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ASSIGNMENT AND SUBLEASE

LEON H. WALLACE*

I. INTRODUCTION

As a general proposition, the courts of both England and the United States agree that a transfer of a tenant's entire interest in the premises is an assignment, not a sublease, and that the transferee is substituted as the tenant of the landlord in place of the transferor.¹ Conversely, a transfer of an estate in the premises less than that which the transferor himself has, with a reversion left in him, is not an assignment, but a sublease, making the transferee the tenant of the transferor.² The fact that


the interest transferred is of a duration but slightly less than the interest of the tenant is immaterial.3

Unfortunately, these basic principles, so firmly intrenched, so unfailingly reiterated in our law, are applied, especially in this country, only to the most obvious and simple situations. Thus there is complete accord that when a lessee leases his estate under exactly the same terms, and with the duties of the sub-tenant running to the original lessor, an assignment has been effected.4 Likewise, if he leases to the sub-tenant for only a fraction of the remainder of the term, a sublease has been effected.5 The distinction is important. An assignee is in privity of estate with the lessor, and consequently has the benefit of and is directly liable to the lessor on all covenants in the lease which run with the land.6 He is not liable to the lessee unless the lessee has been held by the lessor to account for a breach of the covenants by the assignee.7 A sublessee, however, is liable only to the lessee according to the terms of the sublease, and does not come in privity of estate with the lessor.8 The difficulty to another who holds at will, it is a sublease. Austin v. Thomson, (1863) 45 N. H. 113; Cross v. Upson, (1864) 17 Wis. 638. So if one with a term of a year or more lets to hold from year to year. Austin v. Thomson, (1863) 45 N. H. 113; Peirse v. Sharr, (1828) 2 Man. & R. 418. And a tenant from year to year, having a possibility of a term of indefinite duration, creates a sublease when he leases to one for years. Oxley v. James, (1844) 13 Mees. & W. 209, 153 Eng. Repr. 86; or to one to hold from year to year. Curtis v. Wheeler, (1830) 1 Moody & M. 493, 173 Eng. Repr. 1235; Pike v. Eyre, (1829) 9 Barn. & C. 909, 109 Engl. Repr. 338; see also 20 Col. L. Rev. 95 (1920).


See supra, note 1; see also 20 Col. L. Rev. 94 (1920); 29 Yale L. J. 568 (1920); 37 Harv. L. Rev. 630 (1924).

See supra, note 2.


See Tiffany, Real Property, I, (1920) No. 54, No. 55, pp. 159-174; Dunlap v. Bullard, (1881) 131 Mass. 161; Davis v. Vidal, (1912) 105 Tex. 444,
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The difficulty is: What have the courts regarded as a sufficient retention to constitute a reversionary estate? To answer this, it will be necessary to analyze the situation on the basis of what the courts have done, instead of accepting altogether what they have incidentally said.

II. THE ENGLISH AUTHORITIES

The effect of an instrument in form and intent a sublease, but for a term covering a remainder of the original term, seems to have been questioned for the first time in a nisi prius case,\(^9\) in which it was held that if the lessee reserves the rent to himself or granting over, it is an underlease, and not an assignment, though he parts with the whole term. Shortly after,\(^10\) an instrument, inadmissible in evidence as a lease, because unstamped, was admitted as a declaration of trust, and not as a lease, because nothing was "reserved" to the lessor. Almost a century later,\(^11\) Parke observed that *Poulton v. Holmes*\(^12\) was a doubtful authority, and advised the parties to settle; but during this same period, in four different cases,\(^13\) it was held that the lessee who had sublet for the remainder of the term, or his representatives, might recover the rent reserved in the sublease. In two of the cases\(^14\) the action was by one to whom the lessee, after subletting, had assigned his rights under the sublease. The actions, being in the name of the assignee, would not have been sus-


\(^12\) (1721) 1 Str. 405, 93 Engl. Repr. 596.


tainable if the demands had been merely choses in action. The judges construed the cause of action to be "rent," even though a reversion was absent; since it was "rent," it was not affected by the rule forbidding assignment of a chose in action. It should be noted, however, that the judges in these cases clearly regarded "rent" as something different than a "reversionary interest."

There is, likewise, a decision that the lessee who had "subleased" for a term coextensive with his own was entitled to re-enter for a breach of condition on a power of re-entry contained in the sublease given by him. The court observed that the absence of reversion was no objection, because it was analogous to the feoffment in fee rendering rent. It may be urged that these cases are not of necessity in conflict with the principle that a "sublease" for the residue of a term is an assignment, because the defendant in each of these cases was liable for rent to the original lessee by virtue of his express covenants, in spite of the fact that he occupied the position of assignee. The case of Pollack v. Stacy, however, cannot be disposed of by that argument.

However, there are decisions which reveal the other side of the picture presented by the foregoing cases. It was held that one deriving title from the sublessee for the residue of the term is entitled, as an assignee of the original lessee, to hold the original lessor for breach of covenants in the initial lease. Likewise, a sublessee for the residue of the term is liable to the original lessor for rent reserved by the original lessee, and an assignee of a lessee is not liable to the original lessor on the covenants of a lease after the lessee has made a lease for the

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16 See note 13, supra.


19 Beardman v. Wilson, (1868) L. R. 4 C. P. 58; see note 18, supra. Accord, Lewis v. Baker, (1905) 1 Ch. 46. See also Hallen v. Speath, (1923) A. C. 684; Cottey v. Richardson, (1851) 7 Exch. 143 (reservation of new rent).
remainder of his term, because the transaction amounted to an assignment. Nor does mere reservation of the same rent constitute a revision. A sublease for a period co-extensive with, or longer than, the sublessor's term operates as an assignment. And if a lessee grants for more than the length of his term, reserving rent, an assignment has been effected, and it is doubtful whether such assignor would have any remedies for recovering the rent.

In passing, it should be noted that the English courts never considered the possibility of (1) reservation of a different rent to the sublessor, (2) reservation of right of surrender at end of term, (3) reservation of right of reentry, or (4) any other rights such as are ordinarily reserved in a lease, being a reversionary estate sufficient to effect a sublease as to the head lessor.

It is evident from the review of the English cases that there are actually two groups of holdings:

(1) in one group the sublessee is liable to the original lessee;
(2) in the other group the sublessee is liable to the original lessor.

