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William H. Cotter

EFFECT OF LEASEHOLD PROVISIONS REQUIRING THE LESSOR'S CONSENT TO ASSIGNMENT

After more than two weeks of unproductive inquiry, H and his wife W think they finally have found an apartment that suits their needs. It includes such desirable features as two bedrooms, fireplace, tile bath, and a view at a reasonable price. The only drawback is that the landlord requires a lease. H and W explain to the landlord that they are only going to be in the area six months and are therefore wary of entering into a two year lease. Nevertheless, the landlord remains adamant, assuring them that all his leases contain a provision for assignment. He produces a lease form, signs it, and hands it to H. H reads the document carefully; his fears are somewhat allayed when he notices that the form being used is approved by the local real estate association.

Since the assignment provision is crucial, H reads it two or three times: "[T]he lessee agrees not to underlet the whole or any part . . . nor assign this lease nor any rights hereunder . . . without the written consent of the lessor."[1] This provision does not appear hazardous; all it requires is the landlord's written permission before an assignment is completed. To H, this seems like a completely reasonable reservation; besides, the apartment is just perfect and his wife is anxious to get settled. Anticipating no trouble six months hence when he will actually ask the landlord for permission, H signs the lease.

We find, in this all-too-realistic hypothetical, many of the recurring inequities inherent in the lessor-lessee relationship. Because of the unequal bargaining power between the parties, there is none of the give and take so necessary to the drafting of a fair contract. The result: a standard form lease, designed to protect the landlord's rights while waiving those of the tenant. One of the terms most frequently found in such a lease, and the immediate object of our concern, is the provision requiring the landlord's written consent to assignment.[2]

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1. NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, SHORT FORM LEASE § 3.

2. Mention should be made of three topics that are outside the scope of this discussion but nevertheless deserve further inquiry: (1) The effect of various state statutes that condition valid leasehold assignments upon receiving the landlord's consent. *E.g.*, TEX. REV. CIV. STAT. ANN. art. 5237 (1962): "A person renting said lands or tenements shall not rent or lease the same during the term of said lease to any other person without first obtaining the consent of the landlord, his agent or attorney." (2) Leaseholds wherein a "special relationship" between the lessor and lessee might inherently condition assignment upon receiving the landlord's consent. *E.g.*, Gerould Co. v. Arnold Constable & Co., 65 F.2d 444 (1st Cir. 1933). (3) The evolving application of the law in the area of cooperative apartments. *Compare* Mowatt v.

This note is organized into three parts. The first provides definitions of the three standards constantly employed by courts in construing restrictions that condition assignment upon obtaining the landlord's consent. The second investigates the present state of the substantive law; each of the four most frequently encountered restrictive provisions is considered individually. The third part presents analytical arguments for both judicial and legislative change in the law.

I. Introductory Definitions

From the outset, it is essential that the reader distinguish the following terms:

Arbitrary

" 'Arbitrary' means '[d]epending on will or discretion,' [and] not governed by any fixed rules or standards."[3]

Good Faith

"Good Faith . . . [is] the actual existing state of the mind . . . without regard to what it should be from given legal standards of law or reason."[4] In conventional usage, the term "good faith" has a generally accepted meaning; it is usually understood to depict honesty of purpose or the intention to satisfy one's duty or obligation.[5]

Reasonable

"Arbitrary considerations of personal taste, sensibility, or convenience do not constitute the criteria of the landlord's duty under an agreement [stipulating that consent to assignment will not be unreasonably withheld]. Personal satisfaction is not the sole determining factor. Mere whim or caprice, however honest the judgment, will not suffice. . . . The standard is the action of a reasonable man in the landlord's position."[6]

In interpreting the term "reasonable," courts tend to take the view that there are very few relevant factors (rent, terms of lease, financial condition of assignee, etc.) that a landlord can take into consideration

1540 Lake Shore Drive Corp., 385 F.2d 135 (7th Cir. 1967), *with* Weisner v. 791 Park Ave. Corp., 6 N.Y.2d 426, 160 N.E.2d 720, 190 N.Y.S.2d 70, *rev'g* 7 App. Div. 2d 75, 180 N.Y.S.2d 734 (1958).

3. Paul v. Board of Zoning Appeals, 142 Conn. 40, 44, 110 A.2d 619, 621 (1955), *quoting* WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1942).

