 22 & 23 Vict., c. 35, § 1 (Eng.).

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.*

39. *See, e.g.*, N.C. GEN. STAT. § 4-1 (2011).

40. *Id.* A colonial statute of 1711, reenacted in nearly identical language, provided that "the common Law, is and shall be, in Force in this Government, except such part . . . [as] cannot be put in Execution." 2 EARLIEST PRINTED LAWS OF NORTH CAROLINA, 1699–1751 39 (John D. Cushing ed., 1977). It is unknown whether a colonial court had occasion to consider the applicability of the Rule in Dumpor's Case. The most thorough recent review of law in colonial North Carolina did not include any mention of it. *See generally* William E. Nelson, *Politicizing the Courts and Undermining the Law: A Legal History of Colonial North Carolina, 1660-1775*, 88 N.C. L. REV. 2133 (2010). *But see* Steelman v. City of New Bern, 184 S.E.2d 239, 241 (N.C. 1971) (holding that N.C. GEN. STAT. § 4-1 "adopted the common law . . . as of the date of the signing of the Declaration of Independence").

continued validity.[41] Chancellor James Kent in his influential *Commentaries on American Law* included the Rule in Dumpor's Case, and Oliver Wendell Holmes, in the definitive edition of Kent's *Commentaries* in 1873, noted that in America "[t]his hard rule is considered as unshaken law, down to this day."[42] Ten years later John Henry Wallace, an expert on the early law reports, observed that Coke's Reports enjoyed, if possible, a higher respect in America than in England: "[T]he single name of Lord Coke would oftentimes outweigh the whole bench of Judges whom he reports."[43]

In 1931 the North Carolina Supreme Court confronted the Rule in Dumpor's Case for the first time in *Childs v. Warner Bros. Southern Theatres, Inc.*[44] In *Childs*, a lessor leased commercial property to a lessee, "his executors, administrators and assigns" for a term of five years, subject to a covenant that the lessee "shall not convey [the] lease or underlet the premises without the written consent of the lessors."[45] Thereafter the lessor transferred the reversion to the plaintiff, who granted the lessee permission to assign the lease to the defendant.[46]

When the defendant subsequently reassigned the lease without further permission, the plaintiff notified the defendant: "I shall continue to recognize you as the lessee of the property" and demanded rent.[47] The

41. Welch v. Trotter, 53 N.C. 197, 203 (1860) ("[T]he authorities . . . show that in matters of contract executory, in respect to chattels personal, and likewise chattels real [i.e., leases], (see notes to *Dumpor's* case, 1 Smith's Leading Cases, 15,) a condition that the contract, or a conveyance of a chattel, or a lease for years, shall be void, has, in law, the effect of making the contract, conveyance, or lease for years, void *ipso facto*, on breach of the condition."). The court's reference is not to the original report of *Dumpor's Case*, but to the notes on the case in 1 JOHN WILLIAM SMITH, A SELECTION OF LEADING CASES ON VARIOUS BRANCHES OF THE LAW: WITH NOTES 15 (Phila., John S. Littell 2d ed. 1844).

42. 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 142 n.(d) (O.W. Holmes, Jr. ed., Bos., Little, Brown, & Co. 12th ed. 1873).

43. WALLACE, *supra* note 17, at 192.

44. *See generally* Childs v. Warner Bros. S. Theatres, Inc., 156 S.E. 923 (N.C. 1931).

45. *Id.* at 923. The lease further provided that:

> if the said lessee shall at any time fail or neglect to perform any of the covenants hereunto contained and on his part to be performed, or shall be adjudged a bankrupt or insolvent, then and in that event the lessor shall have the right to reenter into and upon the demised premises.

Id.