Therefore, whether the sublessee intended to or not, he has undertaken a double liability, and even though the original lessor may recover the rent from him, nevertheless the original lessor may have his action, and the first recovery would seem to be no bar. Nor have the English courts ever hinted that

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23 See notes 18, 19, 20, and 21, supra, as to rent; see notes 15 and 17 as to right of re-entry. See also Thorn v. Woolcombe, (1832) 3 Barn. & Adol. 586, 110 Engl. Repr. 213; Selby v. Robinson, (1788) 15 N. C. C. P. 370, 2 T. R. 758, 100 Engl. Repr. 409.

24 See notes 13, 14, 15 and 16, supra.

25 See notes 17, 18, 19, 20, 21, and 22, supra.

26 As between the lessee and sublessee, the relation of landlord and tenant may exist. Pollock v. Stacey, (1847) 9 Q. B. 1033, 115 Engl. Repr. 1570; Poultney v. Holmes, (1721) 1 Str. 405, 93 Engl. Repr. 596. And as between lessor and sublessee, the sublease is held to operate as an assignment. Wollaston v. Hakewill, (1841) 3 Man. & G. 297, 322, 133 Engl.
any agreement by the original lessee to pay the rent due on the
original lease would be implied, as has been done in the United
States. The only protection to the sublessee is that the original
lessor cannot collect from him if he, the original lessor, has col-
clected from the original lessee.

Why did these latter cases hold that the sublease operated as
an assignment? The court reasoned that the sublessee holds of
the revisioner, and not of the lessee, because there can be no
such thing as tenure between the owner of the term for years
and one who has transferred it. Thus a “privity” is established
between the sublessee and the reversioner. The intent of the
parties therefore has no effect, unless it be reasoned that the sub-
lessee has been allowed to assume all the duties which the parties
intended, plus the duties which the law would have imposed.
However, as to the real intent, the courts have ignored it, as
witness the cases where there was a condition with a right of re-
entry on breach thereof reserved.

Inconsistent with the theory of the first group of cases cited is a group of cases denying to the original lessee the privileges
granted by certain statutes in favor of landlords to collect rent,
although regarding the parties as occupying the landlord-tenant
relation as far as a civil action by the lessee against the sub-
lessee. In short, these cases uphold the view that a lease of the

Repr. 1157. See Beardman v. Wilson, (1868) L. R. 4 C. P. 57. It seems
probable that if the lessor were paid, the amount paid might be deducted
from that due the lessee. See Wollaston v. Hakswill, supra. But, if the
lessee has been paid, since the transaction operated as an assignment, that
should be no defense to an action by the lessor against the sublessee.

27 People v. Shorb (1878), 14 Hun. (N. Y.) 112. See also Adams v.
Beach, (1850) 1 Phila. 99, 7 Leg. Int. 178.

28 See note 25, supra.
29 See note 17, supra.
30 See notes 9-15, incl., supra.
Clarke, (1804) 1 Bos. & Pul. 111, 127 Engl. Repr. 379; Rankin v. Newsam,
(1828) 1 Hud. & Br. 70; Fawcett v. Hall, (1832) Al. & Nap. 248; and see also,
Porter v. French, (1846) 9 Ir. L. 514; Jones v. O'Grady, (1850) 13 Ir.
L. 292; Overruling Hogan v. Fitzgerald, (1828) 1 H. & B. 77, n.; Lessee of
Coyne v. Smith, (1826) Batty, 90 n. And see Leominster Canal Co. v. Cow-
ell, (1798) 1 B. & P. 213, 126 Engl. Repr. 865; Smith v. Mapleback, (1786)
Repr. 968 (a lease, and no assignment, but since a demise of the entire in-
terest, lessee had no right to distrain); Pascoe v. Pascoe, (1837) 3 Bing.
(N. C.) 895, 132 Engl. Repr. 656; see note 17, supra; Langford v. Selmes,
entire interest by a lessee is an assignment, but allow the parties thereto, by express contract, to set up a sublease as between themselves; but aside from such agreement, the original lessee does not have power of ouster.

Likewise, if a tenant for years leased for a period of less than his own term, and then his reversion and the fee became united in one person, the rent on the sublease was lost, because the reversion was gone. The courts, while declaring this, decried it as an unrighteous defense. Subsequently this phase of the situation was corrected by statute.

The principle of assignment was also upheld in a decision that an underlessee was not liable for impeachment for waste, because that immunity was set out in a provision of the head lease.

As a result of this review and the cases cited, it may safely be observed that:

(1) the weight of English authority favors the view that a lease by the lessee for the whole of his unexpired term operates as an assignment, but there has been considerable authority that is, at least, inconsistent with the general principle;

(2) in making some of the decisions cited as authority for the proposition supported by the majority, the courts themselves have decried that proposition.

(1857) 3 K. & J. 220, 69 Engl. Repr. 1089, see note 19, supra; and also Slough Picture Hall Co. v. Wade, (1916) 32 T. L. R. 542, 544. (A purported assignment of a lease void as an assignment because not by deed may be good as a subletting, subject to this, that the sublessor having no reversion loses his right of distress so far as it depends on the ownership of the reversion.) See Tiffany, Landlord and Tenant, I, (1912) No. 151, at p. 914.


33 Stat. 4 Geo. II, c. 28, s. 6; Cousins v. Phillips, (1865) 3 H. & C. 892, 159 Engl. Repr. 786; Extended to crown lands by Stat. 8 and 9 Vict. c. 99, s. 7. Effect broadened by Stat. 7 and 8 Vict. c. 76, s. 12, which was shortly repealed by a more efficient Stat. 8 and 9 Vict. c. 106 (when reversion expectant on a lease * * * shall be surrendered or merged, the estate * * * shall * * * be deemed the reversion expectant on the same lease.)


35 See Darling in 16 Amer. L. Rev. 16 (1882) for an excellent discussion of this.
III. THE AMERICAN AUTHORITIES

In the United States, as in England, the courts have generally recognized the principle that a reversionary interest in the landlord is essential to effect a sublease. In this country, we find two distinct groups of cases, and a new principle, hinted at in the English cases. This third principle threatens either to supplant one of the old groups which are based upon technical exceptions, or to form a third group, with a reasonable possibility of becoming paramount. For the purpose of analysis, the three classifications are:

1. Nothing short of a reservation of some length of time of the lessee's (sublessee's) estate will be sufficient to amount to a reversion, and so effect a sublease.