4. Wright v. Mattison, 59 U.S. (18 How.) 50, 59 (1855).

5. People v. Nunn, 46 Cal. 2d 460, 468, 296 P.2d 813, 818 (1956).

6. Broad & Branford Place Corp. v. J.J. Hockenjos Co., 132 N.J.L. 229, 232, 39 A.2d 80, 82 (Sup. Ct. 1944) (citations omitted).

when determining whether to give his consent to assignment; it may therefore be said that the word "reasonable" is generally given a strict interpretation. In one case,[7] the landlord sued for possession of the premises after the tenant had sublet to one of the landlord's business competitors. The lease contained a provision conditioning subletting upon first obtaining the landlord's consent, which the landlord agreed not to unreasonably withhold. When the tenant had proposed to sublet to the business competitor, the landlord had refused to consent. In upholding the sublease, the court stated that if the landlord had wished to prevent the subletting of the premises to a business competitor, he should have expressly stated so in the lease; since he did not do so, his objection to the subtenant was arbitrary and unwarranted.[8]

II. The Present State of the Law

In addition to the general restrictive provision contained in our hypothetical lease, there are three hybrids often encountered. These provisions apparently can be traced to tenants' lawyers who, confronted with adverse judicial decisions, sought to insure greater rights for their clients. Such attempts have met with varying degrees of success.[9]

This section is not designed to provide detailed knowledge of the law of any particular state, but is intended, instead, to be a general introduction to present case law that will allow the reader to follow the arguments propounded in section III.

A. *"The lessee agrees not to assign without first obtaining the lessor's written consent."*

Cases have almost universally held that this provision (*A*) gives the landlord a right to be as arbitrary and unreasonable as he wants in withholding consent.[10] The bizarre result in *Dress Shirt Sales, Inc. v. Hotel Martinique Associates*[11] provides a vivid example. The tenant, under a 10 year lease and unable to continue in business, located

7. Edelman v. F.W. Woolworth Co., 252 Ill. App. 142 (1929).

8. *Id.* at 145.

9. It should be noted that in the absence of a restrictive provision, the common law provided a tenant with an almost completely unfettered freedom to assign. *E.g.*, Everly Enterprises, Inc. v. Altman, 54 Cal. 2d 761, 356 P.2d 199, 8 Cal. Rptr. 455 (1960). This paper is concerned with provisions that derogate from that freedom.

10. *E.g.*, Richard v. Degan & Brody, Inc., 181 Cal. App. 2d 289, 5 Cal. Rptr. 263 (1960); Friedman v. Thomas J. Fisher & Co., 88 A.2d 321 (D.C. Mun. Ct. App. 1952); Jacobs v. Klawans, 225 Md. 147, 169 A.2d 677 (1961); Segre v. Ring, 103 N.H. 278, 170 A.2d 265 (1961); Muller v. Beck, 94 N.J.L. 311, 110 A. 831 (Sup. Ct. 1920); Durand v. Lipman, 165 Misc. 615, 1 N.Y.S.2d 468 (Mun. Ct., Borough of Manhattan 1937); Alwen v. Tramontin, 131 Wash. 78, 228 P. 851 (1924).

11. 12 N.Y.2d 339, 190 N.E.2d 10, 239 N.Y.S.2d 660 (1963), *aff'g* 16 App. Div. 2d 899, 228 N.Y.S.2d 807 (1962).

what he thought was a suitable assignee and asked his landlord for consent. The landlord refused, saying that the proposed assignee's business was unsuitable for the building. The tenant, unable to find anyone who was "suitable," in desperation explained his financial predicament to the landlord. The landlord replied he would be willing to cancel the lease—for a payment of $30,000. Having no choice, the tenant relucantly agreed. In the meantime, however, the landlord apparently had a remarkable change of heart, for no sooner had the money been paid than the landlord rented the location to the same "unsuitable" assignee earlier proposed by the tenant. Understandably outraged, the erstwhile tenant sued to recover the $30,000. Although the court found the landlord's conduct reprehensible, recovery was denied. The provision was found to give the landlord the right to withhold his consent "arbitrarily, for any reason or no reason."[12]

Except for dictum in a Massachusetts district court case,[13] and an apparently controlling decision in Louisiana,[14] this harsh rule is accepted everywhere.[15]

B. *"The lessee agrees not to assign without first obtaining the lessor's written consent, but such consent will not be withheld if a satisfactory assignee is proposed."*

This provision is susceptible to three interpretations. The first is illustrated by the California case of *Kendis v. Cohn*,[16] where the court stated:

> The general rule in cases where the agreement calls for performance by one party to the satisfaction of the other is that the party to be satisfied is the sole judge of its own satisfaction, subject only to the limitation that he must act in *good faith*.[17]

The second position is best expressed in *Underwood Typewriter Co. v. Century Realty Co.*,[18] where the court explained that the landlord's refusal would have to be based on more than mere caprice and whim. The opinion stressed that courts, in interpreting such a provision, would require the landlord to act with reason.[19]

The third position gives the landlord an unqualified right to with-

12. 12 N.Y.2d at 342, 190 N.E.d at 12, 239 N.Y.S.2d at 662.

13. *See* Granite Trust Bldg. Corp. v. Great Atl. & Pac. Tea Co., 36 F. Supp. 77, 78 (D. Mass. 1940).

14. Gamble v. New Orleans Housing Mart, Inc., 154 So. 2d 625 (La. Ct. App. 1963).

15. See cases cited note 10 *supra*.

16. 90 Cal. App. 41, 265 P. 844 (1928).

17. *Id.* at 66, 265 P. at 854 (emphasis added). *See* Millers Mut. Cas. Co. v. Insurance Exch. Bldg. Corp., 218 Ill. App. 12 (1920).