46. *Id.*

47. *Id.*

defendant refused to pay claiming that the reassignment relieved him of liability.[48]

The first sentence of the court's opinion stated the question to be resolved:

> If a lessor executes a lease to a given lessee, and the lease provides that the lessee shall not convey the lease nor underlet the premises without the written consent of the lessor, and thereafter the lessor consents to an assignment of the lease, can such assignee subsequently make a valid reassignment of the lease without the consent of the lessor?[49]

As the North Carolina Supreme Court acknowledged, the question bears obvious similarities to the one answered in *Dumpor's Case*.[50] The only salient difference between the two cases, in fact, is that in *Dumpor's Case* the "proviso" concerning alienation applied to the lessee "or his assigns," while in *Childs* the covenant literally applied to the lessee alone.[51] As the court recognized, some American courts, "in order to avoid the application of the principles in the Dumpor Case," distinguished single from multiple covenants and held that "if the covenant were single, Dumpor's Case applied; but, if the covenant were not single, Dumpor's Case did not apply."[52] While accurate as a description of the American cases, this statement has been described as "ironic," since the covenant at issue in *Dumpor's Case* was multiple.[53] In any event, at this point in the court's opinion it appeared that it intended to apply the Rule in Dumpor's Case and rule in favor of the defendant.

But the court then proceeded to construe the covenant against transfer in *Childs* as multiple in fact, although not in form.[54] The property was leased to the lessee, "his executors, administrators and assigns" and the covenant to pay rent also bound the lessee, "his executors, administrators

48. *Id.* 923–24.

49. *Id.* at 923.

50. *See id.* at 924 (comparing *Dumpor's Case* to the case at bar).

51. *Id.* at 923; Dumpor's Case, (1603) 76 Eng. Rep. 1110 (K.B.) 1110–11; 4 Co. Rep. 119 b.

52. *Childs*, 156 S.E. at 924. The Rule in Dumpor's Case actually makes more sense when applied to "single" covenants. *See* Investors' Guar. Corp. v. Thompson, 225 P. 590, 594 (Wyo. 1924) (observing that "many conditions are single" and that "the view that a waiver of the condition—since conditions are construed strictly—necessarily destroys the whole is probably correct"); *see also* Lynch v. Joseph, 228 A.D. 367, 370 (N.Y. App. Div. 1930) (holding that a single covenant did not run with the land and bind assigns).

53. SCHOSHINSKI, *supra* note 8, § 8:18 n.59.

54. *Childs*, 156 S.E. at 924.

and assigns."[55] The court concluded that "a reasonable construction of the lease involved in this case leads to the conclusion that the restriction against assignment and subletting operated upon the heirs and assigns of the lessee as well as upon the lessee himself."[56] At this point in its opinion, it appeared that the court, relying on precedent from other states limiting the application of the Rule in Dumpor's Case to single covenants, intended to rule in favor of the plaintiff.

Abruptly, the court changed the subject. "Without entering into any discussion of the distinctions which may exist between single and multiple covenants" against transfer, it suddenly turned to another covenant in the lease in *Childs*.[57] "The covenant to pay rent is continuous in its nature, and such covenant is binding by express provision upon the assigns of the lessee . . . ."[58] Of course, even without this "express provision," a covenant to pay rent is one that "runs with the land" and binds assignees in possession who are in privity of estate with the lessor.[59] According to the general rule, a valid reassignment, by ending an assignee's right to possession, breaks the privity of estate and ends the assignee's liability for rent.[60] But the North Carolina court, by adding the comment that "all persons occupying the premises under the assignment from the lessee were charged with notice of the conditions imposed by the writing under which they held title to the premises,"[61] seemed to suggest an alternate holding: in North Carolina—contrary to the general rule—an assignee would be liable for rent, at least if the covenant to pay rent bound the lessee "and assigns," regardless of whether there was a valid reassignment or not.

Nonetheless, without pause, the court proceeded to announce its holding, answering the question with which it began: "[W]e hold that, by consenting to one assignment, the lessor did not waive the conditions of the lease and did not consent that thereafter any subsequent assignee could turn his property over to the use and occupancy of any undesirable or irresponsible person without his approval."[62] Stripped of the aspersion cast

55. *Id.* at 923–24.

56. *Id.* at 924.

57. *Id.*

58. *Id.*

59. SCHOSHINSKI, *supra* note 8, § 8:12 ("Upon the lessee's assignment of his leasehold, the privity of estate between lessor and lessee is destroyed and a new privity of estate is created between the lessor and the assignee.").