Because of the number of jurisdictions involved, and, except for New York and Massachusetts, because of the relative isolation of the decisions within the several jurisdictions, this phase of the review is presented by a doctrinal, rather than a chronological analysis. The chronology, within any jurisdiction may be secured easily from the footnotes.

See note 2, supra.

(a) Cases directly in favor of the proposition, or tending to support it, are cited.

(1) Alabama.
See Johnson v. Moxley, (1927) 113 So. 656.

(2) California.

(3) Florida.
C. N. H. F., Inc. v. Eagle Crest Development Co., (1930) 128 So. 844 (Fla.). A reservation of different rent and right of re-entry is not sufficient to prevent assignment when entire term is passed.

(4) Illinois
Sexton v. Chicago Storage Co., (1889) 129 Ill. 318, 21 N. E. 920, 16 Amer. St. Rep. 274; Taylor v. Marshall, (1912) 255 Ill. 545, 99 N. E. 638. These cases expressly repudiate the contention that a reservation of anything less than a part of the term is sufficient to prevent an assignment.
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(5) Indiana.

*Indianapolis Mfg. and Carpenters Union v. Cleveland, C., C. & St. L. R. Co.*, (1873) 45 Ind. 281 (rent); *Liebschutz v. Moore*, (1880) 70 Ind. 142 (parties called grant a sublease, reserving rent to lessee, but with stipulation for surrender to head lessor). But see *Indian Refining Co. v. Roberts*, (1932) 181 N. E. 283.

(6) Kentucky.

See *Cook v. Jones*, (1894) 96 Ky. 283, 28 S. W. 960, 29 L. R. A. 92, *post*; note 39 (c) and comment.

(7) Maine.

For discussion, see *City of Waterville v. Kelleher*, (1928) 141 Atl. 70 (neither assignment nor sublease).

(8) Michigan.

See *Lee v. Payne*, (1856) 4 Mich. 106; but see note 39 (c), *post*; see also *Fratcher v. Smith*, (1895) 104 Mich. 537, 62 N. W. 832 (language not necessary to decision, however).

(9) Minnesota.

*Cameron-Tobin Baking Co. v. Tobin*, (1908) 104 Minn. 333, 116 N. W. 838 (rent, right of re-entry, surrender); *Craig v. Summers*, (1891) 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236 (right of re-entry); *Ohio Iron Co. v. Auburn Iron Co.*, (1896) 64 Minn. 404, 67 N. W. 221 (rent, right of re-entry); *Davidson v. Minnesota Loan and Trust Co.*, (1924) 158 Minn. 411, 197 N. W. 832, 32 A. L. R. 1418 (rent, surrender, right of re-entry; good digest of cases). These cases expressly hold that only a reservation of a part of the term itself is sufficient to effect a sublease, and repudiate reservation of rent and rights of re-entry.

(10) Missouri.

See *St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. R. Co.*, (1896) 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607 (written intent of parties will not control; here instrument called a sublease was held to be really an operating contract).

(11) New Jersey.


(12) New York.

(13) Oklahoma.
See Holden v. Tidwell, (1913) 37 Okla. 553, 133 Pac. 54.

(14) Texas.
See Campbell v. Cates, (1899) 51 S. W. 268; see also Davis v. First National Bank of El Paso, (1924) 258 S. W. 241 (here nothing was reserved, and the only intent manifested was the fact that the instrument was termed a “sublease”; held, an assignment. But see Davis v. Vidal, (1912) 105 Tex. 444, 151 S. W. 290, 29 L. R. A. 92, post, note 40 (f), where the question of reservation was in issue).

(15) United States.

Weander v. Claussen Brewing Ass'n., (1906) 42 Wash. 226, 84 Pac. 735, 7 Ann. Cas. 536, 114 Amer. St. Rep. 110 (right of re-entry; held, nothing less than part of the term will amount to a reversion, even as between the parties); Sheridan v. Doherty, (1919) 105 Wash. 561, 181 Pac. 16 (right of re-entry; here the term of the sublease was greater than the lessee's term); see also McLennan v. Grant, (1894) 8 Wash. 603, 36 Pac. 682 (where terms are uncertain). Cf. Barnes v. Standard Oil Co. of Calif., (1932) 9 Pac. (2) 1096.

(b) A covenant not to assign is not enough to create a reversionary interest. Spear v. Fuller, (1835) 8 N. H. 174; Shattuck v. Lovejoy, (1857) 74 Mass. 204; cf. Farnum v. Heffner, (1889) 79 Calif. 575, 21 Pac. 955. (As to the effects of such covenants where there is an assignment, see People's Bank v. Mitchell, (1878) 73 N. Y. 406; Butler v. Manny, (1873) 52 Mo. 497; 36 Harv. L. Rev. 624 (1923). Contra, University Club v. Deakin, (1914) 265 Ill. 257, 106 N. E. 790. See 7 Am. L. Rev. 240 (1872).

2. Even though the entire term is granted, a reservation of the following incidents, frequently reserved in leases, will be sufficient to effect a sublease (if the parties so intended?)

(1) A covenant to surrender, or specifically, to surrender on the last day of the sublease, which is also the last day of head lease.\(^{39}\)

All these cases are sometimes cited as authority for the major proposition for this footnote. It is submitted that, with two exceptions, they are not exactly in point for the proposition for which they are cited. The lessee made an outright sale of all he had, reserving nothing, but the sublessee failed to realize that he acquired only what the sublessor had, which included a duty to pay rent to the head lessor. There was no intent to create a sublease. The exceptions are *Cook v. Jones*, *supra*, and *Hockersmith v. Sullivan*, *supra*, where the lessee reserved rent.

\(^{39}\) (To assist understanding, all cases which also include one or more of the other exceptions are starred, and those in which the entire reversionary interest is the proposition for which they are cited are marked thus.

(a) Iowa.
*Collamer v. Kelley*, *supra* (1861) 12 Iowa 319, 323. (A different rent was also involved here. It is doubtful whether the statement on the sublease question was necessary (or possible) in view of the decision.)

(b) Massachusetts.
*Dunlap v. Bullard*, *supra* (1881) 131 Mass. 161. (Reservations of rent, right of re-entry were also involved. This court emphasized the covenant to surrender.)