18. 220 Mo. 522, 119 S.W. 400 (1909).

19. *Id.* at 526, 119 S.W. at 403.

hold his consent and therefore seems to make no distinction between provisions of this type and those described in the previous section.[20]

C. *"The lessee agrees not to assign without first obtaining the lessor's written consent, but such consent will be given once certain enumerated acts are done."*[21]

Few decisions could be found interpreting such clauses, but this is probably because such a provision presents an obvious condition precedent, thereby leading to infrequent court contests.[22] All ascertainable opinions, however, seemed to apply a standard of reasonableness.[23]

D. *"The lessee agrees not to assign without first obtaining the lessor's written consent, such consent not to be unreasonably withheld."*[24]

Naturally enough, since it is expressly called for, the standard of reasonableness is always applied when this limitation is used.[25] Courts,

20. Grossman v. Barney, 359 S.W.2d 475, 476 (Tex. Ct. Civ. App. 1962), in which the Texas statute, set out in note 2, *supra*, was not controlling because of an explicit provision that consent would be given if an acceptable tenant were proposed. *Cf.*, Dress Shirt Sales, Inc. v. Hotel Martinique Associates, 12 N.Y.2d 339, 342, 190 N.E.2d 10, 11, 239 N.Y.S.2d 660, 662 (1963): "It is settled that, unless the lease provides that the lessor's consent shall not be unreasonably withheld, a provision against subleasing without the lessor's consent permits the lessor to refuse arbitrarily . . . ."

21. This provision is also found in another form: "[B]ut such consent will not be withheld if an assignee of the same reputation and financial responsibility as the lessee is proposed."

It might seem that these restrictions are not much different from that discussed just previously, calling for consent if a "satisfactory" assignee is proposed. The author of an annotation in 31 A.L.R.2d 831 (1953) felt the same way and actually did combine them. The cases, however, indicate that there are concrete differences in interpretation. *Compare* Reuling v. Sergeant, 93 Cal. App. 2d 241, 208 P.2d 1046 (1949), *with* Kendis v. Cohn, 90 Cal. App. 41, 265 P. 844 (1928).

22. One such case, however, was Reuling v. Sergeant, 93 Cal. App. 2d 241, 208 P.2d 1046 (1949). The assignment provision stated that consent would not be withheld from "anyone equally as financially and morally responsible as the lessee." The lessor refused even to meet the proposed assignee, a schoolteacher. The lessee brought a suit for damages, alleging that the schoolteacher was sufficiently financially and morally responsible, but the court felt that this allegation was inadequately proven and found for the lessor.

23. *See* Gelino v. Swannell, 263 Ill. App. 235 (1931); Ettinger v. Canby Corp., 189 Misc. 235, 70 N.Y.S.2d 588 (Mun. Ct., Borough of the Bronx 1947); Reisberg v. Ownit Realty Corp., 133 Misc. 156, 231 N.Y.S. 42 (Mun. Ct., Borough of Manhattan 1928).

24. For a different treatment of the subject see Annot., 31 A.L.R.2d 831, 835 (1953).

25. *E.g.*, Haritas v. Goveia, 345 Mass. 774, 188 N.E.2d 854 (1963); Nassif v. Boston & Me. R.R., 340 Mass. 557, 565, 165 N.E.2d 397, 401-02 (1960); Arlu Associ-

however, do not agree whether or not a tenant should have a right of action against his landlord for damages arising out of an unreasonable refusal to consent.[26]

The majority position,[27] based on common law and traceable to England,[28] is founded on a semantic distinction. A clause that "such consent not to be unreasonably withheld" is not considered to be a covenant by the landlord, but a qualification of the tenant's agreement not to assign without consent. There is, therefore, no action for damages. Nevertheless, the tenant can assign without consent, leaving the question of the landlord's reasonableness to court determination should the landlord decide to press the matter, seek specific performance of the contract, or secure a declaratory judgment that the refusal was, in fact, unreasonable and thereafter assign without consent.[29] On the other hand, a clause worded in a slightly different manner, "the landlord agrees that he will not unreasonably withhold consent," is likely to be interpreted as a covenant by the landlord and hence a basis for damages.[30]

A number of recent decisions have found the above distinction repugnant to modern contract principles and allow an action for damages in both instances:[31] "To rely upon technical syntax, nicety of expression, or semantics as determinative would seem to defeat the intention of the parties as expressed in the lease, and be contrary to the

ates v. Rosner, 14 App. Div. 2d 272, 220 N.Y.S.2d 288 (1961); Butterick Pub. Co. v. Fulton & Elm Leasing Co., 132 Misc. 366, 229 N.Y.S. 86 (Sup. Ct., N.Y. County 1928); Treloar v. Bigge, L.R. 9 Ex. 151 (1874).