60. *Id.* ("[T]he assignee's liability ends upon an assignment of his estate.").

61. *Childs*, 156 S.E. at 924.

62. *Id.*; *see also* SCHOSHINSKI, *supra* note 8, § 8:12 ("[T]he assignee, by reassigning, may escape further liability even though the transfer is made to a financially irresponsible

on the second assignee (for which there is no support in the opinion in *Childs*), this appears to be a rejection of the Rule in Dumpor's Case and—despite the possibility of a dubious alternate holding—was so understood at the time.[63] In 1952 the authoritative *American Law of Property*, after observing that "the majority of cases in this country, while criticizing the Rule, have purported to follow it," noted *Childs* as "*contra*."[64]

But doubt remained. Without an unequivocal holding in *Childs*, the leading North Carolina property treatise cautiously stated that the Rule in Dumpor's Case "may still be in effect."[65] What made the situation tolerable was that a well advised lessor could avoid any question of the vitality of the Rule by conditioning permission to transfer on agreement by the assignee that reassignment required further permission[66] or, if the lessor

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person for the express purpose of escaping liability, notwithstanding that the lease purports to bind assigns."). This seemingly harsh rule can be justified by recalling that the lessee, on whose credit-worthiness the lessor originally relied, remains liable on the covenant to pay rent. *Id.* ("[The lessee] remains liable upon all the terms of his contract."). The rule does not apply if the reassignment is merely colorable, that is, if the assign retains the beneficial use and enjoyment of the premises. *Id.*

63. *See* W.T. Covington, Jr., Comment, *Landlord and Tenant—Effect of Consent to One Assignment of Lease on Condition Not to Assign—Dumpor's Case*, 9 N.C. L. REV. 455, 458 (1931) ("The judgment for the plaintiff . . . would entail the existence of the condition and a repudiation of the rule in *Dumpor's Case*."); T. C. Kammholz, Comment, *Landlord and Tenant—Liability of an Assignee of a Lease after Reassignment*, 7 WIS. L. REV. 51, 51 (1931) ("The court held that the doctrine of Dumpor's Case was repudiated in North Carolina . . . .").

64. 1 THOMAS E. ATKINSON ET AL., AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES § 3.58, 305 n.34 (A. James Casner ed., 1952).

65. *Webster's Real Estate Law in North Carolina* states:

> The ancient rule, known as the Rule in Dumpor's Case, dating from 1603, may still be in effect in North Carolina. While a number of states have repudiated this rule, North Carolina has not expressly repudiated the rule and has one decision that is susceptible of the interpretation that the rule still exists and will apply under proper circumstances.

1 JAMES A. WEBSTER, JR., WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 12.30 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999) (footnotes omitted).

66. *Id.* § 12.30 ("[T]he Rule in Dumpor's Case can easily be circumvented in every case by the lessor giving only a qualified consent, that is, consent conditioned on there being no further breach."). The lessor's grant of permission to transfer is the consideration for the assignee's agreement not to reassign without further permission. *See* Kammholz, *supra* note 63, at 52. Furthermore:

> [W]here the lessee is required under the lease to obtain the consent of the lessor to an assignment in order to render such assignment valid, and the lessor, in consideration of his assenting thereto, obtains from the assignee an agreement to assume all the covenants of the lease, a privity of contract is created, and the

had sufficient bargaining power, by conditioning permission on agreement by the assignee to assume all the covenants of the lease.[67]

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In 1931, the North Carolina Supreme Court bade an uncertain farewell to the Rule in Dumpor's Case.[68] In 2012, the North Carolina General Assembly made a second attempt to say goodbye.[69] But a successful send-off depends on what exactly the new statute means by "[t]he rule of property known as the Rule in Dumpor's Case."[70] As noted in *Childs*, some American courts, "in order to avoid the application of the principles in the Dumpor Case," had made attempts, some of them disingenuous, to narrow the scope of the Rule.[71] Not only are there cases that confine the Rule to covenants that are single rather than multiple,[72] there are also cases holding that the Rule does not apply to covenants at all, but only to conditions.[73] Additionally there are cases that confine the Rule to transfers

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> assignee remains liable on the covenants of the lease after a re assignment without the consent of the lessor. This rule does not apply where there is no such consent required from the lessor, as the assignee's promise is without consideration and therefore unenforceable.