(c) New York.
*Piggott v. Mason*, *supra* (1829) 1 Paige (N. Y.) 412. (The covenant to surrender is implied by lessee’s (sublessor’s) right to refuse permission to remove buildings at end of term, and his right to renew lease with head lessor in his own name; in fact, surrender before the end of the term of the head lease would be necessary so the building could be removed.) *Post v. Kearney*, *supra* (1849) 2 Comst. (N. Y.) 394. (There was something akin to a possibility of reverter here in the covenant to surrender if and when the buildings were burned, but the court did not seem to consider this.) *Martin v. O’Connor*, *supra* (1865) 43 Barb. (N. Y.) 514. (This also included rent and right of re-entry); *Collins v. Hasbrouck*, *supra* (1874) 56 N. Y. 157 (the court made some general statement not necessary to the decision); *Ganson v. Tift*, *supra* (1877) 71 N. Y. 48; *Schumer v. Murwitz*, *supra* (1905) 96 N. Y. S. 1026. (The court here assumed that the surrender by the sublessee would leave a fragment of a day in the sublessor.) *Phelan v. Kennedy*, *supra* (1919) 173 N. Y. S. 687; cf. *Woodhull v. Rosenthal*, (1875) 61
(2) A reservation of a right to re-entry for breach of condition.40

N. Y. 382. (The court held that this case did not come within rule of Post v. Kearney, supra, because the covenant was not to surrender to the sublessor specifically.) But there is an assignment if there is a covenant to surrender to the lessee at the same moment of time that he was bound to surrender to the lessor; here the court could not assume that the sublessee was to surrender sometime during the day. Herzig v. Blumenkrohn, (1907) 122 App. Div. 756, 107 N. Y. S. 570. See also Keteltas v. Coleman, (1854) 2 E. D. Smith, 408. (A covenant not to assign is not violated by letting for the whole term with provision for surrender on last day); see also 20 Col. L. Rev. 95 (1920).

40 (a) California.

Kendis v. Cohn, (1928) 265 Pac. 844; Backus v. Duffy,* (1930) 284 Pac. 954. (This case cannot be reconciled with Smiley v. Van Winkle, (1856) 6 Calif. 606, supra, note 38 (a) (2)).

(b) Massachusetts.

Dunlap v. Bullard,* (1881) 131 Mass. 161 (see note 39 (b), supra). Essex Lunch v. Boston Lunch Co.,† (1918) 229 Mass. 557, 118 N. E. 899. (The court talked in terms of something akin to a possibility of reverter, and regarded this in itself as a sufficient reversionary interest.)

(c) Michigan.

Fratcher v. Smith,* (1895) 104 Mich. 537, 62 N. W. 832. (The statements on sublease were not necessary to the decision of the issues raised.)

(d) Montana.

Saling v. Flesch,‡ (1929) 277 Pac. 612. (Rent also was reserved, but the decision was based entirely on the right of re-entry. The court observed that the intention of the parties will govern. However, the language applies here only to the relation of the lessee and sublessee. The case of Wilson v. Cornbrooks, (1927) 6 N. J. Misc. 614, 137 Atl. 819, was relied on heavily; unfortunately that case had been reversed before this decision was rendered.)

(e) New Jersey.

Wilson v. Cornbrooks,‡ (1927) 6 N. J. Misc. 614, 137 Atl. 819. (The decision is directly in point for the proposition. However, this decision was reversed by the Court of Errors and Appeals, (1928) 140 Atl. 292.)

(f) New York.

Martin v. O'Conner,* (1865) 43 Barb. (N. Y.) 514. (A covenant for different rent and one to surrender were also considered.) Collins v. Hasbrouck,* (1874) 56 N. Y. 157 (see note
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(3) A reservation of rent different from that in the head lease.\footnote{41}

\footnotesize

\textit{(g) Texas.}

\footnotesize
41 (a) Iowa.
\textit{Collamer v. Kelley},* (1881) 12 Iowa 319 (see note 39 (a), supra).

\textit{(b) Massachusetts.}

\textit{(c) New York.}

\textit{(d) New Jersey.}
\textit{Wilson v. Cornbrooks}, (1927) 6 N. J. Misc. 614, 137 Atl. 819; this decision was reversed, however, in (1928), 140 Atl. 292.

\textit{(e) Oklahoma.}
\textit{See Baptist General Convention v. Wright}, (1929) 276 Pac. 777.
(4) Other new covenants, not contained in the head lease, which are advantageous to the lessee (sublessor).  

(5) A granting of only a physical portion of the original leasehold, without regard to any of the above exceptions.

(f) Pennsylvania.

*Drake v. Lacoe,* (1893) 157 Pac. 17, 27 Atl. 538, 25 L. R. A. 349. (Held that assignment for increased consideration with 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 between lessor and lessee, but is an express reaffirmance of it.) *McLaren v. Citizens' Oil & Gas Co.*, (1900) 14 Pa. Super. Ct. 167.

(g) Texas.

*H. L. Null & Co. v. J. S. Garlington & Co.*, (1922) 242 S. W. 507. (Here was also a covenant that in case of default in any of the other covenants, the sublessee could enforce performance in any of the modes provided by law.)

(h) United States.

*United States v. Hickey,* (1872) 17 Wall. (U. S.) 9, 13, 21 L. Ed. 59. (The statement of the court was not necessary to the decision of the question involved.)

42 *Piggott v. Mason,* (1829) 1 Paige (N. Y.) 412; *McLaren v. Citizen's Oil & Gas Co.*, (1900) 14 Pa. Super. Ct. 167. See also *Post v. Kearney,* (1849) 2 Comst. (N. Y.) 394. A number of other cases also involve other covenants, but the courts did not seem to give them serious consideration. And see *H. L. Null & Co. v. J. S. Garlington & Co.*, (1922) 242 S. W. 507. See also *Webb v. Jones,* (1927) 263 Pac. 538 (Calif.). Lessee made conditional sale of lease reserving title.

43 (a) Massachusetts.

*Patton v. Deshon,* (1854) 67 Mass. (1 Gray) 325 (a vague and unsatisfactory decision); *McNeill v. Kendall,* (1880) 128 Mass. 245, 35 Am. Rep. 373 (here the lessee, in transferring his leasehold estate in part of the premises for the residue of the term, by an instrument in form a sublease, also granted easements in the part retained by him; the court held in effect that because, on the conveyed of one parcel, as appurtenant thereto, easements in another parcel are granted, the whole interest in the premises conveyed is not disposed of. The reasoning is unsatisfactory, and purports to be based on *Patton v. Deshon,* supra.