26. *Compare* Mann v. Steinberg, 188 Misc. 652, 64 N.Y.S.2d 68 (Sup. Ct., N.Y. County 1946), *with* Singer Sewing Mach. Co. v. Eastway Plaza, Inc., 5 Misc. 2d 509, 158 N.Y.S.2d 647 (Sup. Ct., Monroe County 1957).

27. *E.g.*, Kendis v. Cohn, 90 Cal. App. 41, 265 P. 844 (1928); Butterick Pub. Co. v. Fulton & Elm Leasing Co., 132 Misc. 366, 229 N.Y.S. 86 (Sup. Ct., N.Y. County 1928).

28. *Compare* Treloar v. Bigge, L.R. 9 Ex. 151 (1874, *with* Sear v. House Property & Inv. Soc'y, 16 Ch. D. 387 (1880), *and* Ideal Film Renting Co. v. Nielsen, [1921] 1 Ch. 575.

29. Mann v. Steinberg, 188 Misc. 652, 64 N.Y.S.2d 68 (Sup. Ct., N.Y. County 1946), *see* Kendis v. Cohn, 90 Cal. App. 41, 265 P. 844 (1928).

30. *See* Hedgecock v. Mendel, 146 Wash. 404, 263 P. 593 (1928); Ideal Film Renting Co. v. Nielsen [1921] 1 Ch. 575; Treloar v. Bigge, L.R. 9 Ex. 151 (1874). This semantic distinction is not confined to cases arising under this fourth type of restrictive provision; it has arisen under provisions *B* and *C* as well. Kendis v. Cohn, 90 Cal. App. 41, 265 P. 844 (1928) (provision *B*); Broadway & 94th St., Inc. v. C. & L. Lunch Co., 117 Misc. 440, 190 N.Y.S. 563 (Mun. Ct., Borough of Manhattan 1921) (provision *C*).

31. *See* Haritas v. Goveia, 345 Mass. 774, 188 N.E.2d 854 (1963); Broad & Branford Place Corp. v. J.J. Hockenjos Co., 132 N.J.L. 229, 39 A.2d 80 (1944); Arlu Associates v. Rosner, 14 App. Div. 2d 272, 220 N.Y.S.2d 288 (1961); Rock County Sav. & Trust Co. v. Yost's, Inc., 36 Wis. 2d 360, 153 N.W.2d 594 (1967).

modern concept of contract law."[32] Regardless of the position adopted by a particular jurisdiction on damages,[33] it appears that the burden is always upon the tenant to show lack of reasonableness.[34]

III. Arguments for Changing the Law

The need for readily available places of business is overshadowed only by the even greater need for adequate housing; as prices continue to skyrocket, more and more people are being thrown into the rental market. All too frequently, as in our hypothetical, they are faced with a standardized contract of adhesion. There is no opportunity to negotiate terms; the contract is placed before them and they must either take it or leave it. If they leave it and go elsewhere, they will only run into the same contract again, and again, and again. Often tenants lack education in legal niceties and cannot afford to obtain legal advice. They must rely on their own experience, and in this area such reliance often proves to be a drastic mistake. Experience teaches most people that men are reasonable beings; consequently, most people expect that a lease will be governed by standards of reasonableness. They are unprepared to appreciate the intentionally devious traps laid for them by leasehold provisions that condition assignments upon first obtaining the landlord's consent. To expect them to be prepared would be clearly fatuous.

Why is it that leases provide that "the lessee agrees not to assign without first securing the lessor's written consent," rather than "the lessee agrees that he will not assign under any circumstances"? Courts give essentially the same interpretation to both provisions. Could it be that one is chosen over the other because it is more pleasant sounding, allowing the landlord to more easily dupe the legally ignorant prospective tenant? There appears to be no other reason.

The following discussion will proceed under the premise that the qualifying clauses found in restrictions *B*, *C*, and *D* ("such consent to be given if a satisfactory assignee is proposed," "such consent to be given when certain enumerated acts are done," and "such consent not to be

32. Arlu Associates v. Rosner, 14 App. Div. 2d 272, 275, 220 N.Y.S.2d 288, 291 (1961).

33. It will be particularly interesting to see whether the next California decision in this area adopts the majority or minority view. Kendis v. Cohn, 90 Cal. App. 41, 265 P. 844 (1928), a majority position case, rests in large measure upon the reasoning of Sarner v. Kantor, 123 Misc. 469, 205 N.Y.S. 760 (Sup. Ct., Monroe County 1924), which has subsequently been overruled in New York by Singer Sewing Mach. Co. v. Eastway Plaza, Inc., 5 Misc. 2d 509, 158 N.Y.S.2d 647 (Sup. Ct., Monroe County 1957).

34. *See, e.g.*, Broad & Branford Place Corp. v. J.J. Hockenjos, 132 N.J.L. 229, 233, 39 A.2d 80, 82 (Sup. Ct. 1944); *cf.* Reuling v. Sergeant, 93 Cal. App. 2d 241, 208 P.2d 1046 (1949).

unreasonably withheld") are inserted in leases for one purpose—to circumscribe a landlord's otherwise absolute right to refuse his consent. They are, therefore, solely for the tenant's benefit and may be waived by him at his option. This supposition is important since it then follows that arguments directed toward changing the legal effect of restriction *A* ("the lessee agrees not to assign without first obtaining the lessor's written consent") will be equally and immediately applicable to restrictions *B*, *C*, and *D*. With this in mind, the following arguments will focus only upon alteration of the legal effect of example *A* restraints.