Id.

67. *See* SCHOSHINSKI, *supra* note 8, § 8:12. Schoshinski states, "Where the assignee agrees to assume the lessee's covenants and obligations, privity of contract arises between the lessor and the assignee." *Id.* He further explains, "As the assignee's liability in this situation is not based on privity of estate, it survives his subsequent assignment of the lease." *Id.*

68. *See generally* Childs v. Warner Bros. S. Theaters, 156 S.E. 923 (N.C. 1931).

69. *See generally* An Act Abolishing the Rule in Dumpor's Case and Concerning Broker Price Opinions, 2012 N.C. Sess. Laws 163 (codified at N.C. GEN. STAT. §§ 41-6.4, 93A-82 to -83, 93E-1-3 to -4, -12 (Supp. 2012)).

70. *Id.* (codified at N.C. GEN. STAT. § 41-6.4).

71. *Childs*, 156 S.E. at 924.

72. *E.g.*, Investors' Guar. Corp. v. Thompson, 225 P. 590, 594 (Wyo. 1924). The court observed that it is misleading to cite *Dumpor's Case* where the covenant against transfer is single:

> [T]hat is not the gist of that case. The vital point of that case, the vice of it, is that it holds that a condition in a lease is single, notwithstanding the fact that it is made binding not only upon the lessee but also upon his assigns, and that hence one license destroys the whole condition.

Id.

73. *E.g.*, Williams v. Dakin, 22 Wend. 201, 209 (N.Y. 1839). In New York—until 1846—appeal lay from the state Supreme Court to the Court for the Correction of Errors, composed of the entire New York Senate, augmented by the state's Chancellor and the justices of the state Supreme Court. N.Y. CONST. of 1777, § 32; N.Y. CONST. of 1821, art. V, § 1.

by assignment and refuse to apply it to subleases,[74] as well as cases that distinguish a lessor's waiver by failure to object from express permission to transfer.[75]

North Carolina's experience with the abolition of another venerable rule of property, the Doctrine of Worthier Title, is instructive in this regard.[76] In 1974, the General Assembly adopted a statute with the following seemingly straightforward provision: "The common-law doctrine of worthier title, both the wills branch and the deeds branch, is hereby abolished."[77] The difficulty was that the "common-law doctrine of worthier title" was a rule of law,[78] while the Doctrine, as applied by the leading American case, treated it as a rule of construction.[79] Uncertainty about what exactly the 1974 statute meant led five years later to its repeal and replacement with the current statute:

> The law of this State does not include: (i) the common-law rule of worthier title that a grantor or testator cannot convey or devise an interest to the grantor's or testator's own heirs, or (ii) a presumption or rule of interpretation that a grantor or testator does not intend, by a grant or devise to the grantor's or testator's own heirs or next of kin, to transfer an interest to them.[80]

The difficulty is rooted in the fact that courts in the common law tradition tend to deal with inconvenient precedents by distinguishing them, rather than by rejecting them outright.[81] *Dumpor's Case* has suffered this fate for centuries, making it difficult in many jurisdictions to state exactly what its notorious Rule is. For the 2012 statute to have the effect of clarifying the law of North Carolina concerning covenants against transfer, it would be best to disregard the cases from other jurisdictions that distinguish

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74. *E.g.*, Miller v. Newton-Humphreville Co., 116 A. 325, 325 (N.J. Ch. 1920).

75. *E.g.*, Doe v. Bliss, (1813) 128 Eng. Rep. 519 (C.P.D.) 520; 4 Taunt. 735, 736.

76. The Doctrine of Worthier Title, more descriptively labeled "the rule against remainders to the grantor's heirs" or "the conveyor-heir rule," converted an apparent contingent remainder in the grantor's heirs into a vested reversion in the grantor. REAPPRAISALS, *supra* note 4, at 22–23. The Doctrine applied to devises ("the wills branch") and to inter vivos grants ("the deeds branch"). *Id.*

77. N.C. GEN. STAT. § 28A-1-2 (1974) (repealed and replaced in 1979).

78. SIR EDWARD COKE ET AL., A READABLE EDITION OF COKE UPON LITTLETON § 19 (Oxford University, Saunders 1830) ("If a man make a gift in tail, or a lease for life, the remainder to his own right heirs, this remainder is void, and he has the reversion in him . . . .").