(b) Michigan.

*Fratcher v. Smith,* (1895) 104 Mich. 537, 62 N. W. 332, 29 L. R. A. 92. (Here a different rent was reserved; dictum.)
(6) A combination of two, or more, of the above mentioned exceptions.\(^4^4\)

(c) New York.


(d) Ohio.

*Fulton v. Stuart*, (1825) 2 Ohio 215, 15 Am. Dec. 542, and note. (No intent on part of sublessor here to reserve anything.)

(e) Washington.

*Shannon v. Grindstaff*, (1895) 11 Wash. 536, 40 Pac. 123.

\(^4^4\) (a) Iowa.

*Collamer v. Kelley*, (1861) 12 Iowa 319 (rent, surrender). (See note 39 (a), *supra*.)

(b) Massachusetts.


(c) Michigan.

*Fratcher v. Smith*, (1895) 104 Mich. 537, 62 N. W. 832 (rent, portion granted.) (See note 38 (a), *supra*.)

(d) New York.

*Piggot v. Mason*, (1829) 1 Paige (N. Y.) 412 (rent, right of re-entry, different covenants); *Martin v. O'Conner*, (1865) 43 Barb. (N. Y.) 514 (rent, right of re-entry, surrender); *Collins v. Hasbrouck*, (1874) 56 N. Y. 157 (rent, right of re-entry, surrender); *Ganson v. Tift*, (1877) 71 N. Y. 48 (right of re-entry, surrender); *Koppel v. Tilyou*, (1900) 31 N. Y. Civ. Proc. R. 185, 70 N. Y. S. 910 (rent, right of re-entry, portion granted); *Schumer v. Hurwitz*, (1905) 49 Misc. Rep. 121, 96 N. Y. S. 1026 (right of re-entry, surrender); *Phelan v. Kennedy*, (1919) 173 N. Y. S. 687 (right of re-entry, surrender). For comments on these cases, see notes 39 (c), 40 (f) and 41 (c), *supra*. But where the term of the sublease extended beyond the original term, the sublease was held to operate as an assignment, although it contained reservations of rent, right of re-entry and surrender. *Stewart v. Long Island R. Co.*, (1886) 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844. See also *Gillette Bros., Inc. v. Aristocrat Restaurant*, (1924) 239 N. Y. 87, 145 N. E. 748.

(e) Pennsylvania.


(f) Texas.

(7) A power of cancellation by the lessee (sublessor),\textsuperscript{45} creating in the sublessor an executory interest akin to a possibility of reverter.

3. The manifested intention of the parties will govern, so long as that adds no hazard to the rights of the head lessor.\textsuperscript{46}

Before proceeding to the analysis of the American variations from the strict rule which are grouped under sections 2 and 3 of the above classification, it seems advisable to mention the question of the possible double liability of the sublessee, already discussed in the review of the English authorities. In American cases holding an attempted sublease an assignment, there are frequent dicta that, as between the lessee and the sublessee, the relation of landlord and tenant may exist.\textsuperscript{47} It seems doubtful whether the courts would hold the sublessee for double liability, where the head lessor has been paid by him. At least three cases are authority that the amount paid could, apparently, be deducted from the amount due to the lessee.\textsuperscript{48} However, the writer was unable to find any decisions in a situation where neither the lessee nor sublessee had paid the lessor. The mere liability to the lessor should not be available to the sublessee as a defense in an action by the lessee for the rent, because the lessor may

\textsuperscript{45} (a) Indiana.

\textit{Indian Refining Co. v. Roberts}, (1932) 181 N. E. 283.


ASSIGNMENT AND SUBLEASE

elect to hold the lessee. But if the rent is paid to the lessee, it would certainly destroy the effect of an assignment if such payment to the lessee were a defense to the subsequent action by the lessor for the payment of the rent reserved in the head lease.

IV. Review of the American Variations

A study of the exceptions which have been regarded by American courts as sufficient reversionary interest to prevent an assignment being effected reveals a distinction never used by the English authorities, never contemplated by the common law. If a comparison must be made, these cases have inclined more toward the principle of *Baker v. Gostling* and *Pollack v. Stacey* (where it was held that the lessee who had sublet for the remainder of his term might recover the rent reserved in the sublease) than to that of *Beardman v. Wilson* (where it was held an assignee of a lessee was not liable to the original lessor on the covenants of a lease, after the lessee had made a lease for the remainder of his term, because the transaction amounted to an assignment). Inevitably, this leads to the question: Are these exceptions valid in the light of reason, and in the light of the law laid down by the same courts when these incidents are involved in some other question of the law of real property? The exceptions will be discussed in order:

(1) A covenant to surrender as a reversionary estate.

As pointed out before, the courts have held that a covenant to surrender is a sufficient reversionary estate in land. However, the same courts have held that an attempt to lease for

49 The lessee remains liable to the lessor for the rent reserved in the original lease although the lease has been assigned. See 16 R. C. L. 845; note, 52 L. R. A. (N. S.) 968, 971; note, Ann. Cas. 1916 E, 788; Tiffany, *Landlord and Tenant*, I, (1912), § 151, at p. 915.

50 A discussion of the merits of the rule itself, which the cases in note 38 supra, support, will be made in Section V. This section is devoted to the exceptions introduced by the American courts and supported by the cases cited in notes 39-45, inc., supra.

51 Cases cited in notes 39-45, inc., supra.

52 See note 13, supra.

53 See note 13, supra.

54 See note 19, supra.

55 See note 41, supra.
longer than the lessee's term would constitute an assignment. The difficulty with the general proposition stated here is that the sublessee need not surrender until the same instant of time when the lessee is bound to surrender to his head lessor, with the result that nothing of the original term remains in the lessee. However, the New York courts have assumed that the parties to the sublease intended that a fragment of a day be left in the sublessor, and when the parties have made it impossible for this assumption to be made, the courts have declared an assignment. Other courts using this exception usually cite the New York cases. If this assumption is true, there is, of course, a reservation of part of the term, but the assumption is usually questionable, if not outright fictitious. If the sublessee is bound to surrender sooner, all courts would agree that a sublease had been effected. Again, no court, as far as the writer could find, has ever regarded such a covenant in itself as an estate in land; by its very nature, it is generally bound up with other reservations, and is regarded as a chose in action and "though it may give a right in personam against the transferee for breach of such covenant, it cannot well divest the property right otherwise vested in him for the whole term."