The present law can be changed either by the judiciary or by the legislature. Whoever makes the change can choose from one of two standards: the standard of "reasonableness," or the standard of "good faith." Each alternative will be considered in turn.

A. Judicial Change

1. *Adoption of a Standard of Reasonableness*

Two of the basic axioms of property law are that restraints upon alienation are looked upon with disfavor[35] and that covenants are most strictly construed against the party to be benefited.[36] In view of these principles it is mysterious that in this one narrow area of property, assignment of leasehold interests, courts have historically been so favorably disposed toward landlords. Commenting upon an early California case,[37] one author said:

> [T]he policy of construing strictly restrictions upon alienation seems to have been overlooked by the court in [this] case . . . . It is generally recognized that restrictions of this character are not favored and are to be construed strictly against the lessor . . . . A particular mode of alienation is not to be regarded as prohibited unless it is "by words which admit of no other meaning."[38]

Nevertheless, California courts continue to ignore the general policy of strict construction of restraints upon alienation when they are construing leasehold provisions that require the landlord's written consent to an assignment.

In poignant contrast, examples of strict construction are readily found in several closely related areas. For example, despite an explicit restriction against assignment, California courts have held that there is still a right to sublet,[40] a right to assign a sublease that does not itself

35. 6 R. POWELL, THE LAW OF REAL PROPERTY ¶ 848 (1969).

36. *E.g.*, Corbin's Estate v. McKey & Poague, Inc., 105 Ill. App. 2d 120, 245 N.E.2d 117 (1969).

37. Weintraub v. Weintraub, 98 Cal. App. 690, 277 P. 752 (1929).

38. 18 CALIF. L. REV. 90-99 (1930) (footnotes omitted).

39. See text accompanying notes 11-34 *supra*.

40. Stevinson v. Joy, 164 Cal. 279, 128 P. 751 (1912).

carry a provision against assignment,[41] and a right to give a mortgage on a leasehold.[42] California courts have further held that covenants against assignment do not apply to involuntary assignments such as a sale of the lessee's interest under execution,[43] or to involuntary assignments after the lessee's death.[44] A covenant forbidding assignment without the lessor's consent was found not to be broken when the leasehold interest was assigned, without consent, by the administrator of a deceased lessee's estate.[45] And perhaps most amazing was a decision holding that, despite a provision against assignment, the transmission of a lessee's leasehold interest by will did not give the lessor the right to terminate the lease for breach of contract.[46] England has gone even further, holding that an outright prohibition against assignment was not contravened by an equitable assignment to a trustee.[47]

Decisions of this type are important for two reasons. First, they allow a sharp contrast to be made between the rigor with which the covenants in these cases are construed, and the laxity noted earlier in the interpretation of covenants prohibiting assignment without consent. Second, they implicitly belie the proposition that a landlord should necessarily have a right to retain control by covenant over who is to inhabit his premises. Further, once it is agreed that the primary interest being protected by the courts is the landlord's right to determine who is to inhabit his property, it becomes readily apparent that the only real difference between the above cases of "involuntary" assignment and those of "voluntary" assignment discussed in section II is one of probability—the slight probability that one will die, become bankrupt, or go insane, versus the stronger probability of a voluntary assignment. It is submitted that in this particular area, probability alone is not an adequate foundation for a rule of law.

Once we have seen how strictly restrictive covenants can be interpreted against the landlord, discussion of two minority-rule cases previously mentioned in section II-A[48] proves enlightening. Interpreting a section of the Louisiana Civil Code,[49] the court in *Gamble v. New*

41. Cross v. Bouck, 175 Cal. 253, 165 P. 702 (1917).

42. Chapman v. Great W. Gypsum Co., 216 Cal. 420, 14 P.2d 758 (1932).

43. Farnum v. Hefner, 92 Cal. 542, 28 P. 602 (1891).

44. Joost v. Castel, 33 Cal. App. 2d 138, 91 P.2d 172 (1939).

45. *Id.*; Stratford Co. v. Continental Mortgage Co., 74 Cal. App. 551, 241 P. 429 (1925).

46. Burns v. McGraw, 75 Cal. App. 2d 481, 171 P.2d 148 (1946).

47. Gentle v. Faulkner, [1900] 2 Q.B. 267.

48. See text accompanying notes 13-14 *supra.*

49. LA. CIV. CODE art. 2725 (West 1952): "The lessee has the right to underlease, or even to cede his lease to another person, unless this power has been expressly interdicted.