79. Doctor v. Hughes, 122 N.E. 221, 221–22 (N.Y. 1919).

80. N.C. GEN. STAT. § 41-6.2(a) (Supp. 2012).

81. *See* Childs v. Warner Bros. S. Theaters, 156 S.E. 923, 924 (N.C. 1931) (noting how courts create mechanisms to work around *Dumpor's Case*).

Dumpor's Case and, instead, to accept the maximum extent of the Rule: "If the lessors dispense with one alienation, they thereby dispense with all alienations."[82]

In its most comprehensive statement, the Rule in Dumpor's Case applies to: (1) conditions causing forfeiture and powers giving a right of re-entry; (2) transfers by assignment and transfers by sublease; (3) single covenants and multiple covenants; and (4) waiver by failure to object and express permission to transfer. Stated positively, the law in North Carolina after October 1, 2012 includes a presumption that permission to make one transfer does not terminate a covenant against transfer; that is, in the words of the 1859 English statute that abolished the Rule: "any Licence [sic] . . . shall, unless otherwise expressed, extend only to the Permission actually given . . . but not so as to prevent any Proceeding for any subsequent Breach."[83] The presumption would apply to covenants in leases executed prior to October 1, 2012, as well as to those in leases executed thereafter.[84]

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While the abolition of the Rule in Dumpor's Case represents the ungrudging acceptance of restraints on alienation in leases, it also represents a triumph for the lessor's presumed intention over a strict, potentially intent-defeating rule. Now that covenants against transfer are to be liberally construed, attention will necessarily turn to whether there are any restraints on a lessor's right to refuse permission for a transfer. The question is usually framed as whether a lessor may withhold consent "unreasonably." In England, the 1927 Landlord and Tenant Act provides that permission to assign or sublease may not be unreasonably withheld.[85] And in America, the 1977 *Restatement of the Law of Property* adopts the position that "the landlord's consent to an alienation by the tenant cannot be withheld unreasonably . . . ."[86] Properly speaking, the issue is not whether the lessor

82. Dumpor's Case, (1603) 76 Eng. Rep. 1110 (K.B.) 1113; 4 Co. Rep. 119 b, 120 a.

83. An Act to Further Amend the Law of Property, and to Relieve Trustees, 1859, 22 & 23 Vict., c. 35, § 1 (Eng.).

84. N.C. GEN. STAT. § 41-6.4(b).

85. Landlord and Tenant Act, 1927, 17 & 18 Geo. 5, c. 36, § 19 (Eng.).

86. RESTATEMENT (SECOND) OF PROP. LAND. & TEN. § 15.2(2) (1977). As admitted by the Reporter at the time, this is a "minority view" among the states. *Id.* Twenty-five years later, the situation had not changed. Case law "in a slight minority of jurisdictions implies that the prime landlord's consent cannot be unreasonably withheld, unless there is express language setting forth a stronger standard for consent." Brent C. Shaffer, *Sublease Due Diligence*, PROB. & PROP., Sept.–Oct. 2003, at 50.

may behave "unreasonably" but whether the lessor must be prepared to prove the reasonableness of a refusal in court. In other words, may the lessor "just say no?"

In 1981, the North Carolina Court of Appeals answered that question in the affirmative, holding that a covenant against assignment or subletting "bars the tenant from such a transfer if the lessor reasonably *or unreasonably* withholds his consent."[87] Only if the lease itself requires that the lessor behave reasonably or otherwise provides an objective standard by which to test the appropriateness of the lessor's refusal is the lessor prohibited from withholding consent "based on arbitrary considerations of personal taste, sensibility, or convenience . . . ."[88] This has been criticized as "inconsistent with the landlord's duty to mitigate damages."[89] But in 2006, the North Carolina Court of Appeals held that the duty to mitigate may be eliminated by covenant in a commercial lease.[90] The combination of such a covenant and a covenant against transfer leaves a distressed lessee with few options other than bankruptcy.[91]

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87. Isbey v. Crews, 284 S.E.2d 534, 536 (N.C. Ct. App. 1981) (emphasis added).