(2) A reservation of a right of re-entry for breach of condition as a reversionary estate.

The courts have likewise held that a reservation of a right of re-entry for breach of condition is a sufficient reversionary estate in land to prevent the effecting of an assignment. Ordinarily, however, a right of re-entry is regarded as a chose in action and

56 See Burns' R. S. 1926, (Ind.) § 13415. Conveyances of Greater Estate by Tenant For Life or Years. "A conveyance made by a tenant for life or years, purporting to grant or convey a greater estate than he possessed, or could lawfully convey, shall not work a forfeiture of his estate, but shall pass to the grantee or alienee all the estate which the tenant could lawfully convey." It is submitted that, in the light of this statute, if the rule were to be applied in Indiana, the attempt to convey more than the lessee had would make no difference, because he could only convey what he had, which would bring the case back within the exception.
58 Tiffany, Landlord and Tenant, I, (1912), § 151, at p. 913.
59 See note 40, supra.
not a reservation of any part of the original term,\(^60\) nor does it depend on a reversionary interest in the lessee.\(^61\) Certainly, at common law, rights of re-entry for breach and rights of reverter were not regarded as estates in land. In fact, their assignment or devise was expressly prohibited. The reason for this is lost in the obscurity which affects the entire question of assignment of choises in action under the early law.\(^62\) Whether or not the rule should be abandoned for lack of present necessity is not a question to be discussed here. The fact remains that the rule persists, except where it has been expressly changed by statute. And even where the rule as to assignability and devisability has been changed by statute, the right of re-entry or of reverter is not regarded as an estate in land. For almost a century, such rights have been assignable and devisable in England,\(^63\) but the English courts have never considered such rights as an estate in deciding cases which involve them.\(^64\) Most states now have statutes making contingent reminders and future executory interests as freely devisable and assignable as vested estates.\(^65\) In some states, these statutes have expressly included rights of


\(^{61}\) Contra, Cameron-Tobin Baking Co. v. Tobin, (1908) 104 Minn. 333, 116 N. W. 838. See also Ohio Iron Co. v. Auburn Iron Co., (1896) 64 Minn. 404, 67 N. W. 221. But these cases are expressly overruled in Davidson v. Minnesota Loan and Trust Co., (1924) 158 Minn. 411, 197 N. W. 833.

\(^{62}\) Ames, Disseisen of Chattels, 3 Select Essays Anglo-Am. Leg. Hist., 584, et seq. The courts have followed Coke (a Co. Litt. 214 a), attributing the rule to champerty and maintenance. But the rule is older than champerty and maintenance. The real reason was, probably, the inability of early law to conceive of the transfer of rights without a transfer of the thing in respect to which they existed. The rule persists, although the reasons have long ceased to have any force. See 13 Minn. L. Rev. 271 (1929); see also 8 Col. L. Rev. 142 (1908).

\(^{63}\) 8 and 9 Vict. cr. 106, § 6 (1843), and 1 Vict. ch. 26, § 3, (1837) allowing assignment before and after breach.

\(^{64}\) See Sect. II, supra.

\(^{65}\) Walsh, Future Estates in New York, (1913), § 13, p. 61 et seq.
re-entry and of reverter. In the absence of such statutes it is generally held, as in New York, that they cannot be assigned, conveyed or devised, following the common law rule. Here is an anomalous situation when the same jurisdictions which have held a right of re-entry to be a sufficient reversionary interest to prevent an assignment have consistently held that it is not a reversionary interest at all in every other situation where the question was involved. It is possible that this inconsistency has been recognized by at least one of the courts which had fostered it. The Indiana court in a recent case was logical and consistent in rejecting the right of re-entry as a reversionary estate in view of the Indiana attitude toward such rights.

(3) A reservation of rent different from that in the head lease as a reversionary estate.

Several courts have held that a reservation of rent by the original lessee is a sufficient reversionary interest to prevent an

66 For the effect of these statutes, see Bouvier v. Baltimore & N. Y. R. Co., (1902) 67 N. J. L. 281, 51 Atl. 781 (construed as applying to assignments before breach). See also Hoyt v. Ketcham, (1886) 54 Conn. 60, 5 Atl. 606; Los Angeles and Arizona Land Co. v. Marr, (1921) 187 Calif. 126, 200 Pac. 1051; and 37 Yale L. J. 530 (1928).


69 Indian Refining Co. v. Roberts, (1932) 181 N. E. 283.

70 See Martin v. Pace, (1841) 6 Blackf. (Ind.) 99; Michael v. Doe ex dem. Nutting, (1849) 1 Ind. 481; German Mutual Insurance Co. of Indianapolis v. Grim, (1869) 32 Ind. 249, 2 Am. Rep. 341; Steeple v. Downing, (1878) 60 Ind. 478; see also Buckley v. Taggart, (1878) 62 Ind. 236.
assignment. Rent is not generally regarded as a reversionary interest. Rent may be reserved upon a conveyance in fee, and the obligation to pay it will run with the land. Here again, some of the same courts holding that a reservation of rent is a reversionary interest are not consistent with their own decisions.

(4) Other new covenants as a reversionary estate.

The courts, in general, do not seem seriously to have considered these as sufficient in themselves, and only a few cases have stressed them, although a number of the courts seem to have considered the fact of their presence along with one of the foregoing exceptions. The same argument should apply here as has been applied to the other exceptions. These covenants are, in all other instances, regarded as choses in actions, and though they may give a right in personam against the transferee for breach of such covenants, this would not elevate them to the position of estates in land.

(5) A granting of only a physical portion of the original leasehold as reversionary estate.

This exception seems to have grown out of the confusion of a few courts between a portion of the premises and a portion of the term, the latter of which has otherwise always been contemplated, as a review of the cases demonstrates. It is submitted that logically the same rule should apply whether all the premises are granted or only a portion thereof, whatever the rule may be.

(6) A combination of two, or more, of the above exceptions as a reversionary estate.