"The interdiction may be for the whole, or for a part; and this clause is always

Orleans Housing Mart, Inc.[50] said:

> But there is an important difference and distinction between an absolute prohibition of any right to sublease, a right which would exist under the article in the absence of a prohibition or express "interdiction," and the provision relative to subleasing in the instant case. Here the lessee is simply not permitted to sublet without the written consent of the lessor. This does not *prohibit* or *interdict* subleasing. To the contrary, it permits subleasing provided only that the lessee first obtain the written consent of the lessor. It suggests or connotes that, when the lessee obtains a subtenant acceptable or satisfactory to the lessor, he may sublet. At the time the lease was entered into the lessee had every reason to believe that he could sublet upon producing a proper subtenant. Otherwise the provision would simply prohibit subleasing. Under these circumstances the lessor cannot unreasonably, arbitrarily or capriciously withhold his consent.[51]

A similar restriction was construed in *Granite Trust Building Corp. v. Great Atlantic & Pacific Tea Co.*[52]

> It is settled law that unless restricted by the terms of the lease, a lessee may assign or sublet. A covenant permitting such assignment with the consent of the lessor, therefore, is a covenant for his benefit and is to be construed more strongly against him . . . . It would seem to be the better law that when a lease restricts a lessee's rights by requiring consent before these rights can be exercised, it must have been in the contemplation of the parties that the lessor be required to give some reason for withholding consent.[53]

It is difficult to escape the logic of this reasoning.

There is yet another basis for changing the present law. As most recently evidenced by the new Truth-in-Lending regulations,[54] it is becoming more apparent that public policy requires that the unwary consumer be protected from his own ignorance.[55] The doctrine of caveat emptor is progressively being banished from the marketplace. It would appear that if public policy requires people not be fooled by deceptive

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construed strictly."

As interpreted, the Louisana code section is stricter than the common law, for where the common law calls for covenants being construed against the *lessor*, the Louisiana position is that they be construed against the *lessee*. *See* Owens v. Oglesby, 123 So. 2d 521 (La. Ct. App. 1960). For the common law position, see note 9 *supra*.

50. 154 So. 2d 625 (La. Ct. App. 1963).

51. *Id.* at 627. It is particularly noteworthy that the court reached this decision while following the Louisiana practice of construing restrictive provisions as strictly as possible against the *lessee*. See note 49 *supra*.

52. 36 F. Supp. 77 (D. Mass. 1940).

53. *Id.* at 78.

54. 12 C.F.R. §§ 226.1-.12, 34 Fed. Reg. 2002-2011 (1969).

55. *E.g.*, Exec. Order No. 11,349, 3 C.F.R. § 278 (1967). *See generally Symposium on Consumer Protection*, 64 MICH. L. REV. 1197 (1966).

packaging or labeling,[56] and that if public policy requires people be made all too painfully aware of the precise rate of interest they are paying on their loans and credit purchases,[57] then public policy should also dictate that leases state their terms in forthright, undeceptive language. Once it is established that public policy demands protection of the unwary lessee, then provisions such as those found in Civil Code section 1667 and 1668,[58] permitting the courts to invalidate contracts found to be contrary to the policy of the law, could be invoked to overrule existing cases.

Finally, unless we seek to protect arbitrariness for its own sake, it is most difficult to find any rational basis for the current landlord-tenant policy. A sublease never releases the original tenant (who apparently was in every way acceptable to the landlord) from liability for what the sublessee does or fails to do;[59] and if the leasehold contract is correctly drawn, the same can be true of assignments.[60] Surely, a policy calling for reasonable consideration of prospective assignees and sublessees would not unduly compromise the landlord. A California court, however, evidently disagrees; in *Mattei v. Hopper*[61] the court said:

> [I]t would seem that the factors involved in determining whether a lessee is satisfactory to the lessor are too numerous and varied to permit the application of a reasonable man standard as envisioned by this line of cases. Illustrative of some of the factors which would have to be considered in this case are the duration of the leases, their provisions for renewal options, if any, their covenants and restrictions, the amounts of the rentals, the financial responsibility of the lessees, and the character of the lessees' businesses.[62]

On its face the argument is self-defeating. After stating that the reasonable man standard would not be applicable, the court goes on to list numerous factors that appear perfectly adapted to application of just such a standard. It seems dubious, at best, to argue that though the reasonable standard can readily be applied to each factor indi-

56. *E.g.*, Fair Packaging and Labeling Program, 15 U.S.C. §§ 1451-61 (Supp. IV, 1969); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 343 (1964).

57. *See* 12 C.F.R. §§ 226.1-.12, 34 Fed. Reg. 2002-2011 (1969).

58. CAL. CIV. CODE § 1667: "That is not lawful which is: 1, Contrary to an express provision of law; 2. Contrary to the policy of express law, though not expressly prohibited; or, 3. Otherwise contrary to good morals." CAL. CIV. CODE § 1668: "All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

59. *E.g.*, Dixie Fire & Cas. Co. v. Esso Standard Oil Co., 265 N.C. 121, 143 S.E.2d 279 (1965).

60. *E.g.*, Peiser v. Mettler, 50 Cal. 2d 594, 328 P.2d 953 (1958).

61. 51 Cal. 2d 119, 330 P.2d 625 (1958).

62. *Id.* at 123, 330 P.2d at 627.

vidually, it will become cumbersome when applied to several in concert.[63]

2. *Good Faith Standard*

It is startling to discover that the standard of good faith does not apply to leaseholds. After all, this standard is implied in all transactions under the Uniform Commercial Code[64] and recent tort cases are applying it in the sale of homes.[65] The landlord is needlessly provided with a formidable weapon when he is permitted not only to utilize adhesion contracts, but also to purposely employ misleading language in these contracts. The adoption of a standard of good faith would avoid such contemptible circumstances.

All of the arguments presented for application of the reasonable standard to example *A* restrictions are similarly useful in advocating the good faith standard. Moreover, since the good faith standard is less far-reaching than the reasonable standard, it might prove more acceptable. The adoption of this standard would make restrictions on assignments more palatable by arresting such blatant abuse of discretion as was demonstrated by the *Dress Shirt* case.[66]

The adoption of good faith as the standard, however, embraces one inherent flaw. If the lessor is required to evidence good faith when the tenant requests permission to assign, he should further be called upon to evidence good faith in all his dealings with the lessee. This would necessarily require good faith at the time the leasehold contract was entered into. It is difficult to perceive how a lessor could claim to be dealing in good faith, yet require the lessee to obtain consent prior to assignment of the lease, when the lessor knew full well that such language would probably mislead the lessee into believing that the standard to be employed would be one of reasonableness. It appears, therefore, that if carried to its logical conclusion, the adoption of a standard of good faith would require the lessor to make his lessee aware of the hidden trap in the lease. Such candid disclosure might persuade many tenants to refuse to sign leases until provision was made for the application of the reasonableness standard. If this were the case, the good faith standard might tend to be somewhat self-defeating.

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63. This is especially apparent in view of the strict interpretation courts give to "reasonable." See text accompanying note 8 *supra.*

64. UNIFORM COMMERCIAL CODE § 1-203.

65. *See* Seeger v. Odell, 18 Cal. 2d 409, 115 P.2d 977 (1941); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

66. See text accompanying notes 11-12 *supra.*

B. Legislative Change

1. *Analysis of Current and Proposed Enactments*

Congress and the California legislature have already enacted laws circumscribing a landlord's heretofore arbitrary and unreasonable right to reject a prospective assignee.[67] Outlawing discrimination on the basis of race, color, religion, or national origin is, of course, a good start; but the effort should not end there. As indicated above, even if leasehold restrictions were not couched in deceptive, misleading terms (and it is difficult to argue that they are not), there is still little to justify the present landlord-oriented policy. The law can more adequately protect the landlord's interest by preserving the liability of the original lessee irrespective of assignments or subleases.[68]

In 1927, the English Parliament decided it could no longer countenance a landlord retaining arbitrary power over assignment and subletting under the guise of a seemingly innocuous leasehold provision requiring his consent. It therefore legislated an implied condition of reasonableness into every such lease.[69]

The proposed American Model Residential Landlord-Tenant Code would go much further in regard to subleases but makes no provision at all for restrictions on assignments.[70] The subletting section prohibits

67. 42 U.S.C. §§ 3601-31 (Supp. IV, 1969); CAL. CIV. CODE §§ 51-53.

68. See text accompanying notes 59-60 *supra.*

69. Landlord-Tenant Act of 1927, 17 & 18 Geo. 5, c. 36, § 19, sched. 1: "In all leases whether made before or after the commencement of this Act containing a covenant, condition or agreement against assigning, underletting, changing or parting with the possession of demised premises or any part thereof without license or consent, such covenant condition or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject—

(a) to a provision to the effect that such license or consent is not to be unreasonably withheld, but this provision does not preclude the right of the landlord to require payment of a reasonable sum in respect to any legal or other expenses incurred in connection with such license or consent . . . ."

70. AMERICAN BAR FOUNDATION, MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-403 (Tent. Draft, 1969):

"Section 2-403 Sublease and Assignments

(1) Unless otherwise agreed in writing, the tenant may sublet his premises or assign the rental agreement to another without the landlord's consent.

(2) A written rental agreement may restrict the tenant's right to assign the rental agreement in any manner. The tenant's right to sublease the premises may be conditioned on obtaining the landlord's consent, which shall be withheld upon reasonable grounds as specified in subsection (5); no further restriction on sublease shall be effective.

(3) When the rental agreement requires the landlord's consent to sublease, the tenant may secure one or more persons who are willing to sublet the premises. Each such prospective subtenant shall make a formal, written, signed offer to the landlord, containing all of the following, except as the landlord may waive one or more items:

(a) the prospective subtenant's full name and age.

all restrictions except one that conditions subletting upon obtaining the landlord's consent.[71] In giving or withholding his consent, the landlord must be reasonable, and "reasonable grounds" are narrowly defined and specifically enumerated.[72]

Each of the codes appears to have strong and weak points. The comment to the Model Code fails to indicate why restrictions on assignment are not treated much the same as those on subletting. They should be. The English Act does not go as far as the Model Code, which pro-

(b) the prospective subtenant's marital status.

(c) the prospective subtenant's occupation, place of employment, and name and address of employer.

(d) the names and ages and relationships to the prospective subtenant of all persons who would normally reside in the premises.

(e) two credit references, or responsible persons who will confirm the financial responsibility of the prospective subtenant.

(f) the names and addresses of all landlords of the prospective subtenant from whom he has leased or rented during the prior three years, [or, if more than three, any three of them].

(4) Within [10] days, not including legal holidays, after such a written offer has been delivered or mailed [by certified mail] to the landlord, the landlord may reject the prospective subtenant by delivering or mailing [by certified mail] to the tenant a written reply signed by the landlord which shall contain one or more specific grounds for the rejection.

If the landlord fails to reply within the [10] days, or if his written reply fails to give reasonable grounds for rejecting the prospective subtenant, the tenant may, at his option, terminate the rental agreement by giving written notice to the landlord within [90] days following the lapse of the [10] day reply period or the receipt of the rejection reply which fails to state any reasonable grounds for rejection.

[Thirty] days after such notice is delivered or mailed [by registered mail] to the landlord, the rental agreement shall terminate. The tenant shall be subject to no damages, penalty, or forfeiture of any part or all of his security deposit or any other payment for such termination.

(5) Reasonable grounds for rejecting a proposed subtenant include any facts which reasonably indicate that the proposed tenancy would be less favorable to the landlord than the existing tenancy, including, but not limited to:

(a) Insufficient credit standing or financial responsibility.

(b) Number of persons in the proposed household.

(c) Number of persons under 18 in the proposed household.

(d) Unwillingness of the prospective tenant to assume the same terms as are included in the existing rental agreement.

(e) Proposed maintenance of pets.

(f) Proposed commercial activity.

(g) Written information signed by a previous landlord, which shall accompany the rejection, setting forth abuses of other premises occupied by the prospective subtenant.

No consideration of race, creed, sex, religion, political opinion or affiliation, or national origin may be relied on by the landlord as reasonable grounds for rejection.

(6) In any proceeding in which the reasonableness of the landlord's rejection shall be in issue, the burden of showing reasonableness shall be on the landlord."

71. *Id.* subsection (2).

72. *Id.* subsection (5).

hibits all but reasonable restraints on subletting.[73] The Act's provisions dealing with restraints both on subletting and on assignment could therefore be strengthened. Finally, the Model Code places the responsibility for showing unreasonableness upon the landlord.[74] This might prove burdensome and encourage groundless harrassment suits. The English ruling that places the responsibility upon the tenant[75] has much in common with the present American position;[76] it appears to be preferable to the Model Code.

Conclusion

Today, tenants are being victimized on three separate levels. First, they are coerced by the shortage of urban housing into signing standard-form leases that have been drafted to serve the interests of the landlord and deceptively worded to trap the prospective tenant into making unintended concessions. Second, mesmerized by the god of stare decisis, courts seem unable to throw off the cloak of ill-reasoned precedents and strike out with better reasoned and more just decisions. Finally, their ears and mails filled with the unremitting cries of organized lobbyists, legislators forget the common man, whose votes elected them, and unnecessarily procrastinate in banishing caveat emptor from the marketplace.

It is submitted that the only fair standard to employ in interpreting these restrictive lease provisions is the reasonable contemplation of the parties, and that this reasonable contemplation of the parties will almost always call for the adoption of the standard of the reasonable man.[77]

Beginning with a realistic hypothetical, we have run through the present state of the law, the four frequently encountered types of assignment restrictions, and the possibilities for judicial and legislative change. Along the way, we have observed the traps laid for the unwary tenant, and we have attributed their unfortunate longevity to the recurrent judicial nonapplication of established axioms of property law.

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73. *Compare id.* subsection (5), *with* Landlord-Tenant Act of 1927, 17 & 18 Geo. 5, c. 36, § 19, sched. 1. See note 63 *supra.*

74. *Id.* subsection (6).

75. Shanly v. Ward, 29 T.L.R. (n.s.) 714 (C.A. 1913); Mills v. Cannon Brewery Co., [1920] 2 Ch. 38.

76. See text accompanying note 34 *supra.*

77. *But see* Millers Mut. Cas. Co. v. Insurance Exch. Bldg. Corp., 218 Ill. App. 12, 18 (1940): "It is insisted that the word 'satisfactory' as used in the lease means what would satisfy the mind of a reasonable man. Our attention has not been directed to any case . . . in support of this contention. We may agree with the contention that the covenant not to assign or sublet the premises is to be strictly construed against the lessor. But this would not authorize us to hold that the term as used in the lease should be given a meaning not intended by the parties thereto."

There are abundant reasons and sufficient foundations for changes in this area of landlord-tenant law. Let us hope they will be forthcoming.

*William H. Cotter**

* Member, Second Year Class.