88. *Id.* at 536–37.

89. 1 WEBSTER, *supra* note 65, at § 6.20 n.254. There is no true "duty to mitigate damages." Instead the party suffering the breach is disabled to recover damages from the breaching party to the extent that action by the former could have reduced the loss caused by the latter. Stephanie G. Flynn, *Duty to Mitigate Damages Upon a Tenant's Abandonment*, 34 REAL PROP., PROB. & TR. J. 721, 723 (2000) ("The phrase 'duty to mitigate' gives a false impression of the landlord's position when the tenant breaches the lease agreement. Numerous scholars and commentators have questioned the accuracy of the phrase.").

90. Sylva Shops Ltd. P'ship v. Hibbard, 623 S.E.2d 785, 792–93 (N.C. Ct. App. 2006). This case was criticized in *Webster's Real Estate Law in North Carolina*. 1 WEBSTER, *supra* note 65, § 12.28.

91. *See Sylva Shops Ltd. P'ship*, 623 S.E.2d at 788 n.1. Although this case and *Isbey*, 284 S.E.2d at 536, are not Supreme Court decisions, they are likely to remain final statements of North Carolina law because of the interaction of two rules: (1) The decision of one panel of the Court of Appeals is binding on all other panels, unless overturned by a higher court, *In re Appeal from Civil Penalty Assessed for Violations of the Sediment Pollution Control Act*, 379 S.E.2d 30, 36–37 (N.C. 1989), and (2) there is an automatic right of review by the Supreme Court only if the case directly involves a constitutional question, or if there is a dissent in the Court of Appeals, N.C. GEN. STAT. § 7A-30 (2011). The result is that any subsequent plaintiff raising the same issue decided in either *Sylva Shops* or *Isbey* should lose in the trial court and in the Court of Appeals. Moreover, the decision of the Court of Appeals should be unanimous, meaning that only if a petition for discretionary review is granted will the plaintiff have the opportunity to present the issue to the Supreme Court. *Id.* § 7A-31 (providing discretionary review by the Supreme Court only if the case is of "significant public interest," "involves legal principles of major significance," or if "[t]he decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court"). Few plaintiffs will be likely to bear the costs in time and expense in the

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A lease is a conveyance with promises attached, or putting it the other way around, "[a] lease is a contract which contains both property rights and contractual rights."[92] At the time *Dumpor's Case* was decided, the property aspect of leases was uppermost, so the rights of the lessee as owner of an estate in land were emphasized and restraints on the alienation of that estate discouraged. With the passage of time, the focus of the law shifted toward contract, with its emphasis on the intention of the parties.[93] While the abolition of the Rule in Dumpor's Case is a belated application of contract principles to the construction of covenants against transfer—of practical significance only to a lessor who neglects to require an express agreement from the assignee or subtenant—the increasing emphasis on the contractual aspect of leases inevitably benefits the party with the most bargaining power, typically the lessor. Unless the covenant against transfer expressly imposes a requirement of reasonableness, a lessor may refuse permission to transfer without explanation, and if the lessor's market power is sufficiently strong, the lessor may even secure an exemption from the ordinary duty to mitigate damages.

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hopes of having that opportunity. For a proposal to provide more effective review of the decision of a single panel of the Court of Appeals, see John V. Orth, *Why the North Carolina Court of Appeals Should Have a Procedure for Sitting En Banc*, 75 N.C. L. REV. 1981 (1997).

92. Strader v. Sunstates Corp., 500 S.E.2d 752, 756 (N.C. Ct. App. 1998).

93. This shift in the law of leases was only a specific instance of a general reconceptualization of legal relations in contractual terms. For further examples, see John V. Orth, *Contract and the Common Law*, *in* THE STATE AND FREEDOM OF CONTRACT 44 (Harry N. Scheiber ed., 1998).