If none of the above exceptions is an estate in land, a combination of them should not be unless an accumulation of things which are not estates in land become estates by sheer cumulative

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71 See note 41, supra.
73 See note 42, supra.
74 See note 43, supra.
75 See note 44, supra.
effect. If this is true, it is a new principle in the law of real property. The only way to give effect to this exception would be for the court to admit that the intention of the parties was allowed to govern, and that the cumulative effect was the strengthening of the evidence as to what that intention was.

(7) **A power of cancellation by the sublessee as a revisionary estate creating in the sublessor an executory interest akin to possibility of reverter.**

This is the principle on which a recent Indiana case is based, the court having logically and consistently rejected the other exceptions.76 This proposition is open to the same objection that has been voiced before. This is, according to generally accepted notions of legal principles, a power in personam, and not an estate in land. But, granting the exception, where did the Indiana court get this power of cancellation in the lessee (sublessor)? Surely a power in the sublessee to cancel is not a reversionary estate in the sublessor. While apparently not accepting the contention that the doctrine of mutuality, as applied in Indiana,77 would be pertinent, the court held that since the lessee had a three-year estate, and the sublessee had a three-year estate with a power of cancellation (which it exercised), therefore the lessee must have had something left. The court reasoned that this created a property interest in the lessee (sublessor),—something akin to a possibility of reverter, but which was, nevertheless, such an executory interest as the law would recognize. Granting this, the court has given effect, nevertheless, to another exception which is open to the same criticism as those which the court consistently and logically repudiated. The court purports to have found a sufficient estate to prevent an assignment. It is doubtful whether the court would regard it as an estate if the question arose directly. If anything, it would seem to be merely an executory interest in property, which may ripen into an estate. Here again, the court has abandoned the

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76 See Indian Refining Co. v. Roberts, (1932) 181 N. E. 283 (Ind.).

77 The Supreme Court of Indiana has made some original contributions to the doctrine of mutuality. Without regard to the merits of these contributions, and realizing that the Appellate Court is bound hereby, it seems that the Appellate Court was correct, even under the Indiana doctrine, in refusing, apparently, to apply the doctrine to the case under discussion.
idea of "a reversionary estate" in the sense of reserving a part of the term.\textsuperscript{78}

What have the courts been doing in these cases? The same courts which have called these exceptions sufficient reversionary interest to prevent an assignment have not considered them as reversionary interests except for this purpose. It seems reasonable to venture that in fact the courts were trying to give effect to the intention of the parties, without directly saying as much. Those courts which were logical perforce arrived at the opposite result. In effect, we find but two rules in the American decisions:

(1) A granting of the entire term is an assignment.

(2) A granting of the entire term is not an assignment if the parties did not so intend and if this would add no greater risk to the rights of the head lessor than he already had.

The courts have simply evaded stating the second rule and have thereby placed other courts in the position either of being illogical, or of flouting established rules. Apparently none has wanted to make the direct statement. There is, at least, a strong tendency to support it, as is testified to by those decisions where the courts have decided what they believe to be just, and then sought to justify their decision.

V. AN INSPECTION OF THE MAJOR PROPOSITION

It seems reasonable to assert that none of the exceptions stand the test of comparison with the main body of property law. If, as almost all courts have stated, a reservation of an estate is necessary, these exceptions must fail, unless there is a revision of the accepted concept of an estate throughout the body of property law.

If the exceptions fail, nothing is left except the rule itself, the application of which so many courts have studiously tried to avoid in order to render substantial justice to all the parties. If this is to be the result, it seems pertinent to examine this rule that a reservation of an estate is necessary to effect a sublease and to defeat an assignment, and to consider the reasons therefor.

Why have the courts been unable to say that a subtenant may hold under one who has conveyed his entire term? It is sub-

\textsuperscript{78} The court properly rejected the contention that the power of cancellation changed the term for years into one at will. See \textit{Brown v. Fowler},
mitted that the courts have reasoned thus: For a subtenant to hold under another, there must be privity. There can be no privity when the sublessor has no estate. Therefore the subtenant must be in privity with the head lessor.

This belief in the necessity of privity, as defined by the ancient law, has caused the courts to apply a rule which all too frequently achieved a harsh result. The only alternative led to the unsatisfactory exceptions already noted. In the sublease and assignment cases, the courts which have cleaved to the strict rule have done so under the shadow of privity, used synonymously with tenure.

In the whole field of property law, is the idea of privity used with the same strict connotation as it was used in the ancient days when it signified the relation of tenure? It is submitted that it is not. In order to dispel the unreasoning respect accorded to privity, it is necessary to digress briefly into other branches of property law.

The benefits and burdens of the covenants in a lease are transferred on a transfer of the entire term, so that the transferee in such case occupies the position of assignee, regardless of the intent of the parties, because, says the common law, privity of estate or tenure is created between the original lessor and the sublessee, and therefore they must look to each other for the performance of the mutual duties incident to the landlord-tenant relation. The cited case contained an answer and a rebuke to a note by Serjeant Manning, who asserted that the intent of the parties should govern.

Before the Statute of Quia Emptores tenure could be created on the conveyance of a fee, but that statute halted the practice. The statute only applied to estates in fee, but the subinfeudation of lesser estates, at least for a term of years, was not possible afterwards, because, apparently, it was not allowed before.

(1901) 65 Ohio St. 507; Lindley v. Raydure, (1917) 239 Fed. 928 (citing a number of cases); Rich v. Doneghey, (1918) 71 Okla. 204, 177 Pac. 86; 3 A. L. R. 352; Guffey v. Smith, (1914) 237 U. S. 101, 59 L. Ed. 856.


80 A note to King v. Wilson, 5 Man. & R. 157.

81 See note to Spencer's Case, Smith's Leading Cases, I, (9th Am. Ed.) 206. "The distinction between conveyance by way of subinfeudation and by way of assignment of estates in fee does not appear to have existed in the case of lessor 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 Poulney v. Holmes." See also, 16 Am. L. Rev.
What part does the principle of privity, or, in its strict sense, tenure, play in the subject of covenants running with the land? As a general rule, it is said that in order for covenants to run with the land, there must be privity between the parties. It is also said that no covenant which is a burden to the land will run with it, if such privity is lacking. But rent may be reserved on a conveyance in fee,\textsuperscript{82} although this is denied in England.\textsuperscript{83} The cases deciding this discarded the contention that such a reservation was subinfeudation. Likewise, in a conveyance of land by one who retains ownership of an adjoining parcel, covenants may be introduced qualifying the mode of user of the parcel, or imposing on the owner of one piece the performance of acts for the benefit of the other, which covenants will run with each parcel,\textsuperscript{84} the benefit with one, the burden with the other.

Here, certainly, there is no privity of estate in the strict common law sense of the term. While the courts still use the same terms, "privity" has been used to denote a broader concept than in its original use. In some cases, the courts admit that privity means tenure, and that there is no tenure between adjoining proprietors.\textsuperscript{85}

The companion proposition to the one that only in case of privity can covenants run is "that in case of landlord and tenant, the covenants relating to the estate bind everyone who holds the estate in privity with the landlord, that is, that the question of assignment or sublease is to be determined solely by inquiring whether in each case there would be a feudal tenure between the landlord and the lessee's transferee."\textsuperscript{86}

As indicated above, the test of privity, that is, tenure, has been discredited in one branch of property law, even though the courts still cling to the old terms. With the passing of the feudal

\textsuperscript{82} See note 72, supra.

\textsuperscript{83} See Rawle, \textit{Covenants of Title} (5th), ch. 10, p. 292; 16 Am. L. Rev. 32, 39.

\textsuperscript{84} See Tiffany, \textit{Real Property} (2nd) II, § 392, pp. 1412 ff., § 303, pp. 1416 ff., for collection of cases.

\textsuperscript{85} See Burbank v. Pillsbury, (1869) 48 N. H. 475; Rensselaer v. Hayes, (1859) 19 N. Y. 68; Norfleet v. Cromwell, (1870) 64 N. C. 1. ("The reason for the rule which founds it on privity of estate is arbitrary, and not a rule of reason, and may be dismissed as insufficient.") See note 84, supra.

\textsuperscript{86} See Darling in 16 Amer. L. Rev. 32, 41 (1882). For an excellent treatment of this, see Clark, \textit{The Doctrine of Privity of Estate in Connection with Real Covenants}, 32 Yale L. J. 123, 125 (1922).
system, and with it, the incident of fealty, the old idea was not necessary, and if strictly applied, would have impeded adjustment to changing conditions. There seems to be no vital reason why the fiction of feudal tenure should be perpetuated in the law of assignments and subleases. "We, in the United States have been readier to subordinate logic to utility. * * * The development is merely a phase of the assault, now extending along the entire line, upon the ancient citadel of privity."\(^{87}\)

It may be argued that he who has the beneficial enjoyment of the estate should pay the consideration therefor; but he who subleases for a single day less than the original term enjoys the estate while he holds it, and no court denies that such a holding is a sublease, with no liability to the head lessor, the "overlord." As to covenants which run with the land, it would seem to be as reasonable and as satisfactory if they were transferred only when the totality of interests of the lessee is transferred, rather than when the term alone is passed, and it would be immaterial whether this were done by a voluntary conveyance, or by operation of some rule of law. This could be, and as has been pointed out, is done by a regard of the intention of the parties as manifested by their acts.

VI. CONCLUSION

In an able dissenting opinion,\(^{88}\) it was said, "The characteristic difference between an assignment of his lease and underletting by the original tenant resides in the inquiry whether, as a result of the transaction, the primary lessee has transferred his whole and entire estate, and completely parted with his title, or has retained in himself some fragment or shred of his estate, either substantial or even formal and technical. An underletting implies a constituted relation of landlord and tenant between the parties contracting and that, in turn, the existence in the landlord of an estate superior to the leasehold, and out of which the latter is carved, for there can be no tenure held of one whose title is utterly destroyed. This rule prevails even over the apparent intention, not because that intention ceases to be the test and standard of interpretation, but because an impossible intention is never presumed in preference to one possible and

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\(^{87}\) Mr. Justice Cardozo, The Growth of the Law, p. 77.

operative between the parties. The rule in its origin under the feudal system had a substantial and beneficial force. To the superior lord a service of fealty was due from the tenant in virtue of his tenure; and if the lessee could part with the whole of his estate to one holding under him, the service of fealty was gone, and so, in that case, the new tenant was deemed to hold under the paramount title, as assignee of the lease, put in the place and room of the original tenant, and bound by his covenants to render his services. Of course, that useful result has gone out of the doctrine, and it remains with us simply a rule of legal logic, much less deserving of the power to override and pervert the discovered intention of the parties. As a consequence, a plain tendency to enforce that intention, even upon very narrow and technical grounds, has been developed. Originally, a reversion in the primary lessee of some fragment of his estate was needful to support a sublease. It was said that it might be a day, an hour, or even a minute, but must nevertheless be, and leave in the primary lessee a reversion having a tangible existence. But that reversion now may be purely technical, and the product of reasoning rather than of substantial fact. * * *

It is not necessary, however, to say whether the cases in our own state are in every respect correctly reasoned. It is quite obvious that they mean this, at least: that the contract of the parties construed according to their plain intention as expressed by it, shall prevail where, upon such construction, that contract is a possible one, and can be rendered effective in subordination to established legal rules; and that where a sublease is manifestly intended, the court will search diligently, and even closely, for some trace of a reversion to support it.”

Perhaps this rule of law does not come within the broad statement concerning outworn rules, of Mr. Justice Holmes. Under our system, the law of property should be fixed and certain. The attempt to perpetuate the statement of the rule that a part of the term must be reserved in order to prevent an assignment has not aided that certainty. “Judges have made worthy, if shamefaced efforts, while giving lip service to the rule, to riddle it with exceptions and by distinctions reduce it to a shadow.

89 “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” “The Path of the Law.” Collected Legal Papers, p. 187.
* * * Timidity and not reverence has postponed the hour of dissolution." The courts, in arriving at what seem to be just decisions, have resorted to fictions and presumptions which the facts of the case did not merit, and the strict statement of the law did not uphold. Presumptions of intention and "constructive" terms have been liberally used. It does not seem untoward to suggest that some court should state the rule as it is practiced, and cease to indulge in indirections which lead to inconsistencies with the main body of property law. Instead of floundering in terms to avoid a break with the old rule, the courts, in dealing out the substantial justice which they might have achieved, might reasonably state the rule to be that which many of them have made it: So long as no hazards are added to the rights of the head lessor, a reservation of any interest in property, estate or otherwise, will be sufficient to defeat an assignment, if that represents the intent of the parties as manifested by their acts.

91 See the New York cases under note 39 (c).